

CANADA / JUDGMENT

Continental Steel Ltd. v. CTL Steel Ltd.

2015 BCCA 501

COURT

British Columbia Court of Appeal

DECIDED

26 November 2015

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2015 BCCA 501 Continental Steel Ltd. v. CTL Steel Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Continental Steel Ltd. v. CTL Steel Ltd.,

2015 BCCA 501

Date: 20151126

Docket: CA43143

Between:

Continental Steel Ltd.

Respondent

(Plaintiff)

And

CTL Steel Ltd., CTL Rebar Ltd., Roger James Pride also known as

Roger James Pride Sr., and Frances Louise Pride

Appellants

(Defendants)

Before:

The Honourable Madam Justice Bennett

(In Chambers)

On appeal from: an order of the Supreme Court of British Columbia dated,

September 17, 2015 (Continental Steel Ltd. v. CTL Steel Ltd., 2015 BCSC 1672, New Westminster Registry No. S13077)

Oral Reasons for Judgment

Counsel for the Appellant:

P.D. Le Dressay and T. Acton

Counsel for the Respondent:

A. Pabani

Place and Date of Hearing:

Vancouver, British Columbia

November 26, 2015

Place and Date of Judgment:

Vancouver, British Columbia

November 26, 2015

Summary:

The appellants seek a stay of Registrar proceedings to certify trial costs and a stay of judgment execution. The respondent seeks security for costs. Held: stay denied, security for costs granted. The applicant must demonstrate irreparable harm if a stay is not ordered. The mere additional time and expense of certifying costs which could later reverse after appeal does not meet this test. Any harm can be remedied monetarily. Security for costs is appropriate given the size of the trial awards in relation to the appellants' easily exigible assets, lack of complete financial disclosure, and fact that several are in receivership.

- [1] BENNETT J.A.: The appellants seek a stay of proceedings before the Registrar and a stay of execution of the trial judgment pending the appeal of the order Mr. Justice Weatherill of the Supreme Court of British Columbia, pronounced September 17, 2015 (2015 BCSC 1672). The appellants also request that costs in this application be made costs in the appeal.
- [2] The respondent applied for security for costs in the trial, security for costs in the appeal estimated at \$7,216, and that the appeal be stayed until security is posted. The respondent has, today, adjourned the application for security for cost pending trial until he has prepared a bill of costs. He has filed a draft bill of costs for the appeal.

I. Background

- [3] This case involves a complex commercial dispute between two businessmen engaged in joint ventures to purchase and sell steel overseas.

- [4] Mr. Pride is the principal and operating mind of CTL Steel Ltd. and CTL Rebar Ltd. (collectively "CTL"). Mr. Lloyd owns Continental Steel Inc. ("Continental"). The men were friends for a number of years. CTL Steel and later CTL Rebar entered into a number of joint ventures with Continental from 1995 to 2001.
- [5] The basic terms of the joint venture agreement were that Continental would advance the necessary funds to CTL to purchase steel. CTL would then purchase, ship, and sell the steel. Funds received by CTL for these steel sales would be forwarded to Continental until the advance repaid. Then all profits from additional sales would be split equally between Continental and CTL (RFJ at paras. 1-2).
- [6] The joint ventures initially concerned CTL Steel Ltd. and Continental. Neither party kept very good financial records of their dealings. Continental became concerned that funds from the joint venture steel sales were not being properly accounted for and being misdirected for other uses.
- [7] Continental had also extended a personal loan to Mr. Pride in 1996 (the "Pride Loan") which remains uncollected.
- [8] To alleviate concerns, in 2000, Mr. Pride incorporated CTL Rebar Ltd. He agreed to place all receipts from joint venture steel sales into CTL Rebar's segregated deposit account. All withdrawals from this account were to require the personal approval of both Mr. Pride and Mr. Lloyd.
- [9] Continental brought suit in November 2003 in efforts to collect some, but not all, of missing joint ventures proceeds. The action included a breach of trust claim. After meeting with Mr. Pride in 2004, Mr. Lloyd agreed to keep the suit in abeyance while CTL arranged to pay Continental. Business dealings continued. To further provide comfort to Continental, Mr. Pride transferred 120 shares of CTL Steel (25%) to Mr. Lloyd in June 2006.
- [10] Continental brought the instant suit in 2010. By the time the case got to trial, Continental claimed the following:
- joint venture debts are owed which Mr. Pride personally guaranteed;
 - a substantial debt is owed by Mr. Pride personally (the Pride Loan);
 - post-2000 steel payments received by CTL are imposed with a trust;
 - Mr. Pride personally breached the trust through diversion and misappropriation of funds;
 - remedial constructive trust and a tracing order;
 - deceit regarding a falsified financial statement provided by CTL; and
 - fraudulent conveyance of Mr. Pride's assets, namely his home, to Mrs. Pride.

