

IN THE NEW ZEALAND DISTRICT COURT
HELD AT AUCKLAND

CIV No.08/004/2516

Under the *Fair Trading Act 1986*

BEWTEEN

D.V. Kelly Pty Ltd
24 Wendlebury Rd
Chipping Norton,
NSW, 2170
Australia
Plaintiff

And

Magis S.p.a
via Magnadola
15 - 31045 Motta di Livenza
Treviso, Italy
1st Defendant

And

ECC Living & Lighting Ltd
2nd Defendant

And

Nick Quy
3rd Defendant

**NOTICE OF OPPOSITION
To Defendants
Notice of Interlocutory Application for
Security of Costs
dated 3rd June 2009**

Filed By : Craig Kelly
C/O DV Kelly Pty Ltd
24 Wendlebury Rd
Chipping Norton, NSW, 2170
Australia
Ph: + 61 2 9755 2388
Fax + 61 2 9755 2158
Email : craig@dvkelly.com.au

**NOTICE OF OPPOSITION
To Defendants
Notice of Interlocutory Application for Security of Costs**

The Defendants have filed an Interlocutory Application seeking an order for "Security For Costs".

- i) The Plaintiff consents that an order for security of costs is appropriate, however opposes the quantum of the sum of \$42,275 sought by the Defendants.
- ii) The Plaintiff has filed a Notice of Interlocutory Application for Separate Decisions on four questions partly of fact and partly of law that have been raised by pleadings.
- iii) If Questions 1 or Question 2 of the Plaintiff's Interlocutory Application for Separate Decisions are answered in the negative by the Court, this will render unnecessary any further hearing and the Court should dismiss the whole of the proceeding, and award costs to the Defendants.
- iv) Therefore, given the potential that the whole of the proceedings may be dismissed following a hearing of the Plaintiff's Interlocutory Application for Separate Decisions on questions of fact or of law, any order for security for costs, should only reflect a sum taking into account matters up to such interlocutory hearing.
- v) In addition, or in the alternative, the Courts determination of Questions No. 3 and No. 4 of the Plaintiff's Interlocutory Application for Separate Decisions on questions of fact and/or of law, may substantially reduce the evidence necessary and the trial time required for the Court to make a final determination of the proceedings.
- vi) The hearing of the Plaintiff's Interlocutory Application on these four questions will require Court time for one-half to three-quarters of a day.
- vii) For the above stated reasons, the Plaintiff consents to an order for security for costs up to the hearing of the Plaintiff's 'Interlocutory Application for Separate Decisions' on questions of fact and/or of law, in the sum of \$2,795 (1B) or in the alternate in the sum of \$4,160 (2B), (as per the attached schedules) or such other sum that the court deems just.
- viii) If proceedings continue following the courts determination of the questions raised in the 'Interlocutory Application for Separate Decisions' the Plaintiff will consent to a further order for security for costs either mutually agreed between the Defendants and the Plaintiff, or as the court deems as just.
- ix) As the Plaintiff has been partly successful in defending the Application, and if the difference between the sum security of costs awarded by the Court and the sum of the security of costs sought Defendant is substantial, that each party should pay their own costs in respect of this Notice of Motion.

In the alternative,

- x) The Plaintiff opposes the order for security of costs.

GROUNDS FOR OPPOSITION

The Plaintiff's case is not complex or complicated.

1. The Plaintiff's case is that a trade rival (the First and Second Defendants) and the Third Defendant were all directly or indirectly knowingly involved in or party to, the making of four representations to the public and a trade customer of the Plaintiff.
2. These four representations are in writing, and the Defendant's do not deny the representations were made.
3. The representations created the impression to the public and to a trade customer of the Plaintiff's, that a product being sold by the Plaintiff, (known as the 'Jet Barstool') was being unlawfully sold in New Zealand and that the Plaintiff was acting unlawfully.
4. The Plaintiff says it was engaging in free trade selling lawfully made goods, and the *Copyright Act* does not provide otherwise, therefore the representations in question resulted in members of the public and a trade customer of the Plaintiff being misled, resulting in the Plaintiff having its goodwill poisoned and suffering direct loss and damage.
5. The Plaintiff seeks relief under the provisions of the s42 and s43 of Fair Trading Act, as it say the representations in question were in contravention of s9, 10, 13 and/or 23 of the Fair Trading Act.

Notice of Interlocutory Application seeking a separate decision

6. To secure a speedy and inexpensive determination of the proceeding, the Plaintiff has filed a Notice of Interlocutory Application seeking a separate decision on four questions of fact or of law, or partly of fact and partly of law, that have been raised by pleadings.
7. The Courts determination on these questions may result in the Court dismissing the whole of the proceeding or substantially reducing the amount of evidence required at trial thereby, substantially reducing the time and cost of the proceedings.

Schedule of Cost

8. In determining what is a "reasonable time" for a step in the proceedings, the Plaintiff consents to the Defendants application, that a "normal" amount of time for the particular steps is considered reasonable, and therefore the determination must be made by reference to band B.
9. In determining the category of the proceedings, for the appropriated daily recover rates, under the provisions of s47 of the *District Court Rules* the proceedings are not of such great complexity or significance that they require counsel for the Defence to possess a level of special skill and experience to justify the proceedings to be classified as Category 3 proceedings.

