ROYAL COURT

19th January, 1989

Before: F.C. Hamon, Esq., Commissioner, and
Jurats Lucas and Le Boutillier

Between	Rennie Heseltine and Thelma Joan Heseltine	First Plaintiffs
And	Offco Limited	Second Plaintiffs
And	Richard Jepson Egglishaw Terence Ahier Jehan and Philip Jepson Egglishaw (Practising as Accountants under the name and style of "Strachan and Company")	First Defendant
And	William J. Watkins	Second Defendant

Appeal by Defendants from the Order of the Deputy Judicial Greffier of the 18th May, 1988, that the First Plaintiffs furnish security for the Defendants' costs in the sum of £4,000, and that the Second Plaintiffs should not furnish such costs.

Advocate C.M.B. Thacker for the Defendants
Advocate P. de C. Mourant for the Plaintiffs.

JUDGMENT

THE COMMISSIONER: This is an appeal by the Defendants against the decision of the Deputy Judicial Greffier given on the 18th May, 1988, ordering that there should be a stay of proceedings until the First Plaintiffs gave security for the Defendants' costs of £4,000 within 28 days. The grounds of appeal were that the security ordered was inadequate and that security should also have been ordered against the Second Plaintiff notwithstanding that the Second Plaintiff was a Limited Liability Company registered in Jersey.

The First Plaintiffs are husband and wife with a freehold property in County Kerry, Eire. They are now living with their son in England.

In April, 1978, they were introduced to the First Defendants who practise in Jersey as accountants in the well-established partnership known as Strachan & Co. They proposed to put sums of money by way of investment into a Jersey Settlement. The Second Defendant is also a partner of Strachan & Co. The Order of Justice referred to differences that arose between the parties as a result of which the Plaintiffs suffered financial loss. They alleged professional negligence in the advice that they were given. These allegations were strenuously denied by the Defendants who counterclaimed for their professional fees. A short reply and answer to the counterclaim were filed and, apart from Discovery, the pleadings are effectively closed.

We have not examined the pleadings in detail; both sides accepted that it was not necessary to do so. We anticipate that what we have said suffices to form a background to the summons.

Both parties asked us to consider a preliminary point on whether the Court would regard the appeal as a complete rehearing or as a judicial review.

The Royal Court Rules do not give any guidance in the matter.

Rule 4/1(4) states that:

"Any plaintiff may be ordered to give security for costs"

and Rule 15/2(1) states that:

"A party to proceedings before the Greffier may appeal by summons to the court from an order or decision made or given by the Greffier in those proceedings".

Our attention was drawn to the practices prevailing in England. In particular counsel for the appellants asked us to adopt the provisions of Order 58/1 of the Supreme Court Practice 1988 where the White Book puts the matter beyond doubt:

"An appeal from the Master or Registrar to the Judge in Chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal and the Judge treats the matter as though it came before him for the first time ...."

Lord Atkin put the matter with some force in Evans -v- Bartlam (1937) A.C. 473 where he said at page 478:

"As to the limits of the discretion, if any, it may be necessary to say a word or two later. I only stay to mention a contention of the respondent that the Master having exercised his discretion the Judge in Chambers should not reverse him unless it was made evident that the Master had exercised his discretion on wrong principles. I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it. This in my experience has always been the practice in Chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in Cooper v. Cooper, with which I entirely agree".

The point was reiterated by Payne J. in Blundell -v- Rimmer (1971) 1 All E.R. 1072 at page 1076 where he said:

> "There is one subsidiary point. I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him; that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a re-hearing of the application and I am entitled to treat the matter as though it comes before me for the first time; moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority can be found for this proposition in the speech of Lord Atkin in Evans v. Bartlam ....."

