NOVA SCOTIA COURT OF APPEAL

Citation: *National Bank Financial Ltd. v. Potter*, 2004 NSCA 152

Date: 20041214
Docket: CA 227827
Registry: Halifax

Between:

National Bank Financial Ltd., Joel Wiesenfeld, Alan V. Parish and Brian K. Awad

Appellants

v.

Daniel Potter, Starr's Point Capital Incorporated, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald Richter, Kenneth MacLeod, Futureed.Com Ltd., 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.

Respondents

- and -

Nova Scotia Barristers' Society

Intervenor

Judges: Bateman, Cromwell and Saunders, JJ.A.

Appeal Heard: December 8, 2004, in Halifax, Nova Scotia

Held: **Leave to appeal granted but the appeal dismissed per reasons for judgment of Bateman, J.A.; Cromwell and Saunders, JJ.A. concurring.**

Counsel: James A. Hodgson, for the appellants
Daniel Potter in person and for the respondents, Starr's Point Capital Incorporated and Knowledge House Incorporated
James D.G. Douglas, for the respondent, Blois Colpitts
John F. Rook, Q.C., for the respondent, Stewart McKelvey Stirling Scales

Reasons for judgment:

[1] This is an appeal by National Bank et al. from the interlocutory order of Justice J.E. (Ted) Scanlan of the Nova Scotia Supreme Court, which order issued on August 29th, 2004 (decision reported as **National Bank Financial Ltd. v. Potter**, [2004] N.S.J. No. 281(Q.L.)). The respondents, Daniel Potter, Starr's Point Capital Incorporated and Knowledge House Inc. ("Potter et al."), have filed a notice of contention asking that the order appealed from be upheld for additional or alternative reasons.

[2] The interlocutory application which is the subject of this appeal originated within a complex collection of multi-party actions arising from the collapse of a publicly traded company, Knowledge House Inc. Stock manipulation and insider trading are alleged to have preceded the company's collapse.

[3] On July 7, 2004, parties to the action under Supreme Court Docket No. S.H. 206439 and persons in related actions appeared in Chambers before Justice Scanlan for the purpose of receiving direction as to how a complex Chambers application scheduled to be heard in October 2004, would proceed. (We are advised that the complex Chambers application has been adjourned to March 2005, however, I will refer to that intended proceeding as "the October application".) The judge was to decide what issues would be considered at the October application.

[4] By way of background, National Bank's lawyers obtained a computer server, which had formerly belonged to Knowledge House Inc., containing email communications between many of the parties and/or the parties' counsel. Potter et al., in their defence to National's suit, have counter and cross-claimed on account of National's alleged conversion of this computer data. National has applied to strike that counterclaim. Potter et al. and others, claiming that the lawyers' conduct in accessing the information on the server constitutes an abuse of process, seek relief on that account, asking for an order striking National's third party claim and prohibiting the lawyers involved in obtaining the server from further acting in the litigation.

[5] Potter et al. say that 365 of those communications on the server, which have already been accessed by counsel for National Bank, are subject to solicitor/client privilege. Other participants at the July 7 hearing (some are parties to the action in

question, others are parties to related actions) assert that any privilege has been waived. National says that the communications were in furtherance of an illegal purpose, therefore not privileged. Certain of the parties say that National's counsels' conduct in obtaining the emails constitutes an abuse of process, whether or not the communications are privileged.

[6] In an earlier decision, wherein Justice Scanlan allowed the intervention of the Nova Scotia Barrister's Society on the issue of counsels' conduct in acquiring the information contained on the server, the judge described the complicating effect of these events (reported as **National Bank Financial Ltd. v. Potter** (2004), 224 N.S.R. (2d) 231; N.S.J. No. 192 (Q.L.)(S.C.)):

> [3] There are a number of legal issues in relation to privilege which are likely to arise in the present and associated litigation. Some of these issues arise due to the complexity of the proceedings and some arise due to the sequence of events leading up to the plaintiff having possession of and viewing some of the e-mails. Many of the issues appear to be novel in terms of the issue of solicitor-client privilege. For example the fact that the communications were on a server which came into the possession of a non-owner. The fact that the server is *alleged* to have been delivered to a person for safe keeping yet ended up in the hands of the plaintiff's solicitor and that solicitor has distributed copies of those e-mails to other counsel in the related actions. Other examples of the complexity of the privilege issue arise from the nature of the relationship between some of the parties. One or more of the lawyers who were the author or recipient of the e-mails are now a party to the main action. One or more is also the subject of cross claims, as is the firm they were associated with.

