**NOVA SCOTIA COURT OF APPEAL**
**Citation:** Soontiens v. Giffin, 2011 NSCA 1

**Date:** 20110104
**Docket:** CA 341510
**Registry:** Halifax

**Between:**

Nicole Soontiens, Ilona MacAlpine, XL Electric Limited, a body corporate, Huntec Limited, a body corporate, and CNCA Holdings Limited, a body corporate

Applicants

v.

Gordon Giffin

Respondent

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| **Judge:** | The Honourable Justice Duncan R. Beveridge |
| **Motion Heard:** | December 30, 2010, in Chambers |
| **Held:** | Motion for a stay dismissed. Costs fixed in the amount of $1,500 payable in the cause of the appeal |
| **Counsel:** | George W. MacDonald, Q.C., for the appellants<br>John A. Keith, with Andrew Taillon and Jack Townsend, Articling Clerks, for the respondent |

**Decision**:

INTRODUCTION

[1] The appellants were ordered to pay to the respondent $175,000 as an award of interim costs by December 30, 2010. I heard their motion on December 30, 2010 for a stay of this order until the outcome of the appeal. At the conclusion of the hearing I dismissed the motion on conditions with reasons to follow. These are my reasons.

BACKGROUND

[2] The individual parties are first cousins. The appellants Soontiens and MacAlpine and the respondent Giffin are shareholders in XL Electric Limited and Huntec Limited. CNCA Holdings Limited was a company created after the respondent resigned from active involvement in XL Electric.

[3] XL Electric was a new company created in 1998 to operate an electrical contracting business free of union obligations associated with a company previously run and owned by family members. The parties claim two very different versions about the ownership of shares of XL Electric. The respondent Giffin says they all agreed the three would be treated as equals. Nonetheless, the Shareholder Agreement provided that the appellants Soontiens and MacAlpine would each have 51 Class A Special Voting Common Shares, 10 Class B Common Shares and 34 Class C Common Shares, with the respondent holding 10 Class B Common Shares. Giffin says this obvious unequal share structure was to be equalized after the father of the appellants (the respondent's uncle) was paid out for his investment in XL Electric. The appellants say this is not so – the share structure was set up in this fashion due to the unequal investment by the shareholders in the venture.

[4] In any event, the new company was successful. Giffin's case appears to be that initially all were treated as equals, but as the company became increasingly profitable, the majority shareholders exploited their power to declare unequal dividends for their Class A shares. When it became clear that there would be no alteration of the Class A share structure to equalize ownership, he resigned. A year later he brought proceedings under the Third Schedule of the Nova Scotia *Companies Act*, R.S.N.S. 1989, c. 81 claiming shareholder oppression.

[5] I have not been provided with the full history of the litigation. What is known, and is undisputed, is that the trial of this action was originally scheduled for some weeks commencing January 11, 2010. The trial was suspended on January 13, 2010 to allow for rediscovery of the appellants Soontiens and MacAlpine. Further documentation was produced which led to a motion by the respondent to adjourn the trial without day. The trial judge, McDougall J. granted the motion, setting deadlines for completion of further production, discovery and other matters.

[6] The earliest trial date that could be arranged for what is now estimated to be a three-week trial was January 17, 2011.

[7] The order for interim costs at issue in this appeal was based on s. 7(4) of the Third Schedule of the Nova Scotia *Companies Act*. It provides:

> In an application made or an action brought or intervened in under Section 4, 5 or 6 hereof, the court may at any time order the company or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for such interim costs upon final disposition of the application or action.

[8] The first application for interim costs was heard by Associate Chief Justice Deborah Smith on November 19, December 9 and 18, 2009. The respondent sought interim payment of the legal costs in the amount of $139,000. Smith A.C.J., in an oral decision rendered December 31, 2009 dismissed the motion, but ruled she would remain seized of the matter for the purpose of any further application under s.7(4). She reasoned:

> As indicated previously, the ability of the Court to order the payment of interim costs is unique and is designed to insure that a claimant with a case of sufficient merit to warrant pursuit is not denied the opportunity to present the claim. Mr. Giffin has not provided me with sufficient information concerning his ability to borrow funds in order for me to be satisfied, on a balance of probabilities, that he will be precluded from pursuing this claim without receiving the interim costs that have been requested. Accordingly, his motion for interim costs will be dismissed.
>
> As is clear from the above, Mr. Giffin's financial situation is not static. Some of the evidence that I have relied on in coming to this decision was only available within the last few weeks and it is possible that his financial situation may change

