SUPREME COURT OF NOVA SCOTIA
Citation: *Creighton Estate (Re)*, 2016 NSSC 136

Date: 2016 05 24
Docket: Tru No. 444218
Registry: Halifax

Between:

David Alan Creighton and Shelley Irene Creighton

Applicants

v.

The Estate of Dr. Austin MacLennan Creighton, MD Private Trust Company, Gary Scott Creighton, Brian Stewart Creighton, James Austin Creighton, Alison Marie (Creighton) Cottreau

Respondents

Judge: The Honourable Justice Joshua M. Arnold

Heard: March 21, 2016, in Truro, Nova Scotia

Counsel: Blair Mitchell, for the Applicants
Timothy C. Matthews, Q.C., for the Respondents

By the Court:

[1] Dr. Austin Creighton passed away November 11, 2010. Under the terms of his will, three co-trustees were named: David Creighton and Shelley Creighton (the "Creightons") and MD Private Trust Company (the "Trust Company").

[2] The Creightons have requested production of documents in the hands of the Trust Company.

[3] The Trust Company says it has disclosed all relevant documents. Its representatives agree they have not done an audit of their computer system for related documents, nor have they made inquiries as to the completeness of their disclosure with former employees of the Trust Company, who were primarily responsible for the administration of this estate.

[4] Furthermore, the Trust Company claims that notes, working papers, internal emails, whether in paper form or created electronically, if created in furtherance of decision-making by the Trust Company, as opposed to independent advice, are not subject to disclosure to the co-trustees.

Facts

[5] The Creightons are two of eight children of the testator, the late Dr. Austin Creighton. MD Private Trust Company is a commercial trust company operating in Nova Scotia and elsewhere. According to Dr. Creighton's will, the Creightons are named together with the Trust Company as the executors and trustees of the estate. Dr. Creighton died November 11, 2010. The will was admitted to Probate on January 4, 2011. The will dictated that the Trust Company would "assume the burden of administration" of the estate. As of the making of this motion, the estate is not closed and the Creightons have not released the Trust Company from its obligations as executor and trustee of the estate.

[6] The Creightons raise several issues that they say caused them concern in the course of acting as co-trustees with the Trust Company:

- The Creightons made it known to the Trust Company that they wanted to participate fully in the administration of the estate;
- For the majority of the administration of the estate, Mary Mason was the Trust Company's principal representative in relation to this

specific estate and Stephen Rabey was the national lead for the Trust Company;

- Without consulting or advising the Creightons, the Trust Company sought a legal opinion from Harry Thompson, Q.C., solicitor for the estate. The Creightons were not allowed input as to the facts that would form the basis for Mr. Thompson's opinion. The estate paid for the opinion without the Creightons' knowledge;
- The Creightons eventually obtained a copy of Mr. Thompson's legal opinion;
- The Creightons then repeatedly requested from the Trust Company a copy of any other legal accounts that the Trust Company may have obtained; communications between the Trust Company and Mr. Thompson that had not been copied to the Creightons; and any other documentation or electronic information pertaining the estate;
- On October 3, 2013, the Trust Company advised the Creightons that they would have a response to their inquiries by October 18, 2013;
- On October 10, 2013, the deadline date for reply by the Trust Company was extended to October 25, 2013;
- The Trust Company delivered documents to the Creightons on October 25, 2013;
- On November 12, 2013, the Creightons wrote to the Trust Company advising that the disclosed documents did not satisfy their requests;
- On November 28, 2013, the Trust Company responded by stating, "The administration of the estate has now been completed and we have provided to you the information relevant for the purposes of administration of the estate."
- The Creightons retained counsel and the Trust Company was advised on September 24, 2014, that the Creightons were not satisfied with the Trust Company's response and were maintaining their disclosure request;
- On October 15, 2014, the Trust Company wrote advising that, "Documentation related to the above-noted estate was provided to your clients in 2013."

- During argument, counsel for the Trust Company advised the court that they had not contacted former Trust Company national lead Stephen Rabey, former Trust Company trust officer Mary Mason, or any other individual involved in the administration of the estate as to other repositories for such documents and electronic information, nor did they review any emails or other electronic information sent to or from Stephen Rabey or Mary Mason relating to the administration of the estate.

