[1999–00 Gib LR 70]

REGAL INTERNATIONAL INCORPORATED and WILLOW MARITIME SRL v. OWNERS OF THE M.V. "LERESTI"

SUPREME COURT (Schofield, C.J.): March 10th, 1999

Shipping—arrest of ship—jurisdiction—Supreme Court Act 1981, s.21(8) prohibits service of process in actions in rem for same debt against multiple ships arrested in Gibraltar, not against single ship in Gibraltar or different ships in Gibraltar and abroad—s.21(8) not construed in accordance with Arrest Convention, art. 3(3)—duplicated proceedings may be struck out at common law

Civil Procedure—writ of summons—striking out—may strike out original action in rem if duplicated in later writ to take advantage of new legislation

Arbitration—foreign arbitral award—stay of proceedings—stay of Gibraltar action in rem available under Arbitration Ordinance, s.8 or at common law if based on breach of charterparty subject of foreign arbitration—abuse of process for same parties to litigate same issues in two forms

Shipping—arrest of ship—retention of ship or proceeds—under Civil Jurisdiction and Judgments Ordinance, 1993, s.19, when staying action in rem in favour of related foreign arbitration, may order retention of ship as security for arbitral award—power applies only to ship arrested pursuant to action stayed, not to proceeds of sale of ship previously arrested in other proceedings

The plaintiffs brought proceedings *in rem* to recover moneys owed under two charterparty agreements.

The first plaintiff entered into two charterparties with the defendant. A dispute arose between the parties as a result of which the charter hire remained unpaid. The first plaintiff's rights and obligations were later assigned to the second plaintiff. When the plaintiffs failed to honour an agreement to purchase the two vessels ("the *Cristian A*" and "the *Cristian C*"), the defendant cancelled the charterparties. The dispute was ultimately referred to arbitration in England, in which the plaintiffs claimed payment for goods and materials, the cost of repairs to, and disbursements made on account of the vessels.

The plaintiffs obtained the arrest of another of the defendant's ships ("the *Samarina III*") in Bombay in respect of the same claim. The vessel was released when the defendants gave security for the sum claimed plus interest. This was replaced by a bank guarantee furnished by the vessel's charterers.

Another ship owned by the defendant ("the *M.V. Leresti*") was arrested in Gibraltar at the instance of another creditor and sold to satisfy the claim. The proceeds of sale were held in court. The plaintiffs then commenced the present proceedings *in rem* to recover from those proceeds of sale the moneys due under the two charterparties. Shortly afterwards, they filed a further writ claiming the same relief, together with damages for losses suffered by them due to breach of the agreements, and seeking the retention of the proceeds of sale, under the recently commenced Civil Jurisdiction and Judgments Ordinance, 1993, as security for any award made in the arbitration proceedings in England.

The defendant applied for the writs to be set aside and the plaintiffs sought an order that if either action were stayed or dismissed, the proceeds of sale of the *M.V. Leresti* would nevertheless be retained as security as previously requested.

The defendant submitted that (a) the writs in the two Gibraltar actions were invalidly served under s.21(8) of the Supreme Court Act 1981, which prohibited (i) the service of an action *in rem* against a ship (the *M.V. Leresti*) if another ship (the *Samarina III*) had already been served to enforce the same claim in an action *in rem*, and (ii) the service of two such actions against the same ship (the *M.V. Leresti*) to enforce the same claim; (b) the present proceedings should be stayed pursuant to s.8 of the Arbitration Ordinance pending the outcome of the English arbitration proceedings; (c) alternatively, they should be dismissed, since the existence of multiple actions to enforce the same claim and involving the same parties was an abuse of process, particularly in view of the ongoing proceedings in India; (d) s.19 of the Civil Jurisdiction and Judgments Ordinance, 1993 did not permit the proceeds of the sale of the *M.V. Leresti* to be retained as security for an arbitral award to be made in England, since that ship had been arrested in unrelated proceedings, rather than those the defendant now sought to have stayed; and (e) furthermore, security for the claim had already been given in the Bombay court.

