Docket: 2007-3915(IT)G

BETWEEN:

BARBARA ALLEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 11 and 12, 2009, at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Sherry Darvish

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* with respect to the Notice of Assessment number 42237 dated January 19, 2006 is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Summerside, Prince Edward Island, this 9th day of September 2009.

"Diane Campbell"

Campbell J.

Citation: 2009 TCC 426
Date: 20090909
Docket: 2007-3915(IT)G

BETWEEN:

BARBARA ALLEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

Facts:

[1] The Appellant has been assessed pursuant to section 160 of the *Income Tax Act* (the "*Act*") in the amount of $63,540.36 in respect to a transfer of property made on March 23, 1999 from her spouse, George Nelson Allen. They were married prior to the date of the transfer and remained spouses on the date of the hearing. Mr. Allen is currently unemployed but at the time of the transfer he was a self-employed investment broker. The Appellant is an interior designer.

[2] In 1993, the Appellant and her spouse, Mr. Allen, purchased a property located at 337 - 339 Park Avenue, Newmarket, Ontario. Title to this property was registered in both their names as joint tenants. In 1993 a mortgage in the amount of $270,000.00 was registered against the property with Firstline Trust Company. The Appellant and her spouse together with two children have resided in this property since the date of purchase.

[3] On March 23, 1999, Mr. Allen conveyed his one-half interest in this property to the Appellant for a consideration of $2.00, according to the Land Transfer Tax Affidavit (Exhibit R-1, Tab 2). The Appellant and her spouse had the benefit of legal counsel when this transfer occurred. On the date of the transfer, March 23, 1999, the fair market value ("FMV") of the property was at least $375,000.00 subject to a mortgage balance of $242,588.00 with Firstline Trust Company. The FMV was determined by an appraisal completed by the Minister of National Revenue (the "Minister"). At the time of the transfer, 50% of the equity in the property was $66,203.00. On the date of the transfer, the Minister asserted that the consideration given for the property by the Appellant to her spouse was less than the FMV of the property.

[4] The Appellant asserts that, immediately after the transfer, she made arrangements to have the value of her husband's half-interest in the property calculated by obtaining an appraisal report which valued the FMV of the property at $408,000.00. She testified that she made financial arrangements to advance the funds to him shortly after the transfer. The Appellant claims that she secured a second mortgage on the property for the amount of $60,000.00 on July 5, 1999 and forwarded the majority of the proceeds to her husband in consideration for his interest. Because the costs associated with the refinancing created a shortfall, she made up the final payment by cashing in her RRSPs.

[5] According to the Appellant, her husband experienced business difficulties in March 1999 when the Financial Services Commission of Ontario ("FSCO") froze his corporate accounts after he was charged with breaching the *Loan and Trust Corporations Act*. The Appellant stated that this transfer was to provide her husband with funds to pay his creditors.

[6] The Appellant also claimed that she knew that if she was going to assist her husband it would likely involve selling her car, cashing her RRSPs, refinancing her home and possibly borrowing from family and friends.

[7] Since the transfer, the Appellant claims that she has made all of the mortgage payments, sold her car and some furniture and spent her inheritance while struggling to maintain household expenses on this property.

[8] The Appellant claimed that she never was involved with her husband's business and that she never received money from his business except for the interior design services she provided for his offices.

[9] At the time of the assessment on January 19, 2006, Mr. Allen had an outstanding tax liability of $70,129.00 under the *Act* of which $63,540.36 was assessed to the Appellant pursuant to section 160.

The Appellant's Position:

[10] The Appellant testified that when her husband encountered financial difficulties with his business in March 1999, they entered into an oral contract whereby the Appellant would purchase her husband's interest or equity of redemption in the property.

[11] The Appellant admits that the land registry and transfer document indicates that the property was transferred for a consideration of $2.00. However, she disagrees with the Minister's assertion that she did not pay the FMV consideration for her husband's half-interest in the property. The Appellant requested that this transfer document be disregarded and ultimately changed to reflect the true purchase price of Mr. Allen's half-interest.

