CLAIM NO. 188423
Date: 20030414

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Investors Group Financial Services v. MacGillivray, 2003 NSSM 7

Name	Investors Group Financial Services and I.G. Investment Management Ltd. and Douglas Anthony Bray	Claimants
Name	Ronald G. MacGillivray	Defendant

D E C I S I O N

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers of the parties on August 22, 2007. This decision replaces the previously distributed decision.

Appearances:

Ann Smith on behalf of the Claimants;
Ronald MacGillivray on his own behalf.

[1] This matter came on before me on January 28, 2003. I heard the evidence of Mr. Allan MacLeod, and Mr. Douglas Bray on behalf of the Claimants; and the evidence of Mr. MacGillivray on his own behalf.

[2] Having heard the evidence, I reserved judgment. Since it appeared to me that there was an issue as to the enforceability of the contract upon which the Claimants grounded their claims (about which more later), I invited further submissions from Ms. Smith and Mr. MacGillivray. The last of those submissions was received February 28, 2003.

[3] The claim is for $9,141.91 plus interest and costs. The claim represents monies that were advanced by the Claimant Investors Group Financial Services Inc. (“Investors Group”) to Mr. MacGillivray by way of an advance draw against expected commission income that Mr. MacGillivray was to earn on business (that is, investors) he was to obtain as an agent for Investors Group. The Claimant I.G. Investment Management Ltd. appears to have been part of that arrangement.

[4] The Claimant Anthony Bray, who is a regional director of Investors Group, is a Claimant because he says he is personally liable for the funds that were advanced by Investors Group to Mr. MacGillivray.

[5] The claim, and the issues surrounding it, have to be understood in the context of the following history.

[6] The Investors Group offers various types of investment vehicles, mostly mutual funds, to the public. It advertises its investment products, and "sells" them to the public through the use of "consultants" whose task it is to solicit investment in the funds of the Investors Group; and to service the needs and interests of those clients or investors who have placed money into such funds.

[7] In the spring of 2001 the Defendant Mr. MacGillivray, who had been working for NORTEL Networks in the laser alignment division in Ottawa, was looking to relocate back to Nova Scotia. He submitted his résumé to the Investors Group and he was interviewed in New Glasgow by Mr. MacLeod, who was then associate regional director for the Investors Group, in June 2001: see Exhibit C1.

[8] Mr. MacLeod decided to take Mr. MacGillivray on as a consultant. To do so required the following:

(a) Mr. MacGillivray had to apply for a license under the Canadian Securities and Commodities Futures legislation: see Exhibit C4 and C5; and

(b) he had to take an investment course put on by Investors Group in Winnipeg.

[9] Mr. MacGillivray made his application for a license in July 2001: see Exhibit C4, and in October 2001 he attended the Investors Group training program in Winnipeg.

[10] The training was provided without cost to Mr. MacGillivray; and he was also provided a weekly stipend of $500 which was non-refundable.

[11] Mr. MacGillivray says that while at the course a number of "high rollers" were presented by the Investors Group as examples of what a successful consultant could do by way of business and, in particular, commission. He was also told that the focus of his efforts should be on larger investors (that is, people with more than $100,000 to invest) rather than smaller investors.

[12] At the completion of the course Mr. MacGillivray signed a "Consultant's Agreement" on or about April 29, 2001.

[13] The agreement recited that the Investors Group wished "to appoint the consultant [i.e. Mr. MacGillivray] as an independent contractor for the purpose of canvassing for applications for products issued or distributed by Investors and for the purpose

of collecting and paying over to Investors all payments received in connection with such applications in consideration of the receipt of sales commissions and applicable service fees:" see Exhibit C2.

[14] Pursuant to the terms of the agreement, the Investors Group appointed Mr. MacGillivray "its agent to canvass for applications for products issued or distributed by" Investors Group and to "collect and pay over to" Investors Group "all payments received by the consultant in connection with such applications:" s.1, Exhibit C2.

[15] The consultant was to carry out his responsibility "without interference from Investors, except that Investors may from time to time prescribe rules and regulations respecting the conduct of the consultant's business which are necessary to protect the interests of Investors or its clients or to comply with any law, ordinance or regulation, or with any resolution of the Investment Funds Institute of Canada which has been adopted by Investors, governing or relating to the conduct of Investors' business:" s. 2, Exhibit C2.

