CITATION: John Richard Southwell v. Carlgate Development Inc., Julie Anne Reis and Isabelle Margaret Southwell, 2024 ONSC 822
COURT FILE NO.: CV-21-88130
DATE: 2024/02/09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: John Richard Southwell, Applicant

AND:

Carlgate Development Inc., Julie Anne Reis and Isabelle Margaret Southwell, Respondents

BEFORE: Justice K.A. Jensen

COUNSEL: Counsel, for the Applicants: Michael Wade

Counsel, for the Respondents: Christopher P. Morris

HEARD: December 7, 2023

REASONS FOR DECISION

JENSEN J.

Introduction

[1] The owner of the Applicant Company, John Richard Southwell ("the Applicant"), seeks a declaration that the personal Respondents – his sister, Julie Anne Reis ("Ms. Reis"), and his mother Isabelle Margaret Southwell ("Mrs. Southwell") – were not appointed directors of Carlgate Development Inc. ("the Respondent Corporation" or "Carlgate") in 2005. In addition, the Applicant seeks a declaration that his mother, Mrs. Southwell, did not purchase shares in the Respondent Corporation in 2005.

[2] The Applicant also seeks rectification of various corporate documents pursuant to s. 250 of the Ontario *Business Corporations Act*, R.S.O. 1990, c B.16 ("*OBCA*"), which show Ms. Reis and Mrs. Southwell as directors of the Respondent Corporation and Mrs. Southwell as a shareholder.

[3] The Respondent Corporation was owned primarily by John Richard Southwell's father, John Wallace Southwell ("Mr. Southwell Senior"). In 2005, Mr. Southwell Senior asked his accountants and lawyer to reorganize the Respondent Corporation to minimize the tax consequences when he passed away.

[4] Mr. Southwell Senior passed away on April 9, 2020. The administration of his estate has been held up by the dispute over the ownership of the shares in question and the directorship of the Respondent Corporation.

[5] The Applicant argues there was no agreement to sell Mrs. Southwell shares in Carlgate and to make her and Ms. Reis directors of the Respondent Corporation for the following reasons: there is no evidence that Mrs. Southwell paid for the shares that were purportedly transferred to her in 2005; the documentation required for the transfer of the shares and the appointment of the directors was not signed; and the proper processes for appointing directors and transferring shares were not followed.

[6] The Respondents state that there is ample evidence upon which to infer that there was an agreement to transfer the shares to Mrs. Southwell and to appoint Ms. Reis and Mrs. Southwell as directors. The Respondents assert that the parties' conduct over the years evinces a clear understanding that an agreement was concluded and, therefore, the court is justified in finding a *de facto* contract.

[7] Notably, the Respondents state that there is evidence that the Applicant accepted the ownership and directorship structure of the Respondent Corporation when it suited him. For example, under their authority as directors of the Respondent Corporation, Ms. Reis and Mrs. Southwell authorized the sale of one of the Respondent Corporation's properties to the Applicant's corporation in June 2021. The Respondents assert that the Applicant is only now bringing the Application because the corporate structure is no longer financially advantageous to him. According to the Respondents, the Applicant has produced no evidence to substantiate his claim that the parties mistakenly designated Mrs. Southwell and Ms. Reis as directors and Mrs. Southwell as a shareholder in the corporate documents. Therefore, rectification of the documents pursuant to s. 250 of the *OBCA* is not appropriate, in the Respondents' submission.

Background Information

[8] The Respondent Corporation, Carlgate, was incorporated by Mr. Southwell Senior on or about April 9, 1990. At the time of incorporation, Mr. Southwell Senior was the sole director and shareholder.

[9] In June 2005, Mr. Southwell Senior, in his capacity as the President and sole shareholder of Carlgate, undertook to restructure the corporation (the "2005 Restructuring"). He engaged an accounting firm, McCay Duff, and corporate counsel at Kelly Santini to assist with the 2005 Restructuring.

[10] Recently, Kelly Santini advised that much of Carlgate's corporate documentation, including documents relating to the 2005 Restructuring, were corrupted and are now unrecoverable. Further, Kelly Santini advised that they are unable to locate the minute book.

[11] The corporate minute book has never been found.

[12] Donald Burke was the lawyer from Kelly Santini who completed the 2005 Restructuring. He was examined under oath for the purposes of providing evidence in the present Application. Ms. Reis was also examined.

[13] Kelly Santini provided approximately 30 pages of documents associated with the 2005 Restructuring, which included signed and unsigned corporate documents. The Share Purchase Agreement and the Resolution of the Shareholder naming Mrs. Southwell and Ms. Reis as directors provided by Kelly Santini are unsigned.

