NOVA SCOTIA COURT OF APPEAL

Citation: *Binder v. Royal Bank of Canada*, 2005NSCA94

Date: 20050616
Docket: CA 206440
Registry: Halifax

Between:

Fabian Lowell Binder

Appellant

v.

The Royal Bank of Canada and The Bank of Montreal

Respondents

Judges: Cromwell, Saunders and Oland, JJ.A.

Appeal Heard: September 24, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed with costs; appeal and cross-appeal on costs dismissed without costs per reasons for judgment of Oland, J.A.; Cromwell and Saunders, JJ.A. concurring.

Counsel: Richard Bureau and David Walker, Q.C., for the appellant
William Ryan, Q.C., for the respondent The Royal Bank of Canada
Douglas Tupper, Q.C. and Michelle Higgins, for the respondent The Bank of Montreal

Reasons for judgment:

[1] In August 1995 the appellant, Lowell Binder, commenced an action against the respondents, The Royal Bank of Canada (Royal Bank) and The Bank of Montreal (BMO) (collectively, the Banks) for losses sustained as a result of cheques allegedly cashed without proper endorsements. The Banks' application that same fall to strike the statement of claim was ultimately unsuccessful.

[2] In January 2003 the BMO applied for summary judgment, to strike the statement of claim, and to amend its defence to plead the New Brunswick statute of limitations. The Royal Bank made a concurrent application for the same purposes.

[3] Justice Gerald R.P. Moir of the Supreme Court of Nova Scotia granted the Banks' applications. In his Chambers decision dated August 18, 2003 he allowed the amendment of their defences. He also ruled that Binder's pleadings disclosed no reasonable cause of action, the New Brunswick statute applied, and Binder's action was out of time. Alternatively he held that under the *Bank Act*, R.S.C. 1985, c. B-1 as amended, the cheques on which Binder's claim were based were inadmissible in his action against the Banks. Justice Moir's decision on the Banks' applications is reported as 2003 NSSC 174. In his costs decision dated December 8, 2003 he awarded each of the Banks costs on its application and on the action, and denied Binder's request for costs.

[4] Binder appeals both decisions. Both Banks cross-appeal the costs order.

Background

[5] The facts which gave arise to Binder's action against the Banks involve the financing of an apartment building property located in Moncton, New Brunswick which was owned by Gorbin Enterprises Limited, a company incorporated in New Brunswick. Binder alleges that he was a shareholder as well as an officer of Gorbin Enterprises. He makes no complaint about the construction mortgage taken against the property in 1968.

[6] Binder's claim against the Banks concern a second mortgage and cheques which represented the mortgage proceeds. In 1972 Max Gordon was president of Gorbin Enterprises and Binder its secretary and treasurer. On behalf of that company, Max Gordon signed a second mortgage of $75,000 in favour of Standard

Investments Limited. Reuben Cohen, a Moncton lawyer, acted for both mortgagor and mortgagee.

[7] Standard Investments issued a cheque for $54,837.81, payable to Max Gordon, his wife, Gorbin Enterprises and Cohen. It was endorsed by Max Gordon (both for himself and on behalf of Gorbin Enterprises) and by Mrs. Gordon, and then deposited to lawyer Cohen’s account at a branch of the BMO in Moncton. After certain deductions, Cohen issued a cheque drawn on that account to Gorbin Enterprises, Max Gordon and Mrs. Gordon for $49,837.81. That second cheque was again endorsed by Max Gordon (both for himself and on behalf of Gorbin Enterprises) and by Mrs. Gordon. It was deposited to the account of Gordon’s Concrete Products Ltd. at a branch of the Royal Bank in Moncton. The Royal Bank subsequently presented the cheque to the BMO which honoured it. According to Binder’s pleadings, Max Gordon was the principal and primary shareholder of Gordon’s Concrete.

[8] In 1981 Central Trust, successor mortgagee to Standard Investments, foreclosed on the second mortgage. It bought in at the foreclosure sale and then sold the apartment property the following year. Gorbin Enterprises was dissolved in 1983.

