

HELD AT APIA

C.P. 15/96

BETWEEN: POLI LEOTA of Wellington,  
New Zealand, Unemployed

Plaintiff

A N D: BLUEBIRD TRANSPORT  
COMPANY LIMITED a duly  
incorporated company having its  
registered office at Siusega

Defendant

Counsel: K M Sapolu for plaintiff  
P A Fepuleai for defendant

Hearing: 13 June 1997

Judgment: 17 June 1997

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JUDGMENT OF SAPOLU, CJ

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The plaintiff in this case resides in Wellington, New Zealand. The defendant, which is a local registered company, has made application that the plaintiff provides security for costs by depositing a minimum sum of NZ\$7,625.65 which was calculated on the basis of the total amount of damages claimed. Rule 30 of the Supreme Court (Civil Procedure) Rules 1980 provides :

“(1) In any civil proceeding and at any stage thereof the Supreme Court may require a plaintiff or applicant resident out of jurisdiction of the Supreme Court to deposit any sum of money as security for costs, and may stay the proceeding pending the making of that deposit.

“(2) When any sum has been so deposited as security for costs, it shall be disposed of in such manner as the Court directs”.

It is clear that the power of the Court under Rule 30 to order a deposit of a sum of money as security for costs by a non-resident plaintiff is discretionary. In the exercise of that discretion, the Court would take into account all the circumstances of the case.

In opposing the defendant's application for security for costs, counsel for the plaintiff relied in part on the judgment of Lord Denning MR in the English case of *Sir Lindsay Parkinson Co Ltd v Triplan Ltd [1973] QB 609*. That was a case on an application for security for costs under section 447 of the English Companies Act 1948 which is in similar terms to section 467 of the Companies Act 1955 that is applicable in Western Samoa. However, there are factors relevant to the exercise of discretion which are mentioned in the judgment of Lord Denning MR, and to which counsel for the plaintiff referred, which in my view are also relevant to the exercise of discretion under our Rule 30. These factors are whether : (a) the plaintiff has a bona fide claim; (b) the claim has a reasonably good prospect of success; (c) the defendant has made any admission on the pleadings; (d) the plaintiff's want of means was caused by the defendant's conduct; (e) any delay; and (f) whether the application for security was being used oppressively to stifle a genuine claim. Another relevant factor counsel for the plaintiff referred to is the availability of proceedings for reciprocal enforcement of judgments between Western Samoa and New Zealand which is the plaintiff's country of residence. These factors are not fixed principles to be applied in an inflexible way, but

useful guidelines to be considered in the exercise of discretion having regard to all the circumstances of the case.

I will turn now to the circumstances of this case. Essentially what is alleged for the plaintiff in the statement of claim is that while in Western Samoa in February 1994, he suffered serious injuries in a car accident caused by the negligence of a servant or agent of the defendant. Particulars of the alleged negligence, injuries to the plaintiff and the various damages claimed are set out in detail in the statement of claim. Except for one allegation in the statement of claim to which I will refer later, the defence consists of denials of all the other allegations in the statement of claim and calling upon the plaintiff to prove most of those allegations. On the pleadings and counsel's submissions, it seems to me that the claim is bona fide and not a mere sham or absolutely hopeless. I am also not persuaded that the claim does not have a reasonably good prospect of success. As the pleadings stand, it is simply for the plaintiff to call evidence to prove, if he can, the allegations in his claim.

The allegation in the statement of claim which is admitted by the defendant is the allegation that at all material times the defendant was the owner and/or operator of truck registration number 8374. That is the truck which is alleged by the plaintiff in his statement of claim, as the truck which caused the accident from which he suffered the injuries for which he is now claiming damages.

