19 pages.

23rd January, 1991

17.

Before the Judicial Greffier

BETWEEN	Fundinco Limited	PLAINTIFF
AND	Atlantic Computers plc	DEFENDANT
	(by original action)	
	AND	
BETWEEN	Atlantic Computers plc	PLAINTIFF
AND	Fundinco Limited	DEFENDANT
	(by counterclaim)	

SUMMARY

Application by the plaintiff and defendant in the counterclaim under Rules 4/1(4) and (5) for the defendant and plaintiff in the counterclaim to be ordered to pay security for the costs of the counterclaim up to the close of pleadings.

Advocate W.J. Bailhache for Fundinco Limited (hereinafter referred to as "Fundinco").

Advocate J.G.P. Wheeler for Atlantic Computers plc (hereinafter referred to as "Atlantic").

JUDGMENT

JUDICIAL GREFFIER:

Rule 4/1(4) reads -

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

Rule 4/1(5) reads -

"A plaintiff for the purposes of paragraph (4) of this Rule is a person

(however described) who is in the position of plaintiff in the proceedings in question, including proceedings on a counterclaim".

There is no doubt in this case that Atlantic is the plaintiff in the counterclaim in this action. There is also no doubt that Atlantic is resident out of the jurisdiction and has no assets in the jurisdiction other than the monies which are the object of the claim brought by Fundinco.

However, the question arises as to whether or not I should apply the principles which are used in England in relation to counterclaiming defendants. It is a well established principle that the criteria upon the basis of which security for costs are ordered in Jersey are wider than the very clearly defined criteria set out in Order 23 Rule 1 of the Rules of the Supreme Court 1965, as amended.

However, in this case neither counsel gave me any reasons why I should vary from the English practice and I am proposing to adopt the same in the absence of any clear differing practice in Jersey as the English practice appears to me to be good practical law. I also do so in the knowledge that the wording of Rule 4/1(5) is very similar to that of Order 23 Rule 1(3) as both refer to a person who is in the position of plaintiff, in the proceeding or proceedings in question, including a proceeding or proceedings on a counterclaim.

I quote now from section 23/1-3/8 on page 415 of the 1991 White Book, as follows -

"Counterclaiming defendant resident abroad - The mere making of a counterclaim does not put the defendant in the position of plaintiff under r.1(3); the question is whether, in the particular case, the counterclaim is a cross-action or operates as a defence. Where a claim and counterclaim arise out of different matters, so that the counterclaim is really in the nature of a cross-action, the defendant, if resident out of the jurisdiction, may be ordered to give security (Sykes v. Sacerdoti (1885) 15 Q.B.D. 423: and see Lake v. Haseltine (1885) 55 L.J.Q.B. 205; The Julia Fisher (1877) 2 P.D. 115; The Newbattle (1885) 10 P.D. 33, where he was a foreign sovereign); but where the counterclaim arises out of the same matter, and is in fact the defence to the action, the Court will ordinarily refuse to order the defendant, resident out of the jurisdiction, to give security for costs (Neck v. Taylor [1893] 1 Q.B. 560). Thus, where a counterclaim arises out of the same subject matter as the claim and can properly be relied upon as a set-off, the counterclaiming defendant ought not to be required to give security for costs of the counterclaim unless there are exceptional circumstances (Ashworth v. Berkeley-Walbrook Ltd., The Independent, October 9, 1989, C.A.). In Mapleson v. Masini (1879) 5 Q.B.D. 144, where a plaintiff sued for breach of contract, and the defendant, a foreigner, resident abroad, counterclaimed in respect of breaches of the same contract, it was held the defendant could not be compelled to give security. But each case must be judged on its own merits, and security for costs of a cross-action may be ordered where the claims therein set up are quite independent of the matters in question in the original action (New Fenix, etc., Co. v. General Accident, etc., Corp. [1911] 2 K.B. 619). As to security for damages in

the Admiralty Court, see The James Westoll [1905] P.47, C.A. As to staying proceedings in collision actions until security given, see O.75, r.27. Where the plaintiff obtains a Mareva injunction against defendants resident abroad for a sum exceeding the amount of the costs of the counterclaim by the defendants, the defendants are in the same position as a plaintiff resident abroad who has substantial assets in this country, and therefore the Court will refuse to make an order for security for costs in favour of the plaintiff against the defendants in respect of such counterclaim: Hitachi Shipbuilding & Engineering Co., Ltd. v. Viafiel Compania Naviera S.A. [1981] 2 Lloyd's Rep. 498, C.A.