The plaintiffs submitted in reply that (a) s.21(8) did not preclude the service of a writ in Gibraltar after service in respect of the same claim against another ship in India, nor did it prohibit the service of successive writs in respect of the same claim against the *same ship* within Gibraltar; (b) although they did not oppose a stay of the proceedings pending the outcome of the English arbitration, the actions should not be dismissed; (c) since no final decision had been made in India, it would be wrong to dismiss the present proceedings on the basis of the claim there; and (d) security could be retained for a future arbitral award in England under s.19 of the Civil Jurisdiction and Judgments Ordinance, 1993, notwithstanding that the ship in question had been arrested in other proceedings.

Held, making the following orders:

(1) Section 21(8) of the Supreme Court Act did not invalidate the service of proceedings in the two Gibraltar actions, since that sub-section did not apply to prior service in an action *in rem* overseas or to the service of multiple writs to enforce the same claim against *the same* ship. Section 21 was not to be construed in accordance with art. 3(3) of the 1952 Arrest Convention so as to include foreign proceedings, and therefore the Bombay proceedings against the *Samarina III* were irrelevant. Nor did the existence of two actions against the *M.V. Leresti* in Gibraltar breach s.21(8) (paras. 13–18).

(2) Nevertheless, the original writ would be dismissed, since the claims contained in it were duplicated in the later writ which had been filed to take advantage of the Civil Jurisdiction and Judgments Ordinance, 1993. In addition, the later proceedings would be stayed under s.8 of the Arbitration Ordinance, pending the resolution of the arbitration proceedings in England in which the parties had agreed to participate under the terms of their contracts. Since the Bombay proceedings had not yet been finally determined, the second writ before the Supreme Court could not be dismissed because of them (paras. 20–22; para. 29).

(3) The plaintiffs would not be granted security for an award in the arbitration by the retention of the proceeds from the sale of the defendant's ship arrested in Gibraltar. The court had a discretion to grant such security under s.19 of the Civil Jurisdiction and Judgments Ordinance, 1993 when staying proceedings here only if the arrest had been made in the same proceedings, and since the plaintiffs were mere caveators in the proceedings commenced by the other creditor, s.19 did not apply. Even if the discretion did exist, the court would not have exercised it in the plaintiffs' favour, since security had already been awarded in Bombay, albeit for a lesser amount than claimed here. Although unrelated to the English arbitration, the Bombay proceedings involved the same parties and subject-matter as those in Gibraltar, and it would therefore be improper for the plaintiffs to obtain the same remedy here (paras. 23–29).

Cases cited:

(1) *Centro Latino Americo de Commercio Exterior S.A.* v. *The Kommunar (Owners), The Kommunar (No. 2)*, [1997] 1 Lloyd's Rep. 8; [1996] CLC 1928, *dicta* of Colman, J. applied.

(2) *Monte Ulia, The (Owners)* v. *The Banco (Owners), The Banco*, [1971] P. 137; [1971] 1 Lloyd's Rep. 49; (1970), 115 Sol. Jo. 57.

Legislation construed:

Arbitration Ordinance (1984 Edition), s.8:

> "If any party to an arbitration agreement . . . commences any legal proceedings in any court against any other party to the

arbitration agreement . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement . . . may make an order staying the proceedings."

Civil Jurisdiction and Judgments Ordinance, 1993 (No. 29 of 1993), s.19(1): The relevant terms of this sub-section are set out at para. 23.

Supreme Court Act 1981 (c.54), s.21(8): The relevant terms of this sub-section are set out at para. 13.

International Convention relating to the Arrest of Sea-Going Ships (Brussels, May 10th, 1952; UK Treaty Series 47 (1960)), art. 3(3): The relevant terms of this paragraph are set out at para. 15.

A.E. Dudley for the plaintiffs;
M.X. Ellul for the defendants.

1 **SCHOFIELD, C.J.:** The parties in these two actions are the same, as indeed are the applications. The applications were argued as one, and I shall deliver one order.

