C.A. No. 102690

NOVA SCOTIA COURT OF APPEAL

Cite as Smith's Field Manor Development Ltd. V. Adelaide Capital Corporation, 1994 NSCA 1

BETWEEN:

SMITH'S FIELD MANOR DEVELOPMENT LIMITED Appellant - and - ADELAIDE CAPITAL CORPORATION and CENTRAL GUARANTY TRUST COMPANY Respondent	Charles D. Lienaux for the appellant Gerald R.P. Moir, Q.C. for the respondents Application Heard: April 7, 1994 Decision Delivered: April 14, 1994

BEFORE THE HONOURABLE JUSTICE GERALD B. FREEMAN, IN CHAMBERS

FREEMAN, J.A.: (in Chambers)

The appellant seeks a stay pending appeal of a Supreme Court order granting summary judgment and providing for the sale of "The Berkeley" retirement residence by the receiver appointed on behalf of the respondent, which provided more than $4,000,000 financing for the building by way of a debenture.

The appeal is scheduled for hearing May 26, 1994. The marketing plan of the receiver, Price Waterhouse, for liquidation of the Smith's Field assets calls for an advertisement for tenders beginning April 9 with tenders to close May 19, 1994. Acceptance of a tender and approval of the sale is expected to take a further month. Upon hearing the application I reserved decision and granted an interim stay of execution of the order, which would preclude advertising the building for sale.

Counsel for the appellant is Charles Lienaux, whose wife, Karen Turner-Lienaux, originally owned the shares in Smith's Field Manor Development Limited. The Lienaux's sought a joint venture partner to build The Berkeley and agreed with a several businessmen known as the "Stonehedge Group" to form a new company, The Berkeley Developments Limited. Mrs. Turner-Lienaux transferred her shares in Smith's Field to the new company. She was to own one third of the shares of the new company and two thirds were to be owned by the Stonehedge Group. She was to be paid $666,750 for her shares in the appellant company; it was agreed that payment of $100,000 of that amount would be deferred, and the shares would remain in escrow until it was paid. The Stonehedge Group was to put up $350,000 and the Lienaux's $175,000 unborrowed cash equity in the new company. The Stonehedge group was to manage construction of the building.

Difficulties quickly developed, but the building was finished and Mrs. Turner-Lienaux assumed responsibility for managing it, steering it to a cash flow position of $80,000 per month, about 80 per cent of potential; Mr. Lienaux argues that the undertaking is now viable and able to meet its expenses including mortgage repayment. He alleges the Stonehedge group failed to meet their financial commitments to the new company, giving rise to the present problems. Most of the members of that group have had serious financial problems of their own. Mrs. Turner-Lienaux was not paid the balance due her for her shares and

the status of the appellant company is in doubt. A separate lawsuit relating to the internal problems of Smith's Field is before the courts.

Mrs. Turner-Lienaux's affidavit states that she and her husband have $725,000 invested in the Berkeley venture and have guaranteed a further $333,000 guaranteed by a collateral security mortgage against her home. The matter is obviously one of great urgency for them.

The burden which must be met by the appellant on an application for a stay of execution was summarized by Clarke, C.J.N.S., in **Pentagon Investments Ltd. v. Canadian Surety Company** (1992), 112 N.S.R. (2d) 86, citing from the well known decision of Hallett J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 at p. 87 as follows:

> "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 is difficult to, or cannot be compensated for by a damage award... 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."

Mr. Lienaux submits there are arguable grounds for the appeal. He alleges that Smith's Field was misled by representations of the respondent as to the suitability of the Stonehedge Group as a joint venture partner and the respondent should be estopped from foreclosing. He argued that the mortgage had been renewed as a result of negotiations between himself representing Smith's Field and the respondents during the summer of 1993 and was not in default; he said there was a dearth of case law as to what constituted the

renewal of a mortgage. He argued that the respondent was not at liberty to change terms of the renewal agreement, as it did in October, 1993, but he maintained that in any event the company was not in default. A further ground of appeal was that the mortgage document was a nullity because it was not signed by a proper signing officer of Smith's Field at the time of execution.

The respondent points to evidence that all terms of the renewal were not agreed to in July and August of 1993. It asserts in any event that the appointment of a receiver and its eroded confidence in the ability of Smith's Field to manage its affairs because of its internal difficulties entitle the respondent to realize on its security. There is much merit in the respondent's submissions, and the appellant clearly has the labouring oar on the appeal, but I am prepared to resolve any doubts I may have as to whether an arguable issue exists in favour of the applicant.

Irreparable harm and the balance of convenience may be dealt with together. As the respondent points out, the timing of the proposed tender call and the hearing of the appal is such that the irreparable harm of a sale could be averted simply by adjourning the application to May 26 to be dealt with by the panel hearing the appeal. If the case is decided from the bench there would be no need for a stay, but a stay might be necessary in the event of a reserved decision.

Mr. Lienaux however says irreparable harm to the appellant would result from advertising The Berkeley for sale. The respondent points out there is no evidence of this, but I am inclined to agree with the appellant as a matter of common sense. Even though the venture appears to have survived the appointment of the receiver little harmed, the prospect of a judicial sale of the building is bound to be unsettling to The Berkeley's retirement age clientele, present and potential, adversely affecting the appellant's viability.

On the other hand the two major concerns of the respondent are attrition, that is, loss of tenants without replacement, and the continuing fees of the receiver. The respondent says these are on the order of $10,000 a month while a letter produced by the appellant suggests a lower figure. Neither of these

concerns amount to irreparable harm, and the balance of convenience would appear to favour the appellant. The Berkeley appears to be a viable undertaking, and a delay of less than two months in the sale is unlikely to worsen the respondent's prospects for recovering on its loan. Both sides agree the receiver is holding more than $100,000, perhaps substantially more, against which there are unpaid accounts and current mortgage payments.

If I am wrong in finding for the appellant on the first ground in the **Fulton Insurance** case I would fall back upon the second ground. The extremely heavy financial involvement of the Lienaux's, and the consequences they will suffer if they are unsuccessful in averting a sale of The Berkeley, whether by succeeding on the appeal, finding fresh capital, or by otherwise negoitating a solution, are sufficient to satisfy me that "there are exceptional circumstances that would make it fit and just that the stay be granted."

I will therefore stay the order providing for the sale of The Berkeley.

The appellant has also applied for an order directing the receiver to pay Mr. Lienaux $6,200 as an allowance for the preparation of the appellant's case on appeal. I accept the respondent's submission that the receiver is subject to the direction of the Supreme Court and not of this Court; it is not a party to this application. In any event, this is a cost issue best determined by the panel hearing the appeal. The application for an allowance is dismissed.

Mr. Lienaux has also asked for direction as to whether he is authorized to argue the appellant's appeal before the court. He was granted the right by court order to represent the appellant at the Supreme Court hearing, subject to certain limitations to his giving evidence. In the absence of any objection by the respondent, however, I can see no problem. Given the deep financial involvement of Mr. Lienaux and his wife I would not deny them standing before this Court whether on behalf of the appellant company or otherwise. However I must dismiss the application for the order sought by Mr. Lienaux in the absence of representations by, or notice to, Stonehedge Group members, who may have an interest but who are not parties to the application.

Costs will be costs in the appeal.

Freeman, J.A.