Date:20001011
Docket: CA 163277
CA 163278

NOVA SCOTIA COURT OF APPEAL

[Cite as: Wall v. Horn Abbot Ltd., 2000 NSCA 113]

Bateman, Cromwell and Oland, JJ.A.

BETWEEN:

HORN ABBOT LTD., 679927 ONTARIO LIMITED (formerly HORN ABBOT PRODUCTIONS LIMITED), CHRISTOPHER HANEY, CHARLES SCOTT ABBOTT, JOHN HANEY and EDWARD MARTIN WERNER

Appellants

- and -

DAVID H. WALL

Respondent

REASONS FOR JUDGMENT

Counsel:	John C. Cotter for the appellants Horn Abbot Ltd. and 679927 Ontario Ltd. William L. Ryan, Q.C. and John E. MacDonell for the appellants Christopher Haney, Charles Scott Abbott, John Haney and Edward Martin Werner Kevin A. MacDonald for the respondent
Appeal Heard:	September 26, 2000
Judgment Delivered:	October 11, 2000
THE COURT:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Cromwell and Oland, JJ.A. concurring.

BATEMAN, J.A.:

[1] This is an appeal by Horn Abbot Ltd. et al, from an Order of Justice David MacAdam of the Supreme Court (decision reported at (2000), 183 N.S.R. (2d) 383).

[2] The appellants are defendants in a law suit initiated by Mr. Wall in which he claims that he, not the appellants, is the true inventor of the game Trivial Pursuit. It is Mr. Wall's contention that he was hitchhiking in Cape Breton with a friend Donnie Campbell. They were allegedly picked up by Christopher Haney, one of the appellants. During the ride Mr. Wall says that he shared with Mr. Haney his concept for a trivia board game. He says that Mr. Haney and the other appellants appropriated his idea which became the game Trivial Pursuit. More complete details of the background to the action are set out in an earlier judgment of this Court reported as **Wall v. Horn Abbot Ltd.** (1999), 176 N.S.R. (2d) 96.

[3] In the original statement of claim, issued on November 4, 1994, Mr. Wall says that the hitchhiking meeting occurred in the "autumn of 1979". The date of the alleged meeting was changed by amendment as of right filed on July 12, 1995, to "December 14, 1979". At that point the pleadings had not closed. Leave was granted in

September, 1997 for a further amendment of the statement of claim to aver a meeting date of “December 4, 1980". This amendment was opposed by the appellants.

[4] Subsequent to this amendment, on an application by the appellants for security for costs which was heard in July 1998 by Chief Justice Kennedy, the appellant Haney placed evidence before the court showing that he was residing in Spain from October 1980 to March of 1981 and thus could not have been in Cape Breton at the time of the alleged meeting. In response to that information Mr. Wall applied to the court to again amend the statement of claim to allege a meeting with Mr. Haney in the “fall of 1979". He says that in the face of the information about Mr. Haney’s residence during 1980, he must be mistaken about the date of the meeting. That application to amend was heard by Justice MacAdam and is the subject of this appeal. Although the amendment sought covers the fall of 1979, it was Mr. Wall’s evidence before Justice MacAdam that he believes the meeting must have taken place on November 29, 1979. He relates the date to a hockey tournament that Mr. Wall says was then taking place in Cape Breton.

[5] The appellants say that Justice MacAdam erred in allowing the amendment to the statement of claim. They acknowledge that Justice MacAdam correctly stated the law: generally, leave to amend will be granted unless it is demonstrated that the applicant is acting in bad faith or that the amendment would cause the other party to suffer prejudice which cannot be compensated in costs (see **Stacey v. Electrolux Canada** (1986),76 N.S.R. (2d) 182 (C.A.)). They say, however, that he erred in its application. Simplifying the appellants' argument, they say, *inter alia*, that the judge committed reversible error in failing to find bad faith on the part of Mr. Wall such as to preclude the amendment and in declining to find non-compensable prejudice to the appellants by virtue of the amendment. Their further submission that the judge erred by referring to undue prejudice was rightly not pressed in oral argument having regard to **Baumhour et al. v. Williams et al.** (1977), 22 N.S.R. (2d) 564 at §16.

