

SUPREME COURT OF NOVA SCOTIA

Citation: *ALPC Housing Solutions Inc. v. Martin*, 2017 NSSC 49

Date: 20170315

Docket: Hfx. No. 446514

Registry: Halifax

Between:

ALPC Housing Solutions Inc.,
a body corporate

Applicant

v.

Kris Martin and Jacques Martin

Respondents

LIBRARY HEADING

Judge: The Honourable Justice C. Richard Coughlan

Heard: November 1, 2 and 3, 2016 in Halifax, Nova Scotia

Written Decision: March 15, 2017

Subject: Business associations – Directors and officers – Fiduciary duties.

Summary:

Bryony House is a transition house which provides shelter to women and their children in Halifax, Nova Scotia. In 2013 its Board of Directors was considering a capital campaign to raise funds to expand the facility. Through Maria Sancho, a former resident of Bryony House, ALPC Housing Solutions Inc., (ALPC) became involved in the project. Kris Martin, a director of ALPC, suggested her home be the main prize.

Since their marriage, Ms. Martin and her husband Jacques Martin built houses, sold them and moved. Jacques Martin, who held legal title to the home, sold it to Bryony House for \$1,075,000 plus adjustments. After the draw, Ms. Martin

negotiated with the winners to repurchase the home. One week after the draw, Mr. Martin repurchased the home from the winners for \$621,500.

Issue: Did Kris Martin breach her fiduciary duty to ALPC Housing Solutions Inc.?

Result: Kris Martin owed a fiduciary duty to ALPC, a company of which she was a director. Ms. Martin breached her fiduciary duty to ALPC when she and her husband purchased their former home from the lottery winners. The opportunity came to her as a result of her position as a director of ALPC. She did not make full disclosure about the purchase from the lottery winners to ALPC and obtain consent for the purchase.

Jacques Martin had knowledge of facts which would put a reasonable person on notice about the possible breach of fiduciary duty and is personally liable for his involvement in Kris Martin's breach of fiduciary duty.

Mr. and Ms. Martin are to account for the difference between the amount they sold their home for and amount for which they repurchased it and pay the amount owing, if any, to ALPC.

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Counsel: J. Walter Thompson, Q.C. for the Applicant
Jamie MacNeil and Allison Reid for the Respondents

Coughlan, J.

[1] Bryony House is a transition house which provides shelter to women and their children in Halifax, Nova Scotia. In 2013 its Board of Directors was considering a capital campaign to raise funds to expand the facility. Through Maria Sancho, a former resident of Bryony House, ALPC Housing Solutions Inc., (ALPC) became involved in the project. Kris Martin, a director of ALPC, suggested her home at 205 Willowhill Ridge, Waverley, Nova Scotia be the main prize.

[2] Since their marriage, Ms. Martin and her husband Jacques Martin built houses, sold them and moved. Jacques Martin, who held legal title to the home, sold it to Bryony House for \$1,075,000 plus adjustments. After the draw, Ms. Martin negotiated with the winners to repurchase the home. One week after the draw, Mr. Martin repurchased the home from the winners for \$621,500.

[3] ALPC alleges Ms. Martin breached her fiduciary duty to it and seeks a declaration Jacques Martin holds the property at 205 Willowhill Ridge as a constructive trustee for ALPC and an order for the sale of the property to liquidate the amount to be paid to ALPC; for an order for an accounting and payment to ALPC; an order for Jacques Martin to convey the property to ALPC; an order for disgorgement of the profits of Jacques Martin and Kris Martin and general damages.

[4] Mr. and Ms. Martin seek dismissal of the action and damages for slander of title.

[5] Maria Sancho and Kris Martin met through their children who attended the same school. Ms. Martin owns East Coast Paving and Tri-Force Contracting Limited. East Coast Paving is engaged in residential and commercial paving as well as snow plowing. Tri-Force is engaged in residential house construction.

