Date: 19980203 Docket: C.A. 144651

NOVA SCOTIA COURT OF APPEAL
Cite as Desrosiers v. MacPhail, 1998 NSCA 5

BETWEEN:

DR. JACQUES DESROSIERS and JEAN PALMER for the Appellants	)	Daniel M. Campbell, Q.C.
Appellants	)	Michael J. Wood for the Respondent
- and -	)	W a n d a M a c P h a i l
WANDA MacPHAIL, CAROL M. NEWBURY, WILLIAM EDWARD NEWBURY, CRAIG MacPHAIL, SUSAN ARSENAULT and OSCAR ARSENAULT	)	
Respondents	)	Application Heard: January 29, 1998
	)	Decision Delivered: February 3, 1998

BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)

The appellants, Desrosiers and Palmer, apply for a stay of execution pursuant to **Rule 62.10(2)**.

The accident giving rise to the action occurred on March 24th, 1993. At trial, the appellants, Desrosiers and Palmer, a physician and a nurse, were found liable for damages suffered by the plaintiff (the respondent Wanda MacPhail) in a motor vehicle accident following a medical procedure. The respondent was awarded damages totalling $724,547.66 together with interest and costs. The damages awarded were itemized as follows:

i. general damages for pain and suffering - $75,000.00

ii. past loss of income - $64,623.00

iii. future loss of income - $516,297.00

iv. future loss of pension - $58,627.00

v. investment administration - $10.000.00.

The appellants have appealed both the finding of liability and the assessment of damages. The appeal is to be heard on May 20th,

1998.

The parties accept that the principles to be applied on this application were those stated by Hallett, J.A. in **Fulton Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 at p. 346.:

> In my opinion, 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 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 balanced 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 appellants argue that they can satisfy either the primary or the secondary test set out in **Fulton**.

With respect to the secondary test, the appellants submit, in

essence, that the judgment of the trial judge on the issue of liability is so clearly wrong as to constitute an exceptional circumstance making it fit and just that the stay be granted. I am not persuaded that this is the case.

With respect to the primary test, the respondent concedes that the appeal raises an arguable issue. Therefore, the application for the stay turns on irreparable harm to the appellants and the balance of convenience.

In considering a stay application, I think it is important to remember that a stay is a discretionary order. The general rule is set out in **Rule 62.10(1)** to the effect that "the filing of a notice of appeal shall not operate as a stay of execution of a judgment appealed from". The discretionary nature of the power to grant a stay is clear in the text of **Rule 62.10(2)** which indicates that a judge may order a stay, and further in **Rule 62.10(3)** which indicates that the stay may be granted on such terms as the judge deems just.

I mention this because I sense that counsel were parsing the numerous decisions on stay applications made by judges of this Court as if those decisions were detailed statutory provisions. The elaboration of principles to guide the exercise of this discretion is essential to ensure that the discretion is exercised judicially. However, general principles must not be treated as inflexible rules. Such an approach undermines the true objective of granting judges the discretionary power to grant a stay of execution: that is, to achieve justice as between the parties in the particular circumstances of their case. For a similar statement in the context of applications for extensions of time see the decision of Flinn, J.A. in **Mitchell et al v. Montreal Trust** (unreported, November 2, 1997).

The appellants' case for irreparable harm, should the stay be denied, is quite straight forward. According to the appellants, the respondent's financial circumstances are such that she would be unable to repay any material portion of the award which was paid and spent if the appeal were to succeed.

The first issue, then, is whether the appellants have discharged the burden of establishing irreparable harm in these circumstances.

Irreparable harm is not a term capable of exact definition. As Justice Sharpe notes in his treatise, **Injunctions and Specific Performance** (2nd, 1997):

> It is exceptionally difficult to define irreparable harm precisely ... The important point is that irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case. (at para 2.440 to 2.450)

In the authoritative discussion of the principles relating to stays pending appeal, **RJR - MacDonald Inc. v. Canada**, [1994] 1 S.C.R. 311, Justices Sopinka and Cory describe irreparable harm as follows:

> It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. ... The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration. (Citations omitted)

A number of decisions by judges of this Court on stay applications recognize that the risk that the appellant will not be able to recover funds paid in satisfaction of a judgment in the event the appeal is successful constitutes irreparable harm. These decisions also demonstrate the proposition stated by Justice Sharpe, above, that irreparable harm is a term which takes its meaning in the context of each particular case.

