SUPREME COURT OF NOVA SCOTIA
Citation: Leigh v. Belfast Mini-Mills Ltd. , 2011 NSSC 300

Date: 20110720
Docket: Hfx 272748
Registry: Halifax

Between:

Gillian Leigh, Wanda Cummings and Toltec Holdings Incorporated, carrying on business as Mabou Ridge Centre for Holistic Living

Plaintiffs

v.

Belfast Mini-Mills Ltd. and International Spinners Ltd.

Defendants

Revised decision:	The text of the original decision has been corrected according to the erratum dated July 27, 2011. The text of the erratum is appended to this decision.
Judge:	The Honourable Justice Patrick J. Duncan.
Heard:	November 22 and 23, 2010, in Halifax, Nova Scotia
Final Written Submissions:	January 14, 2011
Counsel:	Gillian Leigh and Wanda Cummings, self represented, and on behalf of all plaintiffs Robert K. Dickson, Q.C. for the defendants

By the Court:

INTRODUCTION

[1] The plaintiffs hold an unwavering conviction in the unassailability of their case. They are dismissive of the defendants' position characterizing it repeatedly as a "sham defence". They seek, in the present motions, to abrogate the procedural and substantive rights of the defendants to obtain evidentiary disclosure or to have the merits of their position adjudicated upon in a trial. For reasons that follow, the plaintiffs will not succeed in these efforts. The result will guide the parties on the future conduct of this action.

[2] It is alleged that in 1998 and 1999 the defendants supplied equipment of their own manufacture ("old equipment") to the plaintiff Gillian Leigh, and Robert Milne, her then husband, for use in fibre processing and end product craft production. The couple operated a business that used this equipment until 2002.

[3] In 2004, Ms. Leigh and her co-plaintiffs contracted with the defendants to "upgrade" the "old equipment" and to provide "new equipment" to enable the plaintiffs to carry on the same type of enterprise. The equipment was delivered

and the defendants offered training to the plaintiffs in how to operate the equipment.

[4] The plaintiffs allege that the equipment was defective and incapable of producing either the quantity or quality of product for which the equipment was intended. They say that the training was inadequate and/or ineffective.

[5] In 2006, after failed attempts between the parties to resolve complaints about the equipment, the plaintiffs commenced an action against the defendants for damages arising from the failure of their business.

ISSUES

[6] The litigation has been contentious. During, and in the wake of, an abridged January 2008 discovery examination of Ms. Leigh disputes arose that are unresolved and are the subjects of a series of motions before me. I will outline those.

Summary Judgment: The plaintiffs seek summary judgment on the pleadings; or on evidence.

Abuse of Process: In the further alternative, the plaintiffs allege that the defendants have conducted themselves in such a way as to constitute an abuse of process. The remedies sought include:

- strike the defence and enter judgment for the plaintiffs;
- expunge affidavit evidence;
- prohibit the defendants from compelling further discoveries or disclosure.

Convert Action to Application: Should the motions for summary judgment or to otherwise strike the defence be unsuccessful, and the litigation is to continue, then the plaintiffs move that this action be converted to an application.

Disclosure/Production by the defendants: If the matter is to proceed, then the plaintiffs seek that the defendants provide further disclosure.

Undertakings: During the discovery, certain undertakings were alleged to have been given by plaintiffs' then counsel. Those have not been satisfied and the defendants seek an order to force compliance. The plaintiffs object to any further disclosure.

Discovery Examination of the plaintiff Leigh: During the discovery, her counsel instructed Ms. Leigh not to answer certain questions. Counsel for the defendants discontinued his examination in order to seek a court ruling to force the witness to answer his questions. The defendants seek an order to force Ms. Leigh to return to complete the discovery and to answer the disputed questions. The plaintiffs object to any further discoveries of either Ms. Leigh or Ms. Cummings and seek an order banning the defendants from doing so.

Production of Documents by the plaintiffs: The defendants also seek an order to force production of documents it believes to be in the possession or control of the plaintiffs and which they refuse to produce.

ANALYSIS

Summary Judgment

[7] The plaintiffs seek an order "… to strike the defense in its entirety, or in the alternative … for summary judgment based on there being no genuine issue for trial." The arguments advanced by the plaintiffs trigger consideration of both **Nova Scotia Civil Procedure Rules 13.03** and **13.04**. I will analyze these two questions separately.

Summary judgment on Pleadings

[8] The applicable provisions in **Rule 13 - Summary Judgment** are:

> **Scope of Rule 13**
>
> 13.01 (1) This Rule allows a party to move for summary judgment on the pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial.
>
> ...
>
> **Summary judgment on pleadings**
>
> 13.03 (1) A judge must set aside … a statement of defence, that is deficient in any of the following ways:

(a) it discloses no …basis for a defence or contest;

(b) ...

(c) it otherwise … sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

(a) judgment for the plaintiff, when the statement of defence is set aside wholly;

(b) …

(c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;

(d) ….

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

(4) …

(5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:

> (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
>
> (b) the outcome of the motion depends entirely on the answer to the question.

[9] In the circumstances of this case **Rule 13.03(1) (a)** and **(c)** create the threshold tests that apply:

> (1) Does the Statement of Defence disclose a basis for a defence or contest?
>
> (2) Does the Statement of Defence set up a defence or ground of contest that is clearly unsustainable when the pleading is read on its own?

The Pleadings

[10] In a statement of claim filed in October of 2006, the plaintiffs plead that the defendants are liable for breach of contract, negligence and negligent misrepresentation. They claim for:

(a) lost net profit

(b) cost of the Mini-Mill

(c) wasted expenses including costs incurred in repairing and installing the Mini-Mill, training costs and costs associated with running the Mini-Mill

(d) damages related to charges incurred in reimbursing customers whose fiber was destroyed in the Mini-Mill

(e) loss of goodwill

(f) interest on loans borrowed to purchase the Mini-Mill that could not be repaid due to the failure of the Mini-Mill to produce revenue

(g) general damages

(h) prejudgment interest

(i) costs

(j) such further and other relief as the court deems just

[11] The defendants contest these claims and in their Defence plead that the old equipment was supplied under contract with Ms. Leigh's former husband and there was no contractual relationship or privity of contract with any of the plaintiffs. They deny any warranty or representation as to the continued operation, functioning or capacity of the original used equipment which was approximately six years old as at the time of its repair and set up.

[12] The new equipment, supplied in or about 2004, is pleaded to have fully performed and worked properly and effectively upon delivery.

[13] The defendants have advanced the position that the plaintiffs lacked training, experience, ability and knowledge in the proper processing of fiber and operation of the equipment. They say that the plaintiffs knew, or ought to have known, that the operation of the mini-mill on a commercial basis required special skill, experience, knowledge, training and ability, all of which they lacked. They plead that they offered proper training to the plaintiffs who failed to complete it and failed to follow the proper procedures required for the successful operation of the equipment.

[14] At paragraph 22 of the Defence they include:

> 22. The Defendants state that if the plaintiffs suffered any loss or damage, such were caused by events or conditions unrelated to the incidents described in the Statement of Claim and are not the Defendant's responsibility.

[emphasis added]

[15] They further attribute the problems encountered by the plaintiffs to the "… poor quality of fiber and failure to properly wash and prepare fibers used in the equipment … "; to inadequate conditions for the storage and maintenance of equipment; and to damage caused by the plaintiffs to the equipment.

