NOVA SCOTIA COURT OF APPEAL
Citation: ***United Gulf Developments Ltd. v. Iskandar***, 2003 NSCA83

Date: 20030812
Docket: CA 205057
Registry: Halifax

Between:

United Gulf Developments Limited and Navid Saberi

Appellants

v.

Esam Iskandar and Pinnacle Developments Limited

Respondents

Judge:	The Honourable Justice Jamie W. S. Saunders
Application Heard:	August 7th, 2003, in Halifax, Nova Scotia, in chambers
Written Judgment:	August 12th, 2003
Held:	Application dismissed with costs of $1,000.00 inclusive of disbursements, as costs in the appeal.
Counsel:	William Moreira Q. C., & Karen Bennett-Clayton, for the Appellants/Applicants Peter Bryson, Q.C. & Philip Whitehead, for the Respondents

Decision:

[1] After hearing arguments I informed counsel that the appellants' application for a stay of execution of the order of Supreme Court Justice Gerald R. P. Moir, dated July 30th was dismissed with reasons to follow. These are my reasons.

[2] The appellants brought an interlocutory application for a stay of the oral decision granted by Justice Moir on July 16th, where he granted the respondents' partial summary judgment by dismissing the appellants' claim for specific performance. Moir, J. held that the property in question was commercial, and that in the absence of evidence that the commercial property was somehow unique, dollar damages were presumed to be the appropriate remedy.

[3] The background to this dispute may be briefly stated. On November 12th, 2002, the parties entered into an agreement concerning ownership - through the transfer of shares - of a number of condominium properties in the Royale Hemlock sub-division in Halifax.

[4] The initial agreement did not address various issues that required resolution prior to closing. An initial closing was scheduled for January 31st, 2003.

[5] No closing occurred. No tender was made. A number of condominium units which were to be transferred to the respondents by the appellants as consideration for the sale, have been sold by the appellants.

[6] Following the failure to close the appellants commenced an action for, among other things, specific performance. The appellants did not move to enjoin or otherwise restrict the transfer of shares. The appellants, unknown to the respondents, filed a statutory declaration at the Registry of Deeds purporting to give notice of their "interest" in lands controlled by the respondents.

[7] The respondents filed a defence in April. In May the respondents applied for dismissal of the statement of claim and alternatively, dismissal of the claim for specific performance. The time lines whereby the respondents could exercise their rights with respect to the four condominium properties are time sensitive. The matter came on for hearing before Moir, J. on July 15th. On July 16th Justice Moir rendered his decision. An order was forwarded by the respondents' counsel to the

appellants' counsel on July 21st. The order was taken out on July 30th. On that same day the appellants filed a notice of appeal from Moir, J.'s decision and order, advancing three grounds of appeal and alleging that he erred in law:

1. in applying the wrong test to an application for summary judgment brought by a defendant,

2. in finding that there was no arguable issue with respect to the unique nature of the land held by the four companies that were subject to the share/purchase agreement between the parties, and

3. in finding that the threshold was met with respect to the respondents' application for summary judgment against the appellants' claim for specific performance.

[8] The general authority to grant a stay of proceedings in this province is governed by s. 41(e) of the ***Judicature Act***, R.S.N.S. 1989, c. 240 which provides that:

> In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
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> . . .
>
> (e) no proceeding at any time pending in the Court shall be restrained by prohibition or injunction but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained prior to the first day of October, 1884, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto provided always that nothing in this Act contained shall disable the Court from directing a stay of proceedings in any proceeding pending before the Court if it or he thinks fit, and any person, whether a party or not to any such proceeding who could have been entitled, prior to the first day of October, 1884, to apply to the Court to restrain the prosecution thereof, or who is entitled to enforce by attachment or otherwise any judgment, contrary to which all or any part of the proceedings have been taken, may apply to the Court thereof by motion in a summary way for a stay of proceedings in such proceeding either generally, or so far as is necessary for the purposes of justice and the Court shall thereupon make such order as shall be just;
> . . .

[9] The court's authority to issue a stay is governed by ***Civil Procedure Rule*** 62.10 which provides that:

> (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.
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> (3) An order under rule 62.10(2) may be granted on such terms as the Judge deems just.
>
> . . .
>
> (5) Nothing herein prevents the staying of execution or proceedings by the court appealed from, as authorized by rule of court or by an enactment.

