SUPREME COURT OF YUKON

Citation: *The Hotsprings Road Development Area Residents Association v. Takhini Hot Springs Ltd.*, 2020 YKSC 44

Date: 20201210
S.C. No. 17-A0043
Registry: Whitehorse

BETWEEN:

THE HOTSPRINGS ROAD DEVELOPMENT AREA RESIDENTS ASSOCIATION

PLAINTIFF

AND

TAKHINI HOT SPRINGS LTD., 45666 YUKON INC., and GOVERNMENT OF YUKON

DEFENDANTS

Before Madam Justice E.M. Campbell

Appearances:

Stephen L. Walsh — Counsel for the Plaintiff

Richard A. Buchan — Counsel for the Defendant, Takhini Hot Springs Ltd. and 45666 Yukon Inc.

Julie DesBrisay — Counsel for the Defendant, Government of Yukon

REASONS FOR JUDGMENT
(Security for Costs)

INTRODUCTION

[1] Takhini Hot Springs Ltd. and 45666 Yukon Inc. (together the "THS defendants") seek an order requiring the plaintiff to pay into court further security for costs in the amount of $20,000. In addition, they seek an order prohibiting the plaintiff, The Hotsprings Road Development Area Residents Association (the "Residents Association"), from taking any further steps in this proceeding until it pays into court the total amount of security for costs ordered by the court. They also seek an order that the

action be dismissed with costs to the defendants if the plaintiff does not pay into court the further amount of security for costs within 30 days of being ordered so.

[2] This action stems from an ongoing dispute regarding the Government of Yukon's ("YG") approval or conditional approval of the THS defendants' application(s) to subdivide a number of lots they own near the Takhini Hotsprings, for residential development(s). The land at issue is located in the Hotsprings Road area, approximately 30 kilometers northwest of Whitehorse.

[3] Takhini Hot Springs Ltd. ("THSL") is a corporation which owns or has an interest in much of the land at issue in this case. THSL is the main proponent of the subdivision of lots and residential development(s) at the heart of the dispute between the parties. THSL is one of the named defendants in this matter.

[4] 45666 Yukon Inc. is a corporation. It is or was the registered owner of a lot, which was specifically identified in the plaintiff's original Statement of Claim (filed on May 31, 2017) as one of the lots at issue (Lot 1536) in this case. 45666 Yukon Inc. is one of the named defendants in this matter.

[5] The plaintiff, the Residents Association, is a society, which was incorporated on April 25, 2016, under the *Societies Act*, R.S.Y. 2002, c. 206. Its stated primary purposes are:

> (a) to work towards en[s]uring that the use and development of land within the Hotsprings Road Development Area conforms with the terms of the Hotsprings Road Local Area Plan and related enactments including, but not limited to the Hotsprings Road Area Development Regulations; and
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> (b) to undertake and engage in any activity which, in the opinion of the society, may assist in achieving the purpose described in subparagraph (A) above.

[6] The Government of Yukon is the territorial government and one of the named defendants in this matter. It took no position with respect to this application.

[7] This application turns, at least in part, on the interpretation of a case management order that Chief Justice Veale, as he then was, made on July 18, 2019, in this matter. On that date, Veale C.J. ordered the plaintiff to pay $10,000 into Court as additional security for costs of THS defendants. In addition, he ordered that:

> 3. Until the Plaintiff pays the $10,000 additional security into Court, all steps in this action, which may reasonably be considered to materially affect the interests of the defendants Takhini Hotsprings Ltd and 45666 Yukon Inc (The "THS Defendants") shall be stayed, subject to the following conditions:
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> a. In the event of any disagreement between the Plaintiff and the THS Defendants about whether any step in this action may materially affect the interests of the THS Defendants, the Court may decide the question in case management, upon request by any of theses parties;
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> b. If the Court determines the interests of the THS Defendants may be materially affected by the Plaintiff's pending step in this action, the stay of proceedings shall be maintained, subject to the Plaintiff complying with paragraph 1 of this order, or with any further order of the Court regarding security for costs.
>
> 4. The current proceedings for relief against the defendant Government of Yukon may proceed.
> (my emphasis)

FACTS

[8] In order to better understand the situation between the parties and the context in which this application is being brought, it is useful to review the procedural history of this case as well as the context in which the case management order of July 18, 2019, was made.

a) Procedural history of this legal action

[9] In this action, the plaintiff challenges the validity of YG's approval or conditional approval of the THS defendants' applications to subdivide a number of their lots, located in the Takhini Hotsprings Road Area, for residential development, pursuant to regulations enacted by YG in 2018. The plaintiff also challenges the legal validity of these regulations.

