S.C.C. File No._____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

KENZIE FINANCIAL INVESTMENTS LTD., SHELLY BECK, THERESE F. DALEY, LINDA JAEGER, ANDREW LITTLE, LAURIE LITTLE, AGNES M. OBERG, STEVEN OGG, LESTER S. IKUTA PROFESSIONAL CORPORATION, LESTER IKUTA, MICKEY IKUTA, BRIAN SEKIYA, HOLLY SEKIYA, SANDRA SOMMER, MARION SOMMER, ALLAN SOMMER, STEVEN REILLY, SWARTS BROS LIMITED and CLARA MAE WOROSCHUK

APPELLANTS
Applicants
Applicants

- and –

ARRES CAPITAL INC.

RESPONDENT
Respondent
Respondent

APPLICATION FOR LEAVE TO APPEAL

(KENZIE FINANCIAL INVESTMENTS LTD., SHELLY BECK, THERESE F. DALEY, LINDA JAEGER, ANDREW LITTLE, LAURIE LITTLE, AGNES M. OBERG, STEVEN OGG, LESTER S. IKUTA PROFESSIONAL CORPORATION, LESTER IKUTA, MICKEY IKUTA, BRIAN SEKIYA, HOLLY SEKIYA, SANDRA SOMMER, MARION SOMMER, ALLAN SOMMER, STEVEN REILLY, SWARTS BROS LIMITED and CLARA MAE WOROSCHUK, APPLICANTS)
(Pursuant to Section 40 of the *Supreme Court Act*)

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TABLE OF CONTENTS

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL

(KENZIE FINANCIAL INVESTMENTS LTD., SHELLY BECK, THERESE F. DALEY, LINDA JAEGER, ANDREW LITTLE, LAURIE LITTLE, AGNES M. OBERG, STEVEN OGG, LESTER S. IKUTA PROFESSIONAL CORPORATION, LESTER IKUTA, MICKEY IKUTA, BRIAN SEKIYA, HOLLY SEKIYA, SANDRA SOMMER, MARION SOMMER, ALLAN SOMMER, STEVEN REILLY, SWARTS BROS LIMITED and CLARA MAE WOROSCHUK, APPLICANTS)
(Pursuant to Section 40 of the *Supreme Court Act*)

TAKE NOTICE that KENZIE FINANCIAL INVESTMENTS LTD., SHELLY BECK, THERESE F. DALEY, LINDA JAEGER, ANDREW LITTLE, LAURIE LITTLE, AGNES M. OBERG, STEVEN OGG, LESTER S. IKUTA PROFESSIONAL CORPORATION, LESTER

IKUTA, MICKEY IKUTA, BRIAN SEKIYA, HOLLY SEKIYA, SANDRA SOMMER, MARION SOMMER, ALLAN SOMMER, STEVEN REILLY, SWARTS BROS LIMITED and CLARA MAE WOROSCHUK apply for leave to appeal to the Supreme Court of Court, under Section 40 of the *Supreme Court Act*, from the judgment of the Court of Appeal of Alberta, Court File Number: 2101-0117AC made October 1, 2021, summarily dismissing the Applicants' appeal on the basis of mootness;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. The factual matrix applicable to this application for leave to appeal is particularly convoluted, requiring a more lengthy review to put this leave application into context.

2. The Applicants successfully sued Arres Capital Inc. ("Arres"), obtaining summary judgment against Arres in July 2013. Arres appealed that judgment. On February 14, 2014, Arres paid $235,000 into court (the "Court Funds") to satisfy the Applicants' judgment in the event Arres' appeal of that judgment failed. Arres appeal was dismissed on April 16, 2014.

3. Arres was put into receivership and bankruptcy in July 2017.

4. The Applicants applied in July 2014 to have the Court Funds released to them. The Court denied that application because of a competing third party's (not Arres) claim to those funds, which claim was intertwined with other ongoing litigation – the "Graybriar" litigation. The third party claimed against trust funds in the Graybriar litigation, but if that claim failed if then maintained it had a claim against the Court Funds. Therefore, because the third party's claim to the Court Funds was intertwined with the protracted Graybriar litigation, the Applicants were prevented by court order from having the Court Funds released to them pending determinations to be made in the Graybriar litigation. Arres had no claim to the Court Funds at that time.

5. By mid-2014 Arres had lost any claim to the Court Funds (Arres' appeal of the Applicants' summary judgment having been denied) and so the funds were "earmarked" for the Applicants and so were no longer exigible property of Arres. Entitlement to the Court Funds thereafter was a contest only between the Applicants and the third party.

6. Following Arres' receivership and bankruptcy, the Receiver/Trustee applied on June 4, 2018, to take control of the Court Funds, relying on section 70 of the *Bankruptcy and Insolvency Act* ("*BIA*") which provides that an unsecured judgment creditor is only entitled to the judgment amount if the judgment has been fully executed by the time of the bankruptcy. The Receiver/Trustee argued an assignment into bankruptcy takes precedence over any unexecuted judgment or order, and because the Court Funds were still in court, the funds remained the property of Arres.

7. The Applicants opposed the Receiver/Trustee's application, taking the position the Court Funds were not exigible property of Arres relying on case law which held that "A judgment creditor may trump a trustee's priority to funds paid into court if the funds are sufficiently 'earmarked' and the creditor has 'done all that it could' to access the funds": *Careen Estate v. Quinlan Brothers Ltd.* (2004), 2 C.B.R. (5th) 102 (Nfld. S.C.). This passage from *Careen Estate* has been repeated and applied in many cases since, most recently in *Toronto Dominion Bank v 1287839 Alberta Ltd*, 2021 ABQB 205.

8. The initial decision of the Court on June 4, 2018, was as follows:

> And I am going to allow the order, but on the understanding that the funds are to be used to determine the priority of claims against the Graybriar funds and the Kenzie funds [Court Funds] only, and not with respect to the other projects that might be in the receivership. If the receiver determines that it wishes to proceed with those other projects, it must give notice to the parties here today so that there can be some determination of whether that is appropriate.

Counsel for the Receiver/Trustee agreed in Court at that time to segregate these two funds from the general administration of Arres' estate (the alleged "Segregation Agreement").

9. The court's decision for segregating the Graybriar trust funds and the Court Funds from the general administration of Arres' estate was because determinations to be made in the Graybriar litigation would impact the third party's claim to the Court Funds. So it made practical sense to have the Receiver/Trustee take control over both funds while the Receiver/Trustee first took steps to have the necessary determinations made in the Graybriar litigation.

10. The Segregation Agreement to treat the Court Funds differently than Arres' general funds is only logically consistent with the Court Funds **not** being Arres' exigible property. The Segregation Agreement is pointless if the funds remained Arres' exigible property for general estate administration.

11. Once determinations made in the Graybriar litigation resulted in the third party renouncing any claim to the Court Funds in the fall of 2020, the Applicants applied to have the Court Funds released to them. Arres' Receiver/Trustee opposed that application on three grounds:

    a. there was no Segregation Agreement in place from the June 4, 2018, court proceedings;

    b. an intervening court order effectively nullified the Segregation Agreement in any event; and

    c. s. 70 of the *BIA* applied to defeat the Applicants' claim to the Court Funds.

12. On April 19, 2021, the same judge who made the decision on June 4, 2018, 2 ¾ years earlier, denied the Applicants' application for the Court Funds, finding "the Kenzie investors have not established entitlement to priority over the Receiver's charges by reason of the funds being earmarked" because "the concept of "earmarked funds" generally … offends the underlying premise of the BIA concerning distribution of a bankrupt's property among creditors, and the specific language of section 70 of the BIA".

13. The Applicants' appealed the court's April 19, 2021, decision on two issues:

    a. that the Court Funds paid by Arres into court in 2014 to satisfy the Applicants' judgment were "earmarked" for the Applicants, and so were not exigible property of Arres into 2017, such that the law required the release of the Court Funds to the Applicants in accordance with *Careen Estate* and subsequent court decisions; and

    b. that Arres' Receiver/Trustee failing to comply with the Segregation Agreement should not disentitle the Applicants to the Court Funds.

14. On October 1, 2021, the Court of Appeal of Alberta issued a final judgment in this matter which summarily dismissed the Applicants' appeal as follow:

    a. The Court approved the reasoning of the lower court and rejected the generalized concept of "earmarked funds" for unsecured creditors as offending the underlying

premise of the *BIA* concerning distribution of a bankrupt's property among all creditors; and

b. The Receiver/Trustee had effectively utilized all of the Court Funds generally to pay its fees and expenses such that there was no money left for the Applicants, thereby rendering their appeal moot.

15. The Court of Appeal of Alberta erred in summarily dismissing the Applicants' appeal by concluding as follows:

a. That the concept of "earmarked funds" paid into court is not applicable in the bankruptcy context, a result that conflicts with prior law on that issue which has been in place since at least 2004 with the *Careen Estate* decision;

b. That the Receiver/Trustee failure to comply with the Segregation Agreement and instead utilizing all of the Court Funds for its own fees and expenses was allowed.

16. This Application appeals the lower courts' decisions and seeks clarification of the law. The decisions of the Court of Queen Bench of Alberta and Court of Appeal of Alberta in this matter raise an issue of public importance by creating an irreconcilable conflict in long-standing law regarding the generalized concept of "earmarked" court funds in the bankruptcy context, to wit: does an unsecured judgment creditor ever have a priority claim to "earmarked" court funds or is the line of authority applying the concept of "earmarked" court funds invalid insofar as it irreconcilably clashes with s. 70 of the BIA permitting no exceptions vis-à-vis bankruptcy taking precedence over every unexecuted judgment or order regardless of the factual context.

Dated at Calgary, Alberta this 26th day of November, 2021.

SIGNED BY:

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Lawyers for the Receiver and Trustee of Arres Capital Inc.

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

Court of Queen's Bench of Alberta

Citation: Access Mortgage Investment Corporation v Arres Capital Inc, 2021 ABQB 307

Date: 20210419
Docket: 1401 12431
Registry: Calgary

Between:

Access Mortgage Investment Corporation

Applicant

- and -

Arres Capital Inc.

Respondent

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] The Receiver for Arres Capital Inc. applies for a distribution order of the remaining funds in this receivership. In a related application, investors in Kenzie Financial Investments Ltd., supported by Arres Capital's Inspector in bankruptcy, take the position that certain funds that had originally been paid into court pursuant to earlier litigation, and were later released to the Receiver, should not be construed as part of the Arres Capital estate. The Kenzie investors submit that they are entitled to the funds, subject only to deduction for the Receiver's expenses actually incurred in respect of dealing with any competing claims to them.

II. Facts

[2] Bankruptcy proceedings in this matter were commenced in 2011. After protracted litigation, which is not necessary to describe in detail for the purpose of this application, the Court granted a bankruptcy order with respect to the estate of Arres Capital Inc. on July 29, 2017. On the same date, Alvarez and Marsal Canada Inc., the trustee in bankruptcy, was appointed Receiver of Arres Capital pursuant to the *Civil Enforcement Act,* R.S.A. 2000, c. C-15. That order was amended and restated on October 23, 2017.

[3] The bankruptcy and receivership proceedings are in their final stages. This application involves priority to a fund of approximately $235,000.

[4] The Kenzie investors claim this fund, which was originally paid into court pursuant to a partial summary judgment that they obtained against Arres Capital in July, 2013.

[5] The amount of the judgment was $228,965.45, inclusive of costs. As Arres Capital appealed the judgment, the sum of $235,000 was paid into court in the summary judgment matter pursuant to a consent order dated February 11, 2014.

[6] The appeal was dismissed on April 16, 2014. Before the Kenzie investors were able to access the funds paid into court, Terrapin Mortgage Corporation made a successful application to be granted intervenor status in the litigation between Arres Capital and the Kenzie investors, and in litigation between Arres Capital and Graybriar Land Company Ltd. and Graybriar Greens Inc., a foreclosure action.

[7] The Kenzie investors applied to have the funds paid out of court to them. Terrapin opposed the application on the basis of a mortgage that it had obtained against four condominiums units that were part of the foreclosure proceedings involving the Graybriar companies. Registration of the mortgage had been stayed by order obtained by the Kenzie investors, who submitted that this was an attempt to mortgage trust property of Graybriar, and that the funds from the mortgage had been advanced before registration.

[8] Terrapin claimed an equitable mortgage over the Graybriar assets, or alternatively, an interest in the funds paid into court by Arres Capital on the basis that Terrapin was essentially the party that provided the funds.

[9] The Kenzie investors took the position at the time, and continue to take the position, that Arres Capital had no further claim over those funds going forward as the issue was between the Kenzie investors and Terrapin.

[10] In July, 2014, Strekaf, J (as she then was) directed that the Kenzie application to access the funds be adjourned sine die pending a determination of a stay order in the Graybriar actions. The Court of Appeal allowed the Graybriar stay order to remain in place.

[11] On July 26, 2017, while the Graybriar foreclosure matters were continuing to unfold, Arres Capital was placed into receivership. On June 4, 2018, I heard an application by the Receiver for an order directing that funds held in court from the Graybriar sales and funds held in court arising from the Kenzie investors' action be paid to the Receiver to enable the Receiver to conduct a claims process and be subject to the Receiver's Charge and the Receiver's Borrowing Charge. I identified the issue in that application as being whether the Receiver's Charge was able to be prioritized over property subject to the trust claims. I found that the Court may impose such a charge where it is satisfied that the Receiver's Charge would secure the

administration of a claims process that represents the only method "of breaking out of the current quagmire in respect to the Graybriar funds".

[12] I directed that the funds paid into court in the Kenzie litigation (the "Court Funds") were to be paid to the Receiver, together with the funds derived from the sale of six Graybriar condominium units.

[13] The June 4, 2018 Order arising from the application provides that the sales proceeds and the funds that had been paid into court are subject to the Receiver's Charge and the Receiver's Borrowing Charge as a first charge in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise, subject to certain sections of the *Bankruptcy and Insolvency Act*, and that the Receiver was authorized "to apply the Funds against current or future indebtedness owing on either the Receiver's Charge or the Receiver's Borrowing Charge."

[14] I made the following comment during the hearing of the application:

> I am going to allow the order, but on the understanding that the funds are to be used to determine the priority of claims against the Graybriar funds and the Kenzie funds only, and not with respect to the other projects that might be in the receivership. If the Receiver determines that it wishes to proceed with those other projects, it must give notices to the parties here today so that there can be some determination of whether that is appropriate.

[15] Counsel for the Receiver immediately reminded the Court after this comment that the claims process "is only in relation to the Graybriar funds". I apologized for the error. Counsel for the Receiver then indicated that:

> ...I think it speaks to your point because this is how we are ... - you want things segregated and - ... we are proposing to segregate, so the Kenzie funds will fall into the general administration of the estate and the parties can make claims [to] them through the bankruptcy process. We don't need an independent process on them.

[16] Counsel for Kenzie investors questioned that comment. He submitted that his position was that use of the Court Funds:

> ...should be limited only to investigations and determinations of priority of competing claims, vis-à-vis those funds and that if the Receiver determines that there is no other competing claims that would disrupt the judgment creditors' otherwise entitlement to those funds, then those investors, those judgment creditors can make an application or can otherwise come back to the court to have those funds released back to that group, rather than being just general money in the receivership to the benefit of all potential creditors, so I want to make sure we are clear on that.

[17] After discussion among counsel and the Court, during which counsel for the Receiver indicated his view that the Court Funds were not trust funds, I noted that "even if it is in the general administration of the estate, you are only going to use it to investigate claims and priority with respect to that amount, is that correct?". The Receiver through counsel indicated that there was a significant portion of the fees outstanding, and that:

> ... you will see in your order that you are, you know, saying that we have first charge on both the Graybriar funds and the Court Funds. With that understanding, and we will have to come back and get fees approved at a later date and that's part of what we are doing today. That's fine to the Receiver. As long as we have the priority, we are happy then to adjudicate claims to the 235 based on entitlement...

[18] I questioned whether the fees of the Receiver outstanding at the time were incurred with respect to the determination of the claims with respect to the two funds of money. Counsel for the Receiver confirmed that the vast majority of the fees incurred fit that description but there was also “the usual general administration”. He later indicated that he did "not want to be entirely hamstrung with the [$235,000] in the general estate" with respect to fees.

[19] Again, counsel for the Kenzie investors questioned this. After discussion, the Receiver agreed to segregate the outstanding fees between the Graybriar matter and the Kenzie matter, which was acceptable to counsel for the Kenzie investors “as long as we can see that segregation both looking back and going forward”.

[20] Finally, counsel for Terrapin submitted that her client wanted the Court Funds segregated "to preserve any trust claims that we have", and asked that the funds not be commingled. Counsel for the Receiver responded that "[a]s long as the charge ranks in priority on them, we will be able to deal with allocation at the end of the piece", and that "... we are happy to have them in two separate accounts at Alvarez".

[21] As a result of this order, the Court Funds in the amount of $241,800 were released to the Receiver.

[22] The Kenzie investors take the position that this indicates that the Receiver agreed to segregate the Court Funds from the general assets of Arres Capital realized during the course of the bankruptcy and receivership, and to utilize those funds only for the Receiver's expenses incurred to deal with any competing claims of creditors (essentially Terrapin) against those funds but that the Court Funds were not otherwise to be available for the general expenses of the bankruptcy and receivership of Arres Capital.

[23] Subsequently, Jones, J. dismissed Terrapin's claim of an equitable mortgage with respect to the four Graybriar condominium units in the receivership proceedings of Arres Capital. Terrapin has confirmed that it is no longer making any claim against the Court Funds, and takes no position on the current application.

[24] Entitlement to the Graybriar funds referred to in the June 4, 2018 hearing has now been resolved by order of August 13, 2019. On that date, the Court authorized distribution of the Graybriar funds to various investors, authorized the payment of certain professional fees incurred by the investors who had been represented in the Graybriar litigation and approved the fees of the Receiver and its counsel to that date.

[25] As of August 21, 2020, the receivership maintained a cash balance of approximately $210,000.00, with an expected GST refund of approximately $11,500 to come. Exigible assets which the Receiver had not been able to monetize, mainly in the form of litigation assets, remain in the receivership, and the Receiver is of the view that, for a number of reasons, it is in the best interest of Arres Capital, its creditors and other stakeholders that it be discharged. Any interest in the remaining exigible assets would vest in the Trustee in bankruptcy.

[26] Receipts and disbursements to discharge are estimated at approximately $113,000, leaving approximately $109,000 in available funds.

[27] The Receiver takes the position that:

a) the Court Funds are not trust property, and are available for distribution to general creditors of the debtors;
b) the Court funds are subject to the priority claims of the Receiver's Charge and the Receiver's Borrowing Charge; and
c) whether or not claim to the Court Funds is a trust claim, the Receiver's professional fees and the fees of its counsel for the period from appointment to June 30, 2019 have been approved by the order of the Court on August 13, 2019.

[28] As there will remain a shortfall on the Receiver's Borrowing Charge, the Receiver does not view it necessary to determine any claims, trust or otherwise, to the Court Funds.

III. Position of the Parties

[29] The Receiver seeks court approval for its fees and disbursements and those of its counsel for the period from July 1, 2019 to July 31, 2020 in the amount of $15,542, and estimated fees and costs to complete the receivership of $50,000, which includes fees and costs incurred but not paid.

[30] The Kenzie investors submit that the Court Funds were to be segregated from other assets of Arres Capital and were only to be used to cover the Receiver's costs and expenses to sort out any contest to entitlement to those funds between the Kenzie plaintiffs and Terrapin. Since Terrapin no longer has a claim against the funds, and therefore the Receiver does not have to incur costs to determine such a claim, the funds should be paid to the Kenzie investors.

[31] The Kenzie investors submit that this was agreed among counsel for the Receiver, counsel for Terrapin and counsel for both Graybriar and the Kenzie investors, despite the provisions of the June 4, 2018 order. They do not rely on, or give evidence of, anything but the record of the June, 2018 hearing with respect to this submission.

IV. Analysis

[32] As noted previously, the transcript of the discussions at the hearing, and the provisions of the June 4, 2018 Order do not support either a direction of the Court or an agreement of counsel as described by the Kenzie investors. While I initially commented that the understanding was that the funds would only be used to determine the priority of claims against the two funds, I was swiftly corrected by counsel for the Receiver, who made it plain that the Kenzie funds would fall into general administration and that the Receiver's application was to obtain priority for the Receiver's Charge and the Receiver's Borrowing Charge over the Court Funds. This priority was reflected in the Order, and confirmed in the Fourth Report of the Receiver in 2019.

[33] In response to my further comment with respect to the use of the funds, counsel for the Receiver indicated that there was already a significant amount of fees outstanding and that "[a]s long as we have the priority, we are happy then to adjudicate claims to the [$235,000] based on entitlement". The Receiver agreed to segregate outstanding fees between the Graybriar matter and the Kenzie matter. It was counsel for Terrapin that wanted assurance that the Kenzie Court

Funds be segregated, to which counsel for the Receiver replied that, as long as the Receiver's charges had priority over them, the Receiver would be able to deal with allocation at the end of the piece, and that the funds would be held in two separate accounts by the Receiver.

[34] That is essentially what the Receiver did: the Graybriar funds were held in an account separate from the Court Funds which were held in the general account.

