

CITATION: JMX Contracting Inc. (Re), 2021 ONSC 5142
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CV-20-00000081-0000
DATE: 20210722

**SUPERIOR COURT OF JUSTICE IN BANKRUPTCY AND INSOLVENCY – ONTARIO
(COMMERCIAL LIST)**

**RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985. C. c-36. AS AMENDED**

**AND RE: AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF JMX CONTRACTING INC., JMX NATIONAL INC.,
BRND PROPERTIES INC., and JMX LEASING INC.**

AND IN THE MATTER OF THE *CONSTRUCTION ACT*, R.S.O. 1990, c. C.30

BEFORE: Wilton-Siegel, J.

COUNSEL: *C. Fell, S. Kour, K. Bannon, and D. Dodgson*, for the Applicants, 2808447 Ontario Inc., 2809588 Ontario Inc. and 2809590 Ontario Inc.

S. Woods, L. Rogers and C. McIntyre, for the Respondent and Cross-Applicant,
Ontario Power Generation

H. Chaiton, for the Monitor, Crowe Soberman Inc.

HEARD: May 21, 2021

ENDORSEMENT

[1] In these proceedings, the applicants 2808447 Ontario Inc., 2809588 Ontario Inc. and 2809590 Ontario Inc. (collectively, the “Applicants”) seek an order approving a litigation funding agreement dated March 1, 2021 (the “Agreement”) between 2809588 Ontario Inc. (“Residual Contracting”) and JMX Contracting Inc. (“JMX”). Ontario Power Generation (“OPG”) seeks an order dismissing the Applicant’s motion, or, alternatively, an order approving the agreement on condition that it be amended to require JMX to agree to indemnify OPG in respect of any adverse costs award that might be made against Residual Contracting in respect of a lien action involving Residual Contracting and OPG, or, in the further alternative, the payment into court of the amount of \$1.5 million by way of security for costs of the lien action.

Factual Background and the CCAA Proceedings

- [2] JMX is a demolition company. It is owned by JMX Leasing Inc. (“JMX Leasing”) which was in turn previously owned indirectly through personal holding corporations by four individuals (the “Previous Shareholders”).
- [3] JMX entered into a contract with OPG dated July 10, 2018 for the demolition of the Lambton Thermal Generating Station of OPG (the “Demolition Contract”). The demolition project contemplated by the Demolition Contract is herein referred to as the “Lambton Project.” On February 3, 2020, OPG formally notified JMX that it was in default of the Demolition Contract. JMX denied that it was in default but did not remedy the alleged default which related to delay of the Lambton Project.
- [4] In April 2020, JMX, JMX Leasing, JMX National Inc. and BRND Properties Inc., all related corporations, (collectively, the “JMX Group”), filed Notices of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”). These proceedings were subsequently converted into proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”). Crowe Soberman Inc. is the monitor in these CCAA proceedings (the “Monitor”).
- [5] JMX’s work on the Lambton Project stopped on or about April 4, 2020, as a result of the regulation prohibiting non-essential construction issued by the Government of Ontario due to the onset of the pandemic. JMX did not re-start demolition work after the regulation was lifted in respect of demolition services on May 18, 2020. The Demolition Contract was formally terminated by OPG on September 30, 2020. OPG subsequently entered a new contract with a third party for completion of the Lambton Project.
- [6] The Demolition Contract contemplated on-going payments by OPG for the demolition work and payments by JMX to OPG for scrap arising on the demolition when the scrap was removed from the site. JMX was entitled to sell the scrap for its own account. As of April 2020, OPG had paid JMX approximately \$20 million. It retained, and continues to hold, a holdback of approximately \$2 million in respect of these payments.

The OPG Litigation

- [7] JMX registered a claim for a construction lien in the amount of approximately \$10.9 million on May 21, 2020. JMX subsequently perfected its lien by commencing a lien action against OPG claiming that amount. It subsequently amended its claim to approximately \$20.8 million in total (the “JMX Lien Claim”). Eight of JMX’s subcontractors have also registered lien claims against title to the site totalling approximately \$2.1 million. JMX disputes one of these claims for approximately \$950,000. To the extent these claims are valid, they will be paid out of the holdback referred to above. For its part, OPG has counterclaimed seeking damages of \$19 million for breach of the Demolition Contract. The JMX Lien Claim and the OPG counterclaim are herein collectively referred to as the “OPG Litigation.”

