Court of King's Bench of Alberta

Citation: 420 Investments Ltd v Tilray Inc, 2024 ABKB 210

Date: 20240411
Docket: 2001 02873
Registry: Calgary

Between:

420 Investments Ltd

Plaintiff

- and -

Tilray Inc and High Park Shops Inc

Defendants

- and -

High Park Shops Inc

Respondent / Plaintiff by Counterclaim

- and -

420 Investments Ltd

Appellant / Defendant by Counterclaim

Reasons for Decision
of the
Honourable Justice E.J. Sidnell

Appeal from the Decision by
the Honourable Applications Judge, JR Farrington
Dated the 22nd day of March, 2024

[1] This is an appeal of the Applications Judge's dismissal of an application for a stay of a monetary judgment pending appeal. For the reasons set out below, the appeal is dismissed.

Litigation history

[2] This action was commenced by the Appellant, 420 Investments Ltd (Four20) on February 21, 2020, in relation to alleged breaches of an arrangement agreement (the Arrangement Agreement) relating to the purchase of the outstanding shares of Four20 by the Respondent, High Park Shops Inc (High Park), and the defendant, Tilray Inc (Tilray).

[3] High Park was formed for the purpose of the acquisition of Four20 and is a subsidiary of Tilray. Tilray and High Park defended the claim.

[4] High Park filed a Counterclaim on March 20, 2020, in relation to a loan advanced in connection with the Arrangement Agreement (the Loan). High Park had advanced $5,000,000 to Four20 under the Loan on August 29, 2019, and a further $2,000,000 on November 29, 2019. On April 14, 2020, Four20 defended the Counterclaim on the basis that the amounts advanced to Four20 under the Loan were not due and payable because High Park's and Tilray's purported notices of termination of the Arrangement Agreement were invalid and the Loan had not become due.

[5] High Park filed an application for summary judgment in relation to the Loan on March 2, 2023. On February 7, 2024, the Applications Judge granted High Park summary judgment against Four20 on its counterclaim in the amount of $7,000,000, plus interest (the Judgment).

[6] On March 22, 2024, the Applications Judge dismissed Four20's application for an interim stay of the Judgment pending the determination of an appeal on the merits. This appeal is from that interim stay dismissal.

[7] Four20 appeals the denial of an interim stay on the grounds that the Applications Judge was incorrect in finding that:

(a) irreparable harm had not been made out; and

(b) the balance of convenience favours High Park.

[8] High Park submits that there is little dispute between the parties on the applicable law. High Park asserts that this appeal turns on the lack of Four20's evidence because Four20 has failed to meet is onus on all three aspects of the test.

Standard of review

[9] Four20 appealed the denial of its interim stay application under Rule 6.14 of the *Alberta Rules of Court*, Alta Reg 124/2010, and obtained permission to have this appeal heard on an expedited basis.

[10] An appeal from an Applications Judge is heard *de novo* and the standard of review is correctness: ***DM v Reeves***, 2017 ABQB 139 and ***Agrium v Orbis Engineering Field Services***, 2022 ABCA 266.

[11] The materials provided to the Court were voluminous and included of material relied upon at the summary judgment application and the stay application, both before the Applications Judge. No new evidence was filed after the stay application was denied on March 22, 2024.

Test for an interim stay pending appeal

[12] Four20 submits that Rule 1.4(2)(h) and section 17 of the *Judicature Act* empower the Court to grant a stay of its orders pending an appeal if it is in the interests of justice or if it is "just and equitable in all of the circumstances of the case": ***Piikani Nation v McMullen***, 2020 ABCA 183 para 15.

[13] Relying on ***Domenic Construction Ltd v Primewest Capital Corp***, 2019 ABQB 430, at para 18, Four20 submits that the test for an interim stay of proceedings pending an appeal is the same as the test for injunctive relief as set out in ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at pages 347 to 349.

[14] In ***Beaumont Energy Inc v Amik Oilfield Equipment & Rentals Ltd***, 2017 ABCA 327, at paras 8 to 10, Strekaf JA said:

> The test for a stay of enforcement pending appeal is the usual tripartite test: *RJR-MacDonald Inc* ... It requires an applicant to demonstrate there is a serious question on appeal, that irreparable harm will be suffered if no stay is granted and that the balance of convenience favours the stay. The latter considers whether refusing the stay will cause the applicant to suffer greater harm than the respondent would suffer if the stay were granted.
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> The threshold for the first part of the test is generally viewed as quite low, although it has been recognized that if "both sides have credible arguments about irreparable harm and balance of convenience, the strength of the serious question may, arguably, influence the court's perception of the relative strength of the contentions about harm and convenience" ...
>
> On an application to stay a monetary judgment pending appeal, demonstrating that there is a significant risk that if the judgment was paid that the applicant would be unable to recover those funds if successful on appeal can constitute irreparable harm ...

