Date: 2001/07/26
Docket: S.H. No. 172491

IN THE SUPREME COURT OF NOVA SCOTIA

[Cite as: Wesco Distribution-Canada Inc. v. Stannair Energy Management Group., 2001 NSSC 151]

BETWEEN:

WESCO DISTRIBUTION-CANADA INC., a body corporate

PLAINTIFF

- and -

STANNAIR ENERGY MANAGEMENT GROUP, a body corporate and **WYECO SUPPLY INCORPORATED**, a body corporate

DEFENDANTS

D E C I S I O N

HEARD BEFORE:	the Honourable Justice David W. Gruchy (in chambers)
PLACE HEARD:	Halifax, Nova Scotia
DATE HEARD:	July 26, 2001
DECISION:	July 26, 2001 (Orally)
WRITTEN RELEASE:	October 29, 2001
COUNSEL:	Dennise K. Mack and Joseph Burke a/c for Wesco Distribution-Canada Inc.
	Tim Hill for Wyeco Supply Incorporated
	Peter Rumscheidt for Stannair Energy Management Group

GRUCHY, J. (Orally):

[1] The application is for an order to set aside two orders of Justice Felix Cacchione dated May 28, 2001 which had the effect of allowing funds to be paid out of court. This application is for an order that the funds be repaid to the court subject less to the amount was paid to Her Majesty the Queen by way of a "super lien."

[2] The applicant Wesco apparently had done some construction work for Minas Electric Limited on a theatre complex located in Halifax. I gleaned that from reading the pleadings. Wesco was not paid for its entire work and sued Minas Electric Limited and obtained judgment against that company in the amount of $18,282.29. There were various other execution creditors of Minas as well and in addition one of the parties before me now, Stannair Energy Management Group, claimed a mechanics' lien against the property and against Minas.

[3] On June 24, 1998, the amount of $22,970.96 was paid into court relative to the creditors of Minas and in August, 1999, a further sum was paid into court in the amount of $5,821.56.

[4] Prior to that Revenue Canada had given notice to pay by virtue of its super lien. On June 16, 2000 Stannair Energy Management Group filed a notice of trial seeking assessment of the validity of its lien against Minas Electric.

[5] I do point out, however, that the solicitor for Maxim Construction Inc. J.D. MacIsaac, Q.C. in correspondence to the chambers judge at that time submitted various matters but then concluded while addressing the matter of remedies sought:

> Maxim requests the court to grant an order permitting Maxim to pay the residual monies into court, less costs; and requests the court determine the priority between the lien claimant, Revenue Canada, and execution creditors of Minas.

[6] So the various execution creditors were on notice at that point that a determination of priorities would be made. The copy of the notice of trial at that time was given to all the various execution creditors and I also point out that in Mr. Rumscheidt's letter to Mr. MacIsaac on August 24, 1999, he as well indicated that he noted that Mr. MacIsaac briefed the chambers judge and had asked that the court determine priority between the claimants. A

copy of that letter as well went to Mr. Erroll Treslan who preceded Ms. Mack in the handling of this file on behalf of Wesco.

[7] At that time Wesco opted not to participate in the trial and decided rather it would await the court's determination of the lien's validity. Accordingly, the only parties at that point before the court were Stannair represented by Mr. Rumscheidt and Wyeco represented by Mr. Hill. It is my view that other parties, having chosen not to participate, in effect allowed the two participating parties to appear before the court to proceed with the action and all the implications involved in the processing of an action, including the settlement of same.

[8] Mr. Hill and Mr. Rumscheidt at that point settled the matter and presented to the court a consent order which was appropriately granted. The effect of the order was that Revenue Canada had established its priority of claim in the amount of $8,575.00 and that left approximately $22,924.80 which was divided equally between Stannair and Wyeco.

[9] I now proceed to examine some of the information which has been exhibited to me. I have already mentioned the letter of Mr. MacIsaac to the presiding judge dated August 20, 1999 and at the risk of being somewhat repetitive I do point out once again that Mr. MacIsaac requested the court to determine the priority between the lien claimant Revenue Canada and execution creditors of Minas.

[10] Ms. Mack on behalf of the applicant herein responded to Mr. MacIsaac's letter and indicated to him, presumably with copies to all, that she would arrange to have an articled clerk attend the application but noted that "We will not be taking any position at this point."

[11] On June 16, 2000 Mr. Rumscheidt on behalf of his client wrote to all concerned including Mr. Treslan and asked that as soon as possible the various counsel indicate to him if their clients intended to participate in the trial.

