Date: 19980924 Docket: CA 145016

NOVA SCOTIA COURT OF APPEAL
Cite as: Maritime Life Assurance Company v. Hartford Accident & Indemnity Company, 1998 NSCA 161
Chipman, Hallett and Roscoe, JJ.A.

BETWEEN:	)	
	)	
THE MARITIME LIFE ASSURANCE COMPANY	)	Scott C. Norton
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
HARTFORD ACCIDENT AND INDEMNITY COMPANY and THE GUARANTEE COMPANY OF NORTH AMERICA	)	Murray J. Ritch, Q.C. and W. Augustus Richardson
	)	for the Respondents
Respondents	)	
	)	
	)	Appeal Heard:
	)	September 22, 1998
	)	
	)	Judgment Delivered:
	)	September 24, 1998

THE COURT: The appeal is dismissed without costs as per reasons for judgment of Roscoe, J.A.; Hallett and Chipman, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal of a decision of Associate Chief Justice Kennedy, as he then was, dismissing an application made by the appellant for an order removing the respondents' solicitors from representing them in the trial of this matter. The withdrawal of counsel was sought because privileged documents belonging to the appellant had mistakenly come into possession of the respondents' solicitors.

In 1977 and 1983 the respondents issued fidelity bonds insuring the appellant against losses arising out of dishonest and fraudulent acts of its employees and agents. The appellant filed proof of loss forms in 1989 seeking coverage of losses arising from fraudulent actions of one of its agents, George Rideout. This proceeding was commenced in 1989 by the respondents as plaintiffs who seek a declaration that they are not obligated to respond to claims made on the fidelity bonds, generally because the appellant failed to notify them as soon as it discovered the fraudulent conduct.

The documents at issue were created by the employees of the appellant after it began investigating Mr. Rideout's activities and before the proof of loss forms were filed. In 1990 the respondents sought production of the documents in issue. That application was refused by Justice Tidman (see 98 N.S.R. (2d) 65) who found:

> . . . After reading the written communications in question I am satisfied they are of a confidential nature, were intended to be of a confidential nature, and were communications between solicitor and client directly related to the giving of legal advice or for the purpose of giving or receiving legal advice.

That decision was upheld on appeal to this Court. (See 99 N.S.R. (2d) 422).

In the course of perusing eleven volumes of documents produced for

inspection, in 1995, one of the respondents' solicitors came across the privileged documents. After discovering the documents, she transcribed their content into her computer and advised her clients of their existence without the knowledge of appellant's counsel. In July, 1996, when the appellant's counsel did learn of the inadvertent disclosure of the documents to the other side, an application to compel the destruction of the documents was made. An application for production of the documents to the respondents was heard at the same time. Justice MacAdam, who heard the applications, on November 28, 1996, dismissed the respondents' application for disclosure and granted the appellant's application for return of the documents. That decision was also upheld on appeal to this Court and leave to appeal to the Supreme Court of Canada was denied.

In his decision dismissing the subsequent application for the removal of the respondents' solicitors, Kennedy, C.J. concluded:

> I am ultimately persuaded, given all of the circumstances of this unusual case, that a proper remedy is a balance based on the philosophy that I perceive from the English courts. In so concluding, I have been mindful that the privileged information has now been disclosed to the plaintiff's management personnel. That information is now with the plaintiff's company so that even were the removal of the plaintiff's counsel accomplished, it would not now totally realize the solution that the defendant seeks. A combination of the defendant's carelessness and the plaintiff's counsel is improper behaviour, a combination of both of those things has caused this mess. A fair, if imperfect remedy, one that I believe will satisfy Justice Sopinka's test in the **MacDonald Estate** and yet strike an equitable balance, is an injunction.

The order enjoins the respondents' counsel absolutely from using any of the information contained in the two privileged documents in any manner for any purpose in the course of the proceeding.

The order sought on this interlocutory application was discretionary and we should not intervene unless persuaded that the Chambers judge applied wrong principles of law or the result of the order is a patent injustice. In our view, Chief Justice Kennedy gave careful consideration to the evidence and the competing interests and applied the proper principles of law. Having considered the material filed and the submissions of counsel, we are not persuaded that the learned Chambers judge erred in principle or that the order gives rise to an injustice. The appeal is dismissed without costs.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.