# COURT OF APPEAL FOR ONTARIO

CITATION: Boughner v. Greyhawk Equity Partners Limited Partnership (Millenium), 2013 ONCA 26
DATE: 20130118
DOCKET: C55900

MacPherson, Cronk and Lauwers JJ.A.

BETWEEN

James Boughner, Richard Gibson and Jack Waldock

Plaintiffs (Appellant) (Respondent)

and

Greyhawk Equity Partners Limited Partnership (Millenium), Greyhawk Equity Partners Ltd., Bedford and Associates Research Group Inc., Terrence M. Bedford and Joanne Harris-Bedford

Defendants

John J. Pirie and David Gadsden, for the appellants, Jack Waldock and the Waldock Group

Orestes Pasparakis and Alex Dimson, for the respondent, Richard Gibson

Paul Michell and Daniel Z. Naymark, for the receiver, A. Farber and Partners Inc.

Heard: January 10, 2013

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated July 16, 2012.

**By the Court**:

[1] The appellant Jack Waldock and the respondent Richard Gibson were both defrauded in an investment scheme called the Greyhawk Fund created and administered by Terrence Bedford and Joanne Harris-Bedford.

[2] Once the fraud was discovered, the Greyhawk Fund quickly unravelled. On February 8, 2011, Morawetz J. of the Superior Court of Justice ordered that A. Farber and Partners Inc. be appointed as Receiver over Greyhawk and related entities. There is money left in Greyhawk, but its value is far below the amounts various people, including Waldock and Gibson, invested in it.

[3] The Receiver identified three methods of allocating the remaining funds to the remaining investors:

(1) *pro rata allocation* – based on the size of each investor's contributions to the Greyhawk Fund. Under this method, each investor's distribution would be based on a percentage of the fund equal to the investor's total claim;

(2) *fund unit allocation* – based on what each investor's unit value in Greyhawk ought to have been in light of actual fund performance. Under this method, each investor's distribution would be based on the performance of the fund during the period that the investor's money was invested; and

(3) *last in, first out* (LIFO) – based on the chronological order of contributions. Under this method, the last investors in the fund would be the first to receive distributions of the remaining funds.

The Receiver took no position on which of these three distribution methods should be employed.

[4] Waldock and Gibson agreed that the LIFO method should not be employed. Unfortunately, they could not agree on which of the other two methods was appropriate. Waldock supports the original contributions method; Gibson prefers the fund allocation method, which he says reflects a modified application of the

lowest intermediate balance rule ("LIBR"), also based on the relative value of each investor's investment in the fund at the time the funds were comingled.

[5] Waldock brought a motion before Morawetz J. to determine the question of allocation method. In reasons released on July 12, 2012, the motion judge accepted Gibson's position, including his claim that the fund unit allocation method as described by the Receiver was a form of LIBR, and ordered that "distributions be made pursuant to the fund unit allocation method (or *pro rata* on the basis of tracing, or LIBR)."

[6] Waldock appeals on two grounds.

[7] First, the appellant submits that the motion judge erred in finding that *pro rata* sharing "on the basis of tracing or LIBR" is the "general rule" that ought to be applied in this case unless it is practically impossible to do so.

[8] We do not accept this submission. In a very careful analysis, the motion judge discussed three leading decisions of this court, *Ontario Securities Commission v. Greymac Credit Corp.* (1986), 55 O.R. (2d) 673, aff'd 65 O.R. (2d) 479 (SCC); *Law Society of Upper Canada v. Toronto-Dominion Bank* (1998), 42 O.R. (3d) 257; and *Graphicshoppe Ltd. (Re)*, [2005] OJ No. 5184. The motion judge concluded:

> Thus, it seems to me that although the Court of Appeal did not, on the facts, apply LIBR in *Law Society*, it was accepted by Moldaver J.A. in *Graphicshoppe*. Thus, by virtue of the Supreme Court of Canada's affirmation of

> *Greymac* and the more recent decision in *Graphicshoppe*, LIBR is an available mechanism to distribute comingled funds.
>
> The controlling authority, *Greymac*, directs, in my view, that *pro rata* sharing based on tracing (LIBR) is the "general rule" that ought to be applied in this case unless it is practically impossible to do so.

[9] We agree with this analysis. The general rule, and the preferred allocation method, in cases like this is, per *Greymac*, the LIBR method. In some cases, as in *Law Society*, this method will not be appropriate because, as Blair J.A. (*ad hoc*) said at para. 33, "it is manifestly more complicated and more difficult to apply." Thus the law in Ontario is as expressed by Morden J.A. in *Greymac* at para. 46:

> While it might, possibly, be appropriate in some circumstances to recognize claims on the basis of a claimant's original contribution... I do not think that it is appropriate where the contributions to the mixed fund can be simply traced, as in the present case.

[10] Second, the appellant contends that the motion judge erred by equating the fund unit allocation calculations conducted by the Receiver with the tracing necessary to properly apply a LIBR calculation or a *pro rata* sharing on the basis of tracing and fund performance.

[11] We disagree. In our view, this is a factual issue. LIBR involves the recalculation of the history of an investor's contributions, using the actual values of the contributions at the time of comingling. The record indicates, and the

motion judge accepted, that this is what the Receiver's fund unit allocation calculations sought to do. Moreover, the motion judge concluded: "I accept the evidence of the Receiver that all steps have been taken to establish that LIBR calculations can be made." We see nothing in the record or in the appellant's submissions demonstrating that the motion judge's conclusions on this issue are palpable and overriding errors.

[12] The appeal is dismissed. The respondent is entitled to its costs of the appeal fixed at $ 20,000, inclusive of disbursements and applicable taxes, payable out of the Fund.

Released: JEM JAN 18 2013

J.E. MacPherson J.A.

E.A. Cronk J.A.

P. Lauwers J.A.