
CANADA / JUDGMENT

Devocht v. Hallgren

2015 BCSC 149

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 149 Devocht v. Hallgren

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Devocht v. Hallgren,

2015 BCSC 149

Date: 20150203

Docket: S62097

Registry: Nanaimo

Between:

Barry Grant Devocht, Joy Morine Devocht,

Hyung Min Chung, Jung Ja Lee and

Good People Estates Ltd.

Plaintiffs

And

Marvin W. Hallgren, Peter G.V. Faulkner and

Hallgren & Faulkner Law Corporation

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiffs, Devocht, and

Good People Estates Ltd:

R.J. Dumonceaux

Counsel for the Defendants:

S.G. Cordell

Place and Date of Trial:

Nanaimo, B.C.

October 3, 2014

Place and Date of Judgment:

Nanaimo, B.C.

February 3, 2015

- [1] In this proceeding, the plaintiffs Barry Devocht, Joy Devocht (the "personal plaintiffs") and Good People Estates Ltd. ("Good People") seek damages for solicitor's negligence arising from their acquisition of development property in Jordan River, BC. These reasons concern the defendants' application to require the three plaintiffs to post security for costs in the amount of \$150,000 before proceeding with this damages action.
- [2] The plaintiffs Hyung Min Chung ("Chung") and Jung Ja Lee ("Lee") have assigned their claims to the personal plaintiffs and have filed discontinuances of their claims in this proceeding.

Background

- [3] On June 7, 2006 the plaintiffs Barry Devocht and Chung agreed to purchase Lot 1 Trailhead Drive (the "land") from Totangi Forestry Ltd. with the intention of subdividing the land into strata lots and constructing residences for resale. Their plan was to separate the lands into three phases and proceed with development and construction of six strata lots comprising the first phase of the project.
- [4] When the plaintiffs entered into the contract of purchase and sale of the land (the "contract"), there was an existing statutory building scheme registered against the title. There was an addendum to the contract making their agreement "subject to the buyers and seller agreeing as to the plans and construction of buildings the buyers plan to build by July 31, 2006". On July 31, 2006 the parties removed this subject clause.
- [5] At the same time the vendor and purchasers added a new subject clause to the contract stipulating that the contract was "subject to the seller and buyers agreeing to the form and content of the restrictive covenant that is to be placed on title at completion to replace the building scheme that is currently on title by August 20, 2006".

[6] On August 22, 2006 Mr. Faulkner was retained to act for the personal plaintiffs in the acquisition of the land. On August 29, 2006 Mr. Faulkner received a copy of the contract and on August 29, 2006 he received confirmation that the restrictive covenant mentioned in the contract had been removed.

[7] On September 1, 2006 Mr. Faulkner received the signed addendum.

[8] On July 28, 2006 the parties executed a letter of understanding in the following terms:

It is the intent of the developer to place a restrictive covenant at completion, on Lot 1 Trailhead Drive, to replace the building scheme that will be removed from title at completion. The restrictive covenant will allow the building of the lodge and cabins approximately as shown on the revised plan of the lot done by West Coast and Designs LTD, dated July 17, 2006 and will allow the lot to be used for tourist commercial as discussed.

[9] On September 1, 2006 the parties entered into another addendum to the contract (the addendum) that included the following terms:

- (a) the seller agreed not to require the buyer to comply with the terms of the existing statutory building scheme ("SBS") but rather would allow the buyer to develop the property in accordance with the provisions of the modified building scheme attached as Schedule A (the "modified SBS");
- (b) if the buyer did not develop the property in accordance with the modified SBS, the seller, at its option, was entitled to require the buyer to comply with the existing SBS without any claim by the buyer against the seller for cost charges or expenses; and
- (c) if the buyer did not complete the purchase of the property as contemplated in the contract of purchase and sale, or transferred their interest in the contract, then the agreement to permit the buyer to develop the property in accordance with the modified SBS became null and void and of no effect.

[10] Good People was incorporated September 1, 2006. The personal plaintiffs are the sole officers and directors of the company.

[11] The completion of the contract of purchase and sale was October 20, 2006.

[12] In November 2006 Mr. Hallgren was retained to incorporate Good People and transfer title of the land to Good People and to prepare a disclosure statement to allow for the interest in the land to be sold. Good People was organized and the property transferred to it but no disclosure statement was prepared. Mr. Devocht was having trouble obtaining financing and was uncertain about the legal structure he wished to use for development of the land.