[16] They specifically deny:

- the existence of a contract for the supply of the old equipment.
- a breach of contract for the supply of the new equipment purchased.
- having provided poor quality equipment (they assert that the equipment was suitable for the purpose of producing quality products)
- that the product was not of merchantable quality
- negligence or negligent misrepresentation
- that the plaintiff suffered a compensable loss

Does the Statement of Defence disclose a basis for a defence or contest?

[17] **Civil Procedure Rule 38** sets out the requirements for pleadings, and particularizes the rules for pleading a defence.

[18] In my opinion, the defence complies with **Rule 38.02** and **38.05(c)** in that it sufficiently sets out the case that the plaintiffs must prepare for and they should not be surprised in a trial of the matter. It pleads material facts, but not the evidence. It properly identifies the persons with a relationship to the claim and what that relationship is. Defences advanced are put in the alternative and facts supporting the alternative defences are pleaded distinctly. Material documents such as contracts are identified.

[19] The basis of the defence is sufficiently disclosed.

Does the Statement of Defence set up a defence or ground of contest that is clearly unsustainable when the pleading is read on its own?

[20] Material facts, law and statutes relied upon are set out in the defence. The basis of the defence cannot be said to be "clearly unsustainable". To the contrary, if the defendants are successful in proving through evidence what is pleaded in the defence they may have a sustainable defence to some, or all of the plaintiffs' claims.

Summary Judgment on Evidence

[21] This motion is brought pursuant to Nova Scotia **Civil Procedure Rule 13.04** which reads:

> **13.04** (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[22] Bryson J. (as he then was), writing in *AFG Glass Centre* v. *Roofing Connection* 2010 NSSC 108, set out a very helpful analysis of the application of this section in circumstances where, as here, it is the plaintiff who seeks summary judgment:

> [13] Keeping in mind that it is the plaintiff who is moving for summary judgment, and who must establish that there is no "genuine issue" for trial, I would characterize the test and applicable legal principles in this way;
>
> (1) The plaintiff must show that, on uncontroverted facts, it is entitled, as a matter of law, to succeed; that is to say, that there is no fact material to the cause of action that is in issue;
>
> (2) The burden then shifts to the defendant to show evidence that the defence has a real prospect of success; that is to say that there is a genuine issue of fact material to the claim or defence, that must be decided before the case can be determined on its merits;
>
> (3) The responding party must put "its best foot forward" or risk losing. This requires more than a simple assertion, but requires evidence, United Gulf, supra;
>
> (4) If material facts are not in dispute, the court has an obligation to apply the law to those facts and decide the matter, Eikelenboom, supra;
>
> [14] To defeat a summary judgment application, a responding party cannot be coy about its true position. A vague assertion of factual disputes will not do. …

[23] The first question to address is whether the plaintiffs have shown that, on uncontroverted facts, they are entitled, as a matter of law, to succeed; that is to say, that there is no fact material to the cause of action that is in issue.

[24] The plaintiffs presented evidence by way of the following affidavits, with a significant amount of documentary evidence attached:

- Wanda Cummings filed October 14, 2010
- Wanda Cummings filed April 26, 2010
- Gillian Leigh filed April 26, 2010
- Wanda Cummings and Gillian Leigh filed June 10, 2010
- Keith Wild filed October 14, 2010
- Ghyslain Bouchard filed October 19, 2010

[25] The evidence of Ms. Leigh and Ms. Cummings provides detailed support for the elements of their claim.

[26] Mr. Wild and Ms. Bouchard provided expert opinion evidence in affidavit form, with the consent of counsel for the defendants, which consent was given for the purposes of these motions only.

[27] Mr. Wild has considerable experience in the textile industry and is a manufacturer and refurbisher of equipment used in that field. He attended at the plaintiff's place of business in April of 2007 to evaluate the Mini -Mills' equipment and to assess the knowledge and skills of Ms. Leigh and Ms. Cummings in their use of the equipment and production of textiles. He concluded that they were operating in "a clean heated facility", that their fibre preparation and knowledge about natural fibre was above average and that "they were sufficiently trained to operate each component [but that] they were misinformed about basic textile theory, principles, and standards. He found the equipment to suffer problems of "inadequate design" and a "poorly executed concept". He concluded that the machines did not have the capability of meeting the "achieve rates as claimed by the manufacturer".

[28] Ms. Bouchard attended at the plaintiffs' business in November 2007 and performed a "diagnostic assessment" of the equipment, "according to the objectives

given me by [the plaintiffs' then] counsel ... ." She too observed Ms. Cummings' and Ms. Leigh's work with the equipment and discussed their knowledge base. She concluded that "While they adhered to the training they were provided by the manufacturers and had a full understanding of fiber preparation prior to processing, I believe that the information they were given and relied upon did not inform them properly of textile theory and standards." As to the mill components, she concluded that "the overall design of the mill made it "impossible to produce a regular yarn with any quality and/or efficiency" and that "this mill set up is not conducive to running a viable business."

[29] The defendant submitted the affidavit evidence of Douglas Nobels, a co-founder of the defendant companies. He sets out a history of events that conflicts with that of the plaintiffs in a number of areas that are material to the cause of the action.

[30] He states that in 1997 the defendants sold a "picker, carder, and pencil roving equipment" to Mr. Robert Milne. He says that a "drafter machine and spinning machine" were sold to Mr. Milne in 1998, and then in 1999 Mr. Milne purchased a Skeinwinder machine. All of this equipment he says was purchased

by Mr. Milne. If accurate, then it may form the basis of the defence that there was no privity of contract with the plaintiffs as it related to that equipment.

[31] Mr. Nobles acknowledges that in November of 1999 a "4 spindle spinner, draw frame and slivermaker" were "purchased by Ms. Leigh" and Mr. Milne.

[32] Material facts are in contest as to who was the purchaser of some of the old equipment.

[33] There is some evidence, in the form of communications from Mr. Milne to the defendants, which supports the defendants' position that between 1998 and 2002, Mr. Milne was able to operate the equipment successfully. This runs contrary to the suggestion that the old equipment was defective or otherwise unsuitable for the purpose it was intended for.

[34] Mr. Nobles testified that in April 2004 the defendants were contracted to move the equipment from Beaver Cove to Mabou, in Cape Breton. In July and November 2004 a technician with the defendant companies attended to provide

training to the individual plaintiffs. He sets out evidence which contradicts allegations made by the plaintiffs, and which also support the defence:

i. Ms. Cummings exhibited problems in her technique;

ii. Proper training was offered to the plaintiffs;

iii. Ms. Cummings left the first day of training after one hour, missing the rest of the day; she did not attend for training on the second day;

iv. Recommendations for operation of the equipment were provided.

[35] Following this, two emails were sent by Ms. Cummings claiming to be "processing away at great speeds" and that the defendants "have produced some very worthwhile product. Yesterday alone we put through ten pounds without a hitch and we know we'll be doubling that in no time at all." These statements are evidence that is, on the face of them, contrary to suggestions that the equipment was not suitable for the purpose.

[36] Further evidence has been presented that in April of 2005 the physical conditions of the area where the equipment was set up were observed to be

unsuitable to milling, and that there was evidence of damage to some of the equipment.

[37] Mr. Nobles provided Invoices produced by the plaintiffs that could support the defendants' claim that the plaintiffs attempted to process fibre that was "mouldy, brittle, sticky, or dirty".

