NOVA SCOTIA COURT OF APPEAL

Citation: *B2B Bank v. Shane*, 2020 NSCA 15

Date: 20200220
Docket: CA 486040
Registry: Halifax

Between:

B2B Bank/B2B Banque

Appellant

v.

Wilma Shane

Respondent

Judge:	The Honourable Justice M. Jill Hamilton
Appeal Heard:	January 14, 2020, in Halifax, Nova Scotia
Subject:	Civil Jury Verdict; Unjust Enrichment
Summary:	The Bank appeals a civil jury verdict which found, among other things, that Ms. Shane was not liable to pay the Bank $118,713.27 it claimed it was owed, as a result of its advancing her $245,000 to purchase investments which she held for over eight years. It was agreed at the trial that if Ms. Shane was unjustly enriched, $118.713.27 was the correct measure of the unjust enrichment and the amount to be paid to the Bank.
Issues:	Was the jury's finding that Ms. Shane was not unjustly enriched by the receipt and use of the money advanced by the Bank for over eight years, so plainly unreasonable and unjust, as to satisfy us that no jury reviewing the evidence as a whole and acting judicially could have reached it?
Result:	Appeal allowed, despite the great deference this Court gives jury verdicts. As we are satisfied the appeal should be allowed on the basis of the Bank's claim for unjust enrichment, we have assumed, without deciding that there was no enforceable loan agreement between the parties. Unjust enrichment occurs

where Ms. Shane is enriched and the Bank suffers a corresponding deprivation in the absence of juristic reason. There was evidence Ms. Shane received a benefit and was enriched – she had the use of $245,000 for over eight years to invest as she saw fit. There was evidence the Bank suffered a corresponding deprivation – it was not repaid the money it advanced together with interest. The parties agreed on the amount of the enrichment/deprivation. There is no reason based on law for Ms. Shane not to have to repay the Bank.

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Judges:	Farrar, Saunders and Hamilton, JJ.A.
Appeal Heard:	January 14, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed, with costs, per reasons for judgment of Hamilton, J.A.; Farrar and Saunders, JJ.A. concurring
Counsel:	Thomas M. Macdonald and Thomas Morehouse, for the appellant Angeli Swinamer and Angus Smith, for the respondent

Reasons for judgment:

Overview

[1] The appellant, B2B Bank, appeals a civil jury verdict rendered December 6, 2018 and the subsequent costs Order of Justice Ann E. Smith dated February 7, 2019.

[2] The jury found the respondent, Wilma Shane, not liable to pay the Bank $118,713.27 it claimed was owing to it as a result of AGF Trust Company ("AGF") advancing $245,000.00 to Ms. Shane on August 1, 2007. It found (1) her conduct had not ratified a forged loan agreement, (2) it was unconscionable to enforce the loan against her and (3) she was not unjustly enriched by the receipt and use of the money the Bank advanced to her.

[3] There is no dispute B2B Bank is the successor of AGF. For ease of reference, I will hereafter refer to both AGF and B2B Bank as the "Bank".

[4] Despite the great deference this Court gives to jury verdicts, I would allow the appeal. I am satisfied that no jury, reviewing the evidence as a whole and acting judicially, could have determined that Ms. Shane was not unjustly enriched by the receipt and use, for over eight years, of the $245,000.00 advanced to her. I would set aside the jury's verdict that Ms. Shane was not unjustly enriched together with the judge's subsequent costs Order. I would order judgment for the Bank in the amount of $118,713.27 plus costs at trial and on appeal.

Concise Statement of Facts

[5] In July of 2007, John Allen, a financial adviser employed with Keybase Financial Group Inc. ("Keybase"), submitted a loan application/loan agreement and a pledge and assignment of documents to the Bank in Ms. Shane's name to allow her to borrow money to invest in mutual funds. Without Ms. Shane's knowledge or consent, he inflated her assets and income, forged her signature on the loan documentation and falsified the income tax documents forwarded with the application.

[6] Mr. Allen was not an employee, agent or representative of the Bank or affiliated with it. The Bank did not provide advice or guidance to Ms. Shane with

respect to the loan application process, loan agreement, loan proceeds or the investment of the loan proceeds.

