Date: 20010906
Docket: CA 172420

NOVA SCOTIA COURT OF APPEAL
[Cite as: Campbell v. Turner-Lienaux, 2001NSCA122]

BETWEEN:

KAREN TURNER-LIENAUX, SMITH'S FIELD
MANOR DEVELOPMENT LIMITED

Appellants

- and -

WESLEY G. CAMPBELL

Respondent

D E C I S I O N

Counsel: Charles D. Lienaux for the appellants
Alan V. Parish, Q.C. and C. Gavin Giles for the respondent

Application Heard: August 30, 2001

Decision Delivered: September 6, 2001

BEFORE THE HONOURABLE JUSTICE BATEMAN IN CHAMBERS

BATEMAN, J.A.: (in chambers)

[1] Smith's Field Manor Development Limited ("Smith's Field") and Karen Turner-Lienaux have appealed from an Order of Justice Suzanne Hood of the Supreme Court wherein she dismissed their claims against the respondent, Wesley G. Campbell, and awarded costs on a solicitor-client basis. (Decision reported as **Campbell v. Lienaux** , [2001] N.S.J. No. 230 (Q.L.)). In this application the respondent seeks security for costs on the appeal.

BACKGROUND:

[2] In 1989 Mr. Campbell, Charles Lienaux and two other investors agreed to incorporate Berkeley Developments Limited and build a residential retirement home known as "The Berkeley" on lands in Halifax owned by the Lienauxes' company, Smith's Field.

[3] Business relations between Mr. Lienaux and Mr. Campbell soured. In 1993 Mr. Campbell brought an action against Mr. Lienaux, his wife Karen Turner-Lienaux, The Berkeley Developments Limited and Smith's Field. He claimed repayment of certain Berkeley funds disbursed by the Lienauxes to themselves, an accounting by Berkeley Developments and Smith's Field of monies received in the operation of the residence, and damages for his increased exposures on guarantees as a result of unauthorized disbursement of funds by the Lienauxes. He also claimed for the appointment of a receiver under ss. 5(2) and 5(3) of the Third Schedule of the Nova Scotia **Companies Act**, R.S.N.S. 1989, c. 81 as amended.

[4] A receiver was appointed to preserve the assets. Later, on the application of Adelaide Capital, another receiver was appointed and given powers of sale. The Berkeley was subsequently sold because mortgage payments were in arrears and there was no agreement as to refinancing. Following the sale of the property Mr. Lienaux filed for bankruptcy. He has since been discharged. The Berkeley Developments Limited has been inactive since 1990. The remaining defendants to Mr. Campbell's action were Ms. Turner-Lienaux and Smith's Field.

[5] A defence and counterclaim was filed on behalf of Ms. Turner-Lienaux claiming damages totalling $408,000 plus punitive damages from Mr. Campbell for alleged breaches of contractual duties, directors' duties of honesty and care and directors' fiduciary duties. Mr. Campbell successfully applied to the court for leave to discontinue the main action. The

counterclaim remained. It is the trial of the counterclaim that took place before Justice Hood and is now on appeal.

[6] Not only did the trial judge dismiss the appellants' claims at trial, she ordered that they pay solicitor client costs. In this regard the trial judge, in strong language, condemned the appellants' conduct in pursuing unfounded, outrageous and scandalous allegations against the respondent. She found the conduct of the litigation to be oppressive and carried out almost as a vendetta against the respondent. She concluded that Mr. Lienaux, although not a party to the matter, was the driving force behind the litigation. It was her view, however, that he was insulated from an order for costs which she would otherwise have made against him.

[7] There were many pre-trial applications and appeals therefrom over the eight years leading up to the trial. The trial itself consumed 38 court days. The decision exceeds 200 pages. There are 28 grounds of appeal, alleging errors of both fact and law.

PRELIMINARY MATTERS:

(a) Recusal:

[8] Mr. Lienaux, by written submissions filed in advance of this hearing, asked that I recuse myself from the hearing of this application. I decline to do so. In 1993, while a judge of the Supreme Court, I heard an interlocutory application for the appointment of a receiver in this matter. It is Mr. Lienaux's submission that because I made findings of credibility adverse to him on that occasion, there is a reasonable apprehension of bias on my part in this security for costs application. I disagree. I know of no authority for his submission that a judge who has ruled against a litigant in an interlocutory matter, even on a question of credibility, is presumed to be biased and thereafter disqualified from participating in the case.

