July 24, 2013

Contractual Interpretation and Context

Written by: Jassmine Girgis

Cases commented on:

Ziegler v Green Acres (Pine Lake) Ltd, 2013 ABQB 349.

Ziegler v Green Acres (Pine Lake) Ltd is a case that revolves around one provision in a unanimous shareholder agreement (USA). Due to tragic circumstances, the Applicants/Defendants (referred to as Defendants) ended up in court, in disagreement over the interpretation of the USA, and specifically, over whether the shares of a deceased shareholder had to be sold to the remaining shareholders, or could remain with the deceased's wife.

Facts

The Defendant, Green Acres (Pine Lakes) Ltd. ("Green Acres") is an Alberta business corporation. Danny Fisher, another Defendant, became the Director and Shareholder of Green Acres in 1977, and has been President since 1988. Danny Fisher married Lexy Fisher in 1990 and she too became a director and shareholder, making both of them the only directors and shareholders of Green Acres at the time. Their two sons, Justin Ziegler and Garth Ziegler, eventually became shareholders as well.

In August 2003, Green Acres went through a corporate restructuring and estate freeze for the Fishers. Subsequently, the four shareholders of Green Acres executed a USA, effective August 31, 2003. Also, as a result of the restructuring, Justin and Garth Ziegler were each issued 24 Class 'D' shares of Green Acres. At all times, Danny and Lexy Fisher continued as the only two directors of Green Acres.

The Plaintiff/Respondent (referred to as Plaintiff), Crystal Ziegler (now Crystal Small) and Garth Ziegler had a daughter in 2004 (Abigail Lee Ziegler, the other Plaintiff) and were married in March 2005. Sadly, Garth Ziegler was killed in an accident on May 29, 2005. After Garth's death, Green Acres continued, for one year, to pay Crystal Ziegler the amount equivalent to Garth's salary, a bi-weekly payment of $1,600.00 per month. On August 3, 2006, Green Acres issued a Notice of Intention to Purchase Shares for the 24 Class 'D' shares Garth had previously held, and which had passed to the Plaintiffs. The Plaintiffs disputed the efficacy of the Notice.

Decision

The issue before Yamauchi J. was whether, pursuant to USA para. 11.01, the Plaintiffs were required to sell the 24 Class 'D' shares to the remaining shareholders who chose to purchase their portion of those shares.

Para. 11.01 states:

> In the event that sickness, accident or disability afflict and prevent any shareholder or principal shareholder from continuing active full time employment with the corporation (hereinafter referred to as the "Afflicted Shareholder"), the parties agree that for the first six (6) months of inability to continue active full time employment, the Afflicted Shareholder shall be paid the same remuneration monthly as he would otherwise be paid if he had continued active full time employment with the Corporation. In the event that the Afflicted Shareholder remains unable to return to active full time employment for a period in excess of twelve (12) months from the date of the affliction, the other shareholders (hereinafter referred to as the "Non-afflicted Shareholders") may serve notice on the Afflicted Shareholder of intention to purchase the Afflicted Shareholders' shares in the same proportion as the respective holdings of shares in the Corporation of the Nonafflicted Shareholders. In the event that the foregoing notice is not served on the Afflicted Shareholder and he remains unable to return to active full time employment for a period of two (2) years from the date of the affliction, such Afflicted Shareholder may serve notice on the Nonafflicted Shareholders requiring them to purchase the Afflicted Shareholder's shares in the same proportion as the respective holdings of shares in the Corporation of the Non-afflicted Shareholders. In the event of a notice given as aforesaid by the Afflicted Shareholder or the Non-afflicted Shareholders, as the case may be, the Afflicted Shareholder shall thereafter sell to the Non-afflicted Shareholders all of the Afflicted Shareholder's shares in the same proportion as the respective holdings of shares in the Corporation of the Non-afflicted Shareholders, for a purchase price equal to the value of such shares as determined in accordance with the provisions of Article 9.05. The Closing Date for such purchase and sale shall be thirty (30) days after the date that the purchase price is so determined and the provisions of Article 9.04 and Article 9.05 shall apply mutatis mutandis to the closing of such purchase and sale.

