

SUPREME COURT OF NOVA SCOTIA

Citation: MacGowan v. RBC Dominion Securities Inc., 2008 NSSC 421

Date: 20081030
Docket: Hfx. No. 207288
Registry: Halifax

Between:

Bruce MacGowan and Susan MacGowan

Plaintiffs

-and-

RBC Dominion Securities Inc., a body corporate and **Hugh Bagnell**

Defendants

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: October 30, 2008 in Chambers at Halifax, Nova Scotia

**Oral
Decision:** October 30, 2008

**Written
Decision:** June 30, 2009

Counsel: Counsel for the Plaintiffs - Peter Coulthard
Counsel for the Defendants - Nigel Campbell and Brian Awad

Wright J.

[1] On October 30, 2008 the plaintiffs brought an application before me in regular Chambers under Rule 20 of the **Civil Procedure Rules** (1972) for an order for production of certain documents by the defendant RBC Dominion Securities Inc. (“RBCDS”). After hearing the submissions of counsel, I gave an oral decision, with brief reasons, dismissing the application and made a costs award of \$500 in favour of RBCDS.

[2] Sometime later, counsel for the defendants submitted a request that my oral decision be turned into a formal written decision for its precedent value in other broker-client litigation cases. In now so doing, I will add the factual context in which the application was brought and expand somewhat on my reasons for judgment without, of course, changing the result in any way.

[3] Briefly, the history of this matter dates back to 1997 when the plaintiffs became an investment client of RBCDS. One of its employees, the defendant Hugh Bagnell, served as the plaintiffs’ investment advisor. This relationship lasted until late 2002 when the plaintiffs closed their account with RBCDS after suffering substantial losses on their investment activities.

[4] On September 15, 2003 the plaintiffs brought this action against both RBCDS and Mr. Bagnell individually claiming negligence, breach of fiduciary duty and breach of contract based on allegations of unauthorized and unsuitable trading in their investment accounts. Included in the Statement of Claim are allegations that RBCDS failed to supervise Mr. Bagnell’s activities with respect to

the plaintiffs' accounts and failed to put in place any adequate systems to prevent such unauthorized and unsuitable trading in those accounts. The action is being defended by RBCDS only, default judgment having been entered against Mr. Bagnell on October 15, 2003 with damages to be assessed.

[5] The person responsible for supervising the trading activity in Mr. Bagnell's client accounts, to ensure that the recommendations made were appropriate for the clients and in keeping with their investment objectives, was Frank Youden, a Vice-President and Branch Manager of the Halifax office of RBCDS. By Notice of Hearing dated January 4, 2005 the Investment Dealers Association of Canada ("IDA"), a regulatory body, alleged that Mr. Youden failed to adequately supervise the trading activity in the client accounts of Mr. Bagnell in accordance with the requirements of IDA regulations and policies. A formal hearing was held in April, 2005 and a decision rendered by the Nova Scotia District Council on December 22, 2005.

[6] The Council decision makes reference to three complainants, including the plaintiff Bruce MacGowan, and ultimately frames the question before the hearing panel as being whether or not Mr. Youden's supervision of the trading activity being carried out by Mr. Bagnell in the MacGowan accounts (and those of one other named client) was reasonable in accordance with the applicable policies and regulations. The conclusion reached by the panel was that Mr. Youden failed to supervise the trading activity in Mr. Bagnell's client accounts to ensure that the recommendations were appropriate for the clients and in keeping with their investment objectives.

[7] With the conclusion of that regulatory hearing, the plaintiffs requested RBCDS to produce, for purposes of this litigation, various documents including the documents pertaining to the complaints of other clients of Mr. Bagnell that were entered as exhibits in the IDA regulatory hearing. While acceding to the other requests for production, RBCDS refused to provide copies of the documents relating to the trading investment accounts of other clients of Mr. Bagnell and the supervision thereof.

[8] Although these documents were acknowledged at the hearing of this application to be RBCDS records and work product (and not generated by the IDA investigation itself), RBCDS argued that this application should be dismissed for two reasons:

(1) The plaintiffs have failed to establish that the disclosure of the RBCDS records pertaining to the trading accounts of other clients of Mr. Bagnell would lead to the discovery of admissible evidence in this action, and

(2) The documents that the plaintiffs seek include personal financial information of non-parties and it would be injurious to the public interest to force disclosure of that personal financial information when they have not been given notice of the application.

