NOVA SCOTIA COURT OF APPEAL

Citation: *Mike's Clothing Limited v. Kentville (Town)*, 2023 NSCA 22

Date: 20230329
Docket: CA 518298
Registry: Halifax

Between:

Mike's Clothing Limited

Appellant

v.

Town of Kentville

Respondent

Judge: The Honourable Justice David P. S. Farrar

Appeal Heard: January 16, 2023, in Halifax, Nova Scotia

Subject: Interlocutory Orders – Issuance of Subpoenas in an Application in Court – Material Facts in Issue – Relevancy

Summary: An Application in Court was commenced by the Town of Kentville ("Kentville") on December 20, 2021 against Mike's Clothing Limited ("Mike's") seeking reconveyance of the Property of Main Street in Kentville. The Property was sold to Mike's by Kentville in the fall of 2019. The sale was subject to conditions that required Mike's to develop the Property within a certain timeframe failing which Kentville had the right to have the Property reconveyed to it. Mike's did not meet the required timelines and Kentville commenced the application.

Mike's contested the Application. It said Kentville acted in bad faith in failing to grant Mike's an extension to the timelines under the sale's agreement and by seeking reconveyance of the Property.

Mike's filed an motion seeking issuance of eight discovery subpoenas for non-party witnesses who, it said, had relevant

information about Kentville's motives in failing to get the extension and seeking reconveyance.

In a decision dated December 12, 2022, the motion was dismissed by Justice Gail Gatchalian (reported, 2022 NSSC 273).

Mike's sought leave to appeal, and if granted, to appeal the decision.

Issues: Did the motions judge err in refusing to issue the subpoenas?

Result: Mike's has not shown that the motion judge's reasons revealed a clear error of law or that a substantive injustice would result from the exercise of her discretion.

The motions judge properly considered the matters in issue and whether the witnesses had relevant information. She found they did not.

She also found that the issuance of the subpoenas would be disproportionate to the value of the evidence to the Application and would not promote the just, speedy and inexpensive determination of it.

Leave to appeal was granted, however, the appeal was dismissed with costs of $2,000.00 to Kentville.

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Appellant

v.

Town of Kentville

Respondent

Judges:	Farrar, Fichaud, and Bourgeois, JJ.A.
Appeal Heard:	January 16, 2023, in Halifax, Nova Scotia
Held:	Leave to appeal granted; appeal dismissed with costs, per reasons for judgment of Farrar J.A.; Fichaud and Bourgeois, JJ.A. concurring
Counsel:	Richard W. Norman, for the appellant John T. Shanks and Calvin DeWolfe, for the respondent

Reasons for judgment:

Introduction

[1] An Application in Court was commenced by the Town of Kentville ("Kentville") on December 20, 2021 against Mike's Clothing Limited ("Mike's") seeking reconveyance of property located at 374/376 Main Street in Kentville (the "Property").

[2] The Property was sold by Kentville to Mike's in the fall of 2019. The sale was subject to conditions requiring Mike's to develop the Property within a certain timeframe failing which the Town had the right to have the Property reconveyed to it.

[3] Mike's did not meet the required timelines and Kentville commenced the Application.

[4] Mike's moved to convert the Application to an action. The motion to convert was dismissed on May 25, 2022.

[5] On July 19, 2022, Mike's filed a motion in the Application seeking the issuance of eight discovery subpoenas for non-party witnesses. In a decision dated September 12, 2022, the motion was dismissed by Justice Gail Gatchalian (reported, 2022 NSSC 273).

[6] Mike's now seeks leave to appeal and, if granted, to appeal the decision.

[7] For the reasons that follow, I would grant leave to appeal but dismiss the appeal with costs to Kentville in the amount of $2,000, inclusive of disbursements.

Background

[8] On August 17, 2018, Kentville issued a request for proposals relating to the sale of the Property. An offer to purchase the Property was submitted by Andrew Zebian. The offer was later amended to identify Mike's as the intended purchaser. Mr. Zebian is the directing mind of Mike's. He is also a Kentville Town Councillor, having been elected in the fall of 2020.

[9] Between August and October 2019 an Agreement of Purchase for the Property was negotiated between Kentville and Mike's (the "Agreement"). The Agreement closed on October 31, 2019.