- [8] The JMX Group conducted a sales process with a stalking horse bidder which was owned by two of the Previous Shareholders (the “Funding Shareholders”). The stalking horse bid was the successful bid in that process.
- [9] The sales process initially contemplated a sale of the assets of the JMX Group, apart from two claims described below. However, the transaction was subsequently restructured to permit the acquiror of the assets of the JMX Group to continue to enjoy certain tax and COVID-grant benefits.
- [10] As restructured using a reverse vesting order, the Applicants, which were shell corporations, acquired the JMX Lien Action, and a similar claim of the JMX Group in respect of a project in Vancouver, and assumed substantially all of the liabilities of the JMX Group, including the liabilities associated with the Lambton Project. As so restructured, the JMX Group was sold to a corporation owned by the Funding Shareholders by way of a share sale, rather than an asset sale as originally contemplated. Since completion of the transaction, JMX has resumed operations and continues as a going concern.
- [11] The Applicants have yet to conduct a claims process in these CCAA proceedings. Accordingly, the amount of the valid claims against Residual Contracting has yet to be established.

The Funding Agreement

- [12] Residual Contracting and 2809590 Ontario Inc. (“Residual Leasing”) have no assets apart from the JMX Lien Claim, in the case of Residual Contracting, and the similar claim in respect of a Vancouver project, in the case of Residual Leasing. They require litigation funding to pursue these claims. In the case of Residual Contracting, it is proposed that such funding will be provided by JMX pursuant to the Funding Agreement.
- [13] The principal terms of the Funding Agreement are as follows:
- (1) JMX will pay the fees and disbursements incurred to advance the OPG Litigation;
 - (2) JMX will only be repaid from proceeds of the OPG Litigation, if any;
 - (3) Interest on advances will accrue at the rate of 6.5% per annum;
 - (4) Funding is conditional, among other things, on approval of the Funding Agreement by this court; and
 - (5) Certain events and defaults will trigger the termination of the funding obligation.
- [14] The Funding Agreement specifically provides that it will terminate upon the making of an order by a court requiring the payment of monies or the granting of an indemnity by JMX

in relation to an award of costs or damages in the OPG Litigation (herein the “Condition Precedent”).

[15] If litigation proceeds are received from the OPG Litigation, they will be distributed in the following priority:

- (1) First, to pay professional fees secured by the Administration Charge (as defined in the Initial Order in these CCAA proceedings) to a maximum of \$300,000;
- (2) Second, to repay any amounts advanced under the Funding Agreement, with interest, to JMX;
- (3) Third, to pay the creditors of Residual Contracting; and
- (4) Fourth, to pay the creditors of Residual Leasing.

Any remaining proceeds would be retained by Residual Contracting and would, therefore, ultimately be for the benefit of its shareholders, being the Previous Shareholders.

Analysis and Conclusions

[16] There are two motions before the Court. Residual Contracting seeks approval of the Funding Agreement. In addition, by motion dated April 5, 2021, OPG has commenced a motion for security for costs in the OPG Litigation which is to be addressed at the same hearing. Although the two motions involve similar issues, they are distinct. I will address the Applicants’ motion for approval of the Funding Agreement first and will then address the appropriate disposition of the OPG motion in light of the determination of the Applicants’ motion.

Analysis of the Application of the Test for Approval of the Funding Agreement

[17] The Court has the authority to approve the Funding Agreement as interim financing under s. 11.2 of the CCAA: see *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, 444 D.L.R. (4th) 373, at paras. 84 and 85.

[18] As a starting point, I adopt the following statement of Glustein J. in *Drynan v. Bausch Health Companies Inc.*, 2020 ONSC 4379, 53 C.P.C. (8th) 297, at para. 18:

The general test for approval of a third-party funding agreement is that it “should not be champertous or illegal and it must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants” [citation omitted]. Applying this test is an exercise of judicial discretion that involves the balancing of various factors to determine what is fair and reasonable in each particular case [citation omitted].

[19] In general, courts have evaluated five factors in considering whether litigation funding agreements should be approved within CCAA proceedings although such factors are not exhaustive of the relevant considerations in any given situation: see *Arrangement relatif à 9354-9186 Québec Inc., (Bluberi Gaming Technologies Inc.) – and – Ernst & Young Inc.*, 2018 QCCS 1040, at para. 74, aff'd in *Callidus Corp.*, at para. 105.

