
CANADA / JUDGMENT

Ali Estate (Re)

2014 BCSC 340

COURT

Supreme Court of British Columbia

DECIDED

3 March 2014

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2014 BCSC 340 Ali Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ali Estate (Re),

2014 BCSC 340

Date: 20140303

Docket: S103503

Registry: Vancouver

In the Matter of the Estate of Muntaz Mohamed Ali, Deceased

Maksood Ali, Co-Executor of the Estate of Muntaz Mohamed Ali

Petitioner

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for Maksood Ali:

H. McLellan

Counsel for Razaanah Ali:

R. Kasting

Place and Date of Hearing:

Vancouver, B.C.

October 23, 2013

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2014

INTRODUCTION

- [1] The late Muntaz Mohamed Ali (the "Deceased") died on November 26, 2008, leaving a last will and testament dated October 10, 2002 (the "Will"). This application arises in relation to a dispute regarding certain dispositions made in his Will.
- [2] The petitioner Maksood Ali ("Mr. Ali") is the Deceased's brother and Razaanah Rabah Ali ("Ms. Ali") is the Deceased's daughter. They are named as co-executors of the Will. They obtained a grant of probate on March 24, 2011. They were each represented by separate counsel on this hearing.
- [3] The respondents, Christina Neelu Hussain and Sophia Dibah Manikiam, are also children of the Deceased, and commenced an action pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490. Their claim was resolved out of court. Ms. Hussain and Ms. Manikiam's counsel was served with this application but did not appear at the hearing. The Deceased's brother, Manjur Ali, and the Deceased's two nephews, Saad Ali and Naushad Ali, are beneficiaries under the Will and, for purposes of this application, are aligned in interest with Mr. Ali. They did not appear at the hearing.
- [4] By way of background, this matter first came on for hearing before me with respect to Mr. Ali's application to rectify the Will. I dismissed his application and directed that after the grant of probate issued, the parties were to re-set the hearing of the interpretation application with affidavits containing only that evidence which was properly admissible on an interpretation application. My reasons are indexed at Ali Estate (Re), 2011 BCSC 537 (the "Rectification Decision").

THE COMPANY

- [5] The Deceased was the sole shareholder of Alfarz Enterprises Ltd ("the Company"). The date-of-death valuation of his shares is \$4,480,000.
- [6] The Company is a holding company that owns all the shares of Fred Surridge Ltd. ("FSL"). FSL, in turn, owns a wholesale waterworks supply business and certain properties in British Columbia on which its operations are situated. Mr. Ali has served in various capacities with FSL since the 1970's. At the time the Deceased made the Will and thereafter, Mr. Ali was the person primarily responsible for managing the business of FSL.
- [7] The Deceased had a shareholder's loan (the "Shareholder's Loan") due to him from the Company in the amount of \$430,961 in 2002, which is the year he made the Will. The amount owing as of the date of his death was \$193,222.

- [8] At his death, the Deceased also held a demand promissory note from the Company, dated January 7, 1982 (the "Promissory Note"). The face amount of the Promissory Note is \$74,000 and, at the Deceased's death, the amount outstanding was \$73,990.

THE WILL

- [9] As mentioned earlier, Mr. Ali and Ms. Ali are the appointed co-executors and trustees under the Will. Paragraph 3.1.2 of the Will provides that all bequests of capital property are conditional on the recipient beneficiary paying any income tax payable by the estate in respect of the realized capital gains associated with such property.

- [10] For purposes of this dispute, the key provisions of the Will are found in paragraph 3.2.2, which provide as follows:

3.2.2 Alfarz Enterprises Ltd.

With respect to the following bequest of my interest in Alfarz Enterprises Ltd. ("the Company") I DECLARE that my interest in the Company is my single largest asset. It is my wish that Maksood [Mr. Ali] receive 70% of the Company and be able to run and manage the Company as his own. However, I also wish to benefit my nephews, Saad Ali and Naushad Ali and my brother, Manjur Ali with 30% of my interest in the Company and to allow them to participate in the future growth of the Company and receive dividends without having any control or responsibility for running or managing the business of the Company. The following instructions are intended to give directions to my Trustees to enable them to restructure the Company in a manner that will reflect these wishes. However, I accept that future situations cannot be foreseen with accuracy and with this in mind I DIRECT that my Trustees have the discretion necessary to take whatever steps are required to reorganize the Company in a manner that gives effect to my wishes.

