

COURT OF APPEAL FOR ONTARIO

CITATION: Pyxis Real Estate Equities Inc. v. Canada (Attorney General), 2025
ONCA 65
DATE: 20250129
DOCKET: COA-24-CV-0464

Nordheimer, Sossin and Copeland JJ.A.

BETWEEN

Pyxis Real Estate Equities Inc. (as successor by two
amalgamations to Edgcombe Inc., Edgefund Equities Inc. and
Pyxis Real Estate Equities Inc.)

Applicant (Respondent)

and

Attorney General of Canada

Respondent (Appellant)

Lesley L’Heureux, Sarah Mackenzie and Tara Magill, for the appellant

Margaret Nixon, for the respondent

Heard: January 14, 2025

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated April 8, 2024, with reasons reported at 2024 ONSC 2039.

Nordheimer J.A.:

[1] The Attorney General of Canada appeals from the order of the application judge that granted rectification of certain corporate resolutions of the respondent.

For the reasons that follow, I would allow the appeal.

Background

[2] In December 2017, David Jubb, who was the sole shareholder of the predecessor corporations, asked his accountants to devise a potential remuneration strategy that would allow him to pay off a shareholder loan he owed, while leaving a balance for Mr. Jubb, all on a tax-free basis. He also wished to reorganize the corporate structure to remove redundant corporations.

[3] The accountants devised a strategy that involved paying tax-free capital dividends up the chain of corporations. The amount arrived at was a total tax-free dividend payable of \$1.4 million. After paying off his shareholder loan, this would leave Mr. Jubb with a tax-free receipt of \$217,404. This required each corporation in the chain to have a capital dividend account balance of at least \$1.4 million.

[4] To implement this transaction, Mr. Jubb told his accountants to obtain the historical tax and accounting records of the corporations in the chain from another accounting firm who had previously been responsible for the corporations' tax accounting.

[5] It appears that the new accountants did not review the historical information they were instructed to obtain. They were therefore not aware that one of the corporations, Edgecombe Inc., had a capital dividend account deficit of \$323,893. As a result, when that corporation received its capital dividend of \$1.4 million, its capital dividend account balance was adjusted to \$1,076,107. To complete the

transaction as intended, it would have had to receive a capital dividend of \$1,723,893.

[6] The parties agree that the corporation at the bottom of the chain, which initiated the transaction, had a capital dividend account balance of approximately \$45 million. It was just as able to pay a tax-free capital dividend of \$1,723,893 as it was able to pay a tax-free capital dividend of \$1.4 million. The parties also agree that there was no tax benefit to initiating the dividend payment chain with the payment of \$1.4 million as opposed to initiating the dividend payment chain with a dividend of \$1,723,893.

[7] In September 2020, the Canada Revenue Agency advised that it had determined that the dividend paid by Edgecombe Inc. exceeded its capital dividend account balance by \$323,893 and that it would issue Edgecombe Inc. a notice of assessment for tax equal to 60% of the excess capital dividend under Part III of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The respondent sought to avoid that additional tax payment by having the relevant corporate documents rectified to direct a capital dividend of \$1,723,893, which it says was its true intention.

Decision Below

[8] The application judge granted the rectification of the corporation resolutions. He noted that the parties agreed on the test for rectification. It is set out in *Canada*

(Attorney General) v. Fairmont Hotels Inc., 2016 SCC 56, [2016] 2 S.C.R. 720,

where Brown J. said, at para. 38:

To summarize, rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties' prior agreement.

[9] In reaching his conclusion, the application judge referred to a memorandum that the accountants had sent to the respondent's lawyer which outlined the proposed plan. He noted that the memorandum was the only written document that outlined the plan. The memorandum referred to the four dividends that would be paid up the corporate chain, each of which was identified as a \$1.4 million tax-free capital dividend.

[10] The application judge characterized how he read the memorandum at para. 17 of his reasons:

When the memorandum is read as a whole, it is clear that the objective of the transactions and the agreement is to pay a tax-free capital dividend to Mr. Jubb of \$1,400,000 and to take such preliminary steps as are required to achieve that objective. Achieving that objective required [the corporation at the bottom of the chain] to pay a capital dividend of \$1,723,893. Given that [that

corporation] had a capital dividend account of \$45 million it was more than able to do so.

