Neutral Citation Number: [2006] EWHC 2123 (Ch)

Case No: HC05C00147

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2006

Before:

MR JUSTICE DAVID RICHARDS

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Between :

Michael Steven Vaughan	**Applicant**
- and -	
1. Ellen Mary Jones	**Respondents**
2. Mark Adrian Fowler	
3. Jane Anne Fowler	

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Michael Waterworth (instructed by **Horsey Lightly Fynn**) for the **Applicant**
John Critchley (instructed by **Hodkin & Co**) for the **Respondents**

Hearing date: 11 July 2006

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Judgment

The Honourable Mr Justice David Richards :

1. This is an application under s 51(3) of the Supreme Court Act 1981 for a third party costs order. The application is made by Michael Vaughan against Mark Fowler and his wife Jane Fowler and it relates to the costs of proceedings between Mr Vaughan and Ellen Mary Jones.

2. Mr Vaughan, Miss Jones and Mr and Mrs Fowler own or occupy neighbouring properties at East Park Farm, near Lingfield in Surrey. The properties comprise a farmhouse, a bungalow and farm land and buildings and were for many years owned by Miss Jones. She lived there with her partner Harold Vaughan, who died in 1996. She is now 78 years old. In 1983 Miss Jones sold the farmhouse to Mr and Mrs Fowler. In 2002 she sold the farm land and buildings (the farm) to Michael Vaughan, her late partner's nephew. In December 2005 she sold the bungalow to Mr and Mrs Fowler, but she continues to live there.

3. There is a history of antagonism and litigation between these parties. The view of Mr and Mrs Fowler, as expressed in their evidence on this application, is that after a short period of good relations following their purchase of the Farmhouse in 1983, relations between them and Miss Jones soured and they became the subject of a prolonged period of harassment by her. This culminated in litigation in the Haywards Heath County Court and a judgment dated 10 June 2002 for damages of £10,200 and injunctions against Miss Jones. She was also ordered to pay two thirds of the costs of Mr and Mrs Fowler, subsequently assessed at over £33,000.

4. In order to raise funds to pay her own costs and these awards of damages and costs, Miss Jones sold the farm to Mr Vaughan for £110,000. Completion took place in October 2002. It was a condition of the purchase that Mr Vaughan would grant Miss Jones a lease of the farm at a rent of £1 per year for a period of five years from the date of completion, renewable on the same terms at Miss Jones' request. The lease was in due course granted, and it reserved to Mr Vaughan a power of re-entry in the event of the bankruptcy of Miss Jones.

5. In April 2003 Miss Jones was adjudicated bankrupt, for non-payment of arrears of £2,500 of council tax. Mr Vaughan exercised his right of re-entry and thus forfeited the lease.

6. In the meantime there was further litigation between Mr and Mrs Fowler and Miss Jones, this time also involving an application by Mr and Mrs Fowler against Mr Vaughan. In addition, Mr and Mrs Fowler commenced a new action against Mr Vaughan for harassment, which was compromised on the terms set out in an order of the Haywards Heath County Court made on 2 August 2004.

7. Miss Jones' bankruptcy was annulled in October 2004, upon her solicitor' undertaking to pay outstanding debts and bankruptcy costs totalling over £61,000. I will come back later to the source of those funds.

8. Following correspondence, Miss Jones commenced proceedings against Mr Vaughan in the Chancery Division on 24 January 2005, seeking to avoid the sale of the farm to him on grounds of misrepresentation and undue influence. Mr Vaughan counterclaimed for a declaration that the lease was forfeit and various monetary

claims. Mr Vaughan applied for an order to strike out Miss Jones' statement of case or for summary judgment on grounds that she had no realistic prospect of success in her claim. The application was heard in July 2005 by Mr Bernard Livesey QC, sitting as a deputy judge of the High Court. He gave summary judgment, dismissing the claim. Miss Jones was ordered to pay the costs of the application. These costs have yet to be assessed, but Mr Vaughan claims a little over £48,500. Miss Jones applied to the Court of Appeal for permission to appeal. Her application was listed for an oral hearing, with the appeal to follow immediately if permission were granted. The application was heard on 21 November 2005, when permission to appeal was refused with costs. A default costs certificate has been issued in the sum of £13,836.17.

