

CANADA / JUDGMENT

Ghag v. Ghag

2021 BCCA 106

COURT

British Columbia Court of Appeal

DECIDED

27 January 2021

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2021 BCCA 106 Ghag v. Ghag

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ghag v. Ghag,

2021 BCCA 106

Date: 20210127

Docket: CA46970

Between:

Ashton Ghag, Cheyenne Ghag, Shaylene Ghag

and Veena Charmaine Ghag

Respondents

(Petitioners)

And

Brendan Ghag

Appellant

(Respondent)

Corrected Judgment: The formatting of the judgment was corrected throughout on March 16, 2021.

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated July 31, 2020 (Ghag v. Ghag, 2020 BCSC 2136, Vancouver Docket S190923).

Oral Reasons for Judgment

The Appellant, appearing in person (via videoconference):

B. Ghag

Counsel for the Respondents (via videoconference):

A. Dosanjh

C.R.J. Gallant

Place and Date of Hearing:

Vancouver, British Columbia

January 25, 2021

Place and Date of Judgment:

Vancouver, British Columbia

January 27, 2021

Summary:

The respondents are beneficiaries of a trust, who in a petition proceeding obtained an order removing the appellant as trustee of the trust and nullifying certain share transactions caused by the appellant. The appellant appeals the orders nullifying the share transactions, on the basis that the matter raised a triable issue and should have been referred to trial. Held: Appeal dismissed. The judge did not err in concluding there was no triable issue. The judge was entitled to accept the appellant's evidence as to his motivations for the share transactions and to find these were inconsistent with the trustee's obligations under the trust.

GRIFFIN J.A.:

Introduction

[1] This appeal involves a dispute over a trust established by the late Sukhvinder "Sukie" Ghag. The appellant, Sukie's son, was the trustee of the trust. He was removed as trustee by court order, and certain share transactions he had caused as trustee were declared null and void. On appeal he does not challenge his removal as trustee, but seeks to set aside the declarations nullifying the share transactions on the basis that the judge ought to have referred the issue to the trial list.

Background

- [2] The background is that Sukie Ghag was married to Veena "Charmaine" Ghag, who is a respondent on this appeal. Together, they had four children: Ashton, Cheyenne, and Shaylene, who join their mother as respondents on appeal, and Brendan Ghag, the appellant. Intending no disrespect but to avoid confusion, I may refer to the parties by first name only from time to time.
- [3] On February 16, 2017, Sukie settled the Sukie Ghag Family Trust (the "Trust"). There is evidence that this was part of his estate planning after he was diagnosed with brain cancer. He subsequently passed away.
- [4] The written Trust instrument provided that the Trust was established for the benefit of five named beneficiaries, namely, Charmaine and the four children. No beneficiary was given priority. The Trust named the appellant as trustee and Charmaine as the replacement trustee.
- [5] The Trust's primary asset when it was settled was all of the Class "A" common voting shares of Abby Pharmacy Ltd. ("Abby Pharmacy"), namely, 100 Class "A" common shares. These shares had formerly been owned by Sukie.
- [6] The Trust gives wide discretionary powers to the trustee, including to exercise the trustee's powers to the same extent and as fully as if the trustee was the sole owner of the Trust fund, and including to make any transfer of assets.
- [7] The Trust instrument expressly provides, in para. 19 under the heading "Acceptance by the Trustee":

The Trustee shall exercise the powers and discretions given to him in what he deems to be the best interests, whether monetary or otherwise, of the Beneficiaries, whether or not such exercise may have the effect of conferring an advantage on any one or more of the Beneficiaries at the expense of the other Beneficiaries .

[Emphasis added.]

- [8] That the Trustee's powers are to be exercised in the best interests of the beneficiaries is consistent with other language in the Trust instrument, including: a provision allowing appointment to other trusts, so long as the beneficiaries are the same persons with the same interests as the beneficiaries of the Trust; a provision allowing a majority of the beneficiaries to consent to a variation of the Trust, so long as it does not result in reversion to the settlor or a specified tax consequence; and the prohibition on the Trustee "deleting" any original beneficiary.
- [9] The underlying proceeding was commenced by petition in July 2019 by Charmaine and the three respondent children, who sought Brendan's removal as trustee of the Trust and the appointment of Charmaine as trustee.

