

BETWEEN **HELICOPTER MANAGEMENT
LIMITED**

Plaintiff

AND **AVIATION CO-OPERATING
UNDERWRITERS LIMITED**

First Defendant

AND **AEROMARINE ADJUSTERS LIMITED**

Second Defendant

AND **HELIKOPTER ENTERPRISES (1988)
LIMITED**

Third Defendant

AND **PACIFIC AEROSPACE
CORPORATION LIMITED**

Fourth Defendant

Hearing: 6 May 1997

Counsel: P O'Brien for plaintiff
GS MacAskill for defendants

Judgment: 14TH May 1997

INTERIM JUDGMENT OF MASTER FAIRE

Solicitors:

P O'Brien, PO Box 25004, Christchurch, for plaintiff
Bell Gully Buddle Weir, DX CP 20509, for first and second defendants
Harkness Henry, DX GP 20015, Hamilton, for third defendant
Tompkins Wake, DX GP 20031, Hamilton, for fourth defendant

Three specific applications seeking security for costs have been made. The first is made by the first and second defendants and supported by an affidavit of Mr I Strathern. The second is an application by the third defendant, and the third is an application by the fourth defendant and is supported by an affidavit of GR Polley. The plaintiff claims the sum of \$92,391.77, plus interest and costs, which sum is fully particularised in paragraph 17 of the statement of claim.

The plaintiff owns a helicopter. The helicopter was involved in an accident in January 1991. The damage sustained in the accident required the fitting of new helicopter rotor blades. The plaintiff alleges that the first defendant was its insurer in 1991 and that the first defendant paid for the costs of the replacement rotor blades. The plaintiff further alleges that the second defendant is the loss adjuster who acted for the insurer and approved the payment for the supply and fitting of the helicopter rotor blades. The plaintiff alleges that the third defendant in fact supplied the blades and that the fourth defendant fitted the helicopter rotor blades.

The plaintiff alleges that the helicopter rotor blades were defective in that

- “(a) The blades contained an inherent defect as a result of pre-existing corrosion;
- (b) The blades were unfit for the purpose for which they were required and not of merchantable quality;
- (c) The blades did not have the potential to run the time life ascribed to them at the time that they were fitted to the Plaintiff’s aircraft.”

The plaintiff’s position is best summed up by the statement made by its director, Mr WJ van der Laan, in his affidavit when he said

“The Plaintiff’s position is this. It believes it has a good claim and will succeed against the party or parties responsible for the procurement and installation of the defective blades. Although it believes it is able to meet its obligations in terms of Court costs it has no interest in continuing proceedings against the Defendant who clearly has no responsibility. Its difficulty is that each Defendant says that it is one of the other Defendants who should be pursued. Coupled with this approach has been a refusal by any Defendant and most notably of the First Second and Third Defendants to whom specific requests for information have been made to supply documentation which must be in their possession and which should quickly clarify the circumstances including contractual arrangements put in place and executed some years ago.”

Before I analyse the specific principles applicable in an application for security for costs in a case such as the present, I record that I put to counsel that a practical solution was the adjournment of the current application for security on the basis that, at a minimum, discovery be given of documents relating to specific issues involving each defendant. The issues and the relevant documents discussed were as follows:

First Defendant

Who was the insured at the time of the 1991 accident?

The relevant documents in relation to this issue would include the policy document and the proposal.

Did the insurer re-instate or pay out on an indemnity basis?

The documents relevant to that issue would include
a discharge
the payment vouchers in relation to the completion of the claim.

Second Defendant

On whose behalf was the second defendant acting? In particular, was the second defendant the agent of either the plaintiff or the insurer?

The relevant documents in relation to this issue are those documents which appoint the second defendant and authorise him to act, or, documents which amount to a ratification on behalf of a principal of actions undertaken by the second defendant.

Third Defendant

To whom is that party contracted in relation to the supply of the helicopter rotor blades?

Relevant to that issue are the following documents:

the invoice issued by the third defendant for the supply of the helicopter rotor blades;
any receipt for payment in respect of that invoice.

Fourth Defendant

To whom was the fourth defendant contracted when it fitted the helicopter rotor blades to the aircraft?

The documents relevant to that issue include

the invoice issued by the fourth defendant in respect of the fitting of the helicopter rotor blades;
the order to carry out such work and issued to the fourth defendant;
the receipt for the payment made in respect of the fourth defendant's invoice.

Having regard to Mr WJ van der Laan's statement of position, it seems clear to me that once full discovery of the matters pleaded in the statement of claim against the first and second defendant is provided together with discovery of the documents that I have indicated under the heading "Third and Fourth Defendants" that it is most likely that this case will be re-pleaded, thus identifying the real issues in dispute and enabling interlocutory applications and, in particular, discovery to be addressed specifically to those issues. I should add that in relation to the issue raised concerning the quality of the blades, documents which define the specifications of the blades and certificates of compliance would also be relevant documents.

This is an application for security for costs filed at an early stage of the proceedings following the filing of statements of defence. The plaintiff company has a share capital of \$1,000. There are four unsatisfied instruments by way of security in favour of UDC Finance registered. Three of the charges secure "all advances".

