IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sidhu v. Hiebert,*
2023 BCSC 1021

Date: 20230613
Docket: M082472
Registry: Vancouver

Between:

Arshdeep Singh Sidhu

Plaintiff

And:

Jan Abram Hiebert, Balwinder Kaur Sidhu, Rajvinder Singh Sidhu, Surinder Singh Rattan, Nissan Canada Inc., Nissan Motor Co., Ltd., Nissan North America, Inc., Abbotsford Nissan Ltd.

Defendants

And:

Insurance Corporation of British Columbia, Jan Abram Hiebert, Balwinder Kaur Sidhu, Rajvinder Singh Sidhu, Surinder Singh Rattan, Nissan Canada Inc., Nissan Motor Co., Ltd., Nissan North America, Inc. and Abbotsford Nissan Ltd.

Third Parties

Before: The Honourable Madam Justice Forth

Reasons for Judgment Re: Tax Gross-Up and Management Fees

Counsel for the Plaintiff:	M.J. Slater, K.C. S. Jaworski
Counsel for the Defendants and Third Parties, Balwinder Kaur Sidhu and Rajvinder Singh Sidhu (the "Sidhu defendants"):	S.K. Padmanabhan S. Katalinic
Counsel for the Third Party, Insurance Corporation of British Columbia ("ICBC"):	No Appearance

Counsel for the Defendant Surinder Singh Rattan:	No appearance
Place and Dates of Trial:	Vancouver, B.C. May 29 – 30, 2023
Place and Date of Judgment:	Vancouver, B.C. June 13, 2023

Introduction

[1] Some of the parties, being the plaintiff and the defendants Mr. and Ms. Sidhu (the "defendants"), appeared before me on the continuation of the trial respecting two outstanding damages issues, being: tax gross-up and management fees. The trial reasons are indexed at 2022 BCSC 1024 and the continuation of the trial on other deferred issues at 2023 BCSC 813.

[2] The plaintiff's position is that he is entitled to $1,400,300 for tax gross-up, relying on a report by Robert Carson, economist, dated May 19, 2023 and his reply report dated May 27, 2023. The plaintiff claims the present value of management fees of $2,393,400, based on Level 4 management services.

[3] The defendants' position is that the plaintiff is entitled to a tax gross-up but submits that it should be $1,534,598, relying on a report by Thomas Steigervald, economist, dated May 19, 2023 and a reply report dated May 24, 2023. The defendants submit that there should be no award made for management fees. In the alternative, if management fees are ordered, they should be no more than $22,000 based on Level 2 management services. In their closing submissions, the defendants agreed that in the unique circumstances of this case, $44,000 could be reasonable to provide for more frequent visits by the plaintiff for investment advice; however, if the Court orders a higher level of management fees, then the amount claimed by the plaintiff is unreasonably high as there are more affordable and appropriate options.

[4] I note the amount claimed by the plaintiff for tax gross-up is less than the amount proposed by the defendants. The reason for this is that the plaintiff has included a figure for management fees whereas the defendants have not. If no management fees are awarded the amount for tax gross-up proposed by Mr. Carson is $1,819,900.

[5] I will first deal with the management fees issues.

Management Fees

[6] The Law Reform Commission of British Columbia, *Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages* (Vancouver: Ministry of Attorney General, 1994) (the "LRC Report"), set out that the rationale for awarding fees for fund management services, investment management services, or both, is that the fund will be exhausted prematurely if the plaintiff is unable to perform these functions and, therefore, must pay others to do so. In other words, the purpose of including fund and investment management fees in a future loss award is to ensure that the value of the award is maintained over time and thus to adhere to the principle of awarding the plaintiff full and fair compensation: *Pestano v. Wong,* 2019 BCCA 141 at para. 9.

[7] The making of such an award is not automatic, but entitlement to the award is a question of fact to be resolved on the evidence in each case: *Pestano* at para. 10.

[8] The question of whether the fund and investment management services are "necessary" and, if so, at what costs, relates to what services are required to achieve a rate of return equal to the statutory discount rate: *Pestano* at para. 11; *Pearson v. Savage,* 2020 BCCA 133 at para. 99. The current statutory discount rate is 2% for future damages: *Pestano* at para. 8; *Law and Equity Regulation,* B.C. Reg. 74/2014.

[9] The plaintiff is not entitled to the cost of investment advice for the purposes of securing a greater return through diversification: *Pestano* at paras. 11–12.

