

CANADA / JUDGMENT

Fulkco v. Fulkco

2022 BCSC 1768

COURT

Supreme Court of British Columbia

DECIDED

11 October 2022

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2022 BCSC 1768 Fulkco v. Fulkco IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Fulkco v. Fulkco, 2022 BCSC 1768 Date: 20221011 Docket: 184846 Registry: Victoria Between: Susan Elizabeth Fulkco Claimant And: David John Fulkco Mary Sharon Fulkco James Steven Hoel Dianne Carol Hoel 113849 B.C. Ltd. Inc. No. BC 113849 JCS Enterprises Inc., Inc. No. BC0956084 Respondents Before: The Honourable Mr. Justice A. Saunders Reasons for Judgment Counsel for the Claimant: C. Murray Counsel for the Respondent David John Fulkco: J. B. Johnston Place and Date of Hearing: Victoria, B.C. June 16, 2022 Place and Date of Judgment: Victoria, B.C. October 11, 2022

- [1] The parties concluded a separation agreement dated September 23, 2020 (the "Agreement"), following a mediation. Under the Agreement, Mr. Fulkco obtained sole ownership of two investment properties and was given credit for capital gains taxes that the parties anticipated he would realize from the sale of those properties.
- [2] Mr. Fulkco also obtained sole ownership of shares the parties owned in a company I will refer to as "W. Inc." W. Inc. had been incorporated by Mr. Fulkco in 2013 to hold shares in a U.S. based energy company, which I will refer to as "D. Co." The Agreement's schedule of the parties' property interests and liabilities describes W. Inc. as having a value of "Nil".
- [3] Mr. Fulkco filed his 2020 tax return in 2021. He claimed capital gains in respect of the sale of the two investment properties, but offset those gains through claiming a capital loss of \$195,681.00 on his investment in W. Inc.
- [4] In the spring of 2021, Ms. Fulkco asked Mr. Fulkco for a copy of his 2020 tax return, to show that he had incurred taxable capital gains on the sale of the two investment properties. When she obtained his tax return on April 29, 2021, she learned the he had not had to pay capital gains tax, despite having been credited for that liability in the Agreement.
- [5] Ms. Fulkco now claims 50% of the value of the claimed capital loss in respect of W. Inc.; or, alternatively, 50% of the \$75,000 taxable gains credit.

- [6] Mr. Fulkco's evidence is that after his investment in D. Co. through W. Inc., the price of oil declined and D. Co. suffered a drop in revenue. At the time of the parties' separation in 2018, he understood that D. Co. was still a viable company, and he hoped that drilling and pumping activity would return to previous levels. In his sworn Form F-8 financial statement, he listed the investment under "Assets" as "Oil wells located in Pittsburgh", with a value of "Nil". He disclosed documents related to the investment in his list of documents, including correspondence with the U.S. Internal Revenue Service ("IRS"). His mediation brief, dated July 9, 2019, describes the investment as follows: This is an investment made by David and his parents in oil well exploration, primarily in Texas, USA. As of this date, the investment has zero net value and David believes that the oil exploration company has ceased business operations. From this investment, there is an amount owing in unpaid taxes to the US. Internal Revenue Service in the amount of approximately USD \$7,300. This is a family debt.
- [7] Mr. Fulkco further states: At the time we finalized the separation agreement in 2020, I still understood [D. Co.] to be operating in some limited capacity although I continued to understand that the market value of shares was around zero. I had not received any communication from the company in many months.
- [8] Ms. Fulkco states that in 2018 Mr. Fulkco told her that the investment in D. Co. "was worthless and gone under". I accept that this was the extent of Ms. Fulkco's actual knowledge of the status of D. Co at the time the Agreement was executed.
- [9] The Agreement explicitly provides that the statements of fact set out in the recitals thereto are correct. The recitals state that as of the execution of the Agreement, the parties have an interest in the property and have the liabilities set out in Schedule "A" thereto. The recitals further provide: The Spouses wish to make a complete and effective settlement of:
1. the rights, interests and claims which either of them may have in and to the property of the other and any property held by them jointly;
 2. their outstanding debts and liabilities;
 3. their respective claims for maintenance, support or alimony from the other;
 4. their rights and responsibilities with regard to the Children. As noted above, the Agreement describes the W. Inc. investment as having a "Nil" value. The Agreement does not credit Mr. Fulkco with any liability in respect of the aforementioned indebtedness of W. Inc. to the IRS.
- [10] The Agreement also sets out the following disclaimer: The Husband and Wife each acknowledge that he or she has general knowledge of the other's financial affairs and that he or she has been fully advised as to his or her entitlement to discovery and other legal means by which he or she may obtain further information with respect to the other's financial affairs and each is satisfied, on the basis of the information which he or she now has, to accept this Agreement as a final settlement of any and all claims he or she may have against the other.

- [11] Mr. Fulkco further attests that in the course of discussions in or around January 2021 concerning preparation of his 2020 income tax return, his accountant inquired as to the current status of D. Co. Mr. Fulkco retained a lawyer in Texas to assist him, and learned in February 2021 that D. Co. had ceased operations and that its charter, certificate, or registration had been forfeited by the State of Texas as of January 15, 2021. Mr. Fulkco's accountant then advised that given the cessation of operations in the U.S., his failed investment might provide a capital loss. Mr. Fulkco attests--and this is uncontroverted--that until he learned of D. Co.'s dissolution he was not aware of its business status nor of any possibility of claiming a capital loss.
- [12] Ms. Fulkco submits that Mr. Fulkco's capital loss in respect of his beneficial ownership of shares in D. Co. ought to have been disclosed so that it could have been included in the calculations of anticipated capital gains taxes payable by Mr. Fulkco that underlay the Agreement. She seeks relief under the Agreement's provision concerning the consequences of non-disclosure of assets: 3.1 Property not disclosed by either Spouse, either advertently or inadvertently, shall be deemed to be owned by the Spouses equally as tenants in common, and the property shall be sold and the proceeds of sale shall be divided equally between them.
- [13] I can find no basis in law for Ms. Fulkco being awarded any compensation in respect of the capital loss. As of the date of the Agreement, Mr. Fulkco had not disposed of the shares, and there is no evidence of there having been circumstances that would constitute a deemed disposition, triggering an entitlement to claim a capital loss, until the dissolution of D. Co. in January 2021--nearly five months after the Agreement was concluded. There was, when the Agreement was negotiated, no capital loss for Mr. Fulkco to disclose.
- [14] Ownership of the shares had been disclosed. It would have been open to Ms. Fulkco when the Agreement was negotiated to make further inquiries as to the status of D. Co. and to seek some form of concession on the basis that the company's status might result in a deemed disposition, triggering a capital loss, at a future date. But she did not do so. Mr. Fulkco was under no obligation to offer any such concession to her or to provide her with legal or accounting advice concerning that asset's potential value in the event of future contingencies.
- [15] The application is dismissed. Mr. Fulkco is entitled to his costs in any event of the cause. "A. Saunders, J."

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