Date: 19971209 Docket: C.A. 142962

NOVA SCOTIA COURT OF APPEAL

Cite as: Hillcrest Development Company Ltd. v. Nova Scotia (Attorney General), 1997NSCA1

BETWEEN:

HILLCREST DEVELOPMENT COMPANY LIMITED, a body corporate Appellant - and - THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in right of the Province of Nova Scotia Respondent	)	Ian Maxwell, Agent for the Appellant Catherine Lunn for the Respondent Application Heard: December 4, 1997 Decision Delivered: December 9, 1997

BEFORE THE HONOURABLE JUSTICE FLINN IN CHAMBERS

FLINN, J.A.: (in Chambers)

The appellant (Hillcrest) commenced an action against the Crown for damages for breach of two construction contracts relating to work on The Pines Resort Hotel. The Crown defended, and counterclaimed, for the cost of correcting and completing Hillcrest's work. Following seven days of trial in June, 1996, and two days in February, 1997, and after receipt of post-trial briefs in March, 1997, Justice Nathanson, in a 73-page decision issued on August 22, 1997, dismissed Hillcrest's claim against the Crown. He allowed the Crown's counterclaim in the amount of $19,557.40 with costs.

Hillcrest has filed a notice of appeal of the decision and order of Justice Nathanson. The matter has been set down for hearing by this Court on March 31st, 1998.

Hillcrest now applies for a stay of execution of Justice Nathanson's order.

The test which I must apply, in determining whether to grant Hillcrest's application for a stay, is that set out by Hallett, J.A. in

Fulton Ins. Agencies Ltd. v. Purdy (1990), 100 N.S.R. (2d) 341.

At p. 346-347 Justice Hallett says the following:

> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
>
> (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
>
> (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

Hillcrest, which was represented by counsel at the trial, is not represented by counsel on this application. The application is supported by the affidavit of Hillcrest's principal, Mr. Maxwell, who appeared on his own behalf at the hearing of the application.

The affidavit is not responsive to the requirements for a stay

set out in **Fulton**, and it is of no assistance to me in determining whether Hillcrest's appeal raises arguable issues, whether Hillcrest will suffer irreparable harm if the stay is not granted or whether the balance of convenience favours Hillcrest. Nor does the affidavit disclose anything exceptional with respect to this application.

I will say more about this affidavit later in these reasons.

In Hillcrest's notice of appeal, the following are identified as the grounds of appeal:

> AND the grounds for appeal are
>
> (1) The learned Justice erred in law.
>
> (2) The learned Justice committed errors in Jurisdiction.
>
> (3) Other errors which may be apparent and made known after the review of the transcript.

Attached to the appellant's notice of appeal is an affidavit of Mr. Maxwell in which he sets out his own opinions as to why the decision of the trial judge is wrong, and should be reversed. I suppose one could conclude from reviewing this affidavit that Hillcrest is arguing that the findings of the trial judge were not supported by

relevant evidence, and that the trial judge relied upon evidence that was not relevant to the issues.

For the purposes of this application I will assume, without deciding, that Hillcrest's appeal raises arguable issues.

There is, however, a real problem with this application in that nowhere in the supporting documentation is there an indication as to how Hillcrest will suffer irreparable harm if the stay is not granted; or how the balance of convenience favours Hillcrest.

I asked Mr. Maxwell, at the hearing of this application, to indicate how Hillcrest would suffer irreparable harm if the stay were not granted. Mr. Maxwell did not say that Hillcrest was unable to respond to the judgment. He said the following:

> If we are not in a position to pay it, at the immediate time, we could have to sell assets, or we could have to sell other things, and we could be in bad financial straits; which, when it's all over, it will be too late - the assets will be gone - there's no getting them back at the price that they took them at. (emphasis added)

This falls far short of the irreparable harm that must be demonstrated before a stay will be granted. Further, Hillcrest has not demonstrated, at all, why the balance of convenience favours it, with respect to this matter.

Hillcrest has failed to meet the primary test, for a stay, set out in **Fulton**.

There are no exceptional circumstances which are present here, nor has it been suggested that any exceptional circumstances exist, in order to invoke the secondary test in **Fulton**.

The application of Hillcrest, for an order to stay execution of the Order for Judgment in this matter dated October 10th, 1997, is, therefore, dismissed.

