C.A. No. 130189

NOVA SCOTIA COURT OF APPEAL

Cite as: Etruscan Enterprises Ltd. v. Griffis,
1996 NSCA 238

FREEMAN, HART AND PUGSLEY, JJ.A.

BETWEEN:

ETRUSCAN ENTERPRISES LIMITED and NOVAGOLD RESOURCES INCORPORATED	)	Ian C. Pickard/Patricia Mitchel
	)	for the Appellant
Appellants	)	
	)	
	)	
- and -	)	
	)	
	)	Dufferin Harper/Lynn Carey
	)	for the Respondent
	)	
WATTS, GRIFFIS and McOUAT	)	
	)	
Respondent	)	
	)	
	)	Appeal Heard:
	)	December 11, 1996
	)	
	)	Judgment Delivered:
	)	December 11, 1996
	)	

.**THE COURT**: Leave to appeal is granted, the appeal is allowed, the order is set aside and the matter is remitted to the Supreme Court for trial. Costs in the amount of $1,500, together with disbursements, are awarded to the Appellants, per reasons given orally by Pugsley, J.A.; Freeman and Hart, JJ.A. concurring.

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

PUGSLEY: J.A.:

Nova Gold Resources Incorporated, (Nova) and Etruscan Enterprises Limited, (Etruscan) apply for leave to appeal, and, if granted, appeal from an order of a Chambers judge dated July 4, 1996, wherein Watts Griffis and McOuat Limited, a firm of consulting engineers, (WGM) obtained summary judgment to recover the sum of $120,593.57 from Nova.

The appellants submit that the Chambers judge erred in concluding that WGM had satisfied the Court that it had clearly established its claim. Alternatively, it was submitted that the appellants had established a *bona fide*, or arguable defence, to the claim.

In December of 1992, WGM was engaged by Nova to review certain technical information to assist Nova in obtaining financing for a gold mining project in Newfoundland called the Pine Cove project. Until October of 1993, WGM provided various consulting services to Nova. Invoices for those services aggregated $40,417.45. Nova does not dispute that it owes this money to WGM.

The heart of the controversy between the two parties relates to two further invoices sent by WGM to Nova:

- an invoice for $25,000 dated September 23, 1993, "in connection with our introduction of Nova Gold to Polaris Fund in Anchorage, Alaska, which led to a successful funding of Nova Gold, as announced by Nova Gold, on December 2, 1993";
- a second invoice for $25,000 dated September 27, 1993, for "our fee in connection with our introduction of Etruscan Enterprises to Mr. Robert E. Nye, which led to a successful private placement of your shares, to Mr. Nye in the amount of $500,000 in March, 1993".

On June 29, 1994 Ross Lawrence, executive vice-president of WGM, wrote Gerald McConnell, president of Nova, requesting payment of the three accounts, and stating:

> To be blunt, we expect all three accounts to be satisfied. Services were rendered and opportunities lost and we expect to be paid. If you are unable, or unwilling, to settle in cash, we are prepared to consider share settlement. However, there must be definitive and clear arrangements made, and in writing.

On July 4, 1994, Mr. McConnell responded stating in part:

> Further to our recent conversations and your letter of June 29, 1994 concerning the three outstanding accounts, I wish to confirm the Board of Directors has agreed to settle all three accounts by the issuance of shares. . . . Now that we have reached this agreement, I look forward to a successful and profitable relationship.

No additional written communications passed between the parties until Mr. McConnell wrote a letter to all creditors of Nova, on February 20, 1996.

The letter to WGM provided in part:

> The purpose of this letter is to outline to you a proposal for settlement of your outstanding account with Nova Gold Resources Inc. and Pine Cove Resources in the amount of $113,560.45. . . . At present Nova Gold does not have funds available to pay your account . . . Nova gold is offering you the opportunity to convert your outstanding accounts to common shares of Nova Gold. The value per share would be the greater of $.50 or the average closing price for the first ten days of March multiplied by 120%. . . . This offer will remain open for a period of 30 days from the date hereof . . . we reiterate that the above offer is being made on the same basis to all creditors of Nova Gold with accounts in excess of $500. . . . If you wish to accept our offer, kindly sign the attached letter of agreement and return to our office by fax.

The attached letter of agreement, also dated February 20, 1996, was signed by Mr. McConnell on behalf of Nova, was addressed to WGM (the Proposed Agreement Letter) and provides in part:

> The following sets out the terms of our agreement with respect to settling the total amount owed by (Nova) and Pine Grove Resources to (WGM) of $113,560.45 (Indebtedness).
>
> In full and final settlement of the Indebtedness, (Nova) agrees as follows:
>
> 1. To issue to (WGM) that number of common shares of (Nova) obtained when the Indebtedness is divided by the greater of:
>
> (a) $0.50, and

> (b) the average closing market of price of (Nova's) common shares on the Toronto Stock Exchange for the first ten days of March, 1996 multiplied by 120% ... .

An Originating Notice had been issued by WGM on February 9, 1996 against Nova and Etruscan claimining, *inter alia*, that WGM had "introduced" Nova to the Polaris Fund and Mr. Nye, that invoices had been sent by WGM to Nova, and that Nova acknowledged the accounts and confirmed it had agreed to settle the accounts by the issuance of Nova's shares to WGM.

Nova and Etruscan filed a joint defence on March 11, 1996 denying the claim, and in particular, denying any agreement to pay WGM for introducing Nova to prospective investors.

