C.A. No. 129723
C.A. No. 130072

NOVA SCOTIA COURT OF APPEAL
Cite as:: Westminer Canada Ltd. v. Fraser, 1996 NSCA 232
Bateman, Hart and Jones, JJ.A.

BETWEEN:

WESTMINER CANADA LIMITED, WESTMINER HOLDINGS LIMITED, WESTERN MINING CORPORATION HOLDINGS LIMITED, JAMES H. LALOR, PETER MALONEY, WILLIAM B. BRAITHWAITE and COLIN WISE Appellants	Thomas P. Donovan and Peter Roy for the Appellants/Defendants
- and -	Douglas A. Caldwell, Q.C. and Dennis James for the Respondents/Plaintiffs
SUMNER N. FRASER, WILLIAM KITCHEN, WILLIAM MUNDLE and DR. JAMES COLLINS in their personal capacities and as representatives of certain investors in Cavalier Energy Limited (successor to Cavalier Capital Corporation) being all those who provided irrevocable unconditional letters of credit or letters of guarantee prior to August 2, 1988 to support a 15 million dollar borrowing by Cavalier Capital Corporation Respondents	Appeal Heard: December 4, 1996 Judgment Delivered: December 18, 1996

THE COURT: Appeals allowed per reasons for judgment of Hart, J.A.; Jones and Bateman, JJ.A. concurring

HART, J.A.:

Messrs. Fraser, Kitchen, Mundle and Dr. Collins, the plaintiffs herein, were investors in Cavalier Capital Corporation. They had provided letters of credit and guarantees to support temporary borrowings by the corporation for the acquisition of Cavalier Energy Limited, a company engaged in exploration for, development, production and marketing of crude oil and natural gas in western Canada. Their guarantees were in the form of bridge financing to be paid out from the proceeds of a public issue of shares of Cavalier Capital to be completed before October 12, 1988.

The plaintiffs claim that the success of this public offering was rendered impossible by the actions of Westminer Canada Limited and the other defendants which caused the eventual bankruptcy of Cavalier and resulted in their being called upon to honour their letters of credit at the bank. They have brought court action seeking damages from the defendants to cover their losses.

The background facts are as follows:

Early in 1988 Westminer made a successful hostile takeover bid to acquire control of Seabright Resources Inc., a Nova Scotia mining company. At that time Terrance D. Coughlan was the president and chief executive officer and a substantial shareholder of Seabright. William C. McCartney, Frederick C. Hanson, H. Robert Hemming and Colin J. MacDonald were directors. They ceased to be officers and directors when the takeover was completed.

Under the leadership of Coughlan and the former directors, a new company was set up, Cavalier Capital Corporation. Arrangements were made to finance the purchase of Cavalier Energy Limited, a western Canadian oil and gas company. It was necessary to borrow over 25 million dollars - 15 million of which

was guaranteed by approximately 35 investors who executed irrevocable, unconditional letters of credit in favour of the bank.

This group of investors included the four plaintiffs in this action as well as Coughlan and the former directors of Seabright. This temporary financing was to be fully paid out from the proceeds of a public offering and the investors' liability released by October 12, 1988.

While these arrangements were being completed, Westminer brought an action in Ontario on August 2, 1988, against the former officers and directors of Seabright (now the directors and officers of Cavalier) claiming fraud, deceit, negligence and wilful misrepresentation and conspiracy in connection with the sale of Seabright to Westminer. They said the officers and directors had withheld information about the mineral properties of Seabright which, if revealed, could have caused them to withdraw from the deal.

As a result of this attack on the integrity of Coughlan and the other directors, the underwriting arrangements for the public issue of shares of Cavalier Capital could not proceed and the company was unable to retire its bank debt. The investors became liable under their letters of credit and, after an attempt at restructuring, the company was petitioned into receivership.

Mr. Coughlan and the former directors of Seabright then sued Westminer for damages for conspiring to injure them by commencement of the Ontario action and other means. The trial judge found in their favour and awarded them substantial damages. He found as a fact that the defendants had intended to damage them, that they had also improperly caused an investigation by the Ontario Securities Commission, had deprived them of insurance protection and had deprived them of the advantage of indemnity provisions under the By-Laws of

Seabright. The trial judge refused, however, to award any damages to them under their claim that the conspiracy had caused them to lose their investment in Cavalier Capital since this claim was too remote.