[12] The Appellant contends that, subsequent to the transfer of the property to her name, she advanced three instalments, one instalment being paid to a creditor of Mr. Allen, totalling $12,400.00 between April and May 1999; other advances totalling $41,063.96 were made to Mr. Allen in cash with some payments made directly toward his debts; and finally, advances totalling $6,650.00 from RRSPs, which the Appellant cashed, were paid to Mr. Allen. Therefore, she argues that she has paid FMV consideration for her husband's half-interest.

The Respondent's Position:

[13] The Respondent submits that at the time of the transfer the Appellant was married to Mr. Allen and therefore not dealing at arm's length. Mr. Allen was liable to pay $63,540.36 under the *Act*. The FMV of the property at the time of the transfer exceeded the consideration of $2.00 given by the Appellant. The amounts,

which the Appellant contends were paid to Mr. Allen subsequent to the transfer, were not consideration for this transfer. Consequently, the Appellant is liable to pay $63,540.36 pursuant to section 160 of the *Act*.

The Issues:

[14] The main issue is whether the Appellant is liable to pay $63,540.36 pursuant to section 160 in respect to the property transfer and more specifically whether FMV consideration was paid to Mr. Allen for his half-interest in the property.

Analysis:

[15] The relevant portions of section 160 provide:

> 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 value at that time of the consideration given for the property, and
>
> (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,
>
> but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.
>
> …
>
> 160(2) The Minister may at any time assess a taxpayer in respect of any amount payable because of this section and the provisions of this Division apply, with any modifications that the circumstances require, in respect of an assessment made under this section as though it had been made under section 152.

[16] Section 160 has been described as a draconian provision. Its purpose is to prevent a taxpayer from avoiding his or her tax liability by transferring property to certain individuals or non-arm's length persons with the result that the taxpayer is then without assets to pay the tax debt while still potentially benefiting from the assets. A non-arm's length transferee may be liable pursuant to section 160 for the money or property transferred by a transferor who owes tax in the year of the transfer or any preceding taxation year to the extent the property transferred exceeds the FMV of the consideration received. This prevents a tax debtor from transferring assets to a spouse or other non-arm's length persons in an attempt to protect those assets from collection. In addition, there is no requirement that the transferor have an intention to avoid the tax liability (*Montreuil et al.* v. *The Queen*, 95 DTC 138, at page 145).

[17] In *Wannan* v. *The Queen*, 2003 DTC 5715, at paragraph 3, the Federal Court of Appeal made the following comment respecting section 160:

> [3] … There is no due diligence defence to the application of section 160. It may apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax. Indeed, it may apply to a transferee who has no knowledge of the tax affairs of the primary tax debtor. However, section 160 has been validly enacted as part of the law of Canada. If the Crown seeks to rely on section 160 in a particular case, it must be permitted to do so if the statutory conditions are met.

[18] The following criteria must be established to trigger the application of section 160 and attract liability according to *The Queen* v. *Livingston*, 2008 DTC 6233, at paragraphs 9 and 17:

> [9] The Tax Court Judge determined that in order for subsection 160(1) of the Act to apply, the following four criteria must be met:
>
> 1) There must be a transfer of property;
> 2) The parties must not be dealing at arm's length;
> 3) There must be no consideration or inadequate consideration flowing from the transferee to the transferor (I would note that the trial judge considered the test to be "No consideration or inadequate consideration flowing from the **transferor** to the **transferee**" [emphasis added]: this is a mistaken quotation of the test as cited in *Raphael v. Canada* [2002 DTC 6798] 2002 FCA 23); and
> 4) The transferor must be liable to pay tax under the Act at that time.
>
> …
>
> [17] In light of the clear meaning of the words of subsection 160(1), the criteria to apply when considering subsection 160(1) are self-evident:
>
> 1) The transferor must be liable to pay tax under the Act at the time of transfer;
> 2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
> 3) The transferee must either be:
>   i. The transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;
>   ii. A person who was under 18 years of age at the time of transfer; or
>   iii. A person with whom the transferor was not dealing at arm's length.
> 4) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.

