IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Toporowski v. Keast,***
2007 BCSC 1941

Date: 20070914
Docket: S060456
Registry: Vancouver

Between:

Robert Toporowski

Plaintiff

And:

Thomas G. Keast, Johannes Schenk and Watson Goepel Maledy

Defendants

Before: The Honourable Madam Justice H. Holmes

Oral Reasons for Judgment

In Chambers
September 14, 2007

Counsel for Plaintiff	B.A. Mason
Counsel for Defendants	A.A. Macdonald
Date and Place of Hearing:	September 4-5, 2007 Vancouver, B.C.

[1] **THE COURT:**

INTRODUCTION

[2] The defendants apply for an order requiring Mr. Toporowski, the plaintiff, to post security for costs of the trial of the action, on the basis that his action against them is obviously destined to fail, and that the defendants would likely be unable to recover an award of costs against him. Mr. Toporowski lives in Alaska, a reciprocating jurisdiction for the purposes of the ***Court Order Enforcement Act***, but has no exigible assets there or here, apart from his spousal interest in the family home registered in his wife's name.

[3] The defendants also seek an order requiring Mr. Toporowski to respond by affidavit to an interrogatory.

THE NATURE OF THE UNDERLYING ACTION

[4] Mr. Toporowski's claim against the defendants is in breach of contract, and relates to the adequacy of the legal representation provided to him in his pursuit of claims against Alamos Minerals Ltd. and its chairman, Chester Miller, with whom Mr. Toporowski dealt. The claims against Alamos and Mr. Miller in what I will call the underlying action relate to the failure of Alamos to purchase certain mineral rights that Mr. Toporowski and his business partner, David McDonald, acquired and maintained through their company Miltop Ltd. The mineral rights related to an open-pit mine in Madison County, Montana, and are described as the "Norris project" or the "Norris rights".

[5] It was Mr. Toporowski's position that he and Mr. Miller concluded an agreement in the latter half of 1995, by which, after the completion of its initial public offering, Alamos would acquire the Norris rights, by purchasing from Mr. Toporowski and Mr. McDonald all of the outstanding shares in Miltop Ltd., which held the Norris rights. By the agreement Mr. Toporowski alleges, Alamos would then reimburse Mr. Toporowski and Mr. McDonald for their out-of-pocket expenses for maintaining of Norris project, and would deliver each of them 250,000 Alamos shares.

[6] Alamos completed its initial public offering in June 1996, but none of the consequences that Mr. Toporowski says were the subject of the agreement resulted. Specifically, Alamos declined to acquire the Norris rights, and provided neither Mr. Toporowski nor Mr. McDonald with 250,000 Alamos shares.

[7] Initially, Mr. Toporowski took the position that he was not reimbursed for the approximately $105,000 U.S. he spent as out-of-pocket expenses to maintain the Norris rights, but, as he later explained in his examination for discovery evidence, he was indirectly reimbursed for those expenses. He acknowledges that he can no longer pursue that aspect of his claim or base a claim against the present defendants on the loss of that claim.

[8] Mr. Toporowski claims in the present action that in breach of their contract with him, the defendants provided inadequate legal representation in his claims against Alamos and Mr. Miller. He makes three main allegations:

1. That his claim against Alamos in breach of contract was inadequately pleaded in various ways, and as a result of some

of the deficiencies was struck by Mr. Justice Melnick on August 13, 2002, in response to an application under Rule 19(24). Mr. Justice Melnick struck the breach of contract claim against Alamos because the particulars of the alleged contract were not pleaded. (Mr. Justice Melnick also struck the claim of breach of warranty of authority against Mr. Miller, because that claim was inconsistent with pleas of negligence and fraudulent misrepresentation against Mr. Miller; but the loss of that claim does not form a basis of Mr. Toporowski's present claim against the defendants).

2. That the defendants failed to properly report to him the consequences of the loss of the breach of contract claim, minimized the significance of the loss, and failed to raise with him the available avenues of response.

