NOVA SCOTIA COURT OF APPEAL

Citation: *Ocean Nutrition Canada Limited v. Matthews*, 2017 NSCA 60

Date: 20170608
Docket: CA 460556
Registry: Halifax

Between:

Ocean Nutrition Canada Limited

Appellant

v.

David Matthews

Respondent

Judge:	Cindy A. Bourgeois, J.A.
Motion Heard:	June 8, 2017, in Halifax, Nova Scotia in Chambers
Written Decision:	June 21, 2017
Held:	Motion for stay dismissed with costs
Counsel:	Nancy F. Barteaux, Q.C., for the appellant Blair Mitchell, for the respondent

Decision:

[1] The appellant, Ocean Nutrition Canada Limited, applies for a stay of execution. Following a nine-day trial, Justice Arthur LeBlanc found that the appellant had constructively dismissed the respondent, David Matthews. The court awarded significant monetary damages totalling $1,084,851 to Mr. Matthews, directing that half of that amount be remitted by the appellant to the Canada Revenue Agency (CRA) as withholding tax.

[2] The motion was heard before me on June 8, 2017. After hearing from the parties, I advised that the motion for stay was dismissed, with written reasons to follow. These are my reasons.

Legal authority

[3] There is no dispute between the parties as to this Court's authority to grant a stay, or the legal principles which should be applied. Unlike some other jurisdictions, the filing of an appeal in Nova Scotia does not automatically stay execution. *Civil Procedure Rule* 90.41 provides in part:

> 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.
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> (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.

[4] The principles considered by a chambers judge on a stay motion are well-established. In *Purdy v. Fulton Insurance Agencies Ltd*. (1990), 100 N.S.R. (2d) 341 (N.S.S.C. (A.D.)), Justice Hallett set out at para. 28 the oft-quoted passage:

> 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:
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> (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.

[5] The appellant does not suggest that this is a case of "exceptional circumstances". Rather, it is argued that the appellant has amply established all three elements and, as such, a stay is warranted.

Analysis

[6] The appellant acknowledges that the burden to meet the above test rests with it, and does not shift. It submits the evidence presented in the affidavit of Hugh Welsh, President, General Counsel and Secretary of DSM Nutritional Products Canada Inc. (formerly Ocean Nutrition Canada Limited), sworn May 24, 2017, satisfies the *Purdy* test.

Arguable issue

[7] An "arguable issue" has been described as one which "could result in the appeal being allowed" (*Westminer Canada Ltd. v. Amirault* (1993), 125 N.S.R. (2d) 171 (C.A.)). The Notice of Appeal sets out eight grounds, all alleging errors of "mixed fact and law".

[8] It is not my function as chambers judge to delve into the merits of the allegations of error. That is for another day. Based on a review of the grounds of appeal, I am satisfied that the appellant has met the low threshold of establishing the existence of an arguable issue.

Irreparable harm

[9] The bulk of the parties' submissions relate to the element of irreparable harm. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) Justices Sopinka and Cory describe "irreparable harm" as follows:

> 59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put

> out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). **The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration** (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)). (Emphasis added)

[10] The appellant argues that in the present instance, irreparable harm has been clearly established. Counsel argues the large monetary size of the judgment, the appellant's inability to retrieve the portion paid to the CRA as withholding tax, and the presence of a collateral mortgage registered against Mr. Matthews' property in Nova Scotia, collectively establish irreparable harm. Counsel put forward several case authorities which support her argument that a respondent's inability to repay a trial judgment reversed on appeal may constitute irreparable harm. While I do not take issue with that general proposition, a review of the cases are instructive with respect to the nature of the evidence adduced in such circumstances to establish irreparable harm.

[11] In *Burton v. Howlett*, 2000 NSCA 98, Chief Justice Glube granted a stay, finding the appellant had met the *Purdy* test. There, the respondent Burton had been successful at trial in an action for wrongful dismissal. It was apparent that a substantial portion of the award, if paid, would be turned over to third parties, including to the CRA, and for repayment of Employment Insurance benefits.

