

CANADA / JUDGMENT

Eisler Estate v. GWR Resources Inc.

2020 BCCA 111

COURT

British Columbia Court of Appeal

DECIDED

25 March 2020

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2020 BCCA 111 Eisler Estate v. GWR Resources Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Eisler Estate v. GWR Resources Inc.,

2020 BCCA 111

Date: 20200325

Docket: CA46598

Between:

Brenda Dolores Liggett, Executor of the Will of Irvin Eisler

and Eisler Holdings Ltd.

Respondents

(Plaintiffs)

And

GWR Resources Inc.

Appellant

(Defendant)

And

Eisler Construction Ltd.

Respondent

(Defendant by Counterclaim)

Before:

The Honourable Mr. Justice Fitch

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 21, 2019 (Eisler Estate v. GWR Resources Inc., 2019 BCSC 1990, Vernon Docket S52943).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

E. Ito

Counsel for the Respondents,

Brenda Dolores Liggett, Executor of the Will of Irvin Eisler, Eisler Holdings Ltd. and Eisler Construction Ltd.

(via teleconference):

A.D. Mardiros (March 25, 2020, only)

U. Radoja

Place and Date of Hearing:

Vancouver, British Columbia

March 20, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 25, 2020

Summary:

The appellant applies for a stay of execution and an order that security being held in the respondents' solicitor's trust account remain in place pending resolution of the appeal. The respondents cross-apply for security for costs of the appeal, security for costs of the trial and security for the trial judgment. Held: Application granted in part; cross-application granted in part. The balance of convenience supports granting a stay on the condition the appellant post security in the amount of the trial judgment. An order requiring the security to remain in the solicitor's account should not be made at this time as the question of its release is currently before the trial judge. The respondents' application for security for costs of the appeal is granted.

The application for security for trial costs is adjourned as costs have not yet been fixed or assessed in the court below. The application for security for the trial judgment is dismissed as the relief sought flows from the condition attached to the stay.

FITCH J.A. (via teleconference):

I. Introduction

- [1] Two applications are before me for determination.
- [2] The appellant, GWR Resources Inc. ("GWR"), applies pursuant to s. 18(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 [Act] for a stay of the order made by Justice Donegan on November 21, 2019, granting judgment to the respondents (Brenda Dolores Liggett (the executor of Irvin Eisler's estate), Eisler Holdings Ltd. ("EHL") and Eisler Construction Ltd. ("ECL"), collectively "the respondents"). In addition, GWR applies for an order that security, currently being held in the respondents' solicitor's trust account, remain in place pending resolution of the appeal.
- [3] The respondents apply for security for costs of the appeal, security for costs of the trial and security for the trial judgment.
- [4] The litigation underlying these applications commenced in 2015 when Mr. Eisler, now deceased, and EHL brought a wrongful dismissal action against GWR, a mining exploration company.
- [5] GWR argued in its defence that it had just cause to terminate Mr. Eisler on grounds that he had breached his fiduciary duties by engaging in a variety of fraudulent acts and other types of misconduct. GWR also relied on these allegations as the basis for its counterclaim against Mr. Eisler and ECL.
- [6] Early on in these proceedings, GWR registered a certificate of pending litigation ("CPL") on a parcel of property owned by Mr. Eisler and his wife based on an allegation that funds misappropriated by Mr. Eisler could be traced into the property. The CPL was later cancelled by Justice G.P. Weatherill, who ordered that Mr. Eisler instead post security in the amount of \$400,000 to be held in his solicitor's trust account pending determination of GWR's counterclaim on its merits: 2018 BCSC 162. That sum remains in the trust account of the respondents' solicitor, pending further order of the trial judge.
- [7] The matter proceeded to trial before Justice Donegan. Reasons for judgment are indexed as 2019 BCSC 1990. The judge found that GWR had wrongfully dismissed Mr. Eisler and awarded the respondents \$79,019.45 in damages. GWR's counterclaim was dismissed in its entirety.

- [8] Following the trial, the respondents made further applications to the trial judge seeking orders: (1) that the security ordered by Weatherill J. be released to them; and (2) that GWR pay Mr. Eisler's trial costs on a full indemnity basis pursuant to a term of his employment contract with GWR or, in the alternative, special costs on grounds that GWR had made improper and unsubstantiated allegations of fraud against Mr. Eisler in the course of the litigation. These matters are currently on reserve.