- [10] The petition came about because of rising concerns by the respondents about: the appellant's dealings with the Trust assets; his refusal to provide an accounting to them regarding the Trust and, indeed, his hostility towards them for requesting the same; and his demands for large sums of money from his mother, Charmaine.
- [11] In late 2018, the appellant requested that Charmaine transfer \$120,000 to him. Charmaine refused. Shortly thereafter, the respondents noticed suspicious transactions in the bank accounts for both the Trust and Abby Pharmacy. In particular, two bank drafts in the amounts of \$100,000 and \$250,000 were taken from the Abby Pharmacy account and deposited in the Trust, and \$100,000 was taken out of the Trust the next day. Over the following month, the respondents and appellant exchanged various communications, culminating in the respondents' request that the appellant resign as trustee.
- [12] Around the same time, the appellant transferred the Abby Pharmacy shares out of the Trust. The shares were transferred such that: the appellant received 55 of the Class "A" common voting shares; Ashton, Cheyenne, and Shaylene each received 15 of the Class "A" common voting shares, as well as shares in various other non-voting classes; and Charmaine did not receive any shares.
- [13] Shortly after distributing the shares, the appellant allotted himself 150 Class "B" common voting shares of Abby Pharmacy, which have equal voting rights to the Class "A" shares.
- [14] Eventually the respondents learned of the share transfers and transactions. In the petition proceeding, they sought declarations setting these aside.
- [15] The appellant filed several affidavits in the petition proceeding, which contained his evidence as to the reasons for his transactions involving the shares of Abby Pharmacy.
- [16] In his affidavits, the appellant affirmed the existence of the Trust, the Trust instrument, and that his actions in transferring the Abby Pharmacy shares were as trustee of the Trust.
- [17] The focus of the appellant's affidavit evidence was on what he claimed to be his father's intentions, prior to the creation of the Trust, which he put forward as justifying his decisions as trustee of the Trust.
- [18] In his affidavit evidence, the appellant claimed that prior to the creation of the Trust:
- a) His father promised him that if he completed his studies and agreed to work with him, he would give him control and ownership of his assets over time (defined by the appellant as "Sukie's Succession Plan").
 - b) After his father became ill in 2016, his and his father's attention turned to minimizing the tax burden upon his passing while maximizing the appellant's control over Sukie's assets, so that he could work towards building a structure of "intergenerational assets" to the benefit of each of the children (defined by the appellant as the "IG Plan"). It is relevant to note the appellant's evidence that both Sukie's Succession Plan and the IG Plan excluded Charmaine.

- c) In furtherance of these plans, he, Sukie and Charmaine entered into an agreement that was to be kept secret from the other siblings (the "Secret Agreement"). The Secret Agreement provided that Charmaine would inherit all of Sukie's assets, including the shares in Abby Pharmacy, shares in other companies, and various real properties. However, the Secret Agreement provided that this was only so the appellant could save taxes, the appellant would be the true owner and could control the assets, and Charmaine would leave the assets to all four children equally in Charmaine's will. For present purposes, there is no need to explore apparent inconsistencies on the face of that document.
 - d) He spent thousands of hours managing, working and advancing the IG Plan and Secret Agreement, both prior to the settlement of the Trust and during his tenure as trustee.
 - e) As Trustee, the appellant followed his father's mandate by treating the respondents within the boundaries of what the appellant considered fair and what his father contemplated for the Trust.
 - f) His father structured his assets under the assumption the Secret Agreement would be followed and relied on the Secret Agreement to trust that his children and grandchildren would be the ultimate beneficiaries of his assets. Again, on the appellant's evidence, this was intentionally excluding Charmaine.
 - g) When the appellant distributed the Abby Pharmacy shares out of the Trust, it was in a manner that "replicated the intention and purpose of the Trust". This was done taking into account tax changes in Canada and his father's intention that the appellant retain control over Abby Pharmacy at all times. It was also done so that his three siblings, as minority shareholders in Abby Pharmacy, have a crystallized interest as opposed to the "amorphous interest that beneficiaries of a non-discretionary trust have".
 - h) He saw his obligations under the trust as being to "defend [his] father's wishes".
 - i) His decisions regarding the share transfers were made "in the spirit of what [his] Dad wanted", and reversing these transactions would "defeat the purpose of all the work [his] Dad and [he] did to create a structure that would maximize [his] control over Abby Pharmacy in a tax efficient manner".
- [19] The appellant put into evidence the trustee resolution that he prepared to document and justify his transfer of the Abby Pharmacy shares out of the Trust and make himself the majority and controlling shareholder. It also set out his motivations and intentions, as follows:

