

Dockets: 2010-3571(IT)G
2014-2450(IT)G

BETWEEN:

MICHAEL DAVIES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on February 5, 2016 at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

Counsel for the Appellant:	Jack W. Millar
	John G. Bassindale
Counsel for the Respondent:	Carol Calabrese

ORDER

UPON HEARING from the Counsel and reviewing their submissions and in accordance with the attached Reasons for Order,

THIS COURT ORDERS THAT:

1. The Respondent's motion is granted and the Appellant's motion is denied;
2. The appeal from the reassessment made under the *Income Tax Act* for the 2014 taxation year identified as docket: 2010-3471(IT)G was dismissed by this Court pursuant to subsection 16.2(2) of the *Tax Court of Canada Act* on November 21, 2013 pursuant a Notice of Discontinuance executed by the parties' solicitors in July, 2013 and filed with the Court on October 2, 2013;
3. The appeal identified as docket: 2014-2450(IT)G is dismissed on the basis that the issues under appeal have been resolved pursuant to subsection 169(3) of

the *Act* and any appeal from the consequential reassessment dated September 13, 2013 has been irrevocably waived under subsection 169(2.2); and

4. Substantial indemnity costs shall be awarded to the Respondent, subject to either party's right to make submissions otherwise within 30 days of this Order.

Signed at Ottawa, Canada, this 27th day of April 2016.

“R.S. Bocock”

Bocock J.

Citation: 2016T CC 104
Date: 20160427
Dockets: 2010-3571(IT)G
2014-2450(IT)G

BETWEEN:

MICHAEL DAVIES,

Appellant,

and

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Respondent.

REASONS FOR ORDER

Bocock J.

I. Relief Sought

a) Appellant

[1] The Appellant's motion seeks relief on two grounds. The first request is to set aside a Notice of Discontinuance executed by the Appellant's former counsel on July 8, 2013 and filed by Respondent's counsel on October 2, 2013; the second is to reinstate the related first filed appeal 2010-3571(IT)G ("initial appeal") on the basis that the executed minutes of settlement ("Minutes of Settlement") are invalid. A second appeal, filed in 2014 as docket: 2014-2450(IT)G ("supplementary appeal") was an attempt to novate the initial appeal, the discontinuance and settlement of which is disputed by the Appellant.

b) Respondent

[2] The Respondent's motion seeks to dismiss the appeals on the basis that the initial appeal was discontinued as a result of effected Minutes of Settlement and conforming reassessment and that the supplementary appeal is an appeal of an assessment otherwise resolved by the Appellant and dismissed by the Court.

II. Facts:

[3] The initial appeal was part of a group of appeals involving approximately 25 to 30 taxpayers. All Appellants until settlement were represented by Osler, Hoskin and Harcourt LLP (“Litigation Counsel”). The initial appeal concerned the Appellant’s 2005, 2006 and 2007 taxation years and involved the deductibility of certain capital cost allowance in respect of a purchased software licence. The Appellant was a lawyer at Litigation Counsel until mid-2007, when he left the firm. He was abroad until late 2010 when he returned to Canada and joined another law firm.

[4] The Appellant was reassessed in 2009. His claimed capital cost allowance was disallowed. He and certain other investors retained Litigation Counsel to file appeals before this Court.

[5] Shortly after the appeals were filed, a meeting was held between Litigation Counsel and the group of Appellants. The Appellant attended that conference call. General parameters of settlement were discussed. Authority appears to have been given to resolve the appeals within the range of 20-40% of deductibility of the capital cost. Litigation Counsel was to pursue resolution, the usual litigation steps and report periodically to the clients. From early December 2010 until September 23, 2013, the Appellant had no communication with Litigation Counsel (the “Silent Period”).

