

Docket: 2009-1669(IT)G

BETWEEN:

ROBERT MASTRONARDI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on common evidence with the
Motion of *Lynda Mastronardi* (2009-1670(IT)G) on December 3, 2009 at
Windsor, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant: John Mill

Counsel for the Respondent: Daniel Bourgeois
Suzanie Chua

ORDER

Upon Motion made by counsel for the Appellant for:

1. An order allowing the Respondent to file its amended Robert Mastronardi Reply provided that the Minister clarify that the facts, added at paragraphs 9(p) and 9.1 and 9.2, either were, or were not, facts assumed by the Minister at the time of assessment;
2. An order striking the term “purports” in paragraph 9(f) of the Lynda Mastronardi Reply;

3. An order directing the Respondent to provide sufficient particulars in accordance with the Demand for Particulars with respect to paragraphs 9(g) and 13 of the Lynda Mastronardi Reply and paragraphs 9(t)(u)(v), 15, 16(a) to (e), 16(f) and 18 of the Robert Mastronardi Reply;
4. An order that should the Respondent fail to provide sufficient particularity with respect to any of the requested paragraphs then such paragraph is to be struck from the Reply;
5. An order that upon delivery of sufficient particulars and/or the striking of those paragraphs with insufficient particulars the Appellant shall have 30 days to serve a further Demand for Particulars with respect to the 2004 taxation year or file an Answer; and
6. Costs of this motion;

And upon hearing submissions by the parties;

It is ordered that the Appellants' Motion is dismissed with costs in any event of the cause, in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 1st day of February 2010.

"Diane Campbell"

Campbell J.

Docket: 2009-1670(IT)G

BETWEEN:

LYNDA MASTRONARDI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on common evidence with the
Motion of *Robert Mastronardi* (2009-1669(IT)G) on December 3, 2009 at
Windsor, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant: John Mill

Counsel for the Respondent: Daniel Bourgeois
Suzanie Chua

ORDER

Upon Motion made by counsel for the Appellant for:

1. An order allowing the Respondent to file its amended Robert Mastronardi Reply provided that the Minister clarify that the facts, added at paragraphs 9(p) and 9.1 and 9.2, either were, or were not, facts assumed by the Minister at the time of assessment;
2. An order striking the term “purports” in paragraph 9(f) of the Lynda Mastronardi Reply;

3. An order directing the Respondent to provide sufficient particulars in accordance with the Demand for Particulars with respect to paragraphs 9(g) and 13 of the Lynda Mastronardi Reply and paragraphs 9(t)(u)(v), 15, 16(a) to (e), 16(f) and 18 of the Robert Mastronardi Reply;
4. An order that should the Respondent fail to provide sufficient particularity with respect to any of the requested paragraphs then such paragraph is to be struck from the Reply;
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6. Costs of this motion;

And upon hearing submissions by the parties;

It is ordered that the Appellants' Motion is dismissed with costs in any event of the cause, in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 1st day of February 2010.

"Diane Campbell"

Campbell J.

Citation: 2010 TCC 57
Date: 20100201
Dockets: 2009-1669(IT)G
2009-1670(IT)G

BETWEEN:

ROBERT MASTRONARDI,
LYNDA MASTRONARDI,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Campbell J.

[1] By way of background to the present Motion, the Appellants have been reassessed in respect to their tax liability for the 2004 taxation year. In dispute are various tax consequences flowing from transactions in which the Appellants engaged to facilitate a settlement agreement. In accordance with this agreement, Robert Mastronardi was to sell his shares in 404564 Ontario Limited to his siblings. The settlement provided that the sale would be completed in a tax effective basis and, consequently the Appellants, who are spouses, completed the following two steps:

1. Pursuant to a “Share Transfer” Agreement dated October 21, 2004, the Appellant, Robert Mastronardi, purported to sell 27 common shares in 404564 Ontario Limited to the Appellant, Lynda Mastronardi, for which she executed a demand promissory note. Robert Mastronardi elected not to have subsection 73(1) of the *Income Tax Act* (the “Act”) apply to this share transfer. These shares were therefore exempt from attribution in accordance with subsection 74.5(1). Lynda Mastronardi in

turn sold these shares to the children of Robert's brother as per the settlement agreement and then relied on section 110.6 of the *Act* to claim a capital gains deduction (the "sale shares"); and

2. Pursuant to a second "Share Transfer" Agreement dated October 22, 2004, Robert Mastronardi purported to convey 27 common shares in 404564 Ontario Limited to the Appellant, Lynda Mastronardi, by way of a gift. Unlike the first transaction, Robert Mastronardi did not elect out of subsection 73(1) of the attribution rules so that these shares were subject to attribution. Lynda Mastronardi also sold these shares to the children of Robert's siblings in accordance with the settlement agreement (the "gift shares"). Subsequently, the capital gain was attributed to Robert Mastronardi.