[16] Under the terms of the agreement the consultant was expected to bear all expenses associated with his or her work as a consultant for the Investors Group.

[17] The consultant was not permitted to use any advertising material other than that which had been approved by Investors Group: s. 3(vii); nor was he or she permitted to "canvass for applications for products issued or distributed by a competitor of Investors during the currency of this agreement:" s. 4, Exhibit C2.

[18] Finally, upon the termination of the agreement, the consultant was not permitted to directly or indirectly "solicit any investment business from any client of Investors in the territory served by the region office or offices with which the consultant was associated during the year prior to such termination:" s. 15(i); and, in addition, was not permitted for two years after termination of the agreement to "directly or indirectly solicit any investment business from any client of Investors with whom the consultant has dealt during the term of this agreement:" s. 15(ii), Exhibit C2.

[19] In return, the consultant was to receive a commission, as well as certain service fees, in respect of investment that he or she brought into the company and maintained with the company over time. From the evidence of Mr. MacGillivray and Mr. MacLeod and Mr. Bray, it is necessary only to know that in order to earn an annual income of approximately $30,000, it would be necessary for a consultant to obtain and maintain at least $1 million of new investment each year in products offered by Investors Group.

[20] Under the terms of the agreement, the regional director had the discretion to provide "commission advances" to the consultant in respect of future commissions: s. 10, Exhibit C2. Under the terms of the agreement, each such commission advance constituted "a debt owing to the region director:" s. 10, Exhibit C2.

[21] About the same time Mr. MacGillivray also signed a “Representative Financing Agreement (“RFA”),” with an effective date of October 16, 2001: see Exhibit C3.

[22] Pursuant to the terms of the RFA, Mr. MacGillivray was entitled to “participate” in the Representative Financing Program for up to two years. Under this program (which appears to have been contemplated under s. 10 of the Consultant’s Agreement) Mr. MacGillivray would be provided with bi-weekly advances against a projected annual commission of $30,000. As I have already noted, in order to earn commission and service fees in this amount, he would have had to obtain approximately $1 million worth of new business.

[23] The advance draws, in the bi-monthly amount of $2,500, less expenses and special benefits, commenced in October 2001.

[24] Mr. MacGillivray started work as a “consultant” for the Investors Group in the Antigonish area of Nova Scotia.

[25] He met a number of times with Mr. MacLeod, to review his sales efforts. The notes of those meetings were made exhibits at the hearing: see Exhibit C7, C8, C9 and C10.

[26] It is clear from the evidence of both Mr. MacLeod and Mr. MacGillivray that, while Mr. MacGillivray did make a fair number of phone contacts and have some appointments, he was unable in the period October 31 through to December 27, 2001 to bring in much, if anything, by way of investment. This is not perhaps surprising, given the turmoil being experienced by the investment market during this period.

[27] Accordingly, on February 1, 2002 Mr. Bray removed Mr. MacGillivray from the Financing Program: see Exhibit C13.

[28] At this point Mr. MacGillivray now “owed” Investors Group $8,750. Pursuant to the terms of the various agreements he had signed, this was now a debt which he was obligated to repay. The first repayment, of 15%, was due and owing February 15, 2002: see Exhibit C13.

[29] I am satisfied on the evidence that Mr. MacGillivray was told in February that he would have to repay these monies. He was accordingly left in a position where he had no commission income (because his sales efforts to date had not proved successful), was expected to bear the cost of working as a “consultant” for the Investors Group, and was also expected to repay the $8,750 he had already received by way of an advance on commissions yet to be earned.

[30] On or about February 22, 2002 Mr. MacGillivray delivered his resignation letter: see Exhibit C15.

[31] Shortly thereafter, Mr. MacLeod prepared a “Consultant Termination Report:” see Exhibit C16.

[32] Mr. MacLeod indicated on the report that he would not “rehire” Mr. MacGillivray because he was “nonproductive.” He also indicated that the “reason for termination” was the fact that Mr. MacGillivray was “nonproductive.”

