

Citation: 2003TCC389
Date: 20030604
Docket: 2000-3716(IT)G

BETWEEN:

DAVID MORLEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by telephone conference call on June 3, 2003

Before: The Honourable Judge D. W. Beaubier

Appearances:

Counsel for the Appellant: Sheldon Silver, Q.C.

Counsel for the Respondent: Harry Erlichman

ORDER AND REASONS FOR ORDER

Beaubier, J.T.C.C.

[1] This motion by the Respondent was heard by telephone conference call on June 3, 2003.

[2] It is for the following relief:

(1) an Order pursuant to subsection 110(c) of the *Tax Court of Canada Rules, General Procedure*, dismissing the appeal with respect to the issue of the fair market value of the computer software acquired;

and for alternative forms of relief.

[3] The grounds for the relief described are summarized as follows in the Notice of Motion:

1. The Appellant states in his Amended Notice of Appeal that Agensys (Canada) Limited Partnership (formerly the Continental Limited Partnership) acquired computer software pursuant to an agreement dated December 20, 1992, as amended and restated on June 30, 1993. The Appellant further states in his Amended Notice of Appeal that he was a partner of Agensys (Canada) Limited Partnership.

2. The stated purchase price for the software was \$12,150,000 plus 10% of the Partnership's annual gross sales of products derived from the software after the Partnership had generated cumulative sales from programs derived from the software in excess of \$12,000,000. The Appellant states in his Amended Notice of Appeal that the software was valued at \$14,875,000 as at April 1993.

3. The Minister of National Revenue assumed in assessing that the software had no value. The Appellant challenges this assumption as to the value of the software.

4. During the examination for discovery of the Appellant which was held on September 11 – 12, 2002, counsel for the Respondent requested production of the object code, source code and related user documentation which was the subject the December 20, 1992 agreement as amended and restated on June 30, 1993.

5. In response to this request, the Appellant advised that the source code was held in escrow in the Turks & Caicos. Counsel for the Appellant undertook to make inquiries as to the availability of the source code and the object code and to advise under what conditions they would be available to the Respondent.

6. To date, the Appellant has produced two versions of source code neither of which could be the source code that was the subject of the December 20, 1992 transaction.

[4] The evidence contained in the extensive affidavit of Elizabeth Chasson, one of the Respondent's counsel in this matter, supports these grounds in detail and is

not refuted. The Appellant has delivered two purported "originals" on copies of the software which is the subject of the fair market value question of the computer software acquired and the Respondent's experts have proven that these two are dated after December 20, 1992.

[5] The Appellant's partnership's escrow agreement with the Trustee (Exhibit to the Affidavit of David R. Poore) dated May 23, 2003) specifies that:

1. Subsequent updates shall be delivered to the Trustee.
2. Release of the "Source Code" is restricted.

As a result, the material the Respondent has received may be updates.

[6] But according to the Amended Notice of Appeal:

1. The "Acquisition Note" on which the value turns is capitalized in the face amount of \$12,150,000 until December 31, 2002. So the value must have been determined by December 20, 1992.
2. The value of \$12,150,000 was for the software which allegedly existed on December 20, 1992.
3. The Appellant subscribed for his five partnership units on October 19, 1993 for a price of \$232,500 – cash, \$35,025 and a "Subscription Note" in the general terms of the Acquisition Note.
4. In his Subscription, the Appellant became a member of the Agensys (Canada) Limited Partnership (formerly The Continental Limited Partnership) which is the Partnership which entered into the Escrow Agreement with Temple Trust Company Limited, a licensed trust company under the laws of the Turks and Caicos Islands, the escrow agent (the "Trust Company").

[7] The Trust Company is in another jurisdiction. It is not a party to this action. Therefore what it has or has not got is not within the power of this Court. That is a chance that the Appellant took when he entered the partnership without taking sufficient safeguards.

[8] The result is that, at present:

1. There is no evidence that the software, which is the source of value on December 20, 1992 exists, or that it existed on December 20, 1992.
2. Any question as to its existence now or in December, 1992 has not been answered by the Appellant, and apparently he cannot answer it.
3. The date for complying with undertakings has expired.

[9] However, the affidavit of Ian R. Assing filed by the Appellant describes a 1993 software which is alleged to be a later version of the December 20, 1992 software. Moreover, the December 20, 1992 Software Acquisition Agreement (Exhibit C to the affidavit of Elizabeth Chasson) contains paragraph 3.1 which sells the software to the Partnership into which the Appellant purchased on October 19, 1993. Finally, the Appellant's Amended Notice of Appeal describes a 1996 lawsuit by the Partnership against the vendor of the software which was settled by, in part, a transfer of the world-wide rights to the software to the Partnership (Paragraphs 18 and 19). In particular, the agreement of December 20, 1992 was not repudiated. Rather, it was enforced.

[10] In these circumstances, on the material before the Court at present, Canadian rights to the software that the December 20, 1992 agreement appears to describe, were produced and transferred to the Partnership for an apparent form of value.

[11] This motion is to dismiss the appeal respecting the fair market value of the software. But there is no evidence that the software had no value. In these circumstances, the question as to what its value is, or the value of the \$12,150,000 note and the remaining consideration by the Partnership (see Article 5 of the Agreement) or, possibly, their value on October 19, 1993, are ones for a Hearing Judge.

[12] Paragraphs 3 and 4 of the Notice of Motion request:

3. an Order requiring the Appellant to answer all outstanding questions and produce the requested documentation arising from the examination for discovery;

4. an Order abridging the time for the filing and service of the Respondent's expert report;

[13] Respecting paragraph 3 of the Notice of Motion, the Appellant did file further material respecting the undertakings on May 23 and on May 30, 2003 and leave is granted to allow such material into the Record. However, it is ordered that the Appellant is not entitled to lead any evidence at the Hearing respecting any matters which are presently outstanding.

[14] In view of the foregoing, the Order requested in paragraph 4 of the Notice of Motion is granted respecting both parties' expert reports which have been served and filed to and including this date.

[15] In summary, it is Ordered:

1. Paragraph 1 of the Notice of Motion is denied;
2. Paragraph 2 of the Notice of Motion is denied with the proviso that at this date, the software presented is apparently dated November 1993. Therefore at the Hearing, (1) the providence of that software is in question and (2) the value respecting which both parties are to present evidence is that of the November 1993 software and not that of any other software or version of software.
3. Paragraph [13] hereof is repeated. However, it is this Court's opinion that the Respondent's motion was the reason that the responses of May 23 and May 30, 2003 occurred.
4. Paragraph [14] hereof is repeated.

[16] Particularly in view of the Court's findings and orders described in subparagraphs [15] 3 and 4 hereof, the Respondent is awarded the costs of this motion on a party and party basis in any event of the cause of this action.

Signed at Saskatoon, Saskatchewan, this 4th day of June 2003.

"D.W. Beaubier"

J.T.C.C.

