Date: 19981223

Docket: C.A. 148323
C.A. 149121

NOVA SCOTIA COURT OF APPEAL

Cite as: Salvage Association v. North American Trust Company, 1998 NSCA 210

Glube, Bateman, Flinn, JJ.A.

BETWEEN:

THE SALVAGE ASSOCIATION	)	
	)	James E. Gould, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Jonathan C.K. Stobie
	)	for the Respondent
NORTH AMERICAN TRUST COMPANY and WESTLACO INVESTMENT COMPANY	)	
	)	
	)	
Respondents	)	Appeal Heard:
	)	November 26, 1998
	)	
	)	Judgment Delivered:
	)	December 23, 1998

THE COURT: Appeal is dismissed as per reasons for judgment of Bateman, J.A., Glube, C.J.N.S., and Flinn, J.A., concurring.

BATEMAN, J.A.:

This is an application for leave and, if granted, an appeal from a decision of Justice John M. Davison of the Supreme Court granting the application of The Salvage Association to conduct discovery examination of certain officers of Westlaco Investment Company.

Background:

This appeal originated as the combination of two appeals. The first appeal is from an Order of MacAdam, J. refusing, in the main, an application by The Salvage Association for an Order requiring North American Life and Westlaco Investment Company to respond to Interrogatories. The second appeal is from a subsequent Order of Davison, J. granting, on the application of The Salvage Association, an Order that Westlaco produce "an informed and knowledgeable officer or representative of Westlaco to be orally examined". The parties have agreed that it is unnecessary to deal with the first appeal because, for practical purposes, the relevant issues will be decided on the second appeal. In this decision a reference to "the appellants" means North American Trust and Westlaco and "the respondent", The Salvage Association.

The original action was commenced by North American Trust Company, on April 14, 1993. North American loaned money to a third party company, which loan was secured by a mortgage on a marine vessel. At the request of North American, Salvage had provided an appraisal of the vessel. The third party defaulted on the loan and North American foreclosed on the mortgage. The vessel was sold for substantially less than the appraised figure. North American alleged that the appraisal was negligently prepared. A Defence

was filed by The Salvage Association, on July 22, 1993. On April 22, 1997 an Order issued granting leave to North American Trust Company to add Westlaco Investment Company as a Plaintiff and to amend the Statement of Claim.

The Amended Statement of Claim included the following at paragraph 1B:

> The Plaintiff Westlaco Investment Company ("Westlaco") is a body corporate under the laws of Nova Scotia with its Head Office at Halifax, Nova Scotia. Pursuant to a transaction effection (sic) as of September 29, 1995, the Plaintiff Trust company for valuable consideration sold and assigned to the Plaintiff Westlaco a portfolio of receivables and associated rights which included the receivable from Hume arising out of the loan referred to in paragraph 6 and all causes of action against the Defendant arising out of or in connection with the valuation of the Huntley by the Defendant including the action set forth in the Statement of Claim. The Defendant by its solicitor of record has been duly notified of the assignment pursuant to letters from the Plaintiff's solicitor of record dated September 5, 1996, and October 4, 1996, and has acknowledged receipt of such notice by letters from the Defendant's solicitor of record dated September 25, 1996, and October 8, 1996.

At paragraphs 16 and 17 of an Amended Defence filed on April 25, 1997, the following was pleaded in response to the amendment to the Statement of Claim:

> 16. As to the Plaintiff Westlaco, the Defendant says that the interests, if any, acquired by the Plaintiff Westlaco in the Hume receivable and the present action were acquired long after the Plaintiff Trust Company's mortgage on the Vessel had been foreclosed by the Plaintiff Trust Company, and the Vessel's judicial sale through and pursuant to the Federal Court of Canada proceeding brought by the Plaintiff Trust Company and referred to in the Amended Statement of Claim. In addition, the Defendant says that such interest, if any, acquired by the Plaintiff Westlaco did not include any interest or right in property, including the Vessel and that the interest, if any, conveyed to and received by the Plaintiff Westlaco was only a bare right of action, that the Plaintiff Westlaco never had any contemporaneous or legitimate interest in the Vessel or the Hume receivable or the present action, and that the transaction and assignment referred to in Paragraph 2 of the Amended Statement of Claim were, as to the Hume receivable and the present action, champertous and thus void and unenforceable against the Defendant as being champertous. (Emphasis added)
>
> 17. As to the Plaintiff Trust Company, the Defendant says that having assigned or purported to have assigned all of its right, title and interest in the Hume loan and receivable and all claims arising therefrom including those advanced in the present action to the Plaintiff Westlaco, the Plaintiff Trust Company now has no remaining right, title or interest whatsoever, legal or equitable, in or to the present action, and that its claim should accordingly be dismissed for that reason. (Emphasis added)

