DAVIES v DAVIES

[2000] 1 FLR 39

Court of Appeal

Sir Stephen Brown P, Aldous and Laws LJJ

4 March 1999

Costs – Summons withdrawn – Whether costs could be awarded in favour of party withdrawing summons

Divorce – Objection to solicitor remaining on record – Conflict of interest – Solicitor previously consulted by other party – Whether risk of disclosure of confidential information

The wife objected to the husband's choice of solicitor in ancillary relief proceedings because she had consulted the same solicitor 7 years earlier on her own behalf, although she had not subsequently instructed him. There had only been one consultation, but it had lasted for some time, and had involved a detailed discussion of the wife's criticisms of the husband's behaviour. The husband's solicitor refused to stand down, and the wife's solicitor issued a summons to bar the husband's solicitor from acting further, and to remove him from the record. It proved difficult to resolve the matter quickly, and at the date of the hearing the wife sought to withdraw the summons on the basis that although she was still of the view that the husband's solicitor had a conflict of interest, she did not want to waste time or money on the point. The husband sought his costs in respect of the summons. The judge considered that there was a real, as opposed to a fanciful risk, of information in the mind of the husband's solicitor having some impact upon the conduct of the case, therefore the summons had been properly issued, and the husband should pay his own and the wife's costs in the matter. The husband appealed, arguing that it was wrong in principle to make an order for costs in the wife's favour when the wife had decided not to proceed with the summons.

Held – dismissing the appeal – while it was only rarely that a party did not press for relief save as to costs, when that did occur the court had a complete discretion to decide the question of costs on the facts. This was not a case in which a party abandoned a claim when it became clear that it had no prospect of success. The wife had not abandoned her complaint, and her request to withdraw the summons was not the result of having 'lost the day'; she had at all times maintained her view that the husband's solicitor should not act. The judge could not have reached a conclusion on costs in this case without consideration of the merits. On the merits, the summons had been properly issued. The judge had been entitled to come to the conclusion that there was a risk of disclosure of confidential information because of the husband's solicitor's previous contact with the wife.

Statutory provision considered

Rules of the Supreme Court 1965 (SI 1965/1766), Ord 21, r 3

Cases referred to in judgment

Bolkiah (Prince Jefri) v KPMG (A Firm) [1999] 2 WLR 215, HL
Francis Day & Hunter v Bron [1963] Ch 587, [1963] 2 WLR 868, [1963] 2 All

ER 16, CA
RTZ Pension Property Trust Ltd v ARC Property Developers Ltd and Another [1999] 1 All ER 532, CA
Solicitors (A Firm), Re [1997] Ch 1, [1996] 3 WLR 16, [1995] 3 All ER 482, ChD

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Martin Pointer QC for the appellant
Philip Cayford for the respondent

SIR STEPHEN BROWN P: We grant you leave to appeal. The judgment to follow will be judgment in the appeal.

This is an appeal from the judgment of Johnson J delivered on 20 May 1998. The matter before the judge arose in the course and context of divorce proceedings between a wife petitioner and a husband respondent. The parties had been married in 1988. The wife eventually petitioned for divorce. A decree nisi was pronounced on 21 November 1997. Financial ancillary relief proceedings followed and are still awaiting a substantive hearing.

The matter which came before Johnson J arose from the fact that 7 years earlier, in January 1991, the wife who by then was unhappy in the marriage consulted a solicitor well experienced in divorce matters, Mr Tooth, but she did not proceed to instruct him after her visit in which she apparently discussed the situation between herself and her husband and made known her criticisms which were fairly substantial about her husband's behaviour and dealt also with the fact that there was a pre-nuptial finance agreement. In fact, she did not, as I have indicated, proceed to instruct Mr Tooth thereafter. When it came to the divorce proceedings she instructed another solicitor. She instructed Mr Sykes in September 1997.

The matter which was particularly outstanding at that stage was the financial ancillary relief which was claimed and which was disputed. It has to be said that in the ancillary relief proceedings both parties relied on allegations of what divorce practitioners refer to as 'conduct', criticising the behaviour of the other party and submitting that it was a relevant matter to be taken into account when considering the financial assessments which were claimed.