[12] The appellant says the inability to retrieve payments made to third parties in the event of a successful appeal was key to the finding of irreparable harm in *Burton*. Counsel notes the following passage in particular:

> [18] I conclude that the irreparable harm to the **applicant is the practical impossibility of collecting back any funds** which she pays to or on behalf of the respondent if the appeal is successful, rather than payment by her to the respondent at this time causing her irreparable harm. (Emphasis added)

[13] The appellant submits the same reasoning applies in the present instance, particularly given the large payment directed to be made to the CRA. I take no issue with the conclusion reached in *Burton*, but note that the evidence presented to the Court in that instance by the appellant was described as follows:

> [10] Ms. Howlett's affidavit sets out that Ms. Burton is unemployed and has been on social assistance from the time she was dismissed by the applicant in March of 1995. (It would appear from the respondent's submission that she first drew unemployment insurance and when that ran out, she went on social assistance.) The affidavit further says that Ms. Burton has no significant assets within or without Nova Scotia. Ms. Howlett's concern is that payments to the government, to the respondent's solicitor and to Ms. Burton could not be recovered if they were paid and the appeal is allowed. As a result of these facts, she submits there is greater potential harm to her if the stay is not granted than would be suffered by Ms. Burton if it is granted.

[14] The appellant also relies upon *Nova Scotia (Public Service Long Term Disability Plan Trust Fund) v. Wright*, 2006 NSCA 6. Granting a motion for stay, Fichaud, J.A. wrote:

> [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 para. 14, and cases there cited; *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (C.A.), at paras. 14-24 and cases there cited.
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> [13] Mr. Wright wishes the freedom to spend the fruit of his judgment. If Mr. Wright obtained and spent $138,000 from the judgment and the appeal was allowed then, from the evidence before me of Mr. Wright's circumstances and income, it is clear that he would be unable to reimburse $138,000 to the Trust Fund. That would be irreparable harm.

[15] Again in *Wright*, it is the nature of the evidence relating to irreparable harm presented by the applicant which I find to be instructive. This was described as follows:

> [7] Included in the evidence for this application was an extract from Mr. Wright's transcript of testimony at trial. This transcript indicates that Mr. Wright is divorced, his wife has filed for bankruptcy, the bank has repossessed the family home, he does not own a vehicle, he is living with one of his children, and his sole income is Canada Pension disability of $969 per month indexed. According to Mr. Wright's transcript, after the long term disability benefits were cut off, he began to feel financial strain, and "we were scrambling after that trying to keep things afloat."

[16] *Wright* was relied upon in *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 57. There, the Attorney General was found at trial to be vicariously liable

for assaults committed by its employee (a probation officer) against the respondent. The award was significant, in excess of $700,000.00.

[17] The Attorney General made application under the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, to suspend payment of the judgment pending appeal. The same three-part test as outlined in *Purdy* was applied. The chamber's judge found that the AG met the test and, in particular, the element of irreparable harm:

> 14 BMG wants to enjoy the fruit of the litigation -- i.e. the freedom to spend the full amount of his judgment as he wishes. If BMG obtained and spent the $723,125 judgment, it is clear from the evidence before me that he would not remotely be able to reimburse the Province should the appeal later be allowed. I am satisfied that this establishes irreparable harm.

[18] The evidence before the Court in that instance included:

> 12 BMG filed an affidavit stating that he jointly (with his common law spouse) owns several properties in Manitoba, and he owns tools and several vehicles. The values of these assets are not established in the evidence. The total of the costs of acquisition is well below the amount of this judgment. BMG has never filed a tax return, but his affidavit estimates his income at $15,000 per annum. Nothing in the evidence suggests that BMG is insolvent.

[19] What the above cases demonstrate is the highly contextual nature of irreparable harm and further underscore the importance of the evidentiary foundation giving rise to a claim thereof. At this juncture, I will turn to the evidence presented by the appellant in support of its claim of irreparable harm.

[20] The appellant relies on the affidavit of Mr. Welsh. It is brief and covers two topics: "ONC's obligation to withhold and remit to the CRA" and "ONC's knowledge of Mr. Matthew's [*sic*] finances". With respect to the first topic, Mr. Welsh deposes:

> 4. In Justice LeBlanc's second judgment dated May 12, 2017, he ordered that ONC pay David Matthews ("Mr. Matthews") $1,084,851.36.
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> 5. Justice LeBlanc further ordered that from this amount ONC "shall remit the withholding tax in the amount of $542,425.68 to the Canada Revenue Agency" ("CRA").
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> 6. In addition to Justice LeBlanc's May 12, 2017 judgment, I am advised by legal counsel that DSM is obligated to "deduct and withhold from the payment" pursuant to Section 153 of the *Income Tax Act*. I am attaching Section 153 to this

> affidavit as Exhibit "A". I am aware of no provision under the *Income Tax Act* that would allow DSM to recover the amount withheld from Mr. Matthews and remitted to the CRA. Section 153(3) of the *Income Tax Act* states:
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> > (3) When an amount has been deducted or withheld under subsection 153(1), it shall, for all the purposes of this Act, be deemed to have been received at that time by the person to whom the remuneration, benefit, payment, fees, commissions or other amounts were paid. (Emphasis in original)
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> 7. Accordingly, I understand that once DSM remits $542,425.68 to the CRA, DSM will have no ability to recover that remittance if its appeal to this Court is successful.

