CITATION: Angus v. The Corporation of the Municipality of Port Hope, 2016 ONSC 6594
COURT FILE NO.: CV-14-79
DATE: 20161021

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IAN ANGUS and DEAN ROSS, Applicants

AND:

THE CORPORATION OF THE MUNICIPALITY OF PORT HOPE, Respondent

BEFORE: THE HON. MR. JUSTICE J.R. McCARTHY

COUNSEL: A. Lenczner, Q.C. and P.E. Veel, for the Applicants

C.G. Paliare, R.R. Stephenson and L. Scott, for the Respondent

HEARD: By written submisisons

COSTS ENDORSEMENT

[1] On June 30, 2016, I released my decision in this matter. At that time, I invited the parties to submit written submissions on costs. I have since received and considered those submissions.

The Applicant's Position

[2] At the commencement of the proceeding, Dean Ross withdrew his application. The matter proceeded with Ian Angus as the loan Applicant. The Applicant seeks costs on one of three bases: full indemnity, substantial indemnity or partial indemnity. The Ontario Court of Appeal has held that full indemnity costs should be awarded where the action is brought to ensure the due administration of a trust fund and where the proceedings are taken for the benefit of all of the beneficiaries of the fund: *McKinnon v. Ontario Municipal Employees Retirement Board*, 2007 ONCA 874, 88 O.R. (3d) 269, at para. 86. In the present case, the court found a breach of trust on the part of the Respondent, which is conduct that is sufficiently egregious to justify costs on the highest scale. On this basis, the Applicant seeks full indemnity costs in the amount of $102,012.45 inclusive of HST. This sum includes disbursements (HST included) of $9,319.11.

[3] In the alternative, the Applicant submits that the court should award either substantial indemnity costs or partial indemnity costs. The Applicant was largely successful on his application, obtaining from the court a declaration of a trust, a finding of a breach of that trust, coupled with an order for an accounting. The rule of thumb for partial indemnity costs is 60% of the actual rates charged to the client. Costs claimed on a partial indemnity basis would be $57,474.40 inclusive of HST and disbursements. Substantial

indemnity rates are defined in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 1.03(1) as 1.5 times that of partial indemnity rates. Costs on a substantial indemnity basis would amount to $92,756.84 inclusive of HST and disbursements.

The Respondent Municipality's Position

[4] The Respondent contends that the Applicant was only partially successful on the application. Accordingly, he is entitled to some measure of costs; however, this should be limited to 50% on the partial indemnity scale ($28,023.15) because of a number of factors. First, there was nothing egregious or even unreasonable about the conduct of the Respondent municipality: indeed, it sought and obtained investment and legal advice in respect of the fund, which it adhered to in good faith. It could not have known that it was a trustee in the legal sense. The uncertainty surrounding the true nature of the agreement should not be laid at the feet of the Respondent. Second, the application was not wholly successful; the Applicant failed in his efforts to have the trust deemed a charitable one, and failed to satisfy the court that the trust had vested within the perpetuities period. Third, the court's decision has left the Applicant and the Ward 2 ratepayers in a substantially worse position in that the unexpended capital and income of the fund will now revert to the settlor in 2022. There is also a looming tax liability. Fourth, the Respondent made a non-Rule 49 offer to settle the issues on the application in March 2015. The offer was not accepted, and the Applicant now finds himself in a worse position now then had he accepted the offer. Finally, the Respondent argues that the rates charged by the Applicant's counsel are excessive and well beyond the costs grid.

Analysis

[5] The application was allowed in part. The court declared Schedule 8 of the Agreement to be a specific non-charitable purpose trust to which section 16 of the *Perpetuities Act*, R.S.O. 1990, c. P.9 applied. The Applicant was unable to persuade the court that the trust was a true vested trust or a charitable trust to which the rule against perpetuities did not apply. A trust saved by section 16 of the *Perpetuities Act* was at best an alternative argument. The court found that the Respondent had evolved into a *de facto* trustee and that it was in breach of its obligation as trustee of the purpose trust. For its part, the Respondent opposed the finding of any kind of trust on the basis that such a trust was never properly constituted, failed or was undone by future agreement of the parties. In the alternative, the Respondent sought to have the trust declared invalid under the rule against perpetuities. Both parties also addressed the issue of whether the agreement was a contract and if so, whether the Applicant enjoyed any non-party rights thereunder. Because the court found the agreement to be a trust, it did not need to adjudicate on the non-party rights issue. The court also found that the Applicant's claim was not barred by the expiration of any limitation period; nor was the claim defeated by the equitable doctrines of laches or acquiescence.

