IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1247249 B.C. Ltd. v. 1098212 B.C. Ltd.,* 2024 BCSC 1665

Date: 20240909
Docket: S244251
Registry: Vancouver

Between:

1247249 B.C. LTD.

Plaintiff

And

1098212 B.C. LTD.

Defendant

Before: Associate Judge Robertson

Reasons for Judgment

Representatives of 1247249 B.C. Ltd.	M. Doar A. Smith
Counsel for 1098212 B.C. Ltd.:	T. Huntsman
Place and Date of Hearing:	Vancouver, B.C. August 16 and 29, 2024
Place and Date of Judgment:	Vancouver, B.C. September 9, 2024

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[1] There are two applications before the court today; one by the defendant, 1098212 BC Ltd. (“109”) seeking to have the plaintiff, 1247249 BC Ltd. (“124”), post the sum of $35,000 as security for costs in respect of this action, and a second brought by 124 in which they seek to, among other things, cross examine one of 109’s deponents on her affidavit in separate foreclosure proceedings, seek a conversion of those proceedings to an action, and a “stay” of the security for costs application.

Background

[2] The parties have a litigious history stemming from an agreement reached between them in April 2020, in which 124 entered into a contract of purchase and sale (the “Sale Agreement”) with 109, wherein 124 agreed to purchase development lands in Nanaimo, B.C. (the “Lotus Lands”) from 109 for the price of $5.75M.

[3] One of the terms of the Sale Agreement was that 109 would provide a vendor take-back (“VTB”) mortgage to 124 to fund the purchase, on reasonable terms. This, and other conditions precedent to the Sale Agreement, were to be fulfilled within seven months of the date of the Sale Agreement, that being by November 27, 2020.

[4] Prior to that date, while 124 was carrying out its due diligence, a dispute arose as to whether or not the parties agreed to certain amendments. 109 ultimately took the position that the Sale Agreement had lapsed due to 124’s failure to waive or fulfil the conditions and pay the required deposit under the Sale Agreement. 124 took the view that 109 had breached the agreement and commenced litigation seeking specific performance of the Sale Agreement.

[5] That issue went to trial, with judgment being pronounced July 7, 2022. 124 was awarded the remedy of specific performance, with a VTB to be provided by 109.

[6] The trial decision necessarily required some further discussions as to the final terms for the overall transaction. In addition, an appeal was filed by 124. The parties were, however, able to then reach an agreement (the “Transaction and Settlement Agreement”), which included the terms for the VTB mortgage.

[7] On that basis, the sale was subsequently completed in or around October 2022, and the Lotus Lands were transferred to 124, with the purchase price being secured by the VTB mortgage. The terms of the VTB mortgage as registered, include that:

a) The principal amount owing is $5,050,000

b) Interest for the first three years accrues at 3.9% per annum, and 4.9% per annum thereafter, compounded semi-annually not in advance;

c) The first payment was due the "day after" June 24, 2024, in the amount of $52,174.43 (the "June 2024 Payment");

d) In the event of default of payment, 124 would have thirty days to rectify any default, upon receipt of written notice from 109 of any such default, with such notice to be deemed received three days after the mailing of the notice to 124's registered office; and

e) Upon a subsequent sale, with the consent of 109, which was not be unreasonably withheld, 124 is entitled to assign the VTB mortgage, with 124 to provide all necessary information to provide such consent 60 days prior to any such assignment, as well as other terms (the "Assignment Clause").

[8] On June 20, 2024, after:

a) receipt of an email from 124 as to a change of registered and records office;

b) a review of the title search of the Lotus Lands which, by then, showed that two mortgages and five certificates of pending litigation ("CPL) had been registered after the VTB mortgage;

c) learning that one of the creditors of 124's principals was petitioning him into bankruptcy; and

d) that there were arrears in property taxes of some $50,000,

counsel for 109 sent a letter to 124 and its principal giving notice that, unless the June 2024 Payment was made as required under the VTB's mortgage by end of business on June 25, 2024, the mortgage would be in default, the acceleration provision triggered and foreclosure proceedings would be immediately commenced (the "Notice Letter"). The Notice Letter suggests that counsel was anticipating an issue with the June 2024 Payment.

