Federal Court of Appeal | Cour d'appel fédérale

Date: 20110510

Docket: A-430-09

Citation: 2011 FCA 159

CORAM: **SEXTON J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

THOMAS GERALD LIDDLE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 10, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on May 10, 2011.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on May 10, 2011)

STRATAS J.A.

[1] This is an appeal from the judgment of Justice Diane Campbell of the Tax Court of Canada: 2009 TCC 451.

[2] The Tax Court judge found that the appellant was liable, as a director of AquaNorth Farms Inc., to pay certain tax amounts that AquaNorth Farms Inc. should have paid but did not, along with

penalties and interest. Specifically, AquaNorth Farms Inc. failed to remit GST under the *Excise Tax Act*, R.S.C. 1985, c. E-15. It also failed to make payroll source deductions under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 and the *Employment Insurance Act*, S.C. 1996, c. 23.

A. The finding of liability

[3] Before the Tax Court judge were two main questions, both of which she determined against the appellant:

(1) Was the appellant a director of AquaNorth Farms Inc. at the time that that corporation was required to remit GST and payroll source deductions?

The Tax Court judge answered this in the affirmative, finding that the appellant was a director at the relevant time. Therefore, the appellant was liable to pay the amounts that AquaNorth Farms Inc. should have paid: see the *Canada Pension Plan*, *supra*, subsection 21.1(1), the *Employment Insurance Act*, *supra*, subsection 83(1) and the *Excise Tax Act*, *supra*, subsection 323(1).

(2) Did the appellant exercise due diligence? Specifically, did he act with "the degree of care, diligence and skill to prevent [AquaNorth Farms Inc.'s] failure [to remit GST and payroll source deductions to the Minister] that a reasonably prudent person

> would have exercised in comparable circumstances?" (See subsection 227.1(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), made applicable to the appellant by subsection 21.1(2) of the *Canada Pension Plan*, *supra*, and subsection 83(2) of the *Employment Insurance Act*, *supra*; see also subsection 323(3) of the *Excise Tax Act*, *supra*.)
>
> The Tax Court judge answered this in the negative, finding that the appellant had not exercised due diligence.

[4] In answering these two main questions, the Tax Court judge made a number of factual findings. One important factual finding was that AquaNorth Farms Inc. became subject to the tax liabilities while the appellant still had effective control of AquaNorth's finances and daily operations. Another important factual finding was that the appellant took no proactive steps to ensure that AquaNorth remitted to the Minister amounts that it was deducting from employee paycheques and GST amounts that it was collecting from its customers. In this Court, the onus is on the appellant to demonstrate that the Tax Court judge's factual findings are vitiated by palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. We are not satisfied that any such error is present. Indeed, the factual findings of the Tax Court judge are well-supported by the evidentiary record.

[5] We see no legal error in the Tax Court judge's consideration of whether the appellant was a director at the relevant time. On the question of due diligence, the Tax Court judge carefully

considered the legal test for due diligence that should be applied to the evidence before us. She adopted the tests set out by this Court in *Soper v. The Queen*, 97 D.T.C. 5407 at page 5416 and *Hartnell v. The Queen*, 2008 D.T.C. 6173 at paragraph 12. Here, likewise, we see no legal error on the part of the Tax Court judge.

B. The involvement of another director

[6] The appellant submitted that another director of AquaNorth Farms Inc. was heavily involved at the times in question. Even if that is the case, by itself that does not give the appellant any defence. The express words of the provisions of subsection 21.1(1) of the *Canada Pension Plan*, subsection 83(1) of the *Employment Insurance Act*, and subsection 323(1) of the *Excise Tax Act*, make the appellant "jointly and severally, or solidarily, liable" for the full amounts that AquaNorth Farms Inc. failed to remit to the Minister.

C. The Tax Court judge's failure to grant an adjournment

[7] In the Tax Court, the appellant requested that the trial be adjourned under section 137 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a for three reasons: he wanted to obtain legal counsel to represent him, he was not aware that a particular individual would be called as a witness against him, and he had not received some information he sought from the Minister.

The Tax Court judge refused the adjournment. Among other things, the Tax Court judge found that some of the comments he made during his request for an adjournment were misleading.

[8] We note that adjournments are discretionary matters related to trial management and, as a result, this Court will interfere only where a trial judge is shown to be clearly wrong: *Superior Filter Recycling Inc. v. The Queen*, 2006 DTC 6491 at paragraph 2; *Wagg v. Canada*, 2003 FCA 303 at paragraphs 21 and 26. In our view, no such error has been demonstrated in this case. It is apparent to us that the Tax Court judge was mindful of the need for the appellant to have a fair trial. Further, there were a number of reasons supporting the Tax Court judge's discretionary refusal to grant the appellant an adjournment. These include the following:

(a) The appellant had ample opportunity to retain counsel before the trial.

(b) Absent a specific request during discoveries, there is no requirement in the Rules for parties to exchange the names of their respective witnesses before trial. Before trial, the appellant was notified by the Crown that it would be calling two witnesses but the appellant did not ask the Crown who they were.

(c) The appellant could have pursued his requests for further information by various means in a timely way under the Rules and the *Access to Information Act*, R.S.C. 1985, c. A-1, but did not do so.

(d) The misleading nature of the comments the appellant made during his request for an adjournment.

D. Disposition

[9] For the foregoing reasons, we shall dismiss the appeal, with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-430-09
APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE DIANE CAMPBELL DATED SEPTEMBER 14, 2009, NOs. 2005-4271(IT)G and 2005-3409(GST)G	
STYLE OF CAUSE:	Thomas Gerald Liddle v. Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 10, 2011
REASONS FOR JUDGMENT OF THE COURT BY:	(SEXTON, DAWSON, & STRATAS JJ.A.)
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

Thomas Gerald Liddle	FOR THE APPELLANT
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