COURT OF APPEAL FOR ONTARIO

CITATION: Anthony v. Binscarth Holdings GP Inc., 2025 ONCA 130
DATE: 20250220
DOCKET: COA-24-CV-0512

Nordheimer, Madsen and Pomerance JJ.A.

BETWEEN

Greg Anthony, Glen Anthony, 2309138 Ontario Inc.,
Anne Anthony, John Anthony and Gary Anthony

Applicants (Appellants)

and

Binscarth Holdings GP Inc., Binscarth Holdings L.P.
and Grant Anthony

Respondents (Respondents)

Mark Wainberg, for the appellants

Eric Brousseau, Gordon Vance and David Postel, for the respondents

Heard: February 11, 2025

On appeal from the judgment of Justice Herman J. Wilton-Siegel of the Superior Court of Justice, dated April 10, 2024, with reasons reported at 2024 ONSC 2106, 171 O.R. (3d) 371.

REASONS FOR DECISION

[1] The applicants appeal from the order of the application judge who dismissed their application in which they sought a declaration that they are entitled to receive from Binscarth Holdings L.P. (the "Partnership") payment of 100% of the appellants' proportionate share of the net income of the Partnership on an annual

basis by way of a cash distribution, retroactive to January 1, 2016. At the conclusion of the hearing, we dismissed the appeal with reasons to follow. These are our reasons.

[2] It is not necessary to go into the detailed background that gives rise to this proceeding, all of which is set out in the thorough reasons of the application judge. Some limited review of the background is necessary, however, to explain the origin of the application.

[3] The appellants are each limited partners of the Partnership. They are also the children of Frank Anthony and Jine Anthony (“the parents”). The Partnership was established as a limited partnership by the parents in December 2011. At present, there are 19 entities with interests in the Partnership. These include children, grandchildren and corporations controlled by those children and grandchildren.

[4] The general partner of the Partnership is Binscarth Holdings GP Inc. ("Binscarth Inc."), an Ontario corporation. All of the shares of Binscarth Inc. are owned by the Anthony Control Trust (the "Trust"). The Trust was established by the parents on December 23, 2011. The beneficiaries of the Trust, pursuant to the Deed of Trust, are the nine children of the parents and any issue of them or of the late Garth Anthony. As may be evident, the appellants are included within the class of beneficiaries. The only assets of the Trust are the shares of Binscarth Inc.

[5] The initial trustees of the Trust were the parents and one of their sons, Grant Anthony, who, obviously, is a brother of the appellants. Grant Anthony is now the sole remaining trustee of the Trust. As a consequence, he is also the sole director and officer of Binscarth Inc. Since the inception of the Partnership, all of the net income, as defined in the Limited Partnership Agreement ("LPA"), of the Partnership has been credited annually to the capital accounts of the limited partners. Binscarth Inc., as the general partner, has not paid any of the income directly to the appellants, save and except amounts necessary to cover the payment of taxes that they incur on the income allocated to them.

[6] The parents established the Partnership to acquire and hold certain properties owned by them. Grant Anthony was not involved in the formation of the Trust or the Partnership. At the outset, the father controlled the Partnership. After his father's death, Grant Anthony became actively involved, although his mother also had some involvement until her death in March 2018. Since then, Grant Anthony has controlled the Partnership.

[7] The Partnership is governed by the LPA dated December 14, 2011, as amended in January 2012 and September 2020. Prior to entering into the LPA, each of the appellants received independent legal advice.

[8] As of December 31, 2022, the total amount of the capital accounts of all of the limited partners of the Partnership, as reflected in the financial statements of

the Partnership, was $103,670,356, of which the appellants' share was $45,588,004.

[9] Of central significance to the issue raised in the application is clause 8.1(a) of the LPA. It reads: "8.1(a) The General Partner may cause the Partnership to make distributions of cash, assets and securities to the Limited Partners on an annual basis at any time and from time to time in the General Partner's sole discretion (a "Discretionary Distribution")."