[35] If there was any misunderstanding about what the Receiver had agreed to do with respect to segregation, that misunderstanding should have been cleared up at the time of the Receiver's Fourth Report dated August 2, 2019. Under the heading "Interim Receipts and Disbursements - July 26, 2012 [the commencement of the receivership] to August 2, 2019", the Receiver discloses that the Court Funds were deposited in the general account and were included with other "receipts" of the receivership, subject to disbursements for professional fees and general and administrative costs.

[36] The Fourth Report also indicates that, in the Receiver's view, the Court Funds "are not trust property for the benefit of any Persons and therefore are available for distribution to general creditors of the Debtor". Ultimately, any distribution to general creditors is unlikely, and in fact there will be a shortfall to cover the Receiver's Borrowing Charge. The Fourth Report indicates that persons who wish to assert a trust or other claim to the assets "are able to do so in the receivership proceedings".

[37] The Fourth Report discloses specifically that:

> Because the Receiver is administering separate classes of assets that will be distributed for the benefit of separate classes of creditors, the Receiver has been careful to segregate professional fee charges and disbursements between the separate asset classes. Since May 2018, the Receiver and its legal counsel have separately recorded and charged their fees and disbursements to "Graybriar" (when performing work related to the Graybriar Funds) and to "General" (when performing work related to the general assets) so as to ensure that allocation of cost is fair and accurate.

[38] While the August, 2019 hearing dealt with distribution to the Graybriar investors and payment of their legal costs, the Court also approved the conduct of the Receiver as reported in the Fourth Report, the payment of the Receiver's general fees and expenses for the period from the inception of the receivership to June 30, 2019, and the payment of the Receiver's fees and expenses specific to the Graybriar issue.

[39] As noted by the Receiver, the interests of the Graybriar investors and those of the Kenzie investors were adverse at the time of the August, 2019 hearing. However, the Kenzie investors had notice of and were represented at the hearing by the same counsel as the Graybriar investors, and the order was not appealed.

[40] In the result, nothing can be done to claw-back distributions from the Graybriar investors, or the payment of their litigation costs. While there may have been a misunderstanding arising from the June, 2018, hearing, there was no breach by the Receiver of the June 4, 2018 Order or what was discussed and agreed to at the hearing.

[41] Although the Kenzie investors do not formally allege a trust with respect to the Court Funds, they submit that the funds were "earmarked" for them, and cite ***Stone Sapphire Ltd. v***

Transglobal Communications Group Inc., 2008 ABQB 575, upheld on appeal, 2009 ABCA 125.

[42] However, the claimant in that case, in similar circumstances as the Kenzie investors, was not able to establish priority over a secured creditor's claim. Topolniski, J. distilled principles relating to priority disputes over money paid into court at para. 11 of that decision:

1. To trump a trustee's priority to funds paid into court under a garnishee or as a condition of opening up a default judgment, the judgment creditor must have completed execution.
2. An order permitting payment out of monies paid into court on obtaining a further order is insufficient to trump the trustee's priority to the funds.
3. A judgment creditor is not elevated to the status of secured creditor by virtue of a payment into court, whether that payment is to advance an appeal or as security for costs.
4. A judgment creditor may trump a trustee's priority to funds paid into court if the funds are sufficiently 'earmarked' and the creditor has 'done all that it could' to access the funds. (***Careen Estate v Quinlan Brothers Ltd.*** (2004), 2004 NLSCTD 132 (CanLII), 2 C.B.R. (5th) 102 (Nfld. S.C.)).
5. A secured creditor trumps a trustee's priority to funds paid into court if the monies are the subject of valid security.

[43] The Court in ***Stone Sapphire*** noted the unusual facts of the ***Careen Estate*** case: money had been paid into court by Careen Estate pending disposition of a trial.

[44] When judgment was awarded against it, counsel for Careen Estate informed the trial judge that his client intended to make an assignment into bankruptcy that day. The trial judge ordered immediate payment out of the funds in court to the plaintiff, but when the defendant's counsel sought payment of the funds, courthouse staff informed him that the court needed to confirm the payment and issue a certificate in accordance with the *Rules of Court*, which could not be accomplished by the close of business that day. Within an hour of that happening, Careen Estate made an assignment into bankruptcy. Thus, only a bureaucratic error prevented the plaintiff from completing execution.

[45] With respect to the concept of "earmarked funds" generally, Topolniski, J. indicated at para 36 that the proposition offends the underlying premise of the *BIA* concerning distribution of a bankrupt's property among creditors, and the specific language of section 70 of the *BIA*. She noted that she was not satisfied that a 2013 decision that found otherwise remained good law in light of the Supreme Court's decision in ***T.E. Cleary Drilling Co. (Trustee of) v Beaver Trucking Ltd***., [1939] S.C.R. 317.

[46] I agree with the Court's reasoning in ***Stone Sapphire***, and find that the Kenzie investors have not established entitlement to priority over the Receiver's charges by reason of the funds being earmarked.

[47] The Kenzie investors submit that there was no basis going forward from the July, 2014 order of Strekaf, J. pursuant to which Arres Capital could have applied back to court to have the Court Funds paid out to it. However, that is essentially what the Receiver did in the July, 2018 application, and was successful.

[48] Finally, the Kenzie investors submit that it is unfair that they are unable to claim the Court Funds, since they have been working since 2014 to execute on their judgment, but were side-lined by the Terrapin claim.

[49] Their frustration is understandable, but the Court Funds have not been paid to another creditor in this case, but have been, and will be, subsumed by the Receiver's Charge and the Receiver's Borrowing Charge in this complex and litigious matter.

V. Conclusion

[50] I allow the Receiver's applications, and dismiss the application of the Kenzie investors for payment of the Court Funds.

[51] If the parties are unable to agree on costs, they may make written submissions.

Dated at Calgary, Alberta this 19th day of April, 2021.

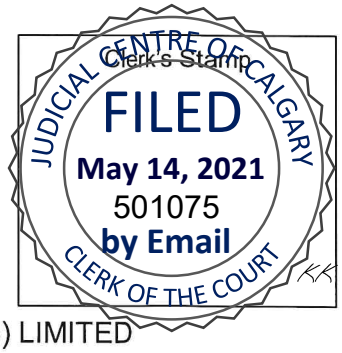
B.E. Romaine
J.C.Q.B.A.

Appearances:

Walker W. MacLeod and Pantelis Kyriakakis
for the Receiver, Alvarez & Marsal Canada Inc.

Jeffrey L. Oliver
for Access Mortgage Corporation (2004) Limited

Loran V. Halyn
for the Kenzie Investors



COURT FILE NUMBER	1401-12431
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ACCESS MORTGAGE CORPORATION (2004) LIMITED
RESPONDENT	ARRES CAPITAL INC.
DOCUMENT	**ORDER (Dismissal Order)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCARTHY TÉTRAULT LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Walker W. MacLeod / Pantelis Kyriakakis Telephone: 403-260-3710 / 3536 Facsimile: 403-260-3501 Email: wmacleod@mccarthy.ca / pkyriakakis@mccarthy.ca

DATE ON WHICH ORDER WAS PRONOUNCED:	**April 19, 2021**
LOCATION OF HEARING:	**Calgary, Alberta**
NAME OF JUDGE WHO MADE THIS ORDER:	**Justice B.E.C. Romaine**

UPON the application (the "**Receiver's Application**") of Alvarez & Marsal Canada Inc., in its capacity as the court-appointed receiver (the "**Receiver**") of Arres Capital Inc. (the "**Debtor**"), pursuant to the order issued by the Honourable Madam Justice Strekaf under the *Civil Enforcement Act* (Alberta) (the "**CEA**") on February 13, 2015, as subsequently amended and restated pursuant to the Order issued by the Honourable Madam Justice B.E.C. Romaine on October 23, 2017 (the "**Receivership Order**"), in the proceedings under Court File Number 1401-12431 (the "**Receivership Proceedings**"); **AND UPON** the application (the "**Kenzie Application**") of Kenzie Financial Investments Ltd., Shelly Beck, Therese F. Daley, Linda Jaeger, Andrew Little, Laurie Little, Agnes M. Oberg, Steven Ogg, Lester S. Ikuta Professional Corporation, Lester Ikuta, Mickey Ikuta, Brian Sekiya, Holly Sekiya, Sandra Sommer, Marion Sommer, Allan Sommer, Steven Reilly, Swarts Bros Limited, and Clara Mae Woroschuk; **AND UPON** having read the Receiver's Application, the Kenzie Application, the Fifth Report of the Receiver, dated August 26, 2020 (the "**Fifth Receiver's Report**"), and the Affidavit of Gaye Saruwatari, sworn on August 25, 2020, all filed; **AND UPON** having read to

Affidavit of Service of Katie Doran, to be filed (the "**Service Affidavit**"); **AND UPON** hearing counsel for the Receiver and counsel for any other persons present;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. The Kenzie Application is hereby dismissed.

2. If the parties are unable to agree on costs they may make written submissions.

3. This Order must be served only upon those interested parties attending or represented at the within application and service may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following the transmission or delivery of such documents.s

J.C.C.Q.B.A.

AGREED AS TO FORM AND CONTENT:

SUGIMOTO AND COMPANY

Per: _____
Loran V. Halyn
Counsel to Kenzie Financial Investments Ltd., Shelly Beck, Therese F. Daley, Linda Jaeger, Andrew Little, Laurie Little, Agnes M. Oberg, Steven Ogg, Lester S. Ikuta Professional Corporation, Lester Ikuta, Mickey Ikuta, Brian Sekiya, Holly Sekiya, Sandra Sommer, Marion Sommer, Allan Sommer, Steven Reilly, Swarts Bros Limited, and Clara Mae Woroschuk

CASSELS BROCK & BLACKWELL LLP

Per: Jeffrey Oliver
Jeffrey Oliver
Counsel to the Plaintiff

In the Court of Appeal of Alberta

Citation: Access Mortgage Investment Corporation (2004) Limited v Arres Capital Inc, 2021 ABCA 325

Date: 20211001
Docket: 2101-0117AC
Registry: Calgary

Between:

Access Mortgage Investment Corporation (2004) Limited

Not Party to Application
(Not Party to Appeal)

- and -

Arres Capital Inc.

Applicant
(Respondent)

- and -

Kenzie Financial Investments Ltd., Shelly Beck, Therese F. Daley, Linda Jaeger, Andrew Little, Laurie Little, Agnes M. Oberg, Steven Ogg, Lester S. Ikuta Professional Corporation, Lester Ikuta, Mickey Ikuta, Brian Sekiya, Holly Sekiya, Sandra Sommer, Marion Sommer, Allan Sommer, Steven Reilly, Swarts Bros Limited and Clara Mae Woroschuk

Respondents
(Appellants)

The Court:

The Honourable Justice Barbara Lea Veldhuis
The Honourable Justice Kevin Feehan
The Honourable Justice L. Bernette Ho

Memorandum of Judgment

Application to Dismiss Appeal

Memorandum of Judgment

The Court:

I. Overview

[1] Alvarez & Marsal Canada as the Receiver of Arres Capital applies to dismiss an appeal by Kenzie Financial Investments and others from two orders of a chambers judge dated April 19, 2021, pursuant to r 14.74(b), *Alberta Rules of Court*, AR 124/2010, on the ground that it is moot.

[2] The April 19, 2021 orders under appeal allow distribution of funds in the receivership, allow discharge of the Receiver upon filing of a discharge certificate, and dismiss the application of the Kenzie investors for payment to them of funds originally paid into court pursuant to earlier litigation and later released to the Receiver. The Kenzie investors say these funds are subject only to deduction of the Receiver's expenses actually incurred in respect of addressing competing claims to the funds.

[3] The Receiver submits the appeal is moot as a result of several orders, not appealed, creating priority charges for the fees and disbursements of the Receiver and its legal counsel, and for amounts borrowed by the Receiver, together with interest and charges. Those orders directed that funds paid out from court to the Receiver were subject to the Receiver's priority charges, approved the professional fees and costs incurred by the Receiver and legal counsel, affirmed the cost allocation proposed by the Receiver, affirmed the conduct of the Receiver and its legal counsel, and authorized the Receiver to make distribution of funds to certain identified persons. The Receiver says there will be a shortfall in the funds held by it such that there will be no funds available to be paid to the Kenzie investors, regardless of the outcome of the appeal.

[4] For the reasons below, the application is allowed.

II. Facts

[5] The background facts to this application are lengthy and complex, and are set out in the reasons below: 2021 ABQB 307. The following is a brief summary.

[6] In July 2013, the Kenzie investors obtained summary judgment against Arres Capital in the amount of $223,768.79, plus costs and interest. On February 11, 2014, the amount of approximately $235,000 was paid into court pursuant to a consent order. As a result of an appeal, a successful intervenor application by Terrapin Mortgage Corporation, and foreclosure litigation between Arres Capital and Graybriar Land Company and Graybriar Greens, the funds remained in court until Arres Capital was placed into receivership on July 26, 2017. A bankruptcy order was granted on the same date, with Alvarez & Marsal Canada appointed as Trustee.

[7] On October 23, 2017, the chambers judge granted an Amended Receivership Order creating priority charges for the fees and disbursements of the Receiver and its legal counsel, and for amounts borrowed by the Receiver, together with interest and charges. On June 4, 2018, the chambers judge granted an order that funds held in court pursuant to the Graybriar actions and the Kenzie summary judgment be paid to the Receiver to enable it to conduct a claims process. The order provided that both groups of funds were subject to the Receiver's charge and the Receiver's borrowing charge which formed a first charge on those funds. It authorized the Receiver to apply those funds "against current or future indebtedness owing on either the Receiver's Charge or the Receiver's Borrowing Charge". Finally, it approved the actions of the Receiver, and its interim accounts and those of its legal counsel pursuant to the Second Receiver's Report. Those orders were not appealed.

[8] As a result of the June 4, 2018 order, funds originating in the Kenzie summary judgment, at that point amounting to approximately $241,800, were released to the Receiver.

[9] On August 13, 2019, another chambers judge granted two orders. The first approved the actions and conduct of the Receiver to the date of the Fourth Receiver's Report, approved the Receiver's and its legal counsel's accounts for fees and disbursements, incurred and to completion, both for general matters in the amount of $310,708, and with respect to the Graybriar funds in the amount of $295,612.

[10] The second order of August 13, 2019 approved distributions from the Graybriar funds to trust creditors of those funds, empowering the Receiver to hold back amounts due, accruing due, or estimated to accrue due for the Receiver's charge or the Receiver's borrowing charge. Neither of the August 13, 2019 orders were appealed.

[11] As of August 21, 2020, the receivership maintained a cash balance of approximately $210,000 with an expected GST refund of approximately $11,500. Receipt and disbursements to discharge exigible assets which the Receiver was unable to monetize were estimated at approximately $113,000, leaving approximately $109,000 in total available funds, and approximately $44,702 in general funds, which the Receiver says were subject to its priority claims.

[12] The first order of April 19, 2021 under appeal approved the Receiver's fees and disbursements and those of its counsel, plus estimated costs and fees to complete the receivership, authorized and directed distribution of funds, and stated that the Receiver had satisfied its obligations under all orders to date. It also provided for the discharge of the Receiver upon completion of a discharge certificate. The second order of April 19, 2021 under appeal dismissed the application of the Kenzie investors as to their entitlement to funds from the 2013 summary judgment.

[13] As at the Sixth Report of the Receiver dated July 29, 2021, after approved distribution, there was cash available in the overall receivership of $73,051 and an estimated shortfall to complete the receivership of approximately $157,045.

[14] The Notice of Appeal was filed on May 6, 2021, the Kenzie investors filed the Appeal Record on May 19, 2021, and filed their Factum and Extracts of Key Evidence on July 14, 2021.

III. Parties' submissions

[15] The Receiver says that as a result of the above orders, a significant amount of the funds it holds have now been disbursed and are no longer recoverable. Remaining funds are subject to priority charges, with the result that even if the appellants were entirely successful on appeal, there are simply no funds available to be paid to them.

[16] The Kenzie investors say the Receiver agreed to segregate the funds resulting from their summary judgment from the general assets of Arres Capital realized during the course of the receivership, and to utilize those funds only for the Receiver's expenses to address the competing claims of Terrapin against those funds. They say the funds were not otherwise to be available for the general expenses of the bankruptcy and receivership of Arres Capital.

[17] The Kenzie investors dispute the chambers judge's determination that the funds paid into court from its 2013 summary judgment were exigible property of Arres Capital, and that there was no agreement to segregate those funds from the general assets. They say the Receiver is bound by such an agreement; as a result, those funds were improperly taken by the Receiver and should be paid back for potential availability to them. If that is done, they say the appeal is not moot.

[18] Alternatively, the Kenzie investors suggested in oral submissions that the debtor-in-possession lender, Access Mortgage, could provide further funding. The Receiver responded that there is no commitment from Access Mortgage to fund the Kenzie investors' summary judgment and such a suggestion is without evidence.

IV. Analysis

(a) Mootness

[19] A panel of the Court of Appeal may dismiss all or part of an appeal if the appeal is moot: r 14.74(b).

[20] The well-known statement on mootness is found in ***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342, 353, 57 DLR (4th) 231. The Supreme Court held that a court may decline to decide a case which raises merely a hypothetical or abstract question, when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of parties and has no practical effect.

[21] The approach to mootness involves a two-step analysis, 353. First it is necessary to determine whether the "required tangible and concrete dispute has disappeared and the issues have become academic"; and if so, whether the court should exercise its discretion to hear the case in any event.

[22] If a matter is determined to be moot, the court may still exercise its discretion to hear it "if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail", 359, and where the expenditure of judicial resources is considered warranted because the question posed is of a recurring nature and raises an issue of public importance, resolution of which is in the public interest, 360-361. Care must also be taken that pronouncing a judgment in the absence of a real dispute affecting the rights of the parties is not intruding into the role of the legislative branch, 362.

[23] In ***Bellatrix Exploration Ltd v BP Canada Energy Group ULC***, 2021 ABCA 148, paras 10-11, this Court set out the test of mootness from ***Borowski*** and listed factors to consider in determining whether a court will hear a matter that is moot: the presence of an adversarial relationship; concerns relating to judicial economy; the importance of the question; whether the issue is "capable of repetition, yet evasive of review"; and the court's proper law-making function. The Court determined, para 14, that the matter before it had become moot and it would not exercise its discretion to hear the question because "this issue would benefit from being fully litigated on a fulsome evidentiary record in the context of a live controversy".

[24] The Kenzie investors do not dispute the test for mootness, but submit the appeal is not moot, on the basis of ***Stone Sapphire Ltd v Transglobal Communications Group Inc***, 2008 ABQB 575, paras 11, 22, 36, [2009] 2 WWR 562, aff'd 2009 ABCA 125, paras 1-3, [2009] 5 WWR 597.

(b) <u>"Earmarked" funds</u>

[25] In ***Stone Sapphire***, Transglobal Communications had made a payment into court of $1,533,352.62 and submitted these funds were "earmarked" for its benefit only; therefore the payment had priority over the banker's security. The chambers judge acknowledged that a judgment creditor may "trump a trustee's priority to funds paid into court if the funds are sufficiently 'earmarked' and the creditor has 'done all that it could' to access the funds", referencing ***Careen Estate v Quinlan Brothers Ltd***, 2004 NLSCTD 132, 2 CBR (5th) 102. In that case, the trial judge ordered immediate payment of funds out of court, having been advised that the same day Careen Estate would be making an assignment into bankruptcy, ***Stone Sapphire***, para 22. Unfortunately, the courthouse staff did not effect payment out immediately, requiring a certificate in accordance with the *Rules of Court*. Under those unique circumstances the court found the funds were those of the Careen Estate "because of the timing of the trial judge's order permitting immediate payout of the monies paid into court and the fact the plaintiff had taken all steps necessary to request the funds", ***Stone Sapphire***, para 23.

[26] The chambers judge in ***Stone Sapphire*** limited ***Careen Estate*** to its facts and said, para 36, "[t]he proposition ... that ... funds paid into court ... may be ... 'earmarked' for an unsecured creditor to defeat the interests of a trustee in bankruptcy ... offends the underlying premise of the *BIA* concerning distribution of a bankrupt's property among all creditors". She also expressed doubt these findings with respect to "earmarking" were good law in light of the Supreme Court of Canada decision in ***Canadian Credit Men's Trust Association as Trustee in Bankruptcy for TL Cleary Drilling Co v Beaver Trucking***, [1959] SCR 311.

[27] Here, the chambers judge reviewed ***Stone Sapphire***, agreed with the court's rejection of a generalized concept of "earmarked funds", and said, para 46: "the Kenzie investors have not established entitlement to priority over the Receiver's charges by reason of the funds being earmarked". The Kenzie investors wish to reargue the law with respect to "earmarked" funds as a proposed ground of appeal.

(c) Synthesis

[28] A review of the financial position of Arres Capital clearly shows that at conclusion of the receivership, there will be no funds available for distribution. The Receiver has obtained all necessary orders to effect the distributions it has made, and to collect its and its counsel's fees and disbursements according to the Receiver's charge and Receiver's borrowing charge. There is no further money to be found.

[29] Even if the Kenzie investors were successful on appeal with respect to the concept of "earmarking", or on the basis that the funds from its summary judgment were not the exigible property of Arres Capital, and there was an understanding that the funds from the summary judgment were to be kept in a separate category than the general funds or the Graybriar funds held by the Receiver, there would still be no funds currently available to be paid to the Kenzie investors.

[30] The result might have been different were it not for the court orders reviewed above. However, the Receiver obtained and followed those orders, and there is no basis to address repayment of its and its counsel's accounts in the receivership. There are no funds left for any prospective payment to the Kenzie investors. As a result, the appeal is clearly moot.