II. GWR's Applications

(a) The Stay Application

- [9] The power to grant a stay of execution is found in ss. 10(2) and 18 of the Act. This power is discretionary and should only be exercised to prevent irremediable harm to the applicant, to preserve the subject matter of the litigation or where other special circumstances arise: *Roe, McNeill & Co. v. McNeill* (1994), 49 B.C.A.C. 247 at para. 6 (Chambers) [Roe]. In making the determination, it should be borne in mind that a successful plaintiff is presumptively entitled to the fruits of their judgment. The onus lies on the applicant to establish the right to a stay: *Bancroft-Wilson v. Murphy*, 2008 BCCA 498 at para. 9 (Chambers).
- [10] The question of whether to grant a stay is determined through application of the familiar three-stage test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [RJR-MacDonald]:
- (1) that there is some merit to the appeal in the sense that there is a serious question to be determined;
 - (2) that irreparable harm would be occasioned to the applicant if the stay was refused; and
 - (3) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.
- [11] The ultimate question on any application for a stay of execution concerns the interests of justice: *Coburn v. Nagra*, 2001 BCCA 607.

(i) Irreparable Harm

- [12] Counsel for the respondents conceded during oral submissions that irreparable harm would be caused to GWR if the stay is refused because the proceeds of the judgment would immediately be distributed by the estate to third parties. This would make prosecution of the appeal futile for GWR. I therefore need only consider the merits of the appeal and the balance of convenience in determining whether the interests of justice warrant imposition of the stay.

(ii) Merit

- [13] The question at this step is to determine whether "an appeal is without merit or has no reasonable prospect of success": Roe at para. 6. The threshold is a low one and is generally met if the Court is satisfied that the issues on appeal are neither frivolous nor vexatious.
- [14] GWR says there is a serious issue to be decided on the question of whether the judge, in holding that Mr. Eisler had not committed fraud or breached his fiduciary duties, misapprehended material evidence essential to the reasoning process that led to the orders made below.
- [15] This error is said to arise out of findings made with respect to a specific allegation that GWR advanced at trial concerning related party transactions between EHL and GWR. Specifically, while Mr. Eisler was serving as GWR's president, GWR purchased two pieces of heavy equipment to be used for mining exploration. GWR's accountant testified, and it was accepted by the trial judge, that these purchases were made in error as they were purchased with flow-through funds, which could not be used by GWR to acquire capital assets. GWR's accountant and EHL's accountant sought to rectify this error by transferring the equipment into EHL's name in exchange for a credit to GWR for money it owed to EHL. GWR would then rent the equipment back from EHL, rental payments being a permissible use of flow-through funds.
- [16] The controversy surrounding these transactions concerns the timing of EHL's acquisition of the equipment as recorded in the accounting ledger. The two assets were improperly purchased by GWR in October 2006 and February 2007, respectively. The transfers to EHL are recorded in the ledger as taking place on March 31, 2007. If this is indeed the case, as GWR urges, then EHL received rental payments from GWR for five and two months, respectively, before actually acquiring title to the assets; GWR would, in effect, have been paying rent for assets it actually owned.
- [17] The judge, however, found there was a reasonable explanation for this. She found that March 31 was the date on which the chargeback was posted, but that the transfers had actually occurred earlier. Therefore, the allegation that EHL had issued invoices and received rental payments for property which it did not own was not made out on the judge's view of the evidence:
- [132] The transfer of ownership from GWR to EHL occurred when the error was detected, shortly after the purchase. Mr. Glimhagen [GWR's accountant] explained, and I accept, that the date the transfer appears in the ledger (March 31, 2007) is actually the date he posted the chargeback, not the date the transaction took place. Although he attempted to ensure that transactions were posted in the quarter in which they occurred, there were occasions when that did not happen. This was one such occasion. In other words, although it appears that GWR was paying EHL to rent a piece of equipment that GWR owned for about five months, this was not the case. It only appears that way because of Mr. Glimhagen's lag in posting the chargeback.

[Emphasis added.]

[18] GWR says the finding that March 31 was the posting date and not the transaction date was a misapprehension of its accountant's evidence and that this constitutes a palpable and overriding error of fact. It says the error is palpable, given its accountant's testimony, and overriding, because it establishes that Mr. Eisler collected rent on the assets before actually acquiring them, which was one of the allegations brought by GWR in support of its claim that Mr. Eisler had committed fraud.

[19] While there may, as the respondents suggest, be challenges associated with pursuing this particular ground of appeal, given the low threshold that applies, I am not prepared to say that the appeal is devoid of merit.

(iii) Balance of Convenience

[20] The balance of convenience stage involves a determination of which of the two parties will suffer the greater harm from the granting or the refusal to grant the stay: *RJR-MacDonald* at 342; *Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, 2013 BCCA 146 at paras. 36-37 (Chambers).

[21] As noted, the respondents acknowledge that the proceeds of the judgment will be distributed to third parties upon receipt. GWR will, therefore, likely be unable to reacquire the proceeds in the event its appeal is successful. However, as the respondents correctly note, the trial judgment must be assumed to be correct and the protection of a successful plaintiff is, generally speaking, a pre-condition for granting a stay: *Gill v. Darbar*, 2003 BCCA 3 at para. 7 (Chambers). The respondents say they would be harmed by an unconditional stay because GWR has no real property in British Columbia and does not have the financial wherewithal to satisfy the judgment, the pending trial costs order, or the costs of the appeal.