[9] In any event, it is my view that Mr. Lienaux's credibility is not germane to this application. I have rejected Mr. Lienaux's submission that I enter into a detailed consideration of the merits of the appeal. He is not a party to this action. He appears, not in his capacity as a lawyer, but as corporate secretary for Smith's Field. It is not disputed that that company has no assets or income. The other appellant, Karen Turner-Lienaux, is self represented, although she generally endorses the position taken by Mr. Lienaux for Smith's Field. Mr. Lienaux has filed an affidavit deposing to her financial resources. He assures the court that he has complete and accurate personal

knowledge of his wife's income and assets. Although I have some reservation about Ms. Turner-Lienaux's financial information coming before the court in this way, counsel for Mr. Campbell did not object. It is my view that to the limited extent that I may have to consider Mr. Lienaux's credibility as it relates to Ms. Turner-Lienaux's financial position, my prior connection to this action is not disqualifying.

(b) Consideration of the merits of the appeal:

[10] Mr. Lienaux has submitted that I should delay hearing the matter until the many volumes of evidence from the trial are produced so that I might review them. At a minimum, he says, I should make a preliminary assessment of the merits of the appeal. I advised Mr. Lienaux in a pre-hearing telephone conference that I would not and could not undertake an appraisal of the merits. This is not an application to dismiss the appeal as frivolous or vexatious. Indeed, on an application for a stay of the trial judgment, Oland, J.A. of this Court was satisfied that the appellants had raised "arguable grounds of appeal", at the same time acknowledging the low threshold for so finding (**Campbell v. Lienaux**, [2001] N.S.J. No.273 (Q.L.)). The respondent does not take the position that the appeal is absolutely unsustainable, although asserting vigorously that it is without merit.

[11] In urging me to assess the strength of the case on appeal Mr. Lienaux relies upon the decision of this Court in **Wall v. 679927 Ontario Ltd.** (1999), 176 N.S.R. (2d) 96; N.S.J. No.124 (Q.L.)(N.S.C.A.). There the chambers judge had ordered the plaintiff to post security for costs before trial, in part, because the action was devoid of merit. The order for security would make it impossible for the plaintiff to pursue the action. He appealed. Cromwell, J.A., writing for the Court said, as is relevant here:

> [59] As will be seen, review of these authorities reveals three clear principles which are consistently applied. First, orders for security should not be used to keep persons of modest means out of court. Second, while the merits of the plaintiffs case are relevant and may be considered, they should only be considered on the basis of undisputed facts, the pleadings, etc. and not on the basis of seriously disputed facts or assessments of credibility. Third, consideration of the merits should only be decisive where they are clear and obvious. In short, the law relating to consideration of the merits on interlocutory applications for security for costs is in harmony with the general reluctance to assess the merits of a claim or defence, other than in obvious cases, before trial.

. . .

[66] I conclude that under rules similar to our rule 42.01(1)(f), the standard for merits assessment is somewhat lower than a demonstration that the case is actually frivolous and vexatious. The standard has been equated with "a very weak case bordering on the frivolous and vexatious" and it has been held that the authority to order security on this basis should be exercised only in the clearest of cases. The authorities also suggest that it may often not be reasonably possible to come to any conclusion concerning the merits on an interlocutory application, particularly where the case turns on the credibility of witnesses.

. . .

[82] These cases establish two points. Even where the defendant is prima facie entitled to security, the courts are reluctant to order it if the plaintiff establishes that the order will, in effect, prevent the claim from going forward. As Reid, J., put it in **John Wink Ltd.**, supra, the danger of wrongly destroying a claim is a greater injustice than allowing an unmeritorious claim to go to trial. Equally clear is the impossibility, in many cases, of making a reliable assessment of the merits on an interlocutory application, particularly where the action is complex or turns on credibility. To quote Reid, J., once again in **John Wink Ltd.**:

> "The impossibility of making a proper decision regarding the merits of a claim on insufficient information *should be so obvious as not to require illustration*." [italics is emphasis added in original]

. . .

