SUPREME COURT OF NOVA SCOTIA

Citation: *Barghouti v. Alborno*, 2017 NSSC 255

Date: 20170927
Docket: Tru No. 416494
Registry: Truro

Between:

Abdul-Karim Barghouti, Zeina Mustafa, 3247003 Nova Scotia Limited, 3261281 Nova Scotia Limited, and 3277016 Nova Scotia Limited

Plaintiffs

v.

Motaz Alborno, 3247734 Nova Scotia Limited, 3247179 Nova Scotia Limited, 3246004 Nova Scotia Limited, and 3261277 Nova Scotia Limited

Defendants

and

Between:

Abdul-Karim Barghouti, Zeina Mustafa, 3247003 Nova Scotia Limited, 3261281 Nova Scotia Limited, and 3277016 Nova Scotia Limited

Plaintiffs

v.

Diana Metlege and D. Metlege Law (a Partnership)

Defendants

Judge: The Honourable Justice Ann E. Smith

Heard: August 30, 2017, in Halifax, Nova Scotia

Counsel: Dennis James, Q.C.; Grace MacCormack, for Plaintiffs (as Respondents)
William Mahody, Q.C.; Jaimie Tax, for the Defendants (D. Metlege and Metlege Law) as Moving Party

By the Court:

Introduction

[1] Diana Metlege and D. Metlege Law (the "Metlege Defendants") move for an order requiring responses, or in some cases more complete responses, to 15 requests for information made by their counsel during the discovery examination of the Plaintiff, Mr. Barghouti.

[2] The issue is whether the requested information is relevant within the meaning of *Civil Procedure Rules 14.01* and *18.18(1)*.

Background

[3] In June, 2013 the Plaintiffs commenced an action against Motaz Alborno, 3247734 Nova Scotia Limited, 3247179 Nova Scotia Limited, 3246004 Nova Scotia Limited, and 3261277 Nova Scotia Limited (the "Alborno Defendants") (Tru No. 416494) claiming special damages for alleged losses on three property transactions. The Plaintiffs claim that Mr. Alborno intentionally falsified documents, was in breach of contract and breached fiduciary obligations they say he owed them in their business partnership.

[4] In May, 2015 the Plaintiffs commenced an action against the Metlege Defendants (Tru No. 439505) seeking special damages relating to losses on the same three property transactions it claims resulted from the negligence of Ms. Metlege in her role as legal counsel on behalf of the Plaintiffs and the Alborno Defendants.

[5] In February, 2016 the two actions were consolidated and continued as a single action – Tru No. 416494.

[6] The Plaintiffs and the Alborno Defendants reached a settlement and a signed Consent Order was issued on November 2, 2016.

[7] On motion of the Plaintiffs, discoveries were ordered for representatives of the parties for the week of September 25, 2016 by Order of Campbell J. dated June 22, 2016.

[8] Apparently, neither Mr. Alborno nor Ms. Metlege attended these discoveries. Mr. Barghouti did attend and was discovered by Mr. Mahody, Q.C., counsel for the Metlege Defendants.

[9] The Plaintiffs took the position that they were not required to respond to the undertakings given at Mr. Barghouti's discovery examination until after Ms. Metlege was discovered. The Metlege Defendants successfully moved for an Order requiring the Plaintiffs to provide their responses to the undertakings within 30 days of March 17, 2017.

[10] On April 18, 2017 the Plaintiffs provided responses to the undertakings. The Metlege Defendants say that of the 41 undertakings, three responses were incomplete. The Plaintiffs refused to answer 15 of the undertakings, primarily on the basis of relevance.

Issue

[11] Should the Plaintiffs be ordered to provide responses, or further responses, to the undertakings?

Law - *Civil Procedure Rules*

[12] There is no disagreement between the parties as to the relevant *Civil Procedure Rules* and the case law interpreting the Rules on a motion such as this.

