SUPREME COURT OF NOVA SCOTIA

Citation: Saturley v. CIBC World Markets Inc., 2011 NSSC 310

Date: 20110629
Docket: Hfx No. 305635 and
Hfx No. 322441
Registry: Halifax

Between:

Fredrick Thomas Saturley — Plaintiff

and

CIBC World Markets Inc. — Defendant

Between:

Gayle Crooks, Archie Gillis, and Karen McGrath — Plaintiffs

and

CIBC World Markets Inc./Marches Mondiaux CIBC Inc.
carrying on business as CIBC Wood Gundy — Defendant

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Judge: The Honourable Justice Gerald R. P. Moir

Heard: Hfx No. 305635 heard June 24, 2011 and Hfx No. 322441 by correspondence

Subjects: Civil Procedure; Case Management Directions, including content of notice to class members, disclosure of "facts" from witness interviews, and redacting irrelevant text.

Summary: Parties moved for directions on numerous issues.

Issues: Including (1) Should the statement of common issues be included in the notice to class members in the class action? (2) In the other action, must the defendant disclose what its counsel knows as a result of interviewing witnesses? (3) Is it appropriate to redact information merely because it is irrelevant?

Results: Among other issues, (1) In this case, including the statement of common issues could mislead. (2) The principle that litigation privilege does not protect "facts" is restricted to material facts as opposed to evidence. What counsel heard and observed when interviewing witnesses is privileged. (3) Followed *Banks v. National Bank*. Irrelevancy is a sufficient reason to redact text unless there is good reason to disclose all the text, such as that the redaction would distort the meaning of the rest of the text.

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DECISION

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	Hfx No. 305635 heard June 24, 2011 and Hfx No. 322441 by correspondence
Written Decision:	Oral decision transcribed and signed on August 2, 2011
Counsel:	Jane O'Neill, Kiersten Amos, and law students Larissa Law and Chase Barlet, for the plaintiffs Michael S. Ryan, Q.C. and John A. Keith, for the defendant

Moir, J. (Orally):

Introduction

[1] I owe the parties decisions on several motions. In *Crooks v. CIBC Wood Gundy*, two points remain in dispute before an order can be settled following my decision on certification filed in May. The motion to resolve these points was made by correspondence delivered late last month.

[2] Last Friday, I heard arguments in *Saturley v. CIBC Wood Gundy* on several motions made for Mr. Saturley and several for CIBC Wood Gundy. I believe that two of those got resolved last Friday.

[3] This decision covers the outstanding issues as I see them. I will supplement it to the extent counsel detect that I have missed anything and, of course, to provide needed clarification. The issues are:

1. Whether the certification order should provide that the statement of common issues be included in the notice to class members?

2. Who should the certification order require to pay for the cost of notification?

3. Whether CIBC Wood Gundy must disclose "facts" known to counsel supporting the just cause defence?

4. How to handle the possibility that privileged communications of Mr. Saturley may be in computers belonging to CIBC Wood Gundy?

5. Whether to require Mr. Saturley to produce his residential, landline telephone records?

6. Whether to require Mr. Saturley to produce more documents similar to the "Recommendation" and "Portfolio Evaluation" documents disclosed on May 27, 2011?

7. Whether to require Mr. Saturley to submit to a further discovery examination about the documents produced on May 27?

8. Whether to order a further discovery examination of Michelle Harris?

9. Whether redactions made by Mr. Saturley to twenty-seven documents are proper?

10. What directions should be given concerning a finish date and exchange of witness lists?

Before turning to those issues, I propose to briefly summarize the history of this litigation and to reiterate my view that counsel have conducted themselves with their customary professionalism.

Summary of Proceedings

[4] *Saturley v. CIBC Wood Gundy* is an action for wrongful dismissal and other causes by an investment advisor against an investment firm that dismissed him in December, 2008.

[5] *Crooks v. CIBC Wood Gundy* is a class action started last year by clients of Mr. Saturley who were compensated for losses resulting from a calculation error that was the fault of CIBC Wood Gundy and not the fault of their investment dealer, Mr. Saturley. The representative plaintiffs claim the compensation was insufficient.

[6] One year ago, Justice Warner ordered case management of the class action. The wrongful dismissal suit was added and the two have been case managed by me since then.

