NOVA SCOTIA COURT OF APPEAL

Citation: *Maynard Holdings Limited v. IForm Works Inc.*, 2022 NSCA 54

Date: 20220812
Docket: CA 516755
Registry: Halifax

Between:

Maynard Holdings Limited

Appellant

v.

IFORM Works Inc.

Respondent

Judge:	Derrick, J.A.
Motion Heard:	August 11, 2022, in Halifax, Nova Scotia in Chambers
Written Decision:	August 12, 2022
Held:	Motion dismissed
Counsel:	Jasmine M. Ghosn, for the appellant Scott R. Campbell and Colin D. Piercey, for the respondent

Decision:

Introduction

[1] On July 20, 2022, Justice Peter Rosinski of the Nova Scotia Supreme Court released a written decision, reported at 2022 NSSC 210, on an interlocutory motion brought by IFORM Works Inc. ("IFORM") in relation to a Potain Tower construction crane (the "Crane") and various other pieces of construction equipment (the "Roberts Street Equipment"). The Crane and the Roberts Street Equipment were in the possession of Maynard Holdings Ltd. ("Maynard") which has been building a multi-unit apartment building in Halifax.

[2] The Crane and Roberts Street Equipment had been owned by Optimo Group Inc., ("Optimo") a construction company the appellant had contracted with to work on the apartment building. In February 2022, Optimo sold the Crane and the Roberts Street Equipment to IFORM, subject to Maynard's security interest in the Crane pursuant to a promissory note given by Optimo to Maynard. Maynard continued to use the Crane and the Roberts Street Equipment at its site and would not permit either IFORM or Optimo to retrieve them. In March 2022, Maynard started an action against Optimo.

[3] By the time Optimo sold the assets, Maynard had terminated their contract which did not contain any express termination or completion date clauses. Justice Rosinski found that since the termination of the contract, Maynard had not had the agreement of either Optimo or IFORM to continue to use the Crane or the Roberts Street Equipment. Maynard did not dispute that it only held a security interest in the Crane, not in the Roberts Street Equipment, nor that it did not own the Roberts Street Equipment. Maynard had not been paying rent for the continued use of the Crane or the Roberts Street Equipment to Optimo or IFORM.

[4] On May 19, 2022, IFORM filed an action against Maynard. A week later IFORM brought a motion against Maynard in relation to the Crane and the Roberts Street Equipment pursuant to various provisions of the Civil Procedure Rules and the *Personal Property Security Act*, SNS 1995-1995, c. 13 ("PPSA").

[5] Justice Rosinski concluded IFORM was entitled to the following relief on an interlocutory basis: a Temporary Recovery Order under *Civil Procedure Rule* 43 over the Roberts Street Equipment; a Preservation Order under *Civil Procedure Rule* 42 over the Crane; an Inspection Order under *Civil Procedure Rule* 17.05 to

permit proper itemization of the Roberts Street Equipment and to permit an examination of the Crane, its condition and that of its associated equipment; and an Order pursuant to subsection 18(4) and 64(2) of the *PPSA* which required Maynard to cease its use of the Crane in its construction work.

[6] Justice Rosinski directed that all the orders be "forthwith enforced" (at para. 106).

[7] Maynard is seeking to appeal Justice Rosinski's decision. It wants a stay of the orders he made until its motion for leave to appeal and the appeal can be heard on February 9th, 2023.

Basic Background Facts

[8] In his decision, Justice Rosinski set out the essential background facts:

