NOVA SCOTIA COURT OF APPEAL

Citation: ***Smith v. Lord***, 2013 NSCA 34

Date: 20130311
Docket: CA 405435
Registry: Halifax

Between:

Leanne Smith

Appellant

v.

Michael Kenneth Lord

Respondent

Judges: Beveridge, Farrar and Bryson, JJ.A.

Appeal Heard: January 22, 2013, in Halifax, Nova Scotia

Held: Leave to appeal granted but appeal dismissed per reasons for judgment of Farrar, J.A.; Beveridge and Bryson, JJ.A. concurring.

Counsel: Christa M. Brothers and Scott R. Campbell, for the appellant
J. Walter Thompson, Q.C. and David S. Green, for the respondent

Reasons for Judgment:

[1] By Order dated April 7, 2003, (the Order), Associate Chief Justice J. Michael MacDonald (as he was then) dismissed the respondent, Michael Kenneth Lord's action against the appellant Leanne Smith, on a Prothonotary's motion in Chambers. Almost nine years later, on March 28, 2012, Mr. Lord filed a motion asking the court to exercise its inherent jurisdiction to set aside the Order.

[2] By decision dated June 12, 2012, (2012 NSSC 232) Nova Scotia Supreme Court Justice Peter Rosinski allowed the plaintiff's motion and set aside the Order.

[3] Ms. Smith seeks leave to appeal and, if granted, appeals from the Order of the motions judge alleging that he committed reviewable error in the formulation, consideration and application of the test for setting aside a dismissal order.

[4] For the reasons that follow, I would grant leave to appeal but dismiss the appeal. However, in these circumstances, without costs to either party.

Background

[5] This unfortunate story starts with a rear end motor vehicle collision on December 11, 1998, between Mr. Lord and Ms. Smith. On December 12, 2000, an Originating Notice/Statement of Claim was filed by Mr. Lord's then solicitor, Kyle D. Langille alleging that Ms. Smith was at fault for the accident and that he suffered injuries as a result of it.

[6] At some time between the filing of the Originating Notice and July 2, 2002, Mr. Langille ceased to act for Mr. Lord and John McKiggan took over as his solicitor.

[7] On July 2nd, 2002, Mr. McKiggan wrote to Ms. Smith's insurer enclosing "a copy of all the medical information … received for Mr. Lord to date." The insurer continued to deal with Mr. McKiggan throughout 2002 and 2003.

[8] On December 18, 2002, a Notice to Appear was issued returnable to Chambers on Appearance Day on January 3, 2003. The Notice to Appear was

issued pursuant to Practice Memorandum #27 which provided that the court could, on its own motion, bring a matter forward to Appearance Day to discuss the status of the case where more than 24 months had passed since the filing of the Originating Notice and Statement of Claim and no Defence had been filed.

[9] The Prothonotary attempted to contact Mr. Langille. However, at that time Mr. Langille had his law practice taken over by the Nova Scotia Barristers' Society. In contacting the Barristers' Society the Prothonotary was informed that Mr. Lord was representing himself in the matter.

[10] The Prothonotary then attempted to locate Mr. Lord and was unsuccessful in doing so.

[11] As a result, on April 7th , 2003, approximately four months after the Prothonotary had first made inquiries about the matter, MacDonald, A.C.J. issued the Order dismissing the action on the basis that the court had been unable to locate Mr. Lord and that he "presumably" had no interest in advancing the claim.

[12] The motions judge below concluded that at the time the dismissal order was issued, Mr. Lord was being represented by Mr. McKiggan. However, there was nothing in the court file to indicate this. The plaintiff and his counsel were unaware of the motion before the Chambers judge and did not receive notice of the imminent dismissal of his action.

[13] Similarly, as no Defence had been filed neither the defendant nor counsel representing her was notified.

[14] Nothing more occurs until March 17, 2004, when Dennise Mack, in-house counsel for Aviva Insurance, Ms. Smith's insurer, attempted to file a Defence on behalf of Ms. Smith. At that time she was informed by court officials that the action had been dismissed.

