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MAY 30 2018
JUDICIAL CENTRE
OF CALGARY

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.

- and -

COURT FILE NUMBER	0903-17684 and 0903-17685
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
RESPONDENT (PLAINTIFF)	ARRES CAPITAL INC.
NON-PARTICIPANTS (DEFENDANTS)	GRAYBRIAR LAND COMPANY LTD. and GRAYBRIAR GREENS INC.
RESPONDENTS (NON-PARTIES)	RICHCROOKS ENTERPRISES (2000) LTD., RICHCROOKS HOLDINGS LTD., 515476 ALBERTA LTD., DEMEL FINANCIAL CORP., GREENMAR HOLDINGS INC., ACCESS MORTGAGE INVESTMENT 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, KEVEN R. PEDERSEN, SUSAN FINE, CAROL KIMIYO SEKIYA, HOLLY SEKIYA and STEVEN OGG
RESPONDENT (INTERVENOR)	TERRAPIN MORTGAGE INVESTMENT CORP.
RESPONDENT (INTERESTED PARTY)	1798583 ALBERTA LTD.

- and -

COURT FILE NUMBER	1201-16440
COURT	COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE	CALGARY
PLAINTIFFS	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
DEFENDANTS	ARRES CAPITAL INC. and WESLEY SERRA
THIRD PARTY DEFENDANTS	Y-K PROJECTS LTD., ALLEN BECK and SHELLY BECK
DOCUMENT	**BENCH BRIEF**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCARTHY TÉTRAULT LLP Barristers and Solicitors Walker W. MacLeod / Pantelis Kyriakakis Suite 4000, 421-7th Avenue S.W. Calgary AB T2P 4K9 Phone: 403-260-3710 / 3536 Fax: 403-260-3501 Email: wmacleod@mccarthy.ca / pkyriakakis@mccarthy.ca

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BENCH BRIEF OF ALVAREZ & MARSAL CANADA INC.

APPLICATION TO RELEASE THE GRAYBRIAR FUNDS AND APPROVE A CLAIMS PROCESS
TO BE HEARD BY
THE HONOURABLE MADAM JUSTICE B.E.C. ROMAINE

June 4, 2018 at 2:00 p.m.

I. INTRODUCTION

1. This Bench Brief is submitted by Alvarez & Marsal Canada Inc., in its capacity as 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***")[1] 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**"),[2] in the proceedings under Court File Number 1401-12431 (the "**Receivership Proceedings**"), in support of the Receiver's application (the "**Application**") seeking: (i) a direction to the Clerk of the Court to pay out both the Graybriar Funds and the Court Funds to the Receiver; (ii) a declaration and confirmation that both the Graybriar Funds and the Court Funds (collectively, the "**Funds**") are subject to the Receiver's Charge and the Receiver's Borrowings Charge (as both terms are defined in the Receivership Order); and, (ii) approval of a Claims Process solely with respect to the Funds. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Second Report of the Receiver, dated May 29, 2018 (the "**Second Receiver's Report**") and the Application.

2. The Debtor and various Persons have engaged in a litany of litigation with each other over the past decade, including several trips to the Court of Appeal. Such litigation has been time consuming, cost intensive, and has made the adjudication of the Claims against the Funds complex and intricate.

3. A central concern of the Receiver over the course of the administration of the Debtor's estate has been identifying assets of material value for the benefit of creditors. That anxiety has been eased by locating the Funds. The Funds total approximately $1,617,020.90 and are comprised of the following sources:

(a) **Graybriar Funds:** $1,382,020.90 held either in Court or by B&M and which arise from the sale of the Units owned by Graybriar; and,

(b) **Court Funds:** $235,000 posted in Court to stay the operation of a summary judgment order against the Debtor.

[1] RSA 2000, c C-15 (Book of Authorities, Tab 1).

[2] Second Receiver's Report, at pages 119-128.

4. The Receiver, for the benefit and on behalf of the Debtor's creditors and stakeholders, advances simple and straightforward claims to the Funds which can be easily summarized as follows:

(a) **Graybriar Funds:** The Graybriar Funds are derived from the sale of Units in the condominium development community referred to as the "Graybriar". The Debtor held first and second ranking mortgages against the Units by virtue of the Arres' Mortgages. The Arres' Mortgages appear to be held by the Debtor in trust for the benefit of the Graybriar Investors pursuant to agreements between the Debtor and various investors (collectively, the "**Investment Agreements**").[3] The Units were subject to certain subordinately registered builders' liens in favour of creditors that were vested off title pursuant to the Graybriar Sale Approval Orders. Once it is confirmed that either the Lien Claims have been satisfied or the Debtor is entitled to receive the Graybriar Funds in priority to any lien claimants, the Receiver proposes to distribute the Graybriar Funds to the Graybriar Investors subject to their *pro rata* entitlement in accordance with the terms and conditions in the Investment Agreements; and,

(b) **Court Funds:** The Court Funds were posted by the Debtor for the purposes of staying a summary judgment order made against the Debtor on an unsecured claim.[4] Litigation involving the Debtor is now stayed and the claims of the plaintiffs, whether on the summary judgment order or in the Kenzie Action generally, are subject to the *Bankruptcy and Insolvency Act* (Canada) (the "***BIA***")[5] by virtue of the bankruptcy order made against the Debtor on July 26, 2017. The Receiver proposes to distribute the Court Funds to the Debtor's creditors which will likely take place via the Debtor's bankruptcy proceedings.

5. Unfortunately, everything involving these matters and the Funds has been exceedingly contentious. Correspondingly, despite the fact that the Receiver does not wish to determine any Persons' Claims against the Funds, but only seeks to implement a process by which such Claims can be efficiently determined, it is the Receiver's understanding that various Persons object to the position taken by the Receiver on this Application.

[3] Second Receiver's Report, at pages 27-47.
[4] Second Receiver's Report, at pages 51-53.
[5] RSC 1985, c B-3.

6. The competing claim to the Graybriar Funds necessitates a Claims Process and the related relief being sought by the Receiver. The Receiver is prepared to administer the Claims Process upon confirmation of the priority of the Receiver's Charge and the Receiver's Borrowing Charge against the Graybriar Funds. The relief sought by the Receiver is entirely consistent with and supported by the Court of Appeal, who previously commented that Court determination of entitlement to the Graybriar Funds would be appropriate:

> The most appropriate course for all concerned, including the creditor Terrapin Mortgage Investment Corp. who advanced money on the strength of the foreclosure order, is to require that the proceeds of judicial sales of the seven units be paid into Court and then have the Court determine who has the rights to such proceeds and whose rights have priority.[6]

II. STATEMENT OF FACTS

A. Introduction

7. As with its previous application for advice and directions heard in October 2017, in the Receiver's submission, only a very small subset of facts are material to the current application by the Receiver, as identified herein. The purpose of the Application is to create a system within which the numerous Claims against the Funds may be determined and some certainty and clarity may be introduced into this process.

8. Graybriar was the owner of certain Lands upon which the Units were constructed. The Debtor provided certain funds to Graybriar which were secured pursuant to the Arres' Mortgages and the Debtor holds the Arres' Mortgages as trustee to and for the benefit of the Graybriar Investors in accordance with and pursuant to the Investor Agreements.[7] The Arres' Mortgages attached to, encumbered, and were perfected against all of the Units.

9. Pursuant to Amended Order – Sale to Plaintiff, granted by Master L.A. Smart on February 3, 2014 (the "**Sale to Plaintiff Order**"),[8] the Units and the Debtor's offer to purchase the Units was accepted. The Sale to Plaintiff Order was subsequently stayed pursuant to the Order of the Honourable Justice S.D. Hillier, granted on February 14, 2014 (the "**Stay Order**").[9]

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[6] ***Arres Capital Inc v Richcrooks Enterprises (2000) Ltd*****,** 2015 ABCA 392, [2016] AWLD 210 at para 4 (Book of Authorities, Tab 2).

[7] Second Receiver's Report, at pages 27-47.

[8] Second Receiver's Report, at pages 55-57.

[9] Second Receiver's Report, at pages 62-64.

10. All of the Units have now been sold pursuant to the Graybriar Sale Approval Orders and all net proceeds have been paid into Court or are held by B&M.

11. The Court Funds, in the amount of $235,000, were paid into Court in accordance with the Order of Justice Wilkins granted on February 11, 2014 in the Kenzie Action.[10] The Court Funds were paid into Court by counsel for the Debtor for the purposes of staying the operation of a court order against the Debtor, pending appeal.[11] The Receiver understands that counsel to the Debtor originally obtained the Court Funds from counsel to 179 Alberta. Litigation involving the Debtor is now stayed, and the claims of the Kenzie Action plaintiffs are subject to the *BIA* by virtue of the bankruptcy order made against the Debtor on July 26, 2017.

12. At this time, the Funds represent the most significant realizable asset of the Debtor and are subject to competing claims, as summarized below.

B. The Graybriar Investors

13. The Graybriar Investors invested in the Arres' Mortgages pursuant to the Investment Agreements. Based on the terms of the Investment Agreements, it would appear that the Graybriar Investors will likely be able to advance trust claims to the Graybriar Funds. However, in order to make distributions to the Graybriar Investors it is necessary to first: (a) confirm and set off any claims the Debtor may have against the Graybriar Funds, under and pursuant to the Investment Agreements, for the benefit of the Debtor's general creditors and stakeholders; (b) confirm the quantum of the Graybriar Investor Claims; and, (c) resolve the validity and priority of any competing claims against the Graybriar Funds, including those identified below.

C. Lien Claims

14. Various Persons had subordinately registered builders' liens against the Units that were vested off title pursuant to the Graybriar Sale Approval Orders. The Receiver has been advised that these claims have been paid out. The Receiver has not been provided with any records confirming such payouts. If the lien claimants are still owed amounts and can assert priority under section 11(5) of the *Builders' Lien Act* (Alberta) over the Arres' Mortgages such lien claimants will be entitled to receive a priority distribution from the Graybriar Funds.

[10] Second Receiver's Report, at pages 59-60.

[11] Second Receiver's Report, at pages 71-92.

D. Related Party Claims

15. Each of Ms. Staci Serra and 875892 Alberta Ltd. (collectively, the "**Related Parties**") are related to the Debtor. The Receiver has been provided with an assignment agreement that suggests that all or part of the receivables due on the Arres' Mortgages were assigned to the Related Parties in September 2010.[12] While there are obvious difficulties with the purported assignment, including: (a) the lack of consideration that appears to have been received by the Debtor in a transaction that occurred within the applicable insolvency "look back" period; (b) the failure of the assignment of the receivable to be perfected prior to the Debtor's bankruptcy; and, (c) whether the Debtor had the capacity to convey the beneficial interest in the Arres' Mortgages, given the trust arrangement arising under the Investor Agreements. Therefore, any potential claim of the Related Parties will have to be determined prior to the release of the Graybriar Funds.

E. Terrapin

16. Terrapin made a loan advance to 179 Alberta (the "**179 Loan**"). 179 Alberta is related to the Debtor.[13]

17. The 179 Loan made by Terrapin to 179 Alberta was for the purposes of financing 179 Alberta's acquisition of certain Units that was to occur by way of the Sale to Plaintiff Order. Terrapin advanced the 179 Loan to 179 Alberta shortly after the Sale to Plaintiff Order was granted. After the advance of the 179 Loan, the Sale to Plaintiff Order was subsequently appealed and stayed, pursuant to the Stay Order. The transactions that were being financed by Terrapin did not complete and 179 Alberta did not receive title to any of the Units. The Units, subject to the transactions that were being financed by Terrapin, were subsequently sold pursuant to the Graybriar Sale Approval Orders and the proceeds therefrom form part of the Graybriar Funds.

18. $235,000 of the 179 Loan was advanced by 179 Alberta to the Debtor and paid into Court in the Kenzie Action.[14]

19. Terrapin appears to be a creditor of a creditor, in this receivership as its claim lies against 179 Alberta, not the Debtor. Ultimately, Terrapin is a victim of its own decision to advance the 179 Loan to 179 Alberta prior to the expiry of the appeal period in respect of the Sale to Plaintiff Order

[12] Second Receiver's Report, at page 49.
[13] Second Receiver's Report, at page 13, para 36.
[14] Second Receiver's Report, at page 59-60.

and to make the proceeds of the 179 Loan immediately releasable and prior to title to the Units being transferred. These facts are not the fault of either the Debtor or the Receiver. The Receiver understands that Terrapin claims either an equitable mortgage in or some type of trust claim to the Graybriar Funds and that Terrapin objects to the relief sought by the Receiver in this Application. Notwithstanding the multitude of factual and legal weaknesses associated with Terrapin's claims that would seem to favour an immediate dismissal thereof, the Receiver is prepared to afford Terrapin the benefit of having the Terrapin Claim determined through the Claims Process.

F. Summary

20. The Receiver's view, based on the information that has been provided to it to date, is that the Graybriar Investors should receive the Graybriar Funds after quantification of all Graybriar Investor Claims and determination of the priority of the Lien Claims. That position appears to be untenable to various other stakeholders and this creates the need for the Claims Process in respect of the Graybriar Funds. The Receiver sees no other alternative other than for it to "quarterback" the administration of the Graybriar Funds so that the various competing Claims may be determined. The Receiver currently only has negligible cash in the estate and the amount on hand exceeds current amounts owing by way of fees and disbursements to the Receiver and its counsel.[15] The Receiver therefore seeks assurance that it will be paid for its reasonable time and effort expended in respect of the Claims Process and is only then prepared to administer the Claims Process on this basis. Absent a viable alternative process (which, for clarity, should be more than Creditors racing to seek release of the Graybriar Funds without accounting for Persons with competing entitlement), the Claims Process represents the only method of breaking out of the current quagmire in respect of the Graybriar Funds.

III. ISSUES

21. This Bench Brief addresses the two main issues for this Honourable Court to determine on the within Application:

(a) whether the Graybriar Funds should be released to the Receiver and administered through the Claims Process; and,

(b) whether the Court Funds should be released to the Receiver and form part of the general assets of the Debtor available for distribution to all creditors.

[15] Second Receiver's Report, at page 18, para 48.

IV. LAW AND ARGUMENT

A. The Graybriar Funds

(i) Trust Claims

22. At the outset, any suggestion by Creditors that the Graybriar Funds are subject to a "trust" for their benefit and should not be administered within the Receivership Proceedings is inaccurate. The Receivership Order defines the Exigible Property as including:

> All of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including any assets, undertakings and properties acquired by the Debtor after the date of this Order and all proceeds thereof. For greater clarity, and without limitation, the Exigible Property includes the Debtor's interest in (a) debts due to the Debtor either now or in the future and (b) causes of action.

23. Section 1(1)(II) of the *CEA* defines "property" as including:

> (i) things, as well as interests in things, (ii) anything regarded in law or equity as property or as an interest in property, (iii) any right or interest that can be transferred for value from one person to another, (iv) any right, including a contingent or future right, to be paid money or receive any other kind of property, and (v) any cause of action.[16]

24. As the registered holder of the Arres' Mortgages, the Debtor has a legal interest in the Arres' Mortgages. The Receiver's current view is that the Debtor holds the Arres' Mortgages as bare trustee to and for the benefit of the Graybriar Investors in accordance with and pursuant to the Investor Agreements. The Receivership Order contemplates "assets … of every nature and kind whatsoever … and all proceeds thereof", a definition which certainly includes bare legal title. Reference to the *CEA* only reinforces this conclusion, as legal title is both a thing "regarded in law … as property or an interest in property" and a "right or interest that can be transferred for value from one person to another".[17]

[16] *CEA* at s 1(1)(ll) (Book of Authorities, Tab 1).

[17] *CEA* at s 1(1)(II)(ii)–(iii) (Book of Authorities, Tab 1).

25. The fact that the Debtor may only have legal title to the Arres' Mortgages does not affect the ability of the Receiver to administer the Arres' Mortgages or the Graybriar Funds derived therefrom. The legal interest of the Debtor constitutes a property interest and the Receiver is expressly empowered, and indeed duty bound, to take possession and control of that asset.

(ii) The Benefit of the Claims Process

26. The jurisdiction to grant a Claims Process Order in a receivership flows from two sources: the *Judicature Act*[18] and judicial precedent. The *Judicature Act* uses broad and inclusive language in empowering this Court to grant appropriate remedies. Section 8 provides the Court with jurisdiction to grant all remedies to which any of the parties to the proceeding may appear to be entitled:

> The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, **so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.**[19]

27. This Honourable Court has, in numerous past instances, issued claims process orders within the context of receivership proceedings. A number of recent claims process orders, as granted within receivership proceedings commenced under statutes that, like the CEA, do not expressly authorize the implementation of a claims adjudication process, are enclosed within this Brief's corresponding Book of Authorities.[20]

28. In the present circumstances the benefits of the Claims Process are abundantly obvious. The Graybriar Funds have been the subject of ongoing litigation for years and no real progress has been made on entitlement. Several parties have advanced claims to the Graybriar Funds, those being the Graybriar Investor Claims, the Terrapin Claim, the Related Party Claims, and the Lien Claims. The Claims Process is necessary to resolve the validity and priority of the Graybriar Investor Claims, the Terrapin Claim, the Related Party Claim, the Lien Claims, and any other unknown claims in order to distribute the Graybriar Funds to the properly entitled Persons.

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[18] RSA 2000, c J-2 (Book of Authorities, Tab 3).

[19] *Judicature Act*, at s 8 [emphasis added] (Book of Authorities, Tab 3).

[20] Book of Authorities, Tabs 4–7.

29. The Receiver recognizes the validity of the Graybriar Investor Claims, based on the information available to date, and acknowledges that the Graybriar Investors will likely be able to advance trust claims to the Graybriar Funds. The Claims Process will not alter pre-existing entitlements to the Graybriar Funds but will instead identify and resolve competing claims so as to facilitate distributions in accordance with such entitlements. This is the only method to resolve the current deadlock in respect of the Graybriar Funds. The Receiver submits that the granting of the Claims Process Order is just, appropriate, and convenient, so as to facilitate and expedite the determination of all claims arising in connection with the Graybriar Funds.

(iii) The Receiver's Charge

30. The Receiver is only willing to undertake the Claims Process upon the confirmation that the Receiver's Charge has priority over all Persons who may have any claims against the Graybriar Funds. This position is driven by the lack of available assets in the estate and the alleged "trust claims" made against the Graybriar Funds; the Receiver cannot be expected to undertake a process to benefit Creditors without reasonable assurance that it will be compensated for its time and effort.

31. The starting point of this analysis is paragraph 17 of the Receivership Order, which was issued over seven months ago and has not been subject to either appeal or application to vary. As discussed above, the Debtor's legal interest in the Arres' Mortgages (and, by extension, the Graybriar Funds) is Exigible Property. However, even if the Debtor only holds the legal interest in the Graybriar Funds, the Receivership Order expressly confirms that even trust claims to the beneficial interest in the Exigible Property are subordinate to the Receiver's Charge:

> The Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Exigible Property, as security for such fees and disbursements, incurred both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Exigible Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person.

32. The Receiver's work will be necessary to sort out and resolve the claims, to determine entitlements, and to distribute the Graybriar Funds. Certain Graybriar Investors are still unknown and, to the Receiver's knowledge, unrepresented. Their entitlement to the Graybriar Funds is therefore at issue and also requires resolution through the Claims Process. Specifically, in order to make distributions to the Graybriar Investors, it is necessary to both: (a) confirm the quantum of the claims of the Graybriar Investors; and, (b) resolve various competing claims against the Graybriar

Funds. This further underscores the need for the Claims Process and the benefit all parties will receive from same.

33. Other Creditors, most notably Terrapin, advance Claims that purport to rank in priority to the Arres' Mortgages and can at least ground an argument that the Graybriar Funds are held entirely for their benefit and never form part of the "Exigible Property." While the current application does not seek to resolve any Claims, it is appropriate to pause here and at least consider the frailties of the Terrapin Claim. The Terrapin Claim arises as a result of Terrapin's own decision to advance the 179 Loan prior to the expiry of the appeal period on the Sale to Plaintiff Order and without requiring that proceeds be held until title issued. It seems inconceivable that a remedy in equity, which would have drastic consequences for the Debtor's third-party creditors, could be available in those circumstances. Even if it is, the Receiver has provided Terrapin with appellate level case authority[21] that confirms an equitable mortgage cannot prime a legal mortgage absent fraud or negligence by the first mortgagor. There is no possibility of negligence by, and no conduct to support fraud involving, the Debtor. Terrapin, however, remains unmoved by the facts and the law against it and continues to insist it somehow has a priority claim to the Graybriar Funds.

34. The feeble nature of the priority Claim asserted by Terrapin can be disregarded here because, even if Terrapin has some form of trust or other claim in equity to the Graybriar Funds, there are a host of common law authorities that allow a charge benefitting a court-officer to prime such trust or equity interest when effort is expended administering it.[22] In this jurisdiction, the inherent power of this Honourable Court to impose a charge on disputed trust assets is confirmed by Madam Justice Topolniski in ***Re Residential Warranty Company of Canada Inc,***[23] a case under the *BIA* that was affirmed on appeal.[24] Ultimately, the Receiver's Charge will secure the administration of the Claims Process which will benefit all claimants as it will provide some much needed certainty and finality to this matter. The Receiver does not dispute that a charge against the Graybriar Funds will reduce the beneficiaries' recovery to the extent that the Receiver draws its fees from such funds. However, that alone is not a sufficient reason to disallow the attachment of the Receiver's Charge. This Court has previously held that losses suffered by a specific beneficiary in

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[21] ***Elias Markets Ltd (Re)***, [2006] 274 DLR (4th) 166, 25 CBR (5th) 50 (ONCA) at paras 68–69 (Book of Authorities, Tab 8).
[22] See e.g. ***Harris v Conway*** (1987), [1989] 1 Ch 32 (HC (Eng)) (Book of Authorities, Tab 9); ***Ontario Securities Commission v Consortium Construction Inc,*** [1992] 9 OR (3d) 385, 93 DLR (4th) 321 (ONCA) (Book of Authorities, Tab 10).
[23] 2006 ABQB 236, 21 CBR (5th) 57 at para 84 **[*Residential*]** (Book of Authorities, Tab 11).
[24] ***Residential Warranty Company of Canada Inc (Re),*** 2006 ABCA 293, 275 DLR (4th) 498 (Book of Authorities, Tab 12).

relation to the expenses associated with the actions of a trustee in bankruptcy should not prevent the trustee from recovering its fees and disbursements through a charge against the trust assets, so long as the trustee's work has broadly benefitted the relevant assets:

> If, as a result of the Appeal, [the party asserting the trust] establishes a recoverable trust of the magnitude claimed, it will have suffered a loss by virtue of the charge. Nonetheless, that loss will have been incurred, broadly speaking, to benefit the trust in realizing assets and to determine entitlements.[25]

35. Without the Receiver's involvement it is likely that the litigation involving the Graybriar Funds will continue absent certainty or finality and that certain parties entitled to the Graybriar Funds will be irrevocably prejudiced. The confirmation that the Receiver's Charge extends over the Graybriar Funds is justified and appropriate in all of the circumstances.

B. The Court Funds

36. The Court Funds, being Funds paid into Court by a third party for the Debtor's benefit, clearly form part of the Debtor's estate and fall under the definition of Exigible Property. The leading case in Alberta dealing with trustees claiming priority over funds paid into court prior to bankruptcy, before a judgment has been executed, is ***Stone Sapphire Ltd v Transglobal Communications Group Inc.***[26] and the facts of that case are on all fours with the current matter.

37. In *Stone Sapphire,* this Court surveyed the authorities and held that a trustee has priority to funds paid into court unless:

(a) the monies are the subject of valid security;[27] or,

(b) the judgment creditor has completed execution, the funds are sufficiently 'earmarked', and the creditor has done all that it could to access the funds.[28]

38. There is no secured interest in this case, nor any evidence that the funds were "earmarked" for the third party. A payment into court does not elevate an unsecured judgment creditor to the

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[25] *Residential,* at para 84 (Book of Authorities, Tab 11).

