Cite as: Coughlan v. Westminer Canada Holdings Ltd., 1990 NSCA 90

S.C.A. No. 02281

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Macdonald and Matthews, JJ.A.

BETWEEN:

TERENCE D. COUGHLAN and JOHN A. GARNETT

Appellants

- and -

WESTMINER CANADA HOLDINGS LIMITED, WESTMINER CANADA LIMITED, JAMES H. LALOR, PETER MALONEY, DONALD SNELL, WILLIAM B. BRAITHWAITE and ROBERT COUZIN

Respondents

- and -

TERENCE D. COUGHLAN and JOHN A. GARNETT

Appellants

- and -

WESTMINER CANADA HOLDINGS LIMITED, WESTMINER CANADA LIMITED

Respondents

Ronald N. Pugsley, Q.C. and Jonathan C.K. Stobie for the Appellants

John M. Barker, Q.C. for the Respondents

Appeal Heard: October 1, 1990

Judgment Delivered: November 30, 1990

THE COURT: Application for leave to appeal dismissed per reasons for judgment of Macdonald, J.A.; Jones and Matthews, JJ.A. concurring.

MACDONALD, J.A.:

This is an application for leave to appeal and, if granted, an appeal from the interlocutory decision of Mr. Justice Nunn, whereby he dismissed an application of the appellants for an order excluding two nonparty groups of individuals from attending the discovery examination of other individuals and having access to the record of such examinations prior to their own discovery examination. The two groups are the Australians directors and/or officers of Western Mining Corporation and present and/or former employees of Seabright. Mr. Justice Nunn did grant an exclusion order with respect to party defendants related to areas concerning alleged conspiracies. In those areas, the order of Nunn, J. restricts the party defendants from being made aware of the answers of each other given on discovery prior to their own discovery examination.

These proceedings arise from the purchase by Westminer Canada Holdings Limited (Westminer Holdings) of shares and warrants of Seabright Resources Limited (Seabright). Westminer Holdings is a wholly owned subsidiary of an Australian company, namely, Western Mining Corporation Holdings Limited (Western Mining). Western Mining, according to the record, is a major mining company with assets in excess of $3.1 billion and annual operating revenues in excess of $1 billion.

Several years ago Western Mining became interested in acquiring companies carrying on gold mining operations in North America. Seabright, at the time, was actively engaged in exploring and developing precious and base metal properties including gold properties located at Forest Hills and Beaver Dam. Both of these locations are in the Province of Nova Scotia. Seabright, at all material times, was a "reporting issuer" under the Ontario Securities Act and its shares and warrants were posted and listed for trading on both the Toronto and Montreal stock exchanges. Westminer Holdings reviewed the public record of Seabright which had

been filed with the Ontario Securites Commission. It is alleged that this record indicated that Seabright's Beaver Dam property contained substantial proven reserves of gold ore which could be profitably mined. Westminer alleges that it was on the strength of such report that it purchased the shares and warrants of Seabright for a price in excess of $85 million. Eventually Seabright and the other companies were amalgamated to form Westminer Canada Limited (Westminer Canada). The shares of Westminer Canada are beneficially owned by Westminer Holdings, whose shares in turn are entirely owned by the parent Australian company, Western Mining.

Shortly after the takeover, Westminer Holdings, or Westminer Canada, discovered that the Beaver Dam property did not contain the valuable ore body allegedly indicated by the public record. In consequence, Westminer Holdings commenced an action in Ontario against the former directors of Seabright. These included the present appellants, Terence D. Coughlan and John A. Garnett. The action alleged, inter alia, that the latter fraudulently concealed and conspired to conceal material information from Westminer Holdings.

On October 25, 1988, Messrs. Coughlan and Garnett commenced two actions in the Supreme Court of Nova Scotia against Westminer Holdings, Westminer Canada and the new board of directors. In the first action, Messrs. Coughlan and Garnett contend that they are entitled to the benefit of insurance coverage under a Directors Indemnity Policy taken out while they were directors of Seabright. They contend that this insurance policy would have afforded them indemnity with respect to the Ontario action, had it not been allowed to lapse after the commencement of the Ontario action by the new directors, but prior to service of the Ontario claim upon them. The plaintiffs allege intentional and malicious conspiracy to deprive them of the benefit of the insurance coverage and also allege breach of fiduciary duty. The second Nova Scotia action by the present appellants is for a declaration

against the corporate respondents that they are obligated to pay all fees, costs, damages and expenses incurred by the appellants in the Ontario and Nova Scotia actions. This claim allegedly is based on a Seabright bylaw allowing indemnification of directors under certain circumstances. In rejecting the application for exclusion of the nonparties, the learned Chambers judge said:

> " In this application, in relating to this part of the application dealing with employees and former employees of the Defendant, none of these people are parties. All of the authorities that have been submitted to me relate to exclusion of parties and 'the principles involved in that manner' which I referred to in my own decision in the former application on the part of the Defendant and certainly there's a discretion in the person presiding at the examination for discovery or in the judge to direct the exclusion of co-plaintiffs or co-defendants where the parties had the same interests and the examinations of the parties will cover the same ground. That seems to be the general principle as laid down in **MacMillan & Slaunwhite** (1979), 40 N.S.R. (2d) 25 at page 34 by Cowan, C.J. The case does not deal with other witnesses outside of the parties.
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> It is clear that other witnesses may very well be excluded from hearing the evidence of other witnesses at trial, but, there is no current authority known excluding them from hearing the evidence of anyone else with regard to the giving of discovery evidence.
>
> The burden is on the Applicant to show that sufficient cause that in any event, if it were treated the same as parties, that some exclusionary order should be granted. The basis of such an exclusionary order would have to be, basically, that it was in the interests of justice, that such an exclusionary order would be granted. I'm not satisfied in this case that the Applicant has met that burden, even accepting it as a lighter burden than in a normal situation, and as a result, I'm going to deny the application with regard to those persons. I don't think there's been sufficient to indicate that there would be a violation of an essential of justice if these parties were not excluded from hearing the evidence of each other. There's a real danger in this type of situation that the Defendant would be prejudiced in the preparation of his defence and in lining up the various witnesses that he might have in giving them and instructing them as to what evidence they may be required to give.
>
> I think also, that it would be a dangerous practice, even though this case involves a great deal of money and involves allegations of conspiracy and fraudulent behaviour, I think it would be a dangerous practice to extend this type of an order which is referred to as a gag order, to the general witnesses that would be called by a party. In this case, it may very well be that some of those witnesses will be called by the plaintiff themselves. So I'm not going to grant that order."

The grounds as put forth by counsel for the appellant in support of the application for leave to appeal are:

"1. THAT the Learned Trial Judge erred in that he acted upon wrong principles of law in finding:

(a) That the personal Respondents in advance of the completion of their respective discovery examinations should not be excluded from the discovery of each other and should be permitted to review the discovery evidence of each other as well as the discovery evidence of the Appellants and the other former Directors of Seabright Resources Inc. (Seabright) being Plaintiffs in other associated actions S.H. No. 65676 and 66230, and certain employees of Seabright concerning the state of affairs of Seabright Resources Inc. and, particularly, the status and evaluation of its Beaver Dam property and their knowledge of such matters up to the time of Seabright's takeover by the Corporate Respondents herein;

(b) That the Directors of Western Mining Corporation of Australia, the parent company of the Corporate Respondents, in advance of the completion of their respective discovery examinations, should not be excluded from the discovery of each other and should be permitted to review the discovery evidence of each other as well as the discovery evidence of the Appellants, the other former Directors of Seabright Resources Inc. (Seabright) being Plaintiffs in other associated actions S.H. No. 65676 and 66230, and certain employees and former employees of Seabright concerning the state of affairs of Seabright Resources Inc. and particularly the status and evaluation of its Beaver Dam property, and their knowledge of such matters up to the time of Seabright's takeover by the Corporate Respondents herein;

(c) That certain employees and former employees of Seabright in advance of the completion of their respective discovery examinations should be permitted to review the discovery evidence of the Appellants as well as the discovery evidence of the other former directors of Seabright being Plaintiffs in associated actions S.H. No. 65676 and 66230 relating to communications which occurred or allegedly occurred between the former Directors of Seabright and such employees and former employees up to the time of the takeover.

2. THAT in making the findings referred to herein the Learned Judge erred in that he misdirected himself as to the applicable law;

3. THAT the Learned Trial Judge did not exercise his discretion judicially;

4. THAT the decision of the Learned Judge was not fair, just and reasonable in all the circumstances."

Civil Procedure Rule 18.01, which provides for discovery examination, reads as follows:

> "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.
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> (2) Where is it unnecessary, improper or vexatious, the court may limit the number of persons to be examined and set aside the appointment for the examination of any person.
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> (3) The costs of examining more than one person, other than a party, shall, unless the court otherwise orders, be borne by the party examining."

