SUPREME COURT OF NOVA SCOTIA
Citation: Wilson v. BMO Nesbitt Burns Inc., 2011 NSSC 373

Date: 20111017
Docket: Hfx. No. 321705
Registry: Halifax

Between:

Christine Wilson

Plaintiff

v.

BMO Nesbitt Burns Inc.

Defendant

ORAL DECISION

Judge:	The Honourable Justice A. David MacAdam.
Heard:	September 13, 2011, in Halifax, Nova Scotia
Final Written Submissions:	September 8, 2011
Written Decision:	October 17, 2011
Counsel:	Nancy F. Barteaux and Isabelle French, for the plaintiff Michelle C. Awad and Ryan Conrod, for the defendant

By the Court:

[1] The plaintiff (herein "Wilson") was employed as an investment advisor with the defendant (herein "Nesbitt") from February 1, 2008, until her employment was terminated on November 30, 2009. Wilson filed a notice of action and statement of claim on December 21, 2009, seeking, *inter alia*, pay in lieu of notice, together with increased damages for bad faith and unfair dealing by the defendant. The defendant filed its defence and counterclaim on January 14, 2010. In its defence Nesbitt says it made an offer of pay in lieu of reasonable notice of termination. In the counterclaim it seeks repayment of monies it says were advanced to the plaintiff and are now repayable. In her defence to the counterclaim Wilson raises three defences:(i) estoppel; (ii) the fact she did not obtain legal advice before signing the letter of employment, a promissory note and loan agreement at the time she joined Nesbitt; and (iii) set -off.

[2] Nesbitt moves for summary judgment on its counterclaim.

Background

[3] Wilson was employed by CIBC Wood Gundy as an investment advisor when, during late 2007 and early 2008 she entered into negotiations with George Fisher, the then manager of the Atlantic Division and manager of the Halifax Branch of Nesbitt. During the course of the discussions Mr. Fisher made a verbal offer to Wilson who then resigned from CIBC Wood Gundy and agreed to join Nesbitt as an investment advisor.

[4] On February 1, 2008, Wilson attended at Nesbitt at which time she was provided with a letter of employment and a promissory note. She signed both of these documents on February 1 and began working for Nesbitt on that day. On February 8, 2008, she was given a loan agreement, which she signed, and then received the sum of $100,000.00 by way of loan from Nesbitt.

[5] It appears that Wilson never read any of these documents before signing, but merely glanced at them. She was not offered, nor did she ask for, an opportunity to review them with counsel of her own choosing.

[6] The letter of employment referenced the $100,000.00 loan (herein "the Loan"), which was to be governed by the terms of the loan agreement and promissory note.

The Promissory Note

[7] They key provisions of the promissory note, as identified by counsel for the defendant, and plaintiff by counterclaim, are:

> 1. FOR THE VALUE RECEIVED the undersigned unconditionally promises to pay to **BMO NESBITT BURNS INC.** (the “Company”) or to its order, at its offices at Halifax, in lawful money of Canada, the amount of One Hundred Thousand Dollars ($100,000.00) (the “Principal Amount”). The Principal Amount shall be due and be paid in five (5) equal instalments (each, an “Instalment Payment”) of $20,000.00 on each anniversary date hereof (a “Payment Date”) with the balance due on February 1, 2013 (the “Maturity”).
>
> 2. The Principal Amount outstanding at any time, and from time to time, shall until Maturity or Default be without interest and, after Maturity, Default or judgment the Principal Amount and any overdue interest shall bear interest at the rate equal to the Prime Rate plus 1%. Interest payable under this Note shall be payable on demand. “Prime Rate” means, at any time, the rate of interest expressed as an annual rate, established or quoted by the Bank of Montreal at such time as being its reference rate of interest to determine the interest rates it will charge for Canadian dollar loans made in Canada, referred to by it as its “prime rate”.

3. The occurrences of any one or more of the following shall constitute a "Default" for the purposes of this Note:

...

(b) if the undersigned ceases to be an employee of the Company and its subsidiaries for any reason whatsoever, unless the undersigned has ceased active employment by reason of short term or permanent disability or as a result of a leave of absence approved by the Company; or

...

4. For purposes of Section 3, the undersigned shall be deemed to have ceased to be an employee on the earlier of:

...

(b) the date on which the Company gives notice of termination, whether or not for cause, to the undersigned, and

...

