DATE: 19971212 CA:143446

NOVA SCOTIA COURT OF APPEAL

Cite as Gaudet v. Barrett, 1997 NSCA 14

BETWEEN:

GILBERT L. GAUDET	)	
	)	Harry E. Wrathall, Q.C. and
Applicant/Appellant	)	Michelle C. Awad
	)	for the Applicant/Appellant
	)	
- and -	)	William M. Leahey, Esq.
	)	for the Respondent
	)	
	)	Daniel W. Ingersoll, Esq.
WAYNE BARRETT	)	for the Canadian Imperial
and MARLENE BARRETT	)	Bank of Commerce
	)	
Respondent	)	
	)	Application Heard:
	)	December 11, 1997
	)	
	)	Decision Delivered:
	)	December 12, 1997
	)	
	)	

BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY ,
IN CHAMBERS

Pugsley, J.A.: (In Chambers)

This is an application brought on behalf of the appellant, Gilbert Gaudet, for a stay of execution of the order of Anderson, J. of the Supreme Court, issued November 28, 1997, requiring Mr. Gaudet to pay to the respondents Wayne and Marlene Barrett, the sum of approximately $236,380.84, including $45,000.00 solicitor and client costs.

The litigation arose out of the aborted sale of the Barretts home to David Reynolds and Brenda Hartlin. The sale was to have taken place on June 30, 1990. Mr. Gaudet, a solicitor, acted for both the Barretts, as vendors, and Reynolds and Hartlin, as purchasers, but removed himself as solicitor for all parties shortly before the scheduled closing date. The Barretts commenced action against Mr. Reynolds and Ms. Hartlin in 1990, but by the time of trial in March of 1994, additional defendants had been added, including Mr. Gaudet, the Canadian Imperial Bank of Commerce (CIBC), against whom a claim was advanced for negligent misrepresentation, as well as the realtor engaged by the Barretts.

The matter was tried over a course of seven days in March and April, 1994, was interrupted for several appeals taken to the Court of Appeal arising out of motions for non-suit, and was finally concluded in September of 1996.

Mr. Gaudet in his notice of appeal submits that Justice Anderson erred in concluding that:

- Mr. Gaudet breached a fiduciary duty owed to the Barretts;
- any breach of fiduciary duty resulted in damage to the Barretts;
- Mr. Gaudet was jointly and severally liable for the damages awarded against Mr. Reynolds, Ms. Hartlin, and the real estate brokerage firm.

It is further alleged that Justice Anderson erred in awarding solicitor and client costs in favour of the Barretts against Mr. Gaudet.

The Barretts own a home at White's Lake, Halifax County. It is presently rented, pursuant to a standard residential lease, to tenants who pay rent on a regular monthly basis. The property was listed for sale in June of 1996 for $373,000.00, and presently is listed at a price of $319,900.00. It is assessed for municipal tax purposes at $247,700.00. Estimates of market value range from a low of $205,000.00 to a high of $300,000.00.

The property is subject to an attachment order taken out by CIBC in March, 1992, for approximately $164,000.00. It is also subject to a collateral mortgage of approximately

$57,000.00 in favour of the Royal Bank. Forty-five thousand dollars of the Barretts' judgment against Mr. Gaudet is subject to a solicitor's lien pursuant to **C.P.R. 63.26.**

The Barretts have no interest in real property in Nova Scotia, other than the property at White's Lake. There are no judgments recorded against them. There is no evidence they have a poor credit rating.

In opposition to the application for the stay, Mrs. Barrett's affidavit, sworn on December 2, 1997, has been filed. She deposes in part:

> 4. ... My husband and I are residents of Nova Scotia and have been for many years. I am presently residing with my husband temporarily in the State of Florida due to the fact that I lost my job as a nurse in Halifax as a result of illness caused by stress associated with the lengthy and extremely difficult litigation. I was able to find temporary employment here in Florida and I am here temporarily on a Visa which I have only just renewed. Both myself and my husband continue to maintain our family residence at White's Lake in the Halifax Regional Municipality. My family relatives remain residents in Nova Scotia, as do those of my husband. As soon as this litigation is concluded and we are able to finalize our financial affairs both with the Canadian Imperial Bank of Commerce and with Mr. Gaudet [it is] our intention to return to Nova Scotia where I hope to obtain employment once again as a nurse.
>
> . . .
>
> 11. THAT if the application of the Appellant for a complete stay is granted, neither myself nor my husband will have the funds to pay our outstanding legal account with the law firm of Leahey Nearing (presently in the approximate sum of $27,000.00) nor will we have any funds to provide to our counsel with which to respond to the Appeal launched by counsel for Gaudet as our counsel will no longer be able to act for us.

