[redacted]

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2003-404-497

BETWEEN	JOSEPH FRANCIS KARAM Plaintiff
AND	ACP MEDIA LIMITED First Defendant
AND	ROSEMARY MCLEOD Second Defendant

Hearing: 9 March 2004

Appearances: M P Reed QC for Plaintiff
S J Mills and H Wild for Defendants

Judgment: 11 March 2004

JUDGMENT (NO. 2) OF HEATH J

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Introduction

[1] In this judgment I deal with various procedural issues argued before me on 9 March 2004.

Security for costs

(a) Jurisdiction and approach

[2] The defendants, ACP Media Ltd (ACP) and Ms McLeod, seek an order for security for costs against Mr Karam.

[3] The jurisdiction for the Court to make such an order springs from r 60 of the High Court Rules 1985 (the Rules). Rule 60(1)(b) states:

> **60 Power to make order**
>
> (1) Where the Court 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,—
>
> the Court may, if it thinks fit in all the circumstances, order the giving of security for costs.

[4] A two stage inquiry is mandated by r 60(1)(b). The first question is whether the defendants have established reason to believe that Mr Karam will be unable to pay their costs if his claim is unsuccessful. If the defendants cross that threshold, the second question is whether, and if so on what terms, security should be ordered.

[5] The legal principles applicable on an application for security for costs are well known. The leading decisions are *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) and *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 (CA). In *A S McLachlan Ltd* the Court of Appeal emphasised, in a

judgment delivered by Gault P, that authorities dealing with particular fact situations were no more than signposts to assist judicial officers in marshalling relevant considerations. At paras [15] and [16] of the judgment Gault P said:

> [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.
>
> [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.

(b) The competing contentions

[6] The essence of the respective argument of counsel can be distilled to some basic propositions.

[7] For ACP and Ms McLeod, Mr Mills submitted that Mr Karam's own evidence established that there were no assets of worth in his own name against which execution could be levied for a judgment for costs should Mr Karam be unsuccessful in his claim. That evidence, coupled with what Mr Mills submitted was not a strong case on the merits, justified an order requiring significant security to be posted to protect the defendants' position. Mr Mills submitted that Mr Karam's claims were drawing the defendants into "unjustified" and "over-complicated" litigation of the type envisaged in para [16] of *A C McLachlan Ltd*: see para [5] above.

[8] For Mr Karam, Mr Reed QC submitted that the statements made on oath by Mr Karam as to his ability to meet costs were sufficient both to reject the application for security at the threshold level or, at least, not to require an order to be made. Mr Reed adopted a suggestion which I had put to both counsel in argument, namely that the many interlocutory issues to be determined in this proceeding be resolved with issues of costs being determined as matters proceed. That would establish whether, if costs were awarded against Mr Karam, costs could be met. A fresh application for

security could be made once the likely length of trial was known, if the defendants continued to harbour justifiable doubts about Mr Karam's ability to pay costs. Mr Reed also urged me not to make an order for security which might have the effect of operating to censor Mr Karam's claims.

(c) Relevant background facts

[9] Mr Karam sues ACP (as publisher) and Ms McLeod (as author) in respect of an article published in the March 2002 edition of *North & South* magazine. A number of major pre-trial issues arise: notably, the need to determine whether Ms McLeod was an independent contractor to or an employee of ACP (this is relevant to the question whether any alleged ill will existing on her part can be attributed to ACP), whether various reports (or draft reports) upon which the author relied are privileged reports (for the purpose of Part II of the First Schedule to the Defamation Act 1992) and whether a defence of honest opinion can rely on privileged material without the need to establish that the content of the privileged material is true: generally, see para [3] of my judgment of 19 February 2004. Those issues are yet to be determined.

[10] The defendants assert that Mr Karam's inability to pay costs can be inferred from two main sources of information. The first is a series of articles and the preface to one of Mr Karam's books *(David and Goliath)*. Mr Mills refers to comment about financial difficulties caused to Mr Karam as a result of his quest to establish the innocence of David Bain. The second is the absence of any real property registered in the name of Mr Karam personally.

