NOVA SCOTIA COURT OF APPEAL
Citation: 2301072 Nova Scotia Ltd. v. Lienaux, 2007 NSCA 4

Date: 20070112
Docket: CA 271137
Registry: Halifax

Between:

Charles D. Lienaux and Karen L. Turner-Lienaux

Appellants

v.

2301072 Nova Scotia Limited and Marven C. Block, Q.C.

Respondents

- and -

The Toronto-Dominion Bank

Intervenor

Judge: The Honourable Justice Thomas Cromwell in Chambers

Application Heard: January 11, 2007, in Halifax, Nova Scotia

Held: Leave to amend notice of appeal granted.

Counsel: Charles D. Lienaux, for the appellants
Gavin Giles, Q.C., for the respondent 2301072 Nova Scotia Ltd.
Dufferin R. Harper and Barbara Kerr, Articled Clerk, for the Intervenor

Reasons for judgment:

[1] The appellants apply for leave to amend their notice of appeal. Leave is required because the notice was filed more than 20 days ago: **Rule** 62.04(4). The application is opposed by the respondent 2301072 Nova Scotia Limited and the intervenor. As, in my view, their arguments in opposition to the amendment relate to the merits of the point raised by it, those arguments are for a panel and not a chambers judge to consider. The amendment should be granted but without limiting the responding parties from arguing these points before the panel.

[2] The underlying proceeding is an application for leave to appeal and, if granted, an appeal from an order requiring the appellants to post security for costs with respect to certain interlocutory applications in which they will be the moving parties. The appellants wish to add as a ground of appeal that the respondent, the plaintiff in the main action, is not a "lawful plaintiff" and, therefore, not entitled to security for costs. This point was raised before the chambers judge in the Supreme Court and is referred to in his reasons. The judge ruled that this was "[a]n interesting argument but not one that deserves much consideration whatsoever at this stage": **2301072 Nova Scotia Limited. v. Lienaux**, [2006] N.S.J. No. 328 (S.C.) at para. 19.

[3] As noted, the **Rules** permit the appellants to amend their grounds without leave within 20 days of filing their notice. Had the appellants done so, the arguments advanced in opposition to the amendment would have had to be raised by way of an application to quash this ground of appeal. Such an application would have to have been heard by a panel. The fact that leave to amend is now required does not, in my view, permit me, sitting alone in Chambers, to rule on the merits of the point raised by the amendment. That is what I am being asked to do by the respondent and the intervenor.

[4] The respondent and the intervenor oppose the amendment on three grounds: first, that the allegations of champerty and maintenance that underlie the proposed amendment were not justiciable issues before the chambers judge, were irrelevant to the security for costs application, were not ruled on by the chambers judge and, therefore, should not be raised on appeal; second, that the torts of champerty and maintenance have been all but eliminated by the common law and, therefore, the

point raised is bad in law; and third, that the issues of champerty and maintenance are not reasonably necessary to the appellants' presentation of their appeal.

[5] The position advanced by the respondent and the intervenor in opposition to the amendment misconceives, fundamentally, the role of a chambers judge of this Court who is asked to grant leave to amend a notice of appeal. These points each relate to the substantive merit of the arguments the appellants wish to make on appeal if leave to amend the notice of appeal is granted. It is not the role of a chambers judge in this Court to rule on the merits of complex legal points such as these.

[6] The focus of the chambers judge is generally on the procedural aspects of getting an appeal ready to be heard by a panel. With certain exceptions which are not relevant here, a chambers judge does not deal with matters that effectively dispose of an appeal. The exceptional cases in which a chambers judge does so are generally concerned with procedural or jurisdictional matters, not the merits of the appeal: see, for example, **Rules** 62.11(d) and 62.17(1)).

[7] The merits of an appeal and of arguments to be advanced on appeal are to be heard and determined by a panel of the court, not by a single judge in chambers. As Saunders, J.A. put it in **Lane v. Carsen Group Inc.** (2003), 214 N.S.R. 92d) 108; N.S.J. 129 (Q.L.) (C.A. Chambers) at para 7, "[w]hether there is any merit to this or any other ground of appeal is for the panel to decide."

[8] The proposed amendment relates to a matter that was raised before the judge of first instance and addressed, if not determined, by him. As for prejudice, my focus must be on the question of whether there is any prejudice to the respondent or the intervenor as a result of the appellants raising this issue now by way of amendment rather than in the original notice of appeal.

[9] The amendment will not interfere with the date set for filing the appeal book or result in any wasted effort to address the appeal as originally framed. Any prejudice to the respondent or intervenor which may result if the amended ground is found to be without merit is not prejudice which is attributable to the fact that the ground is advanced by way of amendment as opposed to having been included in the original notice of appeal. There is no suggestion of any prejudice in that sense resulting from the amendment.

[10] In my view, the amendment is reasonably necessary for the presentation of the appeal and will not occasion prejudice in the sense which is relevant to this application.

[11] Leave to amend the notice of appeal is granted. The permitted amendment is to add to the notice of appeal the following ground of appeal:

> 1. THAT the learned Chambers Judge erred in law when he ruled contrary to the law prohibiting champerty and maintenance that 2301072 Nova Scotia Limited is a lawful plaintiff in proceeding S.H. No. 102390.

[12] The amended notice of appeal shall be included in the appeal book and leave to amend is granted on the condition that the appeal book be filed, as previously ordered, on or before January 15, 2007.

[13] As agreed in chambers, costs of this application will be costs in the cause of the appeal.

Cromwell, J.A.