[38] The defendants produced evidence that there were customers of the plaintiffs who were satisfied with the product they obtained. This information runs contrary to the position being advanced by the plaintiffs' claim. Those same customers, who were neighbours of the plaintiffs, also speak to the personal problems of the individual plaintiffs, and in particular Ms. Cummings. It outlines the negative impact that these personal problems had on the plaintiffs' business and personal relations. This evidence relates directly to the allegation set out in paragraph 22 of the Defence where "other events or conditions" are alleged to be the cause of the plaintiffs' losses.

[39] Mr. Wild and Ms. Bouchard made their assessments in 2007, after the statements of claim and defence were filed. These two witnesses differ in some

ways as to their views of the knowledge and skill these plaintiffs had. In relation to training, but also as to the history of the equipment and its intended use, their respective opinions rest on the untested information supplied to them by the plaintiffs.

[40] Their observations of the equipment presumes that the equipment was in the same condition in 2007 that it was in 2005; that the plaintiffs had done nothing to create or contribute to damage to the equipment; that the knowledge base of the plaintiffs in 2007 was the same as in 2005; that the plaintiffs accurately conveyed to them the circumstances of their training and the information conveyed to the them by the defendants; that the plaintiffs accurately conveyed to them the manner in which the equipment was housed until 2005; and that the plaintiffs accurately reported on the types and quality of fibres being processed. The weight to be attached to the evidence of these witnesses is so intrinsically tied to the quality of the evidence of Ms. Leigh and Ms. Cummings that it can only be assessed after a trial.

[41] The defendants controvert facts alleged by the plaintiffs in support of their cause of action. A court's role on this motion is not to resolve these various

disputes of fact, nor to assess the relative strengths and weaknesses of the positions of the parties. The courts' role is to assess whether there is no fact material to the cause of action that is in issue. I conclude that the disputed facts are material to the causes of action and that the plaintiff is not, as a matter of law, entitled to summary judgment on the evidence.

[42] The second question - Is there evidence that satisfies me that the statement of defence raises a genuine issue for trial? - does not need to be addressed.

Abuse of Process

[43] The plaintiffs submit that the defendants have abused the court's process and seek remedies. **Civil Procedure Rule 88** codifies the authority of the court:

> **88.01 (1)** These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.
>
> **(2)** This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.
>
> **(3)** This Rule provides procedure for controlling abuse.

A number of remedies intended to control abuse are available to the court and described in **Rule 88.02** and **88.05**. They would, if appropriate on the facts, include the remedies sought by the plaintiffs. A pre-condition to ordering a remedy is the determination as to whether an abuse of process has taken place.

[44] The principles upon which a court will grant such a motion were discussed in *Toronto (City)* v. *C.U.P.E., Local 79*, 2003 SCC 63:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, 1994 CanLII 126 (S.C.C.), [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, 1989 CanLII 66 (S.C.C.), [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, 1990 CanLII 27 (S.C.C.), [1990] 3 S.C.R. 979, at p. 1007:
>
> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.
>
> …
>
> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc.* v. *Coles* 2000 CanLII 8514 (ON C.A.), (2000), 51 O.R. (3d) 481

> (C.A.), at para. 55, per Goudge J.A., dissenting (approved 2002 SCC 63 (CanLII), [2002] 3 S.C.R. 307, 2002 SCC 63)) … .

Unsustainable Defence

[45] The plaintiffs have repeatedly complained that the defendants have raised a "sham defence." They argue, in effect, that the defendants have advanced a defence that is frivolous and vexatious or otherwise unsustainable.

[46] This argument is removed from consideration as an abuse of process by **Rule 88.03**:

> **Unsustainable pleading**
>
> **88.03** (1) It is not an abuse of process to make a claim, or raise a defence or ground of contest, that may on the pleadings alone be unsustainable, and such a claim, defence, or ground may be challenged under Rule 13 - Summary Judgment.

[47] I have already considered and dismissed the plaintiffs' application for Summary Judgment that was founded on the same basis. There is no reason to re-examine this argument in the context of the abuse of process argument.

Delay

[48] The plaintiffs complain that the conduct of the defendants since the litigation began and in particular in the period January 2008 to May of 2010 warrants sanction for unreasonable delay. A chronology of events follows.

[49] The action was filed October 17, 2006 and the defence on February 7, 2007. Between those two dates, the defendants changed legal counsel from one located in Prince Edward Island, where the defendants are situated, to counsel in Nova Scotia. This was reasonable to do.

[50] The defendants' List of Documents was filed April 17, 2007 and the plaintiffs' List of Documents on April 20, 2007.

[51] Discovery of five defendant witnesses took place in PEI from October 1-3, 2007. Discovery of the plaintiffs, originally scheduled for September 28-30 of 2007 was re-scheduled for the end of January 2008. That discovery ended with Ms. Leigh's refusal to answer certain questions of the defendants' counsel.

[52] Less than a year after the close of pleadings, all witnesses except Ms. Leigh and Ms. Cummings had been examined.

[53] When the discovery was halted, defendants' counsel indicated his intention to go to court to seek an order to require the defendants to answer questions that had been refused. On January 30, 2008 counsel for the plaintiffs requested that the defendants not proceed with that motion while he reviewed the request and took instructions from his clients. The defendants' motion was not filed until May 6, 2010.

[54] On March 7, 2008 counsel for the plaintiffs filed an Interlocutory Notice (inter partes) with supporting documents, seeking permission from the court to withdraw as the solicitor of record for the plaintiffs. An amended Notice was filed on March 20, 2008. The court granted the request and an order was filed June 23, 2008. Much later, on March 9, 2010, the plaintiffs filed a Notice of Intention to Act on One's Own. In it they indicate that they discharged their counsel on June 19, 2008.

[55] The defendants were notified on or about July 21, 2008 that the plaintiffs did not intend to comply with the "undertakings" and requests for information. The defendants' May 6, 2010 notice of motion seeks compliance with the undertakings.

[56] On September 30, 2008 a conversation between counsel for the defendants and Ms. Leigh took place with respect to outstanding undertakings of the defendants. By letter dated October 28, 2008 counsel advised the plaintiffs that a review of his file led him to conclude that the defendants had fulfilled their undertakings on April 29, 2008. In the same letter he reminds them that he is waiting for fulfillment of "undertakings" made by Ms. Leigh on January 29, 2008. He closes with the following:

> Finally, you advised several months ago that you were going to retain counsel. I await contact from your solicitor once you have provided them with instructions.

[57] Some insight to the plaintiffs' situation in 2008-2009 can be acquired from a letter dated July 20, 2009 prepared by Ms. Cummings in support of an appeal against the refusal of her application for provincial assistance. She outlines the financial, health and relationship problems that arose after the business failed in 2005. There is reference to her 34 court appearances on "bogus criminal charges".

She alleges that the police actions "are directly attributable to the civil litigation." Ms. Cummings advises that she was detained in the East Coast Forensic Unit at the Burnside Correctional Facility for a month in June-July 2008. Ms. Cummings states that she was arrested on two occasions under the "Mental Health Act", apparently in November 2008. This resulted in a further remand to the East Coast Forensic Unit from which she was released in March of 2009.

[58] The letter outlines a persistent series of misfortunes befalling Ms. Cummings during 2009. She and Ms. Leigh experienced a period of separation; there was more police involvement and medical problems.

