NOVA SCOTIA COURT OF APPEAL

Citation: *MacRury v. Keybase Financial Group Inc.*, 2017 NSCA 8

Date: 20170117
Docket: CA 453027
Registry: Halifax

Between:

Kenneth MacRury and
Sheila Knowlton-MacRury

Appellants

v.

Keybase Financial Group Inc., Global Maxfin Investments Inc./Les Investissements Global Maxfin Inc. and Joseph Daniel Laurie

Respondents

Judges:	Farrar, Saunders and Hamilton, JJ.A.
Appeal Heard:	November 21, 2016, in Halifax, Nova Scotia
Held:	Leave to appeal granted, appeal dismissed, per reasons for judgment of Farrar, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Jane O'Neill and Gavin Giles, Q.C., for the appellants Kim T. Duong, for the respondents Keybase Financial Group Inc. and Joseph Daniel Laurie Michael S. Ryan, Q.C., for the respondent Global Maxfin Inc.

Reasons for judgment:

[1] In 2011, Kenneth MacRury and Sheila Knowlton-MacRury sued Joseph Laurie, a mutual fund salesman and his respective employers, Global Maxfin Investments Inc. ("Global") and Keybase Financial Group Inc. ("Keybase") for damages. The claims, made jointly and severally, are pleaded in negligence and for breaches of contractual and fiduciary duties.

[2] The MacRurys moved for summary judgment against all defendants on evidence pursuant to *Civil Procedure Rule* 13.04. Justice Denise Boudreau, in a decision dated June 23, 2016, dismissed the motion (reported as 2016 NSSC 159). The MacRurys seek leave to appeal and, if granted, appeal the decision. The main points on the appeal turn on a settlement agreement Mr. Laurie reached with a regulatory body and the nature and effect of this Court's decision in *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47.

[3] For the reasons that follow, I would grant leave to appeal but dismiss the appeal with costs to Keybase and Laurie in the amount of $2,000 and to Global, also in the amount of $2,000. Costs are payable forthwith and in any event of the cause.

Background

[4] The MacRurys had their initial contact with Mr. Laurie late in 2006. At that time he was employed by Global, a mutual fund dealer. In January, 2007, the MacRurys opened an account with Global purchasing units in mutual funds with a market value of approximately $750,000. The purchase was funded with their equity and the amount of $500,000 which they borrowed on the recommendation of Mr. Laurie. This was referred to as a leveraged investment strategy.

[5] The MacRurys were required to sign a "Know-Your-Client" form to open the account with Global. The form identified their investment experience, investment objectives and time horizons.

[6] On February 28, 2007, Mr. Laurie left Global to join Keybase as a mutual funds salesman. The MacRurys became Keybase clients from that point. The assets which they held in their Global account were transferred to Keybase.

[7] In their Statement of Claim, the MacRurys allege that the current value of the investments is approximately $1.1M while their debt obligations stand at approximately $1.75M. They allege that as a direct result of Mr. Laurie's advice regarding the leveraged investment strategy, their net worth has declined by some $650,000. They further allege that the leveraged investment strategy recommended to them and implemented for them by Mr. Laurie and Global/ Keybase was totally unsuitable for their risk tolerance.

[8] Mr. Laurie and Keybase filed a joint defence. In that defence they argue that the MacRurys were knowledgeable investors and understood the risks associated with the investment strategy. They also plead that any losses the MacRurys suffered were as a result of normal economic or market fluctuations, contributory negligence on the part of the MacRurys or their failure to mitigate. Global filed a similar defence.

[9] The key factor, and the MacRurys' foundation for the summary judgment motion, involves the resolution of 25 complaints Mr. Laurie's clients (including the MacRurys) made with the Mutual Fund Dealers Association of Canada ("MFDA"). The MFDA commenced disciplinary proceedings against Mr. Laurie as a result of those complaints in 2014.

[10] On August 11, 2015, Mr. Laurie and the MFDA reached a settlement agreement (the Settlement Agreement) with respect to those proceedings. Global and Keybase were not involved in the proceedings before the MFDA nor were they signatories to the settlement agreement.

[11] The Settlement Agreement formed the basis for the MFDA Atlantic Regional Council's decision of October 26, 2015 to discipline Mr. Laurie by, among other sanctions, suspending him from conducting securities related business for 2.5 years. The admissions are incorporated into and form part of that decision.

