SUPREME COURT OF NOVA SCOTIA
Citation: Penwell v. Harwood, 2011 NSSC 309

Date: 20110729
Docket: Hfx. No. 331663
Registry: Halifax

Between:

Dr. Donald Penwell, Susan Penwell and Penwell Holdings Incorporated

Plaintiffs/Respondents

v.

Lee Harwood and Scotia Capital Inc./Scotia Capitaux Inc.
carrying on business as ScotiaMcLeod

Defendants/Applicants

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	July 20, 2011, in Halifax, Nova Scotia
Counsel:	Lester Jesudason, with Shaun MacMillan, for the Plaintiffs Michelle Awad, Q.C.. With Ryan Conrod, for the Defendants

By the Court:

Background

[1] Dr. Donald Penwell and Lee Harwood have been acquaintances for 25 years. That state of affairs ended on June 30, 2010, when Penwell filed a legal action against Harwood, an investment advisor with Scotia Capital Inc., and Scotia Capital Inc. (the Defendants).

[2] In 2001, Penwell, his wife and a holding company (the Plaintiffs) transferred investments / monies to the Defendants, which he claims were to be invested so that he and his wife would be financially secure and able to retire in 2006. Their goal was to ensure adequate annual income to fund $150,000 in current dollars with a 3% indexing rate each subsequent year built in.

[3] Their investments likely totalled about $3,000,000. By early 2010 their investments were worth $1,600,000.

[4] The legal action alleges in summary that the Defendants:

(i) were negligent in their recommendations / advice and handling of the Plaintiffs' investments;

(ii) acted in bad faith, breaching their contractual and fiduciary duties to the Plaintiffs by not adequately providing to the Plaintiffs' information / advice regarding the Plaintiffs' investments; disregarding the Plaintiffs' expressed investment instructions; and falsely represented investment information to the Plaintiffs.

[5] In response to the Statement of Claim filed June 30, 2010, on August 4, 2010, the Defendants served the Plaintiffs with a Demand for Particulars.

[6] The Plaintiffs made Answer on about September 10, 2010, and also February 24, 2011.

[7] Nevertheless, the Defendants argue that the Particulars:

> "Have failed to narrow the generality of the Plaintiffs' pleadings... [and] the Defendants are not able to intelligently reply to the Plaintiffs' claims, a requirement of Rule 38.02(2)(a)."
>
> - para. 46, brief.

[8] The resolution of this assertion falls to me as a Chambers Judge.

[9] The Defendants have consequently resisted filing a Defence.

Facts

[10] I have the benefit of three affidavits which set out the facts:

> Dr. Donald Penwell - sworn July 11, 2011
>
> Michelle Awad, Q.C. - sworn May 16, 2011
>
> Lee Harwood - sworn June 23, 2010
>
> - Harwood and Penwell were cross-examined.

[11] Mr. Harwood is a senior investment advisor at Scotia McLeod and has very extensive experience in the investment field. He testified that he was unable to

ascertain what of his conduct it is that the Plaintiffs claim underlies their allegations of breach of contract, breach of fiduciary duty, negligence, and false representations.

[12] He agreed that over the course of the relationship, the Plaintiffs would have received monthly account statements summarizing the activity in their portfolio, as well as having had meetings with Mr. Harwood. Mr. Harwood has notes of such meetings but they have not been forwarded to the Plaintiffs. He outlined that the Plaintiffs' investments were numerous and somewhat sophisticated, thus generating much information that may not have been understood by an unsophisticated investor.

[13] He had the opportunity to examine Exhibit #1 - a spreadsheet created in-house by the Plaintiffs, setting out all the documents that they had received from their clients in relation to their investments with Scotia McLeod. He made comments on the contents of the monthly statements the Plaintiffs would have received. Notably the spreadsheet, which was relied upon by both counsel, contains references that pages are missing from significant numbers of those

statements. In his opinion, the Plaintiffs, though not having all of the documents, certainly had enough to answer the Demand for Particulars.