> **1** **Maynard** is presently continuing to build a multi-unit residential complex ("MR Apartments") which it expects to complete in **mid-September 2022**.
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> **2** To complete construction, Maynard continues to use a crane and equipment ["the Crane" and "the Roberts Street Equipment"] which **Optimo** Group Inc. likely owned and sold to **IFORM** Works Inc. in **February 2022**, subject to Maynard's security interest in the onsite **Crane (Potain MD365)** pursuant to a promissory note given by Optimo to Maynard. Maynard has not permitted Optimo/IFORM to retrieve the Crane or the Roberts Street Equipment from its site.
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> **3** Maynard continued to use the Crane and equipment after **mid-January 2022**, when it purported to terminate the "contract" between itself and Optimo (Exhibit 3 herein - dated January 7, 2021 - but I accept that termination notice was sent on January 13, 2022, being a letter from Maynard principal, Anthony Daniel, to Mr. Hamid Nikkhah).
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> **4** Thereafter, it also barred, Mr. Nikkhah, the principal of Optima (and anyone else on its behalf) from entering the property (Exhibit "B" to Jean Alphonse affidavit - letter of January 4, 2022, from Anthony Daniel to Mr. Nikkhah barring him from attending the work site "for any reason" thereafter).
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> **5** Since termination of the Maynard/Optimo contract by Maynard, Maynard has not had the agreement of either Optimo or IFORM to permit Maynard use of either the Crane or any of Optimo's Roberts Street Equipment. Maynard did not suggest that it owned the Roberts Street Equipment, nor does has it identified any security interest it might have therein. The promissory note is secured only by the Crane.

> **6** IFORM has demanded that Maynard release to it, the Crane and all the equipment which Optimo owned and was on the MR Apartments project site at the time of the purported termination of their agreement in mid-January 2022.
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> **7** IFORM argues that Maynard has not been entitled to use the Crane since it terminated its contract with Optimo (noting that the "contract" is Exhibit "C" to the Nikkhah affidavit and it represents the entirety of the agreement between Maynard and Optimo).
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> **8** It says that *after* Maynard terminated the contract with Optimo for the Crane and the Roberts Street Equipment, IFORM purchased those assets, in relation to which only the Crane was encumbered to the extent of the promissory note, which debt IFORM has always intended and offered to pay off.
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> **9** Maynard has refused to release either the Crane or the Roberts Street Equipment to Optimo or IFORM.

[9] Maynard was unsuccessful in persuading Justice Rosinski that IFORM should be denied relief on the basis that Maynard effectively owned the Crane because it had partially financed Optimo's purchase of it. Maynard submitted it had paid for the Crane by providing Optimo with funds to address the cash flow problems it was having in relation to the project. Justice Rosinski noted that none of the money advanced by the appellant to Optimo was secured by the promissory note.

The Legal Principles Governing a Motion for a Stay

[10] A stay is a discretionary remedy. Since the filing of a Notice of Appeal does not suspend the enforcement of the order being appealed from, a stay may be required to "achieve justice as between the parties in the particular circumstances of their case" (*Hendrickson v. Hendrickson*, 2004 NSCA 98 at para. 11, per Saunders, J.A. quoting *Widrig v. R. Baker Fisheries Ltd*., 1998 NSCA 20).

[11] In *Green v. Green*, 2022 NSCA 30 at para. 11, Justice Van den Eynden 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.

[12] The discretionary power to enter a stay is structured by the "*Fulton*" test (*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23). Under the *Fulton* test,

the party seeking the stay carries the burden of showing, on a balance of probabilities: (1) an arguable issue for appeal; (2) they would experience irreparable harm if the stay was denied; and (3) the balance of convenience favours a stay. The balance of convenience concerns the question of whether the appellant will suffer greater harm if there is no stay than the respondent will suffer if a stay is granted.

[13] In the event the applicant for a stay cannot satisfy the three *Fulton* criteria, exceptional circumstances may justify the granting of a stay on the basis of it being "fit and just" to do so (*Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45 at para. 23 (“Colpitts”).

[14] I am reminded by *Fulton* that the "fairly heavy burden" borne by Maynard is warranted "considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal" (*Fulton, supra* at para. 27).

[15] The parties agree these principles govern the motion.

Applying the Legal Principles

[16] Before I discuss the *Fulton* test in relation to Maynard’s motion, I should address the fact that no formal order has been issued yet in this case. Maynard raised objections to the draft form of the order prepared by IFORM which led to both parties providing written submissions to Justice Rosinski. On August 5th, 2022 he advised counsel for the parties he had their letters and hoped they would be able to “resolve entirely or further reduce the outstanding disagreements regarding the form of Order that should issue”. He indicated he was out of the office until August 26th, 2022.

