Federal Court of Appeal | Cour d'appel fédérale

Date: 20131018

Docket: A-484-12

Citation: 2013 FCA 242

CORAM: **NOËL J.A.**
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DANIELLE LEMIRE

Respondent

Heard at Montréal, Quebec, on September 13, 2013.

Judgment delivered at Ottawa, Ontario, on October 18, 2013.

REASONS FOR JUDGMENT BY:. NOËL J.A.

CONCURRED IN BY: GAUTHIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision by Justice Tardif of the Tax Court of Canada (the TCC judge), who allowed the appeal of Danielle Lemire (the respondent) from an assessment made by the Canada Revenue Agency (the CRA) under subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[2] Specifically, the TCC judge found that the deposit in the respondent's personal bank account of cheques made out to her spouse did not result in a transfer of the funds so deposited for purposes of subsection 160(1) of the Act because the amounts were conveyed to her in the course of a mandate that obliged her to return them to the mandatory.

[3] In support of her appeal, Her Majesty the Queen (the appellant) on behalf of the Minister of National Revenue (the Minister), submits that, in drawing this conclusion, the TCC judge failed to give effect to the decision of this Court in *Canada v. Livingston*, 2008 FCA 89 (*Livingston*), and that, in any event, the assessment is well founded since this is a case of simulation under article 1451 of the *Civil Code of Québec*, R.S.Q., c. C-1991 (C.C.Q.), and pursuant to article 1452 of the C.C.Q., the mandate cannot be set up against to the Minister.

[4] For the reasons that follow, I am of the view that the appeal must be dismissed.

BACKGROUND

[5] The setting for the factual framework is Montréal, and the period in question covers four years, from 1997 to 2001. During this period, the respondent, then a nurse, was in a relationship with a certain Albert Dupuis, a trained accountant; the TCC judge characterized this relationship as being a common-law relationship (reasons at paragraph 88). During this period, Mr. Dupuis owed substantial amounts to the taxation authorities. The amount in question stood at $279,484.81 in 2001 (reasons at paragraph 4).

[6] Because of past financial troubles, Mr. Dupuis had to wait several days before his financial institution would free up money deposited by cheque in his account, which made it difficult to manage his accounting practice (reasons at paragraphs 5 and 6). To solve this problem, Mr. Dupuis asked the respondent to deposit his cheques into her personal account after he had endorsed them. She agreed, and ended up depositing a total of $686,502.04 over the 1997–2001 periods (reasons at paragraph 1). The cheques in question were made out to Mr. Dupuis for sums ranging from $50 to $33,619.69 (appeal book, Exhibit A-2, at pages 59 to 253). It turns out that most of the cheques came from Mr. Dupuis's accounting practice (deposit reconciliation, appeal book at pages 259 to 292; examination of Mr. Dupuis, transcript, appeal book at page 311).

[7] The procedure was always the same: Mr. Dupuis endorsed the cheques and gave them to the respondent; she then deposited them into her own account at an ATM and withdrew the money either from an ATM or the teller in order to return to Mr. Dupuis the cheque amounts in cash, all according to his instructions (reasons at paragraph 13). During the period in question, the respondent identified in her bank book each withdrawal and deposit made at Mr. Dupuis's request with the letter "A" (*ibidem*).

[8] Regarding the frequency of the withdrawals, the TCC judge wrote that "[a]s a general rule, the amounts obtained after the cheque deposits were registered directly in the appellant's personal bank account and then withdrawn in full the same day" (reasons at paragraph 8). Sometimes, the amounts exceptionally remained in the respondent's bank account for a few days, and on rare occasions, the respondent kept small amounts of the money deposited, at Mr. Dupuis's request, as reimbursements for expenses incurred on his behalf (reasons at paragraphs 8 and 9).

[9] This scheme was never made the subject of a written agreement between the respondent and Mr. Dupuis. At the trial, the respondent testified that she had been unaware of Mr. Dupuis's financial situation (reasons at paragraphs 10 and 11; examination of the respondent, transcript, appeal book at page 332).

