Date: 20080220

Docket: A-466-06

Citation: 2008 FCA 65

CORAM: **DESJARDINS J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

VALLEY EQUIPMENT LIMITED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Fredericton, New Brunswick, on February 19, 2008.

Judgment delivered from the Bench at Fredericton, New Brunswick, on February 20, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: NOËL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Fredericton, New Brunswick, on February 20, 2008)

NOËL J.A.

[1] This is an appeal by Valley Equipment Limited ("Valley Equipment") from a decision of Campbell J. of the Tax Court of Canada (the "Tax Court Judge"), confirming the assessment issued by the Minister of National Revenue (the "Minister") with respect to its 2002 taxation year on the basis that damages awarded to Valley Equipment as a result of an unlawful cancellation of a Dealer Agreement with John Deere Limited ("John Deere") were proceeds of disposition of property, subject to a capital gains tax, and did not constitute a non-taxable capital receipt.

RELEVANT FACTS

[2] The matter before the Tax Court Judge proceeded on the basis of an agreed statement of facts which is fully reproduced in the decision under review (Reasons, para. 2). For the purposes of the appeal, if suffices to outline the following facts.

[3] Valley Equipment is a company incorporated under the laws of the Province of New Brunswick. It carried on several lines of business, including that of a John Deer Dealer. Throughout the course of their commercial relationship Valley Equipment and John Deere signed several dealer agreements ("Dealer Agreement" or "Dealer Agreements"), the latest of which came into effect as of February 14, 1986 and March 12, 1991. However, between 1988 and 1992 relations between John Deere and Valley Equipment were strained and on September 28, 1995, John Deere terminated its Dealer Agreement with Valley Equipment.

[4] Refusing to accept this termination (and based on what appears to have been an intent to challenge the termination), Valley Equipment's sole shareholder, Raymond Cook and his son entered into an agreement with Roy and Murray Culberson (the "Culbersons") on September 29, 1995, which specified that the Culbersons were to acquire the John Deere division of Valley Equipment's business for $500,000.00; to lease the building owned by Raymond Cook at $54,500.00 a year for the term of one year; and to acquire the parts and service inventory at cost.

[5] On December 14, 1995, Valley Equipment and the Cooks commenced an action in the New Brunswick Court of Queen's Bench against John Deere alleging breach of contract and claiming

injunctive relief and damages. On January 14, 2000, Glennie J. issued a decision (*Valley Equipment Ltd. v. John Deere Ltd.*, [2000] N.B.J. No. 28), holding that John Deere had wrongfully cancelled Valley Equipment's Dealer Agreements and awarded damages plus interest and costs.

[6] Valley Equipment submits that it then planned an appeal relating to certain points in the judgment, however, it subsequently reached a settlement with John Deere whereby Valley Equipment, Raymond Cook and Nadia Cook agreed to release John Deere from liability in consideration of John Deere paying the amount of $1,014,807.10 and on the condition that the plaintiffs not enter a formal judgment against John Deere (Amended Appeal Book, Tab 6).

[7] In filing its tax return for the taxation year ending December 31, 2000, Valley Equipment disclosed that: "the company received court awarded damages from John Deere Limited for wrongful cancellation of its dealership agreements. The damages received less applicable legal costs, have been determined by counsel to be a non-taxable receipt and have, therefore, been excluded from net income and retained earnings in the financial statements" (Agreed Statement of Facts, para. 9).

[8] Valley Equipment was subsequently assessed on the basis that the award paid by John Deere constituted proceeds of disposition of capital property. The T7 W-C Form received on May 29, 2003 indicated that Valley Equipment's net income for the year 2000 was revised by including a "Taxable Capital Gain … of $536,457.00".

[9] Valley Equipment appealed this assessment to the Tax Court. The Tax Court Judge came to the conclusion that the assessment had been properly issued on the basis that the damage award constituted proceeds from the disposition of capital property. Valley Equipment now appeals this decision before this Court.

