2008 CarswellAlta 1067, 2008 ABQB 480, [2009] A.W.L.D. 160, 452 A.R. 319

Bowles v. Beamish

Kevin Charles Warren Bowles (Plaintiff) and Belinda Heather Beamish (Defendant)

Alberta Court of Queen's Bench

B.E. Mahoney J.

Heard: July 31, 2008
Judgment: August 8, 2008
Docket: Calgary FL01-01795

Counsel: Dale O. Ellert for Plaintiff

Diann P. **Castle** for Defendant

Subject: Civil Practice and Procedure; Family

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — Stay of execution.

Cases considered by *B.E. Mahoney J.*:

Alberta (Minister of Consumer & Corporate Affairs) v. Bennett (1992), 131 A.R. 184, 25 W.A.C. 184, 1992 CarswellAlta 645 (Alta. C.A. [In Chambers]) — referred to

American Cyanamid Co. v. Ethicon Ltd. (1975), [1975] 2 W.L.R. 316, 119 Sol. Jo. 136, [1975] 1 All E.R. 504, [1975] F.S.R. 101, [1975] R.P.C. 531, [1975] A.C. 396 (U.K. H.L.) — referred to

Bowles v. Beamish (2008), 2008 ABQB 395, 2008 CarswellAlta 888 (Alta. Q.B.) — referred to

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 38 D.L.R. (4th) 321, 73 N.R. 341, 46 Man. R. (2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* [1987] 3 W.W.R. 1, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 272, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, [1987] D.L.Q. 235 (S.C.C.) — followed

Morrow v. Zhang (2008), [2008] 5 W.W.R. 689, 2008 CarswellAlta 218, 2008 ABQB 125, 86 Alta. L.R. (4th) 238 (Alta. Q.B.) — followed

Pedersen v. Van Thournout (2008), 2008 ABCA 248, 2008 CarswellAlta 878 (Alta. C.A.) — referred to

Pocklington Financial Corp. v. Alberta Treasury Branches (1998), (sub nom. *Alberta (Treasury Branches) v. Pocklington Financial Corp.)* 228 A.R. 115, (sub nom. *Alberta (Treasury Branches) v. Pocklington Financial Corp.)* 188 W.A.C. 115, 1998 ABCA 254, 1998 CarswellAlta 702, 65 Alta. L.R. (3d) 283 (Alta. C.A. [In Chambers]) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Slater v. Burgoin (2001), 2001 CarswellAlta 1153, 2001 ABCA 213, 286 A.R. 373, 253 W.A.C. 373 (Alta. C.A. [In Chambers]) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 341(1) — considered

R. 508(1) — considered

R. 508(3) — referred to

***B.E. Mahoney J.*:**

1 Pending the hearing of his appeal, the applicant, Kevin Bowles seeks a stay of my judgment where, after an extended trial, I found that he was in a common law relationship with the respondent, Belinda Beamish, but that he was not entitled to a remedy for unjust enrichment. My reasons can be found at 2008 ABQB 395 (Alta. Q.B.). He also seeks an order for spousal support and that some of his belongings be returned to him.

2 Any Court of Queen's Bench judge may grant a stay in a proceeding pending appeal. Rule 508(1) of the *Alberta Rules of Court* provides:

> 508(1) Subject to subrule (3), an appeal does not operate as a stay of enforcement or of proceedings under the decision appealed from unless the Court of Queen's Bench stays enforcement or proceedings of the decision pending appeal.

3 A stay of judgment is also permitted under Rule 341(1) which states:

> 341(1) The Court may by order, at or after the time that a judgment is granted, stay the enforcement of the judgment or remove or extend any stay already granted in respect of the judgment.

4 The practice in this court is to have the judge who gave judgment hear the stay application unless it is impractical to do so. (See Rule 508(3) and *Slater v. Burgoin* (2001), 286 A.R. 373 (Alta. C.A. [In Chambers]) at 375 -376).

5 The purpose of a stay is to prevent a successful appeal from turning out to be a hollow victory because assets that could be attached to pay a judgment have disappeared before the appeal was decided. In other words, successful appellants should not find that their appeal has been futile because the benefit from a successful appeal has been permanently lost. *Alberta (Minister of Consumer & Corporate Affairs) v. Bennett*, [1992] A.J. No. 727, 131 A.R. 184 (Alta. C.A. [In Chambers]).

6 As an equitable remedy, a stay allows the Court to preserve rights and maintain the status quo pending the appeal. The onus is on the applicant to justify the stay and the test for granting a stay is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), which applied *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.). The law was recently summarized by Wittmann, A. C. J. in *Morrow v. Zhang*, 2008 ABQB 125 (Alta. Q.B.), approved by the Court of Appeal at [*Pedersen v. Van Thournout*] 2008 ABCA 248 (Alta. C.A.). The test has a three part inquiry:

1. Is there a serious issue question to be tried?

2. Will irreparable harm result if the stay is not granted?

3. Does the balance of convenience favour granting the stay?

Is there a serious issue question to be tried?

