CITATION: Blake v. Blake, 2021 ONSC 7189
COURT FILE NO.: DC-21-009
DATE: 20211101

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

M.L. EDWARDS R.S.J., S.T. BALE. and FAVREAU JJ.

B E T W E E N:	)	
	)	
BRUCE HOWARD BLAKE, KATHRYN JOAN HOMES and PATRICIA RUTH GEDDES	)	*Edwin G. Upenieks*, for the Applicant Patricia Ruth Geddes
	)	
	)	*Fred Leitch*, for the Applicants
Applicants (Respondents on Appeal)	)	Bruce Howard Blake and Kathryn Joan Homes
	)	
- and –	)	
	)	
KENNETH GEORGE BLAKE and KENNETH GEORGE BLAKE in his capacity as the Estate Trustee of the Estate of AINSLEE ELIZABETH BLAKE	)	*Jeffrey Haylock,* for the Respondent (Appellant)
	)	
	)	*Angela Casey and Laura Cardiff,* Amicus Curiae
Respondent (Appellant)	)	
	)	*Sean Dewart and Adrienne Lei*, for the Intervenor Gregory Sidlofsky
	)	
	)	*Sarit Batner, Moya Graham and Adriana Forest*, for The Advocates' Society
	)	
	)	**Heard at Brampton via Zoom on June 18, 2021**

REASONS FOR DECISION

Overview

[1] It is rare that leave to appeal is granted where the only issue in dispute relates to costs. It is even more rare that this court would hear an appeal which has been rendered moot by the parties' settlement of the action as a whole, including the costs issue for which leave was originally granted.

[2] The appeal as it was originally formulated relates to the Costs Decision of the motion judge who heard a motion for summary judgment. Leave to appeal the decision of the motion judge was granted by the Divisional Court in December 2019. In January 2020, the parties to the litigation

reached a global settlement of their dispute. The global settlement dealt with the award of costs on a substantial indemnity scale against Mr. Blake. The parties agreed that this appeal need not proceed as no money was being paid with respect to the costs order that forms the subject matter of the appeal. It is quite clear as a result of the settlement that the appeal is moot.

[3] In September 2020, the parties appeared before Fowler Byrne J. on a motion for an order permitting Mr. Sidlofsky to intervene in this appeal and to pursue the appeal despite the fact the appeal was moot. The motion was granted. Intervenor status was granted to Mr. Sidlofsky. Fowler Byrne J. framed the issues to be argued on appeal by Mr. Sidlofsky as follows:

> a) are the findings of the motion judge about Mr. Sidlofsky's professional conduct proper and supported by the evidence;
>
> b) what is the extent of a lawyer's duty to the court including when a matter has been argued and remains under reserve; and
>
> c) should there be cost consequences for a client if his or her lawyer has breached his or her duty to the court.

[4] In addition to granting Mr. Sidlofsky intervenor status, Fowler Byrne J. also appointed *amicus curiae* to argue the appeal from the adverse position to Mr. Sidlofsky and ordered that Mr. Sidlofsky's errors and omissions insurer would be responsible for paying amicus' fees and disbursements.

[5] Adding to the cast of characters with standing to argue this moot appeal is The Advocates Society which was granted leave to intervene as a friend of the court on consent by order of this court dated April 28 2021.

The Facts

[6] The background facts are not in dispute and are accurately reflected in the reasons for judgment of Fowler Byrne J. dated October 19, 2020. Those background facts are set out below.

[7] On September 19, 2018, Mr. Blake, in his personal capacity and as estate trustee, brought a motion for summary judgment seeking to dismiss the claims of the Applicants. In his decision of March 18, 2019, the motion judge dismissed the motion and invited written submissions on costs.

[8] At all relevant times, Mr. Sidlofsky was counsel of record for Mr. Blake, personally, and in his capacity as estate trustee. Mr. Sidlofsky made written submissions on costs on behalf of his client and delivered them to the motion judge as directed.