[6] Ms. Sancho and Ms. Martin entered into a partnership ALPC Housing Solutions to build affordable housing for low and middle income earners. They registered the partnership with the Registrar of Joint Stock Companies on April 18, 2013 and signed a partnership agreement dated July 16, 2013.

[7] ALPC purchased land in Eastern Passage, Halifax Regional Municipality, Nova Scotia to be developed for low income housing. The development was called the "Cleopatra Project". Ms. Martin and Ms. Sancho personally borrowed \$200,000 from two individuals Murray Conrad and Mark Shantz. Mr. Conrad does work for East Coast Paving. Mr. Shantz is a friend of Mr. Conrad. The debts were not paid and eventually Mr. Conrad and Mr. Shantz acquired the Eastern Passage property.

[8] Halifax Transition House Association, a registered non-profit organization, operates Bryony House. In 2011 Ms. Sancho stayed at Bryony House for eleven weeks. Bryony House has a picnic for former residents. At the 2013 picnic, Laurie Ehler, the Executive Director of Bryony House, spoke to Ms. Sancho about a campaign to raise funds to expand the shelter. Ms. Sancho agreed to assist. Ms. Sancho told Ms. Ehler she had a business ALPC with Ms. Martin. A couple of weeks later Ms. Ehler spoke with Ms. Sancho and Ms. Martin about the cost benefit of various fundraising ideas. After a number of face to face meetings between them in late August 2013, Ms. Sancho and Ms. Martin suggested a lottery to Ms. Ehler. Ms. Martin suggested her home be the main prize. Title to the

property was in Jacques Martin's name. Ms. Martin told Ms. Ehler the lottery would be Bryony House's best bang for the buck.

[9] Ms. Sancho and Ms. Martin incorporated ALPC Housing Solutions Inc. on September 4, 2013. Ms. Sancho was president and Ms. Martin secretary treasurer. Ms. Martin was a director and secretary treasurer of ALPC from incorporation until she resigned on January 20, 2015.

[10] In October 2013 Ms. Ehler, Ms. Sancho and Ms. Martin attended a meeting of the Board of Directors of Bryony House to propose the lottery. Members of the Board had reservations about the lottery. The Board was told ALPC would market and operate the lottery and at the end provide the proceeds to the Society. The Board approved the lottery. ALPC and Bryony House signed a letter of intent concerning the lottery. The license for the lottery was in the name of the Halifax Transition House Association.

[11] Ms. Martin and her husband moved out of the house. Ticket sales began in January 2014. Ms. Ehler was at the house every weekend selling tickets. Ms. Martin was also at the house showing it and selling tickets. Both Ms. Ehler and Ms. Sancho knew Ms. Martin was telling people she was prepared to repurchase the house from the lottery winner.

[12] Initially, Ms. Martin provided the funds for lottery expenses. In early February 2014, Ms. Martin told Ms. Ehler that she had spent her money. Bryony House had a bank account for the lottery. Cheques and some of the cash went into the account. Bryony House paid for some lottery expenses from the bank account.

[13] During the course of the lottery Ms. Martin provided funds which were used to purchase furniture to furnish the house at a cost of \$75,237.85 and to pay Ms.

Sancho's home rent, car rental and cell phone. Ms. Martin and her husband also paid the cost of maintaining the home during the lottery, including utilities, insurance and mortgage.

[14] Bryony House received two or three appraisals of the Martin house and entered into an Agreement of Purchase and Sale with Jacques Martin dated November 26, 2013 to purchase the house for \$1,075,000.

[15] Ticket sales were slow and Bryony House requested an extension of the date of the draw which the lottery commission granted. The original Agreement of Purchase and Sale expired and Halifax Transition House Association and Mr. Martin entered into another Agreement of Purchase and Sale in November 2014 with the same purchase price of \$1,075,000.

