ROYAL COURT

(Samedi Division) 178.

13th September, 1995

Before: The Judicial Greffier

Between	Pacific Investments Limited	Plaintiff
And	Robert Christensen	First Defendant
And	Alison Mary Holland	Second Defendant
And	Michael Allardice	Third Defendant
And	Graeme Elliott	Fourth Defendant
And	Firmandale Investments Limited	Fifth Defendant
And	James Hardie Industries Limited	Sixth Defendant
And	James Hardie Finance Limited	Seventh Defendant
And	Govett American Endeavour Fund Limited	Eighth Defendant

Application of the First, Second, Third, Fourth and Eighth Defendants for security for their costs up to the hearing of their application for the striking out of the Order of Justice.

Advocate S.J. Willing for the Plaintiff;

Advocate W.J. Bailhache for the First, Second, Third, Fourth and Eighth Defendants;

THE JUDICIAL GREFFIER: The Eighth Defendant operates as an investment fund and the Plaintiff holds just under 5% of the shareholding as bare nominee for KBLP VII Inc. (hereinafter referred to as KBLP VII) which is in turn owned by the trustees of a charitable trust. KBLP VII owes 5.6 million dollars to a company which is

part of the Govett group of companies. The Order of Justice has broadly speaking two parts as follows:-

(1) the first part relates to the conduct of litigation in the United States between the Eighth Defendant and the Govett group of companies and others; and

(2) the second part relates to the question as to whether or not the directors of the Eighth Defendant, who are the First to Fourth Defendants, have acted properly in appointing a new investment management company and in taking steps towards the eventual liquidation of the assets of the Eighth Defendant.

The application for security for costs commenced before me on 29th August, 1995, and at the commencement of the application Advocate Willing, on behalf of the Plaintiff, made an application for an adjournment thereof. He based this application upon two grounds as follows:-

(1) That a revised estimated bill of costs had only been produced to him at the beginning of the hearing. He had previously received an estimated bill of costs up to the close of discovery but the revised bill of costs was now only up to the end of the hearing in relation to the striking out application. He indicated that he would wish to have time to consider this and that he might wish to file an affidavit in answer to the affidavit tendered by the First, Second, Third, Fourth and Eighth Defendants in support of the original bill of costs.

(2) The second ground was that the application should more appropriately be heard before the Royal Court which would, in any event, be dealing with other interlocutory matters and would be in a better position to decide, when so doing, whether the case of the Plaintiff was outstandingly strong or outstandingly weak. He also indicated that, whatever the decision I might make, an appeal would be likely by one or other party and suggested that the matter be remitted to the Royal Court to be dealt with at the same time as the Summons for directions which was to be heard by the Royal Court on September 8th, 1995. Advocate Bailhache opposed the application for an adjournment. He indicated that the Plaintiff's lawyers had already had prior notice of the intention to produce a revised estimated bill relating to costs for a more limited period. He also submitted that if the matter were to be left over as suggested then the hearing in relation to security for costs might well not take place before the application for striking out.

I indicated to both counsel that I was aware from private discussions in relation to procedural matters in the case that it was the view of either the Deputy Bailiff or Lieutenant Bailiff Le Cras or both of them that the application for security for

costs should be dealt with before me. It also seemed to me that the Plaintiff's lawyers would not need more than about one hour to consider the revised estimated bill of costs and, therefore, I indicated that after hearing matters of principle I would allow the Plaintiff's lawyers that time period to consider the revised bill. Accordingly, I refused the application for an adjournment. It actually turned out that the Plaintiff's lawyers had more than an hour to consider the revised bill during the luncheon adjournment.

Rule 4/1(4) of the Royal Court Rules, 1992, as amended, states simply:-

"any Plaintiff may be ordered to give security for costs".

That, in my view, imports a very wide discretion. The English provisions are somewhat different and Order 23 Rule 1(1) reads as follows:-

"1.-(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court -

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2) that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

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."

