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2005 CarswellOnt 972

Brown Estate (Trustee of) v. Chin

BRENDA NICHOLS v. THE BANK OF NOVA SCOTIA, ESTATE TRUSTEE FOR THE ESTATE OF  
ROBERT GUY BROWN; Nichol Brown, c/o The Office of the Children's Lawyer; Glen  
Brown; Susanne Vidito

THE BANK OF NOVA SCOTIA TRUST COMPANY in their capacity as the Estate Trustee  
Without a Will of the Estate of Robert Guy Brown, deceased v. PETER CHIN,  
PATRICIA BROWN, BRENDA NICHOLS, GLEN BROWN, SUZANNE VIDITO for and on behalf of  
a minor, THE CHILDREN'S LAWYER AND BONNIE BROWN

Ontario Superior Court of Justice

DiTomaso J.

Heard: February 10, 2005  
Judgment: February 24, 2005[FN\*]  
Docket: Barrie 03-2466, FLA 741-04

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Proceedings: refusing leave to appeal *Brown Estate (Trustee of) v. Chin* ((2005)), 2005 CarswellOnt 62, 15 E.T.R. (3d) 67 ((Ont. S.C.J.)); additional reasons to *Brown Estate (Trustee of) v. Chin* ((2004)), 2004 CarswellOnt 4547, 15 E.T.R. (3d) 60 ((Ont. S.C.J.)); additional reasons to *Brown Estate (Trustee of) v. Chin* ((2005)), 2005 CarswellOnt 1372, 15 E.T.R. (3d) 77 ((Ont. S.C.J.))

Counsel: Martin J. Prost for Applicant

Kimberley A. **Whaley** for Respondent

Subject: Estates and Trusts; Civil Practice and Procedure

Estates and trusts --- Estates -- Actions involving personal representatives -- Practice and procedure -- Appeals

Woman and man had "off and on" relationship over course of approximately ten years -- Woman and man allegedly built and sold two houses together using their joint physical labour and funds -- Man died intestate at point in time when man and woman had separated and had been living separate and apart for approximately one year -- Estate trustee of man's estate alleged that woman was never spouse of man and brought motion for advice and direction under R. 75.05(5) and 75.06 of Rules of Civil Procedure -- Woman applied under Family Law Rules and s. 21.8 of Courts of Justice Act for declaration of constructive trust and for return of personal property -- Judge hearing

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motions decided that woman's claims were claims against estate and should proceed pursuant to R. 75 of Rules of Civil Procedure and not by way of s. 21.8 of Courts of Justice Act or Family Law Rules -- Judge joined two actions, which were to proceed pursuant to Rules of Civil Procedure, and awarded costs in amount of \$5,500 against woman -- Woman brought motion for leave to appeal order giving directions and costs order -- Motion dismissed -- In respect of both order giving directions and costs order, woman had not demonstrated that judge chose to be guided by different or wrong principles in exercise of his discretion regarding conflicting decision/desirable test for leave to appeal set out in R. 62.02(4)(a) of Rules of Civil Procedure -- Woman had not demonstrated good reason to doubt correctness of order giving directions or costs order and in both cases had not satisfied condition regarding general importance set out in R. 62.02(4)(b) of Rules of Civil Procedure.

**Cases considered by *DiTomaso J.*:**

*Axelrod v. Beth Jacob* (1943), [1943] O.W.N. 80, [1943] 2 D.L.R. 115, 1943 CarswellOnt 113 (Ont. H.C.) - referred to

*Casurina Ltd. Partnership v. Rio Algom Ltd.* (2004), 2004 CarswellOnt 180, 40 B.L.R. (3d) 112, 181 O.A.C. 19 (Ont. C.A.) -- referred to

*Holmes v. Holmes* (1997), 1997 CarswellOnt 4617, 33 R.F.L. (4th) 1 (Ont. Gen. Div.) -- distinguished

*Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 2003 CarswellOnt 5210, 42 B.L.R. (3d) 14, 68 O.R. (3d) 544, 46 C.B.R. (4th) 313, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.*) 180 O.A.C. 158 (Ont. C.A.) -- referred to

*R. v. Palmer* (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, 1979 CarswellBC 533, 1979 CarswellBC 541 (S.C.C.) -- followed

**Statutes considered:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43

Generally -- referred to

s. 21.8 [en. 1994, c. 12, s. 8] -- considered

s. 131 -- referred to

s. 133 -- referred to

**Rules considered:**

*Family Law Rules*, O. Reg. 114/99

Generally -- referred to

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Generally -- referred to

R. 57.03 -- considered

R. 57.02-57.07 -- referred to

R. 57.01(4) -- considered

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R. 59.06 -- referred to

R. 62.02(2) -- referred to

R. 62.02(4) -- considered

R. 62.02(4)(a) -- considered

R. 62.02(4)(b) -- considered

R. 62.02(5) -- referred to

R. 75 [en. O. Reg. 484/94] -- considered

R. 75.05(5) [en. O. Reg. 484/94] -- referred to

R. 75.06 [en. O. Reg. 484/94] -- referred to

MOTION for leave to appeal order directing that estate claim proceed in accordance with R. 75 of *Rules of Civil Procedure* and costs order.

