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ROYAL COURT
(Samedi Division)

82.

14th May, 1992

Before the Judicial Greffier

BETWEEN	**Douglas John Woolley**	**PLAINTIFF**
AND	**Stephen Kingsley**	**FIRST DEFENDANT**
AND	**Brien Hamilton**	**SECOND DEFENDANT**
AND	**Michael Forrest**	**THIRD DEFENDANT**

Application by the Third Defendant for an Order for security for costs against the Plaintiff.

Advocate S.J. Habin for the Third Defendant.
Advocate J.D. Melia for the Plaintiff.

JUDGMENT

JUDICIAL GREFFIER: The history of this action is lengthy. The Plaintiff alleges that in 1972 he entered into a contract with the Defendants under which they agreed to salvage the ship, formerly known as the "Queen Elizabeth", which had sunk off Hong Kong. In the past the Plaintiff alleged that two companies were also parties to that agreement. Indeed, in about 1974 he commenced proceedings against those companies. Those proceedings proceeded very slowly because an Order for security for costs in the sum of £500 was made and fourteen years later the proceedings were struck out for failure to prosecute. After that, for a number of years, the Plaintiff unsuccessfully tried to re-vitalise those companies and subsequently other companies which he believed to be connected with the Defendants and which had been dissolved. Indeed, for the last three years or more it has been a fairly familiar experience for the Courts to find the Plaintiff making unsuccessful applications to re-vitalise companies which had no contractual connection with the alleged contract and then unsuccessfully appealing against the refusal of the Royal Court to reinstate those companies.

In late 1991 the Plaintiff decided to take a more direct approach against the three Defendants. To date he has only been able to serve the Third Defendant who is resident in Jersey. The Plaintiff has not made any applications for service out of the jurisdiction and has so

far attempted unsuccessfully to make applications for substituted service in relation to the First and Second Defendants.

When the Plaintiff first attempted to present his Order of Justice in late 1991 the Deputy Bailiff refused to sign the same upon the basis that any right of action in contract had been prescribed from 1982 onwards by reason of the ten year period of prescription. However, on 2nd December, 1991 the Bailiff, for the reasons set out in an Unreported Judgment of that date, held that the Deputy Bailiff had been wrong to refuse to sign the Order of Justice solely upon the basis of the ground of prescription. On pages 3,4,5 and 6 of the Unreported Judgment the learned Bailiff quoted at length from Bullen and Leake and Jacobs: Precedents of Pleadings (13th Edition) at page 1287 and from the case of Ronex Properties Limited -v- John Laing (1983) QB 398 C.A.

I quote now a section from Donaldson LJ's Judgment on page 405 of the Ronex Properties Limited -v- John Laing action, where at letter A he says:

> ***"Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek trial of preliminary issue or in a very clear case, he can seek to strike out the action upon the ground that it is frivolous, vexatious and an abuse of the process of the Court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed".***

I am also quoting from a similar passage which is to be found in the Judgment of Stephenson LJ on page 408, where he says:

> ***"I agree and desire only to add a few observations on the limitation point. There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a a defendant to apply to strike out the plaintiff's claim as frivolous and vexatious and an abuse of the process of the Court on the ground that it is statute barred. Then the plaintiff and the Court knows that the Statute of Limitations will be pleaded; the defendant can if necessary file evidence to that effect; the plaintiff can file evidence of an acknowledgement or concealed fraud or any matter which may show the Court that his claim is not vexatious or an abuse of process; and the Court will be able to do in, I suspect, most cases what was done in Riches -v- Director of Public Prosecutions, (1973) 1 WLR 1019: strike out the claim and dismiss the action."***

It is clear, in this case, that the Third Defendant has pleaded prescription. It is also clear that the Third Defendant intends to bring an application in order to strike out the Plaintiff's claim as frivolous and vexatious and an abuse of the process of the Court on the ground of prescription. However, before so doing, the Third Defendant has sought to improve his position by obtaining a payment into Court by way of security for costs.