Mr. Justice Nunn, in his decision, at p. 218, 120 N.S.R. (2d) stated:

> "[693] However, there were other factors of uncertainty, even if the offerings were approved. An underwritten deal with Wood Gundy was not a certainty and may not have occurred. The market was not favourable and though there was some recovery by 1990, it still was fluctuating and not too favourable for initial offerings. There could be no assurance the issues would be sold. Problems, unassociated with financing, occurred to the companies properties which could be significant.
>
> [694] All in all, I am not satisfied that damages should be awarded under this head. It cannot be said that these losses are directly attributable to the lawsuit. Though it, indeed, contributed to the loss, its contribution is incapable of calculation and the actual loss may be too remote to be considered. This claim is, therefore denied."

The findings of the trial judge were confirmed in the Court of Appeal.

The plaintiffs in the present action were not parties to the Seabright action against Westminer. They claim, however, that the grievous and malicious injury to the former officers and directors of Seabright who had become the officers and directors of Cavalier had the foreseeable result of damaging the economic prospects of Cavalier and thus causing loss to its investors. In their statement of claim, they allege conspiracy to injure all of the investors in Cavalier Capital and an intent to cause loss or damage to them.

The statement of defence in this proceeding denies the many allegations of the plaintiffs and makes some additional suggestions:

> "8. The Defendants say that the Plaintiffs

> knew of protracted legal proceedings conducted in the Supreme Court of Nova Scotia and that despite such awareness did nothing to assert their alleged right to recover against the Defendants, and that such proceedings resulted in judgments by Justice Nunn on March 23, 1993 and by the Nova Scotia Court of Appeal on January 18, 1994 (the "Seabright Actions"). The Seabright Actions concerned the issue of alleged damages suffered by several investors in Cavalier, allegedly relating to the Ontario Action. As a result of the Plaintiffs' failure to assert their claims in or in association with the Seabright Actions, the Defendants say that the Plaintiffs are therefore barred, precluded or estopped from raising the issue of Cavalier investment losses before this Honourable Court and that this action is an abuse of the Court's process."

The plaintiffs, by application before Mr. Justice Gruchy in Chambers, moved to strike paragraph 8 as disclosing no reasonable defence pursuant to **Civil Procedure Rule** 14.25(1)(a) which says:

> 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;

The Chambers judge in his decision correctly stated the law regarding the striking of pleadings and then went on to determine whether the plaintiffs fell into the category of "wait and see" plaintiffs:

> "While it might not have been impossible for the plaintiffs to have joined the Seabright action, I conclude it would have been extremely impractical and expensive for them to have done so. Therefore, the defendants have not only failed to plead the essential factor of the defence - the ease with which the plaintiffs could have participated in the previous litigation - but, as well, a review of the previous litigation shows

> that the plaintiffs could not easily have entered that process. In the factual circumstances outlined in the pleadings of the Seabright action and resulting decisions, paragraph 8 of the Defence has no basis in law and discloses no reasonable defence."

In my opinion, the Chambers judge improperly considered the merits of clause 8 of the Defence. This clause merely puts the plaintiffs on notice that this issue of law will be raised and it will be up to the eventual trial judge to determine the issue.

A recent review of the law relating to the striking of pleadings was set forth by Justice McQuaid in **Wakelin v. Superior Sanitation Services Ltd.** (1991), 85 Nfld. & P.E.I.R. 151. The P.E.I. **Rule** is the same as ours:

> "This Rule is a virtual duplication of Order 18, Rule 19 of the English **Rules of Practice**, and I would commend to any solicitor contemplating proceeding under our Rule 14.25, or required to defend against any application thereunder, a review of the commentary appearing in the **Supreme Court Annual Practice**.
>
> This is a rule whose limitations are, unfortunately, largely misunderstood. It does not open the door to what is, in effect, a pre-trial application, nor to an argument on a preliminary point of law. It has been said that it is not the practice in the civil administration of the courts to engage in a preliminary hearing on the merits; and further, if there is a point of law which requires serious discussion, there is provision elsewhere to set that matter down for preliminary argument.
>
> What, then, is meant by the expression "no reasonable cause of action (or defence)"?
>
> The authorities indicate that in point of law, every cause of action is a reasonable one, that is to say, one which has some chance of success <u>when only the allegations in the</u>

