IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *IMH 415 & 435 Michigan Apartments Ltd. v. Unique Restoration Ltd.,* 2024 BCSC 1466

Date: 20240712
Docket: S189965
Registry: Vancouver

Between:

IMH 415 & 435 Michigan Apartments Ltd., IMH Pool XIV LP, and IMH GP XIV Ltd.

Plaintiffs

And:

Unique Restoration Ltd., Wynspec Management Inc., Zgemi Inc. and Harconbridge Construction Ltd.

Defendants

And:

IMH 415 & 435 Michigan Apartments Ltd., IMH Pool XIV LP, IMH GP XIV Ltd., and Starlight Group Property Holdings Inc.

Defendants by Way of Counterclaim

And:

Wynspec Management Inc., Zgemi Inc., Harconbridge Construction Ltd., Jerry Wakefield Construction Inc., Greenpoint Asbestos Remediation Services Ltd., Western Environmental Services Inc. aka Western Environmental Services Ltd., dba "Western Environmental Services", Turca Construction Ltd., and Derek W. Neale Architect Inc., Tom Staniszkis Architect Inc., Jerry I. Doll Architect Inc., Larry Adams Architect Inc., and Molly Y. Chan Architect Inc. collectively carrying on business as NSDA Architects, a corporate partnership

Third Parties

Before: Associate Judge Bilawich

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs and Starlight Group Property Holdings Inc.:	D. Garner (June 25, 2024) D. Thompson (July 12, 2024)
Counsel for Unique Restoration Ltd.:	S. Sodhi
Place and Date of Hearing:	Vancouver, B.C. June 25, 2024
Place and Date of Judgment:	Vancouver, B.C. July 12, 2024

Introduction

[1] **THE COURT:** This action involves cross claims which arise out of renovations carried out to apartment buildings located in Victoria, BC.

[2] The plaintiffs apply for orders that:

a) The defendant / plaintiff by counterclaim, Unique Restoration Ltd. (“Unique”) post security for costs of its counterclaim in the sum of $128,240 (the “Security”), or such other amount as the court deems just within 30 days;

b) Unique's counterclaim be stayed until it posts the Security; and

c) If Unique fails to post the Security, the plaintiffs may apply to have its counterclaim dismissed.

[3] An unusual feature of this application is that during the litigation, Unique became insolvent and made a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*). It does not have sufficient funds or revenue with which to fund its legal expenses in this litigation. Its unsecured creditors approved a proposal which incorporates a creative litigation funding solution which allows it to continue pursuing its counterclaim against the plaintiffs. Three of its directors / officers are fronting its legal expenses personally. Unique's legal counsel has agreed to provide their services at reduced rates, provided they will be entitled to additional amounts if the counterclaim is successful. Any net amount remaining would be distributed to Unique's unsecured creditors.

[4] The plaintiffs find themselves in a difficult position. They value their claim against Unique at about $2.9 million. Unique values its counterclaim against the plaintiffs at about $2.4 million. The plaintiffs claim the right to set off their claim against any amount they may be found to owe Unique. Due to Unique's insolvency, any net amount that the plaintiffs may be awarded would simply entitle them to share proportionally with Unique's existing unsecured creditors, which they expect would mean they recover cents on the dollar. They seek security for their costs to defend

Unique's counterclaim, in an apparent effort to force its directors / officers and/or unsecured creditors to either post the Security or bring an early end to Unique's counterclaim.

[5] This application was brought forward late in the proceedings. The application was filed September 25, 2023, but it did not proceed to hearing until June 25, 2024. The trial is currently scheduled for September 16, 2024, for 40 days.

Background

[6] Plaintiffs are owners of residential apartment buildings at 415 and 435 Michigan Avenue (collectively, the "Michigan Properties") in Victoria, BC. The defendant Starlight owns a subsidiary, which is an Asset Manager for the owners of the Michigan Properties (collectively, the "Michigan Owners").

