IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Cabana v. Wells*, 2023 NLSC 46
Date: March 28, 2023
Docket: 202001G3963

BETWEEN:

BRAD CABANA

FIRST PLAINTIFF

AND:

KATHERINE CABANA

SECOND PLAINTIFF

AND:

JOE WELLS

FIRST DEFENDANT

AND:

ROD MURPHY

SECOND DEFENDANT

AND:

RE/MAX EASTERN EDGE REALTY LTD.

THIRD DEFENDANT

AND:

KATRINA A. BRANNAN

FOURTH DEFENDANT

AND:

HUGHES & BRANNAN LAW OFFICES

FIFTH DEFENDANT

AND:

JOHN D. BERGHUIS

SIXTH DEFENDANT

AND:

CONTROL SURVEYS LIMITED

SEVENTH DEFENDANT

AND:

BILL MARTIN

EIGHTH DEFENDANT

AND:

BILL MARTIN CONSTRUCTION LIMITED

NINTH DEFENDANT

AND:

NEWFOUNDLAND AND LABRADOR CREDIT UNION

TENTH DEFENDANT

Before: Justice Garrett A. Handrigan

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: March 1, 2023

Summary:

Eight of the ten Defendants that Brad and Katherine Cabana are suing for damages applied for an order that the Cabanas provide security for costs in the proceedings.

The Court allowed their applications. It stated the terms on which the Cabanas would provide the security and it granted the Defendants leave to apply to have the Statement of Claim struck as against them if the Cabanas do not provide the security for costs as directed. The Court also ordered the Cabanas to pay the costs of the four Interlocutory Applications, to be taxed under Column 3 of the Scale of Costs.

Appearances:

Brad Cabana	Appearing on his own behalf
Katherine Cabana	No appearance on behalf of herself
Christopher J. Peddigrew, K.C.	Appearing on behalf of the First, Second and Third Defendants
R. Barry Learmonth, K.C.	No appearance on behalf of the Fourth and Fifth Defendants
Raymond G. Critch	Appearing on behalf of the Sixth and Seventh Defendants
Glen W. Picco, K.C.	Appearing on behalf of the Eighth and Ninth Defendants
Bionca Bastarache	Appearing on behalf of the Tenth Defendant

Authorities Cited:

CASES CONSIDERED: *Petten v. E.Y.E. Marine Consultants* (1995), 130 Nfld. & P.E.I.R. 205, 405 A.P.R. 205, (Nfld. S.C.(T.D.)); *Cabana v. Wells*, 2023 NLSC 17; *Evans v. Evans*, 2017 NLTD(G) 195

STATUTES CONSIDERED: *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] On July 28, 2020, Brad Cabana and Katherine Cabana filed a Statement of Claim in this Court, naming ten Defendants and claiming from them special damages, general damages, punitive, exemplary and aggravated damages, as well as interest and "[s]uch further and other relief as this Honourable Court deems mete and just" (para. 51 of the Statement of Claim). All ten Defendants filed defences to the claim over the ensuing months and eight of the Defendants also filed Interlocutory Applications, totalling four applications altogether, asking for orders that the Cabanas provide security for costs.

[2] The Sixth and Seventh Defendants, John D. Berghuis and Control Surveys Limited respectively, filed the first Interlocutory Application on May 11, 2021 and sought this relief, typically of all the Defendants who applied[1]:

> … the Applicants request that the order require the Respondents [Brad Cabana and Katherine Cabana] to pay… [the amount of party and party costs representing the reasonable costs of defending this action] to the Registrar of the Supreme Court within 10 days. Further, the Applicants [John Berghuis and Control Surveys Limited] request that, in the event the amount is not paid within the time required, the Applicants shall have leave to apply to dismiss the Respondents' claim. (paras. 22-24 of the 6th & 7th Defendants' Interlocutory Application)

[1] I note that the eight Defendants seeking security for costs filed four Interlocutory Applications between them, to each of which the Cabanas responded with an affidavit and then filed Memoranda of Fact and Law in support of their responses. There are common elements in both the Interlocutory Applications, as well as the Cabanas' responses to them, as there are in the Memoranda of Fact and Law the parties filed in support of their Applications and the Cabanas' responses. I quote only from the common elements in the 6th and 7th Defendants' Interlocutory Application, the Cabanas' response to it and the Memoranda of Fact and Law they both filed to the 6th & 7th Defendants' Interlocutory Application, the first to be filed asking for security for costs. I have, of course, reviewed all materials the Defendants and the Cabanas filed for all Interlocutory Applications.