[10] This is the second time the plaintiff challenges YG's approval of the THS defendants' proposed residential development(s) on lots located near the Takhini Hotsprings.

[11] In 2016, the plaintiff filed its first legal action against YG challenging the validity of a development agreement YG had entered into with THSL. Pursuant to the development agreement, the residential development potential of some of the lots owned by THSL in the Hotsprings Road area, which were to remain undeveloped, was to be transferred to other lots owned by THSL in the same area, which were designated for development. The development agreement allowed for the construction of more than "the maximum of two residences per lot" permitted under the provisions of the Hotsprings Road Local Area Plan ("Local Area Plan"), on the lots designated for development. At the time, the *Hotsprings Road Development Area Regulation*, O.I.C. 1996/136, as amended, provided that the use and development of the land in the area was subject to the Local Area Plan (s. 17(2) of the *Regulation*)

[12] On March 14, 2017, Madam Justice Maisonville ruled in favour of the plaintiff in determining that the development agreement was inconsistent and in conflict with the *Hotsprings Road Development Area Regulation*, O.I.C. 1996/136, and the Local Area

Plan as there had been no consultation regarding the proposed development nor proper rezoning (*The Hotsprings Road Development Area Residents Association v. Yukon (Government of)*, 2017 YKSC 14). Furthermore, Maisonville J. ruled that the agreed upon development would be prohibited until the requirements for proper consultation and rezoning pursuant to s. 17(2) of the *Hotsprings Road Development Area Regulation,* O.I.C. 1996/136, were met. However, Maisonville J. declined to declare the development agreement void because she found that third parties, THSL and potentially others, were involved and that there was no evidence before the court regarding how their rights and interests would be affected by such a declaration. In addition, Maisonville J. noted that no application had been brought in respect of the third parties in that case.

[13] On May 31, 2017, the plaintiff filed the action before the Court. Initially, the action challenged, among other things, the validity of YG's approval of 45666 Yukon Inc.'s application to subdivide a specific lot (Lot 1536) into a condominium plan comprised of, among other things, three single detached residential dwellings. The plaintiff named YG, THSL, 45666 Yukon Inc. and the Takhini Hot Springs Owners Association ("Owners Association") as defendants to this action.

[14] In 2018, the Commissioner in Executive Council issued Order-in-Council 2018/119 ("O.I.C. 2018/119"), entitled "*Regulation to amend the Hotsprings Road Development Area Regulation (2018)*" and Order-in-Council 2018/120 ("O.I.C. 2018/120") entitled "*Second Regulation to amend the Hotsprings Road Development Area Regulation (2018)*" with the stated intent of amending the existing *Hotsprings Road Development Area Regulation* (see s. 1 of both O.I.C.s).

[15] O.I.C. 2018/119, if valid, contains provisions which create new zoning designations for designated parcels of land within the Hotsprings Road area.

[16] O.I.C. 2018/120, if valid, amends O.I.C. 2018/119 by, among other things, adding a clause to the "Special Provisions" applicable to the new zoning designations, which reads as follows:

> Despite the definition "lot" in section 2 of this Regulation, the zoning requirements set out in this Schedule do not apply to a lot created by the registration of a condominium plan but instead apply to the land, as a whole, contained within the boundaries of the condominium plan.

[17] This provision, if valid, has the effect of consolidating the residential potential of lots covered by the new zoning designations if contained within the boundaries of a condominium plan. The lots that the THS defendants are currently developing and those they want to develop are covered by the new zoning designations and special provisions.

[18] The plaintiff has amended its Statement of Claim a number of times since 2017 in order to add allegations and to seek specific relief regarding the validity of the 2018 regulations as well as YG's approval or conditional approval of THSL's applications to subdivide Lots 1576, 1577, 1578 and 1579 into bare land condominium units. I note that, in September of 2018, the plaintiff withdrew, from its Statement of Claim, the allegations regarding the subdivision of Lot 1536 into a condominium plan. The plaintiff's last amendments to its Statement of Claim were filed on January 7, 2020.

[19] Also, the relief sought by the plaintiff has evolved since 2017. More specifically, the plaintiff now seeks a number of declarations with respect to O.I.C. 2018/119, including:

1. that it does not meet the requirement for "rezoning" as per Maisonville J.'s decision; and
2. that its provisions, that allow for more than "a maximum of two residences per lot", are inconsistent with the provisions of the Local Area Plan, and are, therefore, of no force and effect.

[20] In addition, the plaintiff seeks a declaration that the proposed subdivision of Lots 1576, 1577, 1578 and 1579 into bare land condominium units do not conform with the Local Area Plan, and, therefore, that these lots may not be subdivided as proposed and that any such subdivision is invalid and of no force and effect.

