CITATION: Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP, 2025 ONSC 3881
COURT FILE NO.: CV-18-599904
MOTION HEARD: 20250326
REASONS RELEASED: 20250630

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

BEIJING HEHE FENGYE INVESTMENT CO. LIMITED AND RONG KAI HONG
Plaintiffs

- and-

FASKEN MARTINEAU DUMOULIN LLP, LEI HUANG, FASKEN BUSINESS CONSULTING (ASIA) INC., KA AN DEVELOPMENT CO. LIMITED AND CHANG YU LIU
Defendants

BEFORE: ASSOCIATE JUSTICE McGRAW

COUNSEL: R. Swan and I. Thompson
E-mail: swanr@bennettjones.com
-for the Defendants Fasken Martineau Dumoulin LLP, Lei Huang and Fasken Business Consulting (Asia) Inc.

C. Rempel and R. Rai
E-mail: crempel@agbllp
-for the Plaintiffs

REASONS RELEASED: June 30, 2025

Reasons For Endorsement

I. Background

[1] The Defendants Fasken Martineau Dumoulin LLP ("Fasken"), Lei Huang and Fasken Business Consulting (Asia) Inc. ("FBC", collectively, the "Defendants") seek security for costs of $550,000 from the Plaintiff Beijing Hehe Fengye Investment Co. ("BHF").

[2] BHF is a private corporation registered in the People's Republic of China which invests in real estate and the mining industry. The Plaintiff Ron Kai Hong is a Canadian businessman who resides in Markham. Fasken is a major Canadian law firm with multiple offices in Canada and internationally. FBC is a federally incorporated company owned and operated by Fasken with its head office located in Toronto. Mr. Huang is a lawyer in China who was a consultant with FBC.

[3] In this action, the Plaintiffs claim $225,000,000 from the Defendants for negligence, breach of fiduciary duty and misuse of confidential information. The Plaintiffs allege that the Defendants acted in conflict by representing the Plaintiffs in their unsuccessful efforts to acquire a controlling interest in Eastern Platinum Limited ("EPL") at the same time as they were representing other clients with respect to the same interest. EPL is a corporation registered in British Columbia and traded on the Toronto Stock Exchange with platinum and chrome interests and assets in South Africa.

[4] In November 2014, EPL announced that China-based Heibei Zhongo Platinum Co. ("HZ") had agreed to purchase EPL's platinum business for $225,000,000. This transaction did not close and was not supported by BHF, a major shareholder of HZ. In Summer 2015, Horizon International Development Ltd. ("Horizon"), a Hong Kong registered company, engaged the Defendants with respect to acquiring an interest in EPL. The Plaintiffs allege that after a meeting in September 2015 between Horizon and BHF attended by Mr. Huang, BHF engaged the Defendants with respect to certain issues involving EPL. In November 2015, BHF and Mr. Hong agreed to work together to acquire a controlling interest in EPL The Plaintiffs allege that Mr. Huang agreed to advise the Plaintiffs with respect to their acquisition of an interest in EPL and that the Defendants represented the Plaintiffs on a joint retainer. The Defendants deny that they represented or advised the Plaintiffs at any time and there is no written retainer agreement or engagement letter.

[5] In Spring 2016, Horizon abandoned its pursuit of an interest in EPL. Fasken was subsequently retained by Ka An Development Co. Limited ("KAD"), a Hong Kong-registered corporation with respect to EPL. KAD purchased the 13.79% interest of Invesco Canada Ltd. ("Invesco") in EPL for $1.18 per share and its nominees were appointed to EPL's board of directors on July 5, 2016. The Plaintiffs claim that they made a superior offer to purchase a controlling interest for $1.30 per share. However, they allege that Mr. Huang and Michael Boehm, a Fasken lawyer, acting simultaneously for KAD, advised K2 and Harrington Global ("Harrington"), the other two major shareholders of EPL, that they knew BHF and that BHF would not complete the purchase and therefore, they should consider KAD's offer. KAD also purchased Harrington's 10.1 % interest in EPL in August 2016.

