Date: 19981222 Docket: C.A. 145652

NOVA SCOTIA COURT OF APPEAL

Cite as: Williamson v. Williams, 1998 NSCA 195
Freeman, Hart, Cromwell, JJ.A.

BETWEEN:

DOUGLAS WILLIAMSON

Appellant

- and -

GEORGE WILLIAMS, SCOTIA BOND CO. LTD., and MIDLAND WALWYN CAPITAL, INC.

Respondents

W. Dale Dunlop
for the Appellant

William L. Ryan
for the Respondents

Appeal Heard:
September 8, 1998

Judgment Delivered:
December 22, 1998

THE COURT: Appeal allowed in part as per reasons for judgment of Freeman, J.A., Hart and Cromwell, JJ.A., concurring

FREEMAN, J.A.

The appellant Douglas Williamson successfully appealed the dismissal of his claim for damages for breach of the fiduciary duty owed him by the respondents Williams and Scotia Bond, and the matter was referred back to the Supreme Court of Nova Scotia for assessment of damages and costs. He now appeals from that judgment, asserting that the damages and costs as assessed fail to provide the restitution to which he is entitled.

The following issues are raised on the appeal:

1. What is the proper method of calculating damages for breach of fiduciary duty? Did Justice Goodfellow err in the principles he applied in determination of damages in the instant case?

2. Did the Learned Trial Judge err in determining the correct meaning of "values actually received" with respect to the calculation of damages? If so, what is the proper measure of such damages.

3. Did the Learned Trial Judge err in the manner in which he calculated the income tax consequences of the appellant's option trading? If so, what is the proper measure of such damages?

4. Did the Learned Trial Judge err in refusing to consider punitive, aggravated or exemplary damages: If so, what is the proper measure of such damages.

5. Did the Learned Trial Judge err in refusing to award consequential damages? If so, what is the correct amount of such damages?

6. Did the Learned Trial Judge err in his determination of costs and disbursements? If so, what is the correct measure of such costs and disbursements?

The first issue is framed in general terms, and the answer is to be found in the conclusions respecting the five more specific issues which follow it.

Measure of Damages

In the first appeal it was found that Williams, a stock broker and at relevant times president of Scotia Bond, persuaded Dr. Williamson in 1989 to depart from his usual conservative investment strategy and trade in options. Dr. Williamson redeemed securities from his main

portfolio, his No. l account with Scotia Bond, to a value of $200,000 and placed the money in a new options trading account, his No. 2 account, on the clear stipulation that his risk was not to exceed that amount.

Williams understood his instructions and assured Dr. Williamson that the risk was capped at $200,000. Dr. Williamson gave Williams discretionary authority to operate the account on his behalf. Dr. Williamson then left Williams in charge of the No. 2 account while he went on an extended world tour, but not before Williams had persuaded him to sign an authorization to buy and sell on margin. This was presented as a formality of possible convenience. With an account funded to the limit of the risk to be incurred, however, there would appear to be no need to operate on margin, even as a safeguard or precaution. Dr. Williamson was also persuaded to sign a guarantee putting his No. 1 account at risk for losses in the No. 2 account. Mr. Williams' testimony makes it clear that he did not intend to abide by the $200,000 cap Dr. Williamson put on the options trading account:

> Q. All right. Now, does your recollection coincide with Dr. Williamson's that was to be the limit? "I'll give you two hundred thousand, and that's my limit for the options."
>
> A. Yes.
>
> . . .
>
> Q. Now the second thing is there is no doubt in your mind, is there, Mr. Williams, that with respect to the options account, as opposed to all the other investing, that Douglas Williamson was putting himself into your hands to make the decisions? And that he--he didn't pretend that he had the ability to provide the input.
>
> A. No, he did not.
>
> Q. So he was putting himself in your hands?

A. Yes, he was.
. . .

Q. All right. So you really knew that the two hundred limit didn't really mean anything, from your point of view.

A. Didn't mean anything from the point of view of margin, no.

Q. Well, from Scotia Bond's point of view, is that fair?

A. Well, from the client's point of view he wouldn't have to be sold out.

Q The client thought he had--you know, the most that was at risk here or involved was two hundred. But you knew that wasn't really the case.