3. That the defendants failed, in particular, to raise for Mr. Toporowski's consideration the possibilities of Mr. Toporowski appealing Mr. Justice Melnick's order, or seeking independent counsel.

[9] The defendants respond with detailed denials of these allegations.

THE APPLICABLE LAW

[10] Mr. Justice Ehrcke in ***Beasse v. Holness***, 2006 BCSC 1265, noted that the purpose of an order for security for costs was discussed in ***Fat Mel's Restaurant Ltd. v. Canadian Northern Sheild Insurance Co.*** (1993), 76 B.C.L.R. (2d) 231 (C.A.) at 235, where Madam Justice Proudfoot quoted the words of Mr. Justice

Spencer, in ***Island Research & Development Corp. v. Boeing Co.***, [1991] B.C.J. No. 12 (S.C.)(Q.L.) as follows:

> The purpose of security for costs is to protect a defendant from the likelihood that in the event of its success it will be unable to recover its costs from the plaintiff. The plaintiff is not to be permitted a free ride on an unlikely claim at the defendant's expense. The factors to be considered in achieving a just balance between the defendant's right to protection and the plaintiff's right to advance a potential claim for adjudication include the chance of the claim's success, the anticipated level of cost in conducting the action and the prospect of the plaintiffs ever having assets from which to pay the defendants' costs if the claim fails.

[11] The Court of Appeal recently addressed the matter of security for costs in ***Dong v. Au***, 2007 BCCA 37. Writing for the court, Mr. Justice Chaisson reviewed the principles that govern, and in so doing, drew no distinction between the principles that apply where the plaintiff is a corporation and those that apply where the plaintiff is an individual. He referred to the court's earlier decision in ***Kropp (c.o.b. Canadian Resort Development Corp.) v. Swaneset Bay Golf Course Ltd.*** (1997), 29 B.C.L.R. (3d) 252 (C.A.), which outlined the principles applicable to security for costs where the plaintiff is a corporation; and at ¶9 he found that “the approach overall is instructive and applicable generally to a consideration of an application for security for costs”.

[12] In ***Kropp***, Mr. Justice Finch, as he then was, summarized at ¶17 the general principles, which were articulated by the English Court of Appeal in ***Keary Development v. Tarmac Construction***, [1995] 3 All E.R. 534:

> 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.

APPLICATION OF THE GOVERNING PRINCIPLES TO THE PRESENT SITUATION

[13] The defendants contend that an order for security for costs is justified on the basis that Mr. Toporowski's claim cannot possibly succeed. They submit that his claim relies fundamentally on proof of a contract that cannot be proven. The defendants say that Mr. Toporowski cannot possibly establish the existence of a contract that would have entitled him to 250,000 Alamos shares.

[14] I note parenthetically that I refer here and elsewhere to the alleged agreement largely in the passive voice, and I do not refer to the parties said to have made it, because Mr. Toporowski's position as to the parties to the agreement may be different now from as expressed in his pleadings in the underlying action against

Alamos and Mr. Miller. Mr. Mason submits that the pleadings mis-described the agreement Mr. Toporowski alleges, and that this provides further evidence of inadequate services by the defendants in their preparation of his pleadings. Whether that is so will be a matter for the trial.

[15] It appears to be common ground that there is no written contract. The defendants say that nor is there any documentary evidence of any contract. Indeed, there are numerous indications in the correspondence, among Mr. Toporowski, Mr. MacDonald, Alamos, and Mr. Miller, that their discussions did not result in a deal. In addition, Mr. MacDonald, co-owner of Miltop, and an integral part of the deal, as Mr. Toporowski asserts it, deposes that he was involved in the discussions with Mr. Miller or Alamos, and that no agreement was ever reached.

[16] Standing against this body of evidence is Mr. Toporowski's own evidence to the contrary. He deposes that an agreement was reached, albeit not in a formally executed document, that Alamos would take over the project and that Mr. Toporowski would be entitled to 250,000 Alamos shares, and reimbursement of out-of-pocket expenses. Mr. Toporowski relies in part on a handwritten memorandum that he says describes the main terms of the agreement reached in oral communications. He does not assert that the memorandum itself constitutes the agreement.

