IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-2981 (WHITE)
[2019] NZHC 188

BETWEEN	KAREN LOUISE WHITE AND THE PERSONS LISTED IN SCHEDULE 1 Plaintiffs
AND	JAMES HARDIE NEW ZEALAND First Defendant
	STUDORP LIMITED Second Defendant
	JAMES HARDIE NZ HOLDINGS Third Defendant
	RCI HOLDINGS PTY LIMITED Fourth Defendant
	JAMES HARDIE AUSTRALIA PTY LIMITED Fifth Defendant
	JAMES HARDIE RESEARCH PTY LIMITED Six Defendant
	JAMES HARDIE INDUSTRICES PLC Seventh Defendant

Hearing:	On the papers
Counsel:	B D Gray QC, A J Thorn and S J Cooper QC for Plaintiffs J E Hodder QC and McKay for Defendants
Judgment:	18 February 2019

JUDGMENT (NO 3) OF WHATA J
Re Security for costs

CIV-2015-404-3080 (WAITAKERE GROUP LIMITED)

BETWEEN	WAITAKERE GROUP LIMITED & ORS Plaintiffs
AND	JAMES HARDIE NEW ZEALAND First Defendant
	STUDORP LIMITED Second Defendant
	JAMES HARDIE NZ HOLDINGS Third Defendant
	RCI HOLDINGS PTY LIMITED Fourth Defendant
	JAMES HARDIE AUSTRALIA PTY LIMITED Fifth Defendant
	JAMES HARDIE RESEARCH PTY LIMITED Six Defendant
	JAMES HARDIE INDUSTRICES PLC Seventh Defendant

This judgment was delivered by me on 18 February 2019 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors: Adina Thorn Lawyers, Auckland
Chapman Tripp, Auckland

[1] The defendants, collectively known as James Hardie, seek security for costs in the *White* proceedings in the sum of $350,000 in respect of discovery and inspection. This comprises $250,000 for costs and $100,000 for expert fees. The order is sought against the litigation funder, Harbour Fund II, L.P ("Harbour") and the plaintiffs. Disclosure of the funding arrangements is also sought.

[2] A feature of this case is that collectively the plaintiffs are not impecunious. The central issue is whether security can and should nevertheless be made because of Harbour's involvement. I have resolved that it should.

Background

[3] This is a large and complex case. It will be very costly. In short, the owners of 1241 properties claim James Hardie sold defective cladding products over a span of some 27 years. There are five heads of claim, including negligence, breach of duty to warn or withdraw products, negligent misstatement, breach of the Consumer Guarantees Act and or the Fair-Trading Act. Unsurprisingly, the proceedings have been staged. The first stage (Stage 1) will address specified issues[1] and is subject to tailored discovery.[2] Even so, the Stage 1 discovery process will exact a heavy toll in terms of resourcing and associated cost.[3]

Litigation funding

[4] The plaintiffs are supported by a litigation funder, Harbour, and they hold "After the Event" (ATE) insurance for $5,500,000 from QBE Insurance (Europe) Limited and Brit Global Speciality (Syndicate No 2987). The specific terms of their funding and the insurance are not known to me. Harbour is, however, Europe's largest litigation funder and a signatory to the Code of Conduct for Litigation funders in the United Kingdom.

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1 *White v James Hardie New Zealand* [2018] NZHC 1627.

2 *White v James Hardie New Zealand (No 2)* [2018] NZHC 2812.

3 Mr Alexander Petrie for the defendants identified 47,317 de-duplicated top-level items or 67,436 including attachments in respect the plaintiffs search terms of James Hardie's New Zealand servers. James Hardie's proposed search terms returned 33,301 de-duplicated top-level items in respect of the same servers. 2554 boxes of potentially relevant have been identified by James Hardie in relation to James Hardies Australian entities.

Offer of security

[5] The plaintiffs made an offer of security of $50,000.