[9] On July 8, 2019, the motion judge released his costs endorsement ("Costs Decision"). In the Costs Decision, the motion judge expressly considered Mr. Sidlofsky's conduct as counsel and the resulting costs implications. In particular, the motion judge found that Mr. Sidlofsky breached his duty to the court, and because of this breach, found that it was a proper case for an award of substantial indemnity costs in the sum of $91,695.13 payable by Mr. Sidlofsky's client, Mr. Blake.

[10] Mr. Blake sought leave to appeal the Costs Decision, which was granted on December 13, 2019. Mr. Blake then filed his appeal on December 23, 2019.

[11] In or around January 2020, the parties in the main action settled their dispute in its entirety. Accordingly, Mr. Blake has no interest in pursuing his appeal of the Costs Decision. After the affidavits in support of the motion before Fowler Byrne J. were sworn, Mr. Sidlofsky commenced an action against Mr. Blake for his legal fees. Mr. Blake has defended this claim and made his own counterclaim for damages for negligence and breach of contract, relying specifically on the Costs Decision. We will refer to this ongoing litigation between Mr. Blake and Mr. Sidlofsky as the Fees Action.

The Argument of the Summary Judgment Motion

[12] The facts as they relate to the argument of the summary judgement motion, the resulting reasons of the motion judge and his Costs Decision bring context to our reasons. A summary of those facts largely drawn from the factum of amicus is reproduced as follows.

[13] The moving party on the motion before the motion judge, Mr. Blake, is the estate trustee of his mother's estate. The respondents are the other beneficiaries of that estate.

[14] In the underlying litigation, Mr. Blake sought to pass his second set of estate accounts. The main issue on the passing of the estate accounts related to an allegation that Mr. Blake had transferred some of the Deceased's properties (the "Arizona properties") to himself during the Deceased's lifetime, using his authority under the Deceased's power of attorney

[15] The applicants filed objections to the accounts on the basis that Mr. Blake had failed to provide proper disclosure with respect to the transfer of the Arizona properties. They also commenced two separate applications disputing the treatment of the Arizona properties. Those three proceedings were consolidated in an order by the motion judge dated August 2, 2012 ("2012 Consolidation Order"). All three proceedings were ordered to proceed as a trial of the passing of accounts.

[16] At the time the Consolidation Order was made, Mr. Blake had already identified the basis of a possible defence to the objections and applications. The 2012 Consolidation Order therefore preserved Mr. Blake's right to move for a declaration that the beneficiaries were "precluded by the Limitations Act and the doctrine of res judicata from raising issues respecting the deceased's affairs prior to October 31, 2010".

[17] In February of 2018, Mr. Blake brought the summary judgment motion contemplated by paragraph 3 of the 2012 Consolidation Order, specifically seeking the following relief:

> a) Summary judgment dismissing the within proceedings to the extent of any and all objections or other relief sought by any one or all of the applicants in respect of any alleged acts or omissions of Mr. Blake for the period pre-dating October 31, 2010 on the basis such relief is barred by the doctrine of res judicata.

> b) Summary judgment dismissing the within proceedings to the extent of any and all objections or other relief sought by any one or all of the applicants in respect of any alleged acts or omissions of Mr. Blake's for the period pre-dating October 31, 2010 on the basis such relief is barred by operation of the Limitations Act.

[18] Mr. Sidlofsky came on the record for Mr. Blake shortly before argument of the summary judgment motion. He amended the notice of motion to include a third basis for summary judgment, namely that there was no genuine issue for trial. Mr. Sidlofsky also prepared the factum.

[19] Mr. Sidlofsky filed an affidavit in this appeal to the Divisional Court. He was cross examined on that affidavit. His evidence was that the key area of research for the factum filed on the summary judgment motion was the res judicata argument. His factum before the motion judge cited one case and one secondary source in support of the res judicata argument.

[20] On the limitations issue, Mr. Blake argued in his factum that "the applicants' claims/objections are … out of time." Mr. Blake did not mention the *Limitations Act, 2002*, S.O. 2002, c. 24. Mr. Blake asserted the relief sought by the applicants was barred by a two-year limitation period, either from the date of the transfer of the Arizona properties or from the date of the Deceased's death but gave no further basis in support either limitation period.