[9] In his pleadings Binder alleges that he first learned of the existence of the second mortgage in 1982, around the same time as he learned of its foreclosure. He claims that Max Gordon defrauded Gorbin Enterprises and consequently Binder. Among other things, Binder asserts that the BMO wrongfully cleared the Standard Investments cheque and deposited it to Cohen’s account contrary to standard banking practices and Gorbin Enterprises’ signing authority. He maintains that the Royal Bank’s deposit of the cheque from Cohen’s account into an account (Gordon’s Concrete) other than that of Gorbin Enterprises is also contrary to standard banking practices and Gorbin Enterprises’ signing authority.

[10] In 1988 Binder wrote Standard Investments. The original mortgagee’s letter in reply dated March 28, 1988 enclosed copies of the second mortgage and the cheques which had advanced the mortgage funds. Two months later Standard Investments provided a copy of the disbursement statement. That same year Binder obtained a copy of the cheque which had been deposited to the Gordon Concrete account at the Royal Bank.

[11] Binder also contacted the Banks. In a letter dated June 7, 1988 a BMO bank manager in Moncton responded that the period of prescription for a claim such as his is six years and therefore he had no legal recourse.

[12] Following lengthy correspondence with each of them, in 1995 Binder commenced an action in Nova Scotia against the Banks for personal losses sustained as a result of the cheques allegedly being cashed without proper endorsement. Both Banks filed defences pleading s. 2(l)(e) of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258. The BMO also pled the *Bank Act*.

[13] In October 1995 the Banks applied jointly to strike Binder's statement of claim under *Civil Procedure Rules* 14.25 and 25.01. The Chambers judge allowed their application under *Rule* 25.01, holding that Binder's action was barred by the Nova Scotia limitations statute. Her decision was overruled on appeal on the grounds that the application had not been supported by an agreed statement of facts: *Binder v. Royal Bank of Canada*, [1996] N.S.J. 126 (C.A.). Since the Chambers judge had made no finding with respect to the application to strike pursuant to *Rule* 14.25 and no notice of contention had been filed, this court did not address that application in its decision.

[14] The BMO joined Cohen as a third party in 2001. His defence included the *Limitations of Actions Act*, R.S.N.B. 1997, c. L-8.

[15] In June 2002 *Civil Procedure Rule* 13.01 was amended to allow a defendant to apply for summary judgment. The Banks applied for summary judgment under amended *Rule* 13, to strike under *Rule* 14.25, and to amend their defences to plead the New Brunswick limitations statute as Cohen had. Their applications were heard on April 16 and June 4, 2003.

[16] Justice Moir allowed the Banks' applications to plead the New Brunswick *Limitation of Actions Act*. After considering the distinctions between *Rules* 13.01 and 14.25, he decided that the pleadings disclosed no reasonable cause of action based on the rule in *Foss v. Harbottle,* (1843) 2 Hare 461, 67 E.R. 189. Moreover, the New Brunswick limitations statute applied and consequently Binder's action was out of time. In the alternative, the Chambers judge was of the view that the cheques were inadmissible evidence under the *Bank Act*.

[17] In their submissions on the issue of costs, BMO presented evidence that its legal fees exceeded $100,000 and Binder offered evidence that his legal fees and disbursements exceeded that same amount. Each of the BMO and the Royal Bank was awarded $1,500 on the application and $2,500 on the action. Binder's request for costs was denied. Cohen, the third party, received $500 on the application and $2,500 on the action, payable by the BMO but recoverable from Binder.

[18] Subsequent to the Chamber judge's decision on costs and before the hearing of this appeal and cross-appeals, the BMO with the consent of all parties discontinued its third party claim against Cohen. Max Gordon died in 2003.

Issues

[19] All of the grounds of appeal and cross-appeal can be summarized and restated as follows:

1. Whether the Chambers judge committed reviewable error in granting the Banks' application to amend their defences;

2. In view of the timing of the applications, whether he erred in allowing the applications to strike or alternatively to grant summary judgment;

3. Whether he erred in awarding summary judgment against Binder under the New Brunswick *Limitation of Actions Act* or the *Bank Act*;

4. Whether he erred in concluding that the statement of claim should be struck as disclosing no reasonable cause of action pursuant to the rule in *Foss v. Harbottle*;

5. Whether he erred in not awarding costs to Binder; and

6. Whether, when awarding costs to the Banks, he erred in law.

[20] In this decision, I will deal first with all matters pertaining to the appeal and subsequently to those concerning costs.

