SUPREME COURT OF NOVA SCOTIA

Citation: Smith v. Union of Icelandic Fish Producers Ltd., 2010 NSSC 396

Date: 20100331
Docket: SY 5889
Registry: Yarmouth

Between:

Roger H. Smith

Plaintiff

v.

The Union of Icelandic Fish Producers Ltd. (S.I.F.)

Defendant

Judge:	The Honourable Justice Charles E. Haliburton
Heard:	January 18, 2010, in Yarmouth, Nova Scotia
Final Written Submissions:	March 31, 2010
Counsel:	Kevin A. MacDonald, for Roger Smith Alexander S. Beveridge, Q.C. for The Union of Icelandic Fish Producers Ltd. (S.I.F.)

By the Court:

Assessment of Damages

[1] This matter is before the court at this time for an assessment of damages. At an earlier hearing before Hall, J., now retired, the issue of liability was heard and decided. That decision was appealed. Cromwell, J.A. delivered the decision of the Court of Appeal, and in doing so confirmed that the Defendant was liable for damages arising from a certain negligent misrepresentation, upon which the Plaintiff relied.

[2] Upon this portion of the trial coming before me, the Plaintiff offered evidence, the Defendant did not.

[3] The following paragraphs set forth what I understand to be the facts and the law which are to form the basis of the assessment of damages as reflected in the judgement delivered by Cromwell, J.A.

THE APPEAL DECISION

There Was a Sale of a Business Enterprise

[4] Mr. and Mrs. Smith sold their businesses and property to The Union of Icelandic Fish Producers Ltd. ("SIF") for the price of $6.5 million. As part of the transaction, Mr. Smith agreed not to compete with SIF for five years. He did this because SIF assured him that there was a place for him with the company which would provide him with a substantial wage. After the sale was completed, it became clear that there was not and never had been, any place for Mr. Smith with SIF.

[5] Mr. Smith sued SIF for negligently misrepresenting that there was a place for him with the company. (He also claimed there had been an oral contract of employment, but that claim was dismissed at trial and there was no appeal with respect to it.) SIF defended and counterclaimed. It said that Mr. Smith had breached the Non-Competition Agreement and failed to prepare a report for which SIF had paid him $25,000.

[6] The issue of liability only was tried by Hall, J. The judge found SIF liable to Mr. Smith in negligent misrepresentation and set aside the Non-Competition

Agreement. With respect to SIF's counterclaim, the judge found in SIF's favour and directed that the $25,000 paid by SIF to Mr. Smith should be set off against any damages payable to him by SIF. He went on to say;

> **"...SIF assured Mr. Smith that there was a place for him with SIF when SIF knew this was not the case. ...these representations (are) actionable."**

The Background of the Deal

[7] Mr. and Mrs. Smith established Sans Souci Seafoods Limited, a salt fish processing and marketing company. Mrs. Smith was the sole shareholder but Mr. Smith was the driving force in the business and had a beneficial interest in the shares.

[8] SIF is an established Icelandic fish processing company. It was one of Sans Souci's principal suppliers of raw fish and the two companies had been doing business since 1989 or 1990. Mr. Smith testified that a high level of trust had always existed between the two companies.

[9] In response to an inquiry from Mr. Smith, SIF expressed interest in buying Sans Souci. The $6.5 million transaction resulted.

[10] A letter of intent had been signed. It did not mention a Non-Competition Agreement nor Mr. Smith's employment with SIF.

[11] Mr. Smith was assured by SIF throughout that there was a role for him with the company. His solicitor, shortly after the sale had taken place, confirmed Smith's understanding of what had been negotiated between he and Mr. Kristjansson in a letter to the lawyer for S.I.F. This letter said:

> **"...In discussing the Non-Competition Agreement during negotiations [Mr. Smith] understood that there was a place for him in providing consulting services to your client over the period of the Non-Competition Agreement. He understood that this would be discussed and worked out as part of the Non-Competition Agreement. Exact terms were not discussed at the time only the concept."**

[12] There was conflicting evidence at trial about whether the parties discussed Mr. Smith's employment at the time of closing.

[13] After the closing, Mr. Smith went to considerable lengths to try to tie down his place with SIF. He travelled to Newport News to meet with Mr. Kristjansson. He received no further commitment and was told that Mr. Kristjansson had not had a chance to discuss the matter with the Board. Mr. Kristjansson testified that he did not know the purpose of that meeting and that nothing was brought up about employment nor of a consultancy agreement with Mr. Smith.

