Date: 20001213
Docket: S.AM 3593

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Fairbanks v. Nova Scotia (Attorney General), 2000 NSSC 103

Between: WILLIAM B. FAIRBANKS

- and -

ATTORNEY GENERAL OF NOVA SCOTIA

D E C I S I O N

HEARD BEFORE: The Honourable Justice John M. Davison

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: December 13, 2000

DECISION: December 13, 2000 WRITTEN RELEASE: December 19, 2000

COUNSEL: M. Chantal Richard, for the Plaintiff
Reinhold M. Endres, for the Defendant

DAVISON, J.: (Orally)

[1] This application was advanced under an interlocutory notice and an amended interlocutory notice. The first notice requested the setting aside of the statement of claim or portions of it under *Civil Procedure Rule* 14.25 on the grounds the pleadings "may prejudice, embarrass or delay the fair trial of the proceeding" and that they constitute an abuse of process. The amended notice added an alternative ground pursuant to *Civil Procedure Rule* 2 in that the statement of claim failed to comply with the *Rules* of this Court governing pleadings. It is alleged the plaintiff breached the terms of *Civil Procedure Rule* 14.04.

[2] It was clear following oral submissions that the defendant is advancing its position only under *Civil Procedure Rule* 2.

[3] The action is for damages alleging the plaintiff was wrongfully dismissed from the office of Registrar of Probate for the County of Cumberland. The statement of claim makes reference to letters written to the plaintiff on behalf of the defendant and a reply by the plaintiff. The letters are quoted in the statement of claim in a verbatim fashion and the simple position of the defendant is that this constitutes pleading evidence and not material facts.

[4] I would refer to Odgers on *Pleading and Practice* , 18th Edition at p. 98 where there is a heading stating "EVERY PLEADING MUST STATE

FACTS, AND NOT THE EVIDENCE BY WHICH THEY ARE TO BE PROVED". The author points out that this was a clear rule of common law and also points out that there are many cases where the facts and the evidence appear to be mixed to the point where they are indistinguishable. I agree with Ms. Richard, who has expressed that same view, that it is often difficult to separate material facts from evidence.

[5] The position taken by Mr. Endres is that his submission is in keeping with *Civil Procedure Rule* 14.04 which reads as follows:

> **The Facts, not evidence to be pleaded**
>
> 14.04. Every pleading shall contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which the facts are to be proved, and the statement shall be as brief as the nature of the case admits.

[6] Effectively, the defendant seeks to have deleted paras. 5 and 6 and part of para. 4 which contain the complete quotation of the correspondence between the parties. Ms. Richard on behalf of the plaintiff takes the position that the paragraphs contain material facts relating to the matter in which the defendant was dismissed and are therefore in compliance with *Civil Procedure Rule* 14.04. There is no basis to exclude any material facts and

the plaintiff can plead material facts which may be mentioned in the letters. That does not mean it is appropriate to quote the letters.

[7] The statement of claim alleges wrongful termination and sets out in para. 7 the following:

> The aforesaid dismissal of the plaintiff from office of Registrar of Probate for the County of Cumberland was without just cause and was done without providing the plaintiff with adequate notice and other compensation for the loss of his office whereby the plaintiff has suffered loss in damages.

There is no allegation in the statement of claim which indicates that the tone of the correspondence or the manner of getting that correspondence resulted in any damages and the alleged damages are based on the termination.

[8] There is no question that it is often difficult to distinguish between material facts and evidence, but in this case, it is my view that it is clear that the letters *per se* constitute evidence. They contain material facts and the plaintiff is entitled to recite those material facts by an amendment to the statement of claim. In my respectful view it is not necessary or appropriate to do so by quoting the letters.

[9] In Williston and Rolls *The Law of Civil Procedure* (1970) at p. 647 the authors state:

> It is an elementary rule in pleading that when a state of fact is relied on, it is enough to allege it simply without setting forth the subordinate facts which are the means of proving it or the evidence to sustain the allegation. While generally any fact which may be given in evidence may be pleaded, the pleading of a fact which is only relevant insofar as it tends to prove a material allegation is in the nature of pleading evidence and will be struck out.

[10] This principle which is enunciated in our *Civil Procedure Rule* 14.04 is a long standing *Rule* of practice and procedure, and I agree with the submission of Mr. Endres that it is often difficult to find a precise statement as to why there should be this *Rule*.

[11] I think that Mr. Endres has thrown some light when he emphasizes that evidence does nothing more than establish a fact and that pleading evidence is giving the court an incomplete picture because such evidence may have been chosen by a selection process which may not give the court a complete picture. There is also to be considered the letters may be ruled not admissible at trial. One does not know this until the trial is in process.

[12] The plaintiff has pleaded evidence by paragraphs 5 and 6 and a portion of paragraph 4. This is contrary to *Civil Procedure Rule* 14.04 and the long time common law *Rule* on pleadings. The paragraphs are struck.

[13] The defendants are not seeking costs.

[14] The defendants are permitted to amend their statement of claim by advancing any material facts which may accrue as a result of the correspondence, but the text of the correspondence should be eliminated from the pleading.

J.