[20] I will address each of those factors in turn. By way of overview, with the exception of one matter raised by OPG dealt with below, the application of the first four factors to the Funding Agreement is not controversial. The issue on this motion turns principally on the application of the access to justice criteria.

The Plaintiff's Right to Instruct and Control the Litigation Should Not Be Diminished by the Funding Agreement

[21] Residual Contracting will remain in control of the OPG Litigation under the oversight of the Monitor. Because the Funding Shareholders hold only 50 percent of the shares of Residual Contracting, they are not in a position to control that corporation.

The Funding Agreement Must Not Compromise or Impair the Lawyer and Client Relationship or the Lawyer's Duties of Loyalty and Confidentiality

[22] There are no terms in the Funding Agreement that have been identified by the parties as compromising or impairing the relationship between Residual Contracting and its counsel.

The Compensation of the Funds Must Be Fair and Reasonable

[23] As described above, JMX will only be entitled to compensation in the form of interest on monies advanced at the rate of 6.5% per annum. There is no entitlement to a percentage of any damage award as is typical in other third-party litigation funding agreements. On a standalone basis, the compensation contemplated by the Funding Agreement is, therefore, fair and reasonable. I will consider the significance of these arrangements further below.

[24] Moreover, insofar as the purpose of the Funding Agreement is to pursue litigation where the proceeds would be distributed first to creditors of Residual Contracting and then to creditors of Residual Leasing, the Funding Agreement is consistent with the objective of the CCAA of providing a meaningful recovery to the creditors of a debtor company. While OPG argues that the Court should be cognizant of the possibility of a large return to each of the Previous Shareholders, this scenario would only occur if Residual Contracting were substantially successful in the OPG Litigation, which runs counter to OPG's position that the claims of Residual Contracting have no merit. This latter consideration therefore plays no part in this decision.

[25] In this case, however, there is also a further consideration related to the potential for recovery by the creditors.

[26] As mentioned, a unique feature of the Funding Agreement is that JMX is not intending to benefit directly from the OPG Litigation beyond receiving a 6.5 percent rate of return on its funds. That is because, as counsel for the Applicants acknowledged, JMX will benefit

from any satisfaction of the claims of its sub-contractors on the Lambton Project. The significance of this benefit to JMX should not be underestimated. JMX is a continuing business. It needs to be able to engage sub-contractors on its new projects. To do so may well require accommodation with at least some of the sub-contractors of JMX Contracting and JMX Leasing whose claims in respect of the Lambton Project and the Vancouver project remain outstanding. Funding the OPG Litigation, if successful, is one means of achieving payment of some or all such sub-contractor claims.

- [27] However, insofar as JMX has an interest or a need to ensure payment of such claims of its former sub-contractors, it could also settle with them directly out of its current revenues as an ongoing business. Accordingly, in the present circumstances, it cannot be said with certainty that the creditors of Residual Contracting will not be paid unless the OPG Litigation is allowed to proceed, only that the creditors will not be paid in these CCAA proceedings if the OPG Litigation does not proceed.

The Funder Undertakes to Keep Confidential Any Confidential or Privileged Information

- [28] While JMX acknowledges that it has a duty to respect confidentiality and privilege in respect of all information it receives, the terms of the Funding Agreement do not expressly contain this commitment. However, JMX has agreed to amend the Funding Agreement, if approved, to provide that it will comply with the deemed undertaking rule and will respect the obligations of Residual Contracting in regard to confidentiality and privilege.

The Funding Agreement Must Be Necessary to Provide Access to the Plaintiff

- [29] As mentioned, this is the most important consideration for approval of the Funding Agreement. There are two separate issues to be considered in respect of this factor: (1) whether the Funding Agreement as currently drafted is necessary to allow Residual Contracting to pursue the OPG Litigation; and (2) whether on its terms the Funding Agreement satisfactorily balances the facilitation of Residual Contracting's ability to pursue the JMX Lien Claim and the protection of OPG's interests in the OPG Litigation. I will address each issue in turn.

Is the Funding Agreement Necessary to Allow Residual Contracting to Pursue the OPG Litigation?

