

FLINN, J.A.:

This is an application by the respondents (Porter) to quash a notice of appeal filed by R. Robert Kelley on behalf of the appellant (Woodridge) on December 23rd, 1994.

Woodridge appeals an order of a judge of the Supreme Court of Nova Scotia, in Chambers, dated November 25th, 1994, the terms of which order dismissed Woodridge's action against Porter.

At a prior hearing of an application by Porter to dismiss Woodridge's action for want of prosecution, Mr. John Holmes, a majority shareholder of Woodridge, appearing on behalf of Woodridge, made representations to the court that Woodridge had retained counsel. Mr. Holmes was given certain directions by the Chambers judge with which he undertook to comply. Mr. Holmes was told that if he failed to comply the action would be dismissed. The directions of the Chambers judge were not complied with and Woodridge's action was dismissed.

The circumstances which give rise to this matter commenced almost four years ago. In August 1991 an action was commenced by Woodridge, and four other named plaintiffs, against Porter. The originating notice and statement of claim was signed by John Holmes as agent. Mr. Holmes is not a lawyer.

On January 10th, 1992, counsel for Porter made application to a judge of the Supreme Court of Nova Scotia in Chambers for an order striking out the claims of Woodridge and the other plaintiffs in the action. Alternatively, he requested an order that proceedings be stayed until Woodridge, and the other plaintiffs, were represented by counsel. He further requested an order for security for costs. Mr. Holmes appeared at the hearing on behalf of Woodridge and the other plaintiffs. He did not oppose the request for an order that

proceedings be stayed until counsel was retained.

The Chambers judge, in an oral decision at the conclusion of the hearing, struck out the action of all of the plaintiffs except the claim of Woodridge. He refused to order that Woodridge post security for costs. He ordered that Woodridge's action against Porter be stayed until Woodridge was represented by counsel. An order giving effect to this decision was taken out on December 7th, 1992.

On April 14th, 1993, counsel for Porter wrote to Mr. Holmes advising that if counsel was not appointed by the end of June 1993 that he would make an application to have the matter dismissed for want of prosecution. Similar letters were written on June 30th, 1993, and July 14th, 1993, the last of which indicated that the application to dismiss for want of prosecution would be made on July 28th, 1993.

An exchange of correspondence then ensued, between July 28th, 1993 and August 18th, 1993, with proposed counsel for Woodridge, who subsequently advised counsel for Porter that he would not be acting as counsel for Woodridge.

A similar exchange of correspondence ensued between August 29th, 1993, and February 28th, 1994, with a second proposed counsel for Woodridge who, likewise, advised counsel for Porter that he would not be acting for Woodridge.

A further exchange of correspondence ensued between May 29th, 1994 and September 16th, 1994, with a third proposed counsel for Porter who, likewise, advised counsel for Porter that he would not be acting for Woodridge.

On November 15th, 1994, counsel for Porter made an application to the Supreme

Court of Nova Scotia in Chambers, on notice to Mr. Holmes, to dismiss Woodridge's claim against Porter for want of prosecution. On the hearing of the application Mr. Holmes advised the Chambers judge that counsel had been engaged by Woodridge. Mr. Holmes was directed by the Chambers judge, and Mr. Holmes undertook, to have Woodridge's counsel contact counsel for Porter no later than November 17th, 1994, in order to confirm his retainer, failing which an order dismissing the action would be granted.

Counsel for Porter was not contacted by anyone purporting to be counsel for Woodridge. Counsel for Porter filed an affidavit to that effect sworn to the 21st day of November 1994, and appeared before the judge in Chambers on November 25th, 1994. An order was granted dismissing Woodridge's action against Porter.

A certified copy of the order was sent to Mr. Holmes by counsel for Porter on November 28th, 1994, and was received by Mr. Holmes on November 30th, 1994.

Counsel for Porter heard nothing further with respect to this matter until the 11th of January 1995 when he received a copy of a notice of application to set down an appeal. The notice was dated December 22nd, 1994, and signed by R. Robert Kelley as agent for Woodridge. Mr. Kelley is not a lawyer. He is the Secretary of Woodridge. Attached to the notice of application was a notice of appeal. The notice of appeal had not been served on counsel for Porter or any other representative of Porter.

At the hearing of the application to set down the appeal, in Chambers of this Court, on January 12th, 1995, the Chambers judge directed Mr. Kelley to deliver to counsel for Porter on or before January 16th, 1995, an affidavit of service of the notice of appeal.

The appeal was not set down for hearing.

No affidavit of service has been delivered or filed. Counsel for Porter has applied to this Court to strike out the notice of appeal.

Counsel for Porter, in support of his application, submits:

1. That the notice of appeal was not served in accordance with **Civil Procedure Rule 62.02**; and, in fact, has yet to be served.
2. That this is not a proper case where an extension of time for serving the notice of appeal should be granted.
3. That on the basis of **Civil Procedure Rule 62.18(1)** the notice of appeal should be quashed because it discloses no reasonable sustainable ground of appeal; and that the appeal is frivolous, vexatious and without merit.

Mr. Kelley, on May 30th, 1995, filed a one-page submission on behalf of Woodridge. Essentially his position is that Woodridge and its principals have no assets. They are finding it difficult to retain counsel, and that Woodridge should be able to proceed with its case represented by someone other than counsel.

The material on file in support of this application discloses that Woodridge's certificate of registration under the **Corporations Registration Act**, R.S.N.S. 1989, c. 101 was revoked in November 1994.

Civil Procedure Rule 62.18(1) provides as follows:

"62.18 (1) Any party to an appeal may apply in accordance with rule 63.30 to the Court at any time before or at the hearing of the appeal for an order quashing the notice of appeal or dismissing the appeal on the ground that no appeal lies to the Court or that the appeal is frivolous, vexatious or without merit or that the appellant has unduly delayed preparation and perfection of the appeal."

It is over three years, now, since the decision of the Supreme Court of Nova Scotia dated January 10th, 1992, which decided that these proceedings be stayed until Woodridge was represented by counsel. The majority shareholder of Woodridge, Mr. Holmes, has never challenged that decision or the order issued pursuant to it. In fact, he was present in court at the time the decision was handed down and did not oppose it.

Counsel has yet to be retained by Woodridge.

Further, Mr. Holmes made representations to the Chambers judge who granted the order which Woodridge now wishes to appeal. Those representations were that Woodridge had engaged counsel. Mr. Holmes then failed to comply with the Chambers judge's specific direction, and his own undertaking given in respect thereto, to have Woodridge's counsel contact counsel for Porter to confirm his retainer. It was as a result of that failure, the consequences of which Mr. Holmes was made aware, that the order of November 25, 1994, was granted dismissing the action. It is this order which Woodridge wishes to appeal on the basis that Woodridge should not be required to have a lawyer represent it in the action.

Woodridge is, in essence, appealing the Order of the Chambers judge dated December 7th, 1992, which provided that these proceedings be stayed until Woodridge was represented by counsel. It is far too late to consider that matter. In our opinion this appeal is

without merit. Pursuant to **Civil Procedure Rule 62.18(1)** the notice of appeal will be quashed, with costs to Porter which we fix at \$750 plus disbursements.

Flinn, J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

WOODRIDGE DEVELOPMENTS LIMITED

)
Appellant)

- and -
FOR

) REASONS

) JUDGMENT

BY:

PORTER DILLON LIMITED, H.J.)

PORTER LIMITED and HUGH J.)

PORTER)

) FLINN, J.A.

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Respondents)

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