

Docket No: C.A. 164674  
Date: 20000906

**NOVA SCOTIA COURT OF APPEAL**  
**[cite as: Burton v. Howlett, 2000 NSCA 98]**

**BETWEEN:**

SANDRA J. HOWLETT

Appellant/Applicant

- and -

DIANNE MARGARET BURTON

Respondent

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**DECISION**

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Counsel: W. Bruce Gillis, Q.C., for the appellant/applicant  
Patrick J. Saulnier, for the respondent

Application Heard: August 31, 2000

Decision Delivered: September 6, 2000

**BEFORE THE HONOURABLE CHIEF JUSTICE GLUBE,  
IN CHAMBERS**

**GLUBE, C.J.N.S. (In Chambers):**

[1] The applicant, Sandra J. Howlett, a chiropractor, applied for (1) an extension of time for serving the notice of appeal, if necessary; (2) for a date for the appeal to be heard; and (3) for a stay of execution of the judgment at trial pursuant to **Civil Procedure Rule 62.10(2)**, pending the hearing of the appeal.

[2] The case was an action for wrongful dismissal brought by the respondent, Diane Margaret Burton, against her former employer, Ms. Howlett.

**(1) Extension for time for service of the notice of appeal**

[3] Does the applicant need an extension of time for serving the notice of appeal which was filed on time? At the hearing of this issue, I orally responded yes, an extension was necessary as it was not served within the 30 day period as set out in **C.P.R. 62.02(2)**. I did not accept the argument of the applicant that it was “common practice” for the appeal period to run from the date of receipt of the order appealed from or to treat the appeal time as if it was issued on that day.

[4] The respondent argued there was no reasonable excuse for the delay in service. The delay involved after calculating for the holiday, was one day. The applicant forwarded a consented to order to the trial judge for signature in May, 2000. Apparently insufficient copies went with the original order. Although the order was signed on June 1, 2000, a certified copy of the order was not received by the applicant until June 26, after a request was made to the court for a copy of the order.

[5] The notice of appeal sent to the Registrar of the Court of Appeal was date stamped June 27, but not received back by counsel for the applicant until July 4. A certified copy was faxed to the respondent's solicitor on the 5<sup>th</sup> which was a day late and the mailed copy was received by the respondent on July 7.

[6] Based on the fact that the notice of appeal was filed on time and service was delayed only by a day, and it appears that the respondent is not prejudiced by the delay, at the hearing of this application, I orally granted the extension of time for serving the notice of appeal.

**(2) Date for the appeal**

[7] January 25, 2001, at 2:00 p.m. was fixed for the hearing of the appeal.

**(3) Stay of execution**

[8] The applicant (appellant) applies for a stay of execution pending appeal pursuant to **C.P.R.** 62.10(2).

[9] On July 7, 1999, Justice Donald M. Hall, in a written decision, granted damages for wrongful dismissal to Ms. Burton in accordance with an agreement signed between the parties less one-third because of the plaintiff's failure to mitigate and less an amount for rental of an apartment. The amount of the award was \$30,666.00 net. Following a

further decision on costs rendered on December 9, 1999, the order for the total judgment issued on June 1, 2000, including interest, costs and disbursements and an adjustment for rent is in the amount of \$43,699.91. The order further provided that the **Interest on Judgments Act** applied as of July 7, 1999; however, the actual amount of post judgment interest to June 1 was not included in the order. With post judgment interest to May 16, 2000, the total amount as of that date was \$45,579.60 with interest at \$5.99 per day. Counsel for the respondent provided a breakdown that would have funds paid to the respondent's solicitor, an amount for income tax and a repayment to Employment Insurance. The net amount going directly to Ms. Burton would be slightly over \$15,000.00.

[10] Ms. Howlett's affidavit sets out that Ms. Burton is unemployed and has been on social assistance from the time she was dismissed by the applicant in March of 1995. (It would appear from the respondent's submission that she first drew unemployment insurance and when that ran out, she went on social assistance.) The affidavit further says that Ms. Burton has no significant assets within or without Nova Scotia. Ms. Howlett's concern is that payments to the government, to the respondent's solicitor and to Ms. Burton could not be recovered if they were paid and the appeal is allowed. As a result of these facts, she submits there is greater potential harm to her if the stay is not granted than would be suffered by Ms. Burton if it is granted.

[11] Mr. Saulnier, the solicitor for Ms. Burton filed an affidavit essentially setting out the facts from the time of the trial up until the notice of appeal was sent to him, which

relates to the issue of the extension of time for serving the notice of appeal. However, the last two paragraphs of his affidavit relate the following:

A review of the records of the Registry of Joint Stock Companies revealed that the Appellant incorporated her practice in 1997, after the Statement of Claim was issued. In addition, Appellant's counsel advised, and I do believe, that the Appellant stopped drawing an income from the business recently and that funds are being channeled into some sort of trust.

