area committee which shall, in accordance with Schedule 2 to the Act, fix the amount of costs by assessment made without a taxation."

The regulation further provides by paragraph (2) that the area committee may if it thinks fit request the appropriate taxing officer to fix the amount of costs by assessment made without a taxation.

If such request is made by the area committee to the Supreme Court Taxing Officer or Admiralty Registrar the appropriate taxing officer will (i) in the normal course, assess the costs without requiring the attendance of the solicitor: (ii) if he considers it necessary, require production of such papers and vouchers as he thinks fit and/or require the solicitor to attend for further explanation: (iii) issue a certificate of assessment of the costs.

2. *Practice Direction (Legal Aid: Agreed Costs) (No. 2)* [1972] 1 W.L.R. 783 dated 10 May 1972 is cancelled.

F. T. HORNE
Chief Taxing Master

13 March 1984.

[COURT OF APPEAL]

*PROCON (GREAT BRITAIN) LTD. v. PROVINCIAL BUILDING CO. LTD. AND ANOTHER

1984 Jan. 17, 18

Cumming-Bruce, Griffiths and Stephen Brown L.JJ.

Costs—Security for costs—Amount of security—Counterclaim by foreign defendants in excess of plaintiffs' claim—Security awarded in respect of full amount of estimated costs—Court's discretion as to quantum of security to be ordered—Whether practice that only two-thirds of estimated costs awarded—Principles on which discretion to be exercised—R.S.C., Ord. 23, r. 1

The plaintiffs were the builders of a refinery in Newfoundland, Canada. In September 1976 they issued a writ in the Queen's Bench Division against the first and second defendants, the refinery owners, claiming the balance of money due under the building contract. The first and second defendants issued a defence and counterclaim in which they alleged that the work had not been properly done, both in respect of the mode of erection and the timing. Schedule of defects and consequential losses totalling approximately £60 million were annexed to the counterclaim. The first and second defendants had operated the refinery until they went into liquidation and there was evidence that in the event of the plaintiffs obtaining judgment, they would be unlikely to receive anything other than a slender dividend in the liquidation. The plaintiffs accordingly, as defendants to the counterclaim, made an application for security for costs under R.S.C., Ord. 23, r. 1.[1] They gave evidence that by 1 May 1983 costs of approximately £5·5 million had been incurred and that a further £5 million would be incurred up to the estimated date of trial in January 1985. Bingham J. held that in so far as the application related to future costs the calculation of the quantum to be ordered would be limited to the costs up to January 1984 only and that, allowing for reduction on taxation, the approximate party and party costs up to January 1984 would be £6 million and

[1] R.S.C. Ord. 23, r. 1: see post, p. 564D–E.

that security for that amount should be given. The first and second defendants appealed against the order on the ground, inter alia, that it was established practice in the Queen's Bench Division when ordering security for costs to fix a sum of approximately two-thirds of the estimated party and party costs.

On the question as to the correct principle on which security for costs should be awarded under R.S.C., Ord. 23, r. 1 in actions in the Queen's Bench Division:—

Held, dismissing the appeal, that on the true construction of R.S.C., Ord. 23, r. 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; that, accordingly, given that the bulk of the plaintiffs' estimated costs had already been incurred, and that the judge had accepted the estimated costs as reasonable and had made an appropriate reduction to take into account the likelihood of the estimated figure being reduced on taxation, there were no grounds for interference with the judge's order (post, pp. 566H—567B, 568A–B, 569E–H, 571A–C, F–H).

Per curiam. 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 (post, pp. 567B–D, 571D).

The following cases are referred to in the judgment of Cumming-Bruce L.J.:

Birkett v. James [1978] A.C. 297; [1977] 3 W.L.R. 38; [1977] 2 All E.R. 801, H.L.(E.)

Dominion Brewery Ltd. v. Foster (1897) 77 L.T. 507, C.A.

Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan (1866) 1 Ch.App. 437, C.A.

Parkinson (Sir Lindsay) & Co. Ltd. v. Triplan Ltd. [1973] Q.B. 609 ; [1973] 2 W.L.R. 632; [1973] 2 All E.R. 273, Mars-Jones J. and C.A.

Sloyan (T.) & Sons (Builders) Ltd. v. Brothers of Christian Instruction [1974] 3 All E.R. 715; [1975] 1 Lloyd's Rep. 183

The following additional case was referred to in argument:

Harmony Shipping Co. S.A. v. Orri, (unreported), 30 March 1979, Lloyd J.

APPEAL from Bingham J.

The first and second defendants, Provincial Building Co. Ltd. and Provincial Refining Co. Ltd., appealed against the order of Bingham J. made on 6 July 1983 by which he ordered that their counterclaim against the plaintiffs, Procon (Great Britain) Ltd., be stayed unless they provided £6 million security for the plaintiffs' costs of defending the counterclaim, and sought an order that the order be set aside or varied so as to reduce the amount.

