IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Jabez Financial Services , Inc. (Re), 2008 NSSC 59

Date: 20080228
Docket: SH 276050
Registry: Halifax

In the Matter of: The Securities Act, R.S.N.S. 1989, C.418, S29D as am.

and

In the Matter of: An Application by the Nova Scotia Securities Commission to appoint PricewaterhouseCoopers Inc. as Receiver of Jabez Financial Services, Inc.

D E C I S I O N

Judge: The Honourable Justice Kevin Coady

Heard: February 7, 2008, in Halifax, Nova Scotia

Decision: February 28, 2008

Counsel: Stephen Kingston, representing the applicant
Justin Kimball, representing the applicant
Eric Sturk, representing the respondents

By the Court:

[1] This ruling arises from an Amended Interlocutory Notice (Application Inter Partes) brought by PricewaterhouseCoopers Inc. as Receiver for Jabez Financial Services Inc. The applicant seeks the following relief:

> An Order pursuant to **Civil Procedure Rule** 48.12 directing that possession of certain property (as described in Schedule "A" to the draft Order) (the "Property") be given to PricewaterhouseCoopers Inc; and
>
> An Order pursuant to the *Judicature Act*, R.S.N.S. 1989, c.240 declaring that the Property forms part of the assets and property of Jabez Financial Services Inc.

[2] The property referred to as Schedule "A" to the draft order is as follows:

> 1. One 2005 Nissan Altima motor vehicle bearing Vehicle Identification No. 1N4AL11D75C268185
>
> 2. One 2004 Chevrolet Silverado motor vehicle bearing Vehicle Identification No. 1GCHK23114F142910
>
> 3. One Bombardier 18 Foot Pleasure craft with Hull ID CECA0717A999 Lic. No. 11A18978
>
> 4. One 1999 "Shore" Boat trailer bearing Vehicle Identification No. 6500101

5. One truck cap accessory believed to be located at the premises known as 96 Smeltzer Rd, RR #3 Upper Vaughn, Nova Scotia

[3] The respondents seek a stay of these proceedings on the basis that this is an application, not a trial. They argue that the Republic of Panama is the proper forum for such a trial.

[4] A review of the history of this matter is helpful.

- In July and August, 2006 the Nova Scotia Securities Commission received complaints from the public that Jabez Financial Services were offering "deal of the century" investment opportunities to Nova Scotians and that their operations were very suspect.
- Investigations indicated a very secretive investment organization offering unrealistically high returns. Investigators determined that Jabez was registered in Panama and was not licensed to do business in Nova Scotia or anywhere in Canada.
- These initial investigations suggested that Quintin Sponagle, a Nova Scotian was Jabez's general manager of operations and that he possessed full power of attorney for Jabez.

- In September, 2006 Quintin Sponagle acknowledged to the Nova Scotia Securities Commission that he was general manager of Jabez which he described as a “legitimate but very private opportunity” and that they operate by word of mouth.
- Mr. Sponagle further indicated that Jabez was strictly a Panamanian company, that they did not have agents in Nova Scotia and that they did not solicit business in Nova Scotia.
- In September, 2006 Jabez notified its investors that their accounts had been frozen by the Central Netherlands Antilles Bank. Jabez advised that it could not pay interest on investments and could not return investments.
- On October 24, 2006 the Nova Scotia Securities Commission authorized Abel Lazarus, C.A. to investigate Jabez, its affiliated bank and their principles.
- On November 8, 2006 the Nova Scotia Securities Commission issued a temporary cease trade order to Jabez, its affiliated bank and their principles.
- Further investigations determined that 132 Nova Scotians had invested $3,061,397 in Jabez. Additionally 47 persons from other provinces had invested $826,259.63 for a total of $3,887,656.63.

- The Nova Scotia Securities Commission was only able to locate $2,044,257.95 in Jabez name as of November 20, 2006.
- On November 29, 2006 Quintin Sponagle flew to Panama City, Panama.
- Mr. Lazarus concluded by the end of 2006 that Jabez had engaged in the trading of securities, in a manner contrary to the public interest and that these unauthorized activities have placed Jabez investors at immediate and serious risk of loss.
- On March 6, 2006 this court issued an order appointing PricewaterhouseCoopers Inc. as the Receiver of the property and assets of Jabez wherever situate.

