C.A. No. 100975

NOVA SCOTIA COURT OF APPEAL

**Hallett, Chipman and Roscoe, JJ.A.**

**Cite as: Saunders v. Wright, 1994 NSCA 176**

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| **BETWEEN:** | ) | |
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| EDMUND R. SAUNDERS<br>Person | ) | Appellant in |
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| Appellant | ) | |
| | ) | |
| **- and -** | ) | |
| | ) | |
| STEPHANIE JANICE (BOWER) WRIGHT | ) | Michael G. Baker |
| | ) | for the Respondent |
| Respondent | ) | |
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| | ) | Appeal Heard: |
| | ) | September 19, 1994 |
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| | ) | Judgment Delivered: |
| | ) | September 20, 1994 |

**THE COURT:** The appeal is allowed with costs as per reasons for judgment of Chipman, J.A.; Hallett and Roscoe, JJ.A., concurring.

**CHIPMAN, J.A.:**

The appellant was, at all material times hereto, a barrister practicing law in Lunenburg. He was the principal shareholder of a company, Scotia Solomon Gundy Ltd.,

which owned two properties; one at Western Shore and the other at First South, both in the County of Lunenburg. The Western Shore property was the subject of a written agreement between the appellant or Solomon Gundy and one Hubley whereby the latter was entitled to have the property conveyed back to him when he was in a position to finance it in its own name.

Solomon Gundy had mortgaged the two properties to Canada Trust as holder of funds in an R.R.S.P. belonging to the respondent's father. The mortgage was, by early 1991, in default and Canada Trust was threatening foreclosure.

In order to relieve the pressure, the appellant, through the respondent's father, persuaded her to take title to the two properties, arrange a mortgage with the Royal Bank of Canada in St. John, New Brunswick in her own name and with these funds pay out the mortgage to Canada Trust. It was contemplated that there would be a surplus after payment of Canada Trust and other expenses, as in fact there was in the amount of approximately $1,500.

A trust agreement was entered into between the appellant and the respondent dated February 18, 1991. This agreement recited that the respondent took title to the lands on behalf of the appellant pursuant to a separate oral agreement whereby she was to mortgage the lands for a sufficient sum to pay Canada Trust and all expenses of taking title and to pay the respondent "as consideration for acting as trustee in taking title". The respondent did receive $1,500.00 from the proceeds of the new mortgage.

The agreement then provided that the respondent would hold the lands in trust for the appellant who undertook to exonerate the appellant from all liability with respect to taxes, fire insurance premiums and mortgage payments as they came due. In the event the appellant failed to make such payments, it was provided that he:

> "shall forthwith provide to the said Stephanie Bowers sufficient funds to pay out the said mortgage to the Royal Bank and in return

receive a conveyance of the said land."

The agreement contained no express power of sale in the respondent as trustee.

Following execution of the agreement, the appellant maintained an account in the Bank of Montreal in Mahone Bay in which Hubley was depositing payments. The respondent opened an account in the same branch and each month the appellant deposited in that account $665.00 which was slightly more than the respondent required to make monthly payments to the Royal Bank on its mortgage. The appellant continued to make these payments until about April, 1992, when his cheques were returned for insufficient funds. At about the same time, Hubley was successful in making a payment of $13,500. which the respondent applied to the Royal Bank mortgage. In exchange for this payment, the respondent reconveyed to him the Western Shore property. The appellant was not involved in this transaction as his signature was not necessary on any of the paper work, but it does appear that he had no objection to it. Because the amounts paid monthly by the appellant exceeded the monthly payment required for the Royal Bank mortgage, there was a credit in the respondent's account which were not used up until July, 1992, making this the effective time of default. The appellant did make one further payment of $1,000.00 in September, 1992.

After the appellant defaulted in making payments, the respondent, through her father, pursued the appellant by way of some 23 visits to Lunenburg and area and a number of phone calls, all without success. The respondent's father also retained the firm of Stewart, McKelvey, Stirling and Scales relative to this matter and another matter relating to the appellant. At the time of trial, this firm had accumulated charges in connection with these services, both billed and unbilled, in the total amount of $4,534.50. There is no evidence that this firm was successful in accomplishing any payment from the appellant to the respondent pursuant to the trust agreement.

The respondent issued an Originating Notice (Application Inter Partes); on

September 23, 1993. Claims were put forth for an order authorizing the respondent to sell the real property held in trust for the appellant and for other relief and in the interlocutory notice of the hearing, it was specifically claimed that the respondent be entitled to deduct amounts owing to her by the appellant.

