Court of King's Bench of Alberta

Citation: Blazer Mechanical Plumbing & Heating LTD v Delnor Construction 2012 LTD, 2024 ABKB 183

Date: 20240402
Docket: 1801 14036
Registry: Calgary

Between:

Blazer Mechanical Plumbing & Heating LTD.

Appellant

- and -

Delnor Construction 2012 LTD.

Respondent

Reasons for Decision
of the
Honourable Justice Lisa A. Silver

I. Introduction and Background

[1] On March 17, 2023, Applications Judge Prowse ["AJ Prowse"] granted an order for security of costs brought by Delnor Construction 2012 LTD. ["Delnor"], the Defendant/Respondent in the action, ordering the Plaintiff/Appellant, Blazer Mechanical Plumbing & Heating LTD. ["Blazer"], to pay security of costs in the amount of $66,737.75. Blazer appeals that decision pursuant to rule 6.14 of the *Alberta Rules of Court* [*ARC*].

[2] The civil claim arose from a monetary dispute between the parties. Blazer performed work for Delnor, which Blazer alleges Delnor has not paid. Delnor claims a set off arising from the costs Delnor accrued due to an error in Blazer's work. Delnor takes the position Blazer's claim is for the work done to remediate the error for which Delnor should not be accountable.

Blazer claims the error was Delnor's fault and the money owed is for legitimate and compensable work done on the project.

Issues and Position of the Parties

[3] In granting the application, AJ Prowse considered the impecuniosity of Blazer to be of sufficient concern to warrant the ordering of costs. Blazer admitted it has no assets or funds and cannot pay the costs ordered. Blazer argued that AJ Prowse erred by failing to consider the terms of an insurance policy held by Blazer, which would cover any costs ultimately awarded by the trial judge. Moreover, the claim has merit. As a result, the Prowse Order causes undue prejudice to Blazer's ability to continue the action.

[4] Delnor submitted that the insurance policy does not allay any concerns with Blazer's ability to pay legal costs if awarded. The policy does not clearly and explicitly cover a costs award and any such coverage is speculative at best. Additionally, Blazer has provided no evidence that the corporate director, who will financially benefit from the outcome of the lawsuit, cannot pay the security for costs ordered. Moreover, the claim has little merit.

[5] For reasons to follow I dismiss the appeal and uphold the Prowse Order.

II. Standard of Review

[6] The applicable standard on review of an appeal of an Application Judge's decision is correctness: ***Jacobs v McElhanney Land Surveys Ltd***, 2019 ABCA 220 at para 153, leave to appeal to SCC refused. Moreover, such an appeal is heard *de novo*, meaning no deference is owed: ***Club Industrial Trailers v Paramount Structures***, 2022 ABQB 34 at para 16; ***Love v Parmar***, 2023 ABKB 30 at para 24.

III. The Test for Security of Costs

[7] Security for costs, when applied to corporate parties, can be granted under rule 4.22 of the *ARC* or under section 254 of the *Business Corporations Act*: ***Zulu Publications Inc. v WestJet Airlines LTD***, 2021 ABQB 629 at para 16, leave to appeal denied, 2021 ABCA 353. The burden under either provision is the same. On appeal, Blazer relied on the test found under rule 4.22 of the *ARC*.

[8] Rule 4.22 outlines the test for security of costs as follows:

> The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> a) whether it is likely the applicant (Delnor) for the order will be able to enforce an order or judgment against assets (Blazer) in Alberta;
>
> b) the ability of the respondent (Blazer) to the application to pay the costs award;
>
> c) the merits of the action in which the application is filed;

d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's (Blazer) ability to continue the action;

e) and any other matter the Court considers appropriate.

