Docket No.: CA 167793
Date: 20001219

NOVA SCOTIA COURT OF APPEAL

[Cite as: First Mortgage Nova Scotia Fund (lll) Inc. v. HSBC Capital Inc., 2000 NSCA 145]

BETWEEN:

FIRST MORTGAGE NOVA SCOTIA FUND (III) INC., FIRST MORTGAGE FUND (IV) NB INC., FIRST MORTGAGE NOVA SCOTIA FUND (VII) INC. and PACRIM DEVELOPMENTS INC.

Applicants
(Appellants)

- and -

HSBC CAPITAL INC.

Respondent

DECISION

Counsel:	Michael S. Ryan, Q.C. for the Appellants William L. Ryan, Q.C. and Roderick H. Rogers for the Respondent
Application Heard:	December 6, 2000
Decision Delivered:	December 19, 2000

BEFORE THE HONOURABLE JUSTICE FLINN
IN CHAMBERS

FLINN, J.A.: (In Chambers)

[1] This application came before me in Chambers on December 6, 2000. At the conclusion of the hearing, I gave a brief oral decision dismissing the application, and indicated to counsel that I would amplify that oral decision in writing.

[2] On August 4, 2000, by originating notice (application), the respondent commenced the proceeding which gives rise to this application. The appellants, First Mortgage Nova Scotia Fund (III) Inc., First Mortgage Fund (IV) NB Inc., and First Mortgage Nova Scotia Fund (VII) Inc. (the Funds) are immigrant investor funds. The respondent is a custodian under various offering memoranda. The purpose of the originating application was for an order under the **Nova Scotia Companies Act** and the **New Brunswick Business Corporations Act** to appoint an investigator to investigate and report with respect to actions, conduct and affairs of the Funds; and for an order appointing a receiver or a receiver manager of the Funds.

[3] Approximately three months in advance, the matter was set down to be heard in Supreme Court Chambers on December 6 - 8, 2000.

[4] On November 29, 2000, a week before the hearing, the Funds served notice of an interlocutory application seeking to have the respondent's law firm disqualified from representing the respondent in the matter. At the same time, the appellant, Pacrim Developments Inc., sought leave to intervene and be added as a party to the proceeding.

[5] The interlocutory application, to disqualify the respondent's solicitors, was heard by Justice Tidman on December 5, 2000. Justice Tidman was to preside over the hearing of the main application commencing on the next day, December 6, 2000, at 2 o'clock in the afternoon.

[6] Justice Tidman dismissed the appellants' application to disqualify the respondent's counsel.

[7] On the morning of December 6, 2000, the appellants filed a notice of appeal of Justice Tidman's decision, dismissing the appellants' application to

disqualify the respondent's counsel. At the same time, the appellants requested me to hear an "emergency application" to stay the proceedings which were to commence before Justice Tidman at 2 o'clock that very afternoon, pending the hearing of the appellants' appeal.

[8] The application was heard before me at 12 o'clock noon on December 6, 2000. Counsel for the respondent appeared and opposed the application. After hearing counsel, I dismissed the application and I ordered the appellants to pay to the respondent its costs of this application which I fixed at $1,000.00, payable in any event of the cause.

[9] In my opinion, I do not have the express jurisdiction, nor do I have (as counsel for the appellants submits I do), the inherent jurisdiction to grant an order staying proceedings in the Supreme Court of Nova Scotia, while the appellants pursue an interlocutory appeal in the Nova Scotia Court of Appeal. I refer to **Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)** (1996), 154 N.S.R. (2d) 358. In that case, Justice Hallett reviews, in some length, the limited jurisdiction of a Chambers judge of the Court of Appeal, and compares the jurisdiction of a Chambers judge of the Court of Appeal to the

jurisdiction of the Court of Appeal itself. I adopt Justice Hallett's words in § 31 of his judgment in **Future Inns**:

> Considering the clear distinction made in rule 62 as to what authority can be exercised by the court and what is delegated to a judge of the court and the absence of any precedent, I have concluded that a judge of this court, sitting in Chambers, does not have the expressed or inherent jurisdiction counsel for the [appellants] suggests.

[10] Certainly, I have the jurisdiction to order a stay of execution of a judgment of the Supreme Court of Nova Scotia, pending an appeal of that judgment pursuant to the provisions of **Civil Procedure Rule** 62.10. However, that is not what the appellants are requesting on this application. The appellants are requesting that I stay the actual proceedings in the Supreme Court, which I have no jurisdiction to do.

[11] Further, counsel for the respondent submits that even if I had the jurisdiction to grant such an order that I should decline to do so in the circumstances of this case. Counsel for the respondent refers to the fact that if there was a problem with the respondent's counsel's participation in this matter (and counsel does not admit that there is) that it was known to the Funds in August of this year. Having waited until the 11th hour to do

something about it the appellants cannot now complain. The hearing is slated to go ahead this afternoon. Counsel and witnesses for the respondent are hear and ready to testify. Whatever the merit of that position which counsel advances, it seems to me that there is a more fundamental issue here. The trial judge has the ability to deal with this matter by either granting a stay of proceedings until the appeal is heard, or granting an adjournment. In my view the trial judge should deal with this matter, at least initially (see **Labourers International Union of North America, Local 1115 v. Dexter Construction Co.**, (1999), 180 N.S.R. (2d) 129). There was some reference between counsel for the appellants and the trial judge concerning a stay of proceedings. However, no formal application was made nor did counsel for the appellants ask that trial judge for an adjournment.

[12] The application is dismissed.

Flinn, J.A.