NOVA SCOTIA COURT OF APPEAL
Citation: Hendrickson v. Hendrickson, 2004 NSCA 98

Date: 20040809
Docket: CA 226917
Registry: Halifax

Between:

Peter G. Hendrickson

Appellant

v.

Kim C. Hendrickson

Respondent

Judge:	Saunders, J.A.
Application Heard:	August 5, 2004, in Halifax, Nova Scotia, in Chambers
Held:	A partial stay is granted but only to the extent that the appellant's RRSPs are exempt from execution. No costs.
Counsel:	Michael I. King, Q.C., for the appellant Deborah I.Conrad, for the respondent

Decision:

[1] The appellant, Peter G. Hendrickson applies pursuant to *Civil Procedure Rule* 62.10 for a stay of execution of the provisions of the "final" Corollary Relief Judgment issued in this proceeding on July 14, 2004, as it relates the enforcement of its provisions with respect to maintenance, arrears of maintenance and costs. The application is strongly opposed by the respondent, Ms. Kim C. Hendrickson. In support of the application the appellant filed an affidavit deposed on July 22, 2004 to which were attached several exhibits. Counsel for both the appellant and the respondent filed detailed written submissions which were augmented by oral arguments in Chambers.

[2] Mr. Hendrickson is 43 years of age. Mrs. Hendrickson is 45 years of age. They carried on a lengthy relationship before moving in together in 1996. They married on October 5, 1997. Their son Chad was born on July 15, 1999. The parties separated in December, 2001. Attempts at reconciliation failed. Protracted legal proceedings ensued. Ultimately the case came on for trial before Nova Scotia Supreme Court Justice F. B. William Kelly and spread over eight days in October, 2003. Further post-trial submissions and appearances also took place on December 15, 2003 and April 16, May 19 and May 25, 2004.

[3] The decision on the trial was delivered in two parts, the first rendered orally on April 16, 2004 wherein the trial judge concluded that for the purposes of calculating child support in accordance with the Federal Child Support Guidelines, the appellant's income was $400,000 annually; and the second on May 25, 2004 wherein the remaining issues resulting in the Corollary Relief Judgment were determined. Subsequent to these oral decisions, the trial judge's written reasons were released on July 30, 2004 as a comprehensive 57 page judgment. As is apparent from ¶ 76 of his decision, the parties had agreed that the quantum of arrears owed by Mr. Hendrickson, based on existing orders, was $25,000. Kelly, J. rejected Mr. Hendrickson's plea to reduce or otherwise vary this sum and concluded that the amount of arrears should remain at $25,000, not payable forthwith as requested by Mrs. Hendrickson, but rather in equal monthly installments spread over an 18 month period.

[4] By the terms of the Corollary Relief Judgment dated July 14, 2004 Mr. Hendrickson was obliged to pay Mrs. Hendrickson:

1. Child support in the amount of $2,931.00 per month, payable in two monthly instalments;

2. Arrears in child support in the amount of $917.81 per month, payable in two monthly instalments;

3. 40% of childcare expenses, which amounts to a payment of $701.46 per month to be paid in two monthly instalments;

4. Costs to the Appellant for an application before Justice Gass and an application before The Learned Trial Judge, totalling $2,500.00; and

5. 70% of the Respondent's disbursement for the report of Mr. Bradley regarding his opinion of the valuation of the various companies in which the Appellant has an interest.

[5] The appellant filed a notice of appeal on July 23, 2004. On the same date Mr. Hendrickson filed this application for a stay. He swears in his supporting affidavit that, apart from the within appeal, he is also "in the process of" applying to vary the final Corollary Relief Judgment as his "financial circumstances ... have changed dramatically over the past 18 months".

