Docket: CA 161677
Date: 20000607

NOVA SCOTIA COURT OF APPEAL

[Cite as: Atlantic Building Systems v. Barefoot, 2000 NSCA 75]

Glube, C.J.N.S.; Freeman and Bateman, JJ.A.

BETWEEN:

PARANET SERVICES INC., a body corporate, carrying on business under the name ATLANTIC BUILDING SYSTEMS

Appellant

- and -

ROBERT BRETT BAREFOOT

Respondent

REASONS FOR JUDGMENT

Counsel:	Peter C. Ghiz for the appellant M. Chantal Richard for the respondent
Appeal Heard:	May 29, 2000
Judgment Delivered:	June 7, 2000
THE COURT:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.

BATEMAN, J.A.:

[1] This is an appeal from the decision of Justice John M. Davison of the Supreme Court, in chambers [reported at [2000] N.S.J. No.37 (Q.L.)], dismissing the appellant's application, *inter alia*, to set aside a recovery order issued by the Prothonotary.

BACKGROUND:

[2] The appellant, Paranet Services Inc. carrying on business as Atlantic Business Systems ("ABS") agreed to provide materials and labour to construct a home for the respondent, Robert Brett Barefoot, in Sapporo, Japan. As a part of that arrangement ABS contracted to ship the necessary building materials and supplies to Mr. Barefoot in Sapporo in three separate containers. Whether the shipment of a fourth container was contemplated is in dispute. The first two containers were shipped in September and October, 1999. By fax dated October 22, 1999 ABS advised Mr. Barefoot that the third container was ready for shipment and that the total amount owing to ABS to that point, including the cost of shipment of the container was $41,802.14 (CDN) or $28,289 (US). This amount was wired by Mr. Barefoot to ABS on October 26, 1999. On November 5, 1999, Mr. Barefoot received a further invoice from ABS advising that the balance owing was $83,896.60 (CDN) or $43,789.17 (US). This sum was in addition to the invoice of October 22 and included the cost of a fourth container yet to be shipped and for labour supplied by ABS. ABS advised that if Mr. Barefoot did not pay this further amount, the third container would be re-routed back to Canada. That additional sum was not paid and by mid-November the arrangement between the

parties had completely broken down. ABS tradesmen were called off the project and the third container was re-routed to Canada.

[3] On January 11, 2000 Mr. Barefoot commenced an action against ABS in the Supreme Court alleging, *inter alia*, breach of contract and seeking possession of the third container. On January 13, 2000 he successfully applied to the Supreme Court for an interlocutory recovery order. That order was issued *ex parte* by the Prothonotary pursuant to *Civil Procedure Rule 48.01.* Mr. Barefoot posted cash security in lieu of the bond which is required by the *Rule*.

[4] ABS applied, pursuant to *Civil Procedure Rules 48.06* and *48.08*, for interlocutory relief from the recovery order and for security for costs. That application was heard by Justice Davison. He granted the order for security but dismissed the *Rule 48* application. It is from that dismissal that ABS appeals.

ISSUES:

[5] The Notice of Appeal lists seven grounds, which can be summarized as follows:

The judge erred:

(i) in striking the appellant's affidavit from the record and in failing to consider three further affidavits filed by the appellant;

(ii) in permitting reference to Mr. Barefoot's affidavit, which had been filed in support of the original recovery order, and in not requiring Mr.

Barefoot's attendance for cross-examination on that affidavit;

(iii) in failing to conclude that the respondent had not made full and fair disclosure of the facts on the original application for the recovery order; and

(iv) in incorrectly applying the legal principles relevant to *Rule 48.08*.

STANDARD OF REVIEW:

[6] In **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.** (1990), 96 N.S.R. (2d) 82, Matthews, J.A. wrote at p. 85:

> [10] The approach an appeal court must adopt in considering a discretionary order made by a chambers judge has been stated by this Court in **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, wherein Chief Justice MacKeigan in delivering the unanimous judgment of the Court on an appeal concerning an interlocutory injunction stated at p. 333:
>
> > "This Court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result."

