Citation: 2017 TCC 194
Date: 2017**1005**
Docket: 2014-3670(IT)G

BETWEEN:

JAN CHAPLIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Graham J.

[1] Jan Chaplin was a 50% shareholder of a company named Triventa Technologies Corporation. She wanted to obtain control of the company. She attempted to do so by enlisting the aid of an individual named Robert Plummer, who purported to own 8.33% of Triventa's shares. The true owner of the other 50% of Triventa's shares (including the 8.33% purportedly owned by Mr. Plummer) responded by bringing an application in the Ontario Superior Court of Justice against Mr. Plummer and Triventa (the "Application").

[2] Ms. Chaplin entered into an arrangement with Mr. Plummer whereby she agreed to pay all of Mr. Plummer's legal fees relating to the Application and any costs awarded against him in exchange for the shares that he purportedly owned. Mr. Plummer ultimately lost the Application. Following the Application, there were various corporate documents that needed to be prepared to "re-paper" Triventa's corporate history. Ms. Chaplin paid legal fees in respect of the re-papering.

[3] In total, the legal fees paid by Ms. Chaplin in respect of the Application, the costs awarded in the Application, and the re-papering amounted to $163,898 (the "Legal Expenses").

[4] Four years after the Application, Triventa recorded a transaction on its books whereby it deducted the Legal Expenses and correspondingly increased the balance

of Ms. Chaplin's shareholder loan account. Triventa recorded this transaction on the basis that Ms. Chaplin had paid the Legal Expenses on Triventa's behalf.

[5] The Minister of National Revenue reassessed Ms. Chaplin to include the increase in her shareholder loan **account** in her income pursuant to either subsection 15(1) or 56(2) of the *Income Tax Act*. Ms. Chaplin has appealed that inclusion.[1]

[6] I will examine the alleged subsection 15(1) benefit and then move on to examine the alleged subsection 56(2) benefit.

A. Subsection 15(1) Benefit

[7] There are two key issues relating to the alleged subsection 15(1) benefit. The first issue is whether Ms. Chaplin made a loan to Triventa. If Ms. Chaplin did not make a loan to Triventa, the second issue is whether Triventa conferred a benefit on her when her shareholder loan **account** was inappropriately increased.

(a) Did Ms. Chaplin make a loan to Triventa?

[8] I conclude that Ms. Chaplin did not make a loan to Triventa. I reach that conclusion based on: (1) the nature of the dispute that gave rise to the Legal Expenses; (2) the benefit that flowed from the Legal Expenses; (3) the liability to pay and responsibility for paying the Legal Expenses; (4) the actual payment of the Legal Expenses; and (5) the timing of the recording of the purported loan on Triventa's books.

(i) Nature of the dispute that gave rise to the Legal Expenses

[9] I find that the Legal Expenses were incurred as a result of a shareholder dispute among the shareholders of Triventa. The story behind the dispute begins prior to the incorporation of Triventa. It reads like a corporate soap opera with a complex cast of characters. However, to fully understand the dispute and the resulting Legal Expenses, one has to first understand the story.

[10] In 1998, Ms. Chaplin was the vice-chair of the board of a company called Canadian General Tower Limited ("CGT"). CGT was controlled by members of

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[1] The Minister also reassessed Triventa to deny the deduction of the Legal Expenses. That reassessment was not appealed.

Ms. Chaplin's family. CGT was an original equipment manufacturer that made automotive interiors. Its customers were major automobile manufacturers.

[11] CGT retained a consulting firm named SatiStar Corporation to review its quality control system. SatiStar identified that the weakest link in CGT's processes was a die-cutting process that had been outsourced to a small supplier. SatiStar was concerned that, if anything happened to the die-cutting company, CGT would find itself in the position of not being able to meet its contractual obligations to its customers. Such a failure would have involved significant costs and financial penalties and could have resulted in CGT losing its contracts with its customers.

[12] Ms. Chaplin determined that the risk with the supplier could be avoided if she, together with some other investors, started a new die-cutting company to supply CGT's needs. She and SatiStar decided to form such a company. The owners of SatiStar introduced Ms. Chaplin to a couple named Terry and Peggy Breckenridge who were interested in being part of the new company. The new company was to be named Triventa Technologies Corporation.

[13] Triventa was incorporated in 1998.[2] Had the incorporation gone as intended, there would have been three shareholders of Triventa. Ms. Chaplin would have owned one-third of the shares of Triventa personally. Mr. and Ms. Breckenridge would have owned one-third of the shares through a company called Breckenridge Associates Inc. ("BreckenridgeCo"). The remaining one-third of the shares would have been held through a newly incorporated subsidiary of SatiStar called 1307592 Ontario Inc. ("592").[3] The parties believed that the shares of Triventa had been issued in this manner and acted accordingly.

[14] Unfortunately, upon incorporation, a clerical error occurred that had significant ramifications later. Instead of issuing shares to the intended shareholders, Triventa issued only one share. That share was issued to a shelf company named 1307594 Ontario Inc. ("ErrorCo"). Years later, in dealing with the Application, Justice Cullity of the Ontario Superior Court of Justice held that no shares had ever been validly issued other than this single share and that all corporate acts purported to have been performed by Triventa since that time were nullities. Justice Cullity ordered that the one share be cancelled but refused to order

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2 Partial Agreed Statement of Facts, para. 5.

3 Endorsement of Justice Cullity dated September 3, 2003 in *1307592 Ontario Inc. et. al. v. Triventa Technologies Corporation et. al.*, Ontario Superior Court of Justice, court file No. 03-CL-5020, at Exhibit A-1, Tab 47 (the "First Endorsement") at para. 11.

that the ownership be corrected to reflect the parties' intentions.[4] The parties were ultimately left to re-paper Triventa's share ownership based on the guidance provided by Justice Cullity.

[15] Oblivious to this clerical error, the would-be shareholders elected directors. The initial directors of Triventa were to have been Ms. Chaplin, Mr. Breckenridge, Ms. Breckenridge, an indirect shareholder of SatiStar named Mickey Jawa, another indirect shareholder of SatiStar named Robert Plummer, and Ms. Chaplin's husband.[5]

[16] By March 1999, BreckenridgeCo wanted out of Triventa. The other shareholders of Triventa agreed to buy BreckenridgeCo out. The resulting purchase and sale compounded the error that had been made on incorporation. Once again, I will describe what was supposed to have occurred. Ms. Chaplin was meant to have acquired half of the shares held by BreckenridgeCo[6] and 592 was meant to have acquired the other half,[7] with the result that Ms. Chaplin and 592 would become 50/50 shareholders of Triventa.

[17] However, in the course of preparing the documentation to effect the buyout, Triventa's counsel discovered the error that had been made on incorporation. Counsel made what Justice Cullity would later find to have been an unsuccessful attempt to correct the error by acting as if ErrorCo held the shares of Triventa in trust for the three intended shareholders.[8]

[18] During the sale of BreckenridgeCo's shares, some documents were prepared that indicated that 592's portion of the shares was to be purchased equally by Mr. Jawa and Mr. Plummer.[9] Those shares would have amounted to 16.67% of Triventa's shares (8.33% for Mr. Jawa and 8.33% for Mr. Plummer).[10] However,

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4 Judgment in *1307592 Ontario Inc. et. al. v. Triventa Technologies Corporation et. al.*, Ontario Superior Court of Justice, court file No. 03-CL-5020, at Exhibit A-1, Tab 48 (the "Judgment"); Partial Agreed Statement of Facts, para. 22.

5 Exhibit A-1, Tab 3.

6 Transcript pg. 64, lines 17 to 20; Exhibit A-1, Tab 10 (note: while most of the purchase documents indicate that Ms. Chaplin's shares are to be held with her husband, pg. 71 of Tab 10 clarifies that he has assigned his interest to her).

