C.A. No. 119355

NOVA SCOTIA COURT OF APPEAL

Cite as: Bernard H. Morash Agencies Ltd. v. Hanna, 1995 NSCA 134

BETWEEN:

BERNARD H. MORASH AGENCIES LIMITED for the Appellant Appellant - and - GINA HANNA and KEITH M. DOREY Respondents	Jonathan C.K. Stobie M. Shaun O'Leary for the Respondent Gina Hanna Application Heard: August 31, 1995 Decision Delivered: September 5, 1995

BEFORE THE HONOURABLE JUSTICE FLINN IN CHAMBERS

FLINN, J.A.:

The appellant has applied to this court for an order to extend the time for filing of a Notice of Appeal from a decision of a Supreme Court Judge in Chambers, delivered orally on October 7th, 1994, and released, in writing, on January 20th, 1995.

This is an unusual situation.

The respondent (Hanna) is the plaintiff in this action, commenced against Maritime Life Assurance Company (the insurer), claiming the benefits of a life insurance policy issued on the life of her late husband. The insurer has denied coverage on the basis of material misrepresentations by the insured on the initial application for the policy.

The respondent (Dorey) was the insurance agent who took the application from the insured. Dorey worked for the appellant (Morash) at the time. Dorey and Morash were added as defendants in the action. The claim against Dorey is for fraud and negligence in the completion of the application for insurance, and against Morash, as Dorey's employer.

Prior to Dorey being joined in the action, he gave a statement to counsel for the plaintiff of the circumstances surrounding the application for insurance. The statement was in writing and signed by Dorey.

Counsel for the insurer, counsel for Dorey and counsel for Morash sought production of Dorey's statement from counsel for the plaintiff. It was refused on the grounds of privilege.

Out of that refusal arose the first application before Justice MacAdam in Chambers on October 7th, 1994, for an order requiring production of the statement.

Justice MacAdam decided, orally, on October 7th, 1994, and, in writing, on January 20th, 1995, that a copy of Dorey's statement be provided to Dorey, but

not to the other co-defendants, namely, Morash and the insurer.

Counsel for Morash deposes in his affidavit in support of this application as follows:

> "At the hearing of the application on October 5, 1994, I was in the process of arguing on behalf of the Defendant Bernard H. Morash Agencies Limited that if the Defendant Dorey were held to be entitled to a copy of the Statement from the Plaintiff, then the Statement should be produced to the Co-Defendants Bernard H. Morash Agencies Limited and Maritime Life Assurance Company on the grounds that the Statement would no longer be privileged. The Honourable Justice MacAdam stopped me and indicated that argument on that issue, if it were necessary, should be deferred until counsel had the opportunity to fully brief the point. In his written reasons for judgment released January 20, 1995, he wrote:
>
> > Whether, Mr. Dorey having received a copy of the statement, other parties can then demand of Mr. Dorey production of the statement, is dependent on an examination of the solicitor/client privilege in these particular and somewhat unusual circumstances. Although pressed by Morash Agencies to consider whether the statement is privileged in the hands of Mr. Dorey or Mr. Duncan, as counsel for Mr. Dorey, it would be unwise to decide this question in the absence of briefs by counsel, and after they have had an opportunity to canvass this issue in light of these reasons. This question, not having been raised until submissions of counsel, should, if required, await an opportunity for interest counsel to consider and reflect on this particular issue in the context of the solicitor/client privilege, and to provide the court with their respective briefs.
>
> The issue as stated by the Honourable Justice MacAdam was somewhat narrower than the proposition which I was in the process of arguing, namely, that if the Statement was produced to the Defendant Dorey, it ceased to be privileged in the hands of any party, including the Plaintiff;"

No order was taken out giving effect to Justice MacAdam's decision nor was any notice of appeal filed.

On July 31st, 1995, Justice MacAdam heard the second application, at the instance of counsel for the insurer and counsel for Morash, for the production

of the Dorey statement. Justice MacAdam dismissed the application for production of the Dorey statement, but granted an order requiring Dorey to testify as to the contents of the statement.

Counsel for Morash is appealing both decisions of Justice MacAdam. There is no dispute that his Notice of Appeal is timely with respect to the second decision. It is argued by counsel for the respondent Hanna that the Notice of Appeal is out of time with respect to the first decision, and there is no justification for extending that time.

Civil Procedure Rule 62.31(8)(e) provides the Chambers judge of this Court with the discretion to order that:

> "Any time prescribed by this Rule may be extended or abridged before or after the expiration thereof."

