

CANADA / JUDGMENT

Chalmers v. Chalmers Alter Ego Trust

2018 BCSC 336

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 336 Chalmers v. Chalmers Alter Ego Trust

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chalmers v. Chalmers Alter Ego Trust,

2018 BCSC 336

Date: 20180306

Docket: S1610774

Registry: Vancouver

Between:

Duncan Andrew Chalmers

Petitioner

And

David S. Shymko and Ian R. Black, in their capacities as co-Trustees
of the Elizabeth Chalmers Alter Ego Trust dated June 21, 2007, Solus
Trust Company Limited, Cameron David Chalmers, in his personal capacity,
Cameron David Chalmers, in his capacity as the Executor of the Estate of
Elizabeth Mary Day Chalmers and the Estate of John David Chalmers,
Gordon Robert Chalmers, Colleen Elizabeth Chalmers, Kristen Chalmers,
Quentin Bryce Krez Chalmers, Daphne Paulina Mary Chalmers, and
Paulina Cynthia Christine Chalmers

Respondents

Before: The Honourable Mr. Justice Tammen

Reasons for Judgment

Counsel for the Petitioner:

A.D. Francis

Written Submissions dated:

Written Reply Submissions dated:

September 20, 2017

October 12, 2017

Counsel for the Respondents David S. Shymko and Ian R. Black, in their capacities as co-Trustees of the Elizabeth Chalmers Alter Ego Trust dated June 21, 2007:

E.F. Macaulay

Written Submissions dated:

October 2, 2017

Counsel for the Respondents Cameron David Chalmers, in his personal capacity and Cameron David Chalmers in his capacity as the Executor of the Estate of Elizabeth Mary Day Chalmers and the Estate of John David Chalmers, Gordon Robert Chalmers, Colleen Elizabeth Chalmers, and Kristen Chalmers:

K.L. Geddes

Written Submissions dated:

October 2, 2017

Counsel for the Respondents, Quentin Bryce Krez Chalmers, Daphne Paulina Mary Chalmers, and Paulina Cynthia Christine Chalmers:

C.M. Dafoe

Written Submissions dated:

October 12, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 6, 2018

Introduction and Overview

- [1] The parties filed written submissions on costs following my decision on July 18, 2017 that the Elizabeth Chalmers alter ego trust made April 14, 2014 is a properly constituted and valid trust (the "2014 Trust").
- [2] There is disagreement over which parties should have their costs paid out of the 2014 Trust.
- [3] Each party argues that their costs should be fully indemnified from the 2014 Trust. The parties take somewhat different positions with respect to whether the other parties should be indemnified in the same manner.
- [4] The petitioner, Duncan Chalmers, submits that two of the respondents, David S. Shymko and Ian R. Black (the "Co-Trustees"), should not be indemnified from the 2014 Trust because they did not remain neutral in the litigation as required by trustees in an application to interpret a will or trust. Further, the petitioner seeks party and party costs from the Co-Trustees on the basis that they took positions that were in their own personal interests rather than in the interests of the 2014 Trust's beneficiaries.
- [5] The Co-Trustees take the position that the costs of all of the parties should be paid from the 2014 Trust and dispute the positions taken by the petitioner. The Co-Trustees argue that they acted in accordance with their roles as trustees. They submit that this Court has already determined that Mr. Shymko and Mr. Black are not parties to the litigation in their personal capacities on a previous application. In order to award party and party costs against Mr. Shymko and Mr. Black in their personal capacities, the Co-Trustees argue that would require making a costs award against non-parties, which is unusual and done only in special circumstances, of which there is no evidence in the instant case.
- [6] The respondents, Cameron, Gordon, Colleen, and Kristen Chalmers (the "Respondents"), seek full indemnity costs for all parties subject to two deductions from fees otherwise payable to the petitioner. The first deduction they seek is for the petitioner's legal fees that relate to two applications made by the Co-Trustees on January 30, 2017 and March 10, 2017. The Respondents seek a second deduction for 15% of the petitioner's legal fees in relation to the petitioner seeking the enforcement of the 2015 amendments to the 2014 Trust, which I held were not validly made.
- [7] Finally, the respondents, Quentin, Daphne, and Paulina Chalmers, the children of the petitioner ("the petitioner's Children"), had minimal involvement in the underlying litigation. They adopt the submissions of the other respondents and take no position on the entitlement of the other parties.
- [8] I turn first to the proper approach to costs for estate litigation.

