CA on appeal from (SIR JOHN WOOD) (Sitting as a High Court Judge) before Beldam LJ; Mummery LJ; Sir John Knox. 18th June 1998.

JUDGMENT : LORD JUSTICE BELDAM: I will ask Sir John Knox to give the first judgment.

SIR JOHN KNOX:

1. On 19 June 1997, Sir John Wood, sitting as a Deputy High Court Judge, made three orders. In the first, he allowed an appeal by Mr Nigel Francis, the second defendant, from a refusal by Master Eyre on 13 May 1997 to order the plaintiff in the proceedings, Mr Kristjansson, the trustee in bankruptcy of the original plaintiff, Mr Albertsson, to give security for Mr Francis' costs, and he ordered that £20,000 security be given in respect of the latter costs. In the second order, he similarly allowed an appeal by the first defendant, R Verney & Co Ltd ("Verneys") from a similar refusal by Master Eyre, again on 13 May 1997, to order security for their costs, and in that case Sir John Wood ordered that security be given in the sum of £30,000. Third and finally, he made an order dismissing an appeal from a decision of Deputy Master Romer, also on 13 May 1997, that certain letters were privileged and should not be adduced in evidence.

2. The plaintiff appeals, with the leave of this Court granted on 21 November 1997, all three of those orders. The background to the case is briefly as follows. The original plaintiff, Mr Albertsson, was an Icelandic dealer in fish and fish products. Verneys, the first defendants, are dealers and brokers in fish and fish products in the City of London. The second defendant, Mr Francis, was a fish broker and was employed by Verneys as such, admittedly from 11 April 1989 to 31 October 1990. But the plaintiff claims that Verneys remained responsible, vicariously, for certain of Mr Francis' actions, and possibly inactions, after that latter date.

3. It is common ground that there were two relevant sets of sales of fish products made by the original plaintiff. The first set was of two parcels of sales of fish covered by invoices, one dated 14 December 1989 for some US $89,194, and the other by an invoice dated 28 December 1989 for US $75,369. Those invoices were addressed to an Italian concern, La Piedmontese, and it is common ground that the fish was delivered to La Piedmontese and that the latter paid, subject to a reduction in respect of a complaint regarding the quality of the fish.

4. The statement of claim put these sales originally on two alternative bases, one of which was that Verneys bought and sub-sold, but that was denied and has not been pursued before us as the basis of the claim. The second way in which the statement of claim put that claim, was to say that there were sales by the plaintiff direct to La Piedmontese through the agency of the first defendant, which the defendants admit. The latter interpretation is clearly supported by the invoices which I have mentioned, which name La Piedmontese as the purchaser.

5. The plaintiff in the statement of claim admits payment of two several sums of £22,319 odd and £12,506 odd, towards what was due to him on the first of those two invoices, and claimed that there remained owing the balance of some £25,850 on that invoice, and the whole of the sums on the second invoice. That amounts to a total of some £77,021. The statement of claim goes on to allege that Mr Francis instructed La Piedmontese to pay those sums of £25,850 odd and £51,271 odd to a firm of solicitors, Messrs Leon Kaye & Collins, and that payment was made in July 1990 in accordance with those instructions, but that Mr Francis thereafter appropriated those sums for his own use, for which it is claimed, he personally, and Verneys vicariously, are liable.

6. Verneys make no admission regarding the instructions to pay Leon Kaye & Collins, or the payments actually made, and deny vicarious liability. Mr Francis in his amended defence avers that he negotiated with La Piedmontese on the instructions of the original payment, for the payments of US $69,194 and US $55,369 to that firm of solicitors in about August 1990. He denies having appropriated those sums to his own use. But there is, quite plainly, an admission in the amended defence of the second defendant, Mr Francis, of circumstances which plainly make him an accounting party.

7. He accepts that he received the aggregate of just over US $124,000. He claims to have paid two several sums to the plaintiff which, give or take a few cents in the pound for the exchange rate, appear to correspond pretty exactly with the sums which the plaintiff admits having received, which I mentioned earlier.

8. The issue between the parties on this aspect, therefore, is limited to the balance of some US $73,297 which Mr Francis, in his amended defence, claims was used with the knowledge and consent of the original plaintiff, to deal with claims made by a company called Udina Mixed Farms, those claims being made against the plaintiff arising out of the sale of goods to that company Udina Mixed Farms.

