SUPREME COURT OF NOVA SCOTIA

Citation: *Royal Bank of Canada v. Colorcars Experienced Automobiles Ltd.*, 2019 NSSC 283

Date: 20190919
Docket: Hfx No. 406818
Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Colorcars Experienced Automobiles Ltd. and John T. Early III

Defendants

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	June 27, 2019, in Halifax, Nova Scotia
Final Written Submissions:	July 15, 2019
Counsel:	Colin D. Piercey and Brianne E. Rudderham, for the Plaintiff John T. Early, III, for the Defendants

By the Court:

[1] This is a motion brought by the Royal Bank of Canada ("RBC") requesting that the court grant it an order for security for costs against the defendants/plaintiffs by counterclaim, Colorcars Experienced Automobiles Limited ("Colorcars" or “the Corporate Defendant”) and John T. Early III ("Mr. Early"). I will refer to them collectively as “the defendants”. RBC also moves for an order for production against these defendants/plaintiffs by counterclaim.

[2] RBC's motions were to be heard in special chambers on June 27, 2019, at 2:00 p.m. Its documents and briefs were filed, and counsel attended on its behalf that day. Mr. Early did not attend, and filed nothing in advance. He provided counsel for RBC with correspondence on that date indicating that he was too ill to attend. It should be noted that Mr. Early, in addition to being a defendant in his own right, is also the directing mind of the corporate defendant. He did not file any documentation with respect to the illness that had debilitated him.

[3] Rather than require RBC to incur the expense of a further attendance, and in light of the reason advanced for the Defendants’ failure to attend, I directed that the matter could proceed as a "paper application", unless either party provided notice to the other that it sought cross-examination with respect to affidavit evidence provided. I also gave direction with respect to the filing of materials on behalf of the defendants.

[4] I have now received materials filed by Mr. Early consisting of a brief and his affidavit, sworn on July 10, 2019. They were filed on July 15, 2019. Cross-examination has not been requested by RBC, nor has Mr. Early requested to cross-examine RBC’s affiant, Brianne Rudderham.

Background

[5] The antecedents of this case are dated. The matter began as a debt claim brought by RBC against the defendants, jointly and severally, in 2012. At that time, the defendants had a number of accounts with the plaintiff. As of May 9, 2012, they included a business deposit account with accumulated overdraft charges in the amount of $26,141.08, in the names of both defendants, a visa credit line in both names with a balance owing of $40,218.02, and another visa credit line, this one in the name of the corporate defendant only, with $51,501.34 owing.

[6] Accordingly, RBC commenced action on September 12, 2012, claiming a total of $117,860.44 plus interest, realization expenses and costs. A defence and counterclaim was filed by the defendants on December 13, 2012. Their pleadings amount to an admission of the debt owing on both visa credit lines. The counterclaim seeks damages based upon allegations of unjust enrichment, breach of contract and loss of credit and business reputation due to RBC's failure to extend credit to the Defendants in the form of a $350,000.00 business loan. Among other things, the defendants would seek reinstatement of the credit lines and specific performance of the alleged loan contract with the plaintiff.

[7] A Defence to Counterclaim was filed by the plaintiff on January 18, 2013.

[8] The history of this litigation is replete with orders for production by the defendants, as well as orders for discovery. Three of these, dated January 29, 2016, July 22, 2016, and June 18, 2018, awarded costs against the defendants in the amounts of $1,000.00, $200.00 and $200.00 respectively. The total of these cost awards ($1,400.00) remains outstanding. This is despite the fact that on June 15, 2018, during an appearance day hearing, the court found it necessary to warn Mr. Early with respect to some of the potential consequences attendant upon a continuing failure to pay these cost awards.

[9] Some discoveries have been held and the plaintiff has referred to portions of this discovery material in the affidavit filed by Brianne E. Rudderham dated June 5, 2019.

[10] Mr. Early did not provide his affidavit disclosing documents until January 5, 2016, on behalf of both defendants. RBC then brought a motion for summary judgement, which was heard on January 12, 2016.

[11] While RBC was unsuccessful in its summary judgement motion, on January 29, 2016, this court ordered that the defendants make additional disclosure, set a deadline for discoveries of the parties to be completed, and awarded the costs to RBC (in the amount of $1,000.00) referenced above.