[31] Under the circumstances, we decline to exercise our discretion to hear a moot appeal, given the factors set out in ***Bellatrix***.

[32] We acknowledge that the Kenzie investors will be disappointed that they receive nothing from their 2013 summary judgment, but no remedy is available to them given the significant financial difficulties of Arres Capital and its receivership.

V. Conclusion

[33] The application of the Receiver is allowed and the appeal by the Kenzie investors is dismissed.

Application heard on September 23, 2021

Memorandum filed at Calgary, Alberta
this 1st day of October, 2021

Authorized to sign for: Veldhuis J.A.

Feehan J.A.

Authorized to sign for: Ho J.A.

Appearances:

W.W. MacLeod
for the Applicant

L.V. Halyn
for the Respondents

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	2101-0117AC
TRIAL COURT FILE NUMBER:	1401-12431
REGISTRY OFFICE:	CALGARY
APPLICANT:	ACCESS MORTGAGE INVESTMENT CORPORATION (2004) LIMITED
STATUS ON APPEAL:	NOT A PARTY TO THE APPEAL
STATUS ON APPLICATION:	NOT A PARTY TO THE APPLICATION
RESPONDENT:	ARRES CAPITAL INC.
STATUS ON APPEAL:	RESPONDENT
STATUS ON APPLICATION:	APPLICANT
NONPARTY APPLICANTS	KENZIE FINANCIAL INVESTMENTS LTD., SHELLY BECK, THERESE F. DALEY, LINDA JAEGER, ANDREW LITTLE, LAURIE LITTLE, AGNES M. OBERG, STEVEN OGG, LESTER S. IKUTA PROFESSIONAL CORPORATION, LESTER IKUTA, MICKEY IKUTA, BRIAN SEKIYA, HOLLY SEKIYA, SANDRA SOMMER, MARION SOMMER, ALLAN SOMMER, STEVEN REILLY, SWARTS BROS LIMITED and CLARA MAE WOROSCHUK
STATUS ON APPEAL:	APPELLANTS
STATUS ON APPLICATION:	RESPONDENTS
DOCUMENT:	**ORDER (Dismissal Order)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Walker W. MacLeod / Pantelis Kyriakakis Telephone: 403-260-3710 / 3536 Facsimile: 403-260-3501 Email: wmacleod@mccarthy.ca / pkyriakakis@mccarthy.ca

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DATE ON WHICH ORDER WAS PRONOUNCED:	**October 1, 2021**
LOCATION OF HEARING:	**Calgary, Alberta**
NAMES OF JUDGES WHO GRANTED THIS ORDER:	J. A. Veldhuis J. A. Feehan J. A. Ho

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ON THE APPLICATION OF Alvarez & Marsal Canada Inc., in its capacity as court-appointed receiver of Arres Capital Inc. and not in its personal capacity (the "**Receiver**") to dismiss the Civil Notice of Appeal of Kenzie Financial Investments Ltd. and others (as identified in Schedule "**A**" of the Civil Notice of Appeal) (collectively, the "**Appellants**") filed on May 6, 2021 (the "**Appeal**") on the basis that the Appeal is moot (the "**Receiver's Application**") coming on for a hearing; AND UPON HAVING READ the Receiver's Application, the Receiver's Memorandum of Argument, the Appellants' Reply Memorandum of Argument and the Sixth Report of the Receiver, dated July 29, 2021 (the "**Sixth Receiver's Report**"); all filed; AND UPON HEARING counsel for the Receiver and counsel for the Appellants;

IT IS ORDERED THAT:

1. The Receiver's Application is allowed.

2. The Appeal is dismissed.

for Registrar, Court of Appeal

APPROVED AS TO FORM AND CONTENT:

SUGIMOTO AND COMPANY

Per: _____
Loran V. Halyn
Counsel to Kenzie Financial Investments Ltd., Shelly Beck, Therese F. Daley, Linda Jaeger, Andrew Little, Laurie Little, Agnes M. Oberg, Steven Ogg, Lester S. Ikuta Professional Corporation, Lester Ikuta, Mickey Ikuta, Brian Sekiya, Holly Sekiya, Sandra Sommer, Marion Sommer, Allan Sommer, Steven Reilly, Swarts Bros Limited, and Clara Mae Woroschuk

MCCARTHY TÉTRAULT LLP

Per: _____
Walker W. MacLeod
Counsel to the Receiver

I hereby certify this to be a true copy.

For Deputy Registrar
Court of Appeal of Alberta

MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

A. Overview

1. The Applicants are judgment creditors of Arres Capital Inc. ("Arres") relating to a judgment granted on July 17, 2013. Arres appealed that judgment.

2. On February 14, 2014, the amount of $235,000 sufficient to satisfy the Applicants' judgment plus costs to be determined was paid into court by Arres (the "Court Funds") in conjunction with Arres' appeal of that judgment. Arres' appeal was dismissed on April 16, 2014.

3. The Applicants applied for release of the Court Funds in July 2014, but the intervention of a third party, Terrapin Mortgage Investment Corp. ("Terrapin"), thwarted the Applicants' efforts. Terrapin made a claim to the Court Funds on the basis Arres had potentially obtained those funds improperly from Terrapin which were used to pay the Applicants' judgment. However, Terrapin's claim to the Court Funds was intertwined with Terrapin also claiming against trust funds in another action, the "Graybriar" litigation also involving Arres. Terrapin's entitlement to the Court Funds hinged on its claim against the Graybriar trust funds, and the Graybriar litigation was particularly protracted. Consequently, the Applicants were prevented from receiving the Court Funds by court order granted July 23, 2014 freezing the funds in court while Terrapin's claim to Graybriar trust funds remained unresolved, which had implications for its claim to the Court Funds.

4. Three years later, while the Graybriar litigation and Terrapin's claim to Graybriar trust funds remain extant resulting in the Court Funds remaining frozen in court, Arres was assigned into receivership and bankruptcy on July 26, 2017.

5. On June 4, 2018, four years after dismissal of Arres' appeal of the Applicants' judgment, the Receiver and Trustee of Arres (the "Receiver") successfully applied to take possession of the Graybriar trust funds and the Court Funds. The Applicants and Terrapin opposed the Receiver's application on the basis the Court Funds were not exigible property of Arres, and accommodations were agreed upon in that application for the Receiver to receive but segregate the Graybriar trust funds and Court Funds from the general administration of Arres' estate while determinations were made in the Graybriar litigation and Terrapin's claims to either the Graybriar or Court Funds were resolved (the "Segregation Agreement").

6. In December 2018, the Court determined Terrapin had no valid claim against the Graybriar trust funds, followed by a months' long process in Arres' receivership and bankruptcy to distribute those trust funds to a large number of Graybriar investor beneficiaries in August 2019. By September/October 2019, Terrapin had abandoned its claim to the Court Funds, and so the Applicants applied to have the Court Funds released, relying on law that the Court Funds were "earmarked" for them back in 2014 and should not be considered property of Arres in 2017 even though the funds remained in court.

7. On April 19, 2021, the Court finally rendered its decision on the Applicants' application for the Court Funds. The Court dismissed the application concluding there was no Segregation Agreement or no breach of same by the Receiver, concluding that the law regarding funds in court "earmarked" for an unsecured creditor being exempted from the application of s. 70 of the *Bankruptcy and Insolvency Act* ("*BIA*") is not good law.

8. The Applicants' appeal to the Court of Appeal of Alberta was dismissed summarily, in part on the same reasoning as the lower court in concluding the concept of "earmarked" court funds as antithetical to s. 70 of the *BIA*. The Court further determined the Receiver/Trustee's failure to comply with the Segregation Agreement (to the extent there was such an agreement) and instead utilizing all of the Court Funds for its own fees and expenses was allowed.

9. The reasoning of the Court of Appeal of Alberta conflicts with a long line of court decisions going back to at least 2004 with the decision in *Careen Estate v. Quinlan Brothers Ltd.* (2004), 2 C.B.R. (5th) 102 (Nfld. S.C.) concluding "A judgment creditor may trump a trustee's priority to funds paid into court if the funds are sufficiently 'earmarked' and the creditor has 'done all that it could' to access the funds."

10. This Application appeals the lower courts' decisions and seeks clarification of the law. The decisions of the Court of Queen Bench of Alberta and Court of Appeal of Alberta in this matter raise an issue of public importance by creating an irreconcilable conflict in long-standing law regarding the generalized concept of "earmarked" court funds in the bankruptcy context, to wit: does an unsecured judgment creditor ever have a priority claim to "earmarked" court funds or is the line of authority applying the concept of "earmarked" court funds invalid insofar as it irreconcilably clashes with s. 70 of the BIA permitting no exceptions vis-à-vis bankruptcy taking precedence over every unexecuted judgment or order regardless of the factual context.

B. The History of the Proceedings in the Graybriar and Applicants' litigation

11. A comprehensive review of the facts relating to the Graybriar and Applicants' litigation with Arres is necessary to understand how the Applicants' entitlement to the Court Funds became embroiled in the Graybriar matter which prevented the release of the Court Funds to the Applicants for several years through no fault of the Applicants, ultimately resulting in the injustice visited upon the Applicants that grounds their appeal efforts.

12. Arres was a licensed "mortgage broker". Arres arranged syndicated loans funded by investors, securing such loans through land mortgages and other security, collecting loan payments from borrowers, and distributing those loan payments amongst the investors, less Arres' expenses in administering the loans, all in accordance with standard-form written trust agreements between Arres and the investors, designating Arres as bare trustee for the investors.

13. In 2008, Arres arranged a $9,000,000 syndicated loan for a 1-year term secured by a mortgage to fund the subdivision of lands and the construction of a 48-unit condominium complex located in or near the Town of Stony Plain, Alberta. The borrowers were two related corporations referred to collectively as "Graybriar". The Graybriar mortgage went into default in 2009 resulting in Arres commencing foreclosure proceedings on the investors' behalf (the "Graybriar Foreclosure"). Arres misappropriated a significant portion of the investors' trust funds realized in the foreclosure proceedings and the investors commenced an action against Arres (the "Graybriar Investor Action").

14. In 2010, Arres arranged with the Applicants, as their bare trustee, for them to fund a syndicated loan and mortgage in the amount of $3,500,000 to Y-K Projects Inc. ("Y-K") for the development of Y-K's lands located in British Columbia. When Y-K paid out the mortgage in 2012, Arres misappropriated a significant portion of the Applicants' trust funds resulting in the Applicants suing Arres (the "Y-K Investor Action").

15. By July 2013, the Applicants applied for summary judgment in the Y-K Investor Action and were partially successful. Judgment was granted in the amount of $223,768.79 plus costs and interest, with the balance of the Applicants' misappropriation claims against Arres directed to trial. Arres appealed the judgment and the parties agreed to a Consent Order requiring Arres to pay $235,000 into court (comprising the Court Funds) to halt the judgment collection activities of the Applicants pending determination of Arres' appeal.

16. Arres' appeal was dismissed in April 2014 and no further appeal was pursued. Before the Court Funds could be paid out to the Applicants in satisfaction of their summary judgment (the delay due to passage of the appeal period and costs still having to be settled), in June 2014 a third party, Terrapin, made a claim to those funds on the basis Arres had potentially obtained those funds improperly from Terrapin.

17. In July 2014 Terrapin successfully applied in the Y-K Investor Action for intervener status and to effectively prevent the release to the Applicants of the Court Funds pending determination of Terrapin's potential claim to those funds. The court adjourned *sine die* the Applicants' application for release of the Court Funds pending determinations to be made in the Graybriar Foreclosure. From that point, the Court Funds were frozen from the Applicants.

18. Terrapin's claims intertwined the Graybriar Foreclosure with the Y-K Investor Action because:

a. Initially Arres misappropriated trust funds from the Applicants' who successfully sued Arres and obtained a judgment that was upheld on appeal.

b. Arres then secretly attempted to misappropriate trust assets (7 condominium units) from the Graybriar investors, with the intention of obtaining loan funds from Terrapin through a corporation related to Arres to be improperly secured by mortgage against 4 Graybriar condominium units, then using those loan funds to pay the Applicants' judgment.

c. Terrapin advanced its loan funds of $425,000, relying on title insurance before registration of its mortgage against the 4 Graybriar condominium units.

d. Arres used a portion of Terrapin's loan funds to pay the Court Funds for the Applicants' judgment.

e. The Graybriar investors discovered and thwarted Arres' plan to misappropriate their trust assets as security for Terrapin's loan before the plan could be implemented, thereby preventing the registration of Terrapin's mortgage on 4 Graybriar condominium units, resulting in Terrapin then left with an unsecured debt.

f. Thus, Terrapin claimed entitlement to its security or an equitable mortgage over Graybriar trust assets or alternatively to the Court Funds.

19. Therefore, by mid-2014 there was a contest between only the Applicants and Terrapin as to entitlement to the Court Funds. That contest was complicated by Terrapin also claiming entitlement to Graybriar trust assets in the Graybriar Foreclosure. Terrapin was claiming that it either had an interest in the Graybriar trust assets or in the Court Funds. If Terrapin's claim was sustained against the Graybriar trust assets, then it could not maintain any claim to the Court Funds and the Applicants would be entitled to those funds. Alternatively, if Terrapin's claim to Graybriar trust assets was denied, it then could pursue its claim to the Court Funds opposed by the Applicants, and in that eventuality the Applicants' claim to the Court Funds could still prevail.

20. Terrapin's claim to the Graybriar trust assets was disputed by the Graybriar investors, which resulted in protracted litigation spanning several years, during which the Applicants' entitlement to the Court Funds over Terrapin's claim remained unresolved (see: *Richcrooks Enterprises (2000) Ltd. v Arres Capital Inc.*, 2015 ABCA 40). Meanwhile, the Graybriar trust assets comprised of 7 condominium units were sold and the funds were paid into court in the Graybriar litigation or into the trust account of Terrapin's solicitors. Notably, none of these realized sale proceeds, now Graybriar trust funds, were paid to nor held directly by Arres. The Applicants were left to wait out the result of Terrapin's claim to a portion of the Graybriar trust funds.

21. Before Terrapin's claims to the Graybriar trust funds or Court Funds were determined, the Receiver and Trustee for Arres was appointment in July 2017. Arres made no claim to the Court Funds nor alleged any amount owing from the Applicants in its receivership and bankruptcy. The Court Funds were not listed as an exigible asset of Arres. And certainly by July 2017, more than 3 years after Arres' appeal of the Applicants' judgment had been dismissed with no further appeal, Arres could not have applied for the Court Funds to be returned to it on any conceivable legal basis. By that point in time, the Court Funds were subject only to the claims of the Applicants or Terrapin.

22. On June 4, 2018, the Receiver successfully applied to take possession of the Graybriar trust funds and the Court Funds, although Arres held neither of these funds. Arres only connection to the funds was that Arres was one of several defendants in the Graybriar and Y-K actions. Therefore, the Applicants and Terrapin opposed the Receiver's application regarding the Court Funds on the basis the funds were not exigible property of Arres in 2017. The Applicants contended they were judgment creditors whose claim to the Court Funds should trump any claim

of the Receiver to those funds because the funds were sufficiently "earmarked" for the Applicants who had done all they could to access those funds prior to Arres' bankruptcy.

23. In light of the competing claims of the Applicants and Terrapin to the Court Funds, during the June 4, 2018, court proceedings counsel for the Receiver apparently agreed and undertook to handle those funds differently than the property of Arres in the general administration of its estate. It was agreed by Receiver's counsel that the Graybriar trust funds and the Court Funds would be segregated from the general exigible property of Arres while the Receiver assisted in the determination of Terrapin's priority claim with respect to the Graybriar trust funds first and then later if necessary Terrapin's claim to the Court Funds.

24. Notwithstanding the Graybriar trust funds were clearly not exigible property of Arres and the Court Funds were subject to claims that could (the Applicants say would) put those funds outside of the Receiver's hands as property of Arres, the Court made the following "decision" on June 4, 2018, after which a discussion amongst counsel ensued leading to the agreement or undertaking from the Receiver to segregate the Graybriar trust funds and Court Funds from Arres' general exigible property (the alleged Segregation Agreement), all as follows:

> And I am going to allow the order, but on the understanding that the funds are to be used to determine the priority of claims against the Graybriar funds and the Kenzie funds only, and not with respect to the other projects that might be in the receivership. If the receiver determines that it wishes to proceed with those other projects, it must give notice to the parties here today so that there can be some determination of whether that is appropriate.
>
> MR. MACLEOD: That's no problem at all, My Lady.
>
> THE COURT: Okay.
>
> MR. MACLEOD: And just so you understand, the claims process is only in relation to the Graybriar funds. They can't be funds --
>
> THE COURT: Right. Did I include the others?
>
> MR. MACLEOD: Yeah.
>
> THE COURT: I am sorry.
>
> MR. MACLEOD: You might have, but I think it speaks to your point, because this how we are -- you want things segregated and --
>
> THE COURT: Right.

MR. MACLEOD: -- we are proposing to segregate, so the Kenzie funds will then fall into the general administration of the estate and the parties can make claims through them through the bankruptcy process. We don't need an independent process on them.

. . .

MR. HALYN: Yeah. Again, I don't want to interrupt my friend Mr. Walker, but his comment that he just made seems to be a little different than I understood what you were saying and that is that if I am understanding him correctly, he's taking the position that Kenzie Financial 235 in court, just gets paid into general administration of the receiver trustee.

MR. MACLEOD: Yeah.

MR. HALYN: And I am -- my position was, I think it should be limited only to investigations and determinations of priority of competing claims, vis-à-vis those funds and that if the receiver determines that there is no other competing claims, that would disrupt the judgment creditors' otherwise entitlement to those funds, then those investors, those judgment creditors can make an application or can otherwise come back to the court to have those funds released back to that group, rather than being just general money in the receivership to the benefit of all potential creditors, so I want to make sure we are clear on that.

THE COURT: Okay. Mr. MacLeod.

MR. MACLEOD: So the Graybriar funds we say they are trust funds for the benefit of his investors, subject to, you know, determination of the competing claims quantification and all that.

THE COURT: Right.

MR. MACLEOD: They are segregated.

The 235 was posted by Arres Capital. No trust relationship with it whatsoever. It just took the money and put it into court –

THE COURT: Right.

MR. MACLEOD: -- as in relation to an unsecured judgment, so that's why it falls back not into the trust pot of Graybriar, but just the general administration of the estate.

THE COURT: However, even if it is in the general administration of the estate, you are only going to use it to investigate claims and priority with respect to that amount, is that correct?

MR. MACLEOD: Yeah, can I consult with Mr. Konowalchuk on that?

THE COURT: Yes, of course. Yes, in other words -- I know you have to -- okay.

MR. MACLEOD: Yes, so there is a significant portion of the fees that are outstanding, and you will see in your order that you are, you know, saying that we have first charge on the both the Graybriar funds and the court funds. With that understanding, and we will have to come back and get fees approved at a later date and that's part of what we are doing today. That's fine to the receiver. As long as we have the priority, we are happy then to adjudicate claims to the 235 based on entitlement. I suspect we are going to see a bunch of property claims in the bankruptcy estate and so we will have to then deal with that.

THE COURT: Okay.

MR. MACLEOD: So that is where the focus is going to be.

THE COURT: I am assuming, and I can't -- I don't see any evidence to the contrary that those fees outstanding were incurred with respect to the determination of the claims with respect to these two pots of money.

MR. MACLEOD: Yeah.

THE COURT: Yes, okay.

MR. MACLEOD: The vast -- I couldn't say it is everything, My Lady, because there is just the usual general administration.

THE COURT: Yes.

MR. MACLEOD: But the vast majority certainly fit in that pot.

THE COURT: Okay.

MR. MACLEOD: Either one. Either one of them.

THE COURT: Okay.

MR. MACLEOD: And we will be cognizant at this point forward.

At some point we are going to have to come back an justify the fees and that's one point. We are doing an interim fee equivalent a day.

THE COURT: Yes.

MR. MACLEOD: So at some point this is all going to be such to final court supervision. I don't want to be entirely hamstrung with the 235 in the general estate is I think what I am saying, My Lady.

THE COURT: Okay. I think on that basis, Mr. Halyn, I am –

MR. HALYN: Well, again, not being difficult, My Lady, but it would seem to me that what is being proposed is that for the fees and expenses of the trustee or receiver up to this point in time, they are saying, Well, we've worked on all of these different matters, including the Graybriar matters, but we'd like to pay all of that from

the Kenzie Financial funds that are being paid into their hands if I understand what he is saying.

If I am misunderstanding, then please correct me.

MR. MACLEOD: I –

THE COURT: Can you segregate the outstanding fees between the Graybriar matter and the Kenzie matter?

MR. MACLEOD: Yeah, we -- we can do that for sure, My Lady.

THE COURT: Okay.

MR. HALYN: And then so long as we can see that segregation both looking back and going forward, I guess then that would be fine.

THE COURT: Yes. Okay.

MR. HALYN: Okay.

MR. MACLEOD: We will -- when we go back to do the fees next, we will break it down a little bit more, My Lady.

THE COURT: Okay.

…

MS. OKITA: Similar to Mr. Halyn, not to be difficult, but we are looking just to keep those Kenzie funds segregated to preserve any trust claims that we have, and so we are wondering if that can be written into the Court -- into this, so that these will be -- they won't be comingled. And is that what we've already established?