[10] The Agreement included terms requiring signage at the Property and terms establishing construction thresholds to be met for the development of the Property. The first threshold was for the installation of footings for the proposed building to be completed on or before June 30, 2020. If the construction thresholds were not met the parties agreed that Kentville reserved the right to repurchase the Property.

[11] No work was done on the footings, or on the Property at all, by the June 30, 2020 deadline. The Agreement was amended in July 2020 to extend to October 30, 2020 the date when footings for the proposed building were to be installed on the Property.

[12] In December 2020, the Agreement was again amended by the parties and the following dates were agreed to:

(a) Erection of an 8' x 8' billboard – February 28, 2021;

(b) Completion of footings for the proposed building – May 31, 2021;

(c) Completion of building – March 31, 2022.

[13] On June 29, 2021, the parties further amended the Agreement to require installation of the footings on the Property on or before September 30, 2021 and for completion of the construction of the building on the Property on or before June 30, 2022.

[14] The Amending Agreement dated June 29, 2021 prohibited Mike's from asking for any further extensions:

> 3. The dates agreed to herein are critically important and ***Mike's shall not request any further extension thereof and Mike's specifically understands and agrees that the Town may buy back the property pursuant to the agreement***, as amended, if Mike's does not strictly comply with the terms of the agreement, as amended.
>
> 4. All terms of the agreement (as amended), except as specifically amended in this Amending Agreement, are confirmed and survive this Amending Agreement, including (without limitation) the Town's right to buy back the property.
>
> [Emphasis added.]

[15] In late October 2021, Mike's again requested an extension to the construction timelines for the Property. Kentville Town Council voted against granting any further extensions and instructed Dan Troke, its Chief Administrative

Officer ("CAO"), to begin the process to have the property reconveyed to Kentville pursuant to the terms of the Agreement.

[16] At the time Kentville Town Council voted to refuse to extend the Agreement no work had been performed on the Property to prepare it for the installation of footings.

[17] In the Notice of Contest and Notice of Respondent's Claim filed by Mike's in the main proceeding, it claims that the refusal of Kentville Town Council to provide an additional extension under the Agreement resulted from the desire of Council members to punish Mr. Zebian for his attempts to uncover information relating to the dismissal of the former CAO for Kentville, Kelly Rice.

[18] Mike's alleges that actions by Mr. Zebian to secure correspondence and internal reports relating to the dismissal of CAO Rice, and a review of human resources matters within the Town, motivated Kentville Councillors to act in bad faith against it and to refuse to grant a further extension of the construction deadlines established under the Agreement.

[19] In its brief filed in support of the motion, Mike's sets out its theory that the refusal to grant the extension was in "bad faith":

> This refusal occurred against the backdrop of a personal and professional dispute between the Respondent's directing mind, Councillor Zebian, and certain other councillors including the mayor.
>
> The dispute involved a letter written by the Town's former Chief Administrative Officer, Kelly Rice, dated July 30, 2020 (the "Letter"). The Letter describes Ms. Rice's concerns about certain inappropriate behaviour demonstrated by the mayor and councillors. Ms. Rice was fired by Council one day after sending the Letter. In the spring of 2021, Councillor Zebian (who was not part of council in July 2020) sought unsuccessfully to obtain a copy of the Letter. He attempted to FOIPOP a copy of the Letter; the FOIPOP was denied. The Letter was then sent to him by an anonymous source.
>
> Councillor Zebian was concerned and upset by the detailed allegations in the Letter. He confronted the mayor and the current CAO. The Town threatened to sue him and seek an injunction to prevent Councillor Zebian from speaking about the Letter. The relationship between Councillor Zebian and the councillors who formed part of the 2020 council (with the exception of Cathy Maxwell) deteriorated from that point forward. As indicated above, the Town threatened to sue him. The mayor made false public statements about Kelly Rice and Councillor Zebian in February 2022, leading council to issue an unusual statement disclaiming the mayor's statements about Ms. Rice (the council's statement is

