

ROYAL COURT  
(Samedi Division)  
18th November, 1996

216.

Before: The Judicial Greffier

Between	William Hobden	Plaintiff
And	Le Riches Stores Limited (by original action)	Defendant

	AND	
Between	Le Riches Stores Limited	Plaintiff
And	William Hobden (by counterclaim)	Defendant

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Application by the Defendant in the original action (hereinafter referred to as "the Defendant") for an Order for security for their costs in relation to the original action.

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Advocate P.M. Livingstone for the Plaintiff in the original action  
(hereinafter referred to as "the Plaintiff");  
Advocate P.S. Landick for the Defendant.

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THE JUDICIAL GREFFIER: This action relates to an employment contract under the terms of which the Defendant employed the Plaintiff as a director and as a general manager of Trade Saver Food Services. Under the terms of the employment contract the Plaintiff was entitled to receive twelve months notice from the Defendant but the Defendant summarily dismissed the Plaintiff about seven and a half months after the commencement of the contract.

The Plaintiff has sued for the sum of £50,000 representing twelve months notice and the Defendant has both defended the action and counterclaimed for a sum of £1,000,000.00 upon the basis that this loss was caused by the failures on the part of the Plaintiff which led to his summary dismissal.

The present application is for security for costs and the Defendant has sought the sum of £14,640 representing costs which have not yet been incurred.

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:-

5           "1.-(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court -

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

15           (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

20           (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

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

30           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."

35           The issue that arises in this application is 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.

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

45           "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  
50           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

5 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."

10 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:-

15 *"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?"*

20 The question that arises is 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. In this case, both counsel agreed that that was the appropriate test for me to apply. 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 25 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.

30 I quote now from the start of section 23/1-3/3 of the R.S.C. (1995 Ed'n) as follows:-

35 *"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 40 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).*

45 50 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

5 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  
 10 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*  
 15 *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)."

20 I quote now from the headnote on page 227 from the *Shah v.*  
*Barnet London Borough Council* (1983) 1 All ER 226 HL case as  
 follows:-

25 "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  
 30 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  
 35 '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,  
 40 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  
 45 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."

50 The facts in this case in relation to the residence of the  
 Plaintiff are fairly complicated. However the following are  
 clear.

5 The Plaintiff first came to work on a self employed basis for  
the Defendant in February 1993. In June 1994 when the relevant  
contract commenced he became an employee of the Defendant and  
Guernsey Social Security payments were made in respect of that  
10 employment until its termination on 17th January, 1995, when he  
was summarily dismissed. Prior to coming to Jersey he had been  
living with his wife in England but in September 1993 he commenced  
a relationship with a lady who lived and lives in Jersey and has  
housing qualifications and his marriage broke up in early 1994.  
15 In January 1995, when he was summarily dismissed, the Plaintiff  
went to live with the lady in Jersey and he continued to live with  
her until June 1995 whilst he was seeking suitable employment in  
Jersey. When it became apparent that suitable employment could  
not be found he returned to England where he has worked ever since  
20 on a series of projects although he has returned to Jersey to see  
the lady in question and to stay with her as often as he is able  
and at least once a month. Much was made both in the affidavits  
which were before me and in submissions of counsel as to the fact  
that the Plaintiff is currently paying Jersey Social Security and  
Income Tax upon the basis of being self-employed. In my view,  
those submissions are irrelevant because it for me to determine,  
on the facts, where the Plaintiff is ordinarily resident. The  
question is where does the Plaintiff habitually and normally  
25 reside lawfully from choice and for a settled purpose, apart from  
temporary or occasional absences. Although it is clear to me that  
it is the intention of the Plaintiff to return to live in Jersey  
with the lady concerned and that the Plaintiff views this as being  
his "real home", I have come to the conclusion that the Plaintiff  
is ordinarily resident at this moment in time in England. He has  
30 moved around to different addresses in England for more than a  
year as his work needs have required but it seems to me that that  
is where he is based and where he habitually and normally resides  
for the settled purpose of work, apart from temporary or  
occasional absences whilst he is visiting the lady in question. I  
35 am unable to say that Jersey is where he habitually and normally  
resides for the settled purpose of living with the lady with  
temporary or occasional absences in England for his work.

40 In the Burke v. Sogex International Limited case quoted above  
the Bailiff clearly took very seriously the issue of whether the  
person against whom an Order for security for costs was being  
sought and who was resident out of the jurisdiction had assets in  
the jurisdiction. In this particular case, the Plaintiff has in  
45 the jurisdiction the sum of just over £4,000 in a bank account and  
says that he has put these monies there in order to be able to pay  
his 1996 income tax. This income tax will not, in fact, become  
due until September 1997.