[6] At trial Mr. Hendrickson referred to what was said to have been at the time the most recent financial statement for his company covering the period February 1, 2003 to October 27, 2003. On the basis of this financial statement introduced in evidence at trial, Mr. Hendrickson testified that he estimated his company's pre-tax profits for the year ending January 31, 2004 to be approximately $375,000.00. In his affidavit deposed July 22, 2004, Mr. Hendrickson states:

> 10. THAT on the basis of Exhibit "B" the Company's pre-tax profit for the period ending January 31st, 2004 was projected to be $376,144.83. In my oral evidence I estimated the Company's pre-tax profits for that year to be approximately $375,000.00. As it turned out I seriously miscalculated the projection;

[7] Mr. Hendrickson now emphasizes documents appended to his affidavit which purport to be unaudited financial statements for his company for the year ending January 31, 2004 which suggest a pre-tax loss of $-74,309. This loss is said to have occurred over the period of February 1, 2003 to January 31, 2004 which the appellant argues was the result of a dramatic drop in the company's gross

revenue over the previous year. Mr. Hendrickson swears that he is only drawing an annual gross salary of $92,000 from his company, and that as this is his only source of income , he is no longer able to comply with the monthly requirements of the Corollary Relief Order.

[8] ***Civil Procedure Rule*** 62.10 provides in part:

> (1) The filing of a notice of appeal shall not operate as a stay of execution of the judgment appealed from.
>
> (2) A Judge on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution of any judgment appealed from or of any judgment or proceedings of or before a magistrate or tribunal which is being reviewed on an appeal under Rules 56 or 58 or otherwise.
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> (3) An order under rule 62.10(2) may be granted on such terms as the Judge deems just.

[9] The principles governing an application for stay of execution are summarized by Hallett, J.A. in ***Fulton Insurance Agencies v. Purdy*** (1990), 100 N.S.R. (2d) 341 (CA) (MLB):

> (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.

[10] In Nova Scotia, unlike some other jurisdictions, an appeal does not automatically stay execution. A stay is an equitable remedy which calls for the exercise of discretion based on the circumstances of that particular case. As Justice

Freeman noted in ***Coughlan v. Westminer Can. Ltd.*** (1993), 125 N.S.R. (2d) 171 at p. 174:

> Stays deprive successful parties of their remedies, and they are not granted routinely in this province. They are equitable remedies and the party seeking the stay must satisfy the Court it is required in the interests of justice.

[11] Accordingly, a stay is a discretionary remedy and, as noted by Chipman, J.A. in ***Widrig et al. v. R. Baker Fisheries Limited et al.*** (1998), 168 N.S.R. (2d) 378, the court's exercise of this:

> ... discretionary power is to achieve justice as between the parties in the particular circumstances of their case.

[12] Let me say at the outset that the appellant has not shown any exceptional circumstances which would make it fit or just that a stay be granted as required in the secondary test described in ***Fulton***. His complaint that eight and one half months have elapsed since the conclusion of this trial last October such that his:

> ... right to apply to the Court in a timely manner to vary the provisions of the Final Corollary Relief Judgment with respect to the level of child support has been seriously prejudiced.

is hardly persuasive in that it ignores the fact that further arguments, appearances and post-trial written submissions occurred in December, 2003 and in April and May, 2004. It is also significant that the financial statements for Tour Tech. East Limited for the year ending January 31, 2004 and upon which the appellant now relies for the assertion that the trial judge erred in imputing annual income are dated April 8, 2004, at least a full week before the trial judge rendered his decision on this issue. Without in any way intending to comment upon the merits or otherwise of Mr. Hendrickson's appeal or intended application to vary, it strikes me as very odd indeed that he would not have had some inkling of what he now presents as such a dramatic change in his company's financial outlook, or would not have attempted to inform the court of such a change before the trial judge filed his decision imputing income and fixing child support, or would not have acted quickly to obtain early dates when an application to vary could be heard. The appellant's complaint that the Supreme Court - Family Division's "docket is badly overcrowded by child protection cases" such that he thinks it unlikely his application to vary would be heard any earlier than April, 2005 is not in my

opinion, in the circumstances of this case, a factor amounting to an exceptional circumstance such as would satisfy the secondary test in ***Fulton***.