[16] The lottery draw took place November 14, 2014. Ms. Martin called the winner on a speaker phone. The young woman was excited. Subsequently, Ms. Martin met the winners, Jonathan Robert Gould and Erin Trevors, a young couple who came to the house with Mr. Gould's stepmother and Ms. Trevor's sister. Another day the winners visited with Mr. Gould's father and others. The father asked Ms. Martin if she was interested in repurchasing the house. The father said they would discuss selling the house to the Martins. Originally, the winners offered to sell the house to Mr. and Ms. Martin for \$800,000. Ms. Martin, rejected the offer and they agreed on a price of \$601,000. Later after further discussions, Ms. Martin offered to pay \$621,500 for the house which was accepted. Ms. Martin contacted her lawyer on November 17, 2014 and on November 21, 2014, Jonathan Robert Gould and Erin Trevors conveyed the property to Jacques Martin.

[17] During the course of the lottery the relationship between Ms. Sancho and Ms. Ehler deteriorated. Ms. Ehler was concerned about ALPC's use of social media.

ALPC was begging people to buy tickets. Ms. Ehler could no longer work with Ms. Sancho. She felt harassed by Ms. Sancho. Ms. Ehler and the Bryony Board of Directors discussed either firing ALPC or terminating the lottery. The relationship between Ms. Ehler and ALPC was getting bad. Ms. Ehler brought another person, Shelley Robinson, to the meetings as a witness. Ms. Ehler testified for the most part conversations were professional, but there were times Ms. Sancho would yell and scream.

[18] Toward the end of the lottery the relationship between Ms. Martin and Ms. Sancho was also deteriorating. They argued and eventually stopped speaking to each other.

[19] A company director is in a fiduciary relationship to the company of which he or she is a director.

[20] In giving the Court's judgment in **Canadian Aero Service Limited v. O'Malley** [1973] SCJ No. 97, Laskin J., as he then was, discussed the fiduciary duties of directors or senior officers of a company stating at page 606:

Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position

with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

[21] The obligation of a fiduciary not to allow a conflict of his or her duty with his or her own interests is known as the "corporate opportunity doctrine". Determining liability under the doctrine requires a contextual analysis.

[22] In **Canadian Aero Service Limited v. O'Malley**, supra, Laskin J. set out how possible liability under the corporate opportunity doctrine should be analyzed stating at page 620:

The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

[23] In addressing the proper calculation of damages, Laskin J. reiterated liability on the part of the fiduciary does not depend on proof that, but for their actions, the company would have obtained the benefit in question stating at page 621 :

Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum.

[24] The Manitoba Court of Appeal addressed how the analysis should be undertaken in **Matic v. Waldner** 2016 MBCA 60 where Pfuetzner J.A., in giving the Court's judgment stated at paras. 152-153:

152. In summary, determining whether a director has breached his or her fiduciary duty under the corporate opportunity doctrine requires an extensive contextual analysis.

153. All relevant factors must be taken into account, including: the maturity of the opportunity; whether it was actively pursued by the corporation; whether the corporation was capable of taking advantage of the opportunity; whether the opportunity was in the corporation's line of business or a related business; how the opportunity arose or came to the attention of the director; whether the other directors of the corporation had knowledge of the director's pursuit of the opportunity; and whether the other directors gave their fully informed consent to the director's pursuit of the opportunity. The overall goal of the analysis is to determine whether the opportunity fairly belonged to the corporation in the circumstances.

[25] Leave to appeal to the Supreme Court of Canada was denied.

[26] Kris Martin was at all material times a director of ALPC Housing Solutions Inc.. As a director Ms. Martin owed a fiduciary duty to ALPC of loyalty, good faith, honesty and avoidance of conflict of duty and self-interest.

[27] The business opportunity in issue is the purchase of the real property at 205 Willowhill Ridge, Waverley, Nova Scotia which was the main prize of the Bryony House lottery.

[28] I find the purchase of the real property was a mature and immediately available opportunity. The lottery draw took place November 14, 2014 and the sale of the property by the winners, Jonathan Robert Gould and Erin Trevors, to Jacques Martin took place one week later on November 21, 2014.

