NOVA SCOTIA COURT OF APPEAL
Citation: ***Sable Mary Seismic Inc. v. Geophysical Services Inc.***, 2012 NSCA 57

Date: 20120531
Docket: CA 325703
Registry: Halifax

Between:

Sable Mary Seismic Incorporated and
Matthew Kimball

Appellants

v.

Geophysical Services Incorporated

Respondent

Judge:	Duncan R. Beveridge
Application Heard:	May 11, 2012, in Halifax, Nova Scotia By written submissions of May 22 & 25, 2012
Held:	The respondent is entitled to a further payment of $2,000 out of the funds held as security for costs of the appeal.
Counsel:	Derrick J. Kimball, for the appellant, Sable Mary Seismic Incorporated Nash T. Brogan, for the appellant, Matthew Kimball Colin D. Piercey, for the respondent

Reasons for judgment:

[1] The Honourable Justice Gregory M. Warner of the Nova Scotia Supreme Court awarded damages to the respondent of $1,764,251.70 for breach of contract by the appellant Sable Mary Seismic Incorporated ("SMSI") (for breach of contract) in overcharging the respondent while otherwise fulfilling his contractual obligations. He also found SMSI and Matthew Kimball jointly and severally liable for fraud in the amount of $451,855.41. His decision is reported as 2009 NSSC 404.

[2] Justice Warner later awarded significant additional amounts for pre-judgment interest and costs (see 2010 NSSC 357). The total judgment debt owed to Geophysical Services Incorporated ("GSI") amounted to approximately $2.7 million.

[3] Matthew Kimball and SMSI appealed. GSI sought security for costs and costs on that motion, should it be successful. I heard that motion and ordered security for costs on the appeal in the amount of $35,000 to be posted no later than July 15, 2011. I also ordered that costs for the motion were fixed at $2,000, inclusive of disbursements "payable in the cause". My reasons for judgment on the motion are reported as 2011 NSCA 40. The appellants caused to be deposited with the Registrar $35,000 on July 15, 2011.

[4] I was also a member of the appeal panel that heard the appeal and authored the reasons for judgment released March 29, 2012 (see 2012 NSCA 33). The appeal by Matthew Kimball and SMSI was dismissed. The formal order for judgment provided: "It is further ordered that the appellants shall pay costs to the respondent in the amount of $32,500, inclusive of disbursements."

[5] Initially, the respondent filed a written request with the registrar enclosing a draft order requesting payment in the amount of $32,500 out of the funds paid into court. Subsequently, the appellants filed their own written request for an order returning what they said was the balance of the funds held by the Registrar ($2,500) to Kimball Brogan in trust.

[6] Shortly thereafter, the respondent caused the sheriff to serve the Registrar of this Court with the execution order with respect to the substantial judgment debt owed, seeking payment of the balance of $2,500 toward that debt.

[7] The issues created by the competing claims were referred to me as a single judge of the court sitting in Chambers. I initially arranged to hear from the parties by telephone conference. The initial conference was on May 4, 2012. While the appellants confirmed they had no objection to the initial draft order requesting payment of $32,500, the respondent advised that the proper amount should be $34,500 in light of the earlier direction that costs were payable "in the cause" on the motion of security for costs. The appellants disagreed.

[8] Mr. Derek Kimball advised that the money which was paid into court was from his firm's trust account and the source of those funds did not come from either of the appellants, but from a third party. As such, he advocated what was left over after payment of costs on the appeal should be returned to his firm, in trust.

[9] Resolution of the issues was adjourned to provide the parties an opportunity to exchange information, take instructions and potentially reach a resolution. A further telephone conference was held on May 11, 2012. The parties were unable to agree to anything beyond that an order should issue to pay $32,500 to the respondent out of the funds held by the Court. I made that order.

[10] Submissions were made by both parties regarding whether the funds paid into court were only available to satisfy the order for costs arising out of the judgment of the court and consequent order of March 12, 2012. The parties agreed no oral hearing was needed. I requested written submissions. They have now been filed.

ANALYSIS

[11] I am convinced that the proper disposition is a further order should go directing payment to the respondent of $2,000 from the funds held by the Registrar as security for costs. My reasons are as follows.

[12] The sole argument advanced by the appellants is that court orders must be strictly construed. They say the terms of the orders are clear and unambiguous and leads inevitably to a conclusion that the security for costs funds are not available to pay the $2,000 order for costs on the motion.

[13] For ease of reference, I will repeat the operative terms of the orders. The order requiring security for costs provided:

> IT IS HEREBY ORDERED that the respondent's Motion for the appellants to post security for costs for this appeal is granted.
>
> IT IS FURTHER ORDERED that the appellants post $35,000 as security for costs of this appeal no later than July 15, 2011, failing which the respondent will be at liberty to have the appeal dismissed.
>
> IT IS FURTHER ORDERED that the costs on this Motion are fixed at $2,000, including disbursements, payable in the cause.

[14] The order of March 29, 2012 dismissing the appeal provided:

> IT IS ORDERED that the appeal is dismissed;
>
> IT IS FURTHER ORDERED that the appellants shall pay costs to the respondent in the amount of $32,500, inclusive of disbursements.

