

NOVA SCOTIA COURT OF APPEAL

Cite as: Provincial Contracting v. Spence Aggregates Contracting Ltd., 1999 NSCA 9

BETWEEN:

PROVINCIAL CONTRACTING, a body)
corporate, and DUANE ROBERT RICHARDS)
for the appellants)

Appellants)

- and -)

SPENCE AGGREGATES CONTRACTING)
LIMITED)

Applicant/)
Respondent)

G. F. Philip Romney)

W.W. (Bill) Watts)
for the applicant/respondent)

Application Heard:)
August 26, 1999)

Decision Delivered:)
August 27, 1999)

**BEFORE THE HONOURABLE JUSTICE NANCY J. BATEMAN,
IN CHAMBERS**

BATEMAN, J.A.: (In Chambers)

[1] This is an application by the respondent, Spence Aggregates Contracting Limited, for an order for security for costs.

[2] On March 26, 1999 the appellant, Duane Richards, filed a Notice seeking leave, and, if granted, appealing a judgment of Justice Alan Boudreau of the Supreme Court dismissing the appellants' application for an Order setting aside a default judgment. The appeal hearing is set for October 5, 1999. The appellants' factum was filed on August 6th as required by this Court. The respondent's factum is due to be filed by August 31st.

[3] In support of the application for security is an Affidavit dated August 18th, 1999 from Randall Balcome, solicitor for the respondent. It sets out the history of this matter. On July 16, 1997 the respondent entered default judgment against the corporate and personal appellants in the amount of \$90,646.84 including costs of \$942.79. That judgment was registered in Alberta with costs. On November 10, 1998, the appellant, Richards, applied to set aside the default judgment. His application was dismissed by Justice Boudreau of the Supreme Court with costs against Mr. Richards of \$300. Mr. Balcome states in the affidavit:

5. To date, the Respondent has received no payment of the court-ordered amounts. Mr. Richards has not paid any amount owing on the original judgment in this matter. The Respondent has not been paid costs of original application. The Respondent has not been paid costs for the *Ex Parte* application to register the judgment in Alberta. The Respondent has not been paid costs for Mr. Richards' application to set aside the default judgment and to extend the time for filing his defence.

6. Provincial Contracting Limited does not have any property in Kings County, Nova Scotia, and to my best knowledge and belief no property in Nova Scotia to which a judgment can attach. Duane Richards has two pieces of property in Kings County, however, their assessed value is significantly less than the face value of the mortgage and outstanding judgments against Mr. Richards. To my best knowledge and belief Mr. Richards has no other property in Nova Scotia to which a judgment can attach.

[4] It is the respondent's position that security should be ordered because there is no prospect of the respondent recovering costs against the appellant should the appeal be dismissed. The respondent relies, as well, upon the fact that the appellants have not paid the outstanding costs ordered in the proceedings in the lower courts.

[5] **Civil Procedure Rule 62.13** provides:

- (1) A Judge on application of a party to an appeal may at any time order security for the costs of appeal to be given as he deems just.
- (2) If a party fails to give security for costs when ordered, a Judge on application may dismiss or allow the appeal, as the case may require.

[6] This rule was considered by Macdonald, J.A., in **Frost v. Herman**, (1976), 18 N.S.R. (2d) 167 (N.S.C.A.). He said at p.168:

In my view, however, the discretion given a judge under the present *Rule 62.13* to order security "as he deems just" should not be exercised in favour of an applicant unless special circumstances exist for so doing.

[7] I am not satisfied on the information before me that "special circumstances" exist sufficient to warrant an order for security for costs. The solicitor's affidavit is deficient. It provides no particulars of the value of the properties or the face value of the mortgage, nor does it reveal the source of Mr. Balcome's information in this regard.

[8] Additionally, the Appeal Book, which is on file, contains a Sheriff's report dated December 12, 1998, stating that \$4,300 has been collected on the judgment, of which \$2,850.44 has been remitted to the respondent. This report, if accurate, is inconsistent with the information in paragraph 5 of Mr. Balcome's affidavit.

[9] Nor, in my view, has the application for security been made on a timely basis. The respondent has offered no explanation for the delay between the commencement of this appeal and the initiation of this application, save to say that the time was required to investigate the appellants' financial situation.

[10] In the circumstances I am not satisfied that security should be granted. The application is dismissed with costs of the application in the cause.

Bateman, J.A.