

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hart, Macdonald and Matthews, JJ.A.

BETWEEN:

PATRICIA BREDIN MacCULLOCH)	David A. Copp
)	for appellant
Appellant)	
)	
-and-)	Carl A. Holm, Q.C.,
)	for respondent
PRICE WATERHOUSE LIMITED,)	
Trustee in Bankruptcy of)	
the Estate of Charles E.)	Appeal heard:
MacCulloch, deceased)	March 20, 1987
)	
Respondent)	Judgment delivered:
)	April 15, 1987
)	
)	
)	

THE COURT: Appeal dismissed with costs per reasons for judgment of Matthews, J.A., Hart and Macdonald, JJ.A. concurring.

MATTHEWS, J.A.:

The issue here is whether the trial judge conducted an accounting in accordance with the direction of this Court.

The appellant is the widow of the late Charles E. MacCulloch and one of the executors of his estate. She purchased certain estate property for the sum of \$500,000.00. That property consisted of the Monte Vista Farm at Enfield, Nova Scotia, and a condominium in Toronto, Ontario, together with some personal property mainly in conjunction with those two properties. She did not disclose to the other executors, the beneficiaries or the creditors of the estate, that she had a previous agreement to re-sell the farm property for \$1,350,000.00. She subsequently sold the condominium for \$485,000.00. The estate was petitioned into bankruptcy by creditors. The respondent, the trustee in bankruptcy, brought actions against the appellant for a declaration that she held the proceeds from the sales in trust for the trustee and for an accounting of the profits realized on the sales.

The trial judge, Richard, J., in dismissing that action, found that although the appellant was clearly in breach of her fiduciary duty as a trustee and executrix of the estate, such duty was not owed to the creditors of the estate. This Court allowed the appeal from Justice Richard's decision finding that a fiduciary relationship did exist between the appellant and the creditors. The Court directed that the appellant hold the proceeds of the sale of the properties in trust for the respondent and ordered that the appellant account to the respondent for the

profits made on the re-sale of those properties:

"The accounting should be held by the trial Judge who will determine all matters necessary to take the accounts, including the interest to be paid on the balance due and the order for payment."

Details respecting the facts and the reasons can be found in the decision of Richard, J., reported in (1985), 69 N.S.R. (2d) 167, and the reasons of Jones, J.A., in (1986), 72 N.S.R. (2d) 1.

Leave to appeal to the Supreme Court of Canada was denied without reasons - see, (1986), 73 N.S.R. (2d) 270.

Richard, J., conducted the accounting on June 9 and 10, 1986, and rendered his decision on August 19, 1986.

The sale price of the farm property was, as earlier stated, \$1,350,000.00. Briefly put, the trial judge allowed the following expenses in respect to the farm:

"Payment to Realtor	\$65,000.00
Legal Fees	8,606.00
Deed Transfer Tax	2,700.00
Travel Expenses	5,000.00
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TOTAL	\$81,306.00 "

He deducted that amount together with the sum of \$500,000.00 being the price the appellant paid to the estate for the two properties, and determined the appellant accountable to the respondent for the balance, \$768,694.00.

The gross proceeds from the sale of the condominium totalled \$485,000.00. That condominium was purchased as a shell and the appellant at her expense made certain improvements before she sold it. The trial judge permitted the following expenses to be deducted from the sale price:

"Legal Fees	\$ 2,456.93
Real Estate Commission	29,100.00
Travel and Administrative Expense	3,371.00
Improvements	33,037.00
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TOTAL	\$67,964.93"

The balance for which the appellant is here accountable to the respondent is \$417,035.07.

The trial judge then determined that the respondent have judgment against the appellant with respect to the Monte Vista Farm property in the amount of \$768,694.00 together with interest at the rate of 12.39 per cent per annum from January 1, 1982, to the date of judgment, and with respect to the condominium in the amount of \$416,035.07 together with interest at the rate of 12.39 per cent per annum from February 1, 1983, to the date of judgment. Parenthetically I point out that it appears that there is an error in that latter figure and the correct amount should be \$417,035.07. In respect to some five acres reserved from the sale of the Monte Vista Farm by the appellant, the trial judge declared that the appellant hold whatever consideration was received by her in trust for the benefit of the respondent.

The appellant now appeals from that accounting setting out five issues:

- "1. The learned trial judge erred in law in failing to consider or allow the Appellant's claim for a trust interest in the Monte Vista Farm property pursuant to the principles enunciated in the cases Rathwell v. Rathwell, Pettkus v. Becker, and Palachik v. Kiss.

