**Date: 20080124**

**Docket: A-539-06**
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**Docket: A-538-06**
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**Docket: A-541-06**
**Docket: A-542-06**
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**Docket: A-544-06**

**Citation: 2008 FCA 31**

**CORAM:** **LÉTOURNEAU J.A.**
**SEXTON J.A.**
**PELLETIER J.A.**

**A-539-06**

**BETWEEN:**

**ARPEG HOLDINGS LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**A-537-06**

**BETWEEN:**

**BERTHA M. MATHISEN**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**A-538-06**

**BETWEEN:**

**WILLIAM MATHISEN**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**A-540-06**

**BETWEEN:**

**P. ANNE MATHISEN**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**A-541-06**

**BETWEEN:**

**BARBARA BELL**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**A-542-06**

**BETWEEN:**

**CHRISTOPHER G. MATHISEN**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**A-543-06**

**BETWEEN:**

**E. JANE RATCLIFFE**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**A-544-06**

**BETWEEN:**

**MARY MCNEIL**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Vancouver, British Columbia, on January 22, 2008.

Judgment delivered at Vancouver, British Columbia, on January 24, 2008.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
SEXTON J.A.

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**Appellant**

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**BETWEEN:**

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**A-544-06**

**BETWEEN:**

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**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

## REASONS FOR JUDGMENT

**PELLETIER J.A.**

[1] This is an appeal from the decision of Madam Justice Woods of the Tax Court of Canada, reported at 2006 TCC 593, [2006] F.C.J. No. 470, dismissing the appeals of the corporate appellant Arpeg Holdings Ltd. and of the individual appellants Christopher Mathisen, Bertha Mathisen, William Mathisen, P. Anne Mathisen, E. Jane Ratcliffe, Mary Mcneil and Barbara Bell.

[2] The issues in the appeal are the validity of a waiver of the normal re-assessment period with respect to the corporate appellant and the calculation of the value of the shareholder benefits received by the individual appellants.

[3] The corporate appellant is a holding company which was set up by the late Dr. Arne Mathisen who was the husband of the appellant Bertha Mathisen and the father of the other individual appellants. Arpeg held certain properties. In 1996 it disposed of one of those properties and filed a replacement property election. In the spring and summer of 2000, in the course of an audit of the corporation's 1997 and 1998 income tax returns, the auditor, Mr. Eng, became concerned about the replacement property election in the 1996 taxation year. As the normal reassessment period for that taxation year would expire on September 15, 2000, Mr. Eng asked Mr. Mathisen to sign a waiver of the normal reassessment period as provided in subsection 152(4) of the *Income Tax Act*. Christopher Mathisen (Mr. Mathisen) signed the waiver. As a result of the audit, the Minister reassessed the corporation by denying the replacement property election which resulted in a significant additional tax liability for the corporate appellant. The appellants do not dispute the

disallowance of the replacement cost election but they seek to set it aside nonetheless by challenging the waiver on the ground that Mr. Mathisen was not authorized to sign such a document and that the execution of the waiver was induced by Mr. Eng's misrepresentations as to the nature of the document. The appellants say that, as a result, the doctrine of *non est factum* operates so as to make the waiver a nullity for all practical purposes.

[4] As a result of the same audit, the Minister assessed the individual appellants in respect of benefits which they received as shareholders of the corporate appellant. The individual appellants do not deny that they made personal use of certain corporate properties but they object to the calculation of the value of those benefits.

[5] The first issue is the validity of the waiver. If the waiver is not valid, the reassessment of the corporate appellant is out of time and of no effect.

[6] The first ground for challenging the waiver is that the corporation had not authorized Mr. Mathisen to sign the waiver on its behalf. The Tax Court judge analysed this issue in terms of Mr. Mathisen's actual, implied and ostensible authority. She concluded that Mr. Mathisen had both implied and ostensible authority to sign the waiver on behalf of the corporate appellant. In particular, she noted that there was no evidence that the corporation had not given the agency any express notice of any limitation in Mr. Mathisen's authority to deal with tax matters on behalf of the corporation.

