NOVA SCOTIA COURT OF APPEAL

Citation: *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 37

Date: 20170504
Docket: CA 461951
Registry: Halifax

Between:

Maxwell Properties Limited

Appellant

v.

Mosaik Property Management Limited, George Giannoulis, Stavros ("Steve") Giannoulis and J.L. Silver Construction Incorporated

Respondents

Judge:	MacDonald, C.J.N.S.
Motion Heard:	April 20, 2017, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Gavin Giles, Q.C., for the appellant Geoffrey Saunders and Dillon Trider, for the respondents

Decision:

[1] Building a multi-storey structure literally within inches of an existing building is tricky business. I am not referring to architectural and engineering challenges. Instead, I refer to the mutual courtesy expected from the adjoining landowners; something each says the other lacks in this case. Their ensuing dispute found its way initially to the Supreme Court of Nova Scotia and then, in short order, on appeal (and cross appeal) to this Court.

BACKGROUND

[2] Justice Glen McDougall of the Supreme Court succinctly framed the dispute involving the two commercial neighbours in downtown Halifax:

> [3] The plaintiff, Maxwell Properties Limited is a property owner and developer that owns and manages a building at 1580 Grafton Street in Halifax. The defendant, Mosaik Property Management Limited, is a developer and contractor that is renovating and rebuilding a development known as "the Dillon" at Sackville and Market Streets. The Dillon adjoins the plaintiff's Grafton Street property with about one foot of clearance between them. The defendant J.L. Silver Construction is a construction contractor involved in the project. The individual defendants are directors and officers of Mosaik.
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> [4] The plaintiff alleges that the defendants knew that their activities would impact its Grafton Street property and the use and quiet enjoyment of the property by its tenants. However, the plaintiff states the defendants failed to disclose details of their construction activities which have allegedly led to trespasses against the plaintiff's property. The plaintiff also says the defendants have refused to compensate it for trespass and have failed to take steps to minimize the impact of the project on the plaintiff's property. The plaintiff also alleges that building materials and substances have dropped from the construction site onto the roof of the plaintiff's building thereby causing damage. Further, the plaintiff claims contracting personnel have trespassed onto their roof and the defendants have allowed cranes, hoists, and building materials to overhang their building thus trespassing into the plaintiff's airspace.
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> [5] The defendants make a general denial of the allegations. In their defence, they state that the plaintiff wanted to buy the property that is now the site of the Dillon in order to forestall the project. They also claim that there was an arrangement between the individual defendant, George Giannoulis, and the plaintiff's president, John Lawen, to resolve the dispute over the alleged airspace trespass by means of a charitable

> donation by Mr. Giannoulis to Mr. Lawen's church. The defendants also maintain that any airspace violation is *de minimis* in nature being temporary and extending no more than eighteen inches over the plaintiff's property. Further, they say the plaintiff rejected their proposals for protecting its property by means of either a tarp or a plywood shield and that it has therefore failed to mitigate its damages.

[3] In the end, Justice McDougall acceded to Maxwell's request for an injunction, enjoining Mosaik's impugned activities, pending a trial on the merits:

> [18] Accordingly, I am satisfied that the plaintiff has made out a basis for the issuance of an injunction on the ground of trespass.
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> [19] The evidence establishes that the defendants have put up temporary construction frameworks that overhang the plaintiff's property and that occupy the airspace above the roof of the plaintiff's building. The defendants have indicated that the framework will only be required for two to three months in order to complete construction of the exterior walls on two sides of the Dillon development. As such, the trespass is apparently temporary. I am satisfied that this represents a minimal intrusion into the plaintiff's airspace. Any interference with the plaintiff's use and enjoyment of its property is virtually non-existent.
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> [20] The temporary scaffolding or walkway that allegedly rests on a metal fence on the plaintiff's roof is a somewhat more serious intrusion. It should not be supported by the plaintiff's fence, if that is the case, but should be suspended or otherwise connected to the exterior of the defendants' own building. Accordingly, to the extent that the scaffolding is resting directly on the fence, this should be rectified either by suspending it from the Dillon building itself, or by immediate removal if that is not possible. If it can be so connected, the defendants will have two weeks from the date of this decision to complete the necessary work to prevent any contact between the scaffolding and the plaintiff's fence.

[4] However, the judge then decided to suspend certain aspects of his order for three months. Whether by design or otherwise, this should allow Mosaik time to complete its work on the disputed walls.

[5] Therefore, for Maxwell, the suspension defeats the entire purpose of the injunction. The judge had effectively given with one hand, only to take it back with the other. It has, therefore, appealed that aspect of the decision to this Court. Mosaik has cross-appealed challenging the appropriateness of any type of injunction. The expedited appeal is set for June 8th of this year. In the meantime, Maxwell has asked me, sitting alone as a motions judge, to stay the suspension

pending the appeal. In other words, Maxwell wants the immediate enforcement of Justice McDougall's full injunction by suspending the suspension, so to speak.