[3] I heard the four Interlocutory Applications together on March 1, 2023 and reserved my ruling on the applications until now.

THE ISSUE

[4] The four Interlocutory Applications raise a single issue: Should Brad and Katherine Cabana provide security for costs?

THE LAW

Statute – Security for Costs

[5] Rule 21 of the *Rules of the Supreme Court, 1986*, 1986 c42, Sch D (the "Rules") provides, as may be relevant here:

> 21.01**.** The Court may order security for costs to be given in a proceeding whenever it deems it just, and without limiting the generality of the foregoing, it may order security to be given where
>
> (a) a plaintiff resides out of the jurisdiction;

Case Law - Security for Costs

[6] Green J., (as he then was) discussed applying Rule 21, at paragraph 17 of *Petten v. E.Y.E. Marine Consultants* (1995), 130 Nfld. & P.E.I.R. 205, 405 A.P.R. 205, (Nfld. S.C.(T.D.)):

> If the applicant does bring the case within *rule 21.01*, he or she will be *prima facie* entitled to security for costs. In that event, the responding party has an evidentiary burden to show why the justice of the particular case nevertheless requires that security not be posted.

[7] Green J. then considered two approaches that a “responding party” may take to an application for security for costs, the second approach being the relevant one to the applications I have here. The following paragraphs from *Petten* pertain:

> [18] … The second, and alternative, course would be for the responding party to concede financial weakness and argue that the position is so financially precarious that to require security would in effect drive him or her from the court room. In this scenario, the respondent will be stressing financial weaknesses and the applicant will have to argue that the financial position is not so weak as to make it impossible to provide security.
>
> [19] In this case, the Plaintiffs have opted for the second approach. In relying on their own financial weaknesses and in arguing that it would be unjust to require security because the effect would be, in essence to terminate the action against CSE, the Plaintiffs must shoulder an evidentiary burden not only to establish their impecuniosity but also to show that providing security would force them to abandon their claims. It is not merely an assertion of impecuniosity that is sufficient. The responding party must show an inability to borrow or to sell assets to raise the funds required: *Burke v. Larter* (1991), 5 C.P.C. (3d) 188 (P.E.I.S.C., App. D.)
>
> [20] Obviously, the court ought to be concerned as to whether any order for security might have the effect of driving a plaintiff from the court room. The right of any litigant to have access to the courts is an important right to be guarded jealously. That right, however, is not an absolute one. It is subject to the obligation to bring an action in good faith and it must be one that is not frivolous or vexatious or otherwise an abuse of court process. A responding litigant ought not to be subjected to such a proceeding or, if the other side nevertheless wishes to pursue it and it is not struck out, the responding party should be entitled to security for costs. The balancing of the right of access to the court against the right of a defendant to be free from expensive frivolous litigation is a delicate exercise. It involves an assessment on the plaintiff's side, of whether there is a degree of impecuniosity which would actually frustrate the plaintiff's ability to have his case heard and, on the defendant's side, an assessment of whether there is so little merit in the plaintiff's case as to justify a conclusion that the defendant is being subjected to frivolous or otherwise abusive litigation.
>
> [21] I understand "impecuniosity" in this context not to mean a situation where the plaintiff is completely asset and income-free. Rather, it refers to an inability on the part of the plaintiff, with whatever assets he or she has, within a reasonable period of time to sell or encumber them to provide funds to furnish the required security. That ability must be assessed in the context of when the application is made. …

[8] Based on the principles of law that I parse from *Petten*, I will analyze the issue that the Defendants' Interlocutory Applications raise this way:

1. Have the Defendants brought their applications within Rule 21.01?

2. If so, are the Cabanas so financially precarious that to require them to post security for costs "would … drive… [them] from the court room"?

3. If the Cabanas are so weak financially that ordering them to provide security for costs will drive them from the courtroom, are they acting in good faith and is their claim not frivolous or vexatious or otherwise an abuse of this court's process?