[19] The first three requirements are no longer at issue in this appeal. One of the Minister’s assumptions was that the Appellant’s spouse was liable for amounts

owing of $63,540.36 under the *Act* at the time of the transfer of the property to the Appellant. The Appellant did not raise this issue in her Notice of Appeal although in her opening statement she alleged that her request to Canada Revenue Agency ("CRA") to supply the details of her husband's original tax liability was refused. The Respondent stated that Mr. Allen's income tax returns could not be provided to the Appellant without Mr. Allen's consent. Although the Appellant testified that she was unaware of her husband's tax liability at the time of the transfer and that it was not done to thwart the collection efforts of the Minister, according to the decision in *Wannan*, a transferee need not have knowledge of the tax affairs of the primary debtor in order for section 160 to be applied. The Appellant asserts that the purpose of the transfer was to provide funds to her husband so that he could pay his creditors but the caselaw is clear that the reason for the transfer does not impact an analysis under this provision. Moreover, Mr. Allen did not dispute his tax liability. He merely stated that he had no knowledge as to why he was reassessed and that it was too late to contest his tax liability. The Appellant conceded that her husband was reassessed for taxation years prior to 1999. As a result Mr. Allen was liable to pay an amount under the *Act* at the time of transfer and subparagraph 160(1)(e)(ii) is satisfied.

[20] With respect to the second criteria, the Appellant conceded that she and Mr. Allen were husband and wife prior to and on the date of the transfer on March 23, 1999. Pursuant to paragraph 251(1)(a), related persons are deemed not to be dealing with each other at arm's length. The definition of related persons at subsection 251(2) includes individuals connected by marriage. Therefore, the statutory requirement contained at paragraph 160(1)(c) is satisfied.

[21] The Appellant conceded that there was a transfer for the purposes of section 160 and therefore the third criteria is also satisfied. The definition of property as defined in subsection 248(1) of the *Act* includes real property.

[22] Much of the Appellant's evidence focussed on the fourth requirement and that is whether the Appellant paid FMV consideration to her husband at the time he transferred his interest in the property to the Appellant. Generally, a determination of the FMV of a property is a question of fact. According to the decision in *Henderson Estate and Bank of New York* v. *M.N.R.*, 73 DTC 5471, the extent of the Appellant's liability is the value of the assets transferred. Thus the FMV of the property transferred, on the date of transfer, must be determined in order to establish the extent of a transferee's liability. There was an issue whether the FMV of the property that was transferred was $375,000.00, as suggested by the Minister's appraisal, or $408,000.00, as suggested by the Appellant. However, the

Appellant conceded that the FMV of the property was not less than $375,000.00, after being read portions of her statements made at the examination for discovery. Therefore, the only remaining issue to be decided is whether the Appellant paid more than the $2.00 consideration stipulated in the land transfer document.

[23] Subparagraph 160(1)(e)(i) renders a transferee liable for the transferor's tax liability to the extent that the value of the property exceeds the FMV of the consideration received for the property. In *Ruffolo et al.* v. *The Queen*, 99 DTC 184, Bonner J. in examining the term "consideration" for the purposes of section 160, stated the following at paragraph 7:

> [7] … The word "consideration" in subparagraph 160(1)(*e*)(i) is to be given its ordinary meaning, namely, something given in payment. Nothing in the statutory context or in the purpose which underlies section 160 suggests otherwise. …

[24] In *Logiudice* v. *The Queen*, 97 DTC 1462, at page 1466, Bowie J. made the following comments:

> The word consideration, as it is used in the context of section 160 of the Act, in its ordinary sense refers to the consideration given by one party to a contract to the other party, in return for the property transferred. The obvious purpose of section 160 is to prevent taxpayers from escaping their liability for tax, interest and penalties arising under the provisions of the Act by placing their exigible assets in the hands of relatives, or others with whom they are not at arms' length, and thus beyond the immediate reach of the tax collector. The limiting provision in subparagraph 160(1)(*e*)(i) of the Act is to protect genuine business transactions from the operation of the section, to the extent of the fair market value of the consideration given for the property transferred. It is apparent, therefore, that for a transferee to have the benefit of this saving provision she must be able to prove that the transfer of property to her was made pursuant to the terms of a genuine contractual arrangement.
> (Emphasis added)

[25] In *Livingston*, Sexton J. stated the following, at paragraph 27, respecting the consideration requirement under section 160:

