

1985 December 21

[A. LOIZOU, J.]

ROGER DAGHER AND OTHERS,

*Plaintiffs,*

v.

VITTORIO MORACE AND OTHERS,

*Defendants.*

*(Admiralty Action No. 363/83).*

*Admiralty—The Cyprus Admiralty Jurisdiction Order 1893, rules, 185, 191—The Civil Procedure Rules, 0.60, r. 1.—The Rules of the Supreme Court in England 1960 Ord. 65 rules 6, 6A, 6B and 7—Security for costs—Application by defendants for an order directing the plaintiffs, who are foreigners residing abroad with no assets in Cyprus, to provide security for costs—The security, if applied for promptly, may be extended to costs already incurred—Whether bank charges incurred on the Bank Guarantee given for bailing out the defendant ship can be included as part of the costs—Costs of witnesses are recoverable and can be included in the security—The quantum of the security is at the discretion of the Court—It should not be such as to constitute an insurmountable obstacle for a foreign plaintiff.*

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By the present application the defendants seek:-

- (a) An order directing the plaintiffs to lodge in Court within twenty-one days from the date of such order, the sum of C£5,000 or such other amount as the Court may consider proper, as security for defendants costs in this action; and 20
- (b) An order staying all further proceedings in this action until the plaintiffs lodge security for costs.

The application is based on the Cyprus Admiralty Jurisdiction Order, 1893, rules 185, 203 to 212 and 237. 25

In the affidavit filed in support of the application it is stated, and this has not been disputed by the respondents, that all plaintiffs are foreigners residing, established and carrying on business in Lebanon, they have no assets in Cyprus and in case the applicants/defendants are successful in their defence and the costs are adjudicated against them, the defendants will not be able to recover same. It is further alleged that the facts and issues in this case are complicated and evidence will have to be adduced from abroad. Mr. Vittorio Morace (Defendant No. 1) will have to travel from Italy to testify as to the facts of the case. Also the master of the ship will have to be traced and brought to Cyprus to give evidence. Another witness is the defendants representative in Lebanon. (Details of the defendants' estimated costs appear at p. 662 post).

The plaintiffs opposed the said application on the ground that the amount claimed is unreasonable and excessive taking into consideration the procedure which will be followed. Consequently the extent of the Court's discretion is not in issue in this case.

*Held*, (1) Security for costs is not necessarily confined to future but may, when applied for promptly, be extended to costs already incurred in the suit. In the present case taking into consideration the steps taken in the action and their nature it can safely be said that the application for security for costs has been promptly taken.

(2) The amounts claimed in respect of the application to dismiss the action for want of prosecution (see items (c)(d)(e)(f)(g) and (h) at p. 662 post) and in respect of the application for judgment against the plaintiffs in default of filing a reply to the defendants' counterclaim (see items (j) to (o) at p. 662 post) are not justified as both these applications were disposed of without order as to costs.

(3) The applicants base their claim for C£500 to cover Bank charges on the Bank Guarantee given by the defendants for bailing out the defendant ship on a passage in the *St. Eleftherio* [1957] 2 All E.R. 374 at 377. There is no need to pronounce in this case to what extent such charges should be considered as part of the defendants' costs for the purpose of determining the amount of the

security for costs, because in issuing the warrant for the arrest of the defendant ship it was a condition to its issue that a security bond in the sum of £5,000 be given by the applicants/plaintiffs to be utilised according to the directions of the Court in case the said order was proved to be unjustified and unreasonable, i.e. to cover all possible damages resulting from that case *Breidi and Another v The Ship "Gloriana"* (1981) 1 C.L.R. 177 distinguished 5

(4) Witnesses expenses (items (q) (r) and (s) at p 662 post are recoverable (rule 191 of the Cyprus Admiralty Jurisdiction Order 1893) It is, however, too early to have any indication as to the necessity of their presence and the length of their stay or whether their presence can be dispensed with by making use for example of a notice to admit facts or other procedural means that may result in reducing the costs 10 15

(5) The quantum is in the discretion of the Court It should not be such as to constitute an insurmountable obstacle for a foreign plaintiff to make use of the jurisdiction of the Court 20

*Observation by the Court* The existing divergence of opinion regarding the Court's discretion as to whether a foreign plaintiff should be ordered by virtue of rule 185 of the Cyprus Admiralty Jurisdiction Order, 1893 to provide security for costs (see *Hesham Enterprises v The Ship Rami* (1978) 1 C.L.R. 195 at 198, *Farah Hassan Ashour v Claudia Maritime Co Ltd* (1980) 1 C.L.R. 64 and *Almana Engineering v. Glyfos Commercial* (1981) 1 C.L.R. 273) calls for a consideration of the matter and the need for bringing our rules of Court up to date 25 30

