COURT OF APPEAL FOR ONTARIO

CITATION: White v. Gicas, 2014 ONCA 490
DATE: 20140625
DOCKET: C56898

Blair, Watt and Pepall JJ.A.

In the Estate of Constantine Gicas, deceased

BETWEEN

Vivi White (as Estate Trustee with a Will of the Estate of Constantine Gicas, and in her personal capacity) and Elena Floros (in her personal capacity)

Applicants (Appellants)

and

John Gicas

Respondent

Sean Dewart and Margaret E. Rintoul, counsel for the appellants

Reginald M. McLean and Patrick J. Morrissey, counsel for the respondent

Heard: January 24, 2014

On appeal from the judgment of Justice J.M. Spence of the Superior Court of Justice, dated March 13, 2013.

Watt J.A.:

[1] Two ingredients combine to create a trust. The first – declaration of a trust – requires three certainties: certainty of intention; certainty of subject-matter; and certainty of objects. The second – constitution of the trust – requires transfer of title to the trust property to the trustee.

[2] Vivi White and Elena Floros are nieces of Constantine Gicas, secondary beneficiaries of the Constantine Gicas Family Trust, and remainder beneficiaries under the will of Constantine Gicas. Vivi White is also the Estate Trustee with a Will of the Estate of Constantine Gicas.

[3] On an application by Ms. White, as Estate Trustee, and by Ms. White and Ms. Floros as remainder beneficiaries under Constantine Gicas' will, a judge of the Superior Court of Justice concluded that James Gicas had validly created the Constantine Gicas Family Trust. The primary beneficiary of that Trust, Constantine Gicas, died on September 19, 2007.

[4] Vivi White and Elena Floros appeal the decision of the application judge declaring valid the Constantine Gicas Family Trust. They say that the Trust was neither validly declared nor properly constituted. If their main appeal (which I will refer to here as the substantive appeal) fails, they seek leave to appeal the costs awarded against them personally by the application judge.

[5] These reasons explain why I have concluded that the application judge was correct in finding that the Constantine Gicas Family Trust had been validly created and why I would dismiss the appeal from that finding. These reasons explain further why I would grant the appellants leave to appeal the costs award made against them personally, set aside that award, and order that the costs awarded at trial and on this appeal be paid out of the Estate.

THE BACKGROUND FACTS

[6] A brief sketch of the principals, as well as their relationships, will provide an adequate backdrop for the discussions that follow.

The Gicas Family

[7] James Gicas, the family patriarch, died in 2005. He had three children: John, Cynthia and Constantine, who was also known as Dino.

[8] Cynthia Gicas married Harry Floros. The couple had two children: Elena (Floros) and Vivi (White). Cynthia died in 1994.

[9] Constantine died in 2007. He lived with Marlene Popov. Constantine and Marlene had no children.

[10] John Gicas is the only surviving child of James Gicas. He has no relationship with his nieces, Elena and Vivi.

The Family Companies

[11] James Gicas and members of his family had interests in several companies. Shares in some of those companies were to become the principal assets in the Constantine Gicas Family Trust.

[12] Dutch Masters Doughnuts Limited, a Gicas family company, was sold between 1992 and 1994. The proceeds were divided equally among James' children – John, Cynthia (and her husband, Harry Floros) and Constantine. Each

reinvested their share of the proceeds in a new company, Cliff Investments, incorporated on March 2, 1995. The shareholdings of John and Constantine were equal, those of Cynthia somewhat less. Cynthia and the other siblings held the shares through a holding company. Cynthia died on March 5, 1994. Her shares were then held by her children, Vivi White and Elena Floros, and Cynthia's husband, Harry.

[13] Cliff Investments is an "umbrella" corporation that appears to own a commercial property on Overlea Boulevard in Toronto as trustee for the three holding companies. Income from the property is allocated among the holding companies as rental income, not as dividends declared by Cliff Investments. The record does not disclose the existence of any trust or joint venture agreement.

[14] 466369 Ontario Limited (466) was incorporated on January 7, 1981. Its principal asset is a mall located on Warden Avenue in Toronto. James and each of his children held an equivalent number of shares in the company. On October 31, 1991 the share register records a transfer of Constantine's shares to John, Cynthia and David Black, a solicitor, "as joint tenants". Neither of Constantine's share certificates are endorsed to reflect the transfer described in the minute book. The evidence does not disclose any cancellation of the share certificates.