[21] Although the motion before the motion judge was brought on the basis of a supposed limitation period under the *Limitations Act, 2002*, Mr. Blake's factum did not refer to that Act. It did briefly refer to the two-year limitation period in s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23; a reference that was only one sentence, in passing, to say that its two-year limitation period from the date of death would apply "to the extent that the cause of action alleged against Ken (Mr. Blake) can be characterized as a tort."

[22] In oral argument before the motion judge, Mr. Sidlofsky argued primarily that the *Trustee Act* applied, but also relied on the applicants' notices of objection being subject to a two-year limitation period under the *Limitations Act, 2002*. Mr. Sidlofsky cited no case law in his factum on the motion for summary judgment to support the position that the relief sought by the applicants was out of time under either Act.

[23] In his decision, the motion judge held that the ownership and proper treatment of the Arizona properties had not been determined on the first passing of accounts and these issues were therefore not res judicata. The motion judge found as a fact that the second passing of accounts was the first time the applicants had notice that Mr. Blake did not intend to treat the Arizona properties as part of his share of the estate, and deduct their value from his remaining entitlement.

[24] The motion judge found no merit in Mr. Blake's submission that the objections did not raise a genuine issue for trial. On the limitations issue, the motion judge considered the case of *Armitage v Salvation Army*, 2016 ONCA 971 (CanLII), relied on by the applicants, which held that applications to pass accounts are not claims, and therefore not subject to a two-year limitation period under the *Limitations Act, 2002*. The case specifically left open whether or not a notice of objection might be subject to the *Limitations Act, 2002*.

[25] On cross-examination, Mr. Sidlofsky agreed that *Armitage* was cited in one of the Applicants' facta. He admitted he would have read cases cited in the facta, but not noted them up. Neither counsel who argued the motion before the motion judge relied on any additional case law on the limitations issue.

[26] In his decision on the motion for summary judgment, the motion judge referred to the decision of Mulligan J. in *Wall Estate*, 2018 ONSC 1735 released on March 14, 2018, as well as the decision of the Court of Appeal, *Wall v. Shaw*, 2018 ONCA 929 (sitting as the Divisional Court) released November 21, 2018, affirming the decision of Mulligan J.

[27] Only the decision of Mulligan J. had been decided prior to the September 19, 2018 hearing of the summary judgment motion. The appeal decision was released while the motion judge's decision was under reserve.

[28] The motion judge held that *Wall* was determinative of the limitations issue. In his decision on the motion for summary judgment, the motion judge referred to counsel's omission of *Wall* as "both unfortunate and troubling … as the decision of the court at first instance and the decision of the Court of Appeal sitting as the Divisional Court, clearly put to rest any controversy or doubt as to whether a notice of objection is subject to the provisions of the *Limitations Act, 2002*."

[29] In their costs submissions, the applicants, the successful parties, sought substantial indemnity costs from Mr. Blake personally, in the combined total of $91,695. The applicants submitted that substantial indemnity costs were appropriate under Rule 20.06. The applicants argued that Mr. Blake acted unreasonably in bringing the motion and that there was insufficient evidence and an insufficient legal basis for his motion.

[30] Mr. Blake submitted that the motion "was not unreasonable" and that his positions were "arguable." He did not address the finding that *Wall* was on point and would have determined the issue, nor did he otherwise provide a basis for the assertion that his positions were arguable.

[31] In his Costs Decision, the motion judge agreed with the applicants' submissions, and ordered substantial indemnity costs in the amount requested, against Mr. Blake personally.

[32] The motion judge held that other than the assertion of the intervening limitation period, the other two grounds raised in the motion were "easily disposed of". The key issue on the motion was whether any limitation period applied to a notice of objection. *Wall* was "directly on point with the issue at stake on the summary judgement motion."