> [27] Under subsection 160(1), a transferee of property will be liable to the CRA to the extent that the fair market value of the consideration given for the property falls short of the fair market value of that property. The very purpose of subsection 160(1) is to preserve the value of the existing assets in the taxpayer for collection by the CRA. Where those assets are entirely divested, subsection 160(1) provides that the CRA's rights to those assets can be exercised against the transferee of the property. However, subsection 160(1) will not apply where an amount equivalent in value to

> the original property transferred was given to the transferor at the time of transfer: that is, fair market value consideration. This is because after such a transaction, the CRA has not been prejudiced as a creditor. …

[26] Although the Appellant conceded that the FMV of the property at the time of transfer was $375,000.00 and that the mortgage balance was $242,588.00, she submits that she and her husband had an oral contract whereby after this transfer she would make arrangements to calculate his equity in the property and make arrangements to advance funds to her husband within a short time of the transfer. Therefore, according to her argument she has paid FMV consideration for her husband's half-interest leaving her liability under section 160 at nil. The Minister assumed that on March 23, 1999, Mr. Allen transferred his half-interest in the property to the Appellant for a consideration of $2.00 as supported by the documentation. With a FMV of $375,000.00 and a mortgage balance of $242,588.00, the Minister concluded that Mr. Allen's equity in the property was $66,205.00.

[27] The Respondent emphasized that the focus under subparagraph 160(1)(e)(i) is the time of the transfer and the consideration that passed between the parties on that date, which in this appeal is March 23, 1999. The Respondent submits that any payments made subsequent to the transfer will not meet the strict interpretation of this provision as it is not concerned with FMV of the property after the transfer date. The Respondent argued that the consideration that passed on the date of transfer was $2.00 according to the land transfer documentation. According to the Appellant, the lawyer insisted that the consideration be listed at $2.00 in the transfer documents because the Appellant did not have a valuation report for the property and the FMV could not be properly assessed. The Appellant however claims that the lawyer made a mistake because he did not inform her that once the property valuation was completed she should return to him to change the land transfer document (Transcript, pages 45-46). Mr. Allen confirmed that they provided all of the facts concerning this transfer to the lawyer.

[28] The Appellant submits that the $2.00 consideration was used because she wanted the property transferred to her name before providing consideration because she was afraid of what actions FSCO could take. However, the Appellant's evidence was that she signed the land transfer documentation with the knowledge that the listed consideration was $2.00. She signed the affidavit and had the benefit of legal counsel. Although she claimed that the oral agreement with her husband was that she would pay him money after the transfer, there was no evidence presented that would suggest that the transfer documentation was later

changed. This could have been done when the second mortgage was taken out to reflect what the Appellant claimed was the proper FMV consideration. According to the Appellant's submissions, the lawyer acting in this transfer disregarded both the Appellant's and Mr. Allen's stated intention concerning this transfer and in addition did not inform them of the possible ramifications of this transfer. I do not think this is plausible given the testimony of both the Appellant and her husband that the lawyer was privy to all the material facts. If this lawyer had been called to testify, he had the potential to corroborate the Appellant's evidence in this regard.

[29] The Appellant testified that she consulted with the lawyer in respect to this transfer one week before FSCO froze her husband's accounts. She also testified that her husband was not aware of these pending legal problems prior to the freeze by FSCO. Mr. Allen corroborated the Appellant's testimony in this regard. Both also testified that the transfer was completed so that Mr. Allen would have funds to pay his creditors. However, they both also contend that no formal arrangements were made respecting consideration at the time of the transfer because they were afraid of what FSCO might do next (Transcript, pages 127-129, 138-140). This testimony is clearly contradictory. If the Appellant saw the lawyer one week before her husband's accounts were frozen and prior to her husband becoming aware that FSCO was about to freeze his assets, then the transfer could not have been initiated, as they also suggested, because they were afraid of what FSCO's next move might be.

