IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Kidd Family Trust v. Kidd 2005NSSC209

Date: 2005 05 17
Docket: SH 246567
Registry: Halifax

BETWEEN:

The Kidd Family Trust

Plaintiff

and

Terrance Kidd

Defendants

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date Heard: 17 May 2005

Counsel: Mr. Roderick H. Rogers and Ms. Victoria Nickerson, for the Kidd Family Trust

Mr. Hugh H. Wright and Mr. Christopher Wilson, for Terrance Kidd

Moir, J. (Orally):

[1] Terrance Kidd is one of the five children of Lawrence Alfred Kidd, who, for many years, operated a successful retail furniture business on the Bedford Highway through Manorhouse Furniture Limited. Mr. Kidd transferred all the shares in Manorhouse Furniture Ltd. into a trust in October 2004 and he died less than two weeks later, in November 2004. Half of the trust is for the benefit of Mr. Kidd's widow. The other half is for the five children, one tenth each. The trustees have agreed to sell the shares to Terrance Kidd's three brothers and his sister. The purchase price is $1.75 million. A land appraisal and the book value of the current assets less all liabilities suggest the company is worth $3.8 million. This discrepancy and the fact that there was no effort to market the company through listing or public advertisement lead Terrance Kidd to allege that the trustees had breached their fiduciary obligations by agreeing to the non-arms length sale.

[2] Mr. Terrance Kidd was going to start proceedings against the trustees and he requested a time in chambers to apply for an interim injunction on an emergency basis, the emergency being that the sale agreement was about to close. The trustees decided, however, that they should apply to court for directions concerning the sale or for court approval of it and, from their point of view, the emergency consisted in

having the assets tied up by allegations that the sale was in breach of the trustees' obligations.

[3] The trustees and Mr. Terrance Kidd were content for the Court to determine their issues quickly and on affidavits rather than trial. The trustees are John McFarlane, QC, one of Mr. Lawrence Kidd's sons, Michael Kidd, and Mr. Lawrence Kidd's widow, Sheila Kidd. I have affidavits from Michael Kidd and Sheila Kidd. Also, the trustees filed the affidavit of Richard Rafuse, QC, who acted as lawyer to Ms. Kidd in her personal or beneficial capacity. I also have the affidavit of Terrance Kidd and an affidavit he filed of a Mr. Sam Johnston.

[4] No one required cross-examination. The basic evidence is not so much in dispute as the conclusions to be drawn from the evidence. My findings of fact follow. After setting out my findings I will deal with the question of whether the sale to the four children is a breach of fiduciary obligation.

[5] *Facts.* Mr. Kidd founded Manorhouse in 1971 and he remained president until his death last November. Mr. Terrance Kidd was sixteen when his father founded the business. He became an officer and employee of the company and, over the years,

was involved in all aspects of its operation. Unfortunately, poor health now prevents him from working. He lives in an apartment unit in one of the two buildings owned by the company.

[6] The shares are the only subject of the trust. The declaration of trust provides several powers of sale and the trustees are specifically authorized "to exercise all rights incidental to the ownership of shares". The declaration places no restriction on the trustees concerning method of sale or terms of sale.

[7] Shortly before he created the trust, Mr. Kidd had a conversation with his five children. He expressed his views as to what price the business should command. This is set out in the affidavit of Michael Kidd and it is not contested by the affidavit of Terrance Kidd, who was present. For Terrance Kidd, Mr. Wright submits that Lawrence Kidd's views on the value of his company were overridden by the trust declaration and the trustee's consequential duty to get the best price reasonably obtainable. He cites *Re Rudderham* (1970), 12 D.L.R. (3d) 83 (NSSC, AD). However, in that case no one sought to show the deceased's views on value. Rather, the appellants attempted to rely on evidence in contradiction of the very rights the deceased created by his will. The appellants urged the appeal court "that the testator

in his lifetime had manifested an intention that the appellants should have the right to purchase his shares upon his death" (p. 89). The Appeal Division responded at p. 89-90 "the situation following the testator's death was one simply of the Trustee holding 509 shares of J.W. Rudderham Ltd. upon trust for sale". Any expression of intention to the contrary would, indeed, be superceded by the will. An expressed opinion on value is different than an expressed intention in contradiction of a will or similar instrument. I know of no authority saying that the trustees must ignore Mr. Kidds' expressed views as to the value of the property being placed in trust. Rather, it seems to me that a trustee of business assets attempting to decide in good faith whether a price offered is the best price reasonably obtainable for the business should at least consider taking into account the expressed views of the man who founded the business and ran it for thirty-three years. Perhaps those views could be given weight where they were expressed so recently, just days before the trust was created.

