

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hyper Hippo Entertainment Ltd. v. Redcell Games General Partnership*,
2023 BCSC 1064

Date: 20230620
Docket: S217364
Registry: Vancouver

Between:

Hyper Hippo Entertainment Ltd.

Plaintiff

And

Redcell Games General Partnership, Redcell Games Inc., AppQuantum Publishing Ltd., Andrew Doll, Navjote Sandhu, Mikael Pomerleau, and Stephen Williams

Defendants

And

Hyper Hippo Entertainment Ltd.

Defendants by way of Counterclaim

Before: The Honourable Justice Shergill

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.
January 25 and May 18, 2023

Place and Date of Judgment:

Vancouver, B.C.
June 20, 2023

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I. OVERVIEW

[1] The plaintiff, Hyper Hippo Entertainment Ltd. (“Hyper Hippo”), is an online video game and software development company. The defendants, Andrew Doll, Navjote Sandhu, Mikael Pomerleau, and Stephen Williams (collectively the “personal defendants”), are former employees of the plaintiff. Through the corporate defendants Redcell Games General Partnership and Redcell Games Inc. (collectively “Redcell”), the personal defendants create and develop games for mobile platforms.¹

[2] In 2021, Redcell hired the defendant AppQuantum Publishing Ltd. (“AppQuantum”). AppQuantum is a game development and publishing company, and was hired to publish and promote Redcell’s mobile videogame called *Gold and Goblins*. *Gold and Goblins* was launched in early 2021, with substantial financial success.

[3] In August 2021, the plaintiff filed a Notice of Civil Claim alleging that Redcell copied source code, and used other confidential and proprietary information belonging to Hyper Hippo, to develop *Gold and Goblins*. The plaintiff also alleged that AppQuantum knew or ought to have known that Redcell was misusing Hyper Hippo’s proprietary information to develop, test, publish, and sell *Gold and Goblins*.

[4] The defendants deny these allegations. In their Counterclaims filed on November 2, 2021, the Redcell defendants and AppQuantum (collectively, the “defendants”) claim damages for, amongst other things: unlawful interference with economic relations, injurious falsehood, loss of profits, and alleged violations of s. 52 of the *Competition Act*, R.S.C., 1985, c. C-34. All of the allegations in the Counterclaims are denied by the plaintiff.

[5] In separate applications filed in January 2023, the Redcell defendants and AppQuantum seek various orders, including a requirement that the plaintiff to post security for costs, a stay of the action pending the posting of the security, and leave

¹ The personal defendants and Redcell are collectively referred to as the “Redcell defendants”.

to apply for a dismissal of the action if the plaintiff fails to post security within the requisite time. The total amount of security collectively sought by the defendants is approximately \$760,000 (\$446,505.95 sought by the Redcell defendants; and \$316,329.86 sought by AppQuantum).

II. LEGAL FRAMEWORK

[6] The court has power to order security for costs through the common law as well as through statute.

[7] The statutory power is set out in the *Business Corporations Act*, S.B.C. 2002, c. 57, [BCA]. Section 236 of the *BCA* stipulates that the court may order security for costs against a corporation under the following circumstance:

236 If a corporation is the plaintiff in a legal proceeding brought before the court, and 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.

[8] An order for security for costs under s. 236 of the *BCA* is discretionary.

[9] Security for costs is awarded “more readily” against corporations, because they face a decreased risk in pursuing litigation due to the “corporate veil”: *Ocean Pastures Corporation v. Old Masset Economic Development Corporation*, 2016 BCCA 12 at para. 21, citing *Bronson v. Hewitt*, 2007 BCSC 1751 at paras. 41–42.

[10] The Court in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] BCJ No 2160 (QL), at para. 14, 1999 CanLII 5860 (B.C.S.C.) [*Citizens*] outlined the following test for determining whether security for costs is warranted:

1. Does it appear that the company will be unable to pay the defendant’s costs if the action fails?
2. If so, has the company shown it has exigible assets of sufficient value to satisfy an award for costs?
3. Is the court satisfied that the defendant has an arguable defence to present?

4. Would an order for costs visit undue hardship on the company such that it would prevent the company's case from being heard?

