IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *PreveCeutical Medical Inc. v. Lotz,*
2024 BCSC 2105

Date: 20241120
Docket: S243723
Registry: Vancouver

Between:

PreveCeutical Medical Inc., Stephen Van Deventer and Asterion Cannabis Inc.

Plaintiffs

And

Jonathan Lotz and Lotz Law Corporation

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiffs:	M. Nied
Counsel for the Defendants:	J.G. Dives, K.C.
Place and Date of Hearing:	Vancouver, B.C. September 27, 2024
Place and Date of Judgment:	Vancouver, B.C. November 20, 2024

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I. Introduction

[1] This is an application by the defendants in this action seeking an order to compel the plaintiffs to post security for costs. They seek that order on two principal grounds:

a) the plaintiffs are impecunious and therefore unlikely to be able to pay any cost award that might be made against them; and

b) their claim is obviously devoid of merit.

[2] The application is opposed by the plaintiffs. Although they acknowledge that they are impecunious, they say that they are in that position due to the fault of the defendants and therefore that an order requiring them to post security for costs would unfairly stifle their claim, which they say has merit.

[3] For reasons that follow, I have concluded that the application should be allowed in part.

II. Background

[4] The defendants are a lawyer and his personal law corporation. The plaintiff, PreveCeutical Medical Inc. (“PMI”) is one of their former clients.

[5] PMI is a bio-pharmaceutical company based in Vancouver. It was incorporated in 2014 and went public in 2016. Its shares are currently listed on the Canadian Stock Exchange (“CSE”) and other international exchanges. It has approximately 6,000 shareholders with 539,903,359 shares issued and outstanding. At the time of hearing those shares were trading on the CSE at a price of $0.015 per share.

[6] Despite having a market capitalisation of over $8 million, PMI says it is asset-rich but cash-poor. Its assets consist primarily of intellectual property, mostly in the form of provisional patents. Its main product, a synthetic form of scorpion venom intended for therapeutic uses, is not expected to come to market for at least another

10-15 years. In the meantime, development is actively underway in association with researchers at the University of Queensland in Australia.

[7] With no current source of income to offset its expenses, PMI depends on a combination of equity investments and debt for its working capital. It currently owes its creditors approximately $6.2 million, more than half of which is said to be owed to its chair and chief executive officer, the personal plaintiff, Stephen Van Deventer.

[8] Mr. Van Deventer is also the chair and chief executive officer of the second corporate plaintiff, Asterion Cannabis Inc. (“ACI”). ACI is a British Columbia company incorporated in 2018 that is in the medicinal cannabis business. It has a wholly owned Australian subsidiary that recently lost its licence for reasons that Mr. Van Deventer attributes to the fault of the defendants.

[9] This action arises from a news release that PMI issued on June 29, 2018 to announce the closing of a private placement through which it claimed to have raised $6,539,987.50 (the “News Release”). The News Release was also attached to a material change report (the “Material Change Report”) that PMI filed on the same day. What was not mentioned in either of those documents was the fact that PMI would retain only $3,342,090.11, or about 51%, of the amount raised, because the remainder had been spent on consulting fees of various kinds.

[10] On February 14, 2022, the Executive Director of the British Columbia Securities Commission (the “Commission”) issued a notice of hearing against PMI and Mr. Van Deventer, alleging breaches of ss. 50(1)(d) and 168.1(1)(b) of the *Securities Act*, R.S.B.C. 1996, c. 418. As later particularised, the Executive Director’s allegation was that the News Release and the Material Change Report were misleading for failure to disclose the extent of consulting fees paid or owing in connection with the private placement.

[11] On May 2, 2024, the Commission issued its decision *in Re PreveCeutical*, 2024 BCSECCOM 199 (the “Decision”), dismissing the Executive Director’s allegations on the basis that, although the News Release and Material Change

Report did indeed contain a misrepresentation of the kind alleged, it was not seen to be a material one.