A. That's right.

Q. And that was because of what you call the cross-guarantees.

A. I knew that the accounts were implicitly guaranteed.

The account was operated as planned until the end of December, 1989, when, with Dr. Williamson out of the country for the winter, Williams began speculating recklessly with it, at one time running the theoretical limit of risk as high as $700,000. When Dr. Williamson returned to Halifax in the spring of 1990 he found his No. 2 account much diminished in value to $138,029. Williams assured him it would be all right, and, lacking alternatives, Dr. Williamson permitted Scotia Bond to continue operating it. It's value plunged to a low of $7,000 in October, 1990, when Dr. Williamson stopped the trading. The equity value improved over the next months and had risen to $49,214.33 when the balance remaining in the account was transferred to another brokerage house, July 31, 1991.

Using that time as a cutoff, Dr. Williamson's total loss was $150,785.67. This included $5,299.26 lost in normal options trading prior to the end of 1989 when Williams was still faithful to his instructions. The balance of $145,486.41 was found to have resulted from a breach of

fiduciary duty by Williams and Scotia Bond. There were numerous other irregularities and illegalities on the part of Williams and Scotia Bond, but none that resulted in actual loss entitling Dr. Williamson to restitution. The appellant argues that the securities offences for which Williams was disciplined included the faulty advice that induced Dr. Williamson to venture into options trading, and should be considered part of the breach of fiduciary duty. In the earlier appeal the loss for which Dr. Williamson was found entitled to restitution--the loss he actually suffered-- was that brought about by Williams' flouting of his instructions in the operation of the No. 2 account.

That amount of $145,486.41 was calculated from a summary of transactions in the No. 2 account prepared by Dr. Williamson and considered tentative by this court, possibly "subject to refinement and revision in light of values actually received." The matter was referred back to the Supreme Court for assessment of damages. Dr. Williamson's figures were found to be accurate, but the term "values actually received" was interpreted not as the market value with which he was credited at the time of transfer of the equities remaining in the No. 2 account on July 31, 1990, but at the price he received when he finally sold them months later. The trial judge considered net losses and gains during the period preceding their eventual sale and found they had increased in value by $16,030.64. He deducted that amount from the $145,486.41, reducing it to $129,455.77.

It is unfortunate that my choice of words led to that result, for it could not have been intended by the Court of Appeal. Once Dr. Williams took possession of his equities, removing them from Scotia Bond to another broker, the earlier relationship was over and in my view, his loss assumed its final, actionable form. Dr. Williamson might have removed his account from

Scotia Bond on discovering his loss, or at any time thereafter. It was not unreasonable for him to have left it there on Williams' recommendation in the hope of some recovery, and I am not aware of any rule of law that would have required him to do otherwise. In my view the period between the spring of 1990 and July 31, 1991, provided a reasonable period for mitigation of the loss in the interest of both parties, and the transfer to the other broker was an appropriate cutoff point. After that point his decision to keep the same investments was a speculative one and he could not reasonably have looked to Scotia Bond if the values went down. He was entitled to the benefit of his speculation when the values went up. As the appellant suggests, "values actually received" merely provided for the confirmation by the trial judge of the values used in the summary that formed the basis for this court's tentative calculation of the loss. As these values appear to have been correct, the loss suffered by Dr. Williamson should be confirmed at $145, 486.41.

Income Tax Considerations

The third issue in this appeal results from the damages calculated in **Hodgkinson v. Simms** (1994), 117 D.L.R. (4th) 116 at p. 198 ff. in which the capital to be returned to Simms was to be adjusted to take into consideration the tax benefits received as a result of the investments. A similar adjustment was directed for Dr. Williamson. This became controversial at the assessment of damages. The tax specialist who testified for the appellant included $55, 598 taxes paid on capital gains in the securities redeemed by Dr. Williamson to fund the No. 2 account. The appellant argued that the concept of restitution for breach of fiduciary duty was broad enough to include such losses. However the tax liabilities were obligations Dr. Williamson would have had to discharge at some time to realize on the capital gains, which were accumulated independently

of any breach of duty by Williams or Scotia Bond. The actual losses suffered by Dr. Williamson, for which restitution was due to him, were found by this court to have been the depletion of value of the No. 2 account. The tax specialist called by the respondents testified that the interest, commissions and capital losses reflected by the No. 2 account resulted in tax savings of $54, 841 to Dr. Williamson. That evidence was accepted by the trial judge, who deducted that amount from the claim for damages, arriving at a net figure of $74,614. In my view, he did not err in so doing. The amount of $16,030.64 which I have found to have been wrongly deducted, should be added to the figure of $74,614 for a running total of $90,644.64.