7 First Endorsement, para. 11.

8 Exhibit A-1, Tab 9; First Endorsement, para. 6.

9 Exhibit A-1, Tabs 6, 8 and 10.

10 Triventa was supposed to have issued 150,000 shares. Of those shares, 50,000 were to have been issued to BreckenridgeCo. 592 was to have acquired 25,000 of the

Mr. Plummer signed a Declaration of Trust and a Direction and Acknowledgment whereby he agreed that these shares were, in fact, going to be owned by 592.[11]

[19] In the spring of 2000, a shareholder dispute erupted among the shareholders of SatiStar. Two of the shareholders left and were replaced by an individual named Mark Lefebvre.

[20] Mr. Plummer left SatiStar in the spring of 2000. He testified that he left because he was unhappy with the direction in which the company was going, he believed that Mr. Jawa was not pulling his weight, and he was not happy that Mr. Lefebvre had joined the company.[12]

[21] Around this time, Mr. Plummer first began to assert that he had acquired half of 592's share of BreckenridgeCo's shares and thus personally owned 8.33% of Triventa.[13] It is important to note that, as of October 2000, Ms. Chaplin disagreed with his view. She took the position that Mr. Plummer did not own these shares.[14]

[22] For some period following incorporation, Mr. Plummer had been responsible for Triventa's operations. In October 2000, Ms. Chaplin began having numerous

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Breckenridge shares. Mr. Plummer claimed to own 12,500 of the shares acquired by 592 (i.e., 8.33% of Triventa).

11 The Declaration of Trust is found at Exhibit A-1, Tab 10, pgs. 074 and 075. The Direction and Acknowledgement was not entered into evidence. The full text of the Direction and Acknowledgement is reproduced in the factum of the applicants to the Application (Exhibit R-1, Tab 7, at pgs. 6 and 7). I cannot see any benefit that the Application applicants would have gained from inaccurately reproducing the text of the document in their factum when they had already entered the document itself into evidence. Accordingly, I find the reproduction in the factum to be a reliable reproduction of the text of the document signed by Mr. Plummer. In any event, the parties accept the decision of Justice Cullity. The Direction and Acknowledgment was before Justice Cullity (see First Endorsement, para. 9) and it formed a key part of his conclusion that Mr. Plummer and Mr. Jawa intended the BreckenridgeCo shares to be owned by 592.

12 Transcript, pg. 235, line 20 to pg. 236, line 7.

13 A memo from Ms. Chaplin to her husband (Exhibit A-1, Tab 20) dated October 1, 2000 states that Mr. Plummer had begun asserting that he owned shares in Triventa. In paragraph 16 of the First Endorsement, Justice Cullity observes that Mr. Plummer's assertion that he owned these shares was an "after-the-fact invention". The share sale occurred in March 1999. Thus, I conclude that Mr. Plummer began making these assertions sometime between April 1999 and September 2000.

14 Exhibit A-1, Tab 20. Ms. Chaplin incorrectly identifies the other shareholder as being SatiStar instead of 592 but, as SatiStar was the sole shareholder of 592, the effect is the same.

concerns regarding Mr. Plummer's conduct. She believed that he had inappropriately assumed the role of president of Triventa, that he had been inappropriately paying himself a salary in that position, that he had sought a $25,000 loan for Triventa from CGT without authority, that he had produced misleading financial statements for Triventa, and that he had agreed to an inappropriate commission arrangement with a sales representative.[15] Ms. Chaplin testified that, based on these concerns, she had lost confidence in Mr. Plummer and had asked Mr. Jawa to remove Mr. Plummer from any further participation in Triventa.[16]

[23] As a result of the foregoing, Mr. Plummer was removed from any involvement in Triventa. Ms. Chaplin testified that, by the time he was removed, there was only $8,000 left in Triventa's bank account, that Mr. Plummer had already written a cheque for that amount to himself, and that a stop payment had to be placed on the cheque.[17] The clear distrust that Ms. Chaplin had of Mr. Plummer at this point in time weighs heavily in my perception of her motivation for joining forces with him later.

[24] An individual named Kevin Warren eventually took over Mr. Plummer's responsibilities for Triventa's operations. Mr. Warren became a director of Triventa in 2001.

[25] In January 2002, Ms. Chaplin realized that it was a conflict of interest for her to act as a director of both Triventa and CGT. As a result, she resigned as a director of Triventa.[18]

[26] In the summer of 2002, Mr. Warren raised with Ms. Chaplin a number of serious operational and human resources concerns that he had about Triventa. Ms. Chaplin was sufficiently concerned about these problems that she wrote to the other two directors of Triventa (Mr. Jawa and Mr. Lefebvre) demanding action.[19]

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15 Exhibit A-1, Tabs 20 and 23; Transcript pg. 50, lines 5 to 16.
16 Exhibit A-1, Tab 23; Transcript pg. 49, line 12 to pg. 50, line 2.
17 Transcript pg. 51, lines 22 to 28.
18 Exhibit A-1, Tabs 28 and 29.
19 Exhibit A-1, Tabs 30 and 31.

[27] At some point, Triventa had borrowed some money from CGT. By the summer of 2002, the loan was due and Triventa had not repaid it. CGT was pushing Triventa to pay but Mr. Jawa was ignoring the demands.[20]

[28] By the winter of 2003, things were coming to a head between Ms. Chaplin and Mr. Jawa. Ms. Chaplin believed that Mr. Jawa was neglecting Triventa. She recalls his being unresponsive to requests to discuss issues.[21] Ms. Chaplin was concerned both about her investment in Triventa and about Triventa's ability to continue providing goods to CGT. She wrote to Mr. Jawa and asked that a shareholders' meeting be held.[22]

[29] In March 2003, Triventa's board attempted to call an annual general meeting of Triventa.[23] The notice calling the meeting set out the proposed agenda. On its face, nothing in the agenda appears particularly unusual or threatening to me. In fact, the agenda is substantially the same as one Ms. Chaplin had previously proposed to Mr. Jawa.

[30] Ms. Chaplin's actions in the spring of 2003 cause me to conclude that, by April 2003 at the latest, she had decided that she wanted to take control of the board of directors of Triventa. As set out above, Ms. Chaplin had resigned from the board in 2002. Nevertheless, she continued to own 50% of the shares, so she was still in a position to ensure that she was re-elected to the board. However, while being elected to the board would have given her a voice on the board, it would not have given her control of it. Since Triventa was owned equally by 592 and Ms. Chaplin, there was no way, short of buying out 592, that Ms. Chaplin could have taken control of the board.

[31] I conclude that Ms. Chaplin, faced with this obstacle, conceived of a plan that she believed would allow her to take control of the board. It appears that Ms. Chaplin realized that resurrecting Mr. Plummer's old assertion that he was an 8.33% shareholder of Triventa would enable her to, in concert with him, seize control of Triventa's board. This is exactly what she attempted to do. It appears that Ms. Chaplin was willing to overlook her previous distrust of Mr. Plummer and her previous belief that he did not own these shares in order to realize her goal of control.

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20 Exhibit A-1, Tabs 32 and 33.
21 Transcript, pg. 58, lines 4 to 20.
22 Exhibit A-1, Tab 35.
23 Exhibit A-1, Tab 73.

[32] Mr. Plummer testified that Ms. Chaplin had contacted him and had asked him if he still owned his shares in Triventa.[24] Recall that, at this point, Mr. Plummer had been absent from Triventa for almost three years. Mr. Plummer stated that he had informed Ms. Chaplin that he believed he still owned the shares, contrary to what others believed. He testified that Ms. Chaplin told him she planned to hold a meeting.[25] I had the strong impression from Mr. Plummer's testimony that he was well aware in 2003 that he did not own the shares. He referred to learning about the problem with the ownership of the shares in 1999 when he went to sign the share purchase documents, but signing them anyway.[26]

[33] Ms. Chaplin testified that, in 2003, she believed that Mr. Plummer owned 8.33% of Triventa.[27] I do not believe her. It was undoubtedly convenient for her to take that position at the time, but I do not accept that she believed it.

[34] In early April 2003, Ms. Chaplin fired the first shot in the ensuing shareholder battle. She wrote to the board and advised them that, in her opinion, the notice of annual general meeting issued by the board was ineffective because it had not been sent to one of the directors, Mr. Warren, and to one of the shareholders, Mr. Plummer.[28]

[35] As a result of Ms. Chaplin's complaint, the scheduled annual general meeting was cancelled.

