

NOVA SCOTIA COURT OF APPEAL

Citation: *Crooks v. CIBC World Markets Inc.*, 2018 NSCA 68

Date: 20180719

Docket: CA 462245

Registry: Halifax

Between:

Gayle Crooks, Archie Gillis and Karen McGrath

Appellants

v.

CIBC World Markets Inc./Marches Mondiaux CIBC Inc.
carrying on business as CIBC Wood Gundy

Respondents

Judge: The Honourable Justice Cindy A. Bourgeois

Motion Heard: July 19, 2018, in Halifax, Nova Scotia in Chambers

Held: Motion to dismiss appeal granted

Written Release July 27, 2018

Counsel: Jane O'Neill QC, for the appellants
John Keith QC, Jack Townsend, and Lennart Hoffmann, for
the respondents

Decision:

Introduction

[1] On July 19, 2018, I heard a motion brought by the respondents seeking to dismiss an appeal scheduled to be heard September 25, 2018. The motion was brought pursuant to *Civil Procedure Rules* 90.37 and 90.43.

[2] At the conclusion of the chambers hearing, I advised that the motion to dismiss was granted with reasons to follow. These are my reasons.

Background

[3] In asking for the appeal to be dismissed, the respondents readily concede that the appellants have put forward arguable grounds of appeal and, as such, a request for dismissal should not be made or taken lightly. I agree.

[4] The seriousness of the remedy sought and granted compels a review of the concerning procedural history of this matter. The respondents describe the appellants' advancement of their appeal as displaying "repeatedly neglectful conduct—without any form of acknowledgement or explanation." It is an apt description.

[5] On April 6, 2017, the appellants filed a Notice of Application for Leave to Appeal and Notice of Leave to Appeal (Interlocutory) in which they sought to challenge an order issued by Justice Patrick Duncan decertifying class proceedings.

[6] A Motion for Date and Directions (Leave) was scheduled for April 27, 2017. In support of the motion, a Certificate of Readiness was filed by the appellants, but it did not comply with *Civil Procedure Rule* 90.26. In particular, it did not confirm the audio tapes of the matter below had been requested, nor did it provide a date as to when the Appeal Book would be filed.

[7] In a letter accompanying the Certificate, Ms. O'Neill, counsel for the appellants, explained:

Attached is a Certificate of Readiness in this appeal. You will note that we have not yet ordered the audio for transcription. At this stage, the Appeal was filed to preserve our clients' right to appeal; however, the Court below continues to be seized of the matter and there is some uncertainty about how it will proceed.

We will attend Court of Appeal chambers next week and seek directions on whether we can hold the appeal in abeyance until we determine whether we need to pursue it. (Emphasis added)

[8] In an affidavit filed with the Court on April 21, 2017, Ms. O'Neill provided further context:

[12] As counsel for the Appellants, I filed a Notice of Appeal (Interlocutory) to ensure that their right to appeal was preserved, **should an appeal be necessary.**

[13] As counsel for the Appellants, **I am not certain whether an appeal will be necessary,** depending on any future Orders made by Justice Duncan who continues to be seized of the matter. As such, I have not taken steps to order the transcripts or prepare an Appeal Book until after the additional appearances before Justice Duncan who will determine whether this action will continue in a matter consistent with but not strictly under the *Class Proceedings Act* (common issues determined with individual claims assessed) or whether each plaintiff will be required to file an individual action.

[14] We are seeking direction from the Honourable Judge of this Court sitting in Chambers on how to proceed to 1) preserve the Appellants' right of appeal; 2) comply with Justice Duncan's directions to efficiently move this matter forward and 3) to make efficient use of the Courts resources both in the Court below and on Appeal. (Emphasis added)

[9] The motion for date and directions (leave) was heard on April 27, 2017 by Justice Bryson. The parties were advised that pursuant to the *Class Proceedings Act*, leave before a single judge of the Court would be required prior to setting the matter down for appeal. Justice Bryson set the appellants' leave hearing for September 21, 2017. Nothing in the appearance or directions from the Court suggested that the appeal was in "abeyance."

[10] The appellants failed to file the necessary motion materials for the September 21st hearing. Having not received the materials from the appellants for the leave motion scheduled by Justice Bryson, Mr. Keith wrote to Ms. O'Neill on September 18, 2017:

Your motion for leave to appeal is currently scheduled to be heard this Thursday, September 21. Under the Rules, your motion materials should have been filed by last Thursday, September 14.

Could you please file and deliver your motion materials at your earliest convenience? Once we have reviewed your materials, we will be in a position to take instructions as to whether to contest the motion.

