CITATION: Audi v. Breckon, 2019 ONSC
COURT FILE NO.: 17-73654
DATE: 2019/05/17

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LIA AUDI, Applicant

AND

MARK BRECKON in his personal capacity and in his capacities as Estate Trustee of the Estate of Douglas Giles Breckon and Attorney for Property of Douglas Giles Breckon, Respondent

BEFORE: Honourable Justice Marc R. Labrosse

COUNSEL: Miriam Vale Peters, Counsel for the Applicant

Joseph W.L. Griffiths, Counsel for the Respondent

HEARD: January 31, 2019

ENDORSEMENT

Overview

[1] The Applicant is seeking an Order to compel her uncle, Mark Breckon, to pass his accounts as Attorney for Property over Douglas Giles Breckon for the period from July 2009 to March 2, 2014.

[2] This application has its origins in the management of the finances of Douglas Giles Breckon (the "Deceased") from July 2009 to March 2014 by his son, Mark Breckon. The application before the Court seeks to have Mark Breckon pass his accounts with respect to all of his dealings as Attorney for Property for the Deceased.

[3] Within these proceedings, there are already Orders Giving Directions by Justice O'Bonsawin dated November 28, 2017 and Master Fortier dated February 2, 2018. There was also a further Order by Justice MacLeod requiring the Estate of Douglas Giles Breckon (the "Estate") to pass its accounts.

[4] Also part of these proceedings is a Motion for Summary Judgment brought by the Applicant presently scheduled to proceed on May 28, 2019. In that motion, the Applicant seeks a declaration that Mark Breckon is indebted to the Estate in the amount of $1,811,605.01 for monies allegedly taken by him prior to the death of Douglas Giles Breckon.

Factual Background

[5] The Last Will and Testament of the Deceased is dated July 6, 1971. The residue of his estate was to be passed on to his wife Marion Lorine Breckon if she survived him, failing which it was to be divided equally between his sons, Curt Breckon and Mark Breckon. Curt lived in Florida and Mark lived in Ottawa.

[6] On November 9, 2006, the Deceased executed a Continuing Power of Attorney for Property appointing Curt Breckon and Mark Breckon to be his Attorneys "jointly and severally".

[7] Marion and the Deceased were both living in a long-term care facility by August 17, 2010. Marion died on March 28 2011.

[8] Curt died on October 16, 2012 and the Applicant was appointed as "Personal Representative" of Curt's Estate by the Thirteenth Judicial Circuit Court of the State of Florida.

[9] The Deceased died on Mach 2, 2014 and Mark Breckon was the Estate Trustee for the Estate. On March 18, 2014 and then again on March 23, 2014, the Respondent emailed the Applicant about the administration of the Estate. In one of those communications, the Respondent wrote:

> Yes, I spent some of their money. I also sent hundreds of thousands of dollars to your father and additionally paid the taxes owing from other investments. Your Dad never indicated to me what he spent the money on. Now I have started the process of clearing up their estate, life insurance and whatever else is involved and thus my request for the Death Certificates.

[10] On or about March 8, 2017, the Applicant contacted a solicitor in Deep River who had the last will of the Deceased and sought a copy. These proceedings were commenced on August 15, 2017 and then converted to an action on November 28, 2017. There is no dispute that the Applicant and the Respondent are equal beneficiaries to the Estate of the Deceased.

[11] This application seeks an order for the passing of accounts for the entire period that Mark Breckon acted as Attorney for Property for the Deceased. However, that period is broken down into two relevant periods. From July 2009 to October 16, 2012 (the "First Period"), prior to Curt's death, Mark and Curt were the joint and several attorneys for property for the Deceased. However, the Applicant contends that Curt was in Florida during the First Period and that he never acted as an Attorney for Property for the Deceased.

[12] The second period is from October 16, 2012 to March 2, 2014 (the "Second Period") during which Mark Breckon was the sole Attorney for Property of the Deceased. The Second Period is also relevant given that after Curt's death, the Applicant was the sole beneficiary of Curt's estate.

[13] The Applicant's evidence sets out that from her review of the available documentation during the First Period, there are $900,287.41 of questionable transactions that require explanation. During the Second Period, the Applicant claims that there are $697,490.31 in questionable transactions. The Applicant also highlights funds from stocks, RRIFs and life insurance policies in the amount of 213,827.29 that must be accounted for.

