CA on appeal from Chancery (Sir Andrew Morritt) before Mummery LJ; Lawrence Collins LJ; Mr Justice Munby. 18th April 2008

Lord Justice Lawrence Collins:

I Introduction

1. This is an appeal from a judgment of the Chancellor given on May 17, 2007 on an application by the appellant, Mr Mills, for an order that the respondents ("the Receivers") should pay Mr Mills' costs of an unsuccessful action brought by Dolphin Quays Developments Ltd ("the Company") against Mr Mills at their direction. In substance the appeal raises the question whether, when a receiver appointed under a bank charge causes an insolvent company to sue, the action is unsuccessful and the successful party is unable to recover costs against the company, the successful party may recover the costs from the receiver under the jurisdiction in section 51 of the Supreme Court Act 1981 to award costs against a non-party.

2. The Receivers are partners in PriceWaterhouseCoopers. They are receivers of a property of the Company which is subject to a charge, and one of them (Mr Birchall) is a joint administrative receiver (with Mr Lomas, another partner), under a debenture given by the Company to the Bank. The Receivers were not parties to the action by the Company against Mr Mills, and Mr Mills' application was pursuant to the jurisdiction under section 51(3) of the Supreme Court Act 1981 to order non-parties to pay costs, which has been the subject of many decisions since ***Aiden Shipping Company Ltd v Interbulk Ltd*** [1986] AC 965 directed this court to lay down principles for the exercise of the discretion in accordance with "reason and justice" (at 980).

3. The Chancellor exercised his discretion against the application, and this appeal is brought by permission of this court. The amount of costs which Mr Mills claimed was some £60,000, and the combined costs of the application and of this appeal are far in excess of that sum.

II Background

4. In 2001 Orb Estates plc agreed to sell to Mr Mills a long lease of Flat 78, Dolphin Quays, Poole, Dorset, then in course of development, for £650,000. It had also been agreed between them that the purchase price should be paid by set-off against the debt of £1.85m due by Orb Estates plc to Mr Mills but this was not recorded in the written agreement. In August 2002 Orb Estates plc sold its interest in Dolphin Quays, together with the benefit of the agreement with Mr Mills, to the Company, and on the same day the Company charged all the property so acquired to the Bank as security for all liabilities of any kind and in any currency due by the Company to the Bank.

5. In June 2003 the Bank appointed the Receivers as Law of Property Act 1925 receivers of the property subject to the Charge and Messrs Birchall and Lomas as joint administrative receivers under a debenture given by the Company to the Bank. All three were partners in PwC. Mr Mills was the sole director of the Company, had executed the Charge and the debenture on its behalf and sworn the affidavit verifying the statement of affairs as at the date of the appointment of the administrative receivers.

6. In November 2004 the Company, by the Receivers, instituted proceedings against Mr Mills for specific performance of the contract for the sale of the long lease of Flat 78. When the claim came before Mr Peter Leaver QC, sitting as a deputy High Court judge of the Chancery Division, in March 2006 it was for damages for breach of contract equal to the balance of the purchase price, namely £155,000. In a judgment handed down in April 2006 Mr Peter Leaver QC rejected this claim. He concluded that the set-off agreement had been an integral part of the contract for the sale of the lease and, not having been included in that document, the contract was unenforceable under the Law of Property (Miscellaneous Provisions) Act 1989, section 2.

7. No application had been made by Mr Mills for security for costs. While Mr Mills knew that the Company was insolvent, he also knew that substantial sums had been realised in the receivership. His evidence was that he believed throughout that, if his defence succeeded, his costs would be paid from realisations held by the Receivers. It did not occur to his solicitor or to counsel to advise Mr Mills to make such an application because they believed throughout that the real parties were the Receivers who would honour any order for costs made against the Company from funds in the receivership. The solicitor's evidence was that it never occurred to him that chartered accountants of the eminence of PwC, or the Bank, would seek to shelter behind the insolvency of the Company. The Receivers' evidence (which was not accepted by Mr Mills) was that if Mr Mills had applied for security for costs, that might well have had an effect on the Receivers' conduct of the proceedings. The success or failure of such an application might have increased the prospects of settlement.

8. Mr Mills relied on the fact that after Mr Peter Leaver QC handed down his judgment in draft counsel for the Company sought time to consider applying for leave to appeal and disputing its liability as the loser for all Mr Mills' costs. It is said on his behalf on this appeal that this shows that, at the time of judgment, the Receivers and the Company's legal advisers considered that Mr Mills' costs would be met by the Receivers as an expense of the receivership (as were the Receivers' own costs). Mr Mills and his advisers also assumed throughout that would be the case. It was not until June 13, 2006 that the Company's solicitors wrote, on the instructions of the Receivers, stating that Mr Mills was only an unsecured creditor of the Company for his costs and making clear that the Receivers would not pay them. This is a very substantial receivership and ample funds are available to pay Mr Mills' costs.

9. On May 3, 2006 the solicitors for Mr Mills indicated that he would accept a little over £60,000 in respect of his costs. After obtaining instructions from their clients the solicitors for the Company indicated that in their view there was no point in seeking to agree Mr Mills' costs or proceeding to a detailed assessment because *"our client is in Receivership and as such your client is an unsecured creditor"*. On August 17, 2006 they said: *"The receivers acted at*

all times as agents of the Company and have a statutory right of indemnity from the Company's assets in respect of costs incurred."

III The application

10. The grounds on which Mr Mills sought an order that the Receivers should pay his costs were that (1) the Receivers brought the claim at the request of the Bank; (2) the Bank alone had any financial interest in the claim; (3) the Bank had funded and directed the proceedings throughout; and (4) it would be a grave injustice to Mr Mills, a man of modest means, if he had to bear his own costs, especially as he was a substantial creditor of Orb Estates plc, the parent of the Company.

