Date: 19990216 **Docket**: C.A. 143446

NOVA SCOTIA COURT OF APPEAL
Cite as Gaudet v. Barrett, 1999NSCA1

BETWEEN:

GILBERT L. GAUDET	)	Harry E. Wrathall, Q.C.
	)	for the Applicant
Appellant/Applicant	)	
- and -	)	
	)	Leonard J. MacKay
	)	for the Respondents
WAYNE BARRETT and	)	
MARLENE BARRETT	)	
	)	Daniel W. Ingersoll
Respondents	)	CIBC watching brief
	)	
	)	
	)	Application Heard:
	)	January 21, 1999
	)	Final Brief Filed:
	(	February 2, 1999
	)	
	)	
	)	Decision Delivered:
	)	February 16, 1999
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BEFORE THE HONOURABLE CHIEF JUSTICE GLUBE, IN CHAMBERS

C.A. No. 143446

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

GILBERT L. GAUDET	)	
	)	
Appellant/Applicant	)	
- and -	)	BEFORE THE
	)	HONOURABLE
WAYNE BARRETT and	)	CHIEF JUSTICE
MARLENE BARRETT	)	GLUBE,
	)	(In Chambers)
	)	
Respondents	)	
	)	
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GLUBE, CJ.N.S.: (In Chambers)

This is an application pursuant to s. 65.1 of the **Supreme Court Act**, R.S.C. 1985, c.S-26, as amended. Section 65.1 gives a court of appeal concurrent jurisdiction with the Supreme Court of Canada in dealing with an application to stay pending an appeal to that Court.

> Stay of execution — application for leave to appeal
>
> 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.

The applicant seeks leave to appeal to the Supreme Court of Canada on the following grounds:

(1) Whether there must be a causal connection between a breach of fiduciary duty and damages recovered; and

(2) The scope of joint and several liability in Canada and more particularly, whether a fiduciary in breach of his or her duty can be held jointly and severally liable for damages resulting from breach of a separate contract.

This case commenced in 1990 when Gilbert Gaudet, a solicitor, agreed to act for both sides in a real estate transaction. The vendors were Wayne and Marlene Barrett, and the purchasers were David and Brenda Reynolds. Mr. Gaudet became aware of certain conditions which affected the purchasers' ability to obtain funds to complete the purchase. He did not provide this information to the vendors. Both the vendors and the purchasers were obtaining their financing with CIBC. The purchasers needed financing to complete the purchase and the vendors wanted to arrange a line of credit so they could commence construction of a new home pending the completion of the sale to the Reynolds. Mr. Barrett asked a representative of CIBC whether or not the Reynolds' financing was arranged prior to entering into an agreement with CIBC for his own line of credit. Although from the answer they gave him Mr. Barrett believed CIBC had arranged the Reynolds' financing, they did not advise him of specific conditions placed on the purchasers, namely, the requirements that they sell their current home before the transfer date and rearrange the terms of a leased car agreement allowing it to be used as collateral. The Barretts proceeded to obtain a line of credit and commenced construction. Just a few days before the scheduled closing date, Mr. Gaudet advised the Barretts he would no longer be acting for them. Mr. Barrett first learned of the financing conditions imposed on the Reynolds when he took his file to another lawyer. When the Reynolds could not comply with the conditions set by CIBC, the sale fell through. Among others, the Barretts sued Mr. Gaudet, the Reynolds, the real estate firm which acted for both parties, and CIBC.

The trial judge found the solicitor jointly and severally liable with the Reynolds

based on a breach of fiduciary duty. The Bank was found not liable. Mr. Gaudet appealed and the Barretts cross appealed. In its decision, the Court of Appeal made a minor reduction in the award against Mr. Gaudet, set aside the award of solicitor and client costs, increased the award against Mr. Gaudet relating to the real estate company which went into receivership before the conclusion of the trial, allowed the Barretts' appeal from the dismissal of their action against CIBC for negligent misrepresentation, dismissed the claim for breach of fiduciary duty, and made CIBC jointly and severally liable with Mr. Gaudet and the real estate company for the amount awarded for mental anguish, anxiety, upset, depression and sick days.

