2004

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Banks v. National Bank Financial Ltd., 2011 NSSC 79

Date: (20110221)
Docket: Hfx. SH 227347
Registry: Halifax

Between:

DEREK BANKS and PLASTICS MARITIME LTD.

Plaintiffs

and

NATIONAL BANK FINANCIAL LTD.

and

BMO NESBITT BURNS CORPORATION LTD.

Defendants

Justice: The Honourable Justice Pierre L. Muise

Heard: December 3, 2010, Halifax, Nova Scotia

Counsel: Kevin C. MacDonald, solicitor for Derek Banks and Plastics Maritime Ltd. and co-counsel
Jeffrey P. Flinn
Linda L. Fuerst, solicitor for BMO NESBITT BURNS CORPORATION LTD.
James Hodgson, Q.C., solicitor for NATIONAL BANK FINANCIAL LTD.

INTRODUCTION:

[1] The Plaintiffs, Derek Banks ("Banks") and Plastics Maritime Ltd. ("Plastics") commenced an action against National Bank Financial Ltd. ("NBFL") and BMO Nesbitt Burns Corporation Ltd., whose correct name is BMO Nesbitt Burns Inc., ("BMO"). The Plaintiffs allege that NBFL and BMO were involved in a conspiracy to manipulate the stock of Knowledge House Inc. ("KHI"), which created a false market price for KHI shares and an illusion that the liquidity of the shares was higher than it actually was. They allege that the acts in furtherance of that conspiracy, for BMO, were carried out by its branch manager, Shirley Locke ("Locke"). The shares became valueless. The Plaintiffs lost the money they invested in KHI. They claim damages resulting from the alleged conspiracy.

[2] When BMO provided its List of Documents and Supplemental List of Documents, it redacted the documents by blacking out information in relation to BMO clients, including BMO clients who traded shares of KHI during the alleged conspiracy. The client information redacted included: names, telephone numbers, addresses, occupations, social insurance numbers, dates of birth, income, bank

account particulars, assets, investment objectives, margin status, and, trading instructions. The Plaintiffs want the information disclosed to them.

[3] The justification BMO gave for redacting this information was that it was irrelevant to the issues in the action and was private. The Plaintiffs say the information is relevant and that any privacy concerns can properly be addressed by the implied undertaking rule and, if necessary, by sealing of documents.

[4] In the course of oral argument, Linda L. Fuerst, on behalf of BMO, agreed to remove certain redactions and provide the Court and the Plaintiffs with a new copy of the documents revealing those previously redacted portions. The agreement was put into an order. It was issued December 20, 2010 and required BMO to provide:

> "[A] copy of the Documents with the following redactions removed, to the extent that the redacted information relates to KHI and for the period March 1, 2000 to August 15, 2001:
>
> (1) redacted information of named defendants in the National Bank action #206429 alleged to be conspirators ("the named conspirators");
>
> (2) redacted information of any accounts over which the named conspirators were given written trading authorization at BMO NB;

(3) redacted information relating to accounts owned by Ms. Locke; and

(4) redacted information relating to accounts over which Ms. Locke was given written trading authorization by others."

[5] The agreement to disclose that information was an acknowledgement, by BMO, that it is relevant to the subject matter of the proceedings. Ms. Fuerst provided a copy of the documents with redactions removed.

[6] I have to determine which, if any, of the remaining redactions must be disclosed.

ISSUES:

[7] To determine that, I must answer the following questions:

a) Which **Civil Procedure Rules** apply, the **1972 Rules** or the **2009 Rules?**

b) What is the proper interpretation and application of **1972 Rule** 20.02(b)?

c) Is the redacted information relevant or reasonably calculated to lead to admissible evidence?

d) If the redacted information is not relevant and not reasonably calculated to lead to admissible evidence, is there any reason it should not remain redacted?

LAW AND ANALYSIS:

A) Which Civil Procedure Rules apply, the 1972 Rules or the 2009 Rules?

[8] The Plaintiffs and BMO agree that the **Nova Scotia Civil Procedure Rules (1972)** are to be applied, not the **Nova Scotia Civil Procedure Rules (2009)**.

[9] BMO filed its List of Documents under the **1972 Rules**. The Plaintiffs filed their List of Documents under the **1972 Rules**. BMO filed its Supplemental List of Documents after the coming into force of the new **Rules**. However, those documents were filed as a List of Documents, which is in accordance with the **1972**

Rules, as opposed to an Affidavit of Documents, which would have been in accordance with the **2009 Rules**.

[10] Part 5 of the **2009 Rules** deals with disclosure and discovery. **2009 Rule** 14.01 says that, for the purposes of Part 5, when the judge determines "relevance" and "relevancy", she or he must assess whether the judge presiding at the hearing of the trial would find the information relevant or not. That is different from the **1972 Rules** which required the judge to assess whether the information had a "semblance of relevance". A change in the rules for production part way through would cause one party to gain an unfair advantage over the other party. **2009 Rule** 92.08 permits a judge to order that the **1972 Rules** apply when that is the case. I find it is appropriate to apply the **1972 Rules** for disclosure and production in this case, so as to avoid one party gaining an unfair advantage over the other.

[11] In the remainder of this decision, unless I indicate otherwise, when I refer to the **Rules**, I am referring to the **Nova Scotia Civil Procedure Rules (1972)**.

B) What is the proper interpretation and application of Rule 20.02(b)?

[12] **Rule** 20.01 (1) states:

> "Unless the court otherwise orders, a party to a proceeding shall, within sixty (60) days after the close of the pleadings between an opposing party and himself, ... serve on the opposing party a list in Form 20.01A of the documents that are or have been in his possession, custody or control relating to every matter in question in the proceeding and file with the prothonotary the list without a copy of any document being attached thereto."

