8 pages.

ROYAL COURT

65A.

18th May, 1993

Before the Judicial Greffier

BETWEEN	Condor U.K. Limited (formerly Condor Construction Limited) trading as Court Consultants	PLAINTIFF
AND	Hotel de France (Jersey) Limited trading as Hotel de France (by original action)	DEFENDANT
	AND	
BETWEEN	Hotel de France (Jersey) Limited trading as Hotel de France	PLAINTIFF
AND	Condor U.K. Limited (formerly Condor Construction Limited) trading as Court Consultants (by counterclaim)	DEFENDANT
	AND	
BETWEEN	Condor U.K. Limited (formerly Condor Construction Limited) trading as Condor Structures	PLAINTIFF
AND	Hotel de France (Jersey) Limited trading as Hotel de France (by original action)	DEFENDANT
	AND	
BETWEEN	Hotel de France (Jersey) Limited trading as Hotel de France	PLAINTIFF
AND	Condor U.K. Limited (formerly Condor Construction Limited) trading as Condor Structures (by counterclaim)	DEFENDANT

Application by the Defendant in both original actions (hereinafter referred to as "the Defendant") for an Order that the Plaintiff in both original actions (hereinafter referred to as "the Plaintiff") pay additional security for costs.

Advocate R.J. Michel for the Plaintiff.
Advocate W.J. Bailhache for the Defendant.

JUDGMENT

JUDICIAL GREFFIER: On 11th June, 1991, I ordered that the Plaintiff give security for the costs of the Defendant up to and including the completion of discovery by paying to the Judicial Greffier within one month of the date thereof, the sum of £1,250.00 in relation to each action. The reasons for that decision were set out in a brief written Judgment dated 11th June, 1991, which was not distributed in the Jersey Unreported series.

The Defendant is now returning to the Court in order to seek additional security for costs, mainly relating to the period since the completion of discovery.

Although there are two separate actions, they both relate to construction work at the Hotel de France. Between the two actions the Plaintiff is claiming about £70,000. The Defendant has small counterclaims totalling about £5,000 relating to accommodation costs. However, in addition to this they have a substantial counterclaim relating to alleged failure to perform adequately contractual duties as mechanical service consultants and managers of certain contracts. The quantum of the substantial counterclaim has never been determined but, from existing pleadings, it appears that it may be as high as one million pounds.

Section 23/1-3/29 on p.430 of the R.S.C. (1993 Ed'n) reads as follows:-

> ***"Amount of security - The amount of security awarded is in the discretion of the Court, which will fix such sums as it thinks just, having regard to all the circumstances of the case. It is not always the practice to order security on a full indemnity basis. If security is sought, as it often is, at an early stage in the proceedings, the Court will be faced with an estimate made by a solicitor or his clerk of the costs likely in the future to be incurred; and probably the costs already incurred or paid will be only a fraction of the***

security sought by the applicant. At that stage one of the features of the future of the action which is relevant is the possibility that it may be settled perhaps quite soon. In such a situation it may well be sensible to make an arbitrary discount of the costs estimated as probable future costs, but there is no hard and fast rule. On the contrary each case has to be decided on its own circumstances, and it may not always be appropriate to make such a discount (Procon (Great Britain) Ltd. v. Provincial Building Co. Ltd. [1984] 1 W.L.R. 557; [1984] 2 All E.R. 368, C.A.). It is a great convenience to the Court to be informed what are the estimated costs, and for this purpose a skeleton bill of costs usually affords a ready guide (cited with approval by Geoffrey Lane J. in T. Sloyan & Sons (Builders) Ltd. v. Brothers of Christian Instruction [1974] 3 All E.R. 715, p.720).

Where the claim of the plaintiff, who may be required to give security for costs, whether under r.1 or under the Companies Act 1948, s.726(1), is countered by a cross-claim put forward by the defendant, the amount by which such cross-claim exceeds the plaintiff's claim has to be treated as a counter-claim in relation to which the plaintiff is in the position of a defendant and in respect of which therefore he cannot be ordered to give security for costs, and accordingly, in such case the appropriate amount of security must be determined by having regard to the fact that the defence goes to the whole of the plaintiff's claim while disregarding the excess of the defendant's claim over the plaintiff's claim (T. Sloyan & Sons (Builders) Ltd. v. Brothers of Christian Instruction [1974] 3 All E.R. 715).

