Date: 20080507

Docket: A-280-07

Citation: 2008 FCA 174

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
BLAIS J.A.

BETWEEN:

GISÈLE MARCEAU DUMAIS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec, on April 29, 2008.

Judgment delivered at Ottawa, Ontario, on May 7, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: DESJARDINS J.A.
BLAIS J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] The appeal raises the following two issues:

(a) Did Justice Lamarre of the Tax Court of Canada err in concluding that the appellant had received a $42,000 benefit within the meaning of subsection 15(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (Act)?

(b) Was the judge correct to uphold the penalty for gross negligence assessed by the Minister of National Revenue (Minister) under subsection 163(2) of the Act?

Facts

[2] The appellant is the sole shareholder and director of Société Ceaumais Inc. (Company), a company whose financial and fiscal year-end is January 31. On July 11, 2000, the Company bought a building from the Caisse populaire Desjardins. The building, located at 1540 Cadillac in Québec, Quebec, had been put up for sale for non-payment of $66,000 in hypothec instalments. On August 9, 2000, the Company sold the building to the appellant by notarial act; the price stipulated in the contract was $132,000, of which $90,000 was paid on the same day by means of a hypothecary loan obtained by the appellant, and the balance of $42,000 was the [TRANSLATION] "repayment of advances made by the buyer to the seller prior to this date, and in respect of which full and final release is granted" (emphasis added).

[3] However, in the Company's financial statements for the fiscal year ending January 31, 2000, a debt of $22,522.82 is shown for the item [TRANSLATION] "owing to director" under liabilities on the balance sheet. For the fiscal year ending January 31, 2001, this amount not only did not go down, but increased to $26,022.30.

[4] For the fiscal year ending January 31, 2002, there was no longer an “owing to director” item under liabilities. Instead, there was an account [TRANSLATION] “owing to a shareholder” in the amount of $27,043. This amount increased to $37,371 for the fiscal year ending January 31, 2003. At January 31, 2004, it had risen to $41,401.

[5] Since the Company’s closing balance sheets for the year ending January 31, 2001, and for subsequent years appeared to show that the appellant had granted no release to the appellant, the Minister finally assessed the appellant for the equivalent of the $42,000 amount as a benefit conferred to a shareholder in accordance with subsection 15(1) of the Act.

Analysis of the appellants’ submissions

(a) Legal compensation

[6] Despite the laudable efforts of counsel for the appellant, I am not satisfied that the judge made an error warranting our intervention.

[7] The appellant submitted that, under article 1673 of the *Civil Code of Québec* (C.C.Q.), compensation of the two existing debts between the seller and the buyer had been effected by operation of law. It was his contention that the failure to make the appropriate corrections to the financial statements was simply a mistake and did not amount to gross negligence.

[8] Finally, the appellant submits that the judge erred in ruling that she had waived compensation.

[9] At the hearing, counsel for the respondent abandoned reliance on the fact that there might have been a waiver of compensation by the appellant. He submits that, even if one accepts that compensation was effected by means of the transaction for the amount of $22,522.82 appearing under liabilities on the Company's balance sheet as an amount owning to the director, the appellant nevertheless received a $42,000 benefit, which he explains as follows.

[10] The amount of the compensation claimed in the act of sale was $42,000, while the amounts owed to the appellant by the Company for advances totalled only $22,522.82. Therefore, a difference of $19,417.98 remains as a benefit. The appellant acknowledges that there is a benefit in this amount and made the respondent a settlement offer on this basis.

[11] However, according to counsel for the respondent, this amount not only did not disappear from the liabilities on the Company's balance sheet, it continued to increase in subsequent years. It rose from $22,522.82 in 2000 to $26,022.30 in 2001, $27,043 in 2002, $37,371 in 2003 and $41,401 in 2004. Accordingly, he submits that since the Company's debt to the appellant still appears on the Company's books, the appellant could still seek repayment of that debt, without tax consequences, for advances owed to her. This constitutes a benefit of $42,000 consisting of the $19,417.98 amount acknowledged by the applicant and the $22,522.82 debt appearing in the Company's financial statements from the year 2000 onward.

[12] The judge did not err in accepting the respondent's argument to the effect that the appellant could still be reimbursed for the unextinguished debt owed to her by the Company for the advances.

[13] I also agree with the judge's conclusion that the appellant knew or ought to have known that a benefit was being conferred on her as a result of the transaction, especially since the $42,000 amount claimed as advances made to the Company did not exceed $22,522.92 at that time. At paragraph 18 of her reasons for decision, the judge writes the following in support of her conclusion:

> [18] The appellant is the sole shareholder and director of Ceaumais. She managed to detect a mistake in her own tax return for 2000 and that mistake was enough for her to refrain from filing the return within the time fixed by the Act. There were few transactions involving Ceaumais during 2000. The appellant should have verified that the transaction involving the building in question was properly reflected both in the financial statements and in Ceaumais's income tax return. Indeed, no capital gain was reported, and this should have drawn the appellant's attention. She testified that she had decided to transfer the building so that it would be under her own name in order, among other things, to avoid paying tax on the capital. The appellant is not without business sense, and, in my opinion, she was aware, or at least should have been aware, of the fact that she was receiving a benefit when she took possession of a building worth $132,000 without the amount of the debt to her that was set off being reflected in Ceaumais's financial statements. In my view, the fact that the situation was not remedied thereafter, either in the financial statements or in Ceaumais's income tax return, confirms all the more that this was not simply an error.

Upholding of the penalty

[14] Being of the view that this was not simply an error, the judge concluded that, considering the substantial amount in dispute and the fact that the appellant knew that the Company did not owe

her $42,000 at the time of the transaction, there was gross negligence within the meaning of subsection 163(2) of the Act.

[15] I could not say that the judge misunderstood the notion of gross negligence or incorrectly applied it to the facts of the case.

Conclusion

[16] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"
J.A.

"I concur in these reasons.
Alice Desjardins J.A."

"I concur.
Pierre Blais J.A."

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-280-07
STYLE OF CAUSE:	GISÈLE MARCEAU DUMAIS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	April 29, 2008
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	DESJARDINS J.A. BLAIS J.A.
DATED:	May 7, 2008

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