Federal Court of Appeal

Cour d'appel fédérale

Date: 20160615

Docket: A-356-15

Citation: 2016 FCA 181

CORAM: **NADON J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

COAST CAPITAL SAVINGS CREDIT UNION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on April 19, 2016.

Judgment delivered at Ottawa, Ontario, on June 15, 2016.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: NADON J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this appeal, the appellant, Coast Capital Savings Credit Union, seeks to set aside a portion of the August 5, 2015 Order of Justice Valerie Miller of the Tax Court of Canada, reported at 2015 TCC 195. In the Order, the Tax Court Judge granted Coast Capital leave to file an Amended Notice of Appeal after certain paragraphs in the proposed Amended Notice were struck. Coast Capital submits that the Tax Court Judge erred in ordering that the impugned

paragraphs in the proposed Amended Notice of Appeal should be struck as it was not plain and obvious that they disclosed no reasonable cause of action.

[2] For the reasons that follow, I disagree and would dismiss this appeal, with costs.

I. Background

[3] Coast Capital is a credit union in British Columbia. In 2001 and 2002, it was the trustee of a number of trusts that were either self-directed registered retirement savings plans [RRSPs] or registered retirement income funds [RRIFs]. The Minister of National Revenue asserts that Coast Capital, as trustee of the trusts, used funds in them to purchase taxable Canadian property in the form of shares in Canadian-controlled corporations and that it purchased these shares from a non-resident. The Minister further asserts that Coast Capital did not take any steps to verify the residency of the vendor and therefore assessed Coast Capital for a liability in both 2001 and 2002 under subsection 116(5) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [the *ITA*]. That provision states in relevant part:

Disposition by non-resident person of certain property	**Disposition par une personne non-résidente**
…	[…]
Liability of purchaser	**Assujettissement de l'acheteur**
116(5) Where in a taxation year a purchaser has acquired from a non-resident person any taxable Canadian property (other than depreciable property or excluded property) of the non-resident person, the purchaser, unless	**116**(5) L'acheteur qui, au cours d'une année d'imposition, acquiert auprès d'une personne non-résidente un bien canadien imposable (sauf un bien amortissable ou un bien exclu) d'une telle personne est redevable, pour le compte de cette personne, d'un impôt en vertu de la présente partie pour

<table>
<tr><td></td><td>l’année, sauf si, selon le cas :</td></tr>
<tr><td>(a) after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada,</td><td>a) après enquête sérieuse, l’acheteur n’avait aucune raison de croire que la personne ne résidait pas au Canada;</td></tr>
<tr><td>(a.1) subsection (5.01) applies to the acquisition, or</td><td>a.1) le paragraphe (5.01) s’applique à l’acquisition;</td></tr>
<tr><td>(b) a certificate under subsection 116(4) has been issued to the purchaser by the Minister in respect of the property,</td><td>b) le ministre a délivré à l’acheteur, en application du paragraphe (4), un certificat concernant le bien.</td></tr>
<tr><td>is liable to pay, and shall remit to the Receiver General within 30 days after the end of the month in which the purchaser acquired the property, as tax under this Part for the year on behalf of the non-resident person, 25% of the amount, if any, by which</td><td>Cet impôt — à remettre au receveur général dans les 30 jours suivant la fin du mois au cours duquel l’acheteur a acquis le bien — est égal à 25 % de l’excédent éventuel du coût visé à l’alinéa c) sur la limite visée à l’alinéa d):</td></tr>
<tr><td>(c) the cost to the purchaser of the property so acquired</td><td>c) le coût pour l’acheteur du bien ainsi acquis;</td></tr>
<tr><td>exceeds</td><td></td></tr>
<tr><td>(d) the certificate limit fixed by the certificate, if any, issued under subsection 116(2) in respect of the disposition of the property by the non-resident person to the purchaser,</td><td>d) la limite prévue par le certificat délivré en application du paragraphe (2) concernant la disposition du bien par la personne non-résidente en faveur de l’acheteur.</td></tr>
<tr><td>and is entitled to deduct or withhold from any amount paid or credited by the purchaser to the non-resident person or otherwise recover from the non-resident person any amount paid by the purchaser as such a tax.</td><td>L’acheteur a le droit de déduire d’un montant qu’il a versé à la personne non-résidente, ou porté à son crédit, ou de retenir sur un tel montant, ou de recouvrer autrement d’une telle personne, tout montant qu’il a payé au titre de cet impôt.</td></tr>
</table>