[11] Only the first and second elements of the *Citizens* test are raised in this case.

[12] The burden is on the applicant to establish a *prima facie* case that the plaintiff may be unable to pay the defendant's costs if the action fails. If the applicant meets its burden, the onus shifts to the plaintiff to show either that it has exigible assets to satisfy any award of costs, or that there is no arguable defence to the claim: *Troico Home Solutions and Manufacturing Inc. v. Arondus*, 2020 BCSC 1623, at para.10 [Troico], citing *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 1585 at para. 19, and *Citizens* at para. 18.

[13] When considering whether the applicant has established a *prima facie* case that the plaintiff will be unable to pay the applicant's costs, the court must take into account all of the evidence presented – not simply rely on the Land Title and Personal Property Registration searches put forward by the applicant: *Moneywise Financial Inc., v. Key Life WCF Financial Inc.*, 2018 BCSC 1789 at paras. 39, 46, 51 [Moneywise]. Thus, financial evidence presented by the plaintiff may overcome the applicant's evidence in support of a *prima facie* case: *Troico* at paras. 25–27; *Moneywise* at paras. 39, 40, 46, 51.

[14] The court also has the power, through its inherent jurisdiction, to order security for costs: *Integrated Contractors Ltd. v. Leduc Developments Ltd.*, 2009 BCSC 965 at para. 10.

[15] The guiding principles that apply to the exercise of the court's discretion based on its inherent jurisdiction, were articulated in *Kropp v. Swanese Bay Golf Course Ltd.*, [1997] BCJ No 593 (QL) at para. 17, 1997 CanLII 4037 (B.C.C.A.). They are summarized 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.

[16] However, *Kropp* has limited application in this case, as the parties grounded their arguments primarily in the statutory provisions. The only *Kropp* factors raised by the parties are numbers 1, and 5. Specifically, no concerns are raised in relation to factors 2, 3, 4, 6 and 7.

[17] I turn now to addressing the issues, beginning first with Hyper Hippo's financial circumstances.

III. FINANCIAL CIRCUMSTANCES OF HYPER HIPPO

[18] Hyper Hippo was founded in 2012 and was originally based in Kelowna, B.C. It is now a "remote-first" company, meaning that most of its employees work from remote locations. It currently employs 122 people across Canada and the United States, a majority of whom reside in B.C. Hyper Hippo operates on a fiscal year starting on August 1 and ending on July 31.

[19] Over the past two years, Hyper Hippo has gone through a period of significant growth. By the end of 2022, it had nearly doubled its work force. New additions included highly-experienced professionals in leadership positions.

[20] The plaintiff has three notable video games which provide most of its revenue. These are *AdVenture Capitalist*, *AdVenture Communist*, and *AdVenture Ages* (collectively the “*AdVenture Series*”). In 2022, the plaintiff launched two additional games: *Dungeon Dwarves* and *Vacation Tycoon*.

[21] The *AdVenture Series* generate significant revenue for the plaintiff, though admittedly the revenue and uptake from new users has been declining in recent years. This declining revenue and growth grounds the applications for security for costs.

[22] *Dungeon Dwarves* was launched in early February 2022, and is the product of a licensing agreement between Hyper Hippo and Netflix. *Vacation Tycoon* was launched in August 2022. Hyper Hippo is currently in discussion with a third party about an opportunity for *Vacation Tycoon*, which it says could yield significant profits.

[23] The plaintiff has the following four wholly owned subsidiaries:²

- a) Hyper Hippo Publishing Ltd., which is a B.C. Company that provides publishing and related services exclusively for Hyper Hippo.
- b) Hyper Hippo Ventures GP Ltd. and Hyper Hippo Ventures LP, which hold investments in third-party early-stage ventures in the gaming and technology industry. These entities have a low level of activity and are not tied to Hyper Hippo's day-to-day business activities.
- c) Hyper Hippo USA Inc., which is a legal entity used to employ US employees, operating through an intercompany management services agreement.

² Allison Francis Affidavit (“Francis Affidavit”) No. 3 at para. 6.

