

NOVA SCOTIA COURT OF APPEAL

**Citation: Nova Scotia Power Inc. v. Carbo-Pego - Abastecimento De
Combustiveis S.A, 2007 NSCA 93**

Date: 20070910

Docket: C.A. 280312

Registry: Halifax

Between:

Nova Scotia Power Incorporated, a body corporate
Appellant (Applicant)
and

CarboPego - Abastecimento De Combustiveis S.A.
Respondent

Judge: The Honourable Justice Fichaud

Application Heard: September 6, 2007, Halifax, Nova Scotia, In Chambers

Held: Stay of execution granted with costs.

Counsel: David G. Coles, Q.C., Nicole Godbout
and David Parker, articled clerk, for the appellant
(applicant) Nova Scotia Power Inc.
James E. Gould, Q.C. and Lisa Wight, for the respondent
CarboPego-Abastecimento De Combustiveis S.A.

Decision:

[1] The appellant Nova Scotia Power Inc. (“NSPI”) applies for a stay of execution under *Rule* 62.10.

Background

[2] AMCI Export Corporation (“AMCI”) has a head office in Pennsylvania. In April 2004, NSPI sued AMCI in the Nova Scotia Supreme Court for breach of contract. On January 18, 2005 NSPI obtained a pre-judgment attachment order under *Rule* 49, attaching property of AMCI in Nova Scotia. AMCI’s property covered by the attachment order comprises a guaranteed investment certificate valued at \$7,522,925.30 and 21,500 tonnes of coal with an approximate value of \$1,000,000. AMCI’s subsequent application to vacate the attachment order was dismissed by the chambers judge, in a decision affirmed by the Nova Scotia Court of Appeal: 2005 NSCA 152.

[3] The respondent CarboPego-Abastecimento De Combustiveis S.A. (“CarboPego”), a Portuguese corporation, applied to the Nova Scotia Supreme Court to register a judgment in its favour issued by a court in England against AMCI. Justice Robertson granted an interim order, followed by a further order on February 24, 2006 permitting the registration in Nova Scotia of the English judgment, in the amount of \$14,232,667.28. Justice Robertson’s order stayed CarboPego’s execution of this judgment because of the pending NSPI action against AMCI. Clauses 5 and 6 of Justice Robertson’s order prescribed the stay:

5. The enforcement of any such Execution Order against the Attached Property held by any Sheriff in the Province of Nova Scotia pursuant to the Attachment Order obtained by NSPI in S.H. No. 219171 be and the same is hereby stayed until such time as the Entitlement Hearing can be heard and determined, which application may be brought by either party and shall be scheduled to be heard at the earliest available court date convenient to NSPI and CarboPego following the Summary Judgment application in S.H. No. 219171.
6. The restraining order issued herein on 9 January 2006 in CarboPego’s favour be and the same is hereby extended and shall remain effective until further order of this Honourable Court, and any Sheriff in the Province of Nova Scotia is hereby restrained from releasing the Attached Property

more fully described in Schedule 'B' hereto to the extent of \$14,232,667.28 plus interest thereon at the rate of 8% per annum (\$3,135.89 per day) from 30 January 2006 to the date of this Judgment, until further order of this Honourable Court.

[4] On June 13, 2006 and again on June 28, 2006, CarboPego applied to revoke or vary Justice Robertson's stay of execution. Both applications were dismissed by chambers judges of the Nova Scotia Supreme Court.

[5] Paragraph 5 of Justice Robertson's order directed that NSPI and CarboPego schedule an "entitlement hearing" to determine their priorities over AMCI's attached assets. This hearing was convened before Justice LeBlanc, who issued a decision dated April 20, 2007: 2007 NSSC 118. Justice LeBlanc ruled in favour of CarboPego:

[53] In short, NSPI has not established that an attachment order under *Rule 49* gives it an interest in the property of AMCI that can take priority over the registered judgment held by Carbopego.

Justice LeBlanc's decision of April 20, 2007 did not refer to Justice Robertson's stay of execution. On August 23, 2007 Justice LeBlanc issued supplementary reasons, lifting the stay that had been granted by Justice Robertson: 2007 NSSC 248. An order dated August 29, 2007 incorporated the rulings in Justice LeBlanc's reasons of April 20, 2007 and August 23, 2007. This Order is the judgment under appeal.

