S.C.A. No. 02769

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Cite as: Nova Scotia Business Development Corporation v. West Side Stevedoring Ltd., 1992 NSCA 41

B E T W E E N:

THE NOVA SCOTIA BUSINESS DEVELOPMENT CORPORATION	**Alexander MacB. Cameron for applicant**
applicant	
- and -	
WEST SIDE STEVEDORING LIMITED	**Peter D. Darling for respondent**
	Application Heard: November 26, 1992
	Judgment Delivered: December 3, l992

BEFORE THE HONOURABLE MR. JUSTICE G.B. FREEMAN IN CHAMBERS

FREEMAN, J.A.:

After negotiating an agreement for the management and enhancement of the use of

port facilities at Sheet Harbour, Nova Scotia, the parties had a falling out over stevedoring services and fees for the first ship to be handled under the new arrangement; the appellant sought to terminate the agreement.

The respondent obtained an injunction permitting it to continue operating the facilities pending trial on issues related to termination of the contract. The appellant has appealed the injunction, and the application before me is for a stay of the injunction pending that appeal.

Under the agreement West Side Stevedoring Limited, the respondent, was to manage marine facilities consisting of a wharf and abutting lands owned by the appellant, Nova Scotia Business Development Corporation, a provincial Crown corporation. At issue in the dispute was whether West Side had an exclusive right under the agreement to provide stevedoring services for all ships using the wharf facilities under its management.

When the "M.V. Jorita" tied up at the wharf on the weekend of August 29, 1992, to load a cargo of round logs being shipped by Great Northern Timber, Inc. it sought to provide its own stevedores. West Side objected. At one point in the dispute West Side had trucks parked to blockade access to the vessel. Enhanced wharfage fees were paid on behalf of the "Jorita" and the trucks were removed.

The appellant claims this incident constituted fundamental breach of the respondent's contractual duty to promote use of the port facilities, entitling the appellant to rescind the contract. West Side's claim is for specific performance and/or injunctive relief and, in the alternative, damages. Both matters are issues for the trial court.

The agreement was executed July 31, 1992. Section 13 provides:

> 13. This agreement shall be for a term of five years with the right of the Owner to terminate with six months notice for reasonable cause. . . .

Following a hearing on October 30 Mr. Justice David MacAdam of the Trial Division refused West Side's application for summary judgment but granted an injunction allowing it

to continue managing the facilities pending trial of the issues, but without exclusive stevedoring rights. The Business Development Corporation has appealed and seeks a stay of the injunction pending the hearing of the appeal.

The appellant alleges that Mr. Justice MacAdam applied the wrong test for granting the injunction because he merely found that West Side's damages would be difficult to assess. That must be determined on the appeal. The issue before me on this application is whether the injunction should be stayed pending the appeal.

Rule 62.10 of the **Rules of Civil Procedure** states:

> (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 may be granted on such terms as the judge deems just. . . .
>
> (5) Nothing herein prevents the staying of execution or proceedings by the court appealed from, as authorized by rule of court or by an enactment.

I am satisfied I have jurisdiction under Rule 62.10 to deal with the order of Mr. Justice MacAdam.

The test for the granting of stays under Rule 62.10 stated by Mr. Justice Hallett in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 has been widely accepted in practice in this province; the criteria it sets out can be applied to the present issues. However it is important not to lose sight of the fact that the execution order in **Fulton Insurance** involved the payment of a sum of money. When the issue is the reversal of an interlocutory remedy granted upon the considered judgment of a trial judge in the governance of proceedings before his court, that is a factor to be considered in applying the test. Mr. Justice Hallett stated:

> "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 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".

I am satisfied there is an arguable issue. Both parties are claiming equitable relief at trial, one rescission and the other specific performance, for which damages may not be an adequate substitute and the injunction, or the stay of it, must be considered as an interlocutory extension of one or the other of these remedies. It is unlikely the appellant could be adequately compensated in damages. The appellant has met the first two of the three criteria in the first test. The next criterion, the balance of convenience, presents greater difficulty.

If I stay the injunction and the appeal is dismissed, restoring the injunction pending trial, the respondent will suffer the inconvenience of being removed from management of the Sheet Harbour facility for a period of months. This could seriously interfere with its successful operation during the remainder of the contract. Frequent changes in management, West Side to the Business Development Corporation or its nominee, and back to West Side, all pending a final disposition at trial, would confuse the public and might detrimentally affect use of the facility. If I stay the injunction and the appeal is allowed, the appellant will immediately enjoy the benefit of being placed back in temporary control of the facilities pending the trial of the issues. If I refuse the stay and the appeal is dismissed, the present

status quo will continue pending the trial; If I refuse the stay and the appeal is allowed, the appellant's interlocutory relief will be delayed but its nature will not be altered. I must tentatively conclude at this point that the balance of convenience test favours the respondent.

The injunction appears to have been intended to preserve the status quo, with a resolution of the controversial term favourable to the appellant in the meantime. That should ensure that further incidents of the kind that created the problem do not occur. Again, this is favourable to the respondent on the balance of convenience.

The question whether the respondent can be adequately compensated in damages is relevant to the balance of convenience test. If West Side were to be successful in its claim for specific performance it would have the right to manage the facilities at Sheet Harbour for a five year term. Specific performance is generally not available as a remedy when damages can provide adequate compensation.

