

Case Law Review re Security of Costs

Principle of security of costs:

1. Is there reason to believe that the person against whom security of costs has been sought will be unable to pay costs?
2. If no, then security of costs is not necessary.
3. If yes, then the Court has a discretion to make an order, taking into account the following matters:
 - a. Merits of the case of the party against whom security of costs are being sought
 - b. Whether the making of an order for security might prevent the party proceeding with a bona fide claim
 - c. The conduct of the parties
 - d. Likelihood of a costs order
 - e. Public interest

Cases:

4. *North Waikato Action Group Inc v Ministry Of Corrections*¹ concerned an application by the Minister for security of costs against Wendy Finlayson and North Waikato Action Group Incorporated (NWAG). The proceedings related to appeals against the Minister of Correction's decision on the Notice of Requirement for a Men's Correction Facility near Meremere. Brenda Maxwell was a s274 party to NWAG's appeal.
5. The Minister sought \$3000 against Ms Finlayson and Ms Maxwell and \$6000 against NWAG. The Court ordered NWAG, Ms Finlayson and Ms Maxwell to give security of costs each of \$3000 in favour of the Ministry.
6. The Court had jurisdiction to make an order under Rule 62 of the District Court Rules 1992, which states:
 1. Where the Court is satisfied, on the application of a defendant-...
 - (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 proceedings,-

And under the RMA s 278 (now repealed but to be reintroduced in the Bill).

7. In assessing the application, the Court held that the threshold for an order for security for costs under both the section and rule is that there is a reason to believe the plaintiff will be unable to pay costs (*Canterbury Too Good To Waste Incorporated v Canterbury Regional Council* C96/2003). Defendants must cross that threshold before the Court is required to exercise its wider discretion.

¹ A203/03.

8. The wider discretion involves consideration of a number of factors and an overall balance of justice, which can be summarised in *Bell-Booth group Ltd v Attorney General* (1986) 1 PRNZ 457 (HC) as:
 - a. Merits of the appellant's case
 - b. Whether the making of an order for security might prevent the plaintiff proceeding with a bona fide claim
 - c. The conduct of the parties
 - d. Likelihood of a costs order
 - e. Public interest
9. The Court held that it must balance these factors against all relevant considerations in the interests of justice in the particular circumstances of the case (*Nikau Holdings Ltd v Bank of New Zealand* (1992) 5 PRNZ 430).
10. The Court held that an order for security was in the interests of justice. It took into account the fact that the sum sought by the Ministry was not high and the broad terms in which the issues raised by parties to date have been put before the Court. In light of NWAG's demonstrated level of public support, the Court ordered a sum less than that sought.
11. *Canterbury Too Good To Waste Inc v Canterbury Regional Council*² concerns 4 appeals that were brought against a decision to grant consent to Transwaste for a solid waste landfill. Transwaste applied for orders that two societies that had filed appeals should give securities of costs.
12. The Court, after determining that both the societies could not afford to pay an award of costs, analysed the application against each of the discretionary criteria listed above.
13. The Court acknowledged that it was difficult to make an assessment about the merits of a case before it has been fully heard. However, the Court went on to examine the case before it and make a determination as to the merits of the case and the prospects of success.
14. The following aspects of the case were relevant to the Court's determination that the appellant societies cases had merit:
 - a. Even though the first instance decision was made by experienced Commissioners, full opportunity was afforded to the submitters at that hearing to present their cases, and the Commissioner's decision was comprehensive, there is nothing stopping the societies from having a full hearing in the Court.
 - b. Even through Transwaste's witnesses were questioned by the Commissioners, cross examination may alter the balance between the parties cases.
 - c. The appeals were "scattergun" in approach, covering all possible issues that could be argued at the hearing. This approach would be strong grounds for an order of security of costs. However, because the Society had now engaged counsel, the Court held that the counsel would bring a level of professionalism to the case and narrow the issues of concern.

² C 96/2003.

