

NOVA SCOTIA COURT OF APPEAL

Citation: Goulden v. Kimbrell, 2005 NSCA 123

Date: 20050930

Docket: CA 238212

Registry: Halifax

Between: Michael Goulden

Appellant

v.

James Kimbrell and Betty Kimbrell

Respondent

Judge: The Honourable Justice Oland

Application Heard: September 29, 2005, in Halifax, Nova Scotia, In
Chambers

Held: Application for extension of time to file the notice of appeal is granted. Application for extension of time to perfect the appeal is not granted. No costs are awarded on these applications.

Counsel: Martin Dumke, for the appellant
James Kimbrell and Betty Kimbrell were not present.

Decision:

[1] The appellant, Michael Goulden, applies pursuant to **Rule 62.31(7)(e)** for extensions of time for filing the Notice of Appeal and for perfecting the appeal.

The Notice of Appeal

[2] Following a three-day trial, on November 17, 2004 Justice Hiram Carver rendered a decision finding that the respondents, James and Betty Kimbrell, had a right-of-way over Mr. Goulden's property. Mr. Goulden filed his Notice of Appeal on December 20, 2004, after the 30-day period stipulated in **Rule 62.02**.

[3] The factors to be considered on an application for extension of time are set out in **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers). After setting out the three-part test from **Jollymore Estate v. Jollymore** (2001), 196 N.S.R. (2d) 177 (N.S.C.A. in Chambers), Hallett J. A. stated that ultimately the objective must be to do justice between the parties. The simple question to be asked on such an application is whether justice requires the application to be granted.

[4] In the particular circumstances before me, I would grant the application for an extension of time for filing the Notice of Appeal.

[5] It is clear from his affidavit evidence that Mr. Goulden had a reasonable excuse for the delay and had taken several steps to have the appeal heard. Justice Carver's decision was mailed to him. On the day it arrived, he called the office of the prothonotary and was told he had 30 days to appeal. Believing this to be 30 days from his receipt of the decision, he filed his Notice of Appeal together with an application for a stay on December 20, 2004.

[6] Mr. Goulden also deposed that in January 2005 he contacted the courthouse staff to obtain the tapes of the proceeding before Justice Carver. Attached to his affidavit were copies of three follow-up letters in February and May 2005 - he received the tapes on May 27, 2005. While he was awaiting the tapes, on March 17, 2005 he applied in Court of Appeal Chambers to have the appeal set down for hearing. It was then discovered that Justice Carver had not issued an order. None

was signed before his retirement and it was not until May 6, 2005 that an amended order was issued by another Justice.

[7] Throughout this period Mr. Goulden had been self-represented. It was only after he retained counsel in August 2005 that he learned that he had filed the Notice of Appeal late. His counsel advises that the transcription of the tapes will be completed no later than November 15, 2005 and that he is scheduled to appear in Chambers on November 24, 2005 to set down the appeal.

[8] Mr. Kimbrell did not appear on the application but advised by letter that he is opposed to any extension of the time. He has not given any indication of any prejudice caused by the short delay in filing the Notice of Appeal. I observe that no stay of the amended order having been granted, his use of the right-of-way remains undisturbed pending the disposition of the appeal.

[9] I am of the view that here justice requires the application for extension of time to file the notice of appeal to be granted. The time for filing it is extended to the date requested, namely December 20, 2004 which is the date it was actually filed.

Perfecting the Appeal

[10] **Rule 62.17** provides for an application by the Registrar or a party to dismiss the appeal for failure to perfect. I have neither before me. Rather, the appellant seeks an extension of the time to perfect his appeal, apparently as a precautionary measure.

[11] It is clear that if this appeal had been dormant for a period, it is no longer. The appellant has applied to extend the time to file his notice of appeal, has made arrangements for the transcript, and will appear in Chambers shortly after the transcript is available to set down the appeal. Because of several unusual delays beyond the control of the appellant, including the waiting for the tapes and for the issuance of the order, and where counsel who has now been retained must review the transcript before he can prepare the appellant's factum, it is obvious that the usual time frame for perfection of an appeal could not apply.

[12] There being no application to dismiss for failure to perfect and in the particular circumstances before me, I do not find it appropriate to grant the application for extension of time to perfect. My decision is not to prevent the appellant from responding to an application to dismiss for non-perfection, should one be brought.

Costs

[13] There will be no award of costs on these applications.

Oland, J.A.