14 pages

ROYAL COURT
(Samedi Division)

56.

26th March, 1997

Before: The Judicial Greffier

Between	Medos Investments Limited	Plaintiff
And	Daniel Benedict McCann	First Defendant
And	Anthony Edwin Groves	Second Defendant
And	Johannes Lambertus De Goeij	Third Defendant
And	Theodora Clementina Helena Maria De Goeij, nee Bellman	Fourth Defendant
And	Clanbrassil Trust Company Limited	Fifth Defendant

Application by the Defendants for security for the costs of the action from the close of inspection of documents onwards.

Advocate C.G.P. Lakeman for the First to Fifth Defendants;
Advocate R.G.S. Fielding for the Plaintiff.

THE JUDICIAL GREFFIER: The Plaintiff is a limited liability company incorporated in Liberia but it is both managed and administered in Jersey. The First to Fourth Defendants are former directors of the Plaintiff and the Fifth Defendant was an agent of the Plaintiff which maintained its books of account and provided it with secretarial services. During 1987, a discretionary trust known as the Medos Trust was set up whose trustee was a company known as Merryfield Trust Company Limited. The trust seems to have been set up so that certain assets which a Mr. Maynard was to receive following the death of his father were placed in trust, effectively for members of the Maynard family, outside of the United Kingdom. It was decided that these assets, which consisted of United States and Canadian shares, should be sold and the proceeds converted from United States dollars to pounds sterling. It was intended that the proceeds of sale be used in order that the Plaintiff might purchase a property in one of the Spanish Islands (which property is hereinafter referred to as "the Spanish property"). It would appear that the United States shares were transferred to the Medos Trust which then loaned them on to the Plaintiff. The First Defendant was concerned that prior to instructions being given for their sale that they be placed in the name of a nominee in the United States who could guarantee that they would be delivered to a purchaser. For this purpose the First Defendant approached AIB Bank (C.I.) Limited (hereinafter referred to as "AIB") which was to ensure that the stock be held in the name of a firm of brokers in New York called Brown Brothers Harriman (hereinafter referred to as "BBH"). There was a serious delay in AIB informing the Plaintiff through the First Defendant that the shares had been transferred to BBH and during the intervening period the United States stock market crash of 1987 occurred and as a result of this there was a considerable drop in the value of the shares. Because of the shortfall the Plaintiff had to borrow monies from various other parties in order to be able to finance the purchase of the Spanish property. The

Plaintiff subsequently commenced an action against AIB in relation to its failure to notify the Plaintiff that the shares were controlled by BBH and that action was settled after the hearing of a considerable amount of evidence for a payment of £85,000. The parties appeared to agree that there are four headings of claim against the Defendants as follows:-

(1) That the Defendants were in breach of their duty as directors or otherwise liable because they did not proceed with the sale of the shares when they could have so done as it was not necessary for the shares to be transferred to BBH prior to being sold.

(2) That the Defendants were at fault because they failed to ensure that appropriate proceedings were brought against AIB or were brought within the prescription period for negligence or were diligently prosecuted.

(3) That the Defendants were responsible for the offer of £85,000 being accepted in settlement of the action against AIB, this being too low a sum.

(4) That the Defendants have responsibilities in relation to the various loans made to the Plaintiff in order to allow for the financing of the Spanish property due to the shortfall on the amount of the sale price of the United States shares.

A voluntary agreement was reached between the parties, without prejudice to whether security for costs should be ordered and upon this basis a sum has been provided by way of security for costs up to the close of inspection of documents. The present application is in relation to security for costs from that time onwards.

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) of the R.S.C. 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*
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> *(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,*
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> *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 first issue which arises in this application is as to whether the Plaintiff is resident out of the jurisdiction. The principles which the Royal Court follows in relation to the ordering of security for costs where the Plaintiff is resident outside the jurisdiction and does not have any assets within the jurisdiction are clearly set out in many cases.