11. Mr Mills' case was that for him to bear his own costs was a manifest injustice. Although the unsuccessful action was brought in the name of the Company, it was brought by the Receivers for the benefit of the secured creditor, the Bank. The Receivers were engaged, in bringing the action, in realising mortgaged property which in equity belonged to the secured creditor and not to the Company. There was no realistic prospect of any surplus for the Company or its unsecured creditors or shareholders, so that the equity of redemption was valueless and the Company had no economic interest in the action brought in its name.

12. The Receivers throughout had an indemnity out of the monies realised for the benefit of the secured creditor. If the Receivers had succeeded they would have recovered the costs of the action from Mr Mills. The Receivers knew that if they lost the action there was no money for unsecured creditors and that the Company itself would not be able to pay Mr Mills' costs. The Receivers had realised funds more than sufficient to pay Mr Mills' costs as an expense of the receivership. The financial effect on the receivership, and on the Bank, would be minimal.

13. It was submitted on behalf of Mr Mills (in reliance on what the High Court of Australia said in ***Knight v F.P. Special Assets Ltd*** (1992) 174 CLR 178, at 192-193, to which I shall revert) that there was a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who was not a party to the litigation. That category of case consisted of circumstances where the party to the litigation was an insolvent person or man of straw, where the non-party had played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she was acting or by whom he or she had been appointed, had an interest in the subject of the litigation. Where the circumstances of a case fell within that category, an order for costs should be made against the non-party if the interests of justice required that it be made.

14. Reliance was also placed on that decision for the proposition that the failure of Mills to apply for security for costs was not fatal. There were limitations attaching to the availability of security for costs. In particular, the amount awarded as security was no more than an estimate of the future costs and it was not reasonable to expect a defendant to make further applications to the court at every stage when it appeared that costs were escalating so as to render the amount of security previously awarded insufficient. The availability of the remedy was not a reason for denying the existence of jurisdiction to make an order for costs against the real party at the end of the trial of an action.

IV The Chancellor's judgment

15. The Chancellor seems to have considered that there was a conflict in the authorities on the question whether Mr Mills had to show impropriety or unreasonable behaviour on the part of the receivers. He thought that the decision of this court in ***Metalloy Supplies Ltd v MA (UK) Ltd*** [1997] 1 WLR 1613 and the decision of the Privy Council in ***Dymocks Franchise Systems (NSW) Pty v Todd (No 2)*** [2004] UKPC 39, [2004] 1 WLR 2807 were inconsistent. In *Metalloy Supplies Ltd v MA (UK) Ltd* (a case involving a section 51 order against a liquidator) this court had used language which suggested that a section 51 order should be made only where there had been impropriety or unreasonable conduct. In ***Dymocks Franchise Systems (NSW) Pty v Todd*** the Privy Council, at [33], made it clear that whilst any impropriety or the pursuit of speculative litigation might support the making of an order against a non-party, its absence did not preclude the making of such an order. The Chancellor said that it was not open to the Privy Council to overrule a decision of the Court of Appeal in England: ***Re Spectrum Plus Ltd*** [2005] UKHL 41, [2005] 2 AC 680, at [93], [153]. As a result he refused to follow the decision of Evans-Lombe J in ***B.E.Studios Ltd v Smith & Williamson*** [2005] EWHC 2730 (Ch), [2006] 2 All ER 811.

16. The Chancellor refused to make an order against the Receivers, for what he described as a number of, largely cumulative, reasons.

17. First, it had been recognised that the making of a third party costs order required some *"exceptional"* circumstance, which had to be ascertained by reference to the ordinary range of litigation which came before the courts: ***Globe Equities Ltd v Globe Legal Services Ltd*** [1999] BLR 232, 239 at [21] and ***Dymocks Franchise Systems (NSW) Pty v Todd*** [2004] 1 WLR 2807, 2815, at [25(1)]. This case was an entirely normal case of receivers seeking to enforce a contractual right forming part of the security. There was nothing speculative about it in that they obtained the advice of counsel no fewer than three times. If an order were made in this case then it should be made in all such cases.

18. Second, it had not been not alleged that there was any element of impropriety or unreasonableness in the initiation and prosecution of the claim. That confirmed that the claim was in no sense "exceptional."

19. Third, it was not a case in which a non-party funded the proceedings and also substantially controlled them or was to benefit from them, so that he became "the real party" (***Dymocks Franchise Systems (NSW) Pty v Todd*** [2004]

1 WLR 2807, [25(3)]). The Receivers did not fund, or benefit from, the proceedings in any sense relevant to the exercise of the section 51 jurisdiction. They were not the *"real"* party in that sense.

20. Fourth, in the absence of any winding up of the Company, section 109(2) of the Law of Property Act 1925 and the Charge both provided that the Receivers were the agents of the Company and that the Company was solely responsible for their acts or defaults. Consequently it was not possible to identify the Receivers or the Bank as the real party. The party was the Company. The proceedings were commenced and prosecuted by its agents on its behalf for the benefit and at the expense of those claiming under it by virtue of the charge or the equity of redemption.

21. Fifth, the hardship caused to Mr Mills by his inability to recover his costs from the Company could have been avoided if he had pursued his remedy of security for costs from the Company promptly or at all. Given the absence of any exceptional features or of any impropriety or unreasonableness on the part of the Receivers or the Bank, justice did not require that an order in his favour should now be made against the Receivers. It was not possible to know how differently events might have turned out if Mr Mills had taken the steps commonly taken by a normally prudent litigant.

V Conclusions

Receivers and liquidators

22. It is necessary to preface my conclusions with some uncontroversial propositions on the position of receivers and liquidators.

Receivers

23. Receivers are deemed to be agents for the company and the company as mortgagor is solely responsible for their acts and defaults by virtue of section 109(2) of the Law of Property Act 1925 and also, in this case, by virtue of the terms of the Bank's charge. In ***Gaskell v Gosling*** [1896] 1 QB 669, at 697 Rigby LJ said (dissenting in a judgment upheld by the House of Lords in ***Gosling v Gaskell*** [1897] AC 575), that one result is:

"that a receiver and manager appointed by a mortgagee under an agreement that he shall be the agent of the mortgagor is in the same position as if appointed by the mortgagor himself, and as if every direction given to him emanated from the mortgagor himself ..."