[21] The plaintiff's factual allegations surrounding Yukon's approval or conditional approval of THSL's applications for the subdivision of Lots 1576, 1577, 1578 and 1579 into bare land condominium units appear largely uncontested. It is the legal validity and effects of the 2018 regulations and of YG's approval of the THS defendants' applications for residential development of the lots at issue, pursuant to these regulations which appears to be at the centre of this legal action.

[22] Finally, I note that, on July 18, 2019, the plaintiff consented to its claim against the Owners Association, being dismissed, with costs to that defendant in the amount of $4,000.

b) Previous case management orders

[23] On January 25, 2019, Mr. Justice Mahoney ordered the plaintiff to pay into court $4,000 as security for costs to the following defendants: THSL, 45666 Yukon Inc. and the Owners Association. He also ordered that the parties schedule a case management conference to address a number of issues including:

2. …

d. the Plaintiff will advise the Defendants whether Takhini Hot Springs Ltd., Takhini Hot Springs Owners Association and 45666 Yukon Inc. are Defendants in name only and, if so, why the action against them should not be discontinued against them forthwith;

e. if the Defendants mentioned in item (d) above are not mere nominal defendants but real defendants then should the current security for costs amount be increased …

[24] On May 31, 2019, Veale C.J. ordered that THSL, 45666 Yukon Inc. and the Owners Association's application for an order increasing the amount of security for costs be heard on July 17, 2019.

[25] On July 17, 2019, Veale C.J. granted the application that the plaintiff pay into court increased security for costs to those three defendants in the amount of $10,000 and that the action be stayed until that amount is paid into court. At the time, Veale C.J. stated that the stay would apply to the entire action.

[26] However, the next day, after further consideration, Veale C.J. reconvened the parties for a case management conference to discuss the scope of his July 17, 2019, Order. The transcript reveals that Veale C.J. was concerned that the order he had made the day before might be unnecessarily broad in that it would prevent the plaintiff from taking any steps to further its action against YG, even those that may not have a material effect on the interests of the THS defendants. A discussion ensued between the Court and counsel on how Veale C.J.'s concerns could be addressed. Counsel agreed to enter into out of court discussions which, ultimately, led to the mechanism set out at para. 3 of Veale C.J.'s Order of July 18, 2019, reproduced at para. 7 of this

decision. The July 18, 2019 Order further states that the plaintiff's proceeding for relief against YG may proceed.

[27] On August 27, 2019, Veale C.J. presided over another case management conference in this matter. The order he made on that day reveals that, at the time, the plaintiff was considering whether to proceed further with its action and whether and when it would file and serve further amendments to its Amended Amended Statement of Claim. Veale C.J. gave the plaintiff until October 11, 2019 to advise all the defendants of its decision in that regard.

[28] On that date, Veale C.J. also ordered that a further case management conference be scheduled: "for the purposes of setting dates for a further case management conference to determine whether the interests of the Hot Springs Defendants will be materially affected if the plaintiff proceeds with the action and for an application by the Hot Springs Defendants for further security for costs." (my emphasis)

[29] On November 28, 2019, Veale C.J. issued another case management conference order granting leave to the plaintiff to file and serve a Fresh Amended Statement of Claim on or before January 7, 2020, and a timeline for the filing of the defendants' Fresh Statements of Defence and the plaintiff's Fresh Reply.

[30] Veale C.J. set a timeline for the filing by the THS defendants of: "any application for further security for costs together with any supporting affidavits and an Outline addressing the issue whether their interests will be materially affected by the plaintiff proceeding with this action." (my emphasis) He also set a timeline for the filing of the plaintiff's response to the application and hearing of the application in the spring of

2020. However, the hearing of the application was postponed due to the Covid-19 pandemic.

[31] The hearing of this application proceeded before me on two separate days. A second day became necessary after counsel requested that I order the transcript of the July 17, 2019 and July 18, 2019 hearings in order to allow them to make specific submissions on the significance of Veale C.J.'s decision, on July 18, 2019, to amend the order he had made the day before.

POSITIONS OF THE PARTIES

a) The THS Defendants

[32] The THS defendants acknowledge that on July 18, 2019, Veale C.J. moved from ordering a blanket stay of proceedings in this action, until the plaintiff paid the additional security for costs he had ordered, to an order which entitles the plaintiff to pursue its action for relief against YG, without paying the additional security for costs, as long as the plaintiff's pending steps in the action did not materially affect the interests of the THS defendants.

