

CANADA / JUDGMENT

de Beerenbrouck Estate v. Canisius

2017 BCSC 334

COURT

Supreme Court of British Columbia

DECIDED

25 January 2017

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2017 BCSC 334 de Beerenbrouck Estate v. Canisius

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

de Beerenbrouck Estate v. Canisius,

2017 BCSC 334

Date: 20170125

Docket: S1611964

Registry: Vancouver

Between:

Nico Mulder ten Kate, administrator with will annexed of the estate of Maria Joanna Alexandrina Ruijs de Beerenbrouck, also known as Maria Joanna Alexandrine van Nispen tot Sevenaer, deceased, by his litigation guardian Nanny Mulder ten Kate

Petitioner

And

Carel Clemens Canisius, Marie van Nispen tot Sevenaer Genaamd Ruijs de Beerenbrouck, Maria Canisia Carolina Gustave Joanna van Nispen tot Sevenaer, Charlotte Bonga-Tulleken and Beatrice Tulleken

Respondents

Before: The Honourable Madam Justice Burke

Oral Reasons for Judgment

Counsel for the Petitioner:

R. Johal

Counsel for the Respondent B. Tulleken:

D. Stewart

Place and Date of Hearing:

Vancouver, B.C.

January 19, 2017

Place and Date of Judgment:

Vancouver, B.C.

January 25, 2017

- [1] THE COURT: These are my oral reasons for judgment. I reserve the right to add to or edit these reasons as necessary.

INTRODUCTION

- [2] Maria Ruijs de Beerenbrouck ("the testator") lived in Holland but owned property in Abbotsford, British Columbia. Nico Mulder ten Kate ("the administrator") managed the property and a related bank account for many years during the testator's life. After the testator died on January 29, 1999, he continued to manage the property and the bank account and was subsequently appointed as the administrator of the testator's Canadian estate on December 17, 2007.
- [3] The respondent Beatrice Tulleken ("the respondent") is a beneficiary of the testator's estate. She challenges the handling of the estate accounts by the administrator. Accordingly, she seeks a passing of accounts and information from the administrator from the date of the testator's death on January 29, 1999, up until the present. Despite Ms. Tulleken's assertions, I conclude the other respondents take no position on this matter.
- [4] The administrator takes the position that he is responsible for the passing of accounts and providing information related to the handling of the estate but only from the date of his appointment as administrator on December 17, 2007, onwards.
- [5] The administrator has applied under the Trustee Act, R.S.B.C. 1996, c. 464 for direction on whether he is required to provide accounts, information, or documents related to the administration of the Canadian estate for any period prior to his appointment as the administrator. If so, he seeks further direction on to whom that information should be provided, and whether he is required to pass accounts for the period before his appointment as the administrator.

- [6] These reasons may use language that is less than precise. The brevity and timing of these reasons is, however, consistent with seeking to provide reasons efficiently and advance access to justice (see: *Hryniak v. Mauldin*, 2014 SCC 7).

ISSUE

- [7] The issue before me is whether the administrator's duty to account for the estate's accounts includes a duty to account for the period of January 29, 1999 up to December 17, 2007 ("the pre-appointment period")?

BACKGROUND

- [8] The factual matrix is somewhat complex.
- [9] The administrator is 72 years old. He worked for the testator during her lifetime managing her property in Abbotsford and the associated bank account. The testator died on January 29, 1999, leaving a will dated August 25, 1995. She is survived by her adult son, Carel, who has no children, and her adult daughter, Maria, who has two daughters Charlotte and Beatrice (the respondent).
- [10] Under the will, the residue of the estate, including the Canadian estate, passes to the testator's children Carel and Maria. Certain legacies are also to pass to the testator's grandchildren, Charlotte and the respondent. The will, however, did not name an executor.
- [11] The testator, a Dutch aristocrat, was a citizen and resident of the Netherlands. The vast majority of her assets were located in the Netherlands except for a farm property in Abbotsford and one bank account. While the testator was alive, the administrator took instructions by telephone and would meet with her while on visits to Holland.
- [12] The testator's death in early 1999 did not come to the administrator's attention until sometime later in the year. Nonetheless, he continued to manage the Abbotsford property and bank account apparently out of a sense of duty. He was officially appointed as administrator of the Canadian estate on December 17, 2007. Prior to that time, he had sought to transfer the management of the estate to the two named beneficiaries, Carel and Maria, to no avail.
- [13] Meanwhile, the respondents engaged in acrimonious litigation against one another in the Netherlands with respect to the assets of the European estate.
- [14] In 2007, Maria, Carel, Charlotte, and the respondent appointed the administrator as their attorney to apply on their behalf for a Grant of Letters Administration with Will Annexed for the Canadian estate until they could apply on their own behalf. This was ordered on December 17, 2007, at which time the administrator became the administrator of the estate.

