NOVA SCOTIA COURT OF APPEAL

Citation: *Crooks v. CIBC World Markets Inc.*, 2018 NSCA 74

Date: 20180828
Docket: CA 462245
Registry: Halifax

Between:

Gayle Crooks, Archie Gillis and Karen McGrath

Applicants (Appellants)

v.

CIBC World Markets Inc./Marchés Mondiaux CIBC Inc.

Respondent

Judge:	The Honourable Justice Joel E. Fichaud
Motion Heard:	In writing
Held:	Motion for leave to review by a panel granted
Counsel:	Bruce Outhouse, Q.C. and Peter Rogers, Q.C. for the applicants (appellants) John Keith, Q.C. and Jack Townsend for the respondent

Reasons for judgment on the motion:

[1] This is a motion under Rule 90.38 for leave to have a panel review a chambers justice's final disposition of an appeal. That order by Justice Bourgeois dismissed the appeal for the appellants' failure to file a factum by the scheduled date.

Background

[2] The respondent CIBC World Markets Inc./Marchés Mondiaux CIBC carries on business as CIBC Wood Gundy. I will call it "Wood Gundy".

[3] The appellants Ms. Gayle Crooks, Mr. Archie Gillis and Ms. Karen McGrath are representative plaintiffs in a class action against Wood Gundy. They represent investors who traded options under the advice of one of Wood Gundy's brokers. There was a calculation error in their accounts. Wood Gundy paid compensation, but the class plaintiffs dispute Wood Gundy's method of calculating compensation.

[4] On May 11, 2011, Justice Moir identified 19 common issues and certified the class action (2011 NSSC 181). On September 8, 2011, Wood Gundy filed a Statement of Defence. Productions and discoveries followed.

[5] On January 8, 2014, Wood Gundy filed a motion to decertify a number of the common issues. On January 23, 2014, Justice Duncan heard the motion, but held his ruling in abeyance pending the decision of the Court of Appeal on a related matter. After the Court of Appeal's ruling, Wood Gundy filed an amended motion, dated June 5, 2015, to decertify the class proceeding, or alternatively to decertify certain issues. On September 14, 2015, Justice Duncan heard submissions on the amended motion.

[6] On May 27, 2016, Justice Duncan issued a decision that decertified the class proceeding (2016 NSSC 145). He noted that CIBC had made admissions on a number of the common issues, and those admissions should be committed to an order that would operate to the benefit of every class member. The judge concluded that the remaining issues were determinable by individual claims and did not support a class action.

[7] On March 20, 2017, Justice Duncan issued a decision to settle the form of the Order (2017 NSSC 75). The Decertification Order issued on March 24, 2017.

[8] On April 6, 2017, Ms. Crooks, Mr. Gillis and Ms. McGrath filed a Notice of Application for Leave to Appeal to the Court of Appeal. They appeal from Justice Duncan's Order of March 24, 2017 and his reasons of May 27, 2016 and March 20, 2017.

[9] Section 39(3)(b) of the *Class Proceedings Act*, S.N.S. 2007, c. 28 requires leave of a judge of the Court of Appeal for an appeal from a decertification order. On October 5, 2017, Justice Van den Eynden determined that leave would be granted on two of the appellants' grounds, and the appellants agreed to withdraw the third ground. The Order was by consent and was filed on December 21, 2017.

[10] From the filing of the Application for Leave to Appeal in April 2017 to July 19, 2018, the appellants missed a number of deadlines. These included filing dates in Rule 90, or directed by a chambers justice, and extended dates that had been accepted by appellants' counsel at chambers hearings. The appellants' tardiness resulted first in a Registrar's motion to dismiss, and then in a rescheduling at the Court's initiative. Until near the end of this period, Wood Gundy's counsel accommodated by consenting to extensions. Justice Bourgeois' chambers decision outlines the events (2018 NSCA 68, paras. 6-31).

[11] As the directions from the Court stood on April 11, 2018: the appeal book was to be filed by May 31, 2018; the appellants' factum by June 29, 2018; the respondents' factum by August 3, 2018; and the appeal hearing was scheduled for a full day on September 28, 2018.

[12] The appellants filed the Appeal Book on May 31, 2018, as directed.

[13] The appellants did not file their factum by June 29, 2018, as directed. They neither moved for an extension, nor explained why the factum had not been filed.

[14] Wood Gundy's patience reached its limit and, on July 9, 2018, it applied for dismissal of the appeal. The motion was scheduled for hearing in chambers on July 19, 2018.

[15] On July 16, 2018, the appellants sought to file a factum. The Court's Registrar rejected the filing as out of time, and informed the appellants' counsel that an extension was required, either by consent of the respondent or an order of the chambers judge. Wood Gundy did not consent to the late filing. Neither did the appellants move for an extension.

[16] On July 19, 2018, the parties appeared before Justice Bourgeois on Wood Gundy's motion to dismiss.

[17] Justice Bourgeois granted Wood Gundy's motion, and dismissed the appeal. Later I will quote her reasons.

