NOVA SCOTIA COURT OF APPEAL

Citation: *2301072 Nova Scotia Ltd. v. Lienaux*, 2007 NSCA 28

Date: 20070302
Docket: CA 271137
Registry: Halifax

Between:

Charles D. Lienaux and Karen L. Turner-Lienaux

Appellants

v.

2301072 Nova Scotia Limited

Respondent

and

Marven C. Block, Q.C.

Respondent

and

The Toronto-Dominion Bank

Intervenor

Judge: The Honourable Chief Justice Michael MacDonald, In Chambers

Application Heard: February 22, 2007, in Halifax, Nova Scotia

Held: Application for security for costs granted.

Counsel: Charles D. Lienaux, for the appellants
Gavin Giles, Q.C., for the respondent 2301072 Nova Scotia Ltd.
Heather Burchill for the respondent Block (watching brief)
Barbara Kerr, Articled Clerk, for the Intervenor (watching brief)

Decision:

BACKGROUND

[1] The parties are involved in an imbroglio of related actions and applications before this court, the Supreme Court of Canada and the Supreme Court of Nova Scotia. All matters stem from a failed business relationship between the appellants (and their related companies) and one Mr. Wesley Campbell (and his related company). For the purposes of this appeal, Mr. Campbell is connected to the respondent numbered company.

[2] The background to this torturous relationship with resultant litigation has been recited often in previous judgments. They include: **2301072 Nova Scotia Ltd. v. Lienaux** (2005), 234 N.S.R. (2d) 185 (N.S.C.A.); **2301072 Nova Scotia Ltd. v. Lienaux** (2004), 220 N.S.R. (2d) 328, (N.S.S.C. [In Chambers]); and **2301072 Nova Scotia Ltd. v Lienaux**, (2004) 227 N.S.R. (2d) 346 (N.S.S.C.). Perhaps this passage by Roscoe, J.A. in **2301072 Nova Scotia Ltd. v. Lienaux** (2005), 234 N.S.R. (2d) 185 (N.S.C.A.) represents the most comprehensive summary:

> [3] The defences in issue are in response to two foreclosure actions commenced by the Toronto-Dominion Bank against the appellants in 1993 to enforce two mortgages, one in the principal amount of $100,000 and the other in the principal amount of $233,000. The background facts and the relationship between the parties on the appeal are succinctly set out in the decision under appeal as follows:
>
> > [11] The subject matter of the claims of 2301072 Nova Scotia Limited are promissory notes, personal guarantees and mortgages collateral thereto, in respect of the sums of $100,000 and $233,000, which were executed by Lienaux and Turner-Lienaux in favour of Central Guarantee Trust Company (CGT) in 1989. 2301072 Nova Scotia Limited claims the benefit of those notes, guarantees and mortgages, pursuant to their assignment to it by the Toronto-Dominion Bank. The Toronto-Dominion Bank had claimed the benefit of the notes, guarantees and mortgages by virtue of their assignment to it by CGT.
> >
> > [12] Lienaux and Turner-Lienaux argue that the notes, guarantees and mortgages are void and unenforceable against them. Lienaux argues that they have been discharged as against him as a result of his second

> assignment into bankruptcy. Turner-Lienaux argues that her guarantees were coerced by undue influence exercised on her by Lienaux and that neither her guarantee, nor the mortgages collateral thereto, were preceded by independent legal advice, to which she says she was entitled.
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> [13] Another party to the action represented by counsel before me is Marven C. Block, Q.C. He is involved in the litigation because he was the lawyer retained by CGT to prepare the documentation that is central to the matter.
>
> [14] In addition, Lienaux and Turner-Lienaux both raise defences which relate to their participation with Campbell in the development of The Berkeley Senior Citizens Residence in Halifax in 1989. It is these latter pleadings that are the subject of these applications.