[11] Mr Karam disputes inability to pay costs. He has, in an affidavit sworn in opposition to the application, explained the context in which media statements were attributed to him about his financial position. In paras 13 and 14 of his affidavit he deposes:

> 13. Currently I derive income from property investments, which last year had a turnover exceeding $2,000,000, from acting as a business adviser on a private basis, and from assisting in case analyses in respect of various proceedings, as and when instructed.

> 14. I have an unblemished credit record; I have never been insolvent; and I am not insolvent now.

[12] Earlier in his affidavit Mr Karam confirmed that he did not hold property in his own name. He continued:

> 11. Like many people in business, I do not trade in my own name, or hold property under my own name. I operate a trust and two companies. I conducted profitable transactions in real estate last year through those entities worth in excess of $4,000,000.

(d) Evaluation of competing contentions

[13] I am not inclined to be drawn into a premature analysis of the merits of Mr Karam's claims, despite Mr Mills' invitation to that effect. While Mr Mills has raised a number of interesting issues on the merits, it is far too early for an informed assessment of the prospects of success to be undertaken.

[14] If there is a real issue as to whether the words of which Mr Karam complains are capable of the defamatory meanings alleged, that issue ought to be addressed either on an application to strike out the claim or on an application under r 418 of the Rules. In making those comments I refer in particular to Mr Mills' argument based on *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL) and *New Zealand Magazines Ltd v Karen, Lady Hadlee* (CA74/96, 24 October 1996, Henry, Blanchard and Barker JJ). There was no advance warning that this particular issue would be raised on the application for security. I am conscious that the pleaded defamatory meanings involving dishonesty might be construed either as actual dishonesty or as an unconscionable failure to share with the public material facts known to Mr Karam. I prefer to rest my decision on the security application on a basis which does not require a provisional evaluation of the merits of the dispute.

[15] Mr Karam has said, on oath, that he is a person who trades through trusts and companies. He has given evidence of income being derived from property investment. He has drawn attention to what he asserts is an unblemished credit record.

[16] It is a matter for me to assess how much weight should be given to Mr Karam's statements on oath.

[17] In my view, the balance between the interests of plaintiff and defendants in this case is best met by signalling an intention to deal with each interlocutory application on its own merits and to determine issues of costs in relation to such applications as and when decisions are made. That approach is consistent with r 48E of the Rules.

[18] That approach creates an incentive, in a complex piece of litigation, for both plaintiff and defendants to consider carefully what interlocutory applications ought to be brought or opposed, as each knows that significant consequences in costs may follow if particular applications are brought or defended unsuccessfully.

[19] If costs are ordered, I expect them to be paid promptly. If costs are not paid promptly, it will be open to me, by way of sanction for non-compliance with a Court order, to consider dismissing the claim: see r258(2)(a) of the Rules. The availability of that ultimate sanction is a sufficient incentive for a person such as Mr Karam to meet any order for costs. An order for security for costs is unnecessary at this time.

[20] Although I am not prepared to order that security be posted by Mr Karam I observe that there were reasonable grounds for the defendants to make the present application. The absence of assets against which any judgment for costs might be executed would, in many cases, be sufficient to justify an order for security.

(e) Conclusion

[21] The application for security for costs is dismissed. I make no order as to costs on the application for security. The result of the application should be seen by the parties as providing the basis on which interlocutory steps will be managed. I reserve leave for the defendants to re-apply for security at any time prior to the allocation of a firm date of hearing for a jury trial.

Costs applications

(a) Governing principles

[22] The principles governing orders for costs to be made by this Court are set out in rr 46-48G of the Rules. See also *Glaister v Amalgamated Dairies Ltd* (CA99/03, 1 March 2004, McGrath, Hammond and William Young JJ).

[23] The general rule is that costs ought to be determined on interlocutory applications at the time those applications are resolved by the Court. I refer, in particular, to r 48E(1) and (2) of the Rules which provides:

> **48E Costs in interlocutory applications**
>
> (1) Unless there are special reasons to the contrary, costs on an opposed interlocutory application—
>
> (a) Must be fixed in accordance with these rules when the application is determined; and
>
> (b) Become payable when they are fixed.
>
> (2) Despite subclause (1), the Court may reverse, discharge, or vary an order for costs on an interlocutory application if satisfied subsequently that the original order should not have been made.

