IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Boardwalk Contracting Inc. v. Naples,* 2017 BCSC 1581

Date: 20170810
Docket: S1610516
Registry: Vancouver

Between:

Boardwalk Contracting Inc.

Plaintiff

And

Ronald James Naples, Michael James Beiderwieden, and Nixon Services Inc.

Defendants

And

Kerri Anne Naples and Louis Dion

Defendants by way of Counterclaim

- and -

Docket: E50347
Registry: New Westminster

Between:

Kerrie Anne Naples

Claimant

And

Ronald James Naples, Boardwalk Contracting Inc., (Inc. No. BC0840873), Boardwalk Development Inc., (Inc. No. BC1015201), Link Creek Contracting Inc., (Inc. No. BC0996031) and Link Creek Holdings Ltd., (Inc. No. BC1031148)

Respondents

And

Kerrie Anne Naples

Respondent by way of Counterclaim

Before: The Honourable Mr. Justice Voith

Oral Reasons for Judgment

Counsel for Boardwalk Contracting Inc.:	D.A. Frenette
Counsel for Ronald Naples:	No Appearance
Counsel for James Beiderwieden, Nixon Services Inc. and Boardwalk Development Inc.:	B. Vickers
Counsel for Kerrie Naples:	No Appearance
Place and Date of Hearing:	Vancouver, B.C. July 27, 2017
Place and Date of Judgment:	Vancouver, B.C. August 10, 2017

[1] **THE COURT:** The applicants, Mr. Beiderwieden and Nixon Services Inc., ("Nixon"), have applied for various forms of relief. The central object of these various forms of relief is to have the plaintiff, Boardwalk Contracting Inc., ("Boardwalk"), post security for costs in an amount that is to be determined by the court.

Background

[2] This action is related to a family claim bearing Action No. E050347. That family claim involves Mr. and Mrs. Naples and the various companies that they own, either directly or indirectly. I recently delivered reasons for judgment, indexed at 2017 BCSC 1367, (the "Reasons"), that addressed various applications that I had heard in the two actions.

[3] In the Reasons, I said:

> [2] Before turning to my conclusions in relation to these disparate applications, the following background facts are relevant. The Family Claim involves Mr. and Mrs. Naples, and several companies that they own directly or indirectly. The parties were married on August 1, 2004, and separated [August] 1, 2015. They have one son, who is now eleven years old.
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> [3] One of the companies named in the Family Claim is Link Creek Contracting Inc. . . . Link Creek is a company that is owned equally by the parties, and it is the sole owner of the shares of Boardwalk Contracting Inc. . . . Boardwalk was an active construction company which, during the latter years of the parties' relationship, was a significant if not the primary source of their income. Boardwalk was formed as a numbered company in 2008.
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> [4] Boardwalk's fortunes varied somewhat from year to year. In 2011, it had revenues of $22,001, and it lost money. In 2012, it had revenues of approximately a million dollars, and it enjoyed a net profit of approximately $160,000. In 2013, it had revenues of $2,865,000, and net profits of approximately $500,000. In 2014, the year before the parties separated, it had revenues of almost $1.7 million, and net profits of approximately $50,000. Ms. Naples had deposed that Boardwalk also generated an annual income of approximately $150,000 for Mr. Naples. At this point Boardwalk is not operating, and it has significant debt obligations to both the Canada Revenue Agency and to various suppliers.
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> . . .
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> [6] Boardwalk is now effectively shuttered. At this time the primary focus of Boardwalk is to collect its outstanding receivables, to sell its assets, and to pay its various debts. Each of Mr. and Mrs. Naples argues that the demise and ultimate failure of Boardwalk was the fault of the other, and of parties related to or associated with them . . .
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> . . .