> **Scope of discovery**
>
> **18.13 (1)** A witness at a discovery must answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence.
>
> **(2)** A witness at a discovery must produce, or provide access to, a document, electronic information, or other thing in the witness' control that is relevant or provides information that is likely to lead to relevant evidence.
>
> **(3)** A witness who cannot comply with Rule 18.13(2) may be required to make production, or provide access, after the discovery or at a time, date, and place to which the discovery is adjourned under Rule 18.18.
>
> […]
>
> **Production or access after discovery or at adjournment**
>
> **18.18 (1)** A party may require a witness who is examined at a discovery to produce, or provide access to, a document, electronic information, or other thing

> referred to by the witness but not brought to, or accessible at, the discovery, unless one of the following applies:
>
> (a) the document, information, or thing is not in the control of the witness;
>
> (b) it is not relevant and is not likely to lead to relevant evidence;
>
> (c) it is privileged.
>
> (emphasis added)

[13] *Civil Procedure Rule 14.01* sets out the meaning of "relevant" for purposes of disclosure and discovery:

> **Rule 14 - Disclosure and Discovery in General**
>
> **Meaning of "relevant" in Part 5**
>
> **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.
>
> […]

[14] In *Healy v. Halifax (Regional Municipality)*, 2017 NSSC 82 Chipman J. stated that "[R]elevance is the primary consideration in addressing whether or not requests made at a discovery must be answered."

[15] Rosinski J. in *Maple Trade Finance Inc., v. Euler Homes Canada*, 2015 NSSC 37 interpreted "likely to lead to relevant evidence" (*CPR 18.13(1)* and *(2)*) as follows:

> [37] Therefore, to the extent that it is possible to do so, a chambers judge should make an assessment of the purported (trial) relevancy, including materiality to the issues in dispute, of the document, electronic information, or other things being sought to be produced. Similarly, a chambers judge should make an assessment of the purported (trial) relevancy of an objected-to question at discovery. Such questions must ask "for relevant evidence or information that

> is likely to lead to relevant evidence". I interpret "likely to lead to…" as more likely than not to lead to relevant evidence at trial. There is no authority cited by Hermes in its supplementary brief for, and I reject, its apparent position that the word "likely" is to be interpreted as indicative of a threshold "significantly higher" than merely more probable than not.
>
> (emphasis added)

[16] A leading Nova Scotia case as to the trial relevancy test is the decision of the Court of Appeal in *Brown v. Cape Breton (Municipality)*, 2011 NSCA 32. Bryson J.A., writing for the Court stated at paragraph 12:

> 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. This is thought to be the price of reducing litigation cost. 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). It remains to be seen whether this effort to save resources will be frustrated by the time and expense of extensive evidence on such motions in order to reproduce "the vantage point of the trial judge." 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:
>
> - The semblance of relevancy test for disclosure and discovery has been abolished.
> - The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. 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.

[17] More recently, in *Laushway v. Messervey*, 2014 NSCA 7 the Nova Scotia Court of Appeal endorsed the observations of Wood J. in *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 57 where Justice Wood stated that a Chambers Justice should take a more liberal approach to relevance on a motion for disclosure than might a trial judge. Saunders J.A. stated at paragraph 49:

> 49 The observations of Wood, J. in a subsequent decision in *Saturley v. CIBC World Markets Inc*, 2012 NSSC 57 are also instructive. In particular, I agree with Justice Wood's comments at para.9-10 where he said:
>
> > [9] In my view, the Court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than it might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.
> >
> > [10] At the disclosure and discovery stage of litigation, it is better to err on the side of requiring disclosure of material that, with the benefit of hindsight, is determined to be irrelevant rather than refusing disclosure of material that subsequently appears to have been relevant. In the latter situation, there is a risk that the fairness of the trial could be adversely affected.
> >
> > (emphasis added)

[18] Saunders J.A. was clear that there must be a reasonable link between people, events and things in order for relevancy to be established. He stated:

> (61) It is axiomatic that deciding whether something is "relevant" involves an inquiry into the connection or link between people, events and things. Relevance cannot be determined as if it were contained in some kind of pristine, sealed vacuum. One is always expected to ask "relevant to whom? Or to what?"

[19] Rosinski J. in *Maple Trade Finance v. Euler Homes Canada* (*supra*) suggested that a Chambers Justice should consider erring on the side of caution in close-calls on relevancy:

> [38] On the other hand, in "too close to call" situations, I prefer to conclude that: if there is a realistic concern that denial of the information/evidence could adversely affect trial fairness, then a chambers judge should err on the side of

> caution and require the information/evidence be provided by discovery answer and/or production, as may be the case.

