

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

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

**CIV-2017-404-002985
[2021] NZHC 319**

BETWEEN ALPINE SOUTH FISHING LIMITED (IN
LIQUIDATION)
Plaintiff

HYUN CHOI
Second Plaintiff

AND SANG HEE KIM
First Defendant

IAIN ANDREW NELLIES and
KEITH VINCENT HARRIS as former
receivers of Alpine South Fishing Limited
(in liquidation)
Second Defendants

Hearing: 30 November 2020

Appearances: I Hutcheson for the Plaintiffs
A Cherkashina for the Defendants

Judgment: 1 March 2021

JUDGMENT OF ASSOCIATE JUDGE GARDINER

This judgment was delivered by me on 1 March 2021 at 3.30 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date.....

Solicitors:

Park Legal Ltd, Auckland
Norling Law Ltd, Auckland
Small Law Firm Ltd, Auckland

I Hutcheson, Auckland

Introduction

[1] This Court must determine the appropriate quantum for a security for costs order against the second plaintiff, Mr Choi. The first defendant, Mr Kim, requests first, estimated 2B costs with an uplift of 50 per cent of \$53,416.50, due to the loan agreement between the parties providing for indemnity costs in the event of a dispute. Alternatively, Mr Kim seeks estimated 2B costs of \$35,611. Mr Kim says that Mr Choi's claim has little chance of success, is unjustified, is over-complicated and has been unnecessarily protracted. Mr Choi accepts that an order is appropriate but says that the quantum sought by Mr Kim is oppressive. He requests staged payments up to a total of \$20,000.

Background

[2] Messrs Choi and Kim are New Zealand-based businessmen of Korean origin. Mid-2013 they had discussions about forming a joint venture fishing operation in New Zealand. Mr Kim considered investing funds in Mr Choi's company, Alpine South Fishing Limited (**Alpine South**), but ultimately decided to first lend funds to Alpine South to see if it would become successful.

[3] Between August 2013 and January 2014, Mr Kim advanced around \$350,000 to bank accounts nominated by Mr Choi. As security for the loan, Mr Choi executed General Security Agreements, between Alpine South and Mr Kim, with Mr Choi as covenantor, and between Mr Choi and Mr Kim, under which Alpine South / Mr Choi granted a security interest over all the company's and Mr Choi's personal and other property.

[4] Mr Choi repaid some, but not all, of the loan amount. Accordingly, on 3 March 2017, Mr Kim appointed receivers over Alpine South's assets. The receivers sold a fishing vessel owned by Alpine South, *RV Ocean Fresh*, for \$75,000 plus GST. The receivers also sold a residential property at 147 Roydale Avenue, Burnside, Christchurch, owned by Alpine South in which Mr Choi and his wife were living (the **Roydale Avenue property**). The property was understood to have a market value of \$350,000 with a bank mortgage for \$200,000. Mr Choi tried to prevent this sale by

applying for an interim injunction restraining the receivers. On 2 October 2018 that application was dismissed by Van Bohemen J. His Honour refrained from concluding that the claim was frivolous or vexatious, but concluded that the prospects of Alpine South and Mr Choi succeeding in the substantive proceeding are low.¹

[5] An order for costs and disbursements of \$15,046.90 was made against Alpine South.² That costs award was paid by Mr Choi in February 2020.

[6] Alpine South and Mr Choi brought these proceedings against Mr Kim and the receivers of Alpine South. The essence of Mr Choi's claim is that he understood that he/ Alpine South were only giving security over the Roydale Avenue property. Specifically, Mr Choi did not appreciate that the security extended to Alpine South's fishing vessel, nor that interest would be charged on the loaned sums. He alleges, in an amended statement of claim dated 19 February 2020, four causes of action:³

- (a) Non est factum – that is, that the security documents prepared by Mr Kim's solicitors Park Legal were of a substantially different character from those Mr Choi had expected as a result of his discussions with Mr Kim;
- (b) Breach of the Fair Trading Act 1986 – on the basis that Mr Kim was in trade and has engaged in misleading and deceptive conduct;
- (c) Contractual mistake in terms of the Contractual Mistakes Act 1977 – namely, that the extent of the plaintiffs' liability under the General Security Agreements was a mistake because the intended security for the loan from Mr Kim was only the Roydale Avenue property;
- (d) Relief under the Court's inherent jurisdiction on the basis the security documents were unconscionable, and the interest rate was oppressive.