[59] The record before this court picks up again in November of 2008 at which time a letter from Mr. Dickson to the plaintiffs confirms their refusal to comply with disclosure requests, and their intention to provide Interrogatories by November 10, 2008. The next communication is a March 27, 2009 letter from Mr. Dickson to the plaintiffs in which he acknowledges receipt of a voice message on March 26, 2009 and advising that since he had not heard from them since November 3, 2008, he had closed his file.

[60] Following this there is evidence of the parties communicating through March and April 2009.

[61] There was an email exchange, on December 3 and 4, 2009, between the plaintiffs and Mr. Dickson. Among other things, Mr. Dickson indicates that he did not pursue his motion to force compliance because of the request from plaintiffs' counsel.

[62] He stated that he wanted production by the plaintiffs completed by December 4. The plaintiffs responded that they would not comply. They then pointed out that they had a "disagreement with [their] counsel about several issues" and reiterated their opposition to further production or examination of them on discovery. They demanded that the defendants comply with their outstanding undertakings.

[63] In a letter dated February 2, 2010, the plaintiffs provided Mr. Dickson with an item by item response to the requested "undertakings" that the defendants sought compliance with. Items 4, 5, 6, 7 and 9 are refused as "irrelevant to this litigation". The letter does not mention Item 3.

[64] The plaintiffs provided a list of Interrogatories dated February 4, 2010 and directed at a Mr. Richard Hannams. In a letter of the same date, the plaintiffs set out a demand for the defendants to comply with "Undertakings" said to have been given by them at the October 2007 discoveries. Finally they provided a Designation of Address for Delivery which had been filed with the court on January 21, 2010.

[65] Mr. Dickson responded in a letter of April 13, 2010 setting out the defendants' position with respect to the undertakings given by them in Discovery. Twenty four of the thirty one undertakings were taken to be answered on April 28, 2008. The remaining seven were addressed in the letter and enclosures thereto.

[66] There is a somewhat complex series of events that took place in bringing forward the current motions. Those are set out in the decision of LeBlanc J. of this court in *Leigh* v. *Belfast Mini-Mills Ltd.*, 2011 NSSC 23. It is not necessary to repeat that history for the purposes of this motion.

[67] On April 26, 2010 the plaintiffs filed the Notice of Motion currently under consideration and that seeks:

- to strike the defence,
- to bar the discovery of the individual plaintiffs,
- to bar any further demands for disclosure by the defendants,
- to convert the action to an application,
- summary judgment,
- remedies for the defendants' abuse of process.

[68] It was only after these motions were filed that the defendants brought forward the motions to force the plaintiffs to comply with obligations for disclosure and to respond to discovery examination questions.

[69] The plaintiffs submit that there was a positive obligation on the defendants to move the litigation forward expeditiously by making their motions to force compliance by the plaintiffs with discovery and production of documents that were refused. They submit that it was improper of the defendants to wait until after the plaintiffs brought the current motions. They complain that the delay has negatively

impacted their ability to advance the litigation in a "just, speedy, and inexpensive" manner as is the object of the **Civil Procedure Rules**. See, **CPR 1.01.**

[70] The record, as I have summarized it herein, does not support a conclusion that the defendants engaged in any unusual delay, and certainly not in delay for improper purposes. Both parties allowed matters, for their own reasons, to linger without bringing the areas of their disputes over disclosure to the court.

[71] In my view, it would be a strange outcome if the plaintiffs could avoid their own obligations to advance the litigation, to provide disclosure and to participate in discoveries; and also succeed in abrogating the defendants' rights to disclosure and a hearing, because the defendants, faced with plaintiffs' inaction, failed to pursue these motions. There is no reason for a defendant to incur costs to pursue disclosure where the plaintiffs are doing little to advance their claim.

[72] The delay did not render the proceedings oppressive or vexatious. To grant the plaintiffs' motions on this basis would render the trial process unfair and unjust to the defendants. There is no merit in the allegation of abuse of process by delay.

Failure to comply with Undertakings

[73] The plaintiffs argue that by failing to comply with **Rule 18.16(6)**, (requiring compliance with undertakings within 60 days after the undertaking is made) the defendants have abused the court's process.

[74] The defendants take the position that they have complied with the undertakings given and that if the plaintiffs do not agree then their remedy is a motion to the court to force compliance.

[75] I agree with the defendants that there is a remedy available to the plaintiffs under the Rules. It is not an abuse of the court's process for the defendants to stand on their rights under the Rules and to require the plaintiffs to seek their remedy within the Rules.

Privileged or confidential information

[76] The plaintiffs complain that the defendants have persistently and improperly obtained and disclosed information that is private, confidential, and privileged. In

particular they are concerned with information about their records, if any, with police agencies, health and medical professionals, correctional facilities and government departments such as Community Services.

[77] They also oppose the defendants' attempts to intrude into their personal information by asking questions in discovery about their health, and personal conduct.

[78] The plaintiffs take the position that the defendants are on a highly improper and irrelevant "fishing expedition" in their efforts to access this information. As a result, they seek an order to prohibit the defendants from pursuing this line of inquiry in discovery, or by demanding disclosure of documents in these categories. They demand the return of any documentation that may fall in this category of non-disclosable information.

[79] They would, I think, also suggest that the conduct of the defendants has been so objectionable as to warrant the striking of the defence and entering judgment for the plaintiffs.

[80] The plaintiffs' submissions on this issue are lengthy and generally reflect a confused understanding of the law. There are two key components to the argument as I perceive it. First, that there should be some protection against having to disclose personal information and that the attempt to do so by the defendants was improperly motivated and vexatious. Second that the defendants access to the court files for the plaintiffs' concurrent applications under the **Freedom of Information and Protection of Privacy Act** S.N.S. 1993 c. 5, as amended was improper. Related to this same point is the question of whether the defendants should be able to demand production of any documents that the plaintiffs may have obtained in those applications.

[81] The plaintiffs have commenced a court action against the defendants. In doing so, they must yield to the principle that ours is a system that is open to the public. Information in court files and evidence in trials or hearings is presumptively available to the public. That presumption can be modified or even displaced to protect information that is considered privileged or otherwise protected by common law or statute.

[82] The disclosure of privileged information in civil litigation is governed by **Rule 14.05**:

> **14.05 (1)** Nothing in Part 5 requires a person to waive privilege or disclose privileged information.
>
> **(2)** A provision in a Rule in Part 5 for disclosure of a relevant document, electronic information, or other thing means disclosure of a relevant document, electronic information, or other thing that is not privileged.
>
> **(3)** A provision in a Rule in Part 5 that requires an answer to a question calling for relevant evidence, or information that reasonably could lead to relevant evidence, means relevant evidence that is not privileged, or information, not itself privileged, that could lead to relevant evidence that is not privileged.
>
> **(4)** A judge may determine a claim for privilege, except the information and confidences referred to in sections 37 to 39 of the Canada Evidence Act are determined under that Act.
>
> **(5)** A Judge who is required to determine a claim for privilege may direct a person to deliver the thing claimed to be privileged to the judge in order that it may be dealt with under Rule 85.06, of Rule 85 - Access to Court Records.

[83] Even if the information is not privileged, there are restrictions on the use that may be put to certain information acquired in the discovery phase of a proceeding:

> **Collateral use**

> **14.03 (1)** Nothing in Part 5 diminishes the application of the implied undertaking not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of a judge.
>
> **(2)** The implied undertaking extends to each of the following, unless a judge orders otherwise:
>
> (a) documentation used in administering a test, such as test documents supplied to and completed by a psychologist;
>
> (b) all notes and other records of an expert;
>
> (c) anything disclosed or produced for a settlement conference.