Security for costs is not necessarily confined to future costs, but may, when applied for promptly, be extended to costs already incurred in the suit (Brocklebank v. King's Lynn Steamship Co. (1878) 3 C.P.D. 365); Massey v. Allen (1879) 12 Ch.D. 807; Procon (Great Britain) Ltd. v. Provincial Building Co. Ltd. [1984] 1 W.L.R. 557; [1984] 2 All E.R. 368, C.A.).

The amount of security awarded may be increased, see Sturla v. Freccia [1877] W.N. 166, 188; [1878] W.N. 161; Republic of Costa Rica v. Erlanger (1876) 3 Ch.D. 62; Northampton Coal, etc., Co. v. Midland Waggon Co. (1878) 7 Ch.D. 500; Massey v. Allen (1879) 12 Ch.D. 807; and in Re Feld's Will Trusts, Feld v. Feld, Law Journal, Vol.CX, p.2, where the defendants sought security for costs as the costs likely to be incurred were increased, Wynn-Parry J. directed that an additional amount to that already in the defendants' hands be lodged in Court.

There is no rule that the Court will not grant more than two applications for security (Merton v. The Times Publishing Co.

(1931) 48 T.L.R. 34). In that case, however, the Court made a final order of £1,000, but without prejudice to a further application for a commission."

The leading case is Sloyan v. Brothers of Christian Instruction (1974) 3 All E.R. 715, and this has great similarities to the present case. In the Sloyan case there was a claim for £10,500 and a counterclaim for £65,548 in relation to a building contract.

There was a very helpful section beginning near the top of p.721 of that Judgment, which reads as follows:-

"The facts in that case were far removed from those of the present case, but it is noteworthy that the cross-claim there did not exceed the amount of the claim.

In my judgment, the Brothers' cross-claim set out in their defence and counterclaim can properly be treated as a defence or set-off (it does not matter for present purposes which it is called) to the builders' claim, insofar as the former does not exceed the latter. But insofar as the Brothers' claim exceeds the builders' claim it must be treated as a counterclaim to which the builders are in the position of defendants and in respect of which they cannot as such be ordered to give security.

Such a mathematical calculation and ruling should have the merit, as counsel for the builders pointed out, of discouraging massive counterclaims brought in terrorem. He followed that by questioning whether the fact that the builders' claim is only one-sixth that of the Brothers would not justify securing one-sixth of their costs, but it does not seem that this would be a proper way of fixing the security to be ordered.

In my judgment the appropriate amount of security in respect of the Brothers' costs already incurred and to be incurred should be determined having regard to the fact that they put forward a defence to the whole of the builders' claim but disregarding the fact that they claim a great deal more besides. This determination is made difficult by the fact that there are no proven or accepted figures before me as to what the Brothers' costs would have been if they had confined themselves to defeating the builders' claim. No doubt there are many cases where the court is able to arrive at a reasonably accurate figure of what a defendant's costs should be and then, if the usual practice be followed, order security for two-thirds of that amount. But I am really in the dark having regard to the way the estimates were put before me. It was for the Brothers and not for the builders to show what their costs were likely to be, and to show,

amongst other matters, that the whole of such costs as they have incurred and will incur in respect of their expert witness could be attributed to their defence to the builders' claim. They did not do so. In all the circumstances, it seems to me that an amount for security which would be neither 'illusory nor oppressive', to use the words of Lindley MR in the Dominion Brewery case, would be £5,000.".

It appears to me that what I have to do here is to determine the extent of the costs which would need to be incurred by the Defendant in defending the original actions and to exclude therefrom the costs which would be incurred in prosecuting the counterclaim over and above the sum of £70,000. This is, of necessity, a very difficult calculation and will be by way of an estimate.

I also bear in mind that in the previous written Judgment, I had indicated that I would not allow security for the elements of the counterclaim relating to accommodation as these were not, in my view, sufficiently related to the original subject matter of the action.

