Date: 19980728 Docket: CA 145118

NOVA SCOTIA COURT OF APPEAL

Cite as: Halifax Insurance Company v. Metlege, 1998 NSCA 135

Roscoe, Pugsley and Bateman, JJ.A.

BETWEEN:

THE HALIFAX INSURANCE COMPANY, a body corporate Appellant - and - **ANTHONY JOSEPH METLEGE** Respondent	)	Gordon Proudfoot, Q.C. and Sheree Conlon for the Appellant Douglas Tupper, Q.C. for the Respondent Appeal Heard: May 27, 1998 Judgment Delivered: July 28, 1998

THE COURT: Leave to appeal is allowed, the appeal is dismissed, per reasons for judgment of Pugsley, J.A.; Roscoe and Bateman, JJ.A., concurring.

Pugsley, J.A.:

After hearing oral submissions by counsel, on behalf of the parties, on May 27, 1998, the Court reserved its decision. On June 2, the Court, by order, dismissed the appeal with costs, reserving the right to file, subsequently, written reasons.

The following constitutes the opinion of the Court.

The appellant, The Halifax Insurance Company (Halifax) applies for leave to appeal, and if granted, appeals from the interlocutory judgment of Justice Stewart of the Supreme Court of January 5, 1998, respecting certain issues decided against Halifax, arising out of the oral examination on discovery of one Debbie Chipman, claims adjuster for Halifax.

As the result of a comment from the Court during the hearing of the appeal, counsel have since advised that the order taken out before the Chambers judge should be amended to more accurately reflect the issues placed before her by the parties. I have, accordingly, proceeded on the basis that the three issues to be considered in this appeal should be expressed as follows:

- Did Justice Stewart err when she concluded that Halifax's claim of privilege only arose after action was commenced against Halifax by the respondent Anthony Metlege (Metlege) on December 23, 1996?

- Did Justice Stewart err when she concluded that Halifax was obliged to disclose the facts on which it relied in support of its allegation that Metlege should have known his motor vehicle was stolen at the time of purchase?
- Did Justice Stewart err when she required Halifax to disclose the name, and address, of any person who suggested Metlege may have paid less than $35,000 for his motor vehicle?

Background

The material before us reveals that Metlege, a businessman residing in Halifax, alleged that he:

- travelled to Montreal in October, 1995, to purchase a 1995 Jeep Grand Cherokee motor vehicle. While there, he attended at the premises of Le Cartier Motors Ltd. but was unsuccessful in negotiating a purchase. Several weeks later, and after he returned to Halifax, he was contacted by phone by an individual who stated he represented the dealership and had located the vehicle Metlege was seeking. The caller was prepared to deliver the vehicle provided he was paid approximately $35,000 in cash. Metlege agreed and the transaction was completed in Halifax on November 12 with Metlege paying over the money requested in $100 bills. The caller produced registration documents stamped Le Cartier Motors. Metlege registered the vehicle with the Nova Scotia Registry of Motor Vehicles upon payment of several thousand dollars in provincial sales tax;

- Metlege stored the vehicle in his garage until February, 1996, when he sold another vehicle that had been owned by him. Metlege then arranged insurance for the Jeep with Halifax;
- On October 3, 1996, the Jeep was stolen from Metlege's garage. Metlege immediately notified the police, as well as Halifax, of the theft;

On October 7, 1996, Ms. Chipman advised Metlege that the vehicle number identified a Jeep owned by a third party currently resident in British Columbia.

On October 23, 1996, Metlege filed a proof of loss with Halifax, claiming approximately $40,500 respecting the loss arising from the vehicle and its contents.

Halifax rejected the proofs of loss sixty days after filing.

The originating notice (action) was issued on December 23, 1996.

During the course of the discovery examination of Ms. Chipman, counsel for Halifax objected to several questions put to her by Metlege's counsel. The objection was based primarily on the ground that the answers requested were privileged as the information on which they were based was generated by counsel after he was retained to defend the action. Ms Chipman was instructed, accordingly, not to respond to the question.

