NOVA SCOTIA COURT OF APPEAL

Citation: *Crooks v. CIBC World Markets Inc.*, 2018 NSCA 97

Date: 20181204
Docket: CA 462245
Registry: Halifax

Between:

Gayle Crooks, Archie Gillis and
Karen McGrath

Appellants

v.

CIBC World Markets Inc./Marches
Mondiaux CIBC Inc. carrying on business as
CIBC Wood Gundy

Respondent

Restriction on Publication: pursuant to Order of the Court dated October 4, 2018

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: November 27, 2018, in Halifax, Nova Scotia

Subject: **Civil Procedure Rule 90.38(6)**

Summary: The appellants missed a number of deadlines in perfecting their appeal. The final missed deadline was the failure to file their factum as directed by the Court. The respondent made a motion to a judge in Chambers to dismiss the appeal which was granted. The appellants sought leave to review the order of the Chambers judge under Rule 90.38.

Justice Joel Fichaud granted leave to review and the matter proceeded to a review before a 3-member panel of the Court. On the review both parties sought to introduce fresh evidence.

Issues: (1) Should the fresh evidence be admitted?

(2) Should the order dismissing the appeal be set aside?

Result: The evidence sought to be introduced was admitted, not as fresh evidence, but as evidence relevant to the Panel's consideration on the review. The Dismissal Order was set aside and the appeal reinstated after balancing the prejudice to the parties as well as the broader implications to the administration of justice.

Costs were awarded to the respondent in the amount of $5,000 payable by counsel representing the appellants on the dismissal motion.

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Judges:	Farrar, Hamilton and Scanlan, JJ.A.
Appeal Heard:	November 27, 2018, in Halifax, Nova Scotia
Held:	Order dismissing appellants' appeal set aside and appeal reinstated per reasons for judgment of Farrar, J.A.; Hamilton and Scanlan, JJ.A. concurring.
Counsel:	Bruce Outhouse, Q.C. and Peter M. Rogers, Q.C., for the appellants John A. Keith, Q.C. and Jack Townsend, for the respondent

Reasons for judgment:

[1] By order and decision dated July 27, 2018, Justice Cindy Bourgeois dismissed the appellants' appeal because the appellants failed to comply with previous directions and deadlines imposed by the Court (Dismissal Decision reported as 2018 NSCA 68).

[2] On August 7, 2018, the appellants filed a Notice of Motion to the Chief Justice for leave to review an order of a judge under Rule 90.38. Under Rule 90.38(1)(a) the Chief Justice designated Justice Joel Fichaud to hear the leave motion. By decision and order dated August 28, 2018, Justice Fichaud granted leave to review Justice Bourgeois' order dismissing the appellants' appeal (Leave Decision reported as 2018 NSCA 74). A panel was assigned to conduct the review and it was heard on November 27, 2018.

[3] On the review motion before us, both parties sought leave to introduce what they refer to as "fresh evidence". For the appellants, they ask us to consider the evidence which was filed on the leave motion which consists of the affidavits of Jane O'Neill, Q.C., David Graves, Q.C., George MacDonald, Q.C., Gayle Crooks and Rachael Barnes. The appellants also sought to introduce additional evidence on this review which consists of the supplementary affidavit of Jane O'Neill, Q.C. and the affidavit of Mr. G. (there is a publication ban on identifying Mr. G. by his full name). To the extent it is necessary, I will reference the evidence contained in the affidavits when addressing the issues on this review.

[4] The respondent seeks to introduce portions of the affidavit of Jack Townsend, counsel for the respondent, which was filed on the leave motion. The appellants do not object to the admission of the evidence.

[5] At the conclusion of oral argument we set aside the dismissal and reinstated the appeal with reasons to follow. These are those reasons.

Issues

1. Should the fresh evidence be admitted?
2. Should the Dismissal Order be set aside?

Standard of Review

[6] With respect to the first issue, we are considering the introduction of the evidence at the first instance. Therefore, there is no standard of review.

