

Innovative Gifting Inc. v. House of the Good Shepherd

**RE: Innovative Gifting Inc., and
House of the Good Shepherd et al.**

[2010] O.J. No. 2210

Court File Nos. CV-09-380756, CV-09-380758,

CV-09-380760, CV-09-380762

Ontario Superior Court of Justice

L.B. Roberts J.

Heard: May 14, 2010.
Judgment: May 18, 2010.

(32 paras.)

Statutes, Regulations and Rules Cited:

Income Tax Act, R.S.O. 1990, c. I.2, s. 149.1, s. 149.1(2)(b), s. 168(1)(d)

Counsel:

Christopher P. Goldson and Carolyn Chambers, for the Applicant.

Adam J. Stephens, for the Respondents.

ENDORSEMENT

L.B. ROBERTS J.:--

Nature of the Proceedings and Parties:

1 The applicant seeks to enforce its written standard form of agreement and obtain payment of its fees for services rendered to the respondents in the four applications that were heard together before me. The relevant facts are not in dispute and are common to all four applications. This Endorsement disposes of all four applications.

2 The applicant is in the business of fund-raising for charitable organizations through its network of philanthropists and donors. Specifically, the applicant promises to secure donations of cash and shares for the charity with which it contracts in exchange for a fixed percentage of the donations provided to those charities.

3 The respondents are charitable organizations and their senior officers. The applicant secured cash donations for the respondent charities and, with the exception of the House of the Good Shepherd respondent, was paid a portion of its invoiced fees by the other respondents. Agape Life Center Church and Ministries, Greater Works Ministry and Furry World Rescue Mission have brought counter-applications to retrieve the monies paid as fees to the applicant.

4 The principal and common complaint of all the respondents is that the applicant made material and fraudulent misrepresentations to them about the nature of the donations, the legality of its gift-giving program, and the fees to be charged. In particular, the evidence filed by the respondents, to which the applicant did not file any reply evidence, and which is not disputed by the evidence filed by the applicant, can be summarized as follows:

- i. The applicant represented orally and in writing that it would raise donations for the charities in the form of cash and shares and that the shares would have a value of at least four times the value of the cash that was raised.
- ii. Further, on its website, and in its written and oral communications with the respondents, the applicant advertised that a non-resident Swiss philanthropist would match a Canadian donor's cash gift to certain recognized charities in the form of a gift of shares to the donor, which shares "would approximate 6 to 8 times the cash donated by the donor". If the donor gave the shares to the recommended charity, that donor would receive a tax credit on the aggregate amount of cash and fair market value of the donated shares.
- iii. Those representations were false: the shares that were donated were worthless; the applicant failed to deliver all of the promised shares to the respondents; the donors were not entitled to the promised tax credits; and the applicant requested that the respondents provide false tax receipts to donors for the value of shares that were never donated.
- iv. The applicant represented on its website and orally and in writing to the respondents that its fundraising initiatives and agreements were legal and in compliance with Canadian tax laws; however, the appli-

cant's invoices for 90% of the value of the cash donations received were in contravention of sections 149.1(2)(b) and 168(1)(d) of the Income Tax Act (Canada) and well in excess of the respondents' disbursement quota, thereby threatening the respondents' charitable tax status.

5 According to the respondents' evidence, the legitimacy of the applicant's activities was also called into question by the Ontario Securities Commission: as evidence of "one or more potential violations of Ontario securities laws", the Commission seized share certificates that supposedly had been made out to the respondent charities and issued a cease trading order against the applicant on February 20, 2009, extended to November 30, 2009, and which counsel for the applicant advised is still in effect.¹

Analysis:

i. Interpretation of the Agreements:

6 The applicant asserts that its agreements can and should be enforced and that the evidence submitted by the respondents is extraneous and should be ignored.²

7 The identical paragraph respecting the payment of the applicant's fees appears in all four agreements with the respondents, as follows:

"IGI shall present prospective donors to us, and if IGI retains financial planners or other third parties for this service, you shall charge us a cash sum equal to eighteen per cent (18%) (Including GST) of the aggregate donated amount (including cash and the securities, if any) by each donor. The aggregate is based on \$1 in cash donation and \$4 in the public market quoted value of each share donated. If shares are not donated by the donor you shall charge us an amount equal to 90% of the cash donation."

8 According to the terms of the preceding paragraph, it is only if the applicant retained "financial planners or other third parties" to "present prospective donors" that the respondents were obligated to pay to the applicant as its fees a portion of the donations as stipulated in that paragraph. There is no evidence that the applicant retained financial planners or other third parties for any of the donations made to the respondents. In consequence, the respondents' obligations to pay in accordance with the fee structure outlined in that paragraph did not arise.