[9] The granting of an order for security of costs is discretionary: ***Parker v Parker***, 2019 ABCA 114 at para 4. It requires a balancing of the rights of the plaintiff and the defendant in an action considering the competing values such an order represents. These values and objectives were articulated by Justice Lesfurd in ***Liu v Tangirala***, 2005 ABQB 246 [*Liu*], as involving access to civil justice for "legitimate and bona fide plaintiffs," while protecting the administration of justice from "risk-free and doubtful litigation.": ***Liu*** at para 42.

[10] The overall concern in a security for costs application is with an impecunious plaintiff who may "apply unfair pressure" on a "more prosperous" defendant, thereby placing themselves in an enviable "win-win situation": ***Law Society of Alberta v Stinchcombe***, 2009 ABQB 27 at para 20.

[11] Finally, in exercising my discretion, I am mindful of the purpose and intention of the *ARC* to resolve claims in a fair and just manner that is timely and cost effective: Rule 1.2(1) of the *ARC*.

[12] With these principles in mind, I will analyze the test for security of costs to determine if the order is just and reasonable in the circumstances considering the various factors. Blazer conceded the factor under subsection (a) of rule 4.22 is fulfilled. I further find there are no other matters to consider under (e). I will therefore confine my analysis to the other factors under (b) to (d), and then conclude by determining whether, on the basis of those factors, the order for security of costs is just and reasonable.

IV. Analysis

A. The Ability of Blazer to Pay the Costs Award Under Rule 4.22(b)

[13] According to Blazer, the insurance policy, which provides Blazer with an ability to pay any costs award, is an adequate substitute for the security of costs. Moreover, solicitor undertakings can allay any concerns with the policy. For reasons to follow, I find the insurance policy is far from an adequate substitute for the security of costs. The policy fails to provide any guarantee that the insurer will pay the costs award if ordered by the court. Additionally, the solicitor undertakings fail to protect Delnor from the shortfalls, gaps, and inadequacies found in the policy.

[14] Before analyzing the insurance policy and the repercussions flowing from it, it is useful to set out the relevant factual context in which the insurance policy together with the solicitor's undertakings were offered as a substitute for the security of costs.

1. The factual context

[15] Bradley Dovell, the director of Blazer, in his affidavit dated April 21, 2020, averred that although the legal fees "incurred" within the action were being paid by the insurer, "no other costs are being paid, including but not limited to any security of costs that may be ordered." Mr. Dovell in his Questioning of August 10, 2022, testified that the insurance paid "only legal costs" but not "other costs." Blazer did not offer the policy as a substitute for the security of costs before AJ Prowse on March 17, 2023, but only did so on this appeal.

[16] Blazer not only has no assets but faces several outstanding claims of over a million dollars. At the Questioning, Mr. Dovell refused to disclose his own financial status even though he and his spouse provided personal guarantees on behalf of Blazer for the defaulted loans. Mr. Dovell admitted that any proceeds from the action against Delnor would reduce his personal liability. There was no evidence that Mr. Dovell could or could not cover the amount ordered for the security of costs, neither was there an offer by Mr. Dovell to do so.

[17] An analysis of this context reveals two important contextual points. First, it is arguable that the corporate director did not believe the insurance policy covered costs awards in the action. This is particularly pertinent considering Mr. Dovell was using the policy and therefore had working knowledge of it. This is supported by the fact the insurance policy was not initially offered in answer to the security for costs application before AJ Prowse. It is also supported by the lack of any confirmation from the insurer that costs award would be covered by the policy.

[18] Second, Mr. Dovell, as the director and shareholder of Blazer, offered no evidence on his ability to pay or raise the funds needed to pay the security of costs even though the lawsuit would inure to his personal financial benefit. AJ Prowse considered this in his ruling and went even further by suggesting the creditors of Blazer, who would also benefit from a positive outcome of the claim, could possibly raise funds to cover the security for costs.

2. The insurance policy

[19] Before determining whether the policy is an adequate substitute for the security of costs, I will review the policy provisions.

[20] Blazer holds DAS Legal Expense Insurance Policy. It is an “access to justice” program. The indemnity limit for “legal defence” coverage is $200,000.00. The policy covers only aggregate legal costs up to the aggregate limit of $200,000.00.

