Federal Court of Appeal

Cour d'appel fédérale

Date: 20130416

Docket: A-297-12

Citation: 2013 FCA 102

CORAM: BLAIS C.J.
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

CLAUDE MERCURE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec, on December 11, 2012.

Judgment delivered at Ottawa, Ontario, on April 16, 2013.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: BLAIS C.J.
TRUDEL J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] How must a trial judge respond, in order to ensure the right to procedural fairness, when a taxpayer, without understanding the implications, makes an admission that determines the outcome of his appeal? This is the main issue in this appeal. The secondary issue involves the right of the appellant, Mercure, to a rebate of the tax paid pursuant to the construction of his new house.

[2] Mercure and his spouse decided to build themselves a new house. They were the contractors, i.e., they hired the usual subcontractors (plumbers, electricians, etc.) and performed any work they could themselves.

[3] Aware of the possibility of a rebate on the Goods and Services Tax (GST) paid for construction materials, Mercure contacted the Canada Revenue Agency (CRA) to find out how to proceed and specifically inquired about the deadlines for filing his application. Mercure testified that he had been told that the rebate had to be claimed no later than two years [TRANSLATION] "from the date the house is suitable for habitation" (Appeal Book, p. 24). When he asked what [TRANSLATION] "suitable for habitation" meant exactly, he was told the following:

> [TRANSLATION]
>
> Think of yourself as a promoter building a house where the landscaping isn't done and stuff like that, and you walk into a house like that, like a model house, and that gives you an idea of a house that is suitable for habitation.
>
> Appeal Book, p. 24.

[4] This explanation is more or less caught by subsection 256(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-5 (the Act), which reads as follows:

> (3) A rebate under this section in respect of a residential complex shall not be paid to an individual unless the individual files an application for the rebate on or before:
>
> (*a*) the day (in this subsection referred to as the "due date") that is two years after the earliest of
>
> (i) the day that is two years after the day on which the complex is first occupied as described in subparagraph (2)(*d*)(i),
>
> (ii) the day on which ownership is transferred as described in subparagraph (2)(*d*)(ii), and

(iii) the day on which construction or substantial renovation of the complex is substantially completed; or

(*b*) any day after the due date that the Minister may allow.

[5] It is common ground that the applicable provision in this case is subparagraph 256(3)(*a*)(iii). The issue arises from the fact that Mercure filed his claim when he believed his house to be suitable for habitation, while the test set out by the Act refers to construction or renovations that are "substantially completed".

[6] Aware of the fact that the clock was ticking and that work on the house had slowed down with the arrival of a second child, Mercure decided that his house had become suitable for habitation in September 2007, upon the completion of the construction and furnishing of his first child's bedroom. He therefore submitted his application for the rebate in July 2009, less than two years after his house, on his own understanding, had become suitable for habitation. His application was denied on the grounds that it was filed after the time limit.

[7] Mercure appealed from that decision to the Tax Court of Canada, 2012 TCC 148. In his reply to the notice of appeal, the Minister of Revenue, on behalf of Her Majesty the Queen, set out his assumptions of fact:

[TRANSLATION]

11. In denying the application for rebate, the Minister based himself on the following conclusions and assumptions of fact:

. . .

(e) The appellant acknowledged that he moved into the building in April 2006;

. . .

> (i) The invoices submitted by the appellant were checked during the verification carried out by the respondent;
>
> (j) The respondent noted that the cost of the work from the start of construction to December 31, 2006 amounted to $182,572.24;
>
> (k) The respondent noted that the cost of the work in 2007, for the purchase of exterior stones, mouldings and ceramics, amounted to $2,389.50;
>
> (l) The respondent noted that the cost of the work in 2008, for the purchase of paint, sod and exterior membranes, amounted to $2,463.20;
>
> (m) The respondent noted that the cost of the work in 2009, for the purchase of paint and lighting fixtures, amounted to $191.60;
>
> (n) Consequently, the work performed after 2006 was minimal and the house was substantially completed in December 2006.

[8] When Mercure appeared before the Tax Court of Canada, the judge asked him whether he admitted or denied each of the Minister's assumptions of fact, or did not know. Mercure admitted all of the Minster's assumptions of fact. After Mercure had admitted the assumption appearing at paragraph 11(*n*), the judge asked:

> HIS HONOUR: And the controversy: do you understand what is primarily in dispute?
>
> MR. MERCURE: Yes
>
> Appeal Book, pp. 20-21

[9] This question indicates that the judge immediately understood the implications of this admission.

[10] After this exchange, the judge explained to Mercure that he had the "burden of proof", i.e., that it was incumbent on him to show that his claims were well founded. Mercure therefore testified and was cross-examined on the facts that led him to believe that his house had not become suitable for habitation until September 2009.

[11] The Tax Court of Canada judge rendered a written decision three months after the hearing. He began by setting out the facts as they had been related by Mercure. He then reproduced the portion of the transcript in which Mercure concedes the truth of all the Minister's assumptions of fact. The judge therefore decided the issue as follows:

> 17. The appellant is someone who grasps matters quickly and thoroughly. He is very organized and articulate. He was also very well prepared. In the light of that, I cannot set aside his admissions, which are very clear.
>
> . . .
>
> 19. . . . In this case, the appellant made an admission that left no room for ambiguity or interpretation. That admission clearly pinpoints the date from which the time limit is calculated.
>
> 20. . . . The appellant himself identified, through his admissions, the date from which the time limit was calculated.
>
> 21. Consequently, the appeal must be denied since the claim was filed after the expiry of the time limit specified by the Act.

[12] It is clear that the admission to which the judge is referring in his reasons is that relating to paragraph 11(*n*), according to which [TRANSLATION] "the house was substantially completed in December 2006".

