NOVA SCOTIA COURT OF APPEAL

Citation: Van de Wiel v. Blaikie, 2005 NSCA 14

Date: 20050125
Docket: 235400
Registry: Halifax

Between:

Anthony J. Van de Wiel and Deborah Van de Wiel

Appellants

v.

D. Alden Blaikie, L.L.B., Barrister and Solicitor

Respondent

Judge:	The Honourable Justice Cromwell
Application Heard:	January 20, 2005, in Halifax, Nova Scotia, In Chambers
Held:	Application allowed in part.
Counsel:	Bradford Yuill, for the appellants Milton Veniot, Q.C., for the respondent

Decision:

[1] The respondent applies for an order declaring that the appellants' appeal is out of time and is deemed to be, and is, dismissed for that reason. The basis of the application is the respondent's submission that this is an interlocutory appeal which was filed beyond the ten day time limit applicable to interlocutory appeals (**Rule** 62.02(1)(a)) and which the appellants have failed to apply to set down as required by **Rule** 62.05. Under the provisions of **Rule** 62.05, the failure to apply to set the appeal down as required by that **Rule** results in the appeal being deemed dismissed unless a judge otherwise orders. The main issue in contention is whether this is indeed an interlocutory appeal so that the ten day time limit and the requirements of **Rule** 62.05(3) apply.

[2] In brief, the background is this.

[3] The respondent, Mr. Blaikie, is a solicitor. He acts for Mervin Werry and Marguerite Werry in a law suit brought by them against the Van de Wiels. According to the pleadings in the material before me, that law suit relates to the purchase by the Werrys of a residential property from the Van de Wiels.

[4] The Van de Wiels then commenced an action against Mr. Blaikie alleging professional misconduct, incompetence and the infliction of physical, emotional and mental abuse on them. It appears that these allegations arise out of his representation of the Werrys in their action against the Van de Wiels.

[5] Mr. Blaikie defended the action against him and demanded particulars of the plaintiffs' claims. He applied to Goodfellow, J. in Supreme Court Chambers in late September 2004 for an order directing that the Van de Wiels provide a proper mailing address, civic address and telephone number pursuant to **Civil Procedure Rule** 14.03(1)(b), directing that the plaintiffs forthwith provide their reply to the defendant's demand for particulars, requiring the plaintiffs to file their list of documents and for other relief.

[6] Goodfellow, J. issued an order on the 24th of September, 2004, requiring the plaintiffs to provide the address and other contact information as requested by Mr. Blaikie in his application, directing them to provide their reply to the demand for particulars and their list of documents within ten days of personal service of the order upon them. The order also required service upon a psychologist in Truro. This order was subsequently amended by Goodfellow, J. on the 5th of November, 2004, to change the name of the psychologist on whom service was to be effected to the name of a

psychiatrist also in Truro. All other provisions of the September 24th order remained unchanged.

[7] Mr. Blaikie applied to MacDonald, A.C.J. (as he then was) on October 7th, 2004, for an order striking the Van de Wiels' proceeding on account of the Van de Wiels' failure to comply with Goodfellow, J.'s order. On October 7th, MacDonald, A.C.J. S.C. issued an order striking out the Van de Wiels proceeding against Mr. Blaikie and ordering the plaintiffs to pay costs. This order was subsequently issued on the 22nd of October, 2004.

[8] The Van de Wiels, through Mr. Yuill, filed a notice of appeal on November 15th, 2004, appealing the three orders to which I have just referred: the September 24th order of Goodfellow, J.; the November 5th order of Goodfellow, J. changing the name of the health practitioner on whom the order was to be served; and the October 22nd order of MacDonald, A.C.J.S.C. The notice of appeal requests leave to appeal which, of course, is required in appeals from interlocutory but not final orders.

[9] On behalf of Mr. Blaikie, Mr. Veniot submits that all of these orders were interlocutory in nature and, therefore, the only appeal filed in time is that in relation to Goodfellow, J.'s November 5th order. The Van de Wiels have not applied to Chambers for an order setting down the appeal at any time and, if the orders are interlocutory, they have clearly failed to comply with **Rule** 62.05(3) with the effect that the appeal is deemed to be dismissed unless a judge otherwise orders.

[10] So the primary issue is whether any or all of these orders are interlocutory orders.

[11] There is voluminous case law about whether orders should be characterized as final or interlocutory for various purposes. What turns on the distinction in the present case is whether an appeal period of ten days (coupled with a special requirement to apply promptly to set the appeal down) or an appeal period of thirty days (with no special setting down requirements) applies. The short time limits provided in the Rules for interlocutory appeals attempt to reduce unnecessary delay and expense in litigation by preventing it from becoming bogged down in interlocutory matters thus delaying progress towards final resolution of the real dispute between the parties.

[12] In general, an order is interlocutory which does not dispose of the rights of the parties in the litigation but relates to matters taken for the purpose of advancing the matter towards resolution or for the purpose of enabling the conclusion of the proceedings to be enforced: see **Cameron v. Bank of Nova Scotia et al.** (1981), 45 N.S.R. (2d) 303 (S.C.A.D.).

