NOVA SCOTIA COURT OF APPEAL
Citation: *Jeffrie v. Ryan*, 2017 NSCA 23

Date: 20170315
Docket: CA 460485
Registry: Halifax

Between:

Roderick Jeffrie, Mika Fisheries Limited and
H. Hopkins Limited

Appellants

v.

Michael Ryan, Infinitee Wellness Inc. and
Barney Enterprise Limited

Respondents

Judge:	Farrar, J.A.
Motion Heard:	March 9, 2017, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Appellant in person Andrea Rizzato, for the respondent

Decision:

[1] Roderick Jeffrie, Mika Fisheries Limited and H. Hopkins Limited ask that I extend the time to permit them to file an Application for Leave to Appeal from an Interlocutory Order of Justice Robin Gogan. The Order permitted Brian Awad of McInnes Cooper to withdraw as counsel for the proposed appellants who are defendants in two Sydney Supreme Court actions. They are: *Michael Ryan and Infinitee Wellness Inc. v. Roderick Jeffrie, Mika Fisheries Limited and H. Hopkins Limited*, Sydney No. 424490 and *Michael Ryan, Infinitee Wellness Inc. and Barney Enterprise Limited v. Roderick Jeffrie, H. Hopkins Limited and Mika Fisheries Limited*, Sydney No. 431211.

[2] The Order also awarded costs of $250.00 on each action for a total of $500.00 against each of the defendants, payable by them jointly and severally.

[3] Mr. Jeffrie takes no issue with the removal of Mr. Awad. His only complaint is the award of costs against the defendants by the motions judge.

[4] In order to address Mr. Jeffrie's motion and arguments, it is necessary to provide some factual background for context.

Background

[5] Sheldon Nathanson, the solicitor for the plaintiffs in the Sydney actions filed an Appearance Notice returnable February 2, 2015. He was seeking to have dates set for the defendants to file their defences. Mr. Jeffrie attended at the hearing representing the defendants.

[6] The February 2, 2015, appearance is significant to Mr. Jeffrie on this motion for two reasons – he says that at that time Justice Gogan declared she had a conflict; and secondly, there was evidence Mr. Nathanson had a unilateral meeting or discussion with Justice Michael Wood which Mr. Jeffrie says was illegal.

[7] Mr. Jeffrie is correct that Justice Gogan indicated that she could not do anything substantive with respect to the matters because of a conflict with Michael Ryan. However, he is incorrect to assume or suggest that there was some meeting or discussion between Mr. Nathanson and Justice Wood without Mr. Jeffrie's knowledge. A transcript of the discussion leading up to the discussion about the alleged meeting with Justice Wood is set out below:

THE COURT: 9:39:29 … They seem to be related matters.

MR. NATHANSON: They're related matters. I guess dependent on how it proceeds today I may make an application to consolidate both actions. Mr. Jeffries identified himself to me in the elevator. He is present.

THE COURT: Okay, Mr. Jeffries, do you want to come forward?

MR. NATHANSON: I received the affidavits of service from the processor on Friday so I will be providing that to the court now.

THE COURT: And that's just in relation to the Appearance Day Notice?

MR. NATHANSON; That's correct.

THE COURT: Alright.

THE COURT: Okay. We have, is it Mr. Jeffrey or Jeffries. Jeffrey, alright. I'll just say for the record that I can't do anything substantive involving Dr. Ryan because I have a conflict there. But they have come forward. Mr. Jeffrey is present. Is there some, I guess, maybe why don't I hear from you and if there's something that I can do for you today –

MR. NATHANSON: Sure. Essentially, Dr. Ryan and his companies were represented by himself and you'll see the appointment of agent

THE COURT: I saw that.

MR. NATHANSON: -- in relation to the matter. So I've been retained as counsel and I've reviewed the file or the files. There was an application filed by Dr. Ryan and his companies with respect to either Default Judgment or in the alternative, Summary Judgment. It appears clear that because of negotiations that were ongoing between Dr. Ryan and his companies and the defendants the application as the brief outlines is essentially not an appropriate matter for Default Judgment. However, in terms of summary judgment for both those matters, it appears to be a matter that could be considered by the court.

THE COURT: Yes.

MR. NATHANSON: No defences have been filed by any of the defendants. Essentially there has been negotiations. However, once the matter proceeded by way of motion, for summary or default judgment, at that point there was ample opportunity for the defendants to file Statements of Defence. Nothing has been done. These appear to be clear cut cases in terms of the actual debts that are owing. In one matter it's a straightforward debt. It was broken down as the court sees. The other was an investment that by agreement turned into a loan because essentially Dr. Ryan gave up on this investment because of lack of disclosure by the defendants and/or the Chartered Accountant hired by the companies to provide the accounting and to provide all the corporate documentation. There doesn't appear to be any bona fide defence in relation to either of the two matters. I stand to be corrected absolutely but nothing has been filed.