[21] On page one of the policy, it states that the insurer will not pay for “any costs” incurred “before” the insurer has “accepted” the claim, “even if” the claim is later accepted. The policy refers to coverage for “legal costs,” which are defined as insured events, including breach of contract. The pertinent part of the definition is coverage for “costs awarded by a court in Canada to opponents in civil cases if the insured person has been ordered to pay them, or pays them with **our** agreement” (emphasis from the policy). “Our” is defined as the insurer.

[22] There are several relevant general exclusions to the policy. First, the insurance does not apply to “costs not agreed with” the insurer including “legal costs,” as defined by the policy, “incurred before **our** written agreement to pay them” (emphasis from the policy). Second, only the insurer can enforce the policy. Third, if the insurer is “declared bankrupt” or “placed into receivership” or being “wound-up” or if the insurer’s affairs or property is in “liquidation”, the insurance does not apply. It also does not apply where there has been an arrangement made for the benefit of any creditors or creditors have sought receivership.

[23] The insurer must comply with all terms and conditions including a general condition that the insurer must take reasonable steps to recover the legal costs for the insurer. Moreover, the insurer can terminate the policy at any time with written notice and the insurer can also cancel the policy with fifteen days’ notice.

[24] I find upon review of the policy that there are several shortfalls, gaps and inadequacies in the policy that makes coverage for any costs awards speculative at best. Those shortfalls, gaps and inadequacies in the policy are as follows:

a. There was no information from Blazer on the amount already expended through this policy other than Mr. Dovell's evidence that the policy is funding the legal fees for the claim;

b. There is no evidence DAS has given written agreement to cover costs awarded as arguably required by the policy;

c. If there is no prior written agreement to cover costs awards, then the policy suggests coverage for those costs will depend on agreement by the insurer even if already ordered;

d. A third-party, such as Delnor, cannot enforce the terms of the policy;

e. The policy does not apply where Blazer is bankrupt or in receivership or subject to creditors' arrangements;

f. Any monies realized by the claim may go towards the recovery of the insurer's payment of the legal costs of the claim and;

g. Blazer or DAS may terminate the policy and there is no indication whether any costs awarded before the termination date would be covered.

[25] Based on the above identified shortfalls, gaps and inadequacies in the policy, I find it is unclear whether the policy would cover any costs award. This uncertainty is amplified by evidence of an outstanding claim against Blazer by Blazer's former counsel. Although the evidence stops short of proving not all legal costs have been covered by the insurance policy, it is certainly some evidence that such coverage is not guaranteed. I am satisfied that coverage of any costs award is highly speculative and cannot provide an adequate or realistic substitute for security of costs. Security for costs guarantees the coverage of costs if awarded up to the amount secured, while the policy does not.

[26] Furthermore, there is no evidence of the aggregate legal costs already paid through the policy. Considering there were several outstanding claims against Blazer, it is arguable that a good portion of the aggregate limit of legal costs of $200,000.00 have already been expended. Moreover, there is the real possibility that the policy would not apply to Blazer, which, according to Mr. Dovell, was in receivership and subject to a settlement agreement with its creditors. As the evidence is not clear on these points, I rely primarily on the speculative nature of the policy.

[27] Although I am satisfied Blazer's insurance policy is not an adequate substitute for the security of costs, I make no comment on whether, in general, an insurance policy can be considered an adequate substitute in a security for costs application. In my opinion, any such determination is fact driven and must be made on a case-by-case basis. Blazer relied on a series of four cases from Ontario to support its contention that an insurance policy can provide an adequate substitute for the security of costs: ***Alary v Brown***, 2015 ONSC 3021 [*Alary*]; ***Shah v Loblaw Companies Limited***, 2015 ONSC 5987 [*Shah*]; ***Grotz v 1392275 Ontario Inc o/a Hilton Garden Inn Toronto/Markham, et al***, 2016 ONSC 2688 [*Grotz*]; ***Frantz v NB Thrilling Films 4 INC et al***, 2017 ONSC 4637 [*Frantz*].

