

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF THE ESTATE OF

Douglas Giles Breckon, deceased

RE: LIA AUDI, Plaintiff/Moving Party

AND

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

BEFORE: The Honourable Mr. Justice R. Laliberté

COUNSEL: Miriam Vale Peters, Counsel for the Plaintiff/Moving Party

Joseph W. L. Griffiths, for the Defendant/Respondent Party

HEARD: December 19, 2019

ENDORSEMENT

[1] The Plaintiff is the Defendant's niece and grandchild of the deceased, Douglas Giles Breckon ("Douglas").

[2] On November 9, 2006, Douglas appointed his sons, Curt and the Defendant, to be his Attorneys for Property.

[3] Douglas died on March 2, 2014.

[4] Under the terms of his will executed on July 6, 1971, the residue of his Estate was to pass to his wife, Marion. If she did not survive him, the residue was to be shared equally among his sons Curt and the Defendant. In the event of their death prior to the division of his Estate, their respective share would pass to their children.

[5] Douglas' wife Marion died on March 28, 2011. Curt passed away on October 16, 2012.

[6] The Plaintiff is Curt's sole surviving child and thus, an equal beneficiary with the Defendant's Estate.

[7] This litigation revolves around the Plaintiff's claim that the Respondent breached his fiduciary duties while acting in his capacity as Attorney for Property prior to Douglas' death from July 2009 to March 2, 2014.

[8] The Plaintiff has brought a motion for summary judgment seeking a finding that the Defendant breached his said duties and should therefore be personally liable to her for the sum of \$358,460.77. Her claim is based in good part on what she describes as unexplained expenditures, missing income and co-mingling of monies.

[9] The Defendant opposes the relief sought by the Plaintiff on a number of distinct basis including the notion that this matter should not be dealt with in the context of a motion for summary judgment. His view, as stated in his Factum, is that this motion for summary judgement has been overtaken by the Plaintiff's motion for passing of accounts before Justice Labrosse. In the alternative, her motion should be dismissed in that she has failed to lead sufficient, if any, evidence, to support her claim that she is entitled to \$358,460.77. Lastly, the Court should accept findings of facts made by Justice Labrosse and his ruling as to the period that may be opened to review.

[10] Having considered the evidentiary record produced in his motion, the positions put forth by counsel and the relevant principles, the Court comes to the following general findings:

- The Plaintiff's motion for summary judgment is not overtaken by the motion for the passing of accounts;
- The Court is confident that it is capable of reaching a fair and just determination on merit with regard to the issue of whether the Defendant breached his fiduciary duties; the Court's finding is that the evidence establishes such a breach;
- However, the Court is not confident that it can fairly decide the question of the amount payable by the Defendant to the Plaintiff by reason of such breaches; the Court is of the view that a just and fair finding on the question of quantum requires the completion of the accounting process started before Justice Labrosse through the passing of accounts and will require *viva voce* evidence relating to some significant issues of credibility.

[11] At this stage, the Court's intent is to provide brief reasons for these findings in this Endorsement with a view of providing fuller reasons at the end of the proceedings.

The Bringing of a Motion for Summary Judgement by the Plaintiff

[12] Firstly, the Court rejects the Defendant's submission that this motion should be dismissed in part, by reason of the fact that there is no claim for damages made by the Plaintiff in these proceedings, including Justice O'Bonsawin's order of November 28, 2017.

[13] The Order giving directions granted by Justice O'Bonsawin which was on consent of all the parties, made it clear that the significant issues for the trial would be the Defendant's personal liability as both Attorney for Property and Executor for all losses incurred by the Estate by reason of breaches of his common law and statutory fiduciary duties. The parties had also agreed that the trial record would consist of all Motion Records and the Affidavits of the parties. There can be no misunderstanding that the action, which had on consent replaced an Application, involved a claim by the Plaintiff that she was entitled to money from the Defendant if he was found to have breached his said fiduciary duties.

[14] A review of Justice Labrosse's Endorsement of May 17, 2019 makes it clear that he was aware of the Motion for Summary Judgement brought by the Plaintiff and there is no indication of an intent on his part to foreclose the bringing of such a motion. The Court notes the following paragraph of Justice Labrosse's said Endorsement:

“[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.”

