C.A. No. 02963

NOVA SCOTIA COURT OF APPEAL

Freeman, Hart and Roscoe, JJ.A.

Cite as: MacCulloch Holdings Ltd. v. Price Waterhouse Ltd., 1994 NSCA 74
BETWEEN:

MACCULLOCH HOLDINGS LIMITED Appellant	)	Mrs. Patricia MacCulloch in person
- and -	)	Carl A. Holm, Q.C. for the respondent
PRICE WATERHOUSE LIMITED Respondent	)	
	)	Appeal Heard: March 28, 1994
	)	Judgment Delivered: April 12, 1994

THE COURT: Appeal dismissed with costs in the amount of $750.00, per reasons for judgment of Roscoe, J.A.; Freeman and Hart, JJ.A. concurring.

ROSCOE, J.A.:

This is an appeal from a decision of a Chambers judge striking out the appellant's statement of claim against the respondents pursuant to **Civil Procedure Rules** 14.25(1)(a), on the grounds that it disclosed no reasonable cause of action, that the appellant had not obtained leave to commence the action against the respondent Price Waterhouse Limited pursuant to s. 215 of the **Bankruptcy Act** and that most of the matters referred to in the claim were ***res judicata***.

The appellant company is wholly owned by Mrs. Patricia MacCulloch, the widow of the late Charles E. MacCulloch. The history of events as between Mrs. MacCulloch and the respondents is lengthy and arduous. It has been the subject of numerous court proceedings and decisions of this Court and the Supreme Court. The background giving rise to the long-standing dispute was set out in detail by Glube, C.J.T.D. in **MacCulloch v. Price Waterhouse Limited et al.** (1992) 115 N.S.R. (2d) 131 as follows:

> III. BACKGROUND
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> Robert A. Cordy, a Vice-President of Price Waterhouse filed an extensive affidavit. There is also lengthy material in the files from Mrs. MacCulloch. I will attempt to state the background facts as succinctly as possible, however, they span a number of years.
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> In January 1990, an action was commenced by Patricia MacCulloch, the plaintiff and respondent in this application, against Price Waterhouse and Central Guaranty Trust Company ("Central"). The action against Central was discontinued in February, 1992. The amended action against Price Waterhouse, after identifying the parties (paras.1 and 2), sets out that Charles E. MacCulloch died in October 1979 leaving a will (para. 3) and the inventory of his estate showed assets of slightly over ten million dollars (para. 4). The plaintiff and Central were appointed executors and the plaintiff was also a beneficiary under the will (para. 5). On June 7th, 1982, the estate was petitioned into bankruptcy (by the bank) and Price Waterhouse was appointed trustee under the **Bankruptcy Act** for the

estate and was also the receiver and manager for various companies in which the estate had an interest (paras. 6 and 7). Paragraph 8 of the statement of claim states the following:

> "The plaintiff's claim against the defendant is for one of negligent mismanagement of the estate of Charles E. MacCulloch, by virtue of which mismanagement, the plaintiff, as a beneficiary, suffered loss and damages, in that what commenced a 10 million dollar estate has been virtually depleted."

The final paragraph is a claim for special, general and punitive damages, along with prejudgment interest and costs (para. 9).

The originating notice and statement of claim alleging negligent mismanagement was served on Price Waterhouse on July 16th, 1990. On July 26th, 1990, Price Waterhouse made this application to strike the pleadings. This application has been adjourned on a number of occasions for a variety of reasons including awaiting decisions on other matters brought by Mrs. MacCulloch which were before the court.

Probate of Mr. MacCulloch's estate was granted to his executors, originally four, however, one died and one resigned leaving Central and the plaintiff. In December 1981, the executors entered into an agreement which conveyed to Patricia MacCulloch for $500,000 a farm property owned by the estate and a Toronto condominium.