[26] 2008 ABQB 575, 451 AR 128 **[*Stone Sapphire*]** (Book of Authorities, Tab 13), aff'd ***Stone Sapphire Ltd v Transglobal Communications Group Inc***, 2009 ABCA 125, [2009] 5 WWR 597 (Book of Authorities, Tab 14).

[27] *Stone Sapphire,* at para 11 (Book of Authorities, Tab 13).

[28] *Stone Sapphire*, at para 11 (Book of Authorities, Tab 13).

status of a secured creditor.[29] Therefore, neither of the situations altering a trustee's priority over funds arise in the case at hand.

39. The payment into court ordered in *Stone Sapphire* was not made by a third party on the company's behalf. However, the reasoning is applicable to the funds paid into court in this case for the purposes of staying the operation of a court order pending appeal. The cases considered in *Stone Sapphire* (and subsequent cases that have considered *Stone Sapphire)* were concerned with various types of payments into court:

> "The authorities cited are distinguishable on their unique facts, but the distinctions do not detract from the underlying principle applied in each case that regardless of the scenario giving rise to a payment into court, a judgment creditor is simply an unsecured creditor until it has completed execution proceedings. Unless the fruits of the proceedings are in the hands of the judgment creditor, it has no property interest in the asset."[30]

40. This is consistent with ***Transtrue Vehicle Safety Inc v Werenka****,* in which this Court held that the trustee in bankruptcy will prevail regarding funds paid into court where bankruptcy occurs before the matter is adjudicated and judgment executed.[31] Courts from other provinces have come to similar conclusions regarding entitlements to money paid into court and whether someone other than the trustee has a precedential claim to the bankrupt's property.[32] These authorities are analogous to the present case. Therefore, following *Stone Sapphire* and *Transtrue Vehicle,* the Receiver respectfully submits that the Court Funds form part of the Debtor's estate.

41. In the case at hand, there are no facts indicative of a trust and no extraordinary circumstances supporting the imposition of a constructive trust or the Court Funds. The 179 Loan was advanced by Terrapin to 179 Alberta pursuant to a loan agreement in a commercial context. A portion of the 179 Loan was then advanced by counsel to 179 Alberta to the Debtor's counsel to be paid into Court for the benefit of the Debtor. The Terrapin Claim lies against 179 Alberta and not against the Debtor or the Court Funds.

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[29] *Stone Sapphire,* at para 67 (Book of Authorities, Tab 13).

[30] *Stone Sapphire*, at para 34 [emphasis added] (Book of Authorities, Tab 13).

[31] 2015 ABQB 197, [2015] 10 WWR 336 **[*Transtrue Vehicle*]** (Book of Authorities, Tab 15).

[32] See e.g. ***Mikan Inc v Hillier****,* [2015] 28 CBR (6th) 228, 256 ACWS (3d) 272 [NLTD] (the judgment creditor's entitlement was held to be subordinate to the trustee's) (Book of Authorities, Tab 16); ***Tradmor Investments Ltd v Valdi Foods (1987) Inc***, 33 CBR (3d), 244 56 ACWS (3d) 12 (Ont Gen Div) (money paid into court as security for the claim was the property of the bankrupt and did not elevate the litigant's position to that of a secured creditor) (Book of Authorities, Tab 17).

V. RELIEF REQUESTED

42. For the foregoing reasons, the Receiver respectfully requests that this Honourable Court grant the relief as set out in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29TH DAY OF MAY, 2018.

McCarthy Tétrault LLP

"McCarthy Tétrault LLP"
Walker W. MacLeod / Pantelis Kyriakakis
Counsel to Alvarez & Marsal Canada Inc.

LIST OF AUTHORITIES

1. *Civil Enforcement Act*, RSA 2000, c C-15.

2. *Arres Capital Inc v Richcrooks Enterprises (2000) Ltd*, 2015 ABCA 392, [2016] AWLD 210.

3. *Judicature Act*, RSA 2000, c J-2.

4. Order (Claims Process) (135686 Alberta Ltd.) – January 25, 2018.

5. Order (Claims Procedure) (Mosaic Energy Ltd.) – September 14, 2016.

6. Order (Notice of Claims in respect of P&O Assets Ltd.) – January 12, 2015.

7. Order (Trust Claim Process) (Sprague-Rosser Contracting Co. Ltd. and Regional Municipality of Wood Buffalo) – April 6, 2017.

8. *Elias Markets Ltd (Re)*, [2006] 274 DLR (4th) 166, 25 CBR (5th) 50 (ONCA).

9. *Harris v Conway* (1987), [1989] 1 Ch 32 (HC (Eng)).

10. *Ontario (Securities Commission) v Consortium Construction Inc*, [1992] 9 OR (3d) 385, 93 DLR (4th) 321 (ONCA).

11. *Residential Warranty Company of Canada Inc (Re)*, 2006 ABQB 236, 21 CBR (5th) 57.

12. *Kingsway General Insurance Company v Residential Warranty Company of Canada Inc. (Trustee of)*, 2006 ABCA 293, 275 DLR (4th) 498.

13. *Stone Sapphire Ltd v Transglobal Communications Group Inc*, 2008 ABQB 575, 451 AR 128.

14. *Stone Sapphire Ltd v Transglobal Communications Group Inc*, 2009 ABCA 125, [2009] 5 WWR 597.

15. *Transtrue Vehicle Safety Inc v Werenka*, 2015 ABQB 197, [2015] 10 WWR 336.

16. *Mikan Inc v Hillier*, [2015] 28 CBR (6th) 228, 256 ACWS (3d) 272 (NLTD).

17. *Tradmor Investments Ltd v Valdi Foods (1987) Inc*, 33 CBR (3d) 244, 56 ACWS (3d) 12 (Ont Gen Div).

TAB 1

Province of Alberta

CIVIL ENFORCEMENT ACT

Revised Statutes of Alberta 2000
Chapter C-15

Current as of December 17, 2014

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(kk) "Personal Property Registry" means the Personal Property Registry established under the *Personal Property Security Act*;

(ll) "property" includes

(i) things, as well as rights or interests in things,

(ii) anything regarded in law or equity as property or as an interest in property,

(iii) any right or interest that can be transferred for value from one person to another,

(iv) any right, including a contingent or future right, to be paid money or receive any other kind of property, and

(v) any cause of action;

(mm) "related writ" means

(i) in respect of a particular enforcement debtor, a writ that would be disclosed if a distribution seizure search was conducted of the Personal Property Registry using the name of that debtor as shown on the instructing creditor's writ, and

(ii) in respect of a defendant under Part 3, a writ that would be disclosed if a distribution seizure search was conducted of the Personal Property Registry using the name of that defendant as shown on the attachment order;

(nn) "secured obligation" means an obligation secured by an interest in property;

(nn.1) "security" means a security within the meaning of the *Securities Transfer Act*;

(oo) "security certificate" means a security certificate within the meaning of the *Securities Transfer Act*;

(pp) "seizure documents" means the documents prescribed by regulation for the purposes of instructing an agency to carry out a seizure of personal property;

(qq) "serial number goods" means serial number goods as defined in the regulations made under the *Personal Property Security Act*;

TAB 2

In the Court of Appeal of Alberta

Citation: Arres Capital Inc v Richcrooks Enterprises (2000) Ltd, 2015 ABCA 392

Date: 20151216
Docket: 1501-0006-AC
Registry: Calgary

Between:

Arres Capital Inc.

Respondent
(Plaintiff)

- and -

Richcrooks Enterprises (2000) Ltd. and Richcrooks Holdings Ltd., 515476 Alberta Ltd., Demel Financial Corp., Greenmar Holdings Inc., Access Mortgage Investment 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

Appellants
(Plaintiffs/Applicants)

- and -

Graybriar Land Company Ltd. and Graybriar Greens Inc.

Not a Party to the Application
(Defendants)

- and -

Terrapin Mortgage Investment Corp. and 1798583 Alberta Ltd.

Respondents
(Respondents)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order by
The Honourable Madam Justice J. Strekaf
Dated the 17th day of December, 2014
Filed on the 5th day of January, 2015
(Dockets: 0901-02753; 0901-03332)

Memorandum of Judgment
Delivered from the Bench

Fraser C.J.A. (for the Court):

[1] This appeal concerns the decision of the chambers judge to require an undertaking from the appellants in support of orders which affected earlier orders for foreclosure of seven condominium units and her refusal to accept the undertaking offered. It also concerns the ability of the chambers judge and the Queen's Bench to act to prevent the respondent trustee, Arres Capital Inc, from proceeding to take into hand the proceeds of judicial sales of four of those units and to influence the proceeds of sale of the others. The appellants say that allowing Arres to do so would continue misappropriation, conversion, breach of fiduciary duty, and breach of trust agreements by Arres.

[2] In the order under appeal, the chambers judge sought to back up her earlier direction that the appellants give an undertaking that is "meaningful" in order to justify the limitations on the earlier orders for foreclosure. We have concluded that the chambers judge erred in rejecting the undertaking offered by Access Mortgage Investment Corporation (2004) Limited.

[3] We are persuaded that the chambers judge's original assessment of the character of the events before her was flawed. The material before her gave rise to a serious basis to question Arres's entitlement to maintain control of the foreclosure process and to receive, in priority to the appellants, any of the proceeds of judicial sales under the foreclosure orders. The chambers judge proceeded on the assumption that the appellants had no interest in the condominium units. But this is not so. The appellants are the beneficial owners of the units, at least to the extent of representing 61% of the value of those units. In addition, the claims of Arres were disputed and facially disputable. Further, the appellants were prepared to have all the proceeds of sale of the units kept in trust pending resolution of the outstanding litigation. Seen in that light, we are satisfied that in the unique circumstances of this case, the undertaking offered was sufficient.

[4] Without commenting on the merits, we conclude that it would be contrary to the interests of justice to allow the foreclosures to proceed unrestricted and for the proceeds of judicial sales of the units to be distributed without control of the Court. The most appropriate course for all concerned, including the creditor Terrapin Mortgage Investment Corp. who advanced money on the strength of the foreclosure order, is to require that the proceeds of judicial sales of the seven units be paid into Court and then have the Court determine who has the rights to such proceeds and whose rights have priority.

[5] Accordingly, we allow the appeal. We order that the units be sold under judicial approval in the manner agreed to by a consent order made in October, 2015 which this Court has examined. However, we order that the proceeds of such judicially approved sales be paid into Court and disbursed only in accordance with further Court order.

[6] We encourage the parties to proceed to resolve their outstanding litigation with dispatch. To this end, we encourage the appointment of a case manager over all disputes as well as exploration of the possibility of judicial dispute resolution.

Appeal heard on December 9, 2015

Memorandum filed at Calgary, Alberta
this 16th day of December, 2015

Fraser C.J.A.

Appearances:

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

T. Akbar and L. V. Halyn
for the Appellants Richcrooks Enterprises and others

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

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

TAB 3

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 15, 2017

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(i) the administration of justice where there exists no adequate remedy at law, and

(j) a grant of injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse legal title.

(4) The rules of decision in matters mentioned in subsection (3), except where otherwise provided, shall be the same as governed the Court of Chancery in England in like cases on July 15, 1870.

RSA 1980 cJ-1 s5

Pronouncement on wills, etc.

6(1) The Court has jurisdiction

(a) to try the validity of last wills and testaments, whether relating to real or personal estate and whether probate has been granted or not, and

(b) to pronounce the wills and testaments to be void for fraud and undue influence or otherwise,

in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.

(2) The Court has the same jurisdiction as the Court of Chancery had in England on July 15, 1870, with regard to

(a) leases and sales of settled estates,

(b) enabling infants with the approbation of the Court to make binding settlements of their real and personal estates on marriage, and

(c) questions submitted for the opinion of the Court in the form of special cases on the part of those persons that by themselves, their committees or guardians, or otherwise, concur therein.

RSA 1980 cJ-1 s6

Jurisdiction regarding lunatics

7 In the case of lunatics and their property and estates, the jurisdiction of the Court includes, subject to the Rules of Court, the jurisdiction that in England is conferred on the Lord High Chancellor by a Commission from the Crown under the Sign Manual.

RSA 1980 cJ-1 s7

General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either

absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

TAB 4

COURT FILE NUMBER	1201-10692
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT(S)	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AND IN THE MATTER OF 135686 ALBERTA LTD.
DOCUMENT	**ORDER (Claims Process)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCARTHY TÉTRAULT LLP Barristers & Solicitors Sean F. Collins / Walker W. MacLeod / Pantelis Kyriakakis Suite 3300, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Phone: 403-260-3500 Fax: 403-260-3501 Email: scollins@mccarthy.ca / wmacleod@mccarthy.ca / pkyriakakis@mccarthy.ca

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED
JAN 25 2018
CLERK OF THE COURT

I hereby certify this to be a true copy of the original
Dated this 25 day of Jan 18
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: **January 25, 2018**

NAME OF JUDGE WHO MADE THIS ORDER: **Justice B.E.C. Romaine**

LOCATION OF HEARING: **Calgary, Alberta**

UPON the application (the "**Application**") of Ernst & Young Inc., in its capacity as court appointed receiver and manager (the "**Receiver**") of the assets, properties, and undertakings (the "**Property**") of 1357686 Alberta (the "**Debtor**") pursuant to an order issued in the within proceedings on June 16, 2014 (the "**Receivership Order**") to establish a claims process in respect of the Debtor, as outlined in Appendix "**A**" hereto; **AND UPON** having read the Second Report of the Receiver Ernst & Young Inc., dated January 16, 2018 (the "**Second Receiver's Report**"); **AND UPON** having read the Affidavit of Service of Katie Doran, sworn January 18, 2018 (the "**Service Affidavit**"); **AND UPON** hearing counsel for the Receiver and any other counsel present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the Application and the Second Receiver's Report is abridged, the Application is properly returnable today, service of the Application and the Second Receiver's Report on the service list, in the manner described in the Service Affidavit, is good and sufficient, and no other persons, other than those listed on the service list (the "**Service List**") attached as an exhibit to the Service Affidavit, are entitled to service of the Application or the Second Receiver's Report.

DEFINED TERMS

2. Capitalized terms used herein or not otherwise defined shall have the meaning ascribed to such terms in the Claims Process attached as Appendix "**A**" hereto (the "**Claims Process**").

APPROVAL OF CLAIMS PROCESS

3. The Claims Process for determining any and all Claims of all Creditors is hereby approved and the Receiver is authorized and directed to implement the Claims Process.

4. The form of Instruction Letter, Proof of Claim, Newspaper Notice and Notice of Revision or Disallowance, all as set forth in the attached Appendix "**B**", Appendix "**C**", Appendix "**D**" and Appendix "**E**", respectively, are approved.

CLAIMS BAR DATE

5. Any Creditor who has a Claim against the Debtor as of the Filing Date and who has not, as of the Claims Bar Date, either:

(a) received an Instruction Letter form, from the Receiver, setting out the classification and quantum of such Creditor's Claim; or

(b) submitted a Proof of Claim to the Receiver in respect of a Claim, in accordance with this Claims Process;

shall be forever barred, estopped and enjoined from asserting such Claim against the Debtor and such Claim shall be forever extinguished, unless otherwise ordered by the Court.

NOTICE OF TRANSFEREES

6. If a Creditor or any subsequent holder of a Claim who has been acknowledged by the Debtor as the holder of the Claim transfers or assigns that Claim to another Person, the Receiver shall not be required to give notice to or to otherwise deal with the transferee or assignee of the Claim as the holder of such Claim unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been delivered to the Receiver. Thereafter, such transferee or assignee shall, for all purposes hereof, constitute the holder of such Claim and shall be bound by notices given and steps taken in respect of such Claim in accordance with the provisions of the Claims Process.

7. If a Creditor or any subsequent holder of a Claim who has been acknowledged by the Receiver as the holder of the Claim transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person or Persons, such transfers or assignments shall not create separate Claims and such Claims shall continue to constitute and be dealt with as a single Claim notwithstanding such transfers or assignments. The Receiver shall not, in each such case, be required to recognize or acknowledge any such transfers or assignments and shall be entitled to give notices to and to otherwise deal with such Claim only as a whole and then only to and with the Person last holding such Claim provided such Creditor may, by notice in writing delivered to the Receiver, direct that subsequent dealings in respect of such Claim, but only as a whole, shall be dealt with by a specified Person and, in such event, such Person shall be bound by any notices given or steps taken in respect of such Claim with such Creditor in accordance with the provisions of the Claims Process.

NOTICE AND COMMUNICATION

8. Except as otherwise provided herein, the Receiver may deliver any notice or other communication to be given under this Order to Creditors or other interested Persons by forwarding true copies thereof by ordinary mail, courier, personal delivery, facsimile or email to such Creditors or Persons at the address last shown on the books and records of the Debtor, and that any such notice by courier, personal delivery, facsimile or email shall be deemed to be received on the next Business Day following the date of forwarding thereof, or, if sent by ordinary mail on the third Business Day after mailing within Alberta, the fifth Business Day after mailing within Canada, and the tenth Business Day after mailing internationally.

9. Any notice or other communication to be given under this Order by a Creditor to the Receiver shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by registered mail, courier, email (in PDF format), personal delivery or facsimile transmission and addressed to:

Ernst & Young Inc., Receiver of 1357686 Alberta Ltd.
Attention: Jessica Caden
Ernst & Young Inc.
2200 – 215 2nd Street SW
Calgary, Alberta T2P 1M4
E mail: Jessica.caden@ca.ey.com
Fax: 403-206-5075

10. In the event that the day on which any notice or communication required to be delivered pursuant to the Claims Process is not a Business Day then such notice or communication shall be required to be delivered on the next Business Day.

GENERAL

11. The Receiver is authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which Proofs of Claim are submitted, completed and executed and may, if satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of the Claims Process and this Order as to the submission, completion and execution of Proofs of Claim.

12. References in this Order to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

13. Notwithstanding the terms of this Order, the Receiver or any interested Person may apply to this Court from time to time for such further order or orders as it considers necessary or desirable to amend, supplement or modify the Claims Process or this Order.

14. Service of this Order on the service list by email, facsimile, registered mail, courier, or personal delivery shall constitute good and sufficient service of this Order, and no Persons, other than those on the Service List, are entitled to be served with a copy of this Order. Service is deemed to be effected the next business day following the transmission or delivery of such documents.

15. Service of this Order on any party not attending this application is hereby dispensed with.

J.C.Q.B.A.

APPENDIX "A" TO CLAIMS PROCESS ORDER
CLAIMS PROCESS

DEFINITIONS

1. For purpose of this Claims Process the following terms shall have the following meanings:

(a) "**Business Day**" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Calgary, Alberta;

(b) "**CCAA**" means the *Companies' Creditors Arrangement Act* (Canada), as may be subsequently amended and restated;

(c) "**Claim**" has the meaning ascribed to it in the CCAA;

(d) "**Claims Bar Date**" means 5:00 p.m. (Mountain Time) on February 22, 2018 or such other date as may be ordered by the Court;

(e) "**Claims Package**" means the document package which shall include the Instruction Letter, a Proof of Claim and such other materials as the Receiver considers necessary or appropriate;

(f) "**Claims Process**" means the procedures outlined herein in connection with the assertion of any Claim against the Debtor;

(g) "**Claims Process Order**" means the Order pronounced by Justice B.E.C. Romaine of the Court of Queen's Bench of Alberta on January 25, 2018 approving this Claims Process;

(h) "**Court**" means the Court of Queen's Bench of Alberta;

(i) "**Creditor**" means any Person asserting a Claim against the Debtor as of the Filing Date;

(j) "**Debtor**" means 1357686 Alberta Ltd.

(k) "**Filing Date**" means August 24, 2012.

(l) "**Instruction Letter**" means the letter providing instructions on the completion of a Proof of Claim, which letter shall be substantially in the form attached to the Claims Process Order as Appendix "**B**";

(m) "**Known Creditors**" means Creditors which the books and records of the Debtor disclose as having a Claim against the Debtor as of the Filing Date;

(n) "**Receiver**" means Ernst & Young Inc., in its capacity as the Court appointed receiver and manager of the Debtor, and not in its personal capacity or corporate capacity;

(o) "**Newspaper Notice**" means the notice of the Claims Process to be published in the newspapers in accordance with the Claims Process in substantially the form attached to the Claims Process Order as Appendix "**D**";

(p) "**Notice of Revision or Disallowance**" means the form sent by the Receiver revising or disallowing a Proof of Claim submitted by any Person, which notice shall be substantially in the form attached to the Claims Process Order as Appendix "**E**";

(q) "**Person**" shall be broadly interpreted and includes an individual, firm, partnership, joint venture, venture capital fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government or a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, instrumentality or department of such government or political subdivision, or any other entity, however designated or constituted, and the trustees, executors, administrators, or other legal representatives of any individual;

(r) "**Proof of Claim**" means the form setting forth a Creditor's Claim, which proof of claim shall be substantially in the form attached to the Claims Process Order as Appendix "**C**";

(s) "**Proven Claim**" means the quantum and classification of the Claim of a Creditor as finally determined in accordance with the Claims Process, provided that a

Proven Claim will be "finally determined" in accordance with the Claims Process when: (i) it has been accepted by the Receiver; (ii) the applicable time period for challenging a Notice of Revision or Disallowance issued by the Receiver has expired and the Creditor has not taken the steps required by this Claims Process to challenge such Notice of Revision or Disallowance; or (iii) any court of competent jurisdiction has made a determination with respect to the classification and quantum of the Claim and no appeal or motion for leave to appeal therefrom shall have been taken or served on either party, or if any appeal(s) or motion(s) for leave to appeal or further appeal shall have been taken therefrom or served on either party, any and all such appeal(s) or motion(s) shall have been dismissed, determined or withdrawn;

(t) "**Website**" means the website established by the Receiver and located at www.ey.com/ca/foundationgroup;

NOTICE OF CLAIMS PROCESS

2. The Receiver shall cause a Claims Package to be sent to each Known Creditor by regular prepaid mail, courier, facsimile or email on or prior to January 29, 2018.

3. The Receiver shall cause the Newspaper Notice to be published in the *Calgary Herald* and any other newspaper the Receiver consider advisable, on or prior to February 2, 2018.

4. The Receiver shall cause the Claims Package to be posted on the Website on or prior to January 29, 2018.

5. The Receiver shall cause a copy of a Proof of Claim to be sent to any Person requesting such material as soon as practicable.

PROOFS OF CLAIM SENT TO KNOWN CREDITORS

6. On or before January 29, 2018, the Receiver shall send to each Known Creditor an Instruction Letter setting out the classification and quantum of such Known Creditor's Claim, as of the Filing Date.

7. Any Known Creditor who wishes to challenge the classification or quantum of the Claim as set out in the Instruction Letter delivered to it by the Receiver shall, on or before the Claims

Bar Date, send a completed Proof of Claim to the Receiver setting out the Creditor's revised classification and quantum of the Claim.

8. Any Known Creditor who fails to comply with paragraph 7 of this Claims Process shall be deemed to have accepted the classification and quantum of its Claim as set forth in the Instruction Letter, shall have a Proven Claim in the quantum and with the classification specified in the Instruction Letter and shall be forever barred, enjoined and estopped from challenging the classification and quantum of its Claim as set forth in the Instruction Letter delivered to it by the Receiver, except as otherwise may be ordered by the Court.

OTHER PERSONS ASSERTING CLAIMS

9. Any other Person who has a Claim against the Debtor, as of the Filing Date, and who wishes to assert such Claim against the Debtor shall, on or before the Claims Bar Date, send a completed Proof of Claim to the Receiver setting out the classification and quantum of its Claim.

10. Any Person who fails to comply with Paragraph 9 of this Claims Process shall be forever barred, enjoined and estopped from asserting such Claim against the Debtor and such Claim shall be forever extinguished, except as otherwise may be ordered by the Court.

RESOLUTION OF CLAIMS

11. The Receiver shall review any Proof of Claim that is submitted to it on or before the Claims Bar Date and, subject to the terms of this Order, may accept, revise or disallow the Proof of Claim.

12. The Receiver may attempt to consensually resolve the classification or quantum of any Proof of Claim submitted by any Person prior to the Receiver accepting, revising or disallowing such Proof of Claim.

