Date: 19971215 Docket: CA148490

NOVA SCOTIA COURT OF APPEAL

Cite as: Gaston v. Burton, 1998 NSCA 212

PUGSLEY, BATEMAN AND FLINN, JJ.A.

BETWEEN:

RONALD GASTON	)	W. Bruce Gillis, Q.C.,
	)	for the Appellant (Intervenor)
Appellant (Intervenor)	)	
	)	
	)	
- and -	)	
	)	
	)	
	)	
	)	
DIANNE MARGARET BURTON	)	Not appearing
	)	
Respondent	)	
	)	
	)	Appeal Heard:
	)	December 8, 1998
	)	
	)	Judgment Delivered:
	)	December 15, 1998
	)	
	)	
	)	

THE COURT: The appeals are allowed per reasons for judgment of Pugsley, J.A.; Bateman and Flinn, JJ.A., concurring.

Pugsley, J.A.:

There are two appeals before us.

The first arises from the order of Justice Boudreau, dated June 11, 1998, wherein he ordered costs in favour of a plaintiff in a civil action (Dianne Burton - the respondent in this appeal) against a non-party to the action (Ronald Gaston - the present appellant) for his failure to attend to be examined on discovery on May 13, 1998, pursuant to order. Mr. Gaston was unrepresented. The application for costs against Mr. Gaston was made in Chambers on May 27, 1998, without notice to him. He, accordingly, was not in attendance.

The second issue arises from the decision of Justice Moir sitting in Chambers on June 25, 1998. (No order having been taken out.) Justice Moir dismissed an application brought by counsel retained by Mr. Gaston, to set aside, or vary, the *ex parte* order of Justice Boudreau.

I am satisfied that both the order of June 11, 1998, and the decision of June 25, 1998, must be set aside and both appeals allowed.

Background

On May 25, 1995, an Originating Notice (Action) (S.K. No. 5228) was issued on behalf of Dianne Burton claiming the sum of $46,000 from Dr. Sandra Howlett, arising from Dr. Howlett's alleged breach of a written contract to employ Ms. Burton as a housekeeper/babysitter for Dr. Howlett's children at their home in Kingston.

A defence was filed by Bruce Gillis, Q.C., on June 21, 1995, pleading, in part, that the termination of Ms. Burton's services was justified. A counterclaim for damages arising

from "breach of contract, negligence, and intentional infliction of emotional stress", was filed on behalf of Dr. Howlett.

The progress of the litigation may be described as contentious. A number of interlocutory motions were brought, and contested, by each of the parties.

The appellant before this Court is Ronald Gaston. He is the husband of Dr. Howlett. He was not joined as a defendant in S.K. No. 5228.

After a number of unsuccessful attempts to arrange for a discovery examination of Mr. Gaston, counsel for Ms. Burton (Patrick Saulnier) arranged for personal service on Mr. Gaston of a notice of examination in accordance with Form 18.05(a) of **Civil Procedure Rule 18** signed by the appropriate court official.

The notice required Mr. Gaston to attend:

> ...for the purposes of being examined in the above proceeding on Wednesday, May 13, 1998, at 10:00 in the forenoon at the Fairfield Farm Inn, 10 Main Street, Middleton, N.S.

Mr. Saulnier advised Mr. Gillis of the discovery date "just in case you and your client decided to attend".

Mr. Gillis wrote Mr. Saulnier advising that he was not available on the 13th of May, but that he was prepared to make his office available to hold the discovery at a convenient date and queried whether another time could be selected.

Mr. Saulnier responded that he could not accede to this request.

Mr. Saulnier, his client Ms. Burton, and the court reporter attended at the time and place stipulated in the notice of examination and waited until 10:45 a.m. Neither Mr. Gaston, nor Mr. Gillis, showed up.

On May 27, 1998, Mr. Saulnier filed with the Prothonotary in Kentville an Interlocutory Notice (Ex parte application) for a Chambers motion to be held that morning, requesting an order:

- directing Mr. Gaston to appear for discovery by the plaintiff;
- costs from Mr. Gaston, payable forthwith, arising from his failure to appear and be discovered by the plaintiff pursuant to a duly served Notice of Examination; and
- costs from Mr. Gaston, payable forthwith to the plaintiff, of the costs of the application.