- [30] I conclude that the Applicants have failed to establish that the Funding Agreement on the terms before the Court is necessary to permit Residual Contracting to pursue the OPG Litigation for the following reasons.
- [31] First, Residual Contracting has failed to demonstrate that it is unable to obtain traditional third-party litigation funding and, in particular, given the position of JMX that it will not fund any adverse costs award, third-party financing of any such award.
- [32] There is no direct evidence of any efforts made by Residual Contracting to obtain third-party financing. The evidence on this issue is limited to a statement of the Monitor in its Third Report dated May 17, 2021 that, based on discussions with counsel to the Applicants,

the Monitor understands that preliminary discussions were held with certain third-party funders, none of whom were prepared to pursue the opportunity to provide funding. The affidavit dated April 5, 2021 of Charlie Dahl on behalf of the Applicants says merely that “[t]he [Applicants] have no alternative sources of funding to finance the litigation.”

- [33] The Monitor’s evidence is of course hearsay and therefore, at best, suspect in the absence of any substantive affidavit evidence from a representative of the Applicants. More importantly, the court requires sufficient details regarding the nature and breadth of the Applicants’ efforts to obtain third-party financing in order to assess whether it is reasonable to conclude that third-party funding is unavailable.
- [34] More importantly, Residual Contracting has obtained financing to pursue the OPG Litigation. It lacks only financing of any adverse costs award that may be ordered in that litigation. Residual Contracting has failed to establish that it could not also obtain funding from the Funding Shareholders, either directly or through JMX, that includes funding for any such adverse costs award if that were required in order to obtain the approval of the court. I reach this conclusion for the following reasons.
- [35] As mentioned, the affidavit of Mr. Dahl states baldly that “[JMX] has not agreed to pay for security for costs.” He offers no factual circumstances or other rationale to explain the position of JMX nor is there any affidavit of a JMX representative addressing these issues. In particular, there is no evidence that JMX would be financially incapable of funding any adverse costs award in the OPG Litigation. Further, the terms of the Funding Agreement were essentially imposed by JMX without any substantial negotiation, given that the same legal counsel acted on behalf of both the Applicants and JMX in these CCAA proceedings. There was therefore no arm’s-length negotiation to the extent that the Funding Shareholders or JMX are committed, in any sense, in these CCAA proceedings to fund Residual Contracting in respect of the OPG Litigation. In any event, as mentioned above, there is also an underlying business rationale that would support such a decision on the part of the Funding Shareholders.
- [36] Given these considerations, the Court cannot find that it is more probable than not, on the basis of this record, that JMX would be unwilling to provide an indemnity to Residual Contracting if required to do so in order to obtain court approval.

Does the Funding Agreement Also Adequately Protect OPG’s Interests?

- [37] I also conclude, in any event, that the terms of the Funding Agreement do not satisfactorily balance Residual Contracting’s access to justice and the protection of the legitimate interests of OPG. In reaching this conclusion, the following considerations are relevant.
- [38] I accept that without litigation funding Residual Contracting will not have the financial means to prosecute the OPG Litigation, as it has no assets other than the two claims described above and no active business. In this regard, I do not agree that certain disputed monies represent assets of Residual Contracting that exceed the amount of security for costs sought by OPG for the entire action and therefore negate the need for funding of any adverse costs award.