***DiTomaso J.:***

1 This matter came before me on February 10, 2005 at Barrie. Counsel were Kimberley A. Whaley for the Bank of Nova Scotia and Martin J. Prost for Brenda Lynn Nichols.

**Nature of the Motion**

2 This is a motion for leave to appeal by Brenda Nichols (Nichols) for an order granting leave to appeal to the Divisional Court, the order of Justice Howden dated November 25, 2004, issued and entered on December 1, 2004. In particular, Nichols seeks to appeal the Order Giving Directions directing that the estate claim by Nichols proceed in accordance with the rule 75 of the *Rules of Civil Procedure*.

3 Further, the motion is for leave to appeal to the Divisional Court, the order of Mr. Justice Howden pursuant to his endorsement dated January 10, 2005 (the costs order) requiring Nichols to pay the fixed sum of \$5,500.00 to the Estate Trustee of the Estate of Robert Guy Brown, deceased, within 60 days of the date of the endorsement.

4 In the alternative, Nichols seeks an order varying the order as to costs or suspending its operation until the trial of this action pursuant to rule 59.06.

5 The Bank of Nova Scotia Trust Company, in their capacity as Estate Trustee without a will of the Estate of Robert Guy Brown, deceased, (the Estate Trustee) opposes both leave to appeal requests as well as the alternative relief sought.

**Overview**

6 Nichols brings a claim based on constructive trust and the return of personal property. Nichols and the deceased Robert Guy Brown had an "off and on" relationship commencing in 1992. It is alleged that Nichols and Brown built and sold two houses together using their joint physical labour and funds. Brown died intestate on or about January 12 or 16, 2003. About a year prior to his death he and Nichols separated and were living separate and apart. The exact date of their separation is yet to be determined by the court. At the time of Brown's death, he and Nichols were not married and it is alleged by the Estate Trustee that Nichols was never a spouse of the deceased Brown.

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7 The Estate Trustee brought a motion for advice and direction of this court under civil rule 75.05(5) and 75.06.

8 Nichols applied under the family law rules and section 21.8 of the *Courts of Justice Act* for a declaration of constructive trust.

9 On July 13, 2004, the Estate Trustee's civil rule 75 motion and Nichols motion brought under the family law rules came before Wood, J. Both motions were adjourned to the same date with a jurisdictional issue to be decided. This matter was heard on November 3, 2004 by Mr. Justice Howden. He delivered a supplementary endorsement dated November 19, 2004 in respect of the form of the order and an endorsement as to costs dated January 10, 2005.

10 Amongst other matters, Howden, J. determined the jurisdictional issue in favour of the Estate. He decided Nichols' claims were claims against the Estate and should proceed pursuant to rule 75 of the *Rules of Civil Procedure* and not by way of rule 21.8 of the *Courts of Justice Act* or family law rules. He joined the two actions and they were to proceed pursuant to the *Rules of Civil Procedure*.

11 Howden, J. also awarded costs in the amount of \$5,500.00 against Nichols payable within 60 days.

### **Preliminary Issues**

12 There are a number of preliminary issues to be addressed.

#### ***Motion to Leave for Appeal Out of Time***

13 I find that Nichols is out of time in respect of the appeal as it relates to the order giving directions. Her motion for leave to appeal said order was not served until January 17, 2005, almost two months after the date the order was made. While the appeal in respect of the costs order is in time, the appeal in respect of the order giving directions does not comply with rule 62.02(2) as such motion ought to have been brought within 7 days after the making of the order. Nevertheless, I have considered the provisions of said rule and have exercised my discretion to hear this motion for leave to appeal.

#### ***New Evidence on Motion for Leave to Appeal***

14 The affidavit of Nichols sworn January 18, 2005 speaks to her impecuniosity to pay the costs order and the matter of access to justice. Pursuant to rule 62.02(5) the Nichols affidavit does not properly form part of the motion record on a motion for leave to appeal. Further, the new evidence sought to be introduced through the Nichols affidavit does not satisfy the principles set out in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), Quicklaw at page 12. Accordingly, the Nichols affidavit is not admissible and I have disregarded any reference to it either in her written materials or in the submissions made by Nichols' counsel.