[10] The well known and oft-cited test for the granting of stays in this jurisdiction was expressed by Hallett, J.A. in ***Fulton Insurance Agencies Ltd. v. Purdy*** (1990), 100 N.S.R. (2d) 341. There, at pp. 346-47 Justice Hallett stated:

> 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.

[11] During argument I agreed with Mr. Bryson that there were no peculiar and compelling features here to warrant any consideration of the 'exceptional circumstances' or so-called second branch of ***Fulton***. Accordingly I have applied the primary test which obliges the appellants to satisfy me that there is an arguable issue raised on the appeal; that if the stay were not granted and the appeal is successful they will have suffered irreparable harm, impossible or difficult to compensate by dollar damages; and that they enjoy the balance of convenience on this application.

[12] In my view the appellants have failed to satisfy the first two criteria, with the result that there is no need for me to go on to consider on which side of the scales convenience lies.

[13] In ***Coughlan et al v. Westminer Canada Limited et al*** (1993), 125 N.S.R. (2d) 171, Justice Freeman considered the nature of "arguable issue" at p. 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.

[14] In Nova Scotia a stay is a difficult interim remedy to obtain. As Hallett, J.A. observed in ***Fulton Insurance Agencies***, supra, at ¶ 27:

> 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*. (italics mine)

[15] As Justice Freeman observed in ***Coughlan v. Westminer***, supra, at ¶ 8:

> Unless a stay is granted, the orders are to be paid forthwith. *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. (italics mine)

[16] To succeed on this application, the appellants must satisfy me that there is an arguable issue with respect to Justice Moir's dismissal of their claim for specific performance. No evidence was adduced by the appellants before Moir, J. relating to the "uniqueness" of the property in question. The shares give ownership in four holding companies incorporated for the sole purpose of taking title to real property consisting of condominium sites known respectively as Blocks One, Two, Three and Four, located in the Royale Hemlock sub-division in Halifax. There can be no question that these shares relate to commercial properties the parties intend to acquire for commercial purposes.

[17] At the hearing before him, Moir, J. considered the leading case in land actions on specific performance in Canada. In ***Semelhago v. Paramadevan***, [1996] 2 S.C.R. 415, Sopinka, J., writing for an almost unanimous court (LaForest, J. concurring in the disposition but declining to address entitlement to specific performance, as in his view the arguments before the court had not been made in those terms) said at ¶'s 20-23:

> . . . While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.
>
> It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases.
>
> . . .
>
> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.
>
> . . .
>
> In future cases, under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy. (underlining mine)

[18] The appellants did not plead uniqueness in their claim for relief. As noted earlier in these reasons, no evidence was put before Justice Moir to show that these four properties were unique to the extent that their substitute would not be readily available, if the appellants were ultimately successful in the present litigation. Thus there is nothing in the record to sustain the argument that in these circumstances striking a claim to specific performance was, arguably, in error.

[19] Further, no transcript was provided of either the proceedings before Justice Moir or his decision, to support the appellants' complaint that the chambers judge erred by applying the wrong test to an application for summary judgment or otherwise erred in the conclusions he reached.

[20] Without such evidence the appellants have failed to satisfy me that they have raised an arguable issue on the appeal. In fact there is nothing before me to

remotely suggest that Justice Moir was wrong to conclude that the property in question was not unique; that the location of the property was not unique; and that the lands were to be acquired not for personal use but as a commercial investment.

[21] On this application the appellants chose not to present any substantive evidence. The respondents, on the other hand filed an affidavit sworn by Michael Iosipescu, Barrister, of Halifax, in which he describes himself as a business associate and legal counsel to Esam Iskandar, one of the named respondents in these proceedings. Mr. Iosipescu's affidavit sworn August 6th provides important information as to the dealings between the parties, the time sensitivity of certain obligations owed by the respondents, the details of the share/purchase agreement, and the basis of Justice Moir's decision. In argument Mr. Bryson counsel to the respondents clarified his clients' ongoing financing and other obligations requiring them to buy additional lots this month and extending into February, 2004, failing which their rights to acquire such lands will be forfeited.

