

ROYAL COURT

5th March, 1993

32.

Before the Judicial Greffier

BETWEEN	ROGER ST. CLARE PORTEOUS	PLAINTIFF
AND	DANLEROV HOLDINGS LIMITED	FIRST DEFENDANT
AND	REX G. OLIVER	SECOND DEFENDANT
AND	BALTINE (IMPORT/EXPORT) LIMITED	THIRD DEFENDANT

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Application by the Plaintiff for previous Orders for the payment of security for costs to be set aside on the grounds that the Plaintiff is now ordinarily resident in the Island of Jersey and for the sums previously paid to the Judicial Greffier by way of security for costs to be paid back to the Plaintiff forthwith, together with accrued interest thereon.

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Advocate R.J.F. Pirie for the Plaintiff.  
Advocate T.J. Le Cocq for the Defendants.

**JUDICIAL GREFFIER:** On 15th February, 1991, a summons was argued before me in relation to the applications of the Defendants for security for costs. At that time, the Plaintiff was not ordinarily resident in the jurisdiction. As a result of that hearing and on that date, I ordered inter alia -

- "(1) that the Plaintiff give security for the costs of the First Defendant up to the close of inspection of documents by paying the sum of £3,000.00 sterling to the Judicial Greffier within twenty-eight days from the date of this order;
- (2) that the Plaintiff give security for the costs of the Second and Third Defendants up to the close of inspection of documents by paying the sum of £1,800.00 sterling to the Judicial Greffier within twenty-eight days from the date hereof;"

Subsequent to that date the said sums of £3,000 and £1,800 were paid to me by way of the security for costs which had been ordered.

The present application has arisen because the Plaintiff has subsequently moved to Jersey and is now seeking a refund of those sums.

Rule 4/1 (4) of the Royal Court Rules 1982, as amended, and of the Royal Court Rules, 1992, reads as follows:-

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

In the case of Heseltine -v- Strachan & Co (1989) JLR 1 at P.6 beginning at line 31 of the judgment it is stated -

**"There are differences between the Jersey practice and the English practice. Certainly the court in Jersey has a wider discretion to order security than the master has in England."**

However, there appears to be a complete lack of Jersey authority in relation to the matter of the return of security for costs.

The R.S.C. (1993) Ed'n) at s.23/1-3/31 sets out the English principles in relation to this as follows -

**"Return of security - A plaintiff against whom an order for security had been made on account of his residence out of the jurisdiction was in Chancery allowed to get the order discharged at his own expense on coming to reside within the jurisdiction (Mathews v. Chichester (1861) 30 Beav. 135) but at common law the case was otherwise (Badnall v. Haylay (1838) 4 M. & W. 535) at any rate where security had actually been given, though not otherwise (Place v. Campbell (1848) 6 D. & L. 113). In Tottenham v. Cove, April 15, 1918, (unrep) Astbury J. at Chambers adopted the common law practice and declined to order payment out of the deposit to a plaintiff who had returned from abroad. The order being good when made must stand in spite of subsequent circumstances (Westenberg v. Mortimore (1875) L.R.10 C.P. 438) It may be doubted whether this practice would be followed today at any rate where the plaintiff's return from abroad is bona fide and permanent.**

The conclusion expressed in the previous sentence of this note was approved by the Court of Appeal in Parkinson v. Myer Wolff & Manley, April 23, 1985, C.A., unrep. Just as a defendant may from time to time make further applications for security in the light of changed circumstances, so a

plaintiff may be entitled to apply for variation or discharge of an order previously made if his circumstances have changed; whether the Court will accede to such an application will depend on the circumstances, the nature of the order previously made and any other material considerations (ibid). A plaintiff cannot seek to have an order against him for security for costs varied or set aside by producing fresh evidence about his affairs at the date of the order. If however, he can show a material change of circumstances since the date of the order, he may apply for variation or discharge of the order. Whether such an application will be allowed depends on the circumstances and is a matter of discretion to be exercised by the Court (*Gordano Building Contractors Ltd v. Burgess* [1988] 1 W.L.R. 890, C.A.)."

There is a very helpful section commencing at letter B on p.894 of the *gordano limited v. burgess* case, which reads as follows:-

"That leaves, however, the question of whether a plaintiff can apply if he can show a material change of circumstance. There is, surprisingly, no direct authority upon this point in regard to situations of impecuniosity. The matter is discussed in note 23/1-3/31, to R.S.C., Ord. 23, in *The Supreme Court Practice 1988*, pp. 406-407, where reference is made to a decision in this court, *Parkinson v. Myer Wolff and Manley* (unreported), 23 April 1985; Court of Appeal (Civil Division) Transcript No. U.B. 1888 of 1985. The facts are quite unimportant for present purposes, but there is a passage in the judgment of Kerr L.J., who gave the leading judgment, which is material:

"While it is not necessary to express a concluded view on the jurisdiction of the court in such cases, it seems to me at present that the conclusion expressed in that note is correct and that, just as a defendant may from time to time make further applications for security in the light of changed circumstances, so a plaintiff may be entitled to apply for variation or discharge of an order previously made if his circumstances have changed. Whether the court would accede to such an application must then depend on the circumstances, the nature of the order previously made and any other material considerations".