[6] Following oral argument, I indicated that Maxwell's motion would be denied, with reasons to follow. Here are my reasons.

ANALYSIS

[7] The test for granting a stay pending an appeal has been repeated by this Court time and time again. It was first established in *Purdy v. Fulton Insurance Agencies Ltd.*, (1990), 100 N.S.R. (2d) 341 (at pages 348-349). It began with this primary test:

> 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.

[8] Then there is an alternate avenue, should exceptional circumstances command a stay. It has been referred to as the secondary test:

> (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.

[9] I will now consider each test.

The Primary Test

[10] To meet the primary test, the appellant must establish: (a) that its appeal at least raises an arguable issue; (b) it will suffer irreparable harm without the stay; and (c) the balance of convenience favours the appellant. Here is my view on each:

Arguable Issue

[11] In my view, the appellant has raised the requisite arguable issue. It is a low threshold. For example, Maxwell can argue that it is an error in principle to conclude that an injunction was necessary only to then effectively not order one. Of course, that will be for a panel of this Court to decide. I am simply satisfied that this is a legitimate argument it can raise on appeal.

Irreparable Harm

[12] In addressing irreparable harm, Maxwell highlights the fact that its claim involves trespass. This, it asserts, modifies its duty to establish irreparable harm. I refer to its pre-hearing brief:

> To be recalled is that the matter before The Learned Chambers Justice in the Court below pertained to certain admissions by Mosaik that it has been trespassing into and onto Maxwell's property and that Mosaik had been attempting to purchase certain rights from Maxwell in order to permit the forms of trespass to continue. The clear – perhaps only – inference being that there was some if not some considerable value to Mosaik – given its tight lot lines and on-going construction of The Dillon – for those forms of trespass to be permitted to continue.
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> Against that backdrop, there was no arguable benefit to Maxwell. And there was no manner in which Maxwell could calculate the value of the trespass. Was it a value, for instance, to be calculated in accord with some empirical assessment of what the trespass into and onto Maxwell's property was worth to Maxwell; or was it more a question of the value of The Dillon's construction costs being saved by Mosaik as a result of its trespass into and onto Maxwell's property?
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> It is in part because of this conundrum that the authorities have routinely favoured injunctive relief to address trespass. Additionally, the authorities have routinely recognized that trespass represents the strongest type of *prima facie* case that a tort against the victim of the trespass has been committed. And that would be especially so in the instant case given that Mosaik has admitted its trespass and has admitted trying to buy from Maxwell the ability to continue with the trespass.

[13] However, it must be recalled that in this case, we are dealing with an interim order by Justice McDougall. Like me, he was not asked to resolve the merits of the case. Here, his task was simply to identify a serious issue to be tried. In fact, Mosaik is suggesting that, on the merits, any potential tort should be framed in

nuisance as opposed to trespass. Therefore, in my view, Maxwell must establish irreparable harm.

[14] In its pre-hearing brief before Justice McDougall, Maxwell suggested it did suffer irreparable harm:

> 46. The Plaintiff is the registered owner of the land and building; and ownership extends to the airspace above. The physical damage to the roof installations necessary for the safety comfort and quiet enjoyment of the Plaintiff's Building by the Plaintiff's tenant creates a "real risk" of irreparable harm to the Plaintiff in the form of loss of its tenant, goodwill, and revenue. In *McQuarrie's Drugs*, Mr. Justice Edwards found that potential loss of customers and market share is a harm contemplated by the second branch of the test for an injunction. At paragraph 15:
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> > Secondly, on the irreparable harm issue, it is my view that there is a high potential for irreparable harm to the Plaintiff company – the loss of customers, or market share, though difficult to quantify, is real and is the type of harm contemplated by this branch of the test.
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> 47. The above comment applies with equal or greater force to the case at hand, as the Plaintiff's reputation as a property manager and the revenue-generating ability of the Plaintiff's property depend on the Plaintiff's ability to provide current and potential tenants with a safe and disruption-free work environment.

[15] Of course, the harm I am to consider involves only that flowing from the suspension of Justice McDougall's order. Effectively, this involves the harm arising from Mosaik's continued use of Maxwell's airspace. Justice McDougall (at ¶ 20) called this a "minimal intrusion" with Mosaik's interference being "virtually non-existent".

[16] So I am far from convinced that Maxwell has cleared the irreparable harm hurdle. However, for present purposes I will assume that it has. I do this because of my dispositive findings on the balance of convenience, which I will now address.

