IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smartt Inc. v. Siphon Enterprises Corp.,* 2026 BCSC 116

Date: 20260127
Docket: S234864
Registry: Vancouver

Between:

Smartt Inc.

Plaintiff

And

Siphon Enterprises Corp., Michael Romaniuk, Katherine Romaniuk and Solution Effect Inc.

Defendants

Before: The Honourable Justice Lachance

Reasons for Judgment

In Chambers

Counsel for Smartt Inc.:	D.L. Dalke S. Sandhu, Articled Student
Counsel for Siphon Enterprises Corp., Michael Romaniuk, Katherine Romaniuk, Solution Effect Inc.:	N. Lidder A. Meyer J. Tam
Place and Date of Hearing:	Vancouver, B.C. December 5, 2025
Place and Date of Judgment:	Vancouver, B.C. January 27, 2026

Table of Contents

Overview

[1] On October 30, 2023, the applicants – who are the defendants in the underlying proceedings – filed an application to try and compel the plaintiff to post $100,000 as security for costs in these proceedings. On November 14, 2023, Justice Milman granted an order requiring the plaintiff post $20,000 as security for costs (the "Original Security Order"), the reasons for which are indexed at *Smartt Inc. v. Siphon Enterprises Corp.*, 2023 BCSC 2591 (the "Original Reasons"). The defendants now apply to increase that amount to $60,000, as well as to obtain ancillary orders.

[2] The respondent (plaintiff in the underlying proceeding) opposes the application. Further, and in the alternative, it says that if there is to be any amendment, it should be to remove the requirement for security as its financial records reveal it is able to pay any costs that might be awarded against it.

[3] For the reasons that follow, I find that there have been material changes to the circumstances that justify increasing the amount of security the plaintiff must post, but only to a total of $30,000. The additional $10,000 required to ensure the total security for costs amount has been provided for must be paid in trust to the plaintiff's counsel within 30 days of this Order.

Background

[4] The plaintiff, Smartt Inc. ("Smartt"), is an extra-provincially registered company governed by the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and has a Vancouver address for service in this proceeding. When Smartt initially filed this action (the "Fiduciary Breach Action") on July 10, 2023, it was only against three of the current defendants: Michael Romaniuk and Katherine Romaniuk, who are former directors of Smartt, and Siphon Enterprises Corp. ("Siphon"). At all material times, Michael Romaniuk was a director of the third original defendant, Siphon, which is a company incorporated and registered to carry on business in the province of British Columbia.

[5] In the Fiduciary Breach Action, Smartt claims the defendants shared confidential information from, and directly or indirectly competed with, Smartt through another company, Solution Effect Inc. Smartt alleges this was in breach of a non-disclosure agreement and fiduciary duties those defendants owed to Smartt.

[6] From a temporal perspective, one trigger for the instant application appears to be an order issued in this proceeding by Justice Leblanc on September 25, 2025, in *Smartt Inc. v. Siphon Enterprises Corp.*, 2025 BCSC 1864 (the “Consolidation Decision”). To begin with, Leblanc J. agreed with Smartt that another action Smartt had brought directly against Solution Effect Inc. (the “Solution Action”) should be consolidated with this Fiduciary Breach Action. Arguably, Solution Effect Inc. could have been made a defendant from the start; as I will explain, I do not view this consolidation to be of any material consequence to the instant application.

[7] However, Leblanc J. also agreed with Smartt that two proceedings brought against it by the defendants and their related entities should be heard at the same time as the Fiduciary Breach Action. Siphon had filed a petition against Smartt, alleging, among other things, oppression by the majority and management against it as a minor shareholder. Justice Leblanc converted it to an action (*Siphon Enterprises Corp. v. Smartt Inc.*, Vancouver Action No. S-245095) (the "Oppression Action”). Michael Romaniuk had also personally filed an action against Smartt, alleging wrongful dismissal after the business relationship deteriorated (*Michael Romaniuk v. Smartt Inc.*, Vancouver Action No. S-238808, filed December 29, 2023) (the “Wrongful Dismissal Action”).

[8] Smartt’s application was opposed by the defendants, but Leblanc J. ultimately ordered that in addition to the consolidation of the Solution Action with the case at bar, the Oppression Action and the Wrongful Dismissal Action should also be tried at the same time as the Fiduciary Breach Action.