Where both the plaintiff and the counterclaiming defendant reside out of the jurisdiction, and the counterclaim arises out of the same transaction and raises the same basic issues as the claim, both parties should be treated alike in relation to security for costs, since it would be mere chance which party would be plaintiff and which defendant, and therefore the Court should order the plaintiff to give security for costs in respect of the claim, and also order the counterclaiming defendant to give security for costs in a similar amount in respect of the counterclaim (The Silver Fir [1980] 1 Lloyd's Rep. 371, C.A.)."

The case of Ashworth -v- Berkeley-Walbrook Ltd. deals in detail with a number of principles which arise in relation to this case and I am going to quote various sections therefrom as follows -

(a) Beginning with the fourth paragraph on page four of the Judgment.-

"Mr. Leonard bases his submission on a number of authorities.

First, I refer to the case of Neck v. Taylor [1893] 1 Q.B. 560. Lord Esher MR in the Court of Appeal said this:

"The Rule laid down by the cases seems to be as follows. Where the counter-claim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be treated as if that person were a plaintiff, and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counter-claim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded, the Court will not, merely because the party counter-claiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counter-claim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly. Therefore, the Court in that case will have a discretion".

In New Fenix Compagnie Anonyme D'Assurances de Madrid v General Accident Fire and Life Assurance Corporation Limited [1911] 2 KB 619 at page 625 Lord Justice Vaughan Williams said this:

"In my judgment, in this matter of ordering security for costs to be given by a foreigner residing out of the jurisdiction, who, either as plaintiff in a cross-action, or as defendant by a

counter-claim, is setting up a cross-claim, there is no hard and fast rule as to what the circumstances are under which an order for giving security ought to be made. It may be said generally that, if a defendant resident out of the jurisdiction is simply setting up some claim by way of defence to an action, he ought not to be required to give security. On the other hand it may be taken to be the practice that, if such a defendant is simply bringing a cross-action having nothing to do with the transaction which forms the subject-matter of the claim against him, then the mere fact that he is a defendant in the previous action does not prevent an order being made against him for security for costs. If, in truth and in fact, he is not only a defendant, but is bringing an action which is quite independent of the transaction out of which the claim against him arises, then, generally speaking, he ought to be ordered to give security for costs. It has been suggested that, whenever the cross-claim made by such a defendant goes to any extent whatever beyond mere matter of defence, then, whether he sets up the claim as plaintiff in a cross-action or as defendant by way of counter-claim, he ought to be ordered to give security for costs. I do not agree to that suggestion. It appears to me plain on the cases such as Macgregor v Shaw and Mapleson v Masini, that there is no such rule as that, where in such cases the cross-claim to any extent whatever overlaps mere defence, security for costs must always be ordered. One must look in each case to see whether in substance the claim set up by a defendant is set up by him by way of defence to the claim

against him. I do not say that the true test is that which was suggested in the case of Wild v Murray, which was cited to us, i.e. that one must ask oneself the question whether the cross-claim would have been set up if the original claim had not been brought, though the learned Judge who made that suggestion was a great judge, namely, Wood V.-C., afterwards Lord Hatherley LC. As I have said, I do not think that there is any hard and fast rule on the subject. We have to consider whether, in substance upon the facts of the particular case, the defendants in the original action are to such an extent plaintiffs in the cross-action, that they ought according to the general practice in the matter to be ordered to give security for costs, because they have taken up the position of plaintiffs, irrespective of defence to the original action. I think that each case of this kind must be judged on its own merits."

