IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Potter v. Courtney , 2005NSSC174

Date: 050622
Docket: S.H. 235231
Registry: Halifax

Between:

Dan Potter

Plaintiff

v.

Raymond Courtney, Tim Hill, Navigator Technologies Inc., and Burchell MacDougall

Defendants

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	April 20, 2005 in Halifax, Nova Scotia
Written Decision:	June 22, 2005
Counsel:	**Dan Potter** for himself **(**Respondent) **David Coles** for Tim Hill and Burchell MacDougall (Applicants)

By the Court:

[1] Tim Hill is counsel for Raymond Courtney and Navigator Technologies Inc. in what is referred to as the Knowledge House action. A separate action was commenced by Dan Potter, the Chair and CEO of Knowledge House Inc. against Raymond Courtney, Navigator Technologies Inc., Tim Hill and his firm, Burchell MacDougall, for the tort of civil conspiracy.

[2] Tim Hill and Burchell MacDougall apply to strike the pleadings against them pursuant to *Civil Procedure Rule 14.25* or, alternatively, to grant them summary judgment pursuant to *Civil Procedure Rule 13*.

ISSUES

1. Should the pleadings be struck? or
2. Should summary judgment be granted to the defendants, Tim Hill and Burchell MacDougall?

FACTS

[3] Some facts about the Knowledge House Inc. action are required to put this application and this action in context.

[4] Knowledge House Inc. ("KHI") was a publicly traded company and the price of its shares collapsed in 2001. National Bank Financial Limited ("National") commenced action against sixteen of its account holders who had margin loan accounts using KHI shares and other securities as collateral. The actions were consolidated into a single action in July 2002. One of the defendants to the debt action alleges stock price manipulation with respect to KHI. That defendant named a number of individuals, including an employee of National, as one involved in the stock price manipulation.

[5] In a separate action, National sued a number of parties, including KHI and Dan Potter. National claims in that action that certain defendants engaged in an unlawful scheme to manipulate the price of the common shares of KHI.

[6] The present action was commenced on November 17, 2004 by Dan Potter against Raymond Courtney, his company, Navigator Technologies Inc. ("Navigator") and Tim Hill and his firm. In a statement of claim comprising thirty-seven paragraphs and nine pages, Dan Potter refers to KHI having ceased operations after becoming insolvent and making a proposal to its creditors in October 2001. It says Raymond Courtney had previously been an officer and director of KHI and president of its Information Technology Services subsidiary (para. 7). In October 2001, Potter, as Chair and CEO of KHI, negotiated a services contract with Raymond Courtney as president of Navigator under which Courtney and Navigator were retained to assist KHI in selling its excess computer equipment (para. 8). The computer equipment included email data and Potter says his email account contained over 16,000 email documents, including hundreds which he says were protected by solicitor/client privilege (para. 9).

[7] Potter says that in October 2002 Navigator purchased the remaining computer equipment but the purchase did not include email software or the email data (para. 10). He refers to the debt action and, in para. 12, to a request by legal counsel for one of the defendants in that action for a copy of Potter's email documents from the computers purchased by Navigator. The Statement of Claim says in para. 13:

> 13. ... Courtney and Hill secretly and deceitfully agreed and decided to convert all of the email accounts and email documents and to use Potter's email documents - including the documents protected by solicitor-client privilege and the private communications - against him in litigation and to otherwise embarrass and injure him.

[8] In subsequent paragraphs of the Statement of Claim, Potter refers to Hill and Navigator providing counsel for National with the computer equipment, including email documents. Dan Potter says that thereafter National began a lawsuit against a number of parties including himself. That is the action which I refer to as the KHI action. In paragraphs 27 to 29, Potter sets out various actions of Courtney, Hill and Navigator and then, in paras. 30 and 31, claims two alternative methods by which Courtney, Hill and Navigator committed the tort of civil conspiracy. Paragraphs 30 and 31 are as follows:

> 30. The Plaintiff repeats the foregoing and says that, beginning sometime after October 2001, some or all of Courtney, Hill and Navigator agreed and conspired with each other, with the predominant purpose of injuring Potter by appropriating

> Potter's email documents, including documents protected by solicitor-client privilege and documents containing private communications that are not relevant to any matter in question in any legal proceeding, so as to provide the documents to the legal counsel for NBFL and to the NSSC, as well as to use the documents in developing and prosecuting a lawsuit by Courtney against Potter.
>
> 31. Alternatively, beginning sometime after October 2001, some or all of Courtney, Hill and Navigator agreed and conspired with each other by unlawful means to appropriate Potter's email documents, including documents protected by solicitor-client privilege and documents containing private communications that are not relevant to any matter in question in any legal proceeding, so as to provide the documents to the legal counsel for NBFL and to the NSSC, as well as to use the documents in developing and prosecuting a lawsuit by Courtney against Potter in circumstances where some or all of them knew or ought to have known that injury to Potter would result from their acts.

