IN THE SUPREME COURT OF NOVA SCOTIA
Citation: National Bank Financial Ltd. v. Potter, 2008 NSSC 135

Date: 20080507
Docket: 206439
174293
193842
208293
216543
227347
Registry: Halifax

Between:

National Bank Financial Ltd.

Plaintiff

v.

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 and Knowledge House Inc.

Defendants

And Between:

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

Plaintiffs by Counterclaim

v.

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

Defendants by Counterclaim

v.

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

Defendants by Cross-Claim

v.

Knowledge House Inc. and Daniel Potter

Plaintiffs

v.

Stewart McKelvey Stirling Scales, Andrew W. Burke, R. Blois Colpitts and James R. Cruickshank

Defendants

The application and decision apply to the following related actions:

SH174293 (Debt Action)
SH193842 (Mahoney Action)
SH208293 (Barthe Action)
SH216543 (Keating Action)
SH227347 (Banks Action)

Judge:	The Honourable Justice Gregory M. Warner
Heard:	April 21st and 22nd, 2008, in Halifax, Nova Scotia
Counsel:	**David G. Coles, Q.C.**, **James A. Hodgson**, **Joshua J. Santimaw** and **Robert E. Blair** for **National Bank Financial Ltd. ("NBFL")** **W. Dale Dunlop** for **Michael (Ben) Barthe**, **Lutz Ristow**, **Craig Dunham**, **Derek Banks**, **Plastics Maritime Ltd.**, **Lowell Weir**, **Blackwood Holdings**, **Helical Corporation**, **Carole McLauchlin-Weir**, **Calvin Wadden**, **Michael Mahoney** and **3031775 Nova Scotia Limited** **John F. Rook, Q.C.** for **Stewart McKelvey Stirling Scales ("SMSS")**, **Andrew V. Burke**, and **James K. Cruickshank** **George W. MacDonald, Q.C.** and **Cheryl Hodder** for **3058703 Nova Scotia Limited ("Keating")** **Robert G. Belliveau, Q.C.** for **Staffing Strategists International** **Daniel Potter** for **Daniel Potter**, **Knowledge House Inc. ("KHI")**, and **Starr's Point Capital Incorporated** **Mary Jane McGinty** and **Christine J. Doucet** for **Gary Blandford**, **Julia Blandford** and **3017804 Nova Scotia Limited**

By the Court:

A.1 **NBFL's Application**

[1] NBFL applies to amend its Statement of Claim in the "Main Action" and defences, cross-claims, counterclaims and third party claims in the other related actions to remove any material fact allegations that its former employee, Bruce E. Clarke, participated in the alleged conspiracy to manipulate the stock price of KHI between 1999 and September 2001, or committed other wrongful acts.

[2] NBFL submits that:

a) as outlined in **Consolidated Foods Corp. Canada** v. **Stacey**, (1986) 76 N.S.R. (2d) 182 (NSCA), an amendment should be granted unless the responding parties can show that the applicant has acted in bad faith or that by allowing the amendment the responding parties would suffer serious prejudice that could not be compensated for in costs, and, furthermore, the Chambers judge should not enter into an examination of the merits of the proposed amendment.

b) as stated in **Scott Maritimes Pulp Limited** v. **B. F. Goodrich Canada** *et al* (1977) 19 N.S.R. (2d) 181 (NSCA), the overriding consideration in exercising the discretion is whether the amendment can be made without prejudice to the other side.

c) while a party opposing an amendment application must demonstrate that he would be seriously prejudiced or that an injustice would be done by the amendment, an undue or lengthy delay and the nature of the amendment may raise the presumption of prejudice that must be rebutted by the proponent of the amendment. **Wall** v. **Horn Abbot Ltd.** (2000) 183 N.S.R. (2d) 383 (NSSC) and **Gillis Construction** v. **Nova Scotia Power Corp**. (1988) 86 N.S.R. (2) 167 (NSSC).

d) nevertheless, a "party is ordinarily given leave to make such amendments as is reasonably necessary for the due presentation of his case". *Odgers on High Court Proceedings and Practice*, 23rd Edition (London; Sweet & Maxwell, 1991), Page 199.

[3] NBFL cites two decisions where serious prejudice or injustice led to the dismissal of applications to amend:

a) **DeGruchy** v. **Pettipas** (2004) 222 N.S.R. (2d) 198 (NSSC), where the defendant's application made two weeks before trial of an action with a long history, would require further discoveries and an adjournment of the trial; and,

b) **Hardy** v. **Prince George Hotel Ltd.** (2004) 226 N.S.R. (2d) 1 (NSSC), where the defendant's application to add a third party was dismissed. The defendant had added the third party six years previous, discontinued against the third party five years previous and the trial was scheduled within 18 months. The reason was the prejudice caused by the long delay resulting

from the proposed amendment in respect of potential parties whose involvement was known from the beginning.

[4] NBFL cites a circumstance where an amendment was granted. In **Lamey** v. **Wentworth Valley Developments Ltd.** (1999) 175 N.S.R. (2d) 356 (NSCA), the Plaintiff sought to amend the claim commenced in November 1997 in respect of the death of a teenager on a ski trip in February 1997, to add a claim for loss of earning capacity. On hearing the application in September 1998, the Chambers judge found the amendment raised no justiciable issue and dismissed the application. While the Court of Appeal held that "any amendment must contain a justiciable issue" (¶ 14), it found at ¶ 17 that the Chambers' judge embarked upon an extensive examination of the merits by examining the case law and statutes, an exercise reserved for the trial judge, and not the Chambers' judge who should have restricted himself to a bare finding that the proposed amendment raised a justiciable issue. His analysis simply established as far as the Court of Appeal was concerned that a triable issue did exist. The Court of Appeal said the test to be applied is the same as applied for a finding that a reasonable cause of action exists in respect of an application to strike pleadings pursuant to *Civil Procedure Rule* 14.25(1)(a).

[5] In neither the two affidavits of Joshua Santimaw filed in support of its application, nor in its brief, did NBFL explain or attempt to explain its purpose in seeking leave to amend the pleadings. It did note that: on October 2nd, 2007, it had, as of right and without leave pursuant to *CPR* 40.01(a), discontinued any and all claims, cross-claims, counterclaims and third party claims brought by it against Bruce Clarke in all of the actions; while these proceedings have gone on for seven years they were still in their "very early stages"; the amendments do not prejudice any party, especially Mr. Clarke; all parties have had the opportunity to commence against Mr. Clarke personally and if any of them have not done so it is their responsibility for conducting the litigation in the manner they deem fit; discoveries had not commenced; and the application is made in good faith.

[6] The closest that NBFL comes to giving a reason for the proposed amendments is:

> " NBFL discontinued all of its claims against Mr. Clarke to narrow its issues before the court for the due presentation of <u>its</u> case at discoveries and then later at trial. NBFL is therefore not adding any new causes of action but, in fact, removing allegations against a party it discontinued its claims against, which is permitted under the *Civil Procedure Rules*. It would be odd indeed if NBFL, exercising its <u>right</u> to discontinue against a party, in these circumstances [is] not allowed to drop the very allegations setting forth the now discontinued claim."

B. **<u>The Record</u>**

[7] The record in respect of this application consists of the pleadings, published decisions in this litigation, together with the previous decisions on file along with the following affidavits:

1. Joshua Santimaw's short February 7th, 2008 affidavit attaching the last amended pleadings, the proposed replacement pleadings, a copy of an application of August 2007 by NBFL to access its former counsel's file to access *prima facie* privileged materials before Mr. Potter waived privilege, Justice Scanlan's order of December 2007 dismissing the application, and a statement that document disclosure was ongoing, discoveries had not been held and the action not scheduled for trial.

2. Daniel Potter's February 22nd, 2008 lengthy affidavit setting out the history of NBFL's position with respect to a conspiracy to manipulate the trading of shares, and, in particular, Bruce Clarke's role in it.

3. Craig Dunham's February 22nd, 2008 affidavit setting out the history of his involvement with Bruce Clarke and his trading in KHI shares through Mr. Clarke.

4. Craig Dunham's supplementary affidavit of March 3rd, 2008, outlining the prejudice to him, centring on his insolvency as a result of these proceedings, his defaults in respect of the litigation arising from his impecuniousity and his inability to continue the litigation, which he attributes to NBFL's conduct of these proceedings, and his inability to respond to further delays and costs if the application is granted.

5. Joshua Santimaw's supplementary March 6th, 2008 affidavit in response to the Potter affidavit; it highlights the series of events initiated by Daniel Potter for himself, KHI and Starr's Point, including: the filing, in November 2003, of a defence and counterclaim alleging wrongful conduct by NBFL, its lawyers, officers and employees including Mr. Clarke and Mr. Mack and cross-claiming against SMSS and Blois Colpitts for wrongful conduct; his September 24th discontinuance of the cross-claim against SMSS and Colpitts; Justice Scanlan's June 2005 dismissal of the application to strike NBFL's actions on the basis of the pleadings not being inconsistent (upheld by the Court of Appeal), followed by Justice Scanlan's further order not to strike NBFL's pleadings but to turf its legal counsel for improper examination of *prima facie* privileged e-mails; Potter's commencement in 2006 of a separate action against SMSS and Colpitts containing the same claims he had filed in 2003 and discontinued in 2004; Justice Scanlan's January 2007 order to consolidate this new action with the Main Action, thereby effectively producing as a result the same situation, that is, disclosure and production of the privileged e-mails, except for a substantial delay in proceeding and the removal of NBFL's former counsel from the case.

6. George MacDonald's February 22nd, 2008 affidavit attaching correspondence to NBFL's counsel offering to consent to their amendments subject to NBFL's agreement not to produce evidence at trial that would support its material fact allegations against Clarke, or consequently, suggests that Keating should have known of any market manipulation or wrongful acts of Clarke which caused the losses claimed by Keating against NBFL. By a supplementary affidavit dated April 2nd, 2008, Mr. MacDonald attached NBFL's letter declining the offer.

7. An affidavit sworn April 3rd, 2008, by James Wilson, President of Staffing Strategist, simply relying on the pleadings on file and the affidavits of Mr. Potter and Mr. Dunham to support its argument.

8. Daniel Potter's supplementary affidavit of April 8th, 2008, attaching: a letter dated July 16th, 2008, from Mr. Dunlop, counsel for Dr. Ristow, to NBFL's counsel relating his intention to proceed with a summary judgment application against NBFL, in which application he intended to focus on the wrongful actions of Mr. Clarke; an e-mail dated September 10th, 2008, noting that Justice Hood was requesting agreement on dates for the hearing of that application in the fall; and, documents showing that Mr. Hodgson had been legal counsel for NBFL in these actions at least since December 2003.

9. Gary Blandford's affidavit of February 29th, 2008 stating in summary that:

a) in response to NBFL's 2004 action against the Blandfords, they relied on NBFL's outstanding pleadings against Clarke which were incorporated by reference by NBFL in its defence to the Blandfords' counterclaim against NBFL based on Clarke's wrongful conduct against them;

b) NBFL's defence to their counterclaim was filed 16 months later in February 2006 and incorporated NBFL's material fact pleadings against Clarke;

c) only in October 2007, six years after the events, does NBFL seek to amend pleadings to remove allegations against Clarke;

d) NBFL has provided no explanation or reason for the proposed amendment; and,

e) NBFL's proposed amendment would prejudice the Blandfords who did not sue Clarke based on NBFL's pleadings.

10. Transcripts of the evidence of Joel Wiesenfeld and Lorie (Lawrence) Haber before Justice Scanlan, March 16, 2005.

11. Bulletin #3673 and the decision of the Investment Dealers Association of Canada ("IDA") of August 27, 2007, respecting NBFL's conduct.

12. The Brian Awad March 8, 2003 memo, parts of the transcript of his evidence of July 15, 2005 before Justice Scanlan, and correspondence (appendixed to SMSS's brief).