[33] In ordering payment of costs on a substantial indemnity scale, the motion judge did not specifically cite Rule 20.06. He stated that substantial indemnity costs were appropriate "as a result of the clear breach of duty by counsel for Mr. Blake. Counsel for Mr. Blake breached his duty by not bringing *Wall* to the attention of the court, either during submissions or prior to release of the summary judgement decision."

[34] The motion judge imputed actual knowledge of the decision of Mulligan J. to Mr. Sidlofsky. He drew the factual inference that the decision of Mulligan J. was known to Mr. Sidlofsky by November 21, 2018, when a partner at his firm, Charles Wagner, discussed the implications of *Wall* in a blog.

[35] The motion judge considered the small and specialized nature of Wagner Sidlfosky LLP. He found that Mr. Sidlofsky purposefully did not bring *Wall* to the court's attention during submissions or prior to the release of the summary judgment decision. However, the motion judge also found that regardless of actual knowledge, Mr. Sidlofsky ought to have known of *Wall* and that it was a breach of his duty not to conduct reasonable research to become aware of it.

Position of the Appellant – Mr. Blake

[36] We propose to review the position of Mr. Blake as it will give context to this court's ultimate decision. It will also provide a better understanding as to why this court will decide this appeal on a very narrow ground and why we do not intend to discuss many of the issues as framed by Fowler Byrne J. or the issues raised by The Advocates Society; issues which we believe are not necessary to deciding this appeal and which would best be decided in the context of an appeal where the issues are not moot.

[37] Mr. Blake makes the point that when the motion for leave to appeal the Costs Decision was commenced, having this decision overturned was clearly in Mr. Sidlofsky's interest – a fact that Mr. Blake argues is reinforced by Mr. Sidlofsky's having continued to prosecute the appeal.

[38] The Fees Action remains a live action before the Superior Court. The Fees Action relates to allegations regarding nonpayment of fees by Mr. Blake and Mr. Sidlofsky's alleged negligence in the conduct of the summary judgment motion. Mr. Blake argues before this court that Mr. Sidlofsky pursued the costs appeal out of self-interest and charged Mr. Blake while doing so. In his statement of defence and counterclaim in the Fees Action, Mr. Blake relies on the finding of the motion judge that Mr. Sidlofsky breached his duty to the court, in support of his claim that he does not owe fees to Mr. Sidlofsky.

[39] Mr. Blake 's interest in this appeal, it is argued, lies in some of the findings of fact that Mr. Sidlofsky asks this court to make – particularly that he did not know about *Wall* before the release of the motion judge's decision on the summary judgment motion, and that he did not conceal *Wall* from the court. If this court were to make the findings requested by Mr. Sidlofsky, then Mr. Blake argues such findings could affect Mr. Blake 's position in the Fees Action.

[40] Mr. Blake argues that if this court is inclined to allow this appeal, it can and should do so without making its own findings regarding Mr. Sidlofsky's knowledge of *Wall.* Mr. Blake suggests that if this court is inclined to allow this appeal that this court should do so in a limited fashion by simply setting aside the findings of the motion judge and leaving factual findings relating to Mr. Sidlofsky's knowledge of *Wall* to the trial of the Fees Action.

Position of Mr. Sidlofsky

[41] Counsel for Mr. Sidlofsky points out that the motion judge found as a fact that Mr. Sidlofsky knew of the decisions at first instance (*Wall Estate*) and on appeal (*Wall v Shaw*) and that he purposefully did not bring the decisions to the court's attention.

[42] The motion judge made those findings of his own volition. He did not seek submissions from the parties and did not even advise Mr. Sidlofsky that he intended to consider facts that, if

found to be true, would necessarily harm Mr. Sidlofsky, personally and professionally. The motion judge then relied on this finding to justify a punitive costs order against Mr. Sidlofsky's client.

[43] Counsel for Mr. Sidlofsky argues that the motion judge breached the rules of natural justice at the most rudimentary level. Specifically, he argues that Mr. Sidlofsky and his client were not afforded the opportunity to be heard. Natural justice requires that a party whose rights will be affected by a court's decision be provided with notice and afforded the opportunity to adduce evidence and make submissions.