[13] Mercure appealed from the decision, challenging the approach taken by the Tax Court of Canada judge. He alleges that the judge, who did not make him aware of the effect of his admission of paragraph 11(*n*), denied him his right to procedural fairness. He also alleges that everything that happened after that point demonstrated that he had never accepted that the end of

December 2006 was the relevant date for calculating the time limit for filing his claim. He concludes with the argument that, because the judge failed to draw his attention to the effect of the admission of paragraph 11(*n*), the judge should have decided the issue on the basis of his testimony and should not have given his admission the effect that he gave it.

[14] On the merits, Mercure continues to argue that the date from which the time limit for filing his claim should have been calculated was late September 2007. He relies on photos of the interior of the house, taken after December 2006, showing the extent to which the work remained incomplete.

[15] Although these are not his words, the impression created by Mercure's submissions is that he felt he had been set up by the Tax Court of Canada judge. He was led to making an admission whose implications he did not understand, without being given an opportunity to withdraw it or to explain what he meant. He argues rather compellingly that he was deprived of his right to procedural fairness.

[16] As this Court wrote at paragraph 23 of *Wagg v. Canada*, 2003 FCA 303, [2004] F.C.R. 206:

> Litigants represent themselves for a variety of reasons. If they come to realize before the commencement of trial that they have underestimated the complexity of the task before them, it is in their interest and the Court's to allow them to obtain representation. But once a trial is underway, I do not think it unfair to hold appellants to their choice to represent themselves, and to be guided by their own judgment.

[17] In this case, Mercure should have looked at section 256 of the Act, which governs his claim. Had he done so, he would have seen and read the statement, "at the time the construction or substantial renovation thereof is substantially completed" and would have been in a position to understand the significance of the judge's question as to whether paragraph 11(*n*) of the reply to the notice of appeal was true or false. The fact that Mercure prepared his case on the basis of the phrase [TRANSLATION] "suitable for habitation" is understandable, but this explanation does not relieve Mercure of his duty, as a self-represented litigant before the Court, to familiarize himself with the law whose application he is challenging.

[18] However, Mercure is rightly critical of everything that followed his unfortunate admission. The Tax Court of Canada judge seems to have been, or should have been, aware of the fact that this admission eliminated any hope that the appeal would succeed. Therefore, why allow Mercure to make a case whose purpose was to undermine or circumvent his own admission? To the extent that the law of Quebec applied, according to section 40 of the *Canada Evidence Act*, R.S.C. c. C-5, it was not open to Mercure to contradict his own admission. Such is the effect of article 2852 of the *Civil Code of Quebec*. In *La preuve civile,* 4th ed., Cowansville, Éditions Yvon Blais, 2008, Jean-Claude Royer summarizes the doctrine and case law on this issue as follows:

> [TRANSLATION]
>
> 895 – *Inadmissibility of contrary evidence* – A judicial admission that has not been revoked constitutes full and exclusive evidence. The author of the admission may not give contrary evidence. It would be inconceivable to authorize a litigant to prove the

> opposite of what he has admitted before the court. Moreover, a judicial admission may only be revoked if it has been made through an error of fact.

[19] It was open to the Tax Court of Canada judge to ask Mercure whether he admitted or denied the Minister's assumptions of fact or did not know. However, when Mercure admitted that the construction of his house had been substantially completed in December 2006, the judge had a duty to explain to him that he could not adduce evidence that contradicted his own admission. The judge also had a duty to inform him that his appeal would have to be dismissed on the strength of that admission.

[20] Such an explanation would have enabled Mercure to respond and to make submissions about the scope and substance of his admission, which would have led to either the revocation of the admission and the continuation of the trial or a pronouncement of the judgment dismissing the appeal. In either case, Mercure would have had an opportunity to be heard on these points. By proceeding as he did, the Tax Court of Canada judge deprived Mercure of his right to be heard on the issue that became, without Mercure's knowledge, the determinative issue of his appeal, and the judge therefore denied him his right to procedural fairness.

[21] It remains to be decided to what remedy Mercure is entitled. As a general rule, in the case of a breach of procedural fairness, the court does not consider whether the breach had an effect on the outcome of the dispute. The mere fact that a breach of procedural fairness occurred is enough to warrant a new trial. This general rule has only one exception, which is the case in

which the question before the court has an inevitable answer: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at paras. 50-54.

[22] It appears that we are faced with such a question. Even if Mercure's admission regarding paragraph 11(*n*) were to be set aside, the fact remains that the expenses incurred by the end of December 2006 amounted to $182,572.24. The total expenses incurred by the end of 2009 amounted to $187,616.54, which means that 97.3% of the total expenses connected with the construction of the house were incurred by December 2006. While Mercure did store a certain amount of supplies in his garage, as he argued before this Court, the high percentage of the expenses incurred by the end of 2006 leaves no room for doubt that the construction of the house was substantially completed in December 2006. The photographs of the state of the interior of the house and various times after December 2006 filed into evidence by Mercure are not determinative, because the Act requires only that the construction be substantially completed, not fully completed.

[23] For these reasons, I would dismiss this appeal, but without costs.

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

"I concur.
Pierre Blais C.J."
"I concur.
Johanne Trudel, J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-297-12
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REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	BLAIS C.J. TRUDEL J.A.
CONCURRING REASONS BY: **DISSENTING REASONS BY:**	
DATED:	April 16, 2013

APPEARANCES:

Claude Mercure	FOR THE APPELLANT
Pier-Olivier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Claude Mercure	FOR THE APPELLANT
Larivière Meunier, Québec, Quebec	FOR THE RESPONDENT