IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV 2018-085-000795
[2019] NZDC 15084

BETWEEN	AUTOM8 NZ LTD Plaintiff
AND	THE OPEN POLYTECHNIC OF NEW ZEALAND Defendant

Hearing: 30 July 2019

Appearances: Chris Boys for the Plaintiff/Respondent
Oliver Gascoigne and Morgan Evans for the Defendant/Applicant

Judgment: 2 August 2019

RESERVED JUDGMENT OF JUDGE S M HARROP
AS TO DEFENDANT'S APPLICATION FOR SECURITY FOR COSTS

Introduction

[1] The parties entered into a written contract under which the plaintiff, a "one-man" company operated by Aaron Athfield, would provide services to the defendant between 5 February 2018 and 1 February 2019. The services were described as "test management services" which I understand relate to the defendant's computer systems. The plaintiff appears to be a corporate vehicle operated by Mr Athfield for the provision of his services and skills; it is those which the defendant was in truth contracting to receive.

[2] At a meeting on 27 March 2018 the defendant purported to terminate the contract, although it did not at that time provide formal written notice to this effect as

the contract contemplated. It did provide such notice on 27 July 2018 and there is no dispute that, at the very latest from that date, the contract was validly terminated.

[3] The plaintiff through its sole director Mr Athfield filed a very discursive statement of claim (which ought not to have been accepted by the Registry for filing) seeking damages for breach of the contract of $141,243 plus GST and $50,000 for emotional harm and related consequences.

[4] The defendant denies any breach of contract and has applied for security for costs. It seeks an order, in its application dated 17 January 2019, that the plaintiff pay the sum of $20,585, or such other sum as the Court considers sufficient, into Court as security for costs. That payment of that sum is proposed to be staged in line with the likely significant steps in the proceeding. It also seeks an order staying the proceeding pending the payment of the first instalment. The plaintiff opposes the application. It admits it has no ability to pay the defendant's costs if it succeeds but also says it has no ability to pay security for costs and that it would be unjust to order security for costs, as this would have the effect of preventing it pursuing a meritorious claim. It says that the defendant's breaches of contract have created the financial difficulty which the plaintiff now faces.

Jurisdiction and the application of the principles

[5] The application for security for costs is made under Rule 5.48 of the District Court Rules 2014 which provides:

> **5.48 Power to make order for security for costs**
>
> (1) This rule applies if the court is satisfied, on the application of a defendant,—
>
> (a) that a plaintiff—
>
> (i) is resident outside New Zealand; or
>
> (ii) is a corporation incorporated outside New Zealand; or
>
> (iii) is, within the meaning of section 158 of the Companies Act 1955 or section 5 of the Companies Act 1993, as the case may be, a subsidiary of a corporation incorporated outside New Zealand; or

(b) 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 proceeding.

(2) When this rule applies, the court may, if it thinks fit in all the circumstances, order the giving of security for costs.

(3) An order under subclause (2)—

(a) must require the plaintiff or plaintiffs against whom the order is made to give security for costs in respect of the sum that the court considers sufficient—

(i) by paying that sum into court; or

(ii) by giving, to the satisfaction of the Registrar, security for that sum; and

(b) may stay the proceeding until the sum is paid or the security given, as the case may be.

(4) The court may treat a plaintiff as being resident out of New Zealand even though the plaintiff is temporarily resident in New Zealand.

(5) The court may make an order under subclause (2) even if the defendant has taken a step in the proceeding before applying for security.

(6) References in this rule to a plaintiff or defendant are references to the person (however described on the record) who, because of a document filed in the proceeding (for example, a counterclaim), is in the position of plaintiff or defendant.

[6] As is evident from the structure of Rule 5.48, there is a threshold requirement before an order may be made, in this case the applicable one is that there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in its proceeding.

[7] Rather unusually for applications of this kind there is no doubt whatsoever that the plaintiff will be unable to pay the costs of the defendant if it is unsuccessful in its proceeding. The plaintiff candidly admits this and the latest financial information supplied confirms it.