As you are now out of time to have your motion heard as planned this Thursday, it may be that you will need to obtain a new hearing date. Either Mr. Townsend or I can make ourselves available if you would like to adjourn the motion to next Thursday, September 28.

[11] With Mr. Keith's consent, the motion was set over to October 5, 2017. The appellants' motion materials were filed on September 28, 2017. The leave motion was heard by Justice Van den Eynden. The parties advised the chambers judge agreement had been reached that two of the three grounds of appeal raised arguable issues. As such, leave ought to be granted for the appellants to advance the appeal on those grounds. Justice Van den Eynden agreed and directed Ms. O'Neill to draft a consent order for the Court's issuance.

[12] On November 16, 2017, the Deputy Registrar for the Court of Appeal wrote to Ms. O'Neill (copied to respondents' counsel) stating:

Dear Ms. O'Neill;

The above-named appeal had a motion heard in Chambers at the Nova Scotia Court of Appeal on Thursday, October 5, 2017 where the Chambers judge, Justice Van den Eynden, had agreed that 2 of the 3 grounds of appeal presented arguable issues and leave to appeal was granted. Counsel for the appellants, Ms. O'Neill, was to prepare a draft Consent Order to that effect. However, a draft consent order for filing has not been received by the Court of Appeal, and therefore, no order has been issued from this Court stating those previous results.

Would counsel please provide a status report as to the filing of a consent order or, where applicable, if counsel has changed their view of the agreement decided in Chambers. However, with or without a draft consent order for filing, please be advised that filing dates and a hearing date for this interlocutory appeal have still not been scheduled to this date. An amended or new motion for date and direction is required for filing accompanied with a new completed certificate of readiness.

This appeal file will be monitored for the filing of an amended Notice of Motion for dates and direction.

[13] On the same day, the Deputy Registrar received responses from both counsel. Mr. Keith advised:

Thank you Cherri.

We understand that the following ground of appeal has been deleted by the Appellants:

“(1) The Learned Justice erred at law by decertifying a number of common issues previously certified by the Honourable Justice Moir on July 13, 2011”

We further understand that the Appellants intend to proceed on the basis of the two remaining grounds of appeal.

We have not yet received a draft Order from Ms. O’Neill but will obviously respond immediately upon receipt. Finally, we do feel compelled to confirm that we do not believe CIBC is responsible for any delay in this matter.

[14] Ms. O’Neill advised:

Thank you. I will provide the Order to the Court when I am in the office next week.

[15] The order requested by the Court was not received the following week. On November 30, 2017, the Deputy Registrar sent a further email to Ms. O’Neill (copied to respondents’ counsel) stating:

Dear Ms. O’Neill;

Further to my email of November 16, 2017 the draft consent has not been received as expected. As a reminder, since a consent order has not been issued from the Court of Appeal which would have granted the issues agreed by counsel, the appeal remains as it was originally filed. Justice Van den Eynden has asked that I contact counsel **for an immediate status update**.

If appellant’s counsel has changed your view on the issues since your Chambers appearance on Thursday, October 5, 2017, please indicate your decision.

Also, as indicated in my November 16th email, your amended or new motion for date and direction together with a compliant certificate of readiness, is also outstanding. **To avoid a motion to dismiss the appeal, please file those documents forthwith.**

Thank you for your attention to these **time sensitive matters**. (Emphasis added)

[16] On the same day, Mr. Keith replied:

Thank you Ms. Brown,

We are awaiting the draft form of Order and will reply expeditiously upon receipt.

[17] The Deputy Registrar received no response from Ms. O’Neill to her inquiries of November 30th. As of December 7, 2017, the appellants, through their counsel, had not provided the consent order as directed by Justice Van den Eynden and **twice** requested by the Deputy Registrar. Nor had a Motion for Date and

Directions (Appeal) been filed as required. On that date, Registrar Morse filed a motion seeking dismissal of the appeal to be heard December 21, 2017.

[18] On December 14, 2017, the appellants filed a Motion for Date and Directions, returnable December 21, 2017, with supporting Certificate of Readiness. In the Certificate, Ms. O'Neill advised an Appeal Book could be filed no later than February 26, 2018.

[19] On December 21, 2017, Justice Derrick heard both motions. She dismissed the Registrar's motion to dismiss the appeal. In relation to the appellants' motion for date and directions, the appeal was set down for hearing on June 6, 2018. Justice Derrick further directed that:

- (a) The appellants provide the respondents with an index of the Appeal Book by January 15, 2018;
- (b) The appellants file an Appeal Book by February 26, 2018 (the date Ms. O'Neill represented in the Certificate of Readiness);
- (c) The appellants file their factum by March 29, 2018; and
- (d) The respondents file their factum by May 4, 2018.

