IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Ashby v. McDougall Estate, 2005NSSC148

Date: 20050616
Docket: S.K. 241019
Registry: Kentville

Between:

Nancy Elizabeth Ashby

Plaintiff

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., Now 1013874 Nova Scotia Limited and Directors Michael H. Whynot and Arleen Fagan and Michael H. Whynot and Arleen Fagan

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	May 18, 2005, in Windsor, Nova Scotia
Final Written Submissions:	June 8, 2005
Counsel:	Plaintiff/Respondent- unrepresented Defendants/Applicants - Peter Bryson, Q.C.

By the Court:

[1] The defendants seek an order dismissing the plaintiff's action and an injunction prohibiting further actions without leave of the Court. They specifically seek:

(a) dismissal of the action on the basis of *res judicata*;

(b) that the Statement of Claim be struck out under **Rule** 14.25 as disclosing no reasonable cause of action, or alternatively, being false, frivolous or vexatious, or alternatively being an abuse of process;

(c) alternatively, for summary judgment under **Rule** 13.01 on the basis that there is no arguable issue to be tried; and

(d) an injunction under **Rule** 43.01 to prevent the plaintiff from initiating another claim against the defendants without leave of the Court.

BACKGROUND

[2] Donald C. McDougall (McDougall) was a pharmacist and the sole owner of McDougall's Drug Store Ltd. (Company). The Company owned and operated two drugstores.

[3] The plaintiff, Nancy Ashby, was his bookkeeper for 28 years. Among other things she and McDougall were authorized by the Company, acting alone or together, to transact business with the Company's bankers.

[4] McDougall died on December 21, 1999, leaving an estate (including the value of the Company) of approximately $3.8 million dollars.

[5] McDougall's last will (Will), admitted to probate, appointed his daughter and TD Trust (now Canada Trust) as executors and trustees. It bequeathed $10,000.00 to the plaintiff, $100,000.00 to each of his six children, and contained other minor bequests. The residue of the estate was to be invested; the income from one-third was to be paid for the support of McDougall's wife for her lifetime and the income from the remaining two-thirds was to be paid for the support of his six grandchildren for 21 years. Thereafter, the entire residue was to be paid to a hospital foundation.

[6] The relevant portion of the Will for the purposes of this proceeding is paragraph 10 which reads:

> 10. I confirm that the co-owner of any real property, deposits, vehicles or investments that are in our joint names when I die is the sole beneficial owner of such real property, deposits, vehicles or investments by right of survivorship.

[7] In July, 2003, the plaintiff sued the estate of McDougall and the lawyer for the estate, claiming ownership of the Company assets, lost wages, lost dividends, ownership of a portion of a GIC, general damages and punitive damages.

[8] In October, 2003, Boudreau , J., dismissed the action against the lawyer and struck out the Statement of Claim against the executors of the estate with leave to file an amended Originating Notice and Statement of Claim against the estate.

[9] Immediately thereafter the plaintiff filed an amended Statement of Claim against the estate, its executors, the Company and its directors, again claiming ownership of the Company, ownership of a portion of a GIC, punitive damages against the executors of the estate and Directors of the Company, and damages for wrongful dismissal.

[10] In January, 2004, the defendants applied to strike the Statement of Claim as disclosing no reasonable cause of action (**Rule** 14.25) or alternatively, for summary judgment (**Rule** 13.01). Tidman, J., in a written decision, 2004 NSSC 9 struck the Statement of Claim in its entirety and therefore dismissed the action under **Rule** 14.25. At paragraph 21 he wrote:

> 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.

[11] An appeal by the plaintiff to the Nova Scotia Court of Appeal was dismissed in September, 2004 (2004 NSCA 114).

[12] In March, 2005, this action was commenced by the same plaintiff against the same defendants. The Statement of Claim is similar to the Amended Statement of Claim that was struck by Mr. Justice Tidman. Paragraphs 3, 4 and 5 of the present action, which purport to outline the basis of the plaintiff's claim, were not part of the prior amended action struck out by Mr. Justice Tidman. Unlike the prior action, the remedy portion of the present action does not seek relief for wrongful dismissal.

[13] Because the wording of the Statement of Claim is central to this application it is reproduced in full as Appendix A to this decision.

FIRST ISSUE - *RES JUDICATA*

[14] The defendants' main argument for dismissal is that the claims advanced were previously dismissed and the principle of *res judicata* or *issue estoppel* applies. They rely upon the decision of the Nova Scotia Court of Appeal in **Hoque v. Montreal Trust Co. of Canada** [1997] N.S.J. No. 430.

The Law

[15] The law is set out by the Supreme Court of Canada in **Danyluk v. Ainsworth Tehnologies Inc** [2001] 2 S.C.R. 460. Binnie, J., at paragraph 33 writes that the analysis consists of two steps. The first step is to determine whether the applicant has established the three preconditions to the operation of issue estoppel. The second step is a determination of whether, as a matter of discretion, issue estoppel ought to be granted. The three preconditions in the first step are:

(1) whether the same question was decided in the prior proceeding;

(2) whether the judicial decision, that creates the estoppel,was final; and

(3) whether the parties in both proceedings were the same.