[14] Importantly, he acknowledged that one has to examine the overall portfolio of an investor to assess whether the portfolio is consistent with the investor's risk profile and investment goals.

[15] To the extent that an examination of the entire portfolio is required, I would note that in cases such as this which span many years and transactions, parties cannot necessarily expect the same level of particularity in answers to demand for particulars that might be appropriate in less complex cases involving lesser periods of time.

[16] When asked why the Defendants had not provided all the documents requested by the Plaintiffs he indicated, not that the Defendants were unable to ascertain which documents related to the Plaintiffs [which is understandable since McLeod no doubt has a sophisticated document management system], but rather that he was not aware that all documents had been requested, and that they were refused on the basis of legal advice.

[17] Having observed Mr. Harwood during extensive cross-examination, he seemed to be credible in his testimony, and I accept his evidence generally.

[18] Dr. Penwell testified that he is the decision-maker for all three Plaintiffs, and speaks on their behalf.

[19] His affidavit in evidence suggests he is not a sophisticated investor, and that he went to the Defendants in 2001 with the general investment goal of having adequate financial resources to be able to retire on January 1, 2006 [$150,000 income per year, indexed at 3% per year thereafter] and a specific instruction that his investments reflect his risk averse profile.

[20] His evidence is to the effect that he was shocked to see his investments declined so substantially between 2007 and 2010 - in fact falling from $3 million to $1.6 million. He confirmed that his allegation of false representations against Mr. Harwood is based on Mr. Harwood's not adhering to the Plaintiff's very specific instructions regarding their investments, and Mr. Harwood's consequent representations that their investment plan was being adhered to by him.

[21] He testified that the last point at which he was sufficiently financially secure to be able to retire, based on his investments at Scotia McLeod would have been in mid to late 2007. He conceded that on January 1, 2006, he had reached his initial investment goal.

[22] Only after he terminated his relationship with Scotia McLeod, did he with his new investment advisor and an accountant carefully examine the documents he had, with a view to assessing whether the Defendants could be considered liable for the losses the Plaintiffs suffered. He also assisted in the preparation of the Answers to the Demand for Particulars made by the Defendants herein.

[23] Having had the opportunity to observe Dr. Penwell during cross-examination, I am satisfied that he was credible, and accept his evidence generally.

[24] The parties do not disagree on the legal principles applicable; however, they differ on their application to this case.

Position of Parties

The Defendants

[25] In a helpful format, the Defendants have set out the progression of the questions and answers received from the Plaintiffs - paras. 12 - 13 of the Defendants' brief.

[26] They argue that I must keep utmost in my mind, the function of Particulars. They suggest Particulars fulfil at least six purposes:

> (1) **to inform the other side** of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved...
>
> (2) **to prevent** the other side from being taken by **surprise** at the trial...
>
> (3) to enable the other side to **know with what evidence they ought to be prepared and to prepare for trial...**
>
> (4) **to limit the generality** of the pleadings... or of the claim or the evidence...

> (5) **to limit and define the issues to** be tried, and as to which discovery is required...
>
> (6) **to tie the hands of the party** so that he cannot without leave go into any matters not included... But if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings...

[27] The Defendants concede that points 2 and 3 are concerned primarily with the trial stage; whereas points 1, 4, 5 and 6 are concerned with the pleading stage of an action, and may further be divided into three broad categories:

> (i) the “informing” function [what are the core complaints alleged?]
>
> (ii) the “limiting” function [paring down the pleadings so they are sufficiently distinct to enable a meaningful response.]
>
> (iii) the “pinning down” function - [tying a party’s hands so that all involved are “on the same page” regarding the core complaints and responses.]

[28] Using this template, the Defendants argue that over 9 years, many transactions, communications between the parties, and other factors transpired

making it very difficult for them to defend the case without more and better particulars - see paras. 37 - 45, Brief.

[29] Specifically at the hearing, counsel iterated that only four items of request were left to be answered by the Plaintiffs, after the September 10, 2010 and February 24, 2011 Answers satisfied some of the Defendants concerns.

