NOVA SCOTIA COURT OF APPEAL

Citation: *G.W. Holmes Trucking (1990) Ltd. (Re),* 2005 NSCA 132

Date: 20051020
Docket: CA 256037
Registry: Halifax

Between:

In the matter of: G.W. Holmes Trucking (1990) Limited

- and -

In the matter of: The application by A.W. Leil Cranes & Equipment Ltd. for David MacDonald to respond to undertakings pursuant to *Rule* 115 of the *Bankruptcy and Insolvency General Rules* C.R.C., c. 368 and *Rule* 20 of the *Nova Scotia Civil Procedure Rules*

- and -

David MacDonald

Applicant/Appellant

v.

A. W. Leil Cranes & Equipment Ltd.

Respondent

Judge: Justice Linda Lee Oland

Application Heard: October 13, 2005, in Halifax, Nova Scotia, in Chambers

Held: Stay application pending appeal granted with costs.

Counsel: Robert Pineo, for the applicant/appellant
Arthur von Kursell, for the respondent

Decision:

Introduction

[1] This is an application for a stay pending the disposition of an appeal, pursuant to *Rule* 62.10.

[2] G.W. Holmes Trucking (1990) Limited ("Holmes Trucking") made an assignment pursuant to the *Bankruptcy and Insolvency Act* in December 2003. Its majority shareholder, Mr. A.W. Leil, is the majority shareholder of A.W. Leil Cranes & Equipment Limited ("Leil Cranes"). The applicant, David MacDonald, had been employed as the general manager of Holmes Trucking. In 2004 Mr. MacDonald was discovered several times in proceedings pertaining to the bankruptcy of Holmes Trucking and, in the course of those discoveries, gave certain undertakings.

[3] On June 27, 2005 the Registrar in Bankruptcy dismissed Mr. MacDonald's application for cancellation of orders the Registrar had granted for Mr. MacDonald's examination pursuant to s. 163(2) of the *Act*. Mr. MacDonald had contended that the examination was going beyond what is reasonably contemplated by that provision, which describes its purpose as the investigation of the administration of the estate of the bankrupt. He had also argued that Leil Cranes was conducting the examination, not in the interests of the creditors generally, but for its own interests.

[4] Justice M. Heather Robertson of the Nova Scotia Supreme Court dismissed Mr. MacDonald's appeal from the Registrar's decision. Her order issued September 30, 2005 and Mr. MacDonald filed a notice of appeal on October 5, 2005. That notice seeks the reversal of Justice Robertson's order on the basis that Leil Cranes is not a proper person to conduct examinations pursuant to s. 163, as it had received a preferential payment and was pursuing the examinations to further private litigation and not for the benefit of creditors generally.

[5] Leil Cranes applied for an order setting out the date upon which Mr. MacDonald must provide certain undertakings to it. The Registrar in Bankruptcy ordered that the undertakings given by Mr. MacDonald shall be provided unless

the order of Justice Robertson and that order itself are stayed pending the appeal. Hence this application for a stay.

Analysis

[6] That the test for granting a stay of execution pending appeal was set out in *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341 (N.S.C.A.) at § 28-29. To succeed, the applicant must satisfy all three parts of the primary test or satisfy the secondary test, which tests impose a fairly heavy burden on the applicant.

[7] It is my view that this application for a stay does not meet all three parts of the primary test. Mr. MacDonald has not established that if the stay is not granted, he will suffer irreparable harm that is too difficult to, or cannot be compensated by a damage award.

[8] Mr. MacDonald's application was not supported by his own affidavit but by that of Dennis James, one of his solicitors. In regard to the harm that his client would suffer should the stay not be granted, he deposed:

> 7. The undertakings that form the subject matter of the present Appeal relate to a trucking business formerly operated by the Appellant – transportation Logistics Leasing Ltd. These undertakings amount to almost full disclosure of all of his former business records, including client names, suppliers, and business methods such as profit formulae calculations. I attach to this affidavit as Exhibit "5", a listing of the undertakings sought;
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> 8. The Appellant continues to operate in the same trucking industry, with the same clients, suppliers, and business methods such as profit formulae calculations as mentioned in the preceding paragraph. I have been informed by the Appellant, and do believe, that he fears that because the undertakings will become public record, his stature and competitive advantage in the marketplace will be irreparably damaged should these undertakings be fulfilled prior to the present Appeal being heard on its merits;

> 9. That the Appellant has fulfilled most of the undertakings given, save those that would produce the harm referred to in the preceding paragraphs.