Costs in Estate Litigation

- [9] The Court of Appeal in this province recently endorsed the modern approach to awarding costs in estate litigation in *Hollander v. Mooney*, 2017 BCCA 238, stating as follows at para. 112:
- [112] I would emphasize the wisdom of the modern approach to awarding costs in estate litigation, described by Gillese J.A. in *McDougald Estate* at para. 85, that recognizes the need to "restrict unwarranted litigation and protect estates from being depleted by litigation".
- [10] The modern approach, set out in *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.) at para. 80, "is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations applies, to follow the costs rules that apply in civil litigation." The three public policy considerations that underlie this approach are set out in *McDougald Estate* at para. 78 as follows:
1. the importance of giving effect to valid wills that reflect the intention of competent testators;
 2. the appropriateness of the testator, through his or her estate, bearing the costs of the litigation where the difficulties or ambiguities that gave rise to the litigation were caused, in whole or in part, by the testator; and
 3. the public interest in resolving questions concerning the validity of wills without cost to those questioning the will's validity where there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will.
- [11] The first two public policy considerations apply to the underlying litigation. Giving effect to Mrs. Chalmers' testamentary wishes is profoundly important and, upon her death, ambiguity remained regarding which of the two alter ego trusts, the 2007 or the 2014 Trust, was operative. I am of the view that Mrs. Chalmers was responsible at least in part for the outstanding ambiguity and that the parties were "led into the litigation by the conduct of the testator": *Collett Estate (Re)*, 2005 BCCA 291 at para. 14.
- [12] On that basis, I have no difficulty finding that the petitioner, the Respondents, and the petitioner's Children are entitled to have their costs out of the 2014 Trust.
- [13] Having determined that public policy considerations apply in this case such that the costs rules in civil litigation do not apply, the parties are being indemnified for their costs without regard to their respective success in the matter. It is therefore unnecessary for me to consider the Respondent's arguments that the petitioner should be fully indemnified from the 2014 Trust subject to deductions for his legal fees from the two applications dated January 30, 2017 and March 10, 2017 or for his legal fees from seeking enforcement of the 2015 amendments to the 2014 Trust.

- [14] Even if I am wrong in this regard, the petitioner was successful in this petition: he sought and was granted specific declaratory relief, namely that the 2014 Trust was legally constituted. If the costs rules in civil litigation do apply, I would award costs to the petitioner on the basis of this success.

Costs Awards for Trustee Litigants

- [15] Different costs principles apply to trustee litigants. Trustees are "generally indemnified against all reasonable costs and expenses incurred in fulfilling their role, including litigation costs": Hollander at para. 41. The petitioner agrees that, generally speaking, trustees are entitled to indemnification for their legal fees so long as they were reasonably incurred. The petitioner disputes that the Co-Trustees' costs were reasonably incurred in this case because they did not adopt a neutral position in the litigation.
- [16] The Court of Appeal in this province addressed the awarding of costs in Supreme Court proceedings that involve executors and trustees in *Collett Estate*. Smith J.A. summarized the principles as follows at paras. 7 and 8:
- [7] The general principles that guide the exercise of the discretion to award costs in proceedings in the Supreme Court involving executors and trustees are set out in *Turner v. Andrews* (1999), 23 C.C.P.B. 84, 30 E.T.R. (2d) 126 (B.C.S.C.), *aff'd* 85 B.C.L.R. (3d) 53, 2001 BCCA 76. That case concerned an application by a plaintiff for an order that his reasonable legal costs be paid prospectively out of the trust fund in issue in his representative action against the trustees of his pension fund. In dismissing the application, Allan J. summarized the relevant principles as follows:
- [8] Section 86 of the Trustee Act, R.S.B.C. 1996, c. 464, reflects the historic statutory authority which permits a trustee to seek the opinion, advice or direction of the Court on a question respecting the management or administration of trust property. In such circumstances, the Court may order the costs of the parties to be paid out of the estate. That principle was expanded in *Re Buckton*, [1907] Ch. 406 (Eng. Ch. Div.) which held that, in litigation against a trustee, the legal fees of a plaintiff beneficiary may be paid out of the trust fund on an indemnity basis where the issue concerns the interpretation of the trustee's powers. Buckton considered the beneficiary's entitlement to costs in three classes of cases:
- (1) An application made by trustees of a will or settlement, asking the Court to construe the trust instrument for their guidance; to ascertain the interests of the beneficiaries; or to answer a question which arises in the administration of the trusts. In such instances, the costs of all parties, which are necessarily incurred for the benefit of the estate, should be taxed as between solicitor and client and paid out of the estate.