[7] The Bank approved the loan, which required monthly payments of interest only, and advanced $245,000 on August 1, 2007. Concurrently, the mutual funds, in which the whole of the advanced money was invested in Ms. Shane's name, were pledged and assigned to the Bank as collateral security for the loan. Ms. Shane received monthly cash distributions from the mutual funds and paid monthly interest payments to the Bank until May 2015, when she stopped paying. Initially, the monthly cash distributions were double or triple the amount of the required monthly interest payments. By December 2009, the amount of the monthly cash distributions had decreased so that they were about equal to the monthly interest payable. After January 2012, the cash distributions varied, generally being about $100 less than the interest payable.

[8] In September 2007, Keybase contacted Ms. Shane and advised her that Mr. Allen was no longer with Keybase and that he may have overstated her net worth when applying to the Bank for the loan. In October 2007, she requested that Keybase freeze her account. In January 2008, Ms. Shane requested a copy of her file from the Bank, noting that Mr. Allen was under investigation for fraud and/or negligent handling of investment accounts. In February 2008, she filed a complaint with the Nova Scotia Securities Commission against Keybase and Mr. Allen, which eventually resulted in them being sanctioned and fined.

[9] In 2009, Ms. Shane sued Keybase and others, including the Bank. Her action against the Bank was dismissed in 2010 on application by the Bank.

[10] In April 2010, Ms. Shane changed prior instructions that she had given to the Bank and asked that it not redeem the mutual funds it was holding as security for the loan. She indicated she was changing her instructions in light of advice she received that she would have to pay a penalty if they were redeemed and her knowledge that the value of the mutual funds was then insufficient to cover the loan balance.

[11] On May 10, 2010, nearly three years after (1) receiving $245,000.00 from the Bank, (2) beginning to receive monthly cash distributions from the mutual funds and (3) beginning to make monthly interest payments on the loan, Ms. Shane's lawyer sent a letter to the Bank referring to her instructions to the Bank to not redeem her mutual funds and, for the first time, raising with the Bank issues with respect to her liability to repay the loan:

> Lee Shane has asked me to write to counsel for B2B Trust, AGF Trust and Keybase to confirm the basis on which these changes have been made, so there is no misunderstanding. In the discussions with Mr. Duncan and subsequently Mr. Grima, it was made clear that these changes to the status quo (maintained since first learning of the dismissal of Mr. Allen from Keybase in September 2007, pending resolution of the legal claim filed on their behalf by Mr. MacGillivray) were being made to protect her financial position and credit record as a result of the significant changes to the Stone Funds and without any intent to waive or prejudice the elements of the outstanding legal action.
>
> In responding to these significant changes and taking the actions outlined above (in particular, by not proceeding to liquidate the AGF trust account which would have triggered significant financial and legal consequences in immediate collection of the outstanding disputed loan) Lee and Ruth Shane in no way concede the validity of the disputed transactions and investments entered into on their behalf by Mr. Allen or waive their ability to continue with the various claims contained within the legal action. No waiver or admission of any kind should be attributed to these actions.

Lee and Ruth Shane, referred to in the above quote, are Ms. Shane and her mother.

[12] Thereafter, Ms. Shane continued to receive monthly cash distributions and make monthly interest payments to the Bank for a further five years.

[13] On October 31, 2011, charges were laid against Mr. Allen. In November 2013 he plead guilty to fraudulent conduct in connection with the loan to Ms. Shane, among others.

[14] In September 2014 Ms. Shane was awarded a judgment in the amount of $233,190.00 for damages, $50,826.43 for costs and $21,180.00 for disbursements for her successful lawsuit against Keybase, as set out in the reasons of Justice Robert W. Wright reported at 2014 NSSC 31 and 2014 NSSC 287. In 2015, she settled with Keybase for $210,003.71. She testified she accepted this lesser amount because she was concerned Keybase may go bankrupt. She did not use any of this money to repay the Bank.

[15] In 2015, Ms. Shane and others commenced an action against two former investment advisers at Keybase individually. This action is still pending. She testified she will not repay any amount to the Bank if she is successful in this law suit.