*Application granted*  
*Security of costs in the sum*  
*of £1,000.*

**Cases referred to:**

*Hesham Enterprises v The Ship Rami* (1978) 1 C.L.R. 195; 35

*Aeronave SPA and Another v Westland Charter and Others* [1971] 3 All E.R. 531;

*Almana Engineering v. Glyfos Commercial* (1981) 1  
C.L.R. 273;

*Farah Hassan Ashour v. Claudia Maritime Co. Ltd.* (1980)  
1 C.L.R. 64;

5 *Crozat v. Brogden* [1984] 2 Q.B. 30;

*Brocklebank v. King's Lynn Steamship Co.* [1878] 3 C.P.  
D. 365;

*St. Eleftherio* [1957] 2 All E.R. 374;

10 *Breidi and Another v. The Ship "Glorianna"* (1981)  
1 C.L.R. 177;

*Procon (Great Britain) Ltd. v. Provincial Building Co. Ltd.  
and Another* [1984] 1 W.L.R. 557.

#### Application.

15 Application by defendants for an order of the Court  
directing the plaintiffs to give security for costs.

*A. Haviaras*, for applicants-defendants.

*M. Vassiliou* with *E. Euripidou*, for respondents-  
plaintiffs.

*Cur. adv. vult.*

20 A. LOIZOU J. read the following judgment. By the present  
application the defendants seek:-

25 (a) An order directing the plaintiffs to lodge in Court  
within twenty-one days from the date of such order,  
the sum of C£5,000 or such other amount as the  
Court may consider proper, as security for defendants  
costs in this action; and

(b) An order staying all further proceedings in this  
action until the plaintiffs lodge security for costs, as  
above.

30 The application is based on the Cyprus Admiralty Juris-  
diction Order 1893, rules 185, 203 to 212 and 237. Rule  
185 with which we are concerned in this case reads as  
follows:

“185. If any plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision) or any defendant making a counter-claim is not resident in Cyprus, the Court or Judge may, on the application of the adverse party, order him to give such security for the costs of such adverse party as to the Court or Judge shall seem fit; and may order that all proceedings in the action be stayed until such security be given.” 5

It need hardly be said, being so apparent from the wording of this rule, that the Court may order security for costs if the plaintiff, or any defendant making a counter-claim, is not resident in Cyprus. 10

This rule in its material respects corresponds to Order 60 rule 1 of our Civil Procedure Rules and to Order 65, rules 6, 6A, 6B and 7 of the Rules of the Supreme Court in England 1960, which were replaced by Order 23 of R.S.C. (Rev.) (1962) in which there was embodied the previous Case law dealing with the power of the Court to order security for costs. It is a provision intended to safeguard a defendant—(or a plaintiff from a defendant making a counter-claim)—in recovering any costs in his favour in the cases where the plaintiff—(or the counter-claiming defendant)—is resident abroad and has no property in Cyprus on which execution may be levied. 20 25

In *Hesham Enterprises v. The Ship Rami* (1978) 1 C.L.R. p. 195 at p. 198 Triantafyllides, P., referred to the *Aeronave SPA and Another v. Westland Charter and Others* [1971] 3 All E.R. 531 and pointed out by reference to it, that although it is not an inflexible rule that but a matter of discretion whether, a foreign plaintiff should be ordered to provide security for costs, it is the usual practice to order so if the justice of the case demands it. In fact he went further and said: 30

“Indeed, the *Aeronave* case, supra, was decided in relation to the application of Order 23, rule 1, of the Rules of the Supreme Court in England, which is differently worded from our aforementioned rule 185; but there is sufficient similarity between the said two rules in material respects so that the *Aeronave* case 40

can be of guidance for the purposes of the present application;"

5 He then quoted from the judgment of Lord Denning in the *Acronave Case*, at p. 533, which I need not repeat here. On the other hand in *Almana Engineering v. Glyfos Commercial* (1981) 1 C.L.R. p. 273 Savvides J., took a more or less different view. I dealt also with the matter in *Farah Hassan Ashour v. Claudia Maritime Co. Ltd.*, (1980) 1 C.L.R. 64 and I referred to *Hesham Enterprises* case (supra) and the approach of Triantafyllides P., but I said that I could not resist, however, the temptation of quoting a small passage from the judgment in *Crozat v. Brogden* [1984] 2 Q.B. 30 which read:

15 "It is the usual practice of the Courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order."

