Date: 20020911
Docket No.: S.AM. 2265, 2648 and 2649

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Van de Wiel v. National Life Assurance Company, 2002 NSSC 209]

2002 **S.AM. 2649**

DEBORAH van de WIEL

APPLICANT

- and -

THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA

RESPONDENT

1993 **S.AM. 2265**

DEBORAH van de WIEL

PLAINTIFF

- and -

ANNIE MILLS

DEFENDANT

1995 **S.AM. 2248**

DEBORAH van de WIEL

PLAINTIFF

- and -

THE DOMINION INSURANCE CORPORATION

DEFENDANT

D E C I S I O N

HEARD BEFORE: The Honourable Justice Suzanne M. Hood at Amherst, Nova Scotia on June 6, 2002

DECISION: June 6, 2002 (Orally) **WRITTEN RELEASE:** Sept. 10, 2002

COUNSEL: **James S. O'Neil** for Deborah van de Wiel
Kevin A. MacDonald for The National Life Assurance Company of Canada
Colin J. Clarke for Dominion Insurance Corporation

HOOD, J.: (Orally)

[1] The key case for the court to consider in an application such as this is the *Bank of Nova Scotia v. Golden Forest Holdings Limited* [1990] N.S.J. No. 230, a decision of the Court of Appeal in 1990. That was a situation where there had been a foreclosure order and a consent order had been varied by Justice Tidman.

[2] The court in that case talked about inherent jurisdiction after referring to the *Civil Procedure Rules* and saying that they did not apply. Hallett, J.A. went on to say, therefore, if the power to vary an order exists it must be founded in the court's inherent jurisdiction.

[3] He then referred to *Halsbury* on Inherent Jurisdiction and went on to say that:

> Apart from those matters covered by Rules 15.07 and 15.08, the inherent jurisdiction of judges of the Supreme Court of Nova Scotia does not extend to varying "final" orders of the court disposing of a proceeding unless the order does not express the true intent of the Court's decision. If it were otherwise, there would not be the certainty or finality to Court orders that the judicial process requires.

[4] He went on in that case to talk about the foreclosure order not being a final order and therefore, would have varied it, except that it was a consent order. That is the situation which applies here.

[5] In *Goodwin v. Rodgerson* [2002 N.S.J. No. 43, (N.S.S.C.), Justice Stewart concluded that she could not vary or undo a dismissal order issued by the Prothonotary under *Civil Procedure Rule* 28.11 because of the *Golden Forest Holdings* decision. She referred to Rules 15.07 and 15.08 and said that since the April 11, 2001 order was a final order of the court disposing of a proceeding and it expresses the true intent of the court's decision, that is, to dismiss the action, the inherent jurisdiction of a judge of the Supreme Court of Nova Scotia does not extend to vary or set it aside.

[6] I am not bound by that decision. I conclude that in the circumstances of this case that the true interpretation of the *Golden Forest Holdings* case does allow me to use my inherent jurisdiction to set aside the Rule 28.11 order dismissing the action. In coming to that conclusion I look carefully at the wording of the *Golden Forest Holdings* case where the court talks about final orders of the court and decisions which express the true intent of the court's decision. In that regard I consider it to be significant that this is not a court decision which I am varying. There was no decision on the merits. It was a procedural operation under Rule 28.11. It seems to me that it is important that a case like this not be dismissed by a means like that through no fault of the plaintiff herself. It is clear from the affidavits on file that, although there were notices going back and forth, soon after this Rule 28.11 order was issued there was a change of solicitor. It certainly appears that

there were some difficulties with work being done on the file that were no fault of the plaintiff.

[7] It seems to me that it is appropriate in a case like this that the court not give up its inherent jurisdiction to undo an injustice which would cause such severe prejudice to a plaintiff by having her case set aside.

[8] I note the wording of the Newfoundland Court of Appeal in *Beanland v. Beanland* [1997 N.J. No. 145] which talks about final decisions of the court not being reopened but then goes on to say:

> Of course, there is also an inherent jurisdiction in the court to correct or set aside, *ex debito justitiae*, a decision, the fundamental basis for which is found to be lacking.

[9] In this case I find that the fundamental basis for granting the Rule 28.11 order was that the matter was not proceeding, that it was dead. It is clear to me from the material in the file that the matter was not a dead matter. There was apparently, or may well have been, solicitor error that resulted in the action being dismissed. That is not, as I said, the fault of the plaintiff and I will allow the Rule 28.11 order to set aside.

J.