[12] In Mr. Early's affidavit of July 10, 2019, he says very little that is relevant to the applications brought by the plaintiff. For example, (and among other things) he alleges that the plaintiff has failed to diligently prosecute its lawsuit, allowing it to "languish" for years at a time. Most of his affidavit is devoted to changes that have occurred in his circumstances that have negatively affected the financial position of the defendants. He says that cumulatively, these changes have "greatly diminished

the ability of the defendants to defend their position and pursue their counterclaim against the plaintiff".

[13] Some of these changes relate to his health. He indicates that he was diagnosed with bone cancer on October 16, 2018, and is currently receiving active treatment for this condition. Prior to this, he attests that he was diagnosed with Lyme disease at Lunenburg Fishermen's Hospital on July 1, 2017, and experiences repetitive fevers re-occurring every three days. Finally, he indicates that the projected course of treatment for the cancer requires a prescription drug. This drug will cost $6,800.00 per month. He further indicates that he is unable to pay this cost and is uninsured.

[14] Much of the balance of Mr. Early's submissions relate to arguments with respect to the merits of the plaintiff's claim against him and the corporate defendant.

[15] As far as his brief goes, Mr. Early's submissions to this court include the following:

> …Now comes RBC in a discovery request for additional documents to perhaps concoct a different theory of what actually transpired, and they press for them in the 7th year of the lawsuit, 4 months before a scheduled trial I am not sure I will even make.
>
> Now comes RBC with an awakening in the 11th hour that they should seek security for costs. They knew they were dealing with insolvency issues from the time of the inception of the lawsuit, an insolvency they set in motion. They could have asked for security from the outset, though the answer would be the same.
>
> Their actions of default created instance [sic] financial debilitation. This was in their control to mitigate. Highhandedness prevailed however.
>
> I would like the Court to see the action for what it is, an effort to paralyze and extinguish the Defendants' claim for justice without the need for them to obtain a judgment, and deny it.
>
> If on the other hand the Court would view the Plaintiff's motions as justified, that granting them should be weighed against the severe prejudice visited upon the Defendants if granted.
>
> In short I ask that the wrong-doer, Royal Bank of Canada not be allowed to ultimately profit by its wrongful actions both at the outset of this lawsuit and its 11th hour ploy to ultimately snuff the hope of the Defendants by other means.
>
> (*Defendant's brief, p. 3*)

[16] The issues raised in this application are two-fold.

[17] First, should the applicant's motion for security for costs be granted, and if so, in what amount?

[18] Second, should the application for disclosure sought by RBC be granted?

Analysis

A. Should RBC's motion for security for cost be granted and if so in what amount?

i. The motion

[19] *Civil Procedure Rule* 45 is an appropriate place to begin. Its relevant portions provide as follows:

> 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.
>
> (4) A judge may also order security for costs in either of the following circumstances:
>
> (a) the security is authorized by legislation;
>
> (b) the same claim is made by the same party in another proceeding, and it is defended or contested by the party seeking security for costs on the same basis as in the proceeding in which security for costs is sought.

[20] Obviously, the same provisions apply *mutatis mutandis* to "plaintiffs by counterclaim", which is one of the roles in which both Mr. Early and Colorcars find themselves.

[21] Given that Colorcars is a corporate entity, section 152 of the *Companies Act* is also relevant:

> Security for Costs
>
> 152. Where a limited company is a plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.
>
> (*Plaintiff brief, para. 26*)

[22] In *Emmanuel v. Simpson Enterprises Limited*, 2007 NSSC 278, Associate Chief Justice Deborah Smith (as she then was) outlined the two competing principles that are in play. On the one hand, it is necessary to "ensure that people of modest means are not prevented from having access to the court as a result of their financial status". On the other hand, it should be obvious that "the interests of justice are not served if the plaintiff is artificially insulated from the risk of a costs award".

[23] The current iteration of *Civil Procedure Rule* 45 post dates the *Emmanuel* decision. However, as pointed out by Moir, J. (in this Court) in *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316, aff'd. 2012 NSCA 89:

> 21. The need remains for a balance between access to justice and artificial insolation 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.

***Rule* 45.02(1)(a) – Has a defence been filed?**

[24] As I noted earlier, RBC filed its defence to counterclaim on January 18, 2013.

***Rule* 45.02(1)(b) – Will RBC will have undue difficulty in realizing upon an award of costs (if awarded)?**

[25] First, I am satisfied that Mr. Early, as principal of Colorcars, has been a principal of a number of other corporate entities over the years that have been before the courts from 2013 to present.

