Date: 19980519 C.A.No. 147086

NOVA SCOTIA COURT OF APPEAL
Cite as Widrig v. R. Baker Fisheries Ltd., 1998 NSCA 20

BETWEEN:	)	
	)	
JOHN CAMERON WIDRIG,	)	Richard F. Southcott
LAURELLE WIDRIG and	)	for the Appellant
2434132 NOVA SCOTIA LIMITED	)	
	)	
Appellants	)	
	)	
- and -	)	
	)	
R. BAKER FISHERIES LIMITED	)	Donald G. Harding
and ROBERT W. BAKER	)	for the Respondents
	)	
Respondents	)	
	)	
	)	
	)	Application Heard:
	)	May 14, 1998
	)	
	)	
	)	Decision Delivered:
	)	May 19, 1998

BEFORE THE HONOURABLE JUSTICE DAVID R. CHIPMAN IN CHAMBERS

CHIPMAN, J.A.:

The appellant John Cameron Widrig (Widrig) and the respondent Robert W. Baker (Baker) are the principal players in this application for a stay of execution. Haliburton, J., the trial judge, found that the corporate parties were respectfully the alter egos of each of these men. The appellant Laurelle Widrig is the owner of 99% of the shares of the appellant numbered company.

Haliburton, J. was called upon to resolve a dispute arising out of an agreement reached in 1994 whereby Baker transferred a fisheries license for clams to Widrig so that the latter could fish for clams with a vessel owned by him and sell them to Baker for resale in the United States market. It was a term of the agreement that on or after April 30, 1995 Baker could call for the return of the license. Widrig testified at the trial that at the time of the purchase of the vessel "Just For Fun III" (the vessel) in April 1995, this termination date was verbally extended, at the very least, until the repayment of financing on the vessel. The vessel is registered in the name of the appellant numbered company.

Haliburton, J. found that Widrig was in fundamental breach of the agreement thereby entitling Baker to repudiate it. He also found that pursuant to the terms of the agreement, Baker and/or his company were entitled to a transfer of the clam fishing license by Widrig and/or his company, such transfer to be to Baker or a person designated by him, and he so ordered. Haliburton, J. further awarded damages for breach of contract in the amount of $130,000 to the respondents against Widrig and the appellant numbered company. Costs were fixed at $10,375, plus disbursements of $1,466.57. Haliburton, J.

dismissed Widrig's counterclaim. He also made a general finding that wherever there was a dispute of fact between the parties, he preferred the evidence of Baker to that of Widrig, whom he found to be generally less credible.

The amended order giving effect to Haliburton, J.'s decision was issued on May 5, 1998. The appellants' notice of appeal from Haliburton, J.'s written decision of April 22, 1998, was filed on April 30, 1998. By order of Clarke, C.J.N.S. in Chambers, this appeal has been set down for hearing on October 8, 1998.

The appellants seek a stay of execution of the judgment of Haliburton, J. The principal thrust of the application relates to the transfer of the fishing license. Very little has been said respecting the effect of the payment of damages in the event the stay is not granted. Widrig maintains that if he is forced to transfer the license to Baker or his designate, he will, should the appellants be successful in this appeal, have suffered irreparable harm.

Civil Procedures Rule 62.10 provides in part:

> 62.10 (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.
>
> (2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.
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> (3) An order under rule 62.10(2) may be granted on such terms as the Judge deems just.

The principles governing an application for a stay of execution are summarized by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100

N.S.R. (2d) 341 at pp. 346-347:

> 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 balance of convenience or:
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> (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.

These principles have been applied in a number of decisions in Chambers in this Court, most recently by Cromwell, J.A. in **Desrosiers, et al. v. MacPhail, et al.** (C.A. No. 144651). In his decision, Cromwell, J.A. emphasizes that a stay is a discretionary order as very clearly appears from the text of **Rule** 62.10(2) and (3). The exercise of the discretionary power is to achieve justice as between the parties in the particular circumstances of their case.

I have reviewed the lengthy decision of Haliburton, J., the order based thereon, the notice of appeal, the affidavits submitted on behalf of the parties and the written submissions of counsel. I have also heard and considered the viva voce arguments of counsel before me in Chambers.

I may say at the outset that the appellants have not shown any exceptional circumstances which would make it fit or just that a stay be granted as required in the secondary test. I am driven to reviewing the circumstances to determine whether the primary test has been met.

(1) I am satisfied that there are arguable issues raised in the notice of appeal of the appellants. Eleven grounds have been advanced in the amended notice of appeal, but they may be restated generally under four headings: (I) that the trial judge erred in finding that the appellant numbered company was the alter ego of Widrig and thus affected by any breach of contract committed by him; (2) that the trial judge misapprehended the evidence in finding that Baker's conduct did not, in the circumstances, constitute a fundamental breach of contract; (3) that the trial judge failed to turn his mind to evidence to the effect that the date after which Baker could demand the return of the license had been extended; and, (4) that the trial judge erred in ordering specific performance of the contract.

