Citation: 2013 TCC 283
Date: 20130912
Docket: 2012-4580(GST)I

BETWEEN:

DARLA A. PLISKOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

**(Delivered orally from the Bench
on August 23, 2013, in London, Ontario.)**

Pizzitelli J.

[1] The Appellant appeals an assessment by the Minister of National Revenue (the "Minister") for $67,318.43 dated August 31, 2010, against her pursuant to subsection 325(1) of the *Excise Tax Act* of Canada (the "*Act*") involving a non-arm's length transfer on November 12, 2008, by her husband to her of his undivided 50% interest in their residence in London, Ontario, at a time her husband had a tax liability owing on account of his joint and several liability as a director of a corporation for such corporation's GST tax liability. The corporation's liability was in excess of that amount but the husband's liability as director was frozen as of the date he made a consumer proposal pursuant to the *Bankruptcy and Insolvency Act* of Canada on January 20, 2010.

[2] Most of the facts in this matter are not in dispute. The Appellant and her husband were married at the time of the transfer of the property and are still married, never having been separated or divorced in the interim. The Appellant has worked for a large insurance company, London Life, since 1984 as a software programmer and

her husband has been self-employed as an investment advisor or agent since 1994 but since 2004 with World Source Securities, operating the insurance part of the business under the name Dardan Capital Group ("Dardan").

[3] The Appellant and her husband purchased the home in London that is the subject matter of the transfer on September 22, 1988, as joint tenants with the help of a mortgage from the Appellant's employer for $65,000 which was paid off and discharged by May of 2000. The Appellant and her husband also arranged for a joint line of credit from TD Canada Trust for $78,000 secured by a mortgage on their home which was primarily used for their investment in Carriage Properties Inc. ("Carriage"), a corporation which purchased a commercial property out of which the husband and others operated their businesses. The Appellant and her husband each owned 25% of the shares in Carriage. The evidence is also that this line of credit was used to renovate the husband's offices and for business purposes, namely to fund expenses when income from his self-employment was low until it could be repaid.

[4] In December of 2002, the pair obtained a joint line of credit from Manulife Financial having a limit of $202,500 secured by a mortgage on their jointly-owned home from which it paid off the TD Canada Trust line of credit then standing at $74,188.00. The Appellant testified the new line had a larger credit limit that was not intended to be initially used other than for possible family emergencies but the Appellant's husband testified the intention was to use such line along the lines they used the former TD Canada Trust line, namely to include a business purpose which the Appellant denies.

[5] The terms of the Manulife line of credit was that either the Appellant or her husband could draw on it and under paragraph 2.3.2 thereof they were responsible for monitoring the credit limit. More specifically, paragraph 2.3.2 of the Operating Agreement reads as follows:

> 2.3.2 You agree that we need not warn you when you come close to or go over your credit limit. In particular, you must ensure that the balance under your Manulife One Account always remains low enough so that your credit limit allows you to make expected and any unexpected expenses from the account before you receive your next income payment.

[6] Notwithstanding the joint line of credit terms, the evidence is that the husband, with the Appellant's agreement, was in charge of that account and was given responsibility for monitoring and keeping the cheques used to draw on the account until the time the property was transferred to the Appellant after which no further cheques were drawn on the line account.

[7] In addition to the $74,188 payout of the TD Canada Trust line of credit from the Manulife line of credit, the Appellant's husband drew 14 cheques in total over the period from January 13, 2003 to October 7, 2008, ending shortly before the transfer of the property in issue, totalling almost $295,000 which the Appellant testified were without her permission. There were a large number of smaller entries on the Bank Statements for the line tendered into evidence by the Appellant showing repayment instalments, interest charges and service fees, which kept the account within the $202,500 limit for almost that entire period. There was no explanation of the source these deposits came from either the Appellant or her husband.

