NOVA SCOTIA COURT OF APPEAL
Citation: ***Bardsley v. Stewart***, 2014 NSCA 32

Date: 20140331
Docket: CA 420522
Registry: Halifax

Between:

James Bardsley, of Halifax, in the County of Halifax, Province of Nova Scotia; Palmer Refrigeration Inc., a body corporate, incorporated under the laws of the Province of Nova Scotia; and Palmer Engineering Ltd. (a.k.a. Palmer Geothermal & Associates)

Appellants

v.

David Stewart, of Dartmouth, in the County of Halifax, Province of Nova Scotia; Peter Beaini, of Bedford, in the County of Halifax, Province of Nova Scotia; and High Performance Energy Systems Inc., a body corporate, incorporated under the laws of the Province of Nova Scotia (in receivership)

Respondents

Judge:	The Honourable Justice Peter M.S. Bryson
Motion Heard:	March 20, 2014, in Halifax, Nova Scotia in Chambers
Held:	Motion granted.
Counsel:	Kent L. Noseworthy, for the appellants Jasmine Ghosn, for the respondents David Stewart and Peter Beaini Jason T. Cooke, for the respondent David Boyd, C.A. for Receiver Pricewaterhouse Cooper Inc.

Decision:

[1] The respondents, David Stewart and Peter Beaini apply for security for costs and related relief against the appellants, James Bardsley, Palmer Refrigeration Inc. and Palmer Engineering Limited. The motion requests security for the moving parties and the respondent, High Performance Energy Systems Inc., in receivership, (HPES). The receiver supports the motion brought by Messrs. Stewart and Beaini.

[2] The parties have been engaged in extensive and complex litigation for a number of years. HPES is a Nova Scotia company of which Mr. Bardsley and Messrs. Stewart and Beaini were directors and shareholders. Litigation amongst them began in 2009. The applicant respondents claim that Mr. Bardsley was the "directing mind" of the Palmer companies until July 2009 when he transferred sole control to his common-law spouse, Carol Harrietha.

[3] Before engaging in a security for costs analysis it will be useful to set out the relief claimed in this motion and briefly describe the decision under appeal.

Relief Sought

[4] In this motion, the respondents seek the following relief:

1. pay in full the Cost Order of Justice Hood, issued on May 25, 2012 in Hfx. No. 328760 and Hfx. No. 312038, in accordance with the terms of said Order: namely $2500 to Peter Beaini, $2500 to David Stewart, and $2500 to HPES; plus interest calculated at 5% per annum from the date of said Order, by April 20, 2014, failing which the Respondents will be at liberty to have the within appeal dismissed without further notice to the Appellants;
2. pay in full the outstanding balance of the Cost Order of Justice Boudreau, issued on December 1, 2011 in Hfx. No. 312038, in accordance with its terms; namely $38,400 to Jasmine Ghosn in Trust, plus interest calculated at 5% per annum from the date of said Order, by April 20, 2014, failing which the Respondents will be at liberty to have the appeal dismissed without further notice to the Appellants;
3. provide security to the Receiver of HPES, by way of bond or other instrument acceptable to the Receiver, in an amount equivalent to the judgments rendered in Hfx. No. 328760, and referenced in the Order of Justice Moir, issued September 5, 2013: namely (a) $103,377; plus (b)

> $127,918; plus interest calculated at 5% per annum from the date of said Order, by April 20, 2014, failing which the Respondents will be at liberty to have the appeal dismissed without further notice to the Appellants;
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> 4. post security for costs in the amount of $15,000 for the benefit of the Receiver of HPES, and post a further security for costs in the amount of $10,000 for the benefit of Peter Beaini and David Stewart, as security for costs of this appeal, no later than April 20, 2014, failing which the Respondents will be at liberty to have the appeal dismissed without further notice to the Appellants.