[83] From this review of the authorities, I reach the following conclusions. The merit of the plaintiffs case is a relevant consideration to the exercise of discretion to grant or refuse security for costs. The extent to which the merits may properly be considered varies depending on the nature of the case. If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. The assessment of the merits should be decisive only where (a) the merits may be properly assessed on an interlocutory application; and (b) success or failure appears obvious. If the plaintiff resists security that would otherwise be ordered on the basis that the order will stifle the action, the plaintiff must establish this by detailed evidence of its financial position including not only its income, assets and liability, but also its capacity to raise the security. Where the order for security will prevent the plaintiff from proceeding with the claim, the order should be made only where the claim obviously has no merit, bearing in mind the difficulties of making that assessment

at the interlocutory stage. Where the choices are, on one hand, allowing an unmeritorious claim to go to trial and, on the other, stifling a possibly meritorious claim before trial, the policy of our law is clear. While there is a risk of injustice on either account, stifling a possibly meritorious claim is the greater injustice. (Emphasis added)

[12] The above comments were addressed to the trial judge's finding that the plaintiff's case lacked merit. **Civil Procedure Rule** 42.01(1)(f), which concerns the granting of security for costs before trial, provides:

42.01(1) The court may order security for costs to be given in a proceeding whenever it deems it just, and without limiting the generality of the foregoing, it may order security to be given where,

(f) upon the examination of a plaintiff it appears that there is good reason to believe that the proceeding is frivolous and vexatious, and that the plaintiff is not possessed of sufficient property within the jurisdiction to pay costs;

[13] It was in the context of the requirements of that **Rule** that the Supreme Court judge considered the merits of the plaintiff's claim.

[14] The **Rule** applicable here is specific to appeals and states:

62.13.(1) A Judge on application of a party to an appeal may at any time order security for the costs of appeal to be given as he deems just.

[15] To succeed under **Rule** 62.13 the respondent need not demonstrate that the proceeding is frivolous or vexatious. Thus the merits of the appeal, in terms of its potential to fail, is not relevant.

[16] It seems to be Mr. Lienaux's submission, however, that because he has a very strong appeal case, even if other factors militate in favour of an order for security for costs, such should not be ordered. He says that it is necessary, therefore, that I engage in the merits appraisal. It is my view, as was recognized by the Court in **Wall**, that an assessment of the merits of a complex case is impossible at an interlocutory stage. At Justice Cromwell noted, such an inquiry should only be based upon undisputed material in the record. On an appeal from a trial judgment which is based upon findings of fact and credibility it is particularly difficult to conduct any assessment of the merits of the appeal. In particular, this record contains little that is undisputed.

[17] I do not say that a merits assessment of a case on appeal should never occur. If, for example, a trial judgment is clearly wrong on a point of law, and the appeal will without doubt succeed on that account, it may be appropriate to

refrain from ordering security for costs if such an order will stifle the appeal. It is my view, however, that only where success on appeal is readily apparent, should a court use the merits to forestall an order for security which would otherwise be appropriate.

[18] I note, as well, that many of the reported cases from other provinces that consider the merits of the appeal on an application for security do so because of the wording of the relevant rule. The appeal rule in several other Canadian jurisdictions mirror our trial **Rule** 42.01(1)(f) and require that a respondent demonstrate not only that the appellant will be unable to respond to an order for costs if unsuccessful on the appeal but also that the appeal is frivolous and vexatious. (See, for example, **r**. 61.06(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194.) However, even in Ontario, where the court is required to decide whether the appeal is frivolous or vexatious it is thought to be inappropriate, on an application for security for costs, to engage in a detailed consideration of the merits (see **Schmidt v. Toronto-Dominion Bank** (1995), 24 O.R. (3d) 1; O.J. No. 1604 (Q.L.) (Ont.C.A.)).

[19] In my view a consideration of the merits is not necessary at this stage, nor would it be appropriate.

