Court of Queen's Bench of Alberta

Citation: Emerex Oil and Gas Ltd v Drover, 2016 ABQB 420

Date: 20160728
Docket: 1401 03156
Registry: Calgary

Between:

Emerex Oil and Gas Ltd.

Plaintiff

- and -

David H. Drover and Emerex Resources Ltd.

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice J.T. McCarthy

The Application

[1] The Plaintiff Emerex Oil and Gas Ltd. brought an action against the Defendants David Drover and Emerex Resources Ltd. for breach of fiduciary duty. In response, David Drover and Emerex Resources Ltd. counterclaimed against Emerex Oil and Gas Ltd., Dean Smith, Brian Hunter, Terry Bradshaw, Shane Hawryluk and Joseph Dand.

[2] For this application, the Applicants (defendants by counterclaim) Dean Smith, Brian Hunter, Terry Bradshaw and Shane Hawryluk, seek an order requiring the Respondent (counterclaimant) David Drover, to post security for costs with respect to the counterclaim. The Applicants seek $300,000 for security for costs on a solicitor-client basis. Alternatively, they seek $200,000 on a party-party basis.

The Parties

[3] The Plaintiff Emerex Oil and Gas Ltd. ('EOGL') is a corporation registered pursuant to the laws of Alberta. EOGL was incorporated on March 29, 2011 and has been carrying on petroleum exploration and development in Saskatchewan. Its head office is in Calgary. EOGL is not participating in this application.

[4] Dean Smith is a shareholder, current director, and former officer of EOGL. He has been a director since June 2012. His positions as an officer included vice president - business development, chief executive officer and president. In their brief, the Applicants state that Mr. Smith served as an officer from June 2012 until February 7, 2014. However, one of the Applicants, Terry Bradshaw, in his January 20, 2015 Affidavit, states that Mr. Smith served as an officer of EOGL from June 2012 until September 25, 2013.

[5] Brian Hunter is a shareholder and current director of EOGL. He has been a director since October 2013.

[6] Terry Bradshaw is a shareholder, former director and former officer of EOGL. He was a director from October 30, 2013 until August 19, 2015. He served as president of EOGL from January 27, 2015 until August 19, 2015.

[7] Shane Hawryluk is a shareholder and former president of EOGL. In their brief, the Applicants state that Mr. Hawryluk was president from February 7, 2014 until January 26, 2015. However, in his January 20, 2015 Affidavit, Mr. Bradshaw states that Mr. Hawryluk became president of EOGL on November 1, 2013. The Applicants also state that the date of Mr. Hawryluk's resignation is not in evidence.

[8] David Drover is a shareholder, former director and former officer of EOGL. From the incorporation of EOGL until October 2013, Mr. Drover was a director and officer. As an officer, his positions included president, chief executive officer, executive chairman and chief operations officer.

[9] Mr. Drover has been a resident of Castlegar, British Columbia since early 2014. According to his Affidavit sworn on May 4, 2016, Mr. Drover jointly owns his home with his wife. There is $137,250 worth of equity in his house. He also is the "sole proprietor of a numbered company registered in Alberta." Based on his Affidavit, the nature of his interest in the numbered company is not clear. The numbered company has $200,000 worth of assets – half of which is cash. Mr. Drover owns in excess of $600,000 in shares of TSX listed companies. Finally, he also has a number of shares in the company Acapella.

[10] Emerex Resources Ltd. is not participating in this application.

Overview of Litigation

[11] The present litigation arises out of all the parties' involvement with EOGL. All the parties in this application are investors and past or present directors or officers of EOGL.

[12] Mr. Drover incorporated EOGL in March 2011. Over the course of 2012 and 2013, he sought out investors for EOGL. A great many of the investors were his friends and family. The Applicants Dean Smith, Brian Hunter, Terry Bradshaw and Shane Hawryluk were also investors. EOGL had two financing periods: around August 2012, EOGL raised approximately $1,600,000 in share capital, and in February 2013, EOGL raised approximately $700,000.

[13] In July 2012, EOGL purchased a 1920 acre lease in Saskatchewan from Sundance Energy. The cost of the lease was $1,000, and also included the assumed liability for abandoning nine oil and gas wells. The lease was subject to forfeiture if a well was not drilled on the land within 60 days. Therefore, EOGL drilled a well in late September 2012. The well was operational and produced oil and water for two months; however, it was shut-in in November 2012 due to pump rod failure.