5. In the event of Default, unless the Default is a Payment Default and the undersigned is still employed by the Company or a subsidiary of the Company, the entire unpaid portion of the Principal Amount together with any interest shall immediately become due and payable.

...

7. In the event of a Default, the undersigned specifically authorizes the Company to deduct an amount equal to the unpaid portion of the Principal Amount and any interest thereon, or to set off the unpaid portion of the Principal Amount and any interest thereon against, any wages, commissions or other amounts owing to the undersigned pursuant to any provincial, federal or territorial employment legislation which may be applicable from time to time) or at common law (after deduction of applicable employee withholdings, including tax), including, but not limited to, unpaid wages, vacation pay, holiday pay, overtime, or any severance or pay in lieu of notice which may be owing upon termination of employment.

...

11. The undersigned hereby waives the right to assert in any action or proceeding with regard to this Note any setoffs or counterclaims which the undersigned may have.

The Loan Agreement

[8] The loan agreement contained the following provision:

I have read and understood the above and by signing below, I hereby:

(a) agree to employment with BMO Nesbitt Burns on the terms and conditions set out in the Agreement;

(b) accept the Loan and the Bonus on the terms and conditions noted in this Loan Agreement and the Promissory Note;

...

(e) irrevocably authorize and direct the Company, in the event of a Default (as defined in the Promissory Note), to deduct an amount equal to the unpaid portion of the Loan and any interest thereon, or to set off the unpaid portion of the Loan and any interest thereon against, any wages, commissions or other amounts owing to me pursuant to the Nova Scotia *Employment Standards Act* (or any similar federal, provincial or territorial legislation which may be applicable from time to time) or at common law (after deduction of applicable employee withholdings), including, but not limited to, unpaid wages, vacation pay, holiday pay, overtime, or any severance or pay in lieu of notice which may be owing upon termination of employment; and

(f) acknowledge that I am responsible for making all payments on the Loan, including payment of any deficiency in any loan payment following the application of funds in accordance with (c), (d) and (e) above.

[9] Under clause 4 of the loan agreement Wilson was entitled to five annual bonuses of $20,000.00 each, for the first five years of her employment, and clause 5 authorized Nesbitt to apply each bonus payment to the outstanding loan. The first annual bonus of $20,000.00 was credited against the loan shortly after February 1, 2009, being the first anniversary of her employment with Nesbitt. Her employment was terminated before the second anniversary. The balance outstanding on the loan is one of the components of the defendant's claim for monies from Wilson.

The Letter of Employment and the "Asset Gathering Bonus"

[10] The letter of employment also included an entitlement to an asset gathering bonus, (herein "Asset Gathering Bonus"), providing Wilson achieved certain asset gathering thresholds during her first 12 and 18 months with Nesbitt. If she obtained $18,000,000.00 in assets under administration prior to the end of the first 12 months with Nesbitt, she would receive a bonus of $20,000.00, less applicable deductions. The letter of employment also specifically provided that the Asset Gathering Bonus would be subject to her remaining employed by Nebsitt. It provided that if she either resigned or was terminated, with or without cause, prior to February 1, 2013, she would be required to repay part of the Asset Gathering Bonus, calculated on a prorated basis for the period of the five years that she was not employed by Nesbitt.

[11] Wilson was successful, before the expiration of the first 12 months of employment, in obtaining $18,000,000.00 in assets under administration and, as a result, received the $20,000.00 Asset Gathering Bonus on March 10, 2009. She did not achieve the target of $25,000,000.00 in assets under administration during her first 18 months with Nesbitt.

[12] Wilson says she was terminated, without notice, without pay in lieu of notice and without cause, on November 30, 2009. Nesbitt says it gave notice of termination on November 30, 2009, did not allege cause and made an offer to pay in lieu of reasonable notice of termination.

Issues

[13] At issue is whether Nesbitt is entitled to summary judgment on its counterclaim.

Law and Argument

[14] Relevant on this application are *Nova Scotia Civil Procedure Rules* 13.01(1) and 13.04. The relevant provisions read:

> 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.
>
> ...

> 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.

[15] In their pre-hearing submissions, counsel agree that the test for summary judgment is that articulated by Iacobucci and Bastarache, JJ. in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para 27:

> 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for

> consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success".

