CITATION: 3 Dogs Daycare Inc. v. Dogtopia Enterprises Canada Inc., 2024 ONSC 3182
COURT FILE NO.: CV-19-625513
MOTION HEARD: 20240327
REASONS RELEASED: 20240615

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

3 DOGS DAYCARE INC.

Plaintiff

- and-

DOGTOPIA ENTERPRISES CANADA INC., PETER HERBERT THOMAS, EASTERN CANADA DOGGY CARE LTD., MARK SONIK and ANITA SAMADIAN

Defendants

BEFORE: ASSOCIATE JUSTICE McGRAW

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REASONS RELEASED: June 15, 2024

Reasons For Endorsement

I. Background

[1] This is a motion by the Defendants for security for costs. The Defendants seek $389,542.78 on a substantial indemnity scale or alternatively, $300,864.78 on a partial indemnity scale. A more detailed summary of the background to these proceedings is set out in my Reasons For Endorsement dated January 21, 2021 from the Defendants' demand for particulars motion and motion to strike (*3 Dogs Day Care Inc.* v. *Dogtopia Enterprises Canada Inc.*, 2021 ONSC 514). My Costs Endorsement dated January 4, 2022 is at 2022 ONSC 86.

[2] The Plaintiff 3 Dogs Daycare Inc. ("3 Dogs" or the "Plaintiff") is a former franchisee of the Defendant Dogtopia Enterprises Canada Inc. ("DECI"). DECI is the Canadian franchisor of "Dogtopia" which offers dog daycare, boarding and grooming. The Plaintiff was the franchisee of the Burlington, Ontario location (the "Franchise") pursuant to a franchise agreement dated October 6, 2016 (the "Agreement"). Robert Heaphy ("Rob") and his wife Lisa Heaphy ("Lisa", together, the "Heaphys") are the principals and equal 50/50 shareholders of 3 Dogs.

[3] The Defendant Eastern Canada Doggy Care Ltd. ("ECDC") is a regional developer for DECI which recruits and supports Ontario franchisees. The Defendant Mark Sonik ("Mark") is the Eastern Canada Sales Director for DECI and an officer and director of ECDC. The Defendant Anita Samadian is Mark's wife whose corporation was a consultant to ECDC. The Defendant Peter Herbert Thomas ("Peter") is the President and a director of DECI and a director and officer of ECDC.

[4] The Plaintiff claims that the Heaphys had a right to rescind the Agreement pursuant to the *Wishart Act* (Ontario) due to DECI's failure to provide a compliant franchise disclosure document. The Plaintiff alleges that after the Franchise opened, the Defendants conspired to manufacture grounds to terminate the Agreement and take over the Franchise. On October 20, 2018, ECDC, as assignee of the Agreement, purported to terminate the Agreement for cause. The Plaintiff alleges that DECI purposely waited to terminate the Agreement until the lapse of 3 Dogs' two-year statutory right of rescission.

[5] ECDC's grounds for termination included: i.) abuse and mistreatment of dogs in 3 Dogs' care jeopardizing the reputation and goodwill of Dogtopia; ii.) mistreating employees and failing to operate in a manner safe for employees; iii.) failing to conform with the Dogtopia Operating Standards Manual and other policies and procedures and putting staff, customers and dogs at risk by allowing the Heaphys' own aggressive and dangerous dogs into open play and failing to quarantine sick dogs; and iv.) promoting and recommending a trainer who competed with the Franchise.

[6] The Plaintiff commenced this action by Statement of Claim issued on August 14, 2019. In its Amended Claim the Plaintiff claims $5,000,000 for breach of contract; a declaration that the Agreement was wrongfully terminated; $500,000 from DECI and ECDC for breach of the duty of fair dealing pursuant to s. 3 of the *Wishart Act*; $3,000,000 for conspiracy; damages in the amount of the market value of converted assets as at October 20, 2018 and/or the market value as at the end of trial for the detention of the converted assets from October 20, 2018 to the end of trial or alternatively, disgorgement damages based on based on ECDC's gain of the converted assets; damages in an amount to be determined for unjust enrichment by ECDC; $250,000 in punitive damages; and declarations that Peter is personally liable for the acts of DECI and ECDC and Mark is personally liable for the acts of ECDC.