[2] Lynda Mastronardi averaged the adjusted cost base of both the sale shares and the gift shares and reported a capital gain from the sale of the total 54 common shares. Lynda Mastronardi is attempting to rely on subsection 74.1(1) to attribute the gain on the gift shares back to Robert Mastronardi and on section 110.6 to deduct the capital gain herself on the sale shares.

[3] The Minister of National Revenue (the "Minister") claims that the transfer of the beneficial ownership respecting the sale shares and the gift shares from Robert to Lynda never occurred and that it was Robert Mastronardi who realized the capital gain on the share sales. Alternatively, the Minister is alleging that, even if beneficial ownership transferred to Lynda, section 245 applies (the GAAR provision) to render the transfers tax avoidance transactions.

[4] A Notice of Appeal dated May 7, 2009 for both Appellants was purported to be filed with the Court on May 11, 2009. This document was unsigned and was stamped as a draft copy on numerous pages throughout. Replies to the Notice of Appeal were purported to be filed in respect to the appeals of Robert Mastronardi and of Lynda Mastronardi on August 4, 2009. Before hearing the Motion, I canvassed with counsel my concerns respecting the validity of the Notice of Appeal together with the Replies being filed pursuant to an unsigned draft of a Notice of Appeal. Both counsel agreed that a properly signed Notice of Appeal in its present form would be filed forthwith and that any amendments to either the Notice of Appeal or the Replies would be addressed by the appropriate means. The Motion proceeded on this understanding.

[5] The Appellant served a Demand for Particulars dated September 2, 2009. The Respondent delivered separate Responses to this Demand for each of the Appellants. Because the Appellants considered these Responses to be generally limited and incomplete, this Motion has been brought for:

1. An order allowing the Respondent to file its amended Robert Mastronardi Reply provided that the Minister clarify that the facts, added at paragraphs 9(p) and 9.1 and 9.2, either were, or were not, facts assumed by the Minister at the time of assessment;
2. An order striking the term “purports” in paragraph 9(f) of the Lynda Mastronardi Reply; and
3. An order directing the Respondent to provide sufficient particulars in accordance with the Demand for Particulars with respect to paragraphs 9(g) and 13 of the Lynda Mastronardi Reply and paragraphs 9(t)(u)(v), 15, 16(a) to (e), 16(f) and 18 of the Robert Mastronardi Reply.

[6] Although the Appellants withdrew the first request to allow the Respondent to file a proposed Amended Reply to the Notice of Appeal in the Robert Mastronardi appeal, I do not believe there is any authority in any event at common law or otherwise that would allow one party to move to amend the pleadings of an opposing party.

[7] Section 52 of the *Tax Court of Canada Rules* states:

52. Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within thirty days, the Court may order particulars to be delivered within a specified time.

[8] Court proceedings consist of different stages with each stage having its own unique purpose and function. Factual submissions at any stage are intended to serve the purpose and function of that particular stage. In the present appeals, examinations for discovery have not been held and, consequently, the parties are at the preliminary stage of the pleadings, which in fact may still be amended. The function of the pleadings is to define the issues – that is, to define precisely and correctly what is being disputed. To do this, the parties must identify the material facts relied upon to support the issues because it will be these material facts which,

if established at trial, will support that party's entitlement to that which it is seeking. The material facts must not be:

1. conclusions of law; or
2. evidence that proves that the facts being relied on do in fact support the claim being made.

When the parties are satisfied that the issues are sufficiently clear, they proceed to the next stage, the examinations for discovery, where cross-examination of the facts relevant to the issues can occur. In having well defined issues, the pleadings should be focused as should the resulting examinations.

[9] It is often difficult to identify that grey area between "material facts" and "evidence". There is an abundance of caselaw dealing with the function of particulars in relation to the purpose of the pleadings.

[10] At paragraph 30 of *Obonsawin (c.o.b. Native Leasing Services) v. Canada*, [2001] O.J. No. 369, [2001] G.S.T.C. 26, Epstein J. of the Ontario Superior Court of Justice stated:

... In *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586, Master Sandler referred to particulars as "additional bits of information, or data, or detail, that flesh out the material facts, but they are not so detailed as to amount to "evidence". These additional bits of information, known as "particulars", can be obtained by a party under new Rule 25.10, if the party swears an affidavit showing that the particulars are necessary to enable him to plead to the attacked pleading, and that the "particulars" are not within the knowledge of the party asking for them."

In discussing how courts determine whether particulars are necessary to "flesh out" the material facts, Webb J. in *Kozar v. The Queen*, 2008 D.T.C. 3390, at paragraph 5, explained that such a determination will depend on:

... whether the Respondent has set out the relevant facts with sufficient clarity so that the Appellant can determine the issue in dispute and the facts on which the Respondent will be relying ...

