Federal Court  Cour fédérale

Date: 20160603

Docket: T-1916-14

Citation: 2016 FC 620

Ottawa, Ontario, June 3, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

MAX REALTY SOLUTIONS LTD.

Applicant

and

THE DIRECTOR FINANCIAL TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an appeal brought under section 73.21 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, [the Act] by Max Realty Solutions Ltd. [Max Realty] challenging a decision by the Director of the Financial Transactions and Reports Analysis Centre of Canada [the Director] by which Max Realty was found to have violated the Act. Specifically, Max Realty was found to have failed to appoint a compliance officer, failed to develop and apply up-to-date written compliance policies and procedures, failed to assess and

document risks and failed to develop and maintain a written, ongoing compliance training program for its employees. On the strength of these findings, the Director imposed penalties totalling $27,000.

[2] Max Realty appealed the above-noted decision to this Court on November 13, 2009. After a thorough review of the evidence Justice Cecily Strickland found the Director's findings of culpability to be reasonable: see *Max Realty Solutions Ltd. v Canada*, 2014 FC 656 at para 66, (2014) 458 FTR 160 [*Max Realty* #1]. However, she quashed the Director's finding on the quantum of the penalty for the following reasons:

> [76] Here, while the Director found that the facts did not support a finding that the fifth violation had been committed and, therefore, withdrew that violation and accordingly imposed a lesser penalty of $27,000, rather than the $37,500 stated in the Notice of Violation, there is no evidence that the Director considered Max Realty's request that the penalty be revisited. There is also no explanation as to why this penalty was chosen, what factors were considered in sentencing, whether the use of a compliance agreement was considered, nor whether the exercise of the discretion afforded to the Director to impose the penalty proposed, a lesser penalty or no penalty was considered (subsection 73.15(2)).
>
> [77] The Attorney General acknowledges that this is the first appeal of this kind and that the Penalties Regulations did not come into force until December 30, 2008. Further, that subsequent notices of violations issued in other matters have provided a more fulsome fine analysis. Also, that there is an internal fine policy which was not provided to Max Realty, but which has subsequently been distributed to other violators. The policy apparently contains guidance for fines imposed based on the amount of harm caused, compliance history, as well as the size of the entity and its ability to pay.
>
> [78] In Lemire v Canadian Human Rights Commission, 2014 FCA 18, the Federal Court of Appeal stated at paragraph 102 that, "In truth, the considerations relevant to sentencing may overlap with those governing the imposition of an administrative penalty since both are designed to prevent statutorily prohibited conduct."

> The difficulty here is that Max Realty in part, and although not explicitly, is contesting the amount of the fine. Without any reasons, or even reference to fines imposed in comparable circumstances, the Court cannot determine if the fine imposed on the Appellant is reasonable or not.
>
> [79] For that reason, while the decision as to the commission of the violations is confirmed, the fine is set aside, and the question of the amount of the fine is remitted back to the Director and reasons for the amount of any fine subsequently imposed are to be provided to Max Realty.

[3] In accordance with Justice Strickland's decision, the Director reconsidered the quantum of the penalty and imposed a revised penalty of $9,000. It is from this decision that the present appeal is brought.

I. Analysis

[4] The Director's assessment of penalties is fact-based, discretionary and governed by the Act. The applicable standard of review is reasonableness: see *Canada v Kabul Farms Inc.*, 2016 FCA 143 at para 7, [2016] FCJ No 480 (WL) [*Kabul Farms*] and the standard of review analysis carried out in *Max Realty* #1, at para 31 by Justice Strickland.

[5] Max Realty's primary argument challenges, once again, the merits of the Director's findings of culpability. The reasonableness of those findings was determined by Justice Strickland when this matter was last before this Court on appeal and cannot be reargued on this appeal. The principle of finality in litigation applies and was described by the Supreme Court of Canada in *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, at para 18, [2001] 2 SC 460:

> 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to

> establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[6] In the result, the only issue that this Court can consider on this second appeal is the reasonableness of the Director's revised penalty assessment. Although this issue is raised in the Notice of Appeal, no corresponding argument has been advanced in Max Realty's Memorandum of Fact and Law. The only point advanced in oral argument was that Max Realty cannot afford to pay a $9,000 penalty. The Court is, thus, largely left to guess about the substance of Max Realty's concerns.