[7] Last July and August we made various arrangements so the parties could file affidavits, conduct discovery, and be otherwise ready for the certification motion in the class action by early 2011. The motion was heard in March, the decision was filed in May, and, as I said, there are two minor issues to be decided today before an order can be finalized.

[8] Discovery of parties was pretty much completed in the wrongful dismissal action when case management began. However, there were some significant

disclosure issues that had to be resolved and their resolution and other things led to further, fairly extensive, party discoveries.

[9] The defence to the wrongful dismissal action is just cause. Mr. Saturley is said to have caused trades to be made for many clients without their consent. That is to say that Mr. Saturley exercised a discretion that was not granted to him, and probably could not have been lawfully granted to him.

[10] We were eventually informed that CIBC Wood Gundy required interviews or discovery of a large number of investors who had been clients of Mr. Saturley when he was dismissed. The extent of this evidence was not gaged last August when I set a one month trial before myself starting May 2, 2011.

[11] Between August and April we had numerous management meetings, and numerous decisions were required and were made. Among these was a decision about particulars of the justification defence, which concerns us today, and a decision to allow limited discovery of numerous former clients who would not submit to interviews on behalf of CIBC Wood Gundy.

[12] Very shortly before trial was to begin, counsel approached me to resolve some disputes that had arisen during late discoveries or after exchange of witness lists. I was deeply troubled when I noticed that one of the recently disclosed former client witnesses was a person whose credibility I could not assess without bias.

[13] Justice Hood agreed to take over the trial at the last minute. However, the appreciation I then had for the extent of evidence made it clear to me that four weeks was not nearly enough time. I refused to ask Justice Hood to undertake what would certainly become a split trial. (Nor would I have forced that on an unwilling party in the circumstances.)

[14] Fortunately, we were able to set new trial dates for next April and May. As yet, a judge has not been appointed but the court accepted responsibility to provide the new dates quickly, and I have told the parties to expect that we will have a trial judge in good time for them.

[15] It was an error to set the May, 2011 dates. The timing and the length of the trial were based on assumptions that a wrongful dismissal action should always be

ready for quick trial and that four weeks should be plenty of time for the trial of any wrongful dismissal action.

[16] More careful inquiry by me would have revealed that this is no ordinary wrongful dismissal, that there were many preliminary issues making the August setting of trial premature, and that it was not then possible to gauge the extent of the testimony.

[17] So, the error had two unfortunate consequences. As I said, it would have led to a split trial. Secondly, the parties have had to scramble to meet disclosure and investigative goals. That scramble has led to some frustration and some unwarranted complaints.

[18] On both sides, the written submissions for last Friday's hearing contained aspersions, mild but aspersions nevertheless, against counsel opposite. Mr. Ryan found it necessary to start his oral remarks by saying that CIBC Wood Gundy submitted that all efforts by both sets of counsel were *bona fide*.

[19] I have been involved with this litigation as much as any case management judge would be. Based on that experience, and a long time working in this field, I say that the case has been conducted professionally.

Including Common Issues in Notice

[20] Ms. O'Neill states the purpose of notification well when she writes:

> The purpose of a Notice is to inform class members about the proceeding and to allow them a meaningful opportunity to decide whether they will opt out of the proceeding or be bound by the result.

She submits that a statement of the common issues provides information that is necessary to decide whether to opt out.

[21] Mr. Ryan submits that this is not necessary information. He writes "the key information for making the opt-out decision is not a list of common issues but rather the class description." He also submits that the inclusion of the statement of common issues may mislead class members. "Common issues may be added to, deleted or amended in the course of litigation (before or after the opt-out period has ended)".

[22] Ms. O'Neill points out in reply that CIBC Wood Gundy told class members they had been fully compensated for the losses caused by the calculation error. Providing the statement of common issues would ensure that members understood that the claim was for damages in addition to the compensation already provided.

[23] There is no statutory requirement to include the statement of common issues in the notification. Subsection 22(6) provides a detailed prescription of the subjects that must be included, unless the court orders otherwise, and it also provides, in s. 22(6)(j), a discretionary catch-all: "give any other information the court considers appropriate".

[24] The requirements for a notice to class members are nothing like the full disclosure required in an offering memorandum. The notice provides the "opportunity" to make an investigation, not the material facts such an investigation would uncover. To include in the notice only one kind of fact that an investigation could uncover could distort the importance of those facts over others.

