SUPREME COURT OF NOVA SCOTIA
Citation: Ocean v. Economical Mutual Insurance Company,
2011 NSSC 408

Date: 20111110
Docket: Hfx No. 190673
Registry: Halifax

Between

MAY OCEAN, of White's Lake, in the Province of Nova Scotia

Plaintiff

-and-

THE ECONOMICAL MUTUAL INSURANCE COMPANY, a body corporate, registered to carry on business in the Province of Nova Scotia and **RAYMOND PATRICK SULLIVAN** of Lantz, in the Province of Nova Scotia.

Defendants

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: September 9th, 2011

Written Decision: November 10th, 2011

Counsel: Robert G. Belliveau, Q.C. for the Defendant, The Economical Mutual Insurance Company.

May Ocean (Plaintiff – did not appear.)

Raymond Patrick Sullivan (Defendant – did not participate in this motion.)

By the Court:

[1] The Economical Mutual Insurance Company (hereinafter referred to as "Economical") has filed a motion for security for costs against the Plaintiff, May Ocean. Economical asks that security in the amount of $100,000.00 be paid into court by the Plaintiff.

BACKGROUND

GENERAL

[2] This case is about a motor vehicle accident and how the Plaintiff's insurance company (Economical) dealt with the Plaintiff's claim arising out of that accident.

[3] In order to fully appreciate the dynamics of this action, it is necessary to know that the Plaintiff alleges that Economical is involved in monopolistic and "conglomerate" activity. She regularly speaks of a "golden handshake" which she believes exists between Economical and various other entities involved in this litigation.

SPECIFICS

[4] On December 13th, 2000, the Plaintiff was involved in a motor vehicle accident with Raymond Patrick Sullivan. Mr. Sullivan was an uninsured motorist at the time of the collision. The Plaintiff was insured under a standard Nova Scotia automobile policy issued by Economical at the time of the accident.

[5] On December 5th, 2002, the Plaintiff commenced an action in the Supreme Court of Nova Scotia against Economical and Mr. Sullivan. The action against Economical was for what is commonly known as a Section D claim. The action against Mr. Sullivan was for negligence.

[6] At the time of commencing the action the Plaintiff was represented by counsel. On August 30th, 2006, an Order was issued removing Ms. Ocean's counsel as solicitor of record. Since that time, Ms. Ocean has been representing herself in this proceeding.

[7] In July of 2008, Ms. Ocean applied to amend her Statement of Claim to include a negligence and bad faith claim against Economical. Economical opposed that application and filed an application to bifurcate the proceeding in the event that the Plaintiff's application to amend her pleadings was granted.

[8] On July 31st, 2008, the Plaintiff was granted leave to amend her pleadings. On the same date, the court granted Economical's application to bifurcate the issues raised in Ms. Ocean's original Statement of Claim from those that arose as a result of her amended pleadings.

[9] On September 10th, 2008, Economical applied for an order requiring Ms. Ocean to be assessed by an independent medical expert to determine her competency to represent herself in this proceeding. The application was granted (see 2008 NSSC 282.) This decision was subsequently overturned by the Court of Appeal (see 2009 NSCA 81.)

[10] On July 30th, 2010, the proceeding was trifurcated. In particular, the issue of damages was severed and is to be heard after the two liability trials (see 2010 NSSC 314.)

[11] The first liability trial (dealing with the issue of liability for the motor vehicle accident and whether Economical was liable to Ms. Ocean under Section D of her automobile policy) was heard over twenty-five days between September 14th, 2010 and January 5th, 2011. Since the conclusion of this first trial, the court has been case managing the file in an attempt to move the second part of the proceeding on to trial.

[12] On April 29th, 2011, Economical applied to amend its defence in relation to the negligence and bad faith claim brought by Ms. Ocean. The motion was contested. On May 26th, 2011, an Order was issued granting Economical leave to amend its defence. Ms. Ocean was ordered to pay costs of the motion in the amount of one thousand dollars ($1,000.00) payable forthwith. These costs have not been paid.