Aggravated or Punitive Damages

The fourth ground of appeal involves aggravated, punitive damages or exemplary damages. While the judgment of the appeal court expressed no intention to fetter the discretion of the trial judge in awarding damages apart from specifying the losses in the No. 2 account, he correctly observed there was no direction under any of the heads of increased damages. He repeated his observation made at trial that he would not have awarded punitive damages even if he had found that liability existed. This was a matter within his discretion and he did not err in principle in refusing aggravated, punitive or exemplary damages.

Consequential Damages

The trial judge found limited merit in Dr. Williamson's claim for consequential damages, which he observed had not been argued at trial or on the appeal. The appeal had been focused on liability, specifically liability for breach of fiduciary duty. The matter was returned to the trial

court for assessment of damages. It was open to the appellant to prove any damages claimed in the pleadings under the broad heads of general and special damages. The particular subset identified as consequential damages involved $6,556.43 in legal fees arising from dealings with the Royal Canadian Mounted Police, representatives of the Toronto Stock Exchange, and representatives of the respondents in the investigation leading to the disciplinary proceedings against Mr. Williams. The trial judge considered that this claim arose from the nature of the breach but said it was "best addressed in the determination with respect to costs."

It is a safer principle to keep a clear line of definition between costs and damages. Costs are legal fees incurred within a proceeding directed toward procuring desired results. Damages are the monetary measure of the wrong or harm the proceeding is intended to redress. There is an example of this distinction in **Granville Savings and Mortgage Corporation v. Slevin**, [1993] 4 S.C.R. 279, in which Cory J. remarked:

> The respondents are then liable to the appellant for the damages flowing from the breach of their duty. Those damages included the costs incurred in the law suits brought by the appellant seeking to maintain the priority of their charge. These were the only damages seriously contested by the respondents.

The legal expenses claimed as consequential damages by the appellant had nothing to do with bringing his claims to court, but they were a foreseeable result flowing from the breach of fiduciary duty by Williams and Scotia Bond. They were proven as damages, and Dr. Williamson is entitled to them. I would allow consequential damages of $6,556.43, adding this to the $90,644.64 already considered to arrive at a total of $97,201.07.

Costs

Costs were the final issue raised on the appeal. The trial judge dealt with costs as follows:

> **What is the appropriate measure of costs?**
>
> There is no suggestion from the Court of Appeal that solicitor and client costs are appropriate and, on careful reflection, I have been provided with nothing that changes my view that party and party costs are the appropriate exercise of judicial discretion.

In **Gaudet v. Barrett** C.A. 143446/143752, August 28, 1998, Pugsley J.A. relied on **Brown v. Metropolitan Authority et al.** (1996), 150 N.S.R. (2d) 43 (C.A.) in reiterating that solicitor and client costs are only awarded in this jurisdiction in rare and exceptional circumstances as when misconduct has occurred in the conduct of or related to the litigation. I agree with the trial judge that such circumstances do not exist in the present case, and that his judicial discretion was to be exercised. Whether party and party costs determined under the tariffs provide an appropriate remedy will be considered below. The trial judge went on:

> Given, however, that this is a breach of fiduciary trust resulting in some degree of legal costs that were reasonably incurred by Dr. Williamson outside the normal claim, trial preparation, et cetera, it seems to be appropriate that the conduct for which I would have denied the defendant's costs at trial warrants the utilization of tariff "A" scale 5. I do so even with the knowledge that the plaintiff's evidence in respect to damages advanced at trial was inadequate and the same applies to the assistance, or lack of assistance, provided to the court on the final assessment. Nevertheless, I conclude that scale 5 is appropriate which means the amount involved of $74,6514.00 at scale 5 gives party and party costs, fixed and allowed, in the amount of $8,575.00. With respect to disbursements, all reasonable disbursements should be recoverable, including the disbursements on the statements of account rendered to Dr. Williamson on the invoices of July 2nd, 1992 and February 26, 1993. Dr. Williamson's expert at trial advanced very substantial claims far beyond the amount of recovery; nevertheless, on a restitutionary approach, such disbursement is recoverable. The only disbursement that I would not allow recovery for is any account for Mr. Black on this final assessment of damages because he was not given proper instructions resulting in his report being of no assistance to the court. If there are any other disagreements with respect to disbursements, counsel have leave to refer the matter back to the court.

