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

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2017-004-000259**
**[2018] NZHC 1626**

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| BETWEEN | IMRE BUILDERS LIMITED<br>Plaintiff / Counterclaim Defendant |
| AND | CRAIG JOHN VINTON and<br>ELENA SASHA VINTON<br>Defendants / Counterclaim Plaintiffs |
| | LASZLO MICHAEL IMRIE<br>Counterclaim Defendant |

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| Hearing: | 24 April 2018 |
| Appearances: | A Ho for the Plaintiff / Respondent<br>M Colthart for the Defendant / Applicants |
| Judgment: | 3 July 2018 |

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**JUDGMENT OF ASSOCIATE JUDGE SARGISSON**

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This judgment was delivered by me on 3 July 2018 at 4.00 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:

Martelli McKegg, Auckland
Kemps Weir, Auckland

M Colthart, Auckland

## Introduction

[1] This proceeding concerns an action by the plaintiff, Imre Builders Ltd, in which it seeks relief in relation to a construction contract against the defendants, Craig and Elena Vinton. The plaintiff seeks $52,159.42 for unpaid invoices, plus interest. The defendants have filed a counterclaim for $245,630.49.

## Application for security for costs

[2] The current application is by the defendants who apply for security for costs. The application is opposed by the plaintiff.

[3] The defendants say there is reason to believe the plaintiff will be unable to pay an award of costs should judgment be issued against it, and therefore the Court should exercise its discretion under r 5.45 of the High Court Rules 2016 in their favour. The plaintiff is opposed, arguing that the company is in a position to meet an award of costs against it in the event it is unsuccessful.

## Background

[4] The proceeding relates to the costs of alterations to the defendants' home. The plaintiff gave an estimate of $163,000 for the alterations. The defendants presented revised plans and asked the plaintiff to check the estimate. The plaintiff said the estimate stood. In January 2016, the parties signed a contract and work began.

[5] On the very first day the plaintiff said there would be a 'blowout' of $20,000 because it had discovered a foundation issue after visiting the site. The defendants were horrified. The plaintiff said the job would take three months starting from January 2016, but in May 2016 the relationship deteriorated. The parties tried to negotiate a solution. In June they agreed to a fixed price ($60,000) to complete the job but the parties' relationship deteriorated further in July 2016. The plaintiff stopped work; the defendants cancelled the contract and engaged a new builder.

[6] The plaintiff claims for the work done from January to July 2016.

[7] The plaintiff previously obtained an adjudication in the Building Disputes Tribunal dated 5 October 2016. Subsequently, the defendants also brought the matter to adjudication, with the second determination released on 22 December 2016.

[8] The adjudication outcomes were:

(a) In the first adjudication, the adjudicator held that the plaintiff's claim had no merit, dismissing it entirely. The plaintiff was ordered to pay the entire costs of adjudication, totalling $18,975. That involved a departure from the statutory presumption of evenly shared costs.

(b) In the second adjudication, the defendants sought $95,945.52 for defective work, damaged property and unauthorised removal of materials from site. The adjudicator found that the plaintiff's defence was largely without merit. The adjudicator found substantially in favour of the defendants, awarding them $55,661.41. While the defendants were required to pay a third of the costs of adjudication, the plaintiff was required to meet two-thirds of the costs of adjudication and to reimburse the defendants $3,675 on account of costs.

**The substantive claim in this proceeding**

[9] The plaintiff challenges both determinations on the grounds that they are wrong in fact and law. The plaintiff contends that it is entitled to the sum it claimed at adjudication pursuant to the terms of the contract and that the defendants should be required to pay to the plaintiff the amount of $18,975, being the costs order made against the plaintiff at adjudication.

**Principles on security for costs**

[10] Rule 5.45 relevantly states:

**5.45 Order for security of costs**

(1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—

…

(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) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.

…

[11] Evidence of an inability to pay costs may be inferred from credible (i.e. believable) evidence of surrounding circumstances regarding the parties' financial position. It is not necessary to prove to the balance of probabilities that the party will actually be unable to pay costs.[1]

[12] The principles relevant to the decision whether to exercise the discretion to make an order in a case such as this, once the threshold requirements are met, are well established:[2]

(a) There is no burden of proof or predisposition one way or the other. The Court is to exercise its discretion having regard to the particular circumstances of the case.

