C.A. No. 107090

NOVA SCOTIA COURT OF APPEAL
**Cite as: Ross, Barrett & Scott v. Simanic, 1994 NSCA 227**

**Clarke, CJNS; Hallett and Chipman, JJ.A.**

**BETWEEN:**

| | | |
|---|---|---|
| ROSS, BARRETT & SCOTT, a partnership registered pursuant to the Partnerships and Business Names Registration Act, R.S.N.S. 1989, c. 335<br><br>Appellant | ) | George W. MacDonald, Q.C.<br>for the Appellant |
| - and - | ) | |
| MICHAEL SIMANIC, of Mississauga, Ontario<br><br>Respondent | ) | Michael Pugsley<br>for the Respondent |
| | ) | Appeal Heard:<br>November 21, 1994 |
| | ) | Judgment Delivered:<br>December 6, 1994 |

**THE COURT:** Appeal dismissed per reasons for judgment of Hallett, J.A.; Clarke, C.J.N.S. and Chipman, J.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of Justice Bateman setting aside a default judgment obtained by the appellant, a Halifax law firm, against the respondent. The judgment was in the amount of $82,976. The appellant's senior partner, Mr. Anthony Ross, and the respondent, a Toronto based entrepreneur or his company entered into a joint enterprise for the development and sale of condominiums on the Island of St. Kitts. The appellant billed the respondent for legal services in connection with the development. The respondent objected asserting that (i) Mr. Ross was to be paid for his participation out of the profits of the project if, as and when the condos were sold; and (ii) that he was not personally liable in any event as the agreement was with his company. The project appears to have stalled. Mr. Ross claimed he was entitled to be paid for legal services in addition to his right to participate in the profits.

On notice to the respondent the appellant had its account taxed by a taxing master in Halifax and then sued the respondent, who was served with the originating notice in Ontario. The notice provided that the respondent would have ten (10) days to file a defence. The respondent consulted counsel within the ten (10) day period and was given various advices, including an opinion that the appellant had probably proceeded improperly in only giving the respondent ten (10) days to enter a defence as the respondent was outside the jurisdiction of Nova Scotia. A decision was made by the respondent in consultation with counsel not to defend the Nova Scotia proceeding but to commence a proceeding in Ontario claiming a breach by Mr. Ross of his obligations to the joint enterprise. Meanwhile, the appellants entered a default judgment.

The respondent was not getting responses from his Ontario solicitor to his inquiries as to the status of the legal proceedings between himself and Mr. Ross; he eventually sought the advice of another solicitor in Ontario. This resulted in an application being made to the Supreme Court of Nova Scotia to set aside the default judgment. The application was granted. The learned chambers judge in rendering her decision stated:

> " ...Mr. Simanic denies that he had retained Mr. Ross to provide legal services. He says that he and Mr. Ross were involved in a joint venture to establish a condo/casino hotel project on the Island of St. Kitts and that Mr. Ross was to be compensated upon the eventual sale of the units for his political and financing expertise but not for legal services.
>
> Mr. Ross says that the per unit compensation was on an if-and-when arrangement and was in addition to his fee-for-service arrangements with Mr. Simanic. I am satisfied from the evidence there is a substantial issue to be tried to be determined as as whether there was, indeed, a solicitor/client relationship between Mr. Ross and Mr. Simanic. If there was such a relationship, to be determined are the terms for payment. And also, again, if there was such a relationship, whether it was a relationship between Mr. Ross and Mr. Simanic or Mr. Ross and the Simanic corporate entity or both.
>
> And, finally, whether the bill for services, if there was a legal relationship, contained charges for Mr. Ross's activities which were to be rendered not as a solicitor but in relation to his role in the joint venture."

The operative part of the learned judge's decision is as follows:

> " I am satisfied that Mr. Simanic in failing to defend the Nova Scotia action did not appreciate the consequences of doing so, and that he understood that the action in Nova Scotia was not properly constituted or could be adequately responded to in Ontario . . .
>
> In the circumstances, I find that there was no wilful or excessive delay on Mr. Simanic's part in moving to set aside the default judgment. The applicant has met the burden of establishing that there is a substantial issue to be tried and that he has a reasonable excuse for failing to file a defence."

