NOVA SCOTIA COURT OF APPEAL

Citation: Smith v. Michelin North America (Canada) Inc., 2008 NSCA 52

Date: 20080609
Docket: CA 290297
Registry: Halifax

Between:

Everett Smith

Appellant

v.

Michelin North America (Canada) Inc.

Respondent

Revised judgment: The text of the original judgment as been corrected according to the erratum dated July 25, 2008.

Judge: The Honourable Justice Cromwell

Application Heard: June 5, 2008, in Halifax, Nova Scotia, In Chambers

Held: Application for stay of execution dismissed on terms; application for security for costs granted.

Counsel: Paul G. Vogel, Gordon Forsyth, Q.C. and John D. Goudy, for the appellant
Peter McLellan, Q.C., Mark D. Tector, and George Sutherland, Q.C., for the respondent

Decision:

I. INTRODUCTION:

[1] The appellant applies to stay the execution of a costs order against him which he is appealing and the respondent applies for security for costs of the appeal.

[2] The stay application is dismissed on terms. The respondent has undertaken not to enforce the costs order against the appellant's home or pets. On that basis, I see no irreparable harm to the appellant if the stay is not issued and I am not persuaded that there are other exceptional circumstances justifying a stay.

[3] The application for security for costs is granted and the appellant will provide security in the amount of $50,000 on or before August 1, 2008, the day his factum is due. The appellant admits he cannot pay the costs awarded against him at trial and there is no prospect of the respondent recovering any of the costs of the appeal if such are ordered. The appellant represents a group of close to 600 individuals who have contributed $300,000 towards their own legal costs but have made no provision to pay costs that might be awarded against the appellant. The evidence persuades me that, if they wish to pursue this appeal, raising another $50,000 – under $100 per person – will not stand in their way.

II. BACKGROUND:

[4] In very brief overview, the background is this.

[5] The appellant brought an application in the Supreme Court for the interpretation of the Michelin Pension Plan. The critical issue was whether the plan allows the respondent to take contribution holidays. The appellant's claim was that it did not and that the respondent owed the plan roughly $268 million.

[6] Hood, J. dismissed the application with costs. She found (and I will summarize very briefly and without doing justice to the parties' arguments before her or to her comprehensive reasons for judgment) that the original plan documents

permitted contribution holidays, that amendments to the plan were valid and that they authorized the contribution holidays.

[7] The judge found that the appellant should not receive costs either from the respondent or out of the plan, but that he should pay to the respondent one-half of the costs and disbursements in an amount which she assessed. The order for costs and disbursements against the appellant is for $299,688.97.

[8] The appellant has filed an appeal from both the dismissal of his application and with respect to the judge's costs order. The appeal books have been filed and the appeal is to be heard over two days in October.

III. ANALYSIS:

[9] There are two issues for decision:

1. Should the costs order in relation to the appellant be stayed?

2. Should security for costs of the appeal be ordered?

A. Stay Application:

1. Overview:

[10] In Nova Scotia, filing a notice of appeal does not automatically stay execution of the judgment under appeal: *Rule* 62.10(1). However, a judge may stay execution pending appeal on such terms as the judge considers to be just: *Rule* 62.10(2) and (3).

[11] The burden of showing why a stay should be granted is on the appellant. This burden may be discharged either by satisfying a three-part test or showing that there are exceptional circumstances. The appellant relies on both approaches and I will consider them in turn. For the reasons that follow, my view is that the appellant has not discharged the onus on him to show that a stay should be granted.

2. Analysis of submissions:

(a.) The three part-test:

[12] The three-part test for a stay of execution pending appeal was set out in *Fulton Insurance Agencies v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A. Chambers). To obtain a stay on this basis, known as the primary test, the appellant must demonstrate that: (i) the appeal raises an arguable issue; (ii) if the stay is not granted and the appeal is successful, the appellant will suffer irreparable harm; and (iii) that the balance of convenience favours granting the stay because the irreparable harm shown by the appellant is greater than any such harm the respondent would suffer if the stay were granted but the appeal ultimately dismissed.

[13] In my view, the appellant cannot satisfy the second of these requirements in light of the respondent's undertaking not to execute against the appellant's house trailer or horses.

[14] There is no single or comprehensive definition of irreparable harm; it is, in general terms, harm that cannot be adequately compensated by orders for damages or costs.

