IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Max Power Security Services Ltd. v. Donley,* 2024 BCSC 634

Date: 20240126
Docket: S230756
Registry: New Westminster

Between:

Max Power Security Services Ltd.

Plaintiff

And

Margrett Donley also known as Margrett Donelly, Dale Crump, Bruce Clark, Canadian K9 Detection Security & Investigations Ltd., Group8108 Executive Protection Inc., and Canadian K9 Detection Ltd.

Defendants

And

Max Power Security Services Ltd. and Sukhdev Singh Gill

Defendants by Way of Counterclaim

Before: The Honourable Madam Justice Walkem

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	D. Gautam
Counsel for the Defendants Bruce Clark, Canadian K9 Detection Ltd., Group8108:	M. Scherr
Place and Date of Trial/Hearing:	Chilliwack, B.C. January 23, 2024
Place and Date of Judgment:	Chilliwack, B.C. January 26, 2024

[1] **THE COURT** [via videoconference]**:** This my decision in the chambers application that I heard on January 23rd.

[2] In this case, the defendant/applicants, Bruce Clark, Group8108 Executive Protection Inc., and Canadian K9 Detection Ltd., seek an order that the plaintiff/respondent post security for costs in this matter. The applicants rely on s. 236 of the *Business Corporations Act,* S.B.C. 2002, c. 57, and the inherent jurisdiction of this Court.

Background

[3] The plaintiff/respondent, Max Power Security Services Ltd., has as its sole director, Mr. Gill.

[4] Previously, the plaintiff commenced an action against Canadian K9 Detection Security & Investigations Ltd. (which I will refer to as "CK9DSI"), a company owned and directed by Donley and Crump, claiming they had not paid the invoices that they owed him. The plaintiff obtained a judgment against CK9DSI in February 2019, which was entered April 2019, under New Westminster Action 193644.

[5] The defendant, Bruce Clark, purchased the assets in good will of CK9DSI in what amounted to a contract of sale with its owners, Donley and Crump. Donley and Crump made the offer to sell in August 2018 and the agreement was completed October 2018. The total purchase price was $200,000, and it was to be paid in 15% of monthly revenue of the defendant/applicant's company, Canadian K9 Detection Ltd., which I will refer to as "CK9", with a total amount due and payable after a certain point. CK9 is the canine detection services division of Group8108.

[6] As of November 2020, the defendant/applicant had paid $161,641.75 of the purchase price. The plaintiff claims that the defendant/applicant conspired with Donley and Crump to avoid payment of the amount due to the plaintiff under the judgment that the plaintiff had obtained, to, in essence, judgment-proof CK9DSI.

[7] The defendant/applicant strenuously denies those allegations. The defendant/applicant says he became aware of the judgment against CK9DSI when he was notified by the Land Title Office that the plaintiff/respondent had entered a CPL against his home. After that, he made one additional payment of $8,000 to Donley and Crump and has subsequently held roughly between $38,000 to $39,000 that he would otherwise have paid to Donley and Crump without paying it, so he has maintained those funds.

[8] At this point, the defendant/applicant says that he contacted the plaintiff/respondent and suggested that the plaintiff might be able to access the money that the defendant/applicant had held back. The plaintiff says that accessing those funds was not an option because it was payable to Donley and Crump and not the company, CK9DSI, against which the judgment was entered.

[9] The applicant seemed to disagree somewhat about whether there may have been (or still be) an option for the plaintiff to access that sum of money which they continue to hold.

Law

[10] Section 236 of the *Business Corporations Act,* reads as follows:

> [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.

[11] In *Ocean Pastures Corporation v. Old Masset Economic Development Corporation*, 2016 BCCA 12, at para. 41, the difference between when security for costs will be ordered paid by a corporate plaintiff as opposed to by individual plaintiff(s) was explained as follows:

> [21] The reason for the distinction between corporate and individual plaintiffs was set out in *Bronson*:
>
> > [41] … For good reason, individual and corporate plaintiffs have always been treated differently. Absent special circumstances, corporate shareholders are entitled to avail themselves of the

> protection of a limited liability company to avoid personal exposure for costs: [citation omitted]. An order for security for costs prevents the principals of a corporate plaintiff from hiding behind the corporate veil and, as noted by Megarry V.C. in *Pearson*, protects "the community against litigious abuses by artificial persons manipulated by natural persons."
>
> [42] With individuals, the fundamental concern has always been access to the courts. Access to justice is as important today as it was in 1885 when Lord Bowen declared in *Cowell* that "the general rule is that poverty is no bar to a litigant". Individuals, no matter how poor, have always been granted access to our courts regardless of their ability to pay a successful defendant's costs. Only in egregious circumstances have individuals been ordered to post security for costs.

