Divisional Court File No.: 703/22
Superior Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ, and CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

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TO: **THE SERVICE LIST**

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Ontario Court of Justice (General Division)

Blenkarn, Roche v. Beckstead

1995 CarswellOnt 4238, [1995] O.J. No. 2777, 57 A.C.W.S. (3d) 924, 6 W.D.C.P. (2d) 404

Blenkarn and Roche, Respondents (Plaintiffs) and Bryan Beckstead and Lawn Rangers Ltd., Appellants (Defendants)

Bryan Beckstead and Lawn Rangers Ltd., Appellants (Plaintiffs by Counterclaim) and Blenkarn and Roche, Respondents (Defendants by Counterclaim)

Molloy J.

Heard: June 27, 1995
Judgment: September 25, 1995
Docket: 8521/88

Proceedings: Additional reasons, 1996 CarswellOnt 309 (Ont. Gen. Div.)

Counsel: *Walter J. Wysocky*, for Respondents/Plaintiffs
Dana M. Peebles, for Appellants/Defendants

Subject: Civil Practice and Procedure
Headnote
Civil practice and procedure

***Molloy J.*:**

Reasons for Judgment

1 On June 22, 1995 an Order was made by Master Cork requiring the plaintiffs by counterclaim ("Beckstead and Lawn Rangers") to pay into court $1,000 as security for costs. Beckstead and Lawn Rangers now appeal from that Order and argue that the Master erred in law in making it. The defendant by counterclaim ("Blenkarn, Roche") cross appeals on the basis that the Master erred in failing to dismiss the counterclaim (that being the principle relief sought by Blenkarn, Roche on the motion before Master Cork) and in the alternative, argues that the security for costs order should be varied.

A. Background

2 Blenkarn, Roche is a law firm and had been the solicitor for Beckstead and Lawn Rangers for several years. In or about May 1988, that solicitor/client relationship ended. On August 25, 1988 Blenkarn, Roche commenced this action against Beckstead and Lawn Rangers claiming approximately $15,000 owing on various accounts for professional services rendered. Beckstead and Lawn Rangers delivered a statement of defence and counterclaim denying the propriety of the accounts and alleging that Blenkarn, Roche had been negligent in its legal representation thereby causing financial harm to the defendants. The counterclaim seeks $25,000 in damages for that negligence.

3 Beckstead and Lawn Rangers have been represented by the same solicitor throughout in both the main action and the counterclaim. (It is worth noting at this point that Beckstead is the only real defendant left as Lawn Rangers was dissolved by the Provincial Government in 1993.) Blenkarn, Roche has acted as its own legal counsel throughout but only with respect to the main action (i.e. the action for payment of fees). In the counterclaim (based on professional negligence), Blenkarn, Roche is represented by McCarthy Tétrault. Counsel for Blenkarn, Roche as defendant by counterclaim has placed considerable emphasis

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on the fact that he is counsel *only* with respect to the counterclaim and that the counterclaim should be dealt with separate and apart from the main action.

4 Not long after commencing the main action, Blenkarn, Roche brought a motion for summary judgment. That motion was adjourned on October 7, 1988 with costs for the attendance on that day ordered payable to the plaintiff in any event of the cause. Blenkarn, Roche has taken no steps since that time to move the main action forward except that an affidavit of documents was delivered in the action and in the counterclaim in December 1994.

5 In June 1995, the defendants Beckstead and Lawn Rangers brought the plaintiff's motion for summary judgment back on and at the same time brought their own motion for relief based on Blenkarn, Roche's failure to attend for cross-examination on the affidavit filed in support of its summary judgment motion. Both motions came on before me on June 27, 1995. At that time, Blenkarn, Roche advised that it was abandoning its motion for summary judgment. Mr. Peebles, a lawyer with McCarthy Tétrault, was present in the courtroom but stated that he took no position on these matters as his firm was counsel for Blenkarn, Roche only with respect to the counterclaim. (Mr. Peebles was there on an *ex parte* motion related to Master Cork's order of June 22, 1995 which will be referred to later in these reasons). I made the following endorsement:

> June 27, 1995: The plaintiff has abandoned its motion for judgment. Under the circumstances I see no reason to depart from the usual rule of solicitor/client costs. The defendants shall have their costs with respect to the motion for judgment and their cross motion to dismiss the action for failure to attend on cross examination on a solicitor/client basis, payable forthwith after assessment. Those costs shall not include the attendance on October 7, 1988 which have already been ordered payable to the plaintiff in any event.