On 17 November 1997 the husband instructed Mr Tooth. Mr Tooth gave notice to the wife's solicitor of the change of solicitor because the husband had previously instructed another solicitor. That drew from Mr Sykes a letter which was dated 22 December 1997:

'Thank you for your letter of 16 December and enclosure.'

This was Mr Tooth's notice of acting in place of the previous solicitor.

'Regrettably, my client informs me that she consulted you back in 1991, concerning her marriage. Obviously it was one of those one-off consultations which was never followed through, but nevertheless it seems clear to me that you are faced with an unavoidable conflict. I would appreciate it therefore if you would acknowledge receipt of this letter; inform Mr Davies, [the respondent husband] and inform him that the next firm of solicitors he instructs should, in turn, file a further notice of change.

Best wishes. I hope you are well.

Yours sincerely ...'

That drew a reply from Mr Tooth:

'Dear John

Re: Davies

Thank you for your letter of 22 December.

I have absolutely no recollection of your client, nor do I have any file.

I have had this problem before. I am satisfied that I can continue to act.

Yours sincerely ...'

That in turn drew a reply on 30 December 1997:

'Thank you for your letter of 23 December. I will discuss its contents with my client, but while I note what you write, I am bound to say I would have thought it better in all the circumstances if you had stood down. I will come back to you on the point after Christmas.'

The letter, although dated 30 December 1997, had been dictated on 24 December 1997. There followed a letter dated 8 January 1998 to Mr Tooth:

'Dear Raymond

I refer to your letter of 23 December and my reply of 30 December. I have now spoken with Mrs Davies.

> She tells me that she attended on you in January 1991, in the company of a friend. The meeting, of which she took detailed notes, was lengthy and detailed. Your client's behaviour was discussed at great length and you made comments on that behaviour and also on a photograph of your client which my client produced.
> You gave detailed advice as to a petition, the pre-nuptial agreement, and finance. You must have opened a file because you sent my client a bill for £225, plus VAT, which she paid.
> Raymond, while I realise that you are getting older and your memory is not as acute as it used to be, I find it very difficult to accept, as does my client, that the circumstances of this marriage, related to you in great detail – albeit some 7 years ago – will not at some stage in these proceedings emerge from the recesses of your mind.
> In the circumstances, I would ask you yet again to stand down. It will without question be a problem if you do not.

Yours sincerely ...'

That brought a reply on the same date:

'Thank you for your letter of 8 January.

> It is quite absurd for your client to object to my acting for Mr Davies if she says she saw me 7 years ago. I have absolutely no recollection of your client. I have no file, and whether I made notes or not is quite irrelevant.
> What is important from the professional point of view is whether or not there is a conflict of interest ensuing from my knowledge of the particular position.
> I can assure you, and you have known me for a long time, that when Mr Davies came along, and even when I saw the file, I never had any idea that I had met your client. I see literally hundreds of clients a year, and

therefore probably in the last 7 years have seen well over a thousand. I have no memory and nothing in these proceedings has evoked a memory.

> Therefore I am not standing down. If your client has a problem, I am sorry.
> Of course she may remember me because it is much more unusual for a person to see a solicitor than for a solicitor to see a person.
> There is no point in any further correspondence.

Yours sincerely ...'

In due course the solicitor acting for the wife issued a summons. It sought an order:

'... that the respondent's solicitors do forthwith:

(1) be barred from acting further for the respondent;

(2) that they take steps to remove themselves from the record; and further

(3) that the respondent's solicitors do pay the costs of and incurred in making this application, on an indemnity basis.

The probable length of the hearing of this application is 30 minutes.

Counsel will/will not be appearing on behalf of the applicant.'

That summons which, in the ordinary way, would have come before a district judge in the Principal Registry in fact came before Johnson J on 20 May 1998.