On June 29th, 1982, the estate was petitioned into bankruptcy by the bank and Price Waterhouse was appointed as trustee of the estate in bankruptcy. As a result of a legal opinion that the sale of the farm and the condominium was a breach of Mrs. MacCulloch's fiduciary duty as an executor, the trustee commenced an action against her in June of 1984. The evidence at the trial held in April 1985, revealed that at the time Mrs. MacCulloch was negotiating to purchase the two properties in 1981, she had arranged the resale of the farm property for $1,350,000.00 and she later sold the condominium for $485,000.00. She did not advise the other executors nor the residuary legatees that she was negotiating the resale of the property. At the trial, Mrs. MacCulloch was found to be in breach of her fiduciary duty to the estate in probate but she was not found liable to Price Waterhouse who appealed that decision. (See **Price Waterhouse Ltd. v. MacCulloch** (1985), 69 N.S.R. (2d) 167; 163 A.P.R. 167 (S.C.T.D.))

Before the appeal was heard, the trustee notified Mrs. MacCulloch's solicitor out of courtesy that the trustee was filing a report under the **Bankruptcy Act** pursuant to s.16(2) (now s. 34(2)). Following that hearing, Mrs. MacCulloch's solicitor appealed the decision of the registrar to extend the time for the administration of the estate in bankruptcy. In November 1985, the appeal was dismissed.

The appeal by Price Waterhouse of the 1985 case against Mrs. MacCulloch was heard on December 6th, 1985. In the decision dated January 20th, 1986, the Appeal Court held that she had breached her fiduciary duty, she was accountable to the trustee in bankruptcy for the proceeds of the sale of the properties, the proceeds were ordered to be held in trust for Price Waterhouse and she was to account for the profits on the purchase and resale

of both properties. The decision also found that it was incumbent upon the trustee to bring the action. (See **Price Waterhouse v. MacCulloch** (1986), 72 N.S.R. (2d) 1; 173 A.P.R. 1 (C.A.)) Leave to appeal to the Supreme Court of Canada was denied. The trustee learned that upon the sale of the condominium in January 1983, a mortgage was given back to Mrs. MacCulloch which she assigned to her sister as a gift.

In September, 1986, following an accounting hearing before the original trial judge, the trustee entered judgment for approximately $1,800,000.00. On September 3rd, 1986, Mrs. MacCulloch filed a notice of appeal and she obtained a stay on the judgments pending the disposition of the appeal. At the same time the stay was granted, Mrs. MacCulloch was ordered to disclose her assets and not to dispose of or encumber any assets owned by her.

Prior to the appeal on the accounting being heard, the trustee filed a further report with the registrar of its dealings with the estate in bankruptcy and again out of courtesy notified Mrs. MacCulloch through her solicitor. At the hearing before the registrar on January 16th, 1987, Mrs. MacCulloch and her solicitor appeared and made submissions. The registrar, among other things, required a further report from the trustee on June 1st.

On January 28th, 1987, notice was given Price Waterhouse of an application by Mrs. MacCulloch to have Price Waterhouse removed as trustee and of an appeal of the registrar's decision. Central, the administrative executor of the estate, advised the trustee it was satisfied with the administration of the estate in bankruptcy and that it did not believe that it would be in the interest of the estate if Price Waterhouse was removed as trustee. Mrs. MacCulloch offered to release the trustee "from any liability for commencing or prosecuting the action against her and to withdraw her application to have the trustee removed if the trustee would consent to an Order which would have the effect of discharging the judgment". (para. 86 of the Cordy affidavit.) The trustee declined and the application to remove the trustee was dismissed by the court. The appeal from the accounting was heard and dismissed with reasons being given on April 15th, 1987. (See **Price Waterhouse v MacCulloch** (1987), 78 N.S.R. (2d) 300; 193 A.P.R. 300 (C.A.))

In an effort to avoid the continuation of litigation, the trustee at various times, offered to withhold execution if Mrs. MacCulloch would disclose her assets and undertake not to dispose of them. She declined. On April 22nd, an execution order was issued in an effort to preserve the assets. On learning that Mrs. MacCulloch was residing in Lunenburg County, a search at the Registry of Deeds revealed that a property at North West Cove was conveyed by Mrs. MacCulloch to her sister on December 16th, 1985. The trustee wanted to examine Mrs. MacCulloch under the **Collections**

Act. Mrs. MacCulloch's solicitor appeared and entered a conditional appearance on her behalf and objected to the examination.

