SUPREME COURT OF NOVA SCOTIA
Citation: Baird v. Barkhouse, 2012 NSSC 289

Date: 20120730
Docket: 334436
Registry: Sydney

Between:

Jeffrey Warren Baird

Plaintiff

v.

Brian Vincent Barkhouse

Defendant

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	July 18th, 2012, in Sydney, Nova Scotia
Written Decision:	July 30th, 2012
Counsel:	Hugh R. McLeod, for the Plaintiff Guy LaFosse, Q.C.,Jonathan Patterson (articled clerk) for the Defendant

By the Court:

[1] According to the pleadings, the Plaintiff, Jeffrey Warren Baird, was in a collision involving his motor cycle and the motor vehicle driven by the Defendant Barkhouse, on July 26, 2009. A Notice of Action was filed on his behalf on August 18, 2010, in which negligence is alleged against the Defendant and resulting damages are claimed. In particular, the Plaintiff claims loss of income and other financial losses. The matter is defended, with a Notice of Defence having been filed on September 15, 2010.

[2] By way of a Notice of Motion filed on June 5, 2012, the Plaintiff moved for an order of this Court seeking the setting of Discovery dates, an order limiting questions submitted to an expert who had filed a report on behalf of the Plaintiff, and a determination of which party should pay for the expense associated with the expert answering those questions found to be appropriate.

FACTUAL BACKGROUND

[3] Counsel for both parties reached an Agreed Statement of Facts, a task which undoubtedly made the Court's determination less onerous. Although the Court has noted all of the agreed facts, those that follow are particularly relevant to the matters before me.

[4] On the 20th day of September, 2010, the solicitor for the Defendant wrote to the Plaintiff's lawyer, enclosing the Defence, and further requesting that the Plaintiff's Affidavit of Documents be filed within 30 days.

[5] On the 11th day of May, 2011, the Defendant brought a motion seeking to compel the Plaintiff to produce additional documents pursuant to Rule 15. An Order was issued requiring the Plaintiff to file the requested materials by July 31, 2011.

[6] Following the aforementioned Court order, various correspondences were

exchanged between the solicitors for the parties concerning production of the materials which the Court had ordered.

[7] The Plaintiff subsequently provided an Affidavit of Documents. In Tab 3 thereof, there is correspondence from Revenue Canada stating that the Plaintiff had not filed income tax returns for the years 2005 through 2009 inclusive.

[8] The Affidavit also contained correspondence written from the Plaintiff to Nova Scotia Tax Services stating that he had operated his company, Glace Bay Cycle and Motor Company Limited, (the Company) for the period from January 1, 2008 to September 30, 2009, and that due to the motor vehicle accident, there had been no activity in the company since September 30, 2009.

[9] The Affidavit further contained two letters, both dated September 12, 2011, from James Cunningham, addressed “To Whom it May Concern”. In both letters Mr. Cunningham attached balance sheets which he had completed for the Company for the years ending December 31, 2008 and December 31, 2009. In

both letters, Mr. Cunningham asserts "*I have not verified the accuracy of such information nor applied any tests, checks, or audit. Readers are so cautioned*".

[10] The Plaintiff disclosed the Company's 2008 and 2009 tax returns which attached the above noted financial reports prepared by Mr. Cunningham.

[11] Mr. Cunningham subsequently prepared a report, dated September 26, 2011, in which he states that he has complied with Rule 55.14.

[12] In Mr. Cunningham's report of September 26, 2011, he makes reference to the fact that the Plaintiff had provided him with enough information to enable the filing of tax returns and HST returns for the years 2008 and 2009. Mr. Cunningham indicates that he did a direct comparison of individual sales with relative individual costs provided and, as a result, he is of the opinion that the Plaintiff has a "*future loss in the minimum amount of $26,000 per year*", and concludes "*there is a direct loss of $471,000 composed of inventory loss of $11000 and earnings of $460000*".

[13] The September 2011 report asserts that Mr. Cunningham is complying with Rule 55.04 in that he was providing an objective opinion to assist the Court, and that the report "*includes everything I regard as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion*".

[14] The only material attached to Mr. Cunningham's report was his CV. It does not contain a list of materials reviewed by him, nor relied upon in reaching his opinion.