[33] In filling out the form, Mr. MacLeod also indicated that the “reason for leaving” was “management’s decision” (as opposed to it being a result of the “consultant’s decision”), and that the decision was based on his feeling that Mr. MacGillivray lacked the desire to produce; lacked the ability to produce to the region’s standards; and lacked prospecting skills: see Exhibit C16.

[34] Mr. MacGillivray did not repay the monies that had been advanced to him.

[35] On May 27, 2002 the Investors Group demanded payment of the account balance (which by this point was $9,141.91): see Exhibit C18.

[36] On June 27, 2002 Mr. Bray wrote to Mr. MacGillivray, again demanding payment and threatening litigation: see Exhibit C18.

[37] Under the terms of the RFA, the RFA was to be considered “an attachment to and form a part of” the Consultant’s Agreement: see Exhibit C3, p. 2, “acknowledgement.”

[38] The Claimants say that this a simple matter of contract. Investors Group advanced money by way of a loan to Mr. MacGillivray, with the expectation that those monies would be paid back out of the commissions Mr. MacGillivray was to earn. Those commissions were not earned, and under the terms of the contract Mr. MacGillivray was required to repay those monies as a debt owing to both the Investors Group and Mr. Bray. The Claimants say that the agreements were simple business contracts between the Claimants on the one hand, and an independent contractor (not an employee) on the other.

[39] Mr. MacGillivray does not dispute that he signed the agreements.

[40] However, he argued that he should not be liable to pay because:

(a) the Claimants knew or ought to have known in the fall of 2001 that the market was going down, and that it was highly unlikely that a consultant in Antigonish would be able to secure new investment business totalling more than $1 million;

(b) Investors Group told him to focus on large investors (that is, people with more than $100,000 to invest), when it knew or ought to have known that such investors were few and far between in the Antigonish area; and

(c) in all the circumstances it was unfair that Mr. MacGillivray would have to repay the advances.

[41] Having heard the evidence and reviewed the documents, it seemed to me that there was another issue, and that concerned whether the two agreements (read as a whole) were void and unenforceable because they were unreasonable, or in restraint of trade, or both: *Schroeder v. Macaulay* [1974] 3 All E.R. 616 (H.L.); *Stenhouse Australia Ltd. v. Phillips* [1974] 1 All E.R. 117 (P.C.).

[42] I received submissions from both Mr. MacGillivray and Ms. Smith in respect of this concern.

STATUS OF MR. MACGILLIVRAY

[43] The Claimants say that Mr. MacGillivray was an "independent contractor" who merely acted as its "sales representative:" see para. 5 of the Statement of Claim.

[44] Having heard the evidence, and having reviewed the documentation, I am satisfied that whatever Mr. MacGillivray was, he was not an independent contractor.

[45] It is clear from the evidence and from the "Consultant's Agreement" that Investors Group exercised close control and direction of Mr. MacGillivray's activities. There were meetings between Mr. MacGillivray and Mr. MacLeod more than once a month, at which the latter reviewed Mr. MacGillivray's sales efforts to date. Mr. MacGillivray, as a "sales representative," was not permitted to act for any other competitor.

[46] Based on this evidence I am satisfied that the relationship that existed between Investors Group and Mr. MacGillivray was a master-servant relationship, and not a relationship between two independent "businesses;" nor was Mr. MacGillivray an independent contractor. The *indicia* of employment status (the close control, the restrictions on his activities and, indeed, much of the terminology of the "Consultant Termination Report") all point to Mr. MacGillivray being, in effect, an employee of Investors Group.

THE ISSUES

[47] In my view there are two principal issues in this case:

(a) whether the obligation to repay the advances survives termination of the "Consultant's Agreement;" and, in any event,

(b) whether the two agreements (which, by their own terms, must be read together) are enforceable in the particular circumstances of this case; and in particular, whether the obligation under the agreements to repay the commission advances is enforceable.

DOES THE "DEBT" SURVIVE TERMINATION OF THE AGREEMENT?

