Date: 20010907
Docket: CA 170891

NOVA SCOTIA COURT OF APPEAL

[Cite as: MacDonnell v. Campbell, 2001 NSCA 123]

BETWEEN:

LEONARD MacDONNELL

Appellant

\- and -

MARK CAMPBELL and UAP INC.

Respondents

D E C I S I O N

Counsel: Michael LeBlanc for the appellant
Peter M.S. Bryson, Q.C. for the respondents

Application Heard: September 6, 2001

Decision Delivered: September 7, 2001

BEFORE THE HONOURABLE JUSTICE ROSCOE IN CHAMBERS

<u>ROSCOE, J.A.</u>: (in chambers)

[1] This is an application by the respondent for security for costs pursuant to **Civil Procedure Rule 62.13**. The appeal is scheduled to be heard on November 19, 2001. The appellant was supposed to file the Appeal Book on August 15, 2001, and his factum on August 29, 2001 but has not complied with these directions. Mr. LeBlanc, counsel for the appellant, appeared on the application but advised that he has no instructions from his client.

[2] The matter arises from an automobile accident. The appellant, who was the plaintiff at trial, claimed he was seriously injured and suffered substantial loss of income as a result of his injuries. The trial judge found the appellant to be not credible. Although he claimed damages in excess of $650,000, she awarded him $10,000 in general damages and past loss of income of $960. Then, after hearing the parties with respect to costs, and considering an offer to settle made by the defendants prior to trial, she ordered the appellant to pay costs to the respondents in the amount of $17,603.95 plus disbursements. After offsetting the damages award, the appellant (plaintiff) was ordered to pay the defendant $10,547.95. Although a judgment has been issued, no payment has been made.

[3] In addition to the unpaid judgment owing to the respondents, the appellant has two other judgments registered against him totalling $36,567.42.

[4] The appellant has not filed any affidavit in response to the application for security for costs. The respondent has referred to **Frost v. Herman** (1977), 18 N.S.R. (2d) 167, where Macdonald, J.A. said at p. 168:

> ... In my view, however, the discretion given a judge under the present Rule 62.13 to order security "as he deems just" should not be exercised in favour of an applicant unless special circumstances exist for so doing.

And at p. 171:

> 9 Accepting the declaration of the solicitor for the appellant that he believes that the latter is not insolvent and is in a position to pay his just debts, the fact remains that he has not paid the costs taxed against him even though an execution order therefor has been issued. In my view, the following words of Bowen, L.J., in *Cowell v. Taylor* (1885), 31 C.D. 34 (C.A.), at p. 38, in referring to the position of an insolvent appellant are particularly apt:
>
>> 3 ... there the appellant has had the benefit of a decision of one of Her Majesty's courts, and so an insolvent party is not excluded

> from the courts, but only prevented, if he cannot find security,
> from dragging his opponent from one court to another.

> 10 The appellant has acted in an insolvent manner toward the respondent and whether or not the former is in fact insolvent is not for me to decide. The respondent has reason to be apprehensive about the recovery of his costs.

[5] The same can be said of the appellant, here, that is, that he has acted in an insolvent manner toward the respondents and there is good reason for the respondents to be apprehensive about the recovery of costs, both at trial and after the appeal if they are the successful parties.

[6] Accordingly, I will order that the appellant post security for costs in the amount of $2,000 on or before October 5th, 2001 in the manner set out in the order submitted by the respondents' counsel — which I will sign.

Roscoe, J.A.