1987 S.H. No. 63509

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

B E T W E E N:

DONALD RIPLEY

PLAINTIFF

- and -

INVESTMENT DEALERS ASSOCIATION OF CANADA, FRANK DOYLE, ANDREW KNIEWASSER, GREGORY M. CLARKE AND M.ROBERT MILLER,

DEFENDANTS

HEARD at Halifax, Nova Scotia, before the Honourable Mr. Justice Nathanson, Trial Division, in Chambers on May 24 and 30, 1988

DECISION June 13, 1988

COUNSEL Joel Fichaud, Esq.) - for the Plaintiff
A.L. Caldwell, Q.C.)

R.L. Barnes, Esq.) - for the Defendant
D. MacAdam, Q.C.)

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NATHANSON, J.:

The plaintiff stock broker sued the defendant association (hereinafter the "I.D.A.") and certain of its officers for a declaration, prohibition, permanent injunction and damages with respect to an investigation, charges and proposed hearing initiated by the I.D.A. to ascertain whether the plaintiff had acted in a manner which might justify disciplinary action. The defendants have filed a defence.

As the proposed hearing is scheduled to be held on May 30, the plaintiff has applied in Chambers for an interim injunction enjoining the defendants or their

representatives from holding the hearing until after this Court has conducted a trial and has rendered a decision in the principal action. These brief reasons attempt to decide the interlocutory application in a mercilessly short period of time. It is therefore not possible to set out the factual background in great detail. I must content myself with the briefest recitation of the facts of a relatively complicated fact situation.

The I.D.A. is a national association of investment dealers. Its constitution and by-laws regulate the conduct of its members and authorize the discipline of a member or any of its partners, directors or officers for, inter alia, any business conduct or practice which a Business Conduct Committee in its discretion considers unbecoming a member or detrimental to the interests of the public. If found guilty, the Committee is authorized to impose one or more of the following penalties: a reprimand, a fine not exceeding $100,000.00 per offence, suspension and expulsion from membership.

The plaintiff was regional vice-president of McLeod Young Weir Limited, a member of the I.D.A. In July, 1987, the I.D.A. commenced an investigation of a person other than the plaintiff but relating in part to the involvement of the plaintiff with the account of Honourable Stewart McInnes, a federal cabinet minister,

who was a client of the McLeod firm. In August, the plaintiff, upon the proposal of the I.D.A., agreed to a settlement under which the plaintiff paid a penalty and costs of $6,300.00 for having failed to ensure that the McInnes account was opened and supervised by another employee in accordance with a regulation of the I.D.A. The I.D.A. signed the settlement agreement and cashed the plaintiff's cheque but, contrary to a promise, did not submit it for approval to a Business Conduct Committee, as was necessary for it to become a binding document. The reason why it did not do so was that, during the course of another investigation, it was discovered that the essential fact upon which the settlement agreement was based was erroneous. The plaintiff had not failed to supervise the operation of the McInnes account by the creation of a blind trust; rather, a senior employee in the Toronto office of the McLeod firm had effectively countermanded his instructions by requiring that a different procedure be followed. When that fact came to the plaintiff's attention, he demanded repayment of the $6,300.00 penalty he had paid, and the I.D.A. complied.

The McLecd firm terminated the employment of the plaintiff and he, in turn, initiated legal action claiming damages for wrongful dismissal. In January, 1988, the I.D.A. notified the plaintiff it had laid charges against

him allegedly arising from the circumstances surrounding his dismissal by the McLeod firm. The charges included the previous charges relating to the McInnes account with respect to which the I.D.A. had repaid the penalty he had paid. The notice of the charges stated that if the plaintiff did not accept responsibility and a fine of $10,000.00 then the I.D.A. would set down the charges for hearing by a Business Conduct Committee. The plaintiff denied the charges. At a later point of time, the plaintiff demanded that the McLeod firm supply him with particulars of its grounds for his dismissal from employment, and the I.D.A. eventually provided particulars which were in every material respect the same as the charges which the I.D.A. had laid against the plaintiff.