> titled “public statement” but for some unknown reason has not been issued to the public).
>
> The Respondent says that Ms. Rice was a whistleblower and was punished for it. Councillor Zebian attempted to bring Ms. Rice’s allegations to light and to reveal the Town’s cover up. He could not be fired by the Town, but the Town could scupper the Respondent’s development. The Town was motivated by bad faith when it refused to grant the Respondent a further extension. It was motivated by a desire to punish Councillor Zebian as it had punished Ms. Rice. The Town breached its contractual duty of good faith to the Respondent.
>
> The only sensible explanation for the Town’s decision to buy-back the Robinson property (a decision made by councillors opposed to Councillor Zebian’s efforts to investigate Ms. Rice’s allegations) is that the decision was made for bad faith reasons. The Respondent had plans, financing, and permits lined up to begin work. It had provided a detailed schedule of work. The Town has suggested it is anxious to develop the Robinson property, but pulling the plug on a well advanced development in order to re-tender it and start the process all over again would surely have added years to the development time-line.
>
> The breach of the duty of good faith is one of the Respondent’s main allegations in this application. As will be explained in more detail, that is why it says Ms. Rice’s evidence is important, as is the evidence of Mr. Boyd, Mr. Phillips, Ms. Gentleman, Ms. Maxwell, and Ms Young.

[20] Mike’s sought the issuance of eight discovery subpoenas for non-party witnesses in an attempt to discover evidence it said would support Kentville’s breach of its contractual duty of good faith.

[21] The witnesses Mike’s wished to discover include three former CAO’s for Kentville, two Kentville employees, a Kentville Town Councillor, the real estate agent who represented Kentville on the sale of the Property to Mike’s and a representative of the proposed builder of the development hired by Mike’s.

Issues

[22] The issues as set out in Mike’s factum are as follows:

1. Whether leave to appeal should be granted.
2. Whether the motions judge erred in law and fact by refusing to permit the issuance of discovery subpoenas, in particular:
    i. by failing to take a liberal view of the scope of relevance on this motion;

ii. by concluding the appellant's assertion that the Town refused the extension request to punish Andrew Zebian was not a material fact in issue and therefore evidence relating to it was irrelevant;

iii. by concluding that the witnesses did not have relevant evidence; and

iv. by concluding that the discovery of the witnesses would be disproportionate.

[23] Issues 2(i) and (ii) are interrelated and can be addressed as one ground of appeal. Issue 2(iii) appears to relate to the motions judge's alternative analysis of whether Mike's argument that Kentville's decision to enforce the reconveyance constituted retribution against Mr. Zebian. As a result, I would restate the grounds of appeal and address them as follows:

1. Did the motions judge err by concluding Mike's assertion that Kentville's refusal to grant the extension requested was to punish Mr. Zebian was not a material fact in issue, and therefore evidence relating to it was irrelevant?
2. Did the motions judge err in finding the proposed witnesses did not have relevant evidence or the motion was premature with respect to whether Kentville's decision to seek reconveyance constituted retribution against Mr. Zebian?
3. Did the motions judge err in concluding the discovery of the witnesses would not promote the just, speedy and inexpensive determination of the application?

Standard of Review

Leave to Appeal

[24] The issue of whether leave to appeal should be granted is one of first instance. There is no standard of review.

Appeal From a Discretionary Order

[25] The standard of review applicable to appeals from discretionary orders is well established. In the absence of a clear error of law or a substantial injustice we

will not intervene. As explained in *Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89:

> [27] The standard of review in matters such as this is well settled. We will only intervene if we are persuaded that wrong principles of law have been applied, or that failing to intervene would produce an obvious injustice. The threshold for overturning a discretionary order is considerable and is not easily displaced. As this Court said in **A.B. v. Bragg Communications**, 2011 NSCA 26:
>
> > [31] ... Clear error of law or a substantial injustice must be established. ...
> >
> > [33] ... appellate courts are restrained in choosing to intervene. Absent an error in law or a manifest injustice we will decline to do so. The threshold for seeking reversal is high. It is not a soft or casual target. Any party seeking to set aside an interlocutory discretionary order has a heavy onus. Litigants should be reminded that it is not a burden which will be satisfied easily. ...
>
> [28] Thus, in the absence of a clear error of law or a substantial injustice we will refuse to intervene. Appeals from interlocutory matters create delay, run up costs for the parties, and tie up the court's own resources while other proceedings in the system wait to be tried. A judge hearing motions in Chambers develops a well-honed proficiency in the exercise of discretion, especially in cases where he or she has heard the witnesses being examined first hand. These are some of the reasons why the standard of review is strictly applied where any party attempts to set aside a discretionary, interlocutory order.