[16] This test was adopted by the Nova Scotia Court of Appeal in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38, application for leave to appeal dismissed, 267 N.S.R. (2d) 400 (note), at para. 8, as follows:

> 8 Summary judgment is appropriate when a defendant shows that there is no genuine issue of material fact requiring a trial and a responding plaintiff fails to show that its claim is one with a real chance of success: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27.

[17] This two-step analysis was restated by the court in *Cook's Oil Company Ltd. v. Parkhill Construction (1980)*, 2005 NSCA 36 at paras. 9 and 10, where Roscoe J.A.said:

> 9 As noted by the chambers judge, this court first examined the Rule after it had been amended to allow summary judgment applications by defendants in United *Gulf Developments Limited v. Iskandar*...

> 10 It is a two part test. First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[18] Counsel for the defendant, referencing the decision of the Nova Scotia Court of Appeal in *Eikelenboom v. Holstein Assn. of Canada*, 2004 NSCA 103, says that under rule 13.04(1) the court does not have a discretion on whether to grant summary judgment, where the judge is satisfied, upon the evidence, or the lack thereof, that a defence or statement of claim has failed to raise a genuine issue for trial. At paras. 30 and 31, Saunders J.A. made the following statements:

> 30 For reasons that are not clear to me, the learned Chambers judge concluded that only after a full trial where the judge might "examine all the surrounding circumstances" or where "[a]ll, the circumstances both before and during the hearing before the Committee" could be considered would it be possible to decide if waiver had occurred. With respect, all of the surrounding circumstances were already well known. The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in *Gordon Capital*, *supra*, where the only dispute concerned the application of the law, a point with which the Court quickly dispensed in rather terse prose:
>
> > The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.
>
> 31 For the reasons stated, this motion is one that required an application of the law to the undisputed facts. The Chambers judge erred in declining to resolve the matter before her by way of summary judgment. As cases like *Hercules* and *Gordon* have shown, while such an analysis may well be difficult and contentious, neither complexity nor controversy will exclude a proper case from the rigours of summary judgment.

[19] The motion for summary judgment only relates to the counterclaim. Referencing rule 13.04(2), counsel for Nesbitt says it is clear that summary judgment may be granted on a "claim" even if it is not dispositive of the entire lawsuit. Counsel references the decision of Rosinski J. in *Cormier v. Universal Property Management Ltd.*, 2011 NSSC 16, where the court gave summary judgment on a single issue that was non-dispositive of the lawsuit.

[20] In *AFG Glass Centre v. Roofing Connection*, 2010 NSSC 108, at paras. 13 and 14, Bryson J., (as he then was) outlined the steps, including the shifting onus, in a summary judgment motion, as follows:

> 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. In *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372, 2008 SCC 14, the Court said:

> [11]...Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried ... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts ...
>
> [19]...In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future....

[21] The court in *Lameman* also said, at para 11:

> For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings:...If the

> defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal:....Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts:...

No material fact in issue

[22] The onus in establishing that there is no material fact in issue rests on the applicant.

[23] The defendant says that the facts concerning the loan and the requirement to re- pay part of the Asset Gathering Bonus are undisputed. They are contained in the loan agreement, the promissory note and the letter of employment, all of which were signed by Wilson.

[24] Wilson says that in respect to the defendant's motion for summary judgment on the counterclaim, there are "....four genuine issues of fact to be determined at trial...", three of which "....pertain to the Loan Agreement and Promissory Note, while the third relates to the Asset Gathering Bonus."

[25] Counsel references clause 7 of the Promissory Note and clauses (e) and (f) of the Loan Agreement. The submission is that since Wilson was terminated without cause and without notice, she is entitled to pay in lieu of notice. This submission continues:

> 21. ...Pay in lieu of notice is due on the day of termination. The quantum of pay in lieu of notice that is owed to her is the subject of the claim she has brought against Nesbitt Burns. It is not a question to be determined on this motion for summary judgment as the motion only deals with Nesbitt Burns' Counterclaim. Wilson has also claimed she is owed other special damages, which are itemized at paragraph 18 of the Statement of Claim.

