

ROYAL COURT  
(Samedi Division)

167.

30th November, 1993

Before the Judicial Greffier

**BETWEEN** Jubilee Scaffolding Company Limited **PLAINTIFF**

**AND** Mark Amy Limited **DEFENDANT**  
(by original action)

**AND**

**BETWEEN** Mark Amy Limited **PLAINTIFF**

**AND** Jubilee Scaffolding Company Limited **DEFENDANT**  
(by counterclaim)

Application by the Plaintiff in the original action (hereinafter referred to as "Jubilee") for security for costs in relation to the counterclaim of the Defendant in the original action (hereinafter referred to as "Mark Amy").

Advocate R.G.S. Fielding for the Plaintiff in the original action  
Advocate R.J. Michel for the Defendant in the original action

**JUDGMENT**

**JUDICIAL GREFFIER:** The Plaintiff is a scaffolding firm and the Defendant is a building contractor. On 7th August, 1992, an action was brought before the Royal Court by simple Summons in which Jubilee was suing Mark Amy for the provision of scaffolding and temporary roof structures and the action was placed on the pending list. On 12th November, 1992 Jubilee filed Particulars of Claim and on 2nd December, 1992 Mark Amy filed an Answer and Counterclaim. The Counterclaim relates to the same contracts but in it damages are claimed in relation to alleged breach of contract or negligence which total £212,895.87. On 24th February, 1993, Mark Amy was given leave to file an amended Answer and Counterclaim in which it claimed that it was entitled to set off the claims in its Counterclaim against the claims in the original action.

Subsequently, Mark Amy was declared *en désastre*.

Under the terms of Article 8(1) of the Bankruptcy (Désastre) (Jersey) Law 1990 all the property and powers of the debtor vest in the Viscount immediately upon the making of the declaration. The property involved comprises all property belonging to or vested in the debtor at the date of the declaration and the term "property" is defined in Article 1(1) as meaning land, money, goods, things in action, goodwill, and every valuable thing, whether movable or immovable, and whether situated in the Island or elsewhere and also means obligations, servitudes, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property.

It therefore appears to me that the right of action set out in Mark Amy's counterclaim has vested in the Viscount. Article 26 of the Bankruptcy (Désastre) (Jersey) Law, 1990 sets out the general powers of the Viscount and Article 26(b) reads as follows:-

***"The Viscount may bring, institute, or defend any action or other legal proceedings relating to the property of the debtor whether situated in the Island or elsewhere;"***

Article 10 of the Bankruptcy (Désastre) (Jersey) Law, 1990 reads as follows:-

***"Prohibition of pursuing alternative remedies after declaration.***

***With effect from the date of the declaration no creditor to whom the debtor is indebted in respect of any debt provable in the "désastre" shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or legal proceedings to recover the debt."***

In this case, in which both the action and the counterclaim had been commenced prior to the *déclaration en désastre*, the Viscount has decided to allow the existing proceedings to continue in order to save the costs that would be involved if the claim in the original action had been turned into a claim in the *désastre* which he had refused. I make no comments as to whether this is procedurally correct in the light of Article 10. However, it is abundantly clear that this is now an action between Jubilee on the one hand and the Viscount acting in the *désastre* of Mark Amy on the other hand.

Jubilee has a whole number of difficulties to overcome before it will be able to obtain an Order for security for costs.

Rule 4/1(4) and (5) of the Royal Court Rules, 1992, as amended, read as follows:-

**"(4) Any plaintiff may be ordered to give security for costs.**

**(5) 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."**

On page 2 of Fundinco Limited -v- Atlantic Computers plc (23rd January, 1991) Jersey Unreported, I considered the question as to whether or not I should apply the principles which are used in England in relation to applications for security for costs in relation to counterclaiming defendants. I decided so to do in the absence of any clear differing practice in Jersey from the English practice as the English practice appeared to me to be good practical law and as 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.

In the Fundinco case I set out, at some length the English authorities.

However, in England there has been a more recent Judgment in the Court of Appeal concerning this very point, namely Hutchison Telephone (UK) Limited -v- Ultimate Response Limited [1993] BCLC 307. This case was decided on 10th August, 1992 but has not been mentioned in the 1993 White Book nor in any of the supplements thereto to date. In this case the previous cases were reviewed.

I am going to quote a number of sections from that Judgment as follows:-

(a) from page 310, commencing just below g -

**"In the Supreme Court practice 1991, note 23/1-3/8, at the foot of p 415, it is said against the rubric '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.'**"

(b) from page 311 beginning at section e where there is a quotation from the case of Neck -v- Taylor [1893] 1 QB 560 at page 562 as follows:-

**"Where, however, the counterclaim 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 counterclaiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counterclaim 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."*

(c) from the top of page 313 as follows -

*"The question is whether in the particular case the counterclaim is a cross-action or operates as a defence, that is to say merely operates as a defence."*

(d) from page 314 below g as follows -

*"Incidentally asking for damages arising out of the same transaction is a different matter to putting forward a substantive cross-claim which will stand on its own and goes beyond being a mere defence, which has lost the essentially defensive character of a mere defence. If one is considering whether the counterclaim is indeed a mere defence or a cross-claim in its own right which might well stand and be proceeded with even though the original claim was abandoned, the marked discrepancy in size between the amount claimed in the action and the very much greater amount claimed by the cross-claim must be, in my judgment, a relevant factor.*

*One has therefore to look at the nature of the counterclaim and I therefore turn to that."*

I do not propose to set out section 23/1-3/8 of the 1993 White Book in full because the Hutchison case has, in my opinion somewhat clarified the situation.

