

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.* ,  
2007 NSCA 26

**Date:** 20070216

**Docket:** CA 274238

**Registry:** Halifax

**Between:**

W. Eric Whebby Limited, a body corporate

Appellant

v.

Doug Boehner Trucking & Excavating Limited, a body  
corporate, United Gulf Developments Limited, a body  
corporate, Greater Homes Inc., a body corporate, and  
Garden Crest Developments Limited, a body corporate,

Respondents

- and -

United Gulf Developments Limited, a body corporate,  
Greater Homes Inc., a body corporate, and Garden Crest  
Developments Limited, a body corporate

Appellants by Cross-Appeal

**Judge:** The Honourable Justice Jamie W. S. Saunders

**Application Heard:** February 15, 2007, in Halifax, Nova Scotia, In Chambers

**Held:** Application allowed

**Counsel:** Christopher Wilson, for the appellant  
Michael Wood, Q.C., for Doug Boehner Trucking & Excavating  
David Farrar, Q.C., for United Gulf Developments, not appearing  
David Coles, Q.C., for Garden Crest Developments, not appearing

**Decision:**

[1] This multi-party appeal is scheduled to be heard on Wednesday, April 11, 2007. A full day has been set aside.

[2] This is really an appeal with two parts. Owing to a bizarre set of circumstances the appeal process has been bifurcated in the sense that one day has been set aside for this Court to determine if a new trial should be ordered. If such a direction does not result from the hearing on April 11, then June 14, 2007 has been earmarked for a second hearing that will, presumably, focus more on the merits of the appeal.

[3] What makes this case - and the procedures developed to accommodate it - so unique is that during final arguments after a four day trial before Justice Charles E. Haliburton of the Nova Scotia Supreme Court, he advised counsel that through an apparent mechanical malfunction of the court's recording system, none of the evidence taken at trial had been recorded. A discussion then ensued with counsel after which it was decided that Haliburton, J. would hear the balance of oral submissions and deliver a decision. The trial judge rendered his decision on April 21, 2006 and the order was taken out on October 25, 2006.

[4] For the purposes of my decision today it will not be necessary for me to delve too deeply into the facts. Suffice it to say that this litigation arose over contaminated soil at a construction site. Claims and counter-claims were launched to assess responsibility and damages following the remediation of the property.

[5] In his decision the trial judge found the cost of remediation to have exceeded \$500,000.00. He apportioned liability, in varying degrees, among all of the parties.

[6] The applicant today, Doug Boehner Trucking and Excavating Limited ("Boehner") is one of several respondents. Boehner is the only respondent that has not filed a cross-appeal. Boehner seeks an order pursuant to **Civil Procedure Rule 62.31(7)(e)** extending the time by which it may be permitted to file and serve a notice of cross-appeal.

[7] The material facts to support this application are precisely set out by Boehner's counsel, Mr. Michael Wood, Q.C. in his supporting memorandum:

The matter arises out of the supply of certain soil collected by the Appellant, W. Eric Whebby Ltd. (“Whebby”), from lands owned by the Respondent, Garden Crest Developments Limited (“Garden Crest”). The soil that was obtained by Whebby from Garden Crest was then sold to Whebby and Boehner. This soil was then delivered to Boehner and was used by Boehner as landscaping and backfill materials around homes that were built upon lands owned by the Respondent, United Gulf Developments Limited and its related company Greater Homes (“United”). As it turned out, the soil that was supplied by Garden Crest to Whebby, sold by Whebby to Boehner and then used by Boehner upon the lands of United was contaminated with heavy metals and hydrocarbons.

An action was commenced by Boehner as against United for the recovery of the amounts owing for the work completed by Boehner in backfilling the lands in question. United then issued a counter-claim against Boehner seeking the costs of the remediation of the property. Boehner, in turn third partied Whebby. Whebby then partied Garden Crest.

The trial of this matter took place from March 6-9, 2006. During the closing arguments, the parties were advised by the Court that the evidence heard during the entire trial had not been recorded. Apparently there had been a malfunction in the Court’s recording system. The parties agreed to carry on with closing arguments and have the Honourable Justice Haliburton render a decision.

