

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

BETWEEN:

THE CANADIAN SURETY COMPANY)	Scott C. Norton
)	for the Appellant
Appellant)	
)	
- and -)	E. J. Flinn, Q.C.
)	for the Respondent
PENTAGON INVESTMENTS LTD.)	
)	
Respondent)	Application Heard:
)	April 23, 1992
)	
)	Judgment Delivered:
)	May 4, 1992
)	
)	
)	
)	

BEFORE THE HONOURABLE CHIEF JUSTICE CLARKE, IN CHAMBERS

CLARKE, C.J.N.S.:

This is an application for a stay of execution pursuant to Civil Procedure Rule 62.10(2) which provides:

" 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."

The appellant, Canadian Surety, is the insurer of the respondent, Pentagon. Following three fires which occurred on the property of Pentagon in November, 1987, it (the insured) commenced an action against Canadian Surety (the insurer) by which it claimed the proceeds of a policy of fire insurance.

Mr. Justice Goodfellow, after the trial, found for Pentagon. His decision is dated November 22, 1991 and the order for judgment arising therefrom is dated February 13, 1992. The trial judge's reasons for judgment are reported in (1992), 108 N.S.R. (2d) 148.

The judgment at trial provides for the replacement cost of the buildings to Pentagon upon their reconstruction in accordance with the terms of the insurance policy. This is an amount slightly in excess of \$1,500,000.00. In addition, it provides for the payment by Canadian Surety to Pentagon for loss of equipment, supplies, rental income and pre-judgment interest which the parties have agreed is \$150,242.52. It is this latter sum that is the subject of this application.

Canadian Surety is appealing the decision of the trial judge. It contends that if it is successful in its appeal, it may not be able to recover \$150,242.52 from Pentagon due to its financial position. Canadian Surety has offered to place the sum in an interest bearing trust account for the benefit of Pentagon pending the outcome of the appeal or in the alternative, to review other proposals for securing the payment. None of these proposals are acceptable to Pentagon; hence, this application by Canadian Surety seeking to stay the execution of the judgment.

Counsel agree that the principles applicable to this application are those set forth by Mr. Justice Hallett, of this court, in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341, and in particular at pages 346 and 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.

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."

1. **Arguable Issue**

The appellant is advancing three grounds of appeal:

- "(a) the Trial Judge erred in failing to find on the evidence before him that the Respondent breached Statutory Condition 4 of the Appellant's Policy of Insurance in that the Respondent failed to promptly notify the Appellant of changes material to the risk and in the manner in which the Learned Trial Judge characterized the test for determining whether there had been changes material to the risk;
- (b) the Trial Judge erred in failing to find on the evidence before him that the Respondent breached Statutory Condition 7 of the said Policy in that the Respondent wilfully made false statements in the sworn Proof of Loss filed with the Appellant in respect of certain materials and equipment alleged to have been lost in a fire which occurred on November 24, 1987;
- (c) the Trial Judge erred in failing to find on the evidence before him that the Respondent breached Statutory Condition 7 of the said Policy in that the Respondent intentionally damaged the premises by arson."

A review of the decision of the Trial Judge reveals that he made strong findings of fact against the appellant and upon his application of the law concluded, without hesitation, that Pentagon's claim succeeds. However, it is not for me to decide the case on appeal. After considering the documentation before the Court which is naturally limited in an application of this type, I am satisfied that the appellant is advancing serious and substantial grounds of appeal sufficient to find that the appellant has met the burden on it of satisfying the first test of the primary ground, namely that there are arguable issues raised on the appeal. For this reason, the appeal will go forward.

2. Irreparable Harm

The position of the appellant is principally based upon the unaudited financial statements of Pentagon dated December 31, 1987 which indicate assets of \$11,737,333.00 and liabilities of \$11,816,104.00 and a deficit of \$78,771.00 in shareholders' equity. There is a net loss in the income statement of \$374,000.00 (rounded) resulting in retained earnings decreasing from a positive position in year 1986 to a negative position in year 1987. Counsel says the appellant has been unable to obtain any additional financial information, more current than year end 1987. The appellant further says that it knows of no reason why the respondent will be harmed if it does not recover its judgment money now and that it has not been provided with any reasons by Pentagon to confirm that it requires the proceeds for any particular purpose.

Counsel of the respondent submits that Pentagon is under no obligation to provide current financial statements to the appellant and that an application for a stay is not the time or place to make a minute examination of the financial records of the judgment creditor. He informs the Court that there is no evidence Pentagon is in bankruptcy, that it is still in business, that it is not insolvent and that there are no judgments registered against it.

The beginning point is that Pentagon is entitled to the "fruit" of its litigation and the onus is on Canadian Surety to show on a balance of probabilities that it will suffer irreparable harm if it pays out the \$150,000 awarded by the Court to Pentagon. This is not a shifting burden. As Mr. Justice Freeman wrote in his decision dealing with a stay application in **Anwar Construction Limited et al v. J. R. Phillips Electrics Limited et al**, S.C.A. 02528, October 3, 1991, p. 4.

"... A judgment creditor does not as a rule have to prove its financial stability as a condition of collecting on its judgment."

While the appellant is obviously concerned or otherwise it would not have made this application, it has not shown that Pentagon is insolvent nor that it has ceased to continue its corporate existence and carry on the conduct of its business and commercial purposes. Pentagon suffered its fire loss in November, 1987 and a court of competent jurisdiction has decided it is entitled to the award which is the subject of this application. Four and one-half years is a long time to wait for recovery in the world of commerce. In this instance only partial recovery is at stake, pending the outcome of the appeal on the broader issues.

On this ground, I find the appellant has not satisfied the primary test.

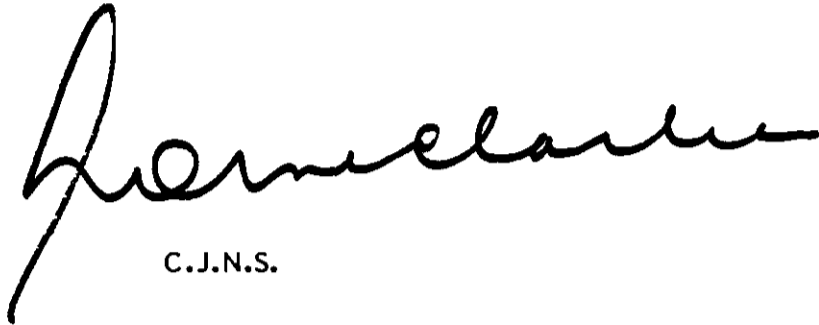
3. **Balance of Convenience**

Based on **Fulton**, irreparable harm and balance of convenience are two parts of the same primary principle upon which the appellant must satisfy the Court if the stay is to be granted. In spite of the assurances offered by the appellant to set aside the money in an interest bearing account, and thereby secure it, the respondent would continue to be deprived of the fund, to which it is presently entitled, for a considerable time.

than those already considered under the primary test "that would make it fit and just that the stay be granted in this case."

Conclusion

The application is dismissed. The appeal has been set down for hearing. The respondent is awarded costs on the application of \$600.00 plus its disbursements.

A handwritten signature in black ink, appearing to read "C.J.N.S.", is written in a cursive style. The signature is positioned above the printed text "C.J.N.S.".

C.J.N.S.