IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-008519
[2012] NZHC 1554

BETWEEN	EVGENY ORLOV Plaintiff
AND	CHRIS PATTERSON First Defendant
AND	DAVID DUNSTAN Second Defendant

Hearing: 25 January 2012

Counsel: D W Grove for applicant/first defendant
E Orlov for respondent/plaintiff (in person)

Judgment: 3 July 2012

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 3 July 2012 at 3pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:
E Orlov, Level 4, 44 Khyber Pass Road, PO Box 8333, Grafton, Auckland
Graham Skeates Law, P O Box 56179, Dominion Road, Auckland

Counsel:
D Grove, Barrister, PO Box 130, Shortland Street, Auckland

[1] This application for security for costs arises in the unusual circumstance of one barrister suing another for the latter's conduct in a civil proceeding where the two were acting for opposing parties. The plaintiff, Mr Orlov, is seeking redress from the first defendant, Mr Patterson, and the second defendant, Mr Dunstan (Mr Patterson's client) for costs that he says he has incurred unnecessarily due to the defendants' conduct in that other proceeding, and for what Mr Orlov claims was an unmerited attack on his reputation.

[2] Mr Patterson contends that there is reason to believe that Mr Orlov will be unable to pay his costs if he (Mr Orlov) is unsuccessful in the proceeding. He seeks security of $32,712 as the costs he would expect to receive on a scale 2B basis if costs are ultimately awarded in his favour. He is willing to accept provision of the security on a staged basis.

[3] Mr Orlov opposes the application on the grounds that he has the means to satisfy any award of costs, and that the matters on which Mr Patterson relies do not, in fact, demonstrate an inability to pay. In the event that the Court considers that there is reason to believe he will be unable to meet costs, he asks that the Court decline to exercise its discretion. If the Court is to consider an award, he contends that the amount sought is unreasonable and that any security should be provided in stages.

The background

[4] Messrs Orlov and Patterson are barristers. They were instructed by opposing parties in a civil proceeding in the District Court. Mr Orlov represented one of several defendants, Axon Projects Limited (Axon). Mr Patterson represented the plaintiff, Mr Dunstan.

[5] Mr Dunstan settled his claim against the defendants other than Axon. As a consequence of that settlement Mr Dunstan received part of his claim. He continued to pursue his claim against Axon.

[6] At about the time of the settlement with the other defendants there was an unresolved dispute between Mr Dunstan and Axon over the filing of Axon's statement of defence:

(a) Axon had been late filing its statement of defence, and was directed to file an application for leave to file out of time.

(b) Axon had failed to appear at the first call of its application for leave. The application was dismissed and the Court gave a direction for hearing of Dunstan's claim against Axon by way of formal proof.

[7] Mr Orlov filed an application to recall that order. When that was declined he filed an appeal which was also unsuccessful.

[8] Mr Dunstan was represented by Mr Patterson on each of Axon's unsuccessful applications. Subsequently Mr Patterson, on instructions from Mr Dunstan, applied for costs against Axon and against Mr Orlov and his employer/instructing solicitor, Mr Gates, personally. Mr Orlov contended that the District Court did not have jurisdiction to make the order against him/his instructing solicitor, and also sought details of the costs being sought. He invited withdrawal of the application. Mr Patterson, on Mr Dunstan's behalf, declined to do so.

[9] Before Mr Dunstan's application was heard:

(a) Mr Orlov ceased to act for Axon before Mr Dunstan's application for costs was heard. In March 2009 Mr Patterson corresponded with Axon's new counsel, Mr Bruce Stewart QC, in relation to a liquidation proceeding commenced by Mr Dunstan, in which the parties exchanged proposals for settlement. In the course of that correspondence Mr Patterson expressed the view that Mr Orlov had been negligent in his handling of Axon's case (for example, in failing to file certain documents and in failing to adequately prepare, focus and present submissions) and made the following propositions:

(i) That Mr Dunstan was only seeking costs against Mr Orlov and not his instructing solicitor, Mr Gates;

(ii) That Mr Dunstan's preference was to recover costs from Mr Orlov and not Axon;

(iii) That Axon was to file a memorandum consenting to an "uplift" in costs in respect of both the District Court and Court of Appeal proceedings;

(iv) Axon was to file a supporting affidavit in respect of the increased costs, specifying that Axon was not kept informed by Mr Orlov of the status of proceedings, the steps being taken on its behalf or the costs being incurred;

(v) That Mr Dunstan and his counsel would provide extensive free assistance to Axon in writing a letter of demand against Mr Orlov and Mr Gates and a complaint to the New Zealand Law Society, and in preparing a statement of claim pleading breach of contract, negligence and breach of fiduciary duties.

