Date: 19990125 Docket: C.A. 153173

NOVA SCOTIA COURT OF APPEAL
Cite as Brown v. Brown, 1999 NSCA 2

BETWEEN:

NORMAN ALLAN BROWN	)	Applicant in person
Applicant	)	
- and -	)	
	)	G. Douglas Sealy for the Respondent
SUSAN MARLENE BROWN	)	
Respondent	)	Application Heard: January 21, 1999
	)	Decision Delivered: January 25, 1999

BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)

The appellant, Mr. Brown, has filed a notice of appeal from the Order of The Honourable Justice Heather Robertson dated the 7th of January, 1999. He applies in Chambers for an order setting the matter down for hearing and for an order staying the Order under appeal. At the hearing in Chambers, I set down the appeal for Wednesday, April 14th, 1999, at 10 a.m. and ordered that the appeal book and appellant's factum are to be filed by February 18th and the respondent's factum by March 5th. I reserved my decision on the stay application.

The order under appeal dealt with various property matters between the parties. The stay application relates particularly to paragraphs 3 and 4 of the Order which provide as follows:

> 3. The following assets shall be held pending further order of the Court or written agreement of both parties: All real property and personal property owned by N.A. Brown Holding Company, all real and personal property owned by D & N Marine Works Ltd., 1954 Mercury Sun Valley, 1938 Buick Coupe, 1954 Dodge Mayfair, RRSP's in the name of Norman Brown, RRSP's in name of Susan Brown, personal savings account of Norman Brown, U.S. Bank account of Norman Brown, all insurance policies as outlined in the Statements of Property on file herein, all remaining director's loans of either party. Neither party shall encumber or dispose of any of the above noted assets. No funds may be transferred between the two companies.
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> 4. Notwithstanding the foregoing, Susan Brown and Norman Brown together or their designated agent (other than a family member, Ed Butler or Doreen Umlah) shall be entitled to perform necessary business functions which may entail expenditures from company accounts, which functions shall be performed under the direct supervision of the company accountant or other appropriate individual satisfactory to both parties. These functions include calculating and remitting any outstanding remittances to Revenue Canada for CPP, EI and Income Tax, any outstanding HST remittances, calculating and making any outstanding corporate tax remittances, calculating and making any outstanding tire tax remittances, paying any outstanding accounts and maintaining any ongoing accounts which must be paid. After these functions are completed all company assets shall be frozen pending further order of

the Court or written agreement of the parties. (emphasis added)

The documents in the Court file indicate that counsel for Mr. Brown and counsel for Mrs. Brown consented to paragraphs 3, 4 and 5 of this Order. Before me in Chambers, Mr. Brown indicates that he did not consent. In the affidavit he has filed, he indicates that he was not aware of an earlier Court order but he does not state on oath that he was not aware of or did not consent to the Order under appeal. There is no dispute that counsel who signed the Order indicating consent to paragraphs 3, 4 and 5 of it was representing Mr. Brown at that time. Counsel generally have authority to consent to orders on behalf of their clients. The order must be treated, for the purposes of this application, as a consent order. Mr. Brown indicates that the Order is creating serious problems, both for him and for some of his customers. For example, he notes in his affidavit that the Order is preventing him from honouring warranty policies and carrying out prepaid service work.

In this Province, there is no automatic stay of an order when that order is appealed: see **Rule** 62.10(1). A judge of the Court of Appeal, however, pursuant to **Rule** 62.10(2) has a discretion to stay the execution of the order appealed pending the disposition of the appeal on such terms as the judge deems just.

The principles that are applied when a stay is requested were set out

by Hallett, J.A. in **Fulton Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 at p. 346:

> ..... stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
>
> (1) satisfy the Court on each of the following:(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 is 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 question then is whether there is an arguable issue raised on appeal. Justice Freeman, in **Coughlan et al. v. Westminer Canada** (1993), 125 N.S.R. (2d) 171 at 174-75 defines an arguable issue as a ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. As Justice Freeman put it,

> ...if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the Court to allow the appeal ... the Chambers judge ... should not ... look further into the merits.: at p. 175

The grounds of appeal raised by the appellant on this appeal are as follows:

> 1. The order has effectively left the appellant with no access to finances or any means by which to earn an income;
> 2. That the learned trial judge made the Order without hearing any evidence whatsoever from the appellant;
> 3. Such other grounds as may appear upon review of the record.

The grounds of appeal do not allege any error of law or fact. The second ground of appeal alleges that the Order was made without hearing evidence. However, the file material indicates that the Order was consented to by counsel for the appellant and, therefore, the failure to hear evidence is not a ground which if successfully demonstrated by the appellant could result in the appeal being allowed. There was no requirement on the Chambers judge to hear evidence when presented with the consent of both counsel.

It is doubtful that there is a right of appeal from a consent order: see **Irving v. Irving** (1998), 164 N.S.R. (2d) 330. While the law on the matter may not be completely clear, there is strong authority for the view that an order made on consent cannot be the subject of an appeal.

I am not persuaded that Mr. Brown has raised an arguable issue.

I conclude, therefore, that Mr. Brown does not meet the first of the three requirements for the granting of a stay because his notice of appeal or other material do not raise any issue which, if accepted by the Court of Appeal, would result in the order being set aside.

It is also necessary, however, to consider whether there are exceptional circumstances that would make it fit and just to grant the stay. In considering this question, I note that while the requirements of an arguable issue, irreparable harm and the balance of convenience are useful guides to the exercise of discretion, the true objective of granting judges the discretionary power to grant a stay of execution is to achieve justice as between the parties pending appeal in the particular circumstances of their case. I think it is important to keep this in mind, especially where, as here, the applicant for a stay is not represented by a lawyer and may not, as a result, file material which addresses the three-part test set out in **Fulton**.

In my opinion, there are two reasons why I should not exercise my discretion in favour of granting a stay in this matter. The first is that the Order under appeal was consented to by counsel representing the appellant. Secondly, the Order under appeal itself indicates that the terms of the order under appeal about which Mr. Brown complains are subject to "further order of the Court", in this context "Court" meaning The Supreme Court of Nova Scotia. The Order is, therefore, subject to variation in the Supreme Court of Nova Scotia if Mr. Brown can convince a judge of that Court that such variation is appropriate. This order, dealing with preservation of property pending trial, is better dealt with by the trial court.

For all of these reasons the application for a stay is dismissed. The costs of the application will be in the cause of the appeal.

C.A. No.153173

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

SUSAN MARLENE BROWN

Appellant

- and -

NORMAN ALLAN BROWN

Respondent

BEFORE THE HONOURABLE JUSTICE CROMWELL. (in Chambers)