[14] A copy of an Ontario Corporation Profile report from the Ministry of Government and Consumer Services generated on May 24, 2022 indicates that Ms. Reis and Mrs. Southwell have been directors of Carlgate since 2005.

[15] In 2006, Mr. Southwell Senior gifted the Applicant 20 Class A Common Shares in Carlgate.

[16] Mr. Southwell Senior passed away on April 9, 2020. Mrs. Southwell, Ms. Reis, and the Applicant were named the joint executors of Mr. Southwell Senior's estate. The will stipulated that if there was a disagreement between the parties, the majority vote would rule.

[17] Mrs. Southwell has dementia. Ms. Reis has her power of attorney. Mrs. Southwell was removed as an executor of Mr. Southwell Senior's will with the result that the Applicant and Ms. Reis are now the sole executors.

[18] At all relevant times, Mr. Southwell Senior and Mrs. Southwell were estranged.

The Issues

[19] The issues in the present case are as follows:

(i) Was there a valid agreement to sell Mrs. Southwell 30 Class A Common Shares in Carlgate and a valid resolution to appoint Ms. Reis and Mrs. Southwell as directors of Carlgate in 2005?

(ii) Should the corporate documents be rectified pursuant to s. 250 of the *OBCA*?

Analysis

Issue One: Was there a Valid Agreement and Resolution?

[20] In the Applicant's view, the evidence does not support that Mr. Southwell Senior affected a valid transfer of shares to Mrs. Southwell or that he properly appointed Mrs. Southwell and Ms. Reis as directors of the Respondent Corporation in 2005. Therefore, the Applicant argues, the resolutions naming Mrs. Southwell and Ms. Reis as corporate directors of Carlgate and the transfer of shares to Mrs. Southwell should be deemed unenforceable.

[21] The Applicant provides the following reasons for the invalidity of the Share Purchase Agreement and the Resolution naming the two personal Respondents as directors:

(i) The required elements for contract formation were not met in the present case;

(ii) There is no evidence that share certificates were ever issued and registered, as required by the *OBCA*, for the shares allegedly purchased by Mrs. Southwell; and

(iii) The proper process for appointing the directors of the Respondent Corporation was not followed;

[22] I will deal with each of the Applicant's arguments in sequence.

(i) Were the Required Elements for Contract Formation Met with Respect to the Sale of Shares?

[23] The Applicant cites *S & J Gareri Trucking Ltd. v. Onyx Corp*., 2016 ONCA 505, at para. 7 and *Kew v. Konarski*, 2020 ONSC 4677, 13 P.P.S.A.C. (4th) 283, at para. 26, for the proposition that regardless of what the parties' subjective intentions may have been, there must be unambiguous evidence of a meeting of the minds for a contract to have been formed. For a meeting of the minds to happen, it must be clear that there was an offer, acceptance, and consideration. It is not sufficient that the parties demonstrate an intent to be bound together.

[24] The Applicant argues that, at best, the Respondents can only demonstrate that Mr. Southwell Senior may have intended to transfer the shares to Mrs. Southwell. However, there is no evidence that he actually did so. According to the Applicant, the fact that the Share Purchase Agreement was unsigned and there was no evidence that Mrs. Southwell ever paid the consideration of $30 demonstrates only a subjective intention on the part of Mr. Southwell Senior to transfer the shares. The Applicant points to the fact that Mr. Burke, the lawyer from Kelly Santini who completed the corporate reorganization in 2005, could not recall meeting with Mrs. Southwell, nor could he remember that she made the required payment for the shares as evidence that there was no acceptance of the offer and no consideration paid. In fact, none of the parties could recall that any consideration was paid by Mrs. Southwell.

[25] The Applicant acknowledges that the Resolution of the Board of Directors, dated June 17, 2005, indicates that the shares were transferred to Mrs. Southwell, but he states that this Resolution was improperly executed because it was signed by Mr. Southwell Senior as the sole director of the Respondent Corporation. However, according to the documents provided by Kelly Santini, Ms. Reis and Mrs. Southwell were appointed as directors on June 16, 2005, and therefore, on June 17, 2005, Mr. Southwell Senior could not have signed the Resolution for the transfer of shares as sole director, since Ms. Reis and Mrs. Southwell were also directors on that date.

[26] The Applicant argues that the unsigned and improperly signed documents reflect the fact that there was no contract for the sale of the shares. The elements required for contract formation were not met in this case, according to the Applicant.