[24] The plaintiff also owns a 60% interest in Mech Mice Entertainment Ltd., which is an inactive company that holds the intellectual property rights for the title “Mech Mice”, a strategy role playing game.

[25] Allison Francis, the Senior Vice President of Finance and Business Operations at Hyper Hippo, avers that “the vast majority (over 90%) of the assets shown in Hyper Hippo’s consolidated financial statements are held by Hyper Hippo and its 100% owned subsidiary Hyper Hippo Publishing Ltd.”³

[26] The consolidated financial statements⁴ for Hyper Hippo for the 2020 to 2022 fiscal years, indicate the following:

	2020	2021	2022
Revenue	\$30.9m ⁵	\$35.8m	\$31.7m
Gross Profit	\$16.0m	\$13.9m	\$14.9m
Assets (Total)	\$13.6m	\$15.5m	\$15.0m
Assets (Cash & Equivalents)	\$9.1m	\$8.1m	\$8.5m
Retained Earnings	\$ 6.5m	\$7.8m	\$7.7m
Liabilities	\$4.3m	\$7.7m	\$6.2m

[27] In addition to the cash in its bank accounts of approximately \$8.5 million (as at the year end of 2022), the plaintiff has a credit facility with the Royal Bank of Canada worth about \$3 million that has not been drawn on to date.⁶

³ Francis Affidavit No. 2 at para. 7.

⁴ All figures having a value of over \$1 million, are rounded off to the nearest one hundred thousand.

⁵ “m” denotes “million”.

⁶ Francis Affidavit No. 1, Exhibit F; Francis Affidavit No. 2 at paras. 10–11; Francis Affidavit No. 3 at para. 11.

[28] The loans outstanding to related parties are not expected to be repaid in the foreseeable future. According to Ms. Francis, the plaintiff does not have liabilities other than those in the normal course of business.

IV. ANALYSIS

[29] The first step of the *Citizens* test requires this Court to determine whether it appears that the plaintiff will be unable to pay the defendant's costs if the action fails. To answer this question, the Court must first ascertain the amount of costs that are expected to be incurred.

[30] The defendants submit that they will likely incur hundreds of thousands of dollars in legal fees and disbursements to defend this action. The Redcell defendants have presented a bill of costs totalling \$446,505.95: \$94,617.60 for legal fees and taxes, and \$351,888.35 for disbursements and taxes. AppQuantum has presented a bill of costs totalling \$316,329.86: \$77,985.60 for legal fees and taxes, and \$238,344.26 for disbursements and taxes.

[31] Each of the bills of costs are based on a 25-day trial, with units estimated for various tariff items that generally sit in the middle to high end of the ranges. The bulk of the bills of costs are comprised of disbursements related to experts. The applicants estimate that they will require a total of five experts between them at a minimum cost of \$100,000 per expert. The Redcell defendants submit that they intend to retain three experts, one for each of the following specialties: source code, market assessment, and damages. AppQuantum submits that it will require two experts: one for damages, and the other for the role of a publisher.

[32] The applicants have not provided any affidavit evidence regarding the anticipated costs for the expert reports, or whether these costs are likely to be incurred. Rather, counsel in both applications rely on various reported decisions in which the court approved costs related to expert reports exceeding \$100,000. They argue that based on these decisions, this Court can infer that the parties in this case will also incur costs of at least \$100,000 per expert, for experts in the various specialties that have been identified.

[33] The applicants' submissions regarding the anticipated cost of expert reports are based on conjecture rather than being grounded in evidence. In my view, the authorities cited cannot be used to absolve the applicants of the obligation to provide evidence to support the amounts set out in their respective bills of costs. It is trite to say that despite commonalities in subject matter, each case turns on its own unique set of facts. Simply because certain experts were retained by counsel in certain cases at a specific cost, does not mean that the same expense will be incurred in this case. The experts in the cases cited by counsel were retained to address the factual matrix and issues specific to each case. Unknown to this Court are the unique set of circumstances surrounding each expert's retainer in a given case. This Court has also not been provided with evidence as to whether the parties intend to retain the same experts referenced in the authorities, or whether those experts are even available to be retained and willing to charge similar fees.

