NOVA SCOTIA COURT OF APPEAL

Citation: Brett v. Amica Mature Lifestyles Inc., 2004 NSCA 100

Date: 20040816
Docket: CA 218741
Registry: Halifax

Between:

Bruce Brett and 2475813 Nova Scotia Ltd.

Appellants

v.

Amica Mature Lifestyles Inc. (#2)

Respondent

Judge:	Justice Joel E. Fichaud
Application Heard:	August 12, 2004, in Halifax, Nova Scotia, In Chambers
Held:	Applications for adjournment and directions as to appeal book granted. Application for stay is dismissed.
Counsel:	Blair Mitchell, for the appellant David Coles, for the respondent

Decision:

[1] The respondent ("Amica") applied for directions on the contents of the appeal books. The appellants (together "Brett") cross applied for a stay of proceedings under ss. 65(1) and 65.1 of the *Supreme Court Act*, R.S.C. 1995, ch. S-27 as amended.

Background

[2] My decision of July 19, 2004 on a related matter in this proceeding (2004 NSCA 93) outlines the background. Briefly, Brett borrowed $100,000 from Amica in return for giving Amica a demand promissory note. Amica demanded payment. Brett has not repaid. Amica sued Brett under the note. Brett's defence pleads set off and counterclaim (the "Amica action").

[3] Brett has a separate action against Ishtar Investments Inc., a predecessor company to Amica (the "Brett action").

[4] Amica applied for summary judgment on the Amica action. Brett cross applied to consolidate the Amica action with the Brett action. Justice Hood granted Amica's application for summary judgment and dismissed Brett's application to consolidate.

[5] Brett has appealed to this Court against the summary judgment and the refusal to consolidate.

[6] A month ago Brett applied under *CPR* 62.10 for a stay of execution pending the determination of the appeal. My decision of July 19, 2004 dismissed Brett's application for the stay because, under the tests in *Fulton Insurance Agency v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.), at para. 28: (a) Brett had not established irreparable harm for *Fulton's* primary test, and (b) there were no "exceptional circumstances that would make it fit and just that the stay be granted" under *Fulton's* secondary test.

[7] The date originally scheduled for Brett to file the appeal books was May 31, 2004. At the chambers hearing on July 15, 2004 I extended this to July 23, 2004. On July 28, 2004 Brett filed two volumes of appeal books.

[8] The hearing date of the appeal initially was scheduled for October 2004. Because of the difficulties with the appeal books discussed below I adjourned the hearing to February 3, 2005.

Issues

[9] There are two issues.

[10] Amica contests many inclusions in Brett's appeal books and seeks directions as to the appeal books' contents.

[11] Brett has filed an affidavit stating that Brett intends to apply to the Supreme Court of Canada for leave to appeal from the decision of July 19, 2004, denying the stay under *CPR* 62.10. Brett now seeks, under ss. 65(1) and 65.1 of the *Supreme Court Act*, a stay execution of Amica's summary judgment pending the decision by the Supreme Court of Canada on that leave application.

[12] I will deal first with the contents of the appeal books and then with the stay application.

1. Appeal Books

[13] The main question is whether the appeal books should contain documents which were in the court file for the Brett action, but were not identified to the Chambers justice as being adduced for the applications under appeal.

[14] Justice Hood heard Amica's application for summary judgment and Brett's cross- application to consolidate. The parties filed affidavits which were identified to Justice Hood as part of the record for those applications. These affidavits clearly belong in the appeal books.

[15] In addition to those affidavits, Brett has included in the appeal books other documents, including affidavits, which were in the court file for the Brett action from earlier interlocutory applications. These other documents were not identified by either party to Justice Hood as being part of the record for the applications which are under appeal.

[16] Counsel for Brett states that, before those applications, he wrote a letter to the Prothonotary asking that the file for the Brett action be provided to Justice Hood. He suggests that, as a result, the full content of the court file for the Brett action became part of the record before Justice Hood. Therefore, counsel argues, Brett is free to include in the appeal book any document in that court file for the Brett action, even if that document was not mentioned in the applications before Justice Hood. Brett refers to *CPR* 38.14:

> An affidavit that has been used and filed in a proceeding, may be used in any other application in the proceeding.

[17] In my respectful view Brett's position is without merit.

[18] It is correct that an affidavit filed in an earlier application may be used in a subsequent application in that proceeding. But it is necessary that the affidavit be tendered to the Chambers justice in the subsequent application. The Chambers justice must be told that the affidavit is part of the record for the application which she is considering. A letter to the Prothonotary requesting that a file be brought to the courtroom does not itself adduce the file's contents as evidence for the application.

