Freedom of contract: removing shareholders' dissent rights by agreement

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Most provincial corporate statutes include dissent rights for shareholders. Dissent rights allow shareholders to object to certain fundamental changes in a corporation and to require the corporation to re-purchase their shares at fair value. If dissent rights are exercised, the dissenting shareholders and the corporation are both governed by the applicable statutory procedure and share value may be determined by agreement or by court order as necessary.

In some cases, dissent rights can be limited by agreement. Recently, in *Husack v Husack et al*, 2023 ONSC 949 (Husack), the Ontario Superior Court of Justice confirmed that contracting out of dissent rights is possible and held that the applicant shareholder was not entitled to dissent to the sale of corporate assets because there was a unanimous shareholders agreement (USA) in place through which all shareholders had effectively, if not explicitly, waived dissent rights.

Background

Husack involved a dispute amongst the shareholders of Frank Husack Holdings Inc. (FHH), a family-controlled holding corporation that had interests in numerous properties and real estate developments. The applicant, Donna Husack (the Applicant), and the respondents, who were the Applicant's mother and three siblings, comprised all the shareholders of FHH.

In 2010, the shareholders executed a USA which included the following clause:

> [3.01] Notwithstanding the foregoing, **the ESTATE shall have the right at its option** to cause the Corporation **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. [Emphasis added]

The "Estate" was defined as "Evelyn Husack, in her capacity of Estate Trustee, Executrix and Trustee of The Estate of Frank Husack". Evelyn, one of the respondents, was also a director of FHH.

The USA also included a clause addressing conflicts between the USA and applicable business legislation, which stated as follows:

> [9.01] 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).

In 2019, all the estate trustees except for the Applicant voted in favour of liquidating FHH's assets. The Applicant subsequently sought to enforce her dissent rights under s. 184(3) of the *Ontario Business Corporations Act* (OBCA), while the respondents argued that the USA waived such rights.

Decision

Justice MacNeil first considered whether any dissent rights of the shareholders of FHH would even be triggered under the OBCA. Pursuant to section 185(1)(e) of the OBCA, dissent rights are triggered upon a sale, lease or exchange of "all or substantially all the property of a corporation other than in the ordinary course of business of the corporation". Justice MacNeil found that the ordinary course of business of FHH was to hold and manage properties, and that the sale of substantially all FHH's assets as resolved by the trustees in 2019 did indeed trigger the shareholders' dissent rights.

Despite this, Justice MacNeil found that any dissent rights related to the impugned sale had been waived by clause 3.01 in the USA, which contained clear and unambiguous language permitting the exact situation contemplated by sections 184(3) and 185(1)(e) of the OBCA. Further, the clear and unambiguous language of clause 9.01 of the USA specifically alerted the shareholder that they were giving up statutory rights to the extent that they conflicted with the USA, such that the direct conflict between section 184(3) of the OBCA and clause 3.01 of the USA necessarily resulted in the waiver of the OBCA in favour of the USA.

Accordingly, even though the USA did not specifically mention dissent rights or s. 184(3) of the OBCA, the language of clauses 3.01 and 9.01 was "sufficiently clear" to oust the Applicant's statutory dissent rights. In addition, Justice MacNeil found that other provisions of the USA supported the enforcement of clauses 3.01 and 9.01 in that they bound the shareholders to give full effect to the purposes and intent of the USA and to carry out its terms and conditions.

Ultimately, Justice MacNeil found that although the purpose of dissent rights is to ensure that shareholders are not locked in when the corporation takes a new direction, such dissent rights can nonetheless be waived. Of note, Justice MacNeil observed there was no authority to the contrary before the Court, nor any case law suggesting that such a waiver would be contrary to public policy.

Takeaways

Husack demonstrates that shareholders may enter into agreements which have the effect of validly waiving shareholders' dissent rights, even if such dissent rights are not

expressly mentioned in the agreement. Husack has yet to be considered by higher courts, but shareholders subject to unanimous shareholders agreements will want to take note of its findings regarding the waiver of statutory shareholder protections.

For more information on Husack or removing shareholders' dissent rights, please reach out to one of the key contacts below.

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