[20] On December 21, 2017, Ms. O'Neill filed the consent order arising from the October 5th leave motion.

[21] Despite having had a Registrar's motion to dismiss brought for their earlier non-compliance, the appellants did not file the Appeal Book on February 26, 2018, as directed by Justice Derrick. The Court received no communication from the appellants seeking to extend this deadline. The Court received no explanation as to why the appellants failed to comply with the direction of Justice Derrick.

[22] The appellants did not file their factum on March 29, 2018, as directed by Justice Derrick. Again, the Court received no request for an extension or explanation from the appellants.

[23] Due to the above deadlines being missed by the appellants, the Court initiated contact with the parties. On April 5, 2018, the Deputy Registrar wrote to Ms. O'Neill (copying respondents' counsel) as follows:

Dear Ms. O'Neill;

This appeal was scheduled for a hearing on Wednesday, June 6, 2018 at 10:00 am. While preparing the file for the next term, our records show that you have missed your filing date for the appeal book which deadline date for filing was February 26, 2018. In addition, you have also missed your factum filing date which was March 29, 2018. As this appeal is scheduled for next term, the file was brought to the attention of the Chambers judge, Justice Fichaud.

Justice Fichaud has requested that counsel **be available for a conference call scheduled for Wednesday, April 11, 2018 at 12:30 pm.**

Please indicate your direct telephone number; the Court of Appeal will initiate the conference call. (Emphasis in original)

[24] Before setting out the details of the appearance with Justice Fichaud, it is important to note that there was, unbeknownst to the Court, communication between the parties relating to the missed deadlines. The unrefuted affidavit evidence of Mr. Townsend establishes:

- (a) The appellants did provide to the respondents a draft index of the Appeal Book on January 15, 2018, as directed by Justice Derrick;
- (b) On January 15, 2018, Mr. Townsend replied to Ms. O'Neill requesting several additions to the proposed Appeal Book;
- (c) On February 27, 2018, Mr. Townsend emailed Ms. O'Neill as follows:

Hi Jane,

I have it in my calendar that you were to file the Appeal Book in this matter yesterday. We haven't received anything from your office on this – did the Appeal Book get filed?

Thanks in advance.

- (d) On March 1, 2018, Ms. O'Neill replied:

Hi Jack. Verbatim is late with the transcripts and will not have them until next week. Can you consent to the Appeal Book being filed on March 20th?

- (e) On March 2, 2018, Mr. Townsend wrote:

Jane:

We can consent to the Appeal Book being filed on March 20, provided it contains all the information identified in my January 15 email that was missing from your

draft index (my email is attached for ease of reference), and provided that your factum is filed in accordance with Justice Derrick's original deadline.

(f) On March 20, 2018, Ms. O'Neill wrote to Mr. Townsend advising she would be unable to have the Appeal Book finalized that day, asserting, however, that the factum would "still be filed on schedule" (March 29th).

(g) On April 2, 2018, Mr. Keith wrote to Ms. O'Neill as follows:

Jane

The appeal book was due on February 26, 2018. We followed up on February 27, 2018. On March 1, 2018, you wrote back to say that the transcript was delayed and requested an extension until March 20, 2018 to file the Appeal Book. We consented to that extension conditional upon the book containing all of the additional information originally identified in Jack's email dated January 15, 2018 (attached for your convenience). We did not hear back and presumed that our proposal was acceptable.

On March 20, 2018 (see below), you wrote to say that you required a further indulgence in terms of delivering the appeal book but that the Appellants' factum would still be filed on schedule. The Appellants' factum was due last Thursday, March 29, 2018.

Neither the factum nor the Appeal Book were delivered on March 29, 2018. We have not heard anything further from you and we are not certain where the matter stands.

I have a very busy April and May. In fairness to my client, I cannot agree to any further extensions of the current dates. We should discuss where to go from here.

(h) The same day, Ms. O'Neill replied:

I am so sorry this happened and ask that if you will consent to me filing tomorrow, I will do so. Again, I am really sorry.

[25] Neither the Appeal Book, nor factum, were filed the following day (April 3rd). Nor did the appellants seek permission to file their materials outside of the deadlines directed by Justice Derrick.

[26] In accordance with the Deputy Registrar's correspondence of April 5th, the parties participated in the Court-initiated conference call with Justice Fichaud on April 11, 2018. Given the Appeal Book and appellants' factum had yet to be filed, the June 6th appeal hearing was released. The appeal was rescheduled for a full day hearing on September 25, 2018. Justice Fichaud directed:

- (a) The Appeal Book be filed May 31, 2018;
- (b) The appellants' factum be filed by June 29, 2018; and
- (c) The respondents' factum be filed by August 3, 2018.

