C.A. No. 106923

NOVA SCOTIA COURT OF APPEAL

Matthews, Roscoe, and Pugsley, JJ.A.

Cite as: Sherman v. Giles, 1994 NSCA 226

BETWEEN:		
ARTHUR E. SHERMAN		Appellant appeared in person
	Appellant	
- and -		
LESLIE GILES		Colin D. Bryson for the Respondent
	Respondent	
		Appeal Heard: November 23, 1994
		Judgment Delivered: December 19, 1994

THE COURT: The appeal is allowed and the order striking the Statement of Claim is set aside with costs as per reasons for judgment of Roscoe, J.A.; Matthews and Pugsley, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal of an order granting a motion made under Rule 14.25 to strike out a Statement of Claim issued by the appellant.

In the Statement of Claim the appellant alleged that as a result of advice

given by the respondent to a police officer, the appellant was wrongfully arrested, charged with extortion and imprisoned. It was alleged that the advice was given "willfully, intentionally, wrongfully, knowingly and /or negligently" and that the advice was "false, untrue and incorrect". He claimed to have suffered damages as a result.

Rule 14.25 is as follows:

> "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;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a)."

On the hearing of the application the respondent, who is a Crown Prosecutor, and a police officer filed affidavits in which they swore that although the appellant was investigated as a result of a complaint of extortion, he was at no time ever arrested, charged or imprisoned as a result. No affidavit was filed by the appellant, who was not represented by counsel.

After a discussion with counsel for the respondent in which the Chambers judge suggested that the application should be determined under Rule 14.25(1) (b) and (d), the transcript sets out the following exchange with the appellant:

" **THE COURT:** Mr. Sherman.

MR. SHERMAN: Yes, My Lady.

THE COURT: My first question to you is, were you arrested as you have alleged in your statement of claim?

MR. SHERMAN: Well . . .

THE COURT: Yes, or no. You were either arrested or you weren't.

MR. SHERMAN: This appears to be trial on affidavit. Now, in this proceeding . . .

THE COURT: That would be a matter of record, sir.

MR. SHERMAN: The pleadings, the statement of claim is assumed to be true, so I want to . . .

THE COURT: I am going to make this very simple. Mr. Sherman, I am going to proceed under (b) and (d) of Rule 14.25.

MR. SHERMAN: I was arrested, I was imprisoned, I was arraigned. The statement of claim shows that and the statement of claim is taken as being true.

THE COURT: Mr. Sherman, I am admitting those affidavits under 14.25 (b) and (d). So, what we are dealing with is whether this is a false, scandalous, or frivolous proceeding, or whether it is otherwise an abuse of process of the Court. I am not going to rule on it on the basis of whether the pleadings disclose no reasonable cause of action. I am going to rule on it on the basis of whether it is false, scandalous, frivolous, or vexatious. So, the affidavits are in and I have the power to do that under 14.25(2).

MR. SHERMAN: Yes, My Lady.

THE COURT: And, I am doing it. I am accepting those affidavits.

MR. SHERMAN: The affidavits?

THE COURT: Yes.

MR. SHERMAN: Yes, My Lady.

THE COURT: All right, so the question to you is whether you were arrested on this matter, contrary to what is in the affidavit of the Constable and Lesley Giles. They

> say you weren't. You weren't charged, you weren't arrested and you weren't detained. You say you were, in your statement of claim.
>
> **MR. SHERMAN:** Well, the fact has been established. In a proceeding of this sort, the affidavits, Mr. Bryson admits that the facts of the affidavit, or the facts of the pleading, that is the statement of claim are taken as being true.
>
> **THE COURT:** Only under 14.25 (1)(a), that is only under that Rule, not under (b), (b), (c) and (d). When you are considering the face of the pleading, you consider them to be true, as pled, but you don't do that when affidavits are admitted under (b), (c) and (d).
>
> **MR. SHERMAN:** I maintain that under the cases, under 14.25, regardless of the sub-rule, that the pleading contested, or attacked, is taken as being true. **Teal v. United Church of Canada at Woodlawn, N. S. Trustees of** (1980), 34 N.S.R. (2d) 313 (C.A.) and the case **Seacoast Towers Services Ltd. v. MacLean** (S.C.A. 01565), that was presented by Mr. Bryson. So, it is established by the claim, the statement of claim, that I was arrested, imprisoned and arraigned and affidavits aside, the affidavits cannot be considered. It is my position the statement of claim is true, it is true, under the cases, or I should say, assumed to be true, for our purposes."