Reasons for and against Security

[6] James Hardie submits the orders are just and necessary for the following key reasons:

(a) It has valid concerns the plaintiffs will be unable to pay James Hardie's significant costs;

(b) Harbour, the entity which underpins this litigation, is properly analogised to an overseas plaintiff with very significant stake in the claim and should provide security; and

(c) The amount of security sought is comparable to the orders made in *Strathboss*.[4]

[7] The plaintiffs respond:

(a) Risk of impecuniosity and failure to pay costs is the key threshold issue;

(b) Each of the plaintiffs is named, the majority of whom are property owners with a "cautious estimate of capital value of $681,802,000";

(c) The presence of a litigation funder is not material in this case – and, to the extent it is relevant, the plaintiffs' ATE insurance provides adequate mitigation of risk of non- payment of costs; and

(d) The security claimed is excessive and quantum should be discounted to reflect the delay in making the application.

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4 *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69.

Framework for assessment

[8] In determining an application for security for costs, the following steps should be followed:[5]

(a) Is the Court's jurisdiction to make an award triggered?

(b) How should the Court exercise its discretion?

(c) What amount should security for costs be fixed at?

(d) Should a stay be ordered?

[9] Usually the central issues for determination are whether there is reason to believe the plaintiffs are unable to pay costs and, if so, whether it is just in all the circumstances to order security. This second issue will turn on the intuitive merits of the claim and whether an award would prevent the plaintiff from pursuing its claim.[6] But, as Gault P noted in *McLachlan*, the Court's discretion should "not be fettered by constructing 'principles' from facts of previous cases."[7]

Jurisdiction

[10] Rule 5.45 of the High Court Rules dealing with security for costs states:

> **5.45 Order for security of costs**
>
> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> (a) that a plaintiff—
>
> (i) is resident out of New Zealand; or
>
> (ii) is a corporation incorporated outside New Zealand; or

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5 I have modified the four steps in *Busch v Zion Wildlife Gardens Ltd (in rec and in liq)* [2012] NZHC 17 at [2] to accommodate the facts of this case.

6 *A S McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 at [15].

7 At [13].

(iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or

(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.

(3) An order under subclause (2)—

(a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—

(i) by paying that sum into court; or

(ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and

(b) may stay the proceeding until the sum is paid or the security given.

(4) A Judge may treat a plaintiff as being resident out of New Zealand even though the plaintiff is temporarily resident in New Zealand.

(5) A Judge may make an order under subclause (2) even if the defendant has taken a step in the proceeding before applying for security.

[11] At first blush, the application for security falls at the first hurdle. There is no evidence before me that all the plaintiffs are impecunious and there is no overseas resident plaintiff in any literal sense. In addition, the collective capacity to pay an award of costs in relation to Stage 1 discovery appears reasonably high, bearing in mind that all plaintiffs are liable for costs.

[12] I agree, however, with James Hardie that the presence of a litigation funder may trigger a security order in the exercise of inherent jurisdiction and for the reasons stated by Court of Appeal and later repeated by French J in the *Houghton* litigation. The following passage suffices for my purposes:[8]

> [36] The making of orders for both representation and admission of a funder substantially alters the balance between plaintiffs and defendants. We consider that the change is so radical as to justify the High Court, in exercise of its inherent jurisdiction under s 16 of the Judicature Act 1908, to consider ordering security as a term of such orders, even where numerous natural

8 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331.

> persons are among the plaintiffs, as the price of the privilege to employ such a procedure. That is in order to protect defendant against the effect of a procedure which could otherwise be oppressive. The facts that the funder has no personal right at stake, that takes part of the proceeds of any claim, and that it is motivated by the financial considerations that gave rise to the common law prohibition of champerty point to the need for the funder to provide security for costs in most cases. *Arkin v Borchard Lines Ltd (Nos 2 and 3)* [2005] 1 WLR 3055 (CA) applied to a litigation funder Lord Denning MR's dictum in Hill v Archbold [1968] 1 QB 686 (CA) that maintenance "is lawful, provided always that the one who supports the litigation if it fails, pays the costs of the other side".

