St. Leonard's Place v. Brown, [2018] O.J. No. 3712

Ontario Judgments

Ontario Superior Court of Justice

Toronto, Ontario

F.L. Myers J.

Heard: March 27, 2018.

Oral judgment: March 27, 2018.

Court File No. CV-16-557186

[2018] O.J. No. 3712

Between St. Leonard's Place et al., Applicants, and Brown et al., Respondents

(39 paras.)

Counsel

R. Segal, M. Ma, I. Dick, Counsel for the Applicants.

S. Carter, R. Gascho, J. Macdonald, M. Kotsopoulos, J. Solomon, E. Stock, J. Irving, J. Kuner, M. Alter, M. Protich, Counsel for Respondents.

V. Sinclair, In person.

M. Walsh, In person.

REASONS FOR JUDGMENT

F.L. MYERS J. (orally)

1 I am going to dictate my decision and I reserve the right to make minor edits for grammar and diction and the like. I am doing this the same day that we finished because in my view, these good people deserve an end to these proceedings.

2 St. Leonard's Place Peel applies under section 10(1) of the *Charities Accounting Act* for:

a) declaration that the pension and a retirement package agreed upon between St. Leonard's and its former Executive Director of 35 years, Rick Brown, is void as against public policy;

b) an order setting aside the pension and retirement package;

c) an order requiring Mr. Brown to repay all amounts paid by St. Leonard's to Mr. Brown or otherwise paid for his benefit;

d) a declaration that St. Leonard's has no further obligation to fund either Mr. Brown's pension or retirement package;

f) a declaration that Mr. Brown was in conflict of interest and breached his fiduciary duties in influencing the Board to establish his pension and retirement package;

g) a declaration that Mr. Brown and all members of the board of directors from 2005 to 2010 committed breaches of fiduciary duties and breach of trust in agreeing to Mr. Brown's pension and retirement package, knowing it was to be financed by St. Leonard's charitable funds;

h) an order for Mr. Brown and the respondents to be personally, jointly and severally liable to repay to St. Leonard's losses that it incurred by the use of its charitable funds.

3 The claim is under section 10(1) of the *Charities Accounting Act* for directions regarding a breach of trust, a breach of fiduciary duties in relation to a charity. This is not a lawsuit or an action for negligence against the former board members. Rather, St. Leonard's, and the board as currently constituted, and Mr. McIntosh, the former Executive Director who replaced Mr. Brown, but has since moved on, claims serious breaches of the highest of duties owed by Mr. Brown as Executive Director and the other respondents as members of the board of directors of St. Leonard's. The applicants allege breach of trust and breach of fiduciary duty.

4 It is common grounds that St. Leonard's Place is an excellent facility. It is a registered charity, although much of its funding is provided by fee--for--service charges to the government. St. Leonard's charitable objectives are set out in its letters patent as follows:

a) to follow Christian teaching by the assistance, education and rehabilitation of prisoners, ex-prisoners and parolees and to promote their re-establishment in society;

b) to raise funds to support such enterprise;

c) to receive donations, gifts, legacies and bequests of every nature and kind; and

d) to erect a building or buildings or to purchase an existing building or buildings for carrying out the aforementioned objects.

5 St. Leonard's is a not-for-profit corporation under the *Corporations Act*. It is managed by a volunteer board. Mr. Brown was first employed by St. Leonard's in 1975. He became Executive Director in 1978. He held that position until he retired at the end of 2013. Mr. Brown led the administration as this small company and small facility of less than ten beds grew to a $5 million annual revenue business with a new building.

6 No witness denies the evidence of the respondents that as Executive Director, Mr. Brown was very successful in leading the operations and growth of this wonderful facility and organization.

7 Mr. Brown was not a volunteer. He was a paid employee. There is nothing unusual about that. The *Charity Rating Guide and Watchdog* posted on the website www.canadiancharitylaw.ca is posted by an authoritative author and says as follows:

> Charity salary levels ought to be based on the skill, experience and education necessary to forward the work of the organization. Charities compete with businesses and the government for employees and must therefore offer reasonable wages to attract, hire and retain competent people. Many charity employees are willing to sacrifice the higher pay in the private sector for the psychological rewards of working for a good cause, but underpaying employees could sabotage a charity's programs if the only people willing to accept such low wages are unqualified to do the job...
>
> A common misconception about charities is that money spent on employee compensation and benefits is not a program service expense and is not fulfilling a group's mission. This is absurd, since most charity workers spend the majority of their time operating programs that directly fulfill their organization's mission.