[14] Over the course of 2013, the relationship between the Applicants and Mr. Drover became strained, largely over the financial management of EOGL. The situation came to a head in October 2013.

[15] EOGL's AGM was scheduled for the end of October 2013. Prior to the AGM, several shareholders requisitioned the board of EOGL to call a special shareholder's meeting. One of the purposes of the meeting was to remove Mr. Drover from EOGL's board. In response to the requisition, Mr. Drover resigned from the board of directors. He also resigned as president.

[16] Due to the various conflicts stemming out of these dealings, Mr. Drover filed a statement of claim against EOGL and Dean Smith on February 11, 2014; however, he discontinued his legal action on March 18, 2014.

[17] On March 21, 2014, EOGL filed a statement of claim against Mr. Drover and his company, Emerex Resources Ltd. EOGL sought damages from Mr. Drover for breach of fiduciary duties. On June 9, 2014, Mr. Drover filed a counterclaim against the Applicants and EOGL. Mr. Drover's counterclaim included claims of negligent statements, oppressive conduct, breach of duty, conspiracy and defamation.

[18] The Applicants made this application for security for costs, with respect to the counterclaim, on January 20, 2015. However, the application was not heard until May 25, 2016.

Allegations in the Claim and Counterclaim

[19] The Applicants state in Terry Bradshaw's January 20, 2015 Affidavit that from EOGL's inception until October 2013, Mr. Drover controlled EOGL. He made all board decisions. During that period, EOGL's board was composed of two people, Mr. Drover and Dean Smith. However, Mr. Drover, being the chairman of the board, held an extra deciding vote in the case of a tie. As such, Mr. Drover had ultimate control over EOGL's board decisions.

[20] The Applicants further contend that in early 2013 they became concerned with Mr. Drover's leadership of EOGL. The Applicants recommended several changes to Mr. Drover, such as a new board of directors and an audit committee. However, Mr. Drover refused to address the Applicants' concerns.

[21] On October 2, 2013, due to the Applicants' concerns, various shareholders requisitioned the board of EOGL to call a special shareholder meeting. The meeting was called to remove Mr. Drover from EOGL's board and to elect new directors. Prior to the special meeting, Mr. Drover resigned from EOGL's board. He also resigned as president of EOGL.

[22] At the AGM on October 30, 2013, Brian Hunter and Terry Bradshaw were elected to the board of EOGL. Dean Smith was re-elected to the board. The newly elected directors undertook a review of EOGL's books, records and operations. Up until this time, EOGL did not have an auditor – instead, financial statements were prepared and approved on instruction from Mr.

Drover. Therefore, the shareholders appointed MNP LLP as EOGL's financial auditor. Once appointed auditor, MNP began to prepare an audited financial statement for EOGL.

[23] Prior to the October AGM, in the spring of 2013, Mr. Drover, acting for EOGL, retained Chapman Petroleum Engineering Ltd. for the purpose of preparing a report on the proved and probable oil reserves located in EOGL's lease. Chapman finished the report in September 2013. Mr. Drover then distributed the report to the shareholders.

[24] Also, in advance of the October 2013 AGM, an information circular, signed by Mr. Drover, was issued to the shareholders. The information circular contained an unaudited financial statement for the year ending in December 31, 2012.

[25] As part of MNP's audit of EOGL, MNP reviewed the Chapman report and the 2012 unaudited financial statement. After reviewing both documents, MNP concluded that both documents were inaccurate. The revised Chapman report reduced the proved reserves by 90% and the probable reserves by 30%. The original Chapman report grossly overvalued the reserves due to the use of inaccurate operating costs. The Applicants argue that although Mr. Drover did not supply these operating costs to Chapman Engineering, Mr. Drover, as president of EOGL, should have noticed the inaccurate operating costs upon review of the draft report. The original and revised Chapman reports appear as Exhibits C and D, respectively, in Terry Bradshaw's January 20, 2015 Affidavit.

[26] The 2012 unaudited financial statement originally stated that the profits of EOGL for 2012 were $1,500. However, the audited financial statement found that EOGL actually experienced a loss of $1,500,000 for 2012. The unaudited and audited financial statements appear as Exhibits E and F, respectively, in Terry Bradshaw's January 20, 2015 Affidavit.