[13] The sale of all of the land to the personal plaintiffs completed without the registration of the modified SBS as contemplated in the September 1, 2006 amendment. By not registering the modified SBS before sale of the lot to the buyers (Barry Devocht and Chung), the vendor lost the ability to amend the SBS without obtaining consent of others who might have been

affected by that instrument. Some of the other persons with an interest in the development of the property declined to consent to filing the modified SBS, and in the end, the plaintiffs were required to obtain court approval to modify the SBS.

- [14] The plaintiffs obtained tentative financing for the development project from Canadian Western Bank ("CWB") for up to \$1 million. One condition of the CWB financing required the plaintiffs to have invested \$300,000 in equity. Another condition was that the plaintiffs were obliged to obtain a minimum of \$630,000 in bona fide pre-sales and to deliver copies of those agreements to the lender. The purpose of the loan was to assist in the construction of six strata homes.
- [15] The plaintiffs' mortgage commitment contained a term that the pre-sales were to be "arm's length" transactions.
- [16] In November 2007 Mr. Hallgren was retained a second time to prepare the disclosure statement. In December 2007 Mr. Hallgren advised Mr. Devocht about the presence of the SBS on title. Mr. Hallgren asserts that Mr. Devocht told him he would look into it himself.
- [17] On January 21, 2008, the Superintendent of Real Estate accepted Good People's disclosure statement for filing. Mr. Devocht head reviewed and approved the disclosure statement appending a copy of the SBS on title. In January 2008 Good People retained Mr. Hallgren to assist in completing the necessary steps to obtain financing from the CWB.
- [18] In the summer of 2009 Good People retained Mr. Hallgren to assist in filing the strata plan with respect to the property. In June 2009 Good People retained another law firm to assist.
- [19] On December 18, 2008 the corporate plaintiff entered into a contract to sell Lot 3 to Lindsay Salzl ("Salzl"). Salzl was to deliver a \$20,000 deposit. There was a completion date for this purchase of March 6, 2009, but construction of the unit was not complete by this date. Salzl extended the completion date of her purchase to April 10, 2009 but her unit was not ready by that time and her mortgage commitment expired April 16, 2009. In the end she did not purchase a unit and on August 13, 2009 Salzl's deposit was returned to her and the contract ended.
- [20] On March 19, 2009 Good People entered into two separate contracts of purchase and sale for lots, each for \$319,900; one sale was to Chungho Kim ("Kim") and the other to Younghok Park ("Park"). Kim and Park were to deliver a \$10,000 deposit each.
- [21] The completion date for the sales to Kim and Park was August 15, 2009; both purchasers extended their completion dates to September 4, 2009. It is apparent from the material that the plaintiffs lent the deposit monies to Kim and Park. Neither Kim nor Park completed on their purchases and sometime later Park made an assignment into bankruptcy.

- [22] The court order amendment to the SBS was obtained August 6, 2009. The plaintiffs allege that the delay in obtaining the order resulted in delays in completing on pre-sales, which resulted in the prospective buyers refusing to complete their purchases of the developed lot, which in turn caused a complete collapse of the project and the plaintiffs' losses.
- [23] The plaintiffs claim damages by reason of the defendants' failure to advise of the consequences of taking title to the land without the registration of the modified SBS. Their notice of civil claim includes the following:
32. As a result of the failure of the defendants or any of them, to ensure registration of the amended building scheme on September 1, 2006, the plaintiffs or any of them have been put to costs and expense, particulars of which include but are not limited to:
 - (a) inability to complete the sales of strata lots as a result of the rejection of the registration of the strata plan by the Land Title Office, causing the loss of three purchase and sale transactions, and causing increased interest, principal and other payments;
 - (b) legal fees and expenses to make application to the Supreme Court to register the amended building scheme on title to the property;
 - (c) inability of the defendants or any of them to keep payments to subtrades current as a result of the loss of the sales;
 - (d) inability of the defendants or any of them to keep their obligations to their mortgagee, Canadian Western Bank current;
 - (e) the costs and expenses of the foreclosure proceeding arising therefrom, as a result of the loss of the sales;
 - (f) because of the foreclosure proceeding, inability of the plaintiff to obtain financing to complete three strata units which were only partially completed at the time of original submission for registration of the strata plan in April, 2009;
 - (g) loss of reputation of the plaintiffs and the strata project, resulting in greater difficulty selling units, lower prices being offered than the original three sales, and inability to properly market the project due to inability to complete unfinished units and incompleting landscaping;
- [24] The plaintiffs alleged that the delay between April 2009 and August 2009 in obtaining court approval of an amended SBS also contributed to their inability to obtain increased bank financing. The plaintiffs' lack of funds in addition to loss of pre-sales led to the eventual collapse of the entire project. The plaintiffs lost the lands in foreclosure brought by CWB.

