Court of Appeal for Saskatchewan
Docket: CACV4246

Citation: *Nilson v ABO Transport Ltd.*, 2024 SKCA 3
Date: 2024-01-04

Between:

Martin Gregory Nilson and Diane Cindy Nilson

Applicants/Appellants
(Defendants)

And

ABO Transport Ltd.

Defendant/Respondent
(Plaintiff)

Before:	Leurer C.J.S. (in Chambers)
Disposition:	Application dismissed, with conditions
Written reasons by:	The Honourable Chief Justice Leurer
On application from: Application heard:	QBG-MJ-00065-2015, Moose Jaw (Sask KB) December 13, 2023
Counsel:	Jeongmin Kim for the Appellants Kevin Mellor for the Respondent

Leurer C.J.S.

I. INTRODUCTION

[1] After a trial before a Court of King's Bench judge, ABO Transport Ltd. [ABO] was awarded a judgment against Martin Nilson and Diane Nilson [Nilsons] in the approximate amount of $600,000.00: *ABO Transport Ltd. v Nilson* (2 August 2023) Moose Jaw, QBG-MJ-00065-2015 (Sask KB). The Nilsons have appealed against the judgment and have applied for a stay of its execution while their appeal is being prosecuted.

[2] I have determined that the execution of the judgment should not be stayed. However, as a condition to refusing to direct a stay of execution, I order that any monies realized as a result of the execution of the judgment shall be paid into the Court of King's Bench and shall only be disbursed with the consent of the parties or by further order of a judge of this Court or a judge of the Court of King's Bench.

II. BACKGROUND

[3] The judgment arises out of a claim by ABO that the Nilsons had breached several contracts that granted it rights to remove and sell gravel from a pit located on the Nilsons' land. After trial, ABO was awarded the following damages:

For breach of contract	$538,455.30
Damage to a loader	$ 1,373.50
Punitive damages	$ 50,000.00
Total:	$589,828.80

[4] On the other side of the ledger, the judge found that ABO was liable to the Nilsons for $20,397.97 in unpaid royalties. The judge ordered that this liability be set off against the damages awarded in favour of ABO. The net result of all of this was a judgment in favour of ABO against the Nilsons in the amount of $569,430.83, plus prejudgment interest and taxable costs. A formal judgment has not yet been entered. It is for this reason that I have described its amount as being approximately $600,000.00.

[5] The judgment is dated August 2, 2023. The Nilsons filed a notice of appeal against it on August 31, 2023. The filing of a notice of appeal does not stay the execution of a judgment (see Rule 15(1) of *The Court of Appeal Rules*). However, Rule 15(3) allows the judge who granted the judgment, or a judge of this Court, to order a stay and "give any directions and orders that the judge considers appropriate in the circumstances".

[6] The Nilsons' notice of application for a stay of execution is dated November 20, 2023. In support of it, they rely on Mr. Nilson's affidavit sworn on November 16, 2023. It explains the Nilsons' limited financial means and swears to the truth of the assertions of fact made in the brief of law that they have filed in support of their application. The brief of law narrates some of the factual background to the lawsuit. It also discusses the law surrounding the granting of stays of execution. As part of this, they emphasize that their appeal is not frivolous or vexatious and they describe how they will face prejudice if ABO is allowed to enforce its judgment. In this regard, they say that ABO has many creditors. The Nilsons fear that any monies paid to ABO will be quickly taken by its creditors. Their concern is that if they prevail in their appeal, with the result that they do not owe the judgment amount, it will be impossible for them to recoup back what was paid over to satisfy the then-extinguished judgment debt. On the other hand, the Nilsons also say that ABO's position is not compromised if it cannot immediately execute on the judgment, because it is now registered against their property, thus ensuring that no material parts of their overall assets are put beyond ABO's later reach, should the judgment be upheld on appeal. Based on all of this, they say that "there is little risk that the Appellants [will] render the Judgment unrecoverable by the Respondent upon the granting of the stay" and therefore "the balance of the respective risk of irreparable harm to each party" justifies the imposition of the stay of execution.

[7] ABO has filed two affidavits of its principal, Allan Olson, in opposition to the requested stay. One was sworn under the style of cause of the proceedings in the Court of King's Bench. No objection was made to me considering its contents based on this fact. Mr. Olson's second affidavit was filed in direct response to the Nilsons' stay application. Taken together, the affidavits recount an unsuccessful effort by ABO to obtain a pre-judgment enforcement order, and they describe an attempt by the Nilsons to sell assets in July of 2023, before the judgment was rendered. The affidavits also summarize some of the evidence led at trial. This is part of ABO's effort to explain what it describes as the overall equities of the situation, including the facts that led to the punitive

damages award against the Nilsons. The affidavits further speak to the effect of the Nilsons' actions on Mr. Olson, and they provide some information as to the assets that the Nilsons might own that would be subject to execution while also noting difficulties that ABO has had in obtaining information to allow the costs to be finalized and to obtain an examination in aid of execution. Finally, the affidavits also contain various statements that amount to legal argument, and not statements of fact. I have ignored these in my consideration of the stay application. ABO has also filed a brief of law.

