IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Morris v. Mariana Cowan Real Estate Ltd., 2014 NSSM 56

Claim No: SCCH 422677

BETWEEN:

Name	Robert Joseph Morris	**Claimant**
Address	c/o Ritch Durnford 1200 – 1809 Barrington Street Halifax, NS B3J 3K8	
Phone	(902) 429-3400	

Name	Mariana Cowan Real Estate Ltd. Mariana Cowan Holdings Ltd. Coldwell Banker Supercity Realty	**Defendants**
Address	c/o Atlantica Law Group 92 Webster Street Kentville, NS B4N 1H9	
Phone	(902) 679-0110	

AND

Claim No: SCCH 425999

BETWEEN:

Name	Robert Joseph Morris	**Claimant**
Address	c/o Ritch Durnford 1200 – 1809 Barrington Street Halifax, NS B3J 3K8	
Phone	(902) 429-3400	

Name	Mariana Cowan and Mariana Cowan Holdings Ltd.	**Defendant**

Address c/o Atlantica Law Group
92 Webster Street
Kentville, NS B4N 1H9
Phone (902) 679-0110

DECISION

This decision concerns an interlocutory order for the above two matters. The decision follows several hearings as well as recent correspondence. Neither matter has been heard, but both have something of an involved procedural history which began with a demand for further and better particulars by Mr. Conway on behalf of the Defendants. Usually decisions and orders on issues of procedure do not occur in Small Claims Court until after all evidence has been adduced and a decision rendered on the merits of a case. This is not to suggest that a party cannot raise them. Sometimes it is necessary for an Adjudicator to provide directions or guidance to facilitate proper conduct of the matter. In those cases, I have, indeed, found it appropriate to issue orders backed with written reasons. Yet the use of such orders and decisions is rarely employed by me or other Adjudicators, at least based on my experience as a Small Claims Court Adjudicator. That is as it should be.

Whenever procedural motions and orders are considered on an interlocutory basis, an Adjudicator must be mindful of the intent and purpose of the *Small Claims Court Act*. The principles are set out in section 2:

"It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice."

For matters to be "adjudicated informally and inexpensively", such a purpose necessarily precludes myriad orders and motions as might be found in certain Supreme Court matters. Of course, those procedures may be a necessary part of the process for matters at the Supreme Court. In comparing the processes, I can do little better than to quote Chief Justice J. Michael MacDonald, then sitting as a Justice of the Supreme Court of Nova Scotia, in *Imperial Life Financial v. Langille* (1998) 166 N.S.R. (2d) 46:

"Our Small Claims Court serves an extremely useful purpose within the administration of civil justice in this province. It provides an informal and inexpensive forum for the resolution of claims within a limited monetary value. It provides access to justice for those who might not otherwise afford it. It makes perfect sense to have claims involving smaller amounts of money processed in an efficient manner without the expense of extensive pre-trial proceedings.

That being said, one must not forget the benefits of our Supreme Court pretrial process. That process provides for liberal discovery procedures designed to enhance settlement and/or narrow the issues. Therefore, it too serves a very significant purpose within the administration of civil justice.

Thus in approaching this issue, I must balance or consider the goals of each judicial regime. In so doing, I conclude that the reference to "claim" in s. 9 of the *Small Claims Court Act*, supra, must refer to "claim" in the global sense. The legislators obviously felt that extensive pre-trial procedures could be avoided (so as to secure greater access to justice) provided the amount at stake was reasonably modest."

This matter began with a demand for further and better particulars. In another case dealing with demands for particulars in Small Claims Court, Adjudicator Augustus Richardson, QC cautioned in *Mercier v. BMO Investments Inc.*, 2014 NSSM 9:

"In short, there is usually no need for anything more than a one line claim, or for a one line defence that sets out the reason for the defence. To impose a requirement for "further and better particulars" would simply encourage the kind of "meta disputes" over the pleadings of a dispute, rather than its merits, that one often finds in the superior courts."