[16] In the second step, the factors for or against the exercise of the discretion must be addressed. It is an error of principle not to address them. In **Danyluk** the question arose from a prior administrative decision dealing with the same issue between the same parties. The Court concluded that the preconditions were met in that case and it then addressed, as part of the discretionary analysis, seven factors that were specifically relevant when an administrative body made the prior decision.

[17] This application is based on a prior decision of the Supreme Court, and not of an administrative tribunal. As noted by Binnie, J., at paragraph 62 in **Danyluk**, where he cited **General Motors of Canada Ltd v. Naken**, [1983] 1 S.C.R. 72, the exercise of discretion in the context of prior Court proceedings is limited and rare.

[18] The principles in **Danyluk** have been approved and applied by the Nova Scotia Court of Appeal in two appeals arising from decisions of this Court: **Copage v. Annapolis Valley Band**, 2004 NSCA 147 and **Connolly v. Canada Post Corp.** 2005 NSCA 55.

Analysis

[19] With respect to the preconditions, the Court is satisfied that the second and third preconditions have clearly been met.

[20] The first precondition requires that the same question be decided in the prior and current proceedings. Central to Mr. Justice Tidman's decision to strike the Statement of Claim, was his determination, as set out in paragraph 21, that it was not a question of determining whether the facts stated could establish a claim, but simply that there were no facts stated. The Court never reached the

stage of determining questions about the merits of the plaintiff's pleadings, or whether they met the threshold of an arguable case.

[21] The Statement of Claim in this case contains in paragraphs 3, 4 and 5, facts upon which this Court is being asked to apply **Rule** 14.25, that is, that the facts pleaded, if true, could establish a claim or at least disclose a reasonable cause of action, and, if so, pursuant to **Rule** 13.01, whether there is a genuine issue for trial.

[22] This Court is not being asked to decide the same question as decided in the proceeding before Mr. Justice Tidman. The pleadings in the prior proceeding were different; that court determined that no facts were pleaded upon which any cause of action could be founded; said another way, the question of whether the facts pleaded in this action disclosed a reasonable cause of action (14.25), or, if so, constituted an arguable issue (13.01), were not decided in the prior action

[23] This Court determines that the first precondition to the application of the principle of *issue estoppel* has not been established.

[24] If the preconditions had been met, this Court would exercise discretion not to dismiss the action based on *issue estoppel* or *res judicata*.

[25] Both Mr. Justice Boudreau in the first application, and Mr. Justice Tidman in the second application, struck the Statement of Claim under **Rule** 14.25. Their

determination was made (as is required by law) solely on the pleadings and without reference to any extrinsic evidence such as contained in affidavits or oral evidence. Neither made any factual determinations.

[26] The issues raised by the plaintiff in this action have never been determined on their merits, either by way of a determination under **Rule** 13.01 for summary judgment or after a trial.

[27] As the Court said in **Danyluk** the underlining purpose of *issue estoppel* is to balance the public interest in finality of litigation with the public interest in ensuring justice is done on the facts of the particular case. There has been no prior determination of the facts alleged in this action.

SECOND ISSUE - APPLICATION TO STRIKE STATEMENT OF CLAIM PURSUANT TO RULE 14.25(1)(a)

The Law

[28] The law is clear. Wilson, J., in **Hunt v. Carey Canada Inc**. [1990] 2 S.C.R. 959, reviewed the history of applications to strike pleadings in England and Canada and at paragraph 33 set out the test in Canada governing the application of this Rule as follows:

> . . . 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?

[29] This test has been stated in similar terms on many occasions by our Court of Appeal including **Vladi Private Islands Ltd. v. Haase** (1990) 96 N.S.R.(2d) 323 at paragraphs 8 and 9, and most recently in **Tupper v. Wheeler** 2005 NSCA 74 at paragraph 19.

Analysis

[30] The Statement of Claim alleges:(a) in paragraph 3 that the plaintiff was joint with McDougall and the Company "on certain documents" thereby leaving her joint with the Company on the death of McDougall; (b) in paragraph 4, that she was joint with the Company and McDougall on a $1.3 million GIC of which $850,000.00 did not belong to the Company and in accordance with the Will she was entitled to the $850,000.00 as the surviving joint co-owner; and (c) in paragraph 5 that she was an officer and director of the Company with McDougall and on his death was the only remaining officer and director. Based on the above she claims in paragraph 6, as the surviving co-owner, title to the Company assets, $850,000.00 of the GIC, funds held in the Company safe, lost income, a "pension adjustment" , and punitive damages.

[31] An application to strike is decided on the basis of the pleadings alone without reference to any extrinsic evidence. Recognizing that the plaintiff is not represented by counsel and may therefore be inarticulate in setting out in precise legal terms her cause of action, I have attempted to construe the words generously in favour of the plaintiff to determine whether they, plainly and obviously, disclose no reasonable cause of action.