[33] However, the THS defendants submit that the interpretation of the July 18, 2019 Order has to be informed by Veale C.J.'s case management orders of August 27, 2019 and November 28, 2019. The THS defendants submit that these subsequent orders demonstrate that the plaintiff's action was in flux during that period of time due to ongoing applications for the development of lots located near the Hotsprings, which prompted the plaintiff to make further amendments to its Statement of Claim. The THS defendants submit that Veale C.J. did not wish to unduly impede the plaintiff from pursuing YG for appropriate relief, provided the THS defendants would have a simple

mechanism to demonstrate that certain relief sought against YG may have a material impact on their interests. According to the THS defendants, providing for that mechanism was ultimately the principal purpose of the July 18, 2019 Order.

[34] The THS defendants submit that, since then, the plaintiff has amended its Statement of Claim a number of times. However, the THS defendants submit that, with two exceptions, the declaratory relief sought by the plaintiff remains substantially the same. The THS defendants submit that, as a matter of substance, the nature of the declarations sought are such that one can easily infer that the THS defendants' interests could be significantly impacted if the relief was granted.

[35] The THS defendants acknowledge that their application is not tied to a specific step taken by the plaintiff in this action. However, the THS defendants submit that, considering that there has already been a tremendous amount of delay and expense occasioned by the plaintiff's numerous amendments to its Statement of Claim, it is counterproductive to require the parties to come to court every time they cannot agree on whether a pending step has a material impact on the THS defendants' interests. In addition, the THS defendants submit that, ultimately, any step taken by the plaintiff in this action must be connected to the relief sought.

[36] The THS defendants submit that, as property owners and developers of the land at issue in this case, it is clear that the declarations sought by the plaintiff, if granted, would have a significant and direct material impact on their interests and that they are not purely unaffected "nominal defendants" as claimed by the plaintiff.

[37] The THS defendants note that, in the previous action filed by the plaintiff, Maisonville J. refused to declare YG's and THSL's development agreement void

because she found that third party interests, including THSL, had been affected and that there had been no application brought in respect of those parties. The THS defendants submit that Maisonville J.'s finding is equally applicable in the present case as the subject-matters of both actions are essentially the same; the affected properties, in relation to the relief sought, are substantially the same; and the two original parties in the proceedings before Maisonville J. are also parties to this action.

[38] In addition, the THS defendants submit that the subject-matter of this action, which involves questions of interpretation of legislation, falls squarely within the criteria of Rule 10(1)(b) and (g) of the Supreme Court of Yukon *Rules of Court*. As such, the plaintiff's proceeding should have been started by way of Petition, rather than Statement of Claim.

[39] The THS defendants submit that proceeding by way of an action by filing a Statement of Claim imposes greater legal expenses and inconvenience on defendants than proceeding by way of a Petition. The THS defendants point out that discovery rights are broader and Statements of Defence must be more detailed, and are more costly to defendants, when a plaintiff proceeds by way of a Statement of Claim.

[40] With respect to the further amount of security for costs they are seeking, the THS defendants submit that the plaintiff has amended its Statement of Claim multiple times since filing its action, and that the plaintiff has alluded to making further amendments. As a result, they submit that they have incurred an inordinate amount of legal expenses to amend their pleadings to respond to the plaintiff's ongoing changes. The THS defendants submit that the court should take into consideration the plaintiff's procedural choice in proceeding by way of a Statement of Claim instead of a Petition in determining

the additional amount of security for costs that is warranted in this case. In particular if the court awards special costs to compensate for the plaintiff's procedural abuse. The THS defendants submit that their legal expenses to date significantly exceeds $50,000 and that they are seeking a $20,000 increase in security for costs to bring it more in line with the costs they have incurred so far and are expected to incur. The THS defendants further submit that the plaintiff has not offered any substantial arguments to oppose the additional $20,000 that is being sought.

[41] Furthermore, the THS defendants submit that the increase in security for cost is justified because the plaintiff's action and inappropriate choice of procedure has delayed their lawfully authorized development plans. In addition, the THS defendants submit that the uncertainty created by the plaintiff's action has impacted their ability to finance their project(s) and to access additional financing for their development plans.

[42] In addition, the THS defendants submit that the usual and proper way to stop a development is to apply for an interim injunction. They note that courts have typically requested plaintiffs to give an undertaking for damages in those type of cases. The THS defendants submit that the plaintiff in this case is trying to achieve the same results through its Statement of Claim without bearing the financial responsibility that comes with applying for an interim injunction.

[43] The THS defendants submit that the plaintiff is a society that does not have any assets while its directors are individuals who live and own property along the Takhini Hotsprings Road.