Subject to the provisions of clause 3.1.2 above, I DIRECT, my Trustees to determine the value of the Company at the date of my death and to enter into a share exchange or corporate reorganization in respect of the Company to the extent necessary to distribute my interest in the Company in the following manner:

10% of my interest in the Company (for a total of 30% of my interest in the Company) will be transferred to each of my nephews, Saad Ali and Naushad Ali and my brother, Manjur Ali by the issuance to each of them of the requisite number of preference shares in the capital of the Company; and

the balance of my interest in the Company will be transferred to Maksood [Mr. Ali] for his own use absolutely PROVIDED THAT if he is not then alive his interest in the Company will be paid or transferred to his children who survive him,

I FURTHER DIRECT my Trustees to take all steps necessary to change the rights and restrictions that attach to the shares of the Company or to create a new class or classes of shares as my Trustees deem necessary to effect the following goals:

it is my intention that the preference shares given to my said nephews and brother will:

be entitled to receive dividends at the same rate and time as the common shares and be entitled to participate in the future growth of the Company on a pro rata basis;

have a par value to be determined upon the advice of tax advisors at the time the preference shares are given to the said beneficiaries;

be redeemable, at the request of the shareholders thereof, for their proportional share of the value of the Company PROVIDED THAT a maximum of 5% of these preference shares may be redeemed in any one year without the prior written consent of the holders of the common shares; and

not have the right to vote at any meeting other than special meetings of the holders of preference shares; and

it is my intention that the common shares will:

have voting control of the Company;

be entitled to receive dividends at the same rate and time as the preference shares at the discretion of the directors of the Company; and

be entitled to participate in the future growth of the Company on a pro rata basis.

[underlining added; capitalization in original]

[11] In overview, clause 3.2.2 directs the trustees to determine the value of the Company at the Deceased's death and enter into any share exchange or corporate reorganization necessary to distribute 70% of the Deceased's "interest in the Company" to Mr. Ali. The remaining 30% is to be distributed equally among Saad Ali, Naushad Ali, and Manjur Ali.

[12] The Will provided other specific bequests to various respondents, the particulars of which are not material on this application.

[13] The residue of the estate devolves to Ms. Ali.

ISSUE

[14] The pivotal issue on this application is the proper interpretation of the phrase "my interest in the Company" in paragraph 3.2.2 of the Will. The essential question is whether that phrase encompasses the Shareholder's Loan owed to the Deceased by the Company at the date of his death and the amount owed by the Company to the Deceased at the date of his death pursuant to the Promissory Note.

- [15] If the court determines that, on a proper interpretation of paragraph 3.2.2 of the Will, the Shareholder's Loan and Promissory Note are not included in the bequest of the Deceased's interest in the Company, those assets would pass to Ms. Ali as the residuary beneficiary. If, on a proper interpretation, the Shareholder's Loan and Promissory Note are captured by the bequest in paragraph 3.2.2, then those assets would be divided in accordance with the directions in that paragraph.