This court, after expressing the intention that Dr. Williamson should have restitution "for the full amount of his losses resulting from the breach of fiduciary duty by Mr. Williams and Scotia Bond," had referred the matter back to the Supreme Court "for the final assessment of

damages and determination of costs. The appellant is entitled to costs at trial, including the assessment of damages, and costs of appeal calculated at forty per cent of the costs of trial, plus disbursements."

The trial judge had found against Dr. Williamson at the first trial on the issues, but had declined to award costs against him. There is no separate tariff or scale to be applied when issues are divided and liability and damages are tried separately. That is essentially what happened in this case. At the first trial, damages and liability were tried together, but when the appeal succeeded on liability, it split the issues and a separate trial was ordered on the assessment of damages. Costs were ordered to be assessed as well, and the cost award of $8,575 by the trial judge was intended to include the trials of both liability and damages. The standard rule is that costs on appeal are to be 40 per cent of the trial costs. Forty per cent of the amount awarded by the trial judge would result in appeal costs of $3,430.

I have found that the damages should be increased from $74,614 to $97,200. Applying the tariff and scale adopted by the trial judge, that would increase the trial costs to $10,129 and appeal costs to $4,051 or a total of $14,180.

The two variables for adjusting costs within the tariffs are the use of higher and lower scales, and determination of the amount involved. Ordinarily when the complexity of a proceeding is increased by trying the issues of liability and damages separately, selection of a higher scale would give adequate relief in costs.

In the present matter the trial judge adopted Scale 5 of Tariff A, that is, the highest of the five scales for calculating party and party costs. Under Scale 3 of Tariff A, the standard, his cost award would have been $2,700 lower. This, however, was not to compensate for the increased complexity and the resulting legal fees of the two trials and appeals, but to reflect the claim for consequential damages. I have found that claim for $6,556.43 should have been included in the award of damages. (If the consequential damages were to be included with the costs and deducted from $8,575, the balance left for legal fees in the proceedings is $2,018.57.) In the present circumstances, even the recalculated costs award of $14,180 is so low as to be manifestly unjust.

The second variable under the tariffs is the determination of the "amount involved." This requires consideration of the amount allowed, the complexity of the proceeding, the importance of the issues, and a number of other matters set out in **Rule 63.04.** When there is a monetary award, as there is in the present appeal, however, the practice appears to favour adopting the amount awarded as the amount involved. Any attempt to adjust the amount involved to factor in the special circumstances of the present appeal to arrive at a more just result would require the arbitrary determination of a fictitious "amount involved" bearing no real relationship to the matters in issue.

One approach might be to double that amount, that is, to award $14,180 for the trial and appeal on the issue of liability and to award $14,180 again for the trial and appeal on the issue of

damages. That would result in a costs award of $28,360, still short of an amount adequate to reflect a regard for restitution. It would set the undesirable precedent that dividing issues for convenience at trial would double the costs. The present solution must be sought in the special circumstances of this case.

The present tariffs were adopted in 1989 to replace the antiquated **Costs and Fees Act** then in effect. In **Landymore v. Hardy** (1992), 112 N.S.R. (2d) 410 Saunders J. stated:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
>
> > " . . . the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity."

In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

The appellant's counsel claimed to have booked time equivalent to $80,000 in fees to Dr.

Williamson through to the end of the first trial. There was no evidence that a contingency fee agreement was in place, although Dr. Williamson's counsel suggests there was an informal arrangement of some nature, nor was there evidence of an actual account for legal fees. Dr. Williamson is nevertheless liable to pay them. By an objective standard no reasonable person informed as to the current level of legal fees based on time charges would anticipate that Dr. Williamson, as a successful litigant, could expect to be billed far below the range of the $80,000 mentioned by counsel in total for all stages of proceedings. Even if evidence of the exact legal fees Dr. Williamson is to be charged were before us, this would not be determinative. An exercise of judicial discretion to assess objectively what was a reasonable amount would still be necessary.