RELEVANT STATUTORY PROVISIONS

[10] Before turning to the decision under appeal, it is useful to set out the relevant statutory provisions. Paragraph 40(1)(*a*) of the *Income Tax Act*, 1985, c. 1 (5th Supp.) (the "Act") defines the term "capital gains" as follows:

40. (1) Except as otherwise expressly provided in this Part	**40.** (1) Sauf indication contraire expresse de la présente partie :
(*a*) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which	*a*) le gain d'un contribuable tiré, pour une année d'imposition, de la disposition d'un bien est l'excédent éventuel :
(i) if the property was disposed of in the year, the amount, if any, by which the taxpayer's proceeds of disposition exceed the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, or	(i) en cas de disposition du bien au cours de l'année, de l'excédent éventuel du produit de disposition sur le total du prix de base rajusté du bien, pour le contribuable, calculé immédiatement avant la disposition, et des dépenses dans la mesure où celles-ci ont été engagées ou effectuées par lui en vue de réaliser la disposition,
…	[…]

[11] "Disposition" is defined in paragraph 248(1) of the Act to include:

"disposition" of any property, except as expressly otherwise provided, includes (*a*) any transaction or event entitling a taxpayer to proceeds of disposition of the property, …	«disposition » Constitue notamment une disposition de bien, sauf indication contraire expresse : *a*) toute opération ou tout événement donnant droit au contribuable au produit de disposition d'un bien; […]

[12] Subsection 248(1) of the Act also defines "property" as:

"property" means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes (*a*) a right of any kind whatever, a share or a chose in action, (*b*) unless a contrary intention is evident, money, (*c*) a timber resource property, and (*d*) the work in progress of a business that is a profession;	«biens » Biens de toute nature, meubles ou immeubles, corporels ou incorporels, y compris, sans préjudice de la portée générale de ce qui précède : *a*) les droits de quelque nature qu'ils soient, les actions ou parts; *b*) à moins d'une intention contraire évidente, l'argent; *c*) les avoirs forestiers; *d*) les travaux en cours d'une entreprise qui est une profession libérale.

[13] The relevant portion of the definition of "proceeds of disposition" in section 54 of the Act provides:

"proceeds of disposition" of property includes, (*a*) the sale price of property that has	«produit de disposition » Le produit de disposition de biens comprend : *a*) le prix de vente de biens qui ont été

been sold,	vendus;
(*b*) compensation for property unlawfully taken,	*b*) les indemnités pour biens pris illégalement;
…	[…]

TAX COURT DECISION

[14] At the beginning of her analysis, the Tax Court Judge identified the basis for the Minister's position in issuing the assessment as follows (page 4):

> … the dealer agreements with John Deere Limited reflected a right which comes within the definition of property as defined in the *Act* and that the damages represented an award for the unlawful cancellation of the agreements which are proceeds of disposition. Therefore a capital gain on the disposition of the agreements was properly calculated and included in the Appellant's income.

[15] According to the Tax Court Judge the resolution of the issue before her was dependent on "what the award of damages was actually for" (Reasons, para. 5). She proceeded to deal with this question as follows (*idem*):

> The judgment of Mr. Justice Peter Glennie is close to one hundred pages long. It recounts a sequence of events replete with copious duplicities on the part of John Deere Limited and its representatives. His findings of fact point to a very blatant and shameful picture of cunning and deception initiated to undermine the Appellant's contractual arrangements with John Deere Limited. Mr. Justice Glennie made numerous findings of acts of bad faith on the part of John Deere Limited. However on a review of the judgment in its entirety, I conclude that Mr. Justice Glennie awarded damages to the Appellant for breach of the dealer agreements by John Deere Limited. In the final few pages of the judgment, under the heading "Conclusion and Disposition", Mr. Justice Glennie states:
>
> > On the basis of my review of all the evidence I conclude that Valley's Dealer Agreements were wrongfully cancelled by John Deere. Since John Deere was not entitled at law to cancel Valley's Dealer Agreement, Valley and Raymond Cook are entitled to damages as a consequence.