> [27] Several further facts are relevant. Mr. Beiderwieden was a former senior employee of Boardwalk and he was described as its Director or Vice-President of Operations. He joined Boardwalk on December 1, 2014. He left Boardwalk in or about October 2016 and he began to operate Nixon . . .
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> . . .
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> [33] The Civil [action] similarly raises multiple causes of action. Boardwalk has sued Mr. Beiderwieden for breach of his employment contract. He, in turn, has counterclaimed, suing for wrongful dismissal and for breach of his employment contract. Boardwalk has also sued Mr. Beiderwieden for breach of fiduciary duty and for wrongful interference with economic relations. Boardwalk accepts that there would be no basis to have any of these various causes of action heard together with or at the same time as the Family Claim.
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> [34] Boardwalk has, however, also sued Mr. Beiderwieden and Mr. Naples in conspiracy, alleging that they formed an unlawful agreement to abandon Boardwalk and to start a new business under Nixon. It alleges that Nixon then hired some former Boardwalk employees and did work for some former Boardwalk clients. Furthermore, Mr. Naples has in the Civil Claim also counterclaimed against Ms. Naples and Mr. Dion for interfering in the operations of the company and for causing it to fail. It is primarily Boardwalk's conspiracy claim, and Mr. Naples' counterclaim that give rise to the overlap or commonality in the Family Claim and the Civil Claim.

Jurisdiction and Legal Framework

[4] The Supreme Court has jurisdiction under s. 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57, and its inherent jurisdiction to order a plaintiff corporation to post security for a defendant's costs of a legal proceeding and to stay the proceeding until that security is posted.

[5] Section 236 provides:

> **236. Court may order security for costs**
>
> 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.

[6] There are two often-cited decisions that set forth the various considerations and principles that govern the court's discretion on an application for security for costs. In *Kropp v. Swaneset Bay Golf Course Ltd*. (1997), 29 B.C.L.R. (3d) 252 (B.C.C.A.), Finch J.A. said:

> [17] In *Keary Development v. Tarmac Construction*, [1995] 3 All E.R. 534, the English Court of Appeal considered s. 726(1) of the *Companies Act 1985*, reviewed a number of authorities applying that provision or its predecessors, and then set out the principles which emerged from those cases. The principles are stated at pp. 539-542, and may be summarized in this way:
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> > 1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
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> > 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;
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> > 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.

[7] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (B.C.S.C.), Romilly J. distilled the factors that are relevant to an application for security for costs for a corporate plaintiff:

> [14] Based then, on the decision in *Kropp, supra* as well as the decision of Spencer J. in *Ruko, supra*, the test to be applied on an application for security for costs is as follows:
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> > 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?
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> > 3. Is the court satisfied that the defendants have an arguable defence to present?
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> > 4. Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff's case from being heard?

Application of the Relevant Considerations

[8] The plaintiff Boardwalk, in the affidavit of Ms. Naples, accepts that it has no funds or assets with which to pay an award of costs if it fails in its action against Mr. Beiderwieden or Nixon. This acknowledgment and various other concessions made by counsel narrow the issues before me. The following specific issues remain, either as a result of the legal principles I have referred to or the submissions of the parties.

a) What legal threshold or premise applies to an application for security for costs involving an impecunious corporate plaintiff?

[9] Boardwalk, in its written and oral submissions, argued that the jurisdiction to order security for costs should be exercised "sparingly and in very special circumstances"; *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 253 at para. 47, leave to appeal ref'd, 2009 BCCA 211, [*Tylon 1*].

[10] The applicants conversely argue that once it is established that a corporate plaintiff will be unlikely to be able to pay costs if its claim fails, security for costs is "generally ordered", unless the court is satisfied there is no arguable defence.

[11] I consider that the position advanced by the applicants is correct. This is so for several reasons.

[12] First, *Tylon 1* dealt with an application brought by the defendants under s. 25(2)(b) of the *Builders Lien Act*, R.S.B.C. 1997, c. 45, to cancel a lien and its post security in lieu of that lien. The plaintiff sought security for its costs to prove its lien. Burnyeat J., at para. 46, commented that s. 24 of the *Builders Lien Act* only allows security to be ordered "in substitution for the 'claim of lien' and nothing else"; at para. 46.

[13] In addition, he observed that it was the plaintiff who was seeking security for its costs of proving its claim. Thus, Burnyeat J. said:

> [47] I am satisfied that there are sound reasons why the amount of security should not include security for costs. It is extremely rare for a plaintiff to seek or be provided with security for costs against a defendant prior to

> obtaining judgment. In the context of a dismissal of an application for leave to appeal an order dismissing the plaintiff's application for security for costs against an impecunious defendant, Donald J.A. in *Dang v. Nguyen* [there is a series of case references] described the relief as "extraordinary" and a form of "pre-judgment execution". In *Wiest v. Middelkamp* [and again there is a cite] an application for security for costs against an impecunious plaintiff was dismissed:
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> > Although the court does have the inherent jurisdiction to order an individual to post security for costs, that power is to be exercised "cautiously, sparingly and indeed under very special circumstances" [and there is a reference to further cases].