Obligations of Co-Trustees and Disclosure

[7] In *Tiger v. Barclays Bank, Ltd.*, [1952] 1 All E.R. 85, the court considered the disclosure obligations of a professional corporate trustee. Jenkins, L.J., stated at pp. 87-88:

> … His first point was that whereas a natural trustee reflects in his own mind on matters arising in the execution of his trust and reaches from time to time decisions leading to action, a corporate trustee per-force performs the equivalent of a natural trustee's mental deliberations by means of internal memoranda and correspondence passing between its various officials and departments, leading in due course to the appropriate action or decision. From this he adduced the general proposition that the internal memoranda and correspondence of a corporate trustee should be exempt from production because they are equivalent to the private thoughts and deliberations of a natural trustee which are incapable of production because never reduced to writing. We are unable to accept this as a general proposition. If a natural executor or trustee does, in fact, reduce his deliberations to writing, as, for instance, by recording them in a diary relating to the administration of the estate or trust, we see no reason in principle why he should not be required to produce it to his successor in office. Another example may be found in the case of two or more natural trustees who record their deliberations in minutes of trustees' meetings. Here, again, we see no reason in principle why the advantage of production and perusal of such minutes should be withheld from their successors in office. Unless it can be shown that records such as these, if kept by natural trustees, would necessarily be exempt from production—and as at present advised we see no sufficient ground for this view—we find it impossible to accept the general proposition that the internal correspondence and memoranda of a corporate trustee must as such necessarily be so exempt. …Examples were put such as that of a corporate trustee with its own legal department and of inter-departmental correspondence resulting in advice on some point of law arising in the administration of the trust being received by the trustee department from the legal department. Counsel, in effect, agreed that correspondence such as this ought to be produced, just as production was ordered of the case submitted to counsel and his opinion thereon in *Talbot v. Marshfield*…

…

> If such a document relates to the administration of the testator's estate and no more than that is known about it, then, at all events, it is potentially a document which would or might assist the plaintiffs in the administration of the estate. Whether it would in fact do so or not must depend on its actual contents, and of that question, *prima facie*, the plaintiffs, whose duty is to carry on the administration, would be the best judges, and obviously they could only form an opinion by looking at the document itself. They would, moreover, have to see it for the purpose of conducting their side of any argument about its production which might ensue before the master. Accordingly, there seems to us from a practical point of view to be little, if any, substance in the partial and imprecisely defined exemption of internal correspondence and memoranda finally propounded by counsel for the bank.

[8] While *Tiger* involved the disclosure obligations of a corporate trustee when replaced by a new trustee, in my opinion the general principles are equally applicable to co-trustees. This approach has been adopted in Canada, according to *Waters' Law of Trusts in Canada*, 4th edn. (Toronto: Carswell, 2012), where the authors state at p. 995:

> At this point, if the trust is already in existence, a trustee must seek information from the other trustees, or from the surviving trustee, concerning the past and ongoing business of the trust. Between trustees the rule in *Re Londonderry's Settlement* does not apply, and a trustee is entitled to examine any documents which have been originated in connection with the administration of the trust. Correspondence between trustees, minutes of meetings, and memoranda have to be made available, and the new trustee is also entitled to see internal correspondence between the departments of a corporate trustee. If the retiring trustee, the personal representative of the deceased trustee, or any continuing trustee refuses for any reason to produce any documentation, the ruling of the court should be obtained on whether the documents in question can fairly be said to concern trust business.

[9] In *Fales v. Wohlleben Estate*, [1977] 2 S.C.R. 302, Dickson, J. (as he then was), examined some of the obligations imposed on a professional trust company and stated at pp. 315-316:

> Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs … and traditionally the standard has applied equally to professional and non-professional trustees. The standard has been of general application and objective though, at times, rigorous. There has been discussion of the question whether a corporation which holds itself out, expressly or impliedly, as possessing greater competence and ability than the man of ordinary prudence should not be

held to a higher standard of conduct than the individual trustee. It has been said by some that a higher standard of diligence and knowledge is expected from paid trustees: *Underhill's Law of Trusts and Trustees*, art. 49, relying upon obiter of Harman J. in *Re Waterman's Will Trusts*; *Lloyds Bank, Ltd. v. Sutton* [[1952] 2 All E.R. 1054.], at p. 1055, and upon *dicta* found in *National Trustees Co. of Australasia v. General Finance Co. of Australasia* [[1905] A.C. 373 (P.C.)., a case which did not turn upon the imposition of a greater or lesser duty but upon the relief to which a corporate trustee might be entitled under the counterpart of s. 98 of the *Trustee Act* of British Columbia, to which I have earlier referred.

In the case at bar the trial judge held that the law required a higher standard of care from a trustee who charged a fee for his professional services than from one who acted gratuitously. Mr. Justice Bull, delivering the judgment of the Court of Appeal, was not prepared to find, and held it unnecessary to find that a professional trustee, by virtue of that character and consequential expertise, had a greater duty to a *cestui-que trust* than a lay trustee.

The weight of authority to the present, save in the granting of relief under remedial legislation such as s. 98 of the *Trustee Act*, has been against making a distinction between a widow, acting as trustee of her husband's estate, and a trust company performing the same role. Receipt of fees has not served to ground, nor to increase exposure to, liability. Every trustee has been expected to act as the person of ordinary prudence would act. This standard, of course, may be relaxed or modified up to a point by the terms of a will and, in the present case, there can be no doubt that the co-trustees were given wide latitude. But however wide the discretionary powers contained in the will, a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence, nor from the application of common sense.

