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CANADA / JUDGMENT

## Tobias v. Tobias

2016 BCSC 125

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COURT

Supreme Court of British Columbia

DECIDED

20 January 2016

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2016 BCSC 125 Tobias v. Tobias

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tobias v. Tobias,

2016 BCSC 125

Date: 20160120

Docket: E132291

Registry: Vancouver

Between:

Mathias Benjamin Tobias

Claimant

And

Kimberley Anne Tobias

a.k.a. Kimberley Anne Hammond

Respondent

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

F.H. Tromans

Counsel for the Respondent:

M.J. Cochrane

Place and Date of Hearing:

Vancouver, B.C.

January 12, 2016

Place and Date of Judgment:

Vancouver, B.C.

January 20, 2016

## INTRODUCTION

- [1] THE COURT: When the summary trial application of the claimant, Mathias Benjamin Tobias, came on for hearing on January 12, 2016, the Court granted the order for divorce. The parties also agreed to the terms of a consent order resolving all issues relating to child support and special expenses, and most issues relating to the determination and division of family assets and debt.
- [2] The outstanding issue is whether \$70,000 advanced to the parties by the claimant's parents, Hans and Marianne Haebler, in October 2004, through a corporation they control, Hama Holdings Inc. ("Hama"), was a gift or a loan. Mr. and Mrs. Haebler advanced the funds to help the claimant and respondent pay for kitchen renovations to the home they then occupied on 12th Avenue in Vancouver, British Columbia. The claimant contends the advance was a loan, that the outstanding balance of approximately \$54,000 is a family debt under s. 86 of the Family Law Act, S.B.C 2011, c. 25 [FLA]. Mr. Tobias seeks orders that the parties are jointly liable for payment of the Hama loan and for payment to Hama of the remaining net proceeds of sale of the family home in the amount of approximately \$54,000. Those funds are presently held in trust by counsel for the respondent.
- [3] For her part, the respondent, Kimberley Anne Tobias says the payment was a gift from the claimant's parents. She submits that the remaining net proceeds of sale of the family home should be divided equally between the parties. In the alternative, if the Court determines the \$70,000 payment was a loan, Ms. Tobias submits that the claimant should bear full responsibility for its repayment. Invoking s. 95 of the FLA, the respondent argues that equal division of the loan would be significantly unfair because the debt was incurred without her knowledge.
- [4] The claimant and the respondent agree that this matter is suitable for disposition by summary trial under Supreme Court Family Rule 11-3. I am satisfied I am able to make the necessary findings of fact and law to determine this application, and that it is just to do so.

## BACKGROUND FACTS

- [5] The parties began to cohabit in July 1989, married on July 28, 1991, and separated on January 1, 2013.
- [6] The claimant and the respondent have two adult children, Lindsay Anne Tobias born August 28, 1993, and Jaime Ruth Tobias born August 24, 1996. Both children are post-secondary students.
- [7] The claimant is a senior project manager employed by a marine construction company. The respondent is a business development manager employed by WestJet. The parties each earn an annual income of approximately \$100,000.
- [8] Throughout the marriage, the respondent was content to leave the management of the family finances to the claimant, who she trusted. She paid little attention to the parties' accounts, including the joint account used by the parties to pay the family expenses.
- [9] During the marriage, the claimant and the respondent purchased and sold several homes. In 1999, they purchased the 12th Avenue home as "fixer upper" for \$419,700. The parties did extensive renovations to the 12th Avenue home in 2000 and renovated the kitchen in 2004. In 2010, the claimant and the respondent sold the 12th Avenue home for \$1,470,000.
- [10] The claimant and the respondent used the proceeds of sale of the 12th Avenue home to purchase their last family home located on 14th Avenue in Vancouver, British Columbia. After the parties separated, they both continued to reside in the 14th Avenue home until they sold that property on July 14, 2013.
- [11] From the proceeds of sale, the parties paid their family debts, other than the alleged loan from Hama for kitchen renovations. From the net proceeds of sale, the claimant and the respondent each received \$447,000. In addition, the respondent received a \$5,000 payment, essentially as the price for her agreement to the sale of the 14th Avenue home at a price she thought was too low.
- [12] Counsel for the respondent holds the remaining proceeds of sale of approximately \$54,000 in trust, pending the determination of this application.

