

CANADA / JUDGMENT

Al-Sabah Estate (Re)

2020 BCSC 169

COURT

Supreme Court of British Columbia

DECIDED

11 February 2020

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2020 BCSC 169 Al-Sabah Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Al-Sabah Estate (Re),

2020 BCSC 169

Date: 20200211

Docket: P142883

Registry: Vancouver

In the Matter of the Estate of Salem Hamoud Al-Jaber Al-Sabah, deceased

Before: The Honourable Madam Justice Duncan

Reasons for Judgment re Application to Pass Accounts/Application for Disclosure from the Administrators

Counsel for the Administrators of the Estate:

N.T. Mitha, Q.C.

Counsel for Sheikha Salem Hamoud Al Jaber Al-Sabah:

D.P. Davison

Place and Date of Hearing:

Vancouver, B.C.

January 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 11, 2020

Introduction

- [1] Sheikh Salem Hamoud Al-Jaber Al-Sabah (the deceased) passed away intestate on June 10, 2003. He was a citizen of Kuwait but had assets outside of Kuwait, including in the United Kingdom and Canada.
- [2] The Ministry of Justice of Kuwait determined there were 15 beneficiaries of the deceased's estate: two wives, two sons, seven daughters and four grandchildren. The Ministry awarded 6% of the shares in the estate to each of the two wives; 14% to each son; 7% to each daughter; and between 3 and 5% to the grandchildren.
- [3] Despite the fact that the deceased passed away nearly 17 years ago, estate proceedings continue in both Canada and the United Kingdom. The main players are two of the deceased's daughters: Sheikha Salem Hamoud Al-Jaber Al-Sabeh, to whom I will refer to as Sheikha Salem, and Sheikha Hind Salem Hamoud Al-Jaber Al-Sabah, to whom I will refer to as Sheikha Hind.
- [4] Sheikha Salem was the administrator of the deceased's estate in British Columbia until the decision of Mr. Justice G.S. Weatherill in *Al-Sabah Estate (Re)*, 2015 BCSC 1781. Weatherill J. replaced Sheikha Salem with a committee of administrators (the Committee), including Sheikha Hind. Sheikha Salem's appeal of Weatherill J.'s decision was dismissed: 2016 BCCA 365.
- [5] The Committee applies for a number of orders, including the passing of accounts for professional services to the estate covering the period of September 11, 2015 through November 30, 2019, as well as the discharge of the administrators as personal representative of the deceased.
- [6] At the conclusion of submissions I requested that Mr. Mitha, Q.C., counsel for the Committee, submit the revised terms sought in the application. In addition to passing the accounts of the Committee and the professional fees incurred, the Committee seeks orders in respect of the following:
 - Release by Norton Rose Fulbright Canada LLP ("Norton Rose") the estate's funds of approximately \$32,049.99 plus any accrued interest, which is currently held in trust by Norton Rose, to the Committee;
 - An order that the estate owes Sheikha Salem \$145,000 and that Sheikha Salem owes the estate \$110,539, with the result that the estate pay to Sheikha Salem \$34,461;
 - A determination as to whether Sheikha Salem is owed 20,000 GBP as a result of a deduction of that amount from a previous payment to her.

- [7] The Committee's application is brought pursuant to s. 99 of the Trustee Act, R.S.B.C. 1996, c. 464 and Rules 25-13 and 25-14 of the Supreme Court Civil Rules. Section 99(1) of the Trustee Act provides:

Unless his or her accounts are approved and consented to in writing by all beneficiaries, or the court otherwise orders, an executor, administrator, trustee under a will and judicial trustee must, within 2 years from the date of the grant of probate or grant of administration or within 2 years from the date of his or her appointment, and every trustee may at any time obtain from the court an order for passing his or her first accounts, and he or she must pass his or her subsequent accounts at the times the court directs.