B. The Progress of the Counterclaim

6 Although Blenkarn, Roche was doing nothing in its own right to proceed with the main action, its solicitors in the counterclaim were being diligent in their efforts to move the counterclaim along. Between April 1993 and October 1994 three motions were brought to dismiss the counterclaim on various procedural grounds such as failure to deliver particulars, failure to deliver an affidavit of documents, and failure to attend for discovery. It is to be noted that all three motions were brought *before* Blenkarn, Roche had delivered its own affidavit of documents in either the main action or the counterclaim. The third motion (brought in October 1994 and seeking dismissal of the counterclaim for delay) was heard by Master Peterson on February 27, 1995. The motion was dismissed but terms were imposed *inter alia* requiring Beckstead to attend for discovery and requiring the counterclaim to be set down for trial within ten days of the main action being set down. Blenkarn, Roche appealed from that Order, which appeal was dismissed by the Honourable Mr. Justice Wright on April 4, 1995.

C. The Motion Before Master Cork and The Order Under Appeal

7 Pursuant to the Order of Master Peterson, the solicitors for Blenkarn, Roche in the counterclaim served a further appointment for discovery of Beckstead, returnable on May 25, 1995. Again he failed to attend. Blenkarn, Roche thereupon brought another motion for dismissal of the counterclaim, or in the alternative, for security for costs and a further order regarding discoveries. That motion was heard by Master Cork on June 22, 1995 and gave rise to the order now under appeal by both parties.

8 Master Cork did not dismiss the counterclaim. He did, however, impose strict terms upon Beckstead, requiring him to attend for discovery upon service of a notice on his solicitor and to deliver an affidavit of documents within seven days prior to the return of the appointment, in default of either of which Blenkarn, Roche would be at liberty to move *ex parte* to dismiss the counterclaim with costs. Beckstead is not appealing those terms of the Order. It appears from Master Cork's endorsement that his reasons for imposing these terms were rooted in what he described as "the incredible and unique history of this litigation" and his view "that the claim and counterclaim can be considered as separate entities for the purposes of this motion".

9 Master Cork also ordered Beckstead to pay into court $1,000 as security for costs at least 14 days prior to the return of the appointment for discovery, in default of which Blenkarn, Roche would be at liberty to move *ex parte* for dismissal of the counterclaim. The Master makes no reference in his endorsement to Rule 56 which governs orders for security for costs. The security for costs order would appear from the endorsement to have been based on the finding expressed at the beginning of

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the endorsement that the claim and counterclaim could be considered as separate entities and on the fact that the defendant by counterclaim has been put to considerable wasted expense in preparing for discoveries that did not proceed. The relevant portion of the endorsement reads:

> There is no question that on four prior occasions the now moving defendant by counterclaim prepared, and was put to expense for appointments, although the sought examination did not proceed. As a result, the defendant by counterclaim also has obtained two Orders, still outstanding, ordering the discovery of the plaintiffs by counterclaim and this cost the defendant by counterclaim further expense.
>
> Accordingly, in order to offset what may be another failed attempt to discover the plaintiffs by counterclaim, and as well, if possible to apply to some of the earlier lost money in efforts that have failed, for this discovery, I order that the plaintiffs by counterclaim post $1,000.00 as security for costs of the moving defendant by counterclaim, to assist in at least partially underwriting the wasted expense of the moving defendant by counterclaim, as well as the extra expense now contemplated to again prepare for discovery, by defendant by counterclaim, and such sum to be payable into court in the usual manner, at least 14 days prior to return of the discovery appointment as set by the defendant by counterclaim.

10 Beckstead's appeal is directed solely towards this security for costs order. Blenkarn, Roche appeals that portion of the order only to the extent that it argues it should be expanded to provide that the costs of Blenkarn, Roche in preparing for discovery should be released to it out of the funds in court on the day after the scheduled examination date.