[13] Subsection (4) of **Rule** 20.01 provides that a true copy of each document must be attached to the list. That rule is subject to certain exceptions which are not applicable in this case.

[14] **Rule** 20.02 (b) provides that:

> "The court may at any time order any party to make discovery, limited to certain documents or classes of documents only, or of documents related to the matters specified in the order."

[15] Justice Moir, at paragraph 11 of **Saturley**, pointed out that "it is technically incorrect to refer in Nova Scotia to discovery of documents". However, since **Rule** 20.02(b) refers to making "discovery" of documents I will use that terminology.

When I refer to making “discovery” of documents or information, I am referring to disclosing them, or it, in response to the other party’s active request that they, or it, be provided.

[16] Determining what information a party making discovery of documents must include in the documents produced under **Rule** 20.02(b) is assisted by the guidelines in **Rule** 18.12(2). That **Rule** states:

> “No objection to any question shall be valid if made solely upon the ground that any answer thereto will disclose the name of a witness, or that the question will be inadmissible at the trial or hearing, if the answer sought appears reasonably calculated to lead to the discovery of admissible evidence.”

[17] As indicated by Justice Moir, in **Saturley** v. **CIBC World Markets Inc.**, 2011 NSSC 4, at paragraph 13, in a discovery question or interrogatory, a party can obtain information beyond “relevant evidence.” That party can obtain “information that is likely to lead to relevant evidence.”

[18] In my view, the party making discovery under **Rule** 20.02(b) is required to produce documents which "appear reasonably calculated to lead to the discovery of admissible evidence".

[19] This view is supported by the comments of Justice Wright, in **MacGowan** v**. RBC Dominion Securities Inc.**, 2008 NSSC 421, where he dealt with an application for production of documents under **Rule** 20. At paragraph 12, he stated:

> "[T]he burden rests on the applicant to satisfy the court that the documents sought are relevant and would lead to the discovery of admissible evidence".

Consequently, he envisioned that production of the information sought would be appropriate, at the production stage, if the Applicant established that it would lead to the discovery of admissible evidence. Although, the word "would" differs from the words "reasonably calculated to" in **Rule** 18.12(2), I take it that Justice Wright used the word "would" in the sense of "would reasonably". In my view, the words "would reasonably" are essentially synonymous with the words "is reasonably calculated to".

[20] Further, this approach makes practical sense. It does not seem practical to support non-disclosure, at the production stage, of information that is reasonably calculated to lead to admissible evidence, if, during discoveries, the moving party will be entitled to that information. Withholding that information would slow down the production process. It also may decrease the effectiveness of the discovery examinations, thus prolonging them. Such results would run contrary to the object of the **Rules**, which is "to secure the just, speedy and inexpensive determination of every proceeding". [**Rule** 1.03]

[21] In the case at hand, the information sought is information contained in documents that have already been disclosed. Discoveries have already commenced. At least Banks has been discovered. Therefore, it would appear particularly impractical to have to wait until discovery examinations of Locke or BMO representatives to obtain the portions of that information, if any, which are reasonably calculated to lead to admissible evidence.

[22] In my view, Rule 20.02(b), allows the Court, in addition to directing the production of information with a "semblance of relevance", to direct the

production of information “reasonably calculated to lead to the discovery of admissible evidence”.

C) Is the redacted information relevant or reasonably calculated to lead to admissible evidence?

Onus of Establishing Relevance

[23] The onus is on the Plaintiffs to establish that the information they seek is relevant. [**Kairos Community Development Ltd.** v. **Nova Scotia (Attorney General)**, 2007 NSSC 330]

Test for Relevance Under the Rules

[24] **Rule** 20.01 provides that the documents to be produced are those “relating to every matter in question in the proceeding”. This has been interpreted as meaning those documents that have a “semblance of relevance”. [**Eastern Canadian Coal**

Gas Venture Ltd. v. **Cape Breton Development Corp.**, [1994] N.S.J. No. 588 (S.C.), affirmed by [1995] N.S.J. No. 177 (C.A.)]

[25] The Plaintiffs and BMO agree that the general test for relevancy under the **Rules** is "semblance of relevance".

[26] Justice Bateman, in **Dowling et al** v. **Securicor Canada Ltd.**, 2003 NSCA 69, at paragraphs 9 to 12, 17 and 18, provided an excellent and frequently cited review of general principles relating to disclosure in Nova Scotia. The case involved an application, pursuant to **Rule** 20.06, for production of documents which had not been included in the defendant's list of documents. The principles she reviewed include the following.

1. The **Rules** governing pre-trial disclosure must be given a particularly liberal interpretation to ensure early, broad, and full disclosure for the following reasons:
    a) to facilitate resolution and simplification of issues before or at trial;
    b) so that the parties can "test the validity of the allegations being advanced";

c) to “avoid the element of surprise”; and,

d) to “discourage the need for continued litigation”.

2. “[W]ithin limits, a ‘fishing expedition’ is permitted by virtue of **Rule** 18.12(2)”, which provides for disclosure of information reasonably calculated to lead to the discovery of admissible evidence.

[27] Justice LeBlanc, in **Murphy** v **Lawtons Drug Stores Ltd.**, 2010 NSSC 289, at paragraph 16, cited with approval ¶3.3 from *The Law of Evidence,* 5th edition (2008), David M. Paciocco and Lee Stuesser, which included the following comments:

> “Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence. As the Supreme Court of Canada has said (in *R v. Arp*, [1998] 3 S.C.R. 339):
>
> > To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of the fact in issue. The evidence must simply tend to “increase or diminish the possibility of the existence of a fact in issue” ... as a consequence, there is no minimal probative value required for evidence to be relevant.

