

COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20100629
Docket: S086372
Registry: Vancouver

Between:

**Michael Bentley, Ethel Marion Campbell, Peter Chapman,
Zenia Cheng, Simon Chin, Krista Friebel, R.S. Patrick Greenwood,
Marie Kristine Klukas, Johnny Leung, David Ley, Ruth Lin,
Lanny James Reedman, Linda Seale, Anne Sheck, David Kenneth Short,
Trevor Howard Walters, and Shirley Wiebe**

Plaintiffs

And:

**Anglican Synod of the Diocese of New Westminster, and Michael Ingham
in his capacity as the Anglican Bishop of the Diocese of New Westminster**

Defendants

Docket: S087230
Registry: Vancouver

Between:

**Eric Law, Stephen Wing Hong Leung, Annie Sheung Kan Tang,
Stephen Chi Him Yuen, and Winsor Wing Tai Yung**

Plaintiffs

And:

Anglican Synod of the Diocese of New Westminster

Defendant

Before: The Honourable Mr. Justice Kelleher

Oral Reasons for Judgment

Counsel for the Plaintiffs:

A.I. Nathanson

Counsel for Defendant, Anglican Synod of
the Diocese of New Westminster:

T.A. Dickson

Place and Date of Hearing:

Vancouver , B.C.
June 11, 2010

Place and Date of Judgment

Vancouver , B.C.
June 29, 2010

[1] **THE COURT:** This decision addresses issues arising from the trial judgment in this matter indexed at 2009 BCSC 1608.

[2] At the risk of oversimplification, the issues at trial were these.

[3] The plaintiffs are clergy and lay leaders from four parishes in the Diocese of New Westminster, part of the Anglican Church of Canada. Their contention was that the property of those parishes was held pursuant to a trust for “historical orthodox Anglican doctrine and practice” and that the blessing of same-sex unions was inconsistent with such doctrine and practice. The plaintiffs sought to have the properties turned over to the congregation based on the exercise of this court’s inherent jurisdiction over trusts and charities. The plaintiffs were not successful. My conclusion is under appeal.

[4] There were two other issues. The plaintiffs’ alternative position was that a bequest by the late Daphne Wai-Chan Chun to the Church of the Good Shepherd should be subject to a *cy-près* scheme and the funds should be applied to the building needs of the congregation. That position succeeded at trial. My conclusion in this regard is the subject of a cross appeal.

[5] Finally, the plaintiffs argued that Bishop Ingham, the current bishop of the Diocese of New Westminster, had no power to dismiss trustees or appoint new trustees to the four parish corporations pursuant to Canon 15. I agreed with the plaintiffs. I understand this is not under appeal.

[6] There are now two issues before me: costs, and a request for directions regarding trustees.

[7] The defendants’ position with respect to costs is that they were substantially successful at trial and that the matter was complex. They say that costs should be awarded at Scale C in these circumstances.

[8] The plaintiffs’ position is more nuanced. Their first position is that the plaintiffs are trustees and as such are entitled to be indemnified out of the trust

property. They say the defendants are also entitled to have their costs paid out of the property so no order as to costs is necessary. The plaintiffs rely on the common law principle that a trustee is entitled to be indemnified for costs and expenses reasonably incurred by her or him in the due administration of the trust. This includes bringing and defending legal proceedings. See *Waters Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005) at 1155 to 1157; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353. Madam Justice Ross of this court said in *Kordyban v. Kordyban*, 2004 BCSC 184, 5 E.T.R. (3d) 176:

[18] A trustee is, in the ordinary course, entitled to be indemnified for the reasonable costs of bringing or defending an action. The court is entitled to order otherwise where the trustee has acted unreasonably or in substance for his or her own benefit, rather than for the fund; see *Re Dallaway*, [1982] 3 All E.R. 118 per Megarry V.C. ...

[9] The plaintiffs' alternative position is that this is an appropriate case in which to make no order as to costs. They argue that the court has a broad discretion to depart from the general rule that costs follow the event where it is fair and reasonable in the circumstances: *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd, 2002 BCCA 454.

[10] The plaintiffs say this in their written submission:

[27] The parties created their own unique pre-trial and trial procedure which was used with great success. Pleadings closed in February 2009 and trial began only three months later. The trial occupied less than three weeks of court time. Given the complexity and uniqueness of the factual and legal issues, the lengthy history to the dispute, the number of witnesses, and the volume of evidence including considerable expert evidence, it is submitted that this was a remarkable feat by the parties. It confirms the motivation of all of the parties to resolve this dispute as expeditiously and responsibly as possible, once it became clear that it would not be resolved within the Anglican church.

[28] Despite the divisiveness of the issues and the depth of the dispute, the parties proceeded with their respective claims responsibly and respectfully. They jointly sought an early trial date and they agreed to very constrained schedules for the exchange of documents and affidavit evidence. The parties resolved all procedural issues through their counsel: not a single contested motion was required. The benefits of the parties' novel procedure are obvious: resolution of the matter in reduced time, at significantly reduced costs, and conserving judicial resources. Had the parties proceeded in the conventional course, the further and considerable costs would have been

largely non-recoverable (on a party-and-party analysis as suggested by the Defendants) and in any event, would have further burdened the trust properties.