The Appeal

Standard of Review

[21] The Chambers judge's order striking Binder's claim is one which has a final or terminating effect. In these circumstances the test is not that usually applied to discretionary orders of an interlocutory nature but rather, whether there was an error of law resulting in an injustice: *Purdy Estate v. Frank*, [1995] N.S.J. No. 243 (C.A.) at § 10; *Clarke v. Sherman*, [2002] N.S.J. No. 238 (C.A.) at § 10.

[22] For the reasons that follow, I am of the view that Justice Moir did not commit any error which would justify interference by this court in allowing the Banks to amend their defences, in determining that the New Brunswick *Limitation of Actions Act* was applicable, and in granting summary judgment. Nor am I satisfied that he made any reviewable error in striking the statement of claim as disclosing no reasonable cause of action.

Amendment of Pleadings

[23] The Banks had originally pled the Nova Scotia *Limitations of Actions Act* only. As in the Nova Scotia statute, the New Brunswick *Limitation of Actions Act* provides that an action such as that brought by Binder must be commenced within six years after the cause of action arose. However, unlike its counterpart in this province, the New Brunswick statute does not include any discretion to extend a limitation period by up to four years.

[24] In deciding whether to grant the Banks' application to amend their defences to include the New Brunswick *Limitation of Actions Act*, the Chambers judge quoted *Stacey v. Consolidated Foods Corp. of Canada Ltd.*, [1986] N.S.J. No. 356 (C.A.) where this court stated that an amendment is to be allowed:

> . . . unless it was shown to the judge that the applicant was acting in bad faith or that by allowing the amendment the other party would suffer serious prejudice that could not be compensated by costs.

[25] The Chambers judge was satisfied that there was no bad faith on the Banks' part in requesting amendment of their defences to include the New Brunswick *Limitation of Actions Act*. He stated that the prejudice is to be found in having a new claim or a new defence raised after the time of pleadings, that in 1995 the

Banks had pled the Nova Scotia *Limitation of Actions Act* which raised the same factual issues as the New Brunswick statute, and that Binder would suffer no prejudice were the amendment allowed. At § 43 of his decision he concluded:

> In my assessment the banks have a serious defence to put forward under the New Brunswick statute and, in all the circumstances, it would be unjust to prevent the defence from being put before the Court. . . .

[26] Binder does not say that by relying upon *Stacey*, the Chambers judge committed an error of law by relying upon the incorrect test. Rather, his argument against the amendments sought by the Banks was essentially two-fold. First, he submits that their applications were brought too late. Secondly, he argues that such amendments would cause him extreme prejudice.

[27] Amendments to pleadings are governed by *Civil Procedure Rule* 15 which reads in part:

> **Amendment of a document filed in a proceeding**
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> 15.01. A party may amend any document filed by him in a proceeding, other than an order,
>
> > (a) once without the leave of the court, if the amendment is made at any time not later than twenty (20) days from the date the pleadings are deemed to be closed or five (5) days before the hearing under an originating notice;
> >
> > (b) at any other time if the written consent of all the parties is filed;
> >
> > (c) at any time with the leave of the court.
>
> **Amendments by the court**
>
> 15.02. (1) The court may grant an amendment under rule 15.01 at any time, in such manner, and on such terms as it thinks just.

> (2) Notwithstanding the expiry of any relevant period of limitation, the court may allow an amendment under paragraph (1),
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> . . .
>
> (3) The court may allow an amendment under paragraph (2) notwithstanding the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same or substantially the same facts as the original cause of action.

[28] Binder's submission that the Banks' application to amend to include the further limitation defence was brought too late is based on *Rule* 14.14(c). Although it had not been raised before the Chambers judge, he argues that the judge erred in law by failing to take that *Rule* into consideration. It reads:

> 14.14. Subject to rules 14.15 and 14.18, a party in his defence or in any subsequent pleading shall,
>
> (c) specifically plead any matter, for example, performance, release, payment, any relevant statute of limitation, statute of frauds, fraud, or any act showing illegality that,
>
> > (i) might make any claim or defence of the opposing party not maintainable;
> >
> > (ii) if not specifically pleaded, might take the opposing party by surprise;
> >
> > (iii) raises issues of fact not arising out of the preceding pleadings.
> > (Emphasis added)

[29] I would reject Binder's submission. *Rule* 14.14(c) does not stipulate that limitation provisions must be included in the original pleadings. It requires only that these be specifically pleaded, not that they be pleaded at the outset. My view is further supported by the fact that nothing in *Rule* 14.14(c) purports to limit the application of *Rule* 15.01 which allows an amendment at any time with leave of the court.

