Date: 1998 01 30
Docket: CV 06272

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**NUNA INVESTMENT CORPORATION,
ROBY GAGNON, CHARLIE ASSELIN,
YVETTE ST. ARNAUD and RAYMOND ST. ARNAUD**

Plaintiffs

- and -

**SHELL CANADA PRODUCTS LIMITED, GEORGE SZTYK,
JOHN BYERS and FLORENCE BYERS**

Defendants

MEMORANDUM OF JUDGMENT

[1] This is an application by the Defendants John Byers and Florence Byers for an order requiring the Plaintiffs to post security for costs.

[2] In this action, the Plaintiffs claim rescission of an agreement of sale. The agreement is for the sale of shares in a company whose sole asset was a gas bar in Iqaluit. The Plaintiffs seek return of the monies paid to the Defendants Byers under the agreement in the amount of approximately $650,000.00, as well as damages. They allege that the Defendants misrepresented the true financial situation of the gas bar. The Defendants deny that they made the representations alleged.

[3] The Court's power to order security for costs is dealt with in Rule 633(1), as follows:

> 633.(1) The Court, on the application of a defendant in a proceeding, may make such order for security for costs as it considers just where it appears that
>
> (a) the plaintiff is ordinarily resident outside the Territories;
> (b) the plaintiff has another proceeding for the same relief pending;

(c) the plaintiff has failed to pay costs as ordered in the same or another proceeding;
(d) the plaintiff brings the proceeding on behalf of a class or an association, or is a nominal plaintiff, and there is good reason to believe that the plaintiff has sufficient assets in the Territories to pay costs;
(e) there is good reason to believe that the proceeding is frivolous or vexatious and that the plaintiff has insufficient assets in the Territories to pay costs;
(f) a statute entitles the defendant to security for costs.

[4] The Court has a discretion as to whether to make the order: *Drywall Services Grand Centre Ltd. v. PCL Constructors Northern Inc.*, [1991] N.W.T.R. 210 (S.C.).

[5] In this case, the applicants rely on Rule 633(1)(a). The Plaintiff Nuna Investment Corporation is a federal corporation registered as an extra-territorial company in the Northwest Territories. The non-corporate Plaintiffs are all resident in the Province of Quebec.

[6] The mere fact that a Plaintiff is non-resident does not entitle a defendant to security for costs: *Frank v. Commissioner of the N.W.T.*, [1985] N.W.T.R. 149 (S.C.); *Mortimer v. Inuvialuit Reg. Corp.*, [1987] N.W.T.R. 228 (S.C.).

[7] The applicants therefore rely on the fact that Quebec is not a reciprocating jurisdiction for purposes of the *Reciprocal Enforcement of Judgments Act*, R.S.N.W.T. 1988, c.R-1.

[8] Some cases indicate that whether the plaintiff resides in a reciprocating jurisdiction is an important factor to be considered in the exercise of judicial discretion with respect to security for costs: for example, *Smallwood v. Sparling et al* (1983), 34 C.P.C. 24 (Ont.H.C.J.).

[9] The importance of reciprocal enforcement legislation will vary depending on the facts of each case. For example, in *Mortimer*, de Weerdt J. said that where such legislation exists in the province where the plaintiff resides, he would be disinclined to grant security for costs where the only basis put forward was the absence of exigible assets of the plaintiff in the jurisdiction where the litigation was pending.

[10] In *Crothers v. Simpson Sears Ltd.*, [1988] 4 W.W.R.673 (Alta.C.A.), Côté J.A. expressed the view, based on a number of factors, that reciprocal enforcement Acts are of little relevance to security for costs.

[11] In my view, the fact that Quebec is not a reciprocating jurisdiction is not determinative. As was pointed out by La Forest J. in *Morguard Invt.Ltd. v. De Savoye*, [1991] 2 W.W.R. 217 (S.C.C.), the reciprocal enforcement of judgments Acts in the various provinces were not intended to replace the ability of a party to bring an action to enforce a judgment given in another province. Rather, they simply provided a more convenient procedure by way of registration of a judgment. Should the Defendants be successful in this action and be awarded costs, they can bring an action in the usual fashion to enforce the costs awarded. Although they would not have the convenience of reciprocal enforcement legislation, pursuant to the principles enunciated in *Morguard,* a less restrictive view of the recognition and enforcement of an out-of-province judgment should prevail than might have been the case before *Morguard*. I was not referred to any particular problems that might exist with respect to the enforcement in Quebec of any judgment that might result from this case.

