NOVA SCOTIA COURT OF APPEAL
Citation: *Wall v. Horn Abbot Ltd.*, 2002 NSCA 143

Date: 20021115
Docket: C. A. No. 188469
Registry: Halifax

Between:

David H. Wall

Appellant

v.

Horn Abbot Ltd., 679927 Ontario Limited
(Formerly Horn Abbot Productions Limited),
Christopher Haney, Charles Scott Abbott,
John Haney and Edward Martin Werner

Respondents

Judge:	The Honourable Justice Saunders, in Chambers
Application Heard:	November 7, 2002, in Halifax, Nova Scotia
Held:	Application for stay of execution denied. Costs to the respondents. Assumed case management of the appeal. Directions given.
Counsel:	Kevin A. MacDonald, for the Appellant John C. Cotter, for the Respondent (Company) William L. Ryan, Q.C., & Mr. John E. MacDonell, for the Respondents (4 named individuals)

Saunders, J.A. (Orally):

[1] This is an application brought on behalf of Mr. Wall, the present appellant, for a stay of execution of part of the order following the decision of Justice Simon J. MacDonald of the Supreme Court of Nova Scotia dated October 17, 2002. He also applies to set the appeal of that decision down for hearing and seeks directions with respect to that appeal.

[2] In support of the application the appellant, through his counsel Mr. MacDonald, has filed a brief in which he states that he first intended to swear and file an affidavit in support, but had since decided to "withdraw" the affidavit, preferring instead to rely upon an affidavit on file sworn by him more than four years ago, August 27, 1998.

[3] The application for a stay is vigorously opposed by counsel representing the respondents; Mr. William S. (Mick) Ryan, Q. C., on behalf of the individual respondents and Mr. John C. Cotter, of Toronto, on behalf of the corporate respondents. Mr. Ryan has filed a brief as well as an affidavit of his colleague John MacDonell. Mr. Cotter faxed a two page brief dated November 5, 2002, stating his clients' position. I have had the advantage of reviewing all of those materials in preparation for today's hearing. Counsel also made oral submissions in support of their respective positions.

[4] *Civil Procedure Rule* 62.10 provides as follows:

> 62.10 (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.
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> (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] The law governing an application to stay execution pending appeal is set out in *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341, where Hallett J.A. stated beginning 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.
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> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either
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> > (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.

[6] The appellant says that he has satisfied either the primary or the secondary test of *Fulton Insurance*. I respectfully disagree. The application is dismissed for reasons that I need only briefly state.

[7] The burden is upon the appellant to adduce evidence to satisfy the requirements for a stay of execution pending disposition on appeal. See for example the recent decision of this court in *R. v. Innocente* (2001), 194 N.S.R. (2d) 183, Oland, J.A., writing for the court at ¶ 7.

> The burden is on the appellant to adduce evidence to satisfy the requirements for a stay of execution of judgment pending disposition on appeal.

All I have heard is his counsel's characterization that Mr. Wall is "of modest means." That, with respect, is not proof of anything. The appellant has not presented any evidence as to his current financial situation. There is not a jot of evidence suggesting, for example, that it will be impossible for the appellant to pay costs or that he cannot now go forward with his suit. That is reason enough to dispose of the application, but I do wish to comment upon and correct certain statements made by counsel for the appellant during the course of his submissions this morning.

[8] First, counsel said "it is impossible to ever show there will be irreparable harm." With respect, that is clearly not the law in Nova Scotia. It is an essential element of any application for a stay of execution to establish, as part of the primary test, irreparable harm. In my experience, when stays are granted the applicant is obliged to adduce to the satisfaction of the trier sufficient affidavit or documentary evidence to satisfy each and every part of the test.

