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COURT OF APPEAL

30th August, 1988

Before the Bailiff, Single Judge

BETWEEN	Thomas Joseph Burke	APPELLANT
AND	Sogex International Limited	RESPONDENT

Application by the Respondent under Rule 12(4) of the Court of Appeal (Civil) (Jersey) Rules, 1964, for an Order that the Appellant furnish security for costs in such sum as the Court shall direct; that in the meantime the appeal be stayed; and that the Appellant pay the costs of the application

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Advocate A.P. Begg for the Appellant
Advocate R.J. Michel for the Respondent

JUDGMENT

THE BAILIFF: I am sitting today as a Single Judge of the Court of Appeal to hear an application made on behalf of the respondent in this case for an order that the appellant give security for the costs of the appeal.

The appeal in question arises from a judgment of Commissioner Le Cras given on the 3rd November, 1987. It is only necessary for me to state briefly what the issues are. The plaintiff, the appellant in this case, is claiming sums of money from the defendant (the respondent). The appellant,

it is accepted and admitted by Mr Begg, his counsel, is resident outside the jurisdiction and does not have assets within the Island. The respondent is a Jersey registered company but, of course, as Mr Begg has said, it is possible for such companies to be wound up very quickly.

In this particular case a sum of $150,000 has already been paid into Court by the defendant, but not in the ordinary way. The payment into Court arose out of an attempted 'déclaration en désastre' by the plaintiff against the defendant. At a preliminary hearing before the Royal Court on the 9th April, 1987, that Court dealt with the question of whether Sogex International Limited should be declared 'en désastre'. I cannot read that judgment as in any way supporting the suggestion of Mr Michel, for the respondent today, that the $150,000 was paid into Court as a token of goodwill; it was not. It was ordered by the Court, and after a great deal of difficulty, the money was paid in and the Court ordered that it remain in Court as a kind of pledge against the risk of Sogex being declared 'en désastre'. Perhaps the effect will be that it will be available should the plaintiff succeed. Thus it is neither a payment into Court in the ordinary accepted way, nor is it a payment into Court in the way in which Mr Michel has argued today.

The judgment of Commissioner Le Cras of the 3rd November, 1987, concerned the claim of the plaintiff that a number of 'pièces signées' had been dishonoured by the defendant and that he was therefore entitled to judgment without more ado. That submission was rejected by the Commissioner and it is from that judgment, which was an interlocutory judgment, that there is now an appeal by the plaintiff before the Court of Appeal. Although dealing with it as an interlocutory matter, were the Court of Appeal to find for the appellant, that would dispose of his claim and it would be a substantive result, although an appeal on an interlocutory judgment.

The principle of ordering that security should be given for the costs of an appeal arises from Rule 12(4) of the Court of Appeal (Civil) (Jersey) Rules, 1964. Counsel has very kindly drawn my attention to two Jersey cases involving an application for security for costs in an appeal and as far as I know there are no other instances where a judgment has been delivered

by a Single Judge. Both cases were heard in 1980; the first is Clore -v- Stype Trustees (Jersey) Ltd (1980) J.J. 149; the second is Birbeck -v- New Guarantee Trust Finance Ltd (1980) J.J. 183. In the first case Mr Clyde, as he then was, referred to Rule 12(4) which states: "The Court may, in special circumstances, order that such security shall be given for the costs of an appeal as the Court thinks just". I pause there to look at the position in England; the wording in the English Rules appears to me to be identical: Order 59.r.10(5) of R.S.C. (1988) (page 879) states: "The Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just". Mr Clyde declined to look at the English rules, holding that his duty was merely to interpret Rule 12(4), but, with great respect, I think he took too restrictive a view of his powers and dismissed, perhaps peremptorily, the decisions and rulings of the English Courts, to which we do pay attention when they are rulings in respect of rules which are identical or very similar to ours. In this case the rules are identical; however the learned Single Judge does not appear to have looked at, or if he did, he certainly did not refer to them, in his judgment.

Both counsel referred me to the commentary on the Rules at page 885 of the 1988 Edition of R.S.C., under paragraph 5: "Security for the costs of an appeal (59/10/16) "The grounds upon which security for costs of an appeal may be ordered are those upon which security for the costs below might be ordered ..... any statutory grounds ..... and any special circumstances which, in the opinion of the Court, render it just to order security ....." (I omit the cases referred to for the moment).