7 The formulation of the first part of the test comes from the House of Lords decision in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (U.K. H.L.), which was adopted by the Supreme Court of Canada in *RJR-MacDonald*. It means that if there is no reasonable chance of the appeal succeeding then obviously the court should not order a stay.

8 Ms. Beamish argues that Mr. Bowles' appeal has no possibility of success because firm findings of fact were made by me as trial judge and appellate courts typically are reticent to overturn a trial judge's judgment on questions of fact. The applicant, on the other hand, says that I misapplied the law of unjust enrichment therefore there is a serious issue for the appeal court to consider.

9 Since the threshold at this part of the test is low and I am unable to conclude that there is no serious question to be determined or that there is no reasonable possibility of success on the appeal, the applicant has met this part of the test.

Will irreparable harm result if the stay is not granted?

10 When considering the test of irreparable harm the court is required to consider whether or not damages can adequately compensate the party seeking the stay.

11 "Irreparable harm" has been interpreted at paras. 58 and 59, by the Supreme Court of Canada in *RJR-MacDonald* where it stated:

> At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than to its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

Does the balance of convenience favour granting the stay?

12 The third part or the balance of convenience test requires an analysis of which party would suffer the greater harm if the stay is granted or refused. Since they are linked, the second and third part of the test must be considered together. *Pocklington Financial Corp. v. Alberta Treasury Branches*, 1998 ABCA 254 (Alta. C.A. [In Chambers]).

13 In addressing the second and third part of the test, Ms. Beamish says that Mr. Bowles' claim and subsequent court freezing orders have tied up her property and money to the point where real estate holdings are in foreclosure and other creditors will, if not satisfied, drive her into bankruptcy. She adds that she must bare the cost of foreclosure and other enforcement proceedings which cannot be recovered from Mr. Bowles because he has stated that he has no assets. In response, Mr. Bowles points out that Ms. Beamish's high debt load started after the separation in November, 2005 and he puzzles over how she acquired funds to buy the home in Kelowna and what happened to the income from rents on the 8th Avenue property.

14 It is a fact that the issues between the parties are still in litigation and success on appeal might be no more than a pyrrhic victory if the remaining assets held by Ms. Beamish are completely depleted. Money damages in these circumstances would not adequately compensate for the harm because, from the evidence I heard at the trial, without some form of preservation order there will be no money left by the time the appeal is finalized.

15 Weighing and balancing the competing considerations, and mindful of the high conflict and level of distrust between the parties, I am of the view that a partial stay is appropriate pending an appellate decision.

16 I am advised by counsel for Ms. Beamish that the property on 31st Avenue has been sold. Therefore, I order that, provided the sale completes, the caveat and certificate of lis pendens are to be discharged and after real estate commissions, real estate legal fees, property taxes and insurance charges incurred in relation to the 31st Avenue property are paid, the proceeds of the sale are to be paid one half to the Toronto Dominion Bank in partial satisfaction of its outstanding line of credit and the rest held in Ms. Castle's trust account pending an appellate decision. If the appellate decision makes no order regarding these funds held in trust then those funds can only be paid out by agreement between the parties or court order.

17 I order that one half the funds held in trust at the Dow Law Office, as the proceeds from the sale of the Discovery Ridge condominium, be paid to Ms. Beamish and the other half to remain in the Dow Law Office trust account pending an appellate decision. If the appeal court makes no order regarding these funds held in trust then those funds can only be paid out by agreement between the parties or court order.

18 There being no sale pending and two rent paying tenants, I order that the caveat and lis pendens registered by Mr. Bowles against the 8th Avenue property remain pending an appellate decision. If the property is sold, or if the appeal court makes no order regarding these encumbrances then Ms. Beamish can re-apply to re-

move them.

19 On the issue of spousal support I wrote in my judgment that no claim for spousal support was advanced by Mr. Bowles in the proceedings I heard. I said this because spousal support was claimed in the statement of claim but it was never argued by either side before me. Nor was any argument made for the return of personal items although Mr. Bowles gave evidence (which Ms Beamish denies) that some of his personal belongings were not returned to him. Counsel for Ms. Beamish argues, without any authorities cited, that these issues are *res judicata*. Without proper submissions on this point I am not prepared to make a ruling. If these issues are not *res judicata* then I also must consider whether I am the proper judge to hear such an application given my role in rendering the judgment on the other matters. Therefore, when counsel argue the costs application I will hear their submissions on the issue of *res judicata* and if necessary, whether I ought to recuse myself from hearing the parties on spousal support and the return of personal belongings.

END OF DOCUMENT