[25] In this case, where there are indications for possible amendments of the common issues and for possible subclassifications, it is better to not include the common issues in the notice.

Paying for Notification

[26] In some class actions the cost of notification is high. We have a small class and an easy method of notification.

[27] Unlike the Ontario provisions on costs generally (see para. 83 of the Decision on Certification) the Ontario statute is similar to ours on who gives notice and who must pay for it. So, the decision in *Rowlands v. Durham Region Health*, [2011] O.J. 1864 (S.C.J.) and Justice Cullity's endorsement in *Farkas v. Sunnybrook*, [2004] O.J. 5134 (S.C.J.) may be helpful to a judge who has a discretion to exercise under s. 27(1) of our *Class Proceedings Act*.

[28] As the costs are small and CIBC Wood Gundy will be giving the notice, I exercise my discretion to direct CIBC Wood Gundy to bear the expense of notification.

Disclosure of "Facts" Supporting Defence

[29] For months now, Mr. Saturley has been pressing for details of the allegation that he made unauthorized discretionary trades. CIBC Wood Gundy responds by saying that it intends to prove that Mr. Saturley generally exercised discretion on behalf of numerous clients who did not, and perhaps could not, give him the authority to do so.

[30] Mr. Saturley does not concede that the unauthorized trading alleged against him founds just cause, but he wishes to know as much detail as possible about the case he has to meet.

[31] CIBC Wood Gundy has provided, and will continue to provide, the names of the clients its investigations suggest were the subjects of unauthorized trading. It discloses whether it alleges all trades on behalf of an alleged client were unauthorized or that Mr. Saturley exercised unauthorized discretion only on certain occasions. When it decides to add the name of a client to the list, it discloses documents in its possession respecting that client.

[32] This level of disclosure is unacceptable to Mr. Saturley. He wants all the details known to counsel for CIBC Wood Gundy.

[33] The conflicting demands and responses first came to a head in a motion for particulars of each offending trade.

[34] The motion for particulars was heard and disposed of in March. The statement of defence, as clarified in some correspondence, made it clear that CIBC Wood Gundy did not anticipate proving isolated incidents of unauthorized trading. It would seek to prove a general practice of trading on behalf of many clients who had not provided required authorizations.

[35] Therefore, the motion for particulars was dismissed except that Mr. Saturley was authorized to produce the correspondence at trial as particulars of the CIBC Wood Gundy defence.

[36] The same subject is now brought forward under the Rules for discovery and disclosure.

[37] Ms. Wilma Ditchfield is a senior official of CIBC Wood Gundy, she was closely involved in the events leading up to Mr. Saturley's dismissal, and she is the person designated under the Rules to manage disclosure by the defendant in this suit. Mr. Graham, for Mr. Saturley, reexamined Ms. Ditchfield for discovery shortly before the trial was scheduled to begin.

[38] On the second day of the discovery, Mr. Graham on behalf of Mr. Saturley asked Ms. Ditchfield "What other clients...is CIBC relying on to support the contention that Mr. Saturley was engaged in discretionary trading?" Mr. Keith stopped Ms. Ditchfield from answering, but he advised Mr. Graham of seven clients newly added to the list.

[39] Mr. Graham then asked Ms. Ditchfield, "What evidence or particulars is CIBC relying on to suggest that … there was discretionary trading in these clients' accounts?" Ms. Ditchfield said, "We don't have anything that we're relying on." Mr. Graham attempted to press on, but Mr. Keith said " ... these arise out of interviews conducted ... by counsel." He added "also there's been some discoveries

of a number of those individuals". He maintained that the information obtained during interviews recently conducted by counsel was privileged.

[40] After the discovery, Mr. Keith arranged for copies of the files on the newly identified clients to be delivered to Mr. Graham and he reiterated, "I maintain that information collected by external counsel in preparation for trial is privileged." He also said, "If we are relying on any other clients, we will advise. If we are relying on a narrower subset of trades, we will also advise."

[41] Not long after that, some two weeks before trial was supposed to begin, Mr. Keith identified another of these clients and delivered a copy of the client's file to Mr. Graham. Mr. Graham asked for "exactly which trades you say that were executed without approval". He also asked for confirmation that a claim for privilege was being made "over all information and evidence gathered" from this client.

