IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

4/10

C.P. No.249/90

1887

BETWEEN DUART HOLDINGS LIMITED

First Plaintiff

A N D ROBERT JOHN McLEAN, HELEN MARY McLEAN, ALASTAIR DOUGALL McLEAN, HAMISH ROBERT McLEAN

Second Plaintiffs

A N D INDUSTRIAL HOLDINGS LIMITED

FirstDefendant

A N D RICHARD HENRY NELSON SMITH, NORMAN BRUCE PAGE, DENIS BARRY O'HARA

Second Defendants

A N D SIMON EARL WILKINSON

Third Defendant

Hearing: 21 August 1991

Counsel: D.I. Jones for First & Second Plaintiffs
S.P. Rennie for Third Defendant

Judgment: 21 August 1991

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ORAL JUDGMENT OF TIPPING, J.

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There are before me cross applications to review a decision of the learned Master in relation to

an application for security for costs. The application was brought by Mr Wilkinson who was at that time the Third Defendant. It was brought in terms of Rule 60. The learned Master delivered a reserved decision in which he traversed a number of matters in some detail and I do not find it necessary to go into similar detail myself as to those matters. I shall concentrate in this judgment on the points which were made to me by counsel on either side.

The learned Master ordered that the Plaintiffs provide security in the sum of $5,000.00. He reserved leave to the Third Defendant to apply for additional security should the Third Defendant be so advised. The fact that the learned Master did that was no doubt based on general principles that questions of security may have to be reviewed up until setting down, but it was also based on the specific proposition that there had been argument before him about whether the duration of the trial was likely to be at least five days.

There had been evidence from the Applicant, the Third Defendant, to that effect but the learned Master felt some concern as to whether or not that evidence was accurate. Mr Rennie told me when opening the application for review that it had in essence been common ground before the learned Master that the hearing of the substantive claim could well last five days, or even longer. Mr Jones was not immediately able to recollect the position but fairly conceded that Mr Rennie's recollection was probably correct and that the learned Master would have been advised by counsel at the hearing before him that it

was essentially common ground that a hearing of at least five days might well eventuate.

The learned Master obviously fixed his sum of $5,000.00 against the background that he was not satisfied of the five day estimate but as counsel have effectively agreed before me that the estimate is realistic it seems to me, with respect to the learned Master, that that is the basis upon which the security should now be fixed. The likely length of the trial is of course but one of the various factors that have to be considered, but it is in my opinion a significant one.

The arguments before me were firstly from Mr Rennie on behalf of the Third Defendant seeking a higher sum, and secondly from Mr Jones on behalf of the Plaintiffs suggesting first that no security should have been awarded at all but, if so, that the sum fixed by the learned Master was entirely appropriate. It is logical in these circumstances to address first the question whether or not security should have been awarded at all, because if I am with Mr Jones on that point the quantum issue raised by Mr Rennie will not arise.

Mr Jones addressed me under various headings, as I have identified them, as to why the learned Master was wrong in the decision which he reached to award security. Broadly speaking I agree with the learned Master's approach and refer to the following matters out of deference to Mr Jones' argument. The first matter raised was the question of delay. It was suggested that the Applicant, the Third Defendant, had been tardy in making

the application. The Rules do not expressly lay down any time limit for an application of this kind, but in ordinary circumstances it ought to be made as soon as the Defendant is appraised of the risk that the Plaintiff may not be able to pay costs if the Plaintiff loses. However the circumstances in this case must be considered.

The Plaintiffs took some three years from the events which are alleged to give rise to the various causes of action in which to mount their proceedings. The proceedings were issued some time in 1990 in relation to events occurring in 1987. Against that background it seems to me that it is a little unrealistic for the Plaintiffs to tax the Defendant with the complaint of delay. While it may be able to be said on one view of the matter that there has been some delay here I do not think that the delay was such as to preclude the application. Mr Jones mentions that the learned Master did not bring this point specifically to account. I have done so in my overall review of the circumstances.

The next point raised by Mr Jones was the proposition that the Plaintiff had an arguable case. I accept that to be so. If it were not so one would be expecting an application on the other side to strike out the claim for want of a cause or causes of action. The fact that the Plaintiff may have an arguable case is not necessarily a factor in my view which should militate against his being required to put up some form of security. The question of the strength of the case becomes relevant. It is not always easy to determine that with any

degree of precision and I do not propose to go into that issue in this case any further.

The next matter raised was the suggestion that the Plaintiffs were impecunious. There are comments about this in the learned Master's judgment which on one view of it might be thought to be slightly contradictory, but there is no foundation in my view, on the material before the Court, for the view that if the Plaintiffs are impecunious that impecuniosity has been caused directly by the actions of the Defendant or the Defendants. To say that would be in essence to pre-judge the issues which are going to be ventilated at the trial.

