NOVA SCOTIA COURT OF APPEAL
Citation: Wall v. Horn Abbot Ltd., 2006 NSCA 60

Date: 20060512
Docket: CA 257198
Registry: Halifax

Between:

David H. Wall

Applicant

v.

Horn Abbot Ltd., 679927 Ontario Limited (formerly Horn Abbot Productions Limited), Christopher Haney, Charles Scott Abbott, John Haney and Edward Martin Werner

Respondent

Judge:	Justice Elizabeth Roscoe, In Chambers
Application Heard:	May 11, 2006, in Halifax, Nova Scotia
Held:	Application for stay is dismissed with costs to be costs in the cause of the application for leave to the Supreme Court of Canada.
Counsel:	Kevin A. MacDonald, for the applicant William L. Ryan, Q.C. and Christa M. Hellstrom for the individual respondents John Cotter, for the corporate respondents

Reasons for judgment:

[1] This is an application for an order staying execution of the judgment of this court dated March 24, 2006, pending an application for leave to the Supreme Court of Canada. The application for the stay is made pursuant to s. 65.1(1) of the **Supreme Court Act**, R.S.C. 1970, c. S-19, as amended:

> 65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

[2] The leave application to the Supreme Court is subject to meeting the requirements of s. 40(1) of the **Act**:

> 40. (1) ...an appeal lies to the Supreme Court ..., where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.
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> [emphasis added]

[3] The decision of this court, for which leave to appeal to the Supreme Court is sought, allowed an appeal from an interlocutory decision refusing to strike a notice of trial with jury and ordered that the trial proceed by judge alone. See: 2006 NSCA 36; [2006] N.S.J. No. 105 (Q.L.). The application for leave to appeal was filed on May 3, 2006.

[4] In the underlying action which was commenced in November 1994, the plaintiff, Mr. Wall, alleges that he was the first to have the concept for the game "Trivial Pursuit" and that after he told one of the defendants about it in 1979, they used his idea to develop and successfully market the game. Mr. Wall claims breach of fiduciary duty, unlawful conversion and fraud, and seeks declarations as to title, declarations as to copyright, trademarks and intellectual property, an accounting, and general damages. The issues of liability and damages have been ordered to be

tried separately. Eight months have been set aside for the trial of the liability issue alone, which is scheduled to commence on May 23, 2006 in Sydney before Justice David MacAdam.

[5] The issues on the appeal to this court were whether the chambers judge erred in concluding that the trial could be by jury because matters could be taken from a jury mid-trial with or without the parties' consent, and whether it was an error to decide before the trial commenced that anyone who chose not to serve on the jury would receive an automatic exemption. This court found that the chambers judge erred by not striking out the trial by jury notice after he determined that there was a real likelihood that he would discharge the jury in the course of the trial. The court declared that it would be an injustice to any litigant if, having prepared for a jury trial, he or she were told part-way through the trial that the forum had changed to a judge-alone trial which would demand different trial strategies. The court held that in stating that judicial discretion to excuse a person from a jury would not apply and that the anticipated length of the trial itself was good and sufficient reason to excuse anyone who wished to be excused, the chambers judge erred in principle. The process for automatic exemption approved by the trial judge impermissibly reduced the randomness of jury selection.

[6] The grounds raised by the application for leave to appeal to the Supreme Court are:

> 1. Is it a sufficient reason to strike the jury notice if, prior to trial, it is perceived as a possibility that the jury might be discharged before the completion of the trial?
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> 2. Is it a sufficient reason to strike the jury notice if, prior to jury selection, it is perceived as a possibility that the length of trial may produce exemptions from jury service?

[7] Counsel for the applicant advises that in addition to this application for a stay pending appeal, an application to adjourn the trial pending the application for leave to the Supreme Court was made to the trial judge who dismissed the application by oral decision May 10, 2006.

[8] In **Minister of Community Services v. B.F.**, 2003 NSCA 125, Justice Cromwell set out the test on an application for a stay pursuant to s. 65.1 of the **Supreme Court Act**:

> [10] These provisions have been held to authorize ... any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the [Supreme] Court of the controversy, so as to enable the Court to render a meaningful and effective judgment.: **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311 at p. 329.
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> [11] The test for a stay under s. 65.1, in circumstances in which a leave application has been filed at the time the stay is sought, was set out by the Supreme Court in **RJR-MacDonald**. (In fact, by the time the decision on the stay was given in that case, leave to appeal had been granted.). Briefly, the test calls for examination of three factors: the strength of the case on the merits to ensure that it raises a serious question, whether the applicant for the stay will suffer irreparable harm if the stay is refused, and finally which party would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits: at p. 334.
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> [12] I should clarify certain aspects of this test as it applies in the context of this case. In applying the first part of the test I must remember that, as leave has not been granted at this point, the first part of this test must be modified so as to be concerned with whether there is a serious or arguable issue for leave being granted pursuant to s. 40 of the **Supreme Court Act**. In other words, the question is not simply whether there is an arguable issue of law, but whether there is an arguable issue of law which could qualify for leave to appeal to the Supreme Court of Canada. As decided by Freeman, J.A in **Turf Masters Landscaping Ltd. v. T. A.G. Developments Ltd.** (1995), 144 N.S.R. (2d) 326 (C.A. Chambers), this requires that the applicants show that there is an arguable issue of public importance, an important issue of law or mixed law and fact, or that the matter is otherwise of such a nature and significance as to warrant decision by the Supreme Court of Canada as required for leave to appeal to that Court under s. 40 of its **Act**.
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> [emphasis added]

[9] The first question is therefore whether the applicant has shown that the issues raised in his application for leave are arguably of public importance, raise an important issue of law or are otherwise of sufficient significance to qualify for leave to appeal to the Supreme Court of Canada. The appellant says the matter is of public importance and raises an important issue of law because it involves the:

> ...sanctity of the jury trial and whether a jury of Canadians or a judge should decide who invented “Trivial Pursuit”®. It involves an important issue of law. It is of National importance as Trivial Pursuit ® is now part of our national consciousness and the stuff of legends. Canadians have the right to know who in fact invented it and that is a determination that should be made by 7 Canadians...

