C.A. No. 127612

NOVA SCOTIA COURT OF APPEAL
Cite as Skipper Fisheries Ltd. v. Thorbourne, 1996 NSCA 15

BETWEEN:

SKIPPER FISHERIES LIMITED, a body corporate Appellant - and - WAYNE THORBOURNE, CLAUDETTE THORBOURNE, THOR SEINERS LIMITED, Claudette Thorbourne and a body corporate, PHOENIX FISHERIES LIMITED, a body corporate, PAUL EDWARD BLADES, BRIAN ARTHUR BLADES, CLIFFORD V. GOREHAM, and S. CLIFFORD HOOD Respondents	Peter M. Rogers and Lloyd I. Berliner for the Appellant Thomas E. Pittman for the Respondents Wayne Thorbourne, Thor Seiners Limited Robert G. Belliveau, Q.C. for the Respondents Phoenix Fisheries Limited, Paul Edward Blades and Brian Arthur Blades & Clifford V. Goreham James L. Connors for the Respondent S. Clifford Hood Application Heard: September 6, 1996 Decision Delivered: September 9, 1996

BEFORE THE HONOURABLE JUSTICE FLINN IN CHAMBERS

FLINN, J.A.: (in Chambers)

The appellant commenced this action against the respondents in 1986. Following a period of Case Management, the matter was set down for two months of trial commencing November 1, 1993. At the opening of the trial counsel for the respondents, Phoenix Fisheries Limited, Paul Edward Blades, Brian Arthur Blades and Clifford V. Goreham (Phoenix) made application to Justice Gruchy of the Supreme Court of Nova Scotia for an order to dismiss the action pursuant to **Civil Procedure Rule 20.09**. The basis of Phoenix's application was that the appellant had failed to make reasonable effort to produce documents and information, and to give full discovery relevant to the matters at issue.

At the hearing of that application various witnesses were called by the appellant and Phoenix; and all parties participated in the examination and cross-examination of them. I am told by counsel for the appellant, and it is not disputed;

> "That evidence includes extensive quantities of *viva voce* evidence in addition to numerous exhibits including approximately 10 bound volumes of discovery evidence extracts."

Whether all of that evidence is required to be produced in the Appeal Book, for the hearing of this appeal from a subsequent application, is the issue before me.

On April 18, 1994, Justice Gruchy rendered a 24 page decision on this first application to dismiss the appellant's action. In this decision, and in supplementary reasons issued on June 21, 1994, Justice Gruchy found the appellant to be in contempt for failure to comply with **Civil Procedure Rule 20**.

However, he found that the contempt fell short of contempt requiring dismissal of the action. On June 28, 1994, Justice Gruchy ordered the proceedings stayed until the appellant had delivered certain documents and information to the respondents, and had paid costs which Justice Gruchy had assessed.

In his decision dated April 18, 1994, Justice Gruchy gave detailed reasons for coming to his conclusions. That decision, and the order based thereon, was not appealed.

In November 1995 the respondents made a second application to Justice Gruchy to dismiss the plaintiff's action as a result of "the continued contempt by the plaintiff [appellant] of the order of this Honourable Court dated June 28th, 1994."

On April 23rd, 1996, Justice Gruchy rendered a 15 page decision in which he concluded:

> "Based on my findings that the plaintiff [appellant] has deliberately continued its actions of contempt and all the consequences of that to the parties and to the Court, I dismiss the plaintiff's [appellant's] action."

The appellant has appealed Justice Gruchy's second decision of April 23rd, 1996, and the order issued pursuant to that decision on July 5th, 1996. The appeal has been set down for hearing for November 13th, 1996.

Counsel for the respondents have made application for an order requiring the appellant to include in its Appeal Book a complete transcript of the first hearing before Justice Gruchy in November 1993. Counsel for the appellant objects to including all of this material because that material relates to an application, and decision, which is not under appeal.

Civil Procedure Rule 62.14(3) provides as follows:

"62.14(3) Except in an interlocutory appeal, an appeal as to costs only or a tribunal appeal, or except where otherwise ordered by a Judge or agreed to by the parties, an appeal book shall consist of the following:

(b) Part II - Evidence:

(i) the index of witnesses shall state the name of the witness, the party who called the witness and shall indicate the pages in the appeal book at which examination in chief, cross examination, or re-examination began;
(ii) list of all exhibits;
(iii) transcript of the evidence at the trial; every page of the transcript of evidence shall have a headline which shall state the name of the witness and whether the page contains the transcript of examination in chief, cross examination or re-examination. The questions shall be numbered consecutively for each witness. Questions shall be preceded by the letter "Q" and the answers by the letter "A";
(iv) copies of affidavits, written admissions and discovery evidence if, and to the degree, that they have been admitted in evidence at the trial and are not reproduced in the transcript of evidence;
(v) photocopies of documentary exhibits, if not reproduced in the transcript, but not exhibits or parts of exhibits not germane to the issues on appeal or which may more conveniently be summarized or described;
(vi) a statement of facts agreed to by the parties in lieu of any or all of (iii), (iv) and (v)."

Counsel for the respondents argue that the second hearing of November

10, 1995, is, simply, a continuation of the first hearing of November, 1993; and that evidence adduced at the first hearing is relevant to consideration of an appeal from the second hearing. Counsel argues that there are relevant facts in the evidence from the 1993 hearing that are not included in Justice Gruchy's 1994 decision, and counsel may wish to refer to those matters on the hearing of the appeal from the second hearing.

Counsel for the appellant argues that whatever act or omission of the appellant resulted in the dismissal of its action, that act or omission occurred after the decision and order arising out of the first hearing. Each of the decision, and order, speaks for itself. He argues there is nothing in Justice Gruchy's decision, which is under appeal, to suggest that he found it necessary to go behind the decision and order arising out of the first hearing.

I agree with counsel for the appellant. In considering the appeal of Justice Gruchy's decision of April 22, 1996, evidence which was adduced at the hearing before Justice Gruchy in 1993 is neither necessary nor relevant. Further, it would be unduly onerous, especially considering costs, for the appellant to be required to reproduce multiple copies of that material. The Appeal Book in this appeal, will, therefore, contain the 21 items identified by counsel for the appellant in his submission to this Court as "INDEX"; and which is attached to these reasons as Schedule "A".

I, therefore, dismiss this application. Costs of the application will be in the cause.

Flinn, J.A.

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