[17] Mr. Toporowski, through Mr. Mason, concedes that the claim against Alamos in breach of contract would not have been easy to prove. However, he submits that the action against the defendants is based on the concept that those claims should

not have been lost on the pleadings alone. He submits that the loss of Mr. Toporowski's ability to pursue the breach of contract claim in relation to the 250,000 shares was compounded by the defendants' inadequate reporting and advice. Lacking accurate and adequate legal advice about the consequences of Mr. Justice Melnick's ruling and the possible avenues of recourse, Mr. Toporowski failed to take or instruct his counsel to take steps to amend the pleading or to appeal.

[18] The appeal in ***Dong v. Au*** turned on the extent to which the Chambers judge should review the merits of the parties' cases in order to determine whether each has a *bona fide* and arguable case. Mr. Justice Chaisson warned against detailed scrutiny in this area at ¶23:

> … on an application for security for costs parties are not obliged to meet all the allegations of fact of each other. The parties are obliged to show that they have an arguable case and that it is *bona fide*. *Bona fide* must be considered objectively, not on the basis that a trial court might or even would be likely to reject the defence on the merits. In my opinion, where there is an arguable case, to conclude on conflicting evidence that it is not *bona fide* would require clear and compelling evidence.

[19] In my view, the situation here is much as Mr. Justice Chaisson described the situation in ***Dong v. Au*** at ¶30:

> … Objectively, each side advanced positions that depended on credibility and the consideration of documents in the context of evidence. It will be for another proceeding to determine which of these positions should prevail. It cannot be said at this stage of the case that either position is not arguable or not *bona fide*.

[20] In my view, the weight of the evidence filed on the present application does not appear to favour Mr. Toporowski's position. However, I am unable to conclude that his position is not *bona fide* or arguable.

[21] I turn then to other factors that relate to Mr. Toporowski's ability to pay costs in the action, and to the effect that an order for security for costs would have on his ability to continue the action.

[22] Mr. Toporowski is, as I have noted, a resident of Alaska, a reciprocating state for the purposes of the ***Court Order Enforcement Act***. However, he has no obvious ability to pay an order for costs, and it is far from clear that efforts to recover would be successful. His financial position and the availability of exigible assets, if necessary, have been neither clear nor entirely straightforward throughout the proceedings.

[23] An application for security for costs in the underlying action was not pursued, because Mr. Toporowski advised, through his former counsel, in January or February 2003, that he held assets in this jurisdiction. Specifically, he claimed to hold 52,000 Alamos shares in two brokerage accounts in Vancouver. However, when Mr. Toporowski's counsel, Mr. Keast, who is now a defendant in this action, suggested that Mr. Toporowski liquidate those shares in order to fund the underlying litigation, Mr. Toporowski told him that those shares had already been liquidated and that, in any event, Mr. Toporowski's wife, and not he, had been the beneficial owner.

[24] The property which Mr. Toporowski identified as his current address, which is the property registered in his wife's name, has an assessed value of just over

$254,000, according to a search. That may well be considerably less than its actual value. He transferred title of the property to his wife on January 6, 2000, for a nominal amount. The property is heavily mortgaged, seemingly for more than its assessed value.

[25] Mr. Toporowski's account with the defendants has been seriously in arrears since early 2004, and remains outstanding in an amount of more than $20,000. In this application, Mr. Toporowski contends that his failure to settle the account must be viewed in light of the deficiencies he alleges in the legal services he was provided.

[26] However, it appears from the evidence that during 2004 and for at least some time afterwards, Mr. Toporowski was expressly appreciative of the defendants' services, and tried to persuade them to continue to act for him, despite his inability to pay his outstanding account. Thus, for at least a year, his apparent best intentions to settle the account were not successful.

