Court File No. CV-19-616261-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

**IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23, AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194, AS AMENDED**

**AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF ADELAIDE STREET LOFTS INC.**

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# BOOK OF AUTHORITIES OF THE APPLICANT
# (APPLICATION RETURNABLE MARCH 21, 2019)

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March 19, 2019

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Court File No. CV-19-616261-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

**IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23, AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194, AS AMENDED**

**AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF ADELAIDE STREET LOFTS INC.**

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2007 CarswellOnt 7565
Ontario Superior Court of Justice [Commercial List]

Dugal v. Research in Motion Ltd.

2007 CarswellOnt 7565, [2007] O.J. No. 4535, 162 A.C.W.S. (3d) 220, 37 B.L.R. (4th) 112, 50 C.P.C. (6th) 398, 87 O.R. (3d) 721

# Mark Dugal, Aaron Murphy, Doug Smees, John O'Malley, Gaetan Siguoin, William Jemison, Paul Mitchell, Steven Moffatt, David Thompstone and John Boote, as Trustees of IRONWORKERS ONTARIO PENSION FUND (Applicant) and RESEARCH IN MOTION LIMITED, JAMES L. BALSILLIE, MIKE LAZARIDIS, DOUGLAS E. FREGIN, DOUGLAS WRIGHT, JAMES ESTILL, E. KENDALL CORK, and JOHN RICHARDSON (Respondents)

C. Campbell J.

Heard: November 5, 2007
Judgment: November 15, 2007
Docket: 07-CL-6844

Counsel: Michael D. Wright, A. Dimitri Lascaris for Applicant
Robert W. Staley, Derek J. Bell for Research in Motion, James Estill, John Richardson

Subject: Corporate and Commercial; Civil Practice and Procedure

**Headnote**

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — Miscellaneous issues
Trustees of Pension Fund alleged improprieties in respect of option granting practices and accounting for same with respect to number of individuals — Trustees sought various relief under oppression remedy section of Business Corporations Act, including leave to commence derivative action in name of R Ltd. against individuals for breach of fiduciary duty and negligence in administration and financial reporting regarding R Ltd.'s stock option program — Parties negotiated settlement — Parties asked court to approve settlement between Trustees, R Ltd. and individual respondents — Parties also sought representative order under R. 10 of Rules of Civil Procedure in order to implement settlement — Settlement approved — Test for shareholder approval of settlement was met — There was arm's length bargaining without suggestion of collusion — Parties provided adequate notice of settlement hearing to all affected persons — Representative order was granted — Representative order was particularly appropriate given opt-out provision that had been exercised by very small minority of shareholders.

**Table of Authorities**

**Cases considered by *C. Campbell J.*:**

*Hollinger International Inc. v. American Home Assurance Co.* (2006), 34 C.C.L.I. (4th) 17, 2006 CarswellOnt 188 (Ont. S.C.J.) — considered

*Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc.* (2006), 2006 CarswellOnt 7072 (Ont. S.C.J.) — referred to

*Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]) — referred to

*Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 37 C.P.C. (4th) 175, 46 O.R. (3d) 130, 1999 CarswellOnt 1851 (Ont. S.C.J.) — considered

*Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)* (1997), 35 O.R. (3d) 177, 1997 CarswellOnt 3084, 17 C.C.P.B. 49 (Ont. Gen. Div.) — followed

*Ryan v. Ontario (Municipal Employees Retirement Board)* (2006), 51 C.C.P.B. 237, 29 C.P.C. (6th) 24, 2006 CarswellOnt 883 (Ont. S.C.J.) — referred to

*Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225, 1988 CarswellOnt 121, 41 B.L.R. 22 (Ont. H.C.) — considered

**Statutes considered:**

*Business Corporations Act*, R.S.O. 1990, c. B.16
s. 246(1) — referred to

s. 249 — referred to

*Class Proceedings Act, 1992*, S.O. 1992, c. 6
Generally — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
R. 10 — considered

REQUEST for court approval of settlement between parties and for representative order.

***C. Campbell J.*:**

1 The Court has been asked to approve a settlement reached between the Applicant, Ironworkers Ontario Pension Fund, and Research In Motion Limited ("RIM") and other individual respondents.

2 The Applicant alleged improprieties in respect of option granting practices and accounting for the same with respect to a number of individuals. Among other remedies, the Applicant sought various relief under the oppression remedy section of the *Business Corporations Act*, R.S.O. 1990 c. B. 16 (the "BCA"), s.247 (1). In addition, the relief sought leave to commence a derivative action in the name of RIM against certain individuals, including members of the audit committee, for breach of fiduciary duty and negligence in the administration of and financial reporting relating to RIM's stock option program.

3 During the period in which demands were made to RIM by the Applicant, certain changes were made on a voluntary basis at RIM by its Board of Directors. Many of the specific allegations contained in the Applicant's claim for relief were vehemently denied by RIM and individual directors, as was the grounds for the remedies of oppression and a derivative action. As the litigation documentation developed, the Court expressed concern that protracted hotly contested litigation could have the undesirable result of adversely affecting shareholder value regardless of the outcome.

4 To the credit of the parties and their counsel, they agreed to commence discussion and negotiation to see if a settlement could be achieved.

5 From progress reports to the Court from time to time, I am satisfied that the settlement that has been reached and for which approval is sought, is the product of difficult, protracted and contentious negotiations at every level. Counsel and their

clients are to be congratulated for achieving a resolution that did not risk shareholder value or faith in the Company.

6 Since the settlement is specifically without admission of wrongdoing on the part of the Company or named individuals, it is not necessary to comment on the allegations, but only on the terms of the settlement themselves and whether they meet the test for approval.

7 During the course of litigation and the negotiations, a Special Committee of RIM reviewed the facts and circumstances of stock options granted to RIM employees between December 1996 and August 2006.

8 As a result of the Special Committee Review, all directors and senior officers who benefited from incorrectly priced options agreed to return the benefits. Changes were made to stock option granting practices and organizational changes were made at the board level, including new independent directors.

9 In addition, Messrs Balsillie and Lazaridis each volunteered and paid $5 million to RIM to defray costs.

10 The essential terms of the Settlement Agreement are as follows:

(a) Balsillie and Lazaridis have each agreed to pay $2.5 million to RIM in order to defray the costs of the Review — this sum is in addition to the $5 million that each of them agreed to pay to RIM after the Application was commenced but before the Settlement Agreement was concluded;

(b) RIM will not compensate the independent members of its Board with stock options;

(c) RIM will retain Towers Perrin, a compensation consultant, to: (i) draft a new Compensation Committee Charter; and (ii) render an opinion to the Compensation Committee on whether it would constitute a material improvement to RIM's current corporate governance practices to assess the effectiveness of the Compensation Committee and its members;

(d) In drafting the new Compensation Committee Charter, Towers Perrin will be required to consult in good faith with a leading corporate governance expert retained by the Applicant, Dr. Richard Leblanc of York University;

(e) Dr. Leblanc will be permitted to make a presentation to the Compensation Committee about the use of position descriptions for members of the Board and its committees;

(f) At any Board meeting where the compensation of C-Level Officers is determined, the Board will meet in executive session and in the absence of inside directors and other RIM executives, and appropriate minutes will be maintained of matters addressed in the executive session;

(g) For so long as it is extant, the Oversight Committee of RIM's Board will, in cooperation with its Audit Committee, periodically review and assess the adequacy of internal controls over: (i) the use of corporate property by RIM management; (ii) directorial conflicts of interest; and (iii) related party transactions, and the review, approval and reporting thereof;

(h) RIM has agreed to pay legal fees and disbursements, inclusive of GST, to Ironworkers' counsel in the total amount of $1.09 million, and also to pay the costs of disseminating the notice of the settlement and the settlement approval hearing; and

(i) Ironworkers has given, subject to Court approval of the Settlement Agreement, a full and final release to RIM and to the Proposed Defendants in respect of claims relating to RIM's stock option practices and reporting thereof, is seeking herein a dismissal of the Application with prejudice and without costs, and is seeking herein a representation order whereby Affected Persons who do not validly exclude themselves will be bound by the release given by Ironworkers.

