SUPREME COURT OF NOVA SCOTIA
Citation: *Hustins v. Locke*, 2020 NSSC 17

Date: 20200115
Docket: 436208
Registry: Halifax

Between:

Arthur James Hustins, Oakwood Securities Limited

Plaintiff

v.

Shirley Alfreda Locke, National Bank Financial Ltd. - Financiere Banque Nationale Ltee, National Bank Financial Inc.- Financiere Banque Nationale Inc.

Defendants

DECISION ON MOTION

Judge: The Honourable Justice Glen G. McDougall

Heard: April 25, 2019, May 22, 2019 and August 22, 2019, in Halifax, Nova Scotia

Final Written Submissions: December 2, 2019

Counsel: Justin Adams and Bruce Outhouse, Q.C., for the Plaintiffs
Tom Keeler and Kevin Kiley, for the Defendants

By the Court:

Introduction

[1] This is a motion by the Plaintiffs, Arthur Hustins and Oakwood Securities Ltd. (the "Plaintiffs"), for a documentary production order. The Defendants, Shirley Locke, National Bank Financial Ltd. ("NBFL"), and National Bank Financial Inc. ("NBFI"; collectively the "Defendants") oppose this motion.

[2] The issues are whether the requested documents are relevant within the meaning of Civil Procedure Rule 14.01 and should be produced, and whether steps should be taken to limit this disclosure if it is granted.

Background

[3] On February 11, 2015, the Plaintiffs commenced an action against the Defendants in negligence, breach of contract, and breach of fiduciary duty.

[4] The Plaintiffs allege that in or about 2007, Mr. Hustins transferred investments on behalf of himself and his investment company, Oakwood Securities Ltd., from CIBC Wood Gundy to Wellington West Capital Inc. ("Wellington West"). Ms. Locke was an investment advisor employed by Wellington West at the

time. In 2011, the Defendant NBFL acquired Wellington West and Ms. Locke was then in the employ of NBFL. NBFI is a related company to NBFL.

[5] The Plaintiffs claim that from approximately 2010 to 2014, Ms. Locke caused significant losses in their investment accounts. The Plaintiffs further claim that NBFL and/or NBFI failed to adequately supervise Ms. Locke in her dealings with their investment accounts and say they are vicariously liable for her actions. The Defendants deny any wrongdoing.

[6] At this stage in the proceeding, all parties have been discovered. From the correspondence filed in support of this motion, the parties have been in dispute about further disclosure since at least 2016. A consent order was filed with this court on July 6, 2018 requiring the Defendants to complete disclosure of outstanding supplementary documents and responses to undertakings as sought by the Plaintiffs. The Defendants have subsequently made some disclosures, both voluntarily and at the further request of the Plaintiffs.

[7] The Plaintiffs filed this motion for further disclosure and documentary production on February 22, 2019. They filed an amended Notice of Motion on May 8, 2019. The Defendants say the documents are not relevant as they go beyond the scope of the pleadings. They further say the production is disproportionately

onerous and if disclosure is granted, it should be limited, particularly as it relates to non-party client information. The Plaintiffs respond that the issues relating to the alleged unconscionable conduct, such as fraud, became known only after this initial disclosure of documents from the Defendants. They say the sought-after evidence is relevant based on the pleadings and other evidence before the court.

[8] Aside from the solicitor's affidavit, the Plaintiffs have also filed the expert report of Michael J. Horgan to provide further factual underpinning for their documentary request. For the Defendants, Doris Ryerson was designated as NFBL's discovery manager for this action. She is a compliance supervisor with NBFL and NBFI and her work included the supervision of Ms. Locke.

[9] The amended Notice of Motion makes the following request for documents of the Defendants:

1. Copies of any correspondence, communications and other documents exchanged between Doris Ryerson or other Tier I supervisors with: other Tier I supervisors, Tier II supervisors, or other National Bank employees and management (including Mario Ruiz), concerning the Plaintiffs' accounts, Ms. Shirley Locke's PRO accounts, and compliance supervision of Ms. Shirley Locke;

2. Copies of any and all trade confirmation sheets for transactions in the Plaintiffs' accounts for the period of July 2009 to December 2014;

3. Copies of any reports and other documents contained within Locke's research file;

4. Monthly account statements for Shirley Locke's PRO accounts (4A-118E-E E&A&S Locke & 4A-E648-E/F/S/W Shirley Locke) for the period of July 2009 to August 2011. If the documents referred to in this paragraph are not in the possession of the Defendants, the defendants must immediately take all reasonable steps to secure and produce to the Plaintiffs any such materials (or materials containing comparable information) from any third parties, including any accountant or accountants who assisted the individual Defendant, Shirley Locke, in the preparation of her tax returns;

