

COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20201103
Docket: CA46728

Between:

Patricia Dawn Elliott

Respondent
(Plaintiff)

And

Ryan McCliggot and Slegg Construction Materials Ltd.

Appellants
(Defendants)

Before: The Honourable Mr. Justice Groberman
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
February 4, 2020 (*Elliott v. McCliggot*, Victoria Docket M144097).

Oral Reasons for Judgment

Counsel for the Appellants
(via teleconference):

J.J.L. Brun

Counsel for the Respondent
(via teleconference):

K.J. Hauer

Place and Date of Hearing:

Vancouver, British Columbia
November 3, 2020

Place and Date of Judgment:

Vancouver, British Columbia
November 3, 2020

[1] **GROBERMAN J.A.:** This is an application for a partial stay of a judgment pending appeal.

[2] The judgment below is in a personal injury action arising out of a motor vehicle accident. The trial was by judge and jury, and the jury awarded a total amount of \$463,385.54.

[3] The respondent's injuries consisted of whiplash and soft tissue damage. I think it is fair to say that the award is a substantial one. The degree to which it departed from expectations may be gauged by the fact that the respondent offered to settle for just under \$100,000.00 prior to trial. In saying that, I do not mean to suggest that the appeal will necessarily be a strong one. The respondent concedes, however, that the appeal has sufficient merit to pass the test for a stay.

[4] It is common ground that the general test for a stay of a judgment is that set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311:

- 1) the appellant must have an arguable appeal;
- 2) there must be a basis for finding that the appellant could suffer irreparable harm if the stay is not granted (assuming the appellant is ultimately successful on the appeal); and
- 3) the balance of convenience must favour the party seeking the stay.

[5] Statements expanding on these factors have been put forward in a number of cases dealing specifically with stays of awards pending appeal. I have been referred to a number of cases, including *Salager v. Dye & Durham*, 2018 BCCA 202 (Chambers). In that case, Griffin J.A. set out some considerations that are prevalent in the case law. At para. 14, she quoted from para. 6 of *Roe v. McNeill* (1994), 49 B.C.A.C. 247 (Chambers), which included, among others, the following factors:

1. A successful plaintiff is entitled to the fruits of his judgment. He should not be deprived of them unless the interests of justice require that they be withheld from him until the defendant's appeal is decided (*Voth Bros. Construction (1974) Ltd. v. National Bank* (1987), 12 B.C.L.R. (2d) 43).

2. The court's power to grant a stay is discretionary and should be exercised only where it is necessary to preserve the subject matter of the litigation or to prevent irremedial damage or where there are other special circumstances (*Contact Airways Ltd. v. De Havilland of Aircraft of Canada Ltd.* (1982), 42 B.C.L.R. 141 at 142).

[6] I have also been referred to *Bancroft-Wilson v. Murphy*, 2008 BCCA 498 (Chambers). The judge in that case said:

[12] ... If the appellant establishes that the respondent's modest means presents a real risk that the appellant would, if successful on appeal, be unable to recover a large portion of the funds paid to the respondent as damages, the appellant may have established that she could face irreparable harm in that sense: *Zylstra v. Hughes*, 2000 BCCA 8, 133 B.C.A.C. 21 (Chambers), Hall J.A.

[7] In the case at bar, the respondent is a person of modest means. She has a strong desire to purchase a home. It is common ground that she would only be able to purchase a home if she receives the judgment proceeds, and is able to put them into a down payment. I have been provided with some evidence as to the terms on which the home will be purchased. Suffice it to say, it is clear the respondent would be quite stretched in purchasing a home, and a large portion of the judgment proceeds would be needed in order to secure mortgage funding for the balance of the purchase.

[8] I am persuaded that in the circumstances of this case, there is a strong likelihood that if the appeal is successful, the respondent will be unable to repay a substantial portion of the award. I say that notwithstanding that her intention is to put the proceeds into real property. My main concerns are three-fold:

- 1) the value of real property can be volatile;
- 2) the transaction costs in purchasing and reselling the property could substantially eat into any equity in the property; and
- 3) a party can experience tremendous difficulty in realizing on a judgment even if it is registered against real property.

[9] I recognize that the respondent would like to purchase a home, but I am of the view that the balance of convenience favours the appellant. That said, the delay in payment occasioned by the partial stay should be as brief as possible. I recognize there have been unavoidable delays in preparing the documents necessary to proceed with the appeal and that the current COVID-19 pandemic creates some barriers that make it difficult for the appellant to proceed as expeditiously as they might like. Counsel are, nonetheless, optimistic that the appeal can be heard by May or June 2021. I think that is an appropriate outside date for the partial stay at this juncture, subject, of course, to the parties being able to either consent to an extension of the stay or to reappear before this Court, if an extension is necessary.

[10] I am going to grant the stay until the hearing of the appeal or June 30, 2021, whichever is earlier. The panel hearing the appeal is able, of course, to grant an extension of that stay to the date of judgment if necessary. I am also granting the parties liberty to seek an extension in chambers if necessary.

[11] The parties would not, normally, be able to set this matter down for hearing until after the appellant has filed its factum. In order to limit the duration of the stay, I am granting them leave to set down the appeal immediately. I am confident that the parties will be able to file their documents in a timely manner. The date to be set for the appeal should not be before May 1, 2021.

[12] In terms of the partial stay, there has been some discussion as to whether a full stay would be better from the stand point of the respondent. The respondent should be able to choose to have a complete stay of the judgment if she prefers that to a partial stay.

[13] There has also been discussion as to where money should be paid pending the hearing of the appeal. I am satisfied that counsel will be able to work out the details.

[14] Assuming the respondent chooses to have only a partial stay in place, it seems to me that the appropriate order is that \$100,000.00 of the judgment be paid

out to the respondent at this stage, and that the balance be subject to the stay. The appellant suggests that an amount for anticipated costs should be deducted from the immediate payout. I am not satisfied that that is appropriate. The \$100,000.00 immediate payout is a round number, and a reflection of the balance of convenience. It is not an amount calculated on a detailed estimation of the eventual outcome of the case.

[15] I am granting a partial stay — a stay of all but \$100,000.00 of the judgment.

[Discussion with counsel re: seeking further clarification]

[16] **GROBERMAN J.A.:** I am ordering a partial stay unless the parties consent to a full stay.

“The Honourable Mr. Justice Groberman”