[12] On the previous day Mr. Rumscheidt had as well written to the court's scheduling office and indicated that although there were several creditors of Minas Electric Limited who he understood wished to make a claim against the monies held in court, all counsel were asked at that time to indicate their participation.

[13] On June 15, 2000, Mr. Rumscheidt gave notice of trial. The notice was with respect to *Stannair Energy Management Group v. Minas* and *Maxim v. Stannair* but the notice of trial did go to all concerned including to Mr. Treslan.

[14] On July 5, 2000, apparently at the request of Ms. Mack, Mr. Rumscheidt forwarded to Ms. Mack all the various pleadings with respect to the claim for lien by Stannair against Minas up to and including orders of Justice Davison on June 24, 1998, and Justice Moir of September, 1999. I will, of course, conclude from that correspondence that Ms. Mack at that point considered the various options available to her client.

[15] The statement of claim of Stannair which was forwarded to Ms. Mack and dated July 24, 1998, set forth the various claims including the requests for an order that the defendants pay $19,970.96 plus interest with respect to the *Mechanics' Lien Act*.

[16] On July 19, 2000, Ms. Mack wrote to the various counsel involved, Mr. Rumscheidt on behalf of Stannair, Mr. Harper on behalf of another claimant, Mr. Donohue on behalf of the Department of Justice, Mr. Hill who is before the court, Mr. Rodger Noel of Credifax Atlantic Ltd. Mr. Mark Cleary of Minas Electric Limited. She said: "I wish to advise that my instructions in this matter are not to participate."

[17] On August 17, 2000 once again, Mr. Rumscheidt wrote to the court with copies of all counsel and essentially set forth the position that other counsel had taken including the various instructions that clients would not participate in the trial. He concluded:

> In the circumstances, we have confirmation from all interested parties that they are either in agreement to waiver of the sixty-day time period or, alternatively, will not be participating in the trial. As such, I would ask that we please have contact from your office as soon as possible as to the next available two-day trial dates. In the circumstances, it appears that only the undersigned and Tim Hill will be participating in the trial itself.

[18] I finally note in the reply relatively recently by Ms. Mack that she confirmed precisely what she has told me today that it was her position at that time that she would not participate in the trial but would wait to see whether the court determined that the lien was valid.

[19] The application is made herein pursuant to *Rule* 15.07 and *Rule* 15.08 and for the purposes of this oral decision I will not read those *Rules*. As Ms. Mack has pointed out to me *Rule* 15.07 is known as the slip rule and is usually the vehicle used by the court to correct accidental slips or omissions. The matter now before me, however, is not what would be considered an accidental slip or omission; but the *Rule* does go on to say that it may amend an order to provide for any matter which should have been but was

not adjudicated upon. Ms. Mack has referred to the cases of *Wood v. Wood* (1982), 56 N.S.R. (2d) 217 (T.D.) and *Burnac Leaseholds Ltd. v. Mun. of Yarmouth*, (N.S.T.D.) S.H. No. 29039, January 14, 1981 (unreported). She has also referred to the case of *Dalziel v. Dalziel* (1977), 3 B.C.L.R. 73 (S.C.) which emphasizes, I think appropriately, that the present *Rule* does go beyond an accidental slip or omission and does give the court authority to amend an order to provide what actually should have been provided in the first instance. That raises the question: What should have been provided in the first instance? In my view, Mr. Rumscheidt and Mr. Hill were the only active participants before the court and accordingly in my view had the authority to settle it.

[20] Ms. Mack has taken the position as well that she had in effect taken a wait and see position which position was not brought before the court. Indeed, that position had not been essentially made known to the other participants.

[21] I am also extremely conscious of the fact that a consent order in circumstances such as these is very difficult to reverse and although the court does have an inherent jurisdiction to vary such an order it does not usually have the power to vary what I consider to be a valid consent order giving effect to a settlement. I refer to *Bank of Nova Scotia v. Golden Forest Holdings Ltd.* (1990), 98 N.S.R. (2d) 429 (C.A.) a case which has been cited to me by Ms. Mack.