The grounds of appeal were that the judge (1) was wrong to order security on the basis of an indemnity against the plaintiffs' estimated party and party costs as incurred to date and estimated as likely to be incurred up to January 1984; (2) was wrong in principle in not following the practice in the Queen's Bench Division of fixing the sum at about two-thirds of the estimated party and party costs up to the stage in the proceedings for which security was ordered; (3) was wrong in treating the bill of costs set out in the plaintiffs' affidavit as a detailed bill, in the absence of

any supporting documents; (4) ought not, having regard to the fact that the first and second defendants were foreign corporations, to have treated that bill of costs in the affidavit as a sufficient and detailed bill of costs in the absence of any supporting documents which would have permitted the costs claimed to have been incurred to be checked; (5) was wrong to infer that the plaintiffs' payment into court was or was likely to have been made, not as an admission of liability, but as a prudent precaution against any risk in costs when the amount paid in was the equivalent of the sum which the plaintiffs contended represented the limit of their liability under the contract and when they were claiming very substantial sums in the action; and (6) in the premises, ought not to have taken the sum paid into court into account in assessing the amount of the security which the first and second defendants were to be ordered to provide.

The facts are stated in the judgment of Cumming-Bruce L.J.

Alexander Irvine Q.C. and *Nicholas Dennys* for the first and second defendants.

Jonathan Playford Q.C. for the plaintiffs.

CUMMING-BRUCE L.J. This appeal raises two issues. The first issue is a matter of general importance. On what principle should security for costs be awarded: that is to say, when it is decided that security should be ordered, on what principle should the amount of that security be determined?

The second issue raises the question whether on the facts the security ordered by the judge was too much, on the ground that he did not take a sufficiently cautious view in order to protect the party against whom security was ordered, from the oppression of meeting security likely or liable to exceed the costs which the party seeking security had incurred or was likely to incur, when taxed on a party and party basis. That second question has involved consideration of much detail. In order to decide whether that ground of appeal was made out it was necessary for this court to take as much trouble as the judge to appreciate the history and prospects in the legal proceedings, to identify the issues with reasonable particularity, to consider the evidence relied upon by the party seeking security as substantiating the costs which that party maintained had already been incurred and which would be accepted by the taxing master taxing on a party and party basis.

So this judgment first has to deal with the point of principle in order to determine whether the judge was right when, having made his appreciation of the impact of costs already incurred and his prognostication of the costs likely to be incurred between July 1983 and 11 January 1984, he decided to arrive at the amount of his order without deducting one third as an arbitrary fraction from the sums that his appreciation of the costs had led him to calculate. Bingham J. said in his judgment:

> "I recognise that there is a difference in practice between various branches of this court. In the Commercial Court it is generally accepted that, if we are presented with applications for security for costs without an attempt to particularise, two-thirds is ordered, but if there is a particularisation with facts and figures, then particularly in respect of past costs, and making an allowance for what might be taxed off, we give an indemnity. I am bound to say that I believe that this is the correct principle and I do not see why, if the costs have

been incurred, there should not be security for all of them and not two-thirds. I think that this is a case where the Commercial Court practice should be adopted. It is a major piece of litigation which is at least quasi-commercial and accordingly I will not take the practice of two-thirds but grant an indemnity of whatever I consider to be the proper sum."

It is important for a proper understanding of that passage in the judgment to bear in mind, as is clear from the preceding passage in the judgment, that when the judge used the phrase"grant an indemnity" he meant an indemnity to protect the party seeking security in respect of party and party costs only, and nothing in his judgment is to be understood as meaning that he was intending to grant an indemnity for anything else; for example, solicitor and client costs, solicitor and own client costs, and so on.

Counsel for the defendants has submitted that the judge was wrong in a number of respects. First, on a point of detail, counsel submits that this is not a commercial case within the meaning of those words for the purpose of listing commercial cases in the Commercial Court: the definition of commercial cases in R.S.C., Ord. 72, r. 1 provides:

"(2) In this order 'commercial section' includes any cause arising out of the ordinary transactions of merchants and traders and, without prejudice to the generality of the foregoing words, any cause relating to the construction of a mercantile document, the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage."

This was, having regard to the pleadings, an action commenced by builders against the building owners. The claim was a simple claim for the balance of moneys due under the contract; nothing obscure, nothing uncertain and the kind of case that, if there is no defence, usually ends in judgment under R.S.C., Ord. 14. But it is not unknown, when builders try to recover their final payment, that they are confronted with a defence alleging by way of set-off that the work has not been properly done. That defence was pleaded by the first defendants in this action. They particularised, and further particularised, and they made a counterclaim in so far as their damage flowing from the plaintiffs' breaches of contract exceeded the amounts claimed by the plaintiffs in their statement of claim. By way of counterclaim the first, and thereafter the second, defendants sought to recover damages in the total sum as it now is of Cdn. $230 million odd, a figure which vastly exceeds the amount claimed by the plaintiffs in respect of cost of work done. The action in consequence of the particulars of the allegations of bad work, negligence and delay in operation of the contract has become rather massive. The pleadings run into hundreds of pages. The pleadings are supplemented by a schedule of further particulars which runs into some 833 pages and that was the bare bones of the set-off and counterclaim because, as is right and proper, there has now come into existence a Scott Schedule which deals in appropriate columns with the allegations initially incorporated in the pleadings.

