**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *B2B Bank v. Phillips*, 2018 NSSC 304

**Date:** 20181129
**Docket:** Halifax No. 447404
**Registry:** Halifax

**Between:**

B2B Bank/B2B Banque

*Plaintiff*

v.

Jeffrey Phillips and Denise Kowalski Phillips

*Defendants*

# DECISION ON COSTS

| | |
|---|---|
| **Judge:** | The Honourable Justice Kevin Coady |
| **Heard:** | October 29, 30, 31, November 1, 2, 2018<br>Halifax, Nova Scotia |
| **Final Written Submissions:** | November 16, 2018 |
| **Written Decision:** | November 29, 2018 |
| **Counsel:** | Thomas M. Macdonald, for the Plaintiff<br>Jamie MacGillivray, for the Defendants |

**By the Court:**

[1] The Plaintiff Bank is a Chartered Canadian Bank with head offices at Toronto, Ontario. It is a provider of banking products and services to financial advisors and mortgage brokers across Canada. Unlike conventional banks, it does not operate retail outlets. The Defendants are a married couple, living in Pictou County, Nova Scotia. Mr. Phillips is 65 years old and is a retired police officer. Ms. Kowalski Phillips is 58 years old and is employed as a nurse.

[2] While this was an action in debt, there is much more to the overall narrative. In 2007 the Phillips were close personal friends with one John Allen who was an investment advisor employed with a company called Keybase Financial Group Inc. The Phillips explicitly trusted Mr. Allen when it came to purchasing investments for their retirement. Neither Mr. Allen nor Keybase Financial were associated with the B2B Bank. The only relationship involved Mr. Allen arranging investment loans with the B2B Bank for his clients. Once these loans were approved, the proceeds went into the Phillips' investment account at Keybase where they were used to purchase investments. Mr. Allen realized a commission each time a transaction occurred.

[3] In approximately 2007 Keybase Financial and its employee, John Allen, developed a "leverage strategy" with respect to the purchase of shares by their

clients. That strategy was defined in a 2011 Settlement Agreement between John Allen and the Nova Scotia Securities Commission:

> While registered with the Commission, the Respondent promoted an investment strategy whereby clients would use the proceeds from investment loans to purchase distribution paying mutual funds. Clients were encouraged and advised by the Respondent to rely on the distributions received from the mutual funds to fully fund the loan payments ("the leveraged strategy").
>
> In facilitating the leveraged strategy for his clients, the Respondent forged loan applications for AGF Trust and B2B by inflating the value of clients' assets, reducing or omitting the value of their liabilities, and fabricating client employment details and salaries. By forging the loan applications and inflating the net worth of the clients, the Respondent was able to receive approval for loans for higher amounts than the client would have qualified.
>
> In facilitating the leveraged strategy, the Respondent also forged Know-Your-Client ("KYC") information on Keybase new-account opening forms, by inflating the value of clients' assets and the extent of their investment knowledge and by extending the time horizon.
>
> The Respondent forwarded the forged loan and KYC documents to compliance personnel at Keybase, and he received approval to open new accounts pending receipt of the proceeds from the new loans.
>
> In all cases, the Respondent did not inform his clients that he forged their loan application forms and KYC information for the purpose of inflating their net worth. In all cases, the Respondent did not inform his clients that they would not have received approval for the loans if he had not forged the forms.
>
> The Respondent instructed his clients to sign the loan documentation and KYC documentation without disclosing that he had falsified their net worth and KYC information. He did not give clients any copies of the loan or KYC documentation or a prospectus for the mutual funds they purchased with the loan proceeds.
>
> In all cases, the Respondent informed his clients that the leveraged strategy would not be subject to risk and that the clients would not have to make the loan payments from their own cash flow, but rather that the leveraged strategy would 'pay for itself' in typically less than 10 years. The Respondent also informed his clients that the leveraged strategy would provide them with additional monthly cash flow which the clients could use as a primary or additional source of income.
>
> A number of the Respondent's clients undertook the leveraged strategy as a primary or additional source of income to meet their everyday household spending requirements. Others relied upon the leveraged strategy to fund lifestyle expenses and make payments on other household debts.

[4] In May and June, 2007 the Phillips, through their financial advisor, John Allen, submitted executed loan applications to the B2B Bank for the purpose of borrowing money to make investments. The Phillips received two loans: one for $150,000 and another for $245,000. Concurrently, the Phillips pledged and assigned the securities to be purchased with the loan proceeds to the B2B Bank as collateral security to the investment loans.

[5] The strategy behind these loans was that the monthly distribution amount would far exceed the loan payment. The evidence established that in 2007 (the $150,000 loan) the cash distributions amounted to $16,538.42 while the loan payments amounted to $5,062.50. Further, in 2007 (the $245,000 loan) the cash distributions amounted to $11,786.40 while the loan payments amounted to $6,329.16. The Plaintiff's expert testified, without challenge, that between 2007 and 2014, the distributions on both loans exceeded the loan payments by $119,355.42.

[6] The Phillips testified that they had no knowledge of these loans at the time they were approved by the B2B Bank. The Phillips' expert testified, without challenge, that the signatures on both loan applications were forgeries.

