

CITATION: The Joseph Lebovic Charitable Foundation v. Jewish Foundation
of Greater Toronto, 2022 ONSC 4012
COURT FILE NO. CV-21-00002743-0000
DATE: 20220711

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

The Joseph Lebovic Charitable Foundation)	
Plaintiff)	Wojtek Jaskiewicz, Michael Ly and Krista
)	Chaytor, for the plaintiff
– and –)	
)	
)	
Jewish Foundation of Greater Toronto, United Jewish Appeal of Greater Toronto and UJA Federation of Greater Toronto)	
Defendants)	Matthew Gottlieb, Paul Fruitman
)	and Nurit Richulsky, for the defendants

Heard at Newmarket on March 21, 2022,
by video conference

S.T. BALE J.:

Overview

[1] The Joseph Lebovic Charitable Foundation (“JLCF”) is a private foundation founded by Joseph Lebovic (“Joseph”). Joseph used JLCF as a vehicle to make donations to the Jewish Foundation of Greater Toronto (“Jewish Foundation”). The Foundation held those donations in the Joseph Lebovic Charitable Fund (“Lebovic Fund”) and made grants from the fund in accordance with Joseph’s recommendations.

[2] Following Joseph’s death in May 2021, his brother, Wolf Lebovic, upon behalf of JLCF, demanded that the Jewish Foundation make certain grants from the Lebovic Fund, pursuant to his direction. The Foundation refused to do so, and JLCF commenced this action.

[3] In the action, JLCF claims a mandatory injunction requiring the Jewish Foundation to disburse funds as instructed by it, until such time as the fund is exhausted. In support of that relief, JLCF alleges an agreement pursuant to which the Foundation is required to distribute funds as instructed by JLCF, provided that those distributions comply with the Foundation’s charitable principles.

[4] On this motion, JLCF requests an order that the entire Lebovic Fund be paid into court under rule 45.02, or in the alternative, an interlocutory injunction restraining the Jewish Foundation from making distributions from the fund, pending final disposition of the action.

Background facts

[5] The Jewish Foundation is a not-for-profit corporation governed by the *Canada Not-for-profit Corporations Act*. It is designated by the Canada Revenue Agency as a registered charity and public foundation.

[6] Between 2011 and 2016, Joseph donated a total of \$19,350,000 to the Jewish Foundation through JLCF. The Foundation held those donations in the Lebovic Fund. The Lebovic Fund is a donor advised fund. Once money is donated, it is invested by the Foundation and grants are made from it to charities in accordance with the Foundation's policies. Advisors to the Foundation's donor advised funds may make recommendations with respect to grants from the funds. However, although the Foundation generally implements such recommendations, it is not required to do so.

[7] During his lifetime, as the Lebovic Fund's advisor, Joseph made recommendations with respect to grants to be made from the fund and the Foundation implemented those recommendations. More generally, the Foundation always implemented recommendations from advisors to its donor advised funds. No grants were made without such recommendations.

[8] In May 2021, Joseph passed away. Other than a relatively small life interest to one person, Joseph left all his assets to JLCF, and appointed his brother, Wolf Lebovic, to be his executor.

[9] In June 2021, Wolf Lebovic, upon behalf of JLCF, demanded that the Jewish Foundation make grants to 16 organizations totalling \$16,765,032.43 from the Lebovic Fund. The Jewish Foundation refused to do so, and in August 2021, JLCF commenced this action. In the statement of claim, JLCF requests a mandatory order compelling the Jewish Foundation to make certain distributions from the Lebovic Fund. Those distributions include the same 16 organizations but increase the total amount to \$17,187,500 (which exceeds the outstanding balance of the fund by \$422,467.57).

[10] In March 2022, counsel for the Jewish Foundation wrote to counsel for JLCF advising that the Jewish Fund intended to make certain distributions from the Lebovic Fund, other than those which Wolf Lebovic had directed. The total of those distributions is \$627,460 (less than 4 per cent of the fund's value). JLCF then brought this motion to prevent the Jewish Foundation from making any distributions from the fund.

Analysis

[11] JLCF requests an order under rule 45.02 of the *Rules of Civil Procedure* securing the Lebovic Fund, or in the alternative, an interlocutory injunction restraining the Jewish Foundation from making distributions from the fund, pending final disposition of the action.

[12] The test for relief under rule 45.02 is set out in *Sadie Moranis Realty Corporation v. 1667038 Ontario Inc*, 2012 ONCA 475, at paras. 18 & 20. The moving party must establish:

- (a) that its claim is to a right in a specific fund;
- (b) that there is a serious issue to be tried as to its claim to the fund (a serious prospect of ultimate success); and
- (c) that the balance of convenience favours granting the order.