- [25] The plaintiffs argue that if they had been properly advised, they would not have entered into contract terms that contemplated an amendment to the SBS; they contend they would have insisted on registration of the modified SBS before paying for the land. If the modified SBS had been in place, the plaintiffs would have met CWB mortgage requirements and the plaintiffs would have secured pre-sales of two lots for an expected purchase price of \$666,000.
- [26] The defendants argue that the collapse of the overall plan of the plaintiffs to develop the land into their strata properties with residences failed because they did not have the financial resources to prosecute the development. Furthermore the Park and Kim agreements were not arm's length and the plaintiffs would have been deemed in breach of the mortgage commitment. The defendants contend that the plaintiffs had attempted to defraud CWB into advancing a portion of the loan proceeds without having secured bona fide offers to purchase.
- [27] Nevertheless, in April 2009 the plaintiffs were short of money; they were desperate to find as little as \$600 to pay for hydro installation work. The Salzl transaction had expired and the Kim and Park agreements were extended to September 4, 2009, well after the court order was obtained on August 15, 2009.
- [28] This proceeding was commenced with a notice of civil claim filed January 28, 2011. Between February and July 2011 the parties exchanged requests for documents and engaged in settlement discussions. Those discussions ended July 14, 2011 and in January 2013 the plaintiffs retained new counsel who communicated a new settlement proposal. In September 2013 the plaintiffs retained Mr. Dumonceaux to represent them in this proceeding. In December 2013, he advised defence counsel that he did not act for Chung or Lee.
- [29] Motivated by concerns about the plaintiffs' impecuniosity and the costs they will incur in this litigation, on June 16, 2014 the defendants filed this application seeking an order that the personal plaintiffs and Good People be required to pay security for costs in an amount of \$150,000.
- [30] There is no issue on this application that the defendants have not applied for a security costs order in a timely way.

The Plaintiffs' Resources

- [31] The defendants' investigation of Good People's financial circumstances reveals that it owns no real property in British Columbia. The defendants performed searches of the registry kept under the Personal Property Security Act, RSBC 1996, c. 359; this revealed evidence of registrations encumbering any other assets owned by the company but no other assets were found in the name of the company.

- [32] The title to the land was foreclosed and the plaintiffs have no continuing interest in the development.
- [33] The defendants' investigation discloses that the personal plaintiffs own a home in Victoria with an apparent value of \$405,500, against which there are mortgages registered with a principal amount of \$367,500 securing current and running accounts. The defendants rely on a 2014 BC Assessment Authority web query for this information.
- [34] There is an issue concerning the use of assessment information as evidence of value. In *Dosanjh v. Liang*, 2015 BCCA 18 [Dosanjh] Groberman J.A. recently considered this question:
- [62] It seems to me that different considerations arise in non-family cases, where one party or the other will generally bear the onus of producing evidence of property value.
- [63] It is not necessary, in this case, to make any pronouncement as to the scope for admission of property assessments as evidence of property value in family law cases, and I will refrain from doing so. In my view, however, there is, absent agreement, no scope for using assessments in place of expert opinion evidence in cases such as the present one.
- [35] *Dosanjh* involved a situation where a real estate transaction failed to complete due to the vendor's repudiation of the contract. The purchaser accepted the repudiation and sought damages. BC Assessments was used to establish damages. In my view, in light of this authority, if the value of assets available to answer for costs judgments is in issue, the evidence must be in the form of admissible opinion evidence.
- [36] Mr. Devocht was recently employed in Alberta in carpentry but in his bankruptcy filing indicates he has no income. He has been unemployed since August 2014. Mrs. Devocht is employed as a teacher and earns \$4,091 per month. The parties are supporting one adult child.
- [37] The personal plaintiffs have made consumer proposals in bankruptcy which have not been accepted or rejected by their creditors. Apparently a further meeting was contemplated.
- [38] Mrs. Devocht has claimed her RRSP savings as exempt under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. Both individuals have claimed as exempt some of their motor vehicles, Mr. Devocht's tools, and their interest in the family home.
- [39] The personal plaintiffs propose to pay \$25,046 for the benefit of their unsecured creditors, whose claims total \$136,165. This proposal includes an immediate payment of \$20,000 followed by 58 monthly instalments of \$87 per month. They propose to use \$663 per month from their income to pay secured creditors totalling \$399,175.
- [40] I note that if the proposal is rejected or the personal plaintiffs breach any commitment in their proposals, then the personal plaintiffs will become bankrupt. The BIA provides:

Result of refusal of proposal

57. Where the creditors refuse a proposal in respect of an insolvent person,
- (a) the insolvent person is deemed to have thereupon made an assignment;
 - (b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- (b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

The Defendants' Position

- [41] The defendants estimate their taxable costs and disbursements through to the conclusion of a trial in this proceeding as \$152,819. The plaintiffs do not take any issue with this estimate. Document production is incomplete and the defendants do not have accounting evidence, a list of all witnesses, or the steps necessary to obtain evidence. The defendants argue that "in all of the circumstances" it would be just to order security for costs at \$150,000 as against the corporate plaintiff and personal plaintiffs.
- [42] The defendants argue that the plaintiffs' claims are weak and conversely their defence is strong.
- [43] They contend:
- (a) Mr. Devocht does not deny he was advised, at the time of purchase, that the SBS remained on title or that he was told that the SBS would have to be removed from title before registration of a strata plan;
 - (b) there was no evidence that pre-sales were lost because of the three month delay in registering a strata plan; they collapsed for other reasons. Even if they were at arm's length, the Kim and Park pre-sale contracts were ratified and extended to September 4, 2009 so they were contractually bound to complete after the three month delay but were released from their contracts by the plaintiffs;
 - (c) the Salzl pre-sale did not complete because construction was slow and her mortgage commitment had expired; and
 - (d) the evidence does not suggest that the three month delay in registering a strata plan affected any CWB funding.
- [44] The defendants argue that the possibility that the plaintiffs will be deterred from pursuing a claim is not, without more detailed evidence, sufficient reason for not ordering security for costs. They contend that a plaintiff must first demonstrate that they have no way of raising funds to continue litigation if an award of costs is made against them; in this case they say the plaintiffs have failed.
- [45] The defendants point to a carefully worded affidavit by Mrs. Devocht in which she said:

I confirm that I do not have access to any other line of credit or credit cards, from which I could draw funds to pay money into court as security for costs.

[46] Mr. Devocht deposed in his affidavit:

The consumer proposal lists accurately all the assets I own and I confirm that I do not have access to any other line of credit or credit cards, from which I could draw funds to pay money into court as security for costs.

[47] Neither of the personal plaintiffs has addressed the possibility of obtaining other financial assistance from family or friends or other bank loans. They seem to have found money from an outside source to help in making their proposal payments. Earlier in 2014 the parties managed to obtain an increase in their mortgage debt, part of which is also to be used to fund their bankruptcy proposal.

[48] Neither plaintiff deposed that an order for security for costs would stifle the litigation. Neither plaintiff described any efforts they have made to obtain financial assistance. Their comment on this point was limited to their assertions that they are unable to access further credit card debt or lines of credit.

[49] The defendants argue that if the court refuses to order security posted by the personal plaintiffs, this should not influence the decision to order the corporate plaintiff to post security. The defendants point out that corporate plaintiffs are treated more harshly when it comes to security for costs orders, the policy reason being that the individuals behind a corporation face less risk in pursuing litigation because they are protected by the corporate veil: *Krupp v. Swansea Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252 (C.A.) [Kropp]. The defendants argue that the less stringent test should continue to apply to the corporate plaintiff in this case, notwithstanding the suggestion in *Hawksview Enterprises Ltd. v. British Columbia Hydro and Power Authority*, 2014 BCSC 226 [Hawksview] that the more stringent test generally applied to individuals may be applied to corporate plaintiffs when an individual and corporate plaintiff are both alleging the same cause of action and damages. The defendants argue that *Hawksview* is distinguishable or wrongly decided and is inconsistent with the decision in *Kropp*.

