C.A. No. 129995

NOVA SCOTIA COURT OF APPEAL
Cite as: Saunders v. Oceanus Marine, 1996 NSCA 236

Roscoe, Pugsley and Bateman, JJ.A.

BETWEEN:

EDMUND and RETA SAUNDERS Appellants - and - OCEANUS MARINE Respondent	Appellant in person G.F. Philip Romney for the Respondent Appeal Heard: December 6, 1996 Judgment Delivered: December 17, 1996

THE COURT: The appeal is dismissed, with the exception of s.1 of the order of July 16, 1996, per reasons for judgment of Pugsley, J.A., Roscoe and Bateman, JJ.A. concurring.

PUGSLEY, J.A.:

This appeal relates to one of a series of transactions between Oceanus Marine Inc. (Oceanus) as a mortgagee, or assignee of certain mortgages, and Edmund Saunders, and his wife Reta, of Lunenburg, as mortgagors. One of these transactions was considered by this Court in July of this year (C.A. No. 125093, decision July 26th, 1996).

On May 29th, 1989, Mr. Saunders, then a practicing lawyer, and his wife mortgaged lands at Heckman's Island, and the Windsor Road, both in Lunenburg County (the Properties) securing the sum of $154,280.50 to Canada Trust Company (the Mortgage).

Canada Trust assigned the Mortgage to First City Trust Company, who later changed its name to North American Trust Company.

By originating notice dated August 5, 1993, North American Trust Company commenced action against the Saunders (SBW 2327) for, *inter alia*, foreclosure of the Mortgage. The amount due under the Mortgage was stated to be $214,426.85. A defence was filed.

On May 11, 1995, an order for foreclosure, consented to as to form, by the Saunders, was taken out before a Chambers judge fixing the amount due on the Mortgage at $175,000.

The Mortgage was subsequently assigned to 252712 N.S. Limited, and shortly thereafter to Oceanus.

By originating notice, dated April 18th, 1996, Oceanus commenced an action for foreclosure of the Mortgage (SBW 3604). The foreclosure sought was pursuant to the same Mortgage referred to in SBW 2327 and encumbered the same lands. The amount due under the Mortgage was stated to be $166,731.24. A defence was filed.

This appeal arises consequent upon three interlocutory orders dated July

16th, 1996, granted by a Supreme Court judge sitting in Chambers.

The Saunders apply for leave to appeal, and if granted, appeal from the orders submitting that the Chambers judge erred when he:

- dismissed their application in action SBW 2327, for a stay of the May 11th, 1995, foreclosure order;
- dismissed their application in action SBW 2327 for rectification of the amount outstanding on the Mortgage;
- granted Oceanus's application for leave to file a notice of discontinuance in action SBW 3604, and thereby, affected rights which the Saunders submit had accrued to them in action SBW 3604;
- concluded that the amount due under the Mortgage should be determined by Doane Raymond, Chartered Accountants.

Two amended notices of appeal were filed by the Saunders on August 8th and November 21st, 1996. Some of the issues raised would appear to be covered in the original notice of appeal. They allege that the Chambers judge erred when he:

- failed to take into account certain payments allegedly made by the Saunders on the Mortgage,
- substituted Oceanus as a plaintiff in place of North American Trust Company in action SBW 2327;
- determined that the Saunders owed any amount on the Mortgage;
- failed to find that admissions made, or deemed to have been made, by Oceanus, in an Answer, filed by Oceanus in action SBW 3604 in response to a Notice to Admit, should be deemed admissions in action SBW 2327.

Mr. Saunders had filed on June 10, 1996, the Notice to Admit, calling upon Oceanus to acknowledge that a Schedule, prepared by Mr. Saunders, a copy of which was annexed to the Notice, "correctly shows" that after all "proper charges and payments" are considered, the Saunders owed nothing on the Mortgage, but, in fact, were owed approximately $31,000.00. On June 20th, 1996, Oceanus filed its Answer to the Notice to Admit, which the Saunders submit constituted an admission of the validity of their claim.

