IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2011-470-997
[2012] NZHC 2416

	BETWEEN	SUISSE INTERNATIONAL LIMITED Plaintiff
	AND	BEVERLEY JEAN MONK Defendant

Hearing: 11 September 2012

Appearances: Mr A Swan for Plaintiff
Mr P Dalkie for Defendant

Judgment: 19 September 2012

JUDGMENT OF ASSOCIATE JUDGE DOOGUE
[Security for Costs]

This judgment was delivered by me on
***19.09.12 at 4.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Counsel:
Mr A Swan, Barrister – andrewswan@xtra.co.nz
Mr P Dalkie, Barrister – paul.dalkie@xtra.co.nz

[1] The defendant has filed an application for security for costs and seeks that same be fixed at approximately $60,000. The plaintiff does not oppose the making of an order but submits that a figure closer to $30,000 would be appropriate. The plaintiff argues for the lower figure on the following grounds:

a) The trial duration which the defendant estimates of five days is excessive and only three days will be required;

b) The plaintiff has a good case (this being put forward as relevant to the discretion as to how much security to award);

c) The plaintiff is impecunious as a result of actions of the defendant which are the basis for the plaintiff's cause of action (again this being pleaded as relevant to a discretionary assessment of the amount of security that ought to be ordered).

[2] I shall deal with each of these matters in turn.

[3] Dealing first with the issue of trial duration, it must be said that not a great deal of information was available from the plaintiff about the number of witnesses proposed to be called. It seems likely that Mr Watt the principal of the plaintiff will be required to give evidence and that there will have to be evidence from an accountant. As I attempted to explain in my judgment following the unsuccessful plaintiff's summary judgment application, it is not possible to isolate out the one transaction which the plaintiff heavily depended upon as the foundation for its summary judgment application. Essentially there needs to be a reconstruction of the wider sequence of dealings between the defendant and the plaintiff. That, it seems to me, could only be attempted with the assistance of accountancy evidence.

[4] The defendant proposes to call the defendant, Mr Sharma who was the director of the plaintiff at the time of the transaction in issue in 2002, an expert accountant and a solicitor who undertook documentation of transactions for the defendant's companies at the relevant time.

[5] Another factor that bears upon trial duration is that there will be substantial amounts of documentation to be reviewed at the trial, according to Mr Dalkie. Mr Swann did not disagree.

[6] The parties' estimates therefore are between three days (the plaintiff) and five days (the defendant). It is impossible to judge the matter with any precision but I would incline more to the longer estimate of five days and I will adopt that for the present purposes.

[7] As a guide to judging the amount of security for costs, the estimate of what solicitor and client costs might be ordered against the respondent party in the event that it fails is a matter that provides assistance. Based upon a five day trial I would accept that the defendant is correct in estimating that party and party costs that might be awarded against the plaintiff in the event that it fails to prove its case at trial would be approximately $46,000 and as well there would be disbursements for expert evidence of $15,000, a total of approximately $61,000.

[8] Mr Swan, I understand, does not argue with the calculation, the difference of his position being confined to the question of the duration of trial.

[9] In exercising the discretion under Rule 5.45 to order discretion and to fix the amount of that discretion, I consider that any matter that is relevant and which assists the Court in properly exercising the discretion ought to be taken into account.

[10] The first matter that Mr Swan raised was the strength of the plaintiff's case. While I have some doubts that that issue is relevant to the matter of quantum, I suppose that the greater the order for security for costs is made the more significant will be the impact upon the ability of the plaintiff to prosecute its claim because of diversion of resources away into satisfying the security for costs order. Care would need to be taken in a case where the plaintiff was able to show that it had a strong prima facie case. Handicapping a plaintiff in that position by setting the security for costs at too high a level or even exposing it to a risk that it might not be able to continue to trial would be contrary to the justice and fairness of the situation. However, I do not consider that the plaintiff's position can be described in these

terms. I think that there is substance to Mr Dalkie's arguments. First there is the fact that the transaction which is at the centre of the plaintiff's claim, took place 10 years ago. Location of documents and establishing witnesses' recollections after such a passage of time will not be without difficulty. Secondly, the plaintiff now intends to file an amended statement of claim which will plead fraud. A party pleading fraud is required to establish its case with a cogency which is proportional to the gravity of the allegations that are made. This will increase the difficulties that the plaintiff faces.