[27] Mr. Toporowski had taken no steps in the litigation by which he would be prejudiced by an order for security for costs. Nor is there any real evidence that an order for costs would stifle the litigation. As Mr. MacDonald notes, the Court of Appeal in ***Kropp*** at ¶22 said that to show the likely stifling effect of an order, a plaintiff must do more than show a simple lack of assets.

[28] In the ***Kropp*** case, the defendants made out a prime case that the corporate plaintiff had insufficient assets to pay costs if unsuccessful. The corporate plaintiff's

evidence did not add to that position to satisfy the requirement to establish that it lacked any means of raising money for security.

[29] Lord Justice Brandon's remarks at the Court of Appeal in ***M.V. Yorke Motors (a firm) v. Edwards***, as approved by the House of Lords at [1982] 1 All E.R. 1024 (H.L.), were cited with approval by Lord Diplock at 1028, and are often quoted in this context, and have recently been cited with approval by courts in this jurisdiction, with respect to what kind of evidence a plaintiff should be expected to lead to support a claim of impecuniosity:

> The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need.

See, for example, ***Beasse*** at ¶26.

[30] I conclude that there is an ample basis on which to conclude that the defendants will likely suffer a dry judgment if they are successful in their defence; and that considering all the circumstances I have outlined, there should be an order for security for costs.

THE AMOUNT OF SECURITY FOR COSTS

[31] There have been no steps taken in the litigation since the parties exchanged document lists in April and June 2006, with a supplemental list of the defendants' in late May 2007. A five-day trial is scheduled.

[32] The defendants submit a draft bill of what they estimate to be the reasonable minimum taxable costs and disbursements to defend the action through the trial, including the discoveries, travel expenses, and certain other expenses, which arrived at a total of $62,782.

[33] Mr. Toporowski, through Mr. Mason submits that that estimate is unreasonably high; and that in any event, an order for security for costs should be made in stages. Mr. Toporowski offers an estimate of $21,244 in total.

[34] Some of the discrepancy between the defendants' estimate and Mr. Toporowski's is attributable to the shorter time Mr. Toporowski estimates for the trial and for discoveries. In my view, the defendants' estimates in these areas are more realistic.

[35] Also, a significant amount of the difference between the estimates is attributable to the fact that the defendants include expenses of $18,000 for the rebuilding and recovery of e-mails from a server that the defendant law firm used at the time of its services to Mr. Toporowski. When the law firm upgraded to a new server, the transfer of the stored material was incomplete, and a portion of the firm's records, stored only on the old server, remains inaccessible without highly specialized assistance. The defendants submit that the expense of retrieving the e-mails from the server is a necessary part of their preparation in the litigation, because they must review a substantial body of e-mail communications to determine whether or not they are relevant.

[36] Mr. Mason submits that this expense for, to use his words, "exhuming" the defendants' file, is extraordinary in both its magnitude and in its nature, and should not be allocated to the plaintiff in this litigation, particularly since the defendants ought reasonably to have known for some considerable time that the plaintiff's lawsuit was coming.

[37] The evidence before me is not sufficient to allow for a determination of whether the $18,000 expense would, if the plaintiff is unsuccessful in the litigation, likely be assigned to him as the losing party; or rather, would be left with the defendant law firm as reflecting the technological problems of its own chosen system for storage of its client records.

[38] Security for costs will not necessarily be ordered in the full amount of the estimate, even if the estimate is reliable. In particular, the amount of security that I will order will not reflect the full amount of the $18,000 estimated expense for recovery of the e-mails from the server. However, that determination is to be without prejudice to the defendants' position in any subsequent application, or in any future bill of costs, either on an application for further security at a future stage of the proceedings, or after the trial.

ORDER

[39] Before any further interrogatories or discovery, Mr. Toporowski is to post the sum of $20,000 as security for costs, and in any event is to do so within 45 days of today, unless the action is discontinued or otherwise disposed of. If that amount has

not been posted within 45 days, the defendants may apply for a dismissal of the action.

[40] Then, before 14 days in advance of the date scheduled for the start of the trial, Mr. Toporowski is to post a further $25,000 as security for costs. If that amount is not posted 14 days in advance of the trial, the defendants may apply for dismissal of the action.

