SUPREME COURT OF YUKON

Citation: *Harvey* v. *5505 Yukon Ltd. et al.*,
2011 YKSC 92

Date: 20111202
S.C. No. 08-A0004
Registry: Whitehorse

Between:

SHARMAN HARVEY, Administrator of the Estate of ROBERT RICHARD HARVEY, Deceased

Plaintiff

AND:

5505 YUKON LIMITED, ROY A. SLADE, and CHRISTINE DOKE

Defendants

Before: Mr. Justice D.R. O'Connor

Appearances:

James D. Vilvang, Q.C. — Counsel for the Plaintiff
P. Daryl Wilson, Q.C. — Counsel for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] In 2004, Robert Harvey and the defendants Roy Slade and Christine Doke owned all of the shares of 5505 Yukon Limited (5505), a predecessor company of the defendant with the same name. Harvey and Slade each owned 44 ¾ percent of the shares and Doke owned 12 ½ percent.

[2] In March of 2004, the three shareholders of 5055 caused the company to purchase new insurance policies for one million dollars on the lives of Harvey and Slade and for $500,000 on Doke's life.

[3] Harvey died on February 24, 2007. The insurer, TransAmerica Life Canada, paid the proceeds of the policy to 5505. The proceeds are being held in trust pending the outcome of this litigation.

[4] The plaintiff, Sharman Harvey, is the widow of Harvey and the administrator of his estate. She claims that 5055 is obligated to pay all of the insurance proceeds to the estate pursuant to a Unanimous Shareholders' Agreement entered into among the shareholders of 5505 in 1997 ("the USA"). In 1997, there were four shareholders of 5505, Harvey, Slade, Gabriel Aucoin and Bruce MacLean.

[5] The USA required 5505 to purchase buyout insurance on the lives of its four shareholders. When a shareholder died, all the proceeds of the insurance policy would be used to buy out the deceased shareholder's interest in 5505. Thus, Ms. Harvey argues, 5505 is required to purchase her late husband's shares for the full amount of the insurance proceeds, being one million dollars.

[6] The defendants 5505, Slade and Doke defend the claim arguing that the USA did not apply to the life insurance purchased in 2004. They do accept however that pursuant to an oral agreement entered into among the shareholders of 5505 at the time 5505 purchased the insurance on Harvey's life in 2004, 5505 is required to pay the estate the fair market value of Harvey's shares at the time of his death. While the value of the shares at the time of death has not been determined by a court, the defendants obviously anticipate that it was less than the full proceeds of the insurance policy.

[7] The defendants argue that:

a) by the time of Harvey's death in 2007, the USA was no longer in effect;

b) by the time of Harvey's death, his shares were not subject to the USA; and

c) even if the USA was valid in 2004, it did not apply to the policy that 5505 purchased on Harvey's life.

[8] The practical effect of each of the defendants' arguments is the same – the USA does not govern the use of the insurance proceeds.

[9] Justice Veale ordered the trial of the action be bifurcated. He ordered that the issue of whether the USA is binding should be tried separately from issues relating to the valuation of the shares of 5505. These reasons relate to the first issue.

[10] I have concluded that even if the USA continued to be in effect in 2004, or at the time of Harvey's death, it does not apply to the life insurance policy on Harvey's life. Rather, the use of the insurance proceeds from that policy is governed by an oral agreement entered into by Harvey, Slade, Doke and 5505 at the time 5505 purchased the insurance.

[11] The conclusions I have reached makes it unnecessary to address several other issues raised by the parties including whether all or part of the USA continued to be effect in 2004 or at the time of Harvey's death and the interpretation of the USA.

[12] Let me then turn to the reasons for my conclusions. I start with a short description of the events preceding the purchase of the insurance.

FACTS

[13] In 1997, Harvey, Slade and the two other shareholders, Aucoin and MacLean each owned 25 percent of 5505. On June 17, 1997, they entered into the USA, which among other things was intended to provide a mechanism for the buyout of a shareholders' shares from the estate of a shareholder who died. To facilitate the buyout,

5505 bought life insurance policies in the amount of $250,000 on the lives of the shareholders. 5505 was the named beneficiary.

[14] In subsequent years, the shareholders of 5505 engaged in a number of corporate transactions including the rollover of the shares in 5505 into private holding companies (1998), the transfers of shares from the holding companies back to individuals (1994 – 1995) and the amalgamation of 5505 with certain holding companies to form the company that is the defendant in this action (1996).

[15] In addition, over the years after the USA, there were several changes in the shareholders. In 1998, Aucoin transferred his shares to the other three shareholders. In 2002, MacLean sold his shares to Harvey and Slade. Also in 2002, Doke purchased 12 ½ percent of the shares from Harvey and Slade. Thus at the time, 5505 purchased the insurance policy in 2004, the shareholdings were Harvey 44 ¾ percent, Slade 44 ¾ percent and Doke 12 ½ percent.

