C.A. No. 112185

NOVA SCOTIA COURT OF APPEAL

Cite as: Lienaux v. Toronto-Dominion Bank, 1994 NSCA 237

BETWEEN:

CHARLES D. LIENAUX and KAREN L. TURNER-LIENAUX Applicants/ Appellants	)	Charles D. Lienaux for the applicants/appellants
- and -	)	Brian MacLellan for the respondent
THE TORONTO-DOMINION BANK Respondent	)	
	)	Application Heard: December 29, 1994
	)	Decision Delivered: December 29, 1994

**BEFORE THE HONOURABLE CHIEF JUSTICE LORNE CLARKE,
IN CHAMBERS**

CLARKE, C.J.N.S.: (orally, in Chambers)

The appellants are applying for an order pursuant to Civil Procedure Rule 62.10(2) to stay, pending appeal, the order of a Chambers judge of the Supreme Court. On November 29, 1994 he granted an order for summary judgment which struck the appellants' defence and gave the respondent Bank the right to sell the land on which the home of the appellant, Karen L. Turner-Lienaux, is situate at 332 Purcell's Cove Road in Halifax. She is the present title holder. The property has been advertized for sale and is scheduled to be sold by the High Sheriff of the County of Halifax on January 11, 1995.

This morning I granted the application of the appellants to appeal the order of the Chambers judge to this Court. It will be heard on April 5, 1995.

There are three mortgages on the subject land. The first is held by Scotiabank and the second and third by the respondent TD Bank. All three are in arrears. Since August or September, 1994, TD has been making the required monthly payments to Scotia, as well as paying taxes and maintaining insurance coverage.

In 1989 the appellant, Charles D. Lienaux, entered a business venture with some associates. Loans were advanced by Central Guaranty Trust, a predecessor of TD. Mrs. Turner-Lienaux signed, as guarantor of her husband, a promissory note for $100,000. She also executed, in support, a collateral mortgage on 332 Purcell's Cove Road.

Defaults having occurred on several loans involved in the venture, differences having arisen among the business associates, and actions having been started as a result, are an all too brief summary of the background behind the application made by TD to pursue the foreclosure sale of 332 Purcell's Cove Road.

On November 29, 1994, TD applied to strike the defence filed by the appellants. After a somewhat lengthy contested hearing, the Chambers judge granted the application and thus cleared the way for TD to proceed with the sale.

In deciding whether to grant the application for a stay of the Sheriff's sale on January 11, 1995, I am guided by the well recognized and accepted propositions of Justice Hallett of this Court in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341.

There he stated at pp. 346-347:

> " 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 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."

I shall now comment on what Justice Hallett considered in **Fulton** as the ingredients of the first test.

First, is there an arguable issue? I begin, in addition to **Fulton**, by referring to two decisions that have been rendered by this Court. In **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171 Justice Freeman wrote at pp. 174-175, para. 11:

> " '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 of 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."

In **Austin et al. v. Habitat Development Ltd. et al.** (1991), 109 N.S.R (2d) 290, Justice Chipman stated at p. 292:

> "Employing the first of the three steps set out for the primary test referred to by Hallett, J.A., the applicant need only show that there is an arguable, or as it is usually said a serious, issue to be determined on the appeal rather than meet the more onerous burden of establishing a ***prima facie*** case."

The grounds of appeal as set forth in the notice of appeal are as follows:

> "1. THAT the learned Chambers judge erred in law when he ruled that the respondent was entitled to summary judgment against the appellant Karen L. Turner-Lienaux.
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> 2. THAT the learned Chambers judge erred in law when he refused to allow the appellants to plead an amendment to their defence.
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> 3. THAT the learned Chambers judge erred in law when he refused the appellants the right to call evidence to show their defence.
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> 4. THAT the learned Chambers judge erred in law when he ruled that the appellants did not show any evidence of an arguable defence of negligent misrepresentation by Central Guaranty Trust Company relating to the financial resources of investor partners recommended to the appellant Charles D. Lienaux by Central Guaranty.

> 5. THAT the learned Chambers judge erred in law when he ruled that the appellants did not show any evidence of an arguable defence relating to the failure by Central Guaranty Trust Company to warn the appellants of default by investor partners recommended to the appellant Charles D. Lienaux by Central Guaranty.
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> 6. THAT the learned Chambers judge erred in law when he ruled that the appellants did not show any evidence of an arguable defence of breach of fiduciary duty owed to the appellant Charles D. Lienaux by Central Guaranty Trust Company.
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> 7. THAT the learned Chambers judge erred in law when he ruled that the appellants did not show any evidence of an arguable defence of breach of confidentiality of the appellants' financial affairs by Central Guaranty Trust Company."

It will be noted that this is not a general ground of appeal but reflects ones which are specifically formulated. I do not intend to review or address each of the seven grounds. I shall refer only to the second and third grounds which will suffice for present consideration.

The second refers to an application made on behalf of Mrs. Turner-Lienaux to amend her defence to permit her to defend on the ground that she received no independent legal advice with respect to the substance and effect of the second mortgage document she signed. This was denied by the Chambers judge. This was not made on the doorstep of a trial but in the course of a Chambers application. I recognize the Chambers judge has considerable discretion in these matters but as I read the affidavit evidence filed with this notice as well as that portion of the record in the Supreme Court Chambers presently before me, I am persuaded this is a ground that ought to be reviewed on appeal. I am, of course, unable to predict the outcome on appeal nor am I required to do so as I understand the law in an application of this sort.