24. Although a receiver is deemed to be an agent of the company, by section 37(1) of the Insolvency Act 1986 a receiver is personally liable on contracts made by him, except insofar as the contract otherwise provides, and is entitled to an indemnity out of the assets of the company.

25. In ***Silven Properties Limited v Royal Bank of Scotland plc*** [2003] EWCA Civ 1409, [2004] 1 BCLC 359 (CA) this court referred to what Mr Peter Millett QC (as he then was) said in *The Conveyancing Powers of Receivers After Liquidation* (1977) 41 Conv (NS) 83 at 88: "*The so called 'agency' of the [receivers] is not a true agency, but merely a formula for making the company rather than [the mortgagee] liable for his acts.*" But this court said (at [26]) that this agency of the receivers is a real one, even though it has some peculiar incidents.

26. Prior to ***Aiden Shipping*, in *Newhart Developments Ltd v Co- Operative Commercial Bank Ltd*** [1978] 1 QB 814 at 819 Shaw LJ said that a receiver could institute proceedings in the name of the company without exposing himself to the risk of liability for costs if they should fail.

27. A receiver ceases to be the agent of the company after liquidation: ***Gosling v Gaskell*** [1897] AC 575. But after liquidation, the receiver may continue litigation commenced prior to liquidation, whether it was commenced by the company (***Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd*** [1980] 2 All ER 655) or by the receiver (***Gough's Garages v Pugsley*** [1930] 1 KB 615).

Liquidators

28. The position of liquidators is different. The costs ordered to be paid by a company in liquidation to a successful defendant are payable out of the net assets in the hands of the liquidator, in priority to other claims, including that of the liquidator for his own costs: ***Norglen Ltd v Reeds Rains Prudential Ltd*** [1999] 2 AC 1, 20, per Lord Hoffmann.

Third party costs orders and receivers

29. In *Dymocks* Lord Brown summarised the effect of the many cases on the application of section 51(3) of the Supreme Court Act 1981 decided since Lord Goff of Chieveley in ***Aiden Shipping*** had said ([1986] AC at 980) that it was for the Court of Appeal to lay down principles for the guidance of judges in the exercise of their discretion under the statute in accordance with reason and justice. Lord Brown's summary made the following points.

30. First, although costs orders against non-parties were to be regarded as *"exceptional"*, exceptional in this context meant no more than outside the ordinary run of cases where parties pursued or defended claims for their own benefit and at their own expense. The ultimate question in any such "*exceptional*" case was whether in all the circumstances it was just to make the order. Second, generally speaking, the discretion would not be exercised against "*pure funders*", i.e. 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 seek to control its course: ***Hamilton v Al Fayed (No 2)*** [2003] QB 1175, 1194. Third, 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 is "*the real party*" to the litigation.

31. His fourth point was this (at [26(4)]-[29]):

"Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests. Since this particular difficulty may be thought to lie at the heart of the present case, it would be helpful to examine it in the light of a number of statements taken from the authorities. …

*In the light of these authorities [**Knight v F.P. Special Assets Ltd** (1992) 174 CLR 178; **Metalloy Supplies Ltd v MA (UK) Ltd** [1997] 1 WLR 1613; **Carborundum Abrasives Ltd v Bank of New Zealand (No. 2)** [1992] 3 NZLR 757 and Arklow Investments Ltd v MacLean (unreported, May 19, 2000, NZ)] their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests."*

32. There is little doubt that in some circumstances the fact that a receiver can litigate in the name of the company without personal liability can result in unfairness. Carswell LJ (as he then was) said in ***Anderson v Hyde*** [1996] 2 BCLC 144 (Northern Ireland Court of Appeal): *"If the plaintiff could recover his costs only against the company, they would also rank as an unsecured debt, and he would receive nothing; whereas the receiver would be able to conduct the defence of the action on behalf of the debenture holder in the knowledge that whatever the result, the debenture holder for whom he acted would not have to pay any costs to the plaintiff."*

33. The liability of receivers to third party costs orders has been considered in several cases in the United Kingdom and the Commonwealth.

34. The earliest cases pre-date ***Aiden Shipping***. In ***Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd*** [1980] 2 All ER 655 an action was begun by the company. Subsequently debenture holders appointed a receiver, who continued the company's action. A compulsory winding up order was made against the company, but the receiver continued to prosecute the action and provide security for the costs of one of the defendants. When the company was ordered to provide further security, it failed to comply with the order and the action was dismissed as against that defendant. HH Judge Fay QC (sitting as an Official Referee) held that the receiver would be ordered to pay the costs incurred after the date of the winding up order, provided he had recourse for the costs against the debenture holders, because the court had the requisite power under section 50(1) of the Supreme Court of Judicature (Consolidation) Act 1925 to order the receiver to pay the costs for an action carried on by him after the company had been compulsorily wound up which had been incurred after the winding up order. It was just and equitable for the court to exercise its discretion under section 50(1) provided the receiver had recourse against his debenture holders, because if the action had been continued by the liquidator and not by the receiver, the defendant would have ranked as secured creditors in the liquidation for their costs.