[13] On May 11th, 2011, Economical filed a motion seeking an order for the discovery examination of the Plaintiff in relation to the negligence/bad faith claim brought by Ms. Ocean. The matter was scheduled to be heard on June10th, 2011.

[14] On May 31st, 2011, a decision was released in relation to the first liability trial (see 2011 NSSC 202.) Mr. Sullivan was found to be 80% liable and Ms. Ocean was

found to be 20% liable for the collision that occurred on December 13th, 2000. In addition, Economical was found liable to pay Ms. Ocean the amount that she is entitled to recover from Mr. Sullivan as damages for bodily injuries resulting from the motor vehicle accident up to a maximum of two hundred thousand dollars ($200,000.00.) Both Ms. Ocean and Economical have appealed that decision.

[15] As indicated previously, Economical's motion for an order for the discovery examination of the Plaintiff was scheduled to be heard on June 10th, 2011. That day, Ms. Ocean filed a letter with the court indicating that she would not be attending as emergency matters required her to leave the province. Her letter concluded with the following paragraph:

> Until which time I take these matters to the Appeal Court and as per my Civil Rights and Freedoms which guarantee me protection from harm and cruel and unusual punishment, I forthright refuse [to] acknowledge and/or partake in any trial proceedings with this lower court – ACJ Smith and Defendant Parties. Proceedings such as what has transpired before a Trial Decision was even rendered, I now know to be another means in which to try and set me up so that my demise can be arranged in such a way that it appears Economical and their affiliates within the Insurance/legal/Judicial conglomerate are not involved. It is easy to see that such an illegal, ruthless and powerful conglomerate would not want the depth of these atrocities more fully revealed.

[16] That same day (June 10th, 2011) a letter was sent to Ms. Ocean from the court in which it was stated:

> Please be advised that the hearing of Economical's motion [for discovery of the Plaintiff] has been set over until Friday, June 17th, 2011 at 9:30 a.m. (at the Law Courts, 1815 Upper Water Street, Halifax, NS B3J 1S7.) I strongly encourage you to attend at that time and wish to advise that **the Court will be proceeding in your absence** if you fail to appear. I also encourage you to bring a support person with you when you attend.

[17] On June 14th, 2011, Ms. Ocean forwarded a further letter to the court in which she stated:

> In reply to your letter dated June 10, 2011. I believe that I have stated myself clearly enough in my previous letter of June 10, 2001 [sic], however I will offer specifics.

> It is fully evident that you are biased and that a "golden handshake" exists between you, Economical and other monopolizing Insurance Companies and as such you are an integral part of the conglomerate web that I claim. This is the driving force behind decisions you have made in the past, are making now and will make in the future. Despite the fact that I did once hold out a slim hope that this was not the case, I have expressed that I consider many of your actions to be highly suspicious.
>
> The above claim, and in lieu of my constitutional rights, is justifiable for me to refuse attendance as demanded in your recent letter. As it is my right NOT to be subjected to cruel and unusual punishment, then I am counting on that right and first law to be there for me at this time when I need it the most. This case has been such that I have been subjected to abuse from all parties in the past and it is likely that I would continue even today except that priorities, some of which I list below make it impossible for me to meet your demands.

[18] Ms. Ocean then referred to a number of additional events that she said prevented her from participating further in this proceeding. These included her need to focus on her appeal and her need to assist her ill mother as well as her partner.

[19] Ms. Ocean's June 14th, 2011 letter is attached to Mr. Belliveau's affidavit filed in support of this motion. Also attached to that affidavit is a copy of Ms. Ocean's Notice of Appeal filed in relation to the Court's May 31st, 2011, decision. ¶ 20 of that Notice of Appeal reads as follows:

> 20. THAT due to abusive and illegal undertakings leading up to and during the first trial, I have been left with no other recourse but to remove myself from further proceedings in regards to this case Hfx. No 190673 now before the Supreme Court so as to protect myself from further harm as afforded by my civil rights and freedoms in our constitutional democracy.