[36] One week later, on Ms. Chaplin's directions, Mr. Warren (in his role as a director) sent out a notice scheduling an annual general meeting of Triventa for May 1, 2003.[29] The notice was not signed by the other two directors of Triventa.

[37] The purported annual general meeting was held on May 1, 2003. Ms. Chaplin was the only shareholder in attendance. Mr. Plummer also attended on the pretence that he was a shareholder. No one representing 592 was present. Mr. Warren and Triventa's accountant were also there. Not surprisingly, the slate of

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24 Transcript, pg. 242, lines 2 to 19.

25 Transcript, pg. 242, lines 16 to 27. Mr. Plummer erroneously referred to the meeting as being a directors' meeting rather than a shareholders' meeting.

26 Transcript, pg. 261, lines 11 to 18.

27 Transcript, pg. 148, line 16 to pg. 149, line 3.

28 Exhibit A-1, Tab 36.

29 Exhibit A-1, Tab 38; Transcript, pg. 62, lines 22 to 24.

directors approved by Ms. Chaplin was elected (i.e., herself, Mr. Plummer and Mr. Warren).[30]

[38] At a directors' meeting held in April, the existing board had determined that a management fee should be paid to Ms. Chaplin and SatiStar. As one of its first actions, Ms. Chaplin's new board purported to cancel that management fee and replace it with a dividend.[31] I note that the indirect effect of this was to give Mr. Plummer, as a purported shareholder, an immediate financial reward.

[39] A document purporting to be another notice of annual general meeting of Triventa was entered into evidence.[32] I give no weight to this document. It bears Mr. Jawa's signature but it appears to me that the signature may have been cut and pasted from somewhere else. Furthermore, the proposed agenda for the meeting appears to be completely contrary to Mr. Jawa's interests. Absent testimony from Mr. Jawa identifying the document as authentic, I am unwilling to give it any weight.

[40] Mr. Jawa and Mr. Lefebvre were, not surprisingly, displeased that Mr. Plummer was asserting that he owned 8.33% of the shares of Triventa. In late May, Mr. Jawa, Mr. Lefebvre and 592 responded by bringing an application in the Ontario Superior Court of Justice against Mr. Plummer and Triventa.[33] The vast majority of the Legal Expenses in issue arise from the Application.

[41] The Application sought the following relief:

a) a declaration that 592 owned 50% of the shares of Triventa;

b) a declaration that Mr. Plummer did not own any shares in Triventa;

c) a declaration that the annual general meeting held on May 1, 2003, was improperly called and, as a result, invalid and of no effect; and

d) a declaration that the current members of the board were Mr. Jawa, Mr. Lefebvre and Mr. Warren (i.e., the individuals who had been directors prior to the purported annual general meeting).

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30 Exhibit A-1, Tab 74.
31 Exhibit A-1, Tab 74.
32 Exhibit A-1, Tab 41.
33 Exhibit A-1, Tab 44.

[42] After the Application was filed, Mr. Plummer became concerned that he might find himself liable for his actions and for court costs. He had no interest in being held liable for either of these things. He also had no appetite for paying legal fees to defend the Application. Mr. Plummer testified that he had expected that there would be problems as a result of the purported annual general meeting but that he had expected both sides would sit down and have a meeting, not start a court action.[34]

[43] Mr. Plummer described the Application as follows: "this was [Ms. Chaplin]'s action, that she was going to take this on, and I basically didn't want anything to do with it."[35] I note that Mr. Plummer referred to it as Ms. Chaplin's action, not Triventa's.

[44] As a result of Mr. Plummer's concerns, Mr. Plummer and Ms. Chaplin entered into an agreement (the "Share Purchase Agreement").[36] The recitals to a draft of the Share Purchase Agreement encapsulate the goals of Mr. Plummer and Ms. Chaplin:[37]

> [Mr. Plummer] wishes to withdraw from and be relieved of all involvement in the Company, including without limitation as a shareholder, director and officer of the Company, and is willing to transfer and assign to [Ms. Chaplin] any and all right, title and interest he may now or hereafter have in and to the Disputed

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34 Transcript, pg. 265, lines 8 to 11 and pg. 267, lines 2 to 14.

35 Transcript, pg. 252, lines 19 to 21.

36 A written copy of the agreement could not be located. Mr. Plummer recalled an agreement like the draft agreement at Exhibit A-1, Tab 46 and could not see why he and Ms. Chaplin would not have signed it (Transcript, pg. 249, lines 12 to 14 and pg. 273, lines 22 to 24). Ms. Chaplin does not know if the draft agreement was signed or not. She does recall signing a one-page agreement but has lost her copy of it (Transcript, pg. 82, lines 1 to 8). Mr. Plummer does not recall a one-page agreement (Transcript, pg. 249, lines 12 to 21 and pg. 273, lines 25 to 27). I prefer Mr. Plummer's evidence to Ms. Chaplin's on this point. I find, based on the description in the legal invoice located at Exhibit A-1, Tab 82, that an agreement was ultimately signed on or before July 22, 2003. Since the draft agreement was emailed on July 18, I find that it was most likely an amended version of that agreement that was signed rather than a one-page agreement. I heard no evidence that would suggest that the principal terms of the final agreement differed from those set out in the draft agreement. Most importantly, Ms. Chaplin agreed that section 5 of the draft agreement reflects the deal reached by Mr. Plummer and her (Transcript, pgs. 174 to 175). Based on the foregoing, I find that the principal terms of the final agreement were the same as those set out in the draft agreement.

37 Exhibit A-1, Tab 46, recital E.

> Shares, and thereby permit [Ms. Chaplin] to become the respondent in the Application hearing.

[45] Pursuant to the Share Purchase Agreement, Mr. Plummer sold Ms. Chaplin any interest that he had in Triventa in exchange for Ms. Chaplin agreeing to pay his legal fees, any court costs awarded against him and any amount for which he was liable as a result of his actions as a purported shareholder and director. In essence, Ms. Chaplin simply stepped into Mr. Plummer's shoes both as a purported shareholder and as a party to the Application. From this point forward, Ms. Chaplin's interest in the Application would be better described as being that of a party to the Application rather than an interested third party. Mr. Plummer was, in essence, her proxy.[38]

[46] Mr. Plummer testified that the Share Purchase Agreement was prepared so that Ms. Chaplin could "go after it".[39] I interpret this to mean so that Ms. Chaplin could pursue ownership of the shares and the resulting control of Triventa. I can see nothing else in the litigation that Ms. Chaplin would have been going after.

[47] Mr. Plummer's reaction to the Application supports my view that his involvement was orchestrated by Ms. Chaplin. He effectively folded at the first sign of opposition. While the fight continued, it was Ms. Chaplin who continued it, not Mr. Plummer. He readily gave up his purported shareholdings just to avoid paying legal costs. This is not the act of a person who believes firmly in his position. This is the act of a person who was helping someone else out and suddenly found himself at personal risk.

[48] The Application was heard by Justice Cullity in August 2003. Justice Cullity declared that Mr. Plummer did not own any shares in Triventa. He further declared that the annual general meeting had been improperly called and, as a result, was of no force and effect.[40] Justice Cullity based these declarations on his finding that, because of the errors that occurred on incorporation, the sole shareholder of Triventa was ErrorCo and the sole director of Triventa remained the employee of Miller Thomson LLP who had been named the first director on incorporation. Since no other shares had been issued, no shares could have been issued to Mr.

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38 I acknowledge that paragraph 18 of the Partial Agreed Statement of Facts states that Ms. Chaplin was not a party to the Application. I agree that she was not technically a party. That does not, however, change the fact that the Share Purchase Agreement had the effect of essentially making her a party.

39 Transcript, pg. 249, lines 1 to 7.

40 First Endorsement, para. 3.

Plummer. Similarly, an annual general meeting that was neither called by the sole director nor attended by the sole shareholder could not have been of any force and effect. For similar reasons, Justice Cullity was unable to declare that 592 owned 50% of the shares of Triventa or that Mr. Jawa, Mr. Lefebvre and Mr. Warren were directors.