[8] Of the 14 cheques written by the Appellant's husband, the first three were written within the first three months of establishing the new line of credit totalling about $28,500 for which no explanation was proffered either. In 2003, four cheques were written to 1537462 Ontario Inc ("153") a corporation of which both the Appellant's husband and Carriage each had a 15% interest, totalling $81,400 as well as a cheque to an entity called Hollywood Tan for $11,000; all marked as loans or testified to as such by the couple. In 2005, only one cheque for $7,500 was written to an entity called Atlantic Packaging Products Ltd. as a loan, a corporation in which neither the Appellant nor her husband apparently had any interest. In 2007, a cheque was drawn to the joint chequing account the Appellant and her husband had with the Royal Bank from which was then drawn a cheque to purchase a car for the Appellant's husband. In 2006, one cheque was issued to Stone Crest Homes Ltd., a corporation owned entirely by the Appellant's husband ("Stone Crest") for $34,000 and in 2008 three further cheques were issued to Stone Crest totalling $87,000. Finally, in October of 2008, two cheques were issued to Dardan, the Appellant's husband's business, totalling $9,200.

[9] The Appellant testified she became aware the line of credit had reached its limit after her husband drew the first of his cheques to Stone Crest in 2006 and advised her husband that she did not approve asking him not to write further cheques. Her evidence is also that she was aware that by October of 2007 the line of credit balance had been reduced to about $88,000 but took no steps to reduce the line of credit or take control of the cheque book to reduce further risk to her, testifying she was prepared to give her husband another chance.

[10] It should be noted that Stone Crest was incorporated in 2005 to develop a townhouse condominium project in London, Ontario. The evidence of the husband is that he had engaged other parties to operate the project but found out they had been stealing from Stone Crest by ordering supplies for other projects on its account or underreporting expenses for his payment which resulted in substantial unpaid liabilities. In 2007, he fired those parties and took over the running of the project himself. Stone Crest experienced financial difficulties with the project for a number of reasons, causing its suppliers and creditors to commence or threaten lien and collection action, ultimately leading to its cessation of business and the bankruptcy filing of the husband personally. In order to deal with the creditors in an honourable way, the husband wrote cheques on the Manulife line of credit to Stone Crest in 2008 without his wife's knowledge, according to his testimony, to fund its obligations effectively maximizing the line usage a second time.

Position of the Parties

[11] The Appellant takes the position that she did not authorize the cheques written by her husband on the Manulife line of credit account; that these cheques were for the sole benefit of her husband and that these constitute an unjust enrichment to him qualifying her to treat her husband's interest in the property transferred to her as belonging to her under a constructive trust or constituting consideration she paid for the transfer. In the alternative, she argues that these cheques represent loans made by her husband which were not repaid and thus should be treated as loans by her to her husband from her share of the account. The Appellant also takes the position that the fair market value of the London home property on the date of transfer was only $332,000 and not $355,000, before deduction of liabilities thereon and division for her share thereof.

[12] The Respondent takes the position the Appellant paid no consideration for the transfer of her husband's interest in the property to her beyond the $2.00 evidenced on the Deed of Transfer and that the fair market value of the house was as assessed, at $355,000, arguing that there was no constructive trust and that this Court does not have the jurisdiction to grant the declarative relief of finding there was a constructive trust.

The Law

[13] As mentioned above, this is an assessment against the Appellant pursuant to section 325 of the *Act*, cascading to her as a result of her husband's director's liability with regards to unpaid GST of Stone Crest pursuant to section 323 of the *Act*.

[14] It is clear that section 323 places a joint and several liability on directors of the corporation to pay the amount that a corporation fails to remit under the *Act*. It is also clear that such liability arises at the time of the failure to remit, not the time the certificate for the amount of the corporation's liability has been registered in Federal Court as confirmed in *Filippazzo v R*, 2000 DTC 2326.

[15] As a condition to assessing director's liability, subsection 323(2) requires that certain steps be taken including that a certificate for the amount of the corporation's liability has been registered in Federal Court and execution for that amount has been returned unsatisfied. The evidence of the Respondent clearly shows that the Federal Court Certificate was issued for $71,005.78 on March 18, 2010 and that the Writ of Seizure and Sale was issued on that date and returned nulla bona thereafter and that the corporation is still indebted to Canada Revenue Agency ("CRA") for an amount far in excess of the sum contained in the certificate to this day. As a result of the Appellant's spouse having made a consumer proposal pursuant to the *Bankruptcy and Insolvency Act* on January 20, 2010, the amount owing to the CRA is reduced to $67,318.48 as of that date, in effect by the amount of the GST assessed against Stone Crest for the period in 2009 following such proposal date and the amount of interest charged against Stone Crest for the period during which the proposal was filed as required. Although not challenged by the Appellant, it should be noted that I agree with the Respondent that it is of no consequence that the Federal Certificate and Writ of Seizure and Sale were issued after the date the consumer proposal was made as there is no requirement in the language of the *Act* that requires it to be made beforehand, only that it be made as a condition of enforcement against the transferor.