On May 28, 1997, Salvage filed Interrogatories pertaining to the Assignment

referenced in the Amended Statement of Claim. The Interrogatories sought information as to the date of execution of the Assignment, the names and positions of the individuals who executed it, their corporate authority, particulars of any other documents relevant to the Assignment or the transfer of assets, the consideration allegedly received in exchange for the Assignment of the Hume receivable and the cause of action, the circumstances of payment of the consideration, and particularization of the "associated rights" and the other causes of action against Salvage referred to in the Amended Statement of Claim.

An Interlocutory Notice seeking an Order requiring the Plaintiffs to respond to the Interrogatories pursuant to **Civil Procedure Rule 19.03** was filed on October 30, 1997 and was heard before Justice A. David MacAdam in Chambers on November 6, 1998.

On November 3, 1997, the solicitor for North American/Westlaco filed an Answer to the Interrogatories refusing to respond on the basis that the information sought was irrelevant to the matters at issue in the proceeding.

Under the Order of Justice MacAdam, issued June 9, 1998, North American/Westlaco must provide answers to Interrogatories limited to:

> (a) Whether the Plaintiff Westlaco had a pre-existing commercial interest or property right ancillary to the subject matter of the litigation;
>
> (b) Whether any other rights or interests were assigned under paragraph 1 of the assignment made as of September 29, 1995, between the Plaintiff NATCand the Plaintiff Westlaco.

The Order provides, as well, that The Salvage Association is not entitled, at this time, to answers respecting the consideration paid for the Assignment or the corporate authority for the execution thereof.

Salvage appealed and North American/Westlaco cross-appealed from this Order.

On March 27, 1998, Adam Abramson, Asset Manager and advisor to Westlaco, filed answers to certain of the Interrogatories. Those questions pertaining to the execution of and authority for the Assignment and to the issue of consideration in relation to the Assignment remain unanswered.

On June 16, 1998, Salvage made application for an Order requiring North American and Westlaco to produce the documents referred to in the Answers to Interrogatories completed by Mr. Abramson and for an Order pursuant to **Civil Procedure Rule 18.15** compelling a representative of Westlaco to attend for discovery examination. By Interlocutory Notice dated the same day, North American/Westlaco applied for an Order that Salvage was not entitled to conduct examinations for discovery on an irrelevant issue.

Both applications were heard before Justice Davison in Chambers on June 24, 1998. By decision dated July 3, 1998, Justice Davison ordered that Westlaco produce an informed and knowledgeable officer or representative of Westlaco to be orally examined. No limitation was placed on the scope of the inquiry. Justice Davison also ordered that North American and Westlaco file and serve a Supplementary List of Documents. Finally,

he ordered that Westlaco pay costs of the Application forthwith.

North American and Westlaco have appealed from this Order.

Grounds of Appeal:

The issues, as framed by the appellants, are:

1. Whether the validity of the assignment of the cause of action is irrelevant where both the assignor and assignee are before the Court as Co-Plaintiffs.

2. Whether Justice Davison erred in ordering the costs of the second application should be paid by the appellants forthwith.

Analysis:

Chipman, J.A. wrote in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 at p. 145:

> At the outset it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice will result . . .
>
> . . .Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters.

(i) The Rule 18 Issue:

The right to conduct discovery examination in Nova Scotia is a broad one governed by **Civil Procedure Rule 18**. The appellant relies upon **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 <u>regarding any matter, not privileged, that is relevant</u> to the subject matter of the proceeding.
> (Emphasis added)

Counsel for North American/Westlaco submits that Davison, J. erred in permitting Salvage examination for discovery on the validity of the assignment. The appellants say that the defences set forth by Salvage in paragraphs 16 and 17 raise issues irrelevant to this proceeding. In those paragraphs, which are set out above, Salvage pleads that the assignment of the cause of action establishes the tort of champerty and renders the assignment void and unenforceable; but also that the assignment has deprived North American of a right of action. It is the appellants' position that if the assignment is valid, the right of action rests in Westlaco or, if the assignment is not valid, in North American. Accordingly, they say, the proposed inquiry by Salvage into the validity of the assignment is irrelevant and not subject matter upon which discovery examination should be granted. The appellants submit that in **Augdome Corporation Limited v. Gray**, [1975] 2 S.C.R. 354 the Supreme Court of Canada has held that the validity of an assignment is immaterial where the assignee and assignor are both before the Court.

