

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1600 Davie Limited Partnership v. ITC
Constructions Management BC Inc.,
2023 BCSC 889*

Date: 20230526
Docket: S213857
Registry: Vancouver

Between:

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

Plaintiffs

And

Metal Yapi Holdings A.S.

Defendant

And

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

Defendants by Counterclaim

And

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

Third Parties

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

Counsel for the Plaintiffs and the
Defendants by Counterclaim

M. Sveinson

Counsel for the Defendant, Metal Yapi
Holdings A.S.:

D. Claassen

Counsel for the Third Party, Siber Façade
Installations Ltd.:

D. Olatunbosun

Place and Date of Hearing:

Vancouver, B.C.
April 17, 2023

Place and Date of Judgment:

Vancouver, B.C.
May 26, 2023

[1] ITC Construction Management BC Inc. ("ITC"), a Defendant by Counterclaim and a Third Party, and Siber Façade Installations Ltd. ("Siber Façade"), whose correct name is Siber Façade Group Inc., a Third Party, each apply against the Defendant, Metal Yapi Holdings A.S. ("Metal Yapi"), for security for costs.

[2] Metal Yapi is a large company in the construction industry, based in Turkey. ITC is a construction management company managing construction projects in this province. Siber Façade, a BC company, works as a sub-trade in construction projects.

[3] The Plaintiffs own and are developing land on Davie Street in Vancouver in a project called "Davie Safeway", a multi-tower residential construction project with a Safeway store as a tenant in part of the commercial space.

[4] By a contract with ITC, dated May 8, 2018, Metal Yapi was to supply windows and other components to be used in the project. Siber Façade has a contract with ITC to install the windows and other components supplied by Metal Yapi.

[5] The Plaintiffs allege that Metal Yapi has been negligent, and caused delays in the supply of the components it was to provide for the project. Its efforts, in the words of counsel for Siber Façade, have been disorganized, incomplete and delayed. (ITC has assigned its claim against Metal Yapi to the Plaintiffs.)

[6] The notice of civil claim was filed April 16, 2021. Metal Yapi filed a response to civil claim on July 14, 2021. On the same day, it filed its counterclaim and its third-party notice. Siber Façade filed its response to third-party notice on September 28, 2021. By agreement, ITC has not yet filed its pleadings in response to the counterclaim or the third-party claim. There have been no discoveries and there is no trial date set.

[7] From the evidence before me, Metal Yapi has nothing in British Columbia except this litigation. It is a Turkish corporation, incorporated under the laws of that country. It has no assets in British Columbia. It is not registered in British Columbia to carry on business.

[8] Security for costs are permitted to ensure that a defendant, or in this case, a defendant by counterclaim and third parties, will be able to recover their costs if they are ultimately successful in the litigation. See, *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 76 B.C.L.R. (2d) 231, 1993 CanLII 1669 (C.A.) at para. 15.

[9] The applications before me are brought under s. 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57:

Court may order security for costs

236 If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

[10] The Court has broad discretion in deciding whether to order security. That point, and other applicable legal criteria, were set out by our Court of Appeal in *Kropp (c.o.b. Canadian Resort Development Corp.) v. Swanese Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252, at para. 17, as follows:

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.

[11] Justice Romilly distilled the factors, from *Kropp* and other cases, at para. 14 in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (B.C.S.C.):

14 Based then, on the decision in *Kropp, supra* as well as the decision of Spencer J. in *Ruko*, [(1991), 49 C.P.C. (2d) 105 (B.C.S.C.)], the test to be applied on an application for security for costs is as follows:

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?

[12] Counsel for Metal Yapi before me conceded that points three and four above are not in issue. The decision today turns instead on only the first two points; whether Metal Yapi would be able to pay the Applicants' costs and, if not, has Metal Yapi shown that it has exigible assets to satisfy the costs awards. Those tests can be examined in light of the seven criteria summarized in *Kropp*, quoted earlier in these reasons.

[13] In *Kraft v. B.C.B.C.*, 2000 BCSC 1493, this Court found as follows, at para. 14:

[14] In a number of cases it has been held that the mere fact that the plaintiff is an extra-provincial company, unregistered in British Columbia, or even that it has no assets within the province, is not sufficient to justify an order for the posting of security: see *Bridgedale A.G. v. Metro Weldtech Inc.* (1984), B.C.Corps. L.G. 78, 270 (Co.Ct.) and *Alpina Equipamentos Industriais Ltda. v. Bennett Environmental Consultants Ltd.* (1990), 45 C.B.C. (2d) 15 (B.C.S.C.). However, in *First Hemisphere Corp. v. Canaccord Capital Corp.*, [1995] B.C.W.L.D. 1937 (S.C.) the court held that the proposition that an order for security for costs is not justified by the sole fact that a plaintiff is a non-resident corporation with no assets in the jurisdiction does not apply where the plaintiff resides in a jurisdiction which has no reciprocal relationship with British Columbia. That would also appear to be applicable to a jurisdiction which has no provision for reciprocal enforcement of an order for costs.