[6] In light of the profoundly divergent views on the issue of what the schedule and agreement might mean and the range of possible consequences that might flow from the court's decision, there can be little doubt that the matter was of the utmost importance. There were millions of dollars at stake. The past and future interests of thousands of

ratepayers and other interested parties were in play. The Applicant's position was that the Respondent was in breach of its fiduciary duties as a trustee. He sought an accounting in respect of a period spanning fifteen years.

[7] The matter was of the greatest complexity. The evidentiary record was vast. The history of the matter was appreciable. There were few legal precedents available to guide the parties and the court to a conclusion on the matter.

[8] I am unable to find any conduct on the part of the Applicant that served to lengthen unnecessarily the duration of the proceeding. I am unable to agree that the Applicant refused to admit anything that he should have admitted. It made scant little difference that Mr. Ross withdrew from the application after admitting that his claim was statute barred – the issues remaining for adjudication remained substantially the same with or without the participation of Mr. Ross. One Applicant sufficed for the proper prosecution of the matter. Nor do I agree that the amended application or grounds for relief made the matter more complex. By the time that the matter was presented to the court for adjudication, the issues were identified, the relief sought was clear and the evidentiary record complete. Moreover, both sides' submissions at the hearing were intelligent, robust and focused.

[9] I do not accept the Respondent's submission that the Ward 2 taxpayers are in a substantially worse position than they were in under the *status quo* that existed prior to the application.

[10] First, the court received some evidence about the *status quo* as it existed at the time of the hearing of the application. It was apparent that the Respondent was acting upon the legal advice it received from its lawyers on or about January 17, 2013. That advice was as follows, "....it is our opinion that the obligations in the Agreement regarding the use of such monies has also terminated thereby giving the current municipality the ability to use both grants as it sees fit, whether on a ward by ward basis or not." Thus, the ratepayers of Ward 2 were dealing with a municipal council armed with an opinion that the obligations it bore under the agreement were at an end. Although I found that income from the fund was used sporadically to defray the taxes as called for in the agreement, the ratepayers enjoyed none of the certainty or consistency that they would have enjoyed as acknowledged and confirmed indirect beneficiaries of a purpose trust. Under the circumstances, it was entirely reasonable for the Applicant not to be satisfied with the *status quo*. The *status quo* existed only under the shroud of a controversial legal opinion.

[11] Second, the Respondent suggests that the combined effect of the judgment and s. 16(2) of the *Perpetuities Act* is that the undistributed residue of the fund will revert to the settlor in 2022, leaving the ratepayers in a worse position than before the application was brought. The question of who will be entitled to the unexpended income and capital of the purpose trust was not before me. Indeed, it could not have been since there are potentially interested parties who might qualify as persons "who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation." Those potentially interested parties were not before the court. It is undoubtedly premature to draw the Respondent's suggested conclusion. There is nothing in either the

judgment or s. 16(2) of the *Perpetuities Act* that foredooms the unexpended income and capital of a purpose trust to revert to the settlor. Indeed, if this was how the Legislature intended a purpose trust to unwind, it could have easily spelled that out in the subsection. It did not. While it is beyond my present mandate to adjudicate or opine expansively on the issue, it is clear that the persons or entities to whom the unexpended income and capital of the trust will go to in 2022 should only be determined by this court once all potentially interested parties have had an opportunity to respond to a fresh application. It remains to be seen whether and how the settlor, who initially funded the trust in exchange for the storage of the low-level radioactive waste ("LLRW") in the municipalities, might lay claim to the unexpended income and capital of the trust now that the radioactive waste is housed in local facilities for the indeterminate future. Regardless, I find that the Respondent's rather alarmist prediction should have no bearing on this court's determination of the application's costs.

[12] Third, I do not view the Respondent's "settlement offer," as set out at paragraph 14 of its submissions, as more favourable to the Applicant than the result obtained in court. The Respondent's argument on this point pre-supposes that the end of the purpose trust period will see the capital and income revert to the settlor. That is very far from being a pre-ordained result. Moreover, the Respondent's offer does not afford the beneficiaries of the purpose trust any protection under trust law. Notably absent from the settlement offer is Repondent's admission or acknowledgement that the fund was impressed with a trust. In my view, the Respondent made the application necessary by choosing to misinterpret, avoid or marginalize the intention expressed in the agreement. Whether it did so under an honest but mistaken belief that the agreement was never, or no longer, a trust is a different question. The Respondent must have known that it was not strictly adhering to the terms of an agreement replete with trust language. It could not have escaped the Respondent's attention that many of the ratepayers of Ward 2 shared a view sharply at odds with its own. With or without the legal advice it received, I find that it was incumbent on the Respondent to seek the opinion, advice and direction of the court by way of application.