[12] The plaintiffs commenced this action on June 5, 2024. In their notice of civil claim, the plaintiffs plead, among other things, that:

a) the defendants acted as counsel for the plaintiffs, including as general corporate counsel to PMI and ACI;

b) the defendants either drafted the News Release or reviewed a draft of it before it was issued and therefore owed a duty to PMI to ensure that it complied with all applicable laws, regulations and policies;

c) when they did so, the defendants knew that PMI had entered into consulting agreements pursuant to which "some of the proceeds of the private placement had been spent on or would be owed to consultants", although the extent of the defendants' knowledge in that regard is alleged to be unknown to the plaintiffs;

d) the defendants owed a duty to the plaintiffs to warn PMI about the risks that PMI was taking by issuing the News Release in that form;

e) the defendants owed that duty not only to PMI, but also to Mr. Van Deventer and ACI, due to an alleged relationship of proximity between the defendants and them;

f) relying on the defendants' negligent advice, PMI issued the News Release and Material Change Report, thereby exposing itself to regulatory proceedings and the findings of the Commission that the News Release and Material Change Report contained misrepresentations; and

g) as a result of that exposure, the plaintiffs suffered various kinds of damages, including:

i. legal fees that PMI incurred in defending itself before the Commission; and

ii. reputational harm, financial losses, loss of financing and business opportunities suffered by all three of the plaintiffs due to the Commission's adverse findings against PMI and Mr. Van Deventer.

[13] In their response to the claim filed June 25, 2024, the defendants plead, among other things, that:

a) in or before June 2018, Mr. Van Deventer, on behalf of PMI, engaged the BridgeMark Group ("BMG") to provide consulting services to PMI in relation to the private placement;

b) the defendants were not involved in the discussions between Mr. Van Deventer and BMG;

c) PMI retained the defendants to assist in drafting the News Release and Material Change Report and, to that extent, the defendants owed PMI a duty of care to provide that service competently, which they did;

d) the defendants had no duty to ensure that the News Release and Material Change Report were not misleading, which was an obligation of PMI's management;

e) when the defendants were consulted about the News Release and Material Change Report, PMI and Mr. Van Deventer intentionally withheld from the defendants the amount that PMI was charged for consulting fees (including, in particular, the fact that BMG was to receive nearly half of the proceeds of the private placement in the form of consulting fees);

f) having no knowledge of that fact, the defendants had no reason to warn PMI that the News Release and Material Change Report needed to mention it, but even if they had been aware of it, the extent of the consulting fees paid to BMG was not a material fact, as the Commission

found, and was therefore not something that the defendants were required to warn PMI about;

g) the defendants were never retained by Mr. Van Deventer and so did not owe him a duty of care;

h) the notice of civil claim discloses no basis for a claim by ACI; and

i) the claim is time-barred.

[14] This application was the first step taken in the action following the close of pleadings. There has been no exchange of documents, no examinations for discovery and no trial date set.

III. Applicable Legal Principles

[15] The Court has inherent jurisdiction to require a plaintiff to post security for costs. The purpose of such an order was explained in *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.*, 1993 CanLII 1669, 76 B.C.L.R. (2d) 231 (C.A.), as follows:

> [15] It is appropriate to start with the question of what is the purpose of an order for security for costs[.] In *Island Research & Development Corp. v. The Boeing Co.* (3 January 1991), Vancouver C902161 (B.C.S.C.), Spencer J. said (at p. 3):
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> > The purpose of security for costs is to protect a defendant from the likelihood that in the event of its success it will be unable to recover its costs from the plaintiff. The plaintiff is not to be permitted a free ride on an unlikely claim at the defendant's expense. The factors to be considered in achieving a just balance between the defendant's right to protection and the plaintiff's right to advance a potential claim for adjudication include the chance of the claim's success, the anticipated level of cost in conducting the action and the prospect of the plaintiffs ever having assets from which to pay the defendants' costs if the claim fails. …

[16] There are two different tests that apply on an application of this kind, depending on whether the plaintiff is a company or an individual. In *Ocean Pastures Corporation v. Old Masset Economic Development Corporation*, 2016 BCCA 12

[*Ocean Pastures*], the Court of Appeal had occasion to consider how those tests should be applied where, as here, the action is brought by both an individual and a corporate plaintiff jointly. The Court held that in these circumstances it is an error to conflate the analysis applicable to each plaintiff—the correct approach, instead, requires that each plaintiff be considered independently: *Ocean Pastures* at para. 27.

[17] Justice Goepel, writing for the Court, explained the rationale for the distinction as follows:

> [21] The reason for the distinction between corporate and individual plaintiffs was set out in *Bronson* [*v. Hewitt*, 2007 BCSC 1751]:
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> > [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.