- [8] Neither the original administrator of the estate, Sheikha Salem, nor the Committee, applied for an order passing accounts within the two-year timeframe. The reasons for that lapse relate to the contested nature of the administration of this estate.
- [9] None of the four members of the Committee seeks remuneration. All of the beneficiaries have been served with the application. All but one of the beneficiaries, who collectively are entitled to over 90% of the deceased's estate, are either in favour of the passing of accounts or take no position. The sole dissenter is Sheikha Salem.
- [10] Mr. Davison, counsel for Sheikha Salem, does not take issue with the professional accounts rendered by the Committee; rather, his position is that the passing of accounts is premature and that his client should be given substantial and detailed disclosure about the administration of the estate before any further steps are taken to pass accounts. Mr. Davison asks for a reference to a Registrar to collect evidence, make inquiries and provide a non-certified report to the court to consider.
- [11] Sheikha Salem's disclosure requests largely relate to the Committee's decision to settle a lawsuit that she began on behalf of the deceased's estate (Vancouver Registry No. S098507, the "Action"). Sheikha Salem maintains the settlement of the Action may have short-changed the estate by an estimated \$10,000,000. The disclosure requests are extremely detailed. I reproduce from Mr. Davison's application record precisely what is sought:
43. The Application Respondent asks that prior to the passing of accounts of the Committee, the Committee provide the disclosure sought in the Notice of Application filed 23 July 2019, and, more specifically, the following:
- a. Within sixty days, the Administrators of the Estate be required to separately provide an affidavit from each of them answering the following questions:
- i. Did you review the claim against Mr. Bakhtiyari et al by the Estate and 492022 B.C. Ltd. ("BC492022"), Vancouver Registry No. S098507 (the "Bakhtiyari Claim");

- ii. What did you do to confirm if \$1.4 million had [been] paid to Mr. Bakhtiyari by Salem Hamoud Al-Jaber Al-Sabah (the "Deceased") and/or BC492022 for the purpose of purchasing the First Property (as defined in the Notice of Application filed 23 July 2019 in these proceedings) at 2605 64th Street, Delta, BC for the benefit of the Deceased or BC492022;
 - iii. What did you do to confirm if the First Property was purchased for \$1,225,000 in 1992;
 - iv. What did you do to confirm if \$4,125,000 had been paid to Mr. Bakhtiyari by the Deceased and/or BC492022 for the purpose of purchasing the Second Property (as defined in the Notice of Application filed 23 July 2019 in these proceedings) at 1960 56th Street, Delta, BC for the benefit of the Deceased or BC492022;
 - v. What did you do to confirm if the Second Property was purchased for \$4 million in 1996;
 - vi. What was involved in your investigation into the Bakhtiyari Claim to determine that BC492022 only had an 80% interest in one of the Properties and that Mr. Bakhtiyari or his company owned the other 20%? With whom did you communicate in the course of that investigation? Did you communicate with Mr. Bakhtiyari? If that communication was oral, please describe it. If that communication was written, please attach that written communication to the affidavit;
 - vii. How did you satisfy yourself that the Deceased owned no part of the First Property;
 - viii. What did you do to satisfy yourself that the Certificates of Pending Litigation should be discharged from title to the Properties;
 - ix. Why did you not request that the funds from the sale of the Second Property be paid into court rather than dismiss the claims.
 - x. What did you do to satisfy yourself that the Bakhtiyari Claim should be withdrawn;
 - xi. When did you become aware that Mr. Bakhtiyari gave Hamad Salem Homoud Al-Jaber Al Sabah \$125,000 in July 2016. If you were aware, what did he tell you it was for;
 - xii. Have you ever received any monies or benefits from Mr. Bakhtiyari directly or indirectly and if so why;
 - xiii. It has been alleged by the Administrators that a portion of the 20% (or \$5,367,100.00) that was paid to Mr. Bakhtiyari from the Deceased's interest in the Second Property, as applicable, was for the payment of certain fees. How did you satisfy yourself that these fees were legitimate and validly or reasonably incurred; and
 - xiv. What did you do to satisfy yourself that Mr. Bakhtiyari was owed 20% of the proceeds from the sale of the Deceased's interest in the Second Property?
- b. The affidavits shall each include evidence that it was duly translated to Arabic by a certified translator and a certificate of independent legal advice with different lawyers as to the effect of swearing an affidavit and its use in these proceedings.