In her decision, the Chambers judge in applying the principles in **Re MacCulloch** (1992), 115 N.S.R. (2d) 131 (T.D.) and **Re Lang Michener and Fabian** (1987), 59 O.R. (2d) 353 found that the Statement of Claim was false, scandalous, frivolous and vexatious and an abuse of process.

The issues raised by this appeal are:

1. Did the Chambers judge err in law by admitting and considering the affidavits on the question of whether the action was frivolous, vexatious and an abuse of process?

2. Did the Chambers judge err in law in concluding that the action was frivolous, vexatious and an abuse of process?

3. If the appellant is successful on either of the first two issues, should this Court deal with the question of whether the Statement of Claim discloses a

reasonable cause of action, in the absence of a decision of the Chambers judge on that point?

The appellant was correct when he stated that in considering an application under Rule 14.25(1)(a), the Court should not admit affidavit evidence to refute the facts alleged in the Statement of Claim. In the case of **Teale v. The United Church of Canada** (1980), 34 N.S.R. (2d), Chief Justice MacKeigan stated at p. 313:

> "Whether a statement of claim discloses a cause of action is ordinarily to be determined solely by perusing its contents and any relevant statutes. Affidavit evidence may be admitted at the discretion of the chambers judge but should not relate to proof or disproof of the facts alleged in the claim. On an application to dismiss it is assumed that the facts alleged in the statement of claim can be proved. The question is whether a claim in law is shown, assuming the facts to be true."

The same conclusion was reached in **Seacoast Towers Services Ltd. v. MacLean** (1987), 75 N.S.R. (2d) 70 (C.A.).

The appellant submits that the same principles apply when the application is made pursuant to Rule 14.25(1)(b) and (d). This issue does not appear to have been directly raised before in Nova Scotia. Although the courts have often relied on affidavit evidence to determine that a matter raised in a Statement of Claim is **res judicata** and therefore frivolous or vexatious, there does not appear to be a Nova Scotia case where the facts alleged in the Statement of Claim were rebutted by affidavit evidence which resulted in a finding that the claim was frivolous or vexatious. Examples of cases where the claim was struck out pursuant to Rule 14.25(1) (b) and (d), on the basis of **res judicata**, are: **Re MacCulloch** (1992), 115 N.S.R. (2d) 131(T.D.); **Fulton v. Pingrove Women's Institute** (1984), 64 N.S.R. 98 (T.D.); and **Feener v. R. and Lunenburg** (1983), 62 N.S.R. (2d) 136 (A.D.).

If affidavit evidence is admitted to prove or disprove the allegations of fact in the Statement of Claim, then it does appear to be, as the appellant submitted, a trial

by affidavit. This was the conclusion reached by Strayer, J. in **Pitney Bowes Inc. v. Yale Security Inc.** (1987), 9 F.T.R. 58 (F.C.T.D.), a case involving a patent infringement. On an application to strike out the Statement of Claim on the basis that it was frivolous and vexatious, the defendant filed an affidavit in which it was stated that the plaintiff did not have a licence respecting the patent in question. On the issue of the appropriateness of the affidavit, Strayer J. said:

> " I am unable to see on what basis this affidavit supports the proposition that the statement of claim is scandalous, frivolous, vexatious or an abuse of the process of the Court. What the affidavit purports to prove is that the plaintiff does not in fact have a licence with respect to patent 1,167,131 and that the Canadian defendant does have one. These are both simply refutations of the allegations in the statement of claim. The affidavit does not demonstrate how the allegations in the statement of claim are scandalous, frivolous, vexatious or an abuse of the process of the Court. It simply disagrees with them and indicates that there may be evidence to contradict those allegations. That does not make the plaintiff's allegations scandalous, vexatious, etc.
>
> One must keep in mind the structure of Rule 419. While 419(1) (a) permits an application to strike on the basis that the pleading "discloses no reasonable cause of action. . .", 419(2) provides that no evidence shall be admissible on an application under that paragraph. I take the purpose of this latter prohibition to be to prevent the Court from considering evidence, on an application to strike for want of a reasonable cause of action, to prove or disprove the allegations in the statement of claim. It is for this reason that it is well established that the Court must, on such an application, assume that the allegations in the statement of claim are true for the purpose of determining whether they disclose a reasonable cause of action. That is, the Court is not supposed to try the merits of the case on affidavit evidence at this preliminary stage. The only purpose that can be served by Mr. Hudnut's affidavit is to demonstrate that there is no reasonable cause of action here by contradicting the allegations in the statement of claim. I am satisfied that this is a purpose for which I may not use the affidavit. Since counsel did not demonstrate to me the scandal, vexation, or abuse of the process of the Court which this affidavit is supposed to prove, other than suggesting that the plaintiff may not succeed in making out its case, I must disregard the affidavit and dismiss the application insofar as it relates to paragraphs 419(1)(b), (c), (d), and (f) of the Rules."

