SUPREME COURT OF NOVA SCOTIA
Cite as: Giffin v. Soontiens, 2010 NSSC 254

Date: 20100604
Docket: Hfx No. 292594
Registry: Halifax

Between:

Gordon Giffin

Plaintiff

v.

Nicole Soontiens, Ilona MacAlpine,
XL Electric Limited, a body corporate,
Huntec Limited, a body corporate, and
CNCA Holdings Limited, a body corporate

Defendants

Judge: The Honourable Justice Glen G. McDougall

Heard: May 26, 2010

Written Decision: July 5, 2010

Counsel: John A. Keith and Andrew Taillon, on behalf of the plaintiff
George W. MacDonald, Q.C. and Jennifer Biernaskie, on behalf of the defendants

By the Court:

[1] A notice of motion was filed on behalf of the plaintiff, Gordon Giffin (henceforth the "plaintiff"), on March 5, 2010.

[2] Initially the plaintiff sought various kinds of relief, some of which were resolved by agreement of the parties subsequent to the filing of the motion documents. The Court is left to rule on whether the defendants are obligated to disclose:

(a) All TD Waterhouse account statements belonging to the Defendant Soontiens and MacAlpine from March 2007 to present day; and

(b) Disclosure of all records relating to all transactions of cash or cash equivalents greater than $3,000.00 on lines of credit controlled by the Defendants.

[3] On May 17, 2010 counsel for the defendants filed a motion for an order requiring the plaintiff to provide a complete response to a Demand for Particulars dated April 14, 2010. The defendants' Demand for Particulars was responded to by counsel for the plaintiff by way of an Answer to Demand for Particulars dated the 21st day of April, 2010.

[4] The response to each of the defendants two questions was the same:

> The demand is refused as it seeks evidence or a description of evidence and does not constitute a request for material facts necessary to answer the claim.

[5] It should be noted that the demand for particulars was made after the parties agreed to allow the plaintiff to file a second amended statement of claim and for the defendants to file their amended defence. These new pleadings were filed with the Court on April 16, 2010 and April 29, 2010, respectively.

[6] According to Civil Procedure Rule 38.08(5) the demand for particulars is not to be filed with the Court. Rule 38.09(1) however requires the answer to the demand for particulars to be filed. Rule 38.09(2) requires the answering party to repeat each numbered demand and provide either: (a) a response which then becomes part of the pleading; or (b) a refusal to respond and the reason for the refusal. In this way both the question and the response find their way into the Court record.

[7] Counsel agreed that the two motions are closely intertwined and so presented their arguments on both motions concurrently.

[8] The Court's ruling on the defendants' motion for further particulars of the plaintiff's claim will be addressed first. This ruling will affect the defendants' obligation to provide the further disclosure sought by the plaintiff in the other motion.

DEFENDANTS' MOTION FOR FURTHER PARTICULARS:

[9] Beginning with the defendants' motion for further particulars, the nature of the request is found in the demand for particulars sent to the plaintiff's counsel on or about April 14, 2010. The demand reads as follows:

> 1. With respect to paragraphs 26 to 28 of the Second Amended Statement of Claim, the particulars of the time period over which the repayment of the alleged loan from Tibor Berta occurred;
>
> 2. With respect to paragraph 29(b) the date by which "any loans to Berta had been repaid or resolved".

[10] Both of these requests purport to seek information that would help to establish a time frame during which the alleged actionable conduct of the defendants took place.

[11] More particularly, it would establish the date when the alleged loan from Ms. Soontiens' and Ms. MacAlpine's father, Tibor Berta, was finally repaid. The likely impact this would have on the defendants' disclosure obligations is obvious. Indeed, the defendants in their written submissions indicated:

> ....that the Plaintiff must be required to provide the material facts upon which he relies in relation to when the alleged loan was 'repaid' or 'resolved' prior to the determination of relevance of the documents sought. There is no basis to suggest that any banking records that post-date the alleged repayment of a loan are relevant to this proceeding.

Or, to paraphrase what was said by defendants' counsel in his oral submissions: "When does it stop?"

[12] Defendants' counsel also argued that his clients are entitled to know when the alleged loan – a loan which is specifically denied in their defence – was repaid or resolved so that they will know the case they have to meet. He submits that it would be unfair to his clients to have to provide on-going disclosure of their personal banking records beyond the date when the plaintiff alleges the loan was repaid or resolved.

[13] The plaintiff, through counsel, submits first and foremost that the further particulars asked for constitute not material facts but rather evidence by which the plaintiff intends to prove the facts supporting his cause of action.