For example, in **Pentagon Investments Ltd. v. Canadian Surety Co.** (1992) 112 N.S.R. (2d) 86 (Clarke, C.J.N.S. in Chambers), a sum of slightly over $150,000.00 on a judgment totalling $1,650,000 was at issue on the stay application. There was evidence before the Court that the financial position of the respondent on the appeal was precarious although it was not in bankruptcy, not insolvent, there were no judgments registered against it and it continued to carry on business. Chief Justice Clarke refused the stay, citing with approval the earlier decision of Freeman, J.A. in **Anwar Construction Ltd. et al v. Phillips (J.R.) Electrics Ltd. et al.** (1991), 108 N.S.R. (2d) 324 to the effect that a judgment creditor

does not, as a rule, have to prove its financial stability as a condition of collecting on its judgment.

Similarly, in **Couglan et al v. Westminer Canada Ltd. et al** (1993), 125 N.S.R. (2d) 171 (Freeman, J.A. in Chambers), the learned Chambers judge noted “a payment of money by one solvent party to another is not generally considered irreparable harm” at p. 175-6. This statement must be placed in the context of evidence before the Court which, in the opinion of Freeman, J.A., established simply that there was a “risk respecting a fraction of the funds ordered to be paid by the applicants.”

In **Kelly v. Dillon** (1995), 145 N.S.R. (2d) 194 (Roscoe, J.A. in Chambers), the appellant agreed to make an immediate payment of the award for general damages and costs. This was in the context of an appeal which related only to the trial judge’s award for lost future wages and cost of future care. There was evidence before the Court that the respondent had no money for her medication and had been refused an application for a bank loan. Justice Roscoe

concluded in these circumstances that, given the appellant's offer to pay a substantial portion of the trial judge's judgment pending appeal, the evidence on the second prong of the **Fulton** test need not show insolvency of the respondent, but rather probability of difficulty of repayment if the appeal were to succeed. In taking this approach, she relied on the earlier decision of Flinn, J.A. in **Slawter v. White**, unreported, July 28th, 1995 (Court of Appeal Chambers). In that case, the appellant admitted liability. The appeal concerned a number of issues relating to the assessment of damages. There was evidence before the Court that the respondent had not worked since the accident and had accumulated significant debts. The appellant offered to pay $100,000.00 pending the disposition of the appeal and, to the extent that a balance remained unpaid following the disposition of the appeal, to pay interest at the pre-judgment interest rate fixed by the trial judge. Justice Flinn ordered a partial stay on condition that the respondent pay the sum of $150,000.00 within two weeks and provide an undertaking to pay interest at the pre-judgment rate on the balance owing following the disposition of the appeal.

In **B&G Groceries Ltd. v. Economical Mutual Insurance Co.** (1992), 112 N.S.R. (2d) 322 (Hallett, J.A. in Chambers), Justice Hallett had considerable financial information about the respondent before him. He granted the stay being satisfied that the appellant had demonstrated that "it could suffer irreparable harm if the stay were not granted in that it might not be able to recover the amount of the judgment if the appeal were allowed".

In **Piercey v. The Lunenburg Co. District School Board** (unreported, October 29, 1997, Bateman, J.A. in Chambers), Justice Bateman indicated that, absent the respondent's offer to segregate and keep safe a large portion of the balance owing, she would have been satisfied that the appellant had shown irreparable harm because, in her view on the evidence before her, it was fair to conclude that "the appellant has cause for concern regarding the collection of the funds paid out, should the appeal succeed" (at para. 20).

It seems to me that the principle emerging from this review

of the authorities is perfectly consistent with the point made by Justice Sharpe, above, to the effect that irreparable harm is not a term which has been given a definition of universal application but rather one which takes its meaning in the context of each particular case. Relevant considerations include the extent of the risk of non-repayment in the event that the appeal succeeds, whether the appeal puts the full amount of the trial judgment at risk or whether it relates only to a portion of the award and whether the respondent has received or has been offered a significant payment pending the appeal.

In my view, two other considerations must be borne in mind. First, as Chief Justice Clarke put it in the **Pentagon Investments** case, the beginning point is that the successful plaintiff is entitled to the "fruit" of its litigation and that the onus is on the appellant to show on a balance of probabilities that it will suffer irreparable harm. Second, the courts have recognized, and rightly so, that the decision to grant or withhold an interlocutory injunction (and as noted in **RJR - MacDonald, supra**, the same principles are applicable to a stay

pending appeal) must not be allowed to turn simply on the basis of the relative wealth of the parties. I am convinced that the discretionary authority to grant a stay was not given for the purpose of keeping those successful plaintiffs who most urgently require their funds from getting them prior to the appeal.

