NOVA SCOTIA COURT OF APPEAL
Citation: ***Heron v. Smith***, 2003 NSCA 92

Date: 20030915
Docket: CA189018
Registry: Halifax

Between:

Brian Heron

Applicant/Appellant

v.

Charles A. Smith

Respondent

Judge:	The Honourable Justice M. Jill Hamilton
Application Heard:	August 28, 2003, at Halifax, Nova Scotia, In Chambers
Held:	Application for extension of time to file a Notice of Appeal denied. Application to vacate and set aside prior Canadian court decisions denied.
Counsel:	Brian Heron, Self-Represented Applicant John E. MacDonell, for the respondent

Decision:

[1] Brian Heron, the appellant, applied in chambers on August 28, 2003 for two things:

> (1) an order for an extension of time to file a notice of appeal with respect to the August 8, 2003 decision of Justice Jamie W.S. Saunders of this court sitting in chambers, and
>
> (2) an order to in effect vacate and set aside all Canadian court decisions made to date arising out of California litigation between himself and Charles A. Smith, the respondent, and to provide that no further court proceedings be permitted in Canada (which would include the present appeal which Mr. Heron and his former co-appellant, Donald MacGillivary, commenced in October, 2002) until "existing law permits". Mr. Heron sometimes refers to this as an application for injunctive relief or an application to correct earlier Canadian orders.

[2] When I raised with Mr. Heron the issue of my jurisdiction as a chambers judge to deal with the substantial issue raised in the second order he sought, he indicated that if I do not have jurisdiction as a chambers judge to grant the second order, that I should set a time and date for a panel of this court to deal with it.

[3] Mr. Heron and Mr. Smith have been involved in almost continuous litigation since 1988, arising from a single rental agreement with an option to purchase that they entered into in 1987 with respect to a house in California. There have been at least 14 concluded court proceedings in California arising from this one agreement, all but one of which favoured Mr. Smith. In addition to the American court proceedings there have been at least four separate court proceedings in Canada, including the decision under appeal, involving at least 26 court appearances.

[4] By orders dated August 16, 2000, Justice Walter R. E. Goodfellow of the Supreme Court of Nova Scotia granted Mr. Smith summary judgment in his action on two judgments for court costs obtained against Mr. Heron in California.

[5] The first California judgment included court costs in the amount of US$52,857.50. The California trial decision awarding those costs had been

appealed to the California Court of Appeal and the appeal had been dismissed before the matter was heard by Justice Goodfellow.

[6] The second California judgment was for post-trial court costs in the amount of US$9,856.17. This second California trial decision was under appeal to the California Court of Appeal at the time this matter was before Justice Goodfellow. Accordingly, Justice Goodfellow ordered that execution on his order domesticating the second order for costs be stayed pending the determination of Mr. Heron's appeal. The California Court of Appeal, Second Appellate District, Division One, filed its decision January 9, 2002, in the case of **Brian Heron v. Charles Smith**, B137614, unpublished, hereinafter called the "**2002 Decision**," dismissing Mr. Heron's appeal.

[7] Mr. Heron appealed Justice Goodfellow's decision to this court and his appeal was dismissed June 20, 2001 (**Smith v. Heron**, [2001] N.S.J. No. 233). His application to the Supreme Court of Canada for leave to appeal this court's decision was denied on July 11, 2002 (**Smith v. Heron**, [2001] S.C.C.A. No. 510).

[8] Mr. Smith attempted to execute on his judgment. He found that certain real property in Cape Breton registered in the name of Mr. Heron appeared to have been conveyed to Mr. MacGillivary by deed dated August 8, 2000. He commenced a lawsuit against Mr. Heron and Mr. MacGillivary alleging fraudulent conveyance. By decision and order dated September 18, 2002 and a supplementary decision dated September 25, 2002, Justice Gerald R. P. Moir of the Supreme Court of Nova Scotia ordered that the defence of Mr. Heron and Mr. MacGillivary be struck and that judgment be entered in favor of Mr. Smith. Justice Moir declared that the August 8, 2000 deed whereby Mr. Heron conveyed the Cape Breton real property to Mr. MacGillivary was void and ordered that the conveyance be set aside. It is these decisions of Justice Moir that are now on appeal to this court.

[9] Mr. MacGillivary filed a notice of discontinuance of his appeal on August 21, 2003, leaving Mr. Heron and Mr. Smith as the only two parties to this appeal.

[10] With respect to both orders sought by Mr. Heron, Mr. Smith argued that Mr. Heron's applications should be dismissed for lack of evidence. He argued the two affidavits Mr. Heron filed in support of his applications are faulty and accordingly must be struck. He argued that without these affidavits there is no evidence before me on the applications, and that without evidence the applications must be struck

because I cannot properly exercise my discretion. He referred me to **Duhamel v. Matic (2000), 262 A. R. 109** at ¶ 19.

