NOVA SCOTIA COURT OF APPEAL
Citation: ***CIBC Wood Gundy Financial Services v. Blackman***,
2007 NSCA 98

Date: 20071017
Docket: CA 281133
Registry: Halifax

Between:

CIBC Wood Gundy Financial Services and
CIBC World Markets Inc.

Appellants

v.

Richard George Blackman

Respondent

- and -

Merrill Lynch Canada Inc.

Intervenor

Judges:	Roscoe, Cromwell and Fichaud, JJ.A.
Appeal Heard:	October 5, 2007, in Halifax, Nova Scotia
Held:	Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Fichaud, JJ.A. concurring.
Counsel:	Grant Machum and Melissa Grant, for the appellants Eric K. Slone, for the respondent Dennis James and Derek A. Simon, articled clerk, for the intervenor

Reasons for judgment:

I. INTRODUCTION AND ISSUES:

[1] Coady, J. in Supreme Court chambers ordered production, on certain terms, of "... the entire agreement of purchase and sale whereby the Defendant CIBC World Markets Inc. purchased the retail operations of Merrill Lynch Canada Inc. ... ." The appellants, supported by the intervenor, seek to set aside the chambers judge's order.

[2] There are two main points to be decided: first, whether the application to the judge was barred by *res judicata* and/or issue estoppel and, if not, whether the material ordered to be produced met the semblance of relevance threshold for production.

[3] In my view, the application was not barred by *res judicata* and the material sought meets the semblance of relevance threshold. While I would grant leave to appeal, I would dismiss the appeal.

II. STANDARD OF REVIEW:

[4] The judge's order was discretionary and interlocutory. We may intervene only if persuaded that the judge erred in legal principle or the order gives rise to a patent injustice: **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143,[1991] N.S.J. No. 86 (Q.L.)(C.A.). Not every error will justify reversal, only errors that are material to the result.

III. ANALYSIS:

[5] There has, of course, been no determination of the merits of the dispute between the respondent, who is the plaintiff in the action, and the appellants, who are the defendants. To appreciate the production issue that is before us, it will be helpful to set out the respondent's theory of its action against the appellants. I do this simply to provide a context for the production issue and not to engage in any assessment of the legal or factual merits of the respondent's (or the appellants') position.

[6] Although there are two appellants it will be convenient for the purposes of this appeal to refer to them both simply as “CIBC”. I will refer to the respondent on appeal as the plaintiff and to the agreement of purchase and sale which the judge ordered produced as the agreement.

[7] The plaintiff’s action arises out of his employment by CIBC as an investment advisor. He alleges that there are implied terms of his employment in addition to the express terms set out in his written employment agreement. Specifically, the plaintiff alleges that CIBC is bound by an agreement he claims to have had with his earlier employers concerning his length of service designation (LOS). That agreement, he alleges, is that his LOS was zero in April of 1998. Whether that term existed and whether CIBC is bound by it are, we are told, critical to the merits of the plaintiff’s action. (The statement of claim alleges, in effect, that the shorter LOS designation was favourable to the plaintiff because employees with longer length of service designations were paid less than those with shorter designations given similar commission revenue production.)

[8] Some brief reference to the plaintiff’s employment background is necessary. After a career with other investment firms, the plaintiff was hired as an investment advisor by Midland Walwyn in April of 1998. He contends that Midland agreed to treat him as a new advisor with an LOS of zero as of that date. This, the plaintiff says, was important to his decision to transfer to Midland from his previous employment. He was not anticipating being able to bring more than half of his existing clients to the new firm and therefore wished his performance to be judged according to the standards of someone making a fresh start. The LOS of zero, he says, reflected that he was starting fresh.

[9] The plaintiff alleges that there then occurred two transactions that led to his employment with CIBC. First, he claims that Midland sold its business to Merrill Lynch. The plaintiff’s position is that his employment simply continued without any new agreements or other documents being signed. Second, and sometime later, CIBC acquired Merrill Lynch’s business. The plaintiff’s position is that the nature of this transaction and its impact on his terms of employment are at the centre of his law suit. He contends that CIBC was obliged to accept that his LOS as of April of 1998 was zero and that CIBC was responsible for Merrill Lynch’s failure to do so before he began employment with CIBC.

[10] With that brief outline of some of the plaintiff's allegations, I turn to the issues raised on appeal.

A. *Res judicata*:

[11] CIBC's first point is that Coady, J. should not have entertained the production application because it had been finally decided by a previous order of MacAdam, J. Respectfully, I cannot agree. In my view, Coady, J. did not err in finding that he had a discretion to vary the earlier production order. While I would not endorse all of his reasoning, my view is that he reached the correct conclusion on this point.

[12] CIBC's submissions on *res judicata* and issue estoppel are not compatible with the provisions of **Rule** 20.10. That rule gives the Court a discretion to revoke or vary any previous order made under **Rule** 20. This power recognizes that the scope of relevant material may change in light of how the litigation evolves and as new material comes to the attention of the parties. Coady, J. had a discretion under the **Rule** to vary the earlier order if persuaded it was appropriate and just to do so in all of the circumstances.

