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Security for costs motions

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Introduction

All provincial and territorial jurisdictions in Canada are 'costs jurisdictions', meaning that their rules of court generally require the losing party in a lawsuit to pay a portion of the legal costs of the successful party. These rules are designed to prevent parties from asserting baseless claims or defences and to encourage settlement. However, a plaintiff which is impecunious or which otherwise lacks sufficient assets in the jurisdiction to pay an adverse costs order has no disincentive against bringing a claim, even if the claim has no merit. The plaintiff literally has nothing to lose. The defendant, meanwhile, is forced to defend against the meritless claim without any realistic possibility of recovering any of its legal costs from the plaintiff.

Fortunately, the courts in each Canadian jurisdiction allow the defendant to bring a motion for security for costs, which prevents the plaintiff from continuing to advance its claim until it posts security to satisfy a potential adverse costs award. The plaintiff is required to pay a requisite amount into court pending resolution of the claim, after which – depending on the outcome of the case – the funds are either returned to the plaintiff or used to pay the defendant's costs. Often, an order for security for costs proves to be an insurmountable obstacle to the plaintiff's action, as it often will be unable to raise the funds needed for security. On the other hand, the courts are reluctant to grant motions for security for costs too readily, since it impedes the plaintiff's access to justice and the determination of the case on its merits.

Below is an overview of what the court will consider on a motion for security for costs. For illustrative purposes, this update cites the rules of court in Ontario only, although the principles governing security for costs motions in other Canadian jurisdictions are similar.(1)

Granting security for costs

A defendant to an action can bring a motion for security for costs only after it has delivered its defence (or, in the case of an application, only after the respondent has delivered a notice of appearance).(2)

Rule 56 of Ontario's Rules of Civil Procedure governs the procedures for a motion for security for costs. The defendant has the initial onus of showing that the plaintiff falls within one of the following enumerated categories:

- The plaintiff is ordinarily resident outside Ontario.
- The plaintiff has another proceeding for the same relief pending in Ontario or elsewhere.
- The defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part.
- The plaintiff is a corporation or a nominal plaintiff (ie, a shell corporation), and there is good reason to believe that it has insufficient assets in Ontario to pay the costs of the defendant.
- There is good reason to believe that the action is frivolous and vexatious and that the plaintiff has insufficient assets in Ontario to pay the costs of the defendant.(3)
- A statute entitles the defendant to security for costs.(4)

These categories stem from the concern that the defendant will be unable to recover

any of its costs from the plaintiff in the event that it succeeds at trial.

However, even if the defendant can establish that one of the above categories applies, the defendant does not have a *prima facie* entitlement to security for costs. Instead, as the court held in *Zeitoun v Economic Insurance Group*,(5) the satisfaction of one of the above categories merely "triggers the inquiry". This means that the court will still consider other factors that may assist in determining whether an order for security for costs is just and, if so, in what amount. The court will look at considerations such as the merits of the claim, the plaintiff's financial circumstances and the effect that such an order has on the plaintiff's ability to have the claim adjudicated on the merits.(6)The court may also consider the litigation behaviour of the parties.(7)

Establishing impecuniosity

Plaintiffs can resist an order for security for costs by satisfying the court that the order would not be just.(8) A plaintiff can do so by introducing evidence that either:

- it actually does have sufficient assets in the jurisdiction to satisfy a potential adverse costs order; or
- to the contrary, it is impecunious, but its claim is "not plainly devoid of merit".(9)

It may seem counterintuitive, if not nonsensical, that a plaintiff can defeat a motion for security for costs by pleading impecuniosity when its impecuniosity is precisely the reason why the defendant is seeking security for costs. The court's rationale for permitting this defence is one of access to justice:

> *"Allowing impecuniosity as a defence to a motion for security for costs is grounded on fundamental fairness such that justice demands that a plaintiff should not be deprived of his ability to pursue a meritorious claim because of his poverty. An injustice would be even more manifest if the plaintiff's impoverishment were caused by the very acts of the defendant of which the plaintiff complains in the action."*(10)

