C.A. No. 128160

NOVA SCOTIA COURT OF APPEAL
Cite as: 679927 Ontario Ltd. v. Wall, 1997 NSCA 162

Freeman, Bateman and Flinn, JJ.A.

BETWEEN:

679927 ONTARIO LIMITED (formerly HORN ABBOT PRODUCTIONS LIMITED), and EDWARD MARTIN WERNER Appellants	William L. Ryan, Q.C. and J. Edgar Sexton, Q.C. for the Appellants
- and -	
	Kevin A. MacDonald for the Respondent
DAVID H. WALL Respondent	Appeal Heard: November 28, 1996
	Judgment Delivered: January 13, 1997

THE COURT: Appeal dismissed with costs to the respondents per reasons for judgment of Flinn, J.A. Freeman and Bateman, JJ.A. concurring.

FLINN J.A.:

The appellants made application to Justice Hood of the Supreme Court of Nova Scotia in Chambers, for a declaration that the Province of Ontario, rather than the Province of Nova Scotia, is the proper forum for the trial of this proceeding commenced against the appellants and others by the respondent. The appellants requested an order staying the proceedings or, alternatively, an order setting aside the originating notice. Justice Hood dismissed the application. The appellants have appealed the decision and order of the Chambers judge.

Background/Facts

The respondent is a resident of Westmount, Nova Scotia. It is alleged in the statement of claim filed, in the Supreme Court of Nova Scotia, on his behalf, that the board game "Trivial Pursuit" was his concept. He alleges that over a period of a year and a half between 1978 and 1979 he developed the idea for a question and answer board game dealing with matters of trivia, testing one's skill and knowledge and incorporating the element of chance by using a pair of dice. He alleges that he developed this idea with a view to production of such a game, or the possibility of entering into a royalty agreement with a known manufacturer of board games. He further alleges that he shared information about the board game with John Haney, a director of the corporate appellant, in December, 1979, while Mr. Haney was visiting Nova Scotia. This, Mr. Wall alleges, was on the understanding that the game concept, invention and all rights in the game were his; that he was to maintain control of all decisions; and that the game was not to be used without his permission.

It is alleged that Mr. Haney converted, to his own use, the respondent's intellectual property and that Chris Haney, another director of the corporate appellant, and his co-defendants, have benefited from the respondent's invention which, it is alleged, was unlawfully converted. He alleges that all of the defendants

are constructive trustees of all profits, property and further gains generated from the plaintiff's idea.

The respondent claims a declaration that he is the holder of all right, title and interest in the board game Trivial Pursuit, and all manner of things derived directly or indirectly therefrom. He claims a declaration that the appellants, and each of them, have held all copyrights, trademarks and other intellectual property in the game and its derivatives as constructive trustees for the plaintiff and he requests an order that those rights be transferred to the respondent. He seeks an accounting of gross revenues and profits generated by the game and its derivatives; he also claims other damages.

The appellants, not yet having filed a defence to the proceeding, brought this application to have Ontario declared the *forum conveniens* for the trial of this proceeding.

In support of the application an affidavit was filed by the appellants' Toronto counsel, the substance of which appears in paragraph 14 of the affidavit as follows:

> "That based on the foregoing I believe that the vast majority of witnesses, parties and documents relevant to the allegations in the statement of claim are not located in Nova Scotia and are located in Ontario."

Counsel for the respondent filed an affidavit of which paragraph 36 deposes as follows:

> "I am advised by David H. Wall and do verify believe that there are presently 20-25 witnesses that he and I have determined would be presently relevant. There are at least 10-20 witnesses who may become relevant as we proceed. All of these witnesses are residents of Nova Scotia."

Application to Adduce Fresh Evidence

Before dealing with the merits of this appeal, I will deal with an application, to adduce fresh evidence, which was made by counsel for the appellants at the commencement of the hearing of this appeal.

The application arises in the following context. Prior to the hearing of the application before Justice Hood, counsel for the appellants requested from counsel for the respondent a list of the names of the witnesses who, as deposed, would give relevant evidence on behalf of the respondent at trial. The day before the hearing of the application counsel for the respondent provided a list of the names.

Counsel for the appellants says that it was not possible, or practical, for him, or anyone else - prior to the hearing of the application the following morning - to have contacted the individuals who were identified as witnesses on the respondent's behalf.

