Docket: 2014-1875(IT)G

BETWEEN:

LANCAN INVESTMENTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on January 27, 2015 at Toronto, Ontario

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Mark Tonkovich
Counsel for the Respondent:	Luther P. Chambers, Q.C. Martin Beaudry

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ORDER

WHEREAS THE Appellant brought a motion for an order:

1. under rule 53, that certain offending portions and paragraphs of the respondent's Reply, dated September 30, 2014, be struck as an abuse of the process of the Court and/or that they may prejudice or delay the fair hearing of this appeal; or

2. in the alternative to the relief sought under the preceding paragraph, that the respondent provide particulars as contemplated by rule 52 in response to the appellant's Demand for Particulars dated October 27, 2014, namely an order that:

> the respondent fully particularize all facts upon which she presently relies and which she intends to prove in order to establish that the non-resident resided in Liechtenstein at any time relevant to supporting the reassessment appealed from;

3. costs of this motion fixed at $9,000, payable forthwith and in any event of the cause; and

4. such further order or directions as are just and equitable in the circumstances.

AND UPON hearing submissions from the parties;

THIS COURT ORDERS THAT:

1. The Respondent is directed to provide the particulars with respect to Questions 2 and 3 of the Appellant's Demand for Particulars dated October 27, 2014, within 60 days from the date of this Order. If an Amended Reply if filed within the 60 days striking the Residency Allegation then the Respondent does not have to provide the said particulars.

2. The Respondent shall pay to the Appellant costs in the fixed amount of $8,000.00 in any event of the cause.

Signed at Ottawa, Canada, this 3rd day of February 2015.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2015 TCC 27
Date: 20150203
Docket: 2014-1875(IT)G

BETWEEN:

LANCAN INVESTMENTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Pizzitelli J.

[1] The Appellant has appealed a reassessment that effectively increased its obligations to withhold and remit required Part XIII of the *Income Tax Act* (the "*Act*") withholding taxes from 5% to 15% in connection with its repurchase of shares from a foreign entity assumed to reside in the Netherlands. The Respondent takes the position that the foreign entity was a trust instead of a corporation and hence under the applicable Treaty is subject to the higher withholding taxes. In the alternative, the Respondent has pleaded that the foreign entity is a resident of Liechtenstein that is subject to a 25% withholding tax the Appellant would be responsible for remitting to the tax authorities and so the appeal should be dismissed as such obligation is in effect greater than the reassessed amount, notwithstanding that the Respondent is not seeking the extra amount. It is the alternative pleading that is in issue in this motion.

[2] The Appellant brings a motion to strike paragraph 9 of the Respondent's Reply dated September 30, 2014(the "Residency Allegation") which reads as follows:

> 9. Alternatively, he says that at all material times Palfinvest Reg. Trust was a resident of the Principality of Liechtenstein by reason of its management and control being in that jurisdiction, rather than a resident of the Netherlands.

[3] The Appellant brings the above motion to strike pursuant to Rules 53(1)(*a*) and (*c*) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") which read as follows:

> **53.** (1) The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document
>
> (*a*) may prejudice or delay the fair hearing of the appeal;
>
> …
>
> (*c*) is an abuse of the process of the Court; or
>
> …

[4] In the alternative, the Appellant requires an order for particulars pursuant to Rule 52 in response to the Appellant's Demand for Particulars dated October 27, 2014, namely an order that:

> the respondent fully particularize all facts upon which she presently relies and which she intends to prove in order to establish that the non-resident resided in Liechtenstein at any time relevant to supporting the reassessment appealed from;

[5] Pursuant to the above Demand for Particulars in relation to the Residency Allegation, the Appellant posed three questions which were answered by the Respondent, all as follows:

> Q1. Which are the "material times" to which the respondent refers?
>
> The "material times" referred to in paragraph 9 of the Respondent's Reply are all times that are relevant to the redemption of the Appellant's shares held by Palfinvest Reg. Trust.
>
> Q2. Who exercised management and control of Palfinvest Reg. Trust ("Palfinvest") during the material times?
>
> The person or persons who exercised management and control of Palfinvest Reg. Trust during the material times is a matter of evidence to be adduced at trial, in respect of which no particulars can be demanded for the purposes of pleading.

> Q3. How was management and control of Palfinvest exercised during the material times?
>
> The manner in which the management and control of Palfinvest Reg. Trust was exercised during the material times is a matter of evidence to be adduced at trial, in respect of which no particulars can be demanded for the purpose of pleading.