Before that day there had been further correspondence between the solicitors acting for both parties. On 2 March 1998 the solicitor for the petitioner wife wrote to Mr Tooth, the solicitor acting for the respondent husband, in these terms:

'The difficulty in retaining next Tuesday's appearance and also maintaining the first appointment, have led my client to the conclusion that she is prepared to withdraw the application on the basis that each party pay their own costs. She is also motivated by the fact that you are well into the case and although, in the light of the allegations of conduct and the advice you gave her at your meeting we think you may subsequently

feel slightly embarrassed, we are concerned to get on with matters and avoid this particular diversion.

> I was somewhat surprised, therefore, to learn from our telephone conversation this morning that you would only agree on the basis that your costs were paid which frankly I think is an unreasonable stance to take. Those costs can hardly at this stage amount to much and in all the circumstances I find your position unattractive.'

The correspondence then continued at intervals during the next few weeks.

Before the hearing on 20 May 1998 Mr Tooth, as the solicitor acting for the husband, wrote on 6 May 1998 to the solicitor for the wife:

'It is apparent that your client recognises the weakness of her case by making an open offer to abandon the proceedings but only on the basis that each side bear their own costs.

> Counsel has advised that this is a [discrete] issue and the costs should follow the event ...
> We invite you, therefore, to agree that the application be dismissed with costs either in the agreed sum on the standard rate basis or to be taxed if not agreed.'

On 8 May 1998 a letter in reply was written by the solicitors for the wife petitioner:

'My client and I recognise the case is now so far advanced that a judge is unlikely, at this stage, to order your removal from the record. It would, without question, cause considerable expense to your client which could really not be justified. Having said that, the summons was in our view properly issued and we do not agree to pay your costs. My suggestions on the question of costs is that the issue be referred to the trial judge. If you reject that proposal then we will have to attend on 20 May 1998 and argue the issue. If we do that you can take it that I will be seeking my client's costs, on an indemnity basis.'

That drew a reply on 11 May 1998 from Mr Tooth, the solicitor for the husband, saying he did not agree with the contention that the summons was properly issued and:

'You have had the opportunity on a number of occasions to withdraw it and pay the costs. This application is entirely separate from the ancillary relief application.'

On 12 May 1998 solicitors for the wife wrote a further letter:

'Thank you for your letter of 11 May 1998.

> Our letter of 8 May 1998 made it entirely clear that the only issue left, as far as we are concerned which is at large is that of costs. I have put forward my proposal in that respect but you appear to have rejected that.
> In the circumstances I cannot for the life of me understand why you have prepared a brief to counsel. The issue as to your acting or otherwise will

not be canvassed before the court on 20 May 1998. If you force me to instruct counsel to argue the question of costs, I will do so and will seek an order that your client pay them – on an indemnity basis.

Yours sincerely ...'

That was then signed.

On 20 May 1998 the matter came before Johnson J. In his judgment the judge rehearsed the brief facts of the marriage. He said:

'In the course of those proceedings, the respondent husband has submitted that this is a case in which the court should have regard to the conduct of the petitioner during the marriage. In support of that allegation, he set out some seven pages of items of conduct upon which he intends to rely. For her part, the petitioner has responded by a 26-page affidavit in which she answered the respondent's allegations and makes allegations of her own. In brief, he says she was a gold-digger; she says he was a drunkard.

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On 17 November 1997 the respondent instructed a well-known and highly regarded solicitor in this field, Mr Raymond Tooth of Sears Tooth. Upon that coming to the knowledge of the petitioner, she, by her solicitors, objected to Mr Tooth acting for the respondent. The reason was that she herself had consulted Mr Tooth in January 1991. There had been one consultation between the petitioner and Mr Tooth, but she says it had lasted for some time and had involved her discussing with Mr Tooth the behaviour of the respondent and the prenuptial agreement to which I have briefly referred. The petitioner says that she explained to Mr Tooth the detail of the respondent's conduct and recounted the details of her own experience and conduct during the marriage. Mr Tooth, she says, advised that he was 100% sure that she could prove that the respondent's behaviour had been unreasonable and that the pre-nuptial agreement would be of no consequence in divorce and ancillary proceedings.'

