SUPREME COURT OF NOVA SCOTIA

Citation: National Bank Financial Ltd. v. Potter, 2010 NSSC 214

Date: 20100607
Docket: Hfx. No. 206439
Registry: Halifax

And in these actions:

Hfx. No.174293 (Debt Action)
Hfx. No. 193842 (Mahoney)
Hfx. No. 216543 (Keating)
Hfx. No. 208293 (Barthe)
Hfx. No. 227347 (Banks)
Hfx. No. 275267 (Romanowsky)

BETWEEN:

National Bank Financial Ltd.

Plaintiff

- and -

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

Defendants

AND BETWEEN:

Bruce Clarke, Fiona Imrie, Gramm & Company Incorporated, 2532250 Nova Scotia Limited, 302828 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

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

Defendants by Counterclaim

- and -

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

Defendants by Crossclaim

AND BETWEEN:

Knowledge House Inc. and Dan Potter

Plaintiffs

- and -

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

Defendants

DECISION

Judge: The Honourable Justice Suzanne M. Hood

Heard: February 22, 2010 in Halifax, Nova Scotia

Written Decision: June 7, 2010

Counsel: **W. Dale Dunlop** and **Scott Hughes** on behalf of Estate of Michael (Ben) Barthe, Lutz Ristow, Craig Dunham, Lowell Weir, Blackwood Holdings, Helical Corporation, Carol McLaughlin-Weir, Calvin Wadden, Michael Mahoney and N.S. Ltd. 3031775 *(Applicants)*

Kevin C. MacDonald *(not participating)* on behalf of Derek Banks and Plastics Maritime Ltd. *(Applicants)*

James Hodgson and **Robert Blair** on behalf of National Bank *(Respondent)*

By the Court:

[1] Twelve parties in seven actions which are part of the Knowledge House Inc. ("KHI") litigation seek to have the pleadings of National Bank Financial Ltd. ("NBFL") struck as an abuse of process and its proceedings stayed.

ISSUE

1. Should NBFL's pleadings be struck as an abuse of process and its proceedings stayed?

FACTS

[2] In the complex KHI litigation involving many actions, NBFL has settled with a number of parties. It filed a Notice of Discontinuance with respect to its former employee, Bruce Clarke ("Clarke"). It then filed a motion to amend its pleadings to remove all mention of Clarke as a conspirator. That motion was denied by Justice Gregory Warner, the judge case managing the KHI litigation. His decision was upheld on appeal.

[3] At the time of that motion, these applicants sought to have all NBFL pleadings against them struck and the proceedings stayed as an abuse of process. The result they say would be that the only remaining issue between them is quantum of damages. Warner, J. concluded this motion should be dealt with separately from the motion before him.

[4] The abuse of process motion has been pending since 2008 and was adjourned from December 2009 to February 22, 2010.

The Law on Abuse of Process

[5] The motion is brought pursuant to *Rule 14.25* (1972 Rules) since an application was commenced in 2008. *Rule 14.25* provides:

> **14.25. (1)** The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> ...
>
> (d) it is otherwise an abuse of the process of the court;

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

[6] *Rule 88* of the new *Rules* is entitled "Abuse of Process" which provides:

Scope of Rule 88

88.01 (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.

(2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.

...

Remedies for abuse

88.02 (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:

(a) an order for dismissal or judgment;

(b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;

...

(e) an order striking or amending a pleading;

...

[7] The *Judicature Act, R.S.N.S.* 1989, c. 240 in s. 41(e) also gives the court authority to grant a stay of proceedings or such other remedy as the court thinks fit.

> **41. Rules of law** - In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> ...
>
> (e) no proceeding at any time pending in the Court shall be restrained by prohibition or injunction but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained prior to the first day of October, 1884, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto provided always that nothing in this Act contained shall disable the Court from directly a stay of proceedings in any proceeding pending before the Court if it or he thinks fit, and any person, whether a party or not to any such proceeding who could have been entitled, prior to the first day of October, 1884, to apply to the Court to restrain the prosecution thereof, or who is entitled to enforce by attachment or otherwise any judgment, contrary to which all or any part of the proceedings have been taken, may apply to the Court thereof by motion in summary way for a stay of proceedings in such proceeding either generally, or so far as is necessary for the purposes of justice and the Court shall thereupon make such order as shall be just;
>
> ...