The distinction where a review rather than an appeal would lie is shown in the case of Hoare & Co., -v- Morshead (1903) 2 K.B. 359. There under Order XIV Rule 6 leave to defend an action was given to the defendant on giving security for the amount claimed to the satisfaction of a Master. It was held that there was no appeal from the decision of the Master with regard to the sufficiency of the security tendered. That is perfectly understandable. Any other decision would have led to a chaotic situation of a succession of appeals. It was useful, however, to see demonstrated a clear exception to a well-established English Rule. We were, however, reminded by counsel for the respondents that although the White Book has a useful contribution to make particularly where the Jersey Rules are not sufficiently detailed to enable a clear decision to be made, they need not be slavishly followed. This would be so if there were good reason to show that the practice of our Courts does not need their sophistication, or indeed if the practice of our Courts calls for a different way of proceeding. Advocate Thacker relied heavily on the case of Broad Street Investments (Jersey) Limited & Others -v- National Westminster Bank plc & Others (1985-86) J.L.R. Part 1, at p. 9. In that case the Bailiff said (and it is important to note that he was limiting his remarks to Rule 6/19 whereby the Greffier can refer questions raised by the Pleadings to the Court):

> "Both counsel recognised that this Court was hearing an appeal against the exercise of the Greffier's discretion, although the way we should approach such an appeal was not argued before us. Our view is ..... that our duty now is to exercise our own discretion but that although we are not fettered by the previous exercise of discretion by the Greffier, we should of course give it due weight".

Those remarks can be read with the final conclusion of the Bailiff at page 12:

> "This Court considers that the Judicial Greffier correctly exercised his discretion to refuse the application and we have independently come to the same conclusion upon the fuller arguments addressed to us".

The case does not really advance the matter because the Bailiff contained his remarks within the confines of Rule 6/19 and declined to go further. Advocate Mourant asked us to draw a distinction between the English practice and the Jersey practice. He pointed out that under Order 23/1 an application for security for costs is made by summons at Chambers before a Master. In Jersey there is a choice and a Plaintiff can make his application either to the Greffier or to the Royal Court. Advocate Mourant urged upon us the fact that the nature of the appeal in England did not arise from the wording of Order 58 Rule 1, but appeared to have evolved over a period of time. There is an appeal from the Master by way of re-hearing because neither party has the option of going to Court in the first instance. In the present case the appellant chose to appear before the Deputy Greffier and the Court should now only carry out a judicial review of the Deputy Judicial Greffier's decision; had Advocate Thacker wished to have the matter fully argued he should have come to the Royal Court in the first instance.

That is an interesting argument.

There are differences between the Jersey practice and the English practice. Certainly the Court in Jersey has a wider discretion to order security than the Master has in England. It does seem to us that the Deputy

Judicial Greffier was given the right to order security by the Rules. From that order an appeal lies to the Royal Court. The making of the order is discretionary. The discretion in our view is vested in the Royal Court and we can see no reason why the Royal Court cannot exercise its discretion in a way contrary to the manner that the Deputy Judicial Greffier exercised it. Weight will obviously be given to the decision of the Greffier; he often will have a long experience in dealing with interlocutory matters of this kind. We can see no reason why the Court's hands should be fettered in the way suggested by Advocate Mourant and we will therefore proceed to deal with the matter as though it had come before us for the first time.

We are therefore to decide two matters: (1) was the amount of £4,000 security ordered by the Deputy Judicial Greffier sufficient when one relates that sum to the £78,000 which the Defendants had requested? and (2) should security have been ordered against the Second Plaintiff a Limited Liability Company within the jurisdiction?

The second question can be disposed of at this stage.

Reliance was placed upon Davest Investments Ltd -v- Peter David Bryant (1982) J.J. 213 where the Judicial Greffier said:

> " ..... 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 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 Limited which is beneficially owned by his firm, Mourant, du Feu and 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 (1985-86) J.L.R. 64 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 circumstances".

We are satisfied that Offco Ltd. has assets comprising gilts which have a value of some £12,500, £800 in cash, 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 Offco Limited.

We now turn to the question of the sufficiency of the security ordered against and paid into Court by the First Plaintiffs.

The wording of Rule 4(1)(4) is important:

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

Both counsel referred me to the judgment of Lord Denning M.R. in Sir Lindsay Parkinson and Company Limited -v- Triplan Limited (1973) 2 All E.R. 273 and in particular to part of his judgment at page 285. He was referring to the interpretation of Section 447 of the Companies Act 1948 which provides:

"Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge 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 costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given".

The relevant part of his judgment is at page 285:

"Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case. Mars-Jones, J., in a full and careful judgment, took that view. He upset the Master's order. He refused to order security for costs. Counsel for Parkinson asked for leave to appeal. He put it on the ground that it was an important point whether or not the court had discretion. It was so important that four or five solicitors were waiting in the court to hear the result of it. The judge gave leave to appeal.