[8] That threshold having been met, the questions remain whether (a) in all the circumstances the Court should exercise its discretion to order the giving of security for costs and, (b) if so, on what basis and, (c) the proceeding should be stayed until security is given.

[9] Counsel helpfully referred me to the leading Court of Appeal decision in *AS McLachlan Ltd v MEL Network Ltd*[1] and to the judgment of Kós J in *Highgate on Broadway Ltd v Devine*[2] in which His Honour applied the relevant principles in a case not dissimilar to the present. His Honour made the important point that the inability of a plaintiff to pay costs is not determinative. If that were so Rule 5.48 would not leave the Court a discretion. His Honour said at paragraphs [20] and [21]:

> [20] While impecuniosity makes an order for security for costs more likely, primarily because it is likely that to permit the case to proceed further without security may well be unduly oppressive of the other parties, it has never been the case that impecuniosity per se requires the making of such an order. That was so at common law, and it is so also under the rules since that threshold has been introduced. As Professor Zuckerman says:
>
> > An order for security for costs directs that unless the claimant (or exceptionally, the defendant) provides a security that will underwrite any liability for costs that he may incur towards the defendant, he will not be allowed to proceed with the claim. On its face of it, this is an extraordinary jurisdiction. The principle of access to justice demands that citizens should have untrammelled opportunity to pursue bona fide claims in the Court. Therefore, requiring a claimant to provide security for costs, as a condition to being allowed to pursue his claim, will normally constitute an unjust constraint of his right of access to justice: *Abraham v Thompson* [1997] 4 All ER 362 (CA). However, considerations of justice support the imposition of security into two types of situations: where the claimant intends to evade any future liability as to costs, and where the claimant would otherwise be effectively immune from costs orders.
>
> [21] Considerations relevant to the discretion may favour, tend against or be neutral to the making of an order. I do not suggest the list that follows is complete. The caution expressed by the Court of Appeal in *McLachlan* that such considerations are not evenly weighed, and must not be used to fetter discretion, must be recalled. On the other hand, an ordered and principled approach is a good reminder that the imposition of security is not an automatic consequence of the plaintiff's impecuniosity. A point that is often overlooked by applicants for security. Many seem to assume that if the impecuniosity threshold is passed, and that state is not necessarily a direct consequence of a cause of action, security will be ordered. The analysis required is actually much more subtle.

[10] Although it is clear from the authorities that a "tickbox" approach is not appropriate, Kós J said that affirmative answers to five identified questions would tend to favour the making of an order against an impecunious plaintiff. In listing these I will discuss their application to the present case:

---

[1] *AS McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).
[2] *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288; [2013] NZAR 1017.

Is the plaintiff a nominal one?

[11] Kós J observed at [22] of his judgment:

> Where the plaintiff is "nominal", so that it is in effect representing the interests of others who will thus be spared exposure to costs, it may be appropriate to make an order for security. In the United Kingdom specific concurrent statutory jurisdiction to award security for costs in the case of a limited liability company has long existed. As Professor Zuckerman has observed the justification for that distinction lies in the separate legal personality of companies, limiting financial exposure (including for costs). Shareholders, who benefit from a company's litigation, are immune to its liability for costs. That may give a company an unfair advantage. A similar provision in New Zealand has been repealed, and the position of companies is to be considered under r 5.45 in the ordinary way. Concurrent jurisdiction still exists in the case of incorporated societies, although that provision is now probably superfluous. Security for costs in the Environment Court, for instance, is dealt with under s 278(1) of the Resource Management Act 1991 and District Court r 4.20.
>
> Here there is no suggestion that the landlord is nominee for other interests. The fact that it is a limited liability company gives rise to no special considerations.

