

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20090320

Docket: A-554-07

Citation: 2009 FCA 93

**CORAM: EVANS J.A.
PELLETIER J.A.
RYER J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

VALERIE GAIL ROSE

Respondent

Heard at Regina, Saskatchewan, on March 4, 2009.

Judgment delivered at Ottawa, Ontario, on March 20, 2009.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

**PELLETIER J.A.
RYER J.A.**

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal by Her Majesty the Queen from a decision by Justice Sheridan of the Tax Court of Canada in which she allowed an appeal by Valerie Gail Rose against an assessment of the Minister of National Revenue under subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The Tax Court's decision is reported as *Rose v. The Queen*, 2007 TCC 657.

[2] Mr and Ms Rose had been the joint owners of their matrimonial home for 23 years. In 2004, Mr Rose had his name removed from the title in order to avoid a potential business creditor. He also owed a substantial amount of tax to the Canada Revenue Agency.

[3] The issue to be decided in this appeal is whether, by putting the house solely in his wife's name, Mr Rose "transferred property, directly or indirectly, by means of a trust or by any other means whatever" for the purpose of subsection 160(1). If he did, then Ms Rose was jointly and severally liable with her husband for his tax debt up to the fair market value of the property transferred, because she had given no consideration for the transfer.

[4] The Judge concluded on the basis of the evidence that Mr Rose had established that he had intended to transfer to Ms Rose only the bare legal title, and that their relationship with respect to the house was to be unchanged. Accordingly, the Judge found that Ms Rose held the legal title on a resulting trust for Mr Rose as the beneficial owner of half of the equitable interest in the house. Hence, she held, there had been no transfer of property for the purpose of subsection 160(1), and set aside the assessment.

[5] In my respectful view, the Tax Court Judge erred in reaching this conclusion. I fully accept the Judge's finding that the Roses were credible witnesses. Nonetheless, when considered against the relevant legal background, the evidence unmistakably indicates that Mr Rose transferred the entirety of his interest in the property. I would allow the Crown's appeal.

B. FACTUAL BACKGROUND

[6] The principal facts are not in dispute and can be stated briefly. Mr Rose had a framing business which was in financial difficulties in 2004. He owed approximately \$57,000 in taxes for the taxation year 2004 and previous years, and was working with a collections officer of CRA, Joan Selinger, to reduce his tax debt by making regular payments.

[7] Mr Rose had done work for a customer, Brian Holyoak, who was dissatisfied with the work and refused to pay for it. He threatened to sue Mr Rose and to place a lien on the Roses' house. In order to secure his claim to be paid for work done, Mr Rose registered a lien on Mr Holyoak's house.

[8] In order to prevent Mr Holyoak from placing a lien on their house, Mr Rose transferred title to his wife on October 19, 2004. With the assistance of a lawyer, the transfer was duly executed and registered at the Land Titles Registry of the Province of Saskatchewan. The fair market value of the house was then \$140,000, although a mortgage of \$110,000 reduced the Roses' equity in it to \$30,000.

[9] At the same time, Mr Rose also removed his name from the title to another house that he owned with his daughter, for whom he had co-signed a loan when the property was purchased as her home. Mr Rose said that he put the property into his daughter's name in order to avoid Mr Holyoak and because his daughter was considering selling it.

[10] Although Mr Rose had been in regular contact with Ms Selinger at CRA, he did not inform her of the transfer of the title in the matrimonial home. She only discovered the transfer when preparing the documents necessary for registering a lien against the house for the unpaid tax. Ms Selinger told Mr Rose that he should not have made the transfer because it looked as if he was trying to prevent the CRA from collecting the debt.

[11] The Tax Court Judge found as a fact that Mr Rose did not transfer the title with the specific intention of avoiding payment of his tax debt, a finding which is not challenged. In February 28, 2005, Ms Rose was assessed in the amount of \$15,000 under subsection 160(1); since she had given no consideration for the transfer, her liability was for the full fair market value of Mr Rose's interest in the house. The CRA registered a lien on the house.

[12] On June 27, 2005, Mr Rose filed a Notice in Bankruptcy, entering "nil" opposite the heading "house" in the Statement of Affairs section of the form. This would seem to contradict his assertion in the tax appeal that he had transferred only his legal interest in the house. However, he explained that he had entered "nil" because the trustee in bankruptcy had advised him that, since his interest in the matrimonial home was worth less than \$32,000, *The Exemptions Act*, R.S.S. 1978, c. E-14, exempted it from execution by his creditors.

[13] Later in 2005, the claim of Mr Holyoak was resolved through mediation and Ms Rose transferred the title to the house back into their joint names. Mr Rose had not been discharged from bankruptcy.

