Docket: 2012-689(IT)G

BETWEEN:

ALBERT J. LANGARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on August 18, 19 and 20, 2014,
at Victoria, British Columbia.
Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant:	Jean-Philippe Couture
Counsel for the Respondent:	Raj Grewal

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2006 and 2007 taxation year is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of June 2015.

"B.Paris"

Paris J.

Citation: 2015 TCC 161
Date: 20150625
Docket: 2012-689(IT)G

BETWEEN:

ALBERT J. LANGARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Paris J.

[1] Mr. Langard is appealing from reassessments of income tax for his 2006 and 2007 taxation years. The Minister of National Revenue (the "Minister") denied his claim for business losses from trading in commodity futures. The amount of the losses was $472,029.89 in 2006 and $151,551.06 in 2007.

[2] The commodity trading activity that gave rise to the losses was carried out in an account set up in the name of, and capitalized by, Bearsden Enterprises Ltd., ("Bearsden") a corporation of which Mr. Langard was a director and president.

[3] The issue in this appeal is whether Mr. Langard incurred the losses personally or whether they were incurred by Bearsden.

[4] Mr. Langard maintains that he and Bearsden entered into an agreement that allowed him to trade commodities for himself using Bearsden's account, and that the losses in issue were incurred during periods he was trading for himself. He says that the agreement with Bearsden is evidenced by documents including a Director's Resolution and written notifications given by him to the company of his intention to begin and cease trading on his own behalf. He also says that he reimbursed Bearsden for all of the losses he incurred while trading for himself.

[5] In reassessing Mr. Langard, the Minister assumed that the terms of the Director's Resolution were not *bona fide*. In the Reply to Notice of Appeal the Respondent also pleaded as additional material facts that:

> - The Resolution and any purported written notices pursuant to it were shams calculated to deceive the Minister into treating corporate losses as personal losses.
>
> - Neither the Resolution nor any purported written notices issued pursuant to it were witnessed or notarized and they were not signed on the dates written on their face.
>
> - The Resolution and any written notices pursuant to it were legally ineffective devices by which the Appellant sought to convert corporate losses to personal losses in order to offset his personal income from other sources.

[6] At the hearing, Mr. Langard testified on his own behalf. Ms. Annie Vallière, a forensic document chemist with the Canada Border Services Agency, was called by the Respondent to give expert evidence.

Facts

[7] Mr. Langard incorporated Bearsden on December 29, 2005. At the time of its incorporation, Mr. Langard's spouse, Sally Langard, was made the sole director. In his testimony, though, Mr. Langard agreed that he was the directing mind of Bearsden.

[8] Mr. Langard testified that Bearsden owned and operated a restaurant he had built near Calgary. It appears that the restaurant had been operating for some time before Bearsden was incorporated but no details of the previous ownership of the restaurant or of the transfer of the restaurant to Bearsden were provided. Mr. Langard also said that when Bearsden was set up, the value of the company was approximately $7 million, of which the restaurant constituted the bulk.

[9] According to Mr. Langard, about 40% of the common shares of the company were controlled by his family (including himself, his spouse and children), another 40% were controlled by John Thorpe, his spouse and children, and the remaining 20% were controlled by employees of the company. He also testified that 60% of the company's preferred shares were controlled by the Thorpe family.

[10] In addition to its restaurant business, Mr. Langard said that Bearsden carried on the business of trading commodities. Mr. Langard also said that he, personally, had been trading commodities almost continuously since the early 1970's.

[11] Initially, Bearsden used a commodity trading account set up in the name of AJS Financial Corporation, ("AJS"), another company of which Mr. Langard said he was president and directing mind. Mr. Langard said that Bearsden intended to open its own account but that it took some time to set it up. A document entitled "Declaration of Trust" dated January 10, 2006, signed by Mr. Langard as president of AJS, stated that AJS was managing and holding in trust for Bearsden the commodity trading account in its name. Curiously, the Trust Agreement is made effective for one-half of the account on December 15, 2005 and for the remainder of the account on December 31, 2005. It was not explained how the agreement could have taken effect, in part, prior to Bearsden's incorporation.