35. In ***Anderson v Hyde*** [1996] 2 BCLC 144 (Northern Ireland Court of Appeal) it was held that where a receiver took over the defence of an action against a company which had gone into insolvent liquidation, the court could order that any costs awarded to the plaintiff should be paid by the receiver and such costs should be treated as expenses of the receivership. In this case proceedings had been commenced in 1991, and then within a few days in September 1993 a debenture holder appointed a receiver and a winding up petition was presented and the official receiver was appointed liquidator. The liquidator did not take over the proceedings and the receiver took effective charge of them from that time, so that the defence of the company was conducted on the instructions of the receiver. The court took into account that if the defence to the proceedings had been carried on by the liquidator instead of the receiver, the plaintiff's costs would on accepted principles been awarded priority. The receiver would have been well aware when he took over the action that if the plaintiff succeeded against the company any award of damages which might be made would rank as an unsecured debt, and if the plaintiff could recover his costs against the company only they would also rank as an unsecured debt. It would be unfair (as Judge Fay said) if the receiver were able to conduct the defence of the action on behalf of the debenture holder in the knowledge that whatever the result, the debenture holder for whom he acted would not have to pay any costs to the plaintiff. It was ordered that the costs incurred by the plaintiff since the appointment of the receiver should be paid (and not only those since the start of the liquidation). There should be noted, however, that there was only about a week between the appointment of the receiver and the appointment of the liquidator.

36. The Northern Ireland Court of Appeal considered that in those circumstances the plaintiff should get its costs from the receiver because: *"… if the receiver elected to carry on with the defence of the action, it cannot be regarded as just and equitable that he should be able to do so at other person's expense."*

37. In both ***Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd*** and ***Anderson v Hyde*** the costs sought were those incurred after a winding up order had been made, at which stage the receiver was no longer the company's agent. The receiver was therefore to be treated as the real party. In the latter case the company in liquidation and the receiver was the defendant in the action.

38. In ***20th Century Television & Appliances Ltd v Midnapore Property Investments Ltd*** (1991) 86 DLR (4th) 628 the Alberta Court of Appeal held that a receiver-manager (a partner in Coopers & Lybrand) appointed by a bank under a debenture was to be personally liable for the costs of an unsuccessful application for ex parte injunctive relief. The order was made against Coopers & Lybrand pursuant to the general power of the court to award costs against the real promoter of litigation.

39. Coopers & Lybrand argued that Midnapore could have sought security for its costs, and in so doing the true beneficiary of the application (The Bank of British Columbia and 20th Century) would be revealed and be made subject to an order for security for costs. The court referred to Midnapore's answer (with apparent approval), namely that the chance of obtaining security for costs was of no comfort to an absent respondent on an ex parte application.

40. The court concluded that it would seem more appropriate for costs to be awarded against a privately appointed receiver than a trustee because the trustee was at least acting for the creditors as a whole and might find it difficult to obtain an indemnity from them due to their varying interests in the outcome. The privately appointed receiver usually served one creditor alone and would not take legal action unless it was clearly to the benefit of that creditor. The receiver was therefore in a preferred position to indemnify himself against the monetary consequences of an unsuccessful action, an action from which the creditor would benefit if it were to succeed.

41. The conclusion was that where the receiver-manager was acting for the benefit of the appointing creditor in pursuing legal action, and where the receiver-manager could be said to be the "real litigant" the preponderance of authority in Canada seemed to allow the discretionary award of costs against him personally.

42. In ***Knight v F.P. Special Assets Ltd*** (1992) 174 CLR 178 orders for the payment of costs were made against the receivers and managers of the claimant in the action, Forest Pty Ltd ("Forest"), and the defendant to a counterclaim brought by the defendants to the action, Howe Corporation Pty Ltd ("Howe"). The issue in the High Court of Australia was whether the Queensland court had jurisdiction to make such an order by virtue of the Queensland rules of court (which are not in the same terms as section 51(3)).

43. The appellants had been appointed as receivers and managers of Howe by banks which held a mortgage debenture over its assets. One of the appellants had also been appointed receiver and manager of Forest. Proceedings were commenced by Forest for specific performance against persons who had agreed to buy shares from it, and also commenced proceedings against the guarantor of the obligations of the purchasers. After the commencement of the action by Forest, the defendants brought a counterclaim against Howe (which was already in liquidation). The solicitors on the record for Forest and for Howe were the solicitors who acted for the banks. The solicitors received their instructions in respect of the action and counterclaim from the banks and the appellants. An order for security for costs was made against Forest, but the action was subsequently discontinued by Forest. Judgment was entered against Howe following failure to comply with a discovery order.

44. The order for security for costs against Forest proved to be insufficient. The solicitors on the record for both Forest and Howe were the solicitors who acted for the banks to whom security had been given by the charges under which the receivers and managers were appointed. The solicitors received their instructions in respect of the action and counterclaim from the banks and the receivers and managers. Applications that the costs of the claim and the counterclaim should be paid by the respective receivers and managers were successful.

45. The Full Court of the Supreme Court of Queensland held unanimously that the court did have jurisdiction to make an order against the receivers, and by a majority that the discretion should be exercised in favour of making the order. Ryan J referred to *Bacal* and said that it was proper that the costs should be ordered to be paid by the receivers when it was clearly established that they were incurred by the receivers primarily for the benefit of a non-party, the banks, and with their support. It would have been "monstrously unfair" to confine the applicants to the orders against impecunious companies and it was not sufficient to decline to make the orders for costs against the receivers that orders had been made for security for costs.

46. Dowsett J (dissenting on the exercise of the discretion) said that the statutory right of the receiver to litigate at the expense of the company was a relevant factor in the exercise of the discretion, although it was not determinative. But the mere fact that a receiver conducted litigation in the name of a company was not sufficient to justify the making of an order for costs against him where he was not otherwise a party.

47. Williams J agreed with Ryan J that the existence of the right to apply for an order for security where litigation was being prosecuted for the benefit of a secure creditor was a matter which was relevant to the exercise of a discretion whether or not to make the receiver personally liable. But it was not necessarily determinative of how the discretion should be exercised. The order for security fell far short of what was required to indemnify the successful litigants, and no such order was sought against Howe. There was therefore no error.

48. Howe went into liquidation shortly after the receivers and managers were appointed. According to the headnote of the report of the decision in the Full Court, Forest went into liquidation, but the judgments do not indicate when that was. The members of the Full Court drew attention to the fact that the receivers and managers were not the agents of the company after liquidation: see at pp 118-119; 121; and 127.

