

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Kentville (Town) v. Mike's Clothing Limited*, 2022 NSSC 273

**Date:** 20220926

**Docket:** *Kentville*, No. 511564

**Registry:** Kentville

**Between:**

Town of Kentville

*Applicant*

v.

Mike's Clothing Limited

*Respondent*

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

**Heard:** September 12, 2022 in Kentville, Nova Scotia

**Counsel:** John Shanks, for the Applicant  
Richard Norman, for the Respondent

**By the Court:**

**Introduction**

[1] In this Application, the Applicant, the Town of Kentville, seeks reconveyance of a property under the terms of an agreement for purchase and sale between the Town and the Respondent, Mike's Clothing Limited. The Town says that Mike's failed to meet the construction deadlines in the agreement, entitling the Town to buy the property back. Mike's response is that the Town denied its request for an extension of the construction deadlines in bad faith. In this motion, Mike's asks for an order authorizing the issuance of eight discovery subpoenas. Mike's says that the witnesses it wishes to discover have information that is relevant to its claim that the Town breached its duty of good faith contractual performance. The Town disputes the relevance of the information.

[2] Andrew Zebian is the directing mind of Mike's. He is also a Town Councillor. As a Councillor, Mr. Zebian attempted to bring to public attention a 2020 letter from the former Chief Administrative Officer ("CAO") of the Town, Kelly Rice, to Council. In the letter, Ms. Rice alleged that the Mayor and certain councillors had engaged in inappropriate conduct. Apparently, the Town terminated her employment one day later. Mike's says that Council decided to

deny its extension request and to enforce reconveyance of the property in order to punish Mr. Zebian for raising concerns about the letter and the termination of Ms. Rice.

[3] Mike's says that the witnesses have the following information relevant to its claim of retribution on the part of Council against Mr. Zebian:

1. information about the merits of Ms. Rice's allegations and the Town's termination of Ms. Rice;
2. information about how the Town treated extension requests of other developers subject to construction deadlines in contracts with the Town and the Town's efforts, if any, to buy back properties from those developers;
3. information about what development was happening in the Town during the Covid-19 pandemic;
4. information about the creation of the agreement and the progress of the development on the part of Mike's.

[4] The Civil Procedure Rules do not set out a test for the approval of a discovery subpoena. However, in my view, Mike's must establish that the information sought from the witnesses is relevant, or that it is likely to lead to

relevant information: under Civil Procedure Rule 18.13(1), a witness at a discovery must answer questions that ask for relevant evidence or information that is likely to lead to relevant evidence. I should also be satisfied that discovery of the witnesses will promote the just, speedy and inexpensive determination of this Application:

Civil Procedure Rule 1.01.

[5] “Relevant” is defined in Rule 14.01(1) as having the same meaning as at the trial of an action. As the motions judge, I am to assess whether the judge presiding at the trial would find the information to be relevant. At this stage in the process, relevance can only be assessed based on the pleadings and the evidence known at this time. Relevant information is information that is probative of a material fact in issue in the proceeding. Information is probative if it logically makes something more or less likely. As the motions judge, I do not assess how probative the information would be in the context of the trial of the action but whether it is probative of a material fact in issue. If the information has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence, then it is relevant. See *Murphy v. Lawton’s Drug Store Limited*, 2010 NSSC 289 at para.16; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4 at

para.46; and *Wilson Fuel Co. v. Power Plus Technology Inc.*, 2015 NSSC 304 at para.16.

[6] The motions judge should take a somewhat more liberal view of the scope of relevance in the context of disclosure and discovery than might be taken at trial, subject to concerns about confidentiality, privilege, cost of production, timing and probative value: *Laushway v. Messervy*, 2014 NSCA 7 at para.49, citing with approval *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 57 at para.9.

Nonetheless, a request for a discovery subpoena should, like a request for production, be supported by evidence, lest it amount to a fishing expedition: see *Intact Insurance Company v. Malloy*, 2020 NSCA 18 at paras.36-41. Allegations, no matter how specifically worded or drafted, which have no basis in the facts or the evidence without more, cannot be the basis for a production application, nor should they be the basis for a discovery subpoena: see *Intact* at para.35.

[7] The Court of Appeal has suggested a number of questions that a motions judge may ask in determining whether to exercise their discretion to make an order for production. I find that those questions are also helpful in determining whether I should exercise my discretion to authorize the issuance of discovery subpoenas, in particular:

(a) How close is the connection between the sought-after information and the matters in dispute?

(b) Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?

(c) What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?

