In the Royal Court of Jersey

In the year one thousand nine hundred and eighty-eight, the eighteenth day of May.

Before the Deputy Judicial Greffier

BETWEEN	Rennie Heseltine Thelma Joan Heseltine and Offco Limited	PLAINTIFFS
AND	Richard Jepson Egglishaw and others practising as Strachan and Company	DEFENDANTS
AND	W.J. Watkins	

Application by the defendants for an order that the plaintiffs provide security for costs.

Advocate C.M.B. Thacker for the Defendants.

Advocate P. de C. Mourant for the Plaintiffs.

This is an application for security for costs to be ordered against the plaintiffs, two of whom (Mr. and Mrs. Heseltine) reside outside the jurisdiction, in Eire. The third plaintiff is a limited liability company registered in Jersey, Offco Limited.

It was agreed by the advocates on both sides that the rules for security for costs differ in England and in Jersey and that the Court in Jersey has a wider discretion to order security for costs, but that when exercising its discretion the Court should apply the principles set out in Order 23 of the Rules of the Supreme Court.

It is appropriate in this application to decide first whether an order for security for costs should in principle be made (a) against the Heseltines outside the jurisdiction and (b) against Offco Limited, within the jurisdiction.

As regards the Heseltines, both counsel accept that they reside outside the jurisdiction in Eire. Advocate Thacker submitted that where the plaintiff is outside the jurisdiction, security for costs should be ordered. In Aeronave S.P.A. -v- Westland Charters Limited (1971) 3AllER 531 C.A. it was held that the power to make such an order was entirely discretionary, but it is the usual or general rule of practice of the court to require the foreign plaintiff to give security for costs because it is ordinarily just to do so. This view was supported in Porzelack K.G. -v- Porzelack (UK) (1987) 1AllER 1074 at page 1077(b). It is also the general rule in Jersey.

Advocate Thacker referred to R.S.C. 23/1 - 3/3 and to the principle established in Winthorp -v- Royal Exchange Assurance Company (1755) 1 Dick 282, that no order for security will be made if there are co-plaintiffs resident within the jurisdiction, and submitted that this rule had now been varied by the recent case of Slazengers and ors. -v- Seaspeed Ferries International Ltd. (1987) 2AllER at p. 906(c) and 908(c), where it was held that this rule applies only where the plaintiffs without and the plaintiffs within the jurisdicition rely on the same cause of action, and where each of the plaintiffs is bound to be held liable for all of such costs as may be ordered to be paid by each of the plaintiffs. Counsel agreed that the Heseltines and Offco Ltd. did not rely on the same cause of action. Advocate Thacker further submitted, on the authority of the Slazengers case at p. 970 of the report of the appeal hearing (reference (1987) 3AllER, C.A.) that even though there is a co-plaintiff within the jurisdiction, security may be ordered if the Court, in its discretion, thinks it just to do so. Advocate Thacker, referred to R.S.C. 23/1 - 3/13, and submitted that whilst the plaintiff's proverty was per se no ground for requiring security for costs, nor was it sufficient reason why security should not be ordered. He went on to refer to the circumstances the Court should take into account in deciding whether to exercise its discretion as set out by Lord Denning, M.R. in Sir Lindsay Parkinson and Company Limited -v- Triplan Ltd. (1973) 2AllER 273 C.A., cited in R.S.C. 23/1 - 3/14 and in particular to No. (2): does the plaintiff

have a reasonable prospect of success. He submitted that in the instant case, this was difficult to assess before evidence is heard. However both counsel agreed that there was a case to argue. Advocate Thacker also referred to No. (5): is the defendants application oppressive. He submitted it was not; the defendants' purpose in the application was to ensure that there were sufficient funds within the jurisdiction to cover any award of costs made against the non-resident plaintiffs.

Advocate Mourant stated that he had little to add to Advocate Thacker's statement of the principles of law involved. He argued forcefully that the order if made would be highly oppressive, though not if the amount ordered were in the region of a few thousand (say two or three thousand) pounds.

In the exercise of my discretion, I am of the opinion that the usual practice should prevail and that an order for security for costs should be made against the Heseltines.

As regards Offco Limited, Advocate Thacker conceded that it is not the usual practice to make an order for security for costs against a plaintiff within the jurisdiction, but referred me to the decision of the Judicial Greffier in Davest Investments Ltd. -v- Peter David Bryant (1982) JJ 213, where it was held that where the plaintiff is a company without sufficient assets to pay the costs awarded against it, an order for security may be made. Advocate Thacker submitted that if Offco were ordered to pay the costs at the end of the day, it lacked the assets to do so.

Advocate Mourant referred me to R.H. Edwards Decorators & Painters Ltd. -v- Tretol Paint Systems Ltd. (1985-86) JLR64, a case heard before me, where I held that it was necessary to find exceptional circumstances in order to depart from the long established practice of not making an order for security against a plaintiff within the jurisdiction.

Offco has assets available within the jurisdiction against which the defendants can enforce a judgment for costs and I am unable to find any exceptional circumstances that would justify me in making an order against Offco.

The application for an order against Offco is refused.

There remains the amount of security to be furnished by the Heseltines.

Advocate Mourant argued persuasively that the defendants' application as it now stood would be highly oppressive. Advocate Thacker was seeking security in the amount of £87,545, less £9,486, (the fees relating to the defendants' counterclaim). Such an order would effectively stifle what both sides accepted to be a bona fide claim. The plaintiffs were under great financial strain and would be obliged to sell their house (itself already subject to a bank charge, with the bank pressing for repayment of their loan) in order to pursue the action. The principle of oppressiveness, set out in the Sir Lindsay Parkinson case, was supported in the Porzelack case at p. 1080(a). The most the Heseltines were able to afford was a few thousand (£2,000 - £3,000) pounds.

Advocate Thacker rejected the submission that his application was oppressive. He submitted further that the defendants should properly be allowed to include English Lawyers fees in their bill of costs. The decision in re. testament Crane (1960) 1.P.D.186 had been distinguished in Official Solicitor -v- Clore (1983) JJ43, in which it was held that in cases where a Jersey Court applies principles of English law, it is not unreasonable for the parties to seek the advice of English Lawyers. He submitted that the instant action was such an action as Jersey trusts law and certainly the Trusts (Jersey) Law, 1984, draws extensively on English Trusts Law. There was also authority in Jersey that in actions involving a breach of duty of care the Jersey Court might have regard to English law.

In deciding on the amount of security to order, I have to strike a balance between the defendants' entitlement to ensure that there are sufficient funds within the jurisdiction to cover their costs and the plaintiffs' right not to have their bona fide claim stifled by an oppressive award. The gap between the parties is very wide £78,000 and £3,000. I have little doubt that if I order security on anything like the scale asked for the plaintiffs' action will be stifled. As regards

the fees of English lawyers, I have considered the Crane and Clore judgments and come to the conclusion that it is not certain that the fees of English lawyers would be allowed and that it is not for me to determine that question on this application. I therefore propose to fix the amount of security using as a basis only the costs incurred by Messrs. Viberts.

Therefore adding a notional £3,300 (on a taxed basis) to Messrs. Viberts costs of £3,100, to cover discovery, preparation for trial and a five day trial, their costs would amount to £6,400. However, being mindful that the amount of security ordered must not be oppressive, I have concluded that the appropriate and reasonable amount to order in this case is £4,000 and I so order. The amount to be paid to the Judicial Greffier within 28 days and the action stayed pending payment. Costs in the cause.