The respondent takes the position that the law on this issue is not as suggested by the appellants. Salvage relies upon comments of McLachlin, J.A., as she then was, in **Fredrickson v. I.C.B.C.**, [1986] 4 W.W.R. 504 (B.C.C.A.), (affirmed, [1988] 6 W.W.R. 633 (S.C.C.)) to the effect that where both the assignee and assignor of a legal chose in action are before the court, the defendant may plead that the assignor, having assigned the right of action, no longer has a personal interest in the proceeding and that the assignee cannot gain an interest from an invalid assignment.

In my opinion, Justice Davison was correct in not deciding this legal issue. He said, in granting the application for discovery examination:

> I have carefully considered the circumstances in this case. I have doubts that further discovery is necessary, but Mr. Gould's position is credible when he says Westlaco Investment Company is a party and the defendants are entitled to discover an officer of that

> company. Leeway must be given in that situation. *Prima facie*, it is appropriate to examine parties. It is Mr. Gould's submission to the court that there is an issue involving the duty of mitigation and that it is relevant to know what Westlaco knew about the claim and the circumstances of the assignment.

The parties agree that the onus is upon the party requesting examination for discovery to demonstrate that the information sought is relevant. (**Upham v. You** (1986), 73 N.S.R. (2d) 73 (C.A.)). Nor is it disputed that the **Rules** concerning discovery examination and the production of documents in this jurisdiction "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". (**Coughlan et al v. Westminer Canada Holdings Ltd. et al.** (1989), 91 N.S.R. (2d) 214 (C.A.) per Matthews, J.A. at p.221)

The matter before Davison, J. was initiated by the Interlocutory application of Salvage (June 16, 1998):

> . . .for an order pursuant to *Civil Procedure Rule 18.15* compelling a representative of the Plaintiff Westlaco Investment Company to attend for oral examination and an order pursuant to *Civil Procedure Rule 20.06(1)* compelling the Plaintiffs Westlaco Investment Company and North American Trust Company to produce all documents referenced in the Answer to Interrogatories sworn by Adam Abramson on March 17, 1998.

In response, North American/Westlaco issued an Interlocutory Notice (June 16, 1998), to be heard on the same Chambers date as the above application:

> . . . for an Order under *Rules 18.02 and 25.01(1)(d)* that the Defendant is not entitled to conduct discovery on an irrelevant issue.

While in form this is an application independent of that by Salvage, in substance, it is a defence to the Salvage application.

The parties have presented this appeal on the basis that the legal issue of the validity of the Salvage defence was appropriately before Davison, J. on the **Rule 18** application (although, in the appellants' submission, not directly determined by him). In my view, however, the application pursuant to **Rule 18** was not the appropriate course within which to determine this issue.

Justice Davison, in my opinion, did not err in ordering that an officer of Westlaco be made available for discovery examination. He was entitled to determine the relevance of the inquiry with reference to the pleadings on record. The information sought by the respondent is "relevant" in the context of the issues raised in the Defence. The law in this area is clear. While examination for discovery is confined to matters relevant to the issues to be tried, these issues are determinable by reference to the pleadings. (**Re Silverhill Realty Holdings Ltd. and Minister of Highways for Ontario**, [1968] 1 O.R. 357 (C.A.))

In **Brown v. Orde**, 1912 CanRepOnt 261, 22 O.W.R. 38, 3 O.W.N. 1230, 2 D.L.R. 562 Justice Middleton considered an appeal from an Order directing that the plaintiff answer certain questions on discovery. The plaintiff had sued the defendant for slander in relation to comments made by the defendant about the plaintiff's appointment to public office. The plaintiff refused to answer questions about his character and competency. On the question of the relevance of the questions Middleton, J. said (CanRep):

> 5 . . . I have to take the pleadings and the supplementary particulars as they stand, and merely to determine whether the questions asked are relevant to the issues so raised. I cannot treat the motion as one attacking either the pleadings or the particulars. If these are insufficient for any reason, they must be attacked directly.

