CITATION: Telus Communications Inc. v. Canada (Attorney General), 2015 ONSC 6245
COURT FILE NO.: CV-14-10528-00CL
DATE: 20151008

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: TELUS COMMUNICATIONS INC., TELUS COMMUNICATIONS COMPANY and TM MOBILE INC., Applicants

AND:

ATTORNEY GENERAL OF CANADA, Respondent

BEFORE: Justice Hainey

COUNSEL: *Ian MacGregor* and *Sharon Ford*, for the Applicants

Rita Araujo and *Jenny Mboutsiadis*, for the Respondent

HEARD: October 5, 2015

ENDORSEMENT

Overview

[1] The Applicants apply on the equitable grounds of rectification for the following order:

(i) Rectifying the organizational structure of the Telus Group, which consists of all entities controlled by Telus Corporation, to bring the multi-tier alignment election executed and filed by Telus Communications Inc. ("Telus") on May 28, 2012 ("Election") pursuant to the *Income Tax Act* ("*Act*") into compliance with the *Act* to give effect to the intention of the Applicants to make a valid election; and

(ii) Permitting the transfer of the limited partnership interest held by Telus Communications Company ("TCC") in EnStream LP ("EnStream") to TM Mobile Inc., ("Mobile"), a wholly-owned subsidiary of TCC, effective as of December 31, 2011.

[2] The federal government's budget for 2011 contained amendments to the *Act* concerning fiscal periods for partnerships. These amendments gave Canadian corporations a one-time opportunity to file an election that would align the fiscal period ends of any partnerships in their corporate groups that were arranged in tiered partnership structures. If an election was not made the fiscal period ends of such partnerships were deemed to be December 31st, commencing in 2011 ("New Rules").

[3] The Telus Group had a tiered partnership structure. Its management decided to have Telus make an Election to align the fiscal period ends of TCC and Tele-Mobile Company ("TMC"), the two partnerships that management believed to be in its multi-tiered partnership structure ("Partnership Structure"). The fiscal period end chosen was January 31st.

[4] Before filing the Election on May 28, 2012, the Applicants' internal tax group obtained advance rulings from the Department of Finance, the drafter of the New Rules, and the Canada Revenue Agency ("CRA"), the administrator of the New Rules. Both of these federal agencies confirmed that the Election would be valid under the New Rules.

[5] In September 2013, fifteen months after Telus filed the Election, the Applicants discovered that their management had inadvertently forgotten about a minority interest TCC held in EnStream, a third partnership in the Partnership Structure. This partnership interest was not reflected on the organizational chart that had been attached to the Election.

[6] Because the New Rules required that all partnerships in a multi-tiered partnership structure had to have a common fiscal period and EnStream had a different fiscal period, the Election was rendered invalid because of this omission. As a consequence, TCC and TMC were deemed to have a December 31st fiscal period end rather than January 31st. This resulted in adverse tax consequences for the Telus Group.

[7] The Applicants ask this Court to correct this error by allowing the transfer of TCC's minority interest in EnStream out of the Partnership Structure to give effect to the Applicants' specific and continuing intention to file a valid Election under the New Rules.

Positions of the Parties

[8] The Applicants submit that it is clear that they intended to make a valid election and their attempt to do so was frustrated by an innocent and honest mistake. They argue that they are entitled to the equitable relief of rectification of the Election under the principles established in *Juliar v. Canada (Attorney General)*, [1999] 46 O.R. (3d) 104 (Ont. S.C.) and *Fairmont Hotels Inc. v. Canada (Attorney General)*, 2014 ONSC 7302. They submit that there will be no prejudice to the Crown if rectification is granted.

[9] The Respondent submits that this is not a case where rectification is available because there is no prior agreement to preserve and no pre-existing instrument to correct. The Respondent maintains that the Applicants are asking the Court to retroactively create a transaction and backdate newly-created documents under the guise of rectification.

Analysis

[10] I am satisfied on the evidentiary record of the following:

(a) The Applicants clearly intended to file a multi-tier alignment election under the New Rules to align the fiscal periods of the only two partnerships their management believed to be in their Partnership Structure.

(b) The Applicants' management inadvertently forgot about a minority interest TCC held in EnStream, a third partnership in their Partnership Structure. They omitted to transfer EnStream out of the Partnership Structure before Telus made its Election. I find that this was an honest inadvertent mistake.

(c) Had the Applicants' management adverted to the existence of TCC's minority interest in EnStream before Telus filed its Election they would have transferred this interest to TCC's wholly-owned subsidiary, Mobile, on a tax deferred basis under s. 85 of the *Act*. This would have made the Election valid and TCC's and TMC's year-end periods would have been January 31st.

(d) At all times the Applicants were acting in good faith and disclosed the mistake in the Election to the CRA within one month of discovering it.

[11] In *Juliar*, *supra*, Cameron J. set out the four requirements of the doctrine of mistake and rectification as follows:

(i) a prior agreement;

(ii) a common intention;

(iii) a final document which did not properly record the intention of the parties; and

(iv) common or mutual mistake.

[12] In *Fairmont*, *supra*, the Ontario Court of Appeal held as follows at para. 10:

> ... the critical requirement for rectification is proof of a continuing specific intention to undertake a transaction or transactions on a particular tax basis.

[13] I am satisfied that the Applicants had, at all times, a continuing specific intention to file a valid Election in order to achieve a particular tax purpose under the New Rules. Their intention to do so was frustrated by an honest and inadvertent mistake. In this regard the Applicants' position is no different than that of the applicants in *Juliar* and *Fairmont*.