C. **Respondents' Submissions**

[8] The Court received pre-hearing memorandums on behalf of their respective clients from George W. MacDonald, Q.C., W. Dale Dunlop, John F. Rook, Q.C., Daniel Potter, Mary Jane McGinty and Robert G. Belliveau, Q.C. All, except Mr. Belliveau, supplemented their written submissions with oral arguments.

C.1 **Keating's Submission**

[9] The Keating response differed from the others. Its response dealt solely with the action commenced in March 2004 by Keating against NBFL. NBFL's defense denied misconduct, and alternatively pleaded that if market manipulation occurred it was an unlawful scheme of Bruce Clarke, Daniel Potter, Blois Colpitts and others, of which scheme NBFL had no knowledge and for which it was not vicariously liable for Clarke's acts. Its defence alleged that Keating was complicite in the stock manipulation. NBFL further third partied against approximately twenty other persons or corporations that it claimed were part of the stock manipulation conspiracy.

[10] Keating wrote NBFL in January 2008 that it would consent to the proposed amendments in its action if NBFL gave an undertaking that at trial it would not:

a) introduce any evidence of any wrongdoing by Bruce Clarke; and,

b) suggest that Charles Keating should have known of market manipulation being conducted by or any unlawful acts of Bruce Clarke, which caused or contributed to the losses suffered by Keating and for which Keating sued NBFL.

[11] Without entering into any further discussion, NBFL simply replied by letter of March 6th that NBFL "cannot consent to your proposal".

[12] Keating asks that the Court only grants the proposed amendments subject to the conditions that:

a) NBFL not be permitted to introduce any evidence at trial of any wrongdoing of Bruce Clarke; and,

b) NBFL not be permitted to suggest that Charles Keating should have known of any market manipulation or wrongful acts being conducted by Bruce Clarke which caused or contributed to the losses claimed herein.

[13] Keating argues that the conditions requested reflect the substance and purpose of the *Civil Procedure Rules*, in particular *Rule* 14.04, 14.12(1)(a) and (b) and 14.14 which it summarizes as requiring a party to plead:

a) facts on which it relies;

b) particulars of misrepresentation, fraud, breach of trust, wilful default or malice;

c) any alternative version of facts intended to be proved; and,

d) any matter that could undermine the claim or take the other party by surprise.

[14] In support it cites **Ford** v. **Kennie**, 2002 NSCA 140, ¶s 50 to 52; **Banco de Inversion Y Comercio Exterior S.A.** v. **Bank of Nova Scotia**, 2005 NSSC 109, ¶ 15; **353905 Ontario Ltd** v. **Nova Scotia**, (1998) 169 N.S.R. (2d) 88 (NSSC), ¶ 10; **Kent Homes** v. **Balcom**, 2005 NSSM 6, ¶s 8 and 9; and, **Rowe** v. **New Cap Inc.** (1994) 134 N.S.R. (2d) 52 (NSSC), ¶ 12.

[15] The factual basis for its argument is that in 2001 NBFL commenced debt collection actions that did not include any allegation of stock manipulation. In response to an allegation by one of the defendants, it investigated the matter, and in March 2003 commenced a separate action, referred to in this complex litigation as the "Main Action", in which it alleged a stock manipulation scheme against several individuals including Bruce Clarke from whom it claimed remedies for loss and damage.

[16] Keating relies upon several portions of the March 16, 2005 transcript of the evidence of Lorie Haber, Executive Vice-president of corporate development and governance of NBFL, respecting NBFL's investigation that led to the Main Action, and the reasons for naming Bruce Clarke as a defendant.

[17] Haber referred to the March 5, 2003 memorandum prepared by Brian Awad, one of NBFL's former counsel, before they accessed the privileged e-mails on the KHI server. His evidence was in part as follows:

> "109. A. . . . I recall that we had been discussing for some time whether we had sufficient evidence to responsibly bring a legal action against various other parties making the kinds of allegations and the Statements of Claim that we made that ultimately ended up being this – what I call the stock manipulation claim. And I remember we were looking at it from a bunch of different ways.
>
> 149. Q. And to this point in time, having read the memorandum, you knew that there were, at least in the view of Mr. Awad, five principals of Knowledge House who were alleged to have been engaged in some form of stock manipulation. Correct?
>
> A. Yes.
>
> 150. Q. You also knew, did you not, that it was alleged that Mr. Clarke and Mr. Colpitts, at least at that stage, were viewed as accomplices? Correct?
>
> A. Yes. Right.
>
> . . .
>
> 194. A. . . .We had been evidence gathering and fact gathering along the way. A lot of the information in evidence that we had, we obtained through analysis of our own files. A lot of information

in evidence that we had, we had from the examination of Mr. Clarke's National Bank Financial files. . . ."

[18] As to the meaning of "responsibly made", he testified:

"362 A. Sure. We were very interested in recovering money from the people who we believed owed us money. We were also very sensitive to the fact that in order to broaden the scope of the people that we were looking for for money we would have to make very serious claims of artificial price support, stock manipulation and so on. And we don't take those kinds of things lightly and we wouldn't do such if we didn't feel comfortable that we had sufficient evidence and grounds to make them and have a very good feeling that we were – that we had a compelling case to make. We were also very sensitive to the fact that in order to do so, we were going to have to make allegations against, in addition to our own clients and some of the people we had dealings with, a very prominent Halifax law firm, very prominent lawyer in Halifax law firm, and so we took it seriously, we took it carefully and we took it slowly.

363. Q. So for every person named in the Statement of Claim, you had the type of evidence in hand that would be necessary to establish their participation in this fraud.

A. We believed that we had more than sufficient evidence to name every person in that claim responsibly."

[19] Specifically with respect to Bruce Clarke, he testified:

"303. Q. And in this particular case, at that point in time based on the drafting of the pleading that was ongoing, National was essentially alleging that it was a victim of a massive fraud by a number of individuals. Correct?

A. Yes.

304. Q. And it was essentially alleging that Mr. Clarke, your former employee, had acted improperly. Correct?

A. Yes.

. . .

308. Q. And you allege in the Statement of Claim that was ultimately issued that Mr. Clarke engaged in all kinds of improper activities, did you not?

A. Yes.

309. Q. And that was your view at the time.

A. Yes.

. . .

329. Q. I see. So you didn't think that a public pleading in which you allege a massive conspiracy, in which you allege that Blois Colpitts broke the law, in which you allege that Mr. Clarke was on a frolic of his own, that somehow or other that wasn't going

> to be of any assistance to you in deflecting the investigations by the Commissions? Is that your evidence?
>
> A. Yes.
>
> 330. Q. Well, then, what was the reason?
>
> A. The reason was very simple, and there's no controversy about this. We had decided in March that we had **overwhelming evidence** to proceed with this action, and we had a list of people that we were going to sue. We took some time getting around to finishing it. **One of the things that was never an issue is whether we were going to sue Bruce Clarke. And I must tell you, it was no mean feat to get to the point of saying, "You know what? We're going to have to let these chips fall where they may and we are going to sue our own employee."** And we believed that we should be bringing our action **so that when we brought our action and sued our own employee it stood on its own ground.** It's actually quite the opposite what you say. Our fear was that if we waited and filed the pleadings that we were planning to file until after the regulators came that then it would like we were trying to deflect it." (emphasis added)

[20] Keating submits that one of NBFL's senior executives decided in March 2003 (confirmed under oath in March 2005) that NBFL had "overwhelming evidence" to "reasonably make" the claims made against Bruce Clarke and that the decision to sue Clarke "stood on its own ground".

[21] Citing **Ryan** v. **Kirby** (1993) 350 A.P.R.172 (P.E.I.S.C.), ¶s 13 and 14, and 19 to 21, Keating submits that NBFL must plead all of the material facts of any "affirmative defence", as disclosure is the essence of pleadings and matters not disclosed may not be relied upon.

[22] It submits that its request that NBFL admit material facts based on its proposed amendments, will simply settle in advance the legal requirement that: the material facts relied upon by NBFL must be pleaded; and the other parties be given reasonable notice of NBFL's new factual matrix. If the amendment is permitted without conditions, the necessary round of Demands for Particulars of the material facts relied upon by NBFL to prove the revamped conspiracy theory will lengthen the proceedings and create unnecessary expense. The delay and expense will be multiplied by the number of parties and actions and the complex nature of these proceedings.

[23] Keating further argues that a second purpose of attaching conditions to the granting of the proposed amendment would be to foreclose NBFL from again reversing its position, as it did in 2003, at some time between now and trial.

C.2 **Dunlop Clients' Response**

[24] This brief cites at length Justice Fichaud's synopsis of the amendment test in **Jeffrey** v. **Naugler**, 2006 NSCA 117.

[25] Counsel submits that before the respondents have an onus to establish bad faith and/or the requisite prejudice (that is, prejudice that cannot be compensated in costs), the applicant is required to produce, by affidavit(s), evidence that will allow the Court and the respondents to understand the reason for the application.

[26] Counsel advocates application of the principles stated in *The Law of Civil Procedure,* by Williston and Rolls, cited and applied by Justice MacIntosh in **Shore** v. **Cantwell and Cantwell**, (1975) 21 N.S.R. (2d) 288, and most recently applied by Justice Legere-Sers at ¶ 54 in **Jachimowicz** v. **Jachimowicz**, 2008 NSSC 40, to the effect that the party seeking to amend must establish why the amendment is sought. The same point - the requirement for an explanation for an amendment - was reviewed in the context of the "bad faith" analysis at ¶ 14 in **Welsh** v. **Mont**, 2002 CarswellNS 599 (NSSC).

[27] In assessing the two Santimaw affidavits filed in support of NBFL's application, counsel submits that the Court should take guidance from the Alberta Court of Appeal analysis in **Mikisew Cree First Nation** v. **Canada**, 2002 CarswellAlta 603, to the effect, at ¶s 10 and 12, that it is a substantive, and not merely technical, requirement that the applicant proffer evidence from someone with real knowledge of the claim to state the belief upon which the amendment is proposed, and, at ¶ 26, that while some amendments are trivial, those alleging new facts of substance require some evidence.

[28] He submits that Santimaw's affidavits provide no evidence to substantiate what are substantial amendments that completely change NBFL's theory of the case and attempt to withdraw a clear admission with respect of Bruce Clarke's conduct. Relying on **Antipas** v. **Coroneos**, 1988 CarswellOnt 358 (OHCJ), and, **Maingot** v. **National Helicopters Inc.**, 2006 CarswellOnt 138 (Master), he argues that the proposed amendments in this case constitute withdrawal of admissions and for that additional reason, the application must identify, by affidavit, the reason for the withdrawal and a statement that the original admission was made by reason of inadvertence or improper instructions.

[29] Applying this requisite, to this case, counsel relies on the evidence of Lorie Haber to the effect that the decision to commence the Main Action against Clarke, was not inadvertent but a deliberate, carefully considered decision based on NBFL's thorough investigation including records available to them as Clarke's employer. The decision was not the result of the change in legal counsel, who in any event are not "new" counsel, having been on the case since 2003.

[30] He argues that the failure to provide substantive reasons in affidavit form for the amendment is strong (presumably inferential) evidence that the application is made for ulterior motives and in bad faith. Based on the Dunham affidavits, he argues that there can be no proper purpose for the proposed amendments.

[31] On the issue of what constitutes prejudice that cannot be compensated in costs, counsel starts his argument with Justice Wright's analysis in **Mitsui & Co.** v. **Jones Power Corp.**, 2001

NSSC 178, ¶s 32 to 37. In **Mitsui,** the defendant substantially altered its theory of the case late in the litigation, after a ruling upholding the validity of a Memorandum of Understanding. Justice Wright was not prepared to permit general amendments which left the respondent in the position of having to speculate as to the significance of the changes. He agreed to permit amendments that contained particulars of the material fact allegations of the applicant.

[32] Contrary to the **Mitsui** procedural matrix, NBFL commenced its first actions alleging Clarke did nothing wrong; in 2003 it changed its position with the commencement of the Main Action. Mr. Dunlop argues that the removal of Clarke as a participant in the stock manipulation conspiracy, when NBFL alleged that he was the person through whom the stocks were manipulated, leaves a huge gap in their conspiracy theory. By whom and how did the stock manipulation conspiracy get put into effect?

