S.C.A. 02378

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

BETWEEN:

KENDALL W. PURDY	)	Peter McLellan
	)	for the applicant/appellant
Appellant	)	
	)	Peter M. Rogers
- and -	)	for the respondent
	)	
FULTON INSURANCE AGENCIES LIMITED	)	Application Heard:
	)	November 15, 1990
	)	
Respondent	)	Decision Delivered:
	)	November 30, 1990
	)	
	)	
	)	
	)	
	)	

BEFORE THE HONOURABLE MR. JUSTICE DOANE HALLETT
IN CHAMBERS

HALLETT, J.:

This is an application under Civil Procedure Rule 62.10(2) to stay execution until an appeal is heard from a summary judgment granted under Civil Procedure Rule 13.

The appellant was the respondent's financial controller for a number of years. On June 7, 1989, his employment terminated; he says he was wrongfully dismissed; the respondent says he resigned.

On April 12, 1990, the respondent commenced proceedings against the appellant alleging that he had defrauded the respondent of approximately $100,000.00 through a series of transactions. In his defence, the appellant denies he defrauded the respondent of any money; he says the President of the respondent initiated and authorized the transactions for the purpose of providing the President with additional remuneration. The appellant also filed a counterclaim alleging wrongful dismissal as the respondent, through its President, authorized and was aware of all the transactions in question.

On October 23, 1990, the respondent applied to a judge of the Trial Division sitting in Chambers for summary judgment with respect to some of the money claimed by the respondent. Summary judgments are not to be lightly granted. The Court must be satisfied not only that there

is no defence but no arguable point can be made on behalf of the defendant (Carl B. Potter Limited v. Anil (Canada) Limited (1976), 15 N.S.R. (2d) 408 (N.S.C.A.); Lunenburg County Press Limited v. Demone (1977), 18 N.S.R. (2d) 689 (N.S.C.A.).

The learned Chambers judge granted summary judgment against the appellant in the amount of $45,700.00 and then refused an application to stay execution of the judgment pending determination of the appellant's counterclaim. The application for the stay was made pursuant to Civil Procedure Rule 13.02(c).

On November 1, 1990, the appellant filed a notice of appeal stating that the learned Chambers judge erred in granting summary judgment on the ground that the appellant had a legitimate defence to the respondent's claim and erred in refusing a stay of execution until the determination of the appellant's counterclaim for wrongful dismissal. The appeal has been set for hearing on March 22, 1991.

In support of the application for stay of execution of the judgment pending disposition of the appeal, the appellant has filed his affidavit which states that since the termination of his employment in June of 1989 he has been self-employed in the sale of automobiles and

his income is approximately $20,000.00 and that in June of 1990 he invested as a partner in a Honda automobile dealership in Truro but that he has yet to draw any income from this business. He further states that following the termination of his wife's employment with the respondent she enrolled as a full-time student in the Nova Scotia Teachers College in the academic year 1989-1990 and that due to her pregnancy and the subsequent loss of the child, she has not been employed since she completed her studies. He further states that an Order for the immediate payment of the judgment and costs would create financial hardship for him and his family.

In Nova Scotia, the authority of this Court to grant a stay of proceedings is governed by Section 41(e) of the Judicature Act, R.S.N.S. 1989, c. 240, which states:

> "41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> ...
>
> (e) no proceeding at any time pending in the Court shall be restrained by prohibition or injunction but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained prior to the first day of October, 1884, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto provided always that nothing in this Act contained shall disable the Court from directing a stay of proceedings in any proceeding pending before the Court if it or he thinks fit, and any person, whether a party or not to any such proceeding who could have been entitled, prior

> to the first day of October, 1884, to apply to the Court to restrain the prosecution thereof, or who is entitled to enforce by attachment or otherwise any judgment, contrary to which all or any part of the proceedings have been taken, may apply to the Court thereof by motion in a summary way for a stay of proceedings in such proceeding either generally, or so far as is necessary for the purposes of justice and the Court shall thereupon make such order as shall be just;"

A stay of execution of judgment is a particular form of a stay of proceedings.

Civil Procedure Rule 62.10 deals with stays of execution and provides in part as follows:

> "62.10 (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.
>
> (3) An order under rule 62.10(2) may be granted on such terms as the Judge deems just."

In contrast to the situation in Nova Scotia where the filing of a notice of appeal does not effect a stay, the Ontario law provides for an automatic stay of execution on the filing of a notice of appeal. The Nova Scotia rule and practice appears to be based on the practice in England's Court of Chancery (Buxton v. Carriss (1958), 13 D.L.R. (2d) 671 at p. 678. Section 43(11) of the

Judicature Act provides that generally in all matters where there is a conflict or variance between rules of equity and rules of common law, the rules of equity shall prevail. This no doubt explains why Civil Procedure Rule 62.10 is framed in the way it is; in the Court of Chancery filing of a notice of appeal did not operate as a stay of execution unless the Court, in the exercise of its judicial discretion, ordered a stay.