[15] On October 20, 2011, the solicitor for the Defendant provided the Plaintiff's lawyer with a series of questions to be answered by Mr. Cunningham with respect to his report, as contemplated by Rule 55.11.

[16] In a letter dated October 24, 2011, the Plaintiff's solicitor acknowledged receipt of the questions, and indicated that they had been sent to Mr. Cunningham

with instructions that he not answer them until a Court had ruled as to which questions were to be answered and who was to pay Mr. Cunningham for doing so.

[17] Defence Counsel sent letters to the Plaintiff's solicitor on numerous occasions in follow up, asking that he proceed to bring a Motion to determine the appropriateness of the questions, and to determine the issue of cost, including a request to provide Defence counsel with any and all information that was considered by Mr. Cunningham, within his control or in that of the Plaintiff, which he had considered in preparing his report and completing the tax information for the Company.

[18] Defence counsel advised that once the requested disclosure had been undertaken, discovery dates would be set.

[19] As noted above, the Notice of Motion was filed on June 5, 2012.

[20] On June 27, 2012, James Cunningham swore an affidavit supplying all

material he had been provided by the Plaintiff, and which had been used in preparing the tax returns for 2008 and 2009.

[21] On June 26 and June 27, 2012, Mr. Cunningham provided two additional letters to Plaintiff's counsel.

[22] There does not appear to be a statement of how Mr. Cunningham is sought to be qualified, as required in Rule 55.09.

THE LAW

[23] The starting point of the required analysis begins with the Civil Procedure Rules. Expert evidence is governed by Rule 55. The mandatory content of an expert report is specified in Rule 55.04. Parties who file reports that do not comply with the Rules, do so at their peril.

[24] For the purposes of this matter Rule 55.04(2) is particularly relevant. It reads:

> (2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:
>
> > (a) details of the steps taken by the expert in formulating or confirming the opinion;
> >
> > (b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for the determination of those issues;
> >
> > (c) the degree of certainty with which the expert holds the opinion;
> >
> > (d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

[25] An expert must also comply with the requirements of Rule 55.04(3) in terms of mandatory content. Several provisions are relevant to the matter before the Court:

> (3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:
>
> > (a) the expert's relevant qualifications, which may be provided in an attached resume;
> >
> > (b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;
> >
> > (e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

[26] Rule 55.09 also requires that a party who files an expert's report also "file a statement of the qualification to be sought from the court at the trial or hearing".

[27] The purpose of the above requirements is for an opposing party, and ultimately the Court, to understand the foundation of the opinion being offered by an expert, and to be able to determine whether the writer has the appropriate qualifications to opine as to a certain subject matter.

[28] Unlike under the former Rules, experts are no longer subject to discovery, unless agreed otherwise, nor can interrogatories be utilized. Experts are however, not immune from being questioned in relation to their reports, pre-trial. Rule 55.11(2) and (3) provide:

> (2) A party who receives an expert's report, or a rebuttal expert's report, may, no more than thirty days after the day the report is delivered, deliver to the other party written questions to be answered by the expert.
>
> (3) The questions may only call for information that is not privileged and is relevant to one of the following:
>
> (a) the expert's qualifications:
>
> (b) a factual assumption made by the expert;
>
> (c) the basis for an opinion expressed in the expert's report.

[29] As noted by Counsel, the Rules are silent as to which party is obligated to pay for the expert answering any question posed under Rule 55.11.

POSITION OF THE PARTIES

[30] Prior to the Motion being scheduled, and following the provision of additional information from Mr. Cunningham, the parties were able to reach agreement in relation to a number of the 55 original questions posed by Defendant's counsel. Based upon the material received, a number of questions were adequately addressed, some were withdrawn, and some the Plaintiff agreed should be answered by Mr. Cunningham. Fourteen questions remained in dispute as follows:

> 10. How many such businesses of this type have you prepared financial statements for?
>
> 28. What are the details of the $4300.00 paid for repairs and maintenance in 2008 that you list in your report that are included in the financial statements that you prepared for Glace Bay Cycle & Motor Co. Ltd.?
>
> 29. On what basis was interest paid to Mr. Baird ($3000.00 in 2008 and $6000.00 in 2009)?