[9] He further says in para. 34:

> 34. The Plaintiff says that the torts, crimes, egregious and illegal breaches of solicitor-client privilege, violations of privacy and other wrongful acts committed by the defendants in furtherance of the conspiracy were committed in bad faith, were recklessly high-handed, supremely arrogant, contumacious, malicious, arbitrary and reprehensible and constituted misconduct that departed to a marked degree from ordinary standards of decent behaviour.

[10] The remedies he seeks are set out in paragraph 37 and include the return of all copies of Potter's email account and email documents, special damages, general damages, aggravated damages, punitive and exemplary damages and solicitor-client costs.

[11] On the same date that this action was commenced, Potter amended a previously filed Interlocutory Application in the KHI action seeking, among others, the following orders:

> 1. Pursuant to the Court's inherent jurisdiction to control abuse of process and contempt of court and pursuant to Civil Procedure Rule 14.25(1)(b), (c) and (d), that the statement of claim of National Bank Financial Ltd. ('NBFL') as against Potter, KHI and Starr's Point and the Crossclaim of Raymond Courtney ('Courtney') as against Potter in this proceeding be struck out and that the proceedings be dismissed or stayed on ground that:

a. NBFL and its counsel, Alan V. Parish, Q.C. and Brian K. Awad, and Courtney and his counsel, Tim Hill, are guilty of contempt of this Honourable Court by committing egregious and oppressive breaches of the solicitor-client privileges of the Applicants, which breaches were calculated in that they objectively ought to have been foreseen to interfere with the administration of justice and to prejudice a fair trial in this proceeding;

b. NBFL and its counsel, Alan V. Parish, Q.C. and Brian K. Awad, and Courtney and his counsel, Tim Hill, committed an abuse of the processes and procedures of this Honourable Court by their egregious and oppressive breaches of the solicitor-client privileges of the Applicants, which breaches were a flagrant misuse of the Court's procedure in a way that was manifestly unfair to the Applicants and which bring the administration of justice into disrepute;

5. In addition, on the ground that the breaches of the Applicants' solicitor-client privileges by Raymond Courtney and his Counsel, Tim Hill, were committed in bad faith, were recklessly high-handed, supremely arrogant, contumacious, malicious, arbitrary, reprehensible and constituted misconduct that departed to a marked degree from ordinary standards of decent behaviour, that they each pay aggravated damages and punitive damages to the Applicants.

6. In addition, ancillary to the orders applied for above, further orders requiring that:

a. no persons associated in the practice of law with Alan V. Parish, Q.C., Brian K. Awad or Tim Hill shall provide advice to any party in this or any related proceeding;

c. all parties and other persons who possess or received the subject emails and other documents formerly stored on the KHI email server, give over the materials to Dan Potter on behalf of KHI and delete or otherwise destroy all other copies of such materials, subject to verification and restraining provisions to ensure preservation and safe keeping of the materials for purposes of this proceeding; and,

d. pursuant to Civil Procedure Rule 63.15, NBFL, Alan V. Parish, Q.C., Brian K. Awad and Tim Hill pay costs to the Applicants on a solicitor and client basis for the wasted costs arising from their misconduct.

[12] The application in the KHI action was heard by Justice J.E. Scanlan on thirteen days in March 2005, after which decision was reserved. That decision was released on May 10, 2005 subsequent to the date on which I heard the application in this action.

[13] Paragraph 10 of the decision by Justice Scanlan sets out what was sought in the application he heard. Justice Scanlan said:

> 10. The principal ground for the application is an allegation that NBFL's [National Bank Financial Limited] counsel wrongfully accessed documents protected by solicitor/client privilege belonging to some or all of the applicants. They also asked the Court to find NFBL in contempt and to find that other actions of NBFL amounted to an abuse of the Court's process warranting a stay of proceedings.