[32] A generous reading of paragraphs 3, 4, and 6 (a)(b) and (e) of the Statement of Claim suggests that the plaintiff claims that she was a joint owner or co-owner with the Company and the late Mr. McDougall on certain documents related to the Company including specifically a GIC (a portion of which did not belong to the Company but to Mr. McDougall), and that by the Will she acquired an interest in those assets and, in particular, in $850,000.00 of the GIC.

[33] This interpretation discloses a cause of action that, if true, would not be, plainly and obviously, unreasonable or unsustainable.

[34] On the other hand, paragraphs 5 and 6 (c)(d)(f) and (g) of the Statement of Claim could not, if true, form the factual basis for any legal claim; specifically, in relation to paragraph 5, the fact that she may have been the sole remaining officer and director of the Company does not in law entitle her to ownership of the Company or any of its assets. If there was some other fact which would,

when combined with her alleged role as sole remaining director and officer, entitle her to some ownership interest, it was not pleaded. Paragraph 5 of the Statement of Claim is struck out.

[35] Neither remedy sought in subparagraph 6 (c) or (d) has any relationship whatsoever to a claim of ownership or co-ownership of the Company or of any other asset of the late Mr. McDougall. These clauses are struck out.

[36] There are no facts or allegations contained in the Statement of Claim to support the claim under sub-paragraph 6(f) to the paintings, stamp collection, gold coins, and old bottles. Sub-paragraph 6(f) is struck out.

[37] No facts or allegations are contained in the Statement of Claim that would support a claim for punitive damages against the executors of the estate or the directors of the Company. Paragraph 6(g) is struck out.

[38] Dickson, C.J., in **Operation Dismantle Inc v. Canada** [1985] 1 S.C.R. 441 at paragraph 27 stated:

> . . . The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true.

[39] This Court cannot speculate, or make assumptions about the pleadings, to fill any gaps in the pleadings.

THIRD ISSUE - SUMMARY JUDGMENT RULE 13.01

The Law

[40] In **Guarantee Company of North America v. Gordon Capital Corporation** [1999] 3 S.C.R. 423, the Supreme Court, in a unanimous decision , and citing its earlier analysis in **Hercules Management Ltd. v. Ernst & Young** [1997] 2 S,C,R, 165, held at paragraph 27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial . . . Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success".

[41] The Nova Scotia Court of Appeal held, in **United Gulf Dev. v. Iskandar** , 2004 NSCA 35, that the term "no arguable issue" contained in Rule 13.01 is not appreciably different from the terms "no genuine issue" described in the Ontario Rule, upon which the **Guarantee Company of North America** case was decided.

[42] As noted by Roscoe, J.A., in **Selig v. Cook's Oil Co.,** 2005 NSCA 36, at paragraph 10, the analysis is a two part process:

> . . . First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must

> establish, on the facts that are not in dispute, that his claim has a real chance of success.

[43] In **Eikelenboom v. Holstein Association of Canada**, 2004 NSCA 103, Saunders, J.A., decided that once it is established that there are no material facts in dispute, the applicable law can be applied to the facts in order to decide whether judgement should be entered. At paragraph 28 he wrote:

> As is obvious from these portions of the judge's decision, she had determined that the material facts were not in dispute and that the law of waiver was "clear." Having reached those conclusions, she ought to have then applied the law to those facts and decided the matter before her. She appears to have gone astray by speculating that there were, or might be, other as yet undisclosed "circumstances" to explore.

APPLICANT'S EVIDENCE

[44] The evidence for the applicant (defendants) consisted of the affidavit of Michael Whynot and of Peter Bryson. Mr. Whynot was cross-examined by Ms. Ashby. Mr. Whynot is a trust officer with Canada Trust Company, which Company is co-executor and co-trustee of the estate along with Arleen Fagan, one of the daughters of McDougall. He and Ms. Fagan, were the two directors of the Company appointed by the estate shortly after McDougall's death. His affidavit and cross-examination established that:

(a) McDougall died on December 21, 1999. Whynot identified the last will and testament that was admitted to probate. The Will left all of McDougall's assets to the executors, with the exception of clause 10, which clause stated that "the co-owner of any real property, deposits, vehicles, or investments that are in our joint names when I die is the sole beneficial owner [thereof] by right of survivorship."

(b) McDougall was the sole owner of all of the shares of the Company.

(c) The Company sold its assets in 2001 and surrendered its Certificate of Incorporation and was struck off by the Registrar of Joint Stock Companies pursuant to s. 137(1) of the **Companies Act**.

(d) The plaintiff was the former bookkeeper with the Company whom McDougall described in his will as a "long time valued employee of the Company" and the executors asked her to perform some of the management functions for the Company after McDougall's death and before the business was sold.