[8] Before his death, Lawrence Kidd and Sheila Kidd had discussions with PricewaterhouseCoopers, who were prepared to assist with marketing the business. The firm offered its services to the trustees for 6% of the value of a successful sale or a reduced fee if the business was sold to one of nine people developed as potential purchasers by Mr. and Ms. Kidd or who had come forward after Mr. Kidd's death.

The reduced fee would have been 4% of the amount initially offered and 6% of the difference between the first offer and the amount under a negotiated agreement. The trustees considered this method of marketing the business after Mr. Kidd died. However, the other trustees agreed with Ms. Kidd's assessment that the fees were too high and the better approach was for the trustees to deal directly with the nine potential purchasers.

[9] Mr. McFarlane retained Mr. Paul Young of Kempton Appraisals Limited to provide the trustees with an opinion of the value of Manorhouse's real estate. The work was carried out and a report was delivered before the end of November 2004. Mr. Young was of the opinion that the market value of the company's real property was $2,835,000. In addition to the value, Mr. Wright emphasizes the definition of market value ("The most probable price that a property should bring in a competitive market under all conditions requisite to a fair sale . . .") and an assumption built into the report ("the exposure time has been estimated to be up to one year"). That has to be read in full context. The report does not say how to go about exposing the business for sale and I do not read the statement about exposure to recommend doing so for a full year.

[10] In the meantime, children of Mr. Lawrence Kidd had arranged for a valuation by Evangeline Securities Limited. It values the assets at $3.8 million. However, the report merely accepts the Kempton appraisal of the real property and the book value of inventory, which was reported to be the lower of original cost or market value as assessed by Manorhouse. So, the asset valuation by Evangeline adds nothing to the Kingston opinion coupled with book value of current assets from the 2004 financial statements. Evangeline did provide cash flow valuations suggesting Manorhouse was worth between $3.2 million and $3.8 million from that perspective.

[11] Mr. Rafuse had advised his client of concerns he had developed with respect to the valuations. He attributed a significant increase in inventory on the 2004 financial statements over the 2003 statements to indicate either under-reporting in the previous year or inclusion of obsolete inventory in the current year. He felt the land appraisal was overly optimistic. He was also concerned about the unusual setting of the business, a furniture store in a two-story frame building. While Mr. Rafuse is a lawyer and not an expert valuer, he is not retained for his legal knowledge alone. Both he and Mr. McFarlane are very experienced commercial lawyers who are retained for their abilities to advise on business, including local business, as well as law. No opinion of Mr. Rafuse was admitted to prove its content but they were

admitted to show advice that Ms. Kidd was entitled to rely upon and, through her, that other trustees were entitled to rely upon.

[12] Mr. Rafuse asked for an aged statement of inventory following upon his concern about valuation. The Evangeline valuation relied on information that the inventory rolled over twice a year, and the financial statements confirm that calculation. However, it appears that new inventory was rolling far more quickly than that in the previous year. A sluggish 67% of the total value of inventory turned out to be over a year old when the report ordered by Mr. Rafuse was produced.

[13] The nine prospects were contacted by Mr. McFarlane and Mr. Rafuse. Three were interested enough to sign confidentiality agreements and to receive a package of information concerning the company. The packages were sent out in early January 2004. Negotiations followed with two of the recipients.

[14] Mr. Rafuse lead the negotiations. He met with Navid Soberi and Larry Thomas of the development firm Greater Homes Reality Limited. Those negotiations spread over four meetings. An associated company, United Gulf Developments Limited, made an offer of $1.2 million for the shares to be paid partly in cash but mostly in title

to a number of condominiums. The trustees decided to reject this offer. The negotiations with these land developers lead Mr. Rafuse and Ms. Kidd to have a meeting with the appraiser, Mr. Young.

[15] The other set of negotiations were with Mr. Phil Jordan, owner of a well-established furniture chain and a friend and associate of Lawrence Kidd. There were at least four meetings. Mr. Rafuse kept this client and Mr. McFarlane informed. As will be seen, the third trustee, Michael Kidd, had developed a conflict. Mr. Jordan delivered an offer early in March 2005. Mr. Jordan offered to purchase the real property for $1 million, the new inventory at cost and inventory over a year old at a discount. Later Mr. Jordan made another offer of $1 million for the land, $700,000 for the inventory and about $24,000 for vehicles.

[16] At a point, all five Kidd children were interested in purchasing the business equally among themselves. Four of them retained Mr. Trevor Hughes and Terrance Kidd retained James Filliter, QC. At an early stage Mr. Terrance Kidd announced he was not interested in having any further relationship with the company. The other four presented an offer. They were aware of the Jordan offer of March 2004 when they prepared their own. They made an identical offer. The trustees rejected it. Mr.