D. The primary purpose of creating the Trust was to create an efficient tax splitting vehicle for Brendan Ghag to fulfill certain agreements and promises made with his father Sukie and mother Charmaine;

H. The Trustee has carefully considered which beneficiaries it is appropriate to distribute the Shares to so that the purpose of the Trust can be preserved;

I. The Trustee does not believe it appropriate to distribute voting control in Abby Pharmacy Ltd. to [the respondents] for reasons including, but not limited to: (8) distributing voting control to the above parties would be contrary to the intention of the settlor of the trust ;

J. The Trustee does not believe it appropriate to distribute any Shares to Charmaine Ghag for reasons including, but not limited, to: (1) it was the intention of the Settlor of the Trust, Sukhvinder Singh Ghag, that Charmaine Ghag never have voting rights in Abby Pharmacy Ltd. (2) it was the intention of the Settlor of the Trust, Sukhvinder Singh Ghag, that Charmaine Ghag not receive Class A Common Shares (3) being mentally unable to properly administer the assets being distributed (4) being emotionally unable to properly administer the assets being distributed (5) a high likelihood that the assets may be expropriated (6) a high likelihood that the assets would lose value as a result of being distributed (7) being a party to serious litigation (8) refusing to enter into settlement agreements that are to the benefit of Abby Pharmacy and the Trust in the past (9) causing material harm to the Trust and Abby Pharmacy in the past.

K. Brendan is the only appropriate beneficiary to receive voting control of Abby Pharmacy Ltd., for reasons including but not limited to: (1) Sukie and Brendan have a plan that requires Brendan to give certain financial support to Charmaine Ghag, Ashton Ghag, Cheyenne Ghag, and Shaylene Ghag (2) Brendan has never withheld that support at any time or deviated from the plan with Sukie (3) the Shares were placed in the Trust by Sukie to allow Brendan to maximize tax efficient distributions at his discretion (4) Brendan has not blocked a settlement agreement that was in the best interests of Abby Pharmacy and the Trust to enter into ([5]) distributing the majority of the Shares to Brendan reflects Sukie's intention that Brendan retain control over Abby Pharmacy Ltd. at all times.

[Emphasis added.]

[20] Charmaine denies signing the document that the appellant puts forward as evidence of the Secret Agreement, purportedly signed four days before Sukie's scheduled brain surgery, and says that she did not see Sukie sign it.

Chambers Decision

[21] As mentioned, the respondents petitioned the court to remove the appellant as trustee of the Trust and for declarations setting aside the transactions that had been undertaken by the appellant involving the shares of Abby Pharmacy. They also sought various forms of ancillary relief, including an accounting and return of certain corporate records. The petition was heard in July 2020.

[22] In the course of the hearing, counsel for the appellant conceded the \$100,000 withdrawal was taken from the Trust by the appellant for personal purposes. After this concession, counsel for the appellant agreed that the appellant should be removed as trustee.

[23] After the parties agreed that the appellant should be removed as trustee, the appellant agreed to the accounting and return of records sought by the respondents as well.

