IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA128/2023
[2023] NZCA 413

BETWEEN	GAUTAM JINDAL Applicant
AND	LIQUIDATION MANAGEMENT LIMITED First Respondent
	IMRAN MOHAMMED KAMAL Second Respondent

Court:	Gilbert and Wylie JJ
Counsel:	Applicant in person A Ho for Respondents
Judgment: (On the papers)	1 September 2023 at 10 am

JUDGMENT OF THE COURT

A Leave to appeal the decision of the High Court fixing security for costs is declined.

B The applicant must pay costs to the respondents jointly for a standard application on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wylie J)

[1] On 9 December 2022 Associate Judge Lester, in the High Court at Auckland, ordered the applicant, Gautam Jindal, to pay security for costs in respect of a claim

that Mr Jindal has filed against the first respondent, Liquidation Management Ltd, and the second respondent, Imran Kamal.[1]

[2] Mr Jindal sought leave to appeal the security for costs judgment as required by s 56(3) of the Senior Courts Act 2016. His application for leave came before the Judge on 1 February 2023 and, in a reserved judgment issued on 13 February 2023, the Judge declined the same.[2]

[3] Mr Jindal now seeks the leave of this Court under s 56(5) to appeal the security for costs judgment.

The factual background

[4] Mr Jindal alleges that Mr Kamal, acting as a liquidator, charged excessive fees in 133 liquidations in the months leading up to 31 August 2021. He asserts that Mr Kamal brought the liquidations to an end within a relatively short period, as Mr Kamal anticipated that he would shortly be unable to practice as a liquidator. He says that the Inland Revenue Department (the IRD) was a creditor in almost all of the liquidations and that the amount received by Mr Kamal in his capacity as liquidator totalled $3,521,000. Mr Jindal alleges that Mr Kamal charged fees and overheads of approximately $2,582,000. He claims that Mr Kamal's fees and expenses were unreasonable and he seeks an order that the Court fix them at a reasonable level and that any excess be refunded by Mr Kamal and/or his company, Liquidation Management Ltd.

[5] Three causes of action are alleged:

(a) Mr Jindal seeks to rely on the High Court's powers under s 284 of the Companies Act 1993 to supervise liquidations. He seeks leave to bring the proceeding pursuant to s 284(1).

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1 *Jindal v Liquidation Management Ltd* [2022] NZHC 2292 [Security for costs judgment].
2 *Jindal v Liquidation Management Ltd* [2023] NZHC 183 [Leave judgment].

(b) Mr Jindal alleges that Mr Kamal has breached "fiduciary duties" owed to each of the 133 companies, their shareholders, directors and creditors, by charging excessive fees and expenses.

(c) Mr Jindal alleges unjust enrichment by the respondents at the cost of the directors and shareholders of each of the 133 companies.

The High Court judgments

[6] Three judgments assist in understanding the background to this matter. The first was given by Associate Judge Taylor and the second and third by Associate Judge Lester.

The originating application judgment

[7] Mr Jindal sought to commence his proceeding by way of originating application.[3] He required leave to do so under r 19.5 of the High Court Rules 2016. His application for leave came before Associate Judge Taylor in December 2021. The Judge declined Mr Jindal's application for leave to commence the proposed proceeding by way of originating application.[4] Relevantly for present purposes, the Judge set out the background to the proceeding. It appears that Mr Jindal was the director and sole shareholder of a company that was placed in liquidation and that Mr Kamal was appointed as its liquidator. Mr Jindal takes the view that Mr Kamal charged excessively for his services as liquidator. He says that Mr Kamal represented that his fees would be $4,000, but later issued invoices totalling more than $20,000. He also alleges that Mr Kamal pursued a non-existent shareholder account and fabricated liquidation accounts to show that the shareholder account was overdrawn. He says that Mr Kamal refused to progress the liquidation until his fees were paid and that he repeatedly asked for money in settlement of the overdrawn shareholder account. It appears that it was only after these experiences that Mr Jindal began to research other liquidations in which Mr Kamal had been involved and that as a

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3 *Jindal v Registrar of Companies* [2021] NZHC 3268 [Originating application judgment].
4 At [51].

consequence, he uncovered the liquidations that are the subject of the present proceeding.[5]