In the recent decision of **Nova Scotia (Attorney General) v. Mossman et al.** (1994), 133 N.S.R. (2d) 229 Justice Roscoe said the following at p. 231:

> "The test for granting an extension of time for an appeal is as set out in the decision of this court in **Maritime Co-Op Services Ltd. and Martin v. Maritime Processing Co., Hogg and Hillcrest Rent-A-Car et al.** (1979), 32 N.S.R. (2d) 71; 54 A.P.R. 71 (C.A.), as summarized in Nova Scotia **Annotated Rules of Practice** (Ehrlich), at p. 308:
>
> > "The time period for filing a notice of appeal should only be extended where:
> >
> > (1) The appeal has sufficient merit, on the basis that it is arguable that the trial judge made a clear error in his perception and evaluation of the evidence;
> >
> > (2) There was a bona fide intention to appeal while the right to appeal existed;
> >
> > (3) A reasonable excuse for the delay in launching the appeal is advanced."

In that case most of the argument was focused on whether or not the appeal had sufficient merit.

In **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173, Hallett J.A. of this Court said the following concerning the three prong test referred to by Roscoe J.A. in **Nova Scotia v. Mossman** (supra):

> "There is nothing wrong with this three part test but it cannot be considered the only test for determining whether time for bringing an appeal should be extended. The basic rule of this court is as set out by Mr. Justice Cooper in the passage I have quoted from **Scotia Chevrolet Oldsmobile Ltd. v. Whynot**, supra. That rule is much more flexible. The simple question the court must ask on such an application is whether justice requires that the application be granted. There is no precise rule. The circumstances in each case must be considered so that justice can be done. A review of the older cases which Mr. Justice Cooper referred to in **Scotia Chevrolet Oldsmobile Ltd. v. Whynot** and which Mr. Justice Coffin reviewed in **Blundon v. Storm** make it abundantly clear that the courts have consistently stated, for over 100 years, that this type of application cannot be bound up by rigid guidelines."

I consider that the three part test is a useful guideline for dealing with such applications. However, I agree with Hallett J.A. in **Tibbetts** that, ultimately, it comes down to a question of whether or not justice requires that discretion be exercised in favour of granting the application.

Without prejudging the grounds of appeal with respect to the second decision of Justice MacAdam, I am satisfied that there is an arguable issue here, and that the appeal has merit.

I am also satisfied that counsel for Morash had a bona fide intention to appeal the first decision of Justice MacAdam, and has given a reasonable explanation as to why the Notice of Appeal was not filed until recently. He deposes, in his affidavit, in support of this application, as follows:

> "12. I have continuously contemplated an appeal from the judgment of the Honourable Justice MacAdam delivered orally on October 7, 1994. I did not file a Notice of Appeal within ten days after the oral judgment on October 7 because I expected that the Plaintiff's solicitors would deliver a copy of the Statement to the solicitor for the Defendant Dorey who would then have had, in my expectation, no valid basis for

> withholding the Statement from the Co-Defendants Bernard H. Morash Agencies Limited and Maritime Life Assurance Company. If matters had unfolded as I had expected, I did not expect that an appeal would be necessary;
>
> 13. Furthermore, at all material times, I believed that the first judgment of the Honourable Justice MacAdam was incomplete until he ruled on the issue which I had raised in the first application and which, in slightly different form, he expressly reserved for further argument in his written decision issued January 20, 1995. I was concerned that an appeal of the first set of reasons for judgment might be considered premature until the issue which had been expressly reserved was decided;"

Although a notice of appeal should have been filed, on a timely basis, with respect to the first decision, I accept counsel's explanation, and refer to **Civil Procedure Rule** 1.03 which provides:

> "The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

The two separate issues raised by the two decisions of Justice MacAdam are closely connected, and the panel hearing this appeal should be pronouncing on both issues, and not just the issue arising out of the second decision. Likewise, I am persuaded by the fact that there is no evidence before me that any prejudice will be occasioned to the respondent Hanna (the plaintiff) if I grant this application.

For all of these reasons, and I believe that justice requires that I do so, I will exercise my discretion in favour of granting the application extending the time for filing the notice of appeal with respect to the decision of Justice MacAdam rendered, in writing, on January 20th, 1995.

At the hearing of this application, and, subject to reaching my decision on this application, I set this matter down for hearing for Thursday, January 18th, 1996 at 2 p.m. Since I have granted this application, the appeal will deal with both

decisions of Mr. Justice MacAdam.

Under the circumstances, each party shall bear their own costs of this application.

Flinn, J.A.

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Appellant

- and -

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Respondents

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