[11] There is one additional matter which is of lesser weight but which still needs to be taken into account. That is that there may be forced in the submission which the defendant makes that the transactions between the plaintiff company and the defendant were authorised on the plaintiff's side by a Mr Sharma who Mr Watt, who was the principal of the company, appointed in his place because of his, Mr Watt's, impending bankruptcy. Mr Dalkie would seem to be on firm ground when submitting that if Mr Sharma had been properly appointed as a director and put forward as such by the plaintiff company it would be difficult for the company to now disavow transactions which he committed the company to.

[12] The next point concerns the claim that the actions of the defendant which were brought under scrutiny by this proceeding were the cause of the plaintiff's impecuniosity and therefore its limited ability to pay security for costs. I note that there was scant information about the plaintiff's financial position. However because of the circumstances which Mr Swan disclosed (about the need for the plaintiff to have time to meet the security for costs award), I will assume that the company has limited means. However as Mr Dalkie pointed out, there are problems with the plaintiff's hypothesis that it was the defendant which brought it to the position where it is impecunious. Even though this transaction occurred approximately 10 years ago the company has entered into quite a number of transactions since that time. I was not given any detail about these. What I have just recorded was the essence of Mr Dalkie's submission and Mr Swan did not attempt to refute it. Mr Dalkie also placed stress upon the fact that Mr Watt had given a similar deposition in other litigation involving Mr Sharma. He suggested that this gave the appearance that the pleas of impecuniosity were advanced as a type of "boiler plate"

ground for Mr Watt resisting security for costs in the litigation that his company was involved in. I do not think that argument is a strong one. It may be that ultimately Mr Watt's point of view will be vindicated and that the Court will be brought to the point of view that both the actions of Mr Sharma and of the defendant caused the company's impecuniosity. While that is a possibility, I must say though that at this point I do not think it would be reasonable to conclude that the company's impecuniosity is due more to those causes than to any of the other causes which can result in trading entities becoming short of funds. The plaintiff's plead of impecuniosity therefore is not a relevant factor that should be taken into account in fixing the amount of security for costs.

[13] In assessing security for costs applications under r 5.45 it is to be kept in mind that the purpose of the rule is to provide the defendant with a fair and reasonable level of protection against unrecoverability of costs. The rule does not have as its purpose the elimination of the risk of unpaid costs orders in their entirety.

[14] My overall view is that an order for security which represents approximately two thirds of any amount that may be ordered against the plaintiff if it fails would be appropriate. I therefore fix the amount of security for costs at $40,000.

[15] The next issue concerns the matter of staggered orders. I agree that staggered discovery comprising three more or less equal payments of $13,000, $13,000 and $14,000 are justified in this case. I will fix the dates for the payments of the first two instalments. The third payment of $14,000 can be directed at the next case management conference.

[16] The next issue concerns timetable directions for matters from this point forward. The parties are agreed that the following timetable orders can be made;

a) The plaintiff is to file and serve an amended statement of claim by **13 October 2012;**

b) The statement of defence to the amended statement of claim is to be filed and served by **26 October 2012.** The first tranche of security for costs of $13,000 is also to be paid on that date.

c) Pursuant to r 8.12 I direct that the parties are to provide standard discovery in this case and the order will incorporate the listing and exchange protocol set out in Part 2 of Schedule 9. Discovery and disclosure are to be completed by **14 December 2012**. On that date the second tranche of security for costs is to be paid.

[17] The Registrar is to allocate a further case management conference at the earliest convenient date in the New Year. Included in the agenda at that meeting will be:

a) Disposing of any remaining interlocutory matters;

b) Making provision for payment of the final tranch of security for costs.

[18] A trial date is now to be fixed. The proceeding will proceed to hearing on **6 May 2013 at 10 am,** five days estimated. I have not overlooked that counsel wished to explore the possibility of a trial at Auckland, but my enquiries to that Registry revealed that there would not be an available date until the end of 2013.

[19] I direct:

a) Rules 9.2 – 9.9 and 9.12 – 9.16 are to apply. The setting down date shall be as prescribed in r 7.13

b) There is no requirement for a pre-trial conference.

[20] The final matter I deal with concerns the issue of costs. Counsel should confer on this issue and provide a consent memorandum or separate memoranda (in the event they are unable to agree) within 14 days of the date of this judgment.

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J.P. Doogue
Associate Judge