MR. MACLEOD: Yes. As long as the charge ranks in priority on them, we will be able to deal with allocation at the end of the piece.

THE COURT: Right.

MR. MACLEOD: I think we are happy to have them in two separate accounts at Alvarez.

THE COURT: Okay. Okay, thank you.

MS. OKITA: Thank you.

[emphasis throughout added]

25. The June 4, 2018 Order included standard terms in receivership and bankruptcy orders that gave the Receiver a priority charge over the assets of the bankrupt for the Receiver's fees and expenses in the general administration of the bankrupt's estate.

26. The underpinning of the Segregation Agreement was to have the Receiver essentially take carriage of the process to determine the validity of all claims relating to the Graybriar trust funds. This approach was proposed to be more cost-effective and expeditious than having the priority claims to those trust funds determined in the normal course of litigation. Because the Applicants' or Terrapin's entitlement to the Court Funds was tied to the Graybriar litigation, it made sense to have the Receiver also take carriage of and determine the entitlement to the Court Funds as well.

27. The Receiver would have priority for only its fees and expenses associated with determining the priority of claims to the Graybriar trust funds and Court Funds. These funds would "be used to determine the priority of claims against the Graybriar funds and the Kenzie funds **only**" (to use the Court's words with emphasis added). The Segregation Agreement did not give the Receiver an unlimited right to priority for payment of its charges for general administration of Arres' estate from either the Graybriar trust funds or the Court Funds.

28. But for the Segregation Agreement that protected the Applicants' interests in, and preserved the Applicants' claim over, the Court Funds, the Applicants would have appealed the June 4, 2018, receivership and bankruptcy order.

29. Thereafter, the Receiver took steps to determine the priority claims of Terrapin and of several parties related to Arres (the "Related Parties") against the Graybriar trust funds. While that process unfolded, no work by the Receiver relating to the Court Funds was undertaken. The priority claims of Terrapin and the Related Parties were dismissed on December 20, 2018.

30. With the priority claims to the Graybriar trust funds dismissed, the Receiver applied to finalize the distribution of the funds to the beneficiary Graybriar investors, filing its Fourth Report in August 2019.

31. The Graybriar trust funds were distributed to the Graybriar investors in the fall of 2019 after deducting the Receiver's charges incurred specifically in connection with resolving the competing priority claims of Terrapin and the Related Parties and administering the Graybriar trust funds, all in accordance with the Segregation Agreement.

32. Following dismissal of Terrapin's priority claim to the Graybriar trust funds, it abandoned its claim against the Court Funds. Accordingly, with no competing claim from Terrapin, the Applicants applied for release of the Court Funds, subject to any Receiver charges relating to its handling of those funds up to that point in time, pursuant to the Segregation Agreement.

33. The Receiver opposed the Applicants' application, disputing the Segregation Agreement and contending that it was entitled to recover from the Court Funds all of its charges for the general administration of Arres' estate which exceeded the amount of those funds, leaving nothing for the Applicants.

34. The Receiver argued that its Fourth Report approved by the court disclosed that it had not segregated the Court Funds from Arres' general account for administration of its estate, and the Applicants had not objected to that Report and so whatever priority claim they may have had to the Court Funds under the Segregation Agreement, that claim was nullified by the Fourth Report. Counsel for the Applicants did not read the Receiver's Fourth Report as indicating the Receiver was not honouring the Segregation Agreement, and so Applicants' counsel continued to believe the Receiver was complying with the agreement.

35. With respect, the submission of the Receiver's Fourth Report should not constitute an absolution of the Receiver's breach of the Segregation Agreement regarding the Court Funds.

36. Following the Receiver completing the distribution of the Graybriar trust funds to the investor beneficiaries after paying all of the Receiver's fees and expenses in connection with handling the Graybriar trust funds, the Receiver's Fourth Report confirmed it continued to hold funds in the amount of $252,009, which exceeded the Court Funds of $241,000 (with interest). Therefore, even if the Court Funds were not deposited into an account separate from the Receiver's general account at the time of the Fourth Report, the Receiver's cash on hand remained sufficient at that time that it could (and was presumed by Applicants' counsel to) comply with the Segregation Agreement to segregate the Court Funds in a separate account and not utilize those funds for the general administration of Arres' estate.

37. Finally, even if Applicants' counsel failed to question whether the Receiver was not complying with the Segregation Agreement regarding the Court Funds following submission of its Fourth Report, the Receiver's non-compliance was quickly brought to the attention of the Receiver later in the fall of 2019 when it presumably held more funds in the general administration of Arres' estate than the amount of the Court Funds. When Applicants' counsel reminded Receiver's counsel of the Segregation Agreement shortly after the Fourth Report, Receiver's counsel did not refute that agreement but instead eventually took refuge in its Fourth Report as excusing any non-compliance.

38. In Reasons for Decision dated April 19, 2021, the Queen's Bench Court in chambers determined the Court Funds were exigible property of Arres to which the Applicants had no priority claim, dismissing the Applicants' argument that these funds were sufficiently "earmarked" to their credit so as to be the Applicants' property, and not Arres, in the receivership and bankruptcy. The Applicants appealed this decision to the Court of Appeal of Alberta.

39. The Court's decision disallowing the Applicant's priority claim to the Court Funds appears to contradict the Court's decision in the June 4, 2018, hearing that resulted in the Segregation Agreement.

C. The Chambers' Decision dismissing the Applicants' claim to the Court Funds

40. The Chambers Court stated that the Receiver's involvement regarding the Graybriar trust funds was to "secure the administration of a claims process that represents the only method "of breaking out of the current quagmire in respect to the Graybriar funds"" [at para. 11]. The Court then confirmed the agreement of the Receiver to segregate its fees as between the Graybriar matter and Kenzie (Appellants') matter and maintain the Graybriar trust funds and Court Funds in two separate accounts:

> [19] Again, counsel for the Kenzie investors questioned this. After discussion, the Receiver **agreed** to segregate the outstanding fees between the Graybriar matter and the Kenzie matter, which was acceptable to counsel for the Kenzie investors "as long as we can see that segregation both looking back and going forward".
>
> [20] Finally, counsel for Terrapin submitted that her client wanted the Court Funds segregated "to preserve any trust claims that we have", and asked that the funds not be commingled. Counsel for the Receiver responded that "[a]s long as the charge ranks in priority on them, we will be able to deal with allocation at the end of the piece", and that "... **we are happy to have them in two separate accounts at Alvarez**".
>
> ...
>
> [33] In response to my further comment with respect to the use of the funds, counsel for the Receiver indicated that there was already a significant amount of fees outstanding and that "[a]s long as we have the priority, we are happy then to adjudicate claims to the [$235,000] based on entitlement". **The Receiver agreed to segregate outstanding fees between the Graybriar matter and the Kenzie matter**. It was counsel for Terrapin that wanted assurance that the Kenzie Court Funds be segregated, to which counsel for the Receiver replied that, as long as the Receiver's charges had priority over them, the Receiver would be able to deal with

allocation at the end of the piece, and **that the funds would be held in two separate accounts by the Receiver**.

[**emphasis** added]

41. It seems clear in those court discussions on June 4, 2018, that keeping both the Graybriar trust funds and Court Funds in "two separate accounts" meant accounts separate from the general administration of Arres' estate so as to prevent comingling. Any other interpretation is illogical, even absurd, in the context of the discussions that took place. Nevertheless, the Court concluded that "two separate accounts" meant "the Graybriar funds were held in an account separate from the Court Funds which were held in the general account" [at para. 34].

42. Therefore, the Court held that "While there may have been a misunderstanding arising from the June, 2018, hearing, there was no breach by the Receiver of the June 4, 2018 Order or what was discussed and agreed to at the hearing" [at para 40].

43. The Court then examined the Applicants' argument that the Court Funds were not the property of Arres at the time of its receivership and bankruptcy because those funds were sufficiently "earmarked" for the Applicants. The Court wrote the following

> [41] Although the Kenzie investors do not formally allege a trust with respect to the Court Funds, they submit that the funds were "earmarked" for them, and cite *Stone Sapphire Ltd. v Transglobal Communications Group Inc.*, 2008 ABQB 575, upheld on appeal, 2009 ABCA 125.
>
> [42] However, the claimant in that case, in similar circumstances as the Kenzie investors, was not able to establish priority over a secured creditor's claim. Topolniski, J. distilled principles relating to priority disputes over money paid into court at para. 11 of that decision:
>
> 1. To trump a trustee's priority to funds paid into court under a garnishee or as a condition of opening up a default judgment, the judgment creditor must have completed execution.
> 2. An order permitting payment out of monies paid into court on obtaining a further order is insufficient to trump the trustee's priority to the funds.
> 3. A judgment creditor is not elevated to the status of secured creditor by virtue of a payment into court, whether that payment is to advance an appeal or as security for costs.
> 4. A judgment creditor may trump a trustee's priority to funds paid into court if the funds are sufficiently 'earmarked' and the creditor has 'done all that it could' to access the funds. (*Careen Estate v Quinlan Brothers Ltd.* (2004), 2004 NLSCTD 132 (CanLII), 2 C.B.R. (5th) 102 (Nfld. S.C.)).
> 5. A secured creditor trumps a trustee's priority to funds paid into court if the monies are the subject of valid security.

> [43] The Court in *Stone Sapphire* noted the unusual facts of the *Careen Estate* case: money had been paid into court by Careen Estate pending disposition of a trial.
>
> [44] When judgment was awarded against it, counsel for Careen Estate informed the trial judge that his client intended to make an assignment into bankruptcy that day. The trial judge ordered immediate payment out of the funds in court to the plaintiff, but when the defendant's counsel sought payment of the funds, courthouse staff informed him that the court needed to confirm the payment and issue a certificate in accordance with the Rules of Court, which could not be accomplished by the close of business that day. Within an hour of that happening, Careen Estate made an assignment into bankruptcy. Thus, only a bureaucratic error prevented the plaintiff from completing execution.
>
> [45] With respect to the concept of "earmarked funds" generally, Topolniski, J. indicated at para 36 that the proposition offends the underlying premise of the BIA concerning distribution of a bankrupt's property among creditors, and the specific language of section 70 of the BIA. She noted that she was not satisfied that a 2013 decision that found otherwise remained good law in light of the Supreme Court's decision in *T.E. Cleary Drilling Co. (Trustee of) v Beaver Trucking Ltd.*, [1939] S.C.R. 317.
>
> [46] I agree with the Court's reasoning in *Stone Sapphire*, and find that the Kenzie investors have not established entitlement to priority over the Receiver's charges by reason of the funds being earmarked.
>
> [emphasis added]

44. This decision highlights a conflict in the law regarding whether the concept of "earmarked funds" generally offends the underlying premise of the *BIA* concerning distribution of a bankrupt's property among creditors, and the specific language of section 70 of the BIA.

D. The Decision of the Court of Appeal

45. The Court of Appeal summarily dismissed the Applicants' appeal, concluding:

a. The appeal was moot because the Receiver's fees and expenses, incurred and anticipated, following its Fourth Report, exceeded the funds in the Receiver's possession as of the Fourth Report in the amount of about $252,000. Therefore, there was nothing left in Arres' estate for the Applicants to make a claim against.

b. The chambers judge was correct in rejecting the "generalized concept of "earmarked funds" as offending "the underlying premise of the *BIA* concerning distribution of a bankrupt's property among all creditors", thereby implicitly approving the chambers judge's position that case law involving "earmarked" funds giving an unsecure creditor priority over a bankruptcy trustee was not good law.

PART II – QUESTION IN ISSUE

46. The Applicants propose the following question to this Honourable Court:

a. Is the statement of law "A judgment creditor may trump a trustee's priority to funds paid into court if the funds are sufficiently 'earmarked' and the creditor has 'done all that it could' to access the funds" good law in Canada?

PART III – STATEMENT OF ARGUMENT

47. Answering this question requires an initial examination of *Canadian Credit Men's Trust Association as Trustee in Bankruptcy for TL Cleary Drilling Co v Beaver Trucking*, [1959] SCR 311. This case involved the entitlement to garnished funds paid into court as between the judgment creditor that served a garnishing order and the bankruptcy trustee of the judgment debtor.

48. This decision, examining s. 41 of the *Bankruptcy Act* (as it then was, now s. 70 of the *BIA*) concluded "that the assignment shall take precedence over garnishment except where such has been completely executed by payment to the creditor or his agent." The legislative intention of the Act "is to ensure the distribution of the debtor's property in accordance with the Act and not according to the execution procedures mentioned in the section all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment" [emphasis added].

49. The Court determined that a garnishing judgment creditor does not rise to the status of a secured creditor by virtue of garnished funds paid into, but remaining in, court at the time of assignment into bankruptcy. The overriding consideration was the funds were the debtor's property.

50. The logic behind this decision follows the legislative intent of the Act that money paid into court by the garnishee was owed to the bankrupt, which was effectively intercepted and redirected into court rather than paid to the bankrupt. The garnished funds remained the bankrupt's property because the funds had not been paid over to the creditor finalizing payment of the debt.

51. Since this decision, cases involving fact scenarios arose that did not so neatly fit this logic. Subsequent cases of funds paid into court, sometimes involving payment from the judgment debtor with the funds arguably intended for the judgment creditor, raised the thorny issue

regarding whose property truly were the funds in court. *Careen Estates* was one of these cases. These cases gave rise to the 5 principles relating to priority disputes over money paid into court noted above.

52. Courts attempting to resolve the tough cases involving a legitimate claim to funds paid into court by a party other than the bankrupt, while staying true to the *TL Cleary* decision, has given rise to three lines of authority that have been so helpfully reviewed by Topolniski J. in the decision of *Transtrue Vehicle Safety Inc v Werenka*, 2015 ABQB 197. He starts his analysis by noting:

> [37] Over time, a rather jumbled body of law has developed concerning contests between trustees in bankruptcy and a litigation claimant to money held in a lawyer's trust account or posted in court pending resolution of a dispute. There are three lines of authority with varying results, sometimes involving factually-like cases.

53. Topolniski J. then examines these three lines of authority, describing each as follows:

> **The First Line of Authority**
>
> [38] The earliest line of authority considers s 70 (and its predecessor, s 50 of the *Bankruptcy Act*, RSC 1970, c B-3), which gives precedence to a receiving order or assignment in bankruptcy over all but completed execution processes and secured creditors. The result is that the fund (Posted Money) remains the payor's property until it is paid out under a lawful order.
>
> ...
>
> **The Second Line of Authority**
>
> [49] This line of authority applies trust principles. The logic is that Posted Money is impressed with a trust in the non-bankrupt litigant's favour as the parties intended it to be held for the benefit of the successful litigant.
>
> ...
>
> **The Third Line of Authority**
>
> [53] The third line of authority is a hybrid form of reasoning that combines the notion of trust law with contingent interests in property on other grounds. This reasoning requires that the trustee is successful in the litigation before it has a right to the money. Section 70 does not factor in the reasoning.

54. Topolniski J., after examining these lines of authority, attempts to reconcile them by considering the intersection of s. 67 (regarding trust assets) and s. 70 (regarding funds in court) of the *BIA* as follows:

Resolving the Conflicting Logic

> [61] Resolving the conflicting logic applied in the authorities requires consideration of the principles underlying the BIA and the principles of statutory interpretation.
>
> ...
>
> [66] Read contextually and harmoniously, s 67 and s 70 must be interpreted to work together rationally to achieve these legislative objectives:
>
> 1. to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors;
> 2. to ensure that the only property that is distributed is the bankrupt's;
> 3. to maximize to the extent that is fair and equitable the value of the estate for distribution; and
> 4. to provide for the financial rehabilitation of insolvent persons.
>
> ...
>
> [69] The authorities ruling that ownership of Posted Money must be determined by resolution of the litigation on the basis of it being s 67(a) "trust" for whoever the ultimate victor might be run afoul of s 70.

55. In the end, Topolniski J. concluded "that if bankruptcy intervenes before the matter is adjudicated and the judgement is executed, s. 70 applies and the trustee in bankruptcy should prevail" [emphasis added]. Conversely, where the matter has been adjudicated (as with the Applicants' judgment upheld on appeal), even if judgment as not been executed, the Court's reasoning would reach the conclusion the Court Funds were the property of the Applicants subject to the competing claim of Terrapin at the time of Arres' bankruptcy.

56. The contest between a bankruptcy trustee and unsecured creditor claimant to funds paid into court was very recently revisited in the matter of *Toronto Dominion Bank v 1287839 Alberta Ltd*, 2021 ABQB 205. This Court again repeats the 5 principles relating to priority disputes over money paid into court, reviews the reasoning of Topolniski J. in *Transtrue Vehicle Safety*, and then concludes as follows [**emphasis** in the original]:

> [15] I would add (or elaborate on) the following: **where a follow-up order to determine priority is contemplated, the funds in question are necessarily not held in trust for any given creditor, at least until that determination is made.** By default, until (at minimum) that happens, the proceeds **remain the property of the former owner (now bankrupt).**
>
> ...
>
> [17] In other words, where monies are parked **pending a priorities determination, by definition they are not held in trust for any particular claimant.** It would only

> **follow** such a determination that the successful claimant(s) should be regarded as the effective (beneficial) owners of the funds.
>
> [18] This explains ***Re Careen***, (2004) 2 CBR (5th) 102 (NLTD), on which the writ-holders rely. There, a priority determination **had been made**, and all that remained was for the now-earmarked-for-the-winning-claimant fund to be paid to that party. With that earmarking (accomplished by the priority decision), the successful claimant deserved to be treated as the effective (beneficial) owner of the funds i.e. in advance of actual receipt. While para 67(1)(a) *BIA* was not mentioned there, reservation of the proceeds for the winning claimant squares with recognition of a trust in that party's favour.

57. Applying the reasoning in this recent case would also result in the Applicants' claim to the Court Funds prevailing over the Receiver's claim.

58. In any event, the jumbled body of law arising from three lines of authority on the issue in this matter begs for clarification, particularly in light of the decisions under appeal where the court confuses, and seems to contradict, all of the prior law giving relief to claimants other than the bankruptcy trustee for monies held by a party other than the bankrupt, whether it be funds in court or in a lawyer's trust account.

59. With respect, the Courts' decisions for which leave to appeal is sought contradict even the most recent decision of the same court in the *Toronto Dominion* matter noted above.

Conclusion

60. The absurdity in this matter is that Arres misappropriated trust funds from the Applicants' who successfully sued Arres and obtained a judgment that was upheld on appeal. Arres then attempted to misappropriate trust assets from the Graybriar investors to pay the Applicants' judgment, embroiling Terrapin in competing claims to the Graybriar trust funds and Court Funds. The court then prevented the Applicants from the spoils of their judgment for more than 3 years, because of Terrapin's competing claim that was later abandoned. And then the court denies the Applicants their due by virtue of the decisions under appeal herein, while Arres as the rogue party ends up with the Court Funds in its bankruptcy which are all then taken by the Receiver.

61. It is difficult to conceive a more unfair, unpalatable, unjust result than what has befallen the Applicants.

62. The decisions for which the Applicants seek leave to appeal should remind the Court that justice cannot be achieved in a factual vacuum. It is the weighting of facts on the scales of justice that determines true justice. The Courts' decisions under review herein appear to take the

position that the factual circumstances in which funds derived from the bankrupt are paid into court are immaterial to the determination of entitlement to those funds in the bankruptcy context.

63. With respect, the Applicants submit some of the cases examining this issue take the more reasonable and just approach to look at the facts surrounding the payment of funds into court or into trust, and the intent or purpose for such payment, to determine whether the funds are truly the property of the bankrupt or some other party. The Applicants invite this Honourable Court to honour this approach and grant leave to consider this issue to achieve that end.

PART IV – SUBMISSIONS CONCERNING COSTS

64. The Applicants leave the determination of whether costs should be awarded for this Application, and if so the amount thereof, to the discretion of this Honourable Court.

PART V - ORDER SOUGHT

65. The Applicants seek an order for leave to appeal the decision of the Court of Appeal of Alberta summarily dismissing their appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Calgary in the Province of Alberta this 26th day of November, 2021.

