NOVA SCOTIA COURT OF APPEAL
Citation: *Doncaster v. Field*, 2015 NSCA 83

Date: 20150903
Docket: CA 434858
Registry: Halifax

Between:

Ralph Ivan Doncaster

Appellant

v.

Jennifer Lynn Field

Respondent

Judge:	Farrar, J.A.
Motion Heard:	August 20, 2015, in Halifax, Nova Scotia in Chambers
Held:	Motion granted.
Counsel:	Appellant in person Janet M. Stevenson, for the respondent

Decision:

Overview

[1] The appellant and respondent's ongoing divorce proceeding has spawned a number of decisions and appeals. It has also resulted in several costs awards against Mr. Doncaster, in favour of Ms. Field, totalling in excess of $82,000.

[2] Mr. Doncaster also has costs awards against him in other proceedings approximating $2,700.

[3] Fifty thousand dollars of those costs awards are as a result of the decision subject to this appeal.

[4] Ms. Field has filed a motion for security for costs seeking an order staying Mr. Doncaster's appeal pending payment of the $50,000 costs awarded below and requiring him to post $15,000 as security for costs in this appeal.

[5] The matter was originally scheduled to be heard on August 6. Mr. Doncaster requested an adjournment to August 20 which I granted. I heard the parties on August 20 in Chambers and at the conclusion of argument reserved decision. For the reasons that follow, I allow the motion for security for costs in the amount of $15,000.

Background

[6] Mr. Doncaster's most recent appeal relates to the decision of Bourgeois, J. (as she was then) released on August 21, 2014 (2014 NSSC 312, unreported) with respect to the parties' divorce trial which was heard on February 20, 21, 24, April 2 and May 2, 2014.

[7] The corollary relief order was taken out on December 3, 2014. Mr. Doncaster filed his Notice of Appeal on December 29, 2014. Mr. Doncaster raises the following grounds of appeal:

1. Justice Bourgeois misapprehended the evidence;
2. Justice Bourgeois erred in the application of trust law;
3. Justice Bourgeois failed to take judicial notice of National Bank's purchase of Altamira Investment Services;

4. Justice Bourgeois' conclusion that 100% of the post-separation deposits to my CIBC account were matrimonial assets is unreasonable and contradicted by the evidence;
5. Justice Bourgeois made material accounting errors in the division of assets;
6. Justice Bourgeois erred in setting the valuation date of assets;
7. Justice Chipman had no jurisdiction to issue an order;
8. the Order omits Justice Bourgeois' finding that the CRA income tax assessment of approximately $400,000 is matrimonial debt;
9. such further and other grounds as may appear on the record.

[8] As an aside, it is clear from the trial judge's decision she found the CRA assessment was a matrimonial debt. (see ¶50). I indicated to Mr. Doncaster at the Chambers hearing in this matter, if he was concerned about the omission in the order that the CRA income tax assessment was a matrimonial debt (ground 8 above), his remedy would be to have the order corrected pursuant to Rule 78.08 which provides:

> **78.08** A judge may do any of the following, although a final order has been issued:
>
> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;

[9] In support of her motion the respondent filed the affidavit of Roxanne Ayer, the office manager employed by the respondent counsel's law firm. In response to the motion, Mr. Doncaster filed his own affidavit. The affidavit addresses Mr. Doncaster's impecuniosity, it does not address the merits of his appeal.

[10] In addition, Mr. Doncaster, on August 13 filed a letter with the Court advising that he has made a consumer proposal under the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3 ("**BIA**") with Grant Thornton agreeing to act as the trustee. He suggests in his correspondence that this creates an automatic stay of the security for costs motion. I will address that issue in more detail later. On August 13, as well, he filed a copy of a consumer proposal and finally on August 19 he filed a Certificate of Filing of a Consumer Proposal from Industry Canada.

Issues

1. Does the filing of a consumer proposal act as an automatic stay of the respondent's motion for security for costs?
2. If it does not, is this the proper case for awarding security for costs pending appeal?

Issue #1 Does the filing of a consumer proposal act as an automatic stay of the respondents motion for security for costs?

[11] The short answer to this question is "no". The **BIA** provides a stay of proceedings applies under s. 69.2 (1) of the **BIA** to "any action, execution or other proceedings [against the debtor], for the recovery of a claim provable in bankruptcy." Claims provable in bankruptcy are "[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt ...". (**BIA**, s. 121(1))

[12] The issue of whether costs are provable claims under the **BIA** was addressed by the Yukon Supreme Court in **Golden Hill Ventures Limited Partnership v. Ross Mining Limited**, 2012 YKSC 102.