Case on Appeal

[5] Mr. Bardsley and the Palmer companies appeal "the judgment dated September 5, 2013" in the proceedings before The Honourable Justice Gerald R.P. Moir. Justice Moir rendered no judgment on September 3, 2013, although the court issued three orders on that date. The Notice of Appeal goes on to say: "the whole of the order or decision is being appealed from in the proceedings in the Supreme Court of Nova Scotia showing court member Hfx No. 328760 made by the Honourable Justice Gerald R.P. Moir." The evidence at this motion, tendered three decisions of Justice Moir: 2012 NSSC 191; 2012 NSSC 192; and 2013 NSSC 11. But it is clear that Justice Moir's appointment of a receiver and accounting order, are not under appeal.

[6] HPES was involved in the business of underground thermal energy storage and distribution. According to Justice Moir, record keeping was poor and the principals found themselves "embroiled in hopeless financial disputes" after a few years of operation. Mr. Stewart and Mr. Beaini brought proceedings before The Honourable Justice John D. Murphy in March of 2009 to obtain shareholder oppression relief under the Third Schedule of the *Companies Act*. They were successful owing to what Justice Moir described as the "outrageous tactics engaged in by Mr. Bardsley". The shareholder oppression order imposed a freeze on payments to directors, including salary, payments for expenses, required appointment of a chartered accountant to prepare financial statements, and required that the parties co-operate with that accountant and the appointment of an auditor.

[7] All three principals were in default of the order almost immediately. Mr. Bardsley engaged in "outrageous tactics" again. Messrs. Stewart and Beaini then countered with "unfair tactics against Mr. Bardsley, tactics that were violations of the very order they had obtained".

[8] In his initial decision Justice Moir ordered as follows (2012 NSSC 191):

> [292] I will grant an injunction requiring Mr. Bardsley to turn the drill rig over to a person who purchases it from High Performance, to execute all documents necessary to have the Registry of Motor Vehicles recognize the purchaser as owner, and to keep the equipment in safe storage until it is sold. I will also grant judgment in favour of High Performance against Mr. Bardsley in an amount equal to the price paid by High Performance for the drill rig, taxes paid by it on the purchase, and interest at three percent a year since the date of purchase. The order will recognize that the judgment creditor is obliged to credit the resale price to the judgment debt if High Performance sells the drill rig.
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> [293] I will grant a declaration that High Performance developed the "Coaxial Borehole Exchange System for Storing and Extracting Underground Cold" that is the subject of a patent application. I will enjoin Mr. Bardsley to take all steps necessary to have High Performance recognized as the owner of the patent.
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> [294] I will order an accounting on the MASDAR contract. The order may reflect that the respondents will be liable to judgment for the balance plus interest on that balance at three percent a year from January 31, 2010 until the court gives judgment for the balance. The order should provide that the parties may agree on a referee, and otherwise each side is to nominate a referee by delivering a curriculum vitae to the court within twenty days of the order.
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> [295] I will order that Mr. Beaini keep all of High Performance's books and records in safe condition until further order. It will direct Mr. Beaini to immediately take possession of the documents now held by the court, and I will enjoin others to deliver High Performance books or records to him.
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> [296] I will order that any shareholder or creditor may make a motion for the receivership of High Performance.
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> [297] The order will provide that the parties bear their own costs.
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> [298] These things should be combined in one order. It must also provide that Mr. Horwich's outstanding fees and expenses are a charge on all property of High Performance and that he is to be paid by High Performance as soon as possible.
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> [299] I will dismiss the other claims made by the applicants in this proceeding.

[9] The parties continued to disagree. On September 5, 2013 Justice Moir granted an order appointing Pricewaterhouse Coopers as Receiver of HPES. He also granted an order for an accounting of a contract between Palmer Refrigeration Inc. and one R. W. Armstrong. This related to the loss of a contract between HPES and the MASDAR development in the United Arab Emirates. That accounting is ongoing. Justice Moir also ordered Mr. Bardsley and the Palmer companies to pay HPES $127,918. Nothing has been paid on that judgment.