[33] To permit the amendment would, in his view, lead to a lengthy (on the basis of past experience) and expensive round of Demand for Particulars from NBFL to be followed by requisite amendments by the respondents to their pleadings. Not all of the litigants have the same financial means as NBFL to continue what has been, to date, seven years of pleadings and document production.

[34] The second Dunham affidavit outlines that: he has been driven to impecuniousity as a result of the proceedings in this litigation; he is in default in his obligations to his legal counsel; he is living on credit; and he is at the end of his ability to continue participating in the litigation that NBFL started against him. As a result anything that would further delay the process will effectively prevent him from having NBFL's claims against him determined on their merits.

[35] Citing **Merzbach** v. **McSween**, 1997 CarswellNS 425 (NSCA) to the effect that a cost award to overcome a prejudicial amendment should be modest and not on the scale of solicitor-client costs, Mr. Dunlop argues that separate from legal expenses, Mr. Dunham, and by analogy many of the other smaller litigants, is prejudiced by a lengthy round of particulars and consequential pleadings amendments by this proposed substantial but unexplained change in NBFL's position (the second taken by NBFL). The prejudice is beyond the capacity of a modest cost award to compensate for.

[36] Dunlop's brief argues that no basis exists for NBFL to revert to its pre-2003 position with respect to a stock manipulation scheme with Clarke as a central figure. It is for that reason that NBFL does not provide a reason to this Court. The proposed amendment is not made in good faith. NBFL's counsel are not "new" to the file; they have been on the case since 2003. While they were denied access to the *prima facie* privileged e-mails improperly obtained in the summer and fall of 2003 by NBFL's former counsel, NBFL and their present counsel have had access, better access than any other party, to all of the records, documents and activities of Bruce Clarke who was their employee throughout the relevant period of time.

[37] Mr. Dunlop submits that the only significant event, that predates the October 2nd, 2007 NBFL discontinuance of all claims against Mr. Clarke and this application to delete their

material fact allegations against Mr. Clarke, was the Ristow summary judgment application. Mr. Dunlop wrote to NBFL's counsel on July 16th, 2007 with respect to proceeding with the summary judgment application. In the letter he stated:

> "It seems to me that the one overriding issue that Justice Hood will have to determine is whether or not there is enough evidence at this stage to almost conclusively demonstrate that Bruce Clarke was involved in the manipulation of KHI stock throughout the years 2000 and 2001. As none of my clients have claimed against anyone other than NBFL, she will not be required to determine who was a member of the conspiracy and possibly not even if there was a conspiracy. It is Mr. Clarke's actions and the consequences thereof that will be the focus of my application."

[38] This application would be the first time NBFL's allegation of material fact against Bruce Clarke (which counsel says were admissions) would be used against NBFL. If NBFL could amend its pleadings as requested, it could argue in the Ristow application that a triable issue remains to be determined. He submits that NBFL knew, as shown by the Lorie Haber 2005 evidence, the consequences of commencing the Main Action alleging a conspiracy of which Bruce Clarke was a participant, and cannot now, without any explanation, withdraws those allegations of material fact, even if it chooses, as of right, to discontinue its claims against Mr. Clarke.

[39] In oral submissions Mr. Dunlop highlighted:

a) without an explanation from NBFL, by affidavit, of the alleged factual basis for the proposed amendments, the respondents are left to guess at what the cause of action means and such is contrary to the practice recognized and upheld in **Jachimowicz** and **Welsh**.

b) the respondents cannot prove absence of good faith without an explanation of the reason for the amendments except by asking the Court to draw inferences.

c) contrary to NBFL's representation, their counsel are not "new" to the file and there is nothing in the Santimaw affidavits from which one can conclude or surmise that they only recently came into possession of new information that could form the basis for the substantially altered material fact allegations of facts respecting Bruce Clarke's actions; on the contrary, they have information in respect of Bruce Clarke that no one else has, including, for example:

> I) the materials (over which NBFL claims privilege) submitted by them to the various securities commissions and investment dealer associations in respect of investigations; and
>
> ii) the expertise, resources, and access to the information to review and analyze the trading in KHI shares during the relevant period, much of which information has not yet been disclosed to the respondents.

Justice Scanlan's restriction on NBFL counsels' access to former NBFL lawyers and some senior executives has not been shown by any affidavit to have restricted them from access to information that was in the possession of NBFL except for the few *prima facie* privileged e-mails improperly obtained from the KHI server, and some working papers.

d) nothing in the affidavits hints that the material fact allegations in the Main Action and related pleadings in other actions, by which NBFL has alleged since 2003 a stock manipulation conspiracy of which Clarke was a key participant, are not now proper material fact allegations, or explain a reversal in the conclusions reached by NBFL in 2003 after its thorough investigation (as testified to by Lorie Haber in 2005).

e) the timing of the proposed amendments, in relation to the Ristow summary judgment application, is too coincidental to ignore, especially in light of the absence of any *bona fide* explanation.

C.3 **Blandfords' Response**

[40] Ms. McGinty reviewed the history of her clients' involvement with Bruce Clarke and NBFL. In Blandfords' defence and counterclaim to NBFL's 2004 action against them, they allege, as a material fact, that Bruce Clarke, employed by NBFL, refused and/or failed to sell KHI shares owned by them when instructed to do so. They counterclaimed against NBFL for Clarke's wrongful actions.

[41] Counsel directs the Court's attention to ¶ 2 of NBFL's defence to Blandfords' counterclaim, filed in April 2007, in which NBFL incorporated by reference its pleadings in the Main Action (SH 206439) and Barthe Action (SH 208293). She highlights that in neither the Main Action nor the Barthe Action was NBFL's claim of fraudulent misrepresentation and conspiracy involving Bruce Clarke sets up as an alternative claim. Ms. McGinty argues that Justice Scanlan's decision respecting alternate pleadings (2005 NSSC 8), upheld by the Court of Appeal, (2005 NSCA 139) is not relevant or applicable to the Blandford pleadings.

[42] Blandfords' primary submission is that the material fact allegations incorporated by reference in NBFL's defence to their counterclaim were admissions. Citing *Civil Procedure Rule* 14.04 and **NBFL** v. **Mahoney**, 2005 NSCA 139, ¶ 10, she submits that pleadings constitute statements of material fact upon which a party may rely and that a litigant may not plead what it knows to be false.

[43] Citing **BC Ferry** v. **T & N**, 1993 CarswellBC 703, ¶ 14; **Kamei Sushi Japanese Restaurant** v. **Epstein**, 1996 CarswellBC 1237, ¶s 12, 14, and 15; and **Hughes** v. **Toronto Dominion Bank**, 2002 CarswellOnt 1544, she submits that admissions are deliberate pleadings made as a concession to the opponent. This requires the admittor to make an informed decision before conceding a material fact.

[44] In arguing that NBFL's pleadings were intended to be unambiguous deliberate admissions, based on plausible facts, she directs the Court's attention to the Lorie Haber March 2005 testimony, Brian Awad's extensive March 2003 memo, and the May 13th, 2004 settlement agreement between Bruce Clarke and the Nova Scotia Securities Commission.

[45] *Civil Procedure Rule* 21.02(4) authorizes the Court to allow withdrawal of admissions. Circumstances under which they may be withdrawn, as outlined in **Antipas**, was adopted by Justice Moir in **L & B Electric** v. **Oickle**, 2005 NSSC 110 (¶ 17), and assumed without argument to be correct on appeal (2006 NSCA 41, at ¶ 22), wherein Justice Hamilton noted:

> "It is broad enough to allow a judge to weigh the competing policies of the right of a party to have a triable issue tried with the need for expedient and responsible litigation, in determining what is right."

[46] NBFL's defence to Blandfords' counterclaim was not made in haste or by inadvertence. It took 16 months (October 2004 to April 2007) for NBFL to file its defence to Blandfords' counterclaim.

[47] Blandfords rely on NBFL's pleadings of material fact against Bruce Clarke, and submit that it was reasonable to do so in all of the circumstances. Now that the limitation period for commencing an action against Bruce Clarke has passed, the Blandfords would be prejudiced in a manner that could not be compensated by costs, by NBFL's proposed amendments.

[48] Counsel submits that in the circumstances NBFL should be estopped from withdrawing the allegations/admissions against Bruce Clarke based on the estoppel principle described by Lord Denning in **H. Clark Ltd.** v. **Wilkinson** [1965] 1 All E.R. 934 cited and adopted by the Nova Scotia Court of Appeal at ¶ 16 in **Sears Canada Inc.** v. **Wilson**, 1990 CarswellNS 452.

[49] Counsel relies on **Maingot** *supra* and **Canada Post Corp.** v. **Keymail Canada Inc.**, 2006 CarswellOnt 4108.

[50] Counsel argues that NBFL now seeks to withdraw its allegations "not because they are any less true but because they may prove to be inconvenient in this particular process".

[51] It submits that the Court should exercise its discretion so as to prevent what is in the circumstances of this case an offence to the integrity of the court process.

C.4 **Potter Response**

[52] Potter's brief details why NBFL's amendment application is made in bad faith and, to a lesser degree, why granting it in its present form would cause prejudice that cannot be compensated in costs.

[53] Potter submits that neither the Santimaw affidavits nor NBFL's brief contains any reason for its radical change in position which focuses solely on removing Bruce Clarke from allegations of wrong doing and conspiracy. Of the 130 paragraphs in NBFL's third amended Statement of Claim (May 2006) in the Main Action, sixty-five are simply descriptive and contain no allegations while the other sixty-five contain allegations in respect of the conspiracy and fraud. Fifty-six of the sixty-five "allegation" paragraphs include allegations of wrongful conduct by Bruce Clarke. Only nine of the sixty-five "allegation" paragraphs do not contain fraud and conspiracy allegations involving Bruce Clarke. The proposed amendments remove Clarke from fifty-six "allegation" paragraphs.

[54] Potter argues that the reverse onus on the respondents - to show bad faith by NBFL and prejudice that cannot be compensated in costs, does not relieve NBFL of providing adequate affidavit evidence of the need for the proposed amendments. He cites **Jachimowicz** at ¶s 40 to 54, and adopts Justice Wright's analytical framework in **Mitsui**:

a) First, the opponents must show bad faith or prejudice that cannot be compensated in costs; and,

b) Second, the Court must examine the application in the context of the entire litigation, including the approach taken by the parties to date, which, in the **Mitsui** case, included extensive pre-trial proceedings.

[55] Justice Wright found that Jones Power's application was not precipitated in bad faith but rather from the reality of a binding judicial finding by the Supreme Court, upheld by the Court of Appeal, that a key MOU was valid and could be the only basis for litigation of the remaining issues. Citing ¶s 28 and 29, Potter notes that Justice Wright concluded that the change in the landscape of the case precipitated Jones Power to request "necessary amendments to reflect the factual reality."

[56] Potter submits that nothing in the history of the KHI litigation to date makes apparent why NBFL's amendments are necessary. He compares NBFL's approach to that of Mr. Lienaux in **Jachimowicz**.

[57] Potter outlines six reasons for finding that NBFL was acting in bad faith. None of them relate to the merits of the dispute or require credibility findings or complex factual analysis.

[58] First, NBFL has failed to state a *bona fide* reason for the amendments. It provides no evidence of a settlement with Clarke, and while the Santimaw affidavits refer to Justice Scanlan's December 4th, 2007 order confirming his May 2005 prohibition order against NBFL contact with their prior legal counsel (ironically the basis upon which Justice Scanlan declined to stay NBFL's action for misconduct), there is no suggestion in the affidavit as to how Justice Scanlan's May 2005 order confirmed in December 2007 necessitates the proposed amendments at this time.

[59] Second, NBFL has not responded to the various respondent's affidavits containing factual allegations of bad faith.

[60] Third, NBFL's present legal counsel have repeatedly filed pleadings alleging fraud and conspiracy involving Clarke. Mr. Hodgson has been counsel since at least December 2003 and was present for three weeks of evidence by NBFL's senior executives and former legal counsel in March 2005; Mr. Coles has been counsel for almost three years.