[44] Finally, the THS defendants submit that to give effect to the spirit and intent of the July 18, 2019 Order; to bring financial responsibility towards the defendants and to give them some form of protection, this Court should:

(i) order the plaintiff to pay additional security for costs into court in the amount of $20,000;

(ii) order an immediate stay of proceedings until the plaintiff pays into court the total amount of security for costs ordered by the court; and

(iii) order that the action be dismissed with costs to the THS defendants, if the plaintiff does not pay into court the total amount of security for costs ordered by the court within 30 days of being ordered to do so.

[45] The THS defendants are seeking costs for this application. They submit costs of this application should be costs in the cause, as special costs in favour of the THS defendants.

b) The Plaintiff

[46] The plaintiff submits that the application filed by the THS defendants should be dismissed with costs to the plaintiff.

[47] Firstly, the plaintiff submits that the THS defendants are mischaracterizing Veale C.J.'s Order of July 18, 2019, by asking the Court to answer the wrong question. The plaintiff submits that the question that triggers the application of Veale C.J.'s Order has never been whether the relief sought, if granted, or if the proceeding in general will materially affect the interests of the THS defendants. Instead, the question is whether a particular pending procedural step in the action may materially affect the interests of the

THS defendants. Furthermore, the July 18, 2019 Order confirms that the proceeding against YG can continue.

[48] The plaintiff submits that on July 17, 2019, Veale C.J. ordered a complete stay of proceedings against all defendants to this action until the full amount of security for costs was paid into court. However, on July 18, 2019, Veale C.J. convened the parties to a case management conference to discuss the scope of the oral order he had made the day before, and more specifically, whether the stay should apply only to the THS defendants as opposed to YG. The plaintiff submits that during the case management conference of July 18, 2019, Veale C.J. indicated that his preference would be to leave an opportunity for the plaintiff to continue its action against YG but not do so in a way that is prejudicial to the THS defendants. According to the plaintiff, the transcript demonstrates that the THS defendants confirmed that they wished to remain as “contingent” or “nominal” parties and also confirmed that the proceedings against YG could continue. The plaintiff submits that, at the end of the case management conference, Veale C.J. issued an order that significantly reduced the scope of the July 17, 2019 Order. More importantly, the July 18, 2019 Order expressly confirmed that the current proceedings for relief against YG may proceed.

[49] The plaintiff further submits that the case management conference orders of August 27, 2019, and November 28, 2019, did not have the effect of amending or rendering void the July 18, 2019 Order. The plaintiff submits that the position advanced by the THS defendants in support of their application is inconsistent and not in compliance with the case management order of July 18, 2019, and that the further amount of security for costs and other relief sought by the THS defendants clearly

exceeds the terms of Veale C.J.'s Order. The plaintiff submits that compliance with case management orders are not optional and that the THS defendants' application clearly disregard the Order made by Veale C.J. on July 18, 2019.

[50] Furthermore, the plaintiff submits that the THS defendants are responsible for much of the delay in this matter by bringing repeated applications for security for costs that have prevented consideration by the court of other legal issues raised by this action.

[51] The plaintiff states that it only named THSL and 45666 Yukon Inc. as nominal defendants in this action to avoid any issue that may be raised as a result of Maisonville J.'s ruling. However, the plaintiff points out that Maisonville J.'s finding, with respect to the issue of material impact on third parties' interests, was made in a case where the plaintiff was seeking to void a contract when one of the party to that contract was not before the court. However, in this case, the plaintiff is not seeking to void a contract. Instead, it is seeking declarations against YG's regulations and decisions. The plaintiff submits that, in the previous action, Maisonville J. granted declarations that are similar to the ones sought in this action even though there was no information before the court on how the declarations could affect third parties' interests. The plaintiff submits that, from the outset, its members have been concerned about the fact that YG's conduct was inconsistent with and in breach of the express terms of the Local Area Plan, and, consequently, they are seeking to vindicate what they perceive as the legally binding obligations of YG under the Local Area Plan. The plaintiff submits that, in that context, Maisonville J.'s finding does not automatically apply in the present case, contrary to what the THS defendants argue.

[52] The plaintiff recognizes that the Court has discretion to make an order for security for costs when it deems it reasonable to do so. However, the plaintiff argues that the THS defendants are mere nominal defendants against whom no claims are made and no relief is sought. The plaintiff further submits that there is no authority or case law that stands for the proposition that security for costs should be granted or awarded to a nominal defendant against whom no claim is made and no relief sought.

[53] The plaintiff further submits that the THS defendants, who are nominal defendants, have failed to demonstrate or adduce persuasive evidence that their interests will be materially affected by the plaintiff proceeding with its action against YG and pursuing the relief it seeks against YG.

ANALYSIS

[54] I reviewed the transcript of the hearing that proceeded before Veale C.J. on July 17 and July 18, 2019. It reveals that Veale C.J. wanted to strike a balance between the recognized interest in allowing the plaintiff to proceed with its action against the government and the need to provide financial reassurance for the THS defendants.