Suffice it to say that demands for particulars are not the only procedural issues which could lead to "meta disputes". The *Small Claims Court Act* and its regulations do not provide for many of the procedural requirements of the *Civil Procedure Rules*. Such a difference is implemented deliberately with the goal of ensuring that matters are adjudicated informally and inexpensively. The *Act* also makes it clear that Small Claims procedures have to follow a significant and fundamental principle, namely the adjudication of such matters must be according to the established principles of law and natural justice.

Below I have briefly summarized the history of this proceeding. The *Small Claims Court Act* does not have a procedure for demanding further and better particulars, although I felt them appropriate in this case. Unfortunately, this matter seems to be taking a life of its own raising many procedural issues. I am hopeful that in providing these reasons, this will bring the matter where it should be, to a hearing on its merits without any further delay.

History of the Proceeding

The litigation between the parties began when the Claimant, Robert Morris, filed a Notice of Claim for wrongful dismissal on December 16, 2013, namely SCCH 422677 (this matter in its original and subsequent form, shall be referred to as "the original claim"). The Claimant served the Claim on the Defendants' registered agent, Byron Balcom, as well as the companies' principal, Mariana Cowan. At the same time, Mr. Morris served Ms. Cowan with a subpoena to appear at the original hearing, January 30, 2014. Unfortunately, this matter was incorrectly placed on a regular docket with other matters despite that Mr. Morris had indicated the matter would take in excess of two hours. Regardless of anything that happened subsequently, the matter would have been rescheduled in any event.

The court received a faxed letter on December 30, 2013 from Mr. Bernie Conway of Atlantica Law Group. In that letter, he advised the following:

"Although my clients intend to defend, they have asked for better particulars to claim as there are no factual basis pleaded to substantiate it. We have requested the better particulars from the claimant.

In addition, I have advised the claimant that my clients will be bringing a claim against him for damages in excess of the $25,000 statutory limit of Small Claims Court. Consequently, I have suggested the matter be converted to a Supreme Court action."

He goes on to request the hearing on January 30, 2014 be converted to a motion to determine whether these requests could be fulfilled. He did not indicate that his clients would not be in attendance.

On January 30, 2014, both Mr. Conway and Mr. Morris appeared. In the interim, Mr. Conway had filed a *pro forma* defence denying all allegations. At the time, Mr. Morris was unrepresented. Neither Ms. Cowan, nor Mr. Balcom were in attendance and neither advised the court that they would not be. Apparently, Ms. Cowan and Mr. Balcom, who are common law partners, were on their annual vacation to Jamaica and would not be returning until later in the year.

Based on inadequate time to hear the matter on the night scheduled, I adjourned the matter to February 13, 2014 to address the several procedural issues which were inhibiting the scheduling of this matter for trial. They included Mr. Conway's motion for further and better particulars, which I granted in part, and a motion by Mr. Morris to have Mr. Conway and his firm disqualified as solicitors of record.

It is not my practice to order further and better particulars, however, it was not clear to me which of the corporate defendants was the employer of the Claimant, Robert Morris. I felt it more appropriate for the benefit of the court as well as the parties, that Mr. Morris provides further and better particulars which I set out in an order filed on February 10. Mr. Morris was very prompt in his response and provided that information to the court in time for the new hearing.

On February 13, the matter proceeded with Mr. Morris seeking to have Atlantica Law Group disqualified as solicitor for the Defendant. Given the allegation, I agreed with Mr. Conway that it was appropriate to await the return of Mr. Balcom and Ms. Cowan. Furthermore, I expressed concern that the information supplied by Mr. Morris did not adequately address the concerns I raised with respect to the pleadings and the possible complexity of the issues. Consequently, I recommended Mr. Morris seek legal advice before the matter resumed.

