
CANADA / JUDGMENT

Re Newton Trust

2013 BCSC 841

COURT

Supreme Court of British Columbia

DECIDED

15 May 2013

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2013 BCSC 841 Re Newton Trust

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re Newton Trust,

2013 BCSC 841

Date: 20130515

Docket: S126069

Registry: Vancouver

Re Appointment of a Trustee of the Newton Trust,
constituted by Deed of Settlement of Samuel Joseph Cohen
made on December 17, 1959

Before: The Honourable Madam Justice Gropper

Corrected Judgment: The case name of the judgment was corrected throughout on
May 23, 2013

Reasons for Judgment

Re: Special Costs in Respect of the Proposed Appointment
of Eric Rice, Q.C.

Counsel for Petitioner:

H. Shapray, Q.C.

Counsel for Respondent:

G. Turriff, Q.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 25 and 26, 2013

Place and Date of Judgment:

Vancouver, B.C.

May 15, 2013

Introduction

- [1] The issue before me in this application is whether I ought to order that Jacqueline Clair Cohen pay the applicant, Graham MacKenzie, Q.C., his special costs of this proceeding or, alternatively, order payment to Mr. MacKenzie of special costs of this proceeding from the assets of the Newton Trust.

Background

- [2] In my reasons for judgment, indexed at 2013 BCSC 799, I reviewed the proceedings before me involving matters arising from the Newton Trust. I also provided a background to the action. I will repeat the facts and add those which are necessary to resolve this issue.
- [3] Ms. Cohen and Mr. MacKenzie are trustees of the Newton Trust. A third trustee, Tom Mayson, Q.C., died in October 2010, leaving a trustee vacancy.
- [4] After Mr. Mayson's death in 2010, Ms. Cohen wrote to Mr. MacKenzie on November 1, 2010 proposing that either Josephine Nadel or Kip Woodward fill the trustee vacancy. Mr. MacKenzie responded on December 16, 2010, stating:

If you will review my previous correspondence, you will see that I had requested more than once an independent person be appointed and I like the idea of a retired Supreme Court of British Columbia Judge. However, I will give you an alternate appointee that is suitable to me when I write you.

- [5] In his further letter of December 31, 2010, Mr. MacKenzie rejected both Ms. Nadel and Mr. Woodward as eligible trustee candidates. He instead nominated Mr. Joseph Calvano as the third trustee. He stated:

As you know, [Mr. Calvano] was president of the Army & Navy stores and turned around a company that had constantly been unprofitable, and in the course of this got rid of about \$8,000,000.00 of bad inventory. Unfortunately, you and Tom [Mayson] made a decision to fire him which cost Army & Navy greatly in legal fees on two occasions.

- [6] Mr. MacKenzie continued, "[i]t is obvious to me that [Mr. Calvano] would be an ideal person to fill the role of the third trustee." Mr. MacKenzie also suggested an alternative: "the third trustee position should be filled by someone like a Supreme Court Judge who has knowledge of trust law, is honest, reliable and unbiased."
- [7] On January 28, 2011, Ms. Cohen responded to Mr. MacKenzie through counsel rejecting the proposal of Mr. Calvano as trustee.
- [8] In July 2011, Mr. MacKenzie commenced a petition (S114597) (jurisdiction petition) in respect of an earlier decision of Registrar Blok (as he then was) indexed at 2005 BCSC 1049, seeking to set it aside for lack of jurisdiction.
- [9] Five months later, Ms. Cohen filed a petition (S118529) (removal/appointment petition) seeking the removal of Mr. MacKenzie as trustee and seeking the appointment of Ms. Nadel and Mr. Woodward as trustees or, alternatively, adding Ms. Nadel as the third trustee in place of Mr. Mayson.
- [10] In August 2012, eight months following the filing of Ms. Cohen's petition, Mr. MacKenzie brought a petition (S196069) to appoint Eric Rice as a trustee of the Newton Trust (Rice petition).
- [11] By September 4, 2012, Mr. Rice had withdrawn his consent to be appointed as a trustee. Mr. MacKenzie asserts that Ms. Cohen interfered with Mr. Rice's appointment through her counsel Howard Shapray, Q.C., which caused Mr. Rice to withdraw his consent to be considered for the trustee position. That conduct, Mr. MacKenzie asserts, is reprehensible and deserving of reproof and rebuke. He argues that special costs are appropriate in these circumstances.