[18] Justice Goepel summarised the test to be applied in respect of a corporate plaintiff as follows:

> [17] The legal principles governing an application for security for costs against an impecunious corporate plaintiff were summarized in *Kropp* [*v. Swaneset Bay Golf Course Ltd*., 1997 CanLII 4037, 29 B.C.L.R. (3d) 252 (C.A.)] at para. 17:
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> 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.
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> [18] Once an applicant for security for costs has shown that a corporate plaintiff will not be able to pay costs should its claim fail, security is generally ordered unless the court is satisfied that there is no arguable defence: *Fat Mel's* at 235.

[19] In addition, it has also been held that where the cause of the corporate plaintiff's impecuniosity is or may be the very conduct that is the subject of the claim, it may be appropriate to refuse to grant the order for security, or to reduce the amount ordered to be posted: *Protea Consultax Inc. v. Air Canada*, 2018 BCSC 995; *Tour-Mate Technologies Corp. v. Syntronix Systems Ltd.*, 1993 CanLII 2250, [1993] B.C.J. No. 599 (S.C.); *Anderson v. D. Brent Adair Personal Law Corp.*, 1998 CanLII 6360, [1998] B.C.J. No. 1362 (S.C.).

[20] Where the plaintiff is an individual, Goepel J.A. affirmed in *Ocean Pastures* that the test to be applied is as set out by Justice Dillon in *Han v. Cho*, 2008 BCSC 1229:

> [27] The onus is on the applicant to establish that he or she will be unable to recover costs [Citation omitted.]. The fact that the plaintiff resides outside the jurisdiction, has no assets within the jurisdiction, or is impecunious, is not sufficient in itself. The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances. Such special circumstances could arise if an impecunious plaintiff also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance.

[21] The factors to be considered when considering whether the requisite "egregious circumstances" are present so as to justify an order requiring an individual plaintiff to post security for costs were helpfully enumerated in *I.J. v. J.A.M.*, 2013 BCSC 270, as follows:

> [14] A number of factors have been considered by the Court in determining whether it is appropriate to make an order for security costs against an individual claimant: (a) the merits of the plaintiff's claim: *Tordoff*, supra, at paras. 19-20; *Frank Hillis Logging Co. v. Hoeya Sound Logging Ltd*., [1971] 2 W.W.R. 471 (B.C.C.A.); and *Launer*, *supra; Mobilificio Trebbianco, S.p.A. v. Rome*, [1981] B.C.J. No. 374 (S.C.); (b) the inability of defendants to recover costs from a plaintiff such as where the plaintiff is bankrupt or insolvent: *Han*, supra, at para. 16; (c) whether the plaintiff has demonstrated an intention not to comply with previous orders relating to costs payable; (d) if there is a risk that the plaintiff is not "findable": *Han, supra*, at para. 17; and (e) where there was evidence suggesting that a false description of residence or a false name had been given to the court or used generally: *Fraser v. Palmer* (1883), 3 Y.& C. Ex. 279; and *Swanzy v. Swanzy* (1858), 4 K.& J. 237.

[22] More recently, in *Iwasaki v. Redford*, 2016 BCSC 504 [*Iwasaki*], Justice Warren summarised the principles that should guide the exercise of the court's discretion in the case of both individual and corporate plaintiffs, in the following terms:

> [57] In summary, if a defendant establishes a real likelihood that he or she will be unable to enforce a costs award, then it is necessary to assess the risk of a legitimate claim being stifled. This requires a consideration of all the relevant factors present in the case in question. The ability of the plaintiff to post the security sought and the merits of the plaintiff's claim are obvious factors to consider. While the court cannot delve deeply into the merits on an application of this sort, if it is plain and obvious that the claim lacks merit then the concern not to frustrate legitimate claims is engaged with less force. If the plaintiff's claim is arguable but there is no reason to believe that the plaintiff will not be able to prosecute the claim if ordered to post security, then the concern not to frustrate legitimate claims does not arise. In my view, if the defendant establishes a real likelihood that it will be unable to enforce a costs award in circumstances where there is no risk of a legitimate claim being stifled, that amounts to special circumstances justifying an order for security for costs. In contrast, where it appears that an order for security for costs is likely to preclude an individual plaintiff's right of access to the courts, security should not be ordered, even where the defendant establishes that it will be unable to enforce a costs award, except in egregious circumstances.