[15] While the issues before Justice Labrosse in the ongoing passing of accounts process are factually related to the issues raised in this Motion, they are legally distinct. The issues before Justice Labrosse, at this point in time, revolve around disclosure and accounting by the Defendant.

[16] The issues raised in litigation claiming a breach of trust usually transcend the scope of a passing of accounts. An action and a trial is seen as the preference course of action. As stated by the Ontario Court of Appeal in *Simone v. Chieftetz*, [2000] O.J. No. 4191, at para. 17:

“17. While there is statutory authority for awarding damages for “misconduct, neglect or default” by a trustee on the passing of accounts (*Estates Act*, s.49 (3)), it is rare for the court to permit the parties to litigate a substantial claim for damages for breach of a trustee’s fiduciary duties through the medium of an audit. As Professor Waters states: “...the courts prefer to see beneficiaries bring breach of trust actions for reinstatement of loss to the trust, rather than that a breach allegation be fought out through the medium of a remuneration hearing...”

[17] The undesirability of litigating the issue of breach of fiduciary duty on a passing of accounts was reinforced by the Ontario Court of Appeal in the following cases:

- *Simone Estate v. Cheifetz*, [2005] O.J. No. 2992.
- *Bikur Cholim Jewish Volunteer Services v. Penna Estate*, [2009] O.J. No. 841.

[18] Therefore, the Court is of the view that the bringing of a Motion for the Passing of Accounts can not be seen as foreclosing the bringing of a Motion for a Summary Judgment in the course of an ongoing action.

Breaches of the Defendant’s Fiduciary Duties as an Attorney for Property

[19] As already noted, the Court is of the view that it is able to reach a fair and just determination on the merits with regard to the Defendant having breached his fiduciary duties in the context of this Motion for Summary Judgment. The record provided allows for the making of necessary findings of fact and the application of the law to the facts.

[20] In deciding this issue, the Court is guided by the following principles:

- Section 32(1) Substitute Decisions Act: A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person’s benefit.
- Section 32(6) Substitute Decisions Act: A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property.

- “21... pursuant to the Substitute Decisions Act... a guardian of property has a fiduciary obligation to carry out his or her obligations with honesty and due care and attention. The core of these obligations includes the duty to be in a position at all times to prove the legitimacy of disbursements made on behalf of the estate...”

- *Aragona v. Aragona*, [2012] O.J. No. 4452.
- *Roach v. Todd*, 2018 ONSC 5289.

- “20. When estate money is mixed with private money the onus is on the fiduciary to distinguish the estate funds and pay the estate funds back first and make good any loss to the estate. If Enzo cannot distinguish or separate the funds all of the property will be considered the property of the Estate...”

- *Villa v. Villa*, [2013] O.J. No. 1982.
- *Norman*, [1951] O.R. 752.

[21] The Court finds that the following facts which are not disputed for the most part, establish, on a balance of probabilities, that the Defendant breached his fiduciary duties as an Attorney for Property:

- He has co-mingled his personal funds with the funds of the Estate;
- He has not kept records to distinguish these mixed funds;
- He has failed to keep accounts of transactions involving the entrusted property in accordance with and as mandated by the *Substitute Decisions Act*;
- He has paid out significant amounts of cash money without proper receipt for same;
- Some of the challenged disbursements from July 2009 to March 2, 2014 are found to be suspect, notably:
 - Form account #8018-833
 - \$41,585.03 payments in Canadian Tire Mastercards;
 - \$18,295.72 for car expenses;
 - \$17,798.86 for Home Depot, Home Hardware and Canadian Tire;
 - \$4,255.58 for pet care;

- \$211,404.44 unidentified expenses.
- From account #7019-295
 - \$47,136.54 payments on Canadian Tire Mastercards;
 - 127,477.08 for Home Depot, Home Hardware and Canadian Tire;
 - \$237,644.20 unidentified expenses;
 - 9,709.51 for car expenses and gas charges.
- The deposit of proceeds from the sale of stocks holdings to an account owned by him and his daughter.

[22] The Court notes that Justice Labrosse raised similar concerns in his May 17, 2019 Endorsement. He stated the following at paragraph 17:

“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.”