[11] I am not prepared to deal with Mr. Heron's applications on this basis. This is not because Mr. Heron is self-represented and as such may deserve some leeway in the contents of his affidavits. I am satisfied that as a retired member of the Florida bar, and as someone who has written the examinations to become a member of the California bar, Mr. Heron must have substantial knowledge of the law and should know what is permitted in an affidavit. In addition, he has substantial personal experience with litigation.

[12] I agree the affidavits filed by Mr. Heron go far beyond what is permitted in a court affidavit. They are similar to affidavits filed by Mr. Heron in response to Mr. Smith's application for security for costs with respect to this appeal. His affidavits are not confined to the facts, contain paragraphs making legal arguments, and contain statements about California law when Mr. Heron has not been qualified to give evidence on the law of California.

[13] The reason I am not prepared to deal with Mr. Heron's applications on the basis of his improper affidavits is because of my hope that if I address Mr. Heron's arguments he will put the issues aside and proceed to have his appeal set down for hearing.

[14] With respect to Mr. Heron's first application seeking an extension of time to file a notice of appeal with respect to Justice Saunders' chambers decision of August 8, 2003, Mr. Heron has not satisfied me that I should grant him an extension of time.

[15] The test to be applied on an application for an extension of time is referred to in the case of **Jollymore v. Jollymore, 2001 NSCA 116**, commencing a ¶ 22:

> 22. In this province, reference is often made to the so-called three part test for extensions of time in cases such as this. It is said that in order to qualify for such relief the court must be satisfied that:
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> (1) the applicant had a *bona fide* intention to appeal when the right to appeal existed;

> (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
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> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

See for example: **Maritime Co-op Services Limited and Martin v. Maritime Processing Company Limited et al**. (1979), 32 N.S.R. (2d) 71 (per Macdonald, J.A.); and **Federal Business Development Bank v. Springhill Bowling Alleys Limited, Bickerton and Canadian Imperial Bank of Commerce** (1980), 40 N.S.R. (2d) 607 (per Pace, J.A.).

23. I note that some provinces, for example British Columbia, apply a five part test when deciding whether to extend time limits. See for example **Trane Sales & Service Agency (B.C.) v. Integrated Building Corp**., [1987] B.C.J. No. 1765 (B.C.C.A., in Chambers). Interestingly, the fifth "part" is to ask whether it is in the interest of justice to allow the extension.

24. I prefer a less rigid approach. Cases cannot be decided on a grid or chart. Ultimately the objective must be to do justice between the parties. I agree with the observations of Justice Hallett of this court in **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 at para. 14:

> 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 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.

[16] I accept that Mr. Heron was considering appealing Justice Saunders' decision within the time allowed for an appeal, but I am not convinced he had

formed a certain intention to do so. As to a reasonable excuse for not filing on time, Mr. Heron suggests he was waiting for information from the registrar of this court about the advisability of appealing, as he was concerned about the possibility of further costs being awarded against him. On the unusual facts of this case, I am not satisfied waiting until he heard back from the registrar gave him a reasonable excuse for not filing his notice of appeal on time. Mr. Heron had a copy of Justice Saunders' decision and is responsible to draw his own conclusions and make his own decisions with respect to appeals, having chosen to represent himself. Given the proposed grounds of appeal set out in Mr. Heron's application, I am also not satisfied that the merits of the appeal have much substance.

[17] Mr. Heron has a history of missed time periods. He did not file his notice of appeal to this court from the decision of Justice Goodfellow on time and had to apply for an extension of time to appeal that decision. He applied for several extensions of time to apply for leave to appeal this court's previous decision to the Supreme Court of Canada. He was also late in filing his notice of appeal in the current appeal and had to apply for an extension of time to do so. I am satisfied the appeal would be a waste of time and money for the parties. The matter before Justice Saunders was whether I erred during the hearing on June 30, 2003, of Mr. Smith's application for security for costs relating to this appeal. Mr. Heron alleges his time for cross-examination of Mr. Smith's lawyer on the affidavits he filed in support of his application for security for costs was limited. He further alleges error in refusing to allow Mr. Heron to put certain questions to Mr. Smith's lawyer during cross-examination.

[18] Justice Saunders held that the appeal of Mr. Heron and Mr. MacGillivary of my rulings was premature since I had not rendered my decision on the application for security for costs at that time. My decision on Mr. Smith's application for security for costs has now been released. This means that the appeal of Justice Saunders' decision would be moot for the most part, except on the issue of costs on which great deference is given to the judge hearing the matter.