[20] However, it is also important to note that a Chambers Justice should ensure that requests for production not become so broad as to result in a "trial within a trial." In *Healey v. Halifax (Halifax Regional Municipality*), 2017 NSSC 82 the plaintiffs sued HRM, the Halifax Regional Fire and Emergency Service, and the Attorney General of Nova Scotia in negligence after their homes were damaged or destroyed in a forest fire. At discovery, they sought production of evidence about the conduct of the fire department in other, unrelated fires. Chipman J. found that the information sought was not relevant. He noted as follows at paragraph 35:

> With respect, I am of the view that these requests, if allowed, would lead to trials within the trial. In this regard, such an inquiry would lead to the parties and the Court having to delve into such things as the particular circumstances in each fire, the nature of the fire, its size, fire behaviour on the dates in question, atmospheric conditions, the individuals who fought the fire, what information they had about the fire, communications from dispatch, as well as the equipment available. Indeed, based on my review of the affidavit evidence and pleadings, the Plaintiffs have failed to establish any connectedness between earlier events and the fire in question. Accordingly, I am of the view that the seven requests need not be answered. They are irrelevant and would lead to a potentially unmanageable trial. In this regard, I find the decision of *Wilson v. Lind*, [1985] O.J. No. 535 be of application. As Justice O'Brien concludes at p. 3:
>
> > If such allegations were permitted in the statement of claim, the discovery process would be extensively prolonged and the trial would involve issues of prior and subsequent negligence and impairment. Rather than one trial there would be several.

[21] A determination of relevance must be made with reference to the material allegations in the pleadings. I refer in that regard to the decision of LeBlanc J. (as he then was) in *Wilson Fuel Co. v. Power Plus Technology Inc.*, 2015 NSSC 304 in the context of a request for disclosure of additional documents under *CPR 14* at paragraph 17:

> A determination of relevance must therefore be made with reference to the facts in issue as identified in the pleadings. However, even if alleged in the pleadings, a fact will not truly be in issue unless it is a necessary and material allegation. To meet the test for relevance, then, (1) the document or electronic information must prove or render probable the past, present or future existence or non-existence of a fact; (2) the fact must relate to an allegation set out in the pleadings; and (3) the

> allegation must not be unnecessary or immaterial to the claim or defence: see generally *The Law of Evidence in Canada* at §§2.43-2.49.

The Statement of Claim and Defence in both the actions against the Alborno Defendants and the Metlege Defendants

[22] As noted previously, the Plaintiffs claim against the Metlege Defendants in negligence and breach of fiduciary duty.

[23] The Statement of Claim alleges Mr. Barghouti and his wife Zeina Mustafa became business partners with Mr. Alborno in 2010 for the purpose of property development in Nova Scotia.

[24] The Statement of Claim alleges that between 2010 and 2013, Mr. Barghouti and Mrs. Mustafa, in partnership with Mr. Alborno, made three real estate investments in Nova Scotia at 20 Dawn Street, Halifax (the "Dawn Street Project"); at 592 Bedford Highway, Halifax, Nova Scotia (the "592 Bedford Highway Project") and 1216 Bedford Highway, Halifax, Nova Scotia (the "1216 Bedford Highway Project").

[25] The Plaintiffs claim losses on these three real estate transactions. They claim that they contributed money for the purchase of these lands, together with Mr. Alborno. There are allegations in the settled lawsuit against Mr. Alborno that he formed the agreements of purchase and sale for the three properties by overstating the purchase price, meaning that the Plaintiffs paid a marked-up price when they contributed to the purchase.

[26] The Statement of Claim in the settled action against the Alborno Defendants alleges that Mr. Barghouti:

> …typically facilitated the transactions by locating available suitable properties. Mr. Alborno would then negotiate a purchase and sale agreement with the selling party. Together, Mr. Barghouti and Mr. Alborno would then consider how they might develop the commercial property by consulting with architects, approval consultants, accountants and appraisers prior to closing. (para. 15)

[27] Paragraph 16 of the Plaintiffs' claim against the Alborno Defendants alleges that "If Mr. Barghouti and Mr. Alborno together deemed the project to be suitable for development, they would decide on their respective contributions to the project."