[16] Prior to the purchase of the insurance in 2004, 5505 continued to hold the insurance policies mentioned above on the lives of Harvey and Slade in the amount of $250,000 each. I accept that those policies had been purchased pursuant to the USA and were intended to provide 5505 with funds to purchase the shares of either Harvey or Slade should one of them die. In 2004, those policies were issued by Maritime Life Assurance Company.

[17] 5505's business involved providing engineering and surveying services. In evidence, Harvey was described as a brilliant engineer and marketer. He played a critical role in the operations and success of 5505. Slade was and is a surveyor and was

very valuable to 5505 in managing many of its contracts. Their roles were complementary. Both were important to the operations of 5505.

[18] Doke worked for 5505 in the 1990's as an office manager. She left the company for a period of time. In 2002, Harvey and Slade enticed her back to serve as what, in effect, would be the Chief Administrative and Financial Officer. At that time, she was offered and purchased a 12 ½ percent of the shares of 5505 for $147,000.

[19] In the fall of 2003, 5505, at the initiative of Doke, purchased a new Group Benefits Plan for employees through Sherman Friesen, an independent financial planner and insurance agent from Vancouver. After purchasing the Group Plan, the principals of 5505 had discussions with Friesen about purchasing life insurance on their lives. Friesen came to Whitehorse to discuss the purchase of the insurance and a number of meetings were held at which Harvey, Slade and Doke attended.

[20] As a result of the discussions, Harvey, Slade and Doke agreed that 5505 would purchase life insurance policies in the amount of one million dollars on the lives of each of Harvey and Slade and $500,000 on Doke's life. In March 2004, 5505 applied to TransAmerica Life Canada for the insurance. 5505 was named the beneficiary. TransAmerica issued the policies. In ensuing years, 5505 paid the premiums.

The Oral Agreement

[21] The overwhelming evidence is that at the time the principals of 5505 were discussing the life insurance with Friesen, they intended the insurance to have two purposes; to provide 5505 with funds to buy back the shares of a deceased shareholder at fair market value and to provide "key person" insurance to 5505 to address the consequences to 5505 of the death of one of the three principals. Further the evidence

establishes that the three principals, Harvey, Slade and Doke did not intend the USA to apply to the insurance that 5505 purchased in 2004.

[22] Slade, Doke and Friesen each gave evidence supporting the conclusions in the preceding paragraph. I accept their evidence. In my view, each of them was credible. All three gave their evidence in a candid and straightforward manner and while there may be a few differences in detail, the overall thrust of each of their evidence confirms the others. I note as well that Friesen was an independent witness with no stake in the outcome.

[23] In 2002, MacLean, who by then owned one third of the shares of 5505, sold his shares to Harvey and Slade for $400,000. They paid him over the following two years. Also in 2002, Doke purchased 12 ½ percent of the shares of 5505 from Harvey and Slade for $147,000. She paid for the shares over the next two years.

[24] Doke testified that Harvey considered the value of the company at the time (2002 – 2004) to be approximately 1.2 million dollars. That value is in line with the amounts paid by Doke when she acquired her shares and by Harvey and Slade when the acquired MacLean's shares.

[25] After Doke returned to 5505 in 2002, she became very concerned about the financial stability of the company in the event that Harvey or Slade should die. She considered it very important that 5505 have key person insurance on the lives of the principals. This concern was understandable as she had a significant interest in the well-being of 5505. She was paying $147,000 for her shares and had personally guaranteed some of the company debt.

[26] Thus, when the principals of 5505 discussed life insurance with Friesen in 2004, they discussed key person insurances as well as buyout insurance. Friesen testified that the discussions covered both aspects. So did Slade and Doke. Harvey was involved in these discussions. Initially, they discussed acquiring $500,000 insurance on the lives of Harvey and Slade. That amount equated to the approximate value of Harvey and Slade's shares, as the principals saw it. However, they also discussed the importance of having key person insurance.

[27] Slade and Doke testified that the three shareholders agreed on the need for key person insurance. The discussions eventually led to 5505 purchasing insurance in the amount of one million dollars on the lives of Harvey and Slade. Harvey was a party to these discussions and to the agreement to buy the insurance for the two purposes.

[28] Slade and Doke testified that the three shareholders agreed that the proceeds of the policies in the event of death of one of them would be used first to buy the deceased's shares at the fair market value and that the remainder would provide 5505 with key person insurance.

[29] Friesen's evidence confirmed the nature of these discussions. In a letter dated June 15, 2007, he indicated that the coverage purchased had both objectives – buyout and key person.

[30] At the same time that 5505 purchased insurance on Harvey and Slade, it also purchased $500,000 on Doke's life. The three shareholders agreed that the proceeds of the Doke policy would be treated in the same fashion as the other two policies, first as buyout and then as key person insurance.

