IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-000856

BETWEEN	RAJENDRA PRASAD Plaintiff
AND	INDIANA PUBLICATIONS LTD First Defendant
AND	ARIN LAL Second Defendant
AND	VENKAT RAM Third Defendant
AND	MAHESH PARERA Fourth Defendant
AND	CHENCHU NAGULU Fifth Defendant

Hearing: 26 June 2009

Appearances: R Prasad, Plaintiff in person
G M Harrison for Defendants

Judgment: 26 June 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON

Solicitors/Counsel:
Parshotom & Co., PO Box 27079, Mt Roskill, Auckland 1440
Copy to:
R Prasad, (Plaintiff), PO Box 14-637, Panmure, Auckland

G M Harrison, PO Box 4338, Shortland Street, Auckland 1140

[1] The defendants seek security for costs in connection with proceedings by the plaintiff for damages and other relief including an injunction for alleged breach of copyright arising out of publication by the defendants of a business directory for the Indian community in Auckland. The plaintiff in these proceedings claims to have the exclusive right to use the words "Indian Business and Directory" in any combination or formation.

[2] In seeking the order for costs the defendants rely on the plaintiff's failure to comply with orders for costs made against him and his company in connection with proceedings that have been brought by the plaintiff and his company in the District Court. Those proceedings have proceeded by way of appeal to this Court and the plaintiff has attempted to appeal from this Court to the Court of Appeal.

[3] The defendants have also applied for judgment in their favour in these proceedings using the summary judgment procedure. The plaintiff has himself brought an application for summary judgment against the defendants. Although the defendants contend that they have a good defence, to avoid incurring extra costs they have chosen at this stage not to file a formal statement of defence.

[4] Before proceeding to consider the application for security for costs, it is appropriate to go through the history of past proceedings between these parties. It seems that the first proceeding was by the plaintiff's company called Sage Group Limited when it brought proceedings in the Manukau District Court for orders preventing the defendants from publishing a directory aimed at the Indian community. Those proceedings had initially been commenced by the plaintiff but during the course of the proceedings Sage Group Limited was substituted on the basis that any copyright belonged to Sage Group Limited and not the plaintiff. Those proceedings were heard in the Manukau District Court when judgment was entered for the defendants and orders made against the plaintiff company for payment of costs. It is significant that in those proceedings, Sage Group Limited, the plaintiff, stated that its publication was called "Indian Biz Information and Business Directory". The defendants' publication, it is claimed, was called "Indian Newslink Fast Phone Indian Business Directory".

[5] Following a defended hearing, the District Court Judge dismissed the claim. The plaintiff appealed and in a decision delivered on 13 April 2006 the decision of the District Court was upheld and the appeal was dismissed, with costs. Sage Group Limited have not paid the costs in connection with those hearings. It has now been placed into liquidation and it is a reasonable inference that any costs ordered will not be paid as Sage Group Limited does not have the assets to meet any claim for costs.

[6] Following the dismissal of those proceedings, the plaintiff attempted to appeal. He sought leave from the High Court to appeal to the Court of Appeal. That application was declined in November 2007 and the plaintiff was ordered to pay costs of $2440. In March 2008, an application by the plaintiff to appeal directly to the Court of Appeal was dismissed by the Court of Appeal with a third order for the plaintiff to pay $2572 in costs. Because the plaintiff was in default of the order for payment costs, a bankruptcy notice was served on him. Just before his application came on for hearing, he tendered cheques in payment of the costs ordered against him but did not include the cost of the bankruptcy notice of $620. Those cheques have now been paid but there still remains outstanding the requirement for the plaintiff to pay $630 costs in connection with the issue of the bankrupt notice.

[7] In June 2008, the plaintiff commenced proceedings in the Manukau District Court claiming damages and an injunction against the defendants alleging breach of copyright. On 20 February 2009, his claim was dismissed and an order for costs was made against him in the sum of $14,931. Those costs were assessed on a full indemnity basis, the Court concluding that the proceedings should never have been brought as the issues raised therein were already subject to a hearing of a decision of the Court resulting in the proceedings being an abuse and contrary to the *res judicata* principle.

[8] The plaintiff has appealed from that decision. The appeal is set down for hearing on 30 July 2009. He has not paid security for costs but apparently has paid the setting down fee.