[11] At paragraphs 4 and 5 of the decision in *Zelinski v. The Queen*, 2002 D.T.C. 1204, affirmed by the Federal Court of Appeal (2002 D.T.C. 7395), Bowie J. stated that:

[4] The purpose of pleadings is to define the issues in dispute between the parties for the purposes of production, discovery and trial. What is required of a party pleading is to set forth a concise statement of the material facts upon which she relies. Material facts are those facts which, if established at the trial, will tend to show that the party pleading is entitled to the relief sought. Amendments to pleadings should generally be permitted, so long as that can be done without causing prejudice to the opposing party that cannot be compensated by an award of costs or other terms, as the purpose of the Rules is to ensure, so far as possible, a fair trial of the real issues in dispute between the parties.

[5] The applicable principle is stated in *Holmsted and Watson*:

This is *the* rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

Applying these principles, I approach both motions on the basis that the test to be applied is whether the paragraphs in dispute, and those that the Appellant proposes to add, are proper pleadings of material facts. The Appellant's motion seeks to add two issues to those now pleaded. She should be permitted to do so, unless it is plain and obvious that they are so ill-founded in law that they could not succeed at trial, even if the facts upon which they depend were established to be true.

[12] The Federal Court of Appeal considered the function of particulars in *Gulf Canada Ltd. v. The Mary Mackin*, [1984] 1 F.C. 884, and stated:

The principles governing an application of this kind were well stated by Sheppard J.A. in the case of *Anglo-Canadian Timber Products Ltd. v. British Columbia Electric Company Limited*, [(1960), 31 W.W.R. 604 (B.C.C.A.)] where he stated at pages 605 and 606:

Hence it appears that an examination for discovery follows upon the issues having been previously defined by the pleadings and the purpose of such discovery is to prove or disprove the issues so defined, by a cross-examination on the facts relevant to such issues.

On the other hand the purpose of particulars is to require a party to clarify the issues he has tried to raise by his pleading, so that the opposite party may be able to prepare for trial, by examination for discovery and otherwise. The purpose of particulars was stated in

Thorp v. Holdsworth (1876) 3 Ch 637, 45 LJ Ch 406, by Jesse, M.R. at p. 639, as follows:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order XIX, was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

That purpose of particulars was stated in *Spedding v. Fitzpatrick* (1888) 38 Ch 410, 58 LJ Ch 139, by Cotton, L.J. at p. 413, as follows:

"The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise."

Also the particulars operate as a pleading to the extent that "They tie the hands of the party, and he cannot without leave go into any matters not included" (Annual Practice, 1960, p. 460) and they may be amended only by leave of the court (Annual Practice, 1960, p. 461).

When pleadings are so vaguely drawn that the opposing party cannot tell what are the facts in issue or, in the words of Cotton, L.J. in *Spedding v. Fitzpatrick*, *supra*, "what case he has to meet," then in such circumstances the particulars serve to define the issue so that the opposite party may know what are the facts in issue. In such instances the party demanding particulars is in effect asking what is the issue which the draftsman intended to raise and it is quite apparent that for such a purpose an examination for discovery is no substitute in that it presupposes the issues have been properly defined.

This case was cited with approval in a later decision of the British Columbia Court of Appeal in the case of *Cansulex Limited v. Perry et al.* [Judgment dated March 18, 1982, British Columbia Court of Appeal, file C785837, not reported.] In that case, Lambert J.A. referred to the *Anglo-Canadian Timber* decision as being one of the decisions which "... delineate the difference between what is properly the subject matter of a Demand for Particulars and what is more properly

the subject-matter of a Demand for Discovery of material that should be obtained on an Examination for Discovery". (See, page 8 of the reasons of Lambert J.A.) Mr. Justice Lambert added:

At the heart of the distinction between the two lies the question whether the material demanded is intended to, and does, delineate the issues between the parties, or whether it requests material relating to the way in which the issues will be proved.

He then went on at pages 10 and 11 of his reasons to enumerate with approval the function of particulars as set out in the White Book dealing with the English Practice. The Supreme Court Practice, 1982, Vol. 1, page 318 details this function as follows:

- (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved
- (2) to prevent the other side from being taken by surprise at the trial
- (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial
- (4) to limit the generality of the pleadings
- (5) to limit and decide the issues to be tried, and as to which discovery is required
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included

Because Rule 408(1) [Federal Court Rules, C.R.C., c. 663] requiring "... a precise statement of the material facts on which the party pleading relies" and Rule 415 permitting applications for further and better particulars of allegations in a pleading are substantially similar to the corresponding sections in the English Rules, I think the above quoted six functions of particulars should apply equally to an application such as the present one under our Rules.

[13] The Ontario Court of Appeal in *Physicians' Services Inc. v. Cass*, [1971] O.J. No. 1561, [1971] 2 O.R. 626, at paragraph 2, stated that the following two principles should guide a court in ordering particulars:

... Accordingly, we would apply the principles laid down in such cases as *Fairbairn v. Sage*, 56 O.L.R. 462, [1925] 2 D.L.R. 536, in which it was held that particulars for

pleading will only be ordered if (1) they are not within the knowledge of the party demanding them, and (2) they are necessary to enable the other party to plead. ...