[30] The Appellant submitted that payment of property taxes and mortgage payments subsequent to the transfer could be viewed as part of the FMV consideration. The Appellant referred to the decision in *Michaud* v. *The Queen*, 99 DTC 43, to support her contention that these payments by her in the period after the transfer could be further consideration within the meaning of section 160. However, the *Michaud* decision does not support such a proposition. Lamarre Proulx J. held that the execution of a legal obligation does not constitute a "transfer" for the purposes of section 160 and the spouse in that case was merely carrying out a legal obligation to pay the mortgage. The decision in *Michaud* actually turned on the fact that there was no transfer and not that payments made on a mortgage post-transfer constituted consideration. However, I agree with the Respondent's submissions that payments made in respect to the mortgage or other expenses related to the property after the transfer date cannot be considered valid consideration because the transferor, Mr. Allen, had already disposed of his interest in the property when these payments were made. Also Little J. in dismissing the appeal in *Arain* v. *The Queen*, 2007 DTC 11, stated that the payment of property taxes plus amounts paid to install new windows post-transfer

could not be viewed as part of FMV consideration because the spouse had already disposed of his interest in the property and could not benefit from such payments.

[31] In another decision of Little J., *Madsen* v. *The Queen*, 2005 DTC 369, which was upheld by the Federal Court of Appeal, it was held that a vague promise to pay her spouse in the future when she had funds for his interest in the transferred property without further documentation did not constitute consideration at the time of the transfer.

[32] In the present appeal, the Appellant testified that their arrangement consisted of an oral agreement but there was no documentation or other corroborating evidence to show in fact that there was a promise to pay consideration in the future. I do not wish this to be taken to mean that I would always require written documentation. Each case must turn on its own set of facts. However, in this appeal, I believe there are too many inconsistencies in the evidence to give any credence to the oral testimony without further corroborating evidence sufficient to satisfy the onus which rests with the Appellant. Both the Appellant and her husband were represented by legal counsel who, according to their testimonies, was fully informed of all material facts surrounding this transfer. If that were the case, it strikes me as being suspect that the lawyer, armed with that knowledge, would not have drafted documentation such as a promissory note to reflect these circumstances. Such a paper trail would have supported their stated intention respecting the consideration at the time of transfer.

[33] The Appellant contends that she paid consideration as evidenced by the steps she took to have the property valued to determine her husband's equity as well as the actions she took immediately after the transfer to honour the oral agreement. The Appellant's position is that at the date of the transfer appropriate consideration had been agreed upon and was paid within months of the transfer. Although documentation was not complete, the Appellant argued that the transfer should be viewed as a transaction honoured between the two spouses and not one that was prepared by a lawyer. In addition, she provided a witness, Andrew Bowman MacQuarrie, who testified that the Appellant indicated in March 1999 that she was buying her husband's share of the home and had to sell her car.

[34] Based on the caselaw, to avoid triggering the application of section 160, the Appellant must show that the FMV consideration was provided to Mr. Allen at the time of the transfer. This is supported by the wording of subparagraph 160(1)(e)(i). According to the Respondent, this means that consideration must be given at the time or date of the transfer, which is March 23, 1999 in this appeal. My view,

however, is that the Respondent's interpretation is too literal an interpretation. If the facts support the existence of a genuine contractual agreement that provides for FMV consideration, as per the decision in *Logiudice*, then this will be sufficient even though actual payment is not provided on the date of the transfer. The Respondent seems to later agree with this view in her submissions (Transcript, pages 267-269).

[35] The Appellant has the onus to prove that there was a valid agreement at the time of the transfer to pay due consideration at a future date. In the present appeal there is no written contract only an alleged oral agreement according to the testimonies of the Appellant and her husband. However, there are simply too many inconsistencies in the testimony to satisfy the Appellant's onus and support a conclusion that a genuine contractual agreement existed to pay due consideration post-transfer. Not only must there be evidence of consideration but the consideration must be sufficient.

[36] The Appellant testified that she advanced a total of $12,400.00 to her husband between April and May 1999 in three instalments:

(1) $10,000.00 paid to Mr. Allen by cheque on April 4, 1999;
(2) $900.00 paid to a numbered company on April 15, 1999; and
(3) $1,500.00 paid to Mr. Allen by cheque on May 18, 1999.

