COURT OF APPEAL FOR ONTARIO

CITATION: Husack v. Husack, 2024 ONCA 117
DATE: 20240214
DOCKET: COA-23-CV-0253

Roberts, Sossin and Dawe JJ.A.

BETWEEN

Donna Husack

Applicant (Appellant)

and

Evelyn Husack, Donald Husack, Dianne Parr and Doreen Wills

Respondents (Respondents)

Denise Sayer and Adam Stikuts, for the appellant

Richard MacGregor, for the respondent, Evelyn Husack

Daniel Waldman, for the respondent, Donald Husack

Jordan Diacur, for the respondents, Dianne Parr and Doreen Wills

Heard: December 19, 2023

On appeal from the order of Justice Byrdena MacNeil of the Superior Court of Justice, dated February 8, 2023, with reasons reported at 2023 ONSC 949.

REASONS FOR DECISION

[1] This appeal arises out of an estate dispute among family members. The appellant seeks to exercise dissent rights under ss. 184 and 185 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*"), in response to the estate trustees' decision to liquidate and wind up a family-owned holding company,

Frank Husack Holdings Inc. (“the Holding Company”), which holds interests in various commercial properties, as well as liquid assets.

[2] The appellant submits that the application judge erred in concluding that the shareholders’ dissent rights were explicitly waived by the provisions of the Unanimous Shareholders Agreement (“USA”) signed by the Holding Company’s shareholders. She did not appeal the application judge’s dismissal of her request for an oppression remedy, nor does she take any issue on appeal with the application judge’s order that the shareholders appoint an independent liquidator for the purpose of winding up the Holding Company’s business and affairs and distributing its property.

[3] On December 20, 2023, we dismissed the appeal with costs, for reasons to follow. These are our reasons.

[4] Frank Husack died on February 21, 2008. The Holding Company, formed by amalgamation of Mr. Husack’s two corporations after his death, holds the remaining assets of Mr. Husack’s estate. The sole directors of the Holding Company are Frank Husack’s widow, Evelyn Husack, and her son, Donald Husack. The estate holds all of the Class A non-voting and Class B voting shares of the Holding Company. The Class A preferential shares, with priority distribution rights, are held by a spousal trust for Mrs. Husack’s benefit. Each of the Husacks’ four children – the appellant Donna Husack, and the respondents

Donald Husack, Dianne Parr, and Doreen Wills – holds approximately 25% of the non-voting common shares of the Holding Company. Mrs. Husack, her four children, and The Effort Trust Company were appointed estate trustees under Mr. Husack's last will and testament. Under his will, Mrs. Husack was granted a veto as estate trustee, over and above her children, so that she could maintain control over the Holding Company after Mr. Husack's death.

[5] Mrs. Husack is 94 years old. She wishes to complete the winding up and distribution of the Holding Company's assets, pursuant to Mr. Husack's will, before she dies. All of the estate trustees, except the appellant, voted in favour of the liquidation and winding-up of the Holding Company.

[6] The application judge's dismissal of the appellant's application principally turned on her interpretation of the USA. The USA was signed by all the shareholders; its validity and enforceability are not impugned.

[7] The application judge concluded that the shareholders' rights under s. 184(3) of the *OBCA* were triggered by the proposed liquidation and winding up. She went on to consider whether these dissent rights were waived by the USA. As the application judge correctly stated, contracting parties are entitled to waive statutory rights, unless they are precluded by public policy.

[8] Having considered the relevant provisions of the *OBCA*, the factual matrix, including the estate planning purpose of the Holding Company, the articles of

amalgamation that created the Holding Company (the "Articles") and the USA, the application judge determined that s. 9.01 of the USA constituted a clear waiver of any dissent rights triggered by the sale and liquidation of the Holding Company. Section 9.01 of the USA provides as follows:

> It is the intent of the parties that such provisions of The Business Corporations Act or any successor legislation granting rights to shareholders, which may be in conflict with the provisions of this Agreement, are hereby waived, and the provisions hereof shall govern their dealings among themselves (to the extent allowed by law).

[9] She found that to hold otherwise would render meaningless s. 3.01 of the USA, which states that, "[n]otwithstanding the foregoing, the ESTATE shall have the right at its option to cause the [Holding Company] to sell all or substantially all the assets owned by it to such person or persons at such time and upon such terms and conditions as the ESTATE in its sole and exclusive discretion considers advisable."

[10] The term "Estate" is defined in the USA as "Evelyn Husack, in her capacity of Estate Trustee, Executrix and Trustee of The Estate of Frank Husack".

[11] The application judge found further support for her interpretation of these provisions by reference to ss. 5.01 and 8.01 of the USA. Section 5.01 of the USA stipulates that the shareholders covenanted and agreed to vote and to act "as to give full effect to the purpose and intent of [the USA]" and that the Holding Company also agreed "to carry out the terms of [the USA] to the full extent

that the [Holding Company] has the power and capacity at law to do so." Section 8.01 of the USA requires the parties to the USA to do whatever is necessary "in order to properly and duly carry out the terms and conditions of [the USA]." The application judge reasoned that these provisions therefore required the shareholders, including the appellant, to do whatever was necessary to give full effect to the purpose and intent of the USA, which supported the enforcement of ss. 3.01 and 9.01. Dissent rights in relation to the sale and liquidation of the Holding Company would be inconsistent with ss. 5.01 and 8.01.

[12] The application judge rejected the appellant's argument, renewed on appeal, that the reference to s. 184 of the *OBCA* in clause C of the Articles explicitly recognizes her dissent rights despite s. 9.01 of the USA. She noted that the USA had an entire agreement clause, s. 10.01, and found that the USA was necessarily entered into by the shareholders after the creation of the Holding Company by the Articles. Mrs. Husack, as president of both corporations amalgamated into the Holding Company, was the sole signatory to the Articles.

[13] Absent extricable error of law, the application judge's interpretation of the Articles and the USA are subject to considerable appellate deference: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50-55. We see no reversible error. The application judge's interpretation reflects the clear language of the USA. Importantly, it is in keeping with the constituent purpose of the Holding Company, namely, to manage and operate

Mr. Husack's assets in accordance with his will, including the veto granted to Mrs. Husack so she could maintain control over the corporation. In this context, the waiver of any dissent rights that could prevent the orderly distribution of the estate's assets is entirely reasonable and in keeping with the objective intention of the parties as expressed in the USA.

[14] Accordingly, we dismiss the appeal. The respondents are entitled to their costs from the appellant as follows:

1. Evelyn Husack: $8,000;
2. Donald Husack: $8,000;
3. Dianne Parr and Doreen Wills in total: $8,000.

"L.B. Roberts J.A."
"L. Sossin J.A."
"J. Dawe J.A."