[12] The Settlement Agreement is referenced in detail in the motions judge's decision (¶10-18). I will not repeat what she said. However, in summary, Mr. Laurie acknowledged that he had misrepresented the Know-Your-Client information recorded on the clients' account; misrepresented clients' risk tolerances; overstated their income; overstated their assets; and understated their liabilities. He also admitted that he failed to properly explain the investment strategy to the clients and that the investment strategy was not suitable and appropriate for the clients having regard to their investment knowledge.

[13] In support of their motion, the MacRurys filed the affidavit of their solicitors, Gavin Giles, Q.C. (sworn April 14, 2016) and Jane O'Neill (sworn April 26, 2016). The evidence of the MacRurys essentially consisted of the proceedings before the MFDA, including the Settlement Agreement, and discovery evidence of Mr. Laurie.

[14] Global filed the affidavit of Maria Andreescu (sworn April 22, 2016). Global's evidence includes the documents which the MacRurys signed while they were clients of Global.

[15] Keybase and Mr. Laurie filed the affidavit of Mr. Laurie (sworn April 22, 2016) and the affidavit of Tijana Polic, with attachments (sworn April 22, 2016). Keybase's evidence included the discovery of Mr. MacRury as well as a number of documents signed by the MacRurys, including Know-Your-Client forms signed over a number of years.

[16] Neither Mr. nor Mrs. MacRury filed an affidavit in support of their motion.

Issues

[17] The appellants, in their factum, identify five issues. They are as follows:

Issue 1)	Should leave to appeal be granted?
Issue 2)	Did the Motions Judge correctly apply the test for Summary Judgment?
Issue 3)	Did the Motions Judge err in law by misapprehending the nature and effect of the admissions made by Joseph Laurie in prior proceedings before the Mutual Fund Dealers Association?
Issue 4)	Did the Motions Judge err in law by misdirecting herself on the nature and effect of the Decision of this Court in *National Bank v. Barthe Estate*, 2015 NSCA 47;
Issue 5)	Did the Motions Judge err in law by finding that Summary Judgment could not be granted because contributory negligence was alleged against the Appellants?

[18] I would restate the issues and reduce them to two:

1. Should leave to appeal be granted?

2. Did the motions judge err by misapprehending the nature and effect of the admissions made by Mr. Laurie and by misdirecting herself on the effect of this Court's decision in *National Bank v. Barthe Estate*?

Analysis

Issue #1 Should leave to appeal be granted?

[19] This is an appeal from an interlocutory motion for which leave is required. In *Burton Canada Company v. Coady*, 2013 NSCA 95, Saunders, J.A. set out the test for leave to appeal:

> [18] … The question of whether leave to appeal ought to be granted is one of first instance. The well-known test on a leave application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed. [citations omitted]

[20] I am satisfied that the appellants have raised arguable issues. I would grant leave.

Standard of Review on Summary Judgment Motions

[21] The respondents, Keybase and Mr. Laurie, ask us to deviate from the long-established standard of review on summary judgments in Nova Scotia. I decline to do so. In the recent decision of *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, Fichaud, J.A. adopted and affirmed the standard of review from *Burton*:

> [29] I adopt Justice Saunders' statement in *Burton*:
>
> > [19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the impugned order under appeal did or did not have a terminating affect, is now extinct. There is only one standard of review. We will not intervene unless wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. [citations omitted]

[22] That is the standard I will apply when addressing the appellants' arguments.

Issue #2 **Did the motions judge err by misapprehending the nature and effect of the admissions made by Mr. Laurie and by misdirecting herself on the effect of this Court's decision in *National Bank v. Barthe Estate*?**

[23] The new *CPR* 13 provides as follows:

> **Summary judgment on evidence in an action**
>
> **13.04 (1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> a) determine a question of law, if there is no genuine issue of material act for trial;
>
> b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[24] In *Shannex*, Fichaud, J.A. outlines, in detail, the approach which should be taken to the interpretation of Rule 13.04 and breaks it down into five sequential questions as follows:

1. Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?

2. If the Answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

   If the answers to #1 and #2 are No, summary judgment must issue.

