

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160504

Docket: A-386-15

Citation: 2016 FCA 138

**CORAM: NOËL C.J.
DAWSON J.A.
TRUDEL J.A.**

BETWEEN:

ELIZABETH HARDTKE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on May 4, 2016.

Judgment delivered from the Bench at Ottawa, Ontario, on May 4, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

NOËL C.J.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on May 4, 2016)

NOËL C.J.

[1] This is an appeal brought by Elizabeth Hardtke (the appellant) from a decision of the Tax Court of Canada (2015 TCC 135) wherein V. Miller J. (the Tax Court judge) dismissed the appellant's appeal from an assessment in the amount of \$249,999 issued against her pursuant to section 160 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the Act). Section 160 is appended to these reasons.

[2] The assessment was issued further to the transfer of the matrimonial home to the appellant by her spouse, Mr. Dieter Hardtke. At the time of the transfer, Mr. Hardtke had substantial unpaid liabilities under the Act, far exceeding the assessed amount.

[3] The deed of sale and related affidavit sworn by the appellant indicated that the consideration given by the appellant for the matrimonial home consisted of \$1 in cash and the assumption of the \$65,000 mortgage on the property. At the time of the transfer, the home had a fair market value of \$315,000. The assessed amount represents the difference between the fair market value and the consideration paid as attested to in the deed of sale.

[4] The appellant's position at trial was that she provided consideration in excess of the fair market value of the matrimonial home by reason of her unregistered equitable interest in a resulting or constructive trust in the home which she claims to have relinquished at the time of the transfer.

[5] The Tax Court judge rejected this contention on the ground that the evidence adduced by the appellant did not establish that there was forbearance of any such right (reasons, paras. 55, 56). She went on to hold that in any event she did not have the jurisdiction to declare the existence of a constructive trust, and that even if she did, the evidence would not have allowed her to grant this remedy (reasons, paras. 57-59).

[6] In support of her appeal, the appellant challenges each of these findings insisting that "a lower evidentiary standard" (memorandum of the appellant, paras. 66-67) would have allowed

the Tax Court judge to conclude that the existence of a constructive trust had been established (*Ibidem*, paras. 67-73).

[7] It suffices to say in this regard that the question whether the evidence establishes the existence of a constructive trust is one of fact which must be established on a balance of probabilities (*Hickman Motors Ltd. v. Canada*, [1997] S.C.R. 336 at para. 92), and that no error of a palpable and overriding nature has been demonstrated with regard to the Tax Court judge's conclusion that the evidence fell short of establishing the existence of a constructive trust (reasons, paras. 58 and 60).

[8] The appellant further argues that section 160 requires that the transferor of the property be shown to have an intent to avoid the payment of taxes. She claims that Mr. Hardtke had no such intent. Without suggesting that intent is relevant, we note that this argument was not raised at trial so that Mr. Hardtke was not called upon to testify and the issue pertaining to his state of mind at the time of the transfer was not explored. In our view, it would be prejudicial to the Crown to allow this argument to be raised for the first time on appeal.

[9] The appeal will accordingly be dismissed with costs.

‘Marc Noël’
Chief Justice

Annex

Relevant Legislative Provisions

Income Tax Act, R.S.C. 1985 (5th Supp.), c. 1, as amended

Loi de l'impôt sur le revenu, L.R.C. 1985 (5e supp.), c. 1, telle que modifiée

Tax liability re property transferred not at arm's length

Transfert de biens entre personnes ayant un lien de dépendance

160 (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

160 (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

(a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

(b) a person who was under 18 years of age, or

b) une personne qui était âgée de moins de 18 ans;

(c) a person with whom the person was not dealing at arm's length,

c) une personne avec laquelle elle avait un lien de dépendance,

the following rules apply:

les règles suivantes s'appliquent :

(d) the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts révisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

(e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for

(ii) le total des montants représentant chacun un montant que l'auteur du transfert doit payer en vertu de la présente loi (notamment un montant ayant ou non fait l'objet d'une cotisation en application du paragraphe (2) qu'il doit payer en vertu du présent article) au cours de l'année d'imposition où les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années.

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

Toutefois, le présent paragraphe n'a pas pour effet de limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi ni celle du bénéficiaire du transfert quant aux intérêts dont il est redevable en vertu de la présente loi sur une cotisation établie à l'égard du montant qu'il doit payer par l'effet du présent paragraphe.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-386-15

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