SUPREME COURT OF NOVA SCOTIA

Citation: Saturley v. CIBC World Markets Inc., 2011 NSSC 129

Date: 20110330
Docket: Hfx No. 305635
Registry: Halifax

Fredrick Thomas Saturley — Plaintiff

and

CIBC World Markets Inc. — Defendant

DECISION on PARTICULARS and ORDER OF PRESENTATIONS

Judge:	The Honourable Justice Gerald R. P. Moir
Date of Hearing:	March 22, 2011
Date of Last Written Submissions:	March 29, 2011
Counsel:	George MacDonald, Q.C., Jack Graham, Q.C., and Kiersten Amos, for plaintiff Michael S. Ryan, Q.C. and John A. Keith, for defendant

Moir, J.:

Introduction

[1] The trial of this action is scheduled to begin on May 2, 2011. I heard several motions in my capacity as trial judge.

[2] Among other things, I ruled on issues about particulars, and I reserved on the plaintiff's motion to require the defendant to proceed first with its case on liability. This decision rules on the order of presentations, and I am supplementing my reasons on the particulars because the two are related.

Particulars

[3] Mr. Saturley claims, among other things, that he was wrongfully dismissed by CIBC World Markets carrying on business as "Wood Gundy". Wood Gundy pleads justification based on unauthorized discretionary trades.

[4] Last February, I ordered Wood Gundy to provide particulars of each offending trade. On that same day, Mr. Keith wrote to Mr. MacDonald saying that

"Mr. Saturley took discretion on a continuous and ongoing basis in respect of the following clients". Seven clients are named.

[5] Mr. Keith went on to stipulate for Wood Gundy that "all trades in respect of these client accounts were conducted on a discretionary basis". That is, "Mr. Saturley [assumed] the authority to trade without proper knowledge and approval."

[6] Mr. Keith later named two further clients and stipulated that trades made for the first on February 19, May 5, July 22, and August 29, 2008 were unauthorized and, for the second:

> On August 18, 2008 two mutual funds were sold and the proceeds were used to fund the margin required for a short option combination strategy involving iShares Brazil on September 3, 2008.

Finally, "This list is not comprehensive in that we are continuing in our investigations."

[7] On February 18, Mr. Keith provided the account numbers for these nine clients. He said, "We allege discretionary trading from at least June 2007 through to September 2008."

[8] Noting that the order required particulars on each trade alleged to be offensive, Mr. Graham complained for Mr. Saturley that the general statements were insufficient. He requested "the particulars for each trade...which CIBC relies on in its allegation of discretionary trading". He wanted "the date of each trade and reference to the corresponding document where the trade information can be found".

[9] Mr. Graham repeated his demand several times. On March 14, 2011, Mr. Keith responded,

> We believe that our answer regarding general discretion for every trade for which authority was required is responsive and appropriate. If we rely on a narrower subset of trades, we will advise immediately.

By that time, Wood Gundy had discovered numerous of Mr. Saturley's former clients.

[10] I decided that I would not order Wood Gundy to produce particulars more specific than what is found in its statement of defence and the correspondence after

my order of February 9, 2011. I said that Mr. Saturley could have the correspondence marked at trial and it would serve as a statement of particulars.

[11] As I see it, Wood Gundy has made it clear that it will attempt to prove that Mr. Saturley's general practice involved his exercising discretion that was not authorized. We do not expect the evidence for the defendant to go beyond the parameters of the trades specifically referred to in the particulars and Mr. Saturley's general practices for the identified clients. If the defendant attempts to treat us to an examination of numerous specific trades beyond those parameters, and if it is permitted to do so through amendment of the particulars, the subject will fall within the limits for rebuttal evidence by the plaintiff.

Order of Presentations

[12] Mr. Saturley asserts that Wood Gundy bears the onus of proving that he engaged in unauthorized discretionary trading and that that amounts to just cause. As this is "a primary issue for trial", the employer should be directed to go first as in *Murphy v. Williams Operating Corp.*, [1997] O.J. 1292 (O.C.J.).

[13] Mr. Graham summarizes the argument for requiring Wood Gundy to go first:

> a) the burden of proof is on the Defendant to prove just cause which is a primary issue for trial, therefore the Defendant should present first;
>
> b) due to the lack of particulars provided, the Plaintiff is unable to reasonably anticipate the case he will have to meet with respect to the Defendant's allegations of discretionary trading;
>
> c) in any event, it is not reasonably possible for the Plaintiff to anticipate the Defendant's case with certainty, therefore, the Plaintiff will be required to split his case and be subject to cross-examination twice in order to properly respond to the Defendant's case if the order is not reversed; and
>
> d) most importantly, the prejudice to the Plaintiff, if required to present first and be subject to cross-examination on unknown allegations and be cross-examined a second time, is far greater than any potential prejudice to the Defendant should they be required to present first.