[6] Despite no communication with the Appellant during the Silent Period, much otherwise occurred. In summary, such communications, negotiations, exchanges and deliveries between Litigation Counsel and Respondent’s counsel are described below:

Silent Period Activities		
Date	Nature of Activity	Consequence
January 25, 2012	Litigation Counsel writes the Respondent and proposes basis for resolution of all appeals in the group.	Respondent’s counsel receives and considers the proposal.
January 18, 2013	Letter in which Respondent’s counsel proposes a counter-offer for resolution of all appeals in group.	Litigation Counsel receives counter-offer.

April 30, 2013	Letter in which Respondent's counsel requests confirmation of Litigation Counsel's continued retainer for individual appellants in group to act.	Litigation Counsel receives request.
May 30, 2013	Letter from Litigation Counsel confirming continued retainer and full capacity as counsel for the appellants including the Appellant.	The letter clarifies the basis of resolving the appeals prior to subsequent litigation steps.
June 18, 2013	Respondent's counsel forwards draft Minutes of Settlement and Notices of Discontinuance.	Litigation Counsel receives documents and proceeds to collate and execute.
July 8, 2013	Litigation Counsel executes the Minutes of Settlement and Notices of Discontinuance as counsel.	After execution the documents are forwarded to Respondent's counsel.
July 31, 2013	Respondent's counsel completes execution of Minutes of Settlement and Notices of Discontinuance.	The Minutes of Settlement provide for 10% capital cost deductibility and provides executed discontinuances are to be filed after conforming Notices of Reassessments are issued by the Minister.
September 13, 2013	The Minister issues Notices of Reassessments and forwards same to each Appellant, including the Appellant, by regular mail.	This completes the Minister's obligations under the Minutes of Settlement.

[7] The Silent Period ends on September 23, 2013 when the Appellant receives an email from Litigation Counsel advising the initial appeal had been settled. Thereafter, the Appellant and Litigation Counsel seek to set aside the Minutes of Settlement and prevent the filing of the Notice of Discontinuance. A summary of these actions during this period (the "Rescission Period") may be described below:

Rescission Period Activities	
Date	Nature of Activity
September 23, 2013	In response to Litigation Counsel's email, the Appellant by telephone asks why, on what basis and with what authority the initial appeal was settled and reassessments undertaken. The Appellant is advised of the executed Minutes of Settlement and Notice of Discontinuance.
September 25, 2013	Further to the telephone conversation above, the Appellant emails Litigation Counsel to advise of his surprise at the absence of communication, to confirm he was not in agreement with the settlement and requests to speak about arrangements to continue the initial appeal quickly to prevent prejudice to the Respondent.
September 25, 2013	Litigation Counsel telephones Respondent's counsel to and leaves a message of a "follow-up issue" to settlement.
September 26, 2013	Litigation Counsel and Respondent's counsel speak by telephone. Litigation Counsel confirms of the alleged absence of the Appellant's approval of the Minutes of Settlement and requests that the original disallowance reassessment, giving rise to the initial appeal, be re-issued by the Minister. Litigation Counsel confirms that the September 13, 2013 Notices of Reassessment are in accordance with the Minutes of Settlement.
September 26, 2013	By email the same day, Litigation Counsel characterizes reassessment pursuant to the minutes of settlement as being in error, suggests reversal of the reassessment and requests that the Notice of Discontinuance not be filed.
October 2, 2013	(i) The Notice of Discontinuance is filed by Respondent's counsel. (ii) Respondent's counsel advises Litigation Counsel by letter (received that day) that it was not possible to reverse the reassessments of the Appellant and the Notices of Discontinuance would be filed given fulfilment of the settlement.

October 9, 2013	The Appellant faxes Respondent's counsel directly advising of an absence of authority on the part of Litigation Counsel in executing the Minutes of Settlement and the Notices of Discontinuance and disavowing both documents.
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[8] As a result of the Notice of Discontinuance being filed on October 2, 2013 and receipt of advice by the Court the appeal was discontinued, the Appellant filed the supplementary appeal.