[5] The Receiver initiated an investigation intended to fulfill its mandate. Inquiries indicated the possibility that family and associates of Quintin Sponagle had received property that had been paid for with Jabez funds. Further inquiries disclosed the following:

- On or about August 18, 2006, $16,505.00 was transferred to C.Ron Fillmore Auto Sales Ltd. in Debert, Nova Scotia for the purchase of the Nissan in the name of Shelley Ann Sponagle and which was subsequently registered in the name of Shelley Sponagle;

- On or about June 2006, $35,391.25 was transferred to Armstrong's Auto Sales in Windsor, Nova Scotia for the purchase of the Chevrolet in the name of Jabez, and which was subsequently registered in the name of Mr. Sponagle, followed by an additional $2,274.70 for the purchase of a warranty for the Chevrolet;
- On or about May 17, 2006, $11,980.00 was transferred to Mr. John Anderson of Lower Sackville, Nova Scotia for the purchase of the marine vehicles which were taken in the name of Mr. Sponagle and which were subsequently registered in the name of Mr. Sponagle;
- On or about July 25, 2006, $1,264.26 was transferred to Caps Plus in Lower Sackville, Nova Scotia for the purchase of the truck cap which was taken into the possession of Mr. Sponagle.

[6] A review of each vendors documentation determined that all payments were wired by Jabez to the respective vendors.

[7] The evidence of the Registry of Motor Vehicles records indicated that the Nissan is registered to Ms. Sponagle and the Chevrolet and the Bombardier is registered to Quintin Sponagle.

[8] In May, 2007 the Receiver wrote to the Sponagles demanding repayment of the Jabez funds used to acquire the property, or to surrender the property. Their counsel responded stating that the funds which they had withdrawn represented funds they had invested in Jabez. The Sponagles have not provided any documentation to substantiate their claim.

[9] On November 8, 2007 the Receiver obtained an Interlocutory Recovery Order pursuant to **Civil Procedure Rule** 48.01. The sheriff's office subsequently recovered the Nissan, the Chevrolet truck and the Truck Cap from Ms. Sponagle's residence at Upper Vaughan, Nova Scotia. The Bombardier boat and Trailer were not located.

[10] Ms. Sponagle recovered the seized items pursuant to **Civil Procedure Rule** 48.06. In late November, 2007 she filed bonds and Garth and Norma Sponagle acted as her sureties. Ms. Sponagle filed an affidavit on November 23, 2007 in which she claimed ownership of the items referred to in the Interlocutory Recovery Order.

[11] The applicant seeks a final order of recovery with respect to the subject property. **Civil Procedure Rule** 48.12 applies and states as follows:

> **48.12**(1) "In a proceeding or on an application to recover possession of property, the final order may direct possession of the property to be given to the applicant or, where possession cannot be given, order the value thereof to be recovered by him, and award damages for the wrongful taking or withholding of the same."

[12] The applicant has clearly established that the subject property was purchased with funds forwarded from Jabez. The respondents take the position that these funds were not the property of Jabez. They assert that these funds represented an investment in Jabez by Quintin and Shelley Sponagle. There is a suggestion that Quintin Sponagle liquidated some gold reserves and that Shelley Sponagle sold RRSP's to facilitate their investment in Jabez. Neither Shelley Sponagle nor her sureties provided any evidence to support their position. I am satisfied that the Sponagles had no funds invested in Jabez and that Jabez received no consideration for buying them the subject property.

[13] The applicant Receiver is mandated to "take possession and control of the property" of Jabez and to "seek any kind of judicial relief" necessary to advance the purposes of the receivership order.

[14] The respondents argue against a final Recovery Order on the basis that this is an application and not a trial. **Civil Procedure Rule** 48.12 clearly allows for this relief "in a proceeding or on an application". **Civil Procedure Rule** 1 defines an application as follows:

> "application" means an originating or interlocutory application, motion or petition made,
>
> (ii) in the Supreme Court of Nova Scotia, to a judge in chambers, or to the court when sitting during a trial or pursuant to an order;

[15] This application was made pursuant to the Receivership Order.

[16] I grant an order in favour of the applicant, pursuant to **Civil Procedure Rule** 48.12, requiring the subject property be given to the Receiver. Additionally, I grant a declaration that the subject property forms part of the assets and property of Jabez and that the Receiver is entitled to possession.

[17] In light of the foregoing Ms. Sponagle has been unjustly enriched at the expense of Jabez. The elements of unjust enrichment are set forth in *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834:

1. An enrichment of one party;

2. A corresponding deprivation suffered by the other party; and

3. The absence of a juristic reason for the enrichment.

[18] I am satisfied that all three elements have been established by the applicant and have not been refuted by the respondents. In light of this conclusion Ms. Sponagle holds the subject property as a constructive trustee for Jabez.