Similarly, in **McLeod v. Crawford** 1908 CanRepOnt 3, 11 O.W.R. 101 (aff'd 11. 53 0 O.W.R. 133) Master Cartwright said

> 8 The questions objected to seem to be relevant to the defences above set forth. So long as they appear on the record, the defendants are entitled to the fullest discovery of everything which may (not which must) tend to prove them. See *Canavan v. Harris*, 8 O. W. R. 325. If these pleas are deemed irrelevant, the plaintiffs should proceed under Rule 259 to have them expunged. . . .

In **Jackson v. Belzberg**, [1981] 6 W.W.R. 273. Hinkson J.A., speaking for the Court, confirmed that the scope of examination for discovery is governed by the issues raised by the pleadings. The case law is replete with similar commentary.

While discovery examination is not restricted to the pleadings, relevance must be determined on the pleadings as they stand. This is sound policy. To do otherwise would open the door for collateral attacks upon the pleadings. Here, the appellant is, in effect, seeking to have a point of law determined in advance of the trial, or, possibly, to strike paragraphs 16 and 17 of the Defence. The **Civil Procedure Rules** provide a separate process for each of these remedies.

As regards striking pleadings, **Rule 14.25** states:

> **14.25**. (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
> (b) it is false, scandalous, frivolous or vexatious;
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
> (d) it is otherwise an abuse of the process of the court;

Rules 25 and **27** address the determination of a point of law in advance of trial and provide in relevant part:

25.01(1) The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,

(a) determine any relevant question or issue of law or fact, or both;

. . .

27.01 The parties may state any question of law or fact in the form of a special case for adjudication by the court before a trial or hearing.

27.02. Every special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and set out or refer to such documents as may be necessary to enable the court to decide the questions raised thereby, and shall be signed by the parties or their solicitors.

27.03. A special case shall not be set down for hearing without the leave of the court granted after it is satisfied that the decision of the special case might facilitate the determination of the matters in issue in the proceeding.

Each of these **Rules** carries certain procedural and substantive requirements. For example, in **Wakelin v. Superior Sanitation Services Ltd.** 1990 CanRepPEI 142 (S.C.). McQuaid, J. said of the equivalent of our **Rule 14.25**:

5 This is a Rule whose limitations are, unfortunately, largely misunderstood. It does not open the door to what is, in effect, a pre-trial application, nor to an argument on a preliminary point of law. It has been said that it is not the practice in the civil administration of the courts to engage in a preliminary hearing on the merits; and further, if there is a point of law which requires serious discussion, there is provision elsewhere to set that matter down for preliminary argument.

6 What, then, is meant by the expression "no reasonable cause of action (or defence)"?

7 The authorities indicate that in point of law, every cause of action is a reasonable one, that is to say, one which has some chance of success when only the allegations in the impugned pleadings are considered. The fact that the case may, on the face of it, appear to be weak, and not likely to succeed, is no ground for striking it out.

8 To warrant the striking out thereof, the pleading must be, on the face of it, obviously unsustainable, in which case, however, the remedy will be available only in plain and obvious cases. It will be exercised only where it is clear, beyond reasonable doubt, that there exists no reasonable cause of action in the sense above referred to.

9 It has been further held by the authorities that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad.

10 On the hearing of the present application, the several counsel involved cited legal cases and authorities in support of the argument that the plaintiff could not, or alternatively could, succeed, and, as well, the pertinent bylaws of the Town of Parkdale were drawn to my

attention.

> 11 All of these references went directly to the merits, or otherwise, of the plaintiff's claim. Since that approach was deemed to be necessary, it cannot be said, therefore, that the claim advanced by the plaintiff was, on the face of it, obviously unsustainable, or clearly without any chance of success, when only the allegations of the plaintiff were considered.
> (Emphasis added)

This statement of the law was approved by this Court in **Fraser v. Westminer Canada Ltd.** (1996) 155 N.S.R. (2d) 347. There, Hart, J.A. writing for the Court confirmed that the comments of Justice McQuaid reflect the position expressed by this Court in **Curry v. Dargie** (1984), 62 N.S.R. (2d) 416 where Justice Macdonald said at p. 429:

> The law is quite clear that the summary procedure under *Rule 14.25* can only be adopted where the claim is, on the face of it, absolutely unsustainable. Thus, if it is clear beyond any doubt that an action cannot possibly succeed there is no reason for refusing to strike out the statement of claim. The mere fact, however, that the plaintiff appears unlikely to succeed at trial is no ground for striking out the statement of claim. In *O'Donnell v. Scallion* (1892), 24 N.S.R. 345, Mr. Justice Graham said at p. 355:
>
> > . . . This power to strike out pleadings under this rule should, it seems, be exercised with great caution. Unless the court is satisfied that a pleading discloses no reasonable or probable answer it will not be struck out. The mere fact that the party pleading it is not likely to succeed at the trial is no ground for striking it out; *Dadswell v. Jacobs*; 34 Ch. D., 284, *Boaler v. Holder*, 54 L.T.N.S. 298.
>
> (Emphasis added)

If the appellants wish to strike portions of the Defence, they must do so directly, within this **Rule**.

Alternatively, a point of law may be determined in advance of a proceeding but only if certain procedural requirements are satisfied. In **Westminer**, for example, Hart, J.A. said:

> 35. . . It is only in exceptional cases that a proceeding under *Rule 25.01* can proceed without an agreed statement of facts. (See *Brown v. Dalhousie University* (1995), 142 N.S.R. (2d) 98 (N.S.C.A.); and, *Binder v. Royal Bank of Canada* (1996), 150 N.S.R. (2d) 234 (N.S.C.A.)).

It is not for us to determine whether the appellant would have been successful had he made application under any of these **Rules**.

In my opinion, on an application under **Rule 18** a judge should consider whether the matter upon which examination for discovery is sought is “relevant” taking the pleadings as they exist, save in the exceptional case where the pleading is, on its face, unsustainable. If the party opposing the discovery examination wishes to attack the pleading as insufficient or improper, this should be done directly not collaterally. Similarly, there must be proper application under **Rule 25** or **27** to have a point of law determined in advance of the trial.

(ii) Costs Forthwith:

Justice Davison ordered that the appellants pay costs of the application forthwith. It is the appellants’ submission that on an interlocutory application, as a general rule, costs should be "in the cause". In any event, say the appellants, the costs should not have been ordered payable forthwith.

Civil Procedure Rule 63 vests in the Court a wide discretion with respect to costs. Pursuant to **Rule 63.03**, unless the court otherwise orders, the costs of a proceeding follow the event. With respect to interlocutory matters, **Rule 63.05(1)** states:

> **63.05(1)** Unless the court otherwise orders, the costs of any interlocutory application, whether *ex parte* or otherwise, are costs in the cause and shall be included in the general costs of the proceeding.

In my view **Rule 63.05(1)** simply requires a judge on an interlocutory application to

specifically address the entitlement to costs, failing which this default provision will apply.

In **Ford v. Canadian National Railway** 1937 CanRepSask (C. A.) Martin, J.A. noted that at common law, the successful party on a motion was usually entitled to costs, although not payable forthwith. He said:

> 1 I agree that the order as to costs is not in accord with the established practice. The Master in Chambers dismissed the application for an order that the plaintiff furnish particulars of the negligence alleged in the statement of claim with costs, whereas the order, according to authority, should have made the costs payable to the plaintiff in any event of the cause. In *May v. Murchison* [1935] 3 W.W.R. 426, this Court held that where a trial was adjourned on account of the illness of the defendant and the plaintiff's solicitors had not been definitely notified that the defendant would not be able to appear, the proper order as to costs of the day is that they should be payable to the plaintiff "in any event of the cause." The rule is usually applied to interlocutory proceedings although exceptional cases sometimes arise when the Courts will make the costs of proceedings payable forthwith or payable before a party is allowed to proceed: *Nicholson v. Coulson* (1873) 6 P.R. 65; *Cocker v. Tempest* (1841) 7 M. & W. 502, at 503, 10 L.J. Ex. 195, 151 E.R. 864. No reasons appear in the present case why the rule should be departed from. The object of the Courts in adopting the rule is to have one taxation of costs in an action and no doubt also to avoid making an order as to costs which might prevent someone who may have a just claim from pursuing it because he may be unable to pay the costs of some interlocutory proceeding. (Emphasis added)