The Motion for Leave

[18] On August 7, 2018, the appellants filed a motion to the Chief Justice under Rule 90.38. The motion requests leave to have a panel of this Court review Justice Bourgeois' decision to dismiss the appeal.

[19] Rule 90.38's relevant provisions are:

> 90.38(1) In this Rule 90.38,
>
> (a) a reference to the "Chief Justice" includes a judge designated by the Chief Justice for the purpose of this Rule;
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> …
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> (2) An order of a judge of the Court of Appeal in chambers is a final order of the Court of Appeal, subject only to review under this Rule 90.38.
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> (3) An order of a judge in chambers that disposes of an appeal may be reviewed by a panel of the Court of Appeal, with leave of the Chief Justice.
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> …
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> (6) The Chief Justice may do any of the following on a motion for leave to review:
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> (a) dismiss the motion for leave to dismiss;
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> (b) set the motion down for hearing;
>
> (c) grant leave to review the order of the judge in chambers if the Chief Justice is satisfied that the judge acted without authority under the rules, or the order is inconsistent with an earlier decision of a judge in chambers or the Court of Appeal, or that a hearing by a panel is necessary to prevent an injustice.
>
> (7) The Chief Justice need not give reasons for the determination of a motion under this Rule.
>
> (8) If leave is granted, the Chief Justice must set a time and date for the hearing of the review before a panel of the Court of Appeal and give directions for the filing of factums and other material.

[20] The Chief Justice had a perceived conflict of interest because of a family relationship with one of the law firms involved. Under Rule 90.38(1)(a) the Chief Justice "designated" me to hear the motion in his place.

Analysis

[21] First, the principles that govern the discretion under Rule 90.38.

[22] In *Marshall v. Truro (Town)*, 2009 NSCA 89, Chief Justice MacDonald outlined the approach:

> [9] When then should such motions be granted? As noted above, *Rule 90.38(6)(c)* contemplates three situations. The first two are straightforward; namely when the judge acted without authority or contrary to existing jurisprudence. The third situation – to prevent an injustice – is much more general and requires some elaboration.
>
> [10] It occurs to me that to warrant a review by a panel of this court, an aggrieved party must present a highly compelling case. In other words, the potential for injustice must be clear and significant. Furthermore, one must presume that any potential injustice would have been obvious to the judge who granted the order under review. Therefore, I would expect to grant such relief only in very exceptional circumstances. Otherwise, this provision might be simply viewed as an opportunity for a rehearing; a consequence that would be clearly unintended and unnecessary. In fact, it would be ill advised to allow such a provision to serve as an opportunity for a rehearing. Indeed, courts in similar contexts have discouraged such approaches.

The Chief Justice then quoted passages from *Chandos Construction Ltd. v. Alberta (Minister of Alberta Infrastructure)*, 2008 ABCA 14, paras. 5-6, and *Willman v. Ducks Unlimited (Canada)*, 2005 MBCA 13, paras. 3, 9-10.

[23] In *R. v. Liberatore*, 2010 NSCA 26, the Chief Justice applied the approach. After quoting the passage from *Marshall*, para. 10, Chief Justice MacDonald continued:

> [14] That said, the facts in this case are unique and it is one of those exceptional cases prompting me to grant leave. I have reached this conclusion primarily for the following two reasons.
>
> [15] Firstly, the order under review was issued directly as a result of Mr. Atherton not filing his client's factum on time (albeit after being made fully aware that his failure to do so would result in a dismissal). In other words, the order was justifiably issued without further submissions from the appellant. In these

> circumstances, the Chambers judge may not have been fully aware that this breach had absolutely nothing to do with the appellant who had every reason to assume that his lawyer would handle this. Thus, unlike **Marshall**, *supra*, here the Chambers judge may not have fully appreciated the potential for injustice to the appellant.
>
> [16] Secondly, this appeal does not appear to be frivolous. …
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> …
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> [18] Thus, I am left with a dilemma. On these facts, it was perfectly reasonable for the Chambers judge to dismiss the appeal without further notice to the appellant. However, it is now clear that the appellant would be denied his right of appeal through no fault of his own and in circumstances where the appeal may have merit. This raises sufficient apprehension for me to grant leave to avoid a potential injustice. Of course, as *Rule 90.38* prescribes, it will be ultimately up to a panel of this court to decide if the appeal should proceed. I am, at this stage, simply satisfied that this is one of those exceptional cases where leave should be granted.
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> [19] Having reached this conclusion, there must be consequences for Mr. Atherton's inaction which has caused unnecessary delay and significant disruption. Thus I direct him to personally pay $500.00 costs forthwith to the Crown. I make this order pursuant to *Rule 77.12* (which applies to this matter by virtue of *Rules 90.02* and *91.02*): …
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> …
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> [21] I therefore grant leave to have the dismissal order reviewed by a panel of this court. Pursuant to *Rule 90.38(8)*, I must set a time and date for this review hearing as well as any other appropriate directions. To this end, the review shall take place on Friday, April 9, 2010, at 10:00 am. …

[24] With those principles in mind, I will turn to Justice Bourgeois' reasons for dismissing the appeal.