On May 27th, the trustee again notified Mrs. MacCulloch out of courtesy, of an appearance before the Registrar in Bankruptcy. Again, her solicitor made representations and on June 2nd, 1987, the registrar directed an examination of Mrs. MacCulloch pursuant to s. 162(g) (now s. 192(g)) of the **Bankruptcy Act**. Because of her ill health, the examination never took place. On June 25th, her solicitor obtained an order which was unopposed by the trustee, extending the time to seek leave to appeal to the Supreme Court of Canada. In July, her solicitor wrote several letters complaining about the seizure of her residence.

On August 13th, Mrs. MacCulloch's solicitor obtained an ***ex parte*** order staying the sale of her Rolls Royce which had been seized under the execution order. On August 27th, 1987, the court dismissed an application by Mrs. MacCulloch for a stay of execution; the court found that the trustee had a duty to "press on and obtain recovery of the amount due or at least a sufficient part of that amount to satisfy its costs and the claims of creditors". (decision of Mr. Justice Burchell.) The sale of the motor vehicle was deferred from time to time as the trustee had agreed, subject to court approval, to sell shares for an amount sufficient to pay the creditors. On October 23rd, the court declined to approve the sale. Eventually, a sale was concluded in February 1988 which was approved by the court. Although the trustee had started various proceedings to realize on the judgments against Mrs. MacCulloch, these all ceased with the February 1988 order. On March 4th, 1988, the trustee obtained an order discharging the estate of Charles E. MacCulloch in probate from bankruptcy. The hearing was attended by Mrs. MacCulloch and her solicitor. On April 22nd, 1988, the solicitor for the estate in probate obtained an order renewing the execution order originally obtained by the trustee. Around June 30th, 1988, the judgments were assigned to the estate in probate.

From early March 1988 until mid 1991, numerous letters were written on behalf of Mrs. MacCulloch addressed to the trustee, the Inspectors and the estate's solicitor complaining about vandalism to her property and the seizure of her Rolls Royce. She was told that authority to deal with those matters was now with the estate in probate.

On March 10th, 1989, the trustee applied to the registrar for approval of its final accounts and gave notice of its intention to apply for discharge. On April 17th, 1989, objections were filed by Mrs. MacCulloch and Central as executors of the estate in probate and by Mrs. MacCulloch in her personal capacity. The objections of Mrs. MacCulloch included a claim that the remuneration of the trustee ought to be reduced because of negligence and misconduct

by the trustee. A number of general and specific allegations were made including "committing waste by undertaking unnecessary, costly and futile legislation against Patricia MacCulloch when the trustee knew or ought to have known that the estate contained a surplus and without regard to Patricia MacCulloch as legatee in lieu of dower; failing to disclose to the court in the course of litigation the probable surplus and thereby gaining unfair advantage in the action against Patricia MacCulloch". (Ex. 25 and 26 attached to the Cordy affidavit). In addition to the trustee giving the objectors full disclosure including solicitor's files and correspondence relating to the administration of the estate in bankruptcy and the actions against Mrs. MacCulloch, three days of discoveries were held of Mr. Cordy and the former administrator of the estate.

A six day court hearing was held on the objections in September and October 1989. The decision is dated November 3, 1989. (See **MacCulloch (Bankrupt), Re** (1989), 93 N.S.R. (2d) 226; 242 A.P.R. 226 (S.C.T.D.)) After reviewing the evidence of the expert who testified against the trustees, Hallett, J., states at p. 233:

> "The issue is not whether the actions taken by the trustee to realize on the assets was the best way or the only way but whether it was reasonable and based on an exercise of sound judgment. In my opinion, the trustee's realization plan met the test for the reasons I have stated."

