NOVA SCOTIA COURT OF APPEAL

Citation: *3102602 Nova Scotia Limited v. Fraser*, 2021 NSCA 13

Date: 20210129
Docket: CA 501232
Registry: Halifax

Between:

3102602 Nova Scotia Limited

Appellant

v.

Paul Fraser

Respondent

Judge:	Beaton J.A.
Motion Heard:	January 21, 2021, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Roderick Jeffrie, agent for the appellant Duncan H. MacEachern, for the respondent

Decision:

[1] The Appellant ("the Company") and the Respondent ("Fraser") were engaged in litigation in the Supreme Court of Nova Scotia following the transfer of Fraser's crab fishing license allocation to the use of the Company. Fraser had sought a remedy from the Company for a period of years during which the Company had fished his allocation, but not compensated him for its use.

[2] Following a 2019 trial before the Honourable Justice John Bodurtha, the Company was found to have committed the tort of conversion for its failure to pay for the use of the crab allocation between 2011 and 2020. As set out in two separate but related Orders ("the Orders") made on September 16, 2020 and October 9, 2020, respectively, the Company was ordered to pay Fraser a total of $340,790.13 for the period 2011–2020 along with punitive damages of $15,000, pre-judgment interest and costs to be determined. The earlier of the two Orders also required the transfer of the crab allocation from the Company to an entity of Fraser's choice.

[3] The Company filed an appeal of Justice Bodurtha's decision with this Court on October 21, 2020, and on the same date filed an Appointment of Agent identifying its President Mr. Roderick Jeffrie ("Jeffrie") as its agent on the appeal. On November 5, 2020 the Company filed a motion seeking the imposition of a stay of execution of each of the Orders pending the hearing of the appeal, pursuant to Civil Procedure Rule 90.41(2).

[4] A telechambers hearing on the motion was scheduled for November 19, 2020, at which time counsel for Fraser advised he opposed the motion, but sought an adjournment to further prepare for a contested hearing. That adjournment was granted, subject to an interim order made on the Court's own motion suspending Fraser's right to take any enforcement action in relation to either Order until such time as the Court would render a decision on the motion.

[5] The contested motion was heard in telechambers on January 21, 2021 at which time Jeffrie was cross-examined on his affidavit filed in support of the motion. At the conclusion of the hearing I reserved my decision. The motion is dismissed for the reasons that follow.

[6] A stay of execution is a discretionary remedy (*327991 Nova Scotia Limited v. N2 Packaging Systems, LLC*, 2021 NSCA 2 at para. 54). Simply filing a Notice

of Appeal does not prevent enforcement of the two orders here under appeal. As explained by Van den Eynden J.A. in *Y. v. Swinemar*, 2020 NSCA 56:

> [11] As noted, the filing of a Notice of Appeal does not operate as a stay of execution of the judgment being appealed. That is because a successful party is entitled to the benefit of the judgment obtained. This is in keeping with the companion proposition that an order, although under appeal, is presumed correct unless and until it is set aside. These principles are well-established in Canadian law. They were reiterated by Prowse, J.A. of the British Columbia Court of Appeal, sitting in chambers, when she denied a stay motion aimed at preventing access to assisted death (*Carter v. Canada (Attorney General)*, 2012 BCCA 336 at ¶8).

(See also *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45 at para. 19; *327991 Nova Scotia Limited*, *supra*, at para. 55).

[7] The test governing whether to grant a stay is found in the frequently cited decision *Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23. The party moving for the imposition of a stay bears the burden to establish on a balance of probabilities that:

i. there is an arguable issue(s) raised by the appeal;

ii. the party will suffer irreparable harm if the stay is not allowed;

iii. the party will suffer greater harm if the stay is not granted than would the opposing party if the stay were granted.

[8] These three elements comprise the so-called primary test. Even when the party seeking the stay does not meet the primary test, they may persuade the Court there exist exceptional circumstances that make it fit and just to grant the stay—the so-called secondary test. As noted in *Swinemar*, *supra*: "… This latter branch of the test is akin to a safety valve, catching cases that warrant a stay but fall outside the primary three step test (*La Ferme D'Acadie v. Atlantic Canada Opportunities Agency*, 2009 NSCA 5 at ¶22)" (at para. 15).

[9] Jeffrie's personal perspective was woven throughout each of the arguments advanced by the Company, that is to say, the Company spoke through him. Most (not all) of his submissions internalized the arguments to a personal level. Jeffrie articulated the elements of the *Fulton* test in support of the Company's motion, although much of the argument appeared on its face to be from Jeffrie's own perspective. For that reason, I was mindful to assess his arguments both on the

basis of what Jeffrie was submitting, and also on the basis of the implications for the Company, where not otherwise referenced by Jeffrie. This approach ensured the Company's interest in a stay was considered and examined under the *Fulton* test.