In support of the application, Mr. Saulnier's affidavit recited the background leading up to the aborted discovery examination and further deposed that his client was unnecessarily "put through" expenses aggregating $423.23. The expenses included costs of reserving a room at Fairfield Farm, court reporter's fees, legal fees incurred for Mr. Saulnier's travel time to and from Middleton and Kentville, time spent waiting for Mr. Gaston's arrival, as well as mileage disbursement for Mr. Saulnier's travel.

After requesting a written memorandum from Mr. Saulnier respecting some of the issues raised in the application, on June 11, Justice Boudreau, without reasons, approved and initialed an order providing for discovery examination of Mr. Gaston on June 18 at 10:30 a.m. at the Fairfield Farm Inn and further provided that Mr. Gaston pay $423.23 in costs arising "from his failure to appear and be discovered by the plaintiff pursuant to a duly served Notice of Examination", as well as $200.00 in costs "as the costs of this application".

On June 11, Mr. Gaston was served with a copy of Justice Boudreau's order, as well as a letter from Mr. Saulnier advising that if he did not receive payment within ten days of

$624.23, that measures would be taken to enforce the order. The letter referred to "contempt of court proceedings" pursuant to **Civil Procedure Rule 55.05**.

Mr. Gaston then retained Mr. Gillis.

Mr. Gaston attended, and was examined by Mr. Saulnier, at the discovery examination scheduled, and conducted on, June 18. Mr. Gaston objected to the requirement respecting payment of costs.

On June 17, 1998, Mr. Gillis gave notice in S.K. No. 5228, that an application would be made by Mr. Gaston to the Chambers judge in Kentville on June 25 for an order pursuant to **C.P.R. 37.11(2)** and **C.P.R. 37.13** "setting aside or varying the *ex parte* order made".

In support of the application Mr. Gaston's affidavit was filed, in which he deposed:

1. THAT I am a member of the Canadian Armed Forces stationed at CFB Greenwood in a maintenance position and have a personal knowledge of the matters herein deposed except where otherwise stated.

2. THAT I am not and have never been a party to the within action.

3. THAT I was served with a Notice of Discovery and conduct money requiring me to appear at 10 Main Street, Middleton, Nova Scotia, on the 13th day of May 1988 at the hour of 10:00 o'clock in the forenoon by the Plaintiff's solicitor.

4. THAT on the 12th, 13th and 14th of May 1998, I was confined to bed with a severe case of influenza or some other illness which was causing me to vomit and to experience diarrhea on an uncontrollable basis and for that reason did not attend work nor did I attend the Discovery as I was physically unable to do so because of this illness.

5. THAT the Notice of Discovery contained no telephone number at which I could contact anyone at 10 Main Street, Middleton, Nova Scotia, nor did it contain a telephone number for the Plaintiff or her solicitor.

6. THAT to my knowledge neither the Plaintiff nor her solicitor nor anyone else attempted to reach me at my home on the 13th of May by telephone or otherwise to determine why I was not at 10 Main Street, Middleton, Nova Scotia.

7. THAT I received no further contact from the Plaintiff or her solicitor with respect to the matter whatsoever until a copy of the Order herein dated June 11th, 1998, was

delivered to me along with a letter from the Plaintiff's solicitor demanding that I attend for Discovery and pay the costs as set out therein.

8. THAT in particular I have never received any notice that an application was being made by the Plaintiff or her solicitor or anyone else which would result in an Order requiring me to pay any amount to the Plaintiff for any reason whatsoever.

9. THAT I have not been unco-operative in any way in attending for discovery but as a person who is not a party to this action and who has not received notice of any of the proceedings herein other than the original Notice for Discovery served on me, I was completely unaware that the application for this Order was being made and accordingly had no opportunity to respond to the application.