[14] The result of the application was the removal of National's solicitors who had been involved in the action to the date of the decision. In paragraph 110 of his decision, Justice Scanlan says:

> 110. They are to have no further involvement in the file other than to ensure it is purged of all privileged documents before handing the file over to other counsel. They are directed not to disclose directly or indirectly the contents of any privileged documents or any documents over which privilege has been asserted. This includes any reference to the contents of any privileged documents in their notes.

[15] He continued in para. 111:

> 111. I am satisfied the sections of the pleadings that were drafted in reliance of the materials on the server should be removed from the statement of claim as filed by NBFL. The proper processes could then be invoked in terms of determining which emails are subject to privilege protection and which, **if any**, have lost that protection through the operation of law, i.e. as the result of being in furtherance of any legal purpose, waiver through reliance, etc. [emphasis in original]

[16] Justice Scanlan declined to stay the National action and also declined to remove Tim Hill as counsel for Raymond Courtney and Navigator. In para. 157 of the decision, Justice Scanlan says:

> 157. While I do not condone the actions of Mr. Hill or his client, Mr. Courtney, I am not prepared to order that Mr. Hill be removed from the file. He had not reviewed the emails in question and is not in a position to use the information contained therein as against Mr. Potter or others. I wish to make it clear that I am satisfied Mr. Hill should have recognized the question of ownership of the data on the servers as being a very serious question and complex litigation matter. To simply turn the servers over to Messrs. Parish and Awad is to ignore the seriousness of that issue. It was a serious lapse in judgment on Mr. Hill's part.

[17] Justice Scanlan then concluded in that para.:

> ... it should now be obvious to all involved, including Mr. Hill, that what was done was not appropriate and their actions may well have jeopardized the interests of their own clients. I am not prepared to remove Mr. Hill from the file and I do not stay the Courtney actions.

Application to Strike

[18] *Civil Procedure Rule 14.25* provides 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,
>
> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
>
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).

[19] I conclude that para. (a) is not applicable in this case. Based upon a reading of the Statement of Claim, I conclude that the facts, if proven, do establish a cause of action, that of civil conspiracy.

[20] In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the court dealt with striking a statement of claim. Wilson, J. said in paras. 30 and 31:

30 While this Court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the 'plain and obvious' test. Justice Estey, speaking for the Court in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, stated at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that 'the case is beyond doubt': ...

31 I had occasion to affirm this proposition in Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441. At pages 486-87 I provided the following summary of the law in this area (with which the rest of the Court concurred):

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action 'with some chance of success' (Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in Dowson v. Government of Canada (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it 'plain and obvious that the action cannot succeed?'
>
> And at p. 477 I observed:
>
> It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that [page980] reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs. [Emphasis added]

[21] The question in that case, as in this, was as set out in para. 34:

34 The question therefore to which we must now turn in this appeal is whether it is 'plain and obvious' that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

[22] In para. 35, Wilson, J. said:

> 35 In the last decade the tort of conspiracy has received a considerable amount of attention. In England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff.

[23] Both alternatives are pleaded in Potter's statement of claim.

[24] At para. 40, Wilson, J. said that the law in Canada is not the same as that in England. She said:

> 40 Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in Lonrho. Indeed, this Court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in Lonrho in Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, Justice Estey stated at p. 468:
>
> > The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases I which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff.

[25] In *Canada Cement*, Estey, J. concluded (as quoted in para. 42 of *Hunt v. Carey*):

> 42 ...
>
> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

[26] If the facts alleged by Potter are proven, a claim of civil conspiracy is made out. I am to assume for the purposes of this application that they are proven. Furthermore, I am not to consider affidavit evidence in making this determination. I therefore do not consider the affidavits of Tim Hill or Dan Potter in arriving at my conclusion.

[27] I have referred to and quoted passages from the statement of claim above. Based upon the allegations set out in the statement of claim, I conclude it is not 'plain and obvious' that the action cannot succeed.

[28] It is upon clauses (b) and (d) that Mr. Coles, acting for Mr. Hill and Burchell MacDougall, has focused.

[29] What is at the heart of this lawsuit are the email documents, what was done with them and the intent with which it was done. It is true that the matter of the email documents was dealt with in the decision of Justice Scanlan in the KHI action. However, the focus of the allegations in the KHI lawsuit and the focus of the Statement of Claim in this lawsuit are quite different.

[30] In the KHI action, the allegation is stock manipulation. Part of the evidence of that may be contained in the email documents. The importance of those documents is their contents and whether they contain proof of National's allegations. Their significance in this regard is somewhat obscured by the issue of breach of solicitor-client privilege attaching to some of the email documents.