[27] I find that while there were certainly some irregularities in the documentation of the corporate reorganization in 2005, there is other evidence in this case that demonstrates that Mr. Southwell Senior sold 30 shares to Mrs. Southwell. This is not a case like *Trezzi v. Trezzi*, 2018 ONSC 5180, 42 E.T.R. (4th) 322, (aff'd: 2019 ONCA 978) in which Justice Wilton-Siegel found that the unexecuted documentation of the share transfer did not provide evidence, on its own, that the transfer had occurred. In the present case, there is additional evidence to support the inference that the shares were transferred to Mrs. Southwell, even though there is no evidence of an executed Share Purchase Agreement. That evidence is as follows:

(a) The parties agree that in June 2005, Mr. Southwell Senior, in his capacity as the President and sole shareholder of Carlgate, undertook to restructure the corporation. He engaged the accounting firm of McCay Duff and Mr. Burke at Kelly Santini to assist with the restructure.

(b) During examinations, Mr. Burke testified that he was contacted by Mr. Davidson from McCay Duff in the early part of 2005 to update the corporate minute book of Carlgate and to carry out the instructions provided to Mr. Burke regarding a corporate restructure of Carlgate.

(c) In a letter dated December 15, 2005 ("the Reporting Letter"), which was an exhibit to Ms. Reis' affidavit, Mr. Burke reported to Mr. Southwell Senior about the steps that were taken to affect the corporate restructure of Carlgate. In the Reporting Letter, Mr. Burke confirmed that Mr. Southwell Senior had sold 30 Class A Common Shares to his spouse, Isabelle Margaret Southwell, for $30.00, which was equal to the fair market value of the shares at the date of transfer.

(d) During the examinations, Mr. Burke testified that he believed the Share Purchase Agreement dated June 17, 2005 between Mr. Southwell Senior and Mrs. Southwell was signed. When asked in cross-examination why a signed copy of the Share Purchase Agreement was not attached to the copy of his Reporting Letter, Mr. Burke stated that it was his belief that the signed copy of the Share Purchase Agreement was in the Carlgate minute book when it was later returned to Mr. Southwell Senior. Mr. Burke stated that he believed he had used an unsigned version of the Share Purchase Agreement for the Reporting Letter. Mr. Burke testified that it appeared to him that all the documentation attached to his Reporting Letter was signed at the same time.

(e) In the examinations, Mr. Burke confirmed that he would not have reported the transactions (described in the Reporting Letter) as having been completed and the shares as having actually been transferred if this were not his instructions and if that was not actually done. The following is the exchange between counsel for the Respondents and Mr. Burke on this point:

> Q. Okay. And as we sit here today, do you have any doubt that the transactions as reported in your reporting letter were

> consistent with the instructions that you received and actually effected?
>
> A. No doubt that they were consistent with the instructions received. I do indicate again in that last paragraph that they were reviewed by the accountants prior to execution, the documents that is. So, no, I don't have any doubt that they were carried out.

(f) Mr. Burke confirmed that his office updated the Carlgate minute book, including the share registers, and provided the Carlgate minute book to Mr. Southwell Senior by courier after sending the Reporting Letter.

[28] I also find that the parties' conduct after the reorganization confirms that there was a valid agreement to transfer the shares to Mrs. Southwell. There are multiple documents that were provided by the Respondents that list Mrs. Southwell as a shareholder. They include the following:

(a) The Grouped Trial Balance for Carlgate for 2014 confirms Mrs. Southwell's status as a Carlgate shareholder.

(b) A valuation of Carlgate provided by McCay Duff shows Mrs. Southwell as holding 30 percent of the common shares in Carlgate as of March 31, 2020.

(c) An agreement between the Applicant, Ms. Reis, and Mrs. Southwell dated May 23, 2021 shows that the Applicant accepted that Mrs. Southwell was a Carlgate shareholder. It states as follows:

> The Ontario Registered Corporation of Carlgate Development Inc., owned by Julie Anne Reis, Isabelle Margaret Southwell & John Richard Southwell agrees to sell the property at 122 Old Mill Lane for $475,000 Canadian to Southwell Homes Ltd. [Emphasis added.]

(d) The 2020/2021 tax return for Carlgate, prepared by the company's accountants shows the Common Share ownership as including Isabelle Southwell, the estate of John W. Southwell, Julie Reis and John R. Southwell.

[29] There is no evidence whatsoever that the Applicant objected to the portrayal of Mrs. Southwell as a shareholder in any of these documents.

[30] With respect to the issue of consideration, I acknowledge that even though the parties treated the transfer of shares as having been done as per the evidence above, there is very little evidence that Mrs. Southwell paid the required $30.00 for the shares. This is similar to the situation in *Robert Mandel et al. v. 1909975 Ontario Inc. et al.*, 2020 ONSC 5343, 152 O.R. (3d) 394, where the evidence as to the payment for the shares was somewhat contradictory. The court stated, at

paras. 61-62, that it is up to the trier of fact to weigh the conflicting evidence in the context of the particular circumstances of the case and determine whether judicial intervention is appropriate.