Position of the Parties

[14] The Applicant advances the sole issue of whether leave should be granted compelling the Respondent to pass his accounts as Attorney for Property and over what period should the accounts be prepared.

[15] The Respondent takes several positions. Firstly that the Applicant's request for leave is barred by the two-year limitation period set out in s.4 of the *Limitations Act, 2002*, c.24, Schedule B. Secondly, the Respondent states that the Applicant has not met the test for leave. Thirdly, that the Respondent does not have authority to challenge decisions made jointly by Mark and Curt while Curt was still alive. Fourthly, that an order requiring the passing of accounts is discretionary and not appropriate in these circumstances.

[16] During the hearing of this application, the Court communicated that it was reluctant to order a full passing of accounts for the entire period and invited the parties to submit their respective requested orders.

[17] The Applicant provided two draft orders. The first draft order proposes the passing of accounts by the Respondent from January 1, 2009 to March 2, 2014 and set out a process to deal with objections. The Applicant's second order seeks a number of disclosure orders together with information relating to specific deposits made into the Deceased's accounts and requests documentation relating to the tracing of specific investments and funds that were purported to be owned by the Deceased or Marion Breckon.

[18] The Respondent proposes an order for the Respondent to substantiate, corroborate or validate all deposits in the Deceased accounts that come from the Respondent's own source of funds from 2010 to 2014 and that for each deposit that he is unable to substantiate, the Applicant is to provide an explanation to allow for the source of the deposit to be determined.

Applicable Law

[19] Section 42 of the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 sets out the requirements for an Attorney of Property to pass accounts. Leave of the court is required to compel an Attorney to pass accounts, thus the person seeking the passing of accounts must bring an application for an Order compelling the same.

[20] In order to obtain leave, the applicant must establish some interest in the affairs of the grantor, and that there was at least some evidence that the Attorney was not conducting the affairs of the grantor properly: see *Groh v. Steele*, 2017 ONSC 3625 at para 53.

[21] In *Groh*, the court confirmed that to compel a passing of accounts, a party must fit within one of the enumerated categories of subsection 42(4) of the *SDA*. The Applicant in these proceedings clearly falls under the category of "any other person, with leave of the court" as set out in 42(4)(6) of the *SDA*. Furthermore, the Court in *Groh* stated:

> In my view, such leave should be granted sparingly. The passing of accounts is a detailed review of the financial affairs of the grantor. As such, it is something that is intrusive, and will reveal private financial information about the grantor. In order to obtain leave, the party applying would have to establish both that he or she had some interest (at least indirectly) in the affairs of the grantor, and that there was at least some evidence that the Attorneys were not properly conducting the affairs of the donor. The Court should also consider the role that the Attorneys are playing in the Grantor's affairs.

[22] While the court in *Groh* identified the need for an applicant to have an "interest in the affairs of the Grantor", the Respondent also points to certain authorities that require that the applicant have "a genuine interest in the grantor's welfare". In addition, both lines of cases suggest that there must also be some concern about the management of the grantor's affairs.

Analysis

[23] The proper analysis in this case can proceed by way of a consideration of four issues raised by the Respondent to oppose the request for a passing of accounts:

(1) That the Applicant's request for leave is barred by the two-year limitation period set out in s.4 of the *Limitations Act*;

(2) that the Applicant has not met the test for leave;

(3) that the Respondent does not have authority to challenge decisions made jointly by Mark and Curt while Curt was still alive; and

(4) that an order requiring the passing of accounts is discretionary and not appropriate in these circumstances.

(i) Limitations Act

[24] The Respondent acknowledges that the Court of Appeal has recently confirmed that the *Limitations Act* does not apply to an application by an estate trustee to pass accounts nor to an objection filed by a beneficiary in response to that application: see *Shaw v. Wall*, 2018 ONCA 929 and *Armitage v. Salvation Army*, 2016 ONCA 971. However, the Respondent states that there does not seem to any judicial determination as to whether the *Limitations Act* applies to a request for leave to compel the passing of accounts or to an application by a third party to compel an Attorney to pass accounts.

