IN THE SUPREME COURT OF NOVA SCOTIA
Citation: National Bank Financial Ltd. v. Potter, 2005 NSSC 9

Date: 20050112
Docket: 174293
Registry: Halifax

Between:

National Bank Financial Ltd.

Plaintiff and
Defendant by Counterclaim

- and -

Daniel Frederick Potter, Gramm & Company Incorporated, Starr's Point Capital Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald D. Richter Solutioninc, Limited, John Francis Sullivan and Linda Faye Sullivan, Calvin W. Wadden, Craig Anthony Dunham, Douglas George Rudolph, Gerard B. McInnis and Janine M. McInnis, Lowell R. Weir, Blackwood Holdings Incorporated, Staffing Strategists International Inc. Futureed.com Ltd. and Kenneth MacLeod

Defendants and
Plaintiffs by Counterclaim

- and -

Docket: S.H. 193842
Registry: Halifax

Between:

Michael Mahoney and 3031775 Nova Scotia Limited

Plaintiffs

- and -

National Bank Financial Ltd.

Defendant

- and -

Docket: S.H. 216543
Registry: Halifax

Between:

1384156 Ontario Inc.

Plaintiff

- and -

National Bank Financial Ltd.

Defendant

- and -

Daniel Potter, Starr's Point Capital Incporporated, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald Richter, Donald Snow, Meg Research.com Limited, 3027748 Nova Scotia Limited, Calvin Wadden, Raymond Courtney, Bernard Schelew, Blois Colpitts, Stewart McKelvey Stirling Scales, Bruce Clarke, 2317540 Nova Scotia Limited, Knowledge House Inc., Michael Barthe and Lutz Ristow

Third Parties

- and -

Docket: S.H. 206439
Registry: Halifax

Between:

National Bank Financial Ltd.

Plaintiff

- and -

Daniel Potter, Starr's Point Capital Incorporated, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald Richter, Kenneth MacLeod, Futureed.com Ltd., Donald Snow, Meg Research.com Limited, 3027748 Nova Scotia Limited, Calvin Wadden, Raymond Courtney, Bernard Schelew, Blois Colpitts, Stewart McKelvey Stirling Scales, Bruce Clarke, 2317540 Nova Scotia Limited and Knowledge House Inc.

Defendants

- and -

Docket: S.H. 208293
Registry: Halifax

Between:

Michael Barthe and Lutz Ristow

Plaintiffs and
Defendants by Counterclaim

National Bank Financial Ltd.

Defendant and
Plaintiff by Counterclaim

- and -

Docket: S.H. 227347
Registry: Halifax

Between:

Derek Banks and
Plastics Maritime Ltd.

Plaintiffs

- and -

National Bank Financial Ltd. and BMO Nesbitt Burns Inc.

Defendants

- and-

Daniel Potter, Starr's Point Capital Incorporated, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald Richter, Donald Snow, Meg Research.com Limited, 3027748 Nova Scotia Limited, Calvin Wadden, Raymond Courtney, Bernard Schelew, Blois Colpitts, Stewart McKelvey Stirling Scales, Bruce Clarke, 2317540 Nova Scotia Limited, Knowledge House Inc., Michael Barthe and Lutz Ristow

Third Parties

- and -

Docket: S.H. 226384
Registry: Halifax

Between:

National Bank Financial Ltd.

Plaintiff

- and -

Gary Blandford, Julia Blandford and 3017804 Nova Scotia Limited

Defendants

DECISION

Judge: The Honourable Justice J.E. Scanlan

Heard: December 29, 2004, Halifax, Nova Scotia

Decision: Application for Consolidation

Counsel:

Mr. Alan V. Parish, Q.C./Mr. Brian K. Awad
Counsel for National Bank Financial Ltd.

Mr. George MacDonald, Q.C.
Counsel for 1384156 Ontario Inc.