[12] Mr. Langard testified that, also on January 10, 2006, his spouse, as sole director of Bearsden, passed a resolution which set out the terms of the commodity trading agreement between himself and the company. According to the resolution, the company granted him an option to enter into a partnership with it to trade commodities in the AJS account and in the account that was to be set up in Bearsden's own name. The resolution stated that Mr. Langard would receive 75% of the profits earned and would be responsible for 100% of the losses incurred during the period the partnership was in effect, and that he could commence and terminate the partnership at any time by advising the company in writing of his intention to do so. The resolution also stated that the company would provide the capital to maintain the trading account in good standing.

[13] According to Mr. Langard, he exercised his option to trade commodities in the Bearsden account between May 6, 2006 and September 30, 2006 and again between April 13, 2007 and August 20, 2007. He said he gave the requisite written notices of his intention to trade in the account on May 6, 2006, September 30, 2006 and April 13, 2007. No notice was given for the termination for the second period because the trading account was closed by Bearsden on August 20, 2007. Mr. Langard said that he suffered a loss of $472,029.89 from commodity trading during the first period and a loss of $151,551.06 during the second.

[14] Mr. Langard said he did the bookkeeping for Bearsden and that he recorded these losses in account #1200 in Bearsden's books. Account #1200 was used to record any financial transactions between him and Bearsden.

[15] Excerpts of account #1200 for 2006 and 2007 were entered into evidence. They showed that account #1200 was debited for $472,029.89 on September 30, 2006 for Mr. Langard's "commodity participation" and for the following amounts on the following dates in 2007 for "commodities:"

April 30	$86,981.47	
May 31	$26,670.89	
June 30	$52,500.50	
July 31	($30,153.51)*	*gain on commodities
August 31	$15,551,51	

[16] Mr. Langard stated that credits to account #1200 in 2006 and 2007 were sufficient to offset the losses that he incurred from commodity trading on his own behalf in Bearsden's account. In particular, in September 2006 he says that he obtained a $1 million loan from John Thorpe that was credited to account #1200 on September 30, 2006. Mr. Langard testified that at that time, Bearsden owed Thorpe in excess of $1 million and that Thorpe's loan to him was offset against the debt owing to Thorpe by Bearsden by way of journal entry to Thorpe's shareholder loan account in Bearsen's books. Therefore, he said that, while no money changed hands, Bearsden received credit for the commodity losses in the form of a reduction in the amount it owed Thorpe.

[17] A copy of the loan agreement between Mr. Thorpe and Mr. Langard was entered into evidence as well as a copy of a $1 million promissory note from Mr. Langard to Thorpe. No copy of Thorpe's shareholder loan account in Bearsden was produced.

[18] After the recording of the $1 million loan, account #1200 showed a balance of $123,580 in Mr. Langard' favour on September 30, 2006.

[19] Mr. Langard said that he subsequently repaid the $1 million loan to Mr. Thorpe, but did not elaborate on how or when this occurred.

[20] The 2007 commodity losses recorded in account #1200 were also offset by credits to Mr. Langard's trust account. No corroboration of those credits was provided.

[21] In his 2006 personal tax return, Mr. Langard reported employment income of $510,220. After deducting the business loss for 2006 in issue in these proceedings, Mr. Langard reported total income of $38,617.96.

[22] In his 2007 personal income tax return, Mr. Langard reported a total of $204,214 in salary and management fees, director's fees and bonuses from companies of which he said he was the controlling mind. After deducting the business loss for 2007 in issue in these proceedings, Mr. Langard reported total income of $12,955.11.

[23] Bearsden reported net income of $27,052 for its fiscal year ending January 1, 2007 and a loss of $141,549 for its fiscal year ending January 1, 2008.

Expert Evidence

[24] Ms. Vallière was called by the Respondent to give opinion evidence with respect to whether the age of ink from the signature of Mr. Langard found on certain documents relating to the arrangement allowing him to trade commodities in Bearsden's account was consistent with the date those documents were alleged to have been signed by him.

[25] Ms. Vallière's qualifications as a forensic document chemist were not challenged by the Appellant's counsel and I found her to be qualified to give expert evidence in respect of ink dating.