THE COURT: If there, I mean, if there – well, I'll hear from Mr. Jeffrey

MR. NATHANSON: Right. There appears to be ample evidentiary documentation available to support the monies that were provided by my clients to Mr. Jeffrey and his corporations. So that's where we are today. We just need to move this matter along. The only one, a caveat in terms of the application for summary judgment might be the accounting of the profit from the money, the $190,000 that was essentially given to Mr. Jeffrey for the crab license. You will note that there was a $25,000 amount being sought for the usage of that money during the year that he had available to him those funds. But it's the profit that's been generated as a result of the usage of the crab license by the defendants. The rules do allow for summary judgment, in part, to be granted by the court. And the substantive part of the, essentially the $295,000 that is owing, taking into account the $20,000 paid by the defendant as a payment on the debt could be granted by the court. That's essentially where we are today,

THE COURT: There was – You did have a date before Justice Wood. Is that right? On Halloween, October 31. Was that, I am just looking at some notes in the file. There was some indication that the files would be consolidated and that motions would be made for – or that you would proceed to obtain dates for summary judgment or default judgment.

MR. NATHANSON: Well, what happened was, Justice Wood was not available.

THE COURT: Okay.

MR. NATHANSON: And that was essentially discussions between the Prothonotary and myself in terms of where the matter was going to go and what I was requesting on behalf of my clients was an Appearance Date

THE COURT: Okay.

MR. NATHANSON: So that we could bring these matters forward. So essentially, this is really the first appearance since the motions were filed by my clients in his own right.

THE COURT: Since you've been retained. Okay. Alright.

(Emphasis added)

[8] As can be seen from the transcript, Mr. Nathanson had discussions with the Prothonotary about setting a date for an appearance before Justice Wood. However, Justice Wood was not available and, therefore, nothing occurred. Mr. Jeffrie's continued assertion that there was some sort of clandestine meeting between Mr. Nathanson and Justice Wood is not borne out by the record as he suggests. I have set out the conversation about the alleged meeting in detail because Mr. Jeffrie kept referring to it as evidence of illegal activity on this file

which somehow supported his position on this motion. It also is referred to in his first ground of appeal.

[9] At the February 2, 2015 hearing Justice Gogan set the date of March 6, 2015, for the defendants to obtain counsel and to file Defences. The Defences were actually filed on April 29, 2016.

[10] The next activity, of significance to this motion, occurs in October, 2016. At that time, Mr. Nathanson was seeking to determine the status of Mr. Awad as counsel for the defendants. He wrote letters on October 4 and October 14. Receiving no response he filed an Appearance Notice on October 19, 2016, returnable October 31, 2016. This prompted Mr. Awad to respond as follows:

> Dear Mr. Nathanson:
>
> **Re:** **Ryan v. Jeffrie** – Syd No. 424490 and Syd No. 431211
>
> Next appearance: Monday, October 31, 2016 at 9:30 a.m. [appearance day chambers]
>
> I am writing in response to your letters to me dated October 4 and 14, and the appearance day notices filed on October 19.
>
> I confirm that I am no longer representing the defendants in the above-referenced matters.
>
> I intend to appear via telephone for the October 31 chambers.
>
> I suggest that you serve Mr. Jeffrie with the notices filed on October 19.

[11] The Appearance Day appearance went ahead as scheduled on October 31, 2016. Justice Gogan was also the presiding justice that day. Mr. Awad was present on the phone and confirmed to the court that he was no longer acting for the defendants in the two actions.

[12] Justice Gogan informed Mr. Awad that he would either have to have his clients file a Notice of New Counsel or a Notice of Intention to Act in Person (Rules 33.03 and 33.07) or alternatively, Mr. Awad would have to make a motion to withdraw as counsel pursuant to Rule 33.03. The date of November 28, 2016, was set as the date returnable for Mr. Awad's motion to withdraw if his clients had not filed the appropriate documentation before that date. Justice Gogan instructed Mr. Awad to advise his clients if the proper documentation was not filed and it was necessary to proceed with a motion there may be cost consequences.

[13] Nothing was filed with the Court between October 31 and November 28 by the defendants. On November 28, 2016, the parties appeared before Justice Gogan to hear Mr. Awad's motion. Mr. Jeffrie was served with the motion. He attended at that time and confirmed on the record that he did not wish Mr. Awad to represent the defendants any longer. Justice Gogan granted Mr. Awad's motion. She then heard from counsel for the plaintiffs and Mr. Jeffrie on costs. At no time during the appearance did Mr. Jeffrie object to Justice Gogan hearing the matter.

