

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Geophysical Service Inc. v. Sable Mary Seismic Inc.*, 2011 NSSC 67

**Date:** 20110215

**Docket:** Hfx No. 190408

**Registry:** Halifax

**Between:**

Geophysical Service Incorporated

Plaintiff

v.

Sable Mary Seismic Incorporated and Matthew Kimball

Defendants

**Judge:** The Honourable Justice M. Heather Robertson

**Heard:** February 9, 2011, in Halifax, Nova Scotia

**Written Decision:** February 15, 2011

**Counsel:** Colin Piercey and Tricia Barry, for the plaintiff,  
respondent  
Stephen Kingston and Justin Kimball, for the defendants,  
moving parties

**Robertson, J.:**

[1] The defendants seek an order confirming their ability to pay certain amounts for billed and unbilled time of their respective legal counsel, as well as retainers with respect to ongoing litigation, without such payments violating the terms of two execution orders previously issued February 18, 2010, as Hfx No. 190408 against the defendant judgment debtors to the plaintiff herein, who were successful litigants in this action. The Honourable Justice Gregory Warner rendered the written decision on December 31, 2009.

[2] In support of their application, the defendants filed the affidavit of Sharon L. Cochrane, barrister and solicitor and law partner of Derrick J. Kimball sworn December 16, 2010, which identifies in para. 41. a. the funds proposed to be used to pay these amounts.

I am advised by Matthew Kimball and do verily believe that:

- a. With a loan or loans from a third party or third parties he believes he and SMSI will be able to pay the retainers and legal fees referred to above;

[3] The proposed payments include specific amounts detailed in paras. 37 - 40 inclusive of the affidavit evidence of Sharon L. Cochrane.

Motion for Costs (First Action) Unbilled	\$ 10,186.64
Unbilled Fees, Disbursements, HST (Appeal)	\$ 47,023.45
Retainers Kimball/Brogan (all Appeal matters)	\$120,000.00
Unbilled Fees, Disbursements, HST (Second Action)	\$ 30,331.29
Retainers for Kimball/Brogan (Second Action)	\$100,000.00
Billed Fees/HST (McInnes Cooper)	\$ 8,475.00
Unbilled Fees/HST (McInnes Cooper)	\$ 17,321.21
Retainer (McInnes Cooper)	\$ 25,000.00

[4] The second action referred to in this list is Hfx No. 203124 Geophysical Service Incorporated (“GSI”) v. Sable Mary Seismic Incorporated (“SMSI”), Abbott Contracting Limited, Windsor Sales and Rentals Limited, Matthew Kimball and Mary Claire O’Hara Kimball. GSI alleges that Matthew Kimball, fraudulently conveyed assets to other parties. GSI seeks equitable tracing as well as an order that the conveyance of property of Matthew Kimball to his former wife Mary O’Hara Kimball was fraudulent and void. The pleadings set out that Matthew Kimball is the sole director and president and secretary of the defendant corporations. This action is not scheduled for trial for some months.

[5] The defendants now seek a ruling of the court that these proposed payments do not offend the injunction provision contained in each execution order which reads as follows:

Injunction to hold property, freeze obligations, and require delivery or payment

A judgment debtor, a person who controls property of the judgment debtor, and a person who is obligated or becomes obligated to pay a debt or other liquidable obligation to the judgment debtor must not give up control of the property or make the payment unless one of the following applies:

- the property or obligation is exempt from this execution order;
- the sheriff, in writing, permits otherwise;
- this execution order or a further order provides otherwise.

The person must, instead, allow the property to be seized by, or make the payment to, the sheriff. A person who fails to obey these injunctions may be punished under *Nova Scotia’s Civil Procedure Rule 89 - Contempt*.

[6] This is hereinafter referred to as “the quoted provisions”.

[7] The defendant’s submit that the wording in “the quoted provisions” is derived from *Rule 79.15* and restrains the judgment debtor and third parties from giving up control of the debtor’s property, except in limited circumstances. *Civil Procedure Rule 79.15* provides (in part):

Content of execution order (injunctions)

79.15 An execution order may require a judgment debtor and any person who has control of property in which the judgment debtor has an interest or who is or becomes obligated to pay a debt or other liquidable demand to the judgment debtor to do any of the following:

- (a) refrain from giving up control of the property or pay the debt or other demand except as permitted by the sheriff, the execution order, or another order.

(emphasis added)

[8] Mr. Stephen Kingston, solicitor for the defendants has assured the court that the money contemplated as loans from third parties are not funds that would otherwise be available to the judgment creditor GSI, in satisfaction of the execution orders. However, he seeks the court's agreement that such borrowings do not run afoul of the provisions of "the quoted provisions".

[9] Mr. Colin Piercey on behalf of GSI argues that the defendants are in fact seeking a motion for a stay of execution, or a motion to "vary" that would release approximately \$360,000 from funds subject to the execution order for judgment.

[10] Mr. Piercey says "the affidavit evidence is insufficient to say where the money will come from, what exactly it will go toward or how the proposed payments offend 'the quoted provisions'."

[11] The execution orders are for the following amounts:

1. a \$1,764,251.70 award in favour of GSI against SMSI for breach of contract.
2. a \$451,855.41 award in favour of GSI jointly and severally against SMSI and Kimball for fraudulent misrepresentation

[12] Costs also awarded against the defendants would increase the above awards to \$2,631,463.64 and \$1,017,928.35 respectively.

[13] No voluntary payments have been made to GSI and the only sum thus far collected by execution was \$518.91.

[14] Mr. Piercey says that by allowing these payments of funds for legal fees and retainers somehow the court would “prefer” the moving parties’ solicitors over the successful litigant.

[15] He also submits that *Rule 79.22 (1)* is triggered by the defendants’ request:

(1) A judge may stay enforcement of an execution order or a periodic execution order, conditionally or unconditionally, and on any terms the judge sees fit.

and that the three part test for stay of execution applied in *Purdy v. Fulton Insurance Agencies Limited*, 1990 CarswellNS 344 (CA) para. 28 must therefore apply. The test is as follows:

- (1) Is there an arguable issue on the merits of the appeal;
- (2) Will the applicant suffer irreparable harm should the stay be denied; and,
- (3) Will the appellant suffer greater harm if the stay is not granted than the respondent would suffer if it is granted?

[16] If the moving parties fail to satisfy each of the first three branches of the primary test, courts will entertain a secondary test and ask a fourth question – whether there are other exceptional circumstances justifying a stay?

[17] Mr. Piercey says the defendants have failed to provide any evidence to the court to meet this test. Mr. Kingston agrees that he has not responded to the *Fulton* test and says that the court has a broad and separate discretion pursuant to *Rule 79.15* to use its discretion to approve the requested payments, on the basis of an access to justice argument.

[18] However, in my view, the injunctive language of “the quoted provisions” of execution orders does not prevent the judgment debtors from borrowing new money. Rather, it prevents the judgment debtors from giving up property.

[19] So long as the money lent is entirely new money and not lent on security of the property of either judgment debtor, the loan is not a debt or other liquidable obligation owed to the judgment debtors. The loan will not run afoul of “the quoted provisions”.

[20] As I understand the evidence and the representations of counsel, the funds that may be available to the defendants constitute a loan of new money from third parties. I have not been provided with any particulars that suggest security would be offered involving the judgment debtors’ property.

[21] Thus, in my view the planned borrowing does not offend “the quoted provisions”.

[22] I am prepared to grant a declaration that conforms with my interpretation of “the quoted provisions” of the execution order.

Justice M. Heather Robertson