[6] Mr. Hong filed complaints with the Law Society of Ontario against Mr. Huang, Mr. Boehm and Faskens' Managing Partner which were dismissed without referral to a hearing. Mr. Hong also commenced a derivative action in British Columbia together with 2538520 Ontario Ltd. ("253"), a company controlled by Mr. Hong, which was dismissed and upheld by the B.C. Court of Appeal with leave to the Supreme Court of Canada denied. Mr. Hong and 253 also commenced a derivative action in B.C. against EPL and some of its directors.

[7] This matter first came before me at a telephone case conference on May 9, 2023. At that time, the Defendants had brought this security for costs motion and a motion to strike Mr. Hong as a Plaintiff and the Plaintiffs brought a motion to compel the Defendants to deliver their Affidavit of Documents. The Plaintiffs took the position that the motion to strike was a Rule 21 motion (not Rule 25.11) and I directed the parties to attend at Civil Practice Court ("CPC"). Chalmers J. directed the motions to proceed before an Associate Judge and at a telephone case conference on September 14, 2023, I scheduled the security for costs motion and the motion to

strike to proceed before me on April 9, 2024 for 4 hours.

[8] The motions were adjourned at a telephone case conference on March 12, 2024 to permit interim motions by the Plaintiffs to examine Mr. Huang with respect to the motions and by the Defendants to quash Mr. Huang's summons to witness to proceed on April 9. The motions were not confirmed, were removed from the list and rescheduled for June 6, 2024. At the June 6 attendance, counsel advised that the Defendants had withdrawn their Rule 25.11 motion to strike Mr. Hong as a party and the only remaining interim issue was the Plaintiffs' proposed examination of Mr. Huang on the security for costs motion. The parties resolved this motion and at a telephone case conference on October 8, 2024, the security for costs motion was scheduled for March 26, 2025 for 4 hours.

II. The Law and Analysis

[9] For the reasons that follow, I conclude that it is just in the circumstances to order security for costs on the terms set out below.

[10] Rule 56.01(1) states:

> "The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that…
>
> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;"

[11] Rule 56.01(1) does not create a *prima facie* right to security for costs; it triggers an enquiry whereby the court, using its broad discretion, considers multiple factors to make such order as is just in the circumstances including the merits of the claim, the financial circumstances of the plaintiff and the possibility of an order for security for costs preventing a bona fide claim from proceeding (*Stojanovic* v. *Bulut*, 2011 ONSC 874 at paras. 4-5). The court has broad latitude to make any order that is just in the circumstances (*Yuen* v. *Pan*, 2018 ONSC 2600 at para. 14)

[12] The Court of Appeal summarized the proper approach on a security for costs motion in Y*aiguaje* v. *Chevron Corp.*, 2017 ONCA 827:

> **"23** The Rules explicitly provide that an order for security for costs should only be made where the justness of the case demands it. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of rr. 56 or 61 have been met.
>
> **24** Courts in Ontario have attempted to articulate the factors to be considered in determining the justness of security for costs orders. They have identified such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice

concerns, and the public importance of the litigation. See: *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (H.C.); *Morton v. Canada (Attorney General)* (2005), 75 O.R. (3d) 63 (S.C.); *Cigar500.com Inc. v. Ashton Distributors Inc.* (2009), 99 O.R. (3d) 55 (S.C.); *Wang v. Li*, 2011 ONSC 4477 (S.C.); and *Brown v. Hudson's Bay Co.*, 2014 ONSC 1065, 318 O.A.C. 12 (Div. Ct.).

25 While this case law is of some assistance, each case must be considered on its own facts. It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made."

[13] Determining the order which is just in the circumstances requires a balance between ensuring that meritorious claims are allowed to go forward with the consequences of being left with an unenforceable costs award where a party pursues an unsuccessful claim (*Ascent Inc.* v. *Fox 40 International Inc.*, [2007] O.J. No. 1800 at para. 3; *Rosin* v. *Dubic*, 2016 ONSC 6441 at para. 39; *Lipson* v. *Lipson*, 2020 ONSC 1324 at paras. 47-48). In some cases, security is required to correct the imbalance of a plaintiff having security for a successful claim while a defendant has no security for a successful defence and to prevent a plaintiff from going to trial without posting security, being unsuccessful then avoid paying costs (*2232117 Ontario Inc.* v. *Somasundaram*, 2020 ONSC 1434 at para. 27; *DK Manufacturing Group Ltd.* v. *Co-Operators Insurance*, 2021 ONSC 661 at para. 26).