30. On what basis was the amount of interest to be paid to Mr. Baird determined?

31. Did you verify that Mr. Baird provided a cash flow in the amount of $120,000.00 from his legacies to commence the operations of Glace Bay Cycle & Motor Co. Ltd?

32. If so, how did you verify this?

39. Was the gross profit margin for 2008 22.5% and the gross profit margin for 2009 23.35% for this company?

40. What is your definition of marginal return?

41. How did you calculate the percentages of 29% and 13% in your report of September 26, 2011?

42. Would you indicate how you calculated the projected gross profit of $26,000.00 for the full year 2009?

44. In your report, you referred to a loss in “un-traded” inventory of $11,000.00. Would you indicate how this amount was calculated by you?

45. Would you also indicate how you define “un-traded” inventory?

48. In doing your calculations, why did you not consider disability and mortality in your calculations?

51. What portion of the utility charges for Mr. Baird's personal residence in 2008 and 2009 was paid for by the business?

[31] The Plaintiff, as Applicant, submitted that discoveries should be set immediately, as there is no reason to delay. All financial information has now, since Mr. Cunningham's affidavit was filed in late June, been disclosed. The most extensive arguments however, related to the appropriateness of the questions remaining in dispute, and who should pay Mr. Cunningham for the time he will spend in providing answers to those agreed, or found to be, appropriate.

[32] In terms of the appropriateness of the questions themselves, Plaintiff's counsel advanced a restrictive interpretation of Rule 55.11(3). It is asserted that when a party determines it wishes to pose questions to an expert, it must choose between one of the categories of allowable areas specified in the Rule, namely, either the expert's qualifications; a factual assumption made by the expert; or the basis for an opinion expressed in the expert's report. If a question is asked about

one category, then the inquiring party is restricted from posing questions in the other two. In the present instance, it is argued that because the first question posed relates to the author's qualifications, then the remaining questions which appear to relate to the subject matter of the report, are inappropriate.

[33] The Plaintiff advances a second argument in relation to the appropriateness of the questions. It is submitted that the majority of the questions are interrogatories, and are therefore inappropriate, based upon the prohibition contained in Rule 55.11(1). Plaintiff's counsel points to the form of the questions, submitting that they are clearly in the form of interrogatories, and should be disallowed on that basis.

[34] The Plaintiff submits that the Defendant should be responsible for the expert's fees associated with providing answers to those questions found, or agreed to be appropriate. Counsel submit this situation is akin to that relating to discovery, where it is the party requesting the examination who is responsible for paying the expenses of same under Rule 18, including an attendance fee for non-party witnesses.

[35] The Defendant submits that it has not been in a position to knowledgeable proceed to discoveries, until disclosure had been complete. There has been no intent to delay the process, and that any delay falls at the feet of the Plaintiff, who has not provided timely disclosure and further complicated matters by failing to file an expert's report that was in compliance with the various provisions contained in Rule 55.

[36] It is submitted that all of the remaining questions are appropriate, and should be answered. Further, the Defendant submits that the restrictive interpretation placed on Rule 55.11(3) by the Plaintiff would be contrary to parties being able to fully understand expert reports, especially deficient ones, and ultimately assessing the value of the opinions contained therein. Further, it is submitted that the form of the questions in dispute is irrelevant to whether they are categorized as "interrogatories", but rather whether the answers thereto are provided under oath or affirmation.

[37] In terms of cost obligations, the Defendant submits that a party who advances an expert's report, as part of the costs of litigation, pays for the completion of that report, and accordingly should bear the cost of any questions deemed to be appropriate in relation thereto. It is submitted that this situation should be viewed as being akin to the cost of disclosure, which has been found to be the responsibility of the disclosing party (see *Morrison v. Nova Scotia(Attorney General)*, 2012 NSSC 136 and Rule 14.07(1)).

DETERMINATION

[38] Mr. Cunningham's report of September 26, 2011 is brief. It starts by saying "I met with Mr. Baird on Monday, September 12, 2011 and he advised me as follows". It proceeds to report history conveyed by the Plaintiff in relation specifically to his financial circumstances prior to the motor vehicle accident in question. It expresses an opinion of financial loss, amounting to $471,000.00. The report concludes with a statement that the writer has complied with Rule 55.04 and repeats the wording of that provision.

