

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1600 Davie Limited Partnership v. Metal Yapi Holding A.S.*,
2025 BCSC 979

Date: 20250307
Docket: S213857
Registry: Vancouver

Between:

**1600 Davie Limited Partnership and
1600 Davie Commercial Holdings Ltd.**

Plaintiffs

And:

Metal Yapi Holding A.S.

Defendant

And:

**ITC Construction Management BC Inc., 1600 Davie Limited Partnership
and 1600 Davie Commercial Holdings Ltd.**

Defendants by way of Counterclaim

And:

**Westbank Projects Corp., Siber Façade Installations Ltd.,
and ITC Construction Management BC Inc.**

Third Parties

Before: The Honourable Madam Justice Francis

Oral Reasons for Judgment

In Chambers

Counsel for the Defendant Metal Yapi
Holding A.S.:

D. Lehrer

Counsel for the Defendant by way of
Counterclaim and Third Party ITC
Construction Management BC Inc:

M. Sveinson

Counsel for the Third Party Siber Façade
Installations Ltd.:

D. Milojkovic

No other appearances

Place and Date of Hearing:

Vancouver, B.C.
March 7, 2025

Place and Date of Judgment:

Vancouver, B.C.
March 7, 2025

Introduction

[1] **THE COURT:** Before me are two parallel applications for further security for costs. One is brought by the third party and defendant by way of counterclaim ITC Construction Management BC Inc. (“ITC Construction”) and one is brought by the third party Siber Façade Installations Ltd (“Siber Façade”).

[2] In order to understand these applications, some procedural context is necessary.

[3] This is a large construction case relating to a multi-tower construction project called Davie Safeway. The plaintiff is the owner/developer. Metal Yapi Holding A.S. (“Metal Yapi”) is a subcontractor who contracted with the contractor ITC Construction to supply windows for the project. The factual background for the dispute is set out in the decision of Justice McIntosh cited at 2023 BCSC 889, and I will not repeat it all here.

[4] By way of general overview however, I note that the action was started in April 2021. On July 14, 2021, a response to civil claim, a counterclaim against the plaintiff and ITC Construction, and a third-party notice against Siber Façade and Westbank Projects Corporation was filed. On April 17, 2023, the parties proceeded before McIntosh J. on a security for costs application and he rendered his decision on May 26, 2023.

[5] Before Macintosh J., ITC Construction sought security for costs against Metal Yapi in the amount of \$475,000 and Siber Façade sought \$247,000 in security for costs against Metal Yapi. Justice McIntosh reviewed the authorities. The most well known case on security for costs is *Kropp v. Swanese Bay Golf Course Ltd.*, [1997] 4 W.W.R. 306 (B.C.C.A.), that was then distilled by Justice Romilly in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 91 A.C.W.S. (3d) 362 (B.C.S.C.).

[6] Justice McIntosh noted at para. 11 that Romilly J. set out four considerations on an application for security for costs:

1. Does it appear that the plaintiff company will be unable to pay the defendants' costs if the action fails?
2. If so, has the plaintiff shown that it has exigible assets of sufficient value to satisfy an award of costs?
3. Is the court satisfied that the defendants have an arguable defence to present?
4. Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff's case from being heard?

[7] Justice McIntosh noted that Metal Yapi conceded points three and four. The decision turned on two points:

- a) whether Metal Yapi would be able to pay the applicants' costs; and
- b) if not, had Metal Yapi shown that it has exigible assets to satisfy a costs award.

[8] Justice McIntosh noted that Metal Yapi is a large company based in Turkey participating in construction projects elsewhere, including the United Kingdom. It was common ground that the order for security for costs would not visit undue hardship on Metal Yapi such that it would prevent its counterclaim and third party claims from being heard. Nevertheless, from a practical viewpoint, it would be all but impossible for the applicants to enforce in Turkey a costs award to which they would be entitled from successfully defending against Metal Yapi in this jurisdiction.

[9] In light of those factors, McIntosh J. exercised his discretion to order security for costs ("McIntosh Order"). He held that before Metal Yapi could take any further steps in the litigation against ITC Construction, it must post security for ITC Construction's costs in the amount of \$50,000. He made the same order in the same amount as between Metal Yapi and Siber Façade.

[10] He also, significantly, made an order that the applicants each had liberty to apply for further security for costs after a trial date had been set, between 60 and 90 days prior to that trial date.