[23] In addition, Warren J. distilled from the jurisprudence the following summary at para. 56 on the principles to be applied on applications of this kind:

> - In exercising the discretion to order security for costs, a distinction is drawn between individual plaintiffs and corporate plaintiffs.
> - In the case of a corporate plaintiff, once the defendant has demonstrated that the plaintiff would be unable or unlikely to pay costs, security for costs is generally ordered unless the plaintiff shows that there is no arguable defence. This reflects a concern to prevent the principals of a corporate plaintiff from hiding behind the corporate veil to avoid personal exposure for costs. Accordingly, the possibility that a company might be deterred from pursuing its claim is not a sufficient reason, on its own, for not ordering security for costs against a corporate plaintiff.
> - In the case of an individual plaintiff, the court must balance the risk that a successful defendant will be unable to recover costs against the possibility of stifling a legitimate claim. Because of the longstanding principle that poverty is not a bar to access to the courts, a concern that a legitimate claim could be stifled by an order for security for costs will almost always override a concern that a successful defendant will be unable to recover costs if security is not ordered.
> - "The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances": *Han* at para 27.
> - In the case of an individual plaintiff, it is not enough for the applicant to establish that the plaintiff resides out of the jurisdiction and has no assets in it. Further, the fact that the plaintiff's jurisdiction of residence is a non-reciprocating jurisdiction for the purpose of enforcement of court orders "is of little import": *Bronson v. Hewitt*, 2007 BCSC 1751 at para. 44.
> - The authorities do not establish an exhaustive list of the circumstances that would be special enough or egregious enough to justify an order for security for costs. As Madam Justice Dillon noted in *Han*, if the plaintiff is impecunious, the fact that the plaintiff's claim is weak or that the plaintiff has failed to pay a costs award in the past, might tip the balance in favour of granting the order.
> - Again, as Mr. Justice Shaw put it in *Fraser*, at para. 11, where an order for security for costs would preclude an individual plaintiff's right of access to the courts, it will not be made "except in egregious circumstances amounting to a likely abuse of the court's jurisdiction".

[24] That summary was subsequently endorsed by Justice Newbury in *Kim v. Choi*, 2016 BCCA 375 at para. 5 [*Kim*].

[25] At the outset of her analysis, Warren J. rejected the submission that an individual plaintiff can properly be ordered to post security for costs only in cases amounting to an abuse of process. In support of that submission, the plaintiff had relied on the *dicta* of Justice Shaw at para. 11 of *Fraser v. Houston*, 1997 CanLII 3227, 36 B.C.L.R. (3d) 118 (S.C.) [*Fraser*], where he stated as follows:

> The conclusion I draw from the foregoing authorities is that while the court must have jurisdiction to do what is necessary to prevent its jurisdiction from being abused, the court in exercising this power must weigh carefully the right of our citizens to have access to the courts. In my view, the court should not make an order which would preclude the right of access except in egregious circumstances amounting to a likely abuse of the court's jurisdiction.

[26] At para. 54 of *Iwasaki*, after citing the last sentence of those *dicta* from *Fraser*, Warren J. interpreted it in the following manner:

> In other words, where an order for security for costs *would* stifle a claim, the order might still be made in circumstances amounting to an abuse of process. Having reviewed the authorities, it is my view that while the order sought is an exceptional one, it is not always necessary for an applicant to establish conduct amounting to an abuse of process.
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> [Emphasis in original.]

[27] The plaintiffs argue that the conclusion of Warren J. in that last sentence is not authoritative and should not be followed, since an abuse of process was held to be a necessary precondition for such an order, relying on *Fraser*, in the more recent case of *Della Penna v. Cobb,* 2017 BCSC 2725 [*Della Penna*].

[28] In that case, Justice Sewell refused to order a resident plaintiff advancing an arguable claim, and who had substantial assets in the jurisdiction, to post security for costs. In doing so, he questioned “whether it is accurate to characterize the analysis as one of balancing the interest of the parties” (at para. 19), a proposition he took from another decision of Warren J. (namely, *Huang v. Silvercorp Metals Inc*., 2017 BCSC 273). Instead, Sewell J. relied on *Fraser* for the proposition that such an order is “exceptional” and “should only be exercised to prevent an abuse of the Court’s process”: *Della Penna* at para. 19.

