
CANADA / JUDGMENT

Jones v. McLeod

2017 BCSC 1478

COURT

Supreme Court of British Columbia

DECIDED

4 August 2017

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2017 BCSC 1478 Jones v. McLeod

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jones v. McLeod,

2017 BCSC 1478

Date: 20170804

Docket: S170650

Registry: Vancouver

Between:

Philip James Jones, as Trustee of the McLeod III Trust, and

Philip James Jones, as Trustee of the McLeod IV Trust

Petitioners

And

Sheila Elizabeth McLeod, William Ronald Thomas McLeod

and Malcolm Roy James McLeod

Respondents

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

In Chambers

Counsel for Petitioners:

R.R.E. DeFilippi

Counsel for Respondents:

H. Shapray, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

August 2, 2017

Place and Date of Judgment:

Vancouver, B.C.

August 4, 2017

- [1] THE COURT: The petitioner, Philip James Jones, as trustee of the McLeod IV Trust, applies to amend his petition filed January 20, 2017. By his petition brought pursuant to s. 86 of the Trustee Act, R.S.B.C. 1996. c. 464, Mr. Jones seeks the opinion, advice or directions of the court on certain questions concerning the management or administration of the McLeod IV Trust.
- [2] The McLeod IV Trust is one of several trusts created for estate planning purposes by the late Ross John McLeod, a wealthy businessman who I will refer to in these reasons as "Ross McLeod".
- [3] The respondent, Sheila Elizabeth McLeod, who I will refer to as "Mrs. McLeod", is the second wife and widow of Ross McLeod. She opposes one of the amendments sought by the petitioner. As I will discuss later in these reasons, Mrs. McLeod contends Mr. Jones has breached fiduciary duties he owed to her. She submits that the petitioner should not be permitted to amend or replace a question by which he seeks the opinion and advice or directions of the court on whether he acted in breach of any fiduciary or other duty owed to Mrs. McLeod.
- [4] The respondents, William Ronald Thomas McLeod, who I will refer to as "William", and Malcolm Roy James McLeod, who I will refer to as "Malcolm", are the adult sons of Ross McLeod by his first marriage. They neither appeared nor were represented on the hearing of this application, although Malcolm filed an application response consenting to all of the amendments sought by the petitioner.
- [5] The background of this application may be briefly stated.
- [6] The McLeod IV Trust was established on November 15, 2006 by an indenture made between Dora McLeod, as settlor, and Ross McLeod, as trustee, for the benefit of such persons as the trustee might from time-to-time appoint as beneficiaries from classes of persons defined in the trust document.

[7] As of November 15, 2006, the beneficiaries of the McLeod IV Trust were Ross McLeod and Mrs. McLeod.

[8] Article 8.02(d) of the McLeod IV Trust provides that:

In the event that the Trustee should die before the Trust Property has been fully distributed, the Protector may, by Deed or Will, appoint some person, or a trust company, to fill such vacancy. Notwithstanding the foregoing, no person shall be appointed trustee unless he or she agrees under seal to be bound by this indenture.

[9] The indenture named Mr. Jones as protector.

[10] On November 20, 2006 Ross McLeod made his will.

[11] On September 5, 2011 Ross McLeod died. Under the will, Mrs. McLeod was to inherit approximately \$22 million before taxes. Ross McLeod made no provision for William or Malcolm in his will.

[12] On September 13, 2011, Mr. Jones resigned as protector and was appointed as the trustee of the McLeod IV Trust. The petitioner acknowledges that his appointment of September 13, 2011 as trustee was not by deed or will and that he did not then agree under seal to be bound by the trust indenture of November 15, 2006.

[13] Also on September 13, 2011 the petitioner, as trustee of the McLeod IV Trust, added the Salvation Army as a beneficiary to the McLeod IV Trust.

[14] On August 15, 2014 the Salvation Army was removed as beneficiary of the McLeod IV Trust and William and Malcolm were added as beneficiaries of that trust.