[16] Ms. Shane stopped making monthly interest payments to the Bank in May 2015. In January 2016, the Bank, after written notice to Ms. Shane, redeemed the mutual funds pledged as collateral security for the loan and applied the proceeds of $150,022.77 to the outstanding loan. It then filed a claim against Ms. Shane for the outstanding balance of the loan including interest ($118,713.27) on April 5, 2016 and amended on May 6, 2016. The jury rendered its verdict, now under appeal, on December 6, 2018.

[17] During the trial, Ms. Shane's counsel agreed the Bank was entitled to $118,651.15 if it were successful on its unjust enrichment claim:

> **THE COURT:** … So, counsel, as you know, the members of the jury have come back with another question, which I will read into the record:
>
> > "We would like some clarification on No. 4. If we say yes, does that mean, (a) she, the Defendant, has to pay back the full claim amount, a hundred and eighteen thousand six hundred and fifty-one dollars and fifteen cents ($118,651.15), or, (b) does the Judge decide on an amount she, the Defendant, will have to pay back to bank?"
>
> Counsel, I'll certainly hear from you on this, but I think that what I would tell them is that Counsel has agreed that if they answer Question 4 as yes, that the amount that the Defendant must pay the Bank is a hundred and eighteen thousand six hundred and fifty-one dollars and fifteen cents ($118,651.15), but I will hear from you.
>
> **MR. SMITH: My Lady, if I may, what about a situation where it is only Question 3 where the Plaintiff is successful, so the unjust enrichment question, where they find there's no agreement between the parties, but that Ms. Shane has been unjustly enriched?**
>
> **THE COURT: Oh, no, you agreed that the amount of the claim was 118,651.15.**
>
> **MR. SMITH: Yes, we did, My Lady.**
>
> **THE COURT: And you did not say that that would be left to me; that that was going to be decided by -- all of this was to be decided by the jury.**
>
> **MR. SMITH: Okay.**
>
> **THE COURT: And why would it be any different?**
>
> **MR. SMITH: I'm merely asking, My Lady.**
>
> **THE COURT: Well ---**
>
> **MR. SMITH: I admit we agreed on the damages, and that's -- that seems pretty straightforward.**

> **THE COURT: All right. I mean, the unjust enrichment question was there all along. We had a -- you know, there has been two Pre-Trials on this matter. That was never raised that that number might be somehow different, if the answer to that question was yes. So, it's too late in the day, now, Mr. Smith, to be doing that. I -- because what would I tell the jury? "No, that's for the Judge to decide?" That wasn't part of the plan.**
>
> **MR. SMITH: No, I understand, My Lady.**
>
> (Emphasis added)

[18] Accordingly, the judge answered the jury's question as follows:

> And the answer to the question is that the counsel for the Plaintiff, and counsel for the Defendant agreed that, if you find in favour -- if you answer yes to the fourth question, then the amount that Ms. Shane must -- is liable to pay the Bank is a hundred and eighteen thousand six hundred and fifty-one dollars and fifteen cents ($118,651.15). I hope that answer[s] your question.

[19] The slight difference between the $118,651.15 agreed to during the trial and the $118,713.27 now claimed by the Bank relates to the evidence of the amount owed to the Bank depending on which date the trial concluded.

Issues

[20] I am satisfied the only issue that needs to be dealt with to resolve this appeal is to determine whether the jury's finding that Ms. Shane was not unjustly enriched by the receipt and use of the advanced money for over eight years, is so plainly unreasonable and unjust, as to satisfy us that no jury reviewing the evidence as a whole and acting judicially could have reached it.

Standard of Review

[21] In *McKinley v. BC Tel*, 2001 SCC 38 at paras. 59-60, the Supreme Court of Canada sets out the applicable standard of review:

> 59 The respondents maintain that, even if Paris J. did not err in charging the jury, the jury's verdict was unreasonable and unjust, and thus should be overturned. This Court has repeatedly used a test of "reasonableness" when considering whether to set aside a jury's verdict. In *Vancouver-Fraser Park District, supra*, [*Vancouver-Fraser Park District v. Olmstead* (1974), [1975] 2 S.C.R. 831] at p. 839, de Grandpré J. held that while jury verdicts must be treated with considerable respect and be accorded great weight, they should not be regarded with awe. Rather, where it is found that the evidence "did not permit a