[17] IFORM says the stay motion should proceed despite the absence of an Order, which is typically required to be filed before an appeal can be set down for a hearing and a stay motion heard, given that Justice Rosinski’s decision, “imposes certain obligations and restrictions with immediate effect (and the parties are treating it as such)”.

[18] I agree. In this case, the orders embedded in Justice Rosinski’s decision are clear, unambiguous and enforceable. I see no purpose in delaying the stay motion until a formal Order has been issued. I will therefore proceed to address the primary *Fulton* criteria and the secondary test of exceptional circumstances.

Arguable Issue for Appeal

[19] For reasons I will explain, I do not intend to address the "arguable issue" prong of the *Fulton* requirements as it would require me to determine precisely the same issue that a panel of this Court will ultimately have to decide in its assessment of the motion for leave to appeal.

[20] I signalled my inclination to counsel at the hearing of this motion and neither took exception to it. Counsel for IFORM, Mr. Campbell, endorsed my intended approach, and I made it clear to Maynard's counsel, Ms. Ghosn, that I was not requiring her to address the issue.

[21] To contextualize my reasoning for sidestepping the "arguable issue" aspect of the *Fulton* test, I will provide an overview of the law relating to applications for leave to appeal, and a summary of Maynard's grounds of appeal.

[22] This is a motion for a stay of an interlocutory decision. Maynard is not entitled to appeal as of right but must obtain leave to appeal (*Judicature Act*, R.S.N.S. 1989, c. 240). As is the norm in this Court, leave to appeal will be determined by the panel (*Morrison Estate v. Nova Scotia (Attorney General)*, 2009 NSCA 116, at para. 18) and the application for leave heard with the main appeal. The panel assessing the request for leave to appeal will consider whether Maynard has made out an arguable issue (*Huntley (Litigation guardian of) v. Larkin*, 2007 NSCA 75, at para. 22).

[23] The arguable issue question is routinely considered by this Court with reference to *Amirault v. Westminer Canada Ltd*. (1993), 125 N.S.R. (2d) 171 (C.A.) ("*Amirault*"). *Amirault* established that 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 based on an erroneous principle of law" (at para. 11).

[24] Maynard has advanced grounds of appeal that allege a variety of errors by Justice Rosinski: factual errors (Ground 1); procedural unfairness in relation to the granting of a "Recovery Order" (Grounds 2 (a)-(d)); treatment of IFORM's motion "as though it were a Summary Judgment Motion when it was not" (Ground 2(e)); failure by the judge to consider the security interest held by Maynard in relation to the Crane and its claim of ownership which Maynard is seeking to establish in ongoing legal proceedings (Ground 3); a failure to take account of probative evidence from Maynard and the drawing of unreasonable inferences from

IFORM's evidence (Ground 4); ordering the recovery of the Roberts Street Equipment in the absence of an adequate specification of this equipment by IFORM (Ground 5); and inconsistent findings in paragraphs 100 and 101 of the decision (Ground 6).

[25] The last ground of appeal referring to paragraphs 100 and 101 of Justice Rosinski's decision appears to relate back to Maynard's assertion it has an ownership interest in the Crane that should have defeated IFORM's requests for relief. Paragraphs 100 and 101 of the decision primarily refer to the Roberts Street Equipment that Maynard retained on its site. In paragraph 101, Justice Rosinski added: "While Maynard may have through its security interest had some basis to claim possession of the Crane, it certainly had no basis to use the Roberts Street Equipment…", noting that Jean Alphonse, Director and Vice-President of Maynard, conceded this in cross-examination.

[26] The focus of the panel considering leave will be on whether any of the grounds of appeal advanced by Maynard, if established, appear to be of "sufficient substance" to be capable of convincing the panel to allow the appeal (*Amirault*, at para. 11). The panel will be assessing the leave question in the context of an exercise of discretion by Justice Rosinski: this requires Maynard to demonstrate a clear legal error or a patent injustice (*Colpitts*, at para. 28).