SUGIMOTO & COMPANY

Per: _____
LORAN V. HALYN
Solicitors for the Applicants

PART VI – TABLE OF AUTHORITIES

A. *Richcrooks Enterprises (2000) Ltd. v Arres Capital Inc.*, 2015 ABCA 40: 2015abca40.pdf (canlii.org) or https://www.canlii.org/en/ab/abca/doc/2015/2015abca40/2015abca40.pdf

B. *Canadian Credit Men's Trust Association as Trustee in Bankruptcy for TL Cleary Drilling Co v Beaver Trucking*, [1959] SCR 311: document.do (scc-csc.ca) or https://decisions.scc-csc.ca/scc-csc/scc-csc/en/7355/1/document.do

C. *Transtrue Vehicle Safety Inc v Werenka*, 2015 ABQB 197: 2015abqb197.pdf (canlii.org) or https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb197/2015abqb197.pdf

D. *Toronto Dominion Bank v 1287839 Alberta Ltd*, 2021 ABQB 205: 2021abqb205.pdf (canlii.org) or https://www.canlii.org/en/ab/abqb/doc/2021/2021abqb205/2021abqb205.pdf

PART VII – STATUTES AND REGULATIONS

Bankruptcy and Insolvency Act, RSC 1985, c B-3
https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-b-3/latest/rsc-1985-c-b-3.html?searchUrlHash=AAAAAQAdYmFua3J1cHRjeSBhbmQgaW5zb2x2ZW5jeSBhY3QAAAAAQ&resultIndex=1

In the Court of Appeal of Alberta

Citation: Richcrooks Enterprises (2000) Ltd. v Arres Capital Inc., 2015 ABCA 40

Date: 20150129
Docket: 1501-0006-AC
Registry: Calgary

Between:

Richcrooks Enterprises (2000) Ltd. and Richcrooks Holdings Ltd., 515476 Alberta Ltd., Demel Financial Corp, Greenmar Holdings Inc., Access Mortgage Investments Corporation (2004) Limited, 4-A Professional Services Ltd., Tempest Management Inc., Hudson Principle Investments Ltd., Swartz Bros. Limited, Christopher Schultz Consulting Inc., Curlew Finance, Paul Kornylo, Max Feldman, Sonya Smith, Norman Martin, Bernice Martin, R. Bruce Carson, Delores Carson, Leela Krishnomourthy, Marguerite McRitchie, Priti Gaur, Madhu Gaur, Wendy McKenna, Janet Lorraine Watson, Jim Watt, Gaston Rajakaruna, Shirley Rajakaruna, Gary Drefs, Robert Armstrong, Michael Kurtz, Marlene Kurtz, Kevin R. Pedersen, Susan Fine, Carol Kimiyo Sekiya, Holly Sekiya and Steven Ogg

Applicants

- and -

Arres Capital Inc.

Respondent

- and -

Terrapin Mortgage Investments Corp. and 1798583 Alberta Ltd.

Respondents

- and -

Graybriar Land Company Ltd. and Graybriar Greens Inc.

Not a Party to the Application

Oral Reasons for Decision of
The Honourable Mr. Justice J.D. Bruce McDonald

Application for a Stay Pending Appeal

Oral Reasons for Decision of
The Honourable Mr. Justice J.D. Bruce McDonald

Introduction

[1] The applicant Access Mortgage Investment Corporation (2004) Limited (Access Mortgage) brings on its own behalf and on behalf of other investors, an application pursuant to rule 14.48 for a stay pending appeal of the order granted by Madam Justice Strekaf on December 17, 2014 (the Strekaf Order) which order vacated an earlier order of the Court of Queen's Bench granted by Justice Hillier on February 14, 2014 (the Hillier Order).

Facts

[2] The facts giving rise to this application for a stay pending appeal are somewhat convoluted. Suffice it to say for our purposes however, Access Mortgage and a number of other persons (both corporate and individual) were investors in a $9,000,000 syndicated loan arranged for by Arres Capital Inc. (hereinafter referred to as Arres). Wes Serra was at the time the owner and principal of Arres.

[3] The syndicated loan was secured by a mortgage granted by two companies, Graybriar Land Company Ltd. and Graybriar Greens Inc. (collectively referred to as Graybriar) and was used to fund the subdivision of lands, and then the construction and sale of condominium units on those lands. Arres was the registered mortgagee on behalf of the investors.

[4] At the time that the syndicated loan agreement was entered into between Arres and the various investors (including of course Access Mortgage), Arres was registered as a mortgage broker pursuant to the provisions of the *Real Estate Act* RSA 2000, c R-5. It's registration as a mortgage broker was terminated effective November 3, 2013.

[5] Arres, *inter alia*, managed the collection of the loan repayments from Graybriar and then distributed those funds (less deductions for its administration fees, etc.) to the investors. In October 2013, Arres made substantial deductions from the loan proceeds. The investors decided that these were not proper deductions and, as a result, commenced an action against Arres shortly thereafter to recover those funds. The total amount being claimed in that lawsuit was in excess of $870,000.

[6] The Graybriar mortgage had gone into foreclosure in 2009. By February 1, 2014, only seven condominium units, out of the original 48, remained unsold. On February 3, 2014 without any notice to the syndicate investors (including Access Mortgage), counsel for Arres applied for and obtained an order from Master Breitkreuz (the Breitkreuz Order) which, *inter alia*, directed that the remaining seven condominium units in the Graybriar project be sold to Arres for an amount in excess of $1.8 million.

[7] However, by the terms of the Breitkreuz Order, Arres was not required to pay cash for its acquisition of these units; rather the amount of the stated purchase price was to be paid by way of a set-off against the amount outstanding under the Graybriar loan. No mention was made to Master Breitkreuz at the time that the Breitkreuz Order was obtained that Arres was taking the position, *vis-a-vis* the investors, that it was owed a large amount by them and was therefore entitled to undertake the action that it did.

[8] Arres made arrangements to have a total of four of these seven condominium units transferred to another company 1798582 Alberta Ltd. (179). This company was in turn owned by another company, 875892 Alberta Ltd. (875) which was in turn owned by Wes Serra's wife, Staci

[9] Arres attempted to justify the transfer of the four condominium units to 179 on the basis that on September 30, 2010, it had entered into an assignment of accounts receivable with 875 which was the shareholder of 179. The stated consideration for that assignment was $97,500.

[10] At the time that Arres had applied for and obtained the Breitkreuz Order on February 3, 2014, it was no longer licensed as a mortgage broker in the Province of Alberta. Section 17 of the *Real Estate Act* provides as follows:

> No person shall … deal as a mortgage broker … unless that person holds the appropriate authorization for that purpose issued by the council.

[11] Access Mortgage and the other investors were not advised by counsel for Arres of the Breitkreuz Order either before he applied for and obtained it nor were they advised of its existence after the fact. Rather, in some roundabout way, it came to their attention and as a result, an emergency application was made before Mr. Justice Hillier on February 14, 2014, which resulted in the Hillier Order.

[12] Paragraph 3 of the Hillier Order provided:

> The February 3, 2004 Order of the Learned Master W. Breitkreuz [the Breitkreuz Order], as amended by the February 7, 2014 Order of the Learned Master L. A. Smart, is stayed pending further Order of this Honourable Court or the consent of the parties hereto.

[13] Paragraph 7 of the Hillier Order went on to provide:

> The Applicants' Application is returnable on March 14, 2014, or such later date as is agreed between the parties hereto, or directed by this Honourable Court, in Justice Chambers at the Court Centre in Calgary at which time this Order shall expire and be of no further force or effect unless extended by the court.

[14] At the time of the Hillier Order, title to the seven condominium units had not yet been transferred from Graybriar. Notwithstanding that however, 179 had made arrangements with Terrapin Mortgage Investment Corp. (Terrapin) to mortgage the four condominium units that it was to receive from Arres. Notwithstanding that 179 did not have registered title to the four condominium units in question, it obtained mortgage proceeds in the amount of $425,000 from Terrapin before the Hillier Order had been granted.

[15] From the amount of $425,000, the sum of $138,000 was received by 179 with the balance of monies paid into court to the credit of an action that had been commenced against Arres by Kenzie Financial Investments Ltd.

[16] On February 28, 2014 Arres applied for and obtained, with the consent of counsel for the applicants, an order accepting an offer to purchase condominium unit number 55 from two bona fide third party purchasers. The purchase price was $269,900 and title to the condominium unit was subsequently transferred into the names of the purchasers.

[17] This matter then proceeded in fits and starts and was argued before Justice Strekaf on September 15, 2014. At that time, Justice Strekaf in effect continued for a time the stay granted by the Hillier Order and directed that the matter return to the commercial list on October 7, 2014. She directed that several steps be taken by the applicants (including Access Mortgage) prior to the return date.

[18] The most significant of those steps was the filing and serving of an Undertaking as to Damages in a form satisfactory to the court. On September 30, 2014 a written Undertaking as to Damages was filed in the court of Queen's Bench on behalf of the various investors represented by Access Mortgage.

[19] When the parties reattended before Justice Strekaf on October 7, 2014 she held that the Undertaking that had been given was not acceptable. She then extended the terms of the Hillier Order but indicated that a proper Undertaking as to Damages had to be given. As a result of that direction, a subsequent Undertaking as to Damages was given.

[20] Eventually on December 17, 2014 the parties again reattended before Justice Strekaf who held that the second Undertaking as to Damages proffered by the applicant Access Mortgage was not an Undertaking satisfactory to the court and as a result she directed that the Hillier Order "shall be vacated and [be] of no force or effect as of January 15, 2015". By agreement between the parties, the Hillier Order was extended to January 20, 2014 and by my direction on January 20, 2015 was extended again to January 23, 2015.

Analysis and Decision

[21] The issue on this appeal is a narrow one, namely whether either Undertaking as to Damages given on behalf of the investors in question (including Access Mortgage), is sufficient as a matter of law, given the factual matrix of this case?

[22] The position of the applicant/appellant is that the Undertaking is, as a matter of law, proper given the factual matrix of this case and in particular the fact that the investors in this case represent approximately 61 percent by value of the amount loaned and are accordingly owed approximately 61 percent of the amount paid and to be paid under the Graybriar mortgage. In effect therefore they have a claim upon approximately 61 percent of the net sale proceeds of the six remaining condominium units and the purchase price that was paid into court with respect to the sale of the seventh.

[23] Counsel for Arres, as well as counsel for 179 and counsel for Terrapin argue against the application for the stay.

[24] As indicated at the outset, this application is brought pursuant to rule 14.48 of the current Rules of Court which is the successor to rule 508 under the previous Rules. A stay of a proceedings pending appeal may only be granted if the applicant (which in this case is Access Mortgage on behalf of itself and the other investors it represents) satisfies me as a judge of this court that :

- there is an arguable issue to be determined on appeal;
- that the applicant will suffer irreparable harm if the stay is not granted; and
- that the balance of convenience favours the granting of the stay.

[25] Although counsel for Arres argued that the appeal is devoid of merit, counsel for 179 more realistically and reasonably conceded that this application does meet the rather modest requirements of the first step of the tripartite test.

[26] Certainly I am satisfied that there is an arguable issue on this appeal given its factual matrix. However I decline to delve any further into the merits since the merits must be decided by a panel of this court.

[27] In the submissions of counsel for 179, and of course in the submission of both counsel for Arres and counsel for Terrapin, this application fails on the on the second part of the tripartite test namely that the applicant has not established that irreparable harm will be suffered by it and the other investors it represents should the stay not be granted. The effect of a stay of the Strekaf Order would be to continue the provisions of the Hillier Order which has operated as a stay of the Breitkreuz Order since February 14, 2014.

[28] Counsel for the applicant argued that irreparable harm will be suffered by his client because Arres is hopelessly insolvent and therefore would be unable to respond to any monetary judgement rendered against it.

[29] It should also be pointed out that there have been two significant summary judgments obtained against Arres. The first was for an amount in excess of $1 million and this was obtained by Access Mortgage. This summary judgment was subsequently upheld on appeal by this court. During oral submissions before me, I was informed that a total of $50,000 has in some fashion or another been paid towards this judgment.

[30] The second summary judgment is for approximately $245,000 rendered in favour of Kenzie Investments and that a portion of the proceeds from the mortgage provided by Terrapin has been paid into court to the credit of that judgment.

[31] Furthermore, as indicated previously, Arres had long ago assigned all of its accounts receivable on the Graybriar project to 875 by virtue of the written assignment agreement dated September 30, 2010.

[32] The effect of the Hillier Order has been that title to the six remaining condominium units remains in the name of the mortgagor, Graybriar. Counsel for the applicant points out that under the terms of the Breitkreuz Order, title to all seven condominium units was to have been transferred to Arres or to such other transferees as directed by counsel for Arres. Arres had directed that title to four of the condominium units was to be registered in the name of 179, the company beneficially owned by Wes Serra's wife.

[33] It should be borne in mind that the Strekaf Order vacated the earlier Hillier Order which was the only legal impediment to the hopelessly insolvent Arres Capital from obtaining title to the seven remaining condominium units and then transferring four of those condominium units for no cash whatsoever to 179. What would have been the fate of the three remaining condominium units were it not for the Hillier Order must remain a matter of conjecture to say the least.

[34] It is clear to me that any monetary judgement obtained against Arres will go unsatisfied and this therefore constitutes irreparable harm: *Laube v Juchli*, (1997) 209 AR 67 (CA) at paras 3 - 5. As a result, I am satisfied that the applicant has established that it and the other investors it represents will suffer irreparable harm in the event that the Strekaf Order is not stayed pending the hearing of this appeal.

[35] With respect to the third element of the tripartite test, namely the balance of convenience, it must be reiterated that subsequent to the Hillier Order, the parties did consent to the sale of one of the seven condominium units to bona fide purchasers. Curiously, that condominium unit was one of the units that was to have been transferred to 179.

[36] Counsel for the applicant in submissions before this court made it abundantly clear that his client desires to have the remaining six condominium units sold as soon as reasonably possible and in a commercially prudent fashion, with the proceeds being held in court pending further court order or agreement of the parties. This makes obvious good sense to me and quite frankly I am surprised that the parties have not been able to reach accord on this point long before now.

[37] In any event, I find that the balance of convenience under these circumstances favours the granting of the application for a stay of the Strekaf Order.

Conclusion

[38] In the result, I hold that the applicant has satisfied the three requirements of the tripartite test and accordingly I grant an order to stay the Strekaf Order pending the determination of the within appeal by this court or further court order. As an ancillary matter, I do also order that paragraphs one through six of the Hillier Order are to remain in full force and effect until vacated or varied by an order of this court.

Costs

[39] After hearing submissions from the parties regarding costs, I do hereby award costs in the amount of $2,500 to the applicant, said costs to be paid jointly and severally by Arres, Terrapin and 179. These costs are awarded in any event of the appeal but payable only at the conclusion of the appeal.

Application heard on January 20, 2015

Reasons filed at Calgary, Alberta
this 29th day of January, 2015

McDonald J.A.

Appearances:

L.V. Halyn and T. Akbar
for the Applicant

R.P. Pelletier
for the Respondent Arres Capital Inc.

K. L. Okita
for the Respondent Terrapin Mortgage Investment Corporation.

J.D. Burke
for the Respondent 1798583 Alberta Ltd.

THE CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED as Trustee in Bankruptcy for T. L. Cleary Drilling Company Ltd. (*Defendant*) ..... APPELLANT;

AND

BEAVER TRUCKING LIMITED (*Plaintiff*) ..... RESPONDENT;

AND

THE CALIFORNIA STANDARD COMPANY (*Garnishee*).

1958
*Nov. 12, 13
1959
Jan. 27

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA

Bankruptcy—Garnishment—Monies paid into Court—Rights of garnishor and trustee in bankruptcy—Whether garnishor a "secured creditor"—The Bankruptcy Act, R.S.C. 1952, c. 14, ss. 2(r), 41(1), 42(2), 43(2), 86, 95(2).

Section 41(2) of the *Bankruptcy Act* provides that every receiving order and every assignment "takes precedence over all . . . garnishments . . . except such as have been completely executed by payments to the creditor or his agent, and except also the rights of a secured creditor".

*PRESENT: Locke, Cartwright, Fauteux, Martland and Judson JJ.

1959

CANADIAN CREDIT MEN'S ASSOC. LTD. v. BEAVER TRUCKING LTD. *et al.*

The plaintiff caused to be served a garnishing order upon the garnishee who paid the money into court. The defendant subsequently made a voluntary assignment in bankruptcy, and the trustee in bankruptcy and the plaintiff each claimed the money which was still in court. The trustee's claim was dismissed by a local judge in chambers whose decision was affirmed by a judge of the Court of Queen's Bench. This judgment was in turn affirmed by a majority in the Court of Appeal, which held that the plaintiff was a "secured creditor". The trustee appealed to this Court.

Held: The appeal should be allowed and payment out of the monies in court should be made to the trustee. The plaintiff did not fall within either of the exceptions to s. 41(1) of the *Bankruptcy Act*.

Per Locke J.: The meaning to be assigned to s. 41, as it applies to the present case, is plain. In the clearest terms, it is provided that the assignment shall take precedence over a garnishment, except where such has been completely executed by payment to the creditor or his agent. Here, no such payment was made. If the service of a garnishing order creates an equitable charge upon the debt in favour of the garnishing creditor, and if such a charge falls within the definition of a secured creditor in s. 2(*r*) of the Act, it must be taken that since the rights of garnishing creditors have already been dealt with they are not included in the expression "the rights of a secured creditor" in the concluding words of s. 41(1). *Galbraith v. Grimshaw*, [1910] 1 K.B. 343.

Per Cartwright, Fauteux, Martland and Judson JJ.: The provisions of s. 41(1) are clear, and even a literal interpretation does not lead to the conclusion reached by the majority in the Court of Appeal. The compelling inference is that whoever the secured creditor may be whose rights are excepted from the operation of the section, he is not the attaching or garnisheeing creditor whose position has already been fully dealt with. The intention is to ensure the distribution of the debtor's property in accordance with the Act and not according to the execution procedures mentioned in the section, all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment. It must be concluded, therefore, that judgment creditors who have made use of the execution procedures set out in s. 41(1) are subject to the provisions of the Act unless they have been paid, that they do not come within the class of secured creditors mentioned in the exception, and that they are not secured creditors under the Act as defined in s. 2(*r*).

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Monnin J. Appeal allowed.

J. S. Lamont, Q.C., and *N. H. Layton*, for the defendant, appellant.

No one appeared for the plaintiff, respondent.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba[1], pursuant to leave granted by that Court from its judgment dismissing the appeal

[1] (1958), 25 W.W.R. 669, 37 C.B.R. 60.

taken by the present appellant from an order of Monnin J. by which an appeal from an order of His Honour Judge Buckingham, local judge for the Western Judicial District, was dismissed. The Chief Justice of Manitoba, with whom Schultz J.A. agreed, dissented and would have allowed the appeal.

The facts to be considered in dealing with the matter are as follows:—On November 5, 1956, the respondent commenced an action against T. L. Cleary Drilling Co. Ltd. for the recovery of the sum of $2,282.50 and caused to be served a garnishing order upon the California Standard Company, a debtor of the Cleary company. On February 9, 1957, the garnishee paid into the Court of Queen's Bench at Brandon the sum of $2,282.50. On May 13, 1957, default judgment was signed in the action against the Cleary company for the amount claimed and taxed costs. On June 18, 1957, that company made a voluntary assignment in bankruptcy, in the statutory form, to the Canadian Credit Men's Trust Association Ltd.

On November 18, 1957, the trustee applied for payment out of the amount so paid by the garnishee and which was then in court and, contemporaneously, the present respondent made an application for payment out to it and both motions were by consent heard together by the local judge. By an order dated December 16, 1957, the application by the trustee was dismissed and it was ordered that the amount in court be paid out to the Beaver Trucking Co. Ltd.

Proceedings were stayed on this order, pending an appeal to a judge of the Court of Queen's Bench by the present appellant and, as stated, that appeal was dismissed by Monnin J. on February 28, 1958, in a considered judgment. The reasons for judgment of the majority of the Court of Appeal were delivered by Tritschler J.A.

Section 41 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, so far as it is relevant to the present appeal, reads:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

1959

CANADIAN CREDIT TRUST ASSOC. LTD. v. BEAVER TRUCKING LTD. et al.

Locke J.

(2) Notwithstanding subsection (1), one solicitor's bill of costs, including sheriff's fees and land registration fees, shall be payable to the creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against the property of the bankrupt.

It is in reliance upon the first of these subsections that the trustee claims that the moneys in court should be paid to it for distribution among the creditors. The position taken by the garnishing creditor is that, by reason of the service of the garnishing order upon the California Standard Company in advance of the assignment in bankruptcy, it is a secured creditor within the meaning of that expression in s. 41 and, as such, has priority over the trustee's claim.

The expression "secured creditor" is defined in s. 2(*r*) of the Act to mean:

a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable.

By Rule 526 of the Queen's Bench Rules, the Court is empowered in the matter of a claim such as that of the present respondent to make an order that all debts, obligations and liabilities owing, payable or accruing due from any person who is indebted or liable to the debtor shall be attached. A form of the order which may be made appears as form 74 in the Appendix to the Rules. The nature of the order, in so far as it might concern the present matter, does not differ from the orders *nisi* authorized by Order 45, Rule 1 of the Rules of the Supreme Court 1883 in England. That rule authorizes the making of an order that all debts owing or accruing due from a third person to the debtor shall be attached to answer the judgment or order.

I refer to these rules since in certain of the cases decided in Manitoba it has been held that a garnishing creditor is, by virtue of the service of a garnishing order, a secured creditor within the meaning of s. 41(1) of the *Bankruptcy*

Act, In re Doyle, (a bankrupt)[1], and on appeal[2], though, as pointed out by Adamson C.J.M., the decision did not turn upon that point.

While, in my opinion, it is unnecessary to decide this question in dealing with the present appeal, I think it should be noted that *Ex parte Joselyne*[3], relied upon in coming to the above conclusion, dealt with a bankruptcy matter under the *Bankruptcy Act 1869,* (Imp.). It was there decided that a judgment creditor who before the filing of the bankruptcy petition had obtained a garnishee order *nisi* attaching debts due to the debtor was a secured creditor within the meaning of ss. 12 and 15 of that Act. Neither in the sections referred to nor elsewhere in the Act of 1869 is there any provision such as that portion of s. 41 which expressly states that an assignment takes precedence over all judicial or other attachments and garnishments and, with great respect, I think the decision does not affect the question to be decided here.

In my opinion, the meaning to be assigned to s. 41, as it applies to the present case, is plain. In the clearest terms it is provided that the assignment shall take precedence over a garnishment, except where such has been completely executed by payment to the creditor or his agent. Here, no such payment was made. The moneys were paid into court to the credit of the cause and remain there.

