Date: 19971103 Docket: CA 141436

NOVA SCOTIA COURT OF APPEAL

Cite as Turner-Lienaux v. Campbell, 1997 NSCA 7

BETWEEN:

KAREN TURNER-LIENAUX and SMITH'S FIELD MANOR DEVELOPMENT LIMITED	Appellants/ Applicants	Charles D. Lienaux for the appellants/ applicants
- and -		Gavin Giles for the respondent
WESLEY G. CAMPBELL	Respondent	
		Application Heard: October 23, 1997
		Decision Delivered: November 3, 1997

**BEFORE THE HONOURABLE JUSTICE NANCY J. BATEMAN,
IN CHAMBERS**

BATEMAN, J.A.:

This is an application by the appellants for a stay of an order for costs following the appellants' unsuccessful application for summary judgment in the Supreme Court.

The appellants have appealed the judgment of Justice Jamie Saunders of the Supreme Court wherein he dismissed the appellants' application for summary judgment on a counter-claim . Following a hearing consuming three days, the judge ordered that the appellants pay to the respondent costs in the amount of $12,970.41, payable forthwith. On the merits, the judge, in a lengthy oral decision, dismissed the application and commented that the action did not lend itself to summary disposition and that a trial was the "only arena" to assess the "critical issue" of credibility of the parties.

The appellants have appealed, in part, on the basis that Justice Saunders limited their opportunity to cross-examine the respondent, Wesley Campbell. In the Notice of Appeal, the appellants request that this Court consider the record and grant summary judgment, or, alternatively, remit the matter to the Supreme Court for hearing.

This application for a stay relates only to the payment of the costs ordered by Justice Saunders.

The Law:

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 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.

Analysis:

The appellants do not rely upon the primary test, but rather, submit that there are "exceptional circumstances" here that make it "fit and just" that the stay be granted. In particular, they say that in circumstances where the record reveals, *prima facie*, a breach of fundamental process, the circumstances are exceptional. Here, they say there is such a breach by virtue of the Chambers judge's termination of the cross-examination.

There is, they submit, an additional factor favouring the granting of a stay. Prior to the hearing of the summary judgment application, the respondents successfully applied for security for costs in the main action. Justice Tidman ordered security in the amount of $55,000, which amount has been paid into court by the appellants The appellants say that the costs ordered on the summary judgment application could, with consent of the respondent, be deducted from those posted in the main action. The respondent disagrees. He says that the amount of security was fixed only with reference to the possible costs after trial and does not include any amount for other applications that would take place in the interim. It is the appellants' argument that since the security is in place, there is no urgency in

the payment of the summary judgment costs. This too, they submit, presents an exceptional circumstance supporting the granting of a stay.

The appellants further submit that because the stay sought relates only to an order for costs, rather than a money judgment on the merits, different considerations should apply. The appellants can cite no direct authority for these propositions. They do, however, rely upon **Lienaux et al v. Toronto-Dominion Bank** (1995), 140 N.S.R. (2d) 156 (N.S.C.A.), **Lienaux et al v. T.D. Bank** (1994), 137 N.S.R. (2d) 150 (N.S.C.A., in Chambers) and **Teale v. Trustees of United Church of Canada at Woodlawn** (1979), 34 N.S.R. (2d) 313 (N.S.C.A.).

In my view, the cases cited by the appellants are of little assistance here. In **Lienaux et al v. T.D. Bank** the court granted a stay under the first branch of the **Fulton** test because to do otherwise would cause the sale of unique property, causing irreparable harm. In **Lienaux et al v. Toronto-Dominion Bank**, the court again applied the first branch of the **Fulton** test in granting the stay, staying the effect of a summary judgment pending appeal.

In **Teale**, the appellant applied for leave to appeal the interlocutory decision of a Chambers judge dismissing its application to strike a statement of claim. This Court granted leave but dismissed the appeal, agreeing that the statement of claim should not be struck. Counsel who had succeeded on the interlocutory application did not wait for the appeal but pursued costs from the appellant. The Court of Appeal commented that the lawyer should not have proceeded to tax and collect costs because the costs were made payable "in any event of the cause", not "forthwith". The Court noted, as well, at p.315:

> Even if payment forthwith had been ordered immediate collection of costs while an appeal was pending would have been precipitate and unnecessary in the circumstances.

The appellants say that, on this authority, a stay of the costs order should be granted pending the disposition of the appeal. With respect, the comment in **Teale** was clearly *obiter*. I do not take it to stand for the proposition that a successful party, who has received an order for costs payable "forthwith", must delay the collection of those costs whenever an appeal is filed. **Teale** was decided long before the formulation of the test for a stay in **Fulton**. It is the **Fulton** test that should govern.

There is little jurisprudence on what constitutes “exceptional circumstances”. In **Fulton**, Hallett, J.A. noted that the appellant who seeks a stay bears a heavy burden. This is so, because, as 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.

In **Westminer**, **supra**, Freeman, J.A. commented upon what might constitute “exceptional circumstances” 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.

In **Pelot v. Prudential of America**, (1995), 143 N.S.R. (2d) 367 (N.S.C.A., in Chambers), Hallett, J.A. found there to be exceptional circumstances where to refuse a stay would cause documents over which privilege was claimed to be revealed and render the appeal moot. He noted there that the first branch of the **Fulton** test “was principally directed to a stay of execution of a judgment for a monetary sum.” In my view, where the stay involves judgment for a monetary sum, the appellant should normally be required to meet the three part test. I see no reason to distinguish between a judgment for costs and any other monetary judgment. If the appellant fails

on the first branch of **Fulton**, it would be a rare case where “exceptional circumstances” would dictate a stay.

When Justice Saunders ordered that the costs of the failed summary judgment application be payable “forthwith”, he did not direct that they be paid from the security already in place, although counsel submit that he was aware of the fact that security had been posted. I am further advised by counsel that Justice Saunders’ order that the costs be payable “forthwith” was made only after lengthy submissions on that issue.

The appellants do not purport to meet the burden on the primary test. Nor have the appellants satisfied me that there are “exceptional circumstances” here that warrant the granting of a stay of the costs order. The record does not reveal, in the words of Freeman, J.A., “an error so egregious that it is clearly wrong on its face” or other circumstances that make it fit and just that a stay be ordered. The fact that the Chambers judge terminated the appellants’ cross-examination of the respondent must be assessed in the context of that proceeding. It is not, in itself, *prima facie* error as is suggested by the appellants.

I am not satisfied that this is an appropriate case for a stay. The application is dismissed, with costs in the cause.

Bateman, J.A.