[16] It should also be noted that neither the Appellant nor her husband challenged the husband's director's liability which was assumed by the Respondent in its Reply nor was there even a suggestion of a due diligence defence.

[17] Subsection 325(1) imposes a joint and several liability for unpaid GST on a transferee of property from a transferor if four conditions are met:

1. there must be transfer of property;

2. the transferor and transferee must have been dealing at arm's length or not have been spouses or common-law partners;

3. there must have been no consideration or inadequate consideration given by the transferee to the transferor; and

4. the transferor must have been liable to pay or remit an amount under this *Act* for the reporting period in which the transfer occurs or any preceding reporting period.

[18] There is no question or dispute that the Appellant's spouse transferred his undivided 50% interest in the property to the Appellant on November 12, 2012, as evidenced by a Deed registered on title. There is also no dispute the Appellant as transferee was at the time of transfer, and still is, the spouse of the transferor.

[19] As indicated above, the transferor is liable to pay CRA the sum of $67,318.48 by way of director's liability pursuant to subsection 323(1) in relation to the period of filing in which the transfer of property occurred and for previous periods, clearly established by the evidence of the Respondent's witness and not challenged by the Appellant. Accordingly, the Respondent had met its onus to provide *prima facie* evidence of the existence of the tax liability of the transferor as mandated by Archambault J. in *Gestion Yvan Drouin Inc. v Canada*, [2001] 2 CTC 2315, and the Appellant has not provided any evidence to rebut such evidence.

[20] The major dispute in this case centres on the issue of whether any consideration was given for the transfer and of course the fair market value of the property transferred which affects the limit of the Appellant's liability, if any, pursuant to the formula under section 325 which deducts the value of any consideration given to the transferor from the fair market value of the property transferred.

Consideration

[21] As previously indicated, the Appellant argues that due to the doctrine of constructive trust the Appellant obtained an interest in her husband's one-half share of the home by the amount of the cheques drawn by her husband on the Manulife line of credit account without her permission and for his sole benefit. In the alternative, she argues certain of these unauthorized cheques made payable to Stone Crest and totalling $121,000 constitute a loan by her to her husband and hence constitute consideration paid for his interest.

[22] As the Appellant has argued, the Supreme Court of Canada in *Pettkus v Becker*, [1980] 2 SCR 834, adopted in *Peter v Beblow*, [1993] 1 SCR 980, held that the elements of a constructive trust are (1) unjust enrichment; (2) a corresponding deprivation; and (3) a lack of juristic reason for the enrichment.

[23] The Appellant has argued this Court has applied the doctrine of constructive trust on a few occasions since the decision of former Chief Justice Bowman in *Angela Savoie v Her Majesty the Queen*, 93 DTC 552, who stated that the doctrine goes to the determination of the true ownership of the property and accordingly is germane in allowing the court to meet its obligation of determining true ownership in a dispute. The Appellant in fact relies on the decision of Webb J. in *Darte v Canada*, 2008 TCC 66, 2008 DTC 2567, and Rossiter A.C.J. in *Vidamour v Canada*, 2009 TCC 414, 2009 DTC 1279, the latter relying on the first; which in fact decided that the consideration amounted to the Appellant having established that they would have had a right to the declarative relief of constructive trust and hence the surrender of such right amounted to consideration for the transfer.

[24] The Respondent argues that Webb J. in *Darte* above considered a more detailed analysis of the doctrine than *Savoie* and found in fact that this Court had no jurisdiction to make a declarative relief of constructive trust. In paragraph 21, Webb J. stated:

> 21. As this Court is not a court of equity, the equitable remedy of constructive trust cannot be granted by this Court.

