

NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Attorney General) v. B.M.G., 2007 NSCA 57

Date: 20070514

Docket: CA 278152

Registry: Halifax

Between:

Attorney General of Nova Scotia

Applicant

v.

BMG

Respondent

Judge:

The Honourable Justice Fichaud

Application Heard:

May 10, 2007, in Halifax, Nova Scotia, In Chambers

Held:

Conditional suspension of payment of judgment and costs in the cause.

Counsel:

Glenn Anderson, Q.C., for the applicant, AGNS
Kevin C. MacDonald, for the respondent, B.M.G.

Decision:

[1] The Attorney General applies under s. 20(4) of *The Proceedings Against The Crown Act* R.S.N.S. 1989, c. 360 (“Act”) to suspend payment, pending this appeal, of a judgment against the Crown.

[2] By a decision of January 29, 2007 (2007 NSSC 27), an order of February 9, 2007, and a costs decision dated March 12, 2007, the Nova Scotia Supreme Court determined that the Province was vicariously liable for assaults committed by its employee (a probation officer) on the respondent BMG. The court awarded damages of \$625,000, prejudgment interest of \$15,625 and costs of \$82,500, for a total judgment of \$723,125.

[3] The Attorney General appealed to the Court of Appeal from the rulings on vicarious liability and damages. BMG cross-appealed. The hearings of the appeal and cross-appeal are scheduled for September 19, 2007.

[4] Section 20(4), under which the Attorney General applies, says:

(4) The court by which such an order is made or a court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of the amount so payable, or any part thereof, shall be suspended and, if the certificate has not been issued, may order the direction to be inserted therein.

[5] Section 20(5) prohibits any execution against the Crown. So this application is not for a stay of execution, but a suspension of payment. But the test under s. 20(4) is the same as for stays of execution under Rule 62.10, and the determination is made by a chambers judge: *Hiltz and Seamone Co. v. Nova Scotia (Attorney General)*, [1998] N.S.J. No. 93, at ¶ 4 per Cromwell, J.A.; *Fiske v. Nova Scotia (Attorney General)*, 2001 NSCA 159, at ¶ 9, per Glube, C.J.N.S.

[6] The starting principle is that the successful litigant may retain the fruit of his judgment unless “required in the interests of justice”: *Coughlan v. Westminster Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A.) at p. 174, per Freeman, J.A. The “interests of justice” are governed by the principles under Rule 62.10

[7] In *Fulton Insurance Agency v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.) at ¶ 27, Justice Hallett stated those principles. The applicant for the stay must show

either that (1) there is an arguable case, denial of a stay would cause irreparable harm and the balance of convenience favours a stay or (2) there are exceptional circumstances making it just that the stay be granted.

[8] There are no exceptional circumstances here under *Fulton*'s secondary test. The application turns on the primary test.

[9] Counsel for BMG acknowledges that there is an arguable case under the first step of the primary test. I agree the appeal is arguable, and will say no more about the merits.

[10] Would denial of the suspension cause irreparable harm to the Province?

[11] BMG has limited income and assets. The Attorney General says that if BMG receives and spends the amount of the judgment, and if the Attorney General's appeal succeeds, BMG would be unable to repay.

[12] BMG filed an affidavit stating that he jointly (with his common law spouse) owns several properties in Manitoba, and he owns tools and several vehicles. The values of these assets are not established in the evidence. The total of the costs of acquisition is well below the amount of this judgment. BMG has never filed a tax return, but his affidavit estimates his income at \$15,000 per annum. Nothing in the evidence suggests that BMG is insolvent.

[13] In *Wright v. the Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 6 (Chambers), at ¶ 12, I said:

[14] Generally, if the judgment is monetary, the appellant (applicant for a stay) can afford to pay and the respondent can afford to repay, there is no irreparable harm. But a real risk that the respondent would be unable to repay may establish irreparable harm. See *Bruce Brett and 2475813 Nova Scotia Limited v. Amica Mature Lifestyles Inc.*, 2004 NSCA 93 at ¶ 14, and cases there cited; *MacPhail v. Desrosiers* (1998), 165 N.S.R. (2d) 32 (C.A.), at ¶ 14-24 and cases there cited.

[13] Mr. Wright wishes the freedom to spend the fruit of his judgment. If Mr. Wright obtained and spent \$138,000 from the judgment and the appeal was allowed then, from the evidence before me of Mr. Wright's circumstances and income, it is clear that he would be unable to reimburse \$138,000 to the Trust Fund. That would be irreparable harm.

[14] BMG wants to enjoy the fruit of the litigation – i.e. the freedom to spend the full amount of his judgment as he wishes. If BMG obtained and spent the \$723,125 judgment, it is clear from the evidence before me that he would not remotely be able to reimburse the Province should the appeal later be allowed. I am satisfied that this establishes irreparable harm.

[15] The third element of *Fulton's* primary test is the balance of convenience. If payment of the judgment was wholly or partly delayed and the Attorney General's appeal failed, would BMG suffer greater harm than the potential harm to the Province from immediate payment followed by a successful appeal?

[16] The hearing of the appeal is scheduled for September, 2007. If the Province's appeal is dismissed, then the suspension of payment would last about five or six months from today. BMG's affidavit gives no particulars of inconvenience that he would suffer from a delay in receipt of payment. I infer that the receipt of over \$700,000 would significantly improve BMG's quality of life and a six-month delay in payment would forestall this lifestyle amelioration.

[17] This is a case like *Wright* and *MacPhail* where there was no absolute balance of convenience. There is a variable balance of risk and convenience. Appropriate conditions, tailored to the circumstances, may minimize the risk and inconvenience to both parties pending the result of the appeal.

[18] I would grant the order suspending payment, provided the following conditions are met:

(i) **First** - By Monday, June 11, 2007, the Province would pay the full judgment, including any post-judgment interest to the date of payment, to the solicitors for BMG in trust. Subject only to the second condition discussed below, this full amount would remain in trust, to be disposed of after the decision on appeal consistently with the result of the decision of the Court of Appeal. The solicitors for BMG may invest the amount in trust pending ultimate disbursement.

(ii) **Second** - If BMG provides the mortgage as specified below, BMG may be paid up to \$100,000 from the amount held in trust. BMG's affidavit lists his assets to show that BMG could liquidate those assets to repay the

judgment if necessary. In my view, the only asset with significant security value is the residence and shop in Lynn Lake, Manitoba which the respondent says was purchased in June 1990 for \$25,000, is free of encumbrances, has a home insured for \$145,500, and a shop built for \$13,000. To trigger the payment to BMG, BMG would give the Province a first mortgage on this residence/shop property, with the owners of this property as mortgagors, to secure repayment of the payment from BMG's solicitor's trust account to BMG, in the event the Attorney General's appeal succeeds. If the Attorney General's appeal fails, or if damages are reduced but the judgment debt remains above the amount of the payment from trust to BMG, then the Province shall release the mortgage.

I emphasize that I am not ordering BMG to provide this mortgage. If BMG wishes to receive the payment before the decision on appeal, then the mortgage is the condition.

[19] I fix the costs of this application at \$500. The costs shall be in the cause of the appeal.

Fichaud, J.A.