[22] When I pressed Mr. Moreira during argument to explain why his clients' property was "unique" such that the remedy of specific performance could be said to meet the requirements expressed by Sopinka, J. in ***Semelhago***, I was informed that what makes these appellants' "claim" "peculiar" and "out of the ordinary" is that it represents "a very specific business opportunity" negotiated by the parties in a "complicated" share/purchase agreement. This, in counsel's submission, amounted to a very unique business opportunity and this "uniqueness of the subject matter of the transaction" ought to warrant specific performance protection.

[23] With respect, I cannot agree. The inquiry as to the availability and suitability of a remedy of specific performance must be directed at the property itself and not to the terms of the transaction surrounding it, or the profit that might be derived from its successful completion. By all accounts the parties on both sides of this dispute are seasoned and successful business people, hardly neophytes in commercial transactions. The construction, acquisition and operation of condominium properties is no longer special or rare in this province. Any on-looker can see the explosion of such developments throughout the metropolitan area.

[24] While the terms of the share/purchase agreement between the parties may be intricate, one assumes that profitability for both sides was what drove the parties to negotiate and execute it. The desire to make a profit, whether short or long term, is common to practically every business venture, and ought not in my respectful view, be used to blur the difference between a business opportunity on the one hand and uniqueness of property on the other.

[25] Justice Moir's granting of a partial summary judgment and striking the appellants claim for specific performance was within his discretion as a chambers judge. Absent any evidence that the chambers judge erred in any way in his disposition of the case, there is no reason for me to interfere in the exercise of his discretion by allowing the appellants' application for a stay pending this appeal.

[26] In the result, in answer to the first question, the appellants have failed to raise any arguable issue on this appeal.

[27] The appellants have also failed to persuade me that they will suffer irreparable harm, difficult or impossible to compensate monetarily should their claim for a stay be refused but their appeal prove ultimately successful. In argument counsel for the appellants admitted as much when he acknowledged that any losses suffered by his clients can be calculable in dollar damages as part of the litigation. I am confident that the parties are sophisticated business people, well organized to make money in their ventures and quite able to analyze and compute their losses should that become necessary.

[28] I see nothing in ***Conner v. MacCulloch*** (1974), 16 N.S.R. (2d) 172 (NSSC, TD) that would assist the appellants. There, Dubinsky, J. permitted a stay of execution of his own earlier order, directing that certain share certificates be duly endorsed and left in the custody of the court pending the outcome of the appeal. That decision, almost thirty years old, does not appear to have ever been considered by this court and in any event predates - and so makes no reference to - the appropriate analysis in ***Fulton***. Neither is there any indication in the judge's reasons to suggest the criteria or factors he took into account in ordering the stay.

[29] Further, the basis of the application before me is quite different. In ***Conner*** the applicants sought to prevent or at least protect the transfer of shares which they feared might be disposed of by the plaintiffs prior to the final disposition of the appeal. Here the appellants seek a stay of execution of the partial summary judgment granted by Moir, J. striking their claim for specific performance. Thus, despite how the appellants described their application in their written brief to me, they have not claimed injunctive relief seeking to prevent the respondents from selling, transferring or otherwise disposing of the shares in the holding companies prior to the determination of this appeal.

[30] To summarize then on the first two questions, the appellants made no claim to the uniqueness of these properties in their statement of claim. They adduced no such evidence before Justice Moir. They have not done so in this application before me. There is nothing to indicate that the loss of the remedy of specific performance will in any way cause "irreparable harm" to the appellants. I am satisfied that any loss should be readily calculable in monetary damages.

[31] The balance of convenience is usually only considered if the appellant has established irreparable harm. As Lord Diplock said in ***American Cyanamid v. Ethicon Ltd.***, [1975] 1 All E.R. 504 at p. 511:

> It is where there is doubt as to the adequacy of the respective remedies and damages available to either party or to both, that the question of balance of convenience arises. *If the court is satisfied that the applicant has not proven irreparable harm, the balance of convenience need not be considered.* (italics mine)

[32] I see no need to weigh the balance of convenience between the parties in light of the appellants' failure to show irreparable harm.

[33] In conclusion the appellants have not established any grounds for a stay of execution of the order of Justice Moir. Their application is dismissed. I fix costs of the application at $1,000.00 inclusive of disbursements and accept both counsel's suggestions that these costs be costs in the appeal.