[23] The Court finds that the evidence adduced in the present Motion for Summary Judgment establishes that the Defendant breached his fiduciary duties as Attorney for Property.

[24] As already noted, the Court’s intent is to provide fuller reason at the end of the proceedings.

Amount payable by the Defendant

[25] The Court is not confident that it can reach a fair and just determination on merit on the question of the amount payable by the Defendant to the Plaintiff by reason of breaches of his fiduciary duties. The issue of quantum raises a genuine issue requiring a trial which cannot be fairly and justly decided based on the paper record presented in this Motion.

[26] The Court rejects the Plaintiff’s assertion that “this is a simple arithmetical exercise in which the Court should consider the unexplained disbursements, the missing income or other

assets.” Nor does the Court agree that “*viva voce* evidence or the full mechanics of a trial would not offer any clarity.”

[27] The question of quantum rests mostly on the credibility and reliability of the Defendant as it revolves around his ability or inability to provide cogent and reasonable justification for disbursements, income and assets.

[28] It should also be clearly understood that the Court’s view is that the Defendant bears the onus of establishing the legitimacy of his accounting. The Court rejects the submission made by the Defendant’s counsel that Justice Strathy’s reasoning in *Zimmerman v. McMichael Estate*, 2010 ONSC 2947, applies only on an application for the passing of accounts. The following analysis of Justice Strathy is found to apply in the present matter:

“[50] Considering that Mrs. McMichael was resident in hospitals and nursing homes during almost the entire period covered by the Trusts, there was an onus on Mr. Zimmerman to explain how these expenses could possibly have been for her benefit or related to his duties in the administration of the Trusts. It is simply impossible to objectively determine whether any of these expenses were legitimate expenses on behalf of Mrs. McMichael or the Trust. Only Mr. Zimmerman is in a position to explain and justify the expenses. It is not sufficient for him to make general statements, such as assurances that he acted with the “utmost rectitude” at all times. He had an obligation to demonstrate that each challenged disbursement was properly made...”

[29] The Court also adopts the principle set out by Justice Strathy in paragraph 89 of *Zimmerman*:

“[89] If a trustee has mixed his/her own funds with the funds being held for another, all of the property must be taken to be the other's property until the trustee is able to prove what part of it is his/her own...”

[30] The Defendant’s assertion is that the claim should be dismissed as he accepts that all the disbursements and expenses made during the period from October 16, 2012 to March 2, 2014 (referred to as period #2), were for his benefit because he was essentially spending his own money, either in the form of deposits he made or as part of his own inheritance from his father’s estate. This is obviously one of the significant assertions made by the Defendant which requires proper assessment of his credibility and reliability. It also misses the point that some of the questionable

dealings with the trust assets occurred between July 2, 2009 and October 16, 2012 (referred to as period #1). As noted by Justice Labrosse is his May 17, 2019 Endorsement, at paragraph 46:

“[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.”

[31] While mindful of the Court’s enhanced powers under Rule 20.04 (2.1) and goals of timelines, affordability and proportionality, in the end, the Court’s view remains that the Defendant’s credibility and reliability cannot be fairly and justly assessed on the present paper evidentiary record.

[32] The Court notes the following relevant pronouncements from the Ontario Court of Appeal:

“49...the fact that the new process of adjudication is well-intentioned and can be beneficial cannot impose an imperative on the court to use it in every case. There is a risk that, in an effort to dispose of the case, the evidence will not be properly analysed.”

- *Trotter Estate*, 2014 ONCA 841.

“55. It is not always a simple task to assess credibility on a written record. If it cannot be done, that should be a sign that oral evidence or a trial is required...”

- *Trotter Estate*, op. cit.

“91. Summary judgment can operate as a timely, fair, and cost-effective means of adjudicating a civil dispute, but it has its limits. Not all civil disputes are amenable to a final adjudication on the merits by summary judgment... in certain cases adjudication exclusively on an written record poses a risk of substantive unfairness... The more important credibility disputes are to determining key issues, the harder it will be to fairly adjudicate those issues solely on a paper record...”

- *Cook v. Joyce*, 2017 ONCA 49.