[29] ALPC was not actively pursuing the purchase of the Willowhill Ridge property. In fact, ALPC was unaware the winners were interested in selling the property. Ms. Sancho knew Ms. Martin was telling people who purchased lottery tickets that she, Ms. Martin, was willing to repurchase the property. However, ALPC was not pursuing the possibility of purchasing the property from the winners.

[30] The question arises whether ALPC was capable of purchasing the property. ALPC did not have enough money to purchase the property. It had obtained funds from private investors to finance the purchase of the property for its project in Eastern Passage. Ms. Martin supplied the money used by ALPC to pay the expenses of the lottery. However, it is unknown whether ALPC could have arranged financing to allow for the purchase of the Willowhill Ridge property as it had to purchase the land in Eastern Passage. After all the property was purchased for \$621,500 far less than the purchase price paid to the Martins by Bryony House which was based on two or three appraisals. It cannot be said that ALPC did not have the capacity to take advantage of the opportunity.

[31] Even if ALPC could not have taken advantage of the opportunity that does not excuse the director. In **Felker v. Cunningham** [2000] O.J. No. 3177 Borins J.A., in giving the Court of Appeal's judgment stated at para. 14:

... Moreover, as the fiduciary duty is based on trust, loyalty and confidence, and not economic cost to the employer, fiduciary employees are not relieved of their fiduciary duties if the business opportunity sought to further their own ends is one that the employer would have been unwilling or incapable of exploiting: *Re Berkey Photo (Canada) Ltd. v. Ohlig* (1983), 43 O.R. (2d) 518 at 530-531 (H.C.J.).

[32] ALPC purchased land in Eastern Passage upon which it wished to develop affordable housing. ALPC was in the real estate business. I find the purchase of the Willowhill Ridge property for resale was within its line of business.

[33] The opportunity for Ms. Martin came to Ms. Martin and her husband as a result of Ms. Martin's role as a director of ALPC. While a director she proposed her home be the lottery's grand prize selling the home for \$1 plus adjustments. In the course of selling tickets on behalf of ALPC, Ms. Martin took the opportunity to tell ticket buyers she was willing to repurchase the property. Ms. Martin attended the ticket draw and went through the residence with the lottery winners as a director of

ALPC. Ms. Martin contends she showed the residence as the homeowner. However, she had given up any interest in the property when she and her husband sold it for \$1 plus adjustments. Mr. and Ms. Martin were well compensated for their interest in the property. I find the business opportunity came to Ms. Martin while conducting business for ALPC.

[34] While addressing the extent of the fiduciary duty of a senior employee, the Ontario Court of Appeal dealt with the type of disclosure required to be made in **Felker v. Cunningham**, supra, where Borins J.A., stated at paras. 16-17:

... Moreover, Felker's duty of good faith required that he be open, honest and forthright with Electro Source and make full disclosure of all material facts that, as his employer, it would be entitled to know to successfully operate its business.

17. In this regard, Felker was required to make full disclosure to Electro Source that he was engaged in preparing a presentation to Microchip, with the intention of acquiring Microchip as a client for his fledgling company and, thereafter, carrying on a business in competition with Electro Source. In my view, Felker was in breach of his fiduciary duties when he failed to do so. The only way that Felker could have pursued the Microchip opportunity while an employee of Electro Source without being in breach of his fiduciary duties, would have been to make full disclosure to Electro Source and obtain its consent to do so.

[35] Here while Ms. Sancho, the other director of ALPC, knew Ms. Martin was telling ticket buyers that she was willing to repurchase the property from the winner, Ms. Sancho was not aware the winners were discussing selling the property to Ms. Martin nor the details of the proposed sale. Ms. Martin when testifying confirmed Ms. Sancho did not know about Ms. Martin's discussions with the lottery winners and had no involvement in the negotiations between the lottery winners and Ms. Martin. I find Ms. Martin did not make full disclosure to ALPC of her discussions with the lottery winners or the proposed purchase of the Willowhill Ridge property and did not obtain consent from ALPC to purchase the property.

[36] Considering all of the evidence I find Kris Martin breached her fiduciary duty to ALPC Housing Solutions Inc..