[26] Ms. Vallière used the "solvent loss ratio" method for determining the age of ink on paper. She referred to it as the "SLR method" in her testimony. The SLR method relies on measurement of particular solvents present in ballpoint pen ink. The process involves taking a number of minute samples from the ink and paper by punching out plugs that are 0.5 mm in diameter. Half of the samples are heated for a specified time, after which the amount of solvents remaining in the samples is measured. The amount of solvents remaining is compared to the amount of solvents present in the unheated samples in order to determine the amount of the solvents that was lost through the heating process. According to Ms. Vallière, the rate of loss of the solvents present in ink is greatest soon after ink is applied to paper and gradually decreases as the ink ages. Therefore, ink that has been applied recently would have a higher amount of solvents present in it than older ink, and the more recently applied ink would have a greater rate of solvent loss when heated. The Canada Border Services Agency has compiled data from tests of loss rates for certain solvents found in ballpoint pen ink and has prepared graphs plotting the known loss rates. In this case, she compared the rate of loss of 2-phenoxyethanol in the samples to known loss rates compiled by the Agency for that solvent.

[27] Ms. Vallière sampled ink from the four letters from Mr. Langard to Bearsden giving notice concerning the commodity trading, and from a fifth document, entitled "Declaration of Trust," dated April 19, 2006. The only signature for which she was able to provide an opinion was the one on the letter dated May 6, 2006 from Mr. Langard to Bearsden notifying the company that he was exercising his option to trade commodities on his own behalf. She was unable to perform a solvent loss analysis on the remaining four documents. In the case of two of them, the signature was not applied in ink from a ballpoint pen, and in the case of the other two, the chemical composition of the ink was of more recent formulation and insufficient data on the aging characteristics of the solvents contained in that ink were available.

[28] On the basis of the loss rate Ms. Vallière observed in the samples taken from the signature on the letter dated May 6, 2006, she concluded that the amount of the solvent present in the signature at the time she carried out the analysis was inconsistent with the document having been signed on May 6, 2006. At the hearing, Ms. Vallière ventured an opinion that the age of the signature ink was between one and four years at the time of testing. However, this opinion was not based on any formal analysis of loss rates and was in my view not reliable because, according to the solvent loss rate chart in her report, the signature on the document would have been approximately 500 days old or less. Ms. Vallière defended her opinion that the signature was between one and four years old on the basis that the ink could have been "slow drying" and explained that there were varieties of ink that lost 2-phenoxyethanol more quickly and more slowly than the ink to which the solvent loss rate chart in her report applied. In any event, since this portion of her testimony exceeded the analysis contained in her report and no notice of this conclusion was given to the Appellant's counsel, the one to four year estimate should be excluded.

Position of the Appellant

[29] Counsel maintains that Mr. Langard has produced sufficient credible evidence to refute the Minister's assumption that the terms of the Director's Resolution setting out the commodity trading agreement were not *bona fide*. He points to Mr. Langard's testimony as well as to the Director's Resolution dated January 16, 2006, to Bearsden's accounting records, to the notices from Mr. Langard to Bearsden in accordance with the agreement and the loan agreement with Mr. Thorpe. Counsel submits that this evidence constitutes prima facie proof that the commodity trading arrangement was entered into in good faith, that its

terms were adhered to and that Mr. Langard reimbursed Bearsden for the losses incurred during the periods he was trading on his own account.

[30] Counsel argues that the Respondent has not presented any evidence to refute this prima facie proof. Furthermore, counsel maintains that the Respondent has not met the onus on Her to establish that the Director's Resolution dated January 10, 2006 and the written notices to Bearsden dated May 6, 2006, September 30, 2006 and April 13, 2007 were shams and that they were not signed on the dates written on their face, as pleaded as "Other Material Facts" in paragraphs 13 and 14 of the Reply. Since these additional facts were not assumed at the time of reassessing, the onus of proof falls on the Respondent.

[31] On the latter point, counsel submits that the evidence of Ms. Vallière should be rejected because if one were to rely on the chart of solvent loss rates fund in her report, the age of the signature would be between four and 600 days, meaning the document was signed later than approximately July 2012. However, it is clear that the document was already in existence in 2009 because Mr. Langard gave a copy of the signed document to the Canada Revenue Agency at that time. Therefore, he says, the ink dating process used by Ms. Vallière must have been flawed and her evidence should be given no weight.