[25] The Applicant responds by relying on the Court of Appeal's decision in *Armitage* that the *Limitations Act* does not apply to an application to pass accounts.

[26] It is important to note that in both *Armitage* and *Shaw*, the processes engaged were different. In *Armitage*, it was an application by an Attorney for Property (who then became the

Estate Trustee) seeking compensation for services as Attorney for Property and as estate trustee. The question was if her application for compensation as Attorney for Property was statute-barred.

[27] In *Shaw*, a beneficiary issued a notice of application seeking an order that the estate trustee bring an application to pass his accounts. That application proceeded on consent and the estate trustee proceeded to issue a notice of application to pass the accounts of the estate. When the beneficiary filed a notice of objection, the estate trustee moved to have the notice of objection struck for various reasons including that the objection was statute-barred by ss. 4 and 5 of the *Limitations Act*.

[28] While the Court of Appeal has not ruled that the *Limitations Act* does not apply to any circumstance involving the passing of accounts, there are obvious parallels that cannot be ignored. This is particularly so in *Shaw* where the Court of Appeal focused on the right of the beneficiary to object to the accounts. In that case, the same order for leave that is now being sought proceeded on consent but in respect to an estate trustee. It did not deal with the obligations of an Attorney for Property. However, given that the right to object was found not to be *a proceeding commenced in respect of a claim*, it is difficult to imagine how an initial application for leave against an Attorney for Property could be statute barred. Both are seeking to have the Attorney for Property (or estate trustee) fulfill their statutory obligations and provide necessary information to individuals who qualify to obtain that information.

[29] In further support of this position, the Court in *Shaw* had to deal with the fact that the estate trustee had pre-took his compensation. The result could be that the estate trustee pay money back to the estate. The estate trustee argued that this was surely a claim but the Court of Appeal disagreed as the pre-taking of compensation is known to be done at the risk of the estate trustee who may have to pay the money back. The right to object to a passing of accounts cannot be affected by the estate trustee having erroneously paid himself a compensation.

[30] Consequently, if the notice of application to pass accounts in *Armitage* is not a "claim" within the meaning of the *Limitations Act* and that the Notice of Objection filed by a beneficiary in *Shaw* is also not a "claim", then surely an application to compel an Attorney for Property to pass accounts cannot be treated differently. In the end, it is simply an interested party seeking answers to questions relating to actions taken by the Attorney for Property.

[31] While the Respondent makes the valid point that the result would be that a person could wait 10 years to seek leave, I am of the view that issues of delay in bringing forward an application for leave to pass accounts are more properly dealt with as part of the discretionary nature of the remedy and could be a ground for a Court to refuse to exercise its discretion.

[32] In the end, I conclude that the Applicant's request for leave to compel the Respondent to bring an application to pass the accounts as power of attorney of the Deceased is not statute barred.

(ii) The test for leave

[33] There is no dispute that the Applicant's application to compel the Respondent to pass the accounts as Attorney for Property of the Deceased falls under s. 42(4)(6) of the *SDA*. The question at issue is if the Applicant meets the criteria of having an interest in the affairs of the grantor and that there is at least some evidence that the attorney was not properly conducting the affairs of the donor.

[34] The Respondent argues that a higher test should apply and that leave should only be granted where the applicant has a genuine interest in the grantor's welfare. I find the higher test to be overly restrictive. The present circumstances suggest that the Applicant was not aware of how the Deceased's affairs were being managed during his lifetime. As will be detailed below, her interest crystalized once Curt Breckon passed away. It is also unclear as to what the Applicant may have known about her interest in the affairs of the Deceased during the Second Period. The application of the higher test could lead to an injustice where an interested party learns of her interest after the death of the grantor.

[35] In *McAllister Estate v. Hudgin* (2008), 42 E.T.R. (3d) 313, the applicable criteria was set out as including "the extent of the attorney's involvement in the grantor's financial affairs and whether the applicant has raised a significant concern in respect of the management of the grantor's affairs to warrant an accounting." I find this to be an appropriate criteria to apply.