- c. Within sixty days, the Administrators be required to provide the following documents:
- i. the settlement agreement dated on or about 3 February 2016;
 - ii. all communications between the Administrators relating to the Estate between 11 September 2015 and 3 February 2016;
 - iii. documents related to any settlement or negotiations between the Estate or its agents and Mr. Bakhtiyari or his agents, as regards the settlement of the Bakhtiyari Claim, the settlement of debt, the sale of shares of 516786 B.C. Ltd., and/or the sale of the Properties or either of them between 11 September 2015 and 3 February 2016;
 - iv. all communications between Mr. Bakhtiyari and Hamad Salem Homoud Al-Jaber Al-Sabah; and
 - v. the settlement agreement between parties including the Administrators on behalf of the Estate and Mr. Bakhtiyari with respect to the settlement of the Bakhtiyari Claim.
- d. For each of the above items where the Administrators are asked to confirm how they determined a fact or how they reached a decision, the Administrators shall say if they communicated with Mr. Bakhtiyari or his agents directly or indirectly between 11 September 2015 and 3 February 2016, and if they did, whether such communication was oral or written; where it was oral, they shall summarize that discussion in their affidavits; where it was written they shall attach the document to their affidavits as an Ex.
44. Following such disclosure, the Application Respondent requests this matter be set down before the Registrar to determine if additional disclosure or information is required to have it set before the Court for a hearing before a judge to confirm or vary the Registrar's report.
45. The Application Respondent asks for direction for Court to pay the Application Respondent her outstanding share of the Estate being \$145,806.94 [the Norton Rose legal bill] and the monies paid improperly to Sheikha Hind of £20,000.00.
- [12] The Committee is opposed to the disclosure sought on the basis that most of the information has already been provided. The Committee resists disclosure of the settlement agreement on the basis that it is bound by a confidentiality order which prevents its members from revealing its terms. The Committee is also opposed to a reference to the Registrar to pass the accounts or to engage in the fact-finding mission sought by Mr. Davison, maintaining that those steps are unnecessary as well as costly for the estate.

The Property Purchases by the Deceased

- [13] The first British Columbia property in which the deceased, through a numbered company, had a beneficial interest was 2605-64th Street in Delta. Mr. Bakhtiyari and a numbered company served as the deceased's agent in British Columbia concerning the purchase of this property in or around July 1992. The deceased was never on title.

- [14] The second property in which the deceased had an interest was comprised of two lots on 56th Street in Delta. It was purchased in 1996 through 516786 B.C. Ltd. The deceased and Mr. Bakhtiyari entered into an agreement whereby Mr. Bakhtiyari would provide management services for the second property.
- [15] In 2000, the deceased and Mr. Bakhtiyari entered into a contract of purchase and sale for the first property. Pursuant to the intended sale, the two men effected a share swap of their interests in two numbered companies. The deceased obtained 80% of the second property through 516786 B.C. Ltd. and Mr. Bakhtiyari held a 20% interest in it.
- [16] Elko Kroon, a lawyer who provided solicitor's services to the deceased and Mr. Bakhtiyari, certified that he had read over the documents with the deceased, who was by then blind.

The Commencement of Estate Proceedings

- [17] In March 2008, 12 of the 15 beneficiaries of the estate granted a power of attorney to Andrew Pinnell, then a practicing lawyer in England, to investigate the deceased's properties outside Kuwait. Sheikha Salem learned that her father had held an interest in two properties in Delta, British Columbia. She directed Mr. Pinnell to commence the Action and it was filed on November 18, 2009 in the Vancouver Registry.
- [18] Sheikha Salem believed in 2009, and continues to believe today, that her father was or may have been cheated out of his interest in the first property by Mr. Bakhtiyari and others.
- [19] In 2013, 8 of the 15 beneficiaries holding about 80% of the estate revoked Mr. Pinnell's authority to act on behalf of the estate. Sheikha Hind deposed in her affidavit sworn in 2015 for the proceedings before Weatherill J. that she understood Mr. Pinnell ceased to practice as a solicitor in May 2010 as he was adjudged bankrupt. She attached a copy of disciplinary proceedings against him to her affidavit.
- [20] Sheikha Salem applied to the British Columbia Supreme Court for a grant of administration of the estate, with the assistance of counsel from Norton Rose. On November 6, 2014 the grant of administration was issued to Sheikha Salem.
- [21] Nearly a year later, on September 11, 2015, a number of the beneficiaries holding 79% of the estate applied for an order to revoke the grant of administration to Sheikha Salem and sought to have a committee of four beneficiaries replace her. Counsel from Norton Rose had withdrawn several months earlier. Mr. Pinnell, in whose name the action was begun, sent an agent to request a three-month adjournment.
- [22] Weatherill J. refused the adjournment. He was not satisfied that Sheikha Salem or Mr. Pinnell had acted reasonably and with the required diligence after counsel had withdrawn. He found Mr. Pinnell was "extremely vague" concerning efforts he made to obtain new counsel and denied the adjournment application.

