



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *Weir's Construction Limited v. Warford Estate*, 2016 NLCA 65

Date: November 8, 2016

Docket: 201601H0092

BETWEEN:

WEIR'S CONSTRUCTION LIMITED,
BILL WEIR and JAMES WEIR (JR.)

APPELLANTS

AND:

ROLAND WARFORD (ESTATE OF)

FIRST RESPONDENT

AND:

WORKPLACE HEALTH, SAFETY AND
COMPENSATION COMMISSION

THIRD PARTY

Coram: Welsh J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201401G6280
(2016 NLTD(G) 141)

Application Heard: November 8, 2016

Decision Rendered: November 15, 2016

Counsel for the Appellants: Jorge P. Segovia

Counsel for the First Respondent: John R. Sinnott Q.C.

Counsel for the Third Party: David Blair Pritchett

Welsh J.A.:

[1] This is an application by Weir's Construction Limited for a stay of the enforcement of the order under appeal pending disposition of the appeal. Counsel for the respondent, Roland Warford (Estate of), submits that this Court lacks jurisdiction to order a stay, and, in the alternative, that a stay should be refused. At the hearing of the application, I granted a temporary stay to be in force until release of this decision. Counsel for the Workplace Health, Safety and Compensation Commission conducted a watching brief, but did not make submissions on the application.

BACKGROUND

[2] Roland Warford, deceased in December 2015, was injured in a workplace accident on July 5, 1995. He elected to receive benefits under the *Workplace Health, Safety and Compensation Act*, RSNL 1990, c. W-11. In January, 1997, the Workplace Health, Safety and Compensation Commission (the "Commission") commenced a subrogated action against the employer, Weir's Construction. Subsequently, the Commission abandoned that action, but permitted Mr. Warford to proceed with it.

[3] That action has been delayed over the years as a result of questions regarding the interpretation of the legislation which precludes a cause of action from proceeding, subject to specified exceptions. The Commission had initially commenced a subrogated action on the basis that the exception to the bar against proceeding with an action, where the worker was injured "as a result of an accident involving the use of a motor vehicle", would apply. That decision was challenged on judicial review and the issue was remitted to the Commission for consideration. Since the issue was first remitted, the Commission has taken the position that the action is barred because the exception does not apply.

[4] In the most recent judicial review of the Commission's decision, the applications judge concluded that the matter should not be remitted once more to the Commission and that the action could proceed (2016 NLTD(G) 141):

[158] The decision of the [Commission's Internal Review Specialist] dated July 22, 2014 is quashed. This Court will substitute its determination for that of the Commission. [Mr. Warford], being a worker whose injury arose as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment, is entitled to pursue the action against the

employer by virtue of the exemption to the statutory ban which arises in section 44.1 of the *Workplace Health, Safety and Compensation Commission Act* (sic).

[5] Counsel for Mr. Warford's estate submits that, by virtue of the operation of the *Judicature Act*, RSNL 1990, c. J-4, this Court lacks jurisdiction to order a stay of proceedings because, in the circumstances, that authority is vested in the Trial Division. This submission was not addressed in the written materials. After oral submissions were heard, counsel were given the option of providing further submissions in writing. Both counsel declined. Counsel for the Warford estate submits that, pending a decision on the appeal, Weir's Construction should file a statement of defence and provide a list of documents, and that discoveries should proceed.

ANALYSIS

Jurisdiction to Order a Stay of Enforcement of the Order Pending Appeal

[6] Authority to order a stay of proceedings is addressed in the *Judicature Act* and in the rules of court. The rules have recently been amended, with the *Court of Appeal Rules*, NLR 38/16, coming into force on October 17, 2016, and replacing rule 57 of the *Rules of the Supreme Court, 1986*. Section 60 of the *Court of Appeal Rules* provides for the situation where an appeal or an application was commenced before October 17, 2016.

