

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Ashby v. McDougall Estate, 2008 NSCA 76

**Date:** 20080820

**Docket:** C.A. 299130

**Registry:** Halifax

**Between:**

Nancy Elizabeth Ashby

Appellant

v.

The Canada Trust Company, (formerly T. D. Trust), a body corporate,  
and Arleen Fagan and Michael H. Whynot, Co-Executors and Trustees of the  
Estate of Donald Corbett McDougall

Respondents

**Judge:** The Honourable Chief Justice Michael MacDonald

**Application Heard:** August 14, 2008, in Halifax, Nova Scotia, In Chambers

**Held:** Application dismissed.

**Counsel:** The appellant, in person  
Peter Bryson, Q.C., for the respondent

**Decision:**

[1] Donald Corbett McDougall died in 1999 as the sole shareholder of McDougall's Drug Store Ltd., which operated pharmacies in Chester Basin and Kentville. The appellant, Nancy Elizabeth Ashby, was a long-term employee and was recognized as such with a \$10,000 bequeath in Mr. McDougall's will. She has received this money.

[2] As a self-represented litigant, Ms. Ashby has brought a series of actions involving the same claims against the respondents who have acted as the estate's executors and trustees. All actions have been dismissed. The action that forms the basis of this appeal was dismissed summarily by Warner, J. of the Supreme Court back in February of this year. The Chambers judge also enjoined Ms. Ashby from commencing further actions against the respondents without leave of his court. Almost 6 months later, Ms. Ashby now asks this court to extend the time to file a notice of appeal. For the reasons that follow, I dismiss this application.

[3] Under our *Civil Procedure Rules*, Ms. Ashby had 30 days to file her appeal:

62.02. (1) An appeal, other than a tribunal appeal, shall be brought by filing a notice of appeal with the Registrar

...

(c) in the case of an appeal from any other judgment, within thirty (30) days, from the date of the order for judgment appealed from or, if no order has been made from the date of the decision.

[4] This time may be extended as follows:

62.31. (1) A Judge shall have and may exercise any and all power and authority necessary to deal with any application authorized to be made to him by this or any other rule or any enactment.

...

(7) A Judge may order that

...

(e) any time prescribed by this rule be extended or abridged before or after the expiration thereof; [Amend. 11/79]

- [5] This court's test for granting an extension historically involved three steps:
1. The appeal has sufficient merit, on the basis that it is arguable that the trial judge made a clear error in his perception and evaluation of the evidence;
  2. There was a bona fide intention to appeal while the right to appeal existed;
  3. A reasonable excuse for the delay in launching the appeal is advanced.

[6] See **Maritime Co-operative Services Ltd. v. Maritime Processing Co.** (1979), 32 N.S.R. (2d) 71 (NSSCAD) (in Chambers).

[7] In recent years, we have viewed this three-pronged approach as more of a guide as opposed to a rigid test; the ultimate goal being a just result in the circumstances of each case. Saunders, J.A. in **Doug Boehner Trucking & Excavating Ltd. v. W. Eric Whebby Ltd.** (2007), 251 N.S.R. (2d) 138; 2007 NSCA 26 (in Chambers) explains:

¶15 The granting of an extension to file an appeal pursuant to **Civil Procedure Rule** 62.31(7)(e) is discretionary. The objective must always be to do justice between the parties. The test is simple: does justice require that the application succeed? In making that determination my assessment should be flexible and take into account all relevant circumstances. **Jollymore v. Jollymore Estate**, [2001] N.S.J. No. 296, 2001 NSCA 116 (in Chambers); **Scotia Chevrolet Oldsmobile Ltd. v. Whynot**, (1970) 1 N.S.R. (2d) 1041 (N.S.S.C.A.D.) and **Tibbetts v. Tibbetts** (1992), 112 N.S.R. (2d) 173 (N.S.C.A.).

¶16 As I made clear in **Jollymore**, *supra*, the so-called three-part test may serve as a useful guide but it was never intended to be a fixed grid onto which all cases would be slotted to see if they made the grade.

[8] In this application, the first consideration - dealing with the merits of a potential appeal - draws me to deny the requested extension. I simply see no merit

to this appeal and justice commands that it not proceed. Reviewing the comprehensive material placed before me, it is clear that this application represents Ms. Ashby's latest attempt to pursue what has become a litany of failed causes involving the same subject matter. The respondents in their written brief accurately summarize the history of this litigation:

¶4 On July 14<sup>th</sup>, 2003, the Appellant commenced an Action against the Executors and John Cochrane, Q.C., the Estate proctor. No Causes of Action were alleged and no Relief was sought.

