

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *0998823 B.C. Ltd. v. Douglas R. Johnson, Architect Ltd.*,
2025 BCCA 449

Date: 20251126
Docket: CA50686

Between:

0998823 B.C. Ltd. and Mann Development (Main St) Inc.

Appellants
(Defendants)

And

Douglas R. Johnson, Architect Ltd.

Respondent
(Plaintiff)

Before: The Honourable Justice Griffin
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
April 25, 2025 (*Douglas R. Johnson, Architect Ltd. v. 0998823 B.C. Ltd.*,
2025 BCSC 774, New Westminster Docket S251917).

Oral Reasons for Judgment

Counsel for the Appellants: K.S. Atwal

Counsel for the Respondent: J.A. Morris
B.D.L. Nguyen

Place and Date of Hearing: Vancouver, British Columbia
November 26, 2025

Place and Date of Judgment: Vancouver, British Columbia
November 26, 2025

Summary:

The respondent seeks security for costs of the appeal in the amount of \$10,000 and costs of the underlying Supreme Court proceeding in the amount of \$35,000. Held: The appellants are ordered to post security in the amount of \$10,000 for costs of the appeal and \$5,000 for costs of the Supreme Court proceeding. There is a risk of non-recoverability because the appellants are engaged in a risky business and have properties that are frequently encumbered. However, the appellants are not so impecunious that requiring them to post security would deprive them of the opportunity to appeal. The weak merits of the appeal and the chambers judge's finding that the appellants engaged in an abuse of process justify an order for security for costs of the underlying lower court proceeding. However, because costs have not yet been assessed, a modest amount of security for costs is appropriate.

GRIFFIN J.A.:**Overview**

[1] The respondent, Douglas R. Johnson, Architect Ltd. ("Johnson Architect"), applies for security for costs of:

- a) the appeal in the amount of \$10,000 pursuant to s. 34(1)(a) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [Act]; and
- b) the underlying Supreme Court proceedings in the amount of \$35,000 pursuant to s. 34(1)(b) of the *Act*.

[2] Johnson Architect also seeks a stay of the appeal pending the posting of security for costs and an order permitting it to bring an application to dismiss the appeal as abandoned if the appellants fail to post security.

Background**Underlying Action**

[3] The appeal arises from a dispute between Johnson Architect and the appellants, 0998823 B.C. Ltd. ("099") and Mann Development (Main St) Inc. ("MDI") who are developers (collectively, the "Developers"). The Developers retained Johnson Architect under two contracts to provide architectural services to improve

their lands. Johnson Architect says that although it rendered the contracted services, the Developers did not pay in full, leaving an outstanding balance of \$465,382.88.

[4] On December 15, 2023, Johnson Architect commenced an action against the Developers to recover the unpaid balance. It also filed two builders lien claims and caused two certificates of pending litigation (“CPLs”) to be placed on title to the Developers’ lands.

[5] On December 22, 2023, before the Developers filed a response to civil claim, the parties entered a settlement agreement. The terms were that the Developers would pay \$237,396.93 in exchange for Johnson Architect’s dismissal (subsequently changed to a discontinuance) of the action and release of the associated liens and CPLs.

[6] The Developers paid the settlement funds, and Johnson Architect released the liens and CPLs. Counsel for both parties agreed that Johnson Architect’s counsel would file a notice of discontinuance, rather than a consent dismissal order, due to a concern that the court registry would not accept the filing of a consent dismissal order without the Developers’ response to civil claim.

[7] Counsel for Johnson Architect drafted and endorsed the notice of discontinuance but never filed it due to an oversight.

Response and Counterclaim

[8] Almost one year later, on November 4, 2024, the Developers filed: (1) a response to the original claim; and (2) a counterclaim. They sought damages related to alleged deficiencies in the architectural services for which Johnson Architect had sought payment in its claim.

[9] On November 27, 2024, Johnson Architect informed the Developers of its objection to the filing of the response and counterclaim. It asserted that those filings were a breach of the settlement agreement and therefore an abuse of process. Johnson Architect proposed resolving the matter through consent dismissal of the

original claim and confirmation that its limitation defences were preserved. It notified the Developers of its intention to bring an application to enforce the settlement agreement, should the Developers refuse its proposal.