11 Because the relief sought in the oppression claim and proposed derivative claim was not unique to the Applicant (in that none of the allegations involved any allegations of special damage unique to the Applicant), the parties have agreed to seek a representation order from this Court.

12 The parties have provided adequate notice of this settlement hearing to all affected persons. In fact, much more direct notice was provided in this case than is customarily employed in class proceedings in this province. The notice took the form of:

a) *Press Release*: On October 5, 2007, RIM issued a joint press release of the parties announcing the settlement and describing its terms. The press release resulted in significant coverage in newspapers and newswires, including the *Globe and Mail*, *Report on Business*, Reuters, the Canadian Press, and the Associated Press.

b) *Newspaper Advertisements:* On October 15, 2007, RIM published a "short form notice" in English in each of the *Globe and Mail (National Edition)*, the *National Post*, the *Montreal Gazette* and the *Wall Street Journal* and in French in *La Presse*.

c) *Direct Shareholder Mailing:* RIM directly mailed a "long form notice" in English and French (along with an erratum correcting the domain name for the Applicant's counsel's website) to each RIM shareholder (representing approximately 560 million shares) as at October 5, 2007.

d) *Internet Publication:* A copy of the Settlement Agreement and the long-form notice was published on the websites of Siskinds LLP and Cavalluzzo Hayes Shilton McIntyre & Cornish LLP.

13 While an opt-out right is not necessary for a Rule 10 representation order, in order to ensure that any such order is binding outside of Ontario, the parties agreed to a 35-day opt-out period. That period began on October 15, 2007 (the date when newspaper ads ran and the long-form notices were mailed) and will expire on November 19, 2007. To date, 42 shareholders located throughout the U.S. and Canada, holding a combined 8,817 shares (0.0015% of the total issued and outstanding shares) have opted out. The fact that there have been opt-outs demonstrates that the notice has been effective in reaching shareholders. Some of the opt-outs appear to be motivated by a desire to have nothing to do with a lawsuit against RIM.

14 Section 249 of the BCA requires the Court to give approval to any settlement on such terms as the Court thinks fit and may take into account any shareholder approval.

15 Two lines of cases were put forward as setting the test for shareholder approval. The first test is found in *Sparling v. Southam Inc.*,[1] a derivative settlement hearing under s. 249. The criteria include (i) there is an overriding public interest in favour of settlement; (ii) on a settlement approval motion, the Court should be satisfied that the proposal is fair and reasonable to all shareholders; (iii) in considering the settlement, the Court must recognize that settlements by their nature are compromises and may not satisfy every single concern of all affected parties; (iv) acceptable settlements may fall within a broad range of upper and lower limits; (v) it is not the Court's function to substitute its judgment for that of the parties who negotiate the settlement; (vi) while the Court does not simply rubber-stamp the settlement, it is not the Court's function on a settlement approval motion to litigate the merits of the action; (vii) the Court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement; and (viii) the Court should also consider the nature of the risks involved in establishing the liability claimed.

16 The second line adopts the test enunciated by Winkler J. (as he then was) in *Ontario New Home Warranty Program v. Chevron Chemical Co.*[2] (a class action settlement) and adopted in *Hollinger International Inc. v. American Home Assurance Co.*[3] (an insurance settlement and related derivative class action), which includes (i) likelihood of recovery or likelihood of success; (ii) amount and nature of discovery, evidence or investigation; (iii) settlement terms and conditions; (iv) recommendation and experience of counsel; (v) future expense and likely duration of the litigation; (vi) recommendation of neutral parties, if any; (vii) number of objectors and nature of objections; and (viii) the presence of arm's length bargaining and the absence of collusion.

17 In my view, there is nothing inconsistent with the two lists of factors; indeed, they are largely compatible. Some, such as the number of objectors, are clearly restricted to Class Proceedings. The lists referred to in *Chevron* and in *Hollinger* reflect the emphasis on time and cost associated with modern-day litigation and the need for parties to be mindful of the extent to which continued litigation may take inordinate time and undue cost. That would certainly occur in this action but for

 

the settlement.

18 A Court in these circumstances should in my view be satisfied that there is likely merit in the claim and be aware that there are real risks that liability may not be established. As noted above, I am so satisfied and as well recognize that there was arm's length bargaining without any suggestion of collusion.

19 The settlement is therefore approved. To implement the settlement, the parties have sought a Representative Order under Rule 10 of the *Rules of Civil Procedure*, which gives the Court authority to appoint a person to represent others who may be affected by the proceeding.

20 The Rule is described as the "...'simplified procedure' version of proceeding under the *Class Proceedings Act*..." Rule 10 is "designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 [*Class Proceedings Act*] order." As such, a number of Rule 10 orders have been issued since the advent of the *Class Proceedings Act*.[4]

21 The test for granting a Rule 10 representation order is a simple balance of convenience test. The court is to consider the inconvenience that would be experienced by each party if the order were or were not granted:

> .... the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted.[5]

22 I conclude that the Representative Order, which is hereby granted, is particularly appropriate given the opt-out provision that has been exercised by a very small minority of shareholders.

23 An Order will issue in terms of the draft Order filed as well as in the action in Court File No. 07-CL-6799. Once again, counsel are to be thanked for their effective efforts giving rise to this settlement.

*Order accordingly.*

Footnotes

1 *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.)

2 *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.)

3 *Hollinger International Inc. v. American Home Assurance Co.* (2006), 34 C.C.L.I. (4th) 17 (Ont. S.C.J.)

4 See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 190, R. 10; *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.J. [Commercial List]) at para. 42; *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.) at p. 183; *Ryan v. Ontario (Municipal Employees Retirement Board)* (2006), 29 C.P.C. (6th) 24 (Ont. S.C.J.); *Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc.*, 2006 CarswellOnt 7072 (Ont. S.C.J.)

5 *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)*, *supra* at p. 183

# COUNSEL SLIP

COURT FILE NO CV-19-00614404-00CL DATE FEB. 28/19

NO ON LIST 4

TITLE OF PROCEEDING HI RISE CAPITAL LTD.
-v-
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February 28, 2019.

This Motion is opposed by Mr. Van Londersele and Mr.

Zonglo. Despite their submission I am satisfied that the Motion should be granted so that there can be a distribution, albeit a relatively small one, to all of the investors. Further the Motion is not opposed by the Superintendent of Financial Services. There shall therefore be an order issued on the terms of the attached Order.

The balance of my Endorsement is attached.

Harvey J.

# Endorsement

Mr. O'Brien has requested information from the Applicant about 799 College St. Inc. in the Applicant's possession.

Mr O'Brien + the Applicant have agreed that the Applicant will provide reasonable financial information in its possession about 799 College St. Inc.

To the extent that Mr. O'Brien + the Applicant cannot agree on the scope of information to be provided, they may schedule a 9:30 appointment before me as a further attendance in this Application. Copies of materials given to Mr. O'Brien shall also be sent to Mr. Van Londersele + Mr. Zorylo.

2011 ONSC 1289, 2011 CarswellOnt 2744, 66 E.T.R. (3d) 255

2011 ONSC 1289
Ontario Superior Court of Justice

Gilchrist v. Deakin Estate

2011 CarswellOnt 2744, 2011 ONSC 1289, 66 E.T.R. (3d) 255

# Robert Gilchrist, Marina Gilchrist and Murray Gilchrist and Wiebe De Jong, also known as Bill De Jong Estate Trustee of the Estate of Kathleen Patricia Deakin and in his personal capacity and Janice French

S. Healey J.

Heard: February 24, 2011
Judgment: March 8, 2011*
Docket: Newmarket CV-09-096128-00

Proceedings: additional reasons at *Gilchrist v. Deakin Estate* (2011), 2011 CarswellOnt 2631, 2011 ONSC 2386 (Ont. S.C.J.)