[19] Unless the Court of Appeal by order admits fresh evidence, an affidavit may not be tendered for the first time in the Court of Appeal, to support an appeal against a ruling of the Chambers justice to whom that affidavit was not tendered. Brett has made no application to adduce fresh evidence under *Rule* 62.22. Any such application must be made to a full panel of the Court of Appeal.

[20] At the hearing of this application Amica's counsel acknowledged that the appeal books should include whatever documents from the court file in the Brett action were mentioned in the proceeding before Justice Hood, even if those documents were not formally entered as exhibits.

[21] I have not been given the full transcript of the proceedings before Justice Hood. So I cannot identify what documents from the Court's file in the Brett action may have been tendered or mentioned in the proceedings before Justice Hood. My direction is that the appeal books may include documents from the

court's file in the Brett action only if, on the applications to Justice Hood, counsel identified those documents as part of the record for the applications.

[22] Other matters were discussed at the Chambers hearing with respect to the contents of the appeal books. I will summarize my directions on these points, without extensive reasons for each item.

(a) The appeal books should include the interlocutory notices and the affidavits and exhibits which were filed by either party for the applications before Justice Hood, including the affidavits which dealt with the issues of costs and form of the order.

(b) The appeal books should not include affidavits relating to Brett's application to Justice Hood for a stay, a matter not under appeal.

(c) The appeal books should include a single copy of the cross examinations of both witnesses who were cross examined, Mr. Barazzuol and Mr. Brett. The present version of the appeal books contain three copies of the cross examination of Mr. Barazzuol and omit the cross examination of Mr. Brett.

(d) The appeal books should contain the exhibits which were identified in the cross examinations of Mr. Barazzuol and Mr. Brett. As I have not seen the transcript of Mr. Brett's cross examination, I cannot identify these exhibits in this decision. I understand from counsel at the hearing of this application that the current version of the appeal books may omit at least one of these exhibits.

(e) The current appeal books omit certain exhibits to the affidavit of Ms. Cameron, apparently because of oversight. The complete affidavit should be included.

(f) The current version of the appeal books includes at pages 127-60 another unrelated document in the middle of Mr. Brett's affidavit. The unrelated document should be excluded or moved to an appropriate location in the appeal books.

(g) The current version of the appeal books include an unsigned defence, an unsigned affidavit of Mr. Brett and two copies of Ms. Cameron's affidavit. The

appeal books should not contain unsigned pleadings, unsigned affidavits or duplications, except insofar as such documents were exhibits to the signed affidavits which are to be in the appeal books.

(h) The current appeal books include affidavits which were sworn after the filing of the notice of appeal. These are unrelated to the hearing on the merits or to determine costs and the form of the order. These affidavits should be excluded.

(i) The appeal books should contain the transcript of the full proceedings before Justice Hood, including the argument. There is a potential that on the appeal there may be uncertainty about what was said by counsel to Justice Hood. In case this becomes relevant, it would be prudent that the court have the transcript of counsel's comments and argument to Justice Hood.

[23] Brett's appeal books contain other documents (for instance pleadings) to which Amica took no objection. I am not, with these directions, drafting a full table of contents for the appeal books. I am responding to the points of contention in this application. Any documents in Brett's appeal books to which Amica took no objection may remain, unless there is a conflict with the specific directions which are set out above. Brett is to compile and format the appeal books in accordance with the *Civil Procedure Rules*.

2. Stay

[24] Brett applies for a stay of proceedings and stay of execution under the *Supreme Court Act* pending the determination of Brett's intended application for leave to appeal to the Supreme Court of Canada.

[25] Brett's notice of application states that the application is made further to s. 65(1) of the *Supreme Court Act*.

[26] Brett's Notice of Application should have referred to s. 65.1 of the *Supreme Court Act*. Section 65(1) applies only after a notice of appeal has been filed with the Supreme Court of Canada, which has not occurred here. Section 65.1 authorizes a judge of the court appealed from to grant a stay pending the decision of the Supreme Court of Canada whether to grant leave to appeal.

[27] Amica agreed that Brett could amend its Notice of Application to refer to s. 65.1 of the *Supreme Court Act*. I allow that amendment and will consider the application under s. 65.1.

[28] Sub-sections 65.1(1) and (2) state:

> (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.
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> (2) The court appealed from or a judge of that court may exercise the power conferred by s-s.(1) before the serving and filing of the notice of application for leave to appeal if satisfied that the parties seeking the stay intends to apply for leave to appeal and that delay would result in the miscarriage of justice.

[29] **Section 65.1(2):** Brett makes this application before filing the application for leave to appeal to the Supreme Court of Canada. Section 65.1(2) requires that Brett satisfy me that it intends to apply for leave to appeal, and that denial of the stay would "result in a miscarriage of justice".

[30] Brett's affidavit states that Brett intends to apply for leave to appeal. I am satisfied on that point.

[31] Brett's affidavit filed for this application says nothing to identify a "miscarriage of justice" which would occur if the stay was denied.