[7] The Tax Court judge's conclusions on this issue are amply supported by the evidence. The matter was not pursued in oral argument and rightly so. There is no basis on which we could intervene on this issue.

[8] The appellants' second challenge to the waiver is a plea of *non est factum*. The appellants argue that the execution of the waiver was induced by Mr. Eng's misrepresentation. As a result, they say, it is not enforceable against the corporation. There are differences in the evidence of Mr. Mathisen and that of Mr. Eng. In particular, much of Mr. Eng's evidence as to the nature of any discussion between him and Mr. Mathisen comes in through a note which contains past recollection recorded. The difficulty is that Mr. Eng is not able to say when the note in question was prepared, which means that the Minister cannot show that the note was made contemporaneously with the events recorded. On that basis, the appellants argue that the Tax Court judge erred in considering this evidence. If the note is set aside, the appellants say that the only evidence on the issue of the discussions is that of Mr. Mathisen and it supports the conclusion that the latter was misled as to the contents of the waiver.

[9] The difficulty with the appellants' argument is that it ignores the fact that Mr. Mathisen's evidence is only useful if it is believed. Having observed Mr. Eng and Mr. Mathisen give evidence, in chief and in cross-examination, the Tax Court judge concluded that in the case of a conflict between the evidence of Mr. Mathisen and Mr. Eng, she preferred the evidence of Mr. Eng. The appellants conclude from this that, where there is no contradiction, she believed Mr. Mathisen. My

own view is that the Tax Court judge could not have decided as she did if she believed Mr. Mathisen.

[10] The Tax Court judge was very circumspect in dealing with Mr. Mathisen's evidence. She rejects the notion that Mr. Eng had any reason to mislead Mr. Mathisen. If Mr. Mathisen did not sign the waiver, there was still plenty of time to reassess within the normal reassessment period. The Tax Court judge also rejected the notion that Mr. Eng could think that Mr. Mathisen could be fooled as to the nature of a document which carries the bold type heading "WAIVER IN RESPECT OF NORMAL REASSESSMENT PERIOD". It is implicit in this that the Tax Court judge also rejected the suggestion that Mr. Mathisen was in fact fooled as to the nature of a document whose nature is conspicuously displayed on the document itself. Finally, even though she appears to have drawn no adverse inference from it, the Tax Court judge contrasted Mr. Mathisen's evidence that he did not read the waiver because he had forgotten his reading glasses with her own observation of Mr. Mathisen reading hand-written journal entries without the benefit of reading glasses in the course of his testimony.

[11] It is only in the rarest of circumstances that an appeal court will interfere with a trial judge's assessment of credibility. In this case, not only is there no basis on which we could intervene, the conclusion which the Tax Court judge was asked to draw by the appellants is so inherently unlikely as to be unworthy of any credit. In order to subscribe to the appellants' argument, the Tax Court judge would have to believe that an experienced businessman, responsible for a large successful family business, who has had the benefit of a graduate education in business, would sign a

document which is clearly labeled as a waiver simply because a tax auditor told him that he, the auditor, needed it to complete his audit. There is no basis on which the Tax Court judge can be criticized for failing to embrace such a story.

[12] While this is sufficient to dispose of this aspect of the appeal, I think it proper to refer to one other element of proof because of the allegations made with respect to Mr. Eng's truthfulness. The appellants made much of Mr. Eng's concession that he was inclined to be secretive about the points he was pursuing in his audit. They suggest that this confirms that he would be likely to downplay or minimize the true nature of the waiver. However, when one examines the waiver which Mr. Mathisen signed, one sees that the waiver plainly and explicitly states that it is in reference to the gain from the disposition of a certain property, and the replacement property election made with respect to the proceeds of disposition of that property. There is no concealment whatsoever as to the true nature of the document. It brings little credit to anyone to advance a theory so at odds with the facts.