- [23] Weatherill J. determined that Sheikha Salem had not complied with the notice requirements for the grant of administration. She sent the notices of her application to her relatives at addresses that were "substantially similar" to their actual addresses, but they were not correct. The family was engaged in hotly contested litigation in Kuwait and Weatherill J. found she must have known their actual addresses. Additionally, Sheikha Salem did not disclose in her application for the grant of administration that there was ongoing litigation within the family over the estate in both Kuwait and England, including a rejection by a court in Kuwait of her application for authority over the deceased's affairs outside the country.
- [24] Weatherill J. revoked the grant of administration and replaced Sheikha Salem with the Committee, which consists of two of the deceased's sons - Abdullah Salem Hamoud Al-Jaber Al-Sabah and Hamad Salem Hamoud Al-Jaber Al-Sabah - and two of his daughters - Sheikha Hind and Mai Salem Hamoud Al-Jaber Al-Sabah.
- [25] Sheikha Salem appealed, seeking an order setting aside the order of Weatherill J. and reinstating the grant of administration she received.
- [26] In January 2016, while Sheikha Salem's appeal was pending, the Committee applied for and obtained an order substituting itself as plaintiff in the Action in place of Mr. Pinnell and entered into negotiations to resolve it. There was an offer to purchase the second property. It had an appraised value of \$15 million and it was sold for \$16 million.
- [27] On February 3, 2016, the Committee executed the agreement to settle the Action. A month later the beneficiaries received their proportionate shares of \$7.1 million from the property sale. There was a substantial holdback for taxes as well as a payment of \$5.367 million to Mr. Bakhtiyari for his 20% share of the property and management fees and expenses, including years of property taxes.
- [28] In April 2016, Mr. Bakhtiyari paid \$125,000 to Sheikh Hamad Salem Hamoud Al-Jaber, a beneficiary of the estate and a member of the Committee. One of Sheikha Salem's disclosure requests relates to the reason for this payment.
- [29] Sheikha Salem's appeal was dismissed on September 7, 2016. Bennett J.A., for the Court, referred to the dispute over whether the deceased had an interest in one property or two in British Columbia:
- [15] During argument, another issue arose that requires some comment. The appellant sought a stay in this Court of the order appointing her brothers and sisters as representatives, and she was refused. The asset of the estate in British Columbia was a piece of property (the appellant says two pieces of property). The appellant supported litigation concerning the two pieces of property, and claimed that both properties belonged within the estate. That litigation was settled after the order was appealed, with the litigants agreeing that the estate had an 80% interest in one property and no interest in the other. The property in which the estate was agreed to have an 80% interest was sold by the representatives and the money

disbursed to the beneficiaries, save funds for Canada Revenue Agency and some for outstanding lawyer's fees. The litigation was settled by a consent dismissal. In other words, there is very little left to administer. Even if the appeal was allowed and the appellant was reinstated, no realistic benefit could accrue to the appellant. In my view, the steps taken in furtherance of the order under appeal has eliminated the possibility that we could make an order that would have a practical and direct effect upon the estate. For that reason, too, I would dismiss the appeal.

- [16] The appellant says that her re-appointment as administrator, effectively reverting to the pre-order status quo would allow her to challenge the settlement of litigation or to claim against the current administrators by using the estate's funds, rather than using her own resources. In my view this consequence is indirect and collateral and does not cure the appeal's lack of practical effect upon the estate.
- [30] The beneficiaries received a further share of the estate in September 2018 when the Committee paid out \$1 million. The remaining amount in the estate, net of the accounts, is \$902,032.66, which is held in trust by Harris & Company. Norton Rose, the firm that acted for Sheikha Salem, holds \$32,049.99 plus interest in trust. There is a further amount of \$110,539 which belonged to the deceased and was held by Sheikha Salem in a Scotiabank account. The Committee has asked Sheikha Salem repeatedly about the whereabouts of this money but no explanation has been provided. I understand that Sheikha Salem is prepared to have that amount, or something close to it, deducted from her share in the estate.
- [31] Norton Rose also has an outstanding account of \$145,806.94 for legal services. The Committee regards this as a debt owed by Sheikha Salem as it was incurred by her while she was instructing the firm before the Committee took over administration of the estate. The Committee withheld \$145,000 from Sheikha Salem's share of estate payments so far on account of this outstanding bill, along with the equivalent of 20,000 GBP to satisfy a debt Sheikha Salem owed to Sheikha Hind concerning litigation in the United Kingdom.
- [32] While Sheikha Salem's view was and is that the deceased purchased interests in two properties and that Mr. Bakhtiyari and his numbered companies may have wrongfully deprived the deceased of his interest in one of them, the members of the Committee did not share that view. In affidavits filed for the application before Weatherill J., a number of the deceased's family members deposed as to their understanding of the property holdings in British Columbia.
- [33] Sharma Baraka Obald Aba Al-Hawaya, one of the deceased's two wives who has since passed away, deposed that she was never informed by her daughter, Sheikha Salem, or Mr. Pinnell about the Action in British Columbia nor did they ever discuss the allegations with her. She deposed that she disagreed with them and did not support or consent to Sheikha Salem acting as her deceased husband's representative in British Columbia because based on her understanding of the Action, the claims in it were incorrect:

The allegations in the BC Action state, in part, that Mr. Bakhtiyari and his numbered companies wrongfully took monies provided by my husband or my husband's company and that Mr. Bakhtiyari used the funds provided by my husband to purchase properties for the numbered companies. I am aware through conversations with my husband before he passed away and I believe that my husband and Mr. Bakhtiyari were good friends and business partners and that my husband in effect, owned 80% of one piece of property in British Columbia. I understand that the Response to Civil Claim filed by Mr. Bakhtiyari states in part that my husband owned through his company, 80% of one piece of property in British Columbia. I agree with that Response. As stated above, as best I understand, my husband owned, either directly or indirectly through his company, 80% of one piece of property and that Mr. Bakhtiyari was taking care of the property and there was an expectation that Mr. Bakhtiyari would receive some payment for taking care of the property.

- [34] As noted earlier in these reasons, there was a management agreement between the deceased's company and Mr. Bakhtiyari concerning the property which provided for remuneration to Mr. Bakhtiyari.
- [35] Hamed Salem Hamoud Al-Jaber Al-Sabah, one of the deceased's sons, deposed that he was not aware that Mr. Pinnell had commenced the Action in British Columbia. He said that the allegations in the Action were incorrect. He was aware, through speaking with his father in the summer of 2001, that his father and Mr. Bakhtiyari were good friends and business partners and that his father owned 80% of one piece of property in British Columbia.
- [36] In Sheikha Hind's affidavit, she explained that in the fall of 2010, after learning of Mr. Pinnell's bankruptcy and the Action in British Columbia, she and other family members cancelled the authorizations given by them for anyone to act on their behalf outside of Kuwait in matters relating to their father's estate. Sheika Hind commenced an action against Mr. Pinnell in London and named her sister, Sheika Salem, as a defendant, alleging breach of fiduciary duties in relation to two properties belonging to the deceased in London. Sheika Salem obtained an order to administer the deceased's estate in London. That order was revoked two years later.
- [37] Concerning the Action in British Columbia, Sheika Hind was aware through her mother, Sharma Baraka, that the deceased and Mr. Bakhtiyari were good friends and business partners. She agreed with Mr. Bakhtiyari's Response to Civil Claim in which he said the deceased owned 80% of one property which he was taking care of.
- [38] Mr. Davison objected to Mr. Mitha's reliance on these affidavits, as they were tendered during reply submissions. He urged me to give them little weight, and to accede to his client's application that the Committee each file affidavits detailing their approach to the settlement of the Action.
- [39] While ordinarily an applicant must include everything it intends to rely upon in the application materials, I decided to accept and rely on these affidavits as they had been sworn for an earlier step in these same proceedings. More to the point, the affidavits address the

subject matter of many of the disclosure issues in Sheikha Salem's application. It would be a waste of time and the estate's resources to incur the expense of requiring members of the Committee to swear lengthy affidavits and have separate legal advice if the information sought was already available.

