Federal Court of Appeal | Cour d'appel fédérale

**Date: 20210331**

**Docket: A-11-20**

**Citation: 2021 FCA 66**

**CORAM:** **STRATAS J.A.**
**WOODS J.A.**
**RIVOALEN J.A.**

**BETWEEN:**

**DOW & DUGGAN LOG HOMES INTERNATIONAL (1993) LIMITED**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard by online video conference hosted by the Registry on March 24, 2021.

Judgment delivered at Ottawa, Ontario, on March 31, 2021.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: WOODS J.A.
RIVOALEN J.A.

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## REASONS FOR JUDGMENT

**STRATAS J.A.**

[1] The appellant appeals from the judgment of the Tax Court of Canada (*per* Wong J.): 2019 TCC 280.

[2] The appellant submits that the Tax Court erred in law by relying on evidence in a book of documents that was not properly part of the evidentiary record. The appellant adds that some of the documents in the book are hearsay.

[3] I would not give effect to these submissions. In the Tax Court, the appellant failed to object to the admission into evidence of the documents (*e.g.*, on the basis they were hearsay) and failed to object to the unrestricted use of the documents.

[4] When evidence is offered at first instance and the opposing party considers the evidence inadmissible or restricted in its use, the party must object. The party's objection must clearly notify the Court that an evidentiary ruling is needed. Unless such an objection is made, the Court and all parties are entitled to proceed on the basis that the evidence is admissible without any restrictions on its use.

[5] Where the opposing party is not clear on the matter, good judicial practice is to follow up and clarify whether or not there is an objection. Not clarifying the matter—leaving things vague and uncertain—can lead to confusion and sometimes to a successful appeal.

[6] The Ontario Court of Appeal recently spoke to the issues of the admission of evidence, the use of evidence and objections: *Girao v. Cunningham*, 2020 ONCA 260, 2 C.C.L.I. (6th) 15 at paras. 33-34. In a later case, it stressed the need for first instance courts to clarify any uncertainties on these issues: *Bruno v. Dacosta*, 2020 ONCA 602, 69 C.C.L.T. (4th) 171 at

paras. 53-66. These cases support the above observations. They also give astute advice to first-instance judges and counsel.

[7] In this case, the Tax Court was entitled to treat the book of documents as being admissible without restrictions on its use. The respondent presented the book of documents to the Court. The Court asked the appellant whether it objected "with respect to the entering and marking" of it. The appellant responded, "No, your Honour, because we basically agreed to that, although there are a couple of issues that relate to them." The appellant then raised issues of usefulness and relevance in a non-specific, somewhat vague way.

[8] This did not place the Court on sufficient notice that it must receive submissions and rule on the admissibility or use of the evidence. Overall, given the nature of the appellant's response to the Tax Court's question, the Court was entitled to proceed on the basis that there was no objection and the documents could be used for the truth of their contents.

[9] Even if the appellant made an effective objection and the book of documents was inadmissible, the outcome of this appeal would not change. The appellant failed to raise a *prima facie* case sufficient to demolish the Minister's assumptions in accordance with the principles in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, 148 D.L.R. (4th) 1. The Tax Court made factual findings (at paras. 40-41, 44, 47, 57-58, 69, 74, 95) that rejected key portions of the appellant's case.

[10] The appellant also submits that the Tax Court ignored evidence when it decided its tax appeal. I reject this. The failure of the Court to mention evidence in its reasons does not mean it ignored the evidence: *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 66-69. The Court is presumed to have considered all of the evidence before it: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 46.

[11] First-instance courts, though, must be careful. If the high test for inadequacy of reasons has been met, appeal courts can set aside first-instance judgments: see *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 and related Supreme Court cases. In response to questioning from the Court, the appellant confirmed that it was not raising that issue here.

[12] The appellant also takes issue with the Tax Court's findings of mixed fact and law, in substance questioning the weight the Court gave to certain evidence. I reject this too. We do not reweigh the evidence before the first-instance court and interfere just because we reach a different conclusion: *Mahjoub* at para. 70.

[13] The appellant submits that the penalty the Tax Court upheld against it must be set aside on the ground that the Tax Court relied on hearsay evidence warranting its imposition. I reject this. There was evidence offered at the hearing supporting its imposition and that evidence went in without objection.

[14] Therefore, I would dismiss the appeal with costs.

"David Stratas"
J.A.

"I agree
Judith Woods J.A."

"I agree
Marianne Rivoalen J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-11-20 |

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE S. WONG DATED DECEMBER 12, 2019, NO. 2017-2928(GST)G**

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| **STYLE OF CAUSE:** | DOW & DUGGAN LOG HOMES INTERNATIONAL (1993) LIMITED v. HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY |
| **DATE OF HEARING:** | MARCH 24, 2021 |
| **REASONS FOR JUDGMENT BY:** | STRATAS J.A. |
| **CONCURRED IN BY:** | WOODS J.A.<br>RIVOALEN J.A. |
| **DATED:** | MARCH 31, 2021 |

**APPEARANCES:**

| | |
|---|---|
| Melanie Petrunia | FOR THE APPELLANT |
| Stan McDonald | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Nijhawan McMillan Petrunia<br>Halifax, Nova Scotia | FOR THE APPELLANT |
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