Case No: QBCOF/97/1253/C
FC3/99/6157/C
FC3/99/6785/C
FC3/2000/5212/C

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
Queen's Bench Division Crown Office

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 1 March 2000

B e f o r e :

LORD JUSTICE PETER GIBSON
LORD JUSTICE SCHIEMANN
and
MR. JUSTICE WILSON

HER MAJESTY'S ATTORNEY GENERAL	**Respondent**
- and -	
LEWIS FRANK FOLEY and	**1st Appellant**
HARRY DESMOND FOLEY	**2nd Appellant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr. Guy Sankey Q.C. **(**instructed by the Treasury Solicitor for the Respondent)
The 1st Appellant Lewis Frank Foley appeared in person during the hearing
(instructions having been withdrawn from **Mr. Timothy Straker Q.C. and Mr. Mohammed Hashmot Ullah** (instructed by Messrs. Yoga Rajah & Co of London)
Mr. Raymond Croxon Q.C. and Mr. Frank Slevin (instructed by Messrs. Mahmood Southcombe of Ilford for the 2nd Appellant)

Judgment
As Approved by the Court

LORD JUSTICE SCHIEMANN: (giving the judgment of the Court):-

1. In what circumstances does the Attorney General need to call evidence to satisfy the court that he has authorised the making of an application for a civil proceedings order against an allegedly vexatious litigant? What is the nature of the evidence which he must call? These are the questions with which this appeal is concerned. They are questions of some general interest since there has in recent years been a substantial rise in the number of such orders which are sought and made. Whereas in the years 1990-1994 15 litigants were declared vexatious, there were 44 in the years 1995-1999.

2. Lewis and Harry Foley appeal by permission of this court (Millett and Brooke LJJ) against the making by the Divisional Court (Rose LJ and Hooper J) of a civil proceedings order against each of them. The permission was limited to the issue whether proceedings were properly brought in the name of the Attorney General.

3. Civil proceedings orders are made pursuant to section 42 of the Supreme Court Act 1981 which, as amended, reads as follows:-

> **"Restriction of vexatious legal proceedings**
>
> (1) If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground --
>
> > (a) instituted vexatious civil proceedings, whether in the High Court or any inferior court, and whether against the same person or against different persons; or
> > (b) made vexatious applications in any civil proceedings, whether in the High Court or any inferior court, and whether instituted by him or another; or
> > (c) instituted vexatious prosecutions (whether against the same person or different persons),
>
> the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order, a criminal proceedings order or an all proceedings order.

(1A) In this section -
"civil proceedings order" means an order that -

(a) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;
(b) any civil proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and
(c) no application (other than one for leave under this section) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court;

.....

(2) An order under subsection (1) may provide that it is to cease to have effect at the end of a specified period, but shall otherwise remain in force indefinitely.

(3) Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application.

(4) No appeal shall lie from a decision of the High Court refusing leave required by virtue of this section."

4. In this court, Mr Lewis Foley was represented by Mr Timothy Straker Q.C. and Mr. Ullah and Mr. Harry Foley by Mr. Raymond Croxon Q.C. and Mr. Slevin and the Attorney General by Mr. Guy Sankey Q.C. We also had before us a careful and helpful submission (prepared at the Court's request before the Foleys had obtained legal aid and counsel) by Mr. David Foxton acting as an amicus curiae for which we express our gratitude. Fairly shortly after Mr. Straker had begun his submissions Mr. Lewis Foley rose to inform us that he was dispensing with the further services of his legal team. He then addressed us himself for a while before deciding that he would reinstruct his legal team. This he did and Mr. Straker continued with his submissions. However shortly before he had concluded them Mr. Lewis Foley once more indicated that he did not wish his legal team to continue to represent him. At this point they departed. We heard nothing from Mr. Foley

which calls for a reasoned response from this court and which was not contained in either the written or the oral submission of Mr. Straker which were made with his customary clarity and felicity. Since the hearing we have received letters from each litigant and from Peter Rubery Hayward and Terence Patrick Ewing who, having themselves been declared vexatious litigants some years ago, claim that they acted as unqualified legal advisers to the Foleys. We do not think it appropriate to consider the matters referred to in those letters in so far as they go beyond matters ventilated at the hearing.