10. THAT at present, I am without any knowledge as to the basis on which the Order was made or the representations made to the Court under oath or by counsel which resulted in this Order and I make this Affidavit in support of an application to have the Order set aside on the grounds that it was made without Notice to me and without any opportunity to respond.

11. THAT I am advised by my solicitor and verily believe that Rule 37.04 of the Civil Procedure Rules set out the circumstances where an application may be made for an ex parte Order and that none of those circumstances are present in respect to the Order which I understand has been made against me.

12. THAT attached hereto as exhibits are copies of correspondence between the Plaintiff's solicitor and the Defendant's solicitor indicating attempts to arrange for a convenient time and place for Discovery examination of myself and confirming that the Defendant's solicitor was willing to make his office available for the purposes of holding the Discovery in order to minimize costs but that the Plaintiff's solicitor insisted on reserving a room commercially with whatever additional cost that resulted in.

Annexed to Mr. Gaston's affidavit was a memorandum signed by W. O. M. LaFleur, a maintenance controller who states that on May 12, 1998, Mr. Gaston, who was under his supervision:

> ...contacted me at approximately 10:30 hours to request one day of sick leave due to what he called "the flu". It was granted at that time;

and

> on the 13th of May 1998 I was again contacted and granted Sgt. Gaston an additional day of leave for the same ailment.
>
> As Sgt. Gaston completed his shift on the 13th of May, 1998, there was no requirement for him to visit the Wing Hospital unless he felt the need to do so.

The application was heard before Justice Moir of the Supreme Court sitting in Chambers on June 25, 1998.

Mr. Gaston's affidavit was tendered. During the course of cross-examination by Mr. Saulnier, Mr. Gaston testified:

- he had received correspondence from Mr. Saulnier which set forth his firm name and telephone number;
- he could not find Mr. Saulnier's telephone number in the documents he had on May 13th and at that point "was more concerned with my health than anything else";
- he had received sometime before May 13, a letter from Mr. Saulnier, dated April 16, 1998, which provided in part that failure to "heed a notice of examination can result in serious penalities being imposed against" him;
- that he did not attempt to find a telephone number for Fairfield Farm Inn on May 13.

After hearing submissions from counsel, Justice Moir gave an oral decision, stating in part:

> In my opinion, it is inappropriate for me to determine whether the order ought to have issued *ex parte*. I must assume that Justice Boudreau directed his mind to that issue. I do not sit in appeal of him. Rather, on a review of an *ex parte* order I must be prepared to hear the matter afresh on the merits, listening to both sides. A notice of examination is a requirement by the court to attend. Failure is punishable by contempt. In this respect it is indistinguishable from a subpoena. Mr. Gaston bore the onus to explain to Mr. Saulnier and if not forgiven by him, to the court, the reasons for his absence. Instead, for three weeks he contacted no one. His weak excuse is that there were no telephone numbers on the documents served upon him. The telephone number of Mr. Saulnier was available in the telephone book, as was the telephone of the court.
>
> Having heard both sides, I would do exactly as Justice Boudreau did. Consequently I dismiss the application. I think a lot of this could have been resolved by notice and I will order no costs of this application, but I leave the order of Justice Boudreau undisturbed.

The Notice of appeal

Counsel for Mr. Gaston appeals to this Court from the judgments of both Justice Boudreau and Justice Moir.

The thrust of the appeal from Justice Boudreau's order is that it was made *ex parte* against a person, not a party to the proceedings, who had no notice of the application.

It is submitted that Justice Moir erred in approving Justice Boudreau's order and in misinterpreting **Civil Procedure Rules 18.15, 37.04, 37.11,** and **37.13.**

In September,1998, during the course of a joint telephone conference with the parties, Mr. Saulnier advised this Court that because of the amount involved, he did not intend to participate at the appeal.

No factum was filed on behalf of Ms. Burton. The Supreme Court file available to us, however, does contain Mr. Saulnier's written memorandum to Justice Boudreau, as well as a transcript of the oral submissions he made before Justice Moir.

The Court has, however, been deprived of Mr. Saulnier's oral submissions at the hearing of this appeal.