[26] Indeed, RBC has referenced 13 separate reported decisions involving one or more of Bayport Holdings Limited, Wolfridge Farm Limited and Partner Development Inc. All of these cases deal with corporations of which Mr. Early was the directing mind, and all present a matrix of financial difficulties and/or reluctance on the part of these corporate entities to pay debts or honour judgements against them. Many of them involve foreclosure proceedings.

[27] As RBC points out:

> 17. … From 2013 to present, Mr. Early has been involved in the following Nova Scotia matters: *Baypoint Holdings Limited (Re),* 2013 NSUARB 113, *Baypoint Holdings Limited (Re)*, 2014 NSUARB 111, *Bonang v. Wolfridge Farm Ltd.*, 2014 NSSC 40, *Wolfridge Farm Ltd. v. Bonang*, 2014 NSCA 41, *Wolfridge Farm Ltd. v. Bonang*, 2014 NSCA 70, *Wolfridge Farm Ltd. v. Bonang*, 2016 NSCA 33, *Wolfridge Farm Ltd. (Re.)*, 2015 NSSC 168, *Farm Credit Canada v. Wolfridge Farm Ltd.*, 2015 NSSC 240, *Farm Credit Canada v. Wolfridge Farm Ltd*., 2015 NSSC 309, *Wolfridge Farm Ltd. v. Farm Credit Canada*, 2016 NSCA 19, *Wolfridge Farm Ltd. v. Farm Credit Canada*, 2016 NSCA 46, *Farm Credit Canada v. Wolfridge Farm Ltd*., 2016 NSSC 108, *Canadian Imperial Bank of Commerce v. Partners Management Development Inc.*, 2016 NSSC 2, and *Royal Bank of Canada v. Baypoint Holdings Limited*, 2018 NSSC 233.
>
> (*Plaintiff's brief, para. 17*)

[28] Indeed, in *Wolfridge Farm Limited v. Bonang*, 2014 NSCA 41 and *Wolfridge Farm Limited v. Farm Credit Canada*, 2016 NSCA 19, Mr. Early was required to post security for costs by the Court of Appeal in the amounts of $10,000.00 and $6,000.00 respectively.

[29] Compounding this is the earlier referenced fact that Mr. Early and Colorcars have three outstanding costs awards against them <u>in this proceeding</u>. It is not

inappropriate to observe that the primary reason for these costs awards in the first place, seems to have been the very casual attitude manifested by these defendants to earlier court orders (such as those that required further production) in this proceeding.

[30] Further compounding these concerns are some of the representations contained in Mr. Early's affidavit, as well as in his written brief. In the latter, for example, we find:

> Royal Bank of Canada knows that Colourcars Experienced Automobiles Ltd. has been dead for 8 years.
>
> *(Brief, page 1)*

[31] Next:

> As for myself individually and personally, I am not much of a help to Royal Bank of Canada's cause. Most recently I became subject to a personal judgement in the United States in excess of $2,200,000.00. As obviously, I still have dealings in the United States, a personal bankruptcy filing United States, which I've resisted for some time, is an option which I might be forced to take, if only to end the tireless stream of lawsuits such as this one which I must address.
>
> *(Brief, page 2)*

[32] I am satisfied that RBC will have undue difficulty in realizing upon a costs award against the defendants.

Rule **45.02 (1)(c) "Does the undue difficulty arise only from a lack of means the party making the claim?"**

[33] Obviously, the above criterion modifies the preceding one. It is to be read in tandem with *Rule* 45.02(3) which I will repeat here for ease of reference:

> 45.02(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.
>
> [Emphasis Added]

[34] In *Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89, Justice Saunders, in upholding Justice Moir's earlier referenced decision in this court, explained:

> 59. *Civil Procedure Rule* 45.02 is an example of what I would characterize as the hybrid approach. It directs that while the judge retains the discretion ("may order") to oblige a party to put up security, such an order will only be granted if certain thresholds are all met ("if all of the following are established"). The grant of discretion is paired with a list of factors meant to guide the judge in its application. Among the listed criteria is included a final basket clause which obliges the judge to ultimately consider fairness in all of the circumstances.