[29] This led Sewell J. to formulate the test to be applied as follows:

> [19] … [i]n my view, a party seeking security for costs from a resident plaintiff has the onus of showing special circumstances amounting to a likely abuse of the Court's process.

[30] The parties were unable to find any subsequent decision relying on these *dicta* of Sewell J. in *Della Penna*. It should be noted that Sewell J. does not appear to have had the benefit of the decisions of Warren J. in *Iwasaki,* Newbury J.A. in *Kim* or Goepel J.A. in *Ocean Pastures*, in which such an order was said to be potentially available even if no abuse of process is made out, such as where the plaintiff is impecunious and is advancing a weak claim. Accordingly, I prefer Warren J.'s formulation of the test over that of Sewell J., which appears to me to be too restrictive in light of those authorities.

IV. Discussion

A. Should PMI and ACI be required to post security for costs?

[31] The defendants argue that the corporate plaintiffs should be ordered to post security for costs because they are impecunious and are advancing an obviously unmeritorious claim. In particular, they say that the notice of civil claim discloses no viable cause of action on behalf of ACI. On the contrary, the defendants say that the alleged failure to warn pertains only to services performed for PMI. The defendants cite *Esser v. Luoma*, 2004 BCCA 359 [*Esser*], for the proposition that a solicitor owes no duty of care to non-client third parties.

[32] With respect to PMI, the defendants say the claim is founded on a faulty factual premise, namely, that the defendants knew that PMI would have to pay "some" of the proceeds of the private placement as consulting fees and therefore should have warned PMI about the accuracy of the assertions made in the News Release. In fact, the defendants say, the Commission's finding that PMI had made a misrepresentation in the News Release rested on the fact that nearly half (not "some") of the proceeds of the private placement were paid as consulting fees. PMI does not plead, nor have the plaintiffs adduced any evidence to suggest, that the defendants were aware of that fact. Accordingly, the defendants say that PMI's claim has no chance of succeeding.

[33] In response, the plaintiffs do not dispute that they are impecunious. However, they argue that their impecuniosity has been caused by the omission of the defendants that is the subject of their claim and therefore that an order requiring them to post security would be an "instrument of oppression" that would have the effect of stifling a "legitimate claim."

[34] Turning to the merits of that claim, the plaintiffs argue that the notice of civil claim discloses a viable claim on behalf of ACI, based on their pleading that:

a) the defendants knew of Mr. Van Deventer's role in ACI because they were retained as general corporate counsel for ACI as well as PMI;

b) the defendants owed ACI a duty of care, due to a relationship of proximity between them; and

c) the adverse finding of the Commission that Mr. Van Deventer made a misrepresentation in the News Release caused damage to ACI because of Mr. Van Deventer's role in ACI.

[35] The plaintiffs argue that a lawyer may indeed be found to owe a duty of care to a non-client third party in circumstances where there is sufficient proximity between the two, citing *St. Amand v. Ouellette,* 2006 NBCA 63.

[36] The plaintiffs disagree that their claim rests on a faulty factual premise. They say that the extent of the defendants' knowledge as to the amount of consulting fees payable to BMG is disputed and has yet to be determined.

[37] In view of the plaintiffs' acknowledgment that PMI and ACI are impecunious, the order sought should generally follow against both companies unless there is no arguable defence to the claim. The plaintiffs do not contend that there is no arguable defence to the claim. However, they say that this case falls within an exception to the general rule, inasmuch as it would be oppressive to require them to post security where it is the impugned fault of the defendants that has brought about their impecuniosity.

[38] To this, the defendants respond that the plaintiffs were impecunious before the events giving rise to the claim. I am not persuaded that is so. Assuming the claim has merit, it is possible that the corporate plaintiffs' inability to raise sufficient funds to pay a costs award can be attributed to the adverse findings of the Commission, which, they allege, could have been avoided had PMI been duly warned by the defendants of the risk posed by the News Release.

[39] This raises the question of whether the claim is obviously without merit, as the defendants contend. I am not persuaded that it is.