Analysis

The **Civil Procedure Rules** permit a party to examine any person, who is within or without the jurisdiction, by oral examination on oath, or affirmation, regarding any matter, not privileged, that is relevant to the subject matter of the proceeding.

In this respect, as well as a number of others, the Nova Scotia **Rules** are much broader than those in force in most provinces.

Civil Procedure Rule 18.05(1) provides:

> Unless the court otherwise orders, a notice of examination in Form 18.05A, setting out the time and place of the examination, the name and address of each person to be examined, and issued by the prothonotary, together with the attendance fee, shall be served and paid at least five (5) days before the day appointed for examination, as follows:
>
> (a) where the person to be examined is a party, upon his solicitor, or if he has no solicitor, upon the party himself;
>
> (b) where the person to be examined is not a party, upon that person, and a copy of the notice shall forthwith be served upon any opposing solicitor.

If a party refuses or neglects to attend at a discovery examination, he may be subject to an application, if a plaintiff to have his action dismissed, or if a defendant to have his defence struck.

On May 27, Justice Boudreau was asked to levy a penalty against a non-party. I am not aware of any reported case concerning a request of this nature.

Mr. Saulnier directed Justice Boudreau's attention to the case of **Livingstone v. Nova Scotia Resources Ltd.** (1996), 151 N.S.R. (2d) 371. Justice MacDonald of the Supreme Court, as he then was, awarded costs against several defendants for failure to attend discovery examinations arranged by their counsel with the plaintiff's solicitor, at a case management conference. The case is not comparable - the defendants had notice of the arrangement, in fact they agreed to it, they were represented by counsel, they were parties to the action, and most importantly, they had notice of the application for costs and their counsel attended the hearing and made representations on their behalf.

Rule 18.15 is germane.

It states:

> When any person refuses or neglects to attend at the time and place appointed for his examination or refuses to be sworn or answer any question properly put to him, or produce any document which he is bound to produce, the court may
>
> (a) hold him guilty of contempt;
> (b) if he is a plaintiff, dismiss the proceeding;
> (c) if a defendant, strike out the defence;
> (d) grant such other order as is just.

Mr. Saulnier could have elected to proceed under **Rule 55** for a contempt order. He would first have to apply, on an *ex parte* basis, for leave and then apply, on notice to Mr. Gaston, pursuant to **Rule 55.02**.

I do not accept, as was submitted by Mr. Saulnier before Justice Moir, that Mr. Saulnier's *ex parte* application before Justice Boudreau was sanctioned under **C.P.R. 37.04(1).**

It provides:

> An application may be made ex parte where,
>
> (a) under an enactment or rule, notice is not required;
> (b) the application is made before any party is served;
> (c) the applicant is the only party;
> (d) the application is made during the course of a trial or hearing;
> (e) the court is satisfied that the delay caused by giving notice would or might entail serious mischief, or that notice is not necessary.

Mr. Saulnier submitted to Justice Moir that since **C.P.R. 18.15** does not explicitly provide that notice is required to be given to a person against whom a penalty is sought, that **C.P.R. 37.04(1)(a)** should be interpreted to mean no notice at all is required.

I interpret **C.P.R. 37.04(1)(a)** as impliedly stipulating that notice should always be given to a person who may be affected by any proceeding directed against him, or her.

That requirement is an essential ingredient of due process. No person should be "condemned unheard or without having had an opportunity of being heard." (Jowitt's Dictionary of English Law, Sweet and Maxwell, 1977, p. 161, definition of *audi alteram partem*).

I come to this conclusion notwithstanding the provisions of **C.P.R. 37.04(1)(c)**.

Ms. Burton was, of course, the "only party" to S.K. No. 5228 in respect of the Chambers motion of May 27.

In my view, this section as well, should be interpreted in a way that is not inconsistent with the obligation of a Court to give an opportunity to an individual to state his or her case when the decision of the Court can affect that person's rights.