[7] On September 1, 2020, DECI commenced a separate action against 3 Dogs and the Heaphys for damages of $123,278.96 calculated under the Agreement and $1,500,000 for breach of the duty of fair dealing and loss of good will and reputation (the "DECI Action"). On August 16, 2019, 3 Dogs and the Heaphys commenced an action against their former lawyers, Brian Heagle and Feltmate Delibato Heagle LLP claiming $5,000,000 in general damages and special damages of $740,000 for negligence (the "Solicitor's Action")

[8] Eight (8) telephone case conferences were held on June 3, June 23 and September 15, 2021; January 19 and December 6, 2022; June 28 and September 15, 2023; and January 12, 2024 to speak to costs of the particulars motion, examinations for discovery, refusals and security for costs. Efforts to resolve security for costs were unsuccessful. Examinations for discovery have

been completed, however, numerous undertakings and refusals remain at issue which the parties must resolve so that they can attend mediation. The current deadline to set the action down for trial is July 31, 2024.

II. The Law and Analysis

[9] For the reasons that follow, I conclude that it is just in the circumstances that the Plaintiff post security for costs on the terms set out below.

[10] Rule 56.01(1) states:

> "The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that…
>
> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;"

[11] Rule 56.01(1) does not create a *prima facie* right to security for costs but rather triggers an enquiry whereby the court, using its broad discretion, considers multiple factors to make such order as is just in the circumstances including the merits of the claim, the financial circumstances of the plaintiff and the possibility of an order for security for costs preventing a bona fide claim from proceeding (*Stojanovic* v. *Bulut*, 2011 ONSC 874 at paras. 4-5). The court has broad latitude to make any order that is just in the circumstances (*Yuen* v. *Pan*, 2018 ONSC 2600 at para. 14)

[12] In Y*aiguaje* v. *Chevron Corp.*, 2017 ONCA 827, the Court of Appeal held as follows:

> **"**23 The Rules explicitly provide that an order for security for costs should only be made where the justness of the case demands it. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of rr. 56 or 61 have been met.
>
> 24 Courts in Ontario have attempted to articulate the factors to be considered in determining the justness of security for costs orders. They have identified such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns, and the public importance of the litigation. See: *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (H.C.); *Morton v. Canada (Attorney General)* (2005), 75 O.R. (3d) 63 (S.C.); *Cigar500.com Inc. v. Ashton Distributors Inc.* (2009), 99 O.R. (3d) 55 (S.C.); *Wang v. Li*, 2011 ONSC 4477 (S.C.); and *Brown v. Hudson's Bay Co.*, 2014 ONSC 1065, 318 O.A.C. 12 (Div. Ct.).
>
> 25 While this case law is of some assistance, each case must be considered on its own facts. It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid

criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made."

[13] Determining the order which is just in the circumstances requires a balancing between ensuring that meritorious claims are allowed to go forward with the consequences of being left with an unenforceable costs award where a party pursues an unsuccessful claim (*Ascent Inc.* v. *Fox 40 International Inc.,* [2007] O.J. No. 1800 at para. 3; *Rosin* v. *Dubic,* 2016 ONSC 6441 at para. 39; *Lipson* v. *Lipson,* 2020 ONSC 1324 at paras. 47-48). In some cases, security is required to correct the imbalance of a plaintiff having security for a successful claim while a defendant has no security for a successful defence and to prevent a plaintiff from going to trial without posting security, be unsuccessful then avoid paying costs (*2232117 Ontario Inc.* v. *Somasundaram,* 2020 ONSC 1434 at para. 27; *DK Manufacturing Group Ltd.* v. *Co-Operators Insurance,* 2021 ONSC 661 at para. 26).

[14] The initial onus is on the defendant to show that the plaintiff falls within one of the enumerated categories in Rule 56.01(1). The plaintiff can rebut the onus and avoid security for costs by showing that they have sufficient assets in Ontario or a reciprocating jurisdiction to satisfy a costs order; the order is unjust or unnecessary; or the plaintiff should be permitted to proceed to trial despite its impecuniosity should it fail (*Travel Guild Inc.* v. *Smith,* 2014 CarswellOnt 19157 (S.C.J.) at para.16; *Coastline Corp.* v. *Canaccord Capital Corp.,* [2009] O.J. No. 1790 (ONSC) at para. 7; *Cobalt Engineering v. Genivar Inc.,* 2011 ONSC 4929 at para. 16). This was summarized by Master Glustein (as he then was) in *Coastline:*