[7] With respect to the second issue, the Chambers judge is to be afforded a significant amount of deference. We will only interfere if it is necessary to prevent an injustice.

Analysis

[8] Rule 90.38(6) of the *Civil Procedure Rules* provides:

> **90.38(6)** The Chief Justice may do any of the following on a motion for leave to review:
>
> (a) dismiss the motion for leave to review;
>
> (b) set the motion down for hearing;
>
> (c) grant leave to review the order of the judge in chambers if the Chief Justice is satisfied that the judge acted without authority under the rules, or the order is inconsistent with an earlier decision of a judge in chambers or the Court of Appeal, or that a hearing by a panel is necessary to prevent an injustice.

[9] Rule 90.38(6)(c) is focused on the leave to review motion. The leave judge must be satisfied:

1. the Chambers judge acted without authority under the Rules;
2. the order is inconsistent with an earlier decision of a judge in Chambers or the Court of Appeal; or
3. a hearing by a panel is necessary to prevent an injustice.

[10] Fichaud, J.A. found there is no question that the Chambers judge had the authority under the Rules to dismiss the appeal – the appellants had failed to perfect the appeal in accordance with the timelines that had been set. He was also satisfied that the order was not inconsistent with a previous decision of this Court.

He found on the evidence and the submissions before her, it was entirely appropriate for Justice Bourgeois to dismiss the appeal (Leave Decision, ¶26).

[11] Justice Fichaud then considered the third criterion – was leave necessary to prevent a potential injustice? He found it was and ordered this review (Leave Decision, ¶36).

[12] Rule 90, as noted in *R. v. Liberatore*, 2010 NSCA 33, is silent on what guides the Court on the review hearing.

[13] Saunders, J.A. in *Liberatore* said we should ask ourselves a similar question to that directed by Rule 90.38(6)(c) on the leave application – should the dismissal order be set aside so as to prevent an injustice? (*Liberatore*, ¶9).

[14] In answering that question on this review an issue arose as to what evidence was to be considered. The respondent sought to exclude the evidence of the appellants attempting to explain the reasons for counsel's failings.

[15] The parties in their submissions to the Court refer to the evidence sought to be admitted on this review as "fresh evidence". Both of them refer to the test for the admission of fresh evidence on an appeal as set out by McIntyre, J. in *R. v. Palmer*, [1980] 1 S.C.R. 759:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief.
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[16] In my view, it is not necessary to resort to the *Palmer* test to determine whether evidence will be admissible on a review such as this. The appeal has not been adjudicated on its merits but rather was dismissed summarily for failure to comply with the *Rules*. It is not an application to introduce fresh evidence in the traditional sense – it is simply evidence to aid in this Court's consideration of

whether the dismissal order ought to be set aside. To be admissible the evidence need only be relevant to that issue.

[17] The purpose of receiving evidence on a review is to provide the Panel with information which was not known to the Chambers judge or which may provide context to evidence which was before the Chambers judge. For example, in this case, it was known to the Chambers judge that the filing deadlines had been missed by the appellants' counsel. That is apparent without the necessity to call any evidence. What was not known is the personal circumstances of the appellants' counsel which may have been a contributing factor to the reasons for the missed deadlines.

[18] The appellants' evidence seeks to provide context to the circumstances surrounding the missed deadlines including evidence that:

- appellants' counsel was handling the appeal on her own and was solely responsible for the missed deadlines;
- no other lawyer in her firm nor her co-counsel was aware of the deadlines or the fact that they had been missed;
- the appellants had no knowledge of the deadlines or that they had been missed. The first time they became aware of the dismissal was when they received a copy of the decision from their counsel;
- appellants' counsel has health issues for which she has been treated and continues to be treated;
- her health issues contributed to the cause of the delinquencies;
- she became overwhelmed by the circumstances to the point of being completely immobilized or such that she made irrational work prioritization;
- there was no strategic motive underlying the failings, nor was any delay intentional; and
- appellants' counsel took a leave of absence to seek treatment shortly after the issues on this appeal arose.