[30] Demand #1 related to para. 9 of the Statement of Claim, as to what were allegedly “unsuitable investments” [see also para. 13[A], (b), (c),(d) and (e).

[31] Demand #2 related to paras. 11 and 12 of the Statement of Claim regarding an alleged fiduciary duty, and breach thereof by the Defendants. Counsel suggested at the hearing that it is necessary that the Plaintiffs particularize which of the “hallmarks” of a fiduciary relationship they say were breached by the Defendants.

[32] Demand #4 related to para. 13 of the Statement of Claim and requested the Plaintiffs particularize which investments were: unsuitable; and ones for which the Plaintiffs were not warned of the risks associated with the investment.

[33] Demand #5 related to para. 14(a) of the Statement of Claim and request particulars of what the Plaintiffs alleged were “false assertions and representations”.

The Plaintiffs

[34] They argue that “essentially, the Defendants are demanding that the Plaintiffs, at the pleadings stage, outline each and every investment which is alleged to be “unsuitable” and/or “volatile” in support of the Plaintiffs’ claims - para. 3 Brief.

[35] The Plaintiffs, in their Brief, list a number of reasons why the Defendants’ position is unreasonable:

1. The Plaintiffs have provided particulars twice already and that any remaining demands by the Defendants are, in essence, evidence rather than pleadings [see paras. 23 - 38 of Plaintiff’s brief];

2. The Defendants have all the relevant documents and are experts in investments, and their own investment and document systems;

3. The Plaintiffs had proposed an accommodation to avoid this interlocutory hearing but the Defendants "categorically" rejected the Plaintiffs' overture.

[36] At the hearing, counsel urged the Court to consider the "big picture". They argued that there is no dispute that the Plaintiffs had express investment goals and risk averse investor profile, which was clearly communicated and acknowledged by the Defendants. It is those parameters that frame the argument for the Plaintiff and provide a form of a litmus test in assessing the Defendants' conduct.

[37] Plaintiffs' counsel argues that although losses were primarily realized between 2007 and 2009, those losses were incurred because of conduct of the Defendants, not precisely known by the Plaintiffs at this point, that occurred between 2001 and 2010. Therefore the entire time period, and overall portfolio of investments must be examined at a trial ultimately. However, they suggest that the Plaintiffs' pleadings at present are sufficient to comply with CPR 38 and there is a danger that requiring more particulars than are necessary, may make the pleadings

overly cumbersome, and, by virtue of the cost and effort required to answer Demands in such great detail, may undermine effective access to justice for individual plaintiffs, such as the Plaintiffs.

[38] The Plaintiffs' counsel argues that the Defendants have not, on a balance of probabilities, discharged the onus that they have to demonstrate that they cannot adequately plead in response, based on the existing pleadings and particulars provided by the Plaintiffs.

[39] I will note at this point, that I do not accept the latter statement as correct in law. The mover of the motion has the onus to satisfy the Court, that based on the evidence presented and pleadings, it is necessary that further particulars be provided before that party can make a meaningful response to the allegations. As such the mover of the motion has a notional persuasive onus.

[40] A burden of proof, such as the balance of probabilities, can only be applied to facts. Moreover, it would not be appropriate for a witness to be asked, whether they can, based on the pleadings and particulars provided, make a meaningful

response in their Defence. That is an opinion, and not permitted in any event because it is the ultimate issue that the Court must decide.

[41] Nevertheless, I agree that the Defendants have the persuasive onus here, to satisfy the Court that they cannot meaningfully plead in response, based on the existing pleadings and particulars provided by the Plaintiffs.

[42] The Plaintiffs' counsel also pointed out that the Defendants have not asked in their Demand for Particulars, for a time period to be specified.