## Evidence Relating to the \$70,000 Advance

- [13] I turn now to the evidence relating to the \$70,000 advance.
- [14] Marianne Haebler is 80 years old and retired. Her husband, Hans Haebler, is 86 and is the stepfather of the claimant. Before his retirement, Hans Haebler owned and operated Haebler Construction Ltd., a large and successful construction and development company.

- [15] Marianne Haebler has deposed that in 2004, the claimant told her that he and the respondent wanted to renovate the kitchen of the West 12th Avenue home. According to Mrs. Haebler, a few years earlier she had made a substantial gift from her own savings to the parties to assist them with the initial renovation of the 12th Avenue house.
- [16] Mrs. Haebler was not able to recall the amount of that gift. The claimant has sworn that his mother gave the parties \$100,000 toward their 2000 renovation of the 12th Avenue house.
- [17] Mrs. Haebler has deposed that several years later when the claimant approached her and asked if she and her husband could lend the parties money to renovate the kitchen, she told the claimant she did not have cash at hand, but wanted to help them. Mrs. Haebler says that later, after the claimant approached her, she and Mr. Haebler concluded that they could lend the parties \$70,000.
- [18] Mrs. Haebler has deposed that she and her husband decided on a low interest rate of three percent and that monthly payments would be based upon what the claimant thought the parties could afford. Later the monthly payment was reduced to one-half of the original amount, because the parties were struggling to make ends meet.
- [19] Mrs. Haebler says that when the parties sold the 12th Avenue house, they continued to make monthly payments and that the question of paying out the loan came up after the claimant and the respondent separated and sold the 14th Avenue home. Mrs. Haebler has also deposed that she and Mr. Haebler fully expect repayment of the outstanding balance of the loan with interest.
- [20] Mr. Haebler has deposed that in 2004, he and his wife agreed to help the parties complete their kitchen renovations by way of a loan from Hama. According to Mr. Haebler, the loan from Hama had the following terms: \$70,000 principal amount, three percent annual interest, and monthly payments of \$250, which were later reduced to \$125.
- [21] There is no dispute that in October 2004, Hama made two payments totalling \$70,000 to the parties' joint bank account. Mr. Haebler has produced a document dated December 20, 2005, which he describes as a memo to the auditors of Hama setting out the terms of the loan and the balance then owing. The document is entitled, "Loan to Mathias Tobias".
- [22] After setting out the amount as \$70,000 for home improvements, the three percent interest rate and the amounts paid since October 5, 2004, the document shows an outstanding balance of \$68,875 and provides that the loan is "otherwise repayable on sale of the house".
- [23] Mr. Haebler has sworn that the loan was intended for the parties and their family, and that he and his wife expected it to be repaid, albeit slowly and at a low interest rate. According to Mr. Haebler, he and Mrs. Haebler were prepared to wait until the 12th Avenue house was sold, and later extended the deadline until the 14th Avenue house was sold before they were to receive payment of the outstanding balance.