[14] The plaintiffs requested $1,000.00 in costs ($500.00 on each action). Mr. Jeffrie submitted there should be no costs. The motions judge awarded $250.00 costs on each of the actions to the plaintiffs.

[15] Justice Gogan instructed Mr. Awad to prepare the order and directed that he could circulate it to the parties via email and if no one responded with an objection within 24 hours she would issue it.

[16] Mr. Jeffrie acknowledges that he saw a draft form of order at some point in time but felt that it could not be issued without his consent. The order was eventually issued on December 29, 2016. As it was an interlocutory order the appeal date expired on January 13, 2017.

[17] Mr. Jeffrie says that he became aware of the order being issued sometime in the third week in January. He says he formed the intention to appeal on January 18, 2017.

[18] His first attempt at filing an Application to Extend the Time for Leave to Appeal was on February 9, 2017. He says that he filed the motion wrong and because of bad weather only filed the motion on February 17, 2017.

[19] In the meantime, an Execution Order was issued on January 16, 2017, for the $500.00 costs award. It appears it was executed on Mr. Jeffrie's bank in or around February 6, 2017. The bank sent the monies for the Execution to the Sheriff on February 7, 2017.

Issues

[20] Mr. Jeffrie's proposed grounds of appeal are as follows:

> (1) The Learned Justice erred in law in rendering a decision in the proceeding when it was improper for her to do so as a result of her having a friendship with the Respondent, Michael Ryan, and this constituting a conflict or the

> appearance of conflict. The Justice acknowledged this in a previous hearing among the parties, then stating that she could not render a decision or even consider the matter because she knew the party Michael Ryan. In addition, the Justice noted in her remarks that she saw in the record where Respondent's counsel, Mr. Nathanson, had approached Justice Woods about hearing this proceeding. The Justice knew that such an effort (on his part) was not proper and it was further improper for her to note it, her doing so representing an abuse of her authority and power.
>
> (2) The Learned Justice erred in law and in fact by awarding costs when the facts established that the Appellants did nothing to warrant the matter proceeding to court, it being filed for hearing when the parties were engaged in confidential communications. The Appellants then not being at fault or bearing culpability for the matter being required to proceed before the court.
>
> (3) The decision constitutes a serious error in fact respecting its interpretation of the evidence giving rise to the proceeding taking place, this error continuing with a process that has adversely affected the Appellant's over the course of the past seven years, depriving them unjustly of money, resources and livelihood. The court's interpretation of fact in this instance was so grossly wrong that it constitutes a first act to this continuing scenario. The evidence establishes that the Appellants have done everything necessary to move forward with this matter and the suggestion that they must be directed to do so is patently false.

[21] Mr. Jeffrie's proposed grounds of appeal can be distilled into one – that is – costs of $500.00 should not have been awarded against him. It was unfair and the motions judge was improperly motivated by her relationship with Mr. Ryan in doing so.

[22] He also makes reference in his grounds of appeal to the alleged improper approach by Mr. Nathanson to Justice Wood. I have already addressed that issue above and will say nothing further about this baseless suggestion.

Discussion

[23] Rule 90.37(12) gives a judge of the Court of Appeal the authority to grant an extension of time to file a leave application. In *Farrell v. Casavant*, 2010 NSCA 71, Beveridge, J.A. explained the test for granting an extension of time to appeal as, ultimately, a determination of whether it is in the interest of justice to grant the extension (¶18). In making this determination, the common factors to be considered are:

1. the length of the delay;
2. the reason for the delay;
3. the presence or absence of prejudice;
4. the apparent strength or merit in the proposed appeal; and
5. the good faith intention of the applicant who exercises his right to appeal within the prescribed period of time.

[24] The relative weight to be given to any of these factors varies from case to case (*Farrell*, ¶17).

[25] Mr. Jeffrie, in support of his motion, says this is much more than an appeal about $500.00. He says he was unjustly penalized by the Chambers judge when he did nothing wrong.

[26] He argues it was not his fault that he was not at the appearance day on October 31, 2016. He lays the blame solely in the lap of Mr. Nathanson for not providing him with proper notice when advised to do so by Mr. Awad in his letter to Mr. Nathanson on October 20, 2016. (I pause here to point out that Mr. Jeffrie acknowledged he knew about the appearance day notice but chose not to be in attendance because of the lack of proper notice.)

