IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 70
EMPC 7/2015

IN THE MATTER OF	a challenge a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for security for costs
BETWEEN	S Plaintiff
AND	I LIMITED (FORMERLY L LIMITED) Defendant

Hearing:	By documents filed on 17 March, 18 April, 9 May and 24 May, and 7 June 2016
Appearances:	Anthony Shaw, counsel for plaintiff Richard Harrison, counsel for defendant
Judgment:	10 June 2016

INTERLOCUTORY JUDGMENT (NO 3) OF CHIEF JUDGE G L COLGAN

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[1] The defendant seeks an order for security for costs, failing which it says that the plaintiff's proceedings should be stayed.

[2] The Court is empowered to make such orders by applying r 5.45(2) of the High Court Rules via reg 6 of the Employment Court Regulations 2000. As illustrated, for example, by cases such as *Liu v South Pacific Timber (1990) Ltd*,[1] such orders are both rarely made in this jurisdiction and require persuasive grounds for doing so. That is because, in many instances, an order can mean a plaintiff abandoning viable litigation because he or she has no means of giving the security ordered. It is also because employment litigation is intended to progress, in most cases at least, to a prompt and economic hearing on merits in circumstances in which

[1] *Liu v South Pacific Timber Ltd (1990) Ltd* [2012] NZEmpC 129.

there will frequently be a significant imbalance of economic power between the parties.

[3] The defendant relies on the plaintiff's admitted impecuniosity, pointing to affidavit evidence given by the plaintiff previously that his liabilities exceed substantially his assets. The defendant says that this was reflected in a relatively low contributory costs' order made by the Employment Relations Authority of $2,500.[2] It is a significant argument for the defendant in support of the application for security that, despite its modesty, S has not paid that award as directed by the Authority, has not sought to make arrangements with the defendant to do so, and appears to have no intention of doing so.

[4] The defendant, which I will describe as I Ltd (following the acquisition of L Ltd by I Ltd in mid-2014), has expended significant sums in legal and associated fees already in defence of S's claims. The defendant says that interlocutory claims against it have escalated in recent months around both intensive and extensive document disclosure issues in which S appears to seek more and more information of what I Ltd says is of only peripheral relevance, if any at all.

[5] The Court has very recently decided assertions to the irrelevance of, and privilege in, documents held by the defendant which S asserted might be both relevant to the proceeding and not privileged.[3] Upon inspection and analysis of these documents, the Court concluded that in each case they were not only irrelevant but that in some cases, even if they were relevant, privilege would have attached to them. The defendant has been entirely successful in this interlocutory aspect of the proceeding.

[6] Of greater concern to the defendant is that the plaintiff's demands for further and better disclosure of documents will, if required of it, require the expenditure of substantial sums of money to recover substantial numbers of documents which may, at most, be of marginal relevance to the case, if at all. The defendant says that requiring it to recover and make these documents available to the plaintiff is an

[2] *A v B* [2015] NZERA Auckland 353.
[3] *S v I Ltd* [2016] NZEmpC 30.

irresponsible application of the document disclosure process and, although it has not used this word (yet at least), its submissions amount to saying that this aspect of the conduct of the litigation by S is vexatious.

[7] In regard to the cost and trouble of document disclosure, I Ltd's case is that when it purchased L Ltd in mid-2014 (that is after these proceedings were in train), a deliberate decision was made to retain in hard copy L Ltd's documents that were relevant to the proceeding and all documents that had, by then, been requested by S's former representative and his then advocate. I Ltd says that at that point there was no information that a significantly expanded list of documents would subsequently be sought by the plaintiff.

[8] I Ltd says that its costs of defending S's proceeding in the Authority came to about $32,000 and anticipates that this will be exceeded substantially on S's challenge to this Court, if it has not been already. For example, and to be dealt with as another interlocutory issue, I Ltd says that S's request for a direction that it undertake a large-scale search for information no longer retained, will cost it about $100,000. It says, further, that it is unclear whether such information will be relevant to the case and, indeed, what its relevance may be in any event.

[9] The plaintiff's opposition to the making of any order for security for costs can be summarised as follows. First, he says that he has been unable to find a reported case in which an order for security for costs has been made after more than a year into the litigation. That may or may not be so, but being unusual or even extraordinary, does not, of itself, mean that an application made at this point is inappropriate. Indeed, for the reasons advanced by the defendant, it is the nature of the interlocutory exchanges which have gone on over that period of more than a year which, the defendant says, warrant an order for security for costs in circumstances where, more usually for this type of case, no such application would probably have succeeded. This is not a tenable ground of opposition per se for the plaintiff.

[10] Next, the plaintiff asserts that the defendant has always been under an obligation to submit to applications for document disclosure (including ongoing disclosure) and has, since the outset of the litigation, also been under an obligation to

preserve documents for that purpose. S says that the disclosures which he now seeks ought to have been made by the defendant at an early stage when they were first requested.

[11] Whilst that is true in principle, questions of relevance and proportionality to the litigation affect the extent of those obligations. The cost (and delay) of minute examination of large quantities of documents, the relevance of which may only be speculative at this stage, must also be considered by the Court. Disclosure processes that cost the parties, individually or collectively, more than the amounts at issue in the litigation, require very careful consideration. So, too, do the assessments and assurances of counsel in determining questions such as relevance and privilege. The most recent interlocutory judgment issued by the Court reflects the application in practice of those principles.[4] In particular, the plaintiff's submission that "The probative nature of the data can only be truly known once it is supplied" illustrates the inappropriateness of using an interlocutory procedure to require, initially and at significant cost and delay, the exchange of numerous documents without any discriminating assessment of their relevance.