The security for costs judgment

[8] After referring to the factual background, Associate Judge Lester set out the relevant rule — r 5.45 of the High Court Rules — under which security for costs was sought by the respondents. It was common ground that the threshold set out in r 5.45(1) for ordering the payment of security had been met.[6] The Judge proceeded to consider whether the Court should exercise its discretion to order security and if so in what amount. He reviewed the merits and prospects of Mr Jindal's claims and expressed the view that the second and third causes of action relied on by Mr Jindal were "hopeless".[7] He noted that Mr Jindal was pleading that a fiduciary duty was owed to the 133 companies, their shareholders and creditors, but that Mr Jindal did not plead that a duty was owed by the respondents to him. The Judge commented that Mr Jindal was "a stranger" to the 133 companies and that he was not a director, shareholder or creditor of any of them. He concluded that the second cause of action had no prospect of success and that this supported the ordering of security.[8] Likewise, the Judge considered that the third cause of action — unjust enrichment — would also fail, as one of the elements of such a claim is that the unjust enrichment complained of was gained at the claimant's expense. The Judge considered that this was an insurmountable hurdle to Mr Jindal's third cause of action, because he did not assert that he has suffered loss.[9]

[9] As to the first cause of action, the Judge noted that Mr Jindal is seeking to rely on s 284 of the Companies Act.[10] The Judge noted that all of the 133 liquidations which were the subjects of the proceeding were voluntary liquidations. He nevertheless observed that liquidators appointed by shareholders are subject to the same jurisdiction as court appointed liquidators.[11] He recorded that Mr Jindal has no

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5 At [10]–[16].
6 Security for costs judgment, above n 1, at [14]–[16].
7 At [22].
8 At [22]–[23].
9 At [24].
10 At [25].
11 At [30].

personal interest in the proceeding and rather claims to be acting as a "watchdog".[12] He noted that Mr Jindal has brought his proceeding to the attention of the IRD and observed that the Commissioner is well able to protect her own interests. The Judge also commented that the shareholders who appointed Mr Kamal as liquidator would be aware of the outcome of the liquidation of their own companies and if they had an issue with the fees charged, they could have sought leave to bring their own applications.[13] He considered that there is a further practical point — to whom would any excess fees be paid if Mr Jindal's proceeding is successful? The Judge noted that all companies have been removed from the Companies Register and that they would have to be restored and new liquidators appointed.[14] The Judge considered that the prospects of Mr Jindal being able to obtain leave to pursue the first cause of action are low and that there is "simply no need for him to adopt a 'watchdog' approach".[15]

[10] The Judge also noted that Mr Kamal is no longer an insolvency practitioner and that there is no wider public interest in Mr Kamal's continued involvement in the insolvency field.[16] The Judge was also far from persuaded that the Court has an inherent jurisdiction to permit a person with nothing at stake in relation to a liquidation to seek to review a liquidator's fees. Nevertheless, and assuming that the Court has such jurisdiction, it was, in the Judge's view, highly doubtful that Mr Jindal has standing to seek leave to review the respondents' fees.[17] The Judge was satisfied that Mr Jindal's claims were sufficiently lacking in merit as to have little to no prospect of success and that it was appropriate in the circumstances to order security.[18]

[11] The Judge considered that staged security was appropriate. He fixed initial security in the sum of $7,500, directing that until this sum is paid, Mr Jindal's proceeding is stayed, including his application for leave under s 284(1). He recorded that if security is paid, then Mr Jindal's application for leave can proceed (providing that Mr Jindal also pays the costs ordered on the security for costs application).[19]

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12 At [31].
13 At [32].
14 At [34].
15 At [35].
16 At [38].
17 At [39]–[40].
18 At [44].
19 At [45]–[46] and [50].