[4] As well, the facts underlying the protracted litigation between Mr. Lienaux and Mr. Campbell and related parties arising from their involvement in the Berkeley senior citizen's residence project are set out in detail in the decision of Justice Suzanne Hood (2001 NSSC 44, [2001] N.S.J. No. 230 (N.S. S.C.)) and the decision of this court on the appeal from Justice Hood (2002 NSCA 104, [2002] N.S.J. No. 369 (N.S. C.A.)). An application for leave to appeal to the Supreme Court of Canada was dismissed with costs by that court on March 20, 2003: [2002] S.C.C.A. No. 425 (S.C.C.). The Quicklaw headnote of this court's decision dismissing the appeal from Justice Hood (one of the 24 grounds of appeal, not relevant to this proceeding, was allowed) provides sufficient context for the matters now in issue:

> Appeal by Smith's Field Manor Development from the dismissal of its action against Campbell for damages for fraud, dishonesty and breach of fiduciary duty. Smith's Field alleged that Campbell breached a fiduciary duty by failing to disclose the nature of the initial investment in a retirement home project made by his team. Campbell and his two associates each contributed $50,000 in equity. The remaining $200,000 contribution came in the form of a loan from their company, Stonehedge. Smith's Field stated that the long-term equity contribution should have come from the investor's personal resources, and that failure to inform it that the investment was in the form of a loan from Stonehedge was a material non-disclosure amounting to fraud and a breach of a fiduciary duty. It also alleged that Stonehedge was not at liberty to commit $200,000 to the project, as there were creditors who had claims against those funds that could be asserted against Smith's Field. Smith's Field claimed that if it had known the true situation, it would not have participated with Campbell and his associates, and it sought restitution.

> The trial judge had found that the evidence did not support the allegations of fraud or breach of fiduciary duty. Her findings generally supported the facts alleged by Stonehedge and did not support the facts alleged by Smith's Field.
>
> HELD: Appeal dismissed. The trial judge did not err in her findings of fact. A significant body of evidence supported her findings. There was no merit to the allegations involving the source of the funds.

> [5] In the foreclosure action Chief Justice Kennedy granted the respondents' application and struck out 107 new paragraphs proposed to be added to the three defences filed by the appellants on the basis that the issues raised by them were res judicata. The appellants' application to amend the defences was dismissed in respect of those 107 specific paragraphs. Several other uncontested amendments were allowed. The Chief Justice awarded solicitor client costs to the corporate respondents and Mr. Campbell, and costs in the cause to Mr. Block.

[3] The instant appeal flows from Mr. Campbell's assigned foreclosure action (through his respondent numbered company) against the appellants. Specifically, by way of an interlocutory order, McDougall, J. of the Supreme Court directed the appellants to post security for costs in the main action. That order is now under appeal and this court is scheduled to hear it in May of this year. This appeal prompted the instant application where the respondent now seeks security for costs pending the appeal.

[4] The respondents base their application on what is clearly the appellants' failure to honour costs obligations flowing from numerous past defeats. Specifically, after various unsuccessful related actions and interlocutory applications, the appellants now owe Mr. Campbell and/or his company more than $425,000.00 in unpaid costs. In this action alone, the appellants still owe the respondent over $33,606.93 for failed interlocutory applications.

THE LAW

[5] My authority to direct security for costs pending appeal is set out in Civil Procedure Rule **62.13**:

> (1) A Judge on application of a party to an appeal may at any time order security for the costs of appeal to be given as he deems just.

> (2) If a party fails to give security for costs when ordered, a Judge on application may dismiss or allow the appeal, as the case may require.

[6] Over the years this court has stressed caution when considering such relief. It is understood that a party should not be lightly denied a right to appeal as a result of impecuniosity. Thus an applicant, to be successful, must establish special circumstances.