[12] As the plaintiff's submissions also illustrate (albeit perhaps inadvertently), requiring the defendant to restore electronically data that are now destroyed or at least very difficult to access, may be a course adopted in commercial litigation of very substantial monetary value or of public interest. That is illustrated by cases such as those relied on by the plaintiff such as *NGC New Zealand Ltd v Todd Petroleum Mining Co Ltd*[5] and *Commerce Commission v Telecom Corporation of New Zealand Ltd*.[6] Indeed, in the *Telecom* case, the Court ordered only a sample restored, not full-scale restoration, because of the huge cost of the exercise. In that case, also, there was reason to believe that the other party had knowledge of breaches of a contractual undertaking, and there was a clear line of relevant inquiry. The restoration of files was known to be highly relevant.

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[4] *S v I Ltd*, above n 3.
[5] *NGC New Zealand Ltd v Todd Petroleum Mining Co Ltd* HC Wellington CIV-2004-485-1753, 29 March 2006.
[6] *Commerce Commission v Telecom Corp of New Zealand Ltd* (2005) 18 PRNZ 170 (HC).

[13] Next, the plaintiff submits that more extensive document disclosure by the defendant is warranted because it

> … was secretly and actively in communication with third parties who were involved in the prosecution of the Plaintiff, yet the defendant denied and/or did not inform such to the Plaintiff. Counsel believes that this breaches the good faith obligations of the Act, notwithstanding its effects on the [Plaintiff's] rights as enshrined in the New Zealand Bill of Rights [Act].

[14] The statutory good faith obligations bind parties principally during the continuance of an employment relationship. They do not, certainly not in the same way, bind the parties to an employment relationship which has ended or, in particular, impose good faith obligations on the litigation which follows it. Whilst the plaintiff may be correct that the defendant, through its lawyers, was in communication with others about the prosecution of the plaintiff, this both occurred after the employment relationship had ended and has been determined to be irrelevant to the present proceedings. In relation to any communications between the defendant and others concerning the employment relationship whilst it was extant, either any disclosed documents deal with this area or it is open to the plaintiff, on proper grounds disclosed to the Court, to seek further and better disclosure if there are other such documents which should be provided. The relevant provisions in the New Zealand Bill of Rights Act 1990 (NZBORA) do not apply per se to a private law relationship such as that of employer and employee in this case, although general principles may guide the Court in determining disputed questions of document disclosure. The plaintiff has not specified any relevant NZBORA sections in this regard.

[15] As may be seen, the plaintiff's submissions have focused predominantly, if not exclusively, on the adequacy of the defendant's disclosure of documents. That is connected, indirectly, to the question now before the Court, the provision of security for costs.

[16] The amount sought as security for costs by I Ltd is, in all the circumstances, a relatively modest $10,500. It is unclear as to how that sum has been calculated. In any event, because it is such a modest sum when compared to the probable costs to be incurred, and the recovery of which would be undertaken, by the defendant if

successful, the means of calculation are unnecessary. I Ltd says that, if successful, it would be sure of receiving at least a modest costs' award of at least $40,000 following a four-day hearing. The company says that given, to its knowledge, that S has nearly $40,000 of existing debt, it is inevitable that he would be unable to pay an award of costs, even by regular instalments, for a number of years.

[17] The defendant says that it does not seek to set security at such a level as to disqualify practicably S's participation in his litigation. The suggested figure is a relatively modest proportion of what are likely to be the levels of costs at issue, at least if the defendant is successful. Although it may be to the defendant's credit that it has not sought the provision of security at such a level that this would provide an impediment, even temporarily, to the prosecution by S of his proceedings, I am not satisfied that there is such a strong case for security that causes this case to be an exception to the Court's longstanding reluctance to make such orders, other than in truly exceptional cases. Further, as the Court of Appeal noted in *AS McLauchlan Ltd v MEL Network Ltd*,[7] the Court should also be shown that the claim has little chance of success. That has not been established, at least to this point, by the defendant.

[18] Finally in this analysis, the parties appear to have focused principally on the issue of security for costs in the form of a monetary payment alone. Any requirement to give security may involve assets other than money: for example, providing security over a motor vehicle or vehicles has recently been directed by the Court.[8] It may also include giving security against real property. It is not necessary for the plaintiff himself to provide that security: someone else may do so on his behalf although, in both cases, the recoverability of the security would be an important assurance required by the Registrar who is the officer of the Court who would have to be satisfied.

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[7] *AS McLauchlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]-[16].
[8] *Twentyman v The Warehouse Ltd* [2015] NZEmpC 178 at [36].

Decision

[19] This is an unusual case in at least two respects. The first is that for a personal grievance, very extensive but largely unsuccessful applications for document disclosure have been made by the plaintiff. The second unusual element is that the amount sought for security is very modest, and, arguably, so to persuade the Court that requiring S to give security for this amount will not mean that he has to give up the proceeding altogether because of impecuniosity.

[20] I consider, on balance, that careful judicial control of the document disclosure process is the more appropriate way of ensuring that the defendant's primary concern, that disproportionately large expenditures of time and money are not incurred, is addressed. Requiring the plaintiff to give security for costs is a more blunt instrument. Albeit by a narrow margin, is not appropriate, at least at this stage, to require the plaintiff to give security. I therefore decline the application for an order that the plaintiff give security for costs.

GL Colgan
Chief Judge

Judgment signed at 9.45 am on Friday 10 June 2016