ANALYSIS:

[20] It is the respondent's submission that there is no real prospect of him recovering the costs awarded at trial, or those that may follow the appeal. The respondent's solicitor-client costs to the conclusion of the trial approximate $760,000, including disbursements and HST. I assume that some of that amount would be attributable to interlocutory proceedings and appeals in relation to which party and party costs had been awarded before trial. A significant part of that sum, however, relates to the conduct of the trial itself. On that account Mr. Campbell has received the security for costs paid in advance of trial, amounting to about $115,000 with interest. The appellants have made no other contribution to the trial order. A significant balance therefore remains outstanding. Apparently all orders for party and party costs on the many interlocutory proceedings have been satisfied with the exception of those arising from the recent hearing in this court before Oland, J.A., **supra**. Those costs paid total about $28,000.

[21] The corporate appellant, Smith's Field, has no income or assets. The appellant Ms. Turner-Lienaux says that she is without unencumbered assets from which to respond to the trial award, nor can she access funds to post

security. This serves to confirm the respondent's submission that he has no prospect of recovering what he is now due in costs, nor any significant part thereof, even should he successfully defend the appeal. It is a reasonable inference, then, that there is essentially no possibility that the respondent will realize his costs of appeal if awarded. In so observing I am not, at this point, accepting that the appellants have no access to funds, but recognizing that they appear to have no exigible assets to which the respondent could look for recovery.

[22] As indicated above, the governing **Rule** is 62.13 which permits a judge to grant security for costs on appeal "as deemed just".

[23] In **L. E. Powell & Co. v. Canadian National Railway Co. (No. 2)** (1975), 11 N.S.R. (2d) 532 (N.S.S.C.A.D.), MacKeigan, C.J.N.S. noted that prior to 1966 applications for security for costs on appeal were almost always refused where the only ground was poverty of the appellant. The Chief Justice referred to the decision in **Fleckney v. Desbrisay**, [1927] 1 D.L.R. 537 (N.S.C.A.), where it was noted that the spirit of the **Judicature Act** and **Rules** of 1919 was that every litigant, rich and poor alike, have the right to one appeal in every case in which he has a claim. MacKeigan, C.J.N.S. acknowledged, however, that there had been a change in approach to security for costs on appeal. He said:

> 7 By Rule 62.30, *supra*, this Court or a judge thereof, like the English courts, may now order security for costs on appeal in "special circumstances". The basic principle applied by the English courts in cases like the present has been set forth by Bowen, L.J., in *Cowell v. Taylor* (1885), 31 C.D. 34 (C.A.) at p. 38:
>
>> The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow.
>
> Approved in *Pritchard v. Pattison* (1900), 19 Ont. P.R. 277 (C.A.).

(Emphasis added)

[24] At the time of **Powell**, **supra**, **Civil Procedure Rule** 62.30(1) provided:

> (1) Unless by reason of special circumstances security is ordered by the Appeal Division, or a judge thereof, upon application made within fifteen days from the service of the notice of appeal, security for costs shall not be required on an appeal.

[25] The **Rule** was subsequently changed to its present wording and now appears as:

> 62.13.(1) A Judge on application of a party to an appeal may at any time order security for the costs of appeal to be given as he deems just.

[26] Notwithstanding the change in the wording of the **Rule**, in **Frost v. Herman** (1976), 18 N.S.R. (2d) 167 (N.S.S.C.A.D.) Macdonald, J.A. stated that the principle remained that security should not be ordered on appeal unless "special circumstances" exist. He specifically endorsed, however, the quote from Bowen, L.J. in **Cowell v. Taylor** (1885), 31 C.D. 34 (C.A.) as appears in **Powell** above (at § 22).

[27] In **Frost** the appellant's action was dismissed at trial with costs. The appellant paid no part of the costs and the sheriff was unable to execute on the order. While the appellant appeared to be insolvent, his solicitor maintained that he believed him not to be so. It was not necessary, Justice Macdonald decided, to determine whether the appellant was, in fact, insolvent. In failing to pay the taxed costs against him, even though execution had issued, the appellant had acted in an insolvent manner toward the respondent, causing him to be rightly apprehensive about recovery of costs. Security was ordered.

[28] The appellants plead impecuniosity in defence of the application for security. An order for security, says Mr. Lienaux, would terminate the appeal. He says that Ms. Turner-Lienaux has no income or assets from which to respond to an order for security nor can she borrow funds. The obvious implication is that neither does she have resources from which to respond to an order for costs after appeal, should one be granted. Indeed, Mr. Lienaux agrees that Mr. Campbell will not likely collect any further amounts on what is due or may become due after the appeal. Accordingly, as stated above, (at §21) I am satisfied that the respondent's concern about recovery of his costs on appeal is well founded.