[10] Dickson, J. continued, at p. 317:

During argument there was some discussion as to the obligation of one trustee to keep a co-trustee informed. In my view where an asset of the character of the Inspiration shares is involved, constituting the principal asset of the estate, a duty rested upon Canada Permanent to keep its co-trustee as fully informed as possible as to any information touching upon the shifting fortunes of Inspiration.

[11] In *MacCulloch Estate (Trustee of) v. MacCulloch* (1986), 72 N.S.R. (2d) 1, [1986] N.S.J. No. 88 (N.S.S.C. (A.D.)), Hart, Jones and Pace, JJ.A. confirmed:

22. … It is the duty of executors to watch over and, if necessary, to correct each other's conduct, and an executor who stands by and sees a breach of trust committed by his co-executor becomes himself responsible for that breach.

[12] This responsibility was also referred to in *Maritime Trust Co. v. Eastern Trust Co. et al.*, [1949] 2 D.L.R. 497 (N.B.S.C. (C.D.)), where the court stated:

> 21. The duties of co-trustees are thus stated in 33 Hals, at pp. 223-4:
>
> > "Subject to the foregoing rights of delegation, a trustee, being personally responsible for the exercise of his judgment and for the performance of his duty, cannot escape responsibility by leaving to another person the exercise of that judgment or the performance of that duty, even if he is one of several trustees and the person to whom he leaves it is his co-trustee; nor may he allow a stranger to participate in the management and control of the trust. If he leaves a trust matter to a co-trustee or employs an agent, he remains liable to his *cestui que* trust for the acts and conduct of the co-trustee or agent, except so far as the law allows him to transact the affairs of the trust through a co-trustee or responsible agent.
> >
> > "A trustee is liable if he allows the trust property to remain in the custody or under the control of another person, except when and for so long as the affairs of the trust render it necessary or proper. Where there are several trustees, one of them cannot safely leave the trust property in the sole possession or under the sole control of another of them, except where the other is acting in the capacity of broker or agent of the trustees and is dealing with the property in that capacity, and except as regards title deeds and documents which for the sake of convenience may be kept by one of several co-trustees."

[13] The court in *Maritime Trust Co., supra,* went on to state:

> 31. … "he simply failed to give any consideration at all to the question of his duties". … he took no responsibility for the preservation of the estate, but simply handed over the assets to his co-trustee. In so doing he acted recklessly and in total disregard of his duty as trustee. I refer to Dr. Grant's action in permitting his co-trustee to receive estate moneys and allowing her to retain such moneys and all other assets of the Dugan estate in her sole possession and control with the result that they were all dissipated by her.

[14] More recently, in *Bronson v. Hewitt*, 2010 BCSC 169, varied on other grounds, Goepel, J. reiterated the responsibilities on co-trustees as described in *Fales*, stating that a "trustee has a duty to keep a co-trustee as fully informed as possible" (para. 464).

[15] It would be impossible for the Creightons to fulfill their obligations as co-trustees without being fully informed by the Trust Company. Clearly, in relation to all aspects of the administration of the estate, the Creightons have the right to know

how and why the Trust Company did what they did. Only full and complete disclosure by the Trust Company would allow this to occur.

[16] Co-executors, as is the relationship between the parties in this matter, have a duty to oversee and correct each other's conduct. This duty cannot be abdicated by a natural trustee in favour of a professional corporate trust company. Therefore, it is necessary for co-trustees to have all information that relates to the administration of the estate. This may include internal correspondence and memoranda, emails, other electronically stored information.

[17] The Trust Company must therefore look at any and all information in their possession, whether electronically stored or stored in hard copy, to determine if such information should be disclosed. This includes the electronic information left behind by employees who may no longer by employed by the company, including Stephen Rabey and Mary Mason. The Trust Company must make reasonable efforts to communicate with former employees to determine what other information might be stored electronically in areas that might not be known or occur to the managers.

Conclusion

[18] The disclosure requests by the Creightons were not only reasonable, but were necessary for them to fulfill their obligations as co-trustees. The Trust Company was not a sole trustee. The Trust Company was required, in keeping with its obligations as co-trustee, to provide the Creightons with full and complete disclosure of any and all information relating to the administration of the estate.

[19] Therefore, the Trust Company must:

1. Forthwith take all reasonable steps to inform itself of documents relating to the administration of the estate which are in its possession and control including all electronic records, by making reasonable inquiries with existing and former employees of the Trust Company, including, but not limited to, the former Trust Company national lead, Stephen Rabey; the former Trust Company trust officer, Mary L. Mason; and other individuals involved in the administration of the estate and by conducting its own internal search;

2. Disclose any and all relevant documents in its possession and control pertaining to the administration of the estate forthwith, and no later than May 31, 2016; and

3. If some documents relating to the estate are deemed irrelevant by the Trust Company and not disclosed, an inventory of such documents is to be provided to the Creightons by June 17, 2016. The Creightons may then bring a motion to determine whether the Trust Company should produce those documents to the court for review as to their disclosure.

Arnold, J.