SUPREME COURT OF NOVA SCOTIA
Citation: Fogarty v. Cassidy, 2022 NSSC 363

Date: 20220920
Docket: Syd. No. 421249
Registry: Sydney

Between:

Bill Fogarty

Applicant

v.

Elsbeth Cassidy and Sampson McDougall, a partnership

Respondents

Judge:	The Honourable Justice Patrick Murray
Heard:	May 16, 2022, in Sydney, Nova Scotia
Written Decision:	September 20, 2022
Counsel:	Blair Mitchell for Mr. Fogarty Stephen Kingston for Ms. Cassidy and Sampson McDougall

By the Court:

Introduction

[1] The Applicant, Bill Fogarty, was a client of the Respondents' when he purchased the shares of his partner in a company they owned. Subsequent to the transaction, issues arose that have given rise to the Applicant commencing this action.

Background

[2] The Applicant purchased the 50% interest of his equal shareholder Tom Young in their auto parts business in 2012. This is an action in negligence against the solicitor/law firm who handled the transaction. Nothing has been proven and the trial has not yet occurred.

[3] The purpose of the rules governing disclosure entitle a party to production of information that will be relevant to an issue at trial. Thus, every party has an obligation to search for, acquire, and produce relevant documents in their possession or control.

[4] Full disclosure is presumed to be necessary for the ends of justice to be met. This obligation extends to information that may lead to the discovery of relevant evidence.

Motion

[5] In this motion the Respondents seek full responses to several undertakings given by the Applicant at the discovery of Mr. Fogarty held on November 28, 2019. Some of these have been satisfied, leaving the remainder to be addressed in this motion.

[6] A list of the undertakings and production requests is attached as Appendix "A": Below is a summary as contained in the order sought by the Respondents: Certain of these were "taken under advisement" by Applicant's counsel at the time of discovery:

1. Produce copies of all materials and communications between the Applicant (or on his behalf) and United Auto Parts (UAP) up to the completion of the share purchase transaction in February, 2012;

2. Undertaking to provide redacted copy of letter dated November 30 , 2011, from BMO has been **satisfied**.

3. Produce copies of whatever correspondence or communication that is available between the Applicant (or anyone on his behalf) and Thomas Young (or anyone on his behalf) in regard to the transfer of the insurance policy (the "Policy") to Mr. Young;

4. Produce copies of whatever correspondence and communications that are available between the insurer (or its agent) and the Applicant (or anyone on his behalf) regarding the Policy since February 24, 2012;

5. Advise what the Applicant is seeking from Mr. Young in consideration of the completion of the transfer of the Policy to Mr. Young; and

6. Respond to questions from Respondents' counsel regarding the financial benefits to Company (B&T Battery Limited) and to the Applicant, if any, as a result of the franchise agreement with UAP.

Discussion

Undertaking Number 1 - United Auto Part ("UAP") materials and communications.

[7] In his discovery evidence the Applicant states he was "forced" to complete the share purchase due to an obligation to a third party, UAP. The Respondents submit these communications and correspondence are material and relevant as to whether they support the Applicant's position as stated his discovery evidence. The Respondents say Mr. Young, is adamant that he wanted fair market value and nothing less for his shares. At issue, is whether Mr. Fogarty is entitled to a 25% discount on the purchase price and what that price should be.

[8] Mr. Mitchell, for the Applicant, submits the issue of "UAP" did not arise during the share transfer but two (2) years previous. He says the issue in this case is whether he "overpaid" for Mr. Young's shares, by the sum of $250,000. He submits this is what frames what is relevant and what information should be ordered to be produced in this motion.

Undertaking Numbers 3, 4, 5 - Transfer of Insurance Policy- correspondence, communication, and consideration.

[9] The Respondents submit that the purchase price for the subject shares consisted of cash, credit for a company vehicle and the transfer or assignment of an insurance policy held by the company on the life of Tom Young. While the closing occurred in 2012, Mr. Young maintains this policy has still not been transferred and thus, he has not been paid in full for his shares. The value ascribed to this policy in 2012 was $102,000.

[10] The Respondents submit Mr. Young gave evidence at discovery that it was Mr. Fogarty who is responsible for the policy not being assigned. The Applicant, Mr. Fogarty says it is Mr. Young who has held up the "payment" or transfer of the policy.

