Federal Court of Appeal	 CANADA	Cour d'appel fédérale

Date: 20101021

Dockets: A-428-09
A-429-09

Citation: 2010 FCA 280

CORAM: **NOËL J.A.**
SHARLOW J.A.
LAYDEN-STEVENSON J.A.

Docket: A-428-09

BETWEEN:

PAUL ANTLE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-429-09

BETWEEN:

RENEE MARQUIS-ANTLE SPOUSAL TRUST

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on October 19, 2010.

Judgment delivered at Vancouver, British Columbia on October 21, 2010.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: SHARLOW J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] These are two appeals against the judgments of Miller J. of the Tax Court of Canada (the Tax Court judge), dated September 18, 2009, dismissing the appeal by Mr. Antle (the appellant) and quashing the appeal by the Renee Marquis-Antle Spousal Trust (the Trust) from assessments issued by the Minister of National Revenue (the Minister) under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) in respect of their 1999 taxation year.

[2] The two appeals were consolidated by order of this Court dated November 12, 2009. The reasons which follow dispose of both appeals and will be filed in docket A-428-09. A copy will be filed as Reasons for Judgment in docket A-429-09.

[3] The assessments in question arise from a sale of shares by the appellant to a Canadian arm's length purchaser. In order to shelter the resulting capital gain from tax, the appellant embarked on a plan known in tax circles as a capital step-up strategy. In summary, the plan was for the appellant to settle a Barbados trust in favour of his wife, to convey the subject shares to the Trust which would then sell the shares to his wife, who in turn would sell them to the arm's length purchaser. This series of transactions was to take place in sequence in the course of the same day so that the proceeds of disposition would find their way back into the appellant's newly incorporated business the next day by way of a loan from his wife. Documents purporting to give effect to this plan were

executed on December 14, 1999 and the Trust was said to have come to an end in early 2000 upon payment of the trustee's account.

[4] Based on the inter-play between certain provisions of the Act and of the *Canada-Barbados Income Tax Treaty* (the Treaty), both the appellant and the Trust took the position in filing their respective returns that no tax was payable in Canada as a result of these transactions. It is common ground that, but for this plan, a taxable capital gain in the amount of $1,299,821 would have been realized by the appellant on the sale of the shares to the arm's length purchaser.

[5] The first assessment issued by the Minister disregards the interim sale of the shares to the Trust on the basis, *inter alia*, that the Trust was not validly constituted, and levies the applicable tax in the appellant's hands on the assumption that the shares were sold directly to the arm's length purchaser. The second assessment was issued on the alternative assumption that the Trust did acquire the shares before they were sold to the arm's length purchaser, and is liable to the applicable tax.

[6] The Tax Court judge held that the Trust was not validly constituted because it lacked certainty of intention, certainty of subject-matter, and that in any event no transfer of the shares to the Trust had taken place. He went on to express the view, in *obiter*, that the Trust was not a sham. In the alternative to his conclusion that the Trust was not validly constituted, he went on to find, also in *obiter*, that the result obtained was abusive of the Act and the Treaty and that accordingly, the sale of the shares to the Trust was to be disregarded based on the general anti-avoidance rule

(section 245). Having so found, he confirmed the assessment issued against the appellant and vacated the one issued against the Trust.

[7] In support of his appeal, the appellant submits that the Tax Court judge applied the wrong legal test to determine if the Trust had been validly constituted and that he incorrectly determined that there had been an abuse of the Act and the Treaty. The Trust likewise maintains that it was validly constituted and that the assessment issued against it ought to have been vacated solely because it had been dissolved at the time when the assessment was issued, and the Act does not empower the Minister to assess a Trust which no longer exists.

[8] It is not necessary to go beyond the Tax Court judge's conclusion that the Trust was not validly constituted in order to dispose of the appeals. The Tax Court judge said in this regard (Reasons, para. 49):

> I reach the inevitable conclusion that [the appellant] did not truly intend to settle shares in trust with [the trustee]. He simply signed documents on the advice of his professional advisers with the expectation the result would avoid tax in Canada. I find that on December 14th, he never intended to lose control of the shares or the money resulting from the sale. He knew when he purported to settle the Trust that nothing could or would derail the steps in the strategy. This is not indicative of an intention to settle a discretionary trust. Frankly, I have not been convinced [the appellant] even fully appreciated the significance of settling a discretionary trust, beyond an appreciation for the result it might provide. I conclude that his actions and the surrounding circumstances cannot support a conclusion that signing the Trust Deed, as worded, reflects any true intention to settle shares in a discretionary trust. I do not find that [the appellant] is saved by the language of the Trust Deed itself, no matter how clear it might be. It does not reflect his intentions. …
>
> [My emphasis]

