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20000407 Docket: CA 160130

NOVA SCOTIA COURT OF APPEAL

[Cite as: 353903 Ontario Ltd., v.
Black & MacDonald Ltd., 2000 NSCA 45]

Chipman, Freeman and Bateman, JJ.A.

BETWEEN:

353903 ONTARIO LIMITED, carrying on business under the firm name and style of Steeplejack Services Appellant	)	Michael J. Wood, for the appellant
- and -	)	
BLACK & MACDONALD LIMITED, and CANADIAN GENERAL INSURANCE COMPANY, and HER MAJESTY THE QUEEN IN RIGHT OF CANADA represented by the Minister of Public Works acting through Defence Construction (1951) Limited, and GALVATECH INC. Respondents	)	Michael S. Ryan, Q.C., for Black & MacDonald Limited and Canadian General Insurance Company; Sandra MacPherson Duncan, for HMQ; A. Douglas Tupper, Q.C., Galvatech Inc.
	)	Appeal Heard: March 31, 2000
	)	Judgment Delivered: April 7, 2000

THE COURT: Appeal is dismissed as per reasons for judgment of Bateman, J.A., Chipman and Freeman, JJ.A., concurring.

Bateman, J.A.:

[1] This is an interlocutory appeal from a mid-trial order finding that the corporate appellant, 353903 Ontario Limited, had abused the process of the court and thus requiring it to pay the solicitor client costs of the respondents' counsel. [decision reported at [1999] N.S.J. No. 386]

[2] The appellant is a scaffolding company which performed work for the respondent Black & McDonald Limited, prime contractor on a contract to refit the HMC Dockyard crane located at Dartmouth, Nova Scotia. The appellant sued the respondent Black on account of outstanding services and rental. The total amount claimed was comprised of agreed work and extra work and exceeded $800,000. After several days of trial it was discovered that the appellant had miscalculated the amount of its claim for "agreed" work having wrongly charged about $83,000 of the total amount as "extra" work.

[3] The respondents applied to dismiss the appellant's claim in view of the deception.

[4] Summarizing the circumstances the trial judge wrote:

> [1] This Decision concerns the appropriate remedy at mid-trial where the principal witness for the plaintiff acknowledges that he deliberately lied and misled plaintiff's counsel, counsel for the defendants and the third parties, and the Court, and says that it was done with the tacit acquiescence of senior officers of the corporate plaintiff. The context is the jurisdiction of the Court to protect abuses of its process
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> [2] Counsel say that the fact situation is unique. The case, a complex construction law claim, was commenced in 1994. It involves a multiplicity of

claims and counterclaims of the plaintiff, two defendants and two third parties. Its adjudication will eventually require a total of approximately 21 days of trial time, and the determination of 15 issues raised by the parties for the consideration of the Court.

[3] In early 1997, Justice Hamilton ordered counsel for the plaintiff sub-contractor to provide a breakdown of its claim for damages to other counsel. Counsel for the plaintiff asked the Atlantic General Manager to obtain it. The employee who prepared the breakdown told him of discrepancies in invoicing which had resulted in the plaintiff overcharging the general contractor. He discussed the matter with the president and manager of accounts receivable of the company, neither of whom instructed him to reconcile the invoices or to tell the company's counsel about the situation. He provided the breakdown to counsel, did not reveal the problem, and counsel sent it in a letter to counsel for the defendants and third parties. In subsequent discoveries, the letter containing the incorrect information was exhibited and relied upon.

[4] Prior to trial, a settlement conference was held with a retired judge from British Columbia. The plaintiff's breakdown of damages was used there. The effort at settlement was unsuccessful.

[5] Trial commenced on December 1, 1998, and continued for five days. Because additional trial time was needed, the trial resumed on January 4, 1999, and continued for eight days. The principal witness for the plaintiff testified at trial in accordance with the contents of the breakdown of the plaintiff's claim which he had previously sent to plaintiff's counsel who, in turn, had sent it to counsel opposite with a view to its being introduced into evidence. At the request of counsel, eight days of further trial time was reserved. Before concluding at that point, the Court gave permission to counsel for the plaintiff to reopen his case and recall plaintiff's principal witness with respect only to a question of possible double billing raised by the counsel for the general contractor. The trial was scheduled to resume on November 1, 1999.

[6] On September 20, 1999, the principal witness for the plaintiff was subjected to further discovery. The transcript of that discovery reveals that the principal witness at first testified that the breakdown of the damage claim was correct but, when challenged and confronted, acknowledged that it was incorrect, that it overstated the plaintiff's claim by some $83,000, that he had lied deliberately, and that two senior officers of the plaintiff had knowledge of what he was doing and did not attempt to stop him. The principal witness had discussed the subject with those two officers on several occasions, and it was only after the early portion of the trial that one of them, the president (an owner of the company), directed him to inform the company's lawyer about the incorrect information and the lies under oath.

[5] Justice Nathanson found:

[9] The facts disclose a lengthy course of inaction on the part of the principal witness and the plaintiff during which nothing was done and, when viewed in context, shows a clear intention to mislead counsel and the Court with respect to the scope and amount of the plaintiff's claim. What occurred amounts to an abuse of the process of the Court.

[6] As to relief he said:

> [22] Despite my finding that this is a clear case of abuse of process and despite my inclination that the case can and possibly should end at this point, I am left with a residual concern that such a remedy might be too harsh. If the case proceeds to its natural completion, the plaintiff might be able to establish its claim, might be able to satisfy the Court that its other witnesses are credible, and might be able to persuade that the testimony of one witness is not needed to prove that it has a valid claim and what the proper amount of that claim should be. Therefore, I propose to follow the decision of the Ontario Court of Appeal in *Ontario New Home Warranty Program v. 421363 Ontario Ltd.*, supra. I consider that decision to be perceptive and wise.
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> [23] In the result, this Court orders the plaintiff to pay the solicitor and client costs to date of the two defendants and two third parties. Those costs will be paid as a condition precedent to continuing with the pending trial of the action. ...

[7] The total amount of the solicitor client costs was $451,131.83.

[8] The test governing an appeal from a discretionary order was addressed by Matthews, J.A., for this Court, in **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.** (1990), 96 N.S.R. (2d) 82, at p. 85:

> 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:
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> > 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.

[9] We are satisfied that the evidence before the trial judge supported his conclusion that the appellant's conduct warranted a meaningful punitive monetary sanction. While costs are generally intended for indemnification, in appropriate circumstances costs can serve to censure improper behaviour by a litigant. This order was clearly directed at both indemnifying the respondents and denouncing the appellant's conduct in an effort to deter others who might be inclined to deceive the court. It is impossible here to measure with any accuracy the wasted solicitor client costs occasioned by the appellant's prolonged deception. A significant factor is the lost opportunity for settlement of the action given the substantial overstatement of the appellant's claim.

[10] It might have been preferable for the judge to have awaited the conclusion of the trial before fixing the sanction. We are not satisfied, however, that in these circumstances he would have been in a much better position to do so at that time. In any event, we cannot say that the judge misdirected himself in law or that the order works a patent injustice.

[11] Accordingly, the appeal is dismissed. Counsel for the appellant has

conceded that, failing success on the appeal, solicitor client costs to the respondents are warranted and we so order.

Bateman, J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A