[50] The defendants argue that the less stringent test also applies to Good People because the pleadings in this case do not discriminate between interests of each of the corporate and personal plaintiffs' interests, nor is it clear whether the personal plaintiffs suffered any damage. The CWB financing was offered to Good People subject to the personal plaintiffs providing a personal guarantee.

The Plaintiffs Position

[51] The plaintiffs contend that the court's discretion to order security for costs against individuals is limited to special circumstances, sometimes described as egregious circumstances.

- [52] They argue that the less demanding test applicable to security for costs applications concerning corporation's proceeds from the assumption that the individuals behind the corporation face little risk in pursuing the litigation. The underlying policy is to protect the community against the abuse created when an artificial person is manipulated by a natural person. In this case they suggest that because the personal plaintiffs will be jointly liable with the corporate plaintiff, the policy directed against limited liability corporations avoiding costs is not engaged.
- [53] The plaintiffs rely on *Hawksview* for this submission, where the court indicated that applications for security for costs addressed to personal and corporate plaintiffs alleging the same cause of action and damages should not notionally be subdivided between individuals and corporations. The more stringent principles of the test generally applied to individuals should apply to each plaintiff in this case, notwithstanding the general rule that corporations will be treated less stringently.
- [54] The plaintiffs point out that the defendants recognize that to obtain an order for security against a corporation might stifle the action because the plaintiffs have no assets or means of raising money for security.
- [55] The plaintiffs contend that their current financial difficulties have been contributed to by the negligence of the defendants; this factor should weigh heavily against an order for security for costs.
- [56] The plaintiffs submit that they have a compelling case against the solicitors. Mr. Devocht denied any sophistication in the land development business. He denies being advised by his solicitor that the land was not ready for development because the statutory building scheme could not be modified without court order. That order was not obtained until August 6, 2009 at which point all of the pre-sales previously negotiated by the plaintiffs had collapsed.
- [57] The plaintiffs contend that any order for security will result in a dismissal of the claim. They are currently under a bankruptcy proposal and are attempting to achieve an agreement to pay creditors \$25,000 in satisfaction of more than \$500,000 consumer debt.
- [58] In the absence of any certainty that the statutory building scheme would be approved, the viability of the development was at risk. They contend that the financial collapse of the project and their inability to fund this litigation is a direct consequence of the failure of the real estate development contributed to by the negligence of the defendants. Thus, it would be inappropriate to require them to post security.

The Law

- [59] There are three issues to be decided on this application. I will consider:
- (a) what test for granting security for costs should apply to the corporate plaintiff;
 - (b) whether an order for security for costs should be made against the personal plaintiffs; and

(c) whether an order for security for costs should be made against the corporate plaintiff.

[60] The power to order a corporate plaintiff to post security for costs is a function of the court's inherent jurisdiction and the statutory provisions of the Business Corporations Act, S.B.C. 2002, c. 57 [Act]. Section 236 of the Act provides:

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

[61] The principles underlying security for costs applications were settled in Kropp. The court described the principles from Keary Development v. Tarmac Construction, [1995] 3 All E.R. 534 as a useful summary of the applicable guide to considerations under the Act. They include:

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 evidence, 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.

[62] At the outset, the applicant must prove a prima facie case that the plaintiff company is unable to pay the applicant's costs if the claim fails. If the applicant meets this evidentiary burden, then the plaintiff company may be relieved of the burden of security if it can show it has sufficient eligible assets to satisfy an award for costs or if there is no arguable defence to the claim: Integrated Contractors Ltd. v. Leduc Development Ltd., 2009 BCSC 965; Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress (1999), 36 CPC (4th) 266 (B.C.S.C.).