The judge then referred to certain of the letters to which I have drawn attention. He said:

'By a letter of 8 May 1998, the petitioner's solicitor suggested that the question of costs should be referred to the judge dealing with the applications for ancillary relief. That suggestion was also rejected, and the matter has been brought on for hearing before me as a separate matter.

The petitioner seeks leave to withdraw her application under Ord 21, r 3. The respondent asks that it be dismissed. The real question to be decided is who shall pay the costs involved, and I propose to deal with that question in two parts: first the costs incurred down to 2 March 1998 and secondly the costs thereafter, including the costs of today.

It seems to me unavoidable that in order to decide the first part of the issue I must review the legal position, and there is helpful guidance

available to me from four authorities to which I have been referred.'

The judge referred to *Cordery on Solicitors* (Butterworths) and then to certain authorities, a number of which have been brought to our attention today. The judge said, in particular:

'Finally I was referred to *Re Solicitors (A Firm)* [1995] 3 All ER 482. Lightman J summarised the law in this way:

"The law regulating the freedom of a solicitor who, or whose firm, has at one time acted for a client subsequently to act against that client reflects the need to balance two public interests. First there is the interest in the entitlement of that client to the fullest confidence in the solicitor whom he instructs and for this purpose that there shall be no risk or perception of a risk that confidential information relating to the client or his affairs acquired by the solicitor will be disclosed to anyone else ... Secondly, there is the interest in the freedom of the solicitor to obtain instructions from any member of the public, and of all members of the public to instruct such solicitor, in all cases where there is no real need for constraint; there must be good and sufficient reason to deprive the client of the solicitor or the solicitor of the client of his choice."'

Johnson J went on to say, having referred to certain propositions advanced by Lightman J in his judgment:

'The question for me is not whether Mr Tooth was or was not acting in accordance with the etiquette of his profession.'

Then he said:

'The question I have to ask myself is not whether a wife petitioner in the emotional context of what seem likely to be bitterly contested proceedings should perceive it as being unfair that a solicitor previously consulted by her 7 years ago should now be acting against her. The question is whether, looked at objectively, there is or may be an actual likelihood that knowledge acquired by the solicitor in 1991 may in some way be to the advantage of the respondent husband now in 1998. I have not found this an easy question, and there are passages in the judgments to which I have referred which would point my decision in different directions.

The matter that has weighed with me particularly is that in 1991 this wife entered into a detailed discussion with Mr Tooth about her matrimonial situation, in which no doubt she complained of the respondent, but also no doubt put forward the weaknesses of her own position. Those are the very same matters that are now to be litigated, it would seem, in these proceedings. By way of example, the respondent now says that for the petitioner the marriage was but a device to advantage herself financially at his expense – a matter which must have been active in the minds of both parties in 1991, as indeed it had been on the very day of the marriage.

I have asked myself the question posed by Parker LJ at p 969, previously quoted. In my judgment, it is whether there is here not merely a perception on the part of the petitioner, but in the mind of a reasonable bystander an actual likelihood, of prejudice. In the words of Lightman J, I hold that there is a real as opposed to a fanciful risk of information in the

> mind of Mr Tooth having some impact upon his conduct of the case. I wish to emphasise that in reaching that conclusion I in no way question the integrity of Mr Tooth, who of course enjoys the very highest reputation in our profession.
> As I have pointed out, the petitioner is seeking leave to withdraw her application. The respondent seeks its dismissal. However, in the light of my finding, it would seem to me to follow that the costs of the application of 23 January 1998 should be paid by the respondent.'

The judge went on to consider what he had said should be the second part of his consideration of the matter, that is the costs subsequent to 2 May 1998. He came to the conclusion that he should also order the respondent husband to pay the costs following 2 May 1998. It is against the judge's order that the respondent husband should pay the wife petitioner's costs of the summons, which came before him on 28 May 1998, that the respondent husband now appeals.

The court has granted leave to appeal and has heard all the full and substantive arguments on the appeal.