[27] The Applicants argue that MNP's audit of EOGL showed several other financial improprieties – all of which occurred while Mr. Drover was in control of EOGL. These financial improprieties are listed in Terry Bradshaw's January 20, 2015 Affidavit and include: (1) EOGL management was paid salaries, despite Mr. Drover's representation to shareholders to the contrary; (2) various expenses were reported as capital assets on EOGL's balance sheet; (3) Mr. Drover caused EOGL to make payments for services rendered to his own company, Emerex Resources Ltd. and (4) Mr. Drover submitted expense claims to EOGL for personal or non-business related expenses.

[28] The review of EOGL's operations by the newly elected directors also revealed several irregularities with the business operations of EOGL. These irregularities are listed in Terry Bradshaw's January 20, 2015 Affidavit and include: (1) the cost associated with the liability for abandoning the nine wells acquired through the lease was underestimated by approximately $118,000; (2) a successful drilling program was unlikely due to the geological characteristics of the oil reserves underneath EOGL's acquired lease and (3) Mr. Drover sought and raised $700,000 in the second financing period despite having the knowledge that the lease acquired by EOGL in 2012 would likely not support a successful drilling program.

[29] On January 29, 2014, after completing their review of EOGL, the new directors issued a report to the shareholders. The report contained their findings on EOGL. Exhibit H of Terry Bradshaw's January 20, 2015 Affidavit contains the report to the shareholders. Mr. Drover claims that the contents of this report were defamatory.

[30] The new directors concluded that further investment into EOGL's lease was uneconomical. Therefore, the new directors sought to sell the assets of EOGL. However, no bids or offers were received. The directors then sought to terminate the lease and abandon the wells, the estimated cost being $230,000.

[31] On February 11, 2014, Mr. Drover filed a statement of claim against EOGL and Dean Smith for the recovery of approximately $112,000 that he claimed EOGL owed to him or to his company, Emerex Resources Ltd. However, he discontinued the action on March 18, 2014.

[32] Despite Mr. Drover discontinuing his action, EOGL proceeded to file a statement of claim against Mr. Drover and Emerex Resources Ltd. on March 21, 2014.

[33] On April 29, 2014, Mr. Drover filed a defence. On June 9, 2014, he filed a counterclaim. The counterclaim, in addition to including the original Plaintiff EOGL, included Joseph Dand, Terry Bradshaw, Brian Hunter, Dean Smith and Shane Hawryluk – the latter four being the Applicants.

[34] Mr. Drover's counterclaim outlined the following claims: (1) recovery for legitimate business expenses; (2) Emerex Resources Ltd. sought the amount that EOGL agreed to pay on its behalf with respect to services rendered by a third party; (3) the Applicants breached their fiduciary duty towards Mr. Drover through various means, including by failing to develop the lease, by not correcting the deficiencies in the revised Chapman Engineering report and by rejecting the findings of the original Chapman Engineering report; (4) the Applicants conspired against Mr. Drover and unlawfully and fraudulently injured Mr. Drover and (5) Mr. Drover was defamed by the various shareholder reports and emails authored by the new directors.

[35] The Applicants filed a defence to the counterclaim on June 13, 2014 and served their affidavit of records on July 30, 2014. Mr. Drover and ERL served their affidavits of records in February 2016. Mr. Drover's affidavit of records is 170 pages in length and lists 20,800 producible documents. The Applicants affidavit of records lists 224 records.

[36] The Applicants first filed their application for security for costs on January 20, 2015 at which time Mr. Drover had not served his affidavit of records on the Applicants. The application was originally scheduled for February 5, 2015; however, it was rescheduled to October 13, 2015 by consent. The application was further adjourned on September 18, 2015 and this matter was placed into case management on October 7, 2015.

Issues

[37] The two issues to be resolved are:

1. Whether the Plaintiff by counterclaim, Mr. Drover, should be required to pay security for costs prior to proceeding with his counterclaim?
2. If yes, what amount of security should be ordered?

The Law

[38] Rule 4.22 of the *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Rules*") and s 254 of the *Business Corporations Act*, RSA 2000, c B-9 provide the framework for deciding security for costs applications. Section 254 of the *Business Corporations Act* is applicable exclusively to

bodies corporate (*Amex Electrical Ltd v 726934 Alberta Ltd*, 2014 ABQB 66 at para 6, 582 AR 304 [*Amex*]). Rule 4.22 of the *Rules* is applicable to individuals. Rule 4.22 states that:

> The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

[39] Rule 4.22 of the *Rules* establishes a two-step security for costs analysis. First, the court must consider all the factors outlined in Rule 4.22. Second, the court should consider whether ordering the security for costs is just and reasonable (*Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited*, 2011 ABQB 175 at paras 24-25, 504 AR 295 [*AMEC*]).