[28] Paragraph 17 of the claim against the Alborno Defendants alleges that Mr. Alborno was Mr. Barghouti's primary point of contact, and that "Mr. Barghouti…did occasionally have contact with the architects, approval consultants, accountants and appraisers regarding various aspects relevant to developing the properties that were purchased."

[29] At paragraph 18 of the Claim against the Alborno Defendants, the Plaintiffs allege that:

> once an agreement was finalized with the selling party, Mr. Alborno would sign all necessary documentation for the closing of the sale. He would send Mr. Barghouti a copy of the Purchase and Sale Agreement and the disbursement costs for the closing.

[30] With respect to the Dawn Street Project, the allegations in the Claim against the Alborno Defendants include, at paragraph 23, that

> The $500,000 buy-in (by the Plaintiffs) was paid as a result of Mr. Alborno's provision to Mr. Barghouti of an Agreement of Purchase and Sale which purported to show the purchase price of the property as $660,000.00 rather than the actual purchase price of $310,000.00.

[31] Paragraphs 31 and 32 of the Claim against the Alborno Defendants allege that the Plaintiff 3247003 Nova Scotia Limited ("3247003") was incorporated to operate the 592 Bedford Highway Project and that around or following the closing, Mr. Alborno became the sole shareholder of 3247003 with the final purchase price being $710,000.00.

[32] At paragraph 35 of the Claim against the Alborno Defendants it is alleged by the Plaintiffs that Mr. Alborno provided Mr. Barghouti with a falsified Agreement of Purchase and Sale and a Disbursement of Funds which showed the price of the purchase of 592 Bedford Highway as $1,150,000.00 and $1,200.00.00 respectively.

[33] With respect to the 1216 Bedford Highway Project, the Plaintiffs allege in their action against the Alborno Defendants that Mr. Alborno signed an Agreement of Purchase and Sale for 1216 Bedford Highway for $1,331,550.00 but provided Mr. Barghouti with an Agreement of Purchase and Sale indicating the purchase price at $2,180,150.00.

[34] At paragraph 58 of the Claim against the Alborno Defendants, the Plaintiffs allege that when the Purchase and Sale Agreement for 592 Bedford Highway which Mr. Alborno had provided to Mr. Barghouti was provided to the vendor of the property, Ms. Pamela Tower, she advised that the signature on the document was not her signature, the actual sale price was $710,000.00, not $1,200,000.00 (as indicated on the document) and that she had never before seen the version of the Agreement which had been provided to Mr. Barghouti.

[35] Similarly, with respect to 1216 Bedford Highway, the allegation at paragraph 59 of the Claim against the Alborno Defendants was that when the vendors, Mr. and Mrs. Barnard, were shown a copy of the Agreement of Purchase and Sale provided to Mr. Barghouti by Mr. Alborno, they indicated that some of the pages of the document were not a genuine part of the original Agreement and, in particular, the page of the document showing the purchase price as $2,180,150.00, with the actual purchase price being $1,331,500.00.

[36] In the claim against the Metlege Defendants, the Plaintiffs claim that in November, 2010 Ms. Metlege acted as their legal counsel when they contributed $500,000.00 to the Dawn Street Project. Ms. Metlege also acted as counsel for Mr. Alborno. In fact, Ms. Metlege acted as legal counsel for both the Barghouti Plaintiffs and the Alborno Defendants on each of the three transactions.

[37] The Plaintiffs further allege (paragraph 29) that Ms. Metlege knew, or ought reasonably have known, that it had been represented to Mr. Barghouti and Ms. Mustafa that the purchase price for Dawn Street was $660,000.00 as opposed to the actual purchase price of $310,000.00.

[38] The Plaintiffs claim that Ms. Metlege was negligent by failing to notify her clients, Mrs. Mustafa or Mr. Barghouti, of outstanding liabilities on the property when she knew that Mr. Barghouti had asked lawyer Mr. Iosipescu (a former law practice associate of Ms. Metlege) about same and by her failure to point out the inflated purchase price of the property as indicated in a December, 2010 shareholders' agreement. (paragraph 31)

[39] The Plaintiffs' allegations against Ms. Metlege include the claim that but for her failure to provide full disclosure to them as her clients, they would have had knowledge of Mr. Alborno's actions which would have informed a decision not to engage in future business dealings with him.