[84] The information sought to be obtained by the defendants in their proposed discovery questions has not been shown by the plaintiffs to fall within a recognized privilege. If the evidence is relevant, then it is protected to the same extent that all discovery evidence is protected.

[85] The plaintiffs made applications under **FOIPOP** legislation to access their files held by the Department of Community Services, the Minister of Community Services, the Capital District Health Authority, the Department of Justice and the Royal Canadian Mounted Police. Appeals of decisions in each application were filed in this court and certain information filed by the plaintiffs with the court was

accessed by the defendants. At the time they did so the information had not been sealed.

[86] An application brought before Justice Robertson, after the filing, to seal information was not successful. That decision was unsuccessfully brought before the Court of Appeal for review. See, *Cummings* v. *Nova Scotia (Community Services* 2011 NSCA 2.

[87] The plaintiffs made a motion for an injunction to prohibit the defendants from using that information in other court proceedings, such as the matter before me. Coughlan J. denied the injunction in a decision reported at *Cummings* v. *Belfast Mini-Mills Ltd.*, 2010 NSSC 459. That decision was appealed unsuccessfully, reported in *Cummings* v. *Belfast Mini-Mills Ltd.*, 2011 NSCA 56. The court held:

> [25] Section 42(3) provides no such confidentiality. What is referred to in that section is the information for which disclosure is sought, not the information filed in support of an appeal to the court. In other words, the information referred to in s. 42(3) is the information for which disclosure has been granted or for which the disclosure has been refused. It is with respect to that information that the court is to take every reasonable precaution to ensure that the information is not disclosed. The reason for doing so is apparent: failure to maintain confidentiality of the records sought would defeat the rights of appeal under the

> **FOIPOP** Act and could result in information being disclosed which is protected from disclosure under the **FOIPOP** Act.

[88] There is no evidence that the protected information has been accessed or used by the defendants. The defendants have not engaged in conduct that could constitute an abuse of process by accessing publicly available files.

[89] Whether they can now access the product of the **FOIPOP** applications will be addressed separately.

[90] I have considered the complained of conduct both individually and cumulatively and conclude that there is no basis upon which to find an abuse of process. This motion is dismissed.

Convert action to application

[91] The plaintiffs seek a speedier resolution of the litigation and submit that can be better accomplished if the proceeding is conducted as an application. As with

the Abuse of Process argument, the plaintiffs argue that the defendants are unnecessarily and inappropriately delaying the trial.

[92] The plaintiff initially characterized this as a "motion to convert the action to an application for summary judgment". This incorrectly mixes judicial consideration of both **Rules 6.02** and **13** which are separate and distinct concepts.

[93] Having already concluded that summary judgment should not be granted, and that the pleadings are in order, I will consider whether in all the circumstances it is appropriate to convert the action to an application. In this regard I am governed by **CPR 6.02**:

> **6.02 (1)** A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.

[94] It is the delay that has frustrated the plaintiffs. The reasons for that delay have already been examined. The question to be resolved is the most appropriate manner for this to proceed.

Rule 6.02(3) - *Presumption in favour of an application*

[95] The plaintiffs have referred to a variety of legal concepts in their submissions on this motion, including "laches" and the **Limitation of Actions Act**, neither of which are relevant to this question. The relevant concerns identified by the plaintiffs are captured in **Rule 6.02(3)**:

> **(3)** An application is presumed to be preferable to an action if either of the following is established:
>
> (a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application;

[96] The plaintiffs submit that they "have already seen this erosion, in which they have had to disperse their livestock, auction their farm and house possessions, and sell their farm at a price lower than market value". They note ongoing costs associated with storage of the equipment in dispute and of the carrying costs of loans they have. They say that the delay has inhibited and perhaps made impossible the recommencement of their business.

[97] The claimed losses have largely already occurred. All are compensable in monetary damages, if the plaintiffs are successful in their claim. Interest on the amount may also be ordered in appropriate circumstances. There is no evidence to suggest that the defendants' ability to meet any judgment against them is diminishing with the passage of time.

[98] There is no evidence that the delay has created prejudice to the ability of the plaintiffs to prosecute this claim. It remains open to the plaintiffs, when the preconditions have been satisfied, to request a Date Assignment Conference in accordance with **Rule 4.13(2)**.

[99] Delay is always problematic for the parties - evidence grows stale, memories fade, witnesses die or become unavailable. This case is no different than others in that respect. However, until early 2008, this case was progressing at a reasonable pace. The parties gathered their evidence at an early stage, before the passage of time deteriorated or impacted on the availability of the evidence.

[100] All procedural and substantive rights of the parties continue to be available. I am not satisfied that proceeding by application will make any difference to the maintenance of the substantive rights of the parties.

6.02(4) - *Presumption in favour of an action*

> **(4)** An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:
>
> (a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;
>
> (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

[101] The defendants have been candid in saying that it is premature for them to be certain that they want the trial of this matter to be conducted with a jury. That is a decision that can only be finalized, they say, once discoveries are complete and all undertakings have been satisfied. The submission continues "… for the purposes of this motion, the Defendants do specifically indicate that they will elect trial by

jury", and that there are "no cogent reasons to take away that right to a trial by jury." They submit this is a case that involves multiple issues of fact and credibility, which are "appropriate and suitable for a determination by a Jury".

[102] I am satisfied that the criteria in **Rule 6.02(4)(a)** have been met, deeming action to be the preferred procedure. The **Judicature Act** RSNS 1989, s. 34 provides the *prima facie* right to a jury trial, which is jealously guarded by the Courts. I accept the defendants' representation that they wish to exercise that right in this case which raises substantial disputes of fact. If the defendants' position changes prior to trial and they do not elect jury, it would not have been improper to express a desire at this stage in the proceeding to preserve their right to a jury trial, which I find they are doing in good faith.

[103] With respect to **Rule 6.02(4)(b)**, it is apparent that there will be challenges to the credibility of the plaintiffs' witnesses, but it is premature to determine whether or how issues involving impeachment of credibility will arise. It would be unreasonable prior to the completion of document exchange and discovery examination to require the defendants to provide the early disclosure of complete witness information which is contemplated by the application procedure. This

consideration is particularly important in this case, as both defendants predict that the issue of credibility, as it relates to the parties, additional witnesses of fact, and experts, will be fundamental to determining the outcome.

Rule 6.02(5) - *Factors in favour of an application*

> **(5)** On a motion to convert a proceeding, factors in favour of an application include each of the following:
>
> (a) the parties can quickly ascertain who their important witnesses will be;
>
> (b) the parties can be ready to be heard in months, rather than years;
>
> (c) the hearing is of predictable length and content;
>
> (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross examination.

Rule 6.02(5)*(a)* - *Can the parties quickly ascertain who their important witnesses will be?*

[104] I am satisfied that the plaintiffs have ascertained who their important witnesses will be. Their submissions in the summary judgment application reflect that their case is close to trial ready, except for identifying evidence that may be required to respond to any further disclosure that may be made by the defendants.

[105] The defendants are not at the same point of readiness, largely because of the problems with obtaining the cooperation of the plaintiffs in discovery and production. Opinion evidence will likely be required, and potential expert witnesses have not been identified.

