Date: 19971210

Docket: T-47-91

BETWEEN:

KATHLEEN S. MAPLESDEN

Plaintiff

- and -

HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE

Defendant

Docket: T-1134-90

BETWEEN:

ALBION TRANSPORTATION RESEARCH CORPORATION, 285614 ALBERTA LTD., and HENRY JOHN ALBERT MAPLESDEN also known as JOHN HENRY ALBERT MAPLESDEN and KATHLEEN SYLVIA MAPLESDEN

Plaintiffs

- and -

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT

REED J.:

[1] The actions in T-47-91 and T-1134-90 were scheduled to be heard, one after the other, starting on December 1, 1997. At the commencement of the hearing of T-47-91, it was decided that an order should issue that the two actions be heard together on common evidence.

[2] The T-47-91 action is an appeal of a Tax Court decision that found the plaintiff liable for income tax because of a shareholder's loan she had received. There had been no arrangements made for *bona fide* repayment within a reasonable time and the loan had not been repaid within one year of the creditor's year end. (Refer subsection 15(2) of the *Income Tax Act*). The T-1134-90 action is a claim in negligence against the defendant alleging that it was Revenue Canada's own actions that made it impossible for the plaintiff to repay the loan. Damages are sought in the amount of the tax liability. Both actions arise out of the same fact situation. Most of the facts are not in dispute.

Facts

[3] The plaintiff's husband, Mr. Maplesden, became involved, in 1984, in several businesses that took advantage of the Scientific Research Tax Credits provisions of the *Income Tax Act*. A number of inter-related corporations were involved. The two corporations relevant for present purposes are 285614 Alberta Ltd. ("614") and Albion Transportation Research Corporation ("Albion"). Mr. Maplesden owned 51% of the

shares of the '614 company and Mrs. Maplesden owned 49%. '614 was a holding company and owned all the shares of Albion. Mr. and Mrs. Maplesden did not deal at arm's length with either '614 or Albion.

[4] On October 30, 1984, Albion approved, by corporate resolution, a loan of $750,000.00 to Mrs. Maplesden. This was to be repayable on demand and to be secured by a promissory note. On November 3, 1984, Albion provided Mrs. Maplesden with $710,025.00. Mrs. Maplesden signed a non-interest bearing demand promissory note in favour of Albion for $750,000.00.

[5] The money was used to purchase a house and approximately 160 acres of land ("the Priddis property"). The purchase price of that property was $750,000. The amount of the purchase price over the $710,025.00 that was loaned by Albion to Mrs. Maplesden was provided by Mr. Maplesden. That amount was advanced to him, by way of a loan from Albion Microelectronics Research Corporation Ltd. That company was, or subsequently became, like Albion, a tax debtor.

[6] The Priddis property was acquired by Mrs. Maplesden and was registered in her name. It has been her residence ever since. She has not been employed outside the home at any material time and her only significant asset is the Priddis property. She exercised no independent judgment in either obtaining the loan or purchasing the property. She relied entirely on her husband's decisions in this regard.

[7] On November 16, 1984, Revenue Canada issued a Notice of Assessment against Albion respecting taxes due under subsection 195(2) of the *Income Tax Act*. There was no Notice of Objection to this assessment filed.

[8] In July of 1985, Mr. and Mrs. Maplesden and those who were advising them considered transferring the title to the Priddis property from Mrs. Maplesden to the '614 company. This transfer was not proceeded with because the Albion operating companies were, at the time, under surveillance by Revenue Canada with respect to a possible tax fraud (Exhibit 28, page 5).

[9] On August 27, 1985, a certificate was registered in the Federal Court, pursuant to section 223 of the *Income Tax Act*, certifying that the principal amount of $15 million dollars in taxes together with interest in the amount of $1,368,835.62 was owed by Albion. On the same day a writ of *fieri facias* was issued with respect to that certificate. Revenue Canada realized net proceeds of $3,391,659.01 from this process and applied them against the taxes owed by Albion.

[10] On September 23, 1985, Albion assigned the debt owed to it by Mrs. Maplesden to the '614 company. The '614 company agreed to pay Albion, on demand, an amount corresponding to the amount of that debt. Two days later, an unrelated corporation, 328095 Alberta Ltd., agreed to purchase all of the shares of the '614 company and to assume the indebtedness of the '614 company to Albion. However, that purchase was

not completed. The '614 company, thus, continued to own all the shares of Albion.