[4] In its Notice of Appeal, Coast Capital took the position that it was not the purchaser of the shares, an argument that is now foreclosed due to the recent decision of this Court in *Olympia*

Trust Company v. Canada, 2015 FCA 279, 479 N.R. 317. It also asserted that it did not acquire taxable Canadian property from a non-resident and, in the alternative, that even if it did do so, it did not appreciate that it was dealing with a non-resident when it purchased the shares and, thus, is not liable for the amounts assessed.

[5] In her Reply, the respondent indicated that the Minister made the following assumptions of fact in issuing the Notices of Assessment:

- Certain persons created a scheme to make tax-free withdrawals from RRSPs or RRIFs;

- The scheme involved the purchase of shares of corporations resident in Canada by a trust governed by an RRSP or a RRIF for an amount in excess of the fair market value of the shares;

- The scheme also involved the transfer of funds from pre-existing RRSPs or RRIFs to newly created ones. The annuitants then directed the trustee to use funds in the newly created RRSP or RRIF to purchase shares in Canadian companies, at a price in excess of their fair market value; and

- The promoter kept some of the funds as a fee and transferred the balance of the funds that exceeded the fair market value of the shares to offshore accounts that the annuitants did not own but had access to.

[6] The result of the scheme was that the annuitants stripped funds out of their RRSPs or RRIFs without paying the requisite tax.

[7] Coast Capital is not alleged to have been in any way involved in the scheme and states that it had no knowledge of the fraudulent nature of the transactions that were being undertaken. On the contrary, it asserts that it was misled as to the true nature of the transactions and as to the value of the shares by the promoters of the scheme or by the solicitor who was assisting them. It claims that it learned about the scheme through the discovery process in this litigation and sought to amend its Notice of Appeal following discovery to plead additional facts and new reasons for varying the Notices of Assessment that related to the scheme.

[8] Specifically, it sought to plead that the scheme was a sham, which it asserted would permit the Tax Court to re-characterize the transaction and allow the appeal on the basis that Coast Capital should be reassessed in accordance with what actually occurred. It also sought to amend its Notice of Appeal to raise the assertion that the cost of the shares, for the purposes of subsection 116(5) of the *ITA*, was their fair market value as opposed to their purchase price. These pleas were set out in paragraphs 4A, 23(b), 23(f), 28A, 30A, 33A and 37A of Coast Capital's proposed Amended Notice of Appeal.

II. The Tax Court Judge's Reasons

[9] In her Reasons for Order, the Tax Court Judge held that the proposed amendments set out in paragraphs 4A, 23(b), 23(f), 28A, 30A, 33A and 37A of Coast Capital's proposed Amended Notice of Appeal were not permissible as they disclosed no reasonable cause of action.

[10] In so ruling, she first noted, in accordance with Rule 54 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a, that amendments to pleadings should be allowed at

any stage of an action for the purpose of determining the real questions in controversy between the parties provided that so doing would not result in an injustice to the other party not capable of being compensated by an award of costs (citing *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 at 9-10, 157 N.R. 380 (C.A.)). The Tax Court Judge also acknowledged that she should assume that the facts in the proposed pleadings were true and that amendments should only be struck if it is plain and obvious that they disclose no reasonable cause of action (citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 977, 979-980, 117 N.R. 321).

[11] The Tax Court Judge determined that it was plain and obvious that Coast Capital's sham argument did not disclose a cause of action for three reasons.

[12] First, she held that a sham could only be found in the tax context when the Minister is deceived as to the true nature of the transaction (citing *2529-1915 Québec Inc. v. Canada*, 2008 FCA 398, 387 N.R. 1; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, 53 N.R. 241 [*Stubart*]; *McEwen Brothers Ltd. v. R.*, [1999] 4 F.C. 225, 243 N.R. 149 (C.A.); *Bonavia v. Canada*, 2010 FCA 129, [2010] 6 C.T.C. 99 [*Bonavia*]). Here, Coast Capital, and not the Minister, was deceived, and therefore the plea of sham was not possible.