[7] Subsequent to the hearing of this matter, the Federal Court of Appeal released its decision in *Kabul Farms*, above. The deficiencies in the Director's penalty assessment identified by Justice David Stratas in that decision appear to me precisely mirrored in the penalty decision in this case. In upholding the decision of Justice Simon Fothergill (2015 FC 628), Justice Stratas was critical of the Director's failure to justify her penalty calculations. Some of his concerns, given below, are applicable to this case:

> [28] The first step for the Director was to choose a base amount within the $1 to $100,000 range to reflect the harm, potential or actual, caused by the particular violation. He chose the figures of $50,000, $75,000 and $25,000 for the three violations. There is nothing in his summary of calculation or any of the letters he wrote to tell us why those figures reflect the actual or potential harm. We may presume that the Director considered the actual or potential harm to be at the mid-range, upper-end and lower-end of the range, respectively. But we simply do not know what evidence or analysis of harm he relied upon. For all we know, the Director might have

selected these numbers in order to raise revenue, an improper purpose under this legislation. Or he might have plucked the numbers from the air, equally improper.

[29] Let's now examine the 20% and the 95% reductions the Director applied to the base amounts. He chose those percentages to reflect the legislative criteria of compliance history and need to encourage compliance and not to punish. But we must go further and ask about the precise percentages—20% and 95%—he chose. Are those acceptable and defensible percentages based on the evidence before the Director? Was there evidence capable of underpinning or justifying those numbers?

[30] First, the 20% reduction. Like the Director's selection of the base amounts, the Director provided no justification for the 20% figure. The record before the Director and now before us on judicial review shows that the respondent reported the issues involved in this matter to this regulator, suggesting a good degree of commitment to compliance. This supports a lenient approach to the respondent. But the record also shows that while the respondent worked with the Director to remedy the problems identified, it did not do so, showing itself in need of behavioural modification. This supports a less lenient approach to the respondent. The evidence goes both ways. So why was 20% chosen, as opposed to 5% or 60%? We have no idea.

[31] Next, the 95% reduction. Here again, the Director supplied no justification for it. The record shows that in determining what was needed to encourage the respondent to comply and not to punish, the Director took into account that the respondent operated a relatively small business, not a large, profitable financial institution. However, again, the respondent's inability to remedy the problems identified suggests a need to adjust the respondent's attitude to compliance. So like the 20% reduction, the evidence goes both ways. So why was 95% chosen? Why not 30% or 65%? We have no idea.

[32] For all we know, the 20% and 95% percentages might have been plucked out of the air or adopted for reasons extraneous to the legislation. Maybe the Director did not investigate the case enough to gather the evidence necessary to support a decision. We simply cannot tell. We are left in the dark. In this case, we are a reviewing court that cannot review.

[8] Justice Stratas also expressed misgivings about the Director's apparent use of a strict and undisclosed guideline containing formulae for the assessment of the statutory penalties: see paras 40 and 41. During the hearing of this case, I expressed a similar concern based, in part, on Justice Fothergill's discussion in *Kabul Farms*, above, about the potential for fettering.

[9] The Director must be careful not to apply guidelines as though they have the force of law. The Director's discretion cannot be fettered by excluding from consideration evidence bearing on her statutory mandate. It is worth noting, for example, that the number of full time employees cannot be used as an unyielding proxy for assessing an ability to pay. Other relevant factors may be worthy of consideration. The fact that the Regulations contemplate penalties as low as $1 also implies that the Director has a wide discretion to take account of a range of relevant information and cannot apply a formula that would never allow for such a result.

[10] Section 73.11 of the Act is also broadly worded. It emphasises a non-punitive approach that encourages compliance. This, too, allows for a degree of flexibility in the assessment of penalties and requires the Director to be mindful of all relevant mitigating and aggravating circumstances.

[11] Notwithstanding the above observations, I have nothing before me from Max Realty suggesting that the Director refused to consider relevant evidence bearing on the calculation of the imposed penalties. It may be that Max Realty was unaware of the guidelines.

[12] Despite the lack of submissions from the Appellant, the Director's penalty decision must be set aside for the same reasons given by the Federal Court of Appeal in *Kabul Farms*, above. That is, I simply cannot tell how the Director calculated the base figures and reductions which were applied in this case.

[13] Notwithstanding the Appellant's partial success in this appeal, I am not disposed to award any costs in its favour. The Company did not retain counsel and its submissions to the Court, although well-meaning, were unhelpful. I note, as well, that the Respondent was not seeking costs from the Appellant.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is allowed, in part, with the matter of the penalty to be redetermined on the merits by the Director in accordance with these reasons.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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