[14] Furthermore, the plaintiff contends that he should not be required to provide information that would already be known to the defendants. He suggests they are best positioned to know the details of the alleged loan repayment or the arrangements made to resolve it. Reference was made to the case of **Rowe** v. **New Cap Inc.** (1994), 134 N.S.R. (2d) 52 (N.S.S.C.) where at para. 24 Justice W.R.E. Goodfellow stated:

> [24] It is the position of the defendants that the plaintiff is fully aware and has within his possession knowledge of all occasions where he has been successful on behalf of companies with which he is associated in securing financial handouts, loans, grants, subsidies, etc. In many cases the demand for particulars will not be granted where the knowledge sought is already possessed by the party presenting the demand. While not necessary to the conclusion I have reached, it appears clear that Mr. Rowe knows of what the defendant speaks, although he would undoubtedly categorize his dealings with government and governmental agencies somewhat differently.

[15] But in the case of **M.A. Hanna Co.** v. **Nova Scotia (Premier)** (1990), 97 N.S.R. (2d) p. 281 Glube, C.J.T.D. (as she was then) stated this at para. 11, page 284:

> [11] Normally at this stage of an action a Demand for Particulars is made essentially to allow a defendant to know the case he has to meet in order to prepare a defence, however, the law is clear that the court has a discretion as to whether and what particulars may be ordered. As stated in Odger's **Principles of Pleading and Practice in Civil Actions in the High Court of Justice** (22nd Ed.), at p. 155
>
> > It is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent. He is entitled to know the outline of the case that his adversary will try to make against him, which may be something very different from the true facts of the case. His opponent may know more than he does; in any event it is well to bind him down to a definite story. Particulars will be ordered whenever the master is satisfied that without them the applicant cannot tell what is going to be proved against him at the trial. But how his opponent will prove it is a matter of evidence of which particulars will not be ordered.

[16] In the case that is before me the defendants have already filed a defence. The rules, however, do not preclude them from seeking further particulars provided they do "not demand evidence or a description of evidence." [Reference Rule 38.08(2)]

[17] Rule 38.02 describes the general rules of pleading. The relevant portions of the rule are as follows:

> **General principles of pleading**
>
> **38.02** (1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.
>
> (2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
>
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.
>
> (3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.

[18] Rule 4.02 (4)(b) also offers guidance for the proper drafting of statements of claim:

> (4) The statement of claim must notify the defendant of all the claims to be raised by the plaintiff at trial, conform with Rule 38 – Pleading, and include each of the following:
>
> ...
> (b) a concise statement of the material facts relied on by the plaintiff, but not argument or the evidence by which the material facts are to be proved;

[19] This particular rule reiterates the requirement for providing material facts but not argument or the evidence by which the material facts are to be proved.

[20] Similarly, Rule 4.05(4) offers guidance to a defendant(s) regarding a statement of defence. The relevant portions are:

> (4) The statement of defence must notify the plaintiff of all the defences to be raised at trial, conform with Rule 38 – Pleading, and include each of the following:
>
> ...
>
> (b) a statement of which of the facts pleaded in the statement of claim are admitted, which are not admitted only because the defendant has insufficient knowledge to admit or deny them, and which are denied;
>
> (c) a concise statement of the defendant's version of the material facts, if the defendant will seek to prove a different version of the material facts from those in the statement of claim;
>
> (d) a concise statement of the material facts relied on by the defendant for any further defence, but not argument or the evidence by which the material facts are to be proved;

[21] The question for this Court to decide is whether the information sought by the defendants is:

> (i) material fact as opposed to evidence;
>
> (ii) needed to allow the defendants to know the case they have to meet;
>
> (iii) needed to prevent them from being taken by surprise at trial;
>
> (iv) needed to limit and define the issues to be tried.

[22] Based on my review of the allegations continued in the plaintiff's statement of claim, taken as a whole, the proof that a loan existed between Tibor Berta and the defendant, XL Electric Limited, or between Mr. Berta and his two daughters but with ultimate responsibility for repayment falling to XL Electric Limited, is a key element of the plaintiff's cause of action. Evidence of repayment by the company through whatever means or evidence that the loan has been "resolved", to use the words of the plaintiff, will help support the plaintiff's contention.

[23] The amended statement of claim at paragraph 26 clearly indicates when the plaintiff alleges that the defendants, again, to use the words of the plaintiff, "hatched a plan designed to:

> (a) repay monies owning to Berta; and
>
> (b) Exploit the Class A shares to oppressively pay themselves unequal dividends contrary to Giffin's reasonable expectations and the underlying agreement of equal treatment."

This is stated to have begun in 2005.

[24] Paragraph 27 contains an illustration of how this was carried out. It is clear that this was not intended to be an exhaustive list but rather an example of how the alleged loan was either repaid or resolved.

[25] Paragraph 28 provides further particulars of the alleged manner in which the loan, if indeed there was such a loan, was repaid using XL Electric's funds.