Now before us counsel for Parkinson concedes that his argument was wrong and that the judge was right. There seems to have been some misapprehension on the matter in the past. The sooner it is put right the better. If there is reason to believe that the company cannot pay the costs, then security may be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggest 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".

We can adopt the reasoning of Lord Denning in the present case although of course we are now dealing with plaintiffs who are individuals living outside the jurisdiction. Before proceeding further it may be useful at this stage to examine the financial situation of the First Plaintiffs. We had no affidavit provided to us by Advocate Mourant. He explained the background from his own knowledge of the situation. We found that surprising although we entirely agree that nowhere in the rules is an affidavit called for and no practice direction has been made in this regard. We therefore took the information as it was given to us. Advocate Thacker did not feel that the information was as specific as he had anticipated but he accepted its veracity.

The situation of the First Plaintiffs can be described as parlous. The First Plaintiffs own a substantial house in County Kerry. We were shown estate agents particulars of the property and photographs. The property has a value of somewhere between £100,000 and £70,000. They have incurred borrowing from Midland Bank Ltd of £22,899.30 which they are repaying on a nominal basis of £20 per month. This repayment sum must be set off against the accumulating interest. Mrs. Heseltine has had to sell her jewellery and motor car. They have not paid legal fees for two years and owe some £15,000 to Mourant, du Feu and Jeune. Advocate Mourant appeared before us on a legal aid certificate. They are pensioners with an income of £172 every four weeks.

Their house has been on the market for nearly two years. Sale particulars have been extensively advertised. They live with their son in England. The deeds of the house in Ireland are held by the Bank. They are dependent on their children for sustenance. Both the adult children have problems which lead us to the conclusion that they would not be able to assist financially. The First Plaintiffs have received £19,500 from the Trust Fund and paid £17,000 in fees.

A helpful first principle is set out in the judgment of Sir Nicolas Brown Wilkinson, V.C. in the case of Porzelack K.G. -v- Porzelack (U.K.) Ltd (1987) All E.R. 1074 at page 1076 where the Judge said this:

"The application is made under RSC Ord 23, r 1(1)(a), which provides:

'Where ... it appears to the Court - (a) that the plaintiff is ordinarily resident out of the jurisdiction ... 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'.

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. There is only one exception to that, so far as I know, namely in the case of limited companies, where there is provision under the Companies Act 1985, s 726 for security for costs. Where the plaintiff resident outside the jurisdiction is a foreign limited company, different factors may apply (see DSQ Property Co Ltd -v- Lotus Cars Ltd (1987) 1 W.L.R. 127). Under Ord 23, r 1(1)(a) it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer.

The matters urged before me have spread over a fairly wide field. First there have been attempts to go into the likelihood of the plaintiff winning the case or the defendant winning the case, presumably following the note in The Supreme Court Practice 1985

> vol I, para 23/1 - 3/2, which says: '... A major matter for consideration is the likelihood of the plaintiff succeeding ...'. This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time. 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".

We have examined the pleadings although not in detail. Even on a cursory reading one thing is clear. It is quite impossible to determine the possibility of failure or success on the pleadings alone. This will turn on the facts and how those facts are presented to the Court. Certainly if this were a striking out application under Rule 6/13 (a) or (b) such an application could not, in our opinion, be sustained.

The reasoning in the Porzelack case is re-emphasised in the earlier case of Aeronave S.P.A. -v- Westland Charters Ltd (1971) 3 All E.R. 531 where Lord Denning said at page 533:

> "In 1894 in Crozat -v- Brogden Lopes L.J., said that there was an inflexible rule that if a foreigner sued he should give security for costs. But that is putting it too high. It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if

the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order".

But here we are not dealing with Plaintiffs of substantial means. Advocate Mourant saw a clear analogy in the case of Allen & Others -v- Jambo Holdings Ltd & Others (1980) 2 All E.R. 502 where Lord Denning said at page 505:

> "There is one other point that I must mention, it is said whenever a Mareva injunction is granted the plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw L.J., said in the course of the argument, a legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other plaintiff would be. I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft".