> It seems to me that this wording is concise and definitive in respect to the nature of the damage award.

[16] The Tax Court Judge went on to hold that the rights of Valley Equipment under the Dealer Agreement constitute "property" within the meaning of the Act (Reasons, para. 7), and that this right was unlawfully "taken" when the Dealer Agreement was unilaterally cancelled (Reasons, para. 8). It follows that upon payment of the judgment award, the appellant was in receipt of proceeds resulting from the disposition of property.

[17] The Tax Court Judge rejected the appellant's contention that the compensation was for the overall tortuous conduct of John Deere (Reasons, para. 9). She referred to the reasons for judgment of Glennie J. and noted that there was no explicit discussion of tortuous behavior in the reasons and in fact that the words "tort" or "tortuous" are not used (*idem*). Furthermore, the judgment specifically provided that the damages were intended to compensate Valley Equipment for the wrongful cancellation of the Dealer Agreement.

[18] Finally, even if the appellant had presented a compelling argument that John Deere's behavior was tortuous, the explicit words of Glennie J. showed that this was not the basis for the damage award (Reasons, para. 10).

[19] The Tax Court Judge went on to dismiss the appeal.

ALLEGED ERRORS IN DECISION UNDER APPEAL

[20] In support of its appeal, Valley Equipment makes two propositions (Memorandum of Fact and Law of the appellant, paras. 12-52). First, the Tax Court Judge erred in failing to consider the settlement reached by the parties after Glennie J.'s decision was rendered, as the basis for the payment. Had she done that, she would have been bound to conclude that the settlement was not "property" under the Act.

[21] Second, the Tax Court Judge erred in holding that the damages related to the harm arising from the loss of the John Deere dealership. According to Counsel for the appellant, the exact basis for the harm was as follows (Memorandum of Fact and Law of the appellant, para. 17):

> … In reality, after the cancellation of the dealership, Valley Equipment, on its own, attempted to find a purchaser for its John Deere business. But then after the cancellation, John Deere wrongfully interfered with the potential sale. That was the harm: an interference with the non-property rights of Valley Equipment to freely engage in business. …
>
> (My emphasis.)

[22] According to counsel for the appellant, this "non-property right to freely engage in business" is a *res nullius* analogous in nature to the "non-exclusive, commonly held right to carry on business" which was held by this Court not to be "property" under the Act in *Manrell v. Canada*, [2003] F.C.J. No. 408 (C.A.) ("*Manrell*") at paragraph 47.

ANALYSIS AND DISPOSITION

[23] Dealing first with this last proposition, the conclusion of the Tax Court Judge that the award was paid as compensation for the loss of the John Deere distributorship is in my view unassailable.

Although, as pointed out by counsel for the appellant, Glennie J., in the course of his reasons, does refer to John Deere having interfered in the contractual negotiations with the Culbersons (Reasons, para. 180), his ultimate conclusion, which I have already reproduced (see para. 15 above) confirms that the award was intended to compensate Valley Equipment for the wrongful cancellation of the Dealer Agreement. In providing for this compensation, Glennie J. was giving effect to the central allegation made by Valley Equipment in its statement of claim before the New Brunswick Court of Queen's Bench i.e., (Appeal Book, Vol. I, p. 130, para. 12):

> … that grounds for termination of its Dealership with Deere do not exist and that Deere is not acting in good faith in the exercise of its powers under the Agricultural Dealer Agreement and that in consequence the purported termination of Valley as Deere's Dealer is unlawful, unjustified and of no force or effect.

[24] Furthermore, the mode of computation of the award is wholly consistent with Glennie J.'s expressed intent to compensate Valley Equipment for the wrongful cancellation of the Dealer Agreement (Reasons, para. 301):

> … I allow $500,000.00 to Valley as the loss of the sale of the dealership to the Culbersons together with $160,000.00 for the loss of the sale of inventory to the Culbersons. The proposed sale to the Culbersons was an arms' length transaction negotiated by experienced business people. <u>These amounts represent the loss of Valley's opportunity to sell to the Culbersons and it reflects what Valley calculated its John Deere dealership was worth at fair market value in September of 1995 at the time of the cancellation of Valley's Dealer Agreements.</u>
>
> (My emphasis.)