Mr. Douglas Caldwell, Q.C.
Counsel for Fiona Imrie, Gramm & Company Limited
2532230 Nova Scotia Limited

Mr. John F. Rook, Q.C.
Counsel for Stewart McKelvey Stirling Scales

Mr. Robert Belliveau, Q.C.
Counsel for Bernard Schelew

Mr. Daniel Potter
Counsel for himself as Defendant and on cross-claim against Blois Colpitts and Stewart McKelvey Stirling Scales

Mr. Peter Nathanson
Counsel for Ronald Richter

Mr. Dwight Rudderham
Counsel for Donald Snow, Meg Research and 3027748 Nova Scotia Limited

Mr. Tim Hill
Counsel for Raymond Courtney and Francyne Hunter

Mr. James D. G. Douglas
Counsel for Blois Colpitts

Mr. Phillip M. Chapman
Counsel for Bruce Clarke and 2317540 Nova Scotia Limited

Mr. K. Michael Tweel
Counsel for Gerard McInnis and Janine McInnis

Mr. Glenn R. Jessome
Counsel for Solution Inc.

Mr. Richard Bureau
Counsel for Douglas George Rudolph

Ms. Mary Jane McGinty
Counsel for Gary Blandford and Julia Blandford

Mr Dale Dunlop
Counsel for Michael Mahoney, 13031775 N.S. Ltd., Calvin Wadden, Craig Dunham, Lowell Weir, Blackwood Holdings Inc., Michael Barthe, Lutz Ristow, Derrick Banks and Plastics Maritimes

Ms. Linda Fuerst
Counsel for BMO Nesbitt Burns

Scanlan, J.:

[1] On November 29th I heard an application made by National Bank Financial Limited (NBFL) to consolidate a number of actions. This was one of several applications heard on November 29, 30 and December 1, 2004, in relation to ongoing litigation as between NBFL, former officers, directors and shareholders of Knowledge House Inc. (KHI) and others. All of the litigation arises out of the collapse of the publically traded company, KHI. Initially, after the failure of that corporation, NBFL commenced 16 debt actions related to margin account balances. In response to the NBFL claims a number of defendants filed counterclaims which alleged for various reasons they should not have to repay their margin loans. The defences and allegations are too varied to set out in detail here but I summarize at least a portion thereof. One group of defendants alleged no repayment was required because NBFL was itself responsible for the depletion in the (KHI) share value through various alleged inappropriate actions by NBFL. Another group of defendants alleged that no repayment was required because a broker at NBFL together with certain "insiders" manipulated the public market for KHI shares. Yet another group of defendants alleged that an NBFL employee had failed or refused to follow instructions to sell their shares when instructed to do so. Most of the groups of defendants alleged NBFL managers were negligent in their supervision

of the NBFL employee who was said to had been involved in the manipulation scheme.

[2] On April 29, 2002, this Court heard an application to consolidate the 16 debts actions. The Court granted the application and the first consolidation order was issued on July 16, 2002. Justice Goodfellow heard that initial application and provided written reasons for granting the consolidation order. One of the issues referred to Justice Goodfellow at the time of the April 29, 2002 consolidation hearing was the reference to the NBFL employee, Mr. Bruce Clark and his conduct in relation to KHI shareholders. The issue was whether there was stock manipulation involving Mr. Clark and others and whether there was proper supervision of Mr. Clark. A common question was whether NBFL's actions in the May to August, 2001 period impacted upon the public market for KHI shares.

[3] NBFL now applies for a consolidation order asking that seven actions be consolidated along with the original 16 files as consolidated by Justice Goodfellow.

[4] The Applicant, NBFL, suggests the previously consolidated actions and the ones they now seek to consolidate raise common questions of law or fact. They submit the common questions of law or fact include the following:

Questions of Law

(a) What are the duties of a brokerage house to a client holding securities on margin?

(b) What are the duties of Mortgage House to a client holding securities on margin if the client is an "insider" of the issuer of the security?

(c) What are the duties of a brokerage house to a client holding securities on margin if the security is thinly traded.

(d) What conduct on the part of a brokerage house may disentitle it from collecting on margin debt?

(e) What conduct, on the part of brokerage house, renders it liable for client investment losses?

(f) What creates a fiduciary relationship between the client and the stock broker?

[5] In addition the defences raise questions of law including:

(a) What constitutes manipulative trading?

(b) When is a brokerage house vicariously liable for the conduct of an employee?

(c) Will a brokerage house be vicariously liable if an employee engaged in manipulative trading?

(d) What are the supervisory duties of a brokerage house in respect to its employees?

[6] The various cases have common witnesses and common questions of fact:

(a) Witnesses for discovery and trial of many of these cases are common witnesses with common factual issues. In addition there would be experts required to give testimony and their testimony would apply to many of the cases and involve the same period of time, approximately 1997 to 2001.