It seems to me that there are two parts to the requirements under Order 23 Rule 1 which are as follows:-

(1) that the case fall within one of the sub-paragraphs (a) to (d); and

(2) that the Court must think it just to order security for costs having regard to all the circumstances of the case.

In addition to the power under Order 23 Rule 1, in England, there is a statutory power in section 726 (1) of the Companies Act 1985 which provides:-

> *"Where in England and Wales a limited company is plaintiff in an action or other legal proceeding, the Court 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 defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."*

In Jersey, although we do not have detailed rules or any statutory provision as in England, certain principles have been followed in relation to such applications and one of those principles is that Jersey Courts make a clear differentiation between plaintiffs who are resident out of the Island and plaintiffs who are resident in the Island. In relation to the latter the general principle is that security for costs will not be ordered except for exceptional reasons. This is most clearly summarised on page 7 of Heseltine v. Strachan & Co (1989) JLR 1 and I now quote from the relevant section on page 7:-

> *"The second question can be disposed of at this stage. Reliance was placed upon Davest Invs. Ltd. v- Bryant where the Judicial Greffier said (1982 J.J. at 213-214):*
>
> *"....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, Offco Ltd., 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*

Ltd., which is beneficially owned by his firm, Mourant, du Feu & 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. 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 reasons."

We are satisfied that the second plaintiff has assets comprising gilts which have a value of some £12,500, £800 in cash, and 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 the second plaintiff."

It can be seen from the Heseltine Judgment and from the Davest case that the Court in Jersey is willing to treat the inability of a Plaintiff company to pay an order for costs as an exceptional reason although the Edwards case demonstrates that the Court must be satisfied that it is nevertheless just in all the circumstances of the case. In the Davest case 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. I quote now the final paragraph on page 214 of that Judgment which commences on page 213 of the 1982 Jersey Judgments and which reads as follows:-

"While maintaining the rule that the provisions of foreign statutes, with certain exceptions, cannot be applied to Jersey, it is possible to follow, as a guide-line in the judicial exercise of discretion, a principle that has become encapsulated in a foreign statute. In the case where the plaintiff is a company with insufficient assets to pay the costs of litigation, so that the litigation is financed by the beneficial owner, who could not personally be made liable for the defendant's costs if the action failed, it is just to order that the plaintiff should give some security for the defendant's costs. I therefore ordered the plaintiff to give security in the sum of £500, having first ascertained that this sum would not be oppressive."

The reference in the above quotation to statute was to section 447 of the Companies Act, 1948, which is the predecessor of section 726 (1) of the Companies Act, 1985. There is also a reference to the need for the order being just.

This case bears great similarities to Davest inasmuch as the Plaintiff is a company which has been set up in order to hold the shares in the Eighth Defendant as a nominee and the conduct of this litigation must be being financed by KBLP VII. I will come back later to the matter of the financing of the Plaintiff. It also seems to me that the Plaintiff is a type of nominal Plaintiff who is suing for the benefit of some other person and, therefore, would fall within the terms of Order 23 Rule 1(1)(b) if this application were being made in England. However, even if I am wrong on that point then it seems to me that the combination of nominee status on the one hand and the fact that the litigation is obviously being financed by the ultimate beneficial owner of the asset involved, makes this case into a situation in which there would be, subject to the question of finances, exceptional reasons.

I turn now to the matter of finances and the financing of the Plaintiff. The Plaintiff admits that it holds the shares as a nominee for KBLP VII and the Plaintiff was formed a matter of weeks before this action was commenced. Advocate Willing explained to me that this was because the shares in the Eighth Defendant had previously been held by a nominee, and as there had been a change in the trusteeship of the charitable trust and therefore the ownership of the shares in KBLP VII, it was not surprising that a new nominee company should be formed to hold this asset. Advocate Willing also told me that the nominee company was owned by Centurion Trust Company Limited. Nevertheless, on the face of it a company which has recently been formed would not have any assets. On the hearing on 29th August, 1995, Advocate Willing indicated that he believed that the Plaintiff could pay the sum of security for costs being sought namely £37,000 and he requested an adjournment in order to produce evidence in relation thereto. I made it clear to him that, although the information contained in any further affidavit would be a matter for his clients, I would want to know where this money had come from. On the resumption of the hearing on 30th August, 1995, Advocate Willing produced an affidavit of John Charles Ellis. Paragraphs 2 to 4 of that affidavit read as follows:-