The Chambers judge was requested to consider on July 11th, 1996, on behalf of Oceanus, applications for an order:

- to consolidate SBW 3604 with SBW 2327;
- for foreclosure and sale in SBW 3604;

He was also asked to consider, on behalf of the Saunders, applications for an order to:

- stay or rectify the consent order of May 11th, 1995, granted in SBW 2327;
- strike SBW 3604 on the ground of multiplicity of actions,
- grant judgment to the Saunders on the basis of certain admissions made by Oceanus in the Answer filed in response to the Notice to Admit.

Chambers Applications on July 11th, 1996

The Chambers judge was faced, as this Court is faced, with a very substantial number of affidavits and schedules, arranged in a manner that makes it difficult to determine what is relevant to the critical issues between the parties. Counsel for Oceanus suggested, at the outset of the Chambers application, that if Oceanus

were added as a plaintiff in SBW 2327, counsel would then discontinue SBW 3604, and that his applications to strike the Saunders' defence and for summary judgment in SBW 3604, would then become "irrelevant".

Mr. Saunders suggested that, rather than SBW 3604 being discontinued, SBW 2327 (i.e., the foreclosure action commenced by North American Trust Company on August 5, 1993) be dismissed with costs. Such a dismissal would, presumably, have resulted in the consent order of May 11th, 1995, being rendered moot.

The Chambers judge responded:

> I think just to get this thing moving, ... I am going to grant the application for Oceanus to be substituted for North American Trust in ... 2327. Then I am going to permit [counsel for Oceanus], and the action should never have been started, to withdraw action 3604.

The following exchange then occurred:

Mr. Saunders:	When does the amount that's owing get decided?
The Court:	I thought you and Mr. Romney had decided that.
Mr. Saunders:	Oh no, we haven't decided that at all. I say that there is no money owing on the mortgage.
	. . .
The Court:	Oh no, no, no, just a minute Mr. Saunders. We're not going back to day one. We're going back to May 11, 1993 [i.e. sic. 1995]. I don't care about B.C. I'm starting in May 11, 1993 [sic 1995] when there is a consent order of $175,000. Everything else, Mr. Saunders, is under the table, under the bridge, going down the river. Gone. Okay.
Mr. Saunders:	You refuse to upset the Consent Order.
The Court:	I'm not going to upset that Consent Order. No. No. And neither should I because there is no reason to do it. I spent a lot of time, Mr. Saunders, on that and you're a barrister, you know what is going on, and you had lots of time to complain back from 1989 on with that mortgage and do something about it. And I know that you prepare plenty [of] documents because I got plenty in the last couple of days that you had no difficulty preparing those

> documents. You did nothing on that until 1993 and then coming before the court is an order, a Consent Order as to form, and it sets out that you've agreed that, that it was $175,000 at that time. Now, if you had disagreed, Mr. Saunders, and knowing you as a barrister, you'd never, never have put your signature on that thing anywheres at all. I wouldn't and you wouldn't have unless you agreed with it.
>
> Mr. Saunders: You're, you're denying my Application that there was misrepresentations?
>
> The Court: Yes, I am.

After a detailed review of all the documents, I am satisfied that this conclusion by the Chambers judge was entirely justified.

The genesis of the May 11th, 1995, consent order was contained in an agreement dated April 28th, 1995 and signed by both Mr. and Mrs. Saunders and North American Trust Company. It provides that the agreement is to be read in conjunction with the draft order for foreclosure which is attached. The agreement provides, inter alia:

- that the effective date of the foreclosure order is March 1st, 1995, that the principal amount outstanding is $175,000; and
- that the order for foreclosure will not be exercised for a period of 11 months after the order is taken out.

The agreement goes on to provide that this settlement is to be "inclusive of all matters outstanding between the parties."

Mr. Saunders made the same argument to this Court that he advanced to the Chambers judge - that his consent to the May 11th, 1995, order was obtained by misrepresentation and fraud. The "facts" on which Mr. Saunders relies to support the submission were raised by him, however, in August, 1993, in the defence he drafted to the Originating Notice issued by North American Trust Company. They were issues the Chambers judge presumably concluded were abandoned by Mr.

Saunders almost two years later when he decided to sign the agreement of April 28th, 1995, and consented to the May 11th Order.

