NOVA SCOTIA COURT OF APPEAL
Citation: *Lavy v. Hong*, 2018 NSCA 29

Date: 20180409
Docket: CA 474648
Registry: Halifax

Between:

Danny Lavy, Star Elite Inc. and Elite Group Inc.

Applicants (Appellants)

v.

Shae Hong and Hong and Co.

Respondents

Judge: The Honourable Justice Joel E. Fichaud

Motion Heard: April 5, 2018, in Halifax, Nova Scotia

Held: Motions for a stay and appointment of case management judge dismissed with costs

Counsel: Peter Rogers, Q.C. and Jane O'Neill, Q.C., for the Applicants
Roderick (Rory) H. Rogers, Q.C., and Christopher W. Madill for the Respondents

Reasons for judgment on the motion:

[1] This is a motion for a stay of the timelines in proceedings before the Supreme Court.

Background

[2] Mr. Danny Lavy controls Star Elite Inc. and Elite Group Inc.. Mr. Shae Hong controls Hong and Co.. Star Elite Inc. and Hong and Co. own 50.05% and 49.95%, respectively, of the shares in Sensio Company. Sensio Company owns all the shares of Sensio Inc.. Sensio Inc. is an operating company that manufactures and sells small appliances, with annual revenues over $140,000,000 (USD). Sensio Company and Sensio Inc. were incorporated in 2003.

[3] Messrs. Lavy and Hong are the only directors of Sensio Company and Sensio Inc.. Mr. Hong has been responsible for Sensio Inc.'s operations. Mr. Lavy, through Elite Group Inc., has controlled the Sensio companies' finances and accounting.

[4] Messrs. Lavy and Hong had a falling out that culminated in the summer of 2017 and generated this litigation. Mr. Hong says that, over a period of years and without his approval, Sensio Inc. loaned substantial sums to Mr. Lavy or to companies controlled by Mr. Lavy. Mr. Hong characterizes this as shareholder oppression. Mr. Lavy denies any impropriety and counters that Mr. Hong charged unauthorized expenses to Sensio Inc.

[5] On August 31, 2017, Mr. Hong and Hong and Co. (the "Hong Parties") filed an application in the Supreme Court of Nova Scotia against Mr. Lavy, Star Elite Inc and Elite Group Inc. (the "Lavy Parties"). They sought relief from alleged shareholders' oppression further to the Third Schedule to the *Companies Act*, R.S.N.S. 1989, c. 81. On September 25, 2017, the Lavy Parties filed a Notice of Respondents' Claim, seeking their own remedies against the Hong Parties.

[6] On September 27, 2017, further to a motion for directions, Supreme Court Justice Ann Smith set filing dates and scheduled the hearing for four days staring June 11, 2018.

[7] Meanwhile, on September 7, 2017, the Hong Parties moved for interim injunctive relief. They submitted that Mr. Lavy's control of Sensio Inc.'s finances would permit Mr. Lavy to continue his alleged oppressive behaviour during the litigation, an assertion that Mr. Lavy sharply disputed. On November 20-22, 2017, Supreme Court Justice Frank Edwards heard that motion, and issued a Decision on December 15, 2017 (2017 NSSC 329), followed by an Order on December 29, 2017 ("Interim Injunction"). Justice Edwards ordered various forms of interim relief against the Lavy Parties. The Lavy Parties appealed the Interim Injunction. On April 3, 2018, the Court of Appeal heard that appeal and reserved its decision.

[8] Back to the underlying litigation. The matter was document intensive. According to counsel, the Lavy Parties have produced some 200,000 documents while the Hong Parties have produced about 54,000, with more to come. By early January, 2018, counsel concluded that the production and filing dates set on September 27, 2017 had been too aggressive.

