Date: 19990603
Docket: CA 156289

# NOVA SCOTIA COURT OF APPEAL

Cite as Oceanart Pewter Canada Ltd. v. Hartlen, 1999 NSCA 12

**BETWEEN:**

| | | |
|---|---|---|
| OCEANART PEWTER CANADA LIMITED<br><br>Applicant/<br>Appellant | ) | Robert F. Morrison<br>for the Applicant/Appellant |
| - and - | ) | |
| KAREN HARTLEN, TAMMY MASON and DEBORA GRAY<br><br>Respondents | ) | Scott Sterns<br>for the Respondents |
| | ) | Application heard:<br>June 3, 1999 |
| | ) | Decision delivered:<br>June 3, 1999 |

**BEFORE THE HONOURABLE JUSTICE THOMAS A. CROMWELL,**
**IN CHAMBERS**

**CROMWELL, J.A.:** (orally, in Chambers)

[1] The appellant, Oceanart Pewter Canada Limited, has appealed a judgment of Hamilton J. requiring it to pay damages for wrongful dismissal and costs to three former employees. The amount payable is roughly $20,000.

[2] I have set the appeal down to be heard on September 30, 1999 at 2:00 p.m., with the appeal book being due on July 30, the appellant's factum on August 16 and the respondent's factum on September 3, 1999.

[3] The appellant applies for a stay of execution pursuant to Rule 62.10 of the *Civil Procedure Rules*. Reliance is placed on both the primary and secondary grounds as described by Justice Hallett in the well-known case of **Fulton Insurance Agencies v. Purdy** (1990), 100 N.S.R. (2d) 341.

[4] A brief affidavit of May Ocean, President of the appellant, has been filed. In it, Ms. Ocean says, without elaboration, that paying the respondents what they are owed under the judgment would, and here I quote the affidavit, ". . . have a significant impact on the appellant company in its operations". Ms. Ocean further states that portions of the award will have to be remitted to Revenue Canada, and in the case of one of the respondents, to Human Resources Development Canada. Ms. Ocean fears that it will be extremely difficult and cumbersome for the company to recover funds from those two sources and each of the three respondents. I was advised by counsel that recovery of the remittances should not be unduly difficult provided the appeal is decided

prior to the end of the year. With a date for hearing of September 30, it is almost certan that the appeal will have been decided before the end of December. There is no evidence before me that the respondents are other than solvent parties.

[5] Part way through his submissions, Mr. Morrison for the applicant, asked to call Ms. Ocean as a witness to adduce additional evidence about the impact of payment on the appellant company. I denied that request. The tests for granting a stay are well-known and other than in unusual circumstances evidence in the Court of Appeal chambers is to be given by affidavits which are served and filed in advance of the hearing. No new or unforeseeable issues arose during the course of the hearing. In my respectful view, it would be both improper and unfair to the respondents who, after being served with the appellant's material, chose to file no evidence to now face, at this late stage, a new evidentiary basis for the application.

[6] The general rule with respect to stays is set out in *Civil Procedure Rule 62.10* and it is that the filing of a notice of appeal does not operate as a stay of execution. The judgment at trial may be enforced pending appeal unless the appellant persuades a judge of the Court of Appeal that either the primary test in the **Fulton** case is met, or extraordinary circumstances exist making it just to grant a stay.

[7] In my view, the evidence does not support a conclusion that the primary test for granting a stay has been met. Irreparable harm, or even risk of it, if the stay is not granted has not been established. General and unsupported statements of "significant

impact” on the appellant and of difficulty in recovering funds paid under court order do not establish irreparable harm within the meaning of the **Fulton** test.

[8] Exceptional circumstances justifying a stay have not been made out. Enforcement of a judgment pending appeal, on its own, is not an exceptional circumstance. It is not alleged that the judgment under appeal is so plainly wrong that a stay is justified on that basis. In my opinion, in a case such as this one, involving payment of a sum of money from one solvent party to other solvent parties and where the primary test in **Fulton** is not met, it would be very rare indeed to find exceptional circumstances justifying the exercise of discretion in favour of granting a stay and I can find no such circumstances here.

[9] Having considered the evidence, the memoranda of counsel and the submissions of counsel made before me, I am not persuaded that it would be just to grant a stay of execution. The application for the stay is therefore dismissed. This was an extremely weak case for a stay. With that in mind, I order the appellant to pay the respondents’ costs of this application which I fix at $600 inclusive of disbursements and I direct them to be paid forthwith.

Cromwell, J.A.