

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100126

Docket: A-258-09

Citation: 2010 FCA 28

**CORAM: BLAIS C.J.
LÉTOURNEAU J.A.
TRUDEL J.A.**

BETWEEN:

LES RÉSIDENCES MAJEAU INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on January 26, 2010.

Delivered from the Bench at Montréal, Quebec, on January 26, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on January 26, 2010)

LÉTOURNEAU J.A.

Issues

[1] This is an appeal of a decision of Justice Tardif (judge) of the Tax Court of Canada. In this decision, he confirmed the notice of assessment issued by the Minister of National Revenue against the appellant for the period from February 1, 2004, to January 31, 2005. He therefore dismissed the appeal with costs.

[2] The appellant submits that the judge erred in law in ruling that his expert's report had no probative value and in drawing inappropriate legal conclusions from his testimony.

[3] At the hearing, counsel for the appellant also requested that the penalty imposed on his client be cancelled, although this conclusion was not mentioned in his memorandum of fact and law and was not argued.

Analysis of the judge's decision and the appellant's submissions

[4] Counsel for the appellant, an experienced lawyer, was aware that he was facing a significant challenge in this case by contesting the judge's conclusions regarding his assessment of the credibility of the report and testimony of his client's expert.

[5] The judge did not believe the appellant's expert witness. He described the expert's report as superficial, incomplete, simplistic and accommodating to the appellant. He saw, heard and assessed the expert's testimony and noted hesitations and contradictions. He therefore gave that testimony very little weight.

[6] We have neither the authority nor the capacity to substitute our assessment of the expert witness and his report for the one made by the judge.

[7] As far as the penalty is concerned, we are satisfied that the judge did not make any mistake in upholding it. To avoid this penalty, the appellant had to establish that it was duly diligent.

[8] According to *Corporation de l'école polytechnique v. Canada*, 2004 FCA 127, a defendant may rely on a defence of due diligence if either of the following can be established: that the defendant made a reasonable mistake of fact, or that the defendant took reasonable precautions to avoid the event leading to imposition of the penalty.

[9] A reasonable mistake of fact requires a twofold test: subjective and objective. The subjective test is met if the defendant establishes that he or she was mistaken as to a factual situation which, if it had existed, would have made his or her act or omission innocent. In addition, for this aspect of the defence to be effective, the mistake must be reasonable, i.e. a mistake a reasonable person in the same circumstances would have made. This is the objective test.

[10] As already stated, the second aspect of the defence requires that all reasonable precautions or measures be taken to avoid the event leading to imposition of the penalty.

[11] In this case, the difference between the assessment of the appellant's expert (\$716,500) and the construction costs (\$1,295,688) is highly significant: \$579,188.

[12] The judge did not believe that Mr. Majeau, a knowledgeable businessman, could have made a mistake about the amount of this assessment. It was open to the judge to reach this conclusion on the basis of the evidence in the record.

[13] As far as the measures taken to avoid the event are concerned, the record does not disclose any.

[14] For these reasons, the appeal will be dismissed with costs.

“Gilles Létourneau”

J.A.

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-258-09

STYLE OF CAUSE: LES RÉSIDENCES MAJEAU INC. v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 26, 2010

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LÉTOURNEAU J.A.
TRUDEL J.A.

DELIVERED FROM THE BENCH BY: LÉTOURNEAU J.A.

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