[9] Around that same time, in anticipation of the foreclosure proceedings being commenced, 109's counsel sent letters to the various charge holders on title to ask if they would accept service of the expected foreclosure petition, noting the anticipated default date of June 25, 2024. Counsel for 109 acknowledges that he did not reference the cure period in the June 20, 2024 letter or his correspondence with the charge holders as a result of an oversight, but that he did later advise the charge holders of that cure period. 124's principal states, although this is not in evidence before the court, that counsel admitted that he, through error, "missed" the cure period when the June 20, 2024 letter was sent out. In my view, nothing turns on that.

[10] On June 21, 2024, 124 commenced this action.

[11] In the notice of civil claim, 124 takes issue with the Notice Letter, and pleads that it "ignores the 30-day default period specified" in the VTB mortgage (although, during argument, 124 submitted that there was actually a 60 day cure period for reasons that I was not able to completely follow, based on an interpretation of other terms of either the VTB mortgage or the Transaction and Settlement Agreement), and that 109 was "ignoring" the Assignment Clause as there had been an attempt to seek an assignment made by someone on June 20, 2024. 124 claims that a failure of 109 to consent to an assignment of the VTB was causing significant financial harm to the plaintiff.

[12] In this action 124 seeks an order for specific performance to compel 109 to comply "with the terms of the [Transaction and Settlement Agreement] and judgment by dispensing with 109's consent to the assignment of the VTB Mortgage". They also seek a declaration that 109 breached the Transaction and Settlement Agreement, and an

injunction prohibiting 109 from enforcing its mortgage, and damages for refusal to consent to the purported assignment.

[13] In response to the allegations regarding the purported assignment, 109 states that on June 21, 2024, they received an email from 124's principal that indicated there was some sort of sale and that there had been multiple attempts to facilitate the assignment, without any cooperation. 124 denies any such attempts, although acknowledges that there had been an email from someone about an assignment, but it was withdrawn by the sender, and an email notice of the withdrawal was received in that respect. Nonetheless, 109 did do some investigation and follow up into that party, saw that their companies were not registered in BC, and did attempt to contact the person he believed was the counsel for this party by email on June 24, 2024. That email exchange is before the court. It shows some back and forth whereby counsel for 109 sought particulars of the party who was potentially interested in purchasing the Lotus Lands. A later search conducted by 109 revealed that one of the companies who appeared to be within the "Group" referenced as the proposed purchaser had a receiver appointed over all of its assets and undertakings by order pronounced August 15, 2023, and was then assigned the company into bankruptcy on February 1, 2024, with MNP Ltd. The Trustee's report to creditors indicated over $3M in unsecured debt with assets valued at $1 given a likely shortfall to the secured creditor in the receivership.

[14] No further documents were provided to counsel for 109 to particularize or document the alleged assignment. No further emails were received from that counsel to provide any further information.

[15] 109 argues that not only was the assignment request lacking of any of the necessary particulars for it to be considered in any meaningful way, it was not viewed as a serious inquiry given the overall circumstances, including the timing of it being raised after the Notice Letter was sent.

[16] As of this application, there remains no evidence before the court as to what exactly was contained within this alleged assignment offer or request, or any documents such as the financial viability of the financial ability of the purported buyer/assignee to

complete a sale and satisfy the terms of the VTB mortgage. Given the state of the title, aside from some sort of letter of intent setting out the terms of the sale and financial documents to enable 109 to assess the creditworthiness of the purchaser as mortgagor if the VTB mortgage were assigned to it, particulars would be needed as to how a sale could be logistically achieved given the various CPLs registered on title which, by their nature, prevent any transfer of title from occurring, such as consent by the CPL holders.

[17] The notice of civil claim also alleges that 109 "engaged in actions such as communicating with other parties, which have caused additional difficulties for the completion of the transaction." Counsel for 109 sent various emails on June 19, 2024 to, at least some, of the chargeholders' counsel in which he writes: "I am wondering if you will accept service by email of the Foreclosure Petition and materials I will be filing next week with respect to Lotus. As I expect you know where your [charge] will be above ours we are required to give you notice of the proceeding and naturally you will be a party to it. Please advise. Thank you." Follow up correspondence on June 24, 2024 confirmed that 124 had until June 25, 2024 to pay, following which 109 would give notice and wait 30 days.

[18] There is no legal basis set out in the notice of civil claim as to why that correspondence gives rise to any cause of action.

[19] Subsequently, the required mortgage payment was not made by June 25, 2024, and demand by 109 was then formally issued by letter sent June 26, 2024 to 124's registered and records office, as well as by email to the covenantor under the VTB mortgage, confirming that no payment was received, and advising that the letter would be the 30-day notice to rectify the default, after which they would initiate foreclosure proceedings (the "Demand Letter").