(e) In April, 2001, Ms. Ashby was given 15 months notice of termination, and in September, 2001, was actually terminated and paid out the balance of her notice, subject to the setoff of a loan taken by her from the Company. She signed a release of the Company at that time.

(f) Based on information from John Cochrane, the lawyer for McDougall and the Company for over 40 years, Whynot established that Ms. Ashby was never a shareholder, officer or director of the Company.

(g) He outlined the prior legal proceedings taken by Ms. Ashby against the estate and Company.

[45] Through cross-examination by Ms. Ashby, the following additional facts were elicited:

(a) Ms. Ashby directed Mr. Whynot to Tab A of her affidavit consisting of a standardized business banking agreement (called "BBA") of the Toronto-Dominion Bank, form 3854. The BBA, dated May 11, 1995, was on its face, an agreement between the Company and the Bank authorizing the president or the book keeper or either of them to conduct all aspects of the Company's banking business with the Bank on behalf of the Company. The BBA identified the officers of the Company as: president and secretary - Donald C. McDougall; book keeper - Nancy Ashby. The agreement was signed on behalf of the Company by McDougall and Ashby.

(b) Whynot confirmed that Ms. Ashby was not terminated for cause, but the estate had two problems with her that resulted in her being paid out before their notice to her had run its course. The first was the purchase by her of a vehicle for the Company after the directors had discussed it and advised her not to buy it, and the second was the unauthorized taking by her for her personal use of

$20,000.00 from the GIC invested in the Company name (which loan was eventually setoff against her severence payout).

(c) Whynot acknowledged that the shares of the Company were not specifically identified in McDougall's will.

(d) Until her termination Ms. Ashby had continued to act as bookkeeper and de facto manager of the Company and within that capacity had been requested by the executors/directors to execute several documents and agreements related to Company activities, including the renewal of the pharmaceutical license, a Workers Compensation Accident Report, and documents related to the sale of the assets to Lawtons.

(e) Within a few weeks of McDougall's death the signing authority for the Company had been changed to require cheques to be signed by two of four persons, one of whom was Ms. Ashy; in addition, the required legal steps had been taken by the estate and Company to make Mr. Whynot and Ms. Fagan the sole directors of the Company.

(f) When asked by Ms. Ashby if she had, on McDougall’s death, stepped into his shoes, Whynot acknowledged that she had become de facto manager of the Company but did not agree that she had become an owner or a shareholder.

[46] Mr. Bryson's affidavit simply identified and attached as exhibits the pleadings, affidavits, and the transcript in the prior legal proceedings taken by the present plaintiff against the present defendants, and attached two letters written to the

plaintiff encouraging her to seek legal advice. Mr. Bryson was not cross-examined.

[47] None of this evidence was contradicted by Ms. Ashby, except for her claim that she was a officer and director of the Company. I have already ruled that whether she was or was not an officer or director would not bring her within the category of a "co-owner" or surviving joint owner under clause 10 of the Will.

THE RESPONDENT'S EVIDENCE

[48] The respondent filed an affidavit upon which she was not cross-examined. In addition she subpoenaed Thomas M. Jardine, a former banker with the Toronto Dominion Bank; Carl W. Kent, the long time accountant for McDougall and the Company, and John P. Cochrane, the long time lawyer for McDougall and the Company. Evidence on applications is normally received by affidavit, or agreed facts, but can be received *viva voce* with leave of the Court. Because it was clear that the witnesses subpoenaed by Ms. Ashby were not within her control and their involvement was contrary to her interest, the Court granted leave to receive their evidence orally, and gave Ms. Ashby wide latitude in examining them.

[49] Some of Ms. Ashby's affidavit consisted of declarations, conclusions and opinion that were not factual. Examples include in paragraph 1 and several other paragraphs the words "I was joint with McDougall's Drug Store Ltd.", and in paragraph 3, to the statement: "I signed ownership title to permit the sale of the company vehicle. . .", she added: "I was joint with McDougall's Drug".

[50] Ms. Ashby's affidavit sets forth the following facts:

(a) She outlined specific acts that she carried out at the request of the estate for the Company. She characterized these many acts, in paragraph 11, as follows: "These are all functions of stepping into Mr. McDougall's position."

(b) In responding to an affidavit of John Cochrane sworn September 23, 2003, and attached to her affidavit at tab "D", she made the following points:

(i) Contrary to Mr. Cochrane's claim that there were no claims against the estate for six months after the estate was advertized, she referred to a letter she wrote dated May 13, 2002, and attached as tab "X" to her affidavit, which was her claim against the estate. The Court noted that the letter dated May 13, 2002, appears, on its face, to be a claim with respect to her employment and the termination thereof by the Company, and not a claim for ownership of, or an interest in, the estate.

(ii) She disputed Mr. Cochrane's statement that she was not an officer and director of the Company (Paragraphs 24 (a) to (f) of her affidavit).