9. On 28 and 29 November 2005 Hart J heard Mr Vaughan's counterclaim and gave judgment in favour of Mr Vaughan. Shortly before the hearing it was conceded by Miss Jones that her bankruptcy had entitled Mr Vaughan to forfeit the lease and that he had duly exercised that right. An order declaring his entitlement to possession was resisted but was made by Hart J. The main part of the hearing was concerned with Mr Vaughan's monetary claims, on which Hart J gave judgment for £9,718.22 in respect of part of the claims. A reading of the judgment of Hart J shows that there were serious arguments of principle and quantum raised on behalf of Miss Jones. She was ordered to pay the costs of the counterclaim. A sum of £30,240.01 is payable pursuant to a default costs certificate.

10. On 23 March 2006 Miss Jones was ordered to pay £46,000 to Mr Vaughan on account of the three costs orders to which I have referred. The detailed assessment was stayed by the costs judge pending the outcome of the present application. On 16 May 2006 Miss Jones was adjudicated bankrupt on the petition of Mr Vaughan.

11. The facts directly relevant to the present application are as follows. These became known to Mr Vaughan during and after the hearing before Hart J. Mr and Mrs Fowler provided to Miss Jones or her solicitors the funds necessary to annul her bankruptcy in 2004. The sum required was £61,243.93. This was paid by Mr and Mrs Fowler as the price for the grant of an option to them to purchase the bungalow for £1, exercisable following her death or earlier if she ceased to reside at the bungalow. Mrs Fowler explains in her evidence that as part of this transaction Miss Jones also required them to lend her £30,000 to fund her claim against Mr Vaughan.

12. Mrs Fowler sets out in her evidence what Mr and Mrs Fowler were told by Miss Jones as to the basis of her claim. Miss Jones approached them with her account of how, as she saw it, she had been induced by Mr Vaughan to enter into the sale and leaseback of the farm. Mrs Fowler states, as might be expected, that she and her husband did not have a great deal of sympathy for Miss Jones in view of the long history of antagonism between them. However, Mr and Mrs Fowler had long had an ambition to acquire the bungalow and the farm, if they could afford to do so. They saw Miss Jones' approach as an opportunity to acquire the bungalow and they offered to purchase it outright. Miss Jones was not, however, willing to sell the bungalow at that time but was prepared to enter into the option agreement on the basis described above, including the loan of £30,000. For Mr and Mrs Fowler this was not ideal but it was "the starting point to secure ownership of the bungalow". Mrs Fowler goes on to say:

> "… [Miss Jones] obviously had a sufficient asset in her bungalow to get herself out of the bankruptcy, and fund an

> action against the Applicant, but had she done so using others we felt this clearly could have been to our disadvantage, whereas securing the bungalow for ourselves was clearly to our advantage. We therefore agreed to this."

13. Further loans were made by Mr and Mrs Fowler to Miss Jones for the purposes of the litigation with Mr Vaughan from September 2005. On 7 September 2005 Miss Jones executed a legal charge over her interest in the bungalow in favour of Mr and Mrs Fowler. It secured "the present advance" of £30,000 and "the further advances" defined to mean:

> "…any sums not exceeding in the aggregate (exclusive of the Present Advance) £70,000.00 (or such other sum as may be agreed between the parties hereto) that may be advanced by the Lenders under clause 3 below;"

Clause 3.1 provided:

> "Subject to the provisions of clause 3.2 the Lenders covenant with the Borrower to make the Further Advances to the Borrower or to such persons as the Borrower shall direct from time to time at the request of the Borrower for the purpose of paying the Borrower's legal costs in connection with proceedings against Michael Vaughan under claim number HC05C00147."

