

CANADA / JUDGMENT

Weisstock v. Weisstock

2024 BCSC 2118

COURT

Supreme Court of British Columbia

DECIDED

22 November 2024

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

2024 BCSC 2118 Weisstock v. Weisstock

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weisstock v. Weisstock,

2024 BCSC 2118

Date: 20241122

Docket: S133471

Registry: Kelowna

Between:

Albert Weisstock

Petitioner

And

Antony Weisstock (as Trustee of the Willy and Maria Weisstock Trust),

Antony Weisstock, Walter Weisstock, Silvia Rita Gerard, and

Islandview Country Estates Inc.

Respondents

Corrected Judgment: The text of the judgment was
corrected on the face page on December 13, 2024

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Petitioner:

S.D. Dvorak

Counsel for the Respondent, A. Weisstock:

E.B. Clavier

J. Ko

Counsel for the Respondent, W. Weisstock:

T.J. Moran

S. Silver

Counsel for the Respondent, S.R. Gerard:

L.D. Nykolaychuk

No other appearances

Written Submissions Dated:

October 25, 2023

November 14, 2024

Place and Dates of Trial/Hearing:

Vernon, B.C.

October 24-26, 2023

Place and Date of Judgment:

Kelowna, B.C.

November 22, 2024

Table of Contents

Introduction.. 4

Background.. 5

Issues and Positions of the Parties. 10

Analysis. 11

What evidence can be considered in determining the issues?. 11

Is clause 6(c) void for uncertainty?. 22

Does the decision from the First Petition satisfy the exemption in clause 6(c)?. 24

Is clause 69(c) contrary to public policy?. 25

Did the Trustee act in breach of his duty?. 28

Conclusions. 31

Introduction

- [1] The petitioner seeks orders reinstating him as a secondary beneficiary under a trust deed and for removal of the trustee. The joint spousal trust (the "Trust") was created by his father in 2012 and the trustee is his brother Antony Weisstock ("Tony"). Tony and their two other siblings are the remaining beneficiaries of the Trust.
- [2] The principal asset within the Trust is an interest in shares of Witmar Holdings Ltd. ("WHL"). The balance of the shares in WHL are held by the siblings (directly or through their holding companies) and the estate of their mother. Each of the siblings is a beneficiary of their mother's estate.
- [3] The Trust holds its interest in WHL by way of its ownership of all of the shares in Islandview Country Estates Inc. ("Islandview") which in turn owns a portion of the shares in WHL.
- [4] WHL's assets consist of approximately \$70 million of real estate assets.
- [5] As a result of separate legal proceedings which were also commenced by the petitioner, WHL is the subject of a liquidation order. Those proceedings are described in detail in decisions of this Court at 2022 BCSC 1886 and the Court of Appeal at 2023 BCCA 352. Those proceedings were commenced by petition on April 23, 2020 (the "First Petition").
- [6] Submissions in this proceeding were received some time ago but the Court was asked by the parties to refrain from deciding the matter as there was a prospect of a negotiated resolution associated with the First Petition.
- [7] The genesis of this petition was the issuance by Tony, in his capacity as trustee, of a deed removing the petitioner as a secondary beneficiary of the Trust. The deed is dated February 2, 2022, just prior to scheduled hearing dates for the First Petition.

Background

- [8] The Trust was established May 11, 2012. At that time the family consisted of Witthold Weisstock ("Willy") (the settlor of the Trust), his wife Maria Weisstock ("Maria") and their four children: the petitioner Albert Weisstock ("Albert"), Silvia Gerard ("Silvia"), Walter Weisstock ("Walter") and Anthony Weisstock ("Tony") (the trustee).
- [9] The preliminary averments within the Trust deed include at paragraph A, the following:

A. The Settlor intends to establish a Trust which qualifies as a joint spousal trust as described under subparagraph 73(1.01)(c)(iii) of the Income Tax Act primarily for the benefit for the Settlor and Maria Weisstock, the spouse of the Settlor (hereinafter referred to as the "Spouse"), during their lifetimes;

[10] The definition of beneficiaries and secondary beneficiaries contained within the deed are as follows:

1. In this Deed, the following words shall, unless the context otherwise requires, have the following meanings:

...

(c) "the Beneficiaries" means only the Settlor and the Spouse, and the survivor of them during their respective lifetimes, and following the death of the survivor of the Settlor and the Spouse, the persons entitled to share in the Trust Fund after the such survivor's death;

...

(j) "Secondary Beneficiaries" means upon the death of the survivor of the Settlor and the Spouse:

(i) Those of Albert Weisstock, Walter Weisstock, Antony Weisstock, and Silvia Rita Gerard, who are then alive; and

(ii) If any of Albert Weisstock, Walter Weisstock, Antony Weisstock, and Silvia Rita Gerard are not then alive, then his or her respective children and grandchildren who are then alive or who are thereafter born will stand in the place of such deceased child as a Secondary Beneficiary, with distributions from the Trust being divided in equal portions among them;

[11] The definition of trustee is set out as follows:

(r) "Trustee" means:

(i) During his lifetime, Witthold (known as "Willy") Weisstock, together with any additional Trustee appointed by him; and

(ii) if Witthold Weisstock becomes unwilling or incapable of acting as Trustee, then he shall be replaced as the Trustee by Antony Weisstock ("Tony") together with any additional Trustee appointed under the provisions of this Trust Deed;

(iii) if Witthold and Tony both are or become unwilling or incapable of acting as Trustee, then he shall be replaced as Trustee by Silvia Rita Gerard ("Silvia") together with any additional Trustee appointed under the provisions of this Trust Deed;

(iv) if Witthold, Tony and Silvia are or become unwilling or incapable of acting as Trustee, then they shall be replaced as the Trustee by Walter Weisstock ("Walter"), together with any additional Trustee appointed by under the provisions of this Trust Deed; and