(iii) In response to Cochrane's statement that her joint signing authority with the Company's bank did not bring her under clause 10 of McDougall's will, she stated: "My joint signing authority was not all that I was joint on. I was joint on the Business Banking Agreement (BBA), becoming the joint owner in Mr. McDougall's will." This combines a statement of fact with a legal conclusion; the legal conclusion is dealt with later in this decision.

(iv) With respect to Mr. Cochrane's statement that she had retained lawyers, at least three of whom had contacted or attended upon Mr. Cochrane in his role as proctor of the estate to obtain information, she complained about them in terms of their conflicts of interest, and about misrepresentations by the Executors to them.

[51] Relevant factual information attached as exhibits to her affidavit included at Tab "A", the BBA between the Company and the TD Bank dated May, 1995, and at Tab "B", a letter written by Ms. Ashby to Mr. Jardine of the TD Bank directing that $433,000.00 of a GIC be transferred to the estate.

[52] Thomas M. Jardine is a retired employee of the TD Bank. The BBA attached as Tab "A" to Ms. Ashby's affidavit was completed by him. Between 1995 and 2001 he was the contact person for the TD Bank with the late Mr. McDougall

and his Company. He acknowledged that, at Ms. Ashby's request, he had confirmed to the New Ross Credit Union that Ms. Ashby was the signing officer for the Company's banking business with the TD Bank.

[53] When asked by Mr. Bryson to describe the effect of the BBA, he stated that it permitted Ms. Ashby to deal with the Bank on behalf of the Company, not in her personal capacity.

[54] Carl Kent was the long time accountant for the Company and McDougall. After McDougall's death he communicated with Ms. Ashby. He confirmed that in June, 2000, he had carried out an analysis of the investment account of the Company as of December, 1999. He confirmed that, after the estate had sent the employment (severence) payout offer to Ms. Ashby on September 26, 2001, he had calculated the amount of the income tax and other statutory deductions, and the interest on the loan deducted and setoff against the payout.

[55] While he was not specifically aware of the BBA, he was aware that Ms. Ashby had signing authority for the Company's banking business and assumed the Bank had the appropriate paper work signed. He recalled telling Ms. Ashby that she should get a lawyer, but not that she had "lots of rights". He says he gave this advice as standard advice to all senior employees so that they would have independent clarification of their rights and responsibilities. In answer to

questions from Mr. Bryson he stated that after McDougall's death he considered that his dealings with Ms. Ashby were in her role as the acting Manager on behalf of the Company.

[56] John B. Cochrane, the long time lawyer to McDougall and the Company initially asked the Court for clarification of his right to disclose privileged communications between him, McDougall and the Company. Mr. Bryson, on behalf of the defendants, waived solicitor/client privilege with regards to the issues relevant to this application. Mr. Cochrane confirmed that in 2000 he was proctor for the estate, and because the shares of the Company were an asset of the estate, he was solicitor for the Company. When asked if he had ever said that the shares were "silent in the will", he said that that was not a term he would use. He said the shares were not listed in the Will but were part of the residue of the estate. He said the shares were recorded in the Company's minute book in McDougall's name. He testified that, as recognized agent for the Company, he was aware that Ms. Ashby was not a director or officer of the Company and that Mr. McDougall was, during his lifetime, the sole officer and director of the Company. He stated Ms. Ashby served as a cosigning authority for banking purposes and did not hold a corporate office. When shown the BBA he noted that she was described as a bookkeeper and not as a corporate officer. When

Ms. Ashby represented in a question to Mr. Cochrane that her name was on the investments, he responded that, if she was, she was only on them as a signing officer for the Company. He confirmed that the shares of the Company had not been sold by the estate but rather that the assets of the Company had been sold. He repeated that the estate owned all of the Company shares and at a meeting held within a few weeks after McDougall's death, the shares were formally transferred to the estate as registered and beneficial owner. He stated that Ms. Ashby was the bookkeeper for the Company and became, after McDougall's death, what he described as the *de facto* manager; she looked after all of the business functions of the Company.

[57] Mr. Cochrane denied that at the sale of the Company assets to Lawtons, Ms. Ashby was asked to sign a non-competition agreement "as co-owner"; he said it was not an issue since she was not a licensed pharmacist.

[58] He testified that when Ms. Ashby did make a claim with respect to ownership of the Company and other estate assets, he tried unsuccessfully to "disavow" her of this view.

[59] When questioned by Mr. Bryson, Mr. Cochrane stated that, in addition to conversations he had with Ms. Ashby about her claim, at least three lawyers had

contacted him on her behalf, and that they may have (he was not certain) looked at the Company's minute books.

[60] At the end of the hearing, the Court asked Ms. Ashby if exhibit 3 (her affidavit) contained all of the documents that she had in support of her ownership claims and she responded in the affirmative.

ANALYSIS

[61] Central to the plaintiff's claim is the question of whether there is anything that might shown that Ms. Ashby was a co-owner or a joint owner with right of survivorship with Mr. McDougall in respect of any real property, deposits, vehicles and investments he owned as of the time of his death. The pleadings seem to claim co-ownership of the shares of the Company and a portion of a GIC supposedly invested in the names of the Company, McDougall and herself.