13. In the event that the Receiver elects to accept the quantum and classification of the Claim as set forth in the Proof of Claim, the Creditor shall have a Proven Claim in the quantum and with the classification specified in the Proof of Claim submitted by that Person.

14. In the event that the Receiver elects to revise or disallow the Proof of Claim, the Receiver shall send a Notice of Revision or Disallowance setting out the revision or disallowance of the Proof of Claim.

15. Any Person who wishes to dispute the Notice of Revision or Disallowance received from the Receiver shall, within fifteen days of receipt of the Notice of Revision or Disallowance from the Receiver, file an Application before the Court for the determination of its Claim.

16. Any Person who receives a Notice of Revision or Disallowance from the Receiver and who fails to comply with Paragraph 15 of this Claims Process shall be deemed to have accepted the classification and quantum of its Claim as set forth in the Notice of Revision or Disallowance, shall have a Proven Claim in the quantum and with the classification specified in the Notice of Revision or Disallowance and shall be forever barred, enjoined and estopped from challenging the classification and quantum of its Claim as set forth in the Notice of Revision or Disallowance delivered to it by the Receiver, except as otherwise may be ordered by the Court.

CURRENCY OF CLAIMS

17. Any Claim set out in a Proof of Claim shall be denominated in Canadian dollars, failing which such Claim shall be converted to and shall constitute obligations in Canadian dollars and such calculation will be effected using the noon spot rate of the Bank of Canada as of the date of the Claims Process Order.

APPENDIX "B" TO CLAIMS PROCESS ORDER
INSTRUCTION LETTER FOR THE CLAIMS PROCESS OF 1357686 ALBERTA LTD.
(THE "DEBTOR")

NOTICE TO CREDITORS OF THE DEBTOR

1. **TO: [NAME AND ADDRESS OF CREDITOR]**

On August 24, 2012, the Debtor applied for and received protection from its creditors by order of the Court of Queen's Bench of Alberta (the "**Court**"). Ernst & Young Inc. (the "**Receiver**") was subsequently appointed as receiver and manager of the Debtor's property, assets, and undertakings, by Order of the Court on June 16, 2014.

On January 25, 2018, the Court granted a further order prescribing a process by which the identity and status of all creditors of the Debtor and the amounts of their claims will be established for the purposes of the Debtor's receivership proceedings (the "**Claims Process Order**"). A copy of the Claims Process Order may be viewed at www.ey.com/ca/foundationgroup. All capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Claims Process Order.

Pursuant to the Claims Process Order, the Receiver is to send a notice to each Known Creditor of the Debtor (the "**Notice to Creditor**") indicating the amount of such Creditor's Claim as of August 24, 2012. In the case of the Claims of Creditors whose claims are disputed, a Notice to Creditor will be sent containing the amount which the Debtor is prepared to allow as a Claim by such Creditor.

THE DEBTOR HAS REVIEWED ITS BOOKS AND RECORDS AND ACCEPTED YOUR CLAIM AS FOLLOWS:

Classification: _____

Quantum: _____

IN THE EVENT THAT YOU AGREE WITH THE ASSESSMENT OF YOUR CLAIM AS SET FORTH HEREIN YOU NEED TO TAKE NO FURTHER ACTION.

HOWEVER, IF YOU WISH TO DISPUTE THE ASSESSMENT OF YOUR CLAIM, OR IF YOU DID NOT RECEIVE A COMPLETED NOTICE TO CREDITOR FROM THE RECEIVER, YOU MUST TAKE THE STEPS OUTLINED BELOW.

The Claims Process Order provides that if a Known Creditor disagrees with the assessment of its Claim set out in this Notice to Creditor, the Known Creditor must complete and return to the Receiver, on or before 5:00 pm (MST) on February 22, 2018, a completed Proof of Claim advancing its Claim in a different classification or quantum. A blank Proof of Claim form is enclosed herewith. If any Known Creditor fails to comply with these requirements the Known Creditor shall conclusively be deemed to have accepted the classification and quantum of its Claim, as shown in this Notice to Creditor, unless otherwise ordered by the Court.

The Claims Process Order also provides that any Person who does not receive a Notice to Creditor and who wishes to advance Claims against the Debtor must complete and forward to

the Receiver, a completed Proof of Claim on or before 5:00 pm (MST) on February 22, 2018. Any Person who fails to comply with these requirements shall be forever barred, enjoined and estopped from asserting such Claims against the Debtor and such Claims shall be forever extinguished, except as may otherwise may be ordered by the Court.

Claims not proven in accordance with the procedures set out above shall, except as may otherwise be ordered by the Court, are deemed to be forever barred and may not thereafter be advanced against the Debtor.

If you have any questions regarding the claims process or the attached materials, please contact Jessica Caden of Ernst & Young Inc. at 403-206-5394.

Dated the _____ day of January, 2018 in Calgary, Alberta.

Ernst & Young Inc., in its capacity as
Receiver of 1357686 Alberta Ltd.

Per:

_____

APPENDIX "C" TO CLAIMS PROCESS ORDER
PROOF OF CLAIM AGAINST 1357686 ALBERTA LTD.
(THE "DEBTOR")

For Claims Arising On or Before August 24, 2012
(See Reverse for Instructions)

Regarding the claim of _____ (referred to in this form as "the creditor")
(name of creditor)

All notices or correspondence regarding this claim to be forwarded to the creditor at the following address:

_____

_____

_____

Telephone: _____ Fax: _____

I, _____ residing in the _____
(name of person signing claim) **(city, town, etc.)**

of _____ in the Province of _____
(name of city, town, etc.)

Do hereby certify that:

1. ☐ I am the creditor

OR ☐ I am _____ of the creditor.
(if an officer or employee of the company, state position or title)

2. I have knowledge of all the circumstances connected with the claim referred to in this form.

3.A The debtor was, as at August 24, 2012, and still is indebted to the creditor in the sum of $_____ as shown by the statement of account attached hereto and marked Schedule "A". Claims should **not** include the value of goods and/or services supplied or claims arising after August 24, 2012. If a creditor's claim is to be reduced by deducting any counter claims to which the Debtor is entitled and/or amounts associated with the return of equipment and/or assets by the Debtor, please specify.

The statement of account must specify the vouchers or other evidence in support of the claim including the date and location of the delivery of all services and materials. Any claim for interest must be supported by contractual documentation evidencing the entitlement to interest.

B The indebtedness referred to in paragraph 3.A is in the following currency:

☐ Canadian Dollars

☐ United States Dollars

4.A ☐ **Unsecured claim.** $ _____. In respect to the said debt, the creditor does not and has not since August 24, 2014, held any assets of the Debtor as security.

B ☐ **Secured claim.** $ _____. In respect of the said debt, the creditor holds assets of the Debtor valued at $ _____ as security:

Provide full particulars of security, *including the date on which the security was given and the value at which the creditor assesses the security together with the basis of valuation, and attach a copy of the security documents as Schedule "B".*

Dated at _____, this _____ day of _____, 2018.

_____ _____

Witness

Must be signed and witnessed

Instructions for Completing Proof of Claim Forms

In completing the attached form, your attention is directed to the notes on the form and to the following requirements:

Proof of Claim:

1. The form must be completed by an individual and not by a corporation. If you are acting for a corporation or other person, you must state the capacity in which you are acting, such as, "Credit Manager", "Treasurer", "Authorized Agent", etc., and the full legal name of the party you represent.

2. The person signing the form must have knowledge of the circumstances connected with the claim.

3. A. A Statement of Account containing details of secured and unsecured claims, and if applicable, of the amount due in respect of property claims, and must be attached and marked Schedule "A". Claims should **not** include the value of goods and/or services arising after August 24, 2012. It is necessary that all creditors indicate the date and location of the delivery of all goods and/or services. Any amounts claimed as interest should be clearly noted as being for interest.

   B. Tick the appropriate currency.

4. The nature of the claim must be indicated by ticking the type of claim which applies. e.g. –

   Ticking (A) indicates the claim is unsecured;

   Ticking (B) indicates the claim is secured, such as a mortgage, lease or other security interest, and the value of which the creditor assesses the security must be inserted, together with the basis of valuation. Details of each item of security held should be attached as Schedule "B" and submitted with a copy of the chattel mortgage, conditional sales contract, security agreement, etc.;

   A creditor may have separate claims in different categories, in which case a separate claim form must be submitted for each claim.

5. The person signing the form must insert the place and date in the space provided, and the signature must be witnessed.

Send a copy of the completed Proof of Claim, by 5:00 pm (MST) on February 22, 2018, to the Receiver at the below addresses:

Ernst & Young Inc.
Attn: Jessica Caden
2200 – 215 2nd Street SW
Calgary, AB T2P 1M4

Additional information regarding the Debtor's proceedings, as well as copies of claims documents may be obtained at http://www.ey.com/ca/foundationgroup. If there are any

questions in completing the Proof of Claim, please contact Jessica Caden of Ernst & Young Inc. at 403-206-5394.

APPENDIX "D" TO CLAIMS PROCESS ORDER
NEWSPAPER NOTICE

NOTICE TO CREDITORS OF 1357686 ALBERTA LTD.

On August 24, 2012, 1357686 Alberta Ltd. (the "**Debtor**") applied for and received protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the "**CCAA**") by virtue of an order of the Court of Queen's Bench of Alberta (the "**Court**") granted on August 24, 2012. Subsequently, on June 16, 2014, the Debtor's proceedings under the CCAA were terminated and Ernst & Young Inc. was appointed as the receiver and manager (the "**Receiver**") of all of the Debtor's property, assets, and undertakings.

On January 25, 2018 the Court granted further orders establishing a process by which the identity and status of all creditors of the Debtor and the amounts of their claims would be established for purposes of the Debtor's receivership proceedings (the "**Claims Process Order**"). A copy of the Claims Process Order may be viewed at www.ey.com/ca/foundationgroup, or may be obtained by contacting the Receiver at 403-206-5394.

Pursuant to the Claims Process Order the Receiver was required, by January 29, 2018, to send a notice to each known creditor of the Debtor (the "**Notice to Creditor**"), indicating the amount of such creditor's claim as of August 24, 2012. In the case of the claims of creditors whose claims are disputed, a Notice to Creditor was sent containing the amount which the Debtor is prepared to allow as a claim by such creditor.

CREDITORS RECEIVING A *NOTICE TO CREDITOR* WHO AGREE WITH THE AMOUNT SHOWN AS OWED TO THEM BY THE DEBTOR IN THE *NOTICE TO CREDITOR* NEED TAKE NO FURTHER STEPS TO PROVE OR PRESERVE THEIR CLAIMS.

ANY CREDITOR HAVING A CLAIM AGAINST THE DEBTOR WHO HAS NOT RECEIVED A *NOTICE TO CREDITOR* OR WHO DISAGREES WITH THE CLASSIFICATION OR QUANTUM OF THE CLAIM AS INDICATED IN THE *NOTICE TO CREDITOR* MUST FILE A PROOF OF CLAIM WITH THE RECEIVER IN THE PRESCRIBED FORM BEFORE 5:00 PM (MST) ON FEBRUARY 22, 2018. CLAIMS NOT PROVEN IN ACCORDANCE WITH THESE PROCEDURES SHALL BE DEEMED TO BE FOREVER BARRED AND EXTINGUISHED AND MAY NOT BE ADVANCED AGAINST THE DEBTOR, EXCEPT AS MAY BE OTHERWISE ORDERED BY THE COURT.

Any creditor who chooses to file a Proof of Claim is required to provide whatever supporting documentation they may have, such as contracts, bonds, investment forms, cancelled cheques, bills of sale, receipts, or invoices in support of their claim, as at August 24, 2012.

All claims must be made in the prescribed "Proof of Claim" form together with the required supporting documentation and be received by the Receiver on or before the Claims Bar Date, being 5:00 pm (MST) on February 22, 2018.

The prescribed "Proof of Claim" form may be found at www.ey.com/ca/foundationgroup or can otherwise be obtained by contacting:

Ernst & Young Inc.
Attn: Jessica Caden

2200 – 215 2nd Street SW
Calgary, AB T2P 1M4

Phone: 403-206-5394
Fax: 403-206-5075

Ernst & Young Inc., in its capacity
as Receiver of 1357686 Alberta Ltd.

APPENDIX "E" TO CLAIMS PROCESS ORDER
NOTICE OF REVISION OR DISALLOWANCE FOR CLAIMS AGAINST 1357686 ALBERTA LTD. (THE "DEBTOR")

NOTICE OF REVISION OR DISALLOWANCE

TO: [NAME AND ADDRESS OF CREDITOR]

DATE:

PROOF OF CLAIM NO:

Take notice that Ernst & Young Inc., appointed the receiver and manager (the "**Receiver**") of all of the Debtor's property, assets, and undertakings pursuant to the order granted on June 16, 2014 (the "**Receivership Order**"), has reviewed the Proof of Claim you submitted against the Debtor, as part of the Debtor's Claims Process pursuant to the order issued by the Court of Queen's Bench of Alberta on January 25, 2018 (the "**Claims Process Order**"). All capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Claims Process Order.

The Receiver has revised your Proof of Claim as follows:

Classification: _____

Quantum: _____

IF YOU WISH TO DISPUTE THE REVISION OR DISALLOWANCE OF YOUR CLAIM AS SET FORTH HEREIN YOU MUST TAKE THE STEPS OUTLINED BELOW.

The Claims Process Order provides that if you disagree with the revision or disallowance of your claim as set out in this Notice of Revision or Disallowance, you must, within fifteen days of receipt of this Notice of Revision or Disallowance from the Receiver, file an application before the Court of Queen's Bench of Alberta for the determination of your Claim. If you fail to file an application before the Court of Queen's Bench of Alberta for the determination of your Claim in the timeframe specified herein you shall be deemed to have accepted the classification and quantum of your Claim as set forth in this Notice of Revision or Disallowance, shall have a Proven Claim in the quantum and with the classification specified in this Notice of Revision or Disallowance and shall be forever barred, enjoined and estopped from challenging the classification and quantum of the Claim as set forth in this Notice of Revision or Disallowance, except as otherwise may be ordered by the Court.

If you have any questions regarding the claims process or the attached materials, please contact Jessica Caden of Ernst & Young Inc. at 403-206-5394.

Dated the _____ day of _____, 2018 in Calgary, Alberta.

Ernst & Young Inc., in its capacity as
Receiver 1357686 Alberta Ltd.

Per: _____

TAB 5

COURT FILE NUMBER	1601-05495
COURT	Court of Queen's Bench of Alberta
JUDICIAL CENTRE	Calgary
PLAINTIFF	NATIONAL BANK OF CANADA
DEFENDANT	MOSAIC ENERGY LTD.
	IN THE MATTER OF THE RECEIVERSHIP OF MOSAIC ENERGY LTD.
APPLICANT	ERNST & YOUNG INC. in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of MOSAIC ENERGY LTD.
DOCUMENT	**ORDER (CLAIMS PROCEDURE)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 400 3rd Avenue SW, Suite 3700 Calgary, Alberta T2P 4H2 CANADA Tel: +1 403.267.8222 Fax: +1 403.264.5973 Email: howard.gorman@nortonrosefulbright.com randal.vandemosselaer@nortonrosefulbright.com Attention: Howard A. Gorman, Q.C. / Randal S. Van de Mosselaer File no.: 01128610-0068

JUDICIAL CENTRE OF CALGARY
Clerk's stamp
FILED
SEP 14 2016
CLERK OF THE COURT

I hereby certify this to be a true copy of the original Order
Dated this 14 day of Sept
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: September 14, 2016
NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mr. Justice A.D. Macleod
LOCATION OF HEARING: Calgary, Alberta

UPON THE APPLICATION of Ernst & Young Inc., in its capacity as Court-appointed receiver (the "**Receiver**") of the current and future assets, undertakings and properties of Mosaic Energy Ltd. ("**Mosaic**"); **AND UPON** having read the Receivership Order granted by the Honourable Justice P.R. Jeffrey dated April 26, 2016, filed (the "**Receivership Order**"); **AND UPON** reviewing the Second report of the receiver (the "**Second Report**"), hearing submissions from counsel for the Receiver, and from any other parties present,

IT IS HEREBY ORDERED THAT:

Approval of claims procedures

1. The procedure set forth in the attached **Schedule "A"** for determining claims of creditors, other than the claims of employees or former employees, of Mosaic (the "**Claims**

Procedure") is hereby approved, and the Receiver is authorized and directed to implement the Claims Procedure.

2. The procedure set forth in the attached **Schedule "B"** for determining the claims of employees and former employees of Mosaic (the "**Employee Claims Procedure**") is hereby approved, and the Receiver is authorized and directed to implement the Employee Claims Procedure.

3. Nothing in this Claims Procedure Order shall apply to the Plaintiff in this action or to the Plaintiff's Claim against Mosaic, which Claim shall be unaffected by the provisions of this Claims Procedure Order and the Claims Procedure.

Interpretation and General Provisions

4. The time for service of the Notice of Application for this Order is hereby abridged and deemed good and sufficient and this Application is properly returnable today.

5. For the purposes of this Claims Procedure Order, the Claims Procedure, the Employee Claims Procedure, and any of the notices appended hereto or set forth herein, the following terms shall have the following meanings:

   a) "**Business Day**" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Calgary, Alberta;

   b) "**Calendar Day**" means a day, including Saturday, Sunday, or any statutory holiday;

   c) "**Claim**" any right or claim of any Person (other than the Plaintiff) that exists as of the date of this Order against Mosaic, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued or accruing thereon, or costs payable in respect thereof, including without limitation, any claim arising in tort (whether intentional or unintentional), breach of contract or other agreement, breach of duty (including, without limitation, any legal, statutory, express, implied, equitable or fiduciary duty) or by reason of any right of ownership to title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive, or otherwise) and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any

right or claim is executory or anticipatory in nature including, without limitation, any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future, which indebtedness, liability, or obligation, and any interest accrued thereon or costs payable in respect thereof would be a debt provable in bankruptcy had Mosaic become bankrupt, and **includes:**

i. that portion of any Claim (as defined herein) that is secured by security validly charging or encumbering property or assets of Mosaic (including statutory and possessory liens) up to the value of such collateral and duly and properly perfected in accordance with the relevant legislation in the appropriate jurisdiction as of the date hereof;

ii. any right or claim of an Employee as against Mosaic arising out of his or her employment, or the termination of such employment, including without limitation any claim for salary, pay, vacation pay, statutory, contractual or common law severance in lieu of notice;

iii. a Subsequent Claim; and

iv. a Subsequent Employee Claim.

d) "**Claims Bar Date**" means 5:00 P.M. on October 26th, 2016, or such later date as may be ordered by the Court;

e) "**Claims Package**" means the document package sent to all Creditors of Mosaic which shall include a Notice to Creditor, a Proof of Claim, and such other materials and notices as the Receiver may consider necessary or appropriate;

f) "**Claims Procedure Order**" means this Claims Procedure Order;

g) "**Court**" means the Alberta Court of Queen's Bench;

h) "**Creditor**" means any person asserting a Claim that is not an Employee;

i) "**Dispute Package**" means, with respect to any Claim, a copy of the related Proof of Claim, or (as the case may be) Employee Proof of Claim, a Notice of Revision or Disallowance, and a Notice of Dispute;

j) "**Employee**" means anyone who is or was an employee of Mosaic on or before the date of the Receivership Order;

k) "**Employee Claims Package**" means the document package sent by the receiver to Employees of Mosaic, and shall include a Notice to Employee, an Employee Proof of Claim, and such other materials and notices as the Receiver may consider necessary or appropriate;

l) "**Employee Claims Officer**" means a person who is appointed in accordance with the Employee Claims Procedure to adjudicate a dispute or disputes with respect to one or more Employee Claims;

m) "**Employee Proof of Claim**" means a proof of claim in substantially the form attached as **Schedule "H"**;

n) "**Known Creditors**" means those Creditors other than the Plaintiff which are identifiable and ascertainable by the Receiver as Creditors with a Claim, as disclosed by the books and records of Mosaic, and whose Claim remains unpaid, in whole or in part, as at the date of this Claims Procedure Order;

o) "**Newspaper Notice**" means a newspaper notice to Creditors of Mosaic, in substantially the form attached hereto as **Schedule "I"**;

p) "**Notice of Revision or Disallowance**" means a notice in substantially the form attached hereto as **Schedule "E"**;

q) "**Notice of Dispute**" means a notice in substantially the form attached as **Schedule "F"**;

r) "**Notice to Employee**" means a notice in substantially the form attached as **Schedule "G"**;

s) "**Notice to Creditor**" means a notice to a creditor of Mosaic from the Receiver, in substantially the form attached hereto as **Schedule "C"**;

t) "**Person**" shall be broadly interpreted, and shall include an individual, firm, partnership, joint venture, fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government of a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, or any other entity, howsoever designated or constituted, including any Taxing Authority, and the trustees, executors, administrators or other legal representatives of an individual;

u) "**Proof of Claim**" means a proof of claim in substantially the form attached hereto as **Schedule "D"**;

v) "**Proven Claim**" means the amount, status, and/or validity of the Claim of a Creditor or Employee, as finally determined in accordance with this Claims Procedure Order and the Claims Procedure, or the Employee Claims Procedure, as the case may be, and for greater certainty, a Proven Claim will be "finally determined" for the purposes of this definition in each of the following cases:

i. a Notice to Employee has been issued, and remains unanswered;

ii. a Claim has been accepted by the Receiver;

iii. the applicable time period for filing a Notice of Dispute in response to a Notice of Revision or Disallowance in respect of a Claim has expired, and no Notice of Dispute has been filed in accordance with this Claims Procedure Order; or

iv. any court of competent jurisdiction has made a determination with respect to the amount, status, and/or validity of a Claim, and no appeal or application for leave to appeal therefrom has been taken or served on either party, or where any such appeal or application for leave to appeal has been dismissed, determined, or withdrawn;

w) "**Subsequent Claim**" means a claim by a Creditor arising after the date of this Claims Procedure Order, and includes, for greater certainty, a Claim in respect of the disclaimer or resiliation, after the date of this Claims Procedure Order, of any contract, lease, or other arrangement or agreement of any nature whatsoever, whether oral or written, and any amending agreement related thereto;

x) "**Subsequent Claims Bar Date**" means the later of: (i) the Claims Bar Date, or (ii) 5:00 P.M. (Calgary Time) on the day which is thirty (30) Calendar Days after the date on which a Subsequent Claim arose, provided that where the Subsequent Claims Bar Date would otherwise fall on a Saturday, Sunday, or statutory holiday, the Subsequent Claims Bar Date shall in all such cases be deemed to fall on the next Business Day;

y) "**Subsequent Employee Claim**" means a Claim by an Employee arising after the date of this Claims Procedure Order;

z) "**Subsequent Employee Claims Bar Date**" means the later of: (i) the Claims Bar Date, or (ii) 5:00 P.M. (Calgary Time) on the day which is thirty (30) Calendar Days after the date on which the Employee in question was terminated, provided that where the Subsequent Employee Claims Bar Date would otherwise fall on a Saturday, Sunday, or statutory holiday, the Subsequent Employee Claims Bar Date shall in all such cases be deemed to fall on the next Business Day.

aa) "**Tax**" or "**Taxes**" means any and all amounts subject to a withholding or remitting obligation and any and all taxes, duties, fees, and other governmental charges, duties, impositions and liabilities of any kind whatsoever whether or not assessed by the Taxing Authorities (including any Claims by any of the Taxing Authorities), including all interest, penalties, fines, fees, other charges, and additions with respect to such amount;

bb) "**Taxing Authorities**" means her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of each and every province or territory of Canada and any political subdivision thereof, and any Canadian or foreign governmental authority, and "**Taxing Authority**" means any one of the Taxing Authorities;

cc) "**Tax Claim**" means any and all Claims of any Taxing Authority in respect of any taxation year or period ending on or prior to the date of this Claims Procedure Order; and

dd) "**Website**" means the website maintained by the Receiver located at www.ey.com/ca/mosaic.