- (v) if Witthold, Tony, Silvia and Walter are or become unwilling or incapable of acting as Trustee, then they shall be replaced as the Trustee by Albert Weisstock ("Albert"), who shall act as Trustee together with at least two adult Secondary Beneficiaries who agree to act as Trustees and who receive the highest number of votes from all adult Secondary Beneficiaries at a meeting to select Trustees under this provision.
- [12] The settled property subject to the Trust, although complicated by corporate structuring, consists primarily of the shares in WHL that had been held by Willy.
- [13] The background of WHL, its holdings and its management are discussed in detail in the prior decisions of this Court and that of the Court of Appeal referred to above. I will provide only a very brief synopsis here.
- [14] Prior to 1981, Willy and Maria began acquiring real estate assets. They formed WHL in 1981 and transferred their real estate assets into it. Their children became shareholders at a later date. Over time the assets grew dramatically and were valued collectively at in excess of \$70 million dollars when the First Petition was filed.
- [15] Each of Tony, Walter and Albert have, at times, been involved in the day-to-day management of WHL.
- [16] Willy died in August 2012. Maria died in May 2016.
- [17] Upon Willy's death, Tony became the trustee, and upon Maria's death Albert, Walter, Tony and Silvia became the sole beneficiaries of the Trust.
- [18] Paragraph 6 of the trust deed includes the following:
6. Upon the death of the last survivor of the Settlor and the Spouse, the Trustee shall administer the Trust Fund as follows:
- ...
- (b) Hold the remainder of the Trust Fund in Trust and to pay or distribute so much of the income or capital or both as the Trustee in their sole discretion determine to or for the benefit of the Secondary Beneficiaries, with a view to obtaining a distribution which the Trustee determine is fair and equitable, without holding the Trustee' liable to achieve equality, any income not so distributed in any year to be added to the capital of the Trust Fund; provided always the Trustee may, in their absolute discretion, reduce or even completely exclude any one or more, but not all, of the Secondary Beneficiaries from distributions from the Trust Fund, and thereby treat a Secondary Beneficiary unequally if requested to do so by such Secondary Beneficiary; or if a suspension of distributions becomes or is necessary to preserve the Secondary Beneficiary's entitlement to statutory or governmental sources of income or benefits. If there is any dispute in this regard, the decision of the Trustee shall be final and binding on all persons concerned therewith;

- (c) if a Secondary Beneficiary commences legal proceedings against a company in which this Trust holds shares, or against the Trustee or this Trust, alleging that either the administration or management of such company or of the Trust or of both of them is either oppressive or unfair to the Secondary Beneficiary (claims of clearly proven dishonesty, fraud, or theft from or in relation to the company or Trust excepted), or if a Secondary Beneficiary becomes subject to a receivership, bankrupt or becomes subject to matrimonial proceedings in which a spouse of a Secondary Beneficiary makes a claim against the Trust Fund or the Secondary Beneficiary's entitlement to the Trust, then in any such case, the Trustee may in my Trustee's discretion either suspend distributions from the Trust to a Secondary Beneficiary for such period or periods of time, or even indefinitely, or remove such Secondary Beneficiary as a Secondary Beneficiary of this Trust for all purposes, for such period or periods of time, or even indefinitely, in either case as the Trustee in the Trustee's discretion determines; provided always that the Trustee may reinstate the former Secondary Beneficiary after the receivership, bankruptcy or matrimonial proceedings are finalized or resolved, as a Secondary Beneficiary;

...

- (e) On the sixtieth anniversary of the creation of this Trust, if any portion of the Trust Fund remains undistributed, the Trustee shall distribute the Trust Fund then remaining to all the Secondary Beneficiaries then alive in equal shares.

[19] Paragraph 7 of the trust deed includes this:

7. In addition to all other powers by this Deed or by any statute or law conferred upon a Trustee, a Trustee shall have the powers, authority and discretion as follows:

...

- (y) To remove a Secondary Beneficiary as provided for in this Trust Deed, and to reinstate such former Secondary Beneficiary as a Beneficiary when the Trustee determine it is appropriate to do so.

[20] The ownership of WHL and the assets of the Trust are neither controversial nor material to the issues raised in this petition but are helpful in understanding the issues. Between the time the Trust was created and Maria's passing, there was some corporate restructuring, including the creation of Islandview. At the time this petition was commenced Tony was the sole director of Islandview and the Trust owned all of the shares in Islandview, which in turn owns 36 Class A shares in WHL. This represents 20.3 percent of WHL's common stock. The other shareholders of WHL are the holding companies of the four siblings, Albert, Walter, Tony and Silvia and a numbered company owned by Maria's estate.

[21] Each of the four siblings are equal beneficiaries of Maria's estate. Tony and Albert were designated as co-executors of Maria's will, but as a result of still other legal proceedings D. James Ramsay, a retired lawyer, was appointed as the sole executor of Maria's estate.

- [22] In simple terms, any of the four Weisstock siblings who remain as a secondary beneficiary under the Trust has at least a contingent interest in Islandview. This is subject to the terms of the Trust, including the exercise of the discretion of the trustee.
- [23] The net effect of the deaths of Willy and Maria, the creation of the Trust, Islandview and the numbered company was to leave each of the siblings with a 25 percent beneficial interest in WHL subject to the management of the Trust. This was altered, at least temporarily, by Tony's execution of the trust deed.
- [24] The First Petition was commenced by Albert where he sought, under s. 227 or s. 324 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA], orders to have the assets of WHL divided or the company liquidated. It was held to be just and equitable that an order for liquidation be made. For full context the reasons at the trial level and at the Court of Appeal should be reviewed, but in very simplistic terms, at the root of the decision was the animus that existed between the siblings.
- [25] That First Petition was filed April 2020 and was set to be heard, at one point, on March 28, 2022.
- [26] The deed removing Albert as a secondary beneficiary was executed February 2, 2022. After reciting some "tombstone" information, items I and J of the preliminary averments of the deed state as follows:

I. On April 23, 2020, Albert filed an oppression proceeding in the Kelowna Registry of the Supreme Court of British Columbia against inter alia the Trust, the Trustee, Witmar, and Islandview; and

J. Pursuant to Clause 6(c) of the Trust Deed, if a Secondary Beneficiary commences legal proceedings against a company in which this Trust holds shares, or against the Trustee or the Trust, alleging that either the administration or management of such company or of the Trust or of both of them is either oppressive or unfair to the Secondary Beneficiary, the Trustee may in the Trustee's discretion indefinitely remove a Secondary Beneficiary as a Secondary Beneficiary of the Trust for all purposes.

- [27] The substantive content of the deed simply states:

NOW THEREFORE BY THIS DEED pursuant to Clause 6(c) of this Trust Deed, the Trustee indefinitely removes Albert Weisstock as a Secondary Beneficiary of the Trust.

Issues and Positions of the Parties

- [28] The parties agree that in construing a trust document the Court should seek to determine the intentions of the settlor. As a preliminary issue they disagree on what evidence the Court should look at to determine those intentions. Primarily the dispute is in relation to use of direct extrinsic evidence of that intent.