The action and the counterclaim proceeded. The counterclaim is not as simple as a mere elucidation and investigation of hundreds of alleged defects of engineering, drafting and construction, but also involves the statement and investigation of this gigantic claim for consequential loss which in the circumstances (and it is unnecessary for me to elaborate) is

not, from the plaintiffs' point of view, a very easy exercise. When they built the refinery in Canada, purportedly pursuant to contract, the refinery reached the stage of mechanical completion and the second defendants operated the refinery until they went into liquidation. The first and second defendants say that their losses were proximately caused by the inefficiency of the plaintiffs' construction work. It is obvious that other factors contributed; there was a change in the market situation for crude oil between the time when this enterprise was planned and the building contract formed, and the date when, many years afterwards, the refinery began to operate.

There was another difficulty. At one stage during their operation of the refinery, the directors, or some of them, of the second defendants ran off with Cdn. $32 million which the company had relied upon for working capital. So the investigation on the part of the plaintiffs into the validity of the counterclaimants' claim for consequential loss does involve a protracted complex investigation of the financial causation of the collapse of the refinery's operations. The first and second defendants are in liquidation but there are assets: at one time, the asset of the refinery and now, as I understand it, assets represented by the proceeds of sale of the refinery. That is not quite the end of the story because there are massive claims in the liquidation by unsecured creditors and they sufficiently show that it is now most unlikely that, if the plaintiffs obtain judgment, they will receive anything other than a slender dividend in the liquidation—if at all.

The action and counterclaim have been proceeding for years and when the plaintiffs, as defendants to the counterclaim, launched their application for security for costs, they supported that application by an affidavit of their solicitor, followed by further evidence from him which included a statement of the costs already incurred by the plaintiffs upon the counterclaim, which costs had, at the date of the hearing before the judge, already been paid, and the plaintiffs sought security in respect of those costs already incurred and also asked for further security in respect of future costs to be incurred.

The trial is at present fixed for 11 January 1985. Bingham J. decided upon the application of the defendants to limit his gaze to the period that would elapse between 6 July 1983 (the hearing before the judge) and 11 January 1984. The judge tried to make an estimate of how the plaintiffs' costs in meeting the counterclaim would be building up during that period, and he decided not to look beyond that date of 11 January 1984.

Counsel for the first and second defendants in this court submitted that this was not a commercial action; it is a building and engineering dispute of a very common kind though of exceptionally massive proportions, and though there are financial inquiries necessarily implicit in the analysis of the counterclaim for damages, and though there are other legal proceedings arising out of the collapse of the refinery enterprise and the liquidation of the first and second defendants, in truth and in fact this is the kind of action which occurs in the Queen's Bench Division every day of the week: three or four official referees sit every day determining exactly this class of counterclaim. So, it is submitted, the principles which govern the practice in connection with security for costs in the Queen's Bench Division are the relevant principles and Bingham J. was wrong in preferring the practice which, in his experience, he regarded as the practice of commercial courts. Mr. Irvine supported that submission by drawing our attention to the differences in the procedure for control of

actions proceeding in the commercial list as compared to other actions proceeding in the Queen's Bench Division. When a case is assigned to the commercial list the commercial judge takes control of the interlocutory procedure and that procedure is geared to the subject matter. Instead of the kind of pleadings which the rules require elsewhere in the Queen's Bench Division, pleading is by points of claim and points of defence; everything is required to be concise. The judge determines the interlocutory programme with a view to achieving a great expedition and so, from the very beginning, the judge is introduced progressively more and more intimately into the subject matter of the proceedings. Contrast the background of interlocutory proceedings in the Queen's Bench Division which are not in the commercial list. The rules of pleading are followed and may, as in this case, be voluminous. Interlocutory business is usually undertaken by the masters or on appeal to the judge in chambers of the day. There is not usually any single judicial figure in control of the whole case from the beginning. Therefore, it is submitted, the judge was wrong in disregarding the practice in the Queen's Bench Division generally and preferring the practice, as the judge recognised it to be, in the Commercial Court.

Mr. Irvine makes another respectful criticism of the passage in the judgment to which I have referred. Unable to find authority on this point, Mr. Irvine sought to investigate as best he could the experience of practitioners in the Commercial Court and as a result was able to inform this court that, if the judge thought there was a settled practice in the Commercial Court of the kind that he described, he was probably wrong because, though some practitioners in the Commercial Court do expect that security for costs which had been particularised will be granted on a 100 per cent. basis, sometimes—and indeed quite often—the order is not 100 per cent. of the particularised costs but something much more like two-thirds. Mr. Irvine submits the practice in the Queen's Bench Division is settled and is accurately summarised in a note in the *Supreme Court Practice 1982* under R.S.C., Ord. 23, r. 1, at p. 440. That note reads:

> "Amount of security. The amount of security awarded is in the discretion of the court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not the practice to order security on a full indemnity basis. The more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up to the stage of the proceedings for which security is ordered; but there is no hard-and-fast rule. 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, 720)."