In the case at hand, the appellants have demonstrated at least some risk that there would be difficulty recovering funds paid out under this judgment if they were to succeed on appeal. The respondent is not insolvent and there is absolutely nothing before me to even suggest that there is any legitimate concern about her good faith or her honestly; indeed, counsel for the appellants made absolutely no submissions along these lines. However, it is clear that the respondent has virtually no assets and is not working. Therefore, if the judgment proceeds were paid and then subsequently diminished by whatever means, it is unlikely that the respondent would be able to repay those funds to the appellants should they succeed on their appeal. In reaching the conclusion that this constitutes at least some measure of irreparable harm, I have in mind the fact that this appeal, which is conceded by the respondent to be

arguable, places the whole amount of the trial judge's award at risk. This is not a case in which only some portion of that award is realistically at risk on appeal.

Having found a measure of irreparable harm, it is necessary to assess the balance of convenience. Under this heading, I should consider whether the granting of the stay (and therefore further delay in the payment of the damages awarded at trial) will cause irreparable harm to the respondent on the appeal and then determine which of the two parties will suffer the greater harm from the granting or the refusal of the stay pending the decision on the merits of the appeal: see **RJR - MacDonald**, above, at p. 342.

In my opinion, the respondent will suffer irreparable harm if a full stay is granted. In her affidavit filed on this application, which is uncontradicted, she indicates that her present income means that she is "still unable to afford many items which [she] considers to be necessary including a new knee brace, weekly exercise classes, modification of exercise equipment to be placed in [her] new home,

pain medication, etc.". The deprivation of these items seems to me to constitute irreparable harm.

It further seems to me that the balance of convenience overwhelmingly favours some immediate payment on account of the roughly $800,000.00 owed to this respondent. That a judgment creditor of a judgment of more than three-quarters of a million dollars should be unable to afford pain medication is, in my view, completely unacceptable.

Also relevant to the issue of the balance of convenience is the question of who will benefit from the income derived from these funds during the period between the trial and the appeal. This was of concern to Justice Bateman in her recent decision in **Piercy v. Lunenburg** to which I have referred above. It was also of concern to Justice Flinn in **Slawter v. White, supra**. While the approaches adopted by my colleagues in these two cases differed, they address the same concern: that the appellants will obtain more benefit from keeping the money pending appeal than the respondent will receive

by way of post-judgment interest if the appellants' appeal fails.

Taking all of these considerations into account in the context of this case, a partial stay will best minimize the risk of irreparable harm to both the appellants and the respondent. The appeal will be heard in late May. In the meantime, the respondent's immediate needs, as disclosed in her affidavit, can be met by a partial payment. As for the appellants, being required to make only a partial payment will significantly reduce the risk which they have identified.

I will, therefore, order a partial stay of execution on two conditions: (i) that the appellants pay to the respondent on account of her general damages the sum of $5,000.00 per month on the first day of each month starting January 1, 1998, and continuing until the 1st day of the month in which the appeal is heard. The appeal is presently scheduled for May 20th and provided that the hearing proceeds on that day the effect is that the appellants will be required to pay a total of $25,000.00 to the respondent; (ii) that if the pre-judgment rate awarded by the trial judge exceeds the post-judgment

interest rate provided pursuant to **Rule 62.10(4)**, the appellants shall file a written undertaking in a form similar to that required by Justice Flinn in **Slawter v. White**. In other words, they will undertake to pay interest at the higher rate for the period between judgment at trial and the date of judgment on the appeal, in the event that the appeal is dismissed or in the event that after disposition of the appeal, funds are owed by the appellants to the respondent.

The first payment of $10,000, for January and February, 1998, will be made within seen (7) days of today's date and the required undertaking filed by the same date. If counsel are unable to agree on the form of the undertaking, I will hear them at telephone Chambers as soon as the arrangements can be made. In default of compliance with these conditions by the appellants, the application for the stay is dismissed.

The appellants made no offer of partial payment in the face of uncontradicted evidence that the respondent could not afford her pain medication. In light of that, the respondent shall have its costs

of this application, which I fix at $1,000.00 inclusive of disbursements payable forthwith.

Cromwell, J.A.

C.A. No. 144651

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Respondents	)	
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