[9] Second, counsel for the applicant this morning said "the balance of convenience is a lower threshhold" and suggested that in these circumstances, in this case, such ought to be reason enough to favour the application and grant the stay. With respect, that is not the law in Nova Scotia. Balance of convenience is a separate component or element in the sequence of steps to be demonstrated in any application for a stay of execution. It is not to be given any lesser importance or more relaxed treatment than the others. See, for example, the comments of Justice Freeman writing in *Westminer Canada Ltd. v. Amirault* (1993), 125 N.S.R. (2d) 171, where he said at ¶ 12 of that judgment:

> Even if irreparable harm is established, a stay may not follow <u>unless the applicant is able to show further</u> 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 arise only after irreparable harm has been shown. (underlining mine)

[10] Lastly, counsel for the appellant this morning said: "This case is exceptional in circumstance" and therefore ought to satisfy the secondary test of *Purdy v. Fulton Insurance*, even if I were not persuaded that the primary test had been met. Again, with respect, I do not see the circumstances of this case to be in any way exceptional. I accept Mr. Ryan's submission urging that I ought to ignore Mr. MacDonald's bald faced statement in his brief that the respondents are "billionaires." There is no proof of any such thing. In any event, and subject to argument in another case, I doubt that a respondent's wealth is a relevant factor in applications to stay. I also accept Mr. Ryan's argument that by having the appellant's affidavit withdrawn at the last moment and not being given the tax returns of Mr. and Mrs. Wall as requested, the respondents have been prejudiced and denied the opportunity to test the deponents on the changed circumstances, now alleged by their counsel.

[11] Finally, I agree with and accept Mr. Ryan's submission that there ought to be a consequence, a meaningful result when applications are so often taken that prove to be unsuccessful or without merit. Justice MacDonald, after hearing the application in Sydney, determined that certain matters or positions taken were without merit and for reasons expressed at the time decided that costs ought to be awarded in favour of the present respondents.

[12] So too do I. To illustrate I find that there is no evidence to support the contention made by the appellant today that the respondent's claim for costs and disbursements previously awarded them is simply to impair Wall's efforts to proceed with his litigation. On the contrary, the only evidence before me is that the costs ordered by Justice MacDonald were intended to reflect and alert Mr. Wall to the fact that there are and will be cost consequences when applications are found to be without merit. There is no good reason to deny the respondents the fruits of their litigation.

[13] In conclusion, there is no evidence before the court to sustain the motion. The application for a stay of execution is denied with costs to the respondents. Mr. Ryan on behalf of his collective clients will have the sum of $600 payable forthwith and Mr. Cotter on behalf of his collective clients will have the sum of $200 payable forthwith. If counsel for the respondents would prepare an order reflecting those directions, I would be pleased to initial it.

[14] There remains then the matter of setting the case down for appeal and giving certain directions with respect to it. For reasons that will become apparent in a moment, I decline to fix any date for the hearing of the appeal until such time as I am satisfied that the matter is ready for appeal in a reasonable fashion. I am going to give these specific directions concerning dates. By Friday, November 29, 2002 I will expect counsel for the appellant Wall to file and exchange with his learned friends on the other side, a list stating with precision the exact questions upon which this present appeal is taken. I am not interested in categories or topics to be reviewed. Rather, I expect to see in writing the precise questions numerically listed that counsel for the appellant seeks leave to ask, that is, intends to challenge before this court on appeal. As well as the list which I am advised will amount to approximately 150-160 questions, I would also by the same date oblige counsel for the appellant to furnish a letter which will outline what counsel envisions as being necessary to include within the appeal book in order to address that list of questions. Counsel's letter would then come to me, to Mr. Ryan and to Mr. Cotter on or before Friday, November 29, 2002. Then, on or before Friday, December 13, 2002, I would expect Mr. Cotter and Mr. Ryan to reply, in writing, to the court and to Mr. MacDonald indicating their view of the questions; that is stating their position, whether they agree, disagree and if so, in what respects. Further, I would expect them to state how they would propose the appeal book be prepared and what ought to go into it. Upon receipt of both of those communications in writing I will then decide how best to coordinate the appeal with counsel. I intend to take over case management of this appeal. It seems to me to be an appeal that calls out for that kind of approach. After receiving the materials from counsel I will decide whether I wish to have a teleconference with counsel in December or communicate in some other fashion in January. Once I am satisfied that there are reasonable ways to coordinate the preparation of the appeal book and what it ought to contain, I will give directions as to the date by which it will be filed, and what it is to

contain. Later, presumably by teleconference, I will fix dates for the exchange of facta and the actual hearing of this appeal.

[15] I think that is all I need say with respect to these directions. My order for costs and the amount that I have awarded for both sets of respondents is inclusive of disbursements.

Saunders, J. A.