[19] Considering the foregoing, I am satisfied it would not be just to grant the extension of time requested by Mr. Heron. If the extension Mr. Heron seeks was granted, the setting down of the main appeal would be further delayed and it is already eleven months since the notice of appeal was filed with the court. Much of this delay has been caused by Mr. Heron as set out in my previous decision dealing with Mr. Smith's application for security for costs.

[20] Accordingly, I dismiss Mr. Heron's application for an extension of time to file a notice of appeal with respect to Justice Saunders' decision of August 8, 2003.

[21] Mr. Heron has also failed to satisfy me that I have jurisdiction as a chambers judge to grant his application to vacate and set aside all Canadian court decisions made to date arising out of California litigation between himself and Mr. Smith and to provide that no further court proceedings be permitted in Canada until "existing law permits". Justice Hallett's decision in **Future Inns Canada Inc. v. Labour Relations Board (N.S.)** (1996), 154 N.S.R. (2d) 358 (CA) satisfies me the jurisdiction of a chambers judge does not include the issues raised by the second order sought.

[22] Mr. Heron has also failed to satisfy me that if I question my jurisdiction as a chambers judge to grant the order he applies for, I should set the matter down for hearing by a panel of this court. Rather, I am satisfied his argument has no merit and that to set the matter down to be heard by a panel of this court would be a further waste of time and money for the parties.

[23] Mr. Heron argues that in seeking the second order he is not seeking to have the issues previously adjudicated re-litigated. Rather he frames his application in terms of "fresh evidence" that he says is now available and that was not available before Justice Goodfellow or this court previously. Mr. Heron has not applied to introduce fresh evidence. If he had applied for the admission of fresh evidence, from Civil Procedure Rule 62.22 it appears the admission of fresh evidence may have to be considered by a panel of this court rather than a judge sitting in chambers.

[24] The information Mr. Heron characterizes as fresh evidence is contained in the **2002 Decision**.

[25] In domesticating the two California orders for court costs, Justice Goodfellow found and this court confirmed, that the California orders before them were final as to Mr. Heron owing Mr. Smith these court costs. Paragraph 3 of this court's decision sets out the test for the enforcement of a foreign order in Nova Scotia as follows:

> [3] On appeal, the appellant offers several arguments challenging both the correctness of the California decisions and the orders made by Justice Goodfellow. After a complete review of the material filed, we are satisfied that the appeal should be dismissed. The correctness of the California orders is not open for debate in this jurisdiction. (see Mahon/Moore Group of Companies Limited et al. v. Mercator Enterprises Limited et al. (1978), 31 N.S.R. (2d) 327 (S.C.)) It is clear from the record that all of the prerequisites for the enforcement of a foreign order by the courts of Nova Scotia have been satisfied, including:
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> > [1] the appellant was a resident of California at the time of the proceedings there and he fully participated in person and through counsel in the trials and appeals;
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> > [2] the subject matter of the lawsuit in California was real property situated in the State, and therefore there was a substantial connection with the forum;
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> > [3] the judgments of the California courts are final judgments on the merits, not subject to recission or variation by the courts that made them; and
> >
> > [4] the judgments are for definite sums of money.
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> (see **Canadian Conflicts of Laws, J.-G. Castel, Butterworths, 4th ed.**, (1997), ¶'s 153 - 175 and **Four Embarcadero Center Venture v. Mr. Greenjeans Corp.** (1988), 26 C.P.C. (2d) 248 (Ont. H.C.))

[26] It is the third requirement, finality, that Mr. Heron argues the **2002 Decision** shows was missing in the California orders that were considered by Justice Goodfellow and this court previously.

[27] In the **2002 Decision** the court states on page 2:

> In February 1987, Brian Heron and Charles Smith executed a printed form "Rental Agreement (Month-to-Month Tenancy)" and a "Supplemental Portion of Rental Agreement" prepared by Smith, the owner of the property. Under the terms of the parties' agreement, Heron rented a single family residence for 12 months, and Heron also got an option to purchase the property. At the end of the

> 12-month period, Heron thought he had exercised the option, but Smith disagreed and refused to sell.
>
> In 1988, Heron sued Smith for breach of contract and specific performance of the option. The case was tried to the court in 1992, and judgment was entered for Smith on the ground that Heron had not effectively exercised the option. Heron appealed, and we reversed on procedural grounds. (Heron v. Smith (Jun. 7, 1994, B066658) [nonpub.opn.], Heron I) On remand, the case was again tried to the court (but a different judge) with the same result, and judgment was entered for Smith, including an award of attorney's fees in the amount of $52,857.50. Heron appealed, and we affirmed, rejecting Heron's claim that he had validly tendered payment (a condition precedent to his exercise of the option). (Heron v. Smith (Mar. 26, 1999, B112390) [nonpub.opn.], Heron II.) Heron did not challenge the award of attorney's fees.
>
> Following remand, the trial court (yet another judge) granted Smith's post-appeal motion for additional attorney's fees in the amount of $9,856.17 (the amount incurred on the last appeal). Heron (*in propria persona*) appeals from the order awarding attorney's fees. We affirm. (Emphasis added)