If, as is stated by Farwell L.J. in *Galbraith v. Grimshaw*[4], the service of a garnishing order creates an equitable charge upon the debt in favour of the garnishing creditor and, if such a charge falls within the definition of a secured creditor in the *Bankruptcy Act,* it must be taken that, since the rights of garnishing creditors have already been dealt with, they are not included in the expression "the rights of a secured creditor" in the concluding words of the subsection.

If there were ambiguity in the language of the first subsection of s. 41, and I think there is none, it would be necessary for us to construe it in the manner directed by

[1] (1957), 22 W.W.R. 651, 36 C.B.R. 141.
[2] (1958), 23 W.W.R. 661, 36 C.B.R. 134.
[3] (1878), 8 Ch. D. 327, 38 L.T. 661.
[4] [1910] 1 K.B. 339 at 343.

1959

CANADIAN CREDIT TRUST ASSOC. LTD. v. BEAVER TRUCKING LTD. et al.

Locke J.

s. 15 of the *Interpretation Act,* R.S.C. 1952, c. 158, and to give to it such interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. The purpose of the *Bankruptcy Act* and of all bankruptcy legislation in Canada and in England is to assure that, in the case of insolvent debtors, their assets shall be divided fairly among their creditors, having due regard to the position of persons such as mortgagees who, having advanced moneys upon the security of assets of the debtor, are to be afforded the rights of secured creditors, and to those claims which are by statute entitled to preference.

Section 86 and those sections immediately following it declare the position of secured creditors and define the extent to which they are entitled to priority. Subject to such rights and to preferences to which other claims such as those of the Crown may be declared to be entitled and the costs and expenses of the trustee, it is the purpose of the Act that the creditors shall rank *pari passu* upon the estate. The construction of the Act contended for by the respondent in the present matter would mean that a creditor sufficiently alert to bring an action and attach moneys owing to a debtor on the brink of insolvency may thereby obtain preference over other creditors who refrain from bringing actions, for the amount of his claim in full and not merely for his costs, as provided by s. 41(2). This, in my opinion, is directly contrary to the intent and purpose of the *Bankruptcy Act,* and any such contention should be rejected unless the language of the Act should require it in the clearest terms.

I would allow this appeal with costs against the respondent in the proceedings before the local judge and before Monnin J. and the Court of Appeal. In the circumstances, the trustee's costs of this appeal should be paid out of the moneys paid into court by the garnishee and no order for costs be made against the respondent. The balance remaining in court should be paid to the appellant.

The judgment of Cartwright, Fauteux, Martland and Judson JJ. was delivered by

JUDSON J.:—A judgment creditor and the trustee in bankruptcy of the judgment debtor are in competition here for monies in court paid in pursuant to a garnishee order issued by the judgment creditor. When the bankruptcy occurred the plaintiff already had a default judgment, the money had been paid into court by the garnishee but no move had been made for payment out. When the plaintiff moved after the bankruptcy of the judgment debtor, it was met with a counter-motion by the trustee, who claimed that the bankruptcy had precedence over the attachment under the terms of s. 41 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, subs. (1) of which reads:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

The trustee in bankruptcy is the appellant before this Court from a judgment awarding the money to the judgment creditor.

Until the concluding phrase of the section "and except also the rights of a secured creditor", words could not be plainer. The claim of the trustee prevails over that of the judgment creditor under any of the execution procedures mentioned unless there has been payment to the creditor or his agent. It is not sufficient that the fund may have been stopped in the hands of the garnishee or that it may be in court subject to further order or even subject to payment-out on an order already issued. Nor does it matter when the money was attached or paid into court or what the status of the action may have been when bankruptcy supervened. The only question is—has the execution procedure been completed by payment to the creditor or his agent?

In the judgment under appeal, the Court of Appeal[1] has held that the section has no such operation because a judgment creditor who has caused a garnishee order to

[1] (1958), 25 W.W.R. 669, 37 C.B.R. 60.

1959

CANADIAN CREDIT TRUST ASSOC. LTD. v. BEAVER TRUCKING LTD. et al.

Judson J.

be served is a secured creditor. After specific and clear directions concerning the rights of the garnisheeing creditor and the trustee in bankruptcy, it is held that the section has said nothing because the creditor whose position and rights are defined and limited in the first part of the section is the same creditor who is removed from its scope and put within the exception.

Only the plainest language could compel an interpretation which produces this conclusion and I do not think that this compulsion exists in the present case. With all respect to the majority opinion in the Court of Appeal, I agree with the dissenting opinion expressed by Adamson C.J., that the provisions of the section are clear and that even a literal interpretation does not lead to the conclusion reached by the majority. To me the compelling inference is that whoever the secured creditor may be whose rights are excepted from the operation of the section, he is not the attaching or garnisheeing creditor, whose position has already been fully dealt with. The intention that I find plainly expressed is to ensure the distribution of the debtor's property in accordance with the *Bankruptcy Act* and not according to the execution procedures mentioned in the section, all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment.

There are subsequent sections which carry out this intention and reinforce my conclusion. These sections, also, would be without meaning if the judgment under appeal is correct. Although under s. 41(1) the execution creditor must give way to the trustee in bankruptcy, by the next subsection the one who has first attached by way of garnishment or lodged a writ of execution with the sheriff gets his solicitor's bill of costs paid and this is done in accordance with the priorities established in s. 95(*g*). Next there is provision in s. 42(2) for delivery to the trustee of any property of the bankrupt under execution or attachment, and finally, by s. 43(2), the trustee is enabled to have himself registered as the owner of any land "free of all the encumbrances or charges mentioned in s. 41(1)".

My conclusion, therefore, is that judgment creditors who have made use of the execution procedures set out in s. 41(1) are subject to the provisions of the *Bankruptcy Act* unless they have been paid, that they do not come within the class of secured creditors mentioned in the exception, and that they are not secured creditors under the *Bankruptcy Act* as defined in s. 2(*r*).

The same conclusion is involved in *Royal Bank of Canada v. Larue*[1], which held, affirming a judgment of this Court[2], that a judicial hypothec upon the real property of the bankrupt was postponed to an authorized assignment under the *Bankruptcy Act*. When *Larue* was decided, the exception which has given rise to difficulty in the present litigation had already come into the Act, having been enacted by 1921, 11-12 Geo. V., c. 17, s. 10. I cannot find any distinction between the present s. 41(1) and the legislation upon which the decision in *Larue* was founded, which would in any way impair the authority of that case. There was no suggestion either in the judgment of this Court or in the reasons of the Privy Council that the exception took the Bank as holder of a judicial hypothec outside the scope of the first part of the section. The result was that the priority of the trustee in bankruptcy, established by the section, attached for all purposes, including distribution of the proceeds according to the priorities established by the *Bankruptcy Act*. The recent decision of the Saskatchewan Court of Appeal in *Re Sklar and Sklar (Bankrupt)*[3] upon the present s. 41(1) is to the same effect. These two judgments had to do with the position of a judgment creditor who had issued execution against land but under the terms of the section, there is, in my opinion, no possible distinction between the result that must follow from this procedure and procedure by way of attachment or garnishment of debts.

I am also in respectful agreement with Adamson C.J. that there was no authority in the Province of Manitoba which bound the Court of Appeal to hold that a judgment creditor who had served a garnishee order was a secured creditor under the *Bankruptcy Act*. This finding is based

[1] [1928] A.C. 187.
[2] [1926] S.C.R. 218, 7 C.B.R. 285, 2 D.L.R. 929.
[3] (1958), 26 W.W.R. 529, 15 D.L.R. (2d) 750.

1959

CANADIAN CREDIT TRUST ASSOC. LTD. v. BEAVER TRUCKING LTD. et al.

Judson J.

upon the judgment in *Kare v. North West Packers Limited et al*[1], which was not a bankruptcy case and involved no determination of rights under s. 41(1) of the *Bankruptcy Act*. The contest there was between a garnisheeing creditor and a receiver appointed by a group of bondholders, seeking to enforce a floating charge. The judgment of the Court of Appeal awarded the money to the garnisheeing creditor on the ground that he was a secured creditor under the Queen's Bench rules at the time when the floating charge crystallized.

The next case was *McCurdy Supply Company Limited v. Doyle*[2], affirmed without reasons[3], which gave priority to a judgment creditor who had garnisheed a mortgage debt over a subsequent assignee of the mortgage. Again, no question concerning the effect of s. 41(1) of the *Bankruptcy Act* was involved but this matter did come up when Doyle went into bankruptcy a short time later. There were then three parties competing for the money, the garnisheeing creditor, the assignee of the mortgage and the trustee in bankruptcy of Doyle; *Re Doyle (A bankrupt): McCurdy Supply Company Ltd.*[4] and on appeal[5]. The mortgage had been assigned for full value prior to bankruptcy and no attack was made on the propriety of that transaction. Therefore, whatever the position of the garnisheeing creditor may have been, whether that of secured creditor or not, there was a much more serious obstacle in the way of the trustee in bankruptcy. There was no property to pass to him because the bankrupt had made a complete assignment of the mortgage prior to bankruptcy. As pointed out by Adamson C.J. in his reasons in the present case, anything said about the position of the garnisheeing creditor was *obiter* and unnecessary to the decision, and the prior assignment of the mortgage was a complete answer to the trustee's claim.

In litigation concerned solely with the position of the garnisheeing creditor under s. 41(1) of the *Bankruptcy Act* it is unnecessary to enquire further into the authority

[1] (1955), 63 Man. R. 16, 14 W.W.R. (N.S.) 251, 2 D.L.R. 412.
[2] (1957), 64 Man. R. 289.
[3] (1957), 64 Man. R. 365.
[4] (1957), 22 W.W.R. 651, 36 C.B.R. 141.
[5] (1958), 23 W.W.R. 661, 36 C.B.R. 134.

of *Kare v. North West Packers Limited* as a determination of rights between such a creditor and the holder of a floating charge seeking to enforce his security, and although I express no opinion on this matter, these reasons should not be taken as an indirect affirmation of the principle of that decision.

The appeal should be allowed and an order made directing payment out of the monies in court to the trustee in bankruptcy. In the circumstances, the trustee's costs of this appeal should be paid out of the fund and there should be no order for costs against the respondent. In the Courts below the trustee is entitled to an order for costs against the respondent.

Appeal allowed.

Solicitors for the defendant, appellant: Lamont & Layton, Winnipeg.

Solicitor for the plaintiff, respondent: A. B. Rutherford, Virden.

Court of Queen's Bench of Alberta

Citation: Transtrue Vehicle Safety Inc v Werenka, 2015 ABQB 197

Date: 20150324
Docket: 1103 15902, B103 869312
Registry: Edmonton

Between:

Docket: 1103 15902

Transtrue Vehicle Safety Inc

Plaintiff

- and -

Yvette H. Werenka, 1351454 Alberta Ltd and CY Assets Inc

Defendants

Yvette H. Werenka, 1351454 Alberta Ltd and CY Assets Inc

Plaintiffs by Counterclaim

- and -

Transtrue Vehicle Safety Inc, Lola Ventures Inc and Terrence R. Booth

Defendants by Counterclaim

And Between

Docket: B103 869312

In The Matter of The *Bankruptcy And Insolvency Act*, RSC 1985, c B-3

And In The Matter of Yvette Helena Marie Werenka

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

Introduction

[1] On the brink of a 10-day trial, Yvette Werenka (Werenka) settled a lawsuit brought against her by Transtrue Vehicle Safety Inc (Transtrue). Twelve days later, she made an assignment into bankruptcy.

[2] Werenka's trustee in bankruptcy, Exelby & Partners (Trustee), seeks a declaration that the settlement of the lawsuit (Settlement) is a preference prohibited by s 95 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (*BIA*). In turn, Transtrue claims that the money Werenka intended to fund the Settlement is impressed with a trust in its favour, and seeks declaratory relief to that effect.

[3] Transtrue concedes that if it does not succeed in establishing a trust, the evidence supports the Settlement being declared a prohibited preference.

What Happened

[4] Werenka and Terry Booth (Booth) were the indirect shareholders of Transtrue. Werenka was also a director, officer and key employee.

[5] Werenka and Booth's relationship soured. Their attempts at exit strategies failed, and they ended up seeking the Court's help. The result was a Court Ordered sealed bid tender to buy each other's shares. The Order also contemplated this eventuality if they could not agree on closing adjustments:

> 14. … If the parties cannot agree on the appropriate adjustments the parties' shall be at liberty to apply for further directions or order of this Court and the selling party's solicitor shall hold the disputed amounts in trust until further order of the Court.

[6] Werenka, Booth submitted bids. Booth's bid prevailed. Werenka and Booth could not agree on the closing adjustments. Booth claimed that they were $652,807.12 in his favour, $180,000.00 of which he claimed Werenka had misappropriated. They dealt with their stalemate by another Court attendance that resulted in an Order for Booth to pay 25% of the purchase price ($162,571.70) into trust "pending resolution of the matter between the parties or further Order of this Court" (Adjustment Fund).

[7] Later, Booth claimed to unearth more financial irregularities and Transtrue commenced the lawsuit seeking damages for alleged misappropriation ($565,476.00), additional accounting fees ($25,000.00), other accounting costs ($7,980.00), punitive damages ($500,000.00) and solicitor-client costs (Action). Transtrue also registered a certificate of *lis pendens* against the title to Werenka's house (CLP). Werenka defended and counterclaimed adding Booth as a

defendant by counterclaim and alleging malicious prosecution. The parties subsequently amended their pleadings, but the thrust of their allegations, the remedies they sought, and their respective denials of wrongdoing remained the same.

[8] Next, Werenka wanted to sell her house. Transtrue agreed to discharge the CLP on condition that she would pay the net sale proceeds into Court. A Court Order issued which provided for the Clerk of the Court to hold those proceeds "pending further Order of this Court or agreement of the parties". Werenka deposited $91,084.82 with the Clerk (CLP Fund).

[9] Five days before the trial of the Action, Werenka offered to settle by having Transtrue take the Adjustment and CLP Funds ($253,656.52), a mutual release (with no admission of fraud by her), and discontinuances of claims. That same day, Transtrue accepted and received the Adjustment Fund ($162,571.70).

[10] The next day, Transtrue's counsel sent a form of Settlement Agreement, discontinuances, and a draft Consent Order to pay out the CLP Fund. Werenka's counsel returned all but the Settlement Agreement, explaining that Werenka was reviewing it and that no changes were expected. Transtrue's lawyers immediately obtained the Consent Order and deposited the $91,084.82 into its trust account. (I digress to note that the Trustee concedes that want of an executed settlement agreement does not affect Transtrue's position).

Standing

[11] Transtrue filed separate, mirrored motions styled in the Action and in Werenka's bankruptcy concerning each of the CLP and Adjustment Funds. Booth is not a party to the motions.

[12] Transtrue did not file a proof of claim in the bankruptcy (as required by *BIA* s 81(1)) or move to lift the stay of proceedings (as required by *BIA* s 69). Consequently, it does not have standing to bring its motions. That said the issue is merely technical since the question of whether Transtrue has a valid trust claim over the Funds can be resolved on the Trustee's motions.

The Issues

[13] The result of this case hinges on the answers to these questions:

1. Should the Court infer that Werenka has admitted the validity of the equitable trust claims pled in the Action?
2. Who has an interest in the CLP Fund?
3. Who has an interest in the Adjustment Fund?

The Short Answer

[14] Evidentiary concerns preclude inferring that Werenka's entering into the Settlement is an admission of the validity of Transtrue's alleged trust claims.

[15] As the CLP did not give Transtrue an interest in Werenka's home, it can have no interest in the CLP Fund that stands in its stead. The $91,084.82 from the CLP Fund together with any interest accrued thereon is property of the bankrupt payable to the Trustee.

[16] The Adjustment Fund is not the subject of an express trust under s 67 of the *BIA*, because Transtrue did not intend to create a trust when Booth paid the money to Werenka's lawyer. As such, one of the required certainties is not satisfied. Booth and Werenka are contingent claimants to the Adjustment Fund. The contingency must be resolved to ascertain the extent of their interest(s) in the Adjustment Fund since the Trustee can be in no better position than Werenka would have been but for the bankruptcy.

Analysis

The Basics

[17] A brief discussion of certain fundamental principles provides the backdrop for the assessment of the issues.

i. The *BIA* and Trustees

[18] The *BIA* is a complete code. Its collective action regime is designed to avoid the "free-for-all that would otherwise prevail" if creditors were allowed to exercise their remedies through normal civil processes: R J Wood, *Bankruptcy and Insolvency Law* (2009) at pp 2-3 cited with approval in ***Ted Leroy Trucking [Century Services] Ltd***, ***Re***, 2010 SCC 60, at para 22 (***Century Services***).

[19] The *BIA* defines a creditor as a person having a "claim provable". In turn, a "claim provable" includes any claim or liability provable by a creditor: *BIA* s 2.

[20] The *BIA* broadly defines property to include any property whether vested, contingent, or incident to property: *BIA* s 2. This includes money held by the bankrupt's solicitor in a trust account at the date of the bankruptcy: ***Smith, Re*** (1975), 20 CBR (NS) 205, [1976] 1 SCR 341 (SCC).

[21] A trustee in bankruptcy is in no higher position than the bankrupt is at the date of bankruptcy and accordingly, the property that vests in the trustee comes "warts and all": ***Saulnier v Royal Bank of Canada***, 2008 SCC 58 at para 50.

[22] Trustees in bankruptcy's watchwords are fairness and neutrality. While a primary function is to maximize proper recovery for the estate, trustees must maintain a dispassionate approach that is ever mindful of the interests of all stakeholders. As officers of the court, trustees must act in an equitable manner and obey the rules of natural justice. In this regard, they cannot allow a windfall to the general body of creditors by depriving others of their interest in property: ***Credifinance Securities Ltd*** at para 38; ***Re Greenstreet Management Inc*** (2007), 38 CBR (5th) 307 at para 18 and (2008) 41 CBR (5th) 86 (Ont SCJ) (***Greenstreet***).

ii. Trusts and the *BIA*

[23] Section 67(1)(a) of the *BIA* provides:

> The property of a bankrupt divisible among his creditors shall not comprise

> (a) property held by the bankrupt in trust for any other person ...

[24] On bankruptcy all of the property, including property held in trust for another, passes to the trustee, who is obliged to hold and administer the subject matter of the trust for the benefit of the beneficiaries: *BIA* s 67(1)(a); ***Ramgotra (Trustee of) v North American Life Assurance Co***, [1996] 1 SCR 325; ***Gough v Gough*** (1996), 41 CBR (3d) 94 (Ont CA).

[25] A person claiming that a bankrupt holds trust property for their benefit must prove a valid trust at the date of bankruptcy: ***Kenny, Re*** (1997) 149 DLR (4th) 508 (ON Ct GD), at para 32. This requires establishing the three certainties of a trust: certainty of intention to create the trust, certainty of the property that is the subject matter of the trust, and certainty of the object for which the trust is created: ***Century Services***.

[26] Unlike an express trust, a constructive trust is not the result of any party's intention. Rather, it is a tool of the Court of equity to remedy a legal wrong: ***Soulos v Korkontzilas***, [1997] 2 SCR 217, 146 DLR (4th) 214; Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters Law of Trusts in Canada*, 3d ed (Toronto, Thomson Carswell, 2005) at 454 (*Waters*).

[27] The standard of proving a constructive trust in a bankruptcy proceeding is very high. It is available in extraordinary cases where finding otherwise would result in a commercial immorality by unjustly enriching the general body of creditors. It also requires that the bankrupt obtained the property through misconduct: ***Ascent Ltd, Re*** (2006), 18 CBR (5th) 269 (Ont SCJ); ***Credifinance Securities Ltd***, 2011 ONCA 160, 74 CBR (5th) 161 at para 26; ***Re McKinnon***, 2006 NBQB 108.

[28] In ***Grant v Ste Marie (Estate of)***, 2005 ABQB 35 (***Grant***) Slatter J (as he then was) explains the premise for this high threshold (at para 17):

> A constructive trust in a bankruptcy may give one claimant a priority over others. The importance of a trust is obviously that it gives the claimant a proprietary remedy, which is especially of importance when the defendant is insolvent: D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989), 68 Can. Bar Rev. 315, at pg. 321. In many cases a plaintiff with a merely personal claim will recover nothing, whereas a plaintiff with a proprietary claim will be able to recover specific identifiable assets. As Paciocco states at pg. 322:
>
> > Concern has been expressed by a number of authors that this result is not always justified. It violates the basic policy that "insolvency should create equality in creditors", that "property . . . in liquidation should be applied in satisfaction of its liabilities pari passu". This policy has such appeal that it has been speculated that, had statutory regimes not been created to implement it, equity would have developed rules relating to the equal distribution of assets. It seems that the force of this policy focuses the burden of persuasion squarely on those who would give priority to remedial constructive trust beneficiaries. (Footnotes Omitted)

[29] Similarly, in ***Credifinance Securities Ltd***, the Court noted that there are other interests to consider besides those of the "defrauder and the defraudee", and that the exercise of remedial

discretion must be informed by additional considerations beyond those in a civil fraud trial (at para 44).

The Issues

Issue 1: Should the Court infer that Werenka admitted the validity of the equitable trust claims pled in the Action?

