COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

41-13-CA

BETWEEN:

IRVING SCHELEW

APPELLANT

- and -

LILLIAN SCHELEW AND JEFFREY SCHELEW

RESPONDENTS

ENTRE :

IRVING SCHELEW

APPELANT

- et -

LILLIAN SCHELEW ET JEFFREY SCHELEW

INTIMÉS

Motion heard by:
The Honourable Justice Richard

Motion entendue par :
L'honorable juge Richard

Date of hearing:
May 27, 2013

Date de l'audience :
Le 27 mai 2013

Date of decision:
July 3, 2013

Date de la décision :
Le 3 juillet 2013

Counsel at hearing:

For the appellant:
Brent R. Corbin

For the respondents:
Charles A. LeBlond, Q.C.

Avocats à l'audience :

Pour l'appelant :
Brent R. Corbin

Pour les intimés :
Charles A. LeBlond, c.r.

DECISION

[1] Irving Schelew (also referred to as "Mr. Schelew") is one of three executors of an Estate. The other two are the respondents, Lillian Schelew and Jeffrey Schelew. Mr. Schelew applies for certain relief pending the disposition of an appeal he has filed against a decision of a judge of the Court of Queen's Bench rendered on February 20, 2013. For the reasons that follow, his motion is dismissed.

[2] The procedural history leading up to Irving Schelew's appeal includes three hearings in the Court of Queen's Bench: the first on January 31, 2011, the second on September 4, 2012, and the third on February 20, 2013. It is this last one that led to the decision that is the subject of Mr. Schelew's current appeal. Each hearing led to a particular decision. To simplify the text, I will refer to each decision as the first, second and third decision, each corresponding, respectively, to the first, second and third hearing. In addition, the first hearing led to a formal order signed on March 22, 2011. I will refer to that as the "first order."

[3] All hearings related to the administration of the Estate and, in particular, to the marketing for sale of its last remaining asset. In the order that resulted from the first hearing, the application judge ordered Mr. Schelew to "provide his full cooperation and effort to sell the Property which will include giving permission to prospective purchasers to view the Property and inspect it, to cooperate in listing the Property for sale and to refrain from interfering in [any] efforts to sell the Property or to grant access to prospective purchasers." The order also provided that "[i]n the event the executors are not able to come to a unanimous decision with respect to any expenditure or offer to purchase, any of the executors may bring the matter before the Court for determination." Neither the first decision nor the first order was the subject of any appeal.

[4] In the aftermath of the first decision and order, Lillian and Jeffrey Schelew returned to court alleging that Irving Schelew had failed to cooperate in the listing for sale of the Property. They applied for directives, seeking an order that decisions with

respect to any eventual sale of the Property be made by a majority of the executors, or, in the alternative, that Irving Schelew be removed as an executor. In the second decision, delivered October 22, 2012, the motion judge concluded that Irving Schelew had "not provided his full cooperation and effort in assisting in the sale of the Property." He further concluded: "Irving Schelew continues to foster opposition to the sale of the Property and continues to attempt to thwart or postpone such sale." According to the judge, "it is clear that Irving Schelew wishes to re-litigate the issue of whether the Property should be sold." The judge affirms: "That issue has been decided." Notwithstanding these conclusions, the judge did not believe the executors had reached the point "where they are hopelessly deadlocked." He therefore gave them "one last chance to meet and come to an agreement with respect to those matters which must be concluded to facilitate the sale of the Property, including the selection and retainer of an appraiser." The judge therefore ordered that the executors hold a meeting to try to resolve these issues, failing which the parties could return to court for further directions. The second decision was not appealed.

[5] The parties returned to the Court of Queen's Bench again on February 20, 2013, on a very narrow issue to determine who should be the appraiser. On that same date, the motion judge stated the issue as follows: "How does the Court properly deal with the inability of the executors to act in concert?" In the end, the judge delivered the third decision in these terms:

> Given that the deadlock must be broken so that the estate can be administered properly and, in particular the sale of that property can proceed, in my view the appropriate mechanism where unanimity is not possible is to have the matter determined by a majority vote of the executors. The minutes of the November 16, 2012 executors' meeting record that a majority of the executors support the choice of Tim Lyons as listing agent. I confirm that decision. […] [That this refers to "listing agent" and not "appraiser" has not been raised as an issue.]