[13] Secondly, the Tax Court Judge held that the taxpayer whose appeal is before the Court must have been a party to the sham (citing *Bonavia*). As Coast Capital was a stranger to the sham, it could not invoke the plea.

[14] Finally, the Tax Court Judge held that the facts pled did not support a finding that Coast Capital was the victim of a sham in any way relevant to its tax appeal as there were no facts pled to demonstrate that the legal rights and obligations created were other than intended. Rather, it appeared that Coast Capital was the victim of fraudulent misrepresentation. However, this did not alter the fact that Coast Capital had used funds from the RRSPs and RRIFs to purchase the shares in question.

[15] Regarding the second amendment that Coast Capital sought to make to its Notice of Appeal, the Tax Court Judge held that it was plain and obvious that the appellant's cost argument raised no cause of action because the plain meaning of "cost to the purchaser" in subsection 116(5) of the *ITA* means the amount that the taxpayer gave up to get the property (citing *The Queen v. Stirling*, [1985] 1 F.C. 342, [1985] 1 C.T.C. 275 (C.A.) [*Stirling*]).

III. Analysis

A. *The Proposed Pleadings Related to the Sham Doctrine*

[16] Turning, first, to the refusal of the proposed amendments that sought to plead that the transaction was a sham and to invoke this as a reason for setting the assessments aside, Coast Capital argues that it was not plain and obvious that the proposed pleading of a sham disclosed no cause of action for three reasons.

[17] First, it says it is not plain and obvious that only the Minister can rely on the sham doctrine. It says that this Court's jurisprudence rests on the Supreme Court of Canada's seminal

decision in *Stubart*, and, in that case, the Court did not definitively state that a plea of sham is only open to the Minister in a tax case. The appellant refers in particular to the passage on page 572 of the majority reasons where Justice Estey cited from *Snook v. London & West Riding Investments Ltd.*, [1967] 1 All E.R. 518, which defines a sham as occurring when acts are undertaken:

> … which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligation (if any) which the parties intend to create.

[18] Coast Capital says that the foregoing passage does not specifically require that the party being deceived be the taxing authority, but rather leaves open the possibility that someone else might be deceived in a sham transaction in a tax case. Coast Capital concedes that the Minister is usually the victim of the sham; however, it says that the fact that its claim is novel or unusual does not make it plain and obvious that it will not succeed. It notes that the Tax Court applied the sham doctrine for the benefit of a taxpayer in *Nunn v. The Queen*, 2005 TCC 806, [2006] 2 C.T.C. 2045. While Coast Capital acknowledges that the *Nunn* decision was reversed on appeal (2006 FCA 403, 367 N.R. 108 [*Nunn* FCA]), it says that this Court did not do so on the basis that only the Minister can rely on the sham doctrine. Coast Capital further says that it must be taxed on the basis of what actually happened (citing in particular *St. Arnaud v. Canada*, 2013 FCA 88, 444 N.R. 176), and, in this case, it was the victim of a sham. It thus submits that it was not plain and obvious that a plea of sham is only open to the Minister and the first reason offered by the Tax Court Judge cannot stand.

[19] Second, Coast Capital submits that the Tax Court Judge erred because it is not plain and obvious that the sham doctrine can only be applied in tax appeals when the appellant is a party to the sham. It says that this part of the Tax Court Judge's holding must have been based on her assumption that only the Minister can rely on the sham doctrine. However, it is obvious that the Minister is not a party to the sham when she relies upon the sham doctrine, and it would be absurd if a party that had perpetrated a sham could rely on that deceit in appealing a tax assessment.

[20] Third, Coast Capital alleges that the Tax Court Judge erred in finding that it had failed to plead sufficient facts to support a finding of sham. Coast Capital says that it has pled sufficient facts to establish that the parties to the sham did something to deceive others and presented a transaction as reality which was different from the actual transaction that they were undertaking: the annuitants could withdraw the funds which formed the purchase price; the true nature of the scheme was not to purchase shares for the purported purchase price but to transfer an amount to offshore accounts for the annuitants' use; and, the promoters and annuitants provided documentation to Coast Capital which falsely misrepresented the true nature of the scheme.

