

CANADA / JUDGMENT

Mayer v. Mayer

2014 BCCA 293

COURT

British Columbia Court of Appeal

DECIDED

21 July 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCCA 293 Mayer v. Mayer

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Mayer v. Mayer,

2014 BCCA 293

Date: 20140721

Docket: CA041399

Between:

Mhinder Mayer

Appellant

(Petitioner)

And

Bhora Mayer

Respondent

(Respondent)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated

October 29, 2013 (Mayer v. Mayer, 2013 BCSC 1958, Vancouver Docket S123077).

Counsel for the Appellant:

G.B. Gomery, Q.C., P.R. Senkpiel

Counsel for the Respondent:

R.S. Fleming

Place and Date of Hearing:

Vancouver, British Columbia

May 30, 2014

Place and Date of Judgment:

Vancouver, British Columbia

July 21, 2014

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

Summary:

This dispute is one of many concerning a trust established by brothers to permit them to carry on business together. The chambers judge dismissed a petition by one of the brothers for a declaration that it was just and equitable the trust be wound up to break a deadlock between the parties. He held that the court does not have a general power to terminate a trust absent consent of all the beneficiaries or an express provision in the trust.

Held: appeal dismissed, without prejudice to the parties to raise the issue in the court below. The petition was clearly premature. The parties agree that it would be open to the court to wind up the trust if the trust contains an implied term authorizing such an action. Whether the trust contains such a term is a matter for the trial judge to determine.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] This appeal constitutes one further chapter in the ongoing litigation between Mhinder and Bhora Mayer which has to date spawned more than 16 separate proceedings and numerous reported decisions. The litigation revolves around the affairs of an entity known as the Brothers' Trust (the "Trust"). This appeal concerns the jurisdiction of a Supreme Court judge to order the winding up of the Trust.
- [2] The chambers judge, who is also the case management judge, dismissed the application. He held that absent an express provision in the trust agreement or the consent of all beneficiaries, the court does not have jurisdiction to wind up a trust.
- [3] Mhinder now appeals. His main submission is that the chambers judge erred in failing to find that it was an implied term of the Trust that the trustees could wind up the Trust.

BACKGROUND

- [4] The Trust is formally constituted by three short and simple agreements that were entered into in 1966, 1978 and 1984. The original parties to the Trust were Mhinder and Bhora, and their brothers Welbier, Bhim and Bhagwan. Welbier died in 1985. Bhim withdrew from the trust in 1987 and Bhagwan withdrew in 1991, leaving Mhinder and Bhora as the joint trustees and only remaining beneficiaries of the Trust.
- [5] The Trust was established as a vehicle to permit the parties to carry on business and own property together as equals. Under the terms of the Trust, the brothers agreed that they would be the equal beneficial owners of all business ventures undertaken and assets acquired by any of them, excluding personal residences. Over time the Trust acquired several parcels of real property and incorporated a number of companies to carry on various businesses. The properties and shares were held nominally by individual brothers.
- [6] From the outset the Trust has contained a provision governing the compensation a brother who wished to leave the trust would receive. Clause 7 of the 1966 agreement stated:

IF A BROTHER WISHES TO LEAVE THE TRUST he must sell and transfer his position, shares and properties to the other brothers at the original value, and/or purchase price.

- [7] This provision was modified in 1984 so that upon the death of a brother, that brother's interest would be transferred at fair market value. In any other circumstances, a brother leaving the Trust would only recover the original value of the properties.
- [8] The chambers judge described this as the "Last Man Standing" clause and it is a matter of some import in regards to the disposition of this application.
- [9] The differences between Mhinder and Bhora arose in 2007 and led to the present litigation. The background to the dispute is set out in previous judgments of this Court and the court below: *Mayer v. Osborne Contracting Ltd.*, 2010 BCSC 1249; *Mayer v. Mayer*, 2011 BCSC 386; *Mayer v. Mayer*, 2012 BCCA 77; and *Mayer v. Mayer*, 2012 BCSC 1264. For the purpose of this

appeal, it is not necessary to review the lengthy history of these proceedings. That background has been set out in detail in the reasons of this Court indexed as 2012 BCCA 77, paras. 8-33.