[15] In ***Knelsen Sand & Gravel Ltd v Harco Enterprises Ltd***, 2021 ABCA 362, at paras 10, and 12 to 13, footnotes omitted, Wakeling JA said:

> The test for a stay of a money judgment is the same as for other stays.
>
> . . .

> An applicant must satisfy the court that the appeal presents a serious issue, that the applicant will suffer irreparable harm if a stay is not granted, and that the harm the applicant will suffer if a stay is not granted exceeds that which will befall the respondent if a stay is granted.
>
> The court may not grant a stay if an applicant fails to pass any one of the tests.

[16] High Park submits that stays of monetary judgments are only "'reluctantly granted' and an applicant must present good evidence to justify a stay": ***First Street Foods Ltd v Mitchell & Mitchell Stores Limited***, 2020 ABCA 303 para 23.

1 Is there a serious issue to be determined on appeal?

[17] There is a serious issue to be determined on appeal if the appeal is neither frivolous nor vexatious. A claim that is baseless, hopeless or not arguable is either frivolous or vexatious. In such a case, there is no serious issue to be determined: ***Knelsen*** para 7. This stage of the test is not difficult, and the threshold is low.

[18] Four20 submits it should prevail on appeal because the matter was not appropriate for a partial summary judgment (in the context of a claim and counterclaim) and because the purported termination notices issued by Tilray and High Park under the Arrangement Agreement were invalid with the result that the Loan has not become due.

[19] The Applications Judge was prepared to accept that the appeal of the Judgment was neither frivolous nor vexatious. I agree with the Applications Judge that the appeal of the Judgment is not baseless, hopeless or not arguable. As a result, it is not frivolous or vexatious.

[20] Four20 succeeds on the first stage of the test that there is a serious issue to be determined on appeal of the Judgment.

2 Will irreparable harm be suffered by Four20 if the stay is not granted?

A Kinds of irreparable harm where there is a monetary judgment

[21] In ***RJR***, at page 341, the Court said:

> "Irreparable" refers to the nature of the harm suffered rather than 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. Examples of the former include instances where one party will be put out of business by the court's decision ...; where one party will suffer permanent market loss or irrevocable damage to its business reputation ...

[22] In ***LDS v SCA***, 2019 ABCA 312, at para 19, Feehan JA said:

> In the second branch of the test the issue to be decided is "whether a refusal to grant relief could so adversely affect the applicants' 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" (***RJR-MacDonald***, p 341). Irreparable harm refers to the nature of the harm suffered rather than its magnitude: "[i]t is harm which either cannot be quantified in monetary terms or which cannot be cured" (pp 341 and 348). ...

[23] Money judgments are different from other types of judgments because money judgments, if reversed on appeal, can often be compensable in monetary damages and costs, and no irreparable harm is occasioned: ***First Street Foods*** para 23. However, there are certain circumstances in which courts have determined that irreparable harm can be found on a stay application for a monetary judgment, including where:

(a) the applicant will be put out of business by the court's decision: ***RJR*** page 341;

(b) the applicant will suffer permanent market loss or irrevocable damage to its business reputation: ***RJR*** page 341; and

(c) where the respondent may be unable to repay the monetary judgment if the decision is reversed on appeal: ***Beaumont Energy*** para 10.

B Evidence of irreparable harm

[24] Four20 cites ***Maple leaf Franchise Concepts Inc v Nassus Frameworks Ltd***, 2010 ABCA 291, as an example of irreparable harm is where a party may be put out of business. That case arose from an interlocutory injunction granted in the context of a restrictive covenant in a franchise agreement and not a monetary judgment. The facts demonstrated that the interlocutory injunction could be the "death" of the applicant's business and a stay was granted: para 16.

[25] Four20 relies on ***Fuller Western Rubber Linings Ltd v Spence Corrosion Services Ltd***, 2012 ABCA 92, at para 3, where there was evidence of irreparable harm as the Court found that corporate appellant "will go out of business" and that the individual appellant "may have to declare bankruptcy" if a stay of the financial terms of a contempt order was not granted.