[8] I have not devoted much time to recounting the evidence in detail, because, as I will explain, the outcome of the application before me turns on a relatively narrow set of circumstances that allows me to balance the parties' competing interests in this case.

III. ANALYSIS

[9] Until Rule 15 was amended effective January 1, 2023, in most circumstances the filing of a notice of appeal against a judgment resulted in an automatic stay of its execution, unless that stay was set aside. Now the situation is reversed. A party who appeals against a judgment must apply to have its execution stayed. In this regard, Rule 15(1) states as follows:

> **Application for stay pending appeal**
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> **15**(1) Unless ordered pursuant to Subrule (3) or otherwise provided by law, the service and filing of a notice of appeal or an application for leave to appeal does not:
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> (a) stay the execution of the judgment appealed from;
>
> (b) stay proceedings in the action; or
>
> (c) invalidate any intermediate act or proceeding taken pursuant to the judgment.

[10] Although the starting point under Rule 15 has in most cases changed, the overall purpose of the Rule remains the same. *Lawson v Rees*, 2016 SKCA 37, 396 DLR (4th) 472 [*Lawson*], dealt with an appeal against an order for spousal support, which was a situation where, under the previous iteration of Rule 15, the filing of a notice of appeal did not give rise to an automatic stay of execution. Instead, a party who thought that a spousal support order should not be enforced while it was under appeal was required to apply for a stay of its execution – just as is now the case under Rule 15. In *Lawson*, Ryan-Froslie J.A. referred to what she described as the "well-settled" principles for when to lift a stay and then added that "the same objectives apply when *imposing a*

stay, namely, to prevent injustice, to ensure the result is as fair and equitable as possible for all sides, to minimize prejudice and to balance the competing interests" (at para 8, emphasis in original). There are many other cases that have applied similar principles to a determination of whether to impose a stay of execution or to lift one. See, for example, *Abrametz v The Law Society of Saskatchewan*, 2019 SKCA 21 at para 12, *Goodman v Saskatchewan (Community Operations)*, 2020 SKCA 51 at paras 41–44, and *Turtle v Valvoline Canadian Franchising Corp.*, 2021 SKCA 46 at paras 23–26 [*Turtle*].

[11] Both parties appropriately refer to *J.L. v T.T.*, 2023 SKCA 43, 91 RFL (8th) 305 [*J.L.*], as establishing the framework that I should apply in my consideration of the Nilsons' request for a stay of execution. In that case, Richards C.J.S. directed that, generally speaking, the same principles that guide the grant of an interlocutory injunction or a stay of proceedings – as summarized by this Court in *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120, 341 DLR (4th) 407 – should apply when there is a request for a stay of execution. In this regard, he wrote as follows:

> [16] The summary in *Mosaic* does not translate perfectly into the context of an application to stay a lower court decision pending the resolution of an appeal. However, as modified to fit the Rule 15 context, it suggests that a decision about whether to grant a stay should be made by proceeding as follows:
>
> > (a) The first step will normally be an assessment of the strength of the appeal. The general rule should be that, unless the appellant has raised a serious question as to the validity of the judgment under appeal, a stay is not appropriate. In other words, an appeal that is frivolous or vexatious cannot ground a stay. If the case is determined to involve a serious ground of appeal, the judge should turn to a consideration of irreparable harm and balance of convenience.
> >
> > (b) Irreparable harm is best seen as an aspect of the balance of convenience. The usual approach here is that the appellant must establish at least a meaningful doubt as to whether the loss they might suffer if the judgment is enforced during the time it takes for the appeal to be heard and decided will be something that is adequately compensable in damages that they would be able to recover. Put another way, the appellant must demonstrate a meaningful risk of irreparable harm. If this is done, the analysis turns to the balance of convenience proper.
> >
> > (c) The assessment of the balance of convenience will usually be the core of the analysis. In this regard, the relative strength of the appellant's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the appellant is likely to suffer before the appeal is decided if the stay is not granted, and they ultimately succeed on appeal, against the risk of the irreparable harm the

> respondent is likely to suffer if the stay is granted and they prevail on appeal. Nonetheless, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.

[12] Chief Justice Richards added that "there may be some limited circumstances where the line of approach just set out will not be directly applicable or where the subject matter of the case demands a special approach to the assessment of the equities of the situation" (*J.L.* at para 18). However, in this case, both parties argued on the basis that the *J.L.* framework is appropriately utilized to determine the outcome of the Nilsons' application.