Rafuse and Mr. Hughes lead negotiations that lead in turn to an offer of $1.6 million to purchase the shares. This was not accepted. Further negotiations lead to an offer of $1.75 million for the shares. Mr. Rafuse advised Ms. Kidd that the offer was fair and reasonable in the circumstances. Ms. Kidd was of the opinion that this represented a fair and reasonable offer reflecting the value of the company. A low price would be against her interests. The same is not true of Mr. Michael Kidd, who has sworn that his offer represents the best deal that could be negotiated by the trustees. Mr. McFarlane has no financial interest in the issue and he too must have been satisfied that the offer by the four children represented the best price reasonably obtainable. The trustees signed a purchase agreement with the four Kidd children.

[17] Subsequent events show that a group put together by Terrance Kidd would have paid $2 million. Also, Mr. Sam Johnston, a personal acquaintance of Lawrence Kidd and the owner of a furniture business, put together a group that is willing to offer $2 million.

[18] <u>*Whether the Sale is Consistent with the Fiduciary Obligations.*</u> The principle is that trustees with power of sale are to obtain the best price reasonably obtainable: *Re Rudderham* (1970), 12 D.L.R. (3d) 83 (NSSC, AD) at p. 90 - 91. For Mr. Terrance

Kidd, Mr. Wright submits that the principal evidence of breach by the present trustees consists in the valuations suggesting a fair price well over $3 million and the failure to take a broader sounding of the market when the negotiations of January to April produced offers under $2 million.

[19] I agree that the real estate appraisal was a factor for the trustees to take into account when they decided whether the offer by the four children represented the best price reasonably attainable. But, it would be a dereliction of duty if the trustees had taken that factor into account uncritically. Real estate appraisals are never the last word on the value of commercial properties and their use may be diminished where a commercial property is unusual if not unique. Trustees such as Mr. McFarlane and Ms. Kidd aided by Mr. Rafuse are appointed for their own knowledge and good judgment. They, not the courts and not the beneficiaries, decide what weight, if any, to give to professional valuations of real estate and corporate valuations of inventory for book value. For a very concrete example, the Evangeline valuation accepted the 2004 book value for inventory at $1,202,798, which means Evangeline accepted the representation from staff that "Inventory valuations are at the lower of original cost or market value." A more penetrating analysis by Mr. Rafuse took account of the changes in financial position over 2003. Staff had told Evangeline that showroom

inventory revolves four or five times a year but in general inventory only revolves twice, the latter being a simple calculation from the financial statements of 2004. However, the 2003 figures suggest inventory was revolving three and a third times a year. The investigation instigated by Mr. Rafuse and the negotiations with Mr. Jordan suggest that the value of inventory was significantly overstated in the 2004 financial statements. The critical judgment of Mr. Rafuse, Mr. McFarlane, Ms. Kidd and Mr. Michael Kidd in his capacity as trustee was demanded in less concrete ways when they considered what weight to give to the real estate appraisal. As they were appointed to, or in Mr. Rafuse's case retained for, such a task. Fact-finding by this Court should reflect deference to their judgments. It is clear to me that they did not place much confidence in the Kempton appraisal, the book value of inventory or Evangeline's calculations of value based on cash flow.

[20] To say that trustees are obligated to get the best price reasonably obtainable is not to say that their judgment is reviewable by some easy measure. As stated in *Buttler* v. *Saunders*, [1950] 2 All E.R. 193, quoted at p. 90 of *Re Rudderham* ". . . trustees have such a discretion in the matter as will allow them to act with proper prudence." The second case to which Mr. Wright referred was *Re Nicholson Estate* (2000), 35 E.T.R. (2d) 126 (O.S.C.J.). Para. 8 and part of para. 9 read:

> The standard of care and diligence required of a trustee in administering a trust is that of a person of ordinary prudence in managing their own affairs. *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727 (U.K. H.L.). The Trustee is held to a reasonable standard of care, not perfection. Nor is the Trustee required to be omniscient.
>
> I am not persuaded by the argument on behalf of the objectors that every sale of property in an estate must be an open sale in the sense of advertising and giving all member[s] of the public an opportunity to purchase every piece of property. What is required is a fair price to be obtained having regard to the market value. When selling homes, farms etc. it would usually require listing the property. That is not an absolute rule. Where a fair market price can be obtained without listings there is no impediment to private sales.

I respectfully adopt what is said in the second paragraph and I go further in saying that to list a valuable commercial property may be unusual and in some circumstances even imprudent.