"7…

(i) The initial onus is on the defendant to satisfy the court that it "appears" there is good reason to believe that the matter comes within one of the circumstances enumerated in Rule 56;

(ii) Once the first part of the test is satisfied, "the onus is on the plaintiff to establish that an order for security would be unjust";

(iii) The second stage of the test "is clearly permissive and requires the exercise of discretion which can take into account a multitude of factors". The court exercises a broad discretion in making an order that is just;

(iv) The plaintiff can rebut the onus by either demonstrating that:

(a) the plaintiff has appropriate or sufficient assets in Ontario or in a reciprocating jurisdiction to satisfy any order of costs made in the litigation,

(b) the plaintiff is impecunious and that justice demands that the plaintiff be permitted to continue with the action, *i.e.* an impecunious plaintiff will generally avoid paying security for costs if the plaintiff

> can establish that the claim is not "plainly devoid of merit", or
>
> (c) if the plaintiff cannot establish that it is impecunious, but the plaintiff does not have sufficient assets to meet a costs order, the plaintiff must meet a high threshold to satisfy the court of its chances of success"

[15] The Plaintiff concedes that it does not have sufficient assets to satisfy a costs award. In Lisa's affidavit sworn February 9, 2024 she states that 3 Dogs has no assets, income or active bank accounts and has not operated any business since October 2018. The Plaintiff is also indebted to various lenders including an outstanding Judgment in favour of BMO in the amount of $328,428.72. At her examination for discovery in February 2023, Lisa testified that 3 Dogs stopped earning revenue at the time of the termination, was not profitable and was hemorrhaging money. Lisa and Rob state that they have been funding the litigation. In most cases, this would be the end of the analysis and the Plaintiff would not dispute that the Defendants have met the light initial onus under Rule 56.01(d) that it appears there is good reason to believe that the Plaintiff does not have sufficient assets in Ontario or a reciprocating jurisdiction to satisfy a costs award (*Georgian Windpower Corp.* v. *Stelco Inc.*, [2012] O.J. No. 158 (ONSC) at para. 7; *Coastline* at para. 7). This is not a heavy onus and only requires the Defendants to establish that there is more than conjecture, hunch or speculation (*Mazzika Arbika Ltd.* v. *Aviva Insurance Company of Canada,* 2017 ONSC 6801 at paras. 21-27; *Amelin Resources Inc., LLC* v. *Victory Energy Operations, LLC,* 2022 ONSC 4514 at paras. 17-18).

[16] The Plaintiff argues that, notwithstanding its admission that it does not have sufficient assets to satisfy a costs award, the Defendants have not met their onus under Rule 56.01 and therefore, their motion must fail. Specifically, the Defendants rely on the affidavit of Kathy Sheppard, a legal secretary, sworn November 15, 2023, who did not specify the source of her knowledge and admitted on cross-examination that she had no information regarding the financial status of the Plaintiff or its shareholders other than from "the file". The Plaintiff submitted that Ms. Sheppard's affidavit should not be permitted at all but declined the court's offer to bring a motion or make submissions to strike it. The Plaintiff asserts that since the Defendants filed second-hand evidence in a legal assistant's affidavit they have not met their onus as they are not entitled to rely on the Plaintiff's admissions in Lisa's affidavit and on her examination for discovery. Put simply, the Plaintiff asserts that the court should ignore its admissions for the purpose of the initial analysis only because this evidence did not originate with the Defendants. I reject these arguments and am satisfied that the Defendants have met the light onus under Rule 56.01(1)(d).

[17] The admissions by Lisa in her affidavit and on her examination for discovery (some of which are cited in Ms. Sheppard's affidavit with excerpts from the transcript) are part of the overall record that the court is entitled to consider in determining whether the onus under Rule 56.01(1)(d) has been met. The Plaintiff has admitted that, not only is there good reason to believe that it has insufficient assets to satisfy a costs award it in fact does not have sufficient assets to do so. The Plaintiff has not referred me to any authority in support of its assertion that the court should disregard its admission that it cannot satisfy a costs award simply because this evidence did not

emanate with the Defendants. It is also not clear on what basis the Defendants should be prevented from relying on discovery testimony regarding undisputed facts given over a year before the security for costs motion was brought. I accept the Plaintiff's submissions that Ms. Sheppard's evidence should be given less weight given that it is based on her review of the file. However, her affidavit contains material facts which are not in dispute including that the Plaintiff has an unpaid Judgment to BMO of over $300,000, an indicia of insolvency and instability which is relevant in considering the initial onus (*Amelin* at para. 18). Her affidavit also references the undisputed fact that BMO seized all of its assets and the admissions from Lisa's discovery testimony regarding the Plaintiff's financial difficulties.