III. Appellant's Grounds for Relief

[9] Appellant's motion counsel has asserted the following general grounds for setting aside the Notice of Discontinuance, rescinding the Minutes of Settlement and reviving the initial appeal or proceeding with the supplementary appeal:

1. The Respondent's filing of the Notices of Discontinuance ("Discontinuance") on October 2, 2013 constituted a fraud on the Court under Rule 172(2) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"). Respondent's counsel was advised, prior to so filing, of the error in the Minutes of Settlement and their consequential invalidity. Respondent's counsel was requested not to file the Discontinuance and should have sought directions from the Court prior to filing same. The Notice of Discontinuance should therefore be set aside.
2. Upon setting aside the Discontinuance, Appellant's motion counsel states the Court must then examine the Minutes of Settlement. In doing so, the Court should find that the imposition of invalid Minutes of Settlement upon the Appellant is an injustice because the initial appeal has not otherwise been heard on its merits nor resolved on terms acceptable to the Appellant.

IV. Setting aside the Notice of Discontinuance

[10] The Court does have authority to set aside a notice of Discontinuance where it or the judgment it represents was obtained, instigated or consequential to some fraud on the Court¹. The Discontinuance is dispositive and ends a matter in the absence of fraud or other authority for the Court to rescind it². During this

¹ *Canada v Scarola*, 2003 FCA 157 at paragraph 21.

² *Scarola* at paragraphs 24 and 25.

argument, the Court cautioned Appellant's motion counsel of alleging fraud and the possible cost consequences should fraud not be established.

[11] The Appellant insists fraud occurred because at the time of filing the Discontinuance, Respondent's counsel then knew Litigation Counsel lacked authority to execute the Minutes of Settlement and Discontinuance. Further, a clear request was made not to file the previously executed Notice of Discontinuance prior to filing. The amounts to procuring the Discontinuance through fraud or false information³ and engages subsection 172(2) of the *Tax Court of Canada Rules (General Procedure)*⁴.

[12] Within the Discontinuance, the representation of the "Appellant agreeing to dismiss the appeal" was false. Further, Appellant's motion counsel alleges Respondent's counsel was reckless as to the truth and turned a blind eye to the obvious and, by then, indisputable fact of the Appellant's opposition to the settlement. Not only was this reckless as to the true state of the facts, but also contrary to the rules of professional conduct to which Respondent's counsel was subject⁵.

[13] For the reasons which follow, the Court finds that the facts do not support the allegations of fraud on the Court, recklessness in respect of the truth or knowledgeable misrepresentation.

[14] The sequence of occurrences, actions and related facts outline above do not satisfy the necessary test for the utilization of the Court's discretionary jurisdiction to set aside the Discontinuance.

[15] The Discontinuance was dated as of a date certain: the last of which was July 31, 2013. The Discontinuance was not to be filed, pursuant to the Minutes of Settlement until certain conditions subsequent were fulfilled. The Respondent relied upon the strength of the escrowed Discontinuance. The Respondent issued the notices of reassessment ("Notices of Reassessment") on the strength of the Minutes of Settlement and escrowed Discontinuance. Respondent's counsel confirmed the Notices of Reassessment conformed to the Minutes of Settlement. At that point, all conditions subsequent were fulfilled and the agreement was fully performed. No party or person knew of any lack of authority, never mind fraud.

³ *Nicholls v Her Majesty the Queen*, 2011 TCC 279 at paragraphs 16, 17 and 18.

⁴ Subsection 172(2): A party who seeks to, (a) have a judgment set aside or varied on the ground of fraud or of facts arising or discovered after it was made, ... may make a motion for the relief claimed.

⁵ Nova Scotia Barrister's Society, *Code of Professional Conduct*, section 5.1-2 (e), (f) and (g).

The release and filing of the Discontinuance completed an outstanding litigation process, then moot among the parties⁶.