[29] This is all the more remarkable given the fact that this is the first case to resolve these issues at trial in Canada. The final outcome will inform the situation across Canada.

[11] I agree entirely with the assertions in these paragraphs. It is to the parties' considerable credit that they were able to accomplish this.

[12] I also note that courts on a number of occasions have declined to make cost orders in church division proceedings. An example is *Chong v. Lee* (1981), 29 B.C.L.R. 13 (S.C.), where Mr. Justice Hinds said this at page 24:

In view of the subject matter of these proceedings and in an endeavour to achieve a degree of harmony amongst the members and adherents of the Church, I exercise my discretion and direct that there shall be no costs to either party with respect to these proceedings.

[13] Similarly, in *United Pentecostal Church of Chipman v. Chipman Pentecostal Church Inc*, 2001 NBQB 49 (CanLII), the court granted substantial relief to the plaintiffs but dismissed an application for costs stating at p. 45:

...In the hope of achieving some harmony and healing between the parties I direct there be no costs to either party.

[14] There is no dispute with respect to the law in the present case. A trustee is entitled to be indemnified for costs and expenses reasonably incurred in the due administration of the trust. However, I am not persuaded that what the plaintiffs were engaged in was the administration of the trust. The property in question belongs to the parish corporations. The plaintiffs were trustees of those corporations. However, they were attempting to remove the properties from the parish corporations because of doctrinal differences between themselves and the defendant Diocese of New Westminster.

[15] While a trustee is ordinarily entitled to be indemnified for the reasonable cost of bringing an action, this is not the case where the action is being brought "in substance for his or her own benefit": *Kordyban*, at para. 18.

[16] I am not suggesting the plaintiffs were in this for their personal gain. However, they were acting for the collective benefit of a large number of like-minded people who have elected to leave the Anglican Church of Canada and the Diocese and align themselves with the Anglican Network in Canada (“ANiC”).

[17] It cannot be said that these are trustees in the ordinary sense who are bringing forward a dispute within the trust for resolution by the court. In fact, having had their dispute adjudicated, these trustees will be leaving. As the plaintiffs' submission states at paragraph 45:

[45] Plaintiffs' counsel has been instructed that the plaintiffs do not wish to remain as trustees on the terms found in the reasons. Accordingly, the trial order need only address when it is appropriate for new trustees to be elected. The reasons concluded that the processes of the parish corporations should be followed and that is what should inform the Court Order.

[18] In the circumstances, this is not an appropriate case for the trustees to be indemnified from the trust property.

[19] Is it a case where in the interests of harmony no order should be made as to costs? Again, it is significant to me the plaintiffs are leaving. Making no order as to costs will not bring about harmony. As paragraph 45 of the plaintiffs' submission quoted above indicates, the plaintiffs are leaving the parishes.

[20] Rule 57(9) of the *Rules of Court* provides:

(9) Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

[21] That test is met when a party has achieved substantial success in the litigation; see *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 at 185 (C.A.).

[22] What is substantial success? In *Fotheringham* Mr. Justice Bouck held that success was substantial if it amounted to approximately 75 percent or more of the dispute.

[23] The defendants succeeded on the principal issue before me. The plaintiffs were successful with respect to the Chun bequest and the jurisdiction of the bishop

under Canon 15. Having regard to the entirety of the matter I am satisfied that it is the defendants who have enjoyed substantial success.

[24] There is no doubt that this was a matter of more than ordinary difficulty. Accordingly, costs at Scale C are awarded.

[25] The second issue concerns directions with respect to trustees. Paragraphs 294 and 295 of the reasons for judgment provides:

[294] It follows that the individuals elected or appointed at the annual vestry meetings of St. Matthias and St. Luke and the Church of the Good Shepherd on February 24, 2008 continue to hold their positions as trustees of their respective parish corporations. They are, however, required to exercise their authority in relation to the parish properties in accordance with the *Act*, as well as the Constitution, Canons, Rules and Regulations of the Diocese. As I have already concluded, they do not have authority to use those properties outside of the Diocese; this includes using them for purposes related to ANiC.

[295] It may be that in light of the other conclusions I have reached, the trustees will no longer wish to remain as such. I do not know. For now, I will leave it to the parties to arrive at a workable resolution. In the event it becomes necessary, they may return to court for further orders in this regard.

[26] Plaintiffs' counsel has been instructed the plaintiffs do not wish to remain trustees. I expect they will resign and new trustees will be elected at the next vestry meeting.

[27] I am told that the trustees have continued to permit clergy members who are associated with ANiC to conduct services in the churches at issue and have not met with Bishop Ingham to reach agreement on other uses of the buildings.

[28] The defendants ask that I direct the trustees of St. Matthews to permit one service per week by a priest named by Bishop Ingham. This is put forward because of the distance to travel to an alternative Anglican church in the Fraser Valley.

[29] I reiterate that these trustees are required to exercise their authority in accordance with the *Act*, Constitution, Canons, Rules and Regulations of the Diocese. The proper exercise of this authority would dictate that the St. Matthews trustees accede to this request and permit such a service. It is so directed.

[30] To summarize, the defendants are entitled to costs at Scale C.

[31] Pending a vestry meeting where new trustees are elected the St. Matthews trustees are directed to permit one service per week by a priest named by Bishop Ingham.

[32] That concludes my reasons.

Sum J