

NOVA SCOTIA COURT OF APPEAL

Citation: *Oliver v. Oliver*, 2022 NSCA 57

Date: 20220928

Docket: CA 516075

Registry: Halifax

Between:

Eugene Carroll Oliver

Appellant/Applicant

v.

Susan Pearl Oliver

Respondent

Judge: Bourgeois, J.A.

Motion Heard: July 21, 2022, in Halifax, Nova Scotia in Chambers

Written Decision: September 28, 2022

Held: Motion dismissed with costs

Counsel: Hugh E. Robichaud, for the appellant/applicant
Lynn Connors, Q.C., for the respondent

Decision:

[1] The parties have been involved in litigation following the breakdown of their marriage. After a five day trial, Justice Jean M. Dewolfe rendered a lengthy decision (2022 NSSC 131) in which she addressed issues pertaining to the division of matrimonial assets, Ms. Oliver’s claim to a portion of Mr. Oliver’s business assets, and retroactive spousal support. A Corollary Relief Judgment was issued on June 21, 2022.

[2] Mr. Oliver filed a Notice of Appeal on June 30, 2022. He subsequently filed a motion seeking to stay the entirety of the Corollary Relief Judgment. The motion was heard on July 21, 2022. After having considered the evidence filed by both parties and the submissions of counsel, I advised the motion was dismissed, with reasons to follow. These are my reasons.

Background

[3] The parties were married in 1983 and had two children who are now adults. They separated in July, 2020. The parties accumulated significant matrimonial assets during the marriage. Further, Mr. Oliver is the sole shareholder of Ryash Enterprises Limited (“Ryash”), the entity through which he has operated a successful commercial fishing operation. The expert evidence adduced at trial, and accepted by the trial judge placed a value of \$1,760,000 on this asset, and demonstrated the company had little debt and “lots” of working capital.

[4] In November 2020, Ms. Oliver applied for interim spousal support. Due to a number of adjournment requests, the motion was not heard until June 2021. By order issued September 2, 2021, Justice John Keith found Mr. Oliver to have a gross annual income of \$91,000 and Ms. Oliver to have a gross annual income of \$6,000. He ordered Mr. Oliver to pay spousal support in the monthly amount of \$3,194 to Ms. Oliver, with payments to commence on July 1, 2021. Justice Keith directed that the issue of retroactive support owing from the date of separation would be determined at the divorce hearing. Mr. Oliver was also ordered to pay Ms. Oliver costs in the amount of \$4,000.

[5] The interim order was not appealed. Mr. Oliver has not voluntarily paid spousal support as ordered, nor has he paid the costs as ordered.

[6] The divorce hearing was heard over five days in January – March, 2022. Both parties were represented by counsel. In the midst of Mr. Oliver’s trial

testimony it became apparent that he had in his possession a number of bank drafts, the existence of which had not been previously disclosed. In her decision, the trial judge wrote:

[180] In his evidence on February 9, 2022, Mr. Oliver testified that he was keeping various bank drafts in a “safe place”. He testified that these funds were to be used as a down payment on a new boat for the business. He admitted he had not signed a contract to have a new boat built, but said he had talked to the “loan board” and a builder. He provided no clear plan for financing the boat.

[181] In his business valuation, Mr. Duffett noted that Ryash’s wooden boat would need to be replaced within the next ten years.

[182] Eight Bank drafts were delivered to the Court pursuant to a Preservation Order sought by Ms. Oliver’s lawyer and issued by the Court on March 21, 2022. They are in the name of “Eugene Oliver” except for one which is in the name of “Eugene Oliver Ltd.”.

[183] These Bank drafts total \$230,000:

- 3 x \$50,000 payable to Eugene Oliver from the Ryash Scotiabank bank account
- 4 x \$8,000 and 2 x \$20,000 payable to Eugene Oliver from the Ryash RBC bank account
- 1 x \$8,000 payable to “Eugene Oliver Ltd” from the Ryash RBC bank account (which may not be negotiable as apparently there is no such corporate entity).

[184] It appears from Ryash bank records that the funds used to purchase these drafts were all removed from Ryash’s bank accounts in November 2021.