[15] The appellant says he will suffer irreparable harm in two respects if I deny the stay. First, the appellant submits that if execution on the judge's order is not stayed, his two horses, a thirteen year old mare and a 9 month old foal, will be property subject to execution. He says that they are kept as pets, that he has a significant emotional attachment to them and they form an important part of his life. These horses, the appellant submits, are irreplaceable and their loss could not be compensated for in money should the appeal be successful. Second, the appellant says that the respondent might execute against his home, a house trailer, and that this, too, would cause him irreparable harm if the stay is denied and the appeal were to be successful.

[16] The respondent has undertaken, pending disposition of the appeal, not to attempt to execute against the appellant's home or horses. That undertaking satisfies me that the appellant's house trailer and horses will not be seized pending the appeal and that there is no risk of either of the two types of irreparable harm on which the appellant relies in support of his stay application. I acknowledge that

there may be some doubt as to whether the trailer would be subject to the *Sale of Land Under Execution Act*, R.S.N.S. 1989, c. 409 which provides that land may be sold only after the judgment has been registered for a year. Whether the house trailer is land within the meaning of the Statute is a question I do not need to decide here in light of the respondent's undertaking not to execute against the house trailer.

[17] The appellant fails on the second requirement of the primary test and there is no need for me to consider the other two requirements.

(b.) Exceptional circumstances:

[18] Turning to the secondary test, the appellant submits that there are exceptional circumstances making it just that the stay be granted even though the primary test is not satisfied.

[19] Very few cases have been decided on the basis of this secondary test. There is no comprehensive definition of what constitutes exceptional circumstances justifying a stay. What must be shown is that it is unjust in all of the circumstances for the appellant to have to bear all the risk arising from uncertainty about the outcome of the appeal: see e.g., *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2006 NSCA 129 (C.A. Chambers); *Coughlan v. Westminer* (1993), 125 N.S.R. (2d) 171 (C.A. Chambers) at para. 13.

[20] The appellant submits that there are several exceptional circumstances making it just to grant a stay. I have considered these submissions carefully but I am not persuaded that these circumstances, individually or collectively, are exceptional so as to justify granting a stay in this case.

[21] First, the appellant submits that he acted in a representative capacity on behalf of all the beneficiaries of the plan and for their benefit. However, in my view, the appellant's representative capacity is a factor against, rather than in favour of, granting the stay.

[22] The appellant was appointed, at his request, to represent all members, member spouses or beneficiaries having an interest in the plan. He is the chair of a voluntary association with roughly 600 members who gave the association an

authorization and direction to represent their interests. The form of authorization which each member signed included an agreement that the individual's continuing membership in the association was subject to "... satisfying such further and additional financial contribution as [the association] in its sole discretion may from time to time determine appropriate." The evidence is that about $300,000 has been raised to date. The appellant, therefore, represents a large group from which money has been raised for the purposes of litigation and the members of which have agreed to make additional contributions as required.

[23] The group has apparently taken no steps to protect the appellant from an adverse costs award. The appellant undertook to act in a representative capacity and took that risk. It is unrealistic, in my view, for the appellant now to ask that his representative capacity should shield him from the obvious risk he knowingly took and for which apparently no provision was made. This is not, in my view, an exceptional circumstance which would justify granting a stay of execution.

[24] Second, the appellant submits that, even if his appeal with respect to the contribution holiday issue fails, he could still be relieved of any costs liability if his costs appeal were to succeed. Respectfully, this is not an exceptional circumstance. It is not at all unusual, let alone exceptional, for the whole amount of a judgment to be in issue on appeal as it is in this one.

[25] Third, the appellant submits, in effect, that a stay is justified because there are clear errors in the judge's costs decision. It is argued that the judge clearly erred in principle by failing to award costs out of the plan given her finding that the appellant's claims were not adverse to the interests of other plan members. It is also argued that there is a clear error in the judge's calculation of the amount of the award; the appellant says that the result is a party and party award that is almost as large as the amount the judge thought was a reasonable solicitor and client award.

[26] I cannot accept these submissions. Alleged errors in a trial judgment will only constitute exceptional circumstances justifying a stay if "... the judgment appealed from contains an error so egregious that it is clearly wrong on its face ...": *Amirault v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A. Chambers) at para. 13. The errors relied on by the appellant do not in my judgment come close to meeting this test. While the appellant certainly raises arguable issues with

these submissions, these aspects of the judge's decision are not "clearly wrong" or "egregious".

[27] The judge's refusal to order costs out of the plan was a determination within her discretion to which considerable deference is generally accorded on appeal. Whether she erred in legal principle is a matter for the panel that will hear the appeal, not for me sitting as a chambers judge, to determine. As for the quantum of costs, the appellant's submissions are premised on one interpretation of the judge's reasons setting a maximum hourly rate which she thought reasonable. As the respondent's submissions demonstrated, the correctness of the appellant's interpretation is not self-evident. And the fact remains that the judge's costs order amounted to less than one-half of the respondent's actual legal fees. Again, this is not a clear and egregious error on the face of the decision, but rather an arguable issue to be resolved by the panel hearing the appeal.