[6] I am not persuaded that Justice MacAdam erred. As has often been stated by this Court, we will not interfere with a discretionary interlocutory order, as is this, unless wrong principles of law have been applied or patent injustice would result (see **Exco Corporation**

Limited v. Nova Scotia Savings and Loan et al. (1983), 59 N.S.R. (2d) 331(C.A.)). The parties' written and oral arguments before us were extensive. I will touch on only a few of the most significant points.

[7] The appellants say that the cost of investigating and establishing the whereabouts of Mr. Haney over the "fall of 1979" in order to disprove Mr. Wall's allegation that a meeting occurred will be prohibitive and is, therefore, non-compensable prejudice. In the security for costs proceeding before Chief Justice Kennedy, however, Mr. Ryan, for the appellants, in the context of speaking to the cost of the proceeding to that date, represented to the court that the appellants had already expended substantial time and expense investigating the "autumn 1979" time frame. In reviewing the dates of the alleged meeting set out in the first two amendments, he said:

> . . . We are now in December 14th, 1979. All the work we've done in the last four to five months, eight months, dealing with autumn of '79, is now out the window. . . . We're now in 1980. . . . What about all the money we spent just proving autumn, 1979? What about all the time, money and expense we've proven (sic) to disprove or were taken to disprove the allegation about December 14th, 1979. Now we're faced with the unenviable task of saying we're not even in 1979.

[8] The transcript of these remarks was before Justice MacAdam attached to the affidavit of John McDonnell, one of the solicitors for the appellants. As the respondent submits, this latest amendment essentially returns to the timing pleaded in the original statement of claim. Apparently much work has already been done by the appellants to establish Mr. Haney's whereabouts in the "autumn of 1979". I am not persuaded that Justice MacAdam erred in concluding that the appellants had failed to demonstrate non-compensable prejudice resulting from the time frame alleged in the proposed amendment.

[9] The appellants submit that the judge erred by weighing the respective prejudice to the appellants and the respondent. In my view, he did not err in looking at the overall effect of granting or denying the amendment in his consideration of whether the amendment would occasion undue prejudice.

[10] While it is the appellants' position that no amendment should have been allowed, they say, in the alternative, that the amendment to the "fall of 1979" comprises too broad a time frame making it impossible for the appellants to defend the proceeding. They ask that this Court

narrow the time period to coincide with the November 29, 1979 date now alleged by Mr. Wall. The record indicates, however, that at the Chambers hearing and by subsequent written submission the appellants rejected the judge's suggestion that the time frame during which the alleged meeting occurred, be substantially narrowed. Both appellant counsel insisted that the judge determine the matter only on the basis of the "fall of 1979". Accordingly, the possibility of limiting the time frame requested for the amendment was not before the Chambers judge and is, therefore, not before us.

[11] Finally, the appellants say that the amendment will necessitate their re-discovery of several witnesses. They allege specific non-compensable prejudice with respect to Donnie Campbell, who is expected to be a key witness for Mr. Wall. It is their submission that Mr. Campbell can't be found and that the judge erred by failing to so find. In this regard Justice MacAdam said:

> [38] Counsel for the defendants raises as an example of prejudice the suggestion that Donald Campbell, identified by Justice Cromwell as a person "who can reasonably be expected to be an important witness for the plaintiff", and who was discovered in February 1998, cannot now be located. Counsel says granting the requested amendment "obviously necessitates further discovery of Mr. Campbell, but Mr. Campbell cannot be found." Although counsel for the plaintiff disputes that Mr. Campbell

> cannot be found, or that there is evidence to support this allegation, the issues of a "fair trial" and what use, if any, may be made of Mr. Campbell's discovery, and what effect, if any, on the trial will result if he cannot be found and brought to testify, are for the trial judge to assess and determine.
>
> (Emphasis added)

[12] Clearly, Justice MacAdam was not satisfied that the evidence before him established that Mr. Campbell was unavailable or that his re-discovery was essential to the appellants' case. On the record before us I cannot say that he erred in so concluding.

[13] In summary, the appellants not having met the burden, I would dismiss the appeal with costs to the respondent fixed at $1500 inclusive of disbursements.

Bateman, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.