[15] Mrs. McLeod says the designation of the Salvation Army as a beneficiary was made without her informed consent. She has also claimed, since August 2014, that the petitioner, as trustee of the McLeod IV Trust, acted in breach of his fiduciary duty by appointing Malcolm and William as beneficiaries. Mrs. McLeod claims that upon the death of Ross McLeod on September 5, 2011, she became the only beneficiary of the trust and was entitled in law to call for the winding up of the trust in accordance with the rule in *Saunders v. Vautier* (1841), 49 E.R. 282 (Rolls Ct.), *aff'd* (1841), 49 E.R. 482 (E.W.H.C.).

[16] The petitioner says that the appointments of the beneficiaries, about which Mrs. McLeod complains, were part of a plan to roughly equalize the distribution of the late Ross McLeod's assets among Mrs. McLeod, William and Malcolm. The total value of the assets in dispute is approximately \$150 million.

[17] On September 13, 2016 the petitioner was appointed trustee of the McLeod IV Trust by deed and agreed under seal to be bound by the trust indenture. When the petitioner and the respondents were unable to resolve Mrs. McLeod's claim to all of the assets of the McLeod IV Trust, the petitioner, as trustee, applied to the court for its opinion and advice or directions on the questions concerning the management and administration trust.

[18] Section 86(1) of the Trustee Act provides:

86 (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.

[19] The petition is set for hearing for five days commencing October 23, 2017. Accordingly, the petitioner brings this application pursuant to Rule 16-1(19) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which provides a party may amend a petition at any time with leave of the court.

[20] The amendments sought are set out in paras. 1 through 7 of Part 1 of the petitioner's notice of application. The only contested amendment is set out in para. 4 and relates to para. 1(c) of the petition.

[21] Paragraph 1(c) of the petition seeks the following relief:

1. A declaration setting out the opinion, advice or directions of the court on the following questions concerning the management or administration of the McLeod IV Trust, being:

...

(c) whether, in the circumstances that have occurred, the petitioner, Philip James Jones, as the trustee of the McLeod IV Trust, acted in breach of any duty, fiduciary or otherwise, to the Respondent, Sheila Elizabeth McLeod, in appointing the Respondents, William Ron add Thomas McLeod and Malcolm Roy James McLeod, as beneficiaries to the McLeod IV Trust on August 15, 2015.

[22] The amendments sought would strike out the words "acted in breach of" and replace them with the word "owed."

[23] The court's opinion, advice or directions would be sought on the question of whether the petitioner owed any duty, fiduciary or otherwise, to the respondent, Sheila Elizabeth McLeod, rather than whether he had acted in breach of any fiduciary or other duty.

[24] The petitioner says this amendment is intended to clarify the particular legal question on which the opinion, advice or direction of the court is sought by the trustee, and only the trustee may seek the opinion, advice or direction of the court under s. 86(1) of the Trustee Act.

[25] Mrs. McLeod submits the court should not be confined to answering any question about whether the petitioner owed a fiduciary duty. She says the court should also provide its opinion on whether Mr. Jones acted in breach of a fiduciary duty owed to her. Mrs. McLeod says Mr. Jones was also the lawyer for Ross McLeod, and the architect of her late husband's estate planning. She says Mr. Jones had a solicitor and client relationship with her. Mrs. McLeod says Mr. Jones appointed himself as trustee of the McLeod IV Trust without notice

to her and that the appointments of first the Salvation Army, and later William and Malcolm, as beneficiaries of the McLeod IV Trust, prevented her, as the true sole beneficiary of the trust following her husband's death, from calling for the winding up of the trust and the distribution to her of all of its assets.