[31] I also conclude that Harvey, Slade and Doke did not intend the USA to govern the use of the proceeds from the life insurance policies purchased by 5505 in 2004. Accepting for the sake of discussion, that the USA continued to exist in 2004, the agreement that Harvey, Slade, Doke and 5505 reached in 2004 about the new insurance was separate and distinct from the USA.

[32] To start, I accept Doke's evidence that while she was aware in very general way of the existence of the USA, she did not have any idea about the content of the agreement and in particular did not know how it would govern the use of life insurance proceeds. She was never told that the shares that she agreed to purchase in 2002 were subject to the USA. Even if one accepts the plaintiff's argument that Doke became a party to the USA by virtue of s. 148(2) of the Yukon *Business Corporation Act*, her lack of knowledge of the USA supports a conclusion that she intended to enter into a different agreement about the use of the insurance proceeds being purchased.

[33] Slade testified that although he knew about the USA, he did not consider it to be valid any longer. He testified that at the time of the purchase of the insurance in 2004, the principals of 5505 did not discuss the USA nor did they have regard to its provisions when they considered how the proceeds of insurance would be used.

[34] Slade and Doke's evidence is supported by Friesen's evidence. Not surprisingly in the course of selling the insurance, Friesen asked the principals of 5505 if there was a shareholders' agreement. He was told (it is not clear by whom), that there was something from the past. He asked to see it but they did not produce it because it was old and not current. As a result, Friesen never saw it. Harvey was part of this discussion. Slade and Doke did not recall this exchange.

[35] Ms. Harvey argues that because neither Slade nor Doke recall Friesen's request to see the USA and the response that I should disregard Friesen's evidence. I do not agree. I conclude that none of Slade, Doke or Harvey considered the USA to be operative, particularly in relation to the insurance that 5505 was purchasing. When testifying, it would have been easy for Slade or Doke to simply have adopted Friesen's evidence about his request to see the USA and the response rather than saying they didn't recall it. If would have helped their case. They did not. I accept that they were truthful in saying they did not recall the exchange. Nevertheless, I find that Friesen made the request as he testified. Importantly, the answer he received is consistent with Slade and Doke's evidence that none of the three principals of 5505 intended the USA to apply to the insurance being purchased.

[36] Moreover, I am satisfied that given the relationships among Harvey, Slade and Doke, it is not surprising that they would enter into an oral agreement about the use of the proceeds of the life insurance policies and not reduce it to writing. It is clear that they trusted each other. Harvey and Slade had worked together as, in effect, partners for many years. It is true that they formalized the USA in 1997 when they brought others into 5505. At that time they involved a lawyer and ended up with a lengthy and complicated USA. They also ended up with a corporate structure, involving rollovers to holding companies, that cost them a lot in legal fees and provided no benefit.

[37] However, after 2002, Aucoin and MacLean were no longer part of 5505. I accept that Harvey and Slade went back to the comfortable handshake type of relationship that had been the basis of their business dealings before 1997.

[38] It was the same with Doke. She agreed to buy shares in 2002. At that time, the three shareholders did not involve a lawyer. Again they trusted one another. Doke paid $147,000 for her shares over two years and gave a guarantee for a company debt. There was no written agreement for that transfer of shares, nor did the company issue a share certificate until December 2005. In the intervening three years, Doke's interests were based on an oral understanding with Harvey and Slade and on trust.

[39] Not surprisingly, the trio of Harvey, Slade and Doke did not choose to reduce their agreement about the use of the insurance proceeds in 2004 in writing.

[40] It is also worth noting that the agreement that the three reached in 2004 about the use of the insurance proceeds is not inconsistent with the USA. Clause 4B.02 of the USA requires the purchase of buyout insurance. It also provides that the USA "shall extend to and include any additional policies issued pursuant hereto, such additional policies to be listed in Schedule A".

[41] The 2004 policies were not listed in Schedule A. Thus on the face of it, they were not subject to the USA. Had the three shareholders intended the policies to be governed by the USA, they could have added them as a Schedule to the agreement.

[42] In addition, Clause 4B.16 of the USA contemplates that the company may purchase "key man insurance" as well as "Article 4B" buyout insurance. The lawyer who drew the USA stated that he did not intend to make all insurance policies owned by 5505 *prima facie* "Article 4B life insurance" under the USA.

[43] In arguing that there was not an agreement in 2004, Ms. Harvey points to the fact that Friesen did not testify that the parties "agreed" to how the proceeds would be used when he was present. Reading his evidence very narrowly that may be correct.

However, Friesen's evidence was clear that the lengthy discussions in which he was involved contemplated the two types of insurances, buyout and key person insurance. Whether the actual agreement took place in his presence or not is immaterial. I am satisfied that the parties did agree to purchase both kinds of insurance.