The dismissal of the application to strike the Statement of Claim was upheld on appeal, although another part of the judgment was varied. See: (1988), 80 N.R. 267 (F.C.A.)

In this case the affidavits filed by the respondent are similar to those referred to by Strayer, J., that is, they simply disagree with the statements made in the Statement of Claim and do not demonstrate that the claim is frivolous. The attempt by the Chambers judge to have the appellant either admit or deny the truth of the contents of the affidavits was, although understandable and expedient in the circumstances, improper. I agree with the conclusion in **Pitney Bowes**: the Court is not supposed to try the merits of the case on affidavit evidence at the preliminary stage. The error is similar to that in **Seacoast, supra**, where, when referring to an application under 14.25(1)(a) heard by the Chambers judge, Matthews, J.A. said:

> ". . . Here, the judge in chambers did not follow the principle that the purpose of an application under that rule is not to try issues, but determine if there are issues to be tried."

The next issue is whether, notwithstanding the affidavits, there was cause to strike the Statement of Claim on the basis that it was frivolous and vexatious. The power to strike out pleadings is one that must be sparingly used. (See **Vladi Private Islands Ltd. v. Hasse et al.** (1990), 96 N.S.R. (2d) 323 (C.A.) at page 325 and cases cited therein.) The tests used to determine an action's viability in the face of an application under Rule 14.25 have been variously described as: "obviously unsustainable", " devoid of all merit" (**Rizzetto v. New Waterford** (1982), 54 N.S.R.(2d) 273); "where the court is satisfied that the case is beyond doubt" (**Attorney General of Canada v. Inuit Tapirisat of Canada**, [1980] 2 S.C.R. 735); "is certain to fail because it contains a radical defect". (**Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959) and "only in the clearest of cases" (**Nelles v. Ontario** (1989), 60 D.L.R. (4th) 609.

In this case, without the factual dispute raised by the affidavit evidence,

it cannot be said that the action was obviously unsustainable. Although the Chambers judge relied on **Re MacCulloch, supra**, as support for finding this action was frivolous and vexatious, this case pales in comparison to the "duplicitous and multiplicity of actions" referred to by Glube, C.J. in **MacCulloch**. The Chambers judge relied on the principles listed in **Re Lang Michener et al. and Fabian et el.** (1987), 59 O.R. (2d) 353 which are said to lead to the conclusion that an action is frivolous or vexatious or an abuse of process of the court:

> "(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
>
> (f) the failure of the person instituting the proceedings to pay the cost of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
>
> (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings."

An examination of that list discloses that, with the exception of (b), they

each involve an issue akin to, or in the nature of, **res judicata**. In this case there was no evidence of a previous determination of the issue, of multifarious proceedings between these two parties, of repetition of grounds from an earlier proceeding, of a "history" of the matter, of a failure to pay an order for costs, nor of any unsuccessful appeals. In my view, given the onerous test that should be applied on an application to strike pleadings, this action should not have been determined frivolous and vexatious. The second indicator listed is one properly considered under the next issue herein, that is, whether there is a reasonable cause of action.

The respondent submitted that this Court should find that the Statement of Claim discloses no reasonable cause of action, even though the Chambers judge declined to do so. The appellant attempted to argue the question of possible Crown immunity before the Chambers judge, but was told it was not in issue. The main argument of the respondent on this issue, before this Court, is that the appellant's claim is faulty because he did not plead malice. However, the appellant sought leave to amend his Statement of Claim to add an allegation of malice, but leave was summarily denied by the Chambers judge without reasons. In **Hunt v. Carey, supra**, Madam Justice Wilson adopted the statement of the British Columbia Court of Appeal in **Minnes v. Minnes** (1962), 39 W.W.R. 112 that:

> ". . . So long as the statement of claim, **as it stands or as it may be amended**, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out."
>
> (emphasis added)

Although the claim of malicious prosecution is flawed, because malice has not been pled, it cannot be said that the claim is beyond a doubt, unsustainable,

however improbable that it will succeed.

The appeal should be allowed and the order striking the Statement of Claim set aside, with costs to the appellant in the amount of $200. plus disbursements, in the cause, in any event.

Roscoe, J.A.

Concurred in:

Matthews, J.A.

Pugsley, J.A.