COURT OF APPEAL FOR ONTARIO

CITATION: Locking v. McCowan, 2016 ONCA 88
DATE: 20160129
DOCKET: C61038

Gillese, MacFarland and van Rensburg JJ.A.

BETWEEN

Daniel Locking

Plaintiff (Appellant)

and

Ronald McCowan, Allen W. Weinberg, Joseph Feldman, Marc Charlebois, Laura Philp (a.k.a. Laura Phelp, a.k.a. Laura Philps, a.k.a. Laura Philip, a.k.a. Laura Philips), Holyrood Holdings Limited, Samuel H. Nash, Goldman Sloan Nash & Haber LLP, Graham Rawlinson, and Torys LLP

Defendants (Respondents)

Proceeding under the *Class Proceedings Act, 1992*

John Archibald and Paul Bates, for the appellant

J. Thomas Curry and Julia G. Brown, for the respondents

Heard: January 20, 2016

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated August 19, 2015, with reasons reported at 2015 ONSC 4435.

Gillese J.A.:

FACTS IN BRIEF

[1] The appellant is the representative plaintiff in a proposed class action by unit holders of Partners REIT, an unincorporated real estate investment trust

whose units trade on the Toronto Stock Exchange. The appellant claims that the class sustained losses when the REIT's unit price dropped because an improper property transaction had to be set aside.

[2] Partners REIT is governed by a board of trustees.

[3] Ronald McCowan and Allen W. Weinberg are two of the named defendants and, as will be seen, are central to this appeal. McCowan was the REIT's interim CEO at the relevant time and Weinberg was one of the trustees. The other named defendants in the proposed class action include two other trustees and those who sold the properties to the REIT.

The Transaction

[4] On April 2, 2014, the respondent Laura Philp and her company Holyrood Holdings Limited ("Holyrood") (together, the "Respondents") sold three properties to the REIT (the "Transaction") at McCowan's behest. McCowan failed to disclose that he had a longstanding, close personal and business relationship with Philp and, according to the appellant, a *de facto* ownership interest in the properties and *de facto* control of Holyrood.

[5] When McCowan's conflict of interest was exposed, the Transaction was set aside and all monies paid were returned to the REIT. However, it is alleged that the fall-out caused the REIT's unit price to drop by more than 30 per cent.

The Proposed Class Action

[6] For the purposes of this appeal, the relevant claims in the Amended Statement of Claim are as follows:

- against Weinberg, Feldman and Charlebois, the defendant trustees at the relevant time: breach of trust;
- against McCowan: breach of fiduciary duty and knowing assistance in Weinberg's breach of trust; and
- against the Respondents: knowing assistance in Weinberg's breach of trust and McCowan's breach of fiduciary duty.

The Underlying Motion

[7] A certification motion was brought.

[8] The motion was bifurcated, with the motions judge first determining whether the claims constituted viable causes of action under s. 5(1)(a) of the *Class Proceedings Act*, S.O. 1992, c. 6 ("*CPA*"). As the motions judge correctly noted, for the purposes of the motion, the facts as set out in the pleadings are assumed to be true.

THE DECISION UNDER APPEAL

[9] By order dated August 19, 2015 (the "Order"), among other things, the motions judge permitted the breach of trust claim against Weinberg[1] (and the other defendant trustees) and the knowing assistance claim against McCowan to

[1] Weinberg did not oppose the s. 5(1)(a) motion.

proceed. However, he struck the knowing assistance claim against the Respondents.

[10] In respect of Weinberg, the motions judge noted that the breach of trust claim is supported by the following facts as pleaded: Weinberg knew of McCowan's material interest in the properties and control over Holyrood; he knowingly breached his duties by permitting the REIT to enter into the Transaction without the required disclosure and unit holder approval; he did so in order to preserve the relationship between his law firm and McCowan, its long-time client, and to garner future legal work; and, in so doing, he failed to act honestly and in good faith, with a view to the best interests of both the REIT and the class.

[11] In respect of McCowan, the motions judge noted the following factual allegations: Weinberg and McCowan had a solicitor-client relationship on property deals that pre-dated the Transaction; Weinberg was appointed to the board of trustees on McCowan's direction; McCowan orchestrated the Transaction for his own benefit; McCowan knew that Weinberg would be in breach of trust if McCowan's material interest in the Transaction was not disclosed; and, Weinberg was under McCowan's influence and control. The motions judge concluded that there was a reasonable prospect that a court could find that McCowan persuaded, signaled or otherwise influenced Weinberg in

Weinberg's decision to allow the Transaction to proceed without the required disclosure and unit holder approval. Accordingly, the claim that McCowan knowingly assisted Weinberg in Weinberg's breach of trust could proceed.

