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MUCH ADO

Some cases can be described as "much ado about nothing" or "It is a tale ... full of sound and fury, signifying nothing." The case of M. McGrath Canada Ltd. v. Gibson LLP [2008] O.J. 1542 (SCJ) might be similarly described, except for the precedent that it sets.

The Deal

A law firm acted, probably for a franchisee, to obtain a \$53,000 judgment against the now infamous "3 for 1 Pizza and Wings". The law firm then contracted with the plaintiff, McGrath, to collect the judgment.

McGrath did a wonderful job. It received a cheque for \$58,000 from Aijon Consulting to pay the judgment. It then paid \$44,000 to the law firm, on behalf of the franchisee, and presumably applied the balance to its fees for the great work it performed.

Everyone was happy, until the bank informed McGrath that the cheque from Aijon was a previously valid cheque that had been altered and re-issued and was a forgery. The bank therefore withdrew \$58,000 from McGrath's account. McGrath immediately notified the law firm, but was too late. The law firm had already paid \$36,000 to the franchisee and had applied \$8,000 to its fees in obtaining the judgment.

McGrath was not impressed with the law firm's response and sued the law firm for the return of the \$44,000. For whatever reason, it did not join

the franchisee. At the start of trial, McGrath reduced its claim against the law firm to \$8,000 – and, for this vast sum, the parties were embroiled in a one-day trial.

Unjust Enrichment

McGrath claimed that the law firm was unjustly enriched; it obtained a benefit to McGrath's detriment for no juristic reason. The judge dealt with this claim in two paragraphs. He held that since the franchisee owed the fees that the law firm properly used to pay its account, there was a juristic reason for the law firm retaining the money.

We feel, admittedly without the benefit of research, that this misses the point. The question should not have been whether, as between the law firm and the franchisee, there was a juristic reason for the law firm to keep the money. The question is whether, as between McGrath and the franchisee, the franchisee ought to have been allowed to keep the money. If the franchisee could not keep the money, then, we submit, the law firm, who took the money in his stead, ought not to have been allowed to keep the money.

As far as we can see, there was no juristic reason for the franchisee to retain the money. McGrath paid the money to the law firm only because it had collected the money in trust for the franchisee. As part of that trust, it could retain its own fees and then had to remit the money to the beneficiary of that trust, or to the law firm as the agent of that beneficiary. Once the franchisee knew that the money it

received was no longer trust money that was due, there was no longer a juristic reason for the franchisee to have received them.

Accordingly, not only should the franchisee have returned the money, the law firm also should have returned it.

Mistake

McGrath also claimed that the law firm should have returned the money because it was paid under a mistake of fact. The judge noted that the mistake must not only be as to a fact affecting the liability to pay; there must also have been a mistake between the party paying and the party receiving the money. The judge then held that there was no mistake by McGrath in the payment to the law firm. How he could say this is beyond us.

The judge also held that the mistake was not as between McGrath and the law firm and that the law firm had "*the legal and equitable and the moral right to remove the moneys in its trust account*" to pay its fees. Again, without the benefit of further research, we feel that the judge mistook the law firm's right to apply money towards its fees, with its duties, as agent of the franchisee, to return money that, when the truth came out, should not have been paid to the franchisee at all.

Costs

The judge then awarded costs of \$7,000 to the law firm. Normally, an \$8,000 claim, which should have been heard in small claims court, would not attract \$7,000 in costs, but McGrath should have transferred

the matter into small claims court once it realised that the law firm could not possibly be liable for the money that it had paid to the franchisee and for which it had received no benefit.

Application

Assume that a lawyer accepts a cheque and pays some or all of the money to his or her client. Before his client disburses that money (i.e. the money is still sitting in the client's bank account), the cheque is returned due to insufficient funds. Applying the McGrath case, the lawyer has no recourse against the client for the return of the money. This, we suggest, is unjust.

INTEMPERANCE

Much has been written about the principles of civility; the duties of a lawyer to the court and to other counsel; and the duties of a judge and opposing counsel to assist an unrepresented litigant during the course of an action and trial. Little has been written about the duties of an unrepresented litigant in his or her dealings with opposing counsel and the court – until Ranonicich v. Reamy et al [2008] O.J. 2210 (MC).

Nasty

The plaintiff issued a rambling statement of claim that, we gather, was so badly drafted it was difficult to determine what he really wanted. He alleged fraud and other nasty things against the defendant stockbrokers. The lawyer for the brokers served a notice of intent to defend and wrote to the plaintiff noting that he was investigating the matter and requesting that the plaintiff provide 14 days' notice before taking any steps against

the brokers. This was not a wise course of action because the plaintiff ignored the letter and, as soon as he was able, noted the brokers in default for failure to file a statement of defence. The brokers moved to set aside the noting of default and for other relief.

The Master stated, *"The plaintiff now seems to be confusing the defendants and their legal counsel. His letters to counsel have grown more and more intemperate over time. He has referred to McNish in correspondence as an idiot, brain dead, a liar and worse. He has threatened to report him to the Law Society.... He has accused him of withholding documents that he is not yet bound to produce ... and accused him of complicity in the alleged fraud. ... In short, he appears to be treating McNish as yet another victim of his outrage, none of which has been substantiated before the courts though this is*

the fourth action he has started with respect to these events."

She then commented,

"If the plaintiff were counsel, he could face Law Society sanction for his conduct. Further, members of the Law Society of Upper Canada are informally bound by a code of civility when they deal with one another and with self-represented litigants. ...I see no reason why self-represented litigants should not be expected to conduct themselves in a similar manner when dealing with counsel."

As to the noting in default, she stated: *"In view of the notice of intent having been served, it was improper for the plaintiff to take this step without at least alerting McCarthy's that it was their intention to do so."*

Accordingly, she set aside the noting in default, adjourned the rest of the brokers' motion, and awarded costs against the plaintiff of \$800.00.

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