[12] While I accept Mr Boys' submission that here the plaintiff is not a mere nominee for other interests in the usual sense of that word, the reality surely is that Mr Athfield as the sole shareholder would be the person to benefit from any success the plaintiff might have. But equally he is personally immune from any liability for its costs. That in my view tends to favour quite strongly the making of an order for security. As matters stand Mr Athfield is in a position to "pull the strings" one way or another in connection with the plaintiff's claim. But if the claim fails, there will be no costs consequences for him or the plaintiff other than the obligation to meet the plaintiff's own legal costs. Mr Athfield is concerned about the plaintiff's "access to "justice" right, but he has the ability to make that one-sided, cost-free form of justice while putting the defendant to substantial unrecoverable costs if the plaintiff is not successful.

Is there evidence of the plaintiff disposing of assets to avoid meeting an adverse costs order:

[13] Although counsel for the defendant pointed to transactions within the company which might tend to suggest this, I proceed for present purposes on the basis that the transactions are not unusual for a one man company. That said, there is no doubt that the company appears fairly recently to have been in a position to meet costs through

requiring Mr Athfield to meet his obligations to it under the shareholder's current account but it no longer is, because he has arranged for that account to be extinguished. So, whether he did that for any reason related to the litigation or the application for security for costs is ultimately not critical; the practical point is that, as the plaintiff admits, there is simply no current ability for it to pay any costs, or any security for costs.

Is the plaintiff's substantive claim prima facie unmeritorious?

[14] As to this Kós J said:

> While it is not appropriate that a Court predetermine the question of merits or form more than "an impression", if a prima facie case can be established that the respondent's claim is unmeritorious that will be a factor in favour of security. The position is not in New Zealand as absolute as that suggested by Clarke LJ in *Ali v Hudson*, i.e. that the weakness of a party's case will ordinarily be relevant only where it has "no real prospect of succeeding." In New Zealand a prima facie lack of merit will be weighed in the balance; the less apparently meritorious, then the more likely security is.

[15] Caution is necessarily required in drawing, at this early stage where evidence is untested, any adverse conclusions about the prospects of success of the plaintiff's claim. However in this case, because of the terms of the contract, I consider there are real question marks about the plaintiff's prospects of success. While Mr Athfield clearly feels aggrieved at what he sees as the totally unwarranted (purported) termination of the contract at the meeting on 27 March, the contractual reality here is that the plaintiff signed a contract which contained clause 11.4 which provided *"the Buyer [ie the defendant] may terminate this contract at any time by giving 20 Business Days' Notice to the Supplier [the plaintiff]".* This is, on its face, a standard right to terminate exercisable entirely at the discretion of the defendant and without the need for there to be any identified cause or justification provided.

[16] No question of good faith arises as Mr Gascoigne pointed out with reference to the judgment of Woolford J in *Saturn Portfolio Management Ltd v Chamberlain & Ors.*[3] In short, while no doubt both parties hoped and expected that it would be otherwise, Mr Athfield on behalf of the plaintiff entered into a contract which involved

[3] [2017] NZHC 1962.

a substantial business risk for it, namely that without any more than 20 business days' notice, and without any justification whatsoever related to the plaintiff's performance of it, the contract could be terminated and the money that the plaintiff expected to make from it would then simply not be received.

[17] I accept there is a dispute, which cannot be resolved on this application, as to what occurred at the meeting of 27 March. The defendant's witnesses say that Mr Athfield was clearly notified (orally) that the agreement was being terminated on 20 days' notice and that there was no need for him to work out the notice period. Mr Kennedy's evidence is that Mr Athfield said, as he left the meeting, that he would work out the month (which indicates he understood what had just been done). Accordingly even though written notice was not given, the defendant pleads in its statement of defence that Mr Athfield and the plaintiff waived its right to receive formal written notice. There was no misunderstanding and, to reinforce that, Mr Athfield's access to the defendant's computer system was stopped.

[18] Mr Athfield says in his most recent affidavit sworn on 15 July:

> I also wish to repeat what was said in the statement of claim; Mr Kennedy alleges that I told him that I accepted the cancellation, said I didn't need notice, and said I would "work out the month". These are untrue. I did not accept the cancellation, and was shocked and surprised at what I was told.