[12] The Plaintiffs oppose this application on the basis of their financial situation, the strength of their case and the timing of this application.

[13] The financial situation of the Plaintiffs is referred to in identical language in the affidavits of the Plaintiffs Gagnon, Asselin and Raymond St. Arnaud. Each affidavit indicates that the Plaintiffs are financially destitute and that none have jobs. The Plaintiff Yvette St. Arnaud suffered a stroke in December of 1997 that left her severely disabled. The Plaintiff Asselin adds that he is receiving unemployment insurance compensation, which would indicate that he has been employed in the recent past. No reference is made to whether the Plaintiffs have any assets, either in Quebec or the Northwest Territories.

[14] The leasehold property on which the gas bar was situate is the subject of an order for sale made in foreclosure proceedings taken by the corporate Plaintiff's lender. It is the only asset of the gas bar business.

[15] As was stated in *Crothers,* it is not enough for a plaintiff to allege vaguely that he is poor; he must give evidence of that fact. Here, the Plaintiffs have given little information apart from the statement that they are financially destitute. They have not presented facts to substantiate their claim of poverty other than their current status of unemployment and the failure of the gas bar business. I accept that the Plaintiffs are in difficult financial circumstances. I am not satisfied that the evidence goes so far as to establish that they are "impoverished".

[16] The Plaintiffs also ask that the Court consider that their situation is the result of the actions of the Defendants. They say that as a result of information being withheld

from them by the Defendants Byers and Sztyk, they were not aware of the true fuel pricing arrangements under which the gas bar was operating. They say that after they paid to the Defendants Byers $650,000.00 of the $1,010,000.00 purchase price, the Defendant Shell noted irregularities in the fuel pricing arrangements that had existed before the Plaintiffs took over the gas bar and consequently increased the fuel price significantly, adversely affecting the profitability of the business.

[17] In support of their position, the Plaintiffs referred to transcripts from the examinations for discovery of the Defendants John Byers and George Sztyk (the latter an employee of the Defendant Shell) and a copy of an audit report produced by the Defendant Shell. It is not for me at this stage of the proceedings to make any findings of fact on issues in dispute. It will suffice to say that the material raises at least a *prima facie* case that the Defendants Byers and Sztyk had an arrangement in place which resulted in an inflated profit margin being shown for the gas bar for the years prior to the Plaintiffs' purchase of the business.

[18] As has been pointed out in cases such as *Mortimer*, an injustice would result if a meritorious claim did not go to trial because of the plaintiff's inability to satisfy an order for security for costs due to poverty, particularly if the poverty was caused by the acts of which the plaintiff complains in the court action. As I have indicated, I am not satisfied that the Plaintiffs have established that they are impoverished, but I think the same considerations should apply where, as here, a plaintiff is in difficult financial circumstances.

[19] Finally, I consider the timing of this application for security for costs. I was advised by counsel that discoveries are not yet complete and undertakings given are still outstanding. Any order for security for costs would have to give the Plaintiffs some time to comply because of their financial situation and that may mean a delay in finalizing discoveries and getting the matter on for trial or some other resolution.

[20] In all the circumstances, I decline to order security for costs. The application is therefore dismissed. Costs of this application will be in the cause.

[21] Dated at Yellowknife, Northwest Territories this 30th day of January 1998.

V.A. Schuler,
J.S.C.

Counsel for the Plaintiffs: Gerard K. Phillips
Counsel for the Defendants
John Byers and Florence Byers: Ian W. Blackstock
Counsel for the Defendant
George Sztyk: Thomas McCauley
No one for the Defendant Shell Canada Products Limited

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE V.A. SCHULER