

**IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY**

CIV-2008-442-309

BETWEEN

R & P RAIZADA LIMITED
Plaintiff

AND

BOWATER PROPERTIES LIMITED
Defendant

Hearing: 10 December 2009

Appearances: Mr J A Dean for plaintiff
Mr G W Allan for defendant

Judgment: 10 December 2009

(ORAL) JUDGMENT OF LANG J
[on applications by defendant for security for costs and particular discovery]

Solicitors:
John Dean Law Office, Wellington
Pitt & Moore, Nelson

[1] Two applications are before the Court today. The first is an application by the defendant seeking an order that the plaintiff be required to provide security for its costs. The second is an application by the defendant for particular discovery.

Security for costs

[2] I deal first with the application for security for costs.

[3] The Court has power to require a plaintiff to provide security for the defendant's costs in several situations. One of these is where there is reason to believe that, if the defendant succeeds, the plaintiff will be unable to meet the defendant's costs. In the present case the plaintiff frankly accepts that it will have difficulty in meeting the defendant's costs. The plaintiff ceased trading in May 2008 and its counsel concedes that it has no assets at the present time. As a result, any contribution towards costs will need to come from those associated with the plaintiff.

[4] The issue is whether, and to what extent, the Court should exercise its discretion to require security to be provided. Counsel agree that, on a Category 2B basis, the total costs of the proceeding will amount to approximately \$28,000. Counsel for the plaintiff submits that it is not appropriate to require the plaintiff to provide security. He argues that the plaintiff's impecuniosity was caused by the actions of the defendant. He also points to the fact that the plaintiff has a reasonably strong claim and that if an order for security is made the plaintiff is unlikely to be able to bring its claim forward to a hearing.

[5] Counsel also points to the fact that this proceeding was issued many months ago. The defendant has been guilty of significant delay in bringing the present application. For all of these reasons counsel for the plaintiff submits that no order should be made.

[6] I have reached the view that it is appropriate for limited security to be provided by the plaintiff. Without going into detail, I am satisfied that the plaintiff's claim cannot at this stage be categorised as strong. There is therefore a realistic prospect that the defendant may be successful. If that occurs and security is not

provided, the defendant will be left to carry the entire costs of the proceeding without contribution from the plaintiff. That, in my view, is the determinative factor so far as the exercise of the Court's discretion is concerned.

[7] I accept, however, that the defendant has been guilty of delay in bringing the present application. It has known for many months that the plaintiff is not trading. It was also aware that the plaintiff had had difficulty during the term of the lease in meeting its obligation to pay rent. These must have been obvious signals that the plaintiff was likely to be impecunious. I consider that an appropriate response to the defendant's delay is to require security to be provided, but only in respect of the steps that are to follow today's hearing.

[8] The costs of all steps going forward to, and including trial, amount to approximately \$16,000. I consider that justice will be done in the present case if the plaintiff is required to provide security to the satisfaction of the Registrar in the sum of \$15,000. In reaching this conclusion I accept the submission made by counsel for the plaintiff that the Court does not ordinarily order full security to be given. That ignores the fact, however, that the plaintiff remains unsecured for approximately half of the costs of the entire proceeding.

[9] The plaintiff is to provide security by way of five monthly payments of \$3,000. The first payment is to be made on 22 January 2010. The proceeding will remain on foot for so long as the plaintiff fulfils its obligations under this arrangement. In the event that the plaintiff defaults in making any payment, the proceeding shall be automatically stayed until such time as the default is remedied. I direct that counsel for the plaintiff is to advise counsel for the defendant when each payment of security is made.

Particular discovery

[10] I now turn to the issue of discovery.

[11] During the hearing today counsel have made progress regarding the documents that the plaintiff is to provide. I now record the agreement that counsel have reached as follows:

- a) The plaintiff is to provide the defendant with copies of its bank statements and those of Maharajah India Limited for the 12 month period ended 31 March 2006, 31 March 2007 and 31 March 2008. It is also to provide its bank statements from 1 April 2008 to 31 May 2008.
- b) The plaintiff is to provide the defendant with authority to approach the ANZ and Westpac banks in order to verify the branches at which deposits shown in the bank statements were made.
- c) The agents of the defendant are to liaise directly with the plaintiff's accountant regarding the material that the plaintiff's accountant was given to prepare the plaintiff's statements of account.

[12] I record that counsel for the plaintiff has advised the Court that no documents exist in relation to bookings for the function room.

[13] I record also that counsel for the plaintiff has advised the Court that the plaintiff will be providing further particulars and, if possible, supporting documentation relating to the claim for expenditure amounting to \$35,000 referred to in paragraph 32 of the amended statement of claim.

[14] At this stage the defendant does not pursue the provision of GST returns because it appears that the income and expenditure for both the Nelson and Blenheim operations were combined to form a single GST return for each taxable period. This means the GST returns will be of little assistance in providing the plaintiff with information regarding the separate earnings and expenditure of the Nelson and Blenheim operations.

Next event

[15] In order to monitor progress in relation to discovery, the Registrar is to arrange a telephone conference with counsel on 17 February 2010 at 9.30 am.

Costs

[16] I consider that costs in relation to the application for security should lie where they fall. Although the defendant succeeded in part with that application it also failed in part by virtue of its delay in pursuing the application. So far as the application for discovery is concerned I consider that the plaintiff should pay costs on a Category 2B basis. The costs in relation to the hearing and preparation for the hearing are, however, to be reduced by 50 per cent to reflect the fact that part of the hearing, and the preparation for the hearing, related to the application for security.

[17] In reaching this conclusion I have had regard to the fact that a lot of the plaintiff's documents appear to be missing and the plaintiff ought to have provided its bank statements as a minimum step at the outset. There will be orders accordingly.

Lang J