NOVA SCOTIA COURT OF APPEAL

Citation: ***Ingham v. West Hants (District)***, 2005 NSCA 90

Date: 20050608
Docket: CA 245515
Registry: Halifax

Between:

Patricia Ingham

Applicant

v.

Municipality of the District of West Hants

Respondent

Judge: The Honourable Justice Jamie W. S. Saunders

Application Heard: June 2, 2005, in Halifax, Nova Scotia, in Chambers

Held: Application by the applicant for a stay of execution is dismissed; respondent's application to set dates to quash Notice of Appeal granted

Counsel: Patricia Ingham, self-represented appellant and Melissa Ingham-Glenn
Derrick J. Kimball & Sharon Cochrane, Articled Clerk, for the respondent

Decision:

[1] After considering the parties' submissions in chambers, I indicated that the appellant's application for a stay was dismissed, with reasons to follow. These are my reasons.

[2] First some background. The appellant and her daughter first appeared before me in chambers on May 12, 2005, seeking a stay of the prothonotary's order filed April 6, 2005, which confirmed the oral decision of Nova Scotia Supreme Court Justice M. Heather Robertson, rendered on March 21, 2005 following a hearing on February 10, 11 and March 21, 2005. Ms. Cochrane, articled clerk to Mr. Kimball, reported that her principal was out of the country. She requested a brief adjournment pending his return. I granted the adjournment and put it over to June 2, after giving the parties specific directions concerning the documentation to be filed and deadlines for compliance.

[3] During the interval, the respondent Municipality gave notice of application, returnable June 2, to set a time for the hearing of an application pursuant to **Civil Procedure Rule** 62.18 for an order quashing the Notice of Appeal on the grounds that the appeal was frivolous, vexatious and without merit. I disposed of the respondent's application in chambers, with reasons to follow, and I will incorporate those directions at the end of this decision.

[4] Let me now briefly outline the material facts surrounding this rather unusual and protracted litigation.

[5] In July 2001, a fire occurred on Patricia Ingham's property located at 458 Castle Frederick Road, Falmouth, Nova Scotia ("the property") which gutted the house. It was considered dangerous and ultimately resulted in an order pursuant to s. 346(1) of the **Municipal Government Act**, Part XV, Dangerous and Unsightly Premises. The structure was subsequently demolished and the costs of the demolition were added to the appellant's tax bill which was in arrears. The appellant's taxes remained in arrears and tax sale procedures were instituted.

[6] On October 29, 2003 a third party, Char-Vale Charolais Limited ("Char-Vale") purchased the property at tax sale pursuant to the **Municipal Government Act** for $82,000.00 plus HST. The appellant did not redeem the property within six months of the tax sale, but before a deed was issued to the purchaser Ms. Ingham obtained an interim injunction preventing the conveyance of the property pending the hearing of an application for *certiorari* pursuant to **Rule** 56.06.

[7] On February 10 and 11, 2005 the application for *certiorari* was heard before Justice Robertson. The applicant sought an order quashing the sale. On March 21, 2005 closing submissions were presented and Robertson, J. delivered an oral judgment.

[8] There were four issues before the trial judge:

(1) Did the Municipality comply with the provisions of Part XV of the Municipal Government Act, Dangerous and Unsightly Premises?

(2) Were Ms. Ingham's taxes in arrears?

(3) Should Ms. Ingham's application for certiorari be dismissed for failure to comply with the six month limitation period prescribed by Rule 56.06?

(4) Did the Municipality violate the principles of procedural fairness?

[9] Justice Robertson made specific findings of fact, answered the first three questions in the affirmative, the fourth question in the negative and dismissed Ms. Ingham's application. In addition, costs were fixed in the amount of $4,000.00 with disbursements to be taxed. An order to that effect was issued by the prothonotary on April 6, 2005.

[10] An application for the taxation of costs was heard by Adjudicator J. Walter Thompson of the Small Claims Court on May 2, 2005 who rendered a decision dated May 17, 2005, in which he taxed and allowed disbursements following trial totalling $3,763.97.

