

NOVA SCOTIA COURT OF APPEAL

Cite as Arnoldin Construction & Forms Ltd. v. Alta Surety Co., 1994 NSCA 4

BETWEEN:

ARNOLDIN CONSTRUCTION & FORMS)	
LIMITED, a body corporate)	Thomas M. MacDonald
)	for the Appellant
Appellant)	
)	
- and -)	
)	
)	Geoffrey A. Saunders
)	for the Respondent
)	
ALTA SURETY COMPANY, a body)	
corporate)	
)	
Respondent)	
)	
)	Appeal Heard:
)	September 29, 1994
)	
)	Judgment Delivered:
)	October 7, 1994
)	
)	
)	

**BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY,
IN CHAMBERS**

PUGSLEY, J.A.:

Arnoldin Construction & Forms Limited (the "Company") appeals to this Court from the decision and Order of the Supreme Court of Nova Scotia dismissing its action for \$550,000.00 against Alta Surety Company (Alta).

This application was brought by Alta to require the Company to post security for costs pursuant to **Civil Procedure Rule** 62.13(1).

The rule provides:

"A Judge on application of a party to an appeal may at any time order security for the costs of the appeal to be given as he deems just."

Alta's trial costs and disbursements were taxed in the amount of \$23,550.00. Alta's Execution Order, served on both the Company and its banker, was returned unsatisfied.

The affidavit material before the Court reveals:

- the Company was a subcontractor for a project at the Halifax International Airport and subsequently completed its work on the project. As a result of financial problems experienced by the owner, the general contractor failed to pay the Company approximately \$550,000.00 for goods and services rendered;
- the Bank holds security on all of the Company's assets and is presently owed \$300,000.00. This amount will likely be reduced to the sum of \$200,000.00 after realization on all the Company's assets;

- the bank loan was secured by personal guarantees of the two principal shareholders in the Company and their respective wives;
- the two principals of the Company have started a new business which is currently working in Halifax on one job and is tendered on another job.

Lorenzo Arnoldin, the principal shareholder of the Company deposes that: "Neither (the Company) nor (the new Company) nor my brother nor myself, or our respective wives, are in a position to pay security for costs with respect to this appeal, and if ordered to pay security for costs, (the Company's) ability to pursue the appeal will be severely prejudiced.

The appeal has been set down for hearing on January 16, 1995. The length of the trial (one half day)

suggests that the issues are confined but I understand that other parties may intervene.

MacDonald J.A., of this Court on commenting on the present rule stated in **Frost v. Herman** (1976), 18

N.S.R. (2d) 167 at 168:

In my view, however, the discretion given a judge on the present rule 62.13 to order security "as he deems just" should not be exercised in favour of an applicant unless special circumstances exist for doing so.

In my opinion Alta has established that "special circumstances" do exist for reasons of the following:

- (1) Alta is entitled to a substantial sum for its taxed costs of successfully defending a trial. To permit the Company to have a "free ride" without posting security, renders an injustice to Alta. Alta's rights must also be considered (**Holland v. Prince Edward Island School Board** #4 (1987), 64 Nfld & P.E.I.R. 184 at 186).

- (2) The two principals of the Company are not destitute, have started a new business, which has on going work.
- (3) the material before the Court does not demonstrate that the appeal will have to be abandoned if security for costs is ordered .
- (4) Alta has stressed that the appeal is effectively being conducted merely for the benefit of the Company's creditors and/or its shareholders "and that it is not unreasonable to assume that the creditors (including the Bank) would make a contribution in order to keep the appeal alive". Counsel for the Company has represented that the Bank has no interest in pursuing the matter further, but it is not unreasonable to anticipate that the principal shareholders of the Company could make some contribution to enable the appeal to continue.

Alta has made out a case justifying the granting of an Order for security of costs.

This Court follows the English practice wherein the amounts required are intentionally less than the amounts that may probably be taxed (**L.E. Powell & Co. Ltd v. Canadian Railway Co. et al**) (No. 2) (1975), 11 N.S.R. (2d) 532.

An Order shall be issued requiring the Company to post security with the Registrar of the Court of the Appeal in the amount of \$5,000.00 on or before November 4, 1994.

Costs of this application shall be costs in the cause.

J.A.