Federal Court of Appeal

Cour d'appel fédérale

Date: 20101110

Dockets: A-177-10
A-178-10

Citation: 2010 FCA 303

CORAM: **DAWSON J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

Docket: A-177-10

S. ROSS KEUS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

Docket: A-178-10

T. BRUCE KEUS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Halifax, Nova Scotia, on November 9, 2010.

Judgment delivered at Halifax, Nova Scotia, on November 10, 2010.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] S. Ross Keus and T. Bruce Keus (the appellants) are brothers who entered into a partnership agreement for the purpose of carrying on a commercial fishing operation. Each filed tax returns for the 2000, 2001 and 2002 taxation years in which they claimed certain deductions. Each was then reassessed. Each filed an appeal from the reassessment to the Tax Court of Canada (Tax Court). Their appeals were heard together by a Judge of the Tax Court who gave judgment pursuant to the informal procedure. The Judge's reasons are cited as 2010 TCC 294.

[2] Each brother has now appealed the decision of the Tax Court. These appeals have been consolidated by order of this Court.

Issue

[3] The sole issue to be decided on this appeal is whether the Judge erred in finding that certain interest expenses were not deductible by the appellants.

The Facts

[4] The following facts are not in dispute. In 1996, the appellants bought a fishing enterprise for $200,000.00. Based on the value of the gear to be acquired, their bank would only lend $65,000.00 to the appellants to finance the purchase.

[5] To obtain the funds needed to complete the purchase, the appellants' parents, Elizabeth and Cornelius Keus, obtained two bank loans. One loan, for $100,000.00, was secured by a mortgage on the parents' home. The other loan, in the approximate amount of $35,000.00, was a personal

loan. No contemporaneous records were created to document any arrangement between the appellants and their parents.

The Decision of the Judge

[6] The Judge found as a fact that the interest expenses for the two loans were incurred by Cornelius and Elizabeth Keus. The Judge also found as a fact that the expenses were not incurred by the appellants. It followed, as a matter of law, that the interest expenses fell within the limitation on business income deductions contained in paragraph 18(1)(*a*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act). It further followed that the expenses were not deductible under paragraph 20(1)(*c*) of the Act.

The Positions of the Parties

[7] The appellants do not assert the Judge committed any error of law. Nor do the appellants assert any specific palpable and overriding error with respect to any particular finding of fact made by the Judge. Rather, the appellants say that it is "clear from the evidence" that the parents lent money to the appellants to complete the purchase of the fishing enterprise. They say it can be "assumed from the evidence" that the loan from the parents to the appellants was on the same terms and conditions as the loan to the parents from the bank. It is, therefore, submitted that the relationship between the parents and the appellants was one of debtor-creditor. In the alternative, the appellants submit that the parents acted as agents of the appellants when arranging the loan with the bank.

[8] The respondent argues that these are new arguments the appellants cannot advance on appeal because they did not lead a proper evidentiary foundation before the Tax Court. Further, the respondent submits that the Judge did not commit any palpable and overriding error when finding the interest expenses were incurred by the parents.

Consideration of the Positions of the Parties

[9] In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, at paragraph 32, the Supreme Court of Canada restated the principle that applies when a party seeks to raise a new issue on appeal. Justice Binnie wrote:

> […] Unless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited. As Duff J. put it in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at p. 539:
>
> > A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it. [Emphasis added.]

[10] The rationale for this principle is obvious. It furthers the fairness of both the trial and the appeal.

[11] The onus on a party seeking to raise a new issue is substantial. The party must establish that all relevant facts were adduced at trial and that no satisfactory response could have been offered by the opposite party. See: *Block Bros. Realty Ltd. v. Boese*, [1988] B.C.J. No. 416 (C.A.).

[12] The new issues the appellants seek to raise are whether there was a debtor-creditor or an agency relationship between the appellants and their parents. Both issues are in large part fact driven.

[13] The appellants have failed to show that at trial they:

i) examined their witnesses on the facts relevant to these issues;

ii) cross-examined the auditor produced on behalf of the Canada Revenue Agency on the facts relevant to these issues; or

iii) made submissions to the Judge on these issues.

[14] The appellants have fallen well short of establishing that all relevant evidence was adduced before the Tax Court, or that the respondent could not have adduced relevant evidence on these issues had it known that these issues would be in play. In consequence, the appellants are precluded from arguing the new issues on appeal.

[15] Moreover, the evidentiary record, equivocal as it is on these issues, coupled with the factual findings the Judge did make, lead to the inevitable conclusion that the appellants did not establish either a debtor-creditor or an agency relationship.

[16] Therefore, I would dismiss the appeal with costs to the respondent.

[17] A copy of these reasons shall be placed in Court file A-178-10.

"Eleanor R. Dawson"
J.A.

"I agree
Carolyn Layden-Stevenson J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Mr. Joseph M. J. Cooper	FOR THE APPELLANTS
Ms. Catherine M. G. McIntyre	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Blackburn English	FOR THE APPELLANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

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