[28] Although counsel could not provide me with any Alberta decisions on this point, I will make brief comments on the distinguishing factual features between the Ontario cases and the case before me. For instance, all four cases involved plaintiffs who were individuals, not a corporate entity such as Blazer. This is a key difference considering the very real concern with

extinguishing a person's access to civil justice through security of costs and the imbalance between an individual and a corporation who may have a greater ability to defend an action monetarily, strategically and emotionally. This point was made by Justice Côté in ***Calmont Leasing Ltd v 32262 BC Ltd***, 2002 ABCA 290 [*Calmont*], a case involving an application for security for costs in an appeal where the appellant corporation, like Blazer, had no income and no assets: see also ***Poole v City Wide Towing and Recovery Service LTD***, 2020 ABCA 102 at para 55.

[29] Other differences in the Ontario cases arise from the nature of the claims, all involving injury or physical harm caused to the plaintiffs, magnifying the adverse impact the security of costs order would have on an individual plaintiff of modest means.

[30] In ***Alary***, the fact the plaintiff had insurance to cover an adverse cost award was only one of many other factors considered by the court. The court ordered the plaintiff to advise if the policy was terminated or cancelled but the possibility of termination was not explicitly considered in the decision: ***Alary*** at para 37.

[31] The court in ***Shah*** ordered a modest amount for security of costs considering the plaintiff was not resident in Canada and made no financial disclosure. In terms of the insurance policy, the court found, like the Blazer policy, that several of the terms relied on the plaintiff's actions, which were beyond the control of the defendants. One term, like Blazer's policy, was the ability of the plaintiff to terminate the policy at will: ***Shah*** at paras 22 to 23.

[32] The ***Frantz*** decision, as in the case before me, involved a DAS policy. The court relied on the policy as a factor in exercising its discretion to dismiss the security for costs. However, there was written confirmation from DAS that it would honour the terms of the policy: ***Frantz*** at para 12. I also note that the court commented on the privity of contract issue and distinguished between an action arising from a personal injury or tort, permitting equitable remedies, and a breach of contract that would not: ***Frantz*** at paras 10 to 11.

[33] ***Grotz*** also relied on a DAS policy but, unlike Blazer's policy, allowed for coverage of costs up to the date the policy was terminated: ***Grotz*** at para 9. I also note that ***Grotz*** was an appeal against a Master's decision in Ontario, where although the standard of review is correctness, deference to the original decision maker was required: ***Grotz*** at para 2.

[34] In any event, in both ***Frantz*** and ***Gratz***, the court considered solicitor undertakings as an answer to some of the shortfalls of the policy. As Blazer also suggested this avenue, I will now turn to a discussion of whether, despite the inadequacy of the policy to provide a substitute for the security of costs, undertakings can ameliorate the shortfalls or inadequacies of the policy.

3. Solicitor undertakings

[35] Blazer suggested that even if the policy itself was not an adequate substitute for the security for costs, undertakings could be provided to allay any concerns with the coverage in the policy. I find the undertakings do not fill the gap or allay the concerns raised by the adequacy of the policy.

[36] The two undertakings suggested were as follows. First, an undertaking that Blazer would advise of any termination of the policy. Second, Blazer would give advance notice to Delnor when the aggregate legal costs are within $70,000.00 of the $200,000.00 limit.

[37] I find these undertakings do not adequately protect Delnor's interests and do not fill the shortfalls, gaps and inadequacies of the policy. First, to advise of termination does not stop termination of the policy. This undertaking merely provides notice that any adverse costs award will not be covered and Delnor must spend more funds to protect any debt owed to them. In short, the undertaking is a conveyor of bad news that fails to monetarily protect Delnor. Second, the undertaking to give prior notice of when the legal costs limit is approaching does nothing to guarantee or confirm that any costs award would be covered by the policy. Indeed, in receiving this information, Delnor would need to make another application for security of costs to protect themselves.