[21] I have considerable doubt that the decision in *Stubart* can be read in the way Coast Capital submits or that the prior decisions of this Court to the effect that only the Minister can plead the sham doctrine in a tax case can be ignored in the way Coast Capital suggests.

[22] However, it is not necessary in this case to decide whether it is plain and obvious that a plea of sham may only be made by the Minister in a tax case or whether a taxpayer must

necessarily be party to the sham for the doctrine to be invoked, because the third reason offered by the Tax Court Judge for refusing to allow the proposed amendments related to sham is unassailable.

[23] Coast Capital has misapprehended the nature of the Tax Court Judge's third reason for refusing the plea of sham. Contrary to what Coast Capital suggests, she ruled that the plea of sham was irrelevant to the issues before the Tax Court and not that the plea was insufficiently particularized. In so ruling, the Tax Court Judge was correct.

[24] The nature of transaction at issue and the basis for the assessment in this proceeding must be kept in mind. Coast Capital, as trustee of the RRSPs and RRIFs in issue, is alleged to have used funds from the RRSPs and RRIFs to purchase shares in Canadian-controlled corporations from a non-resident person. Subsection 116(5) of the *ITA* provides that a purchaser of taxable Canadian property from a non-resident is liable to pay, as tax on behalf of the non-resident person, 25% of the cost of the taxable Canadian property acquired. As a result, the Minister assessed Coast Capital, as the purchaser of taxable Canadian property, for 25% of the cost of the shares. It is therefore being assessed for its purchase of the shares from a non-resident and not for its mistaken belief as to how much they were worth or for what happened, unbeknownst to it, after the shares were purchased. Thus, Coast Capital's deception as to the value of the shares or as to the ultimate destination of the funds paid out of the RRSPs and RRIFs is irrelevant to the issues that were before the Tax Court.

[25] It follows that the sham doctrine has no application to the share purchase transaction at issue in this appeal. As the Tax Court Judge noted, Coast Capital and the promoters intended that Coast Capital acquire the shares for the agreed-upon purchase price. They also intended that Coast Capital release the funds from the RRSPs or RRIFs and receive the shares. Thus, the parties intended exactly what occurred.

[26] Coast Capital argues that the dishonesty or misrepresentations in the overarching scheme means that the share purchase transaction was a sham and should be set aside for the "real transaction". However, there is no alternate "reality" for the Tax Court to apply. There is no underlying "real" transaction so that the share purchase transaction could be set aside and the Minister could tax on that "real" transaction. Coast Capital complains about the routing of funds to offshore accounts. However, it is not being taxed on the withdrawal from the RRSPs or RRIFs but rather is simply being taxed as the purchaser of taxable Canadian property. It is irrelevant what the promoters did with the funds.

[27] The jurisprudence recognizes that taxpayers are not relieved of their tax obligations if they have been victims of mistake or fraud (*Nunn* FCA at para. 22, citing *Vankerk v. Canada*, 2006 FCA 96 at para. 3, 348 N.R. 258). Thus, the fact that Coast Capital might have been deceived as to the ultimate nature of the transactions in this case is irrelevant to its tax liability under subsection 116(5) of the *ITA*. The Tax Court Judge therefore did not commit a reviewable error in refusing to allow the proposed amendments set out in paragraphs 4A, 23(b), 28A, and 33A of the proposed Amended Notice of Appeal.