[61] Fourth, NBFL's improper motives are clear on the face of the present pleadings and proposed amendments. The proposed amendments remove the only conspirator who was authorized as a registered representative to enter trades of KHI shares on a stock exchange. Removing Bruce Clarke "hollows out" the underpinnings of the conspiracy/fraud claim by effectively removing the only stock manipulator. The remaining pleading is incoherent and will require further amendments and/or particulars to provide the respondents with sufficient notice to fairly understand and respond to the amended claim.

[62] Fifth, the timing of the proposed amendments, following shortly after Mr. Dunlop's notice to NBFL's counsel that the Ristow summary judgment application was proceeding and that Bruce Clarke's actions would be the key and central aspect of the application, is not coincidental. On July 16th, 2007, Mr. Dunlop gave notice that the application would centre on Clarke's action. On September 10th, 2007, dates for the hearing of the application were discussed by counsel with Justice Hood. Potter submits:

> "it can reasonably be inferred from the approach of summary judgment day in the Ristow application that NBFL could see that the logic of having sued its own employee in August of 2003 was in sharp decline . . . If NBFL's original move in suing Mr. Clarke had integrity, then the present change does not."

[63] Sixth, bad faith can be inferred by NBFL's ever changing position over seven years. It commenced litigation in October 2001 with 16 debt collection actions (later consolidated into the Debt Action) and the termination for cause of Bruce Clarke for the stated reason of "credit management", in which notice NBFL expressly declared possession of no knowledge of any inappropriate conduct by Bruce Clarke. This position was maintained in the civil litigation even in a March 14th, 2003 defence to a counterclaim against it in one of the related actions. However, in early 2002 NBFL was dealing with regulators respecting the conduct of Bruce Clarke as well as their supervision, or lack thereof, of him. In communications in January 2002 with the Investment Dealer's Association ("IDA") and on February 20th, 2002 in communications with the Nova Scotia Securities Commission, NBFL took a different position. This evidence of bad faith is referenced at ¶s 45 to 50 of Justice Scanlan's May 10th, 2005 decision. Only in August 2003, in commencing the Main Action, did NBFL clearly allege a fraud and conspiracy directed against it, of which Bruce Clarke was a key participant.

[64] Potter claims that the proposed amendments, made six and a half years after its litigation was commenced, create a major access to justice issue for uninsured and/or self-represented individuals. The ambiguity, as to how the conspiracy and fraud were committed and the roles of

the respective wrongdoers, leaves the respondents without fair notice of the particulars of the watered-down version of the conspiracy and this will lead to a year of demands for particulars and amendments to other pleadings in the six actions involved. Potter suggests that only after these are completed can the litigation, including his estimate of 200 days of discovery, and 100 days of trial, continue.

[65] The delay that would be caused by the proposed amendment is not a serious problem for a large institutional litigant but is a serious financial and personal strain on the many parties who are not in NBFL's league. Payment of costs between parties who are not in the same league cannot overcome the prejudice caused by the serious imbalance.

[66] Potter's oral argument focussed on the reasons in Justice Scanlan's decision (2005 NSSC 8) upheld by the Court of Appeal (2005 NSCA 139) for refused to strike's NBFL's "inconsistent pleadings", and upon what knowledge could have come into NBFL's possession since November 2004 that could have altered the basis for the material fact allegations against Clarke.

[67] In the November 2004 application, opponents of NBFL sought to strike the pleadings that denied the existence of a stock manipulation scheme involving Clarke, because Clarke had signed a settlement agreement with the Nova Scotia Housing Commission acknowledging he was involved in an arrangement that violated securities regulations to assist an insider group to maintain the price of KHI shares. Justice Scanlan noted that Clarke and the other alleged conspirators were maintaining denials in their pleadings of any such conspiracy. He made the following statements:

> "24 In the present case NBFL is not choosing as between two inconsistent rights but rather is asserting that one of two possible factual situations exist. NBFL says at this point, and perhaps not until the Court decides what occurred, does NBFL have full knowledge of the factual situation so as to enable it to assert its rights with certainty.
> . . .
> 26 . . . It may well be beyond the capacity of NBFL to determine at this point in time whether there was stock manipulation. As I have already noted, many of the parties who were alleged to have been party to the stock manipulation scheme continue to deny involvement in any such scheme.
> . . .
> 28 I am not convinced at this point that NBFL has "full knowledge" so as to know what the true situation was in relation to KHI shares and the alleged stock manipulation. If a party does not have full knowledge of the circumstances they should not be barred from setting up alternative pleadings. . . .
> . . .
> 45 I am convinced that until the picture becomes much clearer in terms of the knowledge or participation of any of the parties in these actions the Court should exercise great caution. In saying this I understand there may well be further disclosure made by witnesses during the discovery process. The picture may become clearer in terms of which of the parties were involved in or had knowledge of specific occurrences or there was an obvious lack of knowledge or

> participation in any wrongdoing, if any. **The proceedings may well mature to the point where any of the above-noted issues can be revisited by way of application.** . . ." (emphasis added)

[68] The only information before the Court as to NBFL's knowledge of a stock manipulation scheme involving Clarke was the opinion of NBFL's then solicitors tendered to the Court by way of affidavits of Brian Awad (¶s 43 and 45). Potter submits that, since the November 2004 hearing and in particular during three weeks of testimony given in March 2005 in respect of the hearing of the application regarding the access to the privileged e-mail accounts, more evidence exists to support NBFL's reasons for alleging wrongdoing by Clarke, and no evidence has appeared that might support a withdrawal of the material fact allegations against Clarke. He points out that James Hodgson was NBFL's counsel at the time of the March 2005 hearing and was aware of this evidence. He had been counsel since December 2003.

[69] Specifically, Mr. Potter relies upon the Haber evidence which Justice Scanlan had not heard at the time of his decision respecting inconsistent pleadings. He argues that NBFL had put forward no new evidence that might suggest that NBFL has now reached the point, referred to by Justice Scanlan, of "full knowledge", that could be the basis for the present application to withdraw all material fact allegations against Mr. Clarke.

[70] Responding to Mr. Coles' oral submission that NBFL was an analogous situation to that of Oickle in **L & B Electric v. Oickle**, he notes that in that case (¶ 11), Oickle had filed an extensive affidavit (in which he put forth material fact allegations to support the proposed amendment), and been cross-examined on it. Potter's point is that NBFL, in this application, refuses to give any reason for the proposed amendment and this constituted evidence that they are acting not in good faith but rather in bad faith.

[71] Potter takes issue with Mr. Coles' comparison of NBFL's position in this case with that of Jones Power in **Mitsui**. He asked rhetorically: What equivalent "factual" reality exists in this case that changes the "landscape" with respect to Clarke's actions?

[72] On the issues of bad faith and prejudice, he notes that Justice Scanlan in his May 2005 decision (2005 NSSC 113) almost stayed NBFL's claims because of its misconduct but in declining to stay the claims he stated at ¶s 50 and 51:

> "50 . . . I simply caution NBFL not to be blinded by those headlights to the extent that they would be prepared to sacrifice innocent investors or to use their financial might to crush litigants into submission in a situation in which it may result in an injustice. In that regard litigation may not be an option for some of the affected parties.
>
> 51 NBFL should consider which, if any, of the actions with the parties now before the Court should proceed to trial as opposed to finding some alternative, perhaps mediated, type of resolution. It may well be that as a result of these proceedings NBFL would be able to determine whether some of the parties now

> joined in the action were participants in or victims of a stock manipulation scheme, if one did exist."

[73] Potter submits that instead of acting on this "caution" NBFL seeks to write out of its material fact allegations, the least likely person to be "innocent" or a "victim".

C.5 **SMSS's Response**

[74] Like the other respondents, counsel reviewed the history of NBFL's pleadings and drew the Court's attention to the reason Lorie Haber gave under oath (after Justice Scanlan's 2005 "inconsistent pleadings" decision) for NBFL suing Clarke as a participant in the stock manipulation conspiracy. (The answer to Q. 330).

[75] He submits the application is made in bad faith for several reasons:

a) No explanation is given for the proposed amendments.

b) The possible excuse that NBFL's present counsel are new - "fresh faces" - is simply untrue. Mr. Hodgson has been on the case since December 2003 and Mr. Coles since June 2005. These counsel have amended their pleadings on many occasions since 2003 and always alleged the stock manipulation conspiracy with Clarke as a participant.

c) The evidence of Mr. Haber, Mr. Parrish and Mr. Awad in March 2005 established a strong basis for the allegation of a stock manipulation conspiracy with Clarke in a central role. No new information or disclosure, that might suggest that Mr. Clarke was not a part of the alleged conspiracy, exists.

[76] The brief directs the Court's attention to the proposed deletions in ¶ 66 and 109 (68 and 111 in the existing statement of claim) of the Main Action. The deletions leave a considerable gap in the conspiracy allegations, thereby denying the respondents fair notice of the particulars of NBFL's claim. The paragraphs with the proposed changes read:

> "66. The aforementioned defendants made available the aforementioned accounts for use in perpetrating the scheme set out in this claim. ~~At all material times Clarke acted as the agent for the aforementioned defendants, acting on their instructions in the conduct of elements of the scheme set out in this claim, including monitoring the KHI order book and trading activity on the TSE, maintaining buy orders for KHI Shares in the TSE order book, soliciting NBFL clients to purchase shares of KHI and discouraging those clients from selling KHI shares~~.
>
> 109. From October 2000 through to May 2001, Potter, Wadden, Colpitts, Schelew and Imrie engaged in a number of purchase transactions for KHI shares with the view to dominating the "buyside" of the TSX market for KHI shares. ~~with the full knowledge of each of the individual defendants, Clarke used the~~

> ~~NBFL accounts of 230 NSL, 540 NSL, the Clarke RRSP, and various other accounts within his control, to maintain the Public Market Price of KHI Shares by continuing to dominate the "buy side" of the TSX market for KHI Shares. In addition to voluminous transactions by the above-noted accounts, Clarke placed orders and purchased KHI Shares on the TSX for the NBFL accounts of Potter, Wadden, Colpitts, Schelew and Imrie. These traders were done on the explicit instructions of the account holders, or with their knowledge. This activity continued through to June 2001 and stopped only when the Credit Department of NBFL demanded that Clarke take action to reduce NBFL's credit risk due to KHI Shares held on margin.~~"

[77] SMSS submits that CPR 21 - *Withdrawal of Admissions* - applies to this application. Relevant considerations and factors are as outlined in the case law, including among other cases **Kamei Sushi**, **Maingot**, and **L. & B. Electric Ltd.** v. **Oickle**. The principles include:

I) leave should be granted when the applicant acts *bona fide* and where there is no prejudice to others not compensable in costs.

ii) admissions are deliberate concessions for the benefit of the other parties.

iii) withdrawals of allegations that result in a dramatic shift in a parties' position should be treated as attempts to withdraw admissions.

iv) circumstances leading to the withdrawal of admissions are relevant considerations.

v) a civil case is an agreement between parties to seek resolution of a dispute on matters they chose to put in issue; at some point it is unfair to permit one party to alter the matters they choose to put in issue.

vi) the determinative factors should be:

(1) whether there is a triable issue;

(2) the effect of delay and prejudice on the other parties; and,

(3) the applicant's explanation as to why the factual pleadings should be withdrawn.