The appellants cite **Natural Beauty Products Ltd. v. Body Reform Canada Ltd.** (1990), 96 N.S.R. (2d) 330 (C.A.). There the trial court had refused to grant an interlocutory injunction. The party that had successfully defended against the injunction was awarded costs of the application. In allowing the appeal from the order for costs Hart, J.A., writing for this Court said at p.332:

> The appellant has also argued that the trial judge should not have awarded costs to the respondent in the court below and with this ground of appeal I am inclined to agree. Costs on interlocutory matters are usually "in the cause" so that if after full trial it becomes apparent that a different view should have been taken of the interlocutory application the party applying should not be penalized with costs. No explanation was advanced by the trial judge to justify his order for costs and as I can see no reason for departing from the ordinary rule in this case I would hold that his award of costs to the respondent was in error. (Emphasis added)

Justice Hart's comments were interpreted by Davison, J. in **Uniglobe Travel v.**

Fundy Travel Ltd. (1991), 113 N.S.R (2d) 340 (S.C.) wherein he said at p.340:

> On the question of costs, I have already made reference to the comments of Mr. Justice Hart in *National Beauty Products Limited v. Body Reform (Canada) Limited*, S.C.A. 02250, April 6, 1990 decision, the import of which is that where the issue in the interim proceeding is similar to that which will eventually be decided following full trial, costs should be costs in the cause. I hereby direct that the costs of this proceeding be costs in the cause. (Emphasis added)

I agree with this interpretation. In my view, **Natural Beauty Products** is not to be taken as authority for the general proposition that costs on all interlocutory matters are to be costs in the cause.

In **Banke Electronics Ltd. v. Olvan Tool & Die Inc.** (1981), 32 O.R. (2d) 630 (O.H.C.), Cory, J., as he then was, said:

> Costs may be used by the Court in order to control its processes. By withholding costs or by the award of costs, it may discourage unnecessary interlocutory proceedings. For example, by directing that costs be payable forthwith in any event of the cause, the Court will discourage interlocutory applications which are frivolous and without merit. Such an award of costs will no doubt be made sparingly. It must be remembered that a requirement that costs of an interlocutory application be made forthwith may prevent a meritorious action from coming to trial. A less important but not insignificant factor that should also be considered is that it is preferable if there is only one taxation of costs. At that time all aspects of the litigation can be considered and weighed by the Taxing Officer. (Emphasis added)

Justice Davison did not articulate his reason for awarding costs, payable forthwith. It is apparent, however, that he found the appellants' position on the application to be without merit. In his view, the respondent had a clear right to discover a party to the proceeding. He said:

> ". . . Westlaco Investment Company is a party and the defendants are entitled to discover an officer of that company. Leeway must be given in that situation. *Prima facie* it is appropriate to examine parties."

His award of costs to the successful party on the application accords with the

common law and the provisions of **Rule 63.03**. It is reasonable to conclude, as well, that Justice Davison, in ordering costs payable forthwith, was expressing his disapproval of the appellants' resistance to the discovery, which had necessitated the respondent's application to the Court. Neither of the practical reasons against immediate payment of costs as identified in **Ford, supra**, arose here. There was no suggestion that the Order requiring the payment of the $500 in costs, forthwith, would be unusually burdensome for the appellants in this multimillion dollar lawsuit. The inconvenience and expense of multiple taxation did not arise since Justice Davison fixed the amount of the costs. Additionally, at the conclusion of the trial, should the trial judge be of the view that the examination for discovery on the assignment was unnecessary, then the costs of that examination can be taken into account in fixing the costs of the trial.

The judge hearing the interlocutory application is best positioned to determine the appropriate allocation of costs. Here, an award of costs, payable forthwith, was not unsupported by the record of the proceedings. I cannot say that Justice Davison applied a wrong principle of law. Certainly, a patent injustice will not result from his Order. Therefore, I would not interfere.

Disposition:

Accordingly, I would grant leave but dismiss the appeal, with costs payable to the respondent in the amount of $1000 inclusive of disbursements.

Bateman, J.A.

Concurred in: Glube, C.J.N.S.

Flinn, J.A.

C.A. No. 148323
C.A. No. 149121

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

SALVAGE ASSOCIATION	)	
	)	
	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	
NORTH AMERICAN TRUST COMPANY and WESTLACO INVESTMENT COMPANY	)	Bateman, J.A.
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Respondents	)	
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