Date: 20020626
Docket: CA176068

NOVA SCOTIA COURT OF APPEAL
[Cite as: *Silver v. Co-operators General Insurance Company*, 2002 NSCA 93]

Flinn, Freeman, and Hamilton, JJ.A.

BETWEEN:

ROBERT SILVER and DEANNA SILVER
Appellants

- and -

CO-OPERATORS GENERAL INSURANCE COMPANY, THE BUSINESS DEVELOPMENT CORPORATION and **THE BANK OF MONTREAL**

Respondents

REASONS FOR JUDGMENT

Counsel:	Mr. Silver in person (agent for the appellants) Thomas W. Jarmyn for the respondent The Business Development Corporation J. Andrew Fraser for the respondent Bank of Montreal
Appeal Heard:	June 12, 2002
Judgment Delivered:	June 26, 2002

THE COURT: The appeal is dismissed per reasons for judgment of Hamilton, J.A.; Freeman and Flinn, JJ.A., concurring.

Hamilton, J.A.:

[1] The appellants appeal the September 5, 2001 decision of Justice Donald M. Hall striking their Amended Statement of Claim under **Civil Procedure Rule 14.25.** The application to strike was made under **Civil Procedure Rule 14.25(1)(b), (c)** and **(d)**. The appellants also apply for leave to introduce fresh evidence on appeal. The appellants were represented by counsel at the application before the Chambers judge and are represented by Mr. Silver on this appeal.

[2] The facts are set out in the decision of the Chambers judge and generally relate to alleged wrongful conversion of chattels used by the appellants' company in operating a restaurant prior to the company's bankruptcy. Affidavit evidence was presented by the respondents not disputing the facts set out in the appellants' statement of claim, but providing details and particulars of the transactions relevant to the action. The appellants did not cross-examine on these affidavits or present affidavits of their own on this issue.

[3] I will first deal with the application to admit fresh evidence. The appellants have failed to meet the test for the admission of fresh evidence on appeal as set out in **R. v. Palmer** (1979), 50 C.C.C. (2d) 193 (S.C.C.). The documents are dated 1993 and 1994 and could have been introduced before the Chambers judge. The first criteria in **Palmer** not having been met, the application for the introduction of this material as fresh evidence must be dismissed. Even looking beyond this first criteria the documents themselves are not relevant to anything pled in the appellants' statement of claim. The application for the introduction of fresh evidence is dismissed.

[4] The appellants' first ground of appeal is that the Chambers judge erred in "embarking upon the consideration of affidavit evidence filed on behalf of the (respondents) and tried the merits of the case and not accepting the statement of claim as true and proven".

[5] The Chambers judge considered and used the respondents' affidavit evidence exactly as he is required to do. He considered the law as set out in **Sherman v. Giles** (1994), 137 N.S.R. (2d) 52 (C.A.) and **Wall v. Horn Abbot Ltd.** [1999] N.S.J. No. 124 (C.A.) and applied it to the affidavits

before him. At ¶37 he identified the use of the affidavits as providing "the details or particulars of the transactions that are relevant to the action" which were missing from the statement of claim, which he noted in ¶35 was "very sparse as to the factual basis and particulars of the alleged wrongful acts of the defendants BDC and BMO". He did not use the affidavits where they simply denied an allegation in the statement of claim. At¶39 he stated:

> I am satisfied, therefore, that the affidavits are admissible and the facts set forth therein, except where they simply constitute a denial of an allegation in the plaintiffs statement of claim, should be considered in determining the issues in this application.

[6] The appellants' second ground of appeal is that "the chamber's hearing of December 19, 2000, Hall was not conducted on the basis of a use of the process of the court which was honest and in good faith". The appellants argue this lack of honesty and good faith arose from the respondents' failure to present to the Chambers judge the material the appellants sought to have introduced as fresh evidence, in other words that the affidavits were incomplete. The respondents' failure to include this material and other material listed in their Lists of Documents does not amount to dishonesty or acting in anything but good faith. They are obliged to provide the Chambers judge with material relevant to the issues before him, not every detail of their relationship with the appellants.

[7] Here, given that collateral agreements were not pleaded in the statement of claim and the agreements referred to in the material were never completed, there was nothing improper in the respondents not including them. In addition some of the material consisted of letters from the appellants themselves and, contrary to the appellants' argument, all of the material could have been included in affidavits filed by the appellants or brought out on cross-examination of the respondents' affidavits.

[8] The third ground of appeal is that "the learned Chambers judge erred, in any event, in entertaining the motion when the same was and had been decided against the Respondent by reason of this Court granted September 17, 1997 and confirmed by the Nova Scotia Court of Appeal in June, 1998". The decision being referred to is that of Justice Walter R.E. Goodfellow, **Co-operators General Insurance Company v. Robert Silver and Deanna Silver** (1997), 159 N.S.R. (2d) 218. He dismissed an application to strike made by the only defendants at the time, Co-operators General Insurance Company and Marjorie Freisen, although he removed Ms. Friesen as a

defendant because there was no cause of action against her alleged in the statement of claim. He also restricted the action to chattels only, since the land issues had already been finally adjudicated, and added the respondents as defendants.

[9] This same argument was made before the Chambers judge. He held that the issues before him had not already been decided against the respondents, noting that they were not even parties to the action at the time of the application before Justice Goodfellow. The Chambers judge did not err in this finding.

[10] The Chambers judge reviewed the appellants' claim in some detail and his decision discloses no error of law nor does any patent injustice result from that decision. (See **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 (CA)) Accordingly, I would dismiss the appeal with costs payable by the appellants to each of the respondents in the amount of $1,500, inclusive of disbursements and also inclusive of throw-away costs resulting from the failure of the appellants to appear at the time initially set for the hearing of this appeal.

Hamilton, J.A.

Concurred in:

Freeman, J.A.

Flinn, J.A.