[15] Milissa Holdings was incorporated in 1973 to acquire its principal asset, some valuable farmland near Stouffville Ontario. Starting in early 1998,

Constantine was one of the three officers of the company. The others included Constantine's brother, John, and his sister, Cynthia.

[16] On incorporation, the shareholders of Milissa Holdings were James Gicas (75 shares) and Cynthia/Harry (25 shares). On October 7, 1991 a signed directors' resolution transferred 33.34 of James' shares to Constantine. There were three other (purported) transfers: an unsigned directors' resolution of the same date transferring a further 33.34 of James' shares to "John Gicas, Cynthia Floros and David Black, as joint tenants"; a signed resolution of March 5, 1994 transferring these shares to "John Gicas, estate of Cynthia Floros and David Black, as joint tenants"; and a transfer of 8.32 shares by James to the appellants on June 10, 1997. Rental income from Milissa is distributed equally among Constantine, Cynthia/Harry and John.

[17] Constantine incorporated Cynthcon as a holding company on February 3, 1995. A single share was issued to the Constantine Gicas Family Trust. The principal asset of Cynthcon is about one-third of the equity in Cliff Investments.

The Memorandum of Agreement

[18] On October 31, 1991 James Gicas signed a Memorandum of Agreement recording the previous establishment of the Constantine Gicas Family Trust. James signed as the settlor. John Gicas, Cynthia Floros and David Bruce Black signed as trustees. The primary beneficiaries were Constantine Gicas and his

children, grandchildren or other issue. The secondary beneficiaries were John Gicas, Cynthia Floros, their children, grandchildren or other issue or a registered charity.

[19] The trustees acknowledged previous receipt of several assets, all of them common shares in various companies including Milissa Holdings. The Trust is discretionary with no beneficiary entitled to receive any distribution from the Trust Fund. The trustees agreed to keep the necessary books, records and accounts to reflect the transactions of the Trust.

The Declaration of Constantine Gicas

[20] John Gicas produced a Declaration apparently witnessed by the solicitor Black on the same day as the Trust Agreement. In the Declaration, Constantine says that shares in various Gicas family companies had been informally held in trust for him. He recites that it has been James Gicas' intention that all shares in the family companies be held in trust for him (Constantine), rather than through direct ownership. Specific mention is made of 50 shares in 466 inadvertently issued in Constantine's name rather than in trust for him. At James' request, Constantine purports to transfer the shares from himself to the Constantine Gicas Family Trust.

[21] Constantine's shares in 466 had been issued to him in 1981, about ten years before the Memorandum of Agreement was signed. His shares were transferred to "John Gicas, Cynthia Floros and David Black, as joint tenants".

The Wills of James Gicas

[22] James Gicas executed a will on June 13, 1994 over two and one-half years after the Memorandum of Agreement. James appointed his sons, John and Constantine, as his executors and trustees, and made specific property bequests to John and to the appellants. The residue of the Estate was to be divided equally among John, Constantine and the appellants.

[23] Neither this will nor a codicil executed about nine months later, both of which were witnessed by solicitor Black, contain any reference to or mention of the Constantine Gicas Family Trust.

[24] James Gicas executed a further will on February 17, 2005. He appointed John Gicas as the sole executor and trustee unless John predeceased him or became unable or unwilling to serve as executor in which case Constantine was to become the executor. In this will, the residue of his Estate was to be divided equally between John and Constantine. The will was witnessed by a different solicitor.

[25] The will of James Gicas executed on February 17, 2005 contains no reference to the Constantine Gicas Family Trust.

The Will of Constantine Gicas

[26] Constantine Gicas executed a will on October 10, 2006. The principal beneficiaries were Marlene Popov, a woman with whom Constantine Gicas was living when he died, and his nieces, the appellants. Among other bequests, Constantine Gicas transferred his interest in Cliff Investments, as well as his shares in 466 and Milissa Holdings, to his beneficiaries.

[27] The will of Constantine Gicas contains no reference to the Constantine Gicas Family Trust.

The Estate Litigation

[28] Litigation began on two fronts over the Estate of Constantine Gigas. His brother, John, and his (John's) children, filed a Notice of Objection to prevent the issuance of a Certificate of Appointment of an Estate Trustee with a Will. Marlene Popov sought additional benefits from the Estate.