Notice of Claims Procedures and barring of Claims

6. Subject to the Paragraph 3 hereof, any Creditor who fails to deliver a Proof of Claim in respect of a Claim in accordance with this Claims Procedure Order and the Claims Procedure, and on or before the Claims Bar Date, or (in the event of a Subsequent Claim) the Subsequent Claims Bar Date, shall:

   a) be forever barred, estopped and enjoined from asserting or enforcing any Claim against Mosaic, and such Claim or Claims shall be forever extinguished; and

   b) not be entitled to any further notice in these proceedings.

7. Any Employee who fails to deliver an Employee Proof of Claim in accordance with this Claims Procedure Order and the Employee Claims Procedure, and on or before the Claims Bar Date or (in the event of a Subsequent Employee Claim) the Subsequent Employee Claims Bar Date, shall:

   a) be deemed to accept the Claim as set forth and described in the Notice to Employee;

   b) be forever barred, estopped and enjoined from amending its Claim or otherwise asserting a Claim other than as described in the Notice to Employee; and

   c) the Claim of such Employee as set out in the Notice to Employee shall be a Proven Claim.

Notice Sufficient

8. The publication of the Newspaper Notice, the posting of the Claims Package and this Claims Procedure Order on the Website, and the mailing to the Creditors of the Claims Package in accordance with the Claims Procedure and this Claims Procedure Order shall constitute good and sufficient service and delivery of (i) notice of this Claims Procedure Order, (ii) the Claims Bar Date, and (iii) the Subsequent Claims Bar Date, on all Creditors, Persons wishing to assert a claim as a Creditor, and any other Person who may be entitled to receive service or notice thereof, and no other document or material need be sent to or served upon any Creditor in respect of this Claims Procedure Order.

9. The posting of the Employee Claims Package and this Claims Procedure Order on the Website, and the mailing to Employees of the Employee Claims Package in accordance with the Employee Claims Procedure and this Claims Procedure Order shall constitute good and sufficient service and delivery of (i) notice of this Claims Procedure Order, (ii) the Claims Bar Date, and (iii) the Subsequent Employee Claims Bar Date, on all Employees who may be entitled to receive service or notice thereof, and no other document or material need be sent to or served upon any Employee in respect of this Order.

Filing of Proofs of Claim

10. A Proof of Claim, or an Employee Proof of Claim, shall be deemed filed in a timely manner only if delivered by registered mail, personal delivery, courier, email (in PDF format) or facsimile transmission so as to actually be received by the Receiver on or before (as the

case may be) the Claims Bar Date, the Subsequent Claims Bar Date, or the Subsequent Employee Claims Bar Date.

Notices and communication

11. Except as otherwise provided herein, the Receiver may deliver any notice or other communication to be given under this Claims Procedure Order to Creditors, Employees, or other interested Persons by forwarding true copies thereof by ordinary mail, courier, personal delivery, facsimile or email to such Creditors or Persons at the address last shown on the books and records of Mosaic.

12. Service or delivery of any notice or communication on a Creditor, Employee, other interested Person by courier, personal delivery, facsimile or email shall be deemed to be received on the next Business Day following the date of forwarding thereof or, if sent by ordinary mail, on the third Business Day after mailing within Alberta, the fifth Business Day after mailing within Canada, and the tenth Business Day after mailing internationally.

13. Where a Creditor, Employee, or other interested Person is represented by counsel, the Receiver may serve or deliver any notice or communication on such counsel in any manner permitted by this Claims Procedure Order, and service of a notice or communication on counsel shall constitute service on the Creditor, Employee, or other interested Person, as the case may be.

14. Any notice or other communication to be given to the Receiver under this Claims Procedure Order by a Creditor, an Employee, or other interested Person, shall be in writing, and be in substantially the form (if any) provided for in this Claims Procedure Order. Such notice or communication will be sufficiently given only if delivered by registered mail, courier, email (in PDF format), personal delivery or facsimile transmission, addressed to:

    Ernst & Young Inc., Court-appointed receiver of Mosaic Energy Ltd.
    Attn: Carolyn Parker
    1000, 440 2nd Avenue SW
    Calgary, AB T2P 5E9
    Email: carolyn.parker@ca.ey.com
    Telephone: (403) 206-5331
    Fax: (403) 206-5075

15. In the event that the day on which any notice or communication required to be delivered pursuant to the Claims Procedure or the Employee Claims Procedure is not a Business

Day, then such notice or communication shall be required to be delivered on the following Business Day.

16. In the event of any strike, lockout or other event which interrupts postal service in any part of Canada, all notices and communications to be delivered during such interruption may only be delivered by personal delivery, courier, email, or facsimile transmission, and any notice or communication given or made by prepaid mail within the five (5) Business Day period immediately preceding the commencement of such interruption, unless actually received, shall be deemed not to have been delivered.

General

17. The Receiver is authorized to use its reasonable discretion as to the adequacy of compliance with respect to the manner in which Proofs of Claim, Employee Proofs of Claim, and Notices of Dispute are completed and executed and may, if it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of the Claims Procedure or the Employee Claims Procedure, as the case may be, as to the completion and execution of Proofs of Claim, Employee Proofs of Claim, and Notices of Dispute.

18. The Receiver, in addition to its prescribed powers and duties under the Receivership Order, and under any statute, is authorized and directed to take such other actions and fulfill such other roles as are contemplated by the Claims Procedure, the Employee Claims Procedure, and this Claims Procedure Order.

19. References in this Claims Procedure Order to the singular shall include the plural, and references to the plural shall include the singular, and references to any gender shall include the other gender.

20. The Receiver may apply to this Court from time to time for such further order or orders as it considers necessary or desirable to amend, supplement, or replace the Claims Procedure, the Employee Claims Procedure, or this Claims Procedure Order.

I

Justice of the Court of Queen's Bench of Alberta

Schedule "A"

CLAIMS PROCEDURE

Notice of Claims Procedure

1. The Receiver shall cause a Claims Package to be sent to each Known Creditor by regular prepaid mail, fax, courier or email on or before September 19, 2016.

2. The Receiver shall cause the Newspaper Notice to be published in the Calgary Herald on or before September 19, 2016.

3. The Receiver shall cause the Claims Package to be posted on the Website on or before September 19, 2016.

4. The Receiver shall send a Claims Package to any person requesting such material as soon as practicable on receipt of a written request for a Claims Package from such Person.

Filing of Proofs of Claim and Determination of Claims

5. Every Creditor asserting a Claim against Mosaic under this Claims Procedure shall set out its aggregate Claim in a written Proof of Claim, and shall deliver that Proof of Claim so that it is received by the Receiver no later than the Claims Bar Date, failing which such Creditor shall stand forever barred, estopped, and enjoined from asserting or enforcing any Claim against Mosaic, and such Claim or Claims shall be forever extinguished.

6. Every Creditor asserting a Subsequent Claim against Mosaic under this Claims Procedure shall set out its aggregate Subsequent Claim in a written Proof of Claim, and shall deliver that Proof of Claim so that it is received by the Receiver no later than the Subsequent Claims Bar Date, failing which such Creditor shall stand forever barred, estopped, and enjoined from asserting or enforcing any Claim against Mosaic, and such Claim or Claims shall be forever extinguished.

7. The Receiver shall review each Proof of Claim received by the Claims Bar Date or the Subsequent Claims Bar Date, as applicable, and shall accept, revise, or disallow the Claim set out in such Proof of Claim.

8. The Receiver may attempt to resolve the classification and amount of a Claim by consent through negotiations with the Creditor in respect of such Claim, either before or after accepting, revising, or disallowing such Claim.

9. If the Receiver accepts a Claim as set forth in a Proof of Claim submitted to the Receiver in accordance with this Claims Procedure, that Claim shall be a Proven Claim.

10. If the Receiver chooses to revise or disallow a Claim, the Receiver shall advise the Creditor asserting such Claim of its decision by sending a Notice of Revision or Disallowance to such Creditor.

11. Any Creditor who disputes the classification or amount of its Claim as set forth in a Notice of Revision or Disallowance, shall deliver a Notice of Dispute to the Receiver by 5:00 P.M. (Calgary Time) on the day that is fifteen (15) days after the date of the Notice of Revision or Disallowance. In addition, such disputing Creditor must file an application with the Court, supported by an affidavit setting out the basis for the Claim, and must serve the application and affidavit upon the Receiver immediately upon filing. The application must be scheduled by the disputing Creditor within ten (10) calendar days after the date on which the Notice of Dispute was received by the Receiver.

12. Any Creditor who fails to deliver a Notice of Dispute and schedule an application with the Court by the deadlines set forth in this Claims Procedure shall be deemed to accept the classification and amount of its Claim as set out in the Notice of Revision or Disallowance, and such Claim as set out in the Notice of Revision or Disallowance shall be a Proven Claim.

13. Upon receipt of a Notice of Dispute, the Receiver may attempt to resolve the classification and amount of the Claim with the Creditor by consent.

14. If a Claim is resolved by consent between the Receiver and a Creditor, the Receiver may accept a revised Proof of Claim setting forth the agreed classification and amount of the Claim, and such Claim will be a Proven Claim.

Schedule "B"

EMPLOYEE CLAIMS PROCEDURE

Notice of Employee Claims Procedure

1. In the case of all Employees terminated prior to the date of this Claims Procedure Order, the Receiver shall cause an Employee Claims Package to be sent to each such Employee by regular prepaid mail, fax, courier, or email on or before September 19, 2016.

2. In the case of all other Employees, the Receiver shall cause an Employee Claims Package to be sent to each such Employee by regular prepaid mail, fax, courier, or email within three Business Days of any termination of such Employee, and where an Employee receives an Employee Claims Package after the Claims Bar Date, such Employee's Claim shall be deemed to be a Subsequent Employee Claim for the purposes of this Employee Claims Procedure.

3. The Receiver shall post the Employee Claims Package to the Website.

4. In the case of an Employee Claims Package that is sent to an Employee, the Employee Claims Package shall include a Notice to Employee setting forth the amount and classification of such Employee's Claim as assessed by the Receiver on the basis of the books and records of Mosaic.

Filing of Employee Proofs of Claim and Determination of Claims

5. In the event an Employee who receives an Employee Claims Package agrees with the assessment of the amount and classification of the Claim as set out therein, such Employee need not file an Employee Proof of Claim, or take any further action, and upon no further action being taken on or before the Claims Bar Date or (as the case may be) the Subsequent Employee Claims Bar Date, the Claim set out in the Employee Claims Package shall be a Proven Claim.

6. In the event an Employee who receives an Employee Claims Package disagrees with the assessment of the amount, classification, or both the amount and classification of the Claim as set out therein, such Employee may set out its aggregate Claim in a written Employee Proof of Claim, and deliver that Employee Proof of Claim so that it is received by the Receiver no later than the Claims Bar Date, or, in the case of a Subsequent Employee Claim, the Subsequent Employee Claims Bar Date, failing which such Employee will:

a. be deemed to accept the Claim as set forth and described in the Notice to Employee;

b. be forever barred, estopped and enjoined from amending its Claim or otherwise asserting a Claim other than as described in the Notice to Employee; and

c. the Claim of such Employee as set out in the Notice to Employee shall be a Proven Claim.

7. The Receiver shall review each Employee Proof of Claim received by the Claims Bar Date, or the Subsequent Employee Claims Bar Date, as the case may be, and shall accept, revise, or disallow the Claim set out in such Employee Proof of Claim.

8. The Receiver may attempt to resolve the classification and amount of a Claim by consent through negotiations with the Employee in respect of such Claim, either before or after accepting, revising, or disallowing such Claim.

9. If the Receiver accepts a Claim as set forth in an Employee Proof of Claim submitted to the Receiver in accordance with this Claims Procedure, that Claim shall be a Proven Claim.

10. If the Receiver chooses to revise or disallow a Claim, the Receiver shall advise the Employee asserting such Claim of its decision by sending a Notice of Revision or Disallowance to such Employee.

11. Any Employee who disputes the classification or amount of its Claim as set forth in a Notice of Revision or Disallowance, shall deliver a Notice of Dispute to the Receiver by 5:00 P.M. (Calgary Time) on the day that is fifteen (15) days after the date of the Notice of Revision or Disallowance, supported by an affidavit setting out the basis for such Employee's Claim.

12. Upon receipt of service of a Notice of Dispute in accordance with this Employee Claims Procedure, the Receiver may attempt to resolve the classification and amount of the Claim with the Employee by consent. If a Claim is resolved by consent between the Receiver and an Employee, the Receiver may accept a revised Employee Proof of Claim setting forth the agreed classification and amount of the Claim, and such Claim will be a Proven Claim.

13. Upon receipt of a Notice of Dispute in accordance with this Employee Claims Procedure, and in the event that the classification and amount of an Employee's Claim is not resolved by consent, the Receiver shall attempt to reach agreement with the disputing Employee as to the appointment of an individual to serve as Employee Claims Officer in respect of such Employee's Claim.

14. In the event that the Receiver and the Employee are unable to agree to the appointment of an individual as Employee Claims Officer, the parties shall jointly apply to the Court for the designation of an Employee Claims Officer.

15. The Employee Claims Officer appointed in accordance with this Employee Claims Procedure will have the authority to hear and resolve any matters and issues raised in the Notice of Dispute, and with respect to the Employee's Claim, in a process to be directed by such Employee Claims Officer, which process may include:

    a. filing of application and reply materials;

    b. questioning on any Affidavits, under oath;

    c. exchange of written submissions; and/or

    d. conduct of an oral arbitration hearing,

    all as may be directed by the assigned Employee Claims Officer.

16. On being designated as the Employee Claims Officer in respect of a Claim, the Employee Claims Officer shall write to the Receiver and the Employee identified in the relevant Notice of Dispute, and

    a. confirm receipt of the application contemplated in paragraph 11 hereof;

    b. direct the Employee and the Receiver to forward any additional materials that the Employee Claims Officer may reasonably require; and

    c. advise the Employee and the Receiver as to the process for the resolution of the Employee's application as determined by the Employee Claims Officer in accordance with paragraph 15 hereof.

17. Any Employee who fails to deliver a Notice of Dispute and file an application with the Court within the time set forth in this Employee Claims Procedure shall be deemed to accept the classification and amount of its Claim as set out in the Notice of Revision or Disallowance, and such Claim as set out in the Notice of Revision or Disallowance shall be a Proven Claim.

18. The disputing Employee, or the Receiver, may file any decision of the Employee Claims Officer by way of an Application to the Court, returnable within fifteen (15) days of the rendering of any decision of an Employee Claims Officer.

Schedule "C"

EMPLOYEE PROOF OF CLAIM

IN THE MATTER OF THE RECEIVERSHIP OF MOSAIC ENERGY LTD. ("Mosaic")

Regarding the claim of _____ (the "**Employee**")

All notices or correspondence regarding this claim are to be forwarded to the Employee at the following address:

_____

_____

Telephone Number: (___) ___-____

Facsimile Number: (___) ___-____

Email address: _____

(*All future correspondence will be delivered to the designated email address unless the Employee specifically requests hard copies*)

☐ Please provide hard copies of correspondence to the address above.

I, _____ (*name of Employee signing Claim)*, of _____ (*City, Province or State*), do hereby certify that:

1. I am the Employee.
2. I have knowledge of all the circumstances connected with the claim referred to in this form.
3. The details of my employment with Mosaic include the following:
   a) Date of Commencement of Employment:_____
   b) Date of Termination of Employment:_____
   c) Position at Termination:_____
   d) Salary (including bonuses) at Termination:_____
   e) Age at Termination (optional):_____
4. Since my Termination, I (have/have not) arranged alternate employment (*provide details*).

   _____

   _____
5. **I claim entitlement to a Claim in the sum of $_____, the details and calculation of which are as follows:**

_____

_____

_____

(*attach additional details if space insufficient*)

DATED this ___ day of _____, 2016, at _____.

_____ Per:_____

Witness

Name of Employee

Schedule "D"

NEWSPAPER NOTICE TO CREDITORS OF MOSAIC

NOTICE OF CLAIMS PROCEDURE IN THE RECEIVERSHIP OF MOSAIC ENERGY, LTD. ("MOSAIC")

On April 26, 2016, Ernst & Young Inc. (the "**Receiver**") was appointed as receiver of the current and future assets, undertakings and properties of Mosaic Energy Ltd. ("**Mosaic**"), pursuant to an order of the Court of Queen's Bench of Alberta (the "**Court**").

On September 14, 2016, the Court granted a further order, prescribing the process by which the identity and status of all creditors of Mosaic is to be established for the purposes of the receivership proceedings (the "**Claims Procedure Order**"). A copy of the Claims Procedure Order may be accessed online at www.ey.com/ca/mosaic.

Capitalized terms not defined herein have the meaning given to those terms in the Claims Procedure Order.

Pursuant to the Claims Procedure Order, the Receiver is required, by September 19th, 2016, to send a Claims Package to each Known Creditor, with instructions regarding a Claims Procedure whereby a Creditor of Mosaic can submit and prove a Claim. In addition, the Claims Procedure Order requires the Receiver to publish this notice, in order to give notice of this proceeding to any Creditors who are not Known Creditors.

If you wish to assert a Claim against Mosaic, you may request a Claims Package by submitting a request in writing to the Receiver at the following address:

Ernst & Young Inc., Court-appointed receiver of Mosaic Energy Ltd.
Attn: Carolyn Parker
1000, 440 2nd Avenue SW
Calgary, AB T2P 5E9
Email: carolyn.parker@ca.ey.com
Telephone: (403) 206-5331
Fax: (403) 206-5075

All Creditors, including Known Creditors, who wish to assert a Claim against Mosaic must submit a completed Proof of Claim to the Receiver at the above address on or before 5:00 PM (Calgary Time) on October 19th, 2016 (the "**Claims Bar Date**").

All Creditors who wish to assert a Subsequent Claim against Mosaic must submit a completed Proof of Claim to the Receiver at the above address on or before 5:00 P.M. on the later of (i) the Claims Bar Date, or (ii) the day that is thirty (30) days after the date on which such Subsequent Claim arose (the "**Subsequent Claims Bar Date**").

Please note that your Proof of Claim Form must be delivered by registered mail, personal delivery, e-mail (in PDF format), courier or facsimile transmission, and must be actually received by the Receiver, on or before the Claims Bar Date, or (as the case may be) the Subsequent Claims Bar Date, at the above address.

If you are a Creditor, and you do not submit a Proof of Claim to the Receiver on or before the Claims Bar Date, or (in the case of a Subsequent Claim) the Subsequent Claims Bar Date, your Claim will be barred and extinguished forever.

The publication of this Newspaper Notice to Creditors of Mosaic, the solicitation of Proofs of Claim by the Receiver, and/or the sending of a Proof of Claim by a Claimant to the Receiver, does not grant any Claimant or any Person standing in the receivership of Mosaic.

Schedule "E"

Notice of Revision or Disallowance

To: [NAME AND ADDRESS OF CREDITOR OR EMPLOYEE] (the "**Claimant**" or "**Employee**")

Date:

Proof of Claim No.

IN THE MATTER OF THE RECEIVERSHIP OF MOSAIC ENERGY LTD. ("MOSAIC")

Take notice that Ernst & Young Inc., in its capacity as court-appointed receiver of Mosaic (the "**Receiver**") has reviewed the (*Proof of Claim / Employee Proof of Claim*) in respect of the above-named (*Claimant/Employee*), and has assessed the (*Proof of Claim / Employee Proof of Claim*) in accordance with the order of the Alberta Court of Queen's Bench issued on September 14, 2016 (the "**Claims Procedure Order**").

All capitalized terms not defined herein have the meaning given to such terms in the Claims Procedure Order.

The Receiver has reviewed your (*Proof of Claim / Employee Proof of Claim*) in accordance with the Claims Procedure Order, and has revised or disallowed your Claim, for the following reason(s):

_____

_____

_____

_____

Subject to further dispute by you in accordance with the Claims Procedure, your Claim will be allowed as follows:

Name of Claimant	Claim Amount per Proof of Claim	Classification of Claim per Proof of Claim	Amount of Claim revised/ disallowed	Classification of Claim revised/ disallowed
	$		$	

IF YOU WISH TO DISPUTE THE REVISION OR DISALLOWANCE OF YOUR CLAIM AS SET FORTH HEREIN YOU MUST TAKE THE STEPS OUTLINED BELOW

The Claims Procedure Order provides that if you disagree with the revision or disallowance of your claim as set forth herein, you must:

1. before 5:00 P.M. on the fifteenth (15th) Calendar Day after your receipt of this Notice of Revision or Disallowance, whichever is earlier, deliver to the Receiver a completed Notice of Dispute; and
2. file an application with the Court, with copies to be sent to the Receiver immediately after filing, with suoh application to be:
    i. supported by an affidavit setting out the basis for disputing this Notice of Revision or Disallowance; and
    ii. returnable within ten (10) Calendar Days of the date on which the Receiver receives your completed Notice of Dispute.
3. in the case of an Employee Claim, the application filed with the Court will be referred to an Employee Claims Officer for resolution in accordance with the Employee Claims Procedure.

If you do not dispute the revision or disallowance of your Claim in accordance with the above instructions and the Claims Procedure Order, the amount and classification of your Claim will deemed to be accepted, and the Claim shall be a Proven Claim in the amount, and classification, set forth herein.

If you have any questions or concerns regarding the Claims Procedure, or the attached materials, please contact the Receiver directly.

DATED the _____ day of _____, 2016

Ernst & Young Inc., in its capacity as Receiver of Mosaic Energy, Ltd.

Per: _____

Schedule "F"

Notice of Dispute

To: Ernst & Young, Inc., in its capacity as Court-Appointed Receiver of Mosaic Energy, Ltd. (the "**Receiver**")

Date:

Proof of Claim No.:

Claimant: [NAME AND ADDRESS OF CLAIMANT] (the "**Claimant**" or the "**Employee**")

IN THE MATTER OF THE RECEIVERSHIP OF MOSAIC ENERGY LTD. ("MOSAIC")

Pursuant to the Claims Procedure Order dated September 14, 2016 (the "**Claims Procedure Order**"), the (*Claimant/Employee*) hereby gives notice that it disputes the Notice of Revision or Disallowance dated _____, 2016, issued by the Receiver.

The (*Claimant/Employee*) disputes the Claim as revised or disallowed in the said Notice of Revision or Disallowance as follows:

Amount of Revised Claim accepted by Receiver	Amount of Revised Claim as disputed	Classification of Revised Claim by Receiver	Classification of Revised Claim as disputed
$	$		

Reason for the dispute (*attach copies of any supporting documentation*)

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Address for service of Notice of Dispute of Revision or Disallowance:

Ernst & Young Inc., Court-appointed receiver of Mosaic Energy Ltd.
Attn: Carolyn Parker
1000, 440 2nd Avenue SW
Calgary, AB T2P 5E9
Email: carolyn.parker@ca.ey.com

Telephone: (403) 206-5331
Fax: (403) 206-5075

Pursuant to the Claims Procedure,

1. the (*Claimant/Employee*) has commenced an application with the Court to resolve the dispute over its Claim as set forth herein, and will serve the Receiver with application materials under separate cover; and

2. The return date for the (*Claimant's/Employee's*) application is _____, 2016.

THIS FORM AND ANY REQUIRED SUPPORTING DOCUMENTATION MUST BE RETURNED TO THE RECEIVER BY REGISTERED MAIL, PERSONAL SERVICE, EMAIL (IN PDF FORMAT), FACSIMILE OR COURIER TO THE ABOVE-NOTED ADDRESS, AND MUST BE RECEIVED BY THE RECEIVER BEFORE 5:00 PM ON THE FIFTEENTH CALENDAR DAY AFTER THE DATE OF THE NOTICE OF REVISION OR DISALLOWANCE.

DATED this ____ day of _____, 2016

_____
Witness

Per:_____

(*Name of Claimant or Employee*)

_____
(*if Claimant is not an individual, print name and title of authorized signatory*)

Name:_____

Title:_____

Schedule "G"

NOTICE TO EMPLOYEE

TO: [NAME]

Date:

On April 26, 2016, Ernst & Young Inc. (the "**Receiver**") was appointed as receiver of the current and future assets, undertakings and properties of Mosaic Energy Ltd. ("**Mosaic**"), pursuant to an order of the Court of Queen's Bench of Alberta (the "**Court**").