[30] The prejudice Binder alleges was caused to him by the amendment relates to the period between the Banks' applications in 1995 and their applications in 2003. He submits that immediately after this court reversed the 1995 Chambers decision which had dealt with the limitation of actions argument but not *Rule* 14.25, the Banks could have reapplied under that *Rule* to have the statement of claim struck. Such an application was not made for some six years. In the interim lists of documents, reports by experts, discovery examinations and interlocutory applications were prepared or undertaken. Binder asserts that the prejudice to him were the amendments granted should prevail over the injustice to the Banks because they could have initially pled the New Brunswick *Limitation of Actions Act* or sought to amend their defences at an early or earlier date, and did neither. The prejudice upon which he relies are costs thrown away. Such costs can, in a proper case, be compensated for by an award of costs and do not therefore constitute the sort of prejudice that would deprive the Banks of the amendment they sought.

[31] I would dismiss the appeal in relation to the Chambers judge's decision to grant the Banks' application to amend their defences.

New Brunswick *Limitation of Actions Act*

[32] For the reasons which follow, I would reject Binder's submission that the Chambers judge erred in awarding summary judgment against Binder under the New Brunswick limitations statute.

[33] The Chambers judge found that, once properly pleaded as a result of the amendment which he permitted, the New Brunswick statute applied and afforded the Banks a complete defence to the appellant's claims. He found that the appellant knew all of the material facts by 1988 and therefore that the six year limitation period under the New Brunswick statute expired a year before the appellant commenced his action.

[34] Binder does not challenge the judge's conclusion concerning the applicable choice of law rule. Moreover, no serious argument is mounted against his conclusion that, if the New Brunswick limitations statute applies, Binder's claim against the Banks is statute barred. Rather, the points taken on appeal are first, that the Chambers judge erred in addressing the limitation periods of both Nova Scotia and New Brunswick; second, that he erred in failing to conclude that the Banks had

"chosen" the substantive law of Nova Scotia; and third, that he erred in failing to conclude that the Banks were estopped from relying on the New Brunswick limitation period. In my view, none of these points has any merit.

[35] The Banks' defences, as amended, pleaded the Nova Scotia and New Brunswick limitation provisions in the alternative. The judge therefore cannot be faulted for addressing both provisions which were relied on by the Banks in the alternative on their summary judgment applications.

[36] Binder also submits that the Banks had "chosen" the law of Nova Scotia so that the judge ought not to have relied on the New Brunswick limitation period to dismiss his claim. He makes two related points. The first is that by relying on the substantive law of Nova Scotia, such as the Nova Scotia limitations statute and certain *Civil Procedure Rules* which Binder says are substantive in nature, the Banks should be considered as having "chosen" the substantive law of Nova Scotia. The second point, related to this, is that the Banks' failure to plead the New Brunswick limitation provision earlier in the proceedings constituted a waiver of their right to invoke it later. I will address these points in turn.

[37] It is true, of course, that parties may agree expressly or by implication that a certain legal regime will govern their relationship: see e.g., *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, per La Forest, J. at 1053. An example of an express agreement would be a choice of law clause in a contract; an example of an implicit agreement would be failure to plead foreign law with the result that the presumption that it is the same as domestic law would be applied: *Ibid.* There is no suggestion here that the parties expressly agreed to be bound by the law of a particular jurisdiction. The question, therefore, is whether they did so by necessary implication. Binder says that such an implication arises from the Banks' failure to plead the New Brunswick provision and the reliance by the Banks on the substantive law of Nova Scotia.

[38] In my view, these points do not support an implicit agreement by the Banks to be bound only by Nova Scotia law and there was no triable issue in relation to these matters. As the Chambers judge correctly held, the fact that the Banks adhered to the Nova Scotia *Civil Procedure Rules* in responding to the law suit Binder brought in Nova Scotia ". . . says nothing about [the] applicable substantive law.": Reasons of Moir, J. at § 48. As for the Banks' reliance on the Nova Scotia limitations statute, as noted earlier, the amended pleading relies on the respective

limitation periods of Nova Scotia and New Brunswick in the alternative. That pleading is not consistent with a "choice" of Nova Scotia law.