The matter came on for hearing in the Supreme Court on December 20, 1993. After hearing evidence, the Supreme Court judge:

(a) fixed the amount owing on the Royal Bank mortgage as of December 20, 1993 at $28,019.09;

(b) found that 50% of the account of Stewart, McKelvey, Stirling and Scales, that is to say $2,267.25 should be paid by the appellant to the respondent;

(c) found that the appellant should reimburse the respondent for fire insurance premiums and bank charges in the amounts of $686.00 and $94.28, respectively;

(d) found that the respondent should be compensated for expenses incurred by her father for meals and travel in the sums of $4,830.00 and $8,577.50, respectively, for a total of $13,407.50;

(e) found that the respondent should receive her costs from the appellant on a solicitor/client basis.

The trial judge did not order the sale of the property, noting that there was an indication that once the amounts involved were ascertained payment might be forthcoming. However, an order has since been granted providing for the sale of the property to pay the amounts due from the appellant to the respondent.

The appellant appeals from those portions of the decision and order of the Supreme Court which relate to the following items:

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| (a) | one-half of the legal account of Stewart, McKelvey, Stirling and Scales of $4,534.50 | $2,267.25 |
| (b) | travel of the respondent's father of | $8,577.50 |

(c) meals of the respondent's father of $4,830.00

In order to evaluate these awards, it is necessary to characterize the nature of the appellant's breach of the trust agreement. We have already set out the basic arrangement which was that the appellant was to make the mortgage payments. If he did not do so, he was required to forthwith place the respondent in sufficient funds to pay out the mortgage and in return receive a conveyance. There was no specific remedy for the respondent provided in the agreement, but s. 51 of the **Trustee Act**, R.S.N.S. 1989, c. 479 and the Rules of Court make provision for sale by a trustee. As well, it was pointed out in **Re Nathanson** (1971), 18 D.L.R. (3d) 495 at 501 that apart from statute there is an inherent power in a court to authorize a trustee to sell a trust property. Thus, as present counsel for the respondent perceived, the respondent's remedy lay in an application to the court for an order to sell the trust property so as to enable her to generate sufficient funds to pay the mortgage and other proper expenses and damages if any, making available to the appellant any surplus then remaining.

In short, the appellant's breach of duty to the respondent was a mere breach of a contractual obligation to pay money. The remedy lay in simple enforcement proceedings in court.

The items of expense relating to travel and meals were incurred by or on behalf of the respondent for the purpose of persuading the appellant to make his payments. It is apparent from reading the record that the appellant, while at all times expressing a desire to pay, made it clear that he was in financial straits and was therefore unable to do so. Apart altogether from the question of reasonableness, these expenditures had nothing to do with the administration of the trust. We accept the argument of the appellant that they are not a proper item of damages in a claim made for the enforcement of a mere obligation to pay money.

The account of the firm of Stewart, McKelvey, Stirling and Scales falls in the same category. There is a dearth of evidence on the record as to what, if anything, this firm did in exchange for the fees. Apparently, the purpose of the retainer was to reinforce the respondent's efforts to get money from the appellant by way of persuasion or pressure. As pointed out these efforts were unsuccessful. Again, the respondent's remedy was clear; an application to the court for a sale of the trust property was a simple and effective procedure.

Finally as to the solicitor/client costs, this is not a case where the proceedings related to interpretation of the trust agreement or any other duties carried out by the trustee in relation to the trust. For such, there is a general rule that the trustee is to be reimbursed his reasonable expenses (which can include solicitor/client fees) from the trust property. Costs in this proceeding were simply costs in a successful application to ascertain and enforce an obligation to pay money. There are no exceptional or unusual circumstances of the nature necessary to enable a trial court to award solicitor/client costs against an unsuccessful litigant. Having heard counsel on the respondent's costs of the trial, we fix them on a party and party basis at $3,375.00, plus disbursements to be taxed.

The appeal is allowed and that part of the order of the Supreme Court relating to the payment of the travel, meals and solicitor's expenses is to be deleted. In substitution for the solicitor/client costs there will be costs on a party and party basis of $3,375.00, plus disbursements to be taxed. The appellant will have his costs of this appeal which are limited to disbursements to be taxed and which are to be set off against the amounts due to the respondent by the appellant.

Chipman, J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.