The Settlement

[29] Mediation resulted in a settlement of the estate litigation. When the settlement was completed, Marlene Popov's litigation against the Estate would be dismissed without costs and the Notice of Objection filed by John Gicas and his children would be vacated. The value Marlene Popov received under the settlement exceeded her entitlement under the will, if the shares in the

companies were assets of the Estate (in other words, if there were a trust), by over $800,000.

The Trust and Taxes

[30] From its alleged creation, the Constantine Gicas Family Trust never filed a tax return. Constantine Gicas paid no tax on the disposition of his shares of 466 or of Milissa Holdings to the trust. His T-I return recorded Constantine Gicas' shares in 466, Cynthcon and Milissa Holdings as assets of his Estate. Before he died, Constantine Gicas received rental income directly from Milissa, and dividend income from 466. Cynthcon was allocated one-third of the income generated through Cliff Investments. Constantine Gicas received this money directly. Cynthcon reported receipt of the money to tax authorities. Cynthcon paid dividends directly to Constantine Gicas.

THE DECISION OF THE APPLICATION JUDGE

[31] The application judge was satisfied that the Memorandum of Agreement met the requirements for declaration of a trust: the certainties of intention, subject-matter and object.

[32] The application judge observed that, on its face, the Memorandum disclosed the intention of the settlor to create a trust for the benefit of the primary beneficiary, his son Constantine, and the secondary beneficiaries, his other two children.

[33] The application judge was satisfied that the Memorandum clearly identified the subject-matter of the Trust: shares in listed family companies. Even if Milissa Holdings shares were beyond the power of the settlor to transfer to the Trust, Dino acknowledged that Milissa was an asset of the Trust. His erroneous reference to the number of shares in 466 to be transferred was “not a problem”.

[34] The application judge concluded that paragraph 2 of the Memorandum established certainty of objects by naming primary and secondary beneficiaries.

[35] The application judge was further satisfied that the Trust had been properly constituted by the transfer of its subject-matter. The shares of Milissa are expressly included in article 1 of the Memorandum. The Declaration of Constantine Gicas, executed contemporaneously with the Memorandum, transferred *all* his shares in 466 to the Trust. A resolution of Cynthcon, signed by Constantine Gicas, issued a share of Cynthcon to the Trust. The shareholder loans arise from income paid to shareholders of 466. And the shareholder of 466 is the Trust.

THE SUBSTANTIVE APPEAL

[36] On the substantive appeal, the appellants have raised two issues. The second issue is only reached in the event of an affirmative answer to the first. The issues may be cast as two questions:

i. Was the Constantine Gicas Family Trust validly created?

ii. Were the shares of 466 and Cynthcon assets of the Trust?

Issue #1: Was the Constantine Gicas Family Trust Validly Created?

[37] For a trust to be validly created, it must be properly declared and constituted. Declaration of a trust requires certainty of intention, subject-matter, and objects. Constitution of a trust requires transfer of title to the trust property to the trustee. The parties divide on whether the Constantine Gicas Family Trust was validly created.

The Positions of the Parties

[38] The appellants take the position that the Constantine Gicas Family Trust was neither validly declared nor validly constituted.

[39] As far as declaration of a trust is concerned, Mr. Dewart submits for the appellants that the application judge erred in concluding that the three certainties necessary for a valid declaration of trust had been established. The conclusions were flawed by a combination of factors including misapprehensions of the evidence, a preference of form over substance, and a failure to look beyond the Memorandum of Agreement to consider all the circumstances before reaching conclusions about any of the certainties.

[40] With respect to the declaration of a trust, Mr. McLean contends for the respondent that the application judge considered not only the trust document, but also the surrounding circumstances in reaching his conclusion that the three

certainties essential to a valid declaration of trust had been established. The application judge did not misapprehend any evidence in reaching his conclusion or fall into any legal errors.

[41] Mr. McLean says the purpose underlying the creation of the trust was clear: Constantine Gicas was behaving irrationally. The trust was necessary to preserve his equity and to ensure that he and his siblings shared equally. The assets of the trust were defined in the Memorandum which also governed accretions. The objects were identified, the intention clear and certain.

[42] On the issue of constitution of the trust, Mr. Dewart says that even if there were a valid declaration of trust, no trust was created because the trust was not properly constituted.

[43] Mr. Dewart points out that the shares that were the assets of trust were either not owned by the settlor, or not properly transferred to the trust. A transfer of shares to John Gicas, Cynthia Floros or her estate, and the solicitor Black, “as joint tenants”, is not a proper transfer of the assets to the trustees.