[9] The main thrust of the submissions made by counsel for the plaintiffs is that these documents are indeed relevant in determining whether there was negligent supervision by Mr. Youden of the plaintiffs' trading accounts insofar as they may disclose a pattern of negligent conduct, and that any privacy concerns of other clients are adequately protected by the implied undertaking rule.

[10] After hearing submissions of counsel, I concluded that the application for production of these documents should be dismissed for the two reasons advanced on behalf of RBCDS.

[11] The general test to be applied on an application such as this is whether the documents sought for production relate to any matter in question in the proceeding (see **Civil Procedure Rules** 20.01(1) and 20.06(1)). There are numerous cases from this court and our Court of Appeal recognizing that this test is to be liberally applied and that the test for relevancy at the production stage is much broader than it is at the trial itself. Our courts have consistently ruled that a document must be disclosed at the production stage if it bears a "semblance of relevance" to a matter in issue in the proceeding.

[12] As an aside, I interject that this distinction has been eliminated with the introduction of the new **Civil Procedure Rules** implemented on January 1, 2009. That, of course, has no bearing on the present application which is being decided under the **Civil Procedure Rules** (1972). Nonetheless, the burden rests on the applicant to satisfy the court that the documents sought are relevant and would lead to the discovery of admissible evidence.

[13] As noted earlier, the plaintiffs have pleaded that RBCDS failed to supervise Mr. Bagnell, that it failed to put systems in place to prevent unauthorized trades inconsistent with client investment objectives, and that it failed to meet the standard of care and professional advice and guidance required of investment dealers in the industry. On that footing, counsel for the plaintiffs argues that his clients are entitled to know whether the complaints made by other clients of Mr. Bagnell were similar to their own, whether the trading activities complained of by others were the same, whether those activities resulted in inquiries from the RBCDS Compliance Department and how they were handled, and generally whether the manner in which Mr. Youden supervised Mr. Bagnell's handling of their accounts was the same or different from the manner in which he did so for other clients of Mr. Bagnell (and if different, how so and why).

[14] In my view, the documents pertaining to other clients' trading accounts handled by Mr. Bagnell under Mr. Youden's supervision fail to meet the test of relevancy. Similar act evidence of this sort has little probative value to an examination of the handling of the plaintiffs' trading accounts and in my opinion, is not necessary for disposing fairly of the proceeding. The subject allegation of inadequate supervision, whether framed in negligence or as a breach of fiduciary duty or breach of contract, will require the court to determine the appropriate standard of care and/or scope of fiduciary duty owed to the plaintiffs. That is going to be informed largely by evidence of industry standards and practices, the workplace manuals of RBCDS pertaining thereto (which already have been produced), the contract between the parties, and perhaps the introduction of expert opinion evidence. How Mr. Youden supervised the trading accounts of other

clients of Mr. Bagnell would have little probative value in this determination, especially where different clients often have different investment objectives and risk tolerances in their trading activities. I am simply not persuaded that the production of these records would likely lead to the discovery of admissible evidence in this action.

[15] It should also be noted that the Statement of Claim confines itself to allegations against RBCDS with respect to the plaintiffs' accounts only. Similarly, the defence filed on behalf of RBCDS denies inadequate supervision of Mr. Bagnell's trading activities in respect of the plaintiffs' accounts only. The defence does not sweepingly assert that all of Mr. Bagnell's client accounts were properly supervised or that the plaintiffs' accounts were treated in like manner as they were for other clients, which might otherwise have brought other client records into play.

[16] In the result, the plaintiffs have failed to satisfy the court that the documents sought have a sufficient degree of relevance to be ordered for production.

[17] The second reason for denying this application is based on confidentiality concerns. If the documents sought were ordered to be produced, there would be some unknown number and identity of other clients whose personal financial affairs would now be disclosed in this litigation, unbeknownst to them.

[18] Personal financial information is a very private and sensitive subject to most individuals. While I recognize that the implied undertaking rule would offer some protection, confidentiality concerns nonetheless remain and in the absence of any compelling argument of relevance such that the production of these documents is necessary for disposing fairly of the proceeding, those confidentiality concerns become an added reason for the dismissal of this application.

J.