[42] Mr. Keith responded, "We are alleging general discretion ..." and he claimed litigation privilege "in connection with all of external counsel's discussions" with the client "and the evidence developed through those discussions". When pressed

further, he said that he did not anticipate the evidence would be that all trades were unauthorized. As regards the newly identified client and the rest he said, "We expect their evidence will be that Mr. Saturley generally took discretion."

[43] This prompted counsel for Mr. Saturley to move for "an order directing the defendant to disclose the facts upon which its allegations of discretionary trading are based".

[44] The question of pleading material facts is disposed of by my earlier decision on the plaintiff's motion for particulars. The material facts are:

- Mr. Saturley either did not obtain or could not be given a discretion to make trades in the kinds of securities at issue.

- Nevertheless, he made large numbers of trades for many clients without seeking or obtaining their specific approval of the trades. That is, he generally exercised discretion for which he had no authority.

- The clients are those named by CIBC Wood Gundy and whose client file records it discloses.

In my view, the greater detail desired by Mr. Saturley is a call for evidence, not material fact suitable to pleadings.

[45] So, I regard the motion as being for disclosure of evidence on discovery and as falling under Part 5 - Disclosure and Discovery. "Nothing in Part 5 requires a person to waive privilege or disclose privileged information": Rule 14.05(1). Consequently, a valid claim of litigation privilege will be sustained under Rule 18.17.

[46] For Mr. Saturley, Ms. O'Neill submits that *Metlege v. Halifax Insurance Co.*, [1998] N.S.J. 309 (C.A.) applies. She submits that the holding in that decision takes the disclosure sought by Mr. Saturley outside litigation privilege because he seeks disclosure of facts, not evidence.

[47] Mr. Metlege bought a used car that was delivered to him here from Quebec. He obtained insurance from the Halifax Insurance Company. The vehicle was

stolen and Mr. Metlege claimed under the policy. It turned out that the vehicle had been stolen twice and Mr. Metlege had taken delivery of a stolen vehicle.

[48] The insurance company denied the claim, and defended Mr. Metlege's suit, on the bases that Mr. Metlege had no insurable interest, that the policy was void because Metlege had known the car was stolen, that Metlege had given false particulars, made misrepresentations, and failed to disclose material facts when he contracted for the policy, and that he committed various policy violations afterward.

[49] An adjuster was discovered. Mr. Metlege's counsel attempted to get information about facts known to the insurer "that support the allegation that Metlege should have known the jeep was a 'hot' vehicle": para. 25. The insurer's counsel objected to disclosure of any information uncovered by counsel: also, para. 25.

[50] The thinking of Professor Sharpe, now Justice Sharpe of the Ontario Court of Appeal, on the nature of litigation privilege and its distinction from solicitor and client privilege was accepted widely by Canadian appeal courts, including ours in

Metlege and in *Mitsui v. Jones Power Co.* [2000] N.S.J. 258 (C.A.). Professor Sharpe's thoughts were also accepted by Justice Fish writing for a majority of the Supreme Court of Canada in *Blank v. Canada*, [2006] S.C.J. 39. The thoughts are recorded in one of the 1984 Special Lectures of the Law Society of Upper Canada. Professor Sharpe referred to the longstanding *Wheeler v. Le Marchant* definition, which is cast in reference to documents but may as easily apply to interviews. The information is protected where it was obtained after litigation was contemplated and where it was obtained either to obtain advice about the litigation or to obtain evidence to be used in the litigation or to be used in finding evidence. See *Mitsui* at para. 18.

[51] In more modern terms, the information must have been obtained with contemplated litigation in mind, it must have been obtained for the dominant purpose of receiving legal advice about the litigation or to aid the conduct of the litigation, and it must have been reasonable to have contemplated the litigation: *Leslie v. S & B Apartment Holdings Ltd.*, 2009 NSSC 57 at para. 10.

[52] At p. 164 of the L.S.U.C. text, see *Mitsui* at para. 19, Professor Sharpe distinguished between the foundations for solicitor and client privilege and litigation privilege. He says in part:

> Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process … , while solicitor - client privilege aims to protect a relationship … .

[53] Two more passages from Professor Sharpe's lecture give us a more refined understanding of the foundation for litigation privilege and its relationship to obligations for disclosure. The Court of Appeal referred to them at para. 23 and 24 of *Metlege*.

> Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect - the adversary process - among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparations; there is also the need for disclosure to foster fair trial.
>
> The adversary system depends upon careful and thorough investigation and preparation by the parties through their counsel. The adversarial advocate cannot prepare without the protection afforded by a zone of privacy. Discovery and privilege must strike a delicate balance. Too little disclosure impairs orderly preparation. Counsel cannot come to trial prepared without adequate information about the case the opposing side will present. On the other hand, total disclosure would be demoralizing and would impair orderly preparation. Thorough investigation and careful development of strategy would be discouraged if every thought and observation had to be disclosed. The work product test focuses on

> the need to protect counsel's observations, thoughts and opinions as the core policy of the protection from disclosure of preparatory work.

[54] Para. 31 of *Metlege* requires close examination before treating it as a complete statement of the law on this point. It says:

> Privilege cannot be used to protect facts from disclosure if those facts are relied upon by a party in support of its trial position. It is immaterial that the fact was discovered by a party at the direction of its solicitor, or even by the solicitor independently. If the fact is to be relied upon in support of the defence, then the fact must be disclosed.

[55] The word "facts" can have a wider or narrower meaning in legal discussions. In one context, we distinguish facts from law. In that sense, everything about a witness interview is fact, from what counsel saw and heard (observed), to what counsel believed (thought), to what counsel took to be important enough to note or not (counsel's opinion). In another context, we admonish parties to plead facts but not evidence. We tell civil jurors that they determine the facts, but they must do so on the evidence.

[56] The very next passage in *Metlege*, para. 32, gives us the sense in which the Appeal Court was using the word "facts". It includes, "he must disclose the facts on which he relies although not the evidence to support the fact."

[57] It appears that Mr. Metlege was in the dark about why the Halifax Insurance Company alleged that he knew his car was stolen. The facts underpinning that assertion were as ripe for pleading as discovery.

[58] Ms. O'Neill also refers me to *Global Petroleum Corp. v. CBI Industries Inc.*, [1998] N.S.J. 486 (C.A.). The distinction between material fact and evidence was also prominent in that case. The chambers judge, Justice Hamilton, then of this court, said:

> [A] party does not need to identify, during discovery, the evidence he will rely on to prove his case at trial in the sense of disclosing his trial strategy. The effect of the foregoing is that I am ordering the respondents to provide the facts they are aware of that relate to the allegations in their statements of claim from whatever source they obtained them, including from their lawyers, but without the requirement that they disclose the source of those facts.

See para. 5 of the decision on appeal.

[59] There were a number of issues raised on the appeal in *Global Petroleum*. This one was dealt with by Justice Chipman under the title "Evidence Versus Facts" at para. 17 to 20. At para. 19 he said:

> In each and every case in which Hamilton, J. ordered that the question be answered, she determined that what in substance was requested was a fact. Her order requires that the witnesses disclose facts, not the evidence to be relied on in establishing such facts. That is very clear from her decision.

[60] Justice Cullity recently provided a thorough discussion of the conflicting authorities on disclosure of a relevant fact made known to a witness on discovery by a privileged communication: *Pearson v. Inco Ltd.*, [2008] O.J. 3589 (S.C.J.).

[61] Pearson was a representative plaintiff in a class action. A summer student with his counsel interviewed other class members, who are protected in Ontario, as in Nova Scotia, from discovery.

[62] The defendant requested production of the student's notes and memoranda. Justice Cullity refused to order production because of litigation privilege. The defendant then argued for "disclosure of the facts obtained by the student": para. 12. The basis was that, while the student's work was privileged, it had been given to Mr. Pearson who could be compelled to reveal the facts on discovery: para. 13 and para. 17.

[63] After his thorough review, Justice Cullity sided with the authorities for discovery of facts known to a witness because of a privileged communication. The communication may be privileged, but fact is not. Justice Cullity concluded "... although Inco is not entitled to copies of the student's notes, it is entitled to disclosure of relevant facts contained in them": para. 21.

[64] The decision in *Pearson* was based on the Ontario Rules and consideration of authorities from other provinces, some of which have Rules identical to Ontario's on discovery and some quite different. Our Rules are differently worded, and in minor ways they are different in substance. As general principle goes, ours are not so different from Ontario's that *Pearson* should be distinguished on the basis of differences in practice and procedure.