[26] The plaintiff says that the terms of the Loan Agreement and Promissory Note raise three genuine issues of fact. The first is whether under their terms Nesbitt was required to apply any monies owing to the monies it owed Wilson on the day of termination. Counsel says that under the terms of these instruments Nesbitt was required to deduct or set-off any monies it was owed under the loan against monies it owed to Wilson, before being entitled to any monies from Wilson. Counsel says Nesbitt has not complied with these terms. Counsel says the "deduction/setoff" is mandatory and "...Nesbitt cannot require Wilson to comply with the terms of the instruments if it itself hasn't fulfilled its own obligations...." Effectively the plaintiff is saying that Nesbitt was required to deduct or set-off any

monies it owed to Wilson against any monies owed by Wilson to it, before being entitled to judgment on its counterclaim.

[27] Another alleged issue of fact, is whether, depending on the period of notice for which she will receive pay in lieu of notice as determined at trial, she would then have been entitled to the second annual $20,000.00 bonus payment. Counsel says this is an employment benefit and that such benefits continue to be owed during the notice period. "As a result, it is submitted, the length of the reasonable notice period is a genuine issue of fact that needs to be determined before Nesbitt Burns can know how much is unpaid under the loan."

[28] Counsel's position is summarized in her prehearing submission:

> 31. ...clause 5 of the Loan Agreement (sic) (Promissory Note) states:
>
> > 5. In the event of Default, unless the Default is a Payment Default and the undersigned is still employed by the Company or a subsidiary of the Company, the entire unpaid portion of the Principal Amount together with any interest thereon shall immediately become due and payable.
> >
> > ...

> 32. Wilson submits that "the entire unpaid portion" cannot be determined without resolution of the first genuine issue of fact raised above (i.e. whether Nesbitt Burns was required to deduct or set off the amount it claims is owing under the loan on the date of termination) nor can it be determined without knowing the length of the notice period.

[29] After referencing a number of authorities, counsel suggests that the amount owed to the plaintiff would represent 12 months pay in lieu of notice. Since the issue of the amount of pay in lieu of notice to which the plaintiff is entitled remains an issue for trial, and is not part of this application, I make no comment, one way or the other, in respect to counsel's suggestion as to the reasonable notice period.

[30] Counsel concludes on this issue by suggesting that there are genuine issue of fact as to whether Nesbitt was required to deduct or set-off any monies it claims owing under the promissory note and loan agreement against monies it owed Wilson for wages, or other amounts, prior to claiming the balance on the loan; whether it was required to deduct or set-off monies it owed prior to being able to successfully claim that it has complied with all the terms of the loan instruments; and the length of the reasonable notice period. In fact, the first two are matters of interpretation rather than genuine issues of fact, while the third, the length of the reasonable notice period, is an issue of fact, or at least mixed law and fact.

[31] The plaintiff also says that the interpretation of the terms of the Asset Gathering Bonus, together with Nesbitt's compliance with those terms, are also genuine issues of fact. The issue in respect to the Asset Gathering Bonus relates to the calculation of the prorated amount that Wilson was required to repay to Nesbitt, her employment having been terminated less than five years from the date of commencement. Again, this appears to be more a matter of interpretation than an issue of fact. The relevant dates are not in dispute. The applicable wording is not disputed. The issue is when the bonus was payable. That being determined, it only requires a mathematical calculation to determine how much of the Asset Gathering Bonus was re-payable to Nesbitt. However there is a further adjustment to the amount to be repaid suggested by the plaintiff's counsel. Counsel says a further reduction is required based on the length of the reasonable notice period, because the Asset Gathering Bonus was a term of her employment. As earlier referenced, the determination of the reasonable notice period is a matter of fact, to be determined at trial.

[32] The letter of employment states that the amount of the Asset Gathering Bonus to be repaid, "will be reduced by an amount pro-rated for the time between the payment of the Asset Gathering Bonus and February 1, 2013." Counsel says

the dispute between the parties relates to the interpretation of the phrase "the time between the payment of the asset gathering bonus". Whether the time commences when the payment was due, or whether it commences when the payment was made, would affect the prorated amount to be repaid by Wilson. This, of course, is a matter of simple interpretation.

[33] However, in respect to the payment of the Asset Gathering Bonus, which was made on March 10, 2009, counsel says Nesbitt was acting in bad faith. Counsel says Nesbitt was aware, or ought to have been aware that the Asset Gathering Bonus was owed to Wilson by January 31, 2009, and yet delayed payment until March 10, 2009. Whether Nesbitt acted in bad faith is, of course, an issue of fact, to be determined at trial. If it is determined that Nesbitt so acted it would be open for the court to decide what effect, if any, it might have on the amount of the Asset Gathering Bonus to be repaid by Wilson to Nesbitt. Such a determination will therefore involve issues of law and fact.

