COURT OF APPEAL FOR ONTARIO

CITATION: Fairmont Hotels Inc. v. Canada (Attorney General), 2015 ONCA 441
DATE: 20150617
DOCKET: C59942

Simmons, Cronk and Blair JJ.A.

BETWEEN

Fairmont Hotels Inc., FHIW Hotel Investments (Canada) Inc.
and FHIS Hotel Investments (Canada) Inc.

Applicants
(Respondents in Appeal)

and

Attorney General of Canada

Respondent
(Appellant)

Nancy Arnold and Diana Aird for the appellant

Chia-yi Chua, Geoff R. Hall and Brandon Siegal for the respondents

Heard: June 12, 2015

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice, dated December 19, 2014.

ENDORSEMENT

[1] The sole issue on this appeal is whether the application judge erred by granting the equitable remedy of rectification in the circumstances of this case.

[2] At the end of the appellant's oral argument, this court dismissed the appeal, with reasons to follow. These are those reasons.

[3] The appellant argues that the application judge, citing this court's decision in *Canada (Attorney General) v. Juliar* (2000), 50 O.R. (3d) 728 (C.A.), leave to appeal to SCC refused, [2000] S.C.C.A. No. 621, misapplied the test for rectification by focusing exclusively on the respondent taxpayer's[1] tax intentions and ignoring the prerequisite that, to obtain rectification, it must be demonstrated that the parties agreed as to the terms of the relevant contract, but recorded them incorrectly. In the tax context, as applies here, the appellant says that this rectification prerequisite obliged the respondent to establish that it had settled on a concrete plan to meet its tax objectives, that is, on the means by which to realize its intended tax outcome, before any mistake in its implementation efforts were discovered. To hold otherwise, the appellant submits, would be to sanction impermissible retroactive tax planning.

[4] We do not accept this argument for the following reasons.

[5] Based on the evidence before him, the application judge made the following key factual findings:

> 1) the respondent had a continuing intention from 2002 onwards that its loan arrangements with Legacy would be carried out on a tax and accounting neutral basis through a plan whereby any foreign exchange gains would be offset by corresponding foreign exchange losses; and

[1] We will refer to all the respondents to this appeal, the Fairmont companies, collectively, as the "respondent".

> 2) the respondent also had a continuing intention from 2006 onwards – after the change in control occurred – that the preferred shares of the two relevant companies – the respondent, FHIW Hotel Investments (Canada) Inc. ("FHIW"), and the respondent, FHIS Hotel Investments (Canada) Inc. ("FHIS") – would not be redeemed; and
>
> 3) by reason of a mistake on the part of one of the members of the respondent's senior management team, the preferred shares of FHIW and FHIS were redeemed in 2007, triggering serious adverse, unintended tax consequences.

[6] The application judge summarized these findings in this fashion, at para. 42:

> In this case, the intention of Fairmont from 2002 was to carry out the reciprocal loan arrangements with Legacy on a tax and accounting neutral basis so that any foreign exchange gain would be offset by a corresponding foreign exchange loss. When control of Fairmont changed in 2006 that intention did not change and when the loan unwind occurred in 2007 that intention did not change. By reason of a mistake on the part of Mr. Zahary, the preferred shares of FHIW Canada and FHIS Canada held by FHI were redeemed in 2007, which unbeknown to Mr. Zahary by reason of his mistake caused an unintended tax assessment.

[7] In light of these findings, the application judge concluded, at para. 43, that the respondent did not engage in retroactive tax planning after an audit conducted by the Canada Revenue Agency (the "CRA"). Rather, the real purpose of the pertinent transaction in 2007 was not to redeem the preference shares of FHIW and FHIS but, rather, "to unwind [the Legacy transactions] on a

tax free basis". However, preference share redemptions were "mistakenly chosen as the means to do so".

[8] In these circumstances, relying on this court's decision in *Juliar*, the application judge held that the respondent was entitled to rectify the relevant corporate resolutions to correct the mistaken share redemptions. This result, the application judge noted, would avoid the imposition of an unintended tax burden that the respondent had sought to avoid from the outset, as well as an unintended tax revenue windfall to the CRA arising from the mistaken share redemptions.

[9] On the factual findings of the application judge, set out above, and the binding authority of *Juliar*, we see no basis for intervention with the application judge's discretionary decision to grant rectification.

[10] *Juliar* is a binding decision of this court. It does not require that the party seeking rectification must have determined the precise mechanics or means by which the party's settled intention to achieve a specific tax outcome would be realized. *Juliar* holds, in effect, that the critical requirement for rectification is proof of a continuing specific intention to undertake a transaction or transactions on a particular tax basis.

[11] In this case, on the application judge's findings, the respondent had a specific and unwavering intention from the outset of its dealings with Legacy to ensure that the Legacy-related transactions were tax neutral and, to that end,

that no redemptions of the relevant preference shares should occur. Nonetheless, by mistake, the redemptions were authorized by corporate resolutions.

[12] Contrary to the appellant's argument, in these circumstances, it was unnecessary that the respondent prove that it had determined to use a specific transactional device – loans – to achieve the intended tax result. That the respondent mistakenly failed to employ an appropriate transactional device to achieve the intended tax result does not alter the nature of the respondent's settled tax plan: tax neutrality in its dealings with Legacy and no redemptions of the preference shares in question.

[13] At the end of the day, therefore, *Juliar* and the application judge's factual findings, described above, are dispositive of this appeal. It is not open to a single panel of this court to depart from a binding decision of this court.

[14] The appeal is dismissed. The respondent is entitled to its costs of the appeal fixed, as agreed by counsel, in the amount of $20,000, inclusive of disbursements and all applicable taxes.

"Janet Simmons J.A."
"E.A. Cronk J.A."
"R.A. Blair J.A."