Facts

- [12] On July 30, 2012, Gordon Turriff, counsel for Mr. MacKenzie, telephoned Mr. Rice to ask whether he would be interested in becoming a trustee of the Newton Trust. Mr. Turriff followed up the telephone call with an email, which included a copy of the trust deed. In the email, Mr. Turriff said:

As I explained, there are two current trustees (my client, Graham MacKenzie, Q.C. and Jacquie Cohen) but the trust deed requires three. My client and Ms. Cohen have not been able to agree on who the third trustee should be. Ms. Cohen has applied to court for an order removing my client as trustee and, if he is removed, appointing Josephine Nadel and Kip Woodward as the second and third trustees or, if my client is not removed, appointing Ms. Nadel as the third trustee. Ms. Cohen's position is that the trust is dysfunctional as long as my client is a trustee. My client's position is that he had always acted honestly, in good faith and in the best interests of the trust and that he should be permitted to participate as trustee, having been completely excluded from participation for more than a decade, beginning not long after the appointment of a then third trustee, Tom Mayson, Q.C..

My client intends to oppose the application Ms. Cohen has made for the order removing him as trustee and, unless an appointment can be agreed, to apply for an order appointing a third trustee, ideally a retired Supreme Court judge, consistent with a suggestion that he made in about 2000 and renewed in late 2010 following Mr. Mayson's death.

[13] On August 27, 2012, Mr. Rice responded to Mr. Turriff by email stating that he would be pleased to act as trustee if asked and that he considered himself qualified to act in that capacity. Mr. Rice attached an affidavit in which he set out his qualifications.

[14] On September 4, 2012, at 11:07 a.m., Mr. Turriff emailed Mr. Rice advising that Mr. Shapray had been retained to act as co-counsel for Ms. Cohen and that Mr. Shapray would be calling him. Mr. Turriff continued:

Howard reports that Ms. Cohen intends to proceed with her petition for an order removing Graham and appointing another or others and to defend Graham's petition for an order appointing you.

Howard said he would be calling you and asking you whether you want "to be in the middle of a very nasty controversy."

[15] After he received this email, Mr. Rice phoned Mr. Shapray.

[16] At 12:23 p.m. that day, Mr. Rice emailed Mr. Turriff saying:

I had a talk with Howard about the advisability of me entering the ring at this time. There are bound, he says to be comments to the effect that as MacKenzie's nominee, I am or could be sympathetic to his position, and therefore tarred with the same brush as he will be.

I have no doubt as to the propriety of putting my name forward as you plan to do, but I'm afraid that my stomach for the battle isn't like it once was. We know Howard and Josephine Nadel and [my wife] is therefore not fussy about getting [involved] while they are opposed to it.

I'm sorry, Gordon, but I'm afraid I must ask you to withdraw my name.

[17] At 2:40 p.m., Mr. Turriff emailed Mr. Rice and asked him to reconsider his position. He said:

There is nothing in your affidavit from which an inference could be drawn that you are or could be sympathetic to Mr. MacKenzie's position. Indeed, you are presented as someone who has no relationship of any kind with any of the interested parties. You are just someone whom the court can consider for appointment, in accordance with the intention of the settlor.

If Ms. Cohen swore an affidavit in which she said you are or will be regarded as sympathetic to Mr. MacKenzie's position - because you are his nominee or for some other reason - you could swear a further affidavit in which you say you would approach your duties as trustee from a position of absolute neutrality as between the MacKenzie and Cohen positions and that there is no truth to any suggestion you have chosen or are inclined towards Mr. MacKenzie's side.

[18] The following day, Mr. Rice responded:

I'm sorry, Gordon, but I have to say no. [My wife] for other reasons of sensitivity that I won't get into, is also against it, and [I] feel that I have to respect that.

I should say thank you, of course, for thinking of me.

[19] Mr. Rice swore a further affidavit on December 16, 2012. The purpose of this affidavit was to supplement the information that he had provided to the court in his second affidavit "... to clear up any potential misunderstanding that may arise ...".

[20] In reference to his phone conversation with Mr. Shapray on September 4, Mr. Rice deposes that "[a]t no time during my call to Mr. Shapray did he say or suggest anything to me that I consider to be either improper or unprofessional." Mr. Rice then describes the conversation with Mr. Shapray of September 4 in greater detail. He says:

1. Mr. Shapray indicated that his instructions from Ms. Cohen were to oppose Mr. Rice's appointment on the basis that there were two other candidates, Ms. Nadel and Mr. Woodward, "who would likely be more acceptable than a stranger nominated by Mr. MacKenzie based on their familiarity with the complex business structure of the assets comprising the Newton Trust and their knowledge of the beneficiaries."
2. Mr. Shapray asked Mr. Rice about the extent of his knowledge with regard to the conflict between Mr. MacKenzie and the other trustees of the Newton Trust. He suggested that Mr. Rice review the reasons for judgment of Registrar Blok as well as the statutory declaration sworn by Mr. Mayson. Mr. Rice was not previously aware of those documents.
3. Mr. Shapray told Mr. Rice of Mr. MacKenzie's constitutional challenge to "contentious passing of accounts before Registrar Blok and of Ms. Cohen's application to remove Mr. MacKenzie as a trustee of the Newton Trust."