[7] Some of the pertinent case law was recently reviewed by Cromwell, J.A. in **J & P Reid Developments Ltd. v. Branch Tree Nursery & Landscaping Ltd.**, 2006 NSCA 131 [In Chambers] at paras. 6 and 7:

> [6] As Fichaud, J.A. said in **Williams Lake Conservation Co. v. Chebucto Community Council of Halifax (Regional Municipality)** (2005), 231 N.S.R. (2d) 320 (N.S.C.A. [In Chambers]) at para. 11:
>
> > [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances." It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: [citations omitted].
>
> [7] So, for example, in **Frost v. Herman** (1976), 18 N.S.R. (2d) 167 (N.S C.A.) (Macdonald, J.A., in Chambers) the failure of the appellant to pay the costs awarded at trial, even though an execution order had been issued, was found to constitute special circumstances. Similarly, in **Arnoldin Construction & Forms Ltd. v. Alta Surety Co.** (1994), 134 N.S.R. (2d) 318 (N.S. C.A.) (Pugsley, J.A., in Chambers), the appellant had failed to pay the substantial sum of taxed costs assessed against it at trial and this, in combination of certain other factors referred to by Pugsley, J.A. was found to constitute special circumstances.

ANALYSIS

[8] The appellants' abysmal failure to honour previous court orders for costs clearly represents special circumstances that would justify the relief requested. In response, however, the appellants invite me to consider the merits of the appeal proper. Specifically, their main ground of appeal will be that the respondent, as an

assignee of the bank's debt, is involved in a champertous claim that the courts must prohibit. Thus they will argue in the May appeal that the respondent had no standing to ask McDougall, J. for a security for costs order. Likewise they ask me to declare that it has no standing before this court and that the entire matter is an abuse of process. In other words, the appellants want me to effectively decide the merits of the appeal proper and on that basis dismiss the present application.

[9] I do not accept the appellant's circuitous argument that I must resolve the merits of an appeal yet to be heard before I can consider ordering security for that same appeal. I say this for several reasons.

[10] Obviously this champerty-based assertion represents a complex issue and it would simply make no sense for me to tackle it as a single chambers judge at this preliminary stage. I acknowledge that a judge hearing an application for security can in certain circumstances consider the potential merits of the pending appeal. In fact, I refer to a ruling relative to this matter. In **Turner-Lienaux v. Campbell** (2001), 196 N.S.R. (2d) 364 (N.S.C.A.) [In Chambers], Bateman, J.A. observed:

> [10] Mr. Lienaux has submitted that I should delay hearing the matter until the many volumes of evidence from the trial are produced so that I might review them. At a minimum, he says, I should make a preliminary assessment of the merits of the appeal. I advised Mr. Lienaux in a pre-hearing telephone conference that I would not and could not undertake an appraisal of the merits. This is not an application to dismiss the appeal as frivolous or vexatious. Indeed, on an application for a stay of the trial judgment, Oland, J.A. of this Court was satisfied that the appellants had raised "arguable grounds of appeal", at the same time acknowledging the low threshold for so finding (**Turner-Lienaux v. Campbell**, [2001] N.S.J. No. 273 (N.S C.A. [In Chambers])). The respondent does not take the position that the appeal is absolutely unsustainable, although asserting vigorously that it is without merit.
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> [11] In urging me to assess the strength of the case on appeal Mr. Lienaux relies upon the decision of this Court in **Wall v. Horn Abbot Ltd.** (1999), 176 N.S.R. (2d) 96, [1999] N.S.J. No. 124 (N.S. C.A.) . There the chambers judge had ordered the plaintiff to post security for costs before trial, in part, because the action was devoid of merit. The order for security would make it impossible for the plaintiff to pursue the action. He appealed. Cromwell, J.A., writing for the Court said, as is relevant here:

[59] As will be seen, review of these authorities reveals three clear principles which are consistently applied. First, orders for security should not be used to keep persons of modest means out of court. Second, while the merits of the plaintiff's case are relevant and may be considered, they should only be considered on the basis of undisputed facts, the pleadings, etc. and not on the basis of seriously disputed facts or assessments of credibility. Third, consideration of the merits should only be decisive where they are clear and obvious. In short, the law relating to consideration of the merits on interlocutory applications for security for costs is in harmony with the general reluctance to assess the merits of a claim or defence, other than in obvious cases, before trial.

. . .