[11] On September 30, 1985, Revenue Canada issued an Income Tax Assessment in the amount of $750,000.00 for the 1984 taxation year against Mrs. Maplesden. This assessment was pursuant to subsection 160(2) of the *Income Tax Act*. On the same day, a certificate was registered in the Federal Court pursuant to section 223 of the Act. On October 2, 1985, a writ of *fieri facias* was registered against Mrs. Maplesden's title to the Priddis property.

[12] The September 30, 1985 Notice of Assessment stated:

> This Assessment is issued pursuant to the provisions of Subsection 160(2) of the Income Tax Act and is in respect of a transfer on November 3, 1984 from Albion Transportation Research Corporation to Kathleen S. Maplesden of the property located at Site 10, R.R.No. 1, Priddis, Alberta. Legal Description: SW 1/4 Section 20, Township 22, Range 3W of the 5th Meridian containing 64.7 Hectares
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> (underlining added)

[13] A clerical error had been made. It had been intended that the notice read "in respect of a transfer on November 3, 1984 from Albion ... of funds to purchase the property ...". The assumption underlying this intended assessment was that the promissory note that had been signed by Mrs. Maplesden had no value.

[14] In any event, the Notice of Assessment that was issued was clearly erroneous on its face because the Priddis property had not been transferred from Albion to Mrs.

Maplesden. The property had been acquired from an arm's length vendor.

[15] The relevant provisions of section 160 provide:

> (1) Where a person has ... transferred property, either directly or indirectly, ... by any means whatsoever, to
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> ....
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> a person with whom he was not dealing at arm's length,
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> ....
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> the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
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> (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
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> ....
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> (2) The Minister may at any time assess a transferee in respect of any amount payable by virtue of this section and the provisions of this Division are applicable mutatis mutandis in respect of an assessment made under this section as though it had been made under section 152.

[16] On October 16, 1985, a Notice of Objection with respect to the subsection 160(2) assessment was filed. It was pointed out that the Priddis property had not been transferred from Albion to Mrs. Maplesden, and that the loan was permitted under subsection 15(1) of the *Income Tax Act*.

[17] On October 18, 1985, a Notice of Reassessment for the 1984 taxation year was sent to Mrs. Maplesden. It was issued on the basis that a benefit, governed by subsections 15(1) and 15(2) of the *Income Tax Act*, had been received. The taxes owing

were assessed at $371,954.18. A Notice of Objection was filed with respect to this assessment. It was stated that no amount had been paid by the '614 company to Mrs. Maplesden and that the loan was expressly permitted to the taxpayer under subparagraph 15(2)(a)(ii) of the *Income Tax Act*. Subparagraph 15(2)(a)(ii) allows for loans to assist in the purchase of a dwelling providing certain conditions are met. One of the two conditions, relevant for present purposes, is that when *bona fide* arrangements are made at the time the loan is given, for repayment within a reasonable time the loan will not be treated as income in the taxpayer's hands. The other is that if the loan is repaid within one year of the creditor's year end it will not be taken into the taxpayer's income.

[18] Many discussions were held between Revenue Canada officials and Mr. Maplesden's representatives with respect to the tax situation of the various Albion companies. Insofar as Mrs. Maplesden's situation is concerned, as has been noted, a Notice of Objection was filed on October 16, 1985. Also, a letter, dated March 14, 1986, was sent to Revenue Canada enclosing copies of the relevant documents and pointing out that the Priddis property had never been owned by Albion, but had been purchased by Mrs. Maplesden from an arm's length vendor.

[19] On June 9, 1988, Revenue Canada issued a Notice of Reassessment against Mrs. Maplesden for income tax for the 1984 taxation year. It was issued in the amount of $342,101.53, and was based on the receipt by her of a shareholder's benefit. On the same day the assessment pursuant to subsection 160(2) was reduced to zero. On June 10, 1988,

the writ that had been registered against the Priddis property pursuant to the 160(2) assessment was removed and a new writ in the amount of $342,101.53 was registered.

