



The appellant, Ken Godsoe, a tenant of premises at Apartment #1, 2501 Windsor Street, Halifax, brings this application, pursuant to **Civil Procedure Rule 62.10(2)**, to stay an order of Justice Nunn of the Supreme Court, requiring Mr. Godsoe to vacate the premises and deliver up possession to the respondent landlord, Nick Kapetanakis.

Mr. Godsoe went into possession of the premises in June, 1996. Mr. Kapetanakis gave notice to quit effective March 29, 1997, but Mr. Godsoe refused to move.

On April 4, 1997, Mr. Kapetanakis applied to the Halifax County Residential Tenancies Board for an order requiring Mr. Godsoe to yield up possession. A hearing was held on April 14, 1997.

The Board made the following findings:

1. A landlord/tenant relationship exists according to s.3(2)(c) of the **Residential Tenancies Act**;
2. The landlord gave proper notice to the tenant to vacate according to s. 10(7a) of the **Act**, and is entitled to vacant possession;
3. The tenant poses a risk to the safety and security of the other tenants and the landlord.

Mr. Godsoe appealed the Board's written decision of April 17, 1997 to the Supreme Court. On May 26, at the conclusion of the hearing, Justice Nunn approved the recommendations contained in the report of the Board, and further ordered that Mr. Godsoe vacate Apartment #1 and that Mr. Kapetanakis be put into possession "effective immediately".

Mr. Godsoe has appealed to this Court and the matter was set down this morning for hearing on September 25, 1997 at 2:00 in the afternoon.

The grounds of appeal are as follows:

1. That Justice Nunn denied the applicant's request for an adjournment in order to obtain counsel and thereby breached natural justice; and
2. Such other grounds as this Honourable Court may deem just.

Rule 62.10 of the **Civil Procedure Rules** provides that the filing of a notice of appeal "shall not operate as a stay of execution of the judgment appealed from".

Justice Freeman of this Court commented in **Coughlan v. Westminster Canada Limited** (1994), 125 N.S.R. (2d) 171 at 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.

In deciding whether to grant the application for a stay, I am guided by the comments of Justice Hallett of this Court in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341. In that case Justice Hallett stated that an applicant who sought a stay was required to satisfy either a primary test or a secondary test. The primary test requires the applicant to establish that there is an arguable issue raised on the appeal, 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 damage award, and finally that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted.

I am of the opinion that Mr. Godsoe has not satisfied the primary test. Counsel, however, bases her argument on the secondary test; namely, that there are exceptional circumstances in the case that would make it fit and just that the stay be granted.

I should point out that the material in support of Mr. Godsoe's position was only filed yesterday, and was only available to Mr. Kapetanakis' counsel late last night. Mr. Kapetanakis' affidavit in

response was only filed this morning a few moments before this Chambers hearing was commenced. Notwithstanding this short period of time, both counsel were co-operative in requesting that this matter be considered by the Court in view of the circumstances surrounding the nature of the application.

Mr. Godsoe's affidavit states in part:

4. On March 27, 1997, I was attacked and struck on the head 15 times by an axe. I attended the Victoria General Hospital for treatment in relation to these injuries.

...

5. My physician, Dr. Karen Maley, states in her report that I have multiple medical problems and require regular medication which must be taken regularly to avoid relapse. I suffer from confusion, devastation short-term memory loss, delirium and psychotic episodes if out on the streets and not in my apartment in solitude. It could irrevocable affect my mental and emotional well being if I am not inside my apartment by myself dealing with this problem and if I miss my medication. I do not react well to stress and suffer mood swings and erratic behaviour at times. Being locked out of my apartment without access to medication is an unreasonable strain. I am not physically able to find new accommodation at very short notice.

Attached to Mr. Godsoe's affidavit is a letter dated May 2, 1997 from Dr. Maley, as well as a short note dated May 28, 1997.

Some, but not all, of the representations made by Mr. Godsoe in his affidavit are confirmed by Dr. Maley's reports. In particular, she

stresses the necessity of Mr. Godsoe taking medication on a regular basis. She said in part:

He also does not react well to stress and suffers from mood swings and erratic behaviour at times. Being locked out of his apartment without access to his medication is an unreasonable strain.

It is argued on behalf of Mr. Godsoe that it is necessary for his mental and emotional condition that he be able to remain living in his apartment "in solitude", and that "being locked out of my apartment without access to medication is an unreasonable strain".

