COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *Kareway Homes Ltd. v. 37889 Yukon Inc.*, 2012 YKCA 3

Date: 20120516
Docket: YU694

Between:

Kareway Homes Ltd.

Appellant
(Plaintiff)

And

37889 Yukon Inc.

Respondent
(Defendant)

Before: The Honourable Madam Justice Saunders
(In Chambers)

On appeal from: Supreme Court of Yukon, February 17, 2012
(*Kareway Homes Ltd. v. 37889 Yukon Inc.*, Whitehorse Registry No. 09-A0095)

Counsel for the Appellant:	J. Tucker S. Lesiuk
Counsel for the Respondent:	M. Tatchell C. Cattermole
Place and Date of Hearing:	Vancouver, British Columbia March 29, 2012
Place and Date of Judgment:	Vancouver, British Columbia May 16, 2012

[1] Kareway Homes Ltd. applies for a stay of execution in respect to a monetary judgment against it. 37889 Yukon Inc. applies for an order that in the event a stay is ordered, Kareway post security for the amount of the judgment, pre-judgment interest, and costs. The application is brought under s. 13 of the *Yukon Court of Appeal Act,* R.S.Y. 2002, c. 47, which provides for a stay of execution, with or without terms:

> 13 Execution of the judgment appealed from shall not be stayed except under order of the judge of the Supreme Court or the Court of Appeal, or a judge thereof, and on those terms that are just.

[2] Before trial the numbered company paid $600,000 into court as security for Kareway's claim, in place of the builders lien filed by Kareway. It intends that the stay of execution it has applied for would prevent both collection of the amount of the judgment and the payment out to the numbered company of the monies paid into court, such that the monies would continue to stand as security for a judgment in its favour in the event it is successful on appeal. As para. 5 of the order provides "the Plaintiff's claim of lien registered against the title to the project ... or any security or payment into Court substituted therefor be and is hereby vacated", I consider Kareway, in seeking to freeze the monies now in court, is seeking to stay execution of that paragraph and comes, therefore, within s. 13.

[3] The litigation between the parties arose from construction of a two-building condominium complex in Whitehorse, of which the numbered company is the owner and Kareway is the builder. The parties entered into a development agreement for the project dated February 27, 2007. In 2009, when the project was substantially completed, the owner complained that the total cost exceeded the 2007 estimate plus such extra costs as had been agreed by the parties. As a result of disagreement, Kareway stopped working on the project and gave notice to the numbered company that it was terminating the contract and suing for damages. Kareway subsequently filed a builders lien.

[4] The action was tried before Mr. Justice Gower of the Yukon Supreme Court. A central issue at trial was the nature of the agreement between the parties – was it

a "cost plus" contract or a "fixed price" contract? The learned judge agreed with the numbered company that the contract was properly characterized as a "fixed price" contract. In consequence he dismissed Kareway's claim for unpaid work, dismissed Kareway's claim for a share in the profit from the sale of the condominium units (on the basis there was no profit to be shared), dismissed Kareway's claim for enforcement of its claim of lien, and ordered that the lien registered against the title to the project be vacated. Addressing the numbered company's counterclaim, the judge dismissed the counterclaim for damages for interest paid to the bank, for damages arising from loss of condominium sales due to late completion and for misrepresentation. He found, however, the numbered company had made overpayments to Kareway and gave judgment on the counterclaim in favour of the numbered company in the amount of $533,148.34 for overpayments, and prejudgment interest (now calculated as $8,348.38).

[5] A stay of execution is a species of stay of proceedings. The basic principles applicable on an application for a stay are well known. They are conveniently described by Mr. Justice Smith (referring to a stay of execution in its generic term, stay of proceedings) in *Gill v. Darbar,* 2003 BCCA 3, at para. 7:

> The applicable principles are not in dispute. 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. [In 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. [In Chambers]).