5. Copies of all time-stamped orders, filled or unfilled, relating to 01 Comminuque Labs for any and all of the Plaintiffs' accounts for the months of March and April 2013;

6. Any and all daily commission reports/commission trading sheets from January 1, 2011 to December 31, 2014 that show any activity (including all trades, cancellations and corrections) in any one or more

of the Plaintiffs' accounts. The Defendants shall be permitted to redact client names (other than the Plaintiffs) and other personal information on the daily commission reports/commission trading sheets; however, they shall not redact:

a. Names, client identifiers/account numbers, trades, transactions details, and other related information pertaining to Ms. Locke and any other PRO accounts administered by her;

b. Name(s) of any officer or director of the following companies for the following companies: 01 Communique Lab, International Tower Hill Mines and Intertainment Media;

c. Trades, transaction details (including price), and client identifiers/account numbers relating to Ms. Locke's other clients.

[10] At the motion, it became clear that the Defendants were prepared to search for and produce the documents set out in B., C., D., and E., listed above. The following reasons, then, deal with the documents set out in A. and F.

[11] The following exhibits were filed by the Plaintiffs in support of this motion:

1. Affidavit of Michael J. Horgan

2. Rebuttal affidavit of Michael J. Horgan

3. Affidavit of Justin E. Adams (counsel for the Plaintiffs)

4. Supplemental affidavit of Michael J. Horgan

[12] The Defendants filed the following:

1. Affidavit of Doris Ryerson (Vol. 1)

2. Affidavit of Doris Ryerson (Vol. 2)

3. Affidavit of Shirley Locke

[13] This motion was heard over three days – April 25, May 22, and August 22, 2019.

ISSUES

[14] The issues are:

1. Whether the undisclosed documents are relevant and therefore should be produced; and

2. Whether their disclosure should be limited in some way.

LAW

<u>Principles of trial relevance</u>

[15] The parties cite the appropriate Civil Procedure Rules in their submissions, which guide this decision. I am also cognizant of the purpose of our *Civil Procedure Rules* at Rule 1.01: "These Rules are for the just, speedy, and inexpensive determination of every proceeding." Rule 14.08 provides a presumption of full disclosure of all relevant information as follows:

> **14.08 (1)** Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.
>
> **(2)** Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party, and to preserve the documents and electronic information.

[16] Rule 14.08 goes on to provide for circumstances where the obligation to disclose may be modified:

> **(3)** A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following:
>
> > (a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;
> >
> > (b) the importance of the issues in the proceeding to the parties.
>
> **(4)** The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.

> **(5)** The presumption for disclosure applies, unless it is rebutted, on a motion under Rule 14.12., Rule 15.07 of Rule 15 - Disclosure of Documents, Rules 16.03 or 16.14 of Rule 16 - Disclosure of Electronic Information, Rule 17.05 of Rule 17 - Disclosure of Other Things, or Rule 18.18 of Rule 18 - Discovery.
>
> **(6)** In an application, a judge who determines whether the presumption has been rebutted must consider the nature of the application, whether it is chosen as a flexible alternative to an action, and its potential for a speedier determination of the issues in dispute, when assessing cost, burden, and delay.

[17] In summary, parties are obligated to diligently search for and disclose all relevant documents that they possess or control (see also Rule 15.02). Where there is a dispute over whether something is relevant, Rule 14.12 provides that a judge may order delivery of relevant documents or electronic information. Once the moving party has proven the information sought is relevant on a balance of probabilities, the burden of proof shifts to the defending party to rebut the presumption of full disclosure. If the relevant evidence is shown to be too disproportionately onerous to produce when compared to its probative value, the chambers judge may decline to order production or may limit said production. To rebut the presumption of disclosure, the defending party must fully disclose what evidence it believes would be found or acquired if the disclosure is not limited.

[18] What, then, does "relevant" mean and how is it to be determined? Rule 14.01 indicates that the standard of relevancy is "trial relevancy", not the

"semblance of relevancy" test that once operated under the *Nova Scotia Civil Procure Rules* (1972):

> **14.01 (1)** In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
>
> (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.
>
> **(2)** A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

[19] There are numerous decisions concisely stating the meaning of trial relevance. The Honourable Judge James Donnelly of the Ontario Court, General Division (now the Ontario Superior Court of Justice) summarized the concept of relevance nicely in *R. v. Morin*, [1991] O.J. No. 2528, 16 W.C.B. (2d) 416, as follows:

> Relevant evidence is evidence which, either by itself or in conjunction with other evidence, tends to show the existence or non-existence of a fact in issue. There must be a logical nexus between the fact sought to be adduced and the matter about which the inference is to be drawn. The primary fact must be logically probative of the conclusionary fact. Evidence that is not probative of a fact in issue tends to prove nothing and is inadmissible. The general principle is that all relevant evidence is admissible subject to exclusionary considerations.