[27] On April 13, 2018, the Deputy Registrar forwarded correspondence to counsel confirming the above hearing date and filing deadlines. In bold, the parties were advised:

To extend a filing date: the permission of the Registrar must be obtained and all parties must consent to the extension. To request a new hearing date: a motion must be made to the Chambers Judge. FAILURE TO MEET ABOVE-NOTED FILING DATES MAY RESULT IN THIS APPEAL BEING DISMISSED BY THE PRESIDING JUSTICE.

(Emphasis in original)

[28] The Appeal Book was filed on May 31, 2018, as directed by Justice Fichaud. The appellants did not file their factum on June 29, 2018, as directed. The appellants did not request an extension of time to file their factum, nor provide any indication to the Court why they had not complied with the direction of Justice Fichaud.

[29] On July 9, 2018, the respondents filed the Notice of Motion seeking dismissal of the appeal to be heard July 19, 2018.

[30] Without having sought an extension, the appellants attempted to file their appeal factum on July 16, 2018. It was not accepted. On July 17, 2018, Registrar Morse wrote to Ms. Maxwell (Ms. O'Neill's assistant) as follows:

Dear Ms. Maxwell,

I write to confirm the factum has NOT been accepted for filing.

In order to file a document with the Court of Appeal, after the filing deadline for doing so has passed, the agreement of all the parties must be confirmed and a new filing deadline stipulated.

This may be done via email directly with me so long as we are outside of the 30 days prior to the appeal hearing.

If there is no agreement, a motion must be made to a judge in Court of Appeal chambers.

[31] The respondents did not consent to the late filing of the factum. The appellants did not file a chambers motion seeking permission to file their factum as directed by the Registrar.

Law

[32] *Civil Procedure Rule 90.43* permits a judge to dismiss an appeal where there has been a failure to perfect. Rule 90.43(1) defines a “perfected appeal” as follows:

In this Rule 90.43 a "perfected appeal" means one in which the appellant has complied with the Rules as to each of the following:

- (a) the form and service of the notice of appeal;
- (b) applying for a date and directions in conformity with Rule 90.25;
- (c) filing the certificate of readiness in conformity with Rule 90.26;
- (d) the ordering of copies of the transcript of evidence, in compliance with Rule 90.29;
- (e) filing and delivery of the appeal book and of the appellant's factum.

[33] Rule 90.43(4) further provides:

A judge, on motion of a party or the registrar, may direct perfection of an appeal, set the appeal down for hearing, or, on five days notice to the parties, dismiss the appeal.

[34] In considering what outcome is appropriate, I am mindful of the approach set out by Justice Saunders in *Islam v. Sevgor*, 2011 NSCA 114. Although referencing a Registrar’s motion to dismiss, the principles are equally applicable to a motion to dismiss advanced by a respondent. Justice Saunders wrote:

[36] The approach I take in such matters is this. Once the Registrar shows that the rules for perfecting an appeal have been breached, and that proper notice of her intended motion has been given, **the defaulting appellant must satisfy me, on a balance of probabilities, that the Registrar's motions ought to be denied. To make the case I would expect the appellant to produce evidence that it would not be in the interests of justice to dismiss the appeal for non-compliance.** While in no way intended to constitute a complete list, some of the factors I would consider important are the following:

- (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.

- (ii) whether the grounds of appeal raise legitimate, arguable issues.
- (iii) whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial.
- (iv) whether the appellant has the willingness and ability to comply with future deadlines and requirements under the *Rules*.
- (v) prejudice to the appellant if the Registrar's motion to dismiss the appeal were granted.
- (vi) prejudice to the respondent if the Registrar's motion to dismiss were denied.
- (vii) the Court's finite time and resources, coupled with the deleterious impact of delay on the public purse, which require that appeals be perfected and heard expeditiously.
- (viii) whether there are any procedural or substantive impediments that prevent the appellant from resuscitating his stalled appeal.

[37] It seems to me that when considering a Registrar's motion to dismiss, a judge will wish to weigh and balance this assortment of factors, together with any other circumstances the judge may consider relevant in the exercise of his or her discretion. (Emphasis added)

Analysis

[35] At the outset of the motion hearing, I called upon Ms. O'Neill to advise whether her clients were consenting to the motion to dismiss. Given that nothing had been filed in response to the motion, I thought such may be the case. Ms. O'Neill advised that the motion was very much contested. I then inquired why, if the motion to dismiss was contested, nothing had been filed in response. Ms. O'Neill advised that the attempted filing of the appeal factum was her clients' response to the motion.