One of the problems in this case in this area is that for whatever reason the Plaintiffs have chosen not to put before the Court any detailed information about their financial circumstances. There is simply a bald statement by one of the Plaintiffs that if an order for costs were to go against them in the sum of about $35,000.00, which is apparently the amount of scale costs including trial, then the Plaintiffs would be able to meet an award at that level. The Plaintiffs are in effect asking the Court to accept their word for it. They have not provided any detail in support of the proposition.

It is a little difficult therefore in those circumstances for the Plaintiffs to rely on any sort of impecuniosity argument. Against that Mr Jones says that if the Court is going to take that attitude then really there is no foundation for the making of an order for security at all because under the Rule the Defendant will

on this view of it not have established the criterion, namely that there is reason to believe that the Plaintiff will be unable to pay the costs of the Defendant if unsuccessful.

There is I suppose some apparent logic in that view but on the other hand the Court is faced with the situation that it is simply being asked to take the word of the Plaintiffs for the proposition that they can pay costs, but at the same time is being asked to take the view that the Plaintiffs' impecuniosity is something which should weigh against the application. Mr Jones asks that there be some opportunity given to the Plaintiffs, if I were to take the view that it was necessary for them to supply the sort of evidence which one would have thought they might have supplied earlier.

I do not propose to give the Plaintiffs that opportunity. I propose to decide the matter on the basis of the information before the Court. If the Plaintiffs had thought it appropriate and necessary to put more detailed information they have had plenty of time to do so. I do not consider that impecuniosity is established, but equally I am satisfied on the material before the Court that the Defendant has established that there is reason to believe that the Plaintiff may be unable to pay the costs if the Plaintiff is unsuccessful. I am accordingly satisfied that this was a case where the order for costs was justified and I turn now to consider the question of quantum.

I have already indicated that the learned Master assessed quantum on the basis of a trial likely to take significantly less than the now present estimate of five days. The learned Master's award was something in the nature of a provisional one on the material before him. The length of the trial is of course but one of the various factors to be taken into account. I agree with the analysis made by Mr Jones in his submissions before the Master that the following points ought to be weighed.

First of all the amount or nature of the relief claimed. Here the claim is for a substantial sum, namely about $1 million. The next matter is the type and nature of the proceedings, including the complexity of the issues. It seems to me that the issues here will be both factual and legal. Although the case is not likely to be as complex as some it will not be a straight forward case either. The next point is the estimated duration of the trial. Here of course the position before me is now significantly different from the position as the Master understood it to be and we have a trial likely to last at least five days.

The fourth matter is the probable costs payable by the Plaintiff if unsuccessful. Scale costs on a claim for $1,000,000.00 taking five days would, I gather, come to something like $35,000.00. Against that of course is the bar at $5,750.00, but it would undoubtedly be a case, on the hypotheses I have taken, for the bar being exceeded. Mr Jones submitted that one should not be

mesmerised (that is my way of putting it) by the size of the claim. I accept that point. The sum at issue is really dictated by the circumstances in which the claim arises, but on the other hand someone facing a claim for $1,000,000.00 is in my view entitled to a significantly higher sum by way of security for costs, if such an order is justified, than someone facing a claim for say $100,000.00.

It is a matter of working together all the relevant factors and fixing a sum which is fair to both sides, as I think I have said myself in an earlier judgment. The amount must be such from the Defendant's point of view that is more than nominal and illusory and from the Plaintiff's point of view the amount must not be so high as to be oppressive. In the individual case it is a matter of discretion as to what the figure should be.

I am quite satisfied that the learned Master's figure was based on a view of the likely duration of the case which commended itself to the learned Master but which has now been overtaken by the responsible approach of both counsel in the argument before me, namely that the case will take around five days or possibly longer. For that reason I consider that the amount ordered by the Master should be increased but I must bear in mind that the amount is not necessarily intended to be a full indemnity for the amount which the Defendant might obtain from the Plaintiffs if the Defendant succeeds. I will fix the amount which I consider should be awarded in the formal orders which I am about to make. Those orders will include

certain procedural points that were discussed during the course of argument which I have dealt with at this time in order to expedite the future conduct of the case.