[14] The avoidance of “fishing expeditions”, where demands may be made for improper purposes, is some of the basis for the rationale of restricting the production of particulars at this stage only where necessary to define the issues. As explained by Marceau J. in *Embee Electronic Agencies Ltd. v. Agence Sherwood Agencies Inc.*, 43 C.P.R. (2d) 285, at paragraph 3:

... A defendant should not be allowed to use a request for particulars as a means to pry into the brief of his opponent with a view to finding out about the scope of the evidence that might be produced against him at trial, nor should he be allowed to use such a request as a means to go on a sort of fishing expedition in order to discover some grounds of defence still unknown to him. At that early stage, a defendant is entitled to be furnished all particulars which will enable him to better understand the position of the plaintiff, see the basis of the case made against him and appreciate the facts on which it is founded so that he may reply intelligently to the statement of claim and state properly the grounds of defence on which he himself relies, but he is not entitled to go any further and require more than that.

[15] In *Satin Finish Hardwood Flooring (Ontario) Limited v. The Queen*, 96 D.T.C. 1402, Bowman J. at page 1405 states that:

The purpose of pleadings is to define the issues to be decided by the court, not to provide a detailed outline of the evidence that the parties intend to adduce ...

He went on, at page 1405, to state that particulars must be permitted only “... for the purpose of enabling the opposite party to formulate an intelligent response”.

[16] According to Bowman J.’s decision in *Satin Finish*, allowing an order for particulars presupposes that three conditions have been satisfied:

1. the party demanding the particulars must serve the opposing party a demand for particulars, as required by section 52 of the *Rules*;
2. an affidavit should be issued demonstrating that particulars are required in order to plead; and
3. the purpose of the particulars must be to enable the party making the demand to formulate an intelligent response.

(A) Did the Appellants serve a Demand for Particulars?

[17] Although a demand for particulars was served, the Respondent alleges that some of the questions put before me by the Appellant during the hearing of the Motion were not the same questions contained in the Demand. Appellant counsel suggested that the additional demands related to the material facts which were originally demanded and that they did not expand the grounds for particulars. These additional questions relate, firstly, to a demand to particularize “legislative facts” in respect to the application of subsection 245(2), the GAAR provision and, secondly, to a demand to particularize the stage at which assumptions were made. I will address these additional questions in connection with the particular demand under which they were formulated and submitted during the hearing of the Motion.

(B) Did the Appellants issue an affidavit demonstrating that particulars are required in order to plead?

[18] The Appellants failed to file an affidavit. Appellant counsel referred me to caselaw in which some courts have applied an approach to the general requirement of affidavits, which resulted in the waiver of the affidavit. In *Steiner v. Lindzon et al.*, 14 O.R. (2d) 122, Lerner J. stated at paragraph 24 that “... an affidavit should be delivered with the notice of motion ...”. In *Saan Stores Ltd. v. Reebok Canada Inc.*, 63 A.C.W.S. (3d) 244, which Appellant counsel referred me to, Master Bolton stated at paragraph 17 that the:

... requirement for particulars is something that arises from a study of the pleadings. It is not enhanced in any way by a litigant swearing an affidavit parroting what should be a submission of counsel, i.e. that the material facts necessary to plead to the statement of claim are not present. ...

However, I believe this statement must be viewed with caution in light of Lerner J.’s further comments at paragraph 24 in *Steiner* that:

... an affidavit is not necessary when the allegations are so general that particulars are manifestly necessary, or so bald as to be recognized as a pleading of which particulars should be given without a supporting affidavit: *Welch v. Jackson et al.*, [1948] O.W.N. 708; *Patterson v. Proprietary Mines Ltd. et al.*, [1945] O.W.N. 237; *Madden v. Madden* [1947] O.W.N. 746 [affirmed [1947] O.R. 866].

(Emphasis added)

A proper approach to Lerner J.’s comments were provided by Perell J. in *Mirshahi v. Suleman*, [2008] O.J. No. 4954, where he stated:

... A motion for particulars ordinarily will not be granted unless the moving party deposes that the particulars are not within his or her knowledge and that they are needed to plead; however, a supporting affidavit is not required if the allegations are so general and bald that it is clear that particulars of them are necessary: *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (H.C.J.); *Wood Gundy Inc. v. Financial Trustco Capital Ltd.* [1988] O.J. No. 275 (Ont. Master); *Curry v. Advocate General Insurance Co. of Canada*, [1986] O.J. No. 2564 (Master).

A number of other cases have also followed the principles expressed by Lerner J. Bowman J. in *Satin Finish* cited the lack of an affidavit as one of the reasons to justify dismissing the motion for particulars. Generally, therefore, an affidavit will be required unless it is clearly unnecessary to the demand for particulars because the opposing party's pleadings are such that a court can conclude that it would be impossible to know the exact material facts to be relied upon in support of the claim. Such pleadings will necessitate particulars on their own without a supporting affidavit.