(b) The interests of both the plaintiff and the defendant must be considered. The Court should not allow the rule to be used oppressively to deny plaintiffs with limited means the ability to bring their case before the Court. On the other hand, an impecunious plaintiff must not be allowed to use the inability to pay costs to act oppressively or to place unfair pressure on the defendant. A balancing of a number of factors is required.

(c) The general principles for the exercise of the discretion show that the Court's discretion is not fettered by the automatic application of "principles". The amount of the security ordered should not be illusory nor oppressive, not too little nor too much.[3]

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1 *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1977] 1 NZLR 516 (SC) at 51.
2 See *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA); *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017 at [13]-[28].
3 See *McLachlan v MEL Network Ltd,* above n 2, at [13]-[14].

(d) The Court may take into account, in the exercise of its discretion, whether the action of the plaintiff has reasonable prospects of success. The courts are generally reluctant to grant security where that would have the effect of denying access to justice.[4]

**Analysis**

*The threshold test under r 5.45(1)(b)*

[13] The first matter for this Court to consider is the threshold test concerning whether there is reason to believe that the plaintiff will not be able to meet an award of costs against it. The defendants say there is ample basis for the belief that the plaintiff will not be able to pay an award of costs against it.

*The matters relied upon by the defendants*

*i. Non-payment of sums awarded upon adjudication*

[14] The defendants note that the plaintiff was obliged to make payment to the defendants of $59,336.41, by 18 January 2017, in accordance with the adjudicator's determination of 22 December 2016. The plaintiff failed to do so. The defendant issued a statutory demand on 19 January 2017, which expired unsatisfied on 10 February 2017. At that point, pursuant to s 287 of the Companies Act 1993, the plaintiff was presumed to be insolvent. I do not place great weight on this factor. The plaintiff has adduced evidence that the sum had been transferred into a solicitor's trust account on 25 January 2017. The ability to pay the ordered sum is demonstrated.

*ii. Overdrawn bank account*

[15] The plaintiff overdrew a bank account by the sum of $47,784.92 in making the payment to its solicitor's trust account. The defendants submit that this is evidence of impecuniosity as the plaintiff did not use its own money to make the payment. I do not draw such inference. There is no evidence that the plaintiff, in going into overdraft, breached its banking facilities. The very fact that the plaintiff was able to overdraw a substantial amount of money might be taken to suggest that the plaintiff has overdraft

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4 *Highgate on Broadway Ltd v Devine,* above n 2, at [22](e).

facilities precisely to enable it to pay its debts to its creditors as they fall due. A party does not need to be able to pay its debts from available sources or a costs order out of surplus funds. It is sufficient that the party be able to pay the debts from its banking facilities or other such available sources.

*iii. Non-payment of an employee's entitlement*

[16] The defendants also advance an argument, based on hearsay evidence from a former employee of the plaintiff, that the plaintiff has not been paying its employee and is therefore impecunious. Even were the Court willing to accept such hearsay evidence (which I do not) the inference invited by the defendants would be weak. The plaintiff's records show that the employee in question had been fully paid. Even if the employee had not been fully paid, and the plaintiff's records were incorrect, this does not necessarily suggest an inability to pay. It could be explained by other circumstances such as a genuine disagreement between the two parties as to what was owed.

*iv. Coding of expenses to shareholder's account*

[17] The defendants also point to the treatment in the plaintiff's financial statements of legal expenses relating to the adjudications. They note the coding of some such expenses against the shareholder account. The defendants suggest that such treatment effectively masks a greater indebtedness to unrelated parties. The coding of some expenses to the shareholder's account is unsurprising in a private company, especially against the factual background here where Mr Imre's personal conduct had been impugned. In any event, Mr Imre has deposed that, when required, the plaintiff receives shareholder support. I do not attach weight to the fact that some expenses had been treated in the way they have. It does not cogently inform the question of the plaintiff's ability to pay its debts.

*v. Fluctuating financial performance*

[18] The defendants' next arguments concern the financial position of the plaintiff as outlined in the plaintiff's financial statements. The plaintiff's financial position has fluctuated in the last years, previously recording a net loss and subsequently recording

a net profit. In the construction industry, where accounts may not be finally settled until completion of substantial work, it is unsurprising that a company's performance might vary to the extent of the plaintiff's in separate tax years.

