

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: CIBC World Markets Inc. v. Jessiman, 2006 NSSM 54

Between:

CIBC WORLD MARKETS INC.

CLAIMANT

-and -

EARL JESSIMAN

DEFENDANT

Heard: January 25, 2006
Decision February 17, 2006

Adjudicator David TR Parker

DECISION AND ORDER

A hearing was held in the above matter at Halifax, Nova Scotia, on the 25th day of January, 2006, and the following Order is made:

The Claimant was self-represented.

The Defendant was represented by Counsel, Lisa Gallivan and Sarah Manning;

Service on the Defendant was in accordance with the rules and regulations of the Small Claims Court Act.

This matter involved a claim by CIBC World Markets Inc. in the amount of \$5,782.94.

The Defendant denied the claim and counterclaimed for an amount of \$12,794.00. The counterclaim was broken down into two amounts:

- (1) Final commissions owed to the Defendant estimated at \$2,356.00, and
- (2) Lost commissions due to delays in transferring customer accounts to the Defendant's company estimated to be \$10,438.00.

I shall refer to paragraphs 3 to 9 of the Claimant's pleadings which set out its claim.

3. The Defendant was an Investment Advisor at CIBC Wood Gundy from August 31, 1995, until his resignation on December 24, 2004. CIBC Wood Gundy is the retail division of CIBC World Markets Inc.
4. The Investment Advisor compensation package at CIBC Wood Gundy includes Commission payouts.
5. At the beginning of the 2005 fiscal year, the Defendant was paid at a compensation level based on his production from the previous year.
6. This payout represented in part an advanced payment based on expected production levels.
7. CIBC Wood Gundy's Compensation Program, which forms a part of the terms and conditions of the Defendant's employment contract, states that if after the reconciliation of an Investment Advisor's production and actual grid level takes place at fiscal year-end, an overpayment has occurred, the amount of the overpayment is deducted from future commissions. However if an Investment Advisor has ceased to be an Investment Advisor for CIBC Wood Gundy the Investment Advisor will be liable for any overpayment.
8. On December 24, 2004 the Defendant resigned from CIBC Wood Gundy, after which CIBC Wood Gundy conducted a reconciliation of actual fiscal year-to-date production with respect to the date of his resignation compared to what was paid out by CIBC Wood Gundy.
9. The current overpayment to the Defendant is \$5,782.94."

The Defendant admitted there was an overpayment of \$5,782.94 and I shall allow same in my Order.

With respect to the counterclaim for final commissions, the Claimant presented evidence to show these final commissions were in fact not due to the Defendant. The Defendant told the Court if the Claimant had provided this information presented to the Court earlier to the Defendant then this counterclaim would not have been an issue. My Order will reflect that this part of the counterclaim is dismissed.

The second part of the counterclaim involves losses due to the Claimant's failure to provide requests from clients to transfer their accounts to another company.

The pleadings of the Defendant set out this claim in a succinct fashion and are as follows:

" Following my move to Canaccord Capital, the majority of my clients decided that they would transfer their accounts / portfolios from CIBC Wood Gundy to Canaccord Capital. All of those clients signed the required transfer documentation, which was then forwarded to CIBC Wood Gundy.

The Investment Dealers Association of Canada regulates the practices of the investment industry, and has published regulations for this purpose. IDA regulations 2300.4 and 2300.6 provide that, upon receipt of a signed request from a client to transfer his or her account to another company, a member is required to effect the transfer within ten clearing (business) days.

In January, February and March of 2005, 205 of my clients forwarded transfer documentation to CIBC Wood Gundy. The majority of those transfers were not completed within the ten-day time frame set out by the Investment Dealers' Association.

In several cases, second and third requests for transfer were sent to CIBC Wood Gundy, without success.

The Halifax Branch of Canaccord Capital made a complaint regarding these delays to the Nova Scotia Branch of the Investment Dealers' Association by email and letter dated March 13, 2005.

In total, the transfers of 425 clients' accounts were delayed by CIBC Wood Gundy. 230 were delayed by four weeks or less. 160 were delayed by between four and six weeks. 35 were delayed between six and eight weeks.

As a result of CIBC Wood Gundy's delays and its breaches of the IDA

Regulations referenced above, I have suffered losses. Each of the accounts whose transfer was delayed includes investments which generate commissions for the Investment Advisor who handles the accounts. Until each transfer was complete, those commissions were retained by CIBC Wood Gundy.

As a result of those delays, I have lost a total of \$10,438 in commissions, which I claim from CIBC Wood Gundy."

Prior to hearing evidence on this aspect of the counterclaim, Counsel for the Claimant advised the Court that the issue raised in the counterclaim is before the Investment Dealers Association of Canada ("IDA") and that the counterclaim should be stayed. I advised Counsel I would consider the Court's jurisdiction and rule on the motion on whether to continue on the counterclaim or stay the proceedings.

The IDA is a type of self-regulating body for members of the securities industry. Its mission is to protect investors and enhance the efficiency and competitiveness of the Canadian Capital Market. The IDA has disciplinary procedures to deal with members of the Associations; however, it is set up to deal with discipline somewhat like the law societies in each province. It is not intended to be a court of law.

The Small Claims Court, as with all courts, is concerned with duplicity of proceedings. Section 15 of the Small Claims Court Act makes specific reference to claims before another court and how it will exclude the jurisdiction of the Small Claims Court.

Claim before other court

15 The Court does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with Section 19. R.S., c. 430, s. 15; 1992, c. 16, s. 118.

This court is not required, nor should it excuse itself from hearing a matter which is subject to a self-regulatory body's investigation of a complaint. As long as this court has the jurisdictional statutory authority to deal with a matter as enunciated in the Small Claims Court Act then the Small Claims Court can deal with same.

Therefore, the motion shall not be granted and the Defendant can contact the Clerk of the Small Claims Court, Tanya Pellow, to arrange court time for a continuation of the hearing on his counterclaim.

As this time, I shall make a preliminary Order on the matters referred to herein with the understanding that the parties shall have thirty (30) days from the issuance of this Order to file an Appeal as allowed under the provisions of the Small Claims Court Act.

I would like to thank Counsel and the Defendant Earl Jessiman for the professional manner in which they all conducted themselves in the hearing and the clarity of their respective presentations.

IT IS THEREFORE ORDERED that the Defendant shall pay to the Claimant the following sums:

\$	5,782.94	
\$	<u>160.00</u>	Court Costs
\$	5,942.94	Total

AND IT IS FURTHER ORDERED that the claim by the Defendant and Claimant by counterclaim for \$2,356.00 be dismissed with no order as to costs;

AND IT IS FURTHER ORDERED that the Claim by the Defendant and Claimant by counterclaim for \$10,438.00 continue and that a hearing date be set by the Small Claims Court upon the request of either of the parties to this action.

DATED at Halifax, Nova Scotia, this 17th day of February, A.D., 2006.

David T.R. Parker
Adjudicator of the Small Claims
Court of Nova Scotia