[39] As for Binder's submission dealing with waiver, I agree with the Chambers judge that the facts here did not raise a triable issue concerning waiver by the Banks of the New Brunswick limitation period. In order to waive a limitation defence, the Banks would have to be shown to have had full knowledge of the defence and an unequivocal and conscious intention to abandon it: see, for example, Graeme Mew, *The Law of Limitations*, 2d ed., (Butterworths, 2004) at 126-7; *Marchischuk v. Dominion Industrial Supplies Ltd.* (1989), 39 C.C.L.I. 269; M.J. No. 75 (Q.L.) (Q.B.) as affirmed by [1991] 2 S.C.R. 61 at 68; *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at 499-500. As the Chambers judge correctly pointed out, the only evidence offered in support of the supposed waiver is the course of the proceeding itself. The earlier application based on the Nova Scotia limitations statute and the late pleading of the New Brunswick limitation period do not establish waiver and do not show that there is any triable issue concerning waiver. These steps in the proceeding do not raise a triable issue either as regards the Banks' full knowledge of the availability of that defence or an unequivocal intention to abandon it.

[40] I pause here to observe that Binder repeatedly characterizes this as a case of failure to plead the New Brunswick limitation provision. In light of the amendment, that is an incorrect characterization of the facts. At the best, the argument is circular for it amounts to saying that the pleading should not have been amended because the amendment related to something that was not in the original pleading. But that, of course, is why amendments are provided for under the *Rules*. Binder's attempt to turn an amendment sought late in the proceedings into waiver is, in my view, completely unsuccessful.

[41] Binder also refers to the principles of estoppel, although my understanding of this submission is that it relates mainly to whether the amendment should have been granted rather than to the issue of whether the judge, having granted the amendment, should nonetheless have refrained from applying New Brunswick law. In any event, it is clear that there is no triable issue concerning estoppel here. To show that the Banks are estopped from relying on the New Brunswick limitation period, Binder would have to show that the Banks made a promise or gave an assurance which they intended to affect their legal relationship and to be acted on and that he relied on the promise or assurance to his detriment. While the promise

or assurance must be unambiguous, it may be inferred from the circumstances: see *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57. The material before the Chambers judge did not raise a triable issue with respect to whether the Banks made such a promise or gave such an assurance.

[42] I would, therefore, not give effect to Binder's grounds of appeal in relation to the summary judgment based on the New Brunswick limitation period.

The Rule in *Foss v. Harbottle*

[43] The Chambers judge struck Binder's statement of claim on the basis of the rule in *Foss v. Harbottle*. In his decision, he referred to *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at § 59, wherein La Forest, J. stated:

> [59] The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd.* (No. 2), [1982] 1 All E.R. 354, at p. 367, as follows:
>
>> The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. . . .

[44] According to Binder's statement of claim, Gordon and Binder each held the same number of shares in Gorbin Enterprises. Binder urges that thus they were really equal partners or, as his factum puts it: "Gorbin was really a partnership dressed in a corporate costume." In essence, he argues that Gorbin Enterprises was not a company. Rather, the fact that Gordon and Binder were equal shareholders

means that in reality Gorbin Enterprises was a partnership, one disguised as a corporation, to which the rule in *Foss v. Harbottle* would not apply.

[45] This argument is untenable. Binder's statement of claim asserts that Gorbin Enterprises was incorporated in 1968. Nothing in the pleadings indicates that it was ever anything other than a corporate entity. Nor does Binder present any case law or authority in support of the proposition that the rule in *Foss v. Harbottle* does not apply to companies with equal shareholders or to closely held companies.

[46] According to his statement of claim, Binder invested $10,000 and five months of his time in the construction of the apartment. This, says Binder, constitutes an investment separate from his shareholder investment and allows him to bring a personal action against the Banks, one separate from any derivative action.

[47] In support of this argument, Binder relies in particular upon *Pizzo v. Crory, Laws and Charterhouse Equities Limited et al.,* (1980) 71 N.S.R. (2d) 419 (S.C.N.S. T.D.), and *Vladi Private Islands Ltd. v. Haase et al.* (1990), 96 N.S.R. (2d) 323 (N.S.S.C. A.D.). In *Pizzo* the court held that the minority shareholder was not limited to a derivative action by the rule in *Foss v. Harbottle*. However there the personal claim was based upon alleged breaches of a certain shareholders agreement entered into by all the shareholders and upon certain negligent misrepresentations made in a letter of reliance from one of them. Binder's statement of claim makes no mention of any shareholder agreement, nor does he claim on the basis of any other agreement or contract.