[24] Cross claims for costs are made by ACP Media Ltd and Ms McLeod (on the one hand) and Mr Karam (on the other). The claims arise out of an attempt by Mr Karam to review orders made by Randerson J on 12 December 2003 (with which I dealt in my judgment of 19 February 2004), a subsequent adjournment application (with which I dealt in a Minute issued on 2 March 2004) and an application to join Ms McLeod as a second defendant.

[25] In my Minute of 2 March 2004 I was conscious of the need to resolve historical problems promptly and to encourage all parties to deal positively and expeditiously with remaining interlocutory issues. The brevity of my comments on issues of costs should be seen in that light.

[26] The defendants seek costs in a sum in excess of $20,000. Costs have been calculated on a 3B basis with an uplift to "reflect the Court's disapproval of the cavalier way" in which the issues were approached by (and on behalf of) the plaintiff. Ms Wild submits that those costs are reasonable, particularly given the fact that steps were taken on behalf of Mr Karam to seek adjournments on two separate occasions after the defendants had complied with strict timetabling requirements and it was Mr Karam's turn to take steps.

[27] Mr Reed submits that the orders for costs are not justified. Indeed, Mr Reed submits that costs ought to be awarded in favour of Mr Karam on applications which he submits were largely successful.

[28] Ultimately, the 8 March 2004 hearing date was vacated and the interlocutory issues were re-scheduled to be argued on 9 and 19 March 2004 respectively. To a large extent the costs incurred by ACP and Ms McLeod are not "wasted costs" in the strict sense. But, certainly, there is likely to be a dilution in the real value of the time spent in preparation for hearings because of the need to duplicate work for later hearings. I am satisfied that an award of costs in favour of the defendants ought to be made to reflect that fact.

[29] I am not satisfied, however, that it is appropriate to orders costs on the joinder application. That issue was dealt with pragmatically and was the underlying reason why it was inappropriate to proceed with major pre-trial issues ordered to be heard on 8 and 9 March 2004 by Randerson J. Nevertheless, the late application does, in my view, disentitle the plaintiff to costs.

[30] This proceeding, despite submissions made to me by Mr Reed, is plainly a Category 3 proceeding for costs purposes. It is a proceeding that, because of its complexity or significance, requires counsel to have special skill and experience in this Court: see r 48(1) of the Rules. That does not, necessarily, mean that all costs will be awarded on a Category 3 basis. On occasion, the nature of the application may justify a different basis for an order.

[31] Having weighed the competing arguments on questions of costs and had regard to the observations of the Court of Appeal as to the nature of the discretion as to costs in *Glaister v Amalgamated Dairies Ltd*, I take the view that a broad assessment of costs is appropriate. At paras [21]-[24] (inclusive) of *Glaister*, Hammond J, delivering the judgment of the Court of Appeal, said:

> [21] The new costs regime, as between competing parties, is of a regulatory character. It is important that the integrity of that scheme be maintained, and that if monetary adjustments to the scale are to be made that they be made on a national basis by the Rules Committee. In fact certain monetary adjustments were made to have effect from 1 January 2004, and there is no present reason to think that the former problem of rate obsolesce will arise.
>
> [22] When a departure is to be made from the High Court Rules' allowances, it is necessary that it be done in a particularised, and principled way. As was observed by this Court during the course of argument, the problem is a familiar one in our jurisprudence – a scheme of general application is laid down, but provision then has to be made for something that is not contemplated within the scheme or which is unfairly recognised by it.
>
> [23] The allowances in the High Court Rules may be inappropriate in a given case. In commercial litigation, the difficulties will usually arise in one of two areas – where there is an unusual volume of discovery; or where, for some reason, the quite generous allowance of two days preparation for trial for every day of trial is inadequate.
>
> [24] To put this another way, there is a relatively obvious logic to the monetary allowances in the new Rules and the discretion exists to enable the unexpected and the unforeseen to be fairly accommodated. It is not a case of r46 having an exclusionary primacy over r47 (or any other rules) : the rules are complementary, and designed to produce an effective whole.

