NOVA SCOTIA COURT OF APPEAL
Citation: ***W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.***, 2006 NSCA 129

Date: 20061206
Docket: CA 274238
Registry: Halifax

Between:

W. Eric Whebby Limited, a body corporate

Appellant

v.

Doug Boehner Trucking & Excavating Limited, a body corporate; United Gulf Developments Limited, a body corporate, and Greater Homes Inc., a body corporate; Garden Crest Developments Limited, a body corporate

Respondents

Judge:	The Honourable Justice Thomas Cromwell
Application Heard:	November 30, 2006, in Halifax, Nova Scotia, in Chambers
Held:	Application dismissed.
Counsel:	George W. MacDonald, Q.C. and Christopher Wilson, for the appellant Ann Smith and Cory Withrow, for the respondent Doug Boehner Trucking and Excavating Limited David P.S. Farrar, Q.C. and Sara Scott, for the respondent United Gulf Developments Limited David G Coles, Q.C., for the respondent Garden Crest Developments Limited

Decision:

[1] The appellant, W. Eric Whebby Limited has appealed the judgment of Haliburton, J. ordering it to pay $221,510.00 “into court ... for the benefit of Doug Boehner Trucking & Excavating Limited and United Gulf Developments Limited.” Whebby applies for a stay of execution pending determination of the appeal. At trial, the recording system failed with the result that none of the evidence was recorded and, therefore, no trial transcript can be produced. Whebby says that this is an exceptional circumstance justifying a stay of execution in its favour. I reject this contention and dismiss the stay application.

[2] The background is this. The litigation arises out of the construction of the Garden Crest development at the corner of Spring Garden Road and Summer Street in Halifax. Garden Crest retained Whebby to perform some of the early site excavation and preparation work for the project. Whebby was, among other things, to remove soil from the site. Whebby sold the soil to the respondent, Doug Boehner Trucking & Excavating Limited. The soil was then used by Boehner as landscaping and backfill material around homes that were built in a development on lands owned by the respondent United Gulf Limited and its related company, Greater Homes.

[3] The soil turned out to be contaminated, costly remediation had to be done and litigation ensued. Boehner commenced an action against United for the recovery of the amounts owing for the work Boehner had done in backfilling the lands in question. United counterclaimed against Boehner seeking to recover the costs of remediation. Boehner, in turn, third partied Whebby and Whebby then fourth partied Garden Crest. Boehner settled with United.

[4] The matter was tried by Haliburton, J. over four days in March of 2006. The result, with respect to Whebby, was the order to pay $221,510.00 into court for the benefit of Boehner and United.

[5] In the middle of closing submissions by counsel at trial, the presiding judge informed counsel that, as a result of some error or mechanical failure, none of the evidence presented at trial had been recorded. It will, therefore, not be possible to obtain a verbatim transcript of the evidence called at trial. Although there was no agreement among counsel as to what could constitute the official trial record, they

did agree to continue with closing arguments and to have the presiding judge render a decision.

[6] As mentioned, Whebby now appeals and asks that the order requiring it to pay the funds into court be stayed pending resolution of the appeal. Whebby has also applied to have an expedited appeal heard on the issue of whether there should be a new trial granted in the proceedings as a result of the absence of a transcript.

[7] Whebby's stay application is founded exclusively on the secondary test in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A., in Chambers). Whebby cannot meet the primary test on the evidence before me because there is no evidence that Whebby will suffer irreparable harm if the stay is denied.

[8] Whebby submits that the secondary test best addresses the extraordinary situation that this case presents to the court. It is submitted that Whebby has a reasonable argument to have a new trial ordered and that to require it to pay the judgment following a trial for which no record exists would be to compound "a violation of fundamental justice."

[9] I cannot accept this submission.