[9] The appellant does not dispute that he never intended to grant the trustee control of, or discretion over, the shares. Nor does the appellant challenge the factual finding of the Tax Court judge that, when all surrounding circumstances are considered, there was a failure of certainty of intention in this case. The sole attack against the Tax Court judge's conclusion is that it is based on circumstances that are external to the trust deed which is otherwise clear and unambiguous. The contention is that this amounts to an error of law.

[10] In support of this contention, the appellant referred to the English cases *Knight v. Knight* (1840), 49 E.R. 58, 3 Beav. 148, and *Knight v. Broughton* (1843), 8 E.R. 1195 (HL). I do not believe that these decisions stand for the proposition advanced by the appellant. The statement in the passage relied upon by the appellant is framed as "a general rule" (*Knight v. Knight,* at p. 68) and is followed by words which suggest that context remains relevant (*idem*).

[11] It would be a surprising result if courts were bound by the formal expression of the parties and could not look to the surrounding circumstances, including the conduct of the parties, in assessing whether the intent to settle a trust is present. Indeed, in *Fraser v. Minister of National Revenue*, 91 DTC 5123 at page 5128, Reed J. stated that both the written documents and the actions of the parties were to be considered in the determination of the intention of the parties:

> … in any event, intention is determined by all of the evidence, including the conduct of the parties and the terms of the written documentation which flowed between them, and not merely on the basis of one person's subjective view.

On appeal, (95 DTC 5685), this Court reiterated that a finding of whether or not a trust has been created was to be made on the facts of the case, as evidenced by both the documents and the actions of the parties.

[12] A test that requires one to look at all of the circumstances, and not just the words of the trust deed, is an approach that appears to have been adopted by Canadian courts generally. In *Mohr v. C.J.A.* (1991), 40 E.T.R. 12, for instance the British Columbia Court of Appeal held that (p. 13):

> While the words "trust", "trustees", and 'trust deed' appear from time to time in the agreement, and there is an incomprehensible reference to "a liquidation trust provision in keeping with the current *Trust Act of B.C.*," those words and expressions are not determinative of the issue. The task of the Court is to construe the agreement against the background facts to determine "objectively the 'aim' of the transaction".
>
> [My emphasis]

[13] This approach was also followed by the Court of Queen's Bench of Alberta in *Canada Trust Co. v. Pricewaterhouse Ltd. et al.* (2001), 288 A.R. 387, and in *McEachren v. Royal Bank* (1990), 24 A.C.W.S. (3d) 731, [1991] 2 W.W.R. 702. Finally, in *Air Canada v. M&L Travel Ltd.*, [1993] 3 S.C.R. 787, a case relied upon by the appellant, the Supreme Court refers to the words of the trust deed as "evidence of intention'' and then goes on to consider not only the words but also the actions of the parties (para. 30).

[14] In my view, it was open to the Tax Court judge to consider the actions of the appellant and the surrounding circumstances in determining whether certainty of intention was present despite the clarity of the trust deed.

[15] This suffices to dispose of the appeals. However, I believe it useful to address briefly the Tax Court judge's opinion, in *obiter*, that the Trust was nevertheless not a sham.

[16] The authors of *Waters' Law of Trusts in Canada*, 3rd Edition, Thomson Carswell at page 145 address the concept of a sham as it applies to the very situation with which the Tax Court judge was confronted:

> What is the position if the terms of the trust instrument appear usual in character, but the actual intention is to disregard those terms and for the settler, either as trustee himself or as instructor of the trustee, to retain control of the assets and do with the trust property as he pleases? This hidden intention being revealed, is the trust void as a "sham", or is the trust valid but the trustee is acting in breach of trust?
>
> The term "sham" in English and offshore parlance, adopted in Canada, is not a precise term. It is more a turn of speech; its meaning has been given as "something that is not what it seems; a counterfeit" (Black's Law Dictionary, 7th ed. (St-Paul. Minn.: West Group 2000)). It originated in England with regard to transactions, to which of course there are always at least two parties, and it means the parties' true intent is that others shall be misled by the terms appearing in the transactional instrument. The real terms are something other, and the instrument is therefore declared void. Used in the trust law setting, now a practice in Canada as elsewhere, it describes a trust that the courts will declare void because the provisions in the trust instrument do not represent the settlor's true intent as to the terms upon which the trustee is to hold the trust asset(s). Though the trust instrument sets out the persons or purposes that are to benefit, the settlor's true intent is to retain control of the assets purportedly held in trust because the true intent is to appear to have disposed of the assets and so to evade tax, to defeat personal creditors, or prejudice the claim of an estranged spouse or the children of the relationship. A trust created by the settler who declares himself the trustee of the property, rather than make a transfer of assets to another as trustee, lends itself to this misrepresenting behaviour. But another as trustee who agrees to assist the

> falsity, or who is indifferent to whether, in fact, he merely implements the settlor's decisions, will equally enable the assertion to be made that the fraud [*sic*] [I believe the intended word was "trust"] is but a deception, and consequently void.

[17] In addressing this issue, the Tax Court judge reiterated with even greater force some of his earlier findings (Reasons, para. 67):

> … I do not accept that [the trustee] had any real discretion. These matters were absolutely preordained. The pretence of discretion was critical to make the strategy work, but I entertain no doubt whatsoever in this situation, it was a pretence. If [the trustee] received the shares at all, he received them on the basis that the sole beneficiary [i.e. the wife] had already agreed to buy them. By distributing the proceeds of such sale back to the sole beneficiary, there was no possibility of any comeback against him. The arrangement was, in and of itself, effectively void of discretion.
>
> [My emphasis]

[18] However, he ruled that there was no intentional deception and therefore no sham (Reasons, para. 71):

> The stumbling block for the [r]espondent is that, while all the circumstances point to an arrangement that was inaccurately reflected in the Trust Deed, there was no intentional deception but, if there was deception it was by the very existence of this clever avoidance strategy. Although [the appellant] and [the trustee] and indeed, Mr. Brown, Mr. Devries and Mr. Batallia could all, with some legitimacy, say we believe the trustee always had the discretion to say no, I find they all knew with absolute certainty that the trustee would not say no. The plan was such it made no sense for the trustee to say no.
>
> [My emphasis]

[19] The Tax Court judge found as a fact that both the appellant and the trustee knew with absolute certainty that the latter had no discretion or control over the shares. Yet both signed a

document saying the opposite. The Tax Court judge nevertheless held that they did not have the requisite intention to deceive.

[20] In so holding, the Tax Court judge misconstrued the notion of intentional deception in the context of a sham. The required intent or state of mind is not equivalent to *mens rea* and need not go so far as to give rise to what is known at common law as the tort of deceit (compare *MacKinnon v. Regent Trust Company Limited*, (2005), J.L.Rev. 198 (CA) at para. 20). It suffices that parties to a transaction present it as being different from what they know it to be. That is precisely what the Tax Court judge found.

[21] When regard is had to the reasons as a whole, it is apparent that the only reason why the Tax Court judge reached the conclusion that he did is his finding that the appellant and the trustee - as well as all participants in the plan - could say "with some legitimacy" that they believed that the trustee had discretion over the shares (Reasons, para. 71). While the claim to "some legitimacy" may show that there was no criminal intent to deceive (as would be required in a prosecution pursuant to subsection 239(1) of the Act) and perhaps no tortious deceit, it does not detract from the Tax Court judge's finding that both the appellant and the trustee gave a false impression of the rights and obligations created between them. Nothing more was required in order to hold that the Trust was a sham.

[22] I respectfully conclude that the Tax Court judge was bound to hold that the Trust was a sham based on the findings that he made.

[23] I would therefore dismiss both appeals with one set of costs in file A-428-09. I express no views on the alternative ground on which the Tax Court judge confirmed the validity of the assessment against the appellant.

"Marc Noël"

J.A.

"I agree
Karen Sharlow J.A."

"I agree
Carolyn A. Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-428-09 **A**-429-09
STYLE OF CAUSE:	PAUL ANTLE v. HER MAJESTY THE QUEEN RENEE MARQUIS-ANTLE SPOUSAL TRUST v. HER MAJESTY THE QUEEN
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REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	SHARLOW J.A. LAYDEN-STEVENSON J.A.
DATED:	October 21, 2010

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