- [39] The disputed monies comprise the following funds (herein the “Disputed Monies”). First, OPG is holding \$2,431,297.41 of certified holdback funds owing to Residual Contracting. Second, Residual Contracting says OPG is withholding payment of \$1,699,283.25, which it says OPG has certified, respecting work performed by JMX in March and April 2020. Third, OPG is holding funds totalling \$3,094,775 drawn down under the letter of credit in May 2020 when the issuing bank indicated it did not intend to renew the letter of credit.
- [40] The entitlement of Residual Contracting to these monies is directly in dispute in the OPG Litigation. They would not be available to satisfy any adverse costs award in the very circumstances in which they would be required to do so – if OPG were successful in the OPG Litigation. There are also the following specific restrictions on the availability of these funds. The monies held pursuant to the statutory holdback under the *Construction Act*, R.S.O. 1990, c. C.30, are subject to the statutory trust provisions under that Act in favour of JMX’s subcontractors on the Lambton Project when these funds are received by Residual Contracting. In addition, I do not accept the position of Residual Contracting that the decision in *Yuanda Canada Enterprises Ltd v. Pier 27 Toronto Inc.*, 2017 ONSC 1892, 78 C.L.R. (4th) 181 (Master), supports its view that the amounts owing in respect of work performed in March and April of 2020 constitute assets of JMX available to satisfy any adverse costs award.
- [41] While the facts of *Yuanda* are not entirely clear, it appears that the Master’s decision rested on his finding that the basic holdback was not subject to a right of set-off by the defendant and was subject to a trust fund solely in favour of the plaintiff. As such, it is not authority for the proposition urged on the court, namely that progress payments approved by a defendant but not paid are assets of a plaintiff that should be taken into account for the purposes of a security for costs motion. In any event, OPG disputes that it internally approved payment of JMX’s applications for payment for the periods in question. There is therefore a real issue of whether OPG is legally obligated to pay these applications for payment.
- [42] Given the foregoing, I have proceeded on the basis that Residual Contracting does not have any assets available to satisfy any adverse costs award in the OPG Litigation.
- [43] The Applicants suggest that the Court should approve the funding agreement that Residual Contracting has been able to secure, notwithstanding its obvious deficiency given Residual Contracting’s financial position, for the reason that it would allow for a possible recovery by Residual Contracting’s creditors that would not otherwise be possible given the insolvent state of that corporation. In doing so, they point to the statement of the Supreme Court in *Callidus Corp.*, at para. 96, that “[w]here there are only litigation claims available to be monetized for the benefit of creditors, the objective of maximizing creditor recovery has been considered to ‘take centre stage.’”
- [44] However, that statement must be read in the context of para. 97 of the same decision where it is made express that the role of the court in approving any proposed funding agreement is ultimately to determine if the proposed funding agreement is “fair and appropriate, having regard to all the circumstances and the objectives of the [CCAA].” In other words, recovery of the creditors of a debtor that has availed itself of proceedings under the CCAA

cannot be a reason for approving a funding agreement that would not otherwise be regarded as fair and reasonable. Accordingly, in the present case, the Court must still assess whether the terms of the Funding Agreement appropriately balance the two competing considerations of access to justice for Residual Contracting and protection of the interests of the defendant, OPG.

- [45] In this case, the Funding Agreement completely excludes any obligation not only to fund any order for security for costs but, more significantly, to fund any adverse costs award. The Condition Precedent terminates JMX's obligation to advance funds at any stage of the litigation if a court orders Residual Contracting to pay any adverse costs to OPG. Given that Residual Contracting does not have any assets with which to satisfy any such award or order on its own, this is abusive of OPG as the defendant in the OPG Litigation unless Residual Contracting is "impecunious" as that term is understood for the purposes of Rule 56.01(1)(d) of the *Rules of Civil Procedure*. Such a finding is, however, precluded by the determination above that the Applicants have failed to establish that Residual Contracting is unable to obtain funding of any adverse costs award.
- [46] The Applicants argue that *Drynan*, and the cases cited in that decision, state that a court has the authority, but is not obligated to, order security for costs as a term of a funding agreement to ensure that a defendant's interests are protected. While this may be correct, the argument fails to address the more fundamental concern with the Funding Agreement noted above, being the absence of any obligation to fund any adverse costs award and the termination of the Funding Agreement upon any such order.
- [47] The Applicants have not pointed to any case law in which a court has approved a funding agreement which does not provide for funding of any adverse costs award, much less terminates the funder's obligation to make further advances in the event that a court were to make such an order.
- [48] The cases referred to by the Applicants all involved an indemnity for any adverse costs award. In *JB & M Walker Ltd / 1523428 Ontario Inc. v. TDL Group*, 2019 ONSC 999, 48 C.P.C. (8th) 199, the court stated that the funder had covenanted to post security if required to do so and to cover any costs awarded against the plaintiff, at para. 19. In *David v. Loblaw*, 2018 ONSC 6469, 43 C.P.C. (8th) 418, the court noted, at para. 9, that the funding agreement provided that the funder would pay any court-ordered costs on behalf of the plaintiffs up to a prescribed maximum, after which class counsel would be responsible for court-ordered costs, and would provide security for costs of one or more defendants if required by the court to do so. The defendant did not object to the absence of any posting of security for costs as a condition of court approval but rather to the fact that any security posted would take the form of an undertaking, at para. 16. In *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, the funding agreement was for the specific purpose of funding any adverse costs awards and the funder agreed to post security for costs at different stages of the action in specified amounts, at para. 18. Lastly, in *Drynan*, the funding agreement specifically provided for funding of any adverse costs award, including an award for security for costs, up to an agreed maximum, at para. 14. The defendant's objection was that the funding agreement did not require the funder to post security for costs as a condition of approval of the agreement, at para. 10.