### **Analysis**

#### ***Order Giving Directions***

15 Rule 62.02(4) sets out two independent grounds on which leave may be granted to appeal an interlocutory order to the Divisional Court.

16 The first ground, often described as the *conflicting decision/desirable test*, is found at rule 62.02(4)(a).

17 In order to satisfy rule 62.02(4)(a), it is necessary to demonstrate a difference in the principle chosen as a guide to the exercise of judicial discretion. It is insufficient to show that two courts have exercised their discretion to produce different results. An exercise of discretion which has led to a different result because of different circumstances does not meet the requirement of a "conflicting decision".

18 Nichols' counsel submitted that the decision of Wood, J. in this case together with the decision of Perkins, J. in *Holmes v. Holmes* (1997), 33 R.F.L. (4th) 1 (Ont. Gen. Div.), are conflicting decisions. I disagree. The decision of

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Wood, J. clearly contemplated the issue of jurisdiction being decided by a judge of this court which is exactly what Howden, J. did in his order for directions. In *Holmes*, the divorce petition named Parry Sound as the place of trial. The wife commenced proceedings under the family law rules in Simcoe County. At issue was whether the case was properly brought by the wife in Simcoe County, given that neither party resided there and the wife wanted a trial in Parry Sound.

19 The facts are distinguishable from the facts in our case, which involve a constructive trust claim brought against an estate. There was no decision rendered in this case that the family court had exclusive jurisdiction in matters listed in the schedule to section 21.8 of the *Courts of Justice Act*. Rather, Justice Howden as a judge of the Superior Court of Justice and the family court was empowered to determine the jurisdiction issue. That having been said, it has not been demonstrated by Nichols' counsel that there is a conflict between the schedule to section 21.8 of the *Courts of Justice Act* and rule 75 of the *Rules of Civil Procedure*. Howden, J. was entitled to decide as he did that the *Rules of Civil Procedure* provided in rule 75 a procedure for issues and proceedings involving estates of deceased persons. It not only covers testamentary matters but also contested claims against estates. No case authority directly on point was cited to him. He noted the statement of Perkins, J. as to the exclusivity of family court jurisdiction over matters in section 21.8 set out in *Holmes*. He noted that the submissions before him were far from exhaustive regarding principles of statutory interpretation and analogous authorities. Having made that observation, he found that these proceedings do not come within the section 21.8 exclusive jurisdiction of the family court and I agree. Further, he found that the Estate Trustee's motion is properly brought under rule 75 of the *Rules of Civil Procedure*. He found that rule 75 specifically addressed a summary procedure arising from the estate-related statutory framework which matters of this kind could and should "fairly and best be dealt with".

20 Nichols has not demonstrated that Howden, J. chose to be guided by different or wrong principles in the exercise of his discretion regarding the *conflicting/desirable* test. In my view, it is not desirable that leave be granted under the first ground.

21 The second ground, often described as the *correctness doubted/matters of importance test*, is found at rule 62.02(4)(b). The conditions of this part of the rule are to be read conjunctively.

22 Dealing first with the *correctness doubted* condition, I am not satisfied that Nichols' counsel has demonstrated a good reason to doubt the correctness of the order in question.

23 Unless the decision under appeal is *wholly erroneous, palpably wrong* or having applied an incorrect principle or law, the court determining leave to appeal should defer to the lower court's exercise of discretion. *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2003] O.J. No. 5242 (Ont. C.A.) at paragraph 43.

24 An appeal court will only overrule a judge on a finding of fact or on questions of mixed fact and law where there has been *palpable and overriding error*, or where there is no evidence on the record to support the finding of fact. *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2004), 40 B.L.R. (3d) 112 (Ont. C.A.) at 123, paragraph 22.

25 It has not been demonstrated to the satisfaction of this court that Howden, J. committed any *palpable and overriding error* in making his order giving directions. Pursuant to rule 75.06, he made his order in an estates matter where there was a claim brought against an estate by Nichols who appeared to have a financial interest in that estate. He determined who the parties were and also provided the procedure for bringing the matter before the court in the summary fashion as provided by the civil rules. He joined the civil and family matters and directed that they proceed pursuant to rule 75.06 as he was entitled to do. Nichols has not been prejudiced by Howden, J.'s order for directions as her claims are before the Superior Court of Justice and will be determined as the *Rules of Civil Procedure* may provide.