[65] In my respectful assessment, the approach taken by Justice Cullity accords with our Rules and the opposite approach does not. The inclusion of a relevant fact in a privileged communication to a witness does not shield the fact from being disclosed by the witness on discovery. For reasons already alluded to, we have to be very careful about what we mean by a fact.

[66] The plaintiff seeks an order requiring the defendant to summarize the facts noted by counsel in each interview of the identified witnesses. Ms. O'Neill submits that this is what was done in *Tiller v. St. Andrew's College*, [2009] O.J. 2634 (S.C.J.)

[67] In that case a witness had given a statement to an employee of the defendant shortly after the plaintiff was injured on the defendant's premises. Justice Howden referred to Sharpe's recognition of a tension between the policy underlying disclosure requirements and the policy of litigation privilege. At para. 8, Justice Howden said:

> In prior cases from this court and its predecessors, the solution to this tension has been to protect from production the privileged document or surveillance tape but to require the party in whose possession it is to produce a summary of facts from the document or recording relevant to the issues in the case.

[68] It is clear from the decision as a whole that what Justice Howden means by "summary of facts" is a summary of all relevant information in the witness statement. The witness was a Mr. Griese. The defendant was ordered to "produce a summary of the facts relevant to the issues in this action as revealed in the statement of Klaus Griese": para. 15.

[69] The motion I have to determine is not about statements signed by witnesses, and I do not make any comment on when or whether they may be withheld from documentary disclosure. That said, I must disagree with the notion that there is a substantial difference between turning over a copy of a witness' statement and providing a summary of what is in it.

[70] I think that the distinction submitted by Mr. Saturley is entirely too insubstantial to achieve the necessary balance between the "need for disclosure to foster fair trial" and the "need to protect counsel's observations, thoughts and opinions" in order to provide "a zone of privacy to facilitate adversarial preparations." The balance is better achieved by the approach taken in decisions cited to me by Mr. Ryan and Mr. Keith: *Arcola School Division No. 72 v. Hill*, [1999] S.J. 596 (C.A.) and *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, [2011] S.J. 326 (Q.B.). Both decisions take a stricter view of what amounts to "facts". See *Arcola* at para. 10 and *Potash* at para. 37.

[71] There are two compelling reasons for dismissing this motion. Firstly, the discovery witness is not privy to counsel's interviews and the defendant should not

be required to force counsel to divulge the contents of the interviews. Secondly, this is not a request for facts. It is a request for information about evidence.

[72] Ms. O'Neill submits that it is irrelevant who gathered the "facts". To hold that litigation privilege attaches because counsel conducted the interviews is similar to saying that any document sent to counsel is thereby privileged. I respectfully disagree.

[73] It may be that a client who insists on knowing all about counsel's preparation should be in a different position on discovery than the client who respects "the zone of privacy" that counsel need. In any case, I know of no authority for ordering the client to find out what counsel knows about the details of the evidence counsel is uncovering and marshalling for trial.

[74] As I see it, the court is being asked to order the defendant to find out from counsel the details of what witnesses said during interviews and to divulge those details in summaries. This would make counsel vicarious discovery witnesses. It would constitute an invasion of the zone of privacy afforded to all litigation

counsel and offend the policy for adversarial trial preparation that underlies the privilege.

[75] Secondly, this is not a request for material facts as distinct from evidence. The dichotomy between fact and evidence informs the exclusion of the former from, and the inclusion of the later in, litigation privilege. As I said, summarizing the evidence given by a witness does not elevate it from evidence to fact. The material facts are as pleaded, including in the correspondence that stands as part of the pleadings.

[76] In short, Mr. Saturley knows the allegation of generally exercised unauthorized discretion against him. He knows which former clients CIBC Wood Gundy says were subjects of the unauthorized discretion. What those clients said to counsel during witness interviews is indicative of the evidence they will give in support of the alleged material facts. As such, it is covered by litigation privilege.

[77] Two points of clarification in response to certain of Ms. O'Neill's submissions.

[78] The Rules preserve the tension between disclosure and litigation privilege, they do not prefer disclosure in any way. The Rules for active disclosure of documents, electronic evidence, and real evidence and the Rules for passive disclosure through discovery are qualified by Rule 14.05 which protects all kinds of privilege. That includes Rule 14.08, which declares active disclosure of documents etc. to be "necessary for justice in a proceeding" and does so as part of provisions about proportionality in active disclosure requirements.