[10] As I understand the proposal, it would have permitted the Developers to commence a new independent action, subject to any defences including any limitation defence accrued as of the date of the counterclaim.

[11] Counsel for the Developers responded almost four months later, on March 3, 2025. They rejected the proposal and demanded a response to the counterclaim within two weeks, failing which they would seek default judgment. The following day, on March 4, Johnson Architect advised the Developers that it would seek enforcement of the settlement agreement, apply to strike the response and counterclaim, and seek special costs.

[12] On March 14, 2025, Johnson Architect brought an application to enforce the settlement by way of a stay of the proceedings. The application was heard on April 9, 2025. Two days before the hearing, the Developers filed a requisition seeking default judgment on the counterclaim due to failure to file a response. The requisition did not advise the court of Johnson Architect's outstanding application to stay the proceedings, and default judgment was granted on April 9, 2025.

Chambers Judgment

[13] After hearing Johnson Architect's application on April 9, 2025, on April 25, 2025, Justice Milman, in Supreme Court chambers, granted Johnson Architect's application to enforce the settlement agreement by way of an order staying the proceedings, in reasons indexed at 2025 BCSC 774 ("RFJ").

[14] The chambers judge confirmed that the settlement agreement was predicated upon the end of the underlying action and that the parties did not intend the action to survive beyond the completion of the settlement: RFJ at para. 20. The action's survival was only due to counsel for Johnson Architect's error in not filing the notice of discontinuance: RFJ at para. 21.

[15] The judge observed that in the year following the settlement agreement, the Developers never insisted that Johnson Architect fulfill its promise to discontinue the action.

[16] The judge understood it to be common ground that the limitation period had expired for the cause of action advanced in the counterclaim, had it been filed as a separate action at that time: RFJ at para. 22.

[17] The judge found that the Developers' "objective in proceeding" by way of counterclaim appears to have been to use the existing claim of Johnson Architect to circumvent the expired limitation period: RFJ at para. 22.

[18] The judge concluded that the Developers' conduct amounted to an abuse of process, giving him jurisdiction to stay the proceeding to enforce a settlement: RFJ at para. 24, citing *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5; *Daum v. Borsuk*, 2020 BCSC 2013; *Hutton v. Hutton*, 2020 BCSC 2046.

[19] The judge ordered a stay of proceedings to remedy the Developers' abuse of process. He also ordered special costs against the Developers to rebuke their conduct in obtaining default judgment knowing that Johnson Architect's application to enforce the settlement agreement was pending: RFJ at para. 27.

[20] On May 20, 2025, the Developers filed a notice of appeal. They seek an order to set aside the chambers judge's decision to stay the proceeding and to permit the Developers to continue their counterclaim in the action. They also seek to set aside the costs order.

[21] On October 2, 2025, Johnson Architect filed this application for security for costs. Special costs have not yet been assessed because the appeal is pending, and Johnson Architect did not wish to waive privilege over its solicitor's file to assess costs.

Issues

[22] The issues are whether the Court should order security for costs of (a) the appeal and (b) the underlying Supreme Court proceedings.

Legal Framework

Security for Costs

[23] A single justice has jurisdiction to order security for costs of the appeal and costs in the proceedings giving rise to the appeal: s. 34(1)(a) and (b) of the *Act*, respectively.

[24] Under s. 34(2), a payment of security must be in “the amount and form determined by the justice”.

Costs of the Appeal

[25] The appellant against whom the order is sought bears the onus of demonstrating why security for costs of the appeal should not be ordered: *Lungu v. Cabrita*, 2025 BCCA 105 at para. 15 (Chambers).

[26] The relevant considerations are: (1) the appellant’s financial means; (2) the merits of the appeal; (3) the timeliness of the application; and (4) whether the costs will be readily recoverable: *Ferguson v. Ferstay*, 2000 BCCA 592 at para. 7 (Chambers). The ultimate question, however, is whether an order for security for costs would be in the interests of justice: *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers).

Costs of the Underlying Supreme Court Proceedings

[27] In contrast to applications for security for costs of the appeal, in applications for costs of the underlying Supreme Court proceedings, the onus rests with the applicant to establish that it is in the interests of justice to order security for costs: *Focken v. Fraser Health Authority*, 2023 BCCA 81 at para. 27 (Chambers).