Mr Pointer, on behalf of the husband, submits that the judge was plainly wrong in exercising his undoubted discretion to deal with the matter of costs. He says that it was wrong in principle to make an order for costs when the wife had decided not to proceed with that summons. He also argues that the judge's conclusion that there was an actual likelihood of prejudice was unsupportable, and said he concurred with the view that there was no longer any distinction between the costs incurred before and after 2 May 1998. So far as that matter is concerned, I think that it has been conceded, in effect, perhaps under pressure from the court, that there is no warrant for any distinction between costs up to the hearing and including the hearing of the summons itself on 20 May 1998.

By a late amendment to the draft notice of appeal Mr Pointer sought to take a point on the judge's statement that he had before him an application for leave to withdraw under Ord 21, r 3. In point of fact the judge did not have an application brought specifically under Ord 21, r 3. Mr Cayford, who appeared for the petitioner wife and also appears today for the petitioner wife, says he raised the question of Ord 21, r 3 in argument by way of analogy. It is quite clear that this was not an application brought specifically pursuant to Ord 21, r 3. It was the hearing of an application pursuant to the summons to be found at p 24 to which I have already referred. In my judgment, it makes no difference to any substantive matter in this appeal. It is quite plain that the judge had a discretion to consider the whole question of costs. Indeed, neither party took any point upon jurisdiction at the hearing before him. Order 21, r 3 was not mentioned by counsel for the husband, the respondent, and he concedes that that was not a point which he sought to take at the hearing before the judge. However, there is no doubt, in my judgment, that the judge clearly on 20 May 1998 had the discretion to consider the whole question of costs. Indeed, it appears from the correspondence to which I have referred that both parties went to the court on 20 May 1998 intending that that should be the one matter which they would argue. So it emerged that that was the issue. The judge was quite clearly seised of it.

It is further clear that the judge was invited to consider what was termed the merits of the matter in considering the question of costs. Indeed, the relevance of the so called 'merit aspect is plainly indicated in the judgment and in the skeleton arguments which we have received for the hearing of this appeal, and also I understand in the

skeleton arguments which were before the judge on 20 May 1998. The merits, if I may so term it, of this matter, that is to say the position of a solicitor or any other professional person placed in a position of being consulted by one party and later by the opposing party, has most recently been dealt with by the House of Lords in *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215. Lord Millett gave the principal judgment. In his speech (at 226E–F) he said this:

'It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information that he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding

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importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.'

Lord Millett went on to refer to the judgment of Lightman J in *Re Solicitors (A Firm)*, to which I have made reference. That passage in Lord Millett's speech is, in my judgment, the basis of the approach which the court should take to matters of this nature.

Counsel for the husband has argued that the case of *RTZ Pension Property Trust Ltd v ARC Property Developers Ltd and Another* [1999] 1 All ER 532 assists him in advancing the proposition that where a plaintiff discontinues an action with leave in circumstances tantamount to acknowledgement of defeat, although the court has a wide discretion as to costs, the normal rule, namely that the defendant was entitled to an award of his costs of the action, applied unless good reason could be shown to the contrary. This was an entirely different case where, in the course of a trial itself, the plaintiff's position on liability became wholly untenable as a result of supervening events and the plaintiff faced inevitable defeat. It is clear when one looks at the judgment of Potter LJ that the case was very different from the situation which was before Johnson J. Potter LJ indicated in the course of his judgment (at 541E) the approach which he thought to be appropriate. He said:

'I approach this case on the basis that, where discontinuance occurs in circumstances tantamount to an acknowledgement of defeat, then the normal rule as to costs, namely that the defendant is entitled to an order for his costs of the action, should apply unless good reason can be shown to the contrary. The nature of that good reason will vary according to the form of order which the plaintiff seeks. The alternative forms are of course "no order as to costs" or, more rarely, an order that the defendant pay the plaintiff's costs in respect of a particular issue or issues, or a particular period of time, in respect of which costs have been wasted or unnecessarily incurred as a result of the defendant's conduct of the proceedings.'

Mr Pointer sought to advance the argument in this case that the correspondence showed that the petitioner wife had conceded defeat. I do not read the correspondence in that light. It seems to me to be perfectly clear from the letters that the parties were in strong disagreement as to the issue particularly as to costs and indeed were strongly at issue as to the validity or otherwise of the summons which had instituted the whole

proceedings. The wife's solicitors took the view that they were fully justified in issuing proceedings but for practical reasons then considered that it would be inappropriate to pursue the matter further, particularly having regard to the incurring of further costs. It was apparent, in my judgment, that when the matter came before the judge the issue was a clear one.

