NOVA SCOTIA COURT OF APPEAL
Citation: ***Leigh v Belfast Mini-Mills Ltd.***, 2013 NSCA 110

Date: 20131001

Docket: CA 419411
Registry: Halifax

Between:

Gillian Leigh, Wanda Cummings and Toltec Holdings Incorporated

Appellants

v.

Belfast Mini-Mills Ltd. and International Spinners Ltd.

Respondents

and

Docket: CA 419422
Registry: Halifax

Between:

Wanda Cummings and Gillian Leigh

Appellants

v.

Belfast Mini-Mills Ltd. and International Spinners Ltd.

Respondents

Judge:	The Honourable Justice Joel E. Fichaud
Motion Heard:	September 26, 2013, in Halifax, Nova Scotia, in Chambers
Held:	Motion for consolidation granted, without costs, and motion for security for costs granted.
Counsel:	Wanda Cummings, Appellant, in person, and as agent for Gillian Leigh and Toltec Holdings Incorporated
	Robert K. Dickson, Q.C. and Ryan Blood, articled clerk, for Belfast Mini-Mills Ltd. and International Spinners Ltd.

Reasons:

[1] The Appellants move to consolidate their two appeals. The Respondents move for security for costs.

[2] In October 2006, Ms. Leigh, Ms. Cummings and their company Toltec Holdings Inc. ("Appellants") sued Belfast Mini-Mills Ltd. and International Spinners Ltd. ("Respondents") in the Supreme Court of Nova Scotia. They claimed that equipment sold by the Respondents had design flaws which caused them business losses. The Respondents' Defence denied the allegations. The Appellants initially were represented by counsel, but that firm withdrew in 2008 and, since, the Appellants have represented themselves. The Respondents' witnesses were discovered in October 2007. The discovery of Ms. Leigh was interrupted in January 2008, when Ms. Leigh declined to answer questions.

[3] Since then, and despite court orders, the Appellants have declined to submit to discovery and to produce relevant information. Instead, the Appellants have filed motions and appeals. Judges of the Supreme Court and the Court of Appeal have dismissed the Appellants' motions and appeals, and have ordered the Appellants to pay costs to the Respondents. The Appellants have not paid. These are appeals from another such motion.

[4] The following summarizes the litigation to date:

(1) On December 29, 2010, Justice Coughlan dismissed the Appellants' motions for (a) an injunction to restrain the Respondents from introducing documents and (b) an order that the Respondents' counsel file an affidavit. The judge ordered the Appellants to pay $1,000 costs. (2010 NSSC 459) The appellants appealed to this Court, which dismissed the appeal.

(2) The Appellants moved to convert the action to an application, for summary judgment, for an injunction, to strike the defence, prohibit further discoveries of the Appellants and prohibit further motions by the Respondents. The Respondents moved for an order that Ms. Leigh respond to discovery questions. In July 2010, three days before

the scheduled hearing of the motions, the Appellants requested an adjournment. Justice LeBlanc gave the adjournment and ordered the Appellants to pay $1,000 costs. (2011 NSSC 23)

(3) Justice Duncan then heard the motions. In decisions dated July 20, 2011 on the motions, and August 17, 2011 on costs, he (a) dismissed the Appellants' motions, (b) ordered Ms. Leigh and Ms. Cummings to attend discovery and answer questions, and to produce documentation, and (c) ordered the Appellants to pay costs of $972.53 forthwith and the balance of $3,000 by January 31, 2012 (2011 NSSC 300 and 2011 NSSC 320). The Appellants appealed Justice Duncan's decisions to this Court. On June 15, 2012, Justice Beveridge of this Court dismissed the appeal for failure to perfect (2012 NSCA 67).

(4) The Appellants moved for an order to ban publication, which Justice Duncan dismissed. (2011 NSSC 303)

(5) On May 30, 2012, Justice Coady dismissed another motion by the Appellants. He ordered the Appellants to pay to the Respondents costs of $300 forthwith.

(6) On June 11, 2013, Justice Scanlon dismissed the Appellants' action as an abuse of process, and ordered that the Appellants pay $6,700 outstanding costs from earlier motions and pay forthwith a further $1,200 as costs of the motion to dismiss. The appellants appealed Justice Scanlon's order to this Court. On July 10, 2013, Justice Farrar of this Court ordered the appellants, by July 31, 2013, to post $4,000 as security for costs of that appeal, and ordered the appellants to pay forthwith a further $1,500 as costs of the motion (2013 NSCA 86). On August 19, 2013, Justice Farrar ordered that, as the appellants had not posted the security by the deadline, the appeal was dismissed. The costs have not been paid.