The third ground relates to the refusal of the Chambers judge to permit the appellants the right to call oral evidence to buttress their defence in an effort to persuade him not to strike. The Chambers judge refused.

It appears from the excerpts of the record before me that Mr. Lienaux considered that the oral evidence he wished to call, if believed, was

material to the issues raised in the defence and again was capable of persuading the Chambers judge to permit the defence to stand. Once again, this is an area in which the Chambers judge has considerable discretion. However, it seems to me that this is a ground that is worthy of review, with what result I am unable to say.

The comments I have made on these two grounds alone lead me to conclude that there are arguable issues raised on this appeal without going further into the remaining grounds. They are what Chipman, J.A. in **Austin** called "serious issues" and Freeman, J.A. in **Coughlan** referred to as "realistic issues" and "of sufficient substance".

Second, is the matter of irreparable harm.

It would seem apparent that if the sale goes forward and at a later time the appellants are successful on appeal, that the TD Bank would be able to compensate them in damages.

However, let me read into the record several paragraphs from the sworn affidavit of Mrs. Turner-Lienaux, beginning at paragraph 31:

> "31. THAT I paid $300,000 for my residence at the time of acquisition, $225,000 of which was financed by a mortgage from the then vendor of the property, and $75,000 of which was paid in cash with funds which were exclusively my property.
>
> 32. THAT my residence is located on a 1.5 acre lot on the North West Arm at Halifax and also includes ownership of a 12,000 square foot water right over the North West Arm.
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> 33. THAT I would not be able to replace this property if it was sold and I am successful in this appeal.
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> 34. THAT renovations to my residence were designed by architects according to my specific design requirements.
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> 35. THAT my residence was renovated by GEM Construction Specialist Limited ('GEM') for which GEM invoiced in excess of $300,000.

36. THAT I am advised by Ross Willcocks, an expert quantity survey firm, and verily believe that a reasonable cost of the renovations at my residence was approximately $160,000 which I have paid to GEM with funds which were exclusively my property.

37. THAT the balance claimed by GEM in issue in another proceeding before the Court.

38. THAT in addition to materials supplied by GEM for the renovation of my residence I have supplied and paid for labour and materials valued at approximately $250,000 which includes many materials which I could not replace if my residence was sold and I am successful in this appeal.

39. THAT annexed to this my affidavit as exhibit "C" is a true copy of an appraisal report summary which was prepared for my residence after construction was completed in or about November, 1989.

40. THAT according to the said appraisal the fair market value of my property is $620,000 according to the sales comparison valuation approach and $702,000 by the construction cost valuation approach.

41. THAT I am advised by this appraisal and verily believe that my residence could not be sold for a price which would allow me to recover my investment in it.

42. THAT if my residence is sold at foreclosure for less than approximately $700,000 I shall suffer irreparable financial loss.

43. THAT my residence is furnished with many items which are custom made for this residence, such as draperies and custom made furnishings and equipment which I would not be able to use at any other property.

44. THAT if my residence is sold at foreclosure this would require me to dispose of most of my furnishings and personal possessions which I could not then recover if I am successful in this appeal.

45. THAT it would mean a further irreparable financial loss to me if I was required to vacate my property and was required to dispose of these materials and furnishings.

46. THAT I would suffer irreparable loss of property, loss of personal possessions, and financial loss if my residence is sold and I am then successful in this appeal."

These and other submissions contained in the materials advanced in support of this application lead me to conclude that on their face they are referring to a residence that has a unique character, that would be very hard to duplicate in a similar location and in many respects has a quality and style that its loss would be difficult to compensate in damages.

Based on the materials that I have reviewed and after considering the submissions that have been made it appears to me, quoting Justice Hallett in **Fulton**, "that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that is difficult to, or cannot be compensated for by a damage award".

Third is the matter of the so-called balance of convenience.

Let me read again into the record three paragraphs in the affidavit of Mrs. Turner-Lienaux sworn December 22, 1994:

> "54. THAT the total of the mortgages which the respondent has secured against title to my residence, when added to the outstanding principal of my Bank of Nova Scotia mortgage totals approximately $560,000.
>
> 55. THAT I shall suffer a financial loss of more than $140,000 if my residence is sold at foreclosure for the value of the aforesaid mortgages.
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> 56. THAT the Toronto-Dominion Bank would have to pay my Bank of Nova Scotia mortgage for approximately 70 months or 6 years before they would suffer a financial loss equal to the loss which I shall suffer if my residence is sold at foreclosure for the value of the aforesaid mortgages and I am then successful in this appeal."

A delay while awaiting the disposition of the appeal will obviously add to the expenses and inconvenience of TD Bank. One can assume it will have to continue to carry the Scotiabank mortgage and taxes and insurance. As I have indicated, the appeal will be heard in this Court on April 5, 1995 which is relatively soon. The paperwork which has been filed by the appellants with their application indicates that there is sufficient residual value in the property, after taking the mortgage obligations into account, to cover the additional expenses

of TD even if the appeal is lost. I am assuming, of course, that there is an air of reality to the numbers I have been given. Based on that assumption the appellant, Mrs. Turner-Lienaux, will suffer the greater harm if the stay is not granted.

For the reasons given I find that the three ingredients in the primary test in **Fulton** have been met by the appellant, Mrs. Karen Turner-Lienaux. I will therefore grant an order staying the order of the Nova Scotia Supreme Court dated November 29, 1994 pending the disposition of this appeal.

The costs of this application shall be costs in the appeal which means that this Court, the Nova Scotia Court of Appeal, shall take this application into account when determining the costs to be awarded upon the final disposition of the appeal.

C.J.N.S.