Counsel for Metlege then made an application to Justice Stewart in Chambers for an order to compel Ms. Chipman to answer the question in compliance with **Civil Procedure Rules 18.09 and 18.12**.

First Issue:

Justice Stewart stated:

> The burden of proof is always on the party asserting the privilege to satisfy the court of the grounds for its existence . . . In determining the purpose for a communication between a party and a non-professional agent or employee or third party, the courts have emphasized that it is not enough to show that use in litigation was one of the purposes. Rather it must be the dominant purpose . . .
>
> The mere fact the litigation is pending or within contemplation is not conclusive.
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> . . .
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> In the circumstances, after considering the affidavit of the claims adjustor, D. Chipman, and her discovery evidence, I am satisfied until the Proof of Loss was denied and the action commenced in late December, 1996, litigation and/or obtaining information for counsel cannot be said to be the dominant purpose. Just as equally important, if not primary was the obtaining of information whereby to justify a denial of coverage, entailing an investigation into whether the motor vehicle was stolen and what, if any, role/knowledge the plaintiff had in such activity when purchasing same. In the circumstances, the claim of privilege flows from this date, i.e. December, 1996.

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I am satisfied there was ample evidence before Justice Stewart to justify the selection of December 23 as the appropriate date when privilege arose. In exercising her discretion, she committed no error of principle in making that selection, nor am I satisfied that a patent, or any, injustice would result, if this Court fails to interfere with that determination (**Global Petroleum Corp. et al. v. CBI Industries Inc. et al.** (1997), 158 N.S.R. (2d) 201 (C.A.)).

Second Issue:

Did Justice Stewart err when she concluded that Halifax was obliged to disclose the facts on which it relied in support of its allegation that Metlege should have known his motor vehicle was stolen at the time of purchase?

In considering this issue it is necessary to refer to **C.P.R. 18.01(1)** and **C.P.R. 18.09(1).**

Civil Procedure rule 18.01(1) :

> Any person, who is within or without the jurisdiction, may without an order be orally examined on oath or affirmation by any party regarding any matter, not privileged, that is relevant to the subject matter of the proceeding.

The scope of examination is defined by **C.P.R. 18.09(1)** in these words:

> Unless it is otherwise ordered, a person, being examined upon an examination for discovery, shall answer any question within his knowledge or means of knowledge regarding any matter, not privileged, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings. (emphasis added)

Matters that are relevant to the subject matter of the proceeding would obviously include facts which the plaintiff must establish in order to succeed, as well as any facts that the defendant must prove in order to make out its defence (*Law of Evidence in Civil Cases, Sopinka and Lederman,* p. 14).

It is therefore relevant to examine the defence filed on behalf of Halifax. It alleges in part:

> (3) [Halifax] states that [Metlege] had purchased a stolen vehicle, had no insurable interest and, therefore, the insurance policy was void;

> (4) [Halifax] further states that [Metlege] knew or ought to have known that the vehicle now being claimed for was likely stolen, and yet he presented the vehicle as his own without reservation to [Halifax];
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> . . .
>
> (8) [Halifax] states that there is not (*sic*) contract of insurance as it was void *ab initio* since [Metlege] did not own the said vehicle and/or he had no insurable interest or legal entitlement to same . . . ;
>
> (9)(e) [Halifax] pleads Section 111 of the **Insurance Act**, R.S.N.S. 1989, c-231, in its defence and specifically states that [Metlege] gave false particulars of the described automobile to be insured to the prejudice of [Halifax]; and/or knowingly misrepresented or failed to disclose in the application any fact required to be stated therein; and/or [Metlege] contravened various terms of the contract, including the above; and/or [Metlege] made false statements with respect to the claim under the contract such that [Halifax] is entitled to state that the claim by [Metlege] is invalid and the right of [Metlege] to recover indemnity is thereby forfeited.