[43] In summary, at the hearing the Plaintiffs argued that:

1. The Defendants have not discharged the onus on them to satisfy the Court that they cannot making meaningful response in their Defence to the existing Pleadings and Particulars;

2. The Defendants further requests for particulars are either requests for evidence or descriptions of evidence, or not necessary for them to make a meaningful response in their pleadings;

3. Even if the particulars demanded are technically proper, it would be oppressive to order them, since the necessary information to allow the Plaintiffs to be further informed in relation to this issue, is in the exclusive control and custody of the Defendants who have thus far not provided such information [absent documents for the years 2007 to 2009 - see Exhibit G to Dr. Penwell's affidavit], which the Plaintiffs have requested;

4. The Plaintiffs have demonstrated by their actions [including their prompt and specific responses to the Demands for Particulars, their creation of the spreadsheet that is Exhibit #1 at the hearing, and their proposal - see para. 42 of Dr. Penwell's affidavit] that they have "clearly been anxious to proceed with the matter and have been pressing the Defendants to move the matter forward" - para. 51, Brief.

Analysis

[44] I am guided by the *Civil Procedure Rules (2009)*, especially 38.02 and 38.08 and 1.01, and the cases that have commented on these or predecessor rules, as noted in the robust briefs I had to assist me.

[45] I accept that, as the Plaintiffs argue:

> (i) I should keep in mind the object of the Rules is to provide "for the just, speedy and inexpensive determination of every proceeding" - CPR 1.01.
>
> ii) While a moving party must know the case it has to meet when preparing for, and participating in the trial, and must not be surprised when the opposite party seeks to prove a material fact, the moving party must not demand evidence or a description of evidence when seeking further and better particulars.
>
> - para. 19 Brief.

[46] Otherwise stated, particulars should only be ordered when they are, (i) not within the knowledge of the moving party, and (ii) necessary to allow the responding party to be in a position to answer properly - *Obonsawin v. Canada* [2001] O.J. No. 369, (S.C.), per Epstein, J. (now Epstein, JA) at para. 33. She relied upon the Ontario Court of Appeal decision in *Physicians Services Inc. v. Cass* [1971] OJ No. 1561, which continues to be good law - see also *Hanna v. Scotia MacLeod* [2001] OJ No. 5157, and more recently *Pennyfeather v. Timminco Ltd.* 2011 ONSC 4257 at para. 61. In Nova Scotia, the general principles are stated

at para. 17 - *M.A. Hanna Co. v. Nova Scotia (Premier)* (1990) 97 NSR (2d) 281 (SCTD per Glube, CJNS).

[47] In essence, the Plaintiffs claim a course of misconduct by the Defendants during 9 years, which misconduct included acts and omissions amounting to negligence and acts of deliberate misconduct (i.e. failing to adhere to Plaintiffs expressed / strict instructions regarding their investments and goal of wishing to be able to retire in 2006 with $150,000 generated from their $3,000,000 portfolio), or with a 3% increase in income for each year thereafter .

[48] The Plaintiffs have provided significant Particulars to the Defendants thus far.

[49] The Defendants are in control of the inventory of documents that are most relevant to the litigation, and have the greater ability to organize and understand that information - yet argue they need the Plaintiffs to particularize the “many decisions made and investment transactions completed” - para. 29 and similarly para. 33 and 37 - 45 Brief.

[50] Collectively the Demands for Particulars are summarized below [initially made August 4, 2010; there is no formal further Demand for Particulars in the court file, but it seems counsel exchanged correspondence which prompted a further answer - see February 7, 2011 letter from Defendants' counsel Exhibit P, Dr Penwell's affidavit] and the Answers thereto [September 10, 2010 and February 24, 2011]:

Demand 1: With respect to paragraph 9 of the Statement of Claim, please provide a list of the specific investments which each of the Plaintiffs say were "unsuitable" and "volatile".

Initial Answer: The Plaintiffs say that the opening of margin accounts by the Defendants was, in, and of itself, unsuitable and volatile given the Defendants' awareness of the Penwells' limited investment knowledge and experience, adverse risk tolerance, and stated retirement objectives. The Plaintiffs further state that the overall asset mix and investment portfolio chosen by the Defendants on behalf of the Plaintiffs were unsuitable and volatile.