[28] Mr. Heron argues that the underlined words in the second paragraph quoted above show a variation of the decisions before Justice Goodfellow and this court previously, showing the California decisions before Justice Goodfellow and this court previously were not final. The variation he suggests is that the California court of appeal in the **2002 Decision** agreed that Mr. Heron had not exercised his option to purchase the house in California from Mr. Smith. He argues this differs from the previous finding of the California Court of Appeal in its decision filed March 26, 1999, hereinafter the "**1999 Decision**", that was before Justice Goodfellow and this court previously.

[29] In the **1999 Decision**, the court of appeal affirmed the findings of the trial judge who found the option to buy the house in California had been exercised. The trial decision states in ¶ 3:

> The Court finds that there was an exercise of the option, and a clear acceptance of the offer . . .

[30] The trial judge however went on to find in favor of Mr. Smith, not Mr. Heron, on the basis that Mr. Heron had failed to tender the purchase price. This finding is indicated by the statement in ¶ 6 of the trial decision:

> There was not a tender of performance by the plaintiff in the matter. Based upon that the Court will grant judgment for the defense (Mr. Smith)in the case as to Plaintiff's (Mr. Heron's) causes of action for Specific Performance, and Breach Of Contract.

[31] Mr. Heron indicates he commenced a constitutional challenge in California on September 8, 2003 based on this difference between the **1999 Decision** finding in favour of Mr. Smith on the basis the option was exercised but the purchase price was not tendered, and the **2002 Decision**, perhaps suggesting in its summary of the history of the litigation that the option was not exercised.

[32] This difference Mr. Heron argues requires that all earlier Canadian decisions be vacated and set aside.

[33] I disagree. My reading of the **2002 Decision** satisfies me the court was only attempting to recite the history of this litigation in California in the paragraphs from that decision that are quoted above and relied on by Mr. Heron, when it referred to the tender of payment being a condition precedent to his exercise of the option. The court was not making any new determination with respect to the manner in which Mr. Heron failed to qualify for the specific performance or breach of contract he sought with respect to the California house.

[34] This is made clear in the paragraph in the **2002 Decision** that immediately follows those quoted above which states:

> Heron challenges the underlying judgment on various grounds, none of which are before us on this appeal. Our decision in *Heron II* is the law of this case, and we are without power to reconsider the judgment. (Allen v. Cal. Mutual B. & L. Assn. (1943) 22 Cal. 2d 474, 481.) In any event, Heron's notice of appeal is only from the order for fees, and that notice limits the scope of this appeal. (Polster, Inc. v. Swing (1985) 164 Cal. App. 3d 427, 436.) The only order before us on this third appeal is the order awarding post-trial attorney's fees. (Emphasis added)

[35] This makes it clear the court was not reconsidering the question of whether Mr. Heron had failed in his lawsuit against Mr. Smith because of failing to validly exercise his option or failing to validly tender the purchase price. The only issue before it was the order awarding post-trial attorney's fees. That being the case, the words of the **2002 Decision** Mr. Heron relies on as showing a variation and hence a lack of finality in the decisions before Justice Goodfellow and this court previously is without merit. These words in the **2002 Decision** have no effect on the finality of the decisions before Justice Goodfellow and this court previously.

[36] In reviewing the **2002 Decision** I found two other statements relevant to the issue before me. In that decision the court stated:

> Heron challenges the underlying judgment on various grounds, none of which are before us on this appeal. Our decision in *Heron II* is the law of this case, and we are without power to reconsider the judgment.

[37] This suggests Mr. Heron was attempting to re-litigate the issues decided in the **1999 Decision** before the court in 2002. The court refused to do this. Mr. Heron is attempting to do the same thing again. He is attempting to have this court re-litigate issues previously adjudicated.

[38] In the last paragraph of the **2002 Decision** the court states:

> We note, however, that it is time to bring this litigation to an end...

[39] I agree. It is time to bring this litigation to a close.

[40] Accordingly, I dismiss Mr. Heron's application to vacate and set aside all Canadian court decisions made to date arising out of California litigation between himself and Mr. Smith and refuse to set the matter down for hearing by a panel of this court.

[41] Mr. Smith requested costs of this half-day application be paid by Mr. Heron to Mr. Smith on a solicitor-client basis. I am not satisfied that is appropriate. I am however satisfied that costs should be awarded in connection with this application payable by Mr. Heron to Mr. Smith, forthwith and in any event of the appeal, in the amount of $2,000 plus disbursements.

Hamilton, J.A.