- (2) An application made by the beneficiaries as a result of difficulty of construction or administration of the trust which would have justified an application by the trustees. Again the application is necessary for the administration of the trust and the costs of all parties, which are necessarily incurred for the benefit of the estate, are paid out of the estate.
- (3) An application made by the beneficiaries who make claims adverse to other beneficiaries. Such litigation is adversarial in nature and, subject to the Court's discretion, the unsuccessful party bears the costs of those whom he or she brings to Court.

[9] The Court stated at p. 415:

It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs.

[8] The controversy underlying this appeal arose out of the manner in which the executor administered the estate. Consequently, it falls within the second category of cases described in *Re Buckton*. in the passage just quoted. According to the usual rule, the Public Trustee and the executor would have their special costs of the special case payable out of the estate.

[17] I find that this petition fits neatly into the second category set out in *Buckton*. The petitioner started this proceeding on account of difficulties arising from the administration of Mrs. Chalmers' trusts, a proceeding that just as easily could have been brought by the Co-Trustees. That does not end the analysis, however. Where a case fits into the second category, only costs which were "necessarily incurred for the benefit of the estate" are paid out of the estate, or in this case, the 2014 Trust. Before deciding whether the Co-Trustees' costs were in fact necessarily incurred, I must determine whether the Co-Trustees were acting in their capacity as trustees in the litigation.

i. Were the Co-Trustees acting as trustees?

[18] I agree with the Co-Trustees that the order of Master Harper made March 10, 2017, removing both Mr. Shymko and Mr. Black as respondents in their personal capacities and adding them as respondents in their capacity as co-trustees, is determinative of this issue. In her oral reasons for judgment, Master Harper stated that "it is a misnomer that [the Co-Trustees] are named personally." I have no difficulty finding that the Co-Trustees were acting in their capacity as trustees in the course of the litigation.

ii. Were the Co-Trustees' costs necessarily incurred?

[19] There is no question that the Co-Trustees were in a position to reasonably defend the petition: they were named as respondents by the petitioner and they were carrying out their duties as trustees in defending the proceeding.