5. Before the Divisional Court was a notice of motion signed on behalf of the Treasury Solicitor intimating that the court would be moved by counsel on behalf of the Attorney General for a civil proceedings order against each of the Foleys. The evidence before the Divisional Court on the question whether the making of the application had been authorised by the Attorney General (in so far as there was any) was contained in two affidavits sworn respectively on 16th. February 1996 and 10th. July 1996 by Ms Martin. In the first she swore that she was a solicitor in the Office of the Treasury Solicitor and that she had conduct of this matter on behalf of the applicant and that she had been involved "with a view to consideration being given by Her Majesty's Attorney General as to whether an application should be made to this court for a Civil Proceedings Order....". In the second affidavit, which was apparently prompted by a request by Mr. Lewis Foley that she should also refer to a number of other actions in which he had been involved, she refers to those other actions and exhibits relevant documents. She goes on to say in paragraph 6:

> "I am instructed that a submission was put to the Solicitor General inviting him to agree to this application being made. A copy went to the Attorney General who initialled it and the Solicitor General endorsed the submission with his agreement to the making of the application."

6. The Divisional Court hearing was on 18 February 1997. On that day, or possibly the day before, the Foleys (at that point unrepresented) raised, apparently for the first time, an assertion that the application for a civil

proceedings order had not been and was not being made by the Attorney General. They submitted that in those circumstances the court had no jurisdiction to make the order. This contention was summarily rejected by the Court in the following words in the judgment of Rose LJ (with which Hooper J agreed):

> "..there is a sufficient evidential indication of the appropriate authority for the bringing of this application".

7. The submission relied heavily on two passages in judgments of Pill LJ. The first is a dictum in **A-G v Hayward** a decision of this court (Staughton, Henry and Pill LJJ, unreported 10.11.1995). In that case the appellant led evidence to the effect that the Attorney General had said to him that he had not been personally consulted about the case. A person in the legal secretariat to the Law Officers deposed to the contrary. The court accepted that there had been consultation with the Attorney General. The leading judgment was delivered by Henry LJ and Pill LJ agreed with it. He however went on to say:

> "... in any future applications under section 42, care should in my view be taken that appropriate information is provided in the affidavit in support of the application. An application under section 42 can have serious consequences, and the Attorney-General's involvement by statute should be demonstrated plainly in the evidence submitted to the court with the application."

Neither of the other Lords Justices expressed any view on that matter. It was not necessary for them to do so. The other passage is contained in **A-G v John Williams** a decision of the Divisional Court (Pill LJ and Newman J, unreported 22.4.1996). Pill LJ said:

> "There is evidence by way of affidavit before the court that a law officer has personally considered the papers in this case and authorised the making of the application. Bearing in mind the fundamental right under consideration, the right to bring proceedings before the courts, it is, in my view, appropriate that personal consideration is given to any

proposed application by a law officer and that evidence of such consideration appears on the material before the court."

8. When giving permission to appeal in the present case, Millett LJ indicated that he was far from convinced that these dicta correctly represented the law or that any burden of introducing evidence is placed upon the Attorney General from the outset. However the court thought it right that the law should be examined on the appeal.

The effect of a civil proceedings order

9. Once a civil proceedings order has been made and any appeal against the making of that order has been dismissed, its effect is that the vexatious litigant cannot proceed with any case without the leave of the High Court. This places him at some disadvantage: in particular he is deprived of the right which other litigants have to test a decision of the High Court by seeking permission to appeal to the Court of Appeal.

Who can make the application for a s.42 order?

10. The 1981 Act authorised only the Attorney General to make the application. The ordinary citizen, no matter how vexed he may have been by a persistent litigant, cannot make such an application to the court. By section 1 of the Law Officers Act 1944:

"Any functions authorised ... by any enactment ... to be discharged by the Attorney General may be discharged by the Solicitor General, if ..... the Attorney General authorises the Solicitor General to act in any particular case."