[44] Further, Mr. Dewart contends, several other factors demonstrate that the trust was never properly constituted. The deceased’s will, prepared by the same law firm as the Memorandum of Agreement, makes no mention of the trust and provides for disposition of the shares of Constantine Gicas in a manner that would only be possible if he was the legal owner of the shares. The documents

required to transfer the assets to the trust were not properly executed. The settlement with Marlene Popov far exceeded her entitlement under the will of Constantine Gicas if the trust had been validly created. The trust filed no tax returns. The trustees never met. Income was distributed directly to Constantine Gicas, not through the trust.

[45] With respect to the constitution of the trust, Mr. McLean says for the respondent that what happened after the trust was declared amounted to proper constitution of the trust. In the result, he urges, the Constantine Gicas Family Trust was validly created.

[46] Mr. McLean regards the failure of the trust to file tax returns and the "minor" inconsistencies in the corporate documentation, such as required signatures on share transfers, as matters of form, not of substance. He contends that the trust property was properly alienated to be held by the trustees for the benefit of the designated beneficiaries.

Discussion

[47] I would not give effect to this ground of appeal. As I will explain, I am satisfied that the application judge correctly concluded that the Memorandum of Agreement satisfied not only the three certainties required for the valid declaration of a trust, but also established that the Trust was properly constituted.

[48] On its face, the Memorandum of Agreement satisfies the three certainties required for a valid declaration of a trust.

[49] As to certainty of intention, the preamble of the document entitled “Constantine Gicas Family Trust” records the prior establishment of the Trust and the agreement of the parties, the settlor and trustees, “to confirm and clarify the terms and conditions of the Trust”. The intention of the settlor to create the Trust, as well of the trustees to administer it, could scarcely be plainer.

[50] Second, the Memorandum of Agreement discloses certainty of subject-matter. The assets of the Trust – shares in various companies – are specifically described in article 1 of the Memorandum. The article expressly permits expansion of the assets to include “any further sums which they [the trustees] shall receive from time to time and any accretions or additions thereto”.

[51] Third, the Memorandum of Agreement satisfies the certainty of objects required as it identifies the objects of the Trust. The primary beneficiaries are Constantine Gicas and anyone who is a child, grandchild or other issue of Constantine Gicas. The secondary beneficiaries are John Gicas, Cynthia Floros and their children, grandchildren or other issue, or a registered charity. That the subject-matter of the Trust does not have to be distributed in equal portions, rather is left to the discretion of the trustees, is of no moment.

[52] Likewise, on its face, the Memorandum of Agreement establishes constitution of the Trust. The trustees acknowledge that they have received and are currently holding as assets of the Trust the assets listed in article 1 of the Memorandum. They also acknowledge that any future sums they receive and any accretions or additions are assets of the Trust and constitute the Trust Fund.

Issue #2: Were the Shares of 466 and Cynthcon Assets of the Trust?

[53] The Memorandum of Agreement does not refer to any shares of 466 or of Cynthcon as assets of the Trust. The parties take different views of the effect of this omission.

The Positions of the Parties

[54] For the appellants, Mr. Dewart says that the failure to list the shares of 466 and Cynthcon as assets of the Trust means that they are not included as part of the Trust Fund as defined in article 1 of the Memorandum. It follows that these shares are assets of the Estate of Constantine Gicas.

[55] For the respondent, Mr. McLean takes a contrary position. He submits that in his contemporaneous Declaration, Constantine Gicas transferred all his shares in 466 to the Trust. As for Cynthcon, Constantine Gicas, as the sole director of Cynthcon, signed a resolution issuing one share to the Trust. It follows, Mr. McLean says, that the shares of 466 and Cynthcon form part of the Trust Fund which permits accretions and additions.

Discussion

[56] I would not give effect to this claim of error. In my respectful view, the application judge reached the correct conclusion and made no error in the path he followed to get there.

[57] No issue arises concerning the assets identified in the Memorandum as having been transferred to the Trust by the settlor, among them shares in Milissa. The omission of any reference to shares in 466 and Cynthcon, at first light at least, would appear to support their exclusion from the assets of the Trust.

[58] But there is more. As the application judge noted, in a contemporaneous Declaration, Constantine Gicas transferred *all* his shares in 466 to the Trust. That Constantine may have been mistaken about the precise number of shares he owned is of no moment. Read as a whole, the Declaration makes it clear that he is transferring “the shares” he held in 466 to the Trust.