I quote first from Burke v. Sogex International Limited (1987-88) JLR 633 CofA beginning at line 23 on page 637 where the Bailiff, sitting as a single Judge of the Court of Appeal, said:-

> *"Where an application for security for costs is being considered, the questions always asked of the plaintiffs or defendants as the case may be, are: Is your client out of the jurisdiction? Does he have no assets in the jurisdiction? If the answer to both those questions is in the affirmative, those are important matters - not totally conclusive, I agree with Mr. Clyde and Sir Frank - but important matters to which, with respect, I do not think Mr. Clyde attached sufficient importance and to which the courts of this Island have always attached great importance. I reverse the approach of Mr. Clyde by asking myself those questions, starting from the proposition that security should normally be ordered where a party against whom it is sought is outside the jurisdiction and does not have assets inside the jurisdiction, unless an order would make it unjust."*

In the case of Parkwood Limited v. Midland Bank plc (1st August, 1989,) Jersey Unreported the Deputy Judicial Greffier said in the second paragraph on the first page of that Judgment:-

> *"It is the usual practice of Jersey Courts as in England to require a foreign plaintiff to give security for costs as a matter of discretion because it is just to do so. So is it just or not to order security in the circumstances of this case?"*

The question arises as to what is meant for these purposes by resident and what constitutes a foreign Plaintiff. In England, as appears from the quotation above from Order 23, Rule 1(1)(a) the test is that of whether the Plaintiff is ordinarily resident out of the jurisdiction. Although the discretion in Jersey is undoubtedly wider than that in England, the discretion of the Court is only normally exercised in favour of the applicant upon the basis of certain well defined categories and in relation to the category of a Plaintiff who

is resident outside the jurisdiction it seems to me that the ordinarily resident test is a convenient test for the Courts in Jersey to apply and I shall do so.

I quote now from the start of section 23/1-3/3 of the 1995 White Book as follows:-

"23/1-3/3 Plaintiff resident abroad - A plaintiff who is ordinarily resident abroad may be ordered to give security for costs. The onus is on the defendant to prove that the plaintiff is "ordinarily resident" out of the jurisdiction. The question is one of fact and of degree; it does not depend upon the duration of the residence, but upon the way in which a man's life is usually ordered, and it contrasts with occasional or temporary residence (see Levene v. I.R.C. [1928] A.C. 217 and Lysaght v. I.R.C. [1928] A.C. 234, both decided under the Income Tax Acts).

In R. v. London Borough of Barnet, ex p. Shah [1983] 2 A.C. 309; [1983] 1 All E.R. 226, H.L., it was held that, in the context of the Education Acts, the phrase "ordinarily resident" should be construed according to its ordinary and natural meaning, and that a person is ordinarily resident in a place if he habitually and normally resides lawfully in such place from choice and for a settled purpose, apart from temporary or occasional absences, even if his permanent residence or "real home" is elsewhere. The relevant dicta in Levene v. I.R.C. [1928] A.C., 217 H.L., Lysaght v. I.R.C. [1928] A.C. 234, H.L. and R. v. London Borough of Barnet, ex p. Shah [1983] A.C. 309; [1983] 1 All E.R. 226, H.L. were applied by the Court of Appeal to an application under O.23, Rule 1 in Parkinson v. Myer Wolff & Manley, April 23, 1985, C.A., (unrep). A plaintiff who makes a provisional decision to go and live abroad is not "ordinarily resident" out of the jurisdiction, at any rate so long as he has not left the country (Appah v. Monseu [1967] 1 W.L.R., 893; [1967] 2 All E.R. 583)."

I quote now from the headnote on page 227 from the Shah v. Barnet London Borough Council case as follows:-

"Held - (1) The phrase 'ordinarily resident' in s 1 of the 1962 Act and reg 13 of the 1979 regulations was to be construed according to its natural and ordinary meaning without reference to the immigration legislation, since the material provisions of the 1962 Act and the 1979 regulations made no reference to any restriction on the awards of grants based on any applicant's place of origin, domicile or nationality. According to the natural and ordinary meaning of the phrase a person was 'ordinarily resident' in the United Kingdom if he habitually and normally resided lawfully in the United Kingdom from choice and for a settled purpose throughout the prescribed period, apart from temporary or occasional absences. Furthermore, a specific and limited purpose, such as education, could be a settled purpose. It was irrelevant that the applicant's permanent residence or 'real home' might be outside the United Kingdom or that his future intention or expectation might be to live outside the United Kingdom. Applying the natural and ordinary meaning of

the phrase 'ordinarily resident', all five applicants had been ordinarily resident in the United Kingdom prior to commencing their university study."

