

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** 778938 *Ontario Limited v. Annapolis Management Inc.*, 2022 NSSC 65

**Date:** 20220308

**Docket:** Halifax No. 480460

**Registry:** Halifax

**Between:**

778938 Ontario Limited

*Applicant*

v.

Annapolis Management Inc.

and

Ruby LLP

*Respondents*

**Judge:** The Honourable Justice Gail L. Gatchalian

**Heard:** March 7, 2022, at Kentville, Nova Scotia

**Counsel:** Dillon Trider, for the Applicant  
Peter Planetta, for the Respondents

**By the Court:**

**Introduction**

[1] Two days before the hearing of this Application in Court, the Respondents Annapolis Management Inc. and Ruby LLP requested an adjournment in order to file their affidavits, which they did not file by the deadline set by the court. The Applicant 778938 Ontario Limited opposed the request. I dismissed the motion to adjourn the hearing, with reasons to follow. These are my reasons.

[2] Civil Procedure Rule 5.21(3) sets out what I must consider in determining a motion for an adjournment less than sixty days before the hearing:

5.21(3) A judge who determines a motion for an adjournment less than sixty days before the date for hearing an application in court must consider each of the following:

- (a) the prejudice to the party seeking the adjournment, if the party is required to proceed to the hearing;
- (b) the prejudice to other parties, if they lose the hearing dates;
- (c) the public interest in making the best use of court facilities, judges' time, and the time of court staff.

[3] Civil Procedure Rule 5.15(1) says that a party to an application may only file an affidavit within the deadlines under that Rule or set by a judge giving directions, unless a judge hearing the application permits an affidavit to be filed later. Rule 5.15(2) sets out what a judge must consider on a motion to allow a later affidavit:

- (a) the prejudice that would be caused to the party who offers the affidavit, if the application proceeds without that affidavit;
- (b) the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice of an adjournment if that would be a result;
- (c) if an adjournment would result, the public interest in making the best use of court facilities, judges' time, and the time of court staff.

[4] I concluded that, in the circumstances of this case, the prejudice to the Applicant if an adjournment were granted, combined with the public interest in making the best use of court facilities, judges' time and the time of court staff, outweighed the prejudice to the Respondents, if any, should they be required to proceed with the hearing.

[5] The background to the request for an adjournment was important to my decision.

### **Background**

[6] The Applicant seeks special, compensatory and punitive damages from the Respondents as follows:

- (1) special damages for nuisance in the form of the risk of increased snow load on the roof of a building owned by the Applicant ("the Attica"), consisting of the estimated cost of:

- (a) reinforcing the Attica's roof,

(b) tying the Attica's roof to the building owned by the Respondents ("the NFB building"), and

(c) replacing damaged flashing;

(2) compensatory damages in lieu of a permanent injunction that Annapolis had previously sought, without success, for the snow load nuisance; and

(3) punitive damages for instances of trespass that the Applicant alleges occurred in 2021.

[7] The Respondents acknowledge that they are responsible for the cost of reinforcing the Attica's roof. The only question is quantum.

[8] In a motion for directions heard on May 26, 2021, the Honourable Justice Peter Rosinski set the following deadlines:

- Applicant's Affidavits: July 30, 2021
- Respondents' Affidavits: August 27, 2021

[9] The Applicant filed its affidavits, including an affidavit of Simon Wilbee, Vice President of Construction for the Applicant, filed on July 30, 2021. Mr. Wilbee attached estimates for the cost of (a) reinforcing the Attica's roof, (b) tying the roof to the NFB Building and (c) replacing damaged flashing.

[10] The Respondents did not file any affidavits. In their brief, the Respondents conceded that the request for special damages should be allowed in part.

[11] The hearing was scheduled to take place on September 28, 2021.

[12] On September 24, 2021, I held a case management conference with counsel by telephone. During the call, counsel for the Applicant noted that no evidence had been filed by the Respondents. Counsel for the Respondents did not indicate any intention to file affidavits. Counsel for the Respondents indicated his intention to cross-examine Mr. Wilbee on his July 30, 2021 affidavit.

[13] The hearing was rescheduled to take place on November 2, 2021.

[14] At the hearing on November 2, 2021, the Respondents objected to the admissibility of the estimates attached to the Affidavit of Mr. Wilbee on the basis of hearsay. The Respondents did not file a notice of objection to admissibility, which was required to be filed before the Finish Date: Civil Procedure Rule 5.16(1). The Respondents did not provide advance notice to the Applicant of the objection. The Respondents did not mention their intention to make this objection during the case management call on September 24, 2021. I adjourned the hearing, and allowed the Applicant the opportunity to provide direct evidence of the estimates. I set the following deadlines, which were agreed to by both parties:

- Applicant's Affidavits: February 9, 2022
- Respondents' Affidavits: February 23, 2022
- Notice of Objection to Admissibility of Applicant's Affidavits: February 23, 2022
- Notice of Objection to Admissibility of Respondents' Affidavits: March 2, 2022
- Applicant's Rebuttal Affidavits: March 2, 2022

[15] The hearing was adjourned to March 9 and 10, 2022, to begin at 2:00 p.m. each day.