In Sloyan and Sons Builders Ltd -v- Brother of Christian Instruction (1974) 3 All E.R. 715 Lane L.J. examined with favour the earlier Court of Appeal case of Dominion Brewery -v- Foster (77 L.T. 507) where during argument Lindley M.R. said at page 179:

> "The principle to be applied is that the security ought not to be illusory or oppressive - not too little nor too much".

He went on to refer to Lindley M.R.'s judgment where he said:

> "This case turns upon the true construction of sect. 69 of the Companies Act 1862, and the proper mode of applying it. It is obvious that, as a question of quantum such as this, you cannot lay down any very accurate principle or rule. The only principle which, as it appears to me, can be said to apply to a case of this kind is this, that you must have regard, in deciding upon the amount of the security to

be ordered, to the probable costs which the defendant will be put to so far as this can be ascertained. It would be absurd, of course, to take the estimate of the managing clerk to the defendant's solicitors and give him just what is asked for. You must look as fairly as you can at the whole case. We think that in the present case the security ordered by Kekewich J., ought to be increased by the sum of £250 which will make it up to the sum of £600 in all. We must take into account the chance of the case collapsing without coming to trial. On the whole we think that the sum of £600 is a reasonable one and is sufficient. The view we are taking is consistent with that expressed in the case of The Imperial Bank of China and Japan -v- The Bank of Hindustan, China and Japan, which seems to be the only case on the construction of sect. 69. The costs here and below must be costs in the action".

The trial judge then went on to say this:

"The reference in the judgment to the chance of the case collapsing is relied on by counsel for the builders because as he informed me, without dissent from counsel for the Brothers, the probability that after the legal argument before the arbitrator in May, the unsuccessful party will appeal to the Court of Appeal and that thereafter, as he put it, 'the situation will change'. It seems to me that this is a possibility which can properly be considered when fixing security, particularly as a further application could always be made if necessary, although how far such consideration can be translated into arithmetical terms is problematical. I regard the relevant dictum of Lindley M.R., as meaning that the court should, or at any rate may, order somewhat less than if there seemed to be every prospect that the case would be fought to a finish".

The present case shows no sign of settling. We must assume that it will come to trial. We will turn in due course to the question of the Defendants' bill of costs which includes costs incurred and costs estimated. Advocate Mourant made a scathing attack on those costs, criticising the Defendants for the lengths to which they have gone and are prepared to go in

order to defend the action. We understand that criticism. An example was drawn between David and Goliath. It must be said that a successful action for negligence against professional men on a Trust matter in a finance industry such as that in Jersey could have serious implications for these Defendants. We can see that they are prepared to leave no stone unturned in settling their defence. It does occur to us that had they had any doubts that they might have been in the wrong then by now they would have attempted to settle the matter. Whether because of their diligence the Plaintiffs should have to put up security for costs in the amount that they claim is quite a different matter.

We have impecunious Plaintiffs. We have to strike a balance of fairness. In Pearson & Another -v- Naydler & Others (1977) 3 All E.R. 531 Megarry V.C. said at page 533:

> "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"."

Again this was an action which required interpretation of Section 447 of the Companies Act 1948 which reads as follows:

> "Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge 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 costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until security is given".

The position is not the same as here but as we have to decide a matter where we can derive no assistance from the rules themselves. The arguments of the Vice Chancellor are therefore of great assistance.

Megarry J., went on to say at page 537:

> "It is inherent in the whole concept of the section that the court is to have power to do what the company is likely to find difficulty in doing, namely, to order the company to provide security for the costs which ex hypothesi it is likely to be unable to pay. At the same time, the court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company. For this reason, Mars-Jones J., was not prepared in the Parkinson case to make an order for security for costs for more than £1,500 that the master had ordered. As against that, the court must not show such a reluctance to order security for costs that this becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company. Litigation in which the defendant will be seriously out-of-pocket even if the action fails is not to be encouraged. While I fully accept that there is no burden of proof one way or the other, I think that the court ought not to be unduly reluctant to exercise its power to order security for costs in cases that fall squarely within the section. In the end, looking at the matter as a whole, I have reached the conclusion that, on balance, I ought to make an order for security for costs".

The Deputy Judicial Greffier considered the matter carefully in his judgment. At page 4 he says:

> "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".