[38] I find these undertakings to be wholly inadequate. Moreover, the undertakings, by requiring Delnor to take further litigation steps to protect their position, fail to promote the purpose and intention of the *ARC* and require a disproportionate use of court resources: ***Hryniak v Mauldin***, 2014 SCC 7 at para 32.

4. Other pathways to secure any costs award

[39] Blazer also argued that despite the lack of privity of contract, Delnor could enforce the insurance policy through section 534 of the *Insurance Act* or could raise relief against forfeiture if the policy is terminated. I agree with Delnor that these pathways are not viable options.

[40] First, section 534 requires a failure to satisfy a judgment obtained by a claimant for injury or damage where there is a writ of enforcement against the insured. Even if the term injury or damage can include pure economic damage or injury as suggested by Justice Burrows in ***Qualiglass Holdings Inc v Zurich Indemnity Co of Canada***, 2004 ABQB 577, to rely on the section Delnor would need to take extra steps to enforce the judgment through a writ and expend further money to litigate in accordance with the section. A similar concern is raised with Delnor relying on relief from forfeiture, which, as pointed out by Delnor, would require Blazer's co-operation and, again, require further litigation costs by Delnor in both time and money.

[41] I find these pathways are not adequate substitutes for the security of costs application, where funds are immediately available to cover costs awarded without "costing" the recipient of that award. Such a scenario would fly in the face of the purpose of costs awards, which include indemnifying a successful party for legal expenses incurred: ***VLM v Dominey Estate***, 2023 ABCA 382 at para 4. Blazer's reliance on section 534 of the *Insurance Act* and relief from forfeiture would erode any costs awarded and fail to fulfill the primary purpose of such an award.

[42] I also find that Blazer failed to provide any clear evidence that it could not otherwise raise the funds to pay for the security of costs: ***Calmont*** at para 10; ***Attila Dogan Construction v AMEC Americas Limited***, 2011 ABQB 175 at para 13, appeal dismissed 2012 ABCA 379. Indeed, as commented on by AJ Prowse, Blazer has other alternatives such as funding from Mr. Dovell or its creditors, all who would benefit from a positive outcome of this claim.

5. Conclusion on the ability to pay

[43] In the totality of the factual circumstances, and on a close reading of the policy terms, conditions and exclusions, I find the policy is not an adequate substitute for the security of costs. I further find that the policy together with the solicitor undertakings and the potential ability of Delnor to enforce its claim through the *Insurance Act* or relief from forfeiture, fails to provide an adequate substitute for the security of costs. Considering Blazer is impecunious and offers no

evidence of any other financial means to pay any costs award, I find this factor strongly favours the security of costs order.

[44] I will now turn to the other factors under rule 4.22.

B. Merits of the Action Under Rule 4.22(c)

[45] Blazer submitted that the claim was not clearly devoid of merit. At the very least, even applying Delnor's set off amounts, Blazer is owed $41,000.00. Delnor disputes this position. In its view, the amount set off not only includes the amount deducted from Blazer's claim directly related to Balzer's mislaying of the utility pipes but also the loss of monies from the delay occasioned by the error. Delnor relies on evidence from an employee of Blazer that the work failed to comply with the terms of the contract and on expert evidence that confirms Blazer's sub-par work performance.

[46] Based on the submissions, evidence and pleadings, Delnor has a reasonably meritorious defence to the claim. Even so, it is difficult at this early stage to determine the merits of the action. I therefore find that this factor has limited use in the balancing of factors but is still a factor to consider in light of the claim and the defence: ***Kostic v Scott Venturo Rudakoff LLP***, 2022 ABQB 188 at para 25 (k) & (l). I am mindful that the merits of an action may impact the next factor of whether the security for costs create undue prejudice to Blazer's ability to continue the action.