Mr. Irvine submits that that note is accurate and that the effect that should be given to it—which, he submits, is the effect which is given by judges of the Queen's Bench Division—is as follows. Unless there is some unusual feature, the judge after ascertaining, as he must, the estimated party and party costs, up to the stage of the proceedings with which he is proposing to deal, must deduct an arbitrary fraction of one third of those costs so that the party who has proved those costs will have to bear them himself without security; and if the plaintiff—in this case the defendants—is a corporation outside the jurisdiction who is in liquidation

A with negligible net assets (if any), the defendant to the counterclaim will have the privilege of this practice of fighting the counterclaim, paying the costs that are necessary and reasonable in order to meet the claim; but although he will obtain security in respect of two-thirds of those costs he will incur the other third of the costs, pay them, and, at the end of the day, if successful on the counterclaim have the privilege of obtaining nothing in respect of those costs from the unsuccessful counterclaimant. B This is a privilege which the plaintiffs in this case do not wish to enjoy. And their reluctance to reconcile themselves to the two-thirds' rule of practice can be appreciated when one looks at the figures which the judge arrived at when trying to decide what costs had reasonably been incurred. I quote from the first page of the note of judgment:

> "The plaintiffs' evidence is that, as of 1 May 1983, costs of approxi- C mately £5·5 million have been incurred and the estimate to 11 January 1985 is a further £5 million and I suggest that a ratio in the correct proportion of continuing costs to January 1984, would be £1·75 million. That is not a precise estimate but it seems the best that we can do on the figures available."

When the judge came to the passage in his judgment in which he stated D the order he was making, he said:

> "The bulk of the security being sought to 11 January 1984 has already been incurred and . . . is on a party and party basis. An element in respect of future costs is more tenuous of course because it is speculation and I think it is also right to bear in mind that in very substantial taxations such as this one will be, inevitably it will be E taxed down and I have no doubt that the plaintiffs' solicitors would be astounded if their bill survived without any reduction. Inevitably, whatever figure I come to will be unscientific. All that I can do is to choose a figure, bearing in mind the principles I have just stated. The figure I have come to is £6 million. This sum should be given by way of security acceptable to the plaintiffs, or failing agreement, to the satisfaction of the court.

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So where his calculations, on the view that he had formed of the plaintiffs' evidence, led to a total up to 11 January 1984 amounting to £7·25 million, the judge reduced that to the sum of £6 million, stating that he had in mind that the figures presented in the exhibit of particulars would inevitably be taxed down. But that £6 million was the judge's view of a G just figure on what has been described as an indemnity basis, meaning 100 per cent. of the costs actually incurred, or probably to be incurred on a party and party basis up to 11 January.

The defendants say that that figure was anyway £2 million too much because if the judge had followed the practice described in the note to *The Supreme Court Practice 1982,* having arrived at his £6 million, which allows for a reduction of the figure in the exhibit upon taxation, the judge H should have ordered security in two-thirds of that amount and so that part of the appeal, the terms of quantum, is about £2 million. That is quite a lot of money and explains why the builders are resisting the appeal.

We had the advantage of the researches of Mr. Playford into the history of the note presently published under the heading "Amount of security" in the notes to R.S.C., Ord. 23, and I express my gratitude to him for his industry. It emerges therefrom that from 1910 until 1940 there was a note in the *Yearly Practice* under R.S.C., Ord. 65, r. 6 as follows:

> "The amount of security is in the discretion of the judge and depends upon the circumstances of each case. In the King's Bench Division the amount is fixed at the discretion of the master according to the amount claimed and the nature of the action."

Then from 1943 until 1960 in successive editions of the *Annual Practice* a note under R.S.C., Ord. 65, r. 6 read: "The amount of security was usually in the Chancery Division £100, as provided by C. Ord. 40, r. 6 but is not now limited in amount." Then from 1961 to 1963 in the *Annual Practice* for those years a note under R.S.C., Ord. 65, r. 6 read as follows:

> "The amount of security awarded is in the discretion of the judge, and depends on the circumstances, it is not the practice to order security on a full indemnity basis. Usually in the Chancery Division £100 was ordered as provided by C. Ord. 40, r. 6, but the amount is not now limited."

Since 1964 the note has read as it reads today in *The Supreme Court Practice 1982* :

> "It is not the practice to order security on a full indemnity basis. The more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up to the stage . . . for which security is ordered; but there is no hard and fast rule."

Such is the history of the notes. The time has come to refer to the rule. R.S.C., Ord. 23, r. 1(1) provides:

> "Where, on the application of a defendant to an action or other proceeding in the High Court, it appear to the court—(*a*) that the plaintiff is ordinarily resident out of the jurisdiction . . . 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."

On the plain language of the rule there are no words restricting the generality of the discretion to be exercised by the court. One asks oneself how comes it that since 1964 the editors of *The Supreme Court Practice* have given the advice which appears in their note? And, if there is the conventional approach fixing the sum at about two-thirds of the estimated party and party costs, as the editors state, how is that conventional approach to be regarded as properly consistent with the terms of the rule?

Mr. Irvine correctly submitted that there are many statutory provisions, whether in Acts of Parliament, Rules of Court, or otherwise, which, by their plain language, having regard to its grammatical effect, confer an unfettered discretion upon the court, but it is not at all uncommon for the court itself, with its experience of the practical application of the discretion, to state guidelines which, to the extent that the guidelines require, have the effect of restricting within the stated principle the exercise of judicial discretion. Mr. Irvine submits that is exactly what judges of the Queen's Bench Division, in their wisdom, have done in relation to R.S.C., Ord. 23 and that experience has satisfied them that the just and sensible approach to quantum of security is to restrict the security to about two-thirds of the estimated party and party costs.

