IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Barthe v. National Bank Financial Ltd., 2008 NSSC 30

Date: 20080130
Docket: SH 208293
Registry: Halifax

Between:

Michael Barthe and Lutz Ristow

Plaintiffs/
Defendants by Counterclaim

- and -

National Bank Financial Ltd.

Defendant/
Plaintiff by Counterclaim

- 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., Derek Banks and Plastics Maritime Ltd.

Third Parties

And Between

Bernard Schelew, Daniel Potter, Knowledge House Inc., Starr's Point Capital Incorporated, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Donald Snow, Meg Research.com Limited and 3027748 Nova Scotia Limited

Plaintiffs by Counterclaim

- and -

National Bank Financial Ltd., National Bank of Canada, Real Raymond, Jean Turmel, Michel Labonte, Lorie Haber, Guy Roby, Eric Hicks, Barry Morse, David Mack and Bruce Clarke

Defendants by Counterclaim

Docket: SH 227347

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 Between:

National Bank Financial Ltd., BMO Nesbitt Burns Inc., Donald Snow,
Meg Research.com Limited, 3027748 Nova Scotia Limited,
Bernard Schelew, Raymond Courtney, Fiona Imrie,
Gramm & Company Incorporated, 2532230 Nova Scotia Limited,
3020828 Nova Scotia Limited, Daniel Potter, Knowledge House Inc.,
and Starr's Point Capital Incorporated

Plaintiffs by Counterclaim

And Between:

Derek Banks, Plastics Maritime Ltd., National Bank Financial Ltd.,
National Bank of Canada, Real Raymond, Jean Turmel,
Michel Labonte, Lorie Haber, Guy Roby, Eric Hicks,
Barry Morse, David Mack and Bruce Clarke

Defendants by Counterclaim

And Between:

Raymond Courtney

Plaintiff by Crossclaim

- and -

Daniel Potter, Blois Colpitts,
Stewart McKelvey Stirling Scales and Bruce Clarke

Defendants by Crossclaim

Docket: SH 216543

Between:

1384156 Ontario Inc. continued in the Province of Nova Scotia
as 3058703 Nova Scotia Limited

Plaintiff

- and -

National Bank Financial Ltd.

Defendant

- 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, Derek Banks and Plastics Maritime Ltd.

Third Parties

And Between:

Raymond Courtney

Plaintiff by Crossclaim

- and -

Daniel Potter, Blois Colpitts, Stewart McKelvey Stirling Scales, and Bruce Clarke

Defendants by Crossclaim

And Between:

Donald Snow, Meg Research.com Limited, 3027748 Nova Scotia Limited, Bernard Schelew, Raymond Courtney, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Daniel Potter, Knowledge House Inc., and Starr's Point Capital Incorporated

Plaintiffs by Counterclaim

- and -

Daniel Potter, Blois Colpitts, Stewart McKelvey Stirling Scales, National Bank Financial Ltd., National Bank of Canada, Real Raymond, Jean Turmel, Michel Labonte, Lorie Haber, Guy Roby, Eric Hicks, Barry Morse, David Mack and Bruce Clarke

Defendants by Counterclaim

Docket: SH 193842

Between:

Michael Mahoney and 3031775 Nova Scotia Limited

Plaintiffs

- and -

National Bank Financial Ltd.

Defendant

- 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, Lutz Ristow, Derek Banks and Plastics Maritime Ltd.

Third Parties

And Between:

Daniel Potter, Knowledge House Inc., Starr's Point Capital Incorporated,
Fiona Imrie, Gramm & Company Incorporated,
2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited,
Donald Snow, Meg Research.com Limited,
3027748 Nova Scotia Limited and Bernard Schelew

Plaintiffs by Counterclaim

- and -

National Bank Financial Ltd., National Bank of Canada,
Real Raymond, Jean Turmel, Michel Labonte, Lorie Haber,
Guy Roby, Eric Hicks, Barry Morse, David Mack and Bruce Clarke

Defendants by Counterclaim

Judge: Suzanne M. Hood

Heard: January 28, 2008, in Halifax, Nova Scotia

Written Decision: January 30, 2008

Counsel: David G. Coles, Q.C., James A. Hodgson, and Joshua J. Santimaw, on behalf of National Bank Financial Ltd.
Albert Pelletier, on behalf of Stewart McKelvey
Dale Dunlop, on behalf of Lutz Ristow
Kara Beitel, on behalf of Blois Colpitts
Daniel Potter, on his own behalf

By the Court:

[1] Lutz Ristow has filed an application for summary judgment against National Bank Financial Limited ("NBFL"). NBFL applies to strike paragraphs of Lutz Ristow's affidavit and the exhibits referred to in those paragraphs. The issue is whether the paragraphs and exhibits should be struck:

(a) because they are irrelevant; or

(b) because they do not meet the test for similar fact evidence.

