

Court of Queen’s Bench of Alberta

Citation: Orubor v Borden Ladner Gervais LLP, 2019 ABQB 328

Date: 20190506
Docket: 1201 14829
Registry: Calgary

2019 ABQB 328 (CanLII)

Between:

Lawrence Orubor and Orubor Integrated Technology Inc

Plaintiffs

- and -

**Borden Ladner Gervais LLP, a Limited Partnership for the Practice of Law, and the
Partner Thereof Michael Whitt, Jason Howg, Tim Webb and David Wood**

Defendants

- and -

Between:

Borden Ladner Gervais LLP, a Limited Partnership for the Practice of Law

Plaintiffs by Counterclaim

- and -

Lawrence Orubor and Orubor Integrated Technology Inc

Defendants by Counterclaim

**Reasons for Decision
of
A.R. Robertson, Q.C., Master in Chambers**

Introduction

[1] Part way through this claim of professional negligence, the defendants ask for security for costs. One of the grounds upon which the application is resisted is that it was brought long after the lawsuit was begun.

[2] The defendants argue that there was no reason to apply for security for costs until they were served with “Requirements to Pay” (essentially, garnishee summonses) by Canada Revenue Agency for \$138,202.99, \$84,695.61, and \$140,437.37. Those figures total \$363,335.97. Those were dated January 25, 2017, and they related to the plaintiff Orubor Integrated Technology Inc. By then this lawsuit was over four years old although, as described by counsel for the defendants, it is still quite early in its proceedings.

[3] The application was adjourned a couple of times, at the instance of the plaintiffs, and getting the application to a hearing took two years from the date of filing (in February, 2017) to the date of hearing (in March, 2019). The most recent application to adjourn the application (scheduled to be heard as a special application) was brought by the plaintiff in January, resulting in a delay from February 28 to March 27, 2019.

[4] Well over six years have passed from the date of the statement of claim.

[5] I have concluded that it is appropriate to require that security for costs be provided, although for less than sought, and not for past steps or, at this juncture, for the preparation for trial and trial itself.

Background

[6] The claim revolves around 10 different inventions and their related patent applications. The plaintiffs retained Borden Lander Gervais LLP to prepare and file patent applications. They assert that the defendants “botched” the applications. However, only one of the inventions, a wet/dry vacuum cleaner, has been addressed so far in the questioning.

[7] Rule 4.22, dealing with security for costs, says that the merits of the action in which the application is filed are relevant to the decision on security for costs.

[8] The basic claim in respect of the wet/dry vacuum cleaner is that the basic information relating to the invention was brought to the defendants for them to prepare patent applications in Canada, the United States, and elsewhere, and that the applications were not prepared properly. The plaintiffs assert that by the time they (actually, just Mr. Orubor, since he is the shareholder and director of the corporate plaintiff) understood what was going on, another inventor had applied for patents for a wet/dry vacuum cleaner that incorporated some of the same unique aspects of the plaintiffs’ invention that had been deleted from the U.S. application, making the

plaintiffs' invention largely un-patentable. The plaintiffs were ultimately able to obtain a patent over the invention, but without critical distinguishing features, making it largely, if not completely, unmarketable.

[9] The defendants strenuously argue that there is no merit to the claim. The things that the plaintiffs say were errors in the application were not errors. The details left out did not materially affect the design. For example, the inclusion of a filter and a holder for it was changed in preparing the US application. However, the plaintiffs assert that all vacuum cleaners contain filters so that they do not clog. The placement of the filter, which the plaintiff asserts was unique, was, according to a review of the designs, obvious and therefore not patentable. It was an irrelevant detail for the purposes of the patent application. Also, although the narrative describing the invention for the US patent application was changed, the basic content was not, and the details complained of by the plaintiffs did not affect the patentability of Mr. Orubor's creation.

[10] Also, the defendants say that Mr. Orubor was fully informed as matters progressed, and he was provided with copies of applications shortly after filing, if not before, and he raised no concern at the time.

[11] Furthermore, no working model of the product has ever been created, so it is not yet known for certain whether the invention would even function as designed.

[12] Accordingly, it is in the context of significantly competing views of the facts that the parties appeared before me. It is not, of course, appropriate to treat the application as if it were one for summary judgment or summary dismissal. Although rule 4.22 mandates considering the merits of the claim, the general view is that if there are reasonable cases to be argued on both sides, it is neither possible, nor desirable, to go further at this stage: *Attila Dogan Construction v AMEC Americas Limited*, 2011 ABQB 175, at para. 17. I will discuss this further, below.