2. The learned trial judge erred in law in failing to find that the Appellant was entitled to an adjudication of the issue of any allowance for the capitalized value of her rights to a lifetime occupation and maintenance of the Monte Vista Farm Property by virtue of the operation of the Canadian Charter of Rights and Freedoms.
3. The learned trial judge erred in law in failing to consider and allow the claim of the Appellant for a deduction of the value of chattels sold by her to the purchaser of the Monte Vista Farm Property and which were not acquired by the Appellant from the Plaintiff in the transaction complained of, together with the value of improvements of the Monte Vista Farm Property made personally by the Appellant during her occupation of that property following the death of her husband.
4. The learned trial judge erred in law by failing to make provision in his decision for the adjudication of the issue of ownership of the Toronto Condominium Property and in failing to direct that the obligation of the Appellant to account for the proceeds of resale of the Toronto Condominium Property should be subject to such adjudication.
5. Such further and other grounds as may appear on the hearing of the appeal herein."

Jones, J.A., gave explicit instructions as to the accounting. He said in part at pp. 10-11 of the Report:

"...it seems to me that a calculation of the profits in this instance should be a relatively simple matter as I do not think that the respondent is entitled to offset any claims which she purportedly has against the estate as a beneficiary or otherwise. She used trust property which belonged to the estate and therefore any profit accumulating from the use of the property belongs to the estate..."

And at pp. 11-12:

"The effect of allowing the appeal in this case is to set aside the transaction insofar as the respondent is concerned. Accordingly, any purported settlement of the respondent's rights must fall by the wayside. Certainly the respondent cannot claim a settlement of those rights against the beneficiaries under the will where their consent was obtained without a full disclosure; nor should she be allowed to gain priority over creditors through that route. There is some authority that expenses involved in the sale may be considered on an accounting. See **Waters' Law of Trusts in Canada**, p. 1003; **The Law of Restitution** by Goff and Jones, p. 447. I make no final determination on that issue at this time as it depends on all of the circumstances to be dealt with on the accounting. I would make it clear, however, that the trustee is not entitled to anything on the accounting for her own services or in respect to any claims she may have by way of settlement or against the estate.

.....

"With reference to the disposition of any balance that may be payable to the estate I do not think this court is in a position to decide the matter. I think it is clear from this decision that there are many issues left to be resolved and all of the parties are not represented in these proceedings, specifically the remaining trustees and beneficiaries. No reason was advanced on to why they were not joined in this action. Counsel were unable to inform the court as to whether the estate will in fact recover any surplus. I see no reason why the Trustee in Bankruptcy should be concerned with any surplus which falls to be disposed of under the will. Accordingly, it is not appropriate to rule on any other rights of the parties, including those of the respondent, insofar as this stage of the proceedings is concerned."

Appellant's counsel placed before the trial judge at the accounting much the same as that which later was contained in the first four issues before this Court. At the accounting

Richard, J., commented as to those issues:

"Much of the evidence which she gave on that day in no way related to the proving of her accounts but rather related to matters which were not properly before me. One could speculate that the defendant appeared unwilling to accept the rulings of the Appeal Division as being finally determinative of the matter..."

As the trial judge said, those arguments placed before him, and indeed reiterated before us, "run counter to the clear directive of the Appeal Division".

The trial judge emphasized the definitive instructions he was given by this Court:

"Whatever other rights the defendant may have against the plaintiff, the estate of the late Charles MacCulloch or any of the executors, trustees or beneficiaries will have to be dealt with in other proceedings."

And further:

"If the defendant has a claim against the estate for any property which was allegedly purchased by her or was the subject of an inter vivos gift from the testator then this claim may be pressed in another action."

It is apparent from his decision that the trial judge carefully considered all of the arguments placed before him. In my opinion he made no error in law in reaching his conclusions. He did that which he was directed to do by this Court and he carried out his function properly.

This appeal does not concern the equities between these or any prospective party. The question of title to any of the personal property or to the condominium is not before us. The issue here is that of the propriety of the accounting in

which all of the assets of the estate must be returned. I repeat that which both Jones, J.A., and Richard, J., pointed out, there are many issues left to be determined and those issues should only be resolved when all of the interested parties are before the court. It would not be appropriate to make further comment upon those issues at this time.

Counsel for the appellant informed us that another action is in its initial stages where these, and apparently other issues, will be determined.


The appellant sought to apply the provisions of ss. 7 and 8 of the Canadian Charter of Rights and Freedoms. The Charter does not apply to private litigation, which is the case here. McIntyre, J., in SDGMR v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at p. 597, and at pp. 603-4:

"While, as we have found, the Charter applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the Charter..."


As to Issue 5 appellant's counsel urged that due to the alleged impecuniosity of the appellant and the fact that apparently the estate is no longer insolvent, there being more than sufficient assets to pay all of the creditors, the respondent be permitted to execute on its judgment only "upon application by the Respondent to a Judge and upon the demonstration that such execution is reasonably necessary for the protection of the interest of the creditors". The

jurisdiction of this Court to stay execution is set out in Civil Procedure Rule 62.10. We have no jurisdiction to comply with this request.

I would dismiss the appeal with costs to the respondent.


J.A.

Concurred in:

Hart, J.A. 

Macdonald, J.A. 