- [63] Once the applicant has proved a prima facie case that the plaintiff does not have exigible assets, the burden to prove the existence of such assets shifts to the plaintiff. Absent such evidence the general rule is to order security for costs unless there is no arguable defence: *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 76 B.C.L.R. (2d) 231 (C.A.) [Fat Mel's] at para. 16.
- [64] There is no rule of court governing when an order should be made for security for costs against an individual; it is entirely within the court's discretion and inherent jurisdiction: *Han v. Cho*, 2008 BCSC 1229 [Han].
- [65] Natural persons will not ordinarily be required to post security for costs unless some egregious or extraordinary circumstances merit such an order. This aspect of the application requires a balancing of the interests of justice between the parties in an effort to ensure that the substance of the dispute is properly litigated and the personal plaintiffs are not deprived of access to the court due to impecuniosity: *Han*.
- [66] Special circumstances that may justify cost security orders against personal plaintiffs include the fact that the plaintiff has failed to pay other cost orders. The categories of behaviours that might warrant a security for costs order against individuals is not closed, but it is clear that impecuniosity is not a basis for ordering security from an individual: *Deepak Suri Ltd. v Urban Choice Market Ltd.*, 2013 BCSC 2460.
- [67] The court may consider the merits of the plaintiff's claim but should avoid a detailed analysis of those merits unless failure appears obvious. The onus of proving the absence of an arguable defence is on the plaintiff: *Fat Mel's* at para. 236.
- [68] The cause of action in and of itself is not an asset that can be relied upon by the plaintiff to resist an award of security for costs: *Malahat Marble Products Ltd. v. Anderson* (1955), 14 W.W.R. 697 (B.C.C.A.) at p. 698.
- [69] The court will not order security if such an order would unfairly stifle a valid claim: *Kropp* at para. 17. Where financial hardship is due to the actions of the applicant in the case, an order may be refused.
- [70] In this case, the defendants have met their burden of demonstrating that Good People has no exigible assets and will not be able to pay any order for costs from assets currently owned if the action fails.

The Test to Apply to the Corporate Plaintiff

- [71] In this case, I am not satisfied that the circumstances warrant a departure from the principle outlined in *Kropp* that different considerations apply to corporations resisting security for costs applications. The court said:

[24] So I am respectfully of the view that the learned chambers judge erred in finding that the corporate plaintiff would be prevented from pursuing its claim if security were to be ordered. And it would, in my view, be contrary to the principles enunciated above to refuse security on the grounds that the corporate plaintiff would "have difficulty" in pursuing the action if security for costs were to be ordered. It seems likely, as the defendants contend, that the learned chambers judge failed adequately to distinguish between the position of Mr. Kropp as a natural person, and the corporate plaintiff as an artificial legal entity. I think this is entirely understandable, given the failure to distinguish in the statement of claim between the claims of the two plaintiffs.

[Emphasis added.]

[72] In my view the situation of the corporate plaintiff is distinguishable from the circumstances described in *Hawksview*. In that case, the corporate plaintiff owned a home in which the personal plaintiffs resided; the home was allegedly damaged by the defendants and the corporate plaintiff and personal plaintiffs jointly advanced an identical claim against them. The court applied the more stringent test generally applicable to individuals and declined to order security for costs against the corporation.

[73] I am cognizant of the approach taken by Holmes J. in *Hawksview* where she said:

[15] True, Mr. Cruickshank as one of *Hawksview*'s officers and co-owners, enjoys the protection of *Hawksview*'s corporate veil in relation to *Hawksview*'s own liability. However, along with Ms. Hicks, Mr. Cruickshank pursues the action also in a personal capacity. The fact that *Hawksview* is also a plaintiff in the action does not reduce Mr. Cruickshank's and Ms. Hicks's personal exposure to risk in the litigation as individual plaintiffs.

[17] Similar reasoning leads me to conclude that the defendants applications in this case should each be determined as a whole, according to the test generally applied in relation to individual plaintiffs. The applications should not be notionally subdivided and determined, in relation to *Hawksview*, according to the less demanding test applied in respect of corporate plaintiffs.

[18] As I have indicated, the evidence discloses no special circumstances to support the orders sought. On its face, the plaintiffs have a reasonable claim against all of the defendants. In my view, this is not the appropriate context in which to determine the merit of the claim against the Dickson defendants in the detail necessary for a determination of whether, as those defendants submit, the claim is bound to fail; the acknowledgement by BC Hydro's Gary Nyrose, in his examination for discovery, that BC Hydro takes full responsibility for identifying and replacing hazardous trees and vegetation, is not necessarily determinative of the Dickson defendants' liability. There is no evidence that the individual plaintiffs are impecunious -- indeed, Mr. Cruickshank deposes that he owns an unencumbered property in Mexico with a value he estimates at approximately \$500,000. Mr. Cruickshank deposes that he has family still living in British Columbia, including his mother, three children, and two grandchildren, and travels "home" to British Columbia on a regular basis. I find no basis

on which to conclude that the plaintiffs have failed to deal appropriately with their financial obligations in the past, or have misconducted themselves in any way. Their claim relates to an event which took place when they lived in B.C., and, on the evidence, it was that event which drove the individual plaintiffs to move to their recreational property outside the country.