> impugned pleadings are considered. The fact that the case may, on the face of it, appear to be weak, and not likely to succeed, is no ground for striking it out.
>
> To warrant the striking out thereof, the pleading must be, on the face of it, obviously unsustainable, in which case, however, the remedy will be available only in plain and obvious cases. It will be exercised only where it is clear, beyond reasonable doubt, that there exists no reasonable cause of action in the sense above referred to.
>
> It has been further held by the authorities that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad.
>
> On the hearing of the present application, the several counsel involved cited legal cases and authorities in support of the argument that the plaintiff could not, or alternatively could, succeed, and, as well, the pertinent bylaws of the Town of Parkdale were drawn to my attention.
>
> All of these references went directly to be merits, or otherwise, of the plaintiff's claim. Since that approach was deemed to be necessary, it cannot be said, therefore, that the claim advanced by the plaintiff was, on the face of it, obviously unsustainable, or clearly without any chance of success, when only the allegations of the plaintiff were considered.
>
> I find that the application to strike out does not fall within the parameters of the Rule, as I understand it to be, and must accordingly dismiss it."

This view of the **Rule** had been expressed by this Court some years earlier in **Curry v. Dargie** (1984), 62 N.S.R. (2d) 416 where Justice Macdonald said at p. 429:

> "The law is quite clear that the summary

> procedure under Rule 14.25 can only be adopted where the claim is, on the face of it, absolutely unsustainable. Thus, if it is clear beyond any doubt that an action cannot possibly succeed there is no reason for refusing to strike out the statement of claim. The mere fact, however, that the plaintiff appears unlikely to succeed at trial is no ground for striking out the statement of claim. In *O'Donnell v. Scallion* (1892), 24 N.S.R. 345, Mr. Justice Graham said at p. 355:
>
> > . . . This power to strike out pleadings under this rule should, it seems, be exercised with great caution. Unless the court is satisfied that a pleading discloses no reasonable or probable answer it will not be struck out. The mere fact that the party pleading it is not likely to succeed at the trial is no ground for striking it out; *Dadswell v. Jacobs;* 34 Ch. D., 284, *Boaler v. Holder*, 54 L.T.N.S. 298."

The plaintiffs next moved to strike part of paragraph 9 of the Defence which is as follows:

> "....The Defendants rely on the concurrent findings of fact by the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal in the Seabright Actions regarding causation and remoteness of loss alleged by investors in Cavalier and say those findings bind the Plaintiffs. The Defendants say that the plaintiffs in the Seabright Actions were represented at all times by competent and experienced counsel who brought out all relevant evidence relating to liability for alleged losses resulting from investments in Cavalier due to Cavalier's failure to proceed with an initial public offering. As a consequence of the concurrent findings of fact by the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal in the Seabright Actions, the Defendants say that this proceeding constitutes an abuse of the Court's process."

Mr. Justice Gruchy concluded:

> "The decisions of Nunn, J. and of the Appeal Court with respect to causation and remoteness of loss dealt only with the parties then before them. They appear to me to be very persuasive, and the trial judge of this action may find them persuasive as well, but those parties' relationships with the defendants were different than that of the plaintiffs with the defendants. If the relationship had been identical, then their claims would also have been the same and the relitigation of those claims would have been an abuse of process. (See **Nigro v. Agnew-Surpass Shoes Stores Limited et al** (1977), 18 O.R. (2d) 215). There are undoubtedly facts common to these questions in Seabright and in the present case but there are also potentially significant differences. Given the different relationships between the parties and the potentially different facts, it is not possible to conclude that the results will be the same. The plaintiffs, being in a relationship with the defendants different than that of the former plaintiffs, and not having participated in the former trial, should have the opportunity to address the vital questions of remoteness of damages, whether the conspiracy found against certain of the defendants included the plaintiffs and, if not, whether the defendants should be liable for foreseeable consequences to parties who were not the object of the conspiracy. These issues are different than those of the earlier trial.
>
> MacAdam, J., of this Court, on June 14, 1996, in an unreported written version of an oral decision in **Chapel Island Band Council v. Richard J. MacKinnon** (S.H. No. 81992) addressed a somewhat similar situation. He analyzed the previous decisions in the case before him and compared the issues addressed in them to those then alleged and concluded that although some issues had been determined, other issues could still be brought forward in the current action.
>
> The plaintiffs may take the risk of attracting sanctions if the alleged new issues are not real. A trial of the issues will be necessary to

