

Bateman, J.A. (In Chambers):

On behalf of the appellants, Edmund R. Saunders has applied for leave to appeal to the Supreme Court of Canada from an Order of this Court dated April 14, 1997. That Order dismissed the appellants' appeal from a Supreme Court Order for foreclosure and sale of certain lands mortgaged by the appellants.

The appellants then applied to a judge of this Court, sitting in Chambers, for a stay of the foreclosure Order pending disposition of the matter in the Supreme Court of Canada. By Order dated June 3 1997, Justice R. N. Pugsley granted the stay on condition that "neither the appellants, nor any person acting under their authority, or on their behalf, cut trees or otherwise commit waste on any of the lands described in the subject mortgage".

On June 6, 1997, the appellants filed a Notice of Application for leave to appeal the condition attached to the stay. In addition, the appellants request a stay of execution of that condition pending the hearing by this Court of that application for leave to appeal.

In granting the stay application, Justice Pugsley was exercising his jurisdiction pursuant to the **Supreme Court Act**, R.S.C. 1985, c. S-26, as amended. The following sections are relevant:

65.1(1) Stay of execution — application for leave to appeal

65.1 (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.**

65.1(2) Additional power for court appealed from

(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.

65.1(3) Modification

(3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.
1990, c. 8, s. 40; 1994, c. 44, s. 101.

(Emphasis added)

Justice Pugsley was expressly authorized by s.651(1) of the **Act** to exercise his discretion to impose appropriate terms upon the granting of a stay.

The question of whether an applicant, in these unique circumstances, can appeal the decision of the Chambers judge to a panel of the Court has not previously been answered by this Court.

Hallett, J.A. wrote in **Skipper Fisheries Ltd. v. Thorburn et al**, C.A. No. 127612, September 30, 1996, (Chambers):

There is a very real question whether an appeal lies to this Court from a decision of a member of this court sitting as a Chambers judge. Secondly, if there is such an appeal, there is a question as to the circumstances that should exist to

warrant setting down such an appeal for hearing by a panel of the Court.

The issue in **Skipper** involved an appeal from a decision of a judge of this Court sitting in Chambers on the contents of the appeal book for an appeal to be heard in this Court. It did not concern an appeal of a decision of a Chambers judge pursuant to s. 65.1 of the **Supreme Court Act**.

In **Re NsC Diesel Power Inc. (Bankrupt)**, (1995) 140 N.S.R. (2d) 279 (C.A.), Freeman, J.A. considered an application to appeal an order granted in Chambers by a judge of this Court made pursuant to the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3. He wrote at p. 281-282:

An order by a single judge of this court sitting in Chambers on a matter within his jurisdiction is a decision of this court.

. . .

Our own rules of civil procedure do not provide for an appeal to a panel of this court from a judge sitting in chambers. I do not consider it relevant, in light of s. 194 of the *Bankruptcy Act*, to determine whether a panel of this court possesses jurisdiction to review the decision of a judge in chambers, or in what circumstances such jurisdiction would be exercised.

The respondent submits that this Court has no jurisdiction in these circumstances to hear such an appeal. It is his position that this Court's jurisdiction, once a stay order is granted pursuant to s. 65 of the **Supreme Court Act**, whether by a single judge in Chambers or by a panel, is limited to modifying the stay as contemplated by section 65.1(3). Neither counsel was able to cite clear authority on this issue.

While I have grave doubts that such an appeal lies in these circumstances, in my view this issue should be conclusively determined by a panel of this Court. Accordingly, the matter of the application for leave to appeal the condition imposed in the order for stay shall proceed on the tentative dates assigned during the hearing of the application. Counsel should include in their facta submissions on both the question of leave, including the jurisdiction of this court to hear such an appeal, and the merits of the appeal.

Mr. Saunders requests, as well, a stay of the condition contained in the Order granting the stay. Mr. Saunders' intended appeal on this issue, if granted leave, is an appeal to a panel of this Court as distinct from an appeal to the Supreme Court of Canada. The appropriate test to apply, therefore, is that set out by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at p. 346-347:

In my opinion, stays of execution of judgment pending dispositions of the appeal should only be granted if the appellant can either:

(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:

(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.

In support of the application for the stay heard before Mr. Justice Pugsley, Mr. Saunders submitted his own affidavit dated May 8, 1997. He relies upon that same affidavit in support of the request for a stay of the condition. There is nothing contained in that affidavit which addresses the above requirements, in the context of this further application. Specifically, Mr. Saunders has not satisfied me that if the condition is not stayed the appellants would suffer irreparable harm, nor even if so, that the balance of convenience favours the granting of the stay of the condition. Mr. Saunders has not met the primary test, nor has he satisfied me that "there are exceptional circumstances that would make it fit and just that the stay be granted". The application for a stay of the condition in the Order of June 3, 1997 is dismissed.

Bateman, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

EDMUND R. SAUNDERS)
and RETA W. SAUNDERS)

Applicants/Appellants)

- and -)

OCEANUS MARINE INC.)

Chambers))
Respondent)

REASONS FOR
JUDGMENT BY:

Bateman, J.A.
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