[26] In light of the Defendants' specific denial of any loan from Mr. Berta for the start-up of XL Electric Limited (which is contained in paragraph 3 of the second amended statement of defence), further particulars pertaining to the "time period over which the repayment..... occurred" or "the date by which any loans..... had been repaid or resolved" would not appear to be necessary in order to allow the defendants to properly prepare their defence nor is it necessary to prevent them from being taken by surprise at trial.

[27] The time frame begins sometime in 2005 according to the second amended statement of claim. Further details as to how and when the alleged loan was retired constitutes evidence and not material facts.

[28] While I can understand why the defendants might want this information, it is not something the Court is prepared to order under Rule 38.

[29] It remains open to the defendants to seek out this additional information by way of interrogatories (Rule 19) or further discovery of the plaintiff (Rule 18), if they so choose. The defendants' motion is, therefore, dismissed.

PLAINTIFF'S MOTION FOR DISCLOSURE:

[30] I will now proceed to deal with the Plaintiff's motion for disclosure of:

(i) All TD Waterhouse account statements belonging to the defendants Soontiens and MacAlpine from March 2007 to present day; and

(ii) Disclosure of all records relating to all transactions of cash or equivalents greater than $3,000 on lines of credit controlled by the Defendant.

[31] Part 5 of the rules of civil procedure, comprising Rules 14 to 21, deal with disclosure and discovery. Rule 14.08(1) states:

> 14.08 (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

[32] The determination of relevance, according to Rule 14.01, is no different prior to trial (or in this case in the interim occasioned by the adjournment of the trial) than it would be at trial.

[33] The requirement of full disclosure continues from the time the action is commenced until the issues have been finally decided. Rule 15.02(2)(c) states:

> 15.02 (2) The party must also disclose information about all of the following:
>
> (c) a relevant document newly created, discovered, or acquired.

[34] Rule 15.04 obligates a party "immediately on becoming aware of any of the following, deliver to each other party a supplementary affidavit disclosing documents:

> (a) a relevant document in the actual possession of the party is not covered by the affidavit disclosing documents;
>
> (b) a further relevant document is found or acquired;
>
> (c) a relevant document claimed to be privileged is no longer claimed to be privileged."

[35] In this particular case disclosure was made under the 1972 Rules but, regardless, the concept of full disclosure has not changed. The actual mechanics of exchanging documents might be different and relevance is defined to mean the same as relevance at trial but neither curtail the fundamental requirement for full disclosure.

[36] In an earlier ruling I borrowed from The Law of Evidence in Canada, (Second Edition) by Sopinka, Lederman & Bryant in determining what is meant by relevance. It bears repeating:

> [19] At p. 24 of The Law of Evidence in Canada the authors quoted from the decision of Pratte, J. in **R.** v. **Cloutier**, [1979] 2 S.C.R. 709, who accepted a definition from an early edition of Cross on Evidence:
>
> > For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have a real probative value with respect to the latter.

[37] Later in my ruling I again took the liberty of quoting from this highly regarded source when I stated:

> [22] I will once again quote from The Law of Evidence in Canada by Sopinka, Lederman & Bryant where at p. 25, para. 2.36 they wrote:
>
> > The first step in determining what is relevant is to identify the facts that are in issue in the case.
>
> [23] The authors further wrote at para. 2.38 on the same page 25:
>
> > 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.
>
> [24] And finally at p. 26, para. 2.40 the authors wrote:
>
> > In a civil case, the facts in issue are established by the pleadings.

[38] I agree with the approach taken by Justice Arthur LeBlanc (of this Court) in the case of **Halifax Bridge Commission** v. **Walter Construction Corporation**, 2009 N.S.S.C. 403, when he stated at para. 16:

> I am of the view that the object of the rule is to make available information and documents that are likely to lead to relevant evidence at trial, which I take to mean that the information will probably lead to relevant evidence at trial.

[39] Justice LeBlanc's approach blended Rule 18 and, in particular, Rule 18.13(1) and (2), which obligates a witness at discovery to produce or provide access to a document, electronic information or other thing and to answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence with the general presumption for full disclosure in Rule 14.08 and the specific duties contained in Rule 15.

[40] Based on my understanding of the Rules coupled with my review of the pleadings, the information sought to be disclosed is relevant to the facts in issue in this particular case and so ought to be disclosed.

[41] The requirement for disclosure is ongoing and mutual. I therefore grant the plaintiff's motion for disclosure of the banking and financial information requested.

[42] After hearing from both counsel on the issue of costs, the Court orders costs of $500.00 plus reasonable disbursements payable by the defendants to the plaintiff within 30 days from the date of this decision.

Justice Glen G. McDougall