9 Except in the agreement with Greater Works Ministry, the agreements with the other respondents contain additional fee provisions that appear immediately after the above cited paragraph, which are reproduced below:

"(a) 18% of the aggregate cash, gift received by you and shares to be donated to you by donor if the donated shares' value is to equal approx. four (4) times the cash gifted to you by the Donor; or

- (b) 12.9% of the aggregate cash gift received by you and shares to be donated to you by each Donor if the donated shares' value is to equal approx. six (6) times the cash gifted to you by the Donor, or
- (c) 10% of the aggregate cash gift received by you and shares to be donated to you by each Donor if the donated shares' value is to equal approx. eight (8) times the cash gifted to you by the Donor."

10 In my view, the applicant's form of agreement is vague, uncertain and filled with inherent inconsistencies, as follows:

- i. Although the other paragraphs of the agreements are written as if they are addressed by the respondent to the applicant, that address is reversed in the above subparagraphs: "cash gift received by you and shares to be donated to you"; the "you" refers to the applicant and not to the respondents. As a result, the three subparagraphs make no sense.
- ii. The three subparagraphs designate a certain percentage of the donations without specifying that it is to be paid as a fee to the applicant. Again, on a plain reading, the provisions have no meaning.
- iii. Finally, even if the three subparagraphs can be read to mean payment of fees to the applicant, they are fundamentally inconsistent with the earlier paragraph of the agreement, cited above, in that the fee percentages differ from and are inconsistent with the fee designations of the earlier paragraph: namely, 18% versus 18%, 12.9% and 10%; and the term that 90% of the cash donations shall be paid to the applicant if shares are not donated is not repeated in the three subparagraphs.

11 In consequence, the above noted fee provisions of the applicant's agreements with the respondents cannot be enforced.

ii. Enforceability of the Agreements:

12 While the specific fee provisions in the agreements cannot be enforced, the question remains as to whether the applicant is nevertheless entitled to be paid something for the services that it rendered to secure donations for the respondents.

13 Although the respondents do not dispute that the applicant did secure donations that the respondents received and that they expected to pay between 10% to 18% of those donations as a fee to the applicant, they contend that the agreements should be rescinded or declared void or voidable and that the applicant should be deprived of any fees because of its fraudulent acts and scheme which are against public policy.

14 The applicant submits that a trial is required with respect to the respondents' allegations.

15 With respect to the state of the evidence, the respondents' affidavits are clear and unambiguous. They set out in full detail the particulars of the applicant's scheme and misrepresentations that, if unchallenged, would entitle respondents to the relief that they are seeking. As noted above, the respondents' evidence is undisputed; the applicant's application materials do not deal with the respondents' allegations and the applicant has not filed any affidavit material in reply to the respondents' affidavits nor did the applicant conduct any cross-examinations.

16 In my view, there are no issues requiring a trial.

a) Rescission of the Agreements:

17 I conclude that the remedy or rescission is available to the respondents for the following reasons³:

- i) The uncontested evidence establishes that the applicant made material misrepresentations to the respondents concerning the nature and legality of its gift-giving scheme, including the form and amount of the donations to be made and the amount of its fees, which were clearly false.
- ii) The evidence establishes that the applicant made those misrepresentations either knowing of their falsity or recklessly, namely, with flagrant disregard or indifference to their truth or consequences: although advertised as legitimate, the applicant's scheme was clearly in contravention of the Canadian Income Tax Act and put the respondent charities at risk of losing their charitable status; the allegedly valuable shares were worthless or never donated; and the applicant insisted that the respondent charities provide false tax receipts to donors for shares that were never gifted.
- iii) As evidenced by the applicant's invoices, the aim of the applicant's scheme was to claw back to itself the value of the cash donations that were promised and made to the respondent charities on the misrepresentation that shares would also be donated and that the applicant's fee would be taken from the aggregate value of the cash and shares. As the shares were not donated, the applicant's invoices comprised almost the entirety of the cash donations.
- iv) Finally, the agreements were not fully executed by the applicant: the applicant failed to provide the donated shares. According to the respondents' uncontested evidence, either the shares were never donated or the share certificates were seized by the Ontario Securities Commission. The donation of shares was a fundamental part of the agreements with the respondents and the foundation of the applicant's fee structure, representing over half of the value of the donations for which the applicant invoiced the res-

pondents. The applicant's failure to perform the agreements disentitles it to any fees.