What is clear is that costs determined according to the tariffs of $14,180 are insufficient in the present case. It is recognized that full restitution is not possible. That would require an award of solicitor and client costs, which, as noted above, are not available, despite the dissenting opinion of Mclachlan, J. in **Norberg v. Wynrib**, [1992] 2 S.C.R. 226 at 301.

It is difficult to avoid the conclusion that cases such as the present one require that a middle ground be found, between party and party costs determined under the present tariffs and solicitor and client costs, which affords at least a degree of recognition of the principle of restitution.

Under the old **Costs and Fees Act** anomalies could be avoided by resort to an award of costs in a lump sum. The discretion to award lump sum costs was retained when the tariffs were

established **Rule 63.02 (1)(a)** gives a trial judge discretion to "award a gross sum in lieu of, or in addition to any taxed costs." Practice has focused on the tariffs but this rule, although sparingly used, is still available.

Civil Procedure Rule 63.08 provides this court with a broader discretion which is commonly used to fix costs at the appeal level:

> 63.08. The costs of an appeal and of the proceeding in the court below shall be as directed by the judgment of the Nova Scotia Court of Appeal, or in default of direction shall be in accordance with the applicable provisions of Tariffs.

In **Conrad v. Snair et al.** (1996), N.S.R.(2d) 214, Flinn, J.A. upheld the decision of Nunn J. to award lump sum costs of $80,000 and $30,000 in addition to party and party costs derived from the tariffs. He stated:

> Justice Nunn then said:
>
> > Taking all of those factors into consideration, I think that this is an appropriate case not to increase the scale but to grant a gross sum in addition to the scale. . . .
> >
> > "...I agree with Mr. Barnes' comments that a gross sum is an unusual thing to award, but the way this case developed and this case, itself, is certainly probably one of the best illustrations of a case where a gross sum in addition should be added, because, as Saunders, J. indicated in **Landymore v. Hardy** [(1992), 112 N.S.R. (2d) 410] there is certainly the notion that recovery of costs should represent some substantial contribution towards the party's reasonable expenses in defending the proceeding in this case. But, as he added, they should not amount to a complete indemnity.
>
> In my opinion Justice Nunn did not apply wrong principles in his determination of the amount involved, his application of Scale 3 to that amount, and his determination to award a lump sum rather than to increase the scale. The principles which he considered are those which are set out in **Civil Procedure Rules 63.04 and 63.02.**

In my view the following factors make the award of party and party costs calculated from

the tariffs so inadequate as to be manifestly unjust and call for an award of a lump sum in addition:

(1) The appellant has had to go through a five-day trial, an appeal as to liability, a trial on the assessment of damages ordered by this court, and the present appeal, (as well as the respondents' application for leave to the Supreme Court of Canada.) The tariffs would have yielded similar costs if the present results had been achieved at the initial trial (even if it had been a one or two day trial) and appeal.

(2) The appellant's claim results from a deliberate breach of the fiduciary duty owed to him by the respondents. The appropriate remedy should reflect the principle of restitution.

(3) There is a public interest in protecting investor confidence in financial institutions. (See **Hodgkinson v. Simms**) It is not to the long term benefit of the securities industry if it is seen to be operating outside the law because significant legal expenses cannot be recovered and wronged individuals cannot afford to take erring brokers to court.

In addition to the costs determined under the tariffs I would order lump sum costs of $30,000 for a total contribution of $44,180 toward Dr. Williamson's legal fees incurred at all levels including this appeal, together with the disbursements allowed by the trial judge and disbursements on this appeal.

Conclusion:

In the final result I would increase the damages of $74,614.00 allowed by the trial judge by $16,030.64 and $6,556.43 to a total of $97,201.07 rounded to $97,200, and increase costs for all proceedings in the Supreme Court of Nova Scotia and this court, including this appeal, to a total of $44,180, plus disbursements.

Freeman, J.A.

Concurred in:

Hart, J.A.

Cromwell, J.A.

C.A. No.145652

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DOUGLAS WILLIAMSON Appellant - and - GEORGE WILLIAMS, SCOTIA BOND CO. LTD., AND MIDLAND WALWYN CAPITAL, INC. Respondents	)	REASONS FOR JUDGMENT BY: Freeman, J.A.