[6] After hearing the parties on the matter of costs, the judge continued:

> In my decision of October 22, 2012, I pointed out that the Respondent [Irving Schelew] was not cooperating in the sale of the property and I also mentioned that he continued to foster opposition to the sale, and that he was making attempts at that time to thwart the sale of the property. Despite what Mr.

> Corbin [Irving Schelew's lawyer] has said this afternoon, when I review Exhibit "B" to the Respondent's affidavit, I can come to no other conclusion but that his opposition to the sale continues. Many of the positions which he advanced at the executors' meeting and which are set out in Exhibit "B" to his affidavit (in particular I'm referring to items number 2, 4 and 5) relate not to facilitating the sale but questioning the wisdom of the sale itself. Paragraphs 27 and 32 of the Respondent's pre-motion brief and some of the comments that were made this afternoon in argument underline the fact that the Respondent is still opposing the sale of this property and he, in my view, insists on revisiting the question whether the property should be sold or not. I will reiterate that this is no longer an issue. That decision has been made.
>
> In my view the process to have the sale proceed has been needlessly delayed. The Applicants have been successful in this motion, and I award costs on this motion against the Respondent personally in the amount of $1500.

[7] It is the third decision that is the object of Irving Schelew's appeal to the Court of Appeal. Simultaneously, Irving Schelew has applied to the Court of Queen's Bench for the judge to vary both his second and third decisions. His grounds for this motion are that, at the second and third hearings, the judge "misinterpreted the formal judgment, dated March 22nd 2011, as it does not conform to his January 31st, 2011 oral decision." In short, Irving Schelew says the formal order prepared following the first hearing does not accurately reflect the judge's oral judgment. Specifically, he argues the judge never ordered the marketing for sale of the Property. As of the date of the hearing before me, the motion to vary had yet to be heard.

[8] By Notice of Motion to a judge of the Court of Appeal, Irving Schelew seeks the following:

> 1. The Court of Appeal declare that if the judgment from the February 22nd, 2013 hearing is formalized pursuant to Rule 62.13 (1)(f) that the Court retain jurisdiction to hear the Notice of Motion […];
>
> 2. In the alternative, pursuant to Rule 3.02(2) of the *Rules of Court*, an extension of time to file the formal judgment in relation to the February 22nd, 2013 hearing;
>
> 3. Pursuant to Rule 62.26(2) of the *Rules of Court*, a stay of proceedings of [the decision under appeal]; and

4. Solicitor-Client Costs.

[9] I will deal first with the request for a stay of execution of the decision under appeal. It is common ground that the governing principles consist of the three-part test formulated in the Supreme Court of Canada decisions in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, [1987] S.C.J. No. 6 (QL) and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (QL), requiring the court to consider (1) whether the appeal poses a serious challenge to the decision under appeal, (2) whether the applicant would suffer irreparable harm without the stay, and (3) whether the balance of convenience favours the order sought.

[10] With respect, Irving Schelew has not discharged the burden of convincing me that his appeal poses a serious challenge to the decision appealed from. In my view, his arguments impugning the validity of the third decision are nothing but a fribble attempt to re-litigate the first decision, which was made more than two years ago and which was not appealed.

[11] Irving Schelew insists that the first order does not reflect the oral decision the judge delivered on January 31, 2011. He claims that the judge's misunderstanding of the decision he had actually rendered therefore taints all of his subsequent decisions. In my view, this argument is devoid of merit for at least two compelling reasons. Firstly, neither the first decision nor the first order was ever the subject of any appeal. Secondly, the first order actually does reflect the judge's first decision. Juxtaposing both illustrates this last point:

<u>January 31, 2011 oral decision</u>	<u>March 22, 2011 order</u>
I am going to make an order as follows: That Irving Schelew provide his full cooperation in efforts to sell the property, which includes permitting perspective purchasers to view the property and inspect it, to cooperate in listing the property for sale if that's	IT IS HEREBY ORDERED AS FOLLOWS: 1. The Respondent Irving Schelew shall provide his full cooperation and effort to sell the Property which will include giving permission to