The Legal Basis for a Disclosure Order in Estate Proceedings

- [40] Mr. Davison characterizes his disclosure requests as ones falling within the general right of a beneficiary to receive information about the administration of the trust property. This request appears to fall within Rule 25-13(3), which gives the court jurisdiction to hear and decide any matter relating to the accounts or the remuneration of the personal representative, direct the Registrar to conduct an inquiry, assessment or accounting in relation to any matter relating to the accounts or the remuneration of the personal representative or make any other order or give any direction that the court considers appropriate in the circumstances.
- [41] As a starting point, it is helpful to frame the duty to disclose within the two sides of a fiduciary relationship. In *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, Brown J., for the majority, said:
- [17] Because a trust divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the "hallmark" characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary's enjoyment. As a matter of law, this fiduciary relationship, in turn, impresses the office of trustee with certain duties. In particular, three duties have been recognized in Canadian law as fundamental. First, a trustee must act honestly and with that level of skill and prudence which would be expected of the reasonable person of business administering his or her own affairs. Secondly, a trustee cannot delegate the office to another. And thirdly, a trustee cannot profit personally from its dealings with the trust property or with the beneficiaries of the trust.
- [18] Correspondingly, the beneficiary of a trust has a right to hold the trustee to account for its administration of the trust property and to enforce the terms of the trust. Absent such a right, both the trustee's obligation to act in accordance with its fiduciary duty and the terms of the trust itself would be substantially unenforceable. In effect, the trustee would hold beneficial as well as legal ownership of the trust property -- which would, of course, be contrary to the division of legal and beneficial ownership upon which the trust relationship is premised.
- [42] The question is how much information a beneficiary is entitled to receive when seeking to hold the trustee to account. The jurisprudence in this jurisdiction does not set out a precise or even a general list of what a beneficiary to an estate is entitled to seek by way of disclosure from an administrator, apart from what is required by the Rules in the context of an application to pass accounts.

- [43] In *Schmidt v. Rosewood Trust Ltd. (Isle of Man)*, [2003] 2 A.C. 709 (U.K.P.C.), the Privy Council observed that a beneficiary's right to seek disclosure of trust documents is best approached as one aspect of the court's inherent jurisdiction to supervise and, where appropriate, intervene in the administration of trust [at paras. 66 and 67]. The Privy Council stated there were three areas in which the court may have to exercise its discretion: 1) whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted at all; 2) what classes of documents should be disclosed and in what form; and 3) what safeguards should be imposed to limit the use which may be made of documents or information disclosed by court order [at para. 54].
- [44] *Schultes J.* followed *Schmidt v. Rosewood Trust* in *N-Krypt International Corp. v. LeVasseur*, 2016 BCSC 1539; reversed on other grounds 2018 BCCA 20:
- [38] The trustee has a fundamental duty to account for the trust property (see: D.W.M. Waters, M.R. Gillen and L.D. Smiths, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at pp. 1120-27), and to report on how it has been dealt with (*Re Ballard Estate*, (1994), 20 O.R. (3d) 350 (Gen. Div.) at 355-6).
- [39] However the extent of the "trust information" that will be ordered depends on the particular circumstances. In *Schmidt v. Rosewood Trust Ltd.* [2003] J.C.J. No. 26 (P.C.), the Privy Council held that a beneficiary, simply by asserting a claim, does not have an entitlement to disclosure as of right -- the strength of the claim must be assessed and balanced against competing interests such as personal or commercial confidentiality. This approach has been referred to with at least implicit approval in two British Columbia decisions: *D.M.M. v. R.J.M.*, 2005 BCSC 207 and *Martin Estate (Re)*, 2009 BCSC 1407, and I find it persuasive in any event.
- [45] In *Martin Estate (Re)*, 2009 BCSC 1407, several beneficiaries made requests for information from the trustees of an estate as the parties prepared for a passing of the accounts. The beneficiaries in question were charities. The only remaining assets of the estate were corporate shares. The trustees refused to provide some of the information sought by the beneficiaries because it was not available to them in their capacity as trustees, but as a result of a confidential corporate relationship in the very corporation which comprised the remaining assets of the estate. They also maintained the information was commercially sensitive.
- [46] Registrar Blok, as he then was, reviewed *Schmidt v. Rosewood Trust*, and other authorities concerning disclosure orders in trust relationships. He concluded that the information sought by the beneficiaries ought to be provided. There was no unmanageable prejudice relating to an explanation for payment of sums to an individual and what was done to earn the money and in any event, the beneficiaries offered confidentiality agreements. Registrar Blok said, at para. 35, that "[t]o hold otherwise might also invite mischief in that trustees in future cases could conclude it is open to them to incorporate companies to carry on estate business in order to shield themselves from scrutiny by beneficiaries."

