Court of Appeal before Morritt LJ. 2nd December, 1997

JUDGMENT LORD JUSTICE MORRITT:

1. This is an application by the defendant, Osbournes, a firm of solicitors, made under Order 59 Rule 10(5) seeking security for their costs of the appeal being brought by the plaintiffs, Mr and Mrs Kumar, from the order of Judge Hedley, sitting as a Deputy Judge of the Queen's Bench Division, made on 17th January 1997. Their application is supported by a draft bill of their estimated costs which they put at the precise figure of £13,263.61.

2. The circumstances lying behind the appeal are briefly as follows: in July 1990 Mr and Mrs Kumar borrowed £25,500 from a company called Ashbroom Facilities Ltd on the security of a second mortgage of their home at 92, Sumatra Road, West Hampstead. They defaulted on the necessary repayments and in July 1991, Ashbroom Facilities Ltd commenced proceedings for possession in the Bloomsbury County Court. A possession order was made, suspended on terms, in October 1991.

3. On 28th May 1992 Mr Kumar instructed Osbournes to act on their behalf in seeking further suspensions of the order for possession so that they might remain in their home. The individual at Osbournes so instructed was Mr Lavery. He was originally instructed on the Green Form Scheme and in due course obtained legal aid for a further application for a suspension of the order for possession. Mr Lavery made such applications on 3rd and 12th August 1992 but unsuccessfully. On 13th August 1992, as found by the judge, Mr Kumar instructed Mr Lavery on the telephone that he, Mr Kumar, was in the court office and able to pay into court, there and then, all the arrears of the loan secured by the legal charge due to Ashbroom Facilities Ltd. Mr Lavery then telephoned Ashbroom Facilities Ltd made an agreement with them that if the money was paid before execution of the warrant for possession, then the warrant would not be executed, but if it was paid after the execution of the warrant then the keys to the property would be returned to Mr and Mrs Kumar on production of the receipts demonstrating the appropriate payment into court.

4. The warrant was executed at about 10.25, by which time the money had not all been paid into court. It was not subsequently all paid into court either. It seems that on the following day, 14th August, Mr Lavery, again unsuccessfully, sought to apply to the Court. On 17th August Mr Kumar withdrew his instructions from Osbournes and the papers, on his instructions, were transmitted by them to the new solicitors.

5. These proceedings were commenced by Mr and Mrs Kumar in February 1994. They issued a writ claiming damages for negligence. The particulars of negligence are in substance twofold. First, that Mr Lavery failed to appreciate that his instructions were that the Kumars could only pay part of the amount then due into court and, secondly, that he failed to appreciate that the agreement which he made with Ashbroom Facilities Ltd had to be in writing to be enforceable because of the provisions of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 .

6. The action came before Judge Hedley. On 17th January 1997 he gave judgment rejecting the claim of Mr and Mrs Kumar. He held that the agreement which he found to have been made between Mr Lavery and Ashbroom Facilities Ltd on the morning of 13th August did not have to be in writing to be enforceable, for it did not amount to a disposition of an interest in land. He held in addition that even if it had been required to be in writing it could not in the circumstances have been put into writing because Ashbroom Facilities Ltd would not, as a matter of fact, have entered into a written agreement and there was not the time within which to do so.

7. From that judgment Mr and Mrs Kumar now appeal. They claim that the judge was wrong in law in that the agreement had to be in writing. They also raise other points consequential on the success of that point in claiming that he was also wrong on certain other findings he made with regard to the appropriate measure of damages.

8. Osbournes applied for security for costs on 4th March 1997 by the customary pre-summons letter. They received no response. They applied by this summons on 8th May 1997. They rely on two principal facts. First, that the Kumars were legally aided at the trial, where they gave evidence that they were both homeless and unemployed. It is submitted that that is adequate *prima facie* evidence of inability to pay the costs if unsuccessful. Secondly, that their application for legal aid for this appeal has been refused.

9. As I have indicated the evidence also includes a draft bill of costs, which goes into some detail as to the costs they consider would be incurred, reaching the precise figure of £13,263 and a few pence as I indicated. Of that amount £500 is said to have been incurred already, £11,000 are estimated to be the future costs to the conclusion of the hearing of the appeal and £1,600 would be the costs of the subsequent taxation and the taxation fee, assuming an order for costs in their favour.

10. The position of Mr and Mrs Kumar is that they seek an adjournment of the application for security. They accept that their legal aid was refused but they are seeking to make a fresh application on the footing that legal aid for an appeal is a fresh matter, not merely a continuation of the certificate from the hearing at first instance. They also rely on the fact that they have received from the Civil Appeals Office, and returned duly signed, a request for mediation in accordance with the new scheme which has now come into operation. They submit that on either or both of those grounds this application should be adjourned.

11. The position of Osbournes is that the legal aid point is not correct, that legal aid has been rejected and that so far as mediation is concerned there is no point in mediating on a point of law. Mediation would not be acceptable to Osbournes in any event.

12. It seems to me that the application for an adjournment should be refused. As far as the legal aid point is concerned, the letter which I have been referred to by Mr Kumar is one from the Legal Aid board, dated 27th November 1997 stating: *"Your appeal has been considered by the Area Committee. They have dismissed it for the following reason(s): There are no reasonable prospects of successfully appealing the judgment of Judge Hedley dated 17th January 1997."*

13. So far as the mediation point is concerned, I would agree with the submission made by counsel for Osbournes; if the other party is not prepared to mediate and the disputed matter is a point of law there is not much point in mediation. There is no reason to adjourn this application to enable mediation to take place.

14. Accordingly it is necessary to deal with the application on its merits. The jurisdiction to order security arises under Order 59 Rule 10 (5) which provides that*: "The Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just."*

15. The notes in the Appeal Practice indicate that insolvency or impecuniosity is a sufficient special reason for giving security for costs, but the subsequent notes at 59/10/25 indicate that the matter is one for the discretion of the Court, which has a residual discretion, so as to ensure that proper claims are not stifled by security applications. But on the other hand that claims without much merit are not brought at the risk as to costs of the successful party because the appealing party is not able to pay the costs if unsuccessful.

16. I can express my conclusions shortly. I consider that the Legal Aid Board was right and there is no reasonable prospect of success on this appeal on the short point of law which Mr Kumar seeks to raise. That being so, without in any event prejudging any appeal which may be brought, it does not seem to me to be right in the exercise of the Court's discretion that Osbournes should be at the risk of paying their costs even if they are successful because this particular appeal is allowed to go ahead without any order for security for costs.

17. It seems to me that an order should be made. The question is the amount of the order. It seems to me in doing the best I can on the figures that I have been provided with that the order for security should be in the sum of £10,000. I will order security for costs to be provided in the sum of £10,000 accordingly, by payment into court or in a form agreed with Osbournes.

ORDER: £10,000 security to be provided within 3 months; appeal stayed meanwhile. If security not provided by the expiration of the 3 months the appeal to be dismissed. Respondent/Applicant's costs to be paid by the Plaintiff/Respondent; to be taxed if not agreed. (Order not part of approved judgment)

THE RESPONDENT APPEARED ON HIS OWN BEHALF
MR M WONNACOTT (Instructed by Messrs Ince & Company, London EC3 5EN) appeared on behalf of the Applicant