Federal Court  Cour fédérale

Date: 20130710

Docket: T-2037-12

Citation: 2013 FC 773

Edmonton, Alberta, July 10, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

BLACK SUN RISING INC. AND TIM RUSSELL BISCOPE

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] In April of this year, Madam Justice Heneghan issued a Show Cause Order. The Order required the respondents to appear in Court to hear proof of the act of contempt with which they were charged, which was that they had failed to comply with an Order of Mr. Justice O'Reilly dated 17 December 2012. In accordance with s. 231.7 of the *Income Tax Act*, being satisfied that the Minister had requested information and documentation from the respondents, which had not been provided, he ordered that they provide them in support of an audit being carried out by the Minister. Madam Justice Heneghan was satisfied that a *prima facie* case had been made out and so the show cause order was issued.

[2] Having heard the witness called by the Minister, I dismissed the charge, without calling upon the respondents to offer any defence. I said that reasons would follow. These are those reasons.

[3] This is a case of civil contempt, not in the face of the Court.

[4] The first step is a show cause order. Rule 467(3) of the *Federal Courts Rules* only requires that a *prima facie* case be made out.

[5] The second is the hearing, normally in court with live testimony. A person charged with contempt cannot be compelled to testify. A finding of contempt must be based on proof beyond a reasonable doubt (rules 468-470).

[6] If a case of contempt is made out, the third step is the penalty, which may be as much as five years incarceration less one day.

[7] The test for civil contempt was summarized by the Ontario Court of Appeal in *Prescott-Russell Services for Children and Adults v G (N)* (2006), 82 O.R. (3d) 686, at paragraph 27:

> The criteria applicable to a contempt of court conclusion are settled law. A three-pronged test is required. First, the order that was breached must state clearly and unequivocally what should and should not be done. Secondly, the party who disobeys the order must do so deliberately and wilfully. Thirdly, the evidence must show contempt beyond a reasonable doubt. Any doubt must clearly be resolved in favour of the person or entity alleged to have breached the order. [Citations omitted.]

[8] Another case which offers considerable guidance is the decision of the Federal Court of Appeal in *Apple Computer, Inc v Mackintosh Computer Ltd*, [1988] 3 FC 277, [1988] FCJ No 237 (QL). That was a case, unlike this, in which the evidence of both sides was by way of affidavit.

[9] Mr. Justice Heald said:

> To properly consider the impact of the complete absence of viva voce evidence on this motion, I think it important to keep in mind the context in which this deficiency took place. This is a contempt of Court procedure. Lord Denning M.R. articulated the proper approach succinctly in the case of *In re Bramblevale Ltd.*, [1970] 1 Ch. 128 at 137:
>
> > A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt .... Where there are two equally consistent possibilities open to the Court, it is not right to hold that the offence is proved beyond reasonable doubt.

[10] Although satisfied that he would not interfere with the finding of contempt by the motions judge on the basis of the balance of probabilities, he was not prepared to hold that proof had been made beyond a reasonable doubt.

[11] Mr. Justice Heald also referred to the decision of Ontario Court of Appeal in *Regina v Jetco Manufacturing Ltd and Alexander*, 57 OR (2d) 776, per Brooke J.A. at page 780:

> Thus, while civil procedures are involved, because the allegation is that a public wrong was done and the liberty of the subject is at stake, the proceedings are essentially criminal in nature. The standard of proof governing the trial of criminal offences must be satisfied. The appellants are entitled to the presumption of innocence, and the onus is on the prosecution to prove their guilt beyond a reasonable doubt.

[12] He also approved the comment by Mr. Justice Rouleau in *Selection Testing Consultants International Ltd v Humanex International Inc*, [1987] 2 FC 405, 9 FTR 72, 14 CPR (3d) 234 at page 238:

> Whether contempt of court proceedings are characterized as criminal or civil, the person charged shall always be entitled to the unassailable bastion of Common Law, that is the right to know the particulars of the accusation and the right to remain silent until the accusor has met and discharged the onus.

THE EVIDENCE

[13] The Minister called one witness, Michael Pereira, an auditor with Canada Revenue Agency in Edmonton. He produced a book of exhibits, which included his affidavits sworn 9 November 2012 and 13 March 2013, as well as his memo to file, which is a running contemporaneous chronology of his involvement as set out on a document bearing Canada Revenue Agency's letterhead, which is known as form T-2020.