12. THAT I submit to this Court that it is in fact the intent of Gaudet through his counsel to achieve the objective of depriving us of counsel at a critical time in this litigation (which litigation has already gone on for six years) by achieving a complete stay of any payment while Gaudet himself, with what we reasonably believe to be considerably more resources, goes on to pursue his Appeal.

13. THAT if complete stay is granted to the Appellant, we will not be able to retain other counsel as we presently lack the funds to meet our current legal account, let alone retain new counsel.

14. THAT the end result of such a decision will be that we will be unable to defend the award of $236,000.00 which has been granted to us by the Nova Scotia Supreme Court on Appeal, a result which we submit would be unfair, unreasonable and unjust in the extreme. We would also be unable to pursue our appeal against the Canadian Imperial Bank of Commerce's decision in relation to this matter.

15. THAT through our counsel we have suggested to the appellant that a partial stay be granted in this matter under which the appellant would pay over to our counsel the sum of $65,000.00. We propose that $45,000.00 of this sum be retained by our lawyers, Leahey Nearing, pursuant to the first charge granted to them under the decision of the Nova Scotia Supreme Court. We propose that a further $10,000.00 be paid over to the Canadian Imperial Bank of Commerce and that the remaining sum of $10,000.00 be ordered to be paid to us directly.

16. THAT counsel for the Appellant has rejected this proposal outright and has instead advised our counsel in writing of his intention to apply for a complete stay of execution as noted above.

17. THAT we simply ask at this point in time that this Honourable Court accept the proposal which we have made through our counsel for a partial stay and furthermore direct that Gaudet provide reasonable security to us for payment of the balance due and owing under our Judgment.

In his written decision of July 4, 1997, Justice Anderson also dismissed the Barretts' claim against the Bank, but allowed CIBC's counterclaim for approximately $260,000.00 on the basis of a line of credit extended by the Bank.

At the commencement of the Chambers motion the Court was handed a notice of appeal filed that morning on behalf of the Barretts for an order to set aside CIBC's judgment.

Counsel appeared on behalf of the Bank and asked to present submissions opposing the application for the stay. Mr. Ingersoll points out that his client has a substantial monetary interest in the matter, as it is owed in excess of $260,000.00 by the Barretts. The Bank takes the position that neither a complete, nor a partial stay, should be granted, submitting that Mr. Gaudet has not satisfied the three-part test enumerated in **Fulton Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341. I should add that no submission is advanced on behalf of Mr. Gaudet that there exist "exceptional circumstances" within the second branch of **Fulton**.

As might be expected, counsel for the Barretts welcomes the Bank's involvement, but counsel for Mr. Gaudet is opposed, submitting that the stay application does not directly involve the Bank, and that there were no issues raised in the pleadings between the Bank and Mr. Gaudet, as co-defendants.

There is no doubt the Bank would benefit if the stay were refused. Mr. Gaudet would be obliged to pay approximately $236,000.00 to the Barretts, and that amount, less

$45,000.00 subject to the solicitor's lien, would be directed to the Bank pursuant to the attachment order.

Although the Bank is presently a party to the original litigation, and by virtue of the Barretts' notice of appeal filed yesterday, the Bank will continue to be a part of the appeal process, I conclude that the Bank's request is somewhat akin to a request for intervenor status on a stay application.

One of the issues to be considered by the Court on an application to intervene is the possible prejudice that may be suffered by an existing party if the intervention were to be granted ***(The Conduct of an Appeal***, Sopinka and Gelowitz (Butterworth's p. 187).

The Bank, in dealing with its clients, the Barretts, has a number of remedies available to it, and has already taken advantage of one of those remedies by obtaining an attachment order. The Bank is free to pursue other remedies.

I conclude that it would be unfair to Mr. Gaudet to permit the Bank to address submissions on the stay application. It is one thing for Mr. Gaudet to be faced with a compromise position advanced on behalf of the Barretts, who are prepared to agree to a

partial stay, but quite another thing to have to face submissions advanced on behalf of the Bank, who are opposed to any stay at all, when there is no issue joined in the litigation between the Bank and Mr. Gaudet.

I recognize that the burden rests on the party applying for a stay to satisfy the Court that the stay is required in the interests of justice (**Coughlan et al v. Westminer Canada Ltd. et al** (1993), 125 N.S.R. (2d) 171 at 174.

However, in considering what is just in the circumstances, it is perfectly appropriate for the Court to take into account the compromise position advanced by the party directly affected by the stay.

I will not, therefore, consider the submissions advanced on behalf of CIBC.

The application for the stay is made pursuant to **C.P.R. 52.10**, the relevant provisions of which are as follows:

> (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. . . .

> (3) An order under Rule 62.10(2) may be granted on such terms as the judge deems just.