[7] In his subsequent decision Justice Scanlan said:

> **[5]** A number of parties have objected to the court dealing with the issue of "illegal purpose" by way of a chambers application. The thrust of their argument is that this is an issue which is properly left for trial. Counsel for the lawyer, and also the law firm involved, suggest that the issue of whether the lawyers involved were part of some illegal purpose or scheme, is a matter which will be resolved only after extensive disclosure and pre-trial proceedings, including discovery and the filing of lists of documents.

> **[6]** The issue of solicitor/client privilege may well be determined without consideration as to the issue of whether the lawyer involved was communicating for the purpose of furthering an illegal purpose. For example, the issue of whether the solicitor/client privilege has been waived by the client will be before the court in October. If the court determines the privilege was waived or otherwise lost, then the issue of "illegal purpose" will become moot in relation to the matter of solicitor/client privilege. If the privilege has not been otherwise waived, then the issue of whether the privilege will be lost because the communications were in furtherance of an illegal purpose can be decided at trial.
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> **[7]** The issue of whether the communications were part of some "illegal purpose" is a very substantive issue as between the plaintiff, the various defendants, plaintiffs by counter-claim and cross-claim, and the lawyer and law firm involved. It is at the very heart of the issue as between many of the parties. If the plaintiff is permitted to have this matter adjudicated upon during the October chambers application, the counsel representing the lawyer and law firm will not have had an opportunity to obtain disclosure of many of the relevant documents. They will have lost an opportunity for discovery and disclosure which is afforded to parties in a trial process, as opposed to proceedings pursuant to the rules applicable to chambers applications.
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> **[8]** I accept that the question of whether the communications were part of some illegal scheme will be a factually complex issue. Counsel suggest there are many file boxes full of relevant information. That type of factually complex issue is not one which contemplated by **Rule 9.02** of **The Nova Scotia Civil Procedure Rules**.
>
> **[9]** I am satisfied that it would be unfair to the defendant law firm and lawyer to have the matter of "illegal purpose" determined without them having the benefit of full pre-trial processes, including discovery and production of documents. That is an issue which is too factually complex to proceed by way of a chambers application. That issue will not be before the court during the October hearing.

(Emphasis added)

[8] National Bank says that the judge erred in deciding that at the October application, in the context of determining whether the disputed communications are privileged, the question of their alleged “illegal purpose” would not be heard.

A principal concern of the appellants is the judge's remark, at para. 6 of his decision, above, that the issue of illegal purpose "can be decided at trial". National Bank says that the judge cannot make a decision on whether the disputed communications are privileged without considering their alleged "illegal purpose".

[9] It is helpful to consider the recitals and operative parts of the order following the decision on appeal:

> [heading]
>
> ORDER
>
> BEFORE THE HONORABLE JUSTICE J. EDWARD SCANLAN, IN CHAMBERS
>
> WHEREAS James Hodgson, on behalf of National Bank Financial Limited, Réal Raymond, Jean Turmel, Michel Labonté, Lorie Haber, Guy Roby, Joel Wiesenfeld, Alan V. Parish, Brian K. Awad and Don Winchell, brought an application to (inter alia) strike portions of the counterclaim brought by Daniel Potter, KHI and Starr's Point;
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> AND WHEREAS in the midst of that application counsel agreed to have determined within that application privilege issues arising from disclosure in S.H. No. 174293;
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> AND WHEREAS Daniel Potter, KHI and Starr's Point brought an application on May 6, 2004, for a determination of privilege issues and remedies for alleged abuse of process;
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> AND WHEREAS by letter dated June 3, 2004, James Hodgson advised the Court of the various issues upon which his clients would be relying in response to the privilege and abuse of process applications, including a determination of whether or not the documents in question provided color to the allegation of an illegal purpose;
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> AND WHEREAS on June 7, 2004, this Court set hearing dates of October 18 to 29, 2004, for a determination of the privilege and abuse of process issues;
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> AND WHEREAS Kenneth MacLeod brought an application on June 23, 2004, for a determination of privilege issues and abuse of process issues returnable in the October hearings;
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> AND WHEREAS the Learned Chambers Justice reserved decision and filed a written decision dated July 14, 2004,
>
> IT IS HEREBY ORDERED:

1. The issue of illegal purpose will not be heard in the October hearings;
2. The issue of abuse of process will be determined at the October hearings.

[10] As is clear, notwithstanding the judge's comment in his decision, the order does not preclude a further pre-trial application on the "illegal purpose" issue, should such be necessary.