[6] The Appellant also seeks costs of $9,000.00 in any event of the cause and such other relief as is just and equitable in the circumstances.

[7] I will consider the Motion to Strike and then deal with the Demand for Particulars and costs.

Motion to Strike

[8] The issues of the Motion to Strike and the Demand for Particulars are connected in this matter; being two sides of the same coin. The Appellant argues that the Respondent has not provided any material facts to support such Residency Allegation and that its failure to provide particulars, both in its pleading as well as to the Demand for Particulars suggests the Respondent has no factual foundations for the Residency Allegation and is attempting to ground an improper "fishing expedition" at discovery, thus is an abuse of process and forces the Appellant to exert huge effort and expense to investigate all possible scenarios of which it has no knowledge hence is also prejudicial to it and may lead to unreasonable delays and accordingly should be struck. The Respondent argues that there are no grounds for striking the pleading since if it is taken to be true that Palfinvest resided in Liechtenstein then the Respondent would be successful at trial and argues the Appellant has knowledge of the facts itself.

[9] The parties are in agreement as to the general principles of law applicable to the issues in this matter. It is trite law from the Supreme Court of Canada decision of *Hunt v Carey Canada Inc.* [1990] 2 SCR 959, relied upon in *Satin Finish Hardwood Flooring (Ontario) Limited v The Queen*, 96 DTC 1402, at 1404 that:

> The test used by the courts in motions to strike out a notice of appeal is whether it is "plain and obvious" that the action cannot succeed even if the facts alleged in the notice of appeal are true.

[10] It is clear, as aforesaid, that in the most general sense of the Residency Allegation, if Palfinvest was a resident of Liechtenstein, the Minister would succeed. I appreciate that the Appellant has relied on cases such as *Kinglon Investments Inc. v The Queen*, 2014 DTC 1128 and *O'Dwyer v The Queen*, 2012 TCC 261, 2012 DTC 1215, where this Court has struck pleadings for failure to plead sufficient facts; however I note that in both cases the presiding judge expressed concern that even giving the facts their widest credibility they would not be enough to establish the elements necessary to justify the assessments and thus had no reasonable chance of success, notably in the context of a Rule 58(1)(*b*) for *O'Dwyer* and Rule 53(1)(*d*) for *Kinglon*, none of which Rules are in issue here. In the case at hand, the mere statement that the management and control of the party in question is in Liechtenstein would, in its widest sense, disclose reasonable grounds for opposing the appeal, if found to be true.

[11] I also appreciate Appellant's counsels reference to the decision of former Chief Justice Rip in *Cameco Corp. v The Queen*, 2010 TCC 636, where several paragraphs were struck on the basis they included only bald assertions that failed to specify the underlying factual components of the impugned allegations, but in that case, the chief allegations pertaining to transfer pricing were only struck after Chief Justice Rip gave the Respondent leave to amend the pleadings challenged and the Respondent was found not to have done so and thus created an abuse of process. I take judicial notice of the Federal Court of Appeal decision in *Yacyshyn v Tthe Queen*, [1999] FCJ No. 196, 99 DTC 5133, which I relied upon in *Cameco v The Queen*, 2014 TCC 367, a decision of mine that counsel for the Appellant referenced in argument, where Letournou JA stated at paragraph 18 that:

> … the dismissal of an appeal is a drastic and somewhat ultimate remedy reserved for the egregious case or when no other alternative and less drastic remedy would be adequate.

[12] In the case at hand, I am not satisfied the Appellant has met the high standard of demonstrating the Residency Allegation would have no prospect of success, nor can I find failure to strike it would lead to any prejudice to the Appellant at this early stage in the proceedings that could not be compensated for by costs and that could not be remedied by less drastic means. The matter is at an early stage of litigation and I have no evidence before me that failure to strike the provision would result in any substantial delays. Frankly, as referenced in *Cameco* above, the approach to grant leave to amend if particulars are in order would be the

preferred relief in an application of first instance like in this matter and in fact an order for particulars is the alternative relief requested by the Appellant, which I address next.

Demand For Particulars

[13] The Appellant argues that the Respondent has pleaded no material facts in support of the Residency Allegation, which it claims is a mixed question of law and fact, while the Respondent counters that the said allegation is an expression of fact on its own and a clearly defined issue of "residency" and that the Appellant is really asking for the evidence in support of such allegation which is inappropriate. The Respondent also takes the position that the Appellant has knowledge of the facts and thus further particulars are not needed.