[20] Relevant evidence at trial is evidence, either alone or alongside other evidence, that tends to prove or disprove a material fact in issue. To be relevant, however, the evidence must have some probative value. There is no minimum probative value for evidence to be found relevant (*R. v. Arp*, [1998] 3 S.C.R. 339 (S.C.C.)).

[21] In practice, however, it is not always a simple exercise for the chambers judge to determine trial relevance. We have only the pleadings and other evidence properly before the court to make this determination. Justice Moir succinctly addressed the new test for relevance in *Saturley v. CIBC World Markets Inc*, 2011 N.S.S.C. 4:

> [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.
>
> [47] In my opinion, these conclusions do not suggest a retreat from the broad or liberal approach to disclosure and discovery of relevant information that has prevailed in this province since 1972.

[22] This was later cited approvingly by our Court of Appeal in *Brown v. Cape Breton (Regional Municipality)*, 2011 N.S.C.A. 32, at paragraphs 12-13.

[23] The 2009 *Civil Procedure Rules* and subsequent case law make it clear that relevance must not be turned into a fishing expedition.

[24] In a subsequent decision in *Saturley v. CIBC World Markets Inc*, 2012 N.S.S.C. 57, Justice Wood (as he was then) provided further guidance to the chambers judge dealing with relevance at an early stage of the proceeding:

> [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.

[25] Justice Rosinski in also reflected on the task presented to the chambers judge assessing trial relevance in *Maple Trade Finance Inc v. Euler Hermes American Credit Indemnity Co.*, 2015 N.S.S.C. 37, stating:

> [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. I observe that some jurisdictions have opted to focus on a "proportionality" based assessment of relevance – e.g. see Master Short's comments in *Siemens Canada Ltd. v. Sapient Canada Inc*., 2014 ONSC 2314, in the context of the Ontario Rules.

[26] The fact that this matter is still at an early stage is also important to remember. Pleadings have closed and only parties have been discovered so far. The parties are in the process of assessing the extent of their claim or defence, respectively. As information is shared through discovery and disclosure, parties may become aware of facts they had not contemplated when drafting pleadings. They may later wish to amend their pleadings if a fresh cause of action emerges from the information gathered. Therefore, the chambers judge assessing trial relevance must also be cognisant of the moving party's interest in making and advancing their case. After all, trial is the ultimate test of relevance.

THE PRODUCTION REQUESTS

Mr. Horgan's report

[27] Mr. Horgan's report was admitted into evidence as an attachment to his initial affidavit, sworn April 1, 2019 and filed April 2, 2019. Mr. Horgan's report also contains a copy of his resume and a brief statement as to his qualifications. The Plaintiffs filed a rebuttal affidavit of Mr. Horgan on April 11, 2019, responding to Ms. Ryerson's affidavit and amending some of the documentary requests. Finally, the Plaintiffs filed a supplemental affidavit of Mr. Horgan on May 8, 2019, once again amending the documents sought and correcting some errors in the initial report filed in April.

[28] The Defendants did not file a competing expert report. The Defendants did not object to the admissibility of Mr. Horgan's report nor contest his qualifications as an expert. The Defendants did not opt to cross-examine Mr. Horgan on his findings. Their main contention regarding Mr. Horgan's report, which came out in counsel's oral submissions, is that Mr. Horgan did not review certain documents, particularly discovery transcripts.

[29] I accept Mr. Horgan's report as that of a qualified expert and rely on it for the limited purpose of this motion for disclosure.

Relevance on the evidence

[30] I have carefully reviewed the uncontested evidence on this motion, namely the seven affidavits and their respective exhibits, in coming to my decision.

[31] The Defendants argue the documents sought are not relevant because the Plaintiffs have not pleaded the facts necessary for a cause of action in unconscionable conduct, pursuant to Rule 38.03(3). They say the pleadings are insufficient to create the necessary nexus between the facts pleaded and the evidence sought to be disclosed. Respectfully, this shows a misunderstanding of law. If this was a motion for summary judgment on the pleadings, I would be entitled only to review the pleadings; all material facts for all causes of action would have to be pleaded therein. This is not the case here as I am dealing with a motion for disclosure, where I may rightly review both the pleadings and any evidence properly before the court in my analysis of relevance.