ANALYSIS:

[7] The original recovery order was obtained pursuant to *Civil Procedure Rule 48.01* which provides in relevant part:

> **48.01** (1) Any party or intervenor in a proceeding may apply for an interlocutory order to recover possession of property that was unlawfully taken or is unlawfully detained from him by any other party, or is held by an officer under any legal process issued in the proceeding.
>
> (2) When an applicant applies to recover possession of personal property and files an affidavit that complies with rule 48.02 and a bond that complies with rule 48.03, the prothonotary, on an ex parte application, shall, unless the court otherwise orders, grant and issue an interlocutory recovery order in Form 48.04A.

[8] *Rule 48.03* requires a bond with sureties in an amount equal to one and one-quarter (1¼) times the value of the property sought to be recovered. *Rule 48.02* sets out the information to be contained in the affidavit filed in support of the application:

> **48.02.** The affidavit of an applicant or his agent in support of an interlocutory recovery order shall,
> (a) sufficiently describe any property claimed and the value thereof,
> (b) set out facts showing that,
> (i) the applicant is the owner or lawfully entitled to the possession of the property;
> (ii) the property was unlawfully taken or is unlawfully detained from the applicant by the other party or is held by an officer under any legal process issued in the proceeding;
> (iii) the applicant or his agent has made a demand for the property which has been refused; and
> (c) state the applicant was advised by his solicitor, naming him, and verily believes he is lawfully entitled to recover possession of the property.

[9] ABS, on application before Justice Davison, sought the following relief, as is relevant to this appeal: (i) an order, pursuant to *Rule 48.06(1)* or *48.08(b),* that ABS was entitled to retain possession of the third container; (ii) an order, pursuant to *Rule 48.06(1)(b)*, releasing ABS from the requirement to file a bond; and, (iii) pursuant to *Rule 48.03(4)*, an order requiring the Prothonotary to assign to ABS the proceeds of the cash in lieu of bond filed by Mr. Barefoot.

[10] *Civil Procedure Rule 48.06* and *48.08* provide, as relevant here:

> **48.06**. (1) Any party or person, claiming to be the owner or entitled to possession of any property recoverable under an interlocutory recovery order, is entitled to retain or regain possession of the property if he files with the prothonotary, and delivers to the sheriff as his agent, not later than three (3) days after a true copy of the order is served on him,
>
> (a) an affidavit stating he is entitled to possession of the property by virtue of the facts set forth therein; and
> (b) unless the court otherwise orders, a bond in Form 48.06A, in an amount equal to one and one-quarter (1¼) times the value of the property recovered, as determined by the sheriff, with two sufficient sureties who are approved by the sheriff and who shall justify, or other form of sufficient security,

approved by the sheriff.

48.08. Any party or person, claiming an interest in any property taken under an interlocutory recovery order or claiming that the order was wrongfully granted or issued, may

. . .

(b) make an application in the proceeding as a party or intervenor, and the court may on the hearing thereof;

(i) grant the applicant a reasonable opportunity to amend any affidavit or bond used in support of the grant of the order;

(ii) upon such terms as it thinks just, vary or modify or set aside the order or stay the proceeding;

(iii) order any property taken under the order to be held by the sheriff pending judgment or further order of the court or to be returned or disposed of upon such terms as it thinks just, or to grant any other relief with respect to the return, safety, or sale of the property, or any part thereof;

(iv) order any bond to be released or given;

(v) grant such other order as it thinks just.