[13] The appellants go on to argue that the Tax Court judge erred further when she concluded that Mr. Mathisen's carelessness in failing to read the waiver is a complete bar to the application of *non est factum*. The Supreme Court's last review of the law with respect to *non est factum* is found in *Marvco Colour Research v. Harris* [1982] 2 S.C.R. 774 in which the Supreme Court essentially repudiated the position which it had taken in an earlier case, *Prudential Trust Co. v. Cugnet* [1956] S.C.R. 914. In that case, the Supreme Court had held that only carelessness amounting to negligence (because it was a breach of a duty owed to others) would bar recourse to *non est factum*.

In other words, mere carelessness on the part of the person executing the document would not preclude that person from invoking *non est factum*. In *Marvco*, the Supreme Court followed the decision of the House of Lords in *Saunders v. Anglia Building Society* [1971] A.C. 1004 and concluded that, as between an innocent third party and one who is careless in the execution of a document, the careless party should bear any loss resulting from his or her own carelessness.

[14] The appellants point out that there is a difference between a dispute which concerns only the two parties to the transaction and one, as in *Marvco*, where a third party has acted on the strength of a carelessly signed document. The only authority cited on this point, *Free Ukrainian Society (Toronto) Credit Union Ltd v. Hnatkiw* [1964] 2 O.R. 169, is of no assistance as it says that negligence is not an issue in the case of deliberate misrepresentations made to an illiterate man so as to induce him to sign a promissory note. That point is not contentious. The case does not stand for the proposition that as between two contracting parties, one party may avoid his obligations under the contract by failing to take steps to know what his obligations are.

[15] Mr. Mathisen is a sophisticated, well educated, successful businessman. He cannot avoid the consequences of signing the waiver by not reading it, or by saying that he didn't read it. There is no reason to disturb the Tax Court judge's conclusion on this point.

[16] The last issue is the question of the benefits to shareholders and, in particular, the value to be given to those benefits. The shareholder benefits in question in the appeal are the use of properties located at Whistler and at Crescent Beach. The Whistler properties are three shares of Whistler Ski

Lodges Ltd which entitle the appellants to the exclusive use of three properties located in Whistler B.C. The evidence was that the properties were not rented in the 1997 and 1998 taxation years, which are the years in respect of which the individual appellants were re-assessed. The properties were used for business use 25 days annually and for personal use 51 days annually in those years. The fair market value of the rent which could be charged for the use of each Whistler property was $134.79 per day.

[17] The Crescent Beach property is a home located on land which was acquired as a farm property. Over the years, parcels of the original acquisition were sold and the farm operations moved elsewhere. The home remained on the property and was used as a summer residence for the months of July and August of each year by Mrs. Bertha Mathisen. The home was not rented in the years in question. The fair market value of such accommodation was between $2,000 and $2,500 per month.

[18] The Minister reassessed the individual appellants with respect to the Whistler and Crescent Beach properties on the "cost of capital approach" in which the benefit is equal to the notional return earned if the capital cost of the asset were invested at a prescribed rate. That calculation yielded a gross benefit with respect to the Whistler and Crescent Beach properties in the following amounts which were allocated between the shareholders on the basis of their share holdings. The amounts in question were:

| | | 1997 | 1998 |
|---|---|---|---|
| Whistler | $ | 29,364.61 | 35,829.48 |
| Crescent Beach | $ | 32,885.00 | 38,603.00 |

[19] In the case of the appellant Mrs. Bertha Mathisen, the appellants argue that the value of the benefit, however calculated, must be reduced by the amount of corporate expenses which she paid in respect of the property. The mechanics of such transactions were that the corporation paid the expenses and reduced the amount of its obligation to Mrs Mathisen (her shareholder loan account) by the same amount.

[20] The appellants challenge the Minister's cost of capital approach on the ground that it amounts to a mis-reading of this court's reasons in *Youngman v. Canada* [1990] F.C.J. No. 341, (1990) 90 DTC 6322 and *Fingold v. Canada* [1997] F.C.J. No. 1250. The appellants say that both of these cases involve properties which were constructed or acquired for the benefit of the shareholder. The appellants also say that, unlike *Youngman* and *Fingold*, the properties in question in this case were acquired for business purposes. It simply transpired over time that personal use was made of the properties.