[48] In *Vladi*, shareholders of a closely held company commenced both a derivative and a personal class action against certain directors. This court upheld the decision below which refused to grant the directors' application to strike. It determined that according to the authorities, a fiduciary duty may be owed by directors to shareholders and that whether such a duty exists depends on all of the facts of the particular case. Binder's statement of claim does not identify Gordon as a director of Gorbin Enterprises, nor does it allege breach of any duty by a director to a shareholder.

[49] While those cases are thus distinguishable, it remains necessary to consider whether the Chambers judge erred by applying the rule in *Foss v. Harbottle* to strike where Binder's statement of claim asserts that he had made personal

investments of time and money in the construction of the apartment building. In my respectful view, he did not.

[50] Contrary to Binder's submission, the Chambers judge did not fail to pay any attention to any personal claim he may have. Rather, Moir, J. considered whether Binder's action was derivative or personal:

> [34] . . . The issue is whether the claim advanced by the shareholder is personal or derivative. As in *Hercules*, the claim here is undoubtedly derivative. The essence of the pleaded claims is the banks' acceptance for deposit to third party accounts of faultily endorsed cheques payable to Gorbin Enterprises. Assuming everything stated as fact in the statement of claim to be true, the cause would be Gorbin Enterprises' if there is one. I cannot see how a shareholder can have an [sic] complaint about the absence of a signing officer's signature on an endorsement, aside from the injury to the company and the consequential injury to share value.
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> . . .
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> [36] . . . Assuming it to be true that the banks accepted cheques payable to Gorbin Enterprises but improperly endorsed, it does not follow that the banks are liable to shareholders of the injured company. That is the premise of the statement of claim. Thus, the outcome of this action is plain and obvious. The claim is obviously unsustainable because it undoubtedly runs afoul of the principle in *Foss v. Harbottle*.

[51] Binder's submission regarding a personal action against the Bank amounts to a claim that he is an investor or unsecured creditor in Gorbin Enterprises. However, his statement of claim does not assert any connection with the Banks other than through Gorbin Enterprises. For example, nothing in his pleadings suggests representations, reliance, proximity giving rise to a duty of care, privity of contract, or a direct proprietary interest. Rather, they show that Binder's claim is founded on the BMO's deposit of the Standard Investments cheque payable *inter alia* to Gorbin Enterprises into Cohen's account and the Royal Bank's deposit of the cheque from Cohen's account into the Gordon's Concrete account, both allegedly contrary to Gorbin Enterprises' signing authority and standard banking practices. The wrongs alleged were done to Gorbin Enterprises. They were not wrongs done to Binder. In my respectful view, the Chambers judge neither erred in his characterization of Binder's claim nor in his determination that in the

circumstances as alleged by him, any cause of action would lie with Gorbin Enterprises.

Costs

Standard of Review

[52] Costs are in the discretion of the trial judge. This court will not interfere in a judge's exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice: *Conrad (Guardian Ad Litem of) v. Snair*, [1996] N.S.J. No. 164 at § 5; *D.C. v. Children's Aid Society of Cape Breton (Victoria)*, [2004] N.S.J. 470 (NSCA); and *Fraser v. Westminer Canada Ltd.,* 2005 NSCA 27.

[53] The parties each challenge the Chambers judge's treatment of costs. Binder argues that even though he lost the application brought by the Banks, he should still have been awarded costs. The Banks complain that the amount awarded for their costs was so paltry as to constitute an injustice.

[54] For the reasons that follow, I have not been persuaded that the Chambers judge erred in denying costs to Binder or in awarding the costs he did to the Banks. I would dismiss the appeal and both cross-appeals against the costs order.