[25] It seems there is some confusion in this Court on the matter. While I acknowledge *Savoie* directly relied on the doctrine in a tax matter and *Darte* and *Vidamour* acknowledge the doctrine but found the giving up of a right to secure such declarative remedy was sufficient consideration, I personally am of the view this Court has no jurisdiction pursuant to section 12 of the *Tax Court of Canada Act* to determine property rights between two parties, particularly when one of the parties is not a party to the action. This jurisdiction in my view falls to the Superior Court of each province or designated competent Court. I agree with the conclusion of Webb J. in *Darte* that this Court cannot grant the remedy of constructive trust but not because of a general statement it is not a court of equity, as in my opinion, equitable doctrines often pervade decisions of this Court, including those of estoppel, counter attack and abuse of process, but because such property matters involve two parties, one of whom is not before this Court, in determining matters within the exclusive jurisdiction of the Superior Courts as indicated and that require consideration of a

totality of evidence from both such parties. I share the view expressed by Sarchuk J. as early as in his 1990 decision of *Nelson v The Minister of National Revenue*, 91 DTC 37 at paragraph 22 and again in his decision *John Karavos v R*, 96 DTC 1001 where he stated at paragraph 28:

> 28. A constructive trust is a mechanism by virtue of which a court with equitable jurisdiction can grant redress to an unjustly deprived person. In determining whether unjust enrichment exists and restitution through the invocation of a constructive trust is appropriate a court may take into account the deprived person's actual financial contributions, (which may properly include the contributions of earnings towards household bills and maintenance), all work performed in relation to the property, both physical and otherwise, and other factors as the performance of housekeeping duties, the raising of children etc. The result is that effectively a court is required to embark on an examination of the totality of the marital relationship extending over a period of 30 years to determine whether an unjust enrichment occurred and whether it would be appropriately remedied by a declaratory order vesting the claimant with title to property or by granting a monetary award. In my view such an inquiry is inappropriate in an income tax context. The use of a restitutory device to remedy situations of unjust enrichment should not be equated with the determination of a collateral issue necessary in order for this Court to carry out its statutory function, that is, to dismiss or allow an appeal or vacate or vary an assessment.

[26] In the case at hand, the Appellant argues that her husband was unjustly enriched for withdrawing more from their joint line of credit than his share in the equity of their home. The evidence, however, also suggests that her husband earned substantially more income than her as he reported income of approximately $229,000 in 2007, approximately $200,000 in 2008 and $142,000 in 2009 while the Appellant provided evidence that she earned approximately $85,000 in 2013 for the same employer she worked for throughout the years her husband reported his higher self-employed income as aforesaid. In determining whether there was unjust enrichment should I not consider higher contribution to the family pool as well as higher withdrawals as the Appellant asks? If the husband's withdrawals and contributions are the only evidence before me would it not be reasonable to assume he might be capable of arguing for a larger slice of the property to the comfort of CRA? No doubt if the Appellant and her husband were in an adversarial position instead of in a pooled income arrangement facing a loss of further equity, they would be arguing all the factors that might affect their respective positions as contemplated by Sarchuk J. in *Karavos* above. This demonstrates why this Court cannot be the best forum for such argument, being availed of only part if not a fraction of the evidence that can possibly exist to determine the issue.

[27] I should also add that I cannot agree that the Appellant paid any consideration by granting her husband any forbearance or waiver of her rights to seek the remedy of constructive trust as was found in *Darte* and *Vidamour* above. The Federal Court of Appeal was clear in *Livingston v Canada*, 2008 FCA 89, 2008 DTC 6233, that while forbearance, "the act of refraining from enforcing a right, obligation or debt - can act as consideration for a promise given in return" there must be a legal forbearance to do so. There is simply no evidence in this matter of any contract, waiver or other agreement that the Appellant has agreed to refrain from pursuing her right to declarative relief under the doctrine of constructive trust. The fact she has not done so and still has that option if she wishes to pursue it in the Superior Court of Justice suggests otherwise. The fact she is asking this Court to invoke a remedy she is not prepared to seek before a court having jurisdiction to deal with it only serves to confirm my view that the Appellant does not consider herself to be deprived or her husband to be unjustly enriched from his actions.