[48] The system of cash advances against future commission income clearly presuppose the continued existence of the consulting agreement, if only because the debt that is created by the advance payment is to be offset by the commission income. The issue, however, is whether the "debt" survives the end of the relationship, and in particular, the end of any ability to generate commission income against which to offset the debt.

[49] That question must be answered by a review of the two agreements.

[50] The RFA states by its own terms that it is "a career establishment financing plan" that is "available on a selective basis ... to assist qualified Representatives in establishing their new careers:" Introduction, Exhibit C3.

[51] The RFA also defines "debt" as "the difference between the gross draw received under the Program and your actual total earnings from all sources:" Debt Responsibility, Exhibit C3.

[52] Finally, the RFA is considered to be "an attachment to and form part of" the Consultant's Agreement, and the "terms of that Agreement still apply." As well, the consultant acknowledged that "all payments made to you under this Program are advanced against future earnings and are not to be considered salary:" Acknowledgment, Exhibit C3.

[53] Turning to the Consultant's Agreement, clause 10 contemplates the existence of such cash advance draws. The same clause also empowers the Investors Group to pay over any commission or other income earned by the consultant over to the region director to pay off such cash advances.

[54] Clause 12 of the agreement expressly requires both the consultant and Investors Group to report cash and commission advances as income for tax purposes. More importantly, when the agreement is terminated, "any amounts owing to the Region Director by the Consultant on account of advances will be reported *as income to the Consultant*, as required by law" (emphasis added).

[55] Based on the above review it would appear that, with the exception of the provisions in clause 12 above-noted, there is nothing in either agreement that specifically deals with what is to happen when a consultant's agreement is terminated (whether by the consultant or by Investors Group) in a case where the consultant's cash advance has exceeded his or her commission income.

[56] In the absence of an express provision, we are left with the following question: does the obligation to pay the difference between the cash advance and future income survive the termination of the relationship (in other words, when there is no longer any future income against which to match or measure the cash advances)?

[57] In my view it does not. There are two reasons for this conclusion.

[58] First, the agreement by its very terms requires the "consultant" to report the cash advances *as income*, even when the agreement has been terminated. The agreement was drafted by Investors Group. It can hardly call the monies "a debt" if, at the same time, it is reporting the advance as income to the consultant for tax purposes, and requiring the consultant to do the same.

[59] Second, there is, as noted above, no express provision in the agreements dealing with the situation. Investors Group is, in effect, arguing that the Court should imply the existence of a clause that requires the consultant to repay the cash advance even when he or she is no longer associated with the company.

[60] Whether or not a term is implied into a contract depends upon whether such a term is considered necessary to make "business sense" of the agreement; that is, whether it is necessary for purposes of "business efficacy." Investors Group says that such an obligation is clear, if only by implication. I do not agree.

[61] A similar argument on similar facts was made in *Olympic Industries Inc v. John McNeill* (1993) 86 BCLR (2d) 273 (BCCA). It was rejected. In that case Finch, JA (for the Court) stated at para.33 that there was nothing which suggested that "business efficacy requires an implied term in this contract for repayment of a deficit upon termination."

[62] In my view the same reasoning applies to the circumstances of this case. In saying this I am not to be taken as giving effect to Mr. MacGillivray's submission that he should not have to repay the advance because no one else had been asked to repay their advances. I did not accept this evidence at the hearing, based as it was on tenuous hearsay; and I agree with Ms. Smith's submission that it should not be given any weight.

[63] But the issue of "business efficacy" does not depend on the presence or absence of such evidence. Rather, it turns on whether "business efficacy" requires the implication of a term that is absent from the contract. I am not prepared to imply the existence of such a provision in a case where:

(a) the person urging me to imply the provision was a sophisticated business which drafted the agreement in the first place; and where

(b) an objective person, if asked, could just as easily have said that the advance payment would be waived in the event the consultant was no longer able to earn commissions (because the relationship had been terminated); and where

(c) the agreement itself contains an express clause requiring the payment to be reported *as income* to the income tax authorities, *even after* termination.

[64] This last point also distinguishes the case at bar from the one in *Crown Life Insurance Co. v. De Savoye* (1998) 107 B.C.A.C. 74 (B.C.C.A.). In that case there was no provision which purported to treat a debt said to be owing to the "employer" as, at the same time, income paid to the "employee."

