S.C.A. No. 02717

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Hallett and Matthews, JJ.A.
Cite as: Taymac Services Ltd. v. Esso Petroleum Canada, 1992 NSCA 66

BETWEEN:

TAYMAC SERVICES LIMITED, KEVIN C. TAYLOR and LAURIE E. TAYLOR Appellants	)	H. Keith MacKay John B. Blanchard for the Appellants
- and -	)	Harry E. Wrathall, Q.C. C. Peter MacLellan, Q.C. for the Respondent
IMPERIAL OIL LIMITED, carrying on business under the name of ESSO PETROLEUM CANADA Respondent	)	
Appeal Heard:	)	September 30, 1992
	)	Judgment Delivered: September 30, 1992

THE COURT: Appeal dismissed from interlocutory decision of trial judge per oral reasons for judgment of Clarke, C.J.N.S.; Hallett and Matthews, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The appellants seek leave and, if granted, appeal from an interlocutory decision of Chief Justice Glube wherein, on June 12, 1992, she dismissed the application of the appellants for an injunction.

On April 1, 1989, the corporate appellant and the respondent signed an agreement by which the appellant became the agent of the respondent in the operation of the Wyse Road Esso Service Station in Dartmouth. On February 12, 1992, the respondent, purporting to act pursuant to the agreement, gave notice to the appellant of its termination effective March 31, 1992. On April 1, 1992, the appellants applied for an interlocutory injunction to restrain the respondent from terminating the Agency Agreement pending the trial of issues which it alleged existed between the parties. The appellants commenced an action against the respondent on April 13, 1992, claiming recovery for a variety of business and other losses which they alleged they suffered as a result of the improper acts of the respondent.

Madam Justice Roscoe, then of the Trial Division, granted the injunctive relief sought by the appellants. The operative paragraph of her order of April 27, 1992, provided:

> "**IT IS ORDERED** that the Defendant, Imperial Oil Limited, be and is hereby restrained from terminating, without cause, the Agency Agreement made between the parties and dated April 1, 1989, and from unilaterally changing any of the terms thereof until the trial of this action or until further order from the Court."

On June 2, 1992, the respondent delivered a letter to the corporate appellant terminating the agreement "effective immediately" and requiring it "to vacate the premises immediately". The respondent alleged a breach of s. 9.03(g) of the agreement. It relied upon the following provision:

> "Notwithstanding Section 9.01,
>
> ...
>
> (g) if the Agent becomes bankrupt or insolvent or commits any act of bankruptcy as defined in the Bankruptcy Act,

...

> then in each such case, as often as the same shall happen and notwithstanding any previous waiver, this Agreement shall at Esso's option forthwith become terminated."

Thereupon the appellants applied to the Trial Division for a second interlocutory injunction to restore the parties to their respective positions prior to June 2, 1992 which they asserted meant the continuation of the status quo until the trial or settlement of their action against the respondent. They relied upon the order granted by Madam Justice Roscoe.

After hearing the parties on June 8, 1992, Chief Justice Glube dismissed the application. She expanded upon her reasons on June 12, 1992 by stating the order of Madam Justice Roscoe did not provide relief from s. 9.03(g) of the agreement.

The appellants submit the order of the Chief Justice should be reversed because she erred in law. They contend she applied wrong principles and that her decision results in a patent injustice.

They want this court to reverse her decision and restore the parties to the position they perceive they were in following the earlier order of Madam Justice Roscoe.

The law in a matter such as this has been stated by this court on so many occasions that it is now well settled. We refer, for example, to the decision of this court in **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.** (1990), 96 N.S.R. (2d) 82, wherein Matthews, J.A. wrote at p. 85:

> "[10] The approach an appeal court must adopt in considering a discretionary order made by a chambers judge has been stated by this Court in **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, wherein Chief Justice MacKeigan in delivering the unanimous judgment of the Court on an appeal concerning an interlocutory injunction stated at p. 333:
>
> > 'This Court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result.'

...

> [13] Our role is narrow in this type of an appeal. Beetz, J., referred to that duty at p. 155 of **Metropolitan Stores** when he quoted with approval from Lord Diplock in **Hadmor Productions Ltd. v. Hamilton**, [1982] 1 All E.R. 1042:
>
> > ' ... it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. I must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently ...' "

We have carefully considered the record in this proceeding and the written and oral arguments of counsel. The order issued by Madam Justice Roscoe, to which we have already referred, restrained the appellant from terminating the agreement "without cause" to do so. The underlying issue before Chief Justice Glube was whether a prima facie case for "cause" existed on June 2, 1992. The record reveals there was evidence before Chief Justice Glube upon she could properly conclude the appellant Taymac was insolvent. In view of the terms of the agreement, she was not in error in concluding that the action of the respondent in terminating pursuant to s. 9.03(g) "was appropriate". In our opinion her interpretation of the order of Roscoe, J. cannot be faulted.

In an interlocutory procedure it is not for her to decide the case on its merits. Nor is it for this court. The ultimate resolution will await the trial of the main action. We find no basis upon which to disturb or reverse Chief Justice Glube's exercise of discretion in dismissing the appellant's application for interlocutory relief pending trial. Her decision is consistent with an interpretation of the order issued by Madam Justice Roscoe.

At the time of the application before Chief Justice Glube the appellants sought additional relief for several matters, all of which were denied. Apart from the requested amendment to the statement of claim, which we are informed this morning has now been

settled, Chief Justice Glube did not err in refusing the further relief requested.

In all other respects, while leave to appeal is granted, the appeal is dismissed.

Costs on this appeal will be in the cause.

C.J.N.S.

Concurred in:

Hallett, J.A.

Matthews, J.A.

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Appellants

- and -

IMPERIAL OIL LIMITED,
carrying on business under the name of
ESSO PETROLEUM CANADA

Respondent

ORDER FOR JUDGMENT

REASONS FOR JUDGMENT having been delivered by Clarke, C.J.N.S.; Hallett and Matthews, JJ.A. concurring;

IT IS ORDERED THAT leave to appeal is granted and the appeal is dismissed from the interlocutory decision of Chief Justice Glube dated June 12, 1992 and the order based thereon;

IT IS FURTHER ORDERED THAT costs on this appeal are in the cause.

DATED at Halifax, Nova Scotia, this 30th day of September, 1992.

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Registar