[14] Finally, *Tylon 1*, and the various authorities that are referred to in that decision, pertain to individuals rather than the corporate plaintiffs. The difference in the court's attitudes to applications for security for costs that are brought against individuals as opposed to corporate plaintiffs is well understood.

[15] In *Kropp*, the court, at para. 11, said:

> The law does not treat corporate plaintiffs with the same generosity and flexibility as natural persons opposing an application for security.

[16] The court continued and said:

> [16] A leading English decision is *Pearson v. Naydler,* [1977] 3 All E.R. 531 (Ch. Div.) (referred to in *Fat Mel's, supra*, at 237). Vice-Chancellor Megarry referred to some basic principles at pp. 533, 535:
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> > The basic rule that a natural person who sues will not be ordered to give security for costs, however poor he is, is ancient and well-established. As Bowen LJ said in *Cowell v. Taylor* [(1885), 31 Ch.D. 34 at 38], both at law and in equity 'the general rule is that poverty is no bar to a litigant'. The power to require security for costs ought not to be used so as to bar even the poorest man from the courts.[ellipsis]
> >
> > In the case of a limited company, there is no basic rule conferring immunity from any liability to give security for costs. The basic rule is the opposite; s 447 applies to all limited companies, and subjects them all to the liability to give security for costs. The whole concept of the section is contrary to the rule developed by the cases that poverty is not to be made a bar to bringing an action. There is nothing in the statutory language (the substance of which goes back at least as far as the *Companies Act 1862* s 69) to indicate that there are any exceptions to what is laid down as a broad and general rule for all limited companies. Nor is it surprising that there should be such a rule. A man may bring into being as many limited companies as he wishes, with the privilege of limited liability; and s. 447 provides some protection for the community against litigious abuses by artificial

> persons manipulated by natural persons. One should be as slow to whittle away this protection as one should be to whittle away a natural person's right to litigate despite poverty.

[17] Accordingly, *Tylon 1* arose in fundamentally different circumstances and was governed by very different principles and considerations.

[18] Several further considerations pertain to the question that I have identified. First, it is relevant that once a defendant has shown that a corporate plaintiff will be unable to pay the costs of its unsuccessful claim, the onus shifts to the plaintiff to show why the order should not be made; *Citizens for Foreign Aid Reform* at para. 18.

[19] Second, the authorities expressly address what "general rule" or practice should ensue absent additional considerations. In *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 25 B.C.A.C. 95 (B.C.C.A.), Proudfoot J.A., for the court, said:

> 20 The making of an order under s. 229 of the *Company Act* is discretionary. However, once the applicant for security has shown that the plaintiff will not be able to pay costs should the claim fail, security is generally ordered unless the court is satisfied that there is no arguable defence.

[20] In *Citizens for Foreign Aid*, the court said:

> [23] In sum, on an application for security for costs, once the defendants have established a *prima facie* case that the plaintiff lacks exigible assets, the plaintiff is required to respond with evidence to establish either that it will be able to pay the defendants' costs, that the defendants have no arguable case, or that an order for security will stifle the action. These tests serve to balance the possible injustice of stifling the corporate plaintiff's claim against the possible injustices of exposing the defendants to a law suit where they could not recover their costs if successful.

[21] More recently, in *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 1585, [*Tylon 2*], Ballance J. said:

> [19] While the order is discretionary, the Court of Appeal in ***Fat Mel's*** held that once the defendant has shown a *prima facie* case that the corporate plaintiff may be unable to pay costs if the claim fails, security for costs is "generally ordered" unless the court is satisfied that there is no arguable defence. In ***Fat Mel's,*** the Court of Appeal also endorsed comments made by

> this Court in *Ruko* to the effect that where a defendant has made out a *prima facie* case that the plaintiff may be unable to pay costs, evidence to show that the plaintiff has exigible assets will be required to avoid an order.