Counsel: Paul Trudelle for Defendant, Wiebe De Jong as Trustee of the Estate of Kathleen Patricia Deakin and in his personal capacity
Robert Watson for Defendant, Janice French
Kenneth Shugart for Plaintiffs

Subject: Estates and Trusts; Civil Practice and Procedure

**Related Abridgment Classifications**

Estates and trusts
I Estates
I.5 Construction of wills
I.5.a Fundamental issues
I.5.a.i General principles

**Headnote**

Estates and trusts --- Estates — Construction of wills — Fundamental issues — General principles
Deceased left will directing sale of cottage property — Direction stated that if beneficiary who was also estate trustee did not purchase cottage, that property was to be sold and proceeds divided equally between estate trustee and another beneficiary — Granddaughter who was third beneficiary was to receive any residue of estate — Estate trustee and granddaughter disagreed as to distribution of sale proceeds if estate trustee exercised his option to purchase property — Second beneficiary made offer to purchase property and parties acted under assumption that trustee would not exercise his option — Granddaughter claimed that purchase offer by second beneficiary was improper under terms of will, and that if sale was permitted half of proceeds should become residue — Estate trustee moved for direction of court as to proceeds of sale — Motion granted — Estate trustee's position was not binding and he could still make offer up to time that property was sold — Estate trustee did not have any conflict of interest with granddaughter and was prepared to abide by direction of court — Will was clear and unambiguous that in event of sale to outside party, estate trustee and second beneficiary would share proceeds — Court had jurisdiction to determine motion on merits and question posed to court was not hypothetical — Deceased clearly wished to pass on half of proceeds to designated beneficiaries.

**Table of Authorities**

**Cases considered by *S. Healey J.*:**

*Anglo Canadian Fire & General Insurance Co. v. Robert E. Cook Ltd.* (1973), [1973] 2 O.R. 385, 1973 CarswellOnt 941 (Ont. H.C.) — considered

*Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 69 D.L.R. (4th) 321, 12 C.H.R.R. D/184, 74 O.R. (2d) 481, 38 E.T.R. 1, (sub nom. *Leonard Foundation Trust, Re)* 37 O.A.C. 191, 1990 CarswellOnt 486 (Ont. C.A.) — referred to

*Kaptyn Estate, Re* (2009), 48 E.T.R. (3d) 278, 2009 CarswellOnt 2160 (Ont. S.C.J.) — referred to

*McKay Estate v. Love* (1991), 6 O.R. (3d) 511 at 519, (sub nom. *McKay Estate, Re)* 52 O.A.C. 159, 44 E.T.R. 190, 1991 CarswellOnt 549 (Ont. C.A.) — distinguished

*296616 Ontario Ltd. v. Richmond Hill (Town)* (1977), 14 O.R. (2d) 787, 1977 CarswellOnt 826 (Ont. C.A.) — considered

**Statutes considered:**

*Trustee Act*, R.S.O. 1990, c. T.23
s. 60 — considered

s. 60(1) — considered

s. 60(2) — considered

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
R. 2.01(1) — considered

R. 14.05(3)(d) — considered

R. 74.15(1)(i) — considered

R. 75.06(1) — considered

MOTION for direction of court as to proceeds from sale of estate property.

***S. Healey J.*:**

**Nature of Motion**

1 This is a motion for the advice and direction of the court with respect to the administration of an estate pursuant to subrule 74.15(1)(i), 75.06(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and section 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, with respect to the following questions:

(i) Can the estate trustee accept an offer to purchase made by the applicants for a cottage property owned by the estate; and

(ii) In the event that the answer to the preceding question is affirmative, to whom are the proceeds of sale payable under

  

the Last Will and Testament of the deceased?

**Jurisdiction**

2 The defendant Janice French ("French") argued that neither subrule 74.15(1)(i) nor subrule 75.06(1) should be applied in these circumstances to grant the relief requested. The moving party, the estate trustee Wiebe De Jong ("De Jong"), has a financial interest in this estate in his personal capacity and so satisfies the threshold requirement of each rule. Apart from that, I agree with French that neither of these rules applies to the situation at hand. The parties are not seeking direction on the procedural conduct of the action, to which subrule 75.06(1) applies, nor is this a non-contentious proceeding in which a party is seeking a routine order to assist in the administration of the estate, to which subrule 74.15(1)(i) applies.

3 However, this matter is also before the court by virtue of section 60(1) of the *Trustee Act*. De Jong, in his capacity as estate trustee, requires direction from this court in the face of an objection from French as to the disposition of the cottage property. This motion raises the issue of his administration and management of estate assets and therefore is properly brought before this court. See: *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (Ont. C.A.), as well as *Kaptyn Estate, Re* (2009), 48 E.T.R. (3d) 278 (Ont. S.C.J.), where at para. 26, D. M. Brown J. stated:

> 26 An executor may apply to the court for its opinion, advice, or direction on any question respecting the management or administration of the property or assets of a testator: *Trustee Act*, R.S.O. 1990, c.T.23, s. 60(1). The type of advice which a court may give to executors was explained in the following language of Middleton, J. in the case of *Re Fulford* (1913), 29 O.L.R. 375, which was adopted by Craig J. in *Re Wright* (1976), 14 O.R. (2d) 698 at page 707:
>
> > The executors are protected from all liability if they honestly and with due care exercised discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the court. The executors cannot come to the court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorized to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.

4 French's counsel presents the case of *McKay Estate v. Love* (1991), 6 O.R. (3d) 511 at 519 (Ont. C.A.), at 519 as support for the proposition that it is not the court's function to intervene to give advice as to how an estate trustee should exercise his discretion respecting a proposed sale. The facts of that case are distinguishable in that the trustee sought the advice of the court on whether the sale price of land was acceptable. Such a decision, the court indicated, should generally be left in the discretion of the trustee. The matter before this court is entirely different, as the court is being asked to give directions on whether an offer can even be accepted, and secondly, to whom the proceeds should be allocated if such a decision may be made through an interpretation of the Will on motion. Unlike *McKay Estate*, *supra*, this is not a dispute about the reasonableness of the sale price. I take the remarks of the Court of Appeal to mean that, given the other mechanisms available for challenging the decisions and actions of a trustee, the courts should not become clogged with applications for approval of decisions that fall within a trustee's discretion. I do not accept that the remarks of the court in *McKay Estate*, *supra*, were meant to limit recourse to subsections 60(1) and (2) of the *Trustee Act*, where such applications are necessary to resolve conflicts that arise over the way in which a trustee proposes to manage or administer a testator's property.

5 Secondly, this motion by its nature requires the interpretation of a will. Such questions are usually brought before the court by application pursuant to subrule 14.05(3)(d) of the *Rules of Civil Procedure*, but it is understandable why the moving party did not follow mat procedure in this case. As will be explained below, this proceeding was initiated by such an application, and converted to an action by order of Bryant J. in January 2010. Given that the initiating proceeding is now a Statement of Claim, proceeding by motion was a reasonable manner by which to place this question before the court. Further, subrule 2.01(1) provides sufficient authority for this court to proceed with considering the relief requested even though requested by motion instead of by application.