[21] With respect to Mr. Matthews' personal circumstances, Mr. Welsh says:

> 8. ONC does not have personal knowledge of the current state of Mr. Matthew's [*sic*] finances. I have received information from legal counsel confirming that Mr. Matthews owns a residential property at 59 Grove Avenue in Beaver Bank, Nova Scotia, the 2017 taxable assessment value of which is $340,900. Attached as Exhibit "B" are the search results from Property Online provided to me by legal counsel.
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> 9. The Property Online search also shows that Mr. Matthews took out a collateral mortgage on this property in 2000, which has not been released. Attached as Exhibit "C" is the Collateral Mortgage agreement dated April 3, 2000 and this document does not provide the amount of the indebtedness.
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> 10. I have been informed by Daniel Emond, former COO of ONC and currently employed with DSM as Vice Sourcing Marine Oils, and believe, that Mr. Matthews is no longer employed by TASA in Peru.
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> 11. I am not aware if Mr. Matthews has found new employment in Canada or elsewhere, nor am I aware if Mr. Matthews resides in Canada.

[22] With respect, Mr. Welsh's affidavit fails to establish a sufficient evidentiary foundation for irreparable harm. Notwithstanding the significant face value of the judgment, the evidence adduced falls short of establishing "a practical impossibility" of collecting the funds paid to, or on behalf of, Mr. Matthews should the appeal be successful. I say this for a number of reasons.

[23] Firstly, even if the appellant is correct that provisions of the *Income Tax Act* would prohibit it from directly seeking a return of the portion of the judgment remitted as withholding tax, that, in my view, is not determinative to the issue of irreparable harm. Counsel tries to paint the funds directed to be paid to the CRA as somehow irretrievably lost to the appellant, and the most they could seek to

reclaim from the appellant was the balance paid to him directly. I am not satisfied that such is the case. Based on the materials before me, I see no rationale for the suggestion that the appellants, if successful, and armed with an order from this Court, could not seek directly from Mr. Matthews the return of the entire judgment funds.

[24] The central question is really whether the evidence presented by the appellant establishes a "real risk" that Mr. Matthews would be unable to make the repayment. As noted earlier, evidence of irreparable harm is contextual. Repaying a judgment of $1,084,851 may be practically impossible for some litigants. But is it practically impossible for Mr. Matthews? Does the evidence of Mr. Matthews' circumstances give rise to a "real risk" that the judgment proceeds could not be repaid?

[25] The evidence of Mr. Welsh provides, in my view, limited information as to Mr. Matthews' circumstances. The decision of Justice LeBlanc provides fuller context. Mr. Matthews is a professional chemist who has worked in the omega-32 fish oil industry for the past three decades. His work history outlined in the trial decision suggests he has been consistently employed in positions of increasing authority. He was noted to be working at the time of trial. (I would note that none of the grounds of appeal appear to take issue with the above factual background gleaned from the trial judge's reasons).

[26] Counsel for the appellant concedes that despite searching property records and other sources of creditor information, the only item relating to Mr. Matthews' financial circumstances is the now 17-year-old collateral mortgage. There are no other mortgages, loans or judgments noted in the public record. There is no indication, like in the cases relied upon by the appellant, that Mr. Matthews' financial situation is any way precarious. In summing up, Counsel for the appellant submitted that there was "no evidence that Mr. Matthews would be able to easily pay back a million bucks". With respect, that is not the test.

[27] I am satisfied that the evidence adduced by the appellant has failed to establish irreparable harm. I would add that Mr. Matthews submitted an affidavit in response to the motion. Although filed outside of the timeframe directed in the *Rules*, I determined it ought to be admitted. Based on the conclusion reached above, its admission did not change the outcome of the motion. However, on the issue of Mr. Matthews' financial circumstances, I note his unrefuted evidence that he is presently working in western Canada in an executive position; his level of

income is greater than that he received at ONC; he continues to reside in his home in Nova Scotia, travelling for work; the collateral mortgage has been paid; he and his wife have other assets in the province including vehicles and investments; and they have no other debts.

[28] As a final note, Counsel for the appellant requested that if the motion were unsuccessful, that I consider directing that the trial judgment be paid to Mr. Matthews' Counsel, to be held in trust. I see no basis on the evidence and argument before me to place any such condition on the judgment awarded at trial.

Conclusion

[29] For the reasons above, the motion for stay is dismissed. The appellant shall pay to the respondent costs of $1,500.00, inclusive of disbursements, in any event of the cause.

Bourgeois, J.A.