2 I do not think I need delve too deeply into the rather complicated facts of these cases. The defendant is a Romanian shipping company, CNM Romline Shipping Co. S.A. ("Romline"), which owns a fleet of ships. Following dealings between the parties from August 1995 onwards, on December 13th, 1995 Romline entered into two bareboat charterparties with the first plaintiff, Regal International Inc. ("Regal"), one in respect of a vessel called the *Cristian A* and the other in respect of a vessel called the *Cristian C*. These charterparties were in similar terms and obliged Regal to keep the vessels in good repair and required it to pay for all costs of repairs at the beginning of the charterparty period.

3 Prior to executing the charterparties, Regal and Romline entered into a memorandum of agreement dated December 8th, 1995 in respect of each of the vessels *Cristian A* and *Cristian C*, under which Regal agreed to pay US$733,000 on each vessel for known debts owed by Romline to a third party. Other payments were due to be paid under the charterparties and the memorandum of agreement.

4 The plaintiffs claim that these documents do not wholly reflect the agreement between the parties. Be that as it may, problems arose between them as a consequence of which Regal never paid the charter hire for the vessels. Negotiations between Regal and Romline must have been on-going, and on October 10th, 1996 the second plaintiff, Willow Maritime

SRL ("Willow"), took over performance of the bareboat charters from Regal as assignee and transferee of all rights and obligations thereunder.

5 Willow was incorporated in Romania and the plaintiffs claim that it was created to enable it to participate under Romanian law in a Romanian state auction for the sale of the *Cristian A* and the *Cristian C*, should the plaintiffs wish to purchase the vessels. It seems that the principals of Willow are the same persons as the principals of Regal.

6 The problems between the parties continued and Romline gave notice to the plaintiffs of its intention to withdraw the vessels from the charter-parties. Negotiations continued and a minute of understanding was signed by the parties on March 12th, 1997, giving Willow 90 days in which to purchase the two vessels. In the event of Willow's failure to purchase them the charterparties were to be considered cancelled as from March 12th, 1997. Willow did not purchase the vessels.

7 The disputes between the parties have, under the terms of the charter-parties, been referred to arbitration in London. Both sets of parties make claims against the other. Arbitrators were appointed in February and March of last year. I do not think the plaintiffs had filed their points of claim in the arbitration proceedings by the date of the hearing of these applications.

8 On February 6th, 1998 the plaintiffs made an application before the Admiralty Judge of the Bombay High Court for the arrest of the vessel *Sammarina III*. The *Sammarina III* is owned by Romline and the claim in the Bombay High Court was for US$1,781,469.50 and it appears is in respect of the same cause of action as that in the two suits we are here dealing with. The application for arrest was refused but was granted by the Bombay Court of Appeal on February 9th, 1998. The appeal court further ordered that the vessel could be released upon Romline depositing or furnishing security for the amount claimed plus an amount in respect of interest and for poundage.

9 The *Sammarina III* was subject to a bareboat charter and on March 5th, 1998, on application to the appeal court by the charterers, the order of February 9th, 1998 was varied to the extent that the vessel could be released on the charterers furnishing a bank guarantee in the sum of US $550,000. A later application that this order be stayed was rejected by the court, but the amount of security was increased by US$6,500 to cover poundage and Sheriff's costs. Such security was given by the charterers and the *Sammarina III* was released.

10 The *M.V. Leresti* is also owned by Romline. On September 12th, 1998 she sailed into Gibraltar port and was promptly arrested at the behest of Mobil Oil Hellas S.A. in respect of the alleged non-payment of invoices for the supply of lubricants to the vessel, or perhaps to sister

vessels. The vessel has been sold to satisfy the claim but the proceeds of sale are still held in court. On October 12th, 1998 the plaintiffs filed their writ *in rem* in Cause 1998 A.J. No. 29, claiming as against Romline, as the owners of the *Cristian A* and the *Cristian C*, the sum of US$1,293,789 for goods and materials supplied for the operation and maintenance and the cost of repairs carried out to and disbursements made on account of those two vessels.