[9] While the proceedings have been working their way through the pre-trial process after Justice Milman’s order, the parties have exchanged correspondence altering earlier trial estimates and related costs, and additional financial information

has been exchanged that provides some additional information about their respective financial circumstances. The defendants assert that these events represent material changes to the circumstances Milman J. relied upon in making the Original Security Order, the combined effect of which is to justify increasing the amount of the security for costs that Smartt should be required to post, up from $20,000 to $60,000.

[10] There are two primary issues before me:

I. Have the defendants met the test necessary for variation of the Original Security Order?

II. If so, what, if any, amendments are warranted?

Issue I: Have the Defendants Met the Test for Variation?

The Legal Test for Amending the Original Security Order

[11] I have jurisdiction to amend Justice Milman's order if the respondents satisfy me that there have been one or more material changes in the circumstances Milman J. relied on in making his order, and that it would be unjust not to adjust the security considering those changes. This jurisdiction exists under common law and pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57, s. 236: see *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, 2013 BCSC 2578 at paras. 39–49; *Creative Salmon Company Ltd. v. Staniford*, 2008 BCCA 496.

[12] To apply that test, I must consider both the legal principles for ordering such security as well as the initial court decision that required them to be posted in this case. Regarding the former, the applicable legal principles were affirmed and summarized as follows by the Court of Appeal in *Ocean Pastures Corporation v. Old Masset Economic Development Corporation*, 2016 BCCA 12:

> [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:

> 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.
>
> [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.
>
> [Emphasis added.]

[13] Regarding the latter, while Milman J. based his judgment on the entirety of the circumstances, he specifically relied on various factors that I address below in context with my assessment of the material changes alleged.

Preliminary Question re: Scope of Assessment

[14] An additional legal question arises about whether, if I reach the first threshold and find there has been a material change in any one those factors, I am required to conduct the entire security for costs analysis anew, or if I am to simply assess whether the material changes alone justify changing the terms of the security order (and if so, to what extent).

[15] The first approach would mean that once the court hearing the variation application finds the first threshold has been passed, it would essentially conduct a

hearing *de novo* on the security for costs assessment. The second approach, on the other hand, would require the court to continue to defer to all the findings in the judgment that resulted in the original security for costs order that are not directly or indirectly impugned by the material changes found to exist.

[16] After considering all the circumstances, I find that I do not have to answer that question because the result in this case would be the same under either approach.

[17] Even if I find a material change to one of the relevant factors, Milman J.'s findings about the rest remain persuasive, and they may well be *res judicata* or subject to issue estoppel defences. Even if not *res judicata* or precluded by issue estoppel since I am undertaking the analysis anew, those findings remain compelling examples of reasonable analysis of the various factors, including with respect to what a reasonable security quantum could be based on the circumstances that were before him. At the very least, the Original Security Order and Milman J.'s findings upon which it rests provide support for some form of potential extrapolation for me when determining the appropriate quantum for any revised security for costs order.

[18] However, given the broad discretion and multiple factors that go into that part of the analysis, I find that simply because I might find there are material changes, I am not obligated to increase the Original Security Order. Rather, I am required to set the overall quantum of security based on the legal principles set out in *Ocean Pastures*, with significant deference to any of Milman J.'s findings that have not been altered by a proven material change.

[19] This offers a proportional approach to applications to vary security for costs orders that have already been subjected to a fully comprehensive assessment of the relevant issues in the legal test at large, but without fettering my discretion.

[20] As a result, while I have considered the circumstances as a whole, my reasons below focus on the specific material changes raised by the parties.

The Parties' Positions

[21] The defendants assert there have been three material changes, all related in one way or another to the substantive and procedural complexity of this case. They are, essentially:

(i) the commencement and consolidation of the Solution Action with the Fiduciary Breach Action;

(ii) an increase in the agreed-upon trial duration from three (3) days to fifteen (15) days; and

(iii) the plaintiff's expected reliance on expert evidence, which was not known when this matter was before Justice Milman.

[22] The plaintiff denies that the above-noted changes exist or are "material changes" warranting amendments to the Original Security Order. However, it adds in the alternative that if there are material changes, they justify finding that the applicants can no longer meet the threshold for obtaining a security for costs order at all; as such, the Original Security Order should be set aside.