[15] On March 19th, 2004, Ms. Mack called Mr. McKiggan to inform him that his client's action had been dismissed.

[16] On that same day Mr. McKiggan telephoned the Prothonotary's office and left a message. The Prothonotary responded by letter dated April 1, 2004, advising Mr. McKiggan of the chronology of events, which I have set out above, that resulted in the dismissal of his client's action. She also advised that it was open to him to make an application to set aside the Order.

[17] Inexplicably, there were no further steps taken in this proceeding until the plaintiff's present counsel, David Green, contacted the Prothonotary's office, by telephone, on October 22nd, 2010. Again the Prothontary responded in writing advising Mr. Green of the circumstances surrounding the dismissal of the action, and advising of her contact with Mr. McKiggan in 2004.

[18] Again, inexplicably, no further action was taken until the motion to set aside the Dismissal Order was filed on March 28, 2012, nearly a year and a half later.

Issues

[19] The appellant raises three issues with respect to this appeal:

1. Did the motions judge have jurisdiction to entertain the motion?

2. Did the motions judge commit a reviewable error by disregarding a presumption of law, namely, the presumption of serious prejudice in the face of inordinate delay?

3. Did the motions judge otherwise commit a reviewable error in setting aside the dismissal order?

Standard of Review

[20] The first issue, whether the motions judge had jurisdiction to entertain the motion, is a pure question of law and will be reviewed on the correctness standard. Similarly, the second issue, whether the motions judge disregarded or failed to apply a mandatory presumption of law is also a question of law and will be reviewed on a standard of correctness. (**Housen v. Nikolaisen**, 2002 SCC 33, ¶8-9).

[21] The third issue involves the ultimate discretion of the motions judge. We will not intervene unless the motions judge applied wrong principles of law or a patent injustice would result (**Innocente v. Canada (Attorney General)**, 2012 NSCA 36, ¶29.

Analysis

1. **Did the motions judge have jurisdiction to entertain the motion?**

[22] The appellant argues that the motions judge did not have jurisdiction to set aside an order of another judge of co-ordinate jurisdiction.

[23] With respect I disagree. The motions judge found, and I agree, that, in these circumstances where the Order was made *ex parte* without notice to the parties, he had inherent jurisdiction to hear the motion and decide whether to grant the remedy requested.

[24] Chief Justice MacDonald in **Central Halifax Community Association v. Halifax (Regional Municipality)**, 2007 NSCA 39 provided the following definition of inherent jurisdiction:

> **34** Every superior court in this country has a residual discretion to control its process in order to prevent abuse. Procedural rules, however well intentioned, cannot be seen to stand in the way of basic fairness. This overriding judicial discretion is commonly referred to as the court's inherent jurisdiction. It is a jurisdiction sourced independently from any rule of court or statute. ...

[25] In his seminal article, IH Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23 Jacob defined the inherent jurisdiction of the court as:

> ... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. (Emphasis mine)

[26] In **Goodwin v. Rodgerson**, 2002 NSCA 137, this Court is unequivocal:

> 17 The inherent jurisdiction of the court has been described as a vague concept and one difficult to pin down. It is a doctrine which has received little by way of analysis, but there is no question it is a power which a superior trial court enjoys to be used where it is just and equitable to do so. ... (Emphasis mine)

[27] Inherent jurisdiction is a highly flexible tool. As Master Jacob said at p. 23:

> ...[I]t "may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways. This peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits. (Emphasis mine)

[28] The scope of inherent jurisdiction was discussed in **Halifax (Regional Municipality) v. Ofume**, 2003 NSCA 110, where Saunders, J.A. delineated the scope of inherent jurisdiction broadly to encompass judicial actions that further the goals of "effectiveness", "efficiency" and "fairness":

> [40] ... In the instant case the discretion exercised by ...[the trial judge] derives from the Court's inherent jurisdiction to control its own proceedings. I see this control as fundamental to a court that derives its power and existence not from statute but from the Constitution. The operation of the court is a necessary function of our society. The inherent jurisdiction which helps to maintain the efficiency and fairness of such a court is something far greater than the jurisdiction to correct substantive problems, as was considered in **Baxter**. The inherent jurisdiction exercised by the Chambers judge here is the kind of jurisdiction spoken of by Lord Morris in **Connelly, supra**, quoted in **Montreal Trust Co., supra**, which gives rise to the "powers which are necessary to enable [a court] to act effectively." (Emphasis mine)