(b) What is the corporate financial history of KHI?

(c) What were the profitability prospects of KHI?

(d) Who were the major shareholders of KHI?

(e) Who were the officers and directors of KHI?

(f) What occurred in the public market for KHI shares?

(g) What factors affected the market price and trading volumes in KHI shares?

(h) How did alleged insiders conduct themselves in relation to public market in KHI shares?

(i) How did the bank employees conduct themselves in relation to the public market in KHI shares?

(j) How did NBFL conduct itself in relation to the public market of KHI shares?

(k) Where applicable what, if any, role did BMO Nesbitt Burns or their employees play in relation to KHI or stock manipulation?

[7] There are some common elements in most of the actions. In the Mahoney action it is alleged that an employee of NBFL, Bruce Clark, actively intervened to prevent the sale of KHI shares and other securities, or disregarded and disobeyed the plaintiff’s instructions to sell. There were other alleged wrongful acts

attributed to Mr. Clark. These allegations are similar to pleadings in a number of the consolidated actions including Mr. and Mrs. McInnes, Craig Dunham, Lowell Weir and Blackwood Holdings Ltd., all of which have already been consolidated. The Mahoney statement of claim also pleads and relies upon allegations of stock manipulation as included in the defence filed in S.H. No. 174152, the Calvin Waddan, matter which is already part of the consolidated action.

[8] The Barthe action alleges stock manipulation naming certain individuals including Mr. Potter, Mr. Sullivan, and NBFL employee, Mr. Clark. The Barthe action relies on the pleadings in the stock manipulation action.

[9] In the Keating action the plaintiff alleges that Clark and some officers and directors of KHI were involved in the stock manipulation scheme which resulted in a false market price being created. He further alleges that Clark was acting in his capacity as an employee or agent of NBFL and that NBFL should be held vicariously liable for the actions of Clark.

[10] On the one hand NBFL pleadings assert that there was stock manipulation and the creation of and illusion of higher than actual value of KHI shares on the

market. In the other actions NBFL pleadings deny vicarious liability of NBFL in relation to the actions of its employee, Mr. Clark. NBFL suggests they had no knowledge of any stock manipulation, putting those who allege stock manipulation to the proof thereof.

[11] The pleadings in the Blandford action have similar allegations against Mr. Clark. It also suggests the KHI shares purchased by the Blandford's and their company were purchased through the agency of Mr. Clark and a solicitor, Mr. Colpitts, who they allege was acting on behalf of KHI. They also suggest NBFL failed to follow instructions to sell KHI shares, resulting in further losses. For the purpose of this application it is assumed that if this instruction was given to Clark, the question will be as to whether or not the refusal or failure to sell, if in fact there was such a failure, related to Clark's alleged involvement in the stock manipulation scheme. The issue of NBFL vicarious liability for Clark is also raised in this action.

[12] The Applicant here, NBFL, suggests there is a complete overlap of the issues of law and fact in all of the actions they seek to consolidate. All of the parties other than NBFL have expressed resistence to the application for consolidation.

[13] In many of the actions wherein NBFL has been sued, based on alleged involvement of Mr. Clark in the stock manipulation scheme, NBFL has joined or indicated they intend to join third parties. NBFL will be seeking indemnity from these third parties in relation to any role they may have had in such manipulation scheme if it did exist. In this regard NBFL has indicated it intends to join BMO Nesbitt Burns (BMO) alleging BMO, through their employees, were also involved in the stock manipulation scheme, if it did exist. NBFL has also joined many of the so called "insiders" in the third party actions, claiming indemnity for any liability NBFL may incurr.

[14] I summarize at least in part the position of the various parties as they challenge the consolidation application. This is to highlight some of the differences among the various cases. This summary serves to explain that while there are some common issues, a consolidation of the actions has the potential to severely impact the interests of the respective parties and not necessarily simplify the proceedings to the extent one might , at first glance believe is possible.