- [24] At paragraph 14 of his affidavit, Mr. Haebler says that he and Mrs. Haebler continue to expect repayment of the loan and now that the 14th Avenue house has sold, they require payment of the principal and interest.
- [25] The claimant swore that he and the respondent discussed the cost of kitchen renovations for the 12th Avenue home. He says the parties did not have enough money to complete those renovations and did not want to incur the cost of borrowing from the bank. According to the claimant, the parties talked about approaching Mrs. Haebler for a loan. The claimant says he was not comfortable about asking for the money as a gift, in light of the amount of money his mother had gifted to the parties for the previous renovations.
- [26] The claimant confirms that he discussed a loan with his mother and that she and Mr. Haebler agreed to provide the parties with a low-interest loan in the amount of \$70,000 through Hama.
- [27] Mr. Tobias says the parties started making loan payments almost immediately after receiving the first lump-sum advance of \$60,000 from Hama on or about October 4, 2004. He says the loan payments were made from the parties' TD joint account and transferred to Hama.
- [28] The claimant has produced account statements from the TD joint account from the period from 2004 to 2012, showing monthly transfers to Hama, initially in the amount of \$250, and later in the amount of \$125. Those amounts are consistent with Mr. Haebler's evidence concerning the monthly payments due under the loan.
- [29] The respondent has no recollection of a gift from Mrs. Haebler in or about 2000 for the initial renovations to the 12th Avenue home. Her evidence is that the parties paid for those renovations on their lines of credit. For the purposes of determining this application, it is unnecessary for me to resolve the conflict with respect to the alleged gift of \$100,000 from Mrs. Haebler in 2000.
- [30] Ms. Tobias says that in 2004, the claimant told her that his mother wanted to help the parties with their kitchen renovations. She says that the parties originally expected that Haebler Construction Ltd. would perform the renovation work. However, because the construction company was too busy at the time, Mrs. Haebler decided to give the parties the money.
- [31] The respondent says that when she spoke with Mrs. Haebler about the money, she told her that the claimant was uncomfortable with the idea of a gift and that Mrs. Haebler agreed to have a nominal amount returned to her on a monthly basis, on the understanding that the money transferred to Mrs. Haebler would then go into RESPs for the children. The respondent has sworn that she understood that the payments made to Mrs. Haebler in this manner were "essentially symbolic", and that because Mrs. Haebler would be returning the funds to the family through contributions to the RESP, there was no repayment. Ms. Tobias says she understood the \$70,000 advance was a gift.

- [32] The respondent has produced documents showing a series of transfers of amounts ranging from \$1,000 to \$2,000 from between March 2011 and April 2012 into the parties' joint account and then into the RESP account.
- [33] The claimant admits that his mother made payments to the children's RESP account. However, he denies that there was any arrangement by which his mother made the RESP contributions as a means of returning the monthly loan payments to Hama to the parties.
- [34] On this point, I have disregarded the claimant's inadmissible hearsay evidence that his mother advised him that she had never had a discussion with the respondent about taking the payments to Hama and then paying them to the children's RESP.
- [35] The respondent says she had never heard of Hama before the parties separated and that she had no knowledge that the funds from Mr. and Mrs. Haebler were a loan or of the terms for repayment of the alleged loan.

#### THE LAW

- [36] I turn now to the applicable law.
- [37] In *Beaverstock v. Beaverstock*, 2011 BCCA 413, the appellant mother claimed that she had loaned \$50,000 to her son to refinance his purchase of the property. The respondent, the son's widow, executrix, and sole beneficiary, said she had no knowledge of a loan and that prior to the separation, her husband told her that his mother had given him \$50,000 as an advance on his inheritance. There was also conflicting evidence about whether the respondent had acknowledged the advance was a loan and had admitted an obligation to repay it.
- [38] The Court addressed the correct approach to the resolution of the dispute at para. 9:
- [9] The correct approach to the resolution of this dispute is not in dispute. It is set out in *Pecore v. Pecore* . . . Whether the transfer was a loan or a gift depends on the actual intention of the appellant when she made the advance, which is a question of fact. As the advance was gratuitous, the onus was on the respondent to demonstrate that the appellant intended a gift, since equity presumes bargains, not gifts (para. 24). This equitable principle gives rise to a presumption the son received the money on a resulting trust, which is a rebuttable presumption of law. The trial judge was therefore required to presume the advance was not a gift and to determine whether the respondent had satisfied the burden of rebutting the presumption of resulting trust on a balance of probabilities (para. 44).
- [39] In *Byrne v. Byrne*, 2015 BCSC 318, the issue was whether bi-weekly payments of \$1,000 made by the claimant's father to a joint account held by the claimant and the respondent and used to pay for household expenses constituted a gift or loan. Mr. Justice Armstrong began his analysis at paras. 41 and 42:

- [41] Payments from a parent to an adult child are generally not presumed to be gifts; they are presumed to form a resulting trust in which the parent keeps an interest in the property. However it is open to a party claiming the transfer is a gift to rebut the presumption of a resulting trust by providing evidence to that effect: *Pecore v. Pecore* . . .
- [42] In *Pecore*, the Supreme Court of Canada addressed how the presumptions operate in the context of transfers from a parent to an adult child:
- (a) the focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer . . .
  - (b) When the transferor's intent is unavailable or unpersuasive, the presumptions of advancement (a gift) and resulting trust are useful guides and will apply . . .
  - (c) gifts from parents to independent adult children are not presumed to be gifts; rather the presumption of a resulting trust applies . . .
  - (d) there may be circumstances where a transfer between a parent and an adult child was intended to be a gift and it is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support that claim . . .
  - (e) the burden on the party claiming a gift was made is proof on a balance of probabilities . . .
- [40] At para. 43, the court noted that in *Kuo v. Chu*, 2009 BCCA 405 at para. 9, the Court of Appeal adopted the following factors from *Locke v. Locke*, 2000 BCSC 1300, as applicable to the question of whether a loan or a gift was intended:
- (a) Whether there were any contemporaneous documents evidencing a loan;
  - (b) Whether the manner for repayment is specified;
  - (c) Whether there is security held for the loan;
  - (d) Whether there are advances to one child and not others, or advances of unequal amounts to various children;
  - (e) Whether there has been any demand for payment before the separation of the parties;
  - (f) Whether there has been any partial repayment; and,
  - (g) Whether there was any expectation, or likelihood, of repayment.
- [41] The *Locke* factors are items of circumstantial evidence relevant to the transferor's actual intention. They are not exhaustive and are to be weighed by the trial judge, along with all of the other evidence, in order to determine the transferor's actual intention as a matter of fact: *Beaverstock* at para. 11.
- [42] Whether the opposing spouse was aware of the transaction is not determinative of the question of whether a loan was made: *Byrne* at para. 47.

- [43] In *Beaverstock*, the Court held that the trial judge had erred in law by failing to begin his analysis with the presumption of resulting trust and in failing to make a finding concerning the appellant's actual intention when she advanced the funds to her son.
- [44] In *Puri v. Puri*, 2011 BCSC 1734, the wife received funds from her mother for the purchase of the family home. The issue was whether the funds were a loan or a gift. The court applied *Beaverstock* and held that the onus was on the husband to demonstrate the mother intended a gift: *Puri* at paras. 95 and 96. In the result, the court accepted the mother's evidence that when she provided the funds to her daughter, she intended a loan. The mother had borrowed the funds from a line of credit she held with her husband and the daughter had signed a promissory note.
- [45] More recently in *Savost'Yanova v. Chui*, 2015 BCSC 516, where the husband's father had advanced \$60,000 to assist with the purchase of the matrimonial home, Mr. Justice Weatherill held that in determining the intent of the person of who advances money in a family context, the court must weigh all of the evidence to determine whether the presumption of resulting trust has been rebutted: *Chui* at para. 77.
- [46] At para. 75, the court adopted the following summary of the applicable legal principles:
- [75] The law regarding whether a transfer made by a parent to an adult child is a loan or a gift was summed up by Madam Justice Brown in *Hawley v. Paradis*, 2008 BCSC 1255 at para. 30, after a review of the applicable authorities:
- [30] Based on the case law presented to me, I conclude:
1. that the presumption of advancement no longer applies between adult children and their parents;
  2. that as between adult children and their parents, the presumption is a resulting trust when the parents make gratuitous transfers to children;
  3. that the court must consider all of the evidence in determining whether the parent intended the transfer as a gift or a loan;
  4. that the factors considered in *Wiens* and *Locke* will assist the court in determining whether the advance was a loan or a gift.
- [47] The respondent relies upon a line of authorities that holds that where a parent advances funds to a child for the purchase or maintenance of the family home, there is a rebuttable presumption that the funds are a gift to both the child and his or her spouse: *Cabezas v. Maxim*, 2014 BCSC 767 (appeal pending); *J.B. v. S.C.*, 2015 BCSC 2136; *H.C. v. H.P.C.*, 2014 BCSC 1775; and *Madruga v. Madruga*, 2015 BCSC 1605.

