

## Security for Trial Judgment Ordered for First Time in Ontario

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**January 2021**

Can a court order an appellant to post security for a trial judgment prior to the appellant being permitted to continue with an appeal?

In *Wiseau Studio, LLC v. Harper*,<sup>1</sup> the Court of Appeal ordered this remedy for the first time in Ontario. It is an “extraordinary remedy that should only be granted in exceptional circumstances.”<sup>2</sup>

### **Background**

The action involves a dispute between Wiseau Studio LLC/Tommy Wisseau (“the appellants”) and Richard Harper, Fernando Forero Mcgrath, Martin Racicot d.b.a. Rockhaven Pictures, Room Full of Spoons Inc., Parktown Studios Inc. and Richard Stewart Towns (“the respondents”), regarding a documentary film entitled, “Room Full of Spoons.”

The parties proceeded to trial in January 2020. After eight days, the appellants’ claim was dismissed with judgment granted in favour of the respondents on the counterclaim. The respondents were awarded \$200,000 CDN in punitive damages, \$550,000 USD in damages for an improper *ex parte* injunction, \$25,488.36 USD in prejudgment interest and \$481,521.80 CDN in costs.

The appellants subsequently brought a request to vary the judgment. This too was dismissed, with costs of \$20,000 CDN payable to the respondents.

The appellants have since brought a Notice of Appeal of the trial judgment.

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<sup>1</sup> *Wiseau Studio, LLC v. Harper*, 2021 ONCA 31 (CanLII)

<sup>2</sup> *Wiseau Studio, LLC v. Harper*, 2021 ONCA 31 (CanLII) at para 24; *Vaillancourt v. Cater*, 2017 ABCA 282, at para. 20; *Aetna Financial Services Ltd. v. Feigelman*, 1985 CanLII 55 (SCC), [1985] 1 S.C.R. 2 at p. 10; *C.H. v. M.H.*, 1997 ABCA 263, 53 Alta. L.R. (3d) 80 (sub nom *Hamza v. Hamza*), at para. 24.

The motion at issue in *Wiseau Studio, LLC v. Harper* was to determine if security for the trial judgment and security for the costs of the trial and appeal ought to be ordered.

### ***Security for Trial Judgment***

In considering the issues on the motion, Justice Thornburn took into account [s.134\(2\) of the Courts of Justice Act](#), which provides that, “On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal.”

Justice Thornburn also referred to [rule 1.05 of the Rules of Civil Procedure](#), which provides that “When making an order under these rules the court may impose such terms and give such directions as are just.”

Further, Justice Thornburn examined other Canadian jurisdictions that have granted orders for security of trial judgments, in the following circumstances:

1. Where there are no assets in the jurisdiction against which to enforce a judgment and the appeal has little merit;
2. To preserve assets that would otherwise be destroyed, disposed of, or dissipated prior to the resolution of the dispute; and
3. To encourage respect for the judicial process and avoid abuse of process.

Three principles have emerged regarding when a court may exercise its discretion to order security for judgment. These principles were outlined in the Court of Appeal for British Columbia decision of *First Majestic Silver Corp. et al. v. Davila*:

1. The onus is on the applicant to show that it is in the interest of justice to order posting for security of a trial judgment and/or of trial costs.
2. The applicant must show prejudice if the order is not made.
3. In determining the interests of justice, the chambers judge should consider the merits of the appeal and the effect of such an order on the ability of the appellant to continue the appeal.<sup>3</sup>

Having ordered the appellants to post security for the trial judgment in *First Majestic Silver Corp. et al. v. Davila*, the court in that case further granted the respondents leave to apply

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<sup>3</sup> *Wiseau Studio, LLC v. Harper*, 2021 ONCA 31 (CanLII) at para 27; *First Majestic Silver Corp. et al. v. Davila*, 2013 BCCA 312 at para 15

for the appeal to be dismissed as abandoned, should the appellants fail to comply with the Order.<sup>4</sup>

In the within matter, Justice Thornburn provided examples of when an applicant may establish that the granting of an order for security for judgment would be in the interests of justice, including “the *ex juris* residence of an appellant and therefore the effective immunity of an appellant from enforcement of the judgment”.

They may also include a consideration of the ability to enforce the judgment in the appellant’s *ex juris* jurisdiction and/or the absence of assets in the jurisdiction in which the judgment was rendered.

By contrast, the interests of justice “may not be relied upon by a successful plaintiff where the effect of requiring the posting of security for a trial judgment would be to preclude a party from pursuing the appeal”.

Upon consideration of all of the above, Justice Thornburn held that security for the trial judgment should be posted in this case. The reasons in support of this decision include:

- Wiseau Films is out of the jurisdiction and refused to advise if it has any assets in the jurisdiction.
- Wiseau Films conceded there is no issue that paying security for judgment and/or costs would prevent Wiseau Films from pursuing its appeal.
- Wiseau Films has demonstrated no intention to pay an award.
- Room Full of Spoons will suffer prejudice if the order is not granted.
- The Amended Notice of Appeal is frivolous and does not articulate what errors were made in the comprehensive reasons provided by the trial judge.<sup>5</sup>

### ***Security for Trial and Appeal Costs***

The respondents also sought an order for security for costs of the trial and appeal. This order was granted, substantially for the same reasons as ordering security for the trial judgment.

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<sup>4</sup> Wiseau Studio, LLC v. Harper, 2021 ONCA 31 (CanLII) at para 27; First Majestic Silver Corp. et al. v. Davila, 2013 BCCA 312 at para 25

<sup>5</sup> Wiseau Studio, LLC v. Harper, 2021 ONCA 31 (CanLII) at paras 33 – 37

**Conclusion**

*Wiseau Studio, LLC v. Harper* is an important decision. There is now an accepted remedy available in Ontario for a respondent that may have serious concerns over the ability and/or willingness of an appellant to satisfy a trial judgment, upon conclusion of an appeal.

That said, it is important to remember that security for judgment is considered by the courts to be an extraordinary remedy that will be awarded only in exceptional circumstances.

The courts are unlikely to grant an order for security for judgment absent strong and compelling evidence that the order is in the interests of justice and that the respondent would experience prejudice if the order was not otherwise granted.