[62] The onus is on the applicants to show that there is no genuine issue of fact to be determined at trial.

[63] Dealing first with the Company's shares, the evidence is clear. All 5000 issued common shares of the Company belonged to McDougall at the time of his death as recorded in the minute books of the Company. Registered and beneficial ownership was transferred to the estate within a few weeks of McDougall's

death. Whynot's affidavit (at paragraph 5) and the oral evidence of Mr. Whynot and Mr. Cochrane confirm this. There is no contradictory evidence respecting the ownership of the shares. On the face of the evidence and documents before the court there is no factual basis upon which a Court find that Ms. Ashby co-owned, or owned as joint tenants with the right of survivorship, any of the shares of the Company.

[64] Having so found, Ms. Ashby must establish, on those facts, that her claim has a real chance of success. A generous reading of her affidavit and her representations to the Court make it clear that she believes that the legal basis for her co-ownership is that she and McDougall were the only signing officers of the Company and when he died she stepped into his position (paragraph 14 of her affidavit), and that by reason of her being "joint on the Business Banking Agreement" she became the co-owner of the Company pursuant to paragraph 10 of his Will (paragraph 24(h) of her affidavit).

[65] Ms. Ashby's argument is misguided and cannot succeed at trial. It is basic Company law that ownership of a corporation - usually represented by shares - is not the same as holding a directorship or being a corporate officer, or even a signing officer, of the corporation. While it seems trite to set out the basic structure of a company, the Court notes that a company is a separate legal entity.

It is owned by persons or other legal entities; ownership is usually represented by shares. Ownership of shares does not, in and of itself, give an owner any authority or right to act on behalf of the company or to sign on behalf of the company. The owners appoint directors who are responsible for the direction and operation of the company. Directors do not, by reason of being directors, acquire any ownership interest in the company or the assets of the company. Directors appoint officers who are responsible to the directors for the day to day operations of the company. Officers do not, by reason of being officers, acquire any ownership in the company or its assets. Because a company, as a separate legal entity, is inanimate, it acts eventually through its directors and officers.

[66] It is clear from the affidavit of Ms. Ashby that she has a misconception with respect to the nature of a company. The fact that she and McDougall were signing officers for the Company and, by reason of his death, she became the sole signing officer, is not relevant to the question of ownership, and does not give a right of ownership in the Company or its assets.

[67] The fact that the Will was “silent” as to the shares does not mean that McDougall's ownership of them does not fall within “all my estate” in paragraph 3. It is basic probate law that the words “all my estate” in a will conveys any asset owned at the time of death unless it was otherwise specifically excluded.

[68] With respect to Ms. Ashby's claim for co-ownership of part of the proceeds of a specific GIC, the Court notes that there is no evidence before the Court of the existence of a GIC in the name of the Company and Ms. Ashby and the late Mr. McDougall, or of a GIC in the amount of $1.3 million dollars. Neither Mr. Jardine nor Mr. Kent confirmed the existence of such a GIC.

[69] The inventory of the estate, which is set out at pages 114 - 122 of Mr. Bryson's affidavit does not disclose the existence of the GIC referred to in paragraph 4 of the Statement of Claim.

[70] The only evidence before the Court about a GIC is contained in paragraphs 14 to 17 of Mr. Whynot's affidavit of December 22, 2003, which is reproduced beginning at page 86 of Mr. Bryson's affidavit. That affidavit establishes the purchase of a GIC with a similar number to that set out in the plaintiff's Statement of Claim approximately a month before Mr. McDougall's death in the amount of $739,685.04 by the Company. The affidavit states (consistent with the letter signed by Ms. Ashby to Mr. Jardine on June 21, 2000, and attached as Tab “B” to her affidavit) that $433,628.00 was redeemed and paid to the estate, and the balance of the GIC was withdrawn in October, 2001 and the proceeds credited either to the Company or the estate.

[71] The only evidence of a GIC existing at the time of McDougall's death was of a GIC in the amount of $739,685.04 registered in the name of the Company only.

[72] Ms. Ashby's claim, as set out in the Statement of Claim, is that a $1.3 millon dollar GIC existed in the name of the Company, herself and Mr. McDougall. There is no evidence upon which a Court could find such a GIC exists.

[73] As there is no evidence of a GIC in the joint name of Ms. Ashby and Mr. McDougall and/or the Company, Ms. Ashby may take the same position as she does with respect to the shares of the Company; that is, that the Business Banking Agreement (BBA), of which she was one of two signing officers, gave her, by reason of the death of Mr. McDougall, joint co-ownership of the GIC. That argument is without any legal basis.

[74] With respect to the claim for joint ownership of a GIC, the applicants have discharged the onus of showing that there is no genuine issue of fact to be determined at trial, and the respondent has not established that her claim has a real chance of success.