What light, if any, is thrown upon the history of this rule and the notes in the *Annual Practice* by decided cases? Again, we are indebted to Mr. Playford for his concise review of the authorities. I start in 1897 with *Dominion Brewery Ltd. v. Foster* (1897) 77 L.T. 507. In that case the

A defendants alleged that the company was insolvent, and that the costs of the action would amount to a very large sum, owing to the fact that the evidence and documents involved in the case were very extensive. The amount, as computed by the defendants' solicitors, was upwards of £1000, so they applied under section 69 of the Companies Act 1862 for an order that the plaintiffs should give sufficient security for costs. When counsel for the appellants was opening his appeal from the order of Kekewich J., B he submitted that the words "sufficient security" in section 69 of the Companies Act 1862, must mean enough to satisfy the defendants' probable costs, which in that case were computed at £1000. Lord Lindley M.R. observed, at p. 507:

> "We have to consider the possibility of a collapse of the action. The £1000 estimate is based on the assumption that the case will be fought C out. . . . The principle to be applied is that the security ought not to be illusory nor oppressive—not too little nor too much."

When he came to give judgment, Lord Lindley M.R. said, at p. 508:

> "It is obvious that, as to a question of quantum such as this, you cannot lay down any very accurate principle or rule. The only principle which, as it appears to me, can be said to apply to a case of D the kind is this, that you must have regard, in deciding upon the amount of the security to be ordered, to the probable costs which the defendant will be put to so far as this can be ascertained. It would be absurd, of course, to take the estimate of the managing clerk to the defendant's solicitors and give him just what is asked for. You must look as fairly as you can at the whole case."

E The Master of the Rolls proceeded to state that the court thought that the security ordered [£350] by the judge in the Chancery Division should be increased substantially, and continued:

> "We must take into account the chance of the case collapsing without coming to trial. And on the whole we think that the sum of £600 is a reasonable one, and is sufficient."

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Chitty L.J., after referring to section 69 of the Companies Act 1862, said, at p. 508:

> "I really do not see how we can lay down any rule more useful than that, or any rule more precise. There must be some estimate made as to what expenses the defendant will be put to, and the court has to G take a reasonable view of all the circumstances, the nature of the suit, or any other matters that may properly be brought in."

He agreed with what had been said by Lord Lindley M.R.

There it is quite clear that the thinking of the Master of the Rolls, as he stated, was influenced by the fact that the court had to consider the possibility of a collapse of the action; but the solicitors' clerk's estimate of H £1,000 had been based on the assumption that the action would be fought out.

The next case to which I refer is *T. Sloyan & Sons (Builders) Ltd. v. Brothers of Christian Instruction* [1974] 3 All E.R. 715. Most of the consideration given by Geoffrey Lane J. was concerned with an analysis of the degree to which the costs were likely to be treated as costs of the counter-claim to which the contractors were in the position of defendants and in respect of which they could not be ordered to give security. But

the judge referred to the history of cases on security for costs and began by referring to *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan* (1866) 1 Ch.App. 437. He quoted a passage from Knight Bruce L.J. in that appeal, where the Lord Justice had said, at p. 438:

> "It appears to me that the word "sufficient" must have been intended to have a meaning, and that if the practice of the court was to be followed the Act would have said so. There is nothing to limit the amount of the security."

The reference there was to the practice of the court limiting its order for security to £100.

Geoffrey Lane J. then quoted from Lord Lindley's judgment in *Dominion Brewery Ltd. v. Foster* (1897) 77 L.T. 507, to which I have already referred. He went on to say at [1974] 3 All E.R. 715, 720:

> "The reference in the judgment to the chance of the case collapsing is relied on by counsel for the builders because as he informed me, without dissent from counsel for the Brothers, the probability is that after the legal argument before the arbitrator in May, the unsuccessful party will appeal to the Court of Appeal and that thereafter, as he put it, 'the situation will change'. It seems to me that this is a possibility which can properly be considered when fixing security, particularly as a further application could always be made if necessary, although how far such consideration can be translated into arithmetical terms is problematical. I regard the relevant dictum of Lord Lindley M.R. as meaning that the court should, or at any rate may, order somewhat less than if there seemed to be every prospect that the case would be fought to a finish."

Finally one comes to the judgment of Mars-Jones J. in *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] Q.B. 609, 619–620, where he said:

> "I gather it has become the practice to order something in the region of two-thirds of the best estimate the court can make of the probable costs in the normal run of cases. If that is so, then I would point out that building arbitrations of this kind are not the normal run of cases. The discount of two-thirds, or whatever proportion the court may decide, is made to cover the possibility that the whole of the probable costs would not be incurred because the case was settled or not proceeded with for some reason at some stage. Mr. Tackaberry has argued that the discount also takes into account the possibility that the plaintiff might succeed and that as the offer to settle includes an allowance for that possibility I should not make a further discount from my estimate of Parkinsons' probable costs. . . . In my judgment, where some reasonable assessment of the plaintiff's chances of success can be made at this interlocutory stage, and that must be comparatively rare, that would be relevant to the question of whether security for costs should be made or not, but not to the issue of quantum of the security to be ordered except in so far as a further discount might be called for in addition to that made for the possibility that the whole of the estimated costs might not be incurred."