[55] On July 18, 2019, Veale C.J. requested that counsel enter into discussions to see if they could agree on a mechanism that would give effect to his intent. Later that day, counsel came back with a proposal that was, after some modifications, approved by Veale C.J. and incorporated into his July 18, 2019 Order. The discussions between the Court and counsel on the issue of security for costs reveal that Veale C.J. wanted the plaintiff to post security for costs prior to being authorized to initiate a step that might materially impact the interests of the THS defendants. Be it an amendment to the

Statement of Claim to which the THS defendants would have to respond, requesting document production from the THS defendants or setting the matter down for a hearing.

[56] Veale C.J. also contemplated the possibility of the plaintiff taking steps that might not materially impact the interests of the THS defendants or would not necessitate an immediate response from them, such as requesting further document production from YG or requesting YG to respond to a notice to admit. I note that, at the hearing of the application before me, counsel for the plaintiff indicated to the Court that he did not foresee pursuing those types of discovery steps on behalf of his client and would much rather have the matter set down for a hearing. However, the parties also alluded to the possibility of the plaintiff wanting to amend its Statement of Claim again to reflect the subdivision applications filed since the plaintiff's last amendments to its Statement of Claim.

[57] Looking back at what happened on July 18, 2019, I note that while counsel appeared to agree on the wording of the security for costs provision of the order, they seemed to disagree, almost immediately, not only with respect to the nature of the procedural steps that would trigger a stay of proceedings until the plaintiff paid security for costs into court, but also against who that stay of proceedings would apply considering the wording of para. 4 of the order stating that: "The current proceedings for relief against the defendant Government of Yukon may proceed."

[58] The parties diametrically opposing views regarding the potential impact of the relief sought by the plaintiff on the THS defendants as well as the type or nature of procedural steps the plaintiff may take without triggering payment of the security for costs ordered by Veale C.J., clearly came to light at the hearing of this application

[59] Unfortunately, it has become clear that Veale's C.J. Order of July 18, 2019, did not achieve the laudable goal that he envisaged, which was to provide the parties with a mechanism that would have given them control over the procedural steps the plaintiff could pursue to move its action forward against YG without triggering its obligation to pay the further amount of security for costs into court, all the while protecting the THS defendants' material interests.

[60] What has become clear, while reviewing the history of these proceedings, is that the plaintiff and the THS defendants have become embroiled in a procedural dispute that has taken a life of its own and has lead them astray from the substantive issues raised by the plaintiff's claim.

[61] While I want to reiterate the very important role that the case management process plays in Yukon "in achieving smooth and efficient operation of the courts" (*Dawson (Town of the City of) v. Carey*, 2014 YKCA 3, at para. 39), and the importance of signalling to litigants that compliance with case management orders is not optional and that "any acts or omissions that tend to undermine [the case management process] should be treated seriously" (at para. 39), I am of the view that dismissing this application based on a strict interpretation of Veale C.J.'s Order would simply be inviting the parties back before the court, most likely as soon as the plaintiff takes its very next step to move its case forward. This would have the undesirable effect of further delaying these proceedings, which is certainly not the result that the case management process strives to achieve.

[62] As such, I find that it is not in the best interests of justice to dismiss this application on the basis that it was not triggered by a specific procedural step taken by

the plaintiff in this action, and is not strictly framed within the confines of the July 18, 2019 Order. In addition, I am of the view that I am entitled not only to consider whether further security for costs is warranted in this case but also to determine when the total amount of security for costs is to be paid into court by the plaintiff. I note that the broader wording of Veale C.J.'s Orders of August 27, 2019, "whether the interests of the Hot Springs Defendants will be materially affected if the Plaintiff does proceed with the action and for an application by the Hot Springs Defendants for further security for costs." (my emphasis)) and November 28, 2019, ("any application for further security for costs together with any supporting affidavits and an Outline addressing the issue whether their interests will be materially affected by the plaintiff proceeding with this action"(my emphasis)), already contemplated that possibility.

[63] This finding leads me to the issue of whether the interests of the THS defendants will be materially affected if the plaintiff proceeds with this action.

[64] The plaintiff submits that it does not seek any relief against the THS defendants and that they are defendants in name only (nominal defendants). In addition, the plaintiff submits that its action solely challenges the validity and legality of YG's actions and decisions with respect to the subdivision of the land at issue. The plaintiff further points out that it is not seeking to void a contract between YG and the THS defendants and that Maisonville J. granted declaratory relief similar to what is sought in this case in the absence of any information regarding third parties' interests.