That evening, I expressed my concern to Mr. Conway that while Mariana Cowan had been issued a subpoena to appear on January 30, she did not do so as she was apparently in Jamaica with her spouse. Of greater concern was the clear and unequivocal language used on the document, namely "you must attend" at the prescribed hearing date and the concluding statement:

"If you do not obey this subpoena and do not have adequate excuse for disobeying this subpoena, then you may be found in contempt of court and you could be arrested." (underlining mine)

There is nothing ambiguous about this document. The ramifications of a default of a subpoena are clearly stated and well-known. Yet, Ms. Cowan chose to be on vacation instead of obeying her obligation as a citizen to attend court. Clearly, this is disrespectful and irresponsible, not to mention potentially risky, for if I had found circumstances to be warranted, she could have been found in contempt and arrested. In fact, at no time did I consider that, although were it not for the fact that insufficient time was scheduled for the hearing, I might have declined the motion for particulars and ordered the matter to proceed as scheduled. Obviously, that point is now moot.

Ms. Cowan, through her counsel with reasonable notice could have advised the court and sought leave to adjourn the matter. Given that it was scheduled to be longer than two hours, that request may well have been given serious consideration, without the negative impression a wilful default

of a subpoena obviously creates. More disturbing still is the fact that Byron Balcom, an experienced lawyer and officer of the court, joined her in Jamaica.

The matter continued on May 7, 2014 to address the amendment to Mr. Morris' pleadings as well as the allegations of conflict of interest. Mr. Francis advised the court that the objection based on a conflict of interest was withdrawn. In addition, Mr. Francis filed a new claim on behalf of Mr. Morris, SCCH 425999 ("the second claim") addressing issues arising from the business relationship between Mr. Morris and Ms. Cowan personally and one of her companies. Mr. Conway requested the file be brought forward to be addressed by me on that evening. In effect, he was seeking a finding that Mr. Morris was attempting to divide his claim and increase the amount sought by bringing two separate matters under the *Small Claims Court Act*. For the reasons stipulated, I denied the Defendants' application and ordered the second matter adjourned until further order of the Court.

Following that hearing, the court received a fax from Mr. Francis advising the initial claim was discontinued in favour of a hearing at the Labour Standards Tribunal, and sought to have the second matter set down for hearing. I granted the order. Mr. Conway objected and citing an allegation of abuse of process, requested the matter not be permitted to proceed. This decision follows that motion.

Issues

- Should the court allow the amendment to the pleadings such that two matters will be heard separately?

- Is the discontinuance an abuse of process?

Amended Pleadings and Bifurcation of Claims

Mr. Morris' initial claim was vague. It listed six grounds: wrongful and constructive dismissal; vacation pay being withheld; unpaid overtime and extra duties unpaid; amounts from real estate trade; amounts from real estate investment; declining time off directed by physician's notes. That was the extent of the claim. In addition, he listed three defendants, Mariana Cowan Real Estate Ltd., Mariana Cowan Holdings Ltd. and Coldwell Banker Supercity Realty.

Mr. Francis sought leave of the court to file an amended claim, which I permitted. In addition, he commenced the second claim. It was not until then that it became clear to me there were, in fact, two possible separate business relationships. The original claim is now a claim for wrongful dismissal, seeking unpaid wages and damages for allegedly improper notice, vacation pay and lost benefits. The second claim alleges the breach of a business arrangement outside of the contract of employment.

Mr. Conway objects to this motion as a bifurcation of a claim and cites s. 13 of the *Small Claims Court Act* as authority. Section 13 states:

"A claim may not be divided into two or more claims for the purpose of bringing it within the jurisdiction of the Court."

In addition, he cites *Paul Revere Life Insurance Company v. Herbin* (1996), 149 N.S.R. (2d) 200 (SC) in support of his position. In that case, Saunders, J. (as he then was) dealt with the insured's claim for disability benefits under a contract of disability insurance. At the time, the plaintiff/respondent was seeking payment of $5000 for a five month period of disability benefits. The contract was effective thereafter. His disability was permanent and his Lordship anticipated additional liability and potential claims for benefits under the policy for the rest of the plaintiff's life. Justice Saunders then stated the following:

"I accept Ms. Smith's submission that there is a real likelihood here of as many as 69 separate applications by Mr. Herbin before the Small Claims Court tribunal, with a potential exposure of almost half a million dollars. All of that could well lead to contradictory decisions from different adjudicators on what would arguably be the same material evidence, to say nothing of the added and continuing expense of having to relitigate the same issues, with perhaps the same testimony, repeated by the same witnesses, including experts every time the matter was heard in the Small Claims Court.