[31] This action is against those who directly or indirectly provided the email documents to counsel for National. The significance of the email documents is the intent with which they were provided, if provided legally or alternatively, if provided unlawfully, the "constructive intent" (using Estey, J.'s words) with which they were provided.

[32] Even if none were found to be privileged, or if all were found to be so, that finding would, in my view, have no effect upon the tort of civil conspiracy.

[33] The issue with respect to the email documents in this case is the provision of the email documents.

[34] I also note that Tim Hill represents Courtney and Navigator in the KHI action. It is only in this action that he and his firm are named as parties.

[35] As I have reviewed above, the application in the KHI action dealt with the solicitor-client privileged email documents. The object of the application was to seek the removal of counsel for National as well as counsel for Raymond Courtney and Navigator Technologies. Dan Potter also sought a stay of National's lawsuit and the claims by Raymond Courtney. The stays were not granted.

[36] In the application heard by Justice Scanlan the issue of solicitor-client privileged communications in email documents was the focus of the decision to remove counsel for National. Dan Potter identified many documents over which he claimed solicitor-client privilege either on his own behalf or on behalf of one of the companies involved in that action. In para. 57 of the decision, Justice Scanlan says:

> 57. In my correspondence to counsel after reviewing the email, I did not deal with the issue of waiver of privilege through operation of law. In saying this, I note solicitor-client communication in furtherance of illegal purpose will not be protected by privilege. In the present case, there have been allegations of illegal purpose. These hearings on the issue of privilege have not thus far focused on illegal purpose. If at any time a court is satisfied any communications were in furtherance of illegal purpose then privilege for those documents or that series of documents will be lost. A hearing on that issue will be complex and likely involve extrinsic evidence beyond the emails themselves.

[37] As is apparent from the above, the issue of solicitor-client privileged communications may not be completely exhausted in the KHI action. Another issue that arises in paras. 84 to 94 of the decision is privilege insofar as it relates to KHI directors, of which Raymond Courtney, one of the defendants in this action, was one. At para. 88, Justice Scanlan says:

> 88. Raymond Courtney has pursued a claim in the stock manipulation action. As a director of KHI at the relevant time Mr. Courtney is entitled to rely upon and review any KHI documents on the KHI server even if they are *prima facie* privileged insofar as they relate to the KHI activities in question. ...

[38] In paras. 90 and 91, Justice Scanlan refers to other parties who have alleged stock manipulation and who were directors of KHI. Justice Scanlan says:

> 91. As directors they are entitled to plead reliance upon such communications, including any that are privileged.

[39] Furthermore, in para. 155, Justice Scanlan says:

> 155. Each and every document over which privilege is asserted can be reviewed to see if there has been an actual waiver by the holder of the privilege or waiver through operation of the law.

[40] It is clear to me that the issue of the email documents insofar as it relates to the KHI action has not been concluded. The question for me is whether the pleadings in this action against Hill and Burchell MacDougall should be struck as either vexatious or an abuse of the court's process or both.

The Law

[41] In *Lang Michener et al v. Fabian et al*, [1987] 37 D.L.R. (4th) 685, Justice Henry of the Ontario High Court of Justice dealt with what is a vexatious proceeding. Justice Henry reviewed a number of cases on the subject and then said (at p. 5 of 7 of the Quicklaw version):

> From these decisions the following principles may be extracted:
>
> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
>
> (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
>
> (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[42] In *Patricia B. MacCulloch v. Price Waterhouse Limited* (1992), 115 N.S.R. (2d) and 314 A.P.R. 131 (NSSCTD), an application was made to strike out pleadings on the basis, *inter alia*, that:

> 2. (b) as the allegations in the plaintiff's pleadings having been put in issue in previous proceedings, the plaintiff is barred by the principle of issue estoppel from relitigating the same issues and/or the issues raised are res judicata; ...

[43] In her decision at para. 51 Chief Justice Glube of the Trial Division (as she then was) said:

> 51. ... It appears that Mrs. MacCulloch wishes to relitigate matters which have been previously decided against her; ...

[44] Chief Justice Glube then concluded in para. 55:

> 55. ... Both of the actions are duplicitous and the multiplicity of actions which basically deal with the same matters leads to the inevitable conclusion that these two actions should be struck out under C.P.R. 14.25 (1)(b) or (d).

