Date: 19980313 Docket: C.A. 145621

NOVA SCOTIA COURT OF APPEAL\

Cite as Nova Scotia (Attorney General) v. Hiltz and Seamone Company Ltd., 1998 NSCA 7

BETWEEN:

ATTORNEY GENERAL OF NOVA SCOTIA. representing Her Majesty the Queen in right of the Province of Nova Scotia and SHARON VERVAET Appellants	)	Alexander M. Cameron for the Appellant AGNS
	)	David G. Coles for the Appellant Sharon Vervaet
- and -	)	
	)	Aidan J. Meade for the Respondent
HILTZ and SEAMONE COMPANY LIMITED Respondent	)	Application Heard: March 12, 1998
	)	Decision Delivered: March 13, 1998

BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)

After an 18 day trial, Stewart, J. found Her Majesty the Queen in Right of the Province of Nova Scotia and Sharon Vervaet liable in defamation. The learned trial judge awarded $200,000.00 in general damages as against both defendants and a further $100,000.00 in punitive damages against Her Majesty the Queen in Right of the Province of Nova Scotia. The formal order of the Court is dated January 30th, 1998.

Her Majesty the Queen in Right of the Province of Nova Scotia and Sharon Vervaet (hereafter the appellants) have appealed the decision and order of the learned trial judge. The appellant, Her Majesty the Queen in Right of the Province of Nova Scotia applies for a suspension of payment of the damages pending appeal pursuant to **s. 20(4)** of the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c. 360. The appellant Vervaet applies for a stay of execution pursuant to **Rule 62.10** of the **Civil Procedure Rules**.

For the reasons I will set out, I have concluded that there should be no stay or suspension of the trial judge's order respecting the compensatory damage award of $200,000.00, but that the order for the payment of punitive damages of $100,000.00 should be suspended until the appeal has been determined on its merits.

Counsel agree that the considerations governing the exercise of

discretion in granting a stay of execution under **Rule 62.10** also apply to the granting of a suspension of payment pending appeal under **s. 20(4)** of the **Proceedings Against the Crown Act**. I have not been referred to any Nova Scotia authority for this approach, but it finds some support in an interpretation of similar Crown proceedings legislation in British Columbia: **Air Canada v. Her Majesty the Queen in Right of British Columbia**, [1985] 1 W.W.R. 37 (B.C.S.C.). I accept, therefore, that the principles relating to the suspension application are the same as those regarding the stay.

It was conceded by counsel on behalf of Hiltz and Seamone Company Limited that, for the purposes of this application only, arguable grounds of appeal have been raised by the appellants. In my view, this concession was properly made and even if it had not been made, I would have held that arguable grounds of appeal exist. That being the case, the burden rests with the appellants to show that they will suffer irreparable harm if the stay/suspension (hereafter "stay") is not granted and that the balance of convenience favours the granting of a stay. Alternatively, the burden is on the appellants to establish that exceptional circumstances exist which justify the granting of a stay: see **Fulton Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A. Chambers).

With respect to irreparable harm, the appellants submit that there is a serious doubt as to whether the Crown could ever recover the award if a stay

were not granted and the appeal succeeded. I note that the appeal is concerned not only with the quantum of damages, but with liability so that the whole amount of the award of the learned trial judge is in issue on the appeal.

I agree that the risk of non-recovery may constitute irreparable harm in certain circumstances: see **Desrosiers et al v. MacPhail et al**, C.A. No. 144651 dated February 3, 1998 (unreported) (C.A. in Chambers). However, with due respect to the arguments advanced by the appellants, the evidence before me does not establish any significant risk of non-recovery in this case. There is no evidence that Hiltz and Seamone Company Limited is insolvent or near insolvent. The firm has been in business for many years, has significant retained earnings and owns real property in the Province of Nova Scotia. As my colleague Freeman, J.A. stated in **Coughlan et al v. Westminer Canada Ltd. et al** (1993), 125 N.S.R. (2d) 171 at p. 175-176, a payment of money by one solvent party to another is not generally considered irreparable harm. Justice Freeman was careful to qualify this statement by the use of the word “generally”. I agree with this qualification because it may not be essential in all cases to establish insolvency in order for there to be sufficient risk of non-recovery to constitute irreparable harm. I am convinced, however, that in this case, having regard to the amount of money in question and the available evidence concerning the circumstances of the respondent Hiltz and Seamone Company Limited, the appellants have not discharged the onus of establishing a sufficient

risk of non-recovery to satisfy the irreparable harm branch of the primary test for a stay. That being the case, it is not necessary to consider the balance of convenience.