  

**The Last Will and Testament**

6 The deceased Kathleen Deakin left a Will dated December 4, 2003 ("the Will"), the relevant portions of which provide as follows:

> 3(e)(ix) [The Estate Trustee is directed] To sell the cottage property being Lot 5, Plan 1105, Township of Tiny, County of Simcoe, including furnishings and real estate, conditional upon an opportunity given to BILL DE JONG to purchase the property at 50% of the sale price. In the event BILL DE JONG does not give notice of his intention to complete the purchase of the property within the conditional period and upon the expiration of the conditional period, my Trustee shall then complete the sale transaction and shall, pay, transfer and deliver the net proceeds from such sale as follows:
>
> > 1) one-half (1/2) of the net proceeds to MARINA GILCHRIST, wife of the late DONALD GILCHRIST and his sons ROBERT GILCHRIST and MURRAY GILCHRIST, in equal shares
> >
> > 2) one-half (1/2) of the net proceeds to WIEBE DE JONG also known as BILL DE JONG and BARBARA DE JONG in equal shares.
>
> ...Xx. my Trustee shall thereafter divide, transfer and assign the Residue, as the same shall then be, as follows:
>
> 1) To pay, transfer and assign the remaining residue of my estate to my granddaughter JANICE FRENCH, for her own use absolutely.

**Positions of the Parties**

7 French is the deceased's granddaughter. From the evidence placed before me on this motion, it appears that neither De Jong nor his wife Barbara De Jong, nor Marina and Donald Gilchrist or their sons ("the Gilchrists"), were related to the deceased. De Jong is the estate trustee.

8 The initial application was commenced because the parties were at odds regarding the appropriate distribution of the sale proceeds of the cottage in the event that De Jong exercised his option to purchase set out in paragraph 3(e)(ix). The advice and direction of the court was required with respect to the interpretation of the relevant paragraphs of the Will. One interpretation was that De Jong's cottage purchase payment would fall into the residue and benefit French. The competing interpretation was that De Jong's payment would be made to the Gilchrists. When the matter came before Bryant J. he determined that extrinsic evidence would be required to interpret the testator's intentions in order to address the ambiguity on the face of the Will, and that the conflicting affidavit evidence regarding her intentions required a trial.

9 The necessity for that interpretation is now moot, argues De Jong and the Gilchrists, because the Gilchrists have now made an offer to purchase the cottage. The offer is conditional upon an opportunity being granted to De Jong to exercise the option set out in paragraph 3(e)(ix) of the Will. There is no evidence before me that French is disputing the sale price of $400,000 as being too low. De Jong's affidavit sworn October 13, 2010 for this motion does not state that he will not exercise his option, but all parties are currently acting on the premise that he will not do so.

10 It is the position of French that a purchase by the Gilchrists is improper and not permissible under the terms of the Will, and alternatively, that the Will should be interpreted to provide that one-half of the sale proceeds fall into the residue in the event of a sale to the Gilchrists. French also argues that there is a conspiracy of sorts going on in that De Jong and the Gilchrists must have struck a deal, of which she asserts she has not been informed, with the intention of depriving her of the money that she would have received in the event of a purchase by De Jong. She argues that the pleadings filed in this action align De Jong with her, against her adversary the Gilchrists. Given that De Jong was previously litigating one position to her benefit, French argues that he cannot now "reverse field" with the effect that French is "cut out".

11 It is the position of the Gilchrists that the Will permits them to receive one-half of the proceeds of sale, such that they either pay the full $400,000 and are credited with a return of $200,000 on the Statement of Adjustments, or that they simply

  

pay $200,000, which should belong to De Jong under subparagraph 3(e)(ix)(2).

12 De Jong's position is that on a plain reading of the Will, the proceeds would be payable with one-half of the proceedings going to the Gilchrists and the other half to himself and his wife, but he seeks the advice and the direction of the court with respect to the questions raised at the outset of this endorsement.

**Analysis of Questions Before this Court**

13 French's argument is problematic for a number of reasons. First, De Jong is entitled to change his mind as frequently as he chooses about whether he will or will not exercise his option until such time as an offer is made and that option is exercised. Any prior statements made by him as to his intentions are not binding.

14 Second, it is clear from his Statement of Defence that De Jong is not "aligned" with French, as would be improper for a trustee. His pleading states: "De Jong is prepared to abide by any Order of the Court made with respect to the interpretation of the Will regarding the payment of the proceeds of his purchase of the cottage, and with respect to any determination regarding the proper procedure for effecting the sale."

15 Third, it is of no import that the Gilchrists made a decision to submit an offer after pleadings were exchanged; their decision to do so could be based on a myriad of practical or sentimental factors that are of no business to this court, or to French.

16 Fourth, there is no evidence that there have been any underhanded dealings between the Gilchrists and De Jong. Paragraph 8 of De Jong's affidavit indicates that a draft offer was circulated among counsel before the formal offer was made. This evidence was not contradicted. In any event, even if that had not occurred I would have found it proper for such offer to have been presented solely to the estate trustee.

17 Fifth, French's argument assumes that she would have been successful in persuading the court at trial that De Jong's sale proceeds would form part of the residue.

18 Sixth, she asserts that an agreement had been struck between De Jong and herself that would have had him purchase the property for $260,000, $130,000 of which would have been to her benefit. During submissions her counsel argued that De Jong could not now resile from that agreement and change his mind about the purchase. There is absolutely no merit to this position: there is no evidence of an offer from a third party for $260,000 that would have triggered De Jong's right to exercise his option. There is no contract between De Jong and French. She also presumes, again, that it is a foregone conclusion that the proceeds will belong to her. This point relates to the first point above. There has been no detrimental reliance on the part of French that can be shown to give rise to damages.

19 Last, and most importantly, French's argument ignores the fact that in the event of a sale to a non-party, the Will is clear and unambiguous that the Gilchrists and De Jong, together with his wife, will share equally the net proceeds of sale. Her counsel's factum characterizes the situation as: "the Gilchrists were not given any legacies". This is incorrect; there is a clearly expressed intention that the Gilchrists are to receive one half of the net proceeds of sale in the event of a sale to a non-party, and perhaps, in the event of a sale to De Jong.

20 Of central importance in this motion is whether or not the questions asked on the motion are different than the questions to be determined in the proceeding. French argues that this court has no jurisdiction to answer the questions posed on this motion in the face of the order of Bryant J. directing the trial of an issue. The question raised in the Statement of Claim concerning what is to occur with the sale proceeds if the option is exercised by De Jong arises because the Will is not entirely clear in its drafting as to what should occur following the exercise of that option. In my view the questions before me are different; I am being asked to interpret the Will under an entirely different scenario than that presented to Bryant J. On this motion, the questions being asked are whether De Jong can accept the Gilchrists' offer to purchase the cottage and if so, to whom the proceeds will be payable. The questions before me also involve a preliminary consideration, which is: is there anything in the Will that prohibits the purchase of the cottage by the Gilchrists?

21 French's counsel presents the case of *Anglo Canadian Fire & General Insurance Co. v. Robert E. Cook Ltd.*, [1973] 2

  

O.R. 385 (Ont. H.C.), and asserts that the case stands for the proposition that it is not the court's function on a motion to grant a ruling where such ruling would not necessarily end all proceedings. He alludes to further litigation, in which French would demand payment from De Jong if De Jong were to "pocket" the money himself. As indicted earlier, I can see no merit in any assertion that French has any cause of action against De Jong if such claim arises out of the facts that are now present before this court. Further, the spectre being raised of further litigation involving this estate is not going to prevent this court from determining the motion on its merits. In any event I do not agree that *Anglo Canadian Fire & General Insurance Co.*, *supra*, has any application to this case. Similarly the case of *296616 Ontario Ltd. v. Richmond Hill (Town)* (1977), 14 O.R. (2d) 787 (Ont. C.A.), which French's counsel referred to, has no application to this case, as it involved a ruling that the court should not entertain hypothetical questions. The question before me is not hypothetical; there is a real offer to purchase in play that has not been acted upon by the trustee because he awaits direction from this court.