The matter was succinctly put by Lord Justice Scrutton in the case of Maatschappij Voor Fondsenbezit and another v Shell Transport and Trading Company and others [1923] 22 QB 166 at page 176. He said this:

"The case, however, may raise an important question as to the circumstances under which a foreign defendant can be ordered to give security for the payment of costs awarded against it. The general rule as stated by Brett MR in Tomlinson v Land and Finance Corporation is that a defendant shall not be compelled to give security for costs, the reason being that he is required to attend at the suit of the plaintiff, and if the plaintiff

chooses to sue the defendant where he has no property, that is the plaintiff's concern. This is carried so far that a foreign defendant counterclaiming is not required to give security for the costs of his counterclaim so long as it arises out of the same transaction as the claim: Mapleson v Masini and Neck v Taylor. It is otherwise if the counterclaim arises out of a different and fresh transaction: New Fenix Co v General Accident Co."

In Visco v Minter [1969] P 82, [1969] 2 All ER 714, Mr. Justice Ormrod (as he then was) said this at page 85 D:
"There is no dispute as to the basic principles which are clearly set out in the judgment of Scrutton LJ in what I might call the Shell Transport and Trading case [1923] 2 KB 166, 176 et seq. The court will not order a defendant resident abroad to give security for the plaintiff's costs because the plaintiff has chosen to institute the suit against him in this country where he has no assets. The defendant is entitled to defend himself here without the added embarrassment of having to find security for the plaintiff's costs. So, if the defendant wishes to raise a counterclaim by way of defence, he is allowed to do so without incurring the liability of having to provide security for the costs of the counterclaim. But this Rule is subject to certain limits, because otherwise it would enable a defendant, sued in this court, to bring a cross-action about something quite different. Where the counter-claim or cross-action raises the matters quite outside the plaintiff's claim, the defendant will be treated as a plaintiff so far as the cross-action is

concerned and may be ordered to find security for costs: see New Fenix Compagnie v General Accident Fire & Life Assurance Corporation Ltd [1911] 2 KB 619. The principle seems to me to be that where a defendant counter-attacks on the same front on which he is being attacked by the plaintiff, it will be regarded as a defensive manoeuvre. But if he opens a counter-attack on a different front, even to relieve pressure on the front attacked by the plaintiff, he is in danger of an order for security for costs depending upon the court's assessment of the position in each case."

(b) Beginning with the third paragraph of page six of the Judgment - "Mr. Marks has relied upon two authorities, the first being City of Moscow Gas Company v International Financial Society (1871) 7 Ch AC 225. The Court of Appeal ordered security to be provided by a company which was in liquidation, the fact that it was in liquidation being prima facie evidence that it could not meet the costs. In that case the defendant Society had filed a bill to foreclose a mortgage on the Moscow company's effects. In separate proceedings the Moscow company had been granted leave to file a bill against the Society to declare that the mortgage was not binding. The court regarded the proceedings by the Moscow company as not a mere cross-bill or defence on the original suit. The Master of the Rolls at page 227 expressed the view that, even if the bill was strictly a cross-bill, nevertheless the court had a discretionary power to grant security, but he expressed the view that he did not think it was

a mere cross-bill -- in other words a mere defence -- so, therefore, his opinion on that matter was obiter. When the matter came to the Court of Appeal Lord Justice James clearly treated the matter on the basis that it was not a mere cross-bill and not therefore a mere defence to the original suit.

In the case of Pure Spirit Company v Fowler [1890] 25 QBD 235 a shareholder brought an action in the Chancery Division to set aside a contract on the grounds of fraud in the prospectus. While that action was pending but not being pursued, the company brought an action in the Queen's Bench Division for calls, the company being in liquidation. Mr. Justice Denman did not refer to the question of cross actions at all. He treated the matter simply as being one in which prima facie, the company being in liquidation, it was under an obligation to give security for costs. Mr. Justice Charles agreed with that opinion, but at page 238 he said this:

"In the case to which I referred, James, LJ substantially repeats his previous observation in the case of City of Moscow Gas Co. v International Financial Society. In that case an attempt was made to escape an order for security for costs on the ground that the plaintiff's bill was a cross bill. In the present case also it is contended that the action brought by the company is a cross action; but I do not think that these are cross actions, for in the action in the Chancery Division the company could not set up their claim for calls as a defence to the action. I do not see, therefore, how these can be said to

be cross actions; but even if they are, I am of opinion that the case of City of Moscow Gas Co v International Financial Society is in point; for the Master of the Rolls there said that security for costs ought always to be ordered where the company is in liquidation, and there is nothing to shew that the assets will be sufficient to pay the defendant's costs if he is successful..."