14. The legal charge was executed two days before service of Miss Jones' application for permission to appeal against the order of Mr Bernard Livesey QC. It is common ground that further advances totalling about £50,000 were made by Mr and Mrs Fowler, presumably covering Miss Jones' costs of the application to the Court of Appeal and the trial before Hart J of Mr Vaughan's counterclaim.

15. It would appear that the original loan of £30,000 was unsecured. There is no evidence that interest was payable on any of the loans. Clause 2.1 provides for repayment of the loan on the death of Mrs Jones or on specified earlier events, including failure to comply with any judgment or order against her within 14 days, her property becoming subject to execution or other process or the presentation of a bankruptcy petition against her.

16. By way of explanation of the agreement to make further advances, Mrs Fowler states:

> "Subsequently, when [Miss Jones] needed further funds to continue her claim against [Mr Vaughan] we saw the opportunity of securing the bungalow still further, and agreed to lend [Miss Jones] up to £70,000 (the further advance as referred to in the legal charge on the bungalow)."

17. As regards the covenant in clause 3.1 of the legal charge, Mrs Fowler explains:

> "We were solely interested to ensure the advances were not used against <u>us</u> and could only be deployed in any court case

> against others (in this case the Applicant) she might bring. I believe this is no different to any bank/finance lending situation whereby the lender controls, at least to some extent, the manner in which the advance is used."

18. She described the arrangement overall as follows:

> "At the end of the day therefore the [Miss Jones] had used the asset of her bungalow to get herself out of bankruptcy and pursue what she considered to be a justified claim against the [Mr Vaughan]. At the same time we were able to buy the bungalow, albeit in the stages described above, and have given our family and our property a much greater degree of security in a highly unusual and distressing situation."

19. Following the order of Hart J, Mr Vaughan applied on 9 December 2005 for a charging order over the bungalow and on 21 December 2005 an interim charging order was made. On 17 January 2006 Mr Vaughan applied to the Land Registry for the entry of a notice, enclosing the charging order. However, in the meantime, Miss Jones had sold the bungalow to Mr and Mrs Fowler for £80,000. Their interest was protected by a prior official search lodged on 22 December 2005 and they were registered as proprietors on 18 January 2006. The purchase price had been paid by way of set off against the loans made by them to Miss Jones.

20. The jurisdiction to make a costs order against a non-party is treated in the authorities as exercisable only in exceptional cases, in the sense described by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 at para 25:

> "Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against."

21. It is usually a vital factor in the exercise of the discretion that the non-party's conduct has caused the applicant to incur the costs for which he seeks an order against the non-party: *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055 at para 24. In this case, Miss Jones would not have been able to bring her claim against Mr Vaughan, or defend his counterclaim, without the loans made to her by Mr and Mrs Fowler.

22. A clear distinction is drawn in the authorities between "pure funders" and those funders who derive a personal benefit from the pursuit or outcome of the litigation. "Pure funders" are "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way to seek to control it": *Hamilton v Al Fayed (No. 2)* [2003] QB 1175. The funders in that case provided the claimant with funds for a defamation claim which he would otherwise

have been unable to bring. Their motivation was simply to enable his case to be brought. They obtained no benefit from the proceedings and had no control over them. In such a case, as stated in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (supra) at para 25:

> "…the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights."

23. Similarly, if funds are provided to a litigant by way of loan with no further involvement by the lender and no interest in the litigation conferred on the lender, a costs order against the lender would not ordinarily be appropriate: see: *Petroleo Brasileiro SA v Petromec Inc* [2005] EWHC 2430 (Comm) at para 32. In my judgment, this is the correct approach as regards ordinary commercial lenders. Loans made on non-commercial terms for ulterior purposes are in a different category and may, depending on the circumstances, constitute funding which can justify an order for costs against the lender.