**Decision**

22 On a plain reading of the Will, the testator envisioned a scenario in which the cottage would be sold, De Jong would not exercise his option, and the proceeds of sale would be shared equally by the Gilchrists and De Jong. French would not benefit from the cottage property. There is nothing unclear or ambiguous about the drafting of that aspect of the Will. That is entirely the scenario at hand, with the twist that it is the Gilchrists who have offered to purchase me cottage. Having reviewed the Will in its entirety, there is nothing in the Will that prohibits or limits the ability of the Gilchrists to purchase the cottage. It is argued by French that the Will does not state that the Gilchrists may purchase the cottage. Since such a provision was inserted for the benefit of De Jong, she argues that the testator intentionally did not provide such a right to the Gilchrists. Such an interpretation requires the court to read something into the Will that goes against common sense. The testator wanted to benefit the Gilchrists through her cottage. The testator obviously held the Gilchrists in high enough regard that she made a substantial gift to them in her Will, and it is easy to infer that she would be content that they become owners of her cottage in the event that De Jong chose not to purchase it.

23 To allow the sale to the Gilchrists does not run afoul of the testator's very direct, unambiguous wishes. Allowing this to occur permits the Gilchrists and De Jong and his wife to share equally the proceeds of sale, or their equivalent benefit, which is exactly what the testator wanted to occur. Accordingly, this court orders:

1. The trustee may accept the offer to purchase from the Gilchrists, or any subsequent reasonable offer that may be presented by them;

2. In the event that De Jong does not exercise his option to purchase the property, the proceeds of sale are payable as set out in subparagraph 3(e)(ix) under the Will as follows:

(i) one-half of the net proceeds to Marina, Robert and Murray Gilchrist, in equal shares;

(ii) one-half of the net proceeds to Wiebe and Barbara De Jong, in equal shares.

**Action Moot and Appropriate for Court to Dismiss the Action**

24 As earlier indicated, it is anticipated that De Jong will not exercise his option within the conditional period. If he changes his mind and does do so, the within action will need to proceed to resolve the initial question placed before Bryant J.

25 If he does not exercise his option to purchase within the conditional period, this action is moot and a trial is not necessary to determine the distribution of the proceeds of sale of the cottage in light of this ruling. A discontinuance or dismissal of the action would be appropriate if the sale to the Gilchrists is completed as anticipated.

26 If the parties are unable to agree upon the costs of this motion they may make submissions to me through the trial co-ordinator's office in Newmarket, the moving party by March 18, 2011, the plaintiffs by March 21, 2011 and the defendant French by March 24, 2011.

 

*Motion granted.*

Footnotes

[*] Additional reasons at *Gilchrist v. Deakin Estate* (2011), 2011 CarswellOnt 2631, 2011 ONSC 2386, 66 E.T.R. (3d) 263 (Ont. S.C.J.)

2011 ONSC 7693, 2011 CarswellOnt 14864, 211 A.C.W.S. (3d) 773, 75 E.T.R. (3d) 304

2011 ONSC 7693
Ontario Superior Court of Justice [Commercial List]

InnVest Real Estate Investment Trust, Re

2011 CarswellOnt 14864, 2011 ONSC 7693, 211 A.C.W.S. (3d) 773, 75 E.T.R. (3d) 304

# InnVest Real Estate Investment Trust, InnVest Hotels GP Ltd., InnVest Properties London Ltd., InnVest Properties Truro Inc., IOT Trustee Corp., InnVest Hotels Trustee Corp. and InnVest Operations Trust, Applicants

D.M. Brown J.

Heard: December 23, 2011
Judgment: December 23, 2011
Docket: CV-11-9517-00CL

Counsel: J. Bunting, B. McLeese, for Applicants

Subject: Estates and Trusts; Corporate and Commercial

**Related Abridgment Classifications**

Business associations
VI Changes to corporate status
VI.3 Arrangements and compromises
VI.3.b Under general corporate legislation

Estates and trusts
III Trustees
III.2 Powers and duties of trustees
III.2.k Supervision by court
III.2.k.ii Business decisions

**Headnote**

Estates and trusts --- Trustees — Powers and duties of trustees — Supervision by court — Business decisions
Applicants were combination of trusts and corporations incorporated under Canada Business Corporations Act (CBCA) — Applicants proposed plan of arrangement under which one trust applicant split off some of its holdings into second trust (original plan) — Decision was issued approving original plan (original decision) — One year later, applicants proposed second plan of arrangement (second plan), which effectively reversed transactions in original plan — Second plan unwound stapled unit structure of one applicant trust, transferred assets and liabilities of one applicant trust to another, and reorganized certain applicant corporations — Applicants brought motion for interim order with respect to second plan under s. 192 of CBCA and s. 60(1) of Trustee Act (TA) — Motion granted — It was proper exercise of court's jurisdiction under s. 60(1) of TA and s. 192 of CBCA to grant order sought — Second plan, on its face, fell within categories of arrangement recognized by s. 192 of CBCA as proper subject matter of plan of arrangement proceeding — Second plan involved either exchange of securities of corporation for money or amalgamation — Applicant trusts could be joined as co-applicants under s. 192 of CBCA because second plan involved trust-related transactions for which applicant trusts certainly enjoyed standing — Inquiry into fairness and reasonableness of trust-related steps in second plan fell within court's jurisdiction under s. 60(1) of TA — This was so despite fact that trustees of trust applicants had power to call meetings of unit holders to consider second plan — Case at bar was exceptional, given overall complexity of proposed transaction — Moreover, original decision

 

sanctioned process by which such complex transaction could proceed — It was important for health of our economy that participants could expect reasonably consistent application by courts of processes involving financial and commercial transactions.

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation
Applicants were combination of trusts and corporations incorporated under Canada Business Corporations Act (CBCA) — Applicants proposed plan of arrangement under which one trust applicant split off some of its holdings into second trust (original plan) — Decision was issued approving original plan (original decision) — One year later, applicants proposed second plan of arrangement (second plan), which effectively reversed transactions in original plan — Second plan unwound stapled unit structure of one applicant trust, transferred assets and liabilities of one applicant trust to another, and reorganized certain applicant corporations — Applicants brought motion for interim order with respect to second plan under s. 192 of CBCA and s. 60(1) of Trustee Act (TA) — Motion granted — It was proper exercise of court's jurisdiction under s. 60(1) of TA and s. 192 of CBCA to grant order sought — Second plan, on its face, fell within categories of arrangement recognized by s. 192 of CBCA as proper subject matter of plan of arrangement proceeding — Second plan involved either exchange of securities of corporation for money or amalgamation — Applicant trusts could be joined as co-applicants under s. 192 of CBCA because second plan involved trust-related transactions for which applicant trusts certainly enjoyed standing — Inquiry into fairness and reasonableness of trust-related steps in second plan fell within court's jurisdiction under s. 60(1) of TA — This was so despite fact that trustees of trust applicants had power to call meetings of unit holders to consider second plan — Case at bar was exceptional, given overall complexity of proposed transaction — Moreover, original decision sanctioned process by which such complex transaction could proceed — It was important for health of our economy that participants could expect reasonably consistent application by courts of processes involving financial and commercial transactions.