[27] Mr. Jeffrie's position is that it was an error for the motions judge to take his non-appearance at that time into consideration in awarding costs against him. He repeatedly said that when Mr. Awad told Mr. Nathanson he was no longer representing Mr. Jeffrie, Mr. Nathanson should have provided him (Mr. Jeffrie) with notice.

[28] Mr. Jeffrie's argument misses the point. First, the appearance notice was issued on October 19, 2016, a day before the letter from Mr. Awad indicating that he was no longer acting for Mr. Jeffrie and the corporate defendants. This, despite Mr. Awad having received two letters previous to the appearance notice where Mr. Nathanson was looking to clarify representation. By the time Mr. Awad's letter was received the Appearance Notice had properly been served on all three defendants through counsel of record. It was not necessary for Mr. Nathanson to serve anyone else.

[29] Mr. Jeffrie also, mistakenly, assumes costs were awarded against him because of his failure to attend the October 31, 2016 appearance day. That was not

the case. The costs were awarded against the defendants because they failed to comply with Rule 33 after discharging Mr. Awad. Rule 33 provides:

> **33.01(2)** A party who replaces counsel, or discharges counsel and acts on their own, must comply with this Rule.

[30] A lawyer simply advising other counsel that he is no longer acting for a party is not sufficient to remove himself as counsel of record under the *Civil Procedure Rules*. Rule 33.03 is very explicit as to when a lawyer ceases to be counsel of record. They are:

1. The proceeding concludes;
2. The lawyer is discharged and new counsel files a notice of new counsel;
3. A lawyer is discharged and the party files a notice of intention to act on one's own behalf;
4. When a trial or hearing is scheduled a lawyer can only be discharged as counsel of record; and
5. The lawyer finds it necessary to withdraw as counsel and a judge removes the lawyer.

[31] None of these events occurred before November 28, 2016. Further, Mr. Jeffrie acknowledged that he had discharged Mr. Awad as his counsel. Rule 33.05 sets out what must occur when a party discharges counsel. It provides:

> **33.05 (1)** A party who discharges counsel and retains new counsel must, through the new counsel, immediately file a notice of new counsel.
>
> **(2)** A party who discharges counsel and acts on their own must file a notice of intention to act on one's own.
>
> **(3)** The designated address for delivery of documents to a party does not change until the notice of change of solicitor, or the notice of intention to act on one's own, is filed.

[32] As noted earlier, Justice Gogan, in the hearing on October 31, 2016, made it known that if a Notice of Intention to act on one's own was not filed and it became necessary for a motion to be made to remove Mr. Awad as counsel of record, there would be potential costs consequences.

[33] I will now turn to the issue I must decide, that is, in these circumstances, is it in the interest of justice that I extend the time to appeal? In my view it is not.

[34] First, I am not satisfied that Mr. Jeffrie formed a *bona fide* intention to file a Notice of Application for Leave within the prescribed time period. Mr. Jeffrie says he formed the intention to appeal on January 18, 2017, when he first received the Order. That is still outside the time period to appeal. Further, I reject Mr. Jeffrie's evidence that he formed the intention to appeal on January 18, 2017 for the following reasons:

1. He was present when Justice Gogan made the order with respect to costs. He was also present when she indicated it was not necessary to obtain the consent of the parties to the order but simply to provide them with a draft order and, if no objection was received within 24 hours, she would issue the order . He acknowledges seeing a draft form of order but took no steps to determine when it was actually issued ;
2. Mr. Jeffrie said he didn't do anything after seeing the draft order because he thought it could not be issued without his consent. In light of Justice Gogan's comments set out above, Mr. Jeffrie's evidence on this point is not credible;
3. Mr. Jeffrie made a request to get the audiotape from the November 28, 2016 appearance on December 9, 2016. He received the audiotape in or around December 20, 2016. At that time any mistaken impression about what Justice Gogan said at the November 28, 2015 appearance would have been corrected by merely listening to the tape. (It is unclear why Mr. Jeffrie requested the tape at that time. On the written request he indicated he was not requesting it for an appeal.)
4. It is more than mere coincidence that Mr. Jeffrie did not take any steps to attempt to appeal the order until February 9, 2017 just three days after the Execution Order was served on his bank.

[35] I am of the view Mr. Jeffrie did not form an intention to appeal the order until after the Execution Order was served on his bank. It was the execution, not the issuance of the order, which prompted him to appeal. As a result, I am not satisfied that his intention to appeal is *bone fide*.

[36] Secondly, and perhaps more importantly, I am not satisfied that there is any merit to this proposed appeal. Mr. Jeffrie's argument is that the trial judge was in a conflict of interest and therefore, penalized him by making an award of costs.