3. If the answers to #1 and 2 are No and Yes respectively, leaving only an issue of law, the judge has the discretion to deny summary judgment. Governing that discretion is the principle in *Burton*'s second test: Does the challenged pleading have a real chance of success?

4. If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, the question becomes whether the judge should exercise his or her discretion to finally determine the issue of law.

5. If the motion is dismissed, the judge should ask whether the action ought to be converted to an application and, if not, what directions should govern the conduct of the action (*Shannex*, ¶34-42).

[25] Although the motions judge below did not have the advantage of *Shannex* in coming to her decision, she properly identified the correct question, that is, whether there were genuine issues of material fact for trial (Question #1 in *Shannex*). As she answered that question in the affirmative, she did not have to go further.

[26] The appellants' submissions to the motions judge, and before us, relied heavily on the decision of this Court in *National Bank* and the existence of the Settlement Agreement. Their argument is simply this: The motions judge failed to give effect to the Settlement Agreement which Mr. Laurie reached with the MFDA. Her failure to do so led her to conclude that there were material issues of fact which required a trial. It is succinctly stated in their factum as follows:

> 33. At paragraph 54 and 55, the Motions Judge held that admissions made to administrative bodies in a regulatory proceeding are not necessarily binding in a

> subsequent civil proceeding. She went on to find that "it would appear that only formal admissions made within a specific case would be considered binding." It is the MacRurys' position that these statements are contrary to well-established case law, including this Court's reasons in *National Bank Financial Ltd. v. Barthe* 2015 NSCA 47; the effect of which will be more fully discussion [sic] below under Issue 4.
>
> 34. There is no dispute that Laurie made the admissions in the MFDA Settlement. Further, there is no dispute that he made them willingly, with full knowledge of their effect. The facts and admissions in the Settlement Agreement have been adopted by the MFDA and form part of a decision and Order from that regulatory body [AB, Part 2, Vol 1 at pp. 38-40 (Order) and pp. 42-81 (Reasons)].
>
> 35. None of the Defendants have offered evidence that could raise an issue of material fact for trial regarding these issues. As a result of the admissions against interest, it is clear that the investments were not suitable for the MacRurys and that Laurie negligently misrepresented the risks of the investment, resulting in losses to them. As a result, the MacRurys say that these admissions are binding and relieve them of having to prove them at trial.

[27] The motions judge, with this same argument before her, reviewed the Settlement Agreement in some detail to determine what was actually admitted by Mr. Laurie in relation to the MacRurys and identified a number of problems. I will summarize her findings:

1. The Settlement Agreement contains an Overview which applies to all sections of the Agreement, those involving all clients and those involving some clients. The motions judge could not conclude that the Overview related to the MacRurys (¶42).
2. In the section addressing misrepresenting risks, investment knowledge and time horizons, it refers to all 25 clients. However, paragraph 23 of the Settlement Agreement provides variation within the group of 25 without identifying who were in and out using terminology like "most of the clients had limited or no investment knowledge"; "most of the clients had time horizons of less than 10 years based on their age, health issues and need for liquidity".(¶43).
3. The Settlement Agreement used generalized language that referred to "some or all the clients" which again was unprecise insofar as it relates to the MacRurys (¶46).

[28] She then goes on to identify those sections in the Settlement Agreement which she said could apply to the MacRurys and asked herself two questions:

1. Are the defendants (in particular, Mr. Laurie) bound by the admissions at trial?
2. If so, are there still genuine material questions of fact left for trial (¶50)?

[29] Having asked herself those questions she then proceeded to identify evidence before her which was contradictory or at least could be arguably contradictory, to the Settlement Agreement including:

1. Evidence in relation to Know-Your-Client forms which were updated regularly and signed by the MacRurys which identify the investment experience and education of the MacRurys as "good".
2. The MacRurys were looking at a 15 year time line as opposed to "most of the clients" identified in the Settlement Agreement who had time horizons of 10 years or less.
3. Although the plaintiffs had expressed concern about their investments, they made no changes to their investment strategy and expressed to Mr. Laurie that they were "in it for the long haul". (¶51)

[30] After thoroughly reviewing the Settlement Agreement and the use that she could make of it, the motions judge concluded that the Agreement may be admissible but the use to be made of it depended on the circumstances of the particular case:

> [55] Historically, for example, it would appear that only formal admissions made within a specific case would be considered binding on a party. Admissions made in other contexts were admissible, relevant, and impacted on credibility, but were not binding. (I note, for example, *R. v. Baksh* 2008 ONCA 116.)