[19] With respect to the present Motion, it is apparent on a review of both Replies that none of the Minister's allegations contained in its pleadings fall within the exception to the general requirement of an affidavit. That is, the Minister's allegations and assumptions are not so general that particulars are manifestly necessary or so bald as to be recognized as a pleading for which particulars should be given without the necessity of a supporting affidavit. I must therefore conclude that the Appellants have not satisfied this requirement.

(C) Are the particulars necessary to formulate an intelligent response?

1. The Demand for Particulars in Respect to the Lynda Mastronardi Appeal:

[20] The Appellant demanded particulars in respect to paragraphs 9(f), 9(g), 9(m), which were stated as assumptions in the Reply, and paragraph 13, which was contained under the heading "Grounds Relied on and Relief Sought".

[21] Paragraph 9(f) in the Reply states:

- f) The Appellant executed a promissory note, dated October 21, 2004, in which she purports to promise to pay \$1,030,500 to her spouse, with interest at 5% per annum, payable on demand.

The Demand respecting 9(f) states:

- (1) please state the material facts related to the use of the word “purports”. Did the Minister assume that Lynda Mastronardi did not in fact “promise to pay”? if so, is it the Minister’s position that the Appellant’s representation was fraudulent? if so, please provide the material facts that support that assumption; if not, is it the Minister’s assumption that the note was a sham?
- (2) did the Minister assume that the promissory note was not paid?

The Respondent’s Response states:

1. In answer to the Appellant’s Demand for Particulars concerning paragraph 9(f) of the Reply, the Respondent states that the material facts relied upon by the Minister of National Revenue (the “Minister”) are as stated in paragraphs 9(m) to (p) of the Reply. The Minister did not assume that the Appellant did not in fact “promise to pay”. The Minister did not assume that the promissory note was not paid.

[22] Paragraph 9(g) in the Reply states:

- g) The Appellant and her spouse executed a further document entitled “Share Transfer”, dated October 22, 2004, pursuant to which Robert Mastronardi conveyed to his spouse, by deed of gift, 27 common shares in the capital stock of 404564 (the “Gift Shares”).

The Demand respecting 9(g) states:

- (1) please state the material facts, if any, on which the Minister based the assumption that the “Share Transfer” was not legally effective.

The Respondent’s Response states:

2. In answer to the Appellant’s Demand for Particulars concerning paragraph 9(g) of the Reply, the Respondent states that the Minister did not assume that the share transfer was not legally effective.

[23] Paragraph 9(m) in the Reply states:

- m) The Appellant’s purchase of the Sale Shares was satisfied by way of a promissory note for the full amount of the proceeds.

The Demand respecting 9(m) states:

- (1) please state the material facts, if any, on which the Minister based the assumption that the Appellant did not satisfy the purchase price of the shares by way of promissory note.

The Respondent's Response states:

3. In answer to the Appellant's Demand for Particulars concerning paragraph 9(m) of the Reply, the Respondent states that the question arises from an erroneous reading of paragraph 9(m) of the Reply. The Minister did not assume that the Appellant did not satisfy the purchase price of the shares by way of promissory note.

[24] The Respondent has clearly and precisely answered the Demands respecting 9(f), 9(g) and 9(m) and, in addition, in respect to 9(f), identified specifically those material facts [assumptions 9(m) to (p)] upon which it will rely to support the assumption at 9(f). The responses in 9(g) and 9(m) specifically address the Appellant's Demands. Anything beyond these responses and the parties enter the realm of evidence. The Respondent has made its position clear and there is nothing further that would assist in delineating the issues. I also believe that the actual question posed in the Motion respecting paragraph 9(g) is in fact a new question. The Appellant requested that the Respondent be directed to provide sufficient particulars with respect to 9(g) of the Lynda Mastronardi appeal and stated:

9(g) The Minister assumes at paragraph 9(t-x) of the Robert Mastronardi Reply that there was no disposition of the shares; it is unclear how a share sale transaction can be legally effective without resulting in the disposition of the shares;

The content of this query is very different from the question that was asked in the original Demand and therefore could not be permitted in any event.

[25] Paragraph 13 in the Reply states:

13. The Appellant entered into the transactions with her spouse on October 21 and 22, 2004, with the sole intention of selling the shares at a profit. Consequently, the Appellant dealt with the shares as an adventure in the nature of trade, such that the gain from the sale is to be included on income account.

The Demand respecting paragraph 13 states:

- (1) please state the material facts, if any, that support the contention that there was a “transaction” regarding the Gift Shares; further what material facts relate to the Appellant’s intention regarding the Gift Shares or is this simply a bald assumption?
- (2) please state the material facts, if any, that support the contention that the Appellant dealt with the Gift Shares as an adventure in the nature of trade;
- (3) please state the material facts, if any, that support the contention that the Appellant dealt with the Sale Shares as an adventure in the nature of trade;
- (4) in light of the Appellant’s pleading that these shares are long term family assets what material facts support the contention that the transactions involving these shares constitute an “adventure”?

The Respondent’s Response respecting paragraph 13 states:

4. In answer to the Appellant’s Demand for Particulars concerning paragraph 13 of the Reply, the Respondent states as follows.

