SUPREME COURT OF NOVA SCOTIA
Citation: Pettipas v. Poirier, 2010 NSSC 92

Date: 20100309
Docket: Hfx. No. 310004
Registry: Halifax

Between:

Terrance Bertam Pettipas

Plaintiff

v.

Alfred Mark Poirier

Defendant

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	November 10, 2009
Written Decision:	March 9, 2010
Counsel:	Diana M. Musgrave for the Plaintiff Peter M. Landry for the Defendant

By the Court:

INTRODUCTION

[1] Terrence Pettipas sues Mark Poirier for $40,000.00. Mark Poirier says the money was not a debt owing by him but an investment made by Terrance Pettipas in a company in Texas. Terrence Pettipas also says Mark Poirier was in a fiduciary relationship with him. He also says that Mark Poirier guaranteed the return of at least $20,000.00.

ISSUES

1. Debt
2. Fiduciary Relationship
3. Guarantee

FACTS

[2] Terrance Pettipas (“Pettipas”) is a general contractor. Mark Poirier (“Poirier”) is the president of Chem Tech Services Limited. Chem Blast Technologies is a division of CTS. It employs Mark Poirier, his brother, his two sons and four others in the business of industrial cleaning of production equipment, particularly in the petroleum industry.

[3] Pettipas and Poirier became friends, the former having built the latter’s home. Pettipas dropped by Poirier’s offices in Porter’s Lake two to three times per week.

[4] Poirier went to school with Brian Murphy (“Murphy”) in Ontario and later on they met again when Murphy came to Nova Scotia. Thereafter, they kept in touch and saw each other when Murphy visited Nova Scotia. Poirier said Murphy is a salesman in Texas, selling fire retardant material.

[5] When Murphy was in Nova Scotia in early 2007 with his son-in-law, James McDonald, they discussed with Poirier setting up a company in Texas to do the same type of work Poirier did in Nova Scotia.

[6] Poirier and Pettipas discussed this business opportunity. There is dispute about how this came about which I will deal with hereinafter. Subsequently, Pettipas wrote a cheque for $20,000.00 payable to the Texas company to be incorporated and provided $20,000.00 cash. This was all done by March 2007. Subsequently, Pettipas visited Texas and met with Murphy there.

[7] Poirier went to Texas on two occasions to do jobs for the new business: once in March 2007 and again in June 2007. In early June 2007, Pettipas decided he wanted his money back.

[8] After approximately July 2007, the business did not do any more work in Texas. Pettipas was not repaid and, in April 2009, he commenced action against Poirier. Pettipas and Poirier testified, Murphy was not a witness for either party.

1. Debt

[9] Pettipas says he invested in Poirier personally. He says he did not know Murphy and, therefore, his investment was because of his friendship with and knowledge of Poirier. He says Poirier asked him to invest.

[10] Poirier says he did not ask for the investment but that Pettipas wanted in based on conversations he had about the business opportunity in Texas. He says Pettipas may have been present when he and his brother discussed it.

[11] I accept that Poirier asked Pettipas to invest but, in my view, nothing turns on this. The real issue is whether the money was provided in circumstances that make it a debt owing by Poirier or an investment in the Texas company.

[12] After Pettipas and Poirier discussed the business opportunity in Texas, Pettipas had a telephone conversation with Murphy about the business opportunity. An email from Murphy to Pettipas (Tab 1 of the Exhibit Book) also refers to a meeting by Murphy with both Pettipas and Poirier. It is dated February 3, 2007

and concludes with “great visiting with you and Mark.” Therefore, Pettipas met Murphy as well as talking to him on the telephone. Murphy, with that same email, sent to Pettipas a draft “Operating Agreement” (Tab 2). It refers to a limited liability company called ChemBlast Services LLC and its members as himself, Mark Poirier and James M cDonald. These things occurred before Pettipas provided the money. Later email correspondence indicates Pettipas was to have a four percent ownership interest in the company. This appears to have been a sore point for Pettipas.

[13] Thereafter, Pettipas gave Poirier a cheque for $20,000.00 made out to ChemBlast, the name of the business in Texas. He also gave him $20,000.00 in cash. The $20,000.00 cheque was delivered to Murphy in Texas in March 2007. There are emails from him to Pettipas about it. Murphy had the cheque by March 12, 2007 since he referred to it in an email of that date. Although Poirier said he did not know how the cheque got to Murphy, I accept that Poirier delivered it when he went there in March 2007. The $20,000.00 was taken to Texas in $5,000.00 amounts by four people including both Pettipas and Poirier. Pettipas visited Texas about one week after March 12. Murphy’s email to him of March 12 refers to a visit “next week.”

