

Date: 1998 11 10
Docket: CV 05851

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

AL'S TRUCK STOP LTD. and ALJON HOLDINGS LIMITED

Plaintiffs

- and -

CARTER INDUSTRIES LTD. and STITTCO UTILITIES NWT LTD.

Defendants

Application for security for costs pursuant to Part 49 of the **Rules of Court** and s.188 of the *Companies Act*, R.S.N.W.T. ch.C-12. Application granted.

Application heard: September 9, 1998

Reasons filed: November 10, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for plaintiffs: W.J. Kenny, Q.C.
Counsel for defendant Carter: S. Miller
Counsel for defendant Stittco: A. Wright

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REASONS FOR JUDGMENT

[1] Each of the defendants seeks security for costs on grounds that the plaintiff corporations have insufficient assets and will be unable to pay the defendants' costs if the defendants are successful at trial.

[2] The within proceedings constitute a negligence action against the defendants. The factual foundation commences in 1990. At that time the plaintiff corporations took the initial steps in developing a business venture on Lot 1593 in Hay River. The proposed business venture was to include, *inter alia*, a service station/gas bar. In contemplation thereof, in 1990 Al's Truck Stop and Aljon installed two large underground petroleum fuel storage tanks. A large cement pad was installed above the location of the tanks. Ventilation pipes ran from the underground tanks through the ground cover and the cement pad and were affixed to the cement pad. The service station/gas bar was not ready to commence its business operations until August 1994.

[3] In 1992 Stittco, being a distributor of propane gas in Hay river, was in the course of extending its main underground distribution line to another sector of the town. The route of the distribution line "extension" passed by and adjacent to Lot 1593.

[4] Stittco hired Carter to install the gas line. Carter's work generally involved excavation, installing the line, and back filling. In the statement of claim it is alleged that in carrying out this work Carter struck and dislodged the cement pad and/or the ventilation pipes. It is alleged that this in turn caused damage to and compromised the structural integrity of the underground storage tanks. It is alleged that there was water seepage into the tanks, and that the water froze, causing further damage. Al's Truck Stop and Aljon say that the full extent of the damage was not realized until 1994 when they were ready to fill the underground tanks with petroleum fuel products. In the statement of claim they allege that they suffered damage as a result of the negligence of Carter for which negligence Stittco as principal is also liable, including the cost of removing and replacing the underground tanks, ventilation pipes and cement pad, and loss of business profits. The plaintiffs seek a damages award in excess of \$300,000.

[5] On the present applications for security for costs the defendants rely upon s.188 of the *Companies Act* R.S.N.W.T. 1988, ch.C-12:

s.188. 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 or her defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

and on Rules 632-635 of the **Rules of Court**:

632(1) An application for security for costs may be made at any time after service of the originating document and shall be supported by an affidavit of the defendant, or an agent of the defendant who can speak positively as to the facts, alleging that there is a good defence to the proceeding on the merits and specifying the nature of the defence.

...

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 insufficient 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 sufficient assets in the Territories to pay costs; or
- (f) a statute entitles the defendant to security for costs.

...

634 The Court may refuse to order security for costs where

- (a) it appears on the application that the plaintiff is possessed of sufficient assets within the jurisdiction that will be available for the defendant's costs; or
- (b) the application for security is not made within a reasonable time.

635(1) Unless it otherwise provides, an order for security for costs must

- (a) require the plaintiff to furnish such security as the Court directs within such time as may be specified in the order;
- (b) state that, until the security is furnished, all further steps in the proceeding are stayed; and
- (c) state that in default of the security being furnished within the time allowed the proceeding is dismissed without further order.

[6] In support of the applications the defendants provide the sworn affidavits of Gary Carter, agent for Carter Industries Ltd. and of Glen Mullback, agent for Stittco. These affidavits allege a meritorious defence and are in compliance with the requirements of Rule 632. Gary Carter, who personally performed the subject work, denies that he struck, dislodged or in any way damaged the plaintiffs' property.

[7] The defendants provide evidence of the impecuniosity of the plaintiff corporations. These particulars include:

- (a) Lot 1593, the commercial premises owned by the plaintiff Al's Truck Stop Ltd. is the subject of foreclosure proceedings. The property is heavily encumbered (four mortgages) and there are substantial property tax arrears (\$85,929.18) which remain unpaid. In the foreclosure proceedings, an

attempted judicial sale has been unsuccessful in obtaining an adequate bid which will discharge the encumbrances;

- (b) Lot 1594, the commercial premises owned by the plaintiff Aljon is also the subject of foreclosure proceedings. Judgment has issued against Aljon for \$237,819.95 plus interest and solicitor-client costs. There are substantial property tax arrears (\$44,669.99) which remain unpaid;
- (c) a judgment obtained by Centennial Food Service Ltd. against Al's Truck Stop in the amount of \$2,392.29 plus costs, and registered against Lot 1593 in 1996, remains unsatisfied;
- (d) the plaintiffs have granted debenture security over their other assets to a lending institution as security for outstanding loans;
- (e) the plaintiff Al's Truck Stop is defendant in a lawsuit commenced by Northland Utilities (NWT) Limited to recover \$31,172.00 for unpaid electrical utility accounts. Al's Truck Stop has filed a statement of defence and counterclaim;
- (f) the plaintiff Al's Truck Stop is indebted to the defendant Stittco in the approximate amount of \$49,000.00 for unpaid utility accounts. This debt is the subject matter of Court action CV 06600 in which Al's Truck Stop has filed a statement of defence and counterclaim.