ultimately what the executors decide to do, and to refrain and be enjoined from interfering in the efforts to sell the property or to grant access to perspective purchasers. As I said earlier, we're not at the stage where we're asking, the Court is being asked to order a sale of the property. There's no firm offer been put forward to be considered, either by the executors or by the Court, so that is not an issue, a live issue before me. I believe it's important that on a go-forward basis that three would be some process put in pace so as to avoid misunderstandings and friction among the executors. In the event that there is to be any expenditure made by the estate for appraisals or other costs reasonably to be incurred in connect with any respective sale of the property, then there is to be a meeting of the executors to consider those expenditures. Jeffrey Schelew will be empowered to carry on any negotiations for the purchase and sale of the property. He will not have obviously any final authority to accept or reject any offer. He will therefore if there is an expenditure to be made he is to give fifteen days written notice by fax or certified mail to the other two executors of a meeting to be held in the City of Moncton in the province of New Brunswick to consider the expenditures. Similarly if ultimately an offer to purchase the property is made, or an agreement of purchase and sale is tendered, Jeffrey Schelew will, within fifteen days of receipt of such offer or tentative agreement, provide fifteen days notice, and so as I'm not to be confused here, there's a fifteen days within which the offer is received by Mr. Jeffrey Schelew, he has fifteen days then to send out a notice advising the other executors of the offer, and to call a	prospective purchasers to view the Property and inspect it, to cooperate in listing the Property for sale and to refrain from interfering in the Applicants' efforts to sell the Property or to grant access to prospective purchasers; 2. Should any expenditure need to be incurred by the Estate with respect to any matter relating to the potential sale of the Property including, without limitation, any appraisals or other costs, the Applicants and the Respondent, being the three executors of the Estate of Abraham Lackman, shall meet to consider such expenditures; 3. The Applicant Jeffrey Schelew will be empowered to carry on any negotiations leading to the sale of the Property; 4. Should any expenditure need to be made relating to a potential sale of the property or should an offer to purchase the Property be made, the Applicant Jeffrey Schelew shall give fifteen (15) days written notice by fax or certified mail to the Applicant Lillian Schelew and the Respondent Irving Schelew of a meeting to be held in the City of Moncton, New Brunswick to consider any such expenditure or any such offer to purchase. Any such meeting shall be held within fifteen (15) days of notice being given by the Applicant Jeffrey Schelew. 5. Any such executors meetings can, by unanimous consent, be held at some other place than the City of Moncton, New Brunswick or, by unanimous consent, be held by conference call or in such other fashion as the executors unanimously agree; and

meeting of the executors, again the meeting will be held in the City of Moncton. Any executors meetings can, by unanimous consent, be held in some other place or can be held by conference call or in such other fashion as the executors unanimously agree. The matter will then be put to the executors for a decision, and in the event that the executors are unable to come to a unanimous decision with respect to either the expenditure or in the event that an offer or sale or purchase is the matter that's being considered, then either any of the executors may bring the matter before the Court for determination.	6. In the event the executors are unable to come to a unanimous decision with respect to any expenditure or offer to purchase, any of the executor may bring the matter before the Court for determination.

[12] It is abundantly clear to me that the order reflects the judge's decision that the Property should be marketed for sale. The judge reiterated the intent of his first decision when he stated in his second decision that "it is clear Irving Schelew wishes to re-litigate the issue of whether the Property should be sold", adding that "[t]hat issue has been decided" and then making an order giving the executors "one last chance to meet and come to agreement with respect to those matters which must be concluded to facilitate the sale of the Property." He repeated it again in his third decision, stating that "[t]he decision has been made, in princi[ple], that the property will be sold."

[13] Mr. Schelew anchors his argument on the following statement in the first decision: "We're not at the stage where we're asking, the Court is being asked to order a sale of the property." He claims this statement indicates the judge did not order that the property should be sold.

[14] With respect, that argument is frivolous. The judge's statement, read in context, does nothing more than state the obvious: there was no offer for the purchase of the property in respect of which a failure to gain the unanimous approval of the executors would require court intervention. It takes two parties for anyone to conduct a sale: a seller and a purchaser. The fact that there was no purchaser did not, however, preclude the

judge from making a determination that it was in the best interests of the estate that the Property should be offered for sale. That is what the judge decided on January 31, 2011; it is what is reflected in the order he signed on March 22, 2012; and it is consistently the position the judge maintained in his two subsequent decisions. I am left to conclude, as did the motion judge in his third decision, "that [Irving Schelew's] opposition to the sale continues." In my view, with his appeal and his motion for a stay of execution, Mr. Schelew is simply trying to delay what the judge ordered done on January 31, 2011. The matter was decided then and there was no appeal.

