Date: 20020115
Docket: CA 176068

NOVA SCOTIA COURT OF APPEAL
[Cite as: Silver v. Co-operators General Insurance Company, 2002 NSCA 6]

BETWEEN:

ROBERT and DEANNA SILVER

Appellants

- and -

CO-OPERATORS GENERAL INSURANCE COMPANY, the BUSINESS DEVELOPMENT CORPORATION, formerly known as THE FEDERAL BUSINESS DEVELOPMENT BANK and THE BANK OF MONTREAL

Respondents

D E C I S I O N

Counsel: Appellants in person
Thomas W. Jarmyn for the respondent Business Development Corporation
J. Andrew Fraser for the respondent Bank of Montreal

Application Heard: January 10, 2002

Decision Delivered: January 15, 2002

BEFORE THE HONOURABLE JUSTICE BATEMAN IN CHAMBERS

BATEMAN, J.A.: (in Chambers)

[1] In 1996 the appellants, Robert Silver and Deanna Silver, commenced an action in Supreme Court claiming, *inter alia*, damages from the respondents, the Bank of Montreal ("BMO") and the Business Development Corporation ("BDC") in consequence of an alleged wrongful conversion of chattels. The respondents successfully applied to strike the Statement of Claim, as against them, pursuant to **Civil Procedure Rule** 14.25. The Silvers have appealed. This is an application for security for costs on appeal by the respondents.

[2] In their application to strike the respondents relied upon paragraphs (b) and (d) of **Civil Procedure Rule** 14.25:

> 14.25.(1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
>
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).
>
> (emphasis added)

[3] I am urged by the applicants to conclude, for the purpose of this application, that the Chambers judge was correct in striking the Statement of Claim, and therefore, that security for costs should be ordered because the appellants will inevitably fail on this appeal. The applicants' submissions in this regard stray far beyond the merits of this appeal and include a detailed analysis of the appellants' claim at trial. To the extent that the merits are relevant to this application, it is the merits of the appeal of the order striking the Statement of Claim that are to be

considered, not the appellants' prospect for success in the action which was terminated by the Chambers order.

[4] The **Rule** applicable here is specific to appeals and states:

> 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.

[5] On a security for costs application before this Court the appellants are not required to demonstrate that they will succeed on the appeal. It is sufficient that they have raised an arguable issue on the record before us (**Smith's Field Manor Development Ltd. v. Campbell**, [2001] N.S.J. 333 (Q.L.) (C.A.)).

[6] In granting the application to strike the Statement of Claim, the Chambers judge extensively considered the affidavit evidence filed by the applicants. The admission of those affidavits was opposed by the appellants. The judge was satisfied, however, that the affidavits were admissible. It was his view that they did not dispute the statements of fact in the Statement of Claim but simply provided necessary background information. Accordingly, he accepted that the "facts" contained in those affidavits should be considered. Taking into account those facts, he concluded that the appellants had no chance for recovery in their action and struck the Statement of Claim.

[7] I am satisfied that the question of the admissibility of the affidavit evidence and, if admitted, the use which may be made of the contents, is an arguable issue which has been raised in the Notice of Appeal (**Sherman v. Giles** (1994), 137 N.S.R. (2d) 52; N.S.J. 572 (Q.L.) (N.S.C.A.)). On this security for costs application it is inappropriate to further consider the appellants' potential for success on the appeal.

[8] The applicants contend that security should be ordered not only because the appellants' ultimate success is unlikely but also because they are unable to respond to an order for costs on the appeal. The Silvers have no assets of significance and there is an unsatisfied judgment in the amount of $80,000 against them in favour of BDC arising from a related foreclosure proceeding.

[9] Having found that the potential merit of the appeal does not, here, bear on the security issue, the question is whether security should be ordered on account of the appellants' impecuniosity.

[10] In **L. E. Powell & Co. Ltd. v. Canadian National Railway Co. et al. (No. 2)** (1975), 11 N.S.R. (2d) 532 (N.S.S.C.A.D.), MacKeigan, C.J.N.S. noted that prior to 1966 applications for security for costs on appeal were almost always refused where the only ground was poverty of the appellant. The Chief Justice referred to the decision in **Fleckney v. Desbrisay**, [1927] 1 D.L.R. 537 (N.S.C.A.), where it was noted that the spirit of the **Judicature Act** and **Rules** of 1919 was that every litigant, rich and poor alike, have the right to one appeal in every case in which he has a claim. MacKeigan, C.J.N.S. acknowledged, however, that there had been a change in approach to security for costs on appeal. He said:

> 7 By Rule 62.30, *supra*, this Court or a judge thereof, like the English courts, may now order security for costs on appeal in "special circumstances". The basic principle applied by the English courts in cases like the present has been set forth by Bowen, L.J., in *Cowell v. Taylor* (1885), 31 C.D. 34 (C.A.) at p. 38:
>
> > The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow.
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> (Emphasis added)

[11] At the time of **Powell**, **supra**, **Civil Procedure Rule** 62.30(1) provided:

> (1) Unless by reason of special circumstances security is ordered by the Appeal Division, or a judge thereof, upon application made within fifteen days from the service of the notice of appeal, security for costs shall not be required on an appeal.