In this case, there is a claim in the original action for just under £14,000, much of which is accepted subject to the right of set off, and a counterclaim for £212,000. Furthermore, although the original claim and the counterclaim arise out of the same contracts, the counterclaim, in my opinion goes well beyond being a mere defence and has lost the essentially defensive character of a mere defence and acquired the character of a cross-claim. Accordingly, Jubilee has crossed the first hurdle of establishing that Mark Amy is in the position of a Plaintiff in relation to the counterclaim.

The next obstacle which Jubilee has to overcome is the obstacle of persuading me to exercise my discretion to Order security for costs by reason of the fact that Mark Amy is a company which will be unable to pay Jubilee's costs if it is successful in the defence of the counterclaim.

In the case of D.B. Installations Limited v Vaut Mieux Limited (1987-88) JLR N.5, the Judicial Greffier exercised his discretion to order security for costs against such a company.

In the case of Heseltine v. Strachan & Co., (1989) J.L.R. 1, the Court clearly considered making an Order for security for costs against a Company but declined so to do as it was satisfied that sufficient assets were held by the Company.

I am satisfied from those cases that I have a discretion which I could exercise in favour of a party who was seeking an Order for security for costs against a Jersey company that would be unable to pay the applicant's costs if the applicant were successful in his defence and that that principle also applies to an application for security for costs against a counterclaiming company who is in the position of Plaintiff in the proceedings in question.

However, there is one further important factor which I need to consider in relation to the exercising of my discretion in this matter. That factor is that the counterclaiming party is effectively the Viscount acting in the *désastre* of Mark Amy. Contrary to the submissions of counsel in this case I have found that the terms of the Bankruptcy (Désastre) (Jersey) Law, 1990, and, in particular, Article 8, have the effect of vesting a claim in the Viscount. The current situation is therefore not that the Viscount is acting as the equivalent of the liquidator of a company but is that the claim of Mark Amy, which is represented by the counterclaim, has become vested in the Viscount.

Advocate Fielding submitted that in the eventuality of the counterclaim failing, any Order for costs against the Viscount, acting in the *désastre*, would rank merely as an unsecured claim. Advocate Michel did not deny this but I need to examine the position.

Article 32(1) deals with the order in which money received by the Viscount from the realisation of the property of a debtor should be applied and the first category is as follows:-

**"(a) in payment of the Viscount's fees and emoluments and all costs, charges, allowances and expenses properly incurred by or payable by the Viscount in the "désastre";".**

I have to ask myself the question as to whether Jubilee's costs in resisting the counterclaim would fall within this category. If they do then in this case the Viscount will have sufficient assets to pay the costs of Jubilee in relation to the counterclaim and this application must fail. If it is proper for the Viscount to bring this action, and that would appear to be so under Article 26(b) then in my view legal costs of Jubilee in defending the counterclaim would be costs or charges payable by the Viscount in the *désastre*.

Accordingly, I am dismissing the application for security for costs as there is no reason to fear that Jubilee's costs would not be paid by the Viscount.

I will need to be addressed in relation to the costs of and incidental to the application.

Authorities

Royal Court Rules 1992: 4/1 (4)(5).

Davest Investments Limited -v- Bryant (1982) JJ 213.

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

D.B. Installations Limited -v- Vaut Mieux Limited (1987-88) J.L.R. N.5.

Heseltine & Others -v- Egglisshaw & Others (1989) J.L.R. 1.

R.S.C. (1993 Ed'n) O.23/1-3/14.

Sir Lindsay Parkinson & Co. Ltd. -v- Triplan Ltd (1973) 2 All ER 273.

Pearson & Another -v- Naydler & Others (1977) 1 WLR 899.

Bankruptcy (Désastre) (Jersey) Law 1990.

Hutchison Telephone -v- Ultimate Response (1993) BCLC 307.

Neck -v- Taylor (1893) 1QB 560.

Lehrer McGovern International -v- Circle (1992) EGCS 140.

Aquila Design (GRP) Products -v- Cornhill Insurance (1988) BCLC 134.

Ashworth -v- Berkeley-Walbrook (9th October, 1989) "The Independent".

New Fenix Compagnie Anonyme d'Assurances de Madrid -v- General Accident (1911) 2 K.B. 619.

N.L.J. (1993) p.1258.

Jersey Steel -v- Regal Construction (1970-71) J.J. 1965.

Jersey Steel -v- Holdyne (1972) J.J. 2009.

Burnet -v- Francis Industries (1987) 1 W.L.R. 802.

Canada Enterpriises -v- MacNab Distilleries (1987) 1 W.L.R. 813.

M.S. Fashions -v- B.C.C.I. (1993) 3 W.L.R. 220.

Stein -v- Blake (1993) 3 W.L.R. 718.

Fundinco Limited -v- Atlantic Computers, P.L.C. (23rd January 1991) Jersey Unreported.