Finally, Justice Moir ordered Mr. Bardsley to pay HPES $103,377 for a corporate drill rig to which Mr. Bardsley took personal title. But the order goes on to say "… HPES shall sell the drill rig and credit the resale price to the judgment debt", unless Mr. Bardsley paid the debt within three weeks of the order in which case HPES was to convey the rig to him. Mr. Bardsley did not pay the judgment and the rig has not been sold, so we do not know what amount, if any, Mr. Bardsley owes pursuant to this part of the order.

Grounds of Appeal:

[10] There are three grounds of appeal:

1. At a Motion for Directions in the proceeding prior to the hearing of evidence the head of relief whereby the Respondents as Applicants were seeking a declaration that High Performance Energy Systems Inc. was the owner of the patent rights, if any, in the technology known as "coaxial borehole exchange system for storing and extracting underground cold" was abandoned by the Respondents as Applicants as a third party, Terry Lay, who was not a party or witness in this proceeding was acknowledged to have been a contributor and a co-proponent of the subject patent application #2584770.
2. The trial judge erred in law in finding that the Respondents breached the fiduciary duty owed by James Bardsley to High Performance Energy Systems Inc. in entering into a new contract in February 2010 with RW Armstrong for services on the MASDAR project after the date of termination of the contract between High Performance Energy Systems Inc and RW Armstrong, at a time when High Performance Energy Systems Inc. was not financially able to provide the services to RW Armstrong and with the knowledge and consent of High Performance Energy Systems Inc.
3. The trial judge erred in not allowing set off or a credit for adjustments for the benefit of the Respondents being credited entries in the Respondents accounting misunderstood by the trial judge in the original Decision of May 10, 2012, which mistakes were acknowledged by the trial judge in the Supplementary Decision of November 6, 2012.

Law on Security for Costs

[11] Rule 90.42 authorizes the granting of security for costs:

> 90.42 (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.
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> (2) A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[12] This Court has summarized the law on security for costs on numerous occasions. All of them acknowledge that security for costs on appeal will only be ordered where an applicant can establish "special circumstances". In *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40 Justice Beveridge discussed special circumstances:

> [6] There are a variety of scenarios that may constitute "special circumstances". There is no need to list them. All bear on the issue of the degree of risk that if the appellant is unsuccessful the respondent will be unable to collect his costs on the appeal. In *Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.*, 2005 NSCA 44, Fichaud J.A. emphasized, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute "special circumstances". He wrote:
>
> > [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances." It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman*, at ¶ 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at ¶ 4-5; *Leddicote*, at ¶ 15-16; *White* at ¶ 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at ¶ 7; *Smith v. Heron*, at ¶ 15-17; *Jessome v. Walsh* at ¶ 16-19.
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> See also *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, 2006 NSCA 131.

[13] Even so, the court retains discretion to refuse security for costs. An example of that discretion may be where a *bona fide* appellant is unable to post security and who is thereby deprived of pursuing an arguable appeal: *Sable Mary Seismic Inc.* at (¶7).

[14] Messrs. Stewart and Beaini also say special circumstances can be established where an appellant's litigation is an abuse of process (*Leigh v. Belfast Mini-Mills*

Ltd., 2013 NSCA 86 at 13) or where there has been a finding of fraud against the appellant, (*Hall-Chem Inc. v. Vulcan Packaging Inc.*, 1994 CanLII 580 O.N.C.A.); or where the director of an insolvent company pursues an appeal that could threaten or prejudice the interests of creditors (*ABC Color & Sound Ltd. v. Royal Bank*, 1990 Carswell Alta. 257) (Alta. C.A.).

[15] The respondents add that prior judgments which might frustrate execution of judgment may also constitute special circumstances warranting an order for security of costs, (*Rogers v. Nova Scotia Power Inc.*, 2006 NSCA 33).

[16] In addition to their submissions on "special circumstances", the respondents say that security of costs should be ordered because:

1. the appeal lacks merit;
2. Mr. Bardsley is not impecunious
3. they have "shouldered" the legal costs of representation of HPES in the matter before Justice Moir and in subsequent bankruptcy proceedings.