Subsequent to the hearing before Justice Hood,

Nova Scotia counsel for the appellants requested his partner, at the law firm's Sydney, Nova Scotia office, to make contact with all of the persons who were identified as potential witnesses for the respondent. Over a period of two months, the Sydney lawyer made contact with all named potential witnesses. Sydney counsel then prepared an affidavit setting out his conclusions, from his conversations with these potential witnesses, as to the relevance, or otherwise, of any evidence which they could give at the trial. It is this affidavit which is the subject of the fresh evidence application.

In the case of **Thies v. Thies** (1992), 110 N.S.R. (2d) 177 Freeman, J.A. said the following at p. 179:

> "The tests for admission of fresh evidence on appeals was set out by McIntyre, J., writing for the Supreme Court of Canada in **R. v. Palmer** (1979), 30 N.R. 181; 50 C.C.C. (2d) 193 (S.C.C.):
>
> > '(1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in criminal cases.
> >
> > ...
> > (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
> >
> > (3) the evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.'"

I would reject the appellants' application, because the appellants do not meet the first requirement of the **Palmer** test. Nova Scotia counsel for the appellants acknowledged at the hearing of this appeal that, prior to the hearing of the application before the Chambers judge, he had waived his right to cross-examination on the affidavit filed on behalf of the respondent. Further, if counsel for the appellants thought that the information which he required was important, for the purposes of the application, he could have requested an adjournment from the Chambers judge until such time as the information became available. He made no such request.

Therefore, prior to the hearing of the application which is the subject of this appeal, counsel for the appellant had two avenues open to him to obtain the information which he now seeks to put before this Court on a fresh evidence application. Since he chose not to pursue either avenue, he cannot, now, expect to put that evidence forth in conjunction with his appeal.

Quite apart from the above, the affidavit, which is the subject of the fresh evidence application, is of questionable probative value. In paragraph 8 of the affidavit, for example, counsel deposes as follows:

> "THAT from my discussions with the individuals I believe are the twenty-six (26) potential witnesses listed in Kevin A. MacDonald's correspondence, it was apparent to me that of those twenty-six (26) individuals, at least twenty-four (24), and possibly all twenty-six (26), have absolutely no relevant evidence to give in this matter on behalf of the Plaintiff... ."

That is not a statement of fact. It is an opinion, and, under the circumstances, it is inadmissible. The affidavit is also replete with hearsay statements. As Davison, J. said in **Waverley (Village Commissioners) v. Nova Scotia** (1993), 123 N.S.R. (2d) 46 at p. 50:

> "An affidavit should be confined to facts of which the affiant has personal knowledge except on an application where the affiant can give evidence based on information and belief ...
>
> Affidavits, unlike pleadings, form the evidence which go before the court and are subject to the rules of evidence to permit the court to find facts from that evidence. They should be drafted with the same respect for accuracy and the rules of evidence as is exercised in the giving of **viva voce** testimony."

I will also mention, here, that I have reservations as to whether this Court should ever entertain an application to introduce fresh evidence on an interlocutory

appeal such as this. All of the relevant factors, which favour one jurisdiction over the other, would be within the knowledge of the respective parties at the time of the original application before the chambers judge, or they could be clarified through cross-examination of the deponent of the opposing party's affidavit. A fresh evidence application, under such circumstances, opens the door to a re-hearing of the original application. However, this point was not argued at the hearing of the application to introduce fresh evidence, and I will, therefore, do no more than express my reservations on the point.

The decision of the Chambers judge

The essence of the decision of Justice Hood, on the appellants' application for a declaration that Ontario, rather than Nova Scotia, is the proper forum for the trial of this proceeding, is contained in the following excerpt from her oral decision:

> "Having reviewed those factors, along with others that have been raised, I have concluded that this is one of those cases where there is no one -- no forum, ... which is clearly the most convenient or appropriate and, therefore, I conclude that the defendants have not met the burden of establishing that there is clearly another forum which is a more appropriate forum for this matter to be heard in."

The Issue on this Appeal

The issue on this appeal, as stated in the appellants' factum, is:

> "Did the learned Chambers Judge misdirect herself in principle, and/or give no weight or insufficient weight to relevant circumstances, in failing to find that the Province of Ontario, rather than the Province of Nova Scotia, is the *forum conveniens* for this action?"