In **The Principles of Equitable Remedies** by I.C.F. Spry, LL.D., Fourth Edition, Carswell, 1990, the author states at p. 58:

> "Historically the basis for the grant of specific performance by courts of equity has been the inadequacy of legal remedies, and particularly of damages, in the material circumstances. The precise question that has been asked is whether the relegation of the plaintiff to such remedies as he has in damages or other legal remedies would leave him in as favourable a position in all relevant respects as would exist if the obligation in question were performed in specie."

This is an issue to be determined at trial. If West Side does succeed in its claim for specific performance of the contract, it necessarily follows that damages are not the appropriate remedy. But neither are they a substitute for the right claimed by the appellant to rescind the contract, to which the above passage might equally well apply. In the absence of conjecture as to the likelihood of the outcome, the scales of convenience remain in balance with respect to the ultimate remedies, assuming one party or the other succeeds in gaining the most favourable of the remedies being sought.

It is at this point that the special deference a court of appeal must accord the interlocutory proceedings of a trial court must be considered. In **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54 Mr. Justice Matthews at pp. 56 and 57 quoted the words of former Chief Justice MacKeigan in **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331 125 A.P.R. 331 (C.A.) at p. 333:

> "This court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result."

(See also **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 (S.C.A.D.)).

This principle applies with even greater force when the matter at issue is an application before a chambers judge which would have the effect of nullifying an interlocutory order of the Trial Division for a significant period of time. As chambers judge I do not have the jurisdiction to consider questions as to errors of law and resulting injustice, which are for the court, that is, the panel hearing the appeal.

I would apply that principle to consideration of the balance of convenience, although it might also be appropriately considered in relation to the second test.

While the injunction remains in place both parties must remain within the legal environment they created for themselves when they negotiated the contract a month before the incident in dispute. At that time they determined that a six-month notice period was appropriate even for termination for cause. To stay the injunction would thrust West Side outside the contract pending trial of the issues, which might well expose it to irreparable harm. The injunction was crafted to defuse the term of the contract which gave rise to the incident; similar events should not recur. I am not satisfied refusal of the stay would have an equally adverse effect either on the appellant or the public interests which it represents. Material before me suggests that the appellant and the respondent both share a deep concern in the successful operation of the marine facilities at Sheet Harbour. In short, without

prejudging the issue before this court, I am not satisfied that the first test in **Fulton Insurance** has been met nor that I should substitute my discretion for that of Mr. Justice MacAdam.

The appellant's position however is that it meets the second test in **Fulton Insurance**, and that exceptional circumstances exist which make it fit and just that a stay should be granted. Under s. 9 of the Nova Scotia **Business Capital Corporation Act,** R.S.N.S. 1989, c. 49 it has a mandate to encourage business development in this province and in this case the focus is on the Eastern Shore where the need for development is strongly felt. Therefore it is not merely a party to a commercial contract, but an agent for social and economic betterment. The interests it represents go well beyond its own corporate interests.

It argues that its reputation is being injured by the continued operation of the Sheet Harbour facilities by West Side, and the ramifications of that are so serious the second test of **Fulton Insurance** comes into play. That is, that extraordinary circumstances exist making it fit and just that a stay should be issued.

While mindful of the appellant's important public function, I am not persuaded by the evidence that any irreparable or even substantial harm of an ongoing nature is being done to the corporation, the marine facilities at Sheet Harbour, nor any broader public interest. The evidence on this point consists of an affidavit of Anthony Morrow Mee, president of the company which shipped the logs on the "Jorita." Mr. Mee states in part:

> "That I am presently making arrangements for the export from Nova Scotia of a 15,000 ton cargo of roundwood valued at approximately $1,000,000. The cargo is destined for shipment to the Middle East, and is tentatively scheduled for export on or about January, 1993. In view of my lack of confidence in the management of the Sheet Harbour Terminal, as aforesaid, I will pursue all available alternatives to avoid shipment of the aforesaid cargo from the Sheet Harbour terminal while West Side remains as manager of that terminal."

The respondent has submitted the affidavit of Peter Myers, secretary-treasurer and a shareholder of the respondent, who says he has discussed the matter with Mr. Mee. It is his

evidence that since his affidavit Mr. Mee has agreed to discuss the matter of the cargo with him when he is sure the shipment will be going. Mr. Myers says West Side has serviced six ships since the "Jorita" without further problems. He states in part:

> "That since the granting of the order of MacAdam J., we have freshened our efforts to line up work for the facility in upcoming months. Opportunities are developing, and indeed additional business has been fixed. I have numerous ongoing contacts with the local business community, and the broader maritime community, and at no time has any reluctance been expressed to me about the use of the facility under the management of West Side, apart from my conversation with Mr. Mee noted above. Indeed, at least two business prospects have indicated that they would not consider using the facility if we were not in place as managers."

It would be speculative to assume that Mr. Mee speaks for more than his own understandable dissatisfaction, or that the operation of the Sheet Harbour port would be more successful in hands other than West Side's. I am not satisfied that the applicant has met either the first or second **Fulton Insurance** test, nor that I should grant the stay. The application is dismissed and costs shall be costs in the appeal.

Freeman, J,A.

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	) JUDGMENT BY:
- and -	**)**
	) FREEMAN, J.A.
WEST SIDE STEVEDORING LIMITED	**)**
	) (IN CHAMBERS)