Analysis

[32] The issue before the Court is whether the losses incurred in Bearsden's commodity trading account between May 6, 2006 and September 30, 2006, and between April 14, 2007 until the account was closed in August 2007 were incurred by Bearsden or by Mr. Langard personally.

[33] With respect to the burden of proof, the case law is clear that in a tax appeal, the taxpayer has the initial onus of proving that the assumptions made by the Minister in assessing or reassessing are incorrect. In *McMillan v. The Queen*, 2012 FCA 126, the Federal Court of Appeal stated, at paragraph 7:

> . . . In our respectful view, it is settled law that the initial onus on an appellant taxpayer is to "demolish" the Minister's assumptions in the assessment. This initial onus of "demolishing" the Minister's assumptions is met where the taxpayer makes out at least a prima facie case. Once the taxpayer shows a prima facie case, the burden is on the Minister to prove, on a balance of probabilities, that the assumptions were correct (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 at paragraphs 92 to 94; *House v. Canada*, 2011 FCA 234, 422 N.R. 144 at paragraph 30).

[34] It is also clear that the Respondent has the onus to prove facts that are not pleaded as assumptions in the Reply.

[35] While it is true that the Respondent has pleaded as an additional "material fact" that the Director's Resolution was a sham, this must be viewed in light of the assumed fact that the terms of the resolution "were not *bona fide*." I agree with counsel for the Respondent that an agreement whose terms are not *bona fide* is a sham.

[36] In *Stubart Investments Inc. v. The Queen*, [1984] 1 SCR 536, the Supreme Court of Canada refers to a sham as:

> . . . a transaction conducted with an element of deceit so as to create an illusion calculated to lead the tax collector away from the taxpayer or the true nature of the transaction; or, simple deception whereby the taxpayer creates a façade of reality quite different from the disguised reality.

[37] The concept of sham was also described as follows by the Federal Court of Appeal in *The Queen v. Central Supply Company (1972) Ltd.*, [1997] 3 FCR 674, at paragraph 5:

> . . . A transaction is called a sham when an arrangement creates the appearance of certain rights and obligations which mask the true intent of the parties involved. This usually involves an element of deceit or even fraud. The classic description of a "sham" is found in Lord Diplock's judgment in *Snook v. London & West Riding Investments, Ltd.*,[10] that which gives "the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create".[11] As a result of its ability to disguise an underlying transaction, the remedy for a sham is to replace it with the transaction which actually underlies it. The sham doctrine has been incorporated into the Canadian common law. In *Stubart*, Mr. Justice Estey explained that, in Canadian law, deceit was the "heart and core of a sham."

[38] The definition of "*bona fide*" found in Black's Law Dictionary (8th ed. 2004) was cited by the Supreme Court of Canada in *New Brunswick (Human Rights Commission)* v. *Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 (at paragraph 34): "1. Made in good faith, without fraud or deceit. 2. Sincere, genuine."

[39] Therefore, something that is not *bona fide* contains an element of falseness, bad faith, fraud or deception, and is tantamount to a sham. In the *New Brunswick (Human Rights Commission)* case, at paragraph 40, the Supreme Court of Canada

also made the following observation, confirming, in my view, that something which is not *bona fide* is a sham:

> In the income tax context, the courts have had to determine whether a pension plan is *bona fide* or merely set up as a "sham" for the purpose of achieving a tax advantage. For example, in *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 408, Gibson J. found that the company's pension plan was a masquerade, and that the parties and the trustee of the plan "never intended that it be a document that the parties would act upon" (p. 418). …

[40] Therefore, the assumption in the Reply that the terms of the Director's Resolution were not *bona fide* places the onus on the Appellant to show that those terms were genuine and without deceit. The pleading in paragraph 13 of the Reply that the Director's Resolution was a sham is superfluous and does not shift the onus to the Respondent to prove that the agreement was not genuine. It also seems to me that the pleading, also in paragraph 13 of the Reply, that the notice letters to Bearsden were shams is likewise superfluous. If the underlying agreement was not *bona fide*, I cannot see how documents supposedly prepared in accordance with the agreement could themselves be *bona fide*.

[41] The question, then, is did the Appellant meet the onus to show that the terms of the commodity trading agreement were *bona fide*.