[32] Justice Rosinski dealt with the distinction between summary judgment and disclosure in *Maple Trade Finance Inc.*, *supra*, cited by the Plaintiffs:

> [81] In argument, counsel for Hermes repeatedly made the assertion that the pleadings of Maple were deficient in that not all of the necessary material facts in support of the claims made have been pleaded. Consequently, he argued the ambit of “relevance” was correspondingly reduced – specifically in the context of what production was required to be made by Hermes, and the number of questions which must be answered on discovery by Hermes’ representatives. Counsel gave no authority for this proposition.

> [82] However, in its post hearing brief, Hermes asserted:
>
> > Justice Rosinski suggested during the hearing of these motions that it is not a requirement in Nova Scotia that all of the elements or material facts to support a cause of action be pleaded. This is not accurate. Where the elements of a cause of action are defined at common law, a claim that fails to plead the necessary elements is untenable. The Nova Scotia Court of Appeal has directed so:
> >
> > *Tupper v. Wheeler*, 2005 NSCA 74, at paras 19-20
> >
> > *R. Baker Fisheries Ltd. v. Atlantic Clam Harvesters Ltd.,* 2002 NSCA 82, at paras 17-20.
>
> [83] These cases, both decided under the old Rules, [see also *Cooper v. Atlantic Provinces Special Education Authority*, 2008 NSCA 94] involved motions to strike pleadings pursuant to Rule 14.25. When such a motion is made under the present Rules, a Court must examine only the pleadings to assess whether they are in accordance with Rule 38 [see particularly 38.02(3) and 38.03(3)] before turning to Rule 13.03 – Summary Judgment on Pleadings, to determine whether the claim is "unsustainable when the pleading is read on its own".
>
> [84] I reiterate that Hermes has still not provided any authority for its initial assertion that for disclosure or discovery purposes, "relevance" is correspondingly reduced if not all material facts underlying a cause of action have been pleaded.

[33] Relevance at trial is not something to be determined in a vacuum nor is it confined to the pleadings. Trial relevance turns on the facts, whether they be pleaded or in evidence. Therefore, to step into the shoes of the trial judge, I am entitled to consider the pleadings and any evidence properly before this court in coming to my decision.

[34] Furthermore, though the sought-after evidence may also be used to support a pleading of unconscionable conduct, that does not negate its use for the causes of action that were pleaded, including negligence and breach of fiduciary duty. The evidence disclosed may support the Plaintiffs amending their pleadings in the

future. Notwithstanding this, however, I may still find in favour of relevance based on the pleadings as they are now.

[35] Having reviewed the pleadings, the uncontested evidence on this motion, and the submissions of counsel, I find the sought-after documents are relevant and must be disclosed for the reasons that follow.

“A.” - Tier I supervisor communications

[36] I repeat here the information sought by the Plaintiffs in their amended Notice of Motion:

A. Copies of any correspondence, communications and other documents exchanged between Doris Ryerson or other Tier I supervisors with: other Tier I supervisors, Tier II supervisors, or other National Bank employees and management (including Mario Ruiz), concerning the Plaintiffs’ accounts, Ms. Shirley Locke’s PRO accounts, and compliance supervision of Ms. Shirley Locke;

[37] Here, the information sought is limited in scope to include only communications relating to the Plaintiffs’ accounts, Ms. Locke’s PRO accounts, and the supervision of Ms. Locke generally. The Plaintiffs claim against Ms. Locke

in negligence, breach of contract, and breach of fiduciary duty. At paragraph 19 of their Statement of Claim, the Plaintiffs further allege that the corporate Defendants failed to adequately supervise Ms. Locke. They claim NBFL/NBFI are vicariously liable for Ms. Locke's conduct.

[38] From the Wellington West and NBFL compliance guides filed by the Plaintiffs and the affidavit of Ms. Ryerson filed by the Defendants, I can see that Tier I and Tier II supervision is meant to detect, *inter alia*, improper trading and conflicts of interest amongst its investment advisors.

[39] If Ms. Locke was engaged in improper trading, evidence of her employer's awareness and possible mitigation efforts of this impropriety is directly relevant to the allegations contained in the pleadings. Communications between supervising personnel regarding the Plaintiffs' accounts are therefore relevant to the allegation that the corporate Defendants failed to adequately supervise Ms. Locke. Reviewing correspondence involving the supervision of Ms. Locke more generally is also directly relevant to this.

[40] Furthermore, the Minimum Standards for Retail Customer Account Supervision ("Minimum Standards") entered by the Plaintiffs make it clear that "[a]ll account activity of employees and agents should be subject to review" by the

supervisors. The employees' accounts are marked as "detection tools" for conflicts of interest, according to the NBFL compliance guide. The evidence before me also includes an email between Ms. Ryerson and Mario Ruiz (another supervisor) dated April 3, 2013. This email shows Ms. Locke's personal account(s) held shares in 01 Communique, which is one of the stocks the Plaintiffs allege they lost money in. This suggests a possible conflict of interest. The supervisory communications involving Ms. Locke's personal PRO accounts is also therefore relevant.