18 As the agreements were not fully performed, it is not difficult to restore the parties to their original positions and to reimburse the respondents for any fees paid to the applicant. It is not necessary that the respondents return the cash donations received to the donors because those donations were legitimately made to and received by the respondents and the respondents have provided tax receipts to those donors.

b) Agreements are void or voidable as against public policy:

19 I also agree with the respondents' submissions that the agreements are in any event void or voidable because they are contrary to public policy.

20 The applicant's agreements with the respondents that, according to the applicant, require the respondents to pay to the applicant 90% of the monies raised for charitable purposes, are not merely improvident but void or voidable because they violate section 149.1 of the Income Tax Act of Canada, which section requires a registered charity to disburse for charitable purposes at least 80% of the total amount for which official tax receipts were issued by it in the year previous. Fund-raising expenses are not considered to be charitable activities.⁴

21 The respondents' uncontested evidence is that 90% of the cash donations demanded by the applicant well exceed the 20% allowed for their administrative expenses and that, had they understood that the promised shares would not be donated and that they would be required to pay 90% of the cash donations to the applicant, they never would have entered into the agreements and put their charitable tax status at risk.

22 The agreements are also repugnant on the ground that they are against the public interest because monies raised for charitable purposes do not go to the intended beneficiaries. The applicant does not disclose its fees on its website. A reasonable person would expect that there would be some administrative cost associated with charitable fund-raising and that the cost would be proportionate to the amount of money raised for charitable purposes. The applicant's demanded fees of 90% of the amounts raised cannot be accepted as reasonable.⁵

23 As a result, I find that the agreements in this case are voidable by the respondents as being contrary to public policy.

c) No Profits from Fraud:

24 The respondents also ask that the applicant be deprived of any fees on the ground that the applicant should not receive any profits from its fraud.

25 As I have already found, the applicant's scheme of promising to secure donations of allegedly valuable shares, which were worthless or never provided, and requiring fictitious tax receipts for shares that were never donated, is clearly fraudulent. The cash donations received by the respondents are part and parcel of this fraudulent scheme.

26 To allow the applicant any fees would be contrary to the well-established principle that a fraudulent wrongdoer should be deprived of the profits of its fraud.⁶ In consequence, I hold that no fees are payable to the applicant and that any fees paid to the applicant should be returned to the respondents.

iii. Claims against the Individual Respondents:

27 I also conclude that there is no basis for any claim against the individual respondents. The applicant's evidence does not establish any wrongdoing by or any independent cause of action against those respondents.

28 It appears from the applicant's evidence and the respondents' evidence that the individual respondents were acting entirely within the scope of their employment as the respondent charities' senior officers in their dealings with the applicant.

29 As a result, the applications should be dismissed against them.

Conclusion:

30 For the above reasons, the applications are dismissed and the counter-applications are allowed.

31 The applicant shall return forthwith to the respondents, Agape Life Center Church and Ministries, Greater Works Ministry and Furry World Rescue Mission, the fees that those respondents paid to the applicant, as quantified in their respective affidavit materials, as follows:

- i. Agape Life Center Church and Ministries: \$162,664.99;
- ii. Greater Works Ministry: \$193,450.00;
- iii. Furry World Rescue Mission: \$787,615.00.

Costs:

32 At the conclusion of the hearing, counsel for the parties agreed on the disposition of costs and that, if the respondents were successful, they were entitled to costs on a partial indemnity scale and I so order, as follows:

- i. Agape Life Center Church and Ministries: \$3,576.45;
- ii. House of the Good Shepherd: \$3,007.95;
- iii. Greater Works Ministry: \$3,218.50;
- iv. Furry World Rescue Mission: \$4,515.17;
- v. Counsel fee for the attendance in the amount of \$2,500.00;
- vi. Applicable GST on the above amounts.

L.B. ROBERTS J.

1 See for example Exhibits I" and "J" to the affidavit of Hilary Salmon, sworn September 30, 2009 and filed on behalf of Greater Works Ministry.

2 At the beginning of the hearing of its applications, the applicant abandoned its request for an interlocutory injunction, Mareva injunction and Anton Pillar order.

3 *Machias v. Mr. Submarine Ltd.*, [2002] O.J. No. 1261, 24 B.L.R. (3d) 228 (Sup. Ct. J.), at paras. 137 to 139, 141, 146, 162, 166 and 174

4 *Ontario (Public Guardian and Trustee) v. AIDS Society for Children (Ontario)*, [2001] O.J. No. 2170, 39 E.T.R. (2d) 96 (Sup. Ct. J.), at para. 62

5 *Ibid.*, paras. 53 to 56

6 *Han v. Cho*, [2009] B.C.J. No. 672, 2009 CarswellBC 851 (B.C.S.C.), at paras. 98 and 99