[40] The Plaintiffs make similar allegations in negligence and breach of fiduciary duties with respect to Ms. Metlege's actions as counsel with respect to the two other projects.

[41] The Plaintiffs quantify their loss on each project as being the wrongful mark-ups plus interest. There are additional monetary claims involving 1216 Bedford Highway including extra deed transfer tax and property taxes.

[42] The Metlege Defendants filed a defence on July 2, 2015. In it, they raise certain allegations as well as certain defences.

[43] In relation to the Agreement of Purchase and Sale for the Dawn Street Project, at paragraph 20, Ms. Metlege pleads that it was not until years after that sale closed, in December, 2013, that she first became aware of an apparently forged Agreement of Purchase and Sale. The Dawn Street property transaction closed in December, 2010.

[44] Similarly, at paragraph 35 of the Defence Ms. Metlege says that years after the 592 Bedford Highway Project closed, she became aware, for the first time in March, 2013, of an allegation that Mr. Alborno had provided Mr. Barghouti with an allegedly fake Agreement of Purchase and Sale showing an allegedly fake purchase price of $1.2 million.

[45] At paragraph 45 of the Defence, Ms. Metlege claims that the Plaintiffs have not suffered any damages for which she would be liable in law.

[46] At paragraph 46, Ms. Metlege says that if the Plaintiffs have suffered any damages, such damages are (a) excessive, (b) too remote, and (c) not causally linked to the actions of Ms. Metlege. Ms. Metlege further alleges that the Plaintiffs have failed to mitigate any losses they suffered.

[47] Ms. Metlege alleges at paragraph 47 of the Defence that if she was negligent (which she does not admit), the Plaintiffs were contributorily negligent with respect to any losses suffered by, (a) voluntarily entering a business relationship with Mr. Alborno, and (b) by failing to promptly and appropriately undertake a reasonable level of diligence to investigate the reasonableness of the assumptions underlying the Plaintiffs' decisions to join in the various transactions involving Mr. Alborno.

[48] Ms. Metlege, at paragraph 48 of the Defence specifically pleads the *Contributory Negligence Act*, RSNS 1989, c. 95.

[49] Counsel for the Metlege Defendants says that at the trial of this matter there will be at least three live issues given the allegations contained in the pleadings.

[50] He contends that one issue will be the causal connection between the alleged actions of Ms. Metlege and any loss which the Plaintiffs allege.

[51] Another issue Defence counsel says will be a live one at trial is the proper method to assess damages.

[52] Finally, the Defendants' counsel says mitigation will also be a live issue at trial.

[53] As noted earlier, the Plaintiffs and the Alborno Defendants reached a settlement of their differences after the discovery of Mr. Barghouti at which the outstanding undertakings arose.

[54] It is not disputed that following a Business Dissolution Agreement in January, 2013 between the Barghouti Plaintiffs and the Alborno Defendants, the Plaintiffs ended up owning 100% of the 592 Bedford Highway development, whereas the initial intent, as disclosed in the pleadings, was that there would be a 50/50 ownership between the Barghouti group and the Alborno group.

[55] It is also not disputed that there has been a doubling of the percentage ownership by the Barghouti group in the 1216 Bedford Highway development. Initially, according to the pleadings, the Barghouti group was to receive 25% of that development; they now have an ownership interest of 50%.

[56] Counsel for the Metlege Defendants says that the increased ownership position of Mr. Barghouti may well impact the assessment of damages against Ms. Metlege.

[57] The Metlege Defendants say that it may be that the Plaintiffs are unable to show that in fact they have suffered any loss as a result of Ms. Metlege's actions.

[58] From a pleadings perspective, that is the context into which the analytical framework reviewed above needs to be applied and the context in which I must determine whether the outstanding undertaking responses should be answered.

ANALYSIS

Undertakings September 27, 2016 Discovery

#4 To determine whether the terms of the retainer have been committed to writing, and if so, to provide a copy of those terms.

[59] Apparently Mr. Barghouti retained legal counsel in connection with a business deal in Dubai some years ago, that is not related to the within action. At discovery, for the Metlege Defendants, counsel asked that the retainer agreement between Mr. Barghouti and that counsel be produced, if it had been reduced to writing.

