IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-006784

	BETWEEN	K-AUTO TRADING (NZ) LIMITED Plaintiff
	AND	JEREMY MCGUIRE Defendant

Hearing: 4 February 2008

Appearances: L Herzog for Plaintiff
B R Webster for Defendant

Judgment: 11 February 2008

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by Judge Robinson on February 2008 at 4.30 pm pursuant to Rule 540(4) of the High Court Rules

Registrar/Deputy Registrar

Date:……

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[1] On 24 July 2007 an order was made with the consent of the parties requiring the plaintiff to pay staged security for costs. The first instalment if this was to be within seven days of that date. An order was also made staying the proceedings until such time as the security was paid. Because the plaintiff has been unable to comply with the consent order and pay the first instalment of $10,000, the plaintiff now seeks to set aside those orders and to allow the proceedings to continue without paying any security for costs.

[2] Counsel for both parties accepted that the Court has jurisdiction to set aside or vary the consent order made on 24 July 2007. It was also accepted that such power to set aside or vary the consent order in these circumstances could only be exercised where there had been a significant change in circumstances since the order was made.

[3] The plaintiff claims that its director Miss Kang, when consenting to the order for security for costs, anticipated being able to borrow the amount required. In her affidavit of 14 August 2007 at paragraph 4 she states:

> I regret to advise that the monies that I was hopeful of borrowing have not come through. I reconfirm that I am in no position to pay any security and if I am required to pay security I will not be able to prosecute the claim.

[4] The plaintiff accepts that when the consent order was made it was insolvent. Because of this Miss Kang was advancing funds to the plaintiff to enable it to prosecute its claim against the defendant.

[5] Miss Kang contends she attempted to borrow the $10,000 to satisfy the first condition of the order for security for costs. She has not produced any evidence regarding the anticipated source of the funds required to satisfy the order for security for costs. That order required the plaintiff to provide security in the sum of $10,000 within seven days. It is reasonable to assume that when consenting to such an order, the plaintiff anticipated receiving those funds within a very short period.

[6] In this respect, her inability to provide any further funds from her own resources for security is not a change of circumstance. She was unable to provide

funds for security when the consent order was made. At that time her source of income was a domestic purposes benefit.

[7] Furthermore, there is no evidence as to the efforts made by the plaintiff to obtain an advance of $10,000. If the plaintiff had arranged a source for the provision of those funds, there is no evidence as to the reason for those funds now being unavailable. In this respect, I adopt the comments of Nourse LJ in *Butt v Butt* [1987] 1 WLR, 1351 at 1353 referred to in *Equiticorp Industries Group & Ors v A R Hawkins* HC Auckland CP2455-89 Smellie J, 9 October 1993 at p 12:

> In my judgement what this Court decided in the *Channel* case was that where, upon an application for an interlocutory injunction the respondent chooses not to seek an adjournment to the application, but instead accepts that it should be dealt with and disposed of then and there by offering undertakings until trial or further order, there must be good grounds before the respondent is able to apply to discharge or modify the undertaking. Good grounds can consist of a significant change in circumstances or a becoming aware of new facts which could not reasonably have been known or found out before the undertakings are given.

[8] In the present case, the only new ground advanced by the plaintiff is an inability to obtain funds from a third source. This is not a significant change in circumstances and is not a new fact which could not reasonably have been known when the consent order was made.

[9] However, even if I should be wrong and the plaintiff's inability to obtain a loan of $10,000 to provide security is a substantial factor justifying reconsideration of the consent order, I am still satisfied that the order should not be set aside. The plaintiff acknowledges being insolvent. Consequently, pursuant to rule 60(1)(b) of the High Court Rules, there are very good reasons for believing that the plaintiff will be unable to pay the defendant's costs if the plaintiff is unsuccessful. There are therefore clear grounds for the making of an order for security for costs against the plaintiff.

[10] The making of an order for security for costs under rule 60 is discretionary. The court can in the exercise of its discretion refuse to make an order notwithstanding a conclusion. That the plaintiff will be unable to pay the costs of the defendant. In the exercise of this discretion the court must balance the fact that

requiring security may deny a genuine plaintiff access to the Courts against the interests of the defendant to be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted. These are considerations referred to by the Court of Appeal in *A A McLachlan Ltd* v *Mel Network Ltd* (2002) 16 PRNZ 747 at paragraphs [13]-[16].

