

NOVA SCOTIA COURT OF APPEAL

Citation: Ashby v. McDougall Estate, 2004 NSCA 114

Date: 20040928

Docket: CA 215822

Registry: Halifax

Between:

Nancy Elizabeth Ashby

Appellant

v.

The Estate of Donald Corbett McDougall and Co-Executors,
Trustees the Canada Trust Company, a body Corporate and
Arleen Fagan and McDougall's Drug Store Ltd. and
Directors Michael H. Whynot and Arleen Fagan
and Michael H. Whynot and Arleen Fagan

Respondents

Judge(s):

Glube, C.J.N.S.; Oland and Hamilton, J.J.A.

Appeal Heard:

September 21, 2004, in Halifax, Nova Scotia

Held:

The appeal is dismissed with costs, including costs of the Chambers application, to the respondents in the amount of \$1,500.00 plus disbursements as taxed or agreed, per reasons for judgment of Glube, C.J.N.S.; Oland and Hamilton, J.J.A. concurring.

Counsel:

Nancy Elizabeth Ashby, self-represented appellant
Peter Bryson, Q.C., for the respondents

Reasons for judgment:

[1] This is an appeal of a decision by the Supreme Court Chambers judge striking an amended statement of claim pursuant to **Civil Procedure Rule 14.25**. The appellant also applies to introduce fresh evidence pursuant to **C.P.R. 62.22**. The respondents filed a notice of contention claiming that additionally or alternatively, the respondents should be granted summary judgment.

(A) Fresh Evidence

[2] The test for the admission of fresh evidence is set out in **R. v. Palmer** (1979), 50 C.C.C. (2d) 193 (S.C.C.) . This is a four-part test and failure to meet any one of the four parts means that the proposed evidence is not admissible. The first test is,

(1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases ...

[3] The Chambers hearing took place on January 6, 2004. All of the material the appellant seeks to introduce is dated prior to that date and appears to have been in the appellant's possession long before the January 2004 hearing. The proposed fresh evidence dates back as early as 1995, and concludes with a transcript dated 2003.

[4] As all of the proposed evidence was clearly available prior to 2004, it is not admissible as fresh evidence on appeal.

(B) Civil Procedure Rule 14.25; Statement of Claim Struck

[5] Under **C.P.R. 14.25**, the court may strike out a pleading on the basis that it discloses no reasonable cause of action. The amended statement of claim alleged ownership of a business and certain assets including a G.I.C., wrongful dismissal and damages. The entire amended statement of claim is attached as Appendix A.

[6] In his decision, the Chambers judge set out the entire statement of claim as well as the law for dismissing a claim under **C.P.R. 14.25**. He noted the facts pleaded are to be taken as approved and quoted from **Hunt v. Carey Canada Incorporated**, [1990] 2 S.C.R. 959 at ¶ 33:

... assuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action?

[7] He went on to say that there were no facts to sustain the claim, stating:

In the Amended Statement of Claim in the case now before the Court, it is not a question of determining whether the facts as stated, if true, could establish a claim, since there are simply no facts alleged which could establish or sustain any of the claims that the plaintiff appears to put forward.

[8] In order to overturn the decision of the Chambers judge, I would have to find that he made an error in law resulting in an injustice. (**Clark v. Sherman**, [2002] N.S.J. No. 238 (C.A.) at ¶ 10, citing **Purdy Estate v. Frank**, [1995] N.S.J. No. 243 (C.A.) at ¶ 10.) The failure of the Chambers judge to refer to the affidavit filed by the appellant December 10, 2003, does not amount to such an error of law resulting in an injustice on the facts of this case. After carefully reviewing the record and the written and oral submissions, I am not persuaded that the Chambers judge made an error of law resulting in an injustice.

(C) Notice of Contention

[9] Having upheld the Supreme Court Chambers judge’s decision, it is unnecessary to deal with the claim by the respondent for summary judgment.

(D) Conclusion

[10] An Appeal Court Chambers judge earlier adjourned the appellant’s application for fresh evidence to the hearing of the appeal and ordered costs in the cause. The appeal is dismissed with costs, including costs of the Chambers application, to the respondents in the amount of \$1,500.00 plus disbursements as taxed or agreed.

Glube, C.J.N.S.

Concurred in:

Oland, J.A.

Hamilton, J.A.

Appendix A

AMENDED STATEMENT OF CLAIM

I, the Plaintiff, Nancy Elizabeth Ashby reside at R.R. #2 Centreville in the County of Kings, Province of Nova Scotia, a former twenty-eight year employee of McDougall's Drug Store Limited. Upon the death of Mr. McDougall I became the only Signing Officer of the Corporation put into place by Mr. McDougall in his life time. The executors have never told me this and through the process of manipulation, harassment and threats my employment and all rights were taken from me.

The Defendants: The Canada Trust Company, a body Corporate under the Laws of Canada with head office in the City of Toronto, Province of Ontario, the recognized agent of the Company is Michael H. Whynot, Senior Trust Officer, 5415 Spring Garden Road, Halifax, Nova Scotia.

and

McDougall's Drug Store Limited, Directors Michael H. Whynot and Arleen Fagan.

and

Estate of Donald Corbett McDougall, Executors and Trustees, The Canada Trust Company and Arleen Fagan.

and

M. Arleen Fagan, 881 Ridge Road, Wolfville, in the County of Kings, Province of Nova Scotia.

and

Michael H. Whynot, 78 Hartlen Avenue, of the Halifax Regional Municipality, Province of Nova Scotia.

In light of the shocking process, I am going to cover a wide range of claims.

1. Ownership:	McDougall's Drug Store Ltd.	\$1,887,500.00
	Wage loss: \$37,000.00 x 21 yrs.	777,000.00
	Dividend: \$150,000.00 x 21 years	\$3,150,000.00
	GIC #801623810	\$850,000.00
	Contents that were in the Corporate Bldg., but were not Corporate assets ie;	
	Stamp collection	.00
	American & Canadian money	\$8,000.00
	paintings, old bottles, etc.	.00

2. Wrongful dismissal: McDougall's Drug Store Limited

	Wage loss: \$37,000.00 x 21 years	\$777,000.00
	Dividend: \$150,000.00 x 21 years	\$3,150,000.00
	GIC #801623810	\$850,000.00
	Ownership	\$1,887,500.00
	contents that were in the Corporate Bldg., but not assets of the Corporation, ie: American & Canadian money	\$8,000.00
	paintings, stamp collection, old bottles, etc.:	.00
	5% to my pension fund	\$38,850.00
3.	Ownership: Estate of Donald Corbett McDougall GIC #801623810	\$850,000.00
4.	Punitive: Arleen Fagan, Director of McDougall's Drug Store Ltd., Trustees and Executrix for the Estate of Donald Corbett McDougall:	\$250,000.00
5.	Punitive: Michael H. Whynot, Director of McDougall's Drug Store Ltd., Senior Trust Officer of The Canada Trust Company, Executor and Trustee for the Estate of Donald Corbett McDougall:	\$450,000.00
6.	Punitive: The Canada Trust Company, Executor and Trustee for the Estate of Donald Corbett McDougall:	\$21,000,000.00