Rule 6.02 (5)(b) - *Can the parties can be ready to be heard in months, rather than years?*

[106] If the parties proceed with diligence and remain focussed on the issues of this cause of action, then they may be ready for trial in 2012. However, that is not consistent with the history to this point where strong disagreements over disclosure have resulted in a series of concurrent court proceedings initiated by the plaintiffs, all aimed at protecting the privacy of certain information they regard as personal

and irrelevant to the defendants' position. Those matters have an independent existence but can impact on the date by which this matter can go to trial.

Rule 6.02(5)(c) - *Is the hearing of predictable length and content?*

[107] I am not satisfied that the hearing is of a predictable length and content. There are a number of issues to examine with substantial disagreements on the facts. There is expert opinion evidence which will be subject to challenge. Not all witnesses have been identified at this point.

[108] The plaintiffs, being self-represented, have demonstrated themselves to be somewhat able in putting forward legal arguments, but understandably, show their lack of legal training in the procedural and substantive law arguments they advance. That lack of predictability makes any assessment of the length or content of the hearing uncertain, whether it is by application or as the trial of an action.

Rule 6.02(5)(d) - *Is the evidence such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination*?

[109] I am not satisfied that the evidence will be such that credibility can satisfactorily be assessed during an application hearing, rather than at trial.

Rule 6.02(6) - *Cost and delay of the proceeding*

> **(6)** The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

[110] I have considered the relative cost and delay associated with the application and action routes, and I am not convinced that litigation would be more efficient or less costly if this matter proceeds as an application, rather than by the trial route.

[111] Proceeding as an action ensures the right to determination by jury and offers more procedural safeguards which may be needed to properly address matters relating to fact finding, expert testimony, and assessing credibility. If this case were allowed to continue as an application now, there is substantial risk that the parties might realize as the hearing approached that a trial is required, leading to later conversion and delay.

[112] My consideration of the various provisions in **Rule 6** leads me to the conclusion that the Plaintiffs' motion to convert the action to an application is not supportable and the motion is dismissed.

Disclosure/Production by the defendants:

[113] The plaintiffs seek further disclosure from the defendants. In particular, they state at paragraph 20 on page 3 of their brief dated June 10, 2010 that the defendants made 31 undertakings at Discovery and that the information is "grossly incomplete", both in the defendants' response from April 2008 and an update in 2010.

[114] At paragraph 25 of the same submission they seek information about complaints of other mill failures, than their own.

[115] The defendants submit that they have not been given proper notice of this request, saying that this request cannot be pursued simply by including it in the supporting briefs and evidence.

[116] I agree. The Notice of Motion identifies the alleged failure of the defendants to comply with undertakings as evidence in support of the abuse of process motion. The plaintiffs did not give Notice of Motion pursuant to **Rules 14** or **18** to have the defendants comply with undertakings, or to compel further disclosure. This request is refused. The plaintiffs will need to bring a properly framed motion to seek more information.

Undertakings/Disputed discovery examination questions

[117] The defendants seek an order pursuant to Nova Scotia **Civil Procedure Rule 18.17** requiring the plaintiff Gillian Leigh attend for further discovery examination and to provide complete and sufficient answers to the questions posed by counsel for the defendants, which questions were refused by counsel for the plaintiff, Gillian Leigh. The Notice of Motion particularizes those questions as follows:

> a. Questions in respect to whether Gillian Leigh had provided psychological counseling or professional services for Wanda Cummings;
>
> b. Questions and undertakings respecting visits to the plaintiff's home by RCMP or emergency health services and production of files

c. Undertaking to produce medical records, including records of Dr. Boucher, naturopath's file materials and the nurse practitioner's file materials respecting treatment provided to Wanda Cummings

d. Questions related to alcohol consumption by the plaintiff Gillian Leigh

e. Questions relating to alcohol consumption by the plaintiff Wanda Cummings

f. Questions relating to knowledge pertaining to Wanda Cummings having been ejected from bars in the community or banned from bars or has a problem with alcohol

g. Undertaking to produce medical charts and hospital records relating to Wanda Cummings from the Inverness hospital

[118] The defendants also seek an order requiring that the plaintiffs comply with undertakings given at discovery examination.

[119] After the discovery came to a halt the court reporter produced a list of nine categories in a document titled "Requests and Undertakings - Ms. Leigh". There is some overlap in that list with the above topics for proposed questioning.

[120] The defendants say that the plaintiffs gave undertakings which are numbered 3, 4, 5, 6, 7 and 9, in the court reporter's list and which the defendants say have not been complied with. They are listed here exactly as the court reporter did:

3. Provide any additional health issues of Ms. Cummings to those recalled at discovery

4. Provide EHS records from 2004 to present

5. Provide complete copy of police investigation file

6. Provide the last name for Mary, the naturopath, and her records re Ms. Cummings

7. Provide file of Dr. Boucher re Ms. Cummings

9. Provide medical records for Ms. Cummings from Inverness Hospital

[121] I have reviewed the Discovery transcript and cannot find any firm "undertakings" given by counsel for the plaintiffs. Having said that, subsequent correspondence between the lawyers for the parties refers to undertakings, or undertakings that are under advisement. Similarly, the correspondence between counsel for the defendants and the individual plaintiffs makes use of this term.

[122] In an effort to move this matter forward I will consider the defendants' requests as unfulfilled undertakings; as a request for disclosure; and finally for the purposes of determining appropriate areas of questioning for further discovery examination. They all turn on the question of the relevancy of the information being sought.

Undertakings

[123] An "undertaking" is defined in Black's Law Dictionary 9th ed.: St. Paul, Minnesota: West, 2009, as a "promise, pledge or engagement ". It is defined in Webster's Third New International Dictionary (Unabridged), Chicago: Merriam -Webster, 1986 as a "pledge, promise, guarantee; a promise or security required by law".

[124] The **Civil Procedure Rules** requires parties to fulfill their undertakings:

> **18.16 (6)** A party who undertakes to do anything in the course of a discovery must perform the undertaking no more than sixty days after the day the undertaking is made, unless the parties agree or a judge directs otherwise.

> **24.02 (3)** The following are examples of a non-compliance with a Rule that may lead to a motion on appearance day to compel compliance with the Rule:
>
> (a) not disclosing relevant documents or electronic information;
>
> (b) not performing a discovery undertaking

[125] Undertakings create an ethical obligation upon lawyers who make them. Rule 13 of the Legal Ethics and Professional Conduct: a Handbook for Lawyers in Nova Scotia (The Handbook) states:

> Rule 13
>
> A lawyer has a duty to treat and deal with other lawyers courteously and in good faith.
>
> …
>
> Commentary
>
> …
>
> Undertakings
>
> 13.6 A lawyer has a duty
>
> (a) not to give or request an undertaking that cannot be fulfilled;
>
> (b) to fulfill every undertaking given;
>
> (c) to honour a trust condition once accepted; and

> (d) to provide a written confirmation of an undertaking in unambiguous terms.

[126] An undertaking should not be given when it cannot be fulfilled; an undertaking should not be given when there is valid reason in law to refuse to provide the undertaking, though it might be capable of being fulfilled. Once given, the undertaking is presumptively valid and enforceable.

[127] **Rule 18.16(6)** provides discretion to the court to "direct otherwise" when asked to compel compliance with an undertaking. In my view, that discretion should be exercised judicially, and with restraint, particularly where it was given by counsel for a party.