On an application to set aside a default judgment the applicant must satisfy the court by admissible affidavit evidence that (i) there is an arguable issue between the parties; and (ii) there is a reasonable excuse for failure to file a defence. (**Ives v. Dewar** (1948) 23 M.P.R. 218, (1949) 2 D.L.R. 204; ABN Bank Canada v. NsC Diesel Power Inc. (1991), 101 N.S.R. (2d) 361)

The appellant argues that the learned trial judge erred in that (i) there was no justification for finding that there was a reasonable excuse for failing to file the defence in

that the respondent had made a deliberate decision not to file a defence to the Nova Scotia action; (ii) that inadmissible hearsay evidence formed the basis of the trial judge's decision; and (iii) she failed to award costs of the application to set aside the default judgment to the appellant.

The jurisprudence of this Court that has been consistently followed on appeals from interlocutory orders involving the exercise of a discretion by a chambers judge is that the court will not interfere unless wrong principles of law were applied or a patent injustice resulted from the order. (**Exco Corporation v. Nova Scotia Savings and Loan et al** (1983), 59 N.S.R. (2d) 331).

I will first deal with the appellant's second ground of appeal; it is framed as follows:

> " The chambers judge erred in law in basing her decision solely on hearsay evidence and relied on inferences of fact drawn therefrom which were contrary to the evidence presented."

The evidence in question was a December 10, 1993, letter from the Ontario solicitor attached to an affidavit filed by the respondent; the letter stated:

> " This will confirm our telephone conference on the morning of December 9, 1993 at which time you advised that you had been served with process on Thursday, December 2, 1993 and that I had indicated that in my view, having delivered these materials to our office late on the afternoon of December 8, that it was impossible to instruct local Nova Scotia counsel and to fund those counsel with an appropriate retainer to file a defence before the ten day period expired.
>
> Having considered that aspect, it is my belief that the Nova Scotia Rules of Civil Procedure probably contain a requirement that where service is made outside of the jurisdiction, that an extended period for delivery of the Respondent's pleading is permitted. I suspect that Mr. Ross may not have proceeded correctly.
>
> In any event, you have advised us that Mr. Ross lives in Toronto on weekends and it does appear as a result of our discussion that Mr. Ross could have instituted action within Ontario had he wished to do so. However, it was my suggestion that Mr. Ross may be attempting to obtain a default judgment in Nova Scotia and thereafter to register

> same on the Island of St. Kitts which is a British jurisdiction and thereafter move to enforce that judgment against you in that area.
>
> As a result of our discussions, it was agreed that no appearance in the Nova Scotia action would be made as you have very little to do with Nova Scotia at this time. In addition, action should be commenced here in Ontario against Mr. Ross on the basis of breach of agreement with respect to the March 3, 1993 hand written agreement with respect to charging of fees. I pointed out that the taxing officer referenced your letter of September 16 and that accordingly the account should probably not have been allowed as there was before the court an objection to the very existence of the account.
>
> The third alternative which I suggested was institution of an action in St. Kitts to attack the default proceeding in Nova Scotia. That would provide some insulation if Mr. Ross subsequently moves to attack by registration of the Nova Scotia judgment in the St. Kitt's court. Having discussed these alternatives, you were of the view that the most satisfactory course of action for you was the institution of an action here in Ontario.
>
> We enclose our retainer form which I would ask you to execute and return to us with a cheque in the amount of $1,500.00 to be applied as a retainer on account of fees and disbursements incurred. I also ask that you provide us with Mr. Ross' residential address in Toronto so that service could be effected promptly. The institution of the action here in Ontario will at least provide your local St. Kitts lawyers with a basis to attempt to repel registration of the default judgment from Nova Scotia.
>
> I understand that you have a considerable amount of documentation and that it will be necessary for us to meet and go through the documentation at some length so that I fully understand this somewhat complex transaction. I do reiterate my earlier comment that the agreement of March 3, 1993 does not appear to be directly referrable to services rendered before its date, and indeed the services rendered in the account do not immediately appear to be referrable to the remuneration agreement of March 3. In any event, it appears that there are substantial verbal discussions which accompanied the agreement and I will require your instructions regarding those discussions."