Applicants' Positions on Security for Costs

[40] The Applicants lay out five reasons supporting this security for costs application. These reasons mirror the factors outlined in Rule 4.22.

[41] For the first factor under Rule 4.22, the Applicants state that they will be unable to enforce an order or judgment against assets in Alberta. The Applicants argue that Mr. Drover has few, if any, assets in Alberta. His home, which is jointly owned with his wife, is in British Columbia. Mr. Drover does not own any real estate in Alberta and it is unclear where his various shareholdings are situated. Therefore, the Applicants argue that they will not be able to enforce a costs award against Mr. Drover's assets in Alberta.

[42] For the second factor, the Applicants argue in their brief that Mr. Drover has testified that he has sufficient assets to pay a costs award. The Applicants argue that Mr. Drover's ability to pay favours ordering a security for costs award. Conversely, in their security for costs application, the Applicants state that Mr. Drover would be *unable* to pay costs in the event that the Applicants were successful in defending this action. Presumably, the Applicants meant that they would be unable to collect a costs award, as Mr. Drover had no assets in Alberta.

[43] For the third factor, the Applicants argue that they have a reasonably meritorious defence against Mr. Drover's claim. The Applicants state that the merits of the case should only be considered on the basis of undisputed facts and the pleadings (*Provalcid Inc v Graff*, 2014 ABQB 453 at para 97, 591 AR 117 [*Provalcid*]). The Applicants bring forward various defences against Mr. Drover's claims of breach of fiduciary duty, oppression, conspiracy and defamation.

[44] Against Mr. Drover's claims of oppression and breach of fiduciary duty, the Applicants argue the business judgment rule, which is a defence for business decisions made by directors as

long as the decisions lie within a range of reasonable alternatives (*Peoples Department Stores Inc v Wise*, 2004 SCC 68 at paras 64 to 67, [2004] 3 SCR 461). The Applicants argue that their decision to abandon the wells on EOGL's lease was made after consulting with Chapman Engineering and MNP, two independent companies. The Applicants also acknowledge that, due to s 243(3) of the *Business Corporations Act*, a complainant in oppression is not required to post security for costs. The Applicants do not seek security for costs for the oppression portion of the counterclaim. However, they seek security for costs for the remainder of the counterclaim.

[45] Against the claim of conspiracy, the Applicants allege that as shareholders of EOGL, they had a statutory right to requisition board members to have a shareholder meeting to remove Mr. Drover as a director. The Applicants further believe that Mr. Drover's alleged mismanagement of EOGL was sufficient cause to seek his removal as a director.

[46] Against the claims of defamation, the Applicants argue that they have defences pursuant to the principles of justification, fair comment and qualified privilege. The Applicants contend that the statements made in the allegedly defamatory material, which were two shareholder reports and two emails authored by Mr. Bradshaw, were true statements made carefully in reliance on information received from EOGL's professional advisors. The Applicants also argue these statements were made without malice.

[47] With respect to qualified privilege, the Applicants argue that the director-shareholder relationship established a qualified privilege over the allegedly defamatory communications. The statements were made by Terry Bradshaw, who was then a director of EOGL. As a director of EOGL, he had a duty to convey information about EOGL to the various shareholders.

[48] For the fourth factor, the Applicants argue that Mr. Drover has sufficient assets to pay a costs award. Therefore, Mr. Drover would not be unduly prejudiced by an order to pay security for costs.

[49] For the fifth factor, the Applicants list three specific considerations that were mentioned in *Provalcid* at paragraphs 90 to 92 and 104 to 108. The considerations were (a) whether the application was brought at the earliest opportunity, (b) whether the applicant seeks security for steps already taken and (c) whether the resolution of the issues is important to the community.

[50] For timeliness, the Applicants argue that the application was brought very early in the proceeding. The Applicants state that they do not seek security for any step taken to date in this matter. The Applicants argue that there is nothing of public importance in Mr. Drover's counterclaim. The dispute is private in nature. There are no public interest issues that warrant special consideration.