[9] This is the law I will apply to the issue I stated above. I turn now to analyze that issue, starting with the background to it.

ANALYSIS

Background

[10] Recently, I filed a judgment on an Interlocutory Application dealing with whether or not the Cabanas could rely on an affidavit they filed in responding to the Sixth and Seventh Defendants' Interlocutory Application for security for costs. That judgment may be found at, *Cabana v. Wells*, 2023 NLSC 17. Some of the background to the Interlocutory Applications I am dealing with here, appears in that judgment. I will provide additionally only what is still pertinent to the Applications. I do commend the other judgment to readers for a more complete picture of the ongoing litigation between these parties, and not because it is especially relevant to the present applications.

[11] Brad and Katherine Cabana filed their Statement of Claim in this Court on July 28, 2020, seeking damages, interest and costs from all ten Defendants. They say that over an 8-year period, from about 2010 to 2018, they bought a house and land in Hickman's Harbour, on Random Island, in the Province of Newfoundland and Labrador and demolished the older home that was on the property. Then they built a new house on the land, using funds from two mortgages they gave over the property, to secure repaying the costs they incurred to demolish the old house and to build the new one.

[12] Eventually, the Cabanas decided to sell the property and listed it for sale. Ultimately, they found a buyer and made ready to close the transaction, only to discover that there was a problem with the title to the property and the sale lapsed. Subsequently, the Cabanas stopped paying on their mortgages and notified their mortgagee that the mortgages were in default because of the title defect.

[13] Then they instructed their mortgagee to "…declare it so"; and further "… [to] access the title insurance it has on both mortgages so as to reduce harm to itself, and also to us". (Tab 10 to the Memorandum of Fact and Law filed by the Cabanas on December 3, 2021 to reply to the 6th and 7th Defendants Interlocutory Application).

[14] The mortgagee refused to declare the mortgages in default because of the alleged title defect and ultimately sold the property under power of sale because the Cabanas' defaulted on their payments. The mortgagee incurred a deficiency from the power of sale proceedings and it sued the Cabanas in this Court for the $81,185.32 deficiency, plus costs (File No. 202001G4969); but the mortgagee subsequently discontinued the action when it appeared that its claim against the Cabanas was statute-barred.

[15] On July 28, 2020, about two years after the Cabanas stopped paying on their mortgages, they filed a Statement of Claim in this Court (in the same cause as for this Interlocutory Application, with File No. 202001G3963), suing the following Defendants: Real estate agents, Joe Wells and Rod Murphy; the firm that employed them, Re/Max Eastern Edge Realty Ltd.; lawyer, Katrina A. Brannan; her law firm, Hughes and Brannan Law Offices; land surveyor, John D. Berghuis; his survey

company, Control Surveys Limited; building contractor, Bill Martin; his company, Bill Martin Construction Limited; and the mortgagee, Newfoundland and Labrador Credit Union (the "NLCU").

[16] Overall, the Cabanas claim that they did not get clear title to the property that they bought in 2010 and they hold all of the Defendants accountable for their title problems. In effect, the Cabanas say that significant portions of the new house that Bill Martin built for them in 2015, were outside their property line and fell within the foreshore of the surrounding ocean to which they had no title.

[17] As for the Defendants, this is how the Cabanas attribute liability to them for their deficient title:

- First and Second Defendants, Joe Wells and Rod Murphy: They failed to inform the Cabanas that extending their property into the foreshore was unlawful and that they would require a lease from the Crown.

- Third Defendant, Re/Max Eastern Edge Realty Ltd.: The firm is vicariously liable for the actions of its realtors.

- Fourth Defendant, Katrina Brannan: She misrepresented the property's title as free and clear of encumbrances, when it was not and also failed to advise the Cabanas to buy title insurance.

- Fifth Defendant, Hughes and Brannan Law Offices: The firm is vicariously liable for Katrina Brannan's negligence.

- Sixth Defendant, John Berghuis: He misrepresented the property as free of encumbrances, when it was not and was otherwise reckless.

- Seventh Defendant, Control Surveys Limited: The firm is vicariously liable for John Berghuis' negligence.

- Eighth Defendant, Bill Martin: He advised them to build into the foreshore and did not warn them that it was illegal to build there without a lease.