Robert White, Q.C., in The Art of Discovery (1990: Canada Law Book Inc., Ontario) discusses the individuals who are to be present at discovery examinations. His discussion of this issue is limited to parties and experts. With regards to parties, he states at p. 107:

> " As a general rule, all parties to a lawsuit have the right to be present at all of the oral examinations conducted in that suit, in person or by counsel. This right is, however, subject to an important exception when credibility is in issue.
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> If more than one adverse party is to be examined on the same subject matter, and if the credibility of the parties to be examined is in issue, it is possible to obtain an order excluding each such party from the examination of the other. A request for an exclusion of one adverse party from the examination of another should be made as a matter of course in such circumstances. If the court can be shown the prejudice to the examining party would result if each were present during the discovery of the other, the court's discretion should be exercised in favour of the examiner. To do otherwise would lessen the effect and retard one of the purposes of the discovery."

The majority of cases and certainly the Nova Scotia Supreme Court Trial Division in MacMillan et al. v. Slaunwhite et al. (1979), 40 N.S.R. (2d) 25, support

the position that where the individuals have a common interest and the same ground will be covered in examination, individuals should be excluded from the examinations of one another.

In the MacMillan case, Chief Justice Cowan recognized that there was no Civil Procedure Rule dealing specifically with the situation of exclusion of co-parties during discovery examinations. After a review of the Rule (Civil Procedure Rule 30) dealing with exclusion of witnesses for purposes of a trial and the relevant case law, Cowan, C.J.N.S., concluded (p. 34):

> " In the absence of a specific rule in this province dealing with exclusion of co-parties on examination for discovery, I am of the opinion that the position is similar to that set forth in the Britsh Columbia cases of **Sissons v. Olson; O'Neal v. Murphy; Sweet v. B.C. Electric** and **Benson v. Westcoast, supra,** and in the decision of Bence, C.J.Q.B., in **Basu v. Bettschen, supra.** In my opinion, there is a discretion in the person presiding at an examination for discovery or in a judge to direct the exclusion of co-plaintiffs or co-defendants when fellow parties are testifying on examination for discovery, where the parties have the same interest and the examinations of the parties will cover the same ground.
>
> In the case before me, the seven infant plaintiffs have the same interest in establishing gross negligence on the part of the defendant, Slaunwhite, and in negativing the defences of voluntary assumption of risk, contributory negligence and **ex turpi causa non oritur actio.** Questions of credibility will, undoubtedly, be raised at the trial. In my opinion, this is a proper case for the exercise of the discretion in favour of excluding co-parties during examination for discovery.
>
> I find that there will be no prejudice to the plaintiffs if such an order is granted. An order will, therefore, issue on the application of the defendant, Slaunwhite."

The appellants now argue that the principles set out in Slaunwhite should be extended to situations involving nonparty witnesses. As already mentioned, in this case there are two categories of individuals for whom the appellants are seeking an exclusionary order. In his factum, counsel for the appellant says with respect to the party defendants and the Australian directors and/or officers:

> " It is submitted that a proper application of the principles articulated

> by Chief Justice Cowan in the **MacMillan vs. Slaunwhite** case, to the circumstances of this case supports the Appellants' position that an exclusionary Order should have been granted with respect to the party Defendants. It is further submitted that this authority lends even stronger support to the Appellant's position respecting the Australian Directors (who at the time of the application before Mr. Justice Nunn were not parties and no instruction had been received to add them as parties) and Australian Officers. The evidence which the Appellants will attempt to adduce from individuals falling within these two categories for which an exclusionary Order is sought is clearly a subject of common interest for all these individuals. The pleadings filed in Ontario and in the Nova Scotia actions on behalf of Westminer Canada and Westminer Holdings, at the direction of Western Australia, purport to make a qualitative statement about the nature and extent of the knowledge which these companies through their Directors and Officers had, or could have obtained, with respect to Seabright and its Beaver Dam property. Individuals within these two categories have a common and, indeed, economic interest in this subject, and the examination of each of these individuals will cover common ground to the extent inquiries will be made of each of them under oath as to what they personally knew, or ought to have been able to find out, about Seabright and its Beaver Dam property prior to the conclusion of the takeover."