[20] On July 30, 2024, 109 filed its foreclosure petition in the Nanaimo registry, under Action No. H100552 (the "Foreclosure Proceedings"). In support of its petition, the principal of 109 deposed that she had read the petition, and facts therein are true, and, among other things, exhibited the Demand Letter.

[21] The position of 109 is that this action is nothing more than a thinly disguised attempt to frustrate the rights and remedies it is entitled to enforce as a result of the defaults under the VTB mortgage as being pursued in the Foreclosure Proceedings.

[22] The position of 124 is that the Foreclosure Proceedings, and conduct leading up to it, are nothing more than continuation of the high handed attempts by 109 to regain control of the Lotus Lands, since the trial decision was not resolved in their favour.

124's Application

[23] 124's application is to:

a) cross examine the principal of 109 on her affidavit filed in support of the Foreclosure Proceedings;

b) stay the Foreclosure Proceedings until the examination has occurred;

c) convert the foreclosure petition to an action;

d) stay 109's application for security for costs; and

e) special costs.

[24] The basis for the cross examination is a paragraph in the affidavit that confirms that there was a default under the terms of the VTB mortgage by 124 and that the required June 2024 Payment was not made, such that pursuant to the terms of the VTB mortgage, the full amount due became payable. A reference is made to written demand being made on June 26, 2024, that being the Notice Letter. As noted, 124 argues that the Notice Letter failed to reference the cure period.

[25] The notice of application sets out the basis for cross examination as:

> This highly prejudicial and we say blatantly and maliciously incorrect version of the facts pled are said to be true in Affidavit Number 1 of Irene Wenngatz made July 26, 2024, in the petition action where she states "I have read the petition and the facts therein are true".

[26] And further, under the legal basis:

> With respect to the issue of the default cure period prima face [sic] evidence exists that this is a fact. That evidence exists in the Affidvit #1 of the person we wish to examine, Irene Wenngatz, on page 51 were it states, "In the evidence of default of payment of the defendant payments, the Buyer/Borrower will have thirty (30) days to rectify any default by the Buyer/Borrowers under this mortgage".
>
> The legal basis for cross examination is not just stating that the test for cross examination has been met, but rather that there are material facts at issue that need to be confirmed through cross-examination.

[27] Neither party referred to the law applicable to cross examinations. In *Szeto v. Shon Yee Benevolent Association of Canada*, 2019 BCSC 2015, at paras. 21 to 25, the court set out the various formulations of the test, including that from *Equustek Solutions Inc. v. Jack,* 2013 BCSC 882, where Madam Justice Fenlon, as she then was, stated:

> [6] Rule 22-1(4)(a) provides that the Court may order cross-examination of an affiant in a chambers proceeding. It is, thus, a discretionary order. That discretion must, of course, be exercised judicially. *In Greenwood v. Greenwood,* [1999] B.C.J. No. 846 at para. 15 (S.C.), Mr. Justice Scarth summarized three factors to be considered in the exercise of the court's discretion: first, whether there are material facts in issue; second, whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and third, whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue. (emphasis added)

[28] The dispute with this evidence appears to be primarily one of what is the ultimate issue to be determined by this court, that being whether or not 124 was in default and was entitled to either (a) demand or (b) file the Foreclosure Proceedings when it did.

[29] The issue as to the Notice Letter not referencing the 30-day cure period is not in conflict, as 109 not only admits that there is such a cure period, but that it did not reference the cure period in that initial letter.

[30] As such, it is not clear that any material *facts* are in issue, as opposed to a dispute as to the legal issue of whether or not default occurred, whether issued demand and filing the petition as and when 109 did so was appropriate taking into account the cure period. During submissions, it was clear that 124 wishes to cross examine the deponent on the written terms of the agreement that it believes establish that there was no default or right to demand or foreclose such that her deposed statement that 124 is

in default and was not entitled to demand or foreclose is false. 124 also raised an argument that given the default cure period, that when the deponent swore the affidavit on July 26, 2024, 124 was not yet in default.

[31] The written terms of the VTB mortgage, and Transaction and Settlement Agreement, are evident on their face. Whether there was a default and a right to demand and then foreclosure are the ultimate legal issues for determination in the Foreclosure Proceedings.

[32] Given the issues being raised by 124, I see no useful purpose to be served through a cross examination on the affidavit.

[33] More importantly, the cross examination, and for that matter the second and third orders being sought in 124's application, are, for reasons that are unexplained, brought in this action rather than the Foreclosure Proceedings which is the action in which the affidavit was filed, and relief relates.