[10] I do not agree that the plaintiff’s wish to a have a civil jury trial in this case is a matter of national importance or raises an important issue of law. The Supreme Court has frequently denied leave to appeal in cases where one party’s right to have their case decided by a civil jury was the main issue. See for example: **MacPherson v. Czaban,** [2002] S.C.C.A. No. 480; **Parker (Guardian ad litem of) v. Courtenay (City),** [1991] S.C.C.A. No. 331; **Johnson v. Laing**, [2005] S.C.C.A. No. 91; **Palpal-Latoc v. Berstad**, [2004] S.C.C.A. No. 186; **Weisenberger v. Johnson & Higgins Ltd.,** [1999] S.C.C.A. No. 70; **Cowie v. Colwell,** [1996] S.C.C.A. No. 493; **Chrastina (Litigation Guardian of) v. Patterson Estate,** [1995] S.C.C.A. No. 368; **Gibson v. Bassie, Kantor & Plupek,** [1987] S.C.C.A. No. 34; **Apollo Leasing Ltd. v. Dorland,** [1982] S.C.C.A. No. 255.

[11] Although Trivial Pursuit is a popular Canadian game and a lawsuit involving it would probably be of interest to members of the public, that does not equate to an important question of law or a question of law that is of public or national importance. The applicant has not advanced any argument that the decision of this court is contrary to existing jurisprudence or in conflict with other appellate decisions. It involves an issue that would have likely precedence only in cases involving extremely long trials and only those in Nova Scotia, because it is based on an interpretation, in part, of the Nova Scotia **Judicature Act**, **Juries Act** and **Civil Procedure Rules**.

[12] I am unable to find that the applicant has satisfied the first part of the test for a stay pending appeal to the Supreme Court and the application should therefore be dismissed.

[13] Although it is not necessary to address the second and third prongs of the test for a stay, had the applicant met the first part of the test, I would have found that he has not satisfied the burden of proving that he would suffer irreparable harm if the stay is not granted.

[14] If the stay is not granted the eight month trial by judge alone will commence next week in Sydney. The applicant says that if the stay is not granted it is likely that the Supreme Court would consider his appeal to it to be moot if the trial has proceeded and that leads to irreparable harm. I disagree with that submission. I accept the submission of Mr. Cotter, counsel for the corporate respondents, that there are three possible scenarios if the requested stay is not granted and that none result in irreparable harm to the applicants:

> The first possibility is that the Supreme Court of Canada denies leave. In this scenario the plaintiff clearly suffers no harm of any type, irreparable or otherwise, if the trial proceeds as scheduled before a judge alone.
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> The second possibility is that the Supreme Court of Canada grants leave to appeal, but then dismisses the appeal. In this scenario the plaintiff once again clearly suffers no harm of any type, irreparable or otherwise, if the trial proceeds as scheduled before a judge alone.
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> The third possibility is that the Supreme Court of Canada grants leave to appeal and ultimately allows the appeal, in which case it is open to the Supreme Court, if appropriate, to order a new trial with a jury. This is the only scenario under which the plaintiff potentially suffers any adverse consequences, namely having a second trial of the action. This is not irreparable harm. ...

[15] Although obviously the necessity of a second long trial if the appeal is allowed would involve tremendous costs to all involved, that alone is an insufficient basis to find irreparable harm. Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured: see **RJR-MacDonald Inc. v. Canada (Attorney General)**, *supra* ¶ 59. In **Luscar Ltd. v. Smokey River Coal Ltd.**, [1999] S.C.C.A. No. 381, by order of McLachlin, J., as she then was, an application for a stay pending leave was dismissed. The order provided:

> The applicants Luscar Ltd. And Consol of Canada Inc. apply for an order staying a trial which has been set to commence in Alberta, September 1, 1999, pending determination of their application for leave to appeal from an order of the Alberta Court of Appeal holding that the issue between the applicants and Smoky River Coal Limited should be resolved in court pursuant to the Companies' Creditors Arrangement Act, R.S.A. 1985, c. C-36, (the "CCAA") rather than by arbitration pursuant to the Shareholders' agreement between the parties.

> I am prepared to assume without deciding that the applicants raise an important point of law. Nevertheless, they have failed, in my opinion, to demonstrate that they will suffer irreparable harm if the trial proceeds while their application for leave to appeal is perfected and considered. If they ultimately prevail, the trial will have been a nullity. The decision can be set aside and the applicants compensated for their trial-related costs.

To the same effect, see **Canadian Pacific Railway Company v. Canada (Transportation Agency) ,**[2004] F.C.J. No. 1713 (C.A.); **Balm v. BHC Securities, Inc**., [2003] A.J. 1232 (C.A.).

[16] Since the applicant has not satisfied the first two parts of the test, it is not necessary to consider the balance of convenience. If it were, I would have to consider the thrown away and wasted time and money and prejudice to the respondents from further delay. The respondents' lawyers have cleared their calendars, spent the last several weeks preparing for a long trial and have committed to a lease of premises in Sydney. To stay these proceedings which have been underway for 12 years, a week before the start of an eight month trial which was scheduled a year ago, would be immensely inconvenient and costly, not only for the several respondents, their lawyers, and their witnesses, but also for the court administration.

[17] I therefore dismiss the application for a stay with costs to be costs in the cause of the application for leave to the Supreme Court of Canada.

Roscoe, J.A.