[12] *Kropp v. Swaneset Bay Golf Course Ltd.*, (1997), 29 B.C.C.R.(3d) 252 (C.A.), a 1997 decision of the Court of Appeal, at para. 17, was cited also in *Parkbridge Lifestyle Communities Inc. v. New West Custom Homes (Kelowna) Inc*., 2022 BCCA 299 at para. 46, as summarizing the issues for courts to consider in exercising discretion to require a plaintiff corporation to post security. The *Kropp* considerations, as I will refer to them later, are as follows:

> 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.

[13] In the particular circumstances of this case, issues to consider include whether a lack of resources or impecuniosity on the part of the corporate plaintiff has

been made out and, if it has: whether there is no arguable defence on behalf of the applicant/defendant; whether it is probable that ordering security for costs would stifle the plaintiff's claim; whether the defendant is responsible for the plaintiff's lack of resources; and, whether the timing of the security for costs application should have any effect on the decision.

[14] On the question of whether the plaintiff would be able to pay the costs of the defendant/applicant if the plaintiff was unsuccessful, it is agreed that the plaintiff business is no longer operating and has no business revenue. It has no business assets. The owner is retired. The owner/director, Mr. Gill, says he cannot borrow money from family or friends. He, and his spouse, own a house worth $1.8 million. There was little evidence about any other assets presented, and generally a lack of information. A line of credit document from 2017, so over six years ago, was introduced showing a balance of $2 million owing. This stale-dated document showed no picture of the current situation and what, if any, equity was available to the owner/director of the plaintiff company. The defendant suggested that Mr. Gill may be able to access money for security through that LOC.

[15] The plaintiff/respondent argues that the defendant/applicant has access to the $38,000 to $39,000 which it did not pay to the defendants, Donley and Crump, and from which Mr. Clark and his companies could collect costs if there were any awarded in the case the plaintiff was unsuccessful. The plaintiff/respondent also argues that the previous judgment amount may be a source of payment for costs in the event that the plaintiff is unsuccessful against the applicant, but successful against the other parties. With respect to those arguments, I am not confident that the defendant/applicant could access those amounts. Further, if the plaintiff has not been able to not collect on the judgment, how the applicant/respondent might be able to.

[16] Furthermore, the defendant/applicant argued it has expended greater than this amount in legal costs so far, including to deal with what they argue was a wrongfully placed CPL on Mr. Clark's home.

[17] In coming to the determination that the claim would not likely be stifled, I have considered directions 2 and 6 from the *Kropp* list of seven directions to guide the exercise of the court's discretion:

> 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; [and]
>
> …
>
> 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.

[18] In *Parkridge*, a chambers judge denied an order for certification for costs, a decision overturned on appeal. The Court of Appeal, in applying the *Kropp* factors, said that the plaintiff corporation should have the onus of demonstrating that its action would be stifled by an order for security of costs, describing this as "a not insignificant burden" at para. 50. An affidavit stating (somewhat vaguely) that the plaintiff's company had no cash and that one of the shareholders did not have sufficient cash to pay the amount sought was not sufficient evidence from which a conclusion that the actions would be stifled could be drawn: *Parkridge* at paras. 54 to 58.

[19] The plaintiff cited a number of cases where courts held that an order for security of costs would stifle the plaintiff's ability to bring its case.

[20] In *Number 216 Holdings Ltd. v. ING Insurance Company of Canada*, 2013 BCSC 9, security for costs was not ordered because it would likely stifle the plaintiff's claim and, to a significant degree, the current financial difficulty was contributed to by the defendant's alleged wrongs, and there were unreasonable delays in the application.

[21] *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2016 BCSC 500, provided another example where the plaintiff led sufficient evidence to demonstrate that their claim would probably be stifled, which, along with the

defendant's responsibility for the impecuniosity and the lateness of the application, was found to be sufficient for the court to decide not to order security for costs.

[22] Part of the consideration is whether a director/owner can pay. I find that there are, or could be, available funds to pay a security for costs if ordered. Overall, I find the defendant has made out a *prima facie* case that the plaintiff company will be unable to pay the defendant's costs if the plaintiff's claim fails. Furthermore, I am not satisfied, as the owner/director owns an asset of $1.8 million, that the plaintiff's claim would be stifled if security for costs were ordered.

[23] I now consider whether the plaintiff has established that the defendant has no arguable defence, relying on *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Company*, (1993), 76 B.C.L.R. (2d) 231 (C.A.) at paragraph 16. Direction 4, from the *Kropp* list of seven directions, guides the exercise of the court's discretion that:

> 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;

[24] Here, I find on the argument presented, it is not made out that the defendant has no defence.