9. That brings me to the second parcel of fish that it is common ground the plaintiff sold. Udina Mixed Farms was the purchaser of that parcel. The statement of claim pleads that these sales were again a purchase by Verneys and a subsale to Udina Mixed Farms, but both Verneys and Mr Francis deny such a purchase and a subsale by Verneys, but claim that there was a sale direct by the plaintiff to Udina Mixed Farms, pursuant to a written contract which is identified, and Mr Francis makes a similar plea. So far as payment for those sales of fish are concerned, the plaintiff's case in the statement of claim was that he was paid two sums totalling £31,972, leaving £38,903 outstanding. In addition, the statement of claim pleads that Mr Francis, either on his own behalf or that of Verneys, opened a bank account at Banco Espanol de Credito in Gibraltar in the name of Verneys, and that Mr Francis instructed Udina Mixed Farms to open a letter of credit for the contract price of the subsale to them in the name of Verneys, and that the sums due under it were paid to that bank on 20 November 1990, and that Mr Francis has appropriated those sums for his own use.

10. Verneys deny any knowledge regarding the matters alleged concerning the letters of credit, and deny all liability with regard thereto. Mr Francis admits having opened an account at the Banco Espanol de Credito in the name of a company, Finflak Fisheries Ltd, of which he was the manager, with, he says, with the original plaintiff's knowledge and consent, and he also admits that the sums due under the letter of credit, were paid to the credit of that account, but denies having appropriated those sums. Mr Francis in his defence claims that in respect of the goods shipped to Udina Mixed Farms, the purchaser threatened to reject the entire shipment, and the original terms of sale had to be renegotiated, again with, he says, the original plaintiff's knowledge and consent. He pleads payment to the original plaintiff of three sums totalling just over $151,000 between October 1991 and January 1992. This is in fact a substantially greater sum than the £31,972 which the original plaintiff admitted having received in respect of these sales.

11. Finflak, it appears, was struck off the register of companies in Gibraltar where it was registered, in March 1994. The balance of the sums which Mr Francis admits were paid into the bank account of the Banco Espanol de Credito over and above the payments that he says were paid to the original plaintiff, are claimed by Mr Francis to have been dealt with as shown in the statement of account scheduled to his defence, showing dealings concerning transactions on behalf of the plaintiff insofar as relevant to this action. Mr Francis claims that there is nothing owing by him on that account. There was finally a claim, originally advanced in the statement of claim, that there was a failure by Verneys to notify the plaintiff of Mr Francis' improper appropriations, but that was not pursued before us and I need not deal with that.

12. Overall, the position seems to me to be perfectly clear that Mr Francis was an accounting party in respect of the Italian transaction (if I can call it that compendiously), and that he had a very strong case to answer in relation to the Nigerian transaction, the only difference being that a company which he appears to have certainly managed and possibly controlled and owned, was involved in it and was the company in whose name the proceeds of the letter of credit were transferred into the bank in Gibraltar.

13. One would have thought, although there might well be some complexity in tracing the accounting process, the initial process, whereby Mr Francis would be called upon to give a proper account of his dealings in respect of these matters, would be a relatively simple affair, but the distressing fact is that we have two ring folders with 700 pages of pleadings, affidavits, summonses, etc, at the end of which the parties really have not proceeded very far down the road to solving what appear, on the face of it, not to be very complicated transactions.

14. One of the curiosities in this case which is most unfortunate, is that the statement of claim does not in fact contain a claim for an account. This case seems to me to cry out for a claim for an account, and for an application by summons to be made for an order for an account, in respect of which I can see absolutely no answer at all in relation to the Italian transaction, and a rather dubious answer at best in relation to the Nigerian transaction.

15. However, so far as the parties to the proceedings are concerned, what has happened in this. The writ in March 1994 originally joined Verneys as the only defendant. They joined Mr Francis as a third party, and Mr Francis was also joined as a second defendant in October 1994. The original plaintiff became bankrupt on 20 September 1994 and by an order of Master Eyre on 27 January 1995, his trustee in bankruptcy, the present plaintiff, Mr Kristjansson, was substituted and the action ordered to be carried on.

16. There has been a remarkable number of interlocutory applications, which, as I have mentioned, have generated large quantities of paper without achieving commensurate progress. The applications include the following. In January 1995 summonses for security for costs were issued by both Verneys and Mr Francis. On 16 March 1995, Master Eyre dismissed both those summonses. Either on the same day or previously, the order is not I think before us, Master Eyre also dismissed an application made in November 1994 but served in January 1995, by the plaintiff for an interim payment by the defendant.

