

APPLICATIONS FOR ENFORCEMENT OF FUNDRAISING AGREEMENTS DISMISSED

*By Terrance S. Carter**

A. INTRODUCTION

In *Innovative Gifting Inc. v. House of the Good Shepherd*, [2010] O.J. No. 2210, released May 18, 2010, the Ontario Superior Court of Justice dismissed four applications brought by Innovative Gifting Inc. (the “Applicant”) against four charitable organizations and their senior officers to enforce its written standard form of agreement and obtain payment for fundraising services rendered to the respondent charities. In the agreements at issue, the Applicant had agreed to secure donations of cash and shares for House of the Good Shepherd, Agape Life Center Church and Ministries, Greater Works Ministry and Furry World Rescue Mission in exchange for a fixed percentage of the donations provided to those charities. Three of the four Respondents brought counter-applications seeking the return of funds previously paid to the Applicant under the fundraising agreements. The Respondents contended that the Applicant had made material and fraudulent misrepresentations about the nature of the donations, the legality of the gift-giving program and the fees to be charged.

B. FACTS

The undisputed evidence provided by the Respondents showed that the Applicant had represented that it would raise donations for the charities in the form of cash and shares and that the shares would have a value of at least four times the value of the cash raised. In addition, the Applicant advertised that a Swiss philanthropist would match a Canadian donor’s cash gift with a gift of shares valued at approximately 6 to 8

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times the cash donated. The donor would then receive a tax credit based on the aggregate value of the cash and shares. The Applicant's representations proved false, the promised shares were worthless or never provided; the Applicant requested that the Respondents provide fictitious tax receipts for shares that were never donated; and the donors were not entitled to the tax credits promised by the Applicant.

The Applicant also represented that its fundraising agreements and initiatives were legal and in compliance with Canadian tax laws. The Applicant maintained that its agreements with the Respondents can and should be enforced. Pursuant to the agreements, the Applicant was entitled to be paid a commission of 10-18% of the aggregate donated amount, including cash and shares. However, if no shares were donated, the Applicant was to be paid an amount equal to 90% of the cash donation. Since the Respondents did not in fact receive any valuable shares, the Respondents were invoiced for 90% of the value of the cash donations received.

C. DECISION

The Court found that the Applicant's standard form of agreement was vague, uncertain and filled with inherent inconsistencies. Therefore, the fee provisions of the agreement could not be enforced.¹ The Court then addressed whether the Applicant was nevertheless entitled to be paid something for the services that it had rendered to the charities. The Respondents argued that the agreements should be rescinded or declared void or voidable on public policy grounds.

The Court concluded that the remedy of rescission was available in the circumstances. The Court found that the Applicant had made material misrepresentations to the Respondents about the nature and legality of its gift-giving scheme; the aim of the Applicant's scheme was to "claw back to itself" nearly all of the cash donated to the Respondents; and the agreements were not fully executed by the Applicant, as the Applicant failed to provide the promised shares.²

Further, the Court held that, in any event, the agreements were voidable by the Respondents as being contrary to public policy, because the Applicant's interpretation of the agreements required the Respondents to pay to the Applicant 90% of the monies raised for charitable purposes. The Court found that the agreements were in violation of section 149.1 of the *Income Tax Act*, because the fees charged did not allow

¹ *Innovative Gifting Inc. v. House of the Good Shepherd*, [2010] O.J. No. 2210, paras. 10-11.

² *Ibid.*, para. 17.

the Respondents to meet the 80/20 disbursement quota which was required of registered charities at the time. The Court noted that registered charities were required to disburse at least 80% of the total amount for which official tax receipts were issued in the previous year for charitable purposes and fundraising is not considered a charitable activity.³ The Court also noted that the agreements were “repugnant on the ground that they are against public policy because monies raised for charitable purposes do not go to the intended beneficiaries.”⁴

Further, the Court found that the Applicant’s scheme was clearly fraudulent, and concluded the Applicant should not be allowed to profit from its fraud. The Court held that no fees were payable to the Applicant and that any fees previously paid to the Applicant should be returned to the Respondents.⁵

D. CLAIMS AGAINST SENIOR OFFICERS

The Court concluded that there was no basis for any claim against the senior officers of the Respondents in their individual capacity. The Applicant’s evidence established no wrongdoing by the individual respondents and they were acting entirely within the scope of their employment as senior officers of the charities.

E. CONCLUSION

As shown in *Innovative Gifting Inc. v. House of the Good Shepherd*, fundraising agreements providing for exorbitant fees or commissions may be found unenforceable by the courts. The agreements in the current case were considered voidable based upon breach of public policy due to the extremely high commission demanded by the Applicant. This result follows the conclusion in *The Aids Society for Children (Ontario)*, 105 A.C.W.S. (3rd) 1044 (see *Charity Law Bulletin* No. 9, available at: <http://www.carters.ca/pub/bulletin/charity/2001/chylb09.htm>).

³ *Ibid.*, para. 20.

⁴ *Ibid.*, para. 22.

⁵ *Ibid.*, para. 26.