[32] *Minister of Community Services v. B.F.*, 2003 NSCA 125, a child protection matter, gives an example of such a miscarriage of justice under s. 65.1(2). Justice Cromwell, at para. 16, ruled that there would be a miscarriage of justice if the Minister could apprehend and arrange placement for the appellants' children before the appellants had the opportunity to pursue their appeal from the apprehension order.

[33] There is a significant overlap between the rationales for the requirement that the applicant prove "miscarriage of justice" under s. 65.1(2) and the requirement that the applicant establish "irreparable harm" in every application for the stay. As

will be discussed below, Brett will suffer no irreparable harm. Insofar as there is such an overlap, then in my view there is no "miscarriage of justice" for the same reason that there was no irreparable harm.

[34] There is a further aspect to "miscarriage of justice" under s. 65.1(2). If leave is granted by the Supreme Court of Canada, then (after the appellant files its notice of appeal) there is an automatic stay of execution under s. 65(1) of the *Supreme Court Act*. If the mere timing of Amica's execution before the Supreme Court grants leave would deprive Brett of the automatic stay, it is arguable that this is a "miscarriage of justice".

[35] Such an argument would be more persuasive if Brett's application for leave to appeal was from a decision of the Court of Appeal which dismissed Brett's appeal from the summary judgment. Then leave to appeal would stay the summary judgment itself, under s. 65(1) (after Brett filed its notice of appeal). That is not this case. The Court of Appeal is not scheduled to hear Brett's appeal from the summary judgment until February 2005. Brett's intended application for leave to appeal is from the decision of this Court which denied a stay of execution. The denial of the stay is not an executable judgment. If the Supreme Court granted this application for leave to appeal, (and Brett then files a notice of appeal to the Supreme Court of Canada) the triggering words of s. 65(1) would not stay Amica's execution of the summary judgment. If the Court of Appeal later dismisses Brett's appeal from the summary judgment, then, to obtain the automatic stay of the summary judgment under s. 65(1), it would be necessary for Brett to apply for and obtain leave to appeal from the Court of Appeal's ruling on the summary judgment.

[36] In short, even if Brett obtains leave to appeal from the denial of the stay, this would not trigger s. 65(1)'s automatic stay of the summary judgment itself. That Brett is without the interim stay under s. 65.1(2), between today and the date when the Supreme Court will decide whether to grant leave, is no miscarriage of justice.

[37] **Section 65.1(1):** The test under s. 65.1(1) requires that I (1) decide whether there is a serious question to be litigated, (2) decide whether Brett would suffer irreparable harm if the stay is refused, and (3) assess the balance of convenience to decide which party would suffer greater harm from the granting or

refusal of the stay pending the decision on the application for leave. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at paras. 41-43; *Minister of Community Services v. B.F.* , at para. 10.

[38] With respect to the first element, the serious issue to be litigated, the application is for an interim stay pending the decision by the Supreme Court of Canada whether to grant leave to appeal. So the "serious question" to be litigated is not whether the appeal to the Supreme Court of Canada would succeed, but whether there is an arguable issue of law of sufficient public importance for leave to be granted by the Supreme Court. *Minister of Community Services v. B.F.* at para. 11; *Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd.* (1995) 144 N.S.R. (2d) 326 (C.A.), per Freeman, J.A.

[39] Brett intends to apply for leave to appeal of the Supreme Court of Canada from the decision of July 19, 2004, denying the stay of execution, based on two arguments: (1) Rule 62.10 of the *Nova Scotia Civil Procedure Rules*, prescribing the procedure for a stay application, is *ultra vires* s. 92(14) of the *Constitution Act* 1867; and (2) Rule 62.10 authorizes an unreasonable search and seizure contrary to s. 8 of the *Charter of Rights.*

[40] I need not consider whether there is a serious question to be litigated or the third step, balance of convenience. In my view Brett's application fails on the second step.

[41] Brett must establish that, if the stay were denied, Brett would suffer irreparable harm. My decision of July 19, 2004 dismissed Brett's application for stay because Brett had not established irreparable harm. I reproduce the applicable paragraphs from that decision:

> [12] The primary test requires that the applicant show an arguable issue, irreparable harm and favourable balance of convenience, standards similar to those which govern applications for interim injunctions: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at 127; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334. It is unnecessary to consider whether there is an arguable issue or favourable balance of convenience. Brett's application under Fulton's primary test fails because there is no irreparable harm.