[49] Justice Cullity recognized that his conclusions would create a number of problems for the shareholders of Triventa. As a result he made additional findings to assist the shareholders in resolving their issues. Justice Cullity found that the shareholders' contractual rights had not been affected but could not be "implemented until the requisite corporate organizational steps [had] been taken".[41] He also found clearly that those contractual rights did not include a right on Mr. Plummer's part to any shares. Justice Cullity found that the parties had always intended that BreckenridgeCo's shares be transferred to 592, not Mr. Jawa and Mr. Plummer as Mr. Plummer had contended.[42] He also noted that "[i]f it were permissible, and necessary, to determine the issue of credibility on the basis of the evidence before me and the balance of probabilities, I would be strongly inclined to the view that Plummer's claim [to the 8.33% of the Triventa shares] was an after-the-fact invention."[43]

[50] Following Justice Cullity's decision, Ms. Chaplin and 592 took steps to put Triventa's affairs in order. The necessary documents were prepared to reflect that Ms. Chaplin and 592 were the sole shareholders of Triventa. Mr. Jawa, Mr. Lefebvre and Mr. Warren were appointed as directors. The parties referred to this process as "re-papering". Some of the Legal Expenses in question were in respect of the re-papering.

[51] Before turning to my analysis of the nature of the dispute, I would like to discuss an adverse inference that the Respondent has asked me to draw. Ms. Chaplin did not call either Mr. Jawa or Mr. Lefebvre as witnesses. The Respondent asked me to draw an adverse inference from Ms. Chaplin's failure to do so. In appropriate circumstances, an adverse inference may be drawn against a taxpayer who fails to call a witness who would have given the perspective of the other side to a transaction (*Downey v. The Queen*;[44] *Imperial Pacific Greenhouses*

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41 First Endorsement, para. 8.
42 First Endorsement, paras. 9 to 11.
43 First Endorsement, para. 16.
44 2006 FCA 353.

Ltd. v. The Queen;[45] *Wagner v. The Queen*;[46] *Pièces Automobiles Lecavalier Inc. v. The Queen*[47]). Ms. Chaplin's failure to call Mr. Jawa and Mr. Lefebvre means that I have only heard evidence from witnesses on one side of the dispute. In the case of Ms. Chaplin, the evidence I have heard is self-serving. Mr. Plummer was Ms. Chaplin's proxy in the Application and I had the strong sense from his testimony that he continued to view his role in that manner when testifying in this appeal. Mr. Warren's recollection of events was very weak and added little value. On the whole, I am missing a big piece of the story. The history of Triventa, the nature of the dispute, the purpose for which the Legal Expenses were incurred, the responsibility, if any, that Triventa bore for the Legal Expenses, and the existence of the purported loan from Ms. Chaplin to Triventa are all critical elements of this case. There are also subjects upon which Mr. Jawa and Mr. Lefebvre could have offered significant insights. They would have offered the perspective of parties on the other side of the dispute. They would also have offered the perspective of the party on the other side of the loan. Ms. Chaplin alleges she lent money to Triventa yet did not call any witnesses who could have testified that Triventa borrowed that money from her. As directors of Triventa during the period that the loan was allegedly made, Mr. Jawa and Mr. Lefebvre could have offered that insight.

[52] In a number of instances, documentary evidence accepted by both parties as authentic provides an indication of the testimony that Mr. Jawa would likely have given had he been called as a witness. The statements in those documents are hearsay. Therefore, I have not accepted them for the truth of their contents. I do, however, feel that it is appropriate to conclude from those statements that, had Mr. Jawa been called as a witness, his testimony would not have supported Ms. Chaplin's position.[48]

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45 2011 FCA 79.

46 2013 FCA 11.

47 2013 TCC 310.

48 Those documents include statements that Mr. Jawa believed Mr. Plummer had misappropriated funds from SatiStar prior to his departure from that company (Exhibit A-1, Tab 24), that Mr. Jawa had attempted to hold an annual general meeting on May 22, 2003 but was unable to as Ms. Chaplin did not attend and, without her presence, there were not enough shareholders to achieve quorum (Exhibit R-1, Tab 7, para. 50), that, prior to Mr. Warren sending out the notice for the purported annual general meeting, the board had agreed that the notice should not be sent (Exhibit R-1, Tab 7, paras. 37 and 38 and Exhibit A-1, Tab 37, para. 9), and that April 2003 was the first time that Ms. Chaplin had taken the position that Mr. Plummer was a shareholder (Exhibit R-1, Tab 7, para. 34).

[53] An adverse inference need not be drawn in every case where a party fails to call a witness. It may well be that the party has a satisfactory explanation for not calling the witness. Ms. Chaplin's counsel stated that he had interviewed Mr. Jawa and decided against calling Mr. Jawa as a witness. Counsel stated that he had informed counsel for the Respondent that he would not be calling Mr. Jawa as a witness. He further stated that he had advised counsel for the Respondent that Mr. Jawa remained under subpoena and could thus be made available for the Respondent to call as a witness if the Respondent wished to do so.[49] That is not, in my view, a satisfactory reason for Ms. Chaplin's failure to call Mr. Jawa as a witness. In fact, if anything, it supports drawing an adverse inference. It suggests that, after hearing what Mr. Jawa would say, counsel decided it would not be in Ms. Chaplin's interests to have him testify. The fact that Ms. Chaplin's counsel made it easy for the Respondent to call Mr. Jawa does not change anything. The Respondent had no reason to call Mr. Jawa. The Respondent made an assumption of fact that Ms. Chaplin was not entitled to have her shareholder loan account credited in respect of the Legal Expenses.[50] The Respondent was prepared to rely upon that assumption. It was up to Ms. Chaplin to demolish that assumption and, accordingly, to call the necessary witnesses to do so.

[54] Based on all of the foregoing, I draw an adverse inference from Ms. Chaplin's failure to call Mr. Jawa and Mr. Lefebvre as witnesses. I find that their evidence would not have assisted Ms. Chaplin.

[55] Having set out the history of the dispute and addressed the adverse inferences, I can now consider the nature of the dispute.

[56] Ms. Chaplin says that it was a dispute among the directors of Triventa. I do not accept Ms. Chaplin's characterization of the dispute. If this was a dispute among the directors, then why was only one of the purported new directors made a party to the Application? If the point was to deal with the new board, then why not add Ms. Chaplin and Mr. Warren to the Application? Mr. Jawa and Mr. Lefebvre clearly thought that Mr. Warren was not properly fulfilling his duties as a director.[51]

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49 Transcript pg. 410, lines 7 to 19.
50 Amended Reply, para. 14(k).
51 Exhibit A-1, Tab 40.

[57] Mr. Plummer testified that he saw this as a dispute over the election of the directors, not over his ownership of the shares.[52] I found his testimony on this point disingenuous.

[58] As noted above, I draw an adverse inference from the failure of Ms. Chaplin to call Mr. Jawa and Mr. Lefebvre as witnesses and my resulting inability to benefit from their perspective on the nature of the dispute.

[59] I conclude that this was a shareholder dispute, pure and simple. While it may have manifested itself in a dispute over who the directors were, it was, at its heart, a dispute over whether the shares purportedly held by Mr. Plummer were his or not. The Application was clearly occasioned by Mr. Plummer asserting his shareholdings in a concrete way through attending an annual general meeting and voting his shares. There was no dispute over corporate governance. Either Mr. Plummer was a shareholder and he and Ms. Chaplin could elect the board or he was not and Ms. Chaplin had to work with 592 to elect the board. The dispute was, in its essence, a dispute between 592 and Mr. Plummer or, more accurately, a dispute between 592 and Ms. Chaplin through her proxy, Mr. Plummer.

(ii) Benefit from the Legal Expenses

[60] I find that Ms. Chaplin benefitted from the Legal Expenses and that Triventa did not. The Legal Expenses can be broken down into three categories:

a) legal fees relating to defending the Application (the "Defence Fees");

b) costs awarded as a result of the Application (the "Costs"); and

c) legal fees relating to the re-papering (the "Re-Papering Fees").