See *Laushway, supra* at para.86

[8] In order to determine whether I should authorize the issuance of the discovery subpoenas requested by Mike's, I will consider:

1. The evidence known at this time.
2. What material fact(s) are in issue.
3. Whether the information sought from the witnesses is probative of a material fact in issue and if so, whether authorization of the discovery subpoenas will promote the just, speedy and inexpensive determination of this Application.

### **The Evidence Known at this Time**

[9] In support of the motion, Mike's filed an affidavit of Mr. Zebian. The Town relied on two affidavits from its current CAO, Dan Troke. I have reviewed their affidavits and the exhibits to those affidavits in detail. Both Mr. Zebian and Mr. Troke were cross-examined at the hearing of the motion.

[10] When the parties included the original construction deadlines in the agreement, each deadline was followed by the following language: "Failing which, the Town of Kentville reserves the right to purchase the land back for \$71,000 (Seventy-One Thousand Dollars) plus HST." The parties provided for the possibility of extension to those deadlines as follows: "Any and all deviations from the time table are to be agreed upon by both parties 30 days prior to the dates agreed upon above."

[11] The parties agreed to extend the construction deadlines three times. The last extension was contained in a June 29, 2021 Amending Agreement, which included the following two clauses:

3. The dates agreed to herein are critically important and [Mike's Clothing] shall not request any further extension thereof and [Mike's Clothing] specifically understands and agrees that the Town may buy back the property pursuant to the agreement, as

amended, if [Mike's Clothing] does not strictly comply with the terms of the agreement, as amended.

4. All terms of the agreement (as amended), except as specifically amended in this Amending Agreement, are confirmed and survive this Amending Agreement, including (without limitation) the Town's right to buy back the property.

[12] Mr. Zebian's evidence is that, in the spring of 2021, he made a freedom of information request for a copy of Ms. Rice's 2020 letter, which was denied. He says that, in or around June of 2021, he received a copy of the letter from an anonymous source. In the letter, Ms. Rice accused the Mayor and some councillors of creating an unsafe and unhealthy work environment, and of abusive and disrespectful behaviour. Mr. Zebian says that, on or around July 14, 2021, he met with Mayor Sandra Snow and Mr. Troke about the letter. He says that the conversation became volatile, that Mr. Troke began yelling at him and that the Mayor said that she would be calling the police to retrieve the envelope that the letter came in. Mr. Zebian says that he immediately tried, unsuccessfully, to convene an emergency session of Council to discuss the matter. He says that on July 15, 2021, shortly after the meeting, he received a letter from legal counsel for the Town, demanding that he refrain from speaking publicly about the letter, and threatening to take legal action against him. Mr. Zebian says that his relationship with the Mayor and Councillors Craig Gerrard and Cate Savage subsequently



changed, and that they became increasingly agitated at his public requests for disclosure of Ms. Rice's allegations and his requests to address the concerns of Ms. Rice and staff. The Mayor and Councillors Gerrard, Savage and Maxwell had been on Council in 2020, when Ms. Rice wrote her letter and when she was apparently terminated.

[13] Mr. Zebian says that Mike's received its footing permit in August of 2021. He says that he provided the Town with a letter from his general contractor, Roscoe Construction, which outlined projected completion dates. He says that he also provided the Town with a letter to prove that he had the necessary financing for the project.

[14] Mr. Zebian says that, at the October 25, 2021 Council meeting, a motion was made to extend the deadlines for the construction work. He says that Mayor Snow and Councillors Gerrard and Savage, among others, voted against the request, and voted in favour of enforcing reconveyance of the property.

[15] Mr. Zebian says that the Town has not done a property "buy-back" before, and that previous developers, "acting reasonably" had been given extensions to complete their development, even though none of them had met the contractual deadlines. He says that most of these were handled very casually and without

decisions of extensions via Council. He says that former CAOs and the Town's Planning Department can explain the process and provide more details. He asserts that the decision of council to buy back the property constituted retribution against him for pursuing the "Kelly Rice issue."

[16] Mr. Zebian says that **Ms. Rice** has information about the merits of her allegations, and that **Councillor Maxwell** "can potentially provide information about the 2020 council's decision about Ms. Rice and the Town's actions and decisions in relation to [Mike's] since then."

[17] Mr. Zebian says that former CAOs, **Bill Boyd** and **Mark Phillips**, and **Beverly Gentleman**, who works in the Town's planning department, would know how other developers had been dealt with by the Town when they missed construction deadlines, and would have historical knowledge about the Town's efforts, if any, to buy back properties from developers.

[18] He says that Ms. Gentleman and **Lindsay Young**, an economic development officer with the Town, have evidence about what development was happening in the Town during the Covid-19 pandemic. He says that Ms. Young also told him that, in June of 2021, Councillor Savage asked her if she told Mr. Zebian about Ms. Rice's letter and said that if Mr. Zebian "ever gets his hands on the Letter, we are

all going down,” and that “[w]hen however gives the Letter to him, Mayor Snow will prosecute them to the maximum.”