[25] Justice Bourgeois' decision included:

> [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 the 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.
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> …

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 might 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* [*Islam v. Sevgur*, 2011 NSCA 114] 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 the 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.
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> [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).

[26] Clearly Justice Bourgeois acted with authority. Her ruling was not inconsistent with earlier jurisprudence. As was the case in *Marshall* and *Liberatore*, the issue is whether a review is needed to prevent an injustice under Rule 90.38(6)(c).

[27] Justice Bourgeois said she was "perplexed" and "astounded" at the lack of any explanation for the repeated delinquencies. She termed the absence of an explanation as "fatal". Justice Bourgeois inferred that the appeal itself was not brought in "good faith", and the delay was "intentional" and "strategically employed by the appellants (or their counsel)".

[28] If the material before me matched the record before Justice Bourgeois, I would dismiss this motion. Applying *Marshall*'s approach, I would see no basis for a review by a panel.

[29] But this motion attaches evidence that Justice Bourgeois did not see. That evidence includes Ms. O'Neill's affidavit stating that: (1) she has mental health issues for which she has been treated and continues to undergo treatment; (2) this was the cause of the delinquencies; (3) neither her clients, nor her co-counsel were aware of the delinquencies or her health issues; (4) she "became overwhelmed by my circumstances to the point of being completely immobilized"; (5) "there was absolutely no strategic motive underlying the failings, and nor was any delay intentional"; and (6) she is now under leave of absence from her firm to "obtain treatment by appropriate health professionals for my untreated or inadequately treated health issues". Affidavits from Ms. O'Neill's partners and co-counsel and the appellant Ms. Crooks corroborate the applicable aspects of these statements.

[30] In my view, there is a reasonable possibility that, had Justice Bourgeois seen this evidence, her reasons would have followed a different course.

[31] The appeal is acknowledged to have arguable merit. The appeal book was filed on time. The appellant's factum was tendered to the Court on July 16, 2018. A time extension for the respondent's factum would have enabled the appeal to proceed on the scheduled hearing date of September 28, 2018.

[32] The dismissal of the appeal pivoted on what Justice Bourgeois termed the astounding series of delinquencies. Left with a vacuum of explanatory evidence, Justice Bourgeois inferred that the delays were intentional and strategic. An intentional and strategic delay implicates the client. So it was reasonable that the appellants should bear the consequence – *i.e.* dismissal of their appeal.

[33] The evidence before me depicts a very different scenario, one that does not implicate the appellants.

[34] This situation is not dissimilar to the circumstances in *Liberatore*, where the Chief Justice granted leave for a review by a panel.

[35] In my view, had Justice Bourgeois seen the evidence before me, it is quite possible that, instead of a dismissal of the appeal, there might have been an extension for the respondent's factum, meaning the hearing would proceed on September 28, 2018 as scheduled, and perhaps a costs award against the appellants or their counsel as the Chief Justice ordered in *Liberatore*.

[36] For those reasons, in my view a panel review is necessary to prevent an injustice.

[37] Nothing in my reasons expresses a view on whether any tendered fresh evidence should be admitted, or the effect of any fresh evidence, or the merits of the issues on the review. Those are matters for the panel. My decision is limited to the ruling that a panel review is needed under the criterion in Rule 90.38(6)(c).

Conclusion

[38] I grant leave for the review by a panel of the order of July 27, 2018 that dismissed the appeal.

[39] Rule 90.38(8) requires that I schedule dates for any filings and the hearing.

[40] By September 17, 2018, the appellants will file (1) a record of the material before Justice Bourgeois, (2) a separate volume containing any fresh evidence, in admissible form, that was not before Justice Bourgeois and that the appellants wish the panel to consider, and (3) a notice of motion that the panel admit the fresh evidence. To be clear, any affidavit that was filed for the motion before me should be included again in the material to be filed by September 17.

[41] By October 1, 2018, the respondent will file any fresh rebuttal evidence (in admissible form) that it wishes the panel to consider, and a notice of motion that the panel admit the evidence.

[42] By October 9, 2018, the appellants will file their factum to address both the admission of any fresh evidence and the merits of the review.

[43] By October 26, 2018, the respondent will file its factum on the admission of fresh evidence and the review.

[44] The parties will file five copies of these documents in compliance with Rule 90.

[45] The hearing of the panel review will be on November 27, 2018, starting at 10 a.m., for the full day. From the material filed for this motion, it appears that there will be fresh evidence, some of which may be contested or subjected to cross-examination. The full day will accommodate that evidence and counsel's submissions on the review.

[46] In *Liberatore*, the Chief Justice accompanied the leave for a panel review with an order for costs. On the motion before me, neither party addressed costs. Costs of this motion will be for the panel on the review.

Fichaud J.A.