The key part of the USA para. 11.01 is the opening line:

> In the event that sickness, accident or disability afflict and prevent any shareholder or principal shareholder from continuing active full time employment with the corporation…

The Defendants argued that “death” is a triggering event under para. 11.01, thereby compelling the Plaintiffs to sell the 24 Class D shares to the Non-afflicted Shareholders. As “death” is not expressly included in USA para. 11.01, the Court had to determine whether it fit into the triggering events (sickness, accident or disability) which would require the Plaintiffs to dispose of their shares. If the triggering events did not include death, the shares would become part of Garth’s estate, to be dealt with in whichever manner the personal representative saw fit. The Defendants conceded that “death” does not fall within “sickness” or “disability” but argued that it fell within “accident”, maintaining that “nothing in the drafting structure or the underlying meaning of the words excludes death” (at paras. 17-18, citing Applicant’s Brief, para 22).

The Court mentioned a number of principles of contractual interpretation, including the admissibility of extrinsic evidence if the contract is clear and unambiguous; the necessity of considering the contract as a whole; ensuring the court does not rewrite the contract for the

parties; and the interpretation principle, *ejusdem generis*, which states that "when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed" (*Black's Law Dictionary*, 7th ed (St. Paul, Minnesota: West Publishing Co, 1999), "*ejusdem generis")*.

The Court determined that the drafting structure of the entire agreement did not seem to contemplate death, as the triggering events all appear to provide for a person continuing to live after being afflicted, and the rest of para. 11.01 also contemplates survival, as it provides for a procedure for purchasing shares by the afflicted and non-afflicted shareholders, to be employed 6 months, 12 months and 2 years after the triggering event occurs (*Ziegler* at paras 20, 21).

The Court also found that, elsewhere in the USA, death is contemplated, under another section pursuant to which a shareholder is required to sell his shares, strengthening the argument that "death", not having been mentioned under triggering events, was not meant to be included.

Finally, the Court would not admit the original draft of the USA as extrinsic evidence, having found no ambiguity in the document.

The Court found that USA para. 11.01 did not include "death" as a triggering factor and dismissed the application.

Discussion

As the Court notes, when it comes to contractual interpretation, "the words that the contracting parties have used in their contract form the foundation on which" the Court must build its interpretation (at para 12). In doing so, the task of the interpreter is to give effect to the parties' intentions. To give effect to the parties' intentions and thereby achieve an accurate interpretation, one must consider the words used by the parties in their agreement, and the context for those words (see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed (LexisNexis Canada, 2012) at p 9, cited with approval in *Golden Capital Securities Ltd. v Investment Industry Regulatory Organization of Canada*, [2010] BCJ No 1458, 8 BCLR (5th) 227 at para 44 (BCCA)). Even if the words to the contract are clear and unambiguous, context should nonetheless be considered, as "[f]ew, if any words, can be understood apart from their context and no contractual language can be understood without some knowledge of its context and the purpose of the contract" (see Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed (LexisNexis Canada, 2012) at 9.10). And by context, Hall refers first, to the context of the document, and second, the surrounding circumstances in which the contract arose (*supra* at p 12).

Of the two contextual analyses, the factual context is more contentious. Some decisions maintain that an interpretation of a clearly worded contract can end with words. See for example, *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129 and *KPMG Inc v Canadian Imperial Bank of Commerce*, [1998] OJ No 4746 at para 5 (ONCA), leave to appeal to SCC refused [1999] SCCA No 36. Hall disagrees, however, and highlights other decisions that discuss the importance of factual context. See, for example, *Hi-Tech Group Inc v Sears Canada Inc*, [2001] OJ No 33, 52 (ONCA). This issue is discussed further below.

