17/1

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.1775/87

2232

BETWEEN T.J.F. HAYDON and R.H. OLDEMAN

First Plaintiffs

A N D EQUITICORP HOLDINGS LIMITED AND ANOTHER

Second Plaintiffs

A N D LOMBARD INSURANCE CO. LTD AND ANOTHER

First Defendant

A N D ASSURANCE GENERALES DE FRANCES AND OTHERS

Second Defendants

A N D STILL TAYLOR ASSOCIATES LTD

Third Defendant

A N D HOGG ROBINSON AGENCIES LTD

Fourth Defendant

Hearing: 15 August 1989

Counsel: Ms Bell for Plaintiffs
Craddock QC and Langston for First Defendants
Fee for Second Defendants
Clarke for Third Defendant
Reaney for Fourth Defendant

Judgment: 22 August 1989

JUDGMENT OF SINCLAIR, J.

On 26 June 1989 Master Towle made an order for security for costs in this action (as against the Plaintiffs) in a global sum of $300,000. This action was commenced by the First Plaintiffs as owners of some deer, and in which the Second Plaintiffs were joined as being the financier of

the First Plaintiffs. The basis of the action is that on the evening of 30 June 1986 some 4554 deer disappeared from the First Plaintiff's property. While some were recovered, 3837 were in fact lost. It is said that the First Defendant, at that time, had an insurance policy over the deer which was to expire on 30 June 1986 but that prior to their escape the Third Defendant had been instructed to place an insurance cover over the deer. In turn the Fourth Defendant had been instructed by the Third Defendant to obtain such cover. The insurance to 30 June 1986 was in fact placed with both the First and Second Defendants.

The amount in issue originally approached $8m. but there is a claim for interest which now brings the total amount at risk to over $11m. The Plaintiffs sought to restrict the amount in issue as being the original value of the deer said to have been lost, but that is unreal as there there is an interest claim and the Defendants are entitled to have this matter considered on the basis that at the moment, there is in excess of $11m. at risk.

The First Defendants claim that the insurance policy in question expired originally on 31 May 1986 at 4 p.m. and was extended for one month, so that in fact it expired at 4 p.m. on 30 June 1986. The Plaintiffs contest that suggestion and maintain that there was insurance until midnight on that particular night. If the First Defendant

is correct then of course there was no insurance cover. Alternatively, the First Defendants allege that the loss was created by the First Plaintiffs and that if the deer escaped, then it was as a result of the First Plaintiff's actions, and thereby the claim is said to be fraudulent. The First Plaintiffs are now hopelessly insolvent and a compromise is being proposed under Part XV of the Insolvency Act on their behalf. The Second Plaintiffs are now in the hands of Statutory Managers and precisely what their positions are is not made clear as there is absolutely no information whatever from the Statutory Managers as to their financial situation nor is there any evidence by way of affidavit which might suggest that the Second Plaintiffs might have difficulty in raising a sum for security for costs. The only proper inference I can draw at the moment is that the Statutory Managers desire the action to proceed and that the position of the companies is such that an amount fixed by the Court by way of security for costs can be met. If that is not so, then it was encumbent upon the Statutory Managers to place before the Court information as to the financial situation of the companies under their control.

So far as the other Defendants are concerned, the Second Defendants say that they have an additional defence in that there is no insurance under its policy so far as the Second Plaintiffs are concerned. The Third Defendant, for its part, says it took reasonable steps to comply with the

instructions to obtain cover while the Fourth Defendant quite simply denies everything.

In her submissions, counsel for the Plaintiffs referred to the decisions of Kwasza v. Redmond, unreported decision of Holland, J., CP.97/86, Judgment 2 October 1986; Attorney-General & BCNZ v. Bell-Booth Group Ltd, unreported, CA.73/86, Judgment 30 June 1986 and Aquaculture Corporation v. MacFarlane Laboratories (1984) Ltd, unreported decision of McGeghan, J., Auckland Registry, A.120/85, Judgment 25 February 1987. The principles in relation to security for costs are now well established and there is no need for me to restate them in this application save to observe that I accept a plaintiff is not to be deprived of bringing an action because of its impecuniosity and that a Court should be slow to make an award or fix a sum which might, in all the circumstances, be regarded as oppressive - so far as the plaintiffs are concerned. However, there is another balancing factor which must be mentioned namely that which is referred to in the decision of Pearson v. Naydler (1977) 3 AllER 531 where at p.537 Megarry V-C had this to say:-

> "It is inherent in the whole concept of the section that the court is to have power to do what the company is likely to find difficulty in doing, namely, to order the company to provide security for the costs which ex hypothesi it is likely to be unable to pay. At the same time, the court must not allow the section to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company. For this reason,

> Mars-Jones J. was not prepared in the Parkinson case to make an order for security for costs for more than the 1,500 that the master had ordered. As against that, the court must now show such a reluctance to order security for costs that this becomes a weapon whereby the impecuinous company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company. Litigation in which the defendant will be seriously out-of-pocket even if the action fails is not to be encouraged. While I fully accept that there is no burden of proof one way or the other, I think that the ocurt ought not to be unduly reluctant to exercise its power to order security for costs in cases that fall squarely within the section."

