



Heal & Co. LLP LAWYERS

ASSISTING CLIENTS IN THE BUILT ENVIRONMENT

MOTIONS FOR SECURITY FOR COSTS

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Overview

- Security for Costs Motions
- Issues to take into consideration, including:
 - Timing
 - Counterclaim
 - Burden of each party
 - Role of creditors

Overview continued

- Conclude with a brief analysis of recent decisions

What is a Motion for Security for Costs?

- A means for a defendant to ensure that there are funds in place to pay a portion of the defendant's costs of a proceeding, if that defendant is entitled to costs
- Rule 56

What is a Motion for Security for Costs? (cont'd)

- Not addressing 61.06 in this presentation (security for costs on appeal)
- Focus is on motions for security for costs in lien actions
- See also s.131(1) of *CJA*

Leveling the Playing Field

- One of the most compelling arguments to make
- In all likelihood, the lien claimant's lien, and its costs, have been secured for months or years

Leveling the Playing Field (cont'd)

- Unfair to allow a shell corporation to litigate with impunity. Potentially no downside risk to them, only advantages
- The same cannot necessarily be said for the defendant moving party

Leveling the Playing Field (cont'd)

- Use time to your advantage: “the bond posted to vacate the registration of ABC Co.’s claim for lien was posted more than 2 years ago. With the trial estimated to take place in June 2016, by the time this matter is resolved, ABC Co.’s costs will have been secured for nearly 3-1/2 years. Conversely, 123 Ltd.’s costs, which are significant and continue to mount, have no such security.”

Leveling the Playing Field (cont'd)

- Returning the existing security doesn't necessarily level the playing field

Factors

- Discussion of factors to take into account
- Factors and considerations aren't necessarily independent of each other

Counterclaim

- The jurisprudence surrounding counterclaims in lien actions is sometimes misunderstood
- It was never the case that a defendant bringing a counterclaim was disentitled to bring a motion for security for costs
- See *TD Bank v. Szilagyi Farms*

Counterclaim (cont'd)

- Where the counterclaim is the defence, this is not a basis for using the Rule to seek security for costs
- Costs to complete or rectify deficiencies

Counterclaim (cont'd)

- Exclude the costs of the counterclaim in your draft Bill of Costs for the action
- Be prepared to have your award of security reduced somewhat if there is a counterclaim

Burden of Each Party

- Fit within one of the categories of Rule 56.01
- Onus is on the moving party to begin with
- The extent of what it must prove is not defined in actual terms
- Not “proof” of inability to satisfy a costs award, but “good reason to believe”

Burden of Each Party (cont'd)

- Once that burden is met, the onus shifts to the responding party, who must convince the Court that the just order in that case is that security not be ordered
- There are a number of ways to do this
- Unfair to require the Defendant to prove something within the knowledge of the Plaintiff (*737017 Ontario Inc. v. Min-A-Mart Ltd.*)

Burden of Each Party (cont'd)

- The legal principles are summarized in a number of cases (see *Dean's Standard v. Hachem*)
- The financial risk to the the defendant of being unable to make full recovery of a potential costs award must be balanced against the prejudice to the plaintiff if the order is too extreme

Burden of Each Party

- Motion material (Notice of Motion, Affidavit, Factum, Authorities)
- Remember to seek leave under s. 67(2)
- Include Bill of Costs for entire action – actual costs incurred to date, and estimated costs going forward

Role of Creditors

- Factors aren't necessarily independent of each other
- This is one example of potential interconnectedness
- What if the Plaintiff is effectively, if not actually, insolvent?

Role of Creditors (cont'd)

- Do your homework and determine to whom and to what extent the Plaintiff owes others:
 - CRA
 - Union remittances
 - Unsatisfied Judgments
 - Do a Writ Search
 - Other proceedings

Role of Creditors (cont'd)

- In some cases, it is clear that an action is being brought for the benefit of a Plaintiff's creditors
- Is the company still operating? Are there any outstanding receivables? Are there other claims? To whom does it owe money?

Role of Creditors (cont'd)

- If the Plaintiff is successful in the action, where will the money go?
- Garnishments, Requirement to Pay, Writs

Role of Creditors (cont'd)

- The proper test to apply is not whether the creditors are *willing*, but rather *able*, to post security for costs
- If they get the benefit of success, they should bear the risk of failure

Timing of Motion

- Not an easy determination
- Bringing the motion earlier avoids arguments regarding delay
- However, a more fulsome record on the merits can be helpful if the Plaintiff's claim isn't particularly meritorious (claims for extras with no written approvals, shoddy work, considerable costs to complete and/or rectify)

Timing of Motion (cont'd)

- What if the Plaintiff alleges delay is an abuse of process?
- Consider your motion in the context of the overall purpose of the CLA and the Reference rules