The Judge recorded that if the application for leave fails, that will bring the proceeding to an end; if it succeeds, he fixed further security in the sum of $40,000 through to the end of the discovery process. He reserved leave for this figure to be revisited depending on the final number of companies in issue.[20]

The leave judgment

[12] Mr Jindal sought leave to appeal the security for costs judgment. Associate Judge Lester declined this application.[21] He did not consider that Mr Jindal had identified any arguable errors in the security for costs judgment.[22] He noted Mr Jindal's argument that the proposed litigation is in the public interest, because the proceeding is aimed at having Mr Kamal restore fees to the companies in liquidation, and that the money will then, in most cases, be paid to the IRD. The Judge did not accept this submission. He noted that the Commissioner was well able to pursue Mr Kamal if she considered that he had charged excessive fees. The Judge did not consider that the proposed proceeding is a tax evasion case.[23] Further the Judge did not consider that it is reasonably arguable that he erred in concluding that the case did not engage the public interest. In any event, the Judge noted that there is no rule that plaintiffs in litigation with a public interest element are immune from security for costs.[24] He did not consider that Mr Jindal had identified an arguable error of law or fact and he did not consider that the interests of justice warranted the grant of leave, because "Mr Jindal's case is meritless". He considered that, in balancing the interests of the parties, the respondents should not be exposed to further costs without the protection of security.[25]

Submissions

[13] Mr Jindal is representing himself. In his written submissions he refers to the "watchdog principle". He argues that the second respondent, Mr Kamal, is not of good moral character and that this has previously been recognised by the courts. He accepts

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20 At [46]–[48].
21 Leave judgment, above n 2, at [44].
22 At [20].
23 At [22]–[27].
24 At [30]–[32].
25 At [41].

that he has no personal interest in any fees recovered from the respondents, but he argues that the public interest demands that the High Court invoke its supervisory jurisdiction over the respondents under s 284 of the Companies Act. He argues that the security ordered by Associate Judge Lester is contrary to the approach commonly taken to security in public interest cases and that the Judge erred when he held that Mr Jindal is not justified in adopting a watchdog or public interest-based role, because those with standing under s 284, including the IRD, can protect their own interests. He argues that the Court should not seek to prescribe who can act as a watchdog. In any event, Mr Jindal asserts that he has been in touch with a number of the shareholders and directors of the liquidated companies. He says that two have provided letters of support and executed deeds of assignment transferring to him their claims to moneys owed in the liquidations. He says he is now a creditor in two of the liquidations.

[14] Further, Mr Jindal argues that the effect of ordering security is that his claim has effectively been struck out. He argues that he ought not be "caught in the dilemma of seeking leave to appeal". He denies criticisms levelled against him by the Judge for failing to provide particulars of why he says Mr Kamal's fees were excessive. He says that he cannot do so, given the "scanty" and "high-level" nature of the respondents' liquidation reports. He says that further information is needed so that he can assess the reasonableness of the fees charged and that the onus is on the respondents to provide detailed records for the court to review.

[15] Mr Jindal submits that the Judge was wrong to treat his second and third causes of action as untenable and that both follow from the first. He identifies the following questions that he wishes to raise on appeal:

(a) Is there an element of public interest or benefit such that security for costs should be dispensed with?

(b) Was the High Court's assessment of the merits of his proceeding correct?

(c) Was the High Court justified in fixing second stage security for costs in the sum of $40,000, payable once he is granted leave under s 284?

[16] The respondents oppose Mr Jindal's application. They take issue with many of the facts asserted by Mr Jindal. They dispute the level of fees alleged to have been charged by them. They argue that the Judge did not err in his assessment of the public interest, noting that private interests are engaged in this case and that those with the private interests can take action if they wish to do so. They note that Mr Jindal is yet to show how his interests have been affected by their actions and argue that the deeds of assignment which Mr Jindal referred to in his submissions do not change the position. It is said that there is no proper evidence of those assignments and that, since the companies have ceased to exist for all relevant purposes, the deeds cannot effectively assign anything. They also support the Judge's reasoning as to why Mr Jindal's second and third causes of action are untenable, claiming that they did not owe Mr Jindal any duties and that there is nothing to support the assertion that they were unjustly enriched.

Analysis

[17] The leave judgment was given in the context of the interlocutory application made by the respondents for security for costs. As the High Court declined leave, no appeal lies unless leave is given by this Court.[26]

[18] Leave to appeal against an interlocutory decision should not be granted unless that proposed appeal raises some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the costs and delay of the appeal and the lack of general or precedential value.[27] The ultimate question is whether the interests of justice are

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[26] Senior Courts Act 2016, s 56.