5 Advocate Fielding referred me to the following extract from page 1103 of volume 2 of the 12th edition of Dicey and Morris on the Conflict of Laws:-

"Rule 154 - (1) The domicile of a corporation is in the
10 *country under whose law it is incorporated.*

(2) A corporation is resident in the country where its central management and control is exercised. If the exercise of central management and control is divided between two or
15 *more countries then the corporation is resident in each of these countries".*

In this case, it appears to me that there is little doubt that the central management and control of the Plaintiff is in Jersey and,
20 accordingly, that the Plaintiff is ordinarily resident in Jersey.

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:-
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"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
30 *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."*

35 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
40 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:-

45 *"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. 213:*

"....It has been established practice not to order security
50 *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,'*
55 *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 Davest 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:

"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.

In the case of Pacific Investments Limited v. Christensen and others (13th September, 1995) Jersey Unreported. I considered at page 8 the question as to the test which I should apply in Jersey and I am now quoting the relevant section from that Judgment as follows:-

> *"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."*

In that case, I decided that in the exceptional circumstances in which the Plaintiff held the shares merely as a nominee for a corporate body which was resident out of the jurisdiction and was financed in the action, although it was apparently bankrupt, that I could apply a broader test to that applied under the English statute and that the test that I was going to apply was "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."

I did not, in that case, intend to create a different test to that in England for all cases but merely to find that in the exceptional circumstances of that case that test was appropriate. In my view, in all such cases the ultimate test in Jersey is the test as to whether it is just to make an order in all the circumstances of the case.

I turn now to the financial circumstances of the Plaintiff. The most recent information available is set out in a set of draft accounts which are attached as exhibit JAC1 to the affidavit of Joyelle Ann Carry. These draft accounts show that at 30th June, 1996, the company had assets of just over £250,000 represented by the Spanish property, creditors of just under £30,000 and owed loans totalling just under

£350,000. Of the loans, just over £250,000 is due to the Medos Trust, £22,500 to Mr. Maynard and just under £60,000 to Mr. Maynard's mother. I conclude from this that although the company has a substantial asset, namely the Spanish property, it is insolvent. Accordingly, the Plaintiff is clearly insolvent and, subject to the many other considerations which I must take into account, it appears to me that this could form a basis upon which I could order that security for costs be provided. However, I must decide whether it is just so to do.

In the case of Sir Lindsay Parkinson & Co. Limited v. Triplan Limited [1973] 2 All ER 273 there is commencing at h on page 285 a list of a number of matters which the Court might take into account on such an application as this and I am now quoting from that section as follows:-

> *"Counsel for Triplan helpfully suggests 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."*

The important case of Keary Developments v. Tarmac Construction Limited and another [1995] 3 All ER 534, sets out a number of relevant principles at section 4 on page 540 of the Judgment which reads as follows:-

> *"4. In considering all the circumstances , the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgement not so much of the prospects of success but of the nuisance value of a claim.".*

In this case the Plaintiff's advocate alleges that his client has an overwhelming case. His argument is that the delay in the selling of the United States shares and the conversion of proceeds into pounds sterling resulted either from the failure of the Defendants to realise that the shares were capable of being sold before they came into the possession of BBH or from the failure of AIB to notify the First Defendant on behalf of the Plaintiff that the United States shares were in the control of BBH. If the latter were the case then the Defendants should not have allowed the action to be settled for less than the full

loss suffered plus interest thereon and if the claim against AIB was reduced by virtue of the former question then that was the responsibility of the Defendants, in any event, and, therefore, they are entirely responsible for the loss. The Defendants' advocate, in response, submitted that a variety of other possibilities existed. One possibility was that it was entirely the fault of AIB but that a claim against AIB might not have succeeded and, therefore, that the settlement was reasonable. Another possibility was that the loss had merely been unfortunate and not due to breach of duty on the part of the directors. In my view there is not a high degree of probability of the success of the case such as would lead to a situation in which it would not be appropriate for security to be ordered.

The following additional sections from the Keary Judgment are helpful:-

"1. As was established by this court in Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 All ER 273, [1973] QB 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474 at 479 per Bingham LHJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see Pearson v Naydler [1977] 3 All ER 531 at 536-537, [1977] 1 WLR 899 at 906 per Megarry V-C).