[37] With respect to the $900.00 advance, the Appellant testified that the numbered company was a creditor of her husband's. However, neither the Appellant nor her husband were able to identify the company, its relationship to Mr. Allen, or the exact amount that was owing to this company. The company was not listed as one of Mr. Allen's creditors in the class action lawsuit and it was not listed as one of over 120 creditors in the class action judgment. The Appellant did not produce a representative of this company to testify nor did she submit loan documents that would verify that it was a creditor or that there was in fact a link between the company and Mr. Allen. Although the Appellant questioned Mr. Randolph Reynolds, the CRA official, as to why he did not investigate the numbered company, the onus to do so is upon the Appellant and not the Minister. Without more information, I cannot conclude that the $900.00 cheque was part of the consideration paid to Mr. Allen for the transfer of his half-interest. Simply because the cheque was payable to this company does not support a conclusion that it was one of Mr. Allen's creditors. The only document before me was a Corporate Profile Report indicating that this company was an investment company (Exhibit

R-12). I also have difficulty accepting that the Appellant would simply write this cheque without verifying that money was in fact owed to it.

[38] With respect to the advances of $10,000.00 and $1,500.00, the Respondent submits that they actually originated from Mr. Allen. Both the Appellant and Mr. Allen conceded that the Appellant's income was insufficient to pay Mr. Allen the FMV consideration for his equity but claimed that the source of some of these funds was a loan from their aunt, Alma McKay. The Respondent argued that their testimonies respecting these amounts should be rejected because there were three different versions as to the source of some of these funds. Initially the Appellant, at the examination for discovery, stated that she sold her car to acquire the funds but during the hearing it became apparent that her car was sold in 2000 and could not have been the source of these funds in 1999. Both the Appellant and her husband claimed that they were mistaken as to the date of the sale of the vehicle.

[39] Subsequent to the examination for discovery, the Appellant in her undertakings advised that the source of the funds was an $18,000.00 loan from a personal friend. During the hearing, the Appellant's testimony changed when she stated that the source of the funds was a $25,000.00 loan from her aunt, Alma McKay. Other than a deposit slip for $18,000.00, there was no other evidence adduced respecting the loan or the origin generally of these funds. The Respondent speculated that Mr. Allen likely provided the funds and then the Appellant signed the cheque back to him. The Appellant argued that her husband's accounts were frozen by FSCO in 1999 and therefore he could not have advanced her funds as suggested by the Respondent. The Respondent suggested that Mr. Allen was a sophisticated business person who had been found guilty of defrauding $10 million from over 100 people and that those funds could have come from the $10 million.

[40] The Appellant admitted that she was unable to locate the deposit information for the $18,000.00 loan. It is not clear from the evidence due to the inconsistent testimony what the source of the funds was or where the money originated. Consequently, the Appellant has not satisfied the onus to show that these two advances of $10,000.00 and $1,500.00 were part of the due consideration paid post-transfer.

[41] The Appellant also claimed that she secured a second mortgage on the property in the amount of $60,000.00 to pay some of the FMV consideration to her husband for his share of the property. She testified that the proceeds from this mortgage were only $41,063.96 because there were incidental fees and property

taxes that had to be brought up to date at the time of this refinancing. The Appellant indicated that correspondence from the lawyer handling this transaction sets out the allocation of mortgage proceeds as follows:

(1) $6,271.00 paid to 1096631 Ontario Limited, a creditor of Mr. Allen;
(2) $11,000.00 paid to Mr. Allen's RBC Visa;
(3) $13,250.00 paid to Mr. Allen's Bank of Montreal MasterCard; and
(4) $10,542.96 paid directly to Mr. Allen and the Appellant jointly.

[42] Similarly to the evidence presented respecting the $900.00 payment to one of Mr. Allen's creditors, the Appellant had no knowledge of 1096631 Ontario Limited and did not know how much if anything her husband may have owed to this company. This payment from the mortgage proceeds, without any other supporting evidence, is simply insufficient in light of the many inconsistencies and vague assertions throughout the testimony generally to conclude that this payment should constitute payment to her husband as part of the consideration.