[41] The defendants will be at liberty to apply for further security, if their actual disbursements exceed the amounts ordered to be posted. If those orders require any clarifications counsel may make submissions.

[42] But I turn briefly to the second component of the application before me, and that is that Mr. Toporowski be required to provide an affidavit in response to an interrogatory dated June 23, 2006. The question asked was “What is the legal description of the property owned by the plaintiff in Alaska?”

[43] Mr. Toporowski has not formally responded, because he says that his interest in property is not relevant to the claims in the action, which allege breach of contract to provide competent legal services; and in any event -- I am not sure whether this is Mr. Toporowski's position or simply my observation: The question has largely been answered by Mr. Toporowski's affidavit in response to the application for security for costs, in that he explained that he does not own property in Alaska. It would therefore be difficult for him to provide a literal answer to the question in the interrogatory.

[44] Counsel may wish to respond to the observations I have made, and I will certainly hear anything further that you may have, on either the order that I have made and whether it requires clarification as to security for costs, or as to the application that Mr. Toporowski provide an affidavit in response to the interrogatory.

[45] **MR. MASON**: My Lady, I just have one question: Does the order mean that if the disbursements exceed the amounts admitted by the defendants, then the defendants have liberty to apply? Or does -- because the order doesn't specifically break down the disbursements. And it probably shouldn't, but I just want to know what the condition or the threshold is for the defendants to return to court for a further application. Or do we just leave that at large and see how things go? I'm not perfectly clear what you meant, because we put -- Toporowski puts -- puts up $20,000 --

[46] **THE COURT**: No, I understand --

[47] **MR. MASON**: Okay.

[48] **THE COURT**: -- what's the issue that you're raising.

[49] **MR. MASON**: Okay. Thank you.

[50] **THE COURT**: And my intent is to leave it unstated. I'll tell you why: The $18,000 expense is not something that Iam reflecting exactly in any way in this order; but it may well be that a court in a further application would take a different view. In any event, there is no requirement that the amount of security ordered match precisely the estimate. And in view of the fact that there may be further

applications, I'd prefer not to the marry the estimate too closely to the order. So I'd prefer to leave the order in the way I stated it, unless both counsel feel that it will cause difficulty.

[51] **MR. MACDONALD**: I think we will be able to sort it out, My Lady. I didn't pick up on something that I should have, which is how many days before trial the posting of the $25,000 is?

[52] **THE COURT**: Fourteen.

[53] **MR. MACDONALD**: Fourteen.

[54] **THE COURT**: Now if both counsel are of the view that the amount of time should be different, if both counsel are of the same view as to how it should be different, I would certainly be prepared to modify that. But --

[55] **MR. MASON**: No, I would just perhaps remind you -- and certainly if you've made your mind up on the number of days, that's fine. But I did ask for 90 days, and I think the cases were of the order of 60 days. But I mean, if you've made your mind up, it's not for me to try and change your mind. I'm just -- my submission was for 90 days for Toporowski.

[56] **THE COURT**: No, I understood that --

[57] **MR. MASON**: Okay. Okay.

[58] **THE COURT**: -- would be the first --

[59] **MR. MASON**: Yes.

[60] **THE COURT**: -- instalment.

[61] **MR. MASON**: Mm-hm.

[62] **MR. MACDONALD**: And just to be clear then, I understand that, in the event that the 25,000 fourteen days before trial is not posted, then there could be an application by the defendants to dismiss. And is that 45 days after, that that $25,000 was supposed to be posted? Just -- just the same term that is, as you have made with respect to the --

[63] **THE COURT**: No. I think I need to go back over this.

[64] **MR. MACDONALD**: All right. Just so I can explain myself, I understand that twenty -- twenty thousand in the event that --

[65] **THE COURT**: All right, can I just outline it again?

[66] **MR. MACDONALD**: Yes.

[67] **THE COURT**: And if it -- if there is a flaw in the sequence, you can certainly let me know: Instalment number one, if I can put it this way, is 20,000, and it is to be posted within 45 days of today. If it is not posted within 45 days, the defendants can apply for dismissal.