17. The plaintiff has also issued summonses for an account on 25 April 1995, and for further directions on 19 September 1995. Those summonses were heard by Master Eyre on 4 December 1995, but were then adjourned and only restored for further hearing on 17 December 1996. That apparent inactivity, we were told, was accounted for in part by negotiations relating to a possible voluntary arrangement in relation to Mr Francis' affairs, which were apparently in low financial water, and in part due to an application for legal aid which should, plainly, not have been made on behalf of the present plaintiff, and that was something from which, in my view, the plaintiff can hardly take any sort of comfort. The application should not have been made, and the fact that it was granted is no justification for its having been applied for. However, there it is. There are those explanations, the first one rather better than the second, for that very long period of one year when this action did not progress.

18. Verneys and Mr Francis have also issued summonses to strike out the plaintiff's claim for want of prosecution. All these latter summonses have yet to be disposed of. Verneys and Mr Francis renewed their application for security for costs by the summonses in respect of which the appeal is before this court. As I have mentioned, they were dismissed by Master Eyre on 13 May 1997.

19. There are three main issues which arise on the appeal. The first is whether it was right, as deputy Master Romer and Sir John Wood both held, that the "without prejudice" correspondence which the plaintiff wished to rely upon should not be admissible on the hearing of the summons for security for costs. The second issue is whether the defendants, having once unsuccessfully applied for security for costs under Ord.23,r.1 are thereby debarred from applying again for security, and, if not, in what circumstances can such a renewed application be made. The third

issue which arises if the defendants are not prevented from making a further application for security, is whether Sir John Wood erred in the exercise of his discretion to order security in the two ways in which he did.

20. As regards the first quite discrete point of the "without prejudice" correspondence, the letter in fact is in evidence before us. It is written on behalf of Mr Francis by solicitors in Gibraltar who were then acting for him on 12 August 1993, which is, it will be recalled, somewhat before the writ was issued. It is not necessary for me to read it. It does undoubtedly contain an attempt to arrive at a compromise solution to the disputes between the parties, and it is perfectly clear that it falls within the general principle of the non-admissibility of "without prejudice" material, but Mr Hogarth has argued that there were at least two reasons why he should be allowed to rely upon it.

21. Before I embark on them, I should mention that in fact this seems a slightly unnecessary exercise, because there is very much the same material in documents which he showed us, which is not subject to "without prejudice" protection, and the letter which is of disputed admissibility, does not take the matter very much further. But it does undoubtedly contain an admission which is, on its terms, unqualified.

22. The general principle is to be found in the decision of ***Rush & Tompkins Ltd v. Greater London Council & anr*** [1989] AC 1280 where Lord Griffiths said: *"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in* ***Cutts v. Head*** *...: That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resorting to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J, in* ***Scott Paper Co v. Drayton Paper Works Ltd*** *... be encouraged fully and frankly to put their cards on the table... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'*

The rules applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."

23. The first ground which Mr Hogarth relied upon for distinguishing that rule was that it was inapplicable to interlocutory applications. In relation to that, he relied in particular upon the decision of this Court in ***Family Housing Association (Manchester) Ltd v. Michael Hyde and Partners & ors*** [1993] 1 WLR 354. That was an appeal from an order admitting without prejudice material on an application to strike out an action for want of prosecution. It was in connection with that that the issue arose as to whether or not it was right to admit the "without prejudice" correspondence that was relied upon as explanatory of the delay, which of course is the principal subject of inquiry on applications to strike out for want of prosecution.

24. Hirst LJ, who gave the leading judgment, quoted with subsequent approval, a passage in Phipson on Evidence, 14th Ed, page 554-555 as follows: *"It is certainly the case that without prejudice communications are admissible for the purpose of showing that they have been made. It is long established that they may be adduced in evidence as explaining delay. Though there is little authority on this topic, in practice without prejudice correspondence is regularly exhibited to affidavits without objection from the court or counsel on interlocutory applications, for example to strike out for want of prosecution, or for discovery. In some cases this is because the correspondence, though headed without prejudice, is in reality nothing of the sort. In others, however, it genuinely falls within the protection accorded to without prejudice correspondence, but is admissible because the purpose for which it is tendered does not infringe the policy of the rules."*

