Summary of Brissenden Trust Case

Brief history:

The Brissenden couple left in Trust a 2.5 acre parcel along with the family home to the District of West Vancouver in 1990. The property is adjacent to the Upper Levels Highway in a residential area. The property was to remain in a "natural" state and used as a residential nature park.

The District did not develop the park to any extent and provided no signage for the park until 2018. They rented the house for a number of years, and placed almost $500,000 into general revenue. The District and the Attorney General of BC (AGBC) agree that a surplus, above house maintenance costs, of $206,869.23, but disagreed on whether this money was Trust money or not. The District also applied to use Section 184 of the Community Charter of BC to vary the Trust as well as generally accepted Trust law.

In June of 2017, the District applied to vary the trust[1] to allow for the sale of part of the property, which would be used finance purchase of lots adjacent to Ambleside Part at the waterfront. The AGBC opposed the sale. Instead they chose to defend the Trust from any variation. AGBC also felt that the rent should be included in the trust.

Issues before the Court

A hearing on the merit of the case was held in BC Supreme Court in Vancouver on Jan 23, 2020, and the Court's decision was released on June 29, 2020. In his "Reasons for Judgement" the Honorable Justice Edelmann states[2] that there were four issues at the bar:

"i. Are the funds that were collected from the rental of the house on the Brissenden Property held in trust by the District?

ii. Would the disposition of the southern portion of the Brissenden Property be consistent with the existing purposes of the trust?

iii. Should the Court authorize the disposition of the southern portion of the Brissenden Property as part of an administrative scheme?

iv. Should the Court vary the terms of the charitable trust under s. 184 of the Community Charter?"

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1 West

2 Reasons for Judgment, Paragraph 20

MLHS has an interest in the Judgement as issue 1 and 4 are key parts of our own intervention in the Laing Trust. The Town of Comox received rental which also went into general revenue, and the Town wants to use s. 184 to vary the Trust as well.

Issues ii and iii are less relevant but informative none the less. Both ask about selling the property, with iii treating the variance as part of an administrative scheme, in effect a "bookkeeping" issue, moving assets from one park to another.

After five paragraphs explaining the reasoning, the Justice Edelmann states[3] that:

"The District only had the ability to rent the house on the Brissenden Property because it was given to the District in trust. Any rent money received was revenue generated from the trust property and should have accrued to the trust. "

Fully half of the of the 38-page judgement (19 pages) dealt with the application of s.184 of the Community Charter, written in full below.

"Property Accepted in trust

184 (1) All money that is held by a municipality and is subject to a trust must be invested in accordance with section 183 until it is required for the purposes of the trust.

(2) If, in the opinion of a council, the terms of trusts imposed by a donor, settlor, transferor or will-maker are no longer in the best interests of the municipality, the council may apply to the Supreme Court for and order under subsection (3).

(3) On application under subsection (2), the Supreme Court may vary the terms or trusts as the court considers will better further both the intention of the donor, settlor, transferor or will-maker and the best interests of the municipality.

(4) Section 87 [*discharge of trustee's duty*] of the Trustee Act applies to an order under subsection (3).[4]"

In his remarks, the Justice acknowledges that this is the first time that s. 184(3) has been considered in BC, which accounts for the long discussion on this one issue. The problem is how to balance the donor's wishes with the best interests of the municipality.

3 Ibid, Paragraph 26

4 Ibid, Paragraph 57

The Justice states[5] that "…the Court is not sitting in judicial review of the opinion of the municipality…" regarding the district's opinion on its best interests, but 'that the past conduct of the trustee may be relevant in assessing the current situation[6]", that is the lack of park development and promotion and the rent issue.

On the other side the Justice needed to pry the intentions out of the submitted documents and there is also concern for the impact using s. 184 in favour of the municipality. In the last section of the Reasons for Judgement before the Conclusions and Proposed Order, the Justice ponders[7] "… the chilling effect on charitable giving in the future."

In the end the Justice writes that "… a reasonably informed person would not be unduly deterred from leaving a gift in trust to a municipality if the proposed variation were ordered …" provided the restraints of the Trustee Act continue to be applied as implied by subsection (4).

Court Order

In the end, the Justice agreed that part of the park could be sold, with strict covenants on the remaining part, and that the money could be used to buy the property at Ambleside, provided the new lots be added to the Brissenden Trust assets. Thus the trust assets would be increased by the variation, furthering the donor's intentions, and the District gets its variance. There is no order for the net rental income to be included in the purchase; although paragraphs 18 and 19 state that the AGBC had applied for a ruling on the surplus income as being trust money. That may have been resolved in a separate Judgement.

5 Ibid, Paragraph 115

6 Ibid, Paragraph 113

7 Ibid, Paragraph 119 etc.