[22] In my view, the balance of convenience supports granting GWR's application for a stay of execution on the condition that GWR post security in the amount of the trial judgment -- \$79,019.45 -- to be held pending resolution of the appeal. This will protect the respondents' interest in being able to collect on the fruits of their judgment in the event the appeal is unsuccessful, while at the same time preserving the funds for recovery in the event the appeal is successful. I direct that security for the trial judgment, in a form satisfactory to the Registrar of this Court, be posted within 14 days of the date of this order.

(b) The Application to Have the Security Remain in Place

[23] As noted earlier, GWR also applies for an order that the \$400,000 in security, currently being held in the respondents' solicitor's trust account, remain in place until the appeal is resolved. Some further background is necessary to put this part of GWR's application in context.

- [24] Justice Weatherill ordered the respondents to post this security in connection with GWR's counterclaim on the basis of an allegation that Mr. Eisler had used misappropriated funds to purchase real property. Given that GWR's counterclaim was dismissed in its entirety, the parties anticipate that Donegan J. will order the security to be released to the respondents. That decision, however, has not yet been made. Judgment on this issue remains on reserve.
- [25] As part of what appears to be a compromise regarding the scheduling of these applications, the respondents' solicitor gave an undertaking to hold the \$400,000 security in his trust account pending the disposition of GWR's stay application. This appears to have been done in contemplation that the trial judge would order the security released prior to the hearing of this application. But that has not occurred.
- [26] I think it is clear from the communications that passed between counsel, and from the undertaking given, that the parties agreed that the security would be held in the event it was ordered to be released by Donegan J. until such time as GWR's application to stay that order could be argued before a judge of this Court on its merits.
- [27] The respondents are, of course, eager to have this security released as it appears to be the estate's main asset. The respondents submit that these funds are needed to fund its response to the appeal and, perhaps more importantly given the suspension of filing deadlines announced by this Court on March 17, 2020, to pay off its creditors. In the result, the respondents seek dismissal of this part of GWR's application. The effect of a dismissal order would, from their perspective, free their solicitor from the undertaking he gave and make available for distribution \$400,000 in funds should Donegan J. make the order the parties anticipate she will make.
- [28] GWR seeks what might be characterized as a prospective order, staying the release of funds order the parties anticipate will be made by the trial judge. GWR does so to preserve the status quo until such time as its application to stay the anticipated release of funds order can be heard in this Court.
- [29] There are a number of jurisdictional difficulties with the approach both parties have taken with respect to this issue. While these jurisdictional difficulties were not lost on the parties, neither were they squarely addressed in oral argument, including in response to questions posed by the Court.
- [30] While I appreciate that both parties are motivated to obtain an order that is in their clients' interests, I am not at all inclined to entertain this part of GWR's application at this stage.
- [31] The respondents asked the trial judge to make an order releasing these funds. The judge heard argument on this issue and reserved judgment. As of today's date, no order has been made by the judge with respect to this matter. There is, accordingly, no underlying order to stay. What I am being asked to do -- presumably under s. 10(2)(b) of the Act, although the jurisdictional basis for the application was not clearly articulated -- is make what amounts to a pre-emptive order directing that the \$400,000 in security remain in place regardless of the

order that is eventually made by the trial judge. In my respectful view, doing so would constitute a premature and unjustifiable interference with the authority of the trial judge. I would therefore adjourn generally this part of GWR's application.

- [32] To avoid any possibility that the undertaking given by the respondents' solicitor could be used to delay release of the security (should this be ordered by the trial judge), I direct that if the judge below makes an order releasing the security, GWR either release the respondents' solicitor from the undertaking or reset this portion of its application for hearing within 14 days of the date upon which the Court resumes regular operations, or, on application of either party following the order releasing the security, within 14 days of a judicial determination that the matter should be heard on an urgent basis, whichever is the earlier.