[20] As already mentioned, subsection 15(2) sets out the conditions under which a shareholder's benefit will not be included in a person's income:

> Where a person ... is connected with a shareholder of a particular corporation ... and ... has in a taxation year received a loan from or has become indebted to the particular corporation, ... the amount of the loan or indebtedness shall be included in computing the income for the year of the person ... unless
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> . . . .
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> ... *bona fide* arrangements were made, at the time the loan was made or the indebtedness arose, for repayment thereof within a reasonable time; or
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> (b) the loan or indebtedness was repaid within one year from the end of the taxation year of the lender or creditor in which it was made or incurred and it is established, by subsequent events or otherwise, that the repayment was not made as part of a series of loans or other transactions and repayments.
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> (underlining added)

[21] The plaintiff appealed the tax assessment to the Tax Court. That appeal was dismissed on December 11, 1990. In that appeal it was argued that the demand promissory note was "a *bona fide* arrangement made for repayment of the loan within a reasonable period of time". Alternately, it was argued that the debt had been repaid within the time prescribed by paragraph 15(2)(b) because the debt to Albion had been repaid on the assignment of the loan to the '614 company. These arguments were rejected. The first because, while a promissory note may be a *bona fide* arrangement for repayment of a loan, it does not meet the requirement of providing for repayment

"within a reasonable period of time". A demand note can endure indefinitely. The second argument was rejected because the appropriate question to ask, when considering paragraph 15(2)(b), is not whether the original lender is still owed money, but whether the taxpayer is still indebted on the loan she has incurred.

Vacating a Tax Assessment on Equitable Grounds?

[22] The argument before me was somewhat different than that made to the Tax Court. It was argued that Revenue Canada itself had made it impossible for the plaintiff to repay the loan and therefore had caused her tax liability. Accordingly, as a matter of equity, it is argued, Revenue Canada should not be able to collect the taxes and the tax assessment should be vacated.

[23] When the writ against the Priddis property was first registered, in October 1985, the time period allowed for repayment, under paragraph 15(2)(b), had not expired. The fiscal year end for both Albion and the '614 company was August 31. The money had been borrowed in November of 1984. Thus Mrs. Maplesden had until August 30, 1986 before the loan would be considered, under paragraph 15(2)(b), to be income in her hands.

[24] Counsel for the plaintiff argues that, if the writ pursuant to the erroneous subsection 160(2) assessment not been in place, Mrs. Maplesden could have sold the Priddis property to repay the debt owed, or she could have conveyed the property to the

'614 company and thereby extinguished the debt. Thus, it is argued that it was Revenue Canada's own actions in registering and maintaining a writ against the property, in support of an erroneous assessment, long after the erroneousness of that assessments had been called to its attention, that caused the plaintiff's income tax liability to arise. In such circumstance, it is argued the tax assessment should be vacated.

[25] I have been referred to no authority to support the proposition that this Court has authority to grant the relief sought. The Court's authority is to determine the correctness of the Minister's decisions by reference to the applicable law, primarily the *Income Tax Act*, as applied to the facts of the taxpayer's case. If the relevant facts fall within the provisions of the Act, then, those provisions govern.

[26] Counsel refers to only two authorities: section 3 of the Federal Court Act and the decision in *Teledyne Industries Inc. et al. v. Lido Industrial Products Ltd.* (1982), 31 C.P.C. 285 (F.C.T.D.).

[27] Section 3 of the *Federal Court Act* provides:

> The court of law, equity and admiralty in and for Canada now existing under the name of the Federal Court of Canada is hereby continued ...

That section continues the Court as a court of equity and authorizes the application of equitable principles. That jurisdiction has its roots in the pre-1873 *Judicature Act* days when the courts in England were not unified. "Equity" in section 3 does not mean what is

just and fair. It refers to those principles of law that were administered before 1873 by the Courts of Equity (mainly the Court of Chancery).[1] Tax laws were never part of that regime. Tax laws were within the jurisdiction of the Courts of Exchequer. The Federal Court has equitable jurisdiction in many areas. See Sgayias et al., *Federal Court Practice*, 1997 at 53. But this does not include authority to grant the kind of remedy the plaintiff (appellant) seeks. An explanation of equitable principles and when they apply can be found in Spry, Equitable Remedies (3rd ed., 1984).