24. Those who not only fund litigation but benefit from it will ordinarily find that the discretion to make an order for costs against them is exercised. Citing again from *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (supra) at para 25:

> "Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence - see, for example, the judgments of the High Court of Australia in the Knight case 174 CLR 178 and Millett LJ's judgment in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613."

25. The relevant benefits have in all the authorities to which I was referred been a financial benefit which would have resulted directly from success by the funded party in the litigation. In *McFarlane v EE Caledonia Ltd (No. 2)* [1995] 1 WLR 366, the funder was a company formed to support personal injury claims on a contingency basis. In *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12, the defendant's insurers, who would be liable for the claim if it succeeded, had funded the defence. In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (supra), the funder promoted and funded an insolvent company's appeal to the New Zealand Court of Appeal and its participation as respondent to an appeal to the Privy Council. The funder stood to benefit from success in the proceedings as a secured creditor of the company. In *Arkin v Borchard Lines Ltd* (supra), the funder was a company which carried on a claim-handling business and which agreed to fund expert evidence on a contingency basis and in return for a share of any damages recovered.

26. This is not, however, to say that the benefits to be derived from funding litigation, which will distinguish such funders from "pure funders", need take the form of a benefit from the outcome of the litigation, such as a share in any recovery or the avoidance of a judgment for which the funder would be liable. It would be in my

judgment an unwarranted restriction on the court's jurisdiction, which could cause unjustified distinctions between different categories of funders all of whom fund litigation in pursuit of their own interests.

27. Mr Waterworth for Mr Vaughan submitted that Mr and Mrs Fowler could not be regarded as "pure funders" in the sense discussed in the authorities. They did not provide funds out of sympathy for Miss Jones, but in order to secure personal advantages for themselves. Mrs Fowler had accepted in her evidence that they were not funders without interests of their own. She stated that their purpose was to acquire the bungalow. The purposes and interest in the litigation alleged by Mr Vaughan and on which the application was based are stated in a witness statement of Robert Kelly, an employee of his solicitors, made in support of the application, and in a witness statement made by Mr Vaughan in reply to Mrs Fowler's statement. It is important to note that this was the case which Mr and Mrs Fowler had to meet and to which their evidence and submissions were directed.

28. The purposes and interest alleged by Mr Vaughan are summarised by him in his witness statement as being to "(a) get me off the farmland and (b) seize control of [Miss Jones'] bungalow and the farm." He goes on to refer to Mrs Fowler's evidence that single ownership of all the farm properties would be highly beneficial and to say "I believe that to be the real motive behind Mr and Mrs Fowler's funding of the litigation." He continues:

> "There are, therefore, two good reasons for the Fowlers having funded the litigation against me. On the one hand, if successful they would have removed me from the farmland and so relieved themselves of the perceived burden of having me and my development plans for the land as a neighbour and on the other hand they would have been able to get control of the bungalow, the farm buildings and the farmland thus satisfying the "highly beneficial" case put forward by Jane Fowler in paragraph 16 of her witness statement."

In his skeleton argument Mr Waterworth summarised Mr and Mrs Fowler's purpose as being to further their own interests in unifying the ownership of the three properties.

29. Mr Kelly had suggested opposition to the development as the Fowlers' purpose. He said that Mr and Mrs Fowler were opposed to the development of the farm buildings for which Mr Vaughan had planning permission. This provided, he suggested, a good reason for them to fund Miss Jones' claim to recover the farm and also to take steps to ensure that Mr Vaughan could not enforce any orders against Miss Jones' interest in the bungalow. The significance of this latter point is that under the terms of the sale of the farm to Mr Vaughan, he covenanted not to use the farm for any non-agricultural purpose or to dispose of it while Miss Jones continued to occupy the bungalow.