[22] Accordingly, I am satisfied that an order for security for costs should "generally" go as against an impecunious corporate plaintiff that lacks exigible assets. How the amount of such security is fixed is a different question. This "general rule" can be displaced if the plaintiff establishes that the defendant lacks an arguable defence. Boardwalk argues that additional considerations can also displace this "general rule". In particular it argues that its now impecuniosity is directly attributable to the conduct of the defendants. It further argues that the counterclaim brought by Mr. Beiderwieden against Boardwalk militates against the relief that Mr. Beiderwieden and Nixon seek.

b) Assessment of Merits

[23] I have earlier identified the admonition in *Kropp* to "avoid going into details on the merits unless success or failure seems obvious", at paras. 17; see also *Dong v. Au*, 2007 BCCA 37 at para. 10, citing *Kropp*.

[24] Boardwalk advances, as I said in the Reasons, various claims against the defendants. Two such causes of action are particularly important for the purposes of this application. The first is that Mr. Naples and Mr. Beiderwieden conspired to abandon Boardwalk and to start a new business under Nixon. I am satisfied on the evidence before me that Mr. Beiderwieden and Nixon have an arguable defence against this claim. Indeed, there is a real question at this stage about whether Boardwalk has an arguable claim. Certainly counsel for Boardwalk did not press or advance this claim in any meaningful way during the course of the application.

[25] The second central cause of action is based on the theory that Mr. Beiderwieden, by virtue of his senior position with Boardwalk, owed that entity a fiduciary obligation and that by setting up a competing business, using former Boardwalk employees and doing work for former Boardwalk clients, he breached that obligation.

[26] Counsel for Mr. Beiderwieden argues, based on various factual circumstances, that Boardwalk expressly or constructively dismissed Mr. Beiderwieden, that Boardwalk was not in a position to perform the work or the contracts that it had, and that it was Boardwalk's former clients who approached Mr. Beiderwieden or Nixon to do work for them. In such circumstances, it is argued, it was open to Mr. Beiderwieden and Nixon to do work for these clients. Both counsel accept that Boardwalk's claim against Mr. Beiderwieden for breach of the fiduciary obligations that he owed that entity is the stronger of its claims.

[27] Nevertheless, based on the evidence and authorities that I was taken to, I am satisfied that Mr. Beiderwieden and Nixon have arguable defences as against this specific claim.

c) It was the conduct of the defendants that put Boardwalk in its present financial position

[28] Boardwalk argues that its present financial circumstances are a direct result or product of the defendant's conduct and that this consideration militates against the present application. This submission is supported, in concept, by the relevant authorities. Thus, for example, in *Split Vision Eyewear Inc. v. The Economical Insurance Group*, 2010 BCSC 396, Mr. Justice Walker:

> [79] An application for security for costs should not be used as an instrument of oppression. That concern is particularly acute where, as here, the plaintiff's financial situation is (based on the preponderance of the evidence in the record) tied to the claims in the action: *Grant v. Henderson Development (Canada) Ltd.*, 2003 BCSC 1473 (B.C. S.C.), paras. 11 and 19 .
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> [80] In *Scotford Electrical et al. v. Blue Mountain Log Sales.*, 2005 BCSC 538 (B.C. Master) at para. 23,the Court said that a link between a corporate plaintiff's financial circumstances and the cause of action against the defendant entitles the Court to exercise its discretion against an order for security for costs or to reduce the amount of security ordered:
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> > [W]here a plaintiff corporation's impecuniosity and the cause of action against the defendant are linked, the Court may take this into account in deciding whether to exercise discretion to award security for costs or in determining the amount of security to award.

See also *Apex Mountain Resort Ltd. v. British Columbia*, 1998 CarswellBC 1758 at paras. 28-30.

[29] This particular submission of Boardwalk, however, suffers from two difficulties. First, it is not at all clear that Boardwalk's financial failure was the product of the conduct of Mr. Beiderwieden or of Nixon. Indeed, a central thesis of the defendants' case is that Boardwalk's financial demise was brought about by the interference in its operations of Ms. Naples and her father.

[30] Second, the central legal theory of Boardwalk, that being that Mr. Beiderwieden breached his fiduciary obligation to Boardwalk and that he thereby caused the company's failure, appears to be unsupported by the evidence that exists at this stage in the proceeding. I have earlier referred to Boardwalk's financial results in 2012, 2013, and 2014. Its gross revenues in these years averaged approximately $1.8 million annually. Based on the disclosure that Mr. Beiderwieden and Nixon have made thus far, Nixon has only performed approximately $200,000 of work for two former Boardwalk clients. It is accordingly somewhat difficult to ascribe Boardwalk's financial collapse and its now financial circumstances to the conduct of the applicants.