[78] NBFL's bad faith arises from:

a) the fact that since Justice Scanlan's January 2005 decision it has become apparent, primarily through the evidence of Mr. Haber, Mr. Parrish and Mr. Awad, and the production of a forensic report that was submitted in 2002 to regulatory agencies, that NBFL

conducted a thorough investigation before commencing the Main Action alleging a stock manipulation conspiracy involving Clarke;

b) NBFL's present legal counsel have repeatedly confirmed their position and strategy in suing Clarke as a co-conspirator;

c) Justice Scanlan's observation in his May 10th, 2005 decision (2005 NSSC 113) that NBFL appeared motivated to deflect attention away from itself for the purposes of the regulatory investigations and to show itself as a victim (¶ 49) confirms a strategy of blaming Clarke and others at a time when the strategy was in the best interest of NBFL. The timing of the application to withdraw the material fact allegations against Clarke - when the Ristow summary judgment application in these proceedings was eminent - was a convenient time to drop a position which was not in NBFL's ultimate best interests;

d) in early 2002 NBFL provided a manipulation/conspiracy analysis to securities regulators, but now refuses to disclose it claiming litigation privilege and that disclosure to the regulators did not constitute waiver of privilege;

e) NBFL refuses to provide any explanation for its substantial change in position.

[79] As to prejudice, Mr. Rook notes that the proposed amendments will require other parties to respond with amendments of their own. This further delay is largely the results of NBFL's prior misconduct and delays, and affects the ability of impecunious defendants, such as Mr. Dunham, to continue as a litigant.

[80] Mr. Rook further claims a specific prejudice to SMSS. By commencing, through the Main Action, a stock manipulation conspiracy claim against SMSS, Clarke and other "insiders", and then seeking to withdraw the material fact allegations/admissions against Clarke, NBFL "effectively seeks to hold SMSS liable for all losses, even though the claim against SMSS is limited to vicarious liability for the actions of Blois Colpitts". This loss includes Mr. Haber's estimate of NBFL's Debt Action claims of $7,000,000.00.

[81] The proposed amendments will "suddenly" - six years after NBFL's prior material fact allegations - require SMSS to prove Clarke's involvement in a conspiracy which until now was admitted by NBFL and which involvement is a matter entirely within the knowledge of NBFL as Clarke's employer. SMSS may not be able to get access to relevant persons to inquire as to the involvement of Clarke six years after the fact. It was not necessary, in light of NBFL's prior position, to have access to those persons. In light of the proposed amendment, even if access were obtained, memories may have failed and for other reasons access and cooperation may not occur. This prejudice to SMSS, leaving it in effect "holding the bag" cannot be compensated for in costs. At this stage of these proceedings it is unjust and unfair.

[82] In oral argument, counsel for SMSS notes that it was a defendant in the Main Action and a third party defendant in the others. It had been "dragged into the litigation by NBFL's conspiracy theory". Apparently, none of the other plaintiffs in any of the actions sued SMSS.

[83] Mr. Rook spoke about the definition of a civil conspiracy and how the proposed amendment was deficient in its attempt to maintain the civil conspiracy action without the material fact allegations against Clarke. He submitted that assuming a conspiracy existed as alleged by NBFL, the legal requisites for proof of the conspiracy were those described by the Supreme Court of Canada in **Canada Cement LaFarge Ltd.** v. **British Columbia Lightweight Aggregate Ltd.** [1983] 1 S.C.R. 452 which decision and the law was thoroughly analyzed in Brian Awad's March 5th, 2003 memo at Pages 6 to 12.

[84] Mr. Rook submits that a civil conspiracy cannot be founded upon an agreement alone (unlike a criminal conspiracy). A civil conspiracy required the implementation of the plan and consequential damage to the plaintiff.

[85] The existing NBFL pleading alleges that Bruce Clarke was the person who implemented the conspiracy. Only if implemented - and Clarke (and through him NBFL) was the implementor - does a civil cause of action exist. Without Clarke, there was no civil conspiracy. This is exactly what NBFL's counsel considered in March 2003 in their extensive factual and legal analysis before commencing the Main Action. Clarke was an integral part of the analysis. Only through Clarke did the conspiracy come back to NBFL.

[86] While NBFL could choose, without leave of the Court, to discontinue all claims against Clarke, or even to have not sued Clarke in the first place, it could not sue for conspiracy without making material fact allegations of how the conspiracy was implemented and this meant alleging, as they did after careful research (much of which research and knowledge has not disclosed to the other parties or to the Court), the particular roles of all the parties to the conspiracy including Clarke. He notes that NBFL considered, before it sued Clarke, the issues of vicarious liability and *ex turpa causa*, and their impact on NBFL.

[87] In short, the proposed amendment is deficient in not setting out a cause of action in the absence of specifying how the conspiracy was implemented.

[88] Mr. Rook's second point arises from the same circumstance. If NBFL had not included Clarke in the conspiracy allegations when it commenced the Main Action in 2003, SMSS could have. At this point the landscape has changed, and SMSS is prejudiced, in a manner that costs cannot compensate it for, by being exposed to the conspiracy claim brought by NBFL which originally named Colpitts and Clarke as central figures. If the application to amend is approved, no longer would SMSS be entitled to point to NBFL with respect to the role of Clarke, even though his role is and has been within the knowledge of NBFL, but not the other parties.

[89] Mr. Rook's third focus was to repeat what Mr. Dunlop and Ms. McGinty had argued with respect to the requirement that NBFL provide, in affidavit form, an explanation of its proposed

amendment so that the Court would have a basis for the exercise of its discretion pursuant to CPR 15. No explanation has been advanced.

[90] Mr. Rook submits that it cannot be argued that the May 2005 Order denying NBFL's present counsel access to NBFL's prior counsel, some executives and some of their work product, is the basis for the proposed amendments. As a result of the May 2005 ruling, NBFL was in effect only denied, in terms of documents and disclosure, about 100 e-mails that were held to be privileged until the consolidation of Potter's new/revived action against SMSS with the Main Action. There is no evidence before this Court that denial of access to these e-mails is the reason for, or supports, the proposed amendments. Furthermore, before May 2005, there was no restriction on NBFL or its present counsel that blocked their access to any NBFL executives or documents, including access to Guy Roby who worked with Lorie Haber on this file. Only NBFL's present counsel knows what information they received from these persons and what it means.

[91] Mr. Rook's fourth focus was on bad faith. In addition to the absence of a good faith explanation for the proposed amendments, three reasons exist to find that the proposed amendments were simply a tactical move made in bad faith:

I) NBFL no longer needs to rely upon the allegations against Bruce Clarke to deflect the regulators, as is clear from their responses at discovery;

ii) NBFL now seeks to undermine the claims against them;

iii) having dragged SMSS into the law suits, by removing Clarke, they undermine SMSS's ability to defend itself.

[92] As to the first reason, counsel notes Justice Scanlan's comments, at Page 45 to 50 of his May 2005 decision, to the effect that NBFL appeared to have been improperly motivated to deflect the regulatory bodies' attention away from NBFL.

[93] As to the third reason, he notes that the events that are the subject matter of these law suits occurred between 1999 and September 2001. One party has since died and memories have faded. All knowledge about what NBFL knew then and what Bruce Clarke did has been, throughout this time, within NBFL's knowledge (even with the limited restrictions since 2005 on access to about 100 e-mails and to the work product of their prior lawyers). NBFL pleaded wrongdoing against Clarke in 2003 on the basis of their investigation.

[94] If the proposed amendments are granted, they will lead, at least, to a further year of delay in obtaining better particulars and filing of consequential amendments by other parties, thus further delaying discoveries and the possibility that these parties (other than NBFL) will ever find out what happened within NBFL. This is a prejudice that is significant and cannot be compensated in costs.

[95] In the final alternative, if this Court were to allow the proposed amendments, Mr. Rook submits that all of the defendants should be entitled to all of their costs incurred in defending NBFL's conspiracy allegations since they were first advanced by NBFL.

C.6 **Staffing Strategists' Response**

[96] Its position was given in writing.

[97] NBFL, after initially denying any wrongdoing by itself or Bruce Clarke, and after a thorough investigation, commenced the Main Action against, and blaming all wrongdoing on, Bruce Clarke and other conspirators. It thus explicitly diverted attention from themselves to Mr. Clarke in documents filed with regulators in respect of their investigations.

[98] The present shift comes on the eve of a summary judgment application in which its material fact allegations will be detrimental to its position. This amounts to a manipulation of the Court's process.

[99] This, on top of the misconduct of NBFL and its counsel dealt with by Justice Scanlan in 2005 and his conclusions with respect of improper motive, is evidence of NBFL's bad faith, and an abuse of process.

[100] Mr. Belliveau's brief endorses the submissions of Mr. Dunlop and Mr. Rook as to the history of the litigation, circumstances surrounding this application, and the failure of NBFL to provide a *bona fide* reason for its 180 degree flip-flop. These facts demonstrate that NBFL's sole motivation is to manipulate the Court process.

D. **Analysis**

D.1 **Admissions**

[101] The respondents submit that the material fact allegations in NBFL's pleadings constitute admissions under CPR 21.01.

[102] Pleadings only constitute admissions when they are clearly and deliberately made as concessions to an opponent.

[103] The respondents' argument has appeal. While NBFL initially denied in the debt actions any wrongdoing by itself or its employee Bruce Clarke, when the stock manipulation scheme

(conspiracy) involving Clarke as a central figure was raised by Glen Wadden in his defence to the debt action against him in 2001, NBFL:

a) thoroughly investigated the circumstances;

b) appears to have taken the same view as Wadden, as to the conduct of Clarke, in its dealings with the securities regulators; and,

c) in 2003 deliberately initiating the Main Action against Clarke and others based unequivocally on material fact allegations of conspiracy, fraudulent misrepresentation and wrongdoing of "insiders" with Clarke performing a key role. This action was not an "in the alternative" claim. It was an unnecessary action in the context of responding to conspiracy allegations of those debtors it had sued, and of the other investors in KHI who sued NBFL for alleged wrongdoing by NBFL and/or Clarke.

[104] However, in an earlier application (2005 NSSC 8) Scanlan, J. was asked to strike those portions of NBFL's pleadings which denied the existence of a stock manipulation scheme involving Clarke, on the basis that they were inconsistent with NBFL's pleadings in other actions (such as the Main Action) in which NBFL, as plaintiff, made unequivocal material fact allegations of a stock manipulation scheme/conspiracy in which Clarke was a central figure.

[105] Scanlan, J. dismissed the application. He wrote (Emphasis added):

> "21. As I have noted in the present case it is clear that NBFL is alleging in one series of actions that there was no stock manipulation. In other actions NBFL asserts that there was stock manipulation and relies on it as the basis of its claim. In that sense NBFL is, although in separate actions, "setting up two or more inconsistent sets of material facts and claiming relief thereunder ..." It must be remembered that at this point in the many proceedings, all who are alleging to have been involved in any wrongdoings as regards stock manipulation have denied any wrongdoing. **In other words, no matter what NBFL or their solicitors believe or suspect, the issue of stock manipulation will not be resolved until some time into the future, perhaps even as late as trial**. On the other hand in actions where NBFL have been sued based on allegations that their employee or employees were involved in a stock manipulation or wrongdoing they have denied the same. Again this will be resolved at some time in the future perhaps not until trial. I refer again to the above-noted passage from the Supreme Court Practice and note that NBFL has an obligation not to mix up the facts belonging to each alternative claim and to set out clearly the facts supporting each claim for relief. Alternative pleadings are not contemplated by Rule 14.11 in a case (cases) such as now before the Court. Until a court determines whether there was stock manipulation NBFL will not know what its rights or liabilities may be. The complex series of actions puts NBFL in a situation where they may be entitled to a wide range of rights or subject to substantial liabilities all depending on whether stock manipulation can be proven

and whether NBFL is vicariously liable for improprieties, if any, of its employees.

. . .

24 In the present case NBFL is not choosing as between two inconsistent rights but rather is asserting that one of two possible factual situations exist. **NBFL says at this point, and perhaps not until the Court decides what occurred, does NBFL have full knowledge of the factual situation so as to enable it to assert its rights with certainty.**

. . .

26 In the present case I accept that NBFL has pleaded in separate actions that on the one hand there was no stock manipulation scheme and in the other action pleaded that there was a stock manipulation scheme. I again refer to Vladi Private Islands Limited v. Haase and note that even though the pleading in the separate actions are inconsistent I proceed on the assumption the facts as contained in the pleadings are true. It may well be beyond the capacity of NBFL to determine at this point in time whether there was a stock manipulation. As I have already noted, many of the parties who were alleged to have been party to the stock manipulation scheme continue to deny involvement in any such scheme.