Standard of Review

The standard of review of an appeal of a decision involving the exercise of discretion by a Chambers judge was considered by this Court in **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143 where Chipman J.A. stated as follows at pp. 145-146:

> "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 would result. The burden on the appellant is heavy: **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, at 333, and **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54, at 57.
>
> 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. See **Charles Osenton and Company v. Johnston** (1941), 57 T.L.R. 515; **Finlay v. Minister of Finance of Canada et al** (1990), 71 D.L.R. (4th) 422; and the decision of this court in **Attorney General of Canada v. Foundation Company of Canada Limited et al.** (S.C.A. No. 02272, as yet unreported)."

Principles of Law

The principles upon which a court will grant a stay of proceedings on the basis of *forum non conveniens* have been recently reviewed by the Supreme Court

of Canada in the case of **Amchem Products Inc. v. B.C. (W.C.B.)**, [1993] 1 S.C.R. 897. It is appropriate that I make some detailed reference in this regard because **Amchem** modifies the test enunciated by the English authorities, which have been consistently referred to by our courts, particularly the cases of **MacShannon v. Rockware Glass Ltd.**, [1978] A.C. 795 (H.L.) and **Spiliada Maritime Corporation v. Cansulex Ltd.**, [1987] A.C. 460; [1986] 3 All E.R. 843 (H.L.).

In **MacShannon**, Lord Diplock enunciated the test in the following words at p. 810-812, [1978 A.C.]:

> A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused.
>
> In order to justify a stay two conditions must be satisfied, one positive and the other negative:
>
> > (a) the defendant must satisfy the court that there was another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and
> >
> > (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.

As to condition (b) of the test enunciated in **MacShannon**, Justice Sopinka said the following in **Amchem** at p. 919:

> In my view there is no reason in principle why the loss of a juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum.

In **Spiliada,** decided by the House of Lords eight years after **MacShannon**, Lord Goff stated the test as follows at p. 854-855, ([1986] 3 All E.R.):

> The basic principle is that a stay will only be granted on the ground of forum non-conveniens where a court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> As Lord Kinnear's formulation of the principle indicates, in general, the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ... It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence.

It is noteworthy, that in explaining the test, Lord Goff acknowledges the strong position of a plaintiff, in Canada, where the competing jurisdiction is another province of Canada:

> "(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where 'the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favour of the defendant' (see Scoles and Hay *Conflict of Laws* (1982) p. 366, and cases there cited); and also in Canada, where it has been stated that 'unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed' (see Castel *Conflict of Laws*) 3rd edn, 1974) [p. 282). This is strong language.

> However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff on which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions." {emphasis added}

In **Spiliada** the House of Lords had decided that the burden of proof is different when the defendant is served within the jurisdiction, as opposed to *ex juris*. In **Amchem**, Justice Sopinka said at p. 920:

> "...It seems to me that whether it is a case for service out of the jurisdiction or the defendant is served in the jurisdiction, the issue remains: is there a more appropriate jurisdiction based on the relevant factors."

And further at p. 921:

> "...The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties."

In **Amchem** Justice Sopinka, writing for a unanimous Court, said the following about the test to be applied in an application to stay proceedings in a forum which the plaintiff has selected at p. 921:

> "...While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff."

And at p. 931, he said:

> "...Under this test the court must determine whether there is another forum that is clearly more appropriate. The result of this change in stay applications is that where there is no one forum that is the most appropriate, the domestic

> forum wins outs by default and refuses a stay, provided it is an appropriate forum. (emphasis added).

There is good reason why, in order to displace an appropriate forum selected by the plaintiff, a more appropriate forum must be clearly established. I cannot express that reason any better than did McLachlin, J.A. (as she then was) in the case of **Avenue Properties Ltd. v. First City Development Corporation Ltd. et al** (1986), 7 B.C.L.R. (2d) 45 at p. 50:

> ...a plaintiff's choice of forum should not be lightly denied. It is his right to have ready access to the courts of his jurisdiction and not to be required to travel outside his jurisdiction to present his case. This is particularly the case where the plaintiff resides in the jurisdiction where he seeks to bring his action or where there is some other *bona fide* connection between the action and the jurisdiction in which it is sought to be brought. Accordingly, the court's jurisdiction to stay proceedings should be used sparingly.