[14] Firstly, let me deal with the Respondent's position that the Appellant has knowledge of the fact the management and control of Palfinvest is in Liechtenstein. The Respondent relies on the decision of *Obonsawin v Canada* [2001] OJ No. 369, for the proposition that particulars will not be ordered where the party demanding them has knowledge. This is well established law discussed also in *Mastronardi v The Queen*, 2010 TCC 57, 2010 DTC 1066, at page 5 with reference to *Zelinski v The Queen*, 2002 DTC 1204, paragraph 4.

[15] I cannot find any evidence in the pleadings or Affidavit of P.L. the representative of the Appellant, filed in support of the Appellant's motion that the Appellant acknowledged or had any knowledge of the residence of Palfinvest being other than in the Netherlands. The Respondent itself summarized the provisions in the Affidavit and nowhere is there any indication or mention of the residence being in Liechtenstein. The Respondent has not filed an affidavit in this matter nor sought leave to cross-examine the deponent and so no other evidence is before me regarding the knowledge of the Appellant.

[16] The Respondent's argues in paragraph 46 of his submissions that:

> 46. Unless there in an indication to the contrary, one would ordinarily assume that an entity created by law resides in the jurisdiction in which it is created. On that assumption, Palfinvest's residence would be in the Principality of Liechtenstein, because it was created there….

[17] The Respondent assumes in his argument that the Appellant should assume that Palfinvest's residence is where it was created. Frankly, this is hardly evidence of the Appellant's knowledge and frankly is contradictory to the assumption of the Respondent in its main argument that the residence is in the Netherlands. I agree with Appellant's counsel's argument that the Respondent appears to be attempting to characterize his submissions as if they were evidence. They are not.

[18] I do not find that the Appellant can be taken to have knowledge of Palfinvest's residence being anywhere other than in the Netherlands so his knowledge cannot be a bar to particulars regarding the Residency Allegation.

[19] Secondly, I wish to deal with the Respondent's submission that the Appellant is really asking for evidence in support of the allegation.

[20] There is no dispute between the parties that the Appellant is not entitled to the Respondent's evidence at the pleadings stage. In *Embee Electronic Agencies Ltd. v Agence Sherwood Agencies Inc. et al.* [1979] FCJ No. 1131, Marceau J. stated 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 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.

[21] While I fully agree with the Rule against evidence at pleadings above, I do not agree that the Appellant is asking for any evidence. The Residency Allegation is not accompanied by any material facts at all relating to the management and control of Palfinvest being in Liechtenstein. I agree with the Appellant that the issue of where the management and control of a party lies is a question of mixed fact and law. As stated by Iacobucci and Major JJ in *Housen v Nikolaisen* [2002] 2 SCR 235 at paragraph 26, in distinguishing questions of mixed fact and law from factual findings, "Questions of mixed fact and law involve applying a legal standard to a set of facts." In paragraph 33, it was stated thus: "A question "about

whether the facts satisfy the legal tests" is one of mixed law and fact." The Supreme Court identified the issue of whether certain individuals are the directing minds of a corporation as an example of a mixed question of fact and law.

[22] Clearly, the issue of who the directing minds of Palfinvest are may be an element of the legal test of who exercises management and control. In fact, there may be several tests to determine whether it is exercised by *de jure* or *de facto* control or by related groups to use a few examples. The Appellant must have particulars from the Respondent to understand which of the possible options are relied upon by the Respondent and be able to deal with them, otherwise the statement is ambiguous.

[23] The general principle of the purpose of pleadings was well stated by Bowie J in *Zelinski v The Queen*, 2002 DTC 1204, affirmed by the Federal Court of Appeal (2002 DTC 7395) and relied upon by numerous decisions of this Court including *Mastronardi*, who at paragraph 4 said:

> [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 trial, will tend to show that the party pleading is entitled to the relief sought. …

[24] In *Mastronardi* above, Campbell J. also relied on the Federal Court of Appeal decision in *Gulf Canada Ltd. v The Mary Mackin*, [1984] 1 FC 884, which was actually relied on by the Respondent, which stated that "…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 or otherwise", in effect "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."