[7] This is relevant because, while Weir's Construction filed a notice of appeal on September 13, 2016, the application for a stay was filed after the new rules came into force. In the circumstances, rule 60(1) applies:

Proceedings commenced, but not completed, prior to the coming into force of these rules shall be governed by these rules without prejudice to anything lawfully done under the former rules.

[8] An application to stay the enforcement of an order under appeal falls under rule 42 of the *Court of Appeal Rules*, which provides, in relevant parts:

(1) Filing a notice of appeal shall not operate to stay enforcement of the order under appeal.

(2) Upon application, the Court may stay the enforcement of an order under appeal pending disposition of the appeal, provided that an application to stay the order under appeal has not been made in the Supreme Court, Trial Division.

...

(4) An order made by a judge of the Supreme Court, Trial Division granting or refusing to stay the enforcement of an order under appeal may be appealed to the Court only with leave.

...

“Court” is defined in rule 7(d) to mean “the Court of Appeal, a panel of judges or a judge of that Court”.

[9] In submitting that this Court lacks jurisdiction to order a stay, counsel for the Warford estate relies on section 97 of the *Judicature Act*, together with the meaning of “court” and “proceeding” in that statute. Section 97 provides:

(1) The court may direct a stay of proceedings pending before it.

(2) A person, whether or not that person is a party to the proceeding

(a) who would have been entitled, if *The Newfoundland Judicature Act, 1889* had not been enacted, to apply to the court to restrain the prosecution of the proceeding; or

(b) who may be entitled to enforce an order, contrary to which proceedings may have been taken,

may apply in a summary way for a stay of the proceedings either generally or where necessary for the purposes of justice, and the court shall make the order that may be just.

(Emphasis added.)

Section 2 of the *Judicature Act* provides the following definitions:

In this Act

...

(c) "court" means,

(i) in the Court of Appeal, the court or a judge or the judges of the court, whether sitting in court or chambers, and

(ii) in the Trial Division, the court or a judge or the judges of the court, whether sitting in court or chambers;

(d) "court of appeal" means the appeal division of the Supreme Court of Newfoundland and Labrador;

...

(p) "proceeding" means a civil or criminal action, suit, cause or matter, or an interlocutory application, including a proceeding formerly started by a writ of summons, 3rd party notice, counterclaim, petition, originating summons, originating motion or in another manner;

...

(u) "Supreme Court" means the Supreme Court of Newfoundland and Labrador referred to in section 3, and where the subject or context requires, the Court of Appeal or the Trial Division; and

(v) "Trial Division" means the Trial Division of the Supreme Court.

[10] Section 55 of the *Judicature Act* also makes provision for rules of court:

(1) Each rules committee may make rules

...

(c) regulating the procedure of the court in exercising the jurisdiction of the court conferred by another Act or regulation;

...

(f) respecting the hearing of appeals and all proceedings relating to or brought up by *certiorari* orders from Provincial Court judges or justices of the peace;

...

(k) governing the pleading, practice and procedure generally of the Court of Appeal or the Trial Division.

...

(4) Rules made under this section are subordinate legislation for the purposes of the *Statutes and Subordinate Legislation Act*.

[11] Counsel for the Warford estate submits that the language, “proceedings pending before it”, in section 97 of the *Judicature Act* must be read restrictively with the result that the authority of this Court is constrained where an appeal may be severed from the main action which forms the foundation for the appeal. The effect of this submission is that, in a case such as this, where the trial judge ordered that the cause of action is not barred by the legislation, this Court has no jurisdiction to order a stay of the action pending determination of the appeal which deals with the interpretation of the statute. Rather, he submits, only a judge of the Trial Division could grant that stay.

[12] I cannot accept such an interpretation or conclusion. A proceeding pending before this Court must comprise the foundation upon which the appeal is brought. In this case, proceeding with the action against Weir’s Construction is inextricably tied to the interpretation of the *Workplace Health, Safety and Compensation Act*, and is, therefore, part of the matter or proceeding under appeal.