[15] Mr. Douglas on behalf of his client, Mr. Colpitts, resists the consolidation. He points out the difference in the allegations as against his client versus the claims against other individuals. In this regard he suggests NBFL is alleging Colpitts was involved in a fraud or conspiracy. This is different he says than the other actions. His suggestion is that if the tort allegations against Mr. Colpitts could be disposed of then it would end any litigation against Mr. Colpitts and he would not be involved in the other matters in relation to the debt collection, etc. Mr. Douglas referred to a case tried in this Court **Elliott v. Reagh** [1994] N.S.J. 316, by Justice Grant. In that case the Trial Judge heard two cases at the same time but refused to order consolidation. The consolidation issue came up on appeal and the Appeal Court approved the joint trial versus consolidation. Counsel for Mr. Colpitts suggests it is premature for the Court to order consolidation. He submits the manipulative and insider trading allegations must be tried before any liability can be fixed on any party. He suggests the consolidated debt action and broker liability claims would fall in some logical order, saying that a decision in the NBFL tort action would not dispose of the actions in either the consolidated debt action or the broker liability claims. It is pointed out that many of the various actions have unique issues which are separate and apart from the issue of stock manipulation. They suggest, however, that a decision in the NBFL tort action in relation to

manipulative trading and insider trading allegations has the potential to narrow the issues and reduce the number of parties involved in those actions.

[16] Counsel for BMO takes the position that it is a party in only two actions related to KHI; the Bank's action SH No. 227347 and the Wadden action SH No. 216059. BMO suggests there are 30 other persons or corporations who are parties in actions other than those in which BMO is a defendant. They suggest that making BMO a party to these other actions would be manifestly prejudicial to BMO and result in significant additional expenses. Counsel for BMO suggests the determination as to whether the actions should be consolidated should be left until after pleadings in all the actions are closed and motions related to pleadings and examinations for discovery are complete. Counsel for BMO suggests that while the balance of convenience may favour NBFL in terms of having a consolidated action, the balance of convenience for **all the other litigants** would suggest the action should not be consolidated.

[17] BMO suggests that a combination of case management and solicitor cooperation would allow these various proceedings to proceed to trial in an efficient manner. Reference is made to **Tusa v. Walsh** (1994), 23 C.P.C. (3d) 178

(Gen.Div). In that case the Court noted there is a distinction between a consolidation order and an order that separate actions be tried together. It is clear in this case that if these cases are tried together as opposed to being consolidated, there will be a significant difference in terms of expense and involvement for some of the parties. In addition some parties may gain a strategic advantage in a consolidated trial which would not have been available but for consolidation. I will return later to the issue of strategic advantage.

[18] Mr. Dunlop represents a number of clients including Mr. Mahoney, 3031775 Nova Scotia Limited, Calvin Wadden, Craig Anthony Dunham, Lowell R. Weir, Blackwood Holdings Incorporated, Michael Barthe, Lutz Ristow, Derrick Banks and Plastics Maritime Limited. Mr. Dunlop opposes consolidation as proposed by NBFL. He says however, in principal they are not adverse to consolidation of matters that have a common interest. He suggests the litigation should be divided into two groups. The first action would include all those whom he characterizes as "the innocents". These are the persons against who NBFL has made no allegations of involvement in a stock manipulation scheme. This would include all of Mr. Dunlop's clients other than Mr. Wadden. Mr. Dunlop takes the position that the "innocent parties" claim solely against NBFL based upon the alleged actions of

their employee, Bruce Clark and the assertion of vicarious liability against NBFL. Mr. Dunlop wishes to stay out of any litigation against third parties who may have been involved in any alleged manipulation scheme.

[19] Mr. Dunlop points out that in relation to the alleged “innocent parties”, document exchange has been complete and the matter is ready for discovery. He suggests that the conspiracy litigation would take a lot longer. It is noted however that in order to succeed against NBFL based on an assertion of vicarious liability for the actions of NBFL employee MR Clark, those actions will depend on there being an initial finding of wrongdoing or failings by Mr Clark or other NBFL employees. The essence of the conspiracy case will turn on the issue of whether Mr Clark and others were involved in any wrongdoings. In that sense I do not accept the suggestion by Mr Dunlop that the “innocent parties” cases are so separate from all other actions.

[20] Mr. Dunlop also takes the position that to consolidate the litigation as suggested by NBFL would make the trial and preliminary steps so complex and cumbersome that it would be practically impossible to proceed. He states:

> The number of counsel, as best I can determine, would far exceed that in any previous case in Nova Scotia Litigation history.