[25] I now consider whether the defendant is responsible for the plaintiff's lack of resources, and whether the timing of the security for costs application should have any effect. The plaintiff cites *Integrated Contractors Ltd. v. Leduc Development Ltd.*, 2009 BCSC 965 at para. 14 for the proposition that “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,” the court's discretion may be engaged to refuse an order for security of costs. The court also has an option to reduce the amount of security for costs on this basis.

[26] I find that, although the defendant CK9DSI, possibly along with Donley and Crump, may be responsible for the lack of resources of the plaintiff in that they failed to pay the plaintiff the amount set out in the 2019 judgment, the issue was more

nuanced as against the applicants. Whether the applicants are responsible for the plaintiff's lack of resources is an issue for the trial and depends on the success of the claims alleged against them. The respondent/applicant vigorously denies responsibility for the plaintiff's losses. I do not find this to be a proper basis on which to refuse an order for security of costs on consideration of the evidence presented to me.

[27] In terms of the timing, Direction 7 from *Kropp* is that:

> 7. The lateness of the application for security is a circumstance which can properly be taken into account.

[28] The plaintiff argues that the application for security for costs is late, given that it was made more than two years after the notice of civil claim. The defendant argues that the application was brought in a timely fashion. The evidence was that the defendant was unaware until on or about July 2022 that the plaintiff's company has ceased operations and they became aware of this when then counsel for the plaintiff disclosed this in submissions.

[29] The defendant sought to have this matter heard at least as early as February 2023, though both parties agree that finding a date has been difficult with several hearings cancelled due to limited court availability.

[30] I do not find this is an application brought late such that it should affect whether security for costs should be ordered.

[31] On a consideration of the factors as set out above, I find that security for costs is appropriate in this case. I note that the court has discretion to order any amount of security up to the full amount claimed, as long as the amount is more than nominal, per *Kropp* at para. 17.

[32] In *J.P. Drywall System (BC) Ltd. v. Preview Builders International Inc.*, 2015 BCSC 2333, $10,000 as security for costs was ordered, whereas the defendant's estimated bill of costs was $62,000, because the plaintiff's impecuniosity was found

in some measure, to be a result of the outstanding claims against the defendant, and a counterclaim was also part of the action (paras. 37-44).

[33] The existence of the counterclaim is a proper factor to consider in determining the amount of security that should be posted, since a counterclaim would likely complicate and extend the proceeding and is a factor to reduce the amount of the security: *Parkridge* paras. 66–67. In *Parkridge*, given that the claim and counterclaim had their genesis in the same agreement and its termination, security for costs of $30,000 was ordered when the draft bill contemplated $60,000 for a 20-day trial (paras. 69–70).

[34] Here, there is a counterclaim. The defendant/applicants point out that their counterclaim was linked to the procedure the plaintiff filed it in bringing their claim and does not go to the merits of that claim. The defendant/applicants say the trial has been set for 10 days and they say that that trial estimate is far longer than necessary, given their assessment of the subject matter.

[35] The security sought in the estimated bill of costs is over $87,000, including estimated expert fees of $25,000 and travel costs for a 10-day trial for counsel.

[36] In *Ocean Shores Pastures*, the Court of Appeal said at para. 29:

> ... the court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal. The draft bill is a guideline. The court has the discretion to order security in the amount that it considers appropriate.

[37] I do not agree that the amount of security should be set at the amount of over $87,000 as sought by the defendant. Instead, I set the security at $20,000.

[38] The order with regard to security of costs is that a letter of credit or other security satisfactory to the registrar be posted within 30 days of this order, and that the plaintiff's claim be stayed as against the applicants in the meantime.

[39] Max Power Security Services Ltd. shall pay the costs of the defendant/applicants for this application.

[Discussion with Counsel and the Court resolving a technical issue]THE COURT: All

…

[40] CNSL D. GAUTUM: Okay. I'm going to speak up. I'm -- I'm not -- I'm not asking -- I'm going to withdraw my request for a limited exception, so I'm fine with -- with that. I'm not making any further requests, Justice.

[41] THE COURT: All right.

[42] CNSL D. GAUTUM: No further requests. Thank you.

[43] THE COURT: All right. But if you are not making the further request solely because of our technical issue, we should solve the technical issue. If you are not making the request because you have second thoughts about it, then that is a different matter.

[44] CNSL D. GAUTUM: Yes. Yes, I have second thoughts about it and I don't think --

[45] THE COURT: All right.

[46] CNSL D. GAUTUM: -- the request will be required.

[47] THE COURT: All right. Thank you. Thank you, both counsel. Thank you, Madam Registrar. I will wish all the parties luck in being able to resolve this. All right, thank you.

[48] CNSL D. GAUTUM: Thank you, Justice. Thank you very much.

"A. Walkem J"