- [11] The trial judge severed the fraudulent conveyance claim at trial. It remains outstanding. CTL cross claimed that that Continental in fact owed CTL for considerable overpayments due to CTL's reliance on Continental's allegedly faulty accounting.

II. Facts Relevant to the Motions

Decision of the Lower Court

Claim for debt owed

- [12] At issue was whether various debts accruing from the joint ventures were statute barred. As CTL sold steel, it would send Continental payments by way of cheque "on account". However, it failed to specify which of the joint venture debts to appropriate each payment to. Many joint venture debts would be statute barred unless the limitation period was reset by finding an acknowledgement or confirmation of the debt by CTL. This occurs whenever a debtor makes partial payment on a debt.
- [13] The trial judge considered the law of how a debtor's partial payments are to be allocated when the creditor holds multiple individual debts of the same debtor. He concluded that if a partial payment is made and the debtor does not specify which debt it is to be allocated towards, the creditor has the option of applying the payment to whichever of the debtor's debts he chooses. He held that the creditor could allocate payments tactfully to reset the statute of limitations, even waiting until trial. He also concluded that allocations within a creditor's internal records do not bind that creditor unless they are communicated to the debtor.
- [14] The trial judge held that Continental was free to allocate partial payments as it wished to serve as confirmation of its causes of action. It initially allocated the payments in its internal records but did not disclose these allocations to CTL. In 2010, likely in anticipation of litigation, Continental reallocated the payments in its books. The trial judge accepted the 2010 reallocations. This, in turn, reset the statute of limitations (RFJ at para. 121-124).
- [15] The trial judge found that Continental was entitled to judgment against CTL Steel Ltd. and CTL Rebar Ltd. in the amount of \$2,422,852.90 plus interest for joint venture debts.

Breach of trust claim

- [16] The trial judge found that from 2000, when CTL Rebar Ltd. incorporated, funds from the sale of joint venture steel were impressed with a trust in favour of Continental (RJF at para. 110(f)).

- [17] The trial judge found that Mr. Pride breached this trust by failing to ensure that joint venture sale proceeds go into CTL Rebar's account (RFJ at para. 110(g)) and by intentionally transferring funds out of CTL Rebar's accounts (RFJ at paras. 190, 199-201). The trial judge found however, that only the amounts received to repay Continental's advances were impressed with the trust. Profits owed were not.
- [18] The trial judge granted judgment against Mr. Pride in the amount of \$718,187.72 plus interest, less the amount allocated to profit. He directed the Registrar determine the actual subject of the trust (i.e. \$718,182.72 less profits).

Dismissed claims

- [19] The trial judge dismissed claims that Mr. Pride personally guaranteed loans made to CTL and that Continental could collect on the 1996 Pride Loan on statute of limitation grounds. He dismissed Continental's claims for constructive trust and a tracing order because Continental failed to meet the test for such a remedy. CTL's counterclaim was also dismissed.

Costs

- [20] Costs were awarded to Continental but each party bore its own costs regarding the claims made against Mr. Pride personally. The court also imposed several cost orders against CTL and Mr. Pride - in any event of the cause - in several interlocutory applications. As noted, the costs have not yet been assessed.

Grounds of Appeal

- [21] CTL timely filed a notice of appeal on October 2, 2015. Its first ground of appeal concerns the trial judge's analysis of Continental's appropriation of CTL's payments to various outstanding debts that it owed to Continental. CTL submits that the trial judge erred in law:

by applying case law which contained rules of presumption regarding payment, appropriate, and re-appropriation on accounts as though they were binding presumptions of fact, and did not determine whether the appropriations made by the creditor were appropriations made in fact on all the evidence in the case " (Appellant's Argument at para. 29)

- [22] It is submitted that the trial judge also erred in law by not considering Continental's overriding duty of good faith and honest performance of contract when in 2010, it revised all of the appropriations for the purposes of resurrecting otherwise barred claims in the litigation.