20 I then concluded by saying that the Court has to exercise a discretion with regard to the making of an order for security for costs under rule 185. I leave matters at that with the remark that this divergence of opinion calls for a consideration of the matter and the need for bringing our rules of Court up to date, but does not affect the outcome of this application.

30 In the affidavit filed in support of the application it is stated, that this has not been disputed by the respondents, that all plaintiffs are foreigners residing, established and carrying on business in Lebanon, they have no assets in Cyprus and in case the applicants/defendants are successful in their defence and the costs are adjudicated against them, the defendants will not be able to recover same. It is further alleged that the facts and issues in this case are 35 complicated and evidence will have to be adduced from abroad. Mr. Vittorio Morace (defendant No. 1) will have to travel from Italy to testify as to the facts of the case. Also the master of the ship will have to be traced and bought to Cyprus to give evidence. Another witness is 40 the defendants' representative in Lebanon. The plaintiffs delayed the filing of their reply to defendants' answer, with

the result that the Bank guarantee given by the defendants for bailing out the defendant ship will have to be renewed.

Details of the defendants' estimated costs are also given in page 6, of the Affidavit, reads as follows:

(a)	Instructions to defend	£ 16.00	5
(b)	29.12.83 Attending Court	40.00	
(c)	3.2.84 Preparing application to dismiss the action for want of prosecution	8.00	
(d)	Stamps on application & service	0.75	10
(e)	Attending Registrar	6.00	
(f)	24.2.84 Hearing of application	22.00	
(g)	3.3.84 Hearing of application	22.00	
(h)	24.3.84 Hearing of application	22.00	
(i)	Preparing Answer	23.40	15
(j)	29.8.84 Preparing appl. for judgment in default	10.40	
(k)	Stamps on appl. & service	0.75	
(l)	Attending Registrar	8.00	
(m)	16.6.84 Attending Court	29.00	20
(n)	27.8.84 Attending Court	29.00	
(o)	24.9.84 Attending Court	29.00	
(p)	Hearing (4 sessions)	208.00	
(q)	Examining 4 witnesses	32.00	
(r)	Travelling expenses for 4 witnesses including Hotel and maintenance for 4 days (estimate)	2,500.00	25
(s)	Loss of time of witnesses from abroad (estimate)	1,500.00	
(t)	Bank charges on Bank guarantee (estimate)	500.00	30
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		6,006.00	

The plaintiffs opposed the said application on the ground that the amount claimed is unreasonable and excessive taking into consideration the procedure which will be followed. Consequently the extent of the Court's discretion is not in  
5 issue in this case.

Indeed 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, and  
10 Annual Practice 1982 p. 440).

In the present case taking into consideration the steps taken in the action and their nature it can safely be said that the application for security for costs has been promptly taken and can therefore be extended to costs already in-  
15 curred. In this respect the affidavit contains the items of the costs of two applications. The one is that of the 3rd February 1984, for an order dismissing the action for want of prosecution which are given in paragraphs (c), (d), (e),  
20 (f), (g), and (h) hereinabove set out but that application was withdrawn without costs by counsel appearing for the applicants/defendants as the petition had by then been filed and upon that it was dismissed by the Court with no order as to costs.

The other application was that filed on the 29th May, 25 1984, and which obviously by typing error was referred to in the affidavit as dated 29th August 1984, (paragraph (j)) and is covered by paragraphs (j) to (o), for judgment against the plaintiffs in default of filing a reply to the defendants' counterclaim. No costs were claimed for it by the  
30 applicants and was dismissed by the Court accordingly on the 24th September, 1984, as the Reply and Defence to the Counterclaim had been filed, again with no order as to costs. I cannot see how the costs incurred for both applications can be included in the amount to be given as  
35 security for costs.

In the circumstances therefore there remain as items objected to by the respondents/plaintiffs firstly the costs of witnesses which are to come from abroad, and which are covered by paragraphs (g) (r) and (s) of the affidavit,  
40 and whose costs are estimated at £4,032 and secondly to



Bank Charges as the Bank Guarantee given by the defendants for bailing out the defendant ship under paragraph (t) estimated at £500.