[13] Veale J. reviewed the case law on the issue in detail, albeit in a different context and held:

> 25 In terms of whether court costs are provable claims, counsel provided me with a line of cases that derive from the UK bankruptcy case of *Glenister v. Rowe* (1999), [2000] Ch. 76, [1999] EWCA Civ 1221 (Eng. C.A.). In *Glenister*, it was common ground that if court costs are a "contingent liability" they are a "bankruptcy debt" and the discharge of the bankruptcy would release the bankrupt from the debt. The corollary is that court costs incurred after the date of bankruptcy are not a contingent liability at the date of the bankruptcy. In concluding that the costs in question were not a contingent liability on the date of the bankruptcy and therefore payable by the discharged bankrupt, the Court of Appeal gave the following reasons at p. 84:
>
> > 1. Costs of legal proceedings are in the discretion of the court. Until an order for payment of costs is made there is no obligation or liability to pay them and there is no right to recover them.
>
> 26 The Court went on to say that an "order for costs is a "contingency" which may or may not happen ...". It concluded that no liability can arise simply by

> reason of a claim for costs made in a court proceeding. Simply put, the court concluded that, because of the discretionary nature of an award of court costs, there is no liability, contingent or otherwise, until an order is made.

[14] The Court went on to cite a number of Canadian cases and concluded:

> 33 I note that the cases just cited are consistent with the "Claims Provable" commentary in Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 2009):
>
> > (b) Defendant's Costs
> >
> > If an unsuccessful action is brought by a debtor and he or she is ordered to pay costs or if a judgment is given against him or her before he or she becomes bankrupt, the costs are a provable claim. On the other hand, if no judgment is given against him or her and no order is made for payment of costs until after he or she becomes bankrupt, costs are not a provable debt. In such a case, there is no provable debt to which the costs are incident and there is no liability to pay by reason of any obligation incurred by the bankrupt before bankruptcy, nor are the costs a contingent liability to which the debtor can be said to be subject at the date of his or her bankruptcy: *Re British Gold Fields of West Africa Ltd.*,[[1899] 2 Ch 7]. (emphasis added)
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> 34 The recent Supreme Court of Canada decision in *Newfoundland and Labrador v. Abitibi Bowater Inc.*, 2012 SCC 67 (S.C.C.), confirms this principle, albeit in a different context. In that case, a Companies' Creditors Arrangement Act Court judge concluded that the filing of a claim by the Environmental Protection Agency before the date of bankruptcy should be pursued as a provable claim. This conclusion was upheld by the Supreme Court of Canada. The general principles were set out in para. 26 of that judgment as follows:
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> > These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. ...

[15] Veale J. went on to conclude that the court costs, which were discretionary and which were awarded after the filing date of the bankruptcy, were not an obligation or a liability until after the filing date of the proposal on November 25, 2009 and, therefore, were not a claim provable in bankruptcy.

[16] The essential questions are, therefore, whether the costs are: (1) a debt that the insolvent or bankrupt person was subject to at the time he filed for bankruptcy or made a proposal; or (2) a debt which the person incurred prior to the proposal or bankruptcy and may become subject to in the future.

[17] A security for costs award does not fit into either of these two categories. The nature of security for costs was such that it is not a claim provable in bankruptcy since it is not actually a debt or liability that would be owed by the payor. Indeed, it may never become a debt or a liability if Mr. Doncaster is successful on his appeal. Whether the security would be forfeited by Mr. Doncaster is contingent on future judgments in these civil proceedings and is subject to the complete discretion of the court.

[18] The award of security for costs does not create a debt from Mr. Doncaster to Ms. Field nor does it create a debt to the court and, therefore, is not a claim provable in bankruptcy. For this reason alone I do not accept Mr. Doncaster's argument on this point.

[19] I would also dismiss the argument on the basis that Ms. Field' s motion for security for costs is not commencing or continuing an "action, execution or other proceeding, for the recovery of a claim provable in bankruptcy" (**BIA**, s. 69.2(1)). The **BIA** in s. 69.2(1) provides that:

> "no creditor has any remedy ... or shall commence or continue any action, execution or other proceeding, for the recovery of a claim provable in bankruptcy"?
>
> (Emphasis added)

[20] While Ms. Field has filed this motion, it is in response to Mr. Doncaster's appeal. Here, the insolvent person has commenced and continued the proceeding, not Ms. Field.

[21] Finally, to give effect to Mr. Doncaster's argument would allow insolvent persons to exploit the automatic stay under s. 69.2(1) to be immune from costs in future proceedings they instigate. This is of particular concern in the present case where Mr. Doncaster has an extensive history of litigation and his failure to make any significant payment towards existing costs orders.

[22] In conclusion, I am not satisfied that Mr. Doncaster's filing of a consumer proposal operates as an automatic stay of the motion for security for costs.

[23] It may very well operate as a stay of the costs order of Campbell J. below. It is not necessary to decide that issue on the security for costs motion and I decline to do so without the parties, and in particular, Ms. Field having an opportunity to thoroughly brief and address the issue. However, because of my concerns I am not prepared to stay the appeal pending payment of the lower court's cost award.

Issue #2 If it does not, is this the proper case for awarding security for costs pending appeal?

[24] Rule 90.42 provides:

> **90.42** (1) A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.