[14] He was given Black Sun's file to audit in December 2010. A desk review indicated that income per T-5018 slips exceeded the reported income. Black Sun is in the construction business, more particularly scaffolding. Corporations in that line of business, who seek business deductions, must issue T-5018 slips to their suppliers. It was also noted that there had been a shareholder change in 2009.

[15] Over the next several months, Mr. Pereira had sporadic conversations or meetings with Tim Biscope, Black Sun's principal, and its accountant Tom Drinnan. Mr. Biscope's stated position was

always that he was not personally responsible for any record keeping. His records were with his accountant. Mr. Drinnan, in turn, said the records he had received were in no particular order and that the client was disorganized. He asked for various extensions and finally, by September 2011, provided a first batch of records. I think it fair to say that Mr. Drinnan was giving Mr. Pereira the run-around.

[16] Mr. Pereira was of the view that the records were incomplete. There was no general ledger statement, bank statements for all the years in question were incomplete, few supplier invoices were provided and in no particular order. He waited the next batch of records, which were promised by Mr. Drinnan. They were not forthcoming.

[17] Consequently, he issued a notice to Black Sun with respect to the audit for the period from 1 October 2006 to 30 September 2009. He referred to his authority under section 231.1 of the *Income Tax Act*, which gave him the right to inspect records. "As of today's date (i.e., 18 June 2012) you have not fully complied with that request." He listed 19 sources of information or documents to be made available.

[18] A meeting was arranged with Mr. Drinnan. He begged off on the grounds of medical reasons and asked for an extension. By the end of August 2012, Mr. Drinnan repeated he still had health issues and did not have records ready for review but he did provide some information.

[19] Despite promises from Mr. Drinnan, nothing further was forthcoming.

[20] Consequently, the Department of Justice was retained, and counsel Margaret McCabe wrote to Black Sun saying that if the requested information and documentation was not provided, an application would be made to the Federal Court for a compliance order.

[21] This led to the hearing before Mr. Justice O'Reilly. Although Mr. Pereira did not attend, his note to file indicates that a Mr. Doug Forer appeared on behalf of the respondents and said that they did not have documents for 2006. He was informed that Ms. McCabe had told Mr. Forer that the taxpayer should have some documents and that at a meeting at some point they would be able to assess the situation and determine if some years where documentation is lacking would warrant a Net Worth approach.

[22] However, by 5 April 2013 Mr. Forer wrote to Ms. McCabe to send along copy of correspondence from the accountant, Mr. Drinnan, in which he said: "Certain files and backup information is gone and cannot be replaced, including the information referred to for Black Sun Rising Inc." Mr. Forer did include in that letter some information about bank accounts and credit card information. In her email to Mr. Pereira, Ms McCabe said (privilege obviously being waived):

> Mr. Forer has informed me that he suggested to Mr. Biscope that the latter should make a request from TD for copies of bank statements and any other documents for the material. I indicated I do not believe Mr. Biscope appreciates the seriousness of this matter and that we would be taking this to the contempt stage and Mr. Biscope will have to establish for the court that he is not in contempt of the order by purging it and by producing all, or a goodly amount, of the requested documents.

[23] Part of Mr. Forer's letter was pasted into Mr. Pereira's notes to file. The entire letter is in the court file as part of a motion by the respondents for an order under rule 41(4) of the *Federal Courts*

Rules for a subpoena to compel the attendance of Mr. Drinnan, *duces tecum*, a motion which was unopposed. In his letter, Mr. Drinnan stated that in April 2011 he had to move his office due to the bankruptcy of his landlord. Some old boxes were marked to be thrown out but it now appears that some Black Sun documents were thrown out as well. He concluded:

> For the above reasons, certain files and backup information is gone and cannot be replaced including the information referred to for Black Sun Rising Inc.

[24] Nevertheless, Ms. McCabe appeared before Madam Justice Heneghan and obtained a 9 July hearing date. According to Mr. Pereira's notes, she told him:

> As a result of the fact that Mr. Drinnan appears to have lost of the taxpayer's information, I have been informed that Mr. Biscope will now make efforts to obtain copies of bank statements and whatever supporting documents he can obtained from the banks and past clients and supplies. Mr. Forer inquired whether you would be interested in a meeting with Mr. Forer and Mr. Biscope to discuss what type of information they should "recreate" for the purposes of your audit. I would obviously attend at that meeting, if you are interested in having such a meeting. Please call me to discuss further.