[41] I find the documents set out in "A." are relevant and must be produced.

"F." – daily commission reports and commission trading sheets

[42] The Plaintiffs are seeking the following in their amended Notice of Motion:

> F. Any and all daily commission reports/commission trading sheets from January 1, 2011 to December 31, 2014 that show any activity (including all trades, cancellations and corrections) in any one or more of the Plaintiffs' accounts. The Defendants shall be permitted to redact client names (other than the Plaintiffs) and other personal information on the daily commission reports/commission trading sheets; however, they shall not redact:
>
> - Names, client identifiers/account numbers, trades, transactions details, and other related information pertaining to Ms. Locke and any other PRO accounts administered by her;
>
> - Name(s) of any officer or director of the following companies for the following companies: 01 Communique Lab, International Tower Hill Mines and Intertainment Media;

- Trades, transaction details (including price), and client identifiers/account numbers relating to Ms. Locke's other clients.

[43] The Plaintiffs argue this information, including information regarding non-party clients, is relevant because whether Ms. Locke was engaged in improper conduct, including the crossing of her client's stocks, speaks to Ms. Locke's alleged misconduct. The Plaintiffs further argue that this information would also tend to prove or disprove whether the corporate Defendants improperly supervised her.

[44] The Defendants concede there is information contained in these reports about the Plaintiffs at paragraphs 24 and 53 of their brief. They argue the reports are not relevant, are duplicative of other evidence disclosed, are overly burdensome to produce, and they contain private information about non-party clients. I will deal with the issues of duplicity, burden, and private information later in this decision. The Defendants rely on *MacGowan v. RBC Dominion Securities*, 2008 N.S.S.C. 421, for their contention that the documents are not relevant.

[45] The facts of *MacGowan* are similar to the allegations underlying this action. In that case, the plaintiffs, who were investment clients of the defendant, alleged

that the defendant failed to adequately supervise a rogue investment advisor, which caused the plaintiffs' losses. The plaintiffs sought disclosure of any complaints made by non-party clients to the defendant about the rogue advisor. The basis was that the similar act evidence would show a pattern of negligent supervision on the part of the defendant. Respectfully, I disagree that this case assists the Defendants.

[46] Both the information sought in this matter and its intended purpose can be distinguished. In this case, the Plaintiffs are only seeking documents that show activity on their own accounts. Where non-party information is disclosed, it is only to compare with the Plaintiffs' activity, going to the question of whether Ms. Locke was engaged in misconduct on a larger scale. This again will speak generally to Ms. Locke's possible negligence or breach of fiduciary duty and contract. This will also speak to whether Ms. Locke was being adequately supervised.

[47] Furthermore, the Defendants appear to have conflated "relevance" with "privilege". Information subject to a legal privilege may be redacted from otherwise relevant information. Non-party client information may be private and sensitive, but that alone does not make it privileged information and the Defendants have not provided any authority to suggest otherwise. The document itself may still be relevant and producible despite containing private information. A

party may not unilaterally redact information from an otherwise relevant document, nor may a judge order this redaction, unless the party has rebutted the presumption of full disclosure (see Rules 14.08, 14.12, and 15.07).

[48] These daily commission reports and trading sheets were reviewed by Tier I and Tier II supervisors to, *inter alia*, detect improper trading activity and potential conflicts of interest. According to the Minimum Standards, this involves not only reviewing single transactions but also patterns over time; a single transaction on its own may not indicate impropriety, but the body of transactions may raise questions. The daily reports are indicated as important tools used by supervisors throughout the Wellington West and NBFL compliance guides to detect these patterns of improper trading. This was not refuted by Ms. Ryerson in her affidavit.

[49] There is no question that the daily and monthly commission reports and trading sheets showing activity in the Plaintiffs' accounts are relevant and ought to be produced by the Defendants. They are directly relevant to the Plaintiffs' allegations that Ms. Locke was engaged in improper trading of the Plaintiffs' accounts and that NBFL failed to adequately supervise her.

[50] This material inevitably includes private information relating to non-party clients. Whether or not information belonging to non-party clients should be redacted is another question, which I deal with separately below.

Limits or modifications on disclosure

[51] Having found the sought-after documents are relevant, the burden shifts to the Defendants to rebut the presumption that all relevant documents be disclosed. Only once the presumption is rebutted may I limit the disclosure sought.

[52] The *Civil Procedure Rules* impose a series of requirements the responding party must address in rebutting the presumption of disclosure. As noted above, Rule 14.08(3)-(4) states:

> **14.08 (3)** A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following:
>
> (a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;
>
> (b) the importance of the issues in the proceeding to the parties.
>
> **(4)** The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.