[37] Mr. Jeffrie does not accept any responsibility for the necessity of the two Chambers appearances to address the defendants' legal representation. The fact is the appearances were necessitated by his failure to comply with the Rules. Once he had discharged Mr. Awad it was incumbent upon him to comply with the provisions of Rule 33.05. It was his obligation regardless of what actions may have been taken by Mr. Nathanson. He did nothing. As a result, two Chambers motions were required before Mr. Awad was removed as solicitor of record. Neither of those appearances would have been necessary if Mr. Jeffrie had simply complied with the Rules.

[38] He also fails to appreciate that until such time as a solicitor of record is removed from the record, a party seeking to take proceedings against the individual or corporate defendants, as was the case here, must provide notice to that solicitor.

[39] There is nothing on this record that suggests that Justice Gogan acted in anything other than an objective, neutral and reasonable manner in awarding costs.

[40] The plaintiffs directed the motions judge to Tariff C of Part 16 of the *Civil Procedure Rules* which addresses costs payable on an application heard in Chambers by a Supreme Court judge. It provides, in part:

> …For applications heard in Chambers the following guidelines shall apply:
>
> | **Length of Hearing of Application** | **Range of Costs** |
> |---|---|
> | Less than 1 hour | $250 - $500. |

[41] Both of the appearances in Chambers were less than an hour. The plaintiffs had requested the amount of $500.00 being the upper end of the range of costs under the Tariff. The motions judge rejected that request. She awarded $250.00 on each action for a total of $500.00, an amount at the lower end of the range.

[42] Her award of costs was more than reasonable having regard to the circumstances where the plaintiffs had to file and serve an Appearance Notice and attend Court on two occasions to address the issue of the defendants' legal representation.

[43] There is no merit to Mr. Jeffrie's suggestion that she was improperly motivated in making a costs award against the defendants. I recognize that Justice Gogan had indicated that she was in a conflict of interest with respect to substantive matters involving these two actions because of her relationship with Mr. Ryan. However, her decision to allow Mr. Awad to withdraw, which was consented to by Mr. Jeffrie, cannot be seen as a matter of substance. It follows from the necessity to appear in Chambers on two occasions that costs would be an issue. Her discretion to award costs was guided by the Tariff. Again, hardly a matter of substance in these circumstances.

[44] Finally, Mr. Jeffrie did not voice any objection to Justice Gogan hearing the motion.

[45] For these reasons I would dismiss the application to extend the time for filing the Notice of Application for Leave to Appeal.

Costs

[46] The respondents requested solicitor-client costs for having to respond to this motion. Although Mr. Jeffrie's conduct has been less than ideal, I do not believe that it arises to the level that would warrant solicitor-client costs. However, it does warrant a significant costs award having regard to the amount involved and the effort necessary to respond to it.

[47] Mr. Jeffrie set down the motion without consultation with Mr. Nathanson or Ms. Rizzato as to its timing. It was originally scheduled to be heard on March 2, 2017.

[48] The respondents requested a one week adjournment to March 9, 2017, when they would be available. Mr. Jeffrie refused. It was necessary for the parties to appear by telephone Chambers to address the request for an adjournment. At no time prior to the appearance in telephone Chambers did Mr. Jeffrie indicate that his position with respect to an adjournment had changed. However, immediately upon being asked about his position in the telephone Chambers appearance, he advised that he was agreeable to the adjournment. Not only was he agreeable, he wished to file further submissions – which he did on March 2.

[49] Mr. Jeffrie subsequently requested that Mr. Ryan and Mr. Nathanson be present for cross-examination. I denied the request for Mr. Nathanson to be present for cross-examination as he had not filed an affidavit. However, because

Mr. Ryan had filed an affidavit, he was required to be present for cross-examination.

[50] The costs and expense of having Mr. Ryan attend to be cross-examined was completely unnecessary. What occurred between the parties which resulted in the motions judge granting of the order was not factually complicated. Mr. Jeffrie's cross-examination of Mr. Ryan did not focus on the issues on the motion but, rather sought to delve into the underlying actions on issues that were irrelevant to the matter before me.

[51] The actual motion itself took up approximately one-half day of court time.

[52] The costs to all parties associated with this proposed appeal is disproportionate to the amount in issue. Mr. Jeffrie says he has spent over $5,000.00 in pursuing this motion; the respondents indicate they have spent over $15,000.00 in response to it.

[53] Finally, Mr. Jeffrie has made unfounded allegations of misconduct against two justices and Mr. Nathanson.

[54] Taking into account all of the circumstances, this matter cries out for a significant award of costs. As a result I award costs in the amount of $5,000.00 payable forthwith.

Farrar, J.A.