[60] Mr. Barghouti refused to answer the question on the basis that the response sought is covered by solicitor/client privilege, and is, in any event, not relevant.

[61] At the hearing of the motion, the Defendants indicated that they were not looking for the terms of the retainer, but only to be advised whether the retainer was oral or written. The supposed relevance of the question was expressed as Mr. Barghouti's experience in retaining legal counsel. I note that the Plaintiffs correctly point out that the Plaintiffs have not plead that they were disadvantaged as Jordanians with the process of obtaining legal counsel in Nova Scotia.

[62] Counsel for the Metlege Defendants has not persuaded me that knowing whether a retainer which Mr. Barghouti had with a lawyer in an unrelated matter in a different country at some undisclosed point in the past, can possibly be material to the issues in dispute.

[63] There is no information, and certainly no evidence before me that Mr. Barghouti's retention of Ms. Metlege was anything other than in the normal course of a business person retaining a lawyer to carry out corporate and transactional work.

[64] Mr. Barghouti is not required to answer Undertaking #4.

#7 To determine the dates Mr. Barghouti has been in Canada from 2010 to present.

[65] At the hearing of this motion, counsel for the Metlege Defendants modified this request to provide the dates when Mr. Barghouti was present in Canada from 2010 to the end of January, 2013.

[66] Mr. Barghouti refused to answer this question on the basis of relevance. Counsel for Mr. Barghouti says that there is no relevance to the provision of every date when Mr. Barghouti was in Canada, given the large volume of correspondence which he says discloses the written communications between Ms. Metlege and the former Defendant, Mr. Alborno. The Plaintiffs' counsel says that Ms. Metlege is aware of her communications with Mr. Barghouti, and says that if the Defendants' counsel wished to discover Mr. Barghouti as to his whereabouts on specific dates, they could have done so.

[67] I note that I was not provided with excerpts of the discovery evidence of Mr. Barghouti.

[68] The Metlege Defendants say that the Plaintiffs have squarely put the issue of Mr. Barghouti's whereabouts at issue. As noted earlier, the Claim alleges that Mr. Barghouti and Mrs. Mustafa generally reside in Jordan, with frequent travel to Nova Scotia by Mr. Barghouti. While outside Nova Scotia, the Plaintiffs allege that Mr. Alborno facilitated and managed their property transactions. They say that Mr. Barghouti's meetings and dealings associated with the three properties are highly relevant to the issues in the litigation. Further, the Metlege Defendants say that information as to Mr. Barghouti's attendance in Canada may assist in determining when interactions associated with the relevant properties occurred.

[69] The assessment of relevancy at this point in advance of trial, is difficult. At this stage, I conclude that the requested information is relevant, or likely to lead to relevant information. Mr. Barghouti has put his whereabouts in issue and the Defendants are entitled to information necessary, or likely to assist in their defence. Whether information about Mr. Barghouti's times in Canada during the relevant years is admissible and relevant at trial, will be up to the trial judge.

[70] I am satisfied that Mr. Barghouti should provide the dates he has been in Canada from 2010 until the end of January, 2013.

<u>#9 To identify the feasibility report (relied on by Mr. Barghouti) in relation to the 20 Dawn Street transaction.</u>

[71] At the hearing of this motion, counsel for the Defendants indicated that this undertaking has now been fulfilled.

September 29, 2016

#1 To provide the months when Mr. Barghouti resided in Jordan between 2000 and 2004.

[72] Mr. Barghouti refused to provide this information at discovery on the grounds that the location of his residence some six to ten years prior to the commencement of the real estate transactions underpinning the litigation are not relevant. The Plaintiffs' counsel also says that Mr. Barghouti could have been questioned directly about his awareness of the Halifax real estate market at discovery.

[73] Although I was not provided with copies of Mr. Barghouti's discovery evidence, Defendants' counsel advised that Mr. Barghouti gave evidence that in the years 2000 to 2004 he spent time in Halifax attempting to do business. Counsel for the Metlege Defendants described this activity as Mr. Barghouti "attempting to bring agency business to Jordan."