[7] Unique is a federal company which is extra-provincially registered in BC. It carried on business as a restoration services contractor in the multi-unit residential, commercial and institutional sectors in Ontario and BC.

[8] On May 19, 2016, Unique entered into a contract with Starlight as representative of the Michigan Owners to perform work on the Michigan Properties, including exterior wall and balcony repairs and window replacement (the "Project"). The plaintiffs allege Unique caused or contributed to asbestos contamination, which delayed the Project and caused them damages.

[9] During the Project, on December 14, 2016, WorkSafe BC issued a stop-work order at 415 Michigan Avenue after finding asbestos, and alleged failure to use appropriate Safe Work procedures. On or about January 3, 2017, asbestos was detected at 425 Michigan Avenue. Starlight stopped work there voluntarily. Work subsequently restarted in or around August 2017 (415 Michigan) and September 20, 2017 (435 Michigan) respectively. There is a dispute as to whether the voluntary stoppage was necessary.

[10] Unique says it returned to the Project and remained there until it was substantially complete. The plaintiffs dispute this. Unique alleges that numerous invoices they issued were not paid. They filed two claims of builder's lien on title to the properties.

[11] On September 12, 2018, the plaintiffs filed their notice of civil claim claiming damages arising from the asbestos contamination and Unique's alleged abandonment of the Project.

[12] On November 7, 2018, Unique filed a response to civil claim and counterclaim against the plaintiffs and Starlight claiming for unpaid invoices, relief under the *Builders Lien Act*, S.B.C. 1997, c. 45, and other damages.

[13] Pursuant to a consent order made December 19, 2019, the Michigan Owners posted two lien bonds with the Registrar of this Court, representing replacement security for Unique's claims of lien, which were removed from title to the subject properties.

[14] The litigation is well advanced. Discovery of documents is complete. Numerous days of examinations for discovery have been held. Various expert reports have been produced and exchanged. The trial was originally scheduled for January 24, 2022 for 24 days, but was later rescheduled for September 16, 2024 for 40 days.

Unique's Insolvency

[15] On January 4, 2021, Unique filed a Notice of Intention to Make a Proposal under the *BIA*. Unique argues that the insolvency was caused or contributed to by the Michigan Owners' failure to pay its invoices on the Project.

[16] On March 17, 2021, the plaintiffs applied to the Ontario Superior Court for a consent order to have the stay of proceedings against Unique lifted so they could continue prosecuting this claim it in this BC action. The order was granted.

[17] In its Proposal, Unique indicated this litigation was its only asset that may produce any recovery for its unsecured creditors and it was unable to pay the legal costs necessary to advance its counterclaim.

[18] In order to fund the litigation, three directors / officers of Unique are paying its legal fees personally. Its legal counsel also agreed to a special arrangement from Unique's Proposal:

> The Starlight Litigation is being funded by Directors of the Debtor for the benefit of the Debtor's Creditors and to try to achieve an orderly wind-down of the Debtor's business. The Debtor has appointed the Debtor's Counsel as its counsel in respect of the Starlight Litigation. The Debtor's Counsel has agreed to work at a discounted rate to assist the Debtor and its Creditors, but in the event of a successful outcome of the Starlight Litigation for the Debtor, the Debtor's Counsel shall be entitled to a success fee equal to the greater of: (a) 20% of the gross proceeds of any recovery, and (b) the adjusted hourly rate of $350 per hour for all docketed time spent working on the Starlight Litigation (the “Legal Fees”).

[19] The Proposal contemplates that the officers / directors will be reimbursed for the legal expenses they paid from any recovery. After payment of legal expenses, any net amount remaining would be distributed to Unique’s unsecured creditors.

[20] On or about May 4, 2021, Unique filed its Proposal. Under III, Division 1 of the *BIA*, the first meeting of the creditors was held May 20, 2021. It was reconvened on June 1, 2021 and again on June 21, 2021. Unique's creditors approved an amended version of the Proposal (the “Amended Proposal”) on the latter date. The Amended Proposal also required court approval, which was delayed for a variety of reasons.