[13] In **Irving Oil Ltd. v. Sydney Engineering Inc.** (1996), 150 N.S.R. (2d) 29 (C.A. Chambers), Bateman, J.A. considered the distinction between interlocutory and final orders. Although finding it unnecessary to conclusively determine the nature of the order in the case before her, she cited with approval the first edition of **The Conduct of an Appeal** by Sopinka and Gelowitz (1993) at p. 15 which described the distinction as follows:

> Where such orders have a terminating effect on an issue or on the exposure of a party, they plainly "dispose of the rights of the parties" and are appropriately treated as final. Where such orders set the stage for determination on the merits, they do not "dispose of the rights of the parties" and are appropriately treated as interlocutory.

[14] Mr. Veniot's principal submission is that MacDonald, A.C.J.'s order striking the proceeding did so on purely procedural grounds and did not, therefore, dispose of the rights of the parties on their merits. The order, he says, would not provide the basis for *res judicata* or issue estoppel with respect to the substantive claims asserted by the Van de Wiels against Mr. Blaikie. The order, he submits, should therefore be categorized as interlocutory because, to paraphrase the passage cited by Bateman, J.A. in **Irving**, it does not dispose of the rights of the parties. As Mr. Veniot put it in his helpful memorandum:

> This is as clear a case as ever will be seen of a proceeding struck, on an interlocutory basis, for repeated failures to comply with the **Civil Procedure Rules**. It does not determine anything between the parties with any finality, other than that this particular proceeding, because of the repeated failures to comply with the **Civil Procedure Rules**, even, after the numerous notices given, would be struck.

[15] Mr. Yuill, on behalf of the Van de Wiels, agrees that while Goodfellow, J.'s first order, considered on its own, is clearly interlocutory, MacDonald, A.C.J.'s order striking the proceeding had a terminating effect on the proceeding and therefore ought to be categorized as a final order. He submits, however, that as the order of Goodfellow, J. was the foundation of the application to MacDonald, A.C.J., it ought to be treated as a related matter and, therefore, subject to the same thirty day time limit for appeal. Alternatively, Mr. Yuill says that Goodfellow, J.'s September order was amended on November 5th and that the appeal period ought to be considered as running anew from that date. As noted, the notice of appeal was filed on

November 15th which is within the ten day period reckoned from November 5th.

[16] Counsel agree that there is no extension of time application before me or any application not to deem the appeal dismissed within the meaning of **Rule** 62.05(3). Neither counsel wishes me to deal with extension of time issues in the context of the present application.

[17] The narrow point requiring decision, therefore, is whether an order striking out a proceeding on procedural grounds is a final order even though it is not an adjudication on the merits of the claim which has been struck out.

[18] While I have not been referred to Nova Scotia authority dealing directly with this point, the answer, in my view, is clear. An order striking out a proceeding on whatever ground is a final order because it disposes of the proceeding even though it may not dispose of the rights of the parties asserted in it.

[19] This has been the law in Ontario since at least **Ainsworth v. Bickersteth, et al.**, [1947] O.R. 525 (C.A.). In that case, the statement of claim was struck on the basis that it disclosed no reasonable cause of action against the defendants but without prejudice to any further action the plaintiff might have been advised to take. The court held that this was a final and not an interlocutory order.

[20] In **Re: Buck Brothers Ltd. v. Frontenac Builders Ltd.** (1994), 19 O.R. (3d) 97 (C.A.), the order in question was one concerning an arbitration clause in a contract between joint venturers. One party applied to the court for an order that it was entitled to proceed to arbitration under the clause but the motions court judge ordered that whether the conditions for arbitration had been satisfied should be determined by the arbitrators. The question was whether this order was final or interlocutory. The court held that it was a final order because it finally determined and ended the particular proceeding before the court. It should not, reasoned the court, be considered interlocutory simply because it did not finally determine the other, quite possibly, larger issues between the parties which might subsequently be determined in some other proceeding or by some other process. The following comments of Morden, J.A., writing for the court, are apt for the present application and I quote them in full:

> The starting point for consideration of whether the order of Sutherland J. is final or interlocutory is the following much-quoted statement of Middleton J.A. in *Hendrickson v. Kallio,*, [1932] O.R. 675 at p. 678, [1932] 4 D.L.R. 580 (C.A.):

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties – the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.

In one sense, it can be said that the order in question does not determine "the real matter in dispute between the parties" (which is the right of the moving parties to be paid fair and equitable consideration by the responding parties and, if so, its amount, or, something less than this, whether the condition precedent to commencing an arbitration proceeding has been met). I do not think, however, that, in the circumstances, the order is interlocutory. I read the passage from Hendrickson v. Kallio as referring to "the real matter in dispute between the parties" in the proceeding which is before the court and not in some other proceeding which may, or may not, then be in existence. ...

The foregoing conclusion is not merely a matter of interpreting the words in Hendrickson. It is, in my view, in accord with the purpose of a provision which categorizes orders for appeal purposes. I have difficulty concluding that an order on an issue raised in a proceeding which ends the proceeding is interlocutory simply because it does not finally determine another, quite possibly larger, issue between the parties which may be subsequently determined in some other proceeding or by some other process.