[61] The Defence Fees and the Costs were incurred as part of the shareholder dispute started by Ms. Chaplin. They were clearly incurred for her benefit. Triventa did not benefit from the shareholder dispute. Triventa was in essentially the same position after the dispute ended that had been in before the dispute began. Although Justice Cullity's decision was ultimately based on the error that was made when Triventa was incorporated, the dispute itself had little to do with fixing that error. The dispute was about identifying Triventa's shareholders. Neither side took the position that the only shareholder was ErrorCo. While Triventa arguably

[52] Transcript, pg. 247, line 25 to pg. 248, line 9.

received some benefit from the certainty that Justice Cullity's decision brought as to the status of its incorporation, the Defence Fees and the Costs had nothing to do with that determination. To the extent that Triventa benefitted from Justice Cullity's decision, that benefit arose from the applicants to the Application bringing and prosecuting the Application, not from the respondents to the Application defending it.

[62] Ms. Chaplin submits that the Re-Papering Fees were incurred to fix the legal error that had occurred when Triventa was incorporated and thus benefited Triventa. I accept that legal fees incurred to correct errors made in the incorporation of a company and the issuance of shares to its shareholders would benefit the company. However, it is not clear whether the Re-Papering Fees represent the costs of re-papering Triventa's corporate history to correct past errors or whether they represent Ms. Chaplin's costs of having her counsel review re-papering documents prepared by Triventa's or 592's counsel to ensure that her interests were being protected. The former would benefit Triventa. The latter would benefit Ms. Chaplin. The invoices relating to the Re-Papering Fees are not helpful as they could support either interpretation.[53] None of the re-papering documents themselves were entered into evidence nor was any correspondence indicating who had prepared them. Again, I draw an adverse inference from Ms. Chaplin's failure to call Mr. Jawa and Mr. Lefebvre as witnesses. Their view of whether Triventa benefitted from the Re-Papering Fees would have been valuable, as would their evidence as to the work done towards the re-papering by their counsel or Triventa's counsel. In the circumstances, absent more evidence, I am not prepared to accept that Triventa benefitted from the Re-Papering Fees. Accordingly, I find that the Re-Papering Fees benefitted only Ms. Chaplin.

[63] Based on all of the foregoing, I find that Ms. Chaplin, not Triventa, benefitted from the Legal Expenses.

(iii) Liability to pay and responsibility for paying the Legal Expenses

[64] I find that Triventa was neither liable to pay nor responsible for paying the Legal Expenses. I find that Ms. Chaplin was liable to pay many of the Legal Expenses and was responsible for paying the balance of them. I will discuss each category of the Legal Expenses separately.

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53 Exhibit A-1, Tab 81. They indicate that Ms. Chaplin's lawyers were working with lawyers for SatiStar to work out the re-papering "process" and that her lawyers then prepared "draft documents".

Defence Fees

[65] The Defence Fees were made up of charges from Wildeboer Rand Thomson Apps & Dellelce LLP ("Wildeboer") and Gowling Lafleur Henderson LLP ("Gowlings").

[66] Ms. Chaplin testified that, when she learned about the Application, she contacted a lawyer at Wildeboer named Carolyn Musselman. Ms. Chaplin described Wildeboer as being Triventa's corporate counsel. Ms. Chaplin explained that Wildeboer referred the matter to Gowlings. Gowlings was Ms. Musselman's former firm.[54] Ms. Chaplin explained that Triventa's directors all agreed that it was Triventa that was retaining Gowlings and that Triventa would be paying its fees.[55] I do not accept Ms. Chaplin's testimony on any of these points. It is self-serving, improbable and inconsistent with the documentary evidence. I find that Wildeboer was Ms. Chaplin's counsel, not Triventa's, that Wildeboer referred Mr. Plummer to Gowlings, that Gowlings was Mr. Plummer's counsel but that, as a result of the Share Purchase Agreement, Gowlings represented Ms. Chaplin's interests.

[67] I will look first at Wildeboer's fees. While Ms. Chaplin described Wildeboer as being Triventa's corporate counsel, the reality is that Wildeboer had only just received the purported appointment to that position when Ms. Chaplin and Mr. Plummer attempted to seize control of the company.[56] Historically, Triventa's corporate counsel had been Miller Thomson.[57] Miller Thomson had prepared the incorporation documents. They had also prepared the documents by which BreckenridgeCo's shares were transferred to 592.[58] Since Ms. Chaplin's attempt to seize control of Triventa relied on the idea that some of BreckenridgeCo's shares were, in fact, transferred to Mr. Plummer, one can easily imagine why she would not have wanted Miller Thomson as corporate counsel.

[68] Ms. Chaplin had a history of personal dealings with Ms. Musselman. Ms. Musselman had acted for Ms. Chaplin during the incorporation of Triventa[59]

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54 Transcript pg. 64, line 25 to pg. 65, line 3; pg. 74, lines 3 to 11; and pg. 119, lines 22 to 28.

55 Transcript pg. 75, lines 5 to 16.

56 Exhibit A-1, Tab 74.

57 Shortly after the purported annual general meeting, Ms. Chaplin warned Mr. Jawa that corporate counsel had changed and that Triventa would not pay any future Miller Thomson fees that might be incurred (Exhibit A-1, Tab 43).

58 First Endorsement; Exhibit A-1, Tab 9.

59 Transcript, pg. 119, lines 15 to 24.

and during the purchase of BreckenridgeCo's shares.[60] Ms. Chaplin had also contacted Ms. Musselman for advice prior to holding the purported annual general meeting.[61]

[69] When Ms. Chaplin and Mr. Plummer were negotiating the terms of the Share Purchase Agreement, Wildeboer represented Ms. Chaplin's interests and a different firm represented Mr. Plummer's interests.[62] If Wildeboer was representing Triventa, then why would it have been advising Ms. Chaplin on the Share Purchase Agreement?

[70] All Wildeboer invoices entered into evidence are addressed to Ms. Chaplin, not Triventa.[63]

[71] Based on all of the foregoing, I find that Wildeboer was Ms. Chaplin's counsel, not Triventa's, and thus that Ms. Chaplin was liable to pay Wildeboer's fees.

[72] I turn then to Gowlings' fees. There were two respondents to the Application: Triventa and Mr. Plummer. The only counsel at the hearing on behalf of any respondent was Gowlings. There are thus three possibilities: Gowlings was acting for Triventa and no one was acting for Mr. Plummer; Gowlings was acting for both Triventa and Mr. Plummer; or Gowlings was acting for Mr. Plummer and no one was acting for Triventa.

[73] The documentary evidence supports all three possibilities but the strongest evidence indicates that Gowlings was only representing Mr. Plummer. The written submissions filed by Gowlings in respect of costs describe Gowlings as being "Solicitors for the Respondent, Robert Plummer".[64] The judgment issued in the

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60 Exhibit A-1, Tab 9.

61 Transcript, pg. 63 line 26 to pg. 64, line 3.

62 Exhibit A-1, Tabs 45 and 46.

63 Exhibit A-1, Tabs 80, 81 and 83. I note that no Wildeboer invoices relating to the period from May 27, 2003 (when the Application was filed) to July 31, 2003 were entered into evidence, yet invoices from Gowlings from the same period indicate that Wildeboer was heavily involved in the file during this period. I was not provided with any explanation as to why Wildeboer's fees relating to this period were not claimed as part of the Legal Expenses. I would have thought that one side or the other would have wanted this information in evidence. However, as I can imagine any number of reasons why it would not have been entered into evidence, including the possibility that Wildeboer did not bill for its time during this period, I draw no inferences from the fact that it was not entered.