The Chambers judge considered that the Proposed Agreement Letter of February 20, 1996:

> ...established a clear and unequivocal acknowledgment of the indebtedness, and the whole impact is one of substitution of the method of payment
>
> . . .
>
> There is no denial in that communication by Mr. McConnell. There is no suggestion that the indebtedness is not owed. . . . I see nothing that indicates in any way, shape or form that what was advanced was meant to be negotiations. . . . It seems to me, in the face of the specific unequivocal acknowledgment of the indebtedness, that it would be an injustice to the plaintiff to cause the plaintiff costs to go through a useless exercise.

For reasons not relevant to this appeal the Chambers judge determined liability against Nova but not Etruscan.

Analysis

As this is an appeal from an interlocutory order involving the exercise of discretion, the burden is on Nova to establish that the Chambers judge made a serious error or that injustice would result if the appeal were not allowed (**A.C.A. Co-operative Association Limited v. Associated Freezers Inc.** (1989), 95 N.S.R. (2d) 35).

This general rule is subject to the cautionary words of Chipman, J.A. in **Minkoff v. Poole & Lambert** (1991), 101 N.S.R. (2d) 143 at 145:

> The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations.

The Chambers judge relied on the decision of this Court in **CIBC v. Tench** (1990), 97 N.S.R. (2d) 325 (C.A.) and commented:

> The law is clear that a plaintiff is entitled to obtain summary judgment if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an arguable (**and I would insert in there a fairly arguable**) issue to be tried . . .

The burden on the defendant is not a heavy one. (**Lienaux v. Toronto Dominion Bank** (1995), 140 N.S.R. (2d) 156 at 158).

The Chambers judge made no reference in his decision to the affidavit of Angus MacIsaac, secretary-treasurer of Nova, sworn on July 2, 1996, which was part of the material placed before him.

Mr. MacIsaac deposed in part:

> At no time did NovaGold in any way enter into an agreement with the Plaintiff whereby the Plaintiff would be paid a finder[']s fee for the introduction of investors to NovaGold
>
> . . .
>
> The Board of Directors wished to settle all outstanding claims whether the claims were meritorious or not. NovaGold wanted the restructuring to eliminate all claims against the company and therefore wished to settle all receivables against the company by the issuance of shares. The letter [of July 4, 1994] in no way provided an acknowledgment by NovaGold that the money claimed is due and owing by Nova Gold to the Plaintiff.

With respect to the February 20, 1996 letter signed by Mr. McConnell, Mr. MacIsaac deposed:

> ...this letter, with the exception of a few alterations, was a standard form letter forwarded to all "remaining creditors" of NovaGold with accounts in excess of $500. NovaGold sent this letter to all of its creditors whether their claim against the company was meritorious or not. All creditors were given the opportunity to convert their outstanding accounts to common shares of NovaGold. Once again, NovaGold wished to eliminate all creditors, whether valid or not, who were claiming money from the company so that the company could restructure and move forward. The letter does not contain an acknowledgment that all of the

> money being claimed by the Plaintiff was in fact due and owing by NovaGold.
>
> . . .
>
> I am of the belief that the $50,000 plus interest being claimed with respect to the Polaris Fund and Mr. Robert Nye is without merit and that the Defendants have a bona fide defence to this claim.

A willingness to convert an outstanding account to common shares may well be prompted by pressures, economic or otherwise, totally disassociated with the merits of the account and may not reflect reimbursement in full to the creditor.

We are of the view that the Chambers judge erred, and misapprehended the facts, when he determined that the Proposed Agreement Letter had "established a clear and unequivocal acknowledgement of indebteness". (See coments of this Court in **Norman v. Royal Canadian Legion** (1996), N.S.J. No. 475, decision released November 21, 1996.)

We agree with counsel's submission that the Proposed Agreement Letter should not be considered separate and apart from the general creditor's letter of the same date. The Proposed Agreement Letter simply set out a proposal that Nova was prepared to live with, provided the proposal was accepted by WGM. It was never accepted and accordingly should not have been considered as conclusively determining the amount of Nova's indebtedness. There is another issue respecting the reviewability of the Proposed Agreement Letter by the Court, as it may appear to constitute negotiations in contemplation of existing litigation and thus without prejudice.

The material in Mr. MacIsaac's affidavit presents arguable issues that should be considered by a trial judge where witnesses are called, are examined, and are subject to cross-examination. There was no cross-examination of any of the deponents of the affidavits tendered before the Chambers judge, so he had no opportunity to assess the credibility of the deponents.

There was a real issue between the parties, the resolution of which could be resolved by, or assisted by, *viva voce* evidence. It is, with respect, not the function of a Chambers judge to resolve matters of controversy, which could well involve decisions respecting credibility, on the basis of affidavit evidence alone (see Oceanus Marine Inc. v. Saunders (1996), N.S.J. No. 301, July 26, 1996 (N.S.C.A.)). It should be noted that the decision in Oceanus was filed after the decision of the Chambers judge in this matter.

We would grant leave to appeal, allow the appeal, set aside the order issued by the Chambers judge, and remit the matter to the Supreme Court for trial.

We would award costs to the appellants in the amount of $1,500, together with disbursements, respecting costs of the Chambers application and of this appeal.

Pugsley, J.A.

Consented to:

Freeman, J.A.

Hart, J.A.

C.A. No. 130189

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ETRUSCAN ENTERPRISES LIMITED and **NOVAGOLD RESOURCES INCORPORATED** Appellants	)	
- and -	)	REASONS FOR JUDGMENT BY:
WATTS, GRIFFIS and McOUAT Respondent	)	Pugsley, J.A. (Orally)