[9] Consequently, in mid-January 2018, counsel for both parties agreed to amend Justice Smith's dates for production and filing, while retaining the hearing dates starting June 11, 2018. The agreement was incorporated in an Order of Justice Patrick Duncan, signed as "CONSENTED TO" by both parties' counsel and dated January 18, 2018. Justice Duncan's Order said:

> CONSENT ORDER AMENDING DIRECTIONS
>
> …
>
> **NOW UPON MOTION** of Roderick (Rory) H. Rogers, Q.C. on behalf of the Applicants, with Jane O'Neill, Q.C. consenting to on behalf of the Respondents;
>
> **IT IS HEREBY ORDERED THAT:**
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> 1. The deadlines set at the Motion for Directions heard on September 27, 2017 are amended as follows:
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> (a) Applicants' Affidavit evidence – February 2, 2018;
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> (b) Respondents' Affidavit evidence – March 5, 2018;
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> (c) Applicants' Reply Affidavit evidence – March 19, 2018;
>
> (d) Completion of Discoveries – by April 6, 2018;
>
> (e) Applicants' Expert reports/Affidavit – April 20, 2018;
>
> (f) Respondents' Expert reports/Affidavit – May 11, 2018;
>
> (g) Applicants' submission – May 21, 2018;
>
> (h) Respondents' submission – May 28, 2018;

(i) Applicants' Reply submission – June 4, 2018; and

(j) Hearing – June 11 to 14, 2018.

[10] On February 23 and 24, 2018, the Lavy Parties' counsel met with their anticipated affiants and took reconnaissance of the productions. They saw that the Hong Parties had not produced emails from 2011 to 2015. The Lavy Parties' documents for this stay motion describe these as the "Unproduced Documents".

[11] I note here that, in their preparation for the Interim Injunction motion in November 2017, the Lavy Parties had downloaded the emails from Mr. Hong's computer. So the Lavy Parties possessed the so-called Unproduced Documents. But Justice Edwards' Decision on the Interim Injunction, para. 77, had termed Lavy's taking and use of these emails as "reprehensible". Consequently, in February 2018, the Lavy Parties' counsel held the view that this material should not be accessed for Lavy's productions. Instead, they asserted that the Hong Parties should produce their own 2011-2015 emails.

[12] In short, according to counsel for the Lavy Parties, by late February 2018 there was an occluded documentary production, complicated by uncertainty about who would produce, with looming deadlines that assumed full production.

[13] On February 26, 2018, the Lavy Parties moved in the Supreme Court for an order to either convert the application to an action, or revise the dates for pre-hearing steps and the hearing dates. Justice Jamie Campbell heard the motions on March 6, 2018. On March 13, 2018, Justice Campbell issued a Decision that denied both motions (2018 NSSC 54), followed by an Order of March 28, 2018.

[14] On March 26, 2018, the Lavy Parties filed an Application for Leave to Appeal and Notice of Appeal from the Order of Justice Campbell. They do not appeal the judge's refusal to convert the application to an action. The oppression claims will proceed as an application with cross-examinations. Their appeal challenges only Justice Campbell's refusal to schedule new dates for the application hearing and the remaining pre-hearing steps.

Issues

[15] On March 27, 2018, the Lavy Parties filed, in Court of Appeal chambers, motions for three rulings:

> A) Pursuant to Rule 90.41(2) staying the deadlines pursuant to the Directions for the proceeding in Hfx. No. 467757 [*i.e.* the oppression claims set for June 11, 2018] pending the disposition of the Appeal;
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> B) In the alternative, pursuant to Rule 26.02 of the Civil Procedure Rules directing the Prothonotary to appoint a Case Management judge in Hfx No. 467757; and stay the remaining steps in the proceeding pending determination of a Case Management Judge.
>
> C) A date and directions for the hearing of an expedited appeal.

[16] On April 5, 2018, I heard the motions and scheduled the application for leave and appeal at an expedited hearing on May 28, 2018 before a panel of this Court. This disposed of motion C.