[14] A trial is usually begun by the plaintiff: Rule 51.05(1)(a), but the trial judge "may direct any order of presentations": Rule 51.05(6). These Rules repeat the substance of, respectively, Rules 30.04(2) and 30.04(1) of the 1972 Rules. They, in turn, were taken almost word for word from the English Rules. *Parry v. Fraser*, [1977] 1 All E.R. 309 (Ch. D.) at p. 311 disclaimed "any intention to give any guidance as to the exercise of discretion" to start with the defendant's case. The discretion should be driven by the circumstances in each particular case.

[15] Usually, the party who asserts a cause or defence bears the onus. So, it is mundane to observe that the employer in a wrongful dismissal case bears the onus of proving just cause: *Burton v. Howlett*, [2001] N.S.J. 65 (C.A.) at para. 23.

[16] In some cases, a shift in the onus on an important issue could lead to a shift in the order of presentations so that the party who does not bear the onus is truly put in a responsive role, so that the party gets to hear the case against him before defending himself. The situation is more complicated when the party bears the onus on other live issues.

[17] Several courses of action are available in a case, like this one, in which there are several issues with one party bearing the onus on one, and the other bearing the onus on another issue. We have the discretion to:

(1) require Wood Gundy to begin on all issues, to be followed by Mr. Saturley's case, with Wood Gundy responding within the limits of rebuttal;

(2) require Mr. Saturley to begin but without presenting evidence on just cause, require Wood Gundy to deal with just cause in the first instance during its case, permit Mr. Saturley to present reply evidence in rebuttal;

(3) do the same, but work in some kind of sur-rebuttal to allow for Wood Gundy to present evidence on subjects that take it by surprise in Mr. Saturley's response evidence on cause;

(4) follow the usual course.

[18] The first course is the one requested by Mr. Saturley. It more closely adheres to Rule 51.05(6), which does not contemplate splitting cases. The second appears to follow what happened in *Murphy v. Williams* and what happens in some defamation cases that involve a plea of justification and in labour arbitrations on just cause. The third contemplates a "ping pong back and forth to reflect the shifting evidentiary burdens", to adopt Mr. Ryan's metaphor.

[19] The first course could lead to greater procedural fairness in some dismissal cases. However, the statement of claim in this case alleges both wrongful dismissal and intentional interference with economic interests. Also, Mr. Saturley seeks damages beyond the usual calculation over a notice period. He has sued for general damages related to "loss of clients and business" and "damage to his ability to earn income", as well as loss of income, benefits, and options over the notice period, aggravated damages, and punitive damages. Furthermore, he defends a counterclaim in debt.

[20] Requiring Wood Gundy to go first on all issues would give it the same complaints on the economic tort and the damages issues as Mr. Saturley asserts on the justification issue.

[21] This is not a straight forward wrongful dismissal case. It contains many issues. A whole month has been set aside for the trial. Wood Gundy bears the onus on one important issue, but that does not justify requiring it to put forward its entire case first because there are numerous issues on which the plaintiff bears the onus.

[22] Turning to the second and third courses, to allow a party to split his case can lead to a nightmare of procedural difficulties. There is a hint of that in my posit of the ping pong alternative. Neither course is what Mr. Saturley asks for, but something of the kind was followed in the case he relies on, *Murphy v. Williams*.

[23] Splitting a case may possibly work justice when the split issue is clearly separated from the other issues of fact. That is not the case here. Evidence on cause will also go to the alleged tort, and to some of the claims for damages.

[24] An order of presentations that permits Mr. Saturley to split his case risks complications about when he must present evidence that goes to more than one issue. These complications would put us at risk of procedural unfairness. There is also a risk of procedural unfairness in confining Wood Gundy's response to rebuttal.

[25] These risks are to be weighed against the single benefit: the party who does not bear the onus on one issue gets to hear first the case it must meet on that issue.

[26] The benefit is not as great as may first appear. I do not agree that Mr. Saturley is so deeply in the dark about Wood Gundy's position on just cause that masses of relevant evidence he has to give will be appropriate rebuttal. Through extensive discoveries and the particulars, Mr. Saturley should have a fair appreciation of the evidence to be presented against him on just cause. He might be surprised, but that is what rebuttal is for.

Conclusion

[27] The prominence of issues other than just cause and the overlap of evidence going to those issues and just cause, preclude a simple reversal of the presentations by plaintiff and defendant and the alternative of permitting cases to be split according to onus would give rise to serious risks of procedural unfairness. Therefore, I am not prepared to allow a departure from the usual order of presentations.

J.