[30] Again, ***Grant*** is instructive. There, the *BIA* stay was lifted for a trial about who had the right to certain money the plaintiff gave to a serial fraudster that ended up with the fraudster's trustee in bankruptcy. In finding an express trust on the facts, the Court said in *obiter dicta* that a constructive trust would likely result in any event because the evidence showed the exact timing of payments made to the bankrupt by the plaintiff and its routing thereafter. Applying the concepts of "following" and "tracing", the Court found that the money could be "followed" from the plaintiff to the bankrupt to his criminal defence lawyer. The funds could then be "traced" into the lawyer's trust account and then to the Clerk of the Court, who received the funds from the lawyer as partial restitution (for victims of previous frauds) and finally to the trustee in bankruptcy.

[31] The evidence in the present case is very different. There are unanswered questions about whether Werenka agreed, or indeed *could* agree, that the allegedly misappropriated funds can be 'followed' or 'traced' to the Funds.

[32] Tracing is a means of identifying a substitute for the original thing claimed. One therefore questions how Werenka could admit tracing when the monies deposited to the Adjustment Fund came from Booth.

[33] Concerning the CLP Fund, there is evidence that Werenka deposited her pay for four years (which Transtrue alleges she improperly inflated) and from the same account paid $83,388.79 on her mortgage. Alone, this does not satisfy the threshold for proving a constructive trust in this case. Something more is required to defeat the general body of creditor' legal rights and upset the scheme of the *BIA.*

Issue 2: Who has an interest in the CLP Fund?

[34] Transtrue's description of the CLP Fund as a "lien" mischaracterizes its nature. The CLP did not create an interest in property. It was simply notice of a pending lawsuit. Veit J's overview of the history of the certificate of *lis pendens* in ***TRG Developments Corp v Kee Installations Ltd*** 2014 ABQB 482 at para 23 explains why:

> The purpose of a certificate of *lis pendens* was set out in Brock over one hundred years ago and has not changed; if the articulation of the purpose has not improved over time, it at least has not lost any of its merit:
>
> > The certificate must be distinguished from the *lis pendens* itself. The phrase "*lis pendens*" means precisely what its component words indicate, "law suit pending" and what is sometimes called the doctrine of *lis pendens* was well known and recognized in England many years before the organization of our Court of Chancery. For example, in 1746 Lord Chancellor Hardwicke in ***Worsley v. Earl of Scarborough,*** 3 Atk. 392, says: There is no ...

> doctrine in this Court that a decree ... shall be an implied notice to a purchaser ... but it is the pendency of the suit that creates the notice; for, as it is a transaction in a sovereign Court of justice, it is supposed that all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation." The theory, object, and extent of the doctrine are here set out with great clearness: the effect being that purchasers for valuable consideration without actual notice were sometimes defrauded of their purchase by the operation of this rule of implied notice by *lis pendens*. Parliament interfered in 1839, and by the Act 2 & 3 Vict. (Imp.) ch. 11, sec. 9, provided that no *lis pendens* should bind a purchaser or mortgagee without express notice, unless a memorandum, much the same as our certificate, were left with the senior Master of the Court of Common Pleas.

When our Court of Chancery was constituted by 7 Wm. IV. ch. 2, the doctrine was in full force -- and upon the reorganization in 1849 by 12 Vict. ch. 64, the English legislation as to *lis pendens* was not introduced. In 1855, however by 18 Vict. ch. 127, an *Act to amend the Registry Laws of Upper Canada*, it was by sec. 3 provided in practically the same language as O.J.A., sec. 97. See also 20 Vict. ch. 56, sec. 9.

The whole effect of registering a certificate of *lis pendens* is to place the whole world in the same position as though the legislation had not been passed.

Upon the application to vacate and discharge a certificate of *lis pendens* the plaintiff must say: "I have an action in which some title or interest in certain land is called in question. I desire that the whole world shall know of that, so that any person dealing with this land must take subject to my rights as ultimately declared: the law holds that the registration of a certificate of *lis pendens* will operate as notice to the whole world, and I insist on such notice being given." That is all -- no rights are given by the certificate – the whole effect is that notice is given that rights are being claimed. And a plaintiff, after such registration, is in precisely the same position as he would have been if the legislation of 1849 had not been passed. Of course, any one desiring to deal with the land, and seeing the certificate registered, may examine the records of the Court and satisfy himself as to the validity or otherwise of the claim set up. If he thinks it baseless, he may disregard the warning: but be need not fear the document itself as conferring any rights upon any one.

To a certain extent, however, the registration acts as a cloud upon the title; and, in actual practice, purchasers or mortgagees are deterred from dealing with such land.

[35] The CLP gave Transtrue a means of providing notice to the world of the Action. It did not give Transtrue an interest in the land, a right to file a writ, or a right to execute on a judgment. The CLP Fund, which replaced the CLP, is merely a pool of potential recourse money available to Transtrue, if and when it ever proved its case.

[36] The CLP is property of the bankrupt that the Trustee is entitled to receive.

Issue 3: Who has an interest in the Adjustment Fund?

[37] Over time, a rather jumbled body of law has developed concerning contests between trustees in bankruptcy and a litigation claimant to money held in a lawyer's trust account or posted in court pending resolution of a dispute. There are three lines of authority with varying results, sometimes involving factually-like cases.

The First Line of Authority

[38] The earliest line of authority considers s 70 (and its predecessor, s 50 of *the Bankruptcy Act*, RSC 1970, c B-3), which gives precedence to a receiving order or assignment in bankruptcy over all but completed execution processes and secured creditors. The result is that the fund (Posted Money) remains the payor's property until it is paid out under a lawful order.

[39] A review of *BIA* s 70 and its predecessor, s 50 sets the framework for the reasoning of the first line of authority:

> 70(1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishment, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and except the rights of a secured creditor.
>
> 50(1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or otter attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

[40] In ***Tradmor Investments Ltd v Valdi Foods*** (1987), 33 CBR (3d) 244 (Ont GD); upheld on appeal 43 CBR (3d) 135 (Ont CA) (***Tradmor)***, the plaintiff argued that the payment of money into court by a defendant prior to bankruptcy as a condition of proceeding with litigation elevated its status to that of secured creditor. The Court concluded that payment did not bring the plaintiff within the definition of a secured creditor. Accordingly, the money remained the bankrupt's property that vested in the trustee on assignment. The Court specifically noted (at para 19):

> In circumstances such as the present it would be an anomaly if the Plaintiff, prior to judgment, was given a greater right to the money in court than it would have following judgment.

[41] In ***Meridian Construction Inc, Re***, 2006 NSSC 17 the defendant/bankrupt was ordered by an arbitrator to pay money into his trust account as security for costs. The Court noted that in seeking to have the fund paid out to the other party in the arbitration, the potential creditor was seeking priority for its costs over the claims of both secured and other unsecured creditors. The Court cited ***Tradmor*** and then relied on ***Canadian Freight Assembly Ltd v Garden Grove Distribution*** (1998) Ltd, 2005 MBQB 246 (QL) at paras 22-23 to explain the discrepancy between ***Tradmor*** and ***Acepharm Inc (Re)*** (a case detailed below):

> An order for security for costs is intended to act as security against the legal costs associated with future legal proceedings in the event that the party ordered to pay costs loses and remains the property of the payor.
>
> That is different from where money is paid into court as security for an order to seize property from another, there is case law that holds that the security in intended to protect the interest that the party against whom the order is granted may have in the property. In the event that the property is eventually determined to have been improperly ordered seized from a party, his interest in the property is replaced by the money paid into court.

Thus, money paid into court as security for costs is different from money paid to provide security for the value of goods taken and that therefore replaces the creditor's interest in the particular goods.

[42] ***Re McDermott***, 54 CBR (NS) 37 concerned money paid into court pending appeal. Under the Ontario Rules of procedure, execution of the judgment was stayed pending appeal. When the creditor learned that the debtor was attempting to sell some property, she sought an order lifting the stay. The Court continued the stay and ordered the defendant to pay the sale proceeds into court "until the disposition of the defendant's appeal subject to any other order that may be made in the meantime by reason of unforeseen circumstances." The defendant was unsuccessful on appeal and made an assignment in bankruptcy before the creditor applied to have the money paid out of court.

[43] Rejecting agency and trust notions, Catzman J, (as he then was) ruled that money paid into court remained property of the bankrupt because s 50(1) created a clear statutory preference over any judgment creditor in favour of the trustee in bankruptcy.

[44] Similarly, in ***Laker (Trustee of) v Colby***, 66 CBR (NS) 71 (Que SC), the Court rejected trust and agency arguments. There, money paid into court as a condition of an appeal that was not paid out to the successful party before the payor became bankrupt was held to be property of the bankrupt. The Court noted that the general principle that an assignment in bankruptcy takes precedence over all judgment and executions unless the execution procedure is completed before the assignment. In the result, the deposit continued to belong to the payor debtor.

[45] In ***MJ Roofing & Supply Ltd v Guay***, 40 CBR (NS) 88 (Man QB), the defendant to a debt action paid money to the plaintiff's solicitors to buy a term deposit in both parties' names rather than paying money into court to the credit of the action. Hewak J (as he then was) explained (at para 22):

> While it may be open to interpretation that the monies were advanced by the bank to the bankrupts on certain conditions which may amount to a trust, i.e., the purchase of a term deposit, that condition was met. One must now go on to consider the purpose of purchasing that security as well as the use to which it is intended to be put, in interpreting the application of s. 50(1) of the Act. Obviously the purpose of the advance of funds was to create a ready fund which could be used to satisfy a judgment should the plaintiff succeed in its law suit, or to be returned to the defendants should they be successful in their defence. That being the case, it is still the property of the bankrupts as contemplated under s. 50(1)

> and thus payable to the trustee to be distributed in accordance with the provisions of the Act.

[46] Justice Hewak found that there was no difference between the Posted Money and the garnishment fund at issue in the seminal decision, ***Can Credit Men's Trust v Beaver Trucking Ltd*** (1959), 38 CBR 1. Although the payor bankrupt's interest in the fund was contingent on his success in the litigation, the money nevertheless remained his property because of the operation of s 50 (now s 70).

[47] In ***Bank of Montreal v Faclaris***, 48 OR (2d) 348 (Ont HCJ), a trustee in bankruptcy claimed entitlement to money held by Order "to the credit of the action" where the creditor had obtained default judgment in one of two actions against the bankrupt. The funds were held in trust by the lawyers representing one of the plaintiffs. The Court found a difference between funds held in court and funds held in trust by a lawyer, ruling that in either case, they were not the absolute property of the plaintiff. The Court found that the creditor was not a secured creditor, the money paid into court was not the creditor's money, and the creditor's interest at the date of bankruptcy was contingent on the results of the litigation. The trustee prevailed despite the bankrupt having only a contingent right to the money (at para 14).

[48] In ***Re Charisma Fashions Ltd*** (1971), 15 CBR (NS) 207, money was paid into court with an admission that it was owing to the plaintiff. Logically, given the admission of liability, the trustee lost out to the plaintiff.

The Second Line of Authority

[49] This line of authority applies trust principles. The logic is that Posted Money is impressed with a trust in the non-bankrupt litigant's favour as the parties intended it to be held for the benefit of the successful litigant.

[50] ***Ferguson Gifford v British Columbia (Director of Employment Standards)*** (1997), 47 CBR (3d) 226 (BCSC) (***Ferguson Gifford***) involved a contest between an employer's lawyer, claiming a solicitor's lien, and the Director of Employment Standards who was successful in obtaining an award against the lawyer's client. The client posted the full amount of the award into the lawyer's trust account pending appeal, but the client's bankruptcy intervened before the appeal concluded. The Court found the money was impressed with a trust arising on the agreement of counsel. Noting that although certainty of object generally requires an identifiable person as beneficiary, Boyle J ruled (at para 12): "...it would be too narrow a conclusion to decide that, when created, it was uncertain pending the appeal, which of two persons would benefit. Its purpose was clear".

[51] Justice Boyle rejected the contention of a failed trust (arising from a moot appeal) attributable to the bankruptcy, finding instead that if the appeal was abandoned or unsuccessful, the monies would go to the Director. Under s 15 of British Columbia's *Employment Standards Act*, the certificate granted in the hearing gave the Director a "lien, charge and secured debt". Boyle J held that "The trust fund, although held pending appeal, unless and until the Court rules otherwise is money collected and held in trust for the Director" (at para 15) and "In simplest terms, it's his money. There is no "operational conflict" with the Bankruptcy Act" (at para 18).

[52] ***Re Anderson (Bankrupt),*** 1999 ABQB 398 (Registrar) applied ***Ferguson Gifford***. To open up a default judgment, the defendant debtor paid the net sale proceeds from the sale of a house into a lawyer's trust account "pending resolution of the subject legal proceedings". Some

nineteen months later the plaintiff obtained judgment. Between the judgment and month that passed when another creditor filed a petition for the debtor's bankruptcy, the creditor had twice asked for the money. In his very brief analysis, the Registrar determined that the parties understood the sale proceeds were to be held for the benefit of the creditor if it won its lawsuit, and "once successful" the bankrupt and agent lawyer held the money in trust for the creditor.

The Third Line of Authority

[53] The third line of authority is a hybrid form of reasoning that combines the notion of trust law with contingent interests in property on other grounds. This reasoning requires that the trustee is successful in the litigation before it has a right to the money. Section 70 does not factor in the reasoning.

[54] ***Re Acepharm***, [1999] OJ No 2353 (CA) concerned a contest between the trustee and a litigant to disputed rents held under an agreement permitting the defendant occupier of premises to retain occupation until trial. The plaintiff claimed that the defendant was a tenant while the defendant claimed ownership of the premises. The Ontario Court of Appeal found the chambers judge erred in relying on ***Tradmor*** to find that the fund should be handed to the trustee rather than the appellant/plaintiff.

[55] Noting that money paid into court (as in ***Tradmor***) and money in a law firm's trust account (as in ***Re Acepharm***) have the same practical consequence, Carthy JA commented that but for s 67 it would be logically tempting to assume that the legal consequences of bankruptcy would be the same (at para 7). Justice Carthy went on to observe that an Accountant of the Ontario Superior Court [equivalent to the Alberta Clerk of the Court] is simply "...a repository that responds not to terms of a trust but to the rules of court and court orders" (at para 9).

[56] Ultimately, the Court determined (at para 12):

> The funds were, in every sense, trust funds in the hands of the law firm. *To the extent that they might be considered as held in trust by the bankrupt, the appellant was a contingent beneficiary of that trust. If the funds are not "held by the bankrupt in trust for any other person" then the only property the Trustee can reach is the bankrupt's contingent interest.* That can be realized by continuing the litigation to a conclusion: see s. 67(1) (d) of the Act [which gives the trustee power to deal with the bankrupt's property as might have been exercised by the bankrupt for his own benefit].
>
> (Emphasis Added)

[57] In his concluding words, Carthy JA said that he would set aside the lower court's order "and in its place declare that the funds in question are not property of the bankrupt divisible amongst its creditors *at this time*" (Emphasis added). What happened subsequent to the decision is unknown.

[58] ***Re Acepharm*** was considered in ***Re Greenstreet***. While the facts are distinguishable as there was an unequivocal contractual trust in play, the discussion of contingent interests warrants mention.

[59] The facts are straightforward. Greenstreet Management Inc entered into an agreement for the purchase and sale of a property pursuant to which it paid two deposits to the vendor's solicitor. The agreement for purchase and sale provided that the deposits would be held in trust

pending closing or termination, and credited to the purchase price on completion. The deal did not close. Greenstreet sued the vendor for misrepresentation and refused to close the sale. The vendor counterclaimed for breach of contract. Later, the deposits were ordered to be paid into court "pending further order of the court of the final adjudication of the herein action". Bankruptcy intervened before the litigation was adjudicated.

[60] Morowetz J found that the deposits were trust funds when they were initially paid to the vendor's lawyer to which the bankrupt had only a contingent interest. Mindful of the observation in ***Re Acepharm*** that the Accountant of the Ontario Superior Court Justice is merely a "repository" which responds to the rules of court and court orders, not trusts (at para 9), Morowetz J found that the payment into court merely substituted the Court's Accountant for the lawyers' trust account. The characterization of the deposits as trust money and the parties' contingent interests in it was therefore unaffected. In the result, the trustee could only get at the money by winning the lawsuit (at para 29).

Resolving the Conflicting Logic

[61] Resolving the conflicting logic applied in the authorities requires consideration of the principles underlying the *BIA* and the principles of statutory interpretation.

[62] It is trite that in interpreting legislation, the Court must give effect to the purpose and overall intention of the legislation, in keeping with the definitive formulation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.": ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27 at para 21. This means that provisions must be read to work harmoniously together and that no provision "trumps" another, unless expressly stated with language like "subject to". Context is important and there is a presumption of "harmony, coherence, and consistency": ***Bell ExpressVu Limited Partnership v Rex***, [2002] 2 SCR 559 at para 27.

[63] Principles of statutory interpretation also provide that the legislature does not intend to produce absurd consequences and that an absurd interpretation includes interpretations that are "incompatible with other provisions or with the object of the legislative enactment" or "which defeat the purpose of a statute or render some aspect of it pointless or futile": ***Rizzo Shoes*** at para 27.

[64] Section 70 provides that an unsecured judgment creditor is only entitled to the judgment amount if the judgment has been fully executed by the time of the bankruptcy. An assignment into bankruptcy takes precedence over any unexecuted judgment or order.

[65] Section 67 provides that the Bankrupt's estate does not include any property the bankrupt holds in trust for another. The intent of this provision is relatively apparent when the bankrupt is a traditional trustee holding, for example a real estate vendor holding a deposit from a purchaser or a broker holding stocks for her client. It becomes less clear when the property is paid into court or a lawyer's trust fund pending the resolution of a dispute or litigation.

[66] Read contextually and harmoniously, s 67 and s 70 must be interpreted to work together rationally to achieve these legislative objectives:

1. to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors;
2. to ensure that the only property that is distributed is the bankrupt's;

3. to maximize to the extent that is fair and equitable the value of the estate for distribution; and
4. to provide for the financial rehabilitation of insolvent persons.

[67] When Posted Money is held by a lawyer, it is clearly a trust fund in the lawyer's hands: ***Re Acepharm*** at para 12. The question is: Does the simple fact of deposit with a lawyer automatically mean that there is a "trust" for the purposes of s 67 of the *BIA*?

[68] According to ***Re Acepharm*** and ***Re Greenstreet***, Posted Money deposited with the Clerk of the Court is treated differently, depending on its initial characterization. If it was simply deposited with the Clerk of the Court pursuant to a Court Order, the Clerk is a "mere repository", not a trustee. However, if it was initially deposited with a lawyer as true trust money, that characteristic continues if it is later transferred to the Clerk of the Court.

[69] The authorities ruling that ownership of Posted Money must be determined by resolution of the litigation on the basis of it being s 67(a) "trust" for whoever the ultimate victor might be run afoul of s 70.

[70] If the litigation is pursued to judgment and the Posted Money paid without fully executing on the judgment, that creditor is bootstrapped to a better position than a pre-bankruptcy judgment creditor holding an unexecuted judgment. The effect operates to the detriment of the other creditors and violates the *BIA*'s foundational principles of creditor equality and rateable distribution of a bankrupt's property. I therefore conclude that if bankruptcy intervenes before the matter is adjudicated and the judgement is executed, s 70 applies and the trustee in bankruptcy should prevail. Perhaps facially harsh to the solvent litigant, the result is consistent with the principles of statutory interpretation and the context of ss 67 and 70.

[71] In this scenario, the answer is not dependent upon where the Posted Money is held. As noted in ***Re Acepharm***, if held by a lawyer, such funds are, in every sense, trust funds in her hands. However, this does not equate to the funds automatically qualifying as "trust" property for the purpose of s 67(a). The lawyer is a repository like the Clerk of the Court. The difference is that unlike the Clerk of the Court, the lawyer has professional and fiduciary obligations to her client. Accordingly, it makes no difference whether the fund is on deposit with a lawyer or the Clerk of the Court.

[72] Respectfully, the reasoning in ***Re Anderson*** and ***Ferguson Gifford*** is wanting given the reliance on trust principles without considering s 70 or the germane decisions in ***Re McDermott*** and ***Re Laker***.

[73] While one might try to rationalize the trust logic in ***Ferguson Gifford*** as being consistent with the underlying principles of ss 67 and 70 by arguing that the Director was successful and the award was effectively "executed" by payment into trust, the Director could not access it until the appeal was resolved in its favour or was abandoned.

The Result

[74] As interesting as dissection of the three lines of authority is (or is not, depending on one's perspective), the question of how Posted Money is to be treated is mainly a red herring in this case.

[75] The Adjustment Fund was a hold back of 25% of Booth's payment to Werenka to buy her shares of Transtrue. The purchase value of those shares is contingent on the resolution of the

value of the closing adjustments. Transtrue did not intend that Werenka would hold the Adjustment Fund for its benefit. Rather, Booth's intention was that the hold back would not be released to Werenka until the closing adjustments were resolved.

[76] Simply put, the Adjustment Fund is not the subject of an express trust under s 67 of the *BIA*, because Transtrue did not intend to create a trust when the money was paid to Werenka's lawyer. As such, one of the required certainties for a valid trust is unsatisfied. However, the Trustee can be in no better position than Werenka would have been, but for the bankruptcy.

[77] Werenka had a contingent claim upon the Adjustment Fund at the date of her bankruptcy. She could only claim ownership if she was successful in resolving the closing adjustments in her favour or with Booth's agreement. It is this contingent interest that vested in the Trustee, and consequently the value of the closing adjustments must be resolved.

