NOVA SCOTIA COURT OF APPEAL
Citation: ***Wall v. Horn Abbot Ltd.***, 2003 NSCA 129

Date: 20031203
Docket: CA 188469
Registry: Halifax

Between:

David H. Wall

Appellant

v.

Horn Abbot Ltd., 679927 Ontario Limited (formerly Horn Abbot Productions Limited), Christopher Haney, Charles Scott Abbott, John Haney and Edward Martin Werner

Respondents

Judges:	Roscoe, Freeman and Bateman, J.A.
Appeal Heard:	November 24, 2003, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Freeman and Roscoe, JJ.A. concurring.
Counsel:	Kevin A. MacDonald, for the appellant John C. Cotter, for the respondents, Horn Abbot Ltd. and 679927 Ontario Limited William L. Ryan, Q.C. and John E. MacDonell, for the respondents Christopher Haney, Charles Scott Abbott, John Haney and Edward Martin Werner

Reasons for judgment:

[1] This is an appeal from an interlocutory order of Justice Simon MacDonald of the Supreme Court sitting in Chambers. At issue before him was, principally, an application by the appellant (plaintiff at trial) asking that the respondents (defendants at trial) be compelled to re-attend for Discovery examination. We dismissed the appeal at the conclusion of the hearing, with reasons to follow. These are our reasons.

[2] The proceeding between these parties has a lengthy and litigious history. In the main action, which was commenced in November of 1994, the appellant, David Wall, claims that the concept for the game "Trivial Pursuit" was his and that he disclosed it to the respondent Christopher Haney in 1979. Mr. Wall seeks, inter alia, a declaration that he is the true title-holder of the game and an order for damages and an accounting. Fuller details of the background to this action can be found in the decision of this Court reported as **Wall v. Horn Abbot Limited** (1999), 176 N.S.R. (2d) 96; N.S.J. No. 124 (Q.L.), one of several interlocutory decisions in this proceeding.

[3] The current matter arose from nine days of Discovery of the parties at which time the appellant's counsel asked the individual respondents in excess of five thousand questions. It was the appellant's position before the Chambers judge that the respondents had wrongly refused to answer one hundred and forty-five questions. Of the questions posed to the representatives of the corporate respondents on Discovery and not answered, about twenty were in issue before the Chambers judge.

[4] The Chambers judge ordered the individual respondents to answer a total of eight questions. The representatives of the corporate respondents were directed to answer about twenty questions, with some of the questions to be re-phrased.

[5] The **Civil Procedure Rules** particularly relevant to this proceeding are:

> **18.09.** (1) Unless it is otherwise ordered, a person, being examined upon an examination for discovery, shall answer any question within his knowledge or means of knowledge regarding any matter, not privileged, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings.

(2) In order to comply with paragraph (1), the person being examined may be required to inform himself and the examination may be adjourned for that purpose.

(3) When any person examined for discovery omits to answer or answers insufficiently, the court may grant an order requiring him to answer or to answer further and give such other directions as are just.

18.12. (1) An examiner shall, upon an examination for discovery, cause every question and answer to be taken down and a note made upon the dis-positions of any question objected to and the ground of the objection, but the evidence objected to shall be taken subject to the objection

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

(3) Any ruling or direction of the examiner may be appealed to the court, and the examiner shall upon request certify under his hand the question raised, any answer thereto, and his ruling or direction thereon.

(4) The validity of an objection to any question, answer, ruling or direction shall be decided by the court, and the costs of and occasioned by the objection shall be in the discretion of the court and may be ordered to be paid by the person under examination.

[6] The proper approach by this Court on such an appeal was succinctly stated by Chipman J.A., writing for the Court in **Global Petroleum Corp. v. CBI Industries Inc.** (1998), 172 N.S.R. (2d) 326; N.S.J. No. 486 (Q.L.)(C.A.):

[14] The **Civil Procedure Rules** providing for discovery have existed in their present form for over a quarter of a century. During that time, the practice of the Bar in their use has developed, and court rulings have provided clarification and refinement. Ordinarily, experienced counsel should have no difficulty in making the rules work and in conducting discoveries without unnecessary waste of time and expense. Only rarely should resort to the courts be had. When this happens, the Chambers judge is required to step in and provide a working solution to problems that have proven too difficult for counsel to resolve on their own. Only rarely should it be necessary to appeal to this court from such rulings. Even more

> rarely should it be expected that this court will intervene in the discretionary resolution by the Chambers judge of such issues.

[7] A practice has developed among members of the Bar to generally permit witnesses to answer all questions posed at Discovery, even when not strictly relevant to the subject-matter of the proceeding. It is a good practice and one which should be preserved. A witness at Discovery who arbitrarily refuses to answer questions risks an adverse ruling and cost consequences when the matter is brought before a judge. That said, when a dispute arises as to whether a particular question should be answered, relevance is the threshold issue. In **Coates v. The Citizen and Southam Inc. et al.** (1986), 74 N.S.R. (2d) 143; N.S.J. No. 225 (Q.L.) (A.D.), MacKeigan, J.A. said, for the majority, at p. 146:

> **[19]** Relevancy is the first and paramount requirement for an order compelling a witness to testify. The names of the "security person" and the "lobbyists" are, in my view, not relevant and need not be revealed in this discovery.
>
> **[20]** Our discovery rules are very broad and "are designed to ensure the fullest possible disclosure of the facts and issues before trial" (Jones, J.A., in **Central Mortgage & Housing Corporation v. Foundation Company of Canada Limited** (1983), 54 N.S.R. (2d) 43; 112 A.P.R. 43 (N.S.C.A.), at p.49). See especially the very recent and comprehensive judgment of Mr. Justice Matthews for this Court in **C.K. You v. Upham**, S.C.A. 01545, April 25, 1986 (not yet reported)[now reported at (1986), 73 N.S.R. (2d) 73; application for leave to appeal to S.C.C. dismissed (1987), 76 N.S.R. (2d) 180].
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> **[21]** Despite the breadth of our rules, the acid test for compellability, the test which must be applied before entering upon any balancing of public interest, is whether the answer sought is relevant at all (Rule 18.09(1)) and appears "reasonably calculated to lead to the discovery of admissible evidence" (Rule 18.12(2)). I respectfully question whether Mr. Justice Grant applied this privacy test with respect to the last three alleged sources.
> (Emphasis added)

[8] In a hearing spanning three days, the Chambers judge heard argument on every question in dispute and made a ruling on each one. He determined that some should be answered as relevant.

[9] This is an appeal from an interlocutory order. This Court may not interfere unless wrong principles of law have been applied or a patent injustice will result.

(**Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143; N.S.J. No. 86 (Q.L.)(C.A.) per Chipman, J.A. at p. 145).

[10] Having reviewed the record and applying this standard of review, we are not persuaded that the Chambers judge applied wrong principles of law nor that a patent injustice results from this order. We further find that the Chambers judge did not err in the exercise of his discretion as to costs nor in fixing the place for further Discovery.

[11] The parties have all submitted that it is appropriate that any costs be made payable forthwith. The appeal is dismissed with costs payable forthwith, in any event of the cause, by the appellant to the individual respondents, collectively, and to the corporate respondents, collectively, in the amount of $1500 each for total costs of $3000 inclusive of disbursements.

Bateman, J.A.

Concurred in:
Freeman, J.A.
Roscoe, J.A.