[20] Ms. Ocean has not attended court since May of 2011 when Economical's motion to amend its defence was heard. She has not appeared in court at any time between May of 2011 and the present to request an adjournment. Ms. Ocean was served with notice of Economical's motion for Security for Costs but did not file any materials in response to the motion nor did she attend for the hearing of the matter.

THE MOTION

[21] Economical is seeking security for costs pursuant to Rule 45 in relation to the negligence/bad faith claim advanced by the Plaintiff. It submits that it will experience undue difficulty realizing on a judgment for costs if its defence of this claim is successful.

[22] In his oral submissions, counsel for Economical said that this motion is based on procedural fairness. He referred to the long and protracted course that this litigation has taken to date and the long and protracted course that it is likely to take in the future. Attached to the affidavit filed in support of this motion is an excerpt from the Court's May 31st, 2011 decision where it is stated at paragraphs 123 and 124:

> [123] Counsel for both of the Defendants have expressed concern about the length of time that it took to hear this trial and the significant costs that have been incurred as a result. A trial which, in my view, would have taken no more than 5 days to hear with experienced counsel ended up being heard over approximately 25 days.
>
> [124] As a self-represented litigant, Ms. Ocean cannot be expected to conduct her case as effectively as an experienced lawyer. The difficulty in this case, however, went far beyond inexperience. Ms. Ocean appeared to be unable or unwilling to focus effectively on the matters that were in issue and seemed intent on subpoenaing witnesses and introducing evidence that was not relevant to this proceeding. In addition, she made serious allegations against both of the Defendants (such as allegations of threats) that were not supported by the evidence.

[23] During oral argument in relation to this motion, Mr. Belliveau indicated that the cost to Economical so far in this proceeding has been "shockingly high" and "horrific" and that given the Plaintiff's attitude and beliefs relating to Economical there is virtually no likelihood of his client ever recovering costs if it is successful in relation to this aspect of the proceeding. Economical has referred the Court to the cases of **Flewelling v. Scotia Island Property Ltd.**, 2009 NSSC 94, and **Belende c. Greenspoon**, 2006 CarswellOnt 9135 (Ont. Sup. Ct. J.), in support of the suggestion that the Plaintiff's conduct and attitude can be taken into account by the Court when considering whether Economical will experience undue difficulty realizing on a judgment for costs if they are successful in defending this claim.

[24] Economical has also referred the Court to **Ayangma v. Prince Edward Island**, 2006 PESCAD 23, 2006 CarswellPEI 50 (P.E.I. S.C.(A.D.)) and **Sprenger v. Paul Sadlon Motors Inc.** (2005), A.C.W.S. (3d) 54, 2005 CarswellOnt 547 (Ont. Sup. Ct.

J.) (affirmed at 2006 CarswellOnt 6004 (Ont. C.A.), leave to appeal refused at 227 O.A.C. 399 (note), 2006 CarswellOnt 5928 (S.C.C.)) in support of its position.

[25] Economical submits that the Plaintiff has made no attempt to deal with the costs Order issued on May 26th, 2011, and that this is reflective of how she will deal with any other costs order in the future. In its pre-hearing brief, Economical goes on to submit:

> The facts herein clearly satisfy the requirements of Rule 45.02. Economical has filed a notice of defence. As to the second element, it can be presumed that Economical would have trouble enforcing a costs award given the fact that the Plaintiff has failed to satisfy a past costs order. The Plaintiff's attitude has been one of complete disregard for the court processes unless it suits her. There is already an outstanding order for security for costs which remains unpaid. The Plaintiff has availed herself of the court's processes and has submitted to the court's jurisdiction. Yet she is now exhibiting a virtual contempt of the court processes by refusing to participate any longer in the action in which she herself commenced. She has stated that she is refusing to participate further in the proceeding. The likelihood of her willingness to honour any order for costs is virtually non-existent.

