NZLR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. NO. 491/85

BETWEEN FROUD INDUSTRIES LIMITED

Plaintiff

A N D P. WILSON & R. WILSON

Defendants

Hearing: March 23, 1988

Counsel: Mr. Tomaszyk for Defendants
Mr. Asher for Plaintiff to oppose

Judgment: 29 MAR 1988

JUDGMENT OF MASTER ANNE GAMBRILL

This is an application for security for costs by the Defendants against the Plaintiff under Rule 60 of the High Court Rules in repect of a claim arising out of the termination of a contract and the repossession of a concrete-making machine. The Plaintiff originally issued proceedings on 19th May 1983 in the District Court claiming the loss of profits by the termination of the contract. The Defendants subsequently filed a Statement of Defence and a substantial counterclaim which caused the proceedings to exceed the jurisdiction of the District Court and in 1985 the claim was transferred to the High Court for hearing.

I am told there is a hearing anticipated in May 1988 of this matter and on 3rd February this year, an application for

security for costs was lodged, the Defendants claiming security from the Plaintiff company.

The basis of the Defendants' claim was that the Plaintiff company is a small company with practically no assets and in 1982 it was in receivership. The affidavit evidence shows that the company was in receivership for a period of 18 days and the accounts that relate to 1982 I do not think are particularly relevant to the position of the company today. One of the company shareholders, Mr. Perkinson, filed an affidavit in opposition. He is a Chartered Accountant and a University Lecturer. Exhibited to his affidavit are recent company accounts showing the company is in a reasonable trading situation. The company made a profit last year of $23,000 which was paid to Mr. Froud as a salary. The company owns a Mitsubishi van worth $18,000. The company presently has loans which generate payment of interest of $3,000.22 and its current liabilities in its balance sheet at 31st March 1987 to the Bank, were $2,322.00 which is not a substantial sum.

Counsel referred me to the principles set forth in McGechan on Procedure under Rule 60 and an unreported decision of Sinclair, J. Kenric Print Limited (in receivership) v. Duromark Industries (1985) Limited, C.P. No. 571/86, Auckland Registry, dated 17th February 1987. The Judge in that case held that the delay was too great in respect of an application by a Defendant for security which knew and had always known that the Plaintiff company was in financial

difficulties.

The situation herein is totally different and the Plaintiff company has placed evidence before the Court that shows that it is not trading in financial difficulties.

I am satisfied as to the explanation concerning the receivership and I find that in the nature of the claim being brought, considering the present Statement of Assets of the company, I believe the company would be able to meet its liabilities. I am cognizant that the company may have a shield of limited liability and I am aware that the Defendants have let this matter rest for nearly five years before seeking security. Although an explanation is tendered, I do not find this acceptable. I find that the Plaintiff has given an adequate explanation to the Court both of the short receivership in 1982 and of its present trading position. The Defendants have been unable to point to any current trade or known debts or petitions against the company and I must accept the evidence that it is trading satisfactorily. There is no element of public interest in this case and in exercising my discretion I must consider whether, in this case, I am entitled to recognise that both parties have a claim before the Court for similar amounts of money and their interests are balanced in the costs that either party will incur if they are not successful. I believe that both parties have prospects of success and I am not in a position to either weigh or determine this issue.

The affidavits show that the Plaintiff lost the use of the machine and there is a suggestion that the impecuniosity and the receivership could have been caused by this action. However, it is so long ago I do not think it is relevant in considering the present application relating to the company and the correct information on which to base my decision is the balance sheet which is before the Court for the year ending 31st March 1987.

The Defendants could have sought costs much earlier in the proceedings, at the time the proceedings were moved to the High Court as a result of their counterclaim.

Accordingly I would dismiss the application. Costs are reserved.

MASTER ANNE GAMBRILL

Solicitors:

Kensington Swan, Auckland, for Plaintiff
Cairns Slane Fitzgerald & Phillips, Auckland, for Defendants