> determine the facts in question and therefore will not amount to an abuse of process. In the factual circumstances outlined in the pleadings of the Seabright action and resulting decisions and in comparison with the present case, the sentences in question in paragraph 9 of the Defence has no basis in law and disclose no reasonable defence and will be struck."

Once again the Chambers judge has ruled on the merits of the pleadings, which simply give notice of a legal argument to be raised at trial. The pleading should not be struck.

The plaintiffs also moved to strike the first part of paragraph 10 of the Defence which is as follows:

> "10. The Defendants repeat paragraphs 8 and 9 and say that the Plaintiffs are precluded from re-litigating any claims in relation to losses arising out of any investment, shareholding, or other obligation with respect to Cavalier and to do so is an abuse of the Court's process. In the alternative, if this Honourable Court finds that the Plaintiffs are not precluded from proceeding, the Defendants say that the findings of the Nova Scotia Courts in the Seabright Actions have no binding effect on the Defendants in this litigation."

The Chambers judge dealt with this motion as follows:

> "Insofar as the first two sentences of paragraph 10 of the Amended Defence repeat by reference paragraphs 8 and 9, I need not deal with them further. The paragraph states further, however, that the findings in the Seabright action have no binding effect on the defendants. I am unable to agree. If a question arises in the present case involving the defendants with facts identical to those in Seabright, the defendants, having fully participated in the previous litigation, are bound by the previous results.
>
> Similarly, any finding of fact against any of the previous defendants binds all those who

> participated in the action. A finding of conspiracy against the corporate defendants does not translate into a finding of conspiracy against the personal defendants - a finding Nunn, J., did not make, but it is a finding which binds all who participated in the trial. It will be for the trial judge to decide how those facts fit into the considerations of the new trial."

He concludes:

> "In the circumstances of the present case as pleaded and as found in the decisions of Seabright, I cannot conclude "...that the findings of the Nova Scotia Courts have no binding effect on the Defendants in this litigation". The first and second sentences of paragraph 10 of the Amended Defence will therefore be struck as they have no basis in law and therefore disclose no reasonable defence. That is not to say that the statement is not a legal argument, depending on the facts adduced, but it is not a good pleading."

For the same reasons expressed above, I am of the opinion that the pleadings should not have been struck. The trial judge is the proper person to decide whether either party will be bound by any previous findings.

The plaintiffs final motion under **Rule** 14.25 was to strike the last part of paragraph 10 of the Defence which states:

> "10. In the further alternative, the Defendants say that the law applied by the Nova Scotia Courts in the Seabright Actions has been fundamentally affected by the Supreme Court of Canada in its decision in the case of *Pezim v. British Columbia Securities Commission et al* (1994), 168 N.R. 321 and as such any alleged conspiracy claim against the Corporate Defendants must be considered without reference to the findings in the Seabright Actions. In addition and in any event, any alleged conspiracy claim against the Individual Defendants must be proven by the Plaintiffs in this action as there were no findings of

> conspiracy against the Individual Defendants in the Seabright Actions."

The finding of Justice Gruchy was to the effect that the **Pezim** decision was a matter of law to be argued at the trial but was not a good pleading. I disagree, as it gave notice of an aspect of the law which would be argued and I see no reason to strike it. If the legal argument advanced should be accepted then the factual content of the trial would have to be different and the plaintiffs must be prepared to meet it.