[14] The initial onus is on the defendant to show that the plaintiff falls within one of the enumerated categories in Rule 56.01(1). The plaintiff can rebut the onus and avoid security for costs by showing that they have sufficient assets in Ontario or a reciprocating jurisdiction to satisfy a costs order; the order is unjust or unnecessary; or the plaintiff should be permitted to proceed to trial despite its impecuniosity should it fail (*Travel Guild Inc.* v. *Smith*, 2014 CarswellOnt 19157 (S.C.J.) at para.16; *Coastline Corp.* v. *Canaccord Capital Corp.*, [2009] O.J. No. 1790 (ONSC) at para. 7; *Cobalt Engineering v. Genivar Inc.*, 2011 ONSC 4929 at para. 16). This was summarized by Master Glustein (as he then was) in *Coastline:*

"7…

(i) The initial onus is on the defendant to satisfy the court that it "appears" there is good reason to believe that the matter comes within one of the circumstances enumerated in Rule 56;

(ii) Once the first part of the test is satisfied, "the onus is on the plaintiff to establish that an order for security would be unjust";

(iii) The second stage of the test "is clearly permissive and requires the exercise of discretion which can take into account a multitude of factors". The court exercises a broad discretion in making an order that is just;

> (iv) The plaintiff can rebut the onus by either demonstrating that:
>
> (a) the plaintiff has appropriate or sufficient assets in Ontario or in a reciprocating jurisdiction to satisfy any order of costs made in the litigation,
>
> (b) the plaintiff is impecunious and that justice demands that the plaintiff be permitted to continue with the action, *i.e.* an impecunious plaintiff will generally avoid paying security for costs if the plaintiff can establish that the claim is not "plainly devoid of merit", or
>
> (c) if the plaintiff cannot establish that it is impecunious, but the plaintiff does not have sufficient assets to meet a costs order, the plaintiff must meet a high threshold to satisfy the court of its chances of success"

[15] The light initial onus under Rule 56.01(d) requires the Defendants to establish that it appears there is good reason to believe that BHF does not have sufficient assets in Ontario or a reciprocating jurisdiction to satisfy a costs award (*Georgian Windpower Corp.* v. *Stelco Inc.*, [2012] O.J. No. 158 (ONSC) at para. 7; *Coastline* at para. 7). This is not a heavy onus and only requires more than conjecture, hunch or speculation (*Mazzika Arbika Ltd.* v. *Aviva Insurance Company of Canada*, 2017 ONSC 6801 at paras. 21-27; *Amelin Resources Inc., LLC* v. *Victory Energy Operations, LLC*, 2022 ONSC 4514 at paras. 17-18).

[16] BHF has not filed any evidence to establish that it has sufficient assets in Ontario or a reciprocating jurisdiction to satisfy a costs award and there is no dispute that it does not. Accordingly, I am satisfied that the Defendants have met their onus under Rule 56.01(d) with respect to BHF. However, the Plaintiffs submit that security for costs should not be ordered because the Plaintiffs are advancing a joint claim and Mr. Hong is ordinarily resident in Ontario and has sufficient assets in Ontario to satisfy a costs award (*Vogel* v. *Trinity Capital Corp.*, 2005 CanLII 5457 at para. 17). The Plaintiffs rely on Master Haberman's (as she then was) decision in *Vogel*:

> "15. Security for costs will not be ordered where there are multiple plaintiffs pursing a joint claim, as long as one of them ordinarily resides in Ontario. Conversely, where the claims are several, any plaintiff who is non-resident may be ordered to post security for costs (see *Willowtree Invst v. Brown* (1985) , 48 C.P.C. 150; *Bondarenko v. Kotov* (2004), 2004 CarswellOnt 3767). The rationale for this approach is straightforward – where a claim is joint, any one of the plaintiffs can be called upon to satisfy a cost order in its entirety. Where it is several, however, each plaintiff is only responsible for his share.
>
> 16. This issue then is whether or not the claims asserted here are joint or several. In distinguishing between the two, Master Peppiatt stated the following in *Willowtree (supra)*:

> *In reviewing the authority cited to me which include cases decided in New Brunswick and in the United Kingdom, it seems to me that the law is clear that where claims are joint so that all plaintiffs must succeed or must fail, security will not be ordered from a non-resident plaintiff where there is a plaintiff within the jurisdiction; conversely where the claims are several so that one plaintiff may succeed while another fails a non-resident plaintiff may be ordered to post security.*
>
> 17. Thus, to qualify as joint, it must be clear on the face of the pleading that that all plaintiffs *must* succeed or *must* fail – their claims must necessarily stand or fall together."

[17] I cannot conclude on the face of the Statement of Claim that the Plaintiffs' claims are joint such that they must stand or fall together. The Plaintiffs claim the same damages, advance the same causes of action and are making many of the same allegations. It is also undisputed that Mr. Hong is ordinarily resident in Ontario and has sufficient assets in Ontario to satisfy a costs award. However, as was the case in *Vogel*, I am satisfied that certain different facts and allegations have been pleaded with respect to the Plaintiffs such that I am unable to conclude that they meet the "must succeed or must fail" threshold.

[18] There is no formal relationship between BHF and Mr. Hong. They are not a joint venture or a partnership bur rather two parties who agreed to work together to acquire an interest in EPL. More importantly, material facts and allegations which are central to their claims have been pleaded which do not include both Plaintiffs and may lead to different results. At paragraph 37 of the Statement of Claim, the Plaintiffs allege that Mr. Huang and Mr. Boehm told K2, Invesco and Harrington that they knew BHF and that BHF would not buy their shares. Although this is material to the Plaintiffs' claims that the Defendants acted in conflict to the Plaintiffs' detriment to the benefit of KAD including disclosing confidential information causing their bid to fail. Mr. Hong is omitted from this allegation. Therefore, as pleaded, the Plaintiffs are not alleging that the Defendants told the 3 major shareholders that Mr. Hong, like BHF, would not purchase their shares.

[19] The Plaintiffs further plead at paragraph 39 that the election of KAD's nominees to EPL's board of directors frustrated BHF's desire to control the board, again with no reference to Mr. Hong. Similarly, at paragraph 43, the Plaintiffs allege that the Defendants acted dishonestly by acting for a competing bidder and not disclosing this to the Plaintiffs, "all to BHF's detriment". Mr. Hong is again omitted.

[20] The Plaintiffs also allege that the Defendants began acting for BHF early in the Fall of 2015 (September) while they did not begin acting under a joint retainer for both Plaintiffs until later in the year (November)(paragraphs 15-20). The Plaintiffs submit that this does not affect whether the claims are joint because they are not claiming any damages for the period prior to November 2015 when they allege that the joint retainer commenced. However, in my view, the allegation that the Defendants acted for BHF alone prior to acting jointly for both Plaintiffs raises the possibility of different findings and results with respect to the existence of a joint retainer and/or a solicitor-client relationship and the damages which may be awarded.

[21] On the face of the pleadings, I cannot conclude that the Plaintiffs have satisfied the "must succeed or must fail" threshold such that a costs award against both Plaintiffs could be enforced against Mr. Hong. The pleadings raise the possibility that BHF and Mr. Hong may not succeed or fail together, that one may be entitled to relief which the other is not and that different damages and/or separate costs awards may result. There is no evidence or other basis to support the Plaintiffs' suggestion during oral argument that the omission of Mr. Hong in the relevant paragraphs is a "typo". In addition, as conceded by the Plaintiffs during oral argument, there is the possibility of different costs awards based on the Plaintiffs' conduct and, in my view, the differing allegations by the Plaintiffs, such that Mr. Hong could elect not to pay BHF's costs given that he has not provided an undertaking to satisfy any costs awarded against BHF.