11 On November 26th, 1998 the plaintiffs filed a further writ against Romline in Cause 1998 A.J. No. 40. In that suit the first claim is identical to the claim in 1998 A.J. No. 29. To this claim the plaintiffs have added claims for damages for loss suffered by the plaintiffs as a result of Romline's breach of the two charterparties of December 13th, 1995 and breach of the agreement of March 12th, 1997. A final claim is added for retention of the *res* or its proceeds of sale by way of security for any award which may be made in the arbitration proceedings in London. It is this latter claim which has given rise to the second action, for the Civil Jurisdiction and Judgments Ordinance, 1993, giving the court power to award such security, was not brought into effect until November 5th, 1998. Prior to that date an order for security such as is claimed by the plaintiffs in Cause 1998 A.J. No. 40 could not be made in this jurisdiction, and it was not open to the plaintiffs to make the claim when they filed the writ in Cause 1998 A.J. No. 29.

12 Romline has now applied in each cause for the writs to be set aside. The plaintiffs have filed a cross-summons seeking orders that in the event of the court staying or dismissing the proceedings the proceeds of the sale of the *res* be retained as security for the satisfaction of any award which may be made in the arbitration proceedings in London or that the stay or dismissal be conditional on the provision of equivalent security for the satisfaction of such award.

13 The first argument of Romline is that the writs in these two actions were not validly served. The argument is based on s.21(8) of the Supreme Court Act 1981, which reads:

> "Where, as regards any such claim as is mentioned in section 20(2)(e) to (r), a ship has been served with a writ or arrested in an action in rem brought to enforce that claim, no other ship may be served with a writ or arrested in that or any other action in rem brought to enforce that claim: but this subsection does not prevent the issue, in respect of any one such claim, of a writ naming more than one ship or of two or more writs each naming a different ship."

It is common ground between the parties that this provision applies to Gibraltar and to this action.

14 It is argued for Romline that the provision has an impact upon this case in two ways. First, a sister ship, the *Sammarina III*, was arrested in Bombay in respect of the same claim that is made in the present actions and that the writs served upon the *Leresti* offend s.21(8). Secondly, as the *Leresti* was served with a writ in Cause 1998 A.J. No. 29, it could not be served with a writ in Cause 1998 A.J. No. 40.

15 The argument for Romline is that s.21(8) was enacted to give effect to the decision of the English Court of Appeal in *The Banco* (1), in which case it was held that only one vessel could be arrested in respect of a given claim. In construing the statute then governing the Admiralty jurisdiction of the High Court, s.3(4) of the Administration of Justice Act 1956, the court drew on the 1952 Arrest Convention for assistance. Article 3(3) of the Convention provides:

> "A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any one of such jurisdictions, or bail or security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest."

Mr. Ellul, for Romline, has urged me to construe s.21(8) by reference to this article.

16 This point was considered by Colman, J. in the case of *The Kommunar (No. 2)* (1). After reviewing the same arguments as those made by Mr. Ellul in this case, he said ([1997] 1 Lloyd's Rep. at 20):

> "On the face of it, therefore, there are strong indications that although this country has ratified the Convention, Parliament has made no attempt to introduce all its provisions into English law. Indeed, its provisions have been heavily modified by Parliament. It is, in my view, therefore impermissible to construe the 1989 Act on the assumption that Parliament intended to introduce all provisions of the Convention into English law, although, as Lord Justice Cairns observed in *The Banco* . . . the 1956 Act 'must have been intended to achieve a broadly similar result' to the Convention. Nevertheless, unless the words of the Act are clearly capable of bearing the meaning of a provision in the Convention, I certainly do not

consider that the Convention can be treated as a reliable comparable in all cases of obscurity of meaning in the Act."