The test most commonly applied until recently by this Court for the granting of a stay of execution pending appeal is that the appellant must show that he will suffer irreparable harm that is either difficult to, or cannot be compensated in damages if the stay is not granted and he is eventually successful on the appeal (Bluenose Lanes Ltd. v. Richardt, Canyon Distributors Ltd. and I.A.C. Ltd. (1975), 12 N.S.R. (2d) 540 (N.S.C.A.); W. H. Schwartz & Sons Ltd. v. Nova Scotia Labour Relations Board et al. (1975), 11 N.S.R. (2d) 536 (N.S.C.A.)). Stays were not granted in these cases.

That is not the only test: this Court has considered stays of custody Orders on the ground that if special circumstances exist that could be harmful to a child if the Order were acted upon before the appeal was heard, a stay would be granted (Millett v. Millett (1974), 9 N.S.R. (2d) 26 (N.S.C.A.); Routledge v. Routledge (1986), 74 N.S.R.

(2d) 290 (N.S.C.A.)). These cases involved children's welfare, not monetary judgments. In Millett the stay was granted; in Routledge refused. In the latter case, Clarke, C.J.N.S., stated:

> "In my opnion, there need to be circumstances of a special and persuasive nature to grant a stay."

The test has been expressed in other terms. In Exco Corporation Ltd. et al. v. Nova Scotia Savings & Loan Company et al. (1987), 79 N.S.R. (2d) 29, Jones, J.A., sitting in Chambers, granted a stay of execution on the basis that it was in the best interest of the shareholders in the Company that the status quo be maintained until the appeal from the trial judge's decision was heard. In granting the application, he did not make any reference to the traditional test of irreparable harm. He was concerned that if the stay was not granted, the effect of a successful appeal would be negated so the status quo should be maintained.

In New Brunswick Electric Power Commission v. Maritime Electric Co. ltd. and National Energy Board (1985), 60 N.R. 203, the Federal Court of Appeal applied a similar test but was satisfied the refusal of a stay would not render a successful appeal nugatory.

In effect, the Court, in both these cases,

applied the traditional irreparable harm test although it was couched in different language.

There has been a suggestion in recent cases that the test for determining whether a stay of proceedings should or should not be granted should be essentially the same as that for determining if an interlocutory injunction should be granted pending disposition of a proceeding at the trial level. In Attorney General of Manitoba v. Metropolitan Stores (MTS) Ltd. et al., [1987] 1 S.C.R. 110; (1987), 73 N.R. 341, Mr. Justice Beetz stated at p. 127:

> "A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions:..."

The three main tests currently applied by the Courts in considering applications for interim injunctions were reviewed by Mr. Justice Beetz. The first test is to make a preliminary assessment of the merits of the case and, in particular, whether the applicant can make out a prima facie case or, alternatively, the more relaxed test developed in American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All E.R. 504, whether the application can show there is a serious question to be tried. It was not necessary for Mr. Justice Beetz, nor did he feel it desirable, to choose

between the two tests, although he felt that in a constitutional case such as he was considering the more relaxed American Cyanamid was appropriate. Secondly, the appellant must show that if the injunction is not granted, he will suffer irreparable harm "not susceptible or difficult to be compensated in damages." The third test (the balance of convenience) was described by Mr. Justice Beetz at p. 128 and involves "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits." Mr. Justice Beetz concluded his review of the considerations on an interlocutory injunction application by stating that there may be many other special factors to be taken into consideration in a particular case.

In Re Island Telephone Company Limited (1988), 67 Nfld. & P.E.I. Reports 158, McQuaid, J., applied what I will call the American Cyanamid test in granting a stay of execution of a judgment. In short, (i) is there a serious issue, (ii) the irreparable harm question, and (iii) the balance of convenience.

In Donahoe, The Speaker of the House of Assembly v. MITV and the CBC, June 21, 1990, Jones, J.A., of this Court, sitting as Chambers judge on an application for a stay, stated:

> "Similar considerations apply on the granting of a stay of proceedings as apply on the granting of an injunction."

Mr. Justice Jones made reference to the remarks of Mr. Justice Beetz in support of the above statement.

Mr. Justice Jones agreed with counsel that on the application before him he should consider the tests for interlocutory injunctions: (i) the serious nature of the issues, (ii) the irreparable harm question and (iii) the balance of convenience (the American Cyanamid test). He concluded that the status quo should be maintained (re television in the Legislature) pending the hearing of the appeal. He was of the opinion that there were serious constitutional issues involved over and above simply the mechanical intrusion of television in the Legislature. He therefore stayed any proceedings with respect to the trial judge's judgment and Order that would have paved the way for the respondents to televise the sittings of the Legislature with their own cameras.