LEGAL FRAMEWORK

- [16] The general principles which govern the disposition of this matter are not controversial. In *Thierner Estate*, 2012 BCSC 629, I summarized the governing principles as follows:
- [45] In construing a will, the objective of the court is to ascertain the intention of the testator as expressed in his or her will when it is read as a whole in light of any properly admissible extrinsic evidence: *Rondel v. Robinson Estate*, 2011 ONCA 493, at paras. 23-24; *Theobald on Wills*, 15th ed. (London: Sweet and Maxwell, 1993) at 199. It is a cardinal principle of interpretation that the testator's intention is to be gathered from the will as a whole and not solely from those provisions which have given rise to the controversy: *Perrin v. Morgan*, [1943] A.C. 399 at 406 (H.L.); *Re: Burke* (1960), 20 D.L.R. (2d) 396 at 398-399 (Ont. C.A.).
- [46] Another fundamental tenet affirmed by an established line of authorities is that the court is to ascertain the expressed intention of the testator - the meaning of the written words used in the particular case - as opposed to what the testator may have meant to do when he or she made the will: *Perrin* at 406.
- [47] Earlier lines of authority endorsed an objective approach to will interpretation. However, modern jurisprudence recognizes that a strict literal approach can defeat the intention of the testator, thereby leading to unjust results: *Law Reform Commission of British Columbia, Report on Interpretation of Wills*, LRC 58 (Victoria, MAG, 1982) at 6. The liberal interpretive approach finds its roots in the seminal decision of the House of Lords in *Perrin*.
- [48] In keeping with contemporary judicial thinking, the courts of this province have favoured the subjective approach to interpreting wills, wherein the objective is to ascertain the actual meaning the testator ascribed to the words he or she used in the will. In determining the testator's intention the courts have endorsed the analytical approach commonly described as the "armchair rule". The rule requires that the court put itself in the position of the testator at the point in time when he or she made the will, and from that vantage point construe the language in the will in light of the surrounding facts and circumstances known to the testator.
- [49] In *Re: Burke*, the Ontario Court of Appeal articulated the guiding principles which were cited with approval by our Court of Appeal in *Davis Estate v. Thomas* (1990) 40 E.T.R. 107 (B.C.C.A.) and *Smith v. Smith Estate*, 2010 BCCA 106, at paras. 18 and 28 respectively:

... Each Judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.

[51] Since the meaning of words in wills can differ so much according to the context and circumstances in which they are used, previously decided cases are of limited assistance except in so far as they may express general principles of construction. This notion has repeatedly been embraced by Canadian courts: *Kaptyn Estate (Re)* at para. 32; *Perrin* at 406; *Re: Burke* at 398.

EVIDENTIARY ISSUE

[17] On this application Mr. Ali sought to rely on evidence of the solicitor who drew the Will. The solicitor deposed as to the circumstances relating to the preparation of the Will including the instructions she received from the Deceased. Ms. Ali objects to the admissibility of paragraphs 7 to 20 of the solicitor's affidavit. I reserved my ruling on this evidentiary issue and indicated I would rule on the admissibility of the impugned evidence in these reasons.

[18] Although the primary source of evidence is the "four corners" of the will, the armchair rule entitles the court to look to extrinsic evidence (evidence other than the contents of the will) to identify the surrounding circumstances known to the will-maker at the time the will was made, which might reasonably be expected to have influenced the will-maker in the disposition of his or her property. The extrinsic facts and circumstances that a court may consider include the occupation of the will-maker, the state of his or her property, and the general relationships of the will-maker to his or her immediate family and other relatives: *Kaptyn Estate (Re)*, 2010 ONSC 4293 at para. 38. This indirect extrinsic evidence is generally admissible when construing a will.

[19] However, as I noted in the Rectification Decision, except in very restricted circumstances such as equivocation, on an interpretation application, the court is not permitted to review direct extrinsic evidence of a will-maker's intentions: British Columbia Law Institute, "Wills, Estates and Succession: A Modern Legal Framework," in B.C.L.I. Report No. 45 (B.C. 2006) at 37. The underlying rationale for its exclusion is that the will constitutes the evidence of a will-maker's intention and therefore direct extrinsic evidence of what the testator intended to write is not admissible to identify an ambiguity or to interpret an ambiguity that is apparent on the face of the will. This rule applies in particular to the will-maker's instructions provided to the solicitor who drew the will: *Sarkin v. Osipov Estate* (1989), 36 E.T.R. 139.