- [74] I note the recent case of 603262 B.C. Ltd. v. Eiyom Properties Ltd., 2014 BCSC 2389 in which the court distinguished Hawksview on the basis that on the facts of that case, it was clear that the corporate plaintiff's claim against the defendant was distinct from the individual plaintiffs' claim, and as such the individual plaintiffs faced no personal financial risk from the corporation's involvement in the litigation. In addition there had been no application for costs sought against the individual plaintiffs.
- [75] In the case at bar, while the personal plaintiffs and Good People advance the same cause of action, there is not enough evidence in the pleadings to determine if the claims of the personal plaintiffs and of Good People are the same in the manner contemplated by Hawksview sufficient to merit the application of the more stringent test to both the personal plaintiffs and Good People.
- [76] The land had been transferred into the names of the personal plaintiffs without registering the amended SBS contemplated in the contract. When the land was transferred from the personal plaintiffs to Good People in November 2006, there was no amended SBS in place. Good People alleges that its losses more than two years later occurred because it could not complete sales of its lots with changes to the SBS that were on title from the date it acquired the land. It is unclear which losses are alleged by the personal plaintiffs.
- [77] Either way, the personal plaintiffs are insolvent and at risk of becoming bankrupt soon. They have availed themselves of the BIA to shield some of their assets from creditors. Any order of costs arising from these proceedings would likely force them into bankruptcy; on bankruptcy, any costs payable by the personal plaintiffs will be extinguished. They will, in effect, be gambling on the success of their claims without any risk resulting from a dismissal of their claim. Meanwhile, if the plaintiffs become bankrupt, Good People will not be affected by their changed status and will still enjoy the protection of a limited liability company.
- [78] If Good People's claim fails, the resulting order for costs against Good People will not be payable by the personal plaintiffs because they will be shielded by both the corporate veil and the inevitable bankruptcy proceedings; as well if the personal plaintiffs' claims against the defendants are sufficiently different from Good People's claims such that they will not be jointly liable, the personal plaintiffs will face no personal financial risk from Good People's involvement with the litigation. The defendants will be left without any recourse.

- [79] This speaks to the precise policy reason articulated in Kropp why corporate plaintiffs are treated more harshly in security for costs applications, namely to protect the community against litigious abuses by artificial persons manipulated by natural persons. As Finch J.A. highlights in Kropp, quoting the English decision of Pearson at 535, "one should be slow to whittle away this protection".
- [80] In my view, the principle outlined in Kropp was not diminished by the finding in Hawksview. The facts in this case are distinguishable from those in Hawksview and the principle articulated by Holmes J. has no application to the circumstances before me. The appropriate test to apply to Good People is the one for corporate litigants.

The Personal Plaintiffs

- [81] The personal plaintiffs are insolvent and, in view of their consumer proposals, have no practical hope of paying a costs order if their claim is unsuccessful. I think it is more likely that, if the plaintiffs are unsuccessful, they will become bankrupt soon after as it is unlikely they will be able to continue to meet their proposal obligations and answer to an order for costs of \$150,000.
- [82] The minimal prospects of the defendants recovering costs at the end of this lawsuit are a punishing disadvantage faced by the defendants. There is a tension between an impecunious plaintiff and a legal adversary who is obliged to defend claims with only modest chances of success. Subject to the outcome in the plaintiff's proposal, costs that will accrue between now and trial will be lost to the defendant if the plaintiffs become bankrupt.
- [83] The defendants correctly point out that the plaintiffs did not disclose the financial circumstances of two closely held corporations in which they own shares. The plaintiffs did not disclose the identity of a third party giving them funds to deal with their consumer proposal. Notwithstanding these shortcomings in their financial disclosure, I am not convinced that they should be required to post security. In my view, *Beasse v. Holness*, 2006 BCSC 1265 dealt with circumstances in which the Chambers Judge found the personal plaintiffs to have been less than truthful in their affidavit evidence. This is not the case with the personal plaintiffs in this action.
- [84] I do not accept that this tenuous evidence concerning the personal plaintiffs' circumstances to be untruthful or deliberately misleading. Although they have not addressed some of the usual questions concerning other resources, I am satisfied that this is not an extraordinary or egregious case which would warrant ordering the personal defendants to post security for costs. Insolvency alone has never been a basis for requiring security for costs from personal plaintiffs.
- [85] In the final analysis, the principle of keeping the court accessible to the poorest litigant overrides the risk to more financially robust parties forced to defend claims where costs of a successful defence will not likely be paid.