[8] In *Coughlan v. Westminer Canada Ltd.*, [1991] N.S.J. No. 183 (S.C.), Nunn, J. referred to s. 41 (e) above and the inherent jurisdiction of court. He said at p. 8:

> Section 41(e) of the Judicature Act enables the court to grant a stay of proceedings "if it thinks fit", and requires the court to make "such" order as shall be just. Again, a discretion exists, but it is one to be exercised where it is just to do so. Exercising this discretion in a situation of clear injustice, is a simple task. However, where there is no clear injustice and the determination is to be based upon determining what is "fit" and doing what is just, the task is considerably more difficult.
>
> In 37 Halsbury (4th) 330 in commenting on the inherent jurisdiction of the court, there is the following passage:
>
> > '... The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.'
>
> I think that can be the only test to apply to determine if it is "fit" to grant a stay and make an order which is just.

[9] A number of Supreme Court of Canada decisions have addressed this issue, some in the criminal context and some in civil proceedings.

[10] In *R. v. Power*, [1994] S.C.J. No. 29, L'Heureux-Dubé referred in para. 11 to remedying an abuse of the court's process in the "clearest of cases." She went on in para. 12 to say:

> 12 To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. ...

She continued in that para.:

> Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

[11] That decision was referred to in *R. v. O'Connor*, [1995] S.C.J. No. 98. In *O'Connor*, L'Heureux-Dubé said in para. 75:

> **75** ... Professor Paciocco, supra, at p. 341, has recommended that a stay of proceedings will only be appropriate when two criteria are fulfilled:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

> (2) no other remedy is reasonably capable of removing that prejudice.
>
> I adopt these guidelines, and note that they apply equally with respect to prejudice to the accused or to the integrity of the judicial system.

[12] In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] S.C.J. No. 82, the Court said in para. 59:

> Stays of proceedings are granted but rarely and only in the 'clearest of cases'.

The Court went on in para. 90 to quote the two criteria referred to above from *O'Connor*. The Court continued in para. 91:

> **91** The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future.

The Court continued in that same paragraph:

> ...There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.

[13] In *R. v. Regan*, [2002] S.C.J. No. 14, LeBel, J. in paras. 53 and 54 referred to *O'Connor* and *Tobiass*. He said in para. 53:

> **53** A stay of proceedings is only one remedy to an abuse of process, but the most drastic one: 'that ultimate remedy', as this Court in Tobiass, supra, at para. 86, called it. It is ultimate in the sense that it is final. ... For these reasons, a stay is reserved for only those cases of abuse where a very high threshold is met: "the threshold for obtaining a stay of proceedings remains, under the Charter as under the common law doctrine of abuse of process, the 'clearest of cases'. (O'Connor, *supra*, at para. 68).

ANALYSIS

[14] The applicants say there are three reasons for granting their motion: 1) the conduct of NBFL since Justice Warner's decision dismissing the motion to amend NBFL's pleadings; 2) the refusal by NBFL to disclose its settlement agreements with the parties with whom it has settled; 3) the bad faith findings made by Justice Warner in dismissing the motion to amend the pleadings.

1. Conduct of NBFL

[15] There are two parts to this argument: first, the motions NBFL has brought or is bringing; and second, its "shunning" of settlement, to use the words of the applicants.

a) *Motions*

[16] Counsel for the applicants says there has been a "blitzkreig" of motions by NBFL. He mentions: a) a motion for security for costs; b) a motion or motions for summary judgment against various defendants in the so called debt action; and c) a motion to remove him as counsel on the basis of a conflict of interest.

[17] Mr. Dunlop says these motions are indicative of NBFL's overall plan to use "its financial might to crush the remaining litigants." (quoting from Mr. Dunlop's Memorandum of Law) He says this is the very thing Scanlan, J. warned NBFL not to do in his 2005 decision on the issue of privilege with respect to emails of Dan Potter, KHI and Starr's Point Capital Incorporated (*NBFL v. Potter*, 2005 NSSC 113, the "privilege decision". In that decision, Scanlan, J. cautioned NBFL against

using “financial might to crush litigants into submission in a situation in which it may result in an injustice.” (para. 50)

[18] One may have some concerns about the approach NBFL has taken to this series of actions but must also recognize that not all of the motions which have been heard were initiated by NBFL. One must also consider whether these motions appear to be an abuse of the court’s process. They have not yet been heard so it is somewhat speculative to determine this. However, I can consider whether, on their face, they appear to be so.

i) *Security for Costs*

[19] Two of the parties are in Germany: Dr. Lutz Ristow is a German resident and the Estate of Michael Barthe is the estate of a person who was a resident of Germany. Michael Barthe, at least at one time, owned property in Guysborough County but there is no evidence before me as to whether or not that is still the case.