[75] In summary, assuming that Ms. Ashby is the sole surviving signing officer of the Company (or the sole surviving corporate officer and director), such cannot constitute a legal basis for a claim for co-ownership or joint ownership of either the shares or assets of the Company or of any GIC.

[76] I previously cited paragraph 20 in **Eikelenboom** where the Court of Appeal pointed out that the Chamber's judge ought to have applied the law to those facts before her instead of “going astray by speculating that there were, or might be, other as yet undisclosed ‘circumstances’ to explore”.

[77] The Court has made its determination of this issue based on the evidence before it without speculating as to any other circumstances or facts that are not disclosed in the evidence before it.

[78] There is no arguable case to be tried and the Court grants summary judgment.

FOURTH ISSUE - INJUNCTION

[79] The applicants seek an order enjoining the plaintiff from commencing any further action against the estate or the Company (whose certificate of incorporation has been surrendered) without leave of the Court. They submit that authority for such an application is contained in **Rule** 43.01, and relevant to the exercise of this discretion is **Rule** 14.25(1) (c) and (d), which deal with frivolous and vexatious actions, and abuses of the process of the Court.

THE LAW

[80] The Court has inherent jurisdiction to control its own process and to prevent the abuse of that process. This is clearly set out in sections 5.390 - 5.420 of the Looseleaf Edition of the text "**Injunctions and Specific Performance"** by Robert J. Sharpe and Thomas A. Cromwell. At s. 5.410 they write:

> . . . An injunction forbidding a party from commencing a proceeding is one aspect of the court's jurisdiction to control abuses of its process.

[81] The Supreme Court of Canada dealt with the test for considering anti-suit injunctions in **Anchem Products Inc. v. British Columbia (Workers' Compensation Board),** [1993] 1 S.C.R. 897. In the context of extradition proceedings the Supreme Court of Canada expressed the same principle in **United States of America v. Shulman** [2001] 1 S.C.R. 616. The Nova Scotia Court of Appeal considered an application for an order barring further litigation in **MacCulloch v. Price Waterhouse Ltd.** (1993) 123 N.S.R.(2d) 351, but declined to order this "drastic remedy", in the absence of counsel citing authority for it, and in circumstances where the Court was of the view that future information might become available that would enable the appellant to lodge a reasonable cause of action.

[82] Saunders, J., in **Halifax (Regional Municipality) v. Ofume**, 2003 NSCA 110, at paragraph 21, cited **Orpen v. Ontario Attorney General** [1925] 2 D.L.R. 366 (O.S.C.), as follows:

> . . . it would be wrong to think that that type of case is exhaustive of the scope of inherent jurisdiction. In our view its nature is broader.

[83] Saunders, J., goes on to note, however, that Courts must be cautious in exercising the power. It should not be used to effect changes in substantive law.

[84] The applicant cited four cases that dealt with requests for an order restraining a plaintiff from commencing an action. In **Grepe v. Loam** (1887) 37 Ch. D.168 (C.A.), and **L.J.W. v. N.A.R.** [1984] M.J. 106 (Man.Q.B.), the courts granted limited orders restraining further proceedings in unique situations. In **Shaward v. Shaward** [1988] 3 W.W.R. 319 (Man.C.A.) the Court refused to grant an injunction and stated that it would take a change in legislation to authorize the prohibition of legal actions without leave of the court. In **Dieppe v. Charlebois** (1995) 163 N.B.R.(2d)394 (NBQB) the Court followed **Shaward**, and found it had no jurisdiction; the court stated the situation was a " lacuna or gap" that should be remedied by legislation.

ANALYSIS

[85] There is no question that it is frustrating to the estate, after two prior unsuccessful attempts, to again face a third similar claim made by an unrepresented plaintiff, who has consulted at least three lawyers, and whose claim has been found to be without merit.

[86] The normal method of impressing on an unsuccessful claimant the consequences of initiating repeated unsuccessful litigation is to assess costs against them on a higher than normal party and party basis.

[87] In the case at bar the defendant is a Corporation which has surrendered its certificate and an estate which at some point must wind up its affairs and move on. The Court acknowledges that the impact of the actions taken by the plaintiff are onerous, costly and time consuming. They cannot be ignored and must be taken seriously, in part, because of the quantum of damages claimed.

[88] The Court agrees that the history of the proceeding shows that the present action is vexatious and oppressive. The plaintiff appears to refuse to accept the prior decisions made by Courts, and to accept anything less than a ruling in her favour. At the same time, it might have been helpful if the defendants had, in this or the prior proceedings, produced the share certificates and/or share records of the Company, and copies of the GIC's held by the Company or McDougall at the time of his death, so as to remove, once and for all, any basis for Ms.

Ashby's belief that certificates and GIC's might exist with her name on them as co-owner or joint tenant.

[89] While it is not fair that the defendant estate must pay legal counsel to continuously respond to the similar claims from the same plaintiff, the defendants have not satisfied this court that jurisdiction exists to grant the requested injunction. The four cases cited by the defendants do not support their request; for the same reasons stated by our Court of Appeal in **MacCulloch -** in which case there had been twenty-five prior proceedings, I cannot agree that this "drastic remedy" should be granted.