[65] There was, in other words, no apparent ambiguity in how the "debt" was to be treated or characterized. The case at bar is different. There is an ambiguity. Investors Group, by creating such an apparent contraction (between treating the monies as a debt or as income) cannot now argue that I should ignore the ambiguity created by such a contradiction.

[66] I accordingly rule that the agreements do not provide for repayment of the advances in the event of termination; and that accordingly there is no obligation on the part of Mr. MacGillivray to repay them.

ENFORCEABILITY

[67] If I am wrong in my finding concerning the interpretation of the agreements, and if there is in fact either an express or an implied term requiring repayment in the event of termination, I must then turn to the issue of whether such a term, in the circumstances of this case, is enforceable.

[68] There is no issue that Mr. MacGillivray signed the documents. Nor is there any issue as to his understanding of the documents. Mr. MacGillivray admitted that he understood his obligations under the agreements, and that the payments being made to him were merely advances against his expected commission income. His position was not that he did not understand the agreements; rather his position was that it was unfair to enforce those agreements against him when:

(a) they were signed at a time when the market, to the knowledge of Investors Group, was going down (making it near impossible for Mr. MacGillivray to earn any commission income); and

(b) it was especially unfair to encourage him to expect to be able to earn commission income under those circumstances in an area such as Antigonish.

[69] In *Schroeder v. Macaulay* [1974] 3 All E.R. 616 (H.L.) Lord Reid noted as follows at p. 622:

> "Any contract by which a person engages to give his exclusive services to another for a period necessarily involves extensive restriction during that period of a common law right to exercise any lawful activity he chooses in such manner as he thinks best. Normally the doctrine of restraint of trade has no application to such restrictions: they require no justification. But if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced."

[70] Similarly, Lord Diplock noted at p. 623 that:

> "The question to be answered as respects a contract in restraint of trade of the kind with which this appeal is concerned is: was the bargain fair? The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration."

[71] The RFA is, by its terms, part of the overall Consultant's Agreement. Accordingly, in my view, the RFA and in particular the obligation to repay the advances, must be considered in the context of:

(a) the nature of the relationship between Investors Group and Mr. MacGillivray;

(b) the non-competition clauses contained in the Consultant's Agreement; and

(c) the fact that Investors Group, run by people extremely involved in and knowledgeable of the stock market, was leading people such as Mr. MacGillivray (who had little or no such experience), who were looking for employment, to believe that they could make substantial incomes in the investment industry.

[72] Was there an imbalance in the relationship between Investors Group and Mr. MacGillivray?

[73] Investors Group is obviously a sophisticated company. Mr. MacLeod and Mr. Bray were clearly knowledgeable about the stock market; and as well were knowledgeable about the investment patterns of Nova Scotians. They had access to sales information concerning the region: see for e.g., Exhibit C19. They would have known that the chances of a new sales person, particularly in the Antigonish region, being able to bring in anything like $1 million of new business was (at least on the basis of Exhibit C19) problematic.

[74] Mr. MacGillivray, on the other hand, had no source of income other than what he might hope to make by way of commission income on "sales." He was prohibited from selling anything other than the Investors Group products, and clearly his ability to sell those products would be dependent, at least to some degree, on how the Investors Group itself performed.

[75] Investors Group needed Mr. MacGillivray in the sense that it needed a sales force to keep its products "on the market."

[76] It is also clear that there was no negotiation over the terms of the agreements. They were standard form agreements, drafted by Investors Group, and clearly drafted in favour of Investors Group.

[77] In these circumstances I am satisfied that there was an inequality of bargaining power between the two parties to the agreements. I am also satisfied that the contracts, when taken as a whole, do constitute contracts in restraint of trade. They clearly prohibit Mr. MacGillivray from acting as anything other than an agent or representative of Investors Group; and, moreover, prohibit and limit his actions after the relationship is terminated.