64 Exhibit R-1, Tab 9.

Application refers to Gowlings as being counsel for Mr. Plummer and states that no one appeared for Triventa at the hearing.[65] The judgment was prepared and reviewed by Gowlings and the Application applicants' counsel, WeirFoulds LLP. I find these documents to be very strong evidence that Gowlings considered itself to be counsel for Mr. Plummer and did not consider itself to be counsel for Triventa. That said, Gowlings' invoices tell a different, yet varied, story. The first invoice is addressed to Triventa and was mailed to Triventa's business address.[66] All subsequent invoices are addressed to Triventa and Mr. Plummer and were mailed to Mr. Plummer's home.[67]

[74] Gowlings' actions suggest that it was representing Mr. Plummer. Had it been representing only Triventa, Gowlings would have presumably focussed its efforts on dealing with the error that was made when Triventa was incorporated rather than on the question of whether Mr. Plummer owned shares or not. The fact that this is not what happened strongly indicates that Gowlings was, at a minimum, acting for both Mr. Plummer and Triventa.

[75] It would be a conflict of interest for a law firm to represent both a company and a purported minority shareholder in a shareholder dispute involving that company. I find it unlikely that Gowlings would have allowed itself to be put in such a conflict of interest.

[76] Ms. Chaplin's testimony regarding whom Gowlings represented was inconsistent. She testified that Gowlings represented Triventa.[68] However, at one point in her cross-examination she testified that Gowlings represented Mr. Plummer and Triventa[69] and, at yet another point, she testified that Gowlings represented the three directors appointed at the purported annual general meeting.[70]

[77] Mr. Plummer testified that Gowlings represented Triventa and that he did not have a lawyer other than the one who negotiated the Share Purchase Agreement for him.[71] I accept that Mr. Plummer believes that he did not have a lawyer because, after entering into the Share Purchase Agreement, he had no

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65 Judgment, recitals.
66 Exhibit A-1, Tab 77.
67 Exhibit A-1, Tabs 78, 79 and 82. I note in passing that all of these invoices refer to the matter as a "Shareholders Dispute".
68 Transcript, pg. 75, lines 5 to 6.
69 Transcript, pg. 171, lines 17 to 26.
70 Transcript, pg. 192, lines 5 to 9.
71 Transcript, pg. 266, lines 4 to 19.

further interest in the litigation. I do not, however, accept that that means that Gowlings was not acting to protect his purported interest in Triventa. While Mr. Plummer no longer cared about that interest, Ms. Chaplin certainly did as it was effectively her interest.

[78] Based on all of the foregoing, and in particular Gowlings' own statements as to whom it represented, I find that Gowlings represented Mr. Plummer and that no one represented Triventa. Mr. Plummer was therefore liable to pay Gowlings' fees. However, pursuant to the Share Purchase Agreement, Ms. Chaplin was responsible for paying those fees. It is important to note that the Share Purchase Agreement made Ms. Chaplin, not Triventa, responsible for Gowlings' fees. Those fees were part of the consideration that Ms. Chaplin agreed to pay to acquire any interest Mr. Plummer had in Triventa.

[79] Ms. Chaplin argues that, even if Triventa was not directly liable to pay the Defence Fees, it was nonetheless responsible for paying them pursuant to its by-laws. Section 2.11 of Triventa's By-law No. 1 requires Triventa to indemnify a director or former director against all costs, charges and expenses reasonably incurred by the director in respect of any civil proceeding to which he or she is made party by reason of being or having been a director.[72] Ms. Chaplin submits that, to the extent that the Defence Fees were incurred by Mr. Plummer, this by-law required Triventa to indemnify Mr. Plummer for the Defence Fees. I disagree. The by-law requires Triventa to indemnify directors in respect of proceedings to which they are made party by reason of being a director. The Application named Mr. Plummer because he was claiming that he owned 8.33% of the shares of Triventa, not because he had been elected as a director. If the Application had been concerned with people who had been elected directors at the purported annual general meeting, Ms. Chaplin and Mr. Warren would have also have been named as respondents to the Application. Thus, I find that section 2.11 of the by-laws did not make Triventa responsible for paying the Defence Fees.

[80] Based on all of the foregoing, I find that Ms. Chaplin was either liable to pay or responsible for paying the Defence Fees and that Triventa was neither liable to pay nor responsible for paying them.

Costs

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[72] Exhibit A-1, Tab 2.

[81] Ms. Chaplin takes the position that Triventa and Mr. Plummer were both liable for the Costs. I disagree. I find that only Mr. Plummer was liable for the Costs and that, since Ms. Chaplin had agreed to indemnify him for such costs, Ms. Chaplin was responsible for paying the Costs.

[82] Ms. Chaplin submits that Justice Cullity's endorsement on costs imposed costs on the Application respondents (i.e. Triventa and Mr. Plummer).[73] This is true. However, the judgment resulting from that endorsement imposed costs only on Mr. Plummer. My understanding is that, in Ontario, judges will prepare endorsements and counsel for the parties will then agree on and submit a form of judgment. The judgment in this case was prepared and reviewed by Gowlings and WeirFoulds. It is not my place to question the wording of the judgment. If the parties had believed that there had been an accidental slip or omission in the judgment, they could and should have dealt with the issue before Justice Cullity at the time. It is inappropriate for one party to the proceeding to raise the issue fourteen years after the fact before a different court. I also note that, despite the difference between the endorsement and the judgment, the registry entered the judgment. For all I know, this change may have been specifically raised with Justice Cullity by counsel and received his approval at the time. It is easy to understand why Mr. Jawa, Mr. Lefebvre and 592 would have wanted to only make Mr. Plummer responsible for the Costs. If the Costs were awarded against Triventa, half of each dollar paid to Mr. Jawa, Mr. Lefebvre and 592 would come from their share of Triventa's assets. Again, I draw an adverse inference from Ms. Chaplin's failure to call Mr. Jawa and Mr. Lefebvre as witnesses. Their testimony on this point would have been very valuable.

[83] Mr. Plummer did not even consider the Costs to have been awarded against him since Ms. Chaplin was required to pay them.[74]

[84] My comments above regarding the applicability of section 2.11 of By-law No. 1 are equally applicable to the Costs. The by-law did not require Triventa to pay the Costs.

[85] Similarly, I again note that the Share Purchase Agreement made Ms. Chaplin, not Triventa, responsible for the Costs.

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[73] Endorsement on costs of Justice Cullity dated October 3, 2003, at Exhibit A-1, Tab 50.

[74] Transcript, pg. 252, lines 14 to 25.

[86] Based on all of the foregoing, I find that Mr. Plummer was liable to pay the Costs. However, pursuant to his agreement with Ms. Chaplin, it was actually Ms. Chaplin who was responsible for paying for them. Triventa was neither liable to pay nor responsible for paying the Costs.

Re-Papering Fees

[87] The Re-Papering Fees were paid to Wildeboer and Gowlings. I conclude that Ms. Chaplin was liable to pay the Re-Papering Fees.

[88] Ms. Chaplin testified that Wildeboer and Gowlings were acting for Triventa during the re-papering. Had Ms. Chaplin been more forthright in her testimony regarding whom Wildeboer and Gowlings were representing during the Application and had I had the opportunity to assess her statement against the evidence of Mr. Jawa and Mr. Lefebvre, I may have been more inclined to accept her testimony on this point. However, in the circumstances, I am not prepared to do so.

[89] I have previously concluded that Wildeboer was Ms. Chaplin's counsel. Ms. Chaplin was unable to point to any document that would show that anyone who had authority over Triventa after the judgment was issued retained Wildeboer to perform work on behalf of Triventa.[75] I note that Miller Thomson appears to have still been Triventa's corporate counsel as late as 2005.[76] I also note that Wildeboer's invoices relating to the re-papering were addressed to Ms. Chaplin, not Triventa.[77] Based on all of the foregoing, I conclude that Wildeboer continued to represent Ms. Chaplin during the re-papering and thus that Ms. Chaplin continued to be liable for Wildeboer's fees.

[90] Similarly, no evidence was entered that demonstrated that anyone who had any authority over Triventa after the judgment retained Gowlings to perform work on behalf of Triventa. I have previously concluded that Gowlings was representing Mr. Plummer, for the benefit of Ms. Chaplin. Since, following the judgment Mr. Plummer no longer had any interest in Triventa, it follows that any work Gowlings did post-judgment must have been done for Ms. Chaplin. Accordingly, I find that Ms. Chaplin was liable to pay Gowlings' fees.