- (1) The material facts that relate to the Appellant’s intention regarding the Gift Shares are as stated in paragraphs 9(a) to (q) of the Reply. The question pertaining to the use of the word “transaction” is not a proper question for a Demand for Particulars in that it is ambiguous and appears to elicit legal argument from the Respondent.
- (2) The material facts that support the contention that the Appellant dealt with the Gift Shares as an adventure in the nature of trade are as stated in paragraphs 9(a) to (q) of the Reply.
- (3) The material facts that support the contention that the Appellant dealt with the Sale Shares as an adventure in the nature of trade are as stated in paragraphs 9(a) to (q) of the Reply.
- (4) This question is not a proper question for a Demand for Particulars in that it is ambiguous and appears to elicit legal argument or evidence from the Respondent.

[26] Again, the Respondent has referred the Appellant to the specific assumptions of material fact within the Reply upon which reliance will be placed to support the Minister’s contention respecting both the Sale Shares and the Gift Shares. Those are the specific assumptions to which the Appellant has been directed. The Appellant has the onus and the Respondent, unless the Replies are successfully amended, is left to rely on the specific content of those assumptions. To direct the Respondent to provide further particulars at this stage would amount to giving the

Appellant a license to fish in a pond in off-season. The principles enunciated in the caselaw simply will not permit it. The balance of the information requested in paragraph 13, in my view, elicits legal argument respecting the meaning of an “adventure in the nature of trade” and “transactions”. Whether the Minister has pleaded sufficient material facts to support the suggested meanings of these terms will depend on the eventual outcome of a trial.

2. The Demand for Particulars in Respect to the Robert Mastronardi Appeal:

[27] The Appellant’s Motion demanded particulars in respect to paragraphs 9(t)(u)(v), 15, 16(a)-(e), 16(e), 16(f) and 18.

[28] Paragraphs 9(t), (u) and (v) are assumptions within the Reply and state:

No disposition of shares to Lynda Mastronardi

- t) Lynda Mastronardi
 - i) had little savings and did not have the financial resources necessary to purchase the Sale Shares or to repay the promissory note;
 - ii) did not make alternative financing arrangements to be in a position to repay the promissory note;
 - iii) never intended to repay the promissory note;
 - iv) intended to sell the Sale Shares and the Gift Shares on October 31, 2004, as provided by the Minutes of Settlement;
 - v) was not entitled to make decisions regarding the Sale Shares and the Gift Shares, including their disposition;
 - vi) was not able to enjoy the usual benefits nor was she exposed to the usual risks of ownership regarding the Sale Shares and the Gift Shares.
- u) There was never a transfer of the beneficial ownership regarding the Sale Shares and the Gift Shares from the Appellant to Lynda Mastronardi.
- v) The Appellant did not dispose of the Sale Shares to Lynda Mastronardi on October 21, 2004.

[29] The Appellant's Motion contained the following request respecting 9(t)(u)(v):

9(t)(u)(v) The Minister is of the position that "there never was a transfer of beneficial ownership". The Minister has not particularized which incidents of beneficial ownership did not transfer. This pleading is unclear in light of the Minister's pleading in Lynda's reply that the transfer was "legally effective";

[30] The Respondent's Response to the initial Demand clearly stated that the Minister would be relying on the material facts contained in assumptions 9(d), (f), (g), (i), (j), (m) and (t) of the Reply in order to come to the conclusions at (u) and (v). To go beyond this and order the Respondent to particularize which incidents of beneficial ownership the Minister believes did not transfer is again a quest for legal argument and not for material facts as they relate to the pleadings stage.

[31] With respect to the Appellant's allegation of inconsistent pleadings in the two appeals, in light of the Minister's Reply in the appeal of Lynda Mastronardi, that the transfer was legally effective, the Respondent acknowledged that the Minister assessed two different taxpayers which resulted in mutually inconsistent assessments. These are basically alternative assessments, if you will, which the Respondent must deal with during the hearing of these appeals. In the end, only one appeal in all likelihood will be successfully maintained. The Respondent referred me to several cases in support of this position, including the case of *The Queen v. W.H. Violette Limited*, 88 D.T.C. 6025. In that case, the Federal Court, Trial Division, explained the circumstances in which inconsistent pleadings could be permitted. Whether such circumstances exist in the present appeals is a matter best left to the trial judge. It is not for a motions judge to determine if the Minister was correct in making inconsistent and seemingly contradictory assessments. If any inherent unfairness to this method can be demonstrated, it can be dealt with in terms of costs at the termination of the hearing.

[32] Paragraphs 15, 16 and 18 of the Reply are contained under the heading "Grounds Relied On and Relief Sought" and deal with the application of section 245, the GAAR provision. Those paragraphs state:

15. The tax benefit was the avoidance of the tax liability on the capital gain from the disposition of the Sale Shares and the Gift Shares that would otherwise have resulted, had the Appellant sold the shares directly to the purchasers.