- Ninth Defendant, Bill Martin Construction Limited: The firm is vicariously liable for Bill Martin's negligence.

- Tenth Defendant, NLCU: The mortgagee was aware of the title problem, did not disclose the defect to them, and then induced them to sign a mortgage knowing the title to the property was defective.

[18] The Defendants vigorously defend the Cabanas' claim:

- First, Second and Third Defendants, Joe Wells, Rod Murphy and Re/Max Eastern Edge Realty Ltd.: The claim is statute-barred; Brad Cabana directed the purchase of the property in 2010; they had no knowledge of the foreshore issue; and Re/Max Eastern Edge Realty did not exist as a legal entity in 2010.

- Fourth and Fifth Defendants, Katrina Brannan and Hughes Brannan Law Offices: The claim is statute-barred; Katrina Brannan no longer practices law with the firm; the Cabanas knowingly built outside the boundary of the property they acquired in 2010; and the 2018 sale failed because of that defect.

- Sixth and Seventh Defendants, John Berghuis and Control Surveys Limited: The Cabanas elected to build into the foreshore when the building contractor informed them their newly proposed dwelling would not fit on the lot, they acquired in 2010 and the Defendants were not aware that the Cabanas had no claim to the foreshore.

- Eighth and Ninth Defendants, Bill Martin and Bill Martin Construction Limited: The Defendants built the house that the Cabanas directed them to build, they did not exceed that mandate and they otherwise met their contractual obligations to the Cabanas.

- Tenth Defendant, NLCU: The Defendant held mortgages over the Cabana property but it did not know there were problems with the title to the property until Brad Cabana informed them by a letter dated August 31, 2018.

[19] This is the background to the Defendants' applications for security for costs. I turn now to discuss the issues I stated above against that background.

DISCUSSION

Bringing Applications within Rule 21.01

[20] Rule 21.01 says that the Court may order security to be given for costs, where, amongst other things, "…a plaintiff resides out of the jurisdiction". Green J. in *Petten* at paragraph 17, noted the significance of a finding that one or more of the nine criteria stated in Rule 21.01 apply to the respondent:

> If the applicant does bring the case within *rule 21.01*, he or she will be prima facie entitled to security for costs. In that event, the responding party has an evidentiary burden to show why the justice of the particular case nevertheless requires that security not be posted.

[21] The Plaintiffs, Brad Cabana and Katherine Cabana reside outside the jurisdiction of this Court. The Cabanas list their address as Wabamun, AB T0E 2K0 and readily acknowledge (almost too readily, in fact) that the Defendants have brought them within Rule 21.01. This is how the Cabanas expressed it in paragraph 24 of the "Memorandum of Fact and Law" they filed in response to the Sixth and Seventh Defendants' application for security for costs:

> The Respondents admit they are not residents of the Province [of Newfoundland and Labrador], and therefore agree that the onus is upon them to show cause why a security for costs order is not warranted in this matter.

[22] The Cabanas note that this Province has a *Reciprocal Enforcement of Judgments Act*, R.S.N.L. 1990, c. R-4, as does Alberta where they live and they claim that the rights provided by that legislation offset the effect of Rule 21.01. They rely on this comment from Goodridge J. (as he was then), in *Evans v. Evans*, 2017 NLTD(G) 195 at paragraph 11, to support their submission:

> … I add that Ontario and this province have a reciprocal agreement for judgment enforcement. If the Defendant is successful at trial he will be in position to attach the Plaintiff's wages in Ontario, in the same manner as if she had been living in this province. The process for a reciprocal enforcement of a cost award in Ontario has a few additional steps however; it is not significantly more complex than attaching the wages of someone who is resident in this jurisdiction.

[23] I acknowledge Goodridge J.'s comment, but it is clear that the learned justice had already conducted the "balancing act" that Rule 21.01 applications require and decided that "… [it] favours denying the application for security" (para. 11); and his observations about the relevance of the reciprocal enforcement of judgments legislation appear more as *obiter dicta* than as his rationale for denying the application. In effect, the learned justice, at paragraph 17, decided that "… the effect of an order for security will be to bar her from proceeding with her claim" and he chose not to deny that to the respondent.

