SC CIV 78 017

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

TOBITRON LIMITED

PLAINTIFF
(RESPONDENT)

- and -

H. GUY SCHNEIDER

DEFENDANT
(APPLICANT)

Application for security for costs.
Application heard July 7th, 1978 at Yellowknife, N.W.T.
Judgment of the Court filed: July 12th, 1978.
Application allowed.

Reasons for Judgment by:

The Honourable Mr. Justice C.F. Tallis

Counsel on the Hearing:

Mr. J. Edward Richard, for the Applicant
Defendant
Mr. E. Brogden for the Respondent
Plaintiff

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E. Brogden for the Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE C.F. TALLIS

This is an application for security for costs.

The application initially came on for hearing before me on May 29th, 1978. Several adjournments were granted in order to give the respondent plaintiff an opportunity to cross examine the applicant defendant on his affidavit.

The application was argued on July 7th, 1978. The respondent plaintiff did not file any material on this application.

In this particular case the applicant defendant has filed a statement of defence and counterclaim. No defence has been filed to the counterclaim.

I have carefully considered the affidavit evidence of the applicant defendant and after considering this evidence I am

satisfied that the applicant has complied with the requirements of Rules 593 and 594.

Learned counsel for the applicant indicated that he w also relying on the provisions of section 191 of the Companies Ordinance R.O.N.W.T. 1974, chapter 7 which provides as follows:

> "191. Where a company is plaintiff in any action or other legal proceedings, the court may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

There is no evidence before me to support an applicat under section 191 of the Companies Ordinance. On the evidence adduced I am satisfied that the respondent plaintiff has no asse or property within this jurisdiction that will be available for the defendant's costs. It is significant that the respondent plaintiff did not file any affidavit evidence in opposition to t application.

The respondent plaintiff, Tobitron Limited, was incorporated in the Province of Alberta on the 30th day of June, A.D. 1975. The director of the company is one John Hopwood of Suite 408, 10169 104th Street, Edmonton, Alberta. The head offi or chief place of business of the company in Alberta is at the above address.

The respondent plaintiff was registered extra-territo in the Northwest Territories pursuant to the provisions of the Companies Ordinance on February 15th, 1977. In my opinion, the mere fact that the company is registered extra-territorially in

the Northwest Territories does not preclude the court from making an order for security for costs. In this connection I refer to the following, inter alia, authorities: Frost and Wood Co. v. Lewis (1912) 2 W.W.R. 321; LaSalle Extension University v. Linley (1933) 2 W.W.R. 288; Canada Railway Accident Co. v. Kelly (1907) 5 W.L.R. 412; Northwest Timber Co. v. McMillan (1886) 3 M.R. 277.

I adopt with respect the approach of Marriott (Senior Master) in Buckeye Incubator Co. v. Rice Construction Co. Ltd. (1963) 2 O.R. 195 at pages 196 to 197 where the learned senior master stated as follows:

> "The statement of claim alleges that the plaintiff carries on business within Ontario and elsewhere and that it has its head office in Springfield, Ohio. However, there is no material filed on this application to support the allegation that it carries on business in Ontario. On the other hand in the affidavit of William C. Lawrence filed on behalf of the defendant it is stated that other than for the sale of the goods in question in this action and certain other deliveries of goods to Canada which were manufactured in the U.S. the plaintiff has not at any relevant time carried on business within Ontario and that it has not had an office within Ontario. It further appears that any business carried on by the plaintiff here has been through an agent in St. Thomas, and it has no assets of a permanent nature here.
>
> The plaintiff is the holder of an extra-provincial licence pursuant to the provisions of the Corporations Act R.S.O. 1960, c. 71. The registered office in Ontario appears to be the office of a Toronto firm of solicitors. It further appears that from inquiries that have been made in Springfield, Ohio, as to the financial position of the plaintiff that it has sold its manufacturing business to Buckeye Mfg. Co., a completely unrelated organization; that the plaintiff has retained only its accounts receivable and payable and certain lands and premises and that the Buckeye Mfg. Co. is presently suing the plaintiff for approximately $100,000 in California and that there are several unsatisfied judgments against the plaintiff in Ohio.

Under these circumstances notwithstanding the fact that the plaintiff is registered under the extra-provincial corporations section of the Corporations Act, in my view for the reasons to be given the plaintiff cannot be said to reside in Ontario within the meaning of the Rule. In Ashland Co. v. Armstrong (1906), 11 O.L.R. 414 in a somewhat similar case Boyd, C., in effect held that by itself registration under the then provisions of the Extra-Provincial Corporations Act did not constitute the company as an Ontario resident. The headnote to that case is as follows

> 'In order to shew that a corporation resides in Ontario (within the meaning of Rule 1198), it should appear that the company is incorporate and has its head and controlling office within the jurisdiction where its business is carried on, and 'residence,' as contemplated by the practice as to security for costs, is not implie where a foreign corporation has only a construct residence through agents acting in its business interests and licensed so to do in a comparative small and transient sort of way, as were the plaintiffs in this action; and the evidence not disclosing sufficient property of the plaintiffs within the jurisdiction, they were ordered to gi security for costs.'

Counsel for the plaintiff contends that by reaso of the changes made to the Corporations Act since the Ashland case, it can no longer be considered to be a binding authority on the point, and it therefore does represent the modern practice. After reading ss. 346 and 356 of the Corporations Act, R.S.O. 1960, c. 71 a Regulation 61(47) of 1960, made thereunder, referred by counsel I am not satisfied they effect any change in the principle followed in the Ashland case applica to this case. The requirement that the company is to appoint an attorney to represent it here with certain obligations and rights does not alter the plaintiff's position in the sense that it makes it better able to satisfy a judgment for costs. In the latest edition of Fraser & Stewart, Company Law, 5th ed., p. 84 it i stated that

> 'The holding of a licence or registration does not make that company a resident in the jurisdic so as to absolve it from giving security for cos

> In addition to the Ashland case many other and more recent Canadian cases are cited in support of this statement. It may be that where a foreign corporation has a permanent office within the Province and is in a substantial way of business here, the Court would hold that it resides here without going too deeply into its financial position: Frost & Wood Co. v. Howes (1912), 4 D.L.R. 526, at p. 528, but I think it is to be deduced from the authorities that in general the basic test to be applied is whether the foreign corporation has assets within the jurisdiction sufficient to satisfy any judgment made against it for costs. Re Apollinaris Co., /1891/ 1 Ch. 1, LaSalle Ext. University v. Linley, /1933/ 3 D.L.R. 643, at p. 646."

Applying the above principles to this application I accordingly find that this is an appropriate case for an order for security for costs. As to the amount of security I find that $900.00 would be appropriate having regard to all the circumstances.

I therefore order that the respondent plaintiff do within three months from the service of this order give security for the defendant's costs of this action in the amount of $900.00 by payment thereof to the Clerk of the Court or by bond therefore given to the defendant and approved by its solicitors or by the Court.

I further order that, until the said security for costs is given, all further proceedings in this action are stayed. In default of such security being given within the time above limited, the respondent plaintiff's action herein shall stand dismissed with costs without further order, unless the Court on special application otherwise directs. The costs of and incidental to this application shall be costs in the cause.

DATED AT Yellowknife, in the Northwest Territories, this 10th day of July, A.D. 1978.

C.F. TALLIS
J.S.C.

NO. SC 4284

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