[17] At the hearing on April 5, the Lavy Parties' counsel appeared to concede, appropriately in my view, that motion B was outside my authority. Rule 26.02 governs case management in the Supreme Court, and authorizes a Supreme Court judge to order the appointment of a management judge. A chambers judge in the Court of Appeal neither case manages, nor appoints a case management judge for a Supreme Court proceeding.

[18] This leaves motion A, the stay, that was contested by the Hong Parties. On April 5, I reserved. These are my reasons.

Analysis

[19] Rules 90.41(1) and (2) say:

> 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.
>
> (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 judgment or order, on such terms as may be just.

[20] The Lavy Parties' brief submits:

> 34. The present motion does not seek to stay the order under appeal. By that order the Learned Chambers Justice merely declined to adjust the deadlines previously set for the conduct of the Application in Court. Instead, the Lavy Applicants seek relief against the effect of that judgment, and seek that the Court order that the deadlines in the underlying proceeding be stayed pending the

> outcome of the appeal. At that time, the appeal panel can decide whether the stay should continue until the appeal panel issues a decision on the merits.
>
> 35. Although the relief sought is not technically a stay of the order under appeal, the same test should apply. The order sought is interlocutory, and of the same nature as injunctive relief or a stay of execution, which are both governed by the same test.

[21] The brief then cites the well-known tests from Justice Hallett's reasons in *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341, pp. 348-9: *i.e.*, either (1) an arguable issue on the appeal, with evidential proof of both irreparable harm to the applicant from a denial of the stay and the balance of convenience favouring the applicant, or (2) "exceptional circumstances" in the interests of justice.

[22] I cannot accept the Lavy Parties' submission, for each of two reasons:

1. The requested remedy is outside the scope of Rule 90.41(2).
2. Even if the Rule and the traditional tests for a stay governed the motion, the Lavy Parties have not satisfied their onus to show that the denial of an interim remedy would cause them irreparable harm.

1. Outside the Scope of Rule 90.41(2)

[23] Rule 90.41(2) contemplates two types of interim remedy.

[24] First, it permits a stay of "the execution and enforcement of any judgment appealed from". The Rule does not require that the judgment appealed from contain an order that the appellant perform an affirmative act, such as pay damages. For instance, a tribunal's suspension of a licence may occasion a stay of the suspension: *Re Alementary Services Ltd.*, 2009 NSCA 61, per MacDonald , C.J. N.S.. But the "judgment appealed from" must direct something that is capable of "execution and enforcement".

[25] Here, the judgment appealed from is Justice Campbell's Order of March 28, 2018. That Order dismissed the Lavy Parties' motion to amend the dates in Justice Duncan's Order of January 18, 2018. Justice Campbell's Order contains nothing susceptible to execution or enforcement, meaning there is nothing to stay. The pre-hearing steps and hearing date are stated in Justice Duncan's Order of January 18, which was issued by consent and is not appealed. Rule 90.41(2) does not authorize the stay of an un-appealed Order.

[26] Second, Rule 90.41(2) authorizes the motions judge to "grant such other relief against such judgment or order, on such terms as may be just".

[27] The former Rule 62.10(2) of the 1972 *Civil Procedure Rules* authorized a stay of "any judgment or *proceedings* of or before a magistrate or tribunal which is being reviewed on an appeal" (emphasis added). The current Rule 90.41(2) deleted the authority to stay the underlying "proceedings" but added authority to "grant other relief against such judgment or order, on such terms as may be just". The Lavy Parties characterize a stay of the Supreme Court's pre-hearing steps as "other relief" against the underlying proceeding. They say that Justice Campbell's order effectively reiterated the schedule in the order of January 18, and it is "just' that this schedule be stayed.

