Date: 19970514] Docket: CA 135513

NOVA SCOTIA COURT OF APPEAL
Cite as: Halifax (County) v. Sackville Manor Ltd., 1997 NSCA 109

Clarke, C.J.N.S.; Chipman and Flinn, JJ.A.

BETWEEN:

MUNICIPALITY OF THE COUNTY OF HALIFAX, a body corporate, and SHARON BOND Appellants	)	Daniel W. Ingersoll Ross H. Haynes for the Appellants
- and -	)	
	)	Jonathan C.K. Stobie for the Respondent
SACKVILLE MANOR LIMITED, a body corporate Respondent	)	Appeal Heard: May 14, 1997
	)	Judgment Delivered: May 14, 1997

THE COURT: Appeal dismissed from interlocutory order of trial judge, per oral reasons for judgment of Clarke, C.J.N.S.; Chipman and Flinn, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The appellants seek leave to appeal and, if granted, to reverse an interlocutory order made by Justice Nathanson during the course of a trial between these parties.

The issue at trial relates to an assessment of damages. The respondent claims that, as a result of amendments made by the Municipality in its planning legislation, the value of land upon which the respondent proposed a multi-unit residential development decreased.

During the trial, the appellants called Mr. Speed, who was qualified as an expert witness "to express opinions with respect to the highest and best use of certain lands and valuation of those lands". His opinion was based in part on two subsidiary reports prepared by a firm of structural engineers and underlying that were reports concerning the soil conditions of the respondent's land. The appellants called only Mr. Speed. They did not call the authors of the subsidiary reports.

The respondent moved that the reports of an expert who is not called to testify are inadmissible through another expert.

After hearing argument Justice Nathanson granted the motion. He referred to the decision of Mr. Justice Sopinka in **R. v. Lavallee**, [1990] 1 S.C.R. 852 at 899. Justice Nathanson continued by saying,

> The issue then is the trustworthiness of the facts and the opinions in the subsidiary reports when there is no one able to speak to them under oath and is not able to be cross-examined on them. Of what trustworthiness are the facts and the opinions set out in such subsidiary reports? And my answer would be that there can be none. There are, when one doctor speaks to other doctors, for example, in the hospital setting when facts such as charts and reports and test results are known, that there are strong circumstantial guarantees of trustworthiness. But in the present case we have subsidiary reports on a subject to which the present expert witness is not able to give expert testimony and I am unable to see that there are any -- let alone strong -- circumstantial guarantees of trustworthiness surrounding that circumstance. The ruling, therefore, is that the subsidiary experts' reports will not be admitted into evidence.

The appellants contend that the trial judge erred by applying wrong principles of law and, in particular, by failing to give proper or any weight to the purpose for which the reports were prepared, namely, property valuations. The appellants submit that the report should be admitted to show the basis for Mr. Speed's opinion and not as independent opinion evidence concerning the facts in dispute.

The position of this Court with respect to appeals from interlocutory orders has been stated in many of our judgments. In **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143, Justice Chipman wrote

at p. 145, para. 9:

> At the outset, it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result. The burden on the appellant is heavy: **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, at 333, and **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54, at 57.

While we grant the appellants leave to appeal, we dismiss the appeal for two principal reasons.

The first is that this appeal is premature. An evidenciary ruling was made by the trial judge during the course of the trial. Until such time as the trial is concluded and a decision is rendered, it appears to us that the timing of this appeal is too early and, therefore, unnecessary.

The second reason is that we are not persuaded Justice Nathanson, to paraphrase **Minkoff**, applied wrong principles of law or rendered a decision that resulted in a patent injustice. While the limited exception to the rule against hearsay applies to some forms of hearsay evidence, we do not agree that in these circumstances it applies to what may be described as secondhand expert reports. To admit, through Mr. Speed, the unsworn opinion evidence of other experts on soil conditions

and construction costs, is to admit unsworn evidence of facts that are directly in issue. The record reveals that Mr. Speed sought the opinions of others in areas where he did not profess an expertise. He was not in a position to evaluate the opinions of the experts who authored the subsidiary reports upon which he relied. We agree that Justice Nathanson acted within his discretion in concluding that he was unable to find guarantees of trustworthiness surrounding the circumstances (see **R. v. Lavallee, supra**, Sopinka J. at pp. 898-900).

For these reasons we dismiss the appeal and award the respondent costs of $1,500.00, payable forthwith.

CLARKE, C.J.N.S.

Concurred in:

Chipman, J.A.

Flinn, J.A.