Citation: 2011TCC116
Date: 20110222
Docket: 2009-1561(IT)G

BETWEEN:

MORGUARD CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

(Delivered orally from the bench on October 26, 2010, in Toronto, Ontario.)

V.A. Miller J.

[1] This is a motion brought by the Respondent for an Order to compel the Appellant to produce a knowledgeable nominee to be examined for discovery on its behalf and to amend the timetable that was ordered by this Court on January 20, 2010. The grounds relied on for the motion are that the Respondent attempted to conduct an examination for discovery of the Appellant's nominee on September 22, 2010 and that nominee had not informed himself of the matters under appeal. As a result, the Respondent's right to examine the Appellant for discovery has been effectively denied.

[2] The key issue raised by the pleadings in this appeal is the characterization for tax purposes of the $7,700,000 received by the Appellant as a "break fee" in 2000. The "break fee" was received in the course of a takeover bid that the Appellant (then named Acktion Corporation) made for the shares of Acanthus Real Estate Corporation. It is the Appellant's position that the "break fee" was a windfall or, in the alternative, it was a capital receipt. In computing income for the taxation year ended November 30, 2000, the Appellant included the "break fee" less expenses as a capital gain. It is the Respondent's position that the "break fee" is an income receipt. This issue is entirely a factual one[1].

[3] Counsel for the Respondent relied on the following sections of the *Tax Court of Canada Rules (General Procedure)*:

> 93(2) A party to be examined, other than an individual or the Crown, shall select a knowledgeable current or former officer, director, member or employee, to be examined on behalf of that party, but, if the examining party is not satisfied with that person, the examining party may apply to the Court to name some other person.
>
> 95(2) Prior to the examination for discovery, the person to be examined shall make all reasonable inquiries regarding the matters in issue from all of the party's officers, servants, agents and employees, past or present, either within or outside Canada and, if necessary, the person being examined for discovery may be required to become better informed and for that purpose the examination may be adjourned.

[4] The Appellant selected Mr. Paul Miatello, its Chief Finance Officer, to be examined on its behalf. In 2000, Mr. Miatello was not employed by the Appellant or its predecessor, Acktion Corporation. From the transcript of the discovery, it appears that Mr. Miatello was first employed by the Appellant in 2002 as its corporate secretary. Mr. Miatello stated that he prepared for the examination by reviewing documents that were in the public domain, documents and tax filings that were the files of other people involved in the Appellant during the relevant time. The only person he spoke to who had first-hand knowledge of the events in 2000 was Rai Sahi, the chief Executive Officer of the Appellant.

[5] It is the Appellant's position that Mr. Miatello is a knowledgeable officer of the Appellant and he adequately informed himself of the facts relevant to the appeal. In the course of his examination on September 22, 2010, he answered 285 of the Respondent's questions. There were only 20 questions that he could not answer and he undertook to ask Rai Sahi for the answers and to provide such answers to counsel for the Respondent.

Analysis

[6] On two occasions at the examination for discovery, counsel for the Respondent raised the concern whether the Appellant's nominee had the necessary knowledge to be able to answer the questions posed[2].

[7] The Appellant's nominee did answer questions that were peripheral to the issue under appeal. However, when he was asked specific questions about the "break fee", his answers were vague, non-committal and totally uninformative. As an example, at page 32 of the transcript, counsel for the Respondent asked Mr. Miatello

what were the key terms to the amendment of the pre-acquisition agreement. Mr. Miatello's response was:

> A. A change in offer price and a change in the quantum of the break fee.
>
> Q. How did they determine the change in the offer price?
>
> A. Well, again, these takeover bids are more art than science. You know, it's a number that the company feels comfortable acquiring the target at. So I presume you're looking for something more specific, but it's a price that Acktion was comfortable completing the acquisition at.
>
> Q. Would it be safe to say when you say Acktion, you mean Mr. Sahi?
>
> A. Well, it was Acktion buying, intending to buy Acanthus, so I do mean Acktion.
>
> Q. Sir, earlier you mentioned you had a discussion with Mr. Sahi about the transaction. What areas did you cover with Mr. Sahi precisely?
>
> A. What we talked about spoke more to the intent of the transaction rather than, you know – and I guess I mean that from more of a big picture perspective, you know, why was Acktion desiring to buy the company and what was the long-term intent of Acktion in doing so.
>
> Q. And what did Mr. Sahi say about that?
>
> A. Mr. Sahi said that the intent of Acktion was to acquire Acanthus at a reasonable price, you know, to buy a company that was in the apartment business and for long-term capital appreciation which was part of the strategic plan of the company.
>
> Q. What else did you discuss with Mr. Sahi?
>
> A. I mean, we went over some, reviewed some of the facts that were in the public company documents, but nothing beyond that.