Being Driven from the Courtroom

[24] Of course, the Cabanas take a similar tact to what the plaintiff/respondent did in *Evans*. They say that a security for costs order will drive them from the courtroom. They say they are "impecunious", and they detail what the effect will be on them if I order them to provide security for costs. The following paragraphs, again from the "Memorandum of Fact and Law" they filed in response to the Sixth and Seventh Defendants' application for security for costs, pertain:

> 64. The Cabanas are impecunious… and any order for security for costs by this Court will result in the Cabanas being barred from pursuing their lawful claim… except for an appeal against such a decision.

> 65. Prior to the default of their mortgage terms, the Cabanas were not impecunious. The Cabanas had credit ratings of 721, and 716 with Equifax. As a direct result of their mortgage default the Cabanas' credit rating fell to 615 and 544. The Cabanas, as a result, are no longer able to borrow new money.
>
> 66. The Cabanas have essentially exhausted their line of credit with the Scotia Bank, and their Master Card, and they do not have savings.
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> 67. The Cabanas depend on Mr. Cabana's disability pension with Veterans Affairs, known as a "monthly income replacement support", which provides them with approximately $5,100 per month after taxes".
>
> 68. The Cabanas do not own a home of any kind. They do own a 2007 Ford F350 truck with approximately 350,000 kilometers on it whose value is approximately $5,000. They also own a 2018 Jeep, which they still make monthly payments for, and for which approximately $14,000 remains outstanding.
>
> 69. Berghuis and Control Surveys have requested this Court grant them $24,000 in security for costs, being two thirds of the $75,000 they have stated they will be entitled to, which the Cabanas cannot pay.

[25] I note that the Cabanas provided the following to support their claimed impecuniosity: a copy of their Equifax rating, dated November 17, 2021; a letter from Scotiabank, dated November 19, 2021, denying them a line of credit; an MBNA credit card statement, dated October 20, 2021, with an outstanding balance of $24,389.48; an undated financial statement showing "potential liabilities" of $143,179.17; (including the NLCU's claim for $81,185.17, which is no longer outstanding); confirmatory correspondence from Veterans' Affairs Canada, dated October 20, 2021; a T4A and notices of assessment from CRA for Brad Cabana and Katherine Cabana, dated March 11, 2021 and March 8, 2021 respectively; and financial documentation about their motor vehicles – all under Tab 19 to their Memorandum of Fact and Law.

[26] The Cabanas make a strong case for their impecuniosity. They include a monthly budget in their financial statement showing they incur a monthly deficit of approximately $575.00. They show practically no discretionary spending and the amounts they do claim for their expected living expenses are relatively modest.

[27] I accept their claim that they are neither able to provide security for costs from their present means nor are they capable of borrowing to do it. Let me now examine whether they are acting in good faith in their claim, the relative strength of that claim and whether it is frivolous or vexatious.

Good Faith & Strength of Claim

[28] These are the premises that underlie the Cabanas' claim against the ten Defendants they are suing:

- We purchased a house and land in Hickman's Harbour, on Random Island, NL in 2010, we removed the existing structure and then we built a new one on the same parcel of land, parts of which new house fell outside the boundary line and encroached on the foreshore.

- We were unaware of the encroachment, but all the professionals involved in the process, particularly the real estate agents, the lawyer and the surveyor, either knew of the encroachment or should have discovered it and they owed fiduciary duties to us to find and inform us of the encroachment.

- While the contractor and the mortgagee may not have owed us fiduciary duties to discover and/or disclose the encroachment as did the professionals, the contractor clearly knew about it and he should have informed us as well.

[29] If true, the Cabanas might be able to indict the Defendants with these premises but they do not reflect what, even by the Cabanas' own account, happened here. Let me explain.

[30] The Cabanas recited the events associated with building their new house this way in the Memorandum of Fact and Law that they filed in support of their response to the Sixth and Seventh Defendants' application for security for costs:

> 11. In May of 2015, the Cabanas negotiated with … [Martin and Martin Construction] to demolish their old home and construct their new home on the property.
>
> 12. On the 22nd day of May, 2015 Martin and employees of Martin Construction demolished the old home. Shortly thereafter Martin contacted the Cabanas and advised them their proposed new home would not fit on the current lot, and that fill, footings, and cribbing would have to be added into the water to support the house at an additional cost of $20,000. Martin did not advise the Cabanas of any necessity to have a permit or foreshore lease to fill and build into the water. The Cabanas agreed and proceeded with the work.
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> …
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> 14. As a result of Martin Construction's filling and cribbing work, an addition of approximately 20 feet wide by 40 feet long was built into the foreshore, upon which a new double wide parking spot, a corner of the new house, and a major portion of the new deck were built.
>
> [emphasis added]