[28] In the *Teledyne* decision the Court referred to its equitable jurisdiction to assess the date from which interest should run on a judgment. This "equitable jurisdiction arose because the statutory grant of authority given to the Court was expressed to be "unless the Court orders otherwise". There is no such discretionary grant of authority conferred on the Court in the case of income tax appeals. The plaintiff's appeal of the Tax Court decision must fail.

Negligence Action

[29] I turn next to the claim that Revenue Canada acted negligently in maintaining the writ against the Priddis property, long after it should have known that that writ was not well founded, and thereby caused the plaintiff damage. There is no doubt that Revenue Canada issued an erroneous tax assessment (the subsection 160(2) assessment). An error

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1 See Hood Phillips, *The First Book of English Law* (6th Ed), 1970, at p. 11.

does not itself, however, necessarily constitute negligence.[2] There is no evidence that the defendant's officials acted negligently when they issued the writ in the first instance, in pursuit of taxes owed by Albion.

[30] There was a clerical error in the assessment. The filing of a Notice of Objection does not mean that the taxpayer's position is necessarily accepted at that date. The letter of the following March, sending copies of the appropriate documents to Revenue Canada, indicates that Revenue Canada was still investigating the situation. There is no evidence that the investigation was completed before May 1988 and no negligence between March 1986 and September 1986 has been demonstrated.

[31] Even if I were to assume negligence in this case, I still could not find that the actions of Revenue Canada caused the non-conveyance of the property. There is no reliable evidence that the taxpayer seriously considered conveying the property to '614 or selling it to a third party during the time in question. The proposed transfer of the property in July 1985 had not been proceeded with because of concern that the property might become subject to seizure as a result of Revenue Canada's tax investigations. In order to be persuaded that the writ caused the non-transference of the property during the relevant 1985 - 1986 period, I would expect to see, at least, some communication with Revenue Canada asking it to lift the writ to allow conveyance to '614 or to allow a

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2 See *Hodgins v. Nepean (Township) Hydro-Electric Commission*, [1976] 2 S.C.R. 501.

sale to a third party. Given that there were ongoing investigations with respect to the tax situation of the Albion companies, I am not prepared to find that the existence of the writ was the cause of the debt not being repaid. If there had been a request to Revenue Canada that it expedite the reassessment process with respect to the Priddis property, to allow Mrs. Maplesden to dispose of that property to avoid a tax liability, the result might be different. I note that at least as late as January 1986, the legal advise the Maplesdens were getting was that the property not be transferred.[3]

[32] There is an additional reason why the plaintiff cannot succeed in her negligence action. Mrs. Maplesden brought an action against the solicitors Burnet, Duckworth and Palmer for arranging for her to take a shareholder's loan without advising her of the risk of tax implications. On February 26, 1993, Mrs. Maplesden recovered damages in negligence from that law firm, in the amount of $356,156.20. The Alberta Court of Queen's Bench assessed this amount as the damages sustained by Mrs. Maplesden as a result of the solicitor's negligence. This was calculated to provide compensation for the taxes owed up to the date when that tax liability was confirmed by the Tax Court on December 11, 1990.

[33] Counsel for the plaintiff argues, with respect to the Queen's Bench decision, that the damages that were awarded should only be considered to have compensated the plaintiff for the tax liability owed to the extent that she actually received such funds. The

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3 Exhibit 28, p. 5

award was calculated by deducting, from the amount otherwise to be awarded, an amount attributable to the benefit Mrs. Maplesden received as a result of living in the house during the relevant time. Legal fees were also deducted. I do not find this argument persuasive. The plaintiff has already recovered damages from her solicitors for the tax liability that arose. She cannot recover a second time.

[34] I have not been persuaded that the existence of the writ caused the damage that is alleged and, in any event, the plaintiff has recovered damages from her solicitor for the amount owed as taxes.

Conclusion

[35] For the reasons set out above both actions will be dismissed.

"B. Reed"

Judge

OTTAWA, ONTARIO
December 10, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS OF RECORD

COURT FILE NO.:	T-47-91
STYLE OF CAUSE:	KATHLEEN S. MAPLESDEN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	DECEMBER 1, 1997

REASONS FOR JUDGMENT OF THE HONOURABLE MADAME JUSTICE REED

DATED: DECEMBER 10, 1997

APPEARANCES:

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JAMES YASKOWICH	FOR DEFENDANT

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