[22] Even if I had concluded that the Plaintiffs are advancing a joint claim, based on the holistic approach endorsed by the Court of Appeal in *Yaiguaje,* I would have ordered security though perhaps on different terms that those set out below. While the principles in *Vogel* are relevant and instructive, they must be considered within the larger context of what is just in the circumstances and not a rigid test leading to an automatic result.

[23] BHF is not claiming that it is impecunious and has filed no evidence in this regard. Therefore, to potentially avoid an order for security, it must demonstrate that, on the merits, its claim has a good chance of success or a real possibility of success, a higher threshold, in order to avoid an order for security (*Coastline* at paras. 3 and 7; *Chalhal v. Abdullah et al,* 2022 ONSC 1727 at paras. 47-50; *Chill Media Inc.* v. *Brewers Retail Inc.,* 2021 ONSC 1296 at para. 14). In considering the merits, the court is not required to embark on an analysis such as on a summary judgment motion (*Coastline* at para. 7; *Horizon Entertainment Cargo Ltd.* v. *Marshall,* 2019 ONSC 2081 at para. 3). The court's consideration of the merits is based primarily on the pleadings with recourse to evidence filed on the motion and if the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage (*Coastline* at para. 7; *Horizon* at para. 3). An assessment of the merits should only be decisive where the merits may be properly assessed on an interlocutory application and success or failure appears obvious (*Coastline* at para. 7; *Horizon* at para. 3).

[24] It is not possible to conclude on the record before me that the Plaintiffs' claims have a good chance of success or a real possibility of success. There are numerous disputed issues of fact and multiple issues of credibility which can only be determined on a complete record at trial, not on the limited record on this motion. This includes the fact that there is no written retainer agreement or engageement letter the lone invoice from Fasken is for services related to another firm and expressly states that no legal services were provided by Fasken to BHF. Therefore, determining whether there is a solicitor-client relationship and a joint retainer will require the trial Judge to rely on other documents, correspondence and conduct and to make numerous findings of credibility. The trial Judge will also be required to determine if the Plaintiffs should have mitigated their damages by, among other things, purchasing EPL shares after July 2016 or if they were prevented from doing so as they allege.

[25] The Plaintiffs also argue that the Defendants' motion should fail because they did not bring this motion until May 2022, a delay of 2-4 years (*Chalhal* at paras. 33, 51-55; *Wilson Young & Associates* v. *Carleton University et al,* 2020 ONSC 4542 at para. 59). A motion for

security for costs must be brought promptly upon the moving party discovering that it has a reasonable basis for bringing the motion as a plaintiff should not have to post security after it has incurred significant expense in advancing the litigation (*Wilson Young* at para. 59). The moving party should not be entitled to security for costs if its delay causes prejudice to the plaintiff and failure to explain the delay is fatal to the motion even in the absence of prejudice (*Wilson Young* at para. 59).

[26] I reject the Plaintiffs' arguments regarding timing including their assertion that the Defendants delayed in bringing this motion. To the extent to which the motion can be characterized as delayed, I am satisfied that the Defendants have provided a reasonable explanation. Pursuant to Rule 56.03(1), the Defendants were not permitted to bring a security for costs motion until after they delivered their Statements of Defence. The delivery of Defences was delayed until July 2020 by a successful jurisdiction motion brought by two previous Defendants which was heard in February 2020. The Plaintiffs appealed which they later abandoned. The identity of the parties to the action was uncertain pending this motion. The Defendants also delivered a Request to Inspect and Demand for Particulars in June 2018, leading to a motion for further and better particulars which was resolved in March 2020. There was further delay after the delivery of Defences until the Plaintiffs delivered an Affidavit of Documents sworn by Mr. Hong in February 2022. As set out above, there was subsequent delay in scheduling and proceeding with this motion due to the Defendants' motion to strike which led to multiple attendances before me and at CPC before it was abandoned and the Plaintiffs' motions to compel the Defendants to deliver their Affidavits of Documents to examine Mr. Huang which were resolved.