[13] The test for an interlocutory injunction is set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at para. 48. The moving party must establish:

- (a) that there is a serious issue to be tried;
- (b) that the moving party will suffer irreparable harm, if the injunction is not granted; and
- (c) that the balance of convenience favours granting the injunction.

Whether JLCF claims a right to a “specific fund”

[14] The Jewish Foundation argues that the Lebovic Fund is not a specific fund within the meaning of rule 45.02, because the funds have been pooled with other funds and invested, and because JLCF is not seeking a return of the funds. I disagree, for the following reasons.

[15] First, the Lebovic Fund is readily identifiable. The Jewish Foundation provides regular statements to JLCF showing, among other things, the contributions, investment earnings, distributions from the fund and fees charged to the fund.

[16] Second, rule 45.02 does not require the legal right to the specific fund to be a proprietary right: *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2012 ONCA 475, at paras. 23-27.

Whether there is a serious issue to be tried

[17] For the following reasons, I am not satisfied that there is a serious issue to be tried.

[18] Counsel for JLCF began by arguing that there is an agreement between JLCF and the Jewish Foundation pursuant to which it is required to listen to and comply with JLCF’s recommendations, and the fact that this had always happened is evidence of the agreement.

[19] However, during the course of argument, counsel for JLCF conceded that there could be no such agreement because, in order for charitable gifts to be valid, donors must divest themselves of all power and control over the property and transfer such control to the donee: *Cassan v. The Queen*, 2017 TCC 174, at para. 263 (citing *McNamee v. McNamee*, 2011 ONCA 533, at paras. 23-25). Counsel also conceded that the court cannot order the Jewish Foundation to make any particular distributions.

[20] Counsel attempted to reframe his argument by saying that the agreement should be characterized as requiring the Jewish Foundation to consider JLCF’s recommendations in good faith, and that if they did, they would end up agreeing with the distributions proposed by JLCF. He argued that the court could direct the Foundation to consider the recommendations in good faith, and that JLCF has an arguable case that its recommendations were considered in bad faith. He argued that the Lebovic Fund should be preserved to allow Wolf’s recommendations to be considered in good faith. However, there are a number of difficulties with that argument.

[21] First, it was not pleaded and first surfaced during argument. There is no motion before the court for an order directing the Jewish Foundation to consider JLCF’s recommendations in good faith and no such claim was made in the statement of claim.

[22] Second, even if there were such an agreement, it would not support the mandatory order requested in the statement of claim. Any agreement that would support such an order would be an

agreement giving the donor control over the donated property, and for that reason, would not be enforceable.

[23] Third, JLCF's counsel argued that all JLCF must do on this motion is show that there is a serious issue of bad faith in the Jewish Foundation's review of JLCF's recommendations. I disagree. What JLCF must show is that there is a serious issue to be tried as to JLCF's entitlement to the relief claimed in the statement of claim, *i.e.*, a serious prospect of success in obtaining a mandatory order requiring "that the defendants make any and all donations as instructed by the plaintiff, until all funds in the plaintiff's donor directed account are dispersed." Given the law referred to and JLCF's concession that the Foundation cannot be compelled to make any particular donations, I do not see a serious prospect of success.

[24] Fourth, JLCF's counsel argued that if his client's recommendations were considered by the Jewish Foundation, in good faith, they would accept those recommendations and make the requested payments. However, the Foundation has considered the recommendations and has declined to follow them. It has given its reasons for doing so. Those reasons do not suggest anything other than good faith.

[25] Fifth, as evidence of bad faith, JLCF relies on the following events. At the time of Joseph's passing, he had been engaged in disputes with the Jewish Foundation unrelated to the Lebovic Fund. A meeting between Wolf Lebovic and the Foundation to discuss those disputes was scheduled for June 18, 2021. On June 15, 2021, JLCF made its demand that the Foundation make the distributions that Wolf Lebovic wishes be made. As a matter of convenience, the Foundation suggested that those distributions could be discussed at the pre-arranged meeting. Wolf then refused to meet. In his affidavit filed in support of the motion, he says that there was nothing to discuss about the donations (because JLCF had made it clear what distributions should be made), and alleged that instead of making the donations, the Foundation was attempting to use the donations as leverage to somehow obtain an advantage in the unrelated disputes. However, that allegation is denied by the Foundation and there is no evidence to support it.

[26] Finally, when Wolf Lebovic first made his demand that particular distributions be made, the Jewish Foundation asked to meet with him to discuss it. He refused to meet and continues to do so. On cross-examination, his position was, essentially, that he and he alone has the right to determine distributions from the fund, and that as a result, there is nothing to discuss. When counsel for the Jewish Foundation asked him questions on cross-examination about the distributions that the Foundation proposed to make, Wolf dismissed them as "stupid questions".