- [29] The petitioner points to the fact that at the relevant time the Trust held shares in Islandview, not in WHL, the company against which Albert brought the First Petition, thus making clause 6(c) inapplicable at the time. During the course of submissions, however, the petitioner advised he was not pursuing that argument. Accordingly, I will not address it here.
- [30] The petitioner alleges that the power exercised by Tony under the deed is invalid, relying on several arguments.
- [31] He alleges fatal uncertainty of clause 6(c) when it references an exception to the trigger for the exercise of the trustee's discretion for "clearly proven dishonesty, fraud, or theft from or in relation to the company or the Trust".
- [32] The petitioner also alleges that clause 6(c) is contrary to public policy as it effectively prevents a beneficiary from challenging a trustee's actions and allowing a court to grant a remedy where it is just and equitable to do so.
- [33] The petitioner argues that, in the alternative, the First Petition meets the exception set out in clause 6(c).
- [34] Finally, the petitioner alleges that the power to remove Albert as a secondary beneficiary was exercised for an improper purpose and in breach of Tony's fiduciary duties. He says that Tony's actions in executing the deed were not undertaken in good faith and adds the allegation that Tony acted in a conflict of interest.
- [35] The respondent Tony, whose position and submissions are adopted by the respondent Walter, argues that he was authorized to remove Albert as a secondary beneficiary by the terms of the Trust and doing so was in accordance with the intentions of Willy.
- [36] They argue further that clause 6(c) of the trust is not vague or uncertain and is not contrary to public policy. They say the decision maker as to whether there has been any dishonesty, fraud or theft would be the court. Clause 6(c) "does not preclude a beneficiary from commencing proceedings - it only deters them from commencing specific types of proceedings by imposing a possible penalty (removal) if the proceeding is not commenced for a justifiable reason such as dishonesty, fraud or theft."

Analysis

What evidence can be considered in determining the issues?

- [37] A substantial body of law has developed regarding the sources or categories of evidence of a settlor's intention and the circumstances in which those sources may be relied upon. As a general proposition those sources are the document itself, the context in which the document was created, the surrounding circumstances at the time the document was created and direct evidence of the settlor's intention. When discussing the circumstances when the categories of evidence are to be considered, the authorities have adopted labels.

One is the four corners approach and another is the armchair principle.

- [38] The evidence contained within the petition record here includes all of these categories of evidence. The parties agreed that they would make their submissions as to the evidentiary and substantive issues together and that this decision should address all issues.
- [39] A court in construing a trust instrument should seek to determine the intentions of the settlor: *Killam v. Killam*, 2018 BCCA 64 [Killam BCCA] at para. 52; *Pirani v. Pirani*, 2022 BCCA 65 [Pirani BCCA] at paras. 96, 107 (leave to appeal to SCC ref'd, 40162 (12 January 2023)). In order to ascertain those intentions, the appropriate "starting point" is the language of the trust instrument, understood in light of the context in which it was created, its purposes and relevant law (see *Killam* at para. 52; *Ghag v. Ghag*, 2021 BCCA 106 [Ghag BCCA] at para. 46; *Pirani* at paras. 96, 115).
- [40] The parties disagree on whether it is necessary to go beyond the four corners of the document to determine Willy's intent. The extent to which the context in which the document was created is properly considered as part of the four corners approach is a nuance that can be seen as blurring the line between the four corners approach and the application of the armchair principle.
- [41] The petitioner argues that the "four corners" approach is the correct framework. The respondents argue for a more liberal approach that begins with the "four corners" approach, but moves "almost immediately" to the "armchair" approach so long as there is an arguable ambiguity on the face of the trust. They also argue that the affidavit of lawyer Roy Sommerey, who prepared the trust deed, is relevant evidence that may be considered within the "armchair" approach.
- [42] The direct evidence of Willy's intentions also comes from the affidavit of Roy Sommerey and is the most controversial between the parties.
- [43] *Killam BCCA* (and *Killam v. Killam*, 2017 BCSC 175 [Killam BCSC] provides relatively recent and clear judicial commentary on the four corners and armchair approaches.
- [44] The principles of construction for wills are also generally applicable to trust documents (see *McLean v. McLean*, 2017 BCSC 275 at para. 13; *Wong v. Wong*, 2010 BCSC 1331 at para. 7; *Souch v. Johnson*, 2014 BCSC 1889 [Souch] at para. 16).
- [45] In *Killam BCCA*, Justice Savage defined "four corners" and "armchair" approaches in the following way:
- [13] The "four corners" approach provides that the intention of the testator is to be gleaned from the will itself, and surrounding circumstances are only to be taken into account if the testator's intention cannot be established from the will. The "armchair" approach requires the court to put itself in the position of the testator at the time the testamentary document was written and to consider the contemporaneous surrounding circumstances in order to ascertain the subjective intentions of the testator. Implicit in the "four corners" approach is

recourse to the "armchair" approach if the testator's intent cannot be made out from the text of the will alone.

- [46] Killam BCCA dealt with the interpretation of a will and its codicils, namely the interpretation of a codicil provision that gave one beneficiary of the will control over the inheritance of another beneficiary. At trial, Justice Blok reviewed seemingly inconsistent authorities on the "armchair" and "four corners" approaches (paras. 44-60) and concluded:
- [60] In light of this legal uncertainty I conclude that some combination of the two approaches is called for here. No matter which approach is favoured, the starting point for any analysis is the language of the will and, in this case, the first codicil as well. I therefore begin with an analysis of the language used in the will and I will then look to the surrounding circumstances existing at the time the testator made the will.
- [47] He then proceeded to consider both the purely textual meaning of the will and codicils (paras. 74-89) and the surrounding circumstances (paras. 90-95). Both processes led in that case to the same conclusion; namely, that the impugned provision did not create a trust in favour of the beneficiary whose inheritance was controlled by another (para. 96). In reaching his conclusion, Blok J. based his conclusion upon five different factors, each of which appeared to flow from the "four corners" approach (para. 96).
- [48] The Court of Appeal unanimously upheld Blok J.'s decision. There, Savage J.A. said (for the Court):
- [55] In my view, the judge's findings based on the "four corners" approach contain no error. I agree with the conclusions he reached, and at any rate, his findings are subject to deference on appeal.
- [56] The appellant submits the judge erred by finding that the ambiguity in the Disputed Provision warranted recourse to an examination of the surrounding circumstances, and then improperly considering the relevant evidence to resolve this ambiguity. Contrary to the submission of the appellant, however, I am not persuaded that the judge determined that recourse to the surrounding circumstances was necessary (I note again that I do not accede to the appellant's submission that the judge ought to have considered the evidence relating to the disputed inter vivos gifts).
- ...
- [58] The observation that there is at least "arguable ambiguity" was not a finding that there was ambiguity in the will and/ or Disputed Provision. This observation did not indicate that recourse to surrounding circumstances was necessary to properly construct the Disputed Provision of the will. Rather, the judge's comments indicate that assuming "arguable ambiguity", he would consider the evidence of surrounding circumstances.