Is the Settlement a preference under s 95(1)(a) of the *BIA*?

[78] Transtrue concedes that absent a trust in its favour, the evidence establishes that the Settlement constitutes a preference. I agree with its conclusion.

[79] Having found that there is no trust affecting the CLP Fund and that the interest(s) to the Adjustment Fund are contingent on resolution of the closing adjustments for the purchase of Werenka's shares, the Settlement is void as against the Trustee.

Conclusion

[80] Evidentiary concerns preclude the Court from inferring that the Settlement constitutes an admission by Werenka of the validity of Transtrue's constructive trust claim.

[81] The CLP did not give Transtrue an interest in Werenka's home. Accordingly, it does not give Transtrue an interest in the CLP Fund, which stands in its stead. The CLP Fund was and remains Werenka's property, and hence the Trustee's.

[82] The Adjustment Fund is not the subject of an express trust under s 67 of the *BIA*, but the Trustee can be in no better position than Werenka would have been but for the bankruptcy. The interest(s) in the Adjustment Fund must be determined by resolving the closing adjustments on the share sale.

[83] The Settlement is a preference under s 95(1) (a) of the *BIA*.

Dated at the City of Edmonton, Alberta this 24th day of March, 2015.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Stephen English, QC and Ryan Henriques
Prowse Chowne LLP
for Transtrue Vehicle Safety Inc.

Sheila English
Main Street Law LLP
for Exelby & Partners

Court of Queen's Bench of Alberta

Citation: Toronto Dominion Bank v 1287839 Alberta Ltd, 2021 ABQB 205

Date: 20210317
Docket: 1803 05959
Registry: Edmonton

Between:

Toronto Dominion Bank

Plaintiff

- and -

**1287839 Alberta Ltd, Pricope Matwychuk Holdings Ltd.,
Fehr Quality Contracting Inc., 101279740 Saskatchewan Ltd.
Alexandru Pricope and Christina Matwychuk**

Defendants

**Endorsement
of the
Honourable Mr. Justice M. J. Lema**

A. Introduction

[1] Holders of a writ of enforcement seek a ruling that proceeds of land bound by the writ were held in trust for it and thus did not tumble into the bankruptcy estate of the former owner of the lands. A competing creditor argues that the proceeds were not so held and that the writ-holders so tumbled.

[2] I find that the proceeds were not held in trust for the writ-holders, instead remaining an asset of the now-bankrupt owner.

B. Background

[3] The writ-holders were the first-position registrant against title to certain lands later sold in receivership proceedings against the owner.

[4] A court order approving the sale contained the following provisions governing determination of priority to the sale proceeds (first, **corralling of all claims** against the land and, second, **defining the nature and purpose of the proceeds fund**):

> [**corralling of claims**]: … all of [the former owner's] right, title and interest in and to the [lands] shall vest absolutely in the name of the Purchasers, free and clear of and from any and all **caveats, security interests, hypothecs, pledges, mortgages, lines, trusts or deemed trusts, reservations of ownership, royalties, options, right of pre-emption, privileges, interests, assignments, actions, judgments, executions, levies, taxes, writ of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims"), including**, without limiting the generality of the foregoing:
>
> (a) any encumbrances or charges created by the Receivership Order;
>
> (b) any charges, security interests or claims evidenced by registrations pursuant to the Personal Property Security Act (Alberta) or any other personal property registry systems;
>
> (c) any liens or claims under the Builders' Lien Act (Alberta); and
>
> (d) those **Claims registered on title to [the lands] (all of which are collectively referred to as the "Encumbrances**", which term shall not include the permitted encumbrances, caveats, interests, easements and restrictive covenants listed in [a schedule] (collectively, "Permitted Encumbrances")).
>
> and for greater certainty, this Court orders that all Claims including Encumbrances other than Permitted Encumbrances, affecting or relating to [the lands] are hereby expunged, discharged and terminated as against [the lands]. [s 5 of the order]
>
> [**nature and purpose of proceeds fund**]: For the purposes of determining the nature and priority of Claims, **net proceeds from the sale of [the lands]** (to be held in an interest-bearing account by the Receiver) **shall stand in the place and stead of [the lands]** from and after delivery of the Receiver's Closing Certificate, and **all Claims including Encumbrances** (but excluding Permitted Encumbrances) shall not attach to, encumber or otherwise form a charge, security interest, lien, or other Claim against [the lands] and **may be asserted against the net sale proceeds from the sale of [the lands] with the same priority they had with respect to [the lands] immediately prior to the sale**, as if [the lands] had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale. Unless otherwise otherwise ordered (whether before or after the date of this Order [January 17, 2020]), the **Receiver shall not make any distribution to creditors of net proceeds from sale of [the lands] without further order of this Court**, provided however the

> Receiver may apply any part of such net proceeds to repay any amounts the Receiver has borrowed for which it has issued a Receiver's Certificate pursuant to the Receivership Order. [para 15] [emphasis added]

[5] In other words, **all claims against the lands were shifted, in a priority-neutral way, from the land to the proceeds**.

[6] Critically, that order did not move beyond **identifying the potential claims and shifting the focus from the land to its proceeds**. It **did not earmark the proceeds for any particular claimant**, whether directly or indirectly (e.g. declaring that there was only one claimant).

[7] The order simply **set the stage for Act II**, in which all claimants would either agree on the distribution of the proceeds (presumably yielding a consent order) or a court would rule on priorities after hearing a contested application. Either way, a further court order was expressly contemplated, which would actually allocate the proceeds to the entitled party or parties.

[8] The former owner of the lands **later became bankrupt**, before the proceeds had been paid out to any party.

[9] That is the backdrop against which I summarize the competing arguments.

C. Positions

[10] The writ-holders say:

- "At the time of sale …, **[their writ] was the first registered financial encumbrance** …. The only other financial encumbrance registered on title was an Agreement Charging Land in favour of TD, registered [after] the [writ]. … TD is **not asserting a priority** [over the writ-holder]";
- " .. **BDC has security against assets of [the owner/debtor] that contains a land charge**. The [writ-holders] do not contest the validity of [that] charge or that [it] would encompass [the lands]. Rather, [they say] that, as a matter of law and in determination of priority to the … proceeds …, [they] are **entitled to the … proceeds in priority to BDC's unregistered land charge**;
- the Land Titles Act (ss 14(3) and s 56) determines priority here, with priority turning on relative (date-determined) serial numbers i.e. **registration beats non-registration, earlier registration beats later**;
- "**Immediately prior to the sale, the [writ-holders] had priority to the net sale proceeds by virtue of the writ being the first registered charge** …. BDC's land charge was unregistered at the time of the sale … By virtue of the [above] Order and the *Land Titles Act*, the Writ has priority over BDC's unregistered interest. …";
- **section 70** of the *Bankruptcy and Insolvency Act*, which give priority to a bankruptcy order or assignment over "… garnishments, … executions or other process against the property of a bankrupt" (except where an unsecured creditor has received the fruits of execution), **does not apply** here. The reason is that the lands were sold before the owner-debtor became bankrupt, and, by the date of bankruptcy, the proceeds had **already been earmarked for the writ-holder**. In

other words, the proceeds had effectively been **carved out of the owner's assets and so did not form part of the bankruptcy estate**; and

- the writ-holders do not argue that they actually received the proceeds. Instead, they assert an equivalent position: that the proceeds were being **held in trust for them**. Here they point to para 67(1)(a) *BIA*, which says that "property of the bankrupt divisible among creditors shall **not comprise property held by the bankrupt in trust for any other person**." Effectively, the writ-holders say that, **with the proceeds being reserved for "Claims", and with their writ constituting the first-ranking Claim, the proceeds should be treated as being held in trust for them** i.e. as not tumbling into the bankruptcy with the owner's other assets. In other words, while they did not actually receive the proceeds (and thus qualify for shelter under s. 70's "fruits received" exception), they had **effectively corralled the proceeds and become their beneficial owner**. Actual receipt was not required because they were **already over the goal line with effective ownership** of the proceeds.

[11] BDC says:

- section 70 *BIA* governs;
- the writ-holders are an unsecured claimant falling into s. 70;
- since the writ-holders did not actually receive the proceeds, they do not qualify for the "fruits received" exception in s. 70;
- the proceeds were not being held in trust for the writ-holders; and
- accordingly, on bankruptcy, the writ-holders lost whatever *Land Titles Act* priority they had to the proceeds, ending up in the unsecured-creditors corral, where their only recourse is to file a proof of claim and wait for a dividend (if any) from the bankruptcy trustee.

D. Analysis

[12] The writ-holders' claim turns on **whether the proceeds were being held in trust for them**. If so, they shelter under para. 67(1)(a), which would recognize their beneficial ownership of the property and carve it out of the owner's (now bankrupt's) property. (Since the writ-holders did not actually receive the proceeds, they do not qualify for the **"fruits received" exception** in s 70 or its other exception i.e. deferral to the rights of **secured creditors**.)

[13] Topolniski J. distilled the key considerations in determining priority to proceeds derived from a now-bankrupt's property:

> 1. To trump a trustee's priority to funds paid into court under a garnishee or as a condition of opening up a default judgment, the **judgment creditor must have completed execution** (***T.L. Cleary Drilling Co. (Trustee of) v. Beaver Trucking Ltd.***, 1959 CanLII 58 (SCC), [1959] S.C.R. 311, 38 C.B.R. 1; ***Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.*** (1993), 1995 CanLII 7377 (ON SC), 33 C.B.R. (3d) 244 (Ont. Ct. Gen. Div.), aff'd (1997), 1997 CanLII 14518 (ON CA), 43 C.B.R. (3d) 135 (OCA))

2. An order permitting payment out of monies paid into court on obtaining a further order is insufficient to trump the trustee's priority to the funds (*T.L. Cleary Drilling Co.*).

3. A judgment creditor is not elevated to the status of secured creditor by virtue of a payment into court, whether that payment is to advance an appeal or as security for costs (*T.L. Cleary Drilling Co.*; *Tradmor Investments Ltd*.; and *Laker (Trustee of) v. Colby* (1987), 66 C.B.R. (N.S.) 71 (Que. Sup. Ct.)).

4. A judgment creditor may trump a trustee's priority to funds paid into court if the funds are sufficiently 'earmarked' and the creditor has 'done all that it could' to access the funds (*Careen Estate v. Quinlan Brothers Ltd.* (2004), 2004 NLSCTD 132 (CanLII), 2 C.B.R. (5th) 102 (Nfld. S.C.)).

5. A **secured creditor trumps** a trustee's priority to funds paid into court **if the monies are the subject of valid security** (*BIA*, s. 70; (***T.L. Cleary Drilling Co.***; ***McCurdy Supply Company Limited v. Doyle*** (1957), 1956 CanLII 705 (MB QB), 64 Man. R. 289 (Q.B.), aff'd without reasons (1957), 1957 CanLII 442 (MB CA), 64 Man. R. 365n (C.A.)). [from para 11 of ***Stone Sapphire Ltd v Transglobal Communications Group Inc***, 2008 ABQB 575 ***affd*** 2009 ABCA 125] [emphasis added].

[14] Topolniski J. continued her distilling work in ***Transtrue Vehicle Safety v Werenka***, 2015 ABQB 197, where she examined competing clusters of "monies held" cases and synthesized as follows:

> **Section 70 provides that an unsecured judgment creditor is only entitled to the judgment amount if the judgment has been fully executed by the time of the bankruptcy. An assignment into bankruptcy takes precedence over any unexecuted judgment or order.**
>
> **Section 67 provides that the Bankrupt's estate does not include any property the bankrupt holds in trust for another. The intent of this provision is relatively apparent when the bankrupt is a traditional trustee holding, for example a real estate vendor holding a deposit from a purchaser or a broker holding stocks for her client. It becomes less clear when the property is paid into court or a lawyer's trust fund pending the resolution of a dispute or litigation.**
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> Read contextually and harmoniously, s 67 and s 70 must be interpreted to work together rationally to achieve these legislative objectives:
>
> 1. to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors;
>
> 2. to ensure that **the only property that is distributed is the bankrupt's**;
>
> 3. to maximize to the extent that is fair and equitable the value of the estate for distribution; and
>
> 4. to provide for the financial rehabilitation of insolvent persons.

> When Posted Money is held by a lawyer, it is clearly a trust fund in the lawyer's hands: ***Re Acepharm*** at para 12. The question is: **Does the simple fact of deposit with a lawyer automatically mean that there is a "trust" for the purposes of s 67 of the *BIA*?**
>
> According to ***Re Acepharm*** and ***Re Greenstreet***, Posted Money deposited with the Clerk of the Court is treated differently, depending on its initial characterization. If it was simply deposited with the Clerk of the Court pursuant to a Court Order, the Clerk is a "mere repository", not a trustee. However, if it was initially deposited with a lawyer as true trust money, that characteristic continues if it is later transferred to the Clerk of the Court.
>
> The authorities ruling that ownership of Posted Money must be determined by resolution of the litigation on the basis of it being s 67(a) "trust" for whoever the ultimate victor might be run afoul of s 70.
>
> If the litigation is pursued to judgment and the Posted Money paid without fully executing on the judgment, that creditor is bootstrapped to a better position than a pre-bankruptcy judgment creditor holding an unexecuted judgment. The effect operates to the detriment of the other creditors and violates the *BIA*'s foundational principles of creditor equality and rateable distribution of a bankrupt's property. **I therefore conclude that if bankruptcy intervenes before the matter is adjudicated and the judgement is executed, s 70 applies and the trustee in bankruptcy should prevail. Perhaps facially harsh to the solvent litigant, the result is consistent with the principles of statutory interpretation and the context of ss 67 and 70.**
>
> In this scenario, the answer is **not dependent upon where the Posted Money is held**. As noted in ***Re Acepharm***, if held by a lawyer, such funds are, in every sense, trust funds in her hands. However, this does **not equate to the funds automatically qualifying as "trust" property for the purpose of s 67(a)**. The lawyer is a repository like the Clerk of the Court. The difference is that unlike the Clerk of the Court, the lawyer has professional and fiduciary obligations to her client. Accordingly, it makes **no difference whether the fund is on deposit with a lawyer or the Clerk of the Court**. [paras 64-71] [emphasis added]

[15] I would add (or elaborate on) the following: **where a follow-up order to determine priority is contemplated, the funds in question are necessarily not held in trust for any given creditor**, **at least until that determination is made**. By default, until (at minimum) that happens, the proceeds **remain the property of the former owner (now bankrupt)**.

[16] This was the finding of the Supreme Court of Canada in ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 (paras 82-87), where monies representing a GST amount claimed by CRA had been ordered held by a CCAA monitor:

> The last issue in this case is **whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account** until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an

> alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.
>
> Creation of an **express trust requires the presence of three certainties: intention, subject matter, and object.** Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).
>
> Here, there is **no certainty of the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust**.
>
> **At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust**.
>
> The fact that the location chosen to segregate those monies was the Monitor's trust account has **no independent effect such that it would overcome the lack of a clear beneficiary**. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.
>
> Thus, **uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds**. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." **Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust**. [emphasis added]

[17] In other words, where monies are parked **pending a priorities determination**, **by definition they are not held in trust for any particular claimant**. It would only **follow** such a determination that the successful claimant(s) should be regarded as the effective (beneficial) owners of the funds.

[18] This explains ***Re Careen***, (2004) 2 CBR (5th) 102 (NLTD), on which the writ-holders rely. There, a priority determination **had been made**, and all that remained was for the now-earmarked-for-the-winning-claimant fund to be paid to that party. With that earmarking (accomplished by the priority decision), the successful claimant deserved to be treated as the effective (beneficial) owner of the funds i.e. in advance of actual receipt. While para 67(1)(a) *BIA* was not mentioned there, reservation of the proceeds for the winning claimant squares with recognition of a trust in that party's favour.

[19] Not so here, where **priority to the proceeds in question had not been determined before the date of bankruptcy**. Instead, the proceeds remained subject to all "Claims", with no distribution possible **without further order of the Court**. Necessarily, that "further order" first **required an agreement on priorities among all interested parties or the Court determining priority, neither of which happened here**.

[20] For the same reason, I do not accept the writ-holder's reliance on ***Re Anderson***, 19994 ABQB 398 (para 8), where **funds were being held in trust for a creditor and the creditor had prevailed in the litigation i.e. priorities were determined**, all before the debtor became bankrupt.

[21] Same for their attempt to distinguish ***Senger v Patterson Real Estate Inc***, 2015 ABQB 511, which actually squares with the present case of monies **not held in trust for any given creditor in advance of priorities being determined**.

[22] Even if the writ had staked a front-of-the-line priority for the writ-holders (i.e. under "per *Land Titles Act*" priority), the ground fell away from that position once the owner-debtor became bankrupt. At that point, s 70 *BIA* took over, subordinating all unsecured claims to the trustee unless the "execution fruits" had actually been paid to them.

[23] That did not occur here, and since the writ-holders are (by definition) not secured creditors, they do not qualify for either safe harbour under s 70. (The writ-holders confirmed at the application that they are not secured creditors.)

[24] In the language of ***Re Careen***, the writ-holders had **not** done all that could be done to stake their claim e.g. seeking, and obtaining, the consent of all interested parties to an order recognizing their priority or, failing that, bringing an application for, and being awarded, priority to the proceeds, all aside from having the monies actually paid out to them.

[25] The only thing accomplished by the January 2020 order was to **substitute the proceeds for the land**. That swap was neutral on the priorities equation: the writ-holders continued to in "first registered" (albeit still unsecured) position, but **no actual determination of priorities had been made** (hence the need for a follow-up order), and then the bankruptcy happened, engaging s 70.

[26] Not to mention also engaging s 71 *BIA*, which provides that, on bankruptcy, the bankrupt's property, **subject only to the *BIA* and to the rights of secured creditors**, passes to the bankruptcy trustee. The *BIA* does not provide otherwise in the case of unsecured creditors, consigning them to **proving their claims and waiting for dividends**.

[27] With **no beneficial-interest-crystallizing priority determination**, the proceeds here remained the owner's – now bankrupt's – property and thus **fell into the bankruptcy estate**.

[28] Viewed differently, and recognizing that the January 2020 order was intended to be, and was, priority-neutral, **imagine if the no sale of the lands had occurred and the owner had become bankrupt**. Even though the writ-holder had been sitting, pre-bankruptcy, in apparent first position, it would have **lost that perch on bankruptcy**. The reason, again, is s. 70, which only shelters unsecured creditors (such as the writ-holders here) from the effects of bankruptcy if they have received the fruits of their execution efforts before bankruptcy.

[29] If the writ-holders would not have been immune from the effects of the owner's bankruptcy (i.e. relegation to wait-for-dividend status) in a still-registered-against-the land circumstance, I cannot see why the priority-neutral shift to a focus on the proceeds would change things. Either way, with priority to the proceeds not determined by the date of bankruptcy, the proceeds cannot be regarded as reserved for the writ-holders.

[30] As BDC's counsel pointed out, other potential claimants to the lands, pre-bankruptcy, included the Workers' Compensation Board, the Canada Revenue Agency, the TD Bank (a down-title registrant), BDC itself (via an equitable mortgage), and (in theory) the owner itself, if it had seen any glimmer of equity despite those other claims.

[31] Unless and until the respective priorities of these various claims and the writ-holders' own claim had been determined, it cannot be said that the proceeds were reserved for the exclusive benefit of the writ-holders (or any party, for that matter).

[32] As for the proceeds being reserved for a "class of beneficiaries" which need not be specifically identified for a trust to exist (i.e. with sufficient "certainty of object" i.e. certainty of beneficiary), I do not see that principle applying where priority as among various competing claimants has not been determined. Counsel for the writ-holders cited the ABCA's decision in ***Bruderheim Community Church v Moravian Church in America (Canadian District)*, 2020 ABCA 393** in support of this "class" argument. I do not see that case as helpful here, with a "priority determination" having been reached there (i.e. in favour of a certain subset of "claimants"). The successful claimants did not have to be identified by name; they could rely on the success of their "class."

[33] The key point here is that the writ-holders could not plausibly claim that, on the eve of bankruptcy, "these monies are being held **for us**", as against any other claimants. Whether the claimants here were identified or not, or constituted a "class" or not via the January 2020 order, no one had reached the "winner's circle", such that the funds should be regarded as held for them, before bankruptcy intervened.

E. Conclusion

[34] The proceeds here were plainly in priorities-to-be-determined territory. By definition, they were not being held in trust for any particular creditor, let alone the writ-holders. On bankruptcy, s 70 operated on this incomplete-execution circumstance, undercutting the not-paid-yet writ and, with s 71, pulling these monies into the bankruptcy estate and (thus) the trustee's reach (at least as between the trustee and the writ-holders).

[35] I do not find it necessary to decide whether, pre-bankruptcy, the writ-holders would have had priority over BDC's equitable (unregistered) mortgage.

[36] I do find that, with the in-bankruptcy tug-of-war between the writ-holders and BDC now decided, and with no participant in the application arguing against BDC's priority over all other

parties (i.e. beyond the writ-holders), the proceeds (net of any applicable transaction costs associated receiver's fees) shall be paid to BDC (assuming that its claim is equal to or greater than those net proceeds).

[37] I thank all counsel for their well-prepared and helpful written and oral submissions.

Heard on the 17th day of March, 2021.
Dated at the City of Edmonton, Alberta this 17th day of March, 2021.

Appearances:

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