¹ *Alpine South Fishing Ltd (in rec) v Kim* [2018] NZHC 2579 at [30], [35], [40] and [53].

² *Alpine South Fishing Ltd (in rec) v Kim* [2018] NZHC 3253.

³ *Alpine South Fishing Ltd (in rec) v Kim* [2018] NZHC 2579 at [24].

[7] The relief sought in the statement of claim is an order directing that the General Security Agreements be declared a nullity and set aside, and an enquiry into damages and judgment as the Court deems just. In his affidavit dated 28 March 2018 Mr Choi deposes that Alpine South has suffered losses associated with the sale of the fishing vessel in haste, and at a substantial undervalue. Mr Choi asserts that the market value of the vessel was around \$350,000. He also refers to berthage costs of \$17,250 and receivership costs of \$36,225 and says that the fact of the receivership has compromised his ability to obtain credit.

[8] Mr Kim says that Mr Choi is hopelessly insolvent, that his claims in the substantive proceeding lack merit, and that it is in the interests of justice that he pays security for costs in order to take the proceeding further. He also seeks orders that the substantive proceeding be stayed until security for costs is paid, and that the proceeding be automatically struck out if the security is not paid within a certain timeframe.

[9] Since these proceedings were initiated, Alpine South has been placed into liquidation and taken out of receivership. The liquidator has chosen not to take any steps in the proceeding on behalf of Alpine South. As such, only Mr Choi continues this proceeding. Subsequently, Mr Kim has also appointed a receiver over the personal assets of Mr Choi. The receivership continues with no realisations made as at 16 November 2020 (the date of the filing of the first defendant's submissions).

Legal principles

[10] Rule 5.45 of the High Court Rules 2016 provides that the Court may, if it thinks it would be just in all the circumstances, order a plaintiff to give security for costs where 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 proceeding.

[11] An application for security under this rule usually requires the Court to determine the following three issues:

- (a) is there is reason to believe the respondent will be unable to meet an award of costs against it? (the threshold requirement)
- (b) is it appropriate for an order for security for costs to be made?
- (c) how much security is appropriate?

[12] In this case, Mr Choi, by not opposing the making of an order, has implicitly accepted that the threshold requirement is met, and that it is appropriate for an order for security costs to be made. The only issue is one of quantum.

[13] The determination of each of the three issues is at the Court’s discretion, which is generally not to be fettered by constructing “principles” from the facts of previous cases.⁴ It is accepted however that the overriding consideration is the balance of interests of the plaintiff and the defendant.⁵ For a plaintiff, there is always a strong right to access to justice.⁶ Accordingly, it will be in entirely exceptional circumstances where this Court will make an order for security for costs which would have the effect of preventing the plaintiff from pursuing a claim.⁷ The Court will consider also the extent to which the plaintiff’s impecuniosity may have been caused by the defendant’s conduct.⁸ For a defendant, the Court will recognise their interest in not being drawn into unjustified litigation, particularly where it is overcomplicated and unnecessarily protracted.⁹ To determine whether litigation is justified, this Court will consider the merits of the claim, to the limited extent that is possible at this early juncture.¹⁰ Notwithstanding that it would be inappropriate for the Court to predetermine the merits, an impression that the plaintiff’s claim is unmeritorious may weigh in favour of granting the defendant an order.¹¹

⁴ *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) [*McLachlan*] at [14].