[23] In support, the plaintiff led evidence and relies on a proposal some of the defendants filed in November 2024 under consumer protection legislation. The plaintiff asserts it contains admissions that the defence to the Fiduciary Breach Action is bound to fail, and/or that the defendants owe them at least $11,000. It also relies on the plaintiff's own financial records it asserts demonstrate why the court should find it can meet any costs award that might result if it loses that proceedings.

[24] While the plaintiff simply raised these matters in response to this motion, and not in its own application, I will address them on their merits first as they go to the threshold question of whether "any" security for costs should be awarded in the current circumstances that are before me.

Consumer Protection Proposal

[25] Consistent with the test set out by the Court of Appeal at para. 17 of the *Kropp* decision, in para. 4 of the legal basis in their notice of application, the

defendants acknowledge that in determining whether a security for costs should be ordered (or arguably maintained at all), the court must be satisfied that the defence has an arguable case. While the court should avoid going into detail on the merits unless success or failure appears obvious, proving that an admission of liability has been made would appear to meet the test for demonstrating that the defence has no arguable case. In oral argument, and to a more summary degree in paras. 62–67 of its response, the plaintiff argued that after the Original Security Order, the Romaniuk defendants have made such an admission and thus they have no arguable case.

[26] The plaintiff asserts – and the documents produced in evidence before me show – that in November 2024, the Romaniuk defendants filed a consumer proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Consumer Proposal"). Part of that proposal includes a document that identifies some form of actual or potential liability to Smartt, of at least $11,000. The plaintiff's counsel invited me to find that such a reference amounts to an admission of liability by those defendants to the plaintiff in this action, and in the amount of at least $11,000.

[27] The plaintiff also noted the defendants have repeatedly refused to disclose a specific report the defendants' counsel provided to the requisite trustee as part of their proposal, alleged to set out the nature of the liability and the method of calculation. The plaintiff argues any privilege over this report was lost when it was provided to the trustee, and as it is clearly relevant to the issues in the litigation – not to mention this application – the defendants have no justification in refusing to produce it.

[28] The plaintiff's final position – provided to the defendants only upon filing the response – was that due to the potential significance of that report, if I am not prepared to accept the existing consumer protection documentation before me as proof of the admissions of liability sought, I should adjourn the application altogether and order disclosure of the report. They argue the content should be brought before me for further consideration as part of this security for costs application.

[29] In response, the defendants argue that the Consumer Proposal contains no such admission, and no adjournment is warranted. Essentially, they argue the consumer protection documentation simply identifies potential liabilities – of which this action is clearly one – but is not an admission of liability in this action. They note the document and/or the reference at issue does not even refer to the action, and they argue it is simply a placeholder for an unspecified potential obligation (i.e. should they lose these proceedings). Finally, they note that the Consumer Proposal has since been withdrawn and that they have never entered into bankruptcy.

[30] The defendants oppose the adjournment request in part because of the late timing of the request (the plaintiff has known of their refusal to produce the document for months), but also because they maintain the report is privileged and because the plaintiff is merely speculating as to its content.

[31] I find that the circumstances do not warrant an adjournment or me issuing the production order. If the plaintiff views the counsel report referred to above as so relevant – which it clearly could be if it contains admissions against interest in the action, including but not limited to admissions of liability – it can file a written application for its production in the action. If the document contains such admissions, then I assume the plaintiff would have brought such an application before now. In any event, if it proves to contain such admissions, it would likely constitute a “material change” in the circumstances that I am relying on in making this Order, giving rise to the potential for amending it accordingly.

[32] On the evidence before me, I am not prepared to find that the consumer protection document before me is an admission of liability in regard to the instant proceedings as requested. While the notations on the document could well have that meaning, neither party directed me to any statutory or judicial authority explaining the implications of the particular document at issue. At most, I had bald – and completely contradictory – submissions from counsel about such matters. Without more, I simply do not have sufficient information to draw the significant adverse inference requested by the plaintiff.

[33] Similarly, the fact that there exists an undisclosed legal opinion on the nature of the $11,000 figure (as part of the consumer protection process) carries little weight at this point. It is very possible that such an opinion merely discusses "likelihood" of loss or risks, as opposed to containing actual admissions. I concede it could in theory include recitations or admissions of facts relevant to my determination, but such evidence is not before me at this time.

[34] At this time, I am not prepared to find that the Consumer Proposal document referred to me contains an admission of liability by the personal defendants to Smartt *in relation to the instant proceedings.* Accordingly, I find that their defence is not bound to fail.

