

COURT OF APPEAL FOR ONTARIO

DATE: 20240926
DOCKET: M55315 (COA-24-CV-0243)

Pepall J.A. (Motion Judge)

BETWEEN

China Yantai Friction Co. Ltd.

Applicant (Respondent/Moving Party)

and

Novalex Inc.

Respondent (Appellant/Respondent)

Paul H. Starkman and Calvin Zhang, for the appellant

Jason Wadden and Joshua Hearn, for the respondent

Heard: August 29, 2024

ENDORSEMENT

Relief Requested

[1] The moving party, China Yantai Friction Co. Ltd. ("Friction"), seeks: an order for security for costs of the respondent Novalex Inc.'s appeal in the amount of \$35,000 and of the proceeding below in the amount of \$50,000; an order lifting the automatic stay of the January 26, 2024 judgment of Chang J.; an order that Novalex pay outstanding costs awards in the amount of \$10,000; and an order that Novalex pay into court the amount of the judgment, namely \$1,571,971.06, not including interest and costs.

[2] Novalex has appealed from the January 26, 2024 judgment of Chang J. granting Friction's application under the *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Sched. 5 (the "Act") recognizing and enforcing a commercial arbitration award dated November 19, 2018 granted by a three-member arbitral tribunal of the China International Economic and Trade Arbitration Commission. The panel ordered Novalex to pay Friction \$1,571,971.06 for brake pads manufactured and sold by Friction to Novalex and which Novalex alleged were defective.

[3] Before the application judge, Novalex had opposed the application on the grounds that it was unable to present its case at the arbitration because it was not allowed to present expert evidence that the tribunal had said was necessary. In addition, it submitted that recognition and enforcement of the award would be contrary to public policy because the arbitration was commenced on a false premise as to the agreement between Novalex and China Friction. In support of its submissions, Novalex relied on arts. 36(1)(a)(ii) and (b)(ii) of the Act in support of its position.

[4] For the reasons that follow, I order Novalex to post security for costs of the appeal in the amount of \$35,000 and to pay the outstanding costs awards of \$10,000 both within 30 days of the release of these reasons.

General Principles Relating to Security for Costs

[5] Rule 61.06(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that a judge of this court may make an order for security for costs where it appears that: (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal; (b) an order for security for costs could be made against the appellant under r. 56.01; or (c) for other good reason, security for costs should be ordered. A judge of this court may make such order for security for costs as is just. The overarching principle to be applied in all the circumstances is the justness of the order sought: *Pickard v. London Police Services Board*, 2010 ONCA 643, 268 O.A.C. 153, at para. 17. The rule is permissive. Even if the requirements of the rule are met, a motion judge has discretion to refuse to make the order: *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at para. 18.

Friction's Submissions

[6] Friction relies on rr. 61.06(1)(a) and (c).

[7] First dealing with r. 61.06(1)(a), Friction submits that the appeal is frivolous and vexatious and Novalex has insufficient assets in Ontario to pay the costs of the appeal.

[8] The threshold for establishing that an appeal is frivolous and vexatious is high: *Bukshtynov v. McMaster University*, 2018 ONCA 1006, at para. 10. A

frivolous appeal is one readily recognizable as devoid of merit, having little prospect of success: *Pickard*, at para. 19. A vexatious appeal is one taken to annoy or embarrass the other party or conducted in a vexatious manner: *Pickard*, at para. 19. An appeal may also be vexatious if it is launched for an oblique motive, such as to harm a party or to delay the proceedings or a given result: *Lavallee v. Isak*, 2022 ONCA 290, at para. 19.

[9] Although I do consider Novalex's appeal to be weak, I am not persuaded that there is good reason to believe that it is vexatious. Novalex's position is that the brakes Friction sold did not meet the agreed-upon quality standards, a position accepted by the Arbitral Tribunal. However, according to the Tribunal, the parties had not confirmed the details of the quality problems, and yet, Novalex continued to place orders while refusing to pay for a substantial number of goods. The Tribunal held that this constituted a breach of contract under Chinese law because the scope and manner of Novalex's refusal to pay failed to "correspond to the specific circumstances of the incomplete performance of contractual obligations" by Friction. Throughout these protracted proceedings, Novalex has rigorously defended Friction's claim. It is not enough that an appeal might lack merit; it must also be vexatious. I am not satisfied that Friction has established that Novalex's appeal falls within the parameters of a vexatious appeal. The requirements under r. 61.06(1)(a) are conjunctive: *Gauthier Estate v. White*, 2022 ONCA 846, at

para. 14. Friction has therefore failed to show that it is entitled to security for costs under r. 61.06(1)(a).