III. The Respondents' Applications

(a) Security for Costs of the Appeal

- [33] The respondents seek an order that GWR post \$10,025.60 as security for costs of the appeal.
- [34] The jurisdiction to order security for costs of an appeal is found in s. 24(1) of the Act. The relevant criteria on an application are: 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: *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers) [Lu]. The onus is on the appellant to show why security should not be ordered: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9 (Chambers). The ultimate question is always whether the order would be in the interests of justice.
- [35] The application was made in a timely way. The decision to order security for appellate costs in this case turns then on the merits of the appeal, GWR's financial wherewithal and the recoverability of costs.
- [36] I have already addressed my cursory view of the merits of the appeal. I am not prepared to say it is bound to fail.
- [37] GWR does not suggest that an order requiring it to post security for appellate costs would prevent it from pursuing a meritorious appeal.
- [38] The respondents raise concerns respecting the financial health of GWR and their ability to recover appellate costs (and, more significantly, the substantial trial costs that are likely to be certified) in the event the appeal is dismissed. They point out that GWR's current liabilities are well in excess of its current assets, and that the company suffered significant losses in its most recent reporting year. They submit that GWR has no real property in British Columbia and only \$38,680 worth of personal property. GWR's principal assets are its various interests in mineral claims which are listed on its balance sheet as having a value of approximately \$2.5 million. Although this sum may seem significant on its face, the respondents submit that valuation of the claims is contingent, among other things, on whether the properties in issue contain mineral reserves that are economically recoverable.

In essence, the respondents asked me to take note of the contingent value and illiquid nature of mineral claims on its application for security for appellate and trial costs.

[39] Taking all of these factors into account, I am well satisfied that it is appropriate to order GWR to post, in a form satisfactory to the Registrar, \$10,025.60 as security for appellate costs. The required security for appellate costs must be posted within 14 days of the date of this order. The appeal is stayed until the security is posted.

(b) Security for Trial Costs

[40] Trial costs have yet to be determined in the court below. As I have noted, the respondents seek trial costs on a full indemnity basis, relying on a provision of the Consulting Agreement between Mr. Eisler and GWR that requires the company to "pay all legal fees and expenses incurred [by him] in contesting or disputing any termination provided that [he] is successful in any such action." In the alternative, the respondents seek special costs for all steps taken in the action from the filing of the counterclaim by GWR on grounds that GWR doggedly pursued meritless allegations against Mr. Eisler of fraud and breach of fiduciary duty.

[41] The respondents seek an order that GWR post \$510,801.42, representing full indemnity costs, as security for costs of the trial. In the alternative, the respondents seek an order that GWR post \$62,000 for trial costs, representing an estimate of party and party costs at Scale B.

[42] The jurisdiction to order security for trial costs is derived from s. 10(2)(b) of the Act. Security for trial costs will not be awarded as readily as security for costs of the appeal: *Siekham v. Hiebert*, 2008 BCCA 299 at para. 11 (Chambers). The applicable principles were set out in *Aikenhead v. Jenkins*, 2002 BCCA 234 at para. 30 (Chambers):

1. The onus is on the applicant to show that it is in the interests 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.

[43] Even though costs have not yet been assessed in the court below, the respondents submit this is not an absolute bar to making the order it seeks. The respondents correctly note that this Court has, on occasion, granted security before trial costs have been assessed: *Lombardo v. Lombardo*, 2008 BCCA 21 (Chambers).

[44] There is, however, a well-developed line of authority suggesting that this Court "should have the benefit of the trial court's disposition on costs before deciding whether and in what amount security should be ordered": *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCCA 272 at para. 4 (Chambers); *Buchy v. Villars*, 2008 BCCA 237 at para. 3 (Chambers); *Lu* at para. 19. In the circumstances of this case, including the substantial uncertainty that exists as to the award of costs that might be made in the trial court and the sizable difference between contractual or special costs on the one hand and

party and party costs on the other, I consider following this latter line of authority to be the wisest course. In the result, I exercise my discretion to adjourn generally the respondents' application for security for trial costs.

[45] Once trial costs have been assessed in the court below, the respondents may reset this part of their application for hearing once the Court resumes regular operations, or, on application of either party, following a judicial determination that the matter should be heard on an urgent basis, whichever is the earlier.

(c) Security for the Trial Judgment

[46] I need not address the respondents' application that GWR post security for the judgment as the relief sought flows from the condition I have already attached to the stay order. I would therefore dismiss this part of the respondents' application.

IV. Disposition

[47] For the reasons provided, the application for a stay of the order under appeal is granted on the condition that GWR, within 14 days of the date of this order, post security for the trial judgment, in a form satisfactory to the Registrar, in the amount of \$79,019.45.

[48] GWR's application to have the \$400,000 security remain in the respondents' solicitor's trust account is adjourned generally, on the terms set out herein.

[49] The respondents' application for security for costs of the appeal in the amount of \$10,025.60 is granted. GWR shall post security for appellate costs, in a form satisfactory to the Registrar, within 14 days of the date of this order. The appeal is stayed until such security is posted.

[50] The application for security for trial costs is adjourned on the terms set out herein.

[51] While it is not necessary to say this, given the uncertainties associated with the current health crisis, the timelines set out herein are subject to variation by further order of the Court or judge thereof.

[52] Costs of these applications will be costs in the appeal.

"The Honourable Mr. Justice Fitch"

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