[31] In this case, I find that there is some evidence that Mrs. Southwell paid for the shares. Mr. Burke testified that he would not have reported that the transfer had taken place had the requirements not been carried out. He had no particular recollection of the payment of the money or a meeting with Mrs. Southwell, but I am satisfied that he was honestly reporting the steps that had been taken to fulfill the instructions he had been given.

[32] Furthermore, the Applicant's failure to object to the documentary evidence that Mrs. Southwell was a properly named shareholder leads me to the same conclusion as the court in *Robert Mandel et al.*, at paras. 57-68: it would be inappropriate to undo the actions that have been taken to date based on Mrs. Southwell's status as a shareholder simply to satisfy the Applicant's desire to now take ownership of half of his mother's shares in the Respondent Corporation. He was content to acknowledge his mother as part owner of the Respondent Corporation when it did not affect his interests, but now wishes to challenge her ownership because it is no longer in his best interests. That apparent reversal in the Applicant's position does not assist him in proving that Mrs. Southwell never really owned the shares in the first place because she did not pay for them.

[33] The Applicant states that even if it can be inferred that the Share Purchase Agreement was signed, the transfer is not valid because Mr. Southwell Senior signed the associated resolution for the transfer of shares as the "sole director" of Carlgate when in fact, according to the documents prepared by Mr. Burke, he was at that point (June 17, 2005) one of three directors.

[34] I find that it is not consequential that Mr. Southwell Senior signed the relevant documents as sole director. The intent was clear: sell 30 Class A Common Shares to Mrs. Southwell in order to minimize tax consequences upon his death. Perhaps Mr. Southwell Senior should have signed in his personal capacity as registered and beneficial owner of the shares, but the post-agreement evidence establishes that the parties conducted themselves as though the sale of the shares had taken place.

[35] This was not "an agreement to agree", as suggested by the Applicant, nor was there anything in the documentation provided to me to suggest that there was a crystallizing event that did not take place as required. The Share Purchase Agreement stipulates the following at clauses 5.1 and 6.1:

> 5.1 The transaction provided for herein shall be effective as of the Effective Date, upon delivery by the Vendor of the certificate(s) for the said shares and delivery by the Purchaser of the Purchase Price.
>
> 6.1 This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

[36] Clauses 5.1 and 6.1 are not like the enurement clause in the share purchase agreement in *Alkin Corporation v. 3D Imaging Partners Inc.*, 2020 ONCA 441, in which the clause stipulated

that the agreement would only become effective when executed by both parties. Clauses 5.1 and 6.1 in the present case do not require the execution of the documents for the Share Purchase Agreement to be valid. Paragraph 5.1 requires the delivery of the purchase price and the share certificates. However, for the reasons set out above, I find that the satisfaction of these two conditions can be inferred from the conduct of the parties, both during and after the corporate restructure.

[37] Although I have found that there is evidence to support a finding that the Share Purchase Agreement was signed, I accept the Respondents' alternative submission that the parties were bound by a *de facto* contract for the sale of the shares to Mrs. Southwell. As stated by Justice Lederman in *Second Cup Ltd. v. Niranjan* (2007), 39 B.L.R. (4th) 73 (Ont. S.C.), at para 17:

> The law recognizes that if the parties to an unsigned contract conduct themselves as if they were bound by that unsigned contract, they are subject to an implied or de facto contract on the unsigned contract's terms. (See, for example, *NHM International Inc. v. F.C. Yachts Ltd.*, [2003] F.C.J. No. 72 (Fed. T.D.).

[38] In *Kernwood Ltd. V. Renegade Captial Corporation*, (1997), 97 O.A.C 3, the Ontario Court of Appeal inferred the existence of a contract to purchase shares despite the buyer having failed to sign the share purchase agreement, calling the signature a formality. In the words of the Court:

> With respect, I do not agree that Blair's failure to sign the Share Purchase Agreement establishes that he did not assent to it on November 21, 1989. It is well-settled law that, except in certain situations, a party's intention to be bound can be manifested by words or conduct: *Calvan Consolidated Oil & Gas Company Limited v. M.E. Manning*, 1959 CanLII 56 (SCC), [1959] S.C.R. 253 at 261. A manifest intention to be bound can be established by conduct or words where an objective interpretation of the conduct or words of the parties would lead a reasonable person to conclude that the parties intended to be bound: *Industrial Tanning Co. v. Reliable Leather Sportwear Ltd*., 1953 CanLII 345 (ON CA), [1953] 4 D.L.R. 522 at 525 (Ont. C.A.). In such cases, the requirement of a signature is treated as a mere formality.