27 NBFL says it has some evidence to suggest there was such a scheme and that a civil offence was committed. I do not intend to go through the various pleadings as put forth by NBFL. I simply state that it would appear NBFL has, where possible, pleaded the facts in the alternative. On the issue as to whether or not there was a stock manipulation it would be inappropriate at this stage to have the rules of pleadings impose upon NBFL an obligation as to what actually occurred. There is a complex series of proceedings before the courts wherein that very issues will be determined.

28 **I am not convinced at this point that NBFL has "full knowledge" so as to know what the true situation was in relation to KHI shares and the alleged stock manipulation.** If a party does not have full knowledge of the circumstances they should not be barred form setting up alternative pleadings. I accept that many of the issues in the related actions will depend on a finding as to whether there was a stock manipulation scheme. I am satisfied the various parties will have different causes of actions or remedies depending on whether the alleged wrongdoings can be proven.

29 NBFL has in some instances pleaded facts in the alternative. To the extent they may not have done so I would have permitted an amendment to the pleadings so as to allow alternative pleadings. Because of the various assertions and denials by the different parties, inconsistencies are unavoidable and the pleadings must be in the alternative or at least deemed to be in the alternative. **It would be an offence to the administration of justice to require a party such as NBFL to choose between one or two possible sets of facts only to discover after a lengthy trial, or in this case trials, that the alternative was in fact true.** To apply the rules of pleadings in such a way would prevent NBFL or any other parties affected by circumstances of these cases from embarking on a fact-finding process which would first ascertain the truth as regards what occurred

> and then to have a reasonable application of law so as to determine what the rights, liabilities and remedies of the various parties should be."

[106] In upholding this decision, Bateman, J.A. for the Court of Appeal (2005 NSCA 139) wrote:

> "15 A party may make inconsistent allegations in a pleading provided they are pleaded in the alternative. Defences commonly contain "inconsistent" pleadings.
>
> . . .
>
> 21 . . . It seemed to be his submission that where a party has strong evidence of one position, that party may not plead another position in the alternative. We do not agree. . . . There is, of course, ample authority for the proposition that a party may not plead that which it knows to be false, or a sham, or wholly fictitious: . . . counsel for the appellants has confused the well recognized principle that one cannot plead something known by the pleader within its own knowledge to be false, with a principle requiring the party to plead only what the pleader knows to be true. The first statement is correct; the latter is not. An opinion of solicitors based on their belief that there is strong evidence to support a proposition does not result in the client thereby "knowing" that any other position is false."

[107] To find that NBFL's pleadings respecting a stock manipulation conspiracy involving Clarke constituted admissions would require this Court to reverse the analysis of Justice Scanlan and the Court of Appeal. It would require that I find the pleadings were not made in the alternative. That question has already been decided and it would be inappropriate for this Court, indirectly or by implication, to reverse that finding. The passages quoted in the decision from Justice Scanlan are however very relevant to my analysis of the present amendment application.

D.2 ***Civil Procedure Rules*** **respecting pleadings and amendments**

[108] The relevant *Civil Procedure Rules* ("CPR") include (emphasis added):

> "**14.04.** Every pleading shall contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which the facts are to be proved, and the statement shall not be as brief as the nature of the case admits. [E. 18/7(1)]
>
> . . .
>
> **14.09.** A party may plead claims or defences in the alternative.
>
> . . .

14.11. Unless a party amends his pleading, he shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with a previous pleading of his. [E. 18/10]

14.12. (1) Subject to paragraph (2), **every pleading shall contain the necessary particulars of any claim**, defence or other matter pleaded, **including**

(a) **particulars of any misrepresentation, fraud,** breach of trust, wilful default or undue influence on which the party pleading relies, and

(b) **where a party pleading alleges any condition of the mind** of any person, including any disorder or disability of mind or **any malice, or fraudulent intention**, or other condition of mind except knowledge, **particulars of the facts on which the party relies.** [E. 18/12(1)(4)]

. . .

14.14. Subject to rules 14.15 and 14.18, a party in his defence or in any subsequent pleading shall,

(a) specifically admit every material allegation of fact in a pleading of the opposite party which is not disputed by him, and all allegations of fact in the pleading which are not specifically admitted shall be deemed to be denied and need not be traversed, either specifically or generally; [E. 18/13]

(b) where it is intended to prove a different version of facts than that relied upon by the opposing party, plead his version of the facts; and

(c) **specifically plead any matter, for example, performance, release, payment, any relevant statute of limitation, statute of frauds, fraud, or any act showing illegality that,**

(I) might make any claim or defence of the opposing party not maintainable;

(ii) if not specifically pleaded, might take the opposing party by surprise;

(iii) raises issues of fact not arising out of the preceding pleadings. [E. 18/8(1)]

. . .

15.01. A party may amend any document filed by him in a proceeding, other than an order,

(a) (not applicable)

(b) (not applicable)

(c) at any time with the leave of the court.

. . .

37.02.(1) A notice of application shall set forth with sufficient particularity the nature of any claim being made or of any question sought to be determined, and of any relief or order claimed, and have attached thereto a true copy of any affidavit to be used in support of the application, . . .”

D.3 **Legal test for amending pleadings**

[109] I accept the synoptic adoption by Fichaud, J.A. in **Jeffrey** v. **Naugler**, of ¶s 12 and 13 of the analysis in **Consolidated Foods** v. **Stacey**, and ¶ 39 and 40 in **Scott Maritimes Pulp** v. **B F Goodrich**. I note also Wright, J.'s analysis in 2001 NSSC 178, ¶ 6 to 11.

[110] NBFL's brief advances further considerations that infuse the analysis:

a) in **Gillis Construction** v. **Nova Scotia Power**, Davison, J., noted that the onus was on those opposing the application, but added "lengthy delay and the **nature of the amendment raises the presumption of prejudice** which must be rebutted by he who seeks the amendment" (Emphasis added);

b) the text *Odgers on High Court Proceedings and Practice* states: "either party is **ordinarily** given leave to make such amendments **as is reasonable necessary for the due presentation of his case** . . ." (Emphasis added)

c) in **Lamey**, the Court of Appeal cautioned Chambers judges from "engaging in an extensive investigation of the merits of the proposed amendment by examining the differing case law" . . . when "all that is necessary" is that the "proposed amendments raise a justiciable issue", an analysis similar to the "reasonable cause of action analysis" in applications pursuant to CPR 14.25(1)(a).

[111] The respondents, using different terminology, submit three other considerations:

a) in **Banco de Inversion**, at ¶ 15, (and in other cases) the Court stated as follows:

> "Pleadings should be so framed that they contain all material facts in a sufficiently clear, organized and concise form such that all of the constituent elements of each cause of action being alleged are set out. . . . The defendant must not be left to speculate or guess the particulars of the case alleged against him or her or of the remedy sought."

b) in **Jachimowicz**, citing **Shore** v. **Cantwell and Cantwell**, the Court suggested that the party seeking to amend must establish why the amendment is sought, and that the amendment, if made, would present an issue worthy of trial and *prima facie* meritorious; and,

c) in assessing the proposed amendment, the Court should rely upon the affidavit evidence filed in support of the proposed application (**Jachimowicz** *supra* and **Mikisew** *supra*) showing that the amendment is necessary.

[112] This application brings into focus the issue of onus.

[113] On the one hand, NBFL takes the position that it need not explain to the Court, by affidavit or otherwise, the reason for the amendment. Such would amount to this Court improperly considering the merits of the proposed amendments and would be contrary to the caselaw, the history of which is described in **Consolidate Foods** v. **Stacey** and adopted by our Court of Appeal in **Jeffrey** v. **Naugler**. It says the respondents have the sole burden of persuading the Court that the applicant is acting in bad faith or creating a prejudice that cannot be compensated in costs.

[114] On the other hand, the respondents submit that in none of the caselaw dealing with proposed amendments does the applicant fail to explain or refuse to explain the reason for the proposed amendment (except **Jachimowicz**). It is normal and contemplated by CPR 37.02 that an applicant file something to explain the basis upon which the Court should exercise its judicial discretion. The respondents and the Court are left to speculate and, if necessary, to infer motives where there exists no explanation for the proposed amendment. This, the respondents say, is fundamentally unfair.

[115] In some cases, it may be obvious what the reason for the amendment is and no further explanation is necessary. In other cases, the reason for the amendment may not be obvious. While I agree that it is an unusual approach for an applicant to seek that the Court exercise discretion without giving an explanation, the absence of any direct explanation can be assessed as part of the traditional or ordinary analysis; that is, whether the application is made in bad faith or may cause prejudice which cannot be compensated in costs. In other words, it is open to the Court to draw reasonable inferences from the evidence before it and the absence of evidence before it.

D.4 **Whether NBFL's proposed amendments respecting conspiracy and fraudulent representation comply with CPR 14.04 and 14.12**

[116] The respondents point out that the removal of Clarke's name from NBFL's conspiracy/fraudulent misrepresentation pleadings leaves its pleadings deficient in two respects:

a) it does not, without Clarke, give reasonable disclosure of the alleged conspiracy and how it was effected, and,

b) as submitted by SMSS, it falls short of alleging a civil conspiracy at all, as it does not allege an act done to carry out the conspiracy.

[117] CPR 14.04 requires every pleading to contain a statement in summary form of the material facts on which the party pleading relies. CPR 14.12(1) adds that every pleading shall contain the necessary particulars of, among other things, any misrepresentation, fraud or breach of trust, and "where any malice, or fraudulent intention or other condition of mind except knowledge [is alleged], particulars of the fact on which the party relies".

[118] Mr. Potter has provided a breakdown of NBFL's Main Action pleadings. Sixty-five of one hundred and five paragraphs contain allegations of material fact; only nine do not involve Clarke. Of the many paragraphs that, either by inference or directly, describe Clarke's involvement, the most important are present paragraphs 68 and 111 (proposed paragraphs 66 and 109). They are set out in ¶ 76 of this decision.

[119] I agree with Mr. Rook's submission that Brian Awad's March 2003 memo contains an accurate synopsis of the law of civil conspiracy as enunciated by the Supreme Court in **Canada Cement LaFarge**.

[120] In furtherance of CPR 14.12(1), the requirements respecting pleadings of conspiracy are described in several texts. I cite only three.

[121] *Bullen & Leake & Jacob's Precedents of Pleadings*, Fourteenth Edition (2001; Sweet & Maxwell; London) Section 50: Conspiracy states:

> "50-01: **Different types of conspiracy.** Conspiracy is "the agreement of two or more to do an unlawful act, or to do a unlawful means" . . . Historically, there are two kinds of conspiracy, the elements of which are distinct:
>
> (1) an "unlawful means" conspiracy in which the participants combine together to perform acts which are themselves unlawful; and
>
> (2) a combination to perform acts which, although not themselves *per se* unlawful, are done with the sole or predominant purpose of injuring the claimant: "it is in the fact of the conspiracy that the unlawfulness resides", . . .
>
> **Necessary elements of an action in conspiracy**. The claimant must plead and prove the following necessary elements:
>
> I) a combination or agreement between two or more individuals (required for both types of conspiracy);
>
> ii) an intent to injure (required for both types of conspiracy but must be shown as the sole or predominant purpose for type (2) above);
>
> iii) pursuant to which combination or agreement and with that intention certain acts were carried out;
>
> iv) resulting loss and damage to the claimant.
>
> . . .
>
> 50-04: **The acts done pursuant to the conspiracy**. These are known as overt acts and must be set out in the particulars of claim including details of who is alleged to have acted and what they did. For an "unlawful means" conspiracy (type (1) above), each unlawful act should be set out and pleaded as a separate cause of action."

