C.A. No. 125573

NOVA SCOTIA COURT OF APPEAL
Cite as Sydney Engineering Inc. v. Irving Oil Ltd., 1996 NSCA 5

BETWEEN:

SYDNEY ENGINEERING INCORPORATED and ALPHA INVESTMENTS LIMITED	Lloyd MacNeil for the Appellants	
Appellants		
- and -	Wayne Marryatt for the Respondent	
IRVING OIL LIMITED		
Respondent	Application Heard: March 14, 1996	
	Judgment Delivered: March 14, 1996	

BEFORE: The Honourable Madam Justice Nancy J. Bateman, in Chambers.

BATEMAN, J.A.:

This is an application to extend the time for filing a Notice of Appeal.

Background:

The appellant, Alpha Investments Limited, appeals a judgment of a Chambers judge, which decision was rendered January 16, 1996 and the Order issued January 25, 1996.

The main action commenced on June 21, 1994. It was an action in debt taken by the respondent, Irving Oil Limited against the appellant, Sydney Engineering Incorporated. Default judgment was entered against the appellant on July 7, 1994 in the amount of $21,913.95. An execution order for the amount due was issued that same day and subsequently renewed. In an examination in aid of execution it was learned that the Department of Supply and Services was indebted to Sydney Engineering for an amount in excess of the judgment due. In September, the Sheriff for the County of Cape Breton, having been supplied with the execution order in favour of Irving Oil, made a third party demand upon D.S.S.. He was advised by a representative of D.S.S that the Department would not release funds in response to the Execution Order unless and until an order issued under the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c. 360, as amended. Irving Oil applied, pursuant to **s. 21(1)** of that **Act**, for an order requiring D.S.S. to pay the funds to Irving, in satisfaction of the judgment. Alpha sought leave to intervene in that proceeding. It is the resulting Order that is under appeal.

On January 10, 1990, Sydney Engineering, had issued a floating charge debenture to Alpha Investments. The amount of the debenture was $2,000,000, to secure advances made by Alpha to Sydney of approximately $500,000. On June 9, 1995, purportedly pursuant to the terms of the debenture, Alpha obtained a Specific Assignment of the receivable owed by D.S.S. There is no order granting Alpha the right to intervene in the proceeding, however, it appears from the decision of the Chambers judge that Alpha was an intervenor.

The Chambers judge ordered that the monies owing by D.S.S. be paid to Irving. The operative part of the decision is at p. 2:

> The issue is whether the assignment to Alpha is valid. I do not think that it is. This is an example of a company seeking to protect its sister company from the legitimate claim of a third party. The assignment to Alpha was not done in good faith. Though Alpha and Sydney Engineering are separate legal entities, I will not ignore the fact that they have the same controlling mind. They benefit the same person. Mr. Nickerson executed the assignment on behalf of Sydney Engineering. The assignment is void.
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> I direct that the monies owing to Sydney Engineering by Supply and Services be paid directly to Irving . . .

According to the affidavits filed on this application, Alpha received a copy of the decision on January 16, 1996 and immediately requested an opinion as to the merits of an appeal. That opinion was received January 18, 1996, but was silent on the time within which to appeal. On January 26, 1996, Alpha received a copy of the Order. On February 12, 1996 a representative of Alpha enquired of their solicitor, the time period within which an appeal must be filed and was advised that it was 30 days from the date of the Order. By that time Alpha had formed the intention to appeal and on February 21, 1996, so instructed counsel. The Notice of Appeal was filed on Monday, February 26, 1996.

Jurisdiction:

Pursuant to **Civil Procedure Rule 62.31(8)(e)**, a judge of this Court, sitting alone, has the authority to extend the time for filing a Notice of Appeal. The **Rule** provides:

> A Judge may order that . . . any time period prescribed by this Rule be extended or abridged before or after the expiration thereof.

Analysis:

(i) The applicable time period for filing the appeal:

Pursuant to **Civil Procedure Rule 62.02,** a Notice of Appeal must, generally, be filed within 30 days from the date of the order or judgment appealed from. An appeal from an interlocutory order must, however, be filed within 10 days.

It is only necessary to extend the time for filing the Notice of Appeal, here, if this is an appeal from an interlocutory order. The Notice has been filed within the 30 days.

Counsel for the respondent takes the position that the Order appealed from is interlocutory. Counsel for the appellant submits that it is not interlocutory thus the 30 day filing requirement applies. "Interlocutory order" is not defined in the **Civil Procedure Rules.**

Justice John Sopinka and Mr. Mark A. Gelowitz in their text **The Conduct of an Appeal,** Butterworths 1993, comment upon the distinction between interlocutory and final orders. They wrote at p. 6:

> One who has not been introduced to the intricacies of the matter could be forgiven for speculating that an 'interlocutory' order is one delivered in the course of litigation, prior to final judgment, and that a 'final' order is one that concludes litigation. Such an interpretation would be logical and in accordance with the common law understanding of final judgment; it is, however, sadly unsophisticated. What should be a straightforward application of a simple principle has never been anything of the kind. Every previously untested order appears to raise the question anew, with unpredictable and inconsistent results - so much so that the judges themselves have been driven to despair.