It also appears from the pleadings in the statement of claim and from what counsel for the plaintiff told the Court, that at the time these proceedings were filed in February 1996 the plaintiff was unemployed as a result of the injuries he suffered. Apparently when the plaintiff was injured, he was admitted to the Apia National Hospital and then transferred to New Zealand where he had to undergo a series of eleven operations in Invercargill and Christchurch in the South Island of

New Zealand. For over a year the plaintiff was prevented from working, and in spite of these operations and other medical treatment he has not been able to regain the use of his left arm. His wife was a professional care worker for ten months in order to provide essential nursing care to the plaintiff. Given these circumstances, counsel for the plaintiff submitted that the plaintiff did not have the means to pay security and it is the defendant through the negligence of its servant which was responsible for the plaintiff's financial inability. In other words it is alleged that there is a link between the inability of the plaintiff to pay security and the alleged negligence of the defendant's servant which is said to have caused the accident. Following on from that, it was further alleged that it is the conduct of the defendant's servant which has brought the plaintiff to Court. It was therefore submitted that if security is ordered, that would effectively stifle the plaintiff's action as he is not in a position to pay security. That may likely to be so, even though the power of the Court to grant a stay of proceeding for failing to comply with an order for security is discretionary.

As to the question of delay, counsel for the plaintiff pointed out that the proceedings in this case were filed in February 1996 but the application for security was only filed in May 1997. While I accept that the delay in making an application for security is a relevant consideration, it is relatively insignificant in this case as it does not appear to have resulted in an undue prejudice or disadvantage to the plaintiff. After all it is clear from Rule 30 that security may be ordered at any stage of the proceedings.

The last factor raised for the plaintiff is that if the defendant succeeds in its defence and there is a judgment for costs against the plaintiff, there is available by statute proceedings for the enforcement of such judgment in New Zealand. This factor regarding the availability of reciprocal enforcement of judgments proceedings was also referred to by Ongley J in *Jalfox Pty Ltd v Motel Association in New Zealand* [1984] 2 NZLR 627 which was a case on an application for

security under R.577 of the Code of Civil Procedure (NZ). R.577 of the New Zealand Code of Civil Procedure is similar, though not identical, to our Rule 30. On this question of the availability of ~~reciprocal enforcement of judgments proceedings between Western Samoa and New Zealand~~, it should also be borne in mind, as counsel for the plaintiff did acknowledge, that the defendant if he does obtain a judgment for costs against the plaintiff, is likely to incur further costs to enforce such judgment overseas.

There was no other factor raised in opposition of the application for security. Counsel for the defendant, ~~on the other hand~~, referred to the difficulty and inconvenience to the defendant of having to enforce a judgment for costs against the plaintiff if the defendant succeeds in its defence at trial. Counsel therefore said that to protect the position of the defendant the Court should, in the exercise of its discretion, make an order for security for costs.

After careful consideration, it appears to me on the pleadings and submissions of counsel that the plaintiff's claim is bona fide and that it has a reasonably good prospect of success. It also appears to me that at the time these proceedings were filed in February 1996, the plaintiff did not have the means to meet an order for security and that there was a clear link between the plaintiff's financial inability and the alleged negligence of the defendant's servant. It is also that alleged negligence which counsel for the plaintiff argued was responsible for bringing the plaintiff to Court. I am also conscious that if an order for security is made which the plaintiff cannot meet, his action may be stayed so that he cannot proceed further. On the other hand, I am also conscious that if the defendant succeeds in its defence it may have difficulties in the enforcement of a judgment for costs against the plaintiff.

No doubt the matter is important to both parties. However there is one matter I do not feel confident about. It is not clear whether the plaintiff, who was not in a position to pay security at the commencement of these proceedings in February 1996 is still in the same position given that more than one year has gone by. After all Rule 30 provides that security may be ordered at any stage of proceedings. I would like the plaintiff to clarify this matter by affidavit of himself and of some other person who knows the plaintiff in New Zealand.

As the plaintiff resides in New Zealand, such affidavits are to be filed within 21 days. I will then give my final decision in an addendum to this judgment.

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**CHIEF JUSTICE**

**Solicitors:**

K M Sapolu, Apia, for plaintiff

P A Fepuleai, Apia, for defendant