[2] Lutz Ristow seeks summary judgment in several actions. In S.H. 208293 he is the plaintiff and that is the relevant action in this application. In that action he alleges in para 31:

> 31. The plaintiffs claim against the defendant directly for its negligence in failing to properly supervise the actions of Clarke and carry out the responsibilities entrusted to the branch and senior management of NBFL, with respect to the activities of Clarke.

[3] The failures are then listed in the ensuing six paragraphs and in paragraph 38 of the statement of claim says:

> 38. The plaintiffs state that all the above noted failures by the defendant constitutes negligence and breach of contract which makes the defendant directly liable to the plaintiffs for the loss of money deposited with the defendant.

[4] In his affidavit filed in the summary judgment application, Lutz Ristow says in paragraphs 41 to 44:

> 41. Attached hereto as Exhibit "O" is a true copy of a Settlement Agreement, dated September 20, 2007, between the Investment Dealers Association of Canada and National Bank Financial Ltd.
>
> 42. Attached hereto as Exhibit "P" is a true copy of the Reasons for Decisions in the Disciplinary Hearings with the Investment Dealers Association of Canada with respect to the discipline penalties imposed on National Bank Financial Inc., dated September 20, 2007.
>
> 43. Attached hereto as Exhibit "Q" is a true copy of the Bulletin, dated September 20, 2007, released by the Investment Dealers Association of Canada with respect to the discipline penalties imposed on National Bank Financial Inc.
>
> 44. The source of my information with respect to exhibits "O", "P", "Q", is the website of the Investment Dealers Association of Canada which I was directed to by my solicitor.

He attaches as exhibits the settlement agreement (in French, untranslated), the decision of the Hearing Panel of the Investment Dealers Association (in French, untranslated) and a Bulletin from the Investment Dealers Association dated September 20, 2007 (in English).

[5] In the second paragraph of the Bulletin (Tab "Q") it says that a settlement hearing was held and a settlement agreement was accepted under which NBFL acknowledged violations of various By-laws, Regulations and Policies of the Investment Dealers Association. In the conclusion to the Bulletin it states as follows:

> Financial cooperated fully with the investigation of the matters which are the subject of this agreement, fully acknowledged its responsibility in respect of the failures identified, and has shown itself willing to correct the weaknesses which gave rise to the violations.
>
> Its new management has made significant and important efforts to correct the serious shortcomings in the control and supervisory mechanisms monitoring the activities of its branch offices and has taken the necessary measures to remedy the situation. The improvements are noteworthy and now ensure more controlled supervision of the activities of the representatives at the branch offices. In the circumstances, the IDA considers that there is little risk that a situation similar to the one which occurred at the time of the violations will reoccur. Financial has paid substantial amounts to compensate the clients of the representatives that it failed to supervise adequately.

[6] NBFL does not dispute the accuracy of the Bulletin or deny that NBFL entered the settlement agreement. It says however that this information is "wholly unrelated" to this litigation. It says therefore it is irrelevant and seeks to strike it pursuant to **Civil Procedure Rules** 38.11 and 14.25. Rule 38.11 says:

> The court may order any matter that is scandalous, irrelevant or otherwise oppressive to be struck out of an affidavit.

[7] **Rule** 14.25 provides as follows:

> 14.25. (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> ...
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding; ...

[8] Alternatively, NBFL says if these paragraphs and exhibits are not irrelevant they should not be admitted because they are not similar fact evidence.

ROLE OF CHAMBERS JUDGE ON SUMMARY JUDGMENT APPLICATION

[9] In **Huntley (Litigation Guardian of)** v. **Larkin**, [2007] N.S.J. No. 274, Roscoe, J.A. in para 14 quoted from the decision of the chambers judge where he referred to **Campbell** v. **Lienaux** (1998), 167 N.S.R. (2d) 196 at para 14 in which Cromwell, J.A. said:

> Summary judgment applications are not the appropriate vehicle for determining disputed facts, difficult questions about the appropriate inferences to be drawn from facts or complex legal questions ...