On September 14 2016, the Court granted a further order, prescribing the process by which the identity and status of all claims against Mosaic is to be established for the purposes of the receivership proceedings (the "**Claims Procedure Order**"). A copy of the Claims Procedure Order may be accessed online at www.ey.com/ca/mosaic.

Capitalized terms not defined herein have the meaning given to such terms in the Claims Procedure Order.

Pursuant to the Claims Procedure Order, the Receiver is required to send a notice to each terminated Employee of Mosaic. This Notice is to indicate the amount and classification of such Employee's Claim, as determined by the Receiver on the basis of its review of the books and records of Mosaic.

CLAIM ASSESSED

The Receiver has reviewed the books and records of Mosaic, including those books and records that relate to your employment with Mosaic, and is prepared to accept a Claim against Mosaic from you as an unsecured claim in the amount of **$**_____.

In the event that you agree with the Receiver's assessment of your claim, no further action is required.

However, if you wish to dispute the Receiver's assessment of your claim, you must take the steps outlined below.

DISPUTE OF ASSESSMENT

The Claims Procedure Order establishes an Employee Claims Procedure, whereby if an Employee disagrees with the Receiver's assessment of such Employee's Claim, the Employee must complete and return an Employee Proof of Claim advancing a different amount and/or claiming secured status if applicable, attaching any supporting documentation. The Employee Proof of Claim must be completed using the attached form, and returned to the Receiver by registered mail, courier, email (in PDF format), personal delivery or facsimile transmission, addressed to:

Ernst & Young Inc., Court-appointed receiver of Mosaic Energy Ltd.
Attn: Carolyn Parker
1000, 440 2nd Avenue SW
Calgary, AB T2P 5E9
Email: carolyn.parker@ca.ey.com
Telephone: (403) 206-5331
Fax: (403) 206-5075

The completed Employee Proof of Claim must be actually received by the Receiver no later than 5:00 PM (Calgary Time) on October 19th, 2016 (the "Claims Bar Date").

If you are receiving this Notice to Employee after October 19th, 2016, the Completed Employee Proof of Claim must be actually received by the Receiver no later than 5:00 PM (Calgary Time) on the thirtieth (30th) Calendar Day after the date of this Notice to Employee, or if that day falls on a weekend or statutory holiday, the next Business Day (the "Subsequent Employee Claims Bar Date").

If no Employee Proof of Claim is received on or before the Claims Bar Date, or the Subsequent Employee Claims Bar Date, as the case may be, you will be conclusively deemed to have accepted the amount of your Claim as set out herein, and its status as unsecured. In all such cases your Claim as set out herein shall be a Proven Claim in the Receivership of Mosaic.

A copy of the Employee Proof of Claim form is enclosed; however, further copies may be accessed at www.ey.com/ca/mosaic.

If you choose to complete an Employee Proof of Claim, please note the following:

1. the person signing the form must have knowledge of the circumstances connected with the Claim;

2. the person signing the form must insert the place and date in the space provided; and

3. the signature must be witnessed.

Notice of Revision or Disallowance by the Receiver

If you send a completed Employee Proof of Claim to the receiver in accordance with the above, the Receiver will review the Employee Proof of Claim, and provide you with a notice in writing by registered mail, courier, email, or facsimile to advise as to whether your Claim is accepted, disputed in whole, or disputed in part. Where the Claim is disputed in whole or in part, the Receiver will issue a Notice of Revision or Disallowance indicating the reasons for the revision, or the disallowance, of your Claim.

Notice of Dispute by Employee

If you disagree with the Receiver's revision or disallowance of your Claim, the Employee Claims Procedure allows you to dispute the Receiver's revision or disallowance of your Claim by taking the following steps:

1. completing and returning a Notice of Dispute on the form prescribed in the Claims Procedure Order;

2. delivering the completed Notice of Dispute to the Receiver by registered mail, courier service, email (in PDF format) or facsimile within fifteen (15) Calendar Days of the date on which you receive the Notice of Revision or Disallowance from the Receiver; and

3. file an application with the designated Employee Claims Officer, returnable within ten (10) Calendar Days of the date on which the Notice of Dispute is delivered to the Receiver, supported by an affidavit setting out the reasons for the dispute regarding your Claim.

The Employee Claims Officer will have the authority to decide any dispute regarding your Claim between you and the Receiver. Your Claim as determined by the Employee Claims Officer shall be a Proven Claim in the receivership of Mosaic.

CLAIMS NOT PROVEN OR ACCEPTED IN ACCORDANCE WITH THE PROCEDURES SET OUT IN THIS NOTICE TO EMPLOYEE, THE EMPLOYEE CLAIMS PROCEDURE, AND THE CLAIMS PROCEDURE ORDER, WILL BE FOREVER BARRED AND MAY NOT THEREAFTER BE ADVANCED AGAINST MOSAIC.

Additional information regarding the Mosaic receivership, as well as blank copies of any of the forms referenced herein, may be accessed at www.ey.com/ca/mosaic.

If you have any questions regarding the Employee Claims Procedure, as set out above, or the Claims Procedure Order, please contact the Receiver directly.

Dated the ___ day of _____, 2016, at Calgary, Alberta,

_____

Ernst & Young, Inc., in its capacity as court-appointed Receiver of Mosaic Energy, Ltd.

Per:

Schedule "H"

NOTICE TO CREDITORS OF MOSAIC ENERGY LTD.

TO: [NAME]

On April 26, 2016, Ernst & Young Inc. (the "**Receiver**") was appointed as receiver of the current and future assets, undertakings and properties of Mosaic Energy Ltd. ("**Mosaic**"), pursuant to an order of the Court of Queen's Bench of Alberta (the "**Court**").

On September 14, 2016, the Court granted a further order, prescribing the process by which the identity and status of all creditors of Mosaic is to be established for the purposes of the receivership proceedings (the "**Claims Procedure Order**"). A copy of the Claims Procedure Order may be accessed online at www.ey.com/ca/mosaic.

Capitalized terms not defined herein have the meaning given to such terms in the Claims Procedure Order.

Pursuant to the Claims Procedure Order, the Receiver is required to send a notice to each known creditor of Mosaic.

Any Person (other than an Employee) wishing to assert a Claim against Mosaic, must send a completed Proof of Claim to the Receiver, and such Proof of Claim must be actually received by the Receiver no later than **5:00 P.M. (Calgary Time) on October 19th, 2016 (the "Claims Bar Date").**

All Proofs of Claim should be delivered by registered mail, personal delivery, courier, email (in PDF format) or facsimile transmission to the following address:

Ernst & Young Inc., Court-appointed receiver of Mosaic Energy Ltd.
Attn: Carolyn Parker
1000, 440 2nd Avenue SW
Calgary, AB T2P 5E9
Email: carolyn.parker@ca.ey.com
Telephone: (403) 206-5331
Fax: (403) 206-5075

A copy of the Proof of Claim form is enclosed; however, further copies of the Proof of Claim form may be accessed at www.ey.com/ca/mosaic.

If you do not submit a Proof of Claim on or before the Claims Bar Date, your Claim will be **barred and extinguished forever**, and you will not be entitled to further notice of these proceedings.

If you have any questions regarding the Claims Procedure, or the attached materials, please contact the Receiver directly.

Dated the ___ day of September, 2016, at Calgary, Alberta,

_____

Ernst & Young, Inc., in its capacity as court-appointed Receiver of Mosaic Energy, Ltd.

Per:

Schedule "I"

PROOF OF CLAIM

IN THE MATTER OF THE RECEIVERSHIP OF MOSAIC ENERGY LTD. ("Mosaic")

Regarding the claim of _____ (the "**Claimant**")

All notices or correspondence regarding this claim are to be forwarded to the Claimant at the following address:

_____

_____

Telephone Number: (___) ___-____

Facsimile Number: (___) ___-____

Email address: _____

Attention (Contact Person): _____

(*All future correspondence will be delivered to the designated email address unless the Claimant specifically requests hard copies*)

☐ Please provide hard copies of correspondence to the address above.

I, _____ (*name of Claimant or authorized representative*), of _____ (*City, Province or State*), do hereby certify that:

1. The Claimant has received a Claims Package from the Receiver, and wishes to assert a Claim.

2. I am the Claimant.

   OR

   I am _____ (*position/title*) of the Claimant.

3. I have knowledge of all the circumstances connected with the claim referred to in this form.

4. The Claimant states that Mosaic was at April 26, 2016, and still is, indebted to the Claimant in the sum of CDN$_____ (*insert CDN$ value of claim*) as shown by the statement of account attached hereto and marked Schedule "A".

If the claim is to be reduced by deducting any counterclaim to which the Mosaic is entitled, or amounts associated with the return of equipment or assets by Mosaic, please specify.

The statement of account must specify the evidence in support of the claim including the date and location of the delivery of all services and materials. Any claim for interest must be supported by contractual documentation evidencing the entitlement to interest.

5. A. UNSECURED CLAIM OF $_____. That in respect of this claim the Claimant does not hold and has not held any assets as security.
   B. SECURED CLAIM OF $_____. That in respect of this claim the Claimant holds assets valued at $_____ as security, particulars of which are as follows:

Give full particulars of the security, including the date on which the security was given and the value at which the claimant assesses the security together with the basis of valuation, and attach a copy of the security documents as Schedule "B".

DATED this ___ day of _____, 2016

_____ Per:_____

Witness

Name of Claimant:

_____

(if Claimant is not an individual,
print name and title of authorized signatory

Name:_____

Title:_____

TAB 6

I hereby certify this to be a true copy of the original
Dated this 22 day of January 2015
for Clerk of the Court

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED
JAN 22 2015
CLERK OF THE COURT

COURT FILE NUMBER	1401-00889
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	**NATIONAL BANK OF CANADA**
RESPONDENTS	**DO ALL INDUSTRIES LTD., P&O ASSETS LTD. And KORF DEVELOPMENTS LTD.**
DOCUMENT	**ORDER (Notice of Claims in respect of P&O Assets Ltd.)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCARTHY TÉTRAULT LLP Barristers & Solicitors Sean F. Collins / Walker W. MacLeod Suite 3300, 421 - 7 Avenue S.W. Calgary, AB T2P 4K9 Phone: 403-260-3710 Fax: 403-260-3501 Email: scollins@mccarthy.ca / wmacleod@mccarthy.ca

DATE ON WHICH ORDER PRONOUNCED: **January 12, 2015**

JUDICIAL DISTRICT WHERE ORDER PRONOUNCED: **Calgary, Alberta**

JUDGE PRONOUNCING THIS ORDER: **Justice J. Strekaf**

UPON THE APPLICATION of Alvarez & Marsal Canada Inc. (the "**Receiver**"), in its capacity as court appointed receiver of Do All Industries Ltd. and P&O Assets Ltd. pursuant to the order issued by Justice A.D. MacLeod in the within proceedings on February 6, 2014 (the "**Receivership Order**") under the *Bankruptcy and Insolvency Act* (Canada); **AND UPON** having read the seventh report of the Receiver dated December 3, 2014, the Affidavit of Kordel Korf, sworn December 12, 2014, the supplemental affidavit of Kordel Korf, sworn January 7, 2015, the affidavit of Chadwick Hirsch, sworn January 9, 2015, and the second supplemental affidavit of Kordel Korf, sworn January 11, 2015; **AND UPON** having read the pleadings previously filed herein; **AND UPON** reviewing the authorities provided by Hirsch Construction Ltd., Redriver Lumber Ltd. and G.T. & H. Holdings Ltd. on January 5, 2015 and the written brief of fact and law filed by Kordel Korf on January 8, 2015; **AND UPON** noting the Affidavit of Service of Marcia Smith, sworn December 8, 2014; **AND UPON** hearing from counsel for the Receiver, counsel

for Kordel Korf, counsel for Tough-Enough Drilling Ltd., counsel for Hirsch Construction Ltd., Redriver Lumber Ltd. and G.T. & H. Holdings Ltd., and counsel for Day Construction Ltd., Glen Peterson Construction Ltd. and Turnbull Excavating Ltd;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Capitalized terms used herein or not otherwise defined shall have the meaning ascribed to them below:

(a) "**Affected Claim**" means all Claims against the Debtor other than Excluded Claims;

(b) "**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, as amended;

(c) "**Claim**" means a "claim provable in bankruptcy", "provable claim" or "claim provable" within the meaning of the BIA;

(d) "**Claims Notice Date**" means 5:00 p.m. (Mountain Time) on February 23, 2015 or such other later date as may be ordered by the Court;

(e) "**Court**" means the Court of Queen's Bench of Alberta;

(f) "**CRA**" means the Canada Revenue Agency;

(g) "**Debtor**" means P&O Assets Ltd.;

(h) "**Disputed Claims**" means:

(i) The Affected Claims identified in Schedule "**B**" hereto; and

(ii) Any Disputed Identified Claims;

(i) "**Disputed Identified Claims**" means Identified Claims that the Receiver disputes and/or Kordel Korf disputes in writing to the Receiver prior to the hearing date referenced in paragraph 5;

(j) "**Do All Tax Refund**" means the approximately $1 million tax refund that Do All expects to receive;

(k) "**Excluded Claims**" means any Claims that are secured by charges granted pursuant to the Receivership Order;

(l) "**Filing Date**" means February 6, 2014;

(m) "**GOA**" means the Government of Alberta;

(n) "**Identified Claims**" means Affected Claims that are submitted to the Receiver on or before the Claims Notice Date;

(o) "**Newspaper Notice**" means the form of notice advertising the Claims Notice Date, substantially in the form attached as Schedule "**A**" hereto;

(p) "**Person**" shall be broadly interpreted and includes an individual, firm, partnership, joint venture, venture capital fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government or a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, instrumentality or department of such government or political subdivision, or any other entity, however designated or constituted, and the trustees, executors, administrators, or other legal representatives of any individual;

(q) "**Quantified Known Claims**" means all of the Affected Claims listed in Schedule "**C**" hereto;

(r) "**Receiver**" has the meaning ascribed to it in the Receivership Order;

(s) "**Receivership Order**" means the order issued by Justice A.D. MacLeod in the within proceedings on February 6, 2014;

(t) "**Tough-Enough Claim**" means the existing litigation between Tough-Enough Drilling Ltd. and Do All Industries Ltd;

(u) **Undisputed Identified Claims**" means Identified Claims other than Disputed Identified Claims.

(v) "**Website**" means the website established by the Receiver and located at http://www.alvarezandmarsal.com/do-all;

2. The Newspaper Notice be and is hereby approved. The Receiver shall cause the Newspaper Notice to be published on the Website and once in each of the Edmonton Journal, the Regina Post and the Estevan Mercury, as soon as possible after the filing of this Order.

3. All Quantified Known Claims be and are hereby adjudged and determined to properly be Affected Claims as against the Debtor in the amounts set forth in Schedule B to this order.

4. The CRA, GOA and Persons who have Quantified Known Claims or those Disputed Claims listed in Schedule "B", need not respond to the Newspaper Notice.

5. The Receiver shall file an application returnable during the week of March 2, 2015, or so soon thereafter as may be scheduled with the Court, seeking advice and directions as to:

(a) the manner in which Disputed Claims should be determined;

(b) any distribution from the remaining assets of the Debtor to pay:

(i) Quantified Known Claims; and

(ii) Undisputed Identified Claims;

(c) the Affected Claims of the CRA or GOA; and

(d) any other matters relevant to the continued administration of the estate of the Debtor by the Receiver including, without limitation, the possible discharge of the Receiver as receiver and manager of the Debtor, and the transition to the Debtor of the remaining assets (including transfer to the Debtor of the Do All Tax Refund and the Tough-Enough Claim), and books and records of the Debtor that are in the possession and control of the Receiver to the Debtor.

6. Nothing herein shall operate to change, alter or exclude the priority afforded to Excluded Claims pursuant to and in accordance with the terms of the Receivership Order.

7. References in this Order to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

8. Notwithstanding the terms of this Order, the Receiver or any interested Person may apply to this Court from time to time for such further order or orders as it considers necessary or desirable to amend, supplement, or modify this Order.

9. Service of this Order on those Persons who appeared at the within application by email, facsimile, courier, regular or registered mail or personal delivery shall constitute good and sufficient service of this Order.

J.C.Q.B.A.

SCHEDULE "A"

FORM OF NEWSPAPER NOTICE

IN THE MATTER OF THE RECEIVERSHIP OF P&O ASSETS LTD.

CLAIMS NOTICE

By order of the Court of Queen's Bench of Alberta, Judicial Centre of Calgary (the "**Court**"), an order was granted on February 6, 2014 appointing Alvarez and Marsal Canada Inc. as Receiver and Manager (the "**Receiver**") of P&O Assets Ltd. ("**P&O**"). A copy of the Receivership Order may be found on the Receiver's website at: www.alvarezandmarsal.com/doall.

By further order of the Court dated January 12, 2015 (the "**Claims Notice Order**"), the Receiver has been directed to publically advertise that the Receiver may become authorized to make distributions from the remaining assets of P&O to certain creditors of P&O after February 23, 2015 (the "**Claims Notice Date**") and thereafter seek an order for its discharge and return of the balance of the assets to P&O. A copy of the Claims Notice Order may be obtained from the Receiver and may also be found on the Receiver's website.

Any Person who has a Claim of any kind or nature whatsoever against P&O may provide the Receiver, on or before the Claims Notice Date, with its name, address, the full particulars of its Claim (including, without limitation, the quantum of such Claim) against P&O and copies of all supporting records in respect thereof to the address below:

Alvarez & Marsal Canada Inc.,
Receiver of P&O Assets Ltd.
Attn: Tim Reid / Jill Strueby
Bow Valley Square I
Suite 570, 202-6th Ave SW
Calgary, AB T2P 5E9
E-mail: jstrueby@alvarezandmarsal.com

DISTRIBUTIONS FROM THE REMAINING ASSETS OF P&O, DISCHARGE OF THE RECEIVER AND RETURN OF THE BALANCE OF THE ASSETS TO P&O MAY BE MADE WITHOUT REGARD TO ANY CLAIMS NOT PROVIDED TO THE RECEIVER PRIOR TO THE CLAIMS NOTICE DATE.

SCHEDULE "B"

LISTING OF DISPUTED CLAIMS

Creditor	Quantum of Claim
Hirsch Construction Ltd.	$1,391,372[1]
G.T. & H Holdings Ltd.	$14,090[2]
Total	**$1,405,462**

[1] In addition to these amounts Hirsch also claims interest and costs.

[2] In addition to these amounts G.T. & H also claims interest and costs.

SCHEDULE "C"

LISTING OF QUANTIFIED KNOWN CLAIMS

Creditor	Quantum of Claim
Carson Energy Services Ltd.	$1,271
Day Construction Ltd.	$152,660
Glen Peterson Construction Ltd.	$66,393
Johnson Plumbing and Heating Ltd.	$163,907
MNP LLP	$9,220
Turnbull Excavating Ltd.	$28,014
Southeast Electric Ltd.	$244,133
Total	**$655,598**

TAB 7

COURT FILE NUMBER	1403-13215	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
PLAINTIFF	**E CONSTRUCTION LTD.**	
DEFENDANTS	**SPRAGUE-ROSSER CONTRACTING CO. LTD. and REGIONAL MUNICIPALITY OF WOOD BUFFALO**	
DOCUMENT	**ORDER (TRUST CLAIM PROCESS)**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCARTHY TÉTRAULT LLP Barristers & Solicitors Sean Collins / Walker W. MacLeod Suite 4000, 421 - 7th Avenue S.W. Calgary AB T2P 4K9 Phone: 403-260-3531/ 403-260-3710 Fax: 403-260-3501 Email: scollins@mccarthy.ca / wmacleod@mccarthy.ca	

DATE ON WHICH ORDER WAS PRONOUNCED:	April 6, 2017
NAME OF JUDGE WHO MADE THIS ORDER:	Justice J.M. Ross
LOCATION OF HEARING:	Edmonton, Alberta

UPON THE APPLICATION of Alvarez & Marsal Canada Inc., in its capacity as court-appointed receiver and manager of Sprague-Rosser Contracting Co. Ltd. pursuant to the order issued by the Honourable Justice J.B. Veit under the *Bankruptcy and Insolvency Act* (Canada) on July 31, 2014, as subsequently amended and restated on August 7, 2014, to establish a trust claim process in respect of the Funds (as defined herein); **AND UPON** having read the Notice of Application, filed on March 27, 2017 (the "**Application**") and the Ninth Report of the Receiver; **AND UPON** having read the Affidavit of Service of Katie Doran, sworn April 4, 2017 (the "**Service Affidavit**"); **AND UPON** hearing counsel for the Receiver and counsel present for other parties;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of the Application and the Ninth Receiver's Report in the manner described in the Service Affidavit is deemed to be good and sufficient and the Application is property returnable today.

DEFINED TERMS

2. For the purposes of this Order, the following terms shall have the following meanings:

(a) "**Bridge Contract**" has the meaning ascribed to it in the Consent Order;

(b) "**Bridge Project**" means the Improvement constructed pursuant to the Bridge Contract prior to the termination of the Bridge Contract by the Regional Municipality of Wood Buffalo on March 21, 2014;

(c) "**Business Day**" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Calgary, Alberta;

(d) "**Claim Provable**" has the meaning ascribed to it in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, as amended;

(e) "**Consent Order**" means the consent order issued by the Court on May 5, 2016 in the within proceedings;

(f) "**Court**" means the Court of Queen's Bench of Alberta;

(g) "**Debtor**" means Sprague Rosser Contracting Co. Ltd.;

(h) "**Funds**" means the $4,432,455, plus all accrued interest thereon, presently held by the solicitors for the Receiver pursuant to paragraph 29 of the Consent Order;

(i) "**Improvement**" has the meaning ascribed to it in the *Builders' Lien Act* (Alberta);

(j) "**Instruction Letter**" means the letter regarding completion of a Trust Claim Application, which letter shall be substantially in the form attached hereto as Appendix "**A**";

(k) "**July 17 Order**" means the order issued by the Court in the Receivership Proceedings on July 17, 2015, which, *inter alia*, declared the security of RBC to be valid and enforceable and authorized distribution to be made to RBC subject only to the charges contained in the Receivership Order;

(l) "**Known Creditors**" means Persons which the books and records of the Debtor disclose have a Claim Provable against the Debtor arising from, relating to or otherwise connected with the Bridge Project;

(m) "**Newspaper Notice**" means the notice of the Trust Claim Process to be published in accordance with this Order in substantially the form attached hereto as Appendix "**B**";

(n) "**Ninth Receiver's Report**" means the report filed by the Receiver in the within proceedings on March 27, 2017;

(o) "**Person**" shall be broadly interpreted and includes an individual, firm, partnership, joint venture, venture capital fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government or a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, instrumentality or department of such government or political subdivision, or any other entity, however designated or constituted, and the trustees, executors, administrators, or other legal representatives of any individual;

(p) "**RBC**" means the Royal Bank of Canada;

(q) "**Receiver**" has the meaning ascribed to it in the Receivership Order;

(r) "**Receivership Order**" means the receivership order issued by the Court on July 31, 2014, and subsequently amended and restated on August 7, 2014, in the Receivership Proceedings;

(s) "**Receivership Proceedings**" means the proceedings commenced by RBC on July 29, 2014 in Court File No. 1403-10990;

(t) "**Trust Claim**" means the right or claim of any Person, other than the Debtor, to a beneficial interest in the Funds;

(u) "**Trust Claim Application**" means a notice of application that asserts a Trust Claim to the Funds, substantially in the form attached hereto as Appendix "**C**";

(v) "**Trust Claim Filing Date**" means 5:00 p.m. (Mountain Time) on May 12, 2017 or such other date and time as may be ordered by the Court;

(w) "**Trust Claim Package**" means the document package which shall include a copy of the Instruction Letter, the form of Trust Claim Application, this Order and such other materials as the Receiver considers necessary or appropriate; and,

(x) "**Website**" means the website established by the Receiver in respect of the Debtor and located at https://www.alvarezandmarsal.com/sprague.

NOTICE OF TRUST CLAIM PROCESS

3. The Receiver shall cause a Trust Claim Package to be sent to each Known Creditor by regular prepaid mail, courier, facsimile or email on or prior to April 13, 2017.