Analysis

Leave to Appeal

[26] Kentville concedes that leave to appeal should be granted. I agree Mike's has raised an arguable issue about the appropriate test to be applied when exercising a discretion to issue discovery subpoenas to non-parties in an application.

Issue 1: Did the motions judge err by concluding Mike's assertion that Kentville's refusal to grant the extension requested was to punish Mr. Zebian was not a material fact in issue, and therefore evidence relating to it was irrelevant?

[27] *Rule* 18.11(1) provides the Prothonotary may only issue a discovery subpoena in an application with the permission of a judge.

[28] *Rule* 18.10(1) allows a party to make a motion to a judge for an order approving the issuance of a discovery subpoena after a Notice of Application is filed.

[29] *Rule* 18.13(1) requires a witness at a discovery to answer "every question that asks for relevant evidence or information that is likely to lead to relevant evidence".

[30] *Rule* 1.02 sets out the overall purpose of the *Rules* is "for the just, speedy and inexpensive determination of every proceeding".

[31] The motions judge correctly noted that the *Civil Procedure Rules* do not set out a test for the approval of a discovery subpoena (¶4). In her view, there were two requirements arising from the *Civil Procedure Rules*:

1. The party seeking the subpoena must establish that the information sought from the witnesses is relevant or that it is likely to lead to relevant information (¶4); and
2. The discovery of the witnesses will promote the just, speedy, and inexpensive determination of the application (¶4).

[32] The motions judge then, logically, instructed herself how she should determine relevance for the purposes of addressing the first requirement:

> [5] "Relevant" is defined in Rule 14.01(1) as having the same meaning as at the trial of an action. As the motions judge, I am to assess whether the judge presiding at the trial would find the information to be relevant. At this stage in the process, relevance can only be assessed based on the pleadings and the evidence known at this time. Relevant information is information that is probative of a material fact in issue in the proceeding. Information is probative if it logically makes something more or less likely. As the motions judge, I do not assess how probative the information would be in the context of the trial of the action but whether it is probative of a material fact in issue. If the information has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence, then it is relevant. …

[33] The motions judge also recognized that she was to take a somewhat more liberal view of the scope of relevance in the context of disclosure and discovery than might be taken at trial:

> [6] The motions judge should take a somewhat more liberal view of the scope of relevance in the context of disclosure and discovery than might be taken at trial, subject to concerns about confidentiality, privilege, cost of production, timing and probative value: *Laushway v. Messervy*, 2014 NSCA 7 at para.49, citing with approval *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 57 at para.9. Nonetheless, a request for a discovery subpoena should, like a request for production, be supported by evidence, lest it amount to a fishing expedition: see *Intact Insurance Company v. Malloy*, 2020 NSCA 18 at paras.36-41. Allegations, no matter how specifically worded or drafted, which have no basis in the facts or the evidence without more, cannot be the basis for a production application, nor should they be the basis for a discovery subpoena: see *Intact* at para.35.

[34] The motions judge referred to this Court's decision in *Laushway v. Messervey*, 2014 NSCA 7, for guidance. In *Laushway*, Saunders J.A. suggested a number of questions that should be asked by a judge in determining whether to exercise their discretion to make an order for document production. Although that case was considering document production, the motions judge found the questions instructive in determining whether she should exercise her discretion to issue discovery subpoenas. The questions she identified from *Laushway* are as follows:

> [7] […]
>
> (a) How close is the connection between the sought-after information and the matters in dispute?
>
> (b) Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?
>
> (c) What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?
>
> See *Laushway, supra* at para. 86

[35] Finally, the motions judge concluded she had to determine what evidence was available to her at the time of the motion, what material facts were in issue, and whether the information sought from the witnesses was probative of a material fact in issue, and if so, whether authorization of the discovery subpoenas would promote the just, speedy and inexpensive determination of the application (¶8).