It is interesting to read that paragraph in conjunction with paragraph 59/10/19: "Liberty of the subject - Where the liberty of the subject is in question, security will not usually be ordered ..... but contrast re Carroll (1931) 1 K.B. 104, where Scrutton L.J., said (at p.109): "the fact that the appeal relates to an application for habeas corpus is of itself no ground for preventing the Court ordering security". I pause there to look at the second, Jersey case, Birbeck -v- New Guarantee Trust Finance Ltd, which was heard before Sir Frank Ereaut. I think I may properly distinguish that case from the present one, because there, there was some doubt as to whether Mr Birbeck was in fact resident in Jersey rather than outside Jersey; and there was also a question of the liberty of the subject. I think that case does not

therefore help me very much, although it is quite true that Sir Frank followed the approach of Mr Clyde.

I continue reading from paragraph 59/10/19: "Residence out of the jurisdiction - "Security for costs will generally be ordered where the appellant is out of the jurisdiction ..... unless there are goods and chattels of his within the jurisdiction which are sufficient to answer any possible claim of the respondent and which would be available to execution ..... But it will not be ordered where the appellant resides in Scotland or Northern Ireland ....." (again, I omit the case references).

Taking those two paragraphs together, that is to say the one I have just read, 59/10/19, and the one relating to the grounds upon which security for costs may be ordered, (59/10/16) it seems to me that I might properly approach this application somewhat differently from Mr Clyde and ask myself this question: Should I not order security unless it would be unjust to order it; rather than saying that I am not going to order it unless there are very special circumstances which would entitle me to do so. I think the Court's jurisdiction is unlimited, and its discretion is unlimited. As I have suggested, with respect, I think that that approach would be the more appropriate one for me to take. 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 sought is outside the jurisdiction and does not have assets inside the jurisdiction, unless an order would make it unjust.

Starting from that proposition which, I accept, is a different approach from that of Mr Clyde and may lead to a further appeal before the Full Court of Appeal and may well, indeed, be criticised - the position appears to

be this:

Mr Burke has appealed against the interlocutory judgment of Commissioner Le Cras, which I have already touched upon. He has already been ordered to pay £750 into Court as security for costs below in respect of the substantive action as a result of an Order made by the Judicial Greffier on the 18th May, 1987. Under the terms of that order: (1) the plaintiff was required to give security for the defendant's costs, to the close of pleadings, in the sum of £750; (2) until such security was given, all further proceedings were stayed; and (3) after the close of pleadings, the defendant was at liberty to apply for further security.

It is quite clear that the parties are not equal in this case. Mr Burke is a former employee and the company, we are told, is an important international company with large assets all over the world, although it is registered in Jersey; it is almost a question of David and Goliath. Therefore the question I have to ask myself, using the approach that I have suggested to be appropriate under the circumstances and considering the provisions of Rule 12(4), is whether, if I were to make an Order, would that order be oppressive? Would any Order be oppressive? And I answer that by saying: No, I do not think that any Order would be oppressive; only an order for such sum as would make it practically impossible for the appellant to continue with his appeal would be oppressive. But the respondent has not sought a high figure. He has sought, in fact, a token figure, a figure which in relation to what the appellant (the plaintiff below) has already been ordered to pay in, and has indeed paid in, cannot, by any stretch of the imagination, be regarded as oppressive.

Therefore looking at today's application from the point of view which I have suggested it would be right to look at it - and I repeat that the normal rule is that where the person against whom the order is sought is resident outside the Island and has no assets in it, security for costs should be ordered unless there are special circumstances which would make it unjust to do so, or it would be oppressive to do so, or, as for example in Birbeck, it would affect the liberty of the subject - I cannot find, in the facts of this particular case, that it would be unjust to make an order and I accordingly order that the sum of £1,000 will be given for the costs of the appeal by the

appellant and until it is paid the appeal will be stayed.

(Counsel address the Court on Costs).

I think, after hearing counsel address me on costs, that I accept Mr Begg's argument in this case. I think that although you have succeeded, Mr Michel, there is certainly a matter to be argued and I think that in view of the very important issues raised in the interlocutory appeal, the costs of this application should be in the cause.

Authorities referred to: * at the hearing; ß in the Judgment

* ß Court of Appeal (Civil) (Jersey) Rules, 1964: Rule 12(4).

* R.S.C. Order 23.

* ß R.S.C. Order 59, rule 10.

* Lindgren -v- Jetcat Limited (1985-86) JLR 66 (Part 1).

* ß Clore -v- Stype Trustees (Jersey) Ltd (1980) JJ 149.

* ß Birbeck -v- New Guarantee Trust Finance, Ltd (1980) JJ 183.

* Davest Investments Ltd -v- Bryant (1982) JJ 213.

R.H. Edwards Decorators & Painters Limited -v- Tretol Paint Systems Limited: (1985-86) JLR 64 (Part 1).

* D.B. Installations Limited -v- Vaut Mieux Limited & Others (Unreported Jersey Judgments 87/36).

* Heseltine & Others -v- Egglishaw & Others (Unreported Jersey Judgments 88/17).