[32] I am satisfied that costs ought to be awarded in favour of ACP on the applications to which reference has been made, other than the joinder application. But, I am not satisfied the quantum of costs claimed is justified having regard to the extent to which costs will be regarded as "wasted". In my view, costs should be awarded in favour of the defendants in the sum of $7,500. The following factors have influenced me in reaching that decision:

a) Randerson J made orders on 12 December 2003. They were not challenged until the time at which Mr Karam had to take his first step under the timetable. Whomever may bear the responsibility for the decision to challenge Randerson J's orders so late, it cannot, on any

view, be ACP. Ms McLeod was not, at that time, a party to the proceeding.

b) Subsequently, after I had delivered judgment on 19 February 2004, effectively granting an indulgence in favour of Mr Karam, a further application was made to vary the orders made, even though both ACP and Ms McLeod had taken steps to comply with tight timetabling orders promptly.

c) There was a need for the applications to be dealt with urgently by both senior counsel and those assisting them in the proceeding.

d) The sum I have ordered reflects calculation on a 3B basis with some uplift for urgency.

[33] An award of costs in favour of only ACP is justified on the basis that Ms McLeod was not joined as a party until my judgment of 19 February 2004 was delivered.

(b) Conclusion

[34] I make an order for costs in favour of ACP in the sum of $7,500. I also order reasonable disbursements in respect of the two applications made by Mr Karam resulting in hearings before me on 17 February 2004 and 2 March 2004. Those disbursements are to be fixed by the Registrar.

[35] Those orders will, I hope, deal finally with outstanding historical issues.

Admissions of fact

(a) Jurisdiction

[36] Section 35(2)(c) of the Defamation Act 1992 (the Act) provides:

35 Powers of Judge to call conference and give directions

...

(2) At any such conference, the Judge presiding may—

...

> (c) Require any party to make admissions in respect of questions of fact; and if that party refuses to make an admission in respect of any such question, that party shall be liable to bear the costs of proving that question, unless the Judge before whom the proceedings are tried is satisfied that the party's refusal was reasonable in all the circumstances, and accordingly orders otherwise in respect of those costs:

...

[37] Mr Mills submits that I ought to make an order requiring Mr Karam to admit allegations set out in paragraphs 27 and 28 of the Amended Statement of Defence. Those paragraphs are part of ACP's defence. The pleading is mirrored in Ms McLeod's defence at paras 48 and 49. I refer only to the ACP pleading for convenience.

[38] The allegations largely, but not entirely, relate to the content of the article on which Mr Karam sues.

[39] Mr Reed, on behalf of Mr Karam, submits that the pleading seeks to re-state the article in the chosen terms of the defendants, for the purpose of the defamation case. He submits that Mr Karam ought not to be required to admit those allegations under the s35(2)(c) jurisdiction.

[40] It is common ground that most of the allegations contained in the relevant portions of the Amended Statement of Defence can be proved at little cost to the defendants. Indeed, many can be proved merely through the production of the article in evidence, either by consent in an agreed bundle of documents or through the author.

(b) The nature of the jurisdiction

[41] Section 35 is contained in Part IV of the Act. Part IV deals with procedure. The section is designed to ensure "the just, expeditious and economical disposal of any proceedings for defamation": s35(1). The section contemplates the holding of conferences of parties, or their counsel, presided over by a Judge to determine procedural issues.

[42] The Act was passed, in 1992, at a time when case management procedures were in their infancy. Set in that context, s35 can be seen as an attempt by the Legislature to minimise the cost involved in resolving complex interlocutory issues in defamation cases. The powers conferred on a Judge by s35(2) are not dissimilar to those exercised by Judges or Masters at case management conferences following the 2003 amendments to the Rules: see rr 425-440 of the Rules which came into force from 24 November 2003.

[43] The full range of powers which may be exercised by a Judge at such a conference are set out in s35(2). In full, that subsection states:

> (2) At any such conference, the Judge presiding may—
>
> > (a) Identify the matters in issue between the parties, and ascertain whether those issues may be resolved, in whole or in part, by means (including the publication of a correction or a voluntary apology) acceptable to the parties, and, if the parties agree, the Judge may make such order as is necessary to give effect to the agreement between the parties:
> >
> > (b) With the consent of the parties, or on the application of the plaintiff, exercise the powers conferred on a Court by sections 26 and 27 of this Act:
> >
> > (c) Require any party to make admissions in respect of questions of fact; and if that party refuses to make an admission in respect of any such question, that party shall be liable to bear the costs of proving that question, unless the Judge before whom the proceedings are tried is satisfied that the party's refusal was reasonable in all the circumstances, and accordingly orders otherwise in respect of those costs:
> >
> > (d) Require any party to make discovery of documents, or permit any party to administer interrogatories:

(e) Fix the time within which any statement of defence shall be filed or any other step in the proceedings (including the filing of any document and the giving of any notice) shall or may be taken by any party:

(f) Fix a time and place for the trial of the proceedings:

(g) Give such consequential directions as may be necessary.