On the issue of whether the trustee had obtained the best prices for the properties, Hallett, J., was "satisfied that every reasonable step was taken to obtain the best prices..."(p. 20). He found that the operation of the company by the trustee "... for the purpose of realizing funds to pay down the creditors of the estate was not unreasonable" (p. 235). He also referred to the finding by the Court of Appeal that it was "incumbent" upon the trustee to have commenced the action against Mrs. MacCulloch. He reviewed why it was an overstatement to say that only Mrs. MacCulloch would inherit the judgment against her. He found that the trustee kept the executors informed. Finally he stated at p. 237:

> "In summary, on the major point raised by the objectors that the trustee acted unreasonably or unnecessarily in the manner in which it realized on the assets of the estate, I respectively disagree. While one can say the trustee could have proceeded in other ways, from the evidence I heard I am satisfied that it proceeded in the most reasonable manner so as to maximize the amounts obtained for assets under the trustee's control, both for the benefit of the creditors and for the estate in probate. As to the legal action against Mrs. MacCulloch, it was

> authorized by the inspectors on the basis of the opinion of Mr. John Honsberger, a leading expert in the field of bankruptcy, that Mrs. MacCulloch had breached her fiduciary duties as executor in purchasing and reselling at a profit the Monte Vista Farm and the Toronto condominium. The correctness of the trustee's judgment in proceeding against her was confirmed by the Appeal Division of this court when it stated that it was incumbent upon the trustee to have proceeded against Mrs. MacCulloch. A judgment of 1.8 million dollars was recovered. That is not an insignificant amount, notwithstanding that nothing was collected on the judgment by the trustee. It is now an asset of the estate in probate and it will be for the executors to determine how they wish to treat that asset."

Because the action, S.H. No. 71344, which is the subject of this application commenced in January, 1990, the order following the hearing before Mr. Justice Hallett, adjourned the discharge of the trustee ***sine die*** pending disposition of that action but allowed the trustee to renew its application for discharge upon notice to the executors of the estate in probate. A notice of appeal of Mr. Justice Hallett's decision was filed on behalf of Mrs. MacCulloch listing numerous grounds including "that the trial judge had erred in failing to find the trustee had misconducted himself in various ways in the administration of the estate including in taking proceedings against her." (Affidavit of Robert Cordy, para. 69.) The appeal decision dated June 12, 1991, agreed with the basic findings of the trial judge that the trustee acted reasonably throughout the administration of the estate and found that the trial judge had made no palpable or overriding error. The Appeal Court reduced the trustee's fee. (See **MacCulloch (Bankrupt), Re** (1991), 108 N.S.R. (2d) 130; 294 A.P.R. 130 (C.A.)) The trustee was denied leave to appeal to the Supreme Court of Canada.

The statement of claim in the case under appeal was filed June 29,1993. In it, it is alleged that the respondents "placed illegal caveats against the property" owned by the appellant, that they refused to allow the appellant to winterize the property, to occupy the property "subsequent to seizure", and did not pay taxes on the property. It is alleged that as a result of the filing of the caveats that damage and loss was suffered. The caveats referred to were statutory declarations filed by the respondents which refer to the judgment held by the trustee against Mrs. MacCulloch in the amount of $1.8 million.

At the hearing of the application to strike, Nunn, J. admitted the affidavit of Robert A. Cordy, Vice-President of Price Waterhouse which set out the history of the various proceedings affecting the parties. Mrs. MacCulloch cross- examined Mr. Cordy. The application was granted on the basis that no leave to commence the action against the trustee was granted pursuant to the **Bankruptcy Act** and that no reasonable cause of action was disclosed. With respect to the secondary basis the Chambers judge said:

> I am also satisfied that on reading the originating notice that no reasonable cause of action is disclosed. There is not a statement in summary form of the material facts on which the party pleading relies for his claim. There are, in effect, a dearth of the material facts that are necessary for this action and as was indicated by the defendant there are no facts provided with respect to what is alleged the defendants did when to whom and how. There is no obligation on the defendant to speculate as to what the cause of action against him may be.
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> During the course of the argument, counsel for the defendant did speculate as to what possible actions might lie and indicated that even though speculating as to the types of actions, still there was no basis to them and I have to agree. There was no actionable wrong because the illegal caveats that are referred to are merely filing of statutory declarations. They did not result in a seizure, therefore any claims made on the basis of seizure of property are not justified. The possibility of an action of it being speculated to be an action for slander of title does not produce a valid originating notice in this case because the requirements of slander of title or false statement, of being maliciously made without reasonable concern for accuracy and damages by reliance on the truth of the statements are absent. The statements in the alleged caveats are true. They were not maliciously made and, as has been held in court before, they were made by the trustee who the court held to be acting reasonably and it was not the truth of the statements that were being relied upon. Mrs. MacCulloch may have a contrary belief but if she had the wrong belief that does not support reliance on the document alleged.