[9] In general, disclosure of confidential information required by a court order which is subsequently set aside on appeal constitutes irreparable harm: see, for example, *White v. E.B.F. Manufacturing Ltd.,* [2005] N.S.J. No. 27 (N.S.C.A.) at § 24. However, as I indicated to both counsel in Chambers, their submissions - no matter how fulsome or passionate - do not constitute evidence. The only evidence submitted on irreparable harm is contained in the affidavit in support of this application for a stay.

[10] That affidavit was not generous with particulars. For example, it did not indicate the type or nature of the trucking business which had been carried on by Transportation Logistics Leasing Ltd. and is now carried on by Mr. MacDonald. Nor did it characterize the business as specialized in any respect, identify any competitors, or say anything about the marketplace in which it operates. Nor did it specify which of the 22 undertakings in the listing attached to the affidavit were those which remained unfilled because of the alleged potential for causing irreparable harm. Nor did it demonstrate how disclosure of the information arising from any of the undertakings in question would harm Mr. MacDonald's business. Not one example was given which showed a link between the information to be provided pursuant to an undertaking and a negative impact upon any competitive advantage Mr. MacDonald may enjoy.

[11] It was necessary for me to ask counsel for Mr. MacDonald, in Chambers, which of the listed undertakings might be those which were the subject of this application for a stay. It was necessary for him to indicate which caused the most concern and which might cause lesser concern. It was also necessary for him to address how disclosure of the responses to the certain undertakings might affect his client.

[12] The evidence as to irreparable harm is sketchy, lacks specifics, and does not establish that the answers to the undertakings are confidential or how their disclosure would adversely impact the business. To large measure it consists of Mr. MacDonald's conclusions as to irreparable harm, without setting out the basis for those conclusions. To satisfy the second component of the primary test, it is not enough to simply state that irreparable harm would result. The applicant here

had to substantiate that his responses to certain of the undertakings contain sensitive or confidential business information that would be harmful to him. This Mr. MacDonald failed to do. I have not been persuaded on the evidence before me that he would suffer irreparable harm were a stay pending appeal not granted.

[13] Leil Cranes had offered, had irreparable harm been established, to treat Mr. MacDonald's responses under the implied undertakings rule and to keep them confidential, albeit not clearly for a period extending to the disposition of the appeal. In the circumstances it is not necessary that I decide whether the implied undertakings rule applies or could apply to documents or exhibits from a s. 163 examination. I did however appreciate the detailed post-hearing memoranda both counsel submitted on that and other points which first arose at the Chambers hearing itself.

[14] Since Mr. MacDonald has not satisfied its irreparable harm component, his application has failed to meet the primary test in *Fulton*.

[15] I turn then to the secondary test which requires that the court be satisfied that exceptional circumstances exist which make it "fit and just" that a stay pending appeal be granted. From my review of the Registrar's decision and the notice of appeal, I am persuaded that should a stay not be granted, the appeal will be rendered moot. While Mr. MacDonald was an employee of the bankrupt, and thus not a party to the bankruptcy proceeding, that status does not change the potential and adverse impact upon his appeal. In Chambers, Leil Cranes through its counsel suggested that Mr. MacDonald may have wrongfully used his position as general manager of the bankrupt for his personal gain, and for that reason he has failed to act with dispatch in regard to and is contesting the examinations. However, I observe that the bulk of the undertakings in issue was given only late in 2004 and that applications to the Registrar and appeals of his decisions were undertaken this year.

[16] I am satisfied, in the circumstances of this particular application and appeal, that the applicant has met the secondary test of exceptional circumstances. I would grant him a stay pending appeal together with costs of $1500 plus disbursements as agreed or taxed.