We cannot find anything to criticise in that statement. We agree that this is a case where security for costs should be ordered.

We took the opportunity of examining the estimates of costs submitted by the Defendants (and we propose to ignore the amount of the counterclaim which both counsel agreed was applied by the Deputy Judicial Greffier in error).

These costs are divided into Vibert's costs, the Defendants' own costs and those costs of the Defendant which include English counsel's fees culminating in counsel's attendance at the Hearing for seven days at £1,000 per day.

Much argument centered around the case of Procon (G.B.) Ltd -v- Provincial Building Company Limited (1984) 2 All E.R. 368. In that case Griffiths L.J. said at page 379:

> "I agree that this appeal should be dismissed and I only venture to add a few words of my own because a note in The Supreme Court Practice has stood unchallenged for 20 years.
> This appeal requires the court to decide whether, on an application for security for costs under RSC Ord 23, r 1(1), the court is entitled to award security for costs in the sum which the court estimates the applicant would recover on taxation on a party and party basis, or whether, at least in the Queen's Bench Division, the court is limited by a longstanding practice to awarding no more than two-thirds of that sum. The first and second defendants submit that the court is limited to awarding two-thirds of the estimate of the taxed costs. Their argument is largely founded on the note to Ord 23 in The Supreme Court Practice 1982 Vol. 1, p.440, para 23/1-3/22, which has already been read by Cumming-Bruce L.J., and which has stood unaltered since 1964.. No authority was cited in support of the note and, as Cumming-Bruce L.J.'s review of the authorities has demonstrated, no support of the case can be derived from authority.
> Having heard of the researches of counsel for the plaintiffs in the masters' corridor, I am not myself persuaded that a two-thirds fixed practice in fact exists, but if it does I am satisfied that it is time it stopped. I can see no sensible reason why the court should not order security in the sum which it considers the applicant would be likely to recover on taxation on a party and party basis if the court considers it

just to do so. This, as I understand it, is the practice of the judges in the Commercial Court and it is a practice that ought to be followed in the rest of the Queen's Bench Division. It is, of course, for the party seeking an order for security to put before the court material that will enable the court to make an estimate of the costs of the litigation. In the normal course of things, it is to be expected that the court will, to some extent, discount the figure it is asked to award. Allowance will have to be made for the unquenchable fire of human optimism and the likelihood that the figure of taxed costs put forward would not emerge unscathed after taxation. It is to be observed in the present case that it was this element that led Bingham J., to make a substantial discount in the order of 19 per cent. If the estimate includes future costs, these discounts may be large to allow for the possibility of the settlement of the litigation and this will be particularly so if application is made at the commencement of the litigation and costs are assessed on the assumption that the litigation will proceed to a final trial. In such cases it may be sensible to discount by as much as one-third and I strongly suspect myself that, because some of the masters were doing this where they were asked to estimate security at a very early stage, the note in The Supreme Court Practice emerged in its present form.

Furthermore, if very little information is put before the court on which it can estimate costs, then again it will be reasonable to make a large discount, particularly when it is borne in mind that, if the security proves inadequate as litigation progresses, it is always possible for a further application to be made for more security.

But, having said that, it would be quite wrong, in order to avoid the mental discipline involved in examining the particular facts of the case to determine what is a just figure, to apply a rule of thumb and just reduce every estimate by one-third to avoid trouble, and if any such practice has been insidiously developing it is, as I say, time that it was stopped".

The White Book still, however, talks of the "conventional approach" and indeed in D.B. Installations Ltd -v- Vaut Mieux Ltd and Others unreported 87/36 (15th July 1987) a case which was not on either parties' bundle, the Judicial Greffier is still looking at the "conventional approach"

before making further adjustments.

Advocate Mourant went to some lengths to explain that whilst in Jersey we have a fixed scale of costs there now exist in England only two types of costs: indemnity and standard. But there was still a difference before this change in England. In D.B. Installations -v- Vaut Mieux Ltd the Judicial Greffier discounted Jersey costs on a solicitor/client basis by one-third to bring them to a party and party basis. He had carried out the same exercise in Lindgren t/a Naval Productions -v- Jetcat Limited (1985-86) J.L.R. 66. In England where Procon was followed the Court would fix the costs at about two-thirds of the estimated party and party costs up to the stage of the proceedings for which security was ordered. We make this comment because the second ground of appeal settled by the Defendant reads:

> "The Deputy Judicial Greffier rejected the conventional approach of alloting two-thirds of an estimated party and party cost without adequate ground for departing from it. In the premises as he was unable to make a finding on the estimated party and party costs he could not establish all the relevant circumstances in which to exercise his discretion in order to reject the conventional approach"."