[21] The distinction suggested by the appellants is not relevant. As this court said in *Youngman*, the first step is to identify what the benefit is, that is, what the company did for the shareholder. The second step is to determine what the shareholder would have had to pay to obtain that benefit if he or she were not a shareholder. In both *Youngman* and *Fingold*, the Court found that the benefit was the right to have at their disposal the property in question. In *Youngman*, the property was a house built to the shareholders' specifications. In *Fingold*, it was a luxury condominium purchased and renovated for the use of the shareholder and his wife. In both cases, the corporation's capital was tied up in property which did yield a return. The cost of the benefit is the income which that capital

could have earned had it been productively employed during the taxation year in question. That is what a person dealing at arm's length would have to pay for the use of that capital.

[22] In the present case, the properties were not on the rental market in the years in question. While there were days in which the properties were used for business functions, the properties were at the shareholders' disposition on any other occasion, even if they chose not to make use of them. Thus the proper measure of the benefit is not the cost of renting equivalent accommodation for the period of actual personal use, but is the corporate income foregone by having the corporation's capital tied up in unproductive assets. The Tax Court judge did not err in confirming the Minister's approach to the assessment of the benefits received by the shareholders.

[23] The last issue was the adjustment to be made, if any, with respect to the benefits conferred on Mrs. Mathisen. In the case of the Whistler properties, Mrs Mathisen had access to the properties on the same basis as the other shareholders but she incurred the cost of certain corporate expenses with respect to those properties. With respect to the Crescent Beach property, Mrs. Mathisen was the only shareholder who made any personal use of the property but, once again, she incurred the cost of certain corporate expenses in relation to the maintenance and upkeep of the property.

[24] The Tax Court judge refused to consider any deduction with respect to these payments on the basis that no evidence was led to establish a reasonable apportionment. In my view, the Tax Court judge erred on this point. The ledgers for the properties in question are available and it is possible to identify the various heads of expenses paid in relation to the properties. Mrs. Mathisen

should get no credit for personal expenses such as telephone and cable. She should be credited with the payments made to B.C. Hydro to the extent of the business use of the properties. Fixed costs such as condominium fees, taxes, insurance should be credited in full. The details of the calculation are left to the Minister. In summary, the amount of the benefits conferred on Mrs. Mathisen is to be reduced by the amount of the adjustments permitted above.

[25] In the end, I would dispose of these appeals as follows:

1. I would allow the appeal in File No. A-537-06 with costs fixed at $1,500 and disbursements and I would remit the matter to the Minister for reassessment on the basis that, in the calculation of the shareholder benefit received by the appellant, she is to be given credit for certain payments made as provided in paragraph 24 of the Reasons for Judgment.
2. I would dismiss the appeals in Files Nos. A-539-06, A-538-06, A-540-06, A-541-06, A-542-06, A-543-06 and A-544-06 with one set of costs and disbursements in each file.
3. A copy of these reasons will be placed in each file.

"J.D. Denis Pelletier"
J.A.

“I agree
Gilles Létourneau J.A.”

“I agree
J. Edgar Sexton J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKETS:** | **A-539-06**<br>**A-537-06**<br>**A-538-06**<br>**A-540-06**<br>**A-541-06**<br>**A-542-06**<br>**A-543-06**<br>**A-544-06** |
| **STYLE OF CAUSE:** | ARPEG HOLDINGS LTD. v. HMQ<br>BERTHA M. MATHISEN v. HMQ<br>WILLIAM MATHISEN v. HMQ<br>P. ANNE MATHISEN v. HMQ<br>BARBARA BELL v. HMQ<br>CHRISTOPHER G. MATHISEN v. HMQ<br>E. JANE RATCLIFFE v. HMQ<br>MARY MCNEIL v. HMQ |
| **PLACE OF HEARING:** | Vancouver, British Columbia |
| **DATE OF HEARING:** | January 22, 2008 |
| **REASONS FOR JUDGMENT BY:** | PELLETIER J.A. |
| **CONCURRED IN BY:** | LÉTOURNEAU J.A.<br>SEXTON J.A. |
| **DATED:** | January 24, 2008 |

**APPEARANCES:**

| | |
|---|---|
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