[40] First, I accept that there is a live issue to be resolved as to whether the defendants owed ACI a duty of care based on a sufficiently close relationship of proximity between them. I disagree with the defendants that the Court of Appeal's decision in *Esser* necessarily precludes the recognition of such a duty in this case. In *Esser*, Newbury J.A., with whom Justice Esson concurred, overturned the trial judge's finding that a notary owed a duty of care to the plaintiff, a non-client. The plaintiff complained that the notary had unknowingly assisted a client to commit fraud by transferring title to property that the plaintiff co-owned with the client.

[41] This case is easily distinguished. Here, it is at least arguable that if, as is alleged, the defendants negligently failed to warn PMI about making a misrepresentation in a public filing, harm to ACI could reasonably have been foreseen, given that Mr. Van Deventer was chair and CEO of both companies and both companies were clients of the defendants. Neither side identified any considerations of policy that might militate in favour of, or against, the recognition of such a duty in this case.

[42] Second, I disagree with the defendants that the claim rests on an obviously faulty factual premise. Although the plaintiffs plead only that the defendants were aware that "some" consulting fees would be paid, they also plead that they are unaware of how much the defendants knew about the extent of those fees. The defendants plead that the plaintiffs intentionally concealed that information from them, but Mr. Lotz has adduced no evidence of his own to support that allegation.

Given the uncertainty, I am not prepared to find that the claim is obviously devoid of merit on that ground either.

[43] On the other hand, I am also unable to say on the record before me that the corporate plaintiffs' case is a particularly strong one. In addition to these open questions about the extent of the defendants' knowledge of the consulting fees and the duty of care owed to ACI, the plaintiffs must also prove causation. The evidence supporting this aspect of the claim is very thin. In his affidavit sworn in support of the application, Mr. Van Deventer states only that he has been advised by "many potential investors and potential business partners … that they were not prepared to invest in [PMI] or [ACI] or do business with them because [PMI] and I were the subject of regulatory proceedings." The plaintiffs clearly face significant hurdles in making out their claim.

[44] On balance, I have concluded that the corporate plaintiffs should post some security, but in an amount less than the defendants are seeking. If the defendants are correct that the claim will be shown, upon investigation, to be without merit, then it should not be necessary for them to defend the action through to a trial.

[45] The defendants have adduced a draft bill of costs suggesting that their taxable costs in successfully defending the action through to a trial would exceed $50,000. Nevertheless, at the hearing, they reduced the amount of security they seek to $25,000, with leave to apply for additional security should that amount prove to be insufficient in the future. The plaintiffs argue that if an order for security of costs is to be made, the amount should be no more than $10,000, half of which is to be posted within 90 days, and the remaining half to be posted prior to examinations for discovery.

[46] My order will be that the corporate plaintiffs are to post the amount of $20,000 as security for costs, $10,000 of which is to be posted within 90 days, and the other $10,000 prior to the commencement of examinations for discovery. Further, I am also granting the defendants leave to seek to increase the amount of security posted after examinations for discovery are complete, if the action reaches that stage.

B. Should Mr. Van Deventer be required to post security for costs?

[47] It is not disputed that Mr. Van Deventer, like the corporate plaintiffs, is impecunious. He has deposed that the inability of the corporate plaintiffs to raise capital has forced him to lend them money from his own personal funds. He no longer draws a salary from either company. All of this has left him in a precarious financial position. He says he has been forced to sell his own personal assets and has been unable to remain current with the mortgage payments on the residence that he owns jointly with his wife, which has consequently gone into foreclosure. The lender has conduct of sale and the property has been on the market for many months. The amount owing on the mortgage now exceeds the list price of just under $10 million.

[48] On the other hand, I am satisfied, for the reasons set out above, that Mr. Van Deventer's personal claim, which is at least as strong as ACI's, is a viable one and could be stifled if he were required to post security for costs. There are no egregious circumstances present to justify such an order in his case. I am therefore refusing the application as it pertains to him.

V. Summary and Disposition

[49] The application is allowed in respect of PMI and ACI. They are to post a total of $20,000 as security for costs, $10,000 of which is to be posted within 90 days and the other $10,000 prior to the first of the examinations for discovery.

[50] If that security is not posted as ordered, then the defendants will be at liberty to apply for an order dismissing the claims of PMI and ACI. In addition, the defendants are granted leave to apply to increase the amount of security posted after examinations for discovery are complete, if the action reaches that stage.

[51] The application is refused as it pertains to Mr. Van Deventer.

[52] The costs of the application will be payable in the cause.

"Milman J."