[16] A broader analysis of what occurred also assists. Firstly, with respect to the Discontinuance, the Minister settled all appeals on the basis of the Minutes of Settlement and the Notices of Discontinuance. The Minister would never have detrimentally relied upon the Minutes of Settlement in the absence of the Discontinuance. To do so would give rise to exactly the present circumstance: the disavowal of a group settlement by a taxpayer who argues counsel had no authority. If that knowledge had been obtained and conveyed prior to the issuance of the Notices of Reassessment to all group Appellants, the Minister may have halted the process without suffering prejudice to the Respondent's position or legal rights. This is not the factual scenario before the Court. Moreover, once the group was reassessed in accordance with the settlement, the resolution was complete, the conditions subsequent fulfilled and the pre-dated escrowed Discontinuances were to be filed.

[17] Legal logic and common sense were followed by Respondent's counsel. His legal analysis and conclusion did not ignore or misrepresent the attempted post-reassessment rescission by the Appellant or Litigation Counsel. On the contrary, the legal analysis undertaken merely analysed the attempted rescission and found it of no further legal consequence because of the time it arose in the lock-step settlement process.

[18] Moreover, even if the Court were to find such legal logic faulty, such an error did not constitute fraud. The Discontinuance when dated was correct not just in the mind of Respondent's counsel, but in the mind of Litigation Counsel, the very and only firm retained to protect the Appellant's rights. Prior to execution, Respondent's counsel had Litigation Counsel confirm its authority and representation and thereafter, prepared the documents. After receiving these executed settlement documents and validating such given assurances, Respondent's counsel directed, relying upon the reputation, assertion and customary acts of Litigation Counsel, his own client to effect this final settlement by issuing the conclusive and conforming Notices of Reassessment.

[19] Such an act was a performance of forbearance, compromise and consideration for the then ratified and authentic settlement. Post-facto and untimely disavowal by a single Appellant, entirely caused by the omission of Litigation Counsel, and the subsequent advice of same to Respondent's counsel, also too late

⁶*Nicholls*, at paragraph 16, citing *Robson (Trustee of) v Robson*, 2010 ONSC 4391 at paragraph 23 and 24.

in time, cannot revoke, rescind or avoid the pre-existing settlement reflected in the Minutes of Settlement and Discontinuance and fully performed by the Notices of Reassessment.

V. Minutes of Settlement are Unenforceable

[20] Although the Court has not accepted the argument of the Appellant concerning the Discontinuance as a fraud on the Court, it shall nonetheless address the arguments concerning the invalidity or voidability of the Minutes of Settlement (the “Minutes”).

[21] Appellant’s motion counsel argues that an inquiry into the Minutes reveals there was no authority granted by the Appellant to Litigation Counsel to settle the appeal and enter into the Minutes. Therefore, the Court should not allow itself to give form and effect to a compromise the parties themselves would never have concluded⁷.

[22] Factually and legally the Court cannot abide this argument. No one was aware of the lack of authority (even admittedly Litigation Counsel through its own omission) until after the execution of Minutes and, most importantly, the consequential issuance of the Notices of Reassessment to 25 to 30 appellants. The Court uses the plural form advisedly since the Minister consistently assessed all appellants in the group on the same basis. Respondent counsel’s receipt of Litigation Counsel’s reaffirmation of representation and authority buttresses and strengthens this reliance. It bears repeating that only subsequently to this confirmation were the draft settlement documents prepared, reviewed, signed first by Litigation Counsel and then forwarded to Respondent’s counsel. Respondent’s counsel executed the Minutes and instructed his client to act upon them. The Respondent did just that. Respondent’s counsel only became aware of the absence of authority, which initially was reported to him by Litigation Counsel as only “alleged” on the part of the Appellant, after all foregoing steps were complete and all agreed to limitations for filing the Discontinuance were removed. Until that time, the Respondent or her counsel knew of no limitation of authority⁸ (in fact full authority had been reaffirmed) and concordant, consequential reassessments had issued thereby nullifying former reassessments and their related rights of appeal⁹.

