

Court of King's Bench of Alberta

Citation: Embedia Technologies v Blumell, 2024 ABKB 735

Date: 20241213
Docket: 1701 14578
Registry: Calgary

Between:

Embedia Technologies Corporation and Embedia Sales Corp.

Plaintiffs

- and -

James Reid Blumell, Blumell Consulting Ltd., Tyson McDonald, and Draper Inc.

Defendants

Reasons for Decision of the Honourable Applications Judge J.T. Prowse

[1] The defendant Draper Inc. applies for security for costs. For the reasons which follow I grant the application, but for a lesser amount than sought.

[2] Draper brought its application for security for costs against the plaintiffs (who I will refer to as “Embedia”) under both r. 4.22 and section 254 of the *Alberta Business Corporations Act* (“ABCA”).

[3] Some case law indicates that an application for security for costs against a corporate plaintiff can only be sought under s. 254 of the ABCA [see *Provalcid Inc. v. Graff*, 2014 ABQB 453, 2014 CarswellAlta 1332, at para 93]

[4] Other case law indicates that an application for security for costs against a corporate plaintiff can be sought under both s. 254 of the ABCA and r. 4.22 [see *Xpress Lube & Car Wash Ltd. v. Gill*, 2011 ABQB 457, 2011 CarswellAlta 1192 at para 16 and *North American*

Polypropylene ULC v. Williams Canada Propylene ULC, 2018 ABQB 281, 2018 CarswellAlta 777 at para 49].

[5] The reason this is debated is due to the perception that applications under s. 254 are more difficult for the applicant than applications under r. 4.22.

[6] This perception is explained in para 16 of *Xpress Lube* as follows:

16 To my mind, s. 254 above sets a more stringent test for the Applicant than that set out in Rule 4.22(a) and (b). Section 254 ABCA envisions the situation where the body corporate will be unable to pay costs. Rule 4.22 permits an Order for security for costs where it is unlikely that the Plaintiff can pay costs. As the standard under Rule 4.22(a) and (b) is less onerous on the Applicant than s. 254 ABCA, I will apply Rule 4.22. [emphasis added].

[7] However, what needs to be factored in is that the onus of proof of establishing under s. 254 that a body corporate will be unable to pay costs is the balance of probabilities.

[8] This was addressed in *Geophysical Service Incorporated v. Encana Corporation*, 2016 ABQB 49, 2016 CarswellAlta 3594 at para 44:

... As I am satisfied that the Master correctly concluded that the Defendants met the first part of the test in s. 254 and demonstrated on a balance of probabilities that successful Defendants will be unable to recover their costs, I have considered the following discretionary factors ... [emphasis added]

[9] I question whether there is a material difference between the applicant:

(i) establishing on the balance of probabilities that the plaintiff will be unable to pay a costs award, and

(ii) establishing that the defendant is not likely to be able to enforce a costs award.

[10] This observation is reflected in the reasons of Nielsen J. (as he then was) in *Commercial Construction Supply Ltd. v. Ghost Riders Farm Inc.*, 2016 ABQB 166, 2016 CarswellAlta 495, where (upon concluding that s. 254 applied rather than r. 4.22 as the case dealt with a corporate plaintiff) at para 22 he made the following observation:

Whether an application is brought pursuant to s. 254 of the BCA or pursuant to Rule 4.22, the onus of proof does not change. The applicant seeking security for costs bears the initial onus to establish, on a balance of probabilities, that the respondent will be unable to pay its costs if the defence is successful. If the applicant satisfies this onus, the evidentiary burden shifts to the respondent to show why the Court should not exercise its discretion to make such an Order against it ... [emphasis added]

[11] In the case before me I have concluded, on a balance of probabilities (for reasons set out below), that Embedia will be unable to pay a costs award. As indicated, the next question to consider is whether the Court should exercise its discretion to award security for costs.

[12] What factors should the Court consider when exercising that discretion?

[13] Rule r. 4.22 lists a threshold test (the justness and reasonableness of awarding security for costs) and a number of considerations (the ability of the respondent to pay a costs award, the

merits of the action, and whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action). These factors are not listed in s. 254.

[14] Again, this difference does not seem material. The specific factors listed in r. 4.22 are factors one would expect the court to consider in exercising its discretion ("may order") under s. 254.

[15] Accordingly, in my view there is no material difference between the provisions of r.4.22 and section 254 of the ABCA in deciding whether to award security for costs.

Is it likely that Embedia would be able to pay a future costs award?

[16] There is more evidence before me than is typically before the court in a security for costs application.

[17] Embedia produced its financial statements, and the applicants obtained an opinion from a well qualified expert, primarily relying on those financial statements.

[18] The expert's conclusion was that Embedia did not have the cash to pay a costs award, did not have sufficient assets to convert to cash to pay a costs award, and would be unable to borrow cash to pay a costs award.

[19] Embedia attempted to refute these conclusions by noting that the expert did not factor in two large purchase orders which Embedia had recently landed (one of which is acknowledged to be 'on hold').

[20] In my view it is too speculative to conclude that one or both of these purchase orders will result in work completed, billed and paid, to overcome the expert's conclusions.

[21] I note that Embedia did not cross examine Draper's expert or file a responsive expert's report.

[22] With respect to the justness and reasonableness of ordering security for costs, it is unjust to allow Embedia to pursue this litigation where it would be awarded costs if successful but unable to pay costs if unsuccessful.

[23] The merits of the action cannot be determined at this early stage.

[24] There is no evidence before me to allow me to conclude that granting an order for security for costs would unduly prejudice Embedia's ability to continue the action.

[25] Given the foregoing, it is my conclusion that security for costs should be awarded to Draper.

The quantum of the security for costs

[26] I propose to chronologically stage security for costs into three topics: (i) production of records and part 5 questioning (ii) disbursements for experts and (iii) preparation for trial and trial.

[27] At this time I will only award security for costs for topic (i) production of records and part 5 questioning. Following completion of part 5 questioning Draper has leave to seek security for costs for topics (ii) and (iii).

[28] Draper has presented a draft Bill of Costs seeking security for costs for stage (i) in the amount of \$321,273.75.

[29] The quantum of costs is a matter of discretion, and in my view the appropriate amount is \$126,000 which I have derived as follows:

- \$100,000 for taxable fees
- \$10,000 for expert assistance in part 5 questioning
- \$10,000 for disbursements for part 5 transcripts
- \$6,000 GST on the foregoing

[30] The security can be paid in two tranches of \$63,000. The first tranche is to be paid on or before April 1, 2025, and the action is stayed until it is paid. The second tranche is payable 6 months after payment of the first tranche. The stay will be reimposed if the second tranche is not paid on time.

Costs of this application

[31] If this parties cannot agree on the costs outcome of this application they can make brief written submissions to me in that regard within 60 days from the date of this decision.

Heard on the 4th day of December, 2024.

Dated at the City of Calgary, Alberta this 13th day of December, 2024.

J.T. Prowse
A.J.C.K.B.A.

Appearances:

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