NOVA SCOTIA COURT OF APPEAL

Citation: *W.M. Fares & Associates Inc. v. 3035605 Nova Scotia Ltd.*, 2006 NSCA 53

Date: 20060427
Docket: CA 262593
Registry: Halifax

Between:

W.M. Fares & Associates Incorporated

Appellant

v.

3035605 Nova Scotia Limited and 3030558 Nova Scotia Limited

Respondents

Judge:	The Honourable Chief Justice J. Michael MacDonald
Application Heard:	April 13, 2006, in Halifax, Nova Scotia, in Chambers
Held:	Application for stay of execution granted.
Counsel:	Colin Bryson, for the appellant Jamie MacNeil, for the respondents

Decision:

[1] Justice Hood of the Supreme Court of Nova Scotia in Chambers ordered the appellant's lien vacated because she concluded that it was filed out of time. The appellant has appealed this decision and in the meantime seeks to stay that order. In the circumstances of this case, I believe that the stay should be granted.

Background

[2] Mr. Gary Hill of Dartmouth is the president of the respondent numbered companies, 3030558 Nova Scotia Limited ("558") and 3035605 Nova Scotia Limited ("605"). With 558 owning the land and 605 holding the franchise rights, Mr. Hill wishes to construct a hotel complex along the Dartmouth Waterfront.

[3] The appellant engineering firm entered into a written contract with 605 to do some preliminary engineering and design work on the project. After some initial work, an issue arose between the parties, prompting the appellant to file a builder's lien on September 26, 2005. The amount claimed is $ 34,500.00.

[4] The respondents applied to the Chambers judge for an order vacating this lien, asserting that it was filed well beyond the 60 day deadline. The Chambers judge agreed, concluding at § 9:

> In my view, there is sufficient facts before me to conclude that the contract was abandoned soon after that May date at the latest and certainly more than sixty days before September 26, which was the date when the lien was filed.

[5] The appellant takes issue with this conclusion which it says involved factual disputes that should have been decided at trial and not summarily in Chambers. The hearing of this appeal is scheduled for September 27, 2006. In the meantime the appellant seeks a stay so as to preserve its lien pending appeal. The respondents oppose this relief, asserting that the lien is causing the project to be significantly delayed.

Analysis

[6] The test for ordering stays of execution pending appeal is well settled in this province. Availability rests with two alternative options, one primary and one

secondary. The primary category itself contains three elements. Hallett, J.A. in *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 (N.S.C.A.) at pp. 346-347 explained:

> In my opinion, stays of execution of judgment pending disposition of appeal should only be granted if the appellant can either:
>
> (1) satisfy the Court on each of the following:
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> (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:
>
> (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.

[7] See more recently *Reid v. Halifax Regional School Board* [2006] N.S.J. No. 101 (§ 18); *Potter v. Nova Scotia (Securities Commission)* [2006] N.S.J. No. 12 (§ 11) and *White v. E.B.F. Manufacturing Ltd.* [2005] N.S.J. No. 272 (§ 16).

[8] The appellant relies only on the primary threefold test and is not seeking a stay based on Hallett J.A.'s so-called exceptional circumstances. Thus I will now consider each element of the primary test.

An Arguable Issue to be Raised on Appeal

[9] The test for an arguable issue was set out by Cromwell, J.A. in *MacCulloch v. McInnes Cooper & Robertson*, [2000] N.S.J. No. 238 (N.S.C.A. [in Chambers]) at § 4 as follows. It involves a low threshold:

> The appellants must show that there is an arguable issue raised on appeal. This is not a difficult threshold to meet. What is required is a notice of appeal which contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal: see Freeman J.A., in *Coughlan et al v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171; 349 A.P.R. 171 (C.A.). It is not my role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.

[10] As noted, in this case one of the grounds of appeal involves whether the alleged factual disputes should have been best decided at trial as opposed to summarily in Chambers. In its notice of appeal the appellant purports:

> That the learned Trial Judge erred in failing to find that there was an issue to be tried and, instead, proceeded to make findings of fact based upon disputed facts. In particular, the learned Trial Judge erred by:
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> > a) entering into an inquiry of when the contract between the Appellant and the Respondents had been abandoned;
> >
> > b) entering into an inquiry of when it would have been reasonable for the Appellant to conclude that the said contract had been abandoned.