3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see Farrer v Lacy, Hartland & co (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use it inability to pay costs as a means of putting unfair pressure on the more prosperous company (see Pearson v Naydler [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security,

provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see Roburn Construction Ltd v William Irwin (South) & Co Ltd [1991] BCC 726).

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (see Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.

However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see Flender Werft Ag v Aegean maritime Ltd [1990] 2 Lloyd's Rep 27). In that case Saville J applied by way of analogy the approach adopted in another context, that of payment into court as a condition of leave to defend. In M V Yorke Motors (a firm) v Edwards [1982] 1 All ER 1024 at 1028, [1982] 1 WLR 444 at 449, 450 Lord Diplock approved the remarks of Brandon LJ in the Court of Appeal:

> 'The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives all of whom can help him in his hour of need.'

In Kloeckner & Co Ag v Gatoil Overseas Inc [1990] CA Transcript 250 Bingham LJ cited with approval certain remarks of the Registrar of Civil Appeals. Mr. Registrar Adams was willing to assume that the situation before him was the same as that exemplified in the Farrer case, that is to say that there was a probability that the defendant wrongly caused the plaintiff's impecuniosity on the basis of which security for costs was being sought. The registrar said:

> 'In my judgment, the approach to be adopted in cases where, as here, there are good arguable grounds of appeal and it is within the Farrer principle but the appellant contends that the award of security will stifle the appeal, should be the same as the approach adopted in MV Yorke Motors (a firm) v Edwards Ord 14 cases, where conditional leave to defend is being contemplated. The approach, in my view, should be that

> the onus is on the appellant to satisfy the Court of Appeal that the award of security for costs would prevent the appeal from being pursued, and that it is not sufficient for an appellant to show that he does not have the assets in his own personal resources. As in the Yorke Motors case, the appellant must, in my view, show not only that he does not have the money himself, but that he is unable to raise the money from anywhere else.'

Bingham LJ's comment was : 'I cannot fault the general approach of the registrar.' When the matter went to the full court (1990) Times, 9 April) this court could see no possible grounds upon which an appeal against Bingham LJ's decision could succeed.

That case related to the power to order security under RSC Ord 59, r 10(5), which is not the present case. But, in my judgment, the same approach should be adopted on applications under s 726(1). In the Okotcha case this court was not satisfied on the evidence that a plaintiff ordered to give security was unable to raise the money needed. This court plainly, therefore, adopted the same approach as that indicated in the cases of Flender Werft, Yorke Motors and Kloeckner. Reference was made to the Trident case and Bingham LJ referred to Nourse LJ's remark that an inference could be drawn even in the absence of direct evidence that the claim of the plaintiff would be stifled. He said ([1993] BCLC 474 at 478):

> 'I am inclined to think that the decision itself illustrates more than anything else the different patterns of fact which come before the court in the course of applications such as this.'

He was therefore distinguishing the Trident case on its facts.

In the Trident case Nourse LJ commented that the basis of an application for security was that there was reason to believe that the company would be unable to pay the costs of the defendant, if successful, in his defence (see [1990] BCLC 263 at 266). After referring to what Megarry V-C had said in Pearson v Naydler to the effect that s 726 relates to companies which are likely to find difficulty in meeting orders for security for costs, Nourse LJ said:

> 'It would be pointless to insist on the company putting in evidence in order effectively to admit that which the defendant effectively asserts.'

With all respect to him, it seems to me that there are two quite separate questions which are relevant. One is whether the condition for the application of s 726 is satisfied. That requires the court to look ahead to the conclusion of the case to see whether the plaintiff would be able to meet an order for costs. On that the defendant, accepting the applicability of the section, need put in no evidence. The other question which is relevant, given that an application