[44] Mr. Sidlofsky argues that he learned that he was both accused and found guilty of purposefully misleading the court at the same time, when he received the motion judge's Costs Decision. He argues that he was affected by the Costs Decision in several ways. The findings and result drove a wedge between Mr. Sidlofsky and his client, resulted in inquiries by Mr. Sidlofsky's regulator and attracted significant adverse publicity which called Mr. Sidlofsky's integrity into question. During the course of argument in this court, we were advised that there is ongoing publicity on the internet as a result of the findings.

[45] Mr. Sidlofsky argues that if the motion judge had requested submissions on why the decisions in *Wall* were not referred to in court, he could have explained that he was not aware of the decisions and that he had not seen his law partner’s blog regarding the decision at first instance. He could also have provided submissions about why the decision in *Wall* was not determinative, or even relevant, to the limitations argument he had advanced on his client's behalf.

[46] Mr. Sidlofsky also argues that the motion judge’s conclusion about his supposed misconduct is not supported by the record that was before the court. The motion judge researched the law without seeking submissions from any counsel and found by himself the case he relied on to dispose of the summary judgment motion. He later found that Mr. Sidlofsky’s law firm is a "small specialized firm practicing in the area of estate litigation", presumably after visiting the firm’s website of his own volition.

[47] It is also emphasized by counsel for Mr. Sidlofsky that the motion judge also found the blog commentary of his law partner by himself, and drew inferences based on the dates the decisions and the blog commentary were published. As it happens, the motion judge erred in the basic facts, from which he concluded that Mr. Sidlofsky had misconducted himself. He wrote twice in the Costs Decision that the Court of Appeal’s decision in *Wall v Shaw* was released in March 2018, when in fact this was the date of the decision at first instance. The decision of the Court of Appeal only came out on November 21, 2018, two months after the motion was argued.

[48] Counsel for Mr. Sidlofsky also notes that the motion judge conducted a review of documents regarding a lawyer’s duty as an officer of the court. In doing so, the motion judge did not seek submissions from the parties on this issue, but instead carried out his own research. It appears from the Costs Decision that the motion judge obtained much of the information on which he relied in making the costs award from a paper published on The Advocates’ Society website, the Law Society’s *Rules of Professional Conduct* and to first instance cases that he must have obtained during his online research. He also referred to a decision of the House of Lords that stands for the uncontroversial principle that a court’s failure to apply relevant caselaw in a decision could have significant impact on the public if that decision is later followed.

[49] There are two other aspects to the motion judge's findings that counsel for Mr. Sidlofsky emphasizes in his argument to this court. First, the motion judge held that a lawyer should not mislead the court and may not remain silent if he or she knows of relevant authorities that opposing counsel has not provided to the court. This is indisputably true, and a lawyer who misleads the court, including misleading by omission, is presumptively guilty of professional misconduct.

[50] Second, an important issue noted by counsel for Mr. Sidlofsky with regard to counsel's duty to the court is whether counsel ought to have provided case law to the motion judge while the decision was under reserve. At paragraph 19 of the endorsement, the motion judge wrote that none of the counsel "brought to my attention the decision in *Wall v Shaw* during their submissions nor at any time prior to the release of my decision on the motion".

Analysis

[51] The key issue in this case is whether it was open to the motion judge to base his Costs Decision on his own legal research and internet searches without giving the parties an opportunity to make submissions.

[52] As trial judges we are expected to dispose of matters before us, solely on the basis of the evidence presented to us by counsel. However, it is open to judges to consider all relevant authorities, whether cited by the parties or not: *McCunn Estate v. Canadian Imperial Bank of Commerce* (2001), 53 O.R. (3d) 304, 2001 CanLII 24162 (C.A.), at paras. 42*f*. However, when judges consider authorities not cited by the parties, the issue of whether counsel should be invited to make further submissions arises. *McCunn* provides an example of when such an invitation should be extended; specifically the court refers to a situation where the law has undergone a significant change and the court intends to base its decision on that change.