- [10] The chambers judge has now consolidated many of the outstanding proceedings in one action. Mhinder has prepared a consolidated notice of civil claim. Claims that Bhora has raised in the actions will be pleaded in the consolidated action by way of counterclaim.
- [11] The particular issue which is the subject matter of this appeal arises in a separate petition that Mhinder filed on May 1, 2012. In the petition, Mhinder sought directions in regards to his authority as trustee to bring certain claims which he alleged were for the benefit of the Trust. In the alternative he sought a declaration that if he was not able to pursue the claims as trustee, he had standing to pursue them in his capacity as a beneficiary of the Trust. In his reasons the chambers judge held that Mhinder may not pursue his proposed claims as a trustee but that he was entitled to a declaration that he was at liberty to pursue his proposed claims in his capacity as a beneficiary, at his own risk and expense. No appeal is taken from those decisions.
- [12] In the petition Mhinder also sought a declaration pursuant to s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464, that it was just and equitable that the Trust be wound up in order to break a deadlock between the trustees. He sought an accounting and an order that the trust assets be distributed equally to Mhinder and Bhora or the trust assets be sold and the net proceeds of sale be distributed equally.
- [13] In support of the application, Mhinder submitted that there had been a complete breakdown of trust and confidence between the parties, in consequence of which they were no longer able to cooperate with one another in the management and administration of the Trust and their business affairs. He submitted that the common intention underlying the Trust had been frustrated and in the circumstances it was just and equitable for the court to wind up the trust and distribute the assets. He submitted in the case of a deadlock the court had the power to order a winding up of a trust.
- [14] Bhora opposed the application. He submitted that a trust with adult beneficiaries could only be terminated by the express terms of the trust or by the consent of all beneficiaries not under disability pursuant to the rule in *Saunders v. Vautier*, (1841), 4 Beav. 115, 49 E.R. 282 (aff'd 1 Cr. & Ph. 240, 41 E.R. 482). Alternatively he submitted that he was the last man standing because Mhinder must be taken by his actions to have abandoned the Trust and that an order directing the trustees to wind up the Trust would deprive him of his ability to establish this.
- [15] The chambers judge agreed with Bhora's submissions that a trust with adult beneficiaries can only be terminated either by the express terms of the trust, which are lacking in this case, or by consent of all beneficiaries pursuant to the rule in *Saunders v. Vautier*. In support of that conclusion, the chambers judge cited *Lomas v. Rio Algom Limited*, 2010 ONCA 175, 99 O.R. (3d) 161, in which the Ontario Court of Appeal in turn applied the reasoning of the

New South Wales Supreme Court in *Gaydon, Re*, [2001] NSWSC 473. The thrust of those decisions is that the court does not have a general power to terminate a trust. As a general proposition it is the court's role to uphold and enforce trusts, not to terminate them.

- [16] The chambers judge set out his conclusions as follows:
- [99] I agree that these are distinctions, but they are not distinctions that displace the reasoning quoted above. The jurisdiction of the court to intervene to break a deadlock of trustees is predicated upon the necessity of doing so to carry out the terms of the trust in the interests of the beneficiaries: *Kordyban* at para. 60. I am unable to accept that it extends to ordering a winding up of the trust without the unanimous consent of those beneficiaries. While *Gaydon* suggests that the court will give effect to a trust's winding-up provisions, it does so in the context of express provisions in the trust. I cannot stretch that to justify stepping in to wind up the trust when there are no such express provisions, an absence of consent, and a need for extensive directions because the trust is silent.
- [100] Parenthetically, I note that such an order would resolve nothing in terms of the litigation. The issues between the parties would still require resolution, including the issue of whether *Mhinder* has abandoned the trust.
- [101] I conclude that in the absence of the consent of both beneficiaries, I do not have jurisdiction under s. 86(1) of the Act to order a winding up of the *Brothers' Trust* notwithstanding the deadlock that clearly exists, and notwithstanding that an equal division of trust assets between the two beneficiaries would seem to be an obvious solution to this destructive dispute. Life, I would remind the parties, is short.