After considering the evidence, the Honourable Justice Haliburton ordered that Whebby was liable for the sum of \$221,510.00, which was to be paid into court (or as otherwise agreed among counsel) for the benefit of Boehner and United. Justice Haliburton also ordered that Garden Crest was liable for the sum of \$36,002.00, which was to be paid into court (or as otherwise agreed among counsel) for the benefit of Boehner and United. Lastly, Justice Haliburton ordered that Boehner and United were equally liable for the balance of the remediation costs, in the amount of \$242,606.00. The Order After Trial in this matter was issued on October 25, 2006.

Following the issuance of the Order After Trial, the following documents were filed with the Registrar:

- (a) November 22, 2006 - Notice of Appeal (C.A. No. 274238) filed by Whebby;
- (b) November 22, 2006 - Notice of Appeal (C.A. No. 274309) filed by United;
- (c) November 23, 2006 - Amended Notice of Appeal (in C.A. No. 274238) filed by Whebby; and

- (d) November 24, 2006 - Notice of Cross-Appeal (in C.A. No. 274309) filed by Garden Crest.

Boehner did not file a Notice of Cross-Appeal in either of the appeals filed by Whebby or United.

On December 14, 2006, the Honourable Justice Thomas Cromwell issued an Order whereby C.A. No. 274238 and C.A. No. 274309 were consolidated and were to be continued in the proceeding C.A. no. 274238. This Order also provided that the Notice of Appeal filed by United shall serve as a Notice of Cross-Appeal in the consolidated appeal and the Notice of Cross-Appeal filed by Garden Crest would serve as a Notice of Cross-Appeal in the consolidated appeal.

In accordance with the directions of the Honourable Justice Cromwell, the hearing of the Consolidated Appeal has been split into two separate hearings. The first Appeal is scheduled to take place on April 11, 2007 and will deal solely with the issue as to whether the absence of a trial transcript is sufficient for the Court of Appeal to order a new trial. Dates have been set for the filing of factums in this first appeal. Boehner does not wish to file a Notice of Cross-Appeal with respect to this hearing.

The second Appeal is scheduled to take place on June 14, 2007 and will deal with the substantive merits of the issues that were before and decided by Justice Haliburton. No dates have been set for the filing of factums in this second appeal. Boehner seeks leave for an extension of the time by which Boehner is permitted to file a Notice of Cross-Appeal with respect to this appeal.

[8] Today's application was opposed by the appellant W. Eric Whebby Ltd. ("Whebby") with Mr. Christopher Wilson arguing in the place of senior counsel Mr. George MacDonald, Q.C. who was tied-up in an ongoing trial.

[9] In response to my questions I was advised by Mr. Wood that he was authorized by Mr. David Coles, Q.C., solicitor for Garden Crest Developments Limited ("Garden Crest") to say that the latter would take no position concerning today's application. Further, Mr. Wood advised that he and Mr. David Farrar, Q.C., solicitor for United Gulf Developments Limited, and Greater Homes Inc. ("United Gulf and Greater Homes") had reached agreement on many of the issues between their respective clients and that therefore Mr. Wood did not anticipate any opposition by United Gulf and Greater Homes to Boehner's application.

[10] With those assurances I was prepared to proceed.

[11] In his able submission on behalf of Whebby, Mr. Wilson stressed - quite properly - that the materials filed in support of the application failed to state any reason why the notice of cross-appeal had not been filed within the time limited by our Rules. While recognizing that permitting an extension of time is an exercise of judicial discretion, Mr. Wilson made a strong case for the proposition that such discretion should not be exercised in favour of a party who advances no reasons for failing to comply with the Rules.

[12] Mr. Wood acknowledged that the affidavit filed in support of his application had not offered a reason or excuse for the delay. However, he argued that absence of an excuse per se - while an appropriate factor to consider in applications such as this one - should not stand as a bar to obtaining the court's leave, where justice requires it.

[13] For the reasons that follow I would accept Mr. Wood's submissions and allow the application.