[7] In September 2007 the Phillips received a letter from John Allen advising he could no longer be their financial advisor. They assumed he was ill, given he had

not advanced a reason for his departure. John Allen indicated that a replacement advisor would be taking over their accounts. In later 2007 the Phillips received a phone call from Greg Duncan at Keybase Financial. Mr. Duncan told them about the two loans and the falsity of their loan applications. It was the Phillips' evidence that until that time they had no knowledge of the loans.

[8] The Phillips testified that Mr. Duncan advised them to "stay the course". He pointed out that the ongoing distributions would both pay the loan payments and provide them with an income stream. The Phillips accepted this advice and from 2007 to 2014 that advice was sound. Distributions exceeded the loan payments in each of those seven years. However, as a result of an economic turndown, the value of the securities declined causing the distributions to diminish. The Phillips eventually stopped paying on the loans and they went into default.

[9] The B2B Bank then realized on their security and applied the proceeds to the two loans. It then started an action to recover the balance, in the amount of $173,629.30. The trial lasted five days and was heard by a civil jury. The jury found in favor of the Bank and awarded it the above amount.

[10] I am going to list the questions given to the jury and their answers. The answers give some indication of why the jury found in favor of the Plaintiff:

1. Were there agreements with respect to both loans? **No**

2. Did the Defendants, by their actions, ratify the loan agreements? **Yes**

3. If there were agreements, should they be voided? **No**

4. Were the Defendants enriched from the receipt and use of the Plaintiff's loan monies? **Yes**

5. Are the Defendants liable to repay the Plaintiff's claim? **Yes**

Clearly, the jury concluded that by "staying the course" the Phillips had turned a non-agreement into an enforceable loan agreement. The B2B Bank now seeks its costs.

[11] The subject of costs is governed by Civil Procedure Rule 77 which states:

> 77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.
>
> 77.03 (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
>
> 77.08 A judge may award lump sum costs instead of tariff costs.
>
> 77.10 (1) An award of a party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

Costs are intended to provide a substantial but not a complete indemnity against costs incurred by a successful litigant. The objective is to find an amount that does justice between the parties. It is a matter of judicial discretion.

[12] While the Plaintiff's brief submits that "an argument can be made for the Defendants to pay solicitor and client costs", no such argument was advanced. The Plaintiff's alternative position is that increased tariff costs based on Tariff "A", Scale 3 (increased by 25%) should be awarded. The Plaintiff expanded on this position as follows:

> Based on Tariff A, Scale 3 (the range of the amount at issue is $125,001-$200,000) the costs should be $20,938 plus 25% increase based on Scale 3 ($5,234.50) for a total of $26,172.50 plus $2,000 a day for five days of trial ($10,000) for a total of $36,172.50 to be awarded to the Plaintiff.

[13] In addition, the Plaintiff claims the following disbursements:

1. MRM Consulting (Robert M. Macdonald, FCPA, FCA-IFA) expert forensic accountant

   $20,340.00 (preparation of Report)
   $ 6,953.05 (attendance at trial)
   **$27,293.05**

2. Travel expenses (to meet with client re trial preparation and expert witness re trial preparation)

   $ 871.31 ($1,742.62 ÷ 1/2) (Airfare)
   $ 433.65 ($867.29 ÷ 1/2) (Hotel - 2 nights)
   **$1,304.96**

3. Couriers

   $17.94 (MacGillivray Law copy of Pre-Trial Brief and Book of Authorities)
   $17.94 (MacGillivray Law copy of Exhibit Book
   $29.90 (Prothonotary copy of Pre-Trial Brief and Book of Authorities)
   **$65.78**

4. Printing House (copying and binding extra copies of Expert Report)

   ($241.78 ÷ 1/2)
   **$120.89**

5. Photocopies

   **$716.20**

**Total: $29,500.88**

[14] The Phillips' submissions on costs were generic and no specific reference was made as to quantum. The brief was essentially a plea to minimize any cost consequences given the harm that was done to them by John Allen and Keybase Financial. The following appears on page 1:

> We ask that the Court alleviate some of the cost consequences against the Defendant given its conduct of the proceeding.

I am assuming that the referenced "conduct" is attributable to the B2B Bank. The conduct alleged included an unnecessary date assignment conference, a failure to admit, the presence of a counterclaim and the "novelty" of the action.

[15] In this action the B2B Bank was awarded their full claim. They will also receive pre-judgment interest. The Phillips have experienced financial ruin and continue to face this. They find themselves in this predicament as a result of factors outside of their control. While they showed a disregard for their financial

affairs, they did nothing to create this unfortunate situation. They are only guilty of misplacing their trust in John Allen.

**Conclusion**

[16] The purpose of a cost award is to do justice between the parties. In this case the "justice" required amounts to giving the Phillips a break on costs. I take the view that a lump sum award is the most appropriate way to go and I set that amount at $10,000. There will be no specific award for disbursements. I agree with the Defendants' submission that the Plaintiff's expert was unnecessary and very expensive. The role of this expert was to compare distribution payments to loan payments. He went through the statements and added up the payments. This was not a task that required forensic expertise. In my opinion, counsel could have performed this task and the results could have been admitted by agreement. I will add that these comments equally apply to the Defendants' handwriting analyst.

[17] I have reviewed the parties' submissions on pre-judgment interest and I set it at 2.5%.

Coady, J.