With all respect, it seems to me that that passage is obiter and cannot stand in the light of the subsequent authorities to which I have referred."

(c) Beginning with the third paragraph on page seven of the Judgment -

"The learned Judge plainly did not deal with the matter on that basis. He considered that he had a complete and unfettered discretion as to how the matter should be dealt with. In my judgment, where the counterclaim can be relied upon as a defence -- as plainly it can here because it is relied upon, and properly relied upon, as a set-off -- and where it arises out of the same matter in the transaction, then the general rule is that the counterclaiming defendant ought not to be required to give security for costs unless there are some exceptional circumstances which make it just for him to do so."

(d) Beginning with the third paragraph on page eight of the Judgment-

"The starting point in a case of this kind must be to look at the subject matter of the claim and then to consider whether the counterclaim and the facts supporting it are so inextricably bound up with the claim and its facts that, in reality if not in form, the counterclaim amounts to a defence. If it does, then, although a discretion remains, it should be exercised against making an order for security for costs unless there are exceptional overriding circumstances. Conversely, where the cross-claim is entirely separate and independent of the facts of the claim, the general rule must be to the opposite effect."

(e) Beginning with the sixth paragraph on page eight of the Judgment –

"I add only this. The fact that the quantum of the counterclaim exceeds the claim is not to the point and I echo the sentiments expressed by Mr. Justice Manisty in Mapleson v Masini [1879] 5 QBD 144 (not, incidentally, cited to the learned judge) at page 148:

"It appears that the damages claimed by the defendant are less in amount than those claimed by the plaintiff. But the amount of damages is merely incidental to the counterclaim. It is urged that the defendant ought to give security to the extent of the costs occasioned by the counter-claim, and Lindley J made an order accordingly. With the greatest respect to that learned judge, it seems to me an extraordinary result that, both claims

> arising out of the same transaction, if the defendant had claimed in his counter-claim an amount equal to the plaintiffs' claim he need give no security, but if he claims a different amount he must give security. This would be introducing a principle never before acted on either in courts of law or equity".

I turn now briefly to the facts of this case. The action arises out of a share acquisition agreement entered into between the parties to this action. Associated with the share acquisition agreement was a deed of indemnity and a security interest agreement under which a sum of two million five hundred thousand pounds sterling were deposited in an account with National Westminster Bank in Jersey by the plaintiff but in the name of the defendant subject to the terms of the security interest agreement. There can be no doubt that the share acquisition agreement, the deed of indemnity and the security interest agreement were all one transaction. Under the terms of the security interest agreement, the defendant covenanted to transfer the capital sum of two million five hundred thousand pounds back to the plaintiff on 2nd January 1989 if notice had not been given on any claims properly due under any of the agreements. The plaintiff's argument was that no such notice had been given by that time and that the defendant had failed so to do and that the monies ought to have been transferred back on that date. However, the defendant has pleaded that on 16th January, 1989, 17th January, 1989 and 27th March, 1990 by various letters notice was given of various claims under the agreements which together amounted to a sum well in

excess of the two million five hundred thousand pounds. Advocate Bailhache on behalf of the plaintiff argued that his client's claim was one matter and that the counterclaim was a different matter which should therefore be treated as if it were a cross-action rather than as if it were a defence. I find this argument rather artificial as the monies in the bank account were clearly placed there in order to secure liabilities under the share acquisition agreement and the deed of indemnity and as the notification by letter in the first two cases, at least, was only a fortnight after the date in January, 1989. I take the view that all these transactions together essentially form one transaction and agreement.

Advocate Bailhache's next line of argument was that the amount of the counterclaim so greatly exceeds the amounts of the plaintiff's claim that it ought to be treated as if it were a cross-action. However, it appears to me that this flies in the face of the following sections of the Ashworth v Berkeley-Walbrook Limited case which I have already quoted:-

(i) The section beginning on line three of page five with the words, "It has been suggested that," and ending at the end of the first paragraph on page five with the words, "on its own merit";

(ii) The section beginning with the sixth paragraph on page eight of the Judgment with the words, "I add only this." and ending with the words, "law or equity."