[17] With respect to special circumstances, the respondents claim that Mr. Bardsley has failed to pay costs in proceedings before Justice Hood resulting in a cost order of May 25, 2012 in the amounts of $2500 to each respondent. In addition, Mr. Bardsley has failed to pay the outstanding balance of a cost order in related proceedings before Justice Boudreau whereby Mr. Bardsley and others were jointly and severally ordered to pay costs of $38,400. Mr. Bardsley has failed to pay funds ordered by Justice Moir in his order of September 5, 2013 in the amounts respectively of $103,377 and $127,918, together with interest.

[18] In response, Mr. Bardsley says he has paid the costs ordered by Justice Hood, (indeed he did so some days before the motion before this Court and this is acknowledged by the other parties); that he has paid his one-fifth share of the $38,400 cost award by Justice Boudreau; and that any amounts due pursuant to the order of Justice Moir are uncertain because an accounting with respect to the MASDAR contract is ongoing and the results of that accounting are unknown. Finally he says that any net amount due for the drill rig is not known because it has not been sold.

[19] The respondents augment their submissions by pointing to unflattering findings against Mr. Bardsley in these and related proceedings which suggest improper and dishonest conduct by him. Mr. Bardsley replies by quoting excerpts

from Justice Moir's decision that are uncomplimentary of Messrs. Stewart and Beaini. The record is clear that none of the individual parties observed Carlton Club etiquette.

[20] Mr. Bardsley does not plead impecuniosity but says that the applicants are beneficiaries of an order obtained by them from Justice Hood "freezing" any dealing with his family home or an apartment in the south end of the City. That preservation order was obtained because Mr. Bardsley transferred his interest in these properties to his wife, Ms. Harrietha, on the same day as Justice Boudreau's oral decision dismissing an application by creditors with whom Mr. Bardsley conspired to petition HPES into bankruptcy. HPES and Messrs. Stewart and Beaini say that their ability to realize on these assets is questionable given Ms. Harrietha's 50 percent interest in them. They rhetorically ask what this interest would be worth in the market place. For his part, Mr. Bardsley complains that the preservation order impairs his capacity to raise money and effectively provides the respondents with ample security.

[21] It is appropriate here to address two arguments of the applicants which are not relevant to disposition of their motion. First, resort to the Third Schedule of the *Companies Act* to order payment to "security holders" of HPES is not available to the applicants. That is an argument that could be made to a judge at first instance in appropriate circumstances for a company's secured creditors. It is not a jurisdiction that can be exercised by a judge of the Court of Appeal when no such relief has been ordered in the courts below. As Mr. Bardsley points out, the Third Schedule describes "court" as the Supreme Court of Nova Scotia.

[22] Second, the fact that the applicants may have "shouldered the costs" of the HPES litigation does not assist the applicants in their motion to this Court. Justice Moir awarded no costs to HPES or Messrs. Beaini and Stewart. They can seek indemnification from HPES or the receiver, assuming they pay Ms. Ghosn's bills on HPES' account. The recoverability and priority of those accounts should be determined in the bankruptcy proceedings. It is not for this Court to anticipate what might transpire there or secure costs which Justice Moir did not award.

Merits of the Appeal:

[23] The parties acknowledge that this is a relevant consideration on a motion for security for costs. The respondents say the case for appeal is weak. The appellants say that there are issues of mixed law and fact in their Notice of Appeal and that

the court should be reluctant to assess the merits of the appeal at this stage. As Cromwell J.A. said in *Wall v. 679927 Ontario Ltd. et al.* (1999), 176 N.S.R. (2d) 96:

> 59 As will be seen, review of these authorities reveals three clear principles which are consistently applied. First, orders for security should not be used to keep persons of modest means out of court. Second, ***while the merits of the plaintiff's case are relevant and may be considered, they should only be considered on the basis of undisputed facts, the pleadings, etc. and not on the basis of seriously disputed facts or assessments of credibility. Third, consideration of the merits should only be decisive where they are clear and obvious***. In short, the law relating to consideration of the merits on interlocutory applications for security for costs is in harmony with the general reluctance to assess the merits of a claim or defence, other than in obvious cases, before trial.
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> 83 From this review of the authorities, I reach the following conclusions. The merit of the plaintiff's case is a relevant consideration to the exercise of discretion to grant or refuse security for costs. The extent to which the merits may properly be considered varies depending on the nature of the case. If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. ***The assessment of the merits should be decisive only where (a) the merits may be properly assessed on an interlocutory application; and (b) success or failure appears obvious***. If the plaintiff resists security that would otherwise be ordered on the basis that the order will stifle the action, the plaintiff must establish this by detailed evidence of its financial position including not only its income, assets and liability, but also its capacity to raise the security. Where the order for security will prevent the plaintiff from proceeding with the claim, the order should be made only where the claim obviously has no merit, bearing in mind the difficulties of making that assessment at the interlocutory stage. Where the choices are, on one hand, allowing an unmeritorious claim to go to trial and, on the other, stifling a possibly meritorious claim before trial, the policy of our law is clear. While there is a risk of injustice on either account, stifling a possibly meritorious claim is the greater injustice.
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> [Emphasis added]

Citing *Wall*, Justice Bateman observed in *Campbell v. Turner-Lienaux*, 2001 NSCA 122:

> [17] I do not say that a merits assessment of a case on appeal should never occur. If, for example, a trial judgment is clearly wrong on a point of law, and the appeal will without doubt succeed on that account, it may be appropriate to refrain from ordering security for costs if such an order will stifle the appeal. It is my view, however, that ***only where success on appeal is readily apparent, should a***

> ***court use the merits to forestall an order for security which would otherwise be appropriate.***
>
> [Emphasis added]

[24] While the merits may be considered, they are rarely decisive. In my view it is not possible to form a considered opinion on the merits of this appeal, based on the materials before the court. I will only say that one cannot conclude that the appeal has no merit.

Should Security for Costs be Ordered?

[25] "Special circumstances" are not confined to the failure to pay judgments either in a case under appeal or unrelated matters. Rather, that is evidence of an inability or unwillingness to pay. Depending on the circumstances, a failure to pay judgments may constitute an "objective basis" for concern that a respondent may not recover costs from an appellant. Behaving in an insolvent manner towards a respondent can give rise to such a concern, even if an appellant may be able to pay costs. It is not a question of the appellant's *ability* to pay but rather *the objectively founded concern that a respondent may not recover* because of insolvent behaviour towards that respondent: *Frost* at ¶10, cited in *Monette v. Jordan*, 163 N.S.R. (2d) 75 at 6; and see cases in ¶12 above.

[26] For the purposes of this motion, I will assume, as Mr. Bardsley urges, that the amounts that Justice Moir ordered him to pay to HPES are subject to change and therefore uncertain. But that is not an end to the analysis. There is much evidence before the court that Mr. Bardsley will go to extreme lengths to deny any material benefit to Messrs. Stewart and Beaini arising from their collective involvement in HPES. In the case under appeal, Justice Moir found that Mr. Bardsley breached his fiduciary duties to HPES by redirecting a business opportunity to himself and the Palmer companies from HPES. Likewise he breached the order of Justice Murphy and did what he could to exclude Messrs. Beaini and Stewart from management of HPES. According to Justice Boudreau, he also colluded with "creditors" of HPES to put that company into bankruptcy. He only paid the costs that Justice Hood ordered when faced with the present motion for security. And he has not paid all of the costs ordered by Justice Boudreau (that award was joint and several). All of this demonstrates a strong animus towards Messrs. Stewart and Beaini on which Mr. Bardsley is prepared to act to their detriment. Last, but by no means least, Mr. Bardsley's transfer of property into his wife's name on the day of Justice Boudreau's oral decision

displays an intent to insulate himself from judgment at the instance of the respondents. Mr. Bardsley has behaved in an "insolent manner" toward the respondents.

[27] I am satisfied that "special circumstances" exist warranting security for costs.