[59] The judge's consideration of the surrounding circumstances was secondary to his interpretation of the words of the will. That said, he found it significant that the testator was a highly-educated and accomplished man who had the assistance of an attorney in drafting his testamentary documents, because it reinforced that the words of the will were selected with care and were intended to have meaning. This observation reinforced his conclusions based on the words of the will alone.

[Emphasis added.]

[49] The Court of Appeal here indicates that the "four corners" approach is the primary approach.

[50] The Court further endorsed the "four corners" approach more recently in the context of trust deeds in Ghag BCCA. In that case, the impugned trustee sought to supplant the express terms of the trust deed by reference to a secret agreement that, contrary to those express terms, authorized him to deprive certain beneficiaries of the benefit of the trust. Clearly, it was the express terms of the trust instrument that had to prevail. Justice Griffin said:

[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.

[51] The *Smith* decision referred to also concerned the interpretation of a will. There, Justice Chaisson noted that the trial judge had correctly identified that the applicable legal principles in construing the will were to discern the intention of the testator from the language of the will itself, and resort only to the "armchair" principle if this cannot be ascertained (see paras. 18, 28). The Court of Appeal overturned the judge's finding because the judge erred in their application of the "armchair" approach when it was unnecessary to do so (see paras. 30-37). While Chaisson J.A. went on to consider that an application of the "armchair" principle may also have supported the correct interpretation based on the "four corners" approach, his "armchair" analysis was predicated on assuming such an approach was "necessary" (see paras. 38-42).

[52] Review of Ghag BCCA, Killam BCCA and Smith BCCA suggests that the predominant approach to interpretation of a trust deed is the "four corners" approach.

[53] It is possible, however, to read statements favouring the "four corners" approach as inconsistent with approach implemented by Justice Harris most recently in Pirani.

[54] Pirani dealt with the interpretation of a provision of a family trust deed that ostensibly provided the trustees with an "absolute and unfettered" discretion to terminate the trust and distribute its assets to one or more beneficiaries (para. 27).

[55] Harris J.A. (for the Court) noted that the proper starting point for the interpretation of a trust document is the trust instrument itself (at para. 115). But, important to construing the trust instruments at issue in that case was an appreciation for the complex set of powers and duties created over several trust documents relating to the impugned trustees, who also held directorships of family companies that comprised the trust assets, underscored by two estate freezes (see paras. 5-21, 105, 109-110). These arrangements, and the intentions of the original settlors that they evinced, were required context for understanding whether the settlors had in fact authorized multiple overlapping roles that, at first blush, might be considered disabling conflicts (para. 112). Harris J.A. said:

[96] It is also common ground that in order to establish the degree to which the trust instrument has modified a trustee's duties, it is necessary to seek to determine the actual intentions of the settlor. This inquiry involves interpreting the trust agreement in light of the context in which the trust was established, its purposes and the principles governing its administration.

. . .

[100] . . . What is useful to note, however, is how important it is to the proper interpretation and articulation of the scope and content of a trustee's obligations to understand the circumstances in which powers and duties are created and conferred, and the principles upon which parties base an arrangement (here, an exercise in estate planning). . . .

[56] Harris J.A. then said that the trial judge correctly identified that it was necessary in that case to take a "broader view" of the trust document at issue, by paying attention "to the relationships amongst the trusts; to how all four trusts were administered; and to the fact that, despite the existence of separate trusts and numbered companies, the defendants created and implemented a plan that dealt with four trusts together" (para. 109). Harris J.A. continued:

[110] Respectfully, however, I do not think the judge explored fully the implications of this analytical approach, and she took far too narrow a view both of the relevant context in which the MAP Trust was established, and its effect on the broad discretion conferred by clause 4.12. In my view, the judge fell into error by not properly exploring the structure of the arrangements established at the outset by the First Generation. She also paid insufficient attention to the principles underlying the estate freeze. Undertaking the proper analysis would have led the judge to examine whether the structure of the trusts should be interpreted as influencing the content of the fiduciary duty. In answering this question, she would have had to grapple with the issue of whether, inherent in the structure of trustees occupying different roles, they were authorized to exercise the discretion conferred by clause 4.12 as they saw fit, even in the face of what otherwise might be regarded as a disabling conflict.

[Emphasis added.]

[57] Each of these things is context flowing from the way the relevant trusts had been drafted, and their establishment in light of an estate freeze. Harris J.A. continued:

[116] Thus, a proper interpretation of the trust instrument must consider the context in which it was created. In my opinion, the following facts constitute an important and pertinent part of the factual matrix. Although these facts were acknowledged by the judge, she did not analyse their significance for the issues she had to decide.

[Emphasis added].

[58] The relevant parts of the factual matrix then considered by Harris J.A. in Pirani BCCA were set out at paras. 117-126.

[59] Harris J.A. then interpreted the provision of the trust deed ostensibly providing the power for the winding up and unequal distribution in light of this context, and that provided by other provisions of the trust deed (paras. 129-132). This grounded the finding that the trial judge had erred by not considering whether the application of the general "no conflict" rule had been modified in relation to the impugned trustees in that case (paras. 133-134).

[60] The respondents' argument here includes the following:

77. Lastly, in Pirani v. Pirani, 2022 BCCA 65, the Court of Appeal held that it was an extricable error of law by failing to have proper regard to the context in which a trust was established (at paras. 104-106). It rejected the position that the nature of the trustee's obligations should be gleaned from within the four corners of the trust instrument without resort to the "armchair rule". The Court of Appeal held at para. 116, that "a proper interpretation of the trust instrument must consider the context in which it was created".

[61] A review of additional authorities is informative. In Kenoras Estate v. Smith, 2017 BCSC 339, after a thorough review of authorities on the "armchair" principle at paras. 13-15, Macintosh J. stated:

[16] The two relatively recent Court of Appeal pronouncements cited above, Smith Estate in 2010 and TLC The Land Conservancy in 2014, lead me to conclude that the weight of authority in this province remains that if the will is not ambiguous, extrinsic evidence will not be admitted to interpret it. In my view, that rule does not mean that a court must keep itself oblivious to what, in contract interpretation cases, is referred to as the factual matrix. If it did, it would be almost impossible to know what many of the words in any will were intended to refer to, no matter how clearly drawn and free from ambiguity the will may have been.

[Emphasis added.]