The respondent was fully cross-examined on his affidavit. With reference to the decision not to file a defence to the Nova Scotia action and his consultation with his Ontario solicitor, the respondent was asked:

" Q. What did you understand once you said we aren't going to do

> anything. We've made a decision; we're not going to appear in Nova Scotia. What did you understand the consequences of that would be?"

He responded:

> " A. I didn't. Just simply didn't understand what the consequences of that would be.
>
> Q. So -- but you relied on your lawyer.
>
> A. I certainly did, yes."

Counsel cross-examined the respondent on the letter from the Ontario solicitor. He put to the respondent that the letter stated that he had agreed with his lawyer not to file a defence. He responded to this question:

> " A. I don't know whether I agreed. I don't recollect what I agreed to or not. I just simply followed my lawyer's advice."

The respondent was cross-examined on the statement in the letter where Ontario counsel had advised "In addition, action should be commenced here in Ontario agianst Mr. Ross on the basis of breach of agreement with respect to the March 3, 1993 handwritten agreement." He was asked:

> " So you discussed with your lawyer that you would sue Mr. Ross in Ontario, didn't you?"

He responded:

> " A. I would imagine there would be a counter-claim of some sort, yes.
>
> Q. Counter-claim for what?
>
> A. To the things that he's supposed to perform. He's suing us before he has completed his deal."

In support of the second ground of appeal counsel submits:

> " The sole reason given for the Chambers Judge's decision that the Respondent had a reasonable excuse for his delay and failure to file

> a Defence is as cited above: That he did not understand his solicitor's advice. She relied on the letter from Mr. Hamilton, Mr. Simanic's Ontario counsel, to him which was appended to his first Affidavit."

This assertion is not correct. The chambers judge stated:

> " I am satisfied that Mr. Simanic in failing to defend the Nova Scotia action did not appreciate the consequences of doing so, and that he understood that the action in Nova Scotia was not properly constituted or could be adequately responded to in Ontario."

Clearly the chambers judge did not found her decision solely on one reason. She found that the respondent did not appreciate the consequences of not defending; the respondent's testimony supports this finding. She also found that he understood the action in Nova Scotia may not have been properly constituted; the respondent's testimony supports this. She also found that he understood an adequate response could be made in Ontario; the respondent's testimony supports this finding.

Counsel for the appellant further argues:

> " In order for the Chambers Judge to be able to come to the conclusion that she did, she must be able to rely solely on the evidence presented and not on any hearsay evidence in order to reach her decision. Hearsay evidence has become admissible in certain circumstances, however, the amount of weight which is put to it must be determined based on the reliability and necessity of having that hearsay evidence put into evidence. In no circumstances should hearsay be relied on as the sole basis for a decision as it was here. The Chambers Judge should have been able to uphold her decision solely on the basis of the other evidence presented and not on the hearsay evidence. She was not, however, able to do this. On the contrary, her sole basis for decision was on the hearsay evidence."

Counsel for the appellant argues that the letter from the Ontario solicitor can be admitted only to show the respondent received the letter. He argues that without calling the author it is not admissible for the purpose of proving the respondent received the advice spelled out in the letter. In short, he argues it is hearsay evidence which was not properly proven as the author of the letter was not called as a witness. He argues it was therefore

inadmissible and, as it was the foundation of the decision of the chambers judge, her decision was founded on incorrect principles of law.

**Civil Procedure Rule 38.02** provides:

> " 38.02. (1) An affidavit used on an application may contain statements as to the belief of the deponent with the sources and grounds thereof.
>
> (2) Unless the court otherwise orders, an affidavit used on a trial shall contain only such facts as the deponent is able of his own knowledge to prove."

In Paragraph 17 of the respondent's affidavit in support of the application the respondent stated:

> " 17. THAT I base my belief that it was not appropriate to file a Defence on advice received from my lawyer, Mr. David Hamilton, and attach herewith a copy of a letter dated December 10, 1993 as Exhibit "G". . ."