[35] If the plaintiff obtains information that conclusively demonstrates the consumer protection documents or some yet undisclosed legal opinion amounts to or contains an admission of liability in this action or even acknowledges a debt to the plaintiff in general, that could be a material change. In such case, the plaintiff would be free to bring its own application to amend any order I might make herein, as my order is being made without consideration of such factors.

[36] This brings me to the issue of whether there has been a material change in the plaintiff's financial situation, and a related concern of general application that I have about the parties' approach to financial records in general.

The Plaintiff's Financial Records

[37] In this application, I was asked to consider many of the same financial records of the plaintiff that were before Justice Milman, which went to the issue of whether the plaintiff would be able to pay the costs of the action should it lose at trial. The plaintiff has provided me with updated versions, revealing similar information but for more recent years. It argues that these documents collectively demonstrate it is not impecunious at all and thus there is no need for – or jurisdiction to order – any security for costs to be posted.

[38] Rather, it suggests these records demonstrate it has consistently generated strong revenues over the past three years and that by December 31, 2025, it will be close to generating the same revenues achieved at the time of Milman J.'s order; all this despite having to spend significant revenues to fund this and related litigation against the defendants.

[39] However, the plaintiff's submissions about its financial situation fall into error to some degree by unreasonably expecting this Court to engage in an expert-level, in-depth analysis of the short and long-term implications of such documents based solely on counsel's argument about their proper interpretation.

[40] In paras. 16–23 and 33–41 of the notice of application, the defendants point to numerous alternative interpretations of the same materials, some of which suggest the plaintiff is even more impecunious than it was when before Milman J.

[41] To some extent, both counsel were essentially imploring me at times to assume the role of an expert regarding how to interpret patterns in or changes to the various records. Individual financial records are of course of assistance to the court's determination in these sorts of motions, as courts will often be able to conduct the required analysis of those reports without any expert evidence. However, that may not be the case where the parties are asking the court to draw too many financial inferences, or where they are complex and involve analysing specialized financial reporting records over a series of years.

[42] After consideration of the entirety of the financial record before me, I also find the materials before me continue to support the defendants' view of the plaintiff's ongoing financial struggles. In the result, I find – as did Milman J. – that the plaintiff is unlikely to have the ability to satisfy any costs award against it should it lose the action, so there is no material change in that regard.

[43] I note that these are determinations Milman J. already made against the plaintiff in his original decision. At paras. 3–7 of the Original Reasons, Milman J. summarizes some of these facts, and at paras. 12–14, he summarizes the parties'

respective submissions, which largely mirror those made before me. In the result, he confirms his preference for the defendants' position and concludes that the financial records demonstrate the plaintiff has the requisite impecuniosity to justify issuing an order for security costs against the plaintiff:

> [15] I agree with the defendants that the evidence establishes the requisite *prima facie* case that if the claim fails, the plaintiff may not be able to pay costs in light of its current financial circumstances. Moreover, I am also satisfied that the plaintiff may not have sufficient assets available to satisfy any such award in light of its sizeable liabilities.

[44] The plaintiff's response acknowledges this at multiple locations, including at para. 40, which states:

> At the time the Justice Milman Decision was made the Court expressly considered Smart's financial position, including its liabilities and shareholder deficit, and nonetheless determined that security of $20,000 was appropriate. The financial information now relied upon by the defendants reflects continuity of the same circumstances already canvassed in 2023, rather than any new developments that would justify revising the order.
>
> [Emphasis added.]

[45] While using the admission for a different purpose, at para. 47 of its response, the plaintiff doubles down on the position by effectively arguing there is no evidence of any material change in the plaintiff's financial position:

> The revenue and assets of Smart are not so materially different from the time the Justice Milman Order was granted to justify an increase in security for costs.

[46] The plaintiff cannot have it both ways: either its financial situation has materially changed or it has not.

[47] Whether I assess it anew or defer to Justice Milman's findings, I conclude that there has been no material change to the plaintiff's financial situation. The defendants previously demonstrated to Milman J. that the plaintiff's impecuniosity met the threshold necessary to justify an order for security for costs, and the plaintiff has not provided sufficient evidence for me to take a different view.