[36] I am satisfied that the evidence before demonstrates that the Applicant has an interest in the affairs of the Deceased given that she is an equal beneficiary of the Estate of the Deceased along with the Respondent. Furthermore, there is no doubt that the Respondent was significantly involved in the Deceased's financial affairs, took funds from the grantor and admitted to significant

co-mingling of funds. The Applicant has thus raised a significant concern in respect of the management of the grantor's affairs while the Respondent was power of attorney.

[37] However, there still lies an important issue to determine: at what point did the Applicant's interest in the affairs of the Deceased crystalize?

[38] The evidence is that the Applicant's father Curt Breckon resided in Florida during the entire period that the Respondent acted as Attorney for Property leading up to his death on October 16, 2012. The Applicant was appointed as the "Personal Representative" of the Estate of Curt Breckon on November 19, 2012. She was also the sole beneficiary to Curt's estate.

[39] The Respondent alleges that Curt Breckon also received hundreds of thousands of dollars from the accounts of the Deceased prior to Curt's death although the Applicant disputes this evidence. In addition, despite the evidence of numerous transactions and potential co-mingling of funds by the Respondent while Curt was alive, it does not appear that Curt expressed any interest in the manner in which the Respondent was managing their parents' affairs.

[40] I conclude that the Applicant's interest in the affairs of the Deceased crystalized on October 17, 2012, being the date of Curt's death at which time she became an equal residuary beneficiary along with the Respondent.

(iii) Decisions made prior to October 17, 2012

[41] I have concluded that for the purpose of granting leave for a full passing of accounts, the Applicant's interest in the affairs of the Deceased crystalized on October 17, 2012. However, I do not purport to rule on the Applicant's right to otherwise seek reimbursement for improper transactions by the Respondent that caused for the value of the Estate of the Deceased to be less than it should have been during the First Period.

[42] If Curt Breckon did not see fit to inquire about how the Respondent was managing the Deceased's finances, the Applicant cannot, in my view, require a full passing of accounts over that period. However, it does not prevent the Applicant from obtaining reasonable information about questionable transactions that may have impacted on the eventual value of the Deceased's estate.

The Applicant's entitlement to reimbursement will be determined after the necessary information has been provided to the Applicant.

[43] When considering the Applicant's entitlement to obtain an order to compel the Respondent to pass his accounts as Attorney for Property, it must be remembered that this is a discretionary remedy: see *Dzelme v. Dzelme*, 2018 ONCA 1018 at para 7. In exercising such discretion I am influenced by the Applicant's delay in taking active steps to assert her interests in the Estate of the Deceased. The Respondent reached out to the Applicant within weeks of the death of the Deceased but she took no steps to inquire as to her rights as a beneficiary until March 8, 2017. It must be noted that the principle obligation to reach out to beneficiaries of an estate lies with the estate trustee. Here, the Respondent would have been well aware of the Applicant's status as a residuary beneficiary but he took no steps to provide her with a copy of the will although it was his obligation to do so.

[44] Regardless, with the passage of time, the challenges in providing an accurate accounting of all transactions dating back to 2009 become greater and greater. The delay from March 2014 to March 2017 has not been adequately explained. Although I do not purport to conclude that the Applicant is prohibited from challenging the actions of the Respondent during the First Period, it remains a factor to consider when exercising the Court's discretion.

(iv) Exercise of Discretion

[45] Having considered all of the above factors, I conclude that the Respondent should only be compelled to apply for a passing of accounts with respect to the period from October 17, 2012 to March 4, 2014.

[46] Although a passing of accounts has not been ordered for the period prior to October 17, 2012, there are significant questions that arise out of the Respondent's co-mingling of his personal funds with those of the Deceased. There is therefore merit to further disclosure from the Respondent in the alternative to a passing of accounts for the full period requested by the Applicant. While I appreciate that there may be some overlap with transactions that will form part of the passing of accounts, there are sufficient questions raised by the deficient manner in which the Respondent has maintained the Deceased's records that specific disclosure is required.