[53] The onus is on the Defendants to establish that the cost, burden, and delay involved in producing the relevant documents is disproportionate to the probative value and overall importance of the issues to the parties. They must also fully disclose the information that is likely to be contained in the sought-after documents.

[54] Rule 14.12 deals with production orders. Rule 14.12(4) gives a judge authority to limit or modify the relevant information sought to be produced only after the presumption is rebutted:

> **14.12 (4)** A judge who is satisfied that the requirement is disproportionate under Rule 14.08 may limit a requirement to produce a copy of a document, to produce exactly copied electronic information, or to provide access to electronic information.

[55] See also Rule 15.07, which provides:

> **15.07 (1)** A judge may give directions for disclosure of documents, and the directions prevail over this Rule 15.
>
> **(2)** A judge may not give directions limiting disclosure or production of a relevant document, unless the presumption in Rule 14.08, of Rule 14 - Disclosure and Discovery in General, is rebutted.

[56] The Court of Appeal in *Laushway v. Messervey*, 2014 N.S.C.A. 14, provided some guidance for analyzing whether a production order is disproportionate. That case involved a personal injury arising from a motor vehicle accident. The plaintiff argued his injury made him unable to sit at a computer for extended periods of

time, which greatly affected his ability to earn income. The defendant sought production of the metadata from his computer's hard drive for the purpose of assessing his computer usage patterns. The metadata would contain private information, including some that may belong to non-parties. The plaintiff refused to disclose the metadata on several grounds, including relevance and privacy.

[57] Justice Saunders, writing for the court, upheld the trial decision ordering the production of the metadata. He set out a non-exhaustive list of factors a judge may consider when deciding whether or not to order and/or limit production as follows:

> [86] If it would assist trial judges in the exercise of their discretion when considering whether or not to grant production orders in cases like this one, let me suggest that their inquiry might focus on the following questions. They would supplement the guidance already contained in the **Rules**. The list I have prepared is by no means static and is not intended to be exhaustive. No doubt the points I have included will be refined and improved over time, and adjusted to suit the circumstances of any given case:
>
> 1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?
>
> 2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure; whereas a distant connection would weigh against its forced production;
>
> 3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.
>
> 4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?

> 5. Proportionality: Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?
>
> 6. Alternative Measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?
>
> 7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?
>
> 8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?
>
> 9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third party expert?
>
> 10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the **Rules** which is to ensure the just, speedy and inexpensive determination of every proceeding?
>
> [87] It goes without saying that some of these same points may arise at trial when the judge may again be faced with challenges related to the relevance and reliability of the evidence. It is hoped that these suggested points for inquiry will enable trial judges to take a flexible approach when fashioning production orders containing terms and conditions which will best suit the circumstances of any given case.
>
> [emphasis and formatting original]

[58] Based on the above, it is clear the trial judge – or the chambers judge assessing trial relevance – has wide latitude in ordering how the requested information is to be produced, if at all, but only once the presumption is rebutted. At stake are competing interests: on the one hand, there is the presumption that full disclosure is necessary to advance and defend a case, which is fundamental for the litigation process; on the other hand, the cost, delay, and burden that may be associated with producing otherwise relevant evidence may overwhelm its

probative value. The importance of trial efficiency to access to justice cannot be overstated. Furthermore, in this case, the requested documents contain private, non-party information. The Defendants' clients' interest in keeping their sensitive financial information private must also be considered.

[59] Regarding the sought-after evidence set out in "A.", pertaining to supervisors' communications, I find that the Defendants have not rebutted the presumption of full disclosure. The Defendants have not satisfied me that the cost, burden, and delay in producing these documents outweighs their probative value. The corporate defendants' supervision of Ms. Locke is directly in issue. Furthermore, I have nothing before me fully setting out what information is likely to be found if these documents are disclosed. I do not modify or limit the production sought. The scope of the request as set out by the Plaintiffs is in my opinion not too broad and any excess of documents can likely be mitigated with keyword searches.

[60] The bulk of the Defendants' arguments around proportionality deal with the daily reports set out in "F." above. The Defendants argue that the documents requested are too numerous to produce, are duplicative of other evidence already disclosed, and contain private, non-party client information that the Defendants say is irrelevant. I will deal with each of these arguments in turn.

[61] The first contention, that the pages are too numerous, must fail. The Defendants state at paragraph 59 of their brief that production of the daily reports would involve disclosing a conservative estimate of tens of thousands of pages. The Defendants have not provided evidence of the specific searches they conducted, and during submissions, Defendants' counsel conceded that keywords may refine the search. The Plaintiffs addressed this in oral submissions as well, saying they were not seeking the report for each day between January 1, 2011 and December 31, 2014 (that is, roughly 1,000 multi-page reports). Rather, they were only seeking the daily reports that show any activity on one or more of the Plaintiffs' accounts.