> [13] If the stay was denied, and if Brett paid the judgment but later succeeded on appeal, Brett would have to recover the amount of the judgment from Amica. Brett does not suggest, and there is no evidence, that Amica is insolvent or would be unable to satisfy such a debt. Amica is federally incorporated with a head office in British Columbia. Counsel for Brett acknowledges that, at least under the reciprocal enforcement of judgments legislation, Brett would be able to recover from Amica. Counsel for Brett says that the irreparable harm is the cost, delay and inconvenience of having to recover from Amica through reciprocal enforcement of judgment legislation, if necessary.
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> [14] I do not accept Brett's argument. If the applicant's only loss is financial, the applicant can afford to pay and the loss is quantifiable and recoverable, generally this is not "irreparable harm". There must at least be evidence of risk that the paid judgment would not be recovered. *Halifax (Regional Municipality) v. 3006128 Nova Scotia Ltd.* (2001), 198 N.S.R. (2d) 95 (C.A.), at 99 per Oland, J.A.; *Hiltz and Seamone Co. ltd. v. AGNS* (1998), 167 N.S.R. (2d) 353 (C.A.) At p. 355 per Cromwell, J.A.; *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (C.A.) at paras. 20-22 per Cromwell, J.A.; Campbell v. Jones and Derrick (2001), 197 N.S.R. (2d) 196 (C.A.) at paras. 7 - 8 per Roscoe, J.A.
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> [15] If the financial burden from payment could cause the applicant severe financial distress, or prevent the applicant from carrying forward the appeal, deprive the applicant of indispensable assets or damage the applicant's reputation or employment prospects, this might constitute irreparable harm: *Leddicote v. Nova Scotia (Attorney General)* (2001), 198 N.S.R. (2d) 101 (C.A.) at para. 11 per Roscoe, J.A.; *Jensen v. Jensen* (1991), 108 N.S.R. (2d) 120 (C.A.) at pp. 121 - 22 per Freeman, J.A. There is no evidence or suggestion that Brett would suffer harm of this nature from paying this judgment.

[42] On the present application, Brett has filed nothing and Brett's counsel has said nothing to show that Brett's position is any different now than it was for the first application.

[43] If the stay is denied and Brett succeeds on its application for leave to appeal and on its appeal to the Supreme Court of Canada, the result would be that Brett unnecessarily paid the amount of the summary judgment before the Court of Appeal decided Brett's appeal from the summary judgment. By the date when the Supreme Court of Canada hypothetically would allow Brett's appeal from the denial of the stay, the Nova Scotia Court of Appeal likely will have ruled on the merits of Brett's appeal against the summary judgment. If Brett succeeds on that appeal to the Court of Appeal, then Brett will be entitled at that date to a refund of

the amount paid under the judgment - likely before the Supreme Court of Canada renders its decision on the merits of Brett's appeal from the denial of the stay. If Brett fails its appeal to the Court of Appeal against the summary judgment, then Brett will not be entitled to a refund of the paid judgment, regardless of the later result of Brett's appeal from the denial of the stay.

[44] In either case Brett's alleged "irreparable harm" is the cost, time and inconvenience of recovering from Amica the amount of the judgment paid to Amica, if and when the Court of Appeal reverses the summary judgment.

[45] This is the same alleged "irreparable harm" which was considered in the court's ruling of July 19, 2004. In my view, based on the same principles which were considered in that decision, Brett has not shown "irreparable harm". Brett and Amica, from the evidence, are both solvent. Brett can afford to pay. Amica can afford to repay. The cost of re-collection, through reciprocal enforcement legislation if necessary, is not "irreparable harm" under the authorities which have considered applications for stays.

[46] Counsel for Brett submits that, under the principles stated by Justice Hallett in *Fulton Insurance*, even if Brett fails to establish the conditions for the primary test, I may still grant a stay under *Fulton's* secondary test, where there are "exceptional circumstances that would make it fit and just that a stay be granted". *Fulton's* "exceptional" secondary test is a creature of the interpretation given to Nova Scotia's *Civil Procedure Rule* 62.10. That "exceptional" test does not exist under s. 65.1 of the *Supreme Court Act* and has not been recognized by the authorities which have applied that provision: *RJR-MacDonald*, at paras. 41-43; *Minister of Community Services v. B.F.*, at para. 10; *Pelley v. Pelley*, 2003 NLCA 12, 222 Nfld & PEIR 305 (N.S.C.) at para. 9 per Wells, C.J.N.

[47] **Summary:** Brett has established neither a "miscarriage of justice" for the early application under s. 65.1(2) nor "irreparable harm" for the basic test under s. 65.1(1). I dismiss the application for the stay.

3. Costs

[48] Brett should pay costs to the respondent of $500 plus disbursements with respect to the first issue, concerning the contents of the appeal book. The appeal

books Brett submitted to this Court were late, after the date which had already been extended once because Brett missed the first filing date. The appeal books were inappropriate in numerous respects, which required the respondent to bring this application to clarify the contents. In addition, Brett shall pay the respondent $750 plus disbursements for the stay application. The total costs are payable forthwith in any event of the cause.

J.