It is clear that the Plaintiff is resident out of the jurisdiction. In the case of Rothmer and Others -v- Hill Samuel (Channel Islands) Trust Company Limited and Others, (9th January, 1991) Jersey Unreported, I attempted to review the past leading cases in Jersey in relation to security for costs and in particular the cases of Burke -v- Sogex International Limited (1987-88) JLR 633 C.A. and Parkwood -v- Midland Bank Plc (1st August, 1989) Jersey Unreported. The conclusion of the learned Bailiff in the Burke -v- Sogex case was that security should normally be ordered where a party against whom it is sought is outside the jurisdiction and does not have assets inside the jurisdiction, unless an Order would make it unjust. The conclusion in the second paragraph on the first page of the Parkwood Limited -v- Midland Bank Plc Judgment was,

> ***"It is the usual practice of Jersey Courts as in England to require a foreign plaintiff to give security for costs as a matter of discretion because it is just to do so."***

On page 6 of the Rothmer -v- Hill Samuel Judgment I stated -

> ***"That being so I was left with considering whether the existing Reciprocal Enforcement procedures were a sufficient guarantee to the Defendant of the Enforcement of any Order for costs. It is quite clear in past cases that the existence of these procedures has not weighed significantly in the balance in the minds of Jersey Courts and I see no reason to depart from the earlier principles."***

In this case I applied the principles set out in the past Jersey cases and came to the conclusion that this was an appropriate case for the making of an Order for security for costs.

Advocate Habin drew my attention to section 23/1-3/2 of the 1991 White Book and in particular to the section commencing on the twentieth line which reads as follows:-

> ***"A major matter for consideration is the likelihood of the plaintiff succeeding. This is not to say that every application for security for costs should be made the occasion for a detailed examination of the merits of the case. Parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success***

or failure (Porzelack KG v. Porzelack (U.K.) Ltd. [1987] All E.R. 1074)."

In this action I examined the Porzelack case and found a relevant section under e on page 1077 which reads as follows:

> ***"Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure."***

This is an unusual case because the Plaintiff is seeking to bring his action nineteen years after the date of the alleged contract and, apparently, nine years after the end of the prescription period. Advocate Melia, on behalf of the Plaintiff, stated that the Plaintiff believed that he had a reasonable basis upon which to counter the defence of prescription. However, she was unable to provide me with anything other than vague speculation in relation thereto. The Plaintiff normally operates as a litigant in person and had only instructed Advocate Melia, on the legal aid system, because he could not come over to Jersey on the appropriate date. The Plaintiff is a prolific letter writer and my department probably receives about two letters per week from him. I am therefore extremely well acquainted with the Plaintiff's lines of argument. The only explanation which I have come across in all the voluminous correspondence is an indication that he believes that he can counter the defence of prescription with an allegation of fraud. However, there is absolutely no allegation of fraud in the existing Order of Justice and I have never seen any statement anywhere in all this correspondence as to any logical basis for such a claim. I therefore have no doubt that the Third Defendant will succeed, in due time, in an application to strike out the Order of Justice as against him upon the basis of prescription.

However, Advocate Melia brought to my attention paragraph 304 on page 231 of Volume 37 of the 1982 edition of Halsbury's Laws of England and in particular the following section -

> ***The following guidelines have been laid down as to the circumstances which the court ought to consider on granting or refusing security for costs:***
>
> ***(1) whether the plaintiff's claim is made in good faith and is not a sham;***
> ***(2) whether the plaintiff has a reasonably good prospect of success;***
> ***(3) whether there is an admission by the defendant on the***

pleadings or otherwise 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, for example so as to stifle a genuine claim;

(6) whether the plaintiff's want of means, especially in the case of a limited company, has been brought about by any conduct by the defendant, such as delay in payment, or in doing his part of the work; and

(7) whether the application for security is made at a late stage of the proceedings."

I have already answered section (2) in favour of the Third Defendant. However, the question of oppression and the stifling of a genuine claim is an important question. Advocate Melia also quoted from the Porzelack case and I am now setting out a section beginning with the last paragraph on page 1076, as follows:-

> *"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction."*

I am also quoting from a section which begins with the last line on page 1079 as follows:-

> *"The next matter that I take into account is that, on the evidence before me, there is little doubt that if I order security on anything like the scale asked for, the plaintiff's action will in fact be stifled. It simply does not have the means to put up the money. It is always a matter to be taken into account that any plaintiff should not be driven from the judgment seat unless the justice of the case makes it imperative. I am always reluctant to allow applications for security for costs to be used as a measure to stifle proceedings."*