- [20] The authorities establish that in cases where a court finds an "equivocation", direct extrinsic evidence of a will-maker's dispositive intent, as opposed to indirect extrinsic evidence of surrounding circumstances, may be admitted as an aid to interpretation. An equivocation arises when words appear clear and unambiguous on the face of the will but an ambiguity emerges upon reference to extrinsic circumstances, for example where the words used to describe a gift are equally applicable to two or more donees or assets. To illustrate, if a testator made "a gift to my niece Jill" and the testator actually had two nieces named Jill, extrinsic evidence tending to show that the testator intended to benefit one and not the other niece is properly admitted to resolve the equivocation: *Murray Estate*, 2007 BCSC 1035; B.C.L.I. Report No. 45 at pp. 40 and 41.
- [21] Mr. Ali contends that an equivocation arises in relation to the phrase "my interest in the Company" and, therefore, direct extrinsic evidence of the Deceased's intention is admissible in construing the Will. I am not persuaded that there is any merit to this submission. In this case, the ambiguity is apparent on the face of the Will; I find no equivocation as that concept is contemplated by the authorities. Accordingly, I conclude that the court must interpret the Will without recourse to direct extrinsic evidence of the Deceased's testamentary intent.
- [22] Mr. Ali sensibly conceded that if I find there to be no equivocation, paragraphs 7 to 18 of the solicitor's affidavit are inadmissible. He submits that not all of the statements contained in paragraphs 19 and 20 constitute direct evidence of the Deceased's dispositive intentions. In particular, he asserts that the following extract from those paragraphs is properly characterized as indirect extrinsic evidence of surrounding circumstances:
- I recall we discussed that using a broad word such as "interest" which would capture everything that he owned or was due to him in respect of Alfarz and the concern about omission was therefore avoided.
- [23] I reject this submission. In my view, this evidence is plainly direct extrinsic evidence of the Deceased's testamentary intention and not evidence of the surrounding circumstances. In the result, that evidence is also inadmissible.
- [24] In summary on this issue, I conclude that paragraphs 7 to 20 inclusive of the affidavit are direct extrinsic evidence of the Deceased's intention and are not admissible in determining the meaning the Deceased ascribed to the words "my interest in the Company".

ANALYSIS

- [25] With the pertinent legal principles in mind, I now turn to consider the parties' submissions regarding the proper construction of paragraph 3.2.2. and, specifically, the phrase "my interest in the Company".
- [26] The starting point in the analysis is to note that the task of this Court is to ascertain, as determined from his armchair, the meaning of "my interest in the Company" that best accords with the Deceased's subjective intent as expressed in his Will.

[27] Mr. Ali submits that the bequest of the Deceased's interest in the Company in paragraph 3.2.2. ought to be construed as including the Deceased's Shareholder's Loan and the Promissory Note. Conversely, Ms. Ali asserts that the bequest is limited to the shares of the Company. In support of her submission, Ms. Ali referred to the valuation and re-organization of the Company that occurred after the Deceased's death. In my view, the events that have occurred post-death are not relevant in construing the Will. The fact that Deceased's Shareholder's Loan and the Promissory Note were deducted as liabilities in the valuation of the Company shares is not determinative of the issue.

[28] It is key that in clause 3.2.2 of the Will, the Deceased refers to both his "interest in the Company" and to the "shares in the Company". The Deceased gifted "his interest in the Company" and not his shares of the Company. In my view, it is clear that in his Will the Deceased intended to distinguish between his "interest" in the Company and his "shares" in the Company. I am fortified in my view by clause 5.4 in the Will which provides as follows:

5.4. Vote Shares

If my Estate includes shares, options, obligations or other interests, (the "Interests") in or in connection with any corporation, trust, partnership, syndicate or other entity, my Trustees, in their discretion, may join in or take any action in connection with these Interests and may exercise any rights, powers and privileges that exist or arise in respect of those Interests in the same manner that I could were I alive and the sole owner of the Interests.