- [23] CTL's second ground of appeal challenges the trial judge's findings of trust and breach of trust because it says it was provided with no notice of these claims and was unable to offer a meaningful defence. CTL argues these findings were not made out on the case pleaded. The finding of a trust was based on a theory not advanced by the plaintiff until final written submissions were made on December 17, 2014 at the end of the trial. CTL further submits that the trust and its breach were all found without any pleadings whatsoever.
- [24] Continental filed notice of cross appeal on October 8, 2015. It argues that the judge erred in finding personal claims against Mr. Pride were statute barred. It submits that the record shows that Mr. Pride acknowledged his personal guarantee of all of CTL's loans and the Pride Loan, thereby reviving Continental's claims against Mr. Pride personally. It also argues that it was entitled to a tracing order.

Financial Means of the Appellants

- [25] Mr. Pride is 71 and his wife, who he submits is in bad health, is 69. He submits that they collectively have a monthly government pension income of \$2,425. He says that he works manual labor to support his family and pay legal fees. At the hearing he did not disclose what he earns from this employment. He does not set out what his expenses are.
- [26] Mr. Pride discloses assets of \$420,000 in an RRSP which he says is accessible to him through a RRIF at an annual rate of \$25,000. Mrs. Pride discloses a \$500,000 family home (transferred to her by Mr. Pride in 1998), \$120,000 in RRSPs and recreational vehicles (an RV and boat) with a combined worth of \$85,000-\$90,000. Continental submits discovery transcripts in which Mrs. Pride admits that the RV is actually owned by a company in which she and Mr. Pride are managers, and submits that the RV and boat are located in the United States.
- [27] CTL Steel Ltd. went into receivership shortly after this action commenced in 2010. Mr. Pride is a defendant in that litigation as guarantor of CTL Steel's debts with the Royal Bank of Canada ("RBC"), a secured creditor. Mr. Pride personally posted costs of \$10,000 in order to participate in the passing of accounts in that litigation.
- [28] Mr. Pride has ordered the appeal record, appeal books, and transcripts for the instant appeal. He points out that Continental has chosen not to contribute to these costs. Mr. Pride says that he is barely able to keep his family and the litigation afloat.
- [29] RBC obtained default judgment in 2013 against Mr. Pride in the sum of \$44,812.30 plus interest. This amount is the balance owed to RBC from default judgment against CTL Steel Inc. for \$159,352.17.

III. The Law

A. Security for Costs of the Appeal

- [30] Section 24(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, provides that a justice may order that an appellant pay or deposit costs in an amount and in a form determined by the justice.
- [31] The ultimate question is whether the order would be in the interests of justice (*Lu v. Mao*, 2006 BCCA 560 at para. 6). In this regard, Madam Justice Rowles in *Ferguson v. Ferstay*, 2000 BCCA 592 at para. 7, identified the following as relevant considerations:
- 1) the appellant's financial means;
 - 2) the merits of the appeal;
 - 3) the timeliness of the application; and
 - 4) whether the costs will be readily recoverable.
- [32] The appellant against whom an order is sought bears the onus of showing why security should not be required (*Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9).
- [33] The appellant's circumstances are the paramount consideration in determining whether some, all, or none of the security be ordered (*A B & A Matthews v. Dixon*, 1999 BCCA 333 at para. 13).
- [34] The usual form of security for costs includes "a provision that the appeal is stayed pending the deposit of the security " (*Austin v. Goerz*, 2007 BCCA 151 at para. 6 (*Chiasson J.A. in Chambers*)). Authority for this order is found in s. 10(2)(b) of the Court of Appeal Act, which permits a justice to make any order to prevent prejudice to any person.

B. Stay of Proceedings and Execution

- [35] The relevant provisions of the Court of Appeal Act for granting a stay of proceedings and execution are:

Powers of a Justice

10 (2) In an appeal or other matter before the court, a justice may do one or more of the following:

- (b) make an interim order to prevent prejudice to any person

Stay of proceeding

18 (1) After an appeal or application for leave to appeal is brought, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal has been taken are stayed in whole or in part.