[22] Mr. Hill's position chronologically preceded Mr. Rumscheidt's and, accordingly, probably stole some of Mr. Rumscheidt's thunder. Mr. Hill points out (I am not certain that this is entirely relevant and is certainly not a determining factor.) that the claims of Wyeco, Stannair and Wesco amounted to approximately $127,800.00. If there had been a trial, he points out, and Wesco had participated and had been successful in arguing that the Stannair lien should not prevail, Wesco would have only been entitled to approximately $3,300.00. As I say, I do not want to rely on that in any way because I do not think the amount is what is at issue. But he does point out that the smaller of the two sums; that is, roughly $5,500.00 paid into court, on the basis of the interpleader application was made pursuant to *Civil Procedure Rule* 50. *Rule* 50.04(1)(c) is set forth in Mr. Hill's brief and I will not read it for the purposes of an oral decision. But where a party fails to appear in response to an application for interpleader relief, the court may make an order declaring the claimant and all persons claiming under him be forever barred from prosecuting the client. Mr. Hill points out, and I think

fairly, that counsel for Wesco clearly indicated it was her intention not to appear and that, he says, amounts to a failure to appear.

[23] Accordingly, Mr. Hill says that Wesco thereby lost all claims to "those funds". I think that by "those funds" Mr. Hill means the amount at issue in the interpleader or more precisely the $5,500.00. But if you take out the $5,500.00 that was not at issue there together with the super lien and the mechanics' lien there was no money left over.

[24] Mr. Hill points out that the claim for Stannair would ordinarily take priority over various judgments including those of presumably Wesco and Wyeco. Wyeco continued before the court. Mr. Hill points out that in the absence of Stannair's claim being disputed successfully, Stannair would have been entitled to all the remaining funds after payment of the super priority claim of Revenue Canada which is the point that I just made.

[25] Wyeco chose to contest the Stannair mechanics' lien. Indeed, Wyeco was the only claimant which apparently continued to contest it. That put the only parties before the court as Stannair and Wyeco and Stannair had the carriage of the mechanics' lien action.

[26] Mr. Hill points out and I think correctly that Stannair had the authority to settle or resolve the proceedings in any way it saw fit as there were simply no other funds and only the claim of Wyeco that it had to deal with. Stannair was at liberty to resolve the remaining dispute with Wyeco in whatever manner Stannair thought. Mr. Hill has brought to my attention the case of *Beaver Lumber Company v. Curry et al.*, [1926] 4 D.L.R. 619 (Sask. C.A.). The result of that was that a claimant who did not appear "to the writ" establishing a claim against the land under their mortgage, must be taken to admit at least that the plaintiff's liens have priority over its mortgage, I find to be exactly the position of Wesco in this particular case.

[27] Finally I do wish to once again say that there was an implied consent to the carriage of the action on the part of Stannair and by failing to appear it was a concession to the priority of Stannair's mechanics' lien.

[28] On the basis of what I have already said I would dismiss this action but there is another matter I want to bring to counsel's attention. I refer to *Germscheid v. Valois* (1989), 34 C.P.C. (2d) 267(Ont. H.C.). This was a case in which Mr. Justice Kurisko of the Ontario High Court of Justice addressed the matter of what I refer to as "wait and see plaintiffs".

[29] The wait and see plaintiff is one who sits back and waits for other parties to carry the action taking no risk themselves, incurring no costs themselves and

then hopes to take benefit of the action. It has been held that such a tactic is an abuse of process. A portion of the head note of this case is as follows:

> The concept of abuse of process has developed out of the doctrine of issue estoppel. Canadian Courts have declined to directly embrace the nonmutual issue estoppel doctrine (an American concept) but have attempted to achieve some of the same results by the use of the concept of abuse of process. Canadian Courts should, however, take steps to prevent litigants from taking a "wait and see" approach, i.e., where a plaintiff would stay out of the first action brought by another plaintiff with a view to availing himself or herself of the benefit of a favourable judgment but avoiding the consequences of an unfavourable judgment in the first action.
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> . . .
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> The "wait and see" approach should attract cost sanctions for two reasons. First, other litigants would be deterred from adopting unjustified or unexplained "wait and see" tactics. Second, the defendants could be indemnified for the expenses that were now being incurred because the plaintiff failed to participate in the first trial. Therefore, the plaintiff was ordered to pay the full solicitor-and-client costs of the opposing defendants and the supporting defendants on the motion. (That is, of course where the motion is successful.)

[30] The case refers to an American case, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645 (1979) which essentially sets forth the advocated approach to a wait and see party.

[31] I refer this case to your attention because I think it is germane ultimately but not solely. It is not the sole reason for my decision herein. My decision is not dependent upon this particular case but it is of relevance herein.

[32] Therefore the application herein is dismissed with costs. I am not going to award solicitor-client costs; instead I will take advantage of the discretion I have and name a specific figure. I award $650.00 costs to Mr. Rumscheidt's client and I award $1,300.00 to Mr. Hill's client.

J.