⁷ *Sheperd v Robinson* [1919] 1 KB 474 at page 480.

⁸ *Scherer v Paletta* [1966] 2 OR. At paragraph [10]; and *Souriani v Canada*, 2001 FCA 185 at paragraph 4.

⁹ *Transcanada Pipelines Limited v Her Majesty the Queen*, 2001 FCA 314 at paragraph 12.

[23] Such facts do not legally warrant deconstruction of an accepted, reliable resolution process. Subsection 169(3)¹⁰ of the *Act* is used by counsel consistently, frequently and reliably to resolve litigation before this Court. It functions because of the before-described characteristics. A proposed settlement reached through counsel under its provisions avoids resolved matters from proceeding to trial under the Tax Court's rules even minutes before commencement. The process allows the parties to settle the terms between themselves, generate, receive and affirm Notices of Reassessment, waive all rights of appeal and conclude an appeal or group of appeals with finality. With these present facts, should this Court conduct such a post-factum inquiry into the nature of authority of a solicitor-client relationship it would destroy that widely-used, respected and reliable process. There is no evidence that Respondent's counsel, when concluding the Minutes, had any knowledge whatsoever of the lack of authority until after all documents, actions and conditions subsequent were effected and concluded, otherwise entirely in accordance with the terms of the Minutes and related documents.

[24] To conduct such an inquiry and rescind the Minutes in these factual circumstances ignores the obvious and consequential responsibility and omissions of Litigation Counsel: no communication with a client for 3 years, no fresh contact within 54 days of execution of the Minutes, the day delay in contacting Respondent's counsel and then only by voicemail and no advice by Appellant's counsel directly to the Court. These omissions clearly impact the solicitor-client relationship, but their time of discovery was simply too late to allow this Court to exercise its discretion to invalidate the Minutes and the resolution of this settled litigation¹¹. To so lately pierce this veil of solicitor-client agency also ignores: (i) the non-compensable prejudice to be suffered by the Respondent - such prejudice itself identified by the Appellant at the outset of the discovery - who settled all other appeals in the group: (ii) the doubt to be cast upon the reliability of subsection 169(3) of the *Act* and related sections of the Tax Court's rules for future litigants and, (iii) the otherwise more contained and proximate remedies available elsewhere to the Appellant for compensation arising from Litigation Counsel's omissions.

[25] For these reasons, the Appellant's motion is denied. The initial appeal was dismissed in October, 2013 and the supplementary appeal identified as docket: 2014-2450(IT)G is dismissed on the basis that the substantive issues under appeal

10 Subsection 169(3): Disposition of appeal on consent. Notwithstanding section 152, for the purpose of disposing of an appeal made under a provision of this Act, the Minister may at any time, with the consent in writing of the taxpayer, reassess tax, interest, penalties or other amounts payable under this Act by the taxpayer.

11 *Softsim Technologies Inc. v Her Majesty the Queen*, 2012 TCC 181 at paragraphs 83 and 84.

have been resolved pursuant to subsection 169(3) of the *Act* and all rights of appeal from the consequential reassessment dated September 13, 2013 have been irrevocably waived under subsection 169(2.2).

[26] Given the unproven allegations of fraud against Respondent's counsel by the Appellant, substantial indemnity costs shall be awarded to the Respondent, subject to either party's right to make written submissions otherwise within 30 days of this Order.

Signed at Ottawa, Canada, this 27th day of April 2016.

“R.S. Boccock”

Boccock J.

CITATION: 2016T CC 104

COURT FILE NO.: 2010-3571(IT)G
2014-2450(IT)G

STYLE OF CAUSE: MICHAEL DAVIES AND THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 5, 2016

REASONS FOR ORDER BY: The Honourable Mr. Justice Randall S.
Bocock

DATE OF ORDER: April 27, 2016

APPEARANCES:

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