[10] The LRC Report proposes a classification system that provides (at 45–46):

> Level 1 - The plaintiff requires only a single session of investment advice and the preparation of an investment plan at the beginning of the period the award is to cover.
>
> Level 2 - The plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award.
>
> Level 3 - The plaintiff will need management services in relation to custody of the fund and accounting for investments on a continuous basis.
>
> Level 4 - The plaintiff will require full investment management services on a continuous basis, including custody of the fund, accounting, and discretionary

> responsibility for making and carrying out investment decisions. Such a plaintiff is likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs.

[11] This classification has never been legislated, but it has been described as a "useful analytical tool" for judges in the assessment of claims and investment management, although it does not represent a set of rigid categories into which every plaintiff will fit neatly: *Pestano* at para. 15.

Evidence Regarding Trustee and Investment Management Services

[12] The plaintiff testified, at the continuation of the trial, that if he receives the funds for the future care costs and loss of income, he would invest it with a company like TD Wealth. TD Wealth is the firm that is currently looking after the discretionary trust that was set up after the Nissan Settlement. He testified that he does not have the ability to invest the funds on his own behalf and would need to rely on the advice of an investment manager. The plaintiff was not familiar with any of the various investment products. He testified that it was really important for him to hire someone like TD Wealth or RBC Dominion to assist him since he had no knowledge of investing in stocks or managing finances.

[13] The plaintiff did attend the University of the Fraser Valley and took courses as part of the computer science program. He further testified that he has spoken to Darren Cameron of TD Wealth a few times a year relating to management of the funds in the discretionary trust. The gist of the conversations were the rate of return on the investments. The plaintiff could not recall what the rate of return was.

[14] The plaintiff's father testified at the main trial that he assists the plaintiff with accessing his bank account, transferring money, and other financial arrangements.

[15] Neither economist advocated for a particular level for the plaintiff and simply relied on the assumptions provided to them. Mr. Carson was told to assume that the plaintiff will require full investment management services for the remainder of his lifetime and to base the calculations of fund management expenses on a fee schedule provided by Greg Upson of RBC Dominion Securities Inc. Mr. Steigervald

was told to assume that the plaintiff would require Level 2 investment services as outlined in the LRC Report.

[16] There was no evidence adduced by the plaintiff on whether management services were necessary to achieve the statutory rate of return. Mr. Steigervald addressed the issue of the necessity of professional investment management services in his report dated May 19, 2023. He states:

> …Financial institutions (e.g., banks) offer complimentary advisory services so long as the customer purchases the bank's investment products. It is likely that a real annual return of 2.0% can be reasonably attained by taking advantage of the institution's full range of products (i.e., equities, fixed interest securities, index funds, and exchange traded funds, etc.), without the assistance of a professional fund management service.

[17] Mr. Steigervald goes on to provide information on the rates of returns from different investments over the past years:

- Annual rates of returns on bonds for the 10, 20, 30, 40, and 50 year periods ending in 2022 were -1.4%, 2.2%, 4.0%, 5.2%, and 3.5% respectively.

- Annual rates of returns on bonds for 10, 20, and 30 years ending in 2019 were 4.0%, 4.6%, and 6.0% respectively.

- Real returns on the Toronto Stock Exchange Total Return Index have been in the range of about 4.3% to 6.3% per year, over periods as long as 50 years ending in 2022.

- On a 60/40% bond and equities (a "mixed portfolio"), the average real returns on a mixed portfolio for the 10 to 50-year periods ending in 2022 were 1.2%, 3.8%, 4.9%, 5.6% and 4.1% respectively.

- On a mixed portfolio, average annual returns for the 10, 20, and 30 year periods ending in 2019, were 4.4%, 4.5%, and 5.8%, respectively.

[18] The plaintiff's counsel during closing submissions suggested that the Court could take judicial notice of the Bank of Canada interest rates, relying on the

decision of the Supreme Court of Canada in *R. v. Find*, 2001 SCC 32 at para. 48 on the ambit of judicial notice. I am not persuaded that I should make references to the Bank of Canada rates since there was no information provided to me on what that rate was for and how that rate relates to the issues of management fees. It is my view that the information that I should rely on is the information provided at the trial and continuation of the trial, the testimony of the experts at the continuation of the trial, and the expert economist reports.

Analysis

[19] The evidence at the trial supports that throughout a day the plaintiff needs hands-on care to ensure his physical needs are met. Most of his life is taken up with having his day-to-day care needs addressed, since he is unable to perform any activities of daily living. He is essentially left with a few hours each afternoon where he has time to use his computer, play video games, and watch sports.