[68] Instalment number two will be $25,000, and that is to be posted fourteen days before the scheduled start of the trial.

[69] **MR. MASON**: Oh, I see. So if we set the trial sometime in that initial 45 days, as long as the trial is set --

[70] **THE COURT**: I am assuming --

[71] **MR. MASON**: -- at least 60 days ahead of -- okay.

[72] **THE COURT**: -- that you are not going to have a trial set thirty days from now

[73] **MR. MASON**: I think that's been clear to both of us then.

[74] **MR. MACDONALD**: I think that's safe to say.

[75] **MR. MASON**: Yeah. Okay.

[76] **THE COURT**: So I am assuming -- suppose your trial is to begin on January the 15th, and I doubt that it would even be that soon. Let's say -- suppose it's to begin on July the 15th. Instalment number two is to be posted by July the 1st. And if it is not, there will be leave to apply for dismissal. Now, that clear? Is that problematic?

[77] **MR. MACDONALD**: That's not problematic, I don't think, if that's the term. If it's not posted by that date, then we can apply for dismissal. I don't think it's problematic.

[78] **THE COURT**: Anything else? And I raise also the matter of the interrogatory.

[79] **MR. MACDONALD**: I'm just happy to stand just -- just to get as much clarity as we can. The -- the terms for the further security just in terms of the sequence of the instalments, I take that that would be after the second proposed instalment?

[80] That that's the order in which Your Ladyship has delivered those terms, so I understand that that -- just in terms of the chronology, that's where such an application could be made.

[81] **THE COURT:** No, an application could be made at any time.

[82] **MR. MACDONALD**: Oh, at any time? Okay. At any time. And --

[83] **THE COURT**: So for example, if for some reason discoveries take on a life of their own and go much longer than estimated, there might be a basis for an application.

[84] **MR. MACDONALD**: And throughout the course of the proceedings until the final disposition? That's what -- ?

[85] **THE COURT**: Yes.

[86] **MR. MACDONALD**: Yeah. Thank you. And on the application for interrogatories, I am just a little vague on what the orders were.

[87] **THE COURT**: I have not made an order, but I raise for your consideration how I can make a useful order. The question asked in the interrogatory is "What is the legal description of the property owned by the plaintiff in Alaska?" The answer that the plaintiff has given in an affidavit filed is "I do not own -- I am not a title holder to property in Alaska. My wife is." How can he answer the question that's asked in the -- ?

[88] **MR. MACDONALD**: If the -- if his answer is "The property that I was referring to is the property that I live in and that my wife owns", that's fine with us. Just -- I -- I -- I --

[89] **THE COURT**: But you have that.

[90] **MR. MACDONALD**: I understand -- I understand that. I understand that.

[91] **THE COURT**: Is there a reason in the litigation to -- ?

[92] **MR. MACDONALD**: I don't see a reason, My Lady.

[93] **THE COURT**: I am going to treat that application as withdrawn.

[94] **MR. MACDONALD**: Mm-hm. I -- I think that's fair, at this juncture.

[95] **THE COURT**: Now --

[96] **MR. MASON**: Just one other thing -- two other things, rather: I assume maybe incorrectly, that the further application would be to this court, as you've made the decision. Or could it be to any judge?

[97] **THE COURT**: It could be to any judge.

[98] **MR. MASON**: Any judge? Okay. And I guess there should be no order for costs, because the success was to some extent divided in this application. On this application.

[99] **THE COUR**T: I think costs should be in the cause.

[100] **MR. MASON**: Okay.

[101] **MR. MACDONALD**: Mm-hm.

[102] **THE COURT**: Nothing else?

[103] **MR. MACDONALD**: No, My Lady.

[104] **THE COURT**: Thank you. And I regret the fact that the day that I thought this would proceed smoothly turned out to be the day that we had a fire drill. But I had no way of knowing that.

"H. Holmes, J."
The Honourable Madam Justice H. Holmes