⁵ *Highgate on Broadway v Devine* [2012] NZHC 2288, [2013] NZAR 1017 [*Highgate*] at [24](c).

⁶ *Highgate*, above n 6, at [23](b).

⁷ *Highgate*, above n 6, at [22](e).

⁸ *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 (HC).

⁹ *McLachlan*, above n 5, at [16].

¹⁰ *Meates v Taylor* (1992) 5 PRNZ 524 (CA); *Lee v Lee* [2019] NZCA 345 at [73].

¹¹ *Highgate*, above n 6, at [24](c).

[14] The amount of security is not necessarily to be fixed by reference to likely costs awards but is rather to be what the Court thinks fit in all the circumstances.¹²

Discussion

Is there reason to believe the respondent will be unable to meet an award of costs against it? Is it appropriate for an order for security for costs to be made?

[15] Mr Choi concedes that the threshold question is met and that an order for security for costs is appropriate. The only issue in dispute is how much security is appropriate.

How much security is appropriate?

[16] Mr Kim submits that an appropriate amount to be ordered as security is \$53,416.50, which is the estimated 2B costs plus an increase of 50 per cent. Mr Kim relies on clauses 7(f) and 12(a)(ii) and (iv) of the loan agreement between Mr Kim as lender, Alpine South as borrower and Mr Choi as guarantor.

[17] Ms Cherkashina for Mr Kim says that there are comparable provisions in the general security agreement, but these are not in evidence before me and she expressly confirms that Mr Kim relies on the provisions of the loan agreement. These provisions relevantly state:

7 RIGHTS AND POWERS OF LENDER ON DEFAULT

...

- (f) Costs of default are payable: All sums expended by the lender in the exercise of the lender's rights and powers following a default or in exercising or enforcing or attempting to exercise or enforce any power, right or remedy contained or implied in this contract are payable by you to the lender upon demand. This clause does not limit any other term of this contract relating to costs; nor is it limited by any other such term.

...

¹² *McLachlan* at [27]. See for example, *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1977] 1 NZLR 516, decided under s 467 of the Companies Act 1955. Quilliam J expected that costs would exceed the sum he ordered as security, however he considered it was a reasonable sum to expect the plaintiff to find and proportionate to the size of the claim.

12 COSTS

- (a) Costs payable by you: You must pay to the lender upon demand, the lender's legal costs (as between solicitor and client) for:

...

- (ii) costs on default: legal services arising from or relating to any default under this contract or the enforcement or exercise or attempted enforcement or exercise of any of the lender's rights, remedies and powers under this contract (including the giving or attempted giving of any notice under the Property Law Act 2007 or any enactment in substitution for that Act, the inspection and valuation of the land and, if the lender is a solicitor's nominee company, the cost of compliance by the relevant solicitor with the Solicitors Nominee Company Rules 1996 or any similar rules in relation to the matters mentioned in this paragraph (ii));

...

- (iv) legal costs of lender: legal services relating to the protection of the lender's security interest taken in conjunction with this contract (including the investigation of any claim relation to land which might affect that interest).

...

[18] If the Court is not minded to order that amount, Mr Kim seeks an order based on estimated 2B costs, of \$35,611. The basis for this estimate is contained in Ms Cherkashina's synopsis of submissions and is based on a three-day hearing. Ms Cherkashina submits that this estimate is appropriate given the number and complexity of the causes of action, the need for cross-examination given the disputed evidence, the number of witnesses (the parties themselves, and possibly a boat valuer, the receivers and Mr Kim's solicitor) and the need to use interpreters for examination of the parties. At the hearing Mr Hutcheson conceded that the hearing could take two to three days.

[19] Ms Cherkashina relies on the statement of the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd*.¹³

[15] The rule [regarding orders for security of costs] itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order

¹³ *McLachlan*, above n 5.

having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied.