[128] The defendants assert that the information they seek is relevant to:

1. whether there were physical or mental health issues that negatively impacted on the plaintiffs' willingness or ability to:

    a. complete the defendants' training;

b. acquire the necessary skills to correctly process the fibre;

c. operate the equipment properly;

d. operate their business as a going concern;

2. whether the plaintiffs are entitled to general damages arising from mental and physical health problems alleged to have been sustained as a result of the failed business.

3. whether the plaintiffs are entitled to general damages for loss of good will.

[129] The defendants consistently sought that the undertakings be complied with. The plaintiffs have consistently refused to comply, going so far, in February 2010 to deny that the undertakings were given. In fact, they may be correct in that assertion.

[130] As with the proposed questions for discovery, discussed later, the plaintiffs take the position that the information sought is not relevant, and if relevant, is privileged information and not disclosable.

Relevancy

[131] **Rule 15** sets out the duty upon a party to make disclosure of relevant documents.

[132] **Rule 14.01(1)** defines relevant for the purposes of disclosure:

> **14.01 (1)** In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
>
> (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.

(2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

[133] Bryson J.A., writing on behalf of a unanimous court in *Brown* v. *Cape Breton (Regional Municipality)* 2011 NSCA 32:

> [12] The Rule requires the Chambers judge to decide relevancy as if he or she were entertaining a request for evidence at trial. In *Murphy* v. *Lawton's Drug Stores Ltd.* 2010 NSSC 289, Justice LeBlanc discusses at some length the meaning of "relevant evidence". In *Murphy* and *Saturley*, Justices LeBlanc and Moir conclude that the "semblance of relevancy" test has been displaced. I agree. However, the consequence is that judges have to determine relevancy long before trial, without the forensic advantages of the trial judge. …. As Justice Moir observes in *Saturley*, we have to ask a Chambers judge to assume the vantage point of the trial judge, "imperfectly constructed though it may be" (*Saturley*, para. 45). … And of course any such ruling is not binding on the trial or application judge: **Rule 14.01(2)**. In any event, I agree with Justice Moir's comments at para. 46 of *Saturley* that:
>
> > [46] This examination of the legislative history, the recent jurisprudence, and the text of **Rule 14.01** leads to the following conclusions:
> >
> > · … Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed.
> >
> > · The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The Rule does not permit a watered down version.

> · Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.
>
> In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.
>
> [13] I also agree with Justice Moir that this does not mean a retreat from liberal disclosure of relevant information.

[134] In *Murphy* v. *Lawton's Drug Stores Limited* 2010 NSSC 289, at paras. 14-20, LeBlanc J. reviews case and academic comment on the tests for relevancy. I am guided in my decision by those statements.

Ability to conduct business

[135] If the plaintiffs had mental or physical health problems that were concurrent with their attempts to operate their business, then it is relevant to both liability and to damages.

[136] The plaintiffs allege inadequate training by the defendants. They submitted expert opinion evidence that speaks to their abilities and understanding of the skills needed to carry out the fibre processing. With respect, there is some evidence of

health and/or behavioral problems that were present both during the operation of the business and subsequent to the failure of the business. Their abilities are in issue.

[137] The defendants say the training was adequate and that other "events or conditions" caused any losses. (para. 22 of the Defence) If by reason of mental or physical health problems the plaintiffs were unable to operate the equipment properly, or to operate the business it would undermine their claims. Information relating to these topics, as encompassed in the language of the undertakings, is therefore relevant, subject to some restrictions outlined later.

General damages claim

[138] Ms. Leigh gave the following evidence at discovery, found at page 64-65:

> Q. That's part of your claim, that the stress has affected you?
>
> A. Yes
>
> Q. Yes, and would you say the same as that Wanda Cummings is advancing a claim based on that as well?

A. Yes.

[139] Later, at page 65, Ms. Leigh replies that in relation to this heading of damages:

A. I'm not sure I can speak for Wanda.

[140] At page 74 she confirms that Ms. Cummings saw a Dr. Ben Boucher a "few times", and at page76:

A. She understands, I think, that her physical illness had affected her eyes.

Q. And is it your understanding that Wanda's physical difficulties ... and is it diabetes that we're talking about?

A. Yes.

Q. ... is connected to the claim for general damages as a result of this case?

A. Yes.

[141] The plaintiffs say that they do not intend to pursue a claim for general damages for mental or physical health issues that resulted in whole or in part from

the failure of their business. This representation has been made in oral and written submissions. Nevertheless, an unqualified claim for general damages is still outstanding in the statement of claim and the defendant seeks to preserve their ability to defend against that claim so long as it continues to exist. The sworn evidence of Ms. Leigh is that they intend to seek damages for health issues that stemmed from the defendants' conduct.

[142] The plaintiffs also suggest that there is no legal basis on which they could be compensated in general damages for their health concerns that followed the failure of the business hence the information sought is not relevant. They cite *Fidler* v. *Sun Life Assurance Co. of Canada* 2006 SCC 30 in support of this proposition. With respect, I do not agree that the court eliminated the right of the plaintiffs to claim for mental distress, although I agree that it may not be an easy claim to prove insofar as it is a claim arising out of an alleged breach of contract. see, *Fidler* at paras. 44-49.

[143] In this case they have claimed general damages in their negligence claim as well.

[144] Even if the plaintiffs were to amend the statement of claim to eliminate this heading of damages, it would still leave open the question as to whether their abilities to operate the business were impacted by medical or other problems.

[145] I conclude that information pertaining to the physical health, mental health and personal conduct of the plaintiffs is relevant.

Goodwill

[146] The plaintiffs have claimed for loss of goodwill.

[147] The term goodwill as described in *Black's Law Dictionary*, 9th ed. includes:

> A business's reputation, patronage, and other intangible assets that are considered when appraising the business … " [Goodwill] is only another name for reputation, credit, honesty, fair name, reliability"…

[148] J. Wilson J. reviewed "goodwill" in the case of *DiFlorio* v. *Con Structural Steel Ltd.* 2000 CanLII 22765 (O.S.C.J.):

> 159 The caselaw emphasizes that goodwill encompasses various aspects of a business enterprise, including reputation by name, earning capacity, human resources, an established client base, and lists of customers and suppliers.
>
> 160 In *Unisource Canada Inc.* v. *Enterprise Paper Co.* (April 1, 1999), Doc. Vancouver C950597 (B.C. S.C.) (unreported), at para.7, goodwill is characterized as consisting of "reputation", "earning capacity of the company", the company's "human resources", as well as "access to its customer lists, access to its suppliers, [and] certain rights to rebates on purchases…"

[149] Goodwill is typically the subject of expert opinion evidence of business valuation. That valuation would depend upon a variety of factors including "human resources" and reputation in the business community.

[150] The plaintiffs say that goodwill attaches to the reputation of the business and is measured against that, not whether they personally enjoyed good reputations. That might be true in certain cases, but the plaintiffs' customers included people from within the community where they lived. The business was not a large corporate entity but depended upon the personal work and marketing efforts of the two principals. The company's goodwill would be very much tied to their individual reputations. In this way, it was a form of personal goodwill. In her discovery evidence, at pages 60-63, Ms. Leigh acknowledged as much.

[151] As such, I do not agree that in the circumstances of this case the claim for goodwill can be so neatly parsed out as the plaintiffs argue. Ms. Leigh testified in discovery that both Ms. Cummings and she had reputations that were "outstanding" (at page 62). There is evidence that is not the case. The information that the defendants seek is relevant to this issue.