[74] I am not satisfied that there is any materiality to the issues in dispute that is engaged by this undertaking. I have no evidence as to the nature of the "agency work" or even how Mr. Alborno's attempts to "bring" agency work to Jordan supposedly impacted his knowledge of the Halifax real estate or development market. I was not advised whether this agency work involved real estate or development.

[75] I am not satisfied that the dates when Mr. Barghouti resided in Jordan some six to ten years before the circumstances and transactions leading to this litigation are relevant, or likely to lead to relevant evidence. As Plaintiffs' counsel contends, the Plaintiffs have not plead that they were unfamiliar with the Halifax real estate market, or were vulnerable in some sense by being Jordanian citizens. Mr. Barghouti is not required to provide the dates when he resided in Jordan during the years 2000 to 2004.

September 29, 2016

#2 To provide the addresses of residence when Mr. Barghouti lived in Halifax between 2000 and 2004

#3 To provide the address of residence where Mr. Barghouti conducted business in Halifax between 2000 and 2004

#4 To check for names of the individuals Mr. Barghouti dealt with during 2000 to 2004

#5 To provide the addresses for both accommodations in Halifax Mr. Barghouti resided in, and the time period that he resided in each

[76] I will deal with these four undertakings together since each requests information concerning the time period 2000 – 2004 when Mr. Barghouti resided in Halifax. The Metlege Defendants have plead, in essence, that the Plaintiffs unreasonably relied upon Mr. Alborno and did not exercise due diligence in agreeing to do business with him. They say that the Plaintiffs will need to be able to demonstrate to the trial judge that they relied on the representations made by Ms. Metlege. The Metlege Defendants say that the claim against them includes allegations that Mr. Alborno and Mr. Barghouti concluded the terms of their business deals outside of Ms. Metlege's presence and then met with her to reduce the deals to writing.

[77] I agree that those will be relevant matters at trial. However, the Metlege Defendants have not met the burden of proof necessary to convince me that Mr. Barghouti's "exposure to the real estate and business development market" during the years 2000 – 2004 is relevant to his reliance on Ms. Metlege six to ten years later or to the exercise of diligence on his part in determining to enter into a business partnership with Mr. Alborno. This is especially the case because the only submission made to the Court was that during the years 2000 – 2004 Mr. Barghouti was attempting to bring agency work to Jordan. As noted earlier, I was not provided with any information as to the nature of this agency work or what is meant by "attempts", or what is meant by "bring to Jordan."

[78] The pleadings do not establish any connectedness between the addresses where Mr. Barghouti lived or conducted business in the 6 – 10 year period prior to the transactions at issue. The same applies with respect to the request that Mr. Barghouti provide the names of individuals Mr. Barghouti dealt with (presumably in connection with his attempts to bring agency work to Jordan). The contention that somehow because Mr. Alborno was attempting to bring agency business to Jordan during the early 2000's informs his interactions with Ms. Metlege or Mr. Barghouti some 6 – 10 years later, is not persuasive. The information sought is of less than marginal relevance and I am not prepared to require Mr. Barghouti to respond to these undertakings.

September 29, 2016

<u>#6 To provide or identify in the documents Mr. Barghouti's first notification to Ms. Metlege of his intent to be involved</u>

[79] Plaintiffs' counsel contends that this undertaking has been fulfilled. Counsel for the Metlege Defendants disagrees, saying that the response does not indicate when Mr. Barghouti, himself, first notified Ms. Metlege of his involvement in the 592 Bedford Highway Project.

[80] I conclude that what occurred when Ms. Metlege first became aware of Mr. Barghouti's involvement is relevant to the issues disclosed in the pleadings.

[81] I am not satisfied that the response provided by Mr. Barghouti at discovery was responsive to the question given that Mr. Barghouti pointed to an email message from Mr. Iosipescu to Ms. Metlege. Mr. Barghouti is to either advise by providing information, or pointing to a particular document, as to his first notification to Ms. Metlege of his intent to be involved in the 592 development.

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#8 To provide the most current application in association with the 592 development

#9 To provide or identify in the documents the most recent appraisal for 592

#10 To provide all documentation available in relation to the offer on 592

#11 To provide a copy of the 592 lease currently in effect

#13 To provide the corporate income tax returns for 7003 Nova Scotia Limited from 2010 forward

#14 To provide the financial statements and corporate income tax returns for 3253478 Nova Scotia Limited from 2010 forward

#16 To produce or identify in the documents a copy of the last appraisal done on the Bedford Highway lot

#17 To provide the financial statements and tax returns from 2010 forward for 3261281, 3261277, 3261278, 3261279 and 3261280 Nova Scotia Limited.