[16] Of course, the interests of the defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[20] Ms Cherkashina submits that this case falls into the category described at [15] and [16]. Mr Choi's claim has little chance of success, is unjustified, is over-complicated and has been unnecessarily protracted. She points to His Honour van Bohemen's conclusion that the prospects of Alpine South and Mr Choi succeeding are low. She says that the statement of claim is unnecessarily complex and involves four causes of action, some of which involve complex and unsettled areas of law. In terms of delay, she highlights that the events to which the proceeding relates took place seven years ago. Mr Choi issued these proceedings in 2017 and no meaningful progress has been made.

[21] Further, Mr Choi has been indebted to Mr Kim and in default of the loan agreement since 2015. Mr Choi does not challenge his liability under the loan agreement, he only seeks to set aside the General Security Agreements. Non-payment of the amounts under the loan agreement for such prolonged periods has already caused undue prejudice to Mr Kim.

[22] Mr Hutcheson for Mr Choi disputes that the claim is unmeritorious and took the Court to the two key emails upon which Mr Choi relies to explain why he understood that Alpine South was only giving security over the Roydale Avenue property. On the issue of the merits of Mr Choi's claim, Mr Hutcheson's submissions essentially repeat those made on the interim injunction proceeding before Van Bohemen J and I do not propose to repeat them here.

[23] Mr Hutcheson contends that the reason Mr Choi does not seek to set aside the loan agreement is because the funds were not paid to Mr Choi personally, or even to Alpine South, they were paid to various associated companies. He suggests that some amendment to the statement of claim might follow but was vague as to the details.

[24] Mr Hutcheson submits that an appropriate costs order would be that which Mr Choi offered in an open letter to Mr Kim's solicitors on 19 March 2020. That was for a sum of \$20,000, payable in \$5,000 tranches, 30, 60, 90 and 120 days after the date of agreement. Mr Hutcheson accepts that Mr Choi took around a year to pay the costs award against him arising out of the interim injunction application; but he says that delay was attributable to the appointment of receivers over his personal assets and those of Alpine South, which resulted in the sale of his family home. In that respect his impecuniosity was caused by Mr Kim. Despite his precarious financial position, he ultimately paid the costs order. He says he has now secured regular employment as a ship's engineer and expects regular income, sufficient to cover any costs award.

[25] Mr Hutcheson emphasises that it is clear from decisions such as *McLachlan* that security should be neither illusory nor oppressive. He says that an order in the nature of the sums sought by Mr Kim would be oppressive and that the figure of \$20,000, paid in stages, is neither illusory nor oppressive and represents a fair and reasonable amount.

My conclusion

[26] I consider that a fair and just amount for Mr Choi to pay as security for costs is \$35,000, that this should be paid in one amount, and that the proceedings should be stayed until payment is made. My reasons are these.

[27] First, the merits of Mr Choi's claim. I accept Mr Hutcheson's submissions that at an interlocutory stage no more than an "impression" can be formed of the merits. The outcome will depend on the Court seeing and hearing the witnesses and making an assessment as to Mr Choi's credibility. However, I have considered Mr Choi's pleading, the affidavits filed by Mr Kim and Mr Choi and the exhibits to those affidavits. I have paid attention to the two emails upon which Mr Choi places great weight as evidence of his intention that only the Roydale Avenue property was to be given as security. Seeing these documents in their context, my assessment is that the prospects of Mr Choi succeeding in his claim are low. I refer to the reasoning of His Honour van Bohemen J at [28]–[29] and [33]–[34] with which I concur. In particular, it is clear from correspondence preceding these two emails that Mr Choi

was aware that Mr Kim intended Alpine South's vessel and fishing quota to be included as security.¹⁴ The email of 22 August 2013 relied on is open to interpretation. The loan agreement and general security agreement, which Mr Choi had for 10 days before signing and returning, plainly state that interest is payable and that general security is given over all present and after-acquired property of Alpine South and Mr Choi. Mr Choi's claim that he did not understand these aspects of the documents strains credibility. This matter will be determined at trial.