[34] It is incumbent upon a party seeking security for costs, to provide some evidentiary basis for their anticipated legal costs. This is especially the case when dealing with large ticket items such as expert retainers. The applicants have failed to provide sufficient evidence to support the estimated costs for experts which are included in their bills of costs. Excluding the expert reports, reduces each bill of costs to about \$100,000.

[35] I turn then to the second aspect of the first step of the *Citizens* test. In support of their argument that the plaintiff may be unable to pay the defendants' costs if the action fails, the defendants rely on the following:

1. Evidence that Hyper Hippo is a B.C. company with no real property or exigible assets in BC.
2. Evidence that the plaintiff has experienced a decline in revenue and overall portfolio performance in the last two years, such that sustainability of its revenue generation capability is questionable. They also point out that Hyper Hippo's most recent games have not performed very well, and

Dungeon Dwarves contains no in-application store⁷ or in-application advertisements. As such, it is incapable of generating ongoing revenue.

3. The failure of the plaintiff to produce documentary evidence as to the assets and financial position of Hyper Hippo. It is argued that the consolidated financial statements for Hyper Hippo and its related entities, are insufficient as they do not explain which assets are held specifically by the plaintiff.

[36] In relation to the first concern raised by the defendants, the plaintiff does not deny that it does not own any real property or significant personal property. However, it argues that this is not determinative. Rather, the Court ought to consider the entire financial circumstances of the plaintiff, such as whether the plaintiff is in default of any outstanding debts or liabilities, the revenue or profitability of the plaintiff, and its ability to meet its recurring payment obligations: *Troico* at paras. 25-28, 39; *Moneywise* at paras. 46, 55–56.

[37] In *Troico*, Justice Ahmad considered an application for security for costs against a plaintiff who did not own any real property, noting:

[25] In *Lancaster Group Inc. v. Kenaidan Contracting Ltd.*, 2020 ONSC 1653, a Master of the Ontario Superior Court of Justice considered a defendant’s application for security for costs under the “insolvency” or “instability” test used in that province. Referring to real property and personal property searches, she stated at para. 14:

[14] I need not comment on the other searches other than to say that they are not as persuasive. Many companies do not own property. Many companies have secured creditors who provide loan and revolving lines of credit. PPSA registrations do not trouble me *per se* or indicate insolvency or instability. Action taken on the security is a better indicator. I see no such activity here.

[26] I agree with that analysis. While the fact that a plaintiff does not own assets, or significant assets, may be some indication of its ability to pay (and most certainly becomes relevant on the second stage of the *Citizens* test), it is not necessarily determinative of the first stage of the *Citizens* test (i.e., whether a plaintiff will be unable to pay a costs award).

⁷ This feature allows users of a game to purchase in-game enhancements.

[38] Justice Ahmad dismissed the application, finding that the defendants failed to establish a *prima facie* case.

[39] I now turn to the second set of concerns raised by the defendants. I disagree with the defendants' interpretation of the financial statements produced by the plaintiff or its suggestion that the plaintiff has a bleak financial outlook.

[40] The evidence does not support the concern that the plaintiff's business is in trouble. The consolidated Financial Statements for the year ending in July 31, 2022, indicate that Hyper Hippo and its related entities, had generated approximately \$31.7 million in total revenue in 2022. While this figure was about \$4 million lower than the previous year, it was still almost \$1 million higher than the 2020 year, despite the decreased revenue and uptake from new users for the *AdVenture Series* games.

[41] While the gross profit for the plaintiff and related companies had decreased by about \$1 million over the two years, this was adequately explained by the fact that the company was going through significant growth, and thus incurring substantially higher costs for salaries and wages. As at January 17, 2023, Hyper Hippo had 122 employees, which is almost double the number of employees in 2019. The consolidated financial statements indicate that the plaintiff's operating expenses include approximately \$12.1 million in salaries and wages for 2022 – up from approximately \$8.9 million in 2021 and \$7.7 million in 2020. Further, the consolidated financial statements reveal that the assets have grown from \$13.6 million in 2020, to \$15 million dollars in 2022. All of this evidence aligns with a growing, rather than declining, business.