26 Regarding the second condition for granting leave under rule 62.02(4)(b), I must also be satisfied that the matters involved are of "such importance" that in my opinion leave should be granted. Matters of "such importance" are matters of general importance, not matters of particular importance relevant only to the litigants. General importance relates to matters of public importance and matters relevant to the development of the law and the administration of justice. I am not satisfied that the issues between the parties transcend those issues merely between

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the parties. Those issues do not take us to matters of public importance relevant to the development of either estate law, family law or both and the administration of justice. Therefore, Nichols has not satisfied me in respect of the second condition regarding general importance.

### ***Costs Order***

27 Counsel for Nichols advised the court quite candidly that instructions were given to bring this part of the motion for leave to appeal *after* the costs order was delivered. It was at that point in time that a decision was made to appeal not only the costs order but the order giving directions -- no such decision having been made regarding the order giving directions until Nichols was ordered to pay \$5,500.00 within 60 days.

28 It is clear that the driving force behind the decision to bring this motion for leave was Nichols' dissatisfaction with being ordered to pay \$5,500.00 within 60 days.

29 In considering whether or not leave to appeal an order as to costs should be granted, an award of costs by a judge should not be lightly interfered with. The applicant must convince the judge for whom leave is requested that there are strong grounds upon which the appellate court could find the judge erred in exercising his discretion.

30 There is a heavy onus on the applicant to establish that the judge failed to exercise his discretion judicially and to advance strong grounds upon which an appellate court could find that he erred in principle in exercising his discretion. Leave should be granted sparingly and only in very obvious cases. *Axelrod v. Beth Jacob*, [1943] O.W.N. 80 (Ont. H.C.).

31 The heavy onus on the applicant is underscored by section 133 of the *Courts of Justice Act*. Further, the *Courts of Justice Act* also speaks to discretionary orders as to costs at section 131.

32 Further, rule 57.03 deals with costs on motions. This rule also allows for discretion to judges on awarding costs.

33 In addition, rule 57.01(4) specifically provides that nothing in this rule or rule 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act* where a court makes a discretionary costs order.

34 Regarding rule 62.02(4)(a) -- the *conflicting decision/desirable* test, I am not satisfied that there are any conflicting decisions in respect of the costs order made by Howden, J. It has not been demonstrated that in the exercise of his discretion regarding an award of costs, Howden, J. chose to be guided by different or wrong principles.

35 Regarding rule 62.02(4)(b) -- the *correctness doubted/matters of importance* test, the conditions of the rule are to be read conjunctively. It has not been demonstrated that Howden, J. misapprehended the facts before him in respect of costs. He found that the Nichols proceeding in family court pending the motion for directions was unnecessary and increased all parties' costs. There was evidence before Howden, J. on which it was open to him to make this finding.

36 In this regard, Howden, J. found the following:

Despite the initiative taken by the Trustee's counsel to raise the issue of resolution and of a procedure to deal with the matters in dispute, the claimant's counsel displayed little or no interest in those initiatives until later in October by which time most of the unnecessary work prior to this motion being brought on for hearing had been done.

37 He awarded costs to the Estate Trustee on a full indemnity basis and considered both the Estate Trustee's bill of costs and legal authority on this point. He held that the quantum of defending the family court claim was not reasonable on the material before him and he found that the amount of costs to be in the amount of \$5,500.00 including disbursements. Said costs were to be paid by Nichols to the Estate Trustee within 60 days.

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38 I am not satisfied that Nichols has satisfied the condition regarding *correctness doubted*. As for *matters of importance*, the issue of costs does not transcend the interests of the immediate parties. I am not satisfied that the proposed appeal involves matters of such importance that leave to appeal should be granted. The issue of costs in this case is not a matter of access to justice but rather clearly relates to the conduct of the moving party. Therefore, the issue of costs in the matter is not one of public importance. Further, it is not a matter relevant to the development of the law and the administration of justice.

**Rule 59.06 -- Amending, Setting Aside or Varying Order**

39 In the alternative, Nichols sought an order varying Howden, J.'s order as to costs or suspending its operation until the trial of this action. The relief sought by Nichols does not come within rule 59.06 on a plain and obvious reading of the rule's wording. I dismiss the motion in respect of this alternate relief sought pursuant to rule 59.06.

**Disposition**

40 Leave for appeal is refused and the motion dismissed. The parties have agreed that the matter of costs in respect of this motion is to be determined by way of written submissions.

41 Counsel are to file with the trial co-ordinator at Barrie within the next 14 days a 2 page memorandum concisely setting out their positions together with supporting documentation.

*Motion dismissed.*

[FN\\*](#). Additional reasons at *Brown Estate (Trustee of) v. Chin* (2005), 2005 CarswellOnt 1372, 15 E.T.R. (3d) 77 (Ont. S.C.J.).

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