NOVA SCOTIA COURT OF APPEAL
Citation: *National Bank Financial Ltd. v. Barthe Estate*, 2013 NSCA 127

Date: 20131108
Docket: CA 420715
Registry: Halifax

Between:

National Bank Financial Ltd.

Appellant

v.

The Estate of the Late Michael Barthe,
as represented by his Executrix Barbara Barthe

Respondent

Judge:	The Honourable Justice Joel E. Fichaud
Motion Heard:	October 31, 2013, in Halifax, Nova Scotia, in Chambers
Held:	Stay of execution granted with costs of $500 in the cause
Counsel:	David G. Coles, Q.C. and Ashlea Richard (Articled Clerk) for the appellant W. Dale Dunlop and Sean MacDonald for the respondent

Reasons:

[1] The Appellant moves for a stay of execution of a monetary judgment pending the disposition of the appeal.

Background

[2] After a two-month trial in the Supreme Court of Nova Scotia, Justice Warner issued a decision in the complex "Knowledge House" litigation (2013 NSSC 248). The decision dealt with several actions. This appeal is from the judge's ruling in one of those actions (S.H. 208293), commenced by Michael Barthe and Dr. Lutz Ristow against National Bank Financial Ltd. ("NBFL"). I will term this the "Barthe Action". Mr. Barthe died in November 2007, and his Executrix is his spouse Barbara Barthe. Dr. Ristow is not a party to the appeal.

[3] Justice Warner's decision concluded that NBFL was liable to Mr. Barthe both vicariously for the misconduct of NBFL's employee, a stockbroker Bruce Clarke, and directly for breach of contract and negligence. The judge quantified damages and pre-judgment interest totalling $2,360,799.70. The decision included the following comments that pertain to the Barthe Action:

> [2] Knowledge House Inc., a publicly-traded technology company, collapsed in August 2001 and closed in September. Eighteen months earlier its share value appeared to be $110,000,000. The events leading to the collapse epitomize the concern expressed by David Dodge, a former Governor of the Bank of Canada, about Canada's international reputation as the 'Wild West' of financial markets.
>
> [3] Along the way from penny stock to 'tech darling' to collapse, the entrepreneur behind the rise and fall, who took control of KHI in late 1998, immediately appeared to exponentially grow its size and sales, and, on paper, its value, by the purchase of three private technology companies in exchange for shares of KHI. While the company had sales, it never had real income, a viable business plan or secure financing.
>
> [4] With the help of other insiders, including some of those who had sold their companies to KHI for shares, a lawyer, and Bruce Clarke, a stock broker

employed by NBFL, the President of KHI, kept KHI afloat until August 2001 by manipulative and artificial trading in KHI shares, while attempting to create a viable business and secure financing, deter existing shareholders from selling their shares, and entice wealthy individuals and institutions to invest.

…

[21] In the Barthe Action (208293) commenced by Michael Barthe and Lutz Ristow against NBFL for its failure to supervise Clarke and the wrongdoing of Clarke as alleged by NBFL in the Main Action, the only remaining plaintiff is the Estate of Michael Barthe. In its pleadings, NBFL denied liability and claimed that Barthe was part of the stock manipulation scheme. NBFL third-partied Wadden in respect of any liability to Barthe.

…

[456] Barthe did not seek advice from Clarke.

[457] The basis of the claim for liability against Clarke (and NBFL) is that before Clarke received the instructions to execute the purchases on the market, Clarke was part of a conspiracy with KHI insiders to manipulate the public stock price. Clarke did not disclose to Barthe his personal involvement in the scheme to purchase shares on the market, mostly from insiders (which was not a breach of his duty, as Barthe was aware that he (Barthe) would be purchasing shares from KHI insiders). Clarke did not disclose and Barthe had no idea that the public market price of KHI shares was artificially maintained by reason of the conduct of Clarke and some KHI insiders.