[43] In respect to the second advance from the mortgage proceeds, the $11,000.00 payment to Mr. Allen's Visa, the only evidence presented was a Visa statement but the transactions shown on this statement relate to charges that were personal in nature. There was no evidence to show how the debt accumulated or how the charges were related to business. The Visa statement also shows two credit card numbers. The Respondent submitted that one of the cards was spousal because if they were separate cards, separate statements would have been issued for each card. About the time that the card was paid, Mr. Allen was experiencing significant problems with FSCO, his business had been closed and his assets and accounts frozen. In light of these facts, he would not have been conducting any business in July 1999. Yet he submits that the Visa was used for business purposes, which is highly improbable.

[44] Neither can the third mortgage advance, the MasterCard payment of $13,250.00, be considered as consideration for Mr. Allen's half-interest in the property. Again it would appear from the MasterCard statement that many of the charges such as purchasing pizza and gas were of a personal nature. Since this statement did not contain Mr. Allen's name, I actually have no independent evidence, other than the oral testimony, that this card was in fact Mr. Allen's MasterCard.

[45] Although the last payment of $10,542.96 was paid, according to the solicitor's correspondence, to both the Appellant and her husband, a bank draft

shows the funds as being deposited to Mr. Allen's bank account. There is also a bank draft indicating that this money was withdrawn from the account on the same day that it was deposited. The Appellant had difficulty recalling this transaction and could not explain the inconsistencies surrounding the payment. There was no actual evidence submitted to show that the funds went to pay creditors or for that matter where the funds actually went. The Appellant's contention, that once she has paid funds to Mr. Allen, it does not matter what he does with the money, is correct but only to the extent that those funds were not withdrawn to pay joint expenses and household expenses. Again, with the vagueness of the evidence and in conjunction with the problems I have generally with the credibility of the testimony, I cannot accept that this payment was part of the FMV consideration received by Mr. Allen in respect of his interest in the property.

[46] Lastly, the Appellant alleged that she withdrew $6,650.00 from her RRSPs to pay the remainder of the consideration owed to her husband. There was some evidence that RRSPs were cashed but there was no evidence to support the amounts which the Appellant claims were cashed in or evidence to support the dates on which the Appellant submits they were cashed. The Appellant testified that these RRSPs were not spousal accounts yet at the examination for discovery she could not remember if her husband had made contributions to the spousal RRSPs or the individual RRSPs. There was no clear evidence presented pertaining to whether Mr. Allen's contributions were part of the spousal RRSPs or the Appellant's individual RRSPs nor was there evidence presented to support the Appellant's contention that RRSP proceeds were used to pay Mr. Allen.

[47] The Appellant maintained that she was never involved in her husband's business activities and never received money from his companies except for the interior design services she provided for his offices. However, the Appellant was named as a defendant in the class action lawsuit commenced in July 1999. As well, Mr. Allen's income tax returns show that the Appellant was involved in his company, Nelbar Management Services. Although the Appellant denied this, the income tax returns suggest a different story and support that the Appellant claimed the same income as her husband did in his returns for the 1995 and 1997 taxation years. The explanation of the Appellant and her husband was that either their accountant made a mistake or it was some type of income splitting. The Respondent submitted that, since the Appellant had her own legal problems and had to hire legal counsel to defend her interests in the lawsuit, she could have used the excess funds received from the second mortgage to pay her own legal expenses. The written documentation indicates that the Appellant was involved in the partnership until 1999, the year of the transfer and because of the difficulties I

have in accepting her evidence overall, I must reject her testimony regarding this as well.

[48] The Appellant has not adduced sufficient evidence to discharge the onus which she has. Documentary evidence was lacking and when that is coupled with oral testimony which is inconsistent and vague on so many points, it will nearly always be fatal to the success of an appeal such as this. The clarity required in the testimony was severely lacking and consequently I cannot conclude that the Appellant had a genuine contractual arrangement with her husband to pay FMV consideration for his half-interest in the property post-transfer or that consideration had been provided post-transfer. The appeal is therefore dismissed with costs to the Respondent.

Signed at Summerside, Prince Edward Island, this 9th day of September 2009.

"Diane Campbell"

Campbell J.

CITATION:	2009 TCC 426
COURT FILE NO.:	2007-3915(IT)G
STYLE OF CAUSE:	Barbara Allen and Her Majesty The Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 11 and 12, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	September 9, 2009

APPEARANCES:

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COUNSEL OF RECORD:

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