[53] The appeal in this case is not concerned with the substance of the motion judge's decision. Leave to appeal was not granted from that decision. Rather, the appeal is concerned with the Costs Decision. However, in order to deal with the Costs Decision, it is nevertheless necessary to look at the motion judge's consideration of *Wall* in the decision on the merits as this ultimately led to his findings of professional misconduct in the Costs Decision. In our view, while it may not rise to the level of an error or a breach of procedural fairness, it may have been preferable for the motion judge to give the parties an opportunity to make submissions on *Wall* before releasing the decision on the merits. In any event, regardless of whether the motion judge should have done so, it was a fundamental breach of procedural fairness for the motion judge to base his Costs Decision on Mr. Sidlofsky's failure to bring the *Wall* decision to the court's attention, without giving counsel an opportunity to address the issue.

[54] In coming to the decision that the motion judge should, as a matter of fairness, have invited submissions from counsel, we want to make clear that we understand the crushing workload the judiciary has to address on a daily basis. Judges are human and can fall into error. The error in this case unfortunately had a very negative impact on Mr. Sidlofsky's professional reputation.

[55] It is clear from a review of the motion judge's Costs Decision that he was of the view that he had not been provided the necessary tools to determine the issue before him. This is made self-evident by paragraph 20 of his Costs Decision where he states:

> In the course of considering my decision, while under reserve, given the lack of helpful authorities on the application of a limitation period to the Notice of Objection, I reviewed the law by considering the jurisprudence and the applicable statutory language.

[56] It is made further evident from his Costs Decision that the motion judge undertook his own review of the law and as a result of that review discovered the *Wall* decision. Having discovered *Wall*, the motion judge concluded that it was determinative of the summary judgment motion. It is clear from paragraph 21 of his Costs Decision that the motion judge was frustrated by counsel not having brought to his attention a decision that was directly on point and determinative of the motion:

> During my review of the law, and without any ingenious or in-depth research on my part, the first instance and appeal decisions in *Wall v. Shaw* 2019 ONSC 4062 (CanLII) came to my attention. These decisions were directly on point with the limitation issue as raised by the respondents and immediately disposed of their submissions on the limitation period.

[57] Lawyers are professionals whose conduct is governed by the *Rules of Professional Conduct.* While the Law Society regulates the legal profession, our courts may in appropriate circumstances sanction the conduct of a lawyer. One of the better-known examples of such a sanction can be found in Rule 57.07(1) of the *Rules of Civil Procedure*. Another example can be found in the court's inherent jurisdiction to find a lawyer in contempt of court. On the facts of this case, another way the court can sanction a lawyer is through the reasons of the court that become part of the public record.

[58] Regardless of how the court imposes a sanction, it is fundamental that the court provides notice to the lawyer of the court's intention to sanction the lawyer. It is also fundamental that the court provide the lawyer an opportunity to be heard prior to sanctioning the lawyer's conduct. To sanction the conduct of a lawyer without notice and without an opportunity to make submissions puts the court in the position of making findings that could have a significant impact on a lawyer's reputation.

[59] In a situation where a judge's decision will have a direct impact on someone who is not a party to the dispute there is an obligation to allow that person to be heard. The Court of Appeal makes this clear in *Fontaine v Canada (Attorney General)* 2018 ONCA 1023, at para 21, as follows:

> Contrary to what the respondent argues, it is precisely because the Eastern Administrative Judge was exercising his judicial functions that he owed the appellant an elevated duty of procedural fairness and natural justice. Of the many principles underlying the Canadian judicial system, generally those who will be subject to an order of the court are to be given notice of the legal proceeding and afforded the opportunity to adduce evidence and make submissions: A.(L.L.) v. B.(A.), [1995] 4 S.C.R. 536, at para. 27.