Those observations, were, in the circumstances of that case, obiter. I would, however, adopt them. As Sir Denys Buckley pointed out in the course of argument, it must be open to a plaintiff to apply for payment out in the light of circumstances which have changed. Mr. Fletcher was disposed to agree that such indeed would be the case. If that is the case, as I think it is, then I can see no difference between

**it and the plaintiff who, not having paid in, seeks to get the order for security set aside in the light of changed circumstances".**

In the absence of any past Jersey authority on this point, it appears to me to be right and sensible to adopt the conclusions set out in the quotation from Gordano Limited v. Burgess.

Counsel for the parties argued the question as to the precise test that ought to be applied.

Advocate Pirie argued that I should treat this application as if it were an application made by the Defendants for security for costs. If, in the light of the changed circumstances, I would not grant security for costs then I ought to order that the existing security for costs be returned. Advocate Le Cocq, however, urged a two stage test. He argued that, even if I would not now grant an application for security for costs, there was a further test as to whether there were other circumstances which affected the decision. He submitted that the question as to whether I should take away the security for costs which has already been paid was different from the question as to whether I should give security for costs.

I would simply rest on the words quoted above from the Parkinson v. Myer Wolff & Manley case (unreported) 23rd April, 1985; Court of Appeal (Civil Division) Transcript No. UB 1888 of 1985, as follows:-

**"Whether the Court would accede to such an application must then depend on the circumstances, the nature of the order previously made and any other material considerations."**

In my view that test is not identical to the test as to whether security for costs would be granted in the present circumstances. I turn now to the changed circumstances.

In his affidavit, the Plaintiff states that although born in England in February 1940, he returned to Jersey with his mother in March 1940 and was christened here before being evacuated to England later that year. He returned to Jersey in 1945 following the liberation of the Island and lived here continuously until 1982 when he moved to Spain. In 1984 he returned to Jersey for medical reasons and remained here until 1986 when he moved to England, where he remained until January 1992. He states that both during the time he lived in Spain and during the time he lived in England he returned regularly to Jersey and has always regarded Jersey as his true home. On the 20th January 1992 he was arrested and imprisoned pursuant to an Ordre Provisoire and remained in custody until released by the Court of Appeal on 8th April, 1992. Since then he has resided continuously at his mother's house in Jersey. He also states that he has full

residential qualifications under Regulation 1(1)(h) of the Housing (General Provisions) (Jersey) Regulations, 1970. In the final paragraph of his affidavit he states that he has been ordinarily resident in Jersey for the past year and that it is his intention to remain permanently.

Advocate Le Cocq argued that the Plaintiff left Jersey whenever it suited him and came back to Jersey whenever it suited him and that he would leave Jersey again when it suited him. On the other hand, he did not deny the facts set out in the affidavit in relation to the periods during which the Plaintiff had resided in Jersey and, in particular did not deny that the Plaintiff had been living continuously with his mother in Jersey since April 1992.

If this were a fresh application for security for costs then I have no doubt that it would be refused. The Plaintiff has substantial ties with the Island and has been currently resident here, of his own volition since early April 1992. In the present circumstances, taking into account the material change in circumstances and the nature of the order previously made, I cannot see any reason why the previous order should not be set aside. I am also unable to find any other material considerations to lead me to any different view.

Finally, there are two further matters which deserve comment. Both Counsel sought to raise with me the merits of the case. The Plaintiff's lawyer argued that the case was overwhelming and the Defendants' lawyer argued otherwise. These were all matters which could have been, but were not canvassed in detail at the first hearing. I have not taken them into account for two reasons. Firstly, because I do not think it is right to allow a line of argument such as this which could have been raised at the first hearing, to be raised at the subsequent hearing. Secondly, because even if I am wrong on that point, I was not satisfied that the Plaintiff's case was overwhelming in the way alleged.

The Plaintiff has specifically sought an order that the monies paid into Court be repaid forthwith. I am unable, at this time to agree to such an order. The effect of the order which I am making appears to me to be to release the monies paid into Court from being held pursuant to the order for security for costs. However, those monies remain the monies of the Plaintiff. As Judicial Greffier I am aware of the fact that a judgment debt exists against the Plaintiff in favour of his former wife. As the holder of these monies, I will need to consider carefully as to whether I am under a duty to pay these over to the Viscount to satisfy that judgement and any other judgments which may exist.

### Authorities

Burke -v- Sogex International (1987-88) J.L.R. 833.

Rothmer and Anor. -v- Hill Samuel and Ors. (9th January, 1991)  
Jersey Unreported.

Woolley -v- Kingsley and Ors. (14th May, 1992) Jersey Unreported.

R.S.C. (1993 Ed'n): Order 23.

Parkinson -v- Myer Wolff & Manley (unreported) (23rd April, 1985)  
Court of Appeal (Civil Division) Transcript No. UB 1888 of  
1985.

4 Halsbury 37: paras. 304-5.

Semler -v- Murphy (1967) 2 All E.R. 185.

Gordano Building Contractors Limited -v- Burgess & Anor. (1988)  
1 W.L.R. 890.

Royal Court Rules, 1982 and 1992: Rule 4(1).

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

Parkwood Ltd. -v- Midland Bank plc (1st August, 1989) Jersey  
Unreported.

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

Porzelack K.G. -v- Porzelack (U.K.) Ltd. (1987) 1 All E.R. 1074.