IN THE COURT OF APPEALOF NEW ZEALAND

CA578/2014
[2015] NZCA 141

BETWEEN	ERIC MESERVE HOUGHTON Appellant
AND	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, CRAIG EDGEWORTH HORROCKS, PETER DAVID HUNTER, PETER THOMAS AND JOAN WITHERS First Respondent
	CREDIT SUISSE PRIVATE EQUITY INC Second Respondent
	CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP Third Respondent
	FIRST NEW ZEALAND CAPITAL Fourth Respondent
	FORSYTH BARR LIMITED Fifth Respondent

Hearing:	13 April 2015
Court:	Stevens, Wild and Miller JJ
Counsel:	C R Carruthers QC and PAB Mills for Appellant A R Galbraith QC and S V East for First Respondent JBM Smith QC and A S Olney for Second to Fifth Respondents
Judgment:	1 May 2015 at 2.15 pm

JUDGMENT OF THE COURT

A The Registrar's decision is varied.

B Increased security for costs in the sum of $100,000 is to be paid by 29 May 2015.

C The time for filing the case on appeal is extended until 7 May. Amended grounds of appeal should be filed, or an extension sought for good reason, by 29 May.

REASONS OF THE COURT

(Given by Miller J)

[1] This judgment responds to the appellant's application for review of a Registrar's decision increasing, from $23,520 to $344,000, the amount of security for costs payable on this appeal.

[2] The appellant is a representative plaintiff who is supported by litigation funders. He is indemnified for adverse costs awards under an insurance policy for $5 million, and he is protected by undertakings from Harbour Litigation Investment Fund LP, a limited partnership domiciled in the Cayman Islands.[1] Harbour Litigation Investment Fund is not a party to the litigation.

[3] The claim failed in the High Court, following a trial of 52 days duration.[2] The High Court has very recently fixed costs and disbursements payable to each respondent at a total of approximately $5 million.[3] That sum will exhaust the insurance policy, leaving the appellant to rely upon the indemnity from Harbour Litigation Investment Fund. However, it is not in dispute that the indemnity extends to costs of the appeal, or that Harbour Litigation Investment Fund can meet its obligations to Mr Houghton.

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1 A New Zealand resident litigation funder (Joint Action Funding Ltd) is also involved, but it appears to be common ground that it has no assets of its own.

2 *Houghton v Saunders* [2014] NZHC 2229.

3 *Houghton v Saunders* [2015] NZHC 548 [Costs judgment].

[4] Security for costs is not payable as a matter of course in the High Court, but under r 35 of the Court of Appeal (Civil) Rules 2005 it is presumptively payable on appeal to this Court. The rationale is that the respondent, having succeeded at first instance, should enjoy a degree of protection against the risk that costs awarded on an unsuccessful appeal will not be paid. Security is fixed according to the following formula:[4]

> 2 x a, where a is the daily recovery rate for category 3 proceedings that is specified in Schedule 2 of the High Court Rules.

The daily recovery rate is presently $2,940, meaning that security is ordinarily set at $5,880.

[5] The daily recovery rate is applied to time allocations set in Schedule 2 to the Court of Appeal (Civil) Rules 2005 when fixing scale costs. A respondent may recover for time spent arguing the appeal (measured in days), and for preparation. The allowance for preparation is three or six days (for category A and B appeals respectively). Disbursements are also recoverable. So, for example, in a category B case that takes a single day or part day to argue, a successful respondent may claim for seven days, plus disbursements. However, security will have been set automatically at an amount equal to two days at the daily recovery rate, with no express provision for additional hearing days should they be required, or preparation costs, or additional counsel, or disbursements.

[6] It will be seen that r 35 does not protect a respondent for all of its scale costs and disbursements; rather, the rule strikes a 'balance of prejudice' between the parties. Because security is fixed automatically under r 35(2), the balance actually struck in any given case may vary according to the likely scale costs and disbursements that will be incurred in fact. This seldom causes difficulty, since few appeals require more than a day to argue.

[7] Under r 35(6) the Registrar may increase, or reduce, or dispense with, security if satisfied that the circumstances warrant it. As Mr Carruthers QC submitted, it does not follow from the security formula that the amount should be

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4 Court of Appeal (Civil) Rules 2005, r 35(5).

increased more or less automatically in cases that will require more than a day to argue. An increase always requires justification. The decision normally depends on considerations that inform the risks, on the one hand, that costs will not be paid promptly and, on the other, that increased security may put an end to an appeal that is not without merit. That said, we have noted that few appeals require more than a day to argue. It follows that in appeals that will take materially longer than a day to argue an increase in security need not affect the balance of prejudice that r 35 seeks to achieve.

[8] An increase in security can be justified for a number of reasons. First, the appellant may be guilty of past procedural misconduct, such as failure to pay costs awarded, which points to a risk that it cannot or will not meet costs on the appeal.[5]

[9] Second, it may be obvious that the proposed appeal lacks any merit.[6] Protecting respondents from vexatious appeals is an important objective of security.[7] This does not mean that additional security will be ordered where, as in this case, the respondents contend that the appeal is weak. The Court does not ordinarily allow itself to be drawn into evaluating the merits when dealing with security.

[10] Third, there may be reason to suppose that the respondents will encounter difficulty in getting scale costs paid promptly.[8] This depends on the circumstances. By way of illustration, the appellant may be unable or unwilling to pay because those costs and disbursements are likely to be unusually large,[9] or the appellant may be resident overseas or otherwise in a better position than most to shelter assets from an award of costs.[10] Most cases in which additional security is ordered exhibit a

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5 See for example *Siemer v Stiassny* [2009] NZCA 624 at [71] (security is the more appropriate where defaults in payment of costs awards have been continuous).