[21] Finally, Mr. Wright referred me to one of the decisions coming out of the litigation over the estate of the colourful Harold Ballard. Para. 38 to 72 of *Ontario* v. *Ballard Estates* (1994), 5 E.T.R. (2d) 212 (OCJ) are headed "Fiduciary Obligation to Obtain Fair Market Value". At para. 45 Justice Lederman stated "The executors, from beginning to end, are fiduciaries who owe an obligation to the beneficiaries of the estate to achieve for them the maximization of the value of the shares." They must act "prudently" (para. 46). And at para. 47:

> A decision on their part to sell cannot be made prudently if it is done in a vacuum, without timely and relevant information as to value. That information is required, at the least, to determine whether it is even a propitious time to sell.

In that case, the executors had agreed to sell to one of their own. The circumstances were complicated. It is sufficient to point out that there was no test of the market. One argument had been that the estate affairs were notorious, so purchasers could come forward. At para. 54 Justice Lederman said,

> That being said, however, what information others may have gleaned from the press and why no bids were made must remain in the realm of speculation. Executors cannot avoid their obligation to maximize the value of the estate assets by taking a passive stance, essentially saying, "If other potential purchasers are out there, they know where they can find me." Beneficiaries can be assured that everything was reasonably done to achieve the highest price only upon a demonstration that the executors took all reasonable positive steps to ferret out the best price.

I accept that statement with one slight qualification. There is a dynamic with valuable commercial assets when they are being liquidated. One aspect of the dynamic is value and the other is time. Justice Lederman mentioned "whether it is even a propitious time to sell" but there may be other questions depending on the marketplace, such as whether the bird in the hand will be there if the birds in the bush got away.

[22] I take the following from these authorities. The trustees overarching obligation was to market the trust property with the prudence they would reasonably be expected to engage when managing their own affairs. That leads to an obligation to get the best price reasonably obtainable but the trustees had discretion to act with proper prudence in selecting a mode of marketing and in conducting that effort through to conclusion. On the other hand, they could not determine they had gotten an offer for the best price reasonably obtainable if they had not acquired sufficient information. They could not make that determination in a vacuum.

[23] In this case, the trustees chose to accept the third offer of the four children rather than to take further measures to market the shares. In my assessment, the trustees had well equipped themselves to make the determination that acceptance of the offer was better than further marketing. They had chosen not to "list" with PricewaterhouseCoopers because of the expense and they had chosen to limit themselves to potential purchasers who had expressed interest because of beating the bushes and because of the publicity generated in the community by Mr. Kidd's death. The difference between those choices and what happened with Mr. Ballard is that Mr. Kidd's trustees developed potential purchasers and Mr. Ballard's executors did not.

The word of mouth approach taken by the Kidd trustees was a very common method of selling a small business, at least in this part of the world.

[24] Nor do I agree with Mr. Wright's submission that the trustees had cause for concern in April 2005 that should have lead them to seek more expert valuations or explore a new marketing plan. They did not act in a vacuum. The trustees had the valuations and their depreciated assessments of them. They had the benefit of whatever advice PricewaterhouseCoopers had provided about the benefits and limits of their services. They had Mr. Kidd's own assessment of the value of the business that he had owned and operated for over three decades. They knew what efforts had been made to identify potential purchasers. They knew in detail what had transpired during negotiations with Greater Homes and with Mr. Jordan and the information that came out of those discussions. They had at their disposal the vast knowledge of commerce in the minds of Mr. McFarlane and Mr. Rafuse. In my assessment, they were well equipped to decide whether to take what they had or start over. In my assessment, they were well within their discretion when they chose between those alternatives.

[25] <u>*Conclusion.*</u> The trustees asked that I approve the sale to which they have agreed and Mr. Rogers suggests I can do so under s. 41(1) of the *Trustee Act,* R.S.N.S. 1989, c. 479. In part that subsection reads “An order under this Act . . . concerning any . . . stock. . . subject to a trust, may be made on the application of any person beneficially interested in the . . . stock . . .”. I have some difficulty with the concept of court approval of sales by trustees vested with full powers of sale and discretion. Further, I have some reservation that s. 41(1) is only intended to give beneficiaries equal status with representatives to make applications of the kind provided for in Part III of the *Trustees Act,* which would not include the approval sought by the trustees in this case.

[26] Trustees are entitled to ask the Court for directions and the Court can make directions as well as grant declaratory relief. I am prepared to grant a declaration that the trustees acted within their discretion and in accordance with their duties when they entered into the share purchase agreement dated 10 May 2005 and I am prepared to direct the trustees to close their agreement.

[27] Counsel can send in their proposals for costs. I would like to see them by the middle of June.

[28] I should have gone much slower with the order part. I said I am prepared to grant a declaration that the trustees acted within their discretion and in accordance with their fiduciary duties when they entered into the shared purchase agreement date 10 May 2005. And I am prepared to direct the trustees to close that agreement.

J.