[27] Importantly, I cannot conclude that the timing of this motion is strategic or that the Plaintiffs would suffer any prejudice due to the timing (*Wilson* at para. 59; *Yaiguage* at para. 23) This is not a case where the Defendants are seeking security on the eve of trial or even late in the litigation. Examinations for discovery have not been conducted and the Plaintiffs are not asserting that they would be unable to advance their claims through to trial if security is ordered.

[28] Taking a holistic approach, I conclude that it is just in the circumstances to exercise the court's discretion to order security for costs. Having considered the relevant factors, I am satisfied that the Defendants are entitled to some protection from an unenforceable costs award. I conclude that an amount can be ordered which balances the parties' interests and is not so onerous to prevent the Plaintiffs from advancing their claims to trial (*Chill Media* at para. 14). This is private, commercial litigation in which the Plaintiffs are claiming $225,000,000 in damages, a significant amount under any analysis. If the Plaintiffs are successful, BHF, a party which is not impecunious, stands to benefit significantly and therefore should accept some of the costs risk of pursuing its claims by posting security (*Crudo Creative Inc.* v. *Marin*, [2007] O.J. No. 5334 (Ont. Div.); *Design 19 Construction Ltd.* v. *Marks*, [2002] O.J. No. 1091 (Ont. S.C.J.) at paras. 10-15).

[29] The court has broad discretion to determine a fair and reasonable amount of security which is substantially similar to the exercise of its discretion in fixing costs of a proceeding pursuant to Rule 57.01 (*Canadian Metal Buildings Inc.* v. *1467344 Ontario Limited*, 2019 ONSC 566 at para. 27). The quantum should reflect an amount that falls within the reasonable

contemplation of the parties, what the successful defendant would likely recover and the factors set out in Rule 57.01 (*720441 Ontario Inc.* v. *The Boiler et al*, 2015 ONSC 4841 at para. 56; *Marketsure Intermediaries Inc.* v. *Allianz Insurance Co. of Canada*, 2003 CarswellOnt 1906 at paras. 17-20). The justness of the order and the balance between seeing claims through to trial against the risk of unenforceable costs awards can and should be reflected in the quantum of security ordered (*Rosin* at paras. 38-39; *Lipson* at para. 48).

[30] The Defendants seek $550,000 on a partial indemnity scale for the entirety of the litigation. This is based on $76,896.79 for costs incurred up to April 3, 2023 when the Defendants served their Motion Record and $487,397.25 for the remaining steps in the proceedings. During oral submissions, the Defendants advised that alternatively, they seek $252,000 up to the conclusion of examinations for discovery including motions arising from discoveries. This is comprised of $175,000 plus the approximately $77,000 in costs incurred up to April 3, 2023. In, my view, there is no reason to depart from the general rule and practice that security for costs should be ordered on a partial indemnity scale by stages in the litigation on a "pay as you go" basis (*Marketsure* at paras. 13-18). In determining a fair and reasonable amount and the reasonable expectations of the parties, I am satisfied that the amount sought by the Defendants must be reduced to reflect numerous factors. This includes the fact that the security relates only to BHF and that there will be overlap and economies of scale in defending the claims by BFH and Mr. Hong. However, all of this must be balanced against and reflective of the significant damages being claimed and the serious allegations, including professional misconduct, being made by the Plaintiffs.

[31] Having reviewed the Defendants' submissions on quantum and considering all of the relevant factors, I am satisfied that it is fair and reasonable, within the parties' reasonable expectations and just in the circumstances for BHF to post security of $140,000 within 30 days. This is without prejudice to the Defendants' right to move for additional security for future steps including mediation, the pre-trial conference and trial. The Plaintiffs shall take no further steps until security has been posted.

IV. Order and Costs

[32] Order to go on the terms set out above.

[33] The parties shall make all efforts to resolve the costs of this motion. If the parties cannot agree on costs, they may file written costs submissions not to exceed 4 pages (excluding Costs Outlines and attachments) on a timetable to be agreed upon by counsel.

Released: June 30, 2025

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Associate Justice McGraw