- [26] On July 28, 2017, Mrs. McLeod commenced an action by notice of civil claim against Mr. Jones and his former law firm in which she claims damages for breach of fiduciary duty. In that action she alleges breaches of fiduciary duty by Mr. Jones in his capacity as a lawyer; as the protector of the McLeod IV Trust; and in his appointments of the Salvation Army, William and Malcolm as beneficiaries of the trust.
- [27] Mr. Shapray has informed the court that Mrs. McLeod also intends to bring a counter-petition seeking the removal of Mr. Jones as trustee. He also refers to Rule 16-1(18) which provides the court with the discretion to apply any of the Supreme Court Civil Rules to a petition proceeding. The hearing of this petition was set for five days in contemplation of Mrs. McLeod applying for the cross-examination of Mr. Jones on his affidavit, or for the examination or cross-examination of witnesses at the hearing.
- [28] Mr. Shapray says that if these processes are invoked the court will be able to make findings of fact necessary to determine whether the petitioner acted in breach of the fiduciary duty.
- [29] Mrs. McLeod does not dispute the proposition that only the trustee may seek directions under s. 86(1) of the Trustee Act (see *Mayer v. Mayer*, 2013 BCSC 1958, aff'd 2014 BCCA 293, at paras. 62-63).
- [30] The authorities provide some assistance on the scope of the questions which may be asked of the court on an application under s. 86(1).
- [31] In *Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.*, 2013 BCSC 2071, rev'd on other grounds, 2014 BCCA 227, Madam Justice Loo said this at para. 116:
- [116] The seeking of legal advice on legal issues arising in connection with the trustee's obligations is an appropriate category of application under s. 86 of the Trustee Act ...
- [32] In *Mansbridge and Roulston (In the Matter of)*, 2004 BCSC 1605, Madam Justice Loo also discussed s. 86 of the Trustee Act. At para. 51 she said this:
- [51] On an application for directions under s. 86 of the Trustee Act, the court should not exercise the trustees' powers, but rather confine itself to advice on any legal issues that arise in connection with the trustees' obligations. This principle is enunciated by Middleton J. in *Re Fulford* (1913), 29 O.L.R. 375 at p. 382:

It is suggested that some scheme should be devised by which the Court should approve of realisation in each particular case, taking the opinion of some advisory committee, if necessary, upon each particular transaction. I do not think that any such scheme can be authorized. The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the Court.

The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.

- [33] What I take from these authorities is that an executor or trustee may seek the advice, opinion or directions of the court on a legal question and then act on that advice.
- [34] These, of course, are proceedings by petition. In *The Owners, Strata Plan No. 1086 v. Coulter et al*, 2005 BCSC 146, Mr. Justice Wilson dealt with an application by the petitioner for an order that the notice to admit procedure, then governed by Rule 31 of the former Rules of Court, applied to petition proceedings. At para. 20, he referred to the petitioner's argument that Rule 31 ought to be applicable to originating proceedings. Mr. Justice Wilson went on to reject that argument, noting that a response is not equivalent or the same as a statement of defence, an answer or a counter-petition.
- [35] At paras. 24 to 26 Wilson J. said this:
- [24] A "response" in Form 124, pursuant to R. 10(5), contains no allegation of material fact. It does not signify the close of pleadings, because there are no pleadings. Issue is joined simply by the statement of the position to be taken in the response.
- [25] R. 1(5) is of no assistance, because R. 10 addresses the object, by permitting summary proceedings for the resolution of certain disputes.
- [26] An originating application presupposes that there will be no dispute about the material facts; although the inferences to be drawn from those material facts may very well be in dispute. Unlike a pleading, the facts are not alleged, they are testified to on affidavit by oath or affirmation.
- [36] While on the hearing of an application for directions under s. 86(1) the court may have to make some findings of fact in order to provide its opinion or directions on a legal question put to it, a petition proceeding is not suitable for the determination of contested issues of fact on questions relating to the trustee's liability.
- [37] In my view the amendments sought by the petitioner should be granted unless there would be prejudice to Mrs. McLeod. Here, the amendments sought will not prejudice Mrs. McLeod. There is no impending distribution of the estate.
- [38] Mrs. McLeod intends to counter-petition for Mr. Jones' removal. It is possible that counter-petition, if brought, may be heard at the same time as Mr. Jones' petition.
- [39] Further, Mrs. McLeod will have the full opportunity to make submissions on the question of whether the petitioner owed her a fiduciary or other duty.

[40] Taking into account my finding that there will be no prejudice to Mrs. McLeod, and the right of the trustee to frame the questions on which he seeks the court's advice, I conclude that the amendments should be granted as sought.

[41] Costs of this application will be costs in the cause.

"PEARLMAN, J."

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