We do not believe that in this case a mathematical formula is necessary. Nor do we think it necessary to have a "conventional approach". Nor do we think it necessary to consider whether the advice of English counsel is an allowable cost (see the Official Solicitor -v- Clore and Others (1984) J.J. 81 C.A.). The Deputy Judicial Greffier went further than we are prepared to go today. He said (and he was to some extent following the judgment in Jetcat on this matter):

> "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".

He might have considered Order 62/12(11) which states that it is not usual to allow the expenses of experts who are not called as witnesses but merely attend the Court to advise counsel.

He based his decision in assessing only Messrs. Vibert's costs of £3,100 to cover discovery, preparation for trial and a five day trial and estimated their costs at £6,400. That sum he reduced to £4,000 because he did not wish his order to be oppressive.

That it seems to us is the very nub of this matter. The Deputy Judicial Greffier obviously examined the bills of estimated costs anxiously. He was right to do so. His conclusion, however, was that if he pushed the amount of security beyond £4,000 the Plaintiffs' genuine claim would have been stifled. Technical guidelines must fall away in clear circumstances such as these. We have been greatly helped by counsel. We are, however, confirmed in our view that £4,000 is a reasonable amount to order for security for costs in this particular case and we do not intend to disturb the Order of the Deputy Judicial Greffier.

Costs will be in the cause.

On preliminary point that Appeal from Judicial Greffier's Decision should be by way of Rehearing.

Royal Court Rules, 1982 (as amended): R.4/4; R.15/2(1).
R.S.C. O.58/1(2); O.23; O.25/1(2); O.62/12(11).
Halsbury's Laws of England (4th Edition), Vol 37, para 649.
The Official Solicitor -v- Clore and Others (1983) J.J. 43.
The Official Solicitor -v- Clore and Others (1984) J.J. 81 C.A.
Hoare and Company -v- Morshead (1903) 2 K.B. 359.
Evans -v- Bartlam (1937) A.C. 473.
Blundell -v- Rimmer (1971) 1 All E.R. 1072.
Broad St. Investments (Jersey) Ltd & Others -v- National Westminster Bank, plc and Others (1985-86) J.L.R. 6.

On the defendant's appeal.

R.S.C. O.23/1 - 3/29, O.62/12/10.
Porzelack K.G. -v- Porzelack (U.K.) Ltd (1987) 1 All E.R. 1074.
Aeronave S.P.A. -v- Westland Charters Ltd (1971) 3 All E.R. 531.
Procon (G.B.) Ltd -v- Provincial Building Company Limited (1984) 2 All E.R. 368.
Lindgren -v- Jetcat Limited (1985-86) J.L.R. 66.
Dominion Brewery -v- Foster (77 L.T. 507).
Republic of Costa Rica -v- Erlanger (1876) 3 Ch. D. 62.
Yorke Motor -v- Edwards (1982) 1 W.L.R. 444.
re Testament Crane (1960) 1 P.D. 186.
The Official Solicitor -v- Clore (1983) J.J. 43.
Sloyan and Sons Builders Ltd -v- Brothers of Christian Instruction (1974) 3 All E.R. 715.
Pearson & Anor -v- Naydler & Ors (1977) 3 All E.R. 531.
Davest Investments Ltd -v- Bryant (1982) J.J. 213.
Sir Lindsay Parkinson and Company Limited -v- Triplan Limited (1973) 2 All E.R. 273.
Solicitors Qualifying Examinations (Jersey) Rules 1973 (R & O 5788).
D.S.Q. Property -v- Lotus Limited (1987) 1 W.L.R. 127.

Companies Act 1948 s.447.

Allen & Others -v- Jambo Holdings Limited & Ors (1980) 2 All E.R. 502.

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

D.B. Installations Ltd -v- Vaut Mieux Ltd: 1987 Unreported 87/36 (15/7/87).