

The Halifax Regional Municipality Pension Committee (plaintiff) v. State Street Bank and Trust Company and State Street Global Advisors Ltd./Conseillers en Gestion Global State Stree Itée (defendants)

(Hfx. 309063; 2012 NSSC 399)

Indexed As: Halifax (Regional Municipality) Pension Committee v. State Street Bank and Trust Co. et al.

Nova Scotia Supreme Court

Duncan, J.

November 15, 2012.

Summary:

The plaintiff managed municipal pension funds. The defendants were an investment manager and a financial services provider. The plaintiff chose a "130/30" investment strategy (short positions to maximum of 30% of portfolio value). A trust agreement settled the funds (approximately \$47,000,000) on the defendants to invest in the "Alpha Fund", a common trust fund controlled by one of the defendants. Custody of, and prime brokerage for, the "Alpha Fund" was transferred by the defendants to Lehman Brothers Inc. (LBI), which then transferred the funds to an affiliate, Lehman Brothers International (Europe) (LBIE). LBI became insolvent, then bankrupt. LBI's administrator "froze" the funds in the "Alpha Fund" and the plaintiff's attempt to have the funds returned were unsuccessful. The plaintiff brought an action against the defendants for a return of the funds, alleging negligence, breach of fiduciary duty and breach of contract. The plaintiff argued that it did not authorize the transfer to LBI, nor was it informed of the transfer. The defendants pleaded that the transfer was authorized by the plaintiff, that LBI's bankruptcy was "sudden and unexpected" and that its actions were consistent with industry practice and contractual expectations. The parties were at an impasse respecting the extent of their mutual disclosure obligations and the timetable to effect disclosure and discovery. The plaintiff moved for an order compelling documentary disclosure, providing directions respecting disclosure, and setting a trial date. The defendants, by counter-motion, sought an order compelling the plaintiff to expand its search for documents and electronic information and to disclose that information, including information over which the plaintiff claimed solicitor/client privilege. The defendants also sought a schedule for the exchange of relevant documents, electronic information and discovery examinations.

The Nova Scotia Supreme Court, in a judgment reported (2011), 310 N.S.R.(2d) 6; 983 A.P.R. 6, allowed both motions in part and rendered a decision resolving the disputes respecting the ongoing production and scheduling issues. The parties disagreed on the form of the order to give effect to the court's decision. The court received draft orders reflecting the points of agreement and disagreement.

The Nova Scotia Supreme Court, in a judgment reported (2011), 310 N.S.R.(2d) 191; 983 A.P.R. 191, granted orders accurately reflecting the court's decisions on the scope of production and the scheduling issues. The defendants moved to amend their statement of defence respecting a live issue at trial (whether either or both of the laws of Nova Scotia or Massachusetts applied). The plaintiff opposed the amendment, arguing that it was a delaying tactic done in bad faith in

the face of the impending hearing of its summary judgment application.

The Nova Scotia Supreme Court, in a judgment reported (2012), 313 N.S.R.(2d) 248; 990 A.P.R. 248, allowed the defendants to amend their statement of defence. The amendment was opposed only on the ground of bad faith. The evidence and submissions did not disclose bad faith. The court was also satisfied that any prejudice to the plaintiff could be compensated for by way of costs. The plaintiff moved for summary judgment. The defendants moved to adjourn the hearing of the summary judgment motion on the ground that the plaintiff had yet to make full disclosure and requiring the defendant to respond to the summary judgment motion before disclosure was complete would constitute substantive prejudice.

The Nova Scotia Supreme Court, in a judgment reported (2012), 315 N.S.R.(2d) 99; 998 A.P.R. 99, adjourned the hearing of the summary judgment motion in the face of incomplete disclosure by the plaintiff. Court ordered disclosure required the plaintiff to, inter alia, search the server of a non-party (Halifax Regional Municipality) using 51 different search terms. The plaintiff brought a motion to amend the search order by varying the search terms and to fix a date for the hearing of its motion for summary judgment. The Municipality, concerned that some of the information in the 16,378 documents generated by the search terms might contain information which it would not disclose because of a potential conflict of interest with the law firm representing the plaintiff, would release documents only if it first reviewed them. The Municipality allegedly lacked the resources to review that many documents. The plaintiff argued that the search terms generated substantial false hits, resulting in inefficiency and an excessive demand on resources. The plaintiff suggested amended search terms to reduce the number of documents generated in the search to eliminate false hits. The plaintiff argued that it was not attempting to limit disclosure, but to obtain relevant information in the most reliable yet cost effective way.

The Nova Scotia Supreme Court dismissed both motions.

Practice - Topic 4559

Discovery - Production and inspection of documents - General - Cost of production - [See **Practice - Topic 4573.3**].

Practice - Topic 4573.3

Discovery - What documents must be produced - Computerized documents or electronic data - Court ordered disclosure required the plaintiff to search the server of a non-party (Halifax Regional Municipality) using 51 different search terms - The plaintiff brought a motion to amend the order by varying the search terms - The Municipality, concerned that some of the information in the 16,378 documents generated by the search terms might contain information which it would not disclose because of a potential conflict of interest with the law firm representing the plaintiff, would release documents only if it first reviewed them - The Municipality allegedly lacked the resources to review that many documents - The plaintiff argued that the search terms generated substantial false hits, resulting in inefficiency and an excessive demand on resources - The plaintiff suggested amended search terms to reduce the number of documents generated in the search to eliminate false hits - The plaintiff argued that it was not attempting to limit

disclosure, but to obtain relevant information in the most reliable yet cost effective way - The Nova Scotia Supreme Court dismissed the motion - The plaintiff and defendant had agreed to the search terms as the most appropriate to identify relevant information for disclosure - The plaintiff's objective was to reduce the number of documents that the Municipality needed to review - This was a resourcing problem, not a legal question, which existed solely because the plaintiff's counsel was seen by the Municipality as being in conflict with the Municipality's interests - The vetting of the information by the Municipality was a reasonable solution - The problem was potentially resolvable with time and money - There was insufficient evidence to allow the court to determine whether revising the search terms would result in relevant documents not being found - The court stated that "the use of the revised search terms necessarily limits disclosure and the evidence fails to rebut the presumption for full disclosure" - Amending the search terms had potential for an unjust result.

Cases Noticed:

Casey v. Halifax (Regional Municipality) et al. (2011), 305 N.S.R.(2d) 219; 966 A.P.R. 219; 2011 NSCA 69, refd to. [para. 52].

Counsel:

George MacDonald, Q.C., Jane O'Neill and Peter Rogers, Q.C., for the plaintiff;
Michael Ryan, Q.C., John Keith and Michael Dube, for the defendants.

These motions were heard by way of correspondence, at Halifax, N.S., before Duncan, J., of the Nova Scotia Supreme Court, who delivered the following judgment on November 15, 2012.

Motions dismissed.

Editor: Steven C. McMinniman

Practice - Topic 4559

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