[26] Noting the comments of Kubic J in ***Domenic Construction***, at para 20, which was a non-monetary judgment stay appeal case, Four20 concedes, and High Park agrees, that:

> In relation to irreparable harm the party seeking the stay must present concrete evidence of the harm that would result if a stay was not granted; it must be definite and unavoidable, and non-compensable in monetary damages or costs.

[27] In ***First Street Foods***, the applicant sought to stay a monetary judgment of $624,116, plus interest and costs, granted after trial on the counterclaim. At para 18, Antonio JA said:

> To establish irreparable harm, [the applicant] relies on the affidavit of Scott Mitchell, which includes the assertions that "[t]he grocery store could be crippled by any attempt to enforce the Mortgage pending appeal, leading to its potential closure or sale". No further information or documentation has been provided. Of course the enforcement of the sizeable judgment would harm the financial interests of [the applicant] and Scott Mitchell, who are jointly liable, but [the applicant] has not discharged its onus of establishing that the harm would be irreparable in the sense of putting it out of business.

[28] In ***Fawcett v College of Physicians and Surgeons of Alberta (Complaint Review Committee)***, 2022 ABCA 416, at para 23, where a stay of a disciplinary investigation was at issue, not a stay of a monetary judgment, Feehan JA said:

> Harms alleged that are speculative, hypothetical, or only arguable at best do not qualify as irreparable harm. Similarly, administrative inconveniences, without more do not qualify as irreparable harm. Evidence of irreparable harm must be

> clear, not speculative, and must be supported by evidence; it must be more than inconvenience ...

[29] In another non-monetary judgment stay case, ***United States Steel Corporation v Canada (Attorney General)***, 2010 FCA 200, at para 7, Layden-Stevenson JA said:

> ... the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied. It is not sufficient to demonstrate that irreparable harm is "likely" to be suffered. The alleged irreparable harm may not be simply based on assertions ...

C Application to the facts in this case

[30] Four20 relies on the context of the dispute and says in its Brief that:

> ... The [Loan] was advanced so that Four20 could continue building stores during the period when the Arrangement Agreement had not yet closed. High Park was to acquire Four20, including the [Loan], which would then become an inter-company loan. The cash has been sunk into assets; selling stores or raising a replacement loan in a regulated industry will take time.

[31] Four20 alleges that, after entering into the Arrangement Agreement, Tilray and High Park were suffering from buyer's remorse. Four20 points to evidence that Tilray and High Park believed that they had overpaid for Four20 and were looking for a mechanism to unwind the Arrangement Agreement. Four20 further surmises that this is what drove Tilray and High Park to issue the notices of default, which Four20 maintains are invalid.

[32] Freida Butcher, the Chair of Four20's Board of Directors, swore an affidavit on February 23, 2024, which recounts a meeting in February 2020 with Andrew Pucher, the Chief Corporate Development Officer for Tilray. Ms. Butcher says that Mr. Pucher claimed that Four20 was insolvent and would have loses in perpetuity. Ms. Butcher also alleges that Mr. Pucher said that Tilray would walk-away from the Arrangement Agreement, would call the Loan and would "put Four20 under" (the Pucher Statement).

[33] Four20 submits that if the Loan is shifted from being a non-current liability to a current liability, then Four20's current liabilities will exceed its current assets because the Judgment makes the Loan amount, plus interest, immediately due. Four20 also acknowledges that it does not have cash on hand to repay the Loan.

[34] To demonstrate irreparable harm, Four20 relies on the following evidence of Ms. Butcher:

> 30. The Balance Sheet attached to Four20's financial statements for the quarter ending September 30, 2023, provides:
>
> | | Assets | Liabilities |
> |---|---|---|
> | Current | $4,375,000.00 | $3,700,000.00 |
> | Non-Current | $28,021,000.00 | $26,775,000.00 |
> | Total | $32,396,000.00 | $30,475,000.00 |
>
> Attached as **Exhibit "U"** are the relevant portions of Four20's financial statements.

> 31. Of the approximately $1,130,000 in promissory notes payable as of September 30, 2023, all but approximately $168,000 have been converted to equity, which has reduced a substantial portion of Four20's current liabilities. In addition to this, Four20 has raised $850,000 in equity since December 2023.
>
> 32. Four20's Balance Sheet as of September 30, 2023, shows the [Loan] which was used in the construction of retail cannabis stores. Four20 is taking active steps to increase its EBITDA and reduce its expenses. ...
>
> 33. Four20 is on the cusp of profitability. However, if the full value of the [Loan] is shifted from a non-current liability to a current liability, then Four20's current liabilities would exceed its current assets, and Four20 does not presently have the cash on hand to repay the [Loan].
>
> 34. Obtaining debt financing in this market has been difficult. Obtaining replacement debt financing to take out the [Loan] will be expensive and take time.