16. This tax benefit resulted, directly or indirectly, from a series of transactions that included the following transactions:
- a) The transfer of the Sale Shares to Lynda Mastronardi on October 21, 2004, for proceeds of disposition reflecting their fair market value;
 - b) The Appellant's election for the roll-over provision in subsection 73(1) of the *Act* not to apply to the sale of the Sale Shares;
 - c) The transfer of the Gift Shares to Lynda Mastronardi on October 22, 2004, by way of gift;
 - d) The Appellant's decision not to elect for the roll-over provision in subsection 73(1) of the *Act* not to apply to the sale of the Gift Shares;
 - e) The disposition of the Sale Shares and the Gift Shares by Lynda Mastronardi to Paul Mastronardi and Marne Safrance on October 31, 2004;
 - f) The claiming of the capital gains deduction by Lynda Mastronardi in respect of the disposition of the Sale Shares, pursuant to section 110.6 of the *Act*.

...

18. The avoidance transactions resulted directly or indirectly in a misuse of subsections 47(1), 73(1), 74.1(2), 74.5(1) and 110.6(2.1), and an abuse having regard to the provisions of the *Act* read as a whole, all within the meaning of subsection 245(4) of the *Act*.

[33] The Motion contained the following Demands in respect to these paragraphs:

(15) The Minister has not particularized its pleading "avoidance of capital gain", this pleading lacks particularity in light of the facts that: the capital gain on the Gift shares was attributed to Robert; and, the capital gain on the Sale shares was declared by Lynda;

(16)a.-e. The Minister sets out a series of five transactions at paragraphs 9(x) and (y), and 16a.-e. Four of these transactions are said to result in a benefit indirectly; and the fifth (16e.) is said to result in the benefit directly. The Minister does not particularize the material facts related to:

- the subsections relied on in each transaction;
- the benefit associated with subsection;
- whether the benefit may only apply to transactions with a certain economic, commercial, family or other non-tax purpose;
- the object spirit and purposes of the subsections relied on; and
- how the object spirit and purposes of the subsections was abused.

(16)e. The Minister assumes the existence of a transaction to which the taxpayer Robert was not a party. The Minister assumes that the tax benefit arises directly to Robert from this transaction. The Minister has not particularized how a tax benefit accrues to Robert from a transaction to which he was not a party.

(16)f. An additional (sixth) transaction is set out at paragraph 16f. The Minister does not assume that this transaction was part of the series of transactions on which it relies. The Minister has not particularized the relevance of this transaction to this proceeding.

(18) Paragraphs 9(a) to (o), 9(t) and 9(y) to (aa) set out the adjudicative facts of this proceeding, the Minister has not particularized the legislative facts relevant to the interpretation of the legislation; nor, has the Minister particularized how the impugned transactions are wholly dissimilar to the transactions intended to be allowed by the subsections.

[34] First, in paragraph 15 of the Reply, the Respondent has clearly identified what it believes to be the tax benefit – the avoidance of tax on a capital gain that would have been realized if there had been a direct sale of shares to Robert’s siblings. As suggested in the Response to the original Demand, the Appellant’s demand implies a misreading of this paragraph of the Reply, as the Response clearly states that the Minister did not assume that the capital gains reported by the Appellants had been avoided or not realized. Paragraph 15 has clearly described the benefit and at other paragraphs contained in the Reply the transactions are set forth from which the tax benefit supposedly flows. This accords with the response provided by the Respondent to the original Demand.

[35] Paragraph 16 of the Reply sets forth the same series of transactions from which the Respondent alleges the tax benefit flowed to the Appellants. However, as correctly noted by the Appellant, the Respondent lists a sixth transaction at paragraph 16 which is not one of the transactions specified in the assumption 9(z). It is added as an additional step in the series but because of the placement of

paragraph 16 in the Reply, the Minister is not entitled to rely on it as an assumption as it will be able to with the five steps that are outlined at assumption 9(z).

[36] At the pleadings stage, I do not believe that the Appellant is entitled to any other material facts except those that the Respondent has supplied. Some of the questions respecting paragraph 16 are an attempt to elicit legal argument and, if I directed that they be answered, I would in essence be requiring the Respondent to divulge its legal argument in respect to its understanding of the relevant legal provisions and how it intends to argue the purpose, object and spirit of these provisions as well as their potential misuse and abuse under section 245 of the *Act*. In fact, the Appellant in his submissions on this Motion stated that he was indeed looking for the identification of the extrinsic aids which demonstrate the object, spirit and purpose of the relevant provisions. Aside from all this, the Respondent has clearly identified specific provisions at paragraph 18 of the Reply, other than section 245, that resulted in misuse and abuse within the *Act* as a whole. There is nothing beyond what the Reply and the subsequent Response contain that is necessary, at the pleadings stage, to enable the Appellant to identify the issues and the material facts in support of those issues that are being relied upon.