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75 Transcript, pg. 189, lines 13 to 27.
76 Exhibit A-1, Tab 57.
77 Exhibit A-1, Tabs 81 and 83.

[91] Based on all of the foregoing, I find that Ms. Chaplin was liable to pay the Re-Papering Fees and that Triventa was neither liable to pay nor responsible for paying those fees.

(iv) Payment of the Legal Expenses

[92] I find that Ms. Chaplin paid the Legal Expenses.

[93] The Legal Expenses totalled $163,898. Ms. Chaplin paid $3,930.87 directly.[78] The remaining $159,967.13 in Legal Expenses was paid through her wholly owned company named Cruickston Park Company Limited.[79] The necessary cash flowed from Ms. Chaplin's father to Cruickston and Cruickston then paid the expenses. Ms. Chaplin then repaid her father personally. Ms. Chaplin explained that she ran the Legal Expenses through Cruickston in order to help keep them separate from her personal finances.[80] She stated that Cruickston was simply a vehicle to get money to Triventa.[81]

[94] A trial balance for Cruickston was entered into evidence. I did not find it helpful. The memos for the various entries were confusing and appear to have been truncated on the printout. I have given no weight to this document.[82]

[95] Ms. Chaplin takes the position that she paid the Legal Expenses on behalf of Triventa. If that is true, then why were they not paid by Triventa in the first place? Ms. Chaplin testified that Triventa did not have the money to pay the Legal Expenses and that, following such a divisive dispute, she was reluctant to advance funds directly to Triventa. She asserts that it would have been imprudent for her to deposit funds to Triventa's bank account to pay the Legal Expenses. There would have been a risk that Mr. Jawa or Mr. Lefebvre could have held up or taken those

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78 I am unable to identify the specific invoices that this amount relates to. It appears to be the three Wildeboer invoices described in paragraphs 25(a) to (c) of the Partial Agreed Statement of Facts. I note that the $558.50 figure in paragraph 25(c) is incorrect. It should read $588.50 (see Exhibit A-1, Tab 83). Even with this adjustment, the math is still off by approximately $50. Nothing turns on this.

79 Partial Agreed Statement of Facts, paras. 26 and 27.

80 Transcript, pg. 102, line 8 to pg. 106, line 6.

81 Transcript, pg. 85, lines 16 to 19.

82 Exhibit R-1, Tab 18. Ms. Chaplin had no idea what "S/H loan to operating bank" meant (Transcript, pg. 209, line 20 to pg. 210, line 1).

funds before they were used for their intended purpose. She says that she therefore paid the expenses directly.[83]

[96] Ms. Chaplin's explanation initially sounds logical but it does not stand up to scrutiny. If Ms. Chaplin did not trust Mr. Jawa and Mr. Lefebvre, then why would she put herself in the position of paying the entire Legal Expenses instead of only half of them? How did she expect to be reimbursed by a company that, by her own testimony, did not have sufficient funds to pay her? How did she expect to cause that company to reimburse her if she no longer had a seat on the board? If Ms. Chaplin truly believed that she was paying the Legal Expenses on Triventa's behalf, then logically she would have paid half of them and asked 592 to pay the other half.

[97] Ms. Chaplin did not speak to Mr. Jawa or Mr. Lefebvre about the Legal Expenses prior to paying them.[84] I note that, by the time the majority of the Legal Expenses were paid, Ms. Chaplin knew that she was no longer a director of Triventa and thus knew that she did not have authority to make payments on its behalf. Similarly, she lacked the authority to borrow money on behalf of Triventa from herself.

[98] Again, I draw an adverse inference from Ms. Chaplin's failure to call Mr. Jawa and Mr. Lefebvre as witnesses. Their testimony as directors of Triventa when the Legal Expenses were paid would have offered valuable insight into whether they believed that Ms. Chaplin had paid the Legal Expenses on Triventa's behalf. I think it is extremely unlikely that they would have supported Ms. Chaplin's position. Why would they ever have accepted that the Defence Fees and Costs were paid on Triventa's behalf? These were expenses related to a legal dispute in which they were victorious. For what possible reason would they have agreed to effectively subsidize half of these amounts by having them paid by Triventa?

[99] Based on all of the foregoing, I find that none of the money used to pay the Legal Expenses came from Triventa. All of it came from Ms. Chaplin. Cruickston acted as Ms. Chaplin's agent in making the payments.

(v) Timing of the recording of the purported loan on Triventa's books

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83 Transcript, pg. 104, lines 6 to 15.

84 Transcript, pg. 223, lines 14 to 20.

[100] The loan was not recorded on Triventa's books when it was allegedly made in 2003 and 2004. It was only recorded in 2007. The timing of the recording of the loan is strong circumstantial evidence that Ms. Chaplin knew the Legal Expenses were not Triventa's expenses and knew that she had not made a loan to Triventa.

[101] Mr. Warren testified on behalf of Ms. Chaplin. He recalled discussing a legal invoice with Ms. Chaplin's husband and possibly with Ms. Chaplin. He described the invoice as relating to an argument that the shareholders were having. He stated that he indicated that it was not appropriate to put the invoice through Triventa. Mr. Warren's recollection of events and documents was weak. These events occurred almost 14 years ago and, unlike Ms. Chaplin and Mr. Plummer, he had no personal interest in the matters. Mr. Warren was unsure whether his discussions regarding the invoice occurred in 2003 or earlier. Either way, I accept that Ms. Chaplin and/or her husband were aware in 2003 that Mr. Warren, who remained as a director after the judgment, did not consider it appropriate to run invoices relating to shareholder disputes through the company.

[102] Even if Ms. Chaplin had decided to pay all of the Legal Expenses on behalf of Triventa rather than paying half of them and having 592 pay the other half, why would she wait three years to record that fact on Triventa's books? In order to protect her position as a creditor, she would logically have wanted to ensure that the loan was recorded immediately. Ms. Chaplin testified that the failure to record the expenses and the loan until 2007 was an oversight.[85] I do not believe her. Again, I draw an adverse inference from her failure to have Mr. Jawa and Mr. Lefebvre testify on this issue.

[103] In 2005, Ms. Chaplin was in discussions with 592 to buy out its interest in Triventa, yet she still did not record the loan on Triventa's books. Surely such a significant loan would have had an effect on the value of Triventa's shares and thus been something that she would have wanted reflected prior to negotiations. Yet Ms. Chaplin testified on cross-examination that she did not discuss the Legal Expenses with Mr. Jawa or Mr. Lefebvre between the time that the judgment was entered and the time they were bought out in 2005.[86]

[104] The shares of 592 were ultimately purchased in 2005 for nominal consideration by a company controlled by what Ms. Chaplin described as her

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85 Transcript, pg. 107, line 26 to pg. 108, line 4. I note that Ms. Chaplin hesitated for a long time before giving this response.

86 Transcript, pg. 223, lines 14 to 20.

family trust.[87] Yet, even after Mr. Jawa and Mr. Lefebvre were no longer in the picture, the purported loan and the Legal Expenses were still not recorded on Triventa's books.

[105] The purported loan and the Legal Expenses were not, in fact, recorded on Triventa's books until 2007 when, having commenced a new business, Triventa found itself in a position where it could benefit from deducting the expenses.[88] This strongly suggests that the recording of the purported loan was a matter of financial convenience rather than of reflecting the reality of a transaction that had occurred years before. Recording the transaction gave Triventa a means to reduce its income. It also provided Ms. Chaplin with a means of extracting cash from Triventa tax-free.

[106] I gave Ms. Chaplin the opportunity to address my concerns regarding the timing of the recording of the Legal Expenses and the purported loan. Ms. Chaplin stated that she understood my concerns but that they were not something she considered at the time.[89] I do not believe her.

[107] All of the above suggests that the transaction was only recorded in 2007 because Mr. Jawa and Mr. Lefebvre were no longer involved in Triventa and thus could not object to the purported loan being recorded and, more importantly, because there was then a financial benefit to both Triventa and Ms. Chaplin in pretending that the expenses were Triventa's.

