

NOVA SCOTIA COURT OF APPEAL

Citation: *Branch Tree Nursery & Landscaping Ltd. v. J & P. Reid
Developments Ltd.*, 2006 NSCA 131

Date: 20061207

Docket: CA 270899

Registry: Halifax

Between:

Branch Tree Nursery & Landscaping Limited,
a body corporate, incorporated under the laws of Nova Scotia

Appellant

v.

J & P Reid Developments Limited, a body corporate,
incorporated under the laws of Nova Scotia

Respondent

Judge: The Honourable Justice Thomas Cromwell

Application Heard: December 7, 2006, in Halifax, Nova Scotia, in Chambers

Held: Application for security for costs granted.

Counsel: Michael Power, for the appellant
Martin Dumke, for the respondent

Decision:

[1] Branch Tree Nursery & Landscaping Limited appeals a judgment of Warner, J. dated August 17, 2006 which ordered it to pay a total of \$87,063.36. This amount included an award of trial costs in the amount of \$18,750.00 and disbursements of \$5,287.63. The appeal has been set down for hearing.

[2] J & P Reid Developments Limited, the respondent on the appeal, applies for security for costs.

[3] The material filed indicates that Reid filed an execution order at the end of August 2006 and that Branch Tree has failed to respond. The material also indicates that Reid conducted an examination in aid of execution of the president of Branch Tree, Micah Beaumont, in which he testified that the company:

- (i) had made a proposal to creditors in 1996;
- (ii) had current liabilities in excess of \$388,000.00; and
- (iii) had an unpaid outstanding judgment of just over \$2,000.00 going back to November of 1996 and that it was unlikely it could pay the outstanding judgment owed to the respondent.

[4] Mr. Beaumont has filed an affidavit indicating that:

- (i) with respect to the 1996 judgment, the creditor company is no longer in business and he “requested [his] counsel to pay [the judgment] out but there is no entity to receive payment and obtain a discharge;
- (ii) “... Branch Tree made a proposal to its creditors in 1996 which was accepted, paid and eventually discharged in accordance with its terms”;
- (iii) Branch Tree has offered to make monthly payments to Reid of \$1,000.00 pending the outcome of the appeal to which proposal Reid has not responded.

[5] The principles which apply to an application for security for costs under **Rule 62.13** are settled. The order may be made where the applicant establishes “special circumstances”. No reliance has been placed on s. 152 of the **Companies Act**, R.S.N.S. 1989, c. 81.

[6] As Fichaud, J.A. said in **Williams Lake Conservation Co. v. Halifax (Regional Municipality)** (2005), 231 N.S.R. (2d) 320 (C.A., in Chambers) at para. 11:

[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: [citations omitted].

[7] So, for example, in **Frost v. Herman** (1976), 18 N.S.R. (2d) 167 (Macdonald, J.A., in Chambers) the failure of the appellant to pay the costs awarded at trial, even though an execution order had been issued, was found to constitute special circumstances. Similarly, in **Arnoldin Construction & Forms Ltd. v. Alta Surety Co.** (1994), 134 N.S.R. (2d) 318 (Pugsley, J.A., in Chambers), the appellant had failed to pay the substantial sum of taxed costs assessed against it at trial and this, in combination of certain other factors referred to by Pugsley, J.A. was found to constitute special circumstances.

[8] In this case, I am persuaded that special circumstances exist making it just to require the appellant to pay security for costs of the appeal. The substantial award of costs against the appellant at trial remains unpaid even though an execution order has been issued. The president of the appellant has testified at an examination that it is unlikely that the company can pay the judgment. There is no evidence before me that ordering security will make it impossible for the appellant company to pursue the appeal. On the contrary, the evidence from the president of the company is that he has offered to make installment payments of \$1,000.00 a month.

[9] It is, in my opinion, just that the appellant be required to post security and I will so order.

[10] Determining the amount of the security to be required is an exercise of judicial discretion. The practice of the Court has generally been to order an amount which is “intentionally less” than the probable costs of the appeal: see for example, **Arnoldin Construction, surpa**. The Court generally takes into account the fact that appeal costs are frequently assessed at 40% of trial costs. The trial costs (exclusive of disbursements) in this case were \$18,750.00, 40% of which would be \$7,500.00. I am also entitled to take into account the disbursements which will be incurred by the respondent in responding to the appeal. In my view, an amount of \$6,000.00 would be an appropriate amount of security.

[11] I order the appellant to pay into Court as security for the costs of this appeal the sum of \$6,000.00 on or before January 29, 2007, which is the date its factum is due to be filed.

Cromwell, J.A.