[10] On the first aspect of the primary test—whether the appeal raises an arguable issue(s)—it is not for a single judge of the Court, sitting alone on a chambers motion, to delve into the merits of the appeal. That task is reserved for the panel eventually assigned to hear the appeal. Thus the bar is lowered somewhat, as rather than examining the merits of the appeal, I must instead ask whether I am satisfied there is an arguable issue(s) for appeal such that either party could be successful (*327991 Nova Scotia Limited*, *supra*, at para. 61).

[11] The notion of an "arguable issue" was examined by Beveridge J.A. in *Colpitts*, *supra*:

> [26] A judge hearing a stay application should not engage in a prolonged examination of the merits of an appeal. An arguable issue is a low threshold. The Application for Leave to Appeal must contain realistic grounds which, if established, appear to be of sufficient substance to be capable of convincing a panel of the Court to allow the appeal. Freeman J.A. in *Coughlan et al. v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A.) articulated how to assess if an arguable issue is made out:
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> > [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. [Bolding in original]
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> …

> [29] To demonstrate that he has an arguable issue, the appellant must be able to identify a ground of appeal that has a realistic chance of being able to convince a panel of the Court that the judge erred in law or that the result of the order would cause a patent injustice. [Emphasis added]

[12] The Notice of Appeal sets out grounds asserting "reviewable errors" made by the trial judge and a denial of a fair trial. Repeatedly throughout his evidence and argument, Jeffrie maintained "he" did not receive a "fair trial".

[13] On their face, the grounds of appeal appear to be related to procedural concerns, which the Company says deprived it of a fair trial, save the second ground, which claims misapprehension of evidence leading to errors of fact. The trial decision reveals many factual findings made by the judge, along with assessments of credibility, a review of the procedural history of the case, and a canvass of the defences put forward by the Company (through Jeffrie).

[14] In relation to the first branch of the primary test Fraser contended there are no arguable grounds of appeal advanced. I am persuaded the most that can be said, giving wide latitude to the arguments of the Company on the point, is that the first branch of the test could possibly be met, as the assertion of misapprehension of evidence, if established on appeal, could result in the appeal being successful. Any further or deeper analysis is unnecessary given my conclusions on the second and third branches of the primary test, and on the secondary test, that follow.

[15] As to the second branch of the primary test—whether the Company will suffer irreparable harm if the stay is not permitted—Jeffrie stated in his affidavit that the stress generated by "having to deal with all the ramifications associated with the Order (sic)" will interfere with his ability to attend to his appeal "in an efficient manner". On cross-examination, he agreed he had not provided any independent evidence of any health issues that would support his assertion. In his affidavit and in cross-examination Jeffrie also identified his concern with unwanted publicity he asserts was associated with certain pre-trial events and the trial outcome.

[16] With respect, these broad expressions of concern do not persuade me the Company would suffer irreparable harm were the stay not granted. It is not uncommon for litigants to experience stressors associated with the court process, nor publicity. The generic nature of Jeffrie's description of these concerns do not rise to the level of irreparable harm. In *Colpitts*, *supra*, at para. 48 Beveridge J.A. referenced the irreparable harm component of the test:

> [48] Irreparable harm is informed by context. This was described by Cromwell J.A., as he then was, in *Nova Scotia v. O'Connor*, 2001 NSCA 47:
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> > [12] The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in *R.J.R.-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
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> > [13] However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at § 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[17] Putting the matter in context, there is nothing in the imposition of a stay that could assist the Company or its Agent with the carriage or efficiencies of conducting the appeal. It is reasonable to assume many litigants find court proceedings stressful, but there was no specific evidence put before the Court to allow me to conclude irreparable harm would befall this appellant occasioned by that factor.

[18] Furthermore, the granting of a stay will not now remedy any negative publicity that may already have occurred, nor could a stay assist in guaranteeing the Company would be spared future publicity. I am not aware there were any publication bans imposed at trial or in relation to the trial decision, and there are none in place in this Court. While the Company may not relish the prospect of publicity, I am unable to conclude, on the very limited evidence on the point, that the spectre of unwanted publicity bears uniquely on the Company such that it would suffer harm, much less irreparable harm, if denied a stay.

[19] As noted earlier, the Order(s) are deemed correct until such time as the outcome of the appeal is known. Jeffrie asserted the publicity associated with the trial has negatively impacted on him, his employees and his business. In cross-examination he agreed the employees he referred to were employees of other companies with which he is engaged, not the appellant Company, rendering that assertion irrelevant.

[20] As discussed above, any publicity associated with the trial is a *fait accompli*—if it has already occurred, the granting of a stay would have no impact

on what has already happened. Despite Jeffrie's invitation to do so, it is not for the Court to engage in conjecture that any enforcement action taken by Fraser in relation to the Order(s) between now and the appeal hearing would generate negative publicity adversely affecting the Company.

[21] On the third branch of the primary test—that the balance of convenience demonstrates the Company would suffer greater harm if a stay were not imposed than would Fraser if it were granted—the Company was unable to satisfy me on this branch of the test. Once again, the evidence on this point was very limited and without sufficient detail to support the assertion.