[65] While, strictly speaking, the plaintiff may be seen as seeking declaratory relief solely against YG, I am of the view that the declarations sought in this action, such as that the lots at issue may not be subdivided as proposed and that any such subdivision

is invalid and of no force and effect, would, if granted, materially affect the interests of the THS defendants who have invested time and money in their development plans. The evidence is to the effect that the filing of the plaintiff's ongoing action has caused uncertainty and delays with respect to the THS defendants' development plans and has increased their expenses, such as incurring higher interest costs in financing their development project. In any event, the court can reasonably conclude that an action seeking to void the government's decision(s) to approve specific applications of a third party developer for the subdivision of specific lots into condominium plans does materially affect the interests of that owner-developer. As a result, I am of the view that the interests of the THS defendants will be materially affected by the plaintiff proceeding with this action.

[66] I now turn to the issue of whether an order for further security for costs is warranted, and, if so, in what amount, and when should payment be made into court.

[67] The THS defendants seek an additional $20,000 in security for costs. They submit that their legal expenses to date significantly exceed $50,000, and that the requested increase would bring the total amount of security for costs more in line with the costs they have incurred so far and are expected to incur in this case. They further submit that the plaintiff is impecunious and that a further amount in security for costs, that takes into consideration the possibility of special costs being ordered in this matter, is necessary to ensure that the plaintiff be held financially accountable.

[68] I am mindful of the fact that the plaintiff is a society not a corporation. However, I am of the view that the principles set out by the British Columbia Court of Appeal in *Kropp v. Swaneset Bay Golf Course Ltd.*, [1997] 4 W.W.R. 306 (B.C.C.A.) at para. 17,

which were considered by Gower J. in *37790 Yukon Inc. v. Skookum Asphalt Ltd.*, 2007 YKSC 24 and *Cobalt Construction Inc. v. Kluane First Nation*, 2013 YKSC 124, are useful in determining whether to order further security for costs in this case. The principles to consider are as follows:

> 1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
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> 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
>
> 3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
>
> 4. The Court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
>
> 5. The Court can order any amount of security up to the full amount claimed as long as the amount is more than nominal;
>
> 6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
> 7. The lateness of the applications for security is a circumstance which can properly be taken into account. (emphasis in original)

[69] I also find the steps set out in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, (1999), 36 C.P.C. (4th) 266 (B.C.S.C.), at para. 14, to determine whether to order security for costs against a corporation, and applied by Gower J. in

37790 Yukon Inc. and in *Cobalt Construction Inc.*; instructive in determining whether to order security for costs against the plaintiff, which is a society:

> 1. Does it appear that the plaintiff company will be unable to pay the defendant's costs if the action fails?
>
> 2. If so, has the plaintiff shown that it has exigible assets of sufficient value to satisfy an award of costs?
>
> 3. Is the court satisfied that the defendants have an arguable defence to present?
>
> 4. Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff's case from being heard?

[70] In addition, I note that both Mahoney J. and Veale C.J. have previously found that an order for security for costs was warranted in this case.

[71] Also, I note that the amount of $4,000 in security for costs ordered by Mahoney J. was paid by the plaintiff to the Owners Association when its action against that defendant was dismissed by consent. The amount of $10,000 in further security for costs ordered by Veale C.J. on July 18, 2019, has not been paid into court.

[72] The plaintiff acknowledges that the Court has discretion to make an order for further security for costs.

[73] A number of affidavits have been filed in this case. I agree with the plaintiff that the affidavits filed by the THS defendants contain some statements of opinion and conclusions that have no evidentiary value and are better left for submissions, such as this excerpt that can be found at para. 7g of Gary Umbrich Affidavit #6, which reads:

> g. To date, the Plaintiff has demonstrated no financial responsibility whatsoever in connection with this action. …

[74] However, the affidavits also contain sufficient factual basis to conclude that the plaintiff has very few assets and that it would not be in the position to pay the THS defendants' costs if its action were to fail. The evidence also reveals that the plaintiff is a society with four directors who all live along the Hotsprings Road, and that some of its directors personally own property along that road. Also, one of the plaintiff's directors is a business owner, another is gainfully employed and the other two directors are retired from gainful employment.

[75] In addition, the president of THSL and 45666 Yukon Inc., Gary Umbrich, deposes in his Affidavit #6 that the THS defendants have incurred in excess of $50,000 in legal costs to date in defending this action. Also, a draft bill of costs totalling $20,976.75 is attached to Mr. Umbrich's Affidavit #6. The draft bill of costs represents counsel's estimate of the assessable costs incurred by the THS defendants to date and to be incurred by them in connection with anticipated steps going forward in this matter. The plaintiff has not, for the purpose of this application, really questioned the work and the amounts set out in the draft bill of costs.