I quote next from the case of Heseltine -v- Strachan & Company (1989) JLR 1, commencing at the last paragraph on page 12 -

> *"We have impecunious plaintiffs. We have to strike a balance of fairness. In Pearson -v- Naydler (14) Megarry, V.-C. said ([1977] 3 All E.R. at 553): "The power to require security for costs ought not to be used so as to bar even the poorest*

> ***man from the courts. Thus in the case I have just mentioned, the Court of Appeal held that an insolvent trustee in bankruptcy could sue as sole plaintiff without giving security for costs. But in order to prevent abuse of this rule, an exception was made for an impecunious nominal plaintiff who is suing for the benefit of some other person; for he may be required to give security for costs ......""***

In the final paragraph on page 13 of the Heseltine -v- Strachan & Co. Judgment Commissioner Hamon quoted with approval the following comments of the Deputy Judicial Greffier -

> ***"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."***

I find it significant that in the extract from paragraph 304 of the 37th volume of Halsbury's Laws of England, the words "***so as to stifle a genuine claim***" are used. The Court in the Heseltine -v- Strachan & Co. case appeared to be approving the words "*bona fide* claim". Section 23/1-3/2 on page 412 of the 1991 White Book indicates that a high degree of probability of failure in the action is relevant. In the Porzelack case in section e on page 1077 a high degree of probability that the defendant will succeed is indicated as a matter which can be weighed. The present action against the Third Defendant falls within these categories.

It is clear to me that the next procedural step which will follow the present application will be an application by the Third Defendant for striking out. As I have already indicated, I would expect this to succeed and, therefore, it would appear to me to be wrong, in principle, to order, at this stage, security for costs beyond the end of that application. The Third Defendant has produced a bill of costs which indicates an expectation of 29 hours of work plus 12 hours of perusal of the Plaintiff's letters up to that point. Accordingly, the plaintiff has requested security for costs in the sum of 41 x £70 equals £2,870 plus £63 disbursements equals £2,933. The Plaintiff suggested £70 per hour as an approximate average of the taxation rates. I have used that figure in the past as an approximation as taxation rates vary between £60 and £90 per hour.

The Plaintiff's advocate asked that a number of items be reduced to a certain extent. Upon going through the bill of costs I have come to the conclusion that the most realistic estimation of appropriate time periods from the point of view of taxed costs would be 22½ hours plus 7½ hours for perusal of the Plaintiff's letters. Thus it appears to me that the appropriate figure would be 30 hours at £70 per hour equals £2,100 plus £63 disbursements which comes to a total of £2,163.

I have little doubt that the Plaintiff will not be able to produce such a sum, even within a period of six months. Although the Plaintiff did not produce any affidavit of means, he had instructed Advocate Melia to the effect that his weekly income was £102. The Plaintiff had also instructed Advocate Melia to the effect that he had absolutely no savings. Against this, I am able to take into account the fact that the Plaintiff has been able to travel to Jersey approximately five or six times per year and to produce stamp duty both for Royal Court and for Court of Appeal hearings.

No Court wants to prevent an impecunious Plaintiff from pursuing a proper action. On the other hand, justice requires that a Defendant be protected through security for costs from an action brought by a non-resident Plaintiff which has no chance of success. I have attempted to balance these factors in order to seek to do justice to both parties. It appears to me that the appropriate Order is that security for costs in the sum of £1,500 be given for the period up to the close of the summons for striking out. The Plaintiff will have a period of six months in order to provide this sum and the action against the Third Defendant will be stayed pending provision of the sum. The costs in relation to this application will be costs in the cause.

AUTHORITIES.

Bullen and Leake and Jacobs: Precedents of Pleadings (13th Ed'n): p.1287.

Ronex Properties Ltd.-v-John Laing. (1983) QB 398 C.A.

Rothmer & Ors-v-Hill Samuel (Channel Islands) Trust Company Ltd & Ors. (9th January, 1991) Jersey Unreported.

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RSC (1991 Ed'n): 23/1-3/2.

Porzelack KG.-v-Porzelack (U.K.) Ltd. (1987) 1 All ER 1074.

4 Halsbury 37: p.231: para.304.

Heseltine-v-Strachan & Company (1989) JLR 1.