[39] For the reasons set out above, I find that the parties clearly conducted themselves as though they were bound by the Share Purchase Agreement.

(ii) Were Mrs. Southwell's Shares Properly Issued and Registered?

[40] The Applicant argues in the alternative that, even if the Share Purchase Agreement was duly signed, share certificates were not issued for the purchased shares and they were not properly registered in Carlgate's securities register.

[41] The Applicant argues that the *OBCA* requires that the transfer of the certified security be completed in the registered form with respect to a certificated security: *OBCA*, s. 22(1). A corporation must prepare and maintain a securities register in which the securities it issues are

recorded in the registered form, including the date and particulars of the issue of each security: *OBCA*, s. 141.

[42] The Applicant argues that although Mrs. Southwell's shares are reflected in the Respondent's Shareholders' Register, there is no record of a securities register. According to the Applicant, the Shareholders' Register is not the same as a securities register, the latter of which is required by the *OBCA*. Accordingly, the Shareholders' Register cannot establish Mrs. Southwell's interest in the shares pursuant to s. 266(3) of the *OBCA*. That provision stipulates that "[a]n entry in a securities register of, or a security certificate issued by, a corporation is, in the absence of evidence to the contrary, proof that the person in whose name the security is registered or whose name appears on the certificate is the owner of the securities described in the register or in the certificate, as the case may be".

[43] The Respondent argues that Carlgate's Stock Transfer Register, which records all the pertinent information required by s. 141 of the *OBCA*, provides proof that Mrs. Southwell is the owner of the shares in question as per s. 266(3) of the *OBCA*. In the Respondent's submission, the Stock Transfer Register is equivalent to a securities register.

[44] In response, the Applicant argues that the Stock Transfer Register does not substantiate properly executed share certificates or evidence of actual issuance of the shares. The new certificate numbers listed (AC1 – AC5) are placeholder identifiers representing Class A Common Shares. The use of placeholder identifiers indicates that a new certificate was not issued.

[45] I disagree with the Applicant that to be valid, the sale of the shares to Mrs. Southwell had to bear a certain kind of identifier and be registered in a document called a "securities register". I have not been referred to any authority indicating that the securities must be identified in a certain way to establish that they were properly issued. Indeed, it is well established that even the absence of a share certificate does not negate a shareholder's status as such*: Romexim Canada Inc. et al. v. James Morrison et al*., 2022 ONSC 2889, at para. 86

[46] However, in *Trezzi*, the Court of Appeal did indicate at paragraph 39, that a document must first be established as a valid "securities register" if it is to be used as proof of the valid transfer, issuance and registration of shares in the absence of executed certificates.

[47] I find, on a balance of probabilities, that the Stock Transfer Register is a valid "securities register" within the meaning of s. 141(1) of the *OBCA*. Mr. Burke, who was responsible for updating all the documents relating to the 2005 Restructure, testified that he updated the corporate documents based on his belief that the transactions had been properly affected. I take this to mean that the share certificates were issued and registered.

[48] Furthermore, as noted above, the parties behaved as though the shares had been properly transferred, issued and registered. Mrs. Southwell was listed as a shareholder of Carlgate in numerous documents. Therefore, I am satisfied that the share certificates were issued and

registered. While some information, such as the addresses of the shareholders, may be missing, that kind of technical irregularity does not affect the validity of the transfer.

[49] Indeed, the Ontario Court of Appeal has stated that the validity of a share transfer in the context of a corporate restructure is not dependent upon formal documentation. In *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165 (Ont. C.A.), a corporate restructure gave rise to the transfer of shares that was not compliant with an article of the corporation's letters patent. The Ontario Court of Appeal affirmed the trial judge's finding that this did not invalidate the transfer of the shares. The court held that the validity of the restructuring of a corporation does not depend on formal documentation, but on the consent of the shareholders, and that consent is a question of fact. In this case, the parties' conduct convinces me that there was consent to transfer the shares to Mrs. Southwell and that they were properly transferred to Mrs. Southwell.

(iii) Were Mrs. Southwell and Ms. Reis Properly Appointed as Directors of Carlgate?

[50] The Applicant argues that the proper process for the appointment of directors was not followed and, as such, the unexecuted corporate resolution naming Mrs. Southwell and Ms. Reis corporate directors of Carlgate should be deemed unenforceable.

[51] The Applicant states that he was surprised when, following the death of Mr. Southwell Senior, Ms. Reis took the position that she and Mrs. Southwell were the directors of Carlgate and had been since June 16, 2005.