Discussion between the Court, Mr. Saunders, and Mr. Romney, then ensued respecting the amount still outstanding on the Mortgage. Mr. Romney maintained that $160,628.31 was outstanding as of June 21, 1996 and continued:

> There was no dispute as to payments being made. The only dispute that may be is, is whether the calculation of interest is correct and to save the court and parties a lot of time and money I would suggest that if there is a question as to the calculation . . . that we get Doane Raymond to calculate the interest from, -interest and payments from March 1, 1995 to the present time and that'll be the figure to be used for foreclosure. {emphasis added}

Mr. Saunders responded:

> I would - if it is calculated by chartered accountant, Doane Raymond should be satisfactory. I don't disagree with Doane Raymond being ordered to do that.

Despite what appeared to be a clear agreement between the parties that Doane Raymond should calculate interest and payments from March 1, 1995, the order taken out by counsel for Oceanus on July 16, 1996, to which neither one of the Saunders consented, provided:

> That the amount due on the mortgage sought to be foreclosed on herein be calculated by Doane Raymond, Chartered Accountants, in accordance with the payments as set out in the Statement attached to the aforesaid Affidavit of Donald G. Fickes.

Mr. Fickes is the president of Oceanus. He had filed an affidavit in support of Oceanus's applications. A schedule annexed to the affidavit detailed all interest accruing and payments made since March 1st, 1995, and determined that the amount outstanding under the Mortgage as of June 27th, 1996, amounted to $160,620.31.

The schedule credits the Saunders with every payment they maintain they made on the Mortgage from March 1st, 1995 up to and including their last payment made on February 14, 1996.

Burden of Proof

Oceanus submits that as the appeals are brought from an interlocutory order, involving the exercise of discretion by the Chambers judge, the burden on the Saunders is to establish either, that the Chambers judge made a serious error of law, or that the rankest case of injustice would result if the appeal were not to be allowed, citing this Court's decision in **A.C.A. Co-Operative Association Ltd. v. Associated Freezers Inc.** (1989), 95 N.S.R. (2d) 35 at 37.

I am satisfied, however, that the three orders make a final disposition of the rights of the parties and that the cautionary words of Chipman J.A. in **Minkoff v. Poole & Lambert** (1991), 101 N.S.R. (2d) 143, at p. 145-6, should be heeded:

> The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations.

First Ground of Appeal - Refusal to Grant Stay

The Chambers judge, in my opinion, was fully justified when he refused to stay the order of May 11th, 1995.

This order was a consent order, albeit as to form, signed by both Mr. and Mrs. Saunders. The preamble provided, however, that the "plaintiff and the defendants have resolved all outstanding issues and have decided upon the terms of foreclosure". It was based on the agreement of April 28th, 1995, signed as well by both Mr. Saunders and his wife.

Mr. Saunders did not raise any complaint respecting the content of this order

until March 29th, 1996. In an affidavit in support of his Chambers application, Mr. Saunders then deposed that "the Order of May 11th, 1995, does not reflect correctly the amount then owing on the said Mortgage", and further, that the order would not have been granted by the Court, "if all the facts had been put forward".

A number of the complaints raised by Mr. Saunders relate back to matters that arose in 1989. I agree with the comments of the Chambers judge when he pointed out to Mr .Saunders that he was "a barrister, you know what is going on and you had lots of time to complain....".

Indeed, Mr. Saunders continued to revise his position with respect to the amount owing under the Mortgage right up until the time of the hearing of the application.

He filed an affidavit on May 17th, 1996, to which he annexed a Schedule calculating the amount owed by him and his wife under the Mortgage at $44,524.34. This figure was, he deposed, "his interpretation of what, if any, is now due ....".

Less than one month later he attached an amended Schedule to the Notice to Admit, purporting to demonstrate that rather than owing any money, he and Mrs. Saunders were owed in excess of $31,000.00. This change arose because, he deposed, the "sum of $50,000.00 was apparently paid on or about November 1st, 1992, which had not been taken into account".

The documents disclose that Mr. Saunders was intimately involved in all aspects of the mortgage transaction relating to the Properties since May of 1989. We have not been shown any persuasive evidence that the amount due under the Mortgage as of May 11th, 1995, should be any figure other than $175,000.00.