[51] With respect to whether ordering security for costs would be just and reasonable, the Applicants point to the alleged behaviour of Mr. Drover during these proceedings. In their brief, the Applicants point to Mr. Drover's inappropriate communication with the Applicants' counsel; Mr. Drover's inappropriate comments made online against the Applicants' families; Mr. Drover's direct communication with the court; Mr. Drover's contemptuous attitude toward the Court and the ballooning of legal expenses due to Mr. Drover's conduct.

[52] The Applicants argue that Mr. Drover's conduct is relevant in deciding whether it is just and reasonable to order security for costs. The Applicants cite paragraph 41 of *Amex* in support of their argument: "A litigant whose lack of resources or their location immunizes him from some of the factors which cause a person to behave as a responsible litigant is a liability to the

court system." The Applicants argue that *Amex* gives further justification for ordering Mr. Drover to pay security for costs.

[53] With respect to amount, the Applicants argue that Mr. Drover should pay $300,000 for security for costs on a solicitor-client basis. Alternatively, they seek $200,000 on a party-party basis.

[54] Relying on the factors set out in *Pillar Resources Services Inc v Primewest Energy Inc*, 2016 ABQB 120, [2016] AWLD 1366 [*Pillar*], the Applicants argue that costs should be awarded on a solicitor-client basis. Due to the size of Mr. Drover's affidavit of records, and the time required to prepare for trial, the Applicant's argue that the legal fees from the present time forward would be $300,000.

[55] In the alternative, the Applicants submit a draft bill of costs, which is Exhibit A in Mr. Bradshaw's April 8, 2016 Affidavit. The amount in the draft bill of costs is $101,500.00. However, the Applicants argue that a multiple should be applied to the party-party costs, resulting in party-party costs of $200,000.

Respondent's Position on Security for Costs

[56] Mr. Drover pointed to two potential statutory provisions that govern security for costs applications: s 254 of the *Business Corporations Act* and Rule 4.22 of the *Rules*. Mr. Drover argues that s 254 of the *Business Corporations Act* should not be used to determine this application.

[57] Mr. Drover, in his brief, listed factors that increase and decrease the likelihood of a security for costs order. These factors are from *Amex* at paragraphs 74 and 75. The only listed factor that Mr. Drover comments on is whether the Applicants failed to apply for security for costs at the earliest convenience. Mr. Drover argues that the security for costs claim was filed 10 months after the statement of claim.

[58] In his brief, Mr. Drover stated that he has always been agreeable to pay securities for cost. Also, Mr. Drover stated in his oral submissions that he is still agreeable to paying security for costs. He has offered his Acapella shares as security for cost. In his brief, Mr. Drover stated that his "Acapella shares…are valued anywhere between $100k and $300k depending on which valuation of Acapella one believes." However, during oral argument, he stated that the Acapella shares are worthless.

[59] Despite being agreeable to pay security for costs, Mr. Drover stated that he is somewhat reluctant to pay security for costs. His reasons are: (1) the Applicants have rejected his offers to pay security for costs prior to this application; (2) in British Columbia security for costs are rarely awarded against individual plaintiffs; (3) Mr. Drover has assets in Alberta against which the Applicants will be able to enforce their judgment. Mr. Drover claims that his numbered company is an asset he owns in Alberta. Also, he states that his house in Castlegar, British Columbia can serve as an asset because British Columbia is a reciprocating jurisdiction with Alberta; (3) Mr. Drover claims that he has enough assets to pay costs if they are ordered against him; (4) he claims that the Applicants' case has no merit whatsoever. In particular, they have no defence to his counterclaim; (5) Mr. Drover argues that paying $300,000 in security for costs will prejudice his ability to continue his counterclaim since he has accrued hundreds of thousands of dollars in legal expenses up to date. He needs the money for living expenses.

Analysis and Decision

Issue 1: Security for Costs

[60] I accept Mr. Drover's position that Rule 4.22 of the *Rules*, and not s 254 of the *Business Corporations Act*, is applicable in this application for security for costs. The Applicants are seeking security for costs from Mr. Drover in his personal capacity, not from a corporation. Therefore, Rule 4.22 applies. I will proceed under Rule 4.22. The five factors to be considered under Rule 4.22 are:

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

[61] I will consider each enumerated factor, after which I will determine whether it is just and reasonable to order security for costs in the circumstances.