[28] In determining the interests of justice, the Court should consider: (1) the merits of the appeal; (2) the effect of such an order on the ability of the appellant to continue the appeal; and (3) the prejudice caused to either party by granting or dismissing the application: *Focken* at para. 27.

[29] There is no formal requirement to establish prejudice, but it remains “an important consideration to the exercise of discretion” granted to a judge by s. 34(1)(b): *England Securities Ltd. v. Ulmer*, 2023 BCCA 11 at para. 32 (Chambers). Prejudice can be shown through a lack of exigible assets, a pattern of “expense-causing tactics”, or conduct causing delay and cost throughout the litigation: *Seikhon v. Dhillon*, 2020 BCCA 185 at para. 27.

[30] Security for costs of the appeal is ordered more readily than security for trial costs: *Siekham v. Hiebert*, 2008 BCCA 299 at para. 13 (Chambers). The reason is trial costs are generally more substantial than costs of an appeal, and it is not right to keep an appellant with an appeal of obvious merit away from the Court by ordering the posting of security the appellant cannot afford: *Adler International Investments Ltd. v. Central Okanagan (Regional District)*, 2001 BCCA 416 at para. 8 (Chambers).

Position of Parties

Johnson Architect

[31] Johnson Architect asserts that the Developers’ lack of exigible assets raises a serious concern about non-recovery of costs. It points to recent land title searches that demonstrate significant encumbrances on the properties of both 099 and MDI. On one property, assessed by BC Assessment at \$12.6 million, a title search indicates the property is encumbered by a mortgage of just over \$72 million, as an example. Other properties show encumbrances of mortgages and liens.

[32] Johnson Architect argues that the appeal has no merit. The Developers led no evidence in response to the application below. There was no dispute as to the terms of the settlement agreement, and the issue the judge determined was one of

contractual interpretation. Johnson Architect submits that the standard of review for interpretation of contracts is that of mixed fact and law and is the deferential standard that applies to findings of fact, as here there is no extricable error of law. The granting of the stay and the costs orders were discretionary orders entitled to deference on appeal.

[33] Johnson Architect asserts that this application is timely and that the Developers were advised of Johnson Architect's intention to bring this application at the outset. I pause to note this hearing date is not for lack of early notice to the Developers.

[34] Finally, Johnson Architect argues that the interests of justice favour granting security for costs. With respect to the costs of the appeal, Johnson Architect asserts that the lack of merit and the risk of non-recovery warrant the order. With respect to costs of the Supreme Court proceedings, Johnson Architect cites the potential for prejudice if it is unable to recover costs awarded for conduct deserving of rebuke.

099 and MDI

[35] The Developers submit that costs will be readily recoverable. They assert that they are established real estate companies and hold considerable real estate assets.

[36] They point to at least two examples of real estate assets, one held by each of them, which have millions of dollars of unencumbered equity.

[37] The Developers submit that there is merit to the appeal. They contend that the chambers judge erred in: (1) interpreting the settlement agreement as releasing the Developers' claims; and (2) concluding that the counterclaim constituted a breach of the settlement agreement or an abuse of process.

[38] With respect to the first error, the Developers argue that the settlement agreement released only Johnson Architect's claims against the Developers. It did not release any claims the Developers may have had against Johnson Architect.

[39] With respect to the second error, the Developers argue, based on new evidence they did not put before the chambers judge, that the counterclaim was brought within the two-year limitation period and was, therefore, not statute-barred. They assert that because the counterclaim was not statute-barred, the judge erred in finding that filing the counterclaim amounted to an abuse of process.

[40] The Developers intend to bring a separate application to adduce fresh evidence on appeal to substantiate the limitation issue.

Analysis

Security for Costs of the Appeal

Merits of the Appeal

[41] I will first address the merits of the appeal. I do not see much merit in the argument that the judge made the first alleged error, of interpreting the settlement agreement as releasing the Developers' claims. Rather, he found that the intention of the parties was to discontinue the existing claim. This was a finding of fact.

[42] As for the second alleged error, the Developers also submit that there was no abuse of process because they brought their counterclaim within the limitation period and so could have started an independent action. In other words, they say the judge was wrong in finding that it was common ground that the limitation period had expired when the counterclaim was filed, and therefore wrong in imputing an abuse of process motive to them.