(Emphasis added)

[21] After referring to several Ontario authorities, Morden, J.A. concluded that it was not relevant that the rights asserted in the proceeding could possibly be asserted in another proceeding and that in that sense, the order may not have finally decided the real matter in dispute between the parties. The order in issue was final because it ended the proceeding.

[22] This approach has been followed in the British Columbia Court of Appeal. For example, in **Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.** (1995), 23 B.C.L.R. (3d) 251, at 255, Hines, J.A. held that the distinction between final and interlocutory orders depends on the effect that the order has on the status of the litigation. See also **Burlington Northern Railway Co. v. Canadian National Railway** (1994), 10 B.C.L.R. (3d) 302 (C.A.) and **Noel Developments Ltd. v. Metro-Can Construction Ltd.**, [1997] B.C.J. No. 2032 (Q.L.) (C.A. Chambers).

[23] The **Ainsworth** and **Buck Brothers** approach has also been followed in New Brunswick: **Perley v. Sypher**, [1990] N.B.J. No. 866 (Q.L.)(C.A.).

More recently, Robertson, J.A. in **Doug's Recreation Centre Ltd. v. Polaris Industries Ltd.**, [2001] N.B.J. No. 162 said:

> ¶ 8 The notion that a final order is one that decides the merits of a case is well accepted at law. Nevertheless, the question remains whether a decision or order can be viewed as final in circumstances where the merits of a case have yet to be decided, albeit in another province. In my view, where an order of the Court of Queen's Bench has the effect of bringing proceedings in that Court to an end that order must be deemed a final order. This is so despite the fact that the merits of the case remain to be decided in another forum. The same conclusion was reached in *Buck Bros. Ltd. v. Frontenac Builders Ltd.* (1994), 19 O.R. (3d) 97 (C.A.). (Emphasis added)

[24] I conclude, therefore, that an order is final for the purposes of **Rule** 62 if the order has the effect of bringing proceedings to an end. Of course, orders that do not have this effect may also be characterized as final in certain circumstances but I do not need to deal with those situations for the purposes of this application.

[25] The order of MacDonald, A.C.J. striking out the Van de Wiels' proceeding terminated that proceeding. It is, therefore, a final order and the present appeal was filed within the thirty day time limit applicable to appeals from final orders.

[26] However, I do not accept Mr. Yuill's submission that the prior orders of Goodfellow, J. should be characterized as final because the failure to comply with those orders led ultimately to the striking of the proceeding by MacDonald, A.C.J. I am aware of no authority to support that position. The authority that I have been able to find is to the opposite effect.

[27] In **Laurentian Plaza Corp. v. Martin** (1992), 7 O.R. (3d) 111 (C.A.), the court held that an order setting aside a default judgment on conditions should be characterized as interlocutory even though the effect of the order would be final if the conditions placed upon the setting aside of the judgment were not met. Morden, J.A., for the court, said at p. 116:

> It can, of course, be fairly said that the effect of the order will be final if the conditions are not met. This is what makes the question a difficult one.
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> . . .
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> ... As a matter of policy it may seem that some of these orders, which, analytically, are interlocutory, might be appropriately treated as final -- but, if this were to be done, where would the line be drawn and how could the definition of

what is final be expressed so that it could be applied with some degree of predictability or confidence?

[28] In my view, this approach is consistent with the purpose of having short time limits for interlocutory appeals. The September 24 order of Goodfellow, J. directed the Van de Wiels to take some routine procedural steps which, the judge decided, they ought to have taken without the necessity of being ordered to do so. His order was clearly for the purpose of advancing the litigation towards some final resolution on its merits. If it was to be appealed, it ought to have been appealed promptly. It is not desirable that we should be debating in January of 2005 the correctness of Goodfellow, J.'s order directing the Van de Wiels to respond to a demand for particulars, to file their list of documents and to take other certain routine procedural steps.

[29] I similarly do not accept Mr. Yuill's submission that the amendment of Goodfellow, J.'s order on November 5th started the time for appeal running again. That amendment related only to service on the medical practitioner and did not in any way vary the substance of the obligation which Goodfellow, J.'s initial September 24th order had imposed on the Van de Wiels.

[30] In the result, I conclude that:

(1) the appeal filed on November 15th insofar as it relates to the directions given by Goodfellow, J. in his September 24 order was filed out of time. Withe respect to both that order and the amended order of November 5th, there has been no application to set the appeal down as required by **Rule** 62.05(3) and the appeal insofar as it relates to these orders is therefore deemed dismissed unless a judge otherwise orders;

(2) the October 22nd order of MacDonald, A.C.J.S.C. is a final order. The notice of appeal filed on November 15th was accordingly filed in time and the requirements of **Rule** 62.05(3) do not apply to it.

[31] Success on the application has been divided. I order that the costs of the application fixed at $750.00 plus disbursements will be costs in the cause of the main appeal.