[11] The Respondents seek evidence of (email) communications between the insurance company representative and Mr. Fogarty, arguing this may assist the Court in resolving the different "narratives" from the two key witnesses.

[12] They also seek what it is Mr. Fogarty is requiring from Mr. Young to have this policy transferred. In the Respondent's brief they have stated:

> 54. Mr. Fogarty acknowledged that, if he had not received the credit for the Policy on closing, he would have required increased financing from BMO and would have incurred additional financing charges as a result. This led to a discussion as to what Mr. Fogarty wanted from Mr. Young in

> order to complete the transfer of the policy and whether this took into account the financing charges. Those requests were taken under advisement by Mr. Fogarty's counsel.

[13] The Applicant submits however that the Respondents do not explain how or why this issue is relevant to Mr. Fogarty's damages claim. In his brief the Applicant argues:

> … None of the evidence surrounding insurance sheds probative light on whether or not the alleged negligence or alleged breach of contract by the Respondents is more likely or less likely to be true. Similarly, the best that can be said of the state of the evidence regarding insurance is that it remains open…
>
> The insurance issue has not arisen as a result of alleged negligent professional advice but from the relationship between the two former shareholders…
>
> whatever lies behind the tug of war between Mr. Young and Mr. Fogarty, that dispute contributes nothing to the damages suffered by reason of the Respondents alleged breach, any more than it can to likelihood, or lack of likelihood, of the alleged breach by the Respondents, itself.

Undertaking Number 6 - Performance of the Company following the share purchase.

[14] Mr. Kingston, for the Respondents, submits completion of this undertaking does not have to do with liability, and that it is relevant only to damages. The issue relates to whether there should be a discount, and if so, is it to be applied to a purchase price of $933,000. or $835,000. Given the conflicting evidence, the reason why the transfer did not take place may be relevant to how this issue is dealt with by the Court.

[15] The Respondents submit this undertaking relates to what benefit, if any, was realized by Mr. Fogarty as a result his purchase of the shares, resulting in him being the sole shareholder.

[16] The Respondents say Mr. Fogarty gave evidence at discovery that he was not sure whether he would have signed the share purchase agreement if he had recognized there would be no discount.

[17] The Respondents argument for requiring this undertaking to be completed once again is the conflicting evidence. If Mr. Fogarty is saying he was not going to complete the deal without a discount, and Mr. Young is saying he was not going to complete the deal with a discount, then there is a causation issue.

[18] The Respondents argue if Mr. Fogarty intended to complete the agreement in any event, there is no causation issue that would justify damages flowing to him.

[19] On the other hand, they say if Mr. Fogarty would not have completed the share purchase, if he had been aware there was no discount, he would not have received any benefit from the transaction, as there would not have been an agreement and thus, no share transfer.

[20] The Respondents, therefore, submit they are entitled to information on what benefit the company received, and what benefit Mr. Fogarty received by completing the purchase. If a party has suffered damages, they are entitled to claim the loss. But if they have not suffered damages, there should be no claim.

[21] In their brief the Respondents submit:

> 72. It is submitted that, contrary to the assertion in the unsworn Affidavit, the requested information is directly relevant to the issue of damages:
>
> (i) If Mr. Fogarty had not signed the Share Purchase Agreement, he would not have acquired Mr. Young's shares;
>
> (ii) Mr. Young was not prepared to sell his shares at a discount;
>
> (iii) If Mr. Fogarty did not acquire Mr. Young's shares, he would not have been able to become a UAP franchisee; and
>
> (iv) To the extent that the Company (and Mr. Fogarty, as sole shareholder) benefited from its association with UAP, such benefits would not have been realized but for the share purchase transaction.
>
> Mr. Fogarty cannot maintain that he would not have proceeded with the share purchase unless he received a discount – and claim damages as a result – while at the same time enjoying the benefits of that same transaction. Such benefits should properly be set-off as against any damages to which Mr. Fogarty might otherwise be entitled, and the Respondents should be entitled to fully explore this issue.

[22] The Respondents rely on the case of ***Musgrave v. Ford***, 2016 NSSC 157, in support of the request that the Applicant be required to fulfil undertaking #6.

[23] In ***Ford***, the Plaintiff claimed his solicitor was negligent in failing to discover judgments against the property on which a second mortgage was to be taken. There was also an allegation the solicitor failed to advise there were outstanding real property taxes. There was a second loan granted by the lender Musgrave. He claimed he had not been made aware of a significant judgment in favour of CRA, that was registered against the property, which judgement would take priority over the second loan.