[16] I held a case management call with counsel on January 28, 2022. Both counsel stated that they did not anticipate any problems meeting the deadlines for the filing of affidavits.

[17] The Applicant filed affidavits on February 9, 2022 that provided direct evidence of estimates from contractors that did not differ in any material way from the estimates attached to the Affidavit of Mr. Wilbee dated July 30, 2021.

[18] On February 24, 2022, thirteen days before the hearing, I held another case management call with counsel. I received, on that date, a letter from counsel for the Respondents dated February 23, 2022, stating that the Respondents did not have enough time to obtain the information required and therefore they were not able to file their affidavits by the February 23, 2022 deadline. The Respondents requested

an extension of at least one week. I granted the Respondents a six-day extension to the deadline and set revised deadlines as follows:

- Respondents' Affidavits: March 2, 2022
- Applicant's Rebuttal Affidavits: March 8, 2022

[19] The Respondents did not meet the March 2, 2022 deadline. No correspondence was received by the Court from the Respondents until March 7, 2022, five days after the deadline and two days before the hearing, when the Respondents sought an adjournment of the March 9 and 10, 2022 hearing dates.

### **Prejudice to Respondents if Required to Proceed with Hearing**

[20] The Respondents filed an Affidavit of Steve Caryi, President of Annapolis, in support of their motion to adjourn. He states that, on November 2, 2021, he was advised of the adjournment of the hearing and the filing dates set by the court. He says that he encountered substantial difficulty obtaining estimates and that he believes that contractors are very busy and many are not interested in taking the time to provide estimates. He states that he was able to make arrangements to have multiple estimates prepared *after* receiving the Applicant's affidavits on February 10, 2022. He states that he believed that these would be provided before the deadline and that the Respondents' affidavits would be filed on time. He says that

the contractors he relied on have not provided him with estimates for the required work.

[21] There was no assertion by Mr. Caryi or by counsel for the Respondents that the estimates they intend to obtain will be material to the case or materially different from those provided by the Respondents. Any prejudice to the Respondents if required to proceed with the hearing is purely speculative.

[22] Counsel for the Respondents characterized the predicament of the Respondents as being out of their control. I do not agree. The substance of the estimates at issue were included in the July 30, 2021 Affidavit of Mr. Wilbee. The Respondents chose not to file affidavits in reply to that Affidavit by the August 27, 2021 deadline set by Rosinski J., and took the chance that their last-minute objection to the admissibility of those estimates would succeed despite the fact that the objection was not timely. Once the Respondents knew, on November 2, 2021, that the Applicant was being provided with an opportunity to file affidavits attaching the estimates to address the hearsay objection, the Respondents should have begun the work to ensure that they would be in a position to file their affidavits on time rather than wait to receive the Applicant's affidavits. If any prejudice is caused to the Respondents, it is not due to the denial of the



adjournment but their failure to take reasonable steps to ensure that they were able to meet the deadline set by the court almost four months earlier.

### **Prejudice to Applicant If Hearing Adjourned**

[23] The Applicants were prepared to proceed on November 2, 2021, and had their witnesses available for cross-examination. They have prepared again for the March 9 and 10, 2022 hearing dates, again ensuring their witnesses are available, including the contractors who prepared the estimates. The hearing, as I mentioned, is in two days. The Respondents acknowledge that an adjournment will cause the Applicant some prejudice. The longer this dispute goes unresolved, the more prejudice there is to the Applicant.

### **Public Interest in Best Use of Court Facilities, Judges' Time, and Time of Court Staff**

[24] Court facilities have been used and the time of judges and court staff has been expended on numerous occasions to ensure that the parties were ready to proceed on the November 2, 2021 hearing date and then the rescheduled hearing dates on March 9 and 10, 2022. The hearing has already been adjourned once. Given the history of this proceeding, it would not, in my view, be in the public

interest to grant the Respondents' request for an adjournment and delay the hearing further.

### **Conclusion**

[25] I conclude that the prejudice to the Applicant if an adjournment were granted, combined with the public interest in making the best use of court facilities, judges' time and the time of court staff, outweigh the prejudice, if any, to the Respondents if they were required to proceed with the hearing.

[26] The Respondents' motion for an adjournment is dismissed.

[27] The parties agreed that the costs of this motion will be addressed by them in closing argument after the hearing of the application.

Gatchalian, J.