> .....Nothing in this decision prevents the Plaintiff from bringing a further motion pursuant to s. 7(4) of the Third Schedule of the *Company's Act* upon filing further and updated financial information, including additional information concerning his ability to borrow and service a loan to finance this litigation. In my view, such a motion could be made during or after the trial. I will remain seized of the matter for the purpose of such a hearing should the Plaintiff choose to proceed with a further motion.

[9] At some point following the adjournment of the original trial in January 2010, the respondent brought a further motion seeking interim costs in the amount of $275,000, broken down as: $145,000 owing to the respondent's law firm; $30,000 in un-billed work-in-progress; the balance of $100,000 being the estimate from the respondent's law firm to bring the litigation to the conclusion of the trial.

[10] This motion was heard by Smith A.C.J. on July 7 and 8, 2010. The learned motions judge adopted as applicable the principles articulated by Goodfellow J. in *McKay v. Munro*, [1992] N.S.J. No. 519. She also reviewed a number of cases from other provinces. She recognized the lack of unanimity in the case law as to whether or not the applicant must satisfy a two-part or a three-part test. The difference being the additional requirement that the financial need of the applicant must be related to the alleged oppression at issue in the litigation.

[11] This led her to conclude that the burden was on the respondent Mr. Giffin to only satisfy her that he had a case of sufficient merit to warrant pursuit and that he is genuinely in such financial circumstances which, but for an order for interim costs under s.7(4), would preclude his claim from being pursued.

[12] Smith A.C.J. was satisfied that Mr. Giffin had established his case had sufficient merit to warrant pursuit. With respect to his financial circumstances, the motions judge was also satisfied that the respondent was unable to reasonably borrow any further funds to finance the litigation, and that but for an order under s.7(4), he would be effectively precluded from pursuing his action.

[13] The appellants argued before Smith A.C.J. that the evidence with respect to the fees and disbursements incurred, and to be incurred, was unsatisfactory by the lack of detail, and otherwise the amounts were excessive and unreasonable in the circumstances. She disagreed.

[14] However, the motions judge was not prepared to grant an order that included $100,000 for anticipated costs for a variety of reasons. Her conclusion was expressed as follows:

> [75] I am prepared to issue an Order requiring XL Electric Limited to pay to the Plaintiff interim costs in the amount of $175,000.00 reserving the right to the Plaintiff to bring a further motion pursuant to s. 7(4) to request an additional payment. This $175,000.00 shall be forwarded to the Plaintiff's solicitor no later than December 30th, 2010. I will remain seized of the matter for the purpose of a further hearing should the Plaintiff elect to proceed with a further motion for interim costs.

[15] An order was duly endorsed by the motions judge on December 8, 2010. Since this order is interlocutory in nature, leave to appeal is required and the appellate process commenced within 10 days (as calculated by Rule 94). An application for Leave to Appeal and Notice of Appeal was filed on December 22, 2010 with motions for date and directions, and a stay of the order for interim costs pending appeal, returnable December 30, 2010. Both parties filed affidavits and briefs.

[16] At the outset of the hearing on December 30, 2010 I gave directions with respect to the filing of the appeal book and written materials. The earliest date available to hear the appeal in light of the logistics of these requirements, and counsels' schedules, was May 30, 2010.

ISSUE

[17] Should a stay of the order for interim costs be granted

PRINCIPLES

[18] There are well known, but competing principles that come into play when the losing party asks this Court to stay the execution or enforcement of a lower court's order pending an appeal. It has long been the law in Nova Scotia that an appeal does not stay the execution or enforcement of a judgment and a successful litigant should not lightly be deprived of the fruits of what has been ordered. Rule 90.41 of the *Nova Scotia Civil Procedure Rules* provides:

> **90.41 (1)** The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.

[19] On the other hand, there may be circumstances where to ensure that the statutory right to challenge the correctness of a lower court's decision is not rendered illusory, a court hearing an appeal must grant a stay or some other order. This is recognized in Rule 90.41(2):

> **90.41 (2)** A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

See also Rule 7.28.