[28] In *Nova Scotia (Attorney General) v. Morrison Estate*, 2009 NSCA 116 (chambers), paras. 21-43, Justice Beveridge reviewed the authorities on a similar matter. Those included *RJR MacDonald Inc. V. Canada (Attorney General)*, [1994] 1 S.C.R. 311, pp. 329-31, where Justices Sopinka and Cory for the Court interpreted the Supreme Court of Canada's Rule that was worded similarly to Nova Scotia's current Rule 90.41(2). I adopt Justice Beveridge's reasoning and the view that Rule 90.41(2) allows a judge, in appropriate circumstances, to stay the underlying proceedings. To similar effect: *Nova Scotia (Attorney General) v. MacLean*, 2016 NSCA 69 (chambers), para. 18.

[29] However, these are not appropriate circumstances. In *Morrison Estate*, Justice Beveridge said:

> 27 Here, the appellants do not just seek a stay of enforcement of an order, but to stay the effect of the order granted by MacAdam J.. Furthermore, they ask that I not only order the certification proceedings be stayed pending appeal, but direct that the original motion for further and better particulars be allowed to proceed in the meantime. The relief sought is what they would get if they were ultimately successful on the appeal – the requested particulars prior to the certification hearing. It would therefore be inappropriate to grant the second aspect of the relief sought.

[30] A stay of the underlying proceedings is an interim order meant to preserve the *status quo* pending the determination of the merits by the panel. It is not meant to impact the panel's determination of the merits.

[31] This appeal hearing is scheduled for May 28, 2018, with the application in the Supreme Court to begin June 11. Likely this Court's panel will issue a decision

before June 11. Denial of the stay gives the parties over two months to conclude their pre-hearing steps. Issuing the stay gives them under two weeks. If compression within two months is uncomfortable, then strangulation within two weeks would be lethal. On May 28, the Lavy Parties will submit that the timelines are impractical. The stay would strengthen the Lavy Parties' submissions to this Court's panel.

[32] The "other relief" under Rule 90.41(2) must respect the role of a motions judge to preserve the equilibrium. It should not lay a thumb on the scales of the merits.

[33] The requested remedy is neither a "stay" nor "other relief" that is contemplated by Rule 90.41(2).

2. Irreparable Harm

[34] The Lavy Parties have characterized the cause of the logjam as the delay in production of Mr. Hong's emails from 2011 to 2015, discussed earlier (paras. 10-12). At the chambers hearing before me, on April 5, the Hong Parties' counsel said that, by April 13, 2018, the Hong Parties will produce copies of those emails. This will leave almost two months, until June 11, for the parties to complete their pre-hearing steps.

[35] I will consider irreparable harm from the perspective of the day that the panel of the Court issues its decision. For the purpose of discussion, I will assume that the decision will issue on May 31, 2018, three days after the argument. I will assess irreparable harm first on the premise that the Lavy Parties' appeal succeeds, then on the premise that it fails.

[36] If the Lavy Parties succeed on the appeal, then the oppression application will not proceed on June 11, and the time lines will be loosened. If I have denied the stay, then between today and May 31, the Lavy Parties will have undertaken some pre-trial activity that eventually would have been necessary in any event. If I have issued the stay, then they will undertake the same activity at a later date consistent with the new time lines approved by the Court of Appeal's ruling. Either way, the Lavy Parties will suffer no irreparable harm that I can discern.

[37] If the Lavy appeal is dismissed, and I have denied the stay, then the Lavy Parties will have had over two months to complete the pre-hearing steps before the hearing starts on June 11. As the panel of the Court would have upheld the time

lines and rejected the merits of the Lavy Parties' argument, irreparable harm to the Lavy Parties would not be an issue.

[38] On the other hand, if the Lavy appeal is dismissed, and I have issued the stay, then the Lavy Parties will have only eleven days, instead of two months, for those pre-hearing steps. The potential for irreparable harm is greater from a stay than from a denial of the stay.

[39] This is an unusual case where the stay would increase, rather than arguably diminish the potential for irreparable harm.

Conclusion

[40] I dismiss the motion for a stay with costs of $1,500 all-inclusive, payable forthwith and in any event of the cause, by the Applicants to the Respondents.

Fichaud, J.A.