[45] In *Hoque v. Montreal Trust Co. of Canada*, [1997] N.S.J. No. 430 (N.S.C.A), the plaintiff was not permitted to allege anything in the new action which was inconsistent with matters essential to the findings in the previous action. Justice Cromwell said in para. 21:

> 21. Res judicata is mainly concerned with two principles. First, there is a principle that '... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed': see Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This '... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.' ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

[46] He concluded in para. 37:

> 37. Although many of these authorities cite with approval the broad language of Henderson v. Henderson, supra, to the effect that any matter which the

> parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on 'new' evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[47] In *Wentzell v. Nova Scotia (Attorney General)* (1985), 69 N.S.R. (2d) 349 (NSSCTD), Glube, C.J.T.D. (as she then was) said in para. 11:

> 11 A party cannot be allowed to come to the court with one issue and when unsuccessful, try to forward another issue on the same facts where the original decision goes against the party.

[48] She continued in para. 13:

> 13 It would be an abuse of our system to allow new litigation to decide an issue already determined and forming part of the reasoning for a previous decision and where the parties are the same.

[49] Applying the principles set out in these cases, I cannot conclude that this action against Tim Hill and Burchell MacDougall is vexatious or an abuse of the court's process.

[50] Although the issue of the solicitor-client privileged comminations in the email documents has been an issue and continues to be an issue in the KHI action, the result in that action does not determine the result of the civil conspiracy claim. As I have said above when dealing with *Civil Procedure Rule 14.25 (a)*, it is not "plain and obvious" to me that the action cannot succeed. Similarly, it is not obvious that this action is brought for an improper purpose. Although this action is brought against the lawyer acting for Raymond Courtney and Navigator in the KHI action, there is an issue with respect to the alleged actions of Raymond Courtney and Tim Hill which, if proven, could form the basis of a civil conspiracy action. I make no comment on the likelihood of its success.

[51] Although the issue of the email documents has been the subject of an application in the KHI action, it was with respect to solicitor-client privilege in some email documents. That is a side issue, albeit an important one, in that action; whereas the very heart of the tort of civil conspiracy alleged in this action is the act of providing all the email documents, not just the solicitor-client privileged ones.

[52] Only one issue with respect to the email document has been litigated. In my view, this is not a situation where there is a history of proceedings such that this one can be considered to be vexatious.

[53] The *MacCulloch* case referred to *Lang Michener* and, in that case, it was significant that Mrs. MacCulloch was bringing matters before the court which, according to Chief Justice Glube, had previously been decided against her. At the time this action was commenced, the application in the KHI action had not been heard. As I have said, the KHI application dealt only with one aspect of the email document issue.

[54] I turn now to the considerations Justice Cromwell referred to in *Hoque* . I conclude that this proceeding is not a collateral attack on earlier findings but one which can continue regardless of what findings had been made or will be made in the KHI matter.

[55] The claim of civil conspiracy is a new cause of action based upon conduct dealing with all the email documents provided to National. This action does not depend on new evidence which could have been discovered in the earlier proceeding. In my view, the two proceedings relate to separate and distinct causes of action. Therefore, the second proceeding does not, in this case, constitute an abuse of process.

[56] Unlike the situation in *Wentzell,* Potter was not unsuccessful in a previous proceeding in putting forward another issue on the same facts.

[57] I cannot conclude that the pleadings against Tim Hill and MacDougall should be struck. The findings made by Justice Scanlan do not, in my view, affect the findings which will be made in this action. His findings dealt with one aspect only of the email documents and dealt only marginally with the actions of Tim Hill.

[58] In para. 27, Justice Scanlan said Tim Hill had no right to waive privilege. That is not in issue in this action.

[59] In para 78, Scanlan, J. queried why Mr. Hill and others did not question the possibility of there being solicitor-client privileged documents on the server. He made no adverse finding about Tim Hill in that regard and the query was limited to the issue of solicitor-client privilege.

[60] In para. 103, Scanlan, J. said the disclosure of the email documents was through the actions of Hill and others. That is not in dispute. He said the actions "surreptitiously" involved the transfer of possession of the server with the email documents. This was said in the context of Potter's knowledge of the transfer of his email documents and it is not in dispute that this was in fact done without Potter's knowledge.

