Date: 20020920
Docket: CA 178236

NOVA SCOTIA COURT OF APPEAL
[Citation: *Brett v. Superior Propane Inc.*, 2002 NSCA 111]

Glube, C.J.N.S.; Freeman and Hamilton, JJ.A.

BETWEEN:

BRUCE BRETT

Appellant

- and -

SUPERIOR PROPANE INC.,
a body corporate under the laws of Nova Scotia

Respondent

REASONS FOR JUDGMENT

Counsel: Gary A. Richard for the appellant
Michael S. Ryan, Q.C. for the respondent

Appeal Heard: September 17, 2002

Judgment Delivered: September 20, 2002

THE COURT: Appeal dismissed per reasons for judgment of Hamilton, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.

HAMILTON, J.A.:

[1] This is an appeal from the decision of Justice Arthur J. LeBlanc dated March 25, 2002, wherein he dismissed the appellant's application to have the respondent's solicitor of record in this action, John Kulik, and the law firm of which he is a member, McInnes Cooper, removed for conflict of interest. The appeal was dismissed at the hearing with reasons to follow. These are the reasons.

[2] This action was commenced in December, 1998. The statement of claim was substantially amended in September, 2000, before a defence was filed. The action involves the respective interests of the parties in heating equipment installed by the respondent in an airport hangar in November 1996. The airport hangar was owned by the Crown and leased to a third party who mortgaged its leasehold interest to the appellant and others in April 1996. The statement of claim in this action indicates that the classification of the heating equipment as a chattel or a fixture is key to the determination of the parties interests, although other issues are raised such as estoppel, abuse of process and fraudulent preference. The pleadings are closed and lists of documents have been exchanged.

[3] John Kulik has acted for the respondent with respect to its interest in this equipment since the spring of 1997. As part of his retainer he applied for, and obtained a recovery order for the respondent for this equipment. As part of the application for the recovery order he provided the legal advice required by **Civil Procedure Rule** 48.02(c), that he believed the respondent was entitled to recover possession of the heating equipment. There is no dispute Mr. Kulik provided this advice to the respondent. There have been several court hearings dealing with the respective interests of the parties in this equipment with Mr. Kulik acting for the respondent each time.

[4] Since late 1995 other lawyers in the law firm McInnes Cooper have acted for a company, Granbury Developments Limited ("Granbury"), described by the appellant as being controlled by him. They represent Granbury in tax litigation arising from assessments made against Granbury under the **Excise Tax Act**, R.S.C. 1985, c. E-15 and also represented Granbury on a harmonized sales tax matter. The tax litigation involves a claim for input tax credits related to the use of a building built by it.

[5] The conflict of interest issue, which is the subject of this appeal, was raised by the appellant in August 2001 in response to a June 2001 letter from Mr. Kulik in

which he sought production of documents relating to the placement of the 1996 leasehold mortgage and the money advanced under that mortgage.

[6] The issue before the Court is whether the trial judge erred in not granting the order sought by the appellant to have John Kulik removed as solicitor of record for the respondent, and the law firm of McInnes Cooper disqualified from acting for the respondent in this action, either (1) because Mr. Kulik gave the advice required by **Civil Procedure Rule** 48.02(c) in connection with the respondent obtaining a recovery order for the heating equipment in the hangar or (2) because Mr. Kulik and McInnes Cooper have a conflict of interest arising from other members of McInnes Cooper representing a company controlled by the appellant on tax matters.

[7] This Court as an appeal court will not interfere with an interlocutory discretionary order unless wrong principles of law have been applied or patent injustice would result. (See: **Minkoff v. Poole (1991), 101 N.S.R. (2d) 143(N.S.S.C.A.D.)**).

[8] On the first aspect relating to Mr. Kulik having provided the respondent with the legal advice required by **Rule** 48.02(c), this Court is satisfied the trial judge did not apply wrong principles of law when he determined that Mr. Kulik and the law firm of McInnes Cooper are not disqualified from acting for the respondent in this action by virtue of that advice. **Rule** 48.02(c) provides as follows:

> Affidavit in support of interlocutory recovery order
>
> **48.02.** The affidavit of an applicant or his agent in support of an interlocutory recovery order shall,
>
> (a) sufficiently describe any property claimed and the value thereof,
>
> (b) set out facts showing that,
>
> (i) the applicant is the owner or lawfully entitled to the possession of the property;

> (ii) the property was unlawfully taken or is unlawfully detained from the applicant by the other party or is held by an officer under any legal process issued in the proceeding;
>
> (iii) the applicant or his agent has made a demand for the property which has been refused; and
>
> (c) state the applicant was advised by his solicitor, naming him, and verily believes he is lawfully entitled to recover possession of the property.

[9] To interpret this **Rule** as the appellant argues, as making any lawyer who provides such legal advice a compellable witness, and hence disqualifying him or her from acting further for that party, is not a reasonable interpretation of this **Rule**. The **Rule** requires the applicant to disclose that he or she obtained legal advice that he or she is entitled to recover possession of the property. There is nothing in the **Rule** suggesting that a lawyer giving such advice is required to disclose the information disclosed to him or her for the purpose of providing such advice. The authorities referred to by the appellant are distinguishable. They deal with situations where a party voluntarily raises legal advice he or she received as a reason for acting in a particular way and then refuses to disclose the advice or the information provided to the lawyer upon which the advice was based.

[10] With respect to the second aspect, the court is also satisfied the trial judge did not apply wrong principles of law in finding that no conflict of interest arises from Mr. Kulik representing the respondent in this action, and other lawyers in the law firm of McInnes Cooper representing Granbury on tax matters.

[11] The appellant admitted that the two matters are not “sufficiently related” so as to give rise to the presumption of a conflict described in the leading case on conflicts, **MacDonald Estate v. Martin,** [1990] 3 S.C.R. 1235. Many, if not most, cases where a conflict has been found to exist involve matters that are sufficiently related and, in fact, many cases involve lawyers having been involved in the same matter.

[12] Appellant's counsel argued that there is no need for a presumption in this case because the contents of paragraph 19 of the appellant's affidavit show that relevant confidential information has been disclosed and the affidavits filed on behalf of the respondent have not denied this although they stated no details were provided. This evidence was considered by the trial judge and it did not satisfy him that relevant confidential information about this action had been provided to other lawyers at McInnes Cooper. The trial judge did not err. There is nothing in the appellant's affidavit suggesting he provided any information about the mortgage itself which is what is relevant in this action. Further, there can be nothing confidential about the amount advanced under the mortgage since a third party, the mortgagor, knows this information.

[13] The trial judge also considered the lengthy almost three year delay of the appellant in bringing his application to remove the respondent's solicitor of record, during which Mr. Kulik represented the respondent in court on several occasions. He did not accept the appellant's explanation for this delay. He did not err in this. As suggested by the trial judge it must have been evident from the time the action was commenced in 1998 that the validity of the appellant's mortgage would be an issue in this action.

[14] The fact that the appellant admits the two matters are not related means the *Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia* published by the Nova Scotia Barrister's Society is not infringed.

[15] The court is also satisfied no patent injustice results from the decision of the trial judge. Accordingly, the appeal is dismissed with costs payable by the appellant to the respondent in the amount of $1,000 including disbursements.

Hamilton, J.A.

Concurred in:

Glube, C.J.N.S.
Freeman, J.A.