

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1233580 B.C. Ltd. v. Western Sandpiper Holdings Ltd.*,
2024 BCSC 1377

Date: 20240712
Docket: S230953
Registry: Vancouver

Between:

1233580 B.C. Ltd.

Plaintiff

And

Western Sandpiper Holdings Ltd.

Defendant

Before: Associate Judge Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J.D. Shields

Counsel for the Defendant:

J.F. Gray

Place and Date of Hearing:

Vancouver, B.C.
July 12, 2024

Place and Date of Judgment:

Vancouver, B.C.
July 12, 2024

Introduction

[1] **THE COURT:** I have before me an application of the defendant, Western Sandpiper Holdings Ltd., seeking an order that:

- a) The plaintiff post security for costs of the defendant in the amount of \$42,028.90 within 30 days;
- b) The action be stayed pending posting of the security for costs by the plaintiff;
- c) If the plaintiff does not post the security for costs within 30 days of the date of this order the defendant shall be permitted to apply to court for the dismissal of the action;
- d) The defendant be permitted to apply for further security for costs if the security posted becomes inadequate in relation to the defendant's anticipated costs.

[2] The plaintiff opposes the relief sought. I have made minor edits to these reasons to enhance readability. The reasoning and outcome have not changed.

Background

[3] The background is the plaintiff 1233580 B.C. Ltd. ("123 BC") entered into an agreement with the defendant ("Western") in relation to a property which had been damaged by fire. 123 BC wished to carry out a banquet business. There is a substantial dispute between the parties as to who was responsible under their agreement to carry out renovations, who is responsible for paying for those and in what proportion, and who was responsible for various delays or omissions during the process. The lease was eventually terminated and there is a claim for damages arising from breach of the lease.

[4] The notice of civil claim was filed on February 8, 2023. The response to civil claim was filed March 20, 2023. Notice of trial was filed August 25, 2023, returnable for February 10, 2025, and is set for nine days. There is also a counterclaim in which Western is seeking damages for various things such as rent arrears and damages relating to release of builders' liens filed by parties that I assume are contractors or

subcontractors involved in renovations, and the like. The amount involved in the counterclaim is roughly \$140,000- \$150,000.

Applicable Law

[5] The test for security for costs is s. 236 of the *Business Corporation Act* which provides:

If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

[6] The court also has inherent jurisdiction to order security for costs, but as an Associate Judge I do not have inherent jurisdiction, so any authority I exercise on this application is pursuant to s. 236.

[7] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160, 1999 CanLII 5860, at para. 14, the court summarized the test to be applied on an application for security for costs:

1. Does it appear that the plaintiff company will be unable to pay the defendants' costs if the action fails?
2. If so, has the plaintiff shown that it has exigible assets of sufficient value to satisfy an award of costs?
3. Is the court satisfied that the defendants have an arguable defence to present?
4. Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff's case from being heard?

[8] In *Kropp v. Swanese Bay Golf Course Ltd.*, [1997] B.C.J. No. 593 (BCCA), the court identified factors to be considered, at para. 17:

1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand,

and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;

4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
7. The lateness of the application for security is a circumstance which can properly be taken into account.

[9] There was a useful summary of the considerations being applied in a case called *Integrated Contractors Ltd. v. Leduc Development Ltd.*, 2009 BCSC 965, at paras. 11-15, a decision of Justice Griffin, when she was this court:

[11] The first stage of the legal test on an application for security for costs is the requirement that the applicant make out a prima facie case that the respondent would be unable to pay the applicant's costs if the respondent's claim fails: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 1999 CanLII 5860 (BC SC), 36 C.P.C. (4th) 266 B.C.S.C., 91 A.C.W.S. (3d) 362; *Kropp v. Swanese Bay Golfcourse Ltd.* (1997), 1997 CanLII 4037 (BC CA), 29 B.C.L.R. (3d) 252, 90 B.C.A.C. 170; and *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993) 1993 CanLII 1669 (BC CA), 76 B.C.L.R. (2d) 231 (C.A.), 25 B.C.A.C. 95.

[12] If the applicants do meet this requirement, the respondent may resist an order for security for costs by showing that it has sufficient exigible assets to satisfy an award of costs: *Scopeset Technology Inc. v. Astaro Corp.*, 2004 BCSC 830.

[13] As well, the respondent to a security for costs application can resist an order for security for costs if it can show there is no arguable defence to its claim: *Scopeset* at para. 15.

[14] In addition, there are other factors which may touch upon the exercise of the court's discretion in determining whether or not to grant an order requiring a party to post security for costs. Potentially relevant on the facts of this application are the following factors:

- a) Where the court is satisfied that ordering security for costs would unfairly stifle a valid claim, the court may refuse to order security: *Kropp* at para. 17;
- b) Where the security for costs application is brought against a defendant advancing a counterclaim, and the counterclaim is sufficiently intertwined with the defendant's defence of the main claim: *Gray v. Powerassist Technologies Inc.*, 2001 BCSC 1208, 10 C.P.C. (5th) 148 (B.C.S.C.), and *Scottford Electrical & Technical Services Ltd. v. Blue Mountain*

Log Sales Ltd., 2005 BCSC 538, 10 C.P.C. (6th) 237 (B.C.S.C., Master); and

c) Where the financial hardship that may give rise to the respondent's inability to pay costs is due to the very actions of the applicants at issue in the respondent's claim: *Tour-Mate Technologies Corp. v. Syntronix Systems Limited et al.*, [1993] B.C.J. No. 599 (S.C.); and *Middlekamp v. Fraser Valley Real Estate Board*, [1993] B.C.J. 2965 (S.C.).