- d. Legal counsel and representation seemed to be a major factor in the Court's reasoning that the case would have reasonable prospects of success.
15. When assessing the conduct of the parties, the Court held that incorporating a society shows "*an unwillingness to be subject to the sanction the Court can apply to have a hearing that does not impose unnecessary costs on other parties. An order for security for costs can restore the possibility of the sanction.*" The Court also took cognisance of the fact that the societies had delayed payment on another Court proceeding for 7 months, signalling an unwillingness to be subject of the sanction of the Court. The Court held that the conduct of the parties makes in favour of an order.
16. When deciding whether an order of security of costs would prevent an appellant from proceeding or be oppressive, the Court held, "*in judging whether to order the giving of security I should take into account that such an order may have the effect of PBBUA discontinuing its appeal, and CTGTWI being inhibited in the presentation of its appeal. ... the Court could be deprived of full presentation of other grounds of the societies' appeals that are relevant to a sound judgement of whether the proposed landfill would promote the sustainable management of natural and physical resources.*"
17. With respect to the public interest aspect of the case, the Court said, "*In this decision I express no opinion about the relevance to these proceedings of issues of general policy such as minimisation and separation of waste, and minimisation of landfill use. I accept that there is a public interest in the Court having independent cases presented on the other, non-political, issues that the societies now say they wish to pursue. I also hold that under the law applicable to these appeals, parties should not be immune from the sanction of costs in case they conduct their cases in ways that add unnecessarily to the costs incurred by other parties. But that does not preclude me from giving consideration to the public interest in community organisations presenting well focused and efficient independent cases on relevant issues affecting the environment.*"
18. On the issue of likelihood of an order of costs, the Court noted that, "*Of course the question whether the societies are likely to be ordered to pay costs is largely imponderable at present. But now the societies have given commitments to the Court that they will present responsible and well-focused cases, I find no basis for supposing that orders that they pay costs are more likely than not. Obviously nothing I say now should influence a decision on any application for costs that may in the event be made.*"
19. Overall, the Court held that the societies appear to have reasonable chances of success and that any orders for security could deprive the Court of independent presentation of relevant grounds that it is in the public interest should be considered. The fact that the societies now had legal representation went in favour of no order of security because it was expected that the cases would be run professionally and with credibility.
20. The Court declined the application for costs.

21. *Green Party Hawke's Bay v Central Hawke's Bay District Council*³ concerns appeals against consent for a subdivision proposal. Shoal Bay Limited applied for security of costs against the Green Party and another party claiming costs for a full hearing would be in excess of \$104,000.
22. The Court assumed that the parties would not be able to pay if costs were awarded. In its discretion, the Court held that even though the appeal was on a condition of consent, the applicant would have to call 2 witnesses and would have to pay for associated legal fees, and that because the parties couldn't afford to pay costs, this was an appropriate case to order security of costs. The Court ordered a sum of \$8,000 was appropriate.
23. The Court in *Winstone Aggregates Limited v Franklin District Council*⁴ ordered security of costs of \$20,000 for Winstone against the Heartbeat Charitable Trust (the Trust).
24. In making the order the Court paid particular attention to the following points:
- a. The Pokeno Protection Society represents a watchdog of the public interest. However, the community is not united on the issues, as can be seen by the Trust and by the recently formed Pokeno Kiatiaki Incorporated Society (the Society) and this goes against the public interest role of the Trust and the Society.
 - b. The notices of appeal are wide ranging and of a general nature, they fail to particularise or identify the contested issues.
 - c. The fact that the Society is not calling evidence may result in the court having difficulty making a decision on the general nature of the issues filed in the appeal.
 - d. The applicant has already spent a considerable amount of time negotiating and mediating with the Pokeno Protection Society, who it thought was representative of the community.
 - e. Costs of proceeding to a hearing may be in the order of \$300,000.
25. The High Court in *Bay of Islands Mooring Owners Association Inc v Far North District Council*⁵ rejected an application for security of costs because it was brought 20 months after the proceedings were initiated. To make an order would allow the application to be used as an instrument of oppression when the plaintiff was acting in a resourceful and responsible way as watchdogs of the public interest.
26. *Makarora Valley Community Inc. v Queenstown Lakes District Council (C134/97)* concerned a situation where the application used a threat of security of costs against the ratepayers to succeed in its application. The Court did not condone that sort of practice. The Court awarded costs against the applicant, and although not explicitly for the applicant's behaviour, this was a consideration of the Court.