Alleged Material Changes

[48] The defendants assert there have been material changes due to the additional proceedings and the Consolidation Decision, an increase in trial duration from three (3) days to fifteen (15) days, and the greater likelihood that expert evidence will be required.

i. Additional Proceedings and the Consolidation Decision

[49] There are clearly more legal proceedings between the parties than there were when Justice Milman's order was issued. However, the issue before me is whether there is a material change in the circumstances *he relied on* in making the Original Security Order. While he cannot be faulted for not anticipating the subsequently filed proceedings, there is also nothing in the Original Reasons that suggests he relied on any assumption that there would be no additional litigation in that regard.

[50] Further, and in any event, while the Consolidation Decision clearly added a new legal entity (Solution Effect Inc.) as an additional defendant to the Fiduciary Breach Action, the decision did not add any material complexity to this action. This is largely because Solution Effect Inc. was already explicitly identified and implicated in the Fiduciary Breach Action as a key player in the wrongdoing alleged. It and its documents would likely have played an important role in the Fiduciary Breach Action even before being added as a party. Ironically, in opposing the consolidation, Solution Effect Inc. relied on the assertion that the notice of civil claim against it was substantially identical to the Fiduciary Breach Action (Consolidation Decision at para. 12).

[51] Justice LeBlanc's reasons for granting the Consolidation Decision provide further support for the conclusion that the Consolidation Decision is not making the Fiduciary Breach Action materially more complex, but rather is simply saving time as well as effort and cost by the parties and the judiciary, compared to having all the matters tried separately:

> [38] I am satisfied, given the interconnected nature of the Proceedings that having them heard together will streamline pre-trial proceedings and will

> reduce the number of days of trial. As the underlying factual matrix is similar throughout the Proceedings, there will be a savings in time in not having to repeat the facts through witness testimony in each of the individual Proceedings. The need to call and recall witnesses multiple times to speak to overlapping and related matters will be eliminated, or at the very least, reduced. I am also satisfied that having the matters heard together and having the Fiduciary Breach Action and Solution Effect Action consolidated will streamline pre-trial discovery procedures.
>
> [39] With respect to consolidating the Fiduciary Breach Action into the Solution Effect Action, the allegations of wrongdoing are the same and the factual matrix underpinning the claims is the same. Disposition of the Fiduciary Breach Claim will dispose of the issues in the other.

[52] The fact that the trial of this action will now be heard simultaneously with the Oppression and Wrongful Dismissal Actions also does not amount to a material change in "this" proceeding. More to the point, any costs implications for those proceedings cannot be laid at the feet of the plaintiff to justify additional security for costs in this action. If anything, the plaintiff has already saved the defendants legal costs by obtaining the Consolidation Order. Those proceedings were commenced by the defendants, and they cannot now use them as grounds to increase the security previously ordered against Smartt.

[53] The existence of the two actions some of the defendants have brought against Smartt will, however, become a consideration in my ultimate analysis of where the balance of fairness lies between the parties regarding setting the level of any security for costs. Such claims are not entirely dissimilar from counterclaims, which courts often consider as a relevant factor in this context, as I discuss later in these reasons.

[54] In summary, I find that while the overall proceedings between the parties are more complex now compared to when Justice Milman's order was made, the defendants have not established that the complexity of this action has materially changed. This is, however, of limited consequence as I find that the defendants have established there are two material changes in other respects.

ii. Increased Trial Duration

[55] Justice Milman's order was made approximately four months after the action had been filed. It is not surprising that he, and in fairness the parties too, had relatively little information to go on regarding the potential scope of the proceedings. Everyone is now in a better position to assess such matters, but there is still a significant likelihood that things will continue to change.

[56] The assessment of trial duration is always tricky, but one thing that has become clear is that the three-day estimate relied upon by Milman J. is no longer applicable to the entire trial the parties will be participating in when this action is determined. Figuring out what that full duration will be in this case – and then determining what amount of that time is attributable to the Fiduciary Breach Action – is additionally speculative, and there is competing evidence in that regard.

[57] I have already rejected the applicants' assertion that the consolidation has materially changed the complexity of the action; I similarly reject the assertion that it would materially increase the duration of its trial. The parties have exchanged correspondence suggesting competing views on trial length. In one letter, the plaintiff even appeared to suggest it would take 15 days to hear this action. However, it has resiled from that position and now suggests 10–15 days for the entire trial of all the actions will suffice. I agree that is the most realistic assessment.