The Corporate Plaintiff

- [86] In this case, it is my view that the corporation must post security for costs.
- [87] The court has inherent jurisdiction on applications to force a corporate plaintiff to post security for costs. Good People has been shown to own no exigible assets and the defendants have made out their prima facie case that if the corporate defendant is unsuccessful, they will not likely recover their costs.
- [88] There was no promise or undertaking by the personal plaintiffs to pay a costs order against Good People nor is there any evidence that the personal plaintiffs' resources that are exempted from the consumer bankruptcy proposal will not be available to answer for the defendants' costs.
- [89] The plaintiffs have not said or established that an order for security for costs will stifle the corporation's claims in this litigation. The evidence tendered on this point is equivocal at best and insufficient on its face. Their evidence demonstrates that they cannot access any other lines of credit or credit card debt to pay for security for costs. They have not addressed the question of any other sources of money that might be available. They were able to secure \$10,000 from a third party to facilitate their consumer proposal. They expect to pay \$5,046 over 58 months to satisfy their unsecured obligations. At this point, it is unknown whether the consumer proposal is or will be accepted by the creditors.
- [90] In view of the personal plaintiffs' circumstances and the fact that the plaintiffs did not disclose what efforts they had made to secure financial help to assist them, none of the plaintiffs have met the burden of showing that the claim will be stifled if they are required to post security.
- [91] I also find that the defendants have an arguable defence to the claim. On the facts asserted by the defendant, there is compelling evidence that the plaintiffs did not suffer any loss in reliance on the advice of the defendants; did not lose the lands due to the delay in obtaining the August 2009 court order; and may have lost the prospect of additional financing as a result of misleading CWB.
- [92] Further, the pleadings do not assist in informing the court about the distinctions between Good People's claims and the personal plaintiffs' claims. This issue was specifically mentioned by Finch J.A. in Kropp when addressing an application against a corporate plaintiff and a personal plaintiff.
- [93] The plaintiffs contend that their impecuniosity is a direct result of the defendant's negligence in advising them between 2006 and 2009. Their claim identifies the delay in obtaining the registration of the strata plan from April 2009 to August 2009 as the cause of the loss.

- [94] The plaintiffs did not explain why the Kim and Park transactions did not complete in September 2009. There was no evidence to explain the results of their efforts to satisfy CWB and finish their project.

Was the Plaintiffs Impecuniosity Caused by the Defendants

- [95] The plaintiffs contend that their current financial circumstances and inability to pay costs were caused by the defendants' negligence and, as such, an order for security for costs should not be made.
- [96] It is clear that the plaintiffs were in difficult financial straits in March and April 2009. Those shortcomings appear to have contributed to the loss of Ms. Salzl's purchase. The plaintiffs' evidence did not persuade me that their impecuniosity was caused by the defendants' negligence and not unrelated circumstances affecting their financial affairs. I infer that the measure and extent of consumer debt disclosed in their proposal is an indication that other factors adversely impacted their current financial state contributing to their impecuniosity.
- [97] In *Tim Keith Contracting Ltd. v. Richform Construction Supply Company Limited*, 2010 BCSC 1861, Schultes J. dealt with a security for costs application involving a plaintiff with a substantial number of claims and actions. The court's comments are apposite:
- [45] As I said in a previous context in this judgment, the much stronger inference from the number of actions against the plaintiff and the amounts claimed in them is that the plaintiff has been defaulting on its financial commitments to a variety of creditors for reasons that extend beyond its dispute with this defendant.

Conclusion

- [98] I order that Good People post security for costs if it wishes to advance the claims against the defendants.
- [99] The amount of security is a matter of discretion for the Court. In my view, after considering all the evidence and the case authorities before me, Good People must post security in the amount of \$100,000. The security must be posted within 60 days failing which the defendants will be entitled to apply for judgment dismissing Good People's claims.

The Honourable Mr. Justice Armstrong

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