I am satisfied that, having regard to the provisions of R.S.C., Ord. 23, r. 1(1), which on their face confer an unfettered discretion upon the court,

there is no solid reason for a general and arbitrary practice whereby, after estimating party and party costs up to the date of the proceedings for which security is ordered, an arbitrary fraction of one-third is knocked off before the order for security is made. There is nothing, in my view, in the authorities that have been cited to this court to justify the validity of what the editors of *The Supreme Court Practice 1982* describe as the more conventional approach of fixing the sum of two-thirds of the estimated party costs. On the contrary, in the cases which I have cited, the principle is this: the security should be such as the court thinks in all the circumstances of the case is just. If security is sought, as it often is, at a very early stage in the proceedings, the court ordering security will be faced with a situation in which a solicitor or his clerk has made an estimate of the costs likely in the future to be incurred; and probably the costs already incurred, or paid, will be a very small fraction of the security that the applicant is seeking. At that stage one of the features of the future of the action, which is relevant, is the possibility that the action may be settled—perhaps quite soon. In such a situation it may well be sensible to make an arbitrary discount of costs estimated as the probable future costs, but whether one-third is likely in any given case to be a sensible discount, and whether any discount at all should be made, will depend on the view of the court on consideration of all the circumstances. There are two ways in which the court can deal with it. The court may, as the judge did here, form a view on the amount of party and party costs which had already been incurred and then make an estimate necessarily approximate of the costs that would be likely to build up during the next six months; and there was nothing before the judge to give him the slightest reason for expecting that this action would settle in the next six months. Therefore, on the principles which in my view are to be derived from the language in the rule, and the words of Lord Lindley M.R. in *Dominion Brewery Ltd. v. Foster,* 77 L.T. 507, 508, there was no reason to think that it would be just to the plaintiffs to knock off an arbitrary fraction of party and party costs which the judge was satisfied had, as to most of them, already been incurred and paid, but as to others would necessarily be subject to an informed appreciation and estimate. Indeed, had the judge in the circumstances adhered to what was thought to be the conventional Queen's Bench Division approach, the result would have been wholly unjust. It would have meant that the plaintiffs, in order to meet the counterclaim, had or would incur £2 million costs which they had no prospect of ever recovering from anybody. That cannot possibly be just.

In my view, whatever the practice in the Commercial Court may be (as to which we have heard varying accounts from the Bar) as far as the position in this Queen's Bench Division action is concerned, the words of the rule point to the order made by the judge; and there was no occasion, having regard to all the circumstances, for making any fractional deduction whether one-third or otherwise. I take the view that the note under the heading "Amount of security" which has been published in *The Supreme Practice* to the notes to R.S.C., Ord. 23 since 1964 is expressed in too dogmatic and inflexible terms and has probably given rise to a misunderstanding by masters and judges of the principles to be followed having regard to the words of the rule. In my view, I would respectfully suggest to the editors of *The Supreme Court Practice 1982* that they reconsider the words of their note. As I have stated, where there is a prospect of settlement, that is a factor to be taken into account by the court in deciding the quantum of security to be ordered. But in a case such as the

present, where millions of pounds of costs assessed on a party and party basis have become the subject of fee notes and have in most cases already been paid, there is no reason that I can see in justice or common sense for any conventional discount of the kind described in the note. There will, of course, be a discount as the judge made, having regard to his expectation that the fees which were particularised before him, would be reduced by the taxing master—that is a quite different matter—but when that discount has been made, if the judge is satisfied that the solicitors have honestly attempted to make, and have made, an actual estimated calculation of their costs and disbursements, then, when the judge has arrived at what he thinks is the actual figure, he should order that figure to be the figure incorporated into his order for security.

It is to be hoped that the editors of *The Supreme Court Practice 1982* will decide not to advise practitioners of the existence of any conventional scale unless they are perfectly certain, on a scrutiny of the case law, that authoritative guidance has been given in the cases which explains the way in which the rule should be applied.

For those reasons, on the first issue raised in the appeal, I hold that the appellant fails. I have dealt with the matter at some length because I regard it as a matter of some general importance.

I come to the next point: that is particular to the circumstances and history of this case. Mr. Irvine has, with characteristic persuasiveness, sought to persuade us that when one looks at the schedule in which the plaintiffs' solicitor, Mr. Pearl, set out the particularisation of the build up of costs to date, there are not less than three items which cry out aloud as inviting suspicion. The first is the enormous sum which has been paid by the plaintiffs for the purpose of using a computer company to control discovery in the action. The figure runs to £2,246,000. Mr. Irvine submits that, if the plaintiffs like to enjoy the facilities of silicon chips and expensive gadgets, then good luck to them, but they never consulted the defendants before embarking upon this enormous computer adventure. The plaintiffs' solicitor swears that, in his view, this has saved the plaintiffs money. The documents are over a million in number. Their analysis and classification was a gigantic task and if silicon chips are not to be used (the people called "programmers" are very expensive in New York) then, according to Mr. Pearl, he would have had to set a great team of solicitors and executives, assisted no doubt by engineering or financial experts, into slogging out the detail of the relevance of documents and the number of documents for which privilege could be claimed. Mr. Irvine submits that that is all very well and no doubt Mr. Pearl believes every word he says, but the computer, as the plaintiffs' solicitor now knows, threw up an immense amount of duplication of paper and the computer is not proof against irrelevance by any means, so that the whole exercise, enormously expensive, really ought not to be taken without a great many pinches of salt when it comes to inviting the court to include it as an item in an order for security. Mr. Irvine points to the fees on a view of the refinery by the plaintiffs' legal advisers, a brace of leading counsel, a brace of junior counsel and solicitors and I know not what army of engineers to explain to the lawyers what they were looking at; it is an enormous sum of money. With politeness and moderation Mr. Irvine submitted that perhaps on the other side of the Atlantic people do themselves rather better than we are used to doing ourselves, and though he did not suggest that the whole thing was a major jollification of the sort that one associates with American conventions, he submits that a shrewd and reasonably cynical