[14] Finally, in January, 1998, Mr. Smith travelled to Iceland , went to the appellants' office and met with Mr. Kristjansson. Mr. Smith testified that Mr. Kristjansson told him that there would be a meeting of the Board the next morning and that he would take the matter up with the Board so that he and Mr. Smith should meet later in the afternoon. The following day, Mr. Kristjansson indicated that the Boards' decision was that they had no place for Mr. Smith in their organization.

[15] In the spring of 1998, Mr. and Mrs. Smith invested $5 million in a lobster holding pound, but that venture was unsuccessful and their new company went bankrupt. In 2000, the Smiths again became involved in marketing salt fish which,

Mr. Smith acknowledged, was in contravention of the Non-Competition Agreement with SIF.

The Trial Findings

[16] The conclusions of Justice Hall, as accepted in the appeal decision, are set out as follows:

> (a) There was no contract of employment between Mr. Smith and SIF;
>
> (b) SIF negligently made a misrepresentation with respect to employment for Mr. Smith;
>
> (c) Mr. Smith signed the Non-Competition Agreement as a result of that misrepresentation and was, therefore, not bound by that agreement;
>
> (d) Mr. Smith suffered detriment and was entitled to damages flowing from the misrepresentation and;
>
> (e) SIF was entitled to set-off against any damages proven by Mr. Smith of $25,000 which it paid to Mr. Smith to produce a report which he failed to produce.

[17] With respect to the counterclaim, the judge found that Mr. Smith owed SIF the $25,000 which it had paid to him for the report he had not completed. That amount was to be set-off against any damages recovered by Mr. Smith.

[18] On his review, Cromwell, J.A. commented on this misrepresentation in the following terms:

> **"According to the evidence called on behalf of SIF at trial, this representation was not simply made carelessly but with knowledge it was false. Mr. Kristjansson's evidence couldn't have been clearer that there was never any interest in giving Mr. Smith a role in the company. There never was, to Mr. Kristjansson's sure knowledge, "...a place..." for Mr. Smith with SIF ..... I would not disturb the judge's finding that Mr. Smith, in fact, relied on SIF's representations", (para 99).**

[19] There was misrepresentation, and there was reliance on that misrepresentation.

The Applicable Law

[20] It was accepted by Cromwell, J.A., that Mr. Smith had proved detriment as had been the conclusion of the judge at trial. He set out the relevant law in the following terms;

"The general rule is that victims of negligent misrepresentation should be restored to the position they would have been in had the misrepresentation not been made: see, e.g. Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co., [1991] 3 S.C.R. 3 at pp. 14-15. In this case, Mr. Smith says (and the judge accepted) that he would not have signed the Non-Competition Agreement absent SIF's assurance that there was a place for him with the company."

"Following this description, damage or detriment, as an element of the cause of action in negligent misrepresentation, may be understood to mean an injury rather than a sum of money to compensate for its infliction. Consistent with the view, the House of Lords approved the following description of what actual damage means in Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd. (No. 2), [1997] H.L.J. No. 52"

"...any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage..."

(my emphasis)

" The House thus recognized that losing the chance to bargain for different terms or being subject to onerous provisions in covenants may constitute damage or detriment for the purpose of determining when a cause of action in negligence is complete. Similarly, in Manuge v. Prudential Assurance Co. Ltd. (1977), 27 N.S.R. (2d) 183; N.S.J. No. 667 (Q.L.) (S.C.T.D.), Hart, J. (as he then was) recognized that the loss of the opportunity to bargain for different terms was detriment for the purpose of deciding whether a cause of action in negligence had ben established. In my view, this approach makes eminent sense."

> **" In this case, Mr. Smith's reliance on SIF's representations at the very least deprived him of the opportunity to negotiate (or to try to negotiate) more acceptable terms or seek out another buyer. They also induced him, as the judge found, to subject himself to the provisions of the Non-Competition Agreement without the corresponding benefit of the place with SIF that he had been assured was there for him. These are the sorts of detriment or damage recognized by the House of Lords in Nykredit and by Hart, J. in Manuge. In my opinion, in the context of the separate trials of liability and damages in this case, that is sufficient to permit Mr. Smith to have the opportunity to prove his damages at an assessment if he can."**