D. Did the Master Err in Failing to Dismiss the Counterclaim?

11 Blenkarn, Roche's principle ground of appeal is that the Master erred in failing to dismiss the counterclaim. Master Cork was aware of and obviously concerned about the persistent failure of Beckstead to produce documents and to attend for discovery when required to do so. The Master was also aware that Beckstead had thereby breached several of the Rules of Civil Procedure as well as previous court orders. Notwithstanding this, the Master decided to give Beckstead one last chance to fulfil its obligations but made this subject to the onerous term that any default by Beckstead would entitle Blenkarn, Roche to move *ex parte* to dismiss the counterclaim. Master Cork's decision in this regard is clearly an exercise of his discretion. As such, it falls squarely within the well known test set out in *Marleen Investments Ltd. v. McBride* (1979), 23 O.R. (2d) 125, 13 C.P.C. 221 (H.C.) and should only be interfered with on appeal if it is clearly wrong. Further, the ruling made by the Master in this instance (i.e. giving Beckstead another chance to attend for discoveries before dismissing his counterclaim) does not raise a question "vital to the final issue of the case", at least as regards Blenkarn, Roche. Accordingly, I do not see this as a situation in which I should substitute my own discretion for that of the Master. (*Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (C.A.)).

12 I do not believe that the Master was "clearly wrong" in refusing to dismiss the counterclaim. Indeed, having considered all of the circumstances and having had the benefit of full argument from counsel on the factual as well as legal issues, in my opinion the Master was clearly right in not dismissing the counterclaim at that stage and the terms imposed were appropriate. Accordingly, Blenkarn, Roche's appeal on this ground is unsuccessful.

E. Did the Master Err in Ordering Security for Costs?

(i) Jurisdiction

13 There is no inherent power to order security for costs, nor can such a power be supported by analogy to other Rules. If the Master's order for security for costs is not properly within Rule 56.01, then the order is made without jurisdiction: see *K.V.C. Electric Ltd. v. Louis Donolo Inc.*, [1964] 1 O.R. 565, 43 D.L.R. (2d) 198 (H.C.J.); *Toronto Dominion Bank v. Szidagyi Farms Ltd.* (1988), 65 O.R. (2d) 433 (C.A.).

14 Rule 56.01(1) provides as follows:

> 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,

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(a) the plaintiff or applicant is ordinarily resident outside Ontario;

(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;

(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;

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs.

15 Master Cork based his order for security for costs on the fact that Blenkarn, Roche had incurred wasted expense in having its legal counsel prepare for discoveries which, through no fault of its own, did not proceed. It is undoubtedly true that the conduct of Beckstead has caused expense to Blenkarn, Roche. It is also understandable that this has been a source of frustration and aggravation for Blenkarn, Roche and its counsel. This concern could have been appropriately addressed through cost awards either on the various interlocutory motions or on the final disposition of the action. This concern, however, is not one of the grounds enumerated under Rule 56.01 as supporting an order for security for costs. Having based his decision on a consideration outside the scope of the Rule, the Master, in my view, exceeded his jurisdiction and accordingly the order for security for costs cannot stand.

16 The foregoing is sufficient to dispose of this ground of appeal. However, as counsel for Blenkarn, Roche has argued vigorously that the security for costs order can be justified under ss. (c), (d), and (e) of Rule 56.01, I will also address those points.

(ii) Rule 56.01(c) - Unpaid Cost Order

17 With respect to ss. 56.01(c), Blenkarn, Roche asserts that Beckstead and Lawn Rangers were ordered to pay costs of $300 by Order of Master Peterson dated February 27, 1995 and that those costs have not been paid. However, those costs were not ordered to be payable forthwith and are therefore not required to be paid prior to final disposition of the action: see *Canada Metal Co. Ltd. v. Canadian Broadcasting Corporation* (1976), 2 C.P.C. 105 (Master); *Staff Builders International Inc. v. Cohen* (1983), 40 C.P.C. 169 (Master). Therefore, the failure to pay those costs does not justify a security for costs order under Rule 56.01(c).

(iii) Rule 56.01(d) - Corporate Party

18 With respect to ss.56.01(d) it is conceded by counsel for the plaintiffs by counterclaim that the corporate party, Lawn Rangers Ltd. is no longer in existence and therefore clearly has insufficient assets to pay any costs that might be awarded against it. This subsection, however, has no application to the individual plaintiff by counterclaim, Beckstead, and the removal of the corporate party has no appreciable effect on any issue in the claim or counterclaim. An order for security for costs solely against the corporate party is useless to Blenkarn, Roche and of no concern to Beckstead. As a practical matter, therefore, it has little if any impact on this proceeding.

