NOVA SCOTIA COURT OF APPEAL
Citation: *Ketler v. Nova Scotia (Attorney General)*, 2016 NSCA 15

Date: 20160229
Docket: CA 444047
Registry: Halifax

Between:

Mark Paul Ketler

Appellant

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia

Respondent

Judge:	Bryson, J.A.
Motion Heard:	February 25, 2016, in Halifax, Nova Scotia in Chambers
Held:	Motion granted; security for costs ordered in the amount of $2,500.00
Counsel:	Nicolle Snow, for the appellant Duane Eddy, for the respondent

Decision:

The Case Under Appeal

[1] While driving home on a pleasant summer's day, Mark Ketler drove off a wooden bridge on a graveled road in Hants County. He was reacting to the sudden appearance of a deer. Mr. Ketler has little recollection of the accident itself. His vehicle rolled off the side of the bridge into a creek. He suffered a painful injury to his right shoulder. He was taken to hospital, examined, treated and released. His shoulder injury persisted. He sued the province for negligent maintenance of the bridge.

[2] In a comprehensive and lengthy decision following a five day trial, the Honourable Justice Gregory Warner dismissed Mr. Ketler's claim, (2015 NSSC 170). He found that Mr. Ketler had not established causation or a breach of the standard of care. Mr. Ketler has appealed, attacking these findings.

[3] The appeal is scheduled to be heard on May 18, 2016.

The Attorney General Seeks Security for Costs

[4] Justice Warner ordered costs to the Attorney General representing the province of $25,313 with disbursements of $23,912.90 for a total of $49,225.90, payable forthwith.

[5] The Attorney General agreed not to seek payment of trial costs pending disposition of the appeal. But she has applied for security of costs, seeking 40 percent of the amount awarded at trial, ($18,690.36). Disbursements are excluded when calculating the 40 percent. In this case, 40 percent of the costs awarded at trial would be $10,124.

[6] There are six grounds of appeal, one of which lists six sub-grounds. The appeal is set for a full day. Without anticipating the Court's ruling on the merits, it is plain that preparing for and arguing this case will not be brief or inexpensive. The successful party may well recover costs in the range of 40 percent of trial costs.

[7] Mr. Ketler raised a preliminary objection to the Attorney General's rebuttal affidavit. I agreed that the affidavit constituted argument and it was struck.

Special Circumstances

[8] A party seeking security for costs must establish that there are "special circumstances" warranting such an order. There are many cases that provide examples of "special circumstances". But as Justice Beveridge has observed, these "[a]ll 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, (*Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40 at para. 6).

[9] The risk must be more than speculative. "It is usually necessary that there be evidence that, in the past, that "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", (*Williams Lake Conservation Company v. Chebucto Community Council of Halifax Regional Municipality*, 2005 NSCA 44 at para. 11 per Fichaud, J.A.).

[10] Special circumstances are those which support an objectively justified concern that the respondent will be unable to recover costs from an unsuccessful appellant. In *Bardsley v. Stewart*, 2014 NSCA 32, the Court put it this way:

> [25] "Special circumstances" are not confined to the failure to pay judgments either in a case under appeal or unrelated matters. Rather, that is evidence of an inability or unwillingness to pay. Depending on the circumstances, a failure to pay judgments may constitute an "objective basis" for concern that a respondent may not recover costs from an appellant. Behaving in an insolvent manner towards a respondent can give rise to such a concern, even if an appellant may be able to pay costs. It is not a question of the appellant's *ability* to pay but rather *the objectively founded concern that a respondent may not recover* because of insolvent behaviour towards that respondent: *Frost* at ¶10, cited in *Monette v. Jordan*, 163 N.S.R. (2d) 75 at 6; and see cases in ¶12 above. [original emphasis]

[11] "Insolvent behaviour" towards the respondent is one way of giving objectivity to the respondents' concern: it is not the only way. Special circumstances may include evidence that the appellant is actually insolvent; or has demonstrated an unwillingness or inability to meet his obligations because he has failed to pay judgments or costs, including trial costs; is not pursuing an appeal in good faith or is otherwise abusing the court's process; or has behaved fraudulently, to name only some such circumstances. (See, respectively: *Williams Lake Conservation Company*; *Frost v. Herman* (1976), 18 N.S.R. (2d) 167; *Branch Tree Nursery & Landscaping Ltd. v. J & P. Reid Developments Ltd.*, 2006 NSCA 131; *Rogers v. Nova Scotia Power Inc.*, 2006 NSCA 33; *Leigh v. Belfast Mini-Mills*

Ltd., 2013 NSCA 86 at para. 13; *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 72 O.A.C. 303 (Ont. C.A.)).