(a) Likelihood of Enforcing an Order or Judgment Against Assets in Alberta

[62] Based on the evidence provided by Mr. Drover, he owns no exigible property in Alberta. His Alberta numbered company, being incorporated, is shielded from any judgment or order made against him personally. All the rest of his declared assets are held outside of Alberta. This factor favours an order for security for costs.

(b) Ability to Pay Costs

[63] Mr. Drover claims to have sufficient assets to pay any costs award. He therefore argues that the Applicants have not established that he cannot pay any potential costs award. This is true. In fact, the Applicants agree that Mr. Drover has sufficient assets to pay any costs award. The Applicants argue that Mr. Drover's ability to pay the costs award supports the order for security for costs. However, the Applicants are mistaken.

[64] The party seeking security for costs bears the initial onus to establish, on a balance of probabilities, that the respondent will be unable to pay its costs if the defence is successful. If the applicant satisfies this onus, the evidentiary burden shifts to the respondent to show why the Court should not exercise its discretion to make such an order against it: *Amex*; *Provalcid*.

[65] Therefore, the Applicants are incorrect to state that Mr. Drover's ability to pay for costs favours an order for security for costs. It does not. Mr. Drover's ability to pay costs disfavours an order for security for costs. Had this application fallen under s 254 of the *Business Corporations Act*, Mr. Drover's ability to pay costs would have been determinative – for the sole criterion under s 254 of the *Business Corporations Act* is whether the respondent "will be unable to pay the costs." However, this application is being made under Rule 4.22.

[66] Under Rule 4.22, I need only *consider* Mr. Drover's ability to pay costs – after which I must determine whether it is just and reasonable to order security for costs. The ability to pay costs is one factor to consider under Rule 4.22 and is not determinative. This principle is from *Autoweld Systems Ltd v CRC-Evans Pipeline International Inc*, 2011 ABQB 265, 504 AR 288, where Justice McMahon stated:

> I need not determine that …[the Plaintiff] "will be unable to pay the costs". The mandate is merely to consider the ability of …[the Plaintiff] to pay in determining what is just and reasonable.

[67] Therefore, while both parties admit that Mr. Drover can pay costs, this admission does not determine the security for costs analysis. Justice McMahon continued on:

[68] As I have described, the Plaintiff is not insolvent…. Nevertheless, the modest net assets of …[the Plaintiff] suggests a real risk of an inability to pay substantial costs after protracted and expensive litigation. What is a viable business today may not be so at the end of this litigation.

[69] These words are very apt to the present situation. I do not see Mr. Drover's current ability to pay costs as indicative that he will be able to pay costs in the future – nor do I consider this factor to be determinative in the analysis.

(c) Merits of the Action

[70] When considering the merits of the action "a reasonably meritorious defence, when considered together with the other factors set out in Rule 4.22, is sufficient to weigh in favour of granting security for costs. It is neither possible, nor desireable, for the Court at this stage to determine which party's case is stronger" (*AMEC* at para 17).

[71] Against Mr. Drover's claims of unpaid expenses, oppression, breach of fiduciary duties, conspiracy and defamation, the Applicants allege a number of defences, which I have listed above in paragraphs 43 to 47. While deciding nothing final with respect to the merits of these defences, these defences are all reasonably meritorious. As the Applicants have stated, I am only to consider the merits of the case "on the basis of undisputed facts, the pleadings, ...and not on the basis of seriously disputed facts or assessments of credibility" (*Provalcid* at para 97).

[72] Against Mr. Drover's claim of oppression, the Applicants put forward the business judgment rule defence. Mr. Drover argues that Chapman Engineering and MNP were colluding with the Applicants to ruin his company. Therefore, the advice Chapman Engineering and MNP gave to the Applicants was, according to Mr. Drover, not independent. However, whether or not the advice was independent is not for me to presently decide. Based on the pleadings of the Applicants, the business judgment rule is a meritorious defence. The same applies to the other defences put forward by the Applicants.

[73] For their defence against the claim of conspiracy, the Applicants claim that they had a statutory right to requisition board members to have a shareholder meeting to remove Mr. Drover as a director. The Applicants further claim that Mr. Drover's mismanagement of EOGL was sufficient cause to seek his removal as a director. Based on undisputed facts, the Applicants had a statutory right under s 142 of the *Business Corporations Act* to requisition board members to hold a meeting to remove Mr. Drover as a board member. Based on the facts pled by the Applicants, they had sufficient grounds to call the meeting. Therefore, they have a reasonably meritorious defence against the claim of conspiracy.