[20] I accept that the plaintiff, although he is cognitively intact, is not able to make investment decisions such as assessing the potential return on various products, whether to purchase certain stocks, when to sell stocks, assessing the risk profile of different products, and how best to ensure that the monies he receives can best meet the needs he has over his life-span. He is capable of speaking to a financial institution about what types of products should be purchased and understanding the various rates of return that can be achieved. As he testified, he has met with Mr. Cameron of TD Wealth a number of times to discuss how the discretionary trust is doing.

[21] The statutory discount rates are predicated on the assumption that the awards will be invested in low-risk fixed income securities which will require annual payments from a fund that is self-liquidating in nature: *Pestano* at para. 7.

[22] The only evidence before me on whether allowing a bank to invest the funds would provide a 2% real rate of return is from the report of Mr. Steigervald. As previously noted, Mr. Steigervald opines that it is likely that the real annual return of 2% can reasonably be attained through taking advantage of the financial institution’s

full range of products. I note that Mr. Carson does not challenge this opinion. However, he does opine that the purpose of investment management is not only to increase returns, but also to manage risk. He notes that as time goes on, the plaintiff will be required to withdraw increasingly larger proportions of his funds each year (relative to the remaining invested capital) and he may need to prioritize risk management over the rate of return.

[23] The other evidence I have is the historical returns on bonds and stocks. The evidence before me supports that prior to 2019 the average returns on bonds and stocks over the past 50 years have always generated returns in excess of 2%. However, the financial turmoil since 2020 has resulted both in bonds and stocks of average returns over the past 10 years ending in 2022, of -1.4% on bonds and 1.2% on stocks.

[24] The Court is left with trying to determine what the future holds in the financial markets in these uncertain financial times. As noted in *Cikojevic v. Timm*, 2012 BCSC 1688 at para 72, one cannot “cover its eyes against the reality of volatile economic conditions and a challenging investment climate”.

[25] I am also obliged to determine the case on the evidence before me. I find myself in the same situation as faced by the Court of Appeal in *Pestano* at paras. 64, 83 and *Pearson* at para. 109, that there is no evidence that supports that the plaintiff cannot achieve a 2% return if investing in low-risk fixed income securities. It was open to the plaintiff to try and adduce that evidence and he failed to do so.

[26] I am not persuaded that the plaintiff is entitled to a management fee in excess of $2 million to achieve a 2% real return. However, I am persuaded that this plaintiff, with his unique needs, is entitled to some objective financial advice from a financial advisor on issues relating to which products would be best suited for him, whether the financial institution is providing the independent advice needed, and how various withdrawals should be made.

[27] Many of the plaintiff's care needs are vital. They are vital in the truest sense, in that if these needs are not met, he faces death. He is reliant on oxygen supplied by his ventilator and if the ventilator stops working and a care aide is not present to commence hand bagging, he will die. This is unlike many costs of care awards in which a party may need therapies, medications, house-keeping, and the like—their lives are often not at risk if these services are not obtained.

[28] I note in all of the examples provided by the defendants, none of the parties were in the situation faced by this plaintiff.

[29] I further note that I am not bound by the various levels as set out in the LRC Report, but can craft an award that addresses this plaintiff's unique circumstances.

[30] I am not persuaded that the alternative position of the defendants, being an award of $5,000 every five years, adequately addresses this plaintiff's need for advice. In my view, this plaintiff is entitled to a "higher touch" level of service given the catastrophic physical injuries suffered and the time and energy that the plaintiff has, given the multiple medical conditions he faces: *Pearson* at para. 119. It is my view that this plaintiff, with the unique circumstances he faces, should be entitled to more independent advice from someone other than the bank manager where his funds might be held. This financial advisor would be in a position to give independent objective financial advice on the various products that the financial institution has recommended. I accept that the number of hours should be more in the range of 10 hours of advice each year.

[31] Using the rate of $250 per hour, as set out in Mr. Streigervald's report, this amounts to 50 hours of advice each five years, being $12,500. Using the multiplier of $4,371 per $1,000, this amounts to a present value figure of $54,637.50 (($12,500 ÷ $1,000) x $4,371). As such, I would assess the present value of the management fees at $55,000.

[32] The expert evidence was that a fee of $22,000 would only have a “trivial” impact on the tax gross-up numbers. I am operating on the assumption that an award of $55,000 will not have a significant impact on the tax gross-up figures.

Tax Gross-up

[33] Tax gross-up is awarded to compensate the plaintiff on the investment income earned from the lump sum awards for the costs of future care: *Watkins v. Olafson*, [1989] 2 S.C.R. 750 at 764–765; *Pestano* at para. 16. The purpose is to counteract the distorting effect of taxation on the awards for cost of future care: *Hodgins v. Street*, 2010 BCSC 455 at para. 14.