[20] It is not an unusual practice for a party to seek security for costs against an out-of-province litigant, especially one who is not a Canadian resident. On its face, this motion does not appear to be an abuse of the court's process.

ii) *Summary Judgment Motion*

[21] NBFL has brought debt actions against those who have defaulted on financial obligations owing to NBFL. Summary judgment motions are often brought in debt actions. This, in my view, is not an abuse of the court's process and, in fact, saves the necessity of a trial, if successful. NBFL has apparently agreed that, if successful, it will not enforce any judgments it obtains until the claims against it by those same parties are resolved. One can only presume that the summary judgment motions will be contested and may not succeed. They are not, on their face, abusive of the court's process.

iii) *Removal of Counsel*

[22] There is also a motion to disqualify counsel for these applicants on the basis of a conflict of interest. This motion arises because NBFL says Dale Dunlop is representing parties who may have claims against each other if some are found to

be participants in a stock manipulation scheme and others innocent victims of such a scheme.

[23] This is an unusual motion in that NBFL is claiming that there is a conflict of interest between Mr. Dunlop and his own clients and not because NBFL is alleging that there is a conflict of interest affecting it directly. Although it is unusual, I must not prejudge the motion. The basic premise underlying NBFL's position does not, *prima facie*, appear to be one which makes the motion an abuse of the court's process. It may or may not be successful. Conflict of interest motions are not inherently an abuse of the court's process and, without knowing more about the grounds for the motion and the defence to it, I cannot conclude now that it is an abuse of the court's process to bring the motion.

b) *"Shunning" Settlement*

[24] The second part of the applicant's argument is that they say NBFL has "shunned settlement", quoting from para. 22 of Craig Dunham's affidavit of March 3, 2008.

[25] Craig Dunham says in his third affidavit, sworn January 10, 2010:

> 27. As noted in my previous affidavits Justice Scanlan strongly urged NBFL to settle with those litigants against whom it was not making allegations of involvement in a conspiracy.
>
> 28. NBFL has made no specific settlement offers to me, but has settled with most of the litigants against which it was alleging involvement in a conspiracy including Blois Colpitts, Stewart McKelvey, Dan Potter and associated parties as well as discontinuing its claim against Bruce Clarke.
>
> 39. I am advised by my solicitor that subsequent to the adjournment of the first discovery NBFL offered to mediate my claim, which offer I accepted.
>
> 47. I then received a call from my solicitor advising that NBFL was canceling the mediation because I had spoken to the press.

[26] The applicants say that Justice Scanlan, in the privilege decision, sent a clear message to NBFL. He said in para. 50 (quoted above) that NBFL should not use its financial ability to crush litigants into submission. He continued in paras. 50 and 51:

> 50 ... 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 litigation were participants in or victims of a stock manipulation scheme, if one did exist.

[27] Mr. Dunlop acknowledges that the court cannot force a party to settle. However, he says NBFL has settled with those against whom it made the most serious allegations and is playing "hardball" with the very people for whom Justice Scanlan expressed concern in his 2005 decision.

[28] It is clear that there is no obligation on the party to litigation to discuss settlement. In his affidavit, Richard Rousseau reviews NBFL's settlement efforts. He says in paras. 7 and 8:

> 7. Contrary to the Dunham Affidavits, NBFL has been and is prepared to engage in reasonable settlement negotiations. However, the resolution of any of the Applicants' claims must take into account NBFL's claims against some of the Applicants, which those Applicants do not dispute, and the issues which arise in the Applicants' claims against NBFL.
>
> 8. In addition, the resolution of the Applicants' claims must take into account that some of the Applicants - Wadden, Barthe, Ristow, Banks and Plastics - may be liable to the other Applicants - Dunham, Mahoney, Weir, Blackwood and Helical - if, in fact, there was a successful stock manipulation scheme.

[29] In para. 12, he lists those with whom NBFL has "resolved claims."

> 12. Since the spring of 2008, NBFL has resolved claims involving the following parties: Daniel Potter, Starr's Point Capital Incorporated, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited,

> 3020828 Nova Scotia Limited, Ronald Richter, Bernard Schelew, Stewart McKelvey Stirling Scales, Blois Colpitts, Knowledge House Inc., Gary Blandford, Julia Blandford and 3017804 Nova Scotia Ltd.