[185] Counsel for Mr. Oliver argues that these drafts are the property of Ryash as they have not yet been cashed. The Court takes judicial notice the Bank drafts are the equivalent of cash. Upon purchasing the drafts, the funds were withdrawn from Ryash’s accounts. Mr. Oliver could have cashed them at any time. Ryash could not get these drafts back unless Mr. Oliver personally chose to deposit them in a Ryash account. If the drafts were to be used for a boat purchase, it would not make sense to withdraw the funds in his personal name.

[186] The Court notes that Mr. Oliver has mixed personal and corporate funds extensively since separation. He has withdrawn significant funds and written numerous cheques on his behalf from the Ryash account. He has not left any funds in his personal accounts.

[187] The Court finds that these funds (or at least \$222,000) are therefore available to Mr. Oliver to satisfy his obligations to Ms. Oliver.

[7] After having considered the evidence and submissions of the parties, the trial judge determined:

- Ms. Oliver was entitled to a matrimonial property equalization payment of \$169,042;
- Ms. Oliver had successfully established a claim to Ryash, valued at \$352,000;
- Ms. Oliver was entitled to retroactive spousal support of \$35,134 (as had accrued from the date of separation to the commencement of support ordered by Justice Keith);
- Each party was entitled to 50% of the net proceeds of the matrimonial home, their cottage, two additional properties and a travel trailer, all of which were to be immediately placed for sale;
- Ms. Oliver was entitled to 50% of the appraised value of recreational vehicles retained by Mr. Oliver, or, if he had not obtained an appraisal by June 30, 2022, the sum of \$5,000; and
- She would maintain jurisdiction to address the issue of prospective spousal support and costs.

[8] The trial judge directed that Mr. Oliver was to make payment to Ms. Oliver as follows:

[208] Amounts owed to Ms. Oliver by Mr. Oliver as result of the within decision of this Court shall be paid on or before June 30, 2022 as follows:

- (a) in cash;
- (b) by spousal rollover of Mr. Oliver's RRSP. Any rollover shall include a 30% discount for future tax liability;
- (c) from the \$222,000 bank drafts in Mr. Oliver's name held by the Court; and/or
- (d) from Mr. Oliver's share of the **net** proceeds of sale of the Matrimonial Home, the Cottage, the Sanibel trailer, Springhill Property and Lequille Property. Mr. Oliver's share of said proceeds shall be held in trust pending resolution of or the Court's decision on prospective spousal support, costs and security.

[209] Arrears of interim spousal support (approximately \$33,000) shall be paid through the Nova Scotia Maintenance Enforcement Program by June 30, 2022.

[9] The trial judge further noted:

[210] If any funds owing to Ms. Oliver on account of the property division, retroactive spousal support, spousal support arrears, and costs on the June 2021 interim motion are unpaid as of June 30, 2022, Ms. Oliver may have security for payment by way of a charge on the shares of Ryash.

[10] In his Notice of Appeal, Mr. Oliver raised the following grounds of appeal:

1. THAT the learned Trial Judge erred in law by finding that bank drafts were property of Eugene Oliver available for satisfaction of any payments due the Respondent as a result of the division of matrimonial assets and spousal support.
2. THAT the learned Trial Judge erred in law by finding that bank drafts were property of Eugene Oliver, and not property held in trust by Eugene Oliver for the company, Ryash Enterprises Ltd.
3. THAT the learned Trial Judge erred in law by not making any provisions for tax consequences to Eugene Oliver by ordering that bank drafts were available for satisfaction of any payments due the Respondent.
4. THAT the learned Trial Judge erred in fact and law by finding that the Respondent was entitled to twenty (20) per cent of the value of Ryash Enterprises Ltd.;
5. THAT the learned Trial Judge erred in law in ordering that twenty (20) per cent of the value of Ryash Enterprises Ltd. be paid to the Respondent without adjustment for taxation considerations; and
6. Such further and other grounds that may appear upon a review of the transcript.