[14] It is clear that Pettipas knew the money was going to Texas to be used in a company there. His email to Murphy dated March 14 says "I was under the understanding that the funds I sent you guys ... ." The reply from Murphy refers to "the interests purchased" and "in future ... all investments ... ." There is no responding email from Pettipas at that time disputing that he was buying an interest in the company or making an investment. His later emails to Murphy raise questions about the company and the amount of his shareholding in it. In his June 3 email to Murphy, he says:

> ... I have been doing a lot of thinking about my investment in your company and have decided that I don't feel I have been treated fairly in way my investment has been handled. I believe that first I have made a bad decision and see no way to make any money or even that I will even get my money back. My biggest concern is the amount of value you made my investment and I never liked it from the beginning to the fact there is no way of knowing when or how much my investment is worth and when I would receive any money back. I spoke to Mark about this and never really had a chance to discuss this better but I would like to hear from you to settle out this matter.

Pettipas did not copy Poirier on this email.

[15] In reply, the following day, Murphy explains that the money has not been used for office, salary or travel expenses. He then continues:

> As to how the interest you acquired was valued, that was dealt with several times Terry. No one twisted anyones arms. Would you remember the discussions with a reminder of your comments about 'ground floor opportunities'? You seemed to understand the issues at that time. After your trip down here, do you recall your enthusiasm for the opportunity? I sure do. So, I won't ask what has changed your mind, but something or someone has, apparently.
>
> Terry, look, as you seem from the tone of your mssg. to be unhappy, though I think it would be a financial mistake, perhaps it would be better if you simply have your money back and we reacquire your interest. Theres no point in you being unhappy and tinking you're being snookered or something. I, as you, don't want that and sure wouldn't want a partnership with those to whom a partnership is unagreeable.

[16] When Murphy sent him a copy of Pettipas' email, Poirier replied to Murphy on June 5 saying:

> I believe in part Terry is feeling uneasy because he hasn't received anything in writing as per a structured shareholding.

[17] In an email entitled "Ownership changes," Murphy replies to Pettipas on June 18, with copies to Poirier and James McDonald. He says:

> Further to and subject to our conversation of this morning, 18-Jun-2007, please be advised that your 4% ownership interest in Chemblast Services LLC (the Corporation) has been terminated and has reverted to the Corporation.

> The original monies you provided ($40,000CD) is hereinafter separated from the operations of the Corporation and is no longer considered nor will be treated as an investment in the Corporation.
>
> The Corporation owes you a re-payment of ... $33,831.77USD.

In response, Pettipas emails Murphy on the same day (without a copy to Poirier) asking for interest on his money. He says:

> I don't know what lending company that would lend money without no gains of some kind.

[18] Murphy replied in an email dated June 20, 2007, which he copied to Poirier and McDonald:

> ... It is critical that we must re-emphasize one thing here and make it a very clear point - you *invested* in this company, with full access to growth or to loss. That was made very, very clear to you. You did not 'lend' any monies to this Corporation. ...
>
> As to what you expected in this investment Terry, I cannot say, but as you say, your decision today is the best one for you, and perhaps for us as well.

[19] Pettipas then responded to Murphy on June 22 (again with no copy to Poirier):

> Brian, I don't know how you can say my ... investment is terminated when I haven't been paid back my money. You can't terminate me without Mark or does he even matter.

[20] Murphy replied on June 23 with copies to Poirier and McDonald:

> You are owed money *most certainly*, but not any longer as an investor.

[21] Even as late as January 17, 2008, Pettipas emailed Murphy asking for a Financial Statement. He said "Since I own a portion of this company ...

[22] In my view, this series of emails makes it perfectly clear that Pettipas invested in a business in Texas and knew all along that is what he was doing. He used the words "my investment." He had discussions with Murphy. Although he delivered the cheque for $20,000.00 to Poirier, Pettipas himself delivered $5,000.00 to Murphy on his trip to Texas.

[23] When he rethought his decision, he contacted, not Poirier in Nova Scotia where both lived and worked, but Murphy in Texas. He did not even copy Poirier on his emails, Poirier received them only from Murphy.

[24] I conclude it could not be clearer that Pettipas was investing in a business in Texas, even though I have concluded that it was a business opportunity Poirier had told him about. Giving Pettipas information and requesting an investment does not make Poirier Pettipas' debtor. Both were investing in the Texas company, although in different ways. The emails from Murphy clearly state that the money was to be repaid by the company.

[25] The claim for repayment of a debt fails since no debt was owed by Poirier. Therefore, I do not need to deal with the issue of the *Statute of Frauds*.