Although this passage relates to admissibility at trial, it does provide some guidance in assessing relevance at the pre-trial stage.

[28] Justice Moir, in **Nova Scotia (Attorney General)** v. **Royal and Sun Alliance Insurance Company of Canada**, [2004] N.S.J. No. 16 (S.C.), applied the "semblance of relevancy" standard for ascertaining relevance at this preliminary stage. He ordered the production of information that he determined was only marginally relevant to the facts in issue, finding there was sufficient connection to warrant disclosure. He noted that the issue of relevance could be revisited when the question of admissibility at trial came up.

[29] However, as stated by Justice MacDonald, as he then was, in **Gould Estate** v**. Edmonds Landscape and Construction Services Ltd.**, [1997] N.S.J. No. 545 (S.C.), at paragraph 7:

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

[30] "Speculation is not sufficient" to establish relevance, "a fair and reasonably solid foundation must be provided".: **Ontario Realtor Corp.** v **P. Gabriele and Sons Ltd.**, [2005], O.J. No. 4010 (S.C.J.), paragraph 6.

Basis for Determining Matters in Question

[31] Sopinka, Lederman and Bryant, " The Law of Evidence in Canada, 3rd Edition", Lexus Nexus Canada Inc. 2009, at paragraphs 2.36, 2.38 and 2.40, states the following:

> "¶2.36 The first step in determining what is relevant is to identity the facts that are in issue in the case.
>
> ....
>
> ¶2.38 A fact will be relevant not only where it relates directly to the fact in issue, but also where it proves or renders probable the past, present or future existence (or non-existence) of any fact in issue.
>
> ....
>
> ¶2.40 In an civil case, the facts in issue are established by the pleadings.

[32] The particular fact to which the information relates need not be specifically pleaded. Justice LeBlanc, in **Halifax Dartmouth Bridge Commission** v **Walter Construction Corporation**, 2009 NSSC 403, at paragraph 19, stated:

> "The question to be determined is ... whether the documents ... would in any way assist the defendants and the third parties in defending the plaintiff's claim. The fact that it is not pleaded is not necessarily the controlling factor. One has to look [at] the pleadings and determine whether there is information or documents which would support the defence ... ."

[33] On the flip side, the mere pleading of a fact will not necessarily lead to the requirement to produce information related to that fact.

[34] For example, in **Santos** v **Santek Investments Inc.**, [1999] O.J. No. 548 (C.J., G.D.), the Court refused to order production of information relating to the Defendants' profits, even though it was relevant to the quantum of punitive damages and a claim for punitive damages had been included in the pleadings. At paragraph 11, the Court stated:

> "A balance must therefore be struck between relevance and common sense. Punitive damages which is an extraordinary discretionary remedy should not be used as a boiler plate excuse for invasive discovery which is not truly relevant to the factual dispute in issue."

[35] In **Bridge** v. **Dominion of Canada General Insurance Co.**, [2000] O.J. No. 5349 (S.C.J.), the Court refused to order production of "performance reviews or job appraisals for the three employees handling the Plaintiff's insurance file" where there were no "specific or particularized allegations of incompetence or misconduct" on their part. At paragraph 6, the Court stated:

> "Broad, unsubstantiated allegations in pleadings cannot be used by parties to embark on a fishing expedition. The job performance reports, in my view, have no semblance of relevance to the matters in issue raised by the pleadings." (emphasis by underlining added)

[36] In **Kairos Community Development Ltd.** v **Nova Scotia (Attorney General)**, 2007 NSSC 330, the Statement of Claim stated that the Plaintiff provided services in "the Halifax Regional Municipality and beyond". On that basis, the Plaintiff sought production of information concerning what the province had paid to other organizations, throughout Nova Scotia, providing the same services as the Plaintiff. The Plaintiff was a Halifax based company. Justice Hood

found there was no evidence before her of what services it provided to persons outside Halifax County. In paragraph 25, she stated:

> "Based upon the information before me, I conclude that the documentation with a semblance of relevance does not include documentation outside the so called central region. The breadth of the production requested by **Kairos** goes beyond documentation with a semblance of relevance. Documentation with a semblance of relevance would include documentation with respect to those who provide similar services in the central region to those provided by **Kairos**."

[37] The **Kairos** decision demonstrates that, in some circumstances, the parties seeking production may have to present evidence providing some substantiation for a fact alleged in the pleadings before information related to that fact will be ordered to be produced.

Matters in Question

[38] There are many ongoing actions emanating from the collapse of KHI. The Plaintiffs' action against NBFL and BMO is one of them. It has become known as

the “Banks Action”. The initial action was commenced by NBFL. It encompasses counterclaims and crossclaims. It has become known as the “Main Action”.