During the course of its investigations, the I.D.A. accumulated a number of statements from various persons. The I.D.A. provided the plaintiff with a list of the persons questioned and summaries of their statements, but the I.D.A. has declined to provide copies or transcripts of the full statements. The plaintiff feels that he must examine the full statements not only of the persons who the I.D.A. intends to call as witnesses at his hearing but also those who will not be called to give evidence, so that he will be sure that he has knowledge of all existing inculpatory and exculpatory facts with which to prepare

his defence and that all such facts are placed before the tribunal before which the hearing will be held.

The wrongful dismissal action against the McLeod firm is not directly related to the principal action or the interlocutory application in the present case. However, there are some indirect connections.

One connection is that the McLeod firm has refused to deliver to the plaintiff notes which he made and kept during the period of his employment. The plaintiff says that he suffers from dyslexia which affects his memory and he requires those notes so that he can properly prepare a defence in the present action and for the disciplinary hearing which the I.D.A. has scheduled. The McLeod firm has delivered some of those notes to the I.D.A. which, until recently, was unwilling to provide copies to the plaintiff. The I.D.A. has the authority under its constitution and by-laws to require the McLeod firm to return the plaintiff's notes or copies thereof to him, but it has not taken any steps to do so to date.

A second connection is that the local manager of the McLeod firm has sent a memo to its Halifax staff referring the plaintiff's court action and reminding that the McLeod firm has a rule that "under no circumstances

is any McLeod employee to provide information to Mr. Ripley, or anyone on his behalf, or to provide documents or any other assistance to Mr. Ripley or anyone on his behalf." The plaintiff says that various employees of the McLecd firm have declined to communicate with him for fear of the possible consequences to their employment so that, therefore, he is hindered in properly preparing for trial and for the pending hearing.

A third connection is that, for some unknown reason, the McLeod firm, although not charged by the I.D.A., will have the right to cross-examine witnesses at the hearing of the charges against the plaintiff. Since the McLeod firm is involved in litigation with the plaintiff, has co-operated with the I.D.A. by sending some of the plaintiff's notes to it, and apparently has instructed its employees not to co-operate with the plaintiff, the plaintiff is fearful of the fairness of the pending hearing.

The plaintiff says that certain officers and employees of the I.D.A. have made public or private statements which can be interpreted to indicate that his guilt has been pre-judged and is a foregone conclusion. While some of those statements are what the solicitor for the I.D.A. has labelled "double hearsay", which may not be admissible or credible, others are not. I will limit myself to four examples. Sheila Copps, Member of Parliament

for Hamilton, swears that the president of the I.D.A. told her in October, 1987, that the findings of the I.D.A. investigation would clear Stewart McInnes but that Mr. Ripley was central, and that Mr. Ripley would figure prominently in the findings of I.D.A. When Ripley complained to Senator E.W. "Staff" Barootes, a director of the I.D.A., that officers of the I.D.A. had been stating that he was guilty, Senator Barootes agreed with him. In an Interrogatory on file, Gregory M. Clarke, Vice-President for member regulation of the I.D.A., whose duties include supervision of all investigations, stated:

> **". . .I say that I advised Senator Barootes that we intended to have a Business Conduct Committee hearing into the charges against Mr. Ripley. Since I believe Mr. Ripley to be guilty, I may have indicated that I felt there would be a penalty at that time."**

Eric W. Balcom, a friend of the plaintiff, swore in an affidavit on file about overhearing a conversation in an elevator in the Central Trust building:

> **"The older man said something like this, 'Ripley's through - he's done'. The younger man replied, 'Ripley is a tough customer and will try to kill your business'. The other fellow said, 'When we get through fixing him at Investment Dealers 'he will be finished'. then something was said about your notes, as without them Ripley could hardly remember his own name."**

I have had occasion in the past to consider the prerequisites for an interim injunction: See **Woodlawn Sports Centre (1975) Limited v. Canadian Shopping Centres Limited** (1985), 70 N.S.R. (2d) 319 at p. 321 and **Merck & Co. Inc., Kolco/Air International Limited v. Scotia Marine Products (1983) Inc.** (1986), 73 N.S.R. (2d) 374 at p. 375-6, and it is unnecessary to review the material here.