[35] Moreover, as Justice Moir had originally noted in *Ellph.com* when the motion was heard in this Court, section 152 of *The Companies Act* is also available with respect to corporate plaintiffs like Colorcars:

> 22. *The Companies Act* contains its own provision about security for costs: s. 152. I do not think that the discretion under that section is governed by considerations different than those under Rule 45 -- Security for Costs.

[36] That said, *Rule* 45.02(3)(b) is clearly applicable to both Mr. Early and Colorcars. They have three costs awards, in this proceeding alone, against them. These awards remain unsatisfied. Two of them are in excess of three years old, and the other one has been outstanding well in excess of a year.

[37] *Civil Procedure Rule* 45.02(3)(c) also applies to Colorcars, on the basis of Mr. Early's own affidavit.

[38] The use of the word "rebuttable presumption" in *Rule* 45.02(3) means, of course, that it is open to Mr. Early and Colorcars to rebut the presumption noted. ACJ Smith (as she then was) noted in *Ocean v. Economical Mutual Insurance Company*, 2011 NSSC 408, that the rebuttal process requires provision of "detailed evidence of [their] financial position including not only [their] income, assets and liabilities, but also [with respect to their] capacity to raise security."

[39] I am in respectful agreement. It is obvious that the process of "rebuttal" must be a dynamic one. Some effort must be expended by Mr. Early and Colourcars to "rebut", otherwise the word is bereft of any meaning. (See also *Armoyan v. Armoyan*, 2014 NSSC 143, at paras. 32-37)

[40] The information provided by Mr. Early does not come anywhere close to providing the requisite level of detail necessary. Very little other than blanket assertations have been made in his affidavit and brief.

[41] As a consequence, neither Mr. Early or Colorcars has come near to rebutting the presumption created by *Rule* 45.02(3).

"45.02(1)(d) - in all of the circumstances, is it unfair for the claim to continue without an order for security for costs?"

[42] Reference has earlier been made to the tension between the two primary principles that are engaged in these types of applications. In *Ocean* (supra), this tension was expressed somewhat differently, but to the same effect:

> 40. ... 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 para. 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.
>
> [Emphasis Added]

[43] So, too, in *Ellph.com*, at the appellate level, we find a reference to:

> 95. … the well-known objectives surrounding the grant, or refusal of costs which includes a recognition that the risk of being exposed to a costs award is meant to encourage reasonable behaviour in litigation. See for example, *Landymore v. Hardy*, [1992] N.S.J. No. 79 (Q.L.) (C.A.); *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47; and *Wall v. 679927 Ontario Ltd. et al*. (1999), 176 N.S.R. (2d) 96 (C.A.).
>
> [Emphasis Added]

[44] I agree with RBC's submission, which is to the effect that an order for security for costs may require the defendants to take a second, harder, look at the merits of the numerous allegations in the counterclaim. Within this context, and by way of example only (without any attempt to be exhaustive), I note that in the

Statement of Defence the defendants referred to RBC providing "conditional approval" for the loan upon which RBC is alleged to have reneged, but make no further reference to the essential elements of an enforceable contract.

[45] By way of a further example, I also note the reference by RBC to a balance sheet provided by Mr. Early on September 29, 2011, when the application was made for the referenced business loan. A representation was made therein that Colorcars had no taxes payable. There has been a subsequent acknowledgement by the defendants in their Statement of Defence and Counterclaim at para. 20 that near the relevant time, Colorcars owed approximately $1,100,000.00 in HST to Canada Revenue Agency (“CRA”).

[46] To the extent that facts exist which would explain these apparent factual discrepancies which, on their face, appear to be inimical to the counterclaim brought by the defendants (for example, the latter, if established, could furnish the basis for a defence that any alleged contract was void for misrepresentation in any event) then their discovery by RBC has been frustrated by the continuing difficulty that it has had in obtaining appropriate disclosure from Mr. Early and Colorcars.

[47] Mr. Early's conduct to date, both in his own right and as the directing mind of the corporate defendant, viewed holistically, leads inexorably to the conclusion, that if RBC succeeds in the litigation and obtains a judgement for costs, in all likelihood the defendants simply will not pay it.

[48] There also appears to be a supposition on the part of the Defendants/Plaintiff by Counterclaim, that there is no financial disincentive to which they will be potentially subject in the event of further non compliance with court orders.

[49] In my view, based upon the foregoing, it would be unfair for the defendants' counterclaims to continue without an order for security for costs.

ii) How much?