I also note from the quotation from section 23/1-3/29 that the amount of security awarded may be increased. I take this to mean that it can be increased not only in relation to the period of the case involved, i.e. after the close of discovery, but also in relation to increased costs up to the close of discovery.

I would also comment in passing that I have, in past cases, repeatedly rejected the two thirds principle, which I find to be arbitrary, in favour of ordering costs up to a particular stage in the procedure, such as the close of inspection of documents.

It is clear to me that the subject matter of the two actions has now become far more complex and detailed and the nature of the claim far more substantial than appeared to be the case in 1991 when I made the first order for security for costs. At that time it was not clear as to whether the quantum of the counterclaims would be as much as £70,000 but now they would appear to be as much as one million pounds. I am now being told that there are a vast number of documents available on discovery.

Advocate Bailhache produced a skeleton bill based upon an expectation of a ten week trial. As the sums claimed in relation to this are very substantial, the first question which I have to determine is the likely length of trial which would be needed in order to defend the claim for £70,000. In my view, this would be of the order of two weeks.

Included in the time for preparing the case for trial and attending the trial are hours relating to an English solicitor.

I was referred in this connection to the Judgment in Rahman -v- Chase Bank (C.I.) Trust Company Limited & Ors. (1990) J.L.R. 316. The section commencing on page 140 of that Judgment deals with the costs of non-Jersey lawyers. In this case, Advocate Bailhache conceded that there was very little, if any, in the way of non-Jersey law involved and that the assistance of the English solicitor would be not by way of specialist advice on legal points but by way of assistance in managing the case. I have no doubt that in these circumstances the fees of an English solicitor would not be recoverable on taxation and that, therefore, I should not make any allowance for these.

Advocate Michel sought to raise the issue of oppression in relation to the case on the basis that the Plaintiff is now in receivership and has limited resources. Advocate Bailhache, however, attempted to counter this by saying that an insurance company was assisting in relation to the cases. However, it is clear to me that the insurance company can only have an interest in resisting the substantial counterclaim and not in pursuing the claims for £70,000. Advocate Michel did not provide me with details of the available financial resources of the Plaintiff.

Included in the skeleton bill was a claim for £75,000 for experts' costs both pre-trial and at trial. Advocate Bailhache indicated that these would be for a consulting engineer, an electrical engineer and a heating engineer. However, I was not given any clear breakdown as to how these figures would be calculated.

Following the principles set out above and based upon a two week trial, I have come out with the following figures:-

(1) It appears to me that the costs incurred to date, which would be applicable to the defence of the case now come to about the previous security of £2,500. The £5,720 based on £160 per hour would come to £2,860 approximately on taxation and in addition to this there would be the costs of the hearing on 4th May, 1993. However a deduction would need to be made for the fact that work will have been done beyond that needed purely to defend the claim of £70,000.

(2) The claim for 60 hours for making inspection I have reduced to 20 hours at £70 per hour equals £1,400.

(3) The claim for further pleadings I have reduced to 6 hours at £90 per hour equals £540.

(4) The claim for further interlocutories I have reduced to 6 hours at £100 per hour equals £600.

(5) The claims for preparing bundles for trial I have reduce to 4 hours at £70 plus 8½ hours at £40 equals £620.

(6) The claim for preparing case for trial I have reduced to 16 hours at £90 per hour which equals £1,440 and I have disallowed any sum for an English solicitor.

(7) The sum for attending trial I have allowed at 10 days at 5½ hours per day equals £5,500. In addition to this I have allowed further preparation time whilst the case is going on at 2 hours per day at £90 per hour and this comes to a further £1,800.

(8) I have allowed attending for Judgment at £100.

(9) I have allowed experts' costs in the sum of £5,000.

(10) These figures totalled together come to an additional £17,000.

Finally, I have to ask myself the question as to whether the provision of additional security in the total sum of £17,000 in relation to the claims for £70,000 is oppressive. Nothing was put before me to indicate that it was oppressive and so I am ordering in relation to each case that the Plaintiffs in the original action provide additional security in the sum of £8,500. I will need to be addressed both on the time period in relation to this and also in relation to the matter of costs.

Authorities

R.S.C. (1993 Ed'n): 23/1-3/29: p.430.

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

Rahman -v- Chase Bank & Ors. (1990) J.L.R. 316.