[34] Notice of this defect was given by 109 in their response filed August 12, 2024 where they stated "There is no legal basis to obtain the relief that the plaintiffs are seeking in this application. They should seek the relief in the foreclosure petition."

[35] This court cannot, in this action, make orders in another action.

[36] As such, even if I am wrong that there is no basis on which to order cross examination of 109's principal on her affidavit, I would not do so.

[37] Similarly, an application to convert the foreclosure petition to an action must be brought in the Foreclosure Proceedings.

[38] I dismiss paras. 1, 2 and 3 in 124's application. However, it is without prejudice to such application being brought in the Foreclosure Proceedings.

[39] Paragraphs 4 and 5 deal with the security for costs application, and costs generally, and I will address them separately.

109's Security for Costs Application

Legal Framework

[40] Turning then to the security for costs application, and request by 124 that it be stayed, the basis of the application by 109 is 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.

[41] The test for such an order has been recently confirmed in *Wonderland Entertainment Inc. v. 1381274 BC Ltd*, 2024 BCSC 392 ("*Wonderland*") at paras. 9 to 12.

> [9] The purpose of security for costs is to protect the defendant from the likelihood that, in the event of its success, it will be unable to recover its costs from the plaintiff (*Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.*, 1993 CanLII 1669 (BCCA) at para. 15).
>
> [10] While the courts are generally cautious in granting security for costs in relation to an impecunious natural person, the same cannot be said against corporate plaintiffs (*Bronson v. Hewitt,* 2007 BCSC 1751 at para. 41, cited with approval in *Ocean Pastures Corp. v. Old Masset Economic Development Corp.,* 2016 BCCA 12 at para. 21). Corporate plaintiffs are treated with less generosity and flexibility than natural persons (*Kropp v. Swaneset Bay Golf Course Ltd.*, 1997 CanLII 4037 (BC CA), [1997] B.C.J. No. 593 (BCCA) at para. 11).
>
> [11] The test for an application under s. 236 of the *BCA* was recently summarized in *Success Group Holdings Ltd. v. Fraser Valley (Regional District)*, 2023 BCSC 243 at paras. 11-13:
>
> [11] There is a two-stage legal test on an application for security for costs. The onus is initially on the applicant, at the first stage, to satisfy the court that there is a *prima facie* case that the respondent would be unable to pay the applicant's costs if the respondent's claim fails (*Integrated Contractors Ltd. v. Leduc Developments Ltd.*, 2009 BCSC 965, para. 11).
>
> [12] If this threshold test is met, the onus then shifts to the respondent to show that it has sufficient exigible assets to satisfy an award of costs, or that there is no arguable defence to its claims (*Integrated Contractors,* paras. 12-13).
>
> [13] If the respondent is unable to satisfy the court on either of these two points, the court may then exercise its discretion to make an order that the respondent post security for costs, taking into consideration the following legal

principles set out by the BC Court of Appeal in *Kropp (c.o.b. Canadian Resort Development Corp.) v. Swaneset Bay Golf Course Ltd.,* 1997 CanLII 4037 at para. 17:

> a) The court has complete discretion whether to order security, and will act in light of all the relevant circumstances;
>
> b) 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;
>
> c) 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;
>
> d) 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;
>
> e) The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
>
> f) 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
>
> g) The lateness of the application for security is a circumstance which can properly be taken into account.

[12] A *prima facie* case that the corporate plaintiff may be unable to pay costs can be satisfied by showing the absence of assets in British Columbia (*Kraft v. B.C.B.C.,* 2000 BCSC 1493 at para. 13 and citing *Ruko of Canada Ltd. v. Canadian Imperial Bank of Commerce* (1991), 49 C.P.C. (2d) 105).

Analysis

[42] The only asset found to be owned by 124 is the Lotus Lands. 109 argues that, given the state of title, there does not appear to be any exigible value available to satisfy a costs judgment in this action, assuming one were to be granted and then registered against the Lotus Lands.

[43] In support of that position they have exhibited a land title search showing that the Lotus Lands are the only property in 124's names, the land title search for the Lotus Lands with the various registered charges including the CPLs as well as those charges, and correspondence with the counsel for the creditor seeking to assign 124's principal into bankruptcy and the petition for bankruptcy order in that respect.