[26] The reference to there already being an order for security for costs is incorrect. There is, however, an Order for costs which remains unpaid.

[27] Economical submits that based on Ms. Ocean's manner of conducting the first trial, the next stage of the proceeding (the negligence/bad faith trial) will take at least 40 days to be heard. Mr. Belliveau suggests that assuming an amount involved of between $500,000.00 and $750,000.00 (due to the complexity of the proceeding and the importance of the issues) and using Scale 2 – basic costs could be in the range of $50,000.00. An additional $2,000.00 per day (as provided by Tariff A) for 40 days would represent additional costs of $80,000.00. Economical submits that if it is successful in defending this claim (which Mr. Belliveau suggests is likely) it will be entitled to costs in the range of $130,000.00 (or more) which, for the purpose of this motion, it has estimated downward to $100,000.00.

[28] Finally, Economical submits that there should be no presumption that it will be protected in relation to future costs as a result of the potential award that Ms. Ocean may receive as a result of the motor vehicle accident claim. It suggests that it is impossible to make that presumption due to an offer of settlement that was apparently made to the Plaintiff prior to that trial (which was not accepted) and due to the costs

that may be awarded as a result of that trial. I take it from this that Economical is suggesting that any damages that Ms. Ocean may be awarded as a result of the motor vehicle accident may well be consumed by any costs award that may be made in relation to that trial.

LAW AND ANALYSIS

[29] Civil Procedure Rule 45 deals with security for costs. It provides:

> **Scope of Rule 45**
>
> **45.01** (1) This Rule provides a remedy for a party who defends or contests a claim and will experience undue difficulty realizing on a judgment for costs if the defence or contest is successful.
>
> (2) A party against whom a claim is made may make a motion for security for costs, in accordance with this Rule.
>
> **Grounds for ordering security**
>
> **45.02** (1) A judge may order a party who makes a claim to put up security for the potential award of costs in favour of the party against whom the claim is made, if all of the following are established:
>
> (a) the party who makes a motion for the order has filed a notice by which the claim is defended or contested;
>
> (b) the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party;
>
> (c) the undue difficulty does not arise only from the lack of means of the party making the claim;
>
> (d) in all the circumstances, it is unfair for the claim to continue without an order for security for costs.
>
> (2) The judge who determines whether the difficulty of realization would be undue must consider whether the amount of the potential costs would justify the expense of realizing on the judgment for costs, such as the expense of reciprocal enforcement in a jurisdiction where the party making the claim has assets.

(3) Proof of one of the following facts gives rise to a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means:

(a) the party making the claim is ordinarily resident outside Nova Scotia;

(b) the party claimed against has an unsatisfied judgment for costs in a proceeding in Nova Scotia or elsewhere;

(c) the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful;

(d) the party making the claim fails to designate an address for delivery or fails to maintain the address as required by Rule 31 – Notice.

.....

Terms of order

45.03 (1) An order for security for costs must require the party making the claim to give security of a kind described in the order, in an amount estimated for the potential award of costs, by a date stated in the order.

(2) The judge may require any kind of security, including payment of money into court.

(3) A judge who requires payment into court may fix a deadline for paying the entire amount, or permit the paying party to make the payment in installments.

Stay and dismissal

45.04 (1) An order for security for costs stays the proceeding, or that part of the proceeding for which the security is due, until the security is given or the claim is dismissed.

> (2) An order for security for costs to be paid by installments stays the proceeding until the first installment is made or the claim is dismissed.
>
> (3) A party who obtains an order for security for costs may make a motion for dismissal of the claim if the party ordered to provide security fails to do so as ordered.