[12] The **Rule** was subsequently changed to its present wording:

> 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.

[13] Notwithstanding this change, in **Frost v. Herman** (1976), 18 N.S.R. (2d) 167 (N.S.S.C.A.D.) Macdonald, J.A. stated that the principle remained that security should not be ordered on appeal unless "special circumstances" exist. He specifically endorsed, however, the quote from Bowen, L.J. in **Cowell v. Taylor** (1885), 31 C.D. 34 (C.A.) as appears in **Powell** above.

[14] The principle enunciated in **Cowell v. Taylor**, favouring the granting of security for costs on appeal where the appellant is without resources to respond to an order for costs if unsuccessful on the appeal, presumes, however, that there has been a trial on the merits. Such is not the case here.

[15] There are no factors apart from the appellants' impecuniosity which would weigh in favour of the order sought. Here the costs of the hearing before the Chambers judge have not yet been fixed, thus it cannot be said that they are unpaid. The appellants have discharged all prior orders for costs. (In contrast see **Frost**, **supra**, and **Arnoldin Construction & Forms Ltd. v. Alta Surety Co.** (1994), 134 N.S.R. (2d) 318; N.S.J. No. 462 (Q.L.) (N.S.C.A.)).

[16] The existence of the unsatisfied foreclosure judgment is a factor to consider, however, there is no indication that the appellants have been in the financial position to respond to that debt. It is clearly reflective of their poor financial position.

[17] The appellants say that the order for security for costs sought by the applicants would preclude them from continuing with the appeal. I accept that is so.

[18] Generally the cases endorsing orders for security on appeal, despite poverty, arise after there has been a decision at trial on the merits of the issue in the case. As stated above, the appellants have not had a trial on the merits. Their action was dismissed without a substantive hearing of their claim. In **Wall v. Horn Abbot Ltd.** (1999), 176 N.S.R. (2d) 96; N.S.J. No. 124 (Q.L.) (N.S.C.A.), Cromwell, J.A., for the Court, at paras. 42 to 50, discusses the rationale underlying the reluctance of a court to conduct a pre-trial assessment of the merits of a claim. Trial on the

merits, he noted, is a key element of a fair procedure. While he was speaking in the context of **Civil Procedure Rule** 42.01, which governs security for costs at trial, the remarks are equally applicable here where there has been no trial of the appellants' claim.

[19] The applicants submit that security should be fixed in the amount of $7500 for each of them. This figure is calculated, based upon an amount involved at trial of $5 million. They modified this request substantially on the hearing of this application.

[20] Security for costs on appeal after a trial, if awarded, is generally fixed at an amount estimated to be somewhat less than the costs award anticipated on the appeal (**Frost v. Herman**, **supra**). Costs on appeal after a trial are often fixed at 40% of the costs awarded at trial if the appeal court is satisfied that such an award would not be excessive.

[21] Costs on an interlocutory appeal, however, would more commonly be in the order of $2000. It appears from the record that this matter was heard in a day or less (December 19, 2000) with final submissions filed on May 25, 2001. The application before the Chambers judge proceeded entirely by affidavit. The quantum of security sought by the applicants is excessive in these circumstances.

[22] In **Royal Bank of Canada v. Woloszyn** (1999), 175 N.S.R. (2d) 352; N.S.J. No. 176 (Q.L.) (N.S.C.A.), Flinn, J.A., of this Court, ordered security for costs in the amount of $7500 on an appeal where: (1) the trial had lasted for 15 days: (2) there would be many volumes of evidence; and, (3) the appellant raised 23 grounds of appeal. Were I inclined to order security for costs here the amount would not approach that sought by each of the applicants.

[23] The applicants have not satisfied me that special circumstances exist here such that security for costs in any amount should be ordered. Even had they made out a *prima facie* case for security, accepting, as I do, that the result of even a modest order for security for costs could end this appeal, I am not satisfied that in these circumstances such an order would be just.

[24] In the event that the appellants are successful on this appeal and the action continues, BMO and BDC can renew their application for security for costs before the trial judge. A claim for security for the trial costs was made as an alternative to

the application to strike. That would be a more appropriate time to raise issues about the complexity of the litigation, the multiplicity of proceedings and the unsatisfied foreclosure judgment.

[25] Accordingly, the application is dismissed with costs to the appellants collectively, in any event of the cause, in the total amount of $750 inclusive of disbursements.

Bateman, J.A.