The first burden that the plaintiff has is to prove that there is a serious question to be tried and that he has a real prospect of success.

The plaintiff is a domestic - not a statutory - tribunal. It is bound by the rules of natural justice, sometimes called the duty of fairness. The plaintiff submits that the I.D.A. has breached those rules and that duty in four ways: (1) it has created a reasonable apprehension of bias; (2) it has acted to deny the plaintiff a reasonable opportunity to defend himself against its charges; (3) it has acted in bad faith; and (4) several of the charges are toc vague.

I accept the test for the reasonable apprehension of bias as described in the minority judgment of de Grandpre, J. in **Committee for Justice Liberty v. National Energy Board** (1976), 9 N.R. 115 (S.C.C.), at pp. 138-9, as: "what would an informed person, viewing the

matter realistically and practically - and having thought the matter through - conclude?" Counsel on behalf of the plaintiff cites the case of **MacBain v. Canadian Human Rights Tribunal** (1985), 62 N.R. 117 (F.C.A.) which deals with the appointment by the Canadian Human Rights Commission of an investigator to investigate a complaint. The Court held that the procedure created a reasonable apprehension of bias for two reasons. First, the fact that the Commission fulfilled its statutory duty by determining that the complaint was "substantiated", and subsequently the tribunal hearing the complaint fulfulled its obligation to make the same determination, created a reasonable apprehension of bias. Second, the fact that the Commission as "prosecutor" had chosen the member of the tribunal also created an apprehension of bias. The Court went on to express the opinion that "even if the governing statute only required the Commission to decide whether there was sufficient evidence to warrant the appointment of a tribunal, reasonable apprehension of bias would still exist". In regard to that opinion, see also **Re McGavin Toastmaster Ltd. et al and Poulowski et al** (1973), 37 D.L.R. (3d) 100 (Man. C.A.).

In the present case, the I.D.A. receives a complaint, decides whether an investigation ought to be carried out, reviews the evidence and decides whether a

tribunal ought to be appointed to hear the complaint and the evidence gathered by the investigation. However, the I.D.A. does not appoint the tribunal; its members are chosen by the standing chairman of the Business Conduct Committee in the relevant area of the ccuntry. An affidavit on file indicates that the members of the Committee chosen by chairmen have stated that they have not pre-judged the plaintiff and are not biased against him. Although there may be no actual bias, all of those facts, when considered together with other facts including the tender of a settlement requiring payment of a "fine" before charges are laid, statements implying the guilt of the person investigated by officers of the organization, withholding full statements given by persons interrogated, granting the privilege to the McLeod firm to cross-examine witnesses at the hearing, the failure to direct the McLeod firm to return the plaintiff's notes to him so that he might prepare a proper defence, would tend to create a reasonable apprehension of bias in the mind of any informed, realistic, practical and reasonable man who has thought the matter through. That is particularly so when, as here, the proposed hearing is in the nature of a trial which may have the effect of punishing the plaintiff for his conduct in the past.

In **I.R.D. Construction Limited** v. **Rent Review**

Commission (1982), 55 N.S.R. (2d) 71 (N.S.S.C.A.D.) the Rent Review Commission refused to provide information in its possession to a landlord who had applied for a rental increase and had requested the Commission to provide the information. The Appeal Division held, at pp. 83-84, that "information to enable a party to make adequate presentation of its case to the Commission must be made available to that party" and that "(f)ailure to produce that information results in a denial of natural justice...."