[79] Secondly, this ruling causes Mr. Saturley no injustice. His client list is known to both sides. There is no reason to think a client would refuse him an interview if he has not already obtained one, or heard enough from those who were discovered. He, or better his counsel, can interview any of these people under the full protection of litigation privilege.

Saturley Privilege in CIBC Wood Gundy Computers

[80] When Mr. Saturley was dismissed, his electronic files of e-mails were left behind. There are good reasons for believing that some of the e-mails may be, or may have been, protected by solicitor and client privilege.

[81] Mr. Saturley moves for "directions regarding review and disclosure of emails retrieved from Mr. Saturley's outloook files". He proposes that I "direct that the outlook files be provided to McInnes Cooper for the initial reviews or … that CIBC engage an independent third party".

[82] We need a mechanism that allows Mr. Saturley to claim privilege in whatever e-mails warrant the claim, that does not change possession or undermine CIBC Wood Gundy's claim to possession, and that allows for acceptance or determination of the claims.

[83] Mr. Ryan says I have a choice from among three mechanisms: review the e-mails myself, afford Mr. Saturley's counsel that opportunity, or leave it with CIBC Wood Gundy's counsel and rely on their good judgment as officers of the court to isolate anything with a whiff of privilege to it. In addition to a disinclination to the work I would have to do, there are two practical reasons why I prefer review by Mr. Saturley and his counsel.

[84] Firstly, determining whether a document is privileged can be done with better precision if the client is present for questioning. Only Mr. Saturley's lawyers can have that advantage.

[85] Secondly, if Mr. Saturley and his counsel do the review they can kill two birds with one stone: whether an e-mail is capable of privilege and whether to claim or waive it.

[86] To maintain the status quo of possession, I would direct that the review be conducted without copies being made. Either the review could be conducted at the offices of CIBC Wood Gundy's counsel, or copies of the files could be delivered electronically to Mr. Saturley's counsel on an undertaking against copying and for return within a specified time.

[87] The parties should agree on a time for completion of the review, or I will set a deadline. Mr. Saturley would be required to identify those e-mails for which he claims privilege. Without looking at those ones, CIBC Wood Gundy would determine which, if any, to contest. It would copy the uncontested ones for Mr.

Saturley and delete them from its computers. The contested ones would need to be preserved, unread, for determination.

Saturley's Residential Telephone Records

[88] CIBC Wood Gundy moves for an order requiring Mr. Saturley "to produce all phone records for his personal residence [or residences] for the time period June 1, 2007 to October 31, 2008."

[89] These records are of marginal relevancy. The timing and number of contacts by Mr. Saturley with his clients is highly relevant to the charge that he generally exercised unauthorized discretion for many clients, but these records may not show us much in that regard. They will only show any calls placed from home to clients who were contacted long distance.

[90] The Rules require disclosure of relevant documents, including relevant documents of only marginal probative value. Rule 14.08 provides an exception for the sake of proportionality, but Mr. Saturley has not attempted to make out a case for that.

[91] Therefore, the motion is granted.

Disclosure by Saturley of Portfolio Evaluation Documents

[92] CIBC Wood Gundy moves for an order requiring Mr. Saturley "to produce any and all documents similar to documents delivered May 27, 2011".

[93] These documents are CIBC Wood Gundy forms titled "Recommendation" or "Portfolio Evaluation". I refer to both as "Portfolio Evaluation records". They were printed by Mr. Michael Cowan, who worked with Mr. Saturley. He made notes on them and kept them when he left CIBC Wood Gundy. The times at which some were printed may shed some light on what Mr. Saturley and his associates were doing when he was dismissed.

[94] I have no reason to believe that Mr. Saturley has any more of these documents. The motion is dismissed with permission to come back when more is known.

Discovery of Saturley on the Portfolio Evaluation Records

[95] CIBC Wood Gundy moves for an order requiring Mr. Saturley to re-attend at discoveries and answer questions (a) "arising out of Saturley's answer to undertakings" and (b) "arising out of additional documentation produced subsequent to Saturley's discovery examination conducted on April 7 and 8, 2011" including the Portfolio Evaluation records.