[27] I have decided not to wade into the question of whether Maynard's Notice of Appeal raises an arguable issue, which avoids me stepping into territory a panel of this Court will be traversing. Furthermore, it is simply not necessary for me to undertake the analysis: in my view the pivotal issue on this motion for a stay is irreparable harm. Has Maynard shown evidence it will suffer irreparable harm if a stay of Justice Rosinski's decision is not granted?

Irreparable Harm

[28] In *Colpitts*, Justice Beveridge described what is meant by irreparable harm:

> **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 s. 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[29] In support of its motion for a stay, Maynard has filed an affidavit from Anthony J. Daniel. Other than the filings from the court below contained in the Motion Record, no other evidence was before me. IFORM did not require cross-examination of Mr. Daniel.

[30] Mr. Daniel is construction manager of the apartment building project and a partner with Maynard. He indicates in his affidavit that he has been on the construction site daily and is familiar with the matters before the Court.

[31] Mr. Daniel's affidavit focuses on what he alleges Optimo owes Maynard for Maynard's contributions toward the purchase of the Crane. He references the amount of the promissory note, $266,106.52, and $128,250.00, an amount he says Optimo would be obliged to pay as a final payment upon completion of the construction contract. (As pointed out by Ms. Ghosn, this amount is a line item in Schedule "A" to the promissory note setting out the Crane purchase details, and described as "10% mechanical lean [*sic*] which Maynard Holding will keep".) Mr. Daniels states: "The subsequent breakdown in our working relationship does not erase Optimo's obligation to pay the $128,250.00 portion owed for the Crane purchase". It is Mr. Daniel's evidence that Optimo owes Maynard the total of these two amounts—$394,356.52 for the Crane plus interest and penalty charges, which entitles Maynard to continue to possess and use the Crane.

[32] Mr. Daniel's affidavit does not mention the Roberts Street Equipment.

[33] Mr. Daniel's affidavit does not offer any evidence of the irreparable harm Maynard would suffer if the stay motion were denied.

[34] In her submissions, Ms. Ghosn framed irreparable harm in terms of the impact of Justice Rosinski's decision on Maynard. Her primary argument is that Maynard will be unable to use the Crane to complete the construction of the apartment building despite having paid a considerable sum of money to assist in

the Crane's purchase. Ms. Ghosn submitted the irreparable harm to Maynard was the presence on the construction site of a crane that cannot be used and the expense of having to pay for another crane to finish the construction.

[35] Ms. Ghosn indicated Maynard only needs the Crane a little longer, to accomplish the construction of the apartment building by mid-September 2022. In her brief she described the irreparable harm justifying the stay as follows:

> Maynard is continuing with its construction project and needs the Crane it says it paid for, and which has been used for over one year. Mr. Alphonse stated in his affidavit that the Crane and equipment are required until September 2022. That is less than two months away, as the Project is almost complete.

[36] Mr. Campbell pointed out that Mr. Alphonse's affidavit filed on the motion before Justice Rosinski did not indicate that a date was set in stone for completion of the apartment building. Mr. Alphonse stated the construction equipment that was the subject of IFORM's motion "is currently in use in the construction of the MR apartments, and is intended by Maynard to be remaining in such use until September 16th, 2022". There is nothing before me to indicate Maynard could not meet its intended target for completion in the absence of a stay. Nor is there any evidence of the implications for Maynard if construction on the apartment building was delayed past September 2022.

[37] Referring to the $266,106.52 plus the $128,250.00 represented by Mr. Daniel as direct payments by Maynard for the Crane, and the encumbrance of the Crane by the promissory note, Ms. Ghosn stated what constituted irreparable harm to Maynard:

> …to now require Maynard to make alternate arrangements for equipment and a crane, at this juncture when the job is almost finished, and while it is owed money, significant money on the Crane, and while legal disputes between Maynard and Optimo remain outstanding…