[30] He also says in para. 9 that NBFL has resolved its claim against two of Mr. Dunlop's clients.

> 9. In September 2004, NBFL resolved its claims against Kenneth MacLeod and FutureEd.com Ltd., both represented by counsel for the Applicants.

[31] He also refers to settlement efforts with the applicants in paras. 10 and 11:

> 10. Immediately after the release of Justice Scanlan's decision in May 2005 removing NBFL's then counsel, NBFL's current counsel engaged in settlement discussions with counsel for the Applicants regarding the resolution of all of NBFL's claims against the Applicants, and the Applicants' claims against NBFL. These discussions did not result in any resolution.
>
> 11. NBFL's counsel engaged in further discussions with counsel for the Applicants in the spring of 2008. These discussions also did not result in any resolution.

[32] In addition, NBFL has agreed to a month long settlement conference in September of this year with the remaining parties to this series of actions.

[33] Although the court encourages parties to settle and encourages settlement discussions, no one disputes that the court cannot force a party to settle or to

discuss settlement. As Bowman, C.J.T.C. said in *Garber v. Canada*, [2005] TCC 635 at para. 33:

> 33 Where the settlement negotiations take place outside of the context of a pre-trial conference (as was the case here) there is no power that this Court has to enforce parties to act reasonably or to bargain in good faith. A party can approach the settlement negotiations in a contrary, perverse and downright cantankerous frame of mind or can refuse altogether to negotiate, and there is really nothing this Court can do about it, except, perhaps, after the case has been heard, to take into consideration in awarding costs under section 147 of the Rules an offer of settlement made by one of the parties.

[34] Settlement discussions are without prejudice and the court cannot know a party's settlement position. There may be good reason why there has been no settlement between these applicants and NBFL. It is impossible to know whether that is the "fault" of NBFL or otherwise. Mr. Hodgson, for NBFL, said one cannot settle if a party takes an unreasonable settlement position or one that the other party has difficulty understanding.

[35] Justice Scanlan encouraged NBFL to settle. He could do no more. I have before me evidence of NBFL's settlement efforts and I have referred to them above.

[36] In my view, the court should not consider, as evidence of bad faith, a party's failure to reach settlement with other parties. Accordingly, I cannot conclude this is evidence of an abuse of the court's process on the part of NBFL.

II. Refusal to Disclose Settlement Agreements

[37] NBFL has, as mentioned above, settled with or discontinued against a number of parties. It has been asked to disclose the details of its settlement agreements and has refused to do so. A motion is scheduled to be heard in June 2010 by Justice Moir to determine if these are Pierringer Agreements which must be disclosed.

[38] In refusing to disclose the agreements, counsel for NBFL said, in a letter dated October 21, 2009:

> In my view, the terms of those agreements do not prejudice your client's defence of NBFL's claim against him nor your client's prosecution of his counterclaim against NBFL and cross-claims against others.

[39] The applicants cite two case authorities for their submission that the refusal to disclose the agreements is a reason to grant the motion they seek.

[40] In *Greer v. Kurtz*, 2008 Can LII 26685 (Ont. S.C.), Matheson, J. said in para. 10:

> The Agreement must be disclosed to all parties including the court almost as soon as it is finally executed. There must be procedural safeguards to protect the non-settling party or parties.

[41] The same is true of Mary Carter agreements, as is set out in *Pettey v. Avis Car Inc.*, 1993 CarswellOnt 425, (Ont. C.J. (Gen. Div)). In that case, Ferrier, J., in para. 32, said:

> **32.** ... The agreement must be disclosed to the parties and to the court as soon as the agreement is made.

[42] These decisions dealt with agreements that were required to be disclosed. It has not yet been decided if the settlement agreements in this case must be disclosed. It should also be noted that none of these applicants have sued the parties with whom NBFL has resolved claims.

[43] It will be for the motions judge to determine if NBFL's position is correct. Justice Moir will determine if the agreements meet the test for classification as

Pierringer Agreements. It would be premature for me to conclude now that NBFL's position is such an unreasonable one that it should be considered to be an abuse of the court's process.

III. Bad Faith

[44] The applicants' principal argument is that NBFL has acted in bad faith and continues to do so. They say the matters discussed above are indicative of that bad faith. I have not concluded that these matters are an abuse of the court's process.

