Date: 19971029 Docket: C.A. 141911

NOVA SCOTIA COURT OF APPEAL

Cite as Lunenburg County District School Board v. Piercey, 1997 NSCA 5

BETWEEN:

LUNENBURG COUNTY DISTRICT SCHOOL BOARD	)	Scott C. Norton for the Appellant
Appellant/Applicant	)	
- and -	)	Jean McKenna for the Respondent Piercey
ROY EUGENE PIERCEY, J.R. MILLIGAN and KATHLEEN MacDONALD	)	Darlene Jamieson for the respondent MacDonald
Respondents	)	
	)	Application Heard: October 23, 1997
	)	Decision Delivered: October 29, 1997

BEFORE THE HONOURABLE NANCY BATEMAN IN CHAMBERS

BATEMAN, J.A.: (in Chambers)

[1] The applicant (appellant) has applied for a stay of an order of the Supreme Court of Nova Scotia requiring the appellant to pay monies to the respondent, Roy Eugene Piercey.

[2] The respondent Piercey, who was a high school student at the relevant time, fell while participating in a planned game on a school outing and was rendered a quadriplegic. He sued the appellant school board, among others. Liability was in issue. The jury found for the respondent and awarded damages payable by the appellant in the total amount of $2,718,562, after gross up. The jury verdict was rendered May 2, 1997 and the order for judgment dated September 23, 1997.

[3] The school activity was undertaken under the supervision of a J.R. Milligan who hired Kathleen MacDonald (now Kathleen MacDonald Allen) to assist him. Mr. Milligan had been hired by the school for the purposes of organizing activities on the school outing. A significant issue was whether the school board was vicariously liable for the negligence (if any) of Milligan and MacDonald. At issue, as well, was the question of contributory negligence.

[4] The appellant has appealed the jury's finding that there was no contributory negligence on the part of Piercey, the trial judge's finding that the appellant is vicariously liable for the negligence of Milligan and MacDonald and the judge's instructions to the jury on the issues of contributory negligence and apportionment of liability.

[5] The appeal is scheduled to be heard on February 13, 1998.

[6] Of the amount due to the respondent, the appellant has paid $225,000. The appellant offers to pay another $100,000 pending conclusion of the appeal. The respondent opposes the stay. According to the affidavit evidence filed by the respondent, the funds paid so far have been fully expended upon repayment of creditors and the purchase of a suitably equipped motor vehicle, housing and medical supplies. The balance due is about $2,600,000. The respondent proposes to invest a minimum of $2,000,000 in conservative investments pending the hearing of the appeal, so that the funds will be available, should the appellant succeed. The balance will be used to pay legal fees, repay a loan and for his ongoing needs. This proposal is not acceptable to the appellant.

The Law:

[7] 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.

[8] Freeman, J.A. said in **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171 at page p.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 interests of justice.

[9] The test to be applied in determining whether or not to grant a stay is 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.

[10] An arguable issue is defined by Freeman, J.A. in **Coughlan v. Westminer, supra,** 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.

Analysis:

[11] I accept that the applicant has met the first requirement of the **Fulton** test. I am satisfied that the appellant has raised an "arguable issue" in the Notice of Appeal. The 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". It is not for me to comment on the prospects of success.

[12] With respect to the second requirement, the appellant submits that "irreparable harm will result if it pays the full amount awarded, the appeal is successful and Piercey is not able to repay the amount . . ." As authority for the proposition that irreparable harm flows from an inability to repay damages the appellant cites the decision of this Court, **Kelly v. Dillon** (1995), 145 N.S.R. (2d) 194 (Roscoe, J.A., in Chambers). Counsel refers, as well, to **Slawter v. White** (unreported, N.S.C.A., July 28, 1995, Flinn, J.A. in

Chambers) and **B.&G. Groceries Ltd. v. Economical Mutual Insurance Co.** (1992), 112 N.S.R. (2d) 322 (C.A.).

[13] The appellant further submits that the balance of convenience favours the granting of the stay in that the interim funds offered by the appellant are sufficient to meet the respondent's needs.

[14] In the alternative, the appellant submits that there are "exceptional circumstances" here within the meaning of the second branch of the **Fulton** test. Specifically, the respondent says that insofar as a substantial portion of the award relates to future losses including future care ($1,995,950), delaying full payment to Piercey will not affect his day-to-day living. As regards this argument, in **O'Brien v. Clark** (unreported, N.S.C.A., April 7, 1995) Pugsley, J.A. specifically rejected the submission that "exceptional circumstances exist because the majority of the trial judge's award of damages relates to future lost income."