Under **Civil Procedure Rule 38.02** paragraph 17 of the affidavit was admissible evidence as to the source and grounds of the belief of the respondent that it was not appropriate to file a defence. It was in keeping with accepted practice to attach the letter from the Ontario solicitor as an exhibit to the respondent's affidavit. The respondent's affidavit and evidence clearly shows that he relied on the advice of his Ontario solicitor in not filing a defence.

The letter from the Ontario solicitor was relevant to the issue as to whether or not the respondent had a reasonable excuse for failing to file a defence. The letter is written on the solicitor's letterhead but the maker was not called to prove it and in this respect has the appearance of being hearsay. However, the letter was not tendered to prove that the contents of the letter were true but whether the respondent received the letter and acted upon it. He has given evidence on oath that he did. The introduction of the letter as an exhibit to the

respondent's affidavit for this purpose does not offend the hearsay rule. See **R. v. O'Brien**, [1978] 1 S.C.R. 591 where the Court stated at p. 593:

> " It is settled law that evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made."

Further support for this conclusion can be found in **R. v. Wildman** (1981), 60 C.C.C. (2d) 298. The Ontario Court of Appeal held that the learned trial judge had improperly excluded as hearsay evidence what a witness had been told in a telephone conversation. The court held that the evidence was not being adduced to prove the truth of what the caller had said but for a different purpose, namely, to show how the accused had acquired knowledge of certain events and to explain his subsequent conduct. The Supreme Court of Canada agreed with the ruling of the Ontario Court of Appeal that the trial judge erred in excluding the evidence as hearsay. (See [1985] 14 C.C.C. (3d) 321 at p. 333).

In a sense the letter from the Ontairo solicitor is original evidence as it was not introduced to prove the contents of the letter were true. Therefore it is not subject to the special rules relating to documentary evidence. (**McWilliams Canadian Criminal Evidence**, 3rd ed., p. 7-1, May 1992).

Given the purpose of tendering the letter from the Ontario solicitor it was not hearsay evidence. The learned chambers judge did not err in admitting the affidavit of the respondent including the letter. Therefore, her decision was not based on hearsay evidence nor was her decision contrary to the evidence. The second ground of appeal cannot be sustained.

With respect to the first ground of appeal I would not interfere with the chambers judge's finding that the respondent had a reasonable excuse for failing to file a defence. The respondent did not defend in Nova Scotia because of the legal advice he received; although

it would appear to be questionable advice it was the reason why the respondent did not file a defence to the Nova Scotia action. I cannot accept counsel's argument that the deliberate decision not to attorn to the jurisdiction of the Nova Scotia courts should not be regarded as a reasonable excuse for failing to file a defence. Nor is the fact that he agreed to the course of action that was proposed by his counsel. His agreement does not negate the fact that underlying the respondent's decision not to file a defence was the advice he had received. The learned chambers judge did not proceed on any incorrect principle of law nor does her ruling result in a patent injustice. I would dismiss the first ground of appeal.

As to costs, while the general rule is that the plaintiff be awarded costs of the application to set aside a default judgment, I am of the opinion, considering all the circumstances that the learned chambers judge properly exercised her discretion in ordering that costs of the application be in the cause. Leave to appeal is granted but the appeal is dismissed with costs to the respondent in the amount of $750 plus disbursements.

Hallett, J.A.

Concurred in:

Clarke, CJNS

Chipman, J.A.

C.A. No. 107090

NOVA SCOTIA COURT OF APPEAL

**BETWEEN**:

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| ROSS, BARRETT & SCOTT, a partnership registered pursuant to the Partnerships and Business Names Registration Act, R.S.N.S. 1989, c. 335 | ) | |
| Appellant | ) | |
| - and - | ) | REASONS FOR |
| | ) | JUDGMENT |
| BY: MICHAEL SIMANIC, of Mississauga Ontario | ) | |
| | ) | Hallett, J.A. |
| Respondent | ) | |