[11] On April 27, 2005, the Appellant filed a Notice of Appeal listing some 27 grounds of appeal.

[12] Funds from the purchase have been held in trust by the respondent for some nineteen months. In the meantime, no deed has been delivered to the purchaser pending this application. Once taxes and other expenses have been paid and the tax deed has been delivered to the purchaser, the remainder of these funds are available to be delivered to Ms. Ingham.

[13] I will turn now to a consideration of the merits. First, I wish to deal with a preliminary matter. At the hearing I raised what seemed to me to be a peculiar feature of this case: that Ms. Ingham was purporting to seek a stay of an order to which her counsel at trial had consented. The order, on its face, clearly bears the signature and name of her solicitor, and it is not limited "As to form." Counsel for the respondent replied that he was not

relying upon any such explicit, or apparent, consent as a basis for his opposition to the appellant's sought-after stay. Ms. Ingham and her daughter, represented that counsel whose name appears as their solicitor on the form of order "did not have their consent" and so "consented without their consent."

[14] While this suggests to me that there is evidently an ongoing dispute between the appellant, her daughter and their trial counsel; it is not a situation that need concern me for the purpose of these reasons. I mention it only because of this peculiar feature, that a dissatisfied litigant could be seen to apply for a judicial stay of an order to which - on the face of it - her lawyer had affirmed her full consent.

[15] I turn now to the merits of Ms. Ingham's application. The jurisprudence relating to stays of execution in this province is well known. I need not set out any extensive review of the authorities. Filing a notice of appeal does not operate as a stay of execution of the judgment from which an appeal is taken (**CPR** 62.10(1)). Whether to grant a stay is within the court's discretion (**CPR** 62.10(3)). There is a heavy burden upon the appellant to demonstrate that a stay is warranted. Justice Hallett, in the seminal case of **Purdy v. Fulton Insurance Agencies Ltd**. (1990), 100 N.S.R. (2d) 341 (C.A.) said:

> [28] In my opinion, stays of execution of judgment pending disposition of appeal should only be granted if the appeal can either:
>
> [29] (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 he 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:
>
> [30] (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.

[16] Those principles have been repeatedly applied by the courts of this province. See, for example, **Westminer Canada Ltd. v. Amirault** (1993), 125 N.S.R. (2d) 173 (C.A.).

[17] As explained by the court in **Westminer** at ¶ 12:

> . . . Establishment of an arguable issue is therefore merely a threshold for consideration of the issue of irreparable harm, which is the substantive basis for granting a stay. Even if irreparable harm is established, a stay may not follow unless the applicant is able to show further that the harm a stay causes to the respondent is less than the harm the applicant would suffer upon execution of the judgment: the balance of convenience. This test can only arise after irreparable harm has been shown.

[18] I agree with the points made by Mr. Kimball and Ms. Cochrane in the excellent brief they filed on behalf of the respondent. The appellant has not met the heavy burden on her to satisfy the three necessary components of the primary test in **Purdy**.

[19] Ms. Ingham's Notice of appeal does not contain a single arguable issue within the meaning of the test. The errors she has alleged are, for the most part, completely irrelevant. None is reasonably specific as to the errors said to have been committed by the trial judge. Nor does the Notice of Appeal contain any realistic grounds which, if established, would be capable of convincing a panel of this court to allow the appeal. **Westminer**, supra, at ¶ 11.

[20] Of the 27 "grounds" advanced by the appellant, only three might, arguably, not be completely irrelevant and, yet specific enough to raise, in the appellant's mind at least, what she would characterize as an arguable issue: that is her assertion that she was not properly served. These three specific "grounds" read:

> The Municipality of West Hants attempting service on Public Computers without facsimile machines abused the Appellants Rights to Privacy
>
> The Appellants Rights to correct an appropriate Out of Province service were ignored by the Municipality of West Hants
>
> To enter a Notice on a tree on the Appellants lands when she is patently Out of Province shows contempt for the Rights and Life of the Appellant

[21] Fatal to the appellant's position, however, is the fact - as emphasized by Mr. Kimball - that he and Ms. Ingham's lawyer agreed at the hearing and

stipulated on the record that all statutory requirements for proper notice and service relating to the demolition and tax sale had been met. The only exception reserved by appellant's counsel was whether 60 day notification of the tax sale had been proved. But that too was later acknowledged by appellant's counsel on the record. Those acknowledgements and stipulations were confirmed and relied upon by Robertson, J. in her decision.

