12 pages.

ROYAL COURT
(Samedi Division) 213.
13th November, 1996

Before: The Judicial Greffier

Between	L'Eau des Iles Jersey Limited	Plaintiff
And	A.E. Smith & Sons Limited (by original action)	Defendant

AND

Between	A.E. Smith & Sons Limited	Plaintiff
And	L'Eau des Isles Limited (by counterclaim)	Defendant

Application by the Defendant in the original action (hereinafter referred to as "the Defendant") for an Order for security for their costs up the close of inspection of documents.

Advocate M.J. Thompson for the Plaintiff in the original action (hereinafter referred to as "the Plaintiff");
Advocate P.C. Sinel for the Defendant.

THE JUDICIAL GREFFIER: This action relates to a written contract which was entered into between the parties on 24th March, 1993. The written contract related to the supply of water to be made by the Plaintiff which would be bottled, marketed and sold by the Defendant. A significant issue between the parties at trial will be the question of whether the water delivered by the Plaintiff was potable (subject to the removal of manganese to acceptable levels). The Defendant alleges that it was not potable and that, therefore, the contract could not be proceeded with as this constituted a fundamental breach of warranty on the part of the Plaintiff. In addition to defending the action the Defendant has brought a counterclaim seeking damages.

I have not yet been addressed on behalf of the Plaintiff in relation to the matter of the reasonableness of the bills of costs to date and future projected costs produced by the Defendant and, in this Judgment, I will therefore confine myself to the issues upon which I have been addressed to date.

It is common ground both that the Plaintiff is insolvent and that Mr. Jolyon Baker is the beneficial owner thereof.

Rule 4/1(4) of the Royal Court Rules, 1992, as amended, states simply:-

"Any Plaintiff may be ordered to give security for costs".

That, in my view, imports a very wide discretion. The English provisions are somewhat different and Order 23 Rule 1(1) reads as follows:-

"1.-(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court -

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2) that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just."

It seems to me that there are two parts to the requirements under Order 23 Rule 1 which are as follows:-

(1) that the case fall within one of the sub-paragraphs (a) to (d); and

(2) that the Court must think it just to order security for costs having regard to all the circumstances of the case.

In addition to the power under Order 23 Rule 1, in England, there is a statutory power in section 726 (1) of the Companies Act 1985 which provides:-

"Where in England and Wales a limited company is plaintiff in an action or other legal proceeding, the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company

will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

In Jersey, although we do not have detailed rules or any statutory provision as in England, certain principles have been followed in relation to such applications and one of those principles is that Jersey Courts make a clear differentiation between plaintiffs who are resident out of the Island and plaintiffs who are resident in the Island. In relation to the latter the general principle is that security for costs will not be ordered except for exceptional reasons. This is most clearly summarised on page 7 of Heseltine v. Strachan & Co (1989) JLR 1 and I now quote from the relevant section on page 7:-

"The second question can be disposed of at this stage. Reliance was placed upon Davest Invs. Ltd. v- Bryant where the Judicial Greffier said (1982 J.J. at 213-214):

"....It has been established practice not to order security for costs against a plaintiff residing within the jurisdiction. In the only recent exception to this practice, Meredith Jones v. Rose et au., an action with certain very peculiar features, although the plaintiff owned land in Jersey it was considered that the land, being 'enclavé,' might not be readily marketable if it had to be sold to pay the defendant's costs."

Davest was in itself an exceptional case. There the plaintiff company had insufficient assets to pay the defendant's costs and the litigation was being financed by the beneficial owner of the company. The Judicial Greffier ordered security of £500.

In the present case, the defendants had set out in their grounds of appeal that, although the plaintiff company, Offco Ltd., had assets within the jurisdiction, it was established "by admissions of its counsel" that the assets were earmarked for particular purposes and would not be sufficient to pay the defendants' costs. With great candour, Advocate Mourant outlined to us the whole background to the formation and administration of Offco Ltd., which is beneficially owned by his firm, Mourant, du Feu & Jeune. We do not propose to repeat the information that he supplied to us, much of which was of a sensitive nature. He also referred us to R.H. Edwards Decorators & Painters Ltd. v. Tretol Paint Systems Ltd. where, inter alia, the Deputy Judicial Greffier set out a principle, with which we entirely agree, that - "it is well established that security for costs will not be ordered against a plaintiff residing within the jurisdiction unless for exceptional reasons."