[66] I conclude that under rules similar to our rule 42.01(1)(f), the standard for merits assessment is somewhat lower than a demonstration that the case is actually frivolous and vexatious. The standard has been equated with "a very weak case bordering on the frivolous and vexatious" and it has been held that the authority to order security on this basis should be exercised only in the clearest of cases. The authorities also suggest that it may often not be reasonably possible to come to any conclusion concerning the merits on an interlocutory application, particularly where the case turns on the credibility of witnesses.

. . .

[82] These cases establish two points. Even where the defendant is prima facie entitled to security, the courts are reluctant to order it if the plaintiff establishes that the order will, in effect, prevent the claim from going forward. As Reid, J., put it in John Wink Ltd., supra, the danger of wrongly destroying a claim is a greater injustice than allowing an unmeritorious claim to go to trial. Equally clear is the impossibility, in many cases, of making a reliable assessment of the merits on an interlocutory application, particularly where the action is complex or turns on credibility. To quote Reid, J., once again in John Wink Ltd.:

> "The impossibility of making a proper decision regarding the merits of a claim on insufficient information should be so obvious as not to require illustration." [italics is emphasis added in original]

. . .

> [83] From this review of the authorities, I reach the following conclusions. The merit of the plaintiffs case is a relevant consideration to the exercise of discretion to grant or refuse security for costs. The extent to which the merits may properly be considered varies depending on the nature of the case. If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. The assessment of the merits should be decisive only where (a) the merits may be properly assessed on an interlocutory application; and (b) success or failure appears obvious. [Emphasis added by Bateman, J.A.]

[11] The case before me is not one where the merits of the appeal should be considered. The appellants in this appeal have raised complex legal and factual issues. There's nothing "clear and obvious" about the merits of this appeal. Simply put, the appellants lost an interlocutory trial application and they have appealed that ruling. In answering this appeal, the respondent will no doubt incur significant legal costs. If the appeal is dismissed, then the respondent runs the all too real risk of having yet another unenforceable order for costs. That's the reality I face; a reality that prompts me to grant the relief requested.

[12] In conclusion, there are in this appeal special circumstances justifying a security for costs order. In fact, given the appellants' horrendous record when it comes to honouring costs obligations, it is hard to imagine a more appropriate circumstance for such relief. In short, I am not prepared allow the appellants to again take the respondent through yet another appeal without providing security.

[13] In reaching this conclusion, I realize that the main action is yet to be heard on its merits. I take note of this because most orders for security pending appeal are issued against appellants who have lost at trial. Nonetheless, the appellants' failure to honour previous costs awards is so profound and exceptional, fairness dictates the relief requested.

[14] As to the amount of security, the respondent, if successful on appeal, predicts a potential costs award of $8,000.00, including prospective disbursements. The appellants offered no suggestions to the contrary. This figure appears reasonable to me.

[15] I therefore order security for costs in the cash amount of $8,000.00. The security shall be posted not later than 4 p.m. on Wednesday, April 4, 2007. In the

event the appellants do not post security as ordered, the respondent may apply to a judge of this court, without notice to the appellants, to dismiss the appeal.

[16] In structuring this order, I decline the respondent's second invitation to effectively stay the prosecution of the appeal until the appellants satisfy all outstanding costs obligations in this matter. The instant notice of application seeks only security for costs for the upcoming appeal. I am, at this stage, loath to consider relief beyond that claimed.

[17] Finally, I will briefly address a minor outstanding issue involving the contents of the appeal book. It includes affidavits from Mr. Giles, counsel for the respondent. The original affidavits had case authorities attached as exhibits. In the appeal book, the appellants did not attach these authorities. The respondent asks me to direct their inclusion. I decline this invitation because Mr. Giles, to his credit, acknowledged that he could, for his purposes, find alternative ways to effectively solve this problem. Thus, I see no need to issue any further directions at this time.

[18] The respondent shall further have costs of this application in the amount of $1,500.00 plus reasonable disbursements to be taxed.

MacDonald, C.J.N.S.