Justice Stewart determined:

> I am satisfied even at this stage with the reason of privilege having been raised by the defendant for its refusal to answer, that the defendant must disclose the facts presently within its corporate knowledge on which its allegation of the plaintiff knowing the vehicle to be stolen at time of purchase is now based, if such further facts exist, and if it intends to rely on them in trial. The request is for facts in issue or facts relevant to the determination of the facts in issue not for evidence and not for the privileged communication in which the facts were contained. If, indeed, there are further facts in support of the defendant's contention, the plaintiff is entitled to know and thereby enable himself to ascertain what he has to meet.

Justice Stewart relied upon two decisions of this court: **Coughlan et al v. Westminer Canada Holdings Ltd. et al.** (1989), 91 N.S.R. (2d) 214, and **Sanford v. Halifax Insurance Company** (1991), 107 N.S.R. (2d) 365.

Counsel for Halifax submits that Justice Stewart's ruling violates the solicitor's "brief rule", or the "work product rule", hallmarks of the adversarial system.

Professor Sharpe, as he then was, in an illuminating article in the 1984 special lectures of the *Law Society of Upper Canada (Claiming Privilege in the Discovery Process)* points out the importance of distinguishing between solicitor/client privilege (which aims to protect the confidential relationship between a lawyer and his client) and the lawyer's brief rule, which he aptly refers to as "litigation privilege" (which aims to facilitate the adversary process).

He writes at p. 165:

> Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect - the adversary process - among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted: there is a need for a zone of privacy to facilitate adversarial preparations: there is also the need for disclosure to foster fair trial. (emphasis added)

Professor Sharpe emphasized the delicate balance that must be struck between discovery, and privilege, in these words at p. 167:

> The adversary system depends upon careful and thorough investigation and preparation by the parties through their counsel. The adversarial advocate cannot prepare without the protection afforded by a zone of privacy. Discovery and privilege must strike a delicate balance. Two little disclosure impairs orderly preparation. Counsel cannot come to trial prepared without adequate information about the case the opposing side will present. On the other hand, total disclosure would be demoralizing and would impair orderly preparation. Thorough investigation and careful development of strategy would be discouraged if every thought and observation had to be disclosed. The work product test focuses on the need to protect counsel's observations, thoughts and opinions as the core policy of the protection from disclosure of preparatory work. (emphasis added)

Halifax seeks to extend the limits of the zone of privacy to encompass not only the "observations, thoughts and opinions", of its counsel, but also any facts which are discovered by counsel that support the allegation that Metlege should have known the jeep was a "hot" vehicle at the time of purchase in November, 1996.

Such an attempt is not consistent with the very broad rules permitting pre-trial discovery examination in this Province; nor is it consistent with the interpretation placed on the rules, as succinctly summarized by Matthews, J.A., on behalf of the court, in **Coughlan v. Westminer Canada Holdings Ltd. et al.** in these words at p. 221:

> Since the advent of the 1972 **Civil Procedure Rules**, the courts of this Province have consistently decided that provisions respecting oral discovery and the production of documents should be liberally interpreted to grant effect to full disclosure of the facts and issues relevant to the subject matter of the proceeding prior to trial. The object is to avoid surprise and encourage settlement by the revelation of the facts relied upon by the parties, and thus discourage the need for expensive continued litigation.

I do not consider that Halifax's position, as suggested, is strengthened by reliance on the "sporting theory of justice", by concern that Metlege would have an opportunity to "tailor" his evidence at trial once possessed of the information requested, or that counsel would, in future, limit investigation because of fear that fruits of any research had to be disclosed to the other side.

Professor Sharpe notes at p. 166:

> The least compelling argument to support privilege is that which asserts that an adversary trial depends upon surprise and which argues that disclosure is the enemy rather than the friend of truth. Although the "sporting" theory has a long and respectable history, it is quite clearly out of keeping with the

> modern view which favours greater pre-trial disclosure, and both case law and the new rules make it clear that the surprise theory has been discarded.

Mr. Metlege has already been examined on discovery by counsel for Halifax. Any inconsistencies in his evidence at trial, one can reasonably expect, would be appropriately exploited in cross-examination. There is, in addition, nothing before us to suggest that Metlege is dishonest. One could argue, as Professor Sharpe points out at p. 170, that:

> By enforcing fuller disclosure in advance of trial, discovery will better enable the honest party to rebut the lie.