[27] *Greendrake v District Court of New Zealand* [2020] NZCA 122 at [6]–[7].

served by granting leave.[28] As this Court stated in *Ngai Te Hapu Inc v Bay of Plenty Regional Council*:[29]

> [17] … leave to appeal should only be granted where the significance or implications of an arguable error of fact or law, either for the particular case or for the applicant or as a matter of precedent, warrants the further delay which the appeal process would involve. …

[19] As noted, r 5.45 of the High Court Rules deals with security for costs. When the Court is considering a security for costs application the following questions will normally arise:

(a) Has the applicant satisfied the Court of the threshold fixed under r 5.45(1)?

(b) How should the Court exercise its discretion under r 5.45(2)?

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

(d) Should a stay be ordered?

Whether or not to order security, and if so, quantum, are discretionary matters and this Court has held that the discretion is not to be fettered by constructing principles from the facts of previous cases.[30] The general approach taken by the courts is to balance the two competing interests — the defendant's interest in being protected from a barren costs order and the plaintiff's right of access to the court.[31]

[20] The Judge was aware of and cited these principles.[32] It cannot responsibly be suggested that there was any error in the approach taken by the Judge.

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28 At [6(e)].
29 *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2018] NZCA 291.
30 *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13]–[14].
31 *Clear White Investments Ltd v Otis Trustee Ltd* [2016] NZHC 2837 at [4].
32 Security for costs judgment, above n 1, at [17]–[18].

[21] It was common ground before the Judge that the threshold fixed by r 5.45(1) was satisfied. As he noted, the real issue between the parties was whether the Court should exercise its discretion to order security and if so, in what amount.[33]

[22] In considering the exercise of his discretion the Judge assessed the merits of Mr Jindal's proceeding. He concluded that the second and third causes of action have no prospect of success.[34] Mr Jindal wishes to dispute this conclusion but we do not consider that it is capable of bona fide and serious argument. The Judge referred to well-known and established legal principles. Any challenge to the Judge's views — that no fiduciary duty was owed by the respondents to Mr Jindal and that any enrichment Mr Kamal received was not gained at Mr Jindal's expense — has no prospect of success.

[23] As for the first cause of action, the Judge had significant reservations as to whether Mr Jindal is likely to be granted leave under s 284(1) of the Companies Act.[35] It is not in dispute that at the time of the leave judgment, Mr Jindal had no interest in any of the companies that had been struck off, whether as a director or as a shareholder. As the Judge observed, if Mr Jindal was correct in his argument that he should be granted leave, any member of the public could challenge the fees of any liquidator.[36] It is hard to fault the Judge's logic on this point and again we doubt that it can be seriously argued on appeal that the Judge erred in this regard.

[24] Since the leave judgment issued, Mr Jindal has taken an assignment of the debts owed to creditors in two of the companies. There are difficulties in this regard. First, the assignments are not properly before us. They are referred to in Mr Jindal's submissions and he annexed copies of them. However, Mr Jindal should have sought leave to admit the assignments as further evidence under r 45(1) of the Court of Appeal (Civil) Rules 2005. In the circumstances, we can give them little weight. Secondly, even if Mr Jindal is now a creditor pursuant to the deeds of assignment, he will still require the leave of the High Court under s 284(1) before he can seek orders under that section. That he is now a creditor does not change the position.

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33 At [16].
34 At [22]–[24].
35 At [39]–[40].
36 At [40].

[25] There are other reasons which suggest that it is unlikely that Mr Jindal will obtain leave under s 284(1). We note the background recited by Associate Judge Taylor in the originating application judgment and summarised above at [7]. The respondents assert that the proceeding is motivated by ill will between Mr Jindal and Mr Kamal. There appears to be some force in that argument. There are the other difficulties highlighted by Associate Judge Lester, including the fact that all of the 133 companies have been struck off the Register. It is also relevant that the IRD and/or any of the other persons listed in s 284(1) could have sought to bring proceedings under that provision but have not done so. Again we do not consider that there is any question of law or fact arising out of the Judge's observations as to the likelihood of Mr Jindal succeeding on his first cause of action which is capable of bona fide and serious argument.