[29] Despite its large scope and flexibility, inherent jurisdiction is not available for use in every situation. As Chief Justice MacDonald in **Central Halifax**, **supra**, observed: ...[Inherent jurisdiction] remains a safety net that can prevent abuse in those truly exceptional cases. (¶44) It must be exercised judicially and with caution. It is typically limited to procedural matters. It cannot effect changes in the substantive law, and it cannot be exercised so as to contravene a law.

[30] William Charles in his article “Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?” (2010), 33 Dalhousie L.J. 63 enumerated this Court’s observations on the topic of inherent jurisdiction, summarizing three of them as follows:

> ... [Inherent jurisdiction] is primarily a procedural concept which the courts must be cautious in exercising and [which] should not be used to make changes in substantive law.
>
> Action taken pursuant to inherent jurisdiction requires an exercise of discretion. This discretion must always be exercised judicially.
>
> A judge does not have an unfettered right to do what is thought to be fair as between the parties. A court’s resort to its inherent jurisdiction “must be employed within a framework of principles relevant to the matters in issue.” [Footnotes Omitted] (p. 13)

[31] In **Perfaniuk v. Ladobruk and Canadian Home Insurance**, [1960] M.J. No. 40 (Q.L.), a decision of the Manitoba Court of Appeal, one party (the insurer) was deprived of an opportunity to have its day in court as a result of a procedural matter. An insured had been involved in a motor vehicle accident and was served with a statement of claim by the appellant. The insured failed to notify the insurer, the respondent, and as a result the action was not defended. The trial judge issued an interlocutory judgment, assessed the damages and entered judgment against the respondent.

[32] The respondent insurer learned of the judgment and immediately applied to have the judgment set aside and to be named as a third party to the action. The respondent’s motion was granted. The appellant appealed, arguing that the court was “without jurisdiction to set the judgment aside at the instance of the insurer” (¶3).

[33] The Manitoba Court of Appeal was satisfied the Court of Queen’s Bench had inherent power to set aside any of its judgments in a proper case and rejected as without foundation the argument that entry of a final judgment put an end to the jurisdiction of the court to set it aside (¶7).

[34] The authorities make it abundantly clear that in circumstances such as this, where an *ex parte* order was granted dismissing the plaintiff's action, without notice to the plaintiff (and in this case, to the defendant), the court has the inherent jurisdiction to review the order to determine whether it ought to be set aside. However, this overriding judicial discretion must be exercised judicially within a framework of principles relevant to the matters in issue.

[35] I am satisfied the motions judge had jurisdiction to entertain the motion before him. I would dismiss this ground of appeal.

[36] Before leaving this area, I would like to comment on the decision of **Francis v. Haliburton et al.**, [1975] N.S.J. No. 500 (Q.L.), a decision of MacIntosh, J. of the Nova Scotia Supreme Court, Trial Division. In that case, the court was asked to set aside an order dismissing an action for want of prosecution. The Order was made *ex parte*.

[37] In determining that he had no jurisdiction to vary the order, the Chambers judge said the following:

> 14 In **Volhoffer v. Volhoffer**, [1925] 3 D.L.R. 552, at page 559, Lamont, J.A., stated:
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>> "In **Koosen v. Rose** (1897), 76 L.T. 145, Lord Esher said, at p. 146:-
>>
>>> 'Now, one judge cannot interfere with the order of another judge of co-ordinate jurisdiction, unless that power has been given by some statute.'
>>
>> It is true, as was held in the case of **Re Sproule** (1886), 12 S.C.R. 140, that every Superior Court has inherent jurisdiction to supervise its own process and to set it aside if issued improvidently, but that does not mean that such jurisdiction may be exercised by a single Judge in Chambers, in the absence of a Rule of Court authorizing him to do so. [*page626]
>
> I am therefore of opinion that, except upon an appeal, a Judge in Chambers has no jurisdiction to set aside an order of the Local Master made in Chambers."
>
> 15 I take these authorities to be a proper statement of the law here involved.