49. The appeal to the High Court of Australia related only to the question of jurisdiction. The majority, Mason CJ, Deane, Dawson, Gaudron JJ, held that there was jurisdiction to make orders for costs against non-parties and dismissed the appeal. In the course of their joint judgment, Mason CJ and Deane J said (at 192-193):

"Obviously, the prima facie general principle is that an order for costs is only made against a party to the litigation. As our discussion of the earlier authorities indicates, there are, however, a variety of circumstances in which considerations of justice may, in accordance with general principles relating to awards of costs, support an order for costs against a non-party. Thus, for example, there are several long-established categories of case in which equity recognized that it may be appropriate for such an order to be made.

For our part, we consider it appropriate to recognize a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

50. ***Carborundum Abrasives Ltd v Bank of New Zealand (No. 2)*** [1992] 3 NZLR 757 was a case in which a company sued the bank, and the receivers appointed by it, claiming that it had been agreed that the appointment would be revoked. When the action was discontinued, the bank and the receivers failed in their attempt to make the directors liable for the costs. The reason was that the directors had no financial interest in the proceedings and their motive in having the company commence the proceedings was to act in what they then conceived to be in the best interests of the company. It was in that context that Tompkins J said (at 765):

"Where proceedings are initiated by and controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in their result, such as a receiver or manager appointed by a secured creditor, a substantial unsecured creditor or a substantial shareholder, it would rarely be just for such a person pursuing his own interests, to be able to do so with no risk to himself should the proceedings fail or be discontinued. That will be so whether or not the person is acting improperly or fraudulently."

51. The effect of these authorities is that there is a recognition that injustice might be caused where litigation is conducted by a receiver on behalf of an insolvent company for the benefit of secured creditors, and that in appropriate cases a non-party costs order against a receiver or against the secured creditor may be made, especially where the non-party is the "real party." A costs order against receivers will be more readily made where the company is in liquidation and the receiver's agency has terminated, or where the successful party has not been able to obtain security for costs or adequate security for costs.

Relevance of security for costs

52. Where the action is brought in the name of the company by a receiver, the defendant can normally obtain security for costs. The availability of security for costs has been considered in a number of decisions involving the personal liability of those causing an insolvent company to bring proceedings, some of which I have already mentioned.

53. In ***Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd*** [1980] 2 All ER 655, HH Judge Fay QC, sitting as an official referee, held that the fact that a defendant could obtain an order for security did not curtail the court's power under what is now section 51 since the practice under the then RSC Ord 23 was not to order security on a full indemnity basis but only to fix a security at about two-thirds of the estimated party and party costs and therefore part of the defendant's costs would not be covered by the usual order for security.

54. In ***20th Century Television & Appliances Ltd v Midnapore Property Investments Ltd*** (1991) 86 DLR (4th) 628 the Alberta Court of Appeal held that a receiver-manager appointed by a bank under a debenture was to be personally liable for the costs of an unsuccessful application for ex parte injunctive relief. Coopers & Lybrand argued that the company which sought the non-party costs order could have sought security for its costs. But the court accepted that the chance of the obtaining of security for costs was of no comfort to an absent respondent on an ex parte application.

55. In ***Knight v F.P.Special Assets Ltd*** (1992) 174 CLR 178, the facts of which have been summarised above, the availability of security for costs was a relevant factor in the exercise of the discretion by the Full Court of the Supreme Court of Queensland and also discussed in the High Court of Australia (where the only issue was that of jurisdiction). In the Full Court of the Supreme Court of Queensland, Ryan J held that it was not sufficient to decline to make the orders for costs against the receivers that security for costs had been ordered. Williams J agreed that the existence of the right to apply for an order for security where litigation was being prosecuted for the benefit of a secured creditor was a matter which was relevant to the exercise of the discretion, but it was not determinative: the order for security fell far short of what was required to indemnify the successful litigants, and no such order was sought against Howe. In the High Court of Australia, Mason CJ and Deane J discussed whether the availability of security for costs meant that the general words of the court rules should be interpreted as not including the power to award costs against a third party. They said (at 190-191):

"No doubt it is an appropriate remedy in many cases but there are limitations attaching to the availability of security for costs. These limitations are such that security for costs is not a remedy in all cases in which justice calls for an order for the award of costs against a non-party. Security cannot be ordered against a defendant or a plaintiff who is an individual and who resides in the jurisdiction. The amount awarded as security is no more than an estimate of the future costs and it is not reasonable to expect a defendant to make further applications to the court at every stage when it appears that costs are escalating so as to render the amount of security previously awarded insufficient. And the availability of the remedy is scarcely a reason for denying the existence of jurisdiction to make an order for costs against the 'real party' at the end of the trial of an action.

The availability of an order for security for costs at an earlier stage of the litigation would, in many situations, be a strong argument for refusing to exercise a discretion to order costs against a non-party, but discretion must be distinguished from jurisdiction."

56. Dawson J said (at 204): *"Having regard to the limited nature of the appeal, I should do no more than observe that an order for security for costs must ordinarily be the appropriate remedy where a receiver and manager conducts litigation through a company which will be unable to pay the costs of the defendant if the defendant is successful in his defence."*

57. But McHugh J (dissenting on the main issue) said (at 217-218): *"As a matter of policy, provision for security for costs is a better remedy for protecting persons involved in litigation with insolvent companies than ordering a receiver to pay the costs of litigation after verdict. Public policy does not preclude an insolvent company from bringing or defending an action. Where it does so, the ordinary remedy is to stay the action until security for costs is provided. If adequate security is sought and provided, no question of ordering a third party to pay the costs ought to arise. If a party does not seek adequate security for costs, after a receiver has been appointed, it is difficult to see how that party can justly complain that the receiver ought to pay those costs after the litigation has been completed. Furthermore, applications for security 'should be made promptly and before significant expenses incurred' by the company [citing **Devenish v Jewel Food Stores Pty Limited** (1990) 94 ALR 664, at 666]. It would be an odd result if, in the exercise of the Court's discretion, an application made before trial to provide security for costs was refused on the ground of delay but the court could make an order for costs against the receiver after verdict."*

58. Consequently what is being said by the majority is the jurisdiction to order security for costs does not preclude jurisdiction to make a third party costs order. Security for costs is an imperfect remedy, but its availability is a factor in the exercise of discretion. McHugh J was saying that the availability of security showed that the costs remedy against the receivers was not available.