[45] The applicants' main submissions on the subject of bad faith arise from the wording of decisions of this court. In particular, the applicants rely on the Supreme Court and Court of Appeal decisions with respect to NBFL's motion to amend its pleadings to delete any reference to Clarke as a conspirator. They also refer to the words of Justice Scanlan in the privilege decision.

[46] In the privilege decision, Scanlan, J. considered whether a stay was the appropriate remedy for the actions of NBFL's solicitors in breaching solicitor/client privilege of Dan Potter, KHI and Starr's Point Capital Incorporated. He ordered the removal of NBFL's counsel and said in para. 113:

> **113** The actions of NBFL solicitors verge on the threshold of warranting a stay. One factor which prevents me from entering a stay is that I am satisfied there was no bad faith or dishonesty in viewing the privileged documents. ...

[47] He said the second part of the motion before him was to stay NBFL's claims for abuse of process. In considering that question, he referred to the *Judicature Act*, s. 41(e) (quoted above) and the comments of LeBel, J. in *Tobiass*, *supra*. He said in para. 120:

> **120** The Court must ask whether the breach of solicitor-client communications has resulted in prejudice to the opposing party and whether the prejudice can be realistically overcome by remedy short of a stay.

He concluded in para. 151:

> **151** ... I am not satisfied it would be in the interest of justice to have all potential claims and, in fact, defences which may be made out by NBFL in this complex litigation dismissed because of the actions of their solicitors. In saying that I am satisfied the court has jurisdiction to grant a stay if it is justified.

He also said in para. 155:

> **155** While I have expressed disdain for the actions of NBFL solicitors as forthrightly as I can, I am not satisfied it would be in the interest of the administration of justice to have various claims for many millions of dollars by and against NBFL dismissed based on anything other than the merits.

[48] In so deciding, Scanlan, J. said in para. 128:

> **128** NBFL will have substantial expenses related to new counsel getting up to speed in this major litigation. In addition there will be substantial cost consequences, which I will deal with after submissions, in relation to the present applications. I expect there will be no confusion in terms of a signal to the public or other professionals. By the time all is said and done I would expect that NBFL and others will get the message that it is not open season on solicitor-client communications. This will send an appropriate message of denunciation and deterrence.

[49] In my view, the action of Justice Scanlan in removing NBFL's counsel in 2005, instead of ordering a stay, was a conclusion that the remedy he granted removed the abuse which had occurred. As L'Heureux-Dubé, J. said in *O'Connor*, *supra*, a stay is only granted where no other remedy is capable of curing the abuse. In deciding not to grant a stay, Justice Scanlan concluded that removing NBFL's counsel redressed the wrong and prevented it from being perpetuated through the proceedings and at trial. He quoted from *Tobiass* where LeBel, J. referred to a stay as a prospective remedy and the most drastic.

[50] If I return to NBFL's actions, through its then counsel, as evidence of bad faith which should lead to a stay, I am in effect revisiting the conclusion in that decision that a stay was not the appropriate remedy.

[51] Although in Dispositions Without Trial (2d ed.), the author gave the privilege decision as an example of "egregious conduct", the author also noted that a stay was not granted and referred to the words of Justice Scanlan quoted above.

[52] Furthermore, the privilege decision dealt with "egregious conduct" against Daniel Potter, KHI and Starr's Point, not the present applicants. Mr. Dunlop participated in the hearing of that motion as counsel for Lutz Ristow and Michael Barthe. In the costs decision arising from the privilege decision, Scanlan, J. said in para. 25:

> **25** There, however, is a major distinction between Mr. Dunlop's clients on the one hand and the Potter group and their lawyers. The distinction relates to the issue at stake. The Potter group and their lawyers were was *(sic)* dealing with a client's fundamental right of protection of privileged communications. Mr. Dunlop's clients supported the Potter group position and in fact played a major part in the submission of briefs and cross examination. As regards the issue of privilege however it was not Mr. Dunlop's clients privilege which he was dealing with. Mr. Dunlop's clients were directly affected by the pace of the litigation, the contents of the pleadings and the actions of NBFL counsel, but the issue of privilege was as between NBFL, the Potter group and their lawyers. The fundamental importance of that privilege issue and the way it was handled by NBFL solicitors put that aspect of the case into the rare and exceptional category warranting costs as I have noted.