It appears to me that in addition to the principles set out in those sections that there is a good practical reason in this case for taking this view. Security for costs in such a case as this is sought in order

to safeguard the plaintiff in the original action against the failure of the counterclaim. In this case if the counterclaim succeeds for an amount in excess of the original claim then there is no need for security for costs. However, if the counterclaim succeeds for any amount at all then that amount will effectively provide security for costs. Alternatively, if the counterclaim fails altogether then it will also have failed as a defence and therefore as security for the costs of a defence are not applicable they should not be ordered. In a case like this, where the counterclaim and original claim are closely tied together, the counterclaim operates as a defence to the claim up to the value of the claim and to that extent is not subject to an application for security for costs. To hold otherwise, would leave the Court in the impossible position of having to distinguish between costs which would have been incurred in any event if the counterclaim had been kept down to the value of the claim and costs above that amount. In a case such as this where there are a large number of separate claims for tax etc., the success of any one or more of them would operate as a partial or total defence to the original claim.

Advocate Bailhache's third line of approach was to argue that even if I found as I have found, there were certain special circumstances which would allow me to operate outside the general rule and his lines of argument were as follows:-

(a) that because the money really belonged to Fundinco, and because Atlantic had taken no positive proceedings anywhere, Fundinco had been forced to commence proceedings whereas it was in reality a defendant in relation to the claims of Atlantic

under the share acquisition agreement and the indemnity. It appears to me that the reality of the situation is that the monies as presently held by Atlantic but subject to the security interest agreement are in a sort of state of escrow with each party needing to take some form of action in order to resolve the situation. It is Fundinco who has chosen to take such action and he chose so to do in Jersey, presumably on the basis that the money was here, and this notwithstanding the fact that the share acquisition agreement and the deed of indemnity were governed by English Law. It appears to me that Fundinco is the plaintiff and that it has chosen a venue where Atlantic has no assets other than any rights to the monies in the National Westminster Bank account and this in the clear knowledge that Atlantic would obviously counterclaim. I therefore rejected that line of argument.

(b) Upon the basis that Atlantic is bankrupt. This appears to be so on the face of the pleadings. The applicable section of the Ashworth Judgment is that which I quoted beginning with the third paragraph on page six, with the words "Mr Marks has relied" and ending with the words, "authorities to which I have referred." It appears to me that the learned Judge in that case is indicating that the Moscow case and the Pure Spirit Company case have been overtaken by subsequent cases. It therefore appears to me to be a matter of discretion as to whether or not I treat bankruptcy as a special circumstance. In England there is statutory provision for a bankrupt company to be ordered to

pay security for costs even if it is not resident out of the jurisdiction. However, even there that will be subject to the principle relating to a counterclaim which is essentially by way of defence. It appears to me that the principle of a counterclaim by way of a defence is the overriding principle in this case and that once I found that this applied in this case, it would be wrong for me to hold that bankruptcy in itself was a special circumstance. It appears to me that if security for costs is not applicable because the counterclaim is essentially a defence then the bankruptcy or non-bankruptcy of the defendant is irrelevant.

(c) The third line of argument was on the basis that by continuing to hold the money under the security interests agreement the defendant was in a position as if it had an injunction without having given any undertaking in damages. I found this ground to be completely irrelevant as security for costs is a totally different matter to security for an undertaking in damages and as the sum of two million five hundred thousand pounds sterling was clearly deposited subject to the security interest agreement as security for the types of claims which are being brought by Atlantic.

Thus I was unable to find any special circumstances and my decision is that security for costs are not approprite in this case. I also take the view that the costs of the application should follow the event and that therefore that Fundinco should be ordered to pay the taxed costs

of Atlantic of and incidental to the application for security for costs.

Finally, if I had made a different decision then the actual quantum of security for costs would have raised a number of interesting points as matters of English Law and Dutch Law and accountancy are raised in the action and the costs of English solicitors, English counsel and accountants together with the costs of Dutch lawyers and accountants were being sought. However, anything which I might wish to say on those questions would be strictly obiter and time constraints prevent me from considering the matter on that basis.

AUTHORITIES.

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RSC (1991 Ed'n): 23/1-3/8

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