25. The learned Lord Justice said (page 362): *"In reaching my conclusion it seems to me important to stress at the outset that I can find nothing in any of the reported authorities which excluded the use of without prejudice correspondence in applications of the present kind. Those authorities are concerned with the use of such correspondence at a trial or during its aftermath, and do not in my judgment extend to an application of the present kind, which essentially determines whether or not there should be a trial at all. I am therefore unable to accept Mr Grime's basic premise as to the wide ambit of those authorities. The unreported authorities on the other hand, while not determinative of the issue, as Mr Grime rightly stresses, the point at issue was not expressly debated, do certainly in my view demonstrate the recognition of a practice allowing admission of without prejudice correspondence in applications of the present kind. This is consistent with the statement in Phipson on Evidence ... and suggests that there has developed a convention permitting the use of such documents for this special purpose. If, as I think, such a convention exists, any agreement between the parties would be subject to it, as in the case of the conventional modification of the general rule established by the* ***Calderbank*** *case. In any event, it seems to me somewhat unreal to treat such an agreement as covering this type of application, which would be most unlikely to be in either party's mind at the time of the without prejudice agreement. So far as public policy is concerned, I fully recognise the strength of the considerations in favour of an embargo as a general rule, as established by the reported cases, but it seems to me*

that there is a preponderant public policy consideration in favour of admitting the evidence in applications of the present kind.

The main considerations of public policy in favour of the general rule excluding the reference to without prejudice correspondence on which Mr Grime so strongly relies, seem to me to have little or no application in the present context, seeing that I do not think the parties' willingness to talk frankly about the strengths and weaknesses of their case, and to make provisional offers or admissions for the purposes of negotiation only, will be to any significant extent inhibited by the knowledge that the negotiations may be referred to in this very narrow field, not for the purpose of showing that such provisional offers or admissions were made, but solely for the purpose of explaining delay and the conduct of the parties at any relevant period."

That, it seems to me, gives the key to the reasons that moved the Court of Appeal in that particular case.

26. The question is, what is the purpose of the use of the evidence in question, and if the purpose, as in ***Family Housing Association*** was solely to explain delay, that has nothing to do with the question whether the admission on which reliance is sought to be placed, is in fact a binding admission which the court should act upon. On the other hand in this case, the whole point of Mr Hogarth's reliance upon this letter is that he wishes to establish that this is indeed a binding admission, binding on Mr Francis through his solicitor's letter, and that seems to me to be the critical distinction between the two types of case.

27. I am fortified in that conclusion by the careful words of the judgment of Hirst LJ where he refers on more than one occasion to "*applications of the present kind*", and "*applications in the present context*". In my view, the learned Lord Justice was certainly not seeking to lay down a general rule applying across all interlocutory applications, but was dealing with the case before him, namely an application to strike out for want of prosecution. I am fortified in that view by the fact that Judge John Newey sitting on Official Referee business ***in Simaan General Contracting Co v. Pilkington Glass Ltd*** [1987] 1 WLR 516, reached the same conclusion. He said (page 520): *"To allow one party to give evidence of 'without prejudice' communications without the consent of another would be in direct conflict with the general rule excluding such evidence and with the public policy which supports it. Defendants sued by plaintiffs resident abroad or by companies likely to get into financial difficulties would be deterred from exploring possibilities of settlement and making sensible offers for fear of prejudicing their prospects of being able to obtain security for costs. In particular a defendant who has obtained an order for security intended to relate to preparations for trial only would be most unwilling to take any action which might prevent him from obtaining a second order for security in respect of trial costs."*

28. The issue in that case was similar to the present case. The question was whether there should be admitted what was ***prima facie*** clearly protected by the "without prejudice" principle, negotiations between the parties which one side claimed could amount to an admission. But on the question of principle, it seems to me that Judge Newey's analysis is correct.

29. He was supported in the view that he formed by an earlier case of ***Sir Lindsay Parkinson & Co Ltd. V. Triplan Ltd*** [1973] QB 609, where Lord Denning, at page 627 said: *"... I am quite clear that a payment into court, or an open offer, is a matter which the court can take into account."*

30. He was dealing with questions of security for costs. The specific mention of the word "open" in that context does support the view that Lord Denning thought the word "open", was an important one, and would very probably not have come to the conclusion in relation to "without prejudice" offers. However that may be, I have no hesitation in expressing the view that there is no general abrogation of "without prejudice" protection on interlocutory applications for security for costs. It is perhaps worth mentioning that Robert Walker LJ, in the course of giving leave to bring this appeal, said that he would not wish to give any encouragement whatsoever to the notion that there is some general relaxation of the "without prejudice" rule on an interlocutory application for security for costs. I respectfully agree.

