

CANADA / JUDGMENT

Five Pharmaceuticals Labs Ltd. v. Apex Labs Ltd.

2023 BCSC 2602

COURT

Supreme Court of British Columbia

DECIDED

23 March 2023

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2023 BCSC 2602 Five Pharmaceuticals Labs Ltd. v. Apex Labs Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Five Pharmaceuticals Labs Ltd. v. Apex Labs Ltd., 2023 BCSC 2602 Date: 20230323 Docket: S221194 Registry: Victoria Between: Five Pharmaceuticals Labs Ltd. Plaintiff And: Apex Labs Ltd. and Tyler Powell Defendants Before: Master Harper Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: W.E. Pedersen Counsel for the Defendant Apex Labs Ltd.: T. Urquhart Place and Date of Hearing: Victoria, B.C. March 23, 2023 Place and Date of Judgment: Victoria, B.C. March 23, 2023

- [1] THE COURT: This is an application for security for costs brought by the defendant Apex Labs Ltd. ("Apex"). Both counsel are very familiar with the legal test. It is set out in several different cases. *Kropp v. Swaneset Bay Golf Course Ltd.*, (1997), 29 B.C.L.R. (3d) 252 (CA), is one of them. There is an arguable defence that is acknowledged on the pleadings. I do not need to say any more about that. Obviously, the case will be contentious.
- [2] The plaintiff is a corporation. There are shareholders. One of them is one of the defendants. The plaintiff itself has no assets. It argues this is because of the defendants stripping the assets away from the company and refusing to carry on with the projects that were agreed to.
- [3] Section 236 of the BC Business Corporations Act, S.B.C. 2002, c 57 applies here. Section 236 states: 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.
- [4] It is clear to me that security has to be given. It is a discretionary order. There is no case that was provided to me in similar circumstances where no security for costs has been provided. It is very typical to make an order for security with leave to reapply for additional security as the case goes along.

- [5] I should say the individual defendant is not represented by Ms. Urquhart. Apex estimates costs through trial of about \$58,000 on the bill of costs provided. The costs estimated through examinations for discovery, including tax, only amount to about \$5,300. In submissions, counsel for Apex said that the document discovery process will be more extensive. I do not know whether examinations for discovery will be longer than usual. I do anticipate, based on what I have heard today and seen, that the document discovery process will be significant, and also that what I view as the catch-all provisions of "correspondence and taking instructions" might be greater than what was put forward in the bill of costs.
- [6] The real crux here is whether, if I order security, it would prevent the case from being heard or, in other words, as per *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, (1999), 36 C.P.C. (4th) 266 (B.C.S.C.) at para. 21, "prevent justice from being done."
- [7] I agree with counsel for Apex that there is insufficient evidence that the plaintiff's shareholders cannot raise funds. I do not think that an order for security for costs will prevent justice from being done. And I think this is one of those cases where an estimate of costs for at least the initial stages is appropriate. I do not think a nominal order for costs will do any good because Apex would then be back in court seeking more costs as the case goes along. It is better to pick a number that adequately assesses the stage of litigation, and the fact that at least the plaintiff, as a corporation, is impecunious (setting aside its shareholders' ability to raise funds).
- [8] Anecdotally, the cases tend to come in in about the \$20,000 range. That is more than enough to take the parties through examinations for discovery but probably not through the retaining an expert stage. I would guess that neither party wants to retain an expert until they have had a serious look at their case and have completed their examinations for discovery.
- [9] I think this is a relatively complex case and the bulk of the bill of costs is in the trial time. But I think balancing all of the factors, the number \$20,000 is the number that keeps running through my mind as the appropriate amount for security for costs. I know the cost of litigation. It is high. The bill of costs is really a drop in the bucket when we look at actual legal fees, but it is only the bill of costs that the court will take into account.
- [10] Working from the orders sought in the notice of application, the orders that I am going to make are, first, that the plaintiff post security for the costs of Apex in the amount of \$20,000.
- [11] Next, that the plaintiff's claims be stayed pending the posting of the security.
- [12] Next, if the plaintiff does not post security within 45 days from the date of this order, Apex is granted leave to apply to the court for dismissal of the plaintiff's claims as against Apex.
- [13] Next, Apex shall be at liberty to apply for a further order for security at any time after the completion of the examinations for discovery of all parties -- and I am thinking here of a particular period of time.

- [14] I am digressing to say that I am not in favour of the wording in paragraph 4 of the notice of application, which says "if the security becomes inadequate." That is a debate that I do not think is productive for the parties to have. But in the hypothetical scenario that there might be some foot-dragging with respect to completion of the examinations for discovery, and in an effort to forestall a further application, I am prepared to say "after completion of the examinations for discovery of all parties or a date, whichever comes earlier".
- [15] Counsel's notions of how these matters drag on is different from mine. I have a much faster sense of time. But is it 12 months from now that that it is going to be done? Is it six months from now? I would like you to just pick a number out of the air.
- [16] CNSL W.E. PEDERSEN: Twelve is probably appropriate.
- [17] CNSL T. URQUHART: I think we both agree on 12 months.
- [18] THE COURT: Twelve months. All right. So that is the number I had in mind for leave to reapply for further security after the completion of the discovery of documents and examinations for discovery of all parties or April 1, 2024, whichever occurs first.
- [19] And I will hear submissions on costs. I would expect that it is costs in the cause, but does anybody have a different position?
- [20] CNSL T. URQUHART: No, Your Honour. Costs in the cause would be acceptable to us.
- [21] THE COURT: Mr. Pedersen?
- [22] CNSL W.E. PEDERSEN: Yes. Agreed.
- [23] THE COURT: All right. And so the order, then, Madam Registrar, is costs will be in the cause. "Master Harper"

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