[emphasis added]

8 I agree. There is no evidence suggesting that Mr. Brown's salary was not commensurate with the appropriate factors. But, in 2000, at about the age of 50, and after having worked 25 years, Mr. Brown raised the question of succession. To that point, he had been participating in a group RRSP. St. Leonard's had been matching his contributions of two percent and then five percent of his salary. In 2002, St. Leonard's agreed to contribute $10,400 and then $10,800 for Mr. Brown and that was equal to approximately 13 percent of his annual salary.

9 Mr. Brown raised concerns that were dealt with first at the Personnel Committee of the board and then discussed his concern with the board that he was looking to retire in about 2009 or 2010 but that his RRSP was going to produce too little in post-retirement income. He hoped to receive $40,000 to $50,000 for post-retirement income annually before taxes.

10 The board did what non-expert boards are supposed to do. They started a committee and then got advice. They heard from two or three pension advisers, including their existing RRSP administrator, Royal Bank of Canada, who discussed a standard life insurance product with them. RBC's calculations showed that Mr. Brown's RRSP was projected on 2005 assumptions to be likely to produce $29,000 before tax annually, starting in late 2009.

11 The Board was populated by several people in the civil service at that time, some connected to municipal housing, others to correction, for example, and they accepted that the Executive Director ought to be entitled to a pension like theirs after 30 to 35 years. RBC recommended a process whereby Mr. Brown would put $136,000 from his RRSP into a new registered Individual Pension Plan, or IPP. St. Leonard's would fund $75,000 down plus another $10,000 per year for five years, for a total of $125,000. RBC advised that based on 2005 assumptions, this funding would be projected to yield 42,000 in 2009, topping up Mr. Brown's RRSP by $12,000.

12 On reading the RRSP calculations and the Board's assessment, it looks like RBC was just selling St. Leonard's a $12,000 annualized product for $125,000, but that was not the case. In fact, the documents supporting RBC's calculations and included with the board minutes from May 30, 2005, board meeting, are clear as a bell that RBC was proposing a stand-alone defined benefit pension plan to yield a benefit equal to two percent per year of Mr. Brown's salary from the early 1990's until his projected retirement in 2010. That benefit calculation worked out to about $42,000 per year by 2010.

13 Perhaps RBC hoped that contributions of 75,000 down plus five annualized payments of $10,000 would be sufficient to yield the $42,000 benefit at 2005 market assumptions. I have no idea if that was correct or at all reasonable, but the crash of 2008 intervened. By 2008, actuarial valuation of the IPP showed the contributions required were $25,000 to $30,000 a year, despite St. Leonard's expectation of only paying $10,000 per year. It is the nature of a defined benefit pension plan that contributions change over time as market experience is compared to the assumptions used previously. If St. Leonard's believed that there was a cap on its contributions of $125,000, then it received a surprise. It has already paid over $350,000 and now there is as much as another $375,000 terminal deficit due to the plan as at December 31, 2017.

14 St. Leonard's says that it was a breach of fiduciary duty or breach of trust to use the charity's assets for a pension for a former Executive Director. This is an impermissible gift for past services. But at 2005, Mr. Brown was not a former Executive Director. Rather, he was negotiating his next five years and succession planning with the board. There is no evidence that the Board members breached any duties in agreeing to provide deferred compensation by way of a pension to the Executive Director in 2005. There is no evidence that the numbers used were out of line with market forces at all in 2005. There is no evidence that Mr. Brown controlled the Board or took steps at all similar to the wrongdoing in the *UBS* case, *2014 ONCA 538*, or in *Goldstone Resources*, *2017 ONSC 879*.

15 Mr. Brown signed the pension document. It was no different in substance than the application and draft that was before the Board on May 30, 2005. It was no different than the application signed by Mr. Lomax for the board. I infer his authority to sign a deferred benefit plan as approved by the board on May 30, 2005, but even if he was

committing a technical breach of the bylaws by signing the document, given that the IPP was approved by the board in much the same defined benefit format, that breach could not have caused any loss to St. Leonard's.

16 It appears that the board may not have appreciated the downside risk of adverse market conditions on future contributions. Whether fault for that lies with RBC or the failure of the board to dig deep enough or to supervise contributions as they increased over time is not before me. I do not agree with Mr. Segal's submissions that possible lack of prudence, if any, is a breach of fiduciary duty or breach of trust.