[76] Furthermore, while I do not need to weigh in at this point on whether the plaintiff should have proceeded by way of Petition instead of Statement of Claim as the matter was not fully argued before me (in saying that, I do not want to be seen as inviting the parties to bring an application in that regard), I must recognize that a plaintiff in an action has broader discovery rights than a petitioner (Supreme Court of Yukon Rules 10, 25 and 27). Also, I note that the plaintiff has amended its Statement of Claim multiple times since first filing its claim; twice after the July 18, 2019 Order - be it with the permission of the court - to reflect the evolving situation with respect to the

subdivision of land for residential development(s) in the Hotsprings Road area. In addition, the plaintiff has alluded to the very possibility of amending its Statement of Claim again. Considering the plaintiff's procedural choice, it is not surprising that the THS defendants, as named defendants, have chosen to respond to each of the plaintiff's amendments in order to preserve their rights to respond to all the plaintiff's claims. As indicated earlier, the declaratory relief sought by the plaintiff, if granted, would have a material effect on the interests of the THS defendants, and more specifically on, THSL, which owns or has an interest in the lots approved for subdivision by YG. In that sense, proceeding by way of a Statement of Claim has a bearing on the THS defendants' legal fees.

[77] I do not intend to go into the details of the merits of this action, as I do not need to do so for the purpose of this application. However, from my cursory review of the pleadings, the outcome of the plaintiff's claim does not appear obvious. Suffice it to say that it appears that the THS defendants have an arguable position to present.

[78] Finally, I must consider whether an order for further security for costs would cause undue hardship on the plaintiff such that it would prevent its case from being heard. As stated, the plaintiff is a society that does not appear to have many assets. However, there is nothing that prevents the plaintiff from seeking out financial support from third parties, including its directors, who are not impecunious, to pursue its action. As a result, I am of the view that a further order for security for costs would not cause undue hardship on the plaintiff.

[79] Also, considering:

a) the draft bill of costs of $20,976.75 submitted by the THS defendants, which includes counsel's estimate of the assessable costs incurred by the THS defendants to date and to be incurred by them in connection with anticipated steps going forward in this matter; (I note that a number of the entries on that draft bill of costs were before Veale C.J. when he ordered an additional amount in security for costs in July 2019)

b) the amount of $10,000 in security for costs ordered by Veale C.J. in July 2019; and

c) the history of this proceeding to date, including the fact that the plaintiff has already paid $4,000 in costs to the Owners Association when it agreed to a consent dismissal of its action against that named defendant.

I find that an additional amount of $11,000 in security for costs, instead of the additional $20,000 requested by the THS defendants, is warranted in this case. In coming to this amount, I did not take into consideration the possibility that special costs may be awarded to the THS defendants if they are successful in defending this action, as I find this consideration premature at this stage of the proceeding.

[80] Furthermore, I find that an order staying the plaintiff's action against all defendants, including YG, until the plaintiff pays into court the total amount of $21,000 in security for costs it has been ordered to pay in this case, is appropriate in order to prevent any further procedural dispute between the parties on this issue, which would result in further unnecessary delays.

CONCLUSION

[81] The application of the THS defendants for further security for costs is granted.

[82] The plaintiff, the Residents Association, is ordered to pay an additional $11,000 into court as security for the costs of the THS defendants in this action;

[83] Paragraphs 3 and 4 of Veale C.J.'s Order of July 18, 2019 are set aside;

[84] This action is stayed against all defendants, including YG, until the plaintiff pays into court the total amount of $21,000 it has been ordered to pay in security for the costs of the THS defendants in this action.

[85] I note that I heard this application at the same time as the application of Northern Sustainable Development Ltd. ("NSD") and Yukon Condominium Corporation No. 256 ("CC256") to be added as defendants in this matter. As I determined in that application that NSD and CC256 should be added as defendants to this action, the stay of proceedings I ordered, pending payment into court by the plaintiff of the total amount of security for costs, applies to these defendants as well.

[86] I decline at this point to order that this action be dismissed with costs to the THS defendants, if the plaintiff does not pay into court the further amount of security for costs within 30 days of being ordered so, as requested by the THS defendants.

[87] Instead, I order that the matter be brought back before me, in case management within 75 days of today's order to:

(i) confirm whether the plaintiff has posted the total amount of security for costs;

(ii) to hear the parties on whether this action should be dismissed or if further time to pay should be granted to the plaintiff, if the plaintiff has not posted the total amount of security for costs by then; or

(iii) to set timelines for the next steps in this matter, if the plaintiff has posted the total amount of security for costs

[88] Counsel may speak to the issue of costs of this application at the next case management.

CAMPBELL J.