[48] In *Cabezas*, the issue was whether funds paid by the respondent's parents toward the mortgage on the family home were a gift or an inheritance to the respondent, so that any property derived from them might be excluded property under s. 85(1) of the FLA. At para. 49, Chief Justice Hinkson cited *Wiens v. Wiens* for the principle that:

... where the parents of a married child advance money to facilitate the purchase or the improvement of the matrimonial home, and the spouses later do not agree as to the nature of that advancement, the court must presume that the money advanced is a gift to the child which on a presumption of advancement becomes a gift to the wife.

[49] After considering the Locke factors, the court concluded that when the funds were advanced, the respondent's mother intended them as a gift for the benefit of both the respondent and the claimant: *Cabezas* at para. 67.

[50] At para. 68, Chief Justice Hinkson stated:

[68] Had Mrs. Maxim's intentions been unclear, I would nonetheless have found that, in keeping with the statement of Harvey J. in *Wiens*, the funds used to pay off the mortgage on the Madeira Park Property were provided by the respondent's parents as a gift to avoid the foreclosure of the property, resulting in a presumption of advancement to the claimant. This presumption of advancement is limited in scope, and does not apply to all gifts or inheritances received by a spouse from his or her parents. Generally, such gifts are excluded property under s. 85(1)(b) of the Act, as was the Camaro received by the respondent from his father in this case. However, where a parent chooses to provide funds to a child for the purchase or maintenance of the family residence (to use the language of the Act), those funds are presumed to be a gift to both the child and his or her spouse. Absent evidence rebutting that presumption, the funds and any proceeds derived from them are family property under s. 84 of the Act. None of the evidence presented is capable, in my view, of rebutting that presumption.

[51] In cases dealing with issues of excluded property under s. 85 of the FLA, judges of this Court have followed and applied *Cabezas* in *J.B. v. S.C.* at para. 99, *H.C. v. H.P.C.* at paras. 69 to 71, and *Madruga v. Madruga* at paras. 16 to 18.

[52] It does not appear that *Beaverstock* was brought to the attention of the court in *Cabezas* or the other authorities cited by the respondent.

[53] On the case law cited on this application, I conclude that the governing authority is the judgment of the Court of Appeal in *Beaverstock*. I must determine whether the actual intention of the claimant's parents was to make a gift or a loan. Because the advance was gratuitous, the respondent bears the onus of demonstrating that the transferors intended a gift, "since equity presumes bargains, not gifts". In determining the transferors' intention, the court must take into account the Locke factors, along with all of the other evidence.

## Application of Legal Principles to Facts

- [54] Here Mr. and Mrs. Haebler have both sworn that when they advanced the funds to Hama, they intended to loan \$70,000 to the claimant and the respondent, to assist with the kitchen renovations.
- [55] There is no contemporaneous document evidencing a loan. However, some 14 months after Hama had advanced the funds, Mr. Haebler prepared a memorandum to the corporate auditor outlining the terms of the loan of \$70,000 to his stepson for home improvements. He recorded the three percent interest rate and payments made to December 20, 2005. Mr. Haebler prepared that document seven years before the parties separated.
- [56] Neither Hama nor the Haeblers took a promissory note or held any security for the loan.
- [57] Mr. and Mrs. Haebler helped all of their children and provided them with assistance in purchasing or renovating their homes. Sometimes that assistance took the form of work performed by Haebler Construction Ltd. at no cost. On other occasions, the children received gifts of money or low-interest loans.
- [58] Here, Mr. Haebler made a demand for payment of the balance of the loan in the amount of \$54,750 by e-mail to Mr. Tobias on June 13, 2013, approximately six months after the parties had separated. The timing of the demand and the fact that Mr. Tobias forwarded a copy to his counsel in this proceeding less than half an hour after he received it leaves me to infer that there was a tactical component to the timing of the demand.
- [59] I find that there has been partial repayment of the monies advanced. The monthly payments of \$250 and later \$125 made from the parties' joint account to Hama commenced shortly after the funds were advanced and continued to 2012. Those amounts are consistent with the evidence of both Mr. Haebler and the claimant that the monthly payments were initially set at \$250 and then reduced to \$125.
- [60] While the respondent asserts that Mrs. Haebler agreed to return any payment made to her by contributions to the children's RESPs, she has not established any correspondence between the amounts paid from the parties' joint account to Hama, and the amounts of Mrs. Haebler's contributions to the RESPs. The respondent, who bears the onus of rebutting the presumption of resulting trust has not established any link between the monthly payments to Hama and the various transfers of between \$1,000 and \$2,000 from Mrs. Haebler's account to the joint account and then to the RESP.
- [61] In weighing the evidence, I also take into account the fact that neither Mr. nor Mrs. Haebler have produced corporate financial statements for Hama recording a loan to the claimant.