2. Fiduciary Relationship

[26] Pettipas claims that Poirier was in a fiduciary relationship with him. He says Poirier owed him a duty of care with respect to the $40,000.00 he advanced. He says Poirier failed in these duties by:

a) failing to ensure the Texas company was incorporated;

b) failing to provide proof of his investment;

c) refusing to provide the expertise to complete ChemBlast's work;

d) failing to communicate an offer of repayment; and

e) failing to communicate with Pettipas about his actions and communications.

[27] The most recent decision of the Supreme Court of Canada on fiduciary relationships is *Galambos v. Perez*, 2009 SCC 48. In that decision, Cromwell, J. restated the basic principles with respect to fiduciary law. He said in para. 67:

> 67 An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. ...

[28] He continued in paras. 68 and 69 to refer to two important points with respect to the role of fiduciary law:

> 68 The first is that fiduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship. ... Thus, while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: ...

> 69 The second is that a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party. This was put succinctly by McLachlin J. (as he then was) in *Norberg*, [*Norberg v. Wynrib*, [1992] S.C.R. 226] at p. 273, when she said that 'fiduciary relationships ... are always dependent on the fiduciary's undertaking to act in the beneficiary's interests'.

[29] Then, in para. 70, Cromwell, J. said:

> 70 ... The particular relationships on which fiduciary law focusses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other. ...

[30] He then analyzed "power-dependency relationships." In para. 72, he quoted from La Forest J. in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at p. 411 where La Forest, J. said:

> ... the concept accurately describes any situation where one party, by statute, agreement a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party.

[31] Cromwell, J. summarized in para. 74:

> 74 In short, not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not.

[32] He then considered the role of the fiduciary in undertaking to act in the interests of the other person. He said in para. 75:

> 75 ... what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her.

[33] In para. 78, he quoted from Professor P.D. Finn, *Fiduciary Obligations* (1977), at para. 15:

> 15 For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter. (Emphasis added by Cromwell, J.)

In that paragraph, he also refers to Professor Lionel Smith's commentary "Fiduciary Relationships - Arising in Commercial Contexts - Investment Advisors: *Hodgkinson v. Simms*" (1995) 74 Can. Bar Rev.714. In that commentary, Professor Smith said: "The fiduciary must *relinquish* self-interest; ..." .

[34] Cromwell, J. also referred to the necessity for a fiduciary to have discretionary power. He said in para. 83:

> 83 It is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests.

[35] He continued in para. 84:

> 84 ... The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty.

[36] In order to determine if Poirier was in a fiduciary relationship with Pettipas, I must consider the hallmarks of a fiduciary relationship and whether Pettipas has established that Poirier was in a fiduciary relationship with him. The relationship between Pettipas and Poirier does not fall within traditional fiduciary relationships. Therefore, it must be one that arises from a particular circumstance, a factual or *ad hoc* fiduciary relationship.

[37] The first factor to be considered is Pettipas' vulnerability in his relationship with Poirier and whether Poirier was able to exert "over-riding power or influence" over Pettipas. However, as Cromwell, J. cautioned in *Galambos, supra*, it is not particularly helpful in deciding whether there is a fiduciary relationship that there is a power-dependency relationship.

[38] Pettipas had spoken not only to Poirier about the business venture in Texas but had a telephone conversation with Murphy and met with him. All of this

occurred before Pettipas made the cheque out to ChemBlast, the Texas company, or delivered it and the cash to Poirier.

[39] Was there a fiduciary relationship created between Pettipas and Poirier at that time? Pettipas knew the money was going to Texas and knew he was investing in a company there. He made his own decision about the investment after speaking with Poirier and both talking to and meeting with Murphy. He did not, in my view, rely upon Poirier solely in making that decision. He also relied upon Murphy and his own judgment in making the investment. He was not vulnerable to Poirier nor did he make himself subject to Poirier's "over-riding power or influence."

[40] Pettipas' vulnerability arose from the nature of the start-up of any new business. Both Poirier and Pettipas thought the venture was a good idea and would be a money maker, looking at the Texas venture from Nova Scotia. Many things could have gone wrong and several did. Poirier did not have an obligation to protect Pettipas just because there was a possibility he could lose his investment. That is too broad a responsibility. A fiduciary relationship requires more. There

must be something special about the relationship which would make it a fiduciary one.

[41] It is true that the security of Pettipas's investment in the Texas venture depended in part upon Poirier's expertise, but it depended upon more than that. Among other things, it depended upon Murphy getting business for the Texas company; it depended upon Poirier training people in Texas to do the work; it depended upon continuing good relations among the shareholders.