[10] As Mr. MacDonald, counsel for Whebby, quite appropriately conceded, the absence of a transcript is not necessarily, on its own, a sufficient basis on which an appellate court will order a new trial. This Court, in **Kenney v. Jodrey**, [1988] N.S.J. 245 (Q.L.)(C.A.), adopted the approach to be followed where a transcript is either incomplete or entirely lacking which was set out in **Plamondon v. Godt** (1979), 105 D.L.R. (3d) 185 (N.W.T.C.A.) and **Morrison v. Aldridge**, [1933] 2 D.L.R. 624 (Ont. C.A.). Those cases indicate that where a transcript is not available, a new trial should be granted only where the court of appeal is satisfied by the appellant that (i) he has a case calling for further investigation; (ii) his case is plausible and that there is some ground for supposing that the judgment in the court below produced an injustice; and (iii) that there are special circumstances warranting a new trial: **Kenney v. Jodrey**, para. 4. In that case, the appeal was dismissed, Macdonald, J.A. observing that the court was not persuaded that the appellant had been prejudiced by not having available a transcript of every word that was spoken by the various witnesses: para. 5. It is clear, therefore, that the absence of a transcript will not inevitably lead to an order for a new trial.

[11] Very few cases have been decided on the basis of the secondary test in **Fulton**. Freeman, J.A. in **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171 (C.A., in Chambers) at para. 13 offered as an example of exceptional circumstances a case in which the judgment appealed from contains errors so egregious that it is clearly wrong on its face. As Fichaud, J.A. observed in **Brett v. Amica Material Lifestyles Inc.** (2004), 225 N.S.R. (2d) 175 (C.A., in Chambers), there is no comprehensive definition of "exceptional circumstances" for **Fulton**'s secondary test. It applies only when required in the interests of justice and it is exceptional in the sense that it permits the court to avoid an injustice in circumstances which escape the attention of the primary test.

[12] While there is no comprehensive definition of what may constitute "exceptional circumstances" which may justify a stay even if the applicant cannot meet the primary test, those exceptional circumstances must show that it is unjust to permit the immediate enforcement of an order obtained after trial. So, for example, in **Fulton** itself, Hallett, J.A. found that exceptional circumstances consisted of three factors in combination: first, that the judgment was obtained in a summary proceeding rather than after trial; second, that on the face of the pleadings the appellant raised what appeared to be an arguable issue and, thus, was likely to be successful on appeal; and third, the appellant had a counterclaim and claim to a set off that had not been adjudicated making it premature to execute on the summary judgment.

[13] While there can be no comprehensive definition of what constitutes special circumstances, they must be circumstances which show that it would be unjust to permit immediate enforcement of the judgment. This is because a stay of execution, in common with interim injunctive relief, must justly apportion the risk of uncertainty about the ultimate outcome of the case. There are arguable issues raised on appeal, but one cannot at this stage speculate about what the outcome of the appeal will be. The risk created by this uncertainty is shared by both the appellant and the respondents. If a stay is granted and the appeal ultimately fails, the respondents will have been kept out of their money needlessly. If, on the other hand, the stay is denied and the appeal ultimately succeeds, the appellant will have been required to pay the judgment needlessly.

[14] As judges of this Court have noted many times, the filing of a notice of appeal in Nova Scotia does not automatically stay execution of the judgment

obtained at trial. Thus, the general rule is that a successful litigant should not be deprived of the "fruit of his judgment" unless that is required in the interests of justice: see **Westminer, supra,** *per* Freeman, J.A. at p. 174. The question is whether the absence of a transcript makes it unjust to apply this general rule in this case. In my view, it does not.

[15] The absence of a transcript of the trial, while of course highly regrettable, does not invalidate the judgment of the Supreme Court of Nova Scotia issued after trial. Moreover, the absence of a transcript seems to me to affect all parties to the litigation equally. At this stage, there is no more reason to suppose that the absence of a transcript may work an injustice to the appellant Whebby than that it may work an injustice to the respondents. While, as Mr. MacDonald ably pointed out, it is not due to any fault of his client Whebby that there is no transcript, it must equally be said that it is due to no fault of any other party that there is no transcript.

[16] In short, I agree with the submissions advanced on behalf of Gulf and Boehner to the effect that the lack of a trial transcript is not, on its own, an exceptional circumstance that justifies the granting of a stay of execution.

[17] The application for a stay of execution is dismissed. The costs of the application will be in the discretion of the panel of the court hearing the appeal.

[18] I will deal with Whebby's application for an expedited appeal on the issue of whether a new trial should be ordered in Chambers on December 14, 2006. The transcription of the judge's trial notes should be available by the end of this week.

Cromwell, J.A.