[18] In advancing these arguments, the Plaintiff relies on *Unimac-Management Corp.* v. *Cobra Power Inc.*, 2015 ONSC 5167 in which Master Wiebe (as he then was) dismissed a security for costs for motion on the basis that the defendants did not have sufficient evidence to meet the initial onus. *Unimac* is distinguishable. In that case there was no admission by the plaintiff that it did not have sufficient assets. Accordingly, I do not read *Unimac* as standing for the proposition that the Defendants cannot satisfy their onus based, at least in part, on the Plaintiff's admission that it has no assets to satisfy a costs award. More generally, consistent with the Court of Appeal's direction in *Yaiguage*, the court is required to consider the justness of the order holistically, examining all the circumstances of the case guided by the overriding interests of justice to determine whether it is just that a security for costs be made. In doing so, the Court of Appeal directs that while the case law is helpful, there is no static list of factors and every case must be decided on its own circumstances and that the court should "take a step back and consider the justness of the order sought in all the circumstances of the case, with the interests of justice at the forefront" (*Yaiguage* at para. 25). I have followed this approach below in concluding that it is just in the circumstances to order security for costs. To find that the Defendants have not met their onus under Rule 56.01(1)(d) and dismiss the motion in the face of the Plaintiff's admission of the very requirement that they cannot satisfy a costs award would be contrary to a holistic and just approach.

[19] The Plaintiff further submits that it would be unjust to order security for costs because it is impecunious and its claim is not plainly devoid of merit. A plaintiff bears a heavy onus to establish that it is impecunious which requires a finding that goes beyond assets and income and means that the plaintiff cannot raise the necessary funds to post security (*Paulus* v. *Murray*, 2007 CanLII 6904 at para. 5). A corporate plaintiff must not only establish that the corporation itself is impecunious, but that it cannot raise funds from its shareholders to do so (*2311888 Ontario Inc.* v. *Ross*, 2017 ONSC 1295 at para. 20). A plaintiff who claims impecuniosity must provide evidence of its financial circumstances with "robust particularity" including complete and accurate disclosure of income, assets, expenses, liabilities and borrowing ability with supporting documentation for each category (*Ross* at paras. 18-19). There must be more than some evidence of impecuniosity and the plaintiff must satisfy the court that it is genuinely impecunious with full and frank disclosure of its financial circumstances (*Montrose Hammond & Co.* v. *CIBC World Markets Inc.*, 2012 ONSC 4869 at paras. 34-35; *EBA Advertising Inc.* v. *Kahn (c.o.b. Taxi Taxi Co.)*, 2013 ONSC 4971).

[20] Based on the record before me, I cannot conclude that the Plaintiff is impecunious. While I accept that 3 Dogs has insufficient assets, I cannot conclude that it is unable to raise or borrow funds to post security. This is largely based on the availability of the Heaphys' personal assets, my

rejection of their arguments that they should not have to use even a limited portion of their assets to post security and their lack of full disclosure and failure to make sufficient inquiries into borrowing funds.