[25] In my view, the Tax Court Judge was on solid ground when she held that Glennie J's award was intended to compensate Valley Equipment for the loss of the John Deere dealership.

[26] Valley Equipment, as a party to the Dealer Agreement, had a legally enforceable right to compel John Deere to abide by its terms. This takes the matter outside the rule set out by this Court in *Manrell, supra* which stands for the sole proposition that a right which does not entail an exclusive and enforceable claim against anyone, is not "property" under the Act (para. 54).

[27] The appellant's alternative argument is that the payment which it received was not the result of the judgment award but the consideration for its agreement to settle the case. According to counsel for the appellant this payment was "unrelated to the actual harm done to Valley Equipment" (Memorandum of Fact and Law of the appellant, para. 12).

[28] The record shows that Valley Equipment signed a release on March 4, 2000 agreeing not to cause a formal judgment to be entered further to the judgment of Glennie J., and releasing John Deere of all liability in consideration for the payment of the sum of $1,014,807.10. The concluding paragraph of the release reads:

> AND FOR SAID CONSIDERATION the Releasors further covenant not to cause a formal judgment to be entered with regard to this proceeding and further acknowledge that all monies owing pursuant to the Decision of Mr. Justice Glennie dated the 14th of January, 2000 in this proceeding, including damages, costs, interest and disbursements, are paid in full.
>
> (My emphasis.)

[29] Given this language, it is difficult to see how the settlement amount could represent something different than the award made by Glennie J. An argument could be made that the settlement amount was of a different character if it exceeded or was below the amount which was awarded by Glennie J. However, on a quick count the amount of $1,014,807.10 is equal to Glennie

J's award (i.e., $885,000 to Valley Equipment, $65,450.00 to Raymond Cook, costs in the amount of $33,000.00) plus accrued interest at the rate of 7% per annum for the period between the date of the judgment and the date of the settlement. In these circumstances, it cannot be seriously argued that the settlement amount represents something other than the judgment award.

[30] I can detect no basis for interfering with the Tax Court Judge's conclusion that the amount received by Valley Equipment was compensation for the wrongful cancellation of the John Deere dealership.

[31] The decision of the Tax Court in *Ipsco Inc. v. Canada*, [2002] T.C.J. No. 110, on which the appellant has placed considerable reliance is also of no assistance. In that case, the legal action and the ultimate settlement amount received by Ipsco was characterized as compensation for a flaw in the design, installation and construction of a pipe treatment system. Significantly, the Tax Court Judge emphasized in that case that Ipsco did not "abandon, transfer or otherwise provide [the payer] with any property for accepting the payment" (*Ipsco, supra*, para. 19). There was no damage in the usual and ordinary meaning of that term since Ipsco's property was not damaged (*Ipsco, supra*, para. 25). The payment could not be viewed as "compensation for property unlawfully taken" since nothing had been taken. This is the basis upon which Rowe D.C.T.J. was able to distinguish the decision of this Court in T*he Queen v. Mohawk Oil Co. Ltd.*, 92 DTC 6135 and conclude that the receipt of the settlement amount did not give rise to a disposition of property.

[32] The situation in the present case is the opposite. In consideration for the settlement payment, Valley Equipment abandoned its right to continue as a John Deere dealer. There was a mutual exchange of property which brings the matter squarely within paragraph 40(1)(*a*) of the Act.

[33] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-466-06
STYLE OF CAUSE:	VALLEY EQUIPMENT LIMITED and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF HEARING:	February 19, 2008
REASONS FOR JUDGMENT OF THE COURT BY:	Desjardins, Noël, Trudel JJ.A.
DELIVERED FROM THE BENCH BY:	NOËL J.A.

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