[8] These particulars of the plaintiffs' financial difficulties are contained in the sworn affidavit of Glen Mullback, an officer of the defendant Stittco, and in the many attachments to that affidavit. These particulars are uncontradicted by any other evidence tendered on this application.

[9] Allan Johnson, the principal of the plaintiff corporations, states in a sworn affidavit that the plaintiffs "have sufficient assets within the jurisdiction of the Northwest Territories to pay the costs of Carter Industries Ltd. and Stittco Utilities NWT Ltd. in the within action". He relies for this assertion on appraisals of the plaintiffs' properties done in 1991, 1996 and 1997. The opinions expressed in the appraisal reports belie the factual results of the attempted judicial sale in the foreclosure proceedings. Mr. Johnson further states in his affidavit that, other than the foreclosure judgment, "there are no current outstanding claims in relation to the Truck Stop Lands". He does not explain or clarify this in the context of the third and fourth mortgages against the property, or the

substantial property tax arrears. With respect to the third mortgage, in favour of the Minister of National Revenue he simply says “no steps have been taken by the Minister of National Revenue” in relation to that mortgage.

[10] Based on the evidence before the Court on this application, I am satisfied that the plaintiff corporations are impecunious and that there is reason to believe that they will be unable to pay the costs of the defendants if those defendants are successful at trial.

[11] There is thus a *prima facie* case for the ordering of security for costs under s.188 of the *Companies Act* and Rule 633(1)(c) and (f).

[12] The actual granting of an order for security costs, however, remains within the discretion of the Court. There is no automatic order for security for costs when the prerequisites are met. *Drywall Services Grand Centre Ltd. v. PCL Constructors Northern Inc.* [1991] N.W.T.R. 210 (S.C.); *McElheran v. Great Northwest Insulation Ltd.* [1992] N.W.T.R. 363 (S.C.); *Nuna Investment Corp v. Shell Canada Products Ltd.* [1998] N.W.T.J. No.10 (S.C.).

[13] In exercising its judicial discretion, the Court considers what is “just” in the circumstances of each case. *Holly Homes Ltd. v. Euchner* (1985) B.C.P.C. (2d) 84 (N.W.T.S.C.); *Drywall Services, supra*.

[14] As stated in *Holly Homes*, some of the circumstances to be taken into account are the *bona fides* of the plaintiff’s claim, whether the plaintiff’s want of means has been brought about by any conduct of the defendant and whether the case is one where goods and services have been provided by the plaintiff to the defendant and for which no payment has been made.

[15] As to the *bona fides* of the within action commenced in 1995, although the plaintiffs do not claim to have eyewitness evidence of the alleged negligence of Carter, they do have documentary evidence confirming that the allegation was made on a timely basis in the summer of 1992. From the defendants’ side, Gary Carter swears in his affidavit that he did not strike, dislodge or damage any property of the plaintiffs. Accordingly, at this stage, it cannot be said with any certainty where the merits lie.

[16] There is no evidence on this application to indicate that the serious financial problems presently besetting the plaintiffs is the direct result of the actions or alleged actions of the defendants, as was the case in *Mortimer v. Inuvialuit Regional Corporation* [1987] N.W.T.R. 228 (S.C.), and in *Nuna Investment, supra*.

[17] Nor is this a case where the plaintiffs have provided goods and services of value to the defendants and have not been paid for them, as in *Holly Homes, supra*.

[18] Taking into consideration all of the circumstances, including Mr. Johnson's continuing contention in his affidavit that the plaintiffs do have sufficient assets to pay the defendants' costs, I determine that it would be just to order the posting of security for costs. There is no compelling reason to deny the defendants' *bona fide* request for this relief that is contemplated by statute and by the **Rules of Court**. To deny the relief would render an injustice to the defendants, as any success they might achieve at trial would be a Pyrrhic victory.

[19] Accordingly, I order the plaintiffs to furnish security for the defendant Carter's costs in the amount of \$15,000.00 and for the defendant Stittco's costs in the amount of \$6,000.00. Pursuant to Rule 635 it is also ordered that a) the plaintiffs shall furnish such security within 90 days of the filing of these reasons, b) until such security is furnished, all further steps in the proceeding are stayed, and c) in default of the security being furnished as ordered, the proceeding is dismissed without further order. Costs of this application shall be in the cause.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
10th day of November 1998

Counsel for plaintiffs:	W.J. Kenny, Q.C.
Counsel for defendant Carter:	S. Miller
Counsel for defendant Stittco:	A. Wright

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