[39] The Plaintiffs’ Statement of Claim (in the Banks Action) alleges, among other things, that:

1. Bruce Clarke, “as an employee of NBFL, admitted his involvement in the KHI stock manipulation scheme”, which:

   a) started in 1999;

   b) involved KHI insiders and persons related to them acting in concert to maintain the price of the KHI stock by engaging in transactions creating “the effect of a liquid market for the shares”;

   c) violated securities laws; and,

   d) prejudiced the interests of investors who were not privy to the scheme. (Paragraph 34)

2. “NBFL admitted the stock manipulation scheme” and that it “resulted in a false market price of KHI shares, in an illusion of higher-than-actual liquidity and value of KHI shares on the market, ... and in loss and damages to ... innocent shareholders of KHI ... .” (paragraph 32)

3. Banks did not know about this scheme, nor its impact. (paragraph 31)

4. “NBFL and BMO were parties to a civil conspiracy ... to strongly discourage investors such as Banks from selling his shares on the open market, which could have potentially driven down the price of shares held ... .” (paragraph 38)
5. “The acts in furtherance of the conspiracy were carried out between Locke for BMO and Clarke for NBFL.” (paragraph 38)
6. “As the employer of Locke, BMO is vicariously liable for the actions of Locke, including her participation in the KHI stock manipulation scheme.” (paragraph 40)
7. “BMO had actual knowledge of improprieties on Locke’s behalf. In particular, the Senior executives at BMO were, or should have been, aware of Locke’s conflict of interest as an apparent market maker and broker to a number of KHI shareholders for at least 14 months before the stock collapsed, during which BMO took no corrective action .” (Paragraph 42)
8. BMO did, or ought to have had, “actual knowledge of high concentrations of KHI stock in a number of accounts under the control of Locke”. (paragraph 43)

[40] The un-redacted contents of some of the documents disclosed by BMO to the Plaintiffs contain information which provides some evidence supporting the allegations that Locke was involved in the KHI stock manipulation scheme and discouraged investors from selling. The following are examples of such information.

1. The lawyer for the Plaintiffs, Kevin C. MacDonald, filed an affidavit in support of this motion. He attached, as Exhibit 4, the documents from BMO's Supplemental List of Documents containing redactions. At Tab 41 of the Supplemental List there is an exchange of e-mails dated June 8, 2000, between Locke and Eric Richards. Richards was an Investment Advisor ("IA") at BMO. In the e-mails, he indicates he has a client wanting to sell KHI stock. Locke says to him: "Between what you put in over the past couple of days and this morning your kinda killing the stock here a bit." He replies that he knows but it is beyond his control.

2. Tab 45 of the Supplemental List contains an exchange of e-mails between Locke and Richards dated July 18, 2000. Richards tells Locke he has a "firm order" to sell KHI shares and that "Blois" is aware. Locke asks whether "Bruce" is aware. Richards replies that he

assumes “Blois will keep him up to date”. Locke responds: “There so touchy these days. Just tell them the number you have to sell.” Based on the remaining materials filed on this motion, “Blois” appears to be Blois Colpitts (a partner with the law firm Stewart McKelvey Stirling Scales) and “Bruce” appears to be Bruce Clarke (an IA and employee of NBFL until October, 2001). Colpitts and Clarke are defendants in the Main Action.

3. Tabs 58 to 60 of the Supplemental List contain an exchange of e-mails, dated January 11 and 12, 2001, amongst Ken MacLeod (Senior Vice President of KHI), Dan Potter (Chair and CEO of KHI), Colpitts, and Locke. MacLeod and Potter are also defendants in the Main Action. The e-mails express concern over Richards advising his client to sell KHI stock and ask how Locke can help with the situation. In those e-mails, Colpitts writes that he talked to Locke about the situation and asks for the name of the client. In addition, MacLeod tells Potter to “send one of da boys to make him [Richards] an offer he can’t refuse”.

4. BMO’s List of Documents is attached as Exhibit 3 to MacDonald’s affidavit. The e-mails at Tab 38BB include correspondence from the

BMO compliance staff expressing concerns over trading of KHI stock, including that:

a) “There have been instances where the insider or possibly a Pro have traded against another of our [BMO’s] clients”;

b) “In a couple of instances ... the insiders are trading against each other”;

c) The response of Carole Cushing, a manager at BMO’s Halifax office, supports the theory of the compliance staff that “they are supporting/creating the market on this stock to avoid the deterioration of the price”; and,

d) The compliance officer questions how all of Richards’ clients are friends with Locke’s clients.

[41] Therefore, whether Locke was involved in the KHI stock manipulation scheme, discouraged investors from selling, and, committed other acts in furtherance of the scheme, are matters in question.

[42] The same information indicates that Richards may have been involved in the KHI stock manipulation scheme and discouraged investors from selling. However, the Plaintiffs' Statement of Claim does not allege that Richards was involved. It does not allege that IA's at BMO, other than Locke, were involved.

[43] The Plaintiffs argue that they have incorporated by reference portions of the Statement of Claim in the Main Action which expands their allegations to encompass all IA's at BMO. I reject that argument for the following reasons.

[44] The Plaintiffs, at paragraph 37 of their Statement of Claim, plead and rely upon allegations in NBFL's Amended Statement of Claim in the Main Action, including the allegations that the defendants in the Main Action:

1. In conspiring to manipulate the KHI stock perpetrated a fraud on the markets "in respect of trading in and holding shares of of KHI *inter alia* in brokerage accounts of the Defendants and others" (paragraph 25);
2. Were involved in a scheme which included "actively restricting the selling of KHI shares of the defendants and others" and "dominating the 'buy side' of the TSE market for KHI shares" (paragraph 26);

3. Knew that if they held or guaranteed "KHI shares on margin at NBFL or elsewhere without excess margin" they would be subject to margin calls (paragraph 77);
4. Used trading accounts within their control "at NBFL and other investment dealers, to place buy orders and execute trades so as to manipulate the market for KHI shares" (paragraph 79);
5. "Employed and funded margin accounts at NBFL and elsewhere" (paragraph 124);
6. "Pressured or prevented each other, as well as other KHI shareholders, from obtaining their shares and/or placing sell Orders" (paragraph 124); and,
7. "Entered buy orders for KHI shares knowing that sell orders of substantially the same sizes at substantially the same times and at substantially the same prices had been entered by various third parties" (paragraph 125).