(2) I am also satisfied that if the stay is not granted and the appeal is successful, the appellants will suffer harm. That harm will result from the fact that he will have been obliged to cause the transfer of the license to the respondent and will therefore not be able to fish for clams with the vessel owned by the appellant numbered company unless and until he can secure another clam fishing license. It is necessary to consider the material offered on behalf of the appellant to determine whether such harm is irreparable and whether it would be difficult to or whether it cannot be compensated for by a damage award.

Widrig has fished the license in his name since April 27, 1994. He claims that

he has been qualified as a “core” fisherman with D.F.O. since that concept was established in December, 1995. Such status, he maintains, would automatically be lost with the transfer of the license pending disposition of the appeal. This license, he says, is his only vessel based license. Once the “core” license is lost, he maintains that he cannot reacquire any other individual fishing license for any species of fish or shellfish. Thus, pending the disposition of the appeal he would be effectively barred from the fishing industry unless he was able to purchase an “existing enterprise”, which consisted of a “core” status and all additional fishing licenses held by a third party. This further assumes that there is an existing enterprise for sale at a reasonable and affordable price. Availability and affordability, he maintains, present very serious concerns, since if the appeal was successful, the purchase would only be required for a period pending the appeal thereby making such purchase prohibitively expensive and impractical. He maintains that if he is required to return the license to Baker pending the appeal, neither he nor the appellant numbered company can earn a livelihood from fishing. Moreover he maintains that even if successful, the license cannot be reissued to him before one year after it is assigned to Baker. This is the basis on which he maintains he will suffer irreparable harm which is greater than any harm the respondents would suffer if the stay was granted.

In response to this, the respondents filed an affidavit from the Director of the Nova Scotia Fisheries and Aquaculture Loan Board stating that the vessel owned by the appellant numbered company is subject to a mortgage to the Board of approximately $132,000 which is currently in arrears. This vessel had been purchased for $162,500 in April, 1995. The Director maintained that Widrig advised that the mortgage would be paid out on or about May 11, 1998, that the vessel is currently using another clam fishing license

and that the subject license is not currently being used by the appellants at this time. It was the Director's belief that the purpose of Widrig's contacts with him were to assure him that the decision of Haliburton, J. and the return of the fishing license to Baker would have no negative effect on the fishing activities of Widrig or the appellant numbered company.

In his affidavit, Baker maintains that Widrig has had ample opportunity to buy a "core" license and maintain his "core" status since this dispute arose in March of 1996, after which he knew that he was at risk of losing the license. "Core" licenses, he maintains, are readily available to be purchased. In 1996, Widrig had requested that Baker permit him to transfer the license to another party which would have resulted in Widrig losing his "core" status at that time. Baker deposes that he has been advised by the licensing unit of D.F.O. that the subject license has been banked by Widrig and is not currently in use and has not been renewed for 1998.

Baker states that Widrig testified at trial that he had not received income from the appellant numbered company or claimed on his income tax returns any income from fishing for the last two years. Produced as an exhibit to his affidavit is a demand from Revenue Canada upon a third person for outstanding income tax owed by Widrig in the amount of $175,699.97. He submits this indicates that Widrig is not able or likely to pay the judgment. If the license is not transferred, the respondents will incur further losses for which they will never be compensated. It is Baker's position that this stay application is a delaying tactic to permit the appellants to continue to hold the license. The damages awarded by Haliburton, J. cover loss of profits only up to the date of trial and the respondents will be obliged in any event to return to court for additional losses which continue as long as the license is not returned. Baker asserts that if the appellants' appeal

is successful, they can and will be compensated by damages.

Baker deposes that the appellants have not paid the damages ordered by Haliburton, J. and notes that there is little if any argument with respect to staying the execution of the payment of money. This, he maintains, indicates that the appellants support the position that he would be able to make payment in the event the decision of Haliburton, J. was reversed.

Widrig filed an affidavit on May 12, 1998 in response to the affidavits filed on behalf of the respondents. He puts a different spin on the conversations he had with the Director of the Nova Scotia Fisheries and Aquaculture Loan Board. He says he has arranged for the payment out of the mortgage on the vessel to the Board, and that the person providing the financing is the mortgagee and that the vessel is still owned by the appellant numbered company.

Widrig maintains that the vessel was fishing under another clam license on a temporary basis only while he was on holidays in the month of April, 1998. Although owned by the appellant numbered company, the vessel is registered in the name of this licensee. Arrangements have been made to retransfer the vessel on May 13.

Widrig maintains that he did not learn until February of 1998 that pursuant to D.F.O. policies, the loss of his license would represent loss of “core” status. He maintains that “core” licenses are not readily available to be purchased and he is not aware of any such availability.

