SUPREME COURT OF NOVA SCOTIA

Citation: *Blackhawk Construction Limited v. Martin*, 2020 NSSC 272

Date: 20201002
Docket: *Hfx No.* 463831
Registry: Halifax

Between:

Blackhawk Construction Limited
Plaintiff/Defendant by Counterclaim

v.

Gregory Neil Martin, Marjorie Marie Martin
Defendants/Plaintiffs by Counterclaim

Judge:	The Honourable Justice Ann E. Smith
Heard:	September 14, 2020, in Halifax, Nova Scotia
Counsel:	William F. Dooks and Colette Williams, as Representatives for the Plaintiff/Defendant by Counterclaim Dennis James, QC, for the Defendants/Plaintiffs by Counterclaim

By the Court:

Introduction

[1] The Defendants/Plaintiffs by Counterclaim (the "Martins") move for an order requiring the Plaintiff/Defendant by Counterclaim, Blackhawk Construction Limited, ("Blackhawk") to provide security for costs.

[2] The evidence on the motion consisted of the Affidavits of Paul Wadden, one of the lawyers for the Martins and the Affidavits of Tiffany Roberts and Rhonda Doucette, paralegals with the Martins' law firm in this matter. Also filed were the Affidavits of Marjorie Marie Martin and William Dooks (unsworn dated August 2020 and sworn dated August 28, 2020). Mr. Dooks is the sole director of Blackhawk.

Issue

[3] The sole issue on the motion is whether the Martins' motion for security for costs should be granted, and if so, in what amount.

Background

[4] In July 2016, Blackhawk, at the request of the Martins, entered into a contract whereby Blackhawk agreed to construct a house and garage for them in West Petpeswick, Nova Scotia (the "Property"). Mr. Dooks claims that the Martins owe Blackhawk $140,000 for its work, services and materials. When Blackhawk was not paid this amount, it placed a lien upon the interests of the Martins in the Property and their land.

[5] The Martins claim, *inter alia*, that Blackhawk failed to construct their home in accordance with the National Building Code, and in accordance with the plans agreed upon. In short, the Martins claim that Blackhawk negligently constructed the house and produced a structure that is unsafe, dangerous and unusable by them or any other person.

[6] Blackhawk denies all of the Martins' allegations. It says that its work was not negligent, and it did not breach its contract with the Martins. Further, Blackhawk says that the Martins undertook an internet campaign which harmed Blackhawk's business.

Law and Analysis

[7] *Civil Procedure Rule* 45 applies to this motion. Its relevant portions provide as follows:

> **45.01 Scope of Rule 45**
>
> **(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.
>
> **45.02 Grounds for ordering security**
>
> **(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.

[8] In *Emmanuel v. Simpson Enterprises Limited*, 2007 NSSC 278, Associate Chief Justice Deborah Smith (as she then was) outlined the two competing principles at play when security for costs is sought.

[9] 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, "the interests of justice are not served if the plaintiff is artificially insulated from the risk of a costs award."

[10] The current *Rule* 45 postdates *Emmanuel*; however, Moir J. of this Court reviewed the new *Rule* and the principles which remain constant, in *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316, aff'd. 2012 NSCA89:

> 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).

[11] *Rule* 45 is discretionary. A judge "may" order security for costs if various parts of the test are met.

The Martins' Position in Brief

[12] The Martins say that Blackhawk is a corporation that does not appear to have sufficient assets to satisfy a judgment for costs, if they are successful on their counterclaim. The Martins also say that the presumption in favour of an order for security for costs cannot be rebutted because undue difficulty does not arise solely from Blackhawk's lack of means. They say that Blackhawk has not met its evidentiary burden for demonstrating impecuniosity.

Blackhawk's Position in Brief

[13] Blackhawk says it is impecunious. It says that its claim against the Martins has merit. Blackhawk also says that the Martins have delayed bringing this motion.

Law

[14] The Martins say that they should have some protection for costs if successful in their counterclaim. The Martins point out that the moving party must establish four factors under *Rule* 45.02(1), each of which they say have been met on this motion.