[43] On the record before me, it is not possible to determine the strength of this argument, but it does appear challenging, as the Developers rely on new evidence in support and chose to put no evidence before the judge. Furthermore, the motive for filing the counterclaim was not the only reason for staying it, and it was not the only reason for the award of special costs.

[44] I cannot say that there is no merit to the appeal, but it will be challenging for the Developers.

Timeliness of the Application

[45] I accept Johnson Architect's submission that the application was timely.

The Developers' Financial Means and Recoverability of Costs

[46] The parties have submitted contrasting information about the Developers' financial position. From the limited evidence, it does appear that the Developers have some net equity in some properties they own.

[47] I am satisfied that an order for security for costs would not preclude them from advancing the appeal.

[48] Nevertheless, the Developers are in a notoriously risky business, and the evidence reveals that their real estate assets are frequently encumbered. The evidence suggests their real estate assets are used in their development operations, often as security, and are often subject to development-related mortgages, liens, and judgments. I consider the evidence sufficient to establish a real risk that efforts by Johnson Architect to recover costs could be hampered and difficult.

[49] There is a presumption in favour of granting security for costs if recovery may be difficult: *Edwards v. Moran*, 2003 BCCA 443 at para. 14 (Chambers).

[50] In my view, it is in the interests of justice for this Court to order security for the costs of the appeal. The Developers have not satisfied me that there is no risk that recovery of costs will be difficult. Furthermore, the Developers' position that they do have financial means shows they will not be deprived of the opportunity to appeal if required to post costs.

[51] As for the amount of security, I have taken into account the observations in *Pereira v. Klonarakis*, 2023 BCCA 454 (Chambers), that costs orders are typically in the range of \$9,000 to \$14,000. The draft bill of costs prepared by Johnson Architect is based on a half-day appeal and does not account for any fresh evidence application. It predicts costs in the range of approximately \$11,000.

[52] I therefore find the amount of \$10,000 to be a reasonable amount of security for costs, and I set that amount as the amount of security for costs that should be posted for the appeal.

Security for Costs of the Supreme Court Proceedings

[53] Security for trial costs before assessment is ordered only in “exceptional cases”: *Musselman v. Vanderstelt*, 2025 BCCA 289 at para. 30 (Chambers).

[54] Justice Hunter, in *Nourifard v. Emadzadeh*, 2024 BCCA 49 (Chambers), observed that this Court has been cautious in ordering security for trial costs before they have been assessed:

[31] While it is open to a chambers judge to order security for trial costs before they have been assessed, recent chambers judgments in this Court have stated a preference for adjourning such applications until the amount of the appellant’s obligation is known: see *Eisler Estate v. GWR Resources Inc.*, 2020 BCCA 111 (Chambers) at para. 44; *E.B. v. British Columbia (Child, Family and Community Services)*, 2020 BCCA 263 (Chambers) at paras. 27–28; *Gonzales Hill Preservation Society v. Victoria (City) Board of Variance*, 2022 BCCA 384 (Chambers) at paras. 44–45.

[55] Johnson Architect seeks security for costs in relation to the Supreme Court proceeding on the basis of non-recoverability because of their concerns about the Developers’ lack of exigible funds. The special circumstance they rely on is the judge’s finding that the Developers engaged in an abuse of process. They also say this is particularly relevant, here, because the merits of the appeal are weak.

[56] I agree that these are exceptional circumstances that justify an order for security of costs of the Supreme Court.

[57] On the other hand, the costs are not yet assessed. Because of this, in my view, a modest amount of security for costs is appropriate. Based on a sample bill of costs prepared by Johnson Architect based on the tariffs, including Scale B, I would order security for the trial costs to be posted in the amount of \$5,000.

Disposition

[58] I allow the applications and order that the Developers post \$10,000 for security for costs of the appeal and \$5,000 as security for the costs of the application in the trial court.

[59] I grant an order staying the appeal pending the posting of security for costs.

[60] I also grant an order permitting Johnson Architect to bring an application to dismiss the appeal as abandoned if the appellants fail to post security for costs in a certain time frame.

[Discussion re: time for posting security for costs]

[61] **GRIFFIN J.A.:** I will order that the security for costs be posted by January 26, 2026.

[62] The appeal is stayed pending the posting of security for costs. Should the Developers not post the security for costs by January 26, 2026, Johnson Architect may apply to dismiss the appeal as abandoned.

“The Honourable Justice Griffin”