We are satisfied that the second plaintiff has assets comprising gilts which have a value of some £12,500, £800 in cash, and an interest-free loan of £4,000 made to the first plaintiffs to enable them to pay in the amount of security ordered and some small disbursement commitments. Advocate Mourant gave an undertaking to Advocate Thacker that the status quo would be preserved subject to the payment of those small necessary disbursements until trial. In these circumstances we will leave the matter as it stands with no order for security being made against the second plaintiff."

It can be seen from the Heseltine Judgment and from the Davest case that the Court in Jersey is willing to treat the inability of a Plaintiff company to pay an order for costs as an exceptional reason although the Davest case demonstrates that the Court must be satisfied that it is nevertheless just in all the circumstances of the case. In the Davest case the Plaintiff company had insufficient assets to pay the Defendant's costs and the litigation was being financed by the beneficial owner of the company. I quote now the final paragraph on page 214 of that Judgment, (1982) JJ 213, which reads as follows:-

"While maintaining the rule that the provisions of foreign statutes, with certain exceptions, cannot be applied to Jersey, it is possible to follow, as a guide-line in the judicial exercise of discretion, a principle that has become encapsulated in a foreign statute. In the case where the plaintiff is a company with insufficient assets to pay the costs of litigation, so that the litigation is financed by the beneficial owner, who could not personally be made liable for the defendant's costs if the action failed, it is just to order that the plaintiff should give some security for the defendant's costs. I therefore ordered the plaintiff to give security in the sum of £500, having first ascertained that this sum would not be oppressive."

The reference in the above quotation to statute was to section 447 of the Companies Act, 1948, which is the predecessor of section 726 (1) of the Companies Act, 1985. There is also a reference to the need for the order being just.

This case bears great similarities to Davest inasmuch as the Plaintiff is a company which is insolvent and the financing of the litigation is being made by the beneficial owner of the company Mr. Jolyon Baker. However, there are numerous other matters which I must also consider in the exercise of my discretion.

Both parties agreed at the outset that this was not a case in which they would be urging upon me either that there was a very high probability of the Plaintiff succeeding or that there was a very high probability of the Defendant succeeding in relation to the original action.

In the case of Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 All ER 273 there is commencing at h on page 285 a list of a number of matters which the Court might take into account on such an application as this and I am now quoting from that section as follows:-

> *"Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively - so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work."*

I will come on later to the matter of oppression and stifling. However, Advocate Thompson did raise the issue as to whether the Plaintiff's want of means has been brought about by the Defendant's refusal to carry out their obligations under the terms of the contract. In this particular case, that is a major allegation of the Plaintiff and it is, of course, countered by the Defendant saying that the water supplied was not potable. I note that in the quotation above from the Parkinson Case that examples of conduct by the Defendant, such as delay in payment or delay in doing their part of the work, are quoted. In this particular case, the Plaintiff only ever had such monies as were injected into it by Mr. Jolyon Baker either out of his own monies or by virtue of monies loaned by other members of his family. It is clear that the Plaintiff has lost monies in this venture which have rendered it insolvent but whether or not that has been due to the conduct of the Defendant will not become clear until the trial. There has been no delay in payment, rather there has been a falling out of business partners over the issue as to whether the water was potable. Furthermore, security for costs is ordered as security for the situation in which the Plaintiff fails in its case and it will so fail if the water was not potable. If the Plaintiff had succeeded on that point and the action was being brought to recover damages then the want of means being brought about by the Defendant would be an extremely significant factor. However, at this moment in time with the potability of the water remaining in issue this factor has no weight in itself although I must still consider the issue of oppression and possible stifling. In the important case of Keary Developments Limited v. Tarmac Construction Limited and another [1995] 3 All ER 534, on page 542 thereof there is the following section beginning just above f:-

"7. The lateness of the application for security is a circumstance which can properly be taken into account (see The Supreme Court Practice 1993 vol 1, para 23/1-3/28). But what weight, if any, this factor should have and in which direction it should weigh must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless it is appropriate for the court to have regard to what costs may yet be incurred."