Whether JLCF will suffer irreparable harm if the injunction is not granted

[27] JLCF argues that it will suffer irreparable harm if the Lebovic Fund is depleted, and it is ultimately successful in the action.

[28] However, there is no basis in the evidence for the suggestion that the Lebovic Fund will be depleted, if the injunction is not granted. The current balance of the fund is \$16,765,032. The distributions from the fund planned by the Jewish Foundation total only \$627,460, nearly three-quarters of which overlaps with the distributions demanded by JLCF. Furthermore, the evidence of the Foundation is that it has the necessary funds to restore the Lebovic Fund, in the event that JLCF is ultimately successful.

Whether the balance of convenience favours granting the relief claimed

[29] JLCF argues that the balance of convenience favours it because the Jewish Foundation has other funds from which it can make the donations it wishes to make. It argues that there will be prejudice to JLCF if the injunction is not granted, because if the fund is depleted and it is successful in the action, there will be no fund from which the donations proposed by JLCF can be made.

[30] However, for the same reasons as given on the issue of irreparable harm, I do not find the balance of convenience to weigh in JLCF's favour.

Whether Wolf, upon behalf of JLCF, can name himself as advisor to the Lebovic fund

[31] The parties spent some time on this issue. The Jewish Foundation's position is that because Joseph did not create a succession plan for the Lebovic Fund, the money in the fund became part of the Jewish Foundation's unrestricted funds. JLCF's position is that as Joseph's executor and as president of JLCF, Wolf has succeeded Joseph as the advisor to the fund.

[32] However, as a result of JLCF's concession that it does not have the right to require the Jewish Foundation to make any particular donations or the right to prevent the Foundation from making any particular donations, it is unnecessary, for the purpose of deciding this motion, for me to decide whether Wolf is entitled to act as advisor to the fund.

[33] In the result, I find that JLCF has not met the test for either an order under rule 45.02 of the *Rules of Civil Procedure* or an interlocutory injunction restraining the Jewish Foundation from making distributions from the fund, pending final disposition of the action.

Costs

[34] As the successful party on the motion, the Jewish Foundation is entitled to its costs. It requests those costs on a substantial indemnity basis, in the amount of \$162,462.87.

[35] The parties agree that that the issues were important and complex; however, JLCF argues that the motion became unnecessarily complex because the Jewish Foundation filed irrelevant evidence. I disagree. Given the seriousness of the allegations made against the Foundation, it was helpful to have the full context of the parties' relationship before the court. The allegations made by JLCF included an unfounded allegation that the Foundation had made a contract with JLCF and had reneged on it, and that the reason why the Foundation was refusing to make the distributions demanded by JLCF was that the Foundation is bankrupt.¹

[36] In February 2022, the Foundation wrote to JLCF advising that it intended to make an annual distribution from the Lebovic Fund. In response, JLCF wrote to the Foundation asking that it confirm that no distributions would be made pending a resolution of the action. JLCF complains that the Foundation did not respond to the letter, and that as a result, it was forced to bring the motion. The difficulty with that argument is that the motion was ill-advised in the first place, that JLCF continued to maintain its position, even after receiving the Foundation's factum which

¹ An application brought by JLCF for an order adjudging the Jewish Foundation to be bankrupt was subsequently dismissed, the court finding that it was an abuse of process and brought for a collateral purpose, namely, to press the Foundation to make the distributions which are in issue in this action: see *Bankruptcy of the Jewish Foundation of Greater Toronto*, 2022 ONSC 2120.

clearly set out the applicable law, and only conceded that it was not entitled to require the Foundation to make any particular disbursements from the Lebovic Fund when counsel was pressed by the court to respond to the Foundation's position.

[37] The representative of JLCF who was cross-examined was abusive and disparaging of counsel, refused to answer proper questions and took it upon himself to terminate the examination before counsel was finished.

[38] In these circumstances, I agree that the Jewish Foundation is entitled to its costs on a substantial indemnity basis.

[39] The costs claimed by the Foundation are substantial. However, JLCF ought reasonably to have expected to pay such costs, if unsuccessful in its attack on the Foundation. The Foundation is a charity that acts for the benefit of the community and should not be required to use charitable funds to pay for the defence of vexatious litigation. At the same time, proportionality must be considered. In all of the circumstances, the Foundation's costs will be fixed at \$135,000,

Disposition

[40] For the reasons given, JLCF's motion is dismissed, with costs fixed at \$135,000.

“S.T. Bale J.”

Released: July 11, 2022

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- and -

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Appeal of Greater Toronto and UJA Federation of
Greater Toronto

Defendants

REASONS FOR DECISION

S.T. Bale J.

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