[28] Second, it is difficult to ascertain what practical purpose these proceedings serve. Mr Choi does not challenge the liability of Alpine South to Mr Kim or his liability as guarantor of that loan. He seeks rather to have the security agreements declared a nullity. Even if successful, and the security agreements are set aside, he remains liable to Mr Kim as guarantor under the loan agreement.

[29] Mr Hutcheson sought to make something of the fact that the funds did not go to Alpine Fishing but to the bank accounts of other related companies. It was not clear where Mr Hutcheson was going with this, but there does not appear to be any scope for Mr Choi to argue that the loan was not between Mr Kim and Alpine Fishing, guaranteed by Mr Choi, in view of the loan agreement and the certificate of receipt of loan he signed, dated 2 September 2013, in which he certified that Mr Kim transferred the sums in question to Alpine Fishing for the company's use.

[30] Mr Choi seeks damages, but the receiver has provided an affidavit confirming that no recoveries have been made in Mr Choi's personal receivership. Therefore, there doesn't look to be any material damages he could seek personally. The damages he refers to in his affidavit are the costs of the receivership, berthage costs and the "loss" made on the sale of the fishing vessel at what he says was below value. This boat was owned by Alpine Fishing, not Mr Choi personally, so any damages would flow to Alpine. Even then, the case for damages appears weak. Brett Lysight, an experienced ship valuer, has provided expert evidence that the market value of the boat was \$70,000 to \$80,000. It was sold for \$75,000.

¹⁴ For example, the letter from Park Legal to Mr Choi dated 9 August 2013 asks Mr Choi to confirm title references for the Roydale Avenue property, details of the quota holding of Alpine South, and details of its vessels.

[31] Third, the estimated 2B costs are \$35,611. I consider this the more probable costs order Mr Choi would be liable to pay if he is unsuccessful at trial. I am not persuaded, based on the minimal submission made on the subject, that the costs clauses in the loan agreement, set out at [17] above, would be found to cover Mr Kim's costs associated with defending this proceeding. A broad reading of the clauses might allow one to characterise Mr Kim's engagement of legal services to defend this proceeding as *relating to any default* under the agreement. But I consider it more likely that the Court will conclude that Mr Kim's defence of Mr Choi's four causes of action does not amount to Mr Kim *exercising his lender's rights and powers following Mr Choi's default*. This is an issue that will need to be developed at the trial.

[32] Four, as to the requirement that the amount be paid in one instalment and the proceedings are stayed until then, I consider it relevant that in March 2020 Mr Choi offered to pay security that would have resulted in \$20,000 being paid by July 2020. This application was made in June 2020. Mr Choi has had plenty of time to anticipate the order now made. His proceeding was issued in 2017 and has made little progress. I do not consider that any further resource should be given to the proceeding until Mr Choi demonstrates that he is serious about advancing it by paying the security ordered.

Result

[33] I make the following orders:

- (a) Mr Choi is to pay into Court security for costs in the total of sum of \$35,000.
- (b) The proceeding is stayed until the sum ordered for security for costs is paid.
- (c) If the security for costs is not paid within three months, Mr Kim may apply to strike out the proceeding.

- (d) If the security is paid, the proceeding will be allocated a case management conference to discuss how to efficiently progress the proceeding through to a hearing. Counsel are to confer and file a joint memorandum addressing the matters in schedule 5 of the High Court Rules 2016 three working days before the conference.

[34] As to the costs of this application, I am mindful that Mr Choi offered to pay \$20,000 in security in March 2020 and accepted that an order should be made. Mr Kim sought indemnity costs in the first instance, which I have refused. Both parties have had a measure of success: Mr Choi in avoiding paying the higher indemnity costs sought by Mr Kim; and Mr Kim by securing a costs award higher than that offered by Mr Choi previously. Accordingly, their costs in relation to this application will lie where they fall.

Associate Judge Gardiner