[52] The Applicant further states that, as a shareholder, he was never advised that Mrs. Southwell and Ms. Reis were directors, nor was he offered or permitted to vote them in as directors.

[53] Finally, the Applicant asserts that there is no evidence that Ms. Reis or Mrs. Southwell had any involvement in the operation or corporate affairs of Carlgate prior to Mr. Southwell Senior's passing.

[54] Therefore, the Applicant argues, the unsigned Resolution of the Shareholder naming Ms. Reis and Mrs. Southwell as directors is a nullity. It may have been prepared by Mr. Burke for Mr. Southwell Senior's signature, but the fact that it was unsigned and never acted upon renders it unenforceable.

[55] The Applicant's evidence on this issue, as provided in his affidavit, is contradicted by the documentary evidence and the evidence provided by Ms. Reis. Ms. Reis' evidence that she and her mother were duly appointed as directors is supported by Mr. Burke's testimony during the examinations for this application. Ms. Reis' evidence that she acted in her capacity as director prior to Mr. Southwell Senior's death is also consistent with the documentary evidence that she signed tax returns as a director of Carlgate. Therefore, I prefer Ms. Reis' evidence and the evidence of Mr. Burke to the evidence provided by the Applicant.

[56] Based on the following evidence, I find, on a balance of probabilities, that Mr. Southwell Senior signed the Resolution of the Shareholder naming Ms. Reis and Mrs. Southwell as directors.

I further find that Ms. Reis and Mrs. Southwell were properly appointed as directors of Carlgate on June 16, 2005.

(i) The parties agree that prior to the corporate restructure in 2005, Mr. Southwell Senior was the sole shareholder and director of Carlgate. The Resolution of the Shareholder naming Ms. Reis and Mrs. Southwell as directors was dated June 16, 2005. The Transfer by Gift of shares to the Applicant and Ms. Reis was dated June 17, 2005 and the Share Purchase Agreement selling shares to Mrs. Southwell was also dated June 17, 2005. Therefore, on June 16, 2005, Mr. Southwell Senior was the sole shareholder and director of Carlgate and did not need to provide anyone with the opportunity to vote on the proposal to appoint Ms. Reis and Mrs. Southwell as directors.

(ii) Mr. Burke testified that he thought the signed version of the Resolution of the Shareholder may have been inserted into the Carlgate minute book and returned to Mr. Southwell Senior. That minute book appears to have been lost. Mr. Burke stated that he had an unsigned version of the Resolution appointing the directors in his file. He thought he had included that unsigned version in his Reporting Letter of December 15, 2005.

(iii) Mr. Burke testified that he had no doubt that he was instructed to prepare the Resolution of the Shareholder appointing Mrs. Southwell and Ms. Reis as directors of Carlgate. He stated that the Resolution of the Shareholder would have been a document that he would have reviewed with Mr. Southwell Senior at the time.

(iv) In the Reporting Letter, Mr. Burke stated the following: “Upon your direction, we confirm having elected your spouse and daughter as directors of the Corporation.”

(v) Mr. Burke testified that he would not have reported to Mr. Southwell Senior that Ms. Reis and Mrs. Southwell had been elected as directors of Carlgate if those were not his instructions and the process had not been carried out.

(vi) Mr. Burke confirmed that his office changed the Carlgate corporate profile report with respect to the appointment of Ms. Reis and Mrs. Southwell as directors. A copy of the Ontario Corporation Profile report from the Ministry of Government and Consumer Services generated on May 24, 2022 confirms the appointment of Ms. Reis and Mrs. Southwell as directors of Carlgate on June 16, 2005.

(vii) The Applicant states that none of the parties involved in the 2005 Restructuring have any record or recollection of the Resolution of the Shareholder naming Mrs. Southwell and Ms. Reis as directors. However, that statement is contradicted by evidence from Ms. Reis of her recollection that Mr. Southwell Senior appointed her as the Secretary and Treasurer of Carlgate in or around 2005, at the same time that she was made a director of Carlgate. Ms. Reis testified that she remembered Mr. Southwell Senior referring to her as his “little secretary treasurer, his right-hand man”.

(viii) The Applicant's statement that he was surprised that Ms. Reis and Mrs. Southwell had been appointed directors conflicts with statements he made in an email he sent to April Wheeler, the corporate accountant, on June 18, 2021. In that email, the Applicant states that he had been appointed a director of Carlgate in 1990 or 1993. Although he was not involved in Carlgate's day-to-day activities at the time, he was nevertheless served with a lawsuit against the corporation. He stated that this embarrassed him and so he asked to be removed as a director. The Applicant stated the following: "On Mckay Duff's advice in 2005 Dad did some re-organizing of the company & said my sister was appointed a Director & I was reduced to just a shareholder." This statement indicates that prior to his father's death, the Applicant was in fact advised, contrary to his assertions in the Application, that his sister had replaced him as a director of Carlgate.