court should wonder a little whether it is sensible to make the defendants put up the security when they really have no idea whether the scale of those fees was as economical as it should have been. And there are other items. We have been taken through, and we tried before we came into court, to read enough of the uninviting bundle in order to gain some appreciation of the validity of the opinions expressed by Mr. Pearl culminating in his table of fees.

The defendants submit that there is enough here to justify this court taking the view that the assessment, or appreciation, of reasonable party and party costs should have been done by the judge in a more critical way and that he should have knocked quite a lot off the figures which he accepted too uncritically.

The answer I believe is to be found in words used by Lord Diplock in a very different context in the well known case of *Birkett v. James* [1978] A.C. 297. At the beginning of his speech dealing with the principles that apply in relation to dismissal for want of prosecution, Lord Diplock said, at p. 317:

> "It is only very exceptionally that an appeal upon an interlocutory order is allowed to come before this House. These are matters best left to the decision of the masters and, on appeal, the judges of the High Court whose daily experience and concern is with the trial of civil actions. They are decisions which involve balancing against one another a variety of relevant considerations upon which opinions of individual judges may reasonably differ as to their relative weight in a particular case. That is why they are said to involve the exercise by the judge of his 'discretion.' "

The context of those observations is very different, but to my mind they apply exactly, with only slight grammatical modification, to the situation posed by the applicant for security for costs. In this case the application was made to Bingham J., a judge of great experience particularly in the Commercial Court, but a judge whose personal and professional qualifications are such that there is every reason to have complete confidence in his capacity to form a view about what has, on the history of the costs already incurred, been a reasonable build up of costs and perfectly qualified to form a view as to what is likely for the next six months, having regard to the history on the previous build up of actual costs, be a sensible estimate to arrive at. In spite of Mr. Irvine's invitation to us to regard the figures accepted by the judge as reflecting too great an innocence on the part of the judge and reflecting also absence, not of cynicism but of cautious criticism about the figures which the plaintiffs' solicitor is putting forward, I take the view that the right approach in this court is that unless we are satisfied that the judge has gone wrong when he accepted this figure or that, we ought to begin by trusting the judge upon whom Parliament has conferred the exercise of discretion. If the judge trusted the plaintiffs' solicitor and on examining his tables decided that the expenses appeared reasonable so that Mr. Pearl's judgment about it could be relied upon, I cannot see any reason why this court should take a different view of Mr. Pearl from that taken by the judge, and I would add (whether it was the case in the instant case or not I know not) that very frequently judges in the Queen's Bench Division including the Commercial Court have learnt a great deal over the years about the judgment and reliability of solicitors who give evidence before them in matters of costs. That may or may not be a factor present in this case—I do not think it

matters—but it is an additional reason why this court should be cautious merely out of an inborn sense of cynicism about mistrusting the testimony of the solicitors to whom the plaintiffs have confided the conduct of their defence to the counterclaim.

For those reasons, without going into more than the minimal detail in this judgment, I reject the second of Mr. Irvine's submissions.

As to the fifth ground of appeal in which it is pleaded that "The judge was wrong to infer that the plaintiffs' payment into court was or was likely to have been made, not as an admission of liability, but as a prudent precaution against any risk in costs when: (*a*) the amount paid in is the equivalent of the sum which the plaintiffs contend represents the limit of their liability under the contract; and (*b*) the plaintiffs are claiming very substantial sums in the action," it is, in my view, sufficient to say, first, that I see no reason in the material before us for holding that the judge was wrong, and secondly, I see very good reasons for thinking that the judge was right.

I would add one last matter. The first and second defendants are in liquidation. Their assets are unlikely, as now understood, to equal their unsecured liabilities, quite apart from these proceedings. The costs of preferring the counterclaim must be very great, though I think it is most natural that the costs in making the complaints against the builders and engineers are likely to be a great deal less, at any rate during the history to date, than the costs of the plaintiffs in meeting the allegations. But the first and second defendants' costs must be very great. Where has it all come from? The plaintiffs, for years, tried to find out; nobody would tell them. It now appears that there is a perfectly natural explanation and the Export Credit Guarantee Department may have a common interest with the first and second defendants in the success of the counterclaim—at any rate in relation to the defective work which the counterclaim has alleged. I cannot say that there is no mystery about it now; there is much less mystery than there was, but it adds nothing to any relevant issue that arises on this appeal, save in this way; it does give an historical explanation of the situation in which the plaintiffs are building up costs which, without security, can never be recovered while the defendants have, we now know, been in the position in which, in spite of having no assets, have been able to continue the litigation to date and incur the costs. But, having said that, I cannot see that those matters have any relevance to any issue which arose in this appeal.