[10] This role is to be contrasted with that of a trial judge. As Davison, J. said in **Yates** v. **Currie**, [1994] N.S.J. No. 69 at para 21:

> The role of the trial judge is to assess the relevance and also the weight of the disputed evidence and arrive at the probative value of the evidence. With due regard to the exclusionary presumption involving disposition evidence, the judge has to weigh the probative value against any prejudice which the evidence is likely to excite.

[11] However, it is not in my view inappropriate for a Chambers Judge to determine on a summary judgment application if paragraphs of an affidavit filed in that application should be struck. In my view, **Rule** 14.25 contemplates this when it refers to striking affidavits "at any stage of a proceeding". It is not the role of the Court to make factual determinations on disputed facts but, in this case, the facts are not in dispute with respect to the existence of the settlement agreement. Nor, in my view, is this a complex legal argument. This issue is one which commonly is dealt with in chambers applications – relevance. Nor do I consider it inappropriate on a chambers application to decide if, for the purposes of a summary judgment application only, the paragraphs and exhibits should be struck because they are not admissible as similar fact evidence.

RELEVANCE

[12] As Haliburton, J. said in **Bell** v. **Canada (Attorney General)**, [2006] N.S.J. No. 487, in para 23:

> ... The issue to be decided, as I understand, is whether or not an agreement was concluded... It is in that specific context that I consider the relevance of the representations set forth in Mr. Dunlop's affidavit.

I must determine what the issue or issues are in the litigation which are at stake in the summary judgment application. One of the issues is whether NBFL failed to properly supervise Clarke; that is the context in which I must look at the impugned paragraphs and exhibits.

[13] As mentioned above, the Bulletin says that NBFL acknowledged violations of certain By-laws, Regulations and Policies of the IDA. The Bulletin concluded by commenting on measures taken by NBFL since the events referred to. The Bulletin refers to "*significant and important efforts to correct the serious shortcomings in the control and supervisory mechanisms monitoring the activities of its branch offices*". It goes on to refer to "*more controlled supervision of the activities of the representatives at the branch offices.*"

[14] The summary in the Bulletin is in my view consistent with wording of the settlement agreement in paragraphs 203 - 207 (Tab "O") and paragraph 14 of the decision of the Association (Tab "P"). It is noteworthy that paragraph 14 of the latter uses the words "*des changements draconiens*" and "*ces améliorations radicales*". One does not have to be completely bilingual to understand those phrases and the adjectives used.

[15] The settlement agreement (Tab "O") in paragraph 203 refers to significant and important efforts ("*des efforts significatifs et importants*") and serious loopholes ("*les graves lacunes*"). More importantly, that paragraph does not refer to only the Joliette or Montreal branches, but branches generally ("*activités dans ses succursales"*). Paragraph 204 refers to control over branch representatives, again without specifying only Montreal or Joliette ("*l'activité des représentants en succursale*"). The settlement agreement then goes on to list twelve infractions relating specifically to Montreal and Joliette.

[16] The general wording of the paragraphs to which I have referred and the general wording of the Bulletin cause me to conclude that the matters referred to in paragraphs 31 - 38 and exhibits "O", "P" and "Q" of the Ristow affidavit are relevant to the issue of supervision by NBFL of Clarke.

[17] One of the issues raised in the statement of claim is supervision by head office in Montreal (paragraph 34(a)), and it is head office which is referred to in the impugned paragraphs and exhibits. The time frame of the allegations in this case is the same as part of the time frame of the infractions dealt with by the Association.

[18] I therefore conclude the paragraphs and exhibits are relevant to this matter and should not be struck.

SIMILAR FACT

[19] The alternate argument of NBFL is that the paragraphs and exhibits should be struck because they are not admissible as similar fact evidence.

[20] In **Dhawan** v. **College of Physicians and Surgeons of Nova Scotia**, [1998] N.S.J. No. 170, Chipman, J.A. dealt with similar fact evidence in a case where a doctor was disciplined by the Nova Scotia College of Physicians and Surgeons. He said in paragraph 61:

> Emphasis has now shifted away from a category-based approach to the resolution of two broad questions: (1) whether the similar fact evidence is relevant to some other

issue beyond disposition or character; and, (2) whether the probative value of the evidence outweighs its prejudicial effect.

[21] He continued in paragraphs 66, 67, 68 and 69:

66 In civil cases, the concern respecting the danger of the case turning on propensity is not so great. The same general rule applies, however. The difference from criminal cases is illustrated in the following passage from the decision of Lord Denning in Mood Music Publishing Co. v. DeWolfe Ltd. (1976), 1 All E.R. 763 (C.A.) at p. 766:

> The criminal courts have been very careful not to admit such [similar fact] evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.