17 In *BCE* *2008 SCC 69*, at paragraphs 36 and 44, the Supreme Court of Canada is clear that breach of duty of prudence is not a breach of fiduciary duty. It is a form of negligence, a common law duty of care informed by statutory breach of prudence. The Supreme Court of Canada was clear in distinguishing a breach of fiduciary duty from a breach of the duty of prudence.

18 No one has been shown to have acted disloyally, in bad faith, to hurt St. Leonard's or contrary to St. Leonard's best interests or contrary to its objects in securing its Executive Director's employment for the next five years, including adjusting his deferred compensation in good faith. It is trite that not every breach committed by a person who occupies a fiduciary position is a breach of fiduciary duty. If a duty of prudence required a lay Board to better understand and hedge for a market crash three years in future, that is not an issue for an application for breach of trust or breach of fiduciary duty under section 10(1) of the *Charities Accounting Act*, nor is the simple act of voting for a resolution a breach of fiduciary duty.

19 Mr. McIntosh refused to particularize evidence or facts supporting the claims for breach of fiduciary duty against the respondents beyond voting, and that undermines the naming of the individuals as respondents in this application. Even if I had concerns with the pension, nothing I heard leads to a finding of personal liability, other than a possible rebalancing of interests between Mr. Brown and St. Leonard's.

20 In the *Christian Brothers* case of the Court of Appeal, 1998 CarswellOnt 815, Mr. Justice Blair said the following at paragraph 72:

> A charitable corporation does not hold its assets "as trustee" for charitable purposes, however. It holds its assets beneficially, like any other corporation. As a matter of corporate law, of course, it must use those assets in a manner consistent with its corporate objects, and its directors have fiduciary obligations to ensure that such is the case. Where its corporate objects and its charitable purposes coincide - as they do in this case - it must use its assets in a manner consistent with those charitable purposes. Nevertheless, this does not mean that it holds all of its assets in some kind of trust capacity.

21 Therefore, the actions of the senior executive and the board in negotiating the senior executive's compensation, absent wrongdoing, cannot amount to a breach of trust. Mr. Segal argues that a gift of charitable assets for past consideration or past performance is still a breach of fiduciary duty. First, he argued that charities breach their fiduciary duties if they ever pay any amount for employment past services. He quickly backed off that submission, which cannot stand in face of the real world.

22 Then he backtracked to say that the pension agreed to here was agreed upon too late in Mr. Brown's employment cycle and is too generous so as to amount to a gift for past services. But all of the cases that he relies upon involve wrongdoing in corporate process. In *UBS*, for example, there was self dealing. Here, the Board met *in camera* with third-party consultants.

23 In *Goldstone*, the facts were that the CEO controlled the board, who rubber-stamped a proposal with no business judgment at all exercised. In two cases, *Faith Hill* (ph) and *Yukon*, volunteers were gifted retroactive honoraria, one in outright breach of a bylaw prohibiting the president from receiving any payments.

24 The IPP was not a gift given to Mr. Brown in gratitude of his years of service. He had an RRSP and he had

negotiations for his ongoing employment and succession. In those negotiations, he negotiated an improvement to his existing post-retirement deferred compensation. There is nothing untoward about any of that.

25 Then, in November 2010, Mr. Brown did not retire. He negotiated again with the board on transition. The 2008 market crash affected his pension and there was a fear that it would not be yielding the $42,000 as parties had hoped and Mr. Brown says was agreed. By that time, he had changed his retirement date and the mortality tables applicable to the pension had also changed so as to increase the cost base.

26 There was back--and--forth between Mr. Brown and senior members of the board, and ultimately the board approved a deal. The deal included Mr. Brown providing two more years of service at full time and full salary, then two years at $42,000 during which he would be a consultant with minimal expectation of actual services being provided. He was being kept available to help his successor if necessary. It turned out Mr. McIntosh did not need his help. There is nothing untoward about that. Mr. Brown was available, attended Board meetings and continued interfacing with other business partners of St. Leonard's, like the Rotary, for example, an important supporter of the business.

27 The $42,000 salary agreed upon was not a fluke. St. Leonard's was agreeing in 2010 to give time to the company, on the hope of improving the performance in the pension plan. It gave -- with Mr. Brown -- they gave it a couple of extra years to try to decrease the deficit that was developing in the plan. There was no expectation of him working those two years because he was supposed to be retired at $42,000 pension already.