(ix) In the June 18, 2021 email to Ms. Wheeler, the Applicant indicated that although he had become aware, after his father's passing, that the paperwork for his sister's appointment may not have been completed correctly, he would not contest her directorship as long as she made no decisions without consulting him.

(x) The Applicant appears to have accepted his sister and mother as directors of Carlgate when it suited him. For example, the Applicant benefitted from a transfer of property that was done on the authority of Mrs. Southwell and Ms. Reis as directors of Carlgate. On June 22, 2021, Ms. Reis and Mrs. Southwell signed the Vendor's Closing Certificate transferring ownership of 122 Old Mill Lane in Mississippi Mills, Ontario from Carlgate Development Inc. to the Applicant. They both signed as directors of Carlgate Development Inc. and indicated that they had the authority to bind the corporation.

(xi) In addition, Ms. Reis signed the 2021 financial statements and the Calculation Valuation Report from 2021 as director of Carlgate.

(xii) The Applicant's statement that there is no evidence of Ms. Reis or Mrs. Southwell acting as directors prior to the death of Mr. Southwell Senior conflicts with Ms. Reis' evidence in her affidavit. Ms. Reis provided evidence that, beginning in 2014, both she and Mrs. Southwell actively assisted Mr. Southwell Senior in managing Carlgate in their capacity as directors. They have continued to act as directors of Carlgate since that time and have been responsible for, among other things, engaging accountants to prepare the annual corporate tax returns, paying property taxes, sending out monthly bank statements to shareholders, collecting monthly rent relating to one of the Carlgate properties and working with the bookkeeper to determine any HST owing.

[57] I accept Ms. Reis' evidence that she and her mother acted as directors prior to Mr. Southwell Senior's death. Although there are no documents that pre-date Mr. Southwell

Senior's death with their signatures as directors, the totality of the evidence convinces me that Ms. Reis and her mother had modest roles in the directorship of Carlgate prior to Mr. Southwell Senior's passing. It is clear to me, based on the above-noted evidence, that contrary to the Applicant's assertions, Ms. Reis did not appoint herself director of Carlgate following Mr. Southwell Senior's death. Rather, she and Mrs. Southwell were duly elected by Mr. Southwell Senior on June 16, 2005.

Issue Two: Should the Corporate Documents be Rectified Pursuant to s. 250 of the OBCA?

[58] The Applicant argues that the corporate documents do not reflect the actual agreement that was reached between the parties in 2005. In the Applicant's view, Mr. Southwell Senior agreed to give him and Ms. Reis shares in Carlgate and to continue as sole director of the company. The Applicant argues that a declaration to that effect is needed, pursuant to s. 250 of the *OBCA*, to rectify the corporate documents.

[59] The mechanism for rectification established in s. 250 of the *OBCA* is a codification of the equitable remedy of rectification: *Mandel*, at para. 73. The guiding principles for the court to consider when determining whether to grant equitable relief in this context are set out by the Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720.

[60] In *Fairmont*, at para. 12, the Supreme Court of Canada held that the ultimate purpose of an order for rectification is as follows:

> [T]o achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions.

[61] The Supreme Court confirmed that courts rectify instruments that do not correctly record agreements. Courts do not rectify agreements "where their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome": at para. 39.

[62] The test for rectification was set out in *Fairmont*, at para. 38. The Supreme Court stated that rectification is available upon the court being satisfied of the following, on a balance of probabilities: (1) there was a prior agreement whose terms are definite and ascertainable; (2) the agreement was still in effect at the time the instrument was executed; (3) the instrument fails to accurately record the agreement; and (4) the instrument, if rectified, would carry out the parties' prior agreement. The party requesting rectification has the burden of proof.

[63] The Applicant's position seems to be that there was a definite and ascertainable agreement in 2005 that Ms. Reis, the Applicant, and Mr. Southwell Senior would hold shares in Carlgate and that Mr. Southwell Senior would continue to be the sole director. However, according to the Applicant, there was no agreement between Mr. and Mrs. Southwell that Mr. Southwell Senior would sell 30 Class A Common Shares to Mrs. Southwell. This is evidenced by the fact that neither party signed the Share Purchase Agreement and Mr. Southwell Senior did not issue the share

certificates, according to the Applicant. In addition, the fact that no one can provide evidence that Mrs. Southwell paid the required purchase price of $30.00 for the shares supports that there was no agreement.