31. The second submission that Mr Hogarth made in this court was based on the other well known exception to the *"without prejudice*" rule, namely where there is what has been felicitously described by Hoffmann LJ as an unambiguous impropriety. The case in which that statement is to be found, is ***Forster v. Friedland & anr*** (unreported) 10 November 1992. The Lord Justice, in dealing with a case where one party, Mr Friedland, was said to have agreed in a binding way, to sell shares at a price of 73 pence, on several occasions in "without prejudice" conversations which were covertly tape recorded, said that, if it came to litigation, he would deny that there was any legally binding agreement. Hoffmann LJ said this: *"In a respondent's notice Mr Wingate-Saul advanced two other grounds for upholding the judge's ruling. The first was that the conversation showed that Friedland was threatening to advance what he knew to be a sham defence, namely, that there had been no agreement whether legally binding or not.*

I accept that a party, whether plaintiff or defendant, cannot use the without prejudice rule as a cloak for blackmail."

32. He then deals with two authorities, one in British Colombia ***Greenwood v. Fitt*** [1961] 29 DLR 1, and ***Hawick Jersey International Ltd v. Caplan*** , The Times, 11 March 1988, which were both cases of blackmail. Hoffmann LJ goes on: *"These are clear cases of improper threats, but the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves and without inhibition. I think it is quite wrong for the tape recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."*

33. In the present case, it seems to me that what is sought to be relied on is a previous inconsistent statement. That seems to me to fall very far short of the sort of unambiguous impropriety which justifies removing the privilege. The authorities which Hoffmann LJ cited vividly illustrate the sort of test that is needed to remove that privilege. As Simon Brown LJ observed in ***Fazl-Alizadeh v. Nikbin & ors*** (unreported) 25 February 1993, of which we have a transcript: *"There are in my judgment powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest of cases. Unless this highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded."*

    I would respectfully agree with that sentiment, and I do not think that this is one of those cases.

34. For those reasons, I would, for my part, uphold the judge's decision on this issue.

35. I turn then to the second issue, which is whether there can be a further application for security for costs after there has been an unsuccessful one. It is, of course, common ground that once a successful application for security has been made, a subsequent application for increased security can perfectly well be made.

36. The rule, RSC Ord.23,r.1, is in very general terms. It reads, so far as relevant:
    "Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court -
    (a) that the plaintiff is ordinarily resident out of the jurisdiction
    ...
    then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just."

37. It would perhaps be difficult to envisage a wider expression of the discretion which the Court is giving. There is a note in the Practice which does not help in my view, regarding the possibility of making a second application after an application has been refused. It is at 23/1-3/19 under the heading "Effect or refusal to order security", the text reads: *"If an application for security is refused by a Master, and his decision is not appealed from, it is final. It estops the parties from making a further application on the same facts. Aliter, if security is ordered."*

38. The authority that is given for that is a decision of which no-one has been able to find a transcript, ***Hermite v. Allingham*** , 13 January 1936.

39. It is in fact principally on this issue that leave was given by this court for this appeal to be brought. It is in my view undesirable that it should be open to a litigant who has failed to secure an order for security in his or her favour and has failed to launch a successful appeal against that refusal, to circumvent the failure to appeal by trying to have his or her application heard all over again by another judge or tribunal. Indeed, no-one contends to the contrary.

40. At the other end of the spectrum, given the very wide discretion conferred by Ord.23,r.1, I can see no justification for an arbitrary rule that no second application for security can ever properly be made unless the first application was successful, in particular if circumstances have arisen since the initial refusal of security, which place a new complexion on the second application as compared with the first, there is no logical reason for denying the court the right to deal with that different application on its altered facts. There is nothing which I can see in Ord.23,r.1 which can be construed to do that.