(iv) Rule 56.01(e) - Individual Impecuniosity

19 As to Rule 56.01(e) I am prepared to accept that there was sufficient evidence before the Master upon which he could reasonably hold that the second requirement of this Rule was met (i.e. that there was reason to believe that Beckstead personally has insufficient assets to pay the defendant by counterclaim's costs). However, before an order for security for costs can be justified under this subsection there must also be good reason to believe that the counterclaim is "frivolous or vexatious". There was no evidence whatsoever before the Master upon which he could reasonably conclude that the counterclaim is frivolous or vexatious. Counsel for Blenkarn, Roche argues that the failure of Beckstead to pursue the counterclaim is sufficient reason

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for concluding that the counterclaim is frivolous. I disagree. Another plausible explanation for the lack of diligence in pushing forward with the counterclaim is that the counterclaim is advanced primarily as a defence to the main action and since the main action has been inactive there is little inclination to push the counterclaim, particularly in view of the expense involved in doing so and the financial difficulties being experienced by Beckstead. In any event, no evidence as to the merits of the claim or the counterclaim were before the Master and there was therefore no good reason to believe that the counterclaim was frivolous. Indeed, if Blenkarn, Roche was in a position to demonstrate that the counterclaim was frivolous, it had an obvious opportunity to do so on its motion for summary judgment. Instead, that motion was abandoned nearly seven years after it was commenced (see above).

20 Accordingly, in my opinion there was no basis for the Master to make a security for costs order against Beckstead under Rule 56.01 even if he had directed his mind to the specific requirements of the various subsections of that Rule.

(v) Security for costs against plaintiff by counterclaim

21 Finally, there is an overriding concern here which I consider to be determinative of the security for costs issue and upon which I believe the Master erred. Master Cork stated at the outset of his endorsement that "the claim and counterclaim can be considered as separate entities for the purposes of this motion". I disagree. The legal and factual issues raised by the claim and counterclaim are inextricable. The claim is for legal fees. The defence and counterclaim are based on the alleged negligence of the law firm in rendering professional services. A substantial portion of the fees claimed in the main action are in respect of the professional services alleged in the defence to be negligent and for which compensation is claimed in the counterclaim. In these circumstances it is artificial to treat the claim and counterclaim as if they were totally separate proceedings.

22 There is no jurisdiction under Rule 56.01 to award security for costs against a defendant: see *Toronto Dominion Bank v. Szilagyi Farms Ltd.* supra. It is appropriate in some cases to award security for costs against a plaintiff by counterclaim, but only when the counterclaim is in substance a claim wholly independent of the defence to the main action. This principle was stated clearly by Morden, J.A. in *Toronto Dominion Bank v. Szilagyi Farms Ltd.* He stated at p.442:

> Where a counterclaim arose out of the same circumstances as the claim and in substance was a defence to the claim security for costs was not ordered.

23 Morden, J.A. then referred with approval to two portions of *Mapleson v. Masini* (1879), 5 Q.B.D. 144 as follows: per Field J. at p. 147:

> [I]n the present case the plaintiff's and defendant's cases rest respectively upon the same circumstances, the contention merely being which version of those circumstances is the correct one. This being the case, I do not think the defendant ought to have been called upon to give security.

and per Manisty J. at p. 148:

> The defendant, because in defending himself he incidentally asks for damages arising out of the same transaction, ought not to be called upon to give security for costs.

Finally, Morden, J.A. (at p.442) distinguished those situations "where the counterclaims were in the nature of independent claims", thus justifying a security for costs order. He lists as an example of such a situation, *Sykes v. Sacerdoti* (1885), 15 Q.B.D. 423.

24 Mr. Peebles, counsel for Blenkarn, Roche on this appeal, cites *Sykes v. Sacerdoti* (1885), 15 Q.B.C. 423 (Eng. C.A.) as authority for the proposition that a claim by a solicitor for payment of his account and a counterclaim by the client for professional negligence should be considered as independent claims for purposes of considering whether it is appropriate to award security for costs against the defendant/plaintiff by counterclaim. He further argues that this principle was adopted by the Ontario Court of Appeal in the *Toronto Dominion Bank v. Szilagyi Farms Ltd.* case as referred to above. I disagree on both counts.