The grounds on which the Court may interfere with a consent order are relatively narrow (See **Halsbury's Laws of England**, 4th edition, vol. 37, p. 286).

All of the circumstances of this case, including the delay of approximately ten months in bringing this application, mitigate against the Court exercising any equitable discretion in favour of the Saunders.

The application for the stay was brought pursuant to the provisions of **Civil Procedure Rule** 52.09 which provides:

> When a party against whom an order has been granted, or any person against whom obedience thereof may be enforced, applies to the court for a stay of execution thereunder because of a matter that occurred after the date of the order, the court may grant the stay and any other relief upon such terms as it thinks just.

I am not convinced that any matters that occurred since May 11th, 1995, would have justified the Chambers judge in granting the stay pursuant to **Civil Procedure Rule** 52.09.

I would, accordingly, dismiss the first ground of appeal.

Second and Fourth Grounds of Appeal - Rectification of the Amount Determined on May 11th, 1995 by Reference to Doane Raymond

The consent order of May 11th, 1995, as I have indicated, conclusively determined that the amount due on the Mortgage as of that date was $175,000.00.

It is clear from the transcript of the Chambers application, that counsel for Oceanus and Mr. Saunders agreed that the issues of interest calculation, and payments made on account, would be determined by Doane Raymond. That agreement should have been reflected in the order taken out by counsel for Oceanus on July 16th, 1996.

It is, in my view, appropriate to allow this ground of appeal, to reflect the

agreement reached by the parties. The matter should be referred to Doane Raymond to determine any changes that should be made to the agreed upon sum of $175,000.00, after March 1st, 1995, as a result of interest accruing, or payments made. Consistent with the representation by Mr. Romney to the trial judge, Mr. and Mrs. Saunders are to receive credit for the payments acknowledged in Mr. Fickes' affidavit. Doane Raymond should then make a report to the Chambers judge who should fix the amount due on the Mortgage. Except for these changes, I would dismiss this ground of appeal.

Remaining Grounds of Appeals Set Out in the Notice to Appeal and two Amended Notices of Appeal

The Saunders submit that the Chambers judge should not have permitted Oceanus to file a notice of discontinuance in SBW 3604, and should not have substituted Oceanus as plaintiff in lieu of North American Trust Company in SBW 2327, without permitting the Saunders to rely, in action SBW 2327, upon the Answers to the Notice to Admit, filed in action SBW 3604.

Mr. Saunders' submission is based upon a very technical interpretation of **Civil Procedure Rule** 21.02. I am convinced, however, that the interpretation is flawed.

Civil Procedure Rule 21.02 provides in part:

> (1) A party may, by a notice to admit in Form 21.02(A), request any other party to admit, for the purposes of a proceeding only, the truth of any relevant fact or the authenticity of any relevant document specified in the notice.

> (2) Unless the court otherwise orders, the truth of any fact or the authenticity of any document specified in the notice to admit shall be deemed to be admitted for the purposes of the proceeding only unless, with in the period specified in the notice, which shall not be less than ten days, the party receiving the notice to admit serves upon the party giving the notice a statement that
>
> > (a) specifically denies the truth of any such fact or the authenticity of any such document and sets forth in detail the reasons why he cannot make the admissions; or
> >
> > (b) declares the admission of the truth of any such fact or the authenticity of any such document cannot be made on the grounds of privilege or irrelevancy or the request is otherwise improper, and sets forth in detail the reasons therefor.

The Notice to Admit drafted by Mr. Saunders requested Oceanus to admit as true, ten propositions, listed in the Schedule, which were obviously in dispute.

The tenth proposition, which is relevant to this ground of appeal provides:

> That the Statement, shown as Item 31 of Schedule "B" hereto, correctly shows all proper charges and payments with respect to the said Mortgage dated May 29, 1989, under foreclosure, with a net credit balance owing to the Defendants [i.e. the Saunders] in the amount of $31,353.91, as of May 31st, 1996.

Oceanus responded to this item as follows:

> The fact being requested to be admitted as true is not within the knowledge of the plaintiff herein but the plaintiff has been advised by Beverly C. Bower that this statement is untrue.