[10] In 2002, during an audit by Revenu Québec, the appellant was informed of the risks associated with this practice, and she therefore ceased it (reasons at paragraph 12).

[11] Mr. Dupuis declared bankruptcy a first time in 1993. He declared bankruptcy a second time on July 5, 2007, without the CRA recovering the taxes he owed (reasons at paragraph 1).

[12] Relying on the deposit by the respondent of the cheques remitted to her by Mr. Dupuis in her bank account, the Minister concluded that amounts had been transferred to the respondent and issued an assessment against her pursuant to subsection 160(1) of the Act holding her jointly and severally liable for Mr. Dupuis's tax debt (*ibidem*).

[13] Subsection 160(1) of the Act reads as follows:

160. (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to	**160.** (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :
(*a*) the person's spouse or common-law partner or a person who has since become the person's spouse or common- law	*a*) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

partner,

(*b*) a person who was under 18 years of age, or

(*c*) a person with whom the person was not dealing at arm's length,

the following rules apply:

(*d*) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and

(*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

b) une personne qui était âgée de moins de 18 ans;

c) une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts revisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,	(ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années;
but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.	aucune disposition du présent paragraphe n'est toutefois réputée limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi.
. . .	[…]

TCC DECISION

[14] The TCC judge rejected the argument by counsel for the appellant to the effect that he was bound to apply this Court's decision in *Livingston* and hold that the deposits made in the respondent's bank account necessarily resulted in a transfer under subsection 160(1). According to the TCC judge, only a transfer of ownership of the amounts so deposited can give rise to the application of this provision, and to the extent that *Livingston* provides otherwise, it should be questioned as a binding precedent.

[15] Analyzing the matter from a civil law perspective, the TCC judge found that Mr. Dupuis never intended the respondent to become the owner of the amounts deposited in her account (reasons at paragraphs 71 and 74). On the contrary, the evidence has unequivocally established that the respondent acted according to Mr. Dupuis's strict and precise instructions in returning the deposited sums without delay and making the requested disbursements (reasons at paragraphs 7 to 9

and 71). According to the TCC judge, the respondent acted as Mr. Dupuis's mandatory (reasons at paragraph 75).

[16] According to the TCC judge, *Livingston* "seems to overrule a well settled line of cases . . ." (reasons at paragraph 22). After reviewing the case law on this issue, the TCC judge concluded that mere possession of property or access to a sum of money does not amount to a transfer. The transferor's patrimony must have been impoverished and, in turn, the transferee's enriched (reasons at paragraph 30).

[17] The TCC judge found it important to discount the idea that the respondent was part of a subterfuge to swindle the tax authorities as was the case in *Livingston* (reasons at paragraph 85). According to the judge, the evidence revealed naivety rather than carelessness, neglect or wilful blindness on the part of the respondent (reasons at paragraph 77). In contrast to the respondent, Mr. Dupuis was perfectly aware of the implications of these transactions, thanks to his training as an accountant (*ibidem*). In light of the foregoing, the judge concluded that the respondent had been "misinformed, misled and essentially used by Dupuis, an accountant, who did not hesitate to make incomplete representations to the [respondent], who agreed to do him a favour" (reasons at paragraph 80).

[18] The only thing the respondent agreed to was "depositing cheques in order to obtain cash in return and then remit it forthwith to its owner Dupuis" (reasons at paragraph 81). The respondent's role as a depositary is verifiable by her clear, methodical bookkeeping—the entries would have been easily verifiable by a third party wishing to enforce a writ of seizure—and her refusal to carry out

further transactions after Revenu Québec auditors informed her of the possible consequences of these transactions (reasons at paragraphs 81 and 82).

[19] In closing his analysis, the TCC judge states that even if he had concluded that "veritable transfers" had been made, the respondent's following of Mr. Dupuis's instructions without ever attempting to enrich herself "constituted valid consideration which was sufficient to defeat an assessment under section 160" (reasons at paragraph 86).