[62] While I do not have an accurate idea of exactly how many pages this may entail, it is important at this juncture to remember that based on the allegations thus far, the Plaintiffs are seeking damages in the millions of dollars. They claim that the wrongdoing occurred over the span of several years. Two of the defendants are large, national corporations. Multiple witnesses will likely be required and thus further discoveries. In short, this is a substantial action. I have nothing in evidence from the Defendants showing what the cost or burden of producing these documents would entail, so my proportionality assessment is somewhat limited on

that end. On a balance, a voluminous page count does not convince me the documents should not be produced.

[63] Turning to the Defendants' claim that the documents requested are too duplicative, I say this must fail as well. First, duplicity does not render a document irrelevant. The Defendants have provided no authority to suggest it does. Second, I am not convinced the documents already produced by the Defendants and these daily reports are truly the same. Without the Defendants' production to date nor an unredacted daily report before me, it is difficult for me to assess this issue. Instead, I rely on the expert report of Mr. Horgan. He concedes at page 8 of his report that some of the information contained in the daily reports will also be found in the trade confirmation documents that have already been disclosed. He says the issue is that the documents the Defendants have disclosed to date do not show whether the trade was at arm's length or whether it was part of a cross.

[64] Once again, without the specific documents before me, it is difficult to say precisely whether the evidence requested contains no additional information from the evidence already provided. I therefore make no finding regarding whether the information about the Plaintiffs' accounts is wholly duplicative of other documents already disclosed. However, the Plaintiffs' request is not limited to information pertaining to their accounts alone; they are seeking additional information

regarding Ms. Locke's accounts and those of non-party clients. Therefore, even if the information on the Plaintiffs' accounts is duplicative, the other information requested is not. There is nothing in the evidence to suggest the Defendants previously disclosed this non-party client information that the Plaintiffs now seek. I do note that duplicity alone is not a bar to production. I do not find this to be a compelling argument in favour of rejecting or limiting disclosure.

[65] The Defendants' third argument is that disclosure should be rejected or limited due to the sensitive, non-party client information contained in these documents. They argue that this information is not relevant. They also point out that they owe both a statutory duty and contractual duty of confidentiality to their clients not to disclose private information to third parties. The Plaintiffs have conceded the documents sought in "F." contain private information, the majority of which they say may be redacted.

[66] While the Plaintiffs are seeking only the daily commission reports showing activity on the Plaintiffs' accounts, they ask that the names of directors or officers of three of the Plaintiffs' stock companies not be redacted. They also ask that client identifiers (presumably things like names, risk tolerance, and addresses) and the transaction details of Ms. Locke's other clients also be unredacted.

[67] I have already found the documents where this information is located to be relevant; I do not need to further find that the private financial information is also relevant to order its disclosure. As Justice Gogan stated in *Hatfield v. Intact Insurance Co.*, 2014 N.S.S.C. 232:

> [37] Confidentiality, sensitivity, privacy or lack of consent are not sufficient grounds, in and of themselves, to rebut the presumption of full disclosure. The general rule is that all relevant documents must be disclosed in a civil proceeding so long as they are not covered by privilege.

[68] However, whether or not the information sought is relevant speaks the to factors of connectivity and proximity discussed in *Laushway*, *supra*. The Plaintiffs rely on Mr. Horgan's report for the factual underpinning that improper crossing or a conflict of interest may have occurred and that this information relating to non-party clients and certain directors and officers is therefore relevant.

[69] As I discuss above, the compliance guides and Minimum Standards filed in evidence make it clear that (a) crosses and conflicts of interest may be indicative of improper trading and (b) reviewing documents that show patterns over time is essential for supervising this behaviour. Coupled with Mr. Horgan's findings that this non-party client information is needed to assess whether Ms. Locke was engaged in improper crosses and/or other conflicts of interest, I am inclined to agree with the Plaintiffs. There is sufficient factual underpinning in evidence such

that some of the non-party client information requested is relevant and therefore must be disclosed.

[70] The sensitive nature of the information requested gives me cause to modify the presumption of full disclosure, however. Justice Wright in *MacGowan*, *supra*, discussed the nature of personal financial information as follows:

> [18] Personal financial information is a very private and sensitive subject to most individuals. While I recognize that the implied undertaking rule would offer some protection, confidentiality concerns nonetheless remain and in the absence of any compelling argument of relevance such that the production of these documents is necessary for disposing fairly of the proceeding, those confidentiality concerns become an added reason for the dismissal of this application.