He goes on to say:

> There must come a point in litigation where the number of solicitors involved out weighs any benefit that could be obtained by a consolidation.

[21] I have nothing to gauge the accuracy of Mr Dunlops's comparison of these cases to others in Nova Scotia. I simply say that his comments are reflective of the complexity of the various cases arising out of the collapse of KHI.

[22] Mr. MacDonald on behalf of Mr. Keating suggests the application to consolidate is premature. He suggests the preferred approach at this time is to have the cases tried at the same time but not consolidate. He referred to the **Coughlan v. Westminer Can Holdings Ltd. (No. 2)** (1991) 105 N.S.R. (2d) 68. wherein four major cases in Nova Scotia were tried at the same time although they were not consolidated. He indicated in that case, as could occur here, discoveries could be held at the same time and there could be one decision from the Court. He referred to the fact that the style of cause would be substantially different if the matters

were tried as a consolidated action. In this regard Mr. Parish did indicate that if the actions were consolidated there would perhaps be direction from the Court on the style of cause. He suggested the respective parties would be trying to gain a strategic advantage as a result of any change in the style of cause. He went so far as to suggest that in a consolidated action NBFL may be put in a position of defendant given the number of claimants and third parties who have countersued NBFL on the issue of vicarious liability.

[23] Counsel for Mr. Keating pointed out that NBFL does not have a debt claim with Mr. Keating. NBFL points out that Keating was a director of KHI and they allege he knew or should have known that the true value of KHI shares was not reflected in the market price.

[24] Mr. Belliveau on behalf of Staffing Strategists International Inc. et. al. also suggested consolidation was premature at this time. He suggested the next major step in the various actions will be to set discoveries. He suggested that discoveries could in fact sort out a lot of the issues for various actions. He too suggested that consolidation if it is ever appropriate, should occur only after the discoveries were held. This position was echoed by BMO's solicitor as well.

[25] Mr. Daniel Potter is a party in many of the cases or has been added as a third party by NBFL. He stated he would not want to have consolidation.

[26] On behalf of Mr. Clark, his counsel, Mr. Chapman takes the position that he wishes to have Mr. Clark discovered only once. He is not clear as to whether or not that means as a result of consolidation or as a result of trial management.

[27] Counsel for Stewart, McKelvey, Stirling and Scales, adopt a position similar to BMO. **They suggest the fact that NBFL is a defendant in a number of proceedings and a plaintiff in others is more than a mere technical difficulty.** The suggestion is that the conflicting position of NBFL would underscore the unworkability of a consolidated action. Counsel suggests that even though some issues overlap, the resolution of any one issue would not resolve the others.

[28] At this juncture I would note there is also the decision which I render on this same date in relation to an application to strike portions of the NBFL pleadings. Because of my refusal to strike portions of NBFL's pleadings, NBFL

will be in a position whereby it will be maintaining somewhat inconsistent positions in the various actions.

[29] In relation to the consolidation of the actions, Ms. Aitken on behalf of Stewart, McKelvey, Stirling and Scales suggests that inconsistent positions by the same party in a consolidated action is untenable. In this regard she refers to paragraph 16 of **Stone v. Confederation Life** (1992) 117 N.S.R. (2d) 194 where the court noted that if the insurance company in that case was allowed to intervene they would be in direct conflict with it's own insured. The court in that case said the situations where an insurer was placed in direct conflict with an insured should be discouraged. I find that the position of an insured and insurer is somewhat distinguishable from the present situation. Having noted the distinction, I am satisfied in this present case that the more distinct the various actions remain the more clarity there will be in terms of the parties understanding the issues and the burden of proof on issues such as whether there was for example stock manipulation.

[30] Ms. Aitken also points out that if common issues as between the parties are identified later, consolidation could occur at that time. She also suggests that even

if the matters are not consolidated, one discovery could be arranged for the various witnesses as opposed to several discoveries in separate actions.