[24] In ***Ford***, the Plaintiff claimed he was entitled to the interest payments made by the borrower, in addition to the full amount of the principal that was owed.

[25] LeBlanc, J. referred to a number of authorities, including ***MacDonald v. Wedderburn***, (1999), 175 N.S.R. (2nd) 89; and ***1874000 NS Limited v. Adams***, (1997) 159 N.S.R. (2nd) 260. At paragraphs 53 and 55, his Lordship stated:

> [53] This argument appears to take *MacDonald* somewhat out of context. The court was addressing causation, not damages. The substance of the transaction involved the purchase of

> shares. In assessing damages, the court held that had the solicitor met the standard of care, the transaction which caused the loss would not have been entered in to, so the plaintiff was entitled to recover what he paid into the transaction. MacAdam J. noted that "[a]lthough he no doubt earned a salary while he worked as an employee, this is not a benefit to be set off against his loss, even if, apart from the purchase of the shares he might not otherwise have been hired as a salesperson" (para. 46). In my view, the plaintiff receiving his salary and Mr. Musgrave receiving the interest are distinguishable: the salary was compensation for work done independent of the contract, while the latter is a benefit derived directly from the contract.
>
> [54] In this case, the Applicant is not claiming against the Respondents for the unpaid bonus. He simply maintains that the interest he has received should not be offset. However, his argument that damages should place him in the position he would have been in had the contract been performed, then the appropriate assessment of damages would go beyond $90,000.
>
> [55] The defendant relies on *1874000 Nova Scotia Limited v Adams* (1997), 159 N.S.R. (2d) 260, [1997] N.S.J. No. 172 (C.A.) That case involved a claim against a chartered accountant for negligent misrepresentation, which induced the plaintiff to purchase shares. Although the plaintiffs would not have made the purchase but for the defendant's negligence, eventually they were able to turn the purchased business into a profitable enterprise. The Court of Appeals cited *Esso Petroleum Co. Ltd. v. Marden*, [1976] 1 QB 801, for the principle that damages should be
>
> > measured in a similar way as the loss due to a personal injury. You should look into the future so as to forecast what would have been likely to happen if he had never entered into this contract: and contrast it with his position as it is now as a result of entering into it. The future is necessarily problematical and can only be a rough-and-ready estimate. But it must be done in assessing the loss. [para. 43, citing *Esso Petroleum* at 820].

[26] Ultimately, in ***Ford***, Justice LeBlanc concluded that the profit made by the lender for the interest payments, should be deducted from the lender's (the Plaintiff) recoverable damages.

> [57] In my view, regardless of whether the offset is considered on the initial assessment of damages or as a matter of mitigation, the conclusion is the same. The interest payments are directly related to the transaction at issue. If Mr. Musgrave would not have made the loan absent Ford's negligence, he would not have made the profit from the interest payments. That being the case, the interest payments should be deducted from his recoverable damages.

[27] In seeking disclosure, the Respondents advance a similar argument here. If the Company and/or Mr. Fogarty made a profit, then those amounts may be relevant in arriving at what the Plaintiff's damages should be. The Respondents acknowledge such an argument may or may not be successful at trial and that an evidentiary basis must be made to support it. The Respondents submit however, that it is a plausible and relevant argument, and that the information they are seeking is relevant evidence or will likely lead to relevant evidence on recoverable damages.

[28] The Applicant submits that ***Musgrave v. Ford*** is neither helpful or persuasive authority with respect to the disclosure sought by the Respondents stating their request is much too broad in seeking disclosure of all financial benefits to the company and to Mr. Fogarty. These two transactions, the share purchase from Mr. Young, and Franchise Agreement between the

company and UAP, are separate and unrelated transactions. The main issue in this case is the discount and what the proper purchase price should have been for the shares back in 2012.

[29] The Applicant refers to ***McCamus***, on the ***Law of Contract (Toronto Second Edition)*** in reference to matters of mitigation as compared to matters of profit or benefit that would have been achieved regardless of any breach of contract.