He then said in para. 28:

> **28** I repeat, this file is as much about the proper administration of justice as it is about costs. It is difficult to put too fine a point on the success of any of the parties other than the Potter group. It is clear that the process NBFL employed had to be stopped before any more damage was done. It took all of the applicants through cross-examination, affidavits, briefs and representation at the hearings to achieve this. Mr. Dunlop was, in no small way, part of that effort. I am satisfied that in terms of the rather extraordinary circumstances surrounding this case that the parties as represented by Mr. Dunlop should also receive a lump sum award of costs but in a lesser amount than awarded to some of the others. I fix costs for Mr. Dunlop's clients in the amount of $80,000 payable in any event of the cause and payable forthwith as a condition of NBFL continuing with the action.

[53] I cannot conclude that the previous actions of NBFL's former counsel in this matter, having been dealt with by Justice Scanlan, should be a consideration for me in determining whether there has been such an abuse of process that a stay should be granted.

[54] The applicants also say there were findings of bad faith by Justice Gregory Warner in *National Bank Financial Ltd. v. Potter*, 2008 NSSC 135 (the "amendment decision") such that I should consider those findings to be sufficient for me to conclude that there has been an abuse of process warranting a stay. I must look carefully at that decision and its conclusions as well as the Court of Appeal decision upholding it and Justice Warner's subsequent Costs Decision.

[55] In the amendment decision, NBFL was seeking to amend its pleadings in all the actions in which a conspiracy was pleaded 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. (para. 1)

NBFL had previously, in October 2007, discontinued any proceedings against Clarke.

[56] Justice Warner said in his decision that NBFL stated no purpose for seeking to amend its pleadings. He said in para. 6:

> **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 its 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 right to discontinue against a party, in these circumstances [is] not allowed to drop the very allegations setting forth the now discontinued claim.

[57] In that proceeding, Mr. Dunlop was representing those who are the applicants on this motion as well as two others. In paras. 32 and 33, Warner, J. said:

> 32 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.

[58] After hearing submissions from the applicants' counsel, NBFL's counsel and counsel representing other parties, Justice Warner concluded the amendment to the pleadings should not be granted. He said in para. 139:

> **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 wrong-doing alleged by NBFL from 2003 until last summer.

He continued in para. 141:

> **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.

[59] He then, in paras. 143 and 144, differentiated between discontinuing a proceeding and amending pleadings. He said:

143 Discontinuance of a proceeding differs from amending pleadings. A discontinuance is simply an abandonment of a claim. ...

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.

[60] Warner, J. then said in paras. 153 and 154:

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 alternate explanation in the proposed amendments as to how the alleged conspiracy and fraudulent misrepresentations 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.

[61] In para. 78, there are comments about bad faith upon which the applicants rely. However, it is unclear to me whether this a summary of the position put forward by Stewart McKelvey Stirling Scales or Justice Warner's conclusion. It is under the sub-heading of "SMSS's response" and many paragraphs before the section of the decision which is entitled "Analysis" beginning at para. 101. For that reason, I will focus on the portion of the decision entitled "Bad Faith" beginning at para. 128.

[62] Justice Warner said in paras. 134 and 135:

> **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.

[63] He then said in paras. 156 to 160:

> **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 the 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 respondent 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.

[64] Justice Warner, in paras. 162 to 168, dealt with the issue of the prejudice likely to arise if the requested amendments were granted. He said in para. 167:

> **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.

[65] His summary is at para. 169 as follows:

> **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).

[66] The decision was appealed and it was upheld. Cromwell, J.A. (as he then was) referred in his decision to para. 169 quoted above. He said in para. 14:

> **14** Warner, J., in a reserved decision, dismissed NBFL's application for three main reasons.

[67] Cromwell, J.A. said in para. 16:

> **16** At the root of the decision is the judge's finding that, viewed in the context of the positions taken by NBFL in this litigation, the deletion of the factual allegations against Mr. Clarke would leave "... a large unexplained gap in the material fact allegations of a civil conspiracy and fraudulent misrepresentation." (Reasons, para. 125). This finding, along with other considerations, was central to the judge's conclusion that the amendments would result in uncompensable prejudice to the other parties: the amendments would lead to consequential demands for particulars and reactive pleading amendments that would result in undue delay and excessive costs to the point of at least some defendants becoming incapable of presenting their cases on the merits. The 'unexplained gap' finding also was an important piece of evidence that the amendments were not sought in good faith.

[68] In paras. 36 to 44, Cromwell, J.A. dealt with the issue of bad faith. He concluded in para. 44:

> **44** I see no error in the judge's conclusion that this position supported the inference that ' ... NBFL will not be restricted in the evidence it may proffer at trial ...' and that this ambiguity in NBFL's position supported an inference of bad faith: Reasons para. 147 and 154.