> jury acting judicially to reach the conclusion" that it did, an appellant court is entitled to set it aside.
>
> 60 Similarly, in *McCannell v. McLean*, [1937] S.C.R. 341, Duff C.J. stated the reasonableness test as follows at p. 343:
>
> > [T]he verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.
>
> In addition, an appellate court that finds there was "no evidence" supporting a particular verdict has "the right and the duty" to set aside that verdict (see *Gray Coach Lines Ltd. v. Payne*, [1945] S.C.R. 614, at p. 618). Although these two tests are distinct, in neither case may the appellate court set aside a verdict on "mere doubts [it] may entertain" or on its "reaching on the reading of the evidence a conclusion different from that the jury reached" (see *Scotland v. Canadian Cartridge Co.* (1919), 59 S.C.R. 471, at p. 477, *per* Davies C.J.).

Analysis

[22] As previously indicated, I will only consider the jury's verdict as it relates to unjust enrichment, assuming without deciding that there was no enforceable loan agreement between Ms. Shane and the Bank.

[23] The Supreme Court of Canada upheld the doctrine of unjust enrichment in Canada in *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725, and at p. 734 states:

> In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, Lord Wright said, at page 61:—
>
> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.
>
> (Footnote removed)

[24] In *Moore v. Sweet*, 2018 SCC 52, the Supreme Court of Canada recently dealt with this doctrine and set out the basis on which a plaintiff will be successful in a claim for unjust enrichment:

> [35] Broadly speaking, the doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit. Where this is found to be the case, the defendant will be obliged to restore that benefit to the plaintiff. As recognized by McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788, "At the heart of the doctrine of unjust enrichment . . . lies the notion of restoration of a benefit which justice does not permit one to retain."
>
> [36] Historically, restitution was available to plaintiffs whose cases fit into certain recognized "categories of recovery" — including where a plaintiff conferred a benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a failed or ineffective transaction, or at the defendant's request (*Peel*, at p. 789; *Kerr*, at para. 31). Although these discrete categories exist independently of one another, they are each premised on the existence of some injustice in permitting the defendant to retain the benefit that he or she received at the plaintiff's expense.
>
> [37] In the latter half of the 20th century, courts began to recognize the common principles underlying these discrete categories and, on this basis, developed "a framework that can explain all obligations arising from unjust enrichment" (L. Smith, "Demystifying Juristic Reasons" (2007), 45 *Can. Bus. L.J.* 281, at p. 281; see also *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, and *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, per Laskin J., dissenting). **Under this principled framework, a plaintiff will succeed on the cause of action in unjust enrichment if he or she can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason** (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Garland*, at para. 30; *Kerr*, at paras. 30-45). While the principled unjust enrichment framework and the categories coexist (*Kerr*, at paras. 31-32), the parties in this case made submissions only under the principled unjust enrichment framework. These reasons proceed on this basis.
>
> (Emphasis added)

[25] The trial judge properly instructed the jury on this test in her charge and again when it posed a question concerning unjust enrichment:

> "The law of unjust enrichment is to prevent a person from retaining a benefit derived from another which it is against conscience to keep."
>
> The Supreme Court of Canada has states (*sic*) that:
>
> "To successfully claim unjust enrichment against another person, the following must be proven:
>
> (1) a person received a benefit;

> (2) another person claiming unjust enrichment suffered a loss corresponding in some way to the benefit; and
>
> (3) there was no juristic reason for the benefit and the loss."

[26] She indicated to the jury that the advance of $245,000.00 to Ms. Shane, and her use of it for eight years, could constitute a benefit to Ms. Shane (step 1) and that Ms. Shane's refusal to repay the Bank could constitute a corresponding loss to the Bank (step 2). There was significant evidence of both, contrary to Ms. Shane's argument that there was no evidence the Bank suffered a corresponding deprivation.

[27] This was not a complicated case. The action was brought by the Bank to recover the money it advanced to Ms. Shane, together with interest for the over eight years it was used by her, that Ms. Shane had not repaid. There was no dispute $245,000.00 was advanced to Ms. Shane on August 1, 2007 and that she had not repaid it.