Balance of Convenience

[17] In my respectful view, the balance of convenience strongly favours Mosaik. Without a stay, its continued use of Maxwell's airspace should have minimal negative impact. On the other hand, with a stay, Mosaik's ability to complete two exterior walls will be seriously impacted. For example, it most certainly will lead to delays in completing the project. This, in turn, could result in significant fallout such as attracting tenants, lost profits, etc.

[18] Perhaps, Maxwell's most compelling argument is that, without a stay, it will effectively likely lose its right of appeal. It explains in its brief:

> (c) The Risk of Rendering an Appeal Moot
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> This Honourable Court has frequently considered the appropriateness of a stay in circumstances when an Appellant's legitimate Appeal will be lost without it. This is one such case.
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> Should the stay Maxwell is seeking not be granted, there will be nothing to prevent Mosaik from proceeding with and completing its impugned construction activities on The Dillon. Once those construction activities have been completed, the issues legitimately raised by Maxwell on its Appeal will be moot. Rendering appeals moot or nugatory has frequently been a factor motivating This Honourable Court to order stays or partial stays. This Honourable Court does so pursuant to the second branch of the *Purdy* test: "special circumstances".
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> In *G.W. Holmes Trucking (1990) Limited*, Re:, 2005 NSCA 132 (Tab5), This Honourable Court (per: Oland, J.) confirmed that on the second branch of the *Purdy* test, This Honourable Court will be moved to order a stay when without one, there is a possibility that a meritorious appeal would be rendered moot. In so doing, This Honourable court effectively by-passed the first *Purdy* tests, the ones of "irreparable harm" and "balance of convenience".
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> Maxwell refers further to *Nova Scotia (Director of Public Safety) v. Dixon*, [2011] NSCA 15 (Tab 6) and Alementary Services Limited v. Nova Scotia (Alcohol and Gaming), 2009 NSCA 61 (Tab 7).
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> In Maxwell's submission, *Alementary* is particularly apposite. There, the temporary suspension of a pub's liquor licence for a two-day period by the Nova Scotia Utility and Review Board was in issue. The pub had taken the suspension on appeal but its liquor licence suspension was scheduled to take place some months before its appeal could be heard. In Chief Justice MacDonald's conclusion, these factors combined to create the possibility that the pub's appeal would be moot should a stay of its liquor licence suspension not be ordered.
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> There is little difference in the instant case: Maxwell's Notice of Appeal and the authorities cited herein serve to create the prospect of a successful appeal which is well beyond merely "arguable". In Maxwell's submission, it has exceeded the low threshold test set out above by a wide margin. But without a stay of the injunctive relief ordered in Maxwell's favour, Mosaik's construction will continue unabated. And by the time Maxwell's appeal is likely heard, Mosaik's construction will be completed. Maxwell will lose all benefit of the injunction ordered in its favour. In terms of its pending appeal, there will be no point in its proceeding further.
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> In its consideration of Motions for stays generally, This Honourable Court has been resolute in its jurisprudential position that potentially meritorious Appeals should be heard and determine on their merits. By refusing a stay in the circumstances of the instant case, Maxwell becomes completely denuded of its

> legal rights whilst Mosaik, as the clearly offending party – already found to be offending – loses nothing. And recall in that regard that there was no evidence before The Learned Chambers Justice, none whatever, that Mosaik could not proceed with the completion of its construction of The Dillon without maintaining its trespasses onto and into Maxwell's property; nor that it would be put to any additional expense in so doing. All of these factors clearly support the imposition of the stay which Maxwell is seeking.

[19] Maxwell is absolutely correct. Preserving a party's right to appeal is a very important consideration when balancing the competing interests. However, this case is unique in that, it would appear whatever I do, Maxwell's appeal will likely be rendered moot. For example, should I deny the stay, Mosaik will likely complete its work on the disputed walls before the appeal is heard. Therefore, from Maxwell's perspective, the damage would have been done and its appeal would become moot. Yet by granting the stay, I would effectively be allowing Maxwell's appeal. For example, by the time the appeal is heard, the suspension will be almost over and likely over by the time the Court disposes of the appeal. With a stay in hand, there would be little incentive for Maxwell to continue its appeal. It would have effectively won its appeal before it even started. Of course, only a panel of this Court can properly grant that relief.

[20] So when I place all these factors on the scale, it tips in Mosaik's favour.

The Secondary Test

[21] Turning to the secondary test, there is nothing exceptional about this matter that would compel me to grant the stay.

DISPOSITION

[22] Maxwell's motion for a stay is denied. As to costs, the parties agreed to an all-inclusive amount of $1,000 payable forthwith. I so order.

MacDonald, C.J.N.S.