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STOCKS, LIES AND NO VIDEOTAPE (BUT A GREAT STORY FOR A MOVIE)

The Manitoba Court of Appeal recently issued its decision In *Warkentin* v *BMO Nesbitt Burns Inc. et al*, 2018 MBCA 22, where an investment advisor who had been dismissed from his employment, without cause, accused his former employer and its general manager of deceit and bad faith.

The advisor had been hired by the defendant employer in August of 2011 and then dismissed five months later, in January of 2012.

Prior to being hired, the advisor had enjoyed a bit of a past. While employed at another investment firm he had applied for a loan with a third party, in which he overstated his financial holdings. His former employer learned of this and reported him to the Investment Industry Regulatory Organization of Canada (IIROC), which dutifully launched an investigation. While this was ongoing, the firm was acquired by a second firm, which wanted no part of the advisor, who resigned (and presumably got paid to do so).

The advisor then needed a new job, and so approached the defendants with his $70 million book of business. He told the general manager something about his ongoing IIROC investigation and arranged for his lawyer to telephone the general manager to provide further details.

The general manager passed on the information he obtained to the defendant's chief compliance officer and others, who authorized the hire based on the information provided. The necessary steps were taken to transfer the book of business to the defendant and approximately $58 million of the business soon transferred. The general manager received a bonus.

A few months later the past employer provided some troubling information to the defendant employer about the exact nature of the IIROC investigation, suggesting the plaintiff had not only overstated his financial holdings, but had apparently done so by forging certain documentation. This led to a hastily-called meeting with the advisor, and as a result of probing questions from the Chief Compliance Officer, the full story was told.

The advisor had (it could be said) "made his money the old fashioned way" by using the "old school" method of cutting and pasting. He had turned two investment statements into one, thereby doubling his holdings and at the same

time conveniently omitting the portion that referenced some debt he had. This increased his apparent net holdings from $121,000 to about $600,000. In the spirit of the moment he also acknowledged he had not actually graduated from a particular university as he had earlier claimed.

The general manager was shocked, and testified this was the first he had learned of the full extent of the plaintiff's misconduct. He explained how the advisor had earlier only told him he had submitted a loan application overstating his holdings, by providing a statement that was a month old and representing the information there as current and correct. He also reiterated the lawyer's description of things, how the advisor "acting in an isolated error of judgment" had misstated his worth on a loan application. The lawyer had also suggested the eventual IIROC punishment would likely be minor as there were no client issues involved.

Not too very long after this meeting, the chief compliance officer and the general manager decided that the plaintiff was not the type of employee they wished to have and so (being remarkably kind) terminated his employment without cause. The advisor was paid four weeks' pay as per his employment agreement. The clients were notified the advisor was no longer employed there and encouraged to stay with him.

Not wanting to leave well enough alone, the advisor sued. He asserted that at the hiring he had fully disclosed his misconduct, but the general manager, scheming to benefit himself by obtaining the advisor's book of business and the revenue stream from it, had initially deceived the chief compliance officer in order to get the hiring authorization. The hiring and rapidly following dismissal were simply a deceitful means of obtaining his book of business and taking advantage of him. He sought compensation for lost income and mental distress, along with aggravated and punitive damages.

The general manager's evidence respecting the very limited initial disclosure by the advisor and the lawyer was accepted, and the court dismissed the advisor's claims. There was no evidence the employer had lied or knowingly misled the advisor, or anyone, and so no breach of any duty of honesty and fair dealing. When the employer had hired the plaintiff it really intended to employ him long term, but did not have full knowledge of his misdeeds. Once it found out the truth, it acted promptly and reasonably. Though some of his clients chose not to follow him (again) to yet another firm, the court accepted the employer did what it could to try and help him retain his book of business.

The defendant employer was also successful in its counterclaim where it sought immediate repayment of a $612,500 loan it had made to the plaintiff on the start of his employment, which was to be repaid immediately if employment ended for any reason. It was also successful in recovering a $127,000 bonus paid to him that similarly was repayable if employment ended for any reason during a particular timeframe.

The takeaways from this case are clear. While it is encouraging in these times to see a willingness to trust and assume that things truly are as they are being presented, the cold reality is that such trust can sometimes be misplaced. If the hard proof of something is available, it probably should be obtained, before acting. This may delay something occurring or even kill a deal, but really, is the gamble of proceeding without that certainty, worth it? Admittedly there may be some exceptional cases where it might be, but the time to ask that question is before binding yourself to something, and not afterwards.

If a decision is made to act without that certainty, then the prudent thing to do is ensure your contractual documents have the necessary recitals addressing in detail what representations have been made as conditions precedent to entering the contract, and suitable escape clauses if the facts unmask someone who only has a passing acquaintanceship with the truth.

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