My Conclusions

[21] A number or reported cases have been cited by counsel in addition to those already named. They have assisted in forming the context in which I intend to assess the damages which will be allowed. One of those, while very different in my view from the present case is **Wiebe v. Gunderson** Vancouver CA031213 September 2004. The case involved the sale of a farm or ranch. It was the buyer who suffered from the misrepresentation. The buyer acquired a property with various deficits that made it worth a good deal less than the price paid. Having bought it, and having operated there for some years, the action was taken to have the price reduced retroactively, and to recover the lost profits and unanticipated expense. The court had the benefit of experts to help quantify the amount of appropriate damages. There the court recalled the 'traditional formula' and found

it "too rigid". The former, the court said, "overlooked consequential damages". Newbury, J.A. went on to say;

> **"The defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment.... The Defendant is bound to make reparation for <u>all the actual damages directly flowing</u> from the fraudulent inducement."**
>
> (my emphasis)

[22] I cite this case as an example of a difficulty that has arisen in my mind (from the cases and, from counsels briefs) with respect to how strictly any alleged consequential damages need be proven. One of the issues that the court dealt with in **Wiebe** was "lost profits". Such a claim was allowed, in spite of the fact that it must import some speculation. At para. 40 of the decision Newbury, J.A. wrote;

> **"...despite my misgivings about the co-existence, in conceptual, of the right to recover "hypothetical" lost profits and the traditional formulation of the measure of damages in tort, it would seem that the trend in Canada..... I will therefore proceed on the basis that the plaintiff here may claim, and the court may award, damages to compensate for lost profits to the extent that they are proven to have resulted directly from the defendants' fraud, and subject to the usual rules of mitigation".**

[23] I am referred as well to **David vs. Halifax** 2004 NSCA 138, where our own Court of Appeal accepted that some hypothetical reasoning might be applied in assessing the circumstances, that the plaintiff might have been in, if not for the misrepresentation.

What Damages Were Suffered

[24] On the hearing before me there was very little in the way of evidence additional to that which had been heard on the trial. For the most part, none of that testimony was re-introduced as a result of objections from counsel to the effect that nothing new was being offered. On the trial, Hall, J. had found Mr. Smith to be a credible witness and he accepted his evidence as a reliable reflection of what representations were made prior to the closing of the sale of this undertaking and of course, the signing of the Non-Competition Agreement. On this hearing there is no evidence except that which was heard from Mr. Smith who said; "I would not have signed the Non-Competition Agreement", if there had been no offer of employment with SIF. He testified to that position in the sure knowledge that without his signature on the Non-Competition Agreement there would have been no sale. I make a finding then, as I believe Hall, J. did before me, that Smith was

induced to sign the Non-Competition Agreement on the basis of the offer of a position with SIF which would have paid him as a consultant $100,000.00 a year for five years together with expenses incurred by him in connection with that work. His agreement to sign, and implicitly his concurrence in the sale of the enterprise, was gained on the basis that he would have this continuing benefit, the details of which were outlined in the letter his then solicitor wrote to that of SIF and as quoted earlier.

[25] Giving evidence before me, Smith confirmed that the Non-Competition Agreement would preclude him from entering into the salt fish business but that it did not remove the possibility that he might engage in some other enterprise involving the fishery. Indeed he did concede that there was, in the back of his mind, even then, the prospect of engaging in the lobster market.

[26] Smith's evidence is to the effect that he was looking forward to international travel on behalf of SIF and or the Icelandic parent operation. He was well aware of their plants located in other areas of the world specifically mentioning a recent acquisition in Spain. He believed his knowledge, experience and contacts in the world of salt fish would be of benefit to the defendants and obviously he looked

forward to the travel and the status of this new engagement. After he realized that there was no position for him with the defendants, he testified that, as an entrepreneur, he became “bored” and decided to prepare to participate in the lobster marketing industry. At some point in 1998 the wheels were set in motion to develop the physical plant necessary to commence operations in that business. Apparently some five and a half million was invested by the Smiths in this new venture which ultimately failed. His evidence is they began buying lobster in the summer of 1999. Then, in late 1999, having concluded that he was not bound by the Non-Competition Agreement because of the failure of the defendants to employ his services as agreed, he and Mrs. Smith re-entered the salt fish business with the incorporation of Galeco Trading Company Limited. This venture also turned out to be a failure when a downturn hit the salt fish industry.

[27] There are in evidence financial statements for the years December 2000 through October 2006. The statements indicate that the firm was in operation for the last 73 days of 1999. Effectively then, the plaintiff was in breach of his Non-Competition Agreement from October of 1999.