[15] First, the party who makes a motion for the order has filed a notice by which the claim is defended or contested (*Rule* 45.02(1)(a)). That part of the test has clearly been met, as the Martins have filed a Statement of Defence and Counterclaim.

[16] Secondly, *Rule* 45.02(1)(b) provides that the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party. Counsel for the Martins says this element of the test is met by virtue of the fact that Blackhawk does not appear to have sufficient assets in Nova Scotia to respond to a costs award.

[17] Thirdly, *Rule* 45.02(1)(c) provides that the undue difficulty does not arise only from the lack of means of the party making the claim. The Martins' counsel says that since Blackhawk is a corporation, there is a rebuttable presumption that the difficulty does not arise solely from Blackhawk's lack of means.

[18] Fourthly, *Rule* 45.02(1)(d) provides that in all of the circumstances, it is unfair for the claim to continue without an order for security for costs. The Martins say that Blackhawk has a lien on their Property, which provides it with protection if Blackhawk's claim succeeds, but without security for costs, they have no such protection.

[19] *Rule* 45.02(3) lists a series of factors, that if proven, give rise to the rebuttal 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.

[20] Saunders J.A. in *Ellph.com Inc. v. Aliant*, *supra*, outlined the necessary analysis once a rebuttable presumption under *Rule* 45.02(3) is established:

> *CPR* 45.02(1)(c) says that a prerequisite to any security is that the difficulty "does not arise only from the lack of means of the party making the claim". We know from Ellph.com's factum (quoted above) their admission that their companies "are insolvent . . . (and) . . . will not be in a position to contribute to Aliant's

> costs". On its face, therefore, the difficulty does "arise only from the lack of means of the party making the claim" which would then suggest that security is unavailable because of the wording of 45.02(1)(c). However, that conclusion is neutered by CPR 45.02(3)(c) which says that when the plaintiff is a corporation there is a rebuttable presumption that the difficulty does not arise solely from the plaintiff's lack of means. Ellph.com could have sought to rebut the presumption but, with its concession, chose not to do so. Accordingly, *CPR* 45.02(1)(c) is satisfied and we are left with 45.02(1)(d) – unfairness - as the only issue.
>
> *[emphasis of the Court of Appeal]*

[21] In order to rebut the *Rule* 45.02(3)(c) presumption, the burden is on Blackhawk to satisfy the Court that the undue difficulty to realize on an award of costs does not arise solely through its lack of means. Mr. Dooks says that Blackhawk is impecunious and that requiring it to provide security for costs would prevent it from continuing with a meritorious claim against the Martins.

[22] In terms of impecuniosity, the Martins say that the evidence before the Court is insufficient to rebut the presumption against them. They refer to the case law which provides that there must be more than a blanket or empty assertion of impecuniosity. Relying on that case law, counsel for the Martins says that impecuniosity must be supported by detailed evidence of a party's financial position, including income, assets and liability as well as capacity to raise security from any source.

[23] The motion decision in *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316 was decided by Moir J. In terms of establishing impecuniosity, Moir J. stated at para. 19, referring to the decision of then Associate Chief Justice Deborah K. Smith in *Emmanuel v. Sampson Enterprises Ltd.*, *supra*, at para. 9:

> (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." 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.
>
> [emphasis added]

[24] In *Yaiguaje v. Chevron Corporation*, 2017 ONCA 741 Epstein J.A. considered what appears to be a similar *Civil Procedure Rule* in that Province dealing with security for costs:

Impecuniosity

[30] A party who seeks to establish impecuniosity must lead evidence of "robust particularity", with full and frank disclosure, and supporting documentation as to income, expenses and liability: *T.S. v. Publishing Group Inc. v. Shokar*, 2013 ONSC 1755 (Master); *Mapara v. Canada (Attorney General)*, 2016 FCA 305, at para. 8. Doherty J. (as he was then) explained the rationale for this evidentiary rule in *Hallum v. Canadian Memorial Chiropractic College* (1989), 1989 CanLII 4354 (ON SC), 70 O.R. (2d) 119 (Ont. H.C.), at pp. 9-10:

> A litigant who falls within one of the categories created by rule 56.01(a) to (f), and who relies on his impecuniosity to avoid an order requiring that he post security, must do more than adduce some evidence of impecuniosity. The onus rests on him to satisfy the court that he is impecunious…The onus rests on the party relying on impecuniosity, not by virtue of the language of rule 56.01, but because his financial capabilities are within his knowledge and are not known to his opponent; and because he asserts his impecuniosity as a shield against an order as to security for costs.
>
> [emphasis added]

[25] In *Elias v. Hawa*, 2018 ONSC 5703 Penny J. considered a motion for security for costs. The Plaintiff resided in California and had no assets in Ontario. He claimed impecuniosity. At para. 19 Penny J. stated:

> [19] The evidentiary threshold to demonstrate impecuniosity is high. Bald statements unsupported by detail are not sufficient. The threshold can only be reached by tendering complete and accurate disclosure of the applicant's income, assets, expenses, liabilities and borrowing ability: *Coastline Corp. v. Canaccord Capital Corp.*, 2009 CanLII 21758 (Ont. S.C.). The court must be satisfied on the evidence provided that the responding party on the motion has no ability to muster funding to continue with the proceeding: *Weidenfield v. Weidenfield Estate*, 2017 ONSC 1275, at para. 18.
>
> [emphasis added]

[26] Cromwell J.A. (as he then was) in *Wall v. Abbot* (1999), 176 NSR (2d) 96 (NSCA) stated:

> [83] …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.

Evidence Before the Court as to Impecuniosity of Blackhawk

[27] Mr. Dooks says that Blackhawk is an impecunious claimant. He says that Blackhawk's claim to impecuniosity is not a blanket or empty assertion, but supported by current bank statements, as well as lists of assets and debts. Mr. Dooks says that his Affidavit sets out Blackhawk's financial situation, which he says shows more debts than assets. He notes that the current assets of Blackhawk are approximately $100,000, with debts in excess of $1 million. Mr. Dooks says that if this Court were to order Blackhawk to pay security for costs, it would be unable to do so, and that Blackhawk's meritorious claim against the Martins could not proceed.

[28] In his Affidavit, sworn August 28, 2020, Mr. Dooks says:

> 15. Blackhawk currently has very little cash, but assets in the amount of approximately $100,000. The majority of the value of Blackhawk assets is real estate. A list of the assets owned by Blackhawk is attached as Exhibit "1."

[29] Exhibit 1 lists real property and equipment which Mr. Dooks values at $99,843.44.

[30] Mr. Dooks' Affidavit goes on:

> 16. Blackhawk currently owes secured creditors approximately $370,000. A list of Blackhawk's secured creditors is attached as Exhibit "2."

[31] Exhibit 2 includes a list of unsecured creditors, which Mr. Dooks says are owed $738,850.72.

[32] Mr. Dooks' Affidavit also states:

> 17. Blackhawk currently owes unsecured creditors approximately $740,000. A list of Blackhawk's unsecured creditors is attached as Exhibit "3."

[33] Mr. Dooks' Affidavit also provides:

> 18. In an effort to pay down some of Blackhawk's debts, it sold a number of assets on Kijiji. A list of the items sold by Blackhawk and the amounts they were sold for is attached as Exhibit "4."

[34] Exhibit 4 mainly lists construction equipment. Mr. Dooks says that the amount realized on the sale of these items was $70,821.28.

[35] Mr. Dooks also swears in his Affidavit as follows:

> 19. Blackhawk is continuing to make minimum payments on its debt obligations including insurance, leases and loan payments. In order to do so I have been personally contributing money to Blackhawk as required. Redacted bank statements for Blackhawk from February 2020 to August 2020 are attached as Exhibit "5."
>
> [emphasis added]

[36] In her Affidavit, sworn July 17, 2020 Marjorie-Marie Martin states:

> 30. It came to my attention on or around April 11, 2020 that Blackhawk was selling off company assets on the buying and selling website Kijiji. I knew this was Blackhawk's equipment because I could see their company logo on the various pieces of machinery. Attached as Exhibit "H" are true copies of these advertisements.
>
> 31. It is my understanding, based on the Kijiji ads, that Mr. Dooks was selling this equipment because he was wanting to retire.
>
> 32. One of my lawyers, Dennis James ("Mr. James"), wrote to Blackhawk's counsel on April 14, 2020 asking for an undertaking from Blackhawk that assets not be sold, or that the cash from any sale be retained in the company to satisfy our claim for damages in this case. Attached as Exhibit "I" is a true copy of this letter.
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> 33. Mr. MacNeil responded to this letter on April 16, 2020 and stated that Blackhawk is effectively insolvent, and that the amount of debt it owes to secured creditors, including the Canada Revenue Agency, exceeds the value of the company assets. Attached as Exhibit "J" is a true copy of this letter.
>
> 34. On April 30, 2020 Mr. James provided Mr. MacNeil with an Undertaking to be signed by Mr. Dooks, stating that any money received from the sale of company assets would be used only to pay Blackhawk's debts, and not for any other purpose. Any remaining money would be held in trust by Blackhawk's lawyer until the present litigation is complete. Attached as Exhibit "K" is a copy of this Undertaking.
>
> 35. To my knowledge, this Undertaking was never signed by Mr. Dooks.

[37] Ms. Martin was cross-examined on her Affidavit by Mr. Dooks. Mr. Dooks was cross-examined on his Affidavit by Mr. James.

[38] In his cross-examination of Mr. Dooks, Mr. James put to him the fact that Exhibit "2" to his Affidavit which he (Mr. Dooks) said was a list of Blackhawk's

secured creditors did not in fact list three secured creditors: Accord Small Business Finance Corporation, Accord Small Business Leasing Corporation and Varion Capital Leasing Corporation. These secured creditors were identified in a *Personal Property Securities Act* (*PPSA*) search on Blackhawk conducted by Tiffany Roberts, paralegal, on August 5, 2020. The *PPSA* search is attached as an exhibit to Ms. Roberts' Affidavit, sworn August 6, 2020.

[39] Mr. Dooks said that this security relates to leases on Blackhawk vehicles. He could not say why he did not list these companies and secured creditors, noting that he put the list together as best he could.

[40] Mr. Dooks acknowledged in cross-examination that much of Blackhawk's unsecured debt is owed to Home Hardware in the approximate amount of $600,000. His evidence was that the Martins' situation contributed to the debt owed to Home Hardware.

[41] An invoice for Darren Myers Building Materials Ltd. on the account of Blackhawk was entered as an exhibit during Mr. Dooks' cross-examination. The invoice shows that as of August 31, 2017 Blackhawk owed Darren Myers Building Materials $345,826.67

[42] Exhibit "3" to Mr. Dooks' Affidavit includes invoices from Bluenose Well Drilling Limited ("Bluenose") for two lots in Musquodoboit Harbour, work which was carried out in January or March 2020. These lots were owned by Blackhawk at the time.

[43] A Property-on-Line printout for properties owned by Mr. Dooks, solely, or with others (attached to the Affidavit of Ms. Roberts), lists five properties in West Jeddore and a property in Dartmouth, Nova Scotia.

[44] Also put to Mr. Dooks on cross-examination were FaceBook posts which reference Mr. Dooks "completing another beautiful home for a great family", dated January 8, 2020. Mr. Dooks wasn't sure which house this referred to.

[45] Counsel for the Martins points out that this evidence establishes that Blackhawk engaged in at least two construction contracts, carried out after its contract with the Martins. Yet, Blackhawk produced nothing on this motion with respect to the income or revenue side of Blackhawk.

Analysis

[46] In deciding this motion, I have carefully considered the competing arguments of counsel for the Martins and those of Mr. Dooks. I have also reviewed the *Rule* and the guiding cases.

[47] *Rule* 45.02(3) (c) provides that a rebuttable presumption is raised 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 party's lack of means, when the party making the claim, i.e., Blackhawk is a corporation.