[28] Finally, the appellant submits that the respondent will receive one-half of the costs awarded immediately even if the stay is granted because that portion is to be paid out of the plan rather than by the appellant. I do not accept that this is an exceptional circumstance justifying a stay of execution against the appellant. The principle underlying stays pending appeal is that orders are enforceable once they are made. The fact that the respondent will get elsewhere one-half of what it is owed does not seem to me to be a good reason, let alone an exceptional circumstance, to stay attempts to collect the other half from the appellant. The appellant's submission, to my mind, also overlooks the fact that the respondent is, and for a long time has been, the only contributor to the plan. The order that the respondent recover one-half its costs out of the plan is much like an order that the respondent recover its costs from itself.

[29] I do not find these circumstances, individually or collectively, to be exceptional so as to justify granting the stay requested by the appellant.

3. Conclusion on stay application:

[30] Subject to the respondent filing an undertaking, in a form satisfactory to the appellant, not to execute against the appellant's horses or trailer, the application for a stay of execution is dismissed. If counsel cannot agree, they may apply to me to

settle the form of undertaking. The undertaking is to be filed within ten days of today's date and I will delay signing my order until the undertaking has been filed.

[31] The appellant had justified concerns about the risk to his home and horses and the respondent's undertaking, I am told, was offered for the first time on the day the stay application was heard. The parties will bear their own costs of the stay application.

B. Security for Costs:

1. Legal Principles:

[32] The respondent applies for security for costs of the appeal. A judge of this Court has discretion to make an order for security as he or she deems just: *Rule* 62.13(1).

[33] To obtain an order for security, the applicant generally must demonstrate that special circumstances exist to justify it. This usually requires showing more than a risk that the appellant will be unable to pay a costs award made on appeal. It is usually necessary for respondents to show that an appellant has acted in an insolvent manner towards them such as, for example, by failing to pay an award of costs made at trial: see, e.g. *Leddicote v. Nova Scotia (Attorney General),* 2001 NSCA 152, 198 N.S.R. (2d) 101 (C.A. Chambers); *Branch Tree Nursery and Landscaping Ltd. v. J & P. Reid Developments Ltd.*, 2006 NSCA 131, 250 N.S.R. (2d) 35 (Chambers); *Williams Lake Conservation Co. v. Halifax (Regional Municipality)*, 2005 NSCA 44, 231 N.S.R. (2d) 320 (C.A. Chambers); *Frost v. Herman* (1976), 18 N.S.R. (2d) 167 (N.S.S.C.A.D. Chambers); *Arnoldin Construction & Forms Ltd. v. Alta Surety Co.* (1994), 134 N.S.R. (2d) 318 (C.A. Chambers).

[34] In exercising the discretion to make an order for security, the court proceeds with caution because of the risk that the order may effectively stifle the appeal: *2301072 Nova Scotia Ltd. v. Lienaux,* 2007 NSCA 28, 252 N.S.R. (2d) 193 (C.A. Chambers) at para. 6.

2. Analysis of submissions:

[35] There is no doubt here the appellant has acted in an insolvent manner towards the respondent. There is an order for the appellant to pay nearly $300,000 in costs and disbursements. By his own evidence, the appellant has not and cannot pay them.

[36] The appellant says, however, that no order for security should be made because it would effectively prevent him and the pension plan members and beneficiaries whom he represents from proceeding with the appeal. He swears in his affidavit that he does not have sufficient funds to post security and that the large group of persons which he represents cannot raise additional funds.

[37] I do not doubt the appellant's evidence that he personally cannot pay any significant amount of security for costs. However, it was never envisioned that he would finance this litigation on his own. In light of all of the evidence before me, I am not persuaded that the group cannot raise a reasonable amount of security. It follows that a reasonable order for security for costs would not stifle the appeal. Moreover, my conclusion from the evidence is that any inability to raise a reasonable amount for security for costs from this large group would reflect the group's loss of interest in the legal proceedings rather than an inability to pay the amount that I have in mind.

[38] I will briefly review the evidence which has led me to this conclusion.

[39] The appellant is the chair of an association with nearly 600 members. The membership fee was at one point set at $300 and, as noted, the authorization and direction signed by each member was subject to the member satisfying such additional contributions as the association might determine to be appropriate. There is also evidence that the association advised members and prospective members that it had "... enough funds now to take our case to it's conclusion in court...".