[6] Meanwhile NSPI applied to the Nova Scotia Supreme Court for a summary judgment in its action against AMCI. The application was heard on April 25 and September 25, 2006 by Justice McDougall, who issued a decision on May 13, 2007: 2007 NSSC 139. Justice McDougall dismissed a portion of NSPI's summary judgment application but, for one claim, granted NSPI summary judgment for liability with damages to be quantified in a separate assessment hearing. The assessment hearing has not yet occurred. AMCI has appealed and NSPI has cross appealed from the decision of Justice McDougall. That appeal and cross appeal, separate from the current appeal, are scheduled to be heard by the Court of Appeal on December 6, 2007.

[7] As mentioned earlier, in the current proceeding, NSPI has appealed from the judgment of Justice LeBlanc. NSPI's amended notice of appeal says that Justice

LeBlanc erred (1) by ruling that NSPI's attachment order did not take priority over CarboPego's registered judgment, and alternatively (2) by failing to rule that NSPI's attachment order ranked *pari passu* with CarboPego's judgment over the attached assets of AMCI. Further, NSPI says (3) that Justice LeBlanc erred by vacating Justice Robertson's stay of execution.

[8] The hearing of NSPI's appeal from Justice LeBlanc's judgment is scheduled for December 11, 2007.

Issue

[9] NSPI applies under *Rule 62.10* for an order staying the execution of CarboPego's judgment against the assets that are attached by NSPI's attachment order.

Application of Rule 62.10

[10] *Rule 62.10* (2) authorizes the chambers judge to "order stayed the execution of any judgment appealed from."

[11] CarboPego's English judgment against AMCI is not under appeal to this court. Neither is Justice Robertson's order that permitted the registration in Nova Scotia of CarboPego's English judgment. I do not have the power under *Rule 62.10* to stay the execution of the English judgment or of Justice Robertson's order.

[12] The matter under appeal is the judgment of Justice LeBlanc. Justice LeBlanc's order of August 29, 2007 said:

5. CarboPego is entitled, as a judgment creditor which has obtained a Judgment and registered a notice of judgment in the Personal Property Security Registry pursuant to the *Creditors' Relief Act* and the *Personal Property Security Act*, to execute on the Attached Property of AMCI, forthwith, subject to any undertaking given or agreement made with respect thereto between CarboPego and NSPI;
6. That part of the Order of Justice M. Heather Robertson herein dated February 24, 2006, granting a stay of execution on CarboPego's Execution Order, be and the same is hereby revoked, lifted, released and set aside, along with any other restraint on distribution of the Attached Property;

[13] I will treat this motion as an application for a stay of execution of ¶ 5 and 6 of Justice LeBlanc's order of August 29, 2007.

Principles under Rule 62.10

[14] The starting principle is that the successful litigant may retain the fruit of his judgment unless "required in the interests of justice": *Coughlan v. Westminster Canada Limited* (1993), 125 N.S.R. (2d) 171 (C.A.), at p. 174, per Freeman, J.A. The "interests of justice" are governed by the principles under *Rule 62.10*.

[15] In *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.), at ¶ 27, Justice Hallett set out what has become the accepted definition of those principles under *Rule 62.10*. In brief, the applicant for the stay must show either that (1) there is an arguable case, denial of a stay would cause irreparable harm and the balance of convenience favours a stay or (2) there are exceptional circumstances making it just that the stay be granted.

[16] This motion may be determined under the primary test. There is no need to deal with the secondary test respecting exceptional circumstances.

Arguable Case

[17] NSPI says that the function of an attachment order is to "attach" property until the conclusion of the underlying lawsuit and this implies an interim property interest. NSPI's lawsuit has not concluded. Justice McDougall has issued a partial summary judgment for liability in favour of NSPI, with damages to be assessed, while liability for the remaining components of NSPI's claim is yet to be decided. NSPI says that *Rule 49* is subordinate legislation and there is an arguable case whether its legislative interim property interest ranks either prior or *pari passu* with CarboPego's interest as a registered judgment holder under the *Creditors' Relief Act*, R.S.N.S. 1989, c. 112 as amended.

[18] NSPI refers to the passages of the decision of April 20, 2007 under appeal ending with ¶ 37, where Justice LeBlanc says:

By this reasoning, an attachment order under *Rule 49* could prevail over the *Creditors' Relief Act*.

Immediately before, Justice LeBlanc had reviewed the authorities cited by NSPI from other provinces dealing with the effect of preservatory rules of court. Although Justice LeBlanc ultimately disagreed with NSPI's proposed reasoning, NSPI submits that its submission was at least arguable.

[19] In my view, NSPI raises an arguable case on appeal. I make no further comment on the merits.

Irreparable Harm

[20] Would denial of the stay cause irreparable harm to NSPI?