[22] Jeffrie's evidence was harm would be greater for the Company (and for him) than for Fraser absent a stay, because Jeffrie owns and operates more businesses than does Fraser, and should the appeal be successful, Fraser "might not" be in a position to return to the Company any monies collected through enforcement. With respect, more than a mere assertion that Fraser might not repay such monies is required. I have not been provided with any specific evidence to support that assertion, such as, to name but two examples, that Fraser has a history of ignoring or disrespecting court orders or a history of concealing assets.

[23] In relation to this third branch of the test, much of the cross-examination of Jeffrie focussed on his knowledge of Fraser's assets and the composition of the assets of the Company. As to the former, Jeffrie agreed he is aware Fraser holds "a fishing license of $750,000". When asked whether Jeffrie agreed this would constitute an asset sufficient upon which to collect if the Company's appeal is successful, Jeffrie's answer was non-responsive.

[24] As to the assets of the Company, in cross-examination Jeffrie agreed no crab allocation can leave the Company without his signature and commented that two shareholders of the Company are currently planning to sell their interests. When it was suggested by counsel for Fraser this would instead create a greater hardship for Fraser, as it would leave the Company with less assets for Fraser to collect upon if the appeal is unsuccessful, Jeffrie was adamant the Company has "lots of assets".

[25] These aspects of the evidence served to illustrate the argument advanced by Fraser in opposing the motion, that the Company will suffer no greater harm than Fraser in the absence of a stay.

[26] Turning to the secondary test—a determination of exceptional circumstances—the concept was explained by Roscoe J.A. in *Landry v. 3171592 Nova Scotia Limited*, 2007 NSCA 111:

> [10] The secondary test in **Fulton**, states that in exceptional circumstances the court may grant a stay if it is fit and just. Recently in **W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.**, 2006 NSCA 129, Justice Cromwell considered the secondary test and explained that it is rarely satisfied:
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> > 11 Very few cases have been decided on the basis of the secondary test in **Fulton**. Freeman, J.A. in **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171 (C.A., in Chambers) at para. 13 offered as an example of exceptional circumstances a case in which the judgment appealed from contains errors so egregious that it is clearly wrong on its face. As Fichaud, J.A. observed in **Brett v. Amica Material Lifestyles Inc.** (2004), 225 N.S.R. (2d) 175 (C.A., in Chambers), there is no comprehensive definition of "exceptional circumstances" for **Fulton's** secondary test. It applies only when required in the interests of justice and it is exceptional in the sense that it permits the court to avoid an injustice in circumstances which escape the attention of the primary test.
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> > 12 While there is no comprehensive definition of what may constitute "exceptional circumstances" which may justify a stay even if the applicant cannot meet the primary test, those exceptional circumstances must show that it is unjust to permit the immediate enforcement of an order obtained after trial. So, for example, in **Fulton** itself, Hallett, J.A. found that exceptional circumstances consisted of three factors in combination: first, that the judgment was obtained in a summary proceeding rather than after trial; second, that on the face of the pleadings the appellant raised what appeared to be an arguable issue and, thus, was likely to be successful on appeal; and third, the appellant had a counterclaim and claim to a set off that had not been adjudicated making it premature to execute on the summary judgment.
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> > 13 While there can be no comprehensive definition of what constitutes special circumstances, they must be circumstances which show that it would be unjust to permit immediate enforcement of the judgment. This is because a stay of execution, in common with interim injunctive relief, must justly apportion the risk of uncertainty about the ultimate outcome of the case. There are arguable issues raised on appeal, but one cannot at this stage speculate about what the outcome of the appeal will be. The risk created by this uncertainty is shared by both the appellant and the respondents. If a stay is granted and the appeal ultimately fails, the respondents will have been kept out of their money needlessly. If, on the other hand, the stay is denied and the appeal ultimately succeeds, the

> appellant will have been required to pay the judgment needlessly.
> [Emphasis added]

[27] I am unable to discern from the evidence or the argument there is any aspect of the appeal or the subject matter of it that could meet the secondary test. I am not persuaded there is anything unusual about the circumstances of the appeal nor potential enforcement of the Orders that could lead to an injustice.

[28] The trial was ultimately a case about money. If the Company is successful on appeal it could be that no monies would be owed to Fraser, but that remains to be determined. There was no evidence before me to establish there would be an injustice to the Company that could not be later undone if execution of the Orders is undertaken at any stage prior to conclusion of the appeal. I am not persuaded there are any exceptional circumstances identified that would render it unjust to the Company should Fraser proceed with enforcement of the Orders pending completion of the appeal. With respect, the Company's plain disagreement or dissatisfaction with the outcome of the trial does not constitute unjust circumstances, much less rise to the level of exceptional circumstances. Therefore, I conclude the interests of justice do not require the imposition of a stay.

[29] The motion for a stay cannot succeed on the primary test nor the secondary test set out in *Fulton*, *supra*. The motion is dismissed. The order of November 19, 2020 temporarily suspending enforcement of the Orders is therefore no longer of any force or effect.

[30] The Company did not seek costs on the motion; Fraser argued for costs if successful. The Company shall pay costs to Fraser of $1,000, payable forthwith.

Beaton J.A.