I agree with the comments of Justice Sherstobitoff, expressed on behalf of the Saskatchewan Court of Appeal, in **Soke Farm Equipment Limited v. New Holland of Canada Limited**, [1990) 2 WWR 762, at p. 768:

> The prevalent view is that broad discovery is to be encouraged as protecting from surprise, uncovering relevant evidence, encouraging settlement, focusing the issues, pinning witnesses down, permitting counsel to size up the case and ensuring a decision of the case after a full consideration of all relevant issues. The risk of permitting fabrication of evidence or tampering with potential witnesses applies equally to persons refusing to disclose their names to the other party and, indeed, broad discovery by both parties limits the opportunities to do these things.

Privilege cannot be used to protect facts from disclosure if those facts are relied upon by a party in support of its trial position. It is immaterial that the fact was discovered by a party at the direction of its solicitor, or even by the solicitor independently. If the fact is to be relied upon in support of the defence, then the fact must be disclosed.

Justice Haines, of the Ontario High Court of Justice, in **Rubinoff v. Newton** (1967), 1 O.R. 402 considered the same issue at p. 404:

> Much of what is learned by a solicitor in the preparation of a case is privileged, but the moment he uses that information for the purpose of founding an action or defence he must disclose the facts on which he relies although not the evidence to support the fact.

This reasoning was adopted with approval by Justice Gruchy of the Supreme Court in **Tsimiskalis v. Halifax Insurance Company** (unreported) N.S.S.C., S.H. No. 74940, October 30, 1992. It is also consistent with the decision of this Court in **Sanford, supra.**

The **Sanford** case involved an interlocutory appeal from the decision of a Chambers judge who dismissed an application that Halifax be required to answer an interrogatory which would have disclosed the basis of its contention that the Sanfords set fire to their residence.

In the course of allowing the appeal and ordering Halifax to respond to the interrogatory, Justice Freeman, on behalf of the court, noted that the allegations in the defence, although specifying only vague and general statements, did constitute an expression of the theory being advanced on behalf of Halifax.

He commented, at p. 267:

> If they are particularized and appear to be capable of proof, they could answer the appellants' claim and destroy their case. If they are disclosed as mere wishful thinking on the part of an insurer, that could destroy the respondents' case. This is the very purpose of the discovery process, . . . to bring facts forward at an early stage to avoid surprise and, quite probably, to save time and expense.

He went on to say, at p. 270:

> Allegations of arson and fraud are too serious to remain unexplained.
>
> . . .
>
> The respondent must disclose the facts within its knowledge on which the allegations of wrongdoing by the appellants are based, if such exist.

It is important to recognize that counsel for Metlege is not seeking disclosure of the opinions, strategies and conclusions reached by Halifax counsel, but rather disclosure of facts which are not part of a solicitor's brief or work product.

I quite agree with Justice Stewart's determination that Halifax:

> ...must disclose the facts presently within its corporate knowledge on which its allegation of [Mr. Metlege] knowing the vehicle to be stolen at the time of purchase is now based, if such further facts exist and it intends to rely on them in trial.

Third Issue

Did Justice Stewart err when she required Halifax to disclose the name and address of any person suggesting Metlege may have paid less than $35,000 for his motor vehicle?

Ontario's **Civil Procedure Rule 31.06(2)** presently provides:

> A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise.

The **Nova Scotia Civil Procedure Rules** do not contain a similar provision.

Under the Nova Scotia **Rules** a party is not obliged, generally, to disclose the names of witnesses, or the manner in which counsel is going to prove its case.

There are, however, exceptions to this general rule and I am satisfied that this case comes within that exception.

At the outset it should be noted that **Civil Procedure Rule 18.12(2)** provides:

> No objection to any question shall be valid if made solely upon the ground that any answer thereto shall disclose the name of a witness, or that the question will be inadmissible at the trial or hearing if the answer sought appears reasonably calculated to lead to the discovery of admissible evidence.