11. The Law Officers Act 1997 has now replaced those provisions. It provides in section 1:

"(1) Any function of the Attorney General may be exercised by the Solicitor General.

(2) Anything done by or in relation to the Solicitor General in the exercise of or in connection with a function of the Attorney General has effect as if done by or in relation to the Attorney General."

12. However that Act was not in force at the time that consideration was given to the institution of the present proceedings. The argument in front of us has proceeded on the basis that the 1997 Act has no direct application.

Is there a burden on the Attorney General to lead evidence that the application is made by him after proper consideration of the relevant material?

13. It was submitted on behalf of the appellants that the Attorney General could not succeed in an application under s.42 in the absence of evidence of his authorisation of the proceedings. We reject that submission. The Attorney General, like any other litigant, is entitled to employ solicitors and counsel to make an application on his behalf. In the absence of any challenge, solicitors making such an application are assumed to have authority so to do from their client. If there is a challenge to the authority of the solicitor it should be made as soon as possible. If it succeeds then there will be no need to examine the substance of the dispute. This has long been the case.

14. **In Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse** [1923] 2 KB 630 at 671-2 Atkin L.J. said:

"I desire to add that even if there were a question of defective authority to sue, in my judgment it was not open to the defendants to raise the point as a matter of defence. The judgment of Warrington J. in the case of Richmond v Branson [1914] 1 Ch. 968, 974 appears to me to state the law in a matter of this kind, where the question is whether the action has been brought with the authority of an existing principal, himself capable of suing. In that case the learned judge says: "But the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? No authority has been cited in support of the affirmative of such a

proposition, and, in my opinion, it is impossible, according to the ordinary practice and procedure of the Court, to justify that proposition. The business of this Court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shewn not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority."

15. In **Warwick R.D.C v Miller-Mead** [1962] 1 Ch 441 Lord Evershed M.R. said this at page 215:

> "... it was unfortunate and (strictly) quite wrong that the point taken by the defendant in the present proceedings—whether it was in effect a mere challenge of the solicitors' authority to issue the writ in the council's name or whether it was the real point involved in the present appeal, as it emerged in this court—was taken by way of "preliminary objection" on the hearing of the motion. In my judgment, if the defendant sought to stay the present proceedings or have them dismissed as disclosing no cause of action (which is the real point now raised by the defendant), and, equally, if the defendant sought to challenge the solicitors' authority to initiate the present action in the council's name and make the solicitors personally liable to pay the defendant's costs, then in either case the defendant should have issued an appropriate summons or process in the action for the purpose."

Danckwerts LJ added at page 463:

> "In this case it is clear that the course of the proceedings has quite failed to comply with the proper procedure. The council began the proceedings on 21 July 1961, by a writ claiming that the defendant was causing a statutory nuisance, and on the same day produced a notice of motion for an interlocutory injunction. It was this notice of motion and nothing else which was before Widgery J as vacation judge. A preliminary objection was taken on behalf of the defendant, but it was an objection which went far beyond the question of interlocutory relief. It was an attack upon the existence of the action. If this attack was to be pursued, the defendant ought to have been required to formulate and serve either a motion or summons for the dismissal of the action. Nothing of the sort occurred, and, in my opinion, the defendant was wholly out of order and his objection should not have been heard at this stage of the proceedings."

16. The contention of lack of authority is in every sense a preliminary - and, if successful, fatal - point; and it should be taken by early, interlocutory application to

stay the proceedings. Accordingly we expect such an issue to emerge in the following way:

(1) in the claim form, and supporting witness statement or affidavit, as now provided by R 94.15 scheduled to the Civil Procedure Rules, the Treasury Solicitor will, merely by his references to the Attorney General as the applicant and to himself as the solicitor acting in the matter, represent that the Attorney makes the application and authorises him to act on his behalf in the proceedings;

(2) there is no need for evidence in support of such representations to be given at that stage;

(3) if a respondent seeks to challenge such representations, he should do so by the early filing of an application notice for a stay, supported by a witness statement;