> … The leading case is *British Westinghouse*, where Viscount Haldane observed: "the subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business". In this case, the plaintiff replaced defective machinery supplied by the defendant with more efficient machinery. The resulting increase in the plaintiff's profits was taken into account in reducing the defendant's liability. On the other hand, in the decision of the Supreme Court of Canada, *Karas v. Rowlett*, where the wrongful non-renewal of the lease on which the plaintiff conducted a business provoked the plaintiff to lease another property on which to conduct a different business, it was held that **since the plaintiff might have, in any event, engaged in the further business, the profits of the new business were not to be taken into account in the reduction of the defendant's liability**. [Emphasis supplied]

[30] In this case, Mr. Fogarty submits the discussion to "move to UAP" as a supplier did not arise form the advice or actions of the Respondents. This is more a situation as in ***Karas***, where the profits of the new business (such as UAP here) were not taken into account since the Plaintiff may have engaged in the further business, in any event.

The Law

[31] In addition to the caselaw referred to in this motion, I adopt and apply the law with respect to production and completion of discovery undertakings as set out in ***Unisys v Pineau-Panda et al***, 2021 NSSC 347 at **paras. 38 - 44**.

> **Civil Procedure Rules**
>
> [38] *Civil Procedure Rule* 18.18 states a party may require a witness at discovery to produce documents following discovery, with certain exceptions:
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> > 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.

(2) A judge may order a witness who fails to comply with a requirement for production or access to make production or provide access, and the judge may order the witness to indemnify the party who seeks the order for the expense of obtaining the production or access.

(3) A party who requires production or access before the party completes examination of a witness at discovery may adjourn the discovery.

(4) A judge may relieve a party or a non-party witness from a requirement to produce, or provide access, at discovery examination if the party or witness rebuts the presumption for disclosure in accordance with Rule 14.08, of Rule 14 - Disclosure and Discovery in General.

[39] Rule 14.08 provides describes the presumption of full disclosure:

> 14.08 Presumption for full disclosure
>
> (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.
>
> (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.

Governing Principles

[40] The principles governing discovery requests, include the following:

a) 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.

b) Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.

c) 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.

(d) The interpretation of the Rule "should be seen in the context of this important historical and procedural shift" from the previous, more liberal, disclosure to disclosure based on relevance, and the cost-benefit analysis of doing so.

(e) The document, information or thing must be in the control of the witness.

[41] Rule 15 requires a party in an action or a contested application to search for, acquire and disclose relevant information that is within its control. ...

[43] Rule 14.08 presumes that full disclosure is necessary for justice in a proceeding. As in Rule 18.18, the focus is on what information the party controls, although the obligation even extends to a party becoming "informed about relevant documents" the party had, or once had, in its control.

[44] The governing principles have some limitations and while relevancy is key, there are other considerations. These include probative value, confidentiality, cost of production and privilege. A "watered down" version of relevancy serves only to return to the previous broad definition. Notwithstanding, disclosure of relevant documents at an early stage may be preferable.

Analysis and Decision

[32] The following represents my reasons for decision on this motion.

[33] In this decision I have considered the motion materials filed by both parties including the Notice of Motion, Affidavit of Mr. Kingston, and the Affidavit of Ms. Horne for the Applicant, together with the Discovery transcripts, Briefs and Authorities, filed in support of the various positions on the undertaking requests.

UAP Communication – Motion Granted

[34] Given the discovery evidence of Mr. Fogarty, whether he was "forced" to complete an agreement with UAP, is likely relevant to whether he would have completed the share purchase with Mr. Young, with or without a discount.

[35] In this regard, communication and correspondence between the Applicant and UAP will likely lead to the discovery of relevant evidence. The requested disclosure may also relate to credibility.

[36] Completion of undertaking #1 is therefore ordered, the Applicant shall make diligent efforts to produce the requested documentation.

Insurance Issues – Motion Granted (in part)

[37] The Respondents submit that the insurance issues are directly relevant to an assessment of damages. Liability and damages are both issues at trial.

[38] The Court finds the issue of the insurance policy is directly related to the consideration paid under the share purchase agreement, (the payment to Mr. Young for the shares). The terms of this agreement, including the purchase price is central to what is at issue in the litigation.

[39] I concur with the Respondents that any communication that existed between the insurance agent and the Applicant will likely lead to relevant evidence and is relevant to Mr. Fogarty's discovery evidence as to who is responsible for the policy not having been transferred.