[13] I turn then to a consideration of whether the primary test has been met in this case.

[14] In his notice of appeal Mr. Hendrickson lists nine grounds:

> 1. The learned trial judge erred in law in deeming income in the hands of the Appellant in the amount of Four Hundred Thousand Dollars ($400,000.00) on the basis of the pre-tax profits of the Appellant's Company Tour Tech East Limited.
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> 2. The learned trial judge erred in law in deeming income in the hands of the Appellant in the amount of Four Hundred Thousand Dollars ($400,000.00) in that the learned trial judge deemed income in excess of the projected earnings of the Company for the period ending January 31st, 2004.
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> 3. The learned trial judge erred in law in that the learned trial judge's conclusion with respect to the deemed income of the Appellant in the amount of Four Hundred Thousand Dollars ($400,000.00) was perverse to the evidence and to the learned trial judge's own findings of fact.
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> 4. The learned trial judge erred in law in that he failed to give proper or any consideration or weight to the discretion structuring factors set out in Section 13 of the *Matrimonial Property Act* and in particular to Section 13(d) and (e) in that the learned trial judge failed to give the Appellant credit for the equity which he acquired in his condominium at 1 Prince Street, Dartmouth, Nova Scotia prior to the commencement of his relationship with the Respondent.
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> 5. The learned trial judge erred in law in that the learned trial judge failed to apportion a matrimonial liability between the Appellant and the Respondent, being the Retirement Compensation Agreement when there was sufficient evidence to accurately apportion the said liability between the Appellant and the Respondent.
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> 6. The learned trial judge erred in law in ordering the Appellant to pay arrears of Twenty-five Thousand Dollars ($25,000.00) in that the learned trial judge failed to give the Appellant any credit for the difference ordered paid under the Interim Order of Justice Gass and the Final Corollary Relief Judgment granted by the learned trial judge.

> 7. The learned trial judge erred in law in that the learned trial judge failed to give any consideration whatsoever to the rights of the minority shareholder (10%) of Tour Tech East Limited when the learned trial judge deemed income in the hands of the Appellant thereby forcing the Appellant to draw additional income from Tour Tech East Limited that was totally unrelated to proper or fair remuneration to the Appellant as either an officer, director or shareholder of the Company.
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> 8. The learned trial judge erred in law in ordering the Appellant to pay seventy (70%) percent of the Respondent's disbursement for the Respondent's expert witness Paul F. Bradley, C.A. without determining what part of the total disbursement related to the valuation of Tour Tech East Limited for the purposes of the Federal Child Support Guidelines and to determine whether the amount of the said disbursement was just and reasonable in all the circumstances.
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> 9. Such other grounds as may appear.

[15] In ***Coughlan, supra*** Freeman, J.A. defined an arguable issue as a ground of appeal which if successfully demonstrated by the appellant, could result in the appeal being allowed. As Justice Freeman put it:

> ... 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 ... should not ... look further into the merits. (at page 175)

[16] After considering these grounds, together with the record before me, the submissions of counsel and the prevailing authorities cited by Mr. King, I am satisfied that there are arguable issues raised on appeal. This first branch of the primary test has been met.

[17] The next question is whether the appellant has persuaded me that if the stay is not granted and the appeal is successful, he will suffer irreparable harm that is difficult to or cannot be compensated for in damages. What constitutes irreparable harm was considered by Justice Cromwell in ***Desrosiers, et al. v. MacPhail, et al.*** (1998), 165 N.S.R. (2d) 32 where at ¶ 12 he said:

> Irreparable harm is not a term capable of exact definition. As Justice Sharpe notes in his treatise, *Injunctions and Specific Performance* (2nd, 1997):

> It is exceptionally difficult to define irreparable harm precisely ... The important point is that irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case. (at para 2.440 to 2.450)