- [15] Out of an abundance of caution, the administrator attests, he then sought the consent of all the respondents to sell the property and ultimately did so. The Abbotsford property was sold pursuant to a court order in April 2014. The value of the estate at present is \$2,180,000 and is available to be distributed to the beneficiaries.
- [16] Given the ongoing Dutch litigation and difficulties with the respondent, the administrator has been unable to distribute the Canadian estate. Difficulties included the respondent refusing to consent to the sale of the property, which required the administrator to obtain the court order in April 2014.
- [17] Furthermore, in August 2013, the respondent emailed the managing partner for the administrator's legal counsel advising that counsel for the administrator had misled the court. The respondent also emailed the accounting firm for the administrator in November 2013 threatening their reputation and demanding "I want to receive what I am entitled to." These actions caused concern but ultimately were not followed up by the respondent.
- [18] Meanwhile, on September 24, 2013, the will was declared invalid by a court in the Netherlands.
- [19] There is some dispute over the extent of the respondent's entitlement to the residue of the estate. I do not, however, need to decide that matter. Ultimately, as a result of the Dutch litigation, the four respondents agreed on March 26, 2014, that the residue of the Canadian estate would be divided amongst the four as follows:

Maria: 1/2;

Carel: 1/3;

Charlotte: 1/12; and

The respondent: 1/12.

- [20] As further litigation in the Netherlands is in process, there appears to be some question as to the extent of the respondent's entitlement under the Dutch agreement. I conclude, however, the respondent Ms. Tulleken has some claim, however tenuous, that entitles her to some interest as a beneficiary.
- [21] After the Dutch agreement, the administrator delivered to the respondents a detailed accounting of the Canadian estate. The respondents, except for the respondent Ms. Tulleken, consented to the accounting. Although of the view he was not compelled to do so, the administrator provided some accounts for the pre-appointment period to the respondent on her request to expedite resolution of the matter. The respondent continues, however, to request further somewhat detailed pre-appointment information from the administrator.

- [22] On October 29, 2015, the respondent requested annual financial statements of the estate, approved by a chartered accountant, from January 29, 1999; the cost of the property and fair market value in 1999; and the values used for calculating property gain when the land was sold, that is the sale proceeds minus the fair market value in 1999.
- [23] The administrator was of the view satisfying this request would not be appropriate without the consent of all the respondents. Amongst other things, the request, he maintains, would involve substantial legal and accounting costs, payable by the Canadian estate, and would therefore reduce the gifts to all the respondents.
- [24] The administrator also says the passing of the accounts and his discharge as administrator have been delayed because of continued requests like this; the refusal to consent to the accounts and the request to await a further decision of the courts in the Netherlands, which was rendered in July 2016.
- [25] The administrator's health is also deteriorating to the point where his physician has advised he cannot continue with the administration of the Canadian estate. Indeed, this application has been brought by his litigation guardian due to his deteriorating health.

DECISION AND ANALYSIS

- [26] I conclude in these circumstances the administrator has fulfilled the duty to account and provide information to the beneficiaries. By and large this duty arose on the administration date on which the administrator accepted responsibility for the estate. That date was December 17, 2007.
- [27] Rule 25-13(6)(a)(i)(A) of the Supreme Court Civil Rules provides that the administrator must provide accounts back to the date of the testator's death. In this case, however, the administrator was appointed years after the death of the testator.
- [28] *Dredge Estate v. MacKeand*, 2015 ONSC 3702 offers some guidance in these circumstances. In that case, two children were appointed trustees of their parents' estate. They applied to pass the accounts of the estate but one of the other beneficiaries objected. She sought disclosure of information related to the accounts from years before the trustees' appointment -- even prior to the testators' deaths. In dismissing the application, the Court stated, at para. 14, that a trustee's standard of care does not include an obligation to investigate into and disclose financial documents from years prior to their appointment as trustees.
- [29] The respondent argues, however, that the principle articulated in *Dredge Estate* is not applicable as the material sought in that case was prior to the date of death. That fact, however, is not enough to distinguish the case. The question before the Court was the breadth of a trustee's duties to investigate into and disclose financial documents that predate the time before becoming a trustee.