In Associated Freezers of Canada Inc. et al. v. A.C.A. Cooperative Association Limited et al., November, 1990, Macdonald, J.A., sitting in Appeal Division Chambers, granted a stay of execution on a judgment of the Trial Division on the ground that an issue raised in the proceedings (whether or not certain insurance companies were required to indemnify the appellants) had been severed from the main proceeding and was yet to be determined by

the Trial Division. It was obviously just to grant the stay until the insurance issue was decided. In the course of his reasons, Mr. Justice Macdonald considered some of the criteria that the Courts use in determining whether an interlocutory injunction should be granted. The judgment was for several million dollars. He concluded that the applicants might suffer irreparable harm that could not be compensated in damages if a stay was not granted.

So what is the current test for granting a stay of execution of a judgment pending disposition of the appeal?

In the older cases, the Court has considered whether the applicant has met the irreparable harm test; in other cases, the American Cyanamid test which has the added components that the applicant must also show there is a serious question on appeal and that the balance of convenience favours granting the stay. Other cases have considered whether there are exceptional circumstances that warrant granting the stay and in other cases a stay is granted to maintain the status quo pending the hearing of the appeal.

There is a wide discretion in the Court under Section 41(e) of the Judicature Act in consideration of stay applications although not as broad a power as conferred on the Court with respect to the consideration of

interlocutory injunctions pursuant to Section 43(9) of the Judicature Act as an interlocutory injunction may be granted in Nova Scotia if it is "just or convenient" to do so. Convenience is not a statutory basis for granting a stay of proceedings nor is that the basis of the American Cyanamid test.

A review of the cases indicates there is a trend towards applying what is in effect the American Cyanamid test for an interlocutory injunction in considering applications for stays of execution pending appeal. In my opinion, it is a proper test as it puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.

In my opinion, stays of execution of judgment pending disposition 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.

While I have reservations on the issue, I am persuaded that notwithstanding the applicant cannot meet the primary test as it would appear that the respondent could pay a damage award in favour of the appellant if the summary judgment was set aside on appeal but after the respondent had executed on the appellant's property, there are exceptional circumstances in this case that warrant the granting of the stay. The exceptional circumstances consist of three factors. First, the judgment was obtained in a summary proceeding rather than after trial. Second, on the face of the pleadings, the appellant raises what appears to be an arguable issue and thus may be successful

on the appeal from the granting of the summary judgment. Third, the appellant's counterclaim and the claim to a setoff have not yet been adjudicated upon by the Trial Division. Therefore, the proceedings (as in the Associated Freezers case) have not been completed and it is premature to execute on the summary judgment. The combined effect of these factors creates an exceptional circumstance that makes it just that the application for a stay of execution of the summary judgment pending the disposition of the appeal from that judgment be granted but on terms.

The objective of stay of execution is to protect the interest of the appellant while, at the same time, protecting those of the judgment creditor who is prevented by the stay from realizing on his judgment. Civil Procedure Rule 62.10(3) provides that a stay of execution may be granted on "such terms as the Judge deems just." This provides great flexibility in granting the remedy although I have not seen any instances where terms have been imposed.

If an interlocutory injunction is granted, as a general rule the Court requires the applicant to make an undertaking that he will pay damages for any loss sustained by the other party by reason of the injunction having been granted if it is held at trial that the party who has been enjoined from doing an act was entitled to do such act.

In my opinion, in order to protect the interest of the judgment creditor, who cannot execute on a monetary judgment if a stay of execution is granted, from having the judgment debtor dissipate his assets before disposition of the appeal, the Court should generally require the appellant to undertake not to dispose of or encumber his assets in the interim. This is necessary to preserve a balance between the interest of the appellant on the one hand and the respondent on the other; it is not a high price for the appellant to pay for the stay of execution and enables the Court to grant a stay in circumstances where it might otherwise not be just. Rule 62.10(7) provides additional protection for the interest of the judgment creditor in that notwithstanding the granting of the stay, the judgment creditor may register the judgment in the Registry of Deeds and thus bind the appellant's real property.

Accordingly, to satisfy my reservations in granting the stay, I would order that the execution of the judgment be stayed pending disposition of the appeal on the condition that the appellant execute under seal an undertaking to the respondent and the Court not to dispose of or encumber his assets so long as the stay is in force. The undertaking shall be in a form acceptable to the respondent and shall have attached to it an affidavit of the appellant describing his assets, such as real estate,

investments and motor vehicles, if any, and the extent to which the assets are respectively encumbered. If the form of undertaking and affidavit is unacceptable to the respondent, I shall fix the form thereof on application by either party. The undertaking and affidavit shall be delivered, duly executed, to the respondent and the Court not later than December 7, 1990. On the date of the hearing of the appeal, the appellant shall file with the Court a further affidavit stating that he has complied with his undertaking. Costs shall be in the cause.

Hallett, J.A.