[58] I also agree with the plaintiff that in the circumstances, it would be appropriate to equally apportion the length of time attributable to each of the three remaining actions (considering the consolidation of the plaintiff's actions). This suggests that, for the purpose of determining security for costs, it is reasonable to allocate 3.3–5 days of trial to this action, or an increase of .3 to 2 days over Milman J.'s estimate. While I would not consider .3 of a day as a "material increase", the potential for it to be an increase of 2 days over the three-day total relied on by Milman J. represents a material change in the circumstances that meets that threshold for giving rise to my jurisdiction to amend the Original Security Order.

iii. Requirement for Expert Evidence

[59] In rendering his initial judgment, Justice Milman relied on the assumption that no expert evidence would be required to determine the matters at issue in this action. I find that the circumstances have changed in that regard, and an expert is very likely to be required. The complexity and financial nature of the claims as well as the losses support that conclusion. I find further support for it in the plaintiff's own bill of costs, which includes a figure of $50,000 for experts. It is notable, however, that the defendants' draft bill of costs does not include any amount for experts, which could suggest they do not believe any are in fact required.

[60] Even if I accepted the $50,000 as an accurate estimate, that figure itself is likely to change and, as the plaintiff argues, the need for expert evidence at all could always dissipate before or even at trial. I also find that the requirement for such evidence is likely due in part to the existence of (or alternatively, could still be required to determine some of the issues in) the defendants' two actions.

[61] In all the circumstances, I find it appropriate to estimate that expert evidence will likely be required, and that a reasonable estimate for it is $30,000. I further find it appropriate to apportion that expense three ways. In the result, this reflects a $10,000 change in the estimated trial costs over and above what Milman J. had before him, which I consider a material change in the circumstances.

Issue 2: What Amendment, if Any, Is Appropriate?

[62] Having concluded there have been material changes, I must now assess whether there should be any change in the amount of security currently ordered. As Justice Milman notes at para. 11 of the Original Reasons, the authorities are clear that I have considerable discretion to set the quantum of the security at an amount the court considers appropriate.

[63] At para. 6 of their submissions, the applicants correctly note that at this stage of the analysis, while the factors change, I am to continue balancing the competing interests. That balancing again considers all the circumstances:

> The Court's discretion must be exercised in light of all relevant evidence and circumstances, balancing the risk of stifling a plaintiff's legitimate claim against the risk of unfair pressure on a defendant due to the plaintiff's impecuniosity. (*Kropp v Swaneset Bay Golf Course Ltd,* 29 B.C.L.R. (3d) 252, 1997 CanLII 4037.)

[64] A list of relevant considerations for determining appropriate amounts is found in this Court's decision in *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCSC 1900:

> [16] In a case such as the one at bar, where the issue is what amount of security should be ordered and what terms should apply to the payment of the security for costs, I accept that there are certain considerations relevant to the exercise of the court's discretion as to the terms to be applied:
>
> (a) "[T]he security should be such as the court thinks in all of the circumstances of the case is just". *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 1993 CanLII 1669 (BC CA), 76 B.C.L.R. (2d) 231 (C.A.) …
>
> (b) "The court can order any amount of security up to the full amount claimed, as long as it is more than nominal". *Kropp, supra,* p. 261; *Galaxy Sports Inc. v*. *Urnbro Holdings Ltd.,* 2004 BCCA 208, (2004), 29 B.C.L.R. (4th) 35 ("*Galaxy Sports*") at para. 17.
>
> (c) The approach to quantum should take into account that the security claimed is but an estimate, usually made at a very early stage of the proceeding. Historically, the courts of this Province recognized that "dollar for dollar" security was not contemplated and even applied a rule of thumb of a one-third discount as the "usual order". While this has since been rejected, the underlying concern about the uncertainty of future estimated costs remains. The "preferable" approach, says the Court of Appeal, avoids any formula but recognizes that:
>
> > one of the features of the future of the action which is relevant is the possibility ' that the action may be settled, perhaps quite soon. In such a situation it may well be sensible to make an arbitrary discount of costs estimated as the probable future costs, but whether one-third is likely in any given case to be a sensible discount, and whether any discount at all should be made, will depend on the view of the court on consideration of all the circumstances.
> >
> > *Fat Mel's, supra* at pp. 238-239.
>
> (d) The amount ordered should "sufficiently secure the defendants' position without unduly burdening the