[458] The only potential liability of Clarke (and NBFL) to Barthe is if, as an order taker, Clarke's duty as Barthe's agent included that he either refuse to become agent for Barthe or to disclose to Barthe the stock manipulation scheme, because of his duty of honesty and good faith as an agent.

…

[549] The Court finds that what Barthe and Ristow received as disclosure before the January 19, 2001, was no relevant financial disclosure and, in some cases, misleading or deceptive financial information.

…

[554] I conclude there are the reasons [*sic*] that Barthe (and Ristow) did not pick a fight with Potter and KHI after January 19, 2001, when they clearly changed their tone, and appear to have understood they had been taken was [*sic*]: (a) they were sophisticated enough to know that they were already heavily invested into KHI. Making accusations against Potter, who was describing himself and his local shareholders as being tapped out, was not going to get him out of KHI with his investment. Sitting on the sideline and hoping for recovery was the most practical option; and (b) it is clear from the tone of their communications that Barthe and Ristow were gentlemen. It would not have been their style to pick a fight with KHI or Potter that, at the end of the day, was not likely to have a realistic prospect of saving their already substantial investment in the company.

[555] I do not agree with the implication of NBFL's submission that Barthe condoned the manipulation of the stock price by Potter and other KHI insiders.

[556] There is no evidence that Barthe would have invested in KHI had he known that the share price had been manipulated when he made his first, 1.7 million dollar investment in August 2000, or when he and Ristow made their 3.250-million-dollar private placement in October/November 2000.

…

[560] Clarke had a duty to be honest and act in good faith toward his principal, Michael (Ben) Barthe.

[561] NBFL had an obligation to take reasonable steps to identify existing and potential material conflicts of interest between it, any of its brokers, and any of its clients.

[562] If NBFL had been supervising the activities of Clarke in his 540 account, it would have known about the loans of money and shares from KHI insiders to Clarke, and their use by Clarke, using NBFL margin debt, to prop up the KHI share price on the market.

[563] When NBFL did conduct its own investigation, after litigation began and in respect of its commencement of the Main Action, its Senior Vice President swore under oath that the illegal scheme to manipulate the KHI share price by KHI insiders and Clarke was clear. NBFL should have known this before late August 2000 when it took on Barthe [as] a client.

[564] There are different ways to avoid a conflict of interest. NBFL can stop providing service to a client. It can, in some circumstances, create internal communication barriers between the brokers who have conflicts and their client. Alternatively, it may disclose the conflict and obtain the client's consent to proceed. NBFL did none of these. Clarke did none of these.

[565] I have found that Barthe did not know of the market manipulation scheme until after January 19, 2001. I find that NBFL should have known of it, as it swore in Court motions dealing with the Main Action that it later learned, before Clarke agreed to purchase KHI shares for Barthe.

[566] Because of my finding that Clarke was part of the scheme to artificially maintain the KHI share price with KHI insiders, he clearly did not act honestly or in good faith in respect of his agreement to act for Barthe as an order taker to acquire KHI shares on the market.

[567] The liability of Clarke and NBFL to Barthe does not arise because Barthe sought and Clarke gave advice, nor because KHI, absent stock manipulation, was not a suitable investment for Barthe, nor because the shares purchased by Clarke came largely from KHI insiders.

[568] The liability is because Clarke was part of a fraudulent scheme to artificially maintain the KHI share price on the market and, for a fee, he agreed to buy approximately 250,000 KHI shares for Barthe, knowing that the price was being artificially maintained by him and KHI insiders.

[569] The investment by Barthe in the private placement in November 2000 is a different situation. The liability of NBFL to Ristow is not in issue, as Ristow is no longer a litigant in these proceedings. Ristow opened an account with NBFL to transfer money to KHI with respect to his contribution of $1,625,000.00, to the private placement. There is no evidence that NBFL or Clarke charged a fee for this service. It did not involve Clarke acting as an order taker, providing advice or providing any other service.