C. **LEGISLATIVE FRAMEWORK**

160.(1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

(a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

(b) a person who was under 18 years of age, or

(c) a person with whom the person was not dealing at arm's length,

the following rules apply:

(d) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and

(e) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market

160.(1) Lorsqu'une personne a, depuis le 1^{er} mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

b) une personne qui était âgée de moins de 18 ans;

c) une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts révisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste

value at that time of the consideration given for the property, and

valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

(ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années;

but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

aucune disposition du présent paragraphe n'est toutefois réputée limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi.

D. DECISION OF THE TAX COURT

[14] The Tax Court Judge held that Ms Rose had the burden of proving that Mr Rose retained his beneficial interest in the house. She formed a favourable view of the Roses as witnesses, and specifically found (at para. 3) that they were “completely credible in their testimony” and answered “complex legal questions to the best of their understanding in a straight-forward manner.”

[15] The Tax Court Judge observed that, since it is a question of fact in each case whether the beneficial interest in property has been transferred, the credibility of the parties to the transfer is often of particular importance. She further found (at para. 19) that the Roses generally lacked “sophistication and expertise in legal matters”, which explained why they had not discussed the terms on which Ms Rose was to hold the legal title.

[16] The Tax Court Judge believed Mr Rose's explanation of his failure to disclose an interest in the house when he filed his notice of bankruptcy, and did not regard it as "indicative of an intention to keep his creditors in the dark" (para. 16). Nor did she equate his "amateurish efforts" (at para. 18) to prevent Mr Holyoak from suing him with a "deliberate scheme to defeat the legitimate claims of creditors."

[17] Nonetheless, the Tax Court Judge found (at para. 20) that the Roses always intended that Mr Rose would retain his beneficial interest in the house, which was evidenced by, among other things, his continuing residence in the house and contributions to household expenses. She accepted (at para. 22) Ms Rose's evidence that it would never have "crossed her mind" to sell the house without her husband's consent.

[18] On these facts, the Tax Court Judge concluded that Mr Rose did not divest himself of his beneficial interest, there was therefore no transfer of property for the purpose of subsection 160(1), and the assessment of Ms Rose could not stand.

E. ISSUES AND ANALYSIS

[19] Counsel for the Crown argues that the Tax Court Judge erred in her conclusion that Mr Rose had retained his beneficial interest and that Ms Rose was a resulting trustee for her husband. It was common ground that this is a question of mixed fact and law and that the Judge's decision may be set aside only if she made a palpable and overriding error in her application of the law to the facts, or decided a readily extricable question of law incorrectly.

[20] Before both the Tax Court and this Court, the parties agreed that Ms Rose has the burden of proving that her husband retained his beneficial interest in the house and that, if she discharged this burden, she would hold the title on a resulting trust for him.

[21] A determination of whether Mr Rose transferred the entirety of his interest to Ms Rose must start with his reason for making the transfer. On this, the evidence is unequivocal: Mr Rose thought that Mr Holyoak might succeed in his claim against him, and wanted to prevent him from placing a lien on the family home. He had taken his name off the title of his daughter's house for a similar reason.

[22] Mr Rose's reason for the transfer is almost conclusive evidence of an intention to transfer his beneficial interest to his wife. Only by divesting himself entirely of his interest in the property could Mr Rose put it beyond the reach of Mr Holyoak, subject to the right of the latter, if a defeated, hindered or delayed creditor, to seek to have the transfer set aside as a fraudulent conveyance. It is also clear from the evidence that Ms Rose understood the reason for the transfer of title to her.

[23] The question before us is whether it was open to the Tax Court Judge on the evidence before her to conclude that, despite Mr Rose's stated intention to avoid Mr Holyoak's claim, he had established that he did not transfer his beneficial interest when he removed his name from the title and put it into his wife's. I note that Mr Rose did not allege, and the Tax Court Judge did not find, that Mr Rose intended to cheat Mr Holyoak by hiding the fact that, despite the transfer of legal title to his wife, he retained a beneficial interest in the house.

[24] The Tax Court Judge relied principally on three items of evidence to establish that Mr Rose retained his beneficial interest in the house. First, the Roses asserted that they intended only to change the ownership of the legal title and had no discussions about the terms on which Ms Rose was to hold the title. The inference to be drawn from this evidence does not depend on the Roses' credibility. However, this evidence is inconsistent with Mr Rose's undisputed intention to transfer title in order to defeat Mr Holyoak's claim.