[42] In my view, Pettipas' vulnerability was because of more than his relationship with Poirier. The start up of any new business has inherent risks.

[43] This in turn, in my view, leads to a consideration of another feature of a fiduciary relationship: whether there was a mutual understanding that Poirier undertook to act in Pettipas' interests and relinquish his own self-interest. This is, in my view, the critical feature of a fiduciary relationship in this case.

[44] A number of authorities have quoted La Forest J.'s description of this. In *Hardman Group v. Alexander*, 2003 NSSC 59, the court, in para. 238, quoted from pp. 176-77 of *Hodgkinson v. Simms* (at 117 D.L.R. (4th) 161):

> ... In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

[45] That same passage was quoted by MacAdam, J. in *Wall v. Horn Abbott Ltd*., 2007 NSSC 197 at para. 533. In *Cranewood Financial Corporation v. Norisawa* , 2001 BCSC 1126, it was stated at para. 76:

> 76 ... the reasonable expectations of the parties was that a fiduciary duty would exist.

[46] Poirier testified that he bought equipment in Texas and was never paid wages for the work he did there or his travel expenses. His company was reimbursed, in part, for some of its expenses (see Exhibit 2), $23,000.00 of an invoice of approximately $26,000.00.

[47] Poirier said that, after the second job he did in Texas, he and Murphy had a falling out over a number of things, including: there being no documentation with respect to his ownership share in the company; James McDonald was supposed to be trained to do the work but he quit; he could not get a work visa; and his own company was having a hard year and he could not afford to "prop up" the Texas company while his expenses were not being reimbursed. He said Murphy was difficult to deal with. He said, for these reasons, he would not return to do more work. He testified he told Pettipas this on his return to Nova Scotia.

[48] Poirier's uncontradicted testimony is that he could no longer work with Murphy and that the other person involved in the business, James McDonald, had quit. The draft Operating Agreement showed the latter was to be a shareholder as well.

[49] Both Pettipas and Poirier were, to a large extent, at the mercy of Murphy. According to Poirier's evidence, Murphy was part of the problem. In his testimony, Pettipas admitted that when he and Poirier were talking about him, Poirier "called Murphy a name."

[50] Murphy's letter to Poirier at Tab 22 dated July 21, in my view, confirms the "falling out" between Poirier and Murphy. In the letter, Murphy says:

> First of all I want to say that I am sorry. Very, very sorry for causing you unnecessary stress. It has been my desire always, to have a business in which both you and I could find our friendship grow. Instead, it would seem that I have done more harm in this area than good. For what it's worth, this is what bothers me the most.
>
> Well, nevertheless, our current business relationship requires immediate attention. It appears to be so unhinged that it cannot continue as situated. You are obviously way upset, perhaps fair to say pissed off; I'm so confused that I can spit and James will go no further.

He continued on p. 2 of the letter:

> Mark, it was easy to see that you were upset right from the point of arriving down here, and James picked up on it pretty quick too. We were hopeful in San Antonio, that whatever the issues were, they could be cleared up and we could move forward. Obviously we weren't able to. And, I know it may have seemed that we were 'ganging' up on you, but honestly that wasn't meant to be the case - except that we both wanted to find out from what was going on.

[51] Pettipas says there was cordial correspondence between Poirier and Murphy in late 2007. However, there is also a cordial email from Pettipas to Murphy in 2008, congratulating him on the birth of a grandchild. In spite of their differences, both Poirier and Pettipas could, at times, be cordial towards Murphy.

[52] In my view, it is clear that Poirier was, at best, acting in both his own interests and those of Pettipas. They both entered the business venture with hopes that it would be successful. Poirier spent time and money trying to make it work. He went to Texas and did two jobs, he inquired of Murphy if there was anything he should be doing with respect to the company incorporation. Both he and Pettipas were to be shareholders of the Texas company. Poirier did not give up his own self-interest. Both he and Pettipas thought the venture would be profitable. Nothing Poirier did or said indicates he had an understanding that he was to protect Pettipas' interests to the exclusion of his own. Nothing in the evidence satisfies me that Pettipas believed that Poirier was doing so either. They were in the venture together with Murphy and James McDonald.

[53] Nor did Poirier have, in my view, discretionary power to affect Pettipas' interest when the original investment was made and the business venture was first undertaken. The money was in the hands of Murphy, supposedly for use by a Texas company to be incorporated. The power to deal with that investment was not something Poirier had control over. There is nothing in the evidence to

indicate what the money was used for. At one point, Murphy told Pettipas only that the money had not been used for office expenses.