[40] The appellant's affidavit indicates that the association currently has 576 members and a remaining bank balance of approximately $7,000 which, he says, it requires to fund communications with members, organize meetings and pay other operating expenses. He says that other funds generated by the association have

been disbursed in payment of litigation costs incurred to date and that the ability to raise more money has been exhausted.

[41] In his costs submissions before Hood, J., the appellant presented a bill of his own costs of $943,522.33 inclusive of disbursements.

[42] On discovery, the appellant testified to the following matters:

> roughly $160,000 were received through the initial membership fees;

> no other funds were solicited from the group until after Hood J.'s decision;

> a second levy was made for the purposes of the appeal which raised about another $140,000;

> the association has not tried to raise money to pay the respondent's legal costs; the association has decided to wait until the outcome of the appeal is known;

> the association has not tried to raise money to provide security for costs of the appeal in case security is ordered;

> while some members have said they will not contribute anything more and the appellant thinks that they will not, there has been no systematic canvassing of the membership to pay;

> the appellant himself could make an additional $300 contribution;

[43] With respect to his claim that the association has exhausted the resources of its members and cannot raise additional funds, the appellant testified as follows:

> 412. Q. You have said, in your Affidavit, paragraph 14, that you have exhausted:
>
> "CPGM [i.e. the association] has exhausted the resources of its members and cannot raise additional funds."

A. Yes

413. Q. You made -- that's a statement you have made, sir?

A. Pardon?

414. Q. That's a statement you made in your Affidavit?

A. Yes.

415. Q. Right. Has your group -- have you canvassed your group for monies to pay costs, that are awarded against you, to Michelin?

A. Do you mean have I went to the group and asked them to pay --

416. Q. The three hundred thousand dollars ($300,000).

A. No, I have not.

. . .

457. Q. Okay. Going back to your Affidavit, where we were before, you have said in paragraph 14, going to the very end of it:

> "CPGM has exhausted the resources of its members and cannot raise additional funds."

A. Yeah, right.

458. Q. Now, specifically, Mr. Smith, have you or any other member of the group asked the members for any costs -- for any payment to help pay the costs, or possible security for costs, for this appeal?

A. No.

459. Q. And, to your knowledge, to be clear on that, has Mr. Duncan or Mr. Ford done that, at your request?

A. No.

460. Q. Have you made any attempt to collect from any member of the group any part of the award of costs made against you?

A. No.

461. Q. Have you made any attempt, or has the group made any attempt, to collect -- to attempt to collect costs to help pay Michelin's costs on this appeal if you're unsuccessful?

A. No.

462. Q. On what basis do you say, sir, that you have exhausted the resources of the members and cannot raise additional funds?

A. Well, the main reason is because when we went to them the last time for the second three hundred dollars ($300), it was a lot of telephone conversations, and a lot of them said "This is it." And a lot of them couldn't afford to even give us the three hundred dollars ($300). Therefore we made the decision we exhausted -- we were done begging them for money because some of them don't have it, can't afford it, and some of them say "No, that's enough."

463. Q. Could you pay three hundred dollars ($300)?

A. Could I pay two hundred?

464. Q. Three hundred.

A. Three hundred? Yes.

465. Q. All right. Did you ask Mr. Duncan if he could pay three hundred?

A. I didn't ask him. He did, yes, or he says he did, yes.

466. Q. No, but another -- you got a hundred and forty thousand in a matter of two or three months.

A. Yes.

467. Q. Right. And, I guess, of your 576 members, how many said "I could not afford another three hundred dollars ($300)"?

A. I couldn't give you a number. Of the group that I called, quite a few.

468. Q. By "quite a few" how many said that they could not afford, not that they wouldn't pay?

A. Some of them said that they could not afford, yeah, for reasons that "Christmas time" and "I don't have it" and "I can't afford it." That's the reasons. The number, I couldn't tell you, sir.

469. Q. Right. And since Christmas time, you have made absolutely no attempt to pay -- to collect from the other members of the CPGM even a nickel to pay the costs award for Michelin, that would be correct?

A. That's correct.

470. Q. And knowing that you've been asked for security for costs --

A. Yes.

471. Q. --- you have not made any attempt to raise even a nickel from any member.

A. No.

[44] The appellant's evidence makes it clear to me that no serious effort has been made to raise money to fund the appellant's liability to the respondent for costs or to post security for the appeal should such be ordered. His evidence is also clear that while some members say that they cannot afford to contribute more, others have simply decided that "that's enough." There is a difference between being unable to post security and being unwilling to spend more money on an appeal.