Is there a defence to the counterclaim that has a "real chance of success"?

[34] Wilson says she has a "real chance of success" on five defences.

(1) Estoppel

[35] Counsel for Wilson refers to the description by Chipman J. of the Court of Appeal in *Kennie v. Ford*, 2002 NSCA 140 , at paras. 41-42, of the distinction between promissory estoppel and estoppel by representation.

> 41 Promissory estoppel is distinguished from estoppel by representation in that it encompasses representations of intention or promises, not simply of fact. Hanbury and Maudsley*: Modern Equity* (London: Sweet & Maxwell Ltd., 2001), describe promissory estoppel at p. 892:
>
> > The doctrine expanded in equity, so as to include, not only representations of fact, but also representations of intention; or promises...Where, by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied on, and to affect the legal relations between the parties, and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced.
>
> 42 Unlike estoppel by representation, which requires representation of a present existing fact, promissory estoppel may arise from a representation of intention. The authorities are not clear whether promissory estoppel can create a cause of action. See Waddams, *The Law of Contracts*, 3rd Edition (Toronto: Canada Law Book Company) p. 133-136, Turner, *The Law Relating to Estoppel by Representation*, (London: Butterworths, 1977) at p. 384.

[36] Counsel for Nesbitt, in stating estoppel is not applicable in this case, references the definition of estoppel by Lord Wright in *Canada & Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd.*, [1947] A.C. 46, at para 7:

> 7 ...Estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted on, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as, indeed, it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. The purchaser or other transferee must have acted on it to his detriment, as, for instance, he did in this case when he took up the documents and paid for them. It is also true that he cannot be said to rely on the statement if he knew that it was false: he must reasonably believe it to be true and therefore act on it. Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified....

[37] The representation relied upon by the plaintiff appears to be the terms of the verbal offer of employment made by Mr. Fisher and which were accepted by Wilson. The initial verbal offer included a one-time payment of $10,000.00, if successful in bringing over $18,000,000.00 in assets under administration, and another one-time payment of $20,000.00 if she was successful in bringing over $25,000,000.00 in assets under administration and protection at Level 4 for 18 months. The offer was accepted, subject to an extension of a Level 4 income

protection beyond 18 months and the provision of an opportunity for Wilson to participate in a Resident Investment Advisor program.

[38] Wilson, on discovery, acknowledged that she knew there would be some terms related to the $100,000.00 payment. However, she said she "did not know what they would be when (she) signed this document". Counsel says that although Wilson knew there would be some terms, she did not know what those terms would be nor was she provided with any documentation to ascertain the terms prior to February 1, 2008.

[39] There is nothing in the evidence, nor the submission of counsel, to suggest any untrue representation. The offer by Mr. Fisher may have lacked many details and they were not provided to Wilson prior to her signing the documents on February 1, 2008 and February 8, 2008. However, she never asked for the details prior to signing and she never read the terms of the instruments that she signed. It is not suggested that the terms of the instruments contradicted the verbal offer, only that they provided terms and conditions that were not known to Wilson. As noted in her discovery Wilson acknowledged she understood there would be terms relating to the $100,000.00 payment. Also, prior to her termination, she did not

approach Nesbitt suggesting that any of the terms contradicted what she had been promised by Mr. Fisher.

[40] There is no "real chance of success" in respect to the suggested defence of estoppel.

(2) Independent Legal Advice

[41] Counsel agree that the test for independent legal advice was outlined by Oland J.A. in *Bank of Montréal v. Courtney*, 2005 NSCA 153, at para 37:

> 37 I turn then to the argument regarding independent legal advice. The absence of such advice does not automatically preclude recovery under a security document. In *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, [1997] S.C.J. No. 93 (QL version), Sopinka, J. for the majority stated at p. 803:
>
> > Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence....

[42] Counsel for Nesbitt notes that the mere lack of independent legal advice does not render a contract unconscionable. As noted by Oland J.A. it requires

determining whether the person understood what was being proposed to them and whether they were free to decide according to their own will.

[43] At her discovery Wilson said:

> "I was pushed a whole bunch of documents in front of me to sign and I signed them".

[44] In her discovery she acknowledged to having signed a lot of documents, but when asked whether or not the person who presented them to her had explained them she said, "I don't remember that, no." In respect to the loan agreement document she signed on February 8, she said that the two persons who presented them did not explain the contents to her.