[25] Apparently, Mr. Pereira was not interested in having such a meeting.

[26] Finally, on Friday, 5 July 2013, Mr. Forer delivered to Ms. McCabe a bundle of documents, which in turn were passed on to Mr. Pereira. His preliminary assessment is that this bundle satisfies some, but not all of his requirements. To be fair, however, he has not had sufficient time to analyze the bundle in depth.

CHARGE OF CONTEMPT DISMISSED

[27] At the conclusion of the Minister's evidence, I informed Mr. Forer that it would not be necessary for him to call his two witnesses: Mr. Biscope and Mr. Drinnan, as I was not satisfied that a case of contempt had been made out.

[28] Has the Minister established that Black Sun and Mr. Biscope are poor record keepers? Yes, he has.

[29] Has the Minister established that the accountant, Mr. Drinnan, was unreliable and let Black Sun and Mr. Biscope down? Yes, he has.

[30] Has the Minister shown that Black Sun and Mr. Biscope have deliberately and wilfully disobeyed Mr. Justice O'Reilly's order? No, he has not.

[31] Does the Minister's evidence show contempt beyond a reasonable doubt? No, it does not.

[32] The Minister seems to have taken the position that all that had to be done was to show that the order of Mr. Justice O'Reilly had not been fully complied with. Indeed, somewhat telling is the Minister's written submissions which are titled: *Applicant's Submissions as to Sentence*, not submissions on contempt.

[33] A decision strongly relied upon by the Minister is that of Mr. Justice Zinn in *Canada (National Revenue) v Money Stop Ltd*, 2013 FC 133, 2013 DTC 5043, [2013] FCJ No 143 (QL). That case is entirely distinguishable on its facts. Playing the role of Mr. Justice O'Reilly, I issued an order of compliance pursuant to s. 231.7 of the *Income Tax Act*. As the respondents did not comply, Madam Justice Gleason issued a show cause order. At the contempt hearing before Mr. Justice Zinn, they admitted that they did not comply with my order. Based on that admission, and being satisfied that all other requirements were met, Mr. Justice Zinn issued an order finding the respondents in contempt, but gave them a further period to provide certain information, failing which the Minister was at liberty to proceed with the request that this Court issue a sentence for contempt.

[34] The respondents having failed to comply, the Court then proceeded to the sentencing stage. At the last minute, certain information was provided. As Mr. Justice Zinn found at paragraph:

> The respondents have provided no evidence either through affidavit or oral testimony to dispute the Minister's evidence, which the Court therefore accepts. I remain satisfied beyond a reasonable doubt that the respondents remain in contempt.
>
> [My Emphasis]

[35] Although certainly not timely, evidence was provided in this case before the contempt hearing, not at the sentencing stage. Furthermore, on the Minister's own evidence, there has been an effort to comply, including an offer to meet which was not taken up.

[36] Counsel submits that to avoid a finding of contempt and to prevent the Minister from carrying out a proper audit, all one need do is hire an incompetent accountant. That is simply not so.

Mr. Justice O'Reilly's order remains in force, subject to a new timetable. If after assessing the information provided, and the reasonableness of the explanations as to why some documentation never existed, and while other documentation was lost by the accountant, the Minister is at liberty to bring on a fresh show cause order. It is one thing not to dance as quickly as the Minister would like. It is quite another to put someone in jail for a maximum period of five years less a day. It would be quite wrong to have that possibility hanging over the respondents' based on the evidence presented before me. The Minister has an arsenal of options open to him. He can call upon third parties, such as the accountant, and such as the purchasers of goods and services to provide information. He has their names. He can also do a net worth assessment. Black Sun may well rue its failure to maintain proper records.

[37] The Minister is not satisfied that enough has been produced, quickly enough. That is not the issue. The issue is whether it has been proven beyond a reasonable doubt that the respondents deliberately and wilfully disobeyed a court order. The evidence falls short. It would be inappropriate, on the evidence before me, to have a contempt order hanging *in terrorem* over the respondents' heads.

[38] In the circumstances, there shall be no order as to costs.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT IS that:

1. The contempt of court charge against the respondents, Black Sun Rising Inc. and Tim Russell Biscope, is dismissed.

2. There shall be no order as to costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2037-12
STYLE OF CAUSE:	MNR v BLACK SUN RISING INC ET AL
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	JULY 9, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HARRINGTON J.
DATED:	JULY 10, 2013

APPEARANCES:

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