[48] Mr. Dooks says that Blackhawk has met the burden of rebutting the presumption of undue difficulty because he has presented evidence to show that the difficulty would be solely because of Blackhawk's lack of means.

[49] As noted earlier in this decision, Blackhawk may rebut the presumption of undue difficulty by, in the words of A.C. J. Smith (as she then was) in *Ocean v. Economical Mutual Insurance Company*, 2011 NSSC 408, providing "detailed evidence of [their] financial position including not only (their) income, assets and liabilities, but also [with respect to their] capacity to raise security."

[50] To track the wording of Doherty J. (as he then was) in *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (Ont. H.C.), Blackhawk's financial capacity is within Mr. Dooks' knowledge and not the knowledge of the Martins.

[51] The evidence before the Court is insufficient to rebut the presumption that the Martins will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from Blackhawk's lack of means.

[52] The case law abundantly establishes that a claim of impecuniosity must be supported by detailed evidence of a party's financial position, including income, assets and liability, as well as capacity to raise security.

[53] The details of Blackhawk's financial capability is within Mr. Dooks' knowledge alone.

[54] The invoices from Bluenose Drilling and the FaceBook postings put to Mr. Dooks in cross-examination, confirm that in late 2019 and early 2020 Blackhawk was carrying out construction work. This was after the July 2019 Social Media FaceBook postings which Mr. Dooks claimed negatively affected Blackhawk's reputation.

[55] It is noted that Mr. Dooks did not provide this information to the Court; rather, it was brought out in cross-examination of Mr. Dooks.

[56] The case law clearly establishes that the evidentiary threshold to demonstrate impecuniosity is high. Bald statements, unsupported by detail are not sufficient. The threshold can only be reached by tendering complete and accurate disclosure of the applicant's income, assets, expenses and liabilities as well as borrowing ability.

[57] In this case, Blackhawk had at least two contracts postdating his contract with the Martins. Yet, Mr. Dooks presented no evidence of the income or revenue side of Blackhawk, including that related to these two projects.

[58] Blackhawk failed to fully disclose its income/revenue. It is not up to the Court to guess or assume that Blackhawk cannot borrow to satisfy security for the Martins. Blackhawk has a lien on their property; they have no such protection should their claim against Blackhawk be successful.

[59] There are bank account statements for Blackhawk, attached to Mr. Dooks' August 28, 2020 Affidavit, but the majority of the information is redacted, including most deposits. The Business Account Statements from Blackhawk end in May 2020; Mr. Dooks provided no explanation as to why more recent statements were not provided.

[60] Certain personal banking statements for Mr. Dooks were in evidence. The total for the period ending July 17, 2020 shows $8,037.06 being deducted from the account, and $44,028.24 being deposited into the account, leaving a positive balance of $35,991.18. Mr. Dooks' Affidavit evidence (August 28, 2020 Affidavit) was that he has "been personally contributing money to Blackhawk as required." This evidence raises the question of why Mr. Dooks is prepared to contribute financially to Blackhawk to support is debt obligations, but is supposedly unable to contribute financially to Blackhawk to secure costs in this matter.

[61] Blackhawk has not provided the detailed evidence regarding its income/revenue sufficient to rebut the presumption in favour of an order for security for costs.

[62] This Court finds that in all of the circumstances the *Rule* 45.02(1)(d) requirement that it be unfair to the moving party to continue without security is met.

[63] Mr. Dooks is a sophisticated person who worked in banking (as a younger man), and has worked for many years in the construction business. He also served as a municipal counsellor and a Member of the Nova Scotia Legislative Assembly. Mr. Dooks knew, or should have known, that the assessment of a company's capacity involves examining both income and debt. However, the vast majority of Mr. Dooks' evidence concerned Blackhawk's debt.

[64] There was also evidence of Mr. Dooks' capacity to lend money to Blackhawk because of his ownership of land. That evidence was not presented by Blackhawk, but rather was confirmed by him upon questioning in cross-examination.

[65] I find that Blackhawk has not met that burden.