[19] I am satisfied that this evidence is properly before the Court and is relevant to the issues to be considered on this review. Similarly, I am satisfied that the additional evidence sought to be introduced by the respondent – which essentially is evidence that appellants' counsel was able to continue to carry on with a number of other files during the time that she was missing the deadlines on this appeal – is also relevant to our consideration. As noted earlier, the appellants did not contest the admission of this evidence.

[20] All of the evidence provides context and information which was not before the Chambers judge at the time of the dismissal motion.

[21] I would admit the evidence sought to be introduced by the parties. I would not call it "fresh evidence". I would prefer to refer to it as relevant evidence for the purpose of determining the sole issue on this appeal, that is, whether an injustice would result if the dismissal order was allowed to stand.

[22] Let me now turn to the substantive issue on this appeal.

Should the Dismissal Order be set aside so as to prevent an injustice?

[23] Saunders, J.A. in *Liberatore* identified the interests to be balanced in determining whether an injustice would result. They are the appellants' interests and the respondent's interests, as well as the broader implications to the administration of justice (¶10).

[24] First, let me address the appellants' situation. For context, some further background is necessary.

[25] The appellants are the representative plaintiffs in a class action lawsuit against the respondent, CIBC World Markets Inc. ("CIBC"). CIBC conceded answers favorable to the appellants on five of the common issues relating to liability in contract, negligence and negligent misrepresentation. As a result of these admissions, and relying upon discovery evidence, CIBC took the position that the other issues in the lawsuit were not common issues and moved that the proceeding be decertified. Justice Patrick J. Duncan decertified the class action (*Crooks v. CIBC World Markets Inc.*, 2016 NSSC 145).

[26] Before an order could be taken out in the decertification decision a further hearing occurred to address other matters. A decision on those issues and to settle the form of order was filed on March 20, 2017 (*Crooks v. CIBC World Markets Inc.*, 2017 NSSC 75). An order was issued on March 24, 2017, with respect to both decisions. It is that order which was under appeal.

[27] Section 39(3)(b) of the *Class Proceedings Act*, S.N.S. 2007, c. 28, requires leave of a judge of the Court of Appeal from a decertification order. On April 6, 2017, the appellants filed a Notice of Application for Leave to Appeal. CIBC consented to leave to appeal on two of the appellants' grounds as follows:

- The Learned Justice erred in law by failing to follow the procedures set out in ss. 21-31 which apply once there has been a determination of common issues in favour of a class;
- The Learned Justice erred in law by finding that, even though common issues had been determined in favour of the class, the *Class Proceedings Act* no longer applies.

[28] Justice Elizabeth Van den Eynden agreed and granted leave to appeal on those two grounds.

[29] Both the Dismissal Decision and the Leave Decision set out the various failings of counsel for the appellants in the conduct of the appeal once leave was granted. It is not necessary to repeat them here other than to say the culminating factor was the appellants' failure to file their factum as directed on June 29, 2018.

[30] This prompted the respondent to make a motion for dismissal which was returnable on July 19, 2018. The appellants sought to file their factum on July 16, 2018, a little over two weeks late. The Registrar of the Court of Appeal refused to accept the factum for filing as it was not filed within the timeframe as required and no extension of time was sought.

[31] The respondent's motion for dismissal proceeded on July 19, 2018. The appellants did not file any materials in response to the motion. At the conclusion of the submissions of counsel, the Chambers judge dismissed the appeal with written reasons to follow. Her written reasons were filed on July 27, 2018, and set out in considerable detail the lack of compliance with the Rules and the reasons for dismissing the appeal.

[32] The evidence on this review hearing shows that appellants' counsel suffered from health issues which she says impeded her ability to do what ought to have been done in this case. Whether it was as a result of improper prioritization or simply an inability to come to terms with what needed to be done on this file is of little consequence. The fact remains that the factum was not filed within the time required and the appeal was dismissed.