An exception is recognized in the case law where the identity of a witness itself constitutes a material fact.

In **Soke Farm Equipment Limited**, Justice Sherstobitoff commented at p. 765:

> The general rule was that a party to an action must disclose the facts upon which he relies but not the evidence by which those facts are to be proved. . . . The rule has never been absolute: if a material fact necessarily involved disclosing the name of a witness, or a potential witness, the court could compel disclosure.

One of the burdens resting on Mr. Metlege is to establish the loss he has suffered as a consequence of the theft of his vehicle. A critical issue is the amount of money Metlege paid at the time of purchase - critical not only on the overall issue as defining the claim against Halifax, but also critical in assisting the determination of whether Metlege knew he was purchasing a stolen vehicle when he paid approximately $35,000 for the

vehicle in November, 1996. This issue is highlighted in several sections of the amended defence. Any person, who was a party to, or a witness to, the purchase transaction, would be a witness to a material fact. The disclosure of that fact necessarily involves disclosing the name of the witness.

In **Rubinoff v. Newton**, Justice Haynes stated at p. 404:

> The line of demarkation between disclosure of facts on which a party relies and the evidence in support of the fact may at times be very fine, and when it occurs the resolution must fact [favour] disclosure.

Speaking of the Ontario practice prior to the change in the **Rules**, Professor Sharpe noted at p. 169:

> Existing rules distinguish facts from evidence for the purpose of discovery and require parties to disclose only facts. The case law recognizes that the distinction is a subtle one at times, and it has been held that where it is difficult to decide whether the information sought is fact or evidence, the court should favour disclosure. Exceptions to the witness rule have been made where the identity of a witness itself constitutes a material fact.

While I have some difficulty in deciding whether the name requested constituted "facts" or "evidence", I would resolve that difficulty in favour of requiring Halifax to disclose.

I concur with the view recently expressed by Justice Cromwell that this Court should narrowly confine the scope of appellant intervention on appeals respecting interlocutory decisions, particularly those involving procedural rulings (**Campbell v. Lienaux** (1998) N.S.J. 142, April 8, 1998, at p. 3).

Counsel for Halifax has raised a number of subsidiary issues in support of its submission. I do not consider them persuasive:

- **C.P.R. 31.15(2)** is not applicable as it deals with limitations on admissibility of documents, an issue not before us;
- Justice Stewart's opinion does not oblige disclosure of opinion, strategies, or conclusions of counsel, and hence does not affect litigation privilege;
- While Halifax may have already disclosed some reports, this limited compliance with the Rules does not affect its obligation to make disclosure of all the facts and issues relevant to the subject matter of the proceeding;
- Justice Stewart's decision does not offend the "principle" of **Lyell v. Kennedy** (No. 2 (1883) 9 App. Cas. 81(H of L)). A review of the opinion of Lord Watson makes it clear that he limited his observations to the particular fact situation before him as "it is always dangerous" to lay down general propositions. He noted, in particular, at p. 93:

> A man may be asked "What is your information and belief as to there being a tombstone in a certain church yard with a certain inscription upon it?" It may possibly be that his information upon the subject is of a privileged character; nevertheless, he might be bound to state his belief . . . (emphasis added)

In a similar vein, Lord Blackburn commented, at p.87:

> I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, "I have a deed which you are entitled to see in the ordinary course of things, but I claim a privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action," or "in the course of litigation". That would be no privilege at all.

Conclusion

I would allow leave to appeal, but dismiss the appeal, with costs fixed at $2,000 together with disbursements.

Pugsley, J.A.

Concurred in:

Roscoe, J.A.

Bateman,J.A.

C.A. No.145118

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

THE HALIFAX INSURANCE	)
COMPANY, a body corporate	)
	)
Appellant	)
- and -	)

	)	
	)	REASONS FOR
ANTHONY JOSEPH METLEGE	)	JUDGMENT BY:
	)	
Respondent	)	Pugsley, J.A.
	)	
	)	
	)	