**Table of Authorities**

**Cases considered by *D.M. Brown J.*:**

*Acadian Timber Income Fund, Re* (2009), 2009 CarswellOnt 8086 (Ont. S.C.J. [Commercial List]) — followed

*First Marathon Inc., Re* (1999), 1999 CarswellOnt 2295 (Ont. S.C.J. [Commercial List]) — referred to

*Innvest Real Estate Investment Trust, Re* (2010), 72 B.L.R. (4th) 98, 2010 CarswellOnt 5664, 2010 ONSC 4292 (Ont. S.C.J.) — considered

*Kaptyn Estate, Re* (2009), 48 E.T.R. (3d) 278, 2009 CarswellOnt 2160 (Ont. S.C.J.) — followed

*Olympia & York Developments Ltd., Re* (1993), 1993 CarswellOnt 197, *(*sub nom. *Olympia & York Developments Ltd. v. Royal Trust Co.)* 18 C.B.R. (3d) 176, 102 D.L.R. (4th) 149 (Ont. Gen. Div.) — referred to

*1768248 Ontario Ltd., Re* (2009), 2009 CarswellOnt 71 (Ont. S.C.J. [Commercial List]) — referred to

**Statutes considered:**

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44
Generally — referred to

s. 192 — considered

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

*Securities Act of 1933*, 15 U.S.C. 2A
s. 3(a)(10) — referred to

  

*Trustee Act*, R.S.O. 1990, c. T.23
s. 60(1) — considered

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
R. 14.05(2) — referred to

R. 14.05(3)(a) — referred to

MOTION for interim order with respect to proposed plan of arrangement under s. 192 of *Canada Business Corporations Act* and s. 60(1) of *Trustee Act*.

***D.M. Brown J.*:**

**I. Ex parte motion for an Interim Order involving a CBCA plan of arrangement and opinion, advice or directions under the Trustee Act**

1 On August 4, 2010, Hoy J., as she then was, in her decision in *Innvest Real Estate Investment Trust, Re*[1] approved, under section 192 of the *Canada Business Corporations Act*[2] and section 60(1) of the *Trustee Act*,[3] a plan of arrangement under which the applicant, InnVest Real Estate Investment Trust ("REIT"), split off some of its holdings into a second trust, the co-applicant, InnVest Operations Trust ("IOT"). Those transactions were prompted by amendments to the *Income Tax Act of Canada* regarding the taxation of "specified investment flow-through entities", the so-called SIFT Rules.

2 Now, a little over a year later, REIT and IOT wish, in effect, to reverse those transactions. Again, the driver is a change to the tax regime which, when enacted, will impose a materially less beneficial tax regime on real estate investment trusts, like InnVest, that have issued "stapled securities". The applicants are proposing a reorganization which ultimately would result in the unwinding of the stapled unit structure of InnVest and the transfer of substantially all of the assets and liabilities of IOT to the REIT, with IOT becoming a wholly-owned subsidiary of the REIT. The reorganization would involve, in part, the reorganization of certain *CBCA* subsidiary corporations.

3 The draft Plan of Arrangement identifies 11 events, or steps, which would occur within the Plan. Of those, four are defined as "Corporate Steps", and section 2.1(a) provides that such steps would constitute an arrangement within the meaning of section 192 of the *CBCA*. The remaining steps involve the REIT and IOT trusts, or associated entities. Accordingly, the plan of arrangement for which this Interim Order is sought is a hybrid plan — or dare I say a "stapled plan" - involving both trust and corporate transactions.

4 At the hearing this morning I granted the order sought, but stated I would release brief reasons explaining my decision. These are those reasons.

**II. Analysis**

5 In seeking the Interim Order the applicants rely on two sources of the court's jurisdiction — the jurisdiction under the *CBCA* s. 192 plan of arrangement regime and the jurisdiction of the court to provide opinion, advice or directions to trustees pursuant to section 60(1) of the *Trustee Act*.

***A. CBCA s. 192***

6 The jurisprudence recognizes that the statutory plan of arrangement mechanisms afford a "flexible and broad concept of reorganization and arrangement between a corporation and its shareholders",[4] and, as put by Pepall J. in *Acadian Timber*

  

*Income Fund, Re*, the word "arrangement":

> is to be given its widest character, limited only by the corporation's own by-laws or general legislation. The purpose of an arrangement is to provide a flexible mechanism that can be adapted to the needs of a particular case. As Farley J. stated in *Re Fairmont Hotels & Resorts*: "... I think it is an error to forget that the very flexibility of the arrangement provision was designed to allow the solution of difficult and awkward situations." In the Policy Statement of the Director, the Director endorses the position that the arrangement provisions of the Act are intended to be facilitative, should not be construed narrowly, and further recognizes that the term arrangement is not exhaustively defined.[5]

7 In recent years the courts have utilized statutory plan of arrangement regimes to deal with arrangements involving tax-driven moves to convert income trusts into corporations. Most of those cases involved transactions in which the end-products were dividend-paying corporations. The decision of Pepall J. in *Acadian Timber* provided the most detailed discussion about the availability of statutory plans of arrangements to effect such results:

> In my view, the arrangement provisions should be available to all of the Applicants in this case. It seems to me that the current income trust conundrum is the sort of exceptional situation contemplated by the dicta in *Re Fairmont*. Assuming that there is compliance with the provisions of the trust deed (a fact that should be addressed at the approval hearing), there is no apparent prejudice to anyone. I also note that a number of income funds that have recently converted into corporate structures have proceeded by way of an arrangement under the CBCA or other comparable provincial statutes. Lastly, while the Director did raise the issue of the ability of the Fund, AT Trust and Acadian Timber LP to be applicants, the Director advised in writing that no position was being taken on this issue for the purposes of this transaction.[6]

8 Justice Hoy's decision in *Innvest* authorized resort to section 192 of the *CBCA*, in conjunction with resort to section 60(1) of the *Trustee Act*, for a hybrid plan of arrangement involving both corporations and trusts whose end product was not a corporation, but a trust. The applicants, which are a combination of trusts and corporations, rely on that precedent for their proposed course of action in the present case.

9 As has been stated in previous cases, the purpose of an interim order is simply to set the wheels in motion for the application process relating to the arrangement and to establish the parameters for the holding of shareholder meetings to consider approval of the arrangement in accordance with the statute.[7] In order to grant such preliminary directions a court need only satisfy itself that reasonable grounds exist to regard the proposed transaction as an "arrangement"; it will be at the final hearing that the court examines whether the applicant has met the applicable statutory criteria, including whether the proposal constitutes an "arrangement", and whether the plan of arrangement is fair and reasonable.

10 In the present case Corporate Steps 3, 4 and 5 in the applicants' proposed plan of arrangement involve either an exchange of securities of a corporation for money or an amalgamation and, on their face, fall within categories of arrangement recognized by section 192 of the *CBCA* as the proper subject-matter of a plan of arrangement proceeding before the court. Although the Director under the *CBCA*, in a letter to the applicants dated December 22, 2011, took the position that the trusts could not be co-applicants under section 192 since only *CBCA* corporations can make such an application, the proposed plan involves trust-related transactions for which the applicant trusts certainly enjoy standing and can be joined as co-applicants in this hybrid proceeding.[8]

***B. Trustee Act, s. 60(1)***

11 What is singular about the present motion is not the substance of the Corporate Steps, but the fact that the Interim Order sought by the applicants contains no directions in respect of the Corporate Steps. The applicants do not seek directions under section 192 of the *CBCA* regarding the calling of any meeting involving persons with an interest in the affected corporations. What the applicants seek are directions involving the affairs of the two trusts, such as the calling of a meeting of unit holders.

12 At the hearing it became evident that the trustees of the REIT and IOT Trusts possess the necessary powers under the respective trust declarations to call and hold meetings of unit holders to consider the proposed transaction. I therefore asked whether it was necessary, given those powers, to seek the assistance of the court under section 60(1) of the *Trustee Act*. I raised that question in light of the case law referenced in my decision in *Kaptyn Estate, Re*[9] which indicated that the proper resort to section 60(1) is to seek "advice as to legal matters or legal difficulties arising in the discharge of the duties of

  

executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern." From what I can see, in the present case no uncertainty exists about the powers of the trustees to call the meeting they propose.