[21] The Heaphys claim that they have no funds or access to funds to lend to 3 Dogs and that a security for costs order would end the litigation. At the time this action was commenced, the Heaphys owned a home in Burlington. They sold this property in October 2020 for $1,265,000 and purchased another property in Caledonia, Ontario for $685,777 (the "Caledonia Property"). I accept the Heaphys' evidence that some of the proceeds were used to pay off their personal debts though it is not entirely clear how much of the proceeds went into the down payment on the Caledonia Property. The Heaphys have refused to advise or provide an estimate with respect to the current value of the Caledonia Property. The Plaintiff spent significant time in written and oral submissions impeaching the accuracy of the Defendants' estimates of the Heaphys' equity including from a property website House Sigma valuing the Caledonia Property at $813,840. While I do not place great weight on the Defendants' estimated valuations of the Caledonia Property (or their suggestion that the Heaphys appear to have assets in the range of $628,771 to $756,833), the greater issue is the Heaphys' failure to provide any evidence or information regarding its value. The Caledonia Property is a material asset which the court must consider in determining whether or not the Plaintiff is able to raise funds from its shareholders to post security. The Heaphys' refusal to provide information regarding the estimated value of the Caledonia Property and their equity is contrary to the robust particularity required of the Plaintiff to establish impecuniosity. The Heaphys have advised that they made numerous improvements to the Caledonia Property in 2021 and Lisa acknowledged that property values have generally increased since they purchased it. There are outstanding mortgages on the Caledonia Property in the amount of $495,077.60 which would suggest that, even if its value has not increased, there may be equity of over $190,000. The Defendants submit that there may be equity of up to $318,000. However, given the lack of full disclosure and a reliable assessment, the true value and equity is unknown.

[22] There is also no evidence that the Heaphys have made any inquiries or attempts to borrow funds from sources other than family members and friends including using the Caledonia Property (*Chantrs Blinds and Shutters Inc.* v. *2037208 Ontario Inc.*, 2022 ONSC 6832 at para. 20). I do not accept the Plaintiff's argument that the Heaphys should not have to try to borrow funds from banks or other lenders or make inquiries because they do not have sufficient cash flow and that taking on any new debt would lead to a default "on a virtually instantaneous basis". This is insufficient in the absence of evidence regarding the costs and terms of borrowing and leaves the court to speculate as to the costs of borrowing and the Heaphys' ability to post any amount for security. Contrary to the Plaintiff's submissions, the Heaphys' cash flow set out in their materials is not the most important consideration. It is one consideration within the context of the rigorous standard of impecuniosity. This standard requires that the Heaphys' make inquiries as to whether they can borrow funds and the costs of doing so and to disclose this information to the court. Without information regarding inquiries made to borrow funds from lenders including the use of equity in the Caledonia Property, the disclosure provided is insufficient to establish that the Heaphys cannot obtain funds.

[23] The Heaphys disclosed that they have $430,525.37 in a spousal retirement savings plan at TD. However, they argue that they should not have to use these funds to post security. They state

that they inquired into the possibility of withdrawing these funds, however, they were advised that the tax consequences would reduce the overall value so as to make it impractical and yield little funds. Further, they say that this is a modest amount and that they if they withdraw funds then they will never be able to stop working.

[24] The Plaintiff relies on *Montrose* v. *CIBC World Markets,* 2012 ONSC 591; aff'd *Montrose Hammond & Co.* v. *CIBC World Markets Inc.*, 2012 ONSC 4869 in which Master Hawkins (as he then was) did not require the plaintiffs to use their retirement savings or the equity in their home to post security. In that case, Master Hawkins concluded that with the costs of litigation, living expenses and debt, all of the plaintiff's assets would be consumed and that to order any security would force them to abandon the litigation. Based on the record before me, I cannot make the same conclusions in the present case. Further, unlike *Montrose*, the Heaphys have not disclosed the value of their principal residence, the Caledonia Property. Given this lack of particularity, the court is left to speculate in considering the Heaphys' assertion that even if they were to borrow funds, they would immediately default. Unlike *Montrose*, I have also concluded that an amount of security can be ordered which would not prevent this action from proceeding to trial. Further, the Plaintiff's claims in this action are significantly higher, the allegations more serious and the causes of action and claims more complex. Without specific information regarding the estimated tax consequences related to withdrawing certain amounts (including amounts which are less than the entirety of their savings) and how much the withdrawals would yield, I am not prepared to exclude the Heaphys' retirement funds as a potential source of security.

[25] As I cannot conclude that the Plaintiff is impecunious, the Plaintiff must demonstrate that its claim has a good chance of success or a real possibility of success (*Coastline* at paras. 3 and 7; *Chalhal v. Abdullah et al,* 2022 ONSC 1727 at paras. 47-50; *Chill Media Inc.* v. *Brewers Retail Inc.,* 2021 ONSC 1296 at para. 14). In considering the merits, the court is not required to embark on an analysis such as on a summary judgment motion (*Coastline* at para. 7; *Horizon Entertainment Cargo Ltd.* v. *Marshall,* 2019 ONSC 2081 at para. 3). The court's analysis is based primarily on the pleadings with recourse to evidence filed on the motion and if the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage (*Coastline* at para. 7; *Horizon* at para. 3). An assessment of the merits should only be decisive where the merits may be properly assessed on an interlocutory application and success or failure appears obvious (*Coastline* at para. 7; *Horizon* at para. 3).