[45] In light of the appellant's discovery testimony, I do not accept the assertion in his affidavit that the association has exhausted its ability to raise funds.

[46] There is very little good news in this picture for the respondent. It has spent over $1 million dollars defending the appellant's claim which failed on every point at first instance. The respondent has recovered a costs awards for less than one

half of this amount. Judging by the evidence filed by the appellant, there is no likelihood that the respondent will recover from the appellant the roughly $300,000 he has been ordered to pay of those costs if the appellant's appeal is not successful. The other half the respondent is essentially entitled to recover from itself because that part of the costs were ordered out of the plan to which the respondent is the only contributor. The respondent is now facing further substantial costs of responding to the appeal and again there is a virtual certainty that no portion of any costs it may be awarded on appeal will be recovered unless security is ordered.

[47] I conclude that the appellant has acted in an insolvent manner towards the respondent with respect to the costs order and that it is a virtual certainty that the respondent will be unable to recover costs from the appellant in the event that costs are awarded against the appellant on appeal.

[48] I am not persuaded that an order for security for costs will stifle the appeal. No serious effort has been made to raise additional funds for this purpose. I am also of the view, based on the material before me, that if the association cannot raise the money for security in the amount I have in mind, this will result from a lack of interest on the part of the membership in proceeding, not from an inability to pay. There would be no injustice if the appeal were to come to an end for that reason.

[49] The respondent has demonstrated special circumstances and it is in the interests of justice to order the appellant to post security for costs of the appeal.

[50] I turn to the question of the amount. The amount of security to be posted must be set in relation to the likely costs of the appeal, if awarded. I must also bear in mind the difficulty that may be encountered by the appellant in raising additional funds. The amount must be fair to both parties.

[51] Our approach has generally been to make our predictions for this purpose fairly conservative, "intentionally less" than the likely costs on appeal, as some of the cases have said: *Arnoldin Construction & Forms Ltd. v. Alta Surety Co.*, *supra*; *Royal Bank of Canada v. Woloszyn*, [1999] N.S.J. No. 176 (Q.L.) (C.A. Chambers); *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, *supra*. I am not persuaded by the respondent's submission that I should set an amount which is "intentionally more" in this case.

[52] The costs of an appeal are of course within the discretion of the panel deciding it. In setting an amount for security for these costs, all I can do is to make a rough estimate of the amount that falls within the likely range of a costs award on appeal based on past experience and the limited information now before me about this appeal.

[53] For this purpose (and of course I have not closely studied the merits of the appeal at this stage), I accept the respondent's characterization of the case on the merits as requiring an interpretation of the specific language of the plan and the application to that language of the law as established by the Supreme Court of Canada. The costs appeal raises issues about the principles relating to when costs should be awarded out of a pension plan and when a representative plaintiff should be awarded costs as well as issues about the size of the costs award. The appeal book is in 6 volumes, running to over 3100 pages and the judge's decision is some 91 pages in length. As noted, 2 days have been set for the hearing and a very large amount of money – roughly $268 million – is potentially in issue. The parties' respective bills of costs for the hearing at first instance are staggering – roughly one million dollars each. In short, while the legal issues are not particularly intricate, the record is substantial, the arguments I anticipate will be fulsome, the hearing will be much longer than the usual appeal hearing in this Court, a lot is at stake and the costs to date have been extraordinary.

[54] I do not think it likely, as presently informed, that a panel of the court would apply the 40% rule to the costs of the appeal. However, I do think it likely that costs will be awarded in a substantial amount in comparison to the usual costs orders made by this Court.

[55] The appellant suggests a figure in the range of $35,000 if security is to be ordered. The respondent seeks $200,000. This latter amount seems to me to be unrealistic. I have never known the court to award costs in anything approaching that amount. Security for costs on appeal must be based on some reasonable estimate of what a panel of this Court might award by way of costs on appeal with the caution that the estimate should be fairly conservative. Moreover, I would be concerned that an order for security in that amount could well be beyond the financial capacity of the association which, to date, has raised only $300,000.

[56] While I do not necessarily accept the means by which the appellant has generated the $35,000 figure, I think it is closer to the right range, although somewhat too low given the exceptional amount of time set for oral argument, the very large amount of money in issue and the extraordinary legal expenses incurred by both parties to date. In my view, a figure of $50,000 is a reasonable, conservative estimate at this point.

[57] I therefore order that the appellant post $50,000 as security for costs of this appeal no later than August 1, 2008, the date on which his factum is due to be filed.

[58] The costs of this application will be fixed at $2500 plus disbursements and will be costs in the cause of the appeal.

Cromwell, J.A.