[74] Against the claims of defamation, the Applicants argue that they have defences pursuant to the principles of justification, fair comment and qualified privilege. Again, based on undisputed facts and on the facts which the Applicants pled, the Applicants were directors making representations to shareholders on the state of EOGL. Therefore, the defences are reasonably meritorious. Since the Applicants' defences are reasonably meritorious, this factor favours an order for security for costs.

(d) Undue Prejudice

[75] Mr. Drover also claims that "paying significant security for costs of $300k" would prejudice his ability to continue his counterclaim. However, Mr. Drover does not object to paying some amount of security for cost. His true objection lies in the amount the order should be for, not whether the order should be made. Therefore, I do not find there will be any undue prejudice in making a security for costs order.

[76] Also, Mr. Drover has stated that he would be able to pay any costs award made against him. I am not sure how he can pay any order for costs, but would be unduly prejudiced by an order to pay security for costs. Lastly, based on the evidence given by Mr. Drover, he currently has assets in excess of $800,000. These funds seem sufficient to continue his counterclaim, even in spite of a security for costs order made against him.

(e) Other Factors

[77] Both parties have mentioned several other factors that I will consider. I do not see the need to consider any other factors not mentioned by either party.

[78] Mr. Drover alleged that the Applicants delayed in bringing this application. He states that the security for costs claim was filed 10 months after the statement of claim. It should be noted that the security for costs application was made in response to the counterclaim, which was filed 2.5 months after the statement of claim was filed. Therefore, the alleged delay was 7.5 months, not 10 months.

[79] However, Mr. Drover does not argue that the alleged delay resulted in any sort of prejudice. From *Pocklington Foods Inc v Alberta (Provincial Treasurer)*, 153 AR 288 at para 9 (ABQB), [1994] AWLD 436 [*Pocklington*]:

> Even if there has been some delay on the part of the defendant in the present case, the order should be granted unless the plaintiff shows that it suffered some prejudice from the delay, or was induced into believing it was safe in incurring costs without risking facing an order for security for costs.

[80] Since the alleged delay in bringing this application did not produce any prejudice, and since the Applicants are not seeking security for steps already taken, the delay does not weigh against ordering security for costs.

[81] Mr. Drover also argued that he has offered his Acapella shares to the Applicants as security for cost. His offer was allegedly rejected. While I make no finding with respect to the nature of the Acapella shares, Mr. Drover's assertion during his oral argument that his Acapella shares are worthless largely explains why the Applicants would not accept his offer. Therefore, the fact that Mr. Drover offered his Acapella shares as security for costs does not weigh against ordering security for costs.

[82] The Applicants, citing *Provalcid*, have put forward three additional factors for my consideration. The factors are (a) whether the application was brought at the earliest opportunity, (b) whether the applicant seeks security for steps already taken and (c) whether the resolution of the issues is important to the community.

[83] Based on *Provalcid*, the timeliness of the application weighs in favour of ordering security for costs. I find there is not enough information to make a determination as to the timeliness of the application. Also, as I mentioned above, Mr. Drover did not experience any

prejudice with respect to the timeliness or untimeliness of this application. Therefore, this particular factor does not favour or disfavor the application.

[84] The Applicants are not seeking security for any step taken to date in this matter. Based on *Provalcid*, this factor favours ordering security for costs.

[85] Lastly, I agree with the Applicants that the resolution of this dispute is not important to the greater community. This is a private dispute. Based on *Provalcid*, this factor favours ordering security for costs.

(f) Just and Reasonable

[86] My decision on security for costs is discretionary; however, this discretion must be the product of a rational process (*Amex* at para 71).

[87] In this particular case, I find that it is just and reasonable to order Mr. Drover to pay security for costs. Mr. Drover has no exigible assets in Alberta. Therefore, there is the possibility that he could escape payment of costs if the Applicants successfully defend this action. The Applicants have a meritorious defence and Mr. Drover would not suffer undue prejudice if security for costs was ordered. Lastly, Mr. Drover himself has stated that he is amenable to paying security for costs. For all of these reasons, I find that it is just and reasonable to order security for costs.

Issue 2: Amount of Security for Costs

[88] The Applicants seek $300,000 for security for costs on a solicitor-client basis. Alternatively, they seek $200,000 on a party-party basis.