[26] Mr Jindal claims to be acting as a "watchdog" in the public interest. Where litigation is brought in the public interest, or as matter of public importance, this can be a factor in the exercise by the court of its discretion in relation to security for costs.[37] The Judge acknowledged this but he did not consider that Mr Jindal's proceeding is bona fide in the public interest.[38] There are a large number of persons and entities with an interest in the matters Mr Jindal seeks to raise — the creditors, shareholders and directors of each of the companies which have now been struck off. Interested persons include the IRD. The Commissioner is certainly capable of protecting her own interests if she considers that the respondents' fees are excessive. The proceeding does not concern, for example, rights guaranteed by the New Zealand Bill of Rights Act 1990 or any other public law concerns. Essentially, Mr Jindal, as an outsider, is seeking to bring, arguably for collateral purposes, a proceeding which can be brought by others directly interested if they wish to do so. We doubt that any challenge to the Judge's view has any realistic prospect of success.

[27] Mr Jindal complains that the security ordered by the Judge denies him access to the court. It appears that Mr Jindal is relatively impecunious, but there is no suggestion that any impecuniosity results from the respondents' actions. As the Judge

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37 See *Ratepayers and Residents Action Association Inc v Auckland City Council* [1986] 1 NZLR 746 (CA) at 750–751 per Richardson J and 753–754 per McMullin J.

38 Security for costs judgment, above n 1, at [37]–[38].

recognised, balancing the interests of plaintiff and defendant is the overriding consideration.[39] The court's broad discretion can be exercised to require security even if doing so prevents a plaintiff from pursuing a claim. As this Court recognised in *A S McLachlan Ltd v MEL Network Ltd*:[40]

> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.
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> [16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

Associate Judge Lester acknowledged these concerns.[41] Nevertheless, he was not persuaded that the circumstances of Mr Jindal's proceeding, and the claims made by him, required that security be dispensed with. Again, we are not persuaded that the Judge's observations in this regard are capable of bona fide and serious argument on appeal.

[28] Mr Jindal also challenges the quantum of security fixed by the Judge. It took into account the likely cost to the respondents in having to undertake discovery in relation to approximately 70 liquidation files (reflecting Mr Jindal's advice to the Court that he would remove from the list of 133 companies those companies where fees were less than $7,500).[42] The Judge was concerned at Mr Jindal's failure to plead why the respondents' fees were unreasonable and/or excessive, either in respect of the rates charged, the overall fee, or the disbursements such as legal fees incurred. He recorded that, during submissions, it became clear that this was because Mr Jindal saw the onus as being on the respondents to justify their fees, rather than on him having to prove that they were excessive.[43] We share the Judge's concern. The quantum of security fixed was intended to take into account the onerous obligation that the respondents will be required to assume if leave under s 284(1) is granted. It is

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39 At [17].
40 *A S McLachlan Ltd v MEL Network Ltd*, above n 30.
41 Security for costs judgment, above n 1, at [18]–[19].
42 At [47]–[48].
43 At [11].

noteworthy that the Judge reserved leave to the parties to revisit the quantum fixed by him, depending on the final number of companies in issue. He also reserved leave to apply for further security, when and if the proceeding is clarified.[44] In our view the orders made were prima facie appropriate and it is difficult to see that any challenge to the same is capable of bona fide and serious argument.

[29] We repeat — in the circumstances of this case, in fixing security for costs, the Judge was exercising a discretion. It is not obvious that the Judge erred in principle, failed to take into account any relevant matter, or took into account any irrelevant matter. It is also not obvious that the Judge was clearly wrong in his decision.[45] The security for costs judgment does not involve any interest of sufficient importance to outweigh the costs and delay of an appeal. It involves no issues of general or precedential importance. In our view, any appeal against the Judge's security for costs judgment cannot succeed. Accordingly, we decline to grant Mr Jindal leave to appeal the security for costs judgment.

[30] For the sake of completeness, we record that Mr Jindal was also seeking leave to introduce expert evidence under r 45 of the Court of Appeal (Civil) Rules. He asserts that this evidence supports his claim that the respondents charged excessive fees. We do not address this application. In a minute issued on 9 May 2023, Brown J held that "[i]t is unnecessary for the r 45 application to be entertained unless and until this Court grants leave to appeal under s 56(5)." We are not granting leave to appeal and it is unnecessary for us to go on and consider Mr Jindal's application for leave under r 45.

Result

[31] Leave to appeal the decision of the High Court fixing security for costs is declined.

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44 At [48]–[49].
45 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

[32] The applicant must pay costs to the respondents jointly for a standard application on a band A basis with usual disbursements.

Solicitors:
Crimson Legal, Auckland for Respondents