[30] A security for costs motion involves the balancing of competing principles. On the one hand, the court strives to insure that people of modest means are not denied access to the court as a result of their financial status. On the other hand, the court recognizes that the interests of justice are not properly served if a plaintiff is artificially insulated from the risk of a costs award. These competing principles are referred to in the case of **Wall v. 679927 Ontario Ltd. et al.** (1999), 176 N.S.R. (2d) 96 (C.A.) where Cromwell, J.A. (as he then was) stated at ¶ 49:

> Throughout the law relating to security for costs, there is tension between access to justice and avoidance of abuse. As the editorial note to the English Rule points out, ".....it is up to the plaintiff to decide whether or not to sue a party who may not be good for costs ... whether he runs that risk is a matter for him. A defendant has no comparable choice. Consequently, the law regards him more favourably, but only slightly.": **The Supreme Court Practice, 1999** (U.K.) at p. 428. In other words, if the risk of costs awards is going to serve its purpose of encouraging reasonable behaviour in litigation, there should generally be some protection that those risks are real to both the plaintiff and the defendant. The difficulty is that the effect of an order for security may be to deny the plaintiff access to the courts. If the plaintiff is unable to pay the security ordered, the action will effectively come to an end, either through stay or dismissal. As J. J. Carthy, Derry Millar and Jeff Cowan point out in **Ontario Annual Practice**, 1998-1999, at rule 56, if actions by poor plaintiffs are subjected to a preliminary review on the merits to which actions by persons who can afford security are not, the effect may be that the poor plaintiff will be denied access to the court which is permitted to others.

[31] In the case of **Emmanuel v. Samson Enterprises Ltd.**, 2007 NSSC 278, the court summarized a number of principles that had been established under the former security for costs Rule (Rule 42 of the *Nova Scotia Civil Procedure Rules* (1972)). The court stated at ¶ 9:

> Counsel have referred the Court to two Nova Scotia Court of Appeal cases which deal with the issue of security for costs. The first is the decision in **Motun (Canada) Ltd. v. Detroit Diesel-Allison Canada East** (1998), 165 N.S.R. (2d) 217 (C.A.).

The second is the decision in **Wall v. 679927 Ontario Ltd. et al.** (1999), 176 N.S.R. (2d) 96 (C.A.). These cases establish, *inter alia*, the following principles:

(1) Civil Procedure Rule 42.01 gives the Court a broad discretion whether to order security for costs. There is no automatic entitlement to security if the case falls within one of the examples set out in Civil Procedure Rule 42.01. Conversely, security can be ordered even if the case does not fall within one of the examples set out in the Rule [see **Wall v. 679927 Ontario Ltd. et al.** *supra*, at ¶ 52.]

(2) 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 [see **Wall v. 679927 Ontario Ltd. et al.** *supra*, at ¶ 82.]

(3) The Court must be cautious not to turn the power to order security for costs into the imposition of a means test for access to the courts [see **Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 73]. Further, Orders for security for costs should not be used to keep persons of modest means out of court [see **Wall v. 679927 Ontario Ltd. et al.** *supra*, at ¶ 59].

(4) Where impecuniosity is relied upon to defend against an Order for security for costs there must be more than a "blanket and empty assertion of impecuniosity". [**Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 76 referring to **Kropp et al. v. Swaneset Bay Golf Course Ltd. et al.**,[1997] 4 W.W.R. 306 (B.C.C.A.) at ¶ 23.] A Plaintiff who alleges impecuniosity and who suggests that an Order for security for costs will stifle the action must establish this by detailed evidence of its financial position including not only its income, assets and liabilities, but also its capacity to raise security [see **Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 83.]

(5) Where an Order for security for costs will prevent a Plaintiff from proceeding with its claim, the Order should only be made where the claim obviously has no merit, bearing in mind the difficulties of making that assessment at an interlocutory stage [see **Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 83.]

(6) The granting of an Order for security for costs is subject to the judge being satisfied that "it is just" to make the Order in the circumstances of the case. The factors that will enter into this consideration may vary depending on the circumstances of each case. (see **Motun (Canada) Ltd. v. Detroit Diesel-Allison Canada East**, *supra*, at ¶ 27].