[15] Irving Schelew also claims the judge erred in his interpretation and application of the case law relating to the court's jurisdiction to break a deadlock between executors and in relation to his interpretation and application of case law relating to the best interests of an Estate. I have not been persuaded that there is any merit to those grounds of appeal. Even if I had been, I would still not grant the stay Mr. Schelew seeks. The decision that the property should be sold was made in January 2011 and is now beyond the reach of the Court of Appeal. The purpose and intent of the third decision was merely to give effect to the earlier decision by appointing the majority's choice of a listing agent. No irreparable harm has been shown to flow from this narrow decision and the balance of convenience favours that effect should be given to the Court's earlier decisions rather than delay their implementation.

[16] Irving Schelew's last ground of appeal is that the judge erred in law when he awarded costs against him. He claims the judge's order was based on "his mistaken belief that he had previously ordered the sale of the building." As I have already stated, the judge had indeed ordered that the building be offered for sale. There was no mistaken belief on the judge's part. In any event, no irreparable harm flows from the judge's order of costs, and the balance of convenience does not favour Mr. Schelew.

[17] For these reasons, I dismiss Irving Schelew's motion for a stay of execution.

[18] In the motion before me, Mr. Schelew also claims he is caught in a classic catch-22 situation and seeks directions accordingly. He is now required to perfect his appeal and Rule 62.13(1)(f) of the *Rules of Court* requires him to file an Appeal Book in which he must include a copy of the formal judgment reflecting the third decision. However, Mr. Schelew has also applied for the motion judge to vary his third decision. Rule 60.03(4) provides that "[b]efore judgment is entered, a party may apply on motion to the judge to vary his decision" (emphasis added). Mr. Schelew's motion to vary has been filed but, as of the date of the hearing before me, a hearing date had yet to be set. The paradoxical situation flows from the fact that if Irving Schelew perfects his appeal he will not be able to proceed under Rule 60.03(4), but if he wants to proceed under Rule 60.03(4) he will be unable to perfect his appeal as required by Rule 62.

[19] In his notice of motion, Mr. Schelew requests that the Court of Appeal declare that if he obtains a formal judgment relating to the third decision, the Court of Queen's Bench judge would nevertheless retain jurisdiction to vary his decision. I am unable to grant such relief. First, the relief is sought from the Court of Appeal, not from a single judge; and second, I am not aware of any basis upon which such a declaration could even be made. Alternatively, Mr. Schelew seeks an extension of time to file the formal judgment relating to the third decision until after his motion to vary has been determined. Rule 62.22(1)(e), of the *Rules of Court* does give me the power to vary the requirements of Rule 62. Therefore, I could relieve Mr. Schelew of the obligation to include a formal judgment in his Appeal Book. This would resolve Mr. Schelew's dilemma. However, in the final analysis, I conclude his appeal is frivolous. On the record before me, I also conclude his motion to vary is frivolous. In light of these conclusions, I opt not to exercise my discretionary powers under Rule 62.22(1)(e). If the motion to vary has not been determined by the date my decision is released, Mr. Schelew will have to opt whether he wishes to proceed with the appeal from the third decision or with his motion to vary the third decision. Based on the record before me, I believe both are equally destined for failure.

[20] Evidently, Irving Schelew has not perfected his appeal within the time prescribed in Rule 62. The Respondents acknowledged I should extend the time for him to perfect. I therefore extend the time for Irving Schelew to perfect his appeal to July 26, 2013.

[21] In his motion before me, Irving Schelew argued that he should be awarded costs of the motion on a solicitor and client basis on the grounds that the solicitor for Lillian and Jeffrey Schelew had breached his ethical duty to the court by standing mute as the judge of the Court of Queen's Bench made the second and third decisions, which he claims did not accord with his first decision. For the reasons already given, this argument is devoid of any merit and is frivolous. The judge's first order reflects his first decision, and the behaviour of counsel for Lillian and Jeffrey Schelew's is beyond reproach. At the hearing before me, counsel for Irving Schelew apologized for having questioned the ethics of Lillian and Jeffrey Schelew's lawyer. But for this apology, I would have awarded costs against Irving Schelew on the same basis he sought them.

[22] Irving Schelew also sought costs on a solicitor and client basis on the grounds of some alleged conflict of interest with respect to Bernard Schelew, who is not a party to these proceedings. There is no merit to this argument.

[23] In the final analysis, Irving Schelew's motion is dismissed and I order him to personally pay one set of costs to Lillian Schelew and Jeffrey Schelew in the amount of $2,500. As stated above, I extend the time for Mr. Schelew to perfect his appeal to July 26, 2013. Considering the time frames involved, I order the initial release of this decision in the English language, with a later release of the French version.