DATE: 19980805 CA149077

NOVA SCOTIA COURT OF APPEAL

Cite as Colchester Young Men's Christian Association v. MCR Holdings Ltd., 1998 NSCA 21

BETWEEN:

THE COLCHESTER YOUNG MEN'S CHRISTIAN ASSOCIATION, a body incorporated under the *Societies Act*, R.S.N.S., 1989, c.42 as amended,	Vincent K. Roberts, Agent for the Applicant/Appellant
Applicant/Appellant	Tara A. Miller for the Respondent
- and -	
MCR HOLDINGS LTD., a body corporate,	
Respondent	Application Heard: July 30, 1998
	Decision Delivered: August 5, 1998

**BEFORE THE HONOURABLE JUSTICE E. J. FLINN,
IN CHAMBERS**

Flinn, J.A.: (In Chambers)

This is an application for stay of execution of a civil judgment pending appeal.

In 1995, the appellant, through its then president and members of a special committee, retained the services of the law firm McInnes, Cooper and Robertson (MCR) to provide legal advice and services with respect to various matters; and, in particular, with respect to the termination of employment of the appellant's executive director, Mr. Vince Roberts. Mr. Roberts' employment was, eventually, terminated. Mr. Roberts filed a complaint with the Labour Standards Tribunal. The Tribunal determined that Mr. Roberts had been wrongfully dismissed, and ordered that he be reinstated with back pay. MCR represented the appellant throughout this tribunal proceeding.

MCR rendered seven separate accounts to the appellant for legal services rendered from August 29, 1995 to June 27, 1996. The first account ($4,300.00) was paid by the appellant. The remaining accounts, totalling $22,090.16, were not paid.

On February 26, 1998, MCR gave Notice of Taxation of its accounts. Following a hearing before the Taxing Master, the accounts were taxed and allowed at $22,090.16 plus costs of taxation of $207.00, for a total of $22,297.16. The appellant had appeared at the taxation and disputed liability for the accounts. The appellant did not appeal the decision of the Taxing Master.

MCR assigned its account to the respondent, MCR Holdings Ltd., and the respondent commenced an action claiming judgment for the amount outstanding. The

appellant filed a defence. The defence essentially disputes the appellant's liability for the account, claiming that the legal services of MCR were not properly authorized by the appellant. The appellant also filed a third-party claim against certain former members of its Board of Directors, for incurring what is alleged to be an unauthorized legal expense.

There is no suggestion in the pleadings that MCR had any knowledge that its retainer was not properly authorized, as alleged by the appellant.

The respondent applied for summary judgment, which Justice Hamilton granted in Chambers following a hearing. It is from the order granting summary judgment that the appellant has appealed. The appellant is claiming a stay of execution pending the hearing of that appeal.

At the hearings before the Taxing Master, the Chambers judge, and now before this Court, the appellant was not represented by counsel. Mr. Roberts, the reinstated executive director of the appellant, (and the person whose termination of employment led to the incurring of the legal costs which are the subject of the judgment), appeared and made representations on behalf of the appellant at all of these hearings.

As Justice Freeman noted in **Coughlan v. Westminer Canada Limited.** (1993), 125 N.S.R. (2d) 171 at p. 174:

> Stays deprive successful parties of their remedies, and they are not granted routinely in this province. They are equitable remedies and the party seeking the stay must satisfy the Court it is required in the interest of justice.

The test which this Court has consistently applied in determining whether to stay execution of a judgment is set out by Justice Hallett in **Fulton Insurance Agencies Limited v. Purdy** (1990), 100 N.S.R. (2d) 341 at p. 346-347:

> A review of the cases indicates there is a trend towards 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:
>
> (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 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 applicant 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 exceptionable circumstances that would make it fit and just that the stay be granted in the case.

The appellant, who carries the onus on this application, has provided me with no evidence in support of its application for a stay of execution. No affidavit has been filed in support of this application.

Mr. Roberts appeared on the hearing of this application, and made representations to the effect that the appellant was in dire financial straits; and that if execution of the judgment was not stayed the YMCA in Truro would have to close and staff would have to be laid off.

There is no evidence before me to support those statements.

Since the appellant has failed to establish that its application meets the criteria set out in the **Fulton** case; and since the appellant carries the onus of proof on this application, I have no alternative but to dismiss the application.

On the hearing of this application I set this matter down to be heard on November 10, 1998 at 2:00 in the afternoon. I also fixed the following filing dates; the appeal book is to be filed by September 18, 1998, the appellant's factum is to be filed by October 2, 1998, the respondent's factum is to be filed by October 16, 1998.

The appellant's application is, therefore, dismissed. The appellant will pay to the respondent, forthwith, its costs of this application which I fix at $350.00 inclusive of disbursements.

Flinn, J. A.

C.A No.149077

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Applicant/Appellant	)	BEFORE THE HONOURABLE JUSTICE FLINN (IN CHAMBERS)
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