

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Brett v. Anthony, 2005 NSSC 235

Date: 20050712

Docket: S.H. 138591

Registry: Halifax

Between:

Bruce R. Brett

Plaintiff

v.

Anthony & Boulton and James N. Horwich

Defendants

v.

James Taylor

Third Party

Judge: The Honourable Justice C. Richard Coughlan

Heard: July 12, 2005 (in Chambers), at Halifax, Nova Scotia

Decision: July 12, 2005 (Orally)

Written Release: August 22, 2005

Counsel: Blair H. Mitchell, for the Plaintiff
Stephen J. Kingston, for the Defendants
Jamie S. Campbell, Q.C., for the Institute of Chartered Accountants of Nova Scotia

Coughlan, J.: (Orally)

[1] Bruce R. Brett applies for an order pursuant to Civil Procedure Rule 20.06, requiring the Institute of Chartered Accountants of Nova Scotia to produce certain file material. The Institute is not a party to the proceeding and claims privilege over the documents. The defendants object to the application and take the position the plaintiff has not demonstrated exceptional circumstances for bringing the application as required by Civil Procedure Rule 28.05(2) and (3), and that the documents are not relevant to the proceeding and the material requested should remain confidential.

[2] Civil Procedure Rule 28.05(2) and (3) provide:

(2) Any party who has filed a notice of trial without a jury and certificate of readiness pursuant to subsection (1) of this rule, or who has consented to the filing of such a notice, shall not, after the filing of the notice, initiate or continue any interlocutory proceeding or form of discovery without leave of the court except discovery of expert witnesses within sixty (60) days of the issuance of the notice.

(3) Leave of the court pursuant to subsection (2) of this Rule shall be granted only in exceptional circumstances.

[3] On September 24, 2000, the plaintiff filed a Notice of Trial Without a Jury and Certificate of Readiness. The matter is scheduled for trial in September of 2005.

[4] The plaintiff made this application. There does not appear to be any exceptional circumstances that warrant exercising my discretion to grant leave to allow the application to be made as provided by r. 28.05(3).

[5] If I erred in determining exceptional circumstances do not exist, I will consider the merits of the application.

[6] Civil Procedure Rule 20.06 provides:

(1) The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just.

(2) Where a document is in the possession, custody or control of a person who is not a party, and the production of the document might be compelled at a trial or hearing, the court may, on notice to the person and any opposing party, order the production and inspection thereof or the preparation of a certified copy that may be used in lieu of the original.

(3) An order for the production of any document for inspection by a party or the court shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest.

- [7] Is production of the requested material necessary for disposing fairly of the proceeding, or for saving costs, or that production is not injurious to the public interest? The party seeking production of documents has the burden of establishing they are relevant to the particular proceeding. In a trial, the Court has to deal with the facts upon which the plaintiff bases his claim and the fact of the complaint to the Institute is not relevant.
- [8] In any event, the requested order is not needed as the plaintiff was the complainant and has a copy of the complaint and the report of the Conduct Committee. Production is not needed for disposing fairly of the proceeding or saving costs.
- [9] Finally, I find the material requested is privileged on the basis of the *Wigmore* test as adopted by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. Spence, J., in giving the judgment of the Court, stated at p. 260:

In his reasons for judgment, Sinclair J.A. first dealt with the admissibility of this tenure form sheet under the classification of qualified privilege and cited from vol. 8 of *Wigmore on Evidence*, 3rd ed., (McNaughton Revision, 1961), para. 2285, outlining four fundamental conditions as necessary to the establishment of a privilege against the disclosure of communications:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
 - (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
 - (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
 - (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
- [10] Applying those conditions to this case:

Condition (1) - the disciplinary process of the Institute works with the understanding only the result of the complaint will be communicated, and not the materials relating to the disposition or settlement.

Condition (2) - keeping information confidential is essential to encourage accountants to give full and frank disclosure to the Institute.

Condition (3) - the reputation of an accountant is important to their livelihood and it is in the interest of the community that the information be kept confidential.

Condition (4) - disclosure of the material requested would be of limited, if any, assistance to the plaintiff, but would be of great prejudice to the relationship between the Institute and its members.

[11] The application is dismissed.

[12] Having heard submissions, I award costs to the defendants in the amount of \$500.00 in any event of the cause and costs to the Institute in the amount of \$500.00 payable forthwith.

Coughlan, J.