[50] This requires us to consider, at the outset, C*ivil Procedure Rule* 45.03(1) which provides as follows:

> 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 equal to or lower than that estimated for the potential award of costs, by a date stated in the order.
>
> [Emphasis Added]

[51] Note must be taken of the use of the word "estimated" in the above. We are obviously not dealing with a precise mathematical exercise at this juncture. This is consistent with (then) ACJ Smith's observations in *Ocean*:

> 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.

[52] Obviously, the first step in this exercise must involve a consideration of the actual counter-claim that Mr. Early and Colorcars have asserted. Their counterclaim is one for damages for "unjust enrichment, loss of credit reputation, loss of business reputation and breach of contract relating to a business loan for $350,000.00".

[53] While I agree with counsel for RBC that the one concrete number to which reference has been made in the Counterclaim is $350,000.00, and that there are, in addition to this, “significant unquantified claims, [which must be quantified] ... having regard to the complexity of the proceeding and the importance of the issues" (*RBC brief, para. 71*), I disagree that $350,000.00 must be the frame of reference when determining the amount involved for the purposes of the estimate required by *Civil Procedure Rule* 45.03(1).

[54] This is because, although the claim alleges misconduct on the part of the bank in relation to a loan anticipated by the defendants in the amount of $350,000.00, this figure was not and is not alleged to bear any relation to the damages sustained by the defendants by virtue of the failure by RBC to follow through on its alleged loan commitment. It is trite to observe that the failure to advance a loan of $350,000.00 does not result in damages in that amount having been sustained by the putative recipient.

[55] In all likelihood, at least some of the material which the court would require in order to undertake the exercise anticipated by the above referenced Rule is among the very material which the defendants have as yet failed to produce (which will be considered in more detail when the second issue is determined). Notwithstanding the absence of this material, the novelty of some of the claims

advanced, and the paucity of the foundation upon which to base such an estimate, I would conservatively fix, for the purpose of this exercise, the sum of $250,000.00 as the "amount involved" in the defendants' counterclaim.

[56] It is a very rough estimate. It has been determined primarily on the basis of the apparent complexity of the proceeding, and its importance to the parties, including but not limited to the profundity of the impact that RBC's conduct is alleged to have had upon the financial integrity of the defendants.

[57] The application of Tariff "A" scale to this figure would yield a costs amount of $22,750.00. To this I make provision for an anticipated two day trial (to deal with the counterclaim ($2,000.00 per day)) which would bring the figure to an estimated amount of $26,750.00.

[58] But this does not end the exercise. The present rule, which was based upon extant case law, tells us that the amount of costs for which security is to be provided shall be in an amount "equal to or lower than" the estimated amount of costs.

[59] Clearly, the Court has significant latitude in determining the actual amount. *Rule* 45.03(1) merely tells me that I must not impose an amount which exceeds my estimate of the potential costs award.

[60] In doing so, I consider a number of factors, including Mr. Early's present health issues, his conduct to date, and the seriousness of the allegations contained in the Counterclaim. I also must consider what, practically speaking, would appear to be a sufficient amount to encourage both Mr. Early and Colorcars to proceed reasonably and to respect the court process (and Court Orders in particular). One of the court's objectives should be to incentivize (or at least encourage) reasonable behaviour during the balance of this litigation.

[61] The sum of $18,500 should be a "stake" sufficient to accomplish those objectives.

[62] Accordingly, Mr. Early and Colorcars shall post the total sum of $18,500 with this Court on or before October 15, 2019, failing which RBC shall be at liberty to make a motion to dismiss their Counterclaim.

B. Should RBC's motion for production be granted?

[63] As earlier noted, an overview of the pleadings reveals that RBC commenced an action in debt against the defendants jointly and severally. The debt was incurred pursuant to unpaid overdraft charges and two visa credit lines. These included a business deposit account number 50134881–001, in the name of both defendants, which had accumulated $26,141.08 in overdraft charges as of May 9, 2012, Visa account number 4515055122616670 in the name of both defendants, and a further Visa number 4516 0700 0609 4066 in the name of the defendant Colorcars alone, in the amounts of $40,218.02, and $51,501.34, respectively, as of that date. To the mix must be added the fact that Mr. Early executed a personal guarantee in (July 2011), guaranteeing the liability of Colorcars up to an amount of $90,000.00.