[31] Yet a further factor is relevant. The relevant authorities require that Boardwalk do more than show that it is impecunious. It must also show that it has no means of raising the funds necessary to post security. In *Kropp*, Finch J.A. said:

> [22] To succeed in showing that an order for security would stifle the action the plaintiff must do more than show that it has no assets [there is a reference to a case]. The defendants have already made out a *prima facie* case that the corporate plaintiff has insufficient assets to pay costs if unsuccessful. Mr. Kropp's affidavit does not really add to that position and establish that the corporate plaintiff is impecunious, in the sense of lacking any means of raising money for security. I think the law requires him to do so. As Megarry, V.C., said in *Pearson, supra*, at 535,the purpose of the provision is to protect "the community against litigious abuses by artificial persons manipulated by natural persons."
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> [23] Mr. Kropp's affidavit provides only a blanket and empty assertion of impecuniosity. In *Burke v. Larter (*1991), 305 A.P.R. 251 (P.E.I.C.A.), such an assertion was rejected. The court at para. 10 approved the decision of the chambers judge who
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> > held that the mere assertion of impecuniosity is not sufficient to meet the test ... [and] that plaintiffs who seek to avoid security for costs on the ground of impecuniosity must lead evidence to demonstrate that they are impecunious by giving evidence of their assets, debts, etc.

[32] In *Citizens for Foreign Aid Reform*, the court said:

> [22] To succeed in showing that an order for security would stifle the action, the plaintiff must show that it has insufficient assets and no means of raising money for security: *Kropp, supra*. In the case at bar, there is dearth of evidence as to the financial state of affairs of the plaintiff. There is also a dearth of evidence as to any access the plaintiff may have to resources. Consequently, though it appears that the plaintiff may be unable to pay costs of the action, it does not follow, in the absence of evidence, that such a state of affairs would result in stifling the advancement of the plaintiff's claim if costs were ordered to be secured.

See *Fat Mel's* at para. 34-35, and *Natco International Inc*. at para. 32.

[33] In the earlier applications that gave rise to the Reasons, there was evidence which addressed the assets of Mr. and Mrs. Naples as well as the assets that were held by some of their companies. One of those companies presently owns land and a cabin in Kelowna. Another company owned a parcel of land that has been sold. The proceeds of that sale are presently held by counsel for either Mr. Naples or Mrs. Naples. Still further affidavit materials filed in the earlier applications revealed that a company owned by Ms. Naples, called Whitemark Business Stations, owns the condominium apartment that she now resides in. None of these assets or any other assets that Ms. Naples may own, directly or indirectly, were addressed in the materials that were filed on this application. Similarly, none of the materials filed by Boardwalk addressed its ability to raise money for security.

[34] Accordingly, I do not consider that Boardwalk has established that Ms. Naples, as a director and principal shareholder of Boardwalk, could not pay security on the company's behalf. I am similarly unpersuaded, on the basis of the present application record, that Boardwalk's present financial circumstances can be ascribed to the conduct of the applicants.

d) The counterclaim that has been filed by Mr. Beiderwieden

[35] I have referred to para. 33 of the Reasons where I identified that Mr. Beiderwieden had filed a counterclaim in which he sued Boardwalk for wrongful dismissal and for breach of his employment contract. Boardwalk argues that it would

be inappropriate to prevent Boardwalk from advancing its claim in circumstances where the company is concurrently being sued in relation to the same or a similar set of events. Once again, Boardwalk's submission, in concept, finds some support in the relevant case law.

[36] In *Gray v. Powerassist Technologies Inc*., 2001 BCSC 1208, Joyce J., in declining to make an order for security for costs, said:

> [27] Turning to the question of prejudice or injustice to the plaintiff if the order for security is denied, it appears to me that he will incur substantially the same costs in any event through the prosecution of his own claim. The defence of the counterclaim may add to the costs to some extent, at least on the issue of quantum of damages, but considering the commonality of the issues in the claim and counterclaim it does not appear to me that the plaintiff's costs will be substantially lessened if the counterclaim does not proceed.
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> . . .
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> [29] In my opinion, the claim and counterclaim are so intertwined that it would constitute an injustice to permit the claim to proceed while stifling the ability of the defendants to pursue a counterclaim is founded on the same facts upon which the defence is dependent. While the claim and counterclaim clearly have some distinct features, particularly with respect to the nature and quantum of damages, both proceedings have their genesis in the same agreement and its termination. Both proceedings depend on a determination of which of the two parties was at fault in the termination of the agreement.