[62] This dictum has since been favourably mentioned in Bodner Estate (Re), 2019 BCSC 237 at para. 16; Louis Winkler Alter Ego Trust #3 v. Winkler, 2019 BCSC 30 at para. 26; and Stewart v. Stewart, 2018 BCSC 556 at para. 56.

- [63] The "surrounding circumstances" that appear relevant under the "armchair" approach have been described somewhat differently from the factual matrix. In *Ali Estate (Re)*, 2014 BCSC 340 [Ali Estate BCSC], in the context of interpreting a will, Justice Dardi said
- [18] Although the primary source of evidence is the "four corners" of the will, the armchair rule entitles the court to look to extrinsic evidence (evidence other than the contents of the will) to identify the surrounding circumstances known to the will-maker at the time the will was made, which might reasonably be expected to have influenced the will-maker in the disposition of his or her property. The extrinsic facts and circumstances that a court may consider include the occupation of the will-maker, the state of his or her property, and the general relationships of the will-maker to his or her immediate family and other relatives: *Kaptyn Estate, Re*, 2010 ONSC 4293 (Ont. S.C.J.) at para. 38. This indirect extrinsic evidence is generally admissible when construing a will.

[Emphasis added.]

- [64] Earlier in *Smith BCCA*, the factors Chaisson J.A. would have considered under the "armchair" approach (if he thought it necessary) related to the state of the testator's estate, and the fact that certain of the named beneficiaries in that case were known by the testator to be old (they were the testators' siblings), thus the testator likely expected them to die before the estate was wound up (see paras. 38-42). In my view, this accords with Dardi J.'s latter summation of the "armchair" principle as involving consideration of matters such as "the state of [the testator's] property" and "the general relationships of the will-maker to his or her immediate family and other relatives".
- [65] Dardi J.'s summation of "armchair" considerations also accords with the reasoning endorsed in *Killam BCCA* at paras. 55, 62 as revealing of no error. In *Killam BCSC*, Blok J. said:
- [90] The following are the most relevant of the surrounding circumstances:
- a) the testator was an exceptionally intelligent, well-educated and well-resourced man;
 - b) the will was drafted with the assistance of a Florida attorney;
 - c) the testator had concerns about Humphrey's character and how Humphrey had used funds the testator had given him in the past;
 - d) Eugene had a strong relationship with the testator in the latter's later years and they communicated often; and
 - e) although the testator gave gifts to his various nieces and nephews during his lifetime, there is no evidence that those gifts were made on an equal basis. In fact, the evidence that the testator ceased giving inter vivos gifts to Humphrey for a time suggests Humphrey did not benefit from the testator's gifts to the same extent as other relatives because he was omitted from distributions for a year or two.

- [66] In my view it is reasonable to take from the authorities these conclusions. No court can properly discern the intentions of the settlor in its construction of a trust deed without some appreciation of the underlying facts that led to the document's creation. As MacIntosh J. says in *Kenoras Estate BCSC*, it would be impossible to understand some terms of a will (or by extension, a trust deed) without some resort to the underlying "factual matrix". However, the Court must stop short of resort to the "surrounding circumstances" summarised by Dardi J. in *Ali Estate BCSC* at para. 18, unless an ambiguity arises in the construction of the trust deed. These are considerations that go more towards the characteristics of the settlor and their wealth, along with substance of the relationships they had with family members.
- [67] Care must be taken with the phrases "factual matrix" and "surrounding circumstances". They appear to have been used interchangeably in contract law discussions (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53). I simply adopt the use that has been made of them in the relevant BC cases in this subject area. The potential for confusion has not to my knowledge been addressed in the authorities and I will not endeavour to do so here.
- [68] In *Pirani* the context considered by the Court was narrower than the surrounding circumstances of the like described in the decision of Dardi J. The focus in *Pirani* was on understanding the relationships created by the relevant instruments, and this could only be done by taking a wider view of the set of relationships the First Generation brothers intended to create through their family company, the estate freeze, and the family trusts.
- [69] The proposition in the respondent's argument that the Court in *Pirani* "rejected the position that the nature of the trustee's obligations should be gleaned from within the four corners of the trust instrument without resort to the 'armchair' rule" is a bold one. It requires a conclusion that the Court intended to eliminate the distinction between the four corners approach and the armchair approach without any reference to the Court's earlier but recent decisions in *Killam BCCA*, *Ghag BCCA* or *Smith*. I am unable to reach that conclusion. In my view *Pirani* represents an example of the Court identifying relevant context and not more.
- [70] I turn next to the affidavit evidence of Mr. Sommerey. The respondents argue that the Roy Sommerey affidavit should be admissible on two bases. These are:
- a) that the affidavit should generally be admissible hearsay to determine the purpose of clause 6(c); and
 - b) that the affidavit should be admissible as indirect extrinsic evidence under the "armchair" principle.
- [71] Generally, direct extrinsic evidence of a settlor's intention is inadmissible to the interpretation of a trust deed (see *Ali Estate* at paras. 18-20; *Souch* at paras. 29-31; *Rondel v. Robinson Estate*, 2011 ONCA 493 [Rondel ONCA] at paras. 27-31 (leave to appeal to SCC ref'd [2011] S.C.C.A. No. 536); see also *Ghag BCCA* at paras. 45-46).

- [72] I note that there is authority to consider direct extrinsic evidence in a case where there is equivocation. That concept is described in *Ali Estate* at para. 20. It is not argued to exist on the facts here.
- [73] In my view direct extrinsic evidence of Willy's intention is not admissible and I will not consider it.
- [74] Indirect extrinsic evidence may be admissible by the court in applying the "armchair" approach where the court deems that approach necessary (see *Ali Estate* at paras. 18-19).
- [75] The respondents endeavour to draw a distinction between the "purpose" of clause 6(c) and its "meaning":
74. To answer the question of whether Tony acted in bad faith and removed Albert for an improper purpose, the court must determine what the purpose of Clause 6(c) was. Tony submits that this analysis is different from the court's analysis in constructing or interpreting a will, where the court is asked to determine what distribution was intended by the will-maker based on the language of the will. On the issue of whether Tony acted in bad faith, the court must consider the purpose behind Clause 6(c), not the meaning of the words used.
75. The Petition alleges that the Trustee acted in bad faith and for an improper purpose. Evidence as to why the discretionary power was included and Willy's express concerns about litigation being brought by Albert is clearly probative to these issues. The law is clear that such extrinsic evidence about the intent of estate planning documents is relevant and admissible to the question of whether a discretionary power has been exercised improperly or in bad faith: *Edell v. Sitzer*, 2001 (ONSC) 55 OR (3d) 198, *aff'd* 2004 OJ No 2314 (ONCA) ("*Edell*"); and *Ghag v. Ghag*, 2021 BCCA 106.
- ...
78. As such, the rules of construction, which exclude and/or limit the introduction of extrinsic evidence do not apply, and the court need only consider the admissibility of Mr. Sommer's Affidavit with regard to the rules for admitting hearsay evidence.
- [Emphasis in original.]
- [76] I do not find support for these assertions in either *Edell* or *Ghag*. Each case speaks to when the application of the four corners approach or armchair principles is appropriate. (*Ghag* at paras. 45, 46 and *Edell* at para. 106).
- [77] In my view the effort to distinguish between the purpose and meaning in this context is, to use the colloquial, a distinction without a difference.
- [78] To the extent that the affidavit of Mr. Sommer contains indirect extrinsic evidence that would properly be considered under the armchair principle I will address that if I conclude in the analysis below that it is appropriate to apply that approach.