[69] Justice Warner also rendered a costs decision awarding costs against NBFL with respect to its motion to amend its pleadings. In the context of the request by the successful parties for solicitor/client costs, Warner, J. again considered the issue of bad faith by NBFL. He said in para. 22:

> **22** To state that generally reprehensible conduct should result in an award of solicitor-client costs does not mean that reprehensible conduct should always result in an award of solicitor-client costs. It does not foreclose the requirement of an inquiry into the nature of the reprehensible conduct.

He then went on to say in paras. 23 and 25:

> **23** This Court's application of the legal test for denying the pleadings amendment led to a finding of bad faith. The term 'bad faith' is not monolithic. Its meaning is circumscribed by the legal test for amending pleadings and by the context in which it was applied.

> **25** This Court's use of the term 'bad faith' differs from the use in other contexts, many of which are described in the cases cited to the Court as involving blatant abuses of process and/or contempt.

He declined to award solicitor/client costs, distinguishing the circumstances from cases where they were awarded.

[70] Mr. Dunlop, for the applicants, says that NBFL has not answered for the bad faith found by Justice Warner in the amendment decision. He says we still do not

know why the amendments were sought. He says that Justice Warner had stated in his decision that, if there was a good reason for the amendments, a further motion could be made but that has not happened.

[71] Mr. Hodgson, for NBFL, on the other hand, says it would be inappropriate for NBFL to file an affidavit which, in essence, disputes Justice Warner's findings of fact. He does say, however, that there are facts which were not before Justice Warner. He says in para. 29 of his memorandum to the court:

> 29. ... his Lordship was not made aware that:
>
> (a) Dunham was involved in recruiting Barthe and Ristow to make a claim against NBFL on the basis that KHI's share price was manipulated prior to NBFL instituting a claim on a similar basis;
>
> (b) Dunham was willing to pay Barthe and Ristow's legal fees for a portion of their claim against NBFL; and
>
> (c) Dunham and other Applicants are partners and have a contingency arrangement of some sort with their counsel.

[72] I agree that NBFL cannot dispute Justice Warner's findings of fact. I also do not see the relevance of NBFL failing, since Justice Warner's decision, to make another amendment motion or explain its reason for having sought the

amendments. The amendments were not allowed and NBFL must deal with that result.

[73] Justice Warner made it clear in his costs decision the limits of his bad faith findings. In my view, the bad faith he found, so limited, is not such as to taint the process to such a degree as to make it unfair to continue the litigation. I cannot conclude that this constitutes an abuse of process which warrants a stay of proceedings.

[74] NBFL says the applicants are, in effect, trying to re-litigate the inconsistent pleadings arguments previously made and decided by this court and upheld on appeal. In his memorandum to the court, Mr. Dunlop says at p. 27:

> ... If this matter proceeds to trial as is NBFL will be trying to prove that those that are making claims against it such as Dr. Ristow, Ben Barthe and Derek Banks were aware of a conspiracy to manipulate the trading, but will be making no effort to prove how the conspiracy worked. For the persons against whom NBFL has made no allegations of impropriety such as Messrs. Dunham, Mahoney and Weir NBFL will pursue the notion that there was no wrongdoing by anyone in a position to manipulate the stock despite the fact that our Courts have already found that NBFL doesn't really believe that is the case. By continuing to follow this factually contradictory line of defense NBFL is making a mockery of the court process that expects litigants to pursue an honestly held believe *(sic)* in a set of provable facts. Instead, in the face of a finding of bad faith, NBFL pursues a defense that is based on a dishonest position contrary to what it knows or ought to know are the true facts.

[75] He says that the courts have found NBFL did not believe that there was no wrongdoing as it alleges in its defences to the actions against it by Dunham, Mahoney and Weir.

[76] In *National Bank Financial Ltd. v. Potter*, 2005 NSSC 8 (the "inconsistent pleadings decision"), Scanlan, J. said in para. 24:

> **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 as to enable it to assert its rights with certainty.

[77] He concluded in para. 29:

> **29** ... It would be an offence to the administration of justice to require a party such as NBFL to choose between one of 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.

[78] His decision was upheld on appeal. In the appeal decision, Bateman, J.A. said in para. 21:

> **21** We do wish to comment upon an assertion made by the appellants' counsel in the course of argument lest his submission be shared by other parties to these and related proceedings. 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. The authorities cited by him do not support his contention and we are aware of no authority that does. 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. ...