[36] The attempted filing of a long overdue appeal factum, without having obtained permission to do so, can hardly be considered a proper response to the respondents' motion to dismiss. To contest the motion, the appellants were required to have filed a brief and any supporting affidavit(s) they wished to rely upon two clear days prior to the hearing. They did not do so.

[37] I am satisfied that in failing to file their factum as directed, the appellants failed to perfect the appeal. I am further satisfied the appellants received proper notice of the motion to dismiss. As such, the appellants bore the burden to satisfy me that the motion ought to be denied. As *Islam* makes clear, the appellants were

expected to adduce evidence to satisfy me that it would not be in the interests of justice to dismiss the appeal. The submissions of counsel made in Court are not evidence.

[38] Turning to the *Islam* factors noted earlier, the respondent conceded the grounds of appeal raise arguable issues. In argument, Mr. Keith also recognized that, given only the filing of the appellants' factum was outstanding, there were no substantial impediments preventing the appellant from moving the appeal forward and they likely had the ability to comply with any further directions. He asserted, however, that a balancing of the other factors, notably in the absence of evidence from the appellants, overwhelmingly supported a dismissal of the appeal. I agree.

[39] In my view, the remaining factors all favour dismissal. In any motion to dismiss for failure to perfect, an appellant will be expected to produce evidence establishing a good reason for their default. Failure to do so places an appeal, even a meritorious one, in jeopardy. Given the history of this matter, plagued by delay and a repeated failure to follow direction of the Court, the lack of an explanation supported by evidence is fatal. It is inexplicable that the appellants (or their counsel) failed to respond to the motion in the manner directed by the *Rules*. It is simply a continuation of the astounding fashion in which this appeal has been advanced.

[40] In chambers, Ms. O'Neill asserted that this file had "fallen through the cracks" and her clients ought not be punished for the results of her busy schedule. With respect, this does not provide a sufficient excuse. Even if I were to accept it as "evidence", it is an inadequate excuse. Ms. O'Neill had already received the "wake-up call" afforded by the Registrar's motion to dismiss. Her failures were again afforded latitude when the appeal hearing was rescheduled by Justice Fichaud. Given the history of this matter, Ms. O'Neill's late in the day expression of regret is insufficient.

[41] *Islam* also suggests the Court consider "whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial." From Ms. O'Neill's early representations to the Court, it is clear the appeal was brought to preserve her clients' right to appeal, amidst uncertainty as to whether it would even be pursued. Early on she queried whether the appeal could be put "in abeyance." Considering these comments, together with the continued failure to move the appeal along despite repeated direction from the Court, I am not satisfied the appeal was brought with a good faith intention to pursue it expeditiously and in

accordance with the *Civil Procedure Rules*. In the absence of evidence to the contrary, the material before me suggests intentional delay was being strategically employed by the appellants (or their counsel).

[42] I have also considered the prejudice to the appellants in dismissing the appeal. This is an interlocutory appeal of a class proceedings decertification motion. As pointed out by the respondents, the appellants are not without remedy. Their ability to bring a claim is not being extinguished, although they may have to do so individually. The appellants have taken no steps to adduce evidence to establish the nature and extent of any prejudice they may suffer.

[43] With respect to the respondents, they are entitled to have the claim against them resolved in a timely fashion, including any appeal proceedings. They should not be forced to beg and cajole the appellants to proceed with the appeal. The materials before me disclose that the respondents have been gracious and accommodating in the face of repeated delays by the appellants. But, at some point, they are entitled to insist upon matters proceeding. Any further delay in this matter, given the history to date, would be an unreasonable infringement on the respondents' right to have the appeal proceed in good faith and expeditiously. Given the missed deadlines, should the appeal not be dismissed, the September 25th hearing date would again need to be rescheduled. Scheduling a third appeal hearing due to the appellants having been persistently non-compliant would, in my view, be unduly prejudicial to the respondents.

[44] The final factor is one that considers "the Court's finite time and resources" and the impact of delay on the public purse. This interlocutory appeal has already been assigned two hearing dates, neither of which could be utilized due to the appellants' delay. Those are hearing dates which were made unavailable for other litigants and were taken into consideration by the Court in its administrative scheduling. There is unnecessary cost added to the effective administration of justice when parties do not act expeditiously. In my view, giving the appellants yet another chance to schedule a third hearing date would only serve to reward the inexcusable delay in advancing the appeal and the repeated failure to comply with directions of this Court. I will not do so.

Conclusion

[45] For the above reasons, the motion to dismiss is granted. The respondents shall have costs of the motion in the amount of \$750.00, payable by the appellants forthwith.

Bourgeois J.A.