He went on (*ibid.*, at 20–21):

"Section 21(8) makes no express reference to proceedings outside this jurisdiction. Moreover, it is located at the end of s. 21 which in all its other sub-sections deals with English Admiralty jurisdiction in personam and in rem without referring to overseas proceedings. Section 20(1) having summarized the scope of the Admiralty jurisdiction of the High Court, sub-ss. (2) and (3) then identify the nature of the claims that may be brought in the Admiralty Court and s. 21 specifies what claims may be brought against particular vessels and the connecting factors that must be present if such claims are to be brought against the vessel in connection with which the claim arises or against a sistership. The description of the earlier proceedings against the ship as 'a ship has been served with a writ or arrested in an action in rem' strongly suggest proceedings in this country rather than in any overseas jurisdiction. The reference to a writ or action in rem appears to be too specifically related to an English Admiralty procedure to be intended to have wider application. In s. 151 of the 1981 Act 'action' is defined as 'any civil proceedings commenced by writ or in any other manner prescribed by rules of court'. Although 'action in rem' is not defined, it is permissible to read action in rem in s. 21(8) as having the meaning ascribed to 'action' in s. 151 within the context of Admiralty procedure. That meaning clearly contemplates exclusively English procedure.

If Parliament had intended s. 21(8) to have wider application than to proceedings in the Courts of this country I feel sure that it would not have been worded in the way in which one finds it. Express reference would have been made to prior foreign as well as English proceedings. The phraseology used must, in my judgment, have been inserted to deal with facts such as those in *The Banco* . . . where the prior arrest had been effected in an English port. Moreover, art. 3(3) restricts multiple arrests to those occurring in the Contracting States and does not apply to prior arrests in non-Contracting States. It would be very odd if Parliament had prohibited multiple arrests where the prior arrest had been outside the Contracting States, yet s. 21(8) can refer only to prior proceedings in rem or arrests in *any* jurisdiction if it is not confined to English proceedings. Further, there has been no attempt to introduce into s. 21(8) the flexibility to be found in the last words of art. 3(3)—'unless the claimant can satisfy the court . . . that there is other good cause for maintaining the arrest.' That is another

indication that Parliament did not set out to follow the Convention, but was instead confining its attention to *The Banco.*

I conclude, therefore, that s. 21(8) of the 1981 Act applies only to proceedings in rem or to a prior arrest in this country. . .”

17 Although these passages were *obiter*, because Colman, J. had based his decision on other points, I find the reasoning in them compelling, and I hold that the arrest of the *Sammarina III* in Bombay does not preclude the serving of a writ for the same claim within this jurisdiction.

18 Nor, to my mind, can s.21(8) be held to prevent a second writ being served on the same vessel. The wording of the provision is quite clearly addressed to the service of a writ on another vessel in respect of a claim for which a first vessel has been served. If it had been Parliament’s intention to create a statutory prohibition against serving the same vessel with two writs, s.21(8) would have been worded accordingly. In stating that “no other ship” may be served with a writ or arrested, Parliament was not providing for the situation that exists in this case.

19 Romline puts its argument on an alternative footing: It says the proceedings should at the very least be stayed pursuant to s.8 of the Arbitration Ordinance because of the ongoing arbitration proceedings in London. It goes further and says that the proceedings ought to be dismissed because the arbitration proceedings were commenced before these proceedings were filed and, furthermore, there are proceedings in respect of the same claim ongoing in the Bombay High Court. There is the further argument, of course, that it is an abuse of process for there to be two suits in existence in this jurisdiction in respect of the same claim and involving the same parties.

20 The plaintiffs concede, I think, that one suit or the other must go. They cannot sustain both suits against Romline in respect of what is basically the same claim. Furthermore, as I understand it, they do not oppose a stay of proceedings. What the plaintiffs seek is security for any claim in which they may succeed in the arbitration proceedings. The argument for the stay of these two actions pending the outcome of the arbitration proceedings is compelling. My power to grant a stay comes from s.8 of the Arbitration Ordinance. Should I go further and dismiss the proceedings as an abuse of process?

21 Most certainly the plaintiffs cannot maintain both actions in respect of the same claim as against the same defendant. The second writ was filed to enable the plaintiffs to take advantage of a statutory innovation and, in the circumstances, it is right that Cause 1998 A.J. No. 29 should be dismissed. On the other hand, although, as I have stated, there are good grounds for staying Cause 1998 A.J. No. 40, I have not been persuaded

that the action should be dismissed. Section 8 of the Arbitration Ordinance speaks of a stay of proceedings if the parties have agreed to go to arbitration. Although proceedings on the same claim are pending in the Bombay High Court, it seems that no final determination has been made in that action and it would be inappropriate to dismiss the proceedings because of the claim in the Bombay High Court.