³ W 10/2001

⁴ A97/2000

⁵ CP34/96.

27. In *Wakatipu Environmental Society v Queenstown Lakes District Council* (C001/97) the Court cites the principles and criteria for the exercise of discretion for security of costs. They are:

- a. *The ordering of security for costs is discretionary.*
- b. *There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.*
- c. *In the exercise of the discretion there is no predisposition one way or the other.*
- d. *The interests of both the plaintiff and the defendant should be considered. The Court should not allow the rule to be used oppressively to shut out a genuine claim by a plaintiff of limited means. On the other hand, an impecunious plaintiff must not be allowed to use its inability to pay costs as a means of putting unfair pressure upon a defendant. It is inherent in the whole concept of security, however, that the Court has the power to order a plaintiff to do what it is likely to find difficulty in doing, namely, to provide security for costs which ex hypothesi it is unable to pay.*
- e. *Factors to be taken into account in the exercising of the discretion include the following:*
 - i. *The merits and bona fides of the plaintiff's case should be considered even though it is difficult to assess merits at an interlocutory stage. The Court should consider whether the action of the plaintiff has reasonable prospects of success.*
 - ii. *Any "reasonable probability" that the impecuniosity of the plaintiff has been caused by the very acts of the defendant on which the action has been brought is a matter sometimes of importance to be taken into account. This is especially so if an order for security might result in a denial of justice.*
 - iii. *The means of interested shareholders and creditors and their ability to assist with the provision of security may be a relevant matter. The means by which a plaintiff overcomes the problem of provision of security is, however, a matter for the plaintiff.*
 - iv. *The means of interested shareholders and creditors and their ability to assist with the provision of security may be a relevant matter. The means by which a plaintiff overcomes the problem of provision of security is, however, a matter for the plaintiff.*
 - v. *Whether the making of an order for security might prevent the plaintiff proceeding with a bona fide claim.*
 - vi. *Any admission made in the course of proceedings of some part of the plaintiff's claim.*
 - vii. *Any admission made in the course of proceedings of some part of the plaintiff's claim.*
 - viii. *Any payment into Court of a substantial sum which indicates that the plaintiff's claim is not merely one of nuisance value.*
 - ix. *Any payment into Court of a substantial sum which indicates that the plaintiff's claim is not merely one of nuisance value.*
 - x. *Whether there are grounds for thinking that the defendants are using the application oppressively to prevent the plaintiff's case coming before the Court.*
- f. *Quantum of security*

- i. The amount of any security is not intended as a pre-estimate of the actual amount of party and party costs that might become payable should the case go to Court and the defence succeed.*
 - ii. Security should be fixed at an amount which is appropriate in the interests of justice and such requires a consideration of all the issues bearing on that matter in a particular case.*
 - g. The balancing of all these factors is required, bearing in mind that if a plaintiff wins he can get the advantage of costs against the defendant enforceable against the defendant's assets and it is only fair that a defendant sued by an impecunious plaintiff should have some means of recovering his costs if he wins by the ordering of security.*
28. The list should also include the public interest aspect under the RMA.
29. In exercising its discretion, the Court had regard to the fact that the application was for a non complying activity. It held that failure by the society would not mean that costs would be awarded against it.
30. Even though the society raised issues in its appeal not previously raised in its original submission, the Court held that that is not sufficient to warrant ordering the society to give security for costs.
31. The Court was particularly troubled with the applicants attempt to by off the society with \$50,000, and then when that failed, to put pressure on the society by making an application for security of costs.
32. Ultimately, the Court decided that the Society should not be ordered to provide security for costs.