POSITION OF THE PARTIES

[20] The appellant submits that the TCC judge should have followed the teachings of this Court in *Livingston* and in *Yates v. Canada*, 2009 FCA 50, [TRANSLATION] "where it was clearly established that depositing money in another person's bank account constitutes a transfer of property" within the meaning of subsection 160(1) of the Act (appellant's memorandum, at paragraph 31).

[21] The appellant further submits that these decisions comply with civil law and banking law since, in the eyes of the bank, the respondent became the owner of the sums after she deposited the cheques in her account and, as in *Livingston*, she was entitled to withdraw them. This is sufficient to trigger the application of subsection 160(1) [appellant's memorandum at paragraphs 43 to 45].

[22] In any event, the appellant objects to the characterization of the arrangement between the appellant and Mr. Dupuis as a mandate, arguing that [TRANSLATION] "there is no single factual element to establish that Dupuis gave the respondent power of attorney to represent him when

cashing cheques when dealing with a third party, specifically the caisse populaire" (appellant's memorandum at paragraph 51). Instead, the arrangement involved the respondent depositing the cheques in her own account in order to withdraw them at Mr. Dupuis's request (appellant's memorandum at paragraph 53).

[23] If, however, the ownership of the sums was not transferred and there was a mandate, as found by the TCC judge, this mandate could not be set up against the tax authorities. The respondent acted rather as a front person by depositing the cheques in her account. Having failed to denounce this agreement to the bank and the tax authorities, she presented herself as the sole owner of the sums to third parties (appellant's memorandum at paragraphs 56 to 59). The remittance of the cheques and their deposit in the respondent's account gave rise to an apparent transfer of which third persons in good faith could avail themselves pursuant to article 1452 of the C.C.Q. (appellant's memorandum at paragraph 62).

[24] At the hearing, counsel for the appellant described as unreasonable the TCC judge's assessment of the respondent's testimony and particularly the fact that he absolved her from any responsibility. In their opinion, the respondent could not have acted unknowingly over the four years during which she was involved in this questionable practice. Absolving the respondent on the ground that she was used by Mr. Dupuis obscures a palpable and overriding error.

[25] The respondent points out that subsection 160(1) must be interpreted in light of its purpose (respondent's memorandum at paragraphs 15 to 23). With this in mind, the respondent submits that for there to be a transfer of property within the meaning of the Act, the tax debtor, in addition to

remitting possession of the property to the transferee, had to relinquish his or her ownership of the property with the result that it was transferred from the patrimony of the transferor to that of the transferee. This therefore excludes mere possession of property being likened to a transfer (respondent's memorandum at paragraph 24).

[26] According to the respondent, in *Livingston*, the term "transferred" was interpreted according to the "critical" factor identified by the Court of Appeal in this case, namely, that there was a conspiracy to avoid paying taxes. In the absence of a desire to avoid paying taxes, the scope of the term should be limited to the transfer of ownership of property (respondent's memorandum at paragraph 26). Applying subsection 160(1) to the mere transfer of a right to withdraw without the ownership of the sum having been transferred would result in penalizing the transferee twice, as he or she would then be liable towards the tax debtor for the sum and towards the tax authorities for the unpaid taxes on this sum (respondent's memorandum at paragraph 27).

[27] The respondent submits that the appellant's alternative argument relying on articles 1451 and 1452 of the C.C.Q. does not hold together either since there was no secret contract binding the parties and the parties never pretended that the sums were owned by anyone other than the tax debtor (respondent's memorandum at paragraph 51). In any case, the existence of a mandate is a question of fact that cannot be challenged in the absence of a palpable and overriding error (respondent's memorandum at paragraph 47).

[28] Lastly, it was the role of the TCC judge to assess the respondent's credibility. The TCC judge had the benefit of hearing the respondent's testimony and concluded that it was reliable. In the context of an appeal, it is not the role of this Court to reassess the credibility of witnesses.