[45] How this would require Nesbitt to have advised her to obtain independent legal advice is unclear. There is no evidence she was under any disability or was unable, if she chose, to read and understand the document she was being asked to sign. She never asked for an opportunity to take the documents to a lawyer, or any other professional, of her choosing. It was her decision to resign from her previous employment, before finalizing the documents relating to her future employment

with Nesbitt. She choose to join Nesbitt of her own free will. Consequently, there is no evidence that she would not have understood the contents of the documents had she chosen to read them, or that she was not acting on her own free will in signing them. There is no evidence of any undue influence.

[46] Excerpts from her discovery indicate that Wilson signed the documents, both on February 1 and February 8, understanding the general nature of the documents, that she did so willingly, and did not ask for an opportunity to secure legal advice in relation to them. In respect to the repayment of the loan by annual payments of $20,000.00, with a bonus of $20,000.00 on the same day, she said she understood in theory how this worked because, "I had one of these similar deals at a previous employer."

[47] Referenced by counsel for Nesbitt is the decision of the Ontario Court of Justice in *Levesque Beaubien Geoffrion Inc. v. Jones,* [1993] O.J. No. 2057; 1993 CarswellOnt 4295. The plaintiff's investment firm had applied for summary judgment in relation to an agreement signed with the defendant. The agreement provided that the defendant would repay various losses he had caused during the course of his employment. The main defence was that the agreement was

unconscionable, because he was under economic duress when he signed it. The defendant had been unemployed when he agreed to the terms of his employment with the plaintiff. At para 19, Gotlieb J., in respect to the defendants argument of economic duress, stated:

> 19 It is this court's finding that there is ample evidence in the case before me to show that there is no unconscionability involved. Mr. Jones, at the time of these events, was, if my mathematics are to be relied upon, age 32 and had been engaged in similar business activities for some nine years, excluding a three-year period when he was not active in that business. He is now age 37. He did not take any steps to deny the letter of agreement until the statement of claim was issued on March 15, 1990. He had an opportunity, when he took copies of the letter away with him on April 15, 1988, to obtain legal or other advice. I have heard no evidence on the subject of when he was to bring it back. Presumably, he could have kept those documents for as long as he wished. The truth is, however, there were negotiations afoot, so that the termination notice required to be filed by the Plaintiff was to be completed and filed so that Mr. Jones could carry on with his new employment. He pleads economic duress. That may have been one of the aspects because no one likes to be unemployed, particularly when there is a lot of money to be made. The fact is though, there was no coercion of will. He was able to take the documents to counsel. He could have taken them, if he wished, to the Toronto Stock Exchange, the Ontario Securities Commission or, indeed, anybody else he wished to discuss it with. He could have discussed it with his father presumably. It is a matter of from whom he would choose to seek counsel. The fact is, there is no evidence to suggest that he felt it was important to take counsel and he is a man of business experience. The parties, I find, were equal in status. The Defendant was anxious to get on with his life....

[48] Like Mr. Jones, Wilson could have taken the documents away with her. Although it was never suggested to her that she obtain independent legal advice, she never asked. There was no coercion. Although she had resigned from her previous employment, that was her choice. She acknowledged, in evidence, that

she would have understood the documents if she had read them. Although not presented with the documents in advance, there is no suggestion that she would not have been permitted the opportunity to read them, or to review them with someone of her choosing, if she had wished to do so.

(3) Damages Cannot Be Determined

[49] In her prehearing written submission counsel for Wilson states that:

> The quantum of damages hinges heavily on the determination of the reasonable notice period. Specifically, without knowing the length of the notice period, it is impossible to know the unpaid portion of the loan because whether Wilson is entitled to one or more $20,000 annual bonuses is unknown (which if owed would reduce the unpaid portion of the loan by the same amount). The amount of the loan that is unpaid also depends on how much is deducted or set off against the pay in lieu of notice and other monies owed to Wilson. Since the amount of the unpaid portion of the loan cannot be determined, the amount of any interest owing cannot also be determined. It is also not possible to calculate the repayment of the Asset Gathering Bonus because it too is dependent on the duration of the notice period.

[50] As observed earlier, the determination of the reasonable notice period and what benefits or entitlements will be included, are matters of fact and are reserved for trial. As these calculations hinge on factual determinations, not before this

court at this time, the amount of damages cannot be determined and therefore cannot be included in any summary judgment award.