(b) Mr Dunstan settled with Axon, and with Mr Gates and his insurer. As a term of that settlement, the application for costs was withdrawn against all parties (including Mr Orlov).

[10] Mr Orlov alleges that there is a history of "bad blood" between himself and Mr Patterson which was played out in the Dunstan proceedings, and particularly the application for costs against him personally. Mr Orlov issued this proceeding seeking redress for the unnecessary costs that he says he has incurred and to remedy what he regards as an attack on his reputation. He has pleaded several causes of action:

(a) Maintenance/champerty

Mr Dunstan did not have a bona fide interest in the latter stages of the Dunstan proceedings, that there was an arrangement between Mr Patterson and Mr Dunstan that legal fees would be paid out of the

costs application, and that the fees sought were unreasonable and would not have been paid but for the contingency arrangement.

(b) Abuse of process – malicious civil proceeding

Both the application for costs and the letter written to new counsel in March 2009 were a malicious use of the Court's process for the predominant purpose of causing him injury; or alternatively, the application for costs was for the purpose of inducing him to stop acting for Axon and otherwise causing him embarrassment.

(c) Unlawful conspiracy to injure

Mr Patterson and Mr Dunstan conspired by unlawful means to cause injury to Mr Orlov and destroy his relationship with Axon through their proposals contained in the March 2009 letter.

(d) Defamation

The March 2009 letter was defamatory.

(e) Injurious falsehood

In the alternative, the March 2009 letter was an injurious falsehood.

[11] Mr Patterson denies that the application for costs was issued for any ulterior purpose or as a consequence of any malice on his part towards Mr Orlov. He says that he was instructed to take all steps in the ordinary course of conducting the Dunstan proceeding.

Principles to be applied

[12] The application for security for costs is made under r 5.45 of the High Court Rules. The applicable parts of that rule are as follows:

5.45 Order for security of costs

(1) Subclause (2) applies if a Judge 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 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.

[13] The Court of Appeal stated the general approach to such applications in *A S McLachlan Ltd v MEL Network Ltd*, summarised as follows:[1]

(a) The applicant must satisfy a threshold test by showing that there is reason to believe that the plaintiff will be unable to pay costs if their proceeding is unsuccessful.

(b) Once that threshold is met, the Court has an unfettered discretion to decide whether or not to order security. This discretion is to be exercised after careful consideration of all the circumstances, and cannot be fettered by principles.

(c) In exercising this discretion, the Court must balance the interests of the plaintiff and defendant. On the one hand, the plaintiff's interest in pursuing legitimate proceedings ought to be protected; consequently, an order that might act as a barrier to the plaintiff's claim ought to be made cautiously. Such an order may be appropriate where the plaintiff's claim has little chance of success. Conversely, the

[1] *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13]-[16].

defendant ought to be protected against unjustified litigation. Therefore, a balancing of interests requires consideration of the relative merits of the substantive case.

Threshold test

[14] In *Concorde Enterprises Limited v Anthony Motors (Hutt) Ltd (No 2)* this Court stated that to satisfy the threshold test:[2]

> ...there should be credible (that is, believable) evidence of surrounding circumstances from which it may reasonably be inferred that the [party] will be unable to pay the costs. This does not, of course, amount to proof that the [party] will, in fact, be unable to pay them.

[15] In *Totara Investments v Abooth Ltd* this Court held that, "in the absence of direct evidence, it can be sufficient to adduce evidence of surrounding circumstances from which an inference of inability to pay can reasonably be drawn".[3]

[16] Furthermore, while the Court "will give due weight to a plaintiff's sworn assertion that it will be able to meet costs awarded", such an assertion is not decisive.[4]

Has the threshold test been met?

