IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *McMullin v East Port Properties Ltd.*, 2006 NSSC 352

Date: 20061121
Docket: SH 184359
Registry: Halifax

Between:

Lois M. McMullin

Plaintiff

v.

East Port Properties Limited and Park Place Entertainment Scotia Limited, carrying on business under the firm name and style of "Casino Nova Scotia/Casino Nouvelle Ecosse" and The Manufacturers Life Insurance Company

Defendants

Judge:	The Honourable Justice Walter R.E. Goodfellow
Heard:	October 18, 2006 Chambers, Halifax, Nova Scotia
Counsel:	Bruce W. Evans, for the plaintiff John D. Rice, for the defendants

By the Court:

BACKGROUND:

[1] Lois M. McMullin issued an Originating Notice Action and Statement of Claim August 13, 2002. The Statement of Claim alleges that she became insured under an insurance contract August 25, 1995 in the course of her employment as a full-time dealer employed by Casino Nova Scotia. Various terms of the insurance contract are set out in the Statement of Claim which goes on to allege that Ms. McMullin has not been gainfully employed since January 4, 2001. It maintains since August 14, 2000 that she has been totally disabled from performing the essential duties of her own occupation as a full-time casino dealer (within the meaning of the insurance contract) and from performing the essential duties of any occupation for which she is qualified and is of equivalent status to her occupation as a full-time casino dealer.

[2] Ms. McMullin proceeded to file her Proofs of Loss documentation and initially Manufacturers Life denied liability.

[3] The Statement of Claim goes on to allege that on May 25, 1995 Casino Nova Scotia made an offer of employment to Ms. McMullin and the statement of claim

sets basic terms said to have been offered including that Ms. McMullin would as long as she remained employed be provided with long-term disability benefits to age 65. It also alleges implied terms of the offer and alleges that despite her total disability she was required after August 14, 2000 by Casino Nova Scotia to work two days a week until January 4, 2001 at which time Casino Nova Scotia notified Ms. McMullin that her employment was terminated on the grounds of absenteeism. The claim is advanced for wrongful dismissal without cause and in phrased in very broad terms claiming damages for bad faith conduct, humiliation, financial and mental distress, failing to maintain the long-term disability coverage, aggravated damages and costs on a solicitor and client basis.

[4] With respect to damages, the damages claimed against Manufacturers Life were set out in paragraph 26 of the Statement of Claim as follows:

> 26. The Plaintiff claims from Manulife:
>
> (A) Special damages for loss of long term disability benefits from February 14, 2001 (twenty-six (26) weeks after August 14, 2000) until date of trial.
>
> (B) A declaration that the Plaintiff is and has been totally disabled within the meaning of the Insurance Contract continuously from August 14, 2000 until date of trial.

(C) Prejudgment interest.

(D) Costs on a solicitor and his own client basis for breach of duty of utmost good faith.

(E) Punitive damages for the breach of the duty of utmost good fath.

[5] The claim for damages against Casino Nova Scotia is set out specifically in paragraph 27 of the Statement of Claim as follows:

27. The Plaintiff claims from Casino Nova Scotia:

(A) Special damages for lost earnings and benefits, including long term disability benefits, which the Plaintiff should have received had her employment been continued throughout the period of her temporary disability;

(B) Damages for lost earnings and benefits, including long term disability benefits, which the Plaintiff should have received had she been provided with reasonable notice of termination from her employment, or alternatively, which she should have received had she been provided with minimum statutory notice of the termination of her employment;

(C) Special damages for mitigation expenses in being rehabilitated and retrained for equivalent alternative employment and in searching for and obtaining equivalent alternative employment;

(D) Aggravated damages for breach of contract to provide security and peace of mind against long term disability by providing long term disability benefits;

(E) Prejudgment interest;

(F) Costs on a solicitor and her own client basis for breach of duty of good faith and fair dealing.

[6] By letter dated April 18, 2006, "WITH PREJUDICE", Ms. McMullin's solicitor advised the solicitor for the defendants that Ms. McMullin had settled her claim for L.T.D. benefits against Manufacturers Life and would not be pursuing her claim for damages for lost long-term disability benefits from Casino Nova Scotia.

APPLICATION:

[7] There was a measure of correspondence between solicitors for the parties dealing with this application and, in particular, its timing. The application itself was set down October 11, 2006 to compel Ms. McMullin to answer interrogatories and was set for October 18, 2006.

[8] The application came before me in Chambers and the solicitor for Ms. McMullin was not in attendance and apparently had advised in writing October 12, 2006 that he was not available on October 18, 2006 and suggested dates commencing the week of November 27, December 4 and December 11, 2006.

[9] The defendants proceeded with the application and I felt in fairness the solicitor for Ms. McMullin should be given an opportunity to make representations and directed that final briefs be filed by Ms. McMullin on or before October 30, 2006 with any response to be filed on or before November 3, 2006.