[44] In analysing s35(2)(c) there are two distinct aspects. First, there is a discretion for the presiding Judge to make any of the orders set out in s35(2). If the Court considers it appropriate, it may require any party to make admissions in respect of questions of fact. The second concerns the consequence of a failure to make an admission. Default in complying with an order cannot be marked by immediate sanctions imposed by the Court. If a party refuses to make an admission the party "shall be liable to bear the costs of proving that question, unless the Judge before whom the proceedings are tried is satisfied that the party's refusal was reasonable in all the circumstances, and accordingly orders otherwise in respect of those costs". The decision whether the *prima facie* obligation to bear the costs of proving the question has been rebutted is for the Judge to determine after trial. That seems to follow from the plain wording of s35(2)(c). More generally, see *Laws NZ, Defamation* para 179.

[45] The power to require an admission is to be contrasted with the Notice to Admit procedure to be found in the parallel provisions of the Rules. That subject is dealt with in r 291 of the Rules which provides:

291 Notice to admit facts

(1) A party who is entitled to serve a notice under rule 278 may at any time serve on any other party a notice in form 24 requiring him to admit, for the purpose of that proceeding only, the facts specified in the notice.

(2) An admission made in compliance with a notice under this rule—

(a) May be amended or withdrawn by the party by whom it was made at any time, if the Court so allows and on such terms as the Court thinks just:

(b) Must not be used against the party by whom it was made in a proceeding or interlocutory application other than the proceeding or interlocutory application for the purpose of which it was made.

(3) If the party on whom a notice to admit facts has been served under the provisions of subclause (1) refuses or neglects to admit the facts within 7 days after the day on which the notice is served on that party or within such longer time as may be allowed by the Court, the costs of proving the facts shall be paid by him, unless the Court otherwise orders.

[46] I refer also to r 439 of the Rules. That rule, dealing specifically with case management conferences, provides:

439 Court to seek admissions and agreements

(1) At a case management conference, the Court—

(a) Shall endeavour to secure that the parties make all admissions and all agreements as to the conduct of the proceeding which ought reasonably to be made by them; and

(b) With a view to such special order (if any) as to costs as may be just being made at the trial, may cause a record to be made, in such form as the Court may direct, of any refusal to make any admission or agreement.

[47] I adopt, with respect, the cautionary observations made by the learned authors of the commentary to *McGechan on Procedure* at para HR439.04. The learned authors say:

HR439.04 Rule to be applied with care

The rule should be applied with care. While the test appears objective, much will depend upon the subjective evaluation of the Judge concerned. The only sanction permitted in the event of refusal is a special record potentially relevant to costs. *A Judge knows no more of the proceeding concerned than appears from the file of pleadings and perhaps affidavits (untested by cross-examination), information, if any, given by counsel, and assumption based on experience. The Judge has no detailed background in the facts of the case, particularly as to the evidence available and its strengths and weaknesses. The parties are likely to be much better informed, but for proper tactical reasons may not be forthcoming. Against a background of inadequate information, despite impeccable motives, a Judge may fail to appreciate the implications of admissions and agreements which appear to him or her appropriate. Counsel should not be subject to undue pressure, nor should they too readily submerge their own views.* (my emphasis)

[48] Although Mr Mills submitted that the power to require facts to be admitted in a defamation case was of a different character to the Notice to Admit procedure set out in r291 of the Rules, I do not agree. Under both provisions the consequence is that the person declining to make admissions, *prima facie*, has the burden of costs of proof of those facts thrown upon him or her. The Court retains a discretion to order

to the contrary. The only point of difference is one of expression: the discretion in s35(2)(c) of the Act is stated in more specific terms by reference to the reasonableness of the decision not to admit, whereas r 291 contains no such constraint on the exercise of the Court's discretion. Clearly, however, the reasonableness of a decision not to admit facts is a relevant factor when exercising the discretion under r 291 post-trial.