[37] The Appellants also argued that interpreting legislative intent requires a consideration of legislative facts and therefore the Appellant is entitled to the particulars of these legislative facts. The Appellant submits that it is seeking the material facts relating to the legislative scheme, including its purpose and background, which is at the heart of the GAAR provision. These particulars, according to the Appellant, will assist in flushing out the facts that the Minister relies on in alleging there was abuse in the circumstances and it will also assist the Appellants in knowing the case to be met. I take from this that the Appellants are saying that the Respondent has an obligation, beyond stating that a particular series of transactions are abusive, to identify material legislative facts underlying the allegation of GAAR. Counsel referred me to the decision in *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44. That decision refers to the case of *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086. Sopinka J., at page 1099, stated:

It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis's words, "who did what, where, when, how and with what motive or intent" Such facts are specific, and must be proved by admissible evidence. Legislative

facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements: see e.g., *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, per Laskin C.J., at p. 391; *Re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714, per Dickson J. (as he then was), at p. 723; and *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, per McIntyre J., at p. 318.

[38] I assume the Appellant is looking for the legislative facts, establishing the purpose and background of the legislation, in the form of explanatory notes, textbooks, legislative historical material and other such items that would pertain to the Minister's perception of the alleged avoidance transactions and how they resulted in a misuse of the provisions which the Respondent enumerated. I can dispose of this quickly by stating that this demand as presented in the Motion was not included in the original Demand and is therefore a new question which cannot now be permitted. However, beyond this reason for denying the Appellant's request, I believe that the legislative facts which the Appellant seeks to obtain in these circumstances can be adduced in evidence and to order the Respondent to disclose the legislative facts at the pleadings stage would in essence amount to ordering the Respondent to disclose its interpretation of the law and its legal argument. This is never the intention of a Demand for Particulars at the stage of pleadings.

3. The Motion Request for Clarification of the Facts contained at paragraphs 9(p), 9.1 and 9.2 of the Robert Mastronardi appeal:

[39] This request refers to a proposed Amended Reply by the Respondent which is not before me in light of the agreement which counsel reached respecting the state of pleadings, such as they were, at the time I heard this Motion. A proposed change to 9(p) would occur and 9.1 and 9.2 would be added if this Amended Reply does in fact get filed. As I understand the Appellant's request, he is alleging that the Respondent failed to particularize the point in time that assumptions were made, that is, the assessment stage, the reassessment stage or the confirmation stage. Since the proposed Amended Reply is simply that – proposed - it was not a part of the proper pleadings that were before me in this Motion and, consequently, it is unnecessary that I address it.

4. The Motion Request for an Order to Strike the term “purports” in paragraph 9(f) of the Lynda Mastronardi appeal:

[40] The Appellant requests that the term “purports” be struck from 9(f) because in using this term, according to its definition, it presumes the Minister viewed the promissory note as presenting a false appearance. Its inclusion in 9(f) is therefore prejudicial to the Appellant. The Appellant seeks particulars which may have been relied upon if, in fact, the Minister’s assumption is that this note purports to be a sham. This is an issue for the trial judge. This assumption, if it does exist, must be dealt with at trial after hearing all of the evidence. The request to strike “purports” from 9(f) is therefore denied. The Respondent has, in my view, sufficiently identified the material facts at paragraphs 9(m) to (p) of the Reply upon which it intends to rely. In addition, the Respondent went on to clarify in its Response to the Demand that “The Minister did not assume that the Appellant did not in fact ‘promise to pay’” and “The Minister did not assume that the promissory note was not paid.” These are sufficiently adequate responses to the original Demand.

Conclusion:

[41] It should be relatively clear from a Demand for Particulars that the facts, for which the Particulars are sought, should have been in the pleadings in the first place. Much of what the Appellant seeks to elicit by way of this Demand goes beyond that which the caselaw principles suggest a court should order at the pleadings stage. It attempts to seek evidence and legal argument of the opposing party on how the issues will be proved and, finally, seeks to obtain some facts through a Demand for Particulars that can and should be accomplished by way of examinations for discovery. The Replies are sufficiently detailed that the Appellants cannot claim that they are unable to formulate and provide an intelligent response. Denying the Appellants particulars at this stage of the proceedings in no way implies that they may not be entitled to seek some of these particulars at the next stage during discoveries.

[42] For these reasons, the Appellants’ Motion is dismissed with costs in any event of the cause. Since the Appellants have been unsuccessful in this Motion, I make no comment on the effect that the lack of an affidavit may have had if the Appellants had been partially or fully successful on the Motion.

Signed at Ottawa, Canada, this 1st day of February 2010.

"Diane Campbell"

Campbell J.

CITATION: 2010 TCC 57

COURT FILE NO.'S: 2009-1669(IT)G and
2009-1670(IT)G

STYLE OF CAUSE: Robert Mastronardi and
Lynda Mastronardi and
Her Majesty the Queen

PLACE OF HEARING: Windsor, Ontario

DATE OF HEARING: December 3, 2009

REASONS FOR ORDER BY: The Honourable Justice Diane Campbell

DATE OF ORDER: February 1, 2010

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