[10] There was a mistake in the Supreme Court file number with the result that the plaintiff's affidavit material dealing with the application was filed October 20, 2006 but for some reason the brief, said to be filed the same date, did not find its way into the file at the same and was only received by myself, the presiding justice by fax November 15, 2006. The defendants were given the opportunity to respond to the late brief and declined.

ISSUE:

[11] The interrogatory at issue in this application sought full particulars of the settlement entered into between Ms. McMullin and Manufacturers Life.

[12] The approach to be taken in an application dealing with disclosure was canvassed thoroughly by Hall, J. recently in *Hodgson v. Timmons*, 2006 NSSC 284 where the case law was reviewed extensively and stated commencing at paragraph 9:

> [9] In **Upham v. You**, Matthews, J.A., of the Nova Scotia Supreme Court (Appeal Division), as the Court was then constituted, said at paragraph 26 and 27:
>
> > The Supreme Court of this Province has consistently held that the Rules relating to discovery of persons and the production of documents should be interpreted liberally to give effect to full disclosure. See for example, **Imperial Oil Ltd. v. Nova Scotia Light & Power Co. Ltd.** (1973), 41 D.L.R.(3d) 594**; Imperial Oil Ltd. v. Nova Scotia Light and Power Co. Ltd**. (1974), 10 N.S.R.(2d) 693, and on appeal at p. 679; **Swinamer v. Canadian General Insurance Company (supra); McCarthy v. Board of Governors of Acadia University** (1976), 22 N.S.R.(2d) 381; and **Schwartz v. Royal Insurance Company** (1978), 26 N.S.R.(2d) 223.
>
> Jones, J.A., said in **Central Mortgage & Housing Corporation v. Foundation Company of Canada Ltd** (1982), 54 N.S.R.(2d) 43 at p. 49:
>
> > "Coupled with the requirements under the Rules for complete disclosure and inspection of documents, interrogatories, admissions, notice of experts' reports, and pretrial conferences, it

> is apparent that our Rules are designed to ensure the fullest possible disclosure of the facts and issues before trial and thereby avoid the element of surprise. Whereas the former Rules prevented pre-trial disclosure of evidence I think one can now say the opposite is true. The object is to avoid surprise, simplify the issues and, hopefully, discourage the need for continued litigation . . . ."

And at p. 53:

> "The practice in this Province has been to interpret the Rules liberally. See the decision of Cowan, C.J.T.D. in **Davies v. Harrington** (1980), 39 N.S.R.(2d) 199; 61 A.P.R. 199."

. . .

> And at paragraph 31:

That there may be an alternate means by which the respondent could achieve this information by calling expert medical evidence, as urged by the appellant, does not make the question any the less relevant. Such evidence may, or may not, be more compelling than that of those other patients of the appellant. Simply because there may be another route to pursue is not reason, in my opinion, to deny the information requested on the basis of relevancy. That argument concerns the weight of the evidence and not its relevancy. . . .

. . .

> And at paragraph 35:

Cowan, C.J.T.D., in King v. King (1975), 20 N.S.R.(2d) 260, had reason to consider Rule 18.09(1) in a maintenance action where the petitioner's solicitor put the discovery to an end on the ground that the questions were irrelevant. He said at p. 263:

> "The Nova Scotia rule with regard to examination for discovery is wider than similar rules in force in other Canadian jurisdictions. Rule 18.09(1) requires the person being examined to 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'."

And further at p. 264:

> "It is apparent, therefore, that the test of relevancy having regard to the subject matter of the proceeding, gives a good deal of leeway to the respondent's solicitor on the examination for discovery."

[10] Again, Matthews, J.A., in **Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp. , (supra)**, stated at paragraph 12

> The chambers judge noted the broad words of Rule 20.06(1) which provides for production of any document "relating to any matter in question in a proceeding". He correctly pointed out the difficulties in determining relevancy at this stage of a proceeding, citing **Toronto Board of Education Staff Credit Union Ltd. v. Skinner et al** (1984), 46 C.P.C. 292 at 296:
>
> > The Court cannot at this stage lay down precise rules as to what is or is not relevant to the issues pleaded. If, however, the documents have a semblance of relevancy, they should be declared producible, leaving it to the trial Judge or the Judge hearing the

> final application to make the determination of relevancy at that time.

[11] J.M. MacDonald, J., as he then was, in **Gould Estate v. Edmonds Landscape & Construction Services Ltd.**, **(supra)**, said at paragraphs 7, 8 and 9:

> . . . [D]isclosure cannot be deemed unlimited. The defendant must establish some practical relevance to the materials being sought.