[11] The application judge then cited this court's decision in *2484234 Ontario Inc. v. Hanley Park Developments Inc.*, 2020 ONCA 273, 150 O.R. (3d) 481 and relied on it for his conclusion that rectification was available in this case. He specifically referred to the decision as confirming that, if two interpretations of an agreement are possible, one of which would give business efficacy to the agreement and the other would defeat business efficacy, the former should be preferred.

Analysis

[12] In my view, the application judge erred in his approach to the test for rectification, and in using *Hanley Park* as authority for that approach. *Hanley Park* was factually distinct from the case here. It was particularly distinguishable in terms of what the prior agreement was. Also, the use of the equitable remedy of rectification in *Hanley Park* cannot be separated from the “unfair and unconscionable” conduct of one of the parties in that case: at para. 88. In addition, in this case, there is no lack of business efficacy in the corporate resolutions as executed. Lastly, I would note the introductory observation that Zarnett J.A. made in *Hanley Park*, at para. 2:

Rectification is an equitable remedy available to correct a document that fails to accurately record the parties' true agreement. It is not available to correct an improvident bargain or to fill a gap in the parties' true agreement, even when the omission defeats what one (or both) of the parties was seeking to achieve.

[13] In *Fairmont Hotels*, Brown J. directly addressed the situation that is before this court. Particularly apposite to this case are the following observations:

While, therefore, a court may rectify an instrument which inaccurately records a party's agreement respecting what was to be done, it may not change the agreement in order to salvage what a party hoped to achieve. (at para. 3)

Alternatively put, rectification aligns the instrument with what the parties agreed to do, and not what, with the benefit of hindsight, they should have agreed to do. (at para. 19)

[T]he English Court of Appeal made clear that a mere intention to obtain a fiscal objective is insufficient to ground a claim in rectification: "... the court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective...". (at para. 22)

Rectification does not operate simply because an agreement failed to achieve an intended effect (here, tax neutrality) – irrespective of whether the intention to achieve that effect was "common" and "continuing". (at para. 30)

[14] Also relevant to the issue raised on this appeal is the Supreme Court of Canada's decision in *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26, 471 D.L.R. (4th) 1, a decision also written by Brown J. The court made it clear in *Collins Family Trust*, if it was not already clear from its earlier decision in *Fairmont Hotels*, that the mere fact that a tax objective is not achieved by an agreed transaction is not a proper ground to grant rectification. Justice Brown said, at para. 22: "While a court may exercise its equitable jurisdiction to grant relief

against mistakes in appropriate cases, it simply cannot do so to achieve the objective of avoiding an unintended tax liability.”

[15] I should note that, while the decision in *Collins Family Trust* was provided to the application judge, he did not make any reference to it in his reasons.

[16] I return to the factors set out in *Fairmont Hotels* respecting when rectification is properly granted. At its core, the test requires that the executed documents fail to accurately record the parties’ agreement. The agreement here was for a \$1.4 million tax-free capital dividend to be paid. The corporate resolutions that were signed document the payment of that dividend. In other words, they accurately reflect the agreement. The fact that the agreement did not result in the intended fiscal objective of being tax-free, or tax neutral, is not a basis for granting rectification.

[17] The application judge concluded his reasons by remarking that, in his view, it would not be “equitable to impose an adverse tax consequence” because “an accountant made a careless error” in implementing an agreed upon structure. As the decisions in *Fairmont Hotels* and *Collins Family Trust* make clear, that is not a proper use of the equitable relief of rectification. It is also not consistent with the general principle that rectification is a form of equitable relief that is to be used “with great caution”: *Fairmont Hotels*, at para. 13.

[18] The corporate resolutions that were executed accurately reflect the agreed upon structure. The fact that there was a flaw in that structure does not affect the accuracy of the written documents. Rectification was not available in this case.

Disposition

[19] I would allow the appeal and dismiss the application. The Attorney General of Canada is entitled to its costs of the appeal fixed in the agreed amount of \$25,000, inclusive of disbursements and HST.

Released: January 29, 2025 “I.N.”

“I.V.B. Nordheimer J.A.”
“I agree. L. Sossin J.A.”
“I agree. J. Copeland J.A.”