[96] The first part of this motion has been resolved. It has not been demonstrated to me that Mr. Saturley can provide relevant, new evidence on the Portfolio Evaluation records.

[97] The motion is dismissed with permission to come back if information develops that shows a compelling reason to subject Mr. Saturley to examination on the Portfolio Evaluation documents.

Michelle Harris Re-examination

[98] CIBC Wood Gundy seeks permission to obtain a discovery subpoena against Michelle Harris as a consequence of the Portfolio Evaluation records.

[99] The person who can best explain the Portfolio Evaluation records appears to be Michael Cowan. I agree with Ms. O'Neill's position that inquiries need to be made of him before more discoveries are launched.

[100] The motion is dismissed with permission to come back.

Saturley Redactions

[101] Twenty-five documents are at issue. These were disclosed by Mr. Saturley with redactions marked "irrelevant". CIBC Wood Gundy moves for production of unredacted copies.

[102] I have reviewed the redacted and unredacted texts. No redaction alters the sense of the disclosed text. Some of the redacted text pertain to the class action, some report on Mr. Saturley's application for a licence from the Securities Commission, some refer to an IIROC investigation of CIBC Wood Gundy or its employers, some are about personal finances, some are innocuously personal, and some are highly personal. None contain information or communications relevant to *Saturley v. CIBC Wood Gundy*.

[103] CIBC Wood Gundy submits that a relevant document should only be redacted to protect an important interest. Otherwise, the irrelevant portions should be disclosed so as to avoid the risk that the sense will be changed.

[104] Mr. Keith points out that Justice Muise confronted this issue in *Banks v. National Bank Financial Ltd.*, [2011] N.S.J. 202 (S.C.). At para. 68 to 70 he reviewed decisions from the Ontario Superior Court, the former Trial Division of the Federal Court, and the Supreme Court of British Columbia supporting the approach advocated on behalf of CIBC Wood Gundy.

[105] Justice Muise referred to decisions of the Alberta Queen's Bench, Alberta Court of Appeal, and New Brunswick Queen's Bench that allowed for redactions of any irrelevant information, unless the redaction would distort the meaning of the document: para. 71 to 74. He then reviewed Nova Scotia authorities and concluded at para. 78:

> So it appears that the approach in Nova Scotia has been to permit redaction of irrelevant portions of documents unless there is good reason to disclose them, such as where redacting them "will distort the meaning and continuity of the documents".

[106] It turned out that this was not necessary to the decision in *Banks*, but it is a persuasive authority. I follow Justice Muise's conclusion about the law of redacting relevant documents in Nova Scotia.

[107] It follows that I should dismiss the motion for production of unredacted documents.

Directions for a Finish Date and Witness Lists

[108] The finish date and the trial readiness conference are safeguards that help the court to have confidence in the new system under which trial dates are assigned before the parties are ready for trial. There is no need for either when a case is under judicial management, just as there is no need for a date assignment conference at which the finish date is set and the trial readiness conference is scheduled.

[109] Even if there had been a finish date or a trial readiness conference, neither implies that pre-trial preparation stops on the happening of either. The finish date is "when all pre-trial procedures are to be finished": Rule 4.16(6)(c) and the trial readiness conference is for the court to "ascertain whether all pre-trial procedures were completed" and to "confirm that the parties are ready for trial": Rule 4.19(1).

[110] I emphasize the phrase "all pre-trial procedures". Often, the most intense pre-trial preparation happens during the days just before trial, including witness preparation.

[111] It follows that I do not accept the plaintiff's proposition that nothing more should be done after the trial was adjourned and I resist the defendant's request for a finish date.

[112] From the perspective of case management, it seems to me reasonable to set January 6, 2012 as the deadline for exchanging revised witness lists.

[113] I will cease to act as case management judge in September when settlement materials are delivered, but I hope that the trial judge will have been scheduled by then. So one or the other should be available for future directions.

Conclusion

[114] I will initial an order that conforms with this decision, which I am prepared to supplement if counsel detect that I missed something. The order should provide that I will hold the redacted documents for thirty days and return them then to Ms. O'Neill, unless a judge of the Court of Appeal directs otherwise.

[115] I have not dealt with costs on the numerous *Saturley v. CIBC Wood Gundy* motions determined over the past year. My inclination is to order them all to be in the cause with counsel having the choice of quantification now by me or a later by the trial judge.

J.