[13] There is no evidence before me as to the other nine inventions that are subject to the claim and the extent to which there may be evidence to support a professional negligence claim in respect of any of the nine.

[14] For the purposes of this application, I assume that the evidence relating to the wet/dry vacuum cleaner applies equally to the balance of the claim. That is, each party strongly believes in the merits of its position, and there is some evidence to support both views.

[15] The plaintiffs did not pay all of the defendants' accounts for services. Accordingly, there is a counterclaim for unpaid fees of \$113,740.14.

[16] The defendants knew, of course, of the unpaid fees but did not bring this application for security for costs until the claim had been proceeding for over four years. The plaintiffs assert that, "The plaintiffs offer no evidence or explanation for over 4 years of delay in bringing its application prior to receipt of a CRA Notice to Pay."

[17] The explanation given by the defendants is that defendants do not bring applications for security for costs - when the plaintiffs reside in Alberta - unless there is some reason to do so. An application without a proper factual basis would be dismissed. The application was brought within two months of receiving the Requirements to Pay from Canada Revenue Agency. Therefore, the defendants argue that they did not delay in bringing the application.

[18] A search of title to the home owned by Mr. Orubor shows that he acquired it for \$1.00, (Mr. Orubor explains that it was a gift from his father) and that it was then thought to have a value of \$480,000, although on the date of registration of the transfer of land in March 2015 a mortgage was registered for \$360,000. There is no current appraisal from an accredited appraiser. The City of Calgary assessed the home in 2017 at \$384,500. This is weak evidence of value, but the plaintiffs offered no current evidence of value at all.

[19] If the house were sold for \$384,500, the real estate commission at normal rates would be \$15,535 plus GST of \$776.75 for a total of \$16,311.75. On the assumption that the mortgage balance remains at approximately \$360,000, the total of the mortgage balance and the commission expense would be \$376,311.75 with an assumed value (in the absence of better evidence) of \$384,500. Accordingly, there is some reason to believe that there is little equity in the home.

[20] A factor to consider is whether the financial hardship of the plaintiffs is due to the very actions of the applicants at issue in the claim: *ProSuite Software Limited v Infokey Software Inc*, 2013 BCSC 227 at para. 77. The plaintiffs assert that that is the situation here.

[21] The claim by CRA is related to the legal fees paid by the plaintiffs to Borden Ladner Gervais. The fees were paid over a period of time for all 10 sets of patent applications, totalling approximately \$350,000. There was a tax credit allowed for the expenses incurred in attempting to obtain patents, but when the patents did not issue the credit was reversed. Accordingly, the plaintiffs assert that this liability has resulted from the defaults of the defendants, although the tax consequences and the fact that one patent was obtained (the CRA letter confirming the re-assessment after the plaintiffs filed an objection says that *no* patents were obtained), were not fully argued or explained before me.

[22] The letter from CRA confirming the disallowance of the expenses specifically says,

But since these were not allowed and you have still not received letters patent for any of the inventions and it appears this may not happen, the expenses are allowed as cumulative eligible capital. This is a permissive deduction that can be used but must be requested in writing. It is prorated over a number of years and you can request in writing 7% of the beginning of the year balance. However, as no claim was requested, no amounts have been applied against taxable income in the year under objection.

[23] This appears to indicate that the expenses are not lost, although they may not be available for immediate deduction. No explanation was provided to me.

[24] Also, I note that the letter from CRA says that the corporation was assessed “Gross Negligence Penalty on the Net Business Income”, but this too was not explained before me.

[25] The burden of showing that security for costs should not be required, once impecuniosity is demonstrated, lies with the plaintiffs: *Commercial Construction Supply Ltd v Ghost Riders Farm Inc*, 2016 ABQB 166, at para. 22, citing *Amex Electrical* and *Provalcid*. A bald assertion that the plaintiffs’ financial position was caused by the defendants’ actions, with evidence that raises many questions, is not especially persuasive.

[26] In addition to the CRA claim, Mr. Orubor deposes that he owes money to family and friends who have been assisting him because they have some faith in his inventions. No details have been provided.

[27] The plaintiffs assert that neither Mr. Orubor nor the corporation have any party to which they can turn to fund a security for cost award even remotely approaching the amount sought by the defendants.