22 The question of *forum conveniens*, although referred to in the skeleton argument of Mr. Ellul, for the defendants, was not pressed by him. In any event, such an argument would lead to a stay, rather than a dismissal, of proceedings in this jurisdiction. In all the circumstances, I consider the proper and appropriate orders should be that Cause A.J. No. 29 be dismissed and Cause A.J. No. 40 be stayed pending resolution of the arbitration proceedings in London.

23 The plaintiffs seek an order for security of their claims pursuant to s.19 of the Civil Jurisdiction and Judgments Ordinance, 1993. Section 19(1) reads:

> "Where in Gibraltar a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of an overseas country, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest—
>
> (a) order that the property arrested be retained as security for the satisfaction of any award or judgment which—
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> (i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed; and
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> (ii) is enforceable in Gibraltar; or
>
> (b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment."

24 The defendants' first argument against the application of this provision is that as the arrest of the *Leresti* was made in another action, brought by Mobil Oil Hellas S.A. in 1998 A.J. No. 24, the plaintiffs are not entitled to security under s.19. The clear wording of the section is that for security to be ordered "the property" must be arrested "in those proceedings," that is, in our case, in 1998 A.J. No. 40. The plaintiffs say that this construction would operate unfairly against creditors such as themselves who can only enter the proceedings in which the vessel is arrested as caveators, and who follow the arresting creditor in pursuit of their claim.

25 I have sympathy with the argument and with creditors who find themselves in the position of the plaintiffs, but I cannot see how I could avoid the strict wording of the statutory provision and extend its scope beyond that which is clearly formulated by the legislators. Had it been the intention of the legislature to make the remedy available to creditors in the plaintiffs' position, the provision would have been differently worded. As it is, neither counsel has been able to provide me with a single example of the similarly worded English provision—s.26 of the Civil Jurisdiction and Judgments Act—being applied in proceedings other than those in which the vessel was arrested. In my judgment, I am not empowered to apply the provisions of s.19 to this case.

26 Even if I am wrong in that, I would not, as a matter of discretion, grant the plaintiffs security in this case. The plaintiffs arrested a sister vessel to the *Leresti*, the *Sammarina III* in Bombay, and have, in the proceedings in which that vessel was arrested, exacted security in the sum of US$556,500. Whilst it is manfully argued on behalf of the plaintiffs that the parties were not the same in the proceedings in Bombay, the only distinction I can find is that the security was given by the charterers of the vessel and not the owners. The action was brought by the same plaintiffs against the defendant in the actions brought in Gibraltar and in respect of the same claim. That it was in the charterers' interests to give security on behalf of the defendant does not alter the nature of the claim. The claim in the Bombay High Court is for an amount in excess of the claim in this court. The Court of Appeal in Bombay reduced the amount of security ordered to something less than half of that claimed in these proceedings.

27 There is some suggestion by the plaintiffs that this decision to reduce the amount of the security was done arbitrarily or peremptorily. I find that difficult to believe of a court with the prestige of the Bombay Court of Appeal and, indeed, this is not borne out by the advocate for the charterers, Mr. Rambhadran, who has deposed that the decision to award security of US$556,500 was made after full arguments were heard on both sides. An application for a stay of that order was also heard and rejected.

28 Although I do not feel that I am fettered by the decision of the Bombay court, and I am aware that security has been awarded of less than half the amount claimed and, further, that the security awarded in Bombay is not related to the arbitration proceedings pending in London, it is awarded in a claim involving the same parties and the same subject-matter. I do not consider that I should exercise my discretion to render assistance to these plaintiffs who are seeking to pursue the defendant in various jurisdictions, and in our case to exact similar remedies to those already exacted in another jurisdiction.

29 The upshot is that I dismiss Cause 1998 A.J. No. 29, stay Cause 1998 A.J. No. 40, and do not award security on the plaintiffs' application. Costs will go to the defendant on these applications.

Orders accordingly.
