

CANADA / JUDGMENT

J.W. Price Construction Ltd. v. Elan Construction Ltd.

2001 BCCA 738

COURT

British Columbia Court of Appeal

DECIDED

12 December 2001

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2001BCCA0738 Citation: J.W. Price Construction v. Elan Construction Date: 20011212 2001 BCCA 738 Docket: CA028923 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR JUDGMENT Before: The Honourable Mr. Justice Lambert December 12, 2001 The Honourable Madam Justice Saunders The Honourable Mr. Justice Hollinrake Vancouver, B.C. BETWEEN: J.A. PRICE CONSTRUCTION LTD. PLAINTIFF (APPELLANT) (RESPONDENT BY CROSS APPEAL) AND: ELAN CONSTRUCTION LIMITED DEFENDANT (RESPONDENT) (APPELLANT BY CROSS APPEAL) B. McLean, C. Armstrong appearing for the Appellant V.E. Pigeon, V.A. Ishkanian appearing for the Respondent

- [1] LAMBERT, J.A.: This is an application under the Court of Appeal Act for review of a decision made by Madam Justice Rowles, sitting in Chambers, when she heard an application for a stay of execution pending an appeal and a cross appeal of a judgment pronounced in August 2001 to the effect that the plaintiff J.W. Price Construction Limited recover from the defendant Elan Construction Limited \$100,000 together with interest of \$30,000 approximately and costs on Scale 3.
- [2] As I have said, the plaintiff has appealed the order on the ground that the amount of \$100,000 was insufficient and did not take into account special damage and increased costs. The defendant Elan has a cross appeal. Elan applied for a stay and the application was to prevent any payment of any amount until the appeal had been heard and disposed of. In dealing with Elan's application Madam Justice Rowles said this:
- [3] A successful party is entitled to the fruits of the judgement at trial and it is up to the party who seeks the stay to establish that it would suffer irreparable harm if a stay were not granted. [4] On the merit of the appeal, it is the plaintiff's position that the cross-appeal is frivolous and, for that reason no stay ought to be considered. [5] It is difficult to ascertain whether an appeal has merit without going into the matter in some detail, particularly when it concerns a suggestion that there were errors in findings of fact. Generally, an appeal on questions of fact is not likely to succeed. While it does not appear to me that this is a strong appeal, I am unable to say that it is bound to fail. [6] I will turn then to consider the balance

of convenience. The material shows that the plaintiff in this case is far from impecunious, and the risk of the defendant not being able to recover funds paid out in satisfaction of a judgement, assuming the appeal were successful, would not be great. It appears to me that what would amount to a partial stay would provide the needed measure of protection to the defendant in this case. [7] A stay will be granted in the following terms. The defendant will post the full amount of the judgement in cash; that is the \$100,000 plus \$30,864.38 in interest and \$30,000 for costs. The plaintiff may draw on the amount so posted up to the sum of \$85,000 without providing any security. Should the plaintiff wish to draw on any amount beyond the \$85,000 the plaintiff will provide an irrevocable letter of credit in a form satisfactory to the Registrar of this Court for the further amount drawn. The security to be posted within two weeks of today's date which is, I understand, possible for the defendant. [8] The costs of this application will be determined by the outcome of the appeal.

- [3] Counsel for Price, this afternoon, on its application for review, said that the two or three points in issue in the cross appeal did not meet the threshold test for the justification for granting of a stay. Reference was made to the tests expressed in relation a stay in this court and to the tests expressed in relation to interlocutory injunctions both in this court and in the Supreme Court of Canada. A note was taken of the parallels between the situation for a stay and the situation for an interlocutory injunction, and note was taken of the various phrases that have been used: "bound to fail"; "a bona fide arguable issue"; and others.
- [4] We heard a discussion of the three issues raised in the cross appeal on behalf of the applicant this afternoon directed to establishing that none of the three points met the threshold test. Madam Justice Rowles said that an appeal on questions of fact is not likely to succeed and that otherwise this is not a strong appeal, but that she was unable to say that the appeal was bound to fail. I think that is an appropriate expression of the test.
- [5] However, I am satisfied, having listened to the arguments, that Madam Justice Rowles did not err in deciding that the threshold test had been met in this case.
- [6] On the question of the balance of convenience, Madam Justice Rowles went to some length to try to craft a decision in the exercise of her discretion that would give substantial fruits of its judgment to Price, but leave some assurance that if the appeal was successful Elan would be able to make some sort of recovery. It is not possible to say that the precise balancing of the interests of the parties was the only possible way to do it, but I am satisfied that Madam Justice Rowles exercised her discretion in a most careful and judicial manner and we cannot, in those circumstances, interfere with that.
- [7] For those reasons I would dismiss the application for review. There was a cross application before the court but the application was not pressed.
- [8] Accordingly, I would dismiss the application for review and I would dismiss the cross application on behalf of Elan for review. I would, after hearing the submissions of the parties on costs, order that each party bear its own costs of the applications this afternoon.

[9] SAUNDERS, J.A.: I agree.

[10] HOLLINRAKE, J.A.: I agree.

[11] LAMBERT, J.A.: So ordered. "The Honourable Mr. Justice Lambert"

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