[28] In the result, the explanation of what prompted the defendants to ask for security for costs (the CRA Requirements to Pay) is said to be the defendants' fault. However, in the course of exploring the plaintiffs' ability to pay it has become apparent that the plaintiffs are likely not going to be able to pay costs in the event that the claim is dismissed by the trial judge, for reasons not directly related to the CRA re-assessment and demands.

[29] That is, the plaintiffs have not demonstrated that they were not impecunious simply because of the problems with the patent applications. The apparent lack of equity in the house occurred upon registration of the transfer of land and mortgage in 2015 when the mortgage having a face amount of \$360,000 was obtained, with the subsequent well-known falling of Calgary's real estate values being a culprit. That acquisition and mortgage occurred a month before the CRA registered a writ for \$352,040 in favour of the Minister of National Revenue. There is no explanation what became of the mortgage funds. No detail has been provided about the debts to family and friends.

Factors to be Considered

[30] The parties agree that rule 4.22 is the governing rule for the application, even though one of the plaintiffs is a corporation and therefore section 254 of the Alberta *Business Corporations Act* is notionally in play. Section 254 arguably applies, and not rule 4.22, in the case of a corporate plaintiff (see *Amex Electrical Ltd v 726934 Alberta Ltd*, 2014 ABQB 66 and *North American Polypropylene ULC v Williams Canada Propylene ULC*, 2018 ABQB 281 at para. 49). However, here we have both corporate plaintiff and an individual plaintiff, with a claim shared between them. Mr. Orubor is the owner of Orubor Integrated Technology Inc. The plaintiffs' claims are one and the same.

[31] Furthermore, both section 254 and rule 4.22 give the court discretion, and neither mandate that the court must require security for costs in any particular circumstance. Rule 4.22, however, sets out factors that are all to be taken into account, including the open-ended "factor", "any other matter the Court considers appropriate". Section 254 does not set out any factors other than the genesis of the application: "the body corporate will be unable to pay the costs of the successful defendant".

[32] Accordingly, rule 4.22 sets out the guiding path to follow here. These are the factors to be considered:

- (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
- (b) the ability of the respondent to the application to pay the costs award;
- (c) the merits of the action in which the application is filed;
- (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
- (e) any other matter the Court considers appropriate.

Analysis

[33] I will review the factors in the order they appear in rule 4.22.

(a) *Whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta* and (b) *The ability of the respondent to the application to pay the costs award*

[34] These aspects of the application are not contested (although ability to pay is also addressed under paragraph (d), discussed below). The plaintiffs admit that both the corporation and Mr. Orubor are in poor financial straits.

[35] Mr. Orubor earns a modest personal income, but he is currently facing the claim by CRA mentioned above, he has already borrowed money from family and friends, and he does not assert that there is any significant equity in his house.

[36] The financial statements for the corporation for several previous years were provided at the last minute, prepared very shortly before production. The explanation for the delay is that the plaintiffs use an accountant who has some unstated medical problem that frequently makes him unavailable to do the accounting work. Regardless of the delay in production, the statements show that the corporate plaintiff has no meaningful asset that would allow it to pay costs if the claim is unsuccessful.

(c) *The merits of the action in which the application is filed.*

[37] As discussed above, there appear to be reasonable arguments for both the plaintiffs and the defendants. The parties spent a considerable amount of time in cross-examination and in argument addressing what they see as weaknesses in the others' position, and the plaintiffs assert that the defendants have not shown that the defence has any merit. They point to certain admissions that they say were obtained in questioning from Mr. Whitt, although a review of the affidavits discloses that the defendants assert the same thing about admissions made by Mr. Orubor.

[38] In both cases I see the admissions as being very likely good read-ins or grist for the cross-examination mill at trial, but not so clear as to allow a clear view of whether the plaintiffs or the defendants are likely to prevail at trial.

[39] This is not a summary judgment application. Expressing a view on the relative merits of each case here, without complete evidence and expert evidence, might have an inappropriate effect on the balance of the litigation. The Court is simply not in a position to express an opinion, other than that there appear to be reasonable arguments both ways.

[40] That does not mean that the merits should not be explored in applications such as this. Masters in chambers are sometimes asked to award security for costs in claims that seem clearly to have little or no merit, or where the defence seems to be weak at best. In *Poppies International*, Master Hanebury cited *XS Technologies Inc v Veritas DGC Land Ltd*, [2003] A.J. No. 1716 and stated that the standard is a low one, at least when dealing with section 254 of the *Business Corporations Act*: the corporate plaintiff "must demonstrate that its claim is not almost certain to fail". The same approach would apply under rule 4.22. A defendant who seeks to have the plaintiff post security for costs must show, at least, that its own position (its defence) "is not almost certain to fail". This is the same approach discussed by Wittmann, C.J., in *Attila Dogan*, mentioned above.