[66] Finally, I note that Mr. Dooks alleges that the Martins are singularly responsible for Blackhawk's position. However, the evidence shows that at the approximate time that Mr. Dooks finished the contract with the Martins, an invoice dated August 31, 2017 shows Blackhawk had an unsecured debt to Home Hardware of $345,826.67. This amount represents approximately 90 per cent of the unsecured debt claimed by Blackhawk. This is only a few months after completion of the work for the Martins. Blackhawk claims the Martins owe it $140,000; the Martins say the amount is $108,000. Clearly, it is not nearly $346,000 in inventory owed to Home Hardware. Obviously, there have to be other reasons why the debt owed to Home Hardware is close to $346,000.

[67] Further, the Home Hardware invoice shows that at the approximate time Blackhawk completed its work for the Martins, the debt to Home Hardware was approximately $247,000.

[68] The evidence shows that Revenue Canada is a secured debtor of Blackhawk, as well as debt owed to leasing companies for equipment. Clearly, these debts have nothing to do with the Martins.

[69] Blackhawk has approximately $1 million in debt. There is nothing before this Court to allow me to make the connection between that level of debt versus the approximate amount of debt ($140,000) Blackhawk claims against the Martins.

[70] The evidence shows that Blackhawk has been working. How much, is not within the knowledge of the Martins. Blackhawk has not been complete in its disclosure in this regard.

[71] There is no evidence before the Court showing that Blackhawk cannot borrow money, including from Mr. Dooks. In fact, the evidence also shows that Mr. Dooks has put money into Blackhawk.

[72] In terms of the timing of the Martins' motion as disclosed in Ms. Martin's Affidavit, the first indication that the Martins had that Blackhawk was possibly in financial difficulty was around April 11, 2020 when it came to her attention that Blackhawk was selling off company assets on Kijiji. As set out earlier in this decision, the Martins' lawyer, Mr. James, wrote to Blackhawk's then legal counsel on April 14, 2020 asking for an undertaking from Blackhawk that assets not be sold, or that the cash from any sale be retained in the company in order to satisfy their claim for damages.

[73] Counsel for Blackhawk responded to Mr. James' letter by advising that Blackhawk was effectively insolvent.

[74] That was the first time, based on the uncontested evidence of Ms. Martin, that Blackhawk's viability was raised. Nova Scotians were then under the restrictions of the pandemic, and Supreme Court was hearing only urgent matters.

[75] The matter was before Justice Arnold in General Chambers on August 7, 2020, but put over for hearing on September 14, 2020, because Mr. Dooks wished to cross-examine the Affiants whose Affidavits were filed in support of the motion. Mr. Dooks was also given the opportunity to file more fulsome information concerning Blackhawk's financial status.

[76] I find that the Martins brought the within motion on a timely basis. They did not delay.

[77] In all of the circumstances, it would be unfair to the Martins to allow the proceeding to continue without security for costs being paid by Blackhawk.

What Amount?

[78] *Rule* 45.03(1) provides:

> **Terms of Order**

> **45.03(1)** An order in security for costs must require the party making the claim to give security of a kind prescribed 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]

[79] The word "estimated" means that determining the amount of a potential award of costs is not an exercise in precision. Then A.C.J. Smith stated, in this regard, in *Ocean v. Economical, supra*:

> 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 an 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.

[80] The application of Tariff "A" (under *Rule* 77), Scale 2 to the amount claimed ($125,001 - $200,000) yields the amount of $16,750. An 11-day trial ($2,000 per day) would result in costs of $22,000. The potential total costs award on the basic scale is $38,750.

[81] Clearly, this Court must not award an amount for security which is greater than the projected actual amount. Also very clearly, the Court has significant latitude in determining the estimated amount.

[82] I conclude that the sum of $30,000 as security is appropriate and shall be posted by Blackhawk.

[83] That sum may be paid in installments, but the total amount must be posted with this Court on or before November 16, 2020.

Conclusion

[84] Blackhawk shall pay security for costs, in the amount, and by the date noted earlier.

[85] The Martins are entitled to their costs on the motion. If the parties cannot agree on costs, I will receive written submissions within 30 calendar days of the date of this decision.

Smith, J.