- [36] Smith J.A. succinctly described the general principles for granting a stay of proceedings in *Gill v. Darbar*, 2003 BCCA 3 (in Chambers) at para. 7:
- [7] Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if satisfied that it is in the interests of justice to do so: *Voth Brothers Construction (1974) v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 at 44-45 (C.A. [Chambers]). The trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay: *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.). The applicant for a stay must satisfy the familiar three-stage test, that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted: *British Columbia (Milk Marketing Board) v. Grisnich* (1996), 50 C.P.C. (3d) 249 at 252 (B.C.C.A. Chambers).
- [37] The court's power to grant a stay is discretionary and should be exercised only where necessary to preserve the subject matter of the litigation or to prevent irreparable damage or where there are other special circumstances: *Roe, McNeill & Co. v. McNeill* (1994), 49 B.C.A.C. 247 at para. 6 (Legg J.A. in Chambers), citing *Contact Airways Ltd. v. DeHavilland of Aircraft of Canada Ltd.* (1982), 42 B.C.L.R. 141 at 142 (C.A.). The onus lies on the applicant to establish the right to a stay: *Bancroft-Wilson v. Murphy*, 2008 BCCA 498 (Smith D. J.A. in Chambers) at para. 9 and *Re Taylor* (1986), 4 B.C.L.R. (2d) 15 at 16 (Craig J.A. in Chambers).
- [38] The test for a stay of proceedings is the same test as a stay of execution: *A.A. v. S.N.A.*, 2007 BCCA 375 at para. 9, see also *Palkovics v. Barta*, 2012 BCCA 306 (Smith D. J.A. in Chambers) at para. 13, quoting *Gill v. Darbar*, 2003 BCCA 3.

IV. Positions of the Parties

Security for costs of the appeal

Continental's position

- [39] Continental contends that CTL Steel is in receivership while none of the appellants have exigible assets. It is alleged that Mr. Pride's main assets were either put into RRSPs or transferred to his wife, making collection difficult. Continental submits that it has no assurances it will be able to recover appeal costs.

CTL's position

- [40] Mr. Pride argues that he is in financial straits. He submits that this Court should interpret the security for costs decision in light of the decision of the Supreme Court of Canada in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59. He says it is an access to justice issue.

- [41] I do not need to consider this issue as the evidentiary foundation for this argument has not been laid. Mr. Pride has not or would not, when asked today, advise the Court of his earnings from employment. He has not filed evidence of his income and expenses. I know that he has significant assets that he has transferred into his wife's name.

Stay of Proceedings and Execution

CTL's position

- [42] CTL submits it has a meritorious appeal. It argues that if the appeal is allowed or Continental's cross appeal for the tracing remedy is allowed, the entire reference to the Registrar that Continental seeks to proceed with will be a waste of time and resources. CTL estimates that the Registrar's proceedings will require expert accounting evidence and consume around four days, perhaps less. It further submits that Continental is not at risk by a stay of proceedings because it already secured a certificate of pending litigation against Mrs. Pride's home - her most significant asset.
- [43] If the stay is not granted, the appellants argue that they must bear the cost of wasteful litigation before the Registrar and then a judgment which both of the appellants and respondent seek to set aside or modify on appeal. Finally they argue that execution may "paralyze" their ability to prosecute the appeal.

Continental's Position

- [44] Continental submits that an accounting of the subject matter of the trust is a straight forward matter which took its accountant two hours to complete. Matters before the Registrar, in its submission, are to take less than two hours. It submits on the affidavit material filed by the accountant that approximately \$300,000 is left owing when profit is taken out of the sum.
- [45] On the merits of the first ground of appeal, Continental submits that the trial judge's conclusions of law on the allocations were correct. Even if the appellant's position is arguable, it says it would be immaterial to the outcome of the case because Mr. Pride transferred 25% of CTL Steel to Mr. Lloyd in 2006. Continental characterizes this transfer as security for the debt CTL owed, thereby serving as an acknowledgement of all debt and resetting the limitation periods. On the merits of the second ground, the appellants provide no basis for an alleged error of law. It says it pleaded the breach of trust and points to pleadings it says are to that effect.