[emphasis added]

[29] The authorities mandate that all the parts of a will are to be construed in relation to each other and, insofar as possible, the Court must read the will as a logical, cohesive whole. The consideration of the contents of the Will as a whole supports the conclusion that the Deceased intended to distinguish between his "interest" in the Company and the "shares" in the Company, and intended that his "interest" in the Company encompassed something more than merely his shares in the Company.

[30] Mr. Ali also submits that in construing the Will the Court may consider the ordinary meaning of the words as defined in dictionary sources. I find merit to his submission that the words the Deceased chose to use in paragraph 3.2.2. do not reasonably support an inference that the Deceased intended to limit his "interest in the Company" to his shares in the Company. A broader scope was intended.

[31] The Canadian Oxford Dictionary, 2d ed., defines interest as:

5 (a) "A financial stake (in an undertaking, etc.)."

(b) "A legal concern, title or right (in property)".

[32] The Dictionary of Canadian Law, 2d ed. defines interest as:

Something which a person has in a thing when that person has advantages, duties, liabilities, losses or rights connected with it, whether ascertained or potential, present or future"

- [33] The ordinary meaning of "interest" is expansive and in my view the ordinary meaning of an "interest" in a company is not limited to shareholdings in that company. It follows that in gifting his "interest in the Company", the Deceased intended to dispose of more than his shares in the Company. It is reasonable to conclude that in the context of the Will, the Deceased intended to bequeath the entirety of his financial stake in the Company, including any indebtedness owing to him by the Company, be it a shareholder's loan or other debt evinced by a promissory note.
- [34] Recourse to the armchair rule and consideration of the circumstances known to the Deceased at the time he made the Will also support the conclusion that he intended that the Shareholder's Loan and Promissory Note were to be included in the subject bequest.
- [35] What circumstances may have reasonably influenced the Deceased in the disposition of his estate? The evidence demonstrates that at the time the Deceased drew the Will, Mr. Ali was managing the Company. The Deceased clearly intended that Mr. Ali continue managing and operating the Company. Indeed, paragraph 3.2.2 of the Will expressly states that the Deceased wished Mr. Ali to run and manage the company "as his own".
- [36] In broad terms, a shareholder's loan is a debt-like form of financing provided by a shareholder to a company in which he or she owns shares. The viability for repayment of such a loan to the shareholder at any given time would be subject to the company's solvency and liquidity at that point in time. Gifting the Shareholder's Loan and Promissory Note to an uninterested third party could potentially result in a calling of the loan and the note at an inopportune time, which potentially could jeopardize the financial operations of the Company. By gifting the liabilities he was owed by the Company, the Deceased provided Mr. Ali with more effective control than if Mr. Ali were a mere shareholder, consistent with his stated intention that Mr. Ali operate the Company "as his own".

CONCLUSION

- [37] I have concluded that, on a proper interpretation of the Will as a whole, and in light of the circumstances known to the Deceased at the time he made the Will, he intended that the Shareholder's Loan and the Promissory Note were to be included in the bequest of his interest in the Company under paragraph 3.2.2.

COSTS

- [38] The parties agree that this application to court to construe the Will was necessary for the administration of the estate and, therefore, both parties should be entitled to their costs of the application payable out of the estate.

[39] Despite this agreement, Ms. Ali submitted that Mr. Ali should be sanctioned with some form of a costs order in the event the Court ruled against him on the issue of the admissibility of the solicitor's affidavit. Courts routinely make evidentiary rulings during the course of hearings and trials without imposing costs sanctions on the losing party. In any case, I was not provided with any authorities that would permit me, on any principled basis, to make such an order in the circumstances of this case.

[40] In the result, both parties shall be paid their reasonable costs of and incidental to this application out of the estate.

"Dardi J."

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Prepared on 28 October 2026 · Esheria