When execution attempts were made in July of 2000, the Appellant's bank advised that the Appellant had no funds in her bank accounts, and no investments with the bank.

[12] A notice of appeal in Nova Scotia does not operate as a stay of execution (C.P.R. 62.10(1)). A stay may be ordered on such terms as the judge deems just (C.P.R. 62.10)(2) and (3)).

[13] The case of **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) sets out the test for determining whether or not a stay should be granted. Hallett, J.A. stated at pp. 346-347:

[28] In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:

[29] (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:

[30] (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.

[14] Stays are not routinely granted as they deprive a successful party of their

remedy. The party seeking the stay must satisfy the court it is required in the interests of justice. (See: **Coughlan et al. v. Westminster Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171 at 174.)

[15] The respondent agreed that the grounds of appeal meet the arguable issue test set out in **Fulton**.

[16] On the second test of **Fulton**, I accept that there may not be any way for the applicant to recover payments made to third parties if the appeal is successful. Also, the applicant rightly has cause for concern about collecting funds paid out to the respondent herself should the appeal succeed. (See: **Dillon v. Kelly** (1995), 145 N.S.R. (2d) 194 (C.A.); **B. & G. Groceries Ltd. v. Economical Mutual Insurance Co.** (1992), 112 N.S.R. (2d) 322 (C.A.); and **MacPhail et al. v. Desrosiers et al.** (1998), 165 N.S.R. (2d) 32 (C.A.).)

[17] The respondent submits that the applicant has not disclosed any information about her personal or business income to support her position that paying the judgment would cause her irreparable harm.

[18] I conclude that the irreparable harm to the applicant is the practical impossibility of collecting back any funds which she pays to or on behalf of the respondent if the appeal is successful, rather than payment by her to the respondent at this time causing

her irreparable harm.

[19] The final issue is the balance of convenience or that the applicant will suffer greater harm than the respondent if the stay is not granted.

[20] In this case, the respondent has been on social assistance from shortly after her dismissal by the applicant. She has made little or no effort to obtain gainful employment. If the appeal is dismissed, the respondent will receive the amount awarded at trial. If the appeal is successful but the applicant has already paid the amount awarded at trial, then she will have paid money which she can possibly never recover.

[21] On the other hand the respondent submits that justice demands payment should be made to her and the stay application refused. The respondent submits she has received no funds since the decision in this case which has gone on since 1995; the applicant has filed numerous applications in which the respondent has been successful in all but one; there was an offer to settle by the respondent in July 1997 which was for an amount less than the judgment; and, finally, there is the issue of whether the respondent could collect if she is successful in light of the applicant's incorporation of her company, not drawing any income recently and having no funds in her bank accounts. Counsel for the applicant advised that although his client incorporated after this action was started, she did so on the advice of counsel for tax purposes.

[22] I do not accept that the issues raised by the respondent shift the balance of

convenience in her favour. On examination of the two situations, I find the balance of convenience is in favour of the applicant who would be substantially out of pocket if she paid the judgment at this time without any possibility of recovery if she is successful on the appeal.

[23] During the hearing of this application the parties were given an opportunity to try to resolve this issue by agreement. The applicant agreed to undertakings being provided if the stay was issued, namely not to dispose of or encumber further any assets except in the ordinary course of her doing business. Further, that as requested she would supply in an affidavit a list of her assets with a value over \$1,000, including her real property, investments, bank accounts, savings bonds, and the current value of or holdings of each; her income tax returns for the years 1995 through 1999 to establish her income prior to incorporating; and when she stopped drawing an income and information showing where the money from her chiropractic clinic is going with an update of that information by a further affidavit at the date of the appeal. However, in addition, the respondent wanted to have the applicant put in trust with her solicitor the amount of \$15,000. The applicant did not agree this was practical as it would mean raising the money and investing it at possibly a lower rate than it would cost for her to borrow that amount. The respondent argued that it would not attract post judgment interest so that probably the rates of interest would even out.

[24] On reviewing this, I do not see any real benefit to the respondent by having this money put in trust at this time.



[25] In evaluating the positions of the parties as set out above, I have concluded that the applicant has met the three steps for a stay of execution and that it is unnecessary to look at the other option of exceptional circumstances. However, in granting the stay and to save the cost of discovery in aid of execution, I am adding the conditions for disclosure and commitment by the applicant as set out above.

[26] As the parties did not raise the issue of costs, the costs of this application shall be costs in the cause of the appeal.

[27] The application is allowed with the conditions as noted above.

Glube, C.J.N.S.