B. *The Proposed Pleadings Related to Cost*

[28] Turning to the refusal to allow the amendment that sought to plead that the cost of the shares, within the meaning of subsection 116(5) of the *ITA*, was their fair market value as opposed to the amounts paid out of the RRSPs and RRIFs, Coast Capital says that the Tax Court Judge misapprehended the effect of its proposed pleading. It says that it seeks to argue that not all of the amount transferred was given to purchase the shares but that some portion was given for the purpose of conveying benefits to the annuitants and the promoters. It claims that the Tax Court Judge therefore erred in ruling that it is plain and obvious that the judge hearing the case on the merits could not be persuaded to find that the cost amount of the shares was in reality substantially less than the amount that was paid out of the RRSPs and RRIFs (citing *R. v. Kendall*, 2015 ABQB 177 at para. 524, 2015 D.T.C. 5046 [*Kendall*]). In *Kendall*, promoters of a scheme similar to that which is alleged to have taken place in this case were convicted of fraud, conspiracy and theft. In his reasons, the trial judge found that the accused diverted the funds they received from contributors' RRSPs and that only a portion of them were actually paid to purchase shares in a Canadian-controlled private corporation.

[29] Coast Capital also notes that the Tax Court Judge allowed it to add section 68 of the *ITA* to the listing in the Notice of Appeal of the statutory provisions it relied upon, which it says is the underpinning for its alternate cost argument. That provision states in relevant part:

Allocation of amounts in consideration for property, services or restrictive covenants	**Contrepartie mixte**
68 If an amount received or receivable from a person can reasonably be regarded as being in part the	**68** Dans le cas où il est raisonnable de considérer que le montant reçu ou à recevoir d'une personne représente en

consideration for the disposition of a particular property of a taxpayer, for the provision of particular services by a taxpayer or for a restrictive covenant as defined by subsection 56.4(1) granted by a taxpayer,	partie la contrepartie de la disposition d'un bien d'un contribuable, la contrepartie de la prestation de services par un contribuable ou la contrepartie d'une clause restrictive, au sens du paragraphe 56.4(1), accordée par un contribuable, les règles ci-après s'appliquent :
(*a*) the part of the amount that can reasonably be regarded as being the consideration for the disposition shall be deemed to be proceeds of disposition of the particular property irrespective of the form or legal effect of the contract or agreement, and the person to whom the property was disposed of shall be deemed to have acquired it for an amount equal to that part;	*a*) la partie du montant qu'il est raisonnable de considérer comme la contrepartie de cette disposition est réputée être le produit de disposition du bien, quels que soient la forme et les effets juridiques du contrat ou de la convention, et la personne qui a acquis le bien à la suite de cette disposition est réputée l'acquérir pour un montant égal à cette partie;
…	[…]

[30] Coast Capital submits that the Tax Court Judge's allowance of the addition of section 68 of the *ITA* to the provisions to be relied upon is inconsistent with her refusal to allow the pleading invoking the cost argument, set out in paragraphs 23(f), 30A and 37A of its proposed Amended Notice of Appeal.

[31] While I agree that it might not have been necessary to allow Coast Capital to add section 68 of the *ITA* to the list of statutory provisions that it relied on, it does not follow that the Tax Court Judge erred in failing to allow the amendments to raise the cost argument. The Tax Court Judge was correct that there is no ambiguity as to the meaning of "cost" in subsection 116(5) of the *ITA*. This term has been defined as meaning the amount paid by the purchaser for the capital property. In *Stirling*, Justice Pratte noted that the term "cost" means "the price that the taxpayer

gave up in order to get the asset" and held that it did not include other charges incurred in respect of the asset. While *Stirling* was decided in the context of interpreting the term "cost" in the context of the *ITA* provisions on capital gains, it applies equally to the definition of "cost" in subsection 116(5) of the *ITA*. The cost of the shares to Coast Capital is what it paid for them and, for purposes of discerning their cost to Coast Capital, it matters not what their actual value might have been nor how the promoters might have diverted the funds paid by Coast Capital for the shares after the funds were paid out of the RRSPs or RRIFs.

[32] It therefore follows that the Tax Court Judge did not err in holding that it was plain and obvious that the pleading set out in paragraphs 23(f), 30A and 37A of Coast Capital's proposed Amended Notice of Appeal disclosed no reasonable cause of action.

IV. Proposed Disposition

[33] For the foregoing reasons, I would dismiss this appeal, with costs.

"Mary J.L. Gleason"
J.A.

"I agree
M. Nadon J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-356-15
STYLE OF CAUSE:	COAST CAPITAL SAVINGS CREDIT UNION v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 19, 2016
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	NADON J.A. RENNIE J.A.
DATED:	JUNE 15, 2016

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