In **Fulton Agencies, supra**, Justice Hallett held that the familiar three part test applicable to interlocutory injunctions is the primary test for the granting of the stay of execution. He added that there is a secondary test which is concerned with whether "there are exceptional circumstances that would make it fit and just that the stay be granted ....".

The appellants rely on this secondary test as enunciated by Hallett, J.A. In particular, it is submitted that the punitive damages award should be stayed on the basis of the exceptional circumstances test. The appellants draw a distinction between the general damages award which is compensatory and the punitive damages award which is not.

The starting point in Nova Scotia is that there is no automatic stay of enforcement of a judgment pending appeal. The onus is on the appellant to justify the delay in enforcing the rights of the successful party as determined at trial. It seems to me that the rationale underlying this approach is that there has been a determination at trial of the rights of the parties. The successful party will have, in most cases, waited a considerable period of time for that determination. Thereafter, enforcement of the rights as determined at trial should be delayed

only where the interests of justice require it.

As regards the award of general damages in this case, there are no exceptional circumstances justifying the stay. The trial judge's order to pay general damages should not be stayed.

Different considerations come into play with respect to the award of punitive damages. Such damages are not awarded to compensate the successful plaintiff for any loss suffered, but rather to punish and deter the defendant's wrongful conduct. Simply put, punitive damages are not awarded primarily because the plaintiff should receive them but mainly because the defendant ought to pay them. That being the case, it seems to me that the rationale for the general rule that judgments should be enforceable pending appeal is considerably weaker as regards awards of punitive damages. This consideration is particularly significant in a case such as this in which the respondent Hiltz and Seamone Company Limited has received a significant compensatory award and where, as here, there is no evidence that non-payment of the punitive damages pending appeal will cause the respondent any irreparable harm or hardship.

I am satisfied, in light of these factors, that exceptional circumstances exist which make it fit and just to suspend payment of the punitive damages portion of the trial judge's award as regards Her Majesty the Queen in Right of the Province of Nova Scotia. In reaching this conclusion, I do not wish to

suggest that an award of punitive damages should, of itself, necessarily be considered an exceptional circumstance justifying a stay of such an order. I base my decision on all of the circumstances which I have outlined.

In the result, I will grant a partial suspension of payment pending appeal pursuant to **s. 20(4)** of the **Proceedings Against the Crown Act** in relation to the learned trial judge's award with respect to punitive damages. In all other respects, the application for the suspension of payment and for a stay of execution pending appeal is dismissed. The order that I have made suspending payment of punitive damages pending appeal will be conditional on the appellant Her Majesty the Queen in Right of the Province of Nova Scotia providing an undertaking to the Court to pay interest on any punitive damages payable as a result of the decision of the Court of Appeal on the merits of this appeal at the pre-judgment interest rate, if any, applicable to the punitive damages award should that rate exceed the rate of interest provided for under **Rule 62.10(4)** of the **Civil Procedure Rules**.

This appeal has not yet been set down pending the preparation of the transcript. The suspension of payment is, therefore, conditional on the appellants applying on or before April 30, 1998, to the Chambers judge to set down this appeal.

Cromwell, J.A.

C.A. No. 145621

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in right of the Province of Nova Scotia and SHARON VERVAET Appellants - and - HILTZ and SEAMONE COMPANY LIMITED Respondent	)	BEFORE THE HONOURABLE MR. JUSTICE CROMWELL, J.A. (in Chambers)