> *"2. I confirm that Pacific currently has funds which are sufficient to meet an order for costs of up to £37,000. These funds are owned by Pacific in its own right and the company is absolutely entitled thereto.*
>
> *3. As Pacific is acting as a nominee for KBLP VII Inc. ("KBLP") the directors of Pacific have agreed with KBLP that henceforth, all time spent by the administrators of Pacific will be charged directly to KBLP. The effect of this is to reduce the total liabilities of Pacific, both present and future, to a nominal amount thereby ensuring that the majority of the monies referred to in paragraph 2 above will remain in Pacific's possession and will thus be available in*

the event of a cost order being made in the present proceedings.

4. Although, previously, legal fees incurred in prosecuting the present action have been rendered to Pacific, Messrs. Ogier & Le Masurier have now agreed with KBLP to render all further fees for work carried out by that firm direct to KBLP."

It is abundantly clear from this affidavit that Mr. Ellis is saying that these proceedings and the management of the Plaintiff are being financed by KBLP VII. However, the affidavit does not tell me where the £37,000 has come from. Is it a gift from KBLP VII or is it working capital provided from the Centurion Group. When was this money acquired. I am bound to ask the question "why have I not been told this"? When I granted the adjournment I made it clear to Advocate Willing that I wanted to know where any assets had come from. I am bound to say that there has been a singular lack of candour on the part of the Plaintiff in relation to this matter. The Plaintiff's argument in this respect is that, as it currently has monies to cover any cost orders which might be made up to the striking out application, I cannot make any orders for security for costs against it. However, the manner in which the Plaintiff's case has been conducted makes me very suspicious that assets may well have been transferred to the Plaintiff for the specific purpose of defeating the application for security for costs. That suspicion is reinforced by the fact that at an earlier interlocutory hearing Advocate J.A. Clyde-Smith, who then appeared for the Plaintiff, readily conceded that an order for security for costs was appropriate. I have a strong suspicion that something has happened to change that and that could well be a transfer of assets to the Plaintiff.

Advocate Bailhache pointed out with some force that although the affidavit of Mr. Ellis makes certain statements and although the third paragraph thereof appears to be saying that the present and future liabilities of Pacific will be merely nominal and thus most of the £37,000 will remain to cover any order for costs, nothing like a complete balance sheet was presented. The affidavit gives me the impression of having been very carefully and precisely drafted in such a way as to make statements which give a general impression but without specifically covering every possibility. In the case of a company which has somehow mysteriously acquired the sum of £37,000 without any explanation there must be a serious risk that that sum will disappear without any explanation. Furthermore, there is no guarantee that the Plaintiff will not become liable for further debts or claims either relating to this matter or otherwise. If, as I strongly suspect, assets have been transferred to the Plaintiff to defeat the application then that implies an ultimate intention to defeat the enforcement of any eventual order for costs.