Is clause 6(c) void for uncertainty?

- [79] There are parallels between the identification of ambiguity that warrants resort to the armchair principle and determining if the clause is void for uncertainty. This is evident in the petitioner's submissions and "supplementary submissions" where submissions connected to ambiguity and those referencing uncertainty are essentially merged.
- [80] Obviously, however, the two inquiries have different objectives. The former is to determine what evidence to consider in identifying the intention of the settlor, the latter is to determine if the intention is sufficiently clear to be valid.
- [81] In my view there is no ambiguity in clause 6(c) requiring the application of the armchair principle. As a result of the parallels, the reasoning for that conclusion is fully explained as I review the question of whether the clause is void for uncertainty.
- [82] The clause refers to two conditions that authorize the trustee to suspend distributions to or to remove a secondary beneficiary. It is the first, or more specifically the exception in it, that is at issue here. The petitioner focuses on the construction of that exception. The relevant portion of the clause, with the exception highlighted in bold is this:

[I]f a Secondary Beneficiary commences legal proceedings against a company in which this Trust holds shares, or against the Trustee or this Trust, alleging that either the administration or management of such company or of the Trust or of both of them is either oppressive or unfair to the Secondary Beneficiary (claims of clearly proven dishonesty, fraud, or theft from or in relation to the company or Trust excepted), . . .

[Emphasis added.]

- [83] The petitioner's argument sets out that which he alleges is uncertain in these terms:
42. These exceptions are curious for a number of reasons. First, what are we to make of the process to satisfy this pre-condition? Who must "prove" that such claims exist, and to whom must they be proven? When is a claim "clearly" proven - does that import a criminal standard, or will a subjective belief suffice? And, how can such a claim be "clearly proven" without first commencing an action, in apparent breach of the general prohibition?
43. Is it the case that a beneficiary must satisfy the Trustee as to these matters before commencing an action? Or must he make a preliminary application to the court for a declaration? As drafted, the clause is internally inconsistent, impossible to fulfill, and gives rise to an absurdity.
44. Second, what is meant by the reference to "dishonesty"? Is it a general lack of integrity, or will a single act of deception satisfy the test? Is it sufficient for conduct to be underhanded, unfair, or unprincipled to be deemed dishonest? In this case, would Tony's use of outsized voting rights to exclude Albert from WHL's board be considered dishonest, invoking the exception?

45. [Third], what is "fraud" in this context? Deceit? Sharp practice perpetrated to gain some unfair advantage? The use of 748's votes to exclude Albert? The use of Islandview's votes to exclude Albert?
- [84] A restatement of the relevant portion of the clause is that any secondary beneficiary who commences such legal proceedings satisfies the pre-condition for the trustee to exercise their discretion unless dishonesty, fraud or theft are clearly proven.
- [85] "Clearly proven", when read in context, must mean to the standard required by those legal proceedings and to the presider in those proceedings. This would obviously include a civil court with jurisdiction such as in the First Petition. Without making any specific finding it might include a process under alternate dispute resolution.
- [86] The petitioner's concern about the timing and whether such claims must somehow be proved before commencing the proceedings does not create uncertainty so as to render the provision void. The intention is, in my view, clear from the document itself. Indeed the petitioner identifies this in his own submissions when he states:
6. . . . There is simply no mechanism provided for a "pre-determination" of a potential complaint of dishonesty, fraud, or theft, and thus the only logical conclusion is that whether a claim qualifies for the exclusion must be an issue that is assessed in hindsight.
7. Specifically, whether a complaint is "clearly proven" can only be determined after it has been heard by the court. Any other interpretation is illogical.

[Emphasis in original.]

- [87] If the proceedings clearly prove dishonesty, fraud or theft as required, the trustee's discretion is not triggered. If, as here, the steps to remove a secondary beneficiary are taken before the beneficiary commencing the proceedings has had the opportunity to prove them, the trustee has the power, and I would say the obligation, to reverse those steps. The question of whether the petitioner here could have sought an injunctive remedy on the basis that trustee acted prematurely is not before me.
- [88] The petitioner's assertion that the meaning of fraud and/or dishonesty is unclear ignores the context in which they are used. In the legal proceedings commenced by the beneficiary the terms should be interpreted as a court would do in the context of the pleadings raising the issues.
- [89] It is my conclusion that the clause is not void for uncertainty.

Does the decision from the First Petition satisfy the exemption in clause 6(c)?

- [90] Given the interpretation of clause 6(c) above, it is important to identify the basis upon which the First Petition was decided. The order there was made pursuant to s. 324 of the BCA. I noted in the trial decision that "At its core, the issue is relatively simple. Do the circumstances here fall within any of the common grounds relied on to justify judicial

intervention, and, if not, is the phrase 'just and equitable' sufficiently elastic to permit the court to intervene here, particularly in light of the fact that this is a private family company?" (para. 72). Further, I observed, "As noted above, assessing blame or fault for the degeneration of sibling relations is not specifically relevant under s. 324. Further, differences of opinion regarding management decisions does not equal mismanagement." (para. 95).

- [91] The petitioner references the comments in the trial decision that there was no technical operational deadlock of WHL because of manipulations of voting control by Tony and Walter. He says this would support a finding that dishonesty was "clearly proven". That conclusion in the trial decision must also be read in context however. The manipulation was a finding of fact. In that decision I expressly did not make a finding of misconduct, it being unnecessary to assess whether a liquidation order was just and equitable as required by s. 324 of the BCA.
- [92] It is my conclusion that the First Petition, being legal proceedings that activate the discretion under clause 6(c) unless the exception applies, do not fall within the scope of the exception.

Is clause 69(c) contrary to public policy?