The background to that is basically that the claim, as previously framed, was simply against the Third Defendant Wilkinson, inter alios. However, the most recent statement of claim filed by the Plaintiffs seeks to have the company in which Mr Wilkinson is a shareholder joined. There was no order made for joinder of the company but Mr Rennie accepts that if a formal order were sought it could hardly be opposed by his client and he has sensibly agreed that I should make the appropriate order on Mr Jones' oral application. I make it perfectly plain that Mr Rennie in that stance was speaking solely on behalf of Mr Wilkinson and not of course on behalf of the company. He acknowledged that Mr Wilkinson could not oppose the joinder of the company and does not do so. As the Plaintiff would have been entitled to seek to join the company on an ex parte application, which would undoubtedly in these circumstances have been granted, I propose to take the course which I have.

The company now having been joined the amended statement of claim which anticipated, quite inappropriately in the circumstances, the joinder can now be regarded as having been validly filed. However Mr Rennie has drawn attention on behalf of Mr Wilkinson, who has now gone down to being the Fourth Defendant, that the only plea in the amended statement of claim dated 19 August 1991 against him is as follows in paragraph 50:-

> "<u>THAT</u> the said Fourth Defendant Simon Earl Wilkinson is personally liable as a director of the Third Defendant Hobbs Wilkinson & Co Limited for the said claims of negligent misstatement and breach of fiduciary duty."

This pleading was discussed between me and counsel during the course of argument and Mr Jones sensibly agreed that it might repay some revision. The present plea seems to be on the basis that Mr Wilkinson is liable qua director of the company. What, as I understand it, the Plaintiffs intend to allege is that because Mr Wilkinson personally made the allegedly negligent mis-statements and committed the alleged breach of fiduciary duty, he personally should be regarded as liable quite independently of the company, and the company in addition, it is said, is liable vicariously for the tort and equitable breach of Mr Wilkinson. Obviously the statement of claim will have to be re-cast in this light to make perfectly plain the basis upon which Mr Wilkinson is said to be personally liable for the tort alleged and for the breach of fiduciary duty alleged.

The orders of the Court are accordingly as follows:-

(1) I join Hobbs Wilkinson & Co Ltd as Third Defendant in these proceedings. The order of joinder and the re-drafted statement of claim are to be served upon them within 21 days of today's date. They shall have 30 days after service within which to file their statement of defence.

(2) I direct that when the necessary further amended statement of claim is filed there shall be no

reference in the heading or elsewhere to the proposition that Mr Wilkinson personally is trading as the company, a concept which at the moment seems to be espoused in the second amended statement of claim but which requires some mental gymnastics to appreciate.

(3) I direct that the Plaintiffs by the further amended statement of claim shall clarify the basis upon which they contend that the Fourth Defendant Mr Wilkinson is personally liable for the negligent mis-statement and breach of fiduciary duty referred to in the pleadings.

(4) I review the Master's decision and increase the amount of security ordered to the sum of $12,500.00.

(5) I reserve leave to the Fourth Defendant, Mr Wilkinson, personally to apply at any time before setting down for an increase in the said sum. By so doing I am not to be thought to be inviting a further application, unless there is some major change in circumstance which is said to justify an increase. The figure which I have fixed is intended to cover the case as presently framed and in accordance with the present time estimate given to me by counsel.

(6) I note that if the Third Defendant, that is to say the company, wishes itself to seek security in the circumstances it will have the right to do so under the Rules. Again I should not be thought to be encouraging such an application on the basis that

if, as may well be the case, the company and Mr Wilkinson personally can be represented by the same firm of solicitors then I doubt that further security ought to be awarded to the company. However if there is to be different representation necessarily arising then the position may be different.

(7) I direct that the proceedings shall be stayed, save only for the filing of the further amended statement of claim earlier directed, until the amended security figure shall have been supplied.

(8) As to the method by which security is to be provided, I endorse the Master's order in that respect, either bond or payment in.

As to costs Mr Rennie has asked that they be fixed and payable. Mr Jones has suggested that they be reserved. The Master asked for submissions by memoranda. As I understand it those have not been made because of the applications for review. It is I think convenient if the whole matter be dealt with now by me.

If the case had stayed with the Master, i.e. there had been no application for review, I would have been inclined to direct that costs be reserved to await the outcome, but in all the circumstances, in the light of the fact that there has been a review, and particularly a firmly pressed cross application by the Plaintiffs to try and vacate the Master's order, it seems to me that some costs should be awarded to the Defendant on this application overall. On the other hand there is

some force in Mr Jones' proposition that the matter was not entirely straight forward or one sided on the points arising.

I therefore fix costs at $500.00 and direct that these shall be paid by the Plaintiff to the Third Defendant and be costs in any event. I do not intend by so saying that they are to be paid forthwith. I am simply saying that they are costs of the Third Defendant against the Plaintiffs and each of them in any event, but not to be paid until after the whole matter has been resolved at which point they can be taken into account as a credit in the Third Defendant's favour.