[570] It appears from the evidence that, while there is no direct evidence of when Barthe made his $1,625,000.00 payment to the private placement, he likely made those payments when they were due for payment on May 15 and August 15, 2001.

Whenever Barthe made those payments, it is clear he made them after January 19, 2001, when he became aware for the first time that the KHI share price had been manipulated.

[571] With that knowledge, any payment by Barthe to the private placement cannot make Clarke or NBFL liable. Clarke's wrongdoing (for which NBFL is vicariously liable) and NBFL's negligence were not the cause of Barthe making the $1,625,000.00 on the last two instalments of the private placement after January 19, 2001.

[572] I find NBFL liable, both vicariously for Clarke, and by reason of its own negligence and breach of contract to Barthe, for the Barthe investment in August 2001 of $1,700,000.00 in KHI shares. The issue of remedy is dealt with later in this decision.

…

[927] Counsel for the Barthe estate submits that the calculation of damages in this claim is the easiest. Based on the Court's assessment of the evidence respecting liability, I agree.

[928] Barthe made two investments in KHI after Clarke became involved in the stock manipulation scheme. However, as the Court found, the evidence appears to show that Barthe paid the last two installments on the private placement after he became aware of the stock manipulation scheme and he knew or should have known, that Clarke was a party to that scheme.

[929] Barthe advanced to Clarke 1.7-million dollars in August 2000 to purchase shares. Clarke purchased 259,000 KHI shares.

[930] The loss to Barthe in the value of the KHI shares was 1.7 million dollars, less the amount recovered by his sale of those shares after the collapse of NBFL. The Court awards 1.7-million dollars less the amount recovered from the sale of the 259,000 KHI shares after the collapse of KHI plus interest at the prejudgment interest rate referred to earlier in this decision of 2.615% per year, compounded monthly, not in advance, from September 1, 2000 to the date of judgment.

> [931] With respect to NBFL's argument regarding mitigation, unlike the circumstances of Dunham and Weir / Blackwood, the quantity of KHI shares held by Barthe was so significant, and the public market so thin, that it is not reasonable to expect that if Barthe had attempted to sell into the market after January 19, 2001 that he would have recovered anything for the shares. It is more likely that placing those shares into the market would have caused an earlier collapse in the public price of the KHI shares.

[4] The Order, dated October 9, 2013, quantified the judgment as $1,675,000 plus prejudgment interest, for a total of $2,360,799.70 before costs.

[5] On October 18, 2013, NBFL appealed the judge's ruling in the Barthe Action. NBFL's grounds of appeal include that the judge erred: (1) in his conclusion that Mr. Clarke had participated in a scheme that artificially elevated the share price, (2) by finding that Mr. Barthe had not ratified failure to disclose the scheme, (3) by finding that the Barthe Estate did not fail to mitigate its damages, (4) by failing to deduct the actual value of the shares from the calculated quantum of damages, (5) by failing to draw an adverse inference from the absence of oral evidence tendered by the Barthe Estate, (6) by relying on evidence for a purpose other than that for which the evidence was admitted, (7) by admitting settlement agreements between NBFL and the regulators for the truth of their contents, and (8) by dismissing NBFL's third party claim against the Barthe Estate for contribution, based on NBFL's claim that Mr. Barthe was a participant in the scheme.

[6] On October 24, 2013, the Estate cross-appealed on several bases, including that NBFL's pleadings should have been struck as an abuse of process for failure to disclose relevant information.

[7] The appeal hearing is scheduled for June 4, 2014.

[8] Mr. Barthe had been a resident of Germany. Ms. Barthe, his executrix, resides in Germany. The Grant of Probate specifies her address in Hamburg.

Issue

[9] On October 18, 2013, NBFL moved for a stay of execution of the judgment for the Barthe Estate, pending the determination of the appeal. I heard the motion on October 31, 2013.

[10] NBFL submits that, if the judgment is paid and its appeal succeeds, there will be a significant risk that the payment would not be recovered.