- [93] The petitioner argues "Clause 6(c) acts as an in terrorem clause, exposing the beneficiaries to risk of divestiture if they seek recourse to the courts. Such clauses are 'void as against public policy' on the ground that beneficiaries have a statutory right to challenge a trustee's actions, and thus any clause that attempts to deny them this right is void."
- [94] Tony's submission includes this response:
53. Moreover, a beneficiary is free to pursue claims of oppression or unfairness against the company or the Trustee, but if they are unable to prove that the oppression or unfairness arose from dishonesty, fraud or theft, then the beneficiary runs the risk that their distributions from the Trust will be suspended or that they will be removed as a beneficiary indefinitely. This is similar to the risk of special cost consequences when a party claims fraud but cannot prove it at trial, which is not against public policy.
- [95] It is true that the clause does not completely preclude a beneficiary from seeking recourse to the courts, but I do not agree that is similar special costs consequences as described.
- [96] The role of special costs awards in litigation is specific and well understood. They might be the result of reprehensible conduct in the litigation by a litigant. In the context of unproved allegations of fraud, there is no automatic entitlement to special costs. This is in part due to the fact that such a rule would unreasonably discourage parties from pursuing perceived wrongful conduct. Rather, frivolous allegations of fraud can be likened to reprehensible conduct and may result in special costs orders. Justice Iyer, just prior to her elevation, provided this useful synopsis in *Li v. Hu*, 2024 BCSC 778:

- [85] Special costs have been awarded against a party who has improperly, and without adequate basis, alleged fraud: *Imbamar S.A. v. Coutinho & Ferrostaal GmbH*, 2015 BCSC 2218 at para. 27; In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 7, the Court reviewed the authorities as follows:
- [23] In *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724 [FANUC], at para. 7, Justice S.K. Ballance observed that unsuccessful allegations of fraud made frivolously or without foundation will also attract special costs.
- [7] The case law demonstrates a wide variety of circumstances that have resulted in the awarding of special costs. The failure to prove allegations of fraud will not automatically result in such an award (see: *307527 B.C. Ltd. v. Langley*, 2005 BCCA 161, 210 B.C.A.C. 155). However, where the totality of the circumstances reveal that allegations of fraud have been made frivolously, are without foundation, or made in circumstances where the alleging party had access to information sufficient to conclude that the defendant was merely negligent or had committed no wrongdoing at all, the allegations themselves are seen to be reprehensible warranting an order of special costs: *Chaplin v. Sun Life Assurance Company of Canada et al.*, 2004 BCSC 116, 1 C.P.C. (6th) 271; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII), [2004] 1 S.C.R. 303, 235 D.L.R.(4th) 193.
- [86] Abandoning a claim of fraud on the eve of trial is not an excuse: *Dunn v. Baird Estate*, 2022 BCSC 498 at paras. 61-65.
- [Emphasis in original.]
- [97] Even if the special costs analogy has merit, it does not support the respondents here. If the triggering of the trustee's discretion under the clause is the equivalent to the order for special costs, it would only occur if the allegations in the First Petition were frivolous.
- [98] In the First Petition the petitioner was successful in obtaining a remedy under s. 324 of the BCA; that it was just and equitable for WHL to be liquidated. The circumstances leading to that are fully set out in the trial and appeal decisions but an untenable set of circumstances had evolved.
- [99] By limiting the exception in the clause to clearly proven dishonesty, fraud or theft, it permits the trustee to divest the petitioner of his interest for seeking a legitimate remedy to that untenable set of circumstances.
- [100] The respondent Tony references *Mawhinney v. Scobie*, 2910 ABCA 76. There, the Court states the following:
- [49] . . . the no contest clause does not prohibit an outright challenge to the validity of the will or litigation in connection with any provision of the will. If the challenge is unsuccessful then Ms. Mawhinney will forfeit the bequest. However, if she were to be successful in challenging the validity of the will, then it would no longer be valid and neither would the no contest clause. Therefore, the effect of the no contest clause is to test the fortitude of a potential

challenger to the validity of the will and how strongly they believe they can successfully challenge the will. The clause is designed to discourage litigation, not prohibit it.

- [101] Ketcham v. Walton, 2012 BCSC 175 is relied on by the petitioner. There the testator left none of the estate to their children. The portion of the will at issue was described in this way at para 3:
- [3] It also includes a peculiar clause explaining his rationale for doing so, and instructs his Executor to take an active role in defending the Will if any of these children brings a Wills Variation action. The Will goes on to say that the Executor is authorized to deplete the Estate, if necessary, to defend against a WVA action, taking as many appeals as necessary to ensure that the Testator's intentions are carried out.
- [102] The Court found as follows:
- [20] If the clause is not repugnant for directing the executor to take an active role in the litigation, then I would find it void as amounting to an in terrorem clause. Alternatively, it should also be void as contrary to public policy as it purports to deny Eric Clay's children their recourse to the courts. The clause does not directly divest the children of an inheritance, but it does have the potential to deny them the fruits of a victory. Since they have a statutory right to challenge the will under the WVA, any clause that attempts to deny them this right (or, by extension, any effective remedy under this right), should offend public policy and be void.
- [21] This is the outcome that was reached in Bellinger v. Nuytten Estate, 2003 BCSC 563 at para. 22 and it should apply here.
- [103] The two decisions highlight material differences in the clauses at issue in those cases which is helpful in analyzing the arguments here. In Mahwhinney the beneficiary would be disentitled if the claim failed. In Ketcham the beneficiary would effectively be disentitled regardless of the merit of the claim.
- [104] In the specific circumstances here, distilling the clause to practical terms, it says to a beneficiary that if you start legal proceedings that have merit, including showing that it is just and equitable to obtain a remedy under the BCA, you give the trustee the discretion to divest you of your interest in this trust. It is only if you clearly prove dishonesty, fraud or theft that you can avoid those potential consequences.
- [105] The effect is to divest the secondary beneficiary because they justifiably turn to the courts for a remedy regardless of the bona fides of the beneficiary's concerns and the success of the proceeding. That there is an exception for a certain category of claim does not save the clause.
- [106] The clause, in my view, is contrary to public policy.

[107] I find myself unable to fully determine the effect of this conclusion, however, given clause 39 of the trust document. It states:

39. If any provision of this Trust Deed is found by a court of competent jurisdiction to be unenforceable, the Trustees may revise or amend the provision to eliminate the uncertainty [sic] or unenforceability, and if that cannot occur, the said provision can be severed from this Trust Deed and the remainder of this Trust Deed shall be enforceable to the maximum extent possible.