[47] I therefore accept the essence of the wording proposed in the Respondent's draft order which will allow the Court to identify funds deposited into the account of the Deceased that come from the Respondent's own sources. As such, the Respondent should identify, substantiate, corroborate and validate all deposits he claims were made into the bank accounts of the Deceased from his own sources between January 1, 2010 and March 2, 2014 including but not limited those deposits listed on Schedule "A" attached. For any deposit the Respondent is unable to substantiate, corroborate, or validate with banking, financial, investment, or other records, the Respondent shall, within 60 days, provide the Applicant with an explanation for each deposit with sufficient particularity to enable the Court to determine the source of the deposit and the basis for the claim that each deposit originated from the Respondent's own source of funds. Such explanation shall be in the form of an Affidavit sworn by the Respondent.

[48] In addition, the Respondent shall identify and substantiate, corroborate or validate with banking, financial, investment or other records in the Respondent's possession or control (including banking or financial of the Respondent) which will allow for the tracing of the following amounts:

(a) The sum of $81,952.10 from the sale of Canadian Pacific Railway, Encana, and Molson Coors stocks;

(b) the sum of $40,408.10 from the sale of Cenovous Energy and Teck Resources Ltd. stocks;

(c) the sum of $57,000 from the sale of certain mutual funds that were in or about November 2009;

(d) the sum of $57,467.09 from the sale of a RRIF; and

(e) the sum of $34,000 on account of life insurance proceeds from Marion Breckon.

[49] In the Applicant's draft order for the Passing of Accounts, she has included a number of dispositions that vary the passing of accounts process set out in the *Rules*. The Respondent did not have the opportunity to make any submissions on this process. I will incorporate those provisions into this Endorsement with the proviso that the parties may agree otherwise as part of

the order they take out, if on consent. Furthermore, either party may seek a further appointment with me to address the terms of the final order.

[50] Finally, the Applicant's draft order seeks access to significant records of the Deceased and Marion Breckon which are in the alternative to a full passing of accounts. I am of the view that once the Respondent has complied with this Endorsement and the previous disclosure orders, I will remain seized of those requests until after the passing of accounts process is complete and other disclosure orders have been complied with. If any of such additional requested disclosure is essential to the Applicant's claims and are time sensitive, I am prepared to meet with the parties and hear further submissions on those other disclosure requests.

Disposition

[51] For the reasons set out above, the Court makes the following orders:

(a) That, within 90 days of this Order, the Respondent shall serve on the Applicant and file an application to pass his accounts as Attorney for Property of Douglas Gilles Breckon, deceased, for the period from October 17, 2012 to March 2, 2014 ("the Passing of Accounts");

(b) that the form of the Respondent's accounts ("the Accounts") shall be as set out in Rule 74.17 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

(c) that the Applicant may deliver a Notice of Objection to the Accounts no later than 60 days after receipt of the Accounts or such further and other date as agreed to by the parties in writing;

(d) that the Respondent may deliver a Reply to the Notice of Objection to the Accounts no later than 60 days after receipt of the Applicant's Notice of Objection or such further and other date as agreed to by the parties in writing;

(e) that the Applicant may deliver a Revised Notice of Objection to the Accounts no later than 60 days after receipt of the Respondent's Reply to the Notice of Objection or such further and other date as agreed to by the parties in writing;

(f) that the Respondent may deliver a Revised Reply to the Notice of Objection to the Accounts no later than 60 days after receipt of the Applicant's Notice of Objection or such further and other date as agreed to by the parties in writing;

(g) that the Respondent shall provide such vouchers and receipts to the Applicant as requested by her and as set out in the Notice of Objection and Revised Notice Objection within 30 days of being served of the Notice of Objection or Revised Notice of Objection as the case may be;

(h) that the Respondent will identify, substantiate, corroborate and validate all deposits he claims were made into the bank accounts of the Deceased from his own sources between January 1, 2010 and March 2, 2014 including but not limited those deposits listed on Schedule "A" attached. For for any deposit the Respondent is unable to substantiate, corroborate, or validate with banking, financial, investment, or other records, the Respondent shall, within 60 days, provide the Applicant with an explanation for each deposit with sufficient particularity to enable the Court to determine the source of the deposit and the basis for the claim that each deposit originated from the Respondent's own source of funds. Such explanation shall be in the form of an Affidavit sworn by the Respondent;

(i) that the Respondent shall identify and substantiate, corroborate or validate with banking, financial, investment or other records in the Respondent's possession or control (including banking or financial of the Respondent) which will allow for the tracing of the following amounts:

(i) The sum of $81,952.10 from the sale of Canadian Pacific Railway, Encana, and Molson Coors stocks;

(ii) the sum of $40,408.10 from the sale of Cenovous Energy and Teck Resources Ltd. stocks;

(iii) the sum of $57,000 from the sale of certain mutual funds that were in or about November 2009;

(iv) the sum of $57,467.09 from the sale of a RRIF; and

(v) the sum of $34,000 on account of life insurance proceeds from Marion Breckon.