[37] Is Jacques Martin liable to ALPC Housing Solutions Inc.? The real property in question was conveyed to Mr. Martin by deed dated November 21, 2014 from Jonathan Robert Gould and Erin Trevors. Mr. Martin was not a director of ALPC and did not owe a fiduciary duty to ALPC. However, a stranger to a trust who receives property subject to a trust may be personally liable for involvement in a breach of trust or fiduciary obligation.

[38] The test for personal liability of a third party for knowing receipt of trust property was set out in **Citadel General Insurance Co. v. Lloyds Bank Canada** [1997] 3 S.C.R. 805 in which LaForest J. in giving the majority judgment stated at para. 49:

More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

[39] Jacques Martin is married to Kris Martin. Mr. Martin was a mechanical engineer in the military. He works for East Coast Paving a business Kris Martin testified she owns. In giving his evidence, Mr. Martin testified he had a business called East Coast Paving. Title to the property at 205 Willowhill Ridge was in his name. Mr. Martin agreed to sell the property to Bryony House for \$1,075,000.

[40] Mr. Martin planned to build a new home on another lot he owned in the area. Mr. and Ms. Martin discussed buying 205 Willowhill Ridge back from the lottery winner. Mr. Martin had the final word on the amount they would pay the winners for the property. He told Ms. Martin he would not pay more than \$620,000 which was the cost of building a home on the other lot he owned. Since

their marriage Mr. and Ms. Martin built houses and then sold them and moved. I find Mr. Martin was aware of all details of the sale of 205 Willowhill Ridge to Bryony House and the purchase of the same property from the lottery winners.

[41] The real property in question 205 Willowhill Ridge, Waverley was conveyed to Mr. Martin by deed dated May 12, 2009. The property was occupied by Mr. Martin and his wife as their matrimonial home. Jacques Martin and Kris Martin entered into the agreement of Purchase and Sale to sell the property to Halifax Transition House Association for \$1,075,000.

[42] Mr. Martin sold the property to the Association for \$1,075,000 plus adjustments. Mr. Martin conveyed the property to Jonathan Robert Gould and Erin Trevors as directed by the Association. Then Mr. Gould and Ms. Trevors conveyed 205 Willowhill Ridge to Mr. Martin by deed dated November 21, 2014, for a purchase price of \$621,500, which was substantially less than he had sold it for earlier that month.

[43] Mr. Martin knew his wife was a director of ALPC and of her involvement in the lottery. He knew he sold the Willowhill Ridge property for substantially more than he purchased it for approximately a week later. I find that Jacques Martin had knowledge of facts which would put a reasonable person on inquiry and he failed to inquire as to the possible misapplication of the trust property and is personally liable for his involvement in Kris Martin's breach of her fiduciary duty.

[44] The issue remains as to the appropriate relief against Kris Martin and Jacques Martin in connection with Kris Martin's breach of fiduciary duty. They are in the words of Laskin, J. in **Canadian Aero Service Ltd. v. O'Malley**, supra, "to answer for their default according to their gain".

[45] The difference between the amount for which 205 Willowhill Ridge was sold for the lottery and the amount paid to repurchase the property less appropriate amounts paid by Ms. or Mr. Martin toward debts of ALPC, expenses properly incurred in connection with the lottery or Maria Sancho is to be paid to ALPC. Kris Martin and/or Jacques Martin are required to account for the difference between the amount for which 205 Willowhill Ridge was sold for the lottery and the amount paid to repurchase the property, together with a detailed statement of the amounts they claim should be deducted from the amount to be paid to ALPC, which accounting is to be provided by April 20, 2017. ALPC is to notify the court by May 12, 2017 if it agrees with or disputes the accounting provided by Mr. and Ms. Martin. If there is a dispute as to the accounting a hearing will be scheduled to determine the amount, if any, to be paid to ALPC.

[46] I will also hear the parties as to costs if they are unable to agree on costs.

Richard Coughlan