Analysis

[11] Rules 90.41(1) and (2) say that the filing of a notice of appeal "shall not operate as a stay of execution or enforcement of the judgment appealed from" but a judge "may, pending disposition of the appeal" issue a stay "on such terms as may be just".

[12] The test remains that stated by Justice Hallett in *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.), paras 28-30. The stay applicant must show that either (1) there is an arguable appeal, and denial of the stay would cause him irreparable harm and the balance of convenience favours a stay, or (2) there are exceptional circumstances making it just that a stay be granted. *Molloy v. Molloy*, 2012 NSCA 28, para 11 and authorities there cited.

[13] In my view, this motion may be determined under the first branch of the test, without reference to the "exceptional circumstances" criterion.

[14] In *Federated Life Insurance Company v. Fleet*, 2008 NSCA 90, Justice Saunders discussed whether the issue was "arguable":

> [19] At this stage the Chambers judge does not delve into the merits of the appeal. Rather, the inquiry focusses on whether the notice of appeal contains realistic grounds which, if established, could be of sufficient substance to persuade a panel of this court to allow the appeal. [citations omitted]

I am satisfied that NBFL's grounds of appeal satisfy this low threshold. I will say no more about the merits.

[15] I will turn to irreparable harm.

[16] In *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 341, Justices Sopinka and Cory for the Court said that irreparable harm "is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other".

[17] *Wright v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 6, says:

> [12] Generally, if the judgement is monetary, the appellant (applicant for a stay) can afford to pay and the respondent can afford to repay, there is no irreparable harm. But a real risk that the respondent would be unable to repay may establish irreparable harm. [citations omitted]

[18] A past instance where the respondent has acted in an insolvent manner towards the stay applicant may be strong evidence that the risk will re-materialize. There is nothing of that sort here. But, as Justice Cromwell said in *Hiltz and Seamone Co. v. Nova Scotia (Attorney General)*, [1998] N.S.J. No. 93, para 7, "it may not be essential in all cases to establish insolvency in order for there to be sufficient risk of non-recovery to constitute irreparable harm".

[19] In *Dutkewych v. Riske*, 2006 NSCA 105, Justice Bateman stayed execution of a monetary judgment to a non-resident, and stated:

> [2] The appellant and respondent, Patricia Riske, were married and resided in the United States. Upon their separation, the appellant petitioned for divorce in California. … The respondent currently resides in Florida. The appellant now lives in Nova Scotia.
>
> …
>
> [14] As discussed by Cromwell, J.A., in **MacPhail v. Desrosiers** (1998), 165 N.S.R. (2d) 32 (CA Chambers), the meaning of "irreparable harm" must be determined in the context of each particular case. He notes that in a number of this Court's decisions judges have accepted that the risk that the appellant will not be able to recover funds paid in satisfaction of a judgment in the event the appeal is successful constitutes irreparable harm (**MacPhail**, para 14). I am satisfied that in these circumstances there is a real risk that the appellant would be unable to recover funds paid out to the respondent who lives in Florida at present. He would thus suffer irreparable harm.

[20] In *Szendroi v. Vogler*, 2011 NSCA 37, the defendants appealed from a damages award of $464,245. The plaintiff lacked assets in Nova Scotia and resided in California. Justice Bryson partially stayed execution, pending the determination of the appeal, and said:

> [17] It is argued on behalf of Mr. Vogler that there is nothing to suggest that he is financially irresponsible or unable to manage money. That may well be but it is clear that unless he preserved his damage award intact, he could not readily repay it if the appellants were substantially successful on appeal. He does not live in this jurisdiction. He does not have a large income and he does not have any assets. Where a substantial payment is offered, all the appellants need do at this stage is satisfy the Court that there is a probability of difficulty of repayment if the appeal is successful (*MacCulloch v. McInnes, Cooper and Robertson*, 2000 NSCA 92, at para. 12 and *Dillon v. Kelly* (1995), 145 N.S.R. (2d) 194). I am satisfied that there is such probability.