> plaintiff". *Scopeset Technology Inc. v. Astaro Corporation*, 2004 BCSC 830 ("*Scopeset")* at para. 40;
>
> (e) "There is no dispute that an order for the posting of security for costs is usually limited to future costs". *Percy* v. *West Bay Boat Builders*, 1995 CanLII 2752 (B.C.S.C.) at para. 22;
>
> (f) "The lateness of the application for security is a factor which can properly be taken into account". Delay, however, is less of a concern where the applicant seeks security for future costs only. *Kropp, supra,* pp. 261, 263 ("where the defendants now seek security for future costs only, their delay is less significant"); and
>
> (g) It is within the court's discretion and indeed, relatively common, for security to be ordered to be posted in instalments. *Galaxy Sports, supra* at para. 19; *Natco International, Inc. v. Photo Violation Technologies Corp.,* 2008 BCSC 1527 at paras. 37-40; *GlobalCom Solutions Inc. v. Nothstein*, 2009 BCSC 276 at para. 35; *Gold River Chinook Project Society* v. *Bowater Pulp and Paper Canada Inc.,* 2002 BCSC 166 at para. 40; *Scopeset, supra,* para. 41.

[65] Additional principles were noted by Master Groves (as he then was) in *Scotford Electrical & Technical Services Ltd. v. Blue Mountain Log Sales Ltd*., 2005 BCSC 538 at para. 41:

1. There is no obligation to award the full amount of security requested;
2. The requirement that the security not be "nominal" does not refer to a fixed amount of money but rather must be determined in relation to the amount of security requested by the defendants;
3. Awards of only 15% to 25% of the amount requested by defendants are not necessarily nominal;
4. If a judge or associate judge considers that an award in the amount requested will halt litigation he or she may reduce the costs given;
5. The link between the cause of action and the impecuniosity, if not used to decline the award of security, may nevertheless be used to reduce the award given; and
6. The presence of a counterclaim can be considered in setting the quantum of security.

[66] At para. 21 of their notice of application, the applicants argue that the increased security they seek is “proportionate to the revised litigation scope”. However, that is not the test I am to apply.

[67] The analysis I must employ does not mandate, encourage, or even routinely involve a “one-for-one” analogy compared to what actual costs have changed, let alone to what might be recoverable as reflected in a bill of costs. I have no obligation to make any increase in the security on a dollar-by-dollar – nor a percentage – basis in comparison to any original bill or bills of costs that were relied upon or considered when Justice Milman made the Original Security Order, let alone in comparison to the amount now requested by the defendants. Draft bills of costs can be helpful in the analysis, but they are only one of many considerations.

[68] Unfortunately, the total value/cost estimate indicated on them can often be inflated through over-estimations of even a single item on such bills. When discussing the appropriate quantum of security in his Original Reasons, Milman J. noted the following that favoured limiting that amount:

> [16] However, I also agree with the plaintiff that there are other factors here weighing against granting the order sought, particularly, that such an order, if the security to be posted is excessive, may well stifle the claim. I also agree that the financial hardship that it is currently facing may well be attributable to the misconduct of the defendants that is the subject of this action. I hasten to add that none of this has been proven, given that we are at an early stage in this litigation. On balance, weighing all those considerations, I have concluded that it is appropriate to make an order that the plaintiff post security for costs.
>
> [17] Turning then to the issue of quantum, I agree with the plaintiff that the bill of costs submitted by the defendants is grossly exaggerated in many ways. Not only have the units been counted on the wrong scale, given the nature of the claim, but the defendants have chosen to tally the maximum number of units in most categories, and many of the line items are either duplicative, exaggerated, or not necessary at all. I agree with the plaintiff that this is not a case that appears to call for expert opinion evidence on either side. This is not a particularly complex case. I therefore prefer the plaintiff's estimate of three days for the anticipated trial, rather than the 10-day estimate proposed by the defendants.

[69] Like Justice Sigurdson's findings at para. 63 of *1043325 Ontario Ltd*., while I find the costs of trial of the Fiduciary Breach Action have materially increased, I also find they are likely to be less than the applicants assert in their new bill of costs.

[70] The applicants' draft bill of costs was reasonable in many respects, and in that regard, it avoids most of the criticism Milman J. noted when discounting it in his assessment. However, it includes an inappropriate assessment of costs for 15 days of trial, which in the result accounts for nearly two-thirds of the entire bill (225 out of the 343 total units, or approximately 65.6%). While the applicants' counsel pointed to other individual units in the bill that were conservative, they do not offset the inaccuracy from the length of trial units used. As noted above, I estimate somewhere between 3.3 to five days for trial is a better figure in that regard.