For those reasons, I conclude that it would be an abuse of process for this matter to remain in the Small Claims Court. As in Ms. Bernard's able brief, I wish to refer to certain sections of the ***Small Claims Court Act,*** R.S.N.S. 1989 c.430. Section 2 of the Act states its purpose as being,

"It is the intent and purpose of this Act to constitute a court wherein claims up to, but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively, but in accordance with established principles of law and natural justice."

I accept counsel's submission on behalf of the insurer that the very rationale for the establishment of the Small Claims Court was that *small claims* would be quickly and inexpensively adjudicated. Naturally, such claims are

heard without access to the usual pre-trial procedures, productions, discovery of parties and discovery of experts, as would be accommodated under our own **Civil Procedure Rules**.

This case is anything but a *small claim.* Having found as I do that there is a real potential for this claim to lead to repeated and identically issue-based claims approaching half a million dollars, it seems to me that the Legislature could hardly have intended the statute to apply to cases such as this." (underlining mine)

After considering the wording of s. 13, Justice Saunders added:

"...Ms. Smith's analogy is apt when she suggested that if this were a wrongful dismissal case and someone were seeking damages in lieu of notice for a period of 12 months, this Court would not permit the break up of such a claim into 12 separate claims each to be adjudicated in the Small Claims Court."

In support of his position, Mr. Francis refers to a decision of Adjudicator Richardson namely, *Rayner v. Smith* 2010 NSSM 6. In that case, the parties were common-law partners, with each party being self-represented. The issues involved the division of assets and debts between the parties arising out of the relationship. Adjudicator Richardson found that the division of property in such a relationship involves the litigation of various individual contracts and torts rather than treating them as one larger claim.

Adjudicator Richardson then stated the following:

"[41] Finally, there is the issue of s.9 of the *Small Claims Court Act*. The section provides that a person "may make a claim under this Act

a. seeking a monetary award in respect of ***a*** matter or thing arising under ***a*** contract or ***a*** tort where the claim does not exceed $25,000.00 ...
b. [not relevant]

c. requesting the delivery to the person of specific personal property where ***the*** person property does not have a value in excess of $25,000.00; ***or***
d. [not relevant].

[42] The use of "or" between s.9(c) and s.9(d) means that the subparagraphs of s.9 are to be read disjunctively. That, and the fact that the subparagraphs refer to "***a*** contract" or to "***specific*** personal property," indicate to me that the Legislature intended the $25,000.00 limit to apply to specific and particular contracts, torts or pieces of personal property. In other words, so long as each was separate and distinct a claimant could launch a claim on such contracts even if the total of all such contracts exceeded $25,000.00.

[43] So for example if there were three joint loans, each for $25,000.00, taken out over the course of a relationship, into which one partner had also had brought a family heirloom worth $25,000.00, then in my view s.9 would permit the following:
a. one claim in respect of each loan, and
b. one claim in respect of the family heirloom.

[44] The fact that the total value of four claims exceeded $25,000.00 would not bar the individual claims ***so long as*** each contract was separate and distinct from the other.

[45] The trick of course will be to distinguish between those contracts which are separate and distinct and those which are part and parcel of a larger, ongoing relationship in which there was a "basic agreement" that loans taken out would be either gifts or equally shared." (underlining mine)

It is important to point out that this matter has not yet been to a full hearing. There has been no evidence adduced whatsoever. I am only able to assess the matters on the basis of the pleadings. For the purposes of this exercise, the correct approach is to assume the Claimant is able to prove the matters raised in his pleadings. If so, then the question is relatively straightforward, are they one claim or two?