Such an interpretation is consistent with the decision of this Court in **Walker v. Delory** (1989), 90 N.S.R. (2d) 1. In that case, the plaintiff brought an action in negligence against three doctors. Counsel could not agree as to which of them was first entitled to examine the opposite parties on discovery. The plaintiff then obtained an *ex parte* order compelling the doctors to appear and be discovered first. The defendants appealed.

In the course of allowing the appeal and setting aside the order of the Chambers judge, Justice Matthews, on behalf of the Court, held at p. 4:

> With deference to the Chambers judge, there was no account taken of the issues concerning the procedural rights of the parties. He ignored the basic principle that the other side should be heard (*Audi alteram partem*).

The principle has long been identified as a part of natural justice and an essential constituent of a fair hearing.

The authors of DeSmith, Woolf & Jowell, *Judicial Review of Administrative Action,* 5th ed. (1995) Sweet and Maxwell, refer to its impressive ancestry in these words at p. 378:

> That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.

It is clear that the "vitality of the maxim" survives in Canada. The Supreme Court has applied it in a number of situations (**Alliance des Professeurs Catholiques de Montreal V. Labour Relations Board of Quebec,** [1953] 2 S.C.R. 140; **Saltfleet Board of Health v. Knapman**, [1956] S.C.R. 877; **Wiswell v. Metropolitan Corp. of Greater Winnipeg**, [1965] S.C.R. 512; Re **Nicholson and Haldimand-Norfolk Police Commissioners** (1979), 88 DLR (3d) 671). While the Supreme Court was prepared to sanction exceptions to the principle in **Calgary Power Ltd. v. Copithorne,** [1959] S.C.R. 24, and **Howarth v. National Parole Board**, [1976] 1 S.C.R. 453, the circumstances in both these cases are distinguishable from the present case. In **Capithorne**, a ministerial order made in accordance with statutory requirements was considered as neither the exercise of a judicial nor a quasi-judicial function. In **Howarth**, the majority considered the question to be an administrative not judicial one. The reasons of Dickson, J. (as he then was) on behalf of the minority, would be considered today by many, as compelling.

Accordingly, I would set aside the decision of Justice Boudreau. With respect, he has erred in considering and determining the issues raised in the notice of motion of May

27 without ensuring that appropriate notice was given to Mr. Gaston and further, providing to Mr. Gaston an opportunity to make submissions.

Justice Moir focused on the failure of Mr. Gaston to notify Mr. Saulnier of the "reasons for his absence".

Justice Moir stated:

> Instead, for three weeks he contacted no one. He weak excuse is that there were no telephone numbers in the documents served upon him. The telephone number of Mr. Saulnier was available in the telephone book, as was the telephone of the court.

With respect, Justice Moir has not given appropriate, nor indeed any, consideration to the reasons set forth in Mr. Gaston's affidavit and confirmed in his *viva voce* evidence - namely that he was :

> . . . confined to bed with a severe case of influenza or some other illness which was causing me to vomit and experience diarrhea on an uncontrollable basis.

The failure to consider the principal reason for Mr. Gaston's absence constitutes, in my opinion, an error of law.

In view of the foregoing, I do not consider it necessary to consider the remaining issues raised by this appeal:

- whether Justice Moir possessed the jurisdiction to consider an appeal from Justice Boudreau;
- whether the **Civil Procedure Rules** permit cost sanctions to be ordered against a non-party to an action.

Mr. Gaston has not been joined as a party to S.K. No 5228. I note, however, that the question of his status, or lack of status, to bring an application before Justice Moir was not contested by Mr. Saulnier.

In the circumstances of this case, Mr. Gaston's apparent lack of formal status in the present appeal, should not be considered an impediment to his appeal to this Court. I would, *nunc pro tunc,* grant him status as an intervenor pursuant to **C.P.R. 8**.

Conclusions

I would set aside the order of Justice Boudreau, as well as the decision of Justice Moir, with costs to Mr. Gaston in the amount of $1,000.00, inclusive of disbursements.

Pugsley, J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.

C.A. No.148490

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

RONALD GASTON Appellant (Intervenor) - and - **DIANNE MARGARET BURTON** Respondent	) REASONS FOR JUDGMENT BY:) PUGSLEY, J.A.