[36] The motions judge reviewed the evidence in some detail. In particular, she referenced the wording of the June 29, 2021 amendment to the Contract. For ease

of reference, I will repeat the provisions of the amendments which prohibited any further extensions:

> 3. The dates agreed to herein are critically important and Mike's shall not request any further extensions thereof and Mike's specifically understands and agrees that the Town may buy back the property pursuant to the Agreement, as amended, if Mike's does not strictly comply with the terms of the Agreement, as amended.
>
> 4. All terms of the Agreement (as amended), except as specifically amended in this Amending Agreement, are confirmed and survive this Amending Agreement, including (without limitation) the Town's right to buy back the Property.

[37] She then summarized the evidence of Mr. Zebian in which he asserted the failure to grant him any further extensions was retaliation by Kentville for Councillor Zebian's attempts to obtain or publicize the Kelly Rice letter.

[38] As set out earlier, Mike's assertion was Mr. Zebian, after attempting to obtain the Kelly Rice letter through an unsuccessful FOIPOP application, confronted the CAO and mayor of Kentville in mid-July 2021. It was at that point he says his relationship with council changed for the worse. Notably, the timing of this meeting occurred after the June 29, 2021 amendment and could not have been a factor in the wording of the amendment which prohibited any further extensions.

[39] After reviewing Mike's submissions on the theory of the case, the motions judge then had to determine if the evidence sought related to a material fact in dispute. She found it did not:

> [21] Mike's relies on the duty to exercise contractual discretion in good faith, meaning that the parties to a contract must exercise such discretion reasonably, that is, in a manner connected to the underlying purposes of the discretion granted by the contract: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paras.1 and 4.
>
> [22] A material fact is one that would affect the result: see *Shannex Inc. v Dora Construction Ltd.*, 2016 NSCA 89 at para.34. I am not satisfied that Mike's claim that the Town refused the extension request to punish Mr. Zebian is a material fact in issue, because the June 19, 2021Amending Agreement does not provide for extension requests and explicitly prohibits them. Council's decision to refuse a further extension to the construction deadlines is not linked to the Town's performance of the contract (see *Callow Inc. v. Zollinger*, 2020 SCC 45 at paras.37, 49 and 51).

[40] The motions judge references *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, to support her conclusion that the evidence of retaliation did not relate to a matter in issue. In *Callow* the Supreme Court makes it clear that dishonest conduct must relate to the performance of the contract:

> [51] In light of *Bhasin*, then, how is the duty of honest performance appropriately limited? ***The breach must be directly linked to the performance of the contract***. Cromwell J. observed a contractual breach because Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause" (para. 94). He pointed, in particular, to the trial judge's conclusion that Can-Am "acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause" (para. 98; see also para. 103). ***Accordingly, it is a link to the performance of obligations under a contract, or to the exercise of rights set forth therein, that controls the scope of the duty.*** In a comment on *Bhasin*, Professor McCamus underscored this connection: "Cromwell J was of the view that the new duty of honesty could be breached in the context of the exercise of a right of non-renewal. That was the holding in *Bhasin*" ("The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law" (2015), 32 J.C.L. 103, at p. 115). While the abuse of discretion was not the basis of the damages awarded in *Bhasin*, the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing, at least in circumstances like ours, on the wrongful exercise of a contractual prerogative.
>
> [Emphasis added.]

[41] The fact that Kentville was not performing an obligation it had under the Contract was obviously a concern to the motions judge. During the course of Mike's submissions she made the following observation:

> **THE COURT:** All right. Thank you, Mr. Norman. I do have some questions for you. So, let me just take your brief out. So, when I look at the brief filed on behalf of Mike's Clothing, if I understand its position correctly, this motion is related to the argument that the Town breached its duty of good faith and that Mike's Clothing is saying that the evidence of the individuals identified is relevant to that argument. ***And it seems to me that the main argument put forward by Mike's Clothing is that that potential evidence is relevant to the argument that the Town did not act in good faith when it refused to grant an extension of the construction development deadline***. Do I have all that ---
>
> **MR. NORMAN:** That's correct.
>
> **THE COURT:** Okay. ***So, then, does that argument then not depend on finding a contractual term that allows for extension requests of the development deadlines and/or a requirement that the Town consider such requests?*** So, to

> put it another way, if we can't find a term in the contract that provides for requests for extensions of developmental guidelines and/or a requirement that the Town consider such requests, how can there then be a duty of good faith on the Town to consider such requests, and therefore, how can evidence regarding the Town's exercise of discretion, I guess, to grant or deny extension requests be relevant to the application?
>
> [Emphasis added.]

