

CANADA / JUDGMENT

654973 B.C. Ltd. v 621437 B.C. Ltd.

2003 BCSC 1770

COURT

Supreme Court of British Columbia

DECIDED

25 November 2003

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2003BCSC1770 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: 654973 B.C. Ltd. v 621437 B.C. Ltd., 2003 BCSC 1770 Date: 20031125 Docket: 03/4501 Registry: Victoria Between: 654973 B.C. LTD. PLAINTIFF And: 621437 B.C. LTD. DEFENDANT Before: Master McCallum Reasons for Judgment Counsel for the Plaintiff Gregory N. Harney Counsel for the Defendant D. Laurence Armstrong Date and Place of Hearing: November 20th, 2003 Victoria, B.C.

- [1] In October 2002 the Defendant gave the Plaintiff an option to buy a parcel of real estate in Victoria on certain terms. The Plaintiff was unable to complete the purchase of the property as agreed and the Defendant now plans to sell the property to a third party. The Plaintiff says it understood the option would be extended and has sued the Defendant for specific performance of the option and relief from forfeiture under the option. The Plaintiff filed a Certificate of Pending Litigation ("CPL") against title to the property which will affect the Defendant's ability to sell the property pending resolution of the litigation. The Defendant says the CPL should be discharged or the Plaintiff required to give an undertaking to pay damages if unsuccessful in the action and post security.
- [2] The Defendant applied under the provisions of ss.256 and 257 of the Land Title Act RSBS 1996, c.250. Counsel for the parties agreed that this was not an appropriate case for cancellation of the CPL. The issue is the amount of security the Plaintiff ought to be required to post as required by s.257(1)(b)(ii) of the Act. The Act is silent as to what considerations ought to be taken into account in fixing the amount of the security.
- [3] The question was addressed by Bouck J. in *Re Cloverlawn-Kobe Developments Ltd. v. Tsogas*, 104 D.L.R.(3d)279 in the following terms: Security for the undertaking is another matter. At this stage the court may now look at the probability of the Plaintiff's success (S.192(2)). Ordering security is an extraordinary procedure. Where the Plaintiff does not have the means to come up with the money then the *Lis Pendens* may be cancelled: *Re 140 Developments Ltd. v. Steveston Meats and Frozen Food Lockers Ltd.* (1973) 59 D.L.R. (3d) 470 @ 477. This appears to be so even though S. 192(1) suggests the owner must post security before the *Lis Pendens* may be removed from the title. For these reasons it seems to me a substantial deposit should only be decreed in the plainest of cases.

- [4] Resolution of the dispute over the alleged extension of the option will involve, inter alia, investigation of a series of correspondence and oral communications in late October 2003 involving the parties and their representatives. Oral evidence from those concerned will be required. On the basis of the limited evidence on this application, it is far from obvious that the Plaintiff has a strong case. That said, the Plaintiff has a substantial investment in this particular property and a significant incentive to pursue the litigation.
- [5] There is no formula for fixing security established in the authorities to which I was referred. It is plain that the amount of security is not necessarily tied to the potential damages (*Mercedes-Benz of Canada Limited v. SAS Properties Ltd.* (1975) 10 B.C.L.R.19)) but potential damages are a factor to be considered. (*Park & Tilford Canada Inc. v. Festival Markets Inc.* [1986] B.C.J. No. 1476). Other factors include the value of the property involved, the annual carrying charges, the likely time until trial and the ability of the Plaintiff to pay damages. (*Park & Tilford*, supra).
- [6] In the case at bar, the property was to be sold to the Plaintiff at a price of \$2,900,000. The evidence of the Defendant is that the carrying cost of the property is approximately \$30,000 per month. As a condition of the option the Plaintiff was required to pay \$15,000 per month during the currency of the option which sum was not to be credited against the purchase price. A trial of the proceeding could likely be accomplished within one year. The Plaintiff is apparently a "shell" company with no assets except its interest in this property.
- [7] Taking those factors into account I make the following orders:
- 1) On or before December 3rd, 2003 the Plaintiff enter into an undertaking, in a form satisfactory to the Registrar, pursuant to the provisions of s.257(1)(b)(i) of the Land Title Act;
 - 2) On or before December 3rd, 2003 the Plaintiff give security in the amount of \$50,000 pursuant to the provisions of s. 257(1)(b)(ii) of the Land Title Act. The amount of security is to be increased by the further sum of \$15,000 per month commencing January 1st, 2004 and continuing on the first day of each month thereafter until further order or agreement of the parties; and
 - 3) If the Plaintiff fails to provide the undertaking or give security or increased security in accordance with this order the Defendant may apply to have the CPL cancelled.
- [8] I take success on this application to be divided. Each party will bear its own costs. "Master William McCallum"

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Prepared on 26 October 2026 · Esheria