67 As Sopinka, Lederman and Bryant, Law of Evidence in Canada points out, Lord Denning brings into play notions of oppression and unfairness, suggesting more flexibility of the rule in civil cases.

68 In MacDonald v. Canada Kelp Co. Ltd. et al. (1973), 39 D.L.R. (3d) 617 (B.C.C.A.), an action was based on allegations of fraudulent misrepresentation. Evidence that the defendant made similar misrepresentations in other transactions was held admissible to prove that he made the misrepresentations alleged by the plaintiff. Bull, J.A. in giving concurring majority reasons for the court said at p. 626:

> When there is a real and substantial nexus or connection between the act or allegation made, whether it be a crime or a fraud (but not, of course, limited to those), and facts relating to previous or subsequent transactions are sought to be given in evidence, then those facts have relevancy and are admissible not only to rebut a defence, such as lack

> of intent, accident, mens rea or the like, but to prove the fact of the act or allegations made. The respondents submit that is not so, and "similar acts" are never admissible to prove the doing of the act itself. I cannot agree ...
>
> 69 In Re College of Physicians and Surgeons of Ontario and Mohan (1993), 16 O.R. (3d) 62 (Ont.Div.Ct.), the appellant was found guilty of professional misconduct arising out of acts of sexual impropriety with three adolescent females. He appealed the Committee's decision inter alia on the ground that it relied on similar fact evidence of two of the complainants to bolster the credit of the other. The court dismissed the appeal. Moldaver, J. delivering the judgment of the court said at p. 65:
>
> ... I am nevertheless satisfied that the incidents described by the three patients bore a sufficient number of similar features such that the committee was justified in using the similar fact evidence as it did ...

[22] In **Wall** v. **Horn Abbot Ltd.**, [2006] N.S.J. No. 541, MacAdam, J. referred to **Dhawan**, *supra*, and then in paragraph 8 said:

> Traditionally, issues relating to similar fact evidence have arisen primarily in criminal, as opposed to civil trials. It is broadly accepted that similar fact evidence is less objectionable in civil cases. Nevertheless, “the same rules apply, and the evidence sought to be introduced must have sufficient nexus with or display the requisite relevance or materiality to the issues in the case.” Evidence going to show “general disposition” alone will not be admissible.

[23] He also referred to **Alexander J. Holdings** v. **Delta Play Ltd.**, [1999] B.C.J. No. 1304, in paragraph 12 where he said:

> 12 The issue of similar fact evidence was further considered, in the context of fraud, in Alexander J. Holdings v. Delta Play Ltd., [1999] B.C.J. No. 1304, 1999 CarswellBC 1282 (B.C.S.C.) A playground owner alleged that a supplier had fraudulently misrepresented itself as the only supplier and installer in the area, as

> well as fraudulently representing the cost of a playground construction project. The supplier objected to the admission of evidence of former customers who claimed to have had similar experiences, and whose evidence was "essentially that [the defendant] quoted a set price for a turn key operation and told them that Delta was the only manufacturer of this equipment in Canada. All of the intended witnesses were unhappy with their dealings with Delta and each told of going over budget. The defendant argued that the evidence went "merely to disposition." The plaintiff claimed that it had a nexus with the issues in the case, and that it showed a pattern of conduct by the defendant. Warren, J. concluded:
>
> > In my view, the evidence is admissible. While there were differences in the versions related by these four witnesses of their dealings with Buchanan and Delta, the substantive portion was remarkably similar to the events related by Good before me...

[24] In my view the evidence of the settlement agreement, decision of the IDA and the IDA Bulletin are “logically probative” of matters in issue here. There is a “real and substantial nexus” between the allegations here and the acknowledgements in the Quebec matter.

[25] As I have said above, the settlement agreement, decision and Bulletin all refer to a failure to supervise. Although certain of the facts relating to the Montreal and Joliette infractions differ from those alleged here, it is clear there is a similarity. NBFL failed to supervise its employees and admitted to not having proper policies and procedures in place. This, in my view, is not evidence of NBFL’s general disposition or character but of a failure to supervise, one of the issues at stake in this matter. In my view, it is not oppressive or unfair to NBFL to have this material before the court.

Clearly, NBFL has had sufficient notice of it to deal with it in the summary judgment application.

[26] I therefore conclude that it is properly admissible as similar fact evidence.

CONCLUSION

[27] The application is dismissed.

[28] Costs are payable forthwith by NBFL to Lutz Ristow. This was a hearing of more than one hour but less than one-half day. Costs are payable in the amount of $1,000.00.

Hood, J.