[19] The first point to make is that there is no need for a termination under clause 11.4 to be "accepted" by the other party. What matters is whether the termination was notified and if it was clearly notified orally, despite Mr Athfield being shocked and seeing no basis on which that could be done as far as his performance was concerned, that is no answer. I also note that in his statement of claim at paragraph 59 Mr Athfield himself has pleaded that:

> I could not believe what I was hearing. I was so happy with our progress and direction. I couldn't accept that I was being dismissed. I tried to explain that things could not have come together any faster … but Mathew told me that there was little point in talking for hours discussing things, that the decision had been made, that there was no need for me to work the 20-day notice period, and that I could leave at the end of the day. Both Mathew and Fraser then stood up to usher me to the door.

[20] On the face of it this evidence is confirmation that, however unjustifiably, Mr Athfield knew very well that the contract had been terminated then and there and that the 20-day notice period in clause 11.4 did not need to be worked. There can be no suggestion on the face of this that even he thought the contract would continue. There are also statements in the letter his original lawyer Mr Mitchell wrote on his behalf which support the contention that Mr Athfield knew the contract had been terminated under clause 11.4.

[21] I therefore consider there is a strong argument that the defendant will succeed in its contention that the contract was validly terminated on 27 March 2018. If that is the Court's conclusion then, as Mr Boys accepted, the plaintiff will recover nothing. I note at this point that Mr Boys accepted that the claim for $50,000 for emotional harm and other consequences would be withdrawn, as it is unsustainable when advanced on behalf of a corporate plaintiff. I also record that Mr Boys accepted that if the claim did succeed it could only be, at most, to the extent of the two invoices rendered for May and June totalling $37,186.40 including GST. So the claim is substantially reduced from that initially mounted.

[22] If, as Mr Boys contends should occur, the Court were later to conclude that the contract was not validly terminated on 27 March 2018 it was, as I have noted, certainly terminated validly pursuant to clause 11.4 by letter of 27 March 2018. That is why the entitlement of the plaintiff to any payment is limited to the two invoices to which I have referred. However, as Mr Gascoigne pointed out, in order for the plaintiff to render an invoice which the defendant is obliged to pay under the contract it is required (under clause 3.2) to set out a description of the services supplied including the amount of time spent in the delivery of the services if payment is based on an hourly fee rate or a daily fee rate.

[23] The invoices rendered in May and June by the plaintiff do not provide any description of the services rendered and, again as Mr Gascoigne points out, there could not have been any services actually rendered because Mr Athfield needed access to the defendant's computer system in order to provide any services. That access stopped on 27 March. On that basis even if the plaintiff's view of the date at which termination occurred is correct, it has made no valid claim and at best, as Mr Boys submitted would

be the case, it might potentially have a claim for reliance damages but it would still need to show that some services had actually been rendered after 27 March 2018. It seems unlikely that it can do so.

[24] I do not overlook the point I raised during the hearing that the paying by the defendant of the April invoice rendered by the plaintiff, tends to go against assertion there was termination on 27 March and that formal notice was waived.

[25] In summary I consider on the information currently available there are significant doubts about the merits of the plaintiff's claim and its prospects of success at trial. That conclusion is not as tentative as it might be at this stage because it is primarily based on the wording of clause 11.4 and the fact the plaintiff was denied the ability to perform any further services after 27 March.

[26] This conclusion makes it more appropriate that security is ordered than would be the case had the claim had obvious merit.

Does the plaintiff have access to third party funding?

[27] There is no suggestion of this here.

Would the denial of security for costs in the circumstances of this litigation be oppressive to the reasonable interests of the defendant and parties other than the plaintiff?

[28] As Kós J observed:

> Security for costs is relatively exceptional. Where it is likely to result in the denial of access to justice, it is entirely exceptional. But in some situations to allow litigation to proceed without the checks and protection of security will be oppressive to the interests of other parties, particularly where the litigation is unjustified or unmeritorious, over-complicated or unnecessarily protracted.