[15] There, Pugsley, J.A. quoted with approval the comments of Freeman, J.A. in **Westminer** at p.175:

> [para13] The secondary test applies when circumstances are exceptional. If for example, the judgment appealed from contains an error so egregious

> that it is clearly wrong on its face, it would be fit and just that execution should be stayed pending the appeal.

[16] As regards the first test, however, the risk of non-recovery of monies paid, should the appeal succeed, is a relevant consideration in weighing the merits of a stay application. In **Fulton,** Hallett J.A. said, irreparable harm "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" (at p.346).

[17] The appellant does not seek to withhold the full balance due, but rather $2,000,000. This would leave $600,000 for the respondent pending appeal. The respondent, on the other hand, does not object to an order preserving the capital sum of $2,000,000 until the disposition of the appeal. Counsel for the respondent submits, however, that as a matter of policy, that fund should not be left in the hands of the appellant who would be free to invest it and reap the benefit of significant interest accrual pending the appeal. It is the respondent’s submission that the appellant will likely earn substantially in excess of the 5% (interest on judgments) it will be obliged to pay, if unsuccessful on the appeal. To permit this to occur, submits the respondent,

given the substantial funds involved here, would be to permit the appellant to finance its costs of appeal on the interest differential and, likely, make money on the delay. The appellant would, therefore, incur no risk in appealing, as the usual disincentive of expense would not apply. I agree. This Court should be hesitant to create a situation in which an appellant stands to gain financially from the delay pending appeal, irrespective of the success of the appeal itself.

[18] I have some difficulty reconciling the decisions in **Westminer** and **O'Brien**, on the one hand and **Kelly** and **Slawter**, on the other. The finding of irreparable harm in each case, however, appears to turn upon the court's assessment of the likelihood that the successful appellant could recover the funds. The appropriate test is summarized by Roscoe, J.A. in **Kelly v. Dillon**, **supra**, at p.198:

> Where the appellant offers to pay a substantial portion of the trial judgment pending the appeal, the evidence on the second prong of the ***Fulton v. Purdy*** test need not show insolvency of the respondent, but rather the probability of difficulty of repayment by the respondent if the appeal is unsuccessful.

[19] As Freeman, J.A. commented in **Westminer, supra**, the "payment of money by one solvent party to another is not generally considered irreparable

harm" but "payment to a party which is insolvent would therefore be likely to cause irreparable harm."

[20] It is fair to conclude from the material on file here that the appellant has cause for concern regarding collection of the funds paid out, should the appeal succeed. This is not to suggest any impropriety in the respondent's use of the funds advanced to date, nor the investments he may make with the balance, but recognizes that, given his age, experience and resources, Mr. Piercey is most probably an unsophisticated investor. The $2,000,000 payment could rapidly shrink in the face of poor investment advice. Should that occur, Mr. Piercey is not "solvent" to the extent that he could repay the funds from independent resources. In this regard, this case is factually distinct from **O'Brien** and **Westminer**, where the court found that the risk of non-payment was not, on balance, sufficient to warrant a stay.

[21] It is, of course, a prerequisite to my attaching conditions to the payment of funds by the appellant to the respondent, that the appellant meet the **Fulton** test. The appellant must satisfy me that it will suffer irreparable harm should the stay not be granted and that the balance of convenience favours the granting of the stay.

[22] But for the respondents offer to segregate and keep safe $2,000,000 of the balance owing, I would have been satisfied that the appellant had shown irreparable harm and that the balance of convenience favoured the stay. I am satisfied, however, that there is minimal risk of harm to the appellant if the respondent deals with the funds as proposed.

[23] Accordingly, the stay is refused on condition that the respondent, forthwith, provide to the Court a written undertaking to hold at least $2,000,000 of the balance owing (and the interest earned thereon) in a segregated account and conservatively invested, pending disposition of the appeal. The requirement to set aside the amount of $2,000,000 shall become operative only after the appellant has paid to the respondent the sum of at least $2,623,263 which, I am advised by the parties, is the substantial portion of the full balance owing, not including amounts already advanced. It would be most advantageous to both parties if counsel could attempt to reach agreement on the nature of the investment of the $2,000,000 in order to maximize return without jeopardizing the capital amount. If, however, counsel cannot agree, then the decision will rest with the respondent, provided it is consistent with his undertaking.

[24] I recognize that this is not a perfect solution and free from all risk; however, in my view it is a reasonable compromise. I make no comment upon the status of the segregated funds *vis-a-vis* third party creditors of the respondent.

Bateman, J.A.

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