10. In considering all the circumstances of the case, the Court may consider that the Plaintiff is represented by a director of the company, who is not a legal practitioner, and has had no legal training, therefore, the complexity of the proceedings should be classified as Category 1, or in the alternative at most Category 2 proceedings.

11. The following schedule details the calculation of security for costs which the Plaintiff consents to.

	Category 1 Proceedings	Allocated days Band "B"	Total (1B)	Category 2 Proceedings	Allocated days Band "B"	Total (2B)
Commencement of Defence	\$860	1.5	\$1,290	\$1,280	1.5	\$1,920
List of Documents on discovery	\$860	N/A	\$0	\$1,280	N/A	\$0
Defendants preparation of written Statement of Evidence to be used at hearing	\$860	N/A	\$0	\$1,280	N/A	\$0
Defendant's preparation of Lists of issues and Authorities	\$860	N/A	\$0	\$1,280	N/A	\$0
Preparation for hearing of defended interlocutory Application	\$860	1	\$860	\$1,280	1	\$1,280
Appearance at defended Interlocutory application	\$860	0.75	\$645	\$1,280	0.75	\$960
		Total (1B)	\$2,795		Total (2B)	\$4,160

In the alternative,

12. In *Minhinnick v Treat of Waitangi Fisheries Commission* HC WN CIV-2003-485-823 [2005] NZHC 79, Associate Judge D.I Gendall commented at par. 46;

Certain general principles as to the exercise of the discretion can be found in Nikau Holdings Ltd and in Bell-Booth Group Ltd v Attorney-General [1986] 1 PRNZ 457, 466 (CA). Importantly, however, the discretion the Court is to exercise is not to be fettered by the automatic application of "principles" extracted from previous cases. Rather, the Court is to consider the facts of the particular case in issue. As the Court of Appeal said in AS McLachlan Ltd v MEL Network Ltd at paragraphs 13 and 14:

... whether or not to order security and, if so, the quantum are discretionary. They are matters for the Judge if he or she thinks fit in all the circumstances. The discretion is not to be fettered by constructing "principles" from the facts of previous cases.

13. Section 61 of the District Court Rules provides;

Power to make order for security for costs

(1) Where the Court is satisfied, on the application of a defendant,—

(a) That a plaintiff—

- (i) Is a resident out of New Zealand; or*
- (ii) Is a corporation incorporated outside New Zealand; or*
- (iii) Is, within the meaning of section 158 of the Companies Act 1955 or section 5 of the Companies Act 1993, as the case may be, a subsidiary of a corporation incorporated outside New Zealand; or*

(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,—

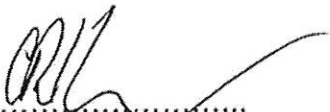
*the Court **may**, if it thinks fit in all the circumstances, order the giving of security for costs.(emphasis added)*

14. The Plaintiff is a corporation incorporated in Australia, and therefore the Defendant's application satisfies the technical requirements rule 61(1)(a)(ii).
15. However, the *District Court Rules* use the words "the Court **may**, if it thinks fit in all the circumstances, order the giving of security for costs". The Rules do not use the words "**shall** give an order for security of costs."
16. This implies that it was not the parliamentary intention that the granting of security for costs be automatic simply by an Applicant showing that the technical requirements of the section have been met, and that the granting of security for costs remains a discretionary power after the District Court considers all the circumstances.
17. The Plaintiff is a firm incorporated in Australia in 1963, and has continually carried on business since that date, and has carried on business in the New Zealand market since the early 1980's.
18. In *Smith v Covington Spencer Ltd* HC AK CIV 2005-404-3020 [2006] NZHC 1184, Heath J commented at par 34;

The rationale for making an order for security for costs against a plaintiff outside New Zealand is that successful defendants ought not to be put to the time, trouble and expense of enforcing a judgment for costs out of the jurisdiction.

19. If the Plaintiff is unsuccessful, and the court makes a judgement of costs against the Plaintiff and in favour of the First Defendant, the First Defendant being an Italian body corporate, faces no different "time, trouble and expense" of enforcing such judgment for costs against the Plaintiff, if the Plaintiff was incorporated in New Zealand rather than in Australia.
20. In today's market with the close economic relations between New Zealand and Australia, and with the similarity in legal systems, and with many New Zealand body corporates conducting business within Australia, a New Zealand firm that is engaged in international trade and has business interests in Australia faces no different "time, trouble and expense" of enforcing a judgment for costs" against an unsuccessful Plaintiff, if the Plaintiff was incorporated in New Zealand or Australia.
21. Although the Defendant's Application satisfies the technical requirements of Section 61(1)(a)(ii) the Application contains no evidence to even suggest that the Plaintiff would not be able or willing to honour the payment of any costs that it might be ordered to pay, nor that the Defendants would face any different "time, trouble and expense of enforcing a judgment for costs" if the Plaintiff was incorporated in New Zealand or Australia. Therefore, taking into consideration all the circumstances, the Defendant's Application should be dismissed with costs.

Dated this 12th day of June 2008



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Craig Robert Kelly
On behalf of the Plaintiff



This document is filed by Craig Kelly
Director of the above named Plaintiff.