It is part of the case of the First, Second, Third, Fourth and Eighth Defendants that in bringing the part of the action relating to the conduct of the legal proceedings against the Govett Group the Plaintiff is acting as a nominee of KBLP VII which in turn is acting on the instructions of the Govett Group. Advocate Willing showed me paragraph 13 of the affidavit of Mr. Ian Moore dated 20th July, 1995, which states that Centurion Trust Company Limited, the Trustee of the charitable trust which owns KBLP VII, has been careful to exercise an independent thought process in relation to this action. It is quite inconceivable that the Plaintiff, which merely holds as the nominee could exercise an independent mind to that of KBLP VII. As KBLP VII is indebted to one of the companies in the Govett Group to the tune of 5.6 million dollars and the current value of the shares is apparently 3 million dollars it seems to me to be very strange indeed that an apparently massively bankrupt corporate body (KBLP VII) should seek to bring complicated and expensive proceedings in Jersey which, if successful in stopping the proceedings in the U.S.A., will have the effect of ensuring that it remains bankrupt. It is not for me to decide the precise link between the Govett Group and the Plaintiff but I am bound to say that there is something very suspicious in relation to this action and that reinforces my strong suspicions in relation to the contention of the Plaintiff that it has means to pay any future order for costs.

However, the main question which I have to decide is precisely what test should I apply in relation to such a case as to the degree of probability or possibility required that the costs of the Defendants will not be paid by the Plaintiff if the Defendants are successful in their striking out action. Section 726(1) of the Companies Act 1985 imports the test of ***"the Court 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 defendant's costs if successful in his defence, require sufficient security to be given for those costs etc."***. I am not bound by the words of the English statute and it seems to me that the test of "will be unable to pay" is unnecessarily high in the context of this case. In this case, it appears to me that there is a substantial risk that if the Defendants are successful in their application to strike out then they will not be able to enforce the whole or any part of their costs order against the Plaintiff. In these circumstances, in which the Plaintiff holds the shares merely as a nominee for a corporate body which is resident out of the jurisdiction and which is financing the action, although itself apparently bankrupt, it seems to me that the substantial risk is sufficient. In so deciding I am applying a broader test than that imported in Order 23 Rule 1(1)(b), namely:- ***"that there is reason to believe that he will be unable to pay the costs of the Defendant if ordered to do so"*** but it seems to me that the peculiar circumstances in this case warrant this.

The next matter for me to consider is the question as to whether, in all the circumstances of the case, such an Order is just. Both parties referred me to the six categories referred to in Sir Lindsay Parkinson & Co., v. Triplan Ltd., (1973) QB 609 case and I am satisfied that none of the principles mentioned therein apply here. Although I am extremely suspicious of the part of the claim relating to the conduct of the litigation in the U.S. against the Govett Group I cannot say either that the action is a sham or that it has no reasonable chance of success. Similarly, as the Plaintiff now says that it has sufficient monies to cover an order for security for costs, there can be no question of oppression.

To sum up, I am satisfied that although the Plaintiff is resident in the jurisdiction there are exceptional reasons which would entitle me to order security for costs. In relation to the question of the means of the Plaintiff I am applying the test of there being a substantial risk that the First, Second, Third, Fourth and Eighth Defendants costs would not be paid if they were successful and finding that that substantial risk exists and overall I am satisfied that it is just to make an Order.

I turn now to the quantum of such an Order.

If I were to be satisfied that the substantial risk of non-payment would only apply to a sum above a certain amount then it would be logical for me to only order security for costs over and above that amount. However, in this case, the substantial risk, in my view, applies to the whole of the amount.

I turn now to the quantum of the estimated bill of costs which was submitted.

The draft bill of costs was in two parts with the first part relating to costs incurred up to and including 24th August, 1995, and with the second part being an estimate of costs incurred up to the completion of the striking out application. The first point of principle which arose was what hourly rate should be allowed upon a taxed costs basis in relation to an employee of Messrs. Bailhache & Labesse who is an English solicitor of eight years call with previous experience in a major litigation firm.

During the course of the hearing I indicated to both counsel that the Royal Court, at a meeting held on 4th January, 1995, decided to adopt the principle set out in section 10.22 of the report of the Legal Practice Committee which was presented to the States on 30th November, 1993, which recommendation reads as follows:-

> *"We recommend that the costs of advice obtained from or work done by lawyers in England or any other country should be allowed on taxation to the extent that the costs of that advice or work is no more than that which would have been allowed on taxation in respect of a Jersey lawyer's fees.*

That limit should not apply in cases where the advice or the work could not reasonably be obtained or done in Jersey, but the amount involved must be reasonable in all the circumstances."