[28] Notwithstanding my opinion however, it is not necessary for me to determine this issue in more detail as even if I were to give the Appellant the benefit of applying *Savoie*, I could not possibly find in the facts herein that there was any unjust enrichment to the Appellant's husband nor deprivation to the Appellant as a result. The evidence is clear that the Appellant and her husband pooled their incomes for the benefit of their families and divided their family and financial responsibilities by agreement. The testimony of both the Appellant and her husband was consistent in that the financial responsibility for the oversight and control of the Manulife line of credit was with the husband with the Appellant's expressed approval. She testified that not only did he start off with this responsibility but that she elected to continue to allow him to keep the cheque book even after she became aware that he had been writing cheques; had maximized the use of the line of credit and then had paid it down to approximately $88,000 in 2007. She failed to take any steps to avoid risk nor took the opportunity to remedy the situation when the line of credit had returned close to the initial amount used to pay off the TD Canada Trust line of credit it replaced. I fail to see how a party can be unjustly enriched when he is given carte blanche to draw on a line of credit with the tacit approval of the party alleging she was deprived especially when the party deprived agrees to risk being deprived again after being given the chance to avoid the deprivation.

[29] The Appellant stood to gain from the husband's actions and investments due to their pooling arrangement and must suffer the downside of any such arrangement in the circumstances. The evidence is that several cheques were written to 153, a corporation in which both the husband and Carriage had a total of 30% of the shares. Moreover, even with regard to the cheques written to Stone Crest, it is clear that the

Appellant knew of her husband's investment in Stone Crest and that the couple were in an arrangement of pooling their wealth. I find it difficult to find unjust enrichment when one of the parties holds title to an asset for the benefit of all. The Appellant even suggested that the funds drawn to ultimately purchase her husband's vehicle was an unjust enrichment yet admits she rented her cars and thus was provided a vehicle from the family assets while a cheque drawn from the Manulife line of credit account to the couple's joint Royal Bank account, of which she presumably would have access to records and statements, and from there to buy a vehicle to be mainly driven by the husband but which she also admitted having driven, was inappropriate. Frankly, I find this incredulous in the context of a pooled wealth and income arrangement they both admitted existed.

[30] The Appellant suggested that the Manulife line of credit was not to be used for business but as mentioned earlier, the first withdrawal from that line of credit was to pay off the TD Canada Trust line of credit which had also been used for her husband's business. Moreover, when the Appellant became aware that the line of credit had been fully utilized from her husband's cheques and then repaid to the $88,000 level in 2007 before increasing again due mainly to his loans to Stone Crest, how did the Appellant think the paydown of the line of credit occurred? It only stands to reason that her husband or his business was the source of those paydown funds and so she must have known the line of credit account was being used for business, at least at that point, as was the TD Canada Trust line of credit before that.

[31] In my opinion, this is a spouse leaving her husband in charge of finances, demonstrating almost wilful blindness to her financial affairs due to her trust and confidence in him and then arguing unjust enrichment when his investment decisions did not pan out. This is not a situation where the doctrine of constructive trust would be applicable. I do not find there was any consideration paid by the Appellant to her husband as a result of any constructive trust.

Loan Consideration

[32] The Appellant also argued in the alternative that the loans her husband made to Stone Crest totalling $121,000 without her knowledge and which were not repaid should be treated as loans or indebtedness owed by her husband to her as consideration for the transfer. There is no dispute between the parties that loans or indebtedness owing by the transferor to a transferee can be considered consideration paid for a transfer for the purposes of subsection 325(1). However, I fail to see how loans made by the husband to Stone Crest from the Manulife line of credit account which the Appellant testified she had no knowledge of and which occurred without

her consent can magically become a loan made by him to her. There is no evidence of any loan between the Appellant and her husband; no evidence of even any discussion at the time suggesting any portion of these payments would be treated in this way as between them.

[33] Having regard to the above, I find that the Appellant has not rebutted the Minister's assumption in the Reply that the only consideration given for the transfer of the property by her to her husband, the transferor, was $2.00.