[19] He says that **Donna Conrad**, a realtor, has information relating to the creation of the agreement, and **Kevin Roscoe**, from Roscoe Construction, has information relating to the progress of the development of the property.

[20] The Town disputes Mr. Zebian’s evidence about his meeting with Mr. Troke and Mayor Snow.

#### **What Material Fact(s) Are in Issue?**

[21] Mike’s relies on the duty to exercise contractual discretion in good faith, meaning that the parties to a contract must exercise such discretion reasonably, that is, in a manner connected to the underlying purposes of the discretion granted by the contract: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paras.1 and 4.

[22] A material fact is one that would affect the result: see *Shannex Inc. v Dora Construction Ltd.*, 2016 NSCA 89 at para.34. I am not satisfied that Mike’s claim that the Town refused the extension request to punish Mr. Zebian is a *material* fact in issue, because the June 19, 2021 Amending Agreement does not provide for

extension requests and explicitly prohibits them. Council's decision to refuse a further extension to the construction deadlines is not linked to the Town's performance of the contract (see *Callow Inc. v. Zollinger*, 2020 SCC 45 at paras.37, 49 and 51).

[23] Mike's also argues that the Town's decision to enforce the reconveyance term constituted retribution against Mr. Zebian, in violation of the Town's duty of good faith contractual performance. To the extent that the contract may be interpreted to provide with Town with the discretion whether or not to enforce reconveyance in the event that Mike's fails to meet a construction deadline, I am prepared to accept, for purposes of this motion, that Mike's claim that the Town's decision to enforce the reconveyance term constituted retribution against Mr. Zebian is a material fact in issue.

**Is the Information Sought from the Witnesses Probative of a Material Fact in Issue?**

***The Merits of Ms. Rice's Allegations and the Town's Treatment of Her***

[24] I am not satisfied that information about the merits of Ms. Rice's allegations makes Mike's claim of retribution against Mr. Zebian by the Mayor and certain councillors more or less likely, as a matter of logic, than the claim would be in the

absence of such evidence. If Ms. Rice's allegations were well-founded, the Mayor and certain councillors could have retaliated against Mr. Zebian for trying to make public Ms. Rice's meritorious allegations alleging misconduct on their part. If Ms. Rice's allegations were not well-founded, the Mayor and councillors could have retaliated against Mr. Zebian for trying to make public Ms. Rice's unmeritorious allegations. The Mayor and councillors could have also retaliated against Mr. Zebian for trying to make public Ms. Rice's allegations, regardless of their merit, because the allegations are the subject of a confidentiality agreement between Ms. Rice and the Town. For these reasons, I conclude that information about the merits of Ms. Rice's allegations is not probative of Mike's claim that Town councillors voted to enforce reconveyance in order to punish Mr. Zebian for raising concerns about Ms. Rice's allegations.

[25] For similar reasons, I am not satisfied that information about the Town's treatment of Ms. Rice makes Mike's claim of retribution against Mr. Zebian by the Mayor and certain councillors more or less likely, as a matter of logic, than the claim would be in the absence of such evidence. If the Mayor and certain councillors retaliated against Ms. Rice for her letter, they might have also retaliated against Mr. Zebian for raising concerns about their treatment of Ms. Rice. If the Mayor and councillors did not retaliate against Ms. Rice for her letter, they might

have retaliated against Mr. Zebian for suggesting that they mistreated Ms. Rice.

The Mayor and councillors might have retaliated against Mr. Zebian for attempting to raise concerns about their treatment of Ms. Rice because the issues are subject to a confidentiality agreement between the Town and Ms. Rice. For these reasons, I am not satisfied that information about the Town's treatment of Ms. Rice is probative of Mike's claim that Council voted to enforce reconveyance in order to punish Mr. Zebian for raising concerns about their treatment of Ms. Rice.

[26] I am also not satisfied that authorizing discovery subpoenas for Ms. Rice and Councillor Maxwell would promote the just, speedy and inexpensive determination of this Application. The anticipated time and expense required to discover this information from Ms. Rice and Councillor Maxwell will not be reasonable having regard to the importance of the information to the issues in dispute. An inquiry into the merits of Ms. Rice's allegations and the manner in which the Town treated her will involve the parties and the Court in a dispute about the employment relationship between the Town and Ms. Rice, as well as the employment relationship between the Town and the employees who are the subject of Ms. Rice's letter. Such an inquiry will be time-consuming and expensive. Ms. Rice's letter sets out twenty examples of alleged misconduct. If the Court were to embark on an inquiry into the merits of Ms. Rice's allegations, it would likely result in the Town responding with its own

evidence. Such an inquiry will not be proportional to the time and resources reasonably required to decide the main issue between the parties, which is whether Mike's and/or the Town breached the terms of the agreement for purchase and sale, including whether the Town's decision to enforce reconveyance of the property was made in bad faith.