- [24] The only issue remaining in dispute was whether the transfer of the Abby Pharmacy shares out of the Trust and the issuance of Abby Pharmacy Class "B" shares to the appellant should be declared null and void.
- [25] The appellant argued the judge did not have the jurisdiction to make such an order. This issue is not pursued on appeal. I see no issue arising from the judge's exercise of jurisdiction, and I will not address it further.
- [26] The appellant also submitted that even if the judge did have the jurisdiction to make the order nullifying the share transactions, the matter should be referred to trial because there was conflicting evidence, particularly with respect to the existence of the Secret Agreement.
- [27] In reasons for judgment given July 31, 2020 and indexed at 2020 BCSC 2136, Justice Tammen granted the declaratory relief sought by the respondents.
- [28] The judge found the existence or not of the alleged Secret Agreement did not need to be decided by him: at para. 4. The appellant had brought a separate action to enforce that agreement and to have himself declared true owner of assets that had passed to Charmaine on Sukie's death.
- [29] The judge found that what was relevant was the appellant's own evidence as to his motives for the transactions at issue. This evidence revealed he took into account extraneous considerations outside the terms of the Trust instrument, namely, what he claimed to be Sukie's intentions and the Secret Agreement (referred to as the secret trust). The judge held:
- [5] For purposes of this application, it is sufficient that I make a finding, amply supported by all the evidence, including that of Brendan, that in administering the Sukie Ghag Family Trust Brendan took into account extraneous considerations, namely the secret trust and what he believed to be the settlor's true intentions, not those explicitly set out in the trust itself. In addition, Brendan concedes in his affidavits that he viewed his duty of loyalty to be to the settlor, not the named beneficiaries of the trust. His evidence is also clear that he did not view Charmaine as a true beneficiary of the trust, and his subsequent actions effectively deprived her of all rights as a beneficiary.
- [30] The judge noted that the share transactions were supported by a resolution that: excluded Charmaine as a beneficiary, ostensibly based on the intentions of the settlor of the Trust; gave voting control of Abby Pharmacy to the appellant, ostensibly based on the plan evinced by the Secret Agreement; and left the Trust without any meaningful assets: at para. 10.
- [31] The judge concluded that this background justified the declaratory relief sought on two grounds. First, setting aside the transactions was appropriate because the appellant took into consideration irrelevant and inappropriate considerations in exercising his discretion as trustee. Second, the appellant's decision was one that no even-handed, fair minded trustee could have made. The judge stated this conclusion as follows:

- [11] Against that backdrop, I have no hesitation in granting the declaratory relief sought. Both the trustee resolution and Brendan's affidavit demonstrate that he took into consideration irrelevant and inappropriate considerations in exercising his discretion as trustee. In addition, his decision to apportion the majority of the trust assets to himself and to exclude entirely one of the named beneficiaries is one that no even-handed, fair minded trustee could have made in the exercise of his discretion. In such circumstances, the court must intervene.
- [32] Having found the appellant had exercised his discretion as a trustee inappropriately, the judge declared the share transactions null and void: at para. 14.

Issues on Appeal

- [33] The appellant seeks to set aside the judge's declarations nullifying the share transactions relating to Abby Pharmacy.
- [34] The appellant states the issues on appeal in a number of ways. But on reading the appellant's factum and upon hearing his oral submissions, it appears that the appellant is really alleging one error by the judge. He submits the judge erred by not referring the matter to the trial list. The appellant submits there was a triable issue as to whether he, as trustee, acted properly when making the decisions regarding the Abby Pharmacy share transactions.
- [35] The respondents submit that the judge did not err, as there was no triable issue as to the appellant's motives for his transactions regarding the Abby Pharmacy shares. The judge simply relied on the appellant's own evidence.

Applicable Legal Principles

Petition Proceedings

- [36] The form of relief sought by the respondents below, and the method of proceeding by petition, was in accordance with the Trustee Act, R.S.B.C. 1996, c. 464, and the Supreme Court Civil Rules.
- [37] Section 30 of the Trustee Act authorizes the removal and replacement of a trustee "on application to the court" by any trust beneficiary, with the consent and approval of a majority in interest and number of the trust beneficiaries. Here, the petition was brought and supported by all the beneficiaries of the trust other than the appellant himself.
- [38] Where an application is authorized by enactment, as here, Rule 1-2(4)(a) and Rule 2-1(2)(b) of the Supreme Court Civil Rules provide that it must be brought by petition. Likewise, Rule 2-1(2)(d) provides that a proceeding must be commenced by petition where the "relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee".

- [39] Rule 20-4 allows the court to make binding declarations in a "proceeding", which is defined in Rule 1-1(1) to include a petition proceeding.
- [40] Pursuant to Rule 22-1(7)(d), the court may order the trial of a matter brought by way of petition.
- [41] The parties rely on a line of cases which hold that this discretion to refer proceedings brought by way of petition to the trial list must be exercised where there are disputes of fact or law, unless the party requesting the trial is "bound to lose": *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 at para. 43. This test incorporates the test for summary judgment into the question of whether it is appropriate to determine matters by way of a petition proceeding.
- [42] The parties do not challenge the correctness of *Saputo*. No doubt this is because it is often cited and applied in this Court, as well as the trial court, and likely can only be revisited by a five-person division. Nevertheless, as an aside, I question whether the authorities relied upon in *Saputo* were decided in a historical context that may no longer be relevant under the current Rules. The availability of hybrid procedures for determining disputes was expressly incorporated into the procedures for hearing petitions in 2010, with the addition of Rule 16-1(18) in 2010. This Rule gives the court power to apply any other Rule to a petition, without first converting the petition to an action: *Bacon v. British Columbia (Minister of Finance)*, 2020 BCCA 218 (Chambers); *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 89. This incorporates the modern approach of using hybrid procedures to determine disputed issues, short of a full trial, which the Supreme Court of Canada has encouraged in the spirit of proportionality and to enhance access to justice: *Hyrniak v. Mauldin*, 2014 SCC 7. This Court in *Saputo* did not discuss Rule 16-1(18).
- [43] Even applying the test derived from the summary judgment context, mere evidentiary conflicts alone will not preclude a decision on a petition. Instead, an evidentiary conflict will only prevent judgment if it relates to a material fact or raises a triable issue: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11.
- [44] As noted in *Lameman*, each side must put its best foot forward at the hearing. The chambers judge is permitted to make inferences of fact that are strongly supported by the undisputed facts. Further, a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 31.