[41] But I do not see this case as falling into the extreme category.

(d) *Whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action*

[42] This is the inverse of the very basis of an application for security for costs. The plaintiffs say that if they are required to post security for costs they will be denied the opportunity to claim against the defendants, and it is the defendants' fault there is a claim of over \$350,000 that they must deal with. That is, they argue that they should not be required to post security for costs precisely because they are impecunious. But it is their impecuniosity that justifies the requirement of security for costs.

[43] The Court of Appeal summarized the conundrum in *Stoney v Trustees for the 1985 Sawridge Trust*, 2017 ABCA 437 at paragraph 6:

Rule 4.22(d) requires consideration of whether a security for costs order “would unduly prejudice the respondent's ability to continue the action”. This criterion is often central to the competing interests that arise in this type of application. On the one hand, the courts are always reluctant to deprive a litigant of his day in court, particularly because of economic hardship. On the other hand, respondents should not be subjected to continuous litigation where they have no prospect of recovering their costs. The presumption in civil procedure that the successful party is entitled to costs acts as an important control on the quantity and intensity of litigation, and that control is missing if the appellant is judgment proof.

[44] So on the one hand, the defendants argue that if they are successful then the impecunious plaintiffs will not be able to pay costs awarded against them, creating the oft-cited “one-way valve” that Mr. Justice Cote of our Court of Appeal discussed in *Calmont Leasing Ltd v 32262 B.C. Ltd*, 2002 ABCA 290. The plaintiffs can risk the cost of their own legal fees, with no meaningful risk of having to pay the defendants if the claim is unsuccessful. That is more clearly the case with respect to the corporation, but less so with respect to Mr. Orubor personally.

[45] On the other hand, the plaintiffs have stated in fairly simple terms that they cannot raise the sort of funds that the defendants want secured and should not be denied their right to sue.

[46] Where the respondent (the plaintiff) wants to rely on this part of rule 4.22, it must tender positive evidence of its inability to raise any funds or limited funds to do so: *Poppies International Inc v International Hasco Trading Co*, 2008 ABQB 531, at para. 13.

[47] In order to consider this factor, it is necessary to consider some broad factors about the case. How much money should be secured?

[48] There is a debate over the expected length of trial. Given the number of issues involved, the defendants suggest that an estimate of 30 days is appropriate.

[49] There is a debate over the remaining number of days to be estimated for pre-trial questioning.

[50] There is a significant dispute over how to factor in expected experts' fees. The defendants say they will need five experts, and estimates the cost at \$50,000 per expert, for a total of \$250,000, but without pre-trial disclosure complete (nine sets of patent applications not having yet been addressed), that is essentially an educated guess. An expert could not, at this stage, provide a meaningful estimate of fees, and the defendants do not tender any.

[51] Questioning has not been completed even on the wet/dry vacuum cleaner invention and patent applications, meaning that after over four years when this application was filed the case still had something in the nature of 90% of the pre-trial work yet to be done.

[52] The plaintiffs have been unable to identify clearly the amounts of their claim, but it is expressed as being in the range of “hundreds of millions of dollars” because they assert that major manufacturers are now manufacturing vacuum cleaners that have the very features that the plaintiffs assert that Mr. Orubor invented but were lost as patented inventions because of the defendants’ negligence. That assertion appears to apply only in respect of the wet/dry vacuum cleaner that has been considered thus far.

[53] Accordingly, the claim is massive in amount and the defendants can reasonably be expected to defend the case accordingly. In the current application, they ask that costs be secured using a multiple of three times column 5 (the highest column on Schedule “C”), to anticipate what a trial court might reasonably award if the claim is dismissed.

[54] The plaintiffs propose to resolve this aspect of the claim by proposing a bifurcation of the trial and adjourning the portions of the claim other than the wet-dry vacuum cleaner invention to a later hearing. There are problems with this suggestion: (a) no application to split up the trial has been brought, and a master in chambers does not tell the justices of the Court how to run trials; and (b) the case is now over six years from the date the statement of claim was filed, so a later trial over the balance of the claim would inevitably deal with memories that will be very faint by the time the second trial is heard; so the chance of a successful bifurcation application seems much less than likely.