[64] Similarly, the lack of signature on the Resolution of the Shareholder appointing Ms. Reis and Mrs. Southwell as directors provides evidence of a definite and ascertainable agreement that Mr. Southwell Senior would continue as the sole director of Carlgate, according to the Applicant. In addition, the fact that Ms. Reis and Mrs. Southwell did not provide documentary evidence that they acted as directors prior to Mr. Southwell Senior's death further supports a finding that there was no consensus among the parties on the directorship issue.

[65] For the reasons set out above, I disagree with the Applicant that there was a definite and ascertainable agreement that only Ms. Reis, the Applicant, and Mr. Southwell Senior would hold shares in Carlgate, and that Mr. Southwell Senior would be the sole director. The unexecuted Share Purchase Agreement and Resolution of the Shareholder that were produced in the context of the present litigation do not provide persuasive evidence of that alleged agreement. Furthermore, the Respondents' inability to produce the minute book or the share certificates does not give rise to an inference that the documents were never signed, and the share certificates were never issued. On the contrary, the weight of the evidence presented in this case supports the conclusion that the documents were likely signed and placed in the corporate minute book, which was lost. Even if this were not the case, the evidence of the parties' conduct after the 2005 Restructuring, as outlined above, directly contradicts the Applicant's theory about the prior agreement.

[66] Although the Respondents did not provide documentary evidence that Mrs. Southwell and Ms. Reis executed documents in their role as directors prior to Mr. Southwell Senior's death, they did produce evidence of that following his death. Moreover, Ms. Reis provided evidence in her affidavit and during the examination that her father referred to her as his "little secretary treasurer" and that she and her mother assisted him, from 2014 onward, in administering the affairs of Carlgate. Finally, the documentary evidence supports that Mrs. Southwell was referred to as a shareholder in Carlgate. The Applicant did not raise any objections to the identification of his mother as a director of and shareholder in Carlgate until disagreements arose between himself and Ms. Reis with respect to the administration of his father's estate and financing agreements between his company and Carlgate.

[67] In *Fairmont*, the Supreme Court of Canada stated that rectification is not to be used to address the unanticipated negative consequences of a prior agreement: see, for example, *Fairmont*, at para. 3. In the present case, the Applicant's correspondence to April Wheeler on June 18, 2021 suggests that the Applicant was prepared to wait and see if there were any negative consequences flowing from the 2005 Resolution of the Shareholder appointing his sister and mother as directors. This does not support the case for rectification.

[68] Furthermore, there is potential for unknown and negative consequences to arise if the Applicant's requested declarations were granted. In *Robert Mandel et al*, Justice Koehnen was similarly concerned that the requested declaration would put into question past actions that had

been taken by the shareholders: see paras. 64-65. This was one of the factors that he took into account in denying the applicants' request for rectification.

[69] Similarly, in the present case, there may be unknown consequences arising from a declaration that Mrs. Southwell and Ms. Reis were not directors of Carlgate and that Mrs. Southwell was not a shareholder. At the hearing, I asked counsel for the Applicant whether a declaration that Ms. Reis and Mrs. Southwell were not directors of Carlgate from 2005 onward could threaten the validity of past transactions, such as the sale of the Old Mills Lane property to the Applicant. When asked whether this sale could be void if it was found that Ms. Reis and Mrs. Southwell lacked authority as directors to affect the transfer, counsel for the Applicant responded that since all the shareholders had agreed to the transaction, it would not be void. However, it remains the case that both Ms. Reis and Mrs. Southwell signed as directors of the corporation, not as shareholders.

[70] Furthermore, if Mrs. Southwell is not a shareholder, as alleged by the Applicant, she would have had no authority to bind the corporation either as a shareholder or as a director. The sale might therefore be voidable, although I make no finding on this point. I also note that Ms. Reis and Mrs. Southwell have submitted tax returns and collected monthly rent under their authority as directors of the corporation. A declaration that they had no such authority might challenge the legitimacy of those transactions.

[71] For these reasons, I find that the Applicant has not met the test in *Fairmont* to establish that the request for rectification of the corporate business records, pursuant to s. 250 of the *OBCA*, is appropriate. The request is therefore denied.

Conclusion

[72] The Application is dismissed. The Applicant has failed to meet the onus of proving that the Share Purchase Agreement and the Resolution of the Shareholder appointing Ms. Reis and Mrs. Southwell as directors are unenforceable. He has similarly failed to establish that the requested rectification of the corporate business records is appropriate.

[73] The Respondents have been entirely successful in this matter. They are therefore, presumptively entitled to costs. The parties are encouraged to come to an agreement on costs. If they are unable to do so, they may schedule an appearance before me to argue costs.

Justice K.A. Jensen

Date: February 9, 2024