59. ***Metalloy Supplies Ltd v MA (UK) Ltd*** [1997] 1 WLR 1613 was a case in which the availability of security for costs militated against a personal costs order against a liquidator. A company in liquidation, by its liquidator, had commenced proceedings claiming the balance of the price of goods sold and delivered. It failed to comply with an order for security for costs and the action was dismissed with costs to be paid by the liquidator personally. The Court of Appeal allowed the liquidator's appeal. Waller LJ suggested that there might be a distinction between the case of a receiver and that of a liquidator, and continued (at 1618): "C*ertainly, as it seems to me, the primary remedy of a Defendant facing a company in liquidation should be security for costs.*"

60. Millett LJ said (at 1620): *"It may be commercially unwise to institute proceedings without the means to provide any security for costs which may be ordered, since this will only lead to the dismissal of the proceedings; but it is not improper to do so. Nor (if he considers only the interests of the company, as he is entitled to do) is it necessarily unreasonable. The defendant may offer to settle; he may not apply for security; and if he does the Court may not order it to be given, particularly if such an order would stifle a meritorious claim."*

61. In ***Petromec Inc v Petroleo Brasileiros SA*** [2006] EWCA Civ 1038 the fact that (inadequate) security had been obtained did not prevent an order being made against an individual who had funded, controlled, and stood to benefit from, the proceedings. One of the grounds of appeal was that in the exercise of his discretion in ordering a third party to pay costs the judge (Moore-Bick LJ, as he had become) had failed to take into account the fact that the defendant Petrobras had been entitled to and did obtain some security for its costs. Longmore LJ said (at [14]) that:

    "But the fact that in the course of the proceedings a judge (Andrew Smith J in this case) ordered security which, in the event, has turned out to be inadequate should not be any reason for declining to exercise jurisdiction in an otherwise appropriate case. As [Moore-Bick LJ] said … 'it is no more unjust to make the backers of an insolvent company liable for the costs . . . . than it is to require them to provide security for costs on its behalf.' "

62. These decisions show that the availability of security is an important factor in the exercise of the discretion, and that the discretion may be exercised more readily in favour of the successful litigant if security was not available at all (as in ***20th Century Television & Appliances Ltd v Midnapore Property Investments Ltd***, where the costs were incurred on an ex parte application), or where adequate security is not available.

Impropriety or unreasonableness as a factor

63. In ***Metalloy Supplies Ltd v MA (UK) Ltd*** [1997] 1 WLR 1613 a company in liquidation, by its liquidator, had commenced proceedings claiming the balance of the price of goods sold and delivered. It failed to comply with an order for security for costs and the action was dismissed with costs to be paid by the liquidator personally. The Court of Appeal allowed the liquidator's appeal. Waller LJ said, after indicating that security was the primary remedy (at 1618):

    "I think (as the Judge decided and as I read the notes the District Judge also decided) that there is jurisdiction to order a liquidator as a non-party to pay the costs personally; but it will only be in exceptional cases that the jurisdiction will be exercised, and impropriety will be a necessary ingredient, particularly having regard to the fact that the normal remedy of obtaining an order for security for costs is available; the caution necessary in all cases where an attempt is being made to render a non-party liable for costs will be the greater in the case of a liquidator having regard to the public policy considerations."

64. Millett LJ said (at 1620): *"Where a limited company is in insolvent liquidation, the liquidator is under a statutory duty to collect in its assets. This may require him to bring proceedings. If he does so in his own name, he is personally liable for the costs in the ordinary way, though he may be entitled to an indemnity out of the assets of the company. If he brings the proceedings in the name of the company, the company is the real plaintiff and he is not. He is under no obligation to the defendant to protect his interests by ensuring that he has sufficient funds in hand to pay his costs as*

well as his own if the proceedings fail. It may be commercially unwise to institute proceedings without the means to provide any security for costs which may be ordered, since this will only lead to the dismissal of the proceedings; but it is not improper to do so. Nor (if he considers only the interests of the company, as he is entitled to do) is it necessarily unreasonable. The defendant may offer to settle; he may not apply for security; and if he does the Court may not order it to be given, particularly if such an order would stifle a meritorious claim."

65. I do not consider that this decision *requires* that before a costs order can be made against a liquidator or receiver that there be impropriety (Waller LJ) or unreasonableness (Millett LJ). On the facts ***Metalloy*** required impropriety or unreasonable behaviour because it was concerned with the personal liability of a liquidator where the costs would come out of his own pocket.

66. Impropriety or unreasonableness are elements in the discretion, and there is no conflict between this decision and what was said by Lord Brown in ***Dymocks*** (at [33]): *" … The authorities establish that, whilst any impropriety or the pursuit of speculative litigation may of itself support the making of an order against a non-party, its absence does not preclude the making of such an order."*

67. This is confirmed by more recent decisions of this court. ***Goodwood Recoveries Ltd v Breen*** [2006] 1 WLR 2723 concerned the liability to a third party costs order of the company's solicitor, Mr Slater, who was also a director and shareholder, and a principal witness. The claim was pursued in the name of the claimant company by Mr Slater as its solicitor pursuant to a conditional fee agreement. The claim failed and Mr Slater's honesty was seriously impugned by the judge. An application that the costs of the defendant should be paid by Mr Slater personally on an indemnity basis succeeded. Mr Slater appealed on the grounds that (1) the case was not *"exceptional"* and (2) the costs sought to be recovered were not caused by the exceptional conduct on which the defendant relied. Rix LJ said (at [59]):

"Where a non-party director can be described as the 'real party', seeking his own benefit, controlling and/or funding the litigation, then even where he has acted in good faith or without any impropriety, justice may well demand that he be liable in costs on a fact-sensitive and objective assessment of the circumstances. It may also be noted that in Lord Brown's comments at para 33 of his opinion 'the pursuit of speculative litigation' is put into the same category as 'impropriety'."