With respect to Mr. Maxwell's affidavit which was filed in support of this application, counsel for the Crown says the following, in her submission to me:

> In reviewing the Affidavit of Ian Maxwell, deposed on November 26, 1997, it is very apparent that these principles have not been complied with. The affidavit is replete with expressions of opinion in regard to: credibility of various witnesses who gave evidence at trial, various legal issues, and appears to be a summation of the merits of the case. Throughout the affidavit there is no indication of whether the information is based on personal knowledge or information and belief; much of which would appear to be based on hearsay. Some of the paragraphs refer to statements which appear to be based on information, but the source of the information is not stipulated nor is the belief of the affiant stipulated in the appropriate paragraph. The affidavit also contains statements given in the context of expert opinion on the requirements and quality of construction. The affidavit, in addition, contains Mr. Maxwell's personal opinions on his interpretation of his rights and due process of the law.

I agree with those submissions. In **Waverley (Village Commissioners) v. Nova Scotia,** (1993), 123 N.S.R. (2d) 55, Justice Davison set out the principles to be applied in the case of affidavit evidence. Mr. Maxwell's affidavit does not comply with those principles.

However, as I have indicated previously in these reasons, I found Mr. Maxwell's affidavit to be of no assistance to me in determining the merits of this application. Therefore, while the affidavit contains matters that would be inadmissible, I have not considered any of the matters contained within that affidavit in

reaching my decision on this application.

There is, however, a matter of more serious consequence with respect to Mr. Maxwell's affidavit.

Civil Procedure Rule 38.11 provides as follows:

> The Court may order any matter that is scandalous, irrelevant or otherwise oppressive to be struck out of an affidavit.

Clearly, there are paragraphs in Mr. Maxwell's affidavit that are "scandalous and irrelevant". The affidavit contains allegations, without any evidentiary foundation whatsoever, concerning the lack of ethics, reputation and unprofessionalism of several witnesses at the trial, and against counsel for the Crown.

I do not intend to repeat the offending paragraphs, for obvious reasons.

In **Adelaide Capital Corp. et al. v. Smith's Field Manor Development Ltd. et al** (1994), 129 N.S.R. (2d) 241 (S.C.N.S.),

Justice Saunders said the following concerning “scandalous and irrelevant” statements in an affidavit, at p. 246:

> The question also arises whether offending paragraphs should simply be ignored by the presiding justice, or expunged from the record. It is unnecessary to state a general rule. Each case will depend upon its own facts. The difficulty here is that some of the allegations contained in Mr. Lienaux’s affidavit are so serious that they ought to be purged from the record entirely. Counsel’s remarks, in court, enjoy an immunity. Affidavits, deposed to by others, and forming a part of the public record, do not. The danger lies in others publishing potentially defamatory allegations thereby causing real harm to the individual maligned. The court supervises its own process and should not be put in a position where its own records are encumbered by scandalous allegations. This court may strike them out either by virtue of its own inherent authority or by virtue of the power prescribed in Civil Procedure Rule 38.11. When commenting on a similar situation in **Rossage v. Rossage et al.**, [1960] 1 All E.R. 600 (C.A.), Hodson, L.J., said at p. 602:
>
> > “...I am clear of opinion (sic) that these matters are irrelevant and scandalous, and therefore they ought to be struck out. The court ought not to be embarrassed by their presence on the file; nor ought the party whom these statements tend to implicate to be embarrassed by having to deal with them.”

Mr. Maxwell has no legal training. Because of this, he should be given some leeway in advancing his appeal. However, Mr. Maxwell cannot be permitted to use the documents, which he files in these proceedings, to make accusations (unsupported by evidence) concerning the character and integrity of witnesses and counsel.

For these reasons I will order that the following paragraphs of Mr. Maxwell's affidavit, filed in support of this application, and sworn to on the 26th day of November, 1997, to be expunged from the record:

Page 1, paragraph #(1)

Page 2, paragraph # (4), (5), (6a) & (6b)

Page 3, paragraph #7, and the paragraph which follows immediately thereafter - # I & II

Page 4, paragraph VII.

I will also order Mr. Maxwell to pay to the respondent its costs of this application which I fix at $500.00 inclusive of disbursements.

Flinn, J.A.

BETWEEN:

HILLCREST DEVELOPMENT COMPANY LIMITED, a body corporate	)	
	)	
Appellant	)	
- and -	)	BEFORE THE HONOURABLE
	)	
THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in right of the Province of Nova Scotia	)	JUSTICE FLINN (in Chambers)
	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	
	)	
	)	