Contextual Interpretation: The Document

Giving effect to the context of the document means the entire document must be considered, and not only the individual words in isolation. In *BG Checo International Ltd v British Columbia Hydro & Power Authority*, [1993] 1 SCR 12 at para 9, La Forest and McLachlin JJ. stated:

> It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole.

By reading the entire document, and thereby providing a contextual reading, the parties' intentions can be identified (see *Canada (Treasury Board) v Wilson*, [1986] FCJ No 673, [1987] 1 FC 452 at 466 (FCA), leave to appeal to SCC refused [1987] SCCA No 60). This method is not without fault, as parties can certainly be inconsistent with their language, through error or carelessness, and it is also possible that parties intend language to have different uses in different parts of the agreement. The process of *ascertaining parties' intentions is a delicate balance, involving an analysis of the parties' reasonable* expectations. This can be aided by considering the other type of contextual analysis, discussed below.

In Ziegler, the Court engaged in a contextual analysis of the document by, as discussed above, looking at the class of items, the entire para 11.01 and the rest of the document. With regard to the particular items, the *ejusdem generis* principle is applicable here, to limit the scope of the phrase by determining the common characteristics of the class of enumerated items. The commonality between "sickness, accident or disability" is the reference to incidents that befall people, but do not necessarily end their lives. These events could certainly end a person's life, but when they are used in combination with the rest of the paragraph, it is less likely that the triggering events were meant to include death. As discussed above, the rest of para 11.01 discusses the procedure to be employed for purchasing shares after the triggering event occurs, both by the afflicted or non-afflicted shareholders, and there is no contemplation of the event resulting in death.

In another section of the USA, shareholders are permitted to purchase shares of a shareholder who becomes subject to a "Withdrawing Event". A "Withdrawing Event" is defined in the USA to be a "change in the principal shareholder, except in the event of the death of a principal shareholder", and examples of this change include becoming bankrupt or having his assets seized (USA para. 9.02(g), cited in *Ziegler* at para 23. The whole of para. 9.02(g) is not quoted in the decision but the decision gives the impression that these examples were included in the USA.)

Taken together, the paragraph containing the triggering events contemplates a shareholder's survival and the Withdrawing Event specifically excludes "death". The two sections require the shareholder to sell his shares in the event of sickness, accident or disability or in the event of a Withdrawing Event. None of these scenarios contemplate having to sell the shares in the event of "death", in spite of the fact, as noted by Yamauchi J., that "Withdrawing Event" could easily have been defined to include "death" (at paras 23-26, 31).

In sum, "death" was contemplated in the agreement. The shareholders turned their minds to it, chose not to include it in the triggering events, and chose to exclude it from the Withdrawing Events. A contextual analysis shows us that expanding any of the triggering events to include "death" is likely not giving effect to the parties' intentions when they drafted the document.

Contextual Interpretation: Factual Context

The factual context, or the circumstances in which the contract arose, is the other contextual type of analysis. In this case, while the Court opined on the facts surrounding the drafting of the USA, it nonetheless made no findings on the factual context, as it determined the document to be unambiguous and therefore did not allow for the admission of extrinsic evidence (at para. 32). Arguably, it could have, and probably should have, allowed evidence of this nature, as ambiguity does not have to be present for a court to consider the factual context: "A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity" (see *Dumbrell v Regional Group of Companies*, [2007] OJ No 298 at para 54). *Dumbrell* goes on to say that in order to find ambiguity, the context to the contract must be considered (at para 54).

In spite of the Court not having considered the factual context in this case, I will nonetheless say a few words on it.