It is apparent, from what Justice Sopinka has said in **Amchem**, that when a plaintiff who has commenced an action in Nova Scotia is faced with an application by a defendant to stay the action (because the defendant claims that another jurisdiction is, clearly, a more appropriate jurisdiction to hear the matter) the plaintiff cannot sit back, do nothing, and claim that the onus is on the defendant to make his case. If the plaintiff does so, he runs the risk that the Court will find, on the evidence before it, that the other jurisdiction is clearly the more appropriate jurisdiction. The plaintiff, therefore, has an evidentiary burden as well, to show the existence of factors which will persuade the Court to exercise its discretion in his favour, and against the defendant's application.

Finally, as Justice Sopinka said in the introduction to his discussion of *forum non-conveniens*, in **Amchem** at p. 912:

> "I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others."

Disposition

It is acknowledged that Nova Scotia is an appropriate forum for the trial of this action. The only issue before the chambers judge was whether the Province of Ontario, is, clearly, a more appropriate forum.

The essence of the position of the appellants, on this appeal, is that the Chambers judge erred in concluding that the central issue was whether the substance of the transaction took place in Nova Scotia. Counsel submits that the Chambers judge erred in attaching too much emphasis on this factor, and too little or no weight to other relevant factors; namely, the number of witnesses from the appellants' side of the case who would have to come from Ontario, and the fact that the appellants documents are not located in Nova Scotia.

It is clear from reading Justice Hood's decision that she was not satisfied that the location of the appellants' witnesses, and documents, were of sufficient importance, when weighed against the factors which favoured Nova Scotia as the appropriate forum, to displace Nova Scotia in favour of Ontario. Those factors, put forth by the respondent and favouring Nova Scotia, include the respondent's residence in Nova Scotia, the fact that his cause of action arose in Nova Scotia, and the fact that his witnesses are resident in Nova Scotia.

The authorities to which I have referred make it clear that, in this case, the appellants must show that Ontario is clearly a more appropriate forum to displace the forum (Nova Scotia) selected by the respondent.

In fact, Justice Hood's ultimate conclusion, following her review of what each of the parties put forward as factors favouring one jurisdiction over the other, was that:

> "..... this is one of those cases where there is ... no forum ... which is clearly the most convenient or appropriate."

That finding is clearly supported by the facts which the parties put before Justice Hood, and it cannot be said that she made any error in law in making that finding. That being so, this court should not interfere with that finding.

Having made that finding, Justice Hood then applied the principle, set out in **Amchem**, namely: where there is no one forum that is the most appropriate the domestic forum (since it is an appropriate forum in this case) wins out by default.

In conclusion, Justice Hood correctly set out the principles established by Justice Sopinka in **Amchem**, and made no error of law in applying those principles to the matter before her. In fact, in my view, she was correct in her conclusion that the appellants had not established that the Province of Ontario was clearly the more appropriate jurisdiction to hear this matter.

While it is not necessary for the purpose of these reasons, I will say something here about location of documents. One of the arguments advanced by the appellants, in favour of establishing the forum in the Province of Ontario, is that their documents are located there. On this appeal, the appellants submit, that the Chambers judge did not give sufficient weight to that fact.

Following the close of pleadings in an action, documents are exchanged between parties for use at discovery and trial. Unless there is something unique about the documents, required to be produced by one party or the other, it can hardly make any real difference, in a *forum non conveniens* application, whether the

originals of those documents are located in one province of Canada or another. Modern photocopying equipment has resolved whatever problem might have existed in the past with respect to location of original documents. There will be exceptions. There will be cases where original documents are required, where original documents cannot be reproduced by photocopying, or are otherwise unique. In the affidavit filed by the appellants, on the hearing of this application, there is no indication that the appellants' documents are unique, or in any way out of the ordinary. Therefore, the fact that the appellants' documents are located in the Province of Ontario would be an insignificant factor in this *forum non conveniens* application.

I would dismiss this appeal. I would order the appellants to pay the respondent his costs of this appeal which I would fix at $1,500.00 plus taxable disbursements.

Flinn, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.

C.A. No. 128160

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REASONS FOR JUDGMENT BY:

FLINN, J.A.