> 16 Under the circumstances, as set forth in this application, I am of the opinion there is no jurisdiction in me as Chambers Judge to vary or rescind the order of a Local Judge of the Trial Division of the Supreme Court.

[38] Although the Chambers judge may have reached the right decision in that case, his statement that "one judge cannot interfere with the order of another judge of co-ordinate jurisdiction, unless that power has been given by some statute" is too broad for two reasons. First, the Chambers judge did not acknowledge the longstanding and wide exceptions to this general rule not the least of which is the so-called "Slip rule" (Rule 78.08 of the **Nova Scotia Civil Procedure Rules**) which allows a court to correct technical mistakes and errors with respect to the express intentions of court. Second, the Chambers judge did not appear to appreciate that a Chambers judge has the inherent jurisdiction to control process even though that had been accepted as far back as **Wallace v. Davis**, 1907 CarswellNS 93 (NSSC) and it has since been acknowledged by this Court, for example, in **Goodwin, supra** and **Ofume, supra**.

2. Did the motions judge commit a reviewable error by disregarding a presumption of law, namely, the presumption of serious prejudice in the face of inordinate delay?

[39] The trial judge accepted, and the parties agreed, that the proper analytical framework for him to apply in determining whether to set aside the Order was as set out in **Hiscock v. Pasher**, 2008 NSCA 101. In that case this Court had to consider whether a Chambers judge erred in his consideration of an appeal from a Prothonotary's order dismissing an action.

[40] In that case, Roscoe, J.A. observed that such orders were administrative and were not made after consideration of the merits of the case. She adopted the test applicable to a motion seeking dismissal for want of prosecution. She stated the test as follows:

> 23 Under **Rule** 28.13, the defendant bears the burden as the applicant. On appeal from a prothonotary's **Rule** 28.11 order, the plaintiff, as the appellant, ought to bear the burden of proving:

> 1. That there is no inordinate or inexcusable delay, or, if there is, that it is not the plaintiff personally who is to blame for the delay;
>
> 2. That the plaintiff has always intended to proceed with the action and was either unaware of the **Rule** 28.11 notice or her solicitor's failure to respond to it;
>
> 3. That the defendant has not likely been prejudiced by the delay; and,
>
> 4. After balancing all the relevant factors, it is shown to be in the interests of justice, to set aside the prothonotary's order.

[41] Roscoe, J.A.'s recitation of the test for dismissal for want of prosecution differs slightly from the well-established and non-controversial test set out in **Clarke v. Ismaily**, 2002 NSCA 64:

> 8 Thus, to summarize, in order to succeed the onus is upon a defendant to show: first, that the plaintiff is to blame for inordinate delay; second, that the inordinate delay is inexcusable; and third, that the defendant is likely to be seriously prejudiced on account of the plaintiff's inordinate and inexcusable delay. If the defendant is successful in satisfying these three requirements, the court, <u>before</u> granting the application must, in exercising its discretion, go on to take into consideration the plaintiff's own position and strike a balance - in other words, do justice - between the parties.(Underlining in original)

[42] The main distinction is that under the test for dismissal for want of prosecution, reference is made to the defendant likely being "seriously prejudiced" whereas in Roscoe, J.A.'s test in **Pasher** the word "seriously" was not included.

[43] Although the wording may be slightly different, I take the two tests to be the same; not simply any likelihood of prejudice would be sufficient to deny the plaintiff a remedy but that there has to be a likelihood of serious prejudice.