[55] The trial judge gave an oral decision on costs after hearing submissions from the parties. The Banks had been successful in their application and in the action as a whole. In regard to their claim for costs the judge stated:

> The plaintiff is an individual. The statement of claim claimed for injuries allegedly done to a corporation. I found that the claim was clearly unsustainable because of the rule in Foss and Harbottle. The action was commenced eight years ago. The application to strike could have been brought at inception. In all of the circumstances, I am satisfied that costs should be restricted to the earliest point at which the application could have been brought.
>
> Specifically, I do not accept the possibility of a derivative action as any reason for delay in bringing the application that would have involved then a separate action just as it might today; and it would have involved then, as now, some assessment

> of the merits of the claim, including limitation periods, when the application for leave to bring the derivative action was brought. (Emphasis added)

[56] In regard to Binder's claim for costs, he concluded:

> This is not a case in which I would order costs to the unsuccessful party. The advantage that would have been realized by an early application to strike the statement of claim on the basis of Foss and Harbottle is totally eclipsed by Mr. Binder having brought the claim in the first place, and despite the rule in Foss and Harbottle.

[57] In the result the Banks were each awarded $4,000 ($1,500 on the application and $2,500 on the dismissed action), Binder received no costs, and the BMO was ordered to pay $3,000 ($500 on the application and $2,500 on the dismissed third party claim) to Cohen.

[58] Each of the Banks put forward the same grounds of appeal, namely:

1. The Chambers judge had erred in law in finding that they were obligated to make an interlocutory application at an earlier stage to have Binder's cause of action struck and including this as a factor in awarding costs;

2. he had improperly exercised his discretion in awarding costs by taking into account irrelevant considerations; and

3. his award of costs to them was so low as to be patently unjust.

I will deal with each of these grounds in turn.

[59] The Banks maintain that the Chambers judge applied wrong principles of law and thus committed reviewable error in stating that "costs should be restricted to the earliest point at which the application could have been brought." This, they say, runs counter to the fundamental principle that it is the plaintiff that bears the

onus of proof. They refer to *Landymore v. Hardy*, [1992] N.S.J. No. 79 (N.S.S.C. T.D.) where Saunders, J. (as he then was) stated:

> Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned.

[60] The Banks rely upon *Western Trust Co. v. Canada Northern Railway*, [1919] 3 W.W.R. 815 (Sask. C.A.). There the trial judge had denied costs to the successful defendant holding that the defendant could have searched and found an affidavit allowing a motion to dismiss the action and, that in failing to do so, it permitted the plaintiff to proceed to trial and to incur costs that could have been avoided. In allowing the appeal and varying the judgment below to order that the plaintiff pay the defendant's costs of the action, Elwood, J.A. for the court stated:

> 19. In my opinion it would be most unfair to defendants, and dangerous and far reaching in consequences, to hold that defendants must, at the earliest possible moment and before the trial, bring before the Court facts which show that the plaintiff is not entitled to proceed with the action, under the penalty of being deprived of their costs if they do not so proceed.

[61] The Banks, and in particular the Royal Bank, also argue that the judge's consideration or failure to properly consider serious yet unfounded allegations made by Binder constituted an error in law. Binder's amended statement of claim had included several allegations and claims including:

(a) an allegation that when it cashed and deposited a cheque made in part to Gorbin Enterprises into the account of Gordon's Concrete, the Royal Bank was the sole and direct beneficiary of the proceeds of the second mortgage as it applied those funds to its own account with Gordon's Concrete and did so for the benefit of itself, only;

(b) allegations that "shortcuts" taken by the Banks were illegal, contrary to their fiduciary duties and obligations as chartered banks, and resulted in losses and damages incurred by Binder; and

(c) claims against the Royal Bank of "wanton and reckless disregard" of the interests of third parties such as Binder as a result of the "conversion" of funds of Gorbin Enterprises.

[62] Binder had also made several complaints, all of which were dismissed. These included complaints to:

(a) the Law Society of Upper Canada against the Senior Vice-President and General Counsel of the Royal Bank and against the Managing Director of the BMO legal department;

(b) the Nova Scotia Barristers' Society against the solicitor of record and associate counsel for the Royal Bank and against counsel for the BMO;

(c) the Law Society of New Brunswick against Cohen, the third party; and

(d) the Superintendent of Financial Institutions and various Members of Parliament against both Banks.

[63] In his decision, the Chambers judge referred to the numerous complaints Binder made against professional representatives or employees of the Banks. In his view, those and some statements and grievances contained serious allegations. He continued:

> . . . However, unlike Justice Hood in Smith's Steel [sic] and Campbell, I have not heard testimony and cannot make required findings, especially findings as to motive. While this information is concerning, even alarming, I do not believe I am equipped to draw conclusions relevant to costs.