[34] It appears that both experts were of the view that the proper approach was to use a mixed portfolio and that is the approach taken by counsel in their submissions.

[35] As such, the only significant discrepancy was what inflation rate to use from 2024 onwards, with Mr. Carson proposing 2.5% and Mr. Steigervald proposing 2%.

[36] Mr. Carson testified that the Bank of Canada aims to keep the inflation rate stable at 2%, however, it has recently been unable to maintained its target 2%, and it is unclear if it will do so in the future. A lot has changed in the economic climate in the last 30–40 years, and Mr. Carson is unable to say that past performance will predict future performance. He agreed that adding 0.5% is arbitrary, since no one knows how much it will be. In cross-examination, he testified that the Bank of Canada wants to achieve the 2%, but has not done so recently and conditions have changed making it harder to achieve in the future. He explained that if the inflation rate is left at 2%, the plaintiff bears the risk if the target rate is not actualized, but if it is moved to 2.5%, the risk is shifted off the plaintiff. In his report Mr. Carson explains the rationale for the rate of 2.5% as:

> In the past it has often been the practise, for the purposes of tax gross-up calculations, to fix the future price inflation rate at a constant 2.0%. This corresponds to the Bank of Canada’s long term policy with respect to its target rate. Increasing the rate allows for the risk that rates may exceed the Bank’s policy rate in the future.

[37] Mr. Steigervald testified that the 2.5% assumption made by Mr. Carson is higher than the 30-year historical, excluding the last few years when there was higher inflation. The Bank of Canada has stated intentions to maintain the mid point between 1 to 3%, which would be 2%. In Mr. Streigervald's report dated May 24, 2023, he explains:

> 18. Also, at the end 2021 the Bank of Canada and the Government of Canada renewed their 5-year agreement on monetary policy and inflation targeting. The document cited in my report of May 19, 2023 (paragraph 7, vi) indicates the following regarding the inflation target:
>
> > *"The inflation target will continue to be the 2 percent mid-point of the 1 to 3 percent inflation-control range."*
> >
> > *"The Bank will utilize the flexibility of the 1 and 3 percent range only to an extent that is consistent with keeping medium-term inflation expectations well anchored at 2 percent."*
>
> [Emphasis in original.]

[38] Mr. Steigervald further testified that one measurement for current inflation expectations can be found by contrasting the nominal yields on Government of Canada Bonds and the yield on real return of Government of Canada Bonds. He says the difference between the two is currently around 2%. He says this measurement reflects a 2% rate of inflation.

[39] I have concluded on the evidence before me that there is more support that the 2% inflation rate is the appropriate rate to use for the future. As both economists testified it is impossible to predict the future and whether there will be a reoccurrence of a pandemic or some other kind of event that will impact the inflation rate.

[40] I will rely upon the stated policy of the Bank of Canada and the Government of Canada along with the long-term historical rate of price inflation in Canada and use the 2% rate.

[41] There was not a satisfactory explanation for why, when the experts used the 2% inflation rate from 2024 onward, the experts' numbers differ by approximately $158,000. Mr. Carson's calculation is $1,692,600 and Mr. Streigervald's calculation

is $1,534,598. Since I am unable to discern which expert is correct I shall award the tax gross-up at the mid-point of these two numbers, being $1,613,599.

Conclusion

[42] As a result of my findings on the appropriate award for tax gross-up and management fees the final damages awarded is:

a.	Non-pecuniary damages:	$403,000.00
b.	Past net wage loss:	none
c.	Future loss of earning capacity: (subject to para. 210 of 2023 BCSC 813)	$1,685,409.00
e.	Cost of future care: (subject to para. 211 of 2023 BCSC 813)	$12,389,348.00
f.	In-trust claim for Mr. Sidhu:	$950,000.00
g.	In-trust claim for Balraj Sidhu:	$25,000.00
h.	Special damages:	$8,560.83
i.	Management fees and tax gross-up:	$1,668,599.00
	TOTAL	**$17,129,916.83**

[43] I note that if any further amounts have been paid by CSIL or PWD then those amounts should be deducted to reflect those payments. The parties have leave to appear back before me if any further assistance is needed in the calculation of the amounts awarded.

[44] In addition, the amount of the Nissan Settlement shall be deducted from the total damages awarded. Since I have ordered that the amount of the Nissan Settlement shall not be made public, see reasons indexed at 2023 BCSC 436, it is my view that any order filed that reveals the amount of the Nissan Settlement is subject to the sealing order filed on February 24, 2023. The parties have leave to return to me if any issue arises in respect to the sealing order.

[45] The remaining issues relate to costs and I will be issuing a separate set of reasons addressing the various cost issues.

"Forth J."