- [47] At the same time, District Registrar Bouck, as she then was, observed in *MacLean v. MacLean Estate*, 2009 BCSC 292, that a passing of accounts is not the forum for beneficiaries to embark on a "fishing trip" to find evidence of trustee bad faith or pursue other remedies against executors [at paras. 48-51].
- [48] Bearing in mind that the jurisprudence speaks to disclosure orders which are tailored to fit the circumstances, I am prepared to order that some, but not all, of the requests for information be answered.
- [49] First, the requests of the Committee to detail every step in their decision to settle the action are anchored in Sheikha Salem's suspicions that the Committee left a \$10 million property out of the estate. The vast majority of the requests are in the nature of discovery and overlook what has already been provided.
- [50] It is clear from the affidavits filed in these proceedings that the Committee had information about the deceased's dealings in British Columbia which was at odds with what Sheikha Salem believed. That information was known to some of the members of the Committee during the deceased's lifetime, obviously long before the Action was commenced. They were aware of the deceased's business dealings and his relationship with Mr. Bakhtiyari. To suggest that they naively or negligently let go of a potential \$10 million estate asset is unfounded in the materials before me. The breadth and detail of the responses requested would put the estate to considerable expense to satisfy the demands of a lone dissatisfied beneficiary who was removed as administrator and appears unable to come to grips with it.
- [51] Some of the more specific requests Mr. Davison advanced, however, fall generally within the beneficiary's right to information.
- [52] Mr. Davison sought disclosure of the settlement agreement respecting the Action. Mr. Mitha has resisted disclosing it because of the existence of the non-disclosure agreement and the fact that the defendants in the action have not given their consent, but he ultimately acknowledged that if Sheikha Salem signed a non-disclosure agreement concerning the settlement, his concerns about the Committee's observance of the non-disclosure agreement would be satisfied. Therefore, I order that the Committee provide the settlement agreement to Sheikha Salem on terms Mr. Mitha and Mr. Davison agree on.
- [53] Second, Mr. Davison seeks an explanation for two payments made by Mr. Bakhtiyari, a defendant in the Action. One payment was to Harris & Company, which acts for the Committee, and one was to a member of the Committee, after the Action was settled. The reason for those payments by an individual opposed in interest to the estate in the Action should be disclosed.

- [54] The Committee's decision to debit 20,000 GBP from Sheikha Salem's share of a previous payment from the estate should be reversed. If the parties require direction as to how or when, they have leave to come back before me. To put it bluntly, the deceased's estate in British Columbia should not be used as a clearing house for intra-family debts, absent agreement by the parties involved.
- [55] The \$145,806.94 legal bill claimed by Norton Rose is not a bill the estate should bear. Sheikha Salem retained the firm to prosecute the Action she instructed Mr. Pinnell to commence in British Columbia. She was not at the time the administrator of the deceased's estate and was ultimately removed as administrator by this Court in favour of the Committee. The Committee settled the Action and it is clear that the Committee would not have commenced it in the first place.
- [56] The Committee must reimburse Sheikha Salem for the \$145,000 it has withheld from her due to the Norton Rose legal bill. Sheikha Salem in turn owes the estate \$110,539. The set off is \$34,461 in Sheikha Salem's favour.
- [57] Mr. Davison sought a reference to the Registrar for the preparation of a non-certified report to the court concerning the disclosure matters he raised. I am not satisfied a report is necessary, nor am I satisfied that the passing of accounts in this matter should go before the Registrar, at least at this stage. The disclosure ordered and the reimbursement of Sheikha Salem for the amounts owing should be completed within 60 days. The parties are at liberty to appear before me for any further orders or directions they require.

Costs

- [58] Mr. Mitha took the position that Sheikha Salem should have to bear her own costs as the application she brought lacked merit and was simply a repetition of previous efforts.
- [59] Mr. Davison maintains that his client should receive her costs from the estate, on the usual special costs basis that prevails in estate matters, because the application was necessary and the only way Sheikha Salem could air her concerns about the administration of the estate.
- [60] Sheikha Salem has had partial success. The 20,000 GBP issue was resolved in her favour, as were several other disclosure issues. As a result, the parties' costs are to be paid on a special costs basis out of the estate.

"Duncan J."

The Honourable Madam Justice Duncan

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