28 The company also agreed to give Mr. Brown health insurance at about $5,000 per year, extended health benefits at about $3,600 per year, car expense, and to recognize 120 accumulated sick days. St. Leonard's policy for employees was to allow only the accumulation of 66 days and only to pay out 30 days on retirement. Therefore St. Leonard's seeks repayment of $3,750 for overpayment of sick days. It also claims in the aggregate approximately $400,000 in benefits agreed to in the 2010 compensation package in addition to the pension deficit and claims that the compensation or the retirement package amounts to another breach of fiduciary duty and breach of trust by providing gifts to Mr. Brown.

29 There is no evidence that recognizing benefits for retired CEO as part of his transition services, including two years extended full--time employment and then standby fees of 40 percent, are out of the normal range for a person of his position, skill, and experience. The Board wanted Mr. Brown to extend his services and Mr. Brown wanted to do so too. There is nothing untoward in working to age 62. I cannot see a breach of fiduciary duty, self dealing, lack of loyalty, or a gift for past services to a volunteer in these facts.

30 Rather, there was a commercial negotiation by a company and its senior employee. Perhaps St. Leonard's should have had a lawyer, but I can understand its desire to avoid avoidable costs. There is no reason for Mr. Brown or St. Leonard's to question each other's good faith, but that is a long way from collusion or bad faith or self dealing. There is no evidence at all of any lack of *bona fides* by anyone in this process.

31 Finally, the November 2010 letter includes a clause in which St. Leonard's agrees to top up Mr. Brown's pension accounts, his RRSP and IPP to $42,000. This supports St. Leonard's claim that it did not understand the IPP to be a defined benefit pension plan, but believed that Mr. Brown had agreed with it that the RRSP and IPP together, with a total further contribution defined of $125,000, would yield the $42,000 hopefully. The Board agreeing to top up shows that it did not understand there to be a defined benefit guarantee already in place.

32 It is clear that the parties today disagree as to what was intended in 2005, but the contract is not interpreted by intentions discerned 10 to 15 years later. The IPP was set up to produce $42,000 annually on its own. Mr. Brown has an RRSP too and it contributed 136,000 to the IPP in 2005 as agreed. That was probably a tax--driven maximum, but there is no evidence of that.

33 Mr. Lomax led the financial effort for the board regarding Mr. Brown and he signed the documents in 2005 as

well. So that there is no doubting that a defined benefit pension plan was on the table throughout. There is no proof of a jointly held intention to do otherwise, so the remedy of rectification is not available to the applicant.

34 The IPP is a registered pension plan under the *Pension Benefits Act*. Any inherent jurisdiction that this Court has to deal with matters of charity stops where the *PBA* applies. I am not free to amend benefits. The *PBA* trumps the *Charities Accounting Act*. See section 114 of the *PBA*.

35 I am not called upon to comment on the degree of the board's diligence in 2005 and whether it truly understood all the implications of the defined benefit plan it entered into. Nor am I called upon to assess the board's lack of complaint. The contributions greatly exceeded $125,000 predicted early on. That suggests that perhaps the board did know that the defined benefit plan contributions were not fixed and were just projections in 2005. I do not know. The issue is not before me.

36 I start with the business judgment rule in assessing the board's conduct. That rule is described by the Court of Appeal in the *UBS* case in paragraph 72, as follows:

> It must be remembered that the business judgment rule is really just a rebuttable presumption that directors or officers act on an informed basis, in good faith, and in the best interests of the corporation. Courts will defer to business decisions honestly made, but they will not sit idly by when it is clear that a board is engaged in conduct that has no legitimate business purpose and that is in breach of its fiduciary duties. In the present case, there was ample evidence upon which the trial judge could base her conclusion that the presumption had been rebutted.

37 There is no basis to rebut the presumption in this case. There is no want of loyalty or probity by Mr. Brown or anyone. There was no self dealing, no lack of loyalty, no collusion, no domineering influence by Mr. Brown on the board in November 2010. The board was active and engaged throughout. The board certainly may have lacked clairvoyance and the possible failure of a lay board to understand fully the nuance of funding under a complex pension structure may be real. Its hired consultant may herself have contributed to its confusion, but these are just not issues of breach of fiduciary duty or breach of trust under section 10(1) of the *Charities Accounting Act*.

38 The evidence is far from proof on the balance of probabilities that any respondent committed a breach of his or her high duties. As far as I can tell, having read two feet of transcripts, these are good people who did good work for a good cause. While not perfect, few of us are. Accusations against these people of breach of fiduciary duty and breach of trust are not close to proved. The application is therefore dismissed. I believe that makes the claim over moot, Ms. Protich.

39 ...END OF EXCERPT OF PROCEEDINGS

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