[49] Two aspects cause me particular concern. The first is that it is generally inappropriate for a Judge to descend into the arena and to require reasons to be given by an affected party for what is, in effect, a tactical decision. Yet, that course will be required if a Judge is to determine why a plaintiff is refusing to admit facts. The second is that the Court will not, ordinarily, make orders which cannot be the subject of an appropriate sanction when the order is not obeyed.

[50] On the first issue, while I accept, in a defamation case to be tried before a jury (as in this case), there is less inhibition on a Judge entering the arena in the manner described, s35(2)(c) is not restricted, in its terms, to defamation cases involving trial by jury. It would be strange if a different construction were to be given to the subsection depending upon whether the trial was to be before a jury or Judge alone.

[51] In relation to the second issue I am not inclined to make an order requiring an admission in circumstances where I have no real ability to sanction non-compliance with that order prior to determination of the trial.

[52] I conclude that the jurisdiction conferred by s35(2)(c) was intended by Parliament to be exercised only in a clear case where it was likely that the cost of proving facts would be prohibitive and the Judge is confident that a plaintiff's ability to test evidence, for purposes that counsel may not wish to disclose (for *valid* tactical reasons) in the presence of his or her opponent, is not inhibited.

(c) Conclusion

[53] In this particular case I rest my decision to refuse to order that the plaintiff admit facts on the discretion reposed in me by s35(2). In my view the following factors militate against exercise of the discretion:

a) Little cost will be saved by requiring admissions to be made. Thus, there is no good reason for me to intrude into what I regard as tactical issues.

b) The relative ease of proof of the facts in issue.

[54] The defendants' application for an order that facts be admitted by the plaintiff is dismissed. On this application, Mr Karam is entitled to costs on a 3A basis. Those costs, together with reasonable disbursements, shall be fixed by the Registrar.

Ancillary issues

(a) Re-formulation of major pre-trial issues

[55] I invited submissions from counsel on whether the questions posed by Randerson J in his orders of 12 December 2003 ought to be re-formulated. Mr Mills took advantage of that opportunity. Mr Reed did not.

[56] I have considered the suggestions made by Mr Mills, on which I note Mr Reed made no submissions.

[57] On reflection, I have decided to defer a decision on the proper formulation of the first three questions set out in para [3] of my judgment of 19 March 2004. I intend to provide any further directions, on this topic, in the judgment I deliver after hearing argument on the r 418 application concerning qualified privilege. That application is to be heard on 19 March 2004.

Settlement conference

[58] Counsel for the parties confirmed to me that they seek a settlement conference.

[59] Counsel have conferred with the Registrar. I direct that a settlement conference, before another Judge, be convened on 24 May 2004.

Argument of major pre-trial issues

[60] The four days during the week of 8 June 2004, indicated as a firm date for argument of major pre-trial issues in para [20] of my Minute of 2 March 2004, is not suitable as both Mr Karam and his counsel will be overseas at the time.

[61] Counsel have conferred with the Registrar. Four days are allocated for the hearing of those major pre-trial issues, to commence at 10am on Monday 12 July 2004.

[62] Timetabling arrangements in respect of those pre-trial issues will be determined by me after hearing argument on an application under r 418 of the Rules (in respect of the qualified privilege issue) on 19 March 2004.

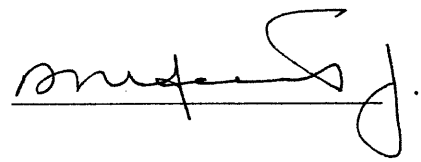
Summary of orders made

[63] The orders made on the application for security for costs are set out in para [21] above.

[64] No order as to costs is made on the application for joinder of Ms McLeod as a party but, on the two applications made by Mr Karam to which I refer in para [24] above, costs are awarded in favour of ACP in the sum of $7,500 together with disbursements to be fixed by the Registrar: see para [32]

[65] The application under s35(2)(c) of the Act is dismissed with the consequences set out in para [54] above.

[66] I thank counsel for their assistance at the hearing on 9 March 2004.



P R Heath J

Delivered at 2.20 ~~am~~/pm on 11 March 2004