[42] As the motions judge correctly noted, the contract provided there would be no further extensions and explicitly prohibited them. The conduct of Kentville in failing to grant any further amendments to the contract is not exercising a contractual discretion. Mike's was asking Kentville to vary the terms of the Agreement when there is nothing in the Agreement that gave it the option or right to even ask for the extensions. Put another way, Mike's argues Kentville was duty bound to grant the amendments to the Agreement when Mike's was in breach of the very terms for which it sought amendments.

[43] The motions judge did not err in finding the evidence sought to be elicited from the witnesses was not probative of a material fact in issue and therefore irrelevant.

[44] I would dismiss this ground of appeal.

Issue 2: Did the motions judge err in finding the proposed witnesses did not have relevant evidence or the motion was premature with respect to whether Kentville's decision to seek reconveyance constituted retribution against Mr. Zebian?

[45] The motions judge then went on to consider Mike's other argument that Kentville's decision to enforce the reconveyance term constituted retribution against Mr. Zebian in violation of Kentville's duty of good faith of contractual performance. She was prepared to accept, solely for the purposes of the motion, Mike's claim that the decision to enforce reconveyance constituted retribution against Mr. Zebian was a material fact in issue (¶23).

[46] In considering this argument, she first discussed the relevance of the merits of Ms. Rice's allegations and the Town's treatment of her. She concluded that the merits of Ms. Rice's allegations and her treatment were irrelevant to the issue of whether Kentville retaliated against Mike's. She reasoned, regardless of the truth of the allegations or the treatment of Ms. Rice by Kentville, it was the retaliation itself that was in issue. The information about the merits of the allegations is not

probative of Mike's claim Kentville retaliated against Mr. Zebian (¶24). Mike's has failed to establish how the motions judge's decision on this point is in error.

[47] The motions judge was also not satisfied the evidence on the treatment of other developers would be probative of Mike's claim that Kentville punished Mr. Zebian for raising concerns about Ms. Rice's allegations and termination. Her conclusion on this point rested on the lack of evidence presented by Mike's on the motion:

> [31] Mr. Zebian does not say what developers had been given extensions; the nature of those developers' construction projects (e.g. whether they were residential and/or commercial units, like this one); what he means when he says developers who acted reasonably were given extensions; where those projects were located (e.g. whether they were in the downtown core, like this property); whether the extensions occurred during a shortage of commercial and residential units in the Town (which is currently the case); whether those developers received one extension or multiple extensions (as is the case here); whether the relevant contracts included language allowing for extensions; or whether the contracts included language explicitly prohibiting further extension requests (as does the June 21, 2019 Amending Agreement between these parties).
>
> [32] ***Mike's has not presented enough to establish a foundation for concluding that the former CAOs and the Town employees are in possession of information that is relevant or likely to lead to the discovery of information relevant to Mike's claim that the Town's decision to enforce reconveyance was made in order to punish Mr. Zebian for raising concerns about Ms. Rice's allegations.***
>
> [Emphasis added.]

[48] Again, Mike's has failed to identify an error in the motions judge's reasoning on this point.

[49] The motions judge was satisfied that information about what development was happening in Kentville during COVID-19 may have been probative of the material fact in issue. However, she was not persuaded to authorize the requested discovery subpoenas because she was not satisfied the individuals sought to be discovered actually possessed the information (¶34).

[50] Perhaps more importantly in the motions judge's mind, Mr. Troke was the designated manager for the Town, and, as such, has a duty to inform himself on matters in issue in the Application. At the time of the motion, he had not yet been discovered. Mike's had not explained why information about development in

Kentville during the pandemic could not be obtained from Mr. Troke. She concluded that authorizing discovery subpoenas for four other individuals, two of whom are Town employees and one of whom is a Town Councillor and the fourth a former CAO, in order to obtain information that Mr. Troke is required to inform himself of, would not be appropriate (¶34).