In this particular case, the Plaintiff submitted that there had been delay in bringing the application. The action was commenced in November, 1993 and the Answer filed in December, 1993. There was subsequently some delay because of a merger between the firms of Bailhache and Bailhache and Bois Labesse and as a result of this there had to be a change of legal representation for both parties. A Summons seeking security for costs was first issued in March, 1995, but this was not proceeded with. The Defendant alleged that this was because there was a substantial lull in the proceedings and that appears to be confirmed by the Court file. Subsequently, in July of this year the Summons was re-issued. Although more than two and a half years have elapsed since the action was commenced, it has not yet been set down on the hearing list and it does appear to me that there were two periods of approximately one year each when there was little activity on the file. Advocate Sinel also submitted that his client had not become aware of the fact that Mr. Jolyon Baker was the sole beneficial owner of the company until relatively recently and had only relatively recently realised that he was in a position to be able to finance the litigation on behalf of the company. It does not seem to me that delay is a material factor in this case.

In the case of Mayo and others v. Cantrade Private Bank Switzerland (C.I.) Limited and another (31st May, 1996) Jersey Unreported, the Royal Court heard an appeal from one of my decisions and, whilst overturning my decision on the facts, upheld my view of the law. My Judgment which was attached as an Appendix to the Judgment of the Royal Court, contained a number of quotations from the important English Court of Appeal case of Keary Developments Limited v. Tarmac Construction Limited and I am now setting out a number of these below as follows:-

There is the following important section from the head note which reads as follows:-

"In exercising its discretion under s 726(1) of the Companies Act 1985 to order a plaintiff company in an action to make a payment of security for the defendant's costs where it appears that the company

may be unable to pay such costs if the defendant is successful in his defence the court will have regard to all the circumstances of the case. The court will not be prevented from ordering security simply on the ground that it would deter the plaintiff from pursuing its claim. Instead, the court must balance the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security against the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success but without going into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure. Account should also be taken of the conduct of the litigation, including any open offer or payment into court, any changes of stance by the parties and the lateness of the application, if appropriate. The court will not refuse to order security on the ground that it would unfairly stifle a valid claim unless it is satisfied that in all the circumstances, including whether the company can fund the litigation from outside sources, it is probable that the claim would be stifled. In this regard it is for the plaintiff company to satisfy the court that it would be prevented by an order for security from continuing the litigation. In considering the amount of security that might be ordered the court will have regard to the fact that it is not required to order the full amount claimed by way of security and it is not even bound to make an order of a substantial amount."

The core of the Keary -v- Tarmac Judgment is found in seven sections which commence at letter h on page 539 and I am now going to quote from sections 2, 3 and 6 thereof which are particularly relevant.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see Pearson v

Naydler [1977] 3 All ER 531 at 536-537, [1977] 1 WLR 899 at 906 per Megarry V-C).

3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous tour company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see Farrer v Lacy, Hartland & Co (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see Pearson v Naydler [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906).

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (see Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.

However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the

litigation (see Flender Werft AG v Aegean Maritime Ltd [1990] 2 Lloyd's Rep 27). In that case Saville J applied by way of analogy the approach adopted in another context, that of payment into court as a condition of leave to defend. In M V Yorke Motors (a firm) v Edwards [1982] 1 All ER 1024 at 1028, [1982] 1 WLR 444 at 449, 450 Lord Diplock approved the remarks of Brandon LJ in the Court of Appeal:

> *'The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need.'*

In Kloeckner & Co AG v Gatoil Overseas Inc [1990] CA Transcript 250 Bingham LJ cited with approval certain remarks of the Registrar of Civil Appeals. Mr. Registrar Adams was willing to assume that the situation before him was the same as that exemplified in the Farrer case, that is to say that there was a probability that the defendant wrongly caused the plaintiff's impecuniosity on the basis of which security for costs was being sought. The registrar said:

> *'In my Judgment, the approach to be adopted in cases where, as here, there are good arguable grounds of appeal and it is within the Farrer principle but the appellant contends that the award of security will stifle the appeal, should be the same as the approach adopted in M V Yorke Motors (a firm) v Edwards Ord 14 cases, where conditional leave to defend is being contemplated. The approach, in my view, should be that the onus is on the appellant to satisfy the Court of Appeal that the award of security for costs would prevent the appeal from being pursued, and that it is not sufficient for an appellant to show that he does not have the assets in his own personal resources. As in the Yorke Motors case, the appellant must, in my view, show not only that he does not have the money himself, but that he is unable to raise the money from anywhere else.'"*

I come now to the question of the means of Mr. Jolyon Baker. In my view, clearly Mr. Jolyon Baker is financing this litigation on behalf of the Plaintiff and, therefore, it is reasonable that the Defendant look to him for the provision of security for costs. We have here a classic case where the Plaintiff is able to proceed with the action because it is being financed by its beneficial owner but if the Plaintiff is unsuccessful in the action then, by reason of the insolvency of the Plaintiff, the

Defendant will not to be able to recover from the Plaintiff any costs Order which it may receive.