[29] Of additional relevance is the fact that since 1992 Ms. Turner-Lienaux has had outstanding against her a judgment for costs in the amount of $59,000 resulting from an unsuccessful legal action against the Province of Nova

Scotia. Her wages are subject to garnishee on that account in the amount of $300 biweekly. Mr. Lienaux says that this judgment will be retired through garnishee in the spring of 2002. Although at times since that judgment was registered Ms. Turner-Lienaux clearly had funds from which she could contribute to the retirement of that obligation, there is no suggestion that she made any voluntary payment.

[30] It is my view that the fact that the respondent is unlikely to recover the costs of this appeal, if awarded, together with Ms. Turner-Lienaux's failure to voluntarily respond to a longstanding order for costs in another proceeding are "special circumstances" which warrant an order for security for costs.

[31] The fact that trial costs are unpaid is another point which weighs in favour of granting an order for security. (see **Frost**, **supra**, and **Arnoldin Construction & Forms Ltd. v. Alta Surety** (1994), 134 N.S.R. (2d) 318; N.S.J. No. 462 (Q.L.) (N.S.C.A.)) In my view it is of lesser significance here, having found that other considerations are sufficient to justify the order. I have considered the amount of those costs and the fact that they were awarded on a solicitor-client basis which order itself is the subject of appeal. I have also taken into account the fact that the security posted has been applied to the amount outstanding.

[32] Mr. Lienaux says that even if I find there to be the necessary special circumstances, the fact that the appellants are impecunious is a complete bar to an order for security. He says that a court may not order security for costs where the effect will be to extinguish the appeal. Such, he says, would be the result of a security order here.

[33] The respondent disputes the appellant Turner-Lienaux's plea of impecuniosity. He correctly points out that the fact of impecuniosity is for the appellant to prove. I have before me only Mr. Lienaux's assertions that substantial monies are owed to various individuals who have assisted with funds for the continuation of the litigation. None of those persons have testified as to the terms upon which monies were advanced, if at all, the arrangements for repayment or their willingness to advance additional funds. Mr. Lienaux says that he and Ms. Turner-Lienaux are unable to borrow from financial institutions. He does not support this contention with particulars in the form of loan applications or letters of refusal. He says that their home, which is in the name of Ms. Turner-Lienaux, is encumbered by four mortgages totalling $850,000. Mr. Lienaux says that that sum far exceeds the value of the residence. Of those mortgages one for $300,000 is made in favour of Charles Lienaux Jr., in trust. Mr. Lienaux says that that mortgage

was placed to "secure" the monies advanced by their friends to assist with the litigation. The actual amount of those loans is said to approximate $200,000 to $225,000. None of the individuals are named as mortgagees on the mortgage. There is no written trust document. Mr. Lienaux, when asked how that mortgage secured the interest of these third parties, maintained that it was a matter of honor, in that his son, who is the named mortgagee, knows to whom the money is owing. Mr. Lienaux agrees that none of the individuals to whom funds are allegedly owing have recourse under the mortgage if not paid. The mortgage was placed in February of 2001 and ranks last of the four. As indicated above, Mr. Lienaux says that the encumbrances on the property far exceed its worth, which he estimates at well below the $650,000 valuation at the time of construction. It is curious, then, that Ms. Turner-Lienaux would execute a mortgage purportedly securing funds loaned by friends if the property does not contain sufficient equity to respond to the amounts owing. I note, as well, that the face amount of the mortgage exceeds the funds said to have been loaned by at least $75,000.

[34] I am not satisfied, on the evidence presented, that Ms. Turner-Lienaux is impecunious in the sense that she does not have access to funds sufficient to post security for costs and continue the litigation.

[35] I am confident that, as they have in the past, the appellants will find the resources to advance the appeal in the face of a security for costs order, if they continue to believe in the merits of their cause. I add, however, that, in these circumstances, a consideration of the interests of not only the appellants but also the respondent leads me to conclude that an order for security is appropriate even should the result be termination of the litigation. In other words, even had I been satisfied that the appellants are impecunious I would have ordered security.