[27] When I weigh the privacy interests of the individuals involved; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources, I am not satisfied that I should exercise my discretion to authorize discovery subpoenas for Ms. Rice and Ms. Maxwell. Authorizing these discovery subpoenas would not promote the just, speedy and inexpensive determination of this Application.

[28] Mr. Zebian also says in his affidavit that Councillor Maxwell "can potentially provide information about ... the Town's actions and decisions in relation to [Mike's] since then." This does not provide me with a sufficient evidentiary foundation to conclude that Councillor Maxwell has relevant information, or information that is likely to lead to relevant evidence.

***Treatment of Other Developers and Development During Covid-19***

[29] I am not satisfied, based on the evidence presented on this motion, that information relating to the Town's treatment of other developers is probative of Mike's claim that the Town punished Mr. Zebian for having raised concerns about Ms. Rice's allegations and termination.

[30] The only evidence of the Town's treatment of other developers comes from Mr. Zebian's assertion that "the Town has not done a property 'buy-back' before, ... previous developers, acting reasonably, had been given extensions to complete their development, "[n]one of these developments met the contractual deadlines," and "most of them were handled very casually and without decisions of extensions via Council." Mr. Zebian was only elected to Council in the fall of 2020. He does not provide the source of this apparent knowledge.

[31] Mr. Zebian does not say what developers had been given extensions; the nature of those developers' construction projects (e.g. whether they were residential and/or commercial units, like this one); what he means when he says developers who acted reasonably were given extensions; where those projects were located (e.g. whether they were in the downtown core, like this property); whether the extensions occurred during a shortage of commercial and residential units in the Town (which is currently the case); whether those developers received one extension or multiple extensions (as is the case here); whether the relevant



contracts included language allowing for extensions; or whether the contracts included language explicitly prohibiting further extension requests (as does the June 21, 2019 Amending Agreement between these parties).

[32] Mike's has not presented enough to establish a foundation for concluding that the former CAOs and the Town employees are in possession of information that is relevant or likely to lead to the discovery of information relevant to Mike's claim that the Town's decision to enforce reconveyance was made in order to punish Mr. Zebian for raising concerns about Ms. Rice's allegations.

[33] Mike's seeks discovery subpoenas for Ms. Gentleman, Ms. Young, Ms. Rice and Councillor Maxwell in part because they can provide information about what development was happening in Kentville during the pandemic. Mr. Zebian's evidence is that development in Kentville came to a stand still during the pandemic. Such information is probative of a material fact in issue. If development in Kentville came to a stand still during the pandemic, it would have some tendency as a matter of logic and human experience to make the proposition that Council retaliated against Mike's more likely than the proposition would be in the absence of that evidence. However, I am not persuaded that I should authorize the requested discovery subpoenas on the basis that these individuals possess such information. Civil Procedure Rule 18.24(1)(b) provides the following example of a

circumstance in which, depending on the circumstances as a whole, holding a discovery would promote the just, speedy and inexpensive resolution of a proceeding: “a designated manager was ill-informed on discovery and discovery of other corporate officers or employees is necessary to obtain information the designated manager should have provided.” Mr. Troke is the designated manager for the Town. He has not yet been discovered. Mike’s has not explained why information about development in the Town during the pandemic could not be obtained from Mr. Troke. Authorizing discovery subpoenas for four other individuals (two of whom are Town employees, one of whom is a Town councillor and the fourth a former CAO) in order to obtain information that Mr. Troke is required to inform himself of, with no explanation as to why he would not be able to provide this information, would not promote the just, speedy and inexpensive determination of this Application.

***The Negotiation of the Agreement and the Progress of Construction***

[34] Mike’s has not explained how the evidence of Ms. Conrad relating to the creation of the agreement or the evidence of Mr. Roscoe concerning the progress of the development is relevant to a material fact in issue. Furthermore, Mr. Zebian says in his affidavit that both Ms. Conrad and Mr. Roscoe have said that they may sign an affidavit. In these circumstances, authorizing the issuance of discovery

subpoenas for these witnesses would not promote the just, speedy and inexpensive determination of this Application.

**Conclusion**

[35] The motion of Mike's Clothing Limited for an order authorizing discovery subpoenas is dismissed, with costs of \$750 payable to the Town of Kentville forthwith.

Gatchalian, J.