As a result of a court order dated December 16, 1997, Mr. Gaudet paid $65,000 to the Barretts on account which reduced the overall balance owing by Mr. Gaudet. Most of the money paid went to the Barretts' lawyers. In the order following the appeal dated November 3, 1998, the relevant parts relating to Mr. Gaudet's obligations to pay are as follows: damages to the Barretts in the amount of $114,267.92; party and party trial costs of $25,000, plus disbursements to be taxed; and, appeal costs of $10,000, plus appeal disbursements of $208.25. Other awards set out in the order were amounts flowing between CIBC and the Barretts. On November 25, 1998, the Court ordered Mr. Gaudet to pay $10,422, in trust, to the Barretts' solicitor, as a credit against the amount due to the Barretts. It appears the balance owing by Mr. Gaudet is $74,054.17. I do not believe this includes the trial disbursements.

On October 30, 1998, Mr. Gaudet filed an application for leave to appeal to the

Supreme Court of Canada. He is now seeking a stay. If the stay is granted, the Barretts seek to have an additional $5,000 paid to their solicitors on account.

The parties agree the test of whether to grant a stay is set out in the decision of Justice Hallett in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-7:

> A review of the cases indicates a trend toward applying what is in effect the **American Cyanamid** test for an interlocutory injunction in considering applications for stays of execution pending appeal. In my opinion, it is a proper test as it puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.
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> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
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> (1) satisfy the Court on each of the following:
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> (i) that there is an arguable issue raised on the appeal;
>
> (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and
>
> (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is

granted; the so-called balance of convenience or:

(2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

The First Test

The Barretts submit the burden on the applicant is even more onerous where the request for a stay follows a decision of the Court of Appeal. The submission is the applicant should show more than just an arguable issue, particularly because of the Barretts' need to finance the cost of the Supreme Court of Canada litigation.

Section 40(1) of the **Supreme Court Act** deals with the basis on which the Supreme Court grants leave to appeal. The section reads as follows:

> Appeals with leave of Supreme Court
>
> 40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other 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. (emphasis added)

Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd. and Dartmouth (City) (1995), 144 N.S.R. (2d) 326 deals with a stay application pending an application for leave to appeal to the Supreme Court of Canada. At p. 332, Justice Freeman states:

> When a stay is sought in a provincial court pending the hearing of an application for leave to appeal to the Supreme Court, the applicant must be able to show that in addition to an arguable issue on the merits, there is an arguable issue with respect to the criteria for appeals to the Supreme Court of Canada referred to in s. 40(1), that is, a question 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.

Thus, the applicant must not only raise an arguable issue, but must also meet the criteria set out in s. 40(1) to warrant the Supreme Court granting leave to hear this case.

The applicant submits they have met the first test in **Fulton**, that is, that there is an arguable issue. They submit the current state of the law causes confusion for litigants on the issues raised in the case at bar. Thus, the issue of causal connection between an award of damages and a breach of fiduciary duty, and whether a fiduciary in breach of his or her duty can be held jointly and severally liable for damages flowing from the breach of a separate contract, are issues which are ones resulting in ongoing uncertainty based on the current state of the law. Their concern is the lack of certainty in the law as to whether the courts have widened the scope of fiduciary duty resulting in awards of damages against innocent fiduciaries who breach their obligations, but do not

in any way personally gain from their breaches.

In support of their position, the applicant cites the views set out by McEachern C.J.B.C. in the case of **C.A. v. Critchley** [1998] B.C.J. No. 2587 (unreported, November 6, 1998), where he points out that the courts have extensively extended fiduciary law into areas other than the law of trusts. Although the Supreme Court of Canada has considered a number of cases, he regretted that those decisions had not resulted in a "comprehensive statement of the law." (para. 81). In the particular case he was considering whether it was "permissible or desirable to engage the law relating to fiduciary obligations in cases where, without dishonesty or intentional disloyalty, harm has been done to a person in the legal care of the Crown." (para. 77). At paragraph 85, he concludes that:

> ...it would be a principled approach to confine recovery based upon fiduciary duties to cases of the kind where, in addition to other usual requirements such as vulnerability and the exercise of a discretion, the defendant personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage.

Chief Justice McEachern suggests the case of **Guerin v. The Queen,** [1984] 2 S.C.R. 335 should be confined to its particular facts and states in **Critchley** that **Guerin** is, "a special case where the aboriginal right in question was said to be unique." (para. 84). In the **Critchley** case, the appeal of the Crown was allowed "against the finding of liability based upon a breach of fiduciary duty by its officers and employees, who were found to have acted honestly throughout." (para. 86).