[13] I am not of the view, however, that the Respondent's breach was as an egregious one. The Respondent has kept track of the investment income earned on the LLRW fund. There is no evidence that it squandered any of the funds on frivolous matters. There is no evidence of misappropriation, absconding or shady dealings. The fund has been placed with a reputable investor. The Respondent did not rely upon legal and investment advice from dubious sources. There has been some effort made to use the funds for the intended purpose. By early 2013, the Respondent was making no secret of its position that the funds were not subject to a trust.

[14] On the application, the Respondent legitimately raised the perpetuities problem and fended off any suggestion that the trust was a charitable one. The Respondent took an overall position that ultimately did not prevail. That overall position did not find favour with the court, but it was not irrational or unreasonable. I see no reason to saddle the Respondent with anything beyond the partial indemnity portion of any costs award.

[15] Similarly, however, and for the reasons set out above, there is no reason to halve or reduce the Applicant's entitlement. The Applicant was entirely correct and justified in seeking the relief he did; he was largely, if not entirely successful in his efforts.

[16] The court recognizes the extraordinary time and effort that went in to the application on both sides. The subject matter was in the high end of complexity. The evidentiary record was dense and daunting. The highest level of legal skill was required to sift through the facts, consider and digest the law and to formulate a coherent and convincing legal argument. The quality of the advocacy was exceptional on both sides. I find it surprising that the Respondent would criticize the Applicant for retaining, "...high-end, senior litigation counsel in Toronto to commence this application, despite them being located more than 100 km from any of the parties involved in this case" when its own counsel on the matter practices within a few city blocks of Applicant's counsel. I find as well that the rates charged by Applicant's counsel are entirely reasonable and justified in the particular circumstances of this case. In cases such as these, the discretion of the court should not be fettered by the costs grid.

[17] On the issue of proportionality and the parties' expectations as to costs, it is obvious that the parties must have expected that both incurred legal expenses and court ordered costs awards would be significant. A reasonably informed person looking at the complexity of the issues and the enormity of the effort required to present the matter to a court would have come to that realization. The Respondent municipality strikes me as a relatively sophisticated litigant. In terms of proportionality to the amounts involved, little more need be said: the LLRW fund involves not only the $10 million opening grant but also the millions of dollars generated by investment income over the past 15 years.

Conclusion

[18] I have concluded that the Applicant is entitled to costs on a full indemnity basis but that the Respondent should only be responsible for the partial indemnity portion of those costs. The balance of the entitlement should come from the trust fund itself. Full indemnity costs are reasonable and appropriate in these circumstances because of the unusual nature and result of the application. It is clear that Mr. Angus has more or less championed the cause of other Ward 2 ratepayers. In that role, he not only retained very competent counsel of choice but also exposed himself to litigation costs in the event the application was unsuccessful. It would be a strange result indeed if Mr. Angus would be left to shoulder the balance of a solicitor's bill when the very fund which was the subject matter of the application and which the court has found to be for the indirect benefit of those ratepayers is unavailable to compensate him. Moreover, the entire litigation arose partly because of the uncertainty surrounding the agreement that constituted the fund. When a will requires interpretation by a court because of the testator's vague or uncertain language or instructions, the estate is typically left to bear most, if not all, of the legal costs expended to clarify the document's meaning. The same logic should apply here. The principle of indemnity must come into play in order to fully compensate Mr. Angus for his brave and risky foray into this problematic litigation.

[19] Having considered the unique circumstances of this case, the outcome of the application, the principle of indemnity and the other factors under r. 57.01 of the *Rules of Civil Procedure*, I would exercise my discretion by awarding full indemnity costs comprised of fees of $80,000 inclusive of HST, plus disbursements of $9,319.11 for a total of $89,319.11 to the Applicant. I would not allow the entire amount sought for fees as set out in Applicant's bill of costs for the simple reason that the Applicant was not entirely successful in obtaining all of the relief he sought. A modest reduction in the fees allowed of the fees is appropriate in these circumstances. In accordance with the Ontario Court of Appeal's direction in *Inter-Leasing v. Ontario (Minister of Revenue)*, 2014 ONCA 683, 245 A.C.W.S. (3d) 539, at para. 5, 55 to 60 per cent of a "reasonable actual rate" should appropriately reflect partial indemnity. Applying the lower percentage of 55 would yield the amount of $44,000 as the partial indemnity amount for which the Respondent should be responsible. I see no reason why Respondent should not pay for the Applicant's disbursements. The Respondent shall therefore pay the amount of $53,319.11 as partial indemnity costs. The Applicant shall recover the balance of their substantial indemnity costs ($36,000) from the LLRW trust fund. These costs are fixed and payable forthwith.

J.R. McCARTHY J.

Date: October 21, 2016