[8] In response to questions concerning the "break fee", Mr. Miatello answered:

> Q. But, sir, it would be fair to say that you can't speak to the negotiations of the break fee, for instance, that happened in 2000.
>
> A. That is correct.

> Q. And you can't speak to the various terms in the pre-acquisition, how they came about.
>
> A. That is correct.

[9] At the examination for discovery, when counsel for the Respondent raised the issue of Mr. Miatello's lack of knowledge, counsel for the Appellant flippantly told counsel for the Respondent to either get an expert or to read about takeover bids to inform himself about how takeover bids generally work. This is wholly unsatisfactory and frustrates the very purpose for a discovery. That purpose being to find out facts which will allow the party to know the case it has to meet; to obtain admissions that will facilitate the proof of its case or will assist in destroying the other party's case[3].

[10] From a complete examination of the discovery transcript, I am satisfied that not only does Mr. Miatello have no personal knowledge of the negotiations that gave rise to the "break fee" but that it is doubtful that he could inform himself of such matters so that he could adequately answer questions such as those at Undertakings 6, 13, 19, 21, 22, 27, 31, 32, 33, 35 and 37 and any questions that might arise from his answers to those questions. As stated in *Donald Applicators Ltd. v. Minister of Revenue*[4]:

> The rule that a witness must inform himself on matters not within his knowledge is intended as a supplement to and not a substitute for discovery and I do not feel that in the present case the ends of justice would had been fully served if the manager of the appellant corporation had been instructed to inform himself.

[11] The obligation of the nominee to inform himself arose prior to the examination for discovery. It arose when he was appointed as the nominee for the Appellant[5]. In the present case, the nominee could not give any details on the only issue which the Appellant had raised in its Notice of Appeal. The majority of his answers were inferences he had drawn from reading the public documents.

[12] In the present case, in response to counsel's questions, Mr. Miatello frequently answered that Mr. Sahi would be able to give the best answer; or, that "if anybody could answer the question, it would be Mr. Sahi"; or, that he had no personal knowledge; or, he had no knowledge.

[13] I am satisfied that this is not a proper case to order Mr. Miatello to "become better informed". The Respondent should not be forced into conducting the discovery by interrogatories[6]. The motion is granted and it is ordered that the Appellant produce

Mr. Sahi as a nominee for the Appellant as he is the person who has knowledge of the facts that gave rise to the issue under appeal. There are no limitations placed on the examination for discovery of Mr. Sahi. To limit the discovery to the questions for which undertakings have been given, would be tantamount to giving the Appellant the list of questions prior to the examination for discovery. Also, to limit the discovery would be to acquiesce to the Appellant's apparent attempt to frustrate the Respondent's discovery of its nominee. I say that it appears that the Appellant attempted to frustrate the discovery because it nominated an officer who had no knowledge of the events that lead to the "break fee" while it had, within its employ, two officers who were knowledgeable of the matters which gave rise to this appeal. Those officers were Mr. Sahi, its Chairman and Chief Executive Officer and Mr. Munsters, its Vice President of Credit and Banking.

[14] The Order of Favreau J. dated January 20, 2010 is amended as follows:

> The examination for discovery shall be completed by November 30, 2010.
>
> Undertakings given at the examination for discovery shall be satisfied by December 31, 2010.
>
> The parties shall communicate with the Hearings Coordinator in writing on or before January 29, 2011 to advise the court whether the case will settle, whether a pre-hearing conference would be beneficial or whether a hearing date should be set. In the latter event, the parties may file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure).*

[15] The Respondent is awarded costs in the amount of $3,000 to be paid within 10 days from the date of this Order.

Signed at Ottawa, Canada, this 22nd day of February 2011.

"V.A. Miller"

V.A. Miller J.

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[1] *Tsiaprailis v. Canada*, 2005 SCC 8 at paragraph 7
[2] Transcript of the examination for discovery at page 9, line 14 and page 34, line 17.
[3] *Fink v. R.*, [2005] 3 C.T.C. 2474 (TCC)
[4] [1966] C.T.C. 163 (Ex. Ct.) at paragraph 5

[5] *Newbigging v. Loeuen Group Inc*., 122 Sask. R. 291 at paragraph 8 (Sask. Ct. Q.B.)
[6] *Supra,* Footnote 5

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APPEARANCES:

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