Mr. Kapetanakis has filed a three-page affidavit dated May 30, 1997 in response.

At the commencement of the hearing I advised both counsel that I was prepared to consider an application from them requesting the opportunity to cross-examine the parties. Counsel declined the invitation.

Mr. Kapetanakis deposes in part:

- that he obtained an order from the Prothonotary on May 28, 1997 for the Sheriff to deliver up possession of the apartment to him, that at 2:30 in the afternoon on May 28, two deputies knocked on the door of

the premises but were refused entry by Mr. Godsoe, that a locksmith removed the lock, that after a scuffle between the Sheriff's deputy and Mr. Godsoe, Mr. Godsoe was escorted from the premises;

- that the Sheriff's deputies advised Mr. Godsoe at this time that he could retrieve all of his belongings from the aforementioned premises by contacting the landlord, but that a police officer would be present while he moved things out;

- that his solicitor told Mr. Godsoe's counsel that Mr. Godsoe could retrieve his prescription medication by contacting Mr. Kapetanakis or his counsel;

- Mr. Godsoe has lived at 31 Castle Lake Drive with his father "at various times, including as recently as April 4, 1997" and would be able to reside there until he finds new accommodation;

- that I am fearful for my life and safety having Ken Godsoe continue to reside at the aforementioned premises as he has threatened to cause me harm at various times, both when I was attempting to collect rent at 2501 Windsor Street, and has presented himself at my home, next door to the aforementioned premises, and banged on my windows and door threatening me;

- that my wife is greatly distressed by the actions of Ken Godsoe coming to our home and threatening us;

- that in late April, 1997, his personal belongings stored in the basement under Mr. Godsoe's control, had been removed by Mr. Godsoe's tenant and sold;
- on May 28, 1997 when he entered the premises with the Sheriff's deputies he "discovered the walls of the apartment had been spray painted with graffiti, there were holes in the walls, the fridge had been painted red, and there were personal belongings strewn all over the apartment";
- that he received a telephone call from Mr. Godsoe on May 29, 1997, "informing me that he wanted to pick up all of his belongings from the apartment at 6:00 on Saturday, May 30th(sic) 1997";
- that I am fearful that if Mr. Godsoe "is allowed to return to the aforementioned premises to take up residence again, that I will receive further threats, I may be assaulted and the premises will sustain further damage".

Since Mr. Godsoe, and his counsel, only received Mr. Kapetanakis' affidavit shortly before the commencement of Chambers this morning, I adjourned the hearing at the conclusion of argument, to give Mr. Godsoe and his counsel an opportunity to consult to consider whether Mr. Godsoe would be called to give *viva voce* evidence in response to the



new matters raise in Mr. Kapetanakis' affidavit. After the adjournment, counsel advised that Mr. Godsoe would not be taking the stand.

I am satisfied that Mr. Godsoe has not met the burden of establishing the secondary test espoused in **Fulton**, i.e. that exceptional circumstances exist that make it fit and just that the stay be granted.

I come to this conclusion for the following reasons:

1. Mr. Kapetanakis has undertaken to return to Mr. Godsoe his medication upon request.
2. Mr. Godsoe did not dispute that he has lived with his father at various times and as recently as the last three days, although counsel maintains that it is "very unsuitable" for such an arrangement to continue. Mr. Godsoe's submission is substantially weakened in view of Mr. Kapetanakis' unchallenged statement that he had received a call from Mr. Godsoe on May 29 informing him that Mr. Godsoe wanted to "pick up all of his belongings from the apartment at 6:00 p.m. on Saturday, May 30(sic), 1997".

In summary, it is clear that not being able to meet the primary test in **Fulton**, Mr. Godsoe is obliged to establish exceptional circumstances in order to justify a stay of execution. The material before me simply does not meet that test.

In view of the conclusion I have reached, it is not necessary to address the alternate submission raised on behalf of Mr. Kapetanakis that since the landlord has resumed possession of the premises, the Court does not have any authority to order the stay under **Civil Procedure Rule 62.10(2)**.

The application is dismissed.

Pugsley, J.A.

**NOVA SCOTIA COURT OF APPEAL**

**BETWEEN:**

**KEN GODSOE**

Appellant

- and -

BY:

**NICK KAPETANAKIS**

Respondent

REASONS FOR  
JUDGMENT

Pugsley, J.A.  
(in Chambers)