[49] In summary, in those decisions in which objections were raised by the defendant, the issues were more minor and related to the manner in which security for costs would be posted (*David v. Loblaw*) and whether the posting of security for costs should be a condition of court approval of the funding agreement (*Drynan*). In all of the decisions relied upon by the Applicants, however, the funding arrangements included an obligation to fund any adverse costs award and, at a minimum, to fund any order for security for costs in a manner acceptable to the court.

[50] Based on the foregoing, I conclude that the Funding Agreement does not adequately protect the interests of OPG as the defendant in the OPG Litigation and, therefore, is not fair and reasonable in its current form.

Disposition of the Applicants' Motion for Approval of the Funding Agreement

[51] Based on the foregoing analysis of the relevant factors for consideration, the motion for approval of the Funding Agreement is denied. The Applicants have not sought any alternative relief in these circumstances. I have, however, considered whether the appropriate disposition of this matter would nevertheless be (1) approval of the Funding Agreement on condition that it be amended to require JMX to agree to indemnify Residual Contracting or OPG in respect of any adverse costs award or (2) approval on the condition that JMX post security for costs in a specified amount.

[52] However, any order approving the Funding Agreement on the condition that JMX fund any adverse costs award and comply with any court order for the provision of security for costs or simply requiring JMX to provide a specified amount of security for costs would terminate JMX's obligations under the Funding Agreement by operation of the Condition Precedent. Accordingly, either alternative form of relief would involve more than a supplementary term ensuring JMX's compliance with obligations to which it has already agreed in the Funding Agreement, as was the case in certain of the decisions referred to above. Either form of alternative relief would, in effect, involve re-writing a fundamental term of the Funding Agreement – JMX's obligation to fund an adverse costs award. In addition, any such order would be of little utility to the parties unless it also addressed issues not before the court regarding any schedule for the posting of security for costs or an alternative arrangement ensuring payment of any adverse costs award.

[53] These considerations are of no consequence if JMX is not prepared to renegotiate the Funding Agreement to include an obligation to fund any adverse costs award. If it is prepared to do so, however, these considerations as well as the very preliminary stage of the OPG Litigation suggest that, in the present circumstances, it would be far preferable for the parties to negotiate all issues pertaining to any such amendment on a more informed basis than would be possible in any judicial determination on the basis of the very limited information in the record regarding the interests of the parties and the likely expenses in the litigation.

[54] Based on the foregoing, I have concluded that the Court should deny approval of the Funding Agreement rather than grant approval on either of the conditional bases described above.

Analysis of the Application of the Test for Security for Costs

- [55] I propose next to address the application of the test for security for costs and then to set out a consensus among counsel reached in a further hearing on July 15, 2021, regarding the determination of the amount of security for costs to be posted if necessary.
- [56] The applicable Rule of the *Rules of Civil Procedure* for this motion is Rule 56.01(1)(d) which reads as follows:
- 56.01 (1) 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;
- [57] OPG says that Residual Contracting has insufficient assets in Ontario to pay any adverse cost award. It says that, in such circumstances, the onus shifts to Residual Contracting to establish that it is impecunious and that an order for security for costs would work an injustice. OPG argues that Residual Contracting has failed to explore all possible sources of financing and therefore has failed to establish that it is impecunious.
- [58] For their part, the Applicants argue that Residual Contracting has assets in Ontario that are sufficient to pay any adverse cost award. These assets consist of the Disputed Monies, which Residual Contracting says are owing to it. In the alternative, the Applicants argue that Residual Contracting has established that it is impecunious and that an order for security for costs would be unjust.
- [59] I will address each of these issues in turn.
- [60] Before doing so, however, I will make two preliminary observations. First, it is not possible to reach any conclusions regarding the merits of the positions of either of the parties to the OPG Litigation. Their respective claims are simply too fact-specific and complex. Second, for the same reason, as well as the absence of a more complete record regarding the factors resulting in the insolvency of the JMX Group, it cannot be said that the insolvency of JMX, and hence of Residual Contracting after the restructured sale transaction in these CCAA proceedings, was the result of the actions of which Residual Contracting complains in the OPG Litigation. All that can usefully be said is that JMX's involvement in the Demolition Contract had a significant negative effect on its profitability and cash flow. Accordingly, OPG's alleged involvement in the insolvency of the JMX Group also does not factor into the conclusions reached below.