Legal Principles

[11] The legal principles governing a motion for a stay are well known. In *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45, Justice Beveridge explained:

[19] The filing of a Notice of Appeal does not operate as a stay of execution or enforcement of the judgment under appeal. However, there may be circumstances where, to ensure that the statutory right to challenge the correctness of a lower court's decision is not rendered illusory, the court scheduled to hear an appeal can grant a stay or some other order.

[20] The power to grant such relief is discretionary. It is set out in *Civil Procedure Rule* 90.41(2):

- (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.

[21] How this discretionary power should be exercised is guided principally by Justice Hallett's test set out in *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 (C.A.). The test has two parts.

[22] For the primary test, an applicant will be successful if the Court is satisfied on a balance of probabilities: an arguable issue is raised by the appeal; the appellant will suffer irreparable harm should the stay not be granted (assuming the appeal is ultimately successful); and, the appellant will suffer greater harm if the stay is not granted than the respondent if the stay is granted.

[23] The appellant may also obtain relief pending an appeal, even if it cannot meet all of the criteria for the primary test, if there are exceptional circumstances that nonetheless make it fit and just to grant a stay. This is known as the secondary test.

[12] The granting of a stay is an equitable remedy. Even if the test as set out in *Fulton* can be satisfied, a stay may be denied if an appellant does not come to court with clean hands. See *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 103 and *Bonitto v. Halifax Regional School Board*, 2015 NSCA 3.

Position of the Parties

[13] Mr. Oliver seeks to have the entirety of the Corollary Relief Judgment stayed pending the outcome of the appeal. He filed an affidavit in support of the motion, and he was not cross-examined.

[14] Mr. Oliver argues in his written submissions, filed July 13, 2022, that he has established the following:

- The grounds in his Notice of Appeal raise arguable grounds;
- He will experience irreparable harm if the Corollary Relief Judgment is not stayed;
- The balance of convenience favours him, as opposed to Ms. Oliver;
and
- In any event, the circumstances in the present instance are “extraordinary”, justifying the granting of a stay.

[15] I have noted in particular, Mr. Oliver's position regarding the balance of convenience:

24. Ms. Oliver has established that she is entitled to a division of assets. Her interests are quantified in the Supreme Court (Family Division) decision in this matter and set out in the CRO.

25. It is acknowledged that she would have to delay access to her interest in the matrimonial assets should a stay be granted. My client argues that any delay in accessing her share of the matrimonial assets is short term and can be compensated if my client is unsuccessful on appeal.

26. The Appeal further argues that any delay will not materially affect the value of the matrimonial assets and Ms. Oliver's interest in said assets.

27. Ms. Oliver would not be any worse off materially in the intermediary.

[16] Ms. Oliver strenuously opposes the motion for a stay, and requests that it be dismissed. She filed an affidavit, and was not cross-examined. In her written submissions, she asserts that the test in *Fulton* has not been established on the evidence presented, there are no extraordinary circumstances justifying a stay, and that the motion should also be dismissed given Mr. Oliver's improper conduct.

Analysis

[17] Relevant to my analysis are the following observations:

- All of the grounds in the Notice of Appeal relate to either the trial judge's characterization of the bank drafts, or her decision in relation to Ms. Oliver's claim to a portion of Ryash. It does not set out any grounds challenging the trial judge's order in relation to the division and sale of matrimonial property, or spousal support;
- Notwithstanding Mr. Oliver acknowledging in his written submissions, as quoted above, that Ms. Oliver was entitled to a matrimonial property division, he asked for a complete stay over all terms of the Corollary Relief Judgment. This position would include a stay on the division and sale of matrimonial properties, and the spousal support ordered. After questioning from the Court, Mr. Oliver's counsel indicated he had an intention to file an Amended Notice of Appeal to challenge aspects of the matrimonial property division, but was unable to provide any degree of specificity regarding the newly proposed grounds. This intention was not

expressed in either Mr. Oliver's affidavit, nor the written submissions in support of the stay;

- When asked by the Court why he had not paid the spousal support and costs ordered by Justice Keith, Mr. Oliver's counsel advised that he could not afford to. It would appear Mr. Oliver did not dispute Justice Keith's finding that his annual income was \$91,000, nor appeal his order. Further, Mr. Oliver has not provided any evidence upon which to establish his claim of impecuniosity; and
- Based on the record before me, and the unchallenged factual finding of the trial judge, Mr. Oliver has had control of the vast majority of the business and matrimonial assets since the date of separation.