Discovery Examination of the plaintiff Leigh

[152] My analysis of the proposed questions intended to be directed to the plaintiffs is the same. To the extent that the questions go to issues of the plaintiffs' willingness or ability to complete training, acquire skills to correctly process the fibre, operate the equipment correctly, operate the business as a going concern, then it is relevant. To the extent that questions seek to explore the plaintiffs' mental and physical health or personal conduct issues as evidence in the general damages claim, it is relevant. This evidence is also relevant to the plaintiffs' claim for damages claimed for loss of goodwill.

[153] The authority to direct the plaintiffs to attend for discovery and to answer questions is set out in **Rule 18.17**:

> (7) A judge may determine an objection to a question, or a line of questions, made at discovery.
>
> (8) A judge may order resumption of the discovery, and provide any directions for its further conduct

[154] I am not satisfied that there is any privilege upon which the plaintiffs can deny production of the information requested, nor do I find any reason to prevent the defendants from asking relevant questions, even though they may touch on very personal questions in the lives of the plaintiffs.

Summary:

[155] I direct that the plaintiff Ms. Leigh attend for the resumption of the discovery and that she answer the following lines of questions:

1. Questions in respect to whether Gillian Leigh had provided psychological counseling or professional services for Wanda Cummings;

2. Questions respecting visits to the plaintiffs' home by RCMP or emergency health services;

3. Questions related to alcohol consumption by the plaintiff Gillian Leigh;

4. Questions relating to alcohol consumption by the plaintiff Wanda Cummings;

5. Questions relating to knowledge pertaining to Wanda Cummings having been ejected from bars in the community or banned from bars or has a problem with alcohol.

[156] I further direct the plaintiffs produce to the defendants the requested materials that are in their control, subject to my later comments. In doing so I remind the plaintiffs of the provisions of **Rule 14.08 (2)**:

> **(2)** Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party, and to preserve the documents and electronic information.

[157] In making this order, I have considered **Rule 14.08(3):**

> **(3)** A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following:
>
> > (a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;
> >
> > (b) the importance of the issues in the proceeding to the parties.

[158] The materials sought are thought to be in the possession of the plaintiffs or available to them. There is evidence that the plaintiffs have had financial stress, but I am not satisfied that there is a disproportionate cost burden for obtaining and disclosing the information. The materials sought are largely institutional and delay should not be an issue in obtaining and producing those files.

[159] I find that the document requests of the defendants are overly broad, and I have revised the description of the information to disclose to better ensure the relevancy of the information. The materials to be produced are:

1. Provide information of any additional health issues of Ms. Cummings to those recalled at discovery.

2. Provide EHS records of calls for service for Gillian Leigh or Wanda Cummings during the period January l, 2004 to the present.

3. Provide complete copy of police investigation files relating to any calls for service involving Gillian Leigh or Wanda Cummings during the period January 1, 2004 to December 31, 2006.

4. Provide the last name for “Mary”, the naturopath, and her records re assessment or treatments of Wanda Cummings after January 1, 2004.

5. Provide file materials of Dr. Ben Boucher for his consultations with Wanda Cummings for the period January 1, 2004 to the present.

6. Provide medical records for Ms. Cummings from Inverness Hospital for the period beginning January 1, 2004 to the present.

Production of FIOPOP Documents by the plaintiffs

[160] The defendants also seek an order pursuant to Nova Scotia **Civil Procedure Rule 14.12** requiring the plaintiffs to deliver complete copies of all documentation obtained by the plaintiffs as a result of various applications and appeals made pursuant to the **Freedom of Information and Protection of Privacy Act**, and in particular any and all documentation obtained by the plaintiffs from the Capital District Health Authority (2010 Halifax # 326867), Department of Community Services (2010 Halifax #327460), Minister of Community Services (2010 Halifax #326861), Department of Justice (2010 Halifax #326871) and the Royal Canadian Mounted Police (2010 Halifax #327449A).

[161] The plaintiffs object on the basis of statutory privilege and relevancy.

[162] Once the material is released to the plaintiffs pursuant to the **FOIPOP** legislation, it is within their control. There is no statutory provision that requires them to maintain the confidentiality of that information. Their objection on that basis fails.

[163] The defendants' submissions focused on the relevancy of the materials requested at the discovery and on the lines of questioning they seek to pursue. In relation to this information their submission is terse:

> It is further respectfully submitted that the documentation related to the Plaintiffs' **FOIPOP** applications and appeals is also relevant to the issues that arise in the matter and ought to be produced. (at para. 36, filed May 10, 2010)

[164] There is no evidentiary basis before me on which I can say that documentation of the Capital District Health Authority (which is not the area in which the plaintiffs resided at the times material to this cause of action), the Minister or Department of Community Services, or the Department of Justice,

would be relevant within the meaning of **Rule 14.** If such documentation exists, I do not know what it pertains to or what time period it encompasses. On this matter, I am not satisfied that this information is relevant or will likely lead to relevant information.

[165] Having said that, the plaintiffs are reminded that they have a positive duty upon them to disclose relevant materials and to do so within the parameters of relevance as I have set out in this decision. If they have obtained documents that are relevant to the matter then they must disclose them. They should need no further direction.

[166] The records obtained, if any, from the RCMP are relevant to the issue of their responses to complaints about Ms. Cummings during the period 2004 until 2006, being the time frame concurrent with the business operation and failure.

[167] I direct that the plaintiffs disclose to the defendants any RCMP documents in the plaintiffs' control or possession and which pertain to contact between the plaintiffs and the RCMP during the period January 1, 2004 to December 31, 2006.

Plaintiff - Wanda Cummings

[168] The plaintiffs sought an order barring the discovery of Ms. Cummings as well. There is no reason to do so. I direct Ms. Cummings to attend at examination for discovery and to answer questions that include the lines of questions I have approved of for Ms. Leigh.

CONCLUSION

[169] The plaintiffs' motions for summary judgment on pleadings or on the evidence, for a finding of an abuse of process, to convert the action to an application, and seeking compliance by the defendants with undertakings are all dismissed.

[170] The plaintiffs Ms. Leigh and Ms. Cummings will attend at discovery and answer the defendants' lines of questions as set out herein.

[171] The plaintiffs will produce documents to the defendants in accordance with the terms of this decision.

COSTS

[172] If the parties are unable to agree on costs, then I will receive the written submissions of the parties as to costs.

ORDER

[173] I direct counsel for the defendants to prepare the Order.

DUNCAN J.

SUPREME COURT OF NOVA SCOTIA

Citation: Leigh v. Belfast Mini-Mills , 2011 NSSC 300

Date: 20110720
Docket: Hfx 272748
Registry: Halifax

Between:

Gillian Leigh, Wanda Cummings and Toltec Holdings Incorporated,
carrying on business as Mabou Ridge Centre for Holistic Living

Plaintiffs

v.

Belfast Mini-Mills Ltd. and International Spinners Ltd.

Defendants

Judge: The Honourable Justice Patrick J. Duncan.

Heard: November 22 and 23, 2010, in Halifax, Nova Scotia

Final Written

Submissions: January 14, 2011

Counsel: Gillian Leigh and Wanda Cummings,
self represented, and on behalf of all plaintiffs

Robert K. Dickson, Q.C. for the defendants

E R R A T U M

1. Page 74, paragraph [171] of the decision of July 20, 2011 reads:

" The plaintiffs will produce documents to the plaintiffs in accordance with the terms of this decision."

It should read:

"The plaintiffs will produce documents to the defendants in accordance with the terms of this decision."