In looking at the original Claim, it included both items under headings of wrongful dismissal as well as "property investment and improvement", for which the total sum claimed was $19,620. In the two separate claims, it is clear the original claim arose out of Mr. Morris' role as "Chief Financial Officer" and his termination from that position. His total claim is for $11,243.71. The second claim arises out of "business arrangement with (Ms. Cowan) to "flip" residential real estate properties" together with the resulting purchase and work allegedly performed at a property at 11 Springvale Avenue. That Claim has been brought against only one corporate defendant, Mariana Cowan Holdings Limited and Ms. Cowan in her personal capacity. The total amount claimed is $25,000.

In applying the law, I find the *Herbin* case cited above can be distinguished from the instant case. In that case, the matter involved the interpretation of a single disability insurance contract and a single insured. The concerns expressed by Justice Saunders, that the matter could create " a real potential for this claim to lead to repeated and identically issue-based claims approaching half a million dollars", do not apply here. The original claim in this matter is one of wrongful dismissal, while the second matter is based in a breach of contract arising from perhaps a partnership, a claim in *quantum meruit* or some other arrangement. However the Claimant wishes to frame the Claims, it is clear that the second claim involves matters outside of the scope

of Mr. Morris' employment, even though the Defendant may well argue that it would not have occurred but for the employment relationship.

Section 13 exists to prohibit fanciful arguments designed to make one claim with identical facts sound like two or more separate actions. Justice Saunders' comments regarding the wrongful dismissal claim, namely a plaintiff seeking to divide the year's claim down into smaller claims each based on one month of damages, in order to take advantage of the monetary limit of the *Small Claims Court* is an example of such an abuse. In my view, that is why his Lordship characterized the analogy by the insurer's counsel, Ms. Smith (now Associate Chief Justice Deborah K. Smith of the Supreme Court of Nova Scotia), as apt. However, s. 13 is not designed to prevent the severance of legitimate claims arising out of distinct circumstances or contracts.

I have stated many times that written decisions of Adjudicators are not binding, but can be, and often are, very helpful and persuasive in deciding other cases with similar facts or principles. I find the case of *Rayner v. Smith* to be such a case. Like my colleague, Adjudicator Richardson, I find s. 9(a) of the *Small Claims Court Act* provides for the consideration of individual claims arising out of specific contracts or torts, or the return of specific personal property. The fact that the types of contracts in the instant case are unique and the defendants, different, suggest to me

that the matter ought to have been framed separately from the outset. This is not likely to generate the multitude of claims based on the same set of facts as contemplated by Justice Saunders. The Claims are based out of two different sets of alleged facts and two different relationships involving different defendants. While it may have been helpful to have them decided together, there is no need that this be so. Once the evidence is adduced and weighed, either party may make a motion to the Adjudicator or Labour Standards Tribunal that the matter is in fact all one claim, they may argue that a matter is *res judicata* and/or part of the larger claim thus exceeding the limit of the Small Claims Court. Until then, to suggest the matters are identical is premature. There is no prejudice as there has been no proceeding. If the court took the strict interpretation that I am urged to take by Mr. Conway, such instances would routinely deny parties access to justice.

In my view, the matters should proceed separately.

Discontinuance and Abuse of Process

Following the division of the claims, the court was advised that the original matter had been discontinued at Small Claims to allow it to continue before the Labour Standards Tribunal. Mr. Conway objected to the discontinuance.

There is no rule governing discontinuance in Small Claims Court. The matter is often simply withdrawn. The issue of withdrawing a claim in favour of proceedings before the Labour Standards Tribunal is not unique. It has been considered by the Nova Scotia Court of Appeal in *New Scotland Soccer Academy v. Nova Scotia (Labour Standards Tribunal)*, 2012 NSCA 40. In that case, the Court dealt with an appeal from the Labour Board where the issue of *res judicata* was raised following the withdrawal of a claim at Small Claims Court. The employer argued the Tribunal had no jurisdiction to hear the matter. Justice Saunders stated the following:

"[31] All Mr. David (*i.e. Michael David, Labour Standards Officer*) did was "re-open" his "investigation". In this, Mr. David's actions were purely administrative. He never conclusively determined the outcome of the dispute between the parties. It was not his role to do so. That was the Director's function. Mr. David never pronounced any final judgment on the merits. Mr. David's investigation would not result in a binding decision. Rather, the ultimate authority to address the merits of this complaint lay not with the investigator, but with the Tribunal itself. While his use of the word "dismissed" on a single occasion may, in hindsight have been unfortunate, the fact remains that he never adjudicated the claim. Rather, Mr. David's decision to reopen the investigation was purely a matter of departmental administration, to move the file along, as is contemplated in the legislation. In my respectful opinion, Mr. David's actions merely permitted the Director to conduct a review of the complaint and either attempt to settle it or, failing settlement, make an order to force compliance, as the **Code**(for example, s. 21) requires. The Director's decision could then be appealed to the Tribunal, as it was here.
[32] Finally, as counsel to the Attorney General made clear in her own able submissions, there is nothing in the Tribunal's jurisprudence or legislation to bar the actions taken here. I am satisfied that once Mr. Krause (*the employee*) saw fit to withdraw his suit in the Small Claims Court (which meant that there had never been an adjudication of the merits of his claim), Mr. David was entitled to reopen his investigation such that the Director, and later the full Tribunal, were bound to deal with it." (underlining and italics mine)

It is clear such matters can be heard at the Labour Standards Tribunal once the issue has been discontinued at Small Claims Court. There is nothing in the original reasons to suggest he cannot. In *Fredericks v 2753014 Canada Inc.* 2008 NSSC 377, the court made it clear that the Labour Standards Tribunal is to be given curial deference on matters of this nature.

Mr. Conway has submitted the following in his brief.

"In the event the Director of Labour Standards follows the law and declines jurisdiction, Mr. Morris will pursue his claim again in the Small Claims Court. When he does so, the Defendants cannot raise issue estoppel as they cannot satisfy the first two stages of the test approved by the Supreme Court of Canada for *res judicata*."

With respect, it is not issue estoppel which would preclude the advancement of a separate claim. I have ordered the original matter stayed subject to leave of the court. Further, as correctly noted by Mr. Francis, the matter is very early in its proceeding without any evidence tendered whatsoever. I prefer a "wait and see" approach and allow a future court to address that issue should it arise.

Similarly, I do not see how pursuing remedies under the *Labour Standards Code* with its limited jurisdiction for awards of compensation for notice and vacation pay are in any way an abuse of process. Once the matter was recognized by the court as separate and the matters permitted to continue as such, the Claimant has the prerogative to discontinue or seek its stay. Any abuse of process would only become evident once there has been evidence called.

In my view, this ground is without merit. The orders will stand as issued.

Disqualification of Counsel

The issue of disqualification of counsel arose early in the proceeding but has been subsequently withdrawn. Mr. Conway has indicated that the Claimant is now seeking to have the firm

removed as solicitors of record in the complaint; there has been no such motion made to this court. I will leave the issue to the decision of the Nova Scotia Barristers' Society.

In making his point, Mr. Conway enclosed the full complaint by Mr. Morris against Mr. Balcom, what I assume is supporting documentation and a complaint before the Nova Scotia Human Rights Commission. Frankly, an excerpt would have sufficed with Mr. Conway's undertaking to disclose the full document if required. The documents were not tendered as evidence or with any foundation. They are irrelevant and their submission inappropriate.

Conclusion

In conclusion, the motion to set aside the discontinuance is denied. The orders as granted will remain in effect. The end result of this decision is as follows:

The original claim, SCCH 422677:

- The motion to amend the pleadings according to the motion of the Claimant, Robert Morris is allowed;

- The discontinuance of this matter is accepted and the motion to set it aside is denied. The matter is adjourned without day until further order of the court.

The second claim, SCCH 425999:

- The matter shall continue as a separate claim and its hearing will proceed as scheduled on September 18, 2014.

Both the original claim and the second claim shall proceed before another adjudicator.

As both matters already have orders giving effect to this decision, no further order is required. If counsel disagree, then I would ask Mr. Francis to prepare the order and obtain Mr. Conway's consent as to form and I will sign it.

Dated at Halifax, NS,
on September 15, 2014;

Gregg W. Knudsen, Adjudicator

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