[17] Mr Patterson contends that there is reason to believe that Mr Orlov will be unable to meet any award of costs, pointing to the actions and statements of Mr Orlov in this proceeding and two other proceedings:

(a) In 2009, Mr Orlov was counsel for parties in a civil proceeding in this Court, and was ordered to pay costs of $21,120 jointly and severally with his client.[5] In an application for stay pending appeal he said that it would put him under pressure to require him to pay those costs, but if the Court was not prepared to grant a stay he asked that he be permitted to pay the award at the rate of $1,500 per month. He

---

[2] *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1977] 1 NZLR 516 (SC) at 519.
[3] *Totara Investments v Abooth Ltd* HC Auckland CIV-2007-404-990, 4 March 2009 at [28].
[4] *Nikau Holdings Ltd v Bank of New Zealand* (1992) 5 PRNZ 430 (HC) at 436.
[5] *Anza Distributing (NZ) Ltd (in liquidation) v USG Interiors Pacific Ltd* HC Auckland CIV 2007-404-3474, 20 November 2009.

claimed that health reasons had required him to reduce his workload. In its judgment refusing the stay, the Court also recorded Mr Orlov's evidence that his clients had not appealed the costs judgment (so Mr Orlov was pursuing the matter on his own), and that he had sought waiver of the filing fee and would be applying for waiver of any requirement to provide security for costs. The wider litigation was settled before Mr Orlov's appeal was heard. The terms of settlement included all costs liability under the High Court orders. Mr Orlov sought to continue his appeal for personal and professional reasons. The appeal was struck out after the Court of Appeal indicated it would only hear it if counsel was appointed by the Court, at Mr Orlov's expense, to contradict Mr Orlov's arguments, and Mr Orlov indicated that he would not accept that requirement. Mr Orlov sought to appeal that decision to the Supreme Court, again with an application for waiver of the filing fee. In February 2011 the Supreme Court refused to grant a waiver (and subsequently declined leave), noting in the course of its judgment that Mr Orlov's submission that the estimated costs of the "contradictor" would present a barrier to him.

(b) In 2009 Mr Orlov took proceedings in the District Court against another barrister. On 4 May 2010, Mr Orlov consented to an order that he provide security for the defendant's costs in the sum of $20,000, with the proceedings to be stayed pending that security being given.[6] Mr Patterson produced evidence that at the time of considering bringing this application, the security had not been paid and the proceeding remained stayed.

(c) On 1 March 2011, Mr Patterson's solicitors wrote to Mr Orlov referring to the remarks of this Court in the stay application, and noted that the remarks indicated that he would be unable to pay costs if Mr Patterson succeeded. They asked Mr Orlov to advise whether he was party to a proceeding in which an order had been made that he provide security, or alternatively that he agree to provide security in this case in the sum of $28,952. Mr Orlov responded on 8 March 2011,

[6] *Orlov v Godinet* DC Auckland CIV-2009-004-001943, 4 May 2010.

contending that he was able to pay any costs that were awarded, without supporting that statement in any way other than saying that he was a practising barrister. He also referred to the High Court proceeding where the costs order had been made against him. He said that those costs had been paid, and contended that that was evidence that he was able to pay costs. He did not refer to the District Court proceeding where he had consented to the order for security for costs.

(d) In a case management conference in this proceeding on 19 April 2011, the Court recorded an indication given by Mr Orlov in the conference that he would discuss with counsel for Mr Patterson an arrangement for providing security by way of sequential payments. Mr Patterson's solicitors put a proposal to Mr Orlov immediately after that conference. The instructing solicitor has given evidence that he did not receive a response to that proposal, other than an enquiry as to whether Mr Patterson and the second defendant (Mr Dunstan) might be willing to "cap costs". He says that he referred Mr Orlov to Mr Patterson's counsel. It is not in dispute that there was no follow up communication between Mr Orlov and Mr Patterson's counsel.

[18] Mr Orlov asserts in his notice of opposition and affidavit in support of that opposition that he has the ability to meet any award of costs from his barrister's practice, or alternatively out of the property in which he now resides. He annexed to his affidavit financial statements for the company under which he conducts his barrister's practice, Equity Law Barristers Chambers Limited, and produced a certificate of title for a property in which he and his wife live. He pointed out that the financial statements show an equity position of $63,271 as at 31 March 2011, and the title to the property was registered in the joint names of himself and his wife (he confirmed that he and his wife hold the property as trustees for a family trust). Further, it is not apparent from the accounts, nor stated in Mr Orlov's evidence, exactly where the money to pay costs would come from (and I note that there is no undertaking from the company itself that it will be liable for any costs).

[19] In addition to that, Mr Orlov says that the matters on which Mr Patterson places reliance do not in fact evidence an inability to pay:

(a) He says that he has settled the High Court proceeding in which he was ordered to pay costs "and therefore has paid all cost orders in relation to that". He has given no detail about the settlement, and particularly how the costs were taken into account or paid. He contends that his unwillingness to meet the costs of a "contradictor" was a matter of rights rather than inability to pay.