[10] Turning to r. 61.06(1)(c), an order for security for costs may be granted “for other good reason”. The reason must be: (i) consistent with the purpose for ordering security, namely, that the respondent is entitled to a measure of protection for costs; and (ii) fairly compelling, because subsection (c) is only engaged when the other subsections are unavailable: *Health Genetic Center Corp. v. New Scientist Magazine*, 2019 ONCA 968, 59 C.P.C. (8th) 15, at para. 26; *Heidari v. Naghshbandi*, 2020 ONCA 757, 153 O.R. (3d) 756, at para. 23. Examples include a determination that the appeal has a low prospect of success and that the appellant has the ability to pay costs, but it would be nearly impossible to collect them: *Henderson v. Wright*, 2016 ONCA 89, 345 O.A.C. 231, at para. 27; *Perron v. Perron*, 2011 ONCA 776, 11 R.F.L. (7th) 31, at paras. 21-23; and *Gauthier Estate*, at paras. 20-21. Ultimately, “the ‘other good reason’ criterion balances the need to ensure the appellant is not denied access to the courts with the respondent’s right to be protected from the risk the appellant will not satisfy the costs of the appeal.”: *Henderson*, at para. 28.

[11] I am persuaded that an order should be granted under r. 61.06(1)(c). First, although not passing the frivolous and vexatious threshold, the appeal does have a low prospect of success. This is especially so given the high degree of deference owed to awards of international arbitral tribunals: *United Mexican States v. Cargill*

Inc., 2011 ONCA 622, 107 O.R. (3d) 528, at para. 33; *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939, 70 C.L.R. (4th) 51, at para. 24.

[12] Second, Novalex's assets appear to be illiquid, which makes collection of costs nearly impossible. While Novalex continues to hold the brake pads for which it has been ordered to pay over a million dollars, they have quality problems according to both the Arbitral Tribunal and Novalex and there is no evidence of any market for them. Novalex also acknowledges that its inventory could not be readily liquidated to raise funds outside the normal course of business. A draft version of Novalex's balance sheet for the year ended December 31, 2023 shows that it has zero cash. In its factum, Novalex acknowledges that it does not have a positive cash flow position and states that it survives on borrowed funds from its secured lender.

[13] Additionally, there is evidence of a registered security interest over all of Novalex's assets under the *Personal Property Security Act*, R.S.O. 1990, c. P.10. Absent more information, I am not prepared to conclude that this transaction was outside the ordinary course of business or done to frustrate Friction's ability to collect on the judgment as Friction alleges. But it is evidence of a further impediment to collection of costs.

[14] It is both compelling and in keeping with the purpose of security for costs that an award be made in favour of Friction under r. 61.06(1)(c). I am satisfied that I should exercise my discretion and order security for costs under this subsection.

[15] I do not propose to exercise my discretion to grant any of the other heads of relief sought by the moving party. I decline to award security for costs of the proceedings below. The requirement to pay the judgment itself should await the outcome of the appeal.

Outstanding Costs Orders

[16] Lastly, Friction asks for an order that Novalex pay outstanding cost awards in Friction's favour in the total amount of \$10,000: \$5,000 on account of the Divisional Court order of May 18, 2021 granting Friction leave to appeal Gibson J.'s order; and \$5,000 on account of the Court of Appeal order of September 29, 2022 dismissing Novalex's motion for leave to appeal the Divisional Court order. This is a stand-alone request by Friction and is not dependent on the motion for security for costs.

[17] Novalex submits that Friction owes Novalex \$20,000 which should be offset against the \$10,000 owed by Novalex. This is because Gibson J. ordered Friction to pay Novalex \$20,000. Novalex argues that even though that order was overturned in part by Divisional Court, it did not overturn Gibson J.'s cost order.

Moreover, the Divisional Court order simply stated that the parties should bear their own costs.

[18] In my view, the Divisional Court order can only reasonably be read as ordering that the parties each bear their own costs of both the Divisional Court appeal and the motion before Gibson J.

[19] As such, no cost payment of \$20,000 or \$10,000 was due from Friction to Novalex. It follows that as a result of the two \$5,000 orders from the Court of Appeal and the Divisional Court respectively, Novalex owes Friction \$10,000 that it has not paid.

Disposition

[20] In conclusion, Novalex is to pay into court the sum of \$35,000 as security for costs of the appeal and \$10,000 to Friction on account of the outstanding costs orders, both due within 30 days of today. If Novalex fails to comply with this order, its appeal may be dismissed on motion by Friction.

[21] The remainder of the motion is dismissed.

[22] As success was divided, there will be no order as to costs.

Sty Repall JA