[21] There are factors that pose a risk of non-recovery, if NBFL paid the judgment debt then succeeded on the appeal.

(a) Ms. Barthe, the Executrix, resides in Germany. Germany is not a reciprocating state under the *Reciprocal Enforcement of Judgments Act*, R.S.N.S. 1989, c. 388.

(b) From the evidence filed for this motion, it appears that the Estate does not have assets in Nova Scotia sufficient to cover the amount of the judgment against NBFL.

(c) The inventory of the Estate refers to one parcel of Nova Scotia property, but the Property Online record indicates that the parcel now belongs to Ms. Barthe and Mr. Michael Rankl. It appears that the Estate has distributed the asset to the beneficiaries.

(d) If the NBFL judgment was paid to the Estate, and then distributed, the Estate would have insufficient assets to respond to a judgment for recovery.

(e) It appears from the evidence and comments of counsel that Mr. Barthe had two wills and two estates. One estate, the Respondent in this appeal, is in Nova Scotia. The other estate is based in Germany. The relationship between the two estates is unclear. The two estates may be separate legal entities, and a hypothetical judgment against the Respondent Estate, for repayment to NBFL if this appeal succeeds, may not legally bind the German Estate.

[22] In my view, these factors combine to constitute sufficient risk of non-recovery to satisfy the criterion of irreparable harm. This is not a comment on Ms. Barthe's personal good faith. I have no evidence, one way or the other, from Ms. Barthe. I am assessing potential risk based on the evidence that is on the record.

[23] Lastly, the balance of convenience.

[24] The appeal is scheduled for hearing on June 4, 2014. Likely there will be a decision by late summer of 2014, about ten months away. From the material filed for this motion, it appears that Mr. Barthe's net worth exceeded $5 million, and those assets either would be in the German Barthe Estate, or would have been distributed to the beneficiaries, in particular Ms. Barthe. Ms. Barthe, who would be the beneficiary of the Nova Scotia Estate's assets, appears to be financially comfortable. There is no evidence that the Respondent (Nova Scotia) Barthe Estate, or Ms. Barthe as beneficiary, will suffer harm from a ten-month delay in the recovery of this judgment against NBFL.

[25] I am satisfied that the balance of convenience favours NBFL.

[26] Counsel for the Barthe Estate cites *E.B.F. Manufacturing Ltd. v. White*, 2005 NSCA 103, where Justice Saunders (in chambers) said:

> [26] The remedy sought by the appellant [a stay pending appeal] is an equitable one. To be accorded such equitable relief, the applicant must come to the court with clean hands. In my opinion it has not.

Counsel submits that NBFL's hands are insufficiently clean to even engage *Fulton*'s tests for a stay, and that I should summarily dismiss NBFL's motion.

[27] I respectfully disagree with counsel's submission. Justice Warner (para 572, quoted above para 3) held that NBFL was liable both vicariously for the conduct of Mr. Clarke and directly for its own negligence and breach of contract. At the trial, NBFL succeeded on some issues. NBFL's appeal raises arguable issues, as discussed earlier. The point of *Fulton*'s principles, in a case like this, is to safeguard against an appreciable risk that, by order of a court, a judgment would be paid and then, if that order was overturned, the payment could not be recovered. That safeguard protects, not just the equities between the parties, but also the systemic integrity of the judicial system. In my view, in these circumstances, it is

unnecessary that the stay applicant with an arguable appeal navigate a moral gateway as a pre-condition to even accessing *Fulton*'s principles.

Conclusion

[28] I will order that the execution and enforcement of the Supreme Court of Nova Scotia's Order dated October 9, 2013, against NBFL in favour of the Barthe Estate, be stayed until the Court of Appeal issues its Order in this appeal.

[29] I fix costs of this motion at $500, payable in the cause of the appeal.

Fichaud, J.A.