[44] For ease of reference, the charges against title to the Lotus Lands, ranking in priority after the VTB mortgage, are as follows:

a) $585,000 mortgage and assignment of rents to Baldev Singh Nijjer, registered on October 24, 2022;

b) $200,000 mortgage registered to Sakera Ridge Developments Ltd. on March 24, 2023. This mortgage was modified on May 29, 2024 to increase the principal balance to $216,197.87.

c) Certificate of Pending Litigation by Adam Soliman, registered on July 17, 2023. Mr. Soliman, who was 124's trial counsel, alleges an agreement to secure his fees by way of a stock option to entitle him to a 10% interest in the Lotus Lands;

d) Certificate of Pending Litigation by 1168737 BC Ltd., registered August 25, 2023, in which it is claimed that 124 had entered into an investment agreement with the plaintiff in respect of the Lotus Lands planned development, pursuant to which 124 would hold legal title in trust for the plaintiff and, once layout approval obtained, would convey a 43% interest in the Lotus Lands. The claimed interest in the Lotus Lands is, however, limited to the amounts advanced, that being $867,000.

e) Certificate of Pending Litigation filed December 20, 2023, in respect of a family law claim brought against 124's principal, in which she claims 124 to be family property.

f) Certificate of Pending Litigation by Go Fish Ltd. filed February 12, 2024 whereby it is claimed that the plaintiff invested funds into the Lotus Lands, and acted as a consultant, on the basis that an ownership interest would be granted to it.

g) Certificate of Pending Litigation by Mario Drew Kurtakis filed June 10, 2024 in which the plaintiff alleges that the Lotus Lands are subject to a remedial

> constructive or resulting trust in his favour given funds advanced and work performed by the plaintiff.

[45] In addition, on June 27, 2024 counsel wrote to 124's principal advising of the intention to seek security for costs and asking for proof of ability to satisfy such an order in the range of $50k. No such information was provided.

[46] Further, there is some evidence of potential insolvency, namely an inability to meet obligations as they fall due, that being the evidence that the property taxes are unpaid in an amount over $50,000, as shown by the tax searches also in evidence, in addition to the claims for unpaid loans and/or the repayment of investments set out in the notices of civil claim, although 124 notes that those claims have yet to be proven.

[47] Finally, a search of the Personal Property Registry shows that 124 has granted a security interest in all their present and personal property to a creditor.

[48] The plaintiff has established the first part of the test, that being a *prima facie* case that a costs order cannot be met by 124.

[49] 124 did not file an affidavit in response to this application, despite that the application was filed on July 16, 2024 and that they had the application materials in hand for over five weeks.

[50] At the hearing, 124 sought to introduce an unsworn affidavit that confirmed that the Lotus Lands are the only "fungible asset" of the corporation and attached email exchanges from August 17, 2024 and August 28, 2024 between counsel for 109 and the principal of 124, which have nothing to do with the ability of 124 to satisfy a costs award. Instead, those emails raise an issue with the fact that the current counsel for 109 has not signed the trial order (although he was not counsel at the trial), discussions about a consent order which 124 asserts was contemplated to be signed under the Transaction and Settlement Agreement, and other procedural issues. They noted that the reason the affidavit was unsworn was the 9:00 a.m. start time for this hearing (I had made this time available for the parties as they had been bumped several times in regular chambers) such that the registry was not open to have the affidavit dealt with.

[51] After the hearing, 124 had the affidavit sworn and emailed to me through trial scheduling. Between the hearing and its being sworn, they amended it to also exhibit a December 19, 2023 appraisal of the Lotus Lands, which was completed by Vancouver Island Appraisals with the stated purpose “to assist with 1st mortgage financing”. The “As Is” value noted in this appraisal is $10.5M, $13,564,000 if approved for development permit, and $33M “As If Developed”.

[52] The principals of 124 argue that there is prejudice to them if an order for security for costs is made because, overall, the conduct of 109 is what has diminished their ability to deal with the Lotus Lands, despite its potential value.

[53] They argue they have financing conditional on the CPLs all being removed which, notably, was not put into evidence even with the after hearing amendment to the unsworn affidavit to include the appraisal. However, even if it was properly put into evidence, there is nothing to satisfy the court that the CPLs’ would or could be removed.

[54] 124 provided the court with court summary sheets indicating that five applications, one in respect of each of the actions in which a CPL has been filed, on August 27, 2024, all of which have been adjourned, for a release of CPL and other relief, such as complete dismissals of the claims. The fact that applications have been filed does not equate to proof that the CPLs can be dealt with.