[36] Had I accepted that the appellants were impecunious, the manner in which this litigation has been conducted would be relevant to the balancing of interests between the appellants and the respondent. On several occasions judges hearing interlocutory matters have commented unfavourably upon Mr. Lienaux's conduct of the proceeding on behalf of Ms. Turner-Lienaux and Smiths Field. This occurred in both security for costs applications; on an application for summary judgment before Saunders, J., as he then was, (**Campbell v. Lienaux** (1997), 165 N.S.R. (2d) 356; N.S.J. No.314 (Q.L.) (N.S.S.C.)); on an interlocutory application before Hood, J. in 1996 (**Campbell v. Lienaux** (1996), 153 N.S.R. (2d) 241; N.S.J. No. 312

(Q.L.)(N.S.S.C.)); and most recently in the trial judgment, cited above. I conclude from reading these decisions that Mr. Lienaux's conduct of the proceedings and approach to the issues has significantly complicated the matter and driven up expenses for both parties, but in particular, for Mr. Campbell.

[37] He has pursued many futile applications and appeals therefrom which have substantially impacted upon the expense of this matter. He has not conducted the litigation in a way which indicates concern for efficient use of the appellants' financial resources, which he maintains are limited. There has been a failed application to disqualify Mr. Campbell's solicitors from continuing to act for him (**Campbell v. Lienaux** (1996), 153 N.S.R. (2d) 241; N.S.J. No.312 (Q.L.)(N.S.S.C.)); an unsuccessful appeal from that order (**Campbell v. Lienaux** (1996), 154 N.S.R. (2d) 159; N.S.J. No. 401 (Q.L.)(N.S.C.A.)); unsuccessful opposition to an application by Mr. Campbell to discontinue the original action (unreported); his appeal of that order was dismissed (**Campbell v. Lienaux** (1996), 154 N.S.R. (2d) 241; N.S.J. No.408 (Q.L.) (N.S.S.C.)); the above mentioned unsuccessful application for summary judgment before Saunders, J.; and most recently, the unsuccessful application to this court to stay the execution of the order for costs in the summary judgment matter (**Campbell v. Lienaux** (1997), 161 N.S.R. (2d) 236; N.S.J. No. 441 (Q.L.)(N.S.C.A.)); an unsuccessful appeal of the dismissal of the stay application (**Campbell v. Lienaux** (1998), 167 N.S.R. (2d) 196; N.S.J. No. 142 (Q.L.)(N.S.C.A.)); an unsuccessful application before this court to rehear that appeal (**Campbell v. Lienaux** (2000), 188 N.S.R. (2d) 171; N.S.J. No. 259 (Q.L.)(N.S.C.A.)); an unsuccessful application to stay execution of the trial judgment (**Campbell v. Lienaux**, [2001] N.S.J. No. 273 (Q.L.)).

[38] Mr. Campbell's actual outlay of legal fees to defend the claim to date has been $612,000 exclusive of disbursements and taxes. His counsel estimate that his legal fees before the Court of Appeal will exceed $100,000. Mr. Lienaux does not dispute that figure. Given the history of this litigation and the length of the trial, I cannot say that the estimate is clearly wrong.

[39] A party who pursues a litigation usually must pay her own legal fees. While at the end of the day she may receive some order for contribution to costs on a party and party basis that amount will rarely be more than a small contribution to actual fees. For persons of ordinary means, the expense of litigation is a reality which promotes sober second thought in the decision to

litigate and impacts on the way in which the proceeding is conducted. It is clear that that element has been absent from this action. The manner in which Mr. Lienaux has conducted the litigation has caused the appellants to incur unnecessary expenses in the form of orders for costs. Undoubtedly it has caused them out of pocket expenses for disbursements and has impeded Mr. Lienaux's ability to otherwise earn income and thereby contribute to the shared household expenses with Ms. Turner-Lienaux. Orders for costs against the appellants on failed interlocutory matters total about $28,000. To that extent, therefore, the appellants precarious financial situation is of their own making. On the other hand, the awards of costs have, in most instances, represented but a fraction of Mr. Campbell's actual fees.