[89] Alberta courts have stated that security for costs can be awarded on a solicitor-client basis where it is *likely* that the costs will be awarded on a solicitor-client basis (*Hamza v Hamza*, 1997 ABCA 263 at para 17, 200 AR 342; *Canada Deposit Insurance Corp v Canadian Commercial Bank*, 1989 ABCA 150 at paras 24 – 26, 61 DLR (4th) 161; *Prairie Land Corp v Concert Properties Ltd*, 2004 ABQB 726 at para 14, 364 AR 283).

[90] In arguing that the security for costs order should be made on a solicitor-client basis, the Applicants rely on the factors set out in *Pillar* at paragraph 2. These factors are:

a) engaged in blameworth conduct during the trial;
b) unduly prolonged the trial;
c) was guilty of misconduct prior to the litigation;
d) alleged fraud and failed to prove it; and
e) that justice would be served by such an award.

[91] I find that these factors are not applicable to the present application. Two of the factors listed involve trial behaviour. The fourth factor, an unproven accusation of fraud, is particularly problematic as fraud forms one of the very causes of action Mr. Drover is pleading. The cause of action pled by Mr. Drover cannot be used by the Applicants as evidence justifying solicitor-client costs – especially when the claim has not been tried on its merits. Also, assessing these factors prior to trial delves too deeply into the merits of this case. At this point, such a determination would be premature.

[92] Otherwise, cases have cited the principle that the amount of security should cover the *probable* costs of the suit. (*ArcelorMittal Tubular Products Roman SA v Canadian Natural Resources Ltd*, 2010 ABQB 552 at para 31, 503 AR 391; *Pocklington* at para 20; *Home Exchange (Alberta) Ltd v Goodyear Canada Inc*, 2001 ABQB 673 at para 14, 291 AR 295).

[93] I find that security for costs should be made on a party-party basis. Obviously, my decision has no bearing on the trial judge's decision on costs.

[94] The Applicants allege that they will incur $200,000 in party-party costs on a go-forward basis. The amount cited in the Applicants' draft bill of costs is $101,500. They argue that party-party costs should be awarded as a multiple of the draft bill of costs. However, I do not think this is a case where it would be appropriate to order costs based on a multiple of the draft bill of costs. Rather, costs should be based on a single set of Schedule C costs.

[95] Given the fact that Mr. Drover has claimed approximately $1,150,000.00 in damages, Schedule C costs should be calculated based on Column 4. The Applicants' bill of costs is at the high end of the scale. In particular, the estimated length of trial and discovery are at the high end of the scale. Also, several expenses included in the bill of costs have already been incurred. Therefore, I have adjusted the bill of costs accordingly. These adjustments reduce the bill of costs to $50,000.

[96] Lastly, the Applicants did not discount the oppression claim in their bill of costs. Due to s 243 of the *Business Corporations Act*, security for costs cannot be received for oppression claims. Therefore, the security for costs should be discounted to account for the oppression claim. If the Court can reasonably determine what percentage of the action involves the oppression claim, security for costs may be awarded for the non-oppression portions of the plaintiff's claim (*Vaasjo v Jurina*, 2016 ABQB 78 at para 22). In this case, the oppression claim is clearly distinguishable from Mr. Drover's other claims. Without more information provided, I am left to assume that all claims would require approximately equal costs. Therefore, as Mr. Drover has five claims, I will discount the security required by 20% to account for the oppression claim.

[97] Based on the above adjustments, I find that party-party costs are most accurately estimated at $40,000. The security for costs order will reflect that amount.

Conclusion

[98] The Applicants' application is granted and the following relief is order:

1. The Respondent, Mr. Drover, is required to post security for costs for the trial of his counterclaim against the Applicants in the amount of $40,000 within two months of this decision.
2. The security is to be held until either the parties agree in writing otherwise or on further order of this Court.
3. Until the security is paid, all proceedings in the action are stayed.
4. If the security is not paid within the time period provided for by this decision, Mr. Drover's counterclaim shall be dismissed without further notice.

[99] The Applicants are entitled to their costs of this application.

Heard on the 25th day of May, 2016.
Dated at the City of Calgary, Alberta this 28th day of July, 2016.

J.T. McCarthy
J.C.Q.B.A.

Appearances:

Mark A. Klassen
for the Plaintiff, Emerex Oil and Gas Ltd.

David H. Drover
Self-Represented Litigant