[21] Mr. Rice says that at the end of the conversation he indicated to Mr. Shapray he probably "didn't wish to get involved in the midst of the disputes." Mr. Shapray urged him not to make any decision until he had reviewed for himself those documents.

[22] Attached to Mr. Rice's third affidavit is an email that he sent on December 12, 2012 to Mr. Shapray. In that email, Mr. Rice explained at greater length his decision to withdraw his name for consideration:

I also wish to reiterate that I do not wish to be associated with the spin that I either of you place on the meaning of my communications. I agreed to let my name stand for the trustee position having been well enough informed by Gordon as to the contentious nature of the proceeding.

Later, after he had me swear an affidavit required for Court approval of the appointment, Gordon told me that you wished to speak to me about the matter. I didn't wait. I contacted you by telephone. You and I spoke briefly about some of the facts and issues. I do not recall you raising anything material that was new to me. The significance our conversation to me was that it reminded me of my reservations in the first place about taking on a trustee role where not all of the beneficiaries were in favour. I decided then to withdraw as a candidate, and I notified Gordon

to that effect.

On reflection, I don't think my reservations were misplaced. In fact, I wish I had acted on them with greater resolve in the first instance. From a professional standpoint I thought there would be headaches that I wasn't eager to endure, and personally there were reasons I had that I stated to both you and Gordon for not taking on the job. I suppose I was hoping that all sides would come quickly to accept me as a qualified party, neutral to the dispute. Naivety is not a good excuse at my stage, but it is absolutely more accurate than the suggestion that I was pressured or that either counsel improperly influenced me in either direction. Both you and Gordon were entirely [professional] in your dealings with me.

[23] Mr. Rice advised Mr. Shapray to provide a copy of this email to Mr. Turriff.

Position of the Parties

[24] Mr. MacKenzie asserts that Ms. Cohen's conduct was reprehensible when she instructed her counsel to tell Mr. Rice that he was "bound to be an object of opprobrium if he allowed his name to stand as a candidate for the appointment of a trustee". This instruction constituted an interference with the process for the appointment of a trustee, as set out in the Newton Trust instrument. Mr. MacKenzie asserts that this interference is a demonstration of her desire to control the trust.

[25] Mr. MacKenzie argues that Ms. Cohen's conduct is such to deserve rebuke or reproof: *Fullerton v. Matsqui* (District) (1992), 74 B.C.L.R. (2d) 305 (C.A.) at 309; *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (C.A.) at para. 17.

[26] Mr. MacKenzie makes it clear that he is not impugning the conduct of Mr. Shapray.

[27] Ms. Cohen asserts that on the evidence, there was nothing reprehensible about either the fact or the content of the actual discussions between Mr. Shapray and Mr. Rice that took place on September 4, 2012.

Analysis

[28] It is unfortunate that Mr. Rice's potential appointment as a trustee has thrust him into focus as a reflection of the dispute between the parties. This is precisely what Mr. Rice stated he wished to avoid by withdrawing his name as a potential trustee.

[29] I reject any suggestion that Mr. Shapray, in his conversation with Mr. Rice, engaged in improper conduct. It strikes me as contradictory to allege that Ms. Cohen engaged in reprehensible conduct without impugning her counsel's conduct.

- [30] I note that Mr. Shapray even advised Mr. Rice to take time to reflect on his decision. It was also reasonable, in my view, for Mr. Shapray to provide Mr. Rice with information on the circumstances of the Newton Trust so that he could make an informed decision about letting his name stand for selection as trustee. It was appropriate to draw Mr. Rice's attention to Registrar Blok's decision and Mr. Mayson's statutory declaration along with any other information Mr. Rice was entitled to review.
- [31] I find that Mr. MacKenzie's claim for special costs does not have any foundation on the law or facts. I agree with Ms. Cohen that once Mr. Rice withdrew his name, that ought to have been the end of the matter.
- [32] The suggestion that Mr. MacKenzie could receive special costs from the Newton Trust is also without foundation. Costs were associated with the petition, but they were minimal once Mr. Rice withdrew his name. The bulk of the costs of this petition have been expended in pursuit of the application for special costs, which cannot be claimed to benefit the Newton Trust.
- [33] The application for special costs is dismissed.
- [34] Ms. Cohen is entitled to her costs of this application in any event of the cause. I will address special costs if requested at the conclusion of all the matters in issue between these parties.

"Gropper J."

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