[9] The plaintiff, in opposing the application, indicated an intention to apply to have these proceedings transferred direct to the Court of Appeal and emphasised that

he was not seeking any money from the defendants but simply wanted to stop them from continuing their publication which he considered to be in breach of his copyright. He accepted that the claim included a claim for money but said that such claim was based on the defendants being required to pay a reasonable sum to him if they wished to continue using what he considered to be his property in that copyright.

[10] The application for order for security for costs was made under rule 5.45. The relevant parts of that rule are as follows:

> If a judge is satisfied on the application of a defendant that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceedings, the judge may, if the judge thinks it is just in all the circumstances, order the giving of security for costs.

[11] In the present case, I must say that there are very good grounds for making that order, having regard to a preliminary view of the merits. That is notwithstanding the general rule that the Court should not prevent a person having a meritorious claim from access to the Courts. However, before the Court can make such an order, the Court must conclude there to be reason to believe that the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful.

[12] There is very little evidence before me as to the plaintiff's financial ability. I have no doubt that had the plaintiff instructed counsel, that evidence would have been available. However, the plaintiff did supply information which would tend to support the view that he does have the ability to pay any costs ordered against him. There is no evidence from the defendants that the plaintiff has an inability to pay costs. The basis upon which the defendants brings this application is not that the plaintiff has an inability to pay costs in the sense that he does not have the resources, but that the plaintiff is unwilling to pay costs and, based on his previous conduct, only pays costs when further proceedings, such as bankruptcy notices, are issued.

[13] I, of course, take into account the evidence that the plaintiff's company failed to pay the costs ordered against it. However, that does not mean that the plaintiff is impecunious. It establishes that his company is impecunious and in the context of

these proceedings, it would be completely wrong for me to hold against the plaintiff the fact that he did not voluntarily inject funds into his company to satisfy the order for costs made against his company in favour of the defendants.

[14] I also have regard to the fact that the plaintiff is in breach of the order for costs made against him personally when the defendants' application for summary judgment was granted in the District Court. However, that order is subject to an appeal. There is no evidence that the defendants have taken any further steps to enforce the order. It may well be that following the dismissal of the appeal if that should happen, the defendants will take steps which will be as successful as previous steps when a bankruptcy notice resulted in the plaintiff paying the costs ordered. Consequently, I am faced with the situation where there is no evidence to show an inability to pay costs where, what evidence there is, establishes not an inability but a reluctance to pay costs.

[15] If the defendants cannot satisfy the Court that the plaintiff will be unable to pay costs, then notwithstanding the Court's conclusion that a security for costs might be appropriate, the Court clearly has no jurisdiction to make such an order. This is emphasised in the case of *Bell v John Holland Properties New Zealand Ltd* 3 PRNZ 536, a decision of 1990. In that case, Barker J, at p 537, said as follows:

> However, I do not at this stage need to consider the merits or otherwise of the plaintiffs' claims because there is a threshold requirement which the plaintiffs say has not been overcome by the defendant. That is, that the rule requires that the defendants must show on credible testimony that the plaintiffs may be unable to pay costs in the event of the defendants being successful. All the cases recognise that there is this threshold which has to be passed.

[16] On my view of the facts in this case, I cannot conclude that the defendants have been able to pass that threshold. It may well be that following the plaintiff's failure to pay costs ordered against him in proceedings that are pending in this Court, the defendants will be able to pass that threshold. In particular, if the plaintiff's appeal for hearing on 30 July is unsuccessful and costs ordered against him are not paid, that evidence would justify a further application by the defendants for security for costs. However, at this stage, for the reasons I have given, I conclude that the

threshold has not been met and consequently the application for security for costs will be refused.

[17] I direct that the applications by the plaintiff for summary judgment and the defendants for summary judgment be set down for hearing in this Court at **10:00 am on 17 July 2009** for half a day. There will be the standard directions for the filing of a bundle of documents, synopsis of argument, chronology and case book. In the circumstances, it may be appropriate if the defendants were to file their synopsis of argument, chronology and case book first. It would be appreciated if that could be filed five working days prior to the fixture, as opposed to three days, with the plaintiff filing any supplementary documents, his case book and synopsis of argument three days before the hearing. Each party will, of course, need to serve their documents on the other.

____

MD Robinson
Associate Judge