“44. With respect, the culture shift referenced in *Hryniak* is not as dramatic or as radical as the motion judge would have it. Certainly there is nothing in *Hryniak* that suggests that trials are now to be viewed as the resolution option of last resort. Put simply, summary judgment remains the exception, not the rule.”

- *Mason v. Perras Mongenais*, 2018 ONCA 978.

[33] As already discussed, the Passing of Accounts process is not, in and of itself, a basis to foreclose the bringing of a Motion for Summary Judgment by the Plaintiff. However, it is seen as a factor weighing against the Court making a final determination as to the quantum payable by the Defendant, prior to the completion of the process started before Justice Labrosse. This finding is based on the following considerations:

- Justice Labrosse made it clear in his May 17, 2019 Endorsement that the proper adjudication of this matter would likely require more than the disclosure ordered by him in the context of the Passing of Accounts, and in fact, seized himself of this issue to ensure proper disclosure of relevant materials. He stated the following at paragraph 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.”

- The Passing of the Accounts process and subsequent potential disclosure orders referred to by Justice Labrosse will likely serve to provide this Court with relevant evidence on the issue of the quantum payable by the Defendant.

Conclusion

[34] For the reasons set out in this Endorsement, the Court makes the following findings and orders:

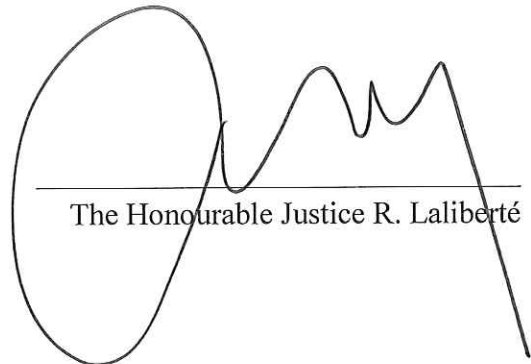
1. The Defendant is found to have breached his fiduciary duties in his capacity as Attorney for Property of the deceased, Douglas Giles Breckon.
2. The Defendant is found to be liable to pay the Plaintiff an amount to be determined following the hearing of *viva voce* evidence.

3. The Court finds that it is unable to come to a fair and just determination as to the amount payable by the Defendant to the Plaintiff in the context of this Motion for Summary Judgement.
4. The issue to be decided by the Court will revolve around the Respondent's ability to counter the accounting provided by the Plaintiff in arriving at the amount of \$358,460.77 which is as follows:

A. Expenditures	
From Account No. 8018-833	\$474,962.11
From Account No. 7019-295	<u>\$1,122,815</u>
Subtotal	\$1,597,777.11
B. Missing Income	
CPR and Encana shares	\$81,952.10
Cenovous Energy Inc. and Teck Resources Ltd. shares	\$40,408.10
Subtotal	\$122,360.20
Subtotal (A+B)	\$1,720,137.31
C. Credits/Deductions	
Less: Accepted co-mingled income from Mark	(\$557,797.66)
Subtotal (A+B+C)	\$1,162,339.65
Lia and Mark were to each receive 50% of total value of Estate or (A+B+C)	\$581,169.83
D. Credits for amounts previously received	
Curt	<u>(\$222,709.52)</u>
To equalize:	
Mark to pay Lia	\$358,460.77

5. The Court's expectation is that the Defendant will testify in both examination and cross-examination and provide further evidence in support of his position as to the quantum payable by him to the Plaintiff.

6. The parties are directed to set an appearance date before Justice Labrosse for his directions with regard to the Passing of Accounts and issues of further disclosure. Once this is completed, a date is to be set before me to discuss the hearing on the issue of quantum.



The Honourable Justice R. Laliberté

Date: February 06, 2020

COURT FILE NO.: CV-17-73654

DATE: 2020/02/03

ONTARIO

SUPERIOR COURT OF JUSTICE

**IN THE MATTER OF THE ESTATE OF Douglas
Giles Breckon, deceased**

RE: LIA AUDI, Plaintiff/Moving Party

AND

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

BEFORE: The Honourable Mr. Justice R. Laliberté

COUNSEL: Miriam Vale Peters, Counsel for the
Plaintiff/Moving Party

Joseph W. L. Griffiths, for the
Defendant/Respondent Party

ENDORSEMENT

Justice R. Laliberté

Released: February 06, 2020