[52] That the parties are hereby granted leave to move for further directions as may appear advisable, if necessary, including without limitation such issues as set out at Rule 74.18 (13.1).

[53] That the unresolved Objections or other issues in the Passing of Accounts shall be heard on application by a judge at the court house, 161 Elgin Street, Ottawa, Ontario on such date as may be fixed by the registrar.

Costs

[54] If the parties are unable to agree on the issue of costs, they may make written submissions. The Applicant will have 20 days to submit their submissions on costs. The Respondent will have 20 days to respond, maximum of 3 pages, excluding bills of costs, costs outlines and attachments. The costs submissions will comply with Rule 4.

Honourable Justice Marc R. Labrosse

Date: 2019/05/17

SCHEDULE A

Account 8018-833

Total Deposits: $118,212.58

Amount	Date
$2,957.00	28-May-09
$11,478.18	18-Nov-09
$29,777.40	08-Oct-10
$12,000.00	29-Oct-10
$10,000.00	04-Feb-11
$15,000.00	10-Jun-11
$10,000.00	05-Jul-11
$5,000.00	12-Jul-11
$12,000.00	30-Sep-11
$10,000.00	05-Jun-12

Account 7019-295

Total Deposits: $324,934.23

Amount	Date
$14,900.00	11-May-10
$17,000.00	27-May-10
$23,840.40	28-May-10
$3,800.00	10-Sep-10
$7,428.66	14-Apr-11
$1,500.00	21-Apr-11
$13,000.00	29-Apr-11
$27,000.00	12-Aug-11
$4,000.00	09-Apr-12
$11,000.00	26-Apr-12
$10,000.00	17-May-12
$10,000.00	26-Jun-12
$10,000.00	04-Jul-12
$10,000.00	17-Jul-12
$18,000.00	23-Jul-12
$10,000.00	03-Aug-12
$2,000.00	09-Aug-12
$60,000.00	20-Aug-12
$60,000.00	26-Sep-12
$11,465.17	01-Oct-12

Account 7019-295

Total Deposits $359,933.35

Amount	Date
$30,000.00	31-Oct-12
$6,000.00	20-Nov-12
$1,385.59	30-Nov-12
$900.00	06-Dec-12
$50,000.00	16-Jan-13
$855.74	31-Jan-13
$546.07	31-Jan-13
$170,086.24	08-Feb-13
$1,401.81	28-Feb-13
$1,255.00	14-Mar-13
$9,182.41	20-Mar-13
$1,401.81	27-Mar-13
$9,500.00	08-Apr-13
$546.07	26-Apr-13
$855.74	26-Apr-13
$62,100.00	29-May-13
$1,711.48	11-Jul-13
$1,405.63	06-Aug-13
$2,320.63	29-Aug-13
$23.35	27-Sep-13
$549.89	27-Sep-13
$855.74	27-Sep-13
$2,813.46	29-Nov-13
$1,406.73	19-Dec-13
$1,414.98	29-Jan-14
$1,414.98	26-Feb-14
$359,933.35	

Account 8018-833

Total Deposits $1,385.59

Amount	Date
$1,385.59	20-Dec-12

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ONTARIO

SUPERIOR COURT OF JUSTICE

RE: LIA AUDI, Applicant

AND

MARK BRECKON in his personal capacity and in his capacities as Estate Trustee of the Estate of Douglas Giles Breckon and Attorney for Property of Douglas Giles Breckon, Respondent

BEFORE: Honourable Justice Marc R. Labrosse

COUNSEL: Miriam Vale Peters, Counsel for the Applicant

Joseph W.L. Griffiths, Counsel for the Respondent

HEARD: January 31, 2019

ENDORSEMENT

Honourable Justice Marc R. Labrosse

Released: 2019/05/17