[31] Her decision is consistent with the Supreme Court of Canada's approach in *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, where it addressed the issue of the admissibility and use to be made of prior civil or criminal decisions. Although *Malik* is referencing prior decisions, in my view, the reasoning is equally applicable where the Settlement Agreement is an integral part of the proceeding and where, as here, it forms the basis for the MFDA decision. After reviewing the authorities on the issue, Binnie, J., writing for a unanimous Court, concluded:

1. whether a prior civil or criminal decision is admissible in subsequent trials on the merits – including administrative or disciplinary

proceedings – will depend upon the purpose for which the decision is put forward and the use sought to be made of its findings and conclusions (¶46);

2. if the decision is admissible, the weight and significance given to it will be dependent on the individual circumstances of the particular case (¶47); and

3. the weight to be given to earlier decisions will rest on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it on the varying circumstances of the case (¶48).

[32] This approach allows the trial judge flexibility in determining whether the Settlement Agreement is admissible and the extent to which it will be used in the determination of the issues at trial.

[33] The motions judge also distinguished *National Bank*. In that case, this Court looked at the impact on the litigation of the failure by National Bank to disclose the settlement agreement. She reasoned:

> [54] Frankly, I remain unconvinced. It must be remembered that the *National Bank (CA)* case had very particular facts which were being addressed by the Court of Appeal. That court was dealing with, in its view, a situation of very clear misconduct which needed to be addressed: that is, the concealment of the agreement by National Bank. Its comments must be interpreted in that light. I do not interpret the case as conclusively standing for the proposition that admissions made to administrative bodies, would always constitute "trump cards" in any litigation.
>
> (Emphasis in original)

[34] In *National Bank*, the issue was whether the conscious decision of National Bank to not disclose the settlement agreement was an abuse of process. The appellants' argument that *National Bank* goes further and stands for the proposition that once a party makes an admission in a settlement agreement with a regulatory body they will be bound by those admissions in any subsequent court proceeding relating to the same matters is not borne out by a review of that decision.

[35] I agree with the distinction made by the motions judge. This Court's recent decision in N*ational Bank* addressed the conduct of the Bank, in particular, its failure to disclose the settlement agreement and whether the Bank's actions throughout that protracted litigation constituted an abuse of process. Saunders,

J.A., writing for the Court, found that it did. That decision does not say that in every situation where there is a settlement agreement the parties are precluded from addressing the issues in a subsequent civil proceeding.

[36] Saunders, J.A.'s concern was with the Bank's concealment of the settlement agreement and its subsequent attempts to justify its failure to disclose what he considered to be an admissible and highly relevant document. He held:

> [263] … Given this background I reject the Bank's argument that its concealment of the settlement agreement in 2005 was reasonable based on the law that existed at that time. It clearly was not justified for all of the reasons I have just given and also the obvious fact that they should have brought the whole matter before a judge to decide whether (a) the escrow agreement was valid; (b) the settlement agreement was admissible; and (c) the settlement agreement was privileged.
>
> [264] In my view, the settlement agreement was a critical, highly relevant piece of evidence for which the Bank was bound to seek the court's formal determination of its claim for privilege, if the Bank wished to decline to disclose it.

(Emphasis added)

[37] In reaching his conclusions, Saunders, J.A. reviewed, in detail, the decision of *Hill v. Gordon-Daly Grenadier Securities* (2001), 56 O.R. (3d) 388, a decision of the Ontario Divisional Court, to address National Bank's argument that the settlement agreement would not have been admissible and, therefore, it had no obligation to disclose it. In rejecting this argument, Saunders, J.A., with *Hill* as authority (where it was found a Settlement Agreement in a securities context was admissible), found that it was not for National Bank to unilaterally decide it was inadmissible. As Saunders, J.A. found, if they wished to take that position, it was incumbent upon them to bring it before the Court to determine whether the settlement agreement was admissible (¶263). It was the deliberate concealment of a highly relevant piece of evidence that was the focus in *National Bank*, not the use that could be made of that evidence at the trial of the proceeding.

[38] Similarly, the Settlement Agreement in this case may be found to be admissible and it will then be up to a trial judge to determine what use, if any, can be made of those admissions.