> *for security is made at a stage when the trial will not have occurred, is whether the plaintiff company will be prevented from pursuing its litigation if an order for security is made against it. On this, evidence from the defendant may be needed. The considerations affecting those two questions seem to me to be rather different. For example, a backer might well be prepared to put up money to assist a company to pursue a case when the trial has not yet occurred, but the same backer would be extremely unlikely to put up money after the trial has been unsuccessfully concluded against the company.*
>
> *However, as I have already indicated, the Trident case establishes that in certain circumstances it will be proper to draw inferences, even without direct evidence, that a company would probably be prevented from pursuing its claim by an order for security. But, in my judgment, such a case is likely to be a far rarer one than those cases in which the court will require evidence from the plaintiff to make good any assertion that the claim would probably be stifled by an order for security for costs."*

The issue was raised by the Plaintiff's advocate as to whether the Plaintiff's want of means had been brought about by the conduct of the Defendants. It is obviously the Plaintiff's case that they have suffered a loss by reason of the conduct of the Defendants but whether or not that has been due to the conduct of the Defendants will not become clear until the trial. There has been no delay in payment or delay in doing work in the manner set out in the Sir Lindsay Parkinson & Co Ltd v. Triplan Judgment, rather there is a dispute as to whether the directors are liable to the Plaintiff as alleged. Furthermore, security for costs is ordered as security for the situation in which the Plaintiff fails in the case and if it fails in this case then the financial situation of the Plaintiff will not be due to the failure of the Defendants.

Advocate Fielding, on behalf of the Plaintiff, spent a great deal of time going into the assets of the company, the trust and Mr. Maynard, in order to seek to demonstrate that a substantial order for security for costs would be liable to stifle the action. This was in line with the principles set out in section 6 above from the Keary Judgment in relation to whether the Plaintiff can raise the amount needed from its directors, shareholders or other backers or interested persons. It is clear to me that Mr. Maynard is one of the backers or interested persons, as the members of his family are the people for whose benefit the trust appears to be set up and as the Spanish property appears to be kept for the benefit of his family as a holiday home. Mr. Maynard appears to be a reasonably wealthy man but one who lives constantly right at the edge of his means with three mortgages, a substantial overdraft, and various other credit facilities. The Medos Trust owns the one share in the Plaintiff and is, therefore, clearly the beneficial owner of the Plaintiff and it continues to have substantial assets in the form of its loan of just over a quarter of a million pounds to the Plaintiff. However, the Medos Trust would not be in a position to produce money by way of security for costs without having to sell the Spanish property and it would undoubtedly impose a considerable financial strain upon Mr. Maynard if he were to be forced to produce a substantial sum of money. However, it became clear to me during the hearing that the Medos Trust was in a position to be able to

give a guarantee to me in a substantial sum as security for costs that it would pay to me such sum as might be ordered in costs against the Plaintiff, if it were unsuccessful in its claim, up to a maximum figure. For the Defendants' position to be fully secured in this respect, it would be necessary for the trustees of the Medos Trust to undertake to the Court that they would not make any distribution of capital or income out of the trust without the consent of either the Defendants or the Court.

I turn now to the matter of the quantum of security for costs involved in this case.

Advocate Fielding objected to the inclusion in the skeleton bill of costs of any costs in relation to the third party proceedings and I agree with him in relation to this. No third party proceedings have currently been issued and, until they are, these costs should be disallowed. The Defendants are seeking security for costs in a total sum of £53,273 based upon the assumption of seven days of trial. The estimation of security for costs is, of course, not a taxation process but an estimation. It appears to me that, although this action has some complex aspects, including Liberian law in relation to the Plaintiff and the duties of directors, that, bearing in mind the fact that voluntary security has already been given up to the close of inspection of documents, that the appropriate amount of security to be ordered is in the sum of £30,000.

Taking all the circumstances into account, it seems to me that it is appropriate for me to order security for costs in the reduced sum of £30,000 and this in addition to the sum already provided voluntarily. I am doing this in the following form. Either this should be provided by the Plaintiff in cash or the trustees of the Medos Trust should execute a document guaranteeing that in the event of an order for costs being made against the Plaintiff and taxed and unsatisfied for a certain period of time they will satisfy that order by making a payment to me of the sum which I will notify to them. The said trustees will also need to undertake to the Royal Court that they will not make any distribution of capital or interest from the trust without the written consent either of the Defendants or of the Judicial Greffier. This form of guarantee will need to be provided to my satisfaction.

Finally, I will need to be addressed both in relation to the time period for the provision of this security and in relation to the costs of and incidental to the application for security.

Authorities

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