[25] It is clear that the pleadings inform the next steps in the litigation process such as discovery and the preparation of evidence for trial. Accordingly, I cannot agree with the Respondent's counsel that the Appellant should not be given particulars on the Residency Allegation now but proceed to discovery and ask for particulars afterwards if needed. Such a position is contrary to the express purpose of pleadings.

[26] In the *Mary Mackin* decision above, relied upon by the Respondent, the Federal Court of Appeal found that the negligence allegation there in issue "linguistically encompasses unspecified omissions and is capable of a range of meanings" and gives a few examples. The Respondent itself acknowledged in paragraph 37 of its submissions that, in addressing the aforesaid allegation: "…This range of unspecified meaning was found to be too wide and imprecise to properly define the issues to be tried.", then goes on to suggest the Residency Allegation here is "clear and unambiguous" in paragraph 38 of its submissions. With all due respect to the Respondent, the Residency Allegation is far too wide and imprecise here as well to properly define the "residency" issue. As I stated above, addressing the residency issue here encompasses an examination of multiple scenarios such as *de jure* or *de facto* control to name a few and the multiple elements that pervade their analyses.

[27] I should also like to comment on the Respondent's suggestion that the Appellant's concerns about the Respondent setting herself up for a "fishing expedition" due to her failure to plead material facts was not well founded. The Respondent argued that since its pleading was clear and ambiguous, then it in fact "had a licence to fish". In light of the above, it is clear to me that the parameters of the "fishing licence" are and must be set within the issues properly pleaded with their material facts. In other words, with sufficient particulars that clearly and precisely define the issues. It is for this reason that "They tie the hands of the party, and he cannot without leave go into any matters not included", as stated by Campbell J. in *Mastronardi* above at paragraph 10. I strongly agree with the Appellant's position on this matter as the Residency Allegation is too wide and imprecise, capable of different meanings and of encompassing different factual elements necessary to meet possibly different legal tests. To let it stand without particulars would be to declare "open season" rather than set parameters of a licence.

[28] In my opinion the Appellant's Demand for Particulars was not premature as the Respondent has contended and the Appellant is entitled to know the particulars of what the Respondent means when she states the management and control of Palfinvest resides in Liechtenstein.

[29] The Questions posed by the Appellant and listed at the beginning of these reasons are proper questions. The Appellant is entitled to know both who the Respondent alleges exercised management and control and precisely how or in

what manner such person or group of persons exercised such management and control, be it *de jure* or *de facto* control or otherwise. The Respondent's answers to Questions 2 and 3, that particulars will not be provided because the Appellant is not entitled to evidence is not a satisfactory answer. The Respondent is directed to provide the particulars requested by the Appellant in said Questions 2 and 3 within 60 days unless within that time she amends her Reply to strike the Residency Allegation.

[30] With respect to Question 1, I find the Respondent has answered such question by effectively stating that the "material times" were the times relevant to the repurchase of shares, the latter of course which gives rise to a deemed dividend under the *Act* that triggers the Appellant's withholding obligation in issue. It is clear to me that the relevant time triggering the deemed dividend is the time of repurchase of shares.

[31] With respect to costs on this matter, the Appellant seeks the sum of $9,000.00 in any event of the cause although in argument suggested its costs on this motion to date totalled approximately $20,000.00. The Respondent did not take issue with that specific amount requested in argument. While I totally agree with the Appellant's argument that this motion would not have been necessary had the Respondent properly provided the particulars requested, the Appellant also sought and argued for the extreme relief of striking the Respondent's alternative pleading in issue without success. While the Appellant had in the end mixed success, I take note of the fact that the Appellant made it clear at the beginning of this motion that he would not proceed if the Minister agreed to provide the requested particulars which the Respondent refused to do, in my opinion, without any reasonable justification, thus making this motion necessary. The Appellant was clear that all it really wanted were the requested particulars. The law on particulars is quite established and clear and the Respondent's arguments to the contrary were, to speak frankly, very unconvincing. Accordingly, I am ordering that the Respondent pay the Appellant costs in the fixed amount of $8,000.00 in any event of the cause.

Signed at Ottawa, Canada, this 3rd day of February 2015.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2015 TCC 27
COURT FILE NO.:	2014-1875(IT)G
STYLE OF CAUSE:	LANCAN INVESTMENTS INC. AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 27, 2015
REASONS FOR ORDER BY:	The Honourable Justice F.J. Pizzitelli
DATE OF ORDER:	February 3, 2015

APPEARANCES:

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