Timing of Motion (cont'd)

- *Univac Management v. CNR*
- *Livent v. Deloitte*
- *Pelz v. Anderson*
- Streamlined and cost-effective procedures

Timing of Motion (cont'd)

- Highlight, if true, that the Plaintiff's impecuniosity is for reasons other than because the Defendant hasn't paid them (other projects where unpaid, 90% of contract balance was actually paid – claim is a claim for extras, evidence of funds being diverted to other projects)
- This requires an assessment of the merits of the case

Timing of Motion (cont'd)

- Where does the motion fall in the context of the action? Other procedural steps? Date of Reference? Pre-trials and other orders made? When were the relevant factors to the motion readily apparent?
- Level of complexity of matter
- Address prejudice

Anything Else?

- Take a step back and look at the motion as a whole. What else might be helpful?
- If the motion will help promote settlement, or a pre-trial resolution of the action, say so

Anything Else? (cont'd)

- “If the Court decides that security for costs is warranted, then the Court may not circumvent its duty by ordering only a “token amount” (*O’Neil v. Leroux*)
- That said, the Court has wide discretion to fashion an appropriate order

The Order is granted. What now?

- If ordered, posting of security may be staged, depending on when motion is brought
- If the Plaintiff fails to post security, the action is stayed (Rule 56)

The Order is granted. What now? (cont'd)

- Consider a motion to strike the claim and discharge the lien
- Seek the delivery up for cancellation of the security posted to vacate the registration of the claim for lien

Recent Decisions

- *North Key Construction v. Black & McDonald* (unreported)
- *Adamson Systems Engineering Inc. v. 1173371 Ontario Ltd.* [2013] O.J. No. 3579 (S.C.J.)

References

GTA Structural Steel Ltd. v. 20 Ashtonbee Holdings Ltd., [2005] O.J. No. 4999 (S.C.J.) (Ont. Master) [motion must be either necessary or would expedite the resolution of the matters in dispute]

Biotechnik Inc. v. O'Shanter Development Co., [2003] O.J. No. 1633 (S.C.J.) (Ont. Master) [motion is “necessary” to do procedural justice to both parties]

References (cont'd)

Adamson Systems Engineering Inc. v. 1173371 Ontario Ltd., [2013] O.J. No. 3579 (Master) [counterclaim imported new and complex issues]

Dean's Standard Inc. v. Hachem, [2014] O.J. No. 1463 [summary of legal principles]

References (cont'd)

Design 19 Construction Limited. v. Marks, [2002] O.J. No. 1091 [where creditors stand to benefit, they should also accept the burdens]

O'Neil v. Leroux, [2011] O.J. No. 2892 (S.C.J.) [a Court should not order only a token amount of security]

References (cont'd)

Smith Bus Lines v. Bank of Montreal (1987),
25 C.P.C. (2d) 255 (Ont. H.C.)
[impecuniosity exception]

*Hallum v. Canadian Memorial Chiropractic
College* 70 O.R. (2d) 119 (H.C.J.) [2 part
test]

References (cont'd)

Websports Technologies v. Cryptologic Inc.
(2004) [2003] O.J. No. 5455 (Master)
[involves something more than a hunch or concern. Need genuine evidence based on proven facts]

737017 Ontario Inc. v. Min-A-Mart Ltd.
[1996] O.J. No 1173 [unfair to require the Defendant to prove something within the knowledge of the Plaintiff]

References (cont'd)

City Commercial Realty Services v. Bakich [2005] O.J. No. 6443) (C.A.) [if the moving party has not shown good reason to believe Plaintiff has an insufficiency of assets, the burden does not shift]

D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp. (1996) 4 C.P.C. (4th) 198 (Ont. Gen. Div)[where creditors of the plaintiff can obtain security, impecuniosity cannot be a bar to an order]

References (cont'd)

City Paving Co. v. Port Colborne (City) (1985), 3 C.P.C. (2d) 316 (Ont. Master) [the quantum and mode of payment are matters for the Court's discretion]

Livent Inc. (Receiver and Manager of) v. Deloitte & Touche [2011] O.J. No. 1660 (Master) [a Court may order security for costs despite appointment of Receiver]

References (cont'd)

Unimac – United Management Corp v. CNR,
2015 ONSC 2372 (S.C.J.) (Ont. Master) [where
delay in bringing motion]

Pelz v. Anderson, 2006 CarswellOnt 7482
(S.C.J.) (Ont. Master) [grounds for refusal to
order security]

Design 19 Construction Ltd. v. Marks [2002]
O.J. No. 1091 (S.C.J.) [it is proper for the Court
to consider whether the creditors of the Plaintiff
can be called upon to post security]

Questions?