[64] It appears that the defendants admit that they have accumulated the amounts owing on the aforementioned Visa credit lines and that these amounts have not been paid to RBC. They also allege that RBC had provided "conditional approval" for a business loan in the global amount of $350,000.00 which was to take the form of a $200,000.00 refinance of a first mortgage on Mr. Early's Dartmouth Road property, and a further $150,000.00 line of credit pursuant to a second charge on the same property (*defence and counterclaim, para. 9*). The defendants also allege that an RBC employee represented to Mr. Early that the loan was a "done deal" and approval was only a formality. (*Defence and counterclaim, paras. 17 and 18*)

[65] Around this time, defendants appear to have forwarded an HST remittance due to initiative taken by CRA. This initiative had taken the form of a $1,100,000.00 HST assessment. Subsequent evidence obtained at discovery of Mr. Early disclosed that this occurred in or around November 2011 (*Statement of Defence, para. 20, Rudderham affidavit paras. 6, 24, and Exhibit 3*).

[66] No funding with respect to the alleged loan was ever provided by RBC and, as a result, the defendants allege unjust enrichment, a loss of credit reputation, loss of business reputation. As previously noted, they have requested, as part of the relief sought, that the court reinstate the Visa credit lines and grant specific performance of the $350,000.00 business loan agreement.

[67] Hence, RBCs motion. As described in its brief:

> RBC is now seeking an Order of this Honourable Court compelling the Respondents to disclose the following outstanding and relevant documentation pursuant to *Civil Procedure Rules* 1.01, 14 and 15:

(a) a copy of Colorcars' entire CRA file, including a copy of the Colorcars audit file with CRA, and the notices of reassessement;

(b) any and all documents with Tax Audit Solutions, and in particular any appeals filed therewith;

(c) a copy of the phase 1 environmental assessment for the Dartmouth Road Property;

(d) any and all documentation where Kevin Desjardins allegedly discussed the placing of a second mortgage on Baypoint Holdings Ltd. and/or discussed a document obtained by RBC with Mr. Early's signature;

(e) any and all documents from Kevin Desjardins allegedly informing Mr. Early that he was approved for a loan;

(f) copies of Mr. Early's personal income tax statements from 2003 to present;

(g) copies of all income tax returns for Colorcars from 2003 to present; and

(h) copies of all American Express account statements that show alleged defaults.

(*Plaintiff brief, para. 26*)

[68] The plaintiff offered the following synopsis with respect to its previous attempts to obtain full disclosure:

> 27. On November 14, 2017, exactly one year after the discovery examination, Mr. Early was sent a copy of the list of undertakings requested during discovery examination. Mr. Early acknowledged receipt of this correspondence sent to him by Titanfile on November 15, 2017, and requested clarity on the relevance of the requested documents.
>
> (Rudderham affidavit, para. 42, Exhibit 27)

> 28. Correspondence was sent to Mr. Early via email on November 17, 2017, regarding the proposed use of Titanfile for document sharing, the scheduling of discovery examination of an RBC representative, and production of documents requested from the defendant. Therein, Mr. Piercey clarified how the requested time, including Colorcars' CRA file, the Tax Audit Solutions file, income tax statements for Mr. Early and Colorcars, a copy of the phase 1 environmental assessment of the Dartmouth Road Property, the American Express account statements, and any and all documentation from Mr. Desjardin relating to approval of the loan and a second mortgage, was relevant to proving or disproving the truth of his allegations made in the Statement of Defence and Counterclaim and for assessing damages.
>
> (Rudderham affidavit, para. 44, Exhibit 29)

> 29. Further, the correspondence sent to Mr. Early on November 17, 2017, highlights that the Personal Statement of Affairs provided to RBC on December 28, 2011, by Mr. Early represented that he had no back taxes owed and that his net worth was $2,000,946. It was explained that the accuracy of these representations, along with others made to RBC in an effort to secure the business loan, may be proved or disproved by the documentation requested.
>
> (Rudderham affidavit, para. 44, Exhibit 29)
>
> 30. No response has been received from Mr. Early.
>
> (*Plaintiff's brief, paras. 27 - 30)*

Analysis

[69] "Relevance" is the engine which drives the discovery process. At this stage, it is determined by the pleadings. It is axiomatic that a document is relevant if it tends to make a fact in issue more or less likely to be true.