(vi) Conclusion

[108] In summary, I find that the Legal Expenses were incurred in respect of a shareholder dispute, not a corporate governance dispute. They were incurred to advance Ms. Chaplin's personal interests. Ms. Chaplin was either liable to pay or responsible for paying the Legal Expenses and she did in fact pay them. The purported loan was not recorded on Triventa's books until Mr. Jawa and Mr. Lefebvre were no longer in the picture and there was a financial incentive for Triventa and Ms. Chaplin to claim that the transaction had occurred.

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87 Transcript, pg. 106, lines 10 to 28.

88 Transcript, pg. 221, line 26 to pg. 223, line 6. Ms. Chaplin described Triventa as being "in a place financially to absorb these expenses." If Triventa was in a financial position to absorb the expenses, I would have expected it to simply pay them rather than record a loan. I think what Ms. Chaplin really meant was that Triventa had income against which to claim the expenses.

89 Transcript, pg. 220, line 28 to pg. 221, line 20.

[109] The Legal Expenses did not benefit Triventa, were never Triventa's to pay, and were not paid by Triventa. They were simply Ms. Chaplin's personal expenses.

[110] Based on all of the foregoing, I find that there was no loan made by Ms. Chaplin to Triventa to pay the Legal Expenses. The bookkeeping entry by which the purported loan was created was a complete fiction.

(b) Did Triventa confer a subsection 15(1) benefit on Ms. Chaplin?

[111] In order for Ms. Chaplin to be liable under subsection 15(1), Triventa must have conferred a benefit on her in her capacity as a shareholder.

[112] As set out above, the Legal Expenses were Ms. Chaplin's expenses. Triventa did not pay the Legal Expenses nor did it reimburse Ms. Chaplin for the Legal Expenses. No money flowed from Triventa to Ms. Chaplin in respect of the Legal Expenses. All that happened was that Ms. Chaplin paid her personal expenses personally. A false bookkeeping entry was made in Triventa's books that indicated something else had occurred, but the entry did not match reality.

[113] The bookkeeping entry was made by Triventa's external accountants at Ms. Chaplin's specific direction.[90] The timing of the recording of the entry strongly suggests that Ms. Chaplin knew that the Legal Expenses were not corporate expenses and, thus, that there was no basis for claiming she had made a loan to Triventa. Ms. Chaplin has extensive business experience and education. She has an MBA and was, during the period in question, the president and CEO of a company with approximately $300 million in revenue. Prior to that position, she held the title of VP Resources and her responsibilities included the company's accounting and finance departments. Based on this experience, I conclude that Ms. Chaplin would have been well aware of the impact of the accounting entry that she instructed Triventa's accountants to make.

[114] That said, I am not convinced that simply making a false bookkeeping entry, even knowingly, confers a benefit on a shareholder. It seems to me that the benefit is conferred when something of value is conferred on the shareholder. At most, a false bookkeeping entry lays the groundwork for disguising a future appropriation or hiding an outstanding debt owed to a company by a shareholder. It is not, in itself, a benefit.

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90 Exhibit R-1, Tab 16.

[115] I am not aware of any cases that address this issue. The parties referred me to a number of leading cases on subsection 15(1) benefits. Those cases involved bookkeeping entries that had been made (knowingly, negligently or innocently) or had been omitted (knowingly, negligently or innocently) but, in each case, there was a transfer of property. The parties focused, in particular, on the Federal Court of Appeal decisions in *Chopp v. The Queen*[91] and *Franklin v. The Queen*.[92] Neither of those decisions assists me. Both dealt with a transfer of something of value from a company to a shareholder. *Chopp* dealt with a company that had paid a shareholder's personal expense and had failed to record a corresponding reduction in the shareholder's loan account. *Franklin* dealt with a company that had failed to reduce the shareholder's loan account when the shareholder received monies intended for the company. In both decisions, the bookkeeping entry, or lack thereof, was relevant only because, if corrected, it had the potential to eliminate the benefit. The bookkeeping entry, or lack thereof, was not itself the benefit.

[116] Based on the foregoing, I conclude that the mere recording of the false bookkeeping entry did not confer a benefit on Ms. Chaplin.

[117] It is possible that the false bookkeeping entry may have hidden what would otherwise have been unrelated subsection 15(1), 15(2) or 56(2) benefits in 2007.[93] However, benefits unrelated to the Legal Expenses were not the basis of either the reassessment or the confirmation. No assumptions of fact were made in support of such unrelated benefits and the possible existence of such unrelated benefits was not raised as an issue by the Respondent either in the Amended Reply or at trial. It is not my role to investigate whether there are other areas that the Minister should have reassessed nor is it Ms. Chaplin's role to defend herself against reassessments that were never made. If the Minister wishes to examine whether the false

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91 1997 CarswellNat 1768.

92 2002 FCA 38.

93 Ms. Chaplin testified that she has never been paid any amount in respect of the purported loan (Transcript, pg. 110, lines 18 to 20) but I have not found Ms. Chaplin to be a reliable witness. If she simply took money from Triventa in 2007 and used the false loan to hide her actions, she may have been liable under subsection 15(1) for that appropriation. Ms. Chaplin testified that her husband extracted funds from Triventa starting in 2007 and that, by 2013, only approximately $119,000 of the false $163,898 loan remained outstanding (Transcript, pg. 111, lines 3 to 22). She did not provide any details as to the amounts extracted or the dates when they were extracted. If Ms. Chaplin's husband did extract funds in 2007, Ms. Chaplin might have been liable under subsection 56(2). A copy of the shareholder loan account was not entered into evidence. If the account had a debit balance at year-end and that balance was hidden by the false loan, Ms. Chaplin may have been liable under subsection 15(2) in respect of the outstanding balance.

bookkeeping entry has hidden some other benefit that should be assessed against Ms. Chaplin, she is free to do so.

[118] In summary, the mere recording of the false loan on Triventa's books did not, in itself, confer a benefit on Ms. Chaplin. It may have laid the groundwork for disguising what would otherwise have been a benefit under subsection 15(1), 15(2) or 56(2), but those possibilities did not form the basis of the reassessment or confirmation and were not argued before me.

B. Subsection 56(2)

[119] The Respondent's alternative argument under subsection 56(2) only arises if I find that Triventa paid the Legal Expenses and that the Legal Expenses were incurred for Mr. Plummer's benefit. In that case, the Respondent makes the alternative argument that Ms. Chaplin was liable under subsection 56(2) because she directed Triventa to pay Mr. Plummer's legal fees. Since I have found that the Legal Expenses were incurred for Ms. Chaplin's benefit and that she paid them, there is no need for me to consider this alternative argument.

C. Judgment

[120] The appeal is allowed and the matter referred back to the Minister for reassessment on the basis that Ms. Chaplin received neither a subsection 15(1) nor a subsection 56(2) benefit in her 2007 tax year.

D. Costs

[121] Costs are awarded to Ms. Chaplin. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which they shall have a further 30 days to file written submissions on costs. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to Ms. Chaplin as set out in the Tariff.

[122] In attempting to reach an agreement the parties may want to bear in mind that my impression is that a great deal of time at trial was wasted in Ms. Chaplin's attempts to show that the Legal Expenses were incurred by Triventa for Triventa's benefit. As I have set out in detail above, there was no merit to this position. Unless I am convinced that my impression is wrong, any decision that I am required to issue in respect of costs will reflect that view.

This Amended Reasons for Judgment is issued in substitution of the Reasons for Judgment dated September 27, 2017.

Signed at Ottawa, Canada, this **5th** day of **October** 2017.

"David E. Graham"

Graham J.

CITATION:	2017 TCC 194
COURT FILE NO.:	2014-3670(IT)G
STYLE OF CAUSE:	JAN CHAPLIN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	May 16 and 17, 2017
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Graham
DATE OF JUDGMENT:	September 27, 2017
DATE OF AMENDED REASONS FOR JUDGMENT	**October 5, 2017**

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