[31] By that, it is clear that the Cabanas knew as early as May 2015 that the new house did not fit on the land that they bought in 2010; that the land had to be extended into the foreshore to accommodate the new construction; that they authorized and instructed Mr. Martin and his company to do the work; and that they then paid Mr. Martin and his company $20,000.00 extra for their services. It is disingenuous to say now that they did not know of the encroachment and that the contractor, the NLCU and the professionals involved with the property, knew or ought to have known of it, but withheld the information from them.

[32] The Cabanas listed their house for sale in 2018 and signed a Multiple Listing Agreement to sell the house for $349,000.00 but state that the sale fell through when the buyers discovered that the lot encroached on the foreshore and that portions of the structures on the land did as well.

[33] On August 31, 2018, the same day that the putative buyers of the house formally requested that the Cabanas return the $1,000.00 deposit which the Cabanas' realtor received from the buyers to hold the house, Mr. Cabana wrote to the NLCU to advise (Tab 10 to the Memorandum of Fact and Law the Cabanas filed to support their response to the Sixth & Seventh Defendants' Interlocutory Application):

> We, Katie and Brad Cabana, hereby notify you in writing that the First and Second Mortgages against the subject property [84 Main Road, Hickman's Harbour, NL] are in an Event of Default, in accordance with the terms of said mortgages. Through no fault of our own, and wholly due to the actions of others, we have been made aware our property is not free and clear of all encumbrances and interests contrary to the terms of the mortgage.
>
> …
>
> It is, therefore, our position that the mortgages, both first and second, on the subject property, are now in an Event of Default and the Credit Union, in accordance with its terms must declare it so. In declaring it so, our position is the Credit Union must access the title insurance it has on both mortgages so as to reduce the harm to itself, and also to us.
>
> [emphasis added]

[34] Of course, the NLCU did not act at Mr. Cabana's behest but exercised its power of sale in the mortgages. It listed the property for sale in 2019 and then sold in in 2020 for $189,000.00. The NLCU sued the Cabanas for a deficiency on the mortgages of $81,185.32, plus costs, but discontinued the claim because it was statute-barred.

[35] The Cabanas rely on this sophism to ground their claim against all parties: We know the fact of our problem, but we do not know what its legal ramifications are for us. The fact is that in 2015 Mr. Martin extended their property into the foreshore at the Cabanas' direction and at their expense and then Mr. Martin placed portions of the structures they directed him to build on the property within that extension. While the Cabanas knew those facts, they say that they did not appreciate the legal implications of them; rather they point to the professionals they dealt with, whom they say knew both the facts and their legal implications for the Cabanas and failed in their duties to advise them of same.

[36] The Cabanas' position is untenable: Mr. Cabana is an intelligent, articulate person. It is clear from the pleadings and the arguments that he files in these causes and the materials that he offers in support of them, that he understands the nuances of real property law and that he would handily understand the implications for selling and mortgaging his property of its encroaching on the foreshore. It is insincere and indefensible to suggest otherwise.

[37] The Cabanas approach the claim against the ten Defendants with the aim of a flared muzzle, in blunderbuss style: File a claim against everyone who had anything to do with the property, regardless of when or how they were involved; and as for the responsibilities the Cabanas had under the mortgages they gave to the credit union, claim that the mortgagee duped them too, use that to create an "event of default" and then encourage the mortgagee to resort to its "title insurance … so as to reduce the harm to itself, and also to us".

[38] At one point, in fact, the Cabanas proposed adding four more Defendants to the ten Defendants they were already suing, including another lawyer and his firm. They declined to do so ultimately, but not before circulating a draft Amended Statement of Claim with the names of fourteen Defendants on it, which a number of the current Defendants thought the Cabanas had filed in this Court on February 10, 2021.