[70] If this needed any further elaboration, it is provided by the *Civil Procedure Rules* and specifically those portions which follow:

> 14.01(1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
>
> (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.
>
> (2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.
>
> …
>
> 14.08 (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.
>
> (2) Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or

> electronic information exist and are in the control of the party, and to preserve the documents and electronic information.
>
> (3) A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following:
>
> > (a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;
> >
> > (b) the importance of the issues in the proceeding to the parties.
>
> (4) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.
>
> (5) The presumption for disclosure applies, unless it is rebutted, on a motion under Rule 14.12., Rule 15.07 of Rule 15 - Disclosure of Documents, Rules 16.03 or 16.14 of Rule 16 - Disclosure of Electronic Information, Rule 17.05 of Rule 17 Disclosure of Other Things, or Rule 18.18 of Rule 18 - Discovery.
>
> …
>
> 15.02 (1) A party to a defended action or a contested application must do each of the following:
>
> > (a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;
> >
> > (b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;
> >
> > (c) acquire and disclose relevant documents the party controls but does not actually possess.

[71] Once evidence has been determined to be relevant, and in the absence of an application under *Civil Procedure* Rule 14.08(3), it must be disclosed in accordance with the *Civil Procedure Rules* and the rules of evidence unless the party resisting production is able to successfully assert a claim of privilege with respect to the material in question. The two relevant species of privilege are solicitor-client privilege and litigation privilege (see *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, 2000 NSCA 96, at para. 14 for a more fulsome discussion of each of these distinct types of privilege).

[72] No claim of privilege has been raised by or on behalf of either defendant. Therefore, RBCs motion will stand or fall upon the relevance of the information which is sought.

[73] It is clear that the object of the relevant Rules, at a pretrial stage of the proceedings, is to mandate disclosure not only of evidence that is apparently “trial relevant”, but also evidence which "will probably lead to relevant evidence at trial" (see, for example, *Halifax – Dartmouth Bridge Commission v. Walter Construction*, (2009) NSSC 403, per LeBlanc, J.). The final decision on relevance is, of course, to be made by the trial judge.

[74] At the present stage, however, it is the pleadings, as well as the discovery evidence and the documents disclosed to date which will provide the court with the necessary frame of reference.

i) Colorcars' entire CRA file include, including a copy of the Colorcars audit file the CRA, and the notices of assessment

[75] When Mr. Early applied for the business loan which forms the subject matter of his counterclaim, on December 10, 2010, and December 28, 2011, he provided personal statements of affairs to RBC (*Rudderham affidavit, paras. 26, 27 and Exhibits 15, 16*). In his Statement of Defence, he indicated that it was on November 7, 2012, that he received the CRA assessment, and that it was unexpected (*defence para. 20*). In Ms. Rudderham's affidavit, filed in support of RBCs motions, it is alleged that Mr. Early had indicated on discovery that he learned of the CRA assessment around November 29, 2011 (which would make it prior to his provision of this second statement of affairs, which does not mention the amount owing to CRA.)

[76] Any evidence which may show whether Mr. Early misrepresented his circumstances in one or more of his statements of affairs which were filed in conjunction with the application for the alleged business loan would relate to the possibility of a defence which could be raised by RBC, namely, that the contract (quite apart from everything else) was void because of the misrepresentation. These documents must be produced.

ii) Any and all documents with Tax Audit Solutions, including any appeals filed therewith

[77] It appears that the defendants hired Tax Audit Solutions to assist the defendants with respect to a contest of the CRA assessment. They are relevant for the same reason that the information in (i) above is relevant. These documents must be produced.

iii) A copy of the phase I environmental assessment for the Dartmouth Road property

[78] The Dartmouth Road property is integral to the defendants' counterclaim in the sense that both the first and second mortgages (which were to secure the alleged $350,000.00 business loan) were to be charges against this property. The existence of environmental issues at this property (*admitted in Statement of Defence at para. 13*), the extent of those issues, and what would be needed in order to remediate them is highly relevant to whether the defendants were ever in possession of viable security for the alleged loan in the first place. It is also relevant to the claims (para. 13 of the Defence and Counterclaim) that these environmental issues could be corrected within "six to nine months". It must be produced.

iv) Any and all documentation where Kevin Desjardins (RBC employee) allegedly discussed the placing of a second mortgage on Bay Point Holdings Limited and/or discuss the document obtained by RBC with Mr. Early's signature.