COSTS

[90] According to **The Law of Costs** by Mark M. Orkin, Second Edition (Looseleaf: Canada Law Book, Aurora), at section 204, costs have traditionally been awarded as an indemnity to the party entitled, and not punishment to the payor. The normal rule was that the "winner" was entitled to party-and party costs, which costs were intended to represent incomplete indemnification for several reasons, including the desire to encourage litigants to resolve or settle their disputes out of court. There are rare and special situations, however, when courts

have recognized the need to express the court's disapproval of the conduct of a party.

[91] The current tariff that applies to Chambers applications (Tariff C), provides a party-and-party scale for awarding costs to the "winner", and a provision for multiplying the amounts where the order is determinative of the entire matter. The conduct of one of the parties is not listed as a factor in awarding a multiplier.

[92] This Court has the power, under CPR 63.02 (1) to depart from the Tariff and to award solicitor-and-client costs, and, in addition, subsection (3) of Tariff C, gives a Chambers Judge a discretion, notwithstanding the Tariff, to award costs that are just and appropriate.

[93] The leading case on when solicitor-and-client costs are appropriate is **Young v. Young** ,[1993] 4 S.C.R.3, where such costs were restricted to cases where the conduct of one of the parties was reprehensible, scandalous or outrageous. The Nova Scotia Court of Appeal reviewed this issue in **Toronto-Dominion Bank v. Lienaux**, [1997] N.S.J. 199, beginning at paragraph 32. It held that a case without merit does not warrant such costs.

[94] Unlike the **Lienaux** case, the conduct of Ms. Ashby in obsessively pursuing and "recycling" the same matter a third time, without any new information or any

significant change in the pleadings, is vexatious and a clear abuse of the processes of the Court.

[95] Solicitor-and-client costs, as between two parties, is not the same as such costs between a solicitor and his/her own client. The former only includes those services reasonably necessary to respond to the plaintiff's action, and not necessarily all the services provided by the solicitor.

[96] This court awards the defendants, on one bill, solicitor-and-client costs against the plaintiff/respondent; that is, the plaintiff shall pay all of the reasonable costs incurred by the defendants to respond to this action, as taxed or approved by this court.

J.

APPENDIX “A”

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

NANCY ELIZABETH ASHBY

PLAINTIFF

- and -

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., now 1013874 NOVA SCOTIA LIMITED and DIRECTORS MICHAEL H. WHYNOT and ARLEEN FAGAN and MICHAEL H. WHYNOT and ARLEEN FAGAN .

DEFENDANTS

STATEMENT OF CLAIM

1. I, Nancy Elizabeth Ashby, the Plaintiff, hereinafter referred to as Nancy Ashby resides at 871 Thorpe Road, RR#2 Centreville, Kings County and Province of Nova Scotia.

2. I, Nancy Ashby, was employed with McEougall's Drug Store Ltd. for Twenty eight (28) years, with primary duty being the bookkeeper, from doing deposits to financial statements and secondary duties included buying of merchandise, pricing, advertising, and hiring staff.

3. I was joint with McDougall's Drug Store Ltd. along with Mr. McDougall on certain documents, leaving myself joint with McDougall's Drug Store Ltd. upon the death of Mr. McDougall.

4. McDougall's Drug Store Ltd., Mr. McDougall and myself were joint on Investment GIC #801623810, of which had a total of $1.3 million in March of 2000, of which approximately $850,000.00 did not belong to the Company. In reference to the testimoniam clause of Mr. McDougall's will, that portion of the investment would be mine upon his death.

5. I, Nancy Ashby, confirm that I signed documents as an officer and director of McDougall's Drug Store Ltd., and being the only remaining upon the death of Mr. McDougall.

6. I, Nancy Ashby, pleads and specifically relies on documents I have, and documents that I know exist relevant to McDougall's Drug Store Ltd. and my claim. I was the co-owner and I am seeking the following relief:

(A)	Deposits, Vehicles, Investments and real property 1,887,000.00	$
(B)	Partial Investments GIC # 801623810 Estate of Donald Corbett McDougall	$ 850,000.00
(C)	Income lost	$ 777,000.00
(D)	Pension adjustment & interest	$ 38,850.00
(E)	American & Canadian funds in Corporate safe	$ 8,000.00
(F)	Paintings, stamp collection, gold coins, old bottles	
(G)	Punitive-Intentional Damages:	
	Arleen Fagan	$ 250,000.00
	Michael H. Whynot	$ 450,000.00
	The Canada Trust Company 21,000,000.00	$

Dated at Kentville, Nova Scotia, this 18th day of Feb. A.D.

Sgd

Nancy Elizabeth Ashby
871 Thorpe Road
RR#2 Centreville
Kings County, Nova Scotia
B0P 1J0
1-902-678-7102

Self Represented