DATE: 19970917 CA:141127

NOVA SCOTIA COURT OF APPEAL

Cite as Salvage Association v. North American Trust Company, 1997 NSCA 4

BETWEEN:

THE SALVAGE ASSOCIATION	)	
	)	
Applicant	)	James E. Gould, Q.C.
	)	for the Applicant
	)	
- and -	)	Jonathan C.K. Stobie
	)	for the Respondent
	)	
	)	
NORTH AMERICAN TRUST COMPANY	)	
and **WESTLACO INVESTMENT COMPANY**	)	
	)	
	)	Application Heard:
Respondents	)	September 11, 1997
	)	
	)	Decision Delivered:
	)	September 18, 1997

BEFORE THE HONOURABLE JUSTICE NANCY J. BATEMAN ,
IN CHAMBERS

BATEMAN, J.A. (In Chambers):

This is an application for an order staying a Supreme Court Order for the production of documents.

The respondents have sued the appellant Salvage Association claiming negligent valuation of a ship. North American Trust alleges that it advanced funds in relation to the ship on the basis of a valuation prepared by the appellants. In its Amended Statement of Defence the Salvage Association, *inter alia*, denies that it is a ship valuer and denies that it held itself out as having expertise in the valuation of marine vessels.

On an application by the respondent, Justice Moir of the Supreme Court ordered that the appellant produce immediately "true copies of valuations of vessels prepared by George Jardine which use the expression 'market value' or similar expressions." In addition, the Order provides that within 120 days of the date of the Order, the appellants produce "all valuations of vessels, for purposes other than insurance, prepared by each of its North American offices for the five year period

leading up to and including May 18, 1990 . . .". It is from that Order that the Salvage Association has appealed.

The grounds of appeal stated in the Notice are:

a. The learned trial judge erred in law in finding that the documents ordered produced have a semblance of relevancy.

b. The learned trial judge erred in law in ordering production of documents from all of the Appellant's North American offices as such an Order is exceptionally burdensome and irrelevant to matters at issue in this proceeding.

The application for the stay of execution is made pursuant to **Rule 62.10** which provides:

> (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 or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.
>
> (3) An order under Rule 62.10(2) may be granted on such terms as the Judge deems just.

The test applicable on a stay application was stated by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

> A review of the cases indicates there is a trend towards applying what is in effect the **American Cyanamid** test for an interlocutory injunction in considering applications for stays of execution pending appeal. In my opinion, it is a proper test as it puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.
>
> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
>
> (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:
>
> (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.

“Arguable issue” is defined by Freeman, J.A. in **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 170 at page 174:

> "An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could

> result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. **It must be a ground available to the applicant**; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. **An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge**; **a general allegation of error may not suffice**. 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. (Emphasis added)

It is necessary, then, to first determine whether the grounds of appeal raise an arguable issue. The test to be applied on an interlocutory appeal was succinctly stated by Chipman, J.A. in **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143 (C.A.) at p.145:

> At the outset, it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result. The burden on the appellant is heavy . . .

There is no suggestion in the stated grounds of appeal that the judge applied wrong principles of law, but rather that in his application of those principles, the judge, in the exercise of his discretion, reached the wrong result. Nor do the grounds suggest a patent injustice resulting from the Order. The appellants submit only that the production of the documents would be burdensome and expensive. I am mindful of Justice Freeman's caution in **Coughlan, supra**, that the Chambers judge hearing the application "should not speculate as to the outcome nor look further into the merits of the appeal". I am not satisfied, however, that the Notice of Appeal, as framed, "contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal".

Even had the appellant met the threshold "arguable issue" test, I am not satisfied that it would suffer irreparable harm if the stay is not granted. My refusal to stay the production Order may result in the appellant being required to produce some of the documents forthwith. In relation to certain of the other documents, the appellant has a period of 120 days before production is required. That time expires well after the date set for the hearing of the appeal. The appellant argues that, in the absence of a stay, its appeal will be moot - at least in part. This, it submits, constitutes irreparable harm. In **Fulton, supra**, Hallett, J.A. wrote that irreparable harm is that which is either difficult to, or cannot be compensated in damages if the stay is not granted and the applicant is eventually successful on the appeal. Should the appellant produce the documents prior to the appeal hearing, and it is subsequently found that it should not have been required

to do so, that can clearly be remedied through a monetary award. The appellant company has not demonstrated that it would suffer “irreparable harm”.

On the secondary test, I am not satisfied that there are exceptional circumstances here that would warrant a stay, in any event. In this regard I have reviewed **Pelot v. Prudential of America**, (1995), 143 N.S.R. (2d) 367 (N.S.C.A., in Chambers), another decision of Hallett, J.A. While it too involves an application to stay a disclosure order, it is factually distinct from the within matter. There it would have been impossible to remedy through damages the harm occasioned by the disclosure of the documents.

In summary then, the application is dismissed. Costs shall be in the cause.

Bateman, J.A.

C.A. No. 141127

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

THE SALVAGE ASSOCIATION	)	
	)	
Applicant/Appellant	)	
	)	
	)	
- and -	)	
	)	
NORTH AMERICAN TRUST COMPANY and WESTLACO INVESTMENT COMPANY	)	BEFORE THE HONOURABLE JUSTICE NANCY J. BATEMAN
	)	
	)	
Respondents	)	(IN CHAMBERS)
	)	
	)	
	)	
	)	
	)	