The three part test described by Mr. Justice Smith is the familiar three part test for an interlocutory injunction described in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[6] Further, where the applicant for a stay is the unsuccessful plaintiff at trial, to the extent the object of the application is to ensure funds are held in court pending disposition of the appeal, there is an aspect of a *Mareva* injunction about the application. On the theory that a party is not generally entitled to secure a claim in damages in advance of establishing entitlement, the standard on the question of merit on a *Mareva* injunction is sometimes expressed as a good arguable case or a strong *prima facie* case: see, for example, *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335, [1995] 3 W.W.R. 116 (S.C.), approved in *Silver Standard Resources Inc. v. Joint Stock Co.* (1998), 168 D.L.R. (4th) 309, 59 B.C.L.R. (3d) 196 (C.A.) and *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481, 285 D.L.R. (4th) 413. *Tracy,* at para. 54, observes that the difference in the words "good arguable case" and "strong *prima facie* case" may be a difference without practical consequence.

[7] I recognize that the original purpose of the fund in court in this case, $600,000, was to stand in the stead of a builders lien. However that claim stands dismissed, engaging the observations of Mr. Justice Smith that generally a successful party is entitled to reap the benefits of success in the trial court. Where the defendant has been successful, the benefits of such success extend to an entitlement to payment out of monies held as security for a judgment against it. Accordingly, and bearing in mind the *Mareva* aspect of the application, in considering the criteria for a stay in relation to Kareway's claim and its request for an order retaining the fund in court, I have applied something approaching the test of a good arguable appeal. I have applied the usual standard, however, in considering the application for an order staying execution against Kareway on the numbered company's judgment on its counterclaim.

[8] The first criterion on an application for a stay is the degree of merit of the appeal. The numbered company contends the appeal is without merit as it is based largely on findings of credibility and findings of fact made by the trial judge, both matters that command a high degree of deference on appeal. In contrast, Kareway

contends that their grounds of appeal are strong and that there is a significant likelihood of success in whole or in part.

[9] Kareway contends that the judge erred in interpreting the contract, including in determining that the contract was a "fixed price" contract and in failing to apply principles that give precedence to clauses of a written agreement in a contest between terms of a written agreement and an incorporated document. It contends further that the judge erred by giving undue weight to evidence of subsequent conduct, erred in failing to give effect to the entire agreement clause in the contract, erred in relying upon extrinsic evidence, demonstrated error in inconsistencies within the reasons for judgment, and erred in considering words deleted from earlier drafts of the contract. Kareway also contends that the judge erred in interpreting the profit provisions of the contract that provided that the parties would share the profit. The judge ordered repayment of an amount paid by the owner to the builder and then included that sum in the cost of work in the calculation of profit. As I understand it, Kareway says there has been a double accounting of that amount. Kareway also contends that the judge erred in according no value to unsold condominiums.

[10] The application for a stay takes on different overtones on the issue of the merit of the grounds just described, depending on whether one is considering a stay of execution of the monetary judgment on the counterclaim, or a stay in respect of the monies now held in court on account of Kareway's (now dismissed) action. Accordingly, I have found it convenient to consider the two aspects separately, dealing first with the application for a stay of execution of the monetary judgment against Kareway.

[11] Notwithstanding the numbered company's vigorous submissions to the effect that Kareway's appeal is without merit, it appears to me there is sufficient merit to easily meet the first of the usual criteria set out above, that is, there is some merit in the appeal. In addition to the issues of contractual interpretation, there are accounting issues on the profit question that appear to me to have sufficient

substance to satisfy the merit requirement under the first of the *RJR-MacDonald Inc.* criteria.

[12] The second criterion is whether Kareway has established irreparable harm should the stay of proceedings be refused. The judgment debt approaches $600,000. Kareway has adduced evidence that the numbered company has no assets of value and is not engaged in business as a going concern. Kareway submits that in the event it is successful on appeal it is unlikely to be able to recover monies it may pay in satisfaction of the judgment. The numbered company counters, contending that the inherent weakness of the appeal diminishes the possibility of irreparable harm to Kareway in the event I decline to order a stay of proceedings. It says there is one suite still owned by it in the condominium complex that has not been sold, and that constitutes a sufficient asset base to satisfy concerns that any remedy Kareway might obtain on this appeal would be an empty one.

[13] On balance I am satisfied that Kareway has established, by the nature of the numbered company's limited business activities and apparent limited assets, that it will suffer irreparable harm in the event it is required to pay the monetary judgment at this time.