[Emphasis added.]

[14] Metal Yapi resides in a jurisdiction, Turkey, which has no reciprocal relationship with British Columbia.

[15] The next decision having application for the present analysis is *Culp Investments LLC v. KPMG Inc.*, 2007 BCSC 451, where the Court said this at paras. 8-10:

[8] The courts have observed on a number of occasions that a defendant should not have to go to a foreign jurisdiction to enforce an order for costs: *Alpina Equipamentos Industriais Ltda v. Bennett Environmental Consultants Ltd.* (1990), 45 C.P.C. (2d) 15 (B.C.S.C.); *C.W. Holdings Ltd. v. Montreal Trust Co.*, [1997] B.C.J. No. 398 at ¶ 19 (S.C.); *Bank of Credit and Commerce International (Overseas) Ltd. (Liquidator of) v. Akbar*, [1998] B.C.J. No. 2320 at ¶ 19 (S.C.).

[9] The fact that the corporation is in a non-reciprocating state is a factor in favour of granting an order for security for costs: *Kraft v. B.C.B.C.*, 2000 BCSC 1493 at ¶ 14; *First Hemisphere Corp. v. Canaccord Capital Corp.*, [1995] B.C.J. No. 1457 (S.C.) at ¶ 5.

[10] The defendant's burden is limited to making out a *prima facie* case that the corporate plaintiff has insufficient assets in the jurisdiction to pay costs if unsuccessful at trial, unless there is no arguable defence: *Kropp, supra*, at ¶ 11 and 12; *Fat Mel's, supra*, 16.

[Emphasis added.]

[16] The reasoning from the decisions referred to above was adopted in *Michael Wilson & Partners, Ltd. v. Desirée Resources Inc.*, 2014 BCSC 2055, at para. 57, which concluded with the finding: “[t]he courts have held a defendant should not have to go to a foreign jurisdiction to enforce an order for costs”. I adopt as well a portion of para. 58 from *Michael Wilson & Partners*:

[58] Here the plaintiff argues the defendants have simply made a bald assertion that it has no assets in this jurisdiction. I do not agree. The evidence of the defendants is that no results were obtained when searches were made for records maintained by the Land Title Office and the personal property registry. In my view there is little more the defendants can do in these circumstances to prove a *prima facie* case that the plaintiff has insufficient or no assets in this jurisdiction. ...

[17] Metal Yapi, from the evidence it filed, is a large company, based in Turkey, participating, sometimes through subsidiaries, in construction projects elsewhere, including the United Kingdom as one example. As I noted earlier, it is common

ground that an 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. At the same time, from a practical viewpoint, it would be all but impossible for the Applicants to enforce in Turkey the costs claims to which they would be entitled from successfully defending against Metal Yapi in this jurisdiction. The costs in time and money from pursuing such claims in Turkey, resisted by Metal Yapi, would render the efforts wasteful.

[18] I exercise the discretion given to me, in accordance with the reasoning in *Kropp*, as quoted above, to order security for costs to both Applicants. Having regard in particular to the last of the criteria from *Kropp*, the timing of the applications before me is not a factor against ordering security, given how slowly the litigation has proceeded to this point.

[19] Turning to the amount of security, ITC seeks \$475,000. Siber Façade seeks \$247,000. Alternatively, Siber Façade, and I believe ITC as well, seek smaller amounts as security, and offer the approach that security be paid incrementally, at appropriate stages in the litigation.

[20] In addressing quantum for security, the Court's task involves more than accepting the bills of cost tendered by the Applicants, which are calculated on the assumption that a full trial proceeded to its conclusion with the times as estimated by the Applicants for various steps in the case, including of course the trial itself. Instead, the Court has to exercise its judgment in determining amounts for security that afford reasonable protection for the Applicants, without imposing undue hardship before trial on those who are responding to the application, in this case Metal Yapi.

[21] On August 5, 2020, Metal Yapi filed a claim of lien against title to the land where the project is being built, alleging that \$2,673,592 was due and owing. The Plaintiffs and Metal Yapi subsequently consented to the discharge of the claim of lien upon the Plaintiffs depositing with the Court a lien bond in the full amount of the claim. On December 23, 2020, the Plaintiffs served Metal Yapi with a notice to

commence an action within 21 days, to enforce its claim of lien. Metal Yapi did not do so. On January 21, 2021, this Court ordered the release of the lien bond.

[22] My order is that before Metal Yapi can take any further step in the litigation against ITC, it must post security for ITC's costs in the amount of \$50,000. I make the same order, in the same amount, as between Metal Yapi and Siber Façade.

[23] The Applicants each have liberty to apply for further security for costs, after a trial date has been set, between 60 and 90 days prior to that trial date.

[24] The costs of the applications before me are costs in the cause.

“Macintosh J.”