[11] After this decision was rendered, Metal Yapi did not make the security for costs payments and no steps were taken in the counterclaim or the third party claim. The plaintiffs' claim against Metal Yapi continued to be pursued and a 60-day trial was set to begin on April 7, 2025.

[12] On December 20, 2024, the applicants sought and obtained an order (the "Guillotine Order") from Justice Whately, which required Metal Yapi to post the security into court by December 27, and ordered that Metal Yapi's claims would be struck if it failed to post security by that deadline.

[13] On December 30, 2024, after the expiry of the Guillotine Order deadline, Metal Yapi posted the security in full. Counsel for Metal Yapi explained to me why they were unable to meet the December 27, 2024 deadline. It appears to have been a series of unfortunate errors that were not the fault of the client.

[14] On January 23, 2025, Metal Yapi filed an application to extend the Guillotine Order deadline to December 30, such that their claims would not be struck. That extension was granted by Justice G.C. Weatherill on February 7, 2025.

[15] That leads us to where we are today. In the applications before me, ITC Construction and Siber Façade seek additional security for costs from Metal Yapi, as the pending trial is about a month away. Both parties appear to agree that the McIntosh Order contemplated the parties coming back to court to determine the quantum of additional security just before trial and, as such, there was little argument about the entitlement of the applicants to have security for costs. If necessary, I would rely on the reasoning of McIntosh J. in that regard.

[16] The issue before me is really whether the applicants should have additional security for costs now, and if so, how much security they require. Metal Yapi makes three arguments:

1. Metal Yapi anticipates that the trial will likely be adjourned, in which case pre-trial and trial legal fees are not imminently payable.

2. Metal Yapi submits that there is overlap between the legal work done for ITC Construction and legal work done for the plaintiff and that this should result in a reduction in any security for costs advanced.
3. Metal Yapi generally says that the amounts sought by both applicants is inflated.

Proximity of Trial Issue

[17] Metal Yapi submits that the case is not ready for trial and will inevitably need to be adjourned. I understand that Metal Yapi has drafted but not yet filed an application to adjourn the trial.

[18] I do not wish to say anything that would tie the hands of the presider who hears the adjournment application about whether or not this case ought to proceed to trial on April 7, 2025. However, I must consider Metal Yapi's argument that this application is not timely because it contemplates imminent trial expenses that may not be incurred.

[19] In my view, I have to look at where things stand as they are today, not where they might stand after a successful adjournment application. There is a trial set to commence for 60 days on April 7, 2025. If the defendant is not successful in obtaining an adjournment, an enormous investment of legal fees will need to be expended by the applicants in very short order.

[20] It is clear to me that the McIntosh Order contemplated a subsequent application for security for trial costs happening in very close proximity to the commencement of trial because he gave a 30 to 60-day window for that to happen.

[21] Additionally, I have been advised by counsel that if Metal Yapi is successful in adjourning the trial, they anticipate tendering expert evidence to which the applicants will need to reply. Therefore, even if there is a lengthy adjournment of the trial, there are imminent, very significant, legal fees that the applicants are on the cusp of incurring.

Overlap Issue

[22] I accept Metal Yapi's submission that some of the items in ITC Construction's bill of costs appear to be costs that would overlap with costs incurred by the plaintiffs, who are represented by the same counsel as ITC Construction. In my view, this does not mean that ITC Construction is not entitled to security for costs, but it does suggest that the quantum should be more modest and more in line with the security that is ordered for the other applicant, Siber Façade.

Inflated Amount

[23] I have reviewed the draft bills of costs of the applicants. Siber Façade allocates \$75,000 for expert reports and ITC Construction allocates \$300,000 for experts. If the matter proceeds to trial in April, it seems unlikely that there are going to be any expert reports tendered by either applicant, given the lack of time to prepare such reports before April.

[24] I do note that if the defendant successfully adjourns the trial, expert reports appear likely to be a cost that is going to be incurred by the parties. Nevertheless, regardless of the outcome of the adjournment application, the expert costs are unlikely to be incurred any time soon.

[25] It seems to me that fairness and security are best achieved if each applicant receives additional security for costs, but in amounts that are somewhat more modest than what is claimed in the bills of costs.

[26] As a result, I will exercise my discretion to order that Metal Yapi must provide security for costs to each applicant in the amount of \$150,000 each, for a total of \$300,000.

[27] If the trial is adjourned and a new trial date is set, Siber Façade and ITC Construction are at liberty to apply for further security for costs between 60 and 90 days prior to the trial.

[28] Subject to any submissions on costs, I order that costs be in the cause.

“Francis J.”