4. The Receiver shall cause the Trust Claim Package to be posted on the Website on or prior to April 13, 2017.

5. The Receiver shall cause the Newspaper Notice to be published in the Fort McMurray Today, the Edmonton Journal and any other newspaper the Receiver consider advisable, on or prior to April 30, 2017.

6. The Receiver shall cause a copy of the Trust Claims Package to be sent to any Person requesting such material as soon as practicable.

IDENTIFICATION AND RESOLUTION OF TRUST CLAIMS

7. Any Person who wishes to assert a Trust Claim to the Funds shall, on or before the Trust Claim Filing Date:

(a) file a Trust Claim Application with the Court that is returnable at 10:00 a.m. on June 22, 2017;

(b) either:

(i) file all supporting evidence relied upon in asserting the Trust Claim; or;

(ii) otherwise confirm to the Receiver and RBC that all evidence relied on in asserting the Trust Claim is contained in the Ninth Receiver's Report; and

(c) serve the Trust Claim Application and all supporting evidence relied upon in asserting the Trust Claim on each of the Receiver and RBC.

8. In the event that either:

(a) no Person complies with paragraph 7 of this Order; or,

(b) all Trust Claim Applications that are filed in accordance with paragraph 7 of this Order are dismissed by the Court;

the Receiver shall immediately disburse the Funds pursuant to and in accordance with the terms of the July 17 Order and without any further order from the Court.

NOTICE AND COMMUNICATION

9. Except as otherwise provided herein, the Receiver may deliver any notice or other communication to be given under this Order to Known Creditors or other interested Persons by forwarding true copies thereof by ordinary mail, courier, personal delivery, facsimile or email to such Known Creditors at the address last shown on the books and records of the Debtor.

GENERAL

10. RBC shall be entitled to participate in any Trust Claim Application that is filed pursuant to paragraph 7 of this Order as an interested Person.

11. References in this Order to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

12. Nothing in this Order shall operate to bar or extinguish any Claims Provable against the Debtor.

13. Notwithstanding the terms of this Claims Process Order, the Receiver, RBC or any Person who files a Trust Claim Application in accordance with paragraph 7 of this Order ~~may~~ any other interested person may or apply to this Court from time to time for such further order or orders as it considers necessary or desirable to amend, supplement or modify this Order or to otherwise schedule a process for the efficient resolution and determination of any Trust Claim Applications that are filed and served in accordance with paragraph 7 of this Order.

J.C.Q.B.A.

APPENDIX "A"

INSTRUCTION LETTER FOR TRUST CLAIM PROCESS OF SPRAGUE ROSSER CONTRACTING CO. LTD. (THE "DEBTOR")

TO: [NAME AND ADDRESS OF KNOWN CREDITOR]

On April 6, 2017 the Court issued an order providing for the identification and resolution of Trust Claims to the Funds (the "**Trust Claim Process Order**"). A copy of the Claim Process Order is enclosed herewith. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Trust Claim Process Order.

Pursuant to the Trust Claim Process Order, the Receiver is to send this Instruction Letter and the enclosed form of Trust Claim Application to Known Creditors and certain other Persons. The Trust Claim Process Order does not compromise or extinguish any Claims Provable against the Debtor. You should only file a Trust Claim Application if you believe that you have a beneficial right to or interest in the Funds presently held by the Receiver.

The Trust Claim Process Order provides that any Person who wishes to advance a Trust Claim to the Funds must, on or before 5:00 pm (MST) on May 12, 2017:

(a) file a Trust Claim Application that is returnable at 10:00 a.m. on June 22, 2017;

(b) either:

  (i) file all supporting evidence relied in support of the Trust Claim Application; or

  (ii) otherwise confirm to the Receiver and RBC that it relies only on evidence in the Ninth Receiver's Report in assert the Trust Claim; and

(c) serve such Trust Claim Application and supporting evidence on each of the Receiver and RBC.

In the event that either no Trust Claim Applications are filed and served in accordance with the Trust Claim Order, or that all Trust Claim Applications that are filed are dismissed, the Funds shall be distributed by the Receiver pursuant to and in accordance with the terms of the July 17 Order and without any further order from the Court.

Dated the _____ day of _____, 2017.

ALVAREZ & MARSAL CANADA INC., in its capacity as court-appointed receiver and manager of Sprague-Rosser Contracting Co. Ltd., and not in its personal or corporate capacity

Per: _____
Name:
Title:

APPENDIX "B"

NEWSPAPER NOTICE FOR THE TRUST CLAIMS PROCESS OF SPRAGUE ROSSER CONTRACTING CO. LTD. (THE "DEBTOR")

On April 6, 2017 the Court issued an order providing for the resolution of Trust Claims to the Funds (the "**Trust Claim Process Order**"). Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Trust Claim Process Order. A copy of the Trust Claim Process Order may be viewed at https://www.alvarezandmarsal.com/sprague.

The Trust Claim Process Order does not compromise or extinguish any Claims Provable against the Debtor. You should only file a Trust Claim Application if you believe that you have a beneficial right to or interest in the Funds presently held by the Receiver.

The Trust Claim Process Order provides that any Person who wishes to advance a Trust Claim to the Funds must, on or before 5:00 pm (MST) on May 12, 2017:

(a) file a Trust Claim Application that is returnable at 10:00 a.m. on June 22, 2017;

(b) either:

  (i) file all supporting evidence relied in support of the Trust Claim Application; or

  (ii) otherwise confirm to the Receiver and RBC that it relies only on evidence in the Ninth Receiver's Report in assert the Trust Claim; and

(c) serve such Trust Claim Application and supporting evidence on each of the Receiver and RBC.

In the event that either no Trust Claim Applications are filed and served in accordance with the Trust Claims Order, or that all Trust Claim Applications that are filed are dismissed, the Funds shall be distributed by the Receiver pursuant to and in accordance with the terms of the July 17 Order and without any further order from the Court.

APPENDIX "C"

COURT FILE NUMBER	1403-13215	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
PLAINTIFF	**E CONSTRUCTION LTD.**	
DEFENDANTS	**SPRAGUE-ROSSER CONTRACTING CO. LTD. and REGIONAL MUNICIPALITY OF WOOD BUFFALO**	
DOCUMENT	**NOTICE OF APPLICATION (ASSERTION OF TRUST CLAIM)**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**[Insert contact information for Applicant or its counsel]**	

NOTICE TO RESPONDENT(S)

This Application is made against you. You are a Respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date:	June 22, 2017
Time:	10:00 a.m.
Where:	Edmonton Court Center
Before Whom:	The Honourable Madam Justice J.M. Ross

Go to the end of this document to see what you can do and when you must do it.

Remedy claimed or sought:

1. • (the "**Applicant**") applies for:

   (a) a declaration that it has a beneficial right and interest in the $4,432,455, plus all accrued interest thereon (the "**Funds**"), presently held by the solicitors for Alvarez & Marsal Canada Inc. in its capacity as receiver and manager of

Sprague-Rosser Contracting Co. Ltd. (the "**Receiver**"), pursuant to paragraph 29 of the consent order issued in the within proceedings on May 5, 2016; and

(b) an order that the Receiver immediately and forthwith disburse the Funds to the Applicant.

Grounds for making this Application:

2. **[Identify all grounds for asserting the beneficial right and interest in the Funds].**

Material or evidence to be relied on:

3. **[File and serve all evidence relied on in asserting the beneficial right and interest in the Funds or otherwise confirm the only evidence relief on is in the Ninth Receiver's Report].**

Applicable Rules:

4. **[Identify all Rules relied on in asserting the beneficial right and interest in the Funds].**

Applicable Acts and Regulations:

5. **[Identify all Acts and Regulations relied on in asserting the beneficial right and interest in the Funds].**

Any irregularity complained of or objection relied on:

6. N/A.

How the Application is proposed to be heard or considered:

7. The Applicant proposes that the Application be heard in person with one, some or all of the parties present, and subject to any further direction from the Honourable Court in terms of scheduling similar applications in an efficient and convenient manner.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

TAB 8

DATE: 20060919
DOCKET: C44161

COURT OF APPEAL FOR ONTARIO

O'CONNOR A.C.J.O., DOHERTY AND MACFARLAND JJ.A.

B E T W E E N :	)	
	)	
IN THE MATTER OF ELIAS MARKETS LTD., ELIAS GROUP LTD. AND ELIAS PROPERTIES LTD. CARRYING ON BUSINESS IN THE CITY OF WINDSOR, COUNTY OF ESSEX AND PROVINCE OF ONTARIO	)	**A. Duncan Grace for Bank of Montreal**
	)	**Milton A. Davis and Brett D. Moldaver for Royal Bank of Canada and Royal Trust Corporation of Canada**
- and -	)	**Fred Myers for RSM Richter Inc.**
IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, SECTION 47(1), AS AMENDED	)	
	)	**Heard: May 10, 2006**

On appeal from the order of Justice Helen A. Rady of the Superior Court of Justice dated August 19, 2005, reported at (2005), 77 O.R. (3d) 461.

MACFARLAND J.A.:

[1] The appellant, Bank of Montreal ("BMO") appeals from the order of Rady J. dated August 19, 2005. It asks this court to set aside that part of her order which entitles Royal Bank of Canada and Royal Trust Corporation of Canada (collectively "RBC") to the remedy of subrogation and to recover from the proceeds realized by the interim receiver, RSM Richter Inc. ("Interim Receiver") from the sale of the property municipally known as 655 and 755 Crawford Avenue, Windsor, Ontario. BMO seeks an order that RBC is not entitled to the remedy of subrogation or to recover any amount from the proceeds realized from the sale of the property and that BMO is entitled to recover under its security the proceeds.

[2] BMO also seeks to set aside that part of the order declaring that an assignment of rents to RBC is in priority to the security held by BMO. In its place, BMO seeks an order declaring the BMO security to be in priority to the RBC assignment of rents and directing the Interim Receiver to pay to BMO the rents collected in respect of the property.

[3] RBC cross-appeals and asks that this court set aside that portion of the order denying RBC an equitable mortgage on the subject lands. In its place, RBC seeks an order directing that RBC is entitled to the sale proceeds of the subject property in priority to any claim by BMO or any other creditor.

[4] By the terms of her order, the motion judge ordered that the Interim Receiver was authorized and directed to distribute on a final basis the proceeds of sale and rental of the property at 655/755 Crawford Avenue, Windsor, Ontario as follows:

(a) to Royal Bank of Canada, the net rental proceeds;

(b) to Royal Bank of Canada, the sum of $854,158.11 from the net sale proceeds;

(c) to Bank of Montreal, the balance of the net proceeds.

[5] BMO takes the position that because the mortgage held by RBC violated the provisions of the *Planning Act*, R.S.O. 1990, c. P.13 it is invalid as is the Assignment of Rents, which was taken at the same time and is, by its terms, “additional security” and therefore collateral to the mortgage. If BMO is correct, it would move into a first priority position ahead of RBC and be entitled to the entire net proceeds, both from the sale of the property and the rents collected.

THE FACTS

[6] The facts which give rise to this appeal are complex but must be set out in detail for a proper understanding of the issues.

[7] This proceeding arises out of the insolvency of Elias Markets Ltd. (“Markets”), Elias Properties Ltd. (“Properties”) and Elias Group Ltd. (“Group”) (collectively “the companies”). The companies carried on a retail grocery business in Windsor and surrounding area. Markets operated the grocery stores and Properties owned the real estate, including 655/755 Crawford Avenue. Group was a holding company and did not carry on any active business.

[8] The proceeding before Rady J. was an application by the Interim Receiver for directions as to the manner of distribution of the proceeds of the sale of the Crawford Avenue properties ($1,670,000) and rents collected therefrom.

[9] On January 6, 1996, one of the Elias companies, 1156712 Ontario Ltd. (hereinafter "1156712") and a predecessor to Properties, bought property at 655 Crawford Avenue, Windsor ("Parcel One").

[10] In so doing, 1156712 assumed: an existing mortgage in favour of Royal Trust with a principal balance of $657,700.18 outstanding on closing; and an existing mortgage in favour of Larcon Holdings Inc. ("Larcon") with a principal balance of $340,279.40 outstanding on closing.

[11] On June 10, 1997, another Elias Company, 882876 Ontario Ltd. ("882876"), also a predecessor to Properties, purchased four additional parcels of land adjacent to the north boundary of Parcel One. ("Parcels Two, Three, Four and Five").

[12] Markets operated a grocery store on Parcel One. In 1998, as part of a plan to develop the entire property, 1156712 and 882876 signed a site Plan Agreement with the City of Windsor. Parcels Four and Five were conveyed to the City. Parcels One, Two and Three remained in the hands of the numbered companies (Parcel One in 1156712 and Parcels Two and Three in 882876). The development proposed a new grocery store building at the south end of Parcel One. The existing building (where Markets was then operating a grocery store) at the north end of Parcel One was to be leased to a bingo hall operator. Parking was to be on Parcel One between the two buildings and on Parcels 2 and 3.

[13] On March 15, 1999, RBC issued a commitment letter agreeing to lend $2,300,000 to 1156712, secured by a first mortgage on Parcel One ("the mortgage commitment agreement" or "MCA"). The MCA required that the existing first mortgage against Parcel One in favour of RBC be discharged from the loan proceeds. As the terms of the MCA required that the security for the loan be a first mortgage on the subject property, any other encumbrances which would otherwise rank in priority to this new mortgage would necessarily have to be discharged.

[14] At this point in time, 1156712 did not own any abutting parcels of land; it owned only Parcel One.

[15] On March 26, 1999, Joseph Elias, on behalf of 1156712, signed the MCA and accepted its terms.

[16] Six days later, by Articles of Amalgamation dated April 1, 1999, 1156712 and 882876 and a third Elias company amalgamated to form Properties (“Properties”). The articles of amalgamation were registered only against title to Parcel One.

[17] At this time, Joseph Elias asked RBC to draw on the $2,300,000 of available financing in order to start the construction on Parcel One. As security for the construction financing, Properties granted to RBC a $1,400,000 construction mortgage, registered against Parcel One on May 26,1999.

[18] On November 26, 1999, the $2,300,000 mortgage was registered in favour of RBC against Parcel One. $1,400,000 of this money went to discharge the construction mortgage. Another $854,184.11 was paid to satisfy prior encumbrances, which included:

1. Royal Bank of Canada mortgage payout – $574,172.55

2. National Bank of Canada Mortgage payment – $161,000.00

3. City of Windsor taxes – $36,685.20

4. Larcon Holdings Inc. mortgage payout – $82,326.36

[19] At the time of the registrations, as a result of the amalgamation, Properties was now the owner of Parcels One, Two and Three. The RBC mortgages – registered May 26, 1999 and November 26, 1999 – were registered only against Parcel One, and thus were void under s. 50(3) of the *Planning Act.* RBC and Properties were unaware at the time that the mortgages were void. All parties to the mortgages had been represented throughout these transactions by the same solicitor, Jeffrey Slopen.

[20] On June 26, 2001, BMO granted Markets a revolving line of credit. As security, Properties gave a guarantee and executed a General Security Agreement (GSA) in favour of BMO. By spring of 2002, the companies were in financial difficulty.

[21] On May 6, 2002, almost one year later, BMO registered a Notice of Agreement Charging Lands against Parcel’s One and Six. On August 18, 2002, it registered a caution against Parcels One and Three. The registrations coincided with BMO’s realization that RBC’s mortgage was defective, a fact still unknown to RBC. On August 23, 2002, the Interim Receiver was appointed. It was only after the appointment of the Interim Receiver that questions were raised about the validity of the RBC mortgage.

[22] BMO admits it was aware of the mortgage financing in place before it granted the line of credit and obtained the GSA. It was also aware there were prior registrations in favour of RBC. BMO admits it granted the demand loan facility to Markets on the assumption the $2,300,000 RBC mortgage was validly registered and would have priority over its security interest.

THE RECTIFICATION APPLICATION

[23] On learning of the breach of the *Planning Act*, Jeffrey Slopen's law firm brought an application to rectify the mortgages, so that they would charge Parcels Two and Three in addition to Parcel One. RBC, BMO, Properties and the Interim Receiver were named as respondents to that application, which proceeded before Abbey J.

[24] In that application, both Slopen and the principal of the mortgagor filed evidence to the effect that it was their common intention to mortgage all three parcels of land.

[25] Abbey J. dismissed the application and, as a result, RBC's mortgage against Parcel One remained void under the *Planning Act*. In his reasons, Abbey J. noted that in March 1999, at the time RBC agreed to advance the $2,300,000, there was no *Planning Act* violation. The pre-amalgamation corporation, 1156712, owned only Parcel One and did not own abutting land at the time. The amalgamation that ultimately affected the validity of the mortgage was effected after the MCA was entered into but before the $2,300,000 RBC mortgage was registered. But for the amalgamation and the effect that triggered under the *Planning Act*, the registered mortgage would be valid.

ISSUES

[26] The appeal and the cross-appeal raise the following issues:

> 1. Did the motion judge err in failing to find that the principles of *res judicata* and abuse of process precluded RBC from asserting a priority claim to the net sale proceeds of the subject property?
>
> 2. If *res judicata* and abuse of process do not apply, should RBC be granted the equitable remedy of either equitable mortgage or subrogation?
>
> 3. Does the RBC Assignment of Rents have priority over BMO's security in respect of the net rents collected by the Interim Receiver from the subject property?

[27] For the reasons that follow, I am of the opinion that the motion judge did not err when she concluded that neither the principles of *res judicata* nor abuse of process precluded RBC from asserting its priority claim on the basis of equitable mortgage or subrogation; that RBC does not have a valid $2,300,000 equitable mortgage on Parcel One, but is entitled to priority over BMO to the extent of $854,184.11 on the basis of subrogation; and that the RBC Assignment of Rents has priority over BMO's security.

I. *RES JUDICATA* AND ABUSE OF PROCESS

[28] BMO argues that, on the motion before Rady J., RBC was in substance seeking the same remedy as was sought in the rectification application – priority over the net sale proceeds of the Crawford Avenue property – on the basis of different legal theories. On the basis of the doctrines of *res judicata* and abuse of process, BMO submits that those legal theories ought to have been advanced as part of the rectification application.

[29] The motion judge, in her careful reasons, concluded:

> [28] The unsuccessful application for rectification of the mortgage brought by Mr. Slopen's law firm was in the nature of a "salvage" action to rectify the mortgage to reflect what was argued to be the parties' intention. If rectification had been granted, RBC would have enjoyed a priority position and presumably the solicitor's malpractice suit would be avoided. There was no need to raise any argument with respect to equitable principles or the doctrine of subrogation.
>
> [29] The present proceeding is brought by the Interim Receiver, seeking the Court's direction on the issue of priorities, the RBC mortgage having been found to be illegal. Essentially the court is being asked to deal with the consequences of the illegal mortgage. No legal or factual issues are being relitigated and this is not an attempt to impeach, in any way, the findings made by Abbey J.

[30] I agree. In *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 at 329, Laskin J.A. writing on behalf of this court noted:

> *Res judicata* itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding.

[31] In this appeal, BMO relies on cause of action estoppel.

[32] BMO submits that the evidence in support of the equitable mortgage and subrogation remedies sought before Rady J. was before the court on the rectification application. Having sought to advance RBC's claim to priority in the rectification application solely on the basis of rectification, BMO submits that RBC cannot now in this proceeding advance a claim to priority on the basis of different legal theories. Those legal

theories were properly part of and ought to have been advanced in the rectification application.

[33] The rectification application was concerned with the mortgage itself, where it was argued that it was always the intention of the parties – both RBC and Properties – that the mortgage was intended to apply to Parcels One, Two and Three. That application was brought by the solicitors who acted for both parties to the mortgage. Had the application been successful, the mortgage would no longer be in breach of the *Planning Act* and an action against the solicitors would have been avoided. When the application failed, the adversity of interest between the solicitors and RBC crystallized. An action against the solicitors in negligence and breach of contract has been instituted and remains outstanding.

[34] Had RBC sought to have the issue of priorities as between it and BMO adjudicated in the proceedings before Abbey J., it would have been obliged to bring a separate application – an application to which the solicitors would not be a party and to obtain an order to have its application heard immediately following the rectification application. The issue of priorities was, in my view, irrelevant to the issue raised in the rectification proceeding. Only when the application for rectification was dismissed did it become necessary to determine the competing priority claims.

[35] The proceeding before Rady J. was brought by the Interim Receiver and sought the direction of the court as to whom the monies it had collected from the sale of the property and the collection of rents should be paid. This was a very different issue than the one determined by Abbey J.

[36] While some of the evidence before Abbey J. was necessarily led before Rady J. to provide context and background, the evidence that specifically related to the priorities issue was new. Clearly relevant to the priorities claim was evidence about what BMO knew about prior encumbrances, specifically the RBC mortgage, when it made its decision to loan money and take a GSA as security. Such was not evidence before Abbey J., nor could it be.

[37] In *McQuillan v. Native Inter-Tribal Housing Co-Operative Inc.* (1998), 42 O.R. (3d) 46, Charron J.A. writing for this court, wrote at p. 50:

> The respondent does not contend that the cause of action is the same in both applications. Indeed, it is not. The respondent relies rather on a wider principle, often treated as covered by the plea of *res judicata*. The doctrine of *res judicata*, in its wider application, prevents a person from relying on a claim or defence which he or she had the opportunity of putting before the court in the earlier

proceedings but failed to do so. This principle was adopted by the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346 at pp. 358-9 … (citing the often-quoted words of Wigram V.C. in *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100 (Eng. V.C.)):

> … where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[38] In *McQuillan*, the appellant was seeking a prescriptive easement over a two-foot strip of land on the respondent's property. In earlier proceedings, the appellant had sought a declaration of possessory title to the same two-foot strip of land based on much the same evidence. In the circumstances, the court had no difficulty concluding that the second application was precluded by the doctrine of *res judicata*. The court noted, at p. 51:

> Upon careful review of the material filed in support of each application in this case, I am persuaded that the respondent's position should be adopted. Although, in a strict legal sense, a different cause of action is advanced on this application, the appellant is in effect seeking an analogous remedy based on virtually identical facts. In each application, the appellant asserted a right to continue to use the two-foot strip of land on the respondent's property as part of her

> driveway. It does not appear that it would make any practical difference to the appellant whether this right was asserted by way of possessory title or by way of prescriptive easement. On the facts as presented on the earlier application, it would have been open to advance not only the claim for possessory title but also, in the alternative, the claim to a prescriptive easement. In my view, the appellant's second application falls clearly within the scope of the doctrine of *res judicata* in its wider application.

[39] In my view, that is not this case. Very different relief was sought and different evidence heard in each of the two proceedings.

[40] Clearly, the Interim Receiver had to have the priorities issue resolved before it could disburse funds, and the rectification application did not and could not deal with that issue. The doctrine of *res judicata* simply does not arise nor is there any abuse of process by bringing the second application.

II. a) SUBROGATION

[41] BMO argues that when it acquired its security interest (some two years after the RBC mortgage had been granted) in the Crawford property, there were no other valid encumbrances affecting the Crawford property. It says that the RBC mortgage, although registered, was void and of no effect and as a result, BMO acquired a first priority position in the Crawford property. As a purchaser for value, the only equities enforceable against BMO are those of which it had notice at the time it acquired its interest in the Crawford Property. And BMO submits that it had no notice of RBC's equity of subrogation.

[42] The fallacy in BMO's argument is that at the time it advanced funds and obtained the GSA which secured those funds, it was aware of the RBC $2,300,000 mortgage, believed that that mortgage had priority over its GSA and was not aware that there was any problem with the RBC mortgage. It advanced funds believing that its GSA ranked behind the RBC $2,300,000 mortgage. It was only after the companies fell into financial difficulty and the receiver appointed that a question was raised (by the Interim Receiver and not BMO) about the validity of RBC's security in view of the apparent breach of the provisions of the *Planning Act*. Only after it became aware of the Elias financial difficulties. Thus, BMO was not in the position of a *bona fide* purchaser for value without notice as it did not give value for taking first place. It got what it paid for, and that did not include ranking as first mortgagee on the property.