However, impecuniosity is something more extreme than merely not having enough assets in the jurisdiction to pay the costs of the defendant.(11) For example, a plaintiff may own assets elsewhere that could be pledged to satisfy the award, or may be able to obtain the necessary funds from other sources.(12) In such circumstances, the plaintiff would likely fail in establishing impecuniosity. Furthermore, in advancing an impecuniosity defence to a security for costs motion, the plaintiff must provide "full and frank disclosure" of its finances, including documentation of income, expenses, assets and liabilities.(13) This includes disclosure of the plaintiff's tax returns and banking records as a matter of course.(14)

If the plaintiff can satisfy the court that it is impecunious, then it merely has to meet the "very low evidentiary threshold" of establishing that its action is not plainly devoid of merit.(15) This involves proving merely that the case is not certain to fail.

Even if the plaintiff cannot establish impecuniosity, the court still has the discretion to dismiss the security for costs motion if it believes that the plaintiff's claim has a "good chance of success".(16) Hence, the degree to which the plaintiff is impecunious, or to which it can show impecuniosity, directly correlates to the level of scrutiny that the court will apply in assessing the merits of the case and determining whether it would be just to grant security for costs to the defendant.

Comment

Many defendants overlook the fact that the satisfaction of one of the enumerated categories is only the beginning of the court's inquiry. In bringing a motion for security for costs, defendants should ensure that they tender evidence not just to substantiate one of the categories of situations where security for costs may be granted, but also to attack the merits of the plaintiff's claim. While defendants can and should respond to a plaintiff's defence of impecuniosity, often this will prove difficult with evidence outside of cross-examination, as the plaintiff's finances often lie solely within its own knowledge. Instead, in order to obtain security for costs, defendants should be prepared to satisfy the court that the plaintiff's claim is devoid of merit.

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Endnotes

(1) All but two Canadian jurisdictions have express rules of court that govern security for costs motions, while those two jurisdictions (British Columbia and Yukon) grant security for costs as part of the court's inherent jurisdiction.

(2) Ontario Rules of Civil Procedure, Rules 56.03(1) and (2). The court also has discretion to order security for costs as a condition of relief at any stage of the proceedings (Rule 56.09).

(3) If the court is satisfied that the action is not plainly devoid of merit, then it also follows that it is not frivolous or vexatious: see *DiFilippo v DiFilippo*, 2013 ONSC 5460 (Master) at para 50.

(4) *Ibid*, Rule 56.01(1). Watson and McGowan, *Ontario Civil Practice 2012* (Toronto: Carswell, 2012) at p1177.

(5) *Zeitoun v Economic Insurance Group* (2008), 91 OR (3d) 131 (Div Ct) at para 45.

(6) *Stojanovic v Bulut*, 2011 ONSC 874 (Master) at para 5, aff'd 2011 ONSC 4632.

(7) *DiFilippo*, *supra* note 3 at para 52.

(8) *DiFilippo*, *ibid* at paras 25-27.

(9) *John Wink Ltd v Sico Inc* (1987), 57 OR (2d) 705 (HC); *Zeitoun*, *supra* note 4 at para 49.

(10) *DiFilippo*, *supra* note 3 at para 30; *John Wink Ltd*, *ibid* at para 5.

(11) Watson and McGowan, *supra* note 2 at p 1178.

(12) See, for example, *Smith Bus Lines Ltd v Bank of Montreal* (1987), 61 OR (2d) 688 (HC).

(13) *DiFilippo*, *supra* note 3 at para 29.

(14) *DiFilippo, ibid.*

(15) *Zeitoun*, *supra* note 4 at para 49.

(16) *Zeitoun*, *supra* note 4 at para 50. See also *Smith Bus Lines*, *supra* note 11; and *Warren Industrial Feldspar Co v Union Carbide Can Ltd* (1986), 54 OR (2d) 213 (HC).