13 Applicants' counsel submitted that the Court's opinion, advice or directions were required for two reasons: (i) a court order would sanction, in effect, the sequence of the complex steps which will be required to complete the proposed transaction, and (ii) a final order hearing would consider whether the trust-aspects of the proposed transaction were fair and reasonable, a finding the applicants require in order to obtain an exemption under the *U.S. Securities Act*.[10] Counsel pointed out that in the *Innvest* decision Hoy J. applied, under section 60(1) of the *Trustee Act*, "a test analogous to that applicable in approving an arrangement in approving the non-Corporate Steps in the Plan of Arrangement".[11]

14 On reflection I concur with Hoy J. that an inquiry into the fairness and reasonableness of the trust-related steps in the proposed plan of arrangement falls within the Court's jurisdiction under section 60(1) of the *Trustee Act*. The hesitation I expressed at the hearing related to the danger of the Court opening its door to applications by trustees for orders approving that which arguably they possess the power to do in any event. However, on a review of the evidence filed, I appreciate that the present case is exceptional in its nature, given the overall complexity of the proposed transaction.

15 Moreover, as I stated at the beginning of these Reasons, what the applicants propose is in large part to reverse that which they did just over a year ago. In *Innvest* this Court sanctioned a process by which such a complex transaction could proceed. It is important for the health of our economy that participants can expect a reasonably consistent application by the courts of processes involving financial and commercial transactions.

**III. Conclusion**

16 I therefore was satisfied that it was a proper exercise of this Court's jurisdiction under section 60(1) of the *Trustee Act* and section 192 of the *CBCA* to grant the Interim Order sought for this hybrid plan of arrangement.

*Motion granted.*

Footnotes

1 2010 ONSC 4292, 72 B.L.R. (4th) 98 (Ont. S.C.J.).

2 R.S.C. 1985, c. C-44.

3 R.S.O. 1990, c. T.23: "A trustee...may...apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property..."

4 *Olympia & York Developments Ltd., Re* (1993), 102 D.L.R. (4th) 149 (Ont. Gen. Div.), p. 163b.

5 *Acadian Timber Income Fund, Re*, [2009] O.J. No. 5517 (Ont. S.C.J. [Commercial List]), para. 8.

6 *Ibid.*, para. 11. See also the April 12, 2010 endorsement of Hoy J. in *Re Futuremed Healthcare Income Fund*, SCJ CV-10-8659-00CL; the August 15, 2008 Interim Order of Horner J. in *H&R Real Estate Investment Trust*, Alberta Queen's Bench, 0801-09491; *1768248 Ontario Ltd., Re*, [2009] O.J. No. 74 (Ont. S.C.J. [Commercial List]); December 22, 2008 endorsement of Pepall J. in *Re CI Financial Income Fund*, SCJ CV-08-7843-00CL.

7 *First Marathon Inc., Re*, [1999] O.J. No. 2805 (Ont. S.C.J. [Commercial List]), para. 9; *Acadian Timber*, *supra.*, para. 6.

8 Joinder is proper under a combination of Rules 14.05(2) and 14.05(3)(a) of the *Rules of Civil Procedure*.

  

[9] [2009] O.J. No. 1685, 48 E.T.R. (3d) 278 (Ont. S.C.J.), paras. 26 to 31.

[10] *United States Securities Act of 1933*, s. 3(a)(10).

[11] *Innvest*, *supra*., para. 41.

2012 ONSC 4450
Ontario Superior Court of Justice [Commercial List]

MacKinnon v. Ontario (Municipal Employees Retirement Board)

2012 CarswellOnt 10630, 2012 ONSC 4450, 222 A.C.W.S. (3d) 903, 99 C.C.P.B. 321

# Wyman MacKinnon (Plaintiff) and Ontario Municipal Employees Retirement Board, Borealis Capital Corporation, Borealis Real Estate Management Inc., Ian Collier, R. Michael Latimer and Michael Nobrega (Defendants)

Morawetz J.

Heard: June 28, 2012
Judgment: June 28, 2012
Written reasons: August 3, 2012
Docket: 05-CL-006035

Counsel: Mark Zigler, Jonathan Bida, for Plaintiff
Peter Griffin, Eli Lederman, for Defendants, Ontario Municipal Employees Retirement Board, Borealis Capital Corporation, Borealis Real Estate Management Inc.
R. Bruce Smith, Christopher Bardsley, for Defendants, Ian Collier, R. Michael Latimer, Michael Nobrega

Subject: Civil Practice and Procedure; Corporate and Commercial; Employment

**Headnote**

Civil practice and procedure --- Disposition without trial — Settlement — Formation and validity — Miscellaneous
Plaintiff brought representative action alleging breaches in transactions whereby municipal employees retirement system (OMERS) transferred management of real estate assets to real estate management company — Chair of mediation and fact-finding process found no wrongdoing, but also found that better disclosure could have avoided litigation, and that greater care ought to have been taken to avoid appearance of conflict of interest — Motion was brought for approval of settlement recognizing improved governance structure at OMERS and chair's fact-finding, and reimbursing plaintiff for costs and professional fees — Motion granted — Parties had benefit of lengthy mediation and fact finding process with experienced law professor, corporate and securities lawyer, and former chair of securities commission — Provision for payment of plaintiff's costs in pursing action and implementing settlement was consistent with appellate court findings in this action that plaintiff should be fully indemnified for costs — With respect to quantum, OMERS had reviewed and approved amounts, which were fair and reasonable in circumstances.

Pensions --- Practice in pension actions — Miscellaneous
Settlement — Plaintiff brought representative action alleging breaches in transactions whereby municipal employees retirement system (OMERS) transferred management of real estate assets to real estate management company — Chair of mediation and fact-finding process found no wrongdoing, but also found that better disclosure could have avoided litigation, and that greater care ought to have been taken to avoid appearance of conflict of interest — Motion was brought for approval of settlement recognizing improved governance structure at OMERS and chair's fact-finding, and reimbursing plaintiff for costs and professional fees — Motion granted — Parties had benefit of lengthy mediation and fact finding process with experienced law professor, corporate and securities lawyer, and former chair of securities commission — Provision for payment of plaintiff's costs in pursing action and implementing settlement was consistent with appellate court findings in this action that plaintiff should be fully indemnified for costs — With respect to quantum, OMERS had reviewed and approved amounts, which were fair and reasonable in circumstances.

**Table of Authorities**

**Cases considered by *Morawetz J.*:**

*Dugal v. Research in Motion Ltd.* (2007), 37 B.L.R. (4th) 112, *(*sub nom. *Ironworkers Ontario Pension Fund (Trustees of) v. Research in Motion Ltd.)* 87 O.R. (3d) 721, 50 C.P.C. (6th) 398, 2007 CarswellOnt 7565 (Ont. S.C.J. [Commercial List]) — followed

*Martin v. Barrett* (2008), 2008 CarswellOnt 3151, 55 C.P.C. (6th) 377, 2008 C.E.B. & P.G.R. 8296, 67 C.C.P.B. 102 (Ont. S.C.J.) — referred to

*Serhan Estate v. Johnson & Johnson* (2011), 2011 CarswellOnt 40, 8 C.P.C. (7th) 73, 2011 ONSC 128, 79 C.C.L.T. (3d) 272 (Ont. S.C.J.) — considered

**Statutes considered:**

*Class Proceedings Act, 1992*, S.O. 1992, c. 6
Generally — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
R. 10 — considered

R. 10.01(3) — considered

MOTION to approve settlement of representative action.

***Morawetz J.* (orally):**

1 On June 28, 2012, the record was endorsed as follows:

The motion proceeded on an unopposed basis. I am satisfied that the requested relief is appropriate in the circumstances. The motion is granted and the order has been signed in the form submitted. Brief reasons will follow.