Interpretation of Trusts and Trustee Discretion

- [45] As stated in *McLeod v. McLeod*, 2011 BCSC 1942, a trustee is obliged to follow the terms of the trust:

[30] The trustee is obliged to follow the terms of the trust. The principle is so basic that it does not need authority; however, it is described succinctly in *Merrill Petroleum Ltd. v. Seaboard Oil Co.* (1957), 22 W.W.R. 529 at 557 (Alta. S.C.):

... While it is also true that there are certain general obligations imposed by law on any trustee (e.g., the duty not to profit from the trust at the expense of the beneficiaries) the more specific obligations and duties of a trustee are set forth in the instrument creating the trust - in other words, except for those general duties imposed by law on all trustees, the terms of a trust are to be found within the four corners of the trust instrument. ... In other words, the first duty of this trustee (as of all trustees) was to follow implicitly the terms of the trust instrument, and, secondly, to observe those general principles of trustee law which did not run counter to the express terms of the trust.

[Emphasis added.]

[46] Where the text of the trust instrument is not ambiguous, it is inappropriate to consider surrounding facts and circumstances. The settlor's intention is to be discerned primarily from the text of the trust instrument: *TLC The Land Conservancy of British Columbia v. The University of British Columbia*, 2014 BCCA 473 at paras. 45-47; *Smith v. Smith Estate, Re*, 2010 BCCA 106 at paras. 18, 28.

[47] A trustee's exercise of wide discretion under the express terms of a trust will rarely be interfered with by a court. Nevertheless, there are grounds that may justify the court's interference in the exercise of a trustee's discretion. As summarized by Professor Waters, the court may interfere in the exercise of discretion by a trustee where:

- a) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision;
- b) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or
- c) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.

(Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012))

[48] These situations have long been recognized as appropriate circumstances for court intervention: *Boe v. Alexander* (1987), 41 D.L.R. (4th) 520 at paras. 20-21 (B.C.C.A.); *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496 at 500 (C.A.); *Martin v. Banting*, 37 E.T.R. (2d) 270 (Ont. S.C.J.), *aff'd* (2002), 46 E.T.R. (2d) 93 (Ont. C.A.); *Pirani v. Pirani*, 2020 BCSC 974 at para. 128; *Edell v. Sitzer* (2001), 55 O.R. (3d) 198 (Ont. S.C.J.), *aff'd* 9 E.T.R. (3d) 1 (Ont. C.A.).

- [49] An example of a trustee's extraneous consideration is a consideration that is not concerned with the welfare or benefit of the beneficiary of the trust, but with something else, such as disapproval of the beneficiary's choice of spouse for racial or religious reasons: Fox at 500.

Did the Judge Err in Principle in Failing to Refer the Matter to Trial?

- [50] I will first consider whether the judge erred in principle in his approach to considering whether there was a triable issue.
- [51] Accepting the parties' positions that the summary judgment test applied, the judge applied that test in concluding that there was no triable issue in relation to the relief sought on the petition. He held:
- [12] The respondent questions the jurisdiction or authority of the court to grant the relief sought. In addition, counsel submits that even if I have the power to grant the relief, a full trial on the merits is necessary to decide the question. I disagree. I have not weighed the evidence, nor decided disputed questions of fact in reaching my decision. I have simply drawn inferences from the undisputed facts, and in particular, based on material sworn and filed by the respondent. A trial would serve no useful purpose.
- [52] I conclude that the judge did not misdirect himself on the proper approach to take when considering the question of whether to refer the matter to the trial list.