That passage rather succinctly summarises some of the principles to be applied so that the Court must be on guard to ensure that an impecunious plaintiff is not put in a position where it can exert undue pressure upon a defendant to settle where substantial costs are involved and where a plaintiff is not really put at risk in relation to those costs.

It was urged in this particular matter that the Statutory Managers' position must be looked at because of their responsibilities not only towards creditors but also towards the shareholders of the Second Plaintiffs, and the fact that they are acting in the public interest. I have no quarrel with that observation but one must also have some regard to the nature of the claim and of the issues involved and while it was urged on behalf of the Plaintiffs that there was more than a reasonable prospect of success, my assessment is that, having regard to the pleadings and the nature of the allegations, it is putting

the position of the Plaintiffs, in relation to this litigation, at too high a level. I can foresee, from the nature of what went on in this particular argument, that the Plaintiffs may be faced with some extremely difficult hurdles and that therfore any chance of success, in my view, cannot be put on more than an even basis. I have no reason to believe, however, that the claim is not bona fide.

In support of the argument that the sum fixed was excessive, it was said that the figure might well deprive the Plaintiffs of an opportunity to present the claim before the Court. It was further said that the Defendants were attempting to take advantage of the impecuniosity of the First Plaintiffs and the statutory management of the Second Plaintiffs. It was also further said that the amount involved was higher than in any other case up to the present time - and as a global amount that might be so. I observe however, that recently, in a decision in Goldcorp Holdings Ltd & Ors v. R.W. Smith & Ors., Auckland Registry, CP.362/89, Judgment 3 July 1989, Thorp J. fixed security in respect of Goldcorp (who was in receivership) at $125,000 on a claim which admittedly was for a sum of $30,000,000.

In their opposition the Defendants were really at one. While some had not as yet, alleged fraud, I gained the impression that amended statements of defence would be

filed to allege just that. It was further submitted, and I am of the view with some justification, that the Master, having heard full argument, carried out a balancing task by exercising his discretion on a correct basis. It was further pointed out that the Plaintiffs elected to join in four defendants with the consequence that the costs would now be higher than otherwise would be the case and, of necessity, what might have been a rather simple action in respect of one Defendant has now become more complex especially when the positions of the other Defendants are taken into account. The amount involved is large and it was submitted on behalf of the Defendants that, in reality, the prospects of success for the Plaintiffs are dim. At this particular time, I feel that the Defendants are probably putting those prospects at the lowest level whereas the Plaintiffs put it at the highest level. With the information at present before the Court, I think the prospects of success must be assessed as I have already said, at somewhere between the two. If the Plaintiffs totally fail, and if party and party costs were allowed in respect of a five week trial on the present scale, costs for the Defendant would be in excess of $300,000. It is to be noted, according to the Defendants, that when the first action was originally commenced in June 1986, the First Defendant was the only one sued. The present action, which was commenced towards the end of 1987, introduced the other three Defendants.

I observe that each case must depend on its own facts and circumstances. The Plaintiffs do not complain that indeed security could have been ordered and that such an order was within the discretion of the Master. The only complaint is as to quantum. If there had been but one Defendant and a sum of $75,000 had been fixed as security for costs, there could in my view have been no ground for complaint. As against one Defendant the amount at issue is large and the trial inevitably will take some time. However, there are four Defendants, all separately represented - as they are entitled so to be - and all defending different facets of the claim. Can it then be said that the total figure is excessive when one has regard to those other factors which I have already referred to in this judgment? I do not think it can be said in all the circumstances that the Master has erred to the point where this Court ought to interfere. I repeat, I have no knowledge whatever of the financial situation of the Second Plaintiffs and if that was a factor which ought to have been taken into account then surely the Statutory Managers should have put the Court in charge of information which would have enabled it to take that factor properly into account. That they have failed to do so is no fault of the Court and the Court is not, in my view, to become involved in a guessing game as to the financial situation of the Equiticorp Group.

In all the circumstances, I am not persuaded that the

global figure fixed was of an amount where this Court ought to interfere. The application is accordingly dismissed and each Defendant is allowed the sum of $400 in costs.

P.A. ... J.

Solicitors:
Rudd Watts & Stone, Auckland, for Plaintiffs;
Heaney Jones, Auckland, for First Defendants;
Bell Gully Buddle Weir, Auckland, for Second Defendants;
Russell McVeigh McKenzie Bartleet & Co, Auckland, for Third Defendant;
Kensington Swan, Auckland, for Fourth Defendant.