In the present case, I find there is an arguable issue. Also, there appears to be a need to clarify the law relating to the liability of fiduciaries. I find this is a question of public importance sufficient to meet the requirement of section 40(1) of the **Act**. It is clear from the case law that it is not for the Chambers judge on an application for a stay to speculate on the outcome of the appeal itself if leave is granted.

The Second Test - Irreparable Harm

With respect to the second test, the applicant submits that if the balance owing is paid to the Barretts, it will go to creditors and if the appeal to the Supreme Court of Canada is successful, he will not be able to recover the funds paid out.

According to an affidavit on file of Mrs. Barrett dated December 2, 1997, she and her husband went to Florida on a temporary basis after she lost her nursing position in Nova Scotia. At that time, she was employed temporarily in the United States, but expressed the intention that she and her husband would return to Nova Scotia in the future once the litigation was ended and their affairs with CIBC were finalized. She also related that she and her husband own their home in Nova Scotia which was listed for sale and was valued at more than $300,000. There is no updated information from the Barretts.

At the stay application hearing, counsel for CIBC, did not participate in the

hearing other than to provide financial information when requested by the Court. Following the hearing, the applicants revised the figures without any objection from the respondents. With this revised financial information, the most conservative estimate of the value of the Barretts' property is that it is worth $210,000, less a mortgage of $57,000, leaving $153,000 net equity in the property. Because of amounts owing to several law firms and to CIBC, the total claim on that equity is $89,965.70. This leaves an available balance of $63,034.30 in the Barretts' property. If the stay is not granted and the applicant pays out the balance of the claim, all the money will go directly to parties other than the Barretts. The opportunity to recover the full amount of the balance if paid now may not exist. To obtain repayment, the house would have to be sold. Reimbursement will depend on the ability to sell the Barretts' property at the suggested value, or better, which may or may not occur. (Note: **B. & G. Groceries Ltd. v. Economical Mutual Insurance Co.** (1992), 112 N.S.R. (2d) 322 (C.A.))

I recognize that the respondents do not have to prove their financial stability as a condition of collecting on their judgment (**Anwar Construction Ltd. et al. v. Phillips (J.R.) Electrics Ltd. et al.** (1991), 108 N.S.R. (2d) 324, 294 A.P.R. 324 (C.A.)). However, if the full amount owed by Mr. Gaudet is paid out at this time, and if there are no existing or insufficient funds from which repayment can be made then, in my opinion, that would result in irreparable harm to the applicant.

I find the second requirement in the first test in **Fulton** has been satisfied and irreparable harm would result to Mr. Gaudet unless a stay is granted.

Third Test - Balance of Convenience

This issue of balance of convenience as it relates to Mr. Gaudet has been covered in dealing with irreparable harm, namely, there is a real risk that Mr. Gaudet will be unable to recover the funds paid to the Barretts if the appeal is successful.

In examining the inconvenience to the Barretts, the only argument is that the respondents are seeking money to cover the ongoing legal costs because of the application for leave to appeal. Counsel requested $5,000, indicating verbally at the hearing that approximately $3,000 has been expended on work in progress.

Counsel informed the Court that on an application for leave to appeal to the Supreme Court of Canada, the normal period before a decision is made is three to four months. The reply in the leave application was not filed until January 8, 1999. Thus a decision could occur by April or May, 1999. Only the CIBC and the solicitors will be inconvenienced or delayed in receiving their payments if this stay is granted. I find the impact of the stay on the Barretts will be minimal. The legal firm has already received $55,422 and CIBC $14,000 from the two advances on the amount owing by Mr. Gaudet and the balance owed by Mr. Gaudet is in an interest bearing account.

I find the balance of convenience is in favor of Mr. Gaudet.

Conclusion

I am satisfied that Mr. Gaudet has met the criteria for a stay with respect to the judgment from this Court from which leave to appeal is being sought. Counsel for Mr. Gaudet requests that the stay application be adjourned until the decision of the Supreme Court on the leave application is rendered. In my opinion, the appropriate order is to stay the payment of the balance of the judgment of this Court until the decision on the application for leave to appeal to the Supreme Court of Canada is rendered. Costs of this application will be costs in the leave to appeal. If leave is granted, the parties may return, if required, for a further hearing on whether or not the stay should be continued. At this time, I do not choose to grant the respondents' request for an amount to be paid to their solicitor.

C.J.N.S.