[11] While the above comments of the judge refer to the question of "illegal purpose" being left to trial, his remarks at the July 7 hearing indicate that his focus was to address the privilege issue in stages. He said on July 7:

> THE COURT
>
> > Well, I'm not doing any of it. I'm just telling somebody to do it. So I will be viewing the e-mails. It's my intention to separate them so that if I'm satisfied they're privileged and irrelevant – in other words, I made the reference to a will that John Smith may be doing. It's my intention to separate those and identify to the parties that they are indeed privileged and irrelevant. I would then go on to note that they are privileged and subject to submissions by counsel on the issue of waiver. They remain privileged until the issue of waiver is determined and also subject to a determination on the issue of abuse of process. And the abuse of process doesn't rule that they've become inadmissible down the road necessarily. It may be that there are other remedies. A lot of the problem here, counsel, is perhaps as a result of an overabundance of caution. And when I say that, I set today's hearing expecting that it might make – might not take very long to do today's hearing. But I wasn't about to embark upon a process that didn't allow everybody to speak to the process and say, yes, I'm going to get into determining issues which they don't want me to determine. That's why we're here today, and it obviously took more than a few minutes. <u>And that is because one of the more important issues is going to be as to whether or not there was an illegal purpose. I</u>

> indicated that that issue may become moot as a result of a waiver by some other means. If it doesn't, I'm not satisfied that I would be prepared to put the other defendants, Mr. Rook's clients, Mr. Douglas' clients and perhaps others in a position of having to respond to the issue of illegal purpose in the October hearings. I'm satisfied that that may in fact go well beyond what we have allotted the time in October, and if it's rendered moot in any event as a result of my decision in October, then there's no need to embark upon a second stage. If we do, then I'm satisfied that they should have fair warning and time to prepare for it at some later date. I'm not prepared to rule at this point in time, counsel, that it should be part of the trial proper as opposed to part of this application. I'm simply saying that I'm adjourning the hearing on that issue until after we determine as to whether there was a waiver by some other means. And I reserve my decision on that issue for the time being, counsel. It may well be that I have time to go through the cases and decide that, yes, it is something that can be done by way of application without the need for full discoveries, full disclosure, completion of pleadings, etc., and I simply say, for today, I reserve on that issue. Be prepared to go with all of the other issues in the October hearing. Okay?
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> (Emphasis added)

[12] It is important to keep in mind how the privilege issue has arisen. This is not a case of a party attempting to gain access to undisclosed documents in relation to which another party has claimed privilege. Here, opposing counsel has unilaterally obtained the documents in issue by accessing the Knowledge House server. The application before the court in October seeks the removal of the counsel who were involved in accessing the information because their actions are said to constitute an abuse of process. Some of the information obtained is allegedly privileged, some is not privileged but confidential and some is inconsequential. Those seeking removal of counsel are attacking the way in which the information was obtained, whether privileged or confidential.

[13] At the July 7th hearing before Scanlan, J. Mr. Hodgson, for the National Bank, was advocating for a detailed and fulsome hearing of the "illegal purpose" issue, necessitating the filing of affidavits, full entitlement to discovery and the cross-examination of affiants at the October application. All other counsel appearing at that hearing opposed consideration of the "illegal purpose" issue at the October application. While their reasons for doing so differed, they agreed, if it was determined, on other grounds, that the disputed communications are not privileged, it would be unnecessary to consider whether they were in furtherance of an illegal purpose, for the purpose of resolving the privilege issue. Counsel were concerned that pursuit of the illegal purpose issue in the detailed way urged by Mr. Hodgson would be highly prejudicial to their defendant clients in the related actions.

[14] There is some confusion as to whether the judge is of the view that the "illegal purpose" issue cannot be addressed before trial. This appeal, however, is from his order. We are not persuaded that the judge erred in principle or at law in deciding that the issue of privilege should be approached in stages. Nor are we persuaded that the fact that the illegal purpose response to the claim of privilege will not be addressed at the October application results in a patent injustice. Should the presiding judge find that the disputed communications are not subject to solicitor/client privilege, it will not be necessary to hear the illegal purpose argument in order to resolve the privilege issue. The necessity or timing of any further consideration of the illegal purpose issue should be left to be determined at a future time by the judge then seized with the matter. Counsel for the law firm Stewart McKelvey Stirling Scales and counsel for lawyer Blois Colpitts acknowledge that, despite the language contained in Justice Scanlan's reasons, nothing in the order prevents him from considering the illegal purpose issue prior to trial, if found necessary, and that it would be problematic for the judge to uphold privilege without first providing counsel for the appellants with an opportunity to address the illegal purpose argument.

[15] Accordingly, while we would grant leave to appeal, the appeal is dismissed without prejudice to any party's right to make further application to the judge to address the allegation of illegal purpose prior to trial.

[16] In the circumstances, there shall be no costs.

Bateman, J.A.

Concurred in:

Cromwell, J.A.

Saunders, J.A.