(4) Set-off

[51] Counsel for the defendants references clause 11 of the promissory note, which provides that the right to assert in any action or proceeding, in regard to the note, that any setoff or counterclaim is waived.

[52] The plaintiff references the description of the distinction between set-off at law under various statutes, and set-off in equity, by Chipman J.A. in *Purdy v. Fulton Insurance Agencies Ltd.* (1991), 105 N.S.R. (2d) 421, 1991 CarswellNS 74. (S.C.A.D.):

> In *Telford* (1987), 21 C.P.C. (2d) 1, Wilson, J. referred to the distinction between set-off at law under various statutes and set-off inequity. The latter can apply where the cross obligations of the parties are not debts. Equitable set-off is available where there is a cross-claim for an unliquidated amount. Wilson, J. referred to the authorities and at p. 19 referred to the following statement by Lord Denning in *Federal Commerce & Navigation Co. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066 at 1078:
>
> > "Over 100 years have passed since the Supreme Court of *Judicature Act* 1873. During that time the streams of common law and equity have flown

> together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before the Supreme Court of Judicature Act 1873? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? (see *United Scientific Holdings Ltd. v. Burnley Borough Council* [[1977] 2 All E.R. 62 at 58, [1977] 2 W.L.R. 806 at 811-12] per Lord Diplock). This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim."
>
> ...
>
> (Citation added)

[53] The question of to whether Wilson was entitled to the second bonus payment of $20,000.00, to be applied against her outstanding loan is, as previously noted, a matter of fact, or at least mixed fact and law. It is an issue reserved for the trial and not part of the motion for summary judgment.

[54] The determination of the amount due on the loan is so closely connected with the defendant’s demands that it would be manifestly unjust to allow the plaintiff to enforce payment before a decision is made on whether the defendant is

entitled an additional $20,000.00 credit. This credit, or suggested credit, is not so much an issue of set-off as it is a factor in determining what is owed. Certainly, Nesbitt did not give Wilson the first $20,000.00 bonus. Rather, it applied it against the loan. This, as testified to by Wilson in her discovery was what she understood was how the loan and annual bonuses worked, because of her having "one of these similar deals at a previous employer." This, in my view, is not a question of set-off.

(6) Unconscionability

[55] Counsel for Wilson, acknowledging that the issue of unconscionability in respect to the execution of the Loan Agreement, Promissory Note and terms pertaining to the Asset Gathering Bonus was not pled in the defence to the counterclaim, said Nesbitt was on notice that this would be argued, as of the discoveries held in January 2010. As noted earlier, in order to respond to the motion for summary judgment it is necessary that the responding party establish through evidence that the allegation has a real chance of success. There is nothing in the evidence, including the excerpts from Wilson's discovery, to sustain an allegation of unconscionability on the part of Nesbitt.

[56] Counsel references the observations of Matthews J.A. in *Toronto Dominion Bank v. Lienaux*, (1995) 140 N.S.R. (2d) 156, [1995] N.S.J. No. 147 (C.A.) at para. 6:

> 6 The issue of independent legal advice is a serious matter. With deference, the chambers judge should have considered this issue when it was first raised. The original motion was by the respondent for summary judgment prior to trial. If there was an arguable issue on the motion raised by the appellants, the law is clear, it should be tried. Fairness demands no less. This issue should not be taken lightly.

[57] The issue of independent legal advice has already been canvassed. Although not suggested by Nesbitt, it was never asked for by Wilson. She simply did not take the time to read the documents she was signing. Additionally, there is no evidence that subsequent to signing these documents she ever returned to Nesbitt complaining of their terms, or the obligations imposed on her, until her dismissal by Nesbitt.

Conclusion

[58] The defendant, and plaintiff by counterclaim, is entitled to judgment in respect to its claims for monies owed to it by Wilson. The plaintiff, and defendant by counterclaim, has not established a defence that has a "real chance of success".

[59] The amount of monies owed to the plaintiff, and defendant by counterclaim, cannot be determined until other issues, reserved for the trial, have been determined. These include whether or not Wilson is entitled to a credit of $20,000.00 against the outstanding loan, as a benefit she would have been entitled by virtue of her dismissal by Nesbitt, without notice and without cause. The amount of the judgment cannot now be determined.

[60] Judgment accordingly.

MacAdam, J.