Valuation Issue

[34] Finally, the Appellant challenges the limit of her liability under the formula found in subsection 325(1), namely on the basis that CRA overvalued the home that is the subject matter of the transfer. Under section 325, a transferee of property will be liable to the CRA to the extent that the fair market value of the consideration given for the property falls short of the fair market value of the property.

[35] The Minister assumed in its Reply that at the time of transfer the market value of the subject property was at least $355,000, the fair market value of all mortgages and other encumbrances was $200,658.74 and that the transferor's interest was at least $77,170.63, being one-half of the equity. The Minister also assumed the fair market value of the consideration given for the transfer of her husband's interest was $2.00.

[36] The only assumption left for the Appellant to challenge is whether the fair market value of the subject property was $355,000. It is clear that the onus to demolish the Minister's assumptions as to value rests with the Appellant as confirmed recently in *Abdulnour v Canada*, 2013 TCC 34, [2013] GSTC 18, relying on the Supreme Court of Canada decision in *Hickman Motors Ltd. v Canada*, [1997] 2 SCR 336, which sets out the general principle that the initial onus of demolishing the Minister's assumptions rest with the taxpayer.

[37] In the case at hand, I am of the view that the Appellant has met the initial onus of demolishing the Minister's assumption that the fair market value of the property at the time of transfer was $355,000. The Appellant submitted evidence that the Minister's assumption was too high based on the Municipal Property Assessment Corporation's ("MPAC") assessment for 2008 of $332,000 as well as evidence from the local newspaper, the London Free Press November 2012 article that stated London values grew by only 10.9% over the four-year span from 2008. This was supported by an MPAC community snapshot article dated July 2012 that stated:

> Despite a rare dip during the 2008 recession and the loss of two major industrial employers, average real estate prices in London have recovered and are continuing to increase at their traditional rate of about 2% to 3% per year, according to Barb Whitney, President of the London and St. Thomas Real Estate Board.

[38] As further support for the fact a recession occurred in 2008, the Appellant submitted into evidence a Canada Mortgage and Housing Corporation Housing Market Outlook for London, Ontario, as at October 17, 2012, which indicated that the average price in London dropped in the fourth quarter of 2008 from an average of about $220,000 to $200,000 or by 10%.

[39] The onus to establish the value then shifted to the Respondent, who called two expert witnesses who were appraisers with the CRA who, using the comparative analysis approach in comparing six like sales of the 2008 and early 2009 years opined that the value of the property at the time of sale was $355,000, the figure used by the CRA in the reassessment in issue.

[40] The first expert witness testified as to the value and on cross-examination agreed that economic conditions might affect the value of property but maintained it was not so for the neighbourhood where the subject property is situate, testifying that in effect this neighbourhood did not suffer the effects of the recession to the same extent as prima facie evidenced by the Appellant's testimony, but provided no details or evidence or comparisons as to why? The Respondent's second expert witness, who co-signed the first expert witness' report because he had not obtained his appraisal credentials at the time of conducting the appraisal - something counsel for the Respondent failed to point out to the Court while qualifying the witness - testified that in fact most neighbourhoods are affected in the same manner by economic conditions. He too testified he did not conduct a specific analysis of such economic conditions. It is also clear that half the comparables sold in the first three-quarters of 2008 making averaging somewhat suspect.

[41] Frankly, the testimony of the Respondent's expert witnesses is in my view contradictory and no evidence was led to demonstrate why the Appellant's residence would not be affected to the same degree as the remaining neighbourhoods in London, Ontario. In these circumstances, I must find that the Respondent has not succeeded in rebutting the evidence of the Appellant as to the value and find the value to be $332,000. The fact the residence sold for $365,000 in October of 2012 suggests that in 2008, four years earlier, it was only worth about $329,000 or so. Notwithstanding the Respondent's expert witness testimony that the MPAC

assessment was outdated, the remaining evidence still collaborates to my satisfaction that the property was only worth $332,000 as per the Appellant's position.

[42] Accordingly, the Minister is ordered to reassess the Appellant on the basis the fair market value of the subject property at the time of transfer was only $332,000, and thus, net of outstanding encumbrances, the transferor's interest in the subject property was $65,670.63.

Signed at Ottawa, Canada, this 12th day of September 2013.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2013 TCC 283
COURT FILE NO.:	2012-4580(GST)I
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