[29] Here the defendant submits that having to face what it considers is an unmeritorious claim is oppressive. It has had to address already a very discursive statement of claim and respond to it in detail. If the case proceeds it will likely be put to considerable expense by way of discovery and the other required attendances, at least at a judicial settlement conference. It also points out that the plaintiff has refused

to mediate as contemplated by the contract and that has led to increased costs. Ironically, the reason for the plaintiff not mediating was that it considered it could not afford to do so. I therefore conclude that this is one of those cases where denying security for costs would be oppressive to the reasonable interests of the defendant although I take into account it is a substantial organisation better able to cope than other defendants might be.

[30] In summary, such factors as apply quite strongly tend to favour the making of an order for security for costs against this impecunious plaintiff.

[31] Kós J also noted that affirmative answers to other inquiries may tend against the making of an order against an impecunious plaintiff.

Is it reasonably probable that impecuniosity was caused by the defendant?

[32] As Kós J noted:

> Where it is reasonably probable that the defendant's actions the subject of a cause of action caused the plaintiff's impecuniosity, that is a strong consideration against awarding security. The Court will already have formed a view as to whether the cause of action has potential merit. The question then is whether it is reasonably probable that it caused the plaintiff's financial embarrassment. A question of linkage, rather than any further examination of the merits.

[33] Mr Boys submitted the impecuniosity of the plaintiff was caused in significant measure by the plaintiff's breaches of contract. The defendant disputes this. While one can accept that the plaintiff has been disappointed to miss out on income which it expected to receive for services provided, the reality is it signed a contract which put it at risk of exactly what has occurred. The defendant does not breach the contract by terminating it in accordance with clause 11.4.

[34] Accordingly, the stopping of the payment of money appears in this case to have arisen from a perfectly orthodox exercise of a contractual right which the defendant had and which the plaintiff knew it had. On that basis, and in the absence of any information about the consequences of the decision for the plaintiff (when considered in their proper light, as opposed to in light of the plaintiff's performance prior to termination) and as to what else the company has been doing since 27 March

2018, I cannot safely conclude that its financial position now was caused by any improper action on the part of the defendant. Indeed, as I have mentioned, the plaintiff had through the shareholder's current account an asset of some $94,906 by way of the shareholder's current account as at 31 March 2018 but no such asset as at 31 March 2019. The company's only asset now is an entitlement to a GST refund of $846. The cause of the change in its financial position between 31 March 2018 and 31 March 2019 is not on the face of it the result of anything the defendant has done or failed to do but rather of the decision, no doubt taken by Mr Athfield himself, to extinguish that asset in his own favour.

Would ordering security deprive the plaintiff of the capacity to advance a prima facie meritorious claim?

[35] As Kós J said:

> Access to justice is an essential human right. The cost of exercising that right is the payment of costs in the event of failure. The right of a successful defendant to costs in that event is arguably subordinate to the plaintiff's right to be heard. Strong social policy considerations favour the use of Courts as an accessible forum for the resolution of disputes and grievances of almost all kinds. Only where a clear impression can be formed that the plaintiff's claim is altogether without merit — so that in the alternative it would be amenable to being struck out — would it be right for security to be ordered where to do so would bring the plaintiff's claim to dead halt. In cases where the claim is being seriously misconducted (with undue complexity or expense), security orders short of effective termination of the claim may be appropriate. As the Court of Appeal said in *McLachlan*, "access to the Courts for a genuine plaintiff is not lightly to be denied".

[36] On the face of the evidence and submissions from the plaintiff ordering any security would bring the plaintiff's claim to "dead halt" as Kós J put it. That certainly is the assertion made by Mr Boys on behalf of the plaintiff. When I explored with him whether *any* level security for costs could be paid he said his instructions were that none could be.

