

CA from application for leave to appeal and a stay of execution before Evans LJ, Thorpe LJ. 19<sup>th</sup> January 1999.

**JUDGMENT : LORD JUSTICE EVANS:**

1. This is a long-standing matter which has become a most unfortunate procedural dispute, essentially as always in this situation it is about costs rather than the original substantive claim and counterclaim which were for relatively small sums. Sitting in this court with Wilson J, on 19<sup>th</sup> November 1997, I gave a judgment which was based upon what Mr Cox told us on that *ex parte* application but which brought the history, so far as we knew it then, up to that date. There have been many subsequent hearings and applications and yet further costs have been incurred.
2. Most recently, His Honour Judge Heath gave a judgment on 7<sup>th</sup> December 1998 refusing various applications made by Mr Cox, who was the plaintiff in the original action and the defendant to the counterclaim. There is an application for leave to appeal against that judgment made by Mr Cox on 26<sup>th</sup> December. The application was listed for hearing today but, meanwhile, we are told by Mr Roche on instructions, there was a direction, presumably by the Registrar or made on his behalf, that the application should be heard *inter partes*. Mr Roche therefore has appeared today and has prepared for us a skeleton argument which is most helpful and which, as I shall say in moment, is to be commended for raising a point which, if valid, might tell in Mr Cox's favour.
3. The second development since the present application was made was that on 11<sup>th</sup> January Mr Cox wrote to the Registrar saying, first, that he needed in effect an adjournment of today's application and, secondly, that in consequence he was asking for a stay of execution regarding the sale of his property 18 Eliston Street, Lincoln to be ordered pending the adjourned hearing.
4. Mr Cox has not appeared today and so far as we know his letter to the Registrar was never replied to. That is again unfortunate. But in those circumstances the absence of any reply may be the reason why he has not appeared today. That is a generous and possibly overgenerous view to take because, as Mr Roche has reminded us and as the lamentable history of these proceedings indicates, there have been many previous occasions when Mr Cox has failed to appear at times when he ought to have done, not only when applications were made against him and there were problems about service, but also when the application was one made by himself and no such problem would arise. However, in all the circumstances and not least with the object of trying to bring this wholly regrettable story to a reasonable early conclusion, I, for my part, would propose that we should treat Mr Cox's letter as an application to adjourn this matter and that we should grant that application, fixing a date during the week commencing ...

**EVANS LJ:** *I said three weeks from now, can you help on that Mr Roche?*

**MR ROCHE:** *Including this week, which I think your Lordship is saying, the week commencing 1st February.*

**EVANS LJ:** *I think I meant excluding this week. So I will say the week commencing the 8th. I would grant the application for an adjournment and order that the application for leave to appeal will be heard inter partes on a date to be fixed during the week beginning 8th February 1999. On that occasion Mr Cox must realise that he will be required to be present and he will not, except in the event of the most exceptional circumstances, be granted any further adjournment. The matter will be dealt with, so far as possible, on that occasion.*

*It seems to us that every effort must be made by the court office, in conjunction with Mrs Rose's solicitors, to bring this matter to the notice of Mr Cox and, if necessary, application must be made for special directions to ensure that notice is given and that one further document is served on Mr Cox. That document is the skeleton argument on behalf of the respondent which Mr Roche has prepared, dated 18<sup>th</sup> January 1999, so that Mr Cox will realise that the point has been raised to which I have already referred. Briefly, there is a possibility that the order made for costs in respect of the automatic striking out of the claim in these proceedings was made on the wrong basis. If the claim had not been automatically struck out, then a question will arise as to the present status of the order that was made consequent upon what was thought to have been an automatic striking out. That point, I would*

*emphasise, is one which Mr Cox must be prepared to deal with when the adjourned hearing of the application takes place.*

*The second matter I would mention is this: the court undoubtedly will do all that it possibly can to bring this story of ever increasing costs and procedures to a close. There are now a number of different interests involved, first of course Mr Cox himself, and secondly Mrs Rose, the respondent to this application or at least the nominal respondent. Her interest is limited in effect to the £500 damages awarded on the counterclaim. The substantial amounts which have been incurred in respect of costs are the concern, first, of her solicitors and, secondly, of the Legal Aid Board. They all have different interests in relation to any overall settlement of this matter. If it is possible to arrange for some form of mediation so that a final conclusion can be reached, then that is clearly something which should be encouraged and will be encouraged by the court. There is always the possibility of appointing a mediator by agreement. There is always the somewhat more remote possibility of the court itself appointing a mediator for that purpose.*

*I mention these now so that the court which hears the adjourned application can consider whether or not to make such a direction for mediation and, perhaps more importantly, so that in the interim those instructing Mr Roche can consider very carefully and from the point of view of the different interests involved whether the time has not come to attempt to appoint a mediator by agreement, who can take all the different interests into account. If that is done, then no doubt the court would consider that that mediation should be given the chance to work before any further legal rulings take place or legal costs are incurred.*

**LORD JUSTICE THORPE:** I agree.

**ORDER:** Application adjourned to the week beginning 8th February. A copy of this transcript to be sent to Mr Cox at public expense. (Order not part of approved judgment)

THE APPLICANT DID NOT APPEAR AND WAS NOT REPRESENTED

MR B ROCHE (Instructed by Messrs Sills & Betteridge, Lincoln LN2 1ED) appeared on behalf of the Respondent