[25] Second, the Judge relied on the fact that the Roses continued their previous arrangements for paying household bills from their separate bank accounts. Mr Rose made the mortgage payments. However, the maintenance of their previous household financial arrangements is likely to have had more to do with the fact that they intended to remain married, and to occupy the house as their home, than with the question of ownership. In short, this evidence is compatible with either view of the ownership of the beneficial interest.

[26] The same is true of the fact that Mr Rose continued to reside in the house. Counsel for Ms Rose argued that this is evidence that he retained his beneficial interest; if he had divested himself of his entire interest, he would have had no right to remain in the house. Again, his continued residence likely had much more to do with the fact that they were a married couple, who intended to continue to live together, than with any legal niceties about ownership of the home.

[27] Third, the Roses testified that although Ms Rose could have sold, leased or mortgaged the house after the legal title was put into her name, she would never have done so without Mr Rose's

agreement. Indeed, Ms Rose testified, such a thing had never occurred to her. However, whether or not Ms Rose had the entire beneficial interest, she was highly unlikely to sell the house without regard to Mr Rose's wishes. A spouse who has had a long marriage, like Ms Rose, would not normally dispose unilaterally of the matrimonial home, however title is held. Consequently, their testimony has little bearing on the question in dispute; it is equivocal on the question of whether Mr Rose retained his beneficial interest in the house.

[28] Counsel made two other arguments. First, he relied on the Tax Court Judge's finding that, because Mr Rose did not expect the CRA to place a lien on the house, he had no intention of hindering its ability to collect his tax debt. The short answer to this argument is that subsection 160(1) does not require an intention to avoid the payment of tax owing (*Addison & Leyen Ltd. v. Canada*, [2006] 4 F.C.R. 532, 2006 FCA 107, at para. 65(6) *per* Sharlow J.A.). In addition, Mr Rose did intend to defeat Mr Holyoak; the transfer of property with the intention of avoiding one creditor may equally prejudice another.

[29] Second, counsel submitted that Mr Rose's interest, valued at \$15,000, was exempt from execution by *The Exemptions Act* because it was worth less than the \$32,000. Hence, even if Mr and Ms Rose had remained joint tenants, neither Mr Holyoak nor the CRA could have executed a lien on Mr Rose's half interest. Counsel pointed to the statement in *Logiudice v. The Queen*, 97 DTC 1462 (TCC) at para. 16, that subsection 160(1) is aimed at preventing tax debtors from placing their *exigible* assets beyond the reach of the Crown.

[30] I do not agree. To limit the application of subsection 160(1) in this way would require words to be read into the text which are not there. I see no warrant for so doing. Further, no judicial determination of the availability of an exemption has been made on the particular facts of this case. A lien could become enforceable if the value of Mr Rose's equity increased significantly as a result of paying down the mortgage and an increase in the market value of the property.

[31] In my respectful view, the Tax Court Judge committed a palpable and overriding error when she inferred from the facts that Mr Rose had discharged his burden of establishing that he had retained his beneficial interest in the house. It is an almost inescapable inference from Mr Rose's statement that he transferred title in order to prevent Mr Holyoak from pursuing his claim by placing a lien on the house that he intended to do this in the most effective, and lawful, manner: that is, by transferring his entire interest in the house. The evidence on which the Judge relied as proving that he did not do this is, in my opinion, largely equivocal on the nature of the interest transferred to Ms Rose.

[32] The Crown also argued that, by virtue of the broad wording of subsection 160(1), Ms Rose was liable for her husband's tax debt, up to the value of his half interest in the house (that is, \$15,000), even if he had transferred only legal title and retained his beneficial interest. Counsel said that this result flows from the decision of this Court in *Livingston v. Canada*, 2007 FCA 89. Because of my conclusion that Mr Rose transferred his beneficial interest in the house to his wife, it is not necessary to decide this question. The implications of *Livingston* are best left for another day

F. CONCLUSIONS

[33] For these reasons, I would allow the appeal with costs, both here and below, set aside the judgment of the Tax Court, and restore the Minister's assessment of Ms Rose under subsection 160(1) in the amount of \$15,000.

“John M. Evans”

J.A.

“I agree

J.D. Denis Pelletier J.A.”

“I agree.

C. Michael Ryer J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-554-07

**(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED
NOVEMBER 1, 2007, NO. 2005-3701(IT)G (2007 TCC 657))**

STYLE OF CAUSE: Her Majesty the Queen and
Valerie Gail Rose

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: March 4, 2009

REASONS FOR JUDGMENT BY: Evans J.A.

CONCURRED IN BY: Pelletier J.A.
Ryer J.A.

DATED: March 20, 2009

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