[18] I turn now to the *Fulton* test.

Arguable grounds

[19] Establishing arguable grounds is a low threshold. I am satisfied Mr. Oliver has met it on the basis of the grounds articulated in the Notice of Appeal.

Irreputable harm

[20] Mr. Oliver bases his claim of irreputable harm on the trial judge's finding that the bank drafts were his personal property and not the property of Ryash. He says such a finding will cause unexpected tax consequences for him as he has not claimed these funds on his personal income tax return. Further, if these bank drafts are used to pay the sums owing to Ms. Oliver, he says these funds will not be available as a down payment on a new fishing vessel.

[21] Mr. Oliver has the burden to establish that without a stay, he will suffer irreparable harm. He has not done so. Firstly, other than his broad assertion that he will suffer taxation consequences, he has provided no evidence to quantify what his tax liabilities may be, or that he would be unable to have any resulting liability re-assessed in the event his appeal is successful.

[22] Secondly, he has fallen short of establishing irreparable harm in relation to the use of the bank drafts to pay the sums owing to Ms. Oliver under the Corollary Relief Judgment. As the trial judge indicated, Mr. Oliver had the option to pay the sums owing to Ms. Oliver in a number of ways, including with cash, an RRSP rollover or out of his share of the sale proceeds of the matrimonial assets, in

addition to the bank drafts. If one or more of the other options are utilized, the bank drafts may not be required.

[23] Further, there is no indication that if the bank drafts are used to satisfy the sums owing to Ms. Oliver, she would be unable to repay these funds in the event Mr. Oliver is successful on appeal.

Balance of Convenience

[24] Having found that Mr. Oliver has failed to demonstrate irreparable harm, I could end my analysis at this point. I will, however, continue on to assess the balance of convenience and other considerations.

[25] The balance of convenience factor considers whether Mr. Oliver will suffer greater harm if there is no stay than what Ms. Oliver will suffer if the stay is granted. Although his Notice of Appeal raises no issues with respect to the matrimonial property division, the ordered sales or retroactive spousal support, Mr. Oliver sought a stay of the entirety of the Corollary Relief Judgment. As noted earlier, his counsel acknowledged Ms. Oliver's entitlement to a matrimonial division had been quantified by the trial judge.

[26] The stay sought by Mr. Oliver would result in him continuing to hold assets which Ms. Oliver has been found to be entitled to, to stop the ordered sale of the matrimonial properties, and relieve his obligation to pay spousal support which has been accruing since the date of separation in 2020. He has challenged none of these things on appeal. The balance of convenience clearly favours Ms. Oliver.

[27] Mr. Oliver has failed to establish the primary test in *Fulton*. In my view, he has also failed to establish extraordinary circumstances justifying a stay. The motion is dismissed on that basis.

[28] As a final consideration, I am also satisfied Mr. Oliver has not come to court with clean hands. As noted earlier, he has not abided by an earlier, unchallenged, court order in relation to interim spousal support or the payment of costs owing to Ms. Oliver. Although he says he cannot afford to abide by Justice Keith's order, the trial judge's factual findings as to his income and assets call this assertion into question. As noted earlier, he provided no evidence of his impecuniosity.

Conclusion

[29] For the reasons above, the motion is dismissed. I turn now to the issue of costs.

[30] At the hearing, both parties were asked their views regarding costs on the motion. Ms. Oliver suggested that win or lose, a costs award of \$2,000 was reasonable in the circumstances. Mr. Oliver indicated that if he was successful on the motion, he sought costs of \$3,000, but if his request for a stay was dismissed, he should only be ordered to pay costs of \$1,000.

[31] As the successful party on the motion, Ms. Oliver is entitled to costs in the amount of \$2,000, inclusive of disbursements, payable forthwith by Mr. Oliver.

Bourgeois, J.A.