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25 Morden, J.A. did adopt the general principle stated by the court in *Sykes v. Sacerdoti*, i.e. where the claim and counterclaim are independent of each other, security for costs may be awarded against a plaintiff by counterclaim. I agree completely with that general statement of principle. Morden, J.A. did *not* make any specific reference to claims and counterclaims by and against a solicitor and I do not take his approval of the general principles stated in *Sykes v. Sacerdoti* as necessarily extending to an application of those general principles to particular fact situations involving such claims.

26 In any event, I do not read *Sykes v. Sacerdoti* as supporting the proposition for which Mr. Peebles cites it. The plaintiff in that case originally brought his action for two separate claims, one for solicitor's costs and the other for money lent to the defendant. The plaintiff signed final judgment on that part of the claim based on solicitor's costs. The defendant who resided outside the jurisdiction, filed a counterclaim for damages alleged to have been caused by the plaintiff's negligence as his solicitor. While admittedly the facts as reported in the case are somewhat sketchy, it appears to me that when Lord Escher said that the claim and counterclaim "arise out of different matters", he was referring to the claim for money lent and the counterclaim for professional negligence. I do *not* take *Sykes v. Sacerdoti* as authority for the proposition that a claim for solicitors fees and a claim for negligence based on the services for which the fees are charged should be characterized as independent matters for purposes of security for costs.

27 In any event, in the case before me the claim and counterclaim are so closely inter-connected that it would not be proper to treat them as wholly separate actions. The dismissal of the counterclaim would have little or no effect on the issues to be tried in the main action. The allegations with respect to negligence would still have to be fully canvassed as they are raised by way of defence as well as by counterclaim. It is clearly not the purpose of the security for costs rule that defendants should be required to provide security before being permitted to defend the claims made against them. In this case, the defence and counterclaim are so interwoven that it could be extremely difficult to isolate those costs which would be attributable only to the counterclaim, as virtually all issues in the counterclaim are also relevant to the defence of the main action. Furthermore, the fact that Blenkarn. Roche is represented by different counsel in the counterclaim is, in my view, irrelevant to that consideration.

28 Similar observations to those I have just expressed were made by Master Peterson on February 27, 1995 in giving reasons for his decision not to dismiss the counterclaim for delay. He held:

> This is a motion by the defendant by counterclaim to have the counterclaim dismissed for delay. There is no doubt that there has [been] considerable delay in pursuing the counterclaim. In my view, however, it would be wrong to examine the delay with respect to the counterclaim without reference to the main action which has not been pursued with diligence. The main action is one for solicitor's fees. The counterclaim is for solicitor's negligence. In my view, the matters are so interwoven that it would not further the interest of justice to attempt to dismiss the counterclaim for procedural reasons when the main action has not been pursued in a timely fashion. The issues raised by the counterclaim go to a defence to the main action and the Defendant cannot be precluded from raising them. There is no prejudice to the Plaintiff by the delay and the Plaintiff is also responsible for delay in pursing the main action. Had the Plaintiff discontinued the main action one could have more concern about allegations of professional negligence being delayed for some 7 years. However, when those allegations are also part of the defence to the main action dismissing the counterclaim will not affect them being raised.

I am in complete agreement with Master Peterson's reasoning on this point.

F. Costs of Earlier Motion

29 I heard an earlier motion relating to this matter on June 27, 1995. The motion was brought by counsel for Blenkarn, Roche as defendant by counterclaim. I reserved the costs of that motion to the judge hearing the appeal, which, purely by coincidence, happened to be me again.

30 Some background is required. Master Cork's order was made on June 22 which was a Thursday. Mr. Peebles, (counsel for Blenkarn, Roche) promptly drafted the order and sent it to Mr. Wysocky (counsel for Beckstead) for approval. Mr. Wysocky first saw the draft on Friday afternoon. The order provides that the security for costs are to be paid into court 14 days prior to

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the return of the discovery appointment. Mr. Peebles served an appointment for discovery for the earliest possible day, July 10, 1995. That meant that the security for costs payment into court was required to be made by Monday, June 26, 1995.

31 On Tuesday June 27, 1995 Mr. Peebles attended before me in Motions Court and sought leave to add a motion to the regular list before me. I agreed to do so. The motion was for an order dismissing the counterclaim by reason of Beckstead's failure to pay $1,000 into court on June 26, 1995 as required by the Order of Master Cork. The Order entitled Blenkarn, Roche to move *ex parte* for that relief. However, the motion was brought before me on the same day as the summary judgment motion referred to earlier in these reasons and Mr. Wysocky was therefore present. I am assuming this was done deliberately and, if so, it is to Mr. Peeble's credit.