[32] The present Civil Procedure Rule dealing with security for costs (Rule 45) came into effect on January 1st, 2009. The first reported case dealing with this new Rule

appears to be **Flewelling v. Scotia Island Property Ltd.**, *supra*. That case involved plaintiffs that had two outstanding judgments against them and who, the court found, were not prepared to be cooperative in any way. Goodfellow, J. commented that Rule 45 represented a considerable change from the former Rule 42 and suggested that the new Rule put greater limitations on the exercise of judicial discretion when considering a security for costs motion. Nevertheless, he was satisfied that it was appropriate to award security for costs in the circumstances of that case. He concluded at ¶ 20:

> .....
>
> The failure time and again of the plaintiffs to attend proceedings, including this application, is indicative of their attitude. It is clear and overwhelming beyond any possible lack of financial resources and means given the attitude of the plaintiffs, their lack of cooperativeness, the difficulties here do not arise only from the lack of means suggested by the plaintiffs.
>
> (d) The fact [is] that any and every legitimate legal procedure that needs to be taken by the defendants has and will be met by a lack of cooperation resulting in the incurring of unnecessary use of resources and delay, so that I readily conclude that it would be unfair not to require the plaintiffs, Dean Flewelling and Elizabeth Flewelling, to continue their claim without an Order for Security for Costs.

[33] The adult plaintiffs in that case were ordered to post security for costs by way of a cash deposit with the Prothonotary of the Supreme Court in the amount of five thousand dollars ($5,000.00.)

[34] Civil Procedure Rule 45 was considered more recently in **Ellph.com Solutions Inc. v. Aliant Inc.**, 2011 NSSC 316. When considering the effect of the new Rule, Moir, J. referred to the principles set out in **Emmanuel v. Samson Enterprises Ltd.**, *supra*, and stated at ¶ 20 - 21:

> [20] The old rule provided categories, or examples, and a catch-all. The new rule abandons that approach. It provides an analytical framework of grounds in Rule 45.02(1), a factor in Rule 45.02(2), rebuttable presumptions in Rule 45.02(3), and special grounds in Rule 45.02(4). That said, the changes require only modest modifications to the Associate Chief Justice's statement of principles.
>
> [21] The need remains for a balance between access to justice and artificial insolation [insulation] from an award of costs. On the more detailed principles:

1. Rule 45.02 provides a broad discretion. The limit on discretion commented on by Justice Goodfellow in *Flewelling v. Scotia Island Property Ltd.*, 2009 NSSC 94 at para. 19 is not severe. The judge has a free hand to do what is just, so long as the defendant files a defence, shows undue difficulty, and either shows that security would not be unfair, see Rule 45.02(1), or establishes special grounds under Rule 45.02(4).

2. The new rule does not change the principle that the court should be reluctant to order security for costs if the plaintiff establishes that doing so will prevent the claim from going forward.

3. The principles that courts should avoid security for costs being used as a means test for access to justice and that the discretion should not be used to exclude persons of modest means from court are reinforced by the ground prescribed by Rule 45.02(1)(c).

4. The new rule does modify the principles about impecuniosity. Now, the burden is on the defendant under Rule 45.02(c) if the plaintiff is an ordinary individual rather than a nominal plaintiff or a corporation under Rule 45.02(3)(c). For nominal plaintiffs and corporations, the burden remains as stated by the Associate Chief Justice.

5. The principle about foreclosing the suit, that an order should not be made that prevents the plaintiff from proceeding unless the claim obviously has no merit, remains unchanged. Indeed, it is enhanced by Rule 45.02(1)(d).

6. The principle that the judge must be satisfied about the justice of ordering security for costs is reflected specifically in the new rule by the express requirement for fairness. The requirement for a circumstantial inquiry into fairness is expressly ("in all the circumstances") preserved.

[35] **Ellph.com Solutions Inc. v. Aliant**, *supra*, involved a case where the defendants sought security in the form of unlimited personal guarantees from the plaintiffs' shareholders. In denying the motion, Moir, J. focussed heavily on the issue of fairness and concluded that in all of the circumstances it would be unjust to order the plaintiffs to provide security for costs. In coming to that decision the court referred to a line of authority that holds that an impoverished plaintiff should not be ordered to post security for costs when the subject of the plaintiff's claim is the cause of the impoverishment.