[14] I can find no prejudice arising to the Crown if rectification is granted. The Applicants' proposed Election was accepted by the CRA in an advance ruling dated April 24, 2012. The CRA committed itself to collecting tax revenue from the Applicants on the basis that TMC and TCC had common fiscal period ends commencing January 31, 2012.

[15] I do not accept counsel for the Respondent's submission that prejudice arises to the Crown because the filing deadline proscribed by Parliament in the New Rules will be frustrated if rectification is granted. The Election was filed well before the applicable deadline. The Election is invalid because of an inadvertent error not because it was filed out of time.

[16] In my view the Applicants meet the requirements for rectification set out in *Juliar* and *Fairmont* for the following reasons:

(i) *Prior Agreement* – There was a prior agreement among the Applicants' internal tax group to file a valid Election under the New Rules to align TMC's and TCC's year-end periods at January 31st. This prior agreement was made known to and accepted by the CRA before the Election was filed.

(ii) *Common Intention* – There was a common intention among the Applicants, that was known to the CRA, to obtain the tax benefit available under the New Rules by making a valid Election and aligning TMC's and TCC's year-end periods at January 31st.

(iii) *Final Document* – The Election dated May 28, 2012 is a final document that did not properly record the Applicants' intention because it overlooked TCC's minority interest in EnStream. As a result, the organizational chart attached to the Election was incorrect.

(iv) *Common or Mutual Mistake* – The Applicants overlooked TCC's minority interest in EnStream. This was a mutual mistake that resulted in an invalid Election.

[17] I do not agree with the Respondent's submission that the Applicants' request for rectification extends beyond what the Court granted in *Juliar* or *Fairmont*. The Respondent argues that this is because the Applicants are asking the Court to retroactively declare that new transactions and new instruments took place when they did not. This, in my view, mischaracterizes the Applicants' request. The Applicants had a specific and continuing intention throughout to file a valid Election. They are not attempting to retroactively avoid an unintended tax disadvantage.

[18] I accept the following submission at para. 39 of the Applicants' factum:

> Had TELUS remembered TCC's minority interest in EnStream before filing the Election, it would have transferred TCC's EnStream interest to TCC's only wholly-owned subsidiary, TM Mobile to ensure that the tiered partnership structure in respect of which the Election was filed (i.e. the two-tier partnership structure consisting of TMC and TCC) was legally correct. Doing so would have given effect to the specific, continuing common intention of TELUS to file a valid election and align the relevant fiscal periods on January 31. The Applicants submit that an order for rectification is equitable and is amply justified in light of the case law set out above.

[19] I am of the view that the rectification order sought by the Applicants will not prejudice the taxing authorities for the same reasons given by the Quebec Court of Appeal in *Services Environnementaux AES Inc. c. Canada (Agence des douanes & du Revenu)*, 2011 QCCA 394, in which the court stated as follows at para. 21:

> The respondents' application is legitimate. In fact, it is not for them a matter of rewriting the taxation history of the file, but of being able to correct the documents to make them consistent with the story designed and written by the parties on the basis of the scenario proposed by the tax legislation. The taxation authorities do not suffer any prejudice because both the *Income Tax Act* and the

> *Taxation Act* set out for the taxpayer the procedure to follow so that a share-for-share exchange can take place without immediate tax consequences and, moreover, if the parties had done so in a manner consistent with their will, there would have been no immediate tax consequences for them.

[20] In the alternative, if I am wrong in concluding that there should be a rectification order pursuant to the principles established in *Juliar* and *Fairmont*, I rely on the equitable jurisdiction of this court to relieve the Applicants from the effect of their mistake. The Ontario Court of Appeal made it clear that this is an alternative basis for granting the relief sought by the Applicants in *TCR Holding Corp. v. Ontario*, 2010 ONCA 233. At paras. 26-27, MacPherson J.A. stated, in part, as follows:

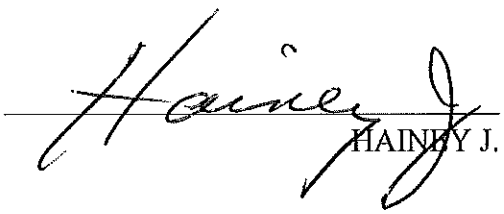
> Broadly speaking, a superior court has 'all the powers that are necessary to do justice between the parties' ... More specifically, 'superior courts have equitable jurisdiction to relieve persons from the effect of their mistakes' ... This was the alternative basis for the application judge's order. After reviewing the relevant evidence, he characterized the inclusion of a still debt-liable 846 in the amalgamation as an 'inadvertent mistake' and ... concluded that there was 'no reason not to grant the relief to TCR under this equitable jurisdiction to relieve against mistake.' I see no basis for disagreeing with this analysis or with the application judge's exercise of discretion of setting aside the amalgamation. The amalgamating companies agreed to the amalgamation based on the mistake that 846 was debt free.

[21] In my view, the same reasoning applies to the Applicants' inadvertent mistake in connection with the Election. I see no reason not to grant the relief requested for the same reason as the application judge in *TCR Holding, supra.*

[22] The application is, therefore, granted. There shall be an order on the same terms as the draft order attached as Schedule A to the Amended Notice of Application.

Costs

[23] The Applicants are entitled to their costs of this application. I urge the parties to agree on costs. If they cannot agree on costs they are to schedule a 9:30 a.m. attendance before me within 30 days to fix costs.



HAINEY J.

Date: October 8, 2015