[82] Counsel referred to these eight undertakings as requests for financial information. I intend to deal with them together.

[83] Counsel for the Metlege Defendants says that responses to these undertakings will assist in developing his position on damages, mitigation and contributory negligence at trial.

[84] It is obvious that the parties have very different perspectives on how damages should be assessed if negligence is made out.

[85] The Plaintiffs' counsel says that the claim against Ms. Metlege relates to very specific transactional damages. In particular, he says that it relates to the overpayment or excess payment between the represented amounts of the purchases that the Plaintiffs were asked to contribute to and the "margin" that was created by the allegedly false documentation that Mr. Alborno provided to Mr. Barghouti.

[86] The Plaintiffs' counsel says that the Plaintiffs are not alleging an ongoing loss in the value of the companies, or the value of the properties, which might make relevant the kind of financial documentation sought in the undertakings above.

[87] In response to the suggestion by counsel for the Metlege Defendants that there may not be any loss incurred by the Plaintiffs, counsel for the Plaintiffs says that if the Plaintiffs happened to gain on the property after Ms. Metlege's actions because of inflation of value or other reasons, that does not go at all to effect the original misrepresented purchase price, and hence overpayment by his clients.

[88] The Plaintiffs' counsel says that this is not an open-ended loss of profit claim such that what the Plaintiffs are doing with the property now is relevant or flows from the pleadings.

[89] The Defendants' theory of the case as it relates to damages is that the Court cannot simply look at the closing dates for the transactions and conclude that the marked-up payments crystalize the Plaintiffs' loss (plus interest).

[90] As noted previously, the Plaintiffs ended up owning 100% of 592 Bedford Highway, although they were initially going to acquire 50% of that development. Similarly, the Plaintiffs were to acquire 25% of 1216 Bedford Highway and now own 50% of that development.

[91] In my view, it would be premature for me, as the Chambers Judge, to preclude the Metlege Defendants from advancing their theory of damage assessment, mitigation and contributory negligence. Whether the trial judge accepts the Metlege Defendants' theory is another matter. But to preclude the Defendants from having the information sought at this point in time raises concerns that could affect trial fairness.

[92] The Plaintiffs are required to answer undertakings 8, 9, 10, 11, 13, 14 and 16. With respect to undertaking 17, the Plaintiffs are not required to provide the information sought with respect to 3261277. The Plaintiffs' counsel has advised that 3261277 was a company 100% owned by Mr. Alborno. I was not provided with any information to the contrary. In these circumstances, the Plaintiffs are not required to answer undertaking 17, as it relates to 3261277.

[93] Finally, I note that the Plaintiffs' counsel pointed out that 3261279 and 3261280 are not Plaintiffs. However, he noted that "relevant portions" of financial

statements for these companies were provided to the Defendants. I assume, therefore, that these companies are related in some way to the Plaintiffs and that was why certain documentation was disclosed. The information sought by undertaking 17 shall be disclosed by 3261279 and 3261280.

#18 To provide the date Mr. Barghouti applied for Canadian citizenship

[94] The Metlege Defendants say that Mr. Barghouti's discovery evidence was that he obtained Canadian citizenship in 2004 or 2005. Counsel for the Metlege Defendants says that in order to obtain Canadian citizenship, an applicant must have a physical presence in Canada for three of the four years prior to application. I was not provided with any authority for that submission. However, counsel for the Plaintiffs did not take issue with it, although he says that the information sought is not relevant.

[95] The sole reason advanced by the Metlege Defendants for requesting this information is that it is relevant to Mr. Barghouti's "exposure to the Halifax business and real estate market."

[96] For the reasons given earlier with respect to the requests for Mr. Barghouti's business and personal residences and the individuals he dealt with while in Halifax in the years 2000 – 2004, I fail to see how the date of his application for citizenship is a matter of trial relevancy.

[97] Mr. Barghouti is not required to answer this question.

Costs

[98] In light of the divided success, I am not prepared to award either party costs.

Smith, J.