[40] With respect to the request for Mr. Fogarty to advise what he wishes to receive from Mr. Young in consideration of the transfer of the insurance policy now, that is really a matter for trial. While it is likely relevant to the Applicant's claim for damages, I find it goes to the ultimate issue to be decided by the Court. I do not find this request to be founded on the share purchase agreement that was completed in 2012.

[41] That said I accept the submission made by the Respondents in its brief:

> 51. Mr. Fogarty acknowledged on discovery that he had received the shares, that he had received a credit against the purchase price in consideration of the transfer of the Policy, and that the Policy had never in fact been transferred.

[42] In respect of Undertaking #5 the Applicant shall not be required to provide what it is Mr. Fogarty wants in consideration for a transfer of the policy now. That is a matter between Mr. Fogarty and his counsel to be established at trial, when the Applicant will have the burden to prove liability and damages.

[43] Completion of undertakings #3 and #4 is ordered, but completion of undertaking # 5 is not ordered.

Performance or benefits received by the Company or Mr. Fogarty- Motion Dismissed

[44] I have not been persuaded that ***Musgrave v Ford*** is applicable in these circumstances. It seems to me to be quite a stretch to say that any profit made the Applicant shareholder or the Company, following completion of the share purchase is relevant because it could be deducted from the damages claimed, whether by way of offset or mitigation.

[45] Cleary the claim for interest payments in ***Ford*** was directly related to the mortgage security taken by Mr. Musgrave, "the transaction at issue". Thus, if he would not have made the loan but for Mr. Ford's negligence, he would not have made any profit from the interest payments. On this basis Justice LeBlanc deducted those payments from the recoverable damages. (Paragraph 57 of ***Ford***)

[46] The Applicant argues the case ***MacDonald v. Wedderburn*** should be applied here. In that case the main issue was causation. MacAdam, J, held that liability for the loss was to be based on what would have happened but for the solicitor's negligence and the actions of the Plaintiff MacDonald, in relation to the breach of the dealership agreement stating:

> 45. The resulting effect is that if either Mr. MacDonald had heeded the warnings he had been given, **or Mr. Wedderburn properly advised his client**, and the advice been acted upon the loss would never have occurred. Perhaps the closing might then have been available in the eventuality of Nissan refusing to approve this transfer or the prior transfer to Mr. McGill. I am satisfied each of the parties bears responsibility for this loss and having regard to all the circumstances, the responsibility is to be shared equally.
>
> 46. In respect to damages, the plaintiff is entitled to one-half of the amount he paid for the shares on June 20. Although he no doubt earned salary while he worked as an employee, **this is not a benefit to be set off against his loss,** even if, apart from the purchase of the shares he might not otherwise have been hired as a salesperson. (Emphasis added)

[47] In this application, the share transaction had been completed in 2012 and the remedy sought by the Plaintiff alleges solicitors' negligence in preparing the share purchase agreement between the Applicant and Mr. Young at that time.

[48] I concur with the Applicant that a subsequent transaction resulting in either a profit or a loss is not relevant. In addition, I find the undertaking request to be overly broad.

[49] I concur with the Applicant that a subsequent transaction, if it is to be taken into account, "must be one arising out of the consequences of the breach and in the ordinary course of business".

[50] Respectfully, the Order requiring completion of undertaking #6 is denied.

Conclusion

[51] The Respondents' motion is granted with respect to undertaking numbers 1, 3, 4, but not with respect to undertaking numbers 5 and 6.

[52] Cost shall be awarded to the Respondents in any event of the cause at the end of the proceeding.

Appendix "A"

1. production of all materials between Mr. Fogarty or on his behalf and UAP between the first approach leading up until the conclusion of the deal in February of 2012. Request taken under advisement.

3. production of whatever correspondence/communications between Mr. Fogarty or anyone on his behalf and Mr. Young or anyone on his behalf on the issue of the insurances.

4. check with insurance company to determine what communications have there been with the insurer and from the insurer regarding the policy since February 24, 20212. Requests taken under advisement.

5. regarding Mr. Young's claim of $250,000, plus/minus, an increase in the purchase price he shouldn't have to bear, not taking into account the $102,000, provide more information regarding the $102,000. Also advise what Mr. Fogarty wants from Mr. Young in consideration of the transfer of the insurance policy now. Request taken under advisement.

6. to the extent the UAP option has increased in the value and the return to Mr. Fogarty, that value and addition should be set off any damages he says he sustained. Request taken under advisement.