[22] The result, in my view, is that even if those three "grounds" extracted from the appellant's Notice of Appeal were assumed to raise, on their face, an arguable issue, such a characterization is defeated by the very agreements and accommodations reached by counsel at the hearing. This in itself is sufficient reason to deny the appellant a stay of execution.

[23] However, given the subject matter of this dispute I will go on to address the other essential elements of the primary test.

[24] The appellant must also satisfy me that if the stay were refused and she were to succeed on appeal, she would suffer irreparable harm that would not be compensable in damages. In other words, that she would suffer irreparable harm if the deed were transferred to the purchaser. At first blush this would seem to be the appellant's best argument in that as land is the object of the dispute, arguably unique in character, such might lend strength to the plea that if the land were conveyed by tax deed to the purchaser pending the hearing of the appeal, Ms. Ingham would suffer irreparable harm.

[25] However, the unique circumstances of this case effectively negate such an argument. At the time of the fire in July 2001, the house on the property was unoccupied and the property was listed for sale with a local realtor. After the fire the appellant reduced the listing price to $75,000.00. Char-Vale bought the property at the subsequent tax sale for $82,000.00. In the event that the appellant were successful on appeal, any damage award would be sufficient to compensate for the loss. To the extent the property is unique, the appellant had planned to sell the property and had established its upper price.

[26] The third essential element of the primary test is the balance of convenience. In my opinion this too favours the respondent Municipality. 19 months have elapsed since Char-Vale paid the purchase price. Under the **Municipal Government Act**, the purchaser was entitled to a deed six months after the tax sale. Such entitlement was prevented by the appellant's application for an interim injunction and *certiorari*. Char-Vale has since served a Notice of Intended Action upon the respondent. Thus, staying the execution of the

prothonotary's order with the resulting impediment to delivery of the deed to Char-Vale, puts the respondent at risk of facing suit by Char-Vale.

[27] Finally, although Char-Vale is not a party, I have no doubt that this delay, has and will continue to cause harm to a purchaser that has waited a year and a half after statutory entitlement, with neither the land nor the money to show for it.

[28] With respect to the secondary or "exceptional circumstances" test, Justice Freeman observed in **Westminer**, supra, at ¶ 13:

> 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 appeal.

The appellant has failed to meet the heavy burden triggered by this part of the test, which is to demonstrate that the trial judge's decision contains "an error so egregious that it is clearly wrong on its face." Neither am I persuaded that there is any other circumstance so exceptional as to call for the exercise of my discretion in ordering a stay.

[29] For all of these reasons, Ms. Ingham's application for a stay of execution is dismissed.

[30] I agree with the respondent that their application to quash the Notice of Appeal, should be dealt with before any consideration is given to scheduling the appeal. There are compelling reasons. First, should a panel of this court quash the Notice of Appeal, it would dispose of the matter in its entirety. This would save both parties considerable expense in the preparation and exchange of appeal books and facta. Second, Char-Vale has an obvious interest in these proceedings. It has served a Notice of Intended Action upon the Municipality. Thus, dealing with the respondent's application to quash the appellant's appeal, as a preliminary matter, seems to be a most sensible way to proceed, both for the parties and others implicated in these protracted proceedings.

[31] After giving specific directions to counsel for the respondent (now as applicant) concerning the limited content of their appeal book for this application pursuant to **CPR** 62.18, I fixed dates as follows:

Applicant Municipality to file the appeal book by: August 15, 2005

Applicant Municipality to file its factum by: September 16, 2005

Respondent, Patricia Ingham, to file her factum by: October 21, 2005

*The application pursuant to **CPR** 62.18 will be heard:*
Thursday, December 1, 2005 at 10:00 a.m.

[32] The respondent Municipality did not seek costs and none will be ordered.

Saunders, J.A.