32 Also on June 27, Beckstead and Lawn Rangers delivered their notice of appeal from Master Cork's Order. An interesting issue was raised as to whether the notice of appeal operated to stay the requirement of posting security. In the final analysis, however, I did not resolve that issue. Rather, I dismissed the motion upon learning that:

> (i) it was impossible to comply with the Order on June 26 because the Order had not been issued and entered by then and payment into court could therefore not be made;
>
> (ii) notwithstanding that, Mr. Wysocky had offered on Monday, June 26 to pay $1,000 to McCarthy Tétrault in Trust to be held by that firm pending the appeal and then disposed of as the court directs, which offer was refused;
>
> (iii) again on the morning of June 27 prior to the motion being heard, Mr. Wysocky offered Mr. Peebles his personal cheque for $1,000 on the same terms, (as he did not have his firm's cheque with him) and again this was refused by Mr. Peebles.

Mr. Peebles explanation was that payment was required of Beckstead and Lawn Rangers and that he considered it inappropriate to accept counsel's personal cheque.

33 I made the following endorsement:

> This motion is dismissed. The Order of Master Cork was made on Thursday, June 22. Under that Order the plaintiff by counterclaim is obliged to deliver an affidavit of documents by the end of business on July 4 and counsel has undertaken to comply with that portion of the Order. The Order of June 22 has not yet been taken out. The plaintiff by counterclaim has moved promptly to file a notice of appeal returnable on July 10. Further, counsel for the plaintiff by counterclaim offered yesterday and again today prior to this motion being heard to pay $1,000 to McCarthy Tetrault in trust to be held pending the appeal. Counsel for the defendant by counterclaim has refused to accept this, insisting that it be the defendant by counterclaim personally who posts the money. I made no determination as to whether the requirement of paying into court contained in Master Cork's Order is stayed by the filing of the notice of appeal. Regardless of that issue I have a discretion to exercise and I think in the circumstances the defendant by counterclaim is being unreasonable in the rigidity of the position he is taking. Since counsel for the defendant by counterclaim has declined to accept a cheque from the plaintiff's counsel, I will simply direct that the $1,000 for security costs be paid into court prior to July 10. The appeal is to be perfected by no later than 5:00 p.m. on July 5, 1995. Costs of this motion reserved to the judge hearing the appeal from the Order of Master Cork.

34 Having now had the benefit of a fuller exploration of the issues involved in the appeal, any concern I might have had earlier about the merits of Beckstead's appeal are completely allayed. Indeed, it is the position of Blenkarn, Roche on the appeal which has, in my opinion, been devoid of any merit.

35 The motion to dismiss the counterclaim for failure to pay money into court was absolutely uncalled for in the circumstances. The purpose of security for costs is just that - to provide security. It is not to impose financial penalties on parties in default of which their claims may be dismissed. In my opinion, the motion should not have been brought. Further, because it was made on an urgent basis and placed on the end of the regular list, counsel for Beckstead was required to be in attendance in court for considerable waiting time. Regardless of the outcome of the action, this is not an expense which should be borne by Beckstead.

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Accordingly, I direct that the costs of that motion be paid to Beckstead in any event of the cause and further that the costs be fixed at $750 and payable forthwith.

G. Disposition

36 The appeal by Beckstead and Lawn Rangers is granted and the Order of Master Cork dated July 22, 1995 directing Beckstead and Lawn Rangers to post security for costs is set aside.

37 The cross-appeal by Blenkarn, Roche is dismissed.

38 The costs of both the appeal and cross-appeal shall be to Beckstead in any event of the cause.

39 The costs of the motion by Blenkarn, Roche to dismiss the counterclaim for failure to pay money into court are fixed at $750.00 and are payable to Beckstead forthwith.

40 In view of the disposition of the appeal I would also set aside that portion of Master Cork's Order awarding the costs of the motion before him to Blenkarn, Roche in the cause. However, I do not believe it appropriate to award the costs of the motion before Master Cork to Beckstead either as it was his failure to attend for discoveries and to produce an affidavit of documents which gave rise to the motion in the first place. Those portions of Master Cork's Order dealing with discovery and production of documents remain in force. Accordingly there should be no costs of the motion before Master Cork to either party.

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MARGARITA CASTILLO
Applicant

-and-

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ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT TORONTO

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