[31] Ms. McGinty on behalf of the Blandfords and their number company suggested a consolidation of a simple debt collection brought by NBFL would be oppressive as against the Blandfords. She suggests the defences are quite distinct in the Blandford case as compared to others. The Blandfords, she says defend as against the claim on margin account and questions the guarantee in relation thereto as well as the extent of the agreement. They also suggest the counterclaim as against NBFL is in relation to an allegation of breach of contract and breach of fiduciary duty. There is no allegation of stock manipulation. They suggest as well that NBFL's employee, Mr. Clark, simply refused to sell KHI shares after being instructed to do so and that the Blandfords do not know or care why Mr. Clark refused to carry out those instructions. Ms. McGinty suggests that if the Blandfords are made parties in the consolidated action then she would be obliged as solicitor for the Blandfords to either participate in or go through all of the transcripts in all of the discoveries in relation to the vast array of other parties. The cost of doing so, she suggests, would be oppressive and prohibitive in view of the amount involved in the Blandford case.

[32] I am satisfied there are some common threads in each of the actions before the Court. The issue of stock manipulation is raised in some cases as a defence to claims. In other cases its asserted as being the basis upon which a claim is being asserted. In the case of the Blandford matter, and others, it is being offered by NBFL as a possible explanation as to why instructions to sell may not have been carried out. Stock manipulation, if proven, may settle one issue and will provide an explanation to what has occurred in many of the cases. The pleadings suggest many of the parties in the actions are not alleged to have been a party to any alleged conspiracy to manipulate.

[33] To the extent that any of those parties might have an interest in the determination as to whether there was stock manipulation or wrongdoing, the issue could be resolved by having a joint trial on the issue of manipulation. Other than the Applicant, NBFL and aside from the issue of whether or not there was stock manipulation, there are fewer common features than one may expect. Perhaps I could state it more accurately by saying the respective cases would appear to have a number of unique aspects. For example some of the parties will be affected by the determination as to whether NBFL will be held vicariously

liable for the actions of its employee, Mr. Clark. Others, who are major litigants, will not be impacted by the issue of vicarious liability. NBFL has made third party claims as against several of the alleged conspirators in the manipulation allegations. This includes BMO and their agents or brokers. Some litigants have no contact or relationship with the BMO, brokers or employees. The Blandfords, have very little in common with any of the other parties which the applicant seeks to join in the consolidated action.

[34] As I have already noted the issue of stock manipulation is raised in some cases as a defence by NBFL. In other cases its stated as being the basis upon which a claim is being asserted by NBFL. For example as I had noted in the case of the Blandfords it is being offered as a possible explanation as to why instructions to sell may not have been carried out. To the extent that stock manipulation, if proven, may settle one issue and may provide an explanation to what has occurred in many of the cases, I am not satisfied at this point that resolution of that issue will resolve all of the cases which the applicants seek to have consolidated. For many, the claims which they have or against which they defend are as much based on unique situations as they are on any manipulation allegations.

The Law in Relation to Consolidation

[35] The issue of consolidation has been considered in many cases including **Seafreez Foods Inc. v. Rothmar Manufacturing Corp.** (1993), 126 N.S.R. (2d) 197 (S.C.) and **Stone v. Raniere** (1992), 117 N.S.R. (2d) 194 (S.C.). In **Seafreez** at paragraph 8 the court noted:

[36] It is an overriding concern that all matters be dealt with at the same time and that all parties and common matters of law and fact of law(sic), be decided in a uniform fashion. This concern is reflected in s. 41 (g) of the Judicature Act...

[37] A second factor is whether a decision in one action will dispose of the other. In **Stone** at page 196 Justice Saunders then of the Supreme Court said:

[38] The common element in these decisions is that in order for consolidation to be ordered a decision in one case would dispose of the essential cause of action in the other case.

[39] Justice Saunders also took into account the question of whether one action would have to be delayed in order for another (in this case, others) to catch up. Finally it was noted that the court should balance the pros and cons of separate

trials versus a consolidated trial. One solution where there were a number of issues in which a party may not be interested was noted in **Seafreez.** There Justice Davidson said a party may opt not to attend those portions of a consolidated proceeding that do not concern the party.

[40] The P.E.I. Court of Appeal has recently rejected stated that the rules in that province which are similar to the rules in Nova Scotia do not require all questions of law or fact be common. I refer to **Abegweit Potatoes Limited v. J. B. Read Marketing Inc.** (2003) 36 C.P.C. (5th) 203. At paragraph 23 Chief Justice McQuaid stated:

> Rule 6.01(1) does not require that all questions of law in fact be common; it refers to "...a question of law or fact in common; ..." ...In assessing whether there is a common question of fact or law common to both proceedings so as to meet the threshold test for granting one of the remedies in Rule 6.01(1)(d), the focus should be on whether there is a common issue of fact or law that bears sufficient important in relation to the other facts or issues in the proceedings which would render it desirable that the matters be consolidated...