The position of the appellants with respect to the employees and former employees of Seabright is stated in the appellants' factum as follows:

> " The Appellants submit that the basis for His Lordship's decision is not only contrary to governing principles of law but inconsistent with his reasoning in connection with the exclusion of the former Directors of Seabright from the examinations of each other. In particular, the Appellants submit that as nonparties, the individuals in this category do not have any inherent 'right' to attend at trial and during pre-trial proceedings. To this extent, the Appellants submit that their position is even stronger with respect to the restriction of access that these individuals have to the discovery evidence to others prior to the completion of their own evidence."

The interlocutory order of Mr. Justice Nunn was one made in the exercise of his discretion.

In Nova Scotia (Attorney General) v. Morgentaler (1990), 96 N.S.R. (2d) 54, Mr. Justice Matthews said at pp. 56 and 57:

> "... As Macdonald, J.A., of the Court wrote in **General Motors Acceptance Corp. of Canada Ltd. v. Fulton Insurance Agencies Ltd.** (1978), 24 N.S.R. (2d) 114; 35 A.P.R. 114 (C.A.), at p. 122:

> ' I appreciate the position of counsel for the appellant on this aspect of the matter. Our function, however, is not to retry cases or to intervene to substitute our interpretation of the evidence for that of the trial judge unless there is an obvious error in the reasons or conclusions reached by him. See **Metivier et al. v. Cadorette,** [1977] 1 S.C.R. 371, at p. 380 et seq; 8 N.R. 129, at p. 138 et seq.'
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> The law is clear: an appeal court should not interfere with such a discretionary order unless it works a substantial injustice. In **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331 (C.A.), this Court considered an appeal from the refusal of the Chambers judge to continue a temporary ex parte injunction. In dismissing the appeal MacKeigan, C.J.N.S., speaking for the Court, said at p. 333:
>
> ' This Court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result.'
>
> We should only interfere if serious or substantial injustice, material injury or very great prejudice would result if we did not. The burden on an appellant seeking to set aside an interlocutory order such as this is indeed heavy."

Therefore, the question to be considered is whether there would be serious or substantial injustice, material injury or great prejudice to the appellants if Mr. Justice Nunn's decision was not interfered with.

The Chambers judge recognized that the case law before him dealt specifically with situations involving co-defendants, co-plaintiffs and adverse parties. He also recognized that there was no current authority which dealt with excluding witnesses from hearing the evidence of anyone else at discoveries.

However, he also stated that if nonparty witnesses were treated the same as parties, the burden would be on the applicant to show that it would be in the interests of justice that an exclusionary order be granted. Although the burden would be lighter than in a normal situation, the Chambers judge was not satisfied that the applicant had met the burden in this case.

It is clear that when considerations of justice were considered, the Chambers judge was satisfied that the burden had not been met by the applicant. Therefore, the order with respect to the Australian directors and/or officers and the former or present employees of Seabright was denied.

I am not persuaded that Mr. Justice Nunn erred in law in the exercise of his discretion or that serious or substantial injustice, material injury or very great prejudice would result to the appellants if this Court did not reverse his decision. In result, the application for leave to appeal is dismissed. Costs of this appeal shall be the respondents' in any event of the cause.

Anyus L. Macdonald

J.A.

Concurred in:

Jones, J.A. Mey.

Matthews, J.A. K. H. O'H.

CANADA

PROVINCE OF NOVA SCOTIA

1988 S.H. 65580

IN THE SUPREME COURT OF NOVA SCOTIA TRIAL DIVISION

(IN CHAMBERS)

BETWEEN:

TERENCE D. COUGHLAN AND JOHN A. GARNETT

Plaintiffs

- and

WESTMINER CANADA LIMITED, WESTMINER CANADA HOLDINGS LIMITED, JAMES H. LALOR, PETER MALONEY, DONALD SNELL, WILLIAM B. BRAITHWAITE AND ROBERT COUZIN

Defendants

AND

1988 S.H. 65581

IN THE SUPREME COURT OF NOVA SCOTIA TRIAL DIVISION

(IN CHAMBERS)

BETWEEN:

TERENCE D. COUGHLAN AND JOHN A. GARNETT

Plaintiffs

- and -

WESTMINER CANADA LIMITED, AND WESTMINER CANADA HOLDINGS LIMITED

Defendants

HEARD BEFORE: The Honourable Mr. Justice Nunn

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: April 20, 1990

COUNSEL: R.N. Pugsley, Q.C., for the Plaintiffs
D.G. Machum, Esq., for the Plaintiffs

J.M. Barker, Q.C., for the Defendants
G.W. MacDonald, Q.C., for the Defendants
Fae Shaw., for the Defendants