Further Answer: The Plaintiffs say that examples of specific investments which they say were "unsuitable" and "volatile" include, but are not limited to, the following:

(this Answer was numbered "2", but clearly relates to Demand 1)

(a) The Defendants recommended investments in capital bank split share stocks which involved leveraging and were inappropriate for the Plaintiffs whose primary investment objective was to produce a steady stream of retirement income. Examples of such capital bank split share stocks include, but are not limited to, 5Banc Split Inc Capital Shares Class B, AllBanc Split Corp II, BNS Split Corp II, R. Split III Corp, TD Split Inc

CL-B Capital Shares, and Global Banc Advantaged 8 Split Corp Class-A Shares.

(b) The Defendants recommended investment in speculative flow-through tax shelters that exposed the Plaintiffs to losses and did not provide them with meaningful tax benefits. Examples of such investments include, but are not limited to, Creststreet Power & Income Ltd., Creststreet 2005 Limited Partnership, Creststreet Kettles Hill LP, Skypower Wind Energy Fund LP, and Earthfirst Canada Inc..

(c) The Defendants bought stock on behalf of the Plaintiffs on margin, which was inappropriate given that their primary investment objective was to produce a steady stream of retirement income without going significantly into debt in order to achieve that objective.

Demand 2: **In paragraphs 11 and 12 of the Statement of Claim, it is alleged that fiduciary duties were owed by one or both Defendants to some or all of the Plaintiffs. The Defendants do not admit that fiduciary duties were owed by either of them to any of the Plaintiffs in the circumstances of this case. However, in the event the Plaintiffs are able to demonstrate that fiduciary duties were owed, whether as alleged in the Statement of Claim or otherwise, please provide specifics of the alleged breaches of those fiduciary duties, including a list of the investments that were made because of the alleged breaches.**

Original Answer: The particulars of the alleged breaches of fiduciary duties are, without limiting the generality of the foregoing, contained in paras. 9, 10, 11, 12, 13 and 14 of the Statement of Claim. The Plaintiffs further state that the breaches of fiduciary duty relate to the overall investment portfolio of the Plaintiffs managed by the Defendants.

Further Answer: The Plaintiffs maintain that the breaches of fiduciary duty have been adequately outlined in paragraphs 9, 10, 11, 12, 13 and 14 of the Statement of Claim and state that it is the overall asset mix and investment portfolio which is in issue. They further state that some of the specific investments made as a result of the alleged breaches of those fiduciary duties include, but are not limited to, those outlined in paragraph 2 herein. In addition, the Plaintiffs state that the Defendants earned high commissions from the purchase and sale of some of the Plaintiffs' investments which were often "new issues" which would often have higher fees associated with them.

Demand 4: **Please advise which specific investments are the subject-matter of each of the claims in each of paragraphs 13(A)(a) through 13(A)(d), 13(A)(f) and 13(A)(i).**

Initial Answer: The particulars are that the allegations relate to the Plaintiffs' overall investment portfolio managed by the defendants. Further particulars are refused because the information being sought is evidence by which the allegations are to be proved as opposed to necessary particulars.

Further Answer: The Plaintiffs maintain their previous Answer of September 10, 2010 and state that examples of specific investments include, but are not limited to, those outlined in paragraph 2 herein.

Demand 5: **With respect to paragraph 14(a), please provide particulars of the allegedly "false assertions and representations".**

Initial Answer: The particulars includes, but are not limited to, that the Defendants made false assertions or representations with respect to the nature of the accounts opened for the Plaintiffs, the overall performance of the Plaintiffs' investment portfolio, and the expected rate of return on the Plaintiffs' investment portfolio.

Further Answer: The Plaintiffs maintain their previous Answer of September 10, 2010 and further state that the Defendants made false assertions and representations about status of the Plaintiffs' margin accounts. The Plaintiffs refuse to provide further particulars on the basis that the information being sought is evidence by which the allegations are to be proved as opposed to necessary particulars.