[122] *Remedies in Tort*, edited by Linda Rianaldi, Chapter 3 "Conspiracy", by Janet Kee (looseleaf to release 8-2007: Carswell), states:

> "**38** In an action for damages for conspiracy, the statement of claim should set out the parties to the agreement and their relationship to one another, particulars of the agreement, the purpose or object of the conspiracy, the overt acts done in pursuance of the agreement and the damages suffered by the plaintiff from those acts.
>
> **39** **A plaintiff must name all of those alleged to be involved in the conspiracy in his pleadings, even if he has elected to sue only one.** (Emphasis added)
>
> **39.1** The plaintiff must plead the particulars of the acts allegedly done by the defendants in concert or combination pursuant to the agreement.
>
> **39.2** A plaintiff who makes an allegation as serious as conspiracy but cannot give any particulars of the allegation must adduce some evidence, even if very little, in order to require a defendant to answer. Defendants should not be called upon to answer a bald allegation of conspiracy of which there is no evidence and of which no particulars are given. At the same time, the court is entitled to draw an inference that the defendants acted in concern in relation to an allegation of conspiracy where some information is provided with respect to the conspiracy. Specifics of various aspects of the conspiracy may not be available to the plaintiff until examinations for discovery, and it may be premature to strike a claim for conspiracy at the pleading stage.
>
> **39.3** It is proper to use interrogatories to seek the names of active participants in an alleged conspiracy since the identity of the alleged co-conspirators is material to the plaintiff's case."

[123] A relevant observation is found in **Rose Park Wellsley Investments Ltd.** v. **Sewell**, 1972 CarswellOnt 233, (Master) at ¶ 10:

> "10 With regard to the particulars of the remaining paragraphs, firstly dealing with para. 7. **I do not think a Plaintiff can allege conspiracy as he has done here without at least naming those alleged to be involved whether he chooses not to sue them or otherwise.** To permit this could permit a fishing expedition without bringing home to the defendant in the pleadings the case he has to meet. The paragraph is prefaced by the statement that full particulars are not known by the plaintiff and sets out particulars as known by the plaintiff. There is no affidavit indicating that the particulars of the conspiracy are not within the knowledge of the defendant and that the particulars are necessary for pleading and, accordingly, I would not order particulars of para. 7 other than the names of persons described as "others" in the said paragraph and as well in para. 6. . . " (Emphasis added)

In that case, the plaintiff filed an affidavit claiming that the particulars of the conspiracy were not known to him. In this respect, **Rose Park** differs from the case at bar.

[124] Another useful source is *The Supreme Court Practice*, a tri-annual annotated review of the English Supreme Court Rules of Practice published by Sweet & Maxwell. My copy is 1985. Order 20 rule 5(1) is similar to our CPR 15.01©. In the annotations to this rule, the writers state:

> "In practice, leave to amend is given only when and to the extent that the proposed amendments have been properly and exactly formulated, see *Derrick v. Williams* (1939) 55 T.L.R. 676; *per* Farwell L.J. in *Hyams v. Stuart King* [1908] 2 K.B. 696, p.724; *J. Leavey & Co. V. Hirst* [1944] K.B. 24, *per* Lord Green M.R., p.27.
> . . .
> It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings" (see *per* Jenkins L.J. in *G.L. Baker Ltd. v. Medway Building & Supplies Ltd.* [1958] 1 W.L.R. 1216, p.1231; [1958] 3 All E.R. 540; p.546).

[125] I agree with the respondents that the proposed amendments, which remove a key party to the conspiracy and fraudulent misrepresentation and who is described in the pleading as fulfilling a unique role, leaves a large unexplained gap in the material fact allegations of a civil conspiracy and fraudulent misrepresentation. On its face, the proposed amended pleading does not meet the requirements of CPR 14.12(1).

[126] This, however, does not in and of itself mean that this Court should dismiss the application to amend the pleadings. If, in applying the traditional bad faith/prejudice analysis, this Court were to determine that NBFL has a *bona fide* reason for the proposed amendment (recognizing that the onus is on the respondents to show the absence of a *bona fide* reason from which I may infer bad faith), and if I determine that the deficiencies could be appropriately dealt with by a demand for particulars pursuant to CPR 14.24 and that such would not meet the requisite prejudice (that is, prejudice not compensable in costs), then I should not deny the amendment application.

[127] Simply put, the fact that the proposed amendments are made without explanation and are deficient in particularizing the civil conspiracy to the degree that it complies with CPR 14.12(1) is a factual finding relevant to the application of the traditional bad faith/prejudice test.

D.5 **Bad Faith**

[128] The onus is on the respondents to establish bad faith.

[129] None of the parties directly briefed or addressed the Court on the meaning of the term "bad faith" as used in the case law for the purposes of applying this test. My reading of those cases submitted suggests there is not a clear and consistent approach. That may be why both sides to this application advanced other considerations (See part D.3 of this decision.)

[130] Is bad faith the absence of good faith, or does it require more? Is it dishonesty of belief or purpose? Or is it impossible to make a complete catalogue of types of bad faith (as stated in the *American Restatement (Second) of Contracts*, ¶ 125 [1979])?

[131] In *Phipson on Evidence*, Fourteenth Edition, by M. N. Howard *et al* (1990; Sweet & Maxwell; London), Chapter 16, the chapter on proof of state of mind, Part 6 and Part 9 are about good and bad faith. The authors provide important guidance as to relevant considerations for assessing whether NBFL's application is made in bad faith when they write:

> "A party's good faith in doing an act may generally be inferred from any facts which would justify doing it. In such cases the state of his knowledge; or the advice, however erroneous, that he received; or the information, whether true or false, on which he acted, may often be relevant. So, to show the bona fides of a party's belief as to any matter, it is admissible to show the state of his knowledge, and that he had reasonable grounds of belief or that it was shared by the community or even by the individuals similarly situated to himself; while the absence of reasonable grounds of belief in the existence of a fact (*e.g.* means of knowing the opposite) is evidence of want of honest belief."

[132] Gordon Hilliker, Q.C. has written texts on insurance law for several years. He suggests that the term "bad faith" may be a misnomer. In the context of contract law, he writes that it involves the breach of the duty of good faith and fair dealing, and forbids parties from concealing what they privately know, or, stated in the positive, impose a duty to disclose all material facts. It does not require malicious or high-handed behaviour.

[133] Seldom does a party declare his or her bad faith. The Court is entitled to draw inferences from the totality of the circumstances surrounding the application including:1) the state of knowledge of the applicant, 2) the advice, however erroneous, it received,and 3) the information, whether true or false, upon which it acted, in determining the *good or bad faith* of a party.

[134] My assessment of bad faith encompasses consideration of the fact that NBFL's discontinuance of all claims against Mr. Clarke is a different process and has a different purpose, than its application to amend pleadings of material facts, so as, in this case, to substantially alter its theory of a stock manipulation conspiracy and how it was enacted.

[135] In the context of this case, an important consideration is the absence of a *bona fide* explanation by NBFL of the reason for deleting the material fact allegations against Clarke.

[136] As previously noted, in November 2004, Justice Scanlan heard an application made by the respondents in this application to strike one version of NBFL's "inconsistent pleadings" - that is, the allegation of the existence of a stock manipulation scheme and Clarke's role in it. Justice Scanlan accepted the representations and position put forward by NBFL that, **at that time**, while they believed that such a scheme involving Clarke, the scheme was denied in pleadings of the alleged conspirators, and NBFL did not have "full knowledge" of the circumstances.

[137] Relevant to this application is Justice Scanlan's analysis of when NBFL may be in a position, and when it should not be put in a position, to choose among different possible factual matrices. His observations are important in light of the evidence before the Court on this application that there is no factual basis proffered for NBFL to be now seeking to withdraw the material fact allegations about Mr. Clarke's involvement in the conspiracy/fraudulent misrepresentation, even if it wished to withdraw its claim for relief against him.

[138] Justice Scanlan's observations include:

> "24 . . . NBFL says at this point, and perhaps not until the Court decides what occurred, does NBFL have full knowledge of the factual situation so as to enable it to assert its rights with certainty.
>
> . . .
>
> 26 . . . It may well be beyond the capacity of NBFL to determine at this point in time whether there was stock manipulation. . . . many of the parties who were alleged to have been party to the stock manipulation scheme continue to deny involvement in any such scheme.
>
> 27 . . . it would be inappropriate at this stage to have the rules of pleadings impose upon NBFL an obligation to choose as between one alleged set of circumstances versus the other when it is not within their full knowledge as to what actually occurred. . . .
>
> 28 I am not convinced at this point that NBFL has "full knowledge" so as to know what the true situation was in relation to KHI shares and the alleged stock manipulation. If a party does not have full knowledge of the circumstances they should not be barred from setting up alternative pleadings. . . .
>
> 29 . . . It would be an offence to the administration of justice to require a party such as NBFL to choose between one or two possible sets of facts only to discover after a lengthy trial, or in this case trials, that the alternative was in fact true. To apply the rules of pleadings in such a way would prevent NBFL or any other parties affected by circumstances of these cases from embarking on a fact-finding process which would first ascertain the truth as regards what occurred and then have a reasonable application of law . . .
>
> . . .
>
> 33 . . . it is not clear as to which parts of the defence or claims made by NBFL will succeed or fail. That will depend on a complex set of facts which have yet to be determined by a Court. . . . Assuming the pleadings are true, this is more just an attempt by NBFL to put the applicants to the expense of a costly trial. Assuming the pleadings are true they are more than an attempt to simply delay or embarrass the other parties. Again I point out at this stage of the proceedings it is

> permissible for NBFL to plead facts in the alternative **until all facts are "known" to NBFL**." (Emphasis added)

[139] NBFL has provided no explanation of the factual basis for the application to remove the material fact allegations against Clarke. There is no representation or affidavit or other evidence before the Court in relation to this application to indicate that facts are now known to NBFL that were not known in November 2004, and that those facts suggest that Clarke was not involved in the wrongdoing alleged by NBFL from 2003 until last summer.

[140] The respondents to this application have provided unchallenged evidence that would reinforce the position taken by NBFL's former counsel and put before Justice Scanlan in November 2004 as to the involvement of Bruce Clarke in whatever stock manipulation scheme is alleged to have occurred.

[141] The absence of any evidence or representation from NBFL that their knowledge of the facts has so matured that their submissions to the Court in November 2004 no longer hold true, is disconcerting.

[142] NBFL did, on October 2nd, 2007, discontinue any and all claims, cross-claims, counterclaims and third party claims brought by it against Bruce Clarke.

[143] Discontinuance of a proceeding differs from amending pleadings. A discontinuance is simply an abandonment of a claim. In Nova Scotia it may be done as of right and without leave (CPR 40.01). It is clear from reading *Odgers on Civil Court Actions*, Twenty-Fourth Edition (1996; Sweet & Maxwell; London), ¶ 17.05, that at common law the abandonment of proceedings does not constitute a bar to bringing a fresh action under more favourable circumstances on the same material fact allegations. Nothing in Nova Scotia *Civil Procedure Rules* would prevent that. NBFL represented to this Court that Mr. Potter has done just that in this case in respect of his discontinued and then recommenced claim against SMSS.

[144] To amend the pleadings is to make a change in a material fact allegation. It is not axiomatic that the discontinuance of a claim against a party is or should be synonymous with a change in a material fact allegation, especially in multiparty proceedings such as these cases. A review of the law of civil conspiracy confirms that it is not necessary to sue all parties to a conspiracy, but it is necessary to name them (if known) and to describe their role. In my view, it would be inappropriate to fail to name, and describe the role of, a person believed to be a party to a conspiracy, or to withdraw material fact allegations against him or her, regardless of whether the claimant wishes to pursue a remedy against that person. In any proceeding, and in this litigation involving several related actions, the material fact allegations affect more than just the party pleading or the party to whom the amendment or pleading is directed.

[145] NBFL may choose, as of right, to discontinue its claims against Clarke without having to amend the material fact allegations contained in the statements of claim in respect of his alleged involvement in a conspiracy and fraudulent misrepresentation directed toward NBFL. It is not

prohibited from commencing a new action on the same material fact allegations against Clarke at a later time.