[64] The case of *Smith's Field Manor Development Ltd. v. Campbell et al.* to which the Chambers judge referred involved a very complex and lengthy trial before Justice Suzanne Hood concerning the bitter litigation that ensued among certain investors, and others, over the development of a 52 unit retirement home on

Green Street in Halifax. Justice Hood's lengthy written judgment following trial is reported at [2001] N.S.J. No. 230; appeal allowed in part (for reasons that are not material to this case) 2002 NSCA 104. It is obvious that Moir, J. was familiar with his colleague's decision in *Smith's Field* and considered its circumstances to be vastly different than this dispute between Binder and the Banks. His clear statement that he was neither prepared nor equipped to follow the approach taken by Justice Hood is hardly surprising considering the description Freeman, J.A. gave to the case when it came to this court on appeal:

> [20] In a lengthy judgment following a 38 day trial, Justice Hood made numerous findings of fact and credibility, generally adverse to the appellants and favourable to the respondent. . . .

Clearly the Chambers judge in this case felt that he did not enjoy the same advantage as had Justice Hood when it came time for her to assess costs. That conclusion by Justice Moir is a finding of fact which is owed a high degree of deference by this court. It has not been shown to have resulted from palpable and overriding error, and there is no reason for us to interfere. (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[65] Neither am I persuaded that the Chambers judge applied any wrong principles of law, or came to a decision that is so clearly wrong as to amount to a manifest injustice. He was thoroughly familiar with the record and the manner in which all parties had asserted or defended their claims. With that advantage, and in exercising his discretion, he was in the best position to determine the date when cost consequences arose, their extent, and by whom they ought to be paid. When making such determinations there was nothing wrong in Justice Moir taking into account such features as the timeliness of the Banks' application. Such considerations were well within his discretion and it is not the role of this court to substitute our view, for his. The point made by Chipman, J.A., in *Couse v. Goodyear Canada Inc.*, (2005) NSCA 46 at § 43-44 seems especially apt:

> In arriving at an award of costs, the trial judge has a great deal of latitude under the jurisprudence and, in particular, under **Rule** 63 . . .

> In exercising his discretion, the trial judge enjoys the benefit of an intimate knowledge of the manner in which the trial progressed before him and the conduct of the parties.

I am not persuaded that there is any reason to interfere with the Chambers judge's exercise of discretion. I would add that the Banks' long delay in seeking to plead the New Brunswick limitation defence and the general rule that costs should be awarded against the party seeking an amendment also tend to support the judge's moderation of the Banks' costs.

[66] The Banks also argue that the costs award was patently unreasonable. They point out that the recovery of costs should represent a substantial contribution although not a complete indemnity of the parties' reasonable expenses: *Landymore*, supra. If the amount involved pursuant to *Rule* 63.04 is $1,200,000 (the valuation of the apartment property) and a moderate scale (Scale III) is applied, costs would have been in excess of $40,000 plus disbursements. If costs are calculated as a lump sum, the Banks argue that the issues involved were complex, highly contested and necessitated significant pre-chambers preparation including discoveries and research, that Binder persisted in pursuing a flawed action and claimed substantial damages, and that the Banks, its employees and officers were inappropriately harassed and embarrassed. The BMO submits that an award based solely on the tariffs would be inappropriate and requested a lump sum award of $80,000 in costs.

[67] In my view there is no merit to this final submission on the part of the Banks. While on the record before him Moir, J. was not prepared to draw specific conclusions regarding motive, he was certainly familiar with the history of the litigation from the nature of the pleadings and submissions, and was alive to the parties' diametrically opposed positions on costs. Bearing in mind those portions of his reasons concerning the conduct of the parties and the way in which the case was litigated, I am not prepared to say that the sums he allowed for costs were patently unjust.

[68] For all of these reasons I would dismiss Binder's appeal seeking costs, and the Banks' cross-appeals demanding a significant increase in the amount of costs.

[69] His appeal of the Chambers judge's decision granting amendment of the defences, striking out the statement of claim, and in the alternative granting summary judgment, having been dismissed Binder shall pay each of the Banks costs of $1,500 together with disbursements. His appeal of the costs decision and the Banks' cross-appeals of that decision are dismissed without costs.

Oland, J.A.

Concurred in:

Cromwell, J.A.

Saunders, J.A.