6 *Ng v Harkness Law Ltd* [2015] NZCA 61 at [14] in which this Court observed that it was relevant to the question of whether to increase security for costs that the appeal was not demonstrably hopeless.

7 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [35].

8 See generally *Ng v Harkness Law Ltd*, above n 6, at [11] for the clear implication that a claim of impecuniosity needs to be supported by evidence.

9 *Erwood v Maxted* [2009] NZCA 542 at [28] (security rightly increased to allow for the possibility of an increased costs order). While noting that our security for costs regime is significantly different from that which operates in the United Kingdom, see generally Lord Justice Jackson (ed) *Civil Procedure* (Sweet & Maxwell, London, 2014) [The White Book] at [25.12.7].

10 *Ng v Harkness Law*, above n 6, at [13]. While again noting the different regime applicable in the United Kingdom, see The White Book, above n 9, at [25.13].

combination of factors. For example, it has been held that an appellant's overseas residence did not of itself justify an increase, in a case where there were no other reasons to suppose that costs would not be paid.[11]

[11] Fourth, the appellant may be supported by a litigation funder.[12] This may justify increased security on the ground that courts should be readier to order security where a non-party who stands to benefit from the litigation is not interested in having rights vindicated but rather is acting in pursuit of profit.[13] Security allows the court to hold the funder more directly accountable for costs. It is consistent with the Court's jurisdiction to award costs against a non-party which is sufficiently interested in the litigation.[14] Security is all the more appropriate where the funder can avoid liability for future costs by terminating the funding agreement by notice before the litigation concludes.[15]

[12] In this case security was initially set according to the formula in r 35(5). Because each respondent is entitled to security for costs unless they have the same solicitor, as two of the five respondents do, the total payable was 2 x $2,940 x 4 = $23,520. That amount was paid.

[13] The respondents sought an increase under r 35(6). They pointed to the scope of the appeal, asserting that it confronts all of the material factual findings made in the High Court, and estimated that it will require 15 days to argue. The Registrar accepted that estimate. She increased the amount of security to $86,000 for each respondent, a total of $344,000.

[14] As noted, the Registrar's determination was made on the assumption that the hearing would require 15 days, that being the respondents' assessment. We think it unlikely that anything like that will be permitted. The appeal will be case-managed to refine the issues, and it goes without saying that respondents' counsel will not be permitted to repeat one another's oral arguments. We propose to fix security on the

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11 *Ng v Harkness Law*, above n 6, at [13].
12 *Saunders v Houghton* [2009] NZCA 610 at [36]; *Green (in his capacity as liquidator of Arimco Mining Pty Ltd (in liq)) v CGU Insurance Ltd* [2008] NSWCA 148.
13 *Saunders v Houghton*, above n 12 at [36]; *Green*, above n 12, at [51].
14 *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757.
15 *Green*, above n 12, at [52].

assumption that five days should suffice. Should it become apparent that significantly more hearing time is required, an application may be made for an increase.

[15] This approach would reduce the total amount of security payable to approximately $94,080. With that the respondents are content, on the assumption that five days will be required. The appellant is not. Mr Carruthers submitted that the respondents have made out no justification for any increase from the default amount. He emphasised that there is no reason to suppose either that Mr Houghton is unable personally to pay costs or that Harbour Litigation Investment Fund is unable or unwilling to meet its undertaking to Mr Houghton. Nor is there any history of procedural misconduct. Counsel is confident that costs awarded in the High Court will soon be paid.

[16] We accept that there is no reason to suppose that Harbour Litigation Investment Fund will not honour its indemnity to Mr Houghton. Further, he is a New Zealand resident. It was earlier assumed that he could not meet costs in the High Court, but costs of the appeal will be much less and we accept Mr Carruthers' submission that we should not make the same assumption here. Of course the corollary is that increased security will not preclude an appeal that, we must assume, is not without merit. We assume that costs in the High Court will be paid without delay. If that does not happen, security in this Court may be revisited.

[17] We are satisfied, nonetheless, that the Registrar was right to order increased security, for two reasons:

(a) Whatever his own resources, Mr Houghton relies on a litigation funder, and an overseas funder at that. We were advised that the funder retains the right to terminate its indemnity for costs on notice.

(b) Scale costs will be unusually high in this case. We have referred to the likely duration of the hearing. Preparation will be correspondingly extensive. Each party is likely to have three counsel.

[18] We consider that total security of $100,000 appropriately balances the parties' interests in the circumstances. There will be an order accordingly, varying the amount fixed by the Registrar. The security is to be held in equal shares for the four separately represented sets of respondents. It must be paid by 29 May 2015. As noted, the amount may be revisited if circumstances plainly warrant it.

[19] Three further issues were addressed at the hearing before us. The first concerned the content of the case on appeal. The respondents wish to include certain documents which were not in evidence before the High Court. They have not made application under r 45 of the Court of Appeal (Civil) Rules. We record that the position reached at the hearing was that this material will be included in the case on appeal as a separate volume and supplied to the Court on the basis that the appellant does not consent to its admission. It will be for the respondents to establish that it is admissible.

[20] The second concerned an extension of time under r 43 for filing the case on appeal and seeking a fixture. The extension is granted. The case on appeal is to be completed and filed by 7 May. We were advised that a fixture was sought within time.

[21] The third concerned an outstanding direction that amended grounds of appeal be filed. That direction was given following an intimation of counsel that the appeal will be refined. Mr Carruthers was unable to comply with the direction by the time of the hearing before us, but he still intends to amend the grounds after settling them with the Claimant Committee. The amended grounds should be filed, or an extension sought for good reason, by 29 May.

Solicitors:
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Bell Gully, Auckland for First Respondents
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Russell McVeagh, Wellington for Second and Third Respondents
Jones Fee, Auckland for Fourth Respondents
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