- [20] This case is distinguishable from *McPherson v. Canada Trust Co.*, 1941 CarswellOnt 99 (Ont. H.C.J.), cited by the petitioner, where the court ordered that the trustee was only entitled to solicitor and client costs up to and including the filing of the statement of defence but not beyond that point because the court held there was no duty on the trustee to be represented at the trial. In *McPherson*, counsel for the trustee "took no active part in the trial other than to ask, at the conclusion of the arguments of the other counsel, for costs of the action as between solicitor and client." The same cannot be said for counsel for the Co-Trustees, who played an active role in this litigation.
- [21] Even so, where a trustee acts unreasonably or in his or her own self-interest, the trustee is not entitled to indemnification from the estate: *Brown v. Rigsby*, 2016 ONCA 521 at para. 14.
- [22] The petitioner submits that the Co-Trustees "stood to benefit financially from the 2007 Trust in a way that they would not from the 2014 Trust." It matters not whether this is true and, in any event, I remain unconvinced by the petitioner's argument that the Co-Trustees had a significant financial interest in preserving the 2007 Trust. The relevant consideration is whether the Co-Trustees acted reasonably and in a manner that befitted their role as trustees throughout the litigation. I find that by taking such a strong position with respect to which trust was operative, they did not.
- [23] The Co-Trustees could have presented their evidence to the Court in a neutral manner and let the Court determine for itself whether the 2014 Trust was an "empty shell" as the Co-Trustees contended. Instead, the Co-Trustees forcefully advanced their position in this proceeding that the 2007 Trust was operative. In so doing, as I noted at paras. 16 and 17 of my Reasons, the Co-Trustees put forward a position which was different than that contained in their advice to Mrs. Chalmers in August 2014.
- [24] The court expects that submissions advanced by an executor or trustee will be not only objective and neutral, but also helpful and legally correct. That did not always occur in this proceeding. Apart from being adversarial, the submissions of the Co-Trustees were not always correct in law, as noted at para. 48 of my Reasons. By their approach to this litigation, the Co-Trustees acted in a manner which was not entirely reasonable, given their obligations as trustees, and which led to additional litigation expense. Thus, not all the costs claimed by the Co-Trustees were "necessarily incurred".
- [25] Having found that the costs incurred by the Co-Trustees were not entirely reasonable, I must determine what proportion of them were incurred unnecessarily. I must bear in mind that the essential determination by the Court, namely which of the two alter ego trusts was operative at the time of Mrs. Chalmers' death, was likely necessary. The parties needed to have a court decide that question. Had the application been brought by the Co-Trustees, and had they taken a neutral position, it is impossible to say with precision what savings in time and costs there would have been. I will deduct 20% from the costs award I make in favour of the Co-Trustees, which I consider to be a modest, but appropriate deduction.

iii. Should the Co-Trustees pay party and party costs to the petitioner?

- [26] As stated at para. 18 above, the Co-Trustees were acting in their capacity as trustees and not in their personal capacities in this litigation. In seeking party and party costs from the Co-Trustees, the petitioner is asking me to award costs against a non-party.
- [27] This Court's jurisdiction to make a costs award against non-parties is limited to "special circumstances": *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771 at para. 21. The court in *Anchorage* held that special circumstances include situations where the non-party engages in fraudulent conduct, an abuse of process, gross misconduct in the instigation or conduct of litigation, or where the non-party is the "real litigant": *Anchorage* at para. 25.
- [28] There is no suggestion that the Co-Trustees have engaged in any behaviour that rises to the level of "special circumstances". Despite my findings that some of the Co-Trustees' actions following Mrs. Chalmers' death could "be described as imprudent", the conduct of the Co-Trustees in this litigation did not come anywhere close to falling within the ambit of abuse of process or gross misconduct. Where the Co-Trustees, in their capacity as trustees, incurred unreasonable litigation costs, I have already dealt with the issue by reducing the proportion of costs the Co-Trustees are entitled to from the 2014 Trust. Accordingly, I refuse to order the Co-Trustees to pay party and party costs to the petitioner.
- [29] Finally, I will briefly address the reply submission of the petitioner, relying on *Pitts v. La Fontaine*, [1880] UKPC 27, and *In Re Arthur Williams & Co.*, [1913] K.B. 88 (C.A.), that in some circumstances, trustees may be liable to pay costs personally. As I read those decisions, they are primarily directed at litigation which is initiated by a trustee, not litigation initiated by another which names the trustee as a respondent. Further, both of those judgments endorse the reimbursement of the costs award from the estate, unless the trustee has been "guilty of misconduct": *Arthur Williams* at 95. Since I have not found misconduct by the Co-Trustees, they would be entitled to have any costs award made against them paid out of the estate in any event. I decline to make such an order.

Conclusion

[30] I award costs as follows:

- 1) the petitioner is entitled to full indemnity costs from the 2014 Trust;
- 2) the personal respondents, Cameron, Gordon, Colleen and Kristen Chalmers, are entitled to full indemnity costs from the 2014 Trust;
- 3) the personal respondents, Quentin, Daphne and Paulina Chalmers, the children of the petitioner, are entitled to full indemnity costs from the 2014 Trust; and
- 4) the Co-Trustees, David Shymko and Ian Black, are entitled to 80% of their costs of these petition proceedings on a full indemnity basis from the 2014 Trust.

"Tammen J."

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