(Emphasis added)

[11] ABS took the position before Justice Davison that the original recovery order should not have been granted because Mr. Barefoot's affidavit in support was deficient and, that, in any event, ABS was entitled to retain possession of the container. ABS filed four affidavits on the application, the deponent in each being Douglas MacArthur, an officer of the appellant company. The first, filed January 17, 2000, contained fifty-six (56) paragraphs primarily responding to the affidavit filed by Mr. Barefoot in the original application for a recovery order; the second, dated January 19, attached copies of the Statement of Claim and Defence; the third, dated January 19 ("the main affidavit"), titled "Supplementary Affidavit of Douglas MacArthur" was an expanded version of the first affidavit; the final affidavit, dated January 20, simply confirmed that it was Mr. MacArthur, for ABS, who had all of the dealings with Mr. Barefoot in relation to the

house construction and stated that his three earlier affidavits were prepared in his capacity as president and chief executive officer of the company.

[12] Counsel for Mr. Barefoot objected to the form and content of the MacArthur affidavits. Justice Davison said of the main affidavit:

> [12] . . . It contains 85 paragraphs and is replete with paragraphs which were irrelevant, scandalous, containing information not within the personal knowledge of the deponent, with no indication of information and belief and paragraphs which intend to attack the credibility of the plaintiff with respect to the affidavit he supplied to the court in the process of getting the recovery order.

[13] He cited **Waverley (Village Commissioners) et al. v. Nova Scotia (Minister of Municipal Affairs) et al.** (1993), 123 N.S.R. (2d) 46 (S.C.) and **Wall v. 679927 Ontario Ltd. et al.** (1999), 176 N.S.R. (2d) 96 (C.A.), both decisions addressing the proper requirements of affidavits. He referred in particular to the comments of Cromwell, J.A. in **Wall** at p.110:

> [41] ... that the Chambers judge erred in failing to make a clear ruling on the admissibility of the Carter affidavit. It was central to his conclusions and its admissibility, in its entirety, was objected to and the objection was fully argued. Moreover, significant portions of the affidavit are clearly irrelevant, scandalous or consist of innuendo and conjecture. <u>The affidavit is so fundamentally defective that the court should not be required to take it apart in pieces to preserve some possibly admissible material. It should have been struck.</u>
> (Emphasis added)

[14] Justice Davison considered whether the main affidavit could be edited but concluded that it was so materially defective it ought to be struck. In so doing he cited examples of paragraphs from the affidavit, which were objectionable for a variety of reasons: in one paragraph the affiant attested to a question of law; in others there is no

indication of the affiant's source of knowledge; others are irrelevant and scandalous. He referred, as well, to eighteen (18) paragraphs of the affidavit which purport to contradict portions of Mr. Barefoot's affidavit. As noted by Justice Davison, the contest between Mr. Barefoot's interpretation of the contract and that of ABS is precisely the subject matter of the main action. These issues will only be resolved in the context of findings of credibility. Such matters do not readily lend themselves to resolution on an interlocutory application. He referred again to Cromwell, J.A. in **Wall**, at p.106:

> [26] . . . an interlocutory application for security for costs should not be the occasion for the determination of the merits of the case where it is complex or depends on disputed facts and findings of credibility. . . .

[15] Cromwell, J.A. elaborated at p.111:

> [43] Our system of civil litigation is based on the principle that disputed issues of fact are to be determined at a trial. There are numerous instances throughout our rules of procedure in civil matters that illustrate this principle.
>
> . . .
>
> [47] This reluctance to assess the merits of a claim or defence before trial is based both on procedural values and practical concerns. The prime procedural value is that "plenary trial on the merits" is a key element of fair procedure: see **Dawson et al. v. Rexcraft Storage and Warehouse Inc. et al** (1998), 111 O.A.C. 201; 164 D.L.R. (4th) 257 (C.A.) per Borins, J.A., at para. 6. Practical concerns relate to the difficulty of making correct factual determinations on the limited material available on interlocutory applications and the important advantages of a trial court in evaluating evidence in light of the factual context of the entire case rather than on a selective and partial record at the interlocutory stage: see **Rexcraft**, supra, at para. 27
>
> [48] In my view, consideration of the extent to, and the manner in which, the merits of the case may be assessed on a security for costs application must take place in the context of this reluctance, evidenced throughout our **Rules**, to assess the merits of cases turning on disputed facts other than at a trial on the merits.