[45] None of the defendants in the Main Action are defendants in the Banks Action. The reference to the alleged activities of the defendants in the Main Action

provides background for and an explanation of the stock manipulation scheme they allege Locke was involved in and committed acts in furtherance of. It is not included by reference as an allegation against all investment advisers who have handled trades involving KHI stock.

[46] Further, “a plaintiff must name all of those alleged to be involved in the conspiracy in his pleadings, even if he has elected to sue only one”. [**National Bank Financial Ltd.** v. **Potter**, 2008 NSSC 135, at paragraph 122, citing *Remedies in Tort*, edited by Linda Rianaldi, Chapter 3 “Conspiracy”, by Janet Kee (looseleaf to release 8-2007: Carswell)] The Plaintiffs have not named Richards, nor even referred generally to any other IA’s at BMO, as being involved in the alleged stock manipulation scheme. They have particularized their pleadings so that they point only to Locke.

[47] Consequently, at this point, whether Richards and other IA’s at BMO were part of the conspiracy and carried out acts in furtherance of the conspiracy, on behalf of BMO, are not matters in issue.

[48] The Plaintiffs' lawyer, Mr. MacDonald, argued that it was not necessary to allege that any IA other than Locke was involved to justify obtaining the information they request. In support, he pointed to the following comments of Chief Justice Cowan, in **King** v. **King** (1975), 20 N.S.R.(2d) 260 (S.C., T.D.), at paragraph 4:

> "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'."

However, paragraphs 10 and 11 of **King** make it clear that, even though the matter in relation to which information is sought need not be "within the scope of the pleadings", it still must be "relevant to the subject matter of the proceeding". Those same paragraphs also make it clear that the subject matter of the proceeding is determined by the questions that are in issue. Consequently, the statement that the matter need not be "within the scope of the pleadings" does not expand the disclosure requirement to include something which has no semblance of relevance to the questions in issue.

[49] At this point, the questions in issue revolve around Locke's activities. They include the following:

1. Was Locke involved in the alleged KHI stock manipulation scheme?
2. Did she discourage investors from selling KHI stock or otherwise improperly influence their decisions to trade in or hold KHI stock?
3. If Locke was involved in the alleged scheme, what, if anything, else did she do in furtherance of it?
4. What effect, if any, did her actions have on the price of the KHI stock?
5. How did her actions impact on Banks' decision to invest in KHI?
6. If Locke was involved in the alleged scheme, what, if any, knowledge did BMO have of her involvement in it and her acts in furtherance of it?
7. Is BMO vicariously liable for Locke's alleged actions?

[50] BMO, in its pre-motion brief, at pages 5 to 10, highlights a number of points which, in its view, are inconsistent with it being involved in the alleged conspiracy. Those points include the following:

1. NBFL, in the Main Action, pleads that it is BMO which made margin calls on insider accounts resulting in a reduction of the market price for KHI shares. To respond to the crisis caused by this margin call,

Potter found a third party to invest at below market price. The Plaintiffs' Statement of Claim makes it apparent that the third party was Plastics. This is inconsistent with the conspiracy to support the market price of KHI shares.

2. Banks, during discovery examination, was unable to provide any evidence to support the alleged conspiracy.

3. Banks testified about the three purchases of KHI stock that his claim is based upon.

    a) In November 1999 he bought a unit of a KHI limited partnership. BMO and Locke received no remuneration in relation to that purchase. It was by dealing directly with Colpitts and Potter that Banks received the offer, assessed, arranged and executed the purchase. He did not deposit the unit, nor the shares into which it was converted, into any account at BMO. The purchase occurred several months before the start of the conspiracy alleged in the Main Action.

    b) In August 2000 Plastics bought KHI shares after negotiating a below market price with Colpitts. Locke did not provide any documentation in relation to the purchase. She did not attend

any of the meetings Banks had with insiders while evaluating the purchase. BMO only earned $1,562.50 on the purchase. That is consistent with having provided execution services only.

c) Banks made his last KHI share purchase in March 2001. Potter asked him to buy those shares because KHI needed funds to continue operating. They were not bought through BMO, nor Locke. They were not deposited into his BMO account. At that time Banks: was a KHI board and audit committee member; could not have sold KHI shares without Potter's consent because of KHI's insider trading policy; and, knew about undisclosed information in relation to KHI's poor financial condition.

[51] These points do appear to be inconsistent with BMO being involved in the alleged conspiracy. They do bring into question the strength of the Plaintiffs' case. However, they do not make it that the Plaintiffs have no arguable case. There are still allegations, and some supporting information, that Locke was part of a general stock manipulation scheme which may have impacted the Plaintiffs. There are still allegations that BMO, as Locke's employer, knew, or ought to have

known, about Locke's improper activities and/or dealings in KHI stock. It is still arguable that BMO could be vicariously liable for Locke's activities. Therefore, the points outlined by BMO do not render the issues related to Locke's alleged improper activities, and BMO's responsibility for them, irrelevant. They are still matters in question.

Redacted Information Relating to Matters in Question

[52] The Plaintiffs, at page 2 of their rebuttal brief, state, as a response to client privacy concerns, that they "do not require the [i.e. BMO's] clients' social insurance numbers, bank account information or dates of birth". I take that to mean they are not asking this Court to order production of that portion of the clients' information. Therefore, I need not consider whether that portion of the redacted information relates to the matters in question.

[53] In my view, information relating to the income and assets of BMO's clients does not assist in determining any of the questions in issue. It does not relate to

Locke's dealings with those clients. It does not assist in identifying the clients Ms. Locke dealt with. It has no semblance of relevance to the questions in issue.