[61] The principal portion of the decision dealing with Tim Hill is para. 157, part of which is quoted above. In that passage, Scanlan, J. only says he will not remove Hill from the file because, in the context of the solicitor-client privileged documents, he was not tainted by knowing their contents. Scanlan, J. referred to Hill's "serious lapse in judgment" in not considering the ownership of the data on the servers. This too was in the context of the solicitor-client privileged documents. These comments do not address Hill's intent or constructive intent in the context of the tort of civil conspiracy.

[62] In my view, any further applications in the KHI action dealing with waiver of solicitor-client privilege of the email documents will not cause a risk of inconsistent findings, at least insofar as Tim Hill and his firm are concerned. Any such issues which might arise with respect to Courtney and Navigator are not before me.

Summary Judgment

[63] Mr. Coles' alternate argument is that Hill and Burchell MacDougall should be granted summary judgment. *Civil Procedure Rule 13* provides:

> **Application for a summary judgment**

> **13.01**. After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
>
> (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[64] The test for summary judgment for defendants has been set out in a number of cases since the *Rule* was amended to permit such applications. In *United Gulf Developments Ltd. v. Iskandar*, [2004] N.S.J. No. 66 (N.S.C.A.), Roscoe, J.A. said in para 9:

> ... I concur with the Chambers judge that the appropriate test where a defendant brings an application for summary judgment in Nova Scotia is the test as set out in Guarantee Co. Of North America v. Gordon Capital Corp. [1999] 3 S.C.R. 423:
>
> 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, and therefore summary judgment is a proper question for consideration by the court. See Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, at para. 15; Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then 'establish his claim as being one with a real chance of success' (Hercules, supra, at para. 15)

[65] The first step is for the applicants in this case, Hill and his firm, to establish that there is "no genuine issue of material fact requiring trial".

[66] Mr. Coles submits there are no material facts in issue but this is disputed by Mr. Potter. Although some facts with respect to the transfer of the computer equipment containing the email documents are not in dispute, for example, that the email software and documents were not transferred with it, in my view, there are material facts critical to the issue of civil conspiracy which are very much in dispute.

[67] Mr. Hills' position is that he acted in his capacity as an officer of the court and in pursuance of his obligations under the *Civil Procedure Rules* to disclose information obtained from his client to National's counsel. In written submissions to the court he also submits that:

> The allegations of solicitor-client privilege are unfounded and any privacy rights belonging to Potter were not breached nor did Mr. Hill or his firm have an obligation to Mr. Potter.

[68] The pleadings refer to an agreement and conspiracy to injure Potter by appropriating the email documents or, alternatively, an agreement by unlawful means to appropriate the email documents in circumstances knowing that injury to Potter would result. The legal determination of the tort of civil conspiracy will be based upon facts which will only come out at trial. These facts are very much in dispute. Therefore, the defendants have not met the first step in the test for summary judgment which is to show there are no material facts in dispute. The application for summary judgment is also dismissed.

[69] The true extent of the damages alleged to have been caused by the defendants will not, in my view, be known until the KHI action has concluded. *Civil Procedure Rule 39.02* provides:

> **Consolidation, etc., proceeding**
>
> **39.02.** Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) some common question of law or fact arises in both or all of them;
>
> (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions;
>
> (c) for some other reason it is desirable to make an order under this rule; the court may order the proceedings to be consolidated on such terms as it thinks just, or may order them to be tried at the same time, or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.

[70] Accordingly, it is my view that this action should be stayed until the determination of the KHI action. If the parties do not agree to do so, either may make an application in Chambers under *Rule 39.02(c).*

COSTS

[71] Since Potter has been successful on this application, he is entitled to his costs.

[72] Potter seeks solicitor-client costs. In *McBeth v. Dalhousie University,* [1986] N.S.J. No. 159 (N.S.S.C. App. Div.), the court concluded that a self-represented party could be awarded costs. She was awarded party-party costs in that case.

[73] Dan Potter has a law degree but is not a practising lawyer. He has not incurred costs of a solicitor to defend this application. In such circumstances, I cannot conclude that he is entitled to an award of solicitor-client costs. Nor do I conclude the circumstances of this application are such that an award of solicitor-client costs would be appropriate even if he had counsel.

[74] The hearing was slightly more than a half day; however, almost half of that time was spent by Mr. Potter cross-examining Mr. Hill on his affidavit. That cross-examination was of little assistance to me in making this decision. For that reason, I award costs to Mr. Potter based upon a hearing of less than one-half day. He is entitled to costs in the amount of $750.00 payable forthwith.

Hood, J.