[42] At the outset, I would make the following observation. The nature of the alleged agreement between Bearsden and Mr. Langard allowing him to trade in Bearsden's account can only be characterized as highly unusual. Why would Mr. Langard choose to enter into this agreement, rather than set up his own commodity trading account? Why give up 25% of any profits while assuming 100% of any losses incurred? Unfortunately, no explanation for the existence of the arrangement was given by Mr. Langard, nor was any reason apparent from any other evidence that was presented.

[43] It was not suggested that Mr. Langard's motivation to trade commodities in Bearsden's account stemmed from fact that he had been barred from trading securities in Alberta for life by the Alberta Securities Commission in 1992. In fact, at the objection stage, Mr. Langard took the position that commodity futures were not "securities" and therefore that the ban on trading did not apply to that activity. However, even if the arrangement to trade commodities through Bearsden's corporate account was intended to circumvent the ban, why would he not have chosen a corporate vehicle in which he (or family members) would have been entitled directly or indirectly to all of the profits? It does not appear that Mr.

Langard lacked the capital needed to engage in the commodity trading since he had employment income in excess of $500,000 in 2006 and according to his testimony, he was also able to borrow $1 million.

[44] It does not appear that the arrangement was necessitated by any urgency on Mr.Langard's part to begin trading, either, since the trading which he says was done on his own behalf did not commence until three and a half months after the Director's Resolution of January 10, 2006.

[45] On the other hand, it appears more plausible to me that Mr. Langard was motivated by a desire to use for himself, personally, losses incurred by Bearsden that were not needed by Bearsden because its income was low in the years in issue. During the periods Mr. Langard says he was trading on his own behalf, there were substantial losses in the account: $472,029.89 in 2006 and $151,551 in 2007. When he claims to have been trading for Bearsden, there were gains: $627,481 in 2006 and $126,585 in 2007. It seems an unlikely coincidence that the amounts of losses suffered by Mr. Langard according to this arrangement were very close to equal his income from other sources in 2006 and 2007, so that he paid little tax in those years, while the net income of Bearsden in 2006 taking into account the commodity gains was $27,052 for the year ending January 1, 2007 and its net loss was $141,549 for the year ending January 1, 2008.

[46] In his testimony, Mr. Langard made the point that it would make no sense for him to absorb all of the losses from the commodity trading solely in order to obtain the tax losses personally, since the tax recovered by applying the losses would be less than the cost of reimbursing Bearsden for the losses. I agree that this is a critical point. What evidence is there then that Mr. Langard paid Bearsden the amount of the losses? He produced a copy of a loan agreement between himself and Mr. Thorpe and journal entries he made in the books of Bearsden showing a $1 million credit to account #1200 as well as debits for the commodity trading losses.

[47] The Respondent submits that these documents alone are insufficient to prove reimbursement of the losses by Mr. Langard. I agree. First, Mr. Thorpe was not called as a witness to verify that the loan was in fact made to Mr. Langard. Since the reimbursement of the trading losses by Mr. Langard is a critical element of his case and the loan agreement is self-serving evidence, I would have expected Mr. Langard to provide any corroboration of the loan and its reimbursement. It would seem to me to be a straight-forward matter to have the loan proved by calling Mr. Thorpe and to show the flow of funds from Mr. Thorpe to Bearsden on behalf of Mr. Langard. However Mr. Thorpe was not called as a witness and no reason was

given for not calling him. I draw a negative inference from the fact that Mr. Thorpe did not testify and find that his evidence would not have assisted Mr. Langard. As well, the failure to document the initial receipt of the $1 million by Bearsden that Mr. Thorpe had allegedly put into the company at some point prior to September 2006 leads me to question whether Mr. Thorpe was owed $1 million by Bearsden at that time. This in turn leads me to doubt that the loan agreement represented a genuine transaction.

[48] In arriving at these conclusions, I find that Mr. Langard's testimony was not reliable. I have already alluded to certain aspects of his testimony that I find implausible, and there were a number of inconsistencies in his testimony or between his testimony in Court and the answers he gave at his examination for discovery.