[60] Along the same vein, Lamer C.J. and Sopinka J. provide similar guidance in *A. (L.L.) v B.(A)* [1995] 4 S.C.R. 536 at para 27:

> The one question that remains is whether both a complainant, a third party to the proceedings (whether or not an appellant, but here one of the appellants), and the Crown, a party to the proceedings, have standing in third party appeals. There is no doubt in my mind that they do. The *audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions.

[61] The motion judge did not award costs against Mr. Sidlofsky personally. He did however award the Applicants their costs on an elevated scale. Substantial indemnity costs were awarded precisely because of the motion judge's finding of Mr. Sidlofsky's "clear breach of duty" (para 37 Costs Decision). While Rule 57.07 is not engaged by the facts of this case, the requirement imbedded in Rule 57.07 to provide a lawyer with notice of the court's intention to award costs against a lawyer should help inform the obligation to similarly provide a lawyer with notice where a finding of professional misconduct may have negative consequences for that lawyer's client.

[62] The following extract from paragraph 13 of the motions judge's Costs Decision makes it abundantly clear that the motion judge was concerned with Mr. Sidlofsky's conduct as it relates to his perceived non-disclosure of the *Wall* decision:

> The conduct of counsel for the respondents gives rise to some very serious concerns regarding counsel's understanding and recognition of his duty as an officer of the court and his duty of candour with counsel opposite.

[63] The concerns about Mr. Sidlofsky's conduct were based on the motion judge's perception of the facts and the law, without giving Mr. Sidlofsky any opportunity to address those concerns. The motion judge reached the following conclusion found at paragraph 26 of his Costs Decision:

> Furthermore, I have also reached the very troubling conclusion that counsel for the respondents **purposely** did not bring the decision in *Wall v Shaw* to the attention of the court during the submissions on the motion or while my decision was under reserve. The decision was directly on point with the issue at stake on the summary judgement motion and the decision was adverse to the interests of the respondents. [Emphasis added.]

[64] The motion judge completed his analysis of the facts and the law with his conclusion that Mr. Sidlofsky breached his duty to the court by his failure to bring the *Wall* decision to the court's attention. A public finding by the court that a lawyer has breached his or her duty to the court is a finding that can have a long-lasting impact on that lawyer's reputation -- hence the requirement

that a lawyer facing such a sanction must be given notice and an opportunity to be heard prior to the court making such a public finding.

[65] Where a motion judge or trial judge intends to call into question the integrity of a lawyer with a finding that the lawyer has breached his or her duty to the court, there is a corresponding obligation on the court to provide that lawyer with notice and an opportunity to be heard. This is a rule of fairness. A lawyer's reputation is something built on years of hard work. A lawyer's reputation can be lost in mere seconds when someone reads a judge's reasons that call into question that lawyer's integrity. We therefore allow the appeal on the basis of a breach of procedural fairness.

[66] As it relates to the various other issues argued on this appeal, we are of the view that those other issues should be left for another day when the court is asked to deal with an appeal where the issues are not moot. Perhaps of equal importance is our concern that if we weigh into those other issues (some of which are framed in the Order of Fowler Byrne J.), we could make factual and legal determinations that might unfairly impact on the Fees Action that continues between Mr. Blake and Mr. Sidlofsky.

[67] In the normal course, where there is a breach of procedural fairness, the appropriate remedy is to send the decision back to the original decision maker or to decide the matter afresh. However, given that the estate litigation has been resolved and some of these issues arise in the Fees Action, there is no purpose in remitting the issue back nor would it be helpful for the panel to decide the issues.

[68] The appeal is allowed. As agreed among the participants on the appeal, there will be no order as to costs.

Edwards R.S.J.

Bale J.

Favreau J.

Favreau J.

Released: November 1, 2021

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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

BRUCE HOWARD BLAKE, KATHRYN JOAN HOMES and PATRICIA RUTH GEDDES

Applicants (Respondents on Appeal)

– and –

KENNETH GEORGE BLAKE and KENNETH GEORGE BLAKE in his capacity as the Estate Trustee of the Estate of AINSLEE ELIZABETH BLAKE

Respondent (Appellant)

REASONS FOR DECISION

Released: November 1, 2021