30. Two further matters were relied on in the evidence. First, it was alleged that the funding was motivated by personal hostility towards Mr Vaughan. This might provide a ground for an order for costs against the funder (see *Hamilton v Al Fayed (No. 2)* (supra) at paras 51 and 86), but Mr Waterworth made clear in the course of submissions that, in the light of the evidence, he did not rely on this as a ground for an

order against Mr and Mrs Fowler. Secondly, it was alleged that the dealings with the bungalow in favour of Mr and Mrs Fowler (the grant of the option and the sale) were at an undervalue and deprived Mr Vaughan of any means of enforcing his costs orders.

31. Mr Waterworth submitted that Mr and Mrs Fowler had done four things which would justify an order against them. I will address the various interests and other matters relied on by Mr Vaughan as they arise when dealing with these four actions. First, Mr and Mrs Fowler had provided the funds to Miss Jones to annul her bankruptcy, thereby putting her in a position where she could bring proceedings against Mr Vaughan. Secondly, they had advanced the initial loan of £30,000 to her, to fund her claim. Thirdly, after her claim was dismissed, they provided further advances for her application to the Court of Appeal and for her defence to the counterclaim. Fourthly, after she had lost on the counterclaim, but before Mr Vaughan had taken steps to enforce the orders in his favour, Mr and Mrs Fowler had called in their loans and purchased the bungalow. Either looked at on its own or, alternatively, in conjunction with the earlier dealings in relation to the bungalow, it was a sale at an undervalue.

32. The first of the acts relied on by Mr Vaughan was the provision by them of the sum of £61,243 required to annul Miss Jones' bankruptcy. For two reasons, reliance cannot in my judgment be placed on this, whether on its own or in conjunction with later acts. First, it did no more than remove an unrelated impediment to the bringing of proceedings by Miss Jones. It did not fund or otherwise cause the litigation nor, leaving aside any question of a transaction at an undervalue to which I shall later return, did it deprive Miss Jones of means to meet any adverse costs orders. Secondly, the funds were provided as the purchase price for the option on the bungalow. It is not suggested that it was an inflated price. Where funds are provided as a purchase price, even if the purchaser knows that they are to be used by the seller to fund litigation, the purchaser is not in a real sense funding litigation; he is purchasing an asset. Again I leave on one side for the moment any question of a sale at an undervalue.

33. The second act was the provision of the initial loan of £30,000. This was a loan which was to be applied in funding Miss Jones' claim. It was not, however, independent of the grant of the option but was commercially part of the consideration for it. There is no reason to doubt Mrs Fowler's evidence that Miss Jones stipulated for the loan as, in effect, a condition of the grant of the option. Mrs Fowler's evidence, which I consider that I should accept, is that the reason for making the loan was to obtain the option. While Mr and Mrs Fowler were concerned that Miss Jones should not use the loan to bring a claim against them, their real purpose, as it appears from the evidence before the court, was not to fund the claim but to obtain the option. Miss Jones for her part was turning an asset to account in order to bring the claim. In these circumstances, I do not consider that Mr and Mrs Fowler fall into the category of persons who fund litigation in order to obtain benefits from the litigation such as to justify a cost order against them.

34. The third act was making the further advances to Miss Jones, secured by the legal charge on the bungalow. This raises in my view different considerations from the initial loan. It was not, in effect, part of the purchase price for anything. Mrs Fowler's explanation is not very illuminating as to her purposes. She says only that she and her husband "saw the opportunity of securing the bungalow still further". I am not sure

what this means. The new loan did not alter the option terms or accelerate its exercise. Security was created, for the first time, covering the existing and the further advances.