Are There Insufficient Assets in Ontario?

- [61] The first issue is whether there is good reason to believe that Residual Contracting has insufficient assets in Ontario to pay any adverse costs award. Clearly, to the extent that the only asset of Residual Contracting is its claim in the OPG Litigation, the test is satisfied. However, the Applicants point to the Disputed Monies, which they say establish assets of Residual Contracting that are in excess of the amount of security for costs sought by OPG for the entire action.
- [62] I have however concluded above that the Disputed Monies are not available to Residual Contracting to satisfy any adverse costs award for the reasons stated therein. Accordingly, given the absence of any other assets, I also conclude that there is good reason to believe that Residual Contracting has insufficient assets in Ontario to pay any adverse costs award for the purposes of Rule 56.01(1)(d).

Is Residual Contracting Impecunious?

- [63] Residual Contracting argues, in the alternative, that if it unable to rely on the Disputed Monies as assets in Ontario, it is “impecunious” for the purposes of Rule 56.01(1)(d). In order to establish “impecuniosity” for the purposes of Rule 56.01(1)(d), a plaintiff must demonstrate that it cannot raise money from other sources, including shareholders and any creditors who might benefit from any award.
- [64] I accept that there is no obvious interest of the Previous Shareholders in collectively providing litigation financing. I also appreciate that the nature of the OPG Litigation may not be amenable to creditor involvement and funding. However, Residual Contracting has obtained funding for the OPG Litigation from JMX. JMX is prepared to fund the fees and disbursements necessary to advance the litigation, apart from any adverse costs award or security for costs award. For the reasons stated above, I have concluded that Residual Contracting has failed to demonstrate that it is unable to obtain traditional third-party litigation funding and, in particular, third-party financing of any such award. I have also concluded that Residual Contracting has failed to establish that it is more probable than not that it could not also obtain funding from the Funding Shareholders, either directly or through JMX, that includes funding for any such adverse costs award if that were required in order to obtain the approval of the court.
- [65] In these circumstances, Residual Contracting cannot establish that it is more probable than not that it is “impecunious” for the purposes of Rule 56.01(1)(d).

Disposition of OPG’s Motion for Security for Costs

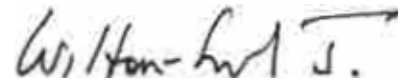
- [66] Accordingly, OPG is entitled to an order in its favour that the Applicants post security for costs in the OPG Litigation.
- [67] However, an order that Residual Contracting post any particular amount of costs is in all probability of little practicality in the present circumstances. In the absence of funding for the OPG Litigation that includes funding of any adverse costs award, Residual Contracting will not be in a position to pursue the litigation, much less fund any order that it post

security for costs. On the other hand, if Residual Contracting is able to obtain a different funding arrangement for the OPG Litigation, it will require court approval of such arrangement. In that context, the relevant facts pertaining to the necessity for posting of security for costs, and the amount of the security to be posted, will inevitably be different from those before the court in this hearing. Moreover, for clarity, if Residual Contracting is able to obtain a different funding agreement, Residual Contracting will be entitled to argue that the order emanating from this endorsement should be varied or set aside under Rule 59.06(2), or otherwise, on the basis of facts arising after the order was made.

- [68] Accordingly, after being apprised orally of the Court's determination regarding the Applicants' motion, the parties reached a consensus that the determination of the amount of security to be posted by Residual Contracting in accordance with the Court's determination of OPG's motion, and the schedule for any supplementary materials, should be adjourned to a date to be agreed upon by counsel. In the absence of agreement, the parties are at liberty to schedule a 9:30 a.m. conference call with the Court through the Commercial List Office.

Costs of these Motions

- [69] If the parties are unable to agree upon costs, they should submit written costs submissions not exceeding five pages in length within three weeks of the date of this endorsement.



Wilton-Siegel, J.

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