[15] The appellants rely on three decisions for its submission of strict interpretation of court orders: *Brosseau v. Berthiaume*, 1993 CarswellOnt. 3118 (O.N.C.J. Gen. Div.); *New Era Cap Co. v. Capish? Hip Hop Inc.*, 2006 FCA 66; *Tatarenko v. Tatarenko*, 2005 ABQB 325. All of these cases dealt with applications by an aggrieved party to seek to hold the responding party guilty of contempt of court orders that either required them to do something or to refrain from certain conduct.

[16] The principles extracted by the appellants from these cases include the comments by Valin J. in *Brosseau v. Berthiaume*:

> **9** In accordance with the general rules of interpretation, the language used in a judgment or order must be construed according to its ordinary meaning and not

> in some unnatural or obscure sense. Upon reading the entire order as a whole, it is clear that the intention of S.D. Loukidelis J. was to create a restraining order. ...

[17] In addition, they rely or the reasons of Sharlow J.A. in *New Era Cap Co. v. Capish? Hip Hop Inc.* where she wrote at para. 11:

> **11** ...I cannot accept that submission. In my view, in the context of contempt proceedings that are based on an alleged failure or refusal to comply with a court order, the words of the order must be read strictly. That is how the judge interpreted the Anton Piller order, and in my view his interpretation was correct. The contempt allegations in this case must be understood in the light of that narrow interpretation.

[18] As already noted earlier, these cases involved contempt proceedings. Contempt proceedings are quasi criminal in nature. Individuals face possible deprivation of their liberty and/or other significant penalties. Such proceedings dictate precision and care in how orders are interpreted (see, for example, *Godin v. Godin* (2012 NSCA 54). That is not the case here. The sole issue here is whether the order requiring the appellants to post $35,000 as security for costs includes the amount of costs that were ordered in interlocutory proceedings involved in the prosecution and defence of the appeal. In my opinion, they are. This conclusion is in accordance with the natural and ordinary meaning of the words used and with the purpose for which security for costs was ordered.

[19] I agree with the submissions of the respondent that “this appeal” and “the cause” are terms which are synonymous. Generally, “the cause” is referred to as the overall proceeding, usually in terms of a trial process, but the term applies equally to an appeal. In Mark M. Orkan, Q.C., *The Law of Costs*, 2nd ed, vol. 2 (Toronto: Canada Law Book, 2011), the learned author writes:

> **105.1 Costs in the Cause**
>
> The phrase “costs in the cause” is a convenient manner of referring to the costs of proceedings before the successful party has been ascertained. It is synonymous with “costs in the action” and “costs to the successful party in the cause”. All such expressions mean that the costs of the proceeding to which they refer are to abide the result of the trial and to go to the party who is there successful with respect to costs. ...

[20] Rule 90.02(1) of the *Nova Scotia Civil Procedure Rules* stipulate that the *Civil Procedure Rules* not inconsistent with Rule 90 apply to the proceedings in the Court of Appeal with necessary modifications as directed by the Court of Appeal or a judge of the Court of Appeal. Tariff C of Rule 77 deals with the issue of costs following an application heard in Chambers by a judge of the Supreme Court. Paragraph (2) of Tariff C provides:

> (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

[21] Tariff A deals with the quantum of fees for lawyers' services on a decision or order in a proceeding in the Supreme Court. This was one of the provisions considered by Justice Warner leading to his order for costs for the trial proceedings of just over $400,000 payable to the respondent. It has no application to the issue of costs on an appeal. Tariff B of Rule 77 is directly applicable. It says:

> **Tariff B**
>
> *Tariff of Party and Party costs allowed on an Appeal to the Nova Scotia Court of Appeal*
>
> On an appeal, the costs allowed shall be 40% of the costs awarded at trial excluding the "length of trial" component unless a different amount is set by the Nova Scotia Court of Appeal.

[22] In my reasons for judgment dated March 29, 2012, I wrote:

> [141] I would therefore dismiss this and all grounds of appeal and award costs to the respondent. Costs at trial were just over $400,000. Despite the complexity of the appeal, the parties recognize that an award 40% of that amount would be $160,000, and would over compensate the respondent for its involvement in the appeal. In my opinion, an award of $32,500, inclusive of disbursements, would be appropriate.

[23] The appellants do not suggest that my reasons for judgment and the ensuing formal order of March 29, 2012 ordering $32,500 inclusive of disbursements as costs on the appeal, included the costs of the motion for security for costs that were fixed at $2,000 "payable in the cause".

[24] In my opinion, pursuant to Rule 90.02, para. (2) of Tariff C in Rule 77 applies to proceedings in the Court of Appeal with the following modification:

> (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff B.

[25] The order of May 10, 2011 required the appellants to post $35,000 “as security for costs of this appeal”. In my opinion, unless otherwise ordered by the court, or a judge thereof, costs ordered or deemed to be ordered in the cause form an integral part of costs of an appeal and are payable from the amount paid into court as security for costs.

[26] I therefore direct an order to issue for payment of $2,000 to the respondent out of the funds held by the Court. If the parties are unable to agree as to the disposition of the balance of $500, I invite them to contact the Registrar to arrange a convenient date for a hearing.

Beveridge, J.A.