[38] I do not find Maynard's case for irreparable harm persuasive. I have not been provided with any evidence of irreparable harm. What has been advanced are arguments that suggest Justice Rosinski's decision may cause Maynard to experience inconvenience and expense. I agree with IFORM that any inconvenience and expense associated with Maynard having to obtain a different crane to complete its construction project does not amount to irreparable harm. Should Maynard be successful before a panel of this Court and Justice Rosinski found to have committed reversible error, an accounting for any losses can be

undertaken. In such an event, the impact to Maynard of compliance with Justice Rosinski's decision will be quantifiable. I further note the very broad powers that can be exercised by the Court of Appeal pursuant to *Civil Procedure Rule* 90.48(1)(e):

> 90.48(1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the Judicature Act or any other legislation the Court of Appeal may do all of the following:
>
> …
>
> (e) make any order or give any judgment that the Court of Appeal considers necessary.

[39] I will briefly address Maynard's ancillary "irreparable harm" arguments. It was Ms. Ghosn's submission that the denial of a stay would render Maynard's appeal moot; that IFORM got more than it asked for from Justice Rosinski; and that Justice Rosinski's decision was premature in light of the ongoing litigation by Maynard against Optimo, and the question of whether the security held by Maynard in the form of the promissory note entitled it to continued possession and use of the Crane.

[40] Its appeal will be moot: Ms. Ghosn asked me to consider a number of issues she says remain live, such as Justice Rosinski's decision to grant relief to IFORM despite the money owed Maynard for the Crane under the promissory note. The issues are ones she intends to raise on appeal. It is not my role on a stay motion to address them. The issue of whether Justice Rosinski committed reversible error is available to be litigated whether or not a stay is granted. And, as I already noted, Maynard has not established that a successful appeal would leave it without remedies.

[41] IFORM got more than it asked for from Justice Rosinski: this is an issue for appeal, should leave to appeal be granted. I will simply add that IFORM's Notice of Motion sought what Justice Rosinski ultimately ordered: a temporary recovery order under CPR 43; a preservation order under CPR 42; an inspection order under CPR 17.05; and relief pursuant to the *PPSA*.

[42] Justice Rosinski's decision was premature: IFORM was entitled under the *Civil Procedure Rules* to seek interim relief. Justice Rosinski had the discretion to order the relief sought. Whether he committed reversible error in doing so is a question for appeal, subject to the issue of leave. As Mr. Campbell pointed out, the security interest in the Crane triggered the provisions of the *PPSA*, subsections

18(4) and 64, and Justice Rosinski had the discretion to order relief pursuant to these provisions.

[43] Maynard has produced no evidence to support its claim of irreparable harm. Evidence of irreparable harm is required under the *Fulton* test. Mere assertions are not enough (*Landry v. Benjamin*, 2019 NSCA 73, at para. 7). Mr. Daniel's affidavit is not evidence of irreparable harm. I agree with IFORM that it constitutes at most a submission or a statement of opinion, the latter being inadmissible in any event.

Balance of Convenience

[44] Since Maynard has not established it will experience irreparable harm, I do not need to determine the balance of convenience. However, were it necessary for me to do so, I would be satisfied the balance of convenience favours IFORM and the denial of a stay.

Exceptional Circumstances

[45] As Justice Fichaud held in *Atlantic Canada Opportunities Agency v. Ferme D'Acadie*, 2009 NSCA 5: "Fulton's secondary test applies when "exceptional circumstances" make it just that a stay be granted". He observed while there has been no comprehensive definition of what constitutes "exceptional circumstances", the test is a "safety valve" employed to satisfy "the interests of justice" where the *Fulton* primary test has not been met (at para. 22).

[46] It is rare that a stay motion succeeds on the secondary test. A judgment under appeal that "contains an error so egregious that it is clearly wrong on its face" would qualify as an exceptional circumstance warranting a stay (*Amirault*, at para. 13).

[47] Maynard has not established a case of "exceptional circumstances". It cannot obtain a stay on this basis.

Conclusion

[48] Maynard's motion for a stay of Justice Rosinski's decision (and any Order that, in due course, is issued as a result) is dismissed with costs payable to IFORM forthwith in the amount of $1000.00, inclusive of disbursements and HST.

Derrick, J.A.