[10] The appellants' principal argument before the application judge, and renewed before us, is their assertion that Binscarth Inc., as the general partner of the Partnership, is required, on an annual basis, to distribute all of the net income of the Partnership to the limited partners. They base this argument on their interpretation of s. 11(1) of the *Limited Partnerships Act*, R.S.O. 1990, c. L.16 (the "*Act*"). As a subsidiary argument, the appellants argue that the provisions of s. 1(1) of the *Accumulations Act*, R.S.O. 1990, c. A.5 support the relief that they seek.

[11] Central to the appellants' argument is their interpretation of s. 11(1) of the *Act*. That section reads:

> A limited partner has, subject to this Act, the right,
>
> > (a) to a share of the profits or other compensation by way of income; and
> >
> > (b) to have the limited partner's contribution to the limited partnership returned.

[12] The appellants assert that s. 11(1) mandates the distribution of all profits of the Partnership on an annual basis. They further assert that any provision of the LPA which disentitles the limited partners to receive (or which leaves such distribution to the discretion of the General Partner) “are superseded by the provisions of the Act and are of no effect”. In support of this argument, the appellants rely solely on *Canadian Home Publishers (General Partner of) v. Colville-Reeves Estate*, 2019 ONCA 314, 146 O.R. (3d) 27 at para. 25, leave to appeal refused, [2019] S.C.C.A. No. 233. That paragraph says, in part: “A limited partner enjoys protection from the liabilities of the limited partnership, unlike a partner in an ordinary partnership. In return for that protection, the limited partner is restricted to the receipt of two things under the *LPA*: one is their share of the profits and the other is the return of their contribution (see *LPA*, s. 11).”

[13] There is nothing in the above quotation, or in the plain wording of s. 11(1) of the *Act*, that supports the appellants’ position. Saying that a limited partner is entitled to a “share” of the profits is not the same thing as saying that a limited partner is entitled to payment of that share. A limited partner is ultimately entitled to receive that share on a dissolution of the limited partnership, as set out in s. 24 of the *Act,* but, with that exception, there is no statutory obligation to make any such distribution. We would add that, if the appellants’ interpretation of s. 11(1) is correct, then arguably s. 24 would be unnecessary.

[14] The interpretation urged by the appellants suffers from other problems. For one, if their interpretation was to be accepted, there is nothing in s. 11(1) that would require the mandated distribution to occur on an annual basis as opposed to any other time period. For another, if the Legislature had intended that there must be a regular distribution of profits, it could easily have said so in the *Act*. We note, in that regard, that s. 11(2), unlike s. 11(1), expressly refers to "payment" of a share of profits. For yet another, imposing such a requirement would appear to be fundamentally at odds with the generally recognized purpose of limited partnerships.[1]

[15] The appellants' position is also in direct conflict with the express provision in the LPA that gives the general partner the sole discretion to make distributions. The appellants must have been aware of that provision in the LPA when they signed it. It does not lie comfortably with the appellants to now urge an interpretation of the *Act* that would lead to a result that is fundamentally inconsistent with the provisions of the LPA that they willingly entered into.

[16] Lastly, we note that the appellants have been unable to point to any authority in support of their interpretation of s. 11(1).

[17] In terms of the subsidiary argument, the *Accumulations Act*, and its prohibition on the accumulation of income arising from the disposition of real or

[1] See, for example, *Binscarth Holdings LP v. Grant Anthony*, 2024 ONCA 522, 172 O.R. (3d) 481, at para. 44.

personal property, has no application to this case. The statute is directed to testamentary dispositions or the settling of trusts. It was never directed to commercial endeavours nor were its prohibitions intended to apply to such commercial activities.[2] This reality likely explains why the appellants cannot point to a single case where the *Accumulations Act* has been applied in this context.

[18] The appellants have failed to show any error in the analysis or conclusions of the application judge. Given our conclusion regarding the proper interpretation of s. 11(1) of the *Act*, it is unnecessary to address the appellants' submissions respecting the issues of the applicable limitations period or of waiver arising from the certificates of independent legal advice.

[19] It is for these reasons that the appeal was dismissed. The respondents are entitled to their costs of the appeal fixed in the agreed amount of $30,000, inclusive of disbursements and HST.

"I.V.B. Nordheimer J.A."
"L. Madsen J.A."
"R. Pomerance J.A."

[2] See, for example, the report of the English Law Commission, *The Rules against Perpetuities and Excessive Accumulations (1998)* at §9.33.