Upon the basis of that decision, Advocate Bailhache argued that it would be illogical to maintain the historic position of only allowing a percentage of the taxed costs rate in relation to English solicitors or barristers who are working as employees of a Jersey firm of lawyers upon the basis that if they had been working for an English firm of lawyers then the full taxed costs rate would have been allowed for the same work. Notwithstanding this argument it seems to me to be desirable to maintain a difference between the amount allowed on taxation in relation to a Jersey qualified lawyer and that allowed for a lawyer with an English qualification who is working for a Jersey firm of lawyers. Accordingly, I have allowed 80% of the taxed costs rate for the English solicitor. There are two other people in the estimated bill of costs who are not qualified as Jersey lawyers, one of whom is described as a legal assistant and the other is described as a costs draftsman. In both cases I have allowed 60% of the taxed costs rate.

Advocate Willing raised an issue in relation to time spent in communicating with English and American lawyers in relation to this case but I have allowed all this time upon the basis that this is an action which is part of a set of proceedings in two other jurisdictions and it does not seem to me to be unreasonable that time be spent ensuring that the proceedings in the various jurisdictions are properly co-ordinated.

Finally, Advocate Willing objected to the sum of £7,500 in the second part of the schedule in relation to total disbursements and the fees of leading counsel, David Oliver, Q.C. Advocate Willing's argument is that following the principles set out in the above-mentioned recommendation 10.22, this work should only be allowed at Jersey rates because it is in relation to matters covered by Jersey Law. Advocate Bailhache, on the other hand, argued that there were matters here relating to the Jersey Companies Law and that this Law had been modelled upon English legislation and, therefore, it was quite reasonable to seek an opinion thereon. I have decided to allow for the purposes of security for costs £5,000 of the sum of £7,500 claimed. I do this upon the basis that although part of the work falls within a specialist advice area part is work which could be done by a Jersey lawyer. Although I had no detailed calculations I have made the assumption that the division is half and half and that the rates of charge for the specialist counsel are about three times Jersey taxed costs rates and that produces the figure of £3,750 plus £1,250 equals £5,000.

Applying these principles to the estimated bill of costs I have come out with a figure of £17,703.60 for part one and

£13,240.00 for part two and thus a total of £30,943.60, which I have rounded up to £31,000.

I am, therefore, ordering that the Plaintiff pay this sum into Court. I will need to be addressed both in relation to the time period in which the payment should be made, in relation to what should happen pending payment in, and in relation to the costs of the whole application other than the costs of the application for the first adjournment which the Plaintiff has already been ordered to pay.

Authorities

R.S.C. (1995 Ed'n): Order 23.

Royal Court Rules 1992: Rule 4/1.

Companies Act 1985: s.726(1).

Sir Lindsay Parkinson & Co Ltd. -v- Triplan Ltd. (1973) QB 609.

Davest Investments Limited -v- Peter David Bryant (1982) JLR 213.

R.H. Edwards Decorators and Painters Ltd. -v- Tretol Paint Systems Ltd. (1985-1986) JLR 64.

Lindgren, trading as Naval Production -v- Jetcat Ltd. (1985-1986) JLR 66.

D.B. Installations Ltd. -v- Vaut Mieux Ltd. (1987-1988) JLR Notes-5.

Re Unisoft Group Ltd. (No.2) (1993) B.C.L.C.532.

R. Heseltine, T.J. Heseltine & Offco Ltd. -v- R.J. Egglishaw, T. Jehan, P.J. Egglishaw (practising as Strachan & Co.) and Watkins (1989) JLR 1.

Rothmer, King, K.S. Joseph and D. Joseph -v- Hill Samuel (C.I.) Trust Co. Ltd. and five otheres (1991) JLR Notes-3.