[13] I am prepared to accept that the Nilsons' appeal is sufficiently meritorious to pass the first stage of the *J.L.* analysis. I do this recognizing that the only ground of appeal that they have developed or explained in their brief of law relates to one head of damages that accounts for only $174,000.00 of ABO's overall judgment amount. In other contexts, this might be important. More specifically, without being convinced that there was an arguable case that the entire judgment amount was susceptible to an attack on an appeal, a judge might be inclined to allow enforcement of the judgment up to its uncontested amount. However, I see two reasons to not employ this logic in this case.

[14] First, several of the Nilsons' grounds of appeal could be understood to challenge the entirety of the judgment. Indeed, their notice of appeal asserts that the whole of the judgment is being appealed. I would have explored in oral argument the other grounds of appeal so that I could assess their overall merits, had I been inclined to think that the Nilsons' stay application would flounder at the first stage of the *J.L.* analysis. This leads to the second point I would make about the role of a merits examination in the context of this application.

[15] I did not, during argument, delve more deeply into the merits of the Nilsons' other grounds of appeal because I was satisfied at the time, and remain convinced now, that in this instance the stay issue does not depend on the strength of their arguments on their appeal. As set out in *J.L.*, once the judge considering the merits of a stay application is satisfied that the appeal is not frivolous or vexatious, the analysis turns to the issues of irreparable harm and the balancing of convenience. Here, the outcome of the Nilsons' stay application is properly resolved through consideration of these two latter parts of the *J.L.* framework. Before explaining this conclusion, I would make one final point about this area of law.

[16] The grant or refusal of a stay of execution is not an all-or-nothing proposition. Chief Justice Richards made this point when he stated as follows in *J.L.*:

> [19] Further, it should be remembered that the question of whether to grant a stay is not an all or nothing proposition. The decision under appeal may be stayed either in whole or in part and, as well, it is open to a chambers judge to fashion an order involving new terms or provisions if the overall equities of the situation so require. See *Turtle v Valvoline Canadian Franchising Corp.*, 2021 SKCA 46 at paras 53-55.

[17] In *Turtle,* the issue was whether an injunction should be left in place pending the hearing and determination of the appeal against it. It was said in that case to be "cutting with too dull a knife" if the assessment were to devolve into a choice between whether to leave the injunction in place or to stay its operation pending the disposition of the appeal. Instead, it was held that "the overall equities and the justice of the situation are best balanced if a more surgical approach is taken – by ordering a *partial*, and *conditional*, stay of enforcement of the Queen's Bench Order" (*Turtle* at para 55, emphasis in original). I do not take this comment to limit the types of orders that may be made under Rule 15(3). As I have already observed, that Rule allows a judge determining a stay application to "give *any* directions and orders that the judge considers appropriate in the circumstances" (emphasis added). This provision allows a judge to impose conditions on the grant of a stay. However, it is also broad enough to encompass the attachment of conditions to the *refusal* of a stay, if such is required to prevent an injustice in the circumstances of the matter that is at hand.

[18] With this, I would return to the second and third parts of the *J.L.* framework. As explained in that case, irreparable harm is best seen as an aspect of the balance of convenience and the assessment of the balance of convenience will usually be the core of the analysis. Brought into the facts of this case, I view the overall balancing of interests can best be achieved by ordering that the application for a stay be dismissed but on conditions, as contemplated in Rule 15(3). I will briefly explain.

[19] The only harm that the Nilsons claim they may face if an execution on the judgment proceeds is that monies realized may be paid over to ABO's creditors, and thus would be unavailable to be returned should they ultimately prevail in their appeal. However, their counsel also agreed that this risk can be ameliorated if a direction is given that any monies that may be obtained through an execution of the judgment be paid into court. For its part, ABO agrees that it

will be satisfied if it is able to execute the judgment but must pay the proceeds into court. Accordingly, by ordering this to take place, the appropriate balance is reached between ABO's prima facie entitlement to enforce its judgment and the Nilsons' right to an appellate review of the judgment that is not rendered moot because of any steps that may be taken by ABO.

[20] Considering all of this, I see no basis upon which to order a stay of execution of the judgment. However, ABO shall pay any amounts that are obtained into court.

IV. CONCLUSION

[21] For the reasons I have given, I dismiss the Nilsons' application for a stay of execution, but do so on the condition that any monies realized as a result of the execution of the judgment shall be paid into the Court of King's Bench and shall only be disbursed with the consent of the parties or by further order of a judge of this Court or a judge of the Court of King's Bench. Should monies be realized as a result of the execution of the judgment and those monies are not paid into the Court of King's Bench, this matter may be brought back before me or another judge of this Court.

[22] The costs of the Nilsons' application are reserved to the panel that hears their appeal.

"Leurer C.J.S."

Leurer C.J.S.