[54] In my view, the investment objectives and trading instructions of the clients of BMO, who traded in KHI stock and had Locke as their IA, are relevant. If the KHI trades and holdings effected through Locke were consistent with the investment objectives and trading instructions of each client, it would tend to be less likely that Locke improperly influenced their investment decisions. If those trades and holdings were inconsistent with those investment objectives and trading instructions, it would tend to be more likely that Locke improperly influenced their decisions to trade in KHI or hold stock. Therefore, it would assist in determining that matter in issue.

[55] In my view, the margin status of Locke's clients is also relevant. It would help determine whether shares were sold to address margin calls. If Locke's clients sold KHI stock to address margin calls in a proportion that was at least approximately reflective of that clients overall stock holdings, it would tend to make it less likely that Locke improperly influenced their decision in relation to which stock to sell to address margin calls. If Locke's clients seldom or never sold

KHI shares to address margin calls it would tend to make it more likely that Locke improperly influenced their decision in relation to which shares to sell. Further, sales made in response to margin calls would tend to be more likely to attract the attention of BMO's representatives, including its compliance staff. As such, it would tend to make it more likely that BMO would have been aware of the concentration and movement of KHI stock in the portfolios being managed by Locke, and, more likely that BMO had, or ought to have had, knowledge of Locke's alleged improper activities.. Therefore, it would assist in determining matters in issue.

[56] The names, telephone numbers, addresses and occupations of Locke's clients, which include co-account holders where the accounts are joint, help identify the investors Locke dealt with. In that way, they relate or have a semblance of relevance to Locke's dealings with her clients. If I am wrong in this conclusion, I find that, for the reasons noted under the next sub-heading, the request for that information is reasonably calculated to lead to admissible evidence.

[57] BMO, at page 14 of its pre-hearing brief, pointed out that, in **MacGowan**, the court refused to order production of information pertaining to other clients of

the defendant investment brokerage firm who were not parties to the action. The court found that this information did not have a semblance of relevance in relation to whether the brokerage firm breached its duty to supervise the investment advisor's handling of MacGowan's accounts. BMO suggests a similar result should obtain in the case at hand. However, the questions in issue in the case at hand are broader than those in **MacGowan**. The questions in issue in the case at hand include whether Locke improperly influenced investors generally in furtherance of the alleged KHI stock manipulation scheme. They are not limited to whether Locke improperly influenced the Plaintiffs specifically in furtherance of that alleged scheme. Even if the investment brokerage firm in **MacGowan** did not properly supervise the IA's handling of other clients' accounts, there was nothing to indicate it would have any impact on MacGowan, nor shed any light on whether the firm properly supervised the IA in the handling of McGowan's accounts. In the case at hand, if Locke improperly influenced clients generally in their KHI trading decisions, that would tend to make it more likely that her actions affected the market price and appearance of liquidity of KHI stock. That would have an impact on the Plaintiffs as holders of KHI stock. In addition, it would be evidence of Locke's involvement in the alleged stock manipulation scheme. As such, unlike in

MacGowan, in the case at hand, the information relating to other clients of the same IA (i.e. Locke) is relevant.

[58] The Plaintiffs have not shown how the redacted information pertaining to clients of other IA's at BMO relates to any matters in issue. The matters in issue emanate from Locke's dealings with her clients. They are not linked to the dealings between other BMO IA's and their clients.

Redacted Information Reasonably Calculated to Lead to Admissible Evidence

[59] Having the names, telephone numbers, addresses and occupations of Locke's clients allows the Plaintiffs to identify and contact them to help verify whether Locke's description of her dealings with them is accurate. Much of the information is a decade or more old. Contact and occupation information could easily have changed over that period of time. Providing both makes it more likely that the Plaintiffs will be able to identify and locate those clients.

[60] Those clients, more likely than not, will have some recollection of their dealings in KHI stock and what, if any, influence Locke had on those dealings. Locke's dealings with those clients is directly related to whether or not she improperly influenced their decisions to trade in or hold KHI stock. Those clients could testify about their dealings with Locke. Therefore, the request to obtain that information is, in my view, reasonably calculated to lead to admissible evidence.

[61] My conclusion that the names, contact information and occupations of Locke's clients who traded in KHI are both relevant and reasonably calculated to lead to admissible evidence is supported by the conclusion reached by the Appeal Division of the Nova Scotia Supreme Court in **Upham** v. **You** (1986), 73 N.S.R.(2d) 73 (cited with approval by the same court in 2003 in the **Dowling** case submitted by the Plaintiffs in this motion). In **Upham** v. **You**, a surgeon was being sued for medical malpractice. The plaintiffs requested a list of the names of patients upon whom he had performed similar surgeries. The Court concluded that those names were relevant and appeared " reasonably calculated to lead to the discovery of admissible evidence". Therefore, they had to be disclosed. There appears to be even more reason to require disclosure of information relating to other clients Ms. Locke dealt with. Locke's dealings with those clients provides a

comparison to her dealings with the plaintiffs, as was the case in **Upham** v. **You**. Those dealings are also in issue themselves because of the allegation that Locke carried out acts in furtherance of the stock manipulation scheme. The pleadings do not limit those acts to acts carried out in connection with the plaintiffs. In **Upham** v. **You**, the surgeon's dealings with those other clients were not directly in issue themselves. They were only relevant to assist in determining whether the results of the plaintiff's surgery were "usual, normal and anticipated".

Relevant Period

[62] BMO's position is that the relevant period for disclosure of the redacted information is from March 1, 2000, to mid-August 2001. In its view, that is the period of the alleged conspiracy. The Plaintiffs' position is that the relevant period is from December 1999 to the end of August 2001.