In the present case, the I.D.A. has declined to provide the plaintiff with copies of the full statements of various persons interrogated. They have given him information against him that, no doubt, they will use to prosecute him. But he cannot be sure what information they may have that might tend to exonerate him and, given the existence of an apprehension of bias, he cannot be sure that the summaries they have provided are accurate. The plaintiff is unable to obtain statements on his own because his former employer has instructed its employees not to co-operate with him and, more important, he has no power to compel co-operation by subpoena because the I.D.A. is not a statutory body and has no power to compel production of documents or the attendance of witnesses at the hearing. Lastly, the I.D.A. has made no effort to help the plaintiff regain possession of his own notes

from his former employer. In my opinion, it will be extremely difficult, if not impossible, for the plaintiff to prepare a full and proper defence in such circumstances. Without the notes and statements, the rights to be represented by counsel and cross-examine witnesses, as granted by the I.D.A. by-laws, mean very little.

The plaintiff alleges that the I.D.A. has laid the present charges against him in bad faith.

This allegation is based upon a number of facts. I will mention only the particulars that I accept:

1. The plaintiff was promised that the settlement agreement he signed would be sent expeditiously to a business conduct committee for final approval, but it never was. At the same time, the I.D.A. cashed the cheque which he submitted in payment of the penalty and costs set out in that agreement. Although the I.D.A. eventually returned his cheque and vacated the previous investigation against another person, it soon laid charges against the plaintiff, including the charges from the previous investigation which they had vacated.

2. The plaintiff's former employer, a member of the I.D.A., and with whom the plaintiff is involved with a law suit of wrongful dismissal, has been granted the right to cross-examine all witnesses at the proposed tribunal hearing by some "authority" other than the tribunal and in spite of the fact that the former employer has no charges pending against it and is not a party to the proceedings. At the same time, the former employer retains some of the plaintiff's personal notes and has ordered its employees not to co-operate with the plaintiff.

3. In addition to retaining some of the plaintiff's personal notes given to it by the plaintiff's former employer, refusing to give the plaintiff full transcripts of statements given by prospective witnesses, the I.D.A. has failed to question any of the witnesses whose names have been supplied to it by the plaintiff.

All of the foregoing, when considered together and in addition to the public or private allegations of guilt on the part of the plaintiff made by officials of the I.D.A., raise a strong suspicion and tend to establish that the I.D.A. may be acting in bad faith.

Finally, we must consider whether the charges against the plaintiff are too vague, that is, in the plaintiff's words, whether he has been given notice of the substance of the charges against him. This allegation of the plaintiff is directed principally at the charge that he acted "in a manner unbecoming a director and officer" contrary to a provision of the membership by-law of the I.D.A. which authorizes disciplinary action for any business conduct which a Business Conduct Committee in its discretion considers unbecoming a member. It is submitted on behalf of the I.D.A. that that language is common to any self-governing crganization the members of which know what conduct is or is not unbecoming. It is submitted on behalf of the plaintiff that no standard exists as to what is unbecoming conduct, and that the particular Business Conduct Committee has unlimited discretion to interpret it in any way that it wishes, on a case by case basis or even arbitrarily.

I am concerned that the words and therefore the charge may mean whatever the I.D.A. intends them to mean or whatever the tribunal hearing the case chooses them to mean, or they may mean nothing at all. Without deciding the point, which should be left to be decided at trial, I am inclined to accept that some of the charges may be so vague as to preclude preparation of a defence against them.

I find that the actions of the I.D.A. have given rise to a reasonable apprehension of bias, have tended to deny the plaintiff a reasonable opportunity to defend himself against the charges, may have been taken in bad faith, and are intended to be judged against a non-existent standard. Therefore, I hold that there is a serious question to be tried and that the plaintiff has a reasonable prospect of success.

The plaintiff also has the burden of proving that the balance of convenience favours the plaintiff in that it appears that the plaintiff is likely to suffer irreparable harm not compensable in damages.

