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15th July, 1987

Before the Judicial Greffier

BETWEEN	D.B. Installations Limited	PLAINTIFF
AND	Vaut Mieux Limited	DEFENDANT
AND	The States of Jersey	FIRST PARTY CITED
	and Francis Charles Hamon & ors, exercising the profession of advocate and solicitor under the name of Crills	SECOND PARTIES CITED

Advocate R.J. Michel for the defendant

Advocate M.S.D. Yates for the plaintiff

This is an application by the defendant that the plaintiff, a limited liability company registered in Jersey, be ordered to give security for the defendant's costs.

The application was made on the ground that, were the plaintiff to be unsuccessful in its claim against the defendant, it would be unable to pay the defendant's costs. In support of that ground, the defendant's advocate had sworn an affidavit deposing to the fact that earlier this year the plaintiff had been sued in

the Petty Debts Court for the recovery of a debt of £554.76 and that the Viscount had been unable to enforce the judgment as the plaintiff had no assets.

Advocate Yates, for the plaintiff, accepted that the plaintiff had virtually no assets (there is only a motor car worth several hundred pounds and some tools) and informed me that the company had not traded since last September.

It might be helpful firstly to set out two established principles:-

(1) Rule 4/1(4) of the Royal Court Rules, 1982, gives the Court a far wider discretion than have the Courts in England in the matter of security for costs (Davest Investments Ltd -v. Bryant, 1982 J.J. 213; R.H. Edwards Decorators and Painters Ltd. -v. Tretol Paint Systems Ltd. (as yet unpublished)); and

(2) It is possible to follow, as a guide-line in the judicial exercise of discretion, a principle that has became encapsulated a foreign statute (Davest Investments Ltd v. Bryant, supra).

Advocate Michel drew my attention to various passages in that part of the Supreme Court Practice 1985 (the White Book) that deals with Security for Costs (Order 23).

Firstly, to S.726 (1) of the Companies Act 1985 (replacing and largely in identical terms to S.447 (1) of the Companies Act 1948), which provides as follows:- "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." Advocate Michel invited me to apply the principle set out in paragraph (2) above and follow the principle encapsulated in S.726(1), pointing out that the then Judicial Greffier had done so in the Davest case.

Secondly, to the passage on page 388 which reads as follows:-

"The Court has a discretion under S.726(1) of the Companies Act 1985, just as under r.1, whether to order security for costs having regard to

all the circumstances of the case (Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd. (1973) Q.B. 609; (1973) 2 All E.R. 273, C.A.). Among the circumstances which the Court might take into account are the following (1) whether the plaintiff's claim is bona fide and not a sham; (2) whether the plaintiff has a reasonably good prospect of success; (3) whether there is an admission by the defendants on the pleadings or elsewhere that money is due; (4) whether there is a substantial payment into Court or an "open offer" of a substantial amount; (5) whether the application for security was being used oppressively, e.g. so as to stifle a genuine claim; (6) whether the plaintiff's want of means has been brought about by any conduct by the defendants, such as delay in payment or in doing their part of the work; (7) whether the application for security is made at a late stage of the proceedings (ibid. per Lord Denning M.R.)."

Advocate Michel went through each of the seven circumstances. He accepted that the plaintiff's claim was not a sham but claimed that the plaintiff was unlikely to succeed. Paragraphs (3) and (4) had no application in this case. The application for security was not being used oppressively, the plaintiff's want of means had not been brought about by any conduct by the defendants and the application was not being made at a late stage of the proceedings.

Advocate Michel also made the point that the Order of Justice contained a "saisie conservatoire" on moneys in the defendant's hands or in the hands of the third parties in an amount which was some £3600 in excess of the plaintiff's liquidated claim and that the effect of this was to give the plaintiff security for its own costs. He accepted that the defendant could have sought to have the injunction raised, either wholly or partially, but for reasons that he explained and which it is not necessary to repeat here, had chosen not to do so.

Advocate Yates submitted that this was a case where it would be inappropriate to require the plaintiff to give security and referred in particular to paragraphs (5) and (6) mentioned above. With regard to paragraph (5), he suggested

that to require a plaintiff who was without assets and whose beneficial owner was on legal aid would stifle what the defendant had accepted was not a sham and would therefore be oppressive. As to paragraph (6), he drew my attention to paragraph 12 (d) of the affidavit sworn by Mr. Dennis Denholme, the sole beneficial owner of the plaintiff, wherein he claims that his own and the plaintiff's cash flow problems have been primarily caused by the devious methods employed by the defendant in avoiding paying the plaintiff what it is entitled to.

Having carefully considered the arguments put forward by both counsel, and not being satisfied that the application is being made so as to stifle what is accepted as a genuine claim and is therefore not being brought oppressively, nor being satisfied, on the information before me, that the plaintiff's want of means had been brought about by the defendant's conduct, I have decided, in the exercise of my discretion, to follow the principle encapsulated in S.726(1) of the Companies Act 1948 and make the order sought by the defendant.

I therefore consider now the amount of security that should be given.

Advocate Michel produced a bill of costs, including disbursements, actually incurred between February and May of this year together with a skeleton bill of the estimated costs up to and including trial. He pointed out that no allowance had in fact been made for the month of June in the skeleton bill, and adding a notional £100 for that omission, his total bill is just short of £5000. It was, however, agreed that if security were to be ordered it should be given up to date of trial only - this would reduce the costs to £2000. It was also agreed that there was a possibility of a settlement before the case came to trial and that it would be proper to discount the amount on that account. The bills had, however, been drawn on a solicitor/client basis and Advocate Michel accepted that they should be discounted by one third to bring them down to a party and party basis. He invited me to follow the English case of Procon (Great Britain) Limited. v. Provincial Building Company Limited (1984) 2 All E.R. 368 and not make a further deduction, and accordingly suggested that a sum in the region of £1400 - £1500 would be

Advocate Yates informed me that he was acting for the beneficial owner of the plaintiff, Mr. Denholme, on legal aid - Mr. Denholme was having to sell up his home in order to meet his existing debts. Advocate Yates drew my attention to paragraph 23/1 -3/23 of the White Book which cites a number of authorities for the proposition that although the fact that the plaintiff is an assisted person is not a sufficient reason why security should not be ordered, the amount of security ordered may be smaller than usual. He did not seek to persuade me that Advocate Michel's estimate of the costs was too high, but submitted that the sum to be ordered should be substantially less than that asked for by Advocate Michel.

I have looked carefully at Advocate Michel's two bills and have reached the conclusion that, had they been drawn for taxation on a party and party basis, they would (up to date of trial and including the notional £100 already referred to) have totalled no more than £1220. From that sum, I have made a deduction of one third to take into account the possibility of a settlement, bringing the figure down to £813 (see the remarks of Griffiths LJ in the Procon case). I have, however, decided that the circumstances of this case are such that even that figure would be too high. In the Procon case, Cumming-Bruce LJ says "..... in the cases which I have cited, the principle is this: the security should be such as the Court thinks in all the circumstances of the case is just." ((1984) 2 All E.R. at p. 376). In my view the just and proper amount in this case is £500 and I so order.

The action (but not the counterclaim) will be stayed until that security is paid, and costs will be in the cause.