[55] Accordingly, I must deal with the single lawsuit as it has been formulated.

(e) *Any other matter the Court considers appropriate*

[56] There are several arguments submitted by the plaintiffs on this point. An important one is the alleged delay in bringing the application. However, the delay has been explained satisfactorily. Many of the cases involving security for costs involve either corporate plaintiffs alone, or plaintiffs who reside outside of Alberta. Neither of those factors exists here. Mr. Orubor resides in Alberta, and he is personally one of the plaintiffs.

[57] Had the defendants tried to bring the application for security for costs earlier, there would have been no factual basis known by them to support it other than the unpaid legal fees – except there was a known dispute and it would have been presumptuous to have assumed that the real reason for non-payment was inability, when the plaintiffs were asserting professional negligence and significant resulting damages.

[58] Another argument submitted on this point is that it would not be “just and equitable” to require security to be posted. This argument simply focusses on the fact that the issues are within the Court’s discretion.

Amount of Security

[59] I turn now to the amounts sought.

[60] The defendants ask for security for costs for steps already taken. This is often claimed, but rarely allowed by the courts: see, for example *Provalcid Inc v Graff*, 2014 ABQB 453, at

para. 108. To order security for costs for steps already taken has been described as “to change the rules after the fact”: *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2003 ABCA 208.

[61] However, past costs may be awarded where the defendants brought their application promptly after discovering that the plaintiff has sold all its assets, stopped doing business, and had commenced multiple complex lawsuits: *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 49 at para. 53, affirming a decision of Master Laycock reported at 2015 ABQB 196.

[62] The facts here are considerably different than those in *Geophysical Service Incorporated*, although the circumstances of the application, brought shortly after receiving the Requirements to Pay, suggest that security for earlier steps might be appropriate. However, in my view the discussion in *Provalcid* and the comment in *Freyberg* are more persuasive.

[63] Here, Mr. Orubor is personally a plaintiff, and the evidence before me indicates that there was, eventually, one patent granted. His counsel assures the Court that Mr. Orubor has obtained other patents. He is working and earning a modest income, although he was reluctant to disclose any details of his earnings or assets in cross-examination.

[64] The defendants ask that security for costs be based on a multiple of three times column 5, because of the enormity of the claim that the plaintiffs advance. Since the action deals with several patent application/professional negligence claims, it can fairly be described as complex. The amount claimed is in the “hundreds of millions of dollars”. The use of a multiple was done in *Attila Dogan*.

[65] In my view, the amount claim seems clearly to be inflated. The range was asserted by Mr. Orubor in cross-examination, not in the amended statement of claim. However, the claim is clearly significant, and a multiple of 2 of column 5 is appropriate.

[66] I have mentioned the anticipated costs of experts’ fees. In my view, it is not appropriate at this time to require that they be secured. The Supreme Court of Canada and the Alberta Court of Appeal have made the point that a full trial is not the default means of dispute resolution, as discussed in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49. The discussion there related to summary judgment applications, but the point applies to security for costs applications as well. Why should a plaintiff be required to post security for costs at an early stage for a trial that we know, given our collective experience and the comments from the Court of Appeal and Supreme Court of Canada, is very likely not going to take place? A staged posting of security is more appropriate.

[67] Also, the plaintiffs estimate a trial of 13 days, and as mentioned the defendants estimate a trial of 30 days. In oral argument defence counsel commented that on reflection his estimate of 30 days seems low, although he would stand by it for the purposes of this application.

[68] It is clear that there is a significantly different view of how long this trial will take.

[69] A 30 day trial is 6 weeks, without considering a statutory holiday that would likely be in the calendar. In my view, given the number of claims involved, that estimate is at best modest. Explaining each patent and explaining the errors that the plaintiffs assert in respect of each one will take quite a bit of time. Explaining why it is said no errors were made, for 10 patent applications in multiple countries, will take time. Expert evidence as to the professional standards of a solicitor practising in intellectual property in Calgary at the time, the marketability of each of the products, the valuation of each of the products if they could have been protected

by patents, and other evidence that is properly the subject of expert testimony, will take considerable time.

[70] In my view, particularly where the time for trial is so significant, costs should be secured up to a point before preparation for trial. As the parties approach trial, another application can be brought to require the plaintiff to post additional security, or to reduce the amount of security posted, if it turns out that pre-trial steps were not as great as estimated at the time of the original order.