In the notice of appeal, the appellant lists thirty-nine reasons the decision should be set aside. Most of the reasons cite the failure of the Chambers judge to recognize the effect of the defendant's actions during the administration of the estate in bankruptcy had on the appellant and Mrs. MacCulloch. Most of the complaints contained in the notice of appeal are matters that were adjudicated upon by Hallett, J., as he then was, at the time the

trustee's accounts were passed. [See 93 N.S.R. (2d) 226 and Appeal Division decision at (1991), 108 N.S.R. (2d) 130] The remaining complaints refer to the trial judge's failure to find that Mr. Cordy was not a credible witness and a concern that the decision and process was unfair to the appellant.

The relevant **Rule** is as follows:

> 14.25(1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
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> (a) it discloses no reasonable cause of action or defence;
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> . . .
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
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> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph 1(a).

On an appeal of an interlocutory order the role of this Court is well settled. For example, in **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.** (1990), 96 N.S.R. (2d) 82, Matthews, J.A. wrote at p. 85:

> The approach an appeal court must adopt in considering a discretionary order made by a chambers judge has been stated by this Court in **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, wherein Chief Justice MacKeigan in delivering the unanimous judgment of the Court on an appeal concerning an interlocutory injunction stated at p. 333:
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> > "This Court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result."

The test under Rule 14.25 was summarized by Macdonald, J.A. in **Vladi Private Islands Ltd. v. Haase et al** (1990), 96 N.S.R. (2d) 323 at p. 325 where he stated:

> The proper test to be applied when considering an application to strike out a statement of claim has been considered by this Court on numerous occasions. It is clear from the authorities that a judge must proceed on the assumption that the facts contained in the statement of claim are true and, assuming those facts to be true, consider whether a claim is made out. An order to strike out a statement of claim will not be granted unless on the facts as pleaded the action is "obviously unsustainable".

At the hearing of the appeal, Mrs MacCulloch's argument focused on several complaints she has with the actions of Price Waterhouse during the administration of the bankruptcy, for example the price obtained for the sale of shares and the continuation of the legal action against her after the payment of the main creditor. All of her complaints respect matters that happened prior to March, 1989, the date of the application heard by Hallett, J. in October, 1989. The review by Justice Hallett at that time was thorough, no action by the trustee to that date escaped the closest scrutiny. He specifically approved the actions taken by the trustee to obtain the judgment against Mrs. MacCulloch and to attempt collection of it, despite the fact that the main creditor of the bankrupt estate had been paid in full. The decision of Justice Hallett that the trustee acted reasonably was upheld by this Court on appeal.

In April, 1987 the trustee issued execution orders against Mrs. MacCulloch and instructed the sheriff to levy execution on her shares in the appellant company and on a debenture issued by the appellant to Mrs. MacCulloch. In addition, the statutory declarations complained of in this action were filed in January, 1986 and June, 1987. The statutory declarations referred to the judgment against Mrs. MacCulloch, and the seizure of the shares and debenture. In July 1987 Mrs. MacCulloch's lawyer wrote to counsel for the trustee advising that in his view the trustee had "seized" the property owned by the appellant herein and that therefore the trustee was responsible for its upkeep and maintenance. The trustee replied that the seizure of the shares and debenture by the sheriff did not amount to a seizure of the property and that the trustee would not be responsible for any damage to the property. Despite this advice, Mrs. MacCulloch apparently left the premises vacant and without power

and did not pay the taxes. Damages are now claimed from the trustee for resulting acts of vandalism and theft.

Justice Nunn properly decided that there was no actionable wrong because there were no "illegal caveats", merely the filing of statutory declarations the contents of which were true. His determination that there was no seizure of the property by the trustee was correct.

In my view the Chambers judge applied the proper test and came to the correct conclusion. The statement of claim does not disclose a reasonable cause of action. The appellant has not shown that there has been any reviewable error. The appeal should be dismissed with costs in the amount of $750.

Roscoe, J.A.

Concurred in:

Freeman, J.A.

Hart, J.A.