As I understand Mr. Saunders submission, he maintains that since Oceanus failed to "specifically deny" the truth of proposition 10 or "failed to declare that the admission of the truth of the proposition could not be made on the grounds of privilege or irrelevancy or that the request is otherwise improper", then Oceanus is deemed to have admitted that the Saunders were owed the sum of $31,353.91 by Oceanus as of May 31st, 1996.

The second argument advanced by Mr. Saunders relates to the Schedule referred to in proposition 10. It is attached to the Notice to Admit as Schedule B. The Answer filed on behalf of Oceanus provides in part:

> In regards to document ... 31, [Oceanus] states that it has copies of [this] document. Oceanus does not admit the truthfulness of any of the contents contained in any of the matters contained in Schedule "B" except for those generated by itself.

There are several reasons for rejecting Mr. Saunders' submissions on this ground of appeal:

- a fair reading of the response from Oceanus indicates that the matters referred to in the Notice to Admit were clearly placed in issue. While the Answer does not follow word for word the suggested response contained in Form 21.02(a), in the context of this litigation, and in view of all the circumstances known to both parties, it complies with the spirit of the **Rule**, and could not, reasonably have been taken by the Saunders as an acknowledgement of the accuracy of Mr. Saunders' calculations. It was patently clear from the commencement of both SBW 2327, and SBW 3604, that Mr. Saunders' position was not accepted by the holders of the Mortgage.
- even if it can be argued that Oceanus, accepted the "authenticity" of Mr. Saunders Schedule, such an admission would not constitute anything other than that the document was one prepared by Mr. Saunders.

To adopt the submission of Mr. Saunders would be to work an injustice entirely inappropriate to the circumstances (See comments of Gillis J. in **Moffat v. Rawding** (1970), 1 N.S.R. (2d) 489 at p. 507 (S.C.N.S.)).

Civil Procedure Rule 40.02 provides:

> At any time after a proceeding is entered for trial or its hearing is commenced in chambers,
>
> > (a) a plaintiff may discontinue the proceeding or withdraw any cause of action therein, against any defendant;
> >
> > ...
>
> with the leave of the court, and the order may contain such terms as to costs, the bringing of any subsequent proceeding, or otherwise, as are just.

I am satisfied, for the reasons outlined above, that the Saunders did not "gain any advantage" over Oceanus with respect to the material contained in the Answer to the Notice to Admit. Accordingly, the Saunders have not sustained any "substantial prejudice" when the Chambers judge permitted Oceanus to discontinue SBW 3604, and substituted Oceanus in place of North American Trust Company (see comments of Freeman J.A. on behalf of the Court in **Turner-Lienaux et al v. Campbell** (C.A. 127433, filed October 17th, 1996, at p. 6)).

I would accordingly dismiss this ground of appeal.

Mr. Saunders has raised a number of other issues in the Factum. Some were not raised before the Chambers judge or raised in the notice to appeal or the amended notice of appeal. They all, in my opinion, have no merit.

Conclusion

I would grant leave to appeal but dismiss all grounds of appeal except for the second ground of appeal. With respect to the second ground, I would delete s. 1 of the Order of July 16th, 1996, which reads:

> That the amount due on the Mortgage sought to be foreclosed on herein be calculated by Doane Raymond, Chartered Accountants, in accordance with the payments set out in the statement attached to the aforesaid affidavit of Donald G. Fickes.

and substitute the following:

> That the amount due on the Mortgage sought to be foreclosed on herein be determined by the Chambers judge in accordance with a report to be prepared and submitted by Doane Raymond, Chartered Accountants respecting the calculation of interest accrued and payments made from March 1st, 1995, to date.

Oceanus has been substantially successful respecting the issues in this appeal and I, accordingly, would award costs to Oceanus in the amount of $1,000.00 plus disbursements to be added to the costs taxed by the Supreme Court in the foreclosure proceedings.

Pugsley, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.

C.A. No. 129995

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

EDMUND and RETA SAUNDERS

Appellants

- and -

OCEANUS MARINE

Respondent

REASONS FOR JUDGMENT BY:

PUGSLEY, J.A.