In the authoritative discussion of the principles relating to stays pending appeal, RJR - *MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, Justices Sopinka and Cory describe irreparable harm as follows:

> 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. ... 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. (Citations omitted)

[18] In all but one respect the evidence here fails to show that such harm as would be suffered by Mr. Hendrickson is irreparable in that it would be difficult to or could not be compensated for, with a monetary damage award. The appellant has not shown - and the burden rests on him - that Mrs. Hendrickson would be unable to pay such compensation. In fact the appellant has not argued that the respondent will be unable to pay a judgment against her. Both parties are solvent. By all accounts she has been able to fulfill her financial obligations throughout these proceedings. If, ultimately, the appellant is successful on appeal or in his application to vary the Corollary Relief Judgment, then any overpayment can be reimbursed upon such terms as may be appropriate at that time.

[19] I would, however, allow a partial stay - perhaps more accurately characterized as a partial exemption from execution - of Mr. Hendrickson's Registered Retirement Savings Plans (RRSPs). In his affidavit in support of the within application, Mr. Hendrickson swears:

> 16. THAT I have been advised by Ms. Sue Evans of the Maintenance Enforcement Office that she intends on garnisheeing 100% of my income from Tour Tech East Limited and to seize my Registered Retirement Savings Plan (RRSPs) in order to satisfy any arrears of maintenance which accrue because of my inability to pay pending an appeal to this Honourable Court and a variation application to the Supreme Court of Nova Scotia (Family Division);

> 17. THAT if the Maintenance Enforcement Office is permitted to seize my RRSPs irreparable harm will be done in that a substantial tax liability will be incurred which cannot be recovered from Canada Customs Revenue Agency or reversed. Further, I will lose future retirement income equivalent to the amount de-registered by the Maintenance Enforcement office plus all of the investment return or growth within the RRSP that would be generated by that money over the next 22 years when I reach 65 years of age; (underlining mine)

[20] I am persuaded, in the circumstances of this case, that to sanction, by way of execution, a collapse of Mr. Hendrickson's RRSPs would, given their nature and the long-term consequences of such action, constitute irreparable harm as that term has come to be defined in the leading authorities. Accordingly, I direct that the appellant's RRSPs are exempt from any execution efforts taken to enforce Mr. Hendrickson's financial obligations in these proceedings, unless or until the court otherwise orders.

[21] In order to succeed in obtaining a stay of execution under the primary test in ***Fulton*** the applicant must also demonstrate that the balance of convenience favours his position. That is that he would suffer greater harm if the application were refused then would Mrs. Hendrickson if the stay were granted.

[22] Save for exempting the appellant's RRSPs from enforcement proceedings in this case for the reasons I have already given, in no other respect has the appellant persuaded me that inconvenience to him in refusing the stay outweighs any inconvenience to Mrs. Hendrickson in granting it. The trial judge's extensive decision describes the protracted, difficult and often erratic history of child support payments. The appellant has not paid anything towards the costs or arrears of child support imposed by Justice Kelly and confirmed in the Corollary Relief Judgment. Following trial Mr. Henrickson received net assets totalling more than $180,000 as a result of the division of matrimonial property. He owns a multi-million dollar business. By all accounts he is an astute and very successful businessman. He is not insolvent. He has a greater net personal worth than does the respondent. There is no evidence of his being at the mercy of other creditors. I am confident that he has access to other financial means at his disposal, whether refinancing equity in his condominium, or taking out an interest-free or minimal interest shareholder's loan, or choosing to exercise other innovative strategies to comply with the court's order. It seems to me that if I were to grant the stay, the serious financial repercussions to the respondent and her young son would far outweigh any

inconvenience to the appellant in requiring him to meet his court-ordered obligations.

[23] For all of these reasons I direct that there will be a partial stay of the Corollary Relief Judgment dated July 14, 2004 but only to the extent that the appellant's RRSPs are exempt from execution.

[24] As success on the application has been relatively divided, I direct that there will be no order for costs.

Saunders, J. A.