[40] The appellants are able to pursue this appeal, as they have the litigation before the trial court, principally without concern for legal fees. Should the appeal fail, the only risk to the appellants, apart from their own disbursements, is an order for costs, which will inevitably go unanswered. As Pugsley J.A. said in **Arnoldin Construction**, **supra**:

> [9] ...
>
> (1) . . . [the respondent] is entitled to a substantial sum for its taxed costs of successfully defending a trial. To permit the company to have a "free ride" without posting security, renders and injustice to Alta. Alta's rights must also be considered. . . .

[41] I would endorse the following comments of McMahon, J. in **Holland v. Prince Edward Island School Board #4** (1987), 64 Nfld. & P.E.I.R.; P.E.I.J. No. 26 (Q.L.) (P.E.I.S.C.A.D). After referring with approval to the above quote from **Cowell v. Taylor**, as appears in the **Powell** case, **supra** (at §23) he said:

> [14] It should be remembered that the plaintiff is not the only one that has rights, the defendant also has rights. The respondent (defendant) in this case has had his costs to date taxed at $67,000.00. If the respondent was an ordinary individual, and not a corporation supported by the taxpayer, defending an action such as this could be financially disastrous. To put the individual to additional financial exposure by permitting the appellant to appeal without posting some security for costs for the appeal would be irresponsible. Because one individual is insolvent is no reason to make another individual insolvent.

. . .

[16] In **Cook and Orr et al.**, [1924] 3 D.L.R. 808, a decision of the Saskatchewan Court of Appeal, Lamont, J.A., dealing with a rule very similar to our own rule approved a decision of the Appellate Court of Alberta, **Gusky v. Rosedale Clay Products** [1917], 34 D.L.R. 727, wherein Walsh, J., stated as follows:

> "The successful litigant should be entitled to an order for security upon proof of the appellant's poverty unless the appellant satisfies the judge or court to whom the application is made that the case is one in which an appeal may properly be taken with some reasonable prospect of success."

[17] Lamont, J.A. interpreted the above as follows:

> "This is not to be taken as meaning that the security should be dispensed with where there is a legal question reasonably fit for argument nor where the appellant in the opinion of the chambers judge has an equal chance of succeeding in the appeal. The successful respondent is, generally speaking, entitled to have security where the poverty of the appellant is established unless it is reasonably apparent from the judgment appealed against and the material before the chamber judge that the judgment in point of law is wrong. A chamber judge on an application for security is not supposed to examine and pass upon all the questions in appeal in order to determine the appellant's chance of success. Unless it is fairly apparent that the judgment is erroneous the security should be ordered."

(Emphasis added)

QUANTUM OF SECURITY:

[42] In fixing the amount of security it is necessary to estimate the costs that might be ordered on the appeal. This Court often follows a guideline of appeal costs at 40% of those ordered at trial. In this case that would be inappropriate since the trial costs were awarded on a solicitor-client basis. At this stage I am not prepared to assume that costs on appeal will be awarded on a solicitor-client basis. The most logical approach seems to be to use a notional "amount involved", calculate what the party and party costs

would have been at trial, and award a percentage of those party and party costs to arrive at an amount which might result on appeal.

[43] I will use an "amount involved" of one million dollars, which was used by the parties during the litigation and accepted by Justice Tidman as the appropriate sum. Tariff A, Scale 1 (complex) is appropriate here given the length and complexity of the litigation. Party and party trial costs at trial would be $55,325. Forty percent of that amount is $22,130. Security for costs generally are less than those which would actually be awarded. I will use 2/3. That would result in an order for security of $14,753.

[44] A security order in that amount, would not represent a reasonable contribution to the respondent's anticipated appeal costs. The appeal is set for one and one half days. The number of grounds and their nature leads me to conclude that conduct of the appeal for the respondent will be rigorous and require counsel to review in detail volumes of evidence. It is not a straight forward appeal on a point of law.

[45] An appropriate amount of security would, in my view, be $20,000.

[46] Accordingly, I order security for costs in the cash amount of $20,000. The security shall be posted not later than 4 p.m. on October 1, 2001. In the event that the appellants do not post security as ordered the respondent may apply to a judge of this court, without notice to the appellants, to dismiss the appeal.

COSTS OF THIS APPLICATION:

[47] The respondent shall have his costs of this application which I fix at $1500 plus disbursements as taxed or agreed.

Bateman, J.A.