[13] Consistent with this conclusion, rule 42 authorizes the Court, upon application, to stay the enforcement of an order under appeal pending disposition of the appeal. In this case, the order under appeal states:

2. This Court will substitute its determination for that of the Commission. The Applicant [Warford estate], being a worker whose injury arose as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker’s employment, is entitled to pursue the action against the employer by virtue of the exemption to the statutory ban which arises in section 44.1 of the *Workplace Health, Safety and Compensation Commission Act* (sic).

(Emphasis added.)

It is clear that pursuing the action is part of the order, and, accordingly, is a component of the appeal and proceedings pending before this Court.

[14] In the result, I am satisfied that rule 42(2) applies and that this Court has jurisdiction to order a stay of the order under appeal, including pursuit of the Warford estate cause of action against Weir’s Construction, pending disposition of the appeal.

Stay Pending Disposition of the Appeal

[15] The three-pronged test to be applied in determining whether to grant a stay of enforcement of the order pending appeal is discussed in *Rees v. Royal Canadian Mounted Police*, 2005 NLCA 4, 244 Nfld. & P.E.I.R. 72.

[16] The first prong of the test is whether there is a serious issue to be argued on appeal. This requires a preliminary, but not a detailed or extensive, investigation of the merits of the appeal to ascertain whether the appeal is frivolous or vexatious. In this case, it cannot be said that the appeal is frivolous or vexatious. The appeal engages consideration of the interpretation of the words “[injured] as a result of an accident involving the use of a motor vehicle” in section 44.1 of the *Workplace Health, Safety and Compensation Act*. While counsel for the Warford estate submits that the judge conducting the judicial review was correct in his interpretation and that, on a plain reading of the language, no other interpretation is possible, that is not the interpretation adopted, or conclusion reached, by the Commission. A review of the decision in *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, supports the conclusion that workers’ compensation legislation must be read in light of its purpose as a no-fault insurance scheme, a factor that may be relevant in interpreting the exception in section 44.1 of the *Act*. Clearly, there is an issue to be determined on the appeal which could not be termed frivolous or vexatious.

[17] The second prong of the test is whether the applicant for the stay will suffer irreparable harm if the stay is not granted. It is the nature of the harm, rather than its magnitude, that must be considered. In the circumstances of this case, the question of recouping costs associated with the litigation is sufficient to satisfy this prong of the test.

[18] The third prong of the test is an assessment of the balance of inconvenience. Counsel for the Warford estate submits that the action should proceed through the filing of a defence, provision of a list of documents, and discoveries. Weir’s Construction takes the position that Mr. Warford received benefits under the *Workplace Health, Safety and Compensation Act*, that the appeal can proceed without undue delay since there is no need for a transcript, and that steps taken to carry forward the action pending a decision on the appeal would amount to an inappropriate use of time, costs and resources should Weir’s Construction’s appeal succeed.

[19] On balance, taking these factors into account, I am satisfied that the inconvenience to the Warford estate that would result if a stay is granted is limited to a relatively short delay in the context of an already lengthy passage of time. By contrast, if the stay is granted, there is a potential for avoiding unnecessary time, expense and resources associated with proceeding as requested by the Warford estate. I conclude that the balance of inconvenience weighs in favour of granting the stay.

[20] In the result, applying the three-pronged test in *Rees*, I am satisfied that, on balance, an order should be made pursuant to rule 42(2) to stay the enforcement of the order under appeal.

SUMMARY AND DISPOSITION

[21] In summary, I am satisfied that this Court has jurisdiction to order a stay of enforcement of the order under appeal pending disposition of the appeal. Applying the analytical approach set out in the *Rees* decision, I conclude that a stay should be ordered pursuant to rule 42(2) of the *Court of Appeal Rules*. As discussed at the hearing of the application, the parties have undertaken to file materials within the time prescribed in the *Court of Appeal Rules*, and to seek an early hearing date once the materials have been filed.

[22] Accordingly, Weir's Construction's application for a stay of the order under appeal pending disposition of the appeal is granted. Costs of the application will be costs in the cause of the appeal.

B. G. Welsh J.A.