[11] It is therefore necessary to consider the strength of the plaintiff's case when exercising the discretion under rule 60. The plaintiff has been importing vehicles from Japan to New Zealand. The plaintiff claims to have arranged to import those vehicles with K-Auto Trading (Korea) Limited, a company in Korea. The plaintiff further claims that K-Auto Trading (Korea) Limited contracted with Agasta Company Limited for the purchase of over 154 second-hand motor vehicles which it sold to the plaintiff. These vehicles were duly imported by the plaintiff into New Zealand.

[12] Agasta Company Limited claims it was not paid for the vehicles supplied to the plaintiff. Consequently, Agasta Company Limited issued proceedings in the Auckland High Court under CIV 2005-404-6541 for delivery to it of the vehicles imported by K-Auto Trading (NZ) Limited and a statement of accounts with regard to the profits from any vehicles that had been sold. The claim was based on four causes of action, being breach of contract, unjust enrichment, breach of a constructive trust, and quasi contract. In those proceedings, Agasta also sought an interim injunction for the release to it of vehicles it claimed to have supplied to the plaintiff.

[13] After a defended hearing, the application for interim injunction was refused. The Court concluded:

a) That there was a serious issue to be tried, namely whether the vehicles in the plaintiff's possession were supplied by Agasta directly to the plaintiff, or to K-Auto Trading (Korea) Limited;

b) That the balance of convenience was against the granting of an injunction because Agasta, on the face of it, retained no interest in the vehicles delivered to the plaintiff, some of which had been sold; and

c) That the granting of an injunction in the terms proposed could put the plaintiff out of business.

[14] The defendant, on behalf of Agasta, registered financing statement charges relating to the 154 vehicles in the possession of the plaintiff pursuant to the Personal Property Securities Act 1999. Those charges were eventually removed by the Registrar of Personal Property Securities.

[15] The plaintiff claims that its business has suffered irreparable harm as a result of the wrongful registration of those charges. It says that its customers, on becoming aware of the charges, refused to deal with it. The plaintiff claims that, as a consequence, it has ceased to continue in business. It brings proceedings based on breach of the Fair Trading Act 1986 , interference in business by unlawful means, and negligence against the defendant claiming damages of $3,518,643.57.

[16] In his evidence, the defendant concedes that the charges he registered on behalf of Agasta were removed by the Registrar, commenting:

> I observe that it was always open to the plaintiff to approach the Registrar in the manner it did, and I was surprised that it took some months to do so.

[17] It is emphasised by the plaintiff that its impecuniosity has been caused by the very acts of the defendant on which the action has been brought. Clearly, if the claim succeeds. The actions of the defendant in wrongly registering the charges were a substantial contributor to the plaintiff's loss of business. This is a significant factor to be taken into account against the making of an order for security for costs in favour of the defendant.

[18] On the other hand, the plaintiff is insolvent. These proceedings, therefore, are brought really for the benefit of the shareholders and creditors of the plaintiff. As Cooke J stated in *Attorney-General v Transport Control Systems (NZ) Ltd* [1982]

2 NZLR 19, 20 when considering an application for security for costs against a company:

> The means of shareholders and creditors for whose benefit an action is in truth being brought are relevant considerations under the section, as is shown by the *Donald* case and another case cited in argument that has reached this Court in recent years, *Erdi v HP Holt Ltd* (CA 47/80, judgment 12 August 1980).

[19] When I balance the strength of the plaintiff's case against the fact that the defendant will be unable to recover any costs should his defence be successful, I conclude that I should not allow the claim to proceed without the plaintiff providing any security for the defendant's costs. There will be substantial costs incurred by the defendant in defending this claim which he simply cannot recover should his defence succeed. Consequently, for the reasons I have given, the application to vary the order for costs will be dismissed.

[20] So far as the costs of this application are concerned I now make the following directions:

a) The defendant shall file and serve a memorandum in support of any application the defendant wishes to make for costs within 14 days of the delivery of this judgment.

b) In the absence of any memorandum there will be no order for costs.

c) On filing and serving such memorandum, the plaintiff shall have 14 days to file a memorandum in answer.

d) The defendants shall have a further 14 days to file a memorandum in reply.

e) On the filing of such memoranda the file shall then be referred to me for consideration.

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MD Robinson
Associate Judge