I am satisfied having regard to all the facts in this case and from the evidence which I have in mind – not only the affidavit of Mr Tooth but all

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the correspondence, some of which I have cited – that in this case this summons was quite properly issued. There was a real matter to be considered. The point of view of the petitioner wife was put forward moderately it seems to me. It was met with a very strong rebuff which indicated that, come what may, the respondent husband was going to seek the dismissal of the matter with costs.

As it turned out, the judge on 20 May 1998 did have to consider the question of 'merits and did have to come to a conclusion. He said:

'As I have pointed out, the petitioner is seeking leave to withdraw her application. The respondent seeks its dismissal. However, in the light of my finding, it would seem to me to follow that the costs of the application of 23 January 1998 should be paid by the respondent.'

He there held in effect that there was a real as opposed to a fanciful risk of information given to Mr Tooth by the wife having some impact on his conduct of the case.

In my judgment he was clearly entitled to come to that conclusion.

The question of costs is peculiarly within the discretion of the judge who hears the proceedings. It is clear that the judge in this instance paid great attention to all the relevant factors, which have again been advanced before us today. He gave full weight to the fact that the husband's solicitor is a man of experience and integrity. But in the circumstances he came to the conclusion that the wife was fully justified in adopting the standpoint which she did and in proceeding to the hearing in the manner in which she did, acknowledging that the matter could be settled on the basis of not proceeding further with each side paying their own costs. In my judgment the judge did not err in the exercise of his discretion. It was a view which he was fully entitled to adopt.

I would dismiss this appeal.

ALDOUS LJ: I agree with everything said by the President in his judgment. I, therefore, confine my judgment to certain limited issues.

Mr Pointer QC opened his submissions to this court with two points of procedure. He submitted that the petitioner should not have issued a summons naming the respondent as defendant. She should have made a separate application to which the respondent's solicitor was the sole defendant. Secondly, he submitted that the judge had wrongly investigated the merits. None of those submissions appear to have been advanced before the judge. For that reason alone I would reject them. In any case, they have no merit.

It was possible for the petitioner to start proceedings against the respondent's solicitors and I accept that that is the procedure adopted in many cases. However, there is no

rule of law or procedure which prevents a petitioner from bringing before the court the issues that arose in this case. There was a dispute between her and the respondent as to whether the respondent's solicitors should continue to act for the respondent, and there was no reason why that should not be decided in the proceedings between the parties. The correspondence which the President has read makes it clear that offers of settlement by both sides were rejected.

The outstanding issue was as to costs. It is accepted, as it had to be, that the court has a discretion on costs to be exercised judicially. I ask, forensically, can that discretion be exercised without coming to some conclusion on the conduct of the parties, in particular whether the application had merit? In my view, the judge could not have come to a conclusion without considering the merits. He might have taken a broad axe to the problem and made each side pay its own costs. That was resisted by the respondent. To deal with the respondent's case he had to consider the merits. The judge cannot be faulted because he heard both sides and resolved the issue raised before him.

Mr Pointer said that the court should reconsider the exercise of discretion carried out by the judge because the judge had erred in principle. He submitted that this was a case where the petitioner had to withdraw or discontinue her application. He submitted that in the absence of misconduct, and there was none, the respondent was entitled to his costs. To support and establish that proposition he referred us to *RTZ Pension Property Trust Ltd v ARC Property Developers Ltd and Another* [1999] 1 All ER 532. That was a case where the trial was adjourned. During the adjournment tests were carried out which showed that the plaintiff's case was certain to fail. It was on that basis that the plaintiff discontinued, leaving open the question of costs. The judge considered the course of the proceedings and concluded that the tests had not been relied upon in the pleadings. He accepted the defendant had been to a substantial extent responsible for some of the wasted costs and ordered the defendant to pay costs up to a particular date, that being the date when the procedure demonstrated in the tests had been first raised. Thereafter, he made no order as to costs. His order was set aside on appeal with the plaintiff being ordered to pay the costs. The reason for that was the Court of Appeal took a different view as to the facts. Potter LJ who gave the judgment, with which the rest of the court agreed, pointed out that the court had the widest discretion possible. He rejected the view that, absent misconduct, the defendant was entitled to the costs upon discontinuance. He said this at 541C:

'The wording of Ord 21, r 3(1) ("on such terms as to costs ... as it thinks just") appears to me to be designed to give the court the widest possible discretion on costs, particularly when considered against the contrasting provision in respect of discontinuance before, or immediately following, defence. I accept that it would be rare indeed that an order for payment of discontinuing the plaintiff's costs would be appropriate. None the less, in the prevailing climate in which the court seeks ways in which to prevent unnecessary costs and delay in the resolution of disputes, it seems to me undesirable that the court should regard itself as shackled from making such an order, for instance in the case of a defendant who perversely encourages a plaintiff into action by concealing the existence of a defence although reasonably invited prior to proceedings to make such disclosure. Such circumstances, however, do not require consideration in this case.'

Potter LJ went on to consider how the principle should be applied in that case.

In the present case the petitioner never abandoned her complaint. The circumstances were not such that there were grounds to hold that she had, to

adopt the words of Potter LJ, 'lost the day'. She had at all times maintained her view that she was right to conclude that Mr Tooth should not act for the respondent. Her offers of settlement were rejected, wrongly in the view of the judge. No doubt it is a rare occurrence that a party does not press for relief save as to costs but when that does occur the court has a complete discretion and must decide the matter of costs, on the facts before it.

I come to the merits. Mr Pointer drew to our attention the relevant passages in *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 WLR 215, in particular, the speech of Lord Millett. He accepted that the court should intervene unless it is satisfied that there was no risk of disclosure. The standard of proof is that stated by Lord Millett at 226H:

'Many different tests have been proposed in the authorities. These include the avoidance of "an appreciable risk" or, "an acceptable risk". I regard such expressions as unhelpful: the former because it is ambiguous, the latter because it is uninformative. I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial.'

In the present case it was submitted by Mr Pointer that there was no risk of disclosure. Mr Tooth, a solicitor whose reputation was not challenged, had had a conference over 7 years previously. No doubt confidential information had been imparted to him. Proceedings had advanced to a stage where the ancillary proceedings were ready to be heard. Despite that, he had no recollection of anything said at court. It followed, Mr Pointer submitted, that Mr Tooth was no longer possessed of confidential information and in any case there was no risk of disclosure.

The memory is a complex phenomenon. Recall may be conscious or sub-conscious. That has been recognised in copyright cases where courts recognise conscious and unconscious copying can take place. The classic case concerned the song *In a Little Spanish Town* (see *Francis Day & Hunter v Bron* [1963] Ch 587).

In the present case Mr Tooth had confidential information and the judge had to decide whether – to adopt the words of Lord Millett – he was 'satisfied that there is no risk of disclosure'. In my view, he was entitled to use his own judgment on the evidence. I can see no reason why this court should interfere with his conclusion.

I, therefore, agree that this appeal should be dismissed.

LAWS LJ: I agree with both judgments. As to the merits, I consider that the judge was entitled to arrive at the conclusion and to make the order that he did. As it seems to me, the process of reasoning in *RTZ Pension Property Trust Ltd v ARC Property Developers Ltd and Another* [1999] All ER 532, upon which Mr Pointer relies and to which my Lords have referred, is that the case is one where a discontinuing party, in effect, acknowledges that he has no merits. That is not the position here. The petitioner did not accept that there was no objection to Mr Tooth acting for her husband. Quite the contrary.

Accordingly, this is far from a case in which it would have been proper to order costs in favour of the petitioner if it was shown that the respondent or Mr Tooth had been guilty of some unreasonable or improper misconduct.

I too would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Sears Tooth* for the appellant
Levison Meltzer Piggott for the respondent

PHILIPPA JOHNSON
Barrister