[21] In *Wright v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 6 at ¶ 12 I said:

[12] Generally, if the judgment is monetary, the appellant (applicant for a stay) can afford to pay and the respondent can afford to repay, there is no irreparable harm. But a real risk that the respondent would be unable to repay may establish irreparable harm. See *Bruce Brett and 2475813 Nova Scotia Limited v. Amica Mature Lifestyles Inc.*, 2004 NSCA 93 at ¶ 14, and cases there cited; *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (C.A.), at ¶ 14-24 and cases there cited.

See also *AGNS v. BMG*, 2007 NSCA 57, at ¶ 13.

[22] So I will consider whether, if the stay was denied, there is a real risk that a subsequent NSPI judgment against AMCI would be unsatisfied.

[23] Counsel for CarboPego says that there is no evidence AMCI is insolvent. With respect, I disagree. One indicator of insolvency is failure to satisfy debts as the debts become due. CarboPego has found it necessary to seek execution in Nova Scotia of its \$14 million English judgment against AMCI. It appears, therefore, that AMCI has failed to satisfy its debt to CarboPego as that debt was due. I am satisfied that, if NSPI obtains a monetary judgment against AMCI, there is a real risk that AMCI will not satisfy that debt to NSPI.

[24] The evidence on this application is that the GIC and coal attached by NSPI's attachment order is AMCI's only property in Nova Scotia. If the stay is denied,

CarboPego would execute against that property. CarboPego's judgment exceeds the value of the attached assets. CarboPego, a Portuguese company, would remove all the property from Nova Scotia and from the jurisdiction of the Nova Scotia courts. If NSPI later obtained a monetary judgment against AMCI, there is a real risk that NSPI would be unable to execute to satisfy that judgment.

[25] Counsel for CarboPego says that, if the stay is denied and NSPI succeeds on the appeal, NSPI may recover the attached property from CarboPego, a solvent company with assets. CarboPego's brief says:

39 . . . The consequences of the release of the Attached Property to CarboPego can easily be undone should NSPI be successful on Appeal and the Court were to so order.

[26] CarboPego has offered no undertaking to replenish the executed assets, should NSPI's appeal succeed after denial of a stay. Undoing the consequence likely would require that NSPI sue CarboPego in Portugal. Both counsel acknowledge that there is no reciprocal enforcement of judgments arrangement between Nova Scotia and Portugal. I have no evidence of Portuguese law or procedure. I disagree that this Portuguese litigation would "easily undo" the loss of security offered by the attachment order covering the assets that now are in Nova Scotia.

[27] I accept that NSPI would suffer irreparable harm if the stay was denied.

Balance of Convenience

[28] The requested stay would apply only until the decision of the Court of Appeal in this proceeding. The appeal is scheduled to be heard on December 11, 2007. There will be a decision likely within four or five months from today. I have discussed NSPI's irreparable harm from a denial of the stay. What harm would CarboPego suffer if the stay was granted until the Court of Appeal's decision?

[29] Counsel for CarboPego cites the prospect that another unnamed creditor of AMCI may seize the assets during the currency of the stay. If there was evidence to support this concern, I would give the submission substantial weight. But there is no evidence on this application of any other creditor who may seek to seize AMCI's assets.

[30] I note that Justice Robertson's order, staying execution by CarboPego, contained a requirement that NSPI give an undertaking to indemnify CarboPego for damages and costs:

9. NSPI's undertaking with respect to damages and costs, filed and served pursuant to clause 7 of the Order of Justice M. Heather Robertson dated February 16, 2006, shall and does apply *mutatis mutandis* fully and in every respect to this Order.

Clause 7 of the order of February 16, 2006 said:

7. NSPI is ordered to forthwith file and serve its written undertaking to pay any and all damages and costs, including legal costs, that may accrue to or be incurred by CarboPego and ordered by the Court as a result of the Sheriff being wrongfully restrained from acting on CarboPego's Execution Order;

This undertaking would help to relieve CarboPego's loss if the condition of the undertaking is triggered.

[31] There is no basis to conclude that the potential irreparable harm to NSPI from denial of the stay is outweighed by any potential harm to CarboPego from the issuance of a stay.

Conclusion

[32] In summary, I will grant a stay of ¶ 5 and 6 of the order of Justice LeBlanc dated August 29, 2007, quoted earlier. This means that the stay of execution issued by Justice Robertson on February 24, 2006 remains in place, as does the provision of Justice Robertson's order providing for NSPI's undertaking for CarboPego's damages and costs. The stay shall continue until the date of the order of the Court of Appeal, following the hearing that is now scheduled for December 11, 1007.

[33] Both counsel said that costs of this application should issue in any event of the cause. I order costs of \$1,000, inclusive of disbursements, payable forthwith by CarboPego to NSPI in any event of the cause.

Fichaud, J.A.