(4) the court would be likely to consider that a respondent who mounts such a challenge had acted unreasonably in not having raised the matter with the Treasury Solicitor by letter prior to issue of the application; on receipt of such a letter, the Treasury Solicitor would presumably wish to explain, in the light of what has been set out above, the circumstances by reason of which he contends he is authorised to act on behalf of the Attorney General in the proceedings;

(5) the court would also be likely to consider that a respondent had acted unreasonably in filing an application notice to stay without the inclusion in or attached to his witness statement of some evidence which raises doubt as to whether the Attorney General had made the application. The absence of a letter - or a satisfactory letter - from the Treasury Solicitor in answer to the enquiry suggested at (4) might constitute such evidence; or there could be other evidence the nature of which it would be foolish for us here to guess.

(6) The Attorney General would respond to the application in the ordinary way, i.e. by service of a witness statement. The author would need to be someone who could give admissible evidence that it was the Attorney General (perhaps acting by the Solicitor General) who had

made the application and had authorised the Treasury Solicitor to act.

(7) The application to stay would be listed in the Crown Office.

17. It will be seen that in our judgment it is for him who challenges the fact that the solicitor has authority to commence proceedings to lead evidence which lends support to that assertion. In the absence of such evidence we see no need for the Attorney General to lead evidence in rebuttal. We are conscious of submissions to the effect that a constitutional right is at stake. Counsel has not sought to argue that the making of a section 42 order is in itself invariably a breach of the litigant's constitutional rights. It should be borne in mind that no order will be made by the court unless it is satisfied as required by the section. The citizen's primary safeguard is the court not the Attorney General. The purpose of the involvement of the Attorney General is to save the citizen from applications by his fellow citizens and indeed to save the court from having to hear such applications. We suspect that the dicta by Pill LJ cited above were motivated by a consciousness that litigants in this type of litigation tend to take every conceivable point and there may be merit in meeting points which might be taken before they are in fact taken. They cannot, in our respectful judgment, be taken as authority for the proposition that a section 42 application purportedly made on the Attorney General's behalf by the Treasury Solicitor must be held to be unauthorised in the absence of evidence to the contrary.

Once a challenge has been made supported by evidence, what evidence is required from the Attorney General?

18. The answer to this will depend on the nature of the evidence led in support of the challenge.

The present case

19. The challenge was made far too late. It was supported by affidavits sworn on the date of the hearing which originally contained two paragraphs asserting a belief in each of the Foleys that the application was not made by the Attorney General or authorised by him. Those two paragraphs were, we understand, expressly disavowed by the Foleys before the Divisional Court and were struck out from the affidavit. No ground for any such belief was advanced. In those circumstances there was no need for the Attorney General to file any further affidavits and the Divisional Court was entitled to make the order which it made.

20. In the event, counsel for the Attorney General, by way of making assurance doubly sure, did seek to adduce in evidence before us a third affidavit, sworn after the Divisional Court hearing, by Mr. Jonathan Jones who at the relevant time was employed in the Legal Secretariat to the Law Officers. He confirms that the application was made with the authority of the Law Officers. He swears that on 29 March 1995 he put a submission dealing with the cases of the Foleys to both the Law Officers. He continues

> "The Attorney General initialled his copy of the submission on 30 March 1995 thereby authorising the Solicitor General to deal with the matter in accordance with Section 1(1)(c) of the Law Officers Act 1944. The Solicitor General endorsed his agreement to the making of the Section 42 application on his copy of the submission on 29 March 1995."

21. These dates led to submissions on behalf of the Foleys that since the Solicitor General appears to have considered the matter on the day before the Attorney General had decided to authorise the Solicitor General to discharge this function it follows that, at the time that the matter was considered by him, the Solicitor General had no authority to consider it. Such submissions were premised on the fact that, at the time of the consideration by the Solicitor General and the making of the application, the Law Officers Act 1997 was not in force. Assuming in favour of the appellants that it is the launching of proceedings rather than the appearance of counsel before the

court which is the latest time in relation to which authorisation has to be considered, we rule on these submissions on the basis that the 1997 Act is of no relevance. Even so, since the Originating Motion containing the application was not issued by the court until well after the 30th March 1995 these submissions lack any force. It is the making of the application which has to be authorised. It clearly was. The fact that, before receiving authority from the Attorney General, the Solicitor General had applied his mind to the facts of the case in the, as it turned out fully justified, expectation that he would obtain specific authority to make an application if he thought fit, does not mean either that that he did not apply his mind properly to the case or that at the time the application was made it he was not authorised to discharge on behalf of the Attorney General the function of making an application under s.42 of the Supreme Court Act 1981.