*vi. Effect of counterclaim on plaintiff's financial position*

[19] The defendants also rely on what they suggest is a net liability position in the plaintiff's finances. While the plaintiff's most recent financial statement records a net equity of $77,533.00, the defendants suggest that by reason of their counterclaim ($245,530.49) the plaintiff should be viewed as having negative equity. A chartered accountant, Mr Hoon, has deposed that it would be prudent and best accounting practice for the counterclaim figure to be disclosed in the financial statements, considering the previous related adjudicator's determinations.

[20] The plaintiff asserts that the defendants' counterclaim is without merit. It submits that it was in essence considered by the Building Practitioners Board (when Mr Imre, the plaintiff's director and shareholder, faced disciplinary proceedings for conduct relating to the work performed on the defendants' property). The complaint was dismissed. Witnesses were called and examined in relation to the allegations made against Mr Imre, including allegations of negligence which are at the heart of the defendants' counterclaim. On this basis, Mr Ho for the plaintiff submits that the sum for which the defendants counterclaim is insufficiently likely to crystallise and should not be treated as a contingent liability, affecting any assessment of the plaintiff's ability to pay its debts.

[21] Secondly, the plaintiff argues that the recognition of the counterclaim as a contingent liability would, to the extent of the award of security, effectively provide security to the defendants for their counterclaim.

[22] In light of the Building Practitioners Board's decision it would not be appropriate that the Court view the counterclaim amount to be a liability (whether contingent or otherwise) to be taken into account in the present context when the Court is considering the plaintiff's ability to pay a future costs award. Whilst it was open to the plaintiff to make provision in its financial statements, the Court should be wary of

placing too much weight on a contingent liability said to arise from a sum which the defendant is seeking to establish by counterclaim in the same proceeding.

*vii. Financial distress*

[23] The defendants rely on a statement by Mrs Imre in an affidavit in which she stated that the situation (referring to the litigation between the plaintiff and the defendants) was financially stressful. The defendants contend that the plaintiff's financial strain must have increased since the writing of that affidavit.

[24] I do not doubt that this lengthy dispute has been placed financial strain on the plaintiff. However I note that the affidavit was written six months after Imre reported a net loss, and six months prior to Imre reporting a net profit. The fact that the plaintiff generated a net profit for the year ending March 2017 suggests that the degree of financial strain upon the plaintiff has decreased rather than increased.

*viii. Incorporation of "Newco"*

[25] The final point raised by the defendants is the incorporation of a new company ("Newco") by Mr Imre. Mr Colthart for the defendants submits that, should the plaintiff prove unsuccessful in the current litigation, the likelihood is that it will simply be placed into liquidation. Mr Imre would then continue to trade through a different company. Mr Imre has deposed that the setting up of Newco was to undertake work which is of a different scope to that ordinarily undertaken by the plaintiff. New work which had been obtained had significant costs attached to it and Mr Imre thought it prudent to ringfence the associated risks. Mr Imre deposes that the plaintiff company is still operating, has a number of jobs in progress, a further job awaiting a start date, several projects for which the plaintiff has been requested to provide a quote, and three other jobs awaiting approval of quotes provided by the plaintiff.

[26] Mr Imre's explanation of the incorporation of Newco is logical. Sound commercial reasons existed for the incorporation. The fact that the plaintiff is trading on cuts across the defendants' suggestion that the plaintiff is in some way manipulating its trending approach in order to immunise one of its entities from an adverse outcome.

**Conclusion**

[27] Ultimately, while I reiterate that there is no onus on either side to convince this Court either for or against a reasonable belief that the plaintiff could not satisfy an order of costs against it, I find that on all the evidence the threshold requirement for an order for security for costs is not met and that application must be declined. None of the individual matters relied upon by the defendants satisfy me that there is reason to believe that the plaintiff, if unsuccessful, will be unable to pay the defendants' costs. Equally, when all those matters are considered together, they do not satisfy me that the threshold test is met.

[28] For these reasons, the exercise of the discretion to award security under r 5.45(2) does not arise.

[29] Costs must follow the event.

**Orders**

[30] I order:

(a) The application for security for costs is dismissed;

(b) The defendants are to pay the costs of the application on a 2B basis together with disbursements to be fixed by the Registrar.

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Associate Judge Sargisson