[59] Further, in connection with Cynthcon, Constantine Gicas issued a share of Cynthcon to the Trust as its sole director, by resolution. This made that share an asset of the Trust.

[60] The Memorandum of Agreement does not limit the assets of the Trust to those specific shares listed as part of article 1. The article expressly permits “further sums” that the trustees may receive from time to time, as well as

accretions and additions. The additional assets need not be contributed by the settlor.

[61] In their original Application, the appellants also sought an order that all shareholder loans due to the Estate from 466 and Cynthcon vest in the appellants personally as the remainder beneficiaries of the Estate of Constantine Gicas.

[62] As the application judge correctly decided, the shareholder loans arise from income attributed to a shareholder but not paid out. The shareholder is the Trust, not the Estate.

[63] For these reasons, I would dismiss the appeal on the substantive issues raised by the appellants.

THE COSTS APPEAL

[64] On the costs appeal, the issue is whether the application was necessary for the proper administration of the Estate of Constantine Gicas and thus whether the costs should properly be borne by the Estate and not the appellants personally.

[65] The appellants seek leave to appeal the costs order made against them by the application judge. They recognize that in order to obtain leave to appeal a costs order they must demonstrate strong grounds upon which this court could find that the application judge erred in the exercise of his discretion: *Sawdon*

Estate v. Sawdon, 2014 ONCA 101, at para. 77. Appellate courts should set aside a costs award only if the judge at first instance has made an error in principle or if the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27; and *Sawdon Estate*, at para. 77.

The Reasons of the Application Judge

[66] The costs endorsement of the application judge is in these terms:

> Costs to the respondent on the partial indemnity scale of $20 000 for fees, plus HST, plus disbursements and HST as per the Bill of Costs, payable within 30 days.

The disbursements claimed, including HST, were $2,393.25.

Discussion

[67] I would grant leave to appeal the costs order made against the appellants personally. I have reached this conclusion for two reasons.

[68] First, the application judge gave no reasons for his costs award. The absence of reasons precludes meaningful appellate review and leaves the appellants without an explanation as to why they were ordered to pay costs personally.

[69] Second, and related to the absence of reasons, we cannot determine whether the application judge applied the proper approach to an award of costs in estate litigation.

[70] The modern approach to the award of costs in estate litigation is exemplified by the decision of this court in *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.), at paras. 78-80. The approach begins from a premise that estate litigation operates subject to the general civil litigation costs regime except in those limited cases in which public policy considerations mandate a different result: *Sawdon Estate*, at para. 84.

[71] In estate litigation, there are two predominant public policy considerations at play:

i. The need to give effect to valid wills that reflect the intention of competent testators; and

ii. The need to ensure that estates are properly administered.

In practical terms, the demise of the testator leaves recourse to the courts as the only viable method of rectifying any difficulties or ambiguities created by the testator and of ensuring that the estate is properly administered: *Sawdon Estate*, at para. 85.

[72] It logically follows that where the problems giving rise to the litigation were caused by the testator, it is appropriate that the testator, through his or her estate, bear reasonable costs associated with their resolution. Indeed, to saddle the estate trustees personally with legal costs in such situations might well discourage them from initiating reasonably necessary legal proceedings to ensure due administration of the estate: *Sawdon Estate*, at para. 86.

[73] In the present case, the problems that underpinned the original application brought by the Estate Trustee were created by the conduct of the testator, Constantine Gicas. It was unclear from what occurred whether certain assets were governed by the Trust or fell outside it. It fell to Ms. White, as the Estate Trustee, to administer the Estate of Constantine Gicas. To do so she needed to know the extent of the assets with which she was dealing. Constantine Gicas could provide no assistance on this issue. Ms. White's recourse to the courts was a reasonably necessary step for her to take as Estate Trustee. The Estate should be responsible for her costs of the application and of the appeal.

CONCLUSION

[74] For these reasons, I would allow the appeal in part. I would amend paragraph 2 of the Judgment below to provide that the costs award made against the Estate Trustee personally on the application be paid out of the Estate of Constantine Gicas. The respondent is entitled to his costs of the appeal, which the parties agree should be fixed at $17,500.00 inclusive of disbursements and all applicable taxes. Those costs should also be payable out of the Estate of Constantine Gicas.

Released: June 25, 2014 (R.A.B.)

"David Watt J.A."
"I agree R.A. Blair J.A."
"I agree S.E. Pepall J.A."