68. In ***Sims v Hawkins*** [2007] EWCA Civ 1175 the defence of the unsuccessful party, a company, had started as being in the interests of the company and had ended as being in the interests of the company's directors and shareholders (Mr and Mrs Hawkins). They arranged for the company to pursue the litigation in the hope of recovering past costs. The successful claimant (Mr Sims) obtained an order that Mr and Mrs Hawkins pay his costs but only from a date shortly before the trial and not covering extensive interlocutory proceedings. Rix LJ said (at [5]) that Millett LJ in ***Metalloy Supplies Ltd v MA (UK) Ltd*** had *"put forward 'some impropriety or bad faith' as a possible alternative basis of liability, but not as essential to it…"*

69. I would not, therefore, agree with the Chancellor's suggestion that Evans-Lombe J was wrong in ***B.E. Studios Ltd v Smith & Williamson*** [2006] 2 All ER 811 not to require an element of impropriety or unreasonableness. In that case the claim brought by B.E. Studios had failed and it was ordered to pay three-quarters of the defendant's costs of the action. The defendant then applied for an order that a director (who was also a shareholder and loan creditor of B.E. Studios) should pay those costs. Evans-Lombe J concluded (at [18]):

*"In my judgment, in the light of the Privy Council's decision in the **Dymocks** case as interpreted and applied by the Court of Appeal in the **Goodwood** case … [i]t is not a requirement for the making of a non-party costs order against a director who has funded and controlled litigation consequent on a claim brought by his company at his instance, that impropriety must be shown in the way that the claim was prosecuted."*

The exercise of discretion by the Chancellor

70. As I have said, the Chancellor came to his conclusion for a number of cumulative reasons. It would therefore be wrong to analyse each of the factors as if it were a separate and determinative test. But since this court is dealing with an exercise of discretion I will deal with each of them to see whether there was any error of principle.

No "exceptional" circumstance

71. The exceptionality test derives from this court's application of Lord Goff of Chieveley's statement in ***Aiden Shipping*** ([1986] AC at 980) that *"in the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not a party to the relevant proceedings"*. Consequently, *"an order for the payment of costs by a non-party will always be exceptional"*: ***Symphony Group plc v Hodgson*** [1994] QB 179, at 192. See also ***TGA Chapman Ltd v Christopher*** [1998] 1 WLR 12, 20; and ***Globe Equities Ltd v Globe Legal Services Ltd*** [1999] BLR 232, 239; and ***Hamilton v Al Fayed (No 2)*** [2003] QB 1175, at [22].

72. In ***Dymocks*** Lord Brown summarised (at [25(1)]) the authorities in this court: exceptional in this context meant no more than outside the ordinary run of cases where parties pursued or defended claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case was whether in all the circumstances it was just to make the order.

73. Mr Gabriel Moss QC for Mr Mills accepts that the present case may be an entirely normal case of receivers seeking to enforce a contractual right forming part of the security. But it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense (***Dymocks*** at [25(1)]) because (a) the claim was brought by the Receivers, using the name of the Company, in the interests of the Bank and using funds charged to and belonging in equity to the Bank, and the Company did not pursue the claim for its *"own*

benefit" or at its *"own expense";* (b) if the claim against Mr Mills had succeeded, all the damages recovered would have been subject to the charge and payable to the Bank; (c) the fact that there was nothing speculative about the claim is irrelevant to the question whether the present case is outside the ordinary run of cases, and it is a feature of many of the cases in which a third party costs order was made that the third party had acted on legal advice; (d) although the Chancellor said that if an order were made in this case then it should be made in all such cases, the jurisdiction will always remain fact-specific. There would be no injustice in cases such as the present, just as it is where there is also a liquidation.

74. My conclusion on this aspect is that the Chancellor properly applied the "*exceptional circumstance*" test by considering whether this action was out of the ordinary run of cases, and ultimately (in conjunction with the other factors) whether it was just to make the order. I agree with him that this case was an entirely normal case of receivers seeking to enforce a contractual right forming part of the security.

75. I accept the argument for the Receivers that although in ***Bacal*** and ***Anderson*** weight was given to the fact that in an action by the liquidator on behalf of creditors the costs of a successful defendant are secured, whereas in an action by the receiver the successful defendant is left to rank as unsecured, this court has since held that it is not in any way exceptional or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper while lacking the means to pay the defendant's costs if they should fail; the defendant's remedy is to apply for security for costs and have the proceedings dismissed if the claimant fails to provide whatever security was ordered: *Metalloy* at 1619-1620.

No impropriety or unreasonableness

76. As I have said, impropriety or unreasonableness is a factor in the exercise of the discretion. The Chancellor's reasoning was that the absence of any element of impropriety or unreasonableness in the initiation and prosecution of the claim confirmed that the claim was not exceptional and also underlined the fact that that it was not an alternative justification for making the order sought.

77. Although (as I have said) I do not think that he was right to see a conflict between ***Dymocks*** and ***Metalloy Supplies Ltd v MA (UK) Ltd*** [1997] 1 WLR 1613, this observation did not in any way vitiate the exercise of his discretion, because whatever he may have said in his discussion of the case-law it is plain that when he came to his conclusions he did not regard impropriety or unreasonableness as a pre-condition to the exercise of the discretion.

The real party

78. For Mr Mills it is said that the fact that the Bank did not direct or interfere with the proceedings does not mean that the Bank did not give its consent to the proceedings or that the proceedings were, at a minimum, not brought for its benefit with its acquiescence. Receivers always benefit directly or indirectly from successful litigation, both in terms of the fees charged for running it (whether on a percentage of recovery basis or a time charge basis) and the prospect of further work from the bank if the recovery is successful.