[78] Given this finding, there is in my view an obligation on Investors Group to justify the contractual obligation they seek to enforce in this case. Investors Group must establish the justification of forcing a new servant to pay back his “living wage” in circumstances where it knew or ought to have known that:

(a) Mr. MacGillivray had no experience with working on 100% commission;

(b) Mr. MacGillivray appears in person as rough-hewn, lacking the kind of superficial financial credibility that a potential investor might expect of a financial planner or advisor;

(c) it was unlikely that the Antigonish/New Glasgow area would be liberally strewn with investors, each of whom had $100,000 or more to place in mutual funds; and accordingly,

(d) it was unlikely that Mr MacGillivray would be making enough money, especially in the first year of the contract, to support himself let alone pay back monies that had been advanced to him.

[79] In my view, this contract is unenforceable, at least in the circumstances of this case. Mr. MacGillivray, to the knowledge of Investors Group, had no experience with this type of arrangement. In addition, Investors Group “puffed up” the potential for sales in this area in the Winnipeg training sessions. It was clearly in the interest of Investors Group to do this, in order to encourage people such as Mr. MacGillivray to “sign on” as its sales force. Without such people, Investors Group would not be able to sell the products that it wished to sell, to the detriment not only of Investors Group but regional managers such as Mr. Bray.

[80] If this contract were in the circumstances of this case enforceable, then we would have a situation where:

(a) Investors Group pays a consultant such as Mr. MacGillivray nothing, in exchange for:

(i) the consultant marketing exclusively Investors Group’s products and servicing it clients; and

(ii) the consultant bearing the cost of his or her marketing of those products; and

(b) the consultant agrees not to compete with Investors Group for one or two years after the termination of the agreement.

[81] Absent the advance on draws, one is hard pressed to find any consideration flowing from Investors Group to the consultant in respect of these agreements. Without any advance on commission payments, Investors Group was entitled to pay the consultant nothing, in exchange for having him or her market its product, bear the cost of marketing that product; and in addition giving up the right to compete with Investors Group in the event that the contract was terminated, even if only after a month or two.

[82] Ms. Smith in her submissions dated February 28, 2003 relied upon *Johnson v. Investors Group Financial Services Inc.* [1999] N.B.J. No. 388 (Q.B.), affirmed [2000] N.B.J. No. 203 (C.A.); and *Johnson v. Investors Group Financial Services Inc.* [1999] N.B.J. No. 470 (Q.B.) in support of the enforceability of the contract.

[83] *Johnson v. Investors Group* involved the Investors Group, and considered the same type of consultant's agreement.

[84] However, in my view, these decisions are distinguishable.

[85] *Johnson v. Investors Group* was a wrongful dismissal case.

[86] The plaintiff there, who had worked as a sales representative for Investors Group for almost ten years, was terminated without cause. The agreement under which he worked contained a provision permitting termination "without cause" and "without notice."

[87] The plaintiff sued for wrongful dismissal, but the Court dismissed the claim on the grounds that the contract clearly permitted a termination without cause and without notice, and that in the circumstances of that case there was nothing unconscionable about such a provision. The contract had been in existence for many years; the plaintiff had on the evidence clearly profited by it. In such circumstances there was nothing unreasonable about enforcing the term in question. Such is clearly not the situation in the case before me.

[88] Ms. Smith also relies on those decisions in respect of her argument that Mr. MacGillivray was an independent contractor.

[89] In my view, for purposes of the case before me, nothing really turns on whether Mr. MacGillivray was in fact an employee or an independent contractor (although in my view he was more akin to the former than the latter). What is important, however, is the nature of the relationship between the two, and in this regard I believe that the decision in *Johnson v. Investors Group* in fact supports the conclusion that a person in Mr. MacGillivray's position was in a dependent relationship, one that contained with it a potential for abuse.

[90] In this regard I note that while Justice McLellan did say in *Johnson v. Investors Group* [1999] N.B.J. No. 388 at para. 4 that the plaintiff was "an independent contractor" with the Investors Group, the learned Judge also immediately went on to note that the plaintiff "was in a situation of economic dependence, akin to full time employment."

[91] I accordingly dismiss the Claimants' claim.

Dated at Halifax, Nova Scotia)
this 14th day of April 2003)
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ADJUDICATOR
W. Augustus Richardson

Original Court File
Copy Claimant(s)
Copy Defendant(s)