[43] In *Mutual Trust Company v. Creditview Estate Homes Limited* (1997), 34 O.R. (3d) 583, this court considered the equitable remedy of subrogation. The facts in that case are as follows. The subject property was a family home purchased by IS and BS as joint tenants in December, 1988. As part of the purchase, IS and BS granted a first mortgage to Scotia Mortgage for $220,000. On April 23, 1990, IS and BS gave a further mortgage to the Bank of Nova Scotia in the sum of $15,000.

[44] In June 1991, RS, the son of IS and BS, was a commercial tenant of Creditview. On June 7, 1991, Creditview commenced an action against RS claiming damages for breach of lease. IS was also named a defendant in that action as the indemnifier of RS with respect to his obligations under the lease. IS transferred his interest in the home property to BS on March 12, 1991.

[45] On February 28, 1992, Creditview commenced an action against IS and BS for a declaration that the transfer from IS to BS was a fraudulent conveyance and void as against Creditview.

[46] On March 2, 1992, Creditview obtained a certificate of pending litigation (CPL) and registered it against the title to the home property.

[47] On September 3, 1992, Mutual Trust agreed to provide $230,000 to refinance the home property to be secured by a first charge. A solicitor retained by Mutual Trust to act on its behalf did not report the existence of the CPL to Mutual Trust.

[48] The Mutual Trust refinancing charge was registered September 16th, 1992, which secured the principal sum of $229,500. Discharges of the Scotia Mortgage and Bank charges were also registered. No request was made to Creditview to subordinate its CPL to the Mutual Trust charge.

[49] A total of $228,863.37 was advanced under the Mutual Trust charge. Of that sum, $227,967.14 was paid to Scotia Mortgage and the Bank for discharges of their charges.

[50] Following its discovery of the CPL on title, Mutual Trust brought an application for an order declaring that the CPL was subordinate to the Mutual Trust charge. The application succeeded on the ground that the Mutual Trust charge was subrogated to the Scotia Mortgage and the Bank charges that it replaced and, accordingly, it ranked ahead of the CPL. This court noted, at pp. 586-587:

> In granting Mutual Trust's application, Adams J. held that the doctrine of subrogation applied, that it was not proscribed by the *Registry Act*, R.S.O. 1990, c. R.20, that the fundamental principle underlying the doctrine was one of fairness in light of all the circumstances, that it applied to

> certificates of pending litigation, that the negligence of the party claiming subrogation was not determinative of the issue, that subrogation is not precluded by the fact that the lands in question are in the land titles system, and the fact that IS was only a guarantor of Mutual Trust's charge presented no obstacle to granting the declaration sought. I agree entirely with his reasoning and his conclusions of these points [citation omitted].

[51] The court went on to quote with approval the following reasoning of Adams J:

> The fundamental principle underlying the equitable doctrine of subrogation is one of fairness in light of all the circumstances. Within this principle is an understanding that no injustice is done by the appropriate subrogation of a party to the rights of original mortgages. Thus Street J. in *Brown v. McLean* (1889), 18 O.R. 533 (H.C.) at p. 536, stated:
>
> > I think, however, that the plaintiff here is entitled upon the ground of mistake to be subrogated to the rights of the original mortgagees to the extent of allowing him a priority over the defendant for the amount he paid to discharge their mortgages. It is clear beyond question that he would not have discharged these mortgages had he been aware of the existence of the Defendant's *fi fa.* He would either have refused to make the advance altogether, or he would have had the mortgages assigned to him instead of discharging them.
> >
> > It is equally clear that the defendant has not been in any way prejudiced by what has happened, and that no injustice will be done by replacing him in his former position.
>
> ….
>
> This is because the equity of subrogation affixes to the land in relation to which the third party advanced the mortgage funds. Further, it is not determinative that the entire situation arises because of the negligence of the party claiming

> subrogation. … In fact, the doctrine is usually called into play because of a mistake or inadvertence. Accordingly, it is not enough to point to negligent conduct to defeat the doctrine's application. The issue remains one of fairness between the affected parties having regard to all the circumstances.

[52] The motion judge in this case concluded that RBC was entitled to rely on the doctrine of subrogation to recover monies advanced to pay municipal taxes and to discharge prior mortgages on Parcel One, all of which totalled $854,184.11. She concluded there was ample authority for the proposition that a mortgagee who pays off earlier encumbrances is entitled to the priority position of those earlier charges. She quoted from *Crosbie-Hill v. Sayer*, [1908] 1 Ch. 866, as follows:

> [W]here a third party at the request of a mortgagor pays off a first mortgage with a view to becoming himself a first mortgagee of the property, he becomes, in a default of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee.

[53] The motion judge reasoned:

> [47] … In my view, it would be simply unfair in the circumstances of this case to deny RBC its subrogation rights. BMO did not rely on the abstract of title to its detriment. Indeed, BMO was aware of the prior advances made by RBC and it assumed that RBC's security was validly registered. This is made evident by the candid testimony of James Graham, a representative of BMO, during the course of his cross-examination. The transcript reveals the following questions and answers.
>
> 58Q. And you were aware of the mortgage financing that had been put in place before Bank of Montreal got involved?
>
> A. That's right, yes.
>
> 125Q. And so Bank of Montreal knew that there were prior registrations including registrations in favour of Royal Bank, right?
>
> A. That's right.

127Q. Now can we agree, Mr. Graham, that when the Bank of Montreal first lent its money to or granted demand loan facility to Elias it assumed that Royal Trust mortgage of 2.3 million dollars was validly registered?

A. Yes, that's right.

[48] As a result, BMO made its lending decision knowing of RBCs prior registered interest. Presumably, it was content to rank behind the RBC mortgage of $2.3 million. That was a business decision that it was entitled to make after weighing the relative risks and benefits.

[49] BMO may suffer a loss but it seems to me that this was a risk undertaken by BMO in making the loan in question. Its loss is not, strictly speaking, caused by RBC's right of subrogation, but rather by reason of the deficiency in the value of the security and the underlying covenant. Moreover, to deny subrogation would give BMO an unanticipated windfall. BMO would be unjustly enriched ... In other words, BMO would receive the value of RBC's advances totalling $854,184 which increased the equity in the property and it would be unjustly enriched as a result. This windfall is made more unfair because BMO only discovered that there might be a defect in RBC's security in the spring of 2002, more than a year after its registrations under the PPSA. It was at that time that BMO took steps to register its GSA against Parcels 1 and 3. BMO also registered its Notices of Agreement Charging Land and Caution in May, August and October 2002, all after it became aware of the potential defect in the RBC mortgage.

[50] I pause here to note that RBC is entitled to subrogation not only for the mortgages that it retired but also for the City taxes it paid on behalf of the mortgagor. Authority for this is found in *Traders Realty Ltd. v. Huron Heights Shopping Plaza Ltd.*, [1967] 64 D.L.R. (2d) 278 (H.C.J.) and the rationale is consistent with the reasoning expressed in the *Creditview* trilogy reviewed above.

> [51] Before leaving the subject, I should deal with BMO's submissions on the issue. It asserts that the doctrine does not appear to have been applied to give a claimant priority over a creditor whose claim did not exist at the time of the payment or advance in question. I can see no reason, in principle, why subrogation should not apply in such a case, particularly where the subsequent creditor has not been misled or has not relied on an abstract of title to its detriment.
>
> [52] BMO asserts that subrogation cannot arise because the RBC mortgage was void. I disagree. Subrogation does not depend on the validity of the underlying registration but arises by virtue of the advance of funds to pay out prior encumbrances.

[54] I agree with her reasoning. On the facts, there is no question that BMO assumed that RBC's security had priority to the extent of $2,300,000 over its GSA. It made its loan to the companies on that basis and, at the time, had no basis to question the validity of the RBC mortgage. It advanced its funds on the assumption that the RBC mortgage was valid and had priority over the GSA.

[55] In such circumstances, there can be no unfairness to BMO if the doctrine of subrogation is invoked to give priority to RBC over BMO to the extent of the earlier mortgages and municipal taxes paid out from the funds advanced by RBC.

b) EQUITABLE MORTGAGE

[56] On cross-appeal, RBC argues that it has a valid equitable mortgage for $2,300,000 on Parcel One, which was created on March 26, 1999 when 1156712 accepted the terms of the RBC MCA dated March 15, 1999. When that equitable mortgage was created, title to Parcel One was in the name of 1156712, which owned no abutting land. Thus, RBC submits, there was no violation of the *Planning Act*.

[57] The motion judge rejected this argument. In reaching this conclusion, the motion judge relied on the decision of this court in *Tessis v. Scherer* (1982), 32 O.R. (2d) 149, leave to appeal to S.C.C. refused, [1982] 2 S.C.R. xi. In that case, a mortgagee sought to enforce a mortgage that had been made in violation of the *Planning Act*; the mortgagor owned abutting parcels of land at the time of the mortgage. This court concluded that the mortgage conveyed no interest as a result of this breach. It does not appear that an

argument was made about whether the loan agreement between the parties created an equitable mortgage.

[58] That issue was raised specifically in the related matter before Sutherland J. in *Scherer v. Price Waterhouse*, [1985] O.J. No. 881 (H.C.J.). In his decision, Sutherland J. carefully reviewed the law on equitable mortgages and concluded that an equitable mortgage had not arisen on the facts of that case. At para. 22, he wrote:

> The highest interest in the land that can have been conferred on Tessis by the loan agreement is the right to an equitable mortgage after the required planning consent had been obtained. In no true sense of the term can Tessis be said to have had an equitable mortgage before that consent was obtained. This is not a case of a want of formalities in the mortgage document or a case of the refusal by the borrower to execute a mortgage. Although there undoubtedly was a mistake the usual equitable remedies are not available if to purport to make them available would be to contravene the statute. No equitable mortgage arises upon the entry into the loan agreement. To put the matter another way, in the absence of the required consent the loan agreement does not create an equitable mortgage any more than a legal mortgage document, correct in all its documentary formalities, creates a legal mortgage. At the material times, Tessis was not an equitable mortgagee.

[59] Because the loan agreement was entered into at a time when the mortgagor owned abutting parcels of land and consent had not been obtained under the *Planning Act,* there was no equitable mortgage because to recognize one would have been in contravention of the statute.

[60] In the instant case, after reviewing the law on equitable mortgages, the motion judge concluded:

> This is not a case involving a want of formalities, an inadvertent omission or misdescription or a refusal on the part of the mortgagor to provide a mortgage. In fact, a mortgage was duly prepared, executed and registered as the parties had agreed. The wrinkle was that no planning consent was obtained and the mortgage was void as a result. I agree … that an equitable mortgage cannot arise upon acceptance of the commitment letter unless a consent is obtained because to hold otherwise would permit a contravention of the statute.

> [40] Moreover, if an equitable mortgage confers the same rights as a legal mortgage, it follows that the mortgagee could foreclose or sell the property. This would result in a change in ownership, the very thing the *Planning Act* seeks to prevent or at least, regulate. As a result, I am not persuaded that the commitment letter gave rise to an equitable mortgage in the circumstances of this case.

[61] I agree with the motion judge that there was no enforceable equitable mortgage on Parcel One. However, I reach this conclusion for different reasons.

[62] As noted by the motion judge, "[t]he legal concept of an equitable mortgage has existed for hundreds of years." Despite this long history, there is a dearth of recent jurisprudence in Ontario on this concept. As such, some comment is in order on the nature of an equitable mortgage, the manner by which an equitable mortgage is created, and the priorities of enforcement.

1) <u>The nature of an equitable mortgage</u>

[63] An equitable mortgage is distinct from a legal mortgage. "An equitable mortgage is one that does not transfer the legal estate in the property to the mortgagee, but creates in equity a charge upon the property": A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger: Law of Real Property*, 2d ed. (Aurora, Ont.: Canada Law Book) at 1643.

[64] The concept of an equitable mortgage would seem to find its foundation in the equitable maxim that "equity looks on that as done which ought to be done". Historically, the courts of equity mitigated the rigour of the common law, tempering its rules to the needs of particular cases on principles of justice and equity. The common law courts were primarily concerned with enforcing the strict legal rights of the parties, whereas equity was a court of conscience; it would step in to prevent an injustice that would otherwise arise from the strict application of the law.

[65] In essence, the concept of an equitable mortgage seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.

2) <u>How is an equitable mortgage created?</u>

[66] In *Scherer v. Price Waterhouse*, Sutherland J. discussed the manner in which an equitable mortgage is created, at para. 20:

In one part of his submissions the applicant claimed to be an equitable mortgagee, citing, among other things, the following passage from *Fisher and Lightwood's Law of Mortgage*, 7th ed., at p. 16:

> Equitable mortgages of the property of legal owners … are created by some instrument or act which is insufficient to confer a legal estate, but which, being founded on valuable consideration, shows the intention of the parties to create a security; or in other words, evidences a contract to do so.

In *Falconbridge, Law of Mortgages*, 4th ed., at p. 80, the following statement is made about equitable mortgages:

> An equitable mortgage therefore is a contract which creates in equity a charge on property but does not pass the legal estate to the mortgagee. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.
>
> 5.2 How an Equitable Mortgage is Created
>
> The equitable nature of a mortgage may be due either (1) to the fact that the interest mortgaged is equitable or future, or (2) to the fact that the mortgagor has not executed an instrument sufficient to transfer the legal estate. In the first case the mortgage, be it [ever] so formal, cannot be a legal mortgage; in the second case it is the informality of the mortgage which prevents it from being a legal mortgage. These alternatives will be discussed separately. (3) An equitable mortgage may also be created by deposit of title deeds.

> It is clear that neither (1) nor (3) above have any application to the facts of this matter and that we need be concerned only with (2) above. In the same publication there appears, at p. 83, under the heading "Mortgage by Instrument not Sufficient to Convey the Legal Estate", the following passage:
>
> > (1) Conveyance defective in form
> >
> > If a document in the form of a legal mortgage is signed but not sealed, or for any other reason is not sufficient to transfer the legal estate, it is an equitable mortgage.
> >
> > An instrument intended to operate as a legal mortgage, which fails so to operate for want of some formality, is valid as an equitable charge and gives the mortgagee a right to a perfected assurance.
> >
> > (2) Agreement to give a Mortgage
> >
> > An agreement in writing duly signed to execute a legal mortgage is an equitable mortgage, operating as a present charge on the lands described in the agreement.

[67] In this case, we are concerned with a mortgage by an instrument that is insufficient to convey the legal estate – the MCA.

3) <u>Priorities</u>

[68] Given that this cross-appeal essentially involves a contest of priority between RBC and BMO to the funds realized upon the sale of the Crawford Avenue property, it is necessary to briefly consider the priorities of enforcement as they relate to equitable mortgages.

[69] In this regard, I adopt the following equitable "rules" as summarized in *Falconbridge on Mortgages*, 5th ed., looseleaf (Agincourt, Ont.: Canada Law Book, 2003) at paras. 7:20 – 7:40:

> Rule 1. *As between two equitable mortgages the first in time has priority, unless the second mortgagee, taking in good*

> *faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee, or by a representation of the first mortgagee which estops him or her from claiming priority over the second mortgage.*
>
> Rule 2. *As between a first legal mortgage and a second equitable mortgage, the first mortgage has priority, unless the second mortgagee, being a mortgagee in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee in connection with the taking of the first mortgage or the subsequent fraud (as distinguished from mere negligence) of the first mortgagee, or unless the first mortgagee is estopped from claiming priority.*
>
> Rule 3. *As between a first equitable mortgage and a second legal mortgage, the second mortgage has priority if the mortgagee has acquired the legal estate in good faith for value and without notice* [emphasis added].

4) Does the commitment letter give rise to an enforceable equitable mortgage?

[70] In order for the MCA to give rise to an enforceable equitable mortgage in this case, it must have arisen prior to April 1, 1999 – the date of amalgamation.

[71] With respect, I disagree with the motion judge that a *Planning Act* consent was required before the MCA could give rise to an equitable mortgage. In reaching this conclusion, the motion judge appears to have been wrongly influenced by the conclusion of Sutherland J. in *Scherer v. Price Waterhouse*.

[72] Importantly, in *Scherer*, the loan agreement contravened the *Planning Act* because the mortgagor owned an interest in an abutting parcel of land at the time the loan agreement was signed and accepted. Here, however, 1156712 did not have any interest in any abutting land at the time the MCA was signed and accepted on March 26, 1999. It only acquired an interest in abutting land on April 1, 1999 as a result of amalgamation. Consequently, if an enforceable equitable mortgage is found to have arisen prior to amalgamation, there would be no violation of the *Planning Act*; no consent was required at that time. Unlike *Scherer*, this would not be a case in which provisions of the *Planning Act* were not complied with.

[73] With that in mind, I turn to the consideration of whether an enforceable equitable mortgage actually arose prior to the date of amalgamation.

[74] RBC signed the MCA on March 15, 1999. It was accepted and signed back to RBC on March 26, 1999. Under the heading "SECURITY", the mortgagor and mortgagee agreed as follows:

> The security for this loan, registered or recorded as required by [RBC], shall be:
>
> - A first charge/mortgage on the freehold property owned by [1156712] and known as 655 Crawford Avenue, in the City of Windsor, being Conc 1, Part 1, Ref Plan 12RI0596 (the "Property").
>
> - A first ranking security interest in an assignment of rentals payable by all tenants of the Property, present and future.
>
> A first and specific registered assignment of the current leases to those tenants as outlined on Form J attached.
>
> Further, [1156712] will provide [RBC], on request, with a first and specific assignment of such other present and future leases of the Property which [RBC] may designate in writing from time to time.

[75] The MCA was subject to the following conditions precedent:

> Prior to an advance of funds hereunder, at [1156712's] expense, [1156712 is] to provide [RBC] with:
>
> - Completion Certificate indicating the new building is completed and that the renovations are completed on the existing building.
>
> - A Remediation Report from Agra Earth & Environmental indicating that the environmental concerns outlined in the Agra Report of December 13, 1995 have been remediated in accordance with MOE guidelines.

[76] Thus, before it can be considered a binding contract, the two conditions must have been either satisfied or waived. And the finding of an enforceable equitable mortgage on Parcel One is dependent on satisfaction or waiver prior to April 1, 1999.

[77] On the record before this court, there is no evidence of compliance with or waiver of the two conditions prior to the date of amalgamation. As a result, RBC does not have a valid and enforceable equitable mortgage on Parcel One.

[78] I conclude with the following observations. Had the conditions precedent been satisfied or waived prior to April 1, 1999, I would have concluded that the MCA gave rise to a valid equitable mortgage for $2,300,000 on Parcel One. But for the conditions, the MCA evidenced a common intention to secure property, which was supported by the valuable consideration of the exchange of promises between RBC and 1156712 regarding the security of that property and the future advance of $2,300,000.

[79] In that context, the equitable mortgage would not have been in violation of the *Planning Act*, because it would have arisen prior to amalgamation. As already discussed, this is a key factual difference between this case and *Scherer v. Price Waterhouse*.

[80] In addition, the equitable mortgage would have been enforceable in priority to BMO's GSA. This is because, as already discussed, BMO acquired its legal charge with notice of RBC's mortgage financing. In this context, it makes no difference that BMO was not aware of the equitable mortgage, given its knowledge of the registered, albeit invalid, mortgage. As a result, and in accordance with the third rule of priorities already described, the equitable mortgage would rank in priority to BMO's subsequent legal interest.

[81] If that were the case, RBC would be entitled to that portion of the $1,670,000 realized upon the sale of 655/755 Crawford Avenue that can be attributed to Parcel One. This would not, as the motion judge feared, "result in a change in ownership [to Parcel One], the very thing the *Planning Act* seeks to prevent or at least, regulate."

III. NET RENTAL PROCEEDS

[82] In addition to the money it collected from the sale of the property, the Interim Receiver also collected money in rental proceeds from Parcel One.

[83] As noted by the motion judge, RBC was granted an Assignment of Rents by Properties, which was registered under both the *PPSA* and the *Land Titles Act.* RBC registered two Financing Change Statements under the *PPSA*. The first was dated April 7, 1998 and referred to an assignment of rents in respect of Parcel One. The second, dated August 31, 2000, referred to a general and specific assignment of rents.

[84] RBC conceded before the motion judge that the registration of the Assignment of Rents under the *Land Titles Act* was also void because of the *Planning Act* breach. It

argued, however, that the registration under the *PPSA* remained valid and binding and took priority over any subsequent *PPSA* registrations, including those of BMO.

[85] I agree with the motion judge's conclusion that the *PPSA* registrations are not inextricably bound to the Assignment of Rents. They are capable of existing independently, such that their valid registrations take priority over BMO's GSA registered under the *PPSA* in 2001. The *PPSA* registrations and the Assignment of Rents evidence an interest in an income stream and, as a result, are not dependent on the validity of the underlying registration against title to the lands. RBC is entitled to the net rental proceeds.

DISPOSITION

[86] In the result, the appeal is dismissed and the cross-appeal is dismissed. Counsel agree that the successful party on the appeal should have costs fixed in the sum of $10,000 and, on the cross-appeal, in the sum of $5000.

[87] Accordingly, RBC is entitled to costs of the appeal fixed in the sum of $10,000 and BMO is entitled to costs of the cross-appeal fixed in the sum of $5000. Both figures are inclusive of disbursements and G.S.T.

RELEASED: September 19, 2006 "DOC"

"J. MacFarland J.A."
"I agree D. O'Connor A.C.J.O."
"I agree Doherty J.A."

TAB 9

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The Law Reports (Chancery Division)

[1989] Ch 32

[CHANCERY DIVISION]

In re BERKELEY APPLEGATE (INVESTMENT CONSULTANTS) LTD. (IN LIQUIDATION)

HARRIS *v.* CONWAY AND OTHERS

[No. 4750 of 1987]

1987 July 23, 24, 27;

Nov. 27

Edward Nugee Q.C. sitting as a deputy High Court judge

Company — Winding up — Liquidator — Costs and remuneration — Assets held on trust by company for investors — Voluntary liquidation — Work done by liquidator benefiting investors — Whether liquidator to be remunerated from trust funds

The business of the company, now in voluntary liquidation, was to place funds on behalf of individual investors on the security of first mortgages of freehold property which were taken in the company's name. All investors were provided with an investment scheme which stated, inter alia, that no costs whatsoever would be incurred by them. Apart from the free assets of the company, moneys held in clients' accounts awaiting investment and the benefit of mortgages were held on trust by the company for the investors. At the commencement of the winding up, funds standing to the credit of clients' accounts amounted to about £1.2 million plus interest of

£29,509 and the total loans made and secured by mortgages amounted to about £10.2 million. The expenses and remuneration of the liquidator were very considerable and likely greatly to exceed the company's free assets.

On the liquidator's application for the determination of the question whether any part of his expenses and remuneration could be paid out of the trust assets either directly or by way of payment to the company: —

Held, granting the application, that, although the liquidator was not in the position of a trustee and the legal title to the mortgages and the clients' accounts remained vested in the company, the court had jurisdiction to enforce the investors' equitable interests in that property and, in doing so, it had a discretion to require an allowance to be made for costs incurred and skill and labour expended in the administration of the property; that, since the work done by the liquidator had been of substantial benefit to both the trust property and the investors and was work that would have had to be done either by the investors themselves or by a receiver appointed by the court whose fees would have had to be borne by the trust property, the court would exercise its inherent jurisdiction to ensure that a proper allowance was made to the liquidator; and that, notwithstanding that the investors were relieved from liability for further payments under the investment scheme, the liquidator was to be compensated out of the trust funds to the extent that the company's assets were insufficient to compensate him adequately for his costs, skill and labour (post, pp. 50A–51B, H–53E).

Scott v. Nesbitt (1808) 14 Ves. Jun. 438; Neesom v. Clarkson (1845) 4 Hare 97; In re Marine Mansions Co. (1867) L.R. 4 Eq. 601; Phipps v. Boardman [1964] 1 W.L.R. 993 and In re Duke of Norfolk's Settlement Trusts [1982] Ch. 61, C.A. applied.