[49] One inconsistency concerned the notices given by Mr. Langard of his intention to begin and cease trading commodities in Bearsden's account. When he was asked in cross-examination about whether he had brought the notices to anyone's attention, he said that he did not recall and that he would have had no reason to send them to anyone. At his examination for discovery he was also asked whether he had sent the written notices to anyone or if he had brought the notices to anyone's attention. He said that he had not, he had no reason to, and that "the only one concerned with this and the only business - - I mean, it was my business and my concern. There is nobody else involved." In re-direct examination, however, he testified that he had advised at least two of the other directors verbally that he was exercising the option, and that he was sure of it. He claimed that he had not understood the question he was asked in cross-examination. However, there was no indication of any misunderstanding on Mr. Langard's part that was apparent to me and the question was clear.

[50] Another difficulty I have with Mr. Langard's evidence related to his accounting in Bearsden's records for the losses incurred from the commodity trading activity during the period he says he was trading on his own behalf.

[51] From January up to the end of July, 2006, the results of Bearsden's commodity trading activity was recorded at or near the end of each month in account #4005. After the end of July, the next entry in that account is dated August 9, showing a gain for the period between August 1 and August 9. The following entry, dated September 30, 2006, shows that a loss of $371,614 was incurred between August 9 and September 30. This latter amount was debited to account #1200 and credited to account #4005 on September 30, 2006 as Mr. Langard's loss

from commodity trading. However, subsequent adjusting journal entries to accounts #4005 and #1200 increased his loss to $472,029. The calculation of this amount was shown in handwriting on an excerpt from account #1200.

[52] Mr. Langard testified that the increase of $100,415 to the amount initially recorded as his commodity trading loss was the amount of the loss he incurred between May 6, 2006 and August 9, 2006. He said that he calculated the additional $100,414 loss by referring to the daily account statements that he received by e-mail. He said that each of the statements set out the cumulative gain or loss on the account and that by taking the difference between those figures for May 6 and August 9, 2006, he determined that the account had lost $100,415 between those two dates. Mr. Langard explained, in particular, that there was a large loss in the account for the period between May 6 and May 31.

[53] However, no entries were made in either account #4005 or #1200 showing a loss for the period between May 6 and August 9, 2006. In fact, according to account #4005, there were gains each month from commodity trading for May, June and July and to August 9 in the following amounts:

May	$67,429
June	$23,346
July	$49,601
August 1-9	$7,843

[54] I found Mr. Langard's explanation of the calculation of the additional $100,471 loss to be convoluted and unsubstantiated. The entries Mr. Langard referred to on the daily account statements were cryptic and did not clearly corroborate his position. I also find it difficult to believe that, despite there being gains from the commodity trading for the months of May, June and July 2006 and from August 1 to August 9, 2006 (as shown by the entries made to account #4005), that there was a loss of sufficient magnitude between May 6 and May 31 to wipe out all of the gains that were recorded for those periods and result in a further loss of $100,414 for the entire period. No corroboration of the alleged loss between May 6 and May 31 was presented.

[55] Furthermore, it was not explained why, if Mr. Langard began trading on his own behalf in the account on May 6, 2006, why no entry showing that date was made in either account #4005 or #1200. In my view, this is clearly inconsistent with his position that the personal commodity trading began on May 6, 2006.

[56] Finally, I would also add that I find it implausible that, after having lost $472,029 trading commodities in five months in 2006, and having ceased trading on his own behalf, Mr. Langard would begin trading again on his own behalf about six months later, subsequently incurring losses in five of the next six months. He testified that he began trading in May 2006 because the account value had gone up substantially and "we were on a roll", but he did not say what led him to start up again in April 2007.

[57] There was also a discrepancy between Mr. Langard's testimony and the documentary evidence he presented to the Court related to the shareholders of Bearsden. Mr. Langard testified that he and his family controlled 40% of Bearsden's common shares, that the Thorpe family controlled another 40%, and that the remaining 20% was controlled by employees of the company.