[36] With these principles and authorities in mind, I turn now to the motion before me.

[37] Economical has filed a defence to this claim. Civil Procedure Rule 45.02(1)(a) is therefore satisfied.

[38] Economical must then establish that it will have undue difficulty realizing on a judgment for costs if Ms. Ocean's negligence/bad faith claim is dismissed and costs are awarded in its favour. Further, Economical must satisfy me that the undue difficulty does not arise solely from a lack of means of the Plaintiff.

[39] Civil Procedure Rule 45.02(3)(b) provides a rebuttable presumption that the party against whom a claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise solely from the claiming party's lack of means if that party has an unsatisfied judgment for costs in a proceeding in Nova Scotia or elsewhere. While it is not specifically stated, in my view, this Rule must be interpreted to mean that the party claimed against (in this case, Economical) has an unsatisfied judgment for costs against the party making the claim (in this case, the Plaintiff). In this case, Economical has an unsatisfied judgment for costs against Ms. Ocean. Ms. Ocean has not provided any evidence to rebut the presumption contained in Civil Procedure Rule 45.02(3)(b). Civil Procedure Rule 45.02(1)(b) and (c) is therefore satisfied.

[40] Finally, Economical must satisfy me that, in all of the circumstances, it would be unfair for the claim to continue without an order for security for costs. When considering all of the circumstances, I must recognize that an order for security for costs requires a plaintiff to post security for a debt that has not yet been determined to exist. In this regard, it is a form of execution before judgment (see **Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 50.) On the other hand, if the risk of a costs award is going to serve its purpose of encouraging reasonable behaviour in litigation, there should generally be some protection that those risks are real to both the plaintiff and the defendant (**Wall**, *supra*, at ¶ 49.)

[41] The circumstances of this case are, to say the least, unique. While I do not accept Economical's suggestion that the Plaintiff's attitude has been one of complete disregard for the court's processes unless it suits her, there is little doubt that the Plaintiff's beliefs have resulted in a proceeding that is unwieldy and hugely expensive. Matters that are routinely agreed to in litigation are contested. Proceedings are

unfocussed and time consuming far beyond the norm. All of this results in great expense.

[42] Paradoxically, the opposite is now being experienced. Ms. Ocean now refuses to participate (at least at this level of court) in an action that she herself has commenced.

[43] In May of this year, Ms. Ocean was ordered to pay costs forthwith in the amount of $1,000.00. This Order has not been complied with.

[44] It is well established that the court should be reluctant to order security for costs if the plaintiff establishes that doing so will prevent a valid claim from being heard.

[45] As indicated above, Ms. Ocean has elected not to participate in this motion. She has not filed any evidence to establish that she is impecunious or to suggest that an order for security for costs will stifle the action. In Ms. Ocean's letter dated June 14th, 2011 (attached to Mr. Belliveau's affidavit filed in support of this motion), she does refer to financial difficulties when she states: "Finances are another immediate problem as I am penniless and the only property I have left remaining is my business – OceanArt Pewter, which is struggling."

[46] In my view, the new security for costs Rule does not change the previously established principle that where impecuniosity is relied upon to defend against an Order for security for costs there must be more than a "blanket and empty assertion of impecuniosity" (see **Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 76 referring to **Kropp et al. v. Swaneset Bay Golf Course Ltd. et al.**, [1997] 4 W.W.R. 306 (B.C.C.A.) at ¶ 23.) Nor does it change the principle that a plaintiff who alleges impecuniosity and who suggests that an Order for security for costs will stifle the action must establish this by detailed evidence of its financial position including not only its income, assets and liabilities, but also its capacity to raise security (see **Wall v. 679927 Ontario Ltd. et al.** *supra*, at ¶ 83).