2 These are the reasons.

3 This was a motion to approve the settlement of a representative action under subrule 10.01 (3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

4 In 2005, this action was commenced against the defendants alleging breaches in the transactions whereby Ontario Municipal Employees Retirement System (”OMERS”) transferred management of its real estate assets to Borealis Real Estate Management Inc. (”Borealis”) in 2002 and subsequently reassumed asset management in 2004. The plaintiff alleged that the transactions were improper and at commercially unreasonable levels leading to increased costs for the pension plan.

5 The plaintiff obtained a representation order to proceed on behalf of all persons who had a present, future, contingent or unascertained interest in the Ontario Municipal Employees Retirement System Fund or may be affected by this proceeding (collectively, the “representative persons”).

6 The parties spent years litigating pleadings motions, which were appealed to the Court of Appeal. Following the release of the Court of Appeal’s decision permitting certain claims to proceed, the parties engaged in a mediation and fact-finding process chaired by Mr. Stanley Beck, Q.C.

7 The defendants made extensive documentary production which had not previously been available to the plaintiff. These documents were reviewed by experts, counsel and Mr. Beck. In addition, Mr. Beck reviewed the governance practices of OMERS in the context of the disputed transactions.

8 Mr. Beck released a lengthy report and letter of recommendation to the court (his "Report and Recommendations"). Mr. Beck found no wrongdoing by any defendant and concluded that the disputed transactions were carried out on commercially reasonable terms. He did, however, conclude that the plan sponsors and stakeholders were not informed of the essential underlying facts, which raised serious questions giving rise to these proceedings. Mr. Beck further concluded that more detailed disclosure by OMERS fully explaining transactions and events at the time, which had not previously been supplied, may have avoided this litigation. He observed that OMERS' processes today will help to ensure better communication and its new strong governance practices will avoid these types of issues in future.

9 Mr. Beck indicated that, although there were not actual conflicts of interest in the transactions, and the defendants acted appropriately throughout, the OMERS Board ought to have taken greater care to have avoided the appearance of a conflict of interest.

10 Mr. Beck concluded that the outsourcing of real estate asset management from OMERS to Borealis in June 2002 was done on commercially reasonable terms based on industry models. However, by November 2003, OMERS concluded that the management of real estate assets was more expensive when outsourced to Borealis than it was projected to be if OMERS took back the management "in house".

11 Mr. Beck further concluded, that since the commencement of the litigation, there have been extensive governance changes at OMERS. The processes in place today will help to ensure better communication and governance, thereby avoiding perceived conflict of interest issues in the future.

12 The plaintiff is satisfied that these governance changes address his and other CUPE members' concerns. Since the events giving rise to this litigation, OMERS and CUPE Ontario have established improved working relationships and, further, they have confidence in, and fully support, the current leadership team at OMERS.

13 A settlement agreement was signed by the parties to resolve this litigation. It recognizes the improved governance structure at OMERS and Mr. Beck's fact-finding report. The key terms of the settlement provide that this action shall be dismissed in a manner that shall be binding on all represented persons and that OMERS will reimburse the plaintiff for his costs and professional fees in the action and the mediation. It is noted that this is to be the sole monetary payment made by any defendant. Further, the parties release each other in relation to the facts and allegations pleaded in this action and Mr. Beck's Report and Recommendations are a matter of public record.

14 The settlement agreement is recommended by Mr. Beck as being fair and in the best interests of all members and stakeholders of the OMERS pension plan and the parties accept the findings and conclusions expressed in the Report and Recommendations.

15 Extensive notice of the settlement approval hearing was provided in accordance with the court's order as follows:

(a) a joint press release was issued;

(b) a newspaper notice was made in the Toronto Star on two occasions;

(c) the notice was mailed, faxed and emailed to all the stakeholder groups representing employers and unions, who are in a position to keep the plan members informed; and

(d) the notice, settlement agreement, press release and motion record were all published on class counsel's website.

16 The due date for objections was June 8, 2012 and no objections were made.

17 Rule 10.01 (3) provides that a judge may approve a settlement in a representative action where: (a) the representative plaintiff agrees to the settlement, (b) the settlement will be for the benefit of the represented persons and (c) requiring service on those represented persons would cause undue expense or delay.

18 It seems to me that the assessment of a settlement in a Rule 10 representative action is analogous to the analysis of settlement approval under the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

19 In approving the settlement of a representative action in *Dugal v. Research in Motion Ltd.* (2007), 87 O.R. (3d) 721 (Ont. S.C.J. [Commercial List]) at para. 20 [Ironworkers]. C. Campbell J. noted that Rule 10 has been described as the "simplified procedure" version of proceedings under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 and that it is "designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 [*Class Proceedings Act, 1992*] order".

20 In *Ironworkers*, C. Campbell J. affirmed the approach and factors to consider in the approval of settlements in class proceedings. These factors include:

(i) likelihood of recovery or likelihood of success;

(ii) amount and nature of discovery, evidence or investigation;

(iii) settlement terms and conditions;

(iv) recommendation and experience of counsel;

(v) future expense and likely duration of the litigation;

(vi) recommendation of neutral parties, if any;

(vii) number of objectors and nature of objections; and

(viii) the presence of arm's-length bargaining and the absence of collusion.

21 Counsel to the plaintiff submitted that the overriding principle is whether the settlement is fair, reasonable and in the best interests of the class as a whole, and not whether it meets the demands of a particular member. Further, a settlement must fall within the range of reasonableness in order to obtain court approval; it need not be "perfect" in every respect. There is a "strong initial presumption of fairness" when the settlement is negotiated at arm's length. See *Martin v. Barrett*, [2008] O.J. No. 2105 (Ont. S.C.J.) at paras. 20-21 and *Serhan Estate v. Johnson & Johnson*, 2011 ONSC 128 (Ont. S.C.J.) at paras. 55-56 [Serhan].

22 Counsel further submits that a focus on the interest of the representative persons as a whole is particularly appropriate in this action. This action relates to the administration of OMERS, rather than seeking payment to individual beneficiaries. As noted by the Court of Appeal, this action was brought "to ensure the due administration of the pension fund".

23 Counsel to the plaintiff takes the position that this action was commenced as there were serious concerns regarding transparency, governance and administration of OMERS in respect of the disputed transactions.

24 It is clear from the record that the parties in this action had the benefit of a lengthy mediation and fact finding process with Mr. Beck, an experienced law professor, corporate and securities lawyer and a former chair of the Ontario Securities Commission. Mr. Beck performed a thorough review of all of the evidence and expert reports. He concluded that there was no wrongdoing and no breach of duty by any of the defendants.

25 Further, the parties have had the benefit of extensive documentary disclosure and review by a neutral third party. The parties have a thorough understanding of the liability issues raised and the likely conclusions by a court. This was recognized in *Serhan* as an important factor to be taken into account in approving a settlement.

26 It is also clear that the transactions at issue in this action raised concerns about transparency and governance at OMERS. However, counsel to the plaintiff acknowledges that these concerns have been substantially addressed through the changes to OMERS' policies and practices that took place over the course of this litigation.

27 Mr. Beck's report found that these policies and procedures have been implemented.

28 Finally, the settlement provides for payment of Mr. MacKinnon's costs in pursuing this action and in implementing the settlement. This is consistent with the Court of Appeal's findings in this action that the plaintiff should be fully indemnified for his costs, which have been incurred on behalf of all the pension plan members. With respect to quantum, it is noted that OMERS has reviewed and approved these amounts which I consider to be fair and reasonable in the circumstances.

29 In the result, an order shall be issued approving the settlement agreement in its entirety and dismissing the action against all defendants.

*Motion granted.*

**End of Document**



  

HI-RISE CAPITAL LTD.
Applicant

SUPERINTENDENT OF FINANCIAL SERVICES *et. al.*
Respondents

Court File No. CV-19-616261-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**BOOK OF AUTHORITIES OF THE APPLICANT**
**(APPLICATION RETURNABLE MARCH 21, 2019)**

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