50 The Defendant objects on the basis that those monies could  
quickly be moved out of the jurisdiction if the Plaintiff were to  
lose the action. However, there is no reason to believe that the  
Plaintiff has maintained this bank account in Jersey merely as a  
means of defeating an application for security for costs.  
Furthermore, the very fact that, whilst currently working and, as

I have already found, ordinarily resident, in England, the Plaintiff has sought to retain both Social Security and Income Tax Assessment status in Jersey supports the view, which is attested to both in his affidavits and in that of the lady with whom he wishes to live in Jersey, that he intends to make Jersey his permanent home.

As I have already said, the Court has, in Jersey, a wider discretion than is available to a Court in England. However, at the end of the day, the test always comes down to that of whether it is just in any particular circumstances to order security for costs.

There are two other factors which I must take into account at this point. The first is that the Plaintiff is alleging that one of the reasons he has been unable to find suitable work in Jersey is that many potential employers have links with the Defendant which would make it difficult for them to employ him whilst this dispute is continuing. If the Plaintiff has been wrongfully dismissed then that wrongful dismissal has strongly contributed to if not caused the Plaintiff's inability to find work in the island which in turn has led to his leaving the jurisdiction. The second factor is that the Defendant has brought this massive but very sparsely pleaded counterclaim for the sum of more than £1,000,000. Where such a large counterclaim is brought and sparsely pleaded, as in this case, one is left with the strong suspicion that the Defendant is trying to frighten the Plaintiff into abandoning his claim and this impression leaves me somewhat uneasy.

The issue of whether the granting of any Order for security for costs would be oppressive was also raised. I am satisfied that the current income of the Plaintiff is about £35,000 per year and that his current expenditure, including tax and social security is about £31,000 per year. However, his current employment is not secure as it is on a contract basis and, therefore, it is difficult to be certain that he can raise any sum of money by way of security from future earnings. He does, however, have in the Island the sum of £4,000 and I am satisfied that it would not be oppressive for me to order that this sum be paid into Court by way of security for costs.

The Plaintiff also raised the issue of how much of the sum of £14,640 being sought by the Defendant related to the massive counterclaim. The case of T. Sloyan & Sons (Builders) Ltd & another v. Brothers of Christian Instruction [1974] 3 All E.R. 715 was quoted and I am now quoting briefly from the headnote on page 716 as follows:-

*"Held - The employers' cross-claim could properly be treated as a defence or set-off to the contractors' claim insofar as the former did not exceed the latter. Insofar as the cross-claim exceeded the contractors' claim it had to be treated as a counterclaim to which the contractors*

*were in the position of defendants and in respect of which they could not be ordered to give security."*

5           In this particular case, bearing in mind that principle, if the Plaintiff had sufficient means then I would have ordered security in the sum of £8,060.

10           As I have said already, I am satisfied that an order for the sum of £4,000 would not stifle the action.

15           I am satisfied that the Plaintiff is not ordinarily resident in Jersey. However, I am also satisfied that the Plaintiff considers Jersey as his permanent home and has every intention of returning to Jersey as soon as suitable work is available for him here. He also has a bank account in Jersey which contains the sum of £4,000 and has maintained both tax and social security status in the Island. I am also satisfied that he is able to furnish the sum of £4,000 by way of security for costs and that for me to order the payment thereof would not be oppressive.

20           In these circumstances I have to ask myself the question whether or not it is just that I order that the Plaintiff furnish security in the sum of £4,000 by paying that sum to me.

25           I have found this to be a very difficult decision to make but in the exercise of my discretion I have decided that the justice of the matter, taking all the factors into account lies in favour of my dismissing the application. In so doing I have taken into account the uncertainties of the Plaintiff's future employment prospects and his high current outgoings (due to commitments to his wife and family), which may well lead to his needing the sum of £4,000 in his bank account and my view that there is only a very slight risk of his not returning to Jersey and removing his assets from the Island.

30           I will need to be addressed by both parties in relation to the costs of and incidental to the application for security for costs, which has, I would note, been most strongly contested by both parties.

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Authorities

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

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

Burke -v- Sogex International Limited (1987/88) JLR 633.

Parkwood Limited -v- Midland Bank p.l.c. (1st August, 1989) Jersey Unreported.

R.H. Edwards Decorators and Painters Limited -v- Tretol Paint Systems Limited 1985/6 JLR 64.

Shah -v- Barnet London Borough Council [1983] 1 All ER 226 HL.

Appah -v- Monseu [1967] 2 All E.R. 583.

T. Sloyan & Sons (Builders) Ltd & anor -v- Brothers of Christian Instruction [1974] 3 All E.R. 715.

Procon (GB) Ltd -v- Provincial Building Co Ltd & Ors [1984] 2 All E.R. 368.

Leverne -v- Commissioners of Inland Revenue [1928] AC 217.

Commissioners of Inland Revenue -v- Lysaght [1928] AC 234.

Jelic -v- Co-operative Press Ltd [1974] 2 All E.R. 767.