It appears to me to be common ground between the parties that Mr. Jolyon Baker and his wife together own a very substantial property in England which was purchased for £325,000 two years ago and upon which an additional £25,000 seems to have been spent in order to enable part of it to be let to holiday makers. It, therefore, seems entirely reasonable to me that I assume that the value of the property is at least £350,000. Against this there is a mortgage of £155,000 leaving an equity in the property of £195,000. There is also a bank overdraft of £27,602.79. In his fourth affidavit Mr. Jolyon Baker gives details of further loans of £31,000 which have been made to him by members of the family towards the unsuccessful project set up through the Plaintiff. He has now, apparently, returned to his former profession of an actor and between 1st September, 1994 and 1st September, 1995 his earnings were about £23,700 and he estimates that they will be about the same for the year ending 1st September, 1996. The income from the holiday letting is around £800 per month. The interest on the mortgage is also around £800 per month. The family consists of Mr. and Mrs. Jolyon Baker and three dependent children. In short, in his affidavit, Mr. Jolyon Baker, whilst admitting that he and his wife own a substantial capital asset with the value of £195,000 denies that he is able to furnish the Plaintiff with the necessary security for costs. Advocate Sinel, on the other hand, says that it is quite unreasonable that a person who lives in such a substantial property is unable to furnish the sum of security for costs which is sought up to close of inspection which is £9,364.34. I am also bound to note that the purchase of the property in England took place after this action was commenced and at a time when Mr. Jolyon Baker knew that he would need to finance such an action. Property prices in England are not as high as those in Jersey and the property appears to me from the photographs which I have seen, to be a very fine property by any standards.

Applying the test in relation to the refusal of an Order for security on the grounds that it would unfairly stifle a valid claim which is set out in Keary I have to ask myself the question whether I am satisfied that in all the circumstances, including whether the company can fund the litigation from Mr. Jolyon Baker, it is probable that the claim would be stifled. I cannot say that that is probable. The claim is for a very substantial amount and it appears to me to be most unlikely that the beneficial owner of the company will allow a requirement for the payment of a sum less than £10,000 to stifle his claim.

I then have to go on to consider all the other factors which I have mentioned above and after so doing, in the exercise of my discretion, I have come to the conclusion that the justice of the case requires the provision of security for costs in this case. I leave over the quantum of such provision until I have been addressed on the same by Advocate Thompson. I will also need to

be addressed, in due course, in relation to the period of time in which payment shall be made and in relation to the costs of and incidental to the application for security for costs.

Authorities

R.S.C. (1995 Ed'n): Order 23.

4 Halsbury 37: paragraphs 298-309.

Royal Court Rules 1992: Rule 4/1 (4).

Companies Act 1985: s.726(1).

Davest Investments Ltd. -v- Peter David Bryant (1982) JJ 213.

R.H. Edwards Decorators Ltd. & Painters -v- Tretol Paint Systems Ltd. (1985-86) JLR 64.

R. Hestletime, T.J. Hestletime & Offco Ltd. -v- R.J. Egglishaw, Jehan, P.J. Egglishaw & Watkins (1989) JLR 1.

Parkwood Ltd. -v- Midland Bank plc (1st August, 1989) Jersey Unreported.

Douglas John Woolloy -v- Kinglsey & Others (14th May, 1992) Jersey Unreported.

Steven Farrer -v- National Westminster Bank Finance (CI) Ltd. (20th October, 1994) Jersey Unreported.

Mayo ... ociates & Ors. -v- Cantrade Private Bank Switzerland (C.I.) Ltd. (31st May, 1996) Jersey Unreported.

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Procon (GB) Limited -v- Provincial Building Company Limited & Others [1984] 2 All ER 368.

Porzelack KG -v- Porzelack (UK) Limited [1987] 1 All ER 1074.

Trident International Freight Services Limited -v- Manchester Ship Canal Company and another [1990] BCLC 263.

Innovare Displays plc -v- Corporate Broking Services Ltd [1991] BCC 174.