- [30] The respondent also points out that the administrator managed the property from 1999 to 2007 and thereby was not a stranger to the finances at the time. This again does not answer the question. The nature of the duties during that time was quite different. Mr. Mulder ten Kate continued to act as a manager of the property in the same way he had done previously. There is no evidence to suggest otherwise and no evidence or allegations that monies were unaccounted for. As in *Dredge Estate* at para. 17, I am not prepared to order the further disclosure sought without a proper evidentiary basis in support -- let alone without any allegations of misconduct.
- [31] As in *Dredge Estate* at para. 15, the pre-appointment period predated by a number of years the existence of any fiduciary duties on the part of the administrator vis-à-vis the estate. Any duties that Mr. Mulder ten Kate had before the date of his appointment were in his capacity as continuing manager of the property. In the absence of allegations of misconduct with a foundation in the evidence, I would characterize the further disclosure sought as a mere fishing expedition.
- [32] *Dredge Estate* is closely on point and factually similar. A trustee's standard of care does not necessarily include an obligation to investigate into and disclose financial documents from years prior to his appointment. The circumstances in each case must be examined to ascertain the extent of that duty. As in *Dredge Estate*, the applicants provided no legal authority, statutory or jurisprudential, supportive of their position for information prior to the date of appointment in circumstances such as these.
- [33] The beneficiaries, involved as they were in acrimonious litigation in the Netherlands, did not seek to administer the estate in any way, rather they appeared to rely on what appears to be the good will of Mr. Mulder ten Kate to continue to manage the property; also, they appointed him as an administrator in December 2007. I do not, therefore, consider his actions, as argued by Ms. Tulleken, to be intermeddling in the estate.
- [34] Even if I had found that the administrator had a duty to provide information from the pre-appointment period, I would not order further disclosure in any case. Pursuant to s. 99(2) of the Trustee Act, I have the discretion to order something less than a full accounting by the administrator.
- [35] As per *Jackson v. King*, 2003 BCSC 328, a court will consider what is reasonable taking into account relevant factors, such as whether the affairs are complex, whether the matter has been outstanding for some time, and the rationale for the requests. In this case a full accounting from December 2007 will be provided. In addition, the matter has been outstanding for some time. Despite this, information from 1999 to 2007, including ledgers, have already been provided to Ms. Tulleken.

- [36] I would exercise that discretion and conclude that in providing the pre-appointment accounts to the respondent on November 9, 2015, by virtue of a letter dated the same day, the administrator has met any burden he may have had to provide any information from 1999 to 2007. Those documents include specific ledgers setting out expenses and credits to the property. With no evidence or allegations of misconduct, I find that further accounts for the pre-appointment period are not required here.
- [37] As noted previously, the documents disclose no apparent breach of fiduciary duty by the administrator during the pre-appointment period. Nor is there an allegation or even reference to any suspicious activity on the part of Mr. Mulder ten Kate from 1999 to 2007. No rationale for the requests is evident other than perhaps curiosity and Ms. Tulleken's desire to have a full accounting from 1999 to 2007. I am therefore inclined to agree, as per the comments in *MacLean v. MacLean*, 2009 BCSC 292, that this is largely an unnecessary fishing expedition.
- [38] Much has been made of a large sum of money in these accounts; being \$267,000. That amount, however, will be dealt with in the passing of the accounts as it is during the period of the appointment of the administrator of 2007. There is nothing further to reveal any concerns otherwise and no allegations of any sort that would support anything improper or suspicious.
- [39] The reality is that Mr. Mulder ten Kate, prior to being an administrator, in good faith continued the management of the property. The potential beneficiaries did not accede to his attempts to pass those responsibilities along to them. In 2007 the respondents clothed him with official administration status for the estate. He has undertaken those duties and is prepared to pass the accounts in order to distribute the estate and be discharged as administrator. I therefore direct that the accounting take place on the basis set out above and the matters now proceed to that process.
- [40] In these circumstances, costs of the petition are awarded to the administrator.
- [41] Is there anything else I can assist the parties with?
- [42] MS. JOHAL: My Lady, just for the purposes of the order, can we just clarify that the costs are awarded to the administrator?
- [43] THE COURT: From the estate, yes. The costs of this petition are awarded to the administrator, payable by the estate.
- [44] MS. JOHAL: On a special costs basis is what we had sought.
- [45] THE COURT: The special costs, can you quantify that?
- [46] MS. JOHAL: Not presently. I guess that could be dealt with after passing the accounts.
- [47] THE COURT: Yes, I am not prepared to award special costs at this time.

- [48] MS. JOHAL: And then the other matter is my friend's application. Perhaps that could be adjourned.
- [49] MR. STEWART: Yeah, I mean I think you have effectively dealt with it.
- [50] THE COURT: Yes, and my recollection, there was not sufficient time to deal with the application so it was in effect adjourned, although my understanding is also that the parties are looking to have this matter proceed to an accounting.
- [51] MS. JOHAL: Yes, My Lady. This notice of application I just sought the pre-administration records and you have taken care of that, so I guess it is just adjourned generally.
- [52] THE COURT: Yes, with the parties proceeding to the accounting on the basis set out in these reasons.
- [53] Thank you very much.

The Honourable Madam Justice E. Burke

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