[41] The assessment as to what the common issues of fact and law may be is to be made by reference to the pleadings. In other words the court must assume the allegations in the pleadings can be proven and then weigh the merits of the request to consolidate in view of the issues raised in the pleadings.

[42] As I have indicated there are common issues for many of the actions related to the question of whether there was stock manipulation and who was involved. There is a distinct division as between a number of the parties. As pointed out by Mr. Dunlop, many parties in the various actions are not alleged to have been involved in any stock manipulation scheme. He refers to them as the "innocents". NBFL on the other hand in the various pleadings is alleged to be either the victim of or alternatively vicariously liable through its employees for the conspiracy. I am satisfied the resolution as to the issue as to whether or not there was a conspiracy to manipulate may resolve one issue and that affects many of the parties. There are many actions or groups of actions which have additional issues which are not related.

[43] Each case must be assessed on an individual basis. The easy way out for the court in this case may be to simply say consolidation should be ordered and leave the parties to sort out or live with the consequences. I am satisfied that the easy choice of consolidation is not the appropriate solution in the present case. I take into account the unique features of this group of cases. For example I take into account the sheer size of the case which would result from consolidation. Once

consolidated all counsel for example will have to copy all other parties on all aspects of the litigation, not just the party with whom they have an issue. While that may in most cases be little more than an nuisance, in this case it will result in many parties having to be copied and or served. The cost of that alone to each party would be substantial. It is true that as the matter now stands NBFL is involved with a large number of the litigants and they will no doubt have to copy most of the various parties at one point. For most of the others they are not in the same position in this regard. There is some overlap but in may instances there are only a few parties involved in a large number of unique issues.

[44] As I weigh the balance of convenience, I am not satisfied it would serve the interest of any party other than NBFL to have all of these actions consolidated into a single action at this time. For all the advantages to NBFL in consolidation there would appear to corresponding disadvantages to the other parties. NBFL may gain some strategic advantages by having consolidation at this time but many other parties would be needlessly dragged into all aspects of this massive litigation. Other than the resolution of the issue stock manipulation many litigants would have very little in common with many of the other parties.

[45] The costs for any party litigating a consolidated action would be substantial. The extent of this cost is perhaps reflected in the NBFL application for security for costs against one party. NBFL in that case is asking for security for costs in the amount of $300,000.00. They are suggesting that for the one party alone this $300,000.00 would amount to nothing more than a reasonable contribution to the costs of litigating a single claim.

[46] There are a number of examples where Courts have refused to order consolidation and instead ordered that the matters be tried together. I have already referred to **Elliott v. Reagh** [1994] N.S.J. No. 316. In that case Justice Grant refused to order consolidation but heard the two cases together. I already referred to **Westminer** where four different cases were tried at the same time but not consolidated. Discoveries were held at the same time and there was a single decision.

[47] Through case management the court can deal with the issue of having discoveries completed without saddling all parties with extensive costs associated with consolidation. Mr. Parish on behalf of NBFL suggests there are no rules to allow the Court to order joint discoveries be held on separate cases if this Court

were not to order consolidation. Counsel who are present representing other parties indicated they would be prepared to cooperate in arranging joint discoveries. It would certainly be preferable if counsel could cooperate in arranging for joint discoveries of witnesses such as Mr. Clark or KHI directors. If a cooperative approach by counsel does not work out a process for discovery there may be direction from the Court. This is complex litigation. In the absence of comprehensive rules the Court may, pursuant to the inherent powers of the court, settle the rules of practice and procedure so as to fill any voids. To the extent that there is any gap in the **Nova Scotia Civil Procedure Rules** as regards ordering of joint discoveries, I am satisfied that the discretion of the Court under case management rules together with the inherent power of the Court can address those difficulties. As I have said the preferable solution would be for counsel to work out these issues without Court intervention. If Mr. Parish is correct in suggesting that a single discovery of parties such as Mr. Clark would be preferable and if all counsel agree that a single discovery would be preferable, the fact there is no consolidation should not interfere with counsel taking that single discovery approach.

[48] At this stage I am not prepared to order consolidation.

J

01/12/05