[37] Once again, however, the factual circumstances of this case do not align with the legal theory that is being advanced by Boardwalk. When Boardwalk let its employees go, those employees, including Mr. Beiderwieden, originally sought to recover their lost wages under the *Employment Standards Act,* R.S.B.C. 1996, c. 113. All of them, other than Mr. Beiderwieden, were successful. Mr. Beiderwieden, however, at some point, chose to commence an action for wrongful dismissal and for his lost wages. His counsel accepts that that claim will necessarily be quite modest and that Mr. Beiderwieden went to work for Nixon very shortly after he left or was let go from Boardwalk.

[38] Thus, though it is fair to say that the circumstances of Mr. Beiderwieden leaving his employment with Boardwalk would be relevant, both to Boardwalk's

action and to his counterclaim, it is not the case, as it was in *Gray*, that Mr. Beiderwieden would incur similar costs in the prosecution of his counterclaim. In this case, Boardwalk's action dwarfs Mr. Beiderwieden's claim in both monetary terms as well as in terms of its legal and factual complexity.

[39] Similarly, in *Paul v. General Magnaplate Corporation* (1995), 27 O.R. (3d) 314 (Ont. Gen. Div.), the court declined to order security for costs in a case where it concluded that "the counterclaim amounts to the real dispute in the action". In the present case, it is Boardwalk's claim that drives the present action and that constitutes the "real claim" in the action.

[40] Accordingly, I do not consider that the existence of Mr. Beiderwieden's claim prevents him from obtaining the relief that he seeks, though that counterclaim does have some relevance to the appropriate quantum of security.

e) Quantum for Security

[41] Mr. Beiderwieden and Nixon seek $133,150 as security. That sum represents the anticipated disbursements, inclusive of expert fees, and the party-and-party costs for a 10-day trial. No issue was taken with respect to the reasonableness of these figures by counsel for Boardwalk. I would add that the anticipated disbursements for trial are supported by the written fee estimates of a potential expert. In addition, the original trial estimate of counsel for Ms. Naples that I referred to in the Reasons suggests that a 10-day trial estimate may be conservative.

[42] Finally, counsel for Mr. Beiderwieden has noted that if Boardwalk continues to advance its conspiracy claim and if it is unable to make out that claim at trial, it may be subject to a special costs award.

[43] All of this is in aid of saying that the costs figures advanced by the applicants appear to be reasonable and may, in fact, be conservative.

[44] The legal principles that govern how the quantum of security should be fixed are straightforward. In *Kropp* at para. 17, Finch J.A. confirmed that the court "can

order any amount of security up to the full amount claimed, as long as the amount is more than nominal". In *Fat Mel's*, Proudfoot J.A. adopted the principle laid down in *Procon (Great Britain) Ltd. v. Provincial Building Co.*, [1984] 2 All E.R. 368 (C.A.):

> [40] …
>
> > . . . the principle is this: the security should be such as the court thinks in all the circumstances of the case is just. If security is sought, as it often is, at a very early stage in the proceedings, the court ordering security will be faced with a situation in which a solicitor or his clerk has made an estimate of the costs likely in the future to be incurred; and probably the costs already incurred, or paid, will be a very small fraction of the security that the applicant is seeking. At that stage 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.

[45] I am mindful that Boardwalk's claim is relatively complex and that it advances claims for both general damages and punitive damages. I have considered Mr. Beiderwieden's counterclaim, the concern of stifling Boardwalk's claim, and the failure of Ms. Naples, as a principal of Boardwalk, to address alternate means by which security for Boardwalk's claim might be posted.

[46] In all of the circumstances, I consider that Boardwalk should post an amount of $60,000 as security for the applicants' costs. That amount is to be posted within 30 days. If such security is not posted, Boardwalk's claim is to be stayed.

[47] Counsel for Mr. Beiderwieden had suggested that if Boardwalk failed to post security, its claim ought to be dismissed. Such "guillotine orders" are, however, inappropriate absent "exceptional and unusual circumstances"; see *Global Banking Systems Inc. v. Datawest Solutions Inc*., 2006 BCCA 577 at para. 19. There is nothing in the circumstances of the present case that would warrant such an order.

[48] Costs of this application are to be in the cause.

"Voith J."