41. The area of dispute centres on the degree of alteration in the circumstances surrounding the second application as compared with the first. One type of circumstance seems to me clearly irrelevant and that is any criticism of the reasoning of the first refusal for security, since by definition the opportunity for challenging that decision on appeal has passed, it is not in my view open to an applicant for security to seek effectively to mount an appeal through the back door. This temptation is not a serious one for the case under appeal here, because there is no satisfactory evidence of Master Eyre's reasoning in refusing security in March 1995. On the other hand, what is legitimate and indeed necessary here, is on comparison of the evidence available to the court when security was refused, with that available when the new application was made.

42. Mr Hogarth in his skeleton argument included a submission that a second application would only be permissible if there was a quite separate legal or factual basis for the application. That was not an argument that he elaborated before us. As I understood it, he accepted that if there was a sufficient change of circumstances, without specifically limiting the area within which those circumstances could arise, that would justify the court in approaching the matter again.

43. That seems to me, if I may say so, to be the correct approach. The only difficulty, and it is a not inconsiderable one, would be in the abstract to define what is a sufficient change. It would in my view be undesirable to seek to define at all closely what the Rules of the Supreme Court have no doubt quite deliberately left at large in the circumstances in which it would be proper for the court to revisit security for costs after an earlier refusal. Obviously, there must be a significant and relevant change of circumstances, otherwise there would be only a re-run of an existing scenario and that, for the reasons I have given, is not permissible. But I can see no logical reason for limiting the field of inquiry in any particular maner, not only for the reason that the rule is a very wide one, but also because it is important that the court should not be in any way fettered in considering what circumstances do justify a new approach.

44. The general principles regarding the exercise of this discretion are familiarly described by the Sir Nicolas Browne-Wilkinson V-C (as he then was) in ***Porzelack KG v. Porzelack (UK) Ltd*** [1987] 1 WLR 420, where he said

(page 422): *"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction."*

45. He then deals with the special case of companies for which there is provision in the Companies Act, and goes on: *"Under RSC Ord.23,r.1(1)(a) it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer."*

46. He then characterised a detailed examination of the possibilities of success or failure as merely blowing the case up into a large interlocutory hearing involving great expenditure of both money and time. He goes on: *"Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighted. But for myself I deplore the attempt to go into the merits of the case, unless it can clearly be demonstrated one way or the other that there is a high degree of probability of success or failure."*

47. Finally, at page 426 he said: *"The next matter that I take into account is that, on the evidence before me, there is little doubt that if I order security on anything like the scale asked for, the plaintiff's action will in fact be stifled. It simply does not have the means to put up the money. It is always a matter to be taken into account that any plaintiff should not be driven from the judgment seat unless the justice of the case makes it imperative. I am always reluctant to allow applications for security for costs to be used as a measure to stifle proceedings."*

48. That particular passage demonstrates, if it needs showing, that the court is not limited to evidence which relates to the issues in the action in deciding questions of security for costs.

49. In my view, it will be a matter for the discretion of the judge who has to deal with a second application after a first unsuccessful one, whether the change in circumstances, which I accept is needed, is sufficient to justify his treating the application as a new one on different circumstances. I do not think that it would improve the matter by seeking to attach an adjective such as substantial or great to illustrate that proposition.

50. I turn therefore to look and see what the learned judge identified as being the circumstances that warranted his embarking on a new application for security from each of the two defendants. At page 12 of the judge's judgment he recited what had been put forward on behalf of the defendants (in particular the first defendant) as indicating that circumstances had changed. He said:

"Mr Thornton [for the first defendant] in his skeleton argument, puts forward a number of matters indicating in his submission that circumstances have changed, and Mrs Kaplan, for the Second Defendant, adopts his reasoning as set out most explicitly in paragraph 5 of his skeleton argument. I do not propose to go through them each in turn, but his first point is that, of course, the action has moved on and that further costs have been involved. The action has not been pursued with despatch. The procedures and activities of the Plaintiff are open to comment and criticism and that, therefore, the conduct which one would expect after security for costs have been refused, namely pressing on with the action in a reasonable timetable, has not been maintained. He remarks on the fact, which is undoubtedly true, that until this morning --- the second day of the hearing before me -- there had been no affidavit from Mr Albertsson, the original Plaintiff, or Mr Kristjansson, the Trustee in Bankruptcy, in this matter today, although the Defendants refused to accept service. Two affidavits have been sworn. I have looked at them de bene esse . They do not fill me with confidence, but I disregard them for the purposes of this judgment.