[71] With this approach in mind, in my view it is appropriate to require the plaintiffs to post security for costs for an estimate of the pre-trial steps to a point shortly before retaining expert evidence and filing a form 37 requesting a trial date.

[72] The plaintiffs are put on notice that a further application for security for costs is very likely going to be brought if the matter is not settled, but they are not required to post those costs now. As well, by the time a further application is brought the parties will have a much better view of the expected trial time, the expert witnesses required, and the overall estimated cost award that would be claimed if the claim is unsuccessful.

[73] The plaintiffs have not completed their pre-trial questioning. Some defendants have not been questioned at all.

Decision

[74] The plaintiff estimates 66 half days, or 33 days, of questioning will be required, but that includes the days of questioning already completed. Given the extent of the claim, I will estimate 25 days yet to be done for the purposes of this award.

[75] There have already been several appearances in masters' chambers trying to get this application underway, adjourned at least twice at the request of the plaintiffs, the application in January (to adjourn from February, with a new date of March 27 being obtained) having been argued strenuously on both sides – despite the fact that at that point the application had been underway for close to two years.

[76] In my view, this mandates an award of costs at two times column five for two adjournment applications, payable forthwith (not part of the security, although they must be paid by the same time as the security is to be posted as a condition of this order), although the costs of this application (subject to counsel advising that there are some extraordinary reasons of which I am not aware) should be in the cause, there having been divided success.

[77] In light of the difficulties in moving this application forward, it is realistic to expect at least two more regular chambers applications and one more special interlocutory application before trial (not counting the expected special application to modify the security for costs order if the claim is not resolved) plus the costs of this application, which I direct be in the cause. Security for costs should therefore include (a) two regular opposed chambers applications and (b) one more contested application before the court where briefs are required, plus (c) the costs of this application.

[78] Goods and Services Tax (“GST”) is not recoverable by a party who is entitled to claim input tax credits. Rule 10.48(2) and Form 44 (an affidavit is required on the bill of costs as to the recovery of GST). As the defendants are in the legal profession, I will assume that expenses

incurred in the course of their business are subject to the recovery of any GST paid by way of input tax credits. Alternatively, an insurer paying legal fees is likely also able to recover input tax credits for GST paid on legal fees. Accordingly, there will be no security for anticipated GST.

[79] Twenty-five days of questioning (discussed above) at double column 5 rates results in a total of \$150,000. Two regular chambers applications would lead to costs awards of \$3,000 for both. One special application with briefs would lead to a costs award of \$4,000, plus the costs of this application for a total of \$8,000. All of them would involve filing charges of \$50 each for the applicant, which I will simply include under an estimate for photocopying and court filing charges.

[80] I would estimate \$30,300 for transcripts of questioning, \$250 for miscellaneous delivery charges, and \$5,000 for photocopying and court filing charges.

Conclusion

[81] My total of those numbers is \$384,250. Security is to be posted by payment to the clerk of the court, unless counsel for the defendants agrees to another form of security.

[82] As that is a significant amount of security to be provided, I will allow four months (in place of the default two-month period referenced in rule 4.23(1)(b)) for the security to be posted from the date of service of the order that reflects these reasons. If the parties are not able to agree on the form of order within two weeks of the release of these reasons, defence counsel may schedule a hearing to settle the terms of the order.

[83] The proceedings are stayed until (a) the security is provided, and (b) the costs award mentioned herein for previous contested adjournments (at double column 5 rates) is paid; with the exception of a possible application before a Justice to bifurcate the trial. Such an application may be made despite the stay of proceedings applying to all other aspects of the case, and if the Justice hearing that application allows the bifurcation, then the amount of costs secured herein, and the deadline for doing so, may be adjusted by that Justice.

[84] In the event that the costs award and the security required to be posted are not paid and posted (respectively) within the deadline specified, then the plaintiffs' claim shall be dismissed on an application brought by the defendants confirming (by evidence) that these steps have not been taken.

[85] For clarity, the counterclaim for unpaid legal fees will not be struck. Rule 10.22 remains in effect in respect of the counterclaim.

[86] Rule 4.23(4) continues to apply, allowing variance of the amount and nature of the security as circumstances require.

[87] As mentioned, the defendants are awarded costs of two contested regular chambers applications to adjourn this application.

Heard on the 27th day of March, 2019.

Dated at the City of Calgary, Alberta this 06th day of May, 2019.

A.R. Robertson, Q.C.
M.C.C.Q.B.A.

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