[146] Of significance to this Court on this point was the answer to the request made, by counsel for Keating, to NBFL to undertake not to introduce evidence of any wrongdoing by Clarke (that is, evidence in support of the present material fact allegations in the pleadings against Clarke), and further an undertaking not to introduce evidence that Charles Keating should have known of market manipulation conducted by Clarke or wrongful acts of Clarke that contributed to the losses Keating claims from NBFL.

[147] In writing, NBFL declined to give any such undertaking. At the hearing of this application, Mr. Coles, on behalf of NBFL, appeared to be saying that it could not restrict what evidence may be introduced at trial by it or by others. NBFL's response to the Keating request confirms in the Court's mind that NBFL will not be restricted in the evidence it may proffer at trial - whether such evidence was known before November 2004, or is known now, or is learned through the completion of the outstanding pre-trial processes, or by its own further investigations.

[148] During a three week hearing in March 2005, Lorie Haber, Alan Parish and Brian Awad testified as to the basis for NBFL's commencement of the Main Action against Clarke and others alleging a conspiracy and fraudulent misrepresentation. This evidence, tendered to this Court, established the thoroughness of the NBFL investigation before it made, in good faith, the material fact allegations against Clarke.

[149] Since the November 2004 hearing, it has been disclosed that Joel Wiesenfeld, one of NBFL's former counsel, commissioned and obtained a forensic report from PriceWaterhouse (over which it presently claims litigation privilege and has not disclosed) which report it did provide to IDA, RS Ltd. and NSSC (Nova Scotia Securities Commission) in or about 2002 to support its conduct in respect of investigation by those regulatory agencies into alleged breached of securities laws by NBFL.

[150] Bruce Clarke entered into a settlement agreement with the Nova Scotia Securities Commissions upon agreed facts that included that he acted as the investment advisor, while employed by NBFL, for an insider group trading in KHI shares in a manner that violated securities laws and, in effect, improperly manipulated the price of KHI shares. This information supports NBFL's "inconsistent pleadings" argument of November 2004, and the material fact allegations NBFL made against Clarke. That settlement agreement is contraindicative of NBFL's present application, without explanation, to withdraw the material fact allegations against Clarke.

[151] NBFL's present legal counsel have been on the job, in the case of Mr. Hodgson, since December 2003, and in the case of Mr. Coles, since June 2005. The restrictions placed on them by Justice Scanlan in May 2005 (2005 NSSC 113), reaffirmed again in an order in December 2007, did restrict access to NBFL's prior legal counsel and some senior NBFL executives and their work product, and until 2007, to about 100 privileged e-mails from the KHI server; however, there is no evidence before the Court that this restricted them from accessing any of NBFL's

documents or records that were not created by the quarantined individuals after the collapse of KHI, or the PriceWaterhouse forensic report (which counsel acknowledge having), or access to most of NBFL's staff, or the documents disclosed by all the other parties to this litigation.

[152] NBFL does not represent, or place before this Court any evidence, that would suggest, that they now have the "full knowledge" that they did not have in November 2004 or that such "full knowledge" is to the effect that Bruce Clarke had no involvement in the alleged conspiracy and/or fraudulent misrepresentation as set out in the material fact allegations made by them, in good faith and after a thorough investigation, in 2003 in the Main Action and in pleadings in related actions since then.

[153] It is reasonable to infer, and the respondents have satisfied me on the basis of the material before the Court, that NBFL has no *bona fide* reason to alter the material fact allegations made against Bruce Clarke at this time. Its discontinuance of claims against Bruce Clarke (which is not irrevocable) does not justify "the sea change" in its material fact allegations respecting the participation of Bruce Clarke in an alleged conspiracy or other wrongdoing. To the extent that NBFL convinced Justice Scanlan in November 2004 that their state of knowledge of the actions of Bruce Clarke was a *bona fide* basis for alleging his involvement in a conspiracy, if one existed, it has not even attempted to proffer some factual basis, in the face of the respondents' submission that no basis exists, for the withdrawal of the allegations. This rings of bad faith.

[154] This conclusion is supported by the absence of an alternative explanation in the proposed amendments as to how the alleged conspiracy and fraudulent misrepresentation were affected on NBFL without Clarke, and further supported by NBFL's refusal to endorse Keating's request that NBFL undertake not to introduce at trial evidence supporting the material fact allegations they wish to withdraw.

[155] The absence of an explanation for a proposed amendment is an unusual approach in any application. It was relied upon by Justice Legere-Sers in **Jachimowicz** where she concluded that the amendment would open up a new inquiry not supported by facts, and, in light of the litigation history, would cause injury, costs and prejudice that could not be compensated in costs. Her analysis and conclusions are relevant to the analysis of this application.

[156] Bad faith is not something that the offender admits to. It usually is proven from conduct and the absence of an explanation, and seldom from the words of the offender. The timing of the change in NBFL's position was shortly before counsel for Mr. Ristow gave notice of his intention to resurrect and pursue the summary judgment application against NBFL, which NBFL was notified would be focused on Bruce Clarke's actions while an employee of NBFL. It appears that the removal of the material fact allegations against Mr. Clarke might make it easier for NBFL to respond to this application. Whether or not it would be a successful tactic is not necessarily relevant. The fact that it may assist NBFL is some evidence that the proposed amendment has a tactical purpose unrelated to NBFL's knowledge with respect to the material fact allegations against Mr. Clarke.

[157] I accept as evidence supporting the bad faith argument that NBFL did conduct a thorough investigation of Bruce Clarke's role in the alleged conspiracy and fraudulent misrepresentation before it made the material fact allegations against him. NBFL has had the best access to, and the best means to analyse, the documents and records of Mr. Clarke's involvement in the alleged wrongdoing. Much of this evidence has come to light since the November 2004 hearing that lead to the "inconsistent pleadings" decision of Justice Scanlan in January 2005. NBFL still claims privilege and has not disclosed some of that evidence.

[158] NBFL declined to undertake, in the Keating action, not to introduce evidence of wrongdoing by Clarke, and the discontinuance of their claims against Mr. Clarke do not prevent them from introducing at trial evidence of the conduct of Clarke in respect of the alleged conspiracy and fraudulent misrepresentation.

[159] I can and do infer from the absence of any factual basis for withdrawing the material fact allegations respecting Mr. Clarke's involvement in the alleged conspiracy, and the tendering of materials by the respondents suggesting that if a conspiracy existed that Clarke was a key participant in it, that the proposed amendment is not sought in good faith.

[160] As the writers of the *Phipson* test note, motive or state of mind is generally inferred from conduct. The timing of the proposed amendment coincides precisely with Mr. Dunlop's advancement in the Ristow summary judgment application against NBFL, which application is centred on Mr. Clarke's conduct as an employee of NBFL. The inference that the proposed amendment is motivated by that summary judgment application, and not by some new or "full knowledge" of Clarke's actions that have not been disclosed to this Court, is irresistible.

[161] Consequences of granting NBFL's application include:

a) a drawn-out process of demands for particulars by the respondents in respect of NBFL's new theory of the conspiracy and fraudulent misrepresentation without Clarke as the prime implementor. This could involve more than ten sets of legal counsel representing approximately forty different parties in the related actions;

b) a lengthy process of applications for amending pleadings by the respondents, to adjust to what is a material change in NBFL's conspiracy theory; and

c) possible applications by those who relied on NBFL's pleadings against Mr. Clarke, to now seek leave to add Bruce Clarke as a party, and, if necessary, to seek relief from expired limitation periods under the *Limitation of Actions Act*.

D.6 **Prejudice**

[162] As evidenced by the uncontradicted affidavits of Craig Dunham, one of the defendants to NBFL's claims is insolvent and on the verge of being unable to defend the claims brought against

him because of the ongoing delays and complexities of the litigation and its wearing affect on his financial capacity to continue. Inevitably his emotional will to continue is compromised by this. This is a prejudice that cannot be compensated by an award of costs that are not punitive (and therefore not an option). The respondents submit that it is obvious that there are other defendants of claims by NBFL who will soon be in the same situation. It is a matter of common sense that parties with the deepest pockets have a greater capacity to withstand the financial, time and emotional stress of litigation.

[163] A review of the twists and turns in the pleadings and disclosure phases of this litigation over the past seven years, leads to the common sense conclusion that those litigants with the deeper pockets have a better likelihood to have their case properly prepared and presented to the Court than those who have empty or near empty pockets. It is obvious that all of the litigants to these actions do not have the same financial stake in the action (that is, in absolute terms or in relative terms), or the same capacity to protect their interests in this litigation. This is not litigation between parties similarly situated with similar capacities to effectively participate. Many of them are defendants in the 16 debt actions and/or third parties added by NBFL in the Main Action in respect of their claim of conspiracy and fraudulent misrepresentation. They are not the initiators of the litigation.

[164] This factor is a consideration in assessing whether the proposed amendment of the material fact allegations against Clarke, in the context of the position taken by NBFL and accepted by the Court in November 2004, and in the absence of any evidence since that time suggesting that the material fact allegations against Clarke are no longer true, should be permitted. NBFL is unable to undertake or to represent that at trial it will not introduce evidence of acts by Clarke that might establish at trial the alleged conspiracy and fraudulent misrepresentation or that Clarke was a party to it. It may be unreasonable to expect NBFL to give such an undertaking, unless it has clear evidence at this stage that would negate the possibility of involvement in an alleged conspiracy. It would be irresponsible for this Court to blindly accept such an undertaking, especially in the absence of any basis to believe that NBFL now has new information that would suggest that he had no role in any alleged conspiracy or fraudulent misrepresentation.

[165] This application to amend pleadings affects not only NBFL but all of the other parties to these proceedings. In considering the effect on the respondents, such as Mr. Dunham (whose affidavits were not challenged), I conclude that even the award of all costs, on a solicitor/client basis (an exceptional, unusual and sometimes punitive award), would not remove the prejudice. I am not satisfied that the case law cited to the Court, that defines the requisite prejudice as being prejudice not compensable in costs, was intended to encompass an award of costs that was exceptional, unusual or punitive.

[166] Based on the affidavits of Mr. Dunham, and on the application of common sense to the circumstances and history of these proceedings, it is likely that further delay in the “pleadings” stage of these proceedings would similarly prejudice other litigants (mostly defendants who do not have deep pockets) in continuing to pursue this litigation in more than a nominal way unless

an award of such substantial costs were made as would enable them to continue. Such an award is not appropriate. It is relevant consideration in assessing the question of prejudice not compensable in costs.

[167] Any further delay in the pleadings stage of these proceedings, which has already stretched almost seven years, absent a very clear basis for that delay, will prejudice the smaller defendants in their ability to litigate the issues on their merits.

[168] The Chief Justice of the Supreme Court of Canada has often expressed concern with respect to delays in the civil justice system and their effect on the relevance of the system. In one such address to the Empire Club of Canada at Toronto on March 8th, 2007, (posted on the Supreme Court's website) she made relevant statements that infuse the issue of prejudice as it appears in this case. She said in part:

> "On the civil side, different but similar problems arise. Whether the litigation has to do with a business dispute or a family matter, people need prompt resolution so they can get on with their lives. Often, they cannot wait for years for an answer. When delay becomes too great, the courts are no longer an option. People look for other alternatives. Or they simply give up on justice."

D.7 **Summary**

[169] The bottom line is that:

1. In the context of these proceedings, bad faith can be inferred where NBFL presents no factual basis for seeking to remove the material fact allegations against Bruce Clarke and the evidence before me suggests that no such factual basis exists, and the timing of the application coincides with other proceedings in this litigation in respect of which the material fact allegations are detrimental to NBFL's interests.

2. The prejudice that would be created by the consequential demands for particulars and reactive pleading amendments in what has already been a lengthy pleading process, will likely result in at least one, and by the application of common sense, more than one of the defendants becoming incapable of presenting their case on its merits in an effective manner. This prejudice is not compensable by an award of non-punitive costs.

3. The proposed amendment leaves a large void in the requisite elements for pleading a civil conspiracy and fraudulent misrepresentation that is not in compliance with the letter or spirit of CPR 14.12(1).

[170] The application is dismissed.

J.