[26] In my view, it is not possible to conclude on the record before me that the Plaintiff's claim has a good chance or real possibility of success. The Plaintiff concedes that the success or failure of its claim will turn on findings of credibility. I agree, however, this is only part of the reason why conclusions on the merits cannot be made at this stage and on this record. The Plaintiff is advancing a $9,000,000 claim based on allegations of conspiracy, breach of the duty of fair dealing, conversion and other improper conduct and multiple provisions of the Agreement. To conclude that the Plaintiff's claim has a good chance of success would require the court to decide numerous disputed complex issues of fact and law, make significant findings of credibility and reconcile multiple issues. None of this is possible or appropriate based on the pleadings, documents, transcripts and submissions before me. These issues can only be properly canvassed at trial or a summary judgment motion on a complete record.

[27] For similar reasons, I reject the Plaintiff's argument that it would be unjust to order security because the Defendants' conduct complained of in this action is at least part of the cause of why the Plaintiff has insufficient assets (*John Wink Ltd.* v. *Sico Inc.*, 1987 CanLII 4299 (ON SC). To arrive at this conclusion would require the court to make conclusions and findings regarding the merits including credibility which, as set out above, are not possible or appropriate on this record at this stage of the proceedings. This is not a straightforward claim like a collection action or one where only the quantum is in dispute such as where the Defendants' refusal to pay an outstanding liquidated amount has deprived the Plaintiff of assets. This is a complex $9,000,000 claim with multiple causes of action where the cause of the Plaintiff's financial difficulties and alleged damages are vigorously disputed. Accordingly, I cannot conclude that the Plaintiff's lack of assets or part of it is a direct result of the Defendants' conduct as alleged in this action (*Cigar500.com Inc.* v. *Ashton Distributions Inc.*, [2009] O.J. No. 3680 (S.C.J.) at para. 40; at paras. 21-27).

[28] The Plaintiff also argues that the Defendants' delay in bringing this motion is fatal to its request for security (*Chalhal* at paras. 33, 51-55; *Wilson Young & Associates* v. *Carleton University et al*, 2020 ONSC 4542 at para. 59). A motion for security for costs must be brought promptly upon the Defendant discovering that it has a reasonable basis for bringing the motion as a plaintiff should not have to post security after it has incurred significant expense in advancing the litigation (*Wilson Young* at para. 59). The moving party should not be entitled to security for costs if its delay causes prejudice to the plaintiff and failure to explain the delay is fatal to the motion even in the absence of prejudice (*Wilson Young* at para. 59). The Defendants first raised the motion at the June 2023 case conference and the motion was scheduled at the September 2023 case conference. The Plaintiff submits that the Defendants had sufficient information regarding the Plaintiff's financial difficulties at the time of termination in 2018 and should have moved for security in mid-2021 after they delivered their Defence. The Defendants claim that they did not fully understand the Plaintiff's financial situation and assets until examinations for discovery in February 2023. In my view, the Defendants should not have waited as long as they did to move for security and have not fully explained this delay with direct evidence. However, I cannot conclude that the timing of the Defendants' request is being used strategically or that they should have brought it immediately upon the close of pleadings (*Wilson* at para. 59; *Yaiguage* at para. 23). The timing is mitigated in part by the fact that the parties continue to deal with undertakings and refusals, there may be a refusals motion and re-attendances on discovery, mediation has not been scheduled and the matter has not been set down for trial. Another material consideration is that the Plaintiff did not correct its answers to undertakings with respect to its record book and confirmation that the Heaphys are 50/50 shareholders until December 2023. I am also not prepared to find that the Plaintiff has suffered any prejudice from the timing of the motion.

[29] Overall, I conclude that the Defendants' delay is not sufficient to deny them an order for security but should be reflected in amount and terms of security. Given the willingness of the Defendants to participate in this litigation without seeking security until the motion was scheduled in September 2023, I am satisfied that the just result is that the amount ordered reflect only estimated costs for future steps in the litigation in addition to a reduction for the delay itself.