Did the Judge Err in Failing to Find a Triable Issue?

- [53] The appellant argues on appeal that the judge erred in not finding the evidence raised a triable issue.
- [54] This alleged error is in essence a challenge to the judge's assessment of the evidence and determination of the facts.
- [55] The appellant submits the chambers judge erred in failing to consider whether the appellant's evidence raised a triable issue. Specifically, he says the considerations he took into account when exercising his discretion in respect of the Abby Pharmacy shares were considerations of the best interests of the beneficiaries of the Trust. He argues that he had discretion under the terms of the Trust to exclude a beneficiary and did not need to treat them all in the same way.
- [56] I agree that the Trust instrument did not require the trustee to treat all beneficiaries in the same way. However, a trustee exercising any power must ensure that they do so "for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant": Edell at para. 173.
- [57] There was no question as to the motivation or purpose for the appellant to exercise his powers the way he did in relation to the Abby Pharmacy shares. He provided ample evidence in that regard.

- [58] The appellant's evidence was that he took the steps he did in furtherance of what he says he believed were his father's intentions and the Secret Agreement: first, to give him total control of Abby Pharmacy in a tax efficient way; and second, to deprive Charmaine of any benefit or ownership of the Abby Pharmacy shares or any voting rights with respect to the shares.
- [59] But the Secret Agreement, which the appellant alleges exists and guided his actions as trustee of the Trust, is expressly contrary to the terms of the Trust. The alleged Secret Agreement provides that Charmaine was to inherit the Abby Pharmacy shares, but to hold them for the appellant as true and sole beneficial owner.
- [60] It is not only undisputed that Charmaine did not inherit the shares of Abby Pharmacy and the appellant was not the sole beneficial owner of those shares, but also the terms of the Trust that applied to those shares are undisputed.
- [61] The express terms of the Trust made five people, including Charmaine, beneficiaries of the Trust's assets without qualification. The Trust also made Charmaine the replacement trustee, meaning the assets, including the voting shares of Abby Pharmacy, could be held by her. The terms of the Trust are clear and unambiguous in this regard, and they are thus expressly contrary to the "intentions" and Secret Agreement that the appellant says guided his decisions.
- [62] Further, the appellant did not dispute that he transferred the major asset of the trust, the Abby Pharmacy shares, out of the trust nor that he put the majority ownership and voting control in his own hands. This action meant he appropriated the majority of the Trust's assets for himself and would no longer be constrained by a trustee's responsibilities and fiduciary obligations with respect to the shares. I do not accede to the notion that any triable issue arose with respect to the obviously improper and self-interested nature of these transactions. The judge was able to conclude, on undisputed evidence, that the appellant's decisions with respect to the Abby Pharmacy shares were so unreasonable that no honest or fair-dealing trustee could have made them: at para. 11.
- [63] In respect of the latter conclusion, it may be that the judge was also influenced by the fact the appellant had taken \$100,000 of funds from the Trust bank account for personal reasons, without accounting for it. This was conceded by the appellant and so also did not give rise to a triable issue.
- [64] In summary, the judge's conclusions were supported by the appellant's own evidence as to the transactions that took place and what his motivations were for the transactions. The respondents could rely on the appellant's evidence without seeking to challenge it at trial. The appellant was not entitled to a trial to challenge his own evidence.
- [65] The appellant seeks to challenge the judge's exercise of discretion and findings based on undisputed evidence. He has not established that the judge made a palpable and overriding error.

Conclusion

- [66] In conclusion, the judge properly applied the test for determining whether a matter should be referred to trial or may be decided on the hearing of the petition. Based on the undisputed evidence before him, he found that a trial would serve no useful purpose. He did not weigh evidence or decide disputed issues.
- [67] The judge did not err in nullifying the appellant's decisions with respect to the Abby Pharmacy shares. Based on the appellant's evidence as to his motivations, it was open for the judge to find the appellant had exercised his discretion as trustee based on extraneous and improper considerations and in a manner that no honest and fair-dealing trustee could have.
- [68] For these reasons, I would dismiss the appeal.
- [69] WILLCOCK J.A.: I agree.
- [70] BUTLER J.A.: I agree.
- [71] WILLCOCK J.A.: The appeal is dismissed.

"The Honourable Madam Justice Griffin"

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