[12] The motions judge struck the knowing assistance claim against the Respondents on the basis that the pleaded facts did not amount to active assistance or participation by the Respondents in Weinberg's decision to allow the Transaction to proceed. He said, "the suppression of information, without more, by a third party that otherwise has no obligations to the REIT or its trustees" does not satisfy the requirement of active assistance or participation in a breach of trust.

THE ISSUE

[13] While the appellant raises a number of grounds of appeal, in essence, they are all targeted at a single issue: did the motions judge err in striking the knowing assistance claim against the Respondents?

ANALYSIS

[14] I agree with the appellant that the claim against the Respondents is legally plausible. In my view, the motions judge erred in two ways in reaching the conclusion that the pleadings failed to disclose a reasonable cause of action as against the Respondents. To explain, I begin by summarizing the motions judge's reasoning on this matter.

[15] Relying on the Supreme Court's decisions in *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, 1997 CanLII 334, *Air Canada v. M&L Travel Ltd.*, [1993] 3 S.C.R. 787, 1993 CanLII 33, and *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, 1997 CanLII 333, the motions judge correctly stated that for a knowing assistance claim to succeed, the plaintiff must establish:

> (i) an act of fraud or dishonesty on the part of the trustee;
>
> (ii) that the defendant had knowledge of the trustee's dishonest conduct; and
>
> (iii) that the defendant assisted the trustee in perpetrating the dishonest conduct.

[16] The motions judge found that the appellant had sufficiently pleaded the first two elements: an act of dishonesty on the part of trustee Weinberg and the Respondents' actual knowledge of, or wilful blindness to, that conduct.

[17] In respect of the third element, the motions judge stated that for the words "knowing assistance" to have meaning, they must mean more than simply standing by or acquiescing. Consequently, the motions judge said, assistance or participation in a breach of trust requires, at the very least, that the defendant take a positive step to help or take part in the trustee's breach of trust. Based on that view, the motions judge concluded that the Respondents' mere suppression of information did not amount to active assistance or participation in a breach of trust.

[18] The motions judge's first error was in failing to accurately and generously construe the claim made against the Respondents. He read the Amended Statement of Claim as alleging that the Respondents' only assistance or participation in the breach of trust was their suppression of information which they had no duty to disclose. On the pleadings, however, the Respondents did not simply stand by and remain silent as the trustee Weinberg, a lawyer acting at the behest of his client McCowan, authorized a self-interested transaction for McCowan's benefit. Rather, it is pleaded that the Respondents were active participants – playing the roles of genuinely disinterested arm's length parties who were the sole owners of the properties – who concealed the improprieties underlying the Transaction and sold those properties to the REIT. Without the Respondents, the Transaction could not have taken place. They actively participated in the Transaction, selling the properties (which McCowan actually owned) to the REIT while intentionally concealing information and falsely portraying themselves as an arm's length vendor. This role enabled Weinberg to commit the breaches of trust alleged against him.

[19] The motions judge's second error relates to his approach to the third element of the knowing assistance claim against the Respondents. The motions judge viewed this element as requiring "that the defendant take a positive step *to help* or *to take part in* the trustee's breach of trust." [Emphasis in original.]

Consequently, the motions judge concluded that suppression of information was not sufficient to amount to assistance or participation.

[20] As the motions judge recognized, the test under s. 5(1)(a) of the *CPA* is the same as the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*: see *Kang v. Sun Life Assurance Co. of Canada*, 2013 ONCA 118, at paras. 26-27. Accordingly, the Respondents had to demonstrate that it was "plain and obvious" that the claim against them could not possibly succeed.

[21] What amounts to assistance – or, in the words of the motions judge, "helping" or "taking part" – has not yet been fully explored in the jurisprudence. It may be that silence is, in certain circumstances, sufficient to constitute assistance. Thus, it is not plain and obvious that the claim against the Respondents could not possibly succeed.

[22] However and in any event, as I have explained, on the pleadings, the Respondents' role was more than a mere suppression of information. They worked in concert with McCowan and intentionally concealed information in order to cloak the true nature of the Transaction and assist Weinberg, who entered into the Transaction in breach of his trust obligations.

DISPOSITION

[23] Having determined that the Amended Statement of Claim pleads facts which assert a legally plausible claim against each of the Respondents under s.

5(1)(a) of the *CPA*, I would allow the appeal, and order that the Order be amended accordingly. I would order costs of the appeal and motion below in favour of the appellant, fixed at $20,000, all inclusive.

Released: January 29, 2016 ("E.E.G.")

"E.E. Gillese J.A."
"I agree. J. MacFarland J.A."
"I agree. K. van Rensburg J.A."