[16] Although made in the context of an application for security for costs, Justice Cromwell's remarks are applicable in a broader context.

[17] *Civil Procedure Rule 38.02* provides:

> **38.02.** (1) An affidavit used on an application may contain statements as to belief of the deponent with the sources and grounds thereof.
>
> (2) Unless the court otherwise orders, an affidavit used on a trial shall contain only such facts as the deponent is able of his own knowledge to prove.

[18] The words of Justice Davison in **Waverley**, supra at p.50, bear repeating:

> [13] Great care should be exercised in drafting affidavits. Both pleadings and affidavits should contain facts but there are marked differences between the two types of documents. Affidavits, unlike pleadings, form the evidence which go before the court and are subject to the rules of evidence to permit the court to find facts from that evidence. They should be drafted with the same respect for accuracy and the rules of evidence as is exercised in the giving of viva voce testimony.
>
> [14] Too often affidavits are submitted before the court which consist of rambling narratives. Some are opinions and inadmissible as evidence to determine the issues before the court. . . .

[19] I would agree with Justice Davison's assessment of Mr. MacArthur's main affidavit. It contains substantial commentary, opinion and scandalous allegations irrelevant to the matters in issue on the application. Parts of the affidavit are a narrative rant, paragraphed at random and attacking Mr. Barefoot's character. Included are comments such as: ". . . he appeared to be using drugs or experiencing withdrawal symptoms"; ". . . it became increasingly likely by his actions that he was a frequent drug user . . ."; ". . . he proceeded to eat too many jelly donuts"; "Barefoot again went back to the trunk of his car and, in an extremely agitated state, again began looking for something. I was afraid it might be a gun."; "[he] got back into his car and almost ran me over down (sic) before I could run behind a street light pole." The offending material so pervaded this lengthy affidavit, it could not be and should not have been edited by the judge so as to conform with the requirements of *Rule 38.02.* While some technical

deficiencies in affidavits may not preclude admission, this material was markedly below the standard.

[20] The appellant, while maintaining that the affidavit was not fatally flawed, says in the alternative, that Justice Davison should have considered the remaining three affidavits in support of his application. The information from the first affidavit was incorporated into the main affidavit. The first affidavit suffers from the same deficiencies. Additionally, the appellant's intention was clearly to replace the earlier affidavit with the subsequent one. In any event, it, like the main affidavit, was not admissible. The remaining two affidavits do not advance the application. They simply attach the pleadings and confirm Mr. MacArthur's status in the company.

[21] Counsel for ABS further submits that, independent of Mr. MacArthur's affidavits, there was sufficient information in the respondent's cross-examination of him to support the application. The respondent had objected to the admission of the affidavits. Justice Davison reserved his decision on that issue. Accordingly, Mr. Barefoot's counsel, while maintaining the position that the affidavits were inadmissible, cross-examined Mr. MacArthur. In my view, upon the judge ruling subsequently that the affidavit was inadmissible, the cross-examination cannot form part of the evidence. In any event, I am not satisfied that the information provided in the cross-examination, even had it been admissible, would have satisfied the requirements of *Rule 48.06(1)(a)*.

[22] In summary, having excluded the main affidavit, there was, in my opinion, no

admissible evidence before the judge to found the appellant's position. The remaining evidence neither supported Mr. MacArthur's application for a recovery order pursuant to *Rule 48.06(1)(a)* nor was it adequate to justify the setting aside or modification of the original recovery order pursuant to *Rule 48.08(b)(ii)*. Justice Davison did not err in dismissing the applications.

DISPOSITION:

[23] I would dismiss the appeal with costs to the respondent, in any event of the cause, fixed at $1000 plus disbursements.

Bateman, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.