[20] As is usually the case, the parties do not dispute that the test to be applied is based on the seminal decision of Hallett J.A. in *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341. The test has two parts. On the primary test, an applicant can be successful if it establishes, on a balance of probabilities, there is an arguable issue raised by the appeal, irreparable harm to the appellant should the stay not be granted (assuming the appeal is ultimately successful) and the appellant will suffer greater harm if the stay is not granted than the respondent if the stay is granted.

[21] The appellant may also be successful in obtaining relief pending an appeal even if it cannot meet all of the criteria for the primary test if there are exceptional circumstances that nonetheless make it fit and just to grant a stay. This is known as the secondary test. The appellant waives any reliance on the secondary test. The parties differ widely on the application of the criteria dictated by the primary test.

ANALYSIS

*Arguable Issue*

[22] What constitutes an arguable issue was addressed by Freeman J.A. in *Coughlan et al. v. Westminer Canada Ltd. et al.* (1994), 125 N.S.R. (2d) 171 at para. 11:

> "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.

[23] This approach has been consistently applied by this Court. For example, in *MacCulloch v. McInnes, Cooper & Robertson* (2000), 186 N.S.R. (2d) 398, Cromwell J.A., as he then was, wrote:

> [4] The appellants must show that there is an arguable issue raised on appeal. This is not a difficult threshold to meet. What is required is a notice of appeal which contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal: see Freeman J.A., in **Coughlan et al v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171; 349 A.P.R. 171 (C.A.). It is not my role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.

[24] The respondent, while acknowledging that the arguable issue threshold is not difficult to meet, contends the appellant has not put forward sufficient detail beyond labelling their grounds of appeal as important issues, and is simply asking this Court to presume an arguable issue.

[25] The Notice of Application for Leave to Appeal and Notice of Appeal sets out five grounds of appeal. It is unnecessary to set them out. There is considerable

overlap with respect to the first three. They focus on the test articulated by the motions judge and used by her in determining the respondent's entitlement to an order for interim costs.

[26] The appellant on the hearing of this motion identified the divergent case law with respect to the criteria to be satisfied by a complainant in a shareholder oppression case to be eligible for an order for interim costs. While arguing vigorously that the motions judge made no error in her careful analysis of the issue, the respondent fairly conceded that if this Court ultimately concluded that she did err, it would put in jeopardy the award of interim costs. In my opinion, the appellant has met its burden of establishing an arguable issue in the sense identified by the case law – there are not mere generic allegations of error but specific realistic grounds identifying arguable issues. It is not up to me to engage in a detailed consideration of the likely outcome or relative merits.

*Irreparable Harm*

[27] The appellant does not claim it cannot pay the awarded amount or that it would suffer irreparable harm if required to do so. The only irreparable harm identified by the appellant is the risk that should the appellant be successful on appeal, it will be unable to recoup the $175,000 from the respondent.

[28] As a general rule, a respondent judgment creditor does not have to prove its financial stability as a pre-condition of collecting on its judgment pending an appeal (*Pentagon Investments Ltd. v. Canadian Surety Co.* (1992), 112 N.S.R. (2d) 86). Nonetheless, irreparable harm has been made out where the Court has been satisfied there is a risk the appellant will not recover if ultimately successful on the appeal. It is, of course, not just any risk of non-recovery that would constitute irreparable harm.

[29] Cases that have considered this aspect of irreparable harm have used different descriptors of the type or level of risk. In *Campbell v. Jones,* 2001 NSCA 138, Roscoe J.A. granted a stay pending appeal of a judgment for $345,000 where there had been a partial payment of $100,000. The respondent was gainfully employed, had some equity in her home, but had significant debts, notably, huge legal fees of almost $250,000. If successful on appeal, the respondent would likely be faced with an order to pay costs of the trial and appeal. Roscoe J.A. felt it was probable if the appeal was successful that the respondent would then become

insolvent, in that her debts would exceed her assets. There was accordingly, a "significant risk of non-repayment" (para. 8).