[11] I am satisfied that this ground represents the requisite arguable issue; thus satisfying this first element which I repeat involves a low threshold. For example a similar issue arose in *Saccary v. Jackson and Deepsea Construction Co. Ltd. et. al.* (1975), 11 N.S.R. (2d) 316, when the Chambers judge refused to vacate a lien on a question of law but where the facts were incomplete. On appeal Coffin, J.A. noted at § 43:

> The appellant [Defendant] may have a perfectly good case after all the facts are established, but in my view, the trial judge was right when he said:

> . . . there are questions of law . . . on this application which are more properly decided at the time of trial, having heard the facts completely.

See also *TJ Inspection Services v. Halifax Shipyards, a division of Irving Shipbuilding Inc.* [2004] N.S.J. No. 347 at § 7 and 8.

[12] Of course the relevance of these cases will be for the panel to determine but for my purposes, there exists the requisite arguable issue.

Irreparable Harm

[13] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), Justices Sopinka and Cory say this about irreparable harm at p. 341:

> . . . 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 . . . (Emphasis added)

[14] That decision has been referred to as the "authoritative discussion of the principles relating to stays pending appeal" in *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (N.S.C.A. [in Chambers]), at § 13. In *MacPhail*, Justice Cromwell was clear to indicate that monetary loss could constitute irreparable harm (at § 14):

> A number of decisions by judges of this court on stay applications recognize that the risk that the appellant will not be able to recover funds paid in satisfaction of a judgment in the event the appeal is successful constitutes irreparable harm. These decisions also demonstrate the proposition stated by Justice Sharpe, above, that irreparable harm is a term which takes its meaning in the context of each particular case.

At § 18 Cromwell, J.A. continues:

> In **B & G Groceries Ltd. v. Economical Mutual Insurance Co. v.**(1992), 112 N.S.R. (2d) 322; 307 A.P.R. 322 (C.A.) (Hallett, J.A. in Chambers), Justice Hallett had considerable financial information about the respondent before him.

> He granted the stay being satisfied that the appellant had demonstrated that "it could suffer irreparable harm if the stay were not granted in that it might not be able to recover the amount of the judgment if the appeal were allowed".

[15] In this case it is significant that while the land is owned by 558, the written contract is with 605. Thus without the stay, it is possible that the land could be either pledged or otherwise disposed of before the scheduled appeal, thus jeopardizing the appellant's security. Furthermore, at §2 of his affidavit before me, Mr. Hill confirms that 605's status with the Registry of Joint Stock Companies remains revoked and that its only asset is the hotel franchise agreement:

> 2. 3035605 Nova Scotia Limited's status by the Registry of Joint Stock Companies was revoked. The only asset the Company has is the hotel franchise rights for a Hilton Hotel. The Company still maintains those franchise rights. Although I see no need to renew the registration, as it was not required by Hilton Hotels, I will renew the Company's registration to satisfy the Appellant.

[16] Thus, while the appellant is suing both companies, it is clear that its main claim is in contract and that is against 605 which does not own the land or any tangible assets for that matter. Thus without the lien, the appellant's ability to recover could be jeopardized. These unique circumstances in my mind amount to irreparable harm.

Balance of Convenience

[17] I have already discussed the prejudice the appellant will suffer should the stay not be granted. On the other hand, the respondents say that, with the stay, there is a charge on the land and as a result their development is being delayed. However, I fail to see this as a serious source of prejudice.

[18] Obviously, should the development proceed, it will involve a significant investment that would make the amount of the appellant's lien appear trivial. There would be nothing to prevent the respondents from vacating this lien by providing appropriate security. See s. 29(4), *Builders' Lien Act R.S., c. 277*.

[19] Thus, without the stay, I see the appellant potentially being unable to recover should it ultimately advance a successful claim. Yet, from the respondents' perspective, with the stay I see only the potential inconvenience of posting modest

security. The potential harm to the appellant without the stay thus exceeds any potential harm to the respondents with the stay.

[20] I grant the application. The order of Justice Hood dated February 21, 2006 shall be stayed pending the disposition of the appeal in this matter. The costs of this application will be in the cause of the appeal.

MacDonald, C.J.N.S.