[35] Notwithstanding the comment in paragraph 30 of her affidavit that she was attaching relevant portions of Four20's financial statements, the document attached to Ms. Butcher's affidavit is a heavily redacted one-page "Consolidated Operating Balance Sheet" as of September 30, 2023, for "Q3". There is no financial statement in evidence and no explanation why Ms. Butcher included financial information which was almost five months old when her affidavit was sworn. Ms. Butcher also refers to Four20's ability to raise $850,000 in equity since December 2023, and that is the only relatively current financial information that she provides.

[36] The Consolidated Operating Balancing Sheet shows the "Tilray loan" as a $7,000,000 item under "Non-current liabilities" but does not show any interest on the Loan, which counsel for Four20 said during the appeal hearing was approximately $3,000,000. However, as I have noted, the Consolidated Operating Balancing Sheet is heavily redacted.

[37] Since Four20 asserts that since it "does not presently have the cash on hand to repay the [Loan]" it would be cash flow insolvent, despite having assets which exceed its liabilities.

[38] Four20 relies on the comments of Nixon J (as he then was) in ***Lay v Lay***, 2023 ABKB 354, at para 67, regarding the assessment of cash flow insolvency:

> In assessing cash flow insolvency, common sense needs to be applied. To illustrate the point, a person's ability to pay their current debts is not equivalent to their expected cash flow, or the total of their possible cash flows measured by their probabilities. That is, a person may have a large potential cash inflow but a small likelihood of being able to realize on that potential cash inflow. As a result, from a cash flow perspective, they may not be able to pay their bills.

[39] However, Four20 has provided no evidence about its cash flow.

[40] Four420 submits that since it cannot pay the judgment that it will be insolvent if a stay of the judgment is not granted. Four20 further submits that the Court can see what enforcement steps can be taken by High Shops as they are set out in the *Civil Enforcement Act*, RSA 2000, c C-15. Four420 further asserts that it will be an "insolvent person" as defined in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, if the appeal is not granted and a stay put in place pending

the appeal on the merits. However, not having funds immediately available for payment of a significant judgment is not, in my view, evidence of insolvency. Indeed, Ms. Butcher speaks to obtaining alternative financing.

[41] Clearly, Four20's liability for the Judgment will affect it financially and I accept that, as Ms. Butcher says, replacement debt financing will be difficult to find, take time to obtain, and will be expensive. However, whether alternative financing is difficult or costly to obtain is not the test. As to the time it would take to obtain alternative financing, it has only been two months since the Applications Judge awarded the Judgment, but it has been over a year since the summary judgment application was made. I do not accept that the time it takes to find alternative financing is an indicator of irreparable harm in this case.

[42] Four20 proffers the Pucher Statement as evidence of its insolvency, but it is a statement Ms. Butcher said was made over four years ago and I do not accept it as evidence of insolvency or irreparable harm.

[43] Four20 asserts that it has been careful not to provide speculative comments about its financial health and that the evidence it is has provided demonstrates it will suffer irreparable harm. Four20 submits that it would be improper for Ms. Butcher to offer a legal conclusion that Four20 is insolvent. I note, however, Ms. Butcher did not say that the execution of the Judgment would put Four20 out of business.

[44] When stripped to its basics, Ms. Butcher provided (then) five-month-old evidence of Four20's assets and liabilities and provided no evidence of cash flows or a financial statement. Ms. Butcher said that, since December 2023, Four20 raised equity in the amount of $850,000. Four420 is working to reduce expenses and is on the cusp of profitability. Four20 does not have the cash to pay out the Loan and obtaining alternative financing would be difficult, expensive and time consuming. I accept Ms. Butcher's evidence on all of these points but find that it does not demonstrate that Four20 will suffer irreparable harm.

[45] I find that Four20 has not provided clear and non-speculative evidence that irreparable harm will follow if the appeal is not granted, and no stay is put in place pending a decision on the merits. It is not sufficient to demonstrate that irreparable harm is likely to be suffered, or to assert that irreparable damage will accrue simply as a commonsense conclusion from the fact that the applicant does not have cash on hand to pay a significant judgment.

[46] In addition, Four20 submits that it will suffer irreparable harm if the Judgment is enforced, and it is then unable to recover those funds if successful on appeal: ***Knelsen*** para 46. Four20 asserts that High Park is a non-operating company incorporated solely for the purpose of the Arrangement Agreement on behalf of its American-based parent company, Tilray. Four20 submits there are serious doubts about whether any funds paid towards the Judgment could be recovered if Four20 is successful on appeal.