[30] In *Dillon v. Kelly* (1995), 145 N.S.R. (2d) 194, the most important indication of the respondent's potential inability to repay an approximate $300,000 judgment was her letter to the trial judge a few months afer trial, but before decision, advising she had no money to buy medication and her application to the bank for a loan had been declined. The appellant offered a partial payment with the balance to be stayed pending the outcome of the appeal. Roscoe J.A. considered that where the appellant offers to pay a substantial portion of the trial judgment pending the appeal, the evidence need not show insolvency of the respondent, but rather only the probability of difficulty of repayment by the respondent if the appeal is successful.

[31] In *R. v. Innocente*, 2001 NSCA 97, Oland J.A. granted a stay pending appeal with respect to an award of costs to the respondent Innocente, on the basis " there was a very considerable risk" the appellant would not recover the costs award if the stay was not granted. Fichaud J.A. in *Nova Scotia Power Inc. v. Carbo-Pego - Abastecimento De Combustiveis S.A.*, 2007 NSCA 93, said he would consider whether, if the stay was denied, "there is a real risk" that a subsequent judgment would be unsatisfied.

[32] In *Wright v. The Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 6, the appellant sought a stay of a judgment for $138,000. Fichaud J.A. noted there was no evidence the respondent had committed an act of insolvency, but had no real means available to him to repay the judgment if he spent the money and was ordered to repay. He found irreparable harm and ordered a partial stay on conditions. He expressed the general approach where money is the issue as follows:

> [12] Generally, if the judgment is monetary, the appellant (applicant for a stay) can afford to pay and the respondent can afford to repay, there is no irreparable harm. But a real risk that the respondent would be unable to repay may establish irreparable harm. See *Bruce Brett and 2475813 Nova Scotia Limited v. Amica Mature Lifestyles Inc.*, 2004 NSCA 93 at ¶ 14, and cases there cited; *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (C.A.), at ¶ 14-24 and cases there cited.

[33] The apparent uncertainty of the application of this aspect of the requirement to demonstrate irreparable harm was commented upon by Bateman J.A in *Piercey v. Board of Education of Lunenburg County District* (1997), 162 N.S.R. (2d) 315 where she said (para.18): "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".

[34] In my opinion, the role that risk of repayment can play in establishing irreparable harm is not a static or fixed one, but varies according to the context of the case being decided. This is in keeping with the observation by Cromwell J.A. in *MacPhail et al. v. Desrosiers et al* (1998), 165 N.S.R. (2d) 32:

> **[20]** It seems to me that the principle emerging from this review of the authorities is perfectly consistent with the point made by Justice Sharpe, above, to the effect that irreparable harm is not a term which has been given a definition of universal application but rather one which takes its meaning in the context of each particular case. Relevant considerations include the extent of the risk of non-repayment in the event that the appeal succeeds, whether the appeal puts the full amount of the trial judgment at risk or whether it relates only to a portion of the award and whether the respondent has received or has been offered a significant payment pending the appeal.

[35] The respondent argues it is plain wrong to even consider that the risk of non repayment could support a stay pending appeal for a number of reasons. First, the appellant had argued before Smith A.C.J. that the respondent had the financial resources to fund the litigation. Second, the only reason the appellants have access to such financial information tending to show otherwise is due to the respondent's motion for interim costs.

[36] The irony, he says, is that the appellant now argues the respondent does not have sufficient financial resources and the information the respondent was required to adduce to be successful on the motion for interim costs is now being used against him to deny him those very costs he needs to carry the action to trial. In addition, a failure to obtain the interim costs puts the trial, a mere weeks away, in jeopardy. A trial, he argues, which was made that much more expensive by the need to abort the first one due to the appellants' non disclosure of highly relevant documents leading to further discoveries and amendment of pleadings.

[37] Part of the context that I consider to be relevant is the very unusual nature of the order for interim costs. That is, the corporate appellant XL Electric Limited is being required to fund the litigation by the respondent against the majority shareholders. It is not disputed that if the order for interim costs is not stayed, those funds will be paid to the respondent's law firm. If the appeal, or the litigation of the main action is unsuccessful, the respondent may well have to repay the interim costs, and be faced with a large account (last estimated to be $100,000 from his law firm) plus whatever costs order may be made against him in favour of the appellants.

[38] I note that two judges have specifically commented on the acrimonious nature of the proceedings between these family members. I do not mean to cast aspersions on any of the parties, but it is a factor that informs the risk to the appellant in the event of a successful appeal.