[19] I adopt the authority advanced by the applicant at page 7 of their pre-hearing memorandum:

> "Waters, in his text *Law of Trusts in Canada* (3rd ed., 2005) defines "constructive trust" at p.454, and discusses it as a remedy in the context of unjust enrichment at pp.469-470, as follows:
>
> > [T]he constructive trust comes into existence, regardless of any party's intent, when the law imposes upon a party an obligation to hold specific property for another. The person obligated becomes

by force of law a constructive trustee towards the person to whom he owes performance of the obligation.[p.454]

...

If a Defendant is required to make restitution of an unjust enrichment, this can be achieved in different ways. The Defendant might be required to pay a sum of money measured by the value of the defective transfer; or he might be required to return the enrichment *in specie*. This second possibility is usually activated by the constructive trust. So there are two steps. The liability in unjust enrichment is established by the proof of the three elements of the cause of action. There then follows a second inquiry, into how restitution should be made. The same issue arises where a Defendant is required to disgorge the profits of a wrongful act. He could be ordered to pay a sum of money, or he could declare to be a constructive trustee of the gain.

...

First, the plaintiff must show that a money award would be inadequate ....The court may consider the probability that a money award will be paid, and any "special interest" which the plaintiff holds in the disputed property. Second, the plaintiff must show that there is a link between the plaintiff's contribution and the property over which the plaintiff now claims a trust ....So the requirement that the plaintiff show a link between his contribution and the asset claimed is one which resonates throughout the general law of trusts. Another requirement is that the plaintiff must have made a *substantial* contribution; this is a threshold requirement, which would appear to confine plaintiff's who have made small contributions to money claims."

(See also ***Snow v. Marsh*** (2004), 229 N.S.R.(2d) 203 (C.A.))

[20] I am satisfied that in light of all the circumstances, a monetary award would not be an appropriate remedy. The proper remedy is a return of the subject property to the Receiver for Jabez.

[21] The applicant seeks the following additional relief:

> "An Order granting leave to the Receiver to apply for damages as against Ms. Sponagle and her sureties, Garth and Norma Sponagle, for the wrongful taking or withholding of the Property;"

[22] I have reviewed the Amended Interlocutory Notice filed in this application. There is no request for such an order. Further, I see no undertaking in the Rule 48.06 bond provided by the respondents, to pay damages. I decline to order leave to apply for damages. This does not preclude the applicant from pursuing other remedies should the value of the subject property fall below the amounts advanced from Jabez for their purchase.

[23] The respondents' submissions, both written and oral, focus on the issue of Forum Non Conveniens. They argue that this proceeding should be stayed and that the proper forum for a trial is the Republic of Panama. The authority advanced is Justice Sopinka's decison in *Amchem Products Inc. V. British Columbia* (Workers

Compensation Board), [1993] 1 S.C.R. 897. Extensive excerpts have been produced in the respondents' pre-hearing memo.

[24] I accept the respondent's submission that "the choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action."

[25] In *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.) MacPherson J.A. stated at paragraph 17:

> "On a motion to stay a proceeding on the basis of forum non conveniens, the test is whether there is clearly a more appropriate jurisdiction in which the case should be tried than the domestic forum chosen by the plaintiff."

[26] In *Avenue Properties Limited v. First City Development Corporation* (1986), 7 B.C.L.R. (2d) 45 (C.A.) McLachlin, J.A. (as she then was) stated at page 50:

> "...a plaintiff's choice of forum should not be lightly denied. It is his right to have ready access to the courts of his jurisdiction and not to be required to travel outside his jurisdiction to present his case. This is particularly the case where the plaintiff resides in the jurisdiction where he seeks to bring his action or where there is some other *bona fide* connection between the action and the jurisdiction

> in which it is sought to be brought. Accordingly, the court's jurisdiction to stay proceedings should be used sparingly."

[27] The following factors support the respondents' position that Nova Scotia is the proper forum:

- The subject property is situate in Nova Scotia.
- The respondents reside in Nova Scotia.
- The majority of "investors" in Jabez reside in Nova Scotia.
- The Receivership Order and the Interlocutory Recovery Order issued from the Supreme Court of Nova Scotia.
- The investigation into Jabez was conducted by the Nova Scotia Securities Commission.

[28] The fact that Jabez was incorporated in Panama is not a persuasive factor. The fact that Quintin Sponagle moved to Panama during this proceeding is not a persuasive factor. I see these as factors designed to avoid supervision by the authorities in Nova Scotia. The likelihood of this case getting off the ground in Panama is remote. I conclude that Nova Scotia is the proper forum and I decline entering a stay.

[29] I will hear the parties on costs by way of written submission.

J.