[5] The Respondents have requested that the Appellants pay the outstanding costs. Execution orders have been issued. In evidence is an emailed reply from Ms. Cummings and Ms. Leigh, to such a request, that "we will not be forwarding any monies to you of any kind and in any event". The Appellants were served with

discovery subpoenas in aid of execution. The Appellants failed to attend. The costs orders remain unpaid.

[6] In August 2013, the Appellants moved in the Supreme Court of Nova Scotia for a stay of the execution orders and a discharge of security and for permission to file evidence electronically. Justice Coady dismissed the motion. I have not been provided with a copy or transcript of Justice Coady's Decision or his Order. According to the Respondents' counsel, Justice Coady also directed that the Appellants take no further steps in the proceeding, and file no further motions or actions against the Respondents, and that the appellants pay further costs of $750 forthwith. Those costs have not been paid.

[7] On September 11, 2013, the Appellants filed two appeals from Justice Coady's ruling. These are the current appeals: CA No. 419411, from Justice Coady's Decision in Supreme Court Docket No. 272748, and CA No. 419422 from Justice Coady's Decision in Supreme Court Docket No. 333144.

[8] On September 19, 2013, the Appellants moved, in the Court of Appeal chambers, for an order to consolidate the two appeals. Also on September 19, 2013, the Respondents moved for security for costs. I heard the motions on September 26, 2013.

[9] I will order that the two appeals be consolidated. It is unclear, from the record for this motion, why there should have been two separate proceedings in the Supreme Court. The facts and issues in the two proceedings appear to be virtually duplicative. There is no reason that any appeal proceedings should be twinned, as were the motions that I heard on September 26, 2013.

[10] I will turn to the Respondents' motions for security.

[11] Rule 90.42 says:

> **Security for costs**
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> **90.42** (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.

[12] *Disabled Consumer Society of Colchester v. Burris*, 2009 NSCA 21, summarized the principles that govern the exercise of the judge's discretion under Rule 90.42(1):

> [11] The case law from this court, discussing the principles governing security, derives from the former *Rule* 62.13, replaced by *Rule* 90.42 on January 1, 2009. The former *Rule* 62.13(1) permitted a judge to order security for costs "as the judge considers just". In my view, the test has not changed, and the case law under the former *Rule* 62.13 applies to this application under the new *Rule* 90.42.
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> [12] The starting principle is that security for costs on appeal is ordered only where the evidence shows "special circumstances". *Frost v. Herman* (1976), 18 NSR (2d) 167 (CA) at p. 168 per Macdonald, J.A., which has been followed in many later rulings of this court.
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> [13] The meaning of "special circumstances" may differ with the context. DCS' concern is that Ms. Burris will be unable to satisfy any costs award, including appeal costs if her appeal fails. As stated in *Williams Lake Conservation Co. v. Chebucto Community Council of Halifax (Regional Municipality)*, 2005 NSCA 44, at ¶ 11:
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> > [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances". It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman*, at ¶ 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at ¶ 4-5; *Leddicote*, at ¶ 15-16; *White* at ¶ 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at ¶ 7; *Smith v. Heron*, at ¶ 15-17; *Jessome v. Walsh* at ¶ 16-19.
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> [14] Balanced with that principle is a concern that the security for costs not deny access to justice. In *Smith v. Michelin North America (Canada) Inc*, 2008 NSCA 52, Justice Cromwell said:
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> > In exercising the discretion to make an order for security, the court proceeds with caution because of the risk that the order may effectively stifle the appeal.

> Where security would prevent the prosecution of an arguable appeal, and no other circumstances justified security, this court has denied security for appeal costs: *Crandall v. Atlantic School of Theology* (1993), 122 NSR (2d) 359 (CA), at ¶ 3 per Jones JA; *Ryan v. Ryan* 2000 NSCA 10, at ¶ 38-41 per Pugsley, J.A.

See also paras 19-21 of *Disabled Consumer Society* and *Fotherby v. Cowan*, 2012 NSCA 77, para 11.

[13] The Respondents have shown "special circumstances" to justify security for costs. The Appellants have failed to abide by the judicial processes for discovery and disclosure, in defiance of court orders. They have not satisfied, nor have they shown any intent to satisfy, costs orders, followed by execution orders. They have avoided examination in aid of execution. These appeals attempt to re-litigate aspects of a claim that has been dismissed, as an abuse of process, by the Supreme Court of Nova Scotia in an Order from which an earlier appeal was dismissed by this Court. Guerrilla litigation warrants security for costs.

[14] The respondents seek security totalling $4,000 for the two appeals, now consolidated. In my view, that amount is, if anything, conservative.

[15] I will grant the Respondents' motion and order that the Appellants' post security for costs of $4,000 for the consolidated appeals. The security shall be posted no later than October 21, 2013, failing which the Respondents may apply, on notice to the Appellants, for further relief including dismissal of the appeal, and for costs related to this motion for security.

Fichaud, J.A.