Then Mr Thornton submits that there has been piecemeal discovery. I have not been through that with a fine toothcomb, but I am quite satisfied that there may have been no real effort to deal fully and properly with discovery. Then he submits that the Defendants have been trying since March 1995 to discover whether the Plaintiff has funds behind him, and how he has been able to finance the litigation so far, and it was only very recently, (Friday, 13th June) that documents were disclosed showing that the insolvency of the estate is in the sum of £1.25 million, that there are a number of banks who are creditors, and I have now been told orally by Mr Hogarth during this hearing that the monies have simply been received from the Trustee in Bankruptcy, so that we do not know whether he personally is supporting this action or whether some of the creditors are supporting this action. One thing is quite clear and that is that substantial costs must have been incurred already on the Plaintiff's side, I would have thought £30,00 to £40,000, and someone has been in a position, and been willing, to support this litigation."

That leads him to the conclusion that there had been a general change of circumstances, and he felt entitled to review the situation and revisit it.

51. Of those factors which the learned judge identifies, it seems to me, for my part, that one might perhaps attach more weight to some than others. Those that do seem to me to be significant, are, first of all the increase in costs. True it is, of course, that actions, unless they are in a state of total immobility, do necessarily increase in costs as they progress. But that does not seem to me to be a valid reason for not treating that as something which is different from the situation which obtained when the earlier application was made, if indeed, of course, additional costs have been incurred.

52. Secondly, and perhaps more importantly, there undoubtedly was a failure to press on on behalf of the plaintiff, and that is a matter which I have dealt with earlier in this judgment, and I need not repeat what I said on that score, but the learned judge was, in my view, undoubtedly justified in relying on that aspect.

53. I do not regard the learned judge as having placed any importance on the absence of an affidavit from Mr Albertsson and Mr Kristjansson. He says in terms "I disregard them for the purposes of this judgment". I do not think they carry the matter further one way or the other. I would be minded to accept Mr Hogarth's submission that affidavits from those two gentlemen are not particularly germane to the issues in the action, the accountability of the first and second defendants for monies that were paid and intended to be received by the plaintiff. But I need not place any reliance on that any more than the learned judge did.

54. Then the issue of discovery. This is perhaps not the only aspect of the case in which pots have been describing kettles in a pejorative way. Both sides claim that the other side has been failing in its duties to give full and proper discovery. Neither side has made an application for specific discovery in support of that view. In my view, all that one gets out of this is that the case has not perhaps been dealt with with the degree of expedition and skill which one would hope to have found. But I do not find the discovery situation as having been a major factor in the judge's reasoning. It is a factor and there was some material upon which he could come to that conclusion, because there were documents that were produced after Master Eyre refused discovery for the first time in 1995, and before it came before him the second time and before Sir John Wood in particular on the appeal from the second occasion of which the subject was dealt with by the learned Master. Although it is perhaps not a subject in which one side is particularly more blameworthy than the other, it is a matter upon which the learned judge, in my view, was entitled to place some reliance.

55. Finally on this score it seems to me that learned judge is amply justified in coming to the conclusion that money must be forthcoming from the Trustee in Bankruptcy's side in this case, and that therefore he would not be stifling the action if he ordered security as in fact he did.

56. For those reasons it seems to me that this being a matter of discretion, and a discretion which is vested in the trial judge as opposed to this court, there is not material upon which it would be right for this Court to come to the conclusion that it was wrong for Sir John Wood to embark on the question of security at all.

57. That leads me to the final point and that is whether or not the exercise of the discretion as regards both the first and second defendants, in favour of ordering security was properly exercised. As regards the first defendant, I see no solid ground for criticising what the learned judge put as the situation in relation to him. It seems to me that plainly there is an arguable case in relation to the vicarious liability of the first defendant for whatever actions of the second defendant are, at the end of the day, found to have been the subject matter of a valid claim by the plaintiff against him. There is no doubt that the employment of the second defendant by the first defendant was limited in point of time, and it came to an end on 31 October 1990, and quite numerous events upon which reliance is placed, and non-events of which complaint is made of, occurred after that date. On that basis, it seems to me plain that the first defendant has an arguable case which the learned judge assessed properly.

58. When it comes to the second defendant, the learned judge said this:

"As against the Second Defendant, it is said, of course, that he is an outright rogue, he is totally dishonest and has been fraudulent. I was told during submissions that it seems to be apparent that the Second Defendant stole some of the writing paper of the First Defendant, and it is not suggested, that I have been able to see, that any fraudulent activity was carried out with the authority of the First Defendant. Therefore, the case against the First Defendant seems to be on all grounds to be a thin case.