[21] Unique notes that Starlight was well aware of its Proposal from the outset of the proposal process and took an active role with the Proposal Trustee in related court proceedings before the Ontario Court.

[22] On June 20, 2023, the Proposal Trustee reconvened a meeting of creditors. The meeting was adjourned twice and eventually reconvened September 28, 2023. Unique's creditors reaffirmed their support for the Amended Proposal.

[23] Unique says that Court approval for the Amended Proposal should have been secured as early as November 2023. However, Starlight indicated that it intended to oppose court approval, so a contested motion had to be scheduled before the Ontario Court, set for February 5, 2024.

[24] On February 5, 2024, Justice Black of the Ontario Superior Court approved the Amended Proposal. One of the arguments that Starlight made to the court was that the manner in which Unique's counterclaim was proposed to proceed before the BC Supreme Court in this action was unfair inasmuch as it shields Unique's estate from the cost consequences, contrary to what Starlight says is an analogous scenario under s. 38 of the *BIA*, which obliges a creditor who proceeds with a debtor's claim to bear the full costs risk of that claim. In response, the Proposal Trustee noted that Starlight was already availing itself of a remedy for that problem in the BC action, namely seeking security for costs as a way to ensure that those funding the action on behalf of Unique could nonetheless be held accountable for costs.

[25] Starlight's arguments were rejected. The court noted that Starlight had itself obtained an order to lift the stay of proceedings to allow it to advance its claim in the BC Action rather than seeking a valuation of its claim against Unique under the *BIA* process in Ontario. The court indicated Starlight was simply seeking to prevent Unique's counterclaim from being pursued. The court found there was nothing inherently improper about both the claim and counterclaim being determined and valued in the BC Supreme Court proceedings, particularly given that the litigation was sufficiently far down the road that the 40-day trial was scheduled to proceed in September 2024. The court inferred that the continuing proceedings and trial were complex and may not lend themselves to a more summary determination in the *BIA* proceeding. There was also no mechanism in the *BIA* proceeding to value Unique's counterclaim, so it made sense for the claim and counterclaim to be dealt with together in a single proceeding.

Applicable Law

[26] The applicants rely on s. 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57:

> Court may order security for costs
>
> 236 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.

[27] The court also has inherent jurisdiction to order security for costs, but I note that Associate Judges do not have inherent jurisdiction. My decision is based solely on s. 236 above.

[28] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160, 1999 CanLII 5860 (S.C.) 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?

[29] In *Kropp v. Swaneset Bay Golf Course Ltd.*, [1997] B.C.J. No. 593, 1997 CanLII 4037 (BCCA), the Court of Appeal identified the factors 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.

[30] In *Integrated Contractors Ltd. v. Leduc Development Ltd.*, 2009 BCSC 965, at paras. 11-15, Justice Griffin, then with this court, provided a useful summary:

> [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. Swaneset 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 *Scotford 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.

[31] Whether to order security for costs is a discretionary decision. However, once the applicant has shown that a corporate plaintiff (in this case, by counterclaim) will not be able to pay costs should the 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. 18, citing *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.*, [1993] B.C.J. No. 507 (C.A.) at para. 16.

[32] A significant consideration in this case is the fact that the applicant plaintiffs are advancing their own claim against Unique in respect of the same project and subject matter on which Unique's counterclaim is based. The plaintiffs' claim would continue even if Unique's counterclaim is stayed due to a failure or inability to post security for costs. Additional counterclaim-specific factors were identified 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

[33] In this case there is no dispute that Unique would be unable to pay the plaintiffs' and Starlight's costs in the event its counterclaim fails. This is illustrated to some extent by records produced by Unique's Proposal Trustee, which disclose that

as of June 21, 2023, Unique had $209,924.12 in cash on hand, which was being held by the Proposal Trustee. In the Notice of Second Meeting of Creditors dated June 5, 2023, there was $10,375,405.48 noted as owing to Unique's unsecured creditors. This did not include any amount in respect of the plaintiff's claim in this action, which was treated as a contingent liability and valued at $0 or given a nominal value for purposes of the *BIA* proceedings.