(b) He contends that he consented to the security in the District Court proceeding "without any admission that I was unable to pay security". He contends that he said that he was able to pay but wanted to put the security over an asset. Again, he has not provided any detail. He says that he is not pursuing that proceeding at the moment because the same underlying facts are being argued in a different proceeding (a disciplinary proceeding), and he will provide security when he decides to continue the claim.

(c) He asserts that he did not respond to the proposal to provide security in this proceeding because it was unreasonable, and because he wished to defer any decision until security could be dealt with in relation to both defendants (Mr Dunstan had not been served at that time).

[20] I am not persuaded that the accounts produced by Mr Orlov dispose of the question of his ability to pay. Although he is the sole shareholder of Equity Law Barristers Chambers Limited, and those accounts (although now out of date) show the equity as Mr Orlov asserts, the company is not a party to the proceeding, and tax records produced by Mr Orlov with his submissions show a gross income for Mr Orlov for that financial year of only $17,500, and a gross income for the eight months to end November 2011 of only $25,500. There is no evidence from Mr Orlov that his living expenses are met in some other way (there is no evidence of any assets in Mr Orlov's name other than the shares in Equity Law Barristers Chambers Limited). This evidence tends to negate Mr Orlov's argument that his decision not to provide the security in the District Court proceeding was entirely for other reasons.

[21] Similarly, the production of the title to the property does not help Mr Orlov. There is no undertaking or consent from the trustees to the use of any equity in that property to meet costs. The trust deed has not been produced, nor has Mr Orlov given any other evidence as to whether the trustees are legally able to provide security. Further, there is no evidence as to the value of the property, or the amount of any equity in it (the title shows a mortgage registered against it).

[22] Turning to the indicators of his inability to meet an order, as advanced by Mr Patterson:

(a) It is self-evident from the matters reported in the decisions in the earlier High Court proceeding that Mr Orlov was under financial pressure at the time. The applications for waiver of fees cannot be explained away by an argument that he would not agree to a "contradictor" on the grounds that it was denying him civil rights (if that was, indeed, the basis for his refusal to agree to that suggestion). Mr Orlov sought to turn this point to his advantage by arguing that the costs that were the subject of the order were paid. However, he has given no evidence of the settlement, and his statement in his affidavit is equivocal as to how the payment was made. In particular, he has not produced any evidence to show a payment by him.

(b) It does not seem likely that Mr Orlov would have agreed to give security in the District Court proceeding if he was able to meet an award of costs. Even if his contention that he did so to avoid the cost of argument is accepted, that suggests that the matter was not clear-cut. If it were, I would expect him to have put material to the defendant to demonstrate his position and to have proved that in this application. I suspect that he had no more available than he has put forward in this application, in which case the consent can be taken as an indicator of some difficulty.

(c) I am also sceptical of the explanation given for not responding to the proposal put to him in April 2011 for security in this proceeding. At the very least I would have expected his position to be put in writing,

perhaps with a counter proposal at a reduced sum until such time as Mr Dunstan had been served and had indicated whether he wished to seek security.

(d) I also take into account that the evidence before the Court that Mr Orlov is currently facing complaint proceedings by his professional body. If the complaints were to be upheld (which is not a matter that I can evaluate in any way in this proceeding) Mr Orlov's ability to meet any award of costs could well be impaired.

[23] Weighing all of the above matters, I am satisfied that there is reason to believe that Mr Orlov will be unable to meet an award of costs. There is no evidence that he has any assets in his own name, and the evidence shows only limited income. This is not to say that he will not, in fact, be able to do so when the time arises. It simply means that Mr Patterson has met the threshold test.

Should security be granted?

[24] The Court has a discretion as to whether to award costs. Mr Orlov invites the Court not to make any award on the grounds that the application has not been brought promptly, that it is not in the interests of justice to do so, and because he has a strong case on the merits.

[25] I am not persuaded that Mr Orlov has any basis for resisting an order for security on the grounds of delay. The prospect of an application was raised in the first case management conference, and a timetable direction was given then (which allowed time for the parties to reach agreement, if that was possible).