The plaintiffs also moved to strike the last sentence of paragraph 10A of the defence and the Chambers judge found this to be a repetition of the position taken by the defence and struck the sentence.

The defendants have appealed all of these findings of the Chambers judge and I would allow the appeal and hold that none of the paragraphs of the Defence challenged under **Rule** 14.25 should be struck.

The plaintiffs brought a second motion before Justice Gruchy in which they sought:

> "2.. An Order pursuant to Rule 25.01 declaring that the decision by the Supreme Court of Canada in Pezim v. British Columbia Securities Commission, et al (1994), 168 N.R. 321, does not affect the law applied by the courts in Coughlan, et al v. Westminer, et al;
>
> 3. An Order pursuant to Rule 25.01 declaring that the issue raised by the words in the third line of paragraph 10 of the Amended Statement of Defence filed by the Defendants, as set out, has been decided as between the Plaintiffs and the Defendants and the Defendants are estopped from raising the issue:
>
> > In the further alternative, the Defendants say that the law applied by the Nova Scotia Courts

> in the Seabright Actions has been fundamentally affected by the Supreme Court of Canada in its decision in the case of *Pezim v. British Columbia Securities Commission et al (1994), 168 N.R. 321* and as such any alleged conspiracy claim against the Corporate Defendants must be considered without reference to the findings in the Seabright Actions.
>
> . . .
>
> 8. An Order pursuant to Rule 25.01 declaring that the issues of fact raised in subparagraphs 14(a), (b), (c), (d) and (e) of the Amended Statement of Defence filed by the Defendants are settled against the Defendants and cannot be relitigated by them."

Civil Procedure Rule 25.01 is as follows:

> "25.01 (1) The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,
>
> (a) determine any relevant question or issue of law or fact, or both;"

The Chambers judge reached the conclusion that no decision under **Rule** 25.01 could be made unless the parties have submitted to the court an agreed statement of facts so that the question of law to be answered can relate to a certain factual situation. He found that no such statement had been presented to the court and he, therefore, could not contemplate making such an order.

He further ruled that it was up to the trial judge to consider the **Pezim** case and not for him. The law, as it stands at the time of trial, will govern the matter.

The plaintiffs have appealed from this decision and, in my opinion, their

appeal should be dismissed. Justice Gruchy correctly refused to grant the order requested.

The plaintiffs argued that an agreed statement of facts was unnecessary since the **Seabright** and **Pezim** decisions were before the Court. However, there were many other facts that had to be known before the requested rulings on law could be made by a judge. It is only in exceptional cases that a proceeding under **Rule** 25.01 can proceed without an agreed statement of facts. (See **Brown v. Dalhousie University** (1995), 142 N.S.R. (2d) 98 (N.S.C.A.); and, **Binder v. Royal Bank of Canada** (1996), 150 N.S.R. (2d) 234 (N.S.C.A.)).

It may be that some preliminary rulings on certain issues would be appropriate to cut down the time and expense involved in the trial but they should be conducted in a way acceptable to the trial court.

I would therefore allow the defendants' appeal under **Rule** 14.25 with costs in the cause and dismiss the plaintiffs' appeal under **Rule** 25.01 with costs in the cause, the amount of the costs in each case being $750.00.

Hart J.A.

Concurred in:

Jones, J.A.

Bateman, J.A.

C.A. No. 129723
C.A. No. 130072

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

WESTMINER CANADA LIMITED, WESTMINER HOLDINGS LIMITED. JAMES H. LALOR, PETER MALONEY, WILLIAM B. BRAITHWAITE and COLIN WISE Appellants	)	
- and -	)	REASONS FOR JUDGMENT BY:
SUMNER M. FRASER, WILLIAM KITCHEN, WILLIAM MUNDLE and DR. JAMES COLLINS, in their personal capacities and as representatives of certain investors in Cavalier Energy Limited (successor to Cavalier Capital Corporation) being all those investors who provided irrevocable unconditional letters of credit or letters of guarantee prior to August 2, 1988 to support a 15 million dollar borrowing by Cavalier Capital Corporation Respondents	)	HART J.A.