¶5 On September 30<sup>th</sup>, 2003, the Respondents successfully applied to have the Appellant's initial Statement of Claim struck out. The Action was dismissed as against Mr. Cochrane. Ms. Ashby was given the opportunity to file an Amended Statement of Claim within 30 days and did so.

*[Respondents' Affidavit, Exhibit 7, p.p. 8 to 10]*

¶6 On December 22<sup>nd</sup>, 2003, the Respondents made an Application to strike out the Amended Statement of Claim. That Application was heard before the Honourable Justice Gordon A. Tidman on January 6<sup>th</sup>, 2004. His Lordship granted the Application and struck out the Amended Statement of Claim. Citing Civil Procedure Rule 14.25, His Lordship found that there were "simply no facts alleged which could establish or sustain any of the claims that the Plaintiff appears to put forward". On January 26<sup>th</sup>, 2004, Justice Tidman granted the Order implementing his Decision. On February 17<sup>th</sup>, 2004, well within the 30 day time frame for appealing, the Appellant, Ms. Ashby, filed a Notice of Appeal, appealing the Decision and Order of Justice Tidman.

*[Respondents' Affidavit, Exhibit 7, p.p. 1 to 5]*

¶7 The Appellant, Ms. Ashby, also applied to the Court of Appeal to adduce further and fresh evidence. The initial Application was heard before the Honourable Justice of Appeal, Linda Lee Oland, who adjourned the Application to the full Appeal Panel. Subsequently, Application was made by the Appellant, Ms. Ashby, to set Appeal dates and arrange for the filing an Appeal Book, factums and otherwise attending to the usual pre-appeal procedures.

¶8 The Appeal of Justice Tidman's Decision was heard on September 21<sup>st</sup>, 2004 and on September 28<sup>th</sup>, 2004 the Court of Appeal dismissed Ms. Ashby's Appeal and ordered costs to the Respondents.

*[Respondents' Affidavit, Exhibit 8]*

¶9 In March, 2005, the Appellant, Ms. Ashby, commenced a further proceeding making similar claims to those in her 2003 action. Affidavits were filed by the Appellant and the Respondents in that proceeding and cross-examination occurred and *viva voce* was given before the Honourable Justice Gregory M. Warner. After hearing the evidence, cross-examination and submissions, Justice Warner granted Summary Judgment in favour of the Respondent and dismissed the Appellant's Action.

*[Respondents' Affidavit, Exhibit 7, Tab C]*

¶10 On March 16<sup>th</sup>, 2006, the Appellant brought a further Application against the Respondents seeking certain corporate and Estate documentation from the Respondents. An initial hearing occurred on March 23<sup>rd</sup>, 2006 but was adjourned. The Respondents voluntarily provided the Appellant with certain documents, but that was not satisfactory to her and the Application resumed in June of 2006 at which time Justice Warner dismissed the Appellant's Application.

*[Respondents' Affidavit, Exhibit 10]*

¶11 On December 12<sup>th</sup>, 2007, the Appellant commenced a further Action in substantially similar form to previous proceedings.

¶12 On February 5<sup>th</sup>, 2008, the Appellant applied for an Order to have her "Statement of Claim proceed". The Respondents replied to have the Action dismissed and for an injunction restraining the Appellant from bringing further proceedings without Leave of the Court.

¶13 By oral Decision of February 5<sup>th</sup>, 2008, Justice Warner dismissed the Appellant's Action and granted the Injunctive relief sought by the Respondents. The Decision was subsequently embodied in an Order dated February 18<sup>th</sup>, 2008. This Order was forwarded to the Appellant by fax on February 22<sup>nd</sup>, 2008.

*[Respondents' Affidavit, Exhibits 5 and 6]*

¶14 Throughout all of the proceedings in the various Courts, including the foregoing proceedings in the Court of Appeal, Ms. Ashby signed all documents and Affidavits herself and represented herself in Court.

[9] In summary, the Supreme Court on three occasions plus a panel of this court have already addressed and rejected Ms. Ashby's claim. Her present notice of

appeal represents a rehash of these same complaints. Justice commands that this application be dismissed but in the circumstances, without costs.

[10] I so order.

MacDonald, C.J.N.S.