The plaintiff asserts that he might lose a proposed opportunity to be appointed an officer and director of his current employer, Midland Doherty Limited. It is not a member of the I.D.A. but is in the same industry and could not help but be affected by the hearing and the

plaintiff's conviction. The plaintiff also asserts that if he should be fined $100,000.00 per offence in accordance with the I.D.A. by-laws, he would be bankrupt; no doubt he would be unable to proceed to trial. The plaintiff further asserts that he would suffer irreparable damage to his reputation. Finally, the plaintiff points out that he has already lost friends and business contacts, and that he, his wife and family have been under great mental stress and medical care as a direct result of the investigation and pending hearing.

The plaintiff also says that it is unlikely that the I.D.A. would suffer substantial inconvenience from a delay of the pending hearing until trial. I am inclined to agree.

I find that the plaintiff might suffer irreparable harm not compensable in damages if the hearing were to go ahead. I hold that the balance of convenience favours the plaintiff.

Counsel on behalf of the I.D.A. submitted that many of the statements made in various affidavits filed on behalf of the plaintiff are not credible. Credibility is one of those issues which are better left to be dealt with at trial. There, the trial judge will hear all the admissible relevant evidence and will be in

the best position to make the necessary rulings as to credibility. No doubt the tribunal which may eventually hear the charges of the I.D.A. against the plaintiff will benefit substantially from those rulings, notwithstanding that the subject matter of the hearing and the subject matter of the trial do not coincide perfectly.

Counsel on behalf of the I.D.A. submitted that the plaintiff would have a right of appeal under the by-laws of the I.D.A. to the Nova Scotia Securities Commission. However, counsel for the plaintiff pointed out that such a right of appeal is no right at all because the legislation governing the Securities Commission does not authorize it to conduct appeals. Therefore, it has no jurisdiction in that regard. Even if it did, a right of appeal is only one factor to be considered by the Court in deciding whether to exercise its discretion: **Re McGavin Toastmaster et al and Poulowski et al**, (supra), per Hall, J.A. at p. 118.

I have dealt with the question of whether the prerequisites for an interim injunction exist in the peculiar circumstances of this case. But I would venture to suggest that the question is normally posed with a view to ascertaining whether an injunction ought to be granted to restrain an event which is in the course of occurrence. Here, the event is one which is scheduled to occur in the

future.

Ought an injunction issue to restrain the occurrence of a future event? The point is dealt with in Sharpe on Injunctions and Specific Performance (Canada Law Book, 1983), at para. 481 on p. 244 where the learned author expresses the opinion that a plaintiff should be granted the protection of an injunction to enjoin litigants before an inferior tribunal where those proceedings are "abusive or vexatious". In **McFetridge v. Nova Scotia Barristers' Society** (1981) 45 N.S.R. (2d) 319, MacKeigan, C.J.N.S. at p. 322 stated that the Court should not interfere by interim injunction except in "very special circumstances, e.g. where it is necessary to obtain time for the court to adjudicate the issue and where the consequences of not staying the lower proceedings would be serious and irreversable."

I am bound by Chief Justice MacKeigan's test. Although the hearing before the tribunal might result in the charges being either substantiated or rejected, I find on a balance of probabilities arising from the facts of this most unusual case that it is necessary to obtain time for the Court to adjudicate the issues arising from the special circumstances of the case, and that the consequences of not staying the proceedings of the tribunal until after trial would be serious and irreversable. Although the

Court is reluctant to enjoin the I.D.A. from holding the hearing, that finding overcomes its natural reluctance to enjoin such future event.

The Court has not judged the merits of the principal action. But, the Court is willing to exercise its discretion in favour of the application of the plaintiff being granted. An interim injunction will issue restraining the I.D.A. pending trial from holding a disciplinary hearing with respect to the charges laid against the plaintiff.

The plaintiff will have his costs of this application after taxation in the usual manner.

J.

Halifax, Nova Scotia
June 13, 1988