C.A. No. 120544

NOVA SCOTIA COURT OF APPEAL

Cite as Kelly v. Dillon, 1995 NSCA 7

BETWEEN:

JOHN MICHAEL KELLY	)	Philip M. Chapman
	)	for the applicant/appellant
Applicant/	)	
Appellant	)	
	)	
- and -	)	Hugh R. McLeod
	)	for the respondent
	)	
GLENDA MARIE DILLON	)	
	)	
Respondent	)	
	)	Application Heard:
	)	October 26, 1995
	)	
	)	Decision Delivered:
	)	October 26, 1995
	)	
	)	

BEFORE THE HONOURABLE JUSTICE ELIZABETH ROSCOE,
IN CHAMBERS

ROSCOE, J.A.: (orally, in Chambers)

This is an application by the appellant for a stay of execution pending appeal, which is scheduled for hearing on February 6, 1996 . The respondent has cross-appealed. The parties were involved in an automobile accident in 1990. The trial judge after a four day trial ordered that the appellant pay the sum of $229,757.85 to the respondent, plus the sum of $17,935.09 costs.

The application for the stay of execution is made pursuant to Rule 62.10 which provides:

> (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.

The test that must be applied in determining whether or not to grant a stay is that stated by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (C.A.) at pp. 346-347:

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

The appellant has agreed to make an immediate payment to the respondent of the amount of $91,695.09 representing the award for general damages and costs, less the amounts of advance payments. It is the payment of the balance of the award that the appellant seeks to stay pending the appeal. I am advised that the respondent has insurance in an amount sufficient to pay the full judgment if the appeal is not successful.

The grounds of appeal in this case relate to the trial judge's award for lost future wages in the amount of $100,000 and the award of damages for future care in the amount of 110,871.60. There are fourteen grounds of the cross-appeal, several of which contain sub-sections. The main thrust of the cross-appeal appears to be a claim that the damage awards are too low because the trial judge erred when he found that the respondent failed to mitigate her losses.

An arguable issue is defined by Freeman, J.A. in **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 170 at page 174:

> "An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on

> an erroneous principle of law. It must be a ground available to the applicant; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful.

It is clear that the grounds of appeal in this case meet the first part of the **Fulton** test, that is that they raise arguable issues. They are not frivolous; the outcome of the appeal is in doubt.

On the second part of the test, the appellant alleges that there are a number of factors that tend to indicate that the respondent would not be able to repay monies paid to her if the stay is not granted and the appeal is allowed. This it is argued would lead to irreparable harm to the appellant. The most significant indication of the financial stability of the respondent, in my view, is that she wrote to the trial judge some months after the trial but before his decision was released to advise him that she had no money for her medication and that her application for a bank loan had been refused.

The circumstances here are very similar to that in **Slawter v. White**, unreported, July 28, 1995, C.A. No. 118453 where Justice Flinn made the following comments:

> With respect to the other two points, of the three-fold primary test, namely: irreparable harm and balance of convenience, I do have some concerns.

> There are two competing equities here.
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> On the one hand I have the submission of counsel for the appellant that if the total amount of the judgment were paid now, and if the appellant was successful in reducing the award on appeal, there is a real probability that the monies that would have to be repaid could not be repaid. Counsel refers to the fact that the respondent has not worked since the accident. The respondent has accumulated debts from family members, his girlfriend and her parents, all of whom will expect to be repaid out of the recovered funds. Reference was also made to the various lawyers who have represented the respondent and who would expect to be paid. No affidavit evidence to counter these concerns was put before me on behalf of the respondent. I have no evidence concerning the respondent's assets, nor what would happen to the judgment funds if paid.
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> On the other hand, the plain fact of the matter is that the respondent was injured in a car accident and the appellant has accepted responsibility. The only issue in the trial was the quantum of damages. Since the matter has been heard and determined by a judge of the Supreme Court, the respondent should not be deprived of the fruits of litigation pending appeal. It has been five years since this accident and the respondent has, to this point in time, received nothing from the party who caused his injuries.

Justice Flinn resolved the competing equities in that case by accepting the appellant's offer to pay a significant portion of the judgment pending the hearing of the appeal, and concluded:

> It seems to me, on the basis of what is before me, to make good sense that I impose a stay on condition that the respondent receive a portion of his judgment now, and on the further condition that he receive interest at 8% on the balance owing following the disposition of the appeal.
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> Since the major portion of the respondent's damage award relates to loss of future care, if the respondent received $150,000, now, and interest on the balance pending disposition of the appeal, my concerns with respect to the competing equities here would be alleviated.

I agree with the approach used by Justice Flinn. Where the appellant offers to pay a substantial portion of the trial judgment pending the appeal, the evidence

on the second prong of the **Fulton v. Purdy** test need not show insolvency of the respondent, but rather the probability of difficulty of repayment by the respondent if the appeal is successful.

The total trial judgment in the **Slawter** case was slightly in excess of one million dollars; so the portion paid prior to the appeal was in the range of fifteen percent. Here, the appellant offers to pay more than a third of the trial judgment which in my view is an amount sufficient to alleviate the respondent's financial difficulties pending the appeal, which is scheduled in just over three months from now.

I am prepared to grant a partial stay of execution. The appellant shall pay the respondent the sum of $91,695.09 by November 1, 1995 and thereupon the balance of the judgment shall be stayed pending the resolution of the appeal. Any balance owing to the respondent after the appeal shall bear interest at the rate of six percent per annum, from the date of the order of the trial judge to the date of the order of the Appeal Court. The costs of this application shall be costs in the cause of the appeal.

J.A.