[30] Applying a holistic approach, considering all relevant factors and balancing the parties' interests, I am satisfied that it is just in the circumstances to exercise the court's discretion to order

some security for costs. I am satisfied that an amount can be ordered on reasonable terms which is not so onerous as to prevent the Plaintiff from advancing its claims to trial while providing the Defendants with some protection from an unenforceable costs award. Given the Heaphys' available assets, their lack of the required disclosure and their failure to make sufficient inquiries into borrowing from financial institutions or using the equity in the Caledonia Property, I do not accept the Plaintiff's assertion that it cannot pay any amount of security, even a minimal amount or that any order for security would prevent it from advancing this action to trial (*Chill Media* at para. 14). The justness of the order and the balance between seeing claims through to trial against the risk of unenforceable costs awards should be reflected in the quantum of security ordered, not simply whether security is ordered at all (*Rosin* at paras. 38-39; *Lipson* at para. 48). In my view, an amount can be ordered which strikes the appropriate balance between not causing the litigation to be halted while providing some protection to the Defendants. Importantly, this is private, commercial litigation with no public interest considerations in which the Plaintiff claims significant damages of $9,000,000 and making serious, complex allegations of conspiracy against corporate and multiple individual defendants which also runs the risk of a high costs award. If the Plaintiff's claims are successful, in whole or in part, the Plaintiff and the Heaphys stand to benefit and therefore should accept at least some of the risk of pursuing their claims (*Design 19 Construction Ltd.* v. *Marks*, [2002] O.J. No. 1091 (Ont. S.C.J.) at paras. 10-15). Further, those who are prepared to finance the litigation should also be prepared, in the absence of impecuniosity, to post security (*Crudo Creative Inc.* v. *Marin*, [2007] O.J. No. 5334 (Ont. Div.).

[31] The court has broad discretion to determine a fair and reasonable amount of security which is substantially similar to the exercise of its discretion in fixing costs of a proceeding pursuant to Rule 57.01 (*Canadian Metal Buildings Inc.* v. *1467344 Ontario Limited,* 2019 ONSC 566 at para. 27). The quantum should reflect an amount that falls within the reasonable contemplation of the parties, what the successful defendant would likely recover and the factors set out in Rule 57.01 (*720441 Ontario Inc.* v. *The Boiler et al*, 2015 ONSC 4841 at para. 56; *Marketsure Intermediaries Inc.* v. *Allianz Insurance Co. of Canada*, 2003 CarswellOnt 1906 at paras. 17-20). In most cases, security for costs will be ordered on a partial indemnity scale in tranches by stage(s) in the litigation on a "pay as you go" basis (*Marketsure* at paras. 13-18).

[32] I am not satisfied that the amount of security sought by the Defendants is fair, reasonable or that it reflects the relevant factors above including the Defendants' delay, the ECDC Action and the expected costs of defending a claim of this nature. To start, there is no reason to depart from the general rule that security for costs should be ordered on a partial indemnity scale. In my view, the most significant reduction to the quantum requested is to reflect the timing of this motion, namely, the Defendants' willingness to proceed without security for costs until this stage of the litigation notwithstanding earlier knowledge of the Plaintiff's financial difficulties. As part of this reduction, it would not be just to order security for steps completed or still in progress, including completion of the current ongoing efforts with respect to refusals and undertakings. It is also in the interests of justice that no security be required before mediation which should be scheduled soon and may resolve some or all of the litigation. Further reductions are necessary given the inevitable overlap and economies of scale from which the Defendants will benefit from this action for the advancement of the ECDC Action (which is effectively a counterclaim) and to reflect more reasonable costs expectations.

[33] The Defendants seek security of $9,230 for the pre-trial and $127,800 for trial on a partial indemnity scale. Having reviewed the Defendants' Bill of Costs and considering all of the factors canvassed above, I am satisfied that it is fair and reasonable, within the parties' reasonable expectations and just in all of the circumstances for the Plaintiff to post security for costs of $15,000 within 60 days after setting the action down for trial; $5,000 within 30 days after the pre-trial; and $25,000 no later than 60 days prior to trial.

IV. Order and Costs

[34] Order to go on the terms set out above.

[35] If the parties cannot agree on the costs of this motion, they may file written costs submissions not to exceed 3 pages (excluding Costs Outlines) on a timetable to be agreed upon by counsel.

Released: June 15, 2024

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Associate Justice McGraw