Quantum of Security for Costs

[28] The factors that can influence the quantum of security for costs are considered by Justice Beveridge in *Sable Mary Seismic Inc.* at ¶32 to 40:

> [37] The case of *Smith v. Michelin North America (Canada) Inc., supra*, provides the best guidance at arriving at a just quantum. In *Smith*, the appellant claimed that the respondent owed $268 million to the pension fund. He lost at trial. The trial judge awarded almost $300,000 in costs. Cromwell J.A., as he then was, agreed special circumstances had been shown. In terms of quantum, he doubted the panel hearing the appeal would award 40% of trial costs, but appeal costs would be significant in light of the amount involved, and the length and complexity of the appeal. He explained:
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> > [50] ***I turn to the question of the amount. The amount of security to be posted must be set in relation to the likely costs of the appeal, if awarded. I must also bear in mind the difficulty that may be encountered by the appellant in raising additional funds.*** The amount must be fair to both parties.
> >
> > [51] ***Our approach has generally been to make our predictions for this purpose fairly conservative, "intentionally less" than the likely costs*** on appeal, as some of the cases have said: *Arnoldin Construction & Forms Ltd. v. Alta Surety Co., supra*; *Royal Bank of Canada v. Woloszyn*, [1999] N.S.J. No. 176 (Q.L.) (C.A. Chambers); *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd., supra*. I am not persuaded by the respondent's submission that I should set an amount which is "intentionally more" in this case.
> >
> > [52] The costs of an appeal are of course within the discretion of the panel deciding it. In setting an amount for security for these costs, all I can do is to make a rough estimate of the amount that falls within the likely range of a costs award on appeal based on past experience and the limited information now before me about this appeal.
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> …

> [39] ***Party and party costs at trial, or on appeal, are not meant to be a complete indemnity to the successful party. The eventual amount of costs on appeal is up to the panel of the court hearing the appeal***. However, based on the information available, I doubt that the 40% rule would be applied. It seems likely it would result in a more than substantial contribution to the respondent's party and party costs should it be successful on the appeal. Like Cromwell J.A., in *Smith*, I must make a rough estimate of the likely costs award on appeal.
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> [40] The appeal book is voluminous. The trial judge's decision is 205 paragraphs. The notice of appeal cites 23 grounds of appeal. The appellants' joint factum is just over 100 pages is length, arguing 90 putative errors. The respondent has been given permission to exceed the normal 40 page facta limit. The hearing is set for a full day. The amount involved is significant. In my opinion, a figure of $35,000 is a reasonable, conservative estimate for costs. In this case, I see no reason to again exercise caution and discount this amount. It is apparent the appellants have the resources to pay this amount, and it provides appropriate protection to the respondent. I am satisfied it is a fair and just quantum in these circumstances.
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> [Emphasis added]

[29] Although the appeal is set down for half a day, the grounds of appeal will require an extensive consideration of the facts of this nine day hearing. Justice Moir's principal decision is 91 pages long, consisting of 299 paragraphs. The respondents seek security of costs of $15,000 for the receiver and $10,000 for Messrs. Stewart and Beaini. I consider these conservative estimates of the true solicitor-client cost of an appeal like this. The actual costs should be higher. I will order that security be posted in these amounts by 4:00 p.m. on Friday, April 18th, failing which the respondents shall be at liberty to apply on notice to the appellants for dismissal of the appeal.

"Other" Security

[30] The applicants also seek "other" security listed in their Notice of Motion—see items 3 and 4 in ¶4 above. They recognize the novelty of this claim for relief. They cite no Nova Scotia cases that have given such relief. They resort to an Ontario case in the context of the automatic stay which the Ontario rules provide in an appeal in that jurisdiction. There is no automatic stay in Nova Scotia appeals. A successful litigant is free to execute on judgment, unless the appellant obtains a stay. Because there is no automatic stay in Nova Scotia, there is no need to balance "… the need to assure that an appellant, if successful, will not be prejudiced if a stay is lifted, and the respondents need to realize some or all of the amount of the judgment …" (*Hall-Chem* p. 8).