[39] I am unable to discern a firm test as to what degree of non-recovery of the judgment is required before irreparable harm can be said to exist such as to invoke the extraordinary remedy of a stay. I find this to be a close case, but in light of all of the circumstances I am satisfied the risk is sufficient that without some conditions being placed on the assets of the respondent, the appellant could suffer irreparable harm by not being able to recover the funds it is required to advance to fund the litigation against it.

[40] In terms of the balance of convenience, the appellant argues that the consequences of granting a stay is that the trial will be adjourned pending the outcome of the appeal, and such a postponement would not cause irreparable harm to the respondent. If the respondent is ultimately successful at trial, any damage award would attract interest which would compensate for the delay, plus interest on the interim costs award that should have been paid.

[41] Where the type of irreparable harm is risk of non-recovery of a money judgment if the appeal is successful, I do not view the authorities as requiring the respondent to demonstrate irreparable harm in order to forestall an order from this Court denying him the fruits of the litigation. It must be recalled that it is the appellant that must demonstrate on a balance of probabilities all three of the criteria. In other words, it must satisfy me that the balance of convenience favours a stay or some other order restricting the respondent from the benefits of the order in his favour pending appeal.

[42] The harm to the respondent if denied the order for interim costs is a further lengthy delay. The appeal is not scheduled to be heard until May 2011. He was already denied his right to have his allegations properly tried in January 2010 by the conduct of the appellants. Complex commercial litigation is not for the light of heart or pocketbook. To now to be forced to give up dates in January 2011 to wait the outcome of the appeal imposes a harm on the respondent which, in my view, cannot be adequately compensated by merely tinkering with interest on the delayed payment. The respondent, like all litigants who must turn to the courts to have their disputes resolved, is entitled to access to justice in a timely and efficient manner. Indeed, the stated object of our judge-made *Civil Procedure Rules* is for the "just, speedy, and inexpensive determination of every proceeding".

[43] There is way to eliminate the appellants' claim to irreparable harm, yet cause no apparent harm to the respondent. No evidence was submitted by either party as to the value of the shares owned by the respondent in XL Electric Limited and Huntec Limited at any particular point of time, let alone as of the date of this motion. However, in the course of awarding interim costs of $175,000 to the respondent, the motions judge wrote:

> [72] Section 7(4) of the Third Schedule of the *Companies Act* provides that upon final disposition of the action the Plaintiff may be held accountable for any interim costs that have been awarded. In the case at bar, there is a significant dispute over the value of Mr. Giffin's interest in XL Electric Limited and Huntec Limited, however, there does not appear to be any dispute that his interest exceeds the amount of interim costs that he is seeking. This is a factor that I have taken into account when analyzing the sufficiency of the Plaintiff's evidence concerning the costs that he has incurred to date.

[44] On the motion before me, the parties did not resile from the suggestion that the value of the respondent's undisputed shareholding in XL Electric Limited would be more than the award of interim costs. To ensure the status quo would be preserved, the respondent offered, as a condition of the motion for a stay being dismissed, to deposit his shares in XL Electric Limited with the Court to be held as security in the event he is required to pay back all or part of the interim costs order of $ 175,000. The appellant readily conceded that if this was ordered, their claim of irreparable harm disappeared. I therefore adopted the offer of the respondent as the appropriate way to ensure the trial was not put in jeopardy by a delay in

payment of the award of interim costs, and the appellants would not be exposed to the risk of non-recovery should their appeal be successful.

[45] I therefore directed that the motion for a stay would be dismissed on condition the respondent deposit his shares in XL Electric Limited with the Registrar of the Court of Appeal to be held as security to the benefit of XL Electric Limited in the event an order of this Court is subsequently issued requiring the respondent to refund all or part of the $175,000 paid; the security shall be realized only as against that portion of the shares necessary to refund the interim costs paid based on such valuation as agreed upon by the parties, or determined by arbitration, or a court of competent jurisdiction; and only if the repayment of the interim costs is unsatisfied after 60 days of the issuance of the order requiring repayment. The balance of shares remaining shall be immediately thereafter returned to the respondent.

[46] Costs are fixed in the amount of $1,500 payable in the cause of the appeal.

Beveridge, J.A.