

Date: 19980828

C.A. No. 146635

NOVA SCOTIA COURT OF APPEAL

Cite as Basin View Village Ltd. v. Montreal Trust Company,
1998 NSCA 8

BETWEEN:

BASIN VIEW VILLAGE LTD. and M. SAMI AL-HAMWI)	Mr. Al-Hamwi appeared in person
)	
Appellants)	
)	
- and -)	
)	
MONTREAL TRUST COMPANY OF CANADA and HERBERT A. MacINTOSH)	Mr. Alan V. Parish, Q.C. for the respondents
)	
Respondent)	
)	Application Heard: August 27, 1998
)	
)	Decision Delivered: August 28, 1998
)	
)	

**BEFORE THE HONOURABLE JUSTICE NANCY J. BATEMAN,
IN CHAMBERS**

BATEMAN, J.A. (in Chambers)

This is the continuation of an adjourned application to dismiss an appeal from an Order of Justice Hood of the Supreme Court, requiring the appellant, M. Sami Al-Hamwi, to provide \$15,000 security for costs in advance of a trial. Mr. Al-Hamwi is representing himself.

The respondent, Montreal Trust, had granted a \$2,725,000 mortgage to the appellant Basin View, guaranteed by Mr. Al-Hamwi, for the purchase of a real estate complex. The loan eventually generated six lawsuits which were consolidated by earlier order of Justice Hood.

Certain of the consolidated actions involved deficiency claims by Montreal Trust against the appellants and related counter-claims. Justice Hood ordered that \$15,000 security for costs be posted by the appellant Al-Hamwi, failing which, the counter-claims would be struck. This was coupled with the undertaking by Montreal Trust to discontinue the deficiency actions against the appellants if the security was not posted.

Mr. Al-Hamwi did not post the security as ordered. The counter-claims were struck and the deficiency actions against the appellants were discontinued. Ultimately, the remaining lawsuits in the consolidated action were settled.

The appellants filed a Notice of Appeal of Justice Hood's order for security for costs. There is some dispute as to whether that order is interlocutory or final. This is a relevant matter because it affects the time within which an appeal must be filed - 10 days in the case of an interlocutory order and 30 days if a final order. If the order is interlocutory, the Notice of Appeal was filed late. If it is final, the Notice of Appeal was filed within time but not served on the respondent within the time required by the **Civil Procedure Rules**.

Despite the time deficiencies and over the objections of respondents' counsel, on May 7 the appeal was set to be heard on October 6, 1998. The appeal book was to be filed by July 15. On July 10 Montreal Trust applied for an order dismissing the appeal on the basis that the appellants had failed to file and serve the Notice of Appeal within the required time period (**Rule 62.11(d)**). The application was returnable on July 23. In the interim, on July 15, Mr. Al-Hamwi filed with the court what purported to be an Appeal Book. The material filed did not, however, conform with the requirements set down in **Rule 62.14**. What was filed, instead, was ten volumes of documents, which were a copy of the List of Documents that Mr. Al-Hamwi had filed in advance of the Supreme Court trial. This deficiency was raised by the respondents on the application to dismiss the appeal in addition to the alleged filing irregularity.

That application came before Justice Freeman of this Court on July 23. After hearing the submissions of the parties, Justice Freeman, in an oral decision rendered

that day, set new dates for the filing of the Appeal Book and Facta, leaving the hearing date in place and adjourning, without day, the application to dismiss. He said in part:

The appeal is set for hearing on October 6, 1998. Mr. Al-Hamwi and Basin View are to file an appeal book in proper form on or before August 17, 1998 and their factums on or before August 31, 1998. There will be no further extensions. The respondent shall file its factum on September 14, 1998. The application to dismiss is adjourned without day.

This matter has now come before me on the respondents' motion to resume the application to dismiss the appeal. I am satisfied from the affidavit material on file Mr. Al-Hamwi has received proper notice of the continuation of this application.

On August 17 the appellants filed another Appeal Book with the clerk of the Court. This Appeal Book was not served on the respondents until late the following day. The respondents submit that the Appeal Book does not comply with the requirements of **Rule 62.14** and, in any event, that the appeal should be struck because the Appeal Book was not served on the respondents on or before August 17. In addition the respondents rely upon the filing and service deficiencies raised in their application of July 23, Justice Freeman having rendered no express ruling on those issues.

In my view, while Justice Freeman did not explicitly rule upon the filing and service issues raised by the respondents, it is implicit in the fact that he granted new filing dates that he found these arguments not to be determinative. Indeed he said: "I am reluctant to dismiss his appeal at this stage on the basis of technical defects that might be cured even at this stage by competent counsel."

The resulting order, issued July 24, requires, *inter alia*, that “[the] Appellants file the Appeal Book in conformity with the requirements of **Rule 62.14** on or before the 17th day of August, 1998”.

Civil Procedure Rule 62.14(3) sets out in detail the substantive requirements for an appeal book:

62.14(3) Except in an interlocutory appeal, an appeal as to costs only or a tribunal appeal, or except where otherwise ordered by a Judge or agreed to by the parties, an appeal book shall consist of the following:

(a) Part I

- (i) index of the documents therein;
- (ii) the notice of appeal, any notice of cross-appeal or respondent’s notice of contention;
- (iii) the pleadings, including any particulars;
- (iv) the decision and order appealed from;
- (v) a reference sheet containing the heading and file number of the matter appealed, the name of the judge, the dates of the hearing and the date of the decision in the court below.

(b) Part II - Evidence:

- (i) index of witnesses; the index of witnesses shall state the name of the witness, the party who called the witness and shall indicate the pages in the appeal book at which examination in chief, cross examination, or re-examination began;
- (ii) list of all exhibits;
- (iii) transcript of the evidence at the trial; every page of the transcript of evidence shall have a headline which shall state the name of the witness and whether the page contains the transcript of examination in chief, cross examination or re- examination. The questions shall be numbered consecutively for each witness. Questions shall be preceded by the letter "Q" and the answers by the letter "A";
- (iv) copies of affidavits, written admissions and discovery evidence if, and to the degree, that they have been admitted in evidence at the trial and are not reproduced in the transcript of evidence;

(v) photocopies of documentary exhibits, if not reproduced in the transcript, but not exhibits or parts of exhibits not germane to the issues on appeal or which may more conveniently be summarized or described;

(vi) a statement of facts agreed to by the parties in lieu of any or all of (iii), (iv) and (v).

(This same information is available from the Court in an Information Sheet which is available to self represented litigants upon request.)

The newest Appeal Book filed by Mr. Al-Hamwi contains substantial, material deficiencies: it includes 93 documents which were not before Justice Hood on the application under appeal; it does not include the affidavit of Herbert A. MacIntosh filed on that application; it does not include the pleadings in the Supreme Court; it does not include the Notice of Application which was before Justice Hood; and it does not contain the application for leave to appeal. There are other more minor, technical omissions. The purpose of an Appeal Book is to provide the Court with a complete and workable record of the underlying material relevant to the appeal. It is not the obligation of a respondent nor of the Court to reconstruct the record. The current Appeal Book would require substantial editing and additions to provide an adequate record. Mr. Al-Hamwi asks for yet another opportunity to perfect the Appeal Book. Justice Freeman's Order is, however, clear: the Appeal Book must meet the requirements of **Rule 62.14**, must have been filed by August 17th and there are to be no further extensions.

Accordingly, the appeal is dismissed.

Bateman, J.A.