C. Undue Prejudice to Blazer's Ability to Continue the Action Under Rule 4.22(d)

[47] Under this factor, I find there is no undue prejudice to Blazer's ability to continue the action. This is primarily based on the lack of evidence from Blazer on other avenues to cover the security of costs from those individuals and creditors who serve to gain from the claim: See ***Calmont*** at para 9; ***The Owners: Condominium Plan No 982 6403 v CPI Crown Properties International Corporation***, 2018 ABCA 232 at para 30; ***2008570 Alberta Ltd v Cedar Peaks Mortgage Investments Inc***, 2020 ABCA 275 at para 14.

[48] This evidence is particularly important where there is an impecunious corporation as the claim becomes "a one-way valve" allowing money to flow from a successful claim "through the company to its creditors or shareholders (or both)" and prevents any money from flowing in the opposite direction should the claim fail: ***Calmont*** at para 8.

[49] I am cognizant that if security of costs cannot be paid by Blazer a potentially arguable claim will not be prosecuted. Even so, "access to justice does not equate to access to civil processes without fear of costs consequences," particularly where, among other factors, the claim is defensible and Blazer has provided no evidence that it could not otherwise raise the funds: ***DataNet Information Systems, Inc v Belzil***, 2011 ABCA 40 (chambers) at para 4.

V. Conclusion

[50] After reviewing all the factors, I find that the order for security of costs is just and reasonable in the circumstances considering Blazer has offered no adequate substitute for its inability to pay any costs award. The insurance policy offered as a substitute for the Prowse Order fails to protect Delnor in any substantive way should costs be awarded. Moreover, the solicitor undertakings fail to provide further comfort in that regard considering Delnor, not Blazer, would be obliged to take further litigation steps to protect itself. Although the claim is

arguable, this factor does not weigh heavily in Blazer's favour considering the claim is defensible and is in the early stages of the proceedings. Finally, there is little evidence of "undue" prejudice to Blazer considering there was no clear evidence of Blazer's inability to garner the funds for the security of costs either through its director or its creditors.

[51] I am mindful that security for costs is a discretionary decision that must not be done lightly. I am also cognizant of the objective of the rule. In the case before me, Blazer is an impecunious corporation with no assets with a corporate director who is unwilling to provide any resources towards this claim from which he will personally benefit. Counsel for Delnor aptly described the situation as Blazer having "no skin in the game," meaning the company is, in the works of Justice Lesfurd, proceeding with a "risk free" litigation. The insurance policy, which is funding the litigation, rather than providing a safety net for Delnor, provides an incentive for Blazer to proceed with litigation "come what may."

[52] I am satisfied that considering the record of proceedings including the totality of the circumstances and the submissions (both written and oral) before me on this appeal, the granting of security of costs by Applications Judge Prowse was well-founded in the law, the facts, and in equity. The appeal is dismissed and the Prowse Order for security of costs is upheld.

[53] Both counsel for the parties were satisfied with the quantum ordered for security of costs considering the potential issues and the expert evidence that may be required. I therefore uphold the amount ordered by AJ Prowse of $66,737.75.

[54] Blazer shall have one month from the date of this decision to post the security for costs in the action in accordance with the Prowse Order dated March 17, 2023, and filed April 3, 2023.

VI. Costs

[55] As the security for costs did not include this appeal, if the parties cannot come to an agreement on costs of the appeal within thirty days of this decision, each party may provide a brief two-page written argument for my consideration. Delnor shall file and serve its brief on Blazer and submit it to my office by May 6, 2024. In response, Blazer shall file and serve its brief on Delnor and submit it to my office by May 20, 2024.

[56] I thank both counsel for their submissions.

Heard on the 15th day of March, 2024.
Dated at the City of Calgary, Alberta this 2nd day of April, 2024.

Lisa A. Silver
J.C.K.B.A.

Appearances:

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