

NOVA SCOTIA COURT OF APPEAL

Citation: *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47

Date: 20150514

Docket: CA 420715

Registry: Halifax

Between:

National Bank Financial Ltd.

Appellant

Respondent by Cross-Appeal

v.

The Estate of the Late Michael Barthe, as
represented by his Executrix Barbara Barthe

Respondent

Appellant by Cross-Appeal

Docket: CA 424848

Registry: Halifax

Between:

Craig Dunham, Lowell Weir and
Blackwood Holdings Incorporated

Appellants

Respondents by Cross-Appeal

v.

National Bank Financial Limited

Respondent

Appellant by Cross-Appeal

Docket: CA 424527
Registry: Halifax

Between:

Calvin Wadden

Appellant

v.

National Bank Financial Limited,
National Bank of Canada, Lowell R. Weir,
Blackwood Holdings Incorporated, Carol McLaughlin-Weir,
Craig Anthony Dunham, The Estate of the Late Michael Barthe

Respondents

Judge: The Honourable Mr. Justice Jamie W.S. Saunders
Appeals Heard: September 26, 29 and 30, 2014, in Halifax, Nova Scotia
Subject: **Abuse of Process. Striking Pleadings. Permanent Stay of Proceedings. Stock Manipulation. Secret Settlement Agreement. Escrow Agreement. Civil Conspiracy. Inherent Jurisdiction. Fairness. Justice. Integrity of the Adjudicative Process. Judgment Writing. *Stare Decisis*. Standard of Review. Ratification. Vindication. Pre-Judgment Interest. Punitive Damages. Solicitor/Client**

Costs.

Summary:

An avalanche of litigation followed the collapse of Knowledge House Inc. in 2001. By 2008 there were more than 54 groups of parties named in 11 actions under case management. When this trial started in February, 2012, five actions involving six groups of parties remained. In a lengthy decision following the completion of the trial, the judge allowed certain claims, dismissed others, and awarded damages to the successful litigants. In certain instances, joint and several liability was imposed. Appeals and cross-appeals were launched by various parties which were heard by the Court on three consecutive days.

Held:

Despite the prodigious efforts of the trial judge to bring resolution to this complex, multi-headed hydra of litigation, he did err in certain material respects which required the Court's intervention.

Accordingly, the appeal was allowed in part, certain findings and awards were set aside, and the outcome corrected, as required.

The Court undertook a detailed and extensive analysis of a variety of subjects including: abuse of process; fairness; justice; integrity of the adjudicative process; inherent jurisdiction; striking pleadings; stay of proceedings; civil conspiracy; ratification; punitive damages; and solicitor/client costs.

The Bank's misconduct involved a deliberate and ongoing pattern of deception amounting to an intentional misleading of the Court, something so egregious as to strike at the very heart of the administration of justice. For more than 10 years the Bank maintained a position and asserted facts in its pleadings which it knew to be false. It deliberately set out on a path to hide the truth from the Court and opposing parties. In doing so it deprived the adjudicative process of highly relevant and critically important facts.

Canadians have the right to expect that the integrity of the adjudicative process in this country's courts and tribunals will

be preserved. Confidence in the administration of justice is critical to the public trust. In cases where fairness is not achieved, respect for the integrity of the justice system will be diminished. Litigants will be less likely to put their faith in the adjudicative process if they cannot be assured that their case will be dealt with fairly.

When exceptional circumstances occur which manifest litigation misconduct so egregious as to amount to an abuse of process, the court is required to intervene. This is such a rare and exceptional case. It does not reflect the fair and honourable way by which business or litigation is to be conducted in Nova Scotia.

The Bank's conduct tainted the case to such a degree as to be manifestly unfair to other parties to the litigation, and brought the administration of justice into disrepute by impairing the adjudicative function of the court and undermining public confidence in the legal process. This case calls for the striking of the Bank's pleadings as well as a permanent stay of its claims and defences, and warrants the level of punitive damages and other relief imposed.

The trial judge erred in law by posing the wrong question. Instead of asking what impact the post-trial discovery of the secret settlement agreement might have had on the evidence led at trial, he ought to have asked himself whether the admissions made by the Bank in the settlement agreement as compared to the public position taken by the Bank in its pleadings in court, constituted an abuse of process and, if it did, with what result. As a result, the trial judge's award of punitive damages was clearly inadequate and a wholly erroneous assessment.

The Bank was ordered to pay punitive damages of \$750,000 to each of the four appellants, for a total of \$3million. Each of the appellants was awarded other specified relief together with their costs on a solicitor/client basis.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 149 pages.