[31] An appellant who "posts security" pending appeal in Ontario is doing so in mitigation of the automatic stay that prevails there. No such need ordinarily arises in Nova Scotia where a successful party is entitled to the fruits of her lower court victory prior to appeal. The court does not usually secure those fruits—it is usually for the successful party to execute on the judgment.

[32] It is not apparent why the *Hall-Chem* example should be followed by giving collection rights to a respondent in an appeal that are superior to those enjoyed by any other successful litigant. One can imagine circumstances where an appeal might have the practical effect of a stay that may result in a loss of exigible assets to a successful trial litigant. That is not this case. The additional prejudice to the respondents here can be addressed in a security for costs order.

[33] Even so, *Hall-Chem* shows that "other security' is only exceptionally granted. In *Hall-Chem*, the court was impressed by the findings of fraud against the individual appellant. The court was sceptical of the merits of the appeal. It was responsive to the respondent's concern that the individual appellant would secrete his assets.

[34] In this case the respondents already enjoy the benefit of Justice Hood's preservation order. That does not give them immediate collection of any judgment—but it provides protection against efforts by Mr. Bardsley to transfer valuable assets. The uncontradicted evidence before me is that these assets have a net value exceeding one million dollars.

[35] It is appropriate to add a word about the parties' behaviour because counsel for Messrs. Stewart and Beaini stressed Mr. Bardsley's improper—she even said fraudulent—conduct.

[36] This motion is not the time to dwell on the aspersions freely cast by the parties against one another. But Justice Moir did not say that Messrs. Stewart and Beaini were simply victims. He described their contempt of court:

> [262] Mr. Stewart and Mr. Beaini are in contempt of the order they already obtained under the Third Schedule. Indeed, they "repeatedly and intentionally violated the shareholder oppression order": para. 184.
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> [263] The contempt is serious. Mr. Bardsley's misconduct is no excuse for disobeying the provisions in the order that recognized Mr. Bardsley's position as a director. Nor, is it an excuse for ignoring the duty of cooperation without getting the order changed. Nor, is it an excuse for ignoring the requirements for an annual meeting, an auditor, and an audit.

> [264] Nor, is there any excuse for disobeying the order that required Mr. Stewart and Mr. Beaini to provide information to the accountant appointed by the court. Mr. Horwich is an officer of this court and he has, in that capacity, been treated with great disrespect by Mr. Stewart and Mr. Beaini.
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> [265] A person who is in contempt of an order may be refused further remedies: *Gordon v. Starr*, [2007] O.J. 3264 (S.C.J.) at para. 23 and *Luu v. Wang*, [2008] BCSC 1810. On that ground alone I would refuse shareholder oppression remedies, or any remedies respecting High Performance, to Mr. Stewart and Mr. Beaini.
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> [266] I also refuse the requested remedy because to now remove Mr. Bardsley at the behest of Mr. Stewart and Mr. Beaini is not a fair exercise of the court's power under s. 5 of the Third Schedule.

[37] Justice Moir did not blame Mr. Bardsley alone for the demise of HPES. He was satisfied that all three directors were responsible:

> [271] The company failed. It did not fail because the jointly developed technology was defective. It failed because the directors of the company, all three of them, provided incompetent management. It would be unfair to single one director out.

[38] Justice Moir found success to be divided. He awarded no costs.

[39] Even if a *Hall-Chem* discretion were available to me, it is unnecessary to decide whether Mr. Bardsley's inappropriate behaviour would attract the extraordinary relief of security for judgment.

Conclusion:

[40] The appellants will post security for costs of $10,000 for the individual respondents and $15,000 for HPES, as previously described. The applicants have enjoyed partial success on their motion. The burden was carried by Messrs. Beaini and Stewart. They shall have costs of $1,500, inclusive of disbursements, payable forthwith. HPES will have costs inclusive of disbursements of $750 payable forthwith.

Bryson, J.A.