

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Preston
Pronounced in Chambers
February 24, 1994

BETWEEN:

ISAAC HOLDINGS LTD. and AMCANA ENTERPRISES INCORPORATED

PLAINTIFFS

AND:

SUN ALLIANCE INSURANCE COMPANY

DEFENDANT

P.M Willcock
F. Potts

Appearing for the Plaintiffs
Appearing for the Defendant

THE COURT: The plaintiffs appeal from an order of Master Patterson requiring them to post security for costs in the amount of \$48,000.00. The action involves a claim by the plaintiffs for indemnity under a policy of insurance with the defendant.

The plaintiff companies sold leather clothing at a number of retail locations. Their claim against the defendant relates to an alleged theft of inventory from a warehouse maintained by the plaintiffs. The defendant insured the contents of the warehouse. The defendant contends that the claim is fraudulent or exaggerated. It contends, as well, that the policy does not cover the loss.

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The starting point for consideration of an application for security for costs against a corporate plaintiff is Section 229 of the *Company Act*. It provides:

"Where a corporation is plaintiff in an action or other legal proceeding and it appears that the corporation will be unable to pay costs of the defendant, if he is successful in his defense, the court may require security to be given by the corporation for those costs and may stay all proceedings until the security is given."

The plaintiffs concede that they will not be able to pay costs if they are unsuccessful in the litigation and concede, as well, that the defendant has an arguable defense. These concessions establish a prima facie case entitling the defendant to security for costs. The plaintiffs argued before the Master that the relief should not be granted because the defendant had delayed its application until late in the litigation. The oral reasons of the learned Master do not set out a finding of fact with respect to delay. He found, however, that the defendant was entitled to security for costs that had already been incurred as well as costs that are likely to be incurred in the future. An award of security for costs that have already been incurred is inconsistent with a finding that the defendant was guilty of delay in the bringing of its application. Delay by a defendant, while not a bar to an award for security for costs, would, except in very unusual circumstances, be a bar to an award of costs that accumulated

during the period of the delay.

The plaintiffs submit that, because the Master did not specifically find whether there was or was not delay, I should draw the inference that he did not properly instruct himself. I will deal with that in two ways:

1. Counsel agree that the test that I must apply on the appeal before me is whether the Master was clearly wrong in the decision which he made. The Master's reasons were oral reasons. It is often difficult to set out the basis for a complex ruling as completely as one would wish when giving reasons orally. The circumstances of many applications, however, make it impractical to give considered reasons. There was evidence before the Master upon which he could conclude that the defendant did not delay its application for security for costs. Accordingly, I am unable to conclude that he was clearly wrong in reaching the decision that he did.
2. In the event that I am incorrect in that conclusion, I will proceed to examine the evidence before the Master regarding delay. That evidence was canvassed anew before me. It establishes that the manner in which the plaintiffs conducted their business activities was such as to blur the lines dividing one corporate plaintiff from another. The alleged theft took place on July 24th, 1992. This action was

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4 commenced October 16th, 1992. On May 12th, 1993, the
5 plaintiff, Isaac Holdings Ltd., was placed in receivership.
6 On December 30th, 1993, the plaintiffs notified the defendant
7 in an affidavit in answer to interrogatories that the
8 plaintiff, Amcana Enterprises, had no assets. The application
9 for security for costs was filed January 7, 1994. The claims
10 manager of the defendant deposed that "I was not aware of the
11 true state of the financial affairs of the plaintiff, Amcana
12 Enterprises Incorporated, until I reviewed Mrs. Vicram's
13 affidavit (the affidavit filed in answer to the
14 interrogatories)."

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16 The plaintiffs submit that the defendant should have concluded
17 from the information that it had about the manner in which the two
18 plaintiff companies carried on business, that the plaintiff,
19 Amcana, became insolvent at the time that the plaintiff, Isaac,
20 did. The manner in which the plaintiff's business affairs were
21 carried on was unusual. That was the plaintiff's choice, not the
22 defendants. The effect has been to increase the difficulty
23 involved in determining at what point the pre-conditions for an
24 application for security for costs were known to the defendant.

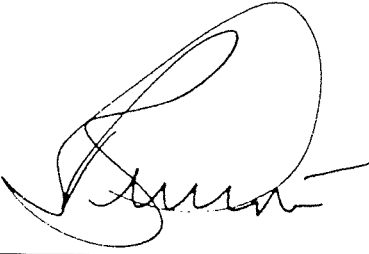
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26 The material before the Master clearly establishes that they
27 were known on December 30th, 1993. It does not establish, on a
28 balance of probabilities, that the conditions were known at an
29 earlier time.
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2 In applications of this nature, the onus is on the plaintiff
3 to show that the defendant was guilty of delay in bringing on its
4 application. On the facts before the Master, I conclude that it
5 did not do so. The plaintiffs raised other grounds of appeal. All
6 but one require that I interfere with the findings of fact
7 expressed or implied in the Master's reasons. In each case, these
8 arguments were made to the Master and he rejected them. There was
9 evidence upon which he was entitled to do so.
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11 The exception is an argument that was advanced before me that
12 was not advanced before the Master. After he ordered security for
13 costs, the Master allowed a companion application of the defendant
14 to add Mrs. Vicram, the principal of the plaintiff companies, as a
15 defendant by way of counterclaim. The counterclaim sounds in
16 fraud. This, the plaintiffs say, removes the foundation for an
17 application under Section 229 of the *Company Act*. The appropriate
18 time to raise that issue was before the Master. I will not deal
19 with it on this appeal. Had it been raised before the Master,
20 there were avenues open to the defendant to meet that submission
21 that are not open to it now.
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23 The appeal from the decision of the Master is dismissed. The
24 defendant is to have its costs of this appeal on Scale 3.
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Mr. Justice Preston