In addition, the Plaintiffs provided the following information in the paragraph numbered "1" of the Further Answers to Demand for Particulars:

> As to the whole Demand for Particulars, the Plaintiffs state that it is the overall asset mix and investment portfolio chosen by the Defendants which were unsuitable and volatile given their age, limited investment knowledge, adverse risk tolerance and stated retirement objectives. The Plaintiffs emphasize that they are not investment experts and therefore cannot reasonably be expected to delineate each and every investment which they allege were unsuitable and volatile. However, once they receive their complete investment documentation from the Defendants, the Plaintiffs expect to retain an expert who will be in a better position to opine on specific investments which were unsuitable and volatile.

[51] The Defendants have not filed a Defence yet. They say they have been unable “to respond intelligently” thus far - para. 28 Brief. They say they require further and better Answers to Demands for Particulars #1, 2, 4 and 5.

[52] What further “particulars” they seek from the Plaintiffs, are more precisely seen not as a further “statement in summary form of the material facts”, but rather

as requests for evidence or a description of evidence; or are otherwise not appropriate requests at this time.

[53] Demand #1 seems no longer as necessary. Counsel at the hearing conceded "we now understand" the allegation in para. 9 of the Statement of Claim. I agree that there is sufficient particularity. Demand #2 was restated at the hearing by counsel as a requirement that the Plaintiffs identify which "hallmarks of fiduciary duty" the Plaintiffs allege in the pleadings were breached - Any greater level of detailed response is not required in this case. For a discussion of the general characteristics of fiduciary obligations, see Justice Wilson's comments in dissent in *Frame v. Smith* [1987] 2 SCR 99 at paras. 56 - 64, and her reference to *Misener v. H.L. Misener and Son Limited* (1977) 21 NSR (2d) 92 [1977] NSJ No. 497 (NSSCAD).

[54] As Sopinka, J noted in *Lac Minerals v. International Corona Resources Ltd.* [1989] 2 SCR 574 at pgs. 596 - 598, there are some traditional relationships, for which the fiduciary characteristics or criteria are presumed to exist, unless in special circumstances they are shown to be absent. One of those traditional relationships is that of principal and agent, which are generally recognized to give

rise to fiduciary relationships. In the case at Bar, we have an agency relationship with no suggestion or evidence of any special circumstances.

[55] Demand #4 was based on the Defendants need to have the Plaintiffs identify specific investment vehicles beyond those identified in their para. 2 Answer, and to put a time frame to this allegation of negligence. The specific investment vehicles that the Plaintiffs identified provide particularity, and the Defendants did not request a time frame in their Demands which suggests, as I accept, that the Plaintiffs are correct to say that is a matter of evidence, not pleadings in this case. Demand #5 was answered as particularly as it need be in the Plaintiffs' Answers:

> "...the Defendants made false assertions... with respect to the nature of the accounts opened... the overall performance of... and the expected rate of return on the Plaintiffs' investment portfolio."

[56] Moreover, at the hearing Dr. Penwell was asked by the Defendants' counsel what he was claiming were false representations. Dr. Penwell confirmed that the allegation was centered on the Defendant Harwood's expressed acknowledgement of the Plaintiffs' risk profile and investment goals, yet his actions were inconsistent with those goals and thereby led to false representations.

Conclusion

[57] In my assessment, the “tipping point” has been reached. Any demonstrable basis for the Defendants continuing to refuse to file a Defence because of the need for more and better Particulars has dissipated.

[58] Pleadings are to be concise, and relate to material facts alleged, interwoven with the applicable law relied upon - they frame the arguments. Each case must be decided on its own merits.

[59] In this case, the existing Statement of Claim and particulars are sufficient to meet the purposes of pleadings, and are in compliance with *Civil Procedure Rule* 38.

[60] The requested *Civil Procedure Rule* 38.08(6) Motion is dismissed.

Costs

[61] While I acknowledge the Plaintiffs' arguments regarding the reasonable offer it proposed to the Defendants to avert this Motion hearing, I conclude it is appropriate to award costs to the successful party based on the Tariff "C" rates, and in the amount of $800 payable to the Plaintiffs forthwith in any event of the cause plus recoverable (reasonable and necessary) disbursements in relation to this Motion.

J.