In response to Baker’s assertion that he had not fished the vessel most of the past two years, Widrig maintains that D.F.O. did not until November 1997 commence enforcing a requirement that the license holder personally operate the vehicle. Prior to that

time, it was common for such holders to have others fish their vessel while they attended other aspects of business. He has personally fished on board the vessel since November 1997 with the exeption of times when he was at the trial and away on vacation. In response to the assertion that he had not received income from fishing, he says that it is the appellant numbered company that sells the clams and secures the revenue. It pays the crew, not including him, and then pays dividends to the appellant Laurelle Widrig. With the exception of approximately $5,000.00 which his wife earns annually from part-time work, the entirety of the income on which his family lives is derived from the fishing revenues. Finally, Widrig undertakes that if a stay of execution is granted, he will not dispose of or encumber assets pending the disposition of this appeal other than in the normal course of business. As his wife is the owner of 99% of the shares of the appellant numbered company which owns the vessel and since the appellant has not pointed to any other assets owned by him, this undertaking does not appear to be of much significance.

Baker filed a further affidavit in support of his position on May 13. He made a phone call to a ship broker in Yarmouth and found that four “core” licenses were readily available for purchase at prices of $10,000, $12,000, $14,000 and $35,000, through that broker alone. Baker produced as an exhibit to his affidavit a newspaper article indicating that Widrig was convicted of allowing someone else to fish with his boat and license on December 5, 1997. He fears that this may jeopardize the license if Widrig continues to fish it.

There are contradictions in the affidavit material presented by the opposing sides here which I could not resolve without hearing viva voce testimony. That said, uncontradicted assertions of the appellant make clear that he will suffer harm if he is

required to transfer the license now and subsequently the appellants succeed in this appeal.

In **Desrosiers, et al. v. MacPhail, et al., supra**, Cromwell, J.A. said at p. 5 of his decision:

> 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)
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> 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:
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> > 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)

The evidence here fails to show that such harm that would be suffered by the appellants is irreparable in that it would be difficult or could not be compensated for by a damage award. The appellants have not shown - and the burden rests on him - that the respondent would be unable to make such compensation. Failure to show the respondents' impecuniosity puts the appellants in a very weak position. Irreparable harm

can be established by showing impecuniosity of the respondents. If this is not shown, what else is there to indicate irreparable harm? Widrig would say that the transfer of the license puts him out of business between now and the decision in this appeal and possibly longer. That may be, but it is a loss that could be measured in money and compensated thereby.

The meaning of irreparable harm here takes shape in the context of this case. The harm can probably be compensated by the respondent if need be. It can probably be minimized by the appellant, or would have been by him using reasonable foresight.

The respondent has offered evidence that specific "core" licenses are available to be purchased. This has not been contradicted. The appellant was also successful in making temporary arrangements to have the vessel fished by another person using that person's license. Since the dispute arose, he has known that he could be ordered to return the license and has had time to prepare for the outcome resulting from Haliburton, J.'s order. Under the regulations the Minister, in his absolute discretion, may for administrative efficiency, prescribe conditions or requirements under which he will issue a license to a new licensee holder as a replacement for an existing license being relinquished.

On consideration, I am not satisfied that irreparable harm has been shown by the appellants.

(3) Even if the appellants could be said to have established irreparable harm, they have not shown that such would, if the stay were not granted, be greater than the respondent would suffer if the stay was granted. I have already concluded that the appellant has failed to show that the respondent could not pay adequate compensation if the stay was not granted and the appeal succeeds. Baker deposes that he has been

without his license and any revenues under the contract for the past two years. The evidence as a whole and particularly evidence adduced on behalf of the respondents suggest that Widrig is probably insolvent. Counsel for the appellants concedes that his clients are impecunious. No evidence has been offered to indicate that the appellants have, in total, assets other than the equity in the vessel which appears on the limited evidence before me, possibly to be in the order of $30,000. The appellants have not paid nor have they made any realistic proposal to pay or secure payment of the damages in the amount of $130,000, plus costs awarded by Haliburton, J. They have not shown that they could compensate the respondents for the additional loss that would be suffered by being deprived of the benefit of the license between now and the determination of this appeal. Such loss suffered by the respondents would, in all probability, never be recouped. The balance of convenience favours the respondents here.

The respondents indicated that they would not oppose a stay of the order respecting the license if the amount of the judgment were paid into court forthwith. In view of the evidence of the appellants' probable insolvency and their concession that they are impecunious, a conditional stay along these lines is not an option. Appellants' counsel at no time indicated any interest in this proposal.

A proposal suggested by appellants' counsel during the argument that Widrig undertake to sell to Baker all clams harvested up until the judgment of this Court on appeal is not viable. It is clear from Haliburton, J.'s decision that there is animosity between the parties which arose out of the sale of clams by Widrig to Baker in 1996. Such an arrangement would, in all probability, break down and could not be relied upon to give Baker any protection. Haliburton, J. referred to Baker and Widrig as "friends no more".

The application is therefore dismissed with costs which I fix at $2,000.00, inclusive of disbursements payable forthwith, to be paid out of the monies paid into court as security for costs with respect to this application. As the decision of Haliburton, J. was stayed by Clarke, C.J.N.S. in Chambers until the disposition of this application, the order giving effect to this decision will provide that Widrig has a period of three days from the date thereof within which to comply with paragraph (1) of the amended order granted by Haliburton, J.

Chipman, J.A.