[39] The appellants also rely on a number of other cases (including *Hill*) to support their position. With respect, all of the cases which have been referred to,

either address the admissibility of settlement agreements in subsequent proceedings or arise in the context of criminal convictions used in subsequent civil proceedings. No case has been cited by the appellants which supports their position that admissions contained in a settlement agreement made with a regulatory body will bind the parties in a subsequent civil proceeding.

[40] I pause here to comment that nothing in these reasons should be interpreted as determining that the Settlement Agreement is admissible on the trial of this matter. The admissibility and use to be made of the Settlement Agreement is a matter for the trial judge.

[41] In concluding that the admissibility and use to be made of the Settlement Agreement will depend on the circumstances arising at the trial, the motions judge did not err. Her thoughtful and comprehensive decision is consistent with the authorities.

Even if Mr. Laurie is bound by the admissions, are there still genuine material questions of fact left for trial?

[42] The motions judge could have simply stopped her analysis at this point and dismissed the MacRurys' motion. However, she went further and asked herself the second question she had identified: Even if Mr. Laurie was bound by the admissions, are there still genuine material questions of fact left for trial?

[43] She concluded there were and that the motion for summary judgment would still fail because the admissions do not resolve all questions of material fact (¶56). She found, correctly in my view, that the plaintiffs' cause of action in negligence required certain factual determinations that were unique to the individual plaintiffs such as the standard of care owed to these particular plaintiffs which would involve a consideration of their individual circumstances (¶58-62).

[44] She further outlined the requirements of a claim for breach of a fiduciary duty which include vulnerability, trust, reliance, discretion, and professional rules or codes of conduct that would apply to the purported fiduciary (¶63). Again, she correctly concluded that a trial judge would have to assess all of these issues and they would be unique to these individual plaintiffs.

[45] Finally, she addressed the issue of contributory negligence and referred to the evidence that the defendants relied on to show that there had been contributory negligence including the fact that the plaintiffs had signed Know-Your-Client

forms (which identified the MacRurys' investment knowledge as "good") and the MacRurys' decision to keep investments rather than make any recommended changes. The motions judge identified these as examples of outstanding issues on contributory negligence, but made it clear it was not an exhaustive list.

[46] The motions judge also noted that very little would be saved, in terms of judicial resources, by resolving the negligence of Mr. Laurie in isolation to the issue of contributory negligence (¶71).

[47] This analysis by the motions judge led her to conclude that even giving the Settlement Agreement its most favourable reading, material issues of fact remain. I agree with both her analysis and conclusion. Nothing more needs to be said on the issue.

The Corporate Defendants

[48] I will now turn to the corporate defendants. Much of the discussion in this decision has been based on how Mr. Laurie's admissions impacted his position on the motion for summary judgment. We cannot lose sight of the fact that both Global and Keybase are parties to this proceeding. As Mr. Ryan, solicitor for Global, pointedly argued before us: Global and Keybase signed nothing and, therefore, cannot be bound by any admissions made by Mr. Laurie.

[49] The MacRurys' argument for summary judgment against the corporate defendants appears to be based on the fact they are vicariously liable for Mr. Laurie's actions. Keybase put into evidence before the motions judge its contract with Mr. Laurie which identifies him as an independent contractor. To the extent that Global and Keybase may be liable for his actions or may be bound by the admissions in the Settlement Agreement cannot be resolved on this record.

[50] In concluding, I would comment that this was a very unusual summary judgment case where the two parties who have alleged negligence on the part of Mr. Laurie chose not to file any affidavit evidence thereby shielding themselves from cross-examination on the very issues the motions judge identified as contentious. I make this comment to highlight the point that it would be highly unusual for summary judgment to be granted in circumstances where the individual parties who claim to be owed a duty and standard of care do not present evidence of their personal circumstances.

Conclusion

[51] In a well-crafted and carefully considered judgment, the motions judge considered the arguments of the parties, properly applied the law and concluded that summary judgment was not the appropriate remedy. In reaching her decision, she did not commit any error.

[52] I would dismiss the appeal with costs to Keybase and Mr. Laurie in the amount of $2,000 and to Global also in the amount of $2,000 inclusive of disbursements payable forthwith and in any event of the cause.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.