[71] In rejecting the disclosure application altogether, Justice Wright found, in part, that if the documents were produced, "there would be some unknown number and identity of other clients whose personal financial affairs would now be disclosed in this litigation, unbeknownst to them" (paragraph 17). While I agree that personal financial information is highly sensitive and should be protected, the requested information can be limited in such a way that balances the privacy rights of the non-party clients and the Plaintiffs' rights to full disclosure.

[72] First, information pertaining to Ms. Locke and the PRO accounts she administers should not be redacted. Ms. Locke is a party to this action and her personal interest in this matter for the reasons discussed above are relevant. Her

privacy rights do not overwhelm this fact. Second, the names of the directors and officers of 01 Communique Lab, International Tower Hill Mines, and Intertainment Media should not be redacted. Whether or not directors and officers stood to gain from the alleged crosses speaks to a possible conflict of interest and whether the corporate Defendants supervised her adequately.

[73] Third, and for similar reasons as above, some information should be viewable relating to other non-party clients of Ms. Locke. However, information that identifies the clients, including names, addresses, and risk tolerance, is not relevant. The Plaintiffs have not satisfied me that it is. Turning to page 9 of Mr. Horgan's report, he says the following: "In those cases where the name of the client has been redacted, we would request that neither the purchase price nor the account number be redacted." I take this to mean that to assess whether Ms. Locke was engaged in improper crosses of her clients' accounts, Mr. Horgan only needs enough information to tell each client apart. The account numbers serve this purpose and, in my opinion, are sufficiently anonymous, as are the trade and transaction details. This achieves both goals of assisting the Plaintiffs in advancing their case and upholding the privacy interests of the non-party clients.

[74] I find the Defendants have rebutted the presumption of full disclosure as it relates to Ms. Locke's clients' identifying information. The presumption is also

rebutted as it relates to all other non-party client information. Therefore, aside from the names of the directors and officers of the aforementioned companies and the account numbers and transaction details of Ms. Locke's other clients, all other non-party identifying information may be redacted. This reflects the legitimate privacy concerns raised by the Defendants.

[75] I also accept the Plaintiffs' offer to have Mr. Horgan personally provide an undertaking that he will only use the information disclosed for the narrow purpose of providing his opinion in this action. This goes above and beyond the implied undertaking that is set out in Rule 14.03, which requires that no information disclosed during a proceeding may be used for any purpose outside the proceeding barring judicial permission. I trust counsel can arrange this to their satisfaction.

[76] The Defendants also raise their obligations under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5. Section 7(3)(c) allows an organization that collects personal data to produce said data if compelled by a court order. The following order satisfies this statutory requirement.

[77] Finally, I also note that we rely on counsel, as officers of the court, to follow through with their various duties under the *Civil Procedure Rules* and those required more generally of the profession. From the discovery excerpts and

communications between counsel for both parties, it is clear the Plaintiffs have repeatedly asked for these documents. Both the supervisor communications set out in "A." and the daily commission reports and trade sheets set out in "F." were sought prior to the consent order dated July 6, 2018. The consent order, ordered by Justice A. Smith, says the following:

> 1. The defendants, **National Bank Financial Ltd./ Financi***ère Banque Nationale Ltée, National Bank Financial Inc.,* **Financi***ère Banque Nationale Inc. and Shirley Alfreda Locke, shall, within calendar thirty (30) days of the date of this Order, complete disclosure of outstanding supplementary documents requested by the plaintiffs and provide responses to any outstanding undertakings; ...*
>
> *[emphasis original]*

[78] I take this to mean the Defendants agreed to provide these documents by consent order, yet over a year later they have not done so. I trust the Defendants will not hesitate to follow the order resulting from this decision.

CONCLUSION

[79] I order the documents requested set out in "A." through "F." of the Plaintiffs' Notice of Motion be disclosed by the Defendants as soon as reasonably possible. The documents themselves that the Plaintiffs seek are relevant. The Defendants have rebutted the presumption of full disclosure as it relates to the documents sought in "F." and shall contain the redactions discussed above. I note

that it appears this action has stalled at the discovery and production stage; the Notice of Action was filed over four and a half years ago and yet it is likely more witnesses will need to be discovered. It is possible this is not the last time these parties will dispute disclosure and discovery questions on the grounds of relevance. I hope this order enables the parties to progress this matter efficiently and effectively to the next stage so that it can eventually be decided on the merits.

[80] The only other matter left to be determined is costs of this Motion. If Counsel are unable to agree on costs, I will accept their written submissions and allow them sixty (60) days from the date of release of this decision to present them. Upon receipt I will make, what I hope will be, the appropriate decision.

Glen G. McDougall, J.