Under the test set out by Justice Hallett in **Fulton Agencies Ltd. v. Purdy**, which has been consistently followed by this Court, Mr. Gaudet is obliged to satisfy the Court that there is an arguable issue raised on the appeal, that if the stay is not granted and the appeal is successful, he will have suffered irreparable harm that is difficult to, or cannot be compensated for by a damage award, and finally, that he will suffer greater harm if the stay is not granted than the Barretts would suffer if the stay is granted.

Counsel for the Barretts suggests that with respect to the first issue, Mr. Gaudet has not satisfied the burden of demonstrating that an arguable issue is raised on the appeal.

Counsel makes two points:

- The appellants have done nothing more than refer to the bare grounds set forth in the notice of appeal which are not "fleshed out" by any reference to the evidence;
- Counsel directs our attention to the decision of Roscoe, J.A., on behalf of this Court dated October 3, 1994, and reported at **Barrett v. Gaudet** (1995), 134 N.S.R. (2d) 349. That appeal arose from the decision of Justice Anderson to

grant a motion for non-suit made on behalf of Mr. Gaudet at the conclusion of the evidence presented on behalf of the Barretts.

Justice Roscoe concluded there was sufficient evidence presented by the Barretts from which inferences could be drawn that Mr. Gaudet was under a duty of care, that he had not met the appropriate standard of care, and that damages resulted.

In essence, counsel argues that the issues raised by Mr. Gaudet in his present notice of appeal have already been considered, and rejected, by this Court in an earlier decision.

I am not persuaded by these submissions.

Justice Freeman in considering this issue in **Coughlan v. Westminer Limited**, said at p. 175:

> But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the Court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful.

I am satisfied that the notice of appeal contains realistic grounds, which if established, would appear to be of sufficient substance to be capable of convincing a panel of the Court to allow the appeal.

With respect to the earlier decision of Justice Roscoe, all the Court decided was that the appellant had established a *prima facie* case on the evidence up to that point. Justice Anderson heard an additional day of evidence in September of 1996. What effect, if any, the additional evidence would have on the ultimate issue of Mr. Gaudet's liability to the Barretts is unknown. Further, the issue before the Court of Appeal was whether there was a duty of care owed by Mr. Gaudet to the Barretts, and if so, whether it was breached, and caused the Barretts to suffer damage.

Justice Anderson determined in his written decision of July 4th, 1997, that Mr. Gaudet was in breach of a fiduciary duty to the Barretts and that breach resulted in additional damage being awarded to the Barretts, and was the basis for an award for solicitor and client costs.

I am of the opinion that the decision of this Court in October of 1994 does not affect the issues raised in Mr. Gaudet's present notice of appeal.

With respect to the remaining issues of irreparable harm and balance of convenience, it is submitted on behalf of Mr. Gaudet that the Barretts "may not be able to repay" any sums paid to them if Mr. Gaudet is successful on the appeal.

It is clear that the inability of a successful appellant to recover monies paid to a respondent is a relevant consideration in weighing the merits of a stay of application (Hallett, J.A., in **Fulton** at p. 346).

Here the appellant is not offering to pay any portion of the trial judgment pending the appeal.

In construing the balance of convenience, I am impressed by the fact that Mrs. Barrett is presently working in Florida as a nurse, that she and her husband plan to return to Nova Scotia so that she can take up her nursing duties in this province once the litigation is resolved, that there are no judgments rendered against them, that there is no evidence that they are insolvent, and that they could be substantially prejudiced if their counsel is entitled to withdraw from their representation in accordance with his retainer.

I am not satisfied that the appellant will suffer greater harm if the stay is not granted than the Barretts would suffer if a full stay were to be granted. I therefore dismiss the application for the full stay.

The balance of convenience, however, is repositioned if a partial stay only is granted, as proposed in paragraph 15 of Ms. Barrett's affidavit. I am persuaded to this view, not only because the equities between the parties would obviously change if money were made available for the Barretts to be enable them to be represented throughout the appeal process, as well as, apparently forestall, any overt action by the Bank to realize on its judgment, but also because it is the Barretts who have initiated the compromise proposal. It is, in my mind, an entirely reasonable resolution of the issue which should substantially alleviate the cause for concern respecting the ability of Mr. Gaudet to recover the funds paid under a partial stay, should the appeal succeed.

The appellant shall therefore pay to the respondent the sum of $65,000.00 by December 16, 1997, and thereupon the balance of the judgment shall be stayed pending the resolution of the appeal.

The appellant, or his counsel, shall also forthwith provide to the Court a written undertaking to hold the balance of funds stayed, in a segregated account, conservatively invested, pending the disposition of the appeal.

In view of my comments concerning the reasonableness of the compromise proposal, the Barretts are entitled to their costs of the application, which I fix at $750.00, together with disbursements, to be paid forthwith.

Pugsley, J.A.

BETWEEN:

GILBERT L. GAUDET Applicant/Appellant - and - **WAYNE BARRETT** and **MARLENE BARRETT** Respondents	)	BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY (IN CHAMBERS)