[33] It is also apparent from the evidence that the individual appellants themselves had no knowledge of the failings of their counsel.

[34] The respondent asked us to take into consideration the appellants' counsel's ability to meet deadlines on other files as a factor in determining the issue on this appeal. While that is certainly relevant to a proper consideration of the true state of her health and her ability to provide capable representation to her many clients at the material time, I fail to see how the appellants' counsel's actions on other files could be determinative of whether the appellants have suffered an injustice in having their appeal dismissed in circumstances where they are entirely blameless. Respectfully, what is important in deciding that issue is their counsel's conduct in advancing their appeal and its impact on their interests in having the case decided on the merits.

[35] The Chambers judge had no knowledge of appellants' counsel's personal situation when she heard the dismissal motion. To the contrary, she surmised a lack of good faith and that it was a concerted effort by the appellants or their counsel to intentionally delay the proceedings which was a strategy being employed by them. She said:

> [41] …I am not satisfied the appeal was brought with a good faith intention to pursue it expeditiously and in accordance with the *Civil Procedure Rules*. In the absence of evidence to the contrary, the material before me suggests intentional delay was being strategically employed by the appellants (or their counsel).
>
> [Emphasis added]

[36] We now know that was not the case. The appellants were unaware of the health issues impacting their counsel; they were unaware that deadlines were not being met and that their appeal was not being prosecuted in a timely manner. They can be in no way faulted for the failings of their lawyer.

[37] In these circumstances, to allow the dismissal order to stand would deny the appellants their right of appeal due to factors that were out of their control or knowledge and for which they have no blameworthiness. Further, although it is not necessary to comment on the merits of the appeal at this point, it is noteworthy that leave to appeal was granted on two issues. Whether the appeal will eventually be successful remains to be seen but it is not a frivolous or vexatious appeal.

[38] In my view, there would be substantial prejudice to the appellants if they were denied their right of appeal.

[39] I will now turn to CIBC's situation. Although CIBC has the right and expectation to have the appeal heard in a timely manner, the only real prejudice to them is the timing of the determination of the issues. At the time of the motion to dismiss, the alternative position put forward by CIBC was to grant it an extension of time to file their factum and to delay the hearing dates. At that time and on this review it could not point to any prejudice it would suffer, other than delay, if the appeal proceeded on the merits.

[40] Any prejudice that it suffers from the delay can be compensated for in costs.

[41] Besides the interests of the parties involved, I must weigh the public interest by taking into account the administration of justice as a whole (*Liberatore*, ¶14). Would respect for the administration of justice be diminished if the appeal was allowed to proceed on its merits? In my view, it would not.

[42] The delay here will be relatively short. Had an extension of time to file a factum been granted to the appellants, a corresponding extension of time for the filing of the respondent's factum would have enabled the Court to proceed with the scheduled hearing date on September 25, 2018, or if it did not proceed on that day, only a short adjournment would have been necessary.

[43] The appeal book has been filed, the appellants' factum has been tendered. It is only necessary that the respondent's factum be filed and new hearing dates be set. In these circumstances I am not persuaded that the granting of the relief sought by the appellants would harm the administration of justice as a whole, whether in terms of unreasonable delay or costs. To borrow from the words of Saunders, J.A. in *Liberatore*, "[a] reasonably informed observer, apprised of all of

the facts, would conclude that [this] appeal ought to be heard so as to avoid an injustice" (*Liberatore*, ¶16).

[44] Accordingly, we set aside the previous Order of the Court dated July 27, 2018; the appeal was reinstated and is to be heard by a panel of this Court on February 14, 2019 for the full day; the appellants' factum shall be filed by December 4, 2018; the respondent shall file its factum by January 22, 2019.

[45] I would award costs to the respondent in the amount of $5,000 for both the leave and review hearing, inclusive of disbursements payable by the appellants' counsel, McInnes Cooper, directly.

Farrar, J.A.

Concurred in:

Hamilton, J.A.

Scanlan, J.A.