[39] The Cabanas not only claim the Defendants are liable to them for breach of their professional responsibilities or because of business or commercial errors, but they use strong, pejorative language to criticize and denigrate the Defendants. I note some of their more deprecatory claims from their Statement of Claim:

- [Joe] Wells conducted himself recklessly and unprofessionally… (para. 40).

- [Rod] Murphy negligently misrepresented the property when…he did not disclose that the improvements to the property extending into the ocean would have required a foreshore lease from the Crown, and may be illegal… (para. 41).

- [Katrina] Brannan negligently misrepresented that the property's title was free of encumbrances to the…[Cabanas] (para. 43).

- [The Cabanas] request this Court to consider whether the repeated and wanton recklessness of [John] Berghuis is sufficient to qualify as fraudulent misrepresentation… (para. 45).

- [Bill] Martin fraudulently misrepresented the requirements for building into the foreshore of the property. (para. 47)

- the Credit Union committed fraudulent misrepresentation … (para. 49).

- [the Credit Union] … discovered that the improvements to the property were flawed and deliberately inserted an old survey so that a mortgage could be awarded. The… [Cabanas] allege this was an actual act of fraud by the Credit Union and/or its agents". (para. 49)

[40] Overall, I find that the Cabanas are not acting in good faith in the claim they have brought against the Defendants. The problems the Cabanas had with their property in Hickman's Harbour are rooted in the directions that they gave to Bill Martin and his company to backfill the foreshore to the property and to build into the backfilled area.

[41] First, they tried to exploit the problem of their own creation to forestall paying their mortgage off after the property's sale fell through when the encroachment came to light and now, they are suing all parties who had any involvement with the property between 2010 and 2018 and blaming them for their losses.

[42] The Cabanas' claim is both frivolous and vexatious and an abuse of the process of this Court.

[43] In the result, I allow the Defendants' claims that the Cabanas provide security for costs to the Defendants who have applied for the same, by these terms:

1. A total of $30,000.00, payable to the Registrar of the Supreme Court of Newfoundland and Labrador in cash, on or before June 30, 2023; and to be allocated to the credit of the Defendants as follows:

    - $7,500.00 to the First, Second and Third Defendants;
    - $7,500.00 to the Fifth and Sixth Defendants;
    - $7,500.00 to the Seventh and Eighth Defendants; and
    - $7,500.00 to the Ninth and Tenth Defendants.

2. If the Cabanas fail to comply with this order, the eight Defendants who applied for security for costs have leave to apply to this Court to strike the Cabanas' Statement of Claim as against them.

COSTS

[44] I also order the Cabanas to pay the costs of these four Interlocutory Applications under Column 3 of the Scale of Costs, but I make no order for costs from *Cabana*, in which I dismissed the Sixth and Seventh Defendants' Interlocutory Application to strike the second affidavit the Cabanas intended to use on the Sixth and Seventh Defendants' current Interlocutory Application.

SUMMARY AND DISPOSITION

[45] Eight of the ten Defendants that Brad and Katherine Cabana are suing for damages applied for an order that the Cabanas provide security for costs in the proceedings.

[46] The Court allowed their applications. It stated the terms on which the Cabanas would provide the security and it granted the Defendants leave to apply to have the Statement of Claim struck as against them if the Cabanas do not provide the security for costs as directed. The Court also ordered the Cabanas to pay the costs of the four Interlocutory Applications, to be taxed under Column 3 of the Scale of Costs.

ORDER

[47] In the result, I order that:

> The Cabanas provide security for costs to the Defendants who have applied for the same, by these terms:
>
> 1. A total of $30,000.00, payable to the Registrar of the Supreme Court of Newfoundland and Labrador in cash, on or before June 30, 2023; and to be allocated to the credit of the Defendants as follows:
>
>   - $7,500.00 to the First, Second and Third Defendants;
>
>   - $7,500.00 to the Fifth and Sixth Defendants;
>
>   - $7,500.00 to the Seventh and Eighth Defendants; and

- $7,500.00 to the Ninth and Tenth Defendants.

2. If the Cabanas fail to comply with this order, the eight Defendants who applied for security for costs have leave to apply to this Court to strike the Cabanas' Statement of Claim as against them.

3. The Cabanas pay the costs of these four Interlocutory Applications, to be taxed under Column 3 of the Scale of Costs.

GARRETT A. HANDRIGAN
Justice