ISSUES ON APPEAL

- [17] On the appeal *Mhinder* abandoned the position taken below that the Court in the case of a deadlock has the power to order a winding up of a trust regardless of the terms of the trust or the position of the beneficiaries. He now submits that the chambers judge erred when he concluded that the court could only wind up the Trust with the consent of the beneficiaries or pursuant to an express provision providing for the winding up. He submits that whether the court can order a winding up of the Trust depends on the terms of the trust. The term need not be expressed but can be implied from the terms of the trust agreement and the surrounding factual matrix. In this case he submits it is an implied term of the Trust that the trustees can buy and sell properties. That power in turn gives the trustees the power to sell all of the trust property and distribute proceeds to the beneficiaries. He asks this Court to make a declaration that the chambers judge has jurisdiction to make an order winding up the Trust.
- [18] *Mhinder* does not ask this Court to grant the specific relief set out in the petition. He acknowledges that a winding up order cannot be made at this time and can only be made in the court below in the context of the ongoing litigation.

- [19] Bhora's position on the appeal also varies from what he argued below. He now quite fairly concedes that the chambers judge erred when he limited the court's power to wind up the Trust to circumstances in which there is an express term. He agrees that if, on the proper interpretation of the trust agreement, the trustees have the power to wind up the Trust, then that finding can be made based on an implied term.
- [20] Bhora submits that the remedy that follows from such a finding is limited and this Court is not in a position to determine the existence or otherwise of any such implied term. Indeed he suggests that on a proper construction of the trust documents, such a term cannot be implied. In that regard he refers specifically to the Last Man Standing clause which, in his submission, sets out the basis upon which the Trust can terminate and the provision that all subsequently acquired assets become subject to the Trust. Both provisions, he says, undermine the submission that the Trust contains an implied term that allows for a winding up.

DISCUSSION

- [21] The parties appear to be in agreement that the chambers judge erred when he suggested that the Trust can only be wound up in the context of an express provision. Both sides now agree that it would be open to the court to wind up the Trust if it contains an implied term authorizing such action and the trustees are deadlocked in regard to that matter.
- [22] I do not accept Mhinder's submission that this Court can make a declaration that the chambers judge has jurisdiction to make an order winding up the Trust. Such a declaration requires the finding that the Trust contains an implied term authorizing the trustees to wind it up. I agree with Bhora that is a question to be determined in the court below. The answer to the question will require the interpretation of the trust documents in light of the surrounding factual matrix. It is not open to this Court to determine whether the Trust contains such an implied term.

REMEDY

- [23] The chambers judge dismissed the application for directions. Appeals are taken from orders not reasons. The petition was clearly premature and could not have been determined summarily. As noted in the proceedings below, Bhora takes the position that Mhinder has abandoned the Trust leaving Bhora as the sole trustee and beneficiary. If the trial judge accepts that position, the question as to whether the trustees have the power to wind up the Trust may well be moot. Even if the trial judge had concluded he had the jurisdiction to wind up the Trust it would have been unjust for him to do so at this stage of the proceedings. The chambers judge did not err in dismissing the application for directions.
- [24] I would dismiss the appeal. Such dismissal is to be without prejudice to Mhinder's right to raise in the court below that the Trust contains an implied term giving the trustees the power to wind up the Trust.

[25] How that issue will be brought in the court below is a matter best left to the case management judge. Whether the proper course is a new petition or an amendment to the consolidated notice of civil claim is a matter for case management. To the extent that the petitioner will be relying on an implied term, whatever pleading is filed will undoubtedly spell out explicitly the term or terms which the petitioner wishes the court to imply.

[26] In the circumstances of this case, I would order each side to pay their own costs of the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Harris"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/CA/14/02/2014BCCA0293.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mayer-v-mayer-2014>

Prepared on 26 October 2026 · Esheria