The fourth charge secures \$125,186. Security in respect of the charges is given over a 1960 Hiller Helicopter, a 1984 Toyota Landcruiser and a 1989 Holden Commodore. The two most recent charges give security over helicopter spraying equipment and a topdressing bucket. The defendants have sought copies of the most recent financial statements of the plaintiff. That has not been provided. In an affidavit in answer to the defendants' application for security for costs, the plaintiff's director, Mr van der Laan, refers firstly to an affidavit filed by the plaintiff company's accountant, Mr O'Connor, and

then to the fact that the plaintiff company has paid substantial premiums to the first defendant over many years, and to the fact that the plaintiff was able to pay an unbudgeted expense in excess of \$37,000 following the scraping of the main rotor blades for the helicopter in 1993 and to the actions of an associated company in which Mr van der Laan is also a shareholder and which company has paid premiums to the first defendant. The affidavit of Mr O'Connor refers to the company's annual turnover of approximately \$250,000 and, but for one year, an average operating costs of \$100,000 per annum. The one special year had operating costs of \$167,000. He refers to an insurance valuation of the principal asset, a helicopter, which has an insurance valuation of \$250,000, with a debt of \$100,000 owing to UDC secured against it. He then refers to the debtors and creditors and the fact that the company has a working capital in excess of \$40,000 and that in the past it has been able to pay substantial unbudgeted expenses. He expresses the view that it could meet legal costs of \$20,000 or higher should they be necessary in addition to continuing to trade.

The defendants' complaint is that they have no way of testing whether the working capital excess is real and whether Mr O'Connor's confident expectation of an ability to pay costs is soundly based because the basis on which that opinion is expressed is not fully disclosed.

The application is made pursuant to Rule 60. An order may be made if the Court is satisfied that there is "reason to believe" that a plaintiff would be unable to pay the defendant's costs if unsuccessful. Rule 60 should only be used where there is some evidentiary foundation or indication to support the belief that an order for costs might not be satisfied. *New Zealand Kiwifruit Marketing Board v Maheatataka Cool Pack Ltd* (1993) 7 PRNZ 209, 213.

Where the threshold test is met, Rule 60 provides that the Court has a discretion whether to order or decline an application for security for costs. The principles governing the discretion are fully set out in *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 and reviewed in *Nikau Holdings Ltd v Bank of New Zealand Ltd* (1992) 5 PRNZ 430.

The statement of position set forth in the affidavit of the plaintiff's director, Mr WJ van der Laan, that I have referred to indicates that this is an obvious case for staged security if the threshold is met.

I make no final determination on the question whether the threshold has been crossed in this case because I have formed the very clear view that to order security at this stage is premature. In my view, this case is appropriately covered by what Barker J in *Davy v Howell* (1993) 7 PRNZ 141 at 145 said

“I do not consider it necessary to make an order for security for costs at this stage. I think that I should have a better idea of where this case is heading once the interlocutories are completed and there are amended pleadings filed. I therefore adjourn the application for security for costs to be considered further at a judicial conference before me at a time when this case is ready to be set down. On that occasion, one will know exactly the issues and have a much better idea of how long the case will take to try.”

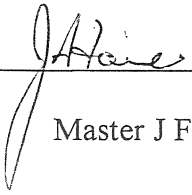
If anything, the plaintiff's case is stronger here and there is certainly an issue as to whether the threshold has been met for the purposes of Rule 60. Nevertheless, I do not propose to strike out the application for security at this stage but will adjourn it. In the period of the adjournment I expect the first and second defendants to give full discovery and the third and fourth defendants to give limited discovery covering the areas which I shall list in the directions which I shall make. I will then require the parties to attend a telephone conference so that I can determine from plaintiff's counsel whether he has information sufficient to put the statement of claim in final form so that the issues are understood and what specific interlocutory applications that are required can be considered.

Accordingly, I make the following directions:

- a) the application for security for costs is adjourned for a telephone conference at 10am on 8 July 1997. I anticipate that counsel for the first and second defendants and counsel for the third defendant, who were not represented before me on this argument, will attend such telephone conference
- b) the first and second defendants shall file and serve a verified list of documents by 27 May 1997

- c) the third and fourth defendants shall file and serve a verified lists of documents covering the following documents in respect of each defendant:
 - i) in the case of the third defendant documents which identify invoices it has issued for the helicopter rotor blades it supplied, receipts for payment, certificates of compliance and documents defining the specification of the blades supplied
 - ii) in the case of the fourth defendant its affidavit shall cover documents which identify the party with whom the fourth defendant contracted for the fitting of the helicopter rotor blade and shall include the order received, the invoice issued for the fitting of the blades, the receipt evidencing payment of its invoice and any certificate of compliance in respect of the blades
 - iii) in the case of both the third and fourth defendants, the verified lists of documents covering the matters that I have identified shall be filed and served by 27 May 1997
- d) all defendants shall make available for inspection by the plaintiff during the period 27 May 1997 to 17 June 1997 the documents contained in the verified lists filed and served
- e) the plaintiff shall file and serve an amended statement of claim on or before 1 July 1997
- f) at the telephone conference scheduled for 8 July 1997 all counsel shall be ready to discuss the following matters:
 - i) whether or not there are any specific issues arising out of the pleadings as they then exist and, if so, what those issues are
 - ii) in the event that there is an indication by the plaintiff that it will discontinue any cause of action, then any application made by the party who is to be dismissed from the proceeding for costs shall be indicated
 - iii) the position in relation to the application for security for costs will be reviewed
 - iv) what further interlocutory directions are required.

The costs of the present application for security for costs are reserved.


Master J Faire