[47] As indicated, Ms. Ocean has not filed any evidence to suggest that she is impecunious or that an order for security for costs will stifle this action. While I have concerns about the Plaintiff's financial situation (based upon statements that she has previously made in court), I must base my decision upon the evidence before me.

[48] I agree with the suggestion made by Economical that there should be no presumption that it will be protected in relation to future costs as a result of the potential award that the Plaintiff may receive as a result of the motor vehicle accident claim. I have not yet heard evidence on damages and so am unable to determine the amount of compensation that Ms. Ocean may be entitled to arising out of the collision. In addition, while costs usually follow the result, there can be factors which alter this general rule. It would be speculative, in my view, to presume that Economical will be protected in relation to future costs as a result of the outcome of the first trial.

[49] Finally, I should comment on the line of authority (referred to in **Ellph.com Solutions Inc. v. Aliant**, *supra*) which holds that an impoverished plaintiff should not be ordered to post security for costs when the subject of the plaintiff's claim is the cause of the impoverishment.

[50] As I have indicated, I do not have any evidence before me which establishes that Ms. Ocean is impoverished. Nor do I have anything before me in response to this motion which suggests that the subject of this claim is the cause of any impoverishment that may exist. As I have indicated, I must determine the motion based on the evidence before me.

[51] Economical has satisfied me that in the circumstances of this case it would be unfair for the claim to continue without an order for security for costs. In coming to this conclusion, I have taken particular note of the unique nature of this proceeding (which I view as unfocussed and hugely expensive) and the fact that Ms. Ocean has an outstanding costs Order which has not been paid.

[52] Pursuant to Civil Procedure Rule 45.03(1) an order for security for costs must require the party making the claim to give security of a kind described in the order, in an amount estimated for the potential award of costs. As indicated previously, Economical has asked for security in the amount of $100,000.00. This is a staggering amount to ask an individual to post for a debt that has not yet been determined to exist. If I was satisfied that $100,000.00 was an appropriate estimate for the potential award of costs, I would have great difficulty finding it appropriate to order security in this amount in "all of the circumstances". As will be seen, however, based on the facts presently before me, I am not satisfied that $100,000.00 is an appropriate estimate for a potential costs award.

[53] Estimating a potential award for costs prior to trial can be difficult. As a preliminary matter, costs are in the discretion of the trial judge who, pursuant to Civil Procedure Rule 77.02(1), may make any order about costs that will "do justice" between the parties. It is almost impossible to know prior to the trial what costs order will accomplish that.

[54] Further, when considering costs the trial judge can take various factors into account such as a written offer of settlement, the conduct of a party, et cetera. It is not possible to know prior to a trial how these factors are going to play out when costs are determined.

[55] Finally, in the case at bar, we have a unique situation where the Plaintiff is presently refusing to participate in her own proceeding. While Economical's estimate of trial time may prove to be correct if a full trial takes place on this aspect of the claim, the fact is that the second trial may prove to be very short if the matter is set down and Ms. Ocean continues to refuse to participate.

[56] Taking all of the circumstances into account and, based on the facts presently before me (including the fact that the trial of this matter may prove to be short if the Plaintiff continues to refuse to participate), I have concluded that it is appropriate for the Plaintiff to post security for costs in the amount of ten thousand dollars ($10,000.00) by way of cash deposit with the Prothonotary of the Supreme Court or such other form of security as is acceptable to Economical.

[57] I want to provide the Plaintiff with a reasonable period of time to raise these funds and I therefore order that the security be posted on or before the 1st day of February, 2012.

[58] As indicated, I have based my decision on the facts that are presently before me including the fact that the Plaintiff is not presently participating in the trial process. Economical will be entitled to bring a further motion for security for costs in the future if the Plaintiff elects to once again engage in this proceeding. Any such motion will be determined on the facts that exist at that time.

[59] Counsel for Economical shall draft an Order to this effect.

[60] I am prepared to hear from the parties on the issue of costs in relation to this motion. Any submissions in this regard should be filed with the court no later than November 30th, 2011.

Deborah K. Smith
Associate Chief Justice