[34] It is apparent that Unique does not have exigible assets of sufficient value to satisfy an award of costs. The Proposal indicated that its only remaining asset is its counterclaim in this action.

[35] I do not propose to get into the details of the competing claims and defences here. The matter is quite complex. Suffice to say that I am satisfied that the plaintiffs and Starlight have an arguable defence to the counterclaim that the claim and counterclaim are very inextricably linked and interconnected.

[36] As to whether an order for security for costs would visit undue hardship on Unique, such that it would prevent its counterclaim from being heard, it is clear that Unique does not have the direct resources necessary to raise the financing to fund substantial security. The ability of the individuals who are standing behind Unique to raise funds for security is also a relevant consideration.

[37] In this case, under the Amended Proposal, funding for Unique's legal expenses comes from its three directors / officers, Steve LeBlanc, John Kennedy, and Martin Williams. In Mr. LeBlanc's affidavit sworn June 2, 2024, he states:

> 62. I do not have any funds that I can contribute towards paying the security for costs requested by Starlight.
>
> 63. I am advised by John Kennedy and Martin Williams they do not have any funds available to contribute to the security for costs requested by Starlight.
>
> 64. In any case, if Starlight is successful on this motion, it will necessitate a further meeting of creditors of Unique and an adjournment of the trial which is currently scheduled to commence on September 16, 2024.

[38] I note that none of the three directors / officers say they do not have or would not be able to arrange funds necessary if security for costs is ordered. They do not

provide any evidence regarding their broader financial circumstances. They simply say they do not have funds they can contribute for that specific purpose. This does not constitute evidence that they lack capacity to raise additional funds for security; at best it indicates an unwillingness or a lack of desire to do so.

[39] The applicants argue that another possible source for Unique to raise funding necessary to cover a possible security for costs requirement are the unsecured creditors who stand to benefit from the Amended Proposal in the event Unique's counterclaim is successful. I note that they stand last in line to receive any net proceeds from a successful counterclaim. Their role under under the Amended Proposal has been passive. They have not been obliged to contribute to Unique's legal expenses thus far. On a practical level, it seems unlikely they would be eager to suddenly change that and contribute. It also appears unlikely that a meeting of creditors could be arranged and funding gathered with sufficient speed to keep the looming September 16, 2024 trial date.

[40] In my view, a critical consideration in this instance is the plaintiffs' and Starlight's delay in bringing this application to a hearing. They have been aware of and involved with Unique's *BIA* Proposal since shortly after they were initiated in January 2021. The plaintiffs applied for and were granted an order lifting the stay of proceedings so they could continue to prosecute their claim against Unique in this action. They were aware of and involved with the Proposal Trustee and the *BIA* process generally, and in particular the various meeting of creditors scheduled between 2021 and 2023. They were aware that unsecured creditors had approved and later reaffirmed their approval of the Amended Proposal. They actively opposed the application for court approval of the Amended Proposal before the Ontario Court.

[41] It is clear that the applicants have long been aware of Unique's insolvency and how its legal expenses for this action were being funded.

[42] Despite having that knowledge, it was not until September 25, 2023 that they filed this application. After filing it, they put it on hold and prioritized the *BIA* proceedings in Ontario court application as their means to try to prevent approval of

Unique's Amended Proposal to enable it to prosecute its counterclaim. That was decided against Starlight on February 5, 2024.

[43] This application did not come on for hearing until June 25, 2024, just over 11 weeks prior to the scheduled trial. To put this in the broader specific of the overall arc of this litigation, recall that the plaintiffs started the action in September 2018, and Unique's counterclaim was filed November 2018.