[79] In the amendment decision, Justice Warner dealt with the argument that the portions of the pleadings NBFL wished to delete were admissions. He concluded they were not and went on to say in para. 107:

> **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. ...

As noted above, the decision not to allow the pleadings to be amended was upheld on appeal.

[80] NBFL can continue to have alternative pleadings; however, it was not permitted to delete any reference to Clarke in its pleadings. As Cromwell, J.A. said in the appeal decision at para. 24:

> **24** With the withdrawal of the allegations against Mr. Clarke, NBFL's claim continues to allege that it was the victim of fraud and conspiracy in trading in accounts maintained with it. But NBFL does not advance any position about how or by whom those trades were carried out or the role of any NBFL employee in that regard.

[81] He continued in para. 45:

> **45** This does not mean, as Mr. Coles suggested in argument, that NBFL will be forced to persist in allegations which it no longer wishes to make.

CONCLUSION

[82] I have considered the individual matters that the applicants raise and have concluded that each is not sufficient, in and of itself, to warrant a stay of proceedings. I must, however, determine whether, in their totality, there has been an abuse of process and whether I should order a stay of proceedings.

[83] I do have concerns about NBFL's approach to this litigation. Its original counsel were removed because of breach of solicitor/client privilege; its amendment of pleadings motion was denied, in part, upon a finding of bad faith in bringing the motion; NBFL is making a motion with respect to conflict of interest by the applicant's counsel which does not arise out of dealings with NBFL itself but with respect to the relations of Mr. Dunlop's clients *inter se*; it has discontinued

against or settled with some of the major players in the litigation but not with the applicants, some of whom no one alleges to be participants in an alleged conspiracy; it has refused to disclose settlement agreements with those with whom it has settled or against whom it has discontinued.

[84] I have discussed each of these above and have said there may be good reasons for the actions NBFL has taken in this litigation. It does, however, leave a lingering concern that NBFL may in fact be doing, or trying to do, just what Justice Scanlan cautioned about five years ago.

[85] A lingering concern, however, is not the test for abuse of process and the "ultimate remedy" of a stay of proceedings. I am, overall, not satisfied that this is one of those clearest of cases, set of exceptional circumstances or very rare cases which demand that the drastic remedy of a stay be ordered. Previous decisions have used words such as "overwhelming evidence" or "conspicuous evidence" of unfairness or bad faith, where a high threshold has been met. Even if I were satisfied there has been an abuse of process, which I am not, a stay of proceedings should only be granted if no other remedy can remove the abuse.

[86] In *Crown, Cork and Seal Canada Inc. v. Cobi Foods Inc.*, [1998] N.S.J. No. 168 (S.C.), the court referred to *Rule 14.25* with respect to frivolous and vexatious claims and abuse of process. The court said in para. 13:

> **13** ... MacAdam, J. in the passage quoted above said that the allegations in the defence should not be classified as frivolous and vexatious. He also said that they should be taken as a 'genuine desire' to defend the claim. That statement puts to rest the abuse of process argument: if one is genuinely defending then one is not abusing the court's process. ...

[87] NBFL is both pursuing claims, and defending claims, for substantial sums. Although it has discontinued against or settled with some key participants in the alleged stock manipulation scheme, it has not abandoned its position that there was a stock manipulation scheme. As the court said in *Barthe v. National Bank Financial Ltd.*, [2009] NSSC 305, the issue of who were participants in the stock manipulation scheme "is very much in dispute in the action brought by NBFL." (para. 45) That applies as well to the other actions to which NBFL is a party. NBFL continues to allege a stock manipulation scheme but, as Cromwell, J.A. said, it does so without now saying "how or by whom those trades were carried out or the role of any NBFL employee in that regard."

[88] As I have said, there is a lingering concern about NBFL's tactics. The outcome of the pending motions may cast NBFL's conduct in a different light than is evident now. That remains to be seen. If the motions are found to be without merit, costs awards or other remedies are available. However, based upon the evidence before me, I cannot conclude that NBFL is not genuinely defending the claims against it and genuinely pursuing the actions it has begun. I therefore must dismiss the motion.

COSTS

[89] NBFL has been successful. It seeks its costs from all applicants, payable forthwith. NBFL is entitled to its costs as a successful party; however, because it may be determined that the motions to which I have referred are without merit, and/or its conspiracy allegations are flawed, I conclude, in my discretion, that its costs are to be in the cause.

Hood, J.