35. It is here necessary to examine the purposes and interests of Mr and Mrs Fowler alleged by Mr Vaughan. The suggestion made by Mr Kelly that their purpose was to prevent development of the farm buildings was denied by Mrs Fowler. On a summary application such as this, evidence of a party's own actions or motives cannot be rejected, unless other evidence or the overall circumstances deprive it of any serious weight. I consider that I should accept Mrs Fowler's denial. While Mr Vaughan's allegation is a possible explanation, it is not so obvious that it must be true and Mrs Fowler has not only denied it but provided the alternative explanation of their wish to acquire the bungalow, which I shall later consider. The suggested motive does not take account of the possibility that, if Miss Jones had recovered the farm, she might have sold it with the benefit of the planning permission to another developer. She might well have needed to sell it in order to raise the funds to repay the price paid by Mr Vaughan. Mr and Mrs Fowler would have been unable to prevent a sale to a developer and there is no evidence that they would have been able to afford to purchase it; while it is possible that they were behind an offer to purchase made by Miss Jones in December 2005, this was not explored in the evidence and it did not form part of Mr Vaughan's case.

36. This also largely answers Mr Vaughan's allegation that the funding was provided so that Mr and Mrs Fowler could acquire both the farm and the bungalow and unify the entire property in their ownership. It is denied by Mrs Fowler. There is no evidence of any arrangement with Miss Jones for the acquisition of the farm and no evidence that Mr and Mrs Fowler could have afforded to acquire it. I cannot on this application reject Mrs Fowler's evidence that it was the acquisition of the bungalow which was the interest which Mr and Mrs Fowler perceived and this was achieved, in part, by the option agreement. Their purpose in the provision of the further advances and the taking of security over the bungalow is not fully explained, but no case is based on them by Mr Vaughan beyond that which I have addressed above.

37. The fourth action relied on by Mr Vaughan was the purchase of the bungalow in December 2005. He alleges that this was at an undervalue and that it prevented him from enforcing his orders for costs. Neither of these points is made good, if the sale in December 2005 is looked at on its own. By then, Miss Jones' interest in the bungalow had since October 2004 been subject to Mr and Mrs Fowler's option to purchase for £1, exercisable if Miss Jones ceased to reside there. There is no evidence as to the value of the bungalow subject to the option but it cannot have been much. The bungalow could not be sold with vacant possession and the only benefit from ownership of the freehold interest, pending exercise by Mr and Mrs Fowler of their option, would be the receipt of such occupation rent, if any, as Miss Jones could be required to pay while she remained there.

38. It may be that the grant of the option was a transaction at an undervalue. I have no evidence as to the proper price for the option, although it is fair to note in Mr Vaughan's favour that the price was fixed not by reference to an arms-length price but by reference to what was required to annul Miss Jones' bankruptcy.

39. Even if I was satisfied that the grant of the option and/or the sale were at an undervalue, and were designed to frustrate attempts by Mr Vaughan to enforce any

costs orders, I would not consider this to be a proper ground in this case for a costs order against Mr and Mrs Fowler. Miss Jones is bankrupt and it is the duty of her trustee in bankruptcy to investigate pre-bankruptcy transactions such as these. The trustee has powers to bring proceedings to set aside transactions at an undervalue or to obtain compensation is respect of them. In my view, that would be the proper forum in which to take proceedings based on the transactions being at an undervalue. Otherwise, Mr and Mrs Fowler are at risk of both (a) an adverse order for costs by reference to Mr Vaughan's inability to enforce his orders against the bungalow and (b) an order setting aside the option and the sale or paying a sum by reference to the undervalue. The fact that the jurisdictions are different does not mean that Mr and Mrs Fowler would not be facing, in effect, a double jeopardy. The risk is not theoretical, as it appears from the official receiver's report dated 7 July 2006 that he is investigating the transactions relating to the bungalow.

40. In conclusion, the circumstances of the case do not in my judgment justify an order for costs against Mr and Mrs Fowler.

41. An unsatisfactory feature of the case was that the grounds relied on by Mr Vaughan were not clearly set out in one document. Mr and Mrs Fowler were faced with something of a moving target and it was a matter about which their counsel protested at an earlier directions hearing as well as at the hearing before me. I consider it desirable, both for the respondents and for the court, that there should in these cases be a concise statement of the grounds and essential allegations of fact relied on by the applicant. This could be amended or supplemented, if the need arose.