And at p. 15:

> It emerges from the cases that the distinction between interlocutory and final orders is not strictly parallel to the distinction between substance and procedure. Pleadings and joinder of claims and parties, for example, are generally regarded as matters of procedure, but orders in such matters can have drastic effects on what and against whom a party can claim. Where such orders have a terminating effect on an issue or on the exposure of

> a party, they plainly 'dispose of the rights of the parties' and are appropriately treated as final. Where such orders set the stage for a determination on the merits, they do not 'dispose of the rights of the parties' and are appropriately treated as interlocutory.

The Order under appeal here, while obtained ancillary to an effort to enforce a judgement in a debt proceeding, is, in effect, an order granted in a separate proceeding - the application pursuant to the **Proceedings Against the Crown Act**. Indeed, Alpha was not a party to the original debt action. It does not simply "set the stage for a determination on the merits", to use the words of Sopinka and Gelowitz. It is akin to a final order in that it determines the rights of the parties, Alpha and Irving, to the funds held by D.S.S.

It is not necessary, however, to conclusively determine the nature of the Order here. For the reasons set out below, I am satisfied that if the appellant has not complied with the time for filing the Notice of Appeal, the period should be extended.

(ii) Extending the time for filing a notice of appeal:

The test to be applied is succinctly stated in **Bernard H. Morash Agencies Limited v. Gina Hanna and Keith M. Dorey**, a decision of Flinn, J. A., in Chambers, September 5, 1995, C.A. No. 119355. He wrote at p. 3:

> In the recent decision of **Nova Scotia (Attorney General) v. Mossman et al.** (1994), 133 N.S.R. (2d) 229 Justice Roscoe said the following at p. 231:
>
> > The test for granting an extension of time for an appeal is as set out in the decision of this court in **Maritime Co-Op Services Ltd. and Martin v. Maritime Processing Co., Hogg and Hillcrest Rent-A-Car et al.** (1979), 32 N.S.R. (2d) 71; 54 A.P.R. 71 (C.A.), as summarized in Nova Scotia **Annotated Rules of Practice** (Ehrlich), at p. 308:
> >
> > > The time period for filing a notice of appeal should only be extended where:

> (1) The appeal has sufficient merit, on the basis that it is arguable that the trial judge made a clear error in his perception and evaluation of the evidence;
>
> (2) There was a bona fide intention to appeal while the right to appeal existed;
>
> (3) A reasonable excuse for the delay in launching the appeal is advanced.

In that case most of the argument was focused on whether or not the appeal had sufficient merit.

In **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173, Hallett J.A. of this Court said the following concerning the three prong test referred to by Roscoe J.A. in **Nova Scotia v. Mossman** (supra):

> There is nothing wrong with this three part test but it cannot be considered the only test for determining whether time for bringing an appeal should be extended. The basic rule of this court is as set out by Mr. Justice Cooper in the passage I have quoted from **Scotia Chevrolet Oldsmobile Ltd. v. Whynot**, supra. That rule is much more flexible. The simple question the court must ask on such an application is whether justice requires that the application be granted. There is no precise rule. The circumstances in each case must be considered so that justice can be done. A review of the older cases which Mr. Justice Cooper referred to in **Scotia Chevrolet Oldsmobile Ltd. v. Whynot** and which Mr. Justice Coffin reviewed in **Blundon v. Storm** make it abundantly clear that the courts have consistently stated, for over 100 years, that this type of application cannot be bound up by rigid guidelines.
>
> I consider that the three part test is a useful guideline for dealing with such applications. However, I agree with Hallett J.A. in **Tibbetts** that, ultimately, it comes down to a question of whether or not justice requires that discretion be exercised in favour of granting the application.

The respondent submits that the appellant has not established that it had formed a **bona fide** intent to appeal within the 10 day period, and thus should not succeed. As stated above, the three part test provides only guidelines for considering an application such as this. It would be inappropriate to, in all cases,

require rigid adherence to the requirement that the intent to appeal be formed within the applicable appeal period, if the "intent" to appeal is synonymous with a "decision" to appeal. Here the appeal period is very short. The appellant although in contact with counsel, was initially not aware of the appeal period, and was then misinformed. It is reasonable for an appellant to seek legal advice on the prospects of an appeal, and to take some time to consider its options, if of the understanding that such time exists. On the other hand, an appellant who is aware of the proper time limits, should not be permitted to rely upon its indecision to extend the prescribed appeal period. I agree with the respondent that an appellant has some obligation to inform itself of the applicable periods. The effect of the failure of the appellant to do so, however, and the reasonableness of its explanation must be considered in each case. Simply put, this appellant, on counsel's advice, thought the appeal period was 30 days. This is confirmed by the appellant's filing of the Notice within the 30 day period. A review of the case law particular to when the appeal period has been missed due to a solicitor's mistake, is found in **Blundon v. Storm** (1970), 1 N.S.R. (2d) 621 (N.S.S.C.A.D.).

The decision of the Chambers judge is very brief. It is not clear upon what legal basis he determined that the assignment was void. He did not address the issue of priorities as between the debenture and the execution order. I am satisfied that the appellant, in his grounds of appeal, has raised arguable issues. There is no indication that the short delay in filing the Notice of Appeal has prejudiced the respondent. Justice requires that the application be granted.

Disposition:

Accordingly, the time for filing the Notice of Appeal herein is, if necessary, extended to the March 15, 1996.

Costs shall be in the cause.

Bateman, J. A.

C.A. No.12557

NOVA SCOTIA COURT OF APPEAL

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