[79] The Statement of Defence and Counterclaim by Mr. Early and Colorcars provides:

> 14. It was at this point in early 2011, that Amy Hutt was reassigned and Kevin Desjardins was assigned the account. At this point Desjardins suggested that the personal residence of Early be used as collateral during the soil re-mediation period. The house was held by a holding company, Baypoint Holdings Ltd. but Early possessed legal authority to pledge the asset. The house appraised by the Royal Bank showed a value of approximately $1,900,000 and an existing first mortgage with ScotiaBank in an amount of $1,200,000 at a very favorable rate and term.
>
> 15. Early was content with the ScotiaBank mortgage and had no need to replace it.
>
> 16. Desjardins suggested that the only manner in which the bank would grant the credit is if RBC could also have the first mortgage position of $1,200,000. Early agreed to the refinance proposal whereby the additional $700,000 equity would be opened to secure the previously offered line of credit.
>
> 17. RBC approved the $1,200,000 mortgage and it closed in the middle of 2011. As a further credit stop-gap measure, Desjardins sought approval and received approval to grant Early another $50,000 visa line. Both the $40,000 and $50,000 visa lines, (at short term and high interest rates) were slated to be paid off by the second mortgage credit facility to be granted to Early and ColorCars after closing

> the first mortgage. In fact Kevin Desjardins remarked to Early that the bank already had created a "Second Charge" on the real estate immediately after the closing of its first mortgage.

[80] Such documentation, if it exists, bears obvious relevance to the assertions made by the defendants in the above referenced portion of their defence, and is also relevant, among other things, to the claim of unjust enrichment brought against RBC. If it exists, it must be produced.

v) Any and all documents from Kevin Desjardins allegedly informing Mr. Early that he was approved for a loan of up to $100,000.00

[81] The defendants have alleged in para. 18 that Mr. Desjardins communicated with Mr. Early in October 2011 in words to the effect that approval had been granted for a line of credit in excess of $250,000.00 and also with respect to an "overdraft line" for the corporate defendant's checking account in the amount of $100,000.00. The defendants have claimed breach of contract on the part of RBC, among other things. All communication with respect to this issue, including documented communication, is relevant to whether or not a binding contract had been concluded between the parties. Such documents must be produced if they exist.

vi) Copies Mr. Early's and Colorcars income tax statements for 2003 to present

[82] Both defendants have claimed damages for unjust enrichment and loss of business reputation. These documents will be relevant to the calculation of damages in the event that the defendants were to be successful in their counterclaims. They must be produced.

vii) Copies of all American Express account statements that show alleged defaults

[83] Para. 19 of the Statement of Defence filed by Mr. Early and Colorcars provides:

> 19. Acting and relying on this commitment, Early materially changed his position and diverted funds from Colorcars from their immediate designated purpose in reliance that these funds would be replaced quickly by RBC. One such diversion resulted in default on an American Express bill in the amount of $30,000,

> resulting in the destruction of Early's personal credit, when the promised RBC funds did not materialize.

[84] The statements are directly relevant to the contentions noted above and must be produced.

Conclusion

[85] As a result, the defendants shall pay the security for costs noted earlier and shall also produce at their own cost the documents sought by RBC, on or by October 15, 2019. In the event of their failure to do so, the plaintiff shall also be at liberty to make a motion to dismiss their counterclaim.

[86] RBC shall also receive its costs payable by the defendants as follows:

i. With respect to the motion for security for costs - $1,000.00 inclusive of disbursements;

ii. With respect to the motion for production - $1,000.00 inclusive of disbursements.

Gabriel, J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Royal Bank of Canada v. Colorcars Experienced Automobiles Ltd.*, 2019 NSSC 283

Date: 20190919
Docket: Hfx No. 406818
Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Colorcars Experienced Automobiles Ltd. and John T. Early III

Defendants

ERRATUM

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	June 27, 2019, in Halifax, Nova Scotia
Final Written Submissions:	July 15, 2019
Counsel:	Colin D. Piercey and Brianne E. Rudderham, for the Plaintiff John T. Early, III, for the Defendants
Erratum Date:	October 1, 2019

Para. 22 – remove heading "Analysis"
Para. 35, line 2 – changed the word "hearing" to "heard"
Para. 60, line 6 – changed the word "objective" to "objectives"