[54] Although Poirier eventually decided not to continue to work in Texas with Murphy, according to Poirier's testimony he had good reason for that decision. It was not a discretion that he exercised, but a *bona fide* business decision that he made. It is not known whether Pettipas' investment would have turned out any differently had Poirier not made that decision. Other factors may well have affected the result.

[55] Poirier could not effectively control the outcome because of the involvement of Murphy and, to a lesser extent, James McDonald. This is inconsistent with a true discretionary power resting with Poirier.

[56] I therefore conclude that there was no fiduciary relationship between Pettipas and Poirier. If there was no fiduciary relationship, the subsequent efforts made by Poirier to assist Pettipas to get his investment back cannot create a fiduciary relationship where none existed before.

[57] Murphy had, on June 18, 2007, told Pettipas that his money had been segregated from the company money. However, it was not returned to him.

[58] Murphy emailed Pettipas on August 14, 2007 referring to "an unfortunate split in the company." He went on to say that Pettipas is not "the only one who "MAY loose *(sic)* his investment ... . I am trying to make sure that you at least, and Mark, do NOT loose *(sic)* your investment, but you may."

[59] On October 17, 2007, Murphy emailed Poirier with a proposal for Pettipas to be returned approximately one-half of his investment. Murphy was to pay $10,289.17US and Poirier $6,500.00US. This was a gratuitous offer by Murphy in my view because it was not a repayment by ChemBlast. I do not accept the evidence of Poirier that it was not set in stone. Murphy's emails indicate his belief that it was an offer. Nevertheless, the offer was not made to Pettipas.

[60] Poirier tried to help his friend recover his investment. There is nothing in the evidence to indicate that, by trying to do so, Poirier was taking on the role of a fiduciary. In my view, he felt guilty about getting Poirier involved in the unsuccessful business venture, but he had not taken on fiduciary duties.

3. Guarantee

[61] Pettipas also says Poirier guaranteed the return of at least $20,000.00 of his money. He said that on many occasions Poirier told him he would get his money back. Poirier denied telling him this and said he told him he would have to deal with Murphy. He agreed he did try to help him get his money back. In his June 3, 2007 email to Murphy (quoted above), Pettipas himself said he had concerns at that early stage about getting his money back.

[62] Pettipas points to the email at Tab 36 as a written acknowledgment of Poirier's guarantee. I have said above that this did not create a fiduciary relationship. Nor do I consider it a guarantee by Poirier. The email at Tab 36 was a proposal by Murphy to Poirier to repay one half of Pettipas' investment. That offer was not conveyed to Pettipas. As I have said, Poirier was not convincing when he explained it was not "set in stone," but the fact remains that the proposal was not passed on to Pettipas. Poirier said he did not agree with it.

[63] Although he did not testify, it appears that Murphy considered his email an offer and thought Poirier had passed it on to Pettipas (email at Tab 38). Poirier's email to Murphy is at Tab 42. In it, Poirier says he passed the offer information on to Pettipas. I have concluded he did not. However, he goes on to say "At this present time funds are short." This may well be the explanation for not having told Pettipas of Murphy's offer.

[64] Poirier goes on to say, "I told Terry I personally will repay him $20,000.00 when I can ... ." He said when things improved "I will try to repay some of the *(sic)* of my offer to him."

[65] No authorities were put forward for the submission that this created a guarantee of payment by Poirier. Pettipas submits that these emails are a written acknowledgment by Poirier; however, the first email is from Murphy not Poirier. The subsequent email from Poirier to Murphy is equivocal. It refers on the one hand to Poirier paying $20,000.00 and, on the other hand, to paying a portion of the offer (one-half of $40,000.00CDN). Pettipas testified that Poirier told him when he sold his business, he would repay him $20,000.00. He said he believed Poirier said this because he felt guilty.

[66] I do not agree that, in such circumstances, Poirier can be said to have committed to anything. The first email refers to a discussion between Poirier and Murphy but does not give details of that discussion except insofar as it mentions the possibility of Murphy sending additional funds later. There is no binding commitment by Poirier in the second email.

[67] It is unfortunate that Poirier did not agree with the proposal, pass it on to Pettipas and pay his share of the $20,000.00. There is, however, nothing, in my view, that legally bound Poirier to agree with Murphy and pay Pettipas. As I have said, no authority was cited to support that submission. Accordingly, I conclude there was no guarantee by Poirier to pay $20,000.00.

CONCLUSION

[68] The action is dismissed. The defendant has been successful and is entitled to his costs. If the parties cannot agree, I will accept written submissions.

Hood, J.