- [46] On the balance of convenience, Continental submits that even though it has a certificate of pending litigation against Mrs. Pride's home, the severed fraudulent conveyance claim will require a lengthy trial, one to two weeks. Allowing Mr. Pride to convert his RRSP into a RRIF without requiring him to post security for judgment could cause irreparable harm to Continental because the rules on judgment execution would restrict collecting from the converted fund.
- [47] I point out that irreparable harm relates to the applicant not to the respondents but that is a factor when one is considering the balance of convenience.

V. Discussion

A. Security for Costs in the Appeal

(1) Appellants' financial means

- [48] In my view, it appears that Mr. Pride has adequate financial means to post security in the amount requested.
- [49] From the materials before me, it appears that the two CTL companies are currently not of any substantial value. However, the Prides disclose combined personal assets of over \$1.1 million including investments and recreational vehicles. They will likely have access to an income next year of approximately \$54,100 (\$29,100 in pensions and \$25,000 from RRIF withdrawals). Mr. Pride has not disclosed his earnings from his employment with another one of his companies.
- [50] Mr. Pride is likely facing some financial pressure due to litigation expenses and a default judgment. However, he seems to have sufficient assets at his disposal to post security for costs without affecting his ability to proceed with the appeal. This is evidenced by the fact that he was able to post \$10,000 for costs in CTL Steel's receivership proceedings. More recently, he ordered an appeal record, appeal books, and transcripts in this appeal. Mr. Pride, in my view, is capable of leveraging or disposing of assets in order to post security in the amount requested by the respondent.

(2) Merits of the appeal

- [51] In my view, the appellants have arguable grounds of appeal.
- [52] CTL argues that the trial judge erred in law by treating rules of presumption regarding appropriation of a debtor's payments as binding presumptions of fact. He argues that not only was this wrong in law but it offends the overriding duty of good faith and honest performance of contract law. In result, he argues that the trial judge's approach would allow the parties to tactfully revise their appropriations in order to revive dead claims in a way wholly inconsistent with accepted accounting principles.

[53] CTL further argues it was unable to mount an adequate defence to the trust claims because they were not raised at trial, nor did it have notice of them. As indicated, in my view, both of these are arguable.

(3) Timeliness of the application

[54] Continental timely filed notice this motion on November 6.

(4) Whether the costs will be readily recoverable

[55] There is some indication that costs will not be readily recoverable. As noted, CTL Steel Inc. is in receivership. There is no indication that CTL Rebar Inc. will be able to satisfy the \$2.4 million judgment against both companies.

[56] Mr. Pride has a RRSP valued at \$420,000. The breach of trust claim is estimated to be approximately \$300,000.

[57] Mrs. Pride, as noted, owns a home valued at \$500,000 with other assets, although, as indicated, those are being pursued by way of a wrongful conveyance.

[58] In sum, given the size of the trial judgments and without factoring in court costs, in relation to the appellant's exigible assets, it appears that Continental may have difficulty recovering costs.

C. Stay of Proceedings and Execution

(1) Merits of the Appeal

[59] As noted, the appellant has arguable grounds of appeal.

(2) Irreparable harm if stay refused

[60] The appellant concedes that there is no irreparable harm in the sense that a monetary award can satisfy any harm that occurs to him as a result of not staying the judgment. Refusing to stay the proceedings would mean that the proceedings before the Registrar would continue. I agree with the submission of Continental that it should be a straight forward and quick matter. The Registrar's proceedings at the most may cause Mr. Pride some additional time and expense but certainly no irreparable harm.

(3) Balance of convenience

[61] Protection of the successful plaintiff is a pre-condition to granting a stay: *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.). In my view, the Continental's interests cannot be adequately protected if a stay of proceedings and execution are granted. The balance of convenience falls in its favour.

[62] In summary, I would grant the motion for security for costs of the appeal. I would order that the appellants post security for costs in the amount of \$7,000 and that the appeal be stayed until the costs are posted with the court.

[63] I adjourn the motion for security for costs in the trial.

[64] I dismiss the application of this motion for a stay of proceedings and stay of execution of the trial judgment.

"The Honourable Madam Justice Bennett"

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Prepared on 25 October 2026 · Esheria