[13] I acknowledge that the representation order was a key factor in *Houghton* not present here. Mr Houghton was also impecunious. Nevertheless, the premise for imposing an order for security in respect of litigation funders remains apposite – a person who supports failed litigation should pay (or at least contribute) to the costs of the successful party. Significantly, that person, Harbour, is not a New Zealand resident company. This engages the evident policy expressed at r 5.45, that overseas resident companies with an interest in proceedings should be amenable to a security for costs award. Moreover, I am disinclined to enable an overseas resident litigation funder (apparently Europe's largest) who stands to gain financially from the litigation, to effectively transfer all the risk of costs in the proceedings and then the potentially significant burden of enforcement, to the defendants. While Lang J was dealing with discretion, not jurisdiction, I draw support from his reasoning in *Walker v Forbes*. He there stated:[9]

> I take a similar approach. The existence of a litigation funder in the present case is an important factor that influences the exercise of the discretion for several reasons. The first of these is that the plaintiffs will not be precluded from continuing with their claims if a significant order for security is made. Furthermore, SPF stands to receive most, if not all, of the proceeds of any successful claim. It has no interest in the litigation beyond the profit it hopes to derive from what it clearly regards as a commercial venture. Commercial ventures generally require an investor to take risks and to incur expenditure as the price to be paid for the chance of success. SPF should therefore be required, as a matter of policy, to contribute significantly to the defendants' costs if the claims are unsuccessful.

[14] I am satisfied therefore that the inherent jurisdiction to make an order for security against an overseas resident litigation funder is engaged in respect of this stage of the process.

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9 *Walker v Forbes* [2017] NZHC 1212 at [33]. See also discussion in *Houghton v Saunders* [2013] NZHC 1824 from [104].

Discretion?

[15] The issue remains as to whether security should be imposed. It is not suggested this is unjustified litigation (except perhaps in relation to the parent companies – but that issue has now been resolved by the Court of Appeal in the plaintiffs' favour.)[10] Nor is it seriously suggested that Harbour could not cover a costs award. It also appears that Harbour has a good history of paying cost orders. There is also the ATE insurance, which I am advised is capable of being made non-exclusionary and non-voidable (if that has not happened already). Nevertheless, James Hardie is exposed to a very heavy costs burden and potentially a very complex and demanding enforcement process. In this regard, I am also not persuaded that I should engage in an inquiry as to whether ATE insurance provides risk mitigation, because whatever its terms,[11] it cannot offer the same security as payment into Court. Among other things, it raises the potential for ancillary litigation when there should be none. This risk was identified in another case helpfully cited by Mr Hodder QC, *Michael Phillips Architects Ltd*:[12]

> It will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond guarantee. That will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the defendant, and because the promise to pay under the policy will be to the claimant.

What should the amount be?

[16] There is no formula for an award for security for costs. But this is a large complex proceeding and "tailored" discovery in this case is a bit of a misnomer in this case. For example, James Hardie must discover information sought in relation all customer complaints (excluding litigation evidence / settlement materials). In addition, it has not been suggested that a large order for security will disenable the plaintiffs from proceeding.

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10 *James Hardie Industries PLC v White* [2018] NZCA 580.

11 I note that the plaintiffs offered to make the policy schedule available. But for the reasons stated I consider the scope of the policy to be a moot point.

12 *Michael Phillips Architects Ltd v Riklin* [2010] EWHC 834 (TCC). See also *Houghton* above n 9 from [109], especially [117]-[119].

