NOVA SCOTIA COURT OF APPEAL
Citation: ***Smith v. Hailey***, 2014 NSCA 2

Date: 20140107
Docket: CA 416474
Registry: Halifax

Between:

Darren K. Smith

Appellant

v.

Elizabeth Marie Hailey, Arthur Earl Ewing, Donald Christopher Ewing and Dundee Securities Corporation

Respondents

Judges:	MacDonald, C.J.N.S.; Beveridge and Farrar, JJ.A.
Appeal Heard:	December 9, 2013, in Halifax, Nova Scotia
Held:	Leave to appeal granted and the appeal is dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Beveridge and Farrar, JJ.A. concurring, with costs to the respondent in the amount of $2,000.
Counsel:	Brian K. Awad, for the appellant Ian R. Dunbar and Charles J. Ford, for the respondents Elizabeth Marie Hailey, Arthur Earl Ewing, and Donald Christopher Ewing Ezra B. van Gelder, for the respondent Dundee Securities Corporation (not participating)

Reasons for judgment:

[1] The late Paul Duggan, through his attorney, registered a retirement income fund (RRIF) with the respondent Dundee Securities Corporation ("Dundee"). This same attorney directed Dundee's employee, the appellant Darren K. Smith to designate the respondents Hailey, Ewing and Ewing as beneficiaries. They are Mr. Duggan's niece and nephews respectively and I will refer to them simply as "the respondents".

[2] Mr. Smith took steps to effect the requested change prior to Mr. Duggan's death. However, upon Mr. Duggan's death, the Public Trustee, as administrator of the estate, concluded that the purported designation was invalid and that the RRIF should form part of the residue of the estate, thereby disentitling these respondents. The Probate Court agreed, without challenge from the respondents.

[3] The respondents have now sued Mr. Smith and Dundee (vicariously) in negligence for failing to effect a valid designation. However, Mr. Smith insists that because the respondents failed to defend their designation in Probate Court, their claim against him constitutes an abuse of process. He asked the Supreme Court of Nova Scotia to dismiss the claim accordingly. He explained his position in his pre-hearing brief to the motions judge:

> 41. In this case, the plaintiffs could have pursued a remedy in the probate proceeding. They were "persons interested in the estate", and so had full standing. They could have sought to prove (as they will have to do in the within proceeding) that RM [the attorney] acted legitimately. They could have tendered evidence to show that RM was acting on instructions from Duggan. They could have advocated to the Probate Court that RM's actions should govern the disposition of the RRIF where the Will did not speak to the RRIF. By doing nothing, the plaintiffs failed to pursue an available remedy, and can be said to have acquiesced in the probable outcome, including all imbedded dispositions of issues.
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> 42. Beyond the issue of acquiescence, the within claim is a collateral attack on the probate court outcome. Justice Binnie commented on the law regarding collateral attack in giving the judgment of the Court in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44:
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> > 20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the

> oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel). Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e. that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: [citations omitted]

43. Collateral attack was discussed again by the Court in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, where Justice Iacobucci J. (writing for the Court) stated:

> 71 …The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal. Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). [citations omitted]

44. The prohibition on collateral attacks protects the integrity of court proceedings, including probate proceedings. The plaintiffs were given notice of the probate proceeding, and kept apprised of its progress. As "persons interested in the estate", they had full standing to access the plethora of procedures contained in the *Probate Court Rules*.

45. It is submitted that the Registrar's order included a determination that RM's actions were not legitimate and, in any event, directed the Public Trustee dispose of and distribute the RRIF proceeds to EM, JM and JS. In the circumstances of this case, the within claim necessarily impugns that outcome and constitutes a collateral attack on it.

[4] Justice Kevin Coady heard the motion and disagreed, reasoning in his oral decision:

> The Public Trustee provided all with a very extensive opinion on the law respecting a valid beneficiary dated November 7th, 2007. This opinion was supported by strong authorities. I suspect that the Counsel advising the Plaintiffs during the probate process were able to assess the Public Trustee's opinion.
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> I agree with the Plaintiffs' position that they agreed with the Public Trustee that the beneficiary designation was invalid, and that was, and that was sufficient reason not to become involved in the distribution process, and I see the **Probate Act** as nothing -- the Probate Order as a, as the end result of a distribution process.
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> I do not see the passing of Accounts by the Registrar of Probate as akin to a full hearing on the issue -- on an issue. I do not accept that by not challenging that process, that such amounts to a barrier to this action in negligence. It is not another kick at the can as far as I'm concerned. Rule 88 states that this Rule is provided to prevent abuse.
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> Abuse is understood to be a tool to prevent parties from keep -- from keeping that -- from keeping -- from battling over the same issues before the same or separate tribunals; i.e. re-litigation. It is not disputed that Mr. Duggan's attorney took steps to make the Plaintiffs beneficiaries of the funds. Somewhere in the, in the chain, that direction did not get through.
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> The only players in the middle are Mr. Murtha, and Mr. Smith, and Dundee. If there is negligence, that's where it will lie. Mr. Murtha is not a party, which, on the facts developed to date, as I see them, is not really surprising. Mr. Smith was the contact person with Mr. Duggan's attorney, and Dundee was his employer.
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> I believe, as well, that there is a strong policy reason for dismissing this action. Dundee's potential exposure is likely limited to being liable for the actions of Mr. Smith. If I dismiss the action against Mr. Smith, it would impact on any potential exposure for Dundee. The Plaintiffs would be left without a cause of action against anyone, possibly. While it can be argued that the Defendants' liability may be tenuous, they are entitled to pursue their claim against both Defendants. ...

[5] I agree with Justice Coady. This is not an abusive action. Mr. Smith's alleged negligence represents a different claim and a different set of issues from those dealt with in Probate Court. As such, estoppel is not in play. Nor is this claim a collateral attack on the Probate Court's order, again because totally different issues are involved.

[6] Granted, perhaps the respondents acquiesced in Probate Court at their peril. Perhaps this will afford Mr. Smith a valid defence. That, however, will be for another day.

Conclusion

[7] I would grant leave but dismiss the appeal with $2,000 in costs payable in one bill to the respondents.

MacDonald, C.J.N.S.

Concurred in:

Beveridge, J.A.

Farrar, J.A.