[13] There was some new material before Coady, J. that had not been before MacAdam, J., notably a document distributed by CIBC to Merrill Lynch employees. It states, among other things, that:

> "All employees of Merrill Lynch Canada Inc. who are part of the deal [i.e., the deal between CIBC and Merrill Lynch] will receive comparable job offers";
> "CIBC and Merrill Lynch have worked closely together to ensure that the overall terms and conditions of your employment offer, have an equal or greater value to you compared to what you have today";
> "CIBC and Merrill Lynch are working closely together to complete the year end compensation process."

[14] This document, for the purposes of the production application, supports an inference that there likely were agreements between CIBC and Merrill Lynch as to how Merrill Lynch employees, including the plaintiff, would be treated after the "deal" closed. As I will discuss in the next section of my reasons, this new

document strengthens the argument that there is a semblance of relevance to the terms of the "deal" as compared to how that argument appeared on the material that was before MacAdam, J.

[15] Of course, **Rule** 20.10 does not authorize parties to keep applying before different judges for the same relief. The Rules and the court's inherent authority to control abuse may be invoked if this occurs. Coady, J. was not persuaded this was a concern here. I do not think he erred in the particular circumstances of this case by exercising his discretion to consider whether the earlier order by MacAdam, J. under **Rule** 20 should be "revoked or varied."

B. **Semblance of Relevance**:

[16] The second point is whether the judge erred in concluding that the agreement met the semblance of relevance standard for production. While I agree with CIBC and the intervenor that the judge appears to have misunderstood their position about relevance, my view is that the agreement meets the semblance of relevance threshold. In the result, the judge's misunderstanding of their position did not lead him into reversible error.

[17] CIBC's position, supported by the intervenor, is that the agreement is irrelevant. They submit that the plaintiff is not a party to the agreement and therefore it cannot affect his rights. Respectfully, this view of relevance cannot be sustained for two reasons.

[18] First, this position overlooks the plaintiff's theory of his case. He says that there may be provisions in the agreement that would help him to establish that there were implied, as well as express, terms of his employment contract. Whether or not this position will ultimately carry the day in either fact or law is not a question we should address at this stage. It is a theory of the case that lends a semblance of relevance to the material sought.

[19] There is a second reason why the agreement meets the semblance of relevance threshold. The theory of CIBC's defence directly places in issue the nature of the transaction with Merrill Lynch. CIBC's defence filed in the action pleads that "CIBC Wood Gundy is not responsible for any agreements with or representations made by previous employers of the Plaintiff." (Defence, AB Tab 5,

para. 4). Mr. Scott's affidavit sworn on January 12, 2005, filed by CIBC, maintains that it "... did not purchase the shares of [Merrill Lynch Canada Inc.] nor did it agree to assume liability for any employees of Merrill Lynch Canada Inc.". The defence and Mr Scott's affidavit therefore place in issue the nature of the transaction. The agreement the judge ordered to be produced presumably sets out the terms of the transaction. Respectfully, CIBC cannot, on one hand, rely on the terms of the transaction to defend the law suit and then, on the other hand, assert that those terms are irrelevant.

[20] The judge did not err in finding that the material he ordered produced met the semblance of relevance standard.

C. Other Issues:

1. The procedure adopted by the judge for production:

[21] The judge ordered that the agreement of purchase and sale be produced to the plaintiff's counsel, Mr. Slone, for his review alone and further, that he not release information which in his view is relevant to the plaintiff's claim to the plaintiff without first seeking directions from the court. Mr. Slone is content with this unusual arrangement which was first suggested by the judge.

[22] During oral argument of the appeal, CIBC for the first time expressed opposition to this arrangement, submitting that any review of the agreement should be done by the Court, not by Mr. Slone.

[23] This aspect of the judge's order gives me some concern. However, I would not interfere with it, mainly because this issue was not raised as a ground of appeal or addressed in the factums filed. I would make it clear, however, that nothing in my reasons should be understood as addressing the merits or otherwise of this method of production.

2. The judge's factual findings:

[24] I would have thought it goes without saying that the facts the judge relied on in making the production order were, for the most part, simply allegations that will be in issue at trial. However, as CIBC and the intervenor have raised the matter and

the respondent does not take issue with their point, I would, as requested by CIBC and the intervenor, make it clear that any statements of fact made by the chambers judge in the context of the production application are not binding on the parties in future proceedings. Any judge who in future must address the merits of the case ought not to consider any of the findings of fact made by the chambers judge in relation to the merits of the case.

IV. DISPOSITION:

[25] I would grant leave to appeal but dismiss the appeal. I would order costs of $1500 payable forthwith to the respondent by the appellants, jointly and severally. In accordance with the order of Hamilton, J.A. granting it leave to intervene, Merrill Lynch Canada Inc. did not seek costs. I would not order it to pay costs on appeal.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.
Fichaud, J.A.