[28] Thomas Hickey testified about the cost to the Bank of loaning money:

> **Q.** This may seem like a kind of different question, but how does B2B Bank get money to loan to people? Tell me how that works?
>
> **A.** Well, it's -- yeah, in kind of -- I'll call it simplistic terms we receive deposits that we, on one hand, take in GICs and deposits, pay an interest on those deposits, and, on the other hand, lend that money out to consumers. There's a lot of mathematics that goes on behind it, but we don't have bags of money that we lend out. We receive consumers' money, and lend it out to other consumers is kind of the basic premise of banking.
>
> …
>
> **Q.** And there's a cost to the bank to obtain funds to loan to people?
>
> **A.** The interest rate paid on deposits is the cost that the bank pays for money.

[29] I am satisfied there was evidence before the jury that the Bank had suffered a corresponding deprivation, step 2 of the unjust enrichment test.

[30] In the alternative, Ms. Shane argues if there were evidence of the Bank's deprivation, the jury's decision on unjust enrichment was reasonable and just because the Bank did not adequately connect the evidence of its deprivation to the test for unjust enrichment.

[31] In my opinion, this should have been clear to the jury from the evidence it heard over the course of the trial. Furthermore, in her charge, the judge drew the jury's attention to the fact the Bank's advances to Ms. Shane could constitute a corresponding loss, for the purposes of unjust enrichment.

[32] Unjust enrichment occurs where Ms. Shane is enriched and the Bank suffers a corresponding deprivation in the absence of a juristic reason.

[33] Ms. Shane received a benefit and was enriched—she had the use of $245,000.00 for over eight years to invest as she saw fit. The unchallenged evidence indicates the total cash disbursements Ms. Shane received from the mutual funds purchased with the money advanced by the Bank exceeded the monthly interest payments she made to the Bank by $47,749.15. In addition, she received $210,003.71 from her action against Keybase that was directly related to the loss she sustained as a result of the money advanced by the Bank being invested in the mutual funds.

[34] The Bank suffered a corresponding deprivation—it was not repaid the money it advanced together with interest. As evidenced by the exchange between the trial judge and Ms. Shane's counsel in paragraph 17 above, the trial proceeded on the basis that Ms. Shane agreed the Bank's loss was $118,713.27 if its claim based on unjust enrichment were successful.

[35] As to the third and final step in the analysis in her charge to the jury on unjust enrichment, the judge correctly instructed:

> Juristic reason means a reason, or explanation based upon law. If you conclude that Ms. Shane received the benefit, the monies from the loan agreement provided by the Bank, that the Bank suffered a corresponding loss in providing Ms. Shane with the loan monies, and that there is no reason or explanation, based upon law, for Ms. Shane to not have to repay the Bank, you may conclude that Ms. Shane was unjustly enriched from the receipt and use of the Bank's loan money.

[36] Whatever vague and never substantiated concern Ms. Shane may once have had for potentially facing fees and penalties she could ill afford if she were "called" on the loan, could hardly constitute a juristic reason justifying her refusal to repay the Bank after having enjoyed the use of the Bank's money for eight years. There is no reason or explanation, based upon law, that Ms. Shane should not be required to repay the Bank. The wrong done to her was done by Keystone, not by the Bank, and Ms. Shane was fully compensated for that. At trial, her counsel

agreed on the amount the Bank should be paid if the Bank succeeded on its claim for unjust enrichment.

Disposition

[37] I would allow the appeal, order Ms. Shane to pay the Bank $118,713.27, and reverse the trial judge's costs Order in the amount of $26,137.78. Following the trial judge's rationale in her costs decision (2019 NSSC 39), I would also order Ms. Shane to pay the Bank trial costs in the amount of $25,000.00 plus $1,000.00 for the pre-trial motion in which the Bank was successful, a total of $26,000.00. I would not order Ms. Shane to pay the Bank's trial disbursements as it did not claim reimbursement for them when it made its submissions on costs in its pre-trial brief.

[38] In addition, I would order Ms. Shane to pay appeal costs of $10,000.00, including disbursements, to the Bank.

Hamilton, J.A.

Concurred in:

Farrar, J.A.

Saunders, J.A.