[44] Ms. Harvey also argues that page 6 of the applications for insurance on Harvey and Slade described the new insurance as a replacement for the existing Maritime Life polices. This, she argues, showed an intention that the new policies be governed by the USA as the policies being replaced had been.

[45] I do not accept this argument. First, the word "replacement" was Friesen's word, not the three principals of 5505. The principals of 5505 did not see page 6 in completed form at the time the applications were submitted. In any event, in one sense, the new policies were replacing the old policies which were being cancelled. The principals agreed that a portion of the new policies would be buyout insurance. However, they did not intend nor agree that the new policies would be subject to the USA. Friesen's use of the word "replacement" does not undermine Slade and Doke's evidence that their agreement did not incorporate the USA.

[46] Similarly, I do not attach any significance to the fact that in the applications for life insurance, Friesen did not check the boxes for "Buy/Sell" and "key person" insurance. Friesen testified that checking these boxes was optional. His evidence, as well as the evidence of Slade and Doke, is clear that the intention was that the insurance be used for both purposes.

[47] In addition, I note that the conclusion that the parties did not intend the use of the proceeds of the insurance to be governed by the USA is consistent with the subsequent

conduct. In 2005 and 2006, the principals engaged in a corporate reorganization and amalgamation. They did not refer to the USA in any of the documents. On the contrary, they included two entire clauses in agreements including in a transfer of shares signed by Harvey. Share certificates issued by 5505 did not refer to the USA. No one, including 5505's lawyer, ever referred to the USA during these corporate steps. While the failure to ever mention the USA in the course of these transactions may not be determinative, it is consistent with a conclusion that the principals of 5505 did not consider it to be operative during the 2004 insurance process.

[48] In summary, I do not suggest that the agreement reached in 2004 amended or terminated the USA rather I conclude that the parties entered into a separate new agreement as to the use of the insurance proceeds. They did not intend or agree that the USA applied to those proceeds.

Hearsay Evidence

[49] During the trial, I allowed the plaintiff's counsel to lead some hearsay evidence from Ms. Harvey: I indicated that I would rule on its admissibility of the hearsay at the end of trial. I do not admit the evidence. It does not fall within any of the established exceptions to the hearsay rule nor in my mind it is sufficiently reliable to be admitted.

[50] In any event, the only part of that evidence that is even remotely relevant to the issues I have decided, is Ms. Harvey's evidence that about one and one-half years before his death, her husband told her that 5505 had life insurance that she would receive on his death and that she would receive the full amount of the policy.

[51] I would attach little weight to this evidence if admitted. As I have said, I accept the clear direct evidence of Slade and Doke about the agreement made in 2004. I prefer that evidence to the hearsay of Ms. Harvey.

SUMMARY

[52] I conclude that the 2004 oral agreement had the following elements:

1. 5505 would apply for the life insurance on the three principals;
2. 5505 would pay for the insurance;
3. 5505 would be the beneficiary of the policies;
4. the policies would be used for two purposes: buyout on death and key person;
5. the buyout portion of the proceeds would have priority and would be for the fair market value of the deceased's shares at death;
6. the balance of the insurance proceeds after the buyout would be for 5505 as key person insurance.

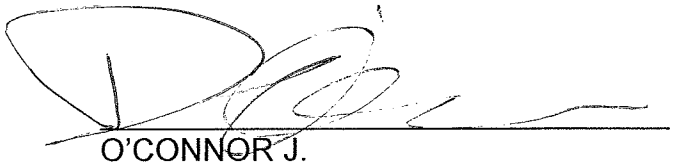
[53] I am also satisfied that the parties contemplated that the minimum buyout would be $500,000. At the time of purchasing the insurance, the principals considered that Harvey and Slade's shares in 5505 were worth about $500,000. There was no evidence that the principals agreed that the buyout portion of the insurance proceeds should ever be less that $500,000.

[54] Thus, while the evidence is not entirely clear on this issue, I conclude that the principals agreed that a deceased's estate should receive a minimum of $500,000 and more if the fair market value of the deceased's shares at the time of death was greater.

[55] My conclusions above leave open the possibility that there will have to be a further trial to address the valuation issue.

[56] During closing argument, the question arose whether 5505 should be valued before or after receiving the insurance proceeds. The parties did not lead evidence on this issue and I therefore leave it open to the valuation hearing.

[57] In the result, I answer the question raised in Justice Veale's order by ruling that the USA does not apply to the insurance proceeds that 5505 received from the policy on Harvey's life. I rule also that there is a legally binding agreement that 5505 purchase Harvey's shares at the fair market value for those shares as of the date of death. I leave the issue of costs of the trial to the case management judge or failing resolution to further submissions to me.



O'CONNOR J.