The applicants base their claim to include the Bank charges in their estimate of costs on a passage to be found in the *St. Eleftherio* [1957] 2 All E.R. p. 374, at p. 377 which reads as follows:

“The fact is, and this is the sanction against abuse, that the plaintiffs, if their alleged cause of action turns out not to be a good one, will be held liable for costs, and those costs will include the costs of furnishing bail in order to secure the release of the ship. The defendants can always secure the release of their ship by the simple expedient of furnishing bail. It is perfectly true that if, as they say it will, the action fails, they will probably not recover inter partes the whole of the costs of furnishing the bail; but in that respect I do not know that they are in any different position from other defendants in other types of action. That observation applies especially in these days of legal aid. There is many a defendant, who has been unsuccessfully sued, but who at the end of it all finds himself in the position that he cannot recover the whole of his costs. That is one of the incidents of litigation which parties have to accept in modern conditions. The simple remedy for the defendants, if they want their ship released, is to put in bail. The action will then be tried, and at the appropriate time—when all the facts have been ascertained—due consideration will be given to the arguments on law which the defendants desire to advance. In my judgment, therefore, this motion is misconceived and I find myself unable to accede to it.”

I need not pronounce in this case to what extent the charges on the bank guarantee given by the defendants for bailing out the defendant ship should, for the purposes of determining the amount of the security for costs to be ordered, be considered as part of their costs, as in issuing the warrant for the arrest of the defendant ship it was a condition to its issue that a security bond in the sum of

£5,000 be given by the applicants/plaintiffs to be utilised according to the directions of the Court in case the said order was proved to be unjustified and unreasonable, i.e. to cover all possible damages resulting from that case.

5 The case of *Breidi and Another v. The Ship "Gloriana"* (1981) 1 C.L.R. 177, in which Demetriades J., held that the bank guarantee furnished in compliance with the order made by the Court on an application by the plaintiffs for the arrest of the ship and her cargo cannot be considered  
10 as a payment into Court for the purposes of an application for security for costs, is obviously distinguishable, as the bank charges in question stem directly from the issue of the warrant of arrest.

There remains therefore to consider the issue regarding  
15 the witnesses' expenses.

Rule 191 provides:-

"The costs to be allowed on taxation shall include all fees of Court of sums reasonably expended in the employment of advocates in procuring the attendance  
20 of witnesses and in the travelling, lodging and maintenance of the party entitled to recover costs."

Witnesses expenses therefore being recoverable have to be included in the amount of the security to be awarded. To my mind the amount of their costs has to be assessed  
25 in the light of all the circumstances of the case including the necessity and the extent, of their being called as witnesses. In the present case I have not been persuaded and in fact it was too early to have any indication as to the necessity of their presence and the length of their stay or  
30 that their presence could not be dispensed with by making use for example of a notice to admit facts or other accepted procedural means that may result in the reduction of costs. I shall make therefore an estimate of the applicants/defendants costs of witnesses which together with the rest of the  
35 costs in the proceedings bring at this stage the total of the amount of the security to be awarded to £1,000.--.

After all, such amount may be increased by the Court if need be and there is ample authority in that respect.

(See Annual Practice 1982 at p. 440 and the authorities therein referred to).

Before concluding I would like to refer to the case of *Procon (Great Britain) Ltd., v. Provincial Building Co., Ltd., and Another* [1984] 1 W.L.R. p. 557 to which my attention was drawn by counsel for the applicants and in which it is pointed out that on the true construction of R.S.C. Order 23 rule 1, the security awarded should be such as the Court in all the circumstances of the case thought just, and that any purported practice of making an arbitrary deduction of one-third of the estimated party and party costs was unsupported by either statutory provision or authority. This case was also referred to as an authority that in addition to a solicitors costs his disbursement must be included in the estimate of costs.

I need not dwell much on both issues. Useful is the per curiam statement to be found therein that the Court in the exercise of its discretion as to the quantum of security to be ordered is entitled to take into account the prospect of settlement, particularly where the security is sought at a very early stage of the proceedings and if it is assumed that litigation will proceed to a final trial, it may be sensible to discount by as much as one-third.

It is obvious that the quantum is in the discretion of the Court and the amount ordered to be given as security should not in any event be such as to constitute an insurmountable obstacle for a foreign plaintiff to make use of the jurisdiction of this Court.

For all the above reasons I grant the application and I order the respondents to give security for costs in the sum of £1,000.- and that in the meantime all proceedings in the action should be stayed until the security is given. Further in the event of the security not being given within two months from to-day, then the action shall stand dismissed, unless in the meantime an order to the contrary is made.

Costs of this application in favour of the applicants.

*Application granted with costs.*