[71] An additional factor that I must consider is whether the existence of the defendants' claims against the plaintiff should have any impact on my assessment. As the defendants rightly acknowledge in their notice of application, the existence of counterclaims has been considered by courts when assessing the balance of fairness between the parties in *Chung v. Shin*, 2017 BCCA 355 at para. 35, and in *Wesbild Holdings Ltd. v. Opticana Eyewear Inc.,* 12 B.C.L.R. (3d) 187 at paras. 14–15, 1995 CanLII 1847 (S.C.). I find there is likely to be some substantive overlap in the proceedings, and findings a court makes in the Oppression and Wrongful Dismissal Actions may be determinative of live matters in this action – and the converse as well – that could justify reducing the level of security required in this action.

[72] Based on all the circumstances, I also find there is some link between the allegations in the notice of civil claim and Smartt's impecuniosity. While I am not satisfied that Smartt's ability to pursue its claim would be stifled by a modest increase in the security for costs, I find there is a real likelihood it would be stifled if the increase was significant.

[73] The record is clear that Smartt has already spent significant amounts on litigation and, as the applicants repeatedly stated, has repeatedly had to rely on

infusion of funds to keep operating. Conversely, the financial burden on the plaintiff has already been increased by the Oppression and Wrongful Dismissal Actions the defendants have brought against the plaintiff. While it is the defendants' right to bring such actions, the financial implications they are having – or could have – on the plaintiff is a relevant consideration.

[74] As but one example, I note the defendants vigorously opposed the plaintiff's application to consolidate his two actions and to have the defendants' proceedings heard together with his, and to hear all the proceedings together in one trial. They did so despite the obvious litigation cost savings that could be achieved from doing so that were evident in the circumstances and confirmed by Leblanc J. in granting that order. In opposing the application, the defendants thereby caused the plaintiff to expend more funds for that motion than was otherwise necessary. The defendants' future applications and conduct in their two actions could foreseeably result in significant additional litigation costs to the plaintiff. Ironically, the defendants now rely on the impact of Leblanc J.'s Order – which was clearly to their financial benefit in regard to saving them costs in the Oppression and Wrongful Dismissal Actions – as one of the grounds for the increased security in this action, namely, by alleging it is increasing the complexity in this proceeding. While I reject that argument, the fact that it is being made demonstrates the potential cost implications that could be influenced by the existence of the defendants' actions, which is relevant to my determination of what amount of security the plaintiff should be required to post in this case.

[75] In summary, I find that there have been material changes to the factors Justice Milman relied on in making his order. In consideration of the overall circumstances, however, I find the plaintiff should be required to post only an additional $10,000 as security for costs, resulting in a total of $30,000 as security for costs being held in regard to this action. This new total amount addresses the increase in the estimated trial time and the potential use of an expert to determine the issues in the Fiduciary Breach Action, while balancing all relevant factors and considerations.

[76] The defendants also seek ancillary orders with respect to the timing of payments as well as a stay of the proceedings pending payment, and an order that the action be dismissed as abandoned should the plaintiff fail to provide that security in the time allowed. However, I prefer Millman J.'s approach, which requires the plaintiff to pay those funds to its counsel, who is to hold it in trust as such security.

[77] The plaintiff shall have 30 days to make that payment. The implications of any breach of this requirement would be addressed in future applications, if necessary.

Costs

[78] While at the discretion of the court, costs are normally awarded to the successful party. The defendants have succeeded in their application, but it is only in part as the increase in security they obtained is considerably less than what they sought. I have not heard the parties on their respective views on the matter, including whether any offers were exchanged or other circumstances exist that might be relevant to my determination of costs.

[79] Accordingly, any of the parties may request – by letter to the court registry no later than 30 days from the date of this judgment – to appear before me for an additional 30 minutes (in total, for both parties) to make submissions on the issue.

[80] If no such request is made prior to that deadline, the parties shall bear their own costs of this application.

Conclusion

[81] I order that:

a) The plaintiff is required to post an additional $10,000 as security for costs in this action.

b) The plaintiff is to pay these funds within 30 days of the date of this Order to plaintiff's counsel, who will hold them in trust pending further order or agreement of the parties.

c) Subject to one of the parties making a request to the court registry within 30 days of this Order to appear before me to make submissions on the issue of costs, the parties shall bear their own costs of this application.

"Lachance J."