As against the Second Defendant, as I have indicated, it is alleged that he is a fraudulent rogue; that it is right to say, first, that discovery is clearly incomplete. Secondly, that there are amendments which will have to be made in order to give effect to what is at the moment only on affidavit evidence and also subject to completion of discovery. Thirdly, it is put up by way of Defence from the Second Defendant that whatever the apparent situation, merely looking at the invoices and such of the bank accounts that have been disclosed, nevertheless there was a general accounting between the Plaintiff and the Second Defendant, as his agent, which needs in fairness to be examined and which, therefore,is incapable of being fairly judged at this juncture."

59. In my judgment, the learned judge, very understandably, because he was faced, as indeed we have been, with 700 pages of not very clearly organised paperwork, slightly misapprehended the nature of the case against the second defendant. The second defendant, in my view, beyond any sort of argument was an accountable party in relation to the Italian transaction. His own pleading seems to me to substantiate that. He also seems to me to be very probably an accountable party in relation to the Nigerian transaction. The only qualification on that liability is the involvement of the Gibraltarian company of which he was apparently the controlling hand. That does not strike me as being a very probable route of excuse for the second defendant being an accountable party, since it is quite clear that his was the controlling hand in what happened, and he was the person who wrote to the original plaintiff to get instructions and give information.

60. Secondly I take into account the fact that, as Mr Hogarth showed us, the second defendant has in fact told lies in the correspondence that is in evidence regarding his dealings with the monies, particularly in relation to the Italian transaction. It may be at the end of the day that those will not prove determinative of the issues. But their existence does to my way of thinking, very substantially weaken the merits of the second defendant's case.

61. As I have said earlier, it is most unfortunate that this case has not proceeded down the straightforward route of a summons for an account with an issue directed, if it needs to be directed, as to whether or not the second defendant is an accountable party. But the main issue in the proceedings, initially, is whether or not he is such an accountable party. I accept, as Miss Kaplan said, that there is also involved, more especially in the way in which the second defendant has pleaded, at the end of the day an issue as to whether anything is ultimately found payable on the taking of that account. But the important factor seems to me to be that the second defendant, first, plainly is in part an accountable party and probably in whole; secondly that he has been shown not to have been frank and accurate in what he wrote to the original plaintiff. That does seem to me to indicate that the learned judge somewhat misapprehended the nature of the second defendant's position as an accountable party.

62. If one takes that into account then it does seem to me that it is not right that the second defendant should have the benefit of security for costs in doing that which he ought to have done which is to be ready with his accounts and to produce justification for his dealings with other people's money.

63. For those reasons, I have reached the conclusion that the learned judge's decision cannot be supported in relation to the second defendant, and in relation to him I for my part would allow the appeal, but not in relation to the first defendant.

LORD JUSTICE MUMMERY:

64. I agree.

LORD JUSTICE BELDAM:

65. I also agree, but desire to add that the administration of justice is daily being considerably impeded by placing before courts bulky files, innumerable affidavits and unnecessary duplication. Here was a straightforward application for security for costs. It took a day and a half for the learned judge to plough through the immense number of documents, over 700 pages, and the fact that in the end we have decided that his decision should be reversed on one aspect of the order he made, is, in my view, largely due to the complexity of the documentation which was put before him.

ORDER: Appeal against the order that the plaintiff should provide security for costs in relation to the first defendant will be dismissed with costs; the appeal against the order that the plaintiff gives security for the second defendant's costs will be allowed with costs. The stay in that case will be remitted. The action against the first defendant will be stayed until £30,000 is brought into court. The appeal against the judge's order in relation to the letters dated 12th and 31 August 1993 and 1st September 1993 is dismissed with costs. There will be an order for immediate taxation of the first defendant's costs of the appeal; if the £30,000 is brought into court, those taxed costs should be satisfied out of the sum of £30,000. (This order does not form part of the approved judgment)

MR A HOGARTH (Instructed by Messrs L Bingham & Co, London EC4Y 0BN) appeared on behalf of the Appellant
MR P THORNTON (Instructed by Messrs Bircham & Co, London SW1H 0DY) appeared on behalf of the First Respondent
MISS B KAPLAN (Instructed by Messrs Lawford & Co, Surrey, TW9 1QF) appeared on behalf of the Second Respondent