[14] On the question of balance of convenience Kareway urges the court to consider that execution on the judgment will adversely impact its cash flow, with possible interruption of its business operations, and that, in the event it is successful on appeal, payment on the judgment will place it in a situation of seeking to recover a significant sum of money paid unnecessarily to a corporation that holds no assets and is not engaged in an on-going business. It submits, in contrast, that the only prejudice the numbered company may suffer if the stay is granted is delay in obtaining payment on the judgment because it, Kareway, is continuing in business as a construction contractor and owns sufficient assets to satisfy the judgment debt if such is necessary at the conclusion of the appeal.

[15] The numbered company disagrees that the balance of convenience favours Kareway. Again it points to one unit, unsold as yet, the existence of which it says

diminishes the risk to Kareway should Kareway ultimately be successful on appeal. The numbered company does not dispute, however, Kareway's submission that apart from this project it has no assets, or Kareway's contention that Kareway is an established business in the local economy. The numbered company relies upon the court's general preference for a hands-off approach whereby the successful litigant may enjoy the fruits of its success. Consistent with that preference, the numbered company says that, in the event the stay of execution is granted, it should at least be protected by a term of the order that Kareway post security: *Larose v. Yavis* (1993), 25 B.C.A.C. 201, and *South Pacific Import Inc. v. Ho,* 2007 BCCA 254. The numbered company says there is a presumption in favour of security for judgment and costs where there is a serious question as to whether recovery may be difficult: *Paradise Lakes Country Club v. Ahmed,* 2005 BCCA 466. Last, the numbered company contends that Kareway has ignored its requests for information that would establish Kareway's ability to satisfy the judgment in the future in the event Kareway is unsuccessful on appeal, and refers to transfers of property during the course of the litigation which it says have diminished the estate from which the judgment could be paid.

[16] It appears to me, on the evidence as to the nature of the parties' respective businesses, that the balance of convenience favours a stay of execution. However, the numbered company's concerns are not devoid of merit, and in exchange for the delay in collecting on its judgment, I consider it should have the certainty of some monies paid into court as security. I shall address that aspect, as it is affected to some degree by the application for a stay in respect to the monies now held in court, after considering the stay application in relation to those monies.

[17] I have earlier indicated that a higher standard should be applied to the merit criterion where a stay application seeks to tie up assets of a party on the chance the applicant is able to reverse the dismissal of its claim. On this question we are not examining the basis of the judgment against Kareway on the counterclaim, but rather assessing as best we can the strength of the claim it advanced as plaintiff against the numbered company. Here the appeal of the dismissal of Kareway's claim

engages questions of fact and credibility as well as questions of law. Questions of fact and credibility present particular difficulties for an appellant. While the grounds of appeal certainly are arguable, I cannot say they rise to the degree of strength that would support the order sought, particularly considering that the numbered company has succeeded at trial and has been deprived of the use of the monies for some time.

[18] I would not interfere, by way of a stay, with disposition of the monies now lodged in court.

[19] I come now to the amount of security that I consider should be paid by Kareway. There are, in my view, serious arguments to be made on the double accounting and profit sharing issues. The numbered company contends, countering Kareway's submission that the judge's method of profit calculation was seriously flawed and amounts to double accounting, that the damage award under-compensates and will be increased on the cross appeal. However just as I am not of a mind to allow Kareway security for its un-established claim, so too I am not inclined to factor the possibility the numbered company will be successful in its attempt to increase the monetary judgment into my determination of the amount that should be posted as security.

[20] It appears to me, at this stage of the appeal, that the considerations Kareway raises with respect to the judge's calculation of profit are sufficiently strong that it ought not to have to post the entire amount of the judgment as security. This conclusion is reinforced by the evidence before me as to the financial ability of Kareway to satisfy the judgment.

[21] Considering the court's usual inclination to order some security in exchange for a stay of proceedings, and being mindful of the issues and evidence, in my view $350,000 is an appropriate sum to stand as security for the judgment, interest and costs, pending disposition of the appeal. In the event Kareway wishes to produce another form of security, it may apply to do so.

[22] Accordingly, I order that there be a stay of execution of the judgment, except for para. 5 of the order relating to the monies now lodged in court, upon Kareway depositing $350,000 in court as security as indicated.

[23] For the convenience of the parties, I would advise that any application to substitute another form of security for the amount ordered to be posted by Kareway may be made to any judge of this court and is not required to await my availability.

"The Honourable Madam Justice Saunders