I would dismiss this appeal.

GRIFFITHS L.J. I agree that this appeal should be dismissed and I only venture to add a few words of my own because a note in *The Supreme Court Practice* has stood unchallenged for 20 years.

This appeal requires the court to decide whether, on an application for security for costs under R.S.C., Ord. 23, r. 1 the court is entitled to award security for costs in the sum which the court estimates the applicant would recover on taxation on a party and party basis, or whether, at least in the Queen's Bench Division, the court is limited by a long-standing practice to awarding no more than two thirds of that sum. The defendants submit that the court is limited to awarding two-thirds of the estimate of the taxed costs. Their argument is largely founded on the note at p. 440 of *The Supreme Court Practice 1982*, which has already been read by Cumming-Bruce L.J., and which has stood unaltered since 1964. No authority was cited in support of the note and, as my Lord's review of the

A authorities has demonstrated, no support of the note can be derived from authority.

Having heard of Mr. Playford's researches in the masters' corridor, I am not myself persuaded that a two-third fixed practice in fact exists, but if it does I am satisfied that it is time it stopped. I can see no sensible reason why the court should not order security in the sum which it considers the applicant would be likely to recover on taxation upon a B party and party basis if the court considers it just to do so. This, as I understand it, is the practice of the judges in the Commercial Court and it is a practice that ought also to be followed in the rest of the Queen's Bench Division. It is, of course, for the party seeking an order for security, to put before the court material that will enable the court to make an estimate of the costs of the litigation. In the normal course of C things, it is to be expected that the court will, to some extent, discount the figure it is asked to award. Allowance will have to be made for the unquenchable fire of human optimism and the likelihood that the figure of taxed costs put forward would not emerge unscathed after taxation. It is to be observed in the present case that it was this element that led Bingham J. to make a substantial discount in the order of 19 per cent. If the estimate includes future costs, these discounts may be large to allow D for the possibility of the settlement of the litigation and this will be particularly so if application is made at the commencement of the litigation and costs are assessed on the assumption that the litigation will proceed to a final trial. In such cases it may be sensible to discount by as much as one-third and I strongly suspect myself that, because some of the masters were doing this, where they were asked to estimate security at a very early stage, that the note in *The Supreme Court Practice* emerged in its E present form.

Furthermore, if very little information is put before the court upon which it can estimate costs, then again it will be reasonable to make a large discount, particularly when it is borne in mind that, if the security proves inadequate as litigation progresses, it is always possible for a further application to be made for more security.

F But, having said that, it would be quite wrong, in order to avoid the mental discipline involved in examining the particular facts of the case to determine what is ajust figure, to apply a rule of thumb and just reduce every estimate by one-third to avoid trouble, and if any such practice has been insidiously developing it is, as I say, time that it was stopped.

On the particular facts of the present case, the bulk of the costs for G which security has been ordered had already been incurred and the judge had the opportunity of looking at the bills and the affidavit of a highly reputable commercial solicitor to support the assertion that these costs had already been incurred. It seems to me in those circumstances that this was a case where justice demanded that the estimate of costs should be based upon that which the applicants were already out of pocket.

H I agree for the reasons given by Cumming-Bruce L.J. that it was a matter for the discretion of the judge to consider the particular figures, bringing to them a lifetime of experience in this field of work. I see no reason for interfering with his discretion and, for the reasons I have given, in my view he was fully entitled to award costs on what he described as an "indemnity basis," which was in fact on the basis of awarding costs equivalent to his best estimate of the taxed costs which had actually been incurred.

I would only add that £6 million may seem a very daunting figure, but it is in fact only approximately three per cent. of the sum at stake in this vast litigation. I doubt if it would be considered an adequate basis for a contingency fee on the other side of the Atlantic.

I agree for these reasons and those given by Cumming-Bruce L.J. that this appeal should be dismissed.

STEPHEN BROWN L.J. I agree that this appeal should be dismissed for the reasons given by Cumming-Bruce L.J. I also desire to associate myself with the observations of Griffiths L.J. upon the note in *The Supreme Court Practice 1982*. It is time that it was removed.

Appeal dismissed with costs.

Solicitors: Herbert Smith & Co.; Davies Arnold & Cooper.

[Reported by COLIN BERESFORD, ESQ., Barrister-at-Law]

[SUPREME COURT TAXING OFFICE]

*PRACTICE DIRECTION (TAXATION: POSTAL FACILITIES)

[No. 3 of 1984]

Costs—Taxation—Postal facilities—Acknowledgment of receipt of papers—Solicitors requiring receipt to enclose stamped addressed postcard or envelope

Solicitors who wish to make use of the existing postal facilities and who require an acknowledgement of the receipt of papers must enclose with the papers a list either written on a stamped addressed postcard or else sent with a stamped and addressed envelope. No responsibility will be accepted for documents alleged to have been sent unless an acknowledgement is produced.

F. T. HORNE
Chief Taxing Master

27 February 1984.