[47] However, the Applications Judge ordered that any funds collected on the Judgment be held in trust pending the appeal on the Judgment. I find there is no basis on which to find irreparable harm in this case because the funds will be held in trust: see ***Beaumont Energy*** para 23.

[48] I find that Four20 has not demonstrated that it will suffer irreparable harm.

3 Does the balance of convenience favour a stay?

[49] Four20 submits that High Park:

(a) is a non-operating company that was incorporated solely for the purpose of the Arrangement Agreement transaction;

(b) has no operations and no employees; and

(c) did not commence its summary judgment application on the Loan for more than three years after Four20 commenced this action.

[50] Four20 asserts that the above facts imply that obtaining judgment on the Loan was a low priority for High Park. It could be the case that the recovery was low priority for High Park, but there is no evidence. In any event, whether recovery of the Loan was a low or high priority for High Park is not determinative as to the balance of convenience.

[51] Four20 further asserts that the requirement that High Park hold any recovered Judgment funds in a lawyer's trust account pending determination of the appeal is an indication that High Park is not currently in need of the proceeds from the Loan, and this weighs the balance of convenience in favour of Four20. However, it is clear from the Applications Judge's reasons that he imposed the trust condition to allay Four20's concerns regarding recovery if it is successful on appeal. Holding funds in trust is a well-accepted approach to balancing the equities where it can be demonstrated that the appellant's recovery of the money it paid may be stymied if the judgment is overturned.

[52] Four20 further submits that the consequences of waiting for the Judgment to be satisfied until the appeal is determined will affect High Park exponentially less than forcing the Judgment to be paid will affect Four20.

[53] This case arises in the context of a failed Arrangement Agreement and a Loan. There is no dispute that Four20 received the Loan proceeds of $7,000,000 and has used those funds to build-out its retail store network. Four20 asserts that paying back the funds it borrowed, pending appeal of the Judgment, would be a greater harm than High Park going without the funds that it lent Four20 under the Loan. I disagree.

[54] The Applications Judge determined that High Park is entitled to repayment of the Loan, plus interest. As the successful party, High Park is entitled to the collect the Judgment now. If a stay is granted and High Park remains successful after the appeal, High Park will have to wait to see if the financial future of Four20 will be such that it can then collect on the Judgment. If High Park is stayed from collecting on the Judgment now, when Four20's assets exceed its liabilities, then the risk of Four20's ability to pay the Judgment is transferred to High Park. Assuming a stay is granted, and High Park is successful on appeal, if Four20's business is successful during the stay period, High Park may be able to collect later. However, there is also a risk that Four20's business will not be sustainable and High Park will not be able to collect the Judgment after an appeal when the stay would be lifted.

[55] As noted, Ms. Butcher sworn in her affidavit that Four20 is on the "cusp of profitability". It is unclear where Four20 will be when the appeal of the Judgment will be heard. With the enforcement of the Judgment, Four20 will undoubtedly be in a difficult financial position pending the hearing of the appeal of the Judgment. However, even if a stay were in place

pending the appeal of the Judgment, there is no guarantee that Four20 would be able to pay the Judgment if upheld on appeal.

[56] On an application for a stay pending appeal, the assessment of the balance of convenience is a determination of which of the two parties will suffer the greater harm from the granting or refusal of a stay pending a decision on the merits: ***RJR*** page 334. I find that Four20 has not demonstrated that it will suffer greater harm than High Park.

[57] In addition, I find that Four20 has not presented any "good evidence to justify a stay": ***First Street Foods*** para 23.

[58] In conclusion, I find that Four20 has not demonstrated that the balance of convenience weighs in its favour.

Conclusion

[59] Although there is a serious issue to be tried, I have found that Four20 has not shown that it will suffer irreparable harm or that the balance of convenience weighs in its favour. Four20 has failed to satisfy all three criteria.

[60] The appeal is dismissed, and the Order granted by the Applications Judge remains in full force and effect.

[61] In the event that the parties cannot agree to costs, after having made legitimate efforts to negotiate the same, they may contact me with a proposal for a procedure to resolve costs, no later than 30 days after the issuance of these reasons.

Heard on the 5th day of April, 2024.
Dated at the City of Calgary, Alberta this 11th day of April, 2024.

E.J. Sidnell
J.C.K.B.A.

Appearances:

R Hawkes KC, G Price and S Miller
for the Appellant

DV Tupper, T Wagner and C Stiemer
for the Respondent