[108] I am not certain what the trustee may be able to undertake. I have, however, heard no submissions for the parties on the issue and conclude it would be inappropriate to proceed without the parties having an opportunity to address this.

Did the Trustee act in breach of his duty?

[109] In Pirani at para. 94 Harris J.A. said:

[94] The parties agree on a number of incontrovertible general principles. First, trustees are fiduciaries and owe duties to the beneficiaries of the trust. Second, as a general matter, trustees should not act in the face of a disabling conflict of interest or duty. Third, conflicts may exist between duties owed as trustees, and duties owed in other capacities; or conflicts may exist between duty and interest. Fourth, where a trustee acts in the face of a disabling conflict, the trustee will bear the onus of demonstrating that decisions were taken in good faith within the scope of the trustee's powers. Depending on the circumstances, the trustee may also have to demonstrate they did not profit from acting as a trustee. Fifth, a prima facie conflict may arise where there is a substantial risk the conflict could sway the decision making.

[Emphasis added.]

[110] The authority for this proposition in Pirani BCCA lies in the trustee's fiduciary relationship to the beneficiaries of the trust, and the general prohibition on a fiduciary's conflict of interest or duty. In Louie v. Louie, 2015 BCCA 247, Justice Newbury said for a unanimous bench at para. 21:

[21] . . . there is clear authority to the effect that once a prima facie case of conflict of interest has been shown, the onus generally shifts to the defendant to show that he or she was acting in the best interests of the plaintiff (in this case, the Band.) See James I. Reynolds, A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples at 196-7; Toronto Party for a Better City v. Toronto (City) 2013 ONCA 327 at para. 58; Roberts v. Canada [1995] F.C.J. No. 1202 at para. 492 (aff'd [1999] F.C.J. No. 1529, aff'd 2002 SCC 79).

[111] A beneficiary may occupy dual roles as both beneficiary and trustee, where the trust authorizes it. In Donovan W.M. Waters, Waters' Law of Trusts in Canada (Toronto: Thompson Reuters) (loose-leaf updated 2020, release 5), at 1.IV, the authors describe the hallmarks of the trust as follows:

The trust is, perhaps, better described by isolating its essential features. The hallmarks, the essential characteristics of the common law trust, are heavily reflective of a peculiar legal history. The foremost of these is the fiduciary relationship which exists between trustee and beneficiary. One party holds the title to property, and manages it, for the benefit of another who has exclusive enjoyment of the property. As we have seen, it is possible to have a variation on this basic framework, for the trustee may him- or herself be a beneficiary. In that case the trustee will have a share in the enjoyment of the property, the remaining share being enjoyed by another. The trustee would then be a trustee for him- or herself and another. But the essential fiduciary relationship remains; the trustee may indeed have two hats, that of trustee and of beneficiary, but he or she is bound to wear only the hat of trustee when carrying out any duty of the trustee. The trustee's management must be scrupulously objective; he or she must act only in the best interests of all the beneficiaries, and the trustee can be held to account if his or her conduct falls short of that standard.

[Emphasis added.]

[112] Pirani also makes it clear that the settlor may modify or oust a trustee's general law duties by authorizing within the trust document arrangements or activities that might otherwise be seen as a breach of those duties. Harris J.A.'s comments to this effect include the following, which he described as being well supported by case authority:

[97] In my view, none of these propositions are controversial. Indeed, the principles in the two preceding paragraphs, both of which are key to this appeal, are reflected, for example, in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Carswell, 2021) [Waters, 5th ed.] at 1003:

It is important to remember, however, that the rules do not involve a total prohibition upon activities which present a conflict of interest and duty, nor upon any possibility of inquiring some profit from the fiduciary role. The person who asks the fiduciary to undertake that task, or who condones the assumption of the task, is perfectly free to permit such activity on the part of the fiduciary. A contract of agency may spell out circumstances in which the fiduciary may derive a personal profit, and a will or trust deed may expressly or impliedly give such a permission.

Where it is alleged the activity was authorized at the time of appointment, this will involve the construction of the instrument appointing the fiduciary . . .

[113] The petition asserts in para. 34:

34. Further and alternatively, Tony's exercise of such discretion, if it exists as he alleges, is being exercised for an improper purpose, relying upon extraneous considerations, including:
- a. his objective of securing a portion of Albert's beneficial interest in the Trust;
 - b. his objective of ensuring that albert cannot become a directory of WHL; and
 - c. his personal animosity toward Albert.

[114] The petitioner says in his argument that the trustee did not act in good faith and that he was in a conflict of interest creating an onus upon him to provide an explanation "as to why he exercised his discretion in the manner he did."

[115] The only explanation provided by Tony in the evidence is:

4. In exercising my discretion under clause 6(c) of the Trust:

(a) I acted in good faith at all times;

(b) Upon a real, honest and genuine consideration of the facts and circumstances prevailing as at February 2, 2022; and

(c) In accordance with the purposes, for which the discretion was conferred.

[116] Tony's position in Islandview was not secret. There is no assertion by the petitioner that he was not fully aware of the structure and purpose of Islandview. Indeed, the petitioner sets them out fully in his petition and they are referred to in the First Petition filed in 2020. I am not satisfied that he breached his duties by non-disclosure of his role in Islandview.

[117] Here the trust deed clearly contemplated that Tony, as a secondary beneficiary, would assume the role of trustee. The terms of clause 6(c) are also clear in creating the discretion exercised once legal proceedings were commenced by the petitioner.

[118] The petitioner suggests the motive for the trustee to act was retribution for his pursuit of the First Petition and not taken in good faith. It is difficult to attach bad faith to a step taken that was specifically authorized by the filing of the First Petition in the trust document.

[119] I conclude the petitioner has failed to establish that the trustee acted in bad faith or that he should be removed from that role.

Conclusions

[120] It is not necessary or appropriate to utilize the armchair principle to determine the settlor Willy's intentions.

[121] I am unable to conclude that Tony acted in breach of his obligations.

[122] Clause 6(c) is not void for uncertainty.

[123] It is, however, contrary to public policy. As stated above however, I decline to draw final conclusions as to what flows from this conclusion in light of clause 39. The parties should consider their positions and advise Supreme Court Scheduling within 60 days of the release of this decision as to how they wish to conclude the matter.

[124] In the circumstances, I decline to address the issue of costs until there is a final conclusion. In light of my retirement from the court, any appearances required by this decision will be scheduled before a different justice of this Court.

"Betton J."

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/sc/24/21/2024BCSC2118cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/weisstock-v-weisstock-2024>

Prepared on 29 October 2026 · Esheria