[63] The Plaintiffs' Statement of Claim, at paragraph 38, shows that they are basing their allegations of conspiracy against BMO and Locke, in part, on Clarke's settlement agreement with the Nova Scotia Securities Commission. A portion of

that settlement agreement is reproduced at paragraph 34. It states that: it was "[c]ommencing in late 1999" that KHI insiders and others agreed to act in concert to affect the price of KHI stock; and, Clarke agreed to help. Therefore, in my view the period of the alleged conspiracy commences in late 1999. December 1999 is in late 1999. Therefore, December 1999 is the appropriate start time of the relevant period for disclosure.

[64] The Plaintiffs, at paragraph 39, of their Statement of Claim, allege that they "sustained significant financial losses from the stock manipulations and eventual collapse at KHI". At paragraph 29, they allege that: "the true market value of KHI stock became apparent in September 2001"; and, the price of KHI shares fell from over $5.00 to $0.04 in a span of a few days. Tab 40 of BMO's List of Documents shows KHI transactions involving Locke on August 16 and 17, 2001. The KHI shares were still selling for prices ranging from $5.01 to $4.00 during those transactions. In my view, the relevant period for disclosure encompasses all of August 2001. A mid-August end date would not capture the August 16 and 17 trades. The price correction to true market value is alleged, by the Plaintiffs in this action, to have occurred in September. Therefore, according to the Plaintiffs, the

alleged stock manipulation scheme was still influencing the price of KHI shares throughout August 2001.

[65] Any portion of this decision requiring disclosure of redacted information will pertain to documents relating to transactions involving KHI stock from December 1, 1999 to August 31, 2001. Any client account agreement, or other document, establishing any investment account at BMO used in KHI transactions during the relevant time period, is a document which, in my view, relates to such transactions. It does not matter whether the agreement or document was made before or during the relevant time period.

[66] The consent disclosure order issued December 20, 2010, covers information relating to the period from March 1, 2000 to August 15, 2001. It is agreed that the type of information covered in that order is relevant. In my view, it is relevant and ought to be disclosed as it relates to the entire relevant time period.

D) If the redacted information is not relevant and not reasonably calculated to lead to admissible evidence, is there any reason it should not remain redacted?

[67] BMO is of the view that the principles outlined in **McGee** v. **London Life Insurance Co.**, 2010 ONSC 1408, are applicable in Nova Scotia. According to **McGee**, the producing party cannot redact relevant portions of a document unless such redaction is required to protect an important interest.

[68] **McGee**, at paragraphs 8, 9, 13, 14 and 20, states:

> "8 It is impermissible for a party to redact portions of a relevant document simply on the basis of its assertion that those portions are not relevant . ...
>
> 9 The whole of a relevant document must be produced except to the extent it contains information that would cause significant harm to the producing party or would infringe public interests deserving of protection. I respectfully adopt as applicable in Ontario the statement of Lowry J., as he then was, in *North American Trust Company v Mercer International Inc* (1999), 36 C.P.C. (4th) 395, [1999] B.C.J. No. 2107 (S.C.) at para. 13:
>
> > Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it

> relates to a matter in question. But where what is clearly not relevant is by its nature such that there is a good reason why it should not be disclosed, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.

....

13 Irrelevance alone is not a sufficient ground on which to redact portions of a document. The party seeking to do so bears the onus of establishing that redaction is necessary to protect an important interest. Some of the cases referred to by the parties include:

> (a) patents or trade secrets ...;
> (b) personal Income Tax information ...;
> (c) commercially sensitive financial information ...;

14 The additional cases referred to by Lowry J. give rise to another possible category:

> (d) records of a purely private and personal nature and not relevant to the issues, such as notes between parties ... .

....

20 It seems to me that corporate minutes like a personal diary, may contain some information that is relevant but innocuous and some information that is irrelevant and very sensitive - sensitive in the sense that the party resisting production would suffer damage or real embarrassment if the irrelevant information were to be disclosed. Very often these issues are resolved between counsel. Where they are not, the court has a duty to ensure that relevant

> information is produced and also to ensure that the process is not being used for oppressive or collateral purposes."

[68] Part of the rationale for this approach is referred to in the passage from **Glaxo Group Ltd. et al** v **Novopharm Ltd.** (1996), 122 F.T.R. 192 (T.D.), cited at paragraph 9 of **North American Trust Co.** v. **Mercer International Inc.** (1999), 22 B.C.T.C. 62 (S.C.), which states:

> "If a party were permitted to disclose and produce only the unilaterally redacted version of a Schedule I document, our motions court would be inundated with requests for more complete disclosure. What information is the party hiding in the expurgated portion of a document? The costs and time involved in such a process are contrary to everyone's interest in the good administration of justice."

[69] In **North American Trust**, at paragraph 11, the Court also referred to the types of information which would be permitted to be redacted as follows:

> "In the cases to which I have been referred, litigants have been relieved from disclosing the whole of a document related to a matter in question where, but only where, the part withheld has been clearly not relevant to the issues and, because of its nature, there has been good reason why that part should not be disclosed. With reference to the decisions of this court specifically, good reason is apparent in the private nature of the affairs of a company recorded in the minutes of its directors' meetings, or the personal sensitivity of a person's medical records, diary notations, or familial communications ... . "

[69] Decisions from Alberta and New Brunswick have taken the approach that only the relevant portions of documents need to be disclosed. In **Lazin** v **Ciba-Geigy Canada Ltd.**, 1976 CarswellAlta 80 (S.C.), the Court concluded, at paragraph 5, that the word "document" meant "only the relevant portions of what might physically be called a document", even if that was part of only one page. In **Lazin** they were dealing with a book or ledger of accounts which contained references to customers of the bank in question which were not involved in any of the relevant transactions at all. Even a single page contained items relating to several customers.