Furthermore the concept of relevance cannot be considered in a vacuum. It involves an element of practicality and pragmatism. The issue requires the court to perform a cost benefit analysis. Specifically I refer to the decision of now the late Justice Sopinka in **R. v. Mohan** (1994), 89 C.C.C. (3d) 402 (S.C.C.) where at page 411 he noted:

> . . . Relevance is a matter to be decided by a judge as question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs": see McCormick on Evidence, 3rd Ed. (1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability . . .

Although the learned Supreme Court Justice was referring to relevance in the context of admissibility, the same practical cost benefit analysis applies to relevance in the context of disclosure.

> [12] From the foregoing it will be seen that the standard for determining what is relevant at the discovery level is very broad. As the cases indicate it seems that if there is a semblance or appearance of relevancy questions should be answered or documents produced subject, of course, to other considerations such as privilege.
>
> [13] Our discovery rule has been interpreted so liberally and broadly that it would appear that if there is doubt as to the relevancy of a question, it should generally be answered. Putting it another way, it seems to me that in such circumstances, if one is to err it should be in favour of allowing the question.

ARGUMENT/CONCUSION:

[13] Ms. McMullin's brief denies entitlement to disclosure on one ground only, that is, that the L.T.D. benefits she received from Manufacturers Life are not deductable for the wrongful dismissal damages claimed against Casino Nova Scotia. This was the determination of the Nova Scotia Court of Appeal in *Kaizer v. Multibond Inc.*, [2002] N.S.J. No. 249. It should be noted that the Court of Appeal was dealing with a question of whether the L.T.D. benefits could be set off against damages for wrongful dismissal and not a question of whether or not the employee was required to disclose the terms and conditions, breath and depth of what he received. It would appear that the decision was based upon actual disclosure of what had been recovered. The Court of Appeal was not dealing with the issue of disclosure.

[14] The claim for the employee here is much broader than the issue that the defendants cannot set off any liability they have for disability benefits Ms. McMullin has received from her contract of insurance and I say this on the assumption that she fits within the law in that regard.

[15] The claim by Ms. McMullin against Manufacturers Life which was settled presumably covers all elements of the claim advanced by Ms. McMullin against Manufacturers Life which are set out earlier in this decision from paragraph 26 of her statement of claim. I say presumably because I see nothing in the file indicating that the action against Manufacturers Life has been terminated. If Ms. McMullin intends for her action against Manufacturers Life to be totally concluded, then a order dismissing her action against Manufacturers Life should be considered.

[16] Relevance involves an element of practicality and the approach of Nova Scotia courts to liberally interpret the rules relating to disclosure is an expression of the objective of the Nova Scotia Civil Procedure Rules, C.P.R. 1.03:

Object of Rules

1.03. The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

[17] How can the court at this stage know with any certainty the boundaries of the plaintiff's widely pleaded claims? There is a clear measure of duplication against the Manufacturers Life Insurance Company and the other defendants beyond payment of L.T.D. benefits. All that has been described as being settled is the specific claim for L.T.D. benefits which, in itself, was part and parcel of the plaintiff's claim expanded against the continued defendants for breach of duty of good faith and fair dealing, etc., etc.

[18] There is before me very clearly more than a semblance or appearance of relevance as to the extent the plaintiff's various claims against Manufacturers Life and the remaining defendants including the delay, manner of handling the situation, continuing claim against the continued defendants for damages for temporary disability, etc., etc. The issue of termination for cause for alleged absenteeism is still a live issue between the parties and the response in part, at least, to this issue by the plaintiff is one of disability. The plaintiff undoubtedly

will give evidence of being in receipt of a settlement of long-term disability as a part of her response to the allegation of absenteeism.

[19] I conclude that the application must be successful and I am prepared to grant the order in the form of the draft order advanced once Ms. McMullin's solicitor has had an opportunity to comment on the form of order or consent to it as to form. Counsel should also direct their attention to the issue of costs and if they cannot reach agreement then the defendant's solicitor should advance what costs and disbursements are sought and the plaintiff's solicitor respond without delay after which I will proceed to determine the issue and if costs are warranted, tax costs and disbursements of the application.

[20] The application here deals with disclosure. In my view the nature of the disclosure would generally govern whether or not and to what extent further disclosure would be appropriate by the production of documents, oral discovery, interrogatories, notice to admit, etc.

[21] There is a very high level of duplication of the damage claims against Manufacturers and the other defendants. If Ms. McMullin has been compensated

for any of the headings for which she seeks damages against the other defendants then her claim may well be limited to one of aggravation and, in that event, the starting point in determining damages would be the point Ms. McMullin received compensation to under the various headings.

[22] I therefore take the view that the issue of whether a further discovery process is appropriate is not before me and I differ with Hall, J.. I differ with Hall, J. in that I hold the determination of further disclosure process should await the specifics of disclosure surrounding the settlement. Whether of not there should be further disclosure should not be foreclosed in advance of knowledge of the specifics sought of the settlement.

J.