[44] At this point, all parties have invested extensive time and financial resources into preparing for a trial which is estimated to require 40 hearing days. This is clearly a factually and legally complex dispute.

[45] It is trite that applications for security for costs ideally should be brought as early as practicable in a proceeding so as to mitigate the prejudice that a plaintiff (by counterclaim in this case) may suffer as a result of being lulled into a false sense of security. See, for example, *Bergen v. Victoria Shipyards Co.*, 2000 BCSC 130, at para. 35:

> [35] An application for security should be brought on early in a proceeding, but delay rather than a bar is a matter to be considered in deciding whether the evidence indicates the plaintiff has been prejudiced by being lulled into a false sense of security. [*Honda Canada Inc. v. Tonka Motorcycle Sales Ltd.* (1986), 1986 CanLII 761 (BC CA), 7 B.C.L.R. (2d) 124 (C.A.)] Where primarily future costs are in issue delay will be a lesser factor. [*Kropp*].

[46] In *Number 216 Holdings Ltd. v. ING Insurance Company of Canada*, 2013 BCSC 9 at paras. 56 and 59-64, Justice Griffin, then with this court, found that giving notice of an application for security for costs four years after the commencement of the action was reason in itself to deny the relief sought:

> [56] The defendants did not give notice of this application until some four years after the action was commenced.
>
> …
>
> [59] The parties have actively prosecuted and defended this proceeding: There have been approximately four days of examination for discovery, production of documents, court applications (application to strike the jury notice and sever the bad faith claim, and the two summary trial applications). In addition, the plaintiff has obtained expert opinions in support of its claims.

> [60] I agree with the plaintiff that the defendants' applications are brought too late in the proceeding.
>
> [61] I do not accept the argument by ING that it only had sufficient information on which to bring this application in February or March of 2012. On the contrary, from the very beginning of the dispute between the plaintiff and ING, ING has been of a mind that the plaintiff has been in desperate financial circumstances. This forms the basis of ING's allegation that the plaintiff had a motive for setting fire to the building.
>
> [62] Furthermore, this does not seem to be a case where the corporate plaintiff's corporate and financial structure is so complicated that it would take considerable time and study to understand. The situation of the corporate plaintiff appears fairly straightforward: It had one asset, the property at issue, for which it incurred expenses and from which it generated rental income. It was not a company which was owned by inter-related companies or secretive persons or offshore interests, unlike the plaintiffs in the case of *Bergen Industries and Fishing Corp. v. Victoria Shipyards Co.*, 2000 BCSC 130, a case relied upon by ING.
>
> [63] In my view, it is no answer to the defendants' delay to simply adjust the amount of security for costs that might be ordered. There is evidence that the reduced sums of security for costs would still stifle the plaintiff's action. Had the defendants brought their applications early on and been successful, the plaintiff would not have incurred all of the expense of full discovery and a summary trial proceeding.
>
> [64] I conclude that the delay in giving notice of this application itself is sufficient reason to deny it in the circumstances of this case.

[47] This reasoning applies equally well to the circumstances here. Unique's counterclaim has been pending since November 2018. It filed its Notice of Intention to Make a Proposal in the *BIA* proceedings on January 4, 2021. The applicants have been aware of Unique's insolvency issue since around that time. The applicants have not offered a reasonable explanation for the delay in filing this application, and equally importantly, their delay in bringing it to an actual hearing. Waiting until what amounts to the eleventh hour prior to a long-standing trial, scheduled for 40 days, is a sufficient basis to deny the application in the circumstances here.

[48] Imposing a significant security requirement in these circumstances would also cause Unique disproportionate and undue prejudice through the likely loss of the current trial date and wasted legal expenses which would arise from that.

Conclusion

[49] I exercise my discretion to dismiss the application.

[50] Unique is entitled to its costs of the application from the applicants.

"Associate Judge Bilawich"