[25] In **Geophysical Services Inc. v. Sable Mary Seismic Inc.**, 2011 NSCA 40, Beveridge J.A. thoroughly reviewed the law with respect to security for costs on an appeal. The applicant must establish "special circumstances" in order for her motion to be granted. Beveridge J.A. described "special circumstances" in **Geophysical**:

> [6] There are a variety of scenarios that may constitute "special circumstances". There is no need to list them. All bear on the issue of the degree of risk that if the appellant is unsuccessful the respondent will be unable to collect his costs on the appeal. In *Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.*, 2005 NSCA 44, Fichaud J.A. emphasized, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute "special circumstances". He wrote:
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> > [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances." It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman*, at ¶ 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at ¶ 4-5; *Leddicote*, at ¶ 15-16; *White* at ¶ 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at ¶ 7; *Smith v. Heron*, at ¶ 15-17; *Jessome v. Walsh* at ¶ 16-19.

> See also *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, 2006 NSCA 131.
>
> [7] However, the demonstration of special circumstances does not equate to an automatic order of security for costs. It is a necessary condition that must be satisfied, but the court maintains a discretion not to make such an order, if the order would prevent a good faith appellant who is truly without resources from being able to prosecute an arguable appeal. This has sometimes been expressed as a need to be cautious before granting such an order lest a party be effectively denied their right to appeal merely as a result of impecuniosity (*2301072 Nova Scotia Ltd. v. Lienaux*, 2007 NSCA 28, at para. 6; *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 52).

[26] In **Lienaux v. Norbridge Management Ltd.**, 2013 NSCA 3, Bryson, J.A. held that:

> [18] Norbridge submits that there is extensive evidence that Mr. Lienaux has behaved in an insolvent manner and, in particular, has failed to pay costs in related proceedings (2007 NSCA 28; 2001 NSCA 122; 2011 NSCA 94). In addition to other unpaid obligations, Mr. Lienaux has not paid four costs awards exceeding $40,000 in total. Chief Justice MacDonald's observation in 2007, remains apposite:
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> > [12] In conclusion, there are in this appeal special circumstances justifying a security for costs order. In fact, given the appellants' horrendous record when it comes to honouring costs obligations, it is hard to imagine a more appropriate circumstance for such relief. In short, I am not prepared allow the appellants to again take the respondent through yet another appeal without providing security. [2007 NSCA 28]

[27] There is an abundance of evidence to establish that Mr. Doncaster has behaved in an insolvent manner and has failed to pay costs in related proceedings. I am satisfied that the respondent has established "special circumstances" which would justify an award of costs.

[28] However, as noted by Justice Beveridge in **Geophysical**, that does not automatically equate to an order for security for costs.

[29] Mr. Doncaster pleads impecuniosity which he says is evidenced by his creditor proposal and the information contained in his affidavit. He argues that to order him to provide security for costs would be to prevent him from proceeding with a meritorious appeal. Assuming that Mr. Doncaster is impecunious, impecuniosity does not offer immunity from security for costs in every case.

[30] As noted by Bryson J.A. in **Norbridge, supra**:

> [25] Norbridge also argues that even if impecuniosity prevents a hearing of the appeal, security can still be ordered. It says that this case is very much like two previous cases involving Mr. Lienaux. In 2011, Justice Saunders said:
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> > [21] Had I reached the conclusion that the appellant was impecunious, or that compelling him to post security would likely terminate the appeal, I would nonetheless have ordered security for costs in favour of the respondents, so as to do justice between the parties in the face of this chronicle of discord which I would characterize as extraordinary and unparalleled. (2011 NSCA 94)
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> And in 2001, Justice Bateman commented in *Campbell v. Turner-Lienaux*, (2001 NSCA 122):
>
> > [35] I am confident that, as they have in the past, the appellants will find the resources to advance the appeal in the face of a security for costs order, if they continue to believe in the merits of their cause. I add, however, that, in these circumstances, a consideration of the interests of not only the appellants but also the respondent leads me to conclude that an order for security is appropriate even should the result be termination of the litigation. In other words, even had I been satisfied that the appellants are impecunious I would have ordered security.

(See also **Doncaster v. Chignecto-Central Regional School Board**, 2013 NSCA 59, ¶38).

[31] Even if I was satisfied that Mr. Doncaster was impecunious; having regard to Mr. Doncaster's litigious history, his failure to honour costs awards in the past, and the number of costs awards against him, leads me to the conclusion that an order for security for costs is appropriate in these circumstances. As in **Norbridge, supra**, I am not prepared to allow Mr. Doncaster to proceed with another appeal without posting security.

[32] As a result, an order will issue requiring Mr. Doncaster to post security for costs in the amount of $15,000 on or before October 1, 2015.

[33] I have chosen the date of October 1 having regard to the appeal which is scheduled for December 10 and the respondent's factum which is due on October 30, 2015. If by October 1 security for costs is not posted, the respondent will have

an opportunity to make application to dismiss the appeal before having to prepare her factum.

Conclusion

[34] I order the appellant to post $15,000 as security for costs for this appeal no later than October 1, 2015, failing which the respondent will be at liberty to bring a motion to have the appeal dismissed. I fix costs on this motion at $2,000 inclusive of disbursements, payable in the cause.

Farrar, J.A.