Docket No.: CA 165211
Date: 20000803

NOVA SCOTIA COURT OF APPEAL

[Cite as: MacCulloch v. McInnes Cooper & Robertson, 2000 NSCA 92]

BETWEEN:

McINNES COOPER & ROBERTSON, a registered partnership
and STEWART McINNES

Appellants

- and -

PATRICIA B. MacCULLOCH

Respondent

DECISION

Counsel:	Dufferin Harper, for the appellants Respondent in person
Application Heard:	August 3, 2000
Decision Delivered:	August 3, 2000

BEFORE THE HONOURABLE JUSTICE CROMWELL
IN CHAMBERS

CROMWELL , J.A. (In Chambers) (Orally):

[1] The appellants have applied to set this appeal down for hearing and for a partial stay of execution of the judgment under appeal pursuant to Rule 62.10 of the **Rules of Civil Procedures**. The appellants propose to pay $50,000.00 to the respondent within seven days and ask that I order that the execution of the balance of the judgment be stayed. The appeal has been set to be heard on November 29, 2000 at 10:00 a.m.

[2] The judgment under appeal found the appellants negligent for arranging for the respondent, who was an executor of her late husband's estate, to purchase estate assets without getting court approval. The judgment awarded the respondent just over $350,000.00 in damages, costs and prejudgment interest.

[3] The appellants rely exclusively on the primary test for a stay as set out by Justice Hallett in the **Fulton Insurance Agencies Ltd. v Purdy** (1990), 100 N.S.R. (2d) at 341 and particularly the passages to be found at p.346 and 347.

[4] The appellants must show that there is an arguable issue raised on appeal. This is not a difficult threshold to meet. What is required is a notice of appeal which contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal: see Freeman, J.A., in **Couglan et al v. Westminer Canada Ltd.** (1993), 125 N.S.R. (2d) 171. It is not my

role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.

[5] Here the notice of appeal sets out grounds relating to both the duty and standard of care as well as causation which, if accepted by the panel hearing the appeal, could result in the appeal being allowed. In my opinion, the appellants meet the arguable issue requirement. I note, as well, that the appeal puts the whole amount of the judgment in issue.

[6] The appellants must also demonstrate that, if the stay is not granted and the appeal were to be successful, they would suffer irreparable harm that cannot be compensated for by a damage award. Justice Hallett in the **Fulton** case gives as an example of irreparable harm the risk that the appellants will not be able to recover their funds from the respondent if the judgment is paid and the appeal succeeds.

[7] The appellants argue that there is a very real possibility that, if they pay the judgment and then succeed on the appeal, they will have difficulty in collecting funds from the respondent.

[8] The trial judge made certain findings relevant to this branch of the test. In earlier proceedings, the estate's trustee in bankruptcy recovered judgment against the respondent in 1986 for just over $1.8 million. This judgment was not paid and was dealt

with in 1996 at the closing of the estate. In the present action, the respondent claimed recovery of the trustee's legal fees and disbursements in those earlier proceedings. The trial judge in this case ruled that the respondent should not recover the trustee's legal disbursements incurred by the trustee in attempting to enforce the judgment against her. He stated at p. 3 of his supplementary decision:

> That expense resulted from her [that is, the respondent's] own decision not to comply with the Court order . . . (emphasis added)

[9] The judge also added:

> I am not satisfied that she had no capacity to respond to these Judgments.

[10] The trial judge also referred, in his principal reasons for judgment, to attempts by Revenue Canada to collect the tax it thought was owed by the respondent arising from the sale of the two properties in issue. According to the trial judge, the collection efforts were ongoing from shortly after the estate was petitioned into bankruptcy in June of 1982 until a settlement was reached with Revenue Canada in 1995.

[11] As Mrs. MacCulloch points out, it is, of course, the starting point for any stay application that an appeal does not operate to stay execution of a judgment and a successful plaintiff is entitled to the fruit of the litigation. However, the authorities also make it clear that initial position gives way to proof that the appellant will suffer irreparable harm if the stay is not granted and the appeal succeeds and if the balance of convenience favors granting a stay.

[12] In a situation like this one in which risk of non-recovery is relied on and a significant interim payment is proposed, I accept the approach of Justices Flinn and Roscoe in the **Slawter v. White** (unreported, July 28, 1995, C.A. No. 118453 and **Dillon v. Kelly** (1995), 145 N.S.R. (2d) 194 cases, respectively, that the appellant meets the irreparable harm branch of the test on proof that there is a probability of difficulty of repayment by the respondent if the appeal is successful.

[13] In light of the findings by the trial judge to which I have referred, I am satisfied that the appellants have met the second branch of the **Fulton** test.

[14] There is no evidence before me that the granting of the partial stay will expose the respondent to any risk of irreparable harm.

[15] There being a significant risk of irreparable harm to the appellants if the partial stay is refused and no similar risk to the respondent if it is granted, the balance of convenience, in my opinion, clearly favours the granting of the partial stay sought by the appellants.

[16] I will, therefore, sign an order granting a partial stay of execution of the judgment under appeal until the final disposition of this appeal by this court but on the following two conditions:

1. The appellants will pay to the respondent the sum of $50,000.00 within seven days of today's date.

2. The appellants will file their appeal book and factum on the dates previously set, that is, the appeal book on September 15, 2000 and the appellants' factum on September 29, 2000.

[17] In default of compliance with either condition, the application for the partial stay is dismissed.

[18] The costs of the application will be fixed at $500.00 including disbursements and will be in the cause of the appeal. I would ask that Mr. Harper prepare an order for my signature.

Cromwell, J.A.