[14] While ordinarily one would expect to see evidence, by way of affidavit, which would identify and explain the reason or excuse for late filing, such an approach should not be seen as a hard and fast requirement or "rigid hurdle" that every applicant must always overcome, to succeed on the application.

[15] The granting of an extension to file an appeal pursuant to **Civil Procedure Rule 62.31(7)(e)** is discretionary. The objective must always be to do justice between the parties. The test is simple: does justice require that the application succeed? In making that determination my assessment should be flexible and take into account all relevant circumstances. **Jollymore v. Jollymore Estate**, 2001 NSCA 116 (in Chambers); **Scotia Chevrolet Oldsmobile Ltd. v. Whynot**, (1970) 1 N.S.R. (2d) (1041) (N.S.S.C.A.D.) and **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 (N.S.C.A.).

[16] As I made clear in **Jollymore**, supra, the so-called three-part test may serve as a useful guide but it was never intended to be a fixed grid onto which all cases would be slotted to see if they made the grade.

[17] I am satisfied that there are important factors which mitigate in favour of granting the application.

[18] The grounds of the proposed cross-appeal are not frivolous and appear to have been carefully considered.

[19] Dates for filing facta leading up to the June 14, 2007 hearing - should such a hearing take place - have not yet been fixed. Consequently, granting Boehner a short extension will have no ill effect on the June hearing date.

[20] The delay here has been of relatively short duration. Had Boehner acted in a timely fashion its notice of cross-appeal would likely have been filed in early December, 2006. That is not so long ago as to cause any real hardship to any of the other parties.

[21] This is a case that is already under appeal, albeit in unusual bifurcated circumstances. This makes it different than a situation where a party seeks an extension of time to initiate an appeal. As in **Tibbetts**, supra, the decision of the trial judge in this matter is already under appeal. The hearing of this appeal on its merits (should that be required) has been scheduled for June 14, 2007, approximately four months from now. There is ample time to accommodate the respective interests of the parties, in a fair way.

[22] The only new ground of appeal raised by Boehner will relate to issues surrounding the trial judge's alleged error in failing to find that the implied conditions of merchantability and fitness for purpose (as per the provisions of the **Sale of Goods Act**, R.S.N.S. 1989, c. 408, as amended) were met by Whebby in relation to the sale of the contaminated fill by Whebby to Boehner. Thus, the proposed cross-appeal will ensure that all issues of liability relating to the cost of remediating the contaminated fill, as may be applicable to the alleged errors in trial judge's decision, might be dealt with by this court in the event that this appeal's "second hearing" proceeds.

[23] Further, no real prejudice would beset the other three parties, since the grounds of cross-appeal proposed by Boehner are, in the main, similar to the grounds advanced by United in that the trial judge is alleged to have erred in finding both United and Boehner equally liable in negligence for a portion of the remediation costs and expenses.

[24] Having regard to all of these circumstances I am not persuaded that any real injustice would result in granting the application. On the contrary, I am satisfied that the interests of justice warrant its success.

[25] I will allow Boehner's application. I will ask Mr. Wood to prepare an order for my signature confirming these directions. Boehner will have until 4:00 p.m. local time, Friday February 23, 2007 to file and serve its notice of cross-appeal pursuant to the provisions of **CPR** 62.08 and 62.31(7)(e). In his submissions today Mr. Wilson said that if I were to allow the application it might have some impact on the arguments Whebby would be inclined to make at the April 11, 2007 hearing. Accordingly my order will also reflect that counsel for Whebby, if so advised, is at liberty to file a supplementary factum to its appellant's factum filed January 26, 2007, intended to respond to the matters raised in Boehner's cross-appeal, and will also be permitted to address those supplementary submissions in oral argument at the hearing scheduled for April 11, 2007 provided that Whebby's supplementary factum is filed with the court and opposing counsel on or before 12 noon local time, Friday March 16, 2007.

[26] Should any other party to this appeal consider itself affected by this decision insofar as the April 11, 2007 hearing is concerned, they may apply to me in Chambers for directions.

[27] In conclusion the application is allowed. There will be no order for costs.

Saunders, J.A.