[26] Mr Orlov raised two matters which could be a basis for arguing that an order should not be made on the justice of the case. The first is his contention that Mr Patterson's approach to the underlying litigation was motivated by malice (although this is probably more a matter for his arguments on merits). The second, which is again interrelated, is that Mr Patterson and Mr Dunstan had an arrangement that Mr Patterson was acting on a contingency basis, and that was the reason for pursuing Mr Orlov personally for the costs.

[27] Mr Patterson has stated in evidence that he brought the application for costs in the District Court on Mr Dunstan's instructions. Whether or not that was the case, and whether or not there was any underlying malicious motivation, is a matter for substantive hearing. It would need very clear evidence to persuade me that it is a factor that I should take into account on the present application. At best, Mr Orlov can only seek to raise an inference from the fact that Mr Patterson proceeded with the application for Mr Dunstan in the face of Mr Orlov's contention that the District Court did not have jurisdiction to award costs against Mr Orlov. That falls well short of what would be needed to persuade me to decline exercising the discretion in this case.

[28] The last point is also relevant to Mr Orlov's principal ground for contending that no orders should be made, namely that the merits are strongly in his favour. The Court will not embark on a consideration of merits on these applications, save in the clearest of cases. This is not one of them. Mr Orlov says that his primary claims are those arising out of the application for costs against him personally. That costs application relies on a significant extension of the now accepted duty of care owed by a barrister to his client. There may also be an arguable point arising out of the lack of jurisdiction, but that will need to be considered in light of Mr Patterson's contention that he was acting on his client's instructions.

[29] Mr Orlov's other claims centre on the letter written to Axon's replacement counsel. Mr Patterson contends that that letter is subject to absolute litigation privilege. If so, all claims relying on that letter must fail.

[30] Mr Orlov attempted to persuade me that the underlying facts were clear, and had to give rise to a successful outcome for one or more of his causes of action. I consider that the merits, if anything, would tend to favour Mr Patterson. However, I do not express that as a concluded view, but rather to indicate that I do not regard merits as a factor for declining to make an order for security.

Quantum

[31] Mr Patterson seeks an order that Mr Orlov provide security for a total sum of $32,712, being the costs to which he would be entitled on a scale 2B basis in the

event that he is successful in the proceeding. He seeks an order that the security be provided by way of payment into Court or into a solicitor's trust account. He is willing to accept an order for payment on a staged basis. The costs are calculated on an estimated two days being required for trial. Counsel for Mr Patterson produced a schedule supporting the costs claimed by reference to relevant items within Schedule 3 of the High Court Rules.

[32] Mr Orlov submitted that if security was to be ordered, he would be in a position to pay it out of his practice, over time. He referred to significant turnover in his practice, notwithstanding the modest drawings that he has been receiving.

[33] I am satisfied that the security being sought by Mr Patterson is reasonable for a claim involving multiple causes of action (even though they derive from only two underlying complaints, namely pursuing the claim for costs against Mr Orlov personally, and the letter written by Mr Patterson to Axon's new counsel on 12 March 2009). Scale costs seem likely to be less than actual costs (they are designed to provide a contribution only towards actual costs). In the circumstances I consider that an order for $30,000 is appropriate.

[34] I also consider that costs should be paid on a staged basis, with 40% of the sum to be paid now for all work up to the end of the interlocutory steps, and the balance to be paid before preparation for trial commences. Mr Orlov has had time since the application was argued to put funds aside, and will have time between now and allocation of a trial date to accumulate the balance.

Decision

[35] Mr Orlov is to provide security for the costs of Mr Patterson in the sum of $30,000 in the following stages:

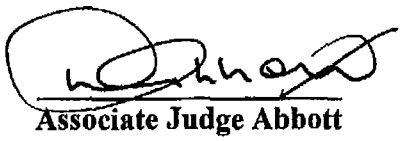
(a) The sum of $12,000 immediately; and

(b) The sum of $18,000 prior to the proceeding being set down for trial.

[36] Security is to be provided by lodging the money with the Registrar of the Court, or to be lodged in a solicitor's trust account on interest bearing deposit on an undertaking not to be dispersed without further order of the Court, or in any other manner that the parties may agree and advise the Court in a joint memorandum.

[37] In light of the uncertainty over Mr Orlov's ability to pay, the proceeding is stayed pending payment of the first sum of $12,000, and a trial date is not to be allocated until the second sum of $18,000 is paid.

[38] Mr Patterson is entitled to costs on this application on a scale 2B basis. Those costs are to be paid within 10 working days of service of a sealed order.



Associate Judge Abbott