- [62] The respondent was aware of the \$70,000 advance, but says she was unaware of the existence of Hama or that the transaction was a loan. The respondent's lack of knowledge is not determinative of whether the funds were advanced as a loan. The fact that she was not aware of Hama or, apparently, the payments made from the parties' joint account to Hama, is consistent with her evidence that she paid little attention to the parties' finances and did not review the bank statements for the joint account, although they were available to her.
- [63] Mr. and Mrs. Haebler expected the loan to be repaid, although they were flexible about the timing for repayment. Their expectation for repayment was partially met through the monthly payments made from the parties' joint account. They also had a reasonable expectation for repayment of the outstanding balance from the proceeds of sale of the 14th Avenue home. I accept the evidence of Mr. Haebler and the claimant that Mr. and Mrs. Haebler deferred repayment from the proceeds of the 12th Avenue home and were prepared to extend the time for repayment until the 14th Avenue home sold.
- [64] After weighing all of these factors and considering the evidence as a whole, I find that Mr. and Mrs. Haebler, when they advanced the \$70,000, intended to loan those funds rather than gift them to the parties.
- [65] The respondent submits that if, as I have found, the advance was a loan, then the court should order that the claimant is fully responsible for its repayment on the ground that equal division of the debt would be significantly unfair to her under s. 95(1) of the FLA.
- [66] In *Jaszczewska v. Kostanski*, Madam Justice Baker concisely summarized the law on the meaning of significantly unfair at paras. 166 to 168:
- [166] In *L.G. v. R.G.*, at para. 71, Justice N. Brown stated:
- In my view, the term "significantly unfair" in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve "perfect fairness". Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge depart from the default equal division.
- [167] Similar statements were made in *Remmem v. Remmem*. In that case, at para. 44, Justice Butler noted:
- The Concise Oxford English Dictionary defines "significant" as "extensive or something weighty, meaningful, or compelling. In other words, the Legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).
- [168] In *Slavenova v. Rangelov*, 2015 BCSC 79, at para. 60, the court said:

The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions.

- [67] Significant unfairness must be compelling or meaningful on a consideration of the factors set out in s. 95(2)(a) through (i). Unequal division will be justified where the court finds that the consequences of equal division would be so weighty as to produce an unjust or unreasonable result.
- [68] Here, the respondent's share of the debt is approximately \$27,000.
- [69] Both spouses pursued their own careers throughout the marriage. The respondent earns an annual income of approximately \$100,000.
- [70] The respondent argues that it would be significantly unfair to divide the alleged loan equally, because it was incurred without her knowledge. She says this is an "other factor" that the court may take into account under s. 95(2)(i).
- [71] The respondent has already received \$452,000 as her share of the net proceeds of sale of the 14th Avenue property. When I consider that she also had the benefit of the renovated kitchen while the parties lived in the 12th Avenue home, I am not persuaded that equal division of this debt would be so compelling, meaningful, or weighty as to constitute significant unfairness.
- [72] Accordingly, there will be a declaration that the parties are jointly liable for payment of the Hama Holdings Inc. loan and that each will indemnify the other for that party's one-half share of the liability.
- [73] The remaining proceeds of sale of the family home currently held in trust by counsel for the respondent will be paid to Hama Holdings Inc.
- [74] The claimant will also have the costs of this application.

"PEARLMAN J."

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