[15] Finally, if the court concludes a security for costs order is warranted, the court has discretion as to the quantum of security.

[10] Whether to order security for costs is a discretionary decision. However, once the applicant has shown that a corporate plaintiff will not be able to pay costs should a claim fail, security is generally ordered unless the court is satisfied there is no arguable defence; see *Ocean Pastures Corporation v. Old Masset Economic Development Corporation*, 2016 BCCA 12, at para. 8, citing the *Fat Mel's Restaurant Ltd.* case, at para. 16.

[11] It was not addressed in argument, but Western has filed a counterclaim in this case. Even if 123 BC's claim was stayed as a result of a security being ordered and not posted, that would not stay Western's counterclaim. One of the issues that commonly arises is whether it is appropriate to allow that to occur. This is addressed in *Gray v. Powerassist Technologies Inc.*, 2001 BCSC 1208, at para. 19:

[19] In my opinion, in accordance with the principle stated in *Kropp* that all relevant circumstances must be considered, the court may also consider the following factors:

- (a) whether the failure to order security for costs will work an injustice on a defendant by counterclaim (who is also a plaintiff) by being unable to recover litigation costs or whether the defendant by counterclaim will incur those cost in any event in the prosecution of its claim;
- (b) the extent of the overlap between the claim and the counterclaim – this factor is related to the previous factor;
- (c) the extent to which the plaintiff's impecuniosity may be due to the actions of the defendant which form the basis for the plaintiff's claim.

Analysis

[12] In this case, the evidence presented to try to establish a *prima facie* case of impecuniosity on the part of 123 BC is an affidavit of a paralegal, Ms. Liang, sworn June 17, 2024. It attaches as exhibits a BC Land Title search dated June 10, 2024. It appears to be a name search using 123 BC’s name, which shows one return relating to a certificate of pending litigation, but it does not indicate that 123 BC owns any interests in land in BC. Secondly, it attaches a BC Personal Property Registry search result which indicates there are no security registrations by or against 123 BC. Thirdly, there is an email from Charest Reporting providing an estimate of the cost of a discovery and a transcript. Lastly, there is an email from an interpreter providing an estimate for interpretation services. This is the only evidence Western tendered in support of this application.

[13] The application itself has attached as “Schedule A” a draft bill of costs, which sets out various tariff items from numbers 1-36. In the bill, it assigns a number of units to various items. In the case of the items where there is a range of units available, it appears to pick a mid-range number. For items where it is a per day charge, it appears to pick arbitrary amounts for certain steps, such as examinations for discovery, applications, preparation for and attendance at a 9-day trial and written argument, again with a mid-range figure. For disbursements, it includes figures for a court reporter and transcript, preparation of an expert report at \$5,000; interpreters and translators, and photocopying charges of 10,000 pages at 10 cents per page. As noted, this is simply attached as a schedule to the notice of application. It is not exhibited to an affidavit and there is no sworn narrative to provide any evidentiary support or explanation for why the numbers in it have been selected.

[14] During submissions, counsel for Western indicated that the numbers used were selected because they were mid-range. The bill is for the entire litigation process, start to finish, rather than starting present day to the conclusion of the action.

[15] Counsel for 123 BC invited me to give reasons regarding the adequacy of the evidence tendered in support of trying to make out a *prima facie* case for whether it appears 123 BC would be unable to pay an award of costs if the case were to go against it. The evidence that has been tendered has been challenged on a couple of different bases; including whether the evidence tendered is admissible based on case law that deals with proper form of attesting to truthfulness of the contents of exhibits to affidavits and the requirement to tender certified copies of certain documents obtained from public registries, and so forth. Counsel for 123 BC also argues the evidence tendered is simply inadequate to establish even a *prima facie* case of 123 BC's inability to pay.

[16] I do have concerns regarding the adequacy of the evidence tendered, but in this case, I am going to rest my decision on the lack of any sworn evidence addressing costs. One of the key considerations on these types of application is whether there appears to be an inability to pay anticipated costs. This means the applicant is obliged to provide some evidence of what their anticipated costs are going to be. In this case, the bill of costs is simply attached as a schedule to the application. It is not exhibited to an affidavit. There is no evidence verifying that it represents a considered estimate of what Western's projected costs are going to be, what assumptions are built into the draft bill of costs and what the estimated disbursements are based on. For example, it says preparation of expert report, \$5,000, but there is no insight offered into what kind of expert report or on what subject.

[17] The application materials fall short just by virtue of their failure to prove what the anticipated costs are. Absent some evidence to support the numbers that are selected, it appears to simply be an arbitrary selection of mid-range numbers and/or rounded numbers, without those having any factual connection the matters in issue in the action, what steps are expected to be taken in the litigation and why these numbers are being put forward.

[18] In my view, this is fatal to this application and sufficient reason, on its own, to dismiss it. I am going to respectfully decline the invitation to go further and comment on the adequacy of the *prima facie* impecuniosity evidence. That can be saved for another day.

[19] CNSL J. SHIELDS: I am happy with costs in the cause, thank you.

[20] CNSL J. GRAY: Okay.

[21] THE COURT: All right. Costs in the cause.

“Associate Judge Bilawich”