[44] I now turn to the appellant's argument on this point which is, that there is a mandatory presumption that the defendant has suffered prejudice and that failing to apply this mandatory presumption resulted in reversible error by the trial judge. With respect to the appellant's position, the presumption is not mandatory, but rather its application will depend on the circumstances of each individual case. In

A.J.M. v. Children's Aid Society of Cape Breton, 2006 NSCA 13, Hamilton, J.A. summarized the law as follows:

> 19 The case law indicates prejudice may be presumed in some circumstances. The judge referred to this case law and found that in the circumstances of this case he should presume serious prejudice rather than require the respondents to prove it:
>
>> [23] Mr. Justice Chipman of our Court of Appeal in *Saulnier v. Dartmouth Fuels Ltd.* (1991), 106 N.S.R. (2d) 425, ... confirmed the *Cooper* test in *Martell*, [1978] N.S.J. No. 512 on the question of onus at page 430. ... I quote:
>>
>>> All that can be said generally about onus is that while the onus is initially upon the defendant as applicant to show prejudice, there may be cases where the delay is so inordinate as to give rise in the circumstances to an inference of prejudice that falls upon the plaintiff to displace. The strength of the inference to be derived from any given period of delay will depend upon all the circumstances in the case.
>>
>> [24] And finally in *Moir v. Landry* (1991), 104 N.S.R. (2nd) 281 (N.S.C.A.), this was a case involving a three year delay. Mr. Justice Hallett, of the Court of Appeal, writing for the Court, noted that the onus to establish prejudice falls on the defendant except in cases of unusual long delay, such as the ten years in Martell. Justice Hallett said at page 284 in *Moir v. Landry, supra*, ...:
>>
>>> A plaintiff has a right to a day in Court and should not lightly be deprived of that right. Therefore, it is only in extreme cases of inordinate and inexcusable delay that a Court should presume serious prejudice to the defendant in the absence of evidence to support such a finding.
>>
>> [25] This is one of those cases. I am satisfied that as a result of the inordinate, inexcusable, extreme delay in excess of ten years in relation to this matter, that I can presume serious prejudice to the defendants. I do not find that the plaintiff has satisfied the onus to establish that no such prejudice exists. (Emphasis mine)

[45] In cases where there has been an inordinate delay prejudice is sometimes presumed without further proof. However, it is not mandatory as suggested by the appellant. The strength of the inference, if any, is to be derived from all of the circumstances of the case.

[46] In this case, although the motions judge did not reference a presumption, he makes reference to the circumstances that are present in this case which led him to conclude that the prejudice was not so substantial to preclude him granting the relief sought. Those circumstances include: the accident was a rear-end collision; the insurer being aware of the accident early on and had an opportunity to investigate that accident; the insurer had received some medical information relating to Mr. Lord's condition; the motions judge felt that any deficiencies in the medical records would likely be to the prejudice of the plaintiff; and he was satisfied, despite the passage of time, there could be a fair trial between the parties.

[47] Therefore, I conclude that the motions judge found it was not necessary to presume prejudice to the appellant. He considered all of the evidence presented to him by way of affidavit and cross-examination and determined the prejudice likely to be suffered by the respondent was not substantial.

[48] In reaching this conclusion he did not commit any reviewable error.

[49] I would dismiss this ground of appeal.

3. Did the motions judge otherwise commit a reviewable error in setting aside the dismissal order?

[50] Under this ground of appeal Ms. Smith argues that the motions judge under-emphasized the real prejudice that the appellant faces; under-emphasized the responsibility of Mr. Lord for the inordinate delay and under-emphasized the alternative remedy (an action against his former counsel).

[51] Those arguments were all made before the Chambers judge. He concluded that Mr. Lord was not personally responsible for the delay and that there was no substantial prejudice to the plaintiff. There was an evidentiary basis for his

findings. In arriving at this conclusion he did not err in law nor does a patent injustice result from his decision.

[52] With respect to the potential alternative remedy against his former counsel, whatever action Mr. Lord may have against his former counsel and its potential success is mere speculation. In my view, it was appropriate for the motions judge to give it little weight in his deliberations.

[53] One final note, this was a motion to set aside a dismissal order, nothing more. There may be other motions relating to the matter including renewal of the Originating Notice and Statement of Claim, limitation of actions or dismissal for want of prosecution. This decision should not be taken as a constraint upon a motions judge's discretion in addressing any other matter which may come before the court below.

Conclusion

[54] I would grant leave to appeal, but dismiss the appeal. Given the unusual circumstances of this case I would not award costs to either party.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.