The intention of the contracting parties can be ascertained, in part, by determining the purpose of the contract. This does not take into account evidence of the negotiations leading up to the contract (Hall, *supra* at pp 27, 30), nor does it does include a consideration of the facts that were in existence when the parties entered into the contract. The Alberta Court of Appeal said the following about it, which it called the "armchair rule":

> That rule lets the court see what the authors of the contract knew when they wrote it, in order indirectly to assist in resolving any difficulties in what certain words of the contract refer to. For example, a contract may contain unclear references to other people, or to things. The background knowledge may help to decide who or what was referred to. The expression quoted comes from the law of wills, and suggests that often one cannot construe a contract without knowing the facts which the parties knew when they contracted (not later). The rule under discussion is rarely called "the armchair rule" in contracts law, but that expression explains more than such vague or misleading labels as "the factual matrix" (*Gainers Inc v Pocklington Financial Corp*, [2000] AJ No 626 at para 21 (CA)).

The ABCA went on to say that this is not a way for the court to receive direct evidence of intent or evidence to contradict the contract or create ambiguities in the contract (at para 23), for "[i]f hindsight, implication, unspoken thoughts, and unwritten statements could have so pivotal a role [as they appear to have had at the lower court level], then written contracts would become a mere trap for the credulous" (at para 24). Rather, "[t]he doctrine lets the court find what a reasonable person would have thought was the aim of the transaction, if that person knew the facts available to the parties" (at para 22). Importantly, the intention of the parties must be assessed objectively.

In doing so, the court is putting itself in the same place as the parties when the contract was drafted. In *Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)*, [1976] 1 WLR 989 (HL), the House of Lords considered a number of decisions on this point and summed them up by saying:

> I think that all of their Lordships are saying, in different words, the same thing — what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me

> implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed. I shall show that this is so in the present case.

The primary purpose of a USA is, as Yamauchi J. noted, to keep control of the corporation confined to the shareholders, through fettering directors' discretion (*Ziegler* at para 29). It is also to control the distribution of shares to outsiders if one shareholder wishes to divest himself of his shares, by giving the right of first refusal to the other shareholders (at para 29). The Defendants made that argument, maintaining that "[o]pening the circle to permit an outsider to acquire a block of shares in the event of accidental death without providing a call option to the existing ownership group would represent a significant and unwarranted anomaly in the overall scheme of the USA" (at par 32).

This point is certainly legitimate but there are two, conflicting, interpretations that can be gleaned from it. While the Court made no findings on the factual context, it did quote from the parties' briefs, where the parties referred to the surrounding circumstances.

First, and on par with the general purpose, the Defendants point to a publication that discusses the close personal relationship shareholders in a closely held corporation enjoy, and how surviving shareholders may not want to have that relationship with a surviving spouse of a deceased shareholder (at para 34, quoting Ricky W Ewasiuk, *Drafting Shareholder's Agreement: A Guide* (Scarborough, Ont: Carswell, 1998), para. 3.4). However, there were other surrounding circumstances when the document was drafted, and these potentially conflict with the general purpose of USAs. The Plaintiffs argued that it would be reasonable to foresee the USA contemplating the sharing of value with the two Ziegler boys and their own families, given that the two were men in their twenties at the time the USA was drafted, and it would not be unreasonable to anticipate they would go on to have families of their own (at para 30, from the Respondents' brief). The Court also noted that the Defendants' interpretation does not close the door to that of the Plaintiffs', as keeping "outsiders" out would not necessarily encompass their son's wife and his daughter. "The structure of the USA could just as easily be interpreted to allow for the holding of Garth's shares by his widow and his child, to facilitate their maintenance following his death" (at para 32).

The Plaintiffs argued that if such interpretations were found, the interpretive principle of *contra proferentum* would be applicable, but the Court found no reason to apply the principle, having found no ambiguity. The principle of *contra proferentum* applies when contracts are ambiguous, to construe the contract against the person who drafted it. Here, as considered only in the document, the contractual words were not ambiguous, but could potentially become ambiguous if factual context is factored in. In the event that they do, and that the factual context above were to be considered, the principal of *contra proferentum* could apply to resolve the ambiguity. However, doing so would have likely resulted in the same outcome, in favour of the Plaintiffs.