22. No doubt foreseeing that this latest affidavit hardly lent strength to the Foleys' case, counsel submitted that it should not be admitted on the basis that the tests in **Ladd v Marshall** [1954] 1 WLR 1489 were not satisfied. We looked at it, taking the view that there was ample reason for the non-production of this evidence before the Divisional Court - no point had clearly been taken on the proper constitution of the action and the Attorney General's authority until the date of the hearing in that court and it could not be foreseen that the Foleys would submit that further evidence as to authority was requisite. As we have held, in fact it was not. On the view we take of the law this affidavit is unnecessary and could be excluded on that ground. However, the appellants having argued for a different of the view of the law, we think it right to admit it.

23. We mention finally some common sense points. The appeal is limited to the question whether it has been shown that the Attorney General gave his consent to the making of an application to have the Foleys declared vexatious. It has not been suggested that counsel appearing for the Attorney General in the appeal has not been instructed to resist the allowing of the appeal. This leads one to the conclusion that if we had been minded to allow

the appeal on the ground sought all that would have happened would have been a new application by the Attorney General in which an affidavit on the lines of the Jones affidavit would have been placed before the court and the court would then have had to consider all over again whether or no the conditions in section 42 had been fulfilled. All this would serve no useful purpose.

24. Mr. Lewis Foley and Mr. Croxon asked the court to order the Attorney General to produce the submission which had been made to him and which was referred to in the affidavits sworn on his behalf. Mr. Sankey offered to produce it to the court but not to the Foleys. We did not accept that offer. In general the court will indeed order the production to the other side of any document referred to in an affidavit. Where one is concerned with a document passing between a litigant and his solicitor, or a document containing advice to a minister circulating within a government department, complex issues can arise. We saw no need to address them in the context of this case. The court will not make an order unless there is reason to suppose that compliance with the order will in some way advance the ends of justice. We heard no coherent argument to suggest that this would be the case if we made the order sought by Mr. Foley and Mr. Croxon. This was a document referred to in, as we hold, an unnecessary affidavit. We therefore refuse to make an order for disclosure.

25. We therefore dismiss the appeals.

Reasons for refusing leave to appeal on other grounds

26. At the hearing before us, permission was sought by Mr. Croxon to expand the grounds of appeal beyond the single point upon which permission had already been given. We refused that application for reasons which follow and raise no points of general interest.

27. Mr. Croxon applies for leave to appeal on the grounds set out in paragraphs 9-11 and 17-22 of the notice of appeal by Harry Foley dated 29 August 1997. The notice of appeal is irregular in as much as it incorporates two points for which leave was not given, but it is convenient for the purposes of this judgment to refer to it and to its numbering.

28. The first point sought to be argued is that Mr. Harry Foley was not given by the Divisional Court a fair opportunity to argue some points "in his skeleton argument relating to the lawful appointment of the Law Officers and their existence in law and whether their decisions to apply for a Civil Proceedings Order against the 2 Appellant might be subsequently challenged in the Divisional Court". The second point is that "the Divisional Court erred in law in making the Civil proceedings order against the 2 Appellant for an indefinite period ….. which was disproportionate in effect without specifically considering whether the said order was individually merited in the circumstances of the 2 appellant seriatim from those pertaining to that of the 1 Appellant".

29. Following delivery of the judgment in the Divisional Court Mr. Harry Foley said this: "I wish leave to appeal, sir. You have not heard all my evidence of perjury. You did not give me the time to put my case forward on perjury which is on your desk now." The Court however, refused him leave.