[70] In **Innovative Health Group Inc.** v. **Calgary Health Region**, 2008 ABCA 219, the Court reaffirmed the principles in **Lazin** in the context of a computer hard drive.

[71] In **Agnew** v. **New Brunswick Telephone Co.**, 2002 NBQB 179, at paragraph 76, the Court held that the disclosing party was "entitled to disclose only those portions of documents that it says may be relevant". **Agnew** cited **Lazin** in support of its conclusion. The documents in question included minutes of corporate meetings.

[72] The information which was allowed to be redacted in **Lazin**, **Innovative Health** and **Agnew** would likely have been permitted to be redacted under the **McGee** analysis also.

[73] Nova Scotia cases appear to accept, at least implicitly, that redaction is permitted on the ground of irrelevance, without having to show that it is required to protect an important interest.

[74] For instance, Justice Coady in **Fisher** v. **West Colchester Recreation Association**, 2010 NSSC 382, went through the document paragraph by paragraph, determining what was relevant and what was irrelevant. He ordered production of the relevant paragraphs and permitted the redaction of the irrelevant paragraphs to remain.

[75] Justice Coady referred to **Sydney Steel Corp.** v **Mannesmann Pipe & Steel Corp.** (1985), 69 NSR (2d) 389 (S.C., T.D.). The Court in **Sydney Steel** excluded the irrelevant portions of documents from production with the exception of those

parts which, if removed, “would likely distort the meaning and continuity of the document”. [paragraph 33].

[76] So it appears that the approach in Nova Scotia has been to permit redaction of irrelevant portions of documents unless there is good reason to disclose them, such as where redacting them “will distort the meaning and continuity of the documents”.

[77] In my view, the information sought to be withheld by BMO fits within the category of information in relation to which there is a good reason to redact. It is information concerning the clients’ private personal and financial affairs. The client account agreements at BMO recognize the private nature of the information. As stated by Justice Wright, at paragraph 18 of **MacGowan**: “Personal financial information is a very private and sensitive subject to most individuals.” That, itself, is enough to bring this information within the types of information that was excluded from production, in the line of cases ending with **McGee,** to protect an important interest. In the case at hand, there is also an additional element at play. The collapse of KHI appears to have resulted in significant losses to some of BMO’s clients. Revealing information which identifies clients as having

experienced such a significant loss could cause considerable harm to those clients. It could come to the attention of persons who would alter their financial or business dealings with those clients as a result of discovering that information. Therefore, unless the information meets the test of relevance or is reasonably calculated to lead to admissible evidence, it would be proper to redact it even under the **McGee** approach.

[78] Consequently, it is unnecessary for me to determine whether the principles in **McGee** apply in Nova Scotia. The **McGee** approach would not result in a different outcome. In addition, in the case at hand, the Plaintiffs are not left guessing the nature of the redacted information. Their motion for disclosure is made on the basis that they know the nature of the redacted information and the are asking for it to be disclosed. The redactions made by BMO would not prompt a disclosure motion simply out of concern over what the nature of the redacted information might be. As such, the rationale noted in **Glaxo** for requiring disclosure of irrelevant portions of documents is inapplicable.

[79] I, therefore, find that the information which does not have a semblance of relevance to the matters in issue, and is not reasonably calculated to lead to admissible evidence, may properly remain redacted.

CONCLUSION

[80] Based on the foregoing, I conclude that BMO must disclose, to the Plaintiffs, the following information in its List of Documents and Supplemental List of Documents, if it is currently redacted and relates to transactions involving KHI shares from December 1, 1999 to August 31, 2001, inclusive:

1. Information of named defendants in the Main Action alleged to be conspirators and of any accounts over which they were given trading authorization at BMO;
2. Information of accounts owned by Locke and of accounts over which she was given written trading authorization by others; and,
3. The names, telephone numbers, addresses, occupations, investment objectives, trading instructions, and margin status of BMO clients who traded in KHI stock with Locke as their IA,

including information in any client account agreement, or other document, establishing any investment account at BMO used in those transactions, irrespective of whether the client account agreement or other document was made before December 1, 1999.

[81] BMO has expressed legitimate concerns over the confidentiality of its clients' private information. The Plaintiffs' submissions show they recognize that is a legitimate concern. They point to their implied undertaking of confidentiality and no collateral use as addressing, at least partially, those concerns. They suggest reviewing the disclosed information with BMO's lawyer and sealing of documents as further options.

[82] The previously redacted information will be disclosed to the Plaintiffs, not the Court. At this stage, there is no need to seal the information. It will not be accessible to the public. It will only become accessible to the public if it is filed as evidence in a pre-trial motion or at trial.

[83] To avoid the private information of BMO's clients becoming unnecessarily accessible to the public, I find that BMO's disclosure requirements should be

subject to a protective confidentiality order. I conclude that, prior to filing any of the redacted information disclosed under items 2 and 3 in paragraph [80], as evidence in a pre-trial motion or at trial, the Plaintiffs must consult with the lawyer for BMO in an attempt to reach an agreement that the information is relevant, for the purpose it is sought to be filed, and, admissible. If no agreement is reached, the information cannot be filed as evidence without prior approval of this Court. Any of the information filed as part of any motion seeking such approval, shall be sealed from public view, pending further order of the Court.

[84] Unless I receive written submissions on costs, I will assume each party has decided to bear its own costs or the parties have resolved the issue of costs.

J.