[17] James Hardie has purportedly based its claim on scale with an uplift to reflect the likely demands of this discovery. The plaintiffs dispute the quantum claimed in terms of scale and oppose any uplift. They also submit that security is forward looking and delay should preclude many of the claimed steps. There is also evidence from Ms Heasley for the defendants raising concerns about costs having already been incurred in respect of discovery in advance of the scope of discovery having been settled and there has been no engagement on the approach taken by the defendants to discovery.

[18] I am nevertheless satisfied that security should be based on scale 3C for all attendances up to and including Stage 1 discovery and inspection. This adequately (if not exactly) reflects the burden on James Hardie applying orthodox litigation cost principles and broadly aligns with the approach taken by Dobson J in *Houghton*.[13] I do not uplift at this time. While discovery imposes a heavy burden, I am not satisfied on the available information that the scale 3C costs will not provide sufficient security.[14]

[19] I do not deduct any applicable step for delay. This is a large demanding proceeding. The defendants were understandably focused initially on responding to the very wide breadth of the plaintiffs' claims, including as to their scope, the claim period and the number of defendants. The delay is I think reflective of this. Furthermore, even though the application has been made some time after the proceedings were commenced, we are still in the initial stages of engagement, unlike cases where a forward-looking approach has been adopted.[15]

[20] As to scale quantum, the parties should be able to agree this. If not, the registrar will fix the sum. Submissions to the registrar should be made within 15 working days. For clarity, I do not allow for doubling of the rate in respect of Court of Appeal matters.

[21] As to expert disbursements, assessing a proper costs award for expert fees after trial is a complex matter.[16] Assessing a proper award for expert costs in advance of

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13 *Houghton,* above n 9 at [125].

14 The uplift sought in any event by the defendants is, apparently, relatively small (at $20,000).

15 Compare *Oceania Furniture* HC Wellington CIV-2008-485-1701, 24 April 2009, where security was declined. Compare also *Ambrose v Pickard* [2009] NZCA 502 at [42] (c).

16 See Katz J's judgment in *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2015] NZHC 470, (2015) 23 PRNZ 200 from [42].

trial of the present kind is, from the Court's perspective, largely an exercise in clairvoyance. I presently have no evidence that might enable me to make an award in respect of these disbursements. I therefore agree with the plaintiffs that I should not make any order until I have better information on the quantum of disbursements likely to be required. I am however minded to make such an order for the same reasons expressed in relation to legal costs. So, if the parties do not agree, they may file further submissions for my review, also within 15 working days. Leave is granted to file supporting evidence, but it must be no more than a summary and only from experts directly engaged in the discovery and inspection process. Costs may follow if this basic guidance is not followed, irrespective of who wins.

Stay

[22] I make no order as to stay at this stage. There is no real risk of security not being paid. Leave, however, is granted to revisit this aspect if my prediction of risk proves flawed.

Disclosure of details of funding arrangements

[23] Given the outcome of the security for costs application, and my view of the disutility of inquiry as to the scope of the ATE insurance, I see no reason to require disclosure.

Outcome

[24] There shall be an award for security for costs based on 3C scale for all attendances up to and including Stage 1 discovery and inspection against Harbour and the plaintiffs. For clarity only one amount need be provided. If quantum cannot be agreed, the quantum shall be fixed by the registrar. Security must then be paid with 15 working days of his fixing the quantum. Furthermore, the parties are to seek to agree a sum in respect of expert disbursements, including for fees incurred in conducting sites visits. If, however, agreement cannot be reached in either respect, submissions and supporting evidence may be filed within 15 working days.

[25] Finally, this should not be seen to set a precedent for all steps in the proceeding. Rather the order is most apt in the context of Stage 1 steps.

[26] The application for disclosure is declined.

Costs

[27] My current view is that the applicants, being largely but not entirely successful,[17] are entitled to costs on a 2B basis together with their reasonable disbursements for this application less 25 per cent, to be fixed by the registrar if quantum is not agreed. Otherwise, submissions may be filed within 5 working days.

[17] The defendants did not succeed on quantum.