[39] More important, is what is not included in Mr. Cunningham's September 2011, which was being filed as a report under Rule 55. In my view, the report does not, in expressing an opinion as to the Plaintiff's substantial financial loss, contain the information required by Rule 55.04(2). There is no explanation as to how the financial loss was calculated in terms of the steps taken by the author, there is no reference to material facts assumed, or theoretical bases for the opinions, or a statement as to the degree of certainty the author has with respect to the financial conclusions reached by him.

[40] Further, Rule 55.04(3) has been ignored as there is no reference to literature or other authoritative materials referenced by the author, although it is quite clear he referenced materials to determine and calculate the cost of an annuity, and the future value of the dollar over a 15 year period, as referenced in the report. Although subsequently addressed in his affidavit, the report does not contain a statement of the material reviewed or acquired by him to prepare the opinion.

[41] The above does not intend to be an exhaustive list of the deficiencies of the Cunningham report in terms of compliance with the provisions of Rule 55. That

may be an issue for another day. I highlight the above concerns, in order to put in context the nature and degree of questions posed on behalf of the Defendant.

[42] I do not accept the Plaintiff's restrictive interpretation of Rule 55.11(3). It would be contrary to the Court's goal of admitting and utilizing **reliable** expert evidence, to arbitrarily limit the written questions that can be asked in the manner being suggested by the Plaintiff. Provided a question relates to one of the categories listed in Rule 55.11(3), the question can be put forward. It is nonsensical to read the rule as requiring a party to choose one of the three categories, and limiting the questions posed therein.

[43] I further cannot accept the Plaintiff's argument that the majority of the questions in dispute are interrogatories and therefore not appropriate. In my view, it is not the form of a question that determines whether it is an interrogatory, but rather, that the answer takes the form of sworn or affirmed evidence available for subsequent use in the proceeding. I have reviewed Rule 19 which governs interrogatories. While I note there is no definition, or required form of an interrogatory, Rule 19.01 states:

> 19.01(1) This Rule allows a party to *question a person in writing*, unless the question was answered by the witness on discovery.
>
> (2) A party may demand *answers in writing* from any person and the person must provide the answers, in accordance with this Rule.

[44] The above wording is not materially different than the phraseology utilized in Rule 55.11(2), relating to "written questions" posed to an expert. The questions posed by the Defendant in this matter are not to be answered under oath, accordingly, I do not consider them to be interrogatories.

[45] The important analysis is whether the questions fall within any of the three permissible subjects contained in Rule 55.11(3). I am satisfied that Question 10 relates to Mr. Cunningham's experience and knowledge base on an important subject which impacted on his opinion. As such, it relates to his qualifications. The remaining questions all seek information from Mr. Cunningham as to how he ultimately reached the opinions contained in his report, either in terms of his factual assumptions or how he reached his conclusions, which go to the basis of the opinion. As such, I find all of the disputed questions to be appropriate.

[46] In terms of expense, the Plaintiff is to be responsible for the payment of any fee charged by Mr. Cunningham in responding to the questions. The questions are being posed to elicit information either not contained, or clearly expressed in the expert report. Accordingly, I consider the situation as being akin to disclosure, and the cost should be borne by the party presenting the report. As an aside, although the Court has commented upon deficiencies in Mr. Cunningham's report in terms of compliance with certain Rules, no criticism is intended of the author. It is the responsibility of Counsel when retaining an expert, to clearly canvass all of the various requirements contained in Rule 55, so that any resulting report has at least, minimally complied with the expectations contained therein.

[47] Now that the financial information relied upon by Mr. Cunningham in preparing his report was provided in June, the parties should proceed to arrange discovery dates. I do not view the Defendant's unwillingness to set a date until financial disclosure was complete, as being unreasonable. The Plaintiff is making a large claim in relation to his financial losses, and as such, the Defendant should be entitled to basic disclosure, prior to examining him on the issue.

[48] If the parties are unable to agree regarding the costs arising from this Motion, written submissions should be filed on or before September 4, 2010.

J.