[37] I am not prepared to proceed on the basis that this is necessarily so. As Mr Boys confirmed, Mr Athfield personally is paying his legal costs for acting on behalf of the plaintiff. Accordingly if security is ordered then Mr Athfield may well also be able to provide that. There is no information as to his personal financial circumstances beyond a brief statement of current assets and liabilities. There is no indication as to

his income and expenditure and other relevant circumstances. While access to justice is important, indeed critical, it is not an absolutely determinative factor. If it were the Court would not be left with the ability to order security against an impecunious plaintiff. Nevertheless, this factor tends to favour not granting the order sought or at least not to do so to the extent sought.

[38] I mention at this stage that I do not believe a corporate plaintiff is able to obtain a waiver of fees, so it is going to have to pay $900 for the setting down of a judicial settlement conference and if that does not result in settlement probably a further $2700 to set a two-day hearing down. Any interlocutory application filed by the plaintiff will attract a fee of $250.

Has the applicant delayed unduly in applying for security?

[39] This is not suggested in this case.

[40] Overall, on the factors which might tend against an order being made against an impecunious plaintiff, there is some tendency present here.

Conclusion on whether security for costs should be ordered

[41] In the end, standing back and considering all of these factors, the question is how should the respective interests of the parties best be balanced in the exercise of the Court's discretion? Having taken time to reflect on this, I am satisfied this is a case where security for costs should be ordered.

[42] Critically this is because Mr Athfield, positioned behind the plaintiff company, is in a position to pursue the claim in an effort to obtain personal benefit but without any risk of being accountable for taking the claim if it is unsuccessful. On the other hand, the defendant will undoubtedly be put to significant costs in defending a claim as to which there are real questions about its merit. It is not a case where the plaintiff's impecuniosity has been caused by the defendant and although the apparent and stated inability to pay any costs or any security for costs on the face of it means the claim will be brought to a halt if an order is made, that essentially will be Mr Athfield's choice. If the plaintiff cannot pay the fees referred to above the case will

not proceed even if I decline to order security. Mr Athfield has to decide whether or not the claim has sufficient merit to put any of his own funds at risk.

[43] If security for costs is paid that is, after all, not money that he or the company will ultimately lose, if the claim succeeds. At worst, having to pay security will give rise to a cashflow issue and require a tangible demonstration of Mr Athfield's confidence in the plaintiff's case. If Mr Athfield is not willing to "put (any of) his money where the plaintiff's mouth is" why should the defendant be put to significant cost in addressing the plaintiff's claim where there are real questions about its merits?

The amount of security for costs and stay

[44] Mr Gascoigne accepted that the calculation of the $20,585 sum sought for security in the application was incorrect. The revised calculation of its likely costs on a 2B basis, which I accept, is $16,985.

[45] Of course, as Mr Gascoigne accepted, ordering security in that amount would effectively amount to provision for the defendant of indemnity against costs, albeit of course not against the defendant's actual costs.

[46] Balancing the interests of the parties as best I can I have come to the view that the sum of **$7,500** should be paid by way of security for costs.

[47] I accept that staged payments are appropriate and order that the above sum be paid as follows:

(a) Within 21 days of the date of this judgment the plaintiff is to lodge at the Court the sum of $2,500.

(b) Following the judicial settlement conference (which will occur here as it appears a short trial will not be ordered, rather a simplified trial is envisaged), in the event of settlement not being reached, a further $2,500 is to be paid within 21 days after that conference.

(c) At least 14 days before the simplified trial the balance of $2,500 is to be paid.

[48] I further direct that the plaintiff's proceeding is stayed pending the making of the first payment, and each of the subsequent payments, in accordance with the time allowed for them.

[49] The defendant is entitled to costs on this application but in the circumstances they are reserved for determination pending the outcome of the proceeding.

[50] I thank all three counsel for their thorough and helpful submissions; my not referring in this judgment to every point made is no reflection on the quality of them.

_____
Judge S M Harrop
District Court Judge

Date of authentication: 02/08/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.