Discretion

[12] Even where special circumstances are demonstrated, a discretion remains in the Court to refuse security. A common example occurs when the Court is reluctant to prevent a "good faith appellant who is truly without resources from being able to prosecute an arguable appeal", (*Sable*, para. 7).

[13] While the merits of the appeal are rarely weighed by a single judge in Chambers, they can be relevant to the exercise of discretion. In the context of an appeal from a chambers decision, prior to trial, Justice Cromwell considered principles which, with one caveat, are apt here:

> [59] As will be seen, review of these authorities reveals three clear principles which are consistently applied. First, orders for security should not be used to keep persons of modest means out of court. Second, while the merits of the plaintiff's case are relevant and may be considered, they should only be considered on the basis of undisputed facts, the pleadings, etc. and not on the basis of seriously disputed facts or assessments of credibility. Third, consideration of the merits should only be decisive where they are clear and obvious. In short, the law relating to consideration of the merits on interlocutory applications for security for costs is in harmony with the general reluctance to assess the merits of a claim or defence, other than in obvious cases, before trial.
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> […]
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> [83] From this review of the authorities, I reach the following conclusions. The merit of the plaintiff's case is a relevant consideration to the exercise of discretion to grant or refuse security for costs. The extent to which the merits may properly be considered varies depending on the nature of the case. If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. ***The assessment of the merits should be decisive only where (a) the merits may be properly assessed on an interlocutory application; and (b) success or failure appears obvious***. If the plaintiff resists security that would otherwise be ordered on the basis that the order will stifle the action, the plaintiff must establish this by detailed evidence of its financial position including not only its income, assets and liability, but also its capacity to raise the security. Where the order for security will prevent the plaintiff from proceeding with the claim, the order should be made only where the claim obviously has no merit, bearing in mind the difficulties of making that assessment at the interlocutory stage. Where the choices are, on one hand, allowing an unmeritorious claim to go to trial and, on the other, stifling a possibly meritorious

> claim before trial, the policy of our law is clear. While there is a risk of injustice on either account, stifling a possibly meritorious claim is the greater injustice.
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> (*Wall v. Horn Abbot Ltd.*, [1999] N.S.J. No. 124)

[14] The caveat is this: unlike Mr. Wall, Mr. Ketler has had the benefit of a trial on the merits. This reduces the merits question on appeal to the grounds named in the Notice of Appeal. It may well be easier to assess merits in an appeal context.

[15] The appellant has not been denied his "day in court". He has had five of them, without success, at great expense to the Attorney General. As Justice Oland observed in *Munroe v. Morgan Industrial Contracting*, 2004 NSCA 49*:*

> [8] Even if I were to assume that he is self-represented and has not paid any portion of the trial costs because he is impecunious, that financial situation of itself does not preclude an order for security for costs. In regard to the previous Rule on such security, MacKeigan, C.J.N.S. stated in *L.E. Powell & Co. Ltd. v. Canadian National Railway Co. et al. (No. 2)* (1975), 11 N.S.R. (2d) 532 (N.S.C.A.), as follows:
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> > By Rule 62.30, *supra*, this Court or a judge thereof, like the English courts, may now order security for costs on appeal in "special circumstances". The basic principle applied by the English courts in cases like the present has been set forth by Bowen, L.J., in *Cowell v. Taylor* (1885), 31 C.D. 34 (C.A.) at p.38:
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> > > ***The general rule is that poverty is no bar to a litigant***, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. ***There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another.*** There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow.
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> The following comments by Bateman, J. in Smith's Field Development Ltd. v. Campbell, supra, are also worth noting:
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> > [40] The appellants are able to pursue this appeal, as they have the litigation before the trial court, principally without concern for legal fees. Should the appeal fail, the only risk to the appellants, apart from their own disbursements, is an order for costs, which will inevitably go unanswered. As Pugsley J.A. said in *Arnoldin Construction, supra*:

> [9] ...
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> > (1) ... [the respondent] is entitled to a substantial sum for its taxed costs of successfully defending a trial. To permit the company to have a "free ride" without posting security, renders an[d] injustice to Alta. Alta's rights must also be considered... .
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> > [Emphasis added]

[16] In *Munroe*, Justice Oland took into account what she regarded as weak merits (appealing findings of credibility) as well as other behaviour of the appellant, to require security.

[17] Nevertheless, this Court remains reluctant to dispose of a security for costs application on the merits, unless success is "readily apparent", (per Bateman, J.A. in *Campbell v. Turner-Lienaux*, 2001 NSCA 122 at para. 17).

Should Security for Costs be Granted?

[18] The Attorney General says that security should be granted because Mr. Ketler has not paid trial costs, does not reside in the jurisdiction (he lives in British Columbia), is unemployed, has no exigible assets, and has a weak case on appeal.