30. It is common ground that this court has jurisdiction to expand a grant of permission to appeal but that this power should be sparingly exercised: **Yorkshire Bank Plc v Hall** [1999] 1 W.L.R. 1713, at p.1725.

31. The proposed grounds of appeal relating to the appointment of the Law Officers were not pursued by Mr Croxon.

32. So far as evidence is concerned, Mr. Harry Foley was permitted to adduce an affidavit sworn by him on 18th February 1996 - the date of the hearing before the Divisional Court. It contains much argument and no

relevant admissible evidence. The substance of the arguable points covered in the affidavit are dealt with in the Divisional Court's judgment. As we understood Mr. Croxon he did not wish to adduce more evidence at this stage.

33. So far as submissions before the Divisional Court on the first point are concerned, they cover much the same ground as those taken by his brother. Mr Harry Foley had submitted a closely typed skeleton argument of which the first 12 pages are substantially concerned with this point. Many authorities are cited and quoted.

34. We have seen nothing in the papers and heard nothing in the submissions to lead us to suppose that Mr. Foley was unreasonably denied any opportunity to put material before the court whether by way of evidence or submission which might have advanced his case further.

35. In the course of submissions, Mr. Croxon has clarified the second main point sought to be argued. The substance of the point is that Mr. Harry Foley wished at the time of the hearing before the Divisional Court and wishes now to argue that any civil proceedings order against him should be limited in time and not be indefinite. He points out that there is no mechanism for discharging an indefinite civil proceedings order and that to be classed as a vexatious litigant is something no-one would wish to be. He submits that Mr. Foley would have liked to persuade the Divisional Court that the facts of the 8 actions in which he was apparently involved did not show such behaviour in him as to warrant the making of an indefinite order. Mr. Foley would have liked to have shown that in at least some of the actions which had been struck out he played a minor or non-existent part. Mr. Harry Foley would like to have put material before the Divisional Court to the effect that Mr. Lewis Foley was using his brother's name without authority.

36. Such arguments are potentially a good reason for either not making an order or for limiting its effect. To take an extreme example, clearly

if a litigant repeatedly starts actions or applications in someone else's name without his knowledge then it would be unjust to pronounce that other vexatious. It is not submitted that the present case is such an extreme case but it is submitted that some of the elements of that position may be found in the present case.

37. However, these submissions face a major obstacle. Neither the evidence nor the written submissions of Mr. Harry Foley give any indication that this type of argument was sought to be advanced before the Divisional Court. In the circumstances, there can be no possible criticism of the Divisional Court for not addressing it. Even the affidavit sworn by Mr. Harry Foley after the judgment of the Divisional Court in support of his application for permission to appeal gives no hint that any arguments based on his brother's alleged lack of authority to pursue the various actions would be pursued in this court.

38. Mr. Croxon submitted that, even if the Divisional Court be beyond criticism in that respect, we should permit these points to be raised in order to do justice to his client who had, like so many litigants in person, been remiss in getting his tackle in order because he did not know what he was doing and was perhaps too much under the influence of his brother who was also not very clear about what had to be done. We are not persuaded by these submissions. Such submissions could only succeed if there were significant evidence to support them. Even now there is none.

39. Finally Mr. Croxon submitted that the Divisional Court had not applied its mind to the question whether it would be right to make a limited as opposed to an indefinite order. He submitted that the involvement of his client in the 8 actions which were laid at his door by the Divisional Court could be seen, by a study of the files exhibited to the affidavits sworn on behalf of the Attorney General, to have been less than full blooded. It is clear from the transcript of judgment that the Divisional Court twice referred to the need to consider whether or not the order should be made indefinite. This shows that

it did apply its mind to the question. The prospect of a minute examination of the 8 case files showing that the making of an indefinite order was outside the discretion of the Divisional Court is not such that it would be right to give leave for that point to be argued, the more so since this court has already refused so to do.

Order: Appeal Dismissed with costs. The costs not to be enforced without the leave of the court. Legal Aid Taxation. Leave to Appeal to House of Lords Refused.

(Order does not form part of the approved judgment.)