79. I see no fault in the Chancellor's application of this factor. The Receivers directed the proceedings on behalf of the Company without any direction or interference by the Bank and the funding of the proceedings by the Company was derived from the realisations in the receivership. They did not fund the claim, nor did the Receivers have any interest in the monies from which the claim was funded or in the outcome of the claim. I do not accept that Receivers could be regarded as the real party (or at any rate one of the real parties) simply because Receivers always benefit directly or indirectly from successful litigation, in terms of the fees charged for running it and the prospect of further work from the bank if the recovery is successful.

80. Nor was the Bank the "*real party*." It did not fund the claim in the sense of granting further facilities for that purpose, nor did it control or direct them. Nor was there any conduct by the Bank which was a cause of Mr Mills' costs.

Agency of the Receivers

81. Mr Mills accepts that the Receivers were the agents of the Company, but says that in terms of the substance, which is the material factor on a question of a third party costs order, they were principals acting for the benefit of the Bank, just like a receiver following a winding up. It would be anomalous that the outcome should depend upon whether or not the creditors of the company concerned had chosen to place it into liquidation. In ***Bacal*** and *Anderson* the court directed that the receiver was to be allowed the sums payable by him under the third party costs order as part of his expenses as receiver. That is effectively what is being sought in the present case.

82. I consider that it was proper for this point to be taken into account by the Chancellor. By virtue of the charge under which they were appointed and section 109(2) of the Law of Property Act 1925, the Company was solely responsible for the Receivers' acts and defaults. I accept the Receivers' argument that the position of receivers as agents is analogous to the position of directors and liquidators. In an ordinary case in which a director or liquidator causes a company to bring proceedings which are unsuccessful, a personal costs order would not be made. Some additional element must be present.

Failure to apply for security for costs

83. I have already discussed in detail the cases on the relevance of the availability of an order for security for costs. I do not accept the argument for Mr Mills that the Chancellor placed too much weight on the absence of an application for security for costs. As the Receivers submitted, Mr Mills was the sole director of the Company and his evidence was that all concerned had recognised throughout that there would be no assets available to pay

unsecured creditors. The Receivers' evidence was that an application for security may well have had an effect on the claim.

Overall conclusion

84. In my judgment, there are no factors which, in accordance with established principles, justify interference with the exercise of discretion by the Chancellor. He did not fail to take into account the relevant matters, nor did he take any irrelevant matters into account. In effect Mr Mills argues that whenever an insolvent corporate litigant (including a defendant) is ordered to pay the costs of legal proceedings, the officer or agent responsible for their conduct should be directed to pay the costs, recovering if he can from his principal pursuant to such indemnity as he may have.

85. I do not consider that ***Aiden Shipping*** justifies the judicial creation of a substantive rule that receivers (and such a rule would apply equally to receivers who bona fide defend a claim against a company) should be personally responsible for the costs of a successful party. If an order were made in this case then it would be made in all virtually all such cases. The normal expectation in a case such as this is that someone in Mr Mills' position will and normally should seek security for costs.

86. It is unfortunate that the effect of the application and of the appeal is that Mr Mills will have expended far more on them than the amount of costs he was claiming. But the reality is that any injustice which has occurred is due largely to the failure of his advisers to take advantage of his right to apply for security for costs.

87. Where the application for security for costs is made on the basis that the claimant is a company which will be unable to pay the defendant's costs (CPR 25.13(2)(c); Companies Act 1985, section 726(1)), and where the receiver is in a position to provide security from realisations or from funds provided by the secured creditor, I can see no reason why the court should not take fully into account the need to ensure that the defendant is adequately protected from incurring irrecoverable costs if the action fails. The amount which the court orders by way of security is, of course, within the discretion of the court. But in such a case the court should be robust in its assessment of the amount of the security, amounting in appropriate cases to the full amount of the estimated standard costs. To order adequate security in this type of case could not possibly run the risk of depriving the claimant company of its right to access to the courts.

88. I would add also that the company may be the defendant, for example where a receiver bona fide resists a claim that certain property is not subject to the bank's charge. In such a case the claimant cannot obtain security. The question of what circumstances will justify a third party costs order against the receiver, if the defence of the action is unsuccessful, does not arise on this appeal.

VI Disposition

89. I would therefore dismiss the appeal.

Mr Justice Munby:

90. I agree.

Lord Justice Mummery:

91. I also agree. A costs order against a non-party can be made by the court in its discretion, which, like all discretions, involves a balancing exercise controlled by principles of justice. The Chancellor's decision not to exercise that discretion against the Receivers was based on correct legal principles. The arguments skilfully deployed by Mr Gabriel Moss QC on behalf of Mr Peter Mills conveyed a strong sense of grievance that is entirely understandable, but have not persuaded me that the Chancellor's decision was a plainly wrong exercise of his discretion.

92. Mr Mills would not have had to invoke the court's jurisdiction to make an order for costs against a non-party, if he had been advised at an early stage to take the prudent routine step of invoking the court's discretion under CPR 25. 13(2)(c) to make an order for security for costs against the Company as claimant in the proceedings. There were ample grounds for believing that the Company would be unable to pay his costs, if it were unsuccessful in its specific performance proceedings against him. A valid claim by the Company would not have been stifled by an order for security, as the Receivers were giving the instructions in the name of the Company and had sufficient assets in their hands, which could have been used to back the claim directly for the benefit of the Company and indirectly for the benefit of the debenture holder, and over which the Receivers had a right of indemnity.

93. If that standard precautionary step had been taken, Mr Mills would not have been in the unfortunate predicament in which he now finds himself: successful in his defence of the litigation and granted a costs order, but against an insolvent corporate claimant and in the unenviable position of an unsecured creditor in the receivership.

Mr Gabriel Moss QC and Mr Michael Kennedy (instructed by Magrath & Co) for the Appellant
Mr William Trower QC and Mr Barry Isaacs (instructed by DLA Piper UK LLP) for the Respondents