[42] The financial strength of the plaintiff is also evidenced by the fact that despite the money expended for growth, the plaintiff and related entities retain substantial cash in their bank accounts (approximately \$8.5 million) and have not had to use their credit facility.

[43] I also dismiss the notion that the lackluster performance of the new games indicates that the plaintiff is in financial trouble. It is unreasonable to expect that each game that is launched will meet the same level of success. The plaintiff's *AdVenture Series* of games continue to generate significant revenue and gain new users. Further, the plaintiff has increased its workforce to grow its portfolio.

[44] Having regard to all of the above, I conclude that the applicants have failed to make a *prima facie* case establishing that the plaintiff may be unable to pay a costs award should the defendants' successfully defend this litigation. I come to this conclusion even if the plaintiff's bills of costs including expert report estimates, were considered reliable at face value (which I have found they are not).

[45] However, even if the evidence is sufficient to establish a *prima facie* case, the application fails at step two of the *Citizens* test.

[46] This brings me to the third concern raised by the defendants – that the consolidated financial statements for Hyper Hippo and its related entities are insufficient as they do not explain which assets are held specifically by the plaintiff. In my view, the evidence produced by the plaintiff is sufficiently reliable, and meets the burden of establishing that the plaintiff has exigible assets of sufficient value to satisfy an award for costs.

[47] First, I reject the notion that the plaintiff is trying to hide something by providing consolidated financial statements. Filing consolidated financial statements is an appropriate method of accounting for companies that meet the requisite criteria. In this case, the plaintiff has produced consolidated financial statements for wholly owned subsidiaries, or subsidiaries in which it contains a controlling interest. There is nothing nefarious about that.

[48] Second, by providing consolidated financial statements of all its related entities, the plaintiff has addressed potential concerns that could arise regarding poor financial performance, or unknown liabilities of the wholly owned subsidiaries, that could impact the plaintiff's financial position and ability to pay.

[49] Third, the assets of the wholly owned subsidiaries or those in which the plaintiff holds a controlling interest, are valid for consideration in a security for costs application.

[50] In *Moneywise* at para. 40, the Court relied on the following evidence to support the plaintiff's ability to pay:

- a. it is in receipt of regular income;
- b. it is owed money from the principal shareholder in the plaintiff;
- c. that Wise Corp., i.e., the parent company of Mr. Wise's group of companies, owes the plaintiff \$328,637 and Mr. Wise is a shareholder of the plaintiff;
- d. Wise Corp. owns shares in Moneywise, PRP Holdings Ltd. (PRP), and 0999942 B.C. Ltd. (942).
- e. PRP owns commercial real estate in Prince George worth approximately \$25 million;
- f. another related company, 942 BC Ltd. has an equity in real estate of approximately \$10 million.

[51] Thus, in *Moneywise*, the Court found it appropriate to rely on the related entities and shareholdings in concluding that the applicants failed to meet the burden of proof establishing that an award for security for costs should be made.

[52] I have come to similar conclusions in this case.

[53] The applicants' bills of costs, taken at their highest, are \$760,000. Taken at their lowest (by excluding the expert report estimates), they total no more than \$250,000. The uncontroverted evidence is that approximately 90% of Hyper Hippo's assets are held by Hyper Hippo and its 100% owned subsidiary Hyper Hippo Publishing Ltd., both of which are B.C. companies. Those assets total approximately \$15 million as at the 2022-year end, of which \$8.5 million is held in cash or equivalents. Bearing in mind that the company only has liabilities of \$6.2 million, I find that there is more than enough in exigible assets held or controlled by the plaintiff, which could satisfy an award for costs, even if the expert reports were obtained at the amounts claimed.

[54] Thus, even if I was to find that the first step of the *Citizens* test had been met by the applicants, the application is defeated at the second step, as the company has shown it has exigible assets of sufficient value to satisfy an award for costs.

V. CONCLUSION

[55] I conclude that the defendants have not established a *prima facie* case that Hyper Hippo will be unable to pay the defendants' costs if the action fails.

[56] Consequently, both the applications for security for costs, are dismissed.

“Shergill J.”