[55] Even if the evidence being relied upon by 124 were properly before the court, 124 would still be unable to meet the onus upon it to establish that it has an ability to satisfy any eventual costs award.

[56] However, that may not be the end of the analysis. As noted in *Kropp v. Swaneset Bay Golf Course Ltd.* 1997 CanLII 407 (BCCA) at para 17, the court must attempt to balance a potential injustice in making a security for costs order an instrument of oppression to stifle a legitimate claim with the use of impecuniosity as means of putting unfair pressure on a defendant. Although not framed in that manner, 124’s arguments centered on, and emphasised that, in their view, they have a legitimate claim that is being stifled.

[57] However, as also noted in *Kropp,* while the court may have regard to the merits of the action, it should avoid going into detail on the merits unless success or failure appears obvious.

[58] The claims raised by 124 that the inability for it to deal with the Lotus Lands, as a result of actions of 109, are hard to reconcile given that five claims were made for an interest in the Lotus Lands and CPLs filed, well before the Notice Letter or any correspondence was sent to the chargeholders' counsel. In terms of the arguments as to whether or not 124 was in default and 109 was entitled to demand and foreclose, those are issues that are properly raised in the Foreclosure Proceedings. They give rise to a defence in those proceedings rather than form the basis for a cause of action, in so far as the materials on this application show. Thus, even if this action is stayed pending the posting of a security for costs order, they can still be raised and no prejudice suffered by 109.

[59] As such, I am not satisfied that an order for security for costs will in fact stifle a legitimate claim.

[60] That leads to an analysis of whether or not the defence of 109 is bound to fail. For the reasons previously noted, that test has not been met. It is not clear that 109 is bound to fail in its defence of this action.

[61] As to the amount of security for costs, as there was no bill of costs before the court, I granted leave for 109 to provide one through trial scheduling, with an opportunity then being given for 124 to advise if they had any response to that bill of costs.

[62] I received that draft bill of costs, which was copied to 124, through scheduling. 124's written response to that bill of costs was, simply: "We, the respondents in the Security for Costs Application, find the draft Bill of Costs submitted by Mr. Huntsman excessive. We believe $4,000 would be ample and there is no reason to pay for travel."

[63] I am satisfied that the draft bill of costs as presented represents a reasonable exposure to 109 in terms of what steps are likely to be taken to dispose of this action, hopefully by way of a summary trial, at 101 units, plus reasonable disbursements,

bringing a potential costs order to $13,132.70. If the matter cannot be resolved by summary trial, then the costs would be significantly higher as trial costs would be added. Even a short three-day trial would add 45 units, or approximately $5,500. As to the issue of travel costs, given the local venue rule, 109 properly commenced the Foreclosure Proceedings in Nanaimo and retained local counsel. 124 chose to commence this action in the Vancouver registry, meaning that 109's counsel will have to travel. Those costs are reasonable.

[64] A reasonable amount for security for costs is, therefore, $15,000.

Conclusion, Costs and Orders Made

[65] I grant 109's application for security for costs, and order that 124 post the sum of $15,000 into court to the credit of these proceedings, to stand as security for 109's costs, until further court order.

[66] Until such time as such security is posted, this action shall be stayed.

[67] I decline to make an order that if such security is not posted within two weeks the proceeding will be dismissed. As such, para. 3 of the notice of application is dismissed, but without prejudice to an application being made by 109 to have the claim dismissed if the security is not posted within eight months of the date of these Reasons.

[68] It may be that the issues in these proceedings are addressed in the Foreclosure Proceedings such that this action becomes moot, which should be evident after the order *nisi* is granted. However, there is not a sufficient basis to grant relief in the nature of a guillotine order at this point, given the stage of this action and the Foreclosure Proceedings.

[69] I dismiss the entirety of 124's application, without prejudice to the applications sought in paras. 1, 2 and 3 being brought in the Foreclosure Proceedings on a proper application in those proceedings.

[70] Other than 124's arguments that it ought to be entitled to special costs, no argument was made, given time constraints. Nonetheless, 109 has been substantially

successful in these applications and, as such, is entitled to its costs at Scale B for both applications, in any event of the cause. This costs order is without prejudice to any argument that 109 may advance in the Foreclosure Proceedings as to its entitlement to full indemnity costs given that there was insufficient time to address whether or not it is entitled to such costs under its mortgage terms on a full indemnity basis; see for example *Andreef v. Toquart Recreational Village Ltd.,* (1992) 10 CPC (3d) 329.

"Associate Judge Robertson"