[58] This information appears to differ from the answer provided by him to an undertaking given at his examination for discovery. Mr. Langard advised then that voting shares of Bearsden were held as follows for the relevant periods in 2006 and 2007:

2006:

Sally Langard	16.666%
Steve Langard	16.666%
John Langard	16.667%
John Thorpe	16.667%
Craig Ison	16.667%
Dave Todoruk	16.667%

2007:

John Langard	12.5%
John Thorpe	12.5%
Nancy Thorpe	12.5%
Craig Ison	12.5%
Dave Todoruk	12.5%
Tracey Thoreson	12.5%
Alison Gillan	12.5%

Oceans Petroleum 12.5%

[59] There was also an inconsistency between Mr. Langard's testimony and his answers on discovery in relation to a document dated April 19, 2006, drafted by him, entitled "Declaration of Trust". It reads, in part:

> DECLARATION OF TRUST
>
> KNOW ALL MEN BY THESE PRESENTS THAT:
>
> Bearsden Enterprises Ltd., "BEL", operates Canadian Bank Account, number 103-419-8, at the Royal Bank, Bow Valley Square, Calgary, "the Account".
>
> The undersigned, BEL, hereby declares that it will hold funds in trust for Al Langard, "the Account Holder", in the Account under accounting code number 1200, "the Account". BEL does not retain any interest whatsoever in the Account other than that of a bare trustee. Any rights, including the right to possession and use, as well as all financial rights, do not in any manner belong to BEL, but are the property of the Account Holder, and BEL hereby waives all such rights in favor of the Account Holder.
>
> Any interest earned by BEL as a result of this Trust Agreement will be for the account of BEL. Overdrafts may be allowed on the authority of the President, as per a Board of Directors Resolution of this date.

[60] In his examination-in-chief, Mr. Langard testified that there was an error in the wording of the document and that the intention was not to have Bearsden hold the funds in the Royal Bank account in trust for Mr. Langard. Mr. Langard testified that the Trust Agreement related to account #1200 rather than to the Royal Bank account. In his examination for discovery, though, Mr. Langard agreed that the trust account referred to in the Trust Agreement was the Royal Bank account.

[61] The answers given at discovery contradict what Mr. Langard said at the hearing, despite no correction to the discovery answers having been made prior to the hearing.

[62] Mr. Langard also claimed that the same error that was made in this Trust Agreement had been made in a number of other similar Trust Agreements that he prepared for other individuals at the same time as the one in issue. None of those other Trust Agreements were introduced into evidence.

[63] Beyond the fact of the inconsistency between Mr. Langard's answer on discovery and at the hearing concerning the Trust Agreement, I find his answer that the account to be held in trust that is referred to in the Trust Agreement was not the Royal Bank account to be implausible. If, as he claims, there was no intention that the funds in the Royal Bank account be held in trust for him, and if Mr. Langard's purpose in drafting the Trust Agreement was simply to identify the General Ledger account #1200 as being the account used to reflect any financial dealings between him and Bearsden, I question why there is a reference to the Royal Bank account at all in the Trust Agreement. In addition, the provision in the Trust Agreement that any interest earned would belong to Bearsden would be unnecessary if the funds in the bank account belonged to Bearsden.

[64] I have already drawn an adverse inference from the Appellant's failure to call Mr. Thorpe as a witness, and would do the same with respect to the failure to call his spouse, Sally Langard, who signed the Director's Resolution setting out the agreement to allow Mr. Langard to trade commodities on his own behalf. As the sole director of Bearsden at the time, I would expect that she would have had some recollection of the circumstances in which the resolution was signed, even if Mr. Langard drafted it, as he says he did. Also, if he had given verbal notice to two other directors of this intention to trade on his own behalf, as he testified he had, I would have expected him to call them as witnesses to confirm those facts.

[65] As a result of my determination that the testimony of Mr. Langard was not credible, and in light of the adverse inferences I have drawn, I find that he has not met the onus on him to show that the terms of the Directors' Resolution dated January 10, 2006, setting out the trading agreement, were *bona fide*. Therefore, he has not shown that the losses incurred in Bearsden's trading account during the relevant periods were incurred by him rather than by the company.

[66] Having reached this conclusion, it is unnecessary for me to deal with the evidence of Ms. Vallière. It is also unnecessary for me to address the Respondent's alternative position that the written notices from Mr. Langard to Bearsden concerning the commencement and end of trading on his own behalf were legally ineffective.

[67] For all of these reasons, the appeal is dismissed, with costs to the Respondent.

Signed at Ottawa, Canada this 25th day of June 2015.

"B.Paris"

Paris J.

CITATION:	2015 TCC 161
COURT FILE NO.:	2012-689(IT)G
STYLE OF CAUSE:	ALBERT J. LANGARD AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia
DATE OF HEARING:	August 18, 19 and 20, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	June 25, 2015

APPEARANCES:

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