[51] Finally, she turned to Ken Roscoe, the principal of the builder Mike's engaged to construct its development on the property, and Donna Conrad, the Town's real estate agent, at the time the agreement was negotiated. She denied these subpoenas on the basis that Mike's had not explained how they would have evidence relevant to a material fact in issue (¶34).

[52] The motions judge's decision on this ground of appeal is well reasoned and supported by the evidence (or lack thereof) she had before her.

[53] I would dismiss this ground of appeal.

Issue 3: Did the motions judge err in concluding the discovery of the witnesses would not promote the just, speedy and inexpensive determination of the application?

[54] The motions judge also considered whether the issuances of the subpoenas would lead to the just, speedy, and inexpensive determination of the Application.

[55] With respect to the discovery subpoenas for Ms. Rice and the Town Council, the motions judge found that delving into the merits of Ms. Rice's claims and the Town's treatment of her would not be proportional to the time and resources required to decide the main issue between the parties:

> [26] I am also not satisfied that authorizing discovery subpoenas for Ms. Rice and Councillor Maxwell would promote the just, speedy and inexpensive determination of this Application. The anticipated time and expense required to discover this information from Ms. Rice and Councillor Maxwell will not be reasonable having regard to the importance of the information to the issues in dispute. An inquiry into the merits of Ms. Rice's allegations and the manner in which the Town treated her will involve the parties and the Court in a dispute about the employment relationship between the Town and Ms. Rice, as well as the employment relationship between the Town and the employees who are the subject of Ms. Rice's letter. Such an inquiry will be time-consuming and expensive. Ms. Rice's letter sets out twenty examples of alleged misconduct. If the Court were to embark on an inquiry into the merits of Ms. Rice's allegations, it would likely result in the Town responding with its own evidence. Such an

> inquiry will not be proportional to the time and resources reasonably required to decide the main issue between the parties, which is whether Mike's and/or the Town breached the terms of the agreement for purchase and sale, including whether the Town's decision to enforce reconveyance of the property was made in bad faith.
>
> [27] When I weigh the privacy interests of the individuals involved; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources, I am not satisfied that I should exercise my discretion to authorize discovery subpoenas for Ms. Rice and Ms. Maxwell. Authorizing these discovery subpoenas would not promote the just, speedy and inexpensive determination of this Application.
>
> [28] Mr. Zebian also says in his affidavit that Councillor Maxwell "can potentially provide information about ... the Town's actions and decisions in relation to [Mike's] since then." This does not provide me with a sufficient evidentiary foundation to conclude that Councillor Maxwell has relevant information, or information that is likely to lead to relevant evidence.

[56] She made a similar comment with respect to issuing subpoenas for the two Town employees, the Town Councillor, and the former CAO:

> [33] […] Mr. Troke is the designated manager for the Town. He has not yet been discovered. Mike's has not explained why information about development in the Town during the pandemic could not be obtained from Mr. Troke. Authorizing discovery subpoenas for four other individuals (two of whom are Town employees, one of whom is a Town councillor and the fourth a former CAO) in order to obtain information that Mr. Troke is required to inform himself of, with no explanation as to why he would not be able to provide this information, would not promote the just, speedy and inexpensive determination of this Application.

[57] Finally, with respect to the evidence of Ms. Conrad and Mr. Roscoe, Mr. Zebian, in his affidavit, said that these individuals may sign affidavits. In the circumstances, the motions judge concluded that authorizing the issuance of discovery subpoenas for those witnesses was inappropriate and would not promote the just, speedy and inexpensive determination of the Application (¶34).

[58] Again, Mike's has not shown any error of law or that a substantial injustice would result in the motions judge's reasoning on this issue.

[59] I would dismiss this ground of appeal.

Conclusion

[60] The motions judge thoroughly reviewed the arguments being put forward by Mike's and properly analyzed the issues relating to the issuance of the subpoenas. There is no reason to interfere with her decision.

[61] I would grant leave to appeal, but dismiss the appeal with costs to Kentville in the amount of $2,000.00, inclusive of disbursements.

Farrar J.A.

Concurred in:

Fichaud J.A.

Bourgeois J.A.