ANALYSIS AND DECISION

[29] The TCC judge concluded that the legal relationship between Mr. Dupuis was in the nature of a mandate. This conclusion is consistent with article 2130 of the C.C.Q. since the respondent, by depositing and cashing Mr. Dupuis's cheques, was acting on behalf of Mr. Dupuis and was obligated to return to him the money she withdrew. More specifically, she was not authorized to use the money for her own account. Giving effect to the evidence and article 2146 of the C.C.Q., it follows that the money always remained that of Mr. Dupuis, as found by the TCC judge.

[30] The TCC judge correctly analyzed the relationship between the parties in accordance with civil law and did not err in refusing to apply this Court's decision in *Livingston*. The rule set out in *Livingston* is based on the common law, and the TCC judge was bound to apply the civil law. From a civil law perspective, the sums deposited in the respondent's account remained the property of Mr. Dupuis. It is also clear that the right to withdraw that money was of no value to the respondent given her obligation to remit the sums to Mr. Dupuis. It follows that no property was transferred for the purposes of subsection 160(1). In this regard, I adopt the reasoning of this Court in *Her Majesty the Queen v. 9101-2310 Québec Inc.*, 2013 FCA 241, at paragraphs 42 to 63.

[31] Counsel for the appellant recognized at the hearing that, if *Livingston* was not binding, the only argument open to them was simulation. The TCC judge did not deal with this issue because it was not raised before him.

[32] Article 1451 of the C.C.Q. reads as follows:

1451. Simulation exists where the parties agree to express their true intent, not in an apparent contract, but in a secret contract, also called a counter letter.	**1451.** Il y a simulation lorsque les parties conviennent d'exprimer leur volonté réelle non point dans un contrat apparent, mais dans un contrat secret, aussi appelé contre-lettre.
Between the parties, a counter letter prevails over an apparent contract.	Entre les parties, la contre-lettre l'emporte sur le contrat apparent.

[33] This provision contemplates that the parties to a simulation agree to enter into an apparent contract and a secret contract in order to conceal their true intent. However, given the TCC judge's assessment of the respondent's testimony, it is clear that the respondent did not become a party to a simulated contract. This suffices, in my opinion, to dispose of the appellant's simulation argument.

[34] Counsel for the appellant further argued, however, that the TCC judge misapprehended the respondent's testimony. According to counsel, the extent of the amounts transferred into the respondent's bank account and the period of time during which the scheme remained in place are such that she had to know that she was participating in a cover-up, the purpose of which was to deceive the creditors. At the very least, she was wilfully blind.

[35] I recognize that the TCC judge's decision regarding the respondent's state of mind may seem surprising. However, it must be acknowledged that he believed the respondent when she stated that she simply accelerated the process of cashing Mr. Dupuis's cheques and that she knew nothing of his financial situation. Findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless the trial judge made some palpable and overriding error (*Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388 and 389).

[36] Unlike the TCC judge, we have not had the advantage of hearing and observing the respondent during her testimony or her spouse, Mr. Dupuis, who also testified (*Housen v. Nikolaisen*, 2002 SCC 33, at para. 25). The TCC judge found that the respondent had been manipulated by Mr. Dupuis to the point that she was unaware of the consequences of her role. I find it impossible to exclude that this may indeed have been the case. It follows that this conclusion is beyond our reach.

[37] Since the respondent, given her state of mind, could not have agreed to a simulated contract, article 1451 of the C.C.Q. does not apply.

[38] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Robert M. Mainville J.A."

Certified true translation

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-484-12

(APPEAL FROM A DECISION OF THE HONOURABLE JUSTICE ALAIN TARDIF OF THE TAX COURT OF CANADA DATED OCTOBER 18, 2012, DOCKET NO. 2010-862(IT)G.)

DOCKET:	A-484-12
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. DANIELLE LEMIRE
DATE OF HEARING:	MONTRÉAL, QUEBEC
PLACE OF HEARING:	SEPTEMBER 13, 2013
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	GAUTHIER J.A. MAINVILLE J.A.
DATED:	OCTOBER 18, 2013

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