[19] Mr. Ketler replies that he has not paid trial costs because the Attorney General agreed to forego collection for now, that he has not behaved in an insolvent fashion towards the Attorney General, and there is no history of him not paying his debts. He counters the "merits" argument by saying that these cannot be determined in a chambers setting, and such arguments only work in favour of the appellant where his case is obviously right, citing *Munroe* at para. 9.

[20] I do not agree with Mr. Ketler that the merits argument is a "one way street", only favouring an appellant with a strong case, which might be frustrated by a security for costs award. As Justice Cromwell makes plain, an appeal apparently without merit will not impede an award of security for costs where special circumstances are established, even if that might end the appeal. But for the reasons Justice Cromwell describes, such cases will be rare. This is not one of them.

[21] Mr. Ketler may have a difficult time challenging the trial judge's findings. But it is not obvious that he will fail. The merits are not relevant to an exercise of discretion in this case.

[22] Although currently unemployed, Mr. Ketler is seasonally employed between March and October as a technician at $20 an hour. His only significant asset is an RSP in the approximate amount of $34,000. Mr. Ketler has earned substantial sums in the past while working in the oil industry but deposes - and one could probably take judicial notice of the fact - that the oil industry in western Canada is in serious decline with no immediate prospect of improvement.

[23] Mr. Ketler argues that the Attorney General's forbearance forecloses her reliance on non-payment of trial costs as a "special circumstance" justifying security for costs. In effect, he says that trial costs are not currently due, so he cannot be faulted for not paying them. But that ignores whether Mr. Ketler can actually pay appeal costs.

[24] Arguably, Mr. Ketler could encroach upon his RSP to pay appeal costs. There would be adverse tax consequences for doing so, depending on his 2016 income. But if he does not do this, the Attorney General has no access to the RSP. Although there is reciprocal enforcement of judgment legislation in British Columbia on which the Attorney General could rely, she cannot seize the RSP because BC law exempts it from execution. Mr. Ketler's blanket denial of any ability to post security prior to the appeal is in response to the Attorney General's request for almost $20,000 in security. Mr. Ketler offers nothing by way of compromise.

[25] Mr. Ketler argues that his difficult financial circumstances are temporary. He will soon resume work. But his anticipated income alone cannot reasonably be expected to cope with his living expenses and a costs award that may approach $10,000.

[26] The Attorney General has demonstrated "special circumstances" because Mr. Ketler has neither the income, nor the assets to pay an award of costs in the foreseeable future, let alone trial costs. Although Mr. Ketler has no history of unmet obligations such as outstanding judgments, and has not indicated any unwillingness to pay, his very modest financial circumstances and the anticipated costs of appeal, give the Attorney General an objective basis for concern about payment.

[27] Mr. Ketler says that he has no present ability to post security. His counsel urges that the Court should not frustrate his appeal by awarding security for costs.

[28] I agree with Mr. Ketler's point in principle; but I am not satisfied that he has no ability to post any security for costs. In *Wall*, Justice Cromwell emphasized the obligation of the appellant to establish impecuniosity, including his inability to raise security:

> [83] … If the plaintiff resists security that would otherwise be ordered on the basis that the order will stifle the action, the plaintiff must establish this by detailed evidence of its financial position including not only its income, assets and liability, but also its capacity to raise the security. …

[29] Mr. Ketler's affidavit says nothing about his ability to raise security. Although Mr. Ketler pleads the transience of his impecuniosity, he has not explained why he cannot raise any security from any source, as Justice Cromwell describes in *Wall*. Mr. Ketler has had plenty of time to do so - the Attorney General's inquiries about his assets began six months ago, and this motion was brought six weeks ago - and adjourned at Mr. Ketler's request.

[30] In his brief, Mr. Ketler contends that "… he does not have the immediate means to ***satisfy the order sought***" (emphasis added). I agree. But that does not mean he cannot pay anything. If Mr. Ketler is pursuing his appeal in good faith, I am satisfied that he can risk something to do it. His appeal requires the Attorney General to do so by incurring the time and expense of responding.

[31] Although the Attorney General has established special circumstances there is real risk that a significant security for costs award would impede Mr. Ketler's ability to pursue the appeal. A modest security for costs award is very likely in his grasp. The Court would normally award security for costs in an amount less than the likely award at appeal, (*Sable*, para. 37). In this case, Mr. Ketler's personal circumstances should temper that amount further.

[32] Accordingly, I order that Mr. Ketler post security for costs by depositing the sum of $2,500.00 with the Registrar of the Court, not later than 4:00 p.m., March 17, 2016, (this is the date on which Mr. Ketler's factum is due). If security is not posted as ordered, the Attorney General may apply for dismissal of the appeal without further notice.

Bryson, J.A.