[28] The plaintiff's claim for damages is set out at page 29 of his post hearing brief as follows;

> **i. Special Damages - $500,000.00 loss of employment income and $5,000.00 for travel expenses (for the trips to Virginia and Iceland);**
>
> **ii. From the above $505,000.00 should be deducted the $25,000.00 determined owing to S.I.F. leaving a balance of $480,000.00;**
>
> **iii. General Damages - $5,000.00 - $10,000.00;**
>
> **iv. Aggravated Damages - $25,000.00 - $35,000.00;**
>
> **v. Pre-Judgement Interest for 9.2 years as follows:**
>
> **- 5% on Specials = $220,800.00;**
>
> **- 2.5% on Generals and Aggravated Damages**;

[29] The detail in item two acknowledges the validity of the counter claim of $25,000.00 found to be owing to SIF on the original trial.

[30] An earlier claim seeking compensation for his losses in lobsters and Galeco has been abandoned. Had it not been so, I would have ruled them not to be recoverable as not flowing "directly" from the promise of a position.

[31] Having reviewed the transcript of the proceedings, hearing the evidence adduced and the law which has been advanced by counsel on this application, I do not find the situation to be one which would entitle the plaintiff to aggravated damages. The conduct of SIF and it's representatives was not abusive. This was a business arrangement between business people. There was a mis-representation acted upon by Smith. While the evidence is that there was some prevarication after the event as to whether or not there was employment for him, I concluded there was not such harsh and arbitrary treatment as to entitle him to more than his actual losses flowing directly from that cause.

[32] As observed in the cases, the plaintiff is entitled to recover as damages, a sum representing the financial loss flowing directly from his alteration of position under the inducement of the (fraudulent) or negligent representations of the defendants. As described in **Queen vs. Cognos Inc.** [1993] 1 S.C.R. 87, 1993 CarswellOnt 801 the object is to put the plaintiff in the position he would have been in had the misrepresentation not been made.

[33] In my view his loss results from his **lost opportunity to bargain**. The bargain, as he understood it, was $6.5 million dollars for the business and assets and $500,000.00 for him as a consultant to be paid over five years with the added bonus of international travel and experience. It was on that basis that he was induced not only to sell the business, which had been paying him as much as $1,000,000.00 a year, but also to sign a Non-Competition Agreement for five years. Since the Non-Competition clause was obviously of no consequence if he was engaged on behalf of SIF in any event, he would have still been participating to some extent, in a business which had been his commercial life's work. From a commercial point of view, it is not unusual, at least in my experience, that the principal of a business which is being sold would continue as a consultant, drawing salary from the business which has been sold as a means of retaining their experience for the benefit of the business and arguably increasing the actual purchase price while charging/receiving it as salary

[34] If the representation had not been made, he would have had the choice of walking away from the deal, or negotiating a better price,or even arranging a direct payment to himself (a la Conrad Black) to compensate him for his agreement not to

compete. His evidence, which I am bound to accept , leads me to conclude that he would have exercised one of these or some other option.

[35] However, when Smith unilaterally repudiated the Non-Competition Agreement, it is my view that he abandoned any further claim to payment as a consultant. I find that he did so when Galeco took over the operation of that failed salt fish plant in late 1999. It follows then that I find him to be entitled to two years of that promised employment income or $200,000.00.

[36] In accordance with my earlier comments, I think him also entitled to his out-of-pocket expenses in relation to those futile meetings about the status of his employment. There are produced in evidence, $3,098.00 in receipts for airfare, which I understand to be attributable to that claim. As he argued in his evidence, there would be other incidental expenses and vehicular travel for which there can be no receipts. In the circumstances I find him to be entitled to $5,000.00 for travel expenses on that account.

[37] I would dismiss his claims for General and Aggravated damages as well as the claim for Solicitor Client costs. The cases I have reviewed where Aggravated

Damages and /or Solicitor Client Costs have been successfully advanced reflect circumstances and personalities very different from the present. The words that courts have used to describe the conduct of the offending party include “egregious, harsh, and arbitrary”. Such has been the conduct that it has resulted in the humiliation of the other, or a loss of esteem in the community, frequently leading to real mental distress. The evidence here does not meet that standard.

[38] It follows, I presume, that the plaintiff is entitled to party and party costs of the proceeding, his disbursements, and the $4,000.00 ordered in costs on the appeal,

[39] I will receive representations from counsel with respect to costs and interest accruing if there is no agreement.

[40] In summary then, the plaintiff will have judgement in the amount of special damages $200,000.00, travel expense $5,000.00, less counterclaim $25,000.00 for a total of $180,000.00 together with costs.

Haliburton J.