

IN THE HIGH COURT OF SOLOMON ISLANDS

Case No 208 of 2000

Between

QUARTER ENTERPRISE Pty Ltd

Plaintiff

-and-

ALLARDYCE LUMBER Co Ltd

First Defendant

-and-

JOHN HENRY HOWDEN BEVERLEY

Second Defendant

-and-

DEVON GEORGE MINCHIN

Third Defendant

Mr A Radclyffe for the Plaintiff

Mr J Sullivan for the Defendants

Hearing 29<sup>th</sup> July 2004  
Before Registrar Chetwynd

Judgment 4<sup>th</sup> August 2004

Registrar Chetwynd -The application before me raises two issues. Should I order the Plaintiff to provide security for costs and if so how much.

It used to be the case that faced with a Plaintiff from outside the jurisdiction the Court would order security. The rationale being that it was difficult for parties to recover costs from a party who had no assets in the jurisdiction. With reciprocal arrangements between countries this rule has been substantially relaxed. There are a number of decisions which reflect this and Mr Sullivan, for the Defendants, does not deny the proposition that if there is a reciprocal enforcement provision as between two different States then security is not necessarily required. As an adjunct the modern law goes on to say that if security is required then it will be limited to the costs of enforcing the judgment of the home Court in the foreign Court. Mr Sullivan accepts that too is an accurate statement of the law.

In this case then the "foreign" Court would be the Supreme Court of New South Wales. The Plaintiff has already provided security in the sum of \$200,000.00 and no one seems to be saying that sum would be insufficient to enable the

Defendants to enforce any costs order made in Solomon Islands in New South Wales. All other things being equal that would be an end to this matter.

All other things are not equal though, we are dealing here with a Plaintiff which is a Limited Company. The authorities provided by Mr Radclyffe indicate that where the Plaintiff is a Limited Company who's solvency is in question then the Court may order security. In fact of course, this applies to all actions, not just those where the Plaintiff has no assets within the jurisdiction. The "rule" has it's basis in the various enactments governing the operation of Limited Companies. In the UK it used to be section 447 of the 1948 Companies Act. In Solomon Islands we have to turn to section 379 of the Companies Act.

*379. Where a company is plaintiff in any action or other legal proceeding, any Judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.*

This provision is clearly discretionary. The court will look at all the circumstances of the case. Decided cases in other jurisdictions are legion in this area of the law and give adequate guidance on the sorts of issues the court which it will take into account. The court will look at the bone fides of the claim. Here there is **no** suggestion that the claim is a complete sham. The Defendant says it will strenuously resist the claim but there are clearly issues which will have to be decided by the Court. I can also take into account the Plaintiff's reasonable chances of success. Of course now is not the time to go into all the evidence but the Court can look at the paperwork presently before it and say whether or not it thinks there is a reasonable chance of success. The Court can also take into account whether or not the Defendant has contributed to the Plaintiff's "want of means". The court will also look at the timing of the request for security, in other words at what stage in the proceedings the request is made. This is not an exclusive list, I must look at all the circumstances of the case.

Of course, whether I need to consider these issues will be dependant on the financial status of the Company. In the present case there seems to be clear evidence from the Plaintiff itself of it's financial status. Mr Gibb's affidavit exhibits a financial statement. Whilst it is said that the Plaintiff has, "substantial assets in Australia" this does not seem to be born out by the financial statement. It reveals that the Company in 2003 had assets of AU\$ 1,997,558.00. Of those assets at least AU\$ 1,987,929.00 relates to the claim against the Defendants in this case. The financial report discloses no fixed assets. It seems to reveal that there are liabilities of AU\$ 1,604,223.00. The Balance Sheet shows that in 2003 the Company had net liabilities of \$AU\$54,185.00. On the face of it the Plaintiff's own evidence reveals a company that cannot be called solvent. To be fair, it might be said that these are 2003 figures and it is possible that the financial health of the Company has improved substantially. I have no evidence of that. I can only rely on the figures provided in Mr Gibb's affidavit. The Company is clearly insolvent without any means of achieving a substantial income.

This being so, I should and I do take into account all the circumstances of the case in deciding whether to order the Plaintiff to provide further security. In my view this is a case where further security should be provided.

The question then arises of how much. In my opinion in order to reach a decision on that question I must look at the scale of costs which applies in this jurisdiction. It has been said many, many times that it is hopelessly out of date. Be that as it may, it is still the scale of costs which applies here. Recent decisions support the view that the Taxing Officer can be more generous with discretionary items but on the whole the scale of Costs provides woefully inadequate remuneration. In this case the Defendants say that due to the nature of the claim they will, if successful, claim indemnity costs. However, that outcome is by no means certain and will only be decided when the Court hears all the evidence. It would be inappropriate for me to attempt a detailed analysis of the evidence at this stage. I simply cannot say whether indemnity costs will be ordered.

The Defendants Solicitor, Mr Katahanas has provided a detailed analysis of the costs which he considers will be incurred by the Defendants. I do not doubt the accuracy of his calculations in any way. Given that this case is still "evolving" it might even be said he is being conservative. However, the fact remains that the figure he provides would be relevant only if the Court orders costs on an indemnity basis. As I have indicated, it is not possible to make any decision on that issue at the moment. I can of course say that if x and y happens then indemnity costs will be an issue for the Judge who hears this case but the evidence about x and y is, at this stage, very limited and as I have said, it would be inappropriate for me to go into any detail now.

I therefore find that this is a case where, in all the circumstances, the Plaintiff should provide further security prior to trial. For the reasons I have indicated above I feel that the amount should reflect the likely sums to be recovered on a taxation using the existing Scale of Costs. The Plaintiff, having already provided security in the sum of \$200,000.00, should provide security totaling SBD 500,000 or in other words an additional sum of SBD300,000. That is the figure that I find is likely to be the amount ordered on a taxation of costs under our existing Scale of Costs and taking into account some of the discretionary items likely to be found in the Bill of Costs. It is not a scientific calculation in any shape or form it is the best estimate I can give on the paperwork before me at this time. The Plaintiff should provide that additional security within 28 days. If the security is not provided the action will be stayed. The timetable for Directions will be extended accordingly. The costs of this application will be costs in the Cause.