The following cases are referred to in the judgment:

Anglo-Austrian Printing and Publishing Union, In re [1895] 2 Ch. 891

Boynton (A.) Ltd., In re [1910] 1 Ch. 519

Bullock v. Lloyds Bank Ltd. [1955] Ch. 317; [1955] 2 W.L.R. 1; [1954] 3 All E.R. 726

Downshire Settled Estates, In re [1953] Ch. 218; [1953] 2 W.L.R. 94; [1953] 1 All E.R. 103, C.A.

Exchange Securities & Commodities Ltd. (No. 2), In re [1985] B.C.L.C. 392

Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1943] A.C. 32; [1942] 2 All E.R. 122, H.L.(E.)

Falcke v. Scottish Imperial Insurance Co. (1886) 34 Ch.D. 234, C.A.

Glasdir Copper Mines Ltd., In re [1906] 1 Ch. 365

Introductions Ltd. (No. 2), In re (Note) [1969] 1 W.L.R. 1359; [1969] 3 All E.R. 697

Introductions Ltd. v. National Provincial Bank Ltd. [1968] 2 All E.R. 1221; [1970] Ch. 199; [1969] 2 W.L.R. 791; [1969] 1 All E.R. 887, C.A.

Marine Mansions Co., In re (1867) L.R. 4 Eq. 601

Merry v. Pownall [1898] 1 Ch. 306

Morrison v. Morrison (1854) 2 Sm. & G. 564

Neesom v. Clarkson (1845) 4 Hare 97

Norfolk's (Duke of) Settlement Trusts, In re [1979] Ch. 37; [1978] 3 W.L.R. 655; [1978] 3 All E.R. 907; [1982] Ch. 61; [1981] 3 W.L.R. 455; [1981] 3 All E.R. 220, C.A.

Northern Milling Co., In re [1908] 1 I.R. 473

Oriental Hotels Co., In re (1871) L.R. 12 Eq. 126

Phipps v. Boardman [1964] 1 W.L.R. 993; [1964] 2 All E.R. 187; [1965] Ch. 992; [1965] 2 W.L.R. 839; [1965] 1 All E.R. 849, C.A.; [1967] 2 A.C. 46; [1966] 3 W.L.R. 1009; [1966] 3 All E.R. 721, H.L.(E.)

Regent's Canal Ironworks Co., In re (1875) 3 Ch.D. 411, C.A.

Scott v. Nesbitt (1808) 14 Ves. Jun. 438

Staffordshire Gas and Coke Co., In re [1893] 3 Ch. 523

Aga Estate Agencies, In re [1986] B.C.L.C. 346

Bainbrigge v. Blair (1845) 8 Beav. 588

Bolton (R.) and Co., In re [1895] 1 Ch. 333, C.A.

Bonnelli's Electric Telegraph Co., In re (1874) L.R. 18 Eq. 656

Chapman v. Chapman [1954] A.C. 429; [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798, H.L.(E.)

Henry v. Hammond [1913] 2 K.B. 515

Hibbert v. Cooke (1824) 1 S. & S. 552

Macadam, In re [1946] Ch. 73; [1945] 2 All E.R. 664

Neill v. Neill [1904] 1 I.R. 513

New, In re [1901] 2 Ch. 534, C.A.

Richards v. Collins (1912) 9 D.L.R. 249

S.C.F. Finance Co. Ltd. v. Masri (No. 2) [1986] 1 All E.R. 40; [1987] Q.B. 1002; [1987] 2 W.L.R. 58; [1987] 1 All E.R. 175, C.A.

Strapp v. Bull, Sons & Co., In re [1895] 2 Ch. 1, C.A.

Wise v. Perpetual Trustee Co. Ltd. [1903] A.C. 139, P.C.

ORIGINATING SUMMONS

By a summons dated 12 March 1987 the applicant, Roger John Harris, the liquidator of Berkeley Applegate (Investment Consultants) Ltd., sought, inter alia, determination of the questions: (1) whether the company held the legal estates of various legal mortgages (a) on trust for those persons who had currently contributed to the principal sums lent under those legal charges (b) on trust for those who had provided funds to the company for investment and who had not at the commencement of the winding up received payment in full of their funds (c) as part of the assets of the company available for application in the course of the winding up; (3) whether the company held sums standing to the credit of certain of its accounts at the Torquay branch of

Royal Bank of Scotland, designated “clients' accounts” (a) on trust for those shown as having sums standing to their credit on clients' account (b) on trust for all those who had provided funds to the company for investment and who had not at the commencement of the winding up received payment in full of their funds (c) as part of the assets of the company available for application in the course of the winding up; (6) whether the sum of £29,509 interest currently held in clients' accounts (a) was held on trust for those having balances in the clients' accounts (b) was held on trust for all those who had provided funds to the company for investment and who had not at the commencement of the winding up received payment in full of their funds (c) formed part of the assets of the company available for application in the course of the winding up. The applicant also sought further relief: (8) in so far as it might be necessary an order for payment to the liquidator as remuneration and/or fees, expenses, costs, disbursements and liabilities in such sum as the court deemed just out of the assets of the company and (in so far as they did not form part of those assets) out of the funds in the clients' accounts and the sums realised from the legal charges or (if and to the extent that the legal charges were not realised) from the beneficial owners; (8A) in so far as any of the property was held to be trust property an order that the company was entitled to be paid and to retain such sum or sums as the court thought fit by way of remuneration as trustee of the property.

The first respondent, Beryl Jessie Mary Conway, represented those persons who had supplied funds to the company for investment and who were recorded as having moneys outstanding secured by mortgages. The second respondents, John Leslie Applegate and Sandra Elspeth Phyllis Applegate (the executors of the estate of Albert Leslie Applegate), represented those who had supplied funds to the company which were recorded as standing to the credit of the clients' accounts. The third respondent, Victor C. F. Clark, represented the unsecured creditors.

In an interim judgment dated 24 July 1987 Mr. Edward Nugee Q.C. held that the assets referred to in questions (1), (3) and (6) of the summons were held on trust. In that judgment, he stated the following facts:

“The principal business of the company was described by its directors as being to act as agent to place funds on behalf of individual investors and obtain first mortgages over freehold property. In outline the way in which it operated was as follows. Individual investors would pay the sum which they wished to invest to the company. The company would then lend the money it received

to approved borrowers on mortgage, the mortgage being taken in the name of the company. The sums advanced to borrowers were generally in excess of the sums received from any one investor, so that money advanced to any one borrower was generally derived from the investments of a number of distinct investors. The company kept records which showed the source from which each advance was derived, and the borrower paid interest direct to the investors whose investments had been applied in making the particular advance to him. Between the time when the investors paid their money to the company and the time when the company applied it in making an advance, the money was held in one of four clients' accounts operated by the company where it earned interest. When the money was applied in making an advance, the company would pay to the investor the amount of interest his money had earned while it was in the clients' account, less interest at the rate of 2 per cent. on the principal which it kept for itself. When a borrower repaid an advance, the money would be placed in one of the clients' accounts and in due course applied in making another advance on mortgage. The interest earned in the meanwhile would be paid to the investor, unless he instructed the company to reinvest the interest as well as the principal. The investors were entitled to withdraw all or part of their capital at any time on 30 days notice. If they did so at a time when it was invested in an advance to a borrower, the company would substitute another investor's money by means of book entries, so that it was not necessary to call in the mortgage advance to which the original investor's money had been applied. At the commencement of the winding up there were about 1085 investors who had placed money with the company, and the company had made about 125 advances on mortgage, the total amount of the loans being about £10.2m. The money in the clients' accounts awaiting investment on mortgage was about £1.2m, which was held for about 275 investors."

Further facts are set out in the judgment.

Anthony Mann for the applicant liquidator. The liquidator's remuneration is provided for by rules 4.127 and 4.218 of the Insolvency Rules 1986 . It is clear that remuneration and expenses cannot be paid out of assets not the property of the company under these rules. It is essential that a liquidator acts in relation to trust assets held by the company in circumstances such as these so as to preserve them for the benefit of the investors. A liquidator has been allowed fees out of trust

assets in In re Introductions Ltd. (No. 2) (Note) [1969] 1 W.L.R. 1359 (in that case without any argument) and in In re Exchange Securities & Commodities Ltd. (No. 2) [1985] B.C.L.C. 392 by concession.

The cases relied on in the latter case do not fully support the concession: In re Anglo-Austrian Printing and Publishing Union [1895] 2 Ch. 891 is a manifestation of a jurisdiction to allow a receiver remuneration. The improvement in value of the asset there achieved was not a benefit officially conferred. In re A. Boynton Ltd. [1910] 1 Ch. 519 was a debenture holders' action in which the dispute was between a bank which had made advances and the receiver who had used the advances in carrying on the company's business: it was held that as the bank had not relied on the receiver's personal credit it must be postponed to the receiver's claim for remuneration. In In re Glasdir Copper Mines Ltd. [1906] 1 Ch. 365 all those interested in the assets were parties to the carrying on of the company's business by the receiver and manager. The case nevertheless illustrates that there is jurisdiction to ensure that the liquidator does not suffer a loss. In In re Marine Mansions Co. (1867) L.R. 4 Eq. 601 a liquidator was allowed only the costs of realisation of assets in priority to the claims of debenture holders. In re Oriental Hotels Co. (1871) L.R. 12 Eq. 126 and In re Regent's Canal Ironworks Co. (1875) 3 Ch.D. 411 are to the same effect: see especially *per* James L.J. in the latter case at 426; litigation costs were allowed out of the fund (see the order, 3 Ch.D. 411 , 428).

Apart from these cases, the jurisdiction to allow the liquidator remuneration can be based on the general jurisdiction of the court over trusts and trustees and on settled equitable principles. The principles are (a) that “he who seeks equity must do equity” and (b) that the court exercises its jurisdiction over trusts so as to promote their administration.

The following are examples of the operation of these principles: (1) Trustees can be allowed remuneration in the absence of an express power contained in the trust instrument: In re Duke of Norfolk's Settlement Trusts [1982] Ch. 61. This does not depend on an implied contract, or on a beneficial interest in the fund, but on the promotion of the administration of the trust. A liquidator is not a trustee, but he is a fiduciary. (2) A person who becomes chargeable with a profit as a constructive trustee (even though this intervention was unauthorised) is entitled to an allowance: Phipps v. Boardman [1964] 1 W.L.R. 993. (3) A tenant for life who completes the principal mansion house is recompensed: Hibbert v. Cooke (1824) 1 S. & S. 552. A receiver

appointed by the court is allowed remuneration. (4) Where a litigant requires the assistance of a court of equity to enforce his claim, he can be made to submit to conditions: In re Northern Milling Co. [1908] 1 I.R. 473; Falcke v. Scottish Imperial Insurance Co. (1886) 34 Ch.D. 234, 251, *per* Bowen L.J. So an allowance was made to the defendant in Phipps v. Boardman [1964] 1 W.L.R. 993, and consignees have been remunerated for the expense of managing estates: Morrison v. Morrison (1854) 2 Sm. & G. 564 and Scott v. Nesbitt (1808) 14 Ves. Jun. 438. This is the jurisdiction exercised in Richards v. Collins (1912) 9 D.L.R. 249. (5) The remuneration sought ought to be allowed under the jurisdiction of the court to see that trusts are properly administered: see In re Duke of Norfolk's Settlement Trusts [1979] Ch. 37, 59, *per* Walton J. Unexpected expenditure of trustees is allowed under this jurisdiction: In re New [1901] 2 Ch. 534, 544, *per* Romer L.J. This is an aspect of the “salvage” jurisdiction: Chapman v. Chapman [1954] A.C. 429, 445, *per* Viscount Simonds L.C., *per* Lord Morton at p. 452.

Finally to allow this claim is desirable as a matter of policy. Liquidators would not undertake cases of this kind unless they know that their time and expense will be compensated.

Richard de Lacy for the first respondent. The assumption of jurisdiction to allow remuneration to the official receiver in the cases of In re Introductions Ltd. (No. 2) (Note) [1969] 1 W.L.R. 1359 and In re Exchange Securities & Commodities Ltd. (No. 2) [1985] B.C.L.C. 392 is distinguishable, as the liquidator here took office voluntarily. In both cases the jurisdiction was accepted without argument. The cases cited in support of the jurisdiction in In re Exchange Securities & Commodities Ltd. (No. 2) [1985] B.C.L.C. 392 do not support the argument of the liquidator, as is shown by the analysis put forward on the liquidator's behalf. The authorities relating to the priority of claims of debenture holders and liquidators are against the claim of the liquidator in this case. This was the result in In re Marine Mansions Co., L.R. 4 Eq. 601 and it was treated as clear law in In re Oriental Hotels Co., L.R. 12 Eq. 126 , that the claims of the secured creditors were paramount to the costs of the winding up. There is no material distinction between the claim of a chargee and the claims of an absolute owner of the property vested in the company for this purpose. In In re Regent's Canal Ironworks Co., 3 Ch.D. 411 , an express distinction was drawn between the costs of carrying on the business (which must have been in part for the benefit of creditors whose debts were secured on it) and the costs of realisation of the property.

Trustees are not entitled to recover expenditure on the trust property, even where the trust property is improved, if there are contractual terms between them and the beneficiaries excluding such claims: see Wise v. Perpetual Trustee Co. Ltd. [1903] A.C. 139. The terms of the investment in this case excluded all right in the company to remuneration: the liquidator cannot be in a better position.

The claim made in this case is not for expenses and remuneration to be paid to the trustee. The liquidator is a stranger to the trust, and has administered only the internal management of the trust itself. The case therefore falls within the principle in Falcke v. Scottish Imperial Insurance Co., 34 Ch.D. 234 , and not within the possible exceptions mentioned by Bowen L.J. The conferment of a benefit (if any) on the investors does not by itself give rise to a claim for remuneration or reimbursement. For the same reason, the jurisdiction in In re Duke of Norfolk's Settlement Trusts [1982] Ch. 61 cannot be exercised in this case.

The only positive authority for the jurisdiction argued for is the Canadian case of Richards v. Collins, 9 D.L.R. 249 , but that decision was really an example of equitable estoppel.

The cases relating to consignees: Morrison v. Morrison, 2 Sm. & G. 564 ; Scott v. Nesbitt, 14 Ves. Jun. 438 , and that relating to the profit of a fiduciary (Phipps v. Boardman [1964] 1 W.L.R. 993) involved affirmation by the beneficiaries of transactions generating profit at the expense of the claimant: the investors in this case need not adopt or affirm any of the acts of the liquidator in order to assert their right to the trust assets. As a matter of discretion the claim should be refused so far as it seeks to augment the assets of the company in order to provide for the remuneration: (a) the company contracted not to be remunerated for its services as trustee (b) the business of the company was an unlawful deposit-taking business and contravened the provisions of the Banking Act 1979 .

Kevin Garnett for the second respondents adopted the argument of the first respondent.

Peter Griffiths for the third respondent adopted the argument of the liquidator.

It is accepted that the jurisdiction requires more support than is to be found in the cases cited in In re Exchange Securities & Commodities Ltd. (No. 2) [1985] B.C.L.C. 392. In re Anglo-Austrian Printing and Publishing Union [1895] 2 Ch. 891 is directed apparently at the costs of proceedings and is not a reliable analogy. In re Bonnelli's Electric Telegraph Co., L.R. 18 Eq. 656 was a case of a solvent company. Wise v. Perpetual Trustee Co. Ltd. [1903] A.C. 139 demonstrates that a contract may impose a limit on the amount which a beneficiary is required to contribute, but the equitable jurisdiction was not resorted to. Civil liability is not affected by the Banking Act 1979 : see S.C.F. Finance Co. Ltd. v. Masri (No. 2) [1986] 1 All E.R. 40, 53. It is not clear from the evidence that the business was unlawful.

Cur. adv. vult.

27 November. EDWARD NUGEE Q.C. read the following judgment. In answer to questions 1, 3 and 6 of this summons I have held that certain assets standing in the name of the company are held on trust for the investors who paid money to the company for investment. At the commencement of the winding up these assets consisted of the benefit of about 125 loans made to borrowers from the company and secured by mortgages, the total amount of the loans being about £10.2 million; the money standing to the credit of the company's clients' accounts amounting to about £1.2 million; and a sum of £29,508.92 representing interest on moneys in the clients' accounts. The assets of the company which are not subject to any trust are of uncertain value. They consist of cash at the bank amounting at the commencement of the liquidation to about £34,000; the proceeds of sale of the company's motor vehicles, which have realised about £11,000; a substantial sum said to be due in respect of interest, of which only about £2,000 has been recovered to date; and the uncertain proceeds of a number of actions for negligence which the company has commenced against valuers who acted for it in connection with the making of loans on security which has proved to be insufficient. Since the company made good to the investors the shortfall which arose on the realisation of the relevant securities, the benefit of these actions should accrue for the benefit of the company.

The remaining questions of the summons concern the expenses and remuneration of the liquidator. These have been very considerable, and are likely greatly to exceed the free assets of the company.

The work undertaken by the liquidator and his solicitors can be summarised under five heads.

(1) Preliminary investigation. This was carried out in the month before the decision to wind up was taken, to see whether a liquidation was appropriate or necessary and to identify some of the potential problems. The work involved a general investigation into the company's affairs and a preliminary identification of potential claimants and the classes into which they fell. Most of it was useful in the liquidation and would have had to be done anyway. It was at this stage that an assessment of the nature of the proprietary claims of the investors first had to be formed, and the liquidator obtained counsel's opinion which was to the effect that, on a preliminary view of the facts, the company's clients' accounts and secured lendings were trust assets and that the investors were accordingly not entitled to vote at the creditors' meeting.

(2) Inquiries from investors and borrowers. The investors were given notice of the creditors' meeting, which was held on 15 January 1987, and this precipitated an avalanche of inquiries from anxious investors and borrowers, both to the liquidator and to his solicitors. The liquidator estimated that immediately before the creditors' meeting inquiries were being made at the rate of up to 100 telephone calls and up to 50 letters a day, and that they continued at this level for a month after the meeting before beginning to reduce.

(3) Ascertainment of assets. In addition to the ascertainment of the company's free assets, this has involved matching the sums paid to the company by the investors with the sums advanced by the company to the borrowers, checking the company's records and the investors' certificates of investment, reconciling the company's clients' accounts with the associated records, and compiling a schedule of mortgage advances showing the investors whose money has been applied to each advance, and a schedule of those interested in the clients' accounts.

(4) Management of investments. Although interest was normally paid direct by the borrowers to the investors, on occasions the borrowers fell behind and the investors asked the liquidator or his solicitors to take steps to recover the arrears. The liquidator felt that these requests could not be ignored, and in 9 cases recovery proceedings have been commenced. There have also been 31 redemptions where loans totalling about £2.3 million have been repaid, and the liquidator's staff

and solicitors have had to deal with those redemptions. The liquidator has also had to supply certificates of interest paid and received for tax purposes. In short the liquidator has continued to carry on the company's mortgage business, though without lending moneys afresh.

(5) General liquidation affairs. The liquidator has also, of course, had a certain amount of work in relation to pure liquidation matters. He estimates, however, that up to the end of May 1987 only about 250 man-hours were spent on this work, whereas about 3,300 man-hours were spent on matters relating to the investors' proprietary claims; and time is still being spent at the rate of 650 man-hours per month, the great majority of it in connection with the trust assets and the investors' interests in them. The liquidator's disbursements include substantial sums paid out for insurance cover on the mortgaged properties, and solicitors' costs of more than £30,000 a large part of which was incurred in dealing with inquiries from investors.

It is common ground that there is no statutory authority for the payment of any part of the liquidator's expenses or remuneration out of the trust assets. Rule 4.127 of the Insolvency Rules 1986 provides that “The liquidator is entitled to receive remuneration for his services as such,” and specifies how that remuneration is to be fixed. Section 115 of the Insolvency Act 1986 provides:

“All expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.”

Rule 4.218 sets out the order of priority in which the expenses of the liquidation are payable out of the assets, subject to any order of the court to the contrary; and the remuneration of the liquidator is included as one of the expenses there mentioned. It is clear, however, that the company's assets do not, for the purposes of these provisions, include assets held by it in trust for others. This is so notwithstanding that the duty of the liquidator under section 100 of the Insolvency Act 1986 to wind up the company's affairs necessarily involves dealing to some extent with the assets which it holds as trustee.

It is clear also that if a receiver of the trust assets had been appointed by the court, the court would have had jurisdiction under R.S.C., Ord. 30, r. 3 to authorise the payment of remuneration out of the trust assets or their income. The appointment of a receiver would have presented

difficulties in the present case, however, because until the liquidator had done a good deal of work the necessary basis of fact for such an appointment had not been established; and moreover each mortgage was held on a distinct trust for a distinct investor or group of investors.

It appears that there has been an increase in recent years in the number of companies going into liquidation which hold part of their assets on trust for their clients or customers. In a significant number of these cases the free assets of the company are not sufficient to cover the costs of establishing and verifying the facts. The difficulty which faces a liquidator in a case of this kind was well put by Mr. Harris, the liquidator in the present case, in the evidence which he gave in support of this application:

“If the legal charges or client account balances are held not to be assets of the company, and if I cannot obtain remuneration out of that property, then I, and any other liquidator approaching the liquidation of companies where there may be proprietary claims to the apparent assets, will be in an impossible situation. Often one cannot tell whether there can be a proprietary claim, or whether an individual asset is one to which such a claim may relate, without carrying out considerable investigative work in the first place. It is unrealistic to expect some sort of application to be made to the court in advance of doing any work, because without an investigation it will not be possible to present an intelligible case on such an application. At the end of the day the work has to be done by someone, and it is usually (and certainly in the present case) best done by the liquidator.”

The order which the liquidator now seeks is an order for the payment to him as remuneration and/or fees, expenses, costs, disbursements and liabilities in such sum as to the court shall seem just, out of the assets of the company and out of the funds in the clients' accounts and the sums realised from the mortgages or from the investors if and to the extent that the mortgages are not realised; and as a less satisfactory alternative, an order that the company be entitled to be paid and retain such sums as the court shall think fit by way of remuneration as trustee of the trust assets. The question which I am now asked to determine is the question of principle, namely, whether any part of the liquidator's expenses or remuneration can be paid out of the trust assets, either directly or by way of payment to the company. If the answer to that question is yes, I am not asked at this stage to decide how the expenses and remuneration should be borne as between

the company's assets and the trust assets, nor am I asked to determine whether any particular item of expenses or remuneration claimed by the liquidator should be allowed. Both these questions will require consideration in due course if payment can properly be made out of the trust assets, but there is not sufficient evidence to enable them to be decided at present. The liquidator is, however, entitled to know before he incurs further expense whether his proper expenses and proper remuneration for his work will be met from the trust assets in the event of the company's own assets proving insufficient.

There is no reported authority directly in point. I was referred to two cases in which the official receiver was acting as liquidator of a company which was in course of being wound up by the court. In In re Introductions Ltd. (No. 2) (Note) [1969] 1 W.L.R. 1359, the company had been incorporated for the purpose of giving services and information to overseas visitors. Subsequently it embarked on the business of pig-farming. Members of the public were invited to purchase sows, and the company undertook to maintain the sows and sell the progeny for the benefit of their owners. The scheme was not financially successful, and was held by Buckley J. and the Court of Appeal to be ultra vires: see Introductions Ltd. v. National Provincial Bank Ltd. [1968] 2 All E.R. 1221; [1970] Ch. 199. The official receiver as liquidator collected the assets of the company, which consisted of a number of freehold farms and the company's pigs and were derived wholly from the pig-breeding business, and sought directions as to the payment of his costs and the costs of the liquidation generally. He pointed out that there was no provision in the Board of Trade Fees Order 1929 for him to charge fees for his services in an “ultra vires case,” although in similar circumstances it had been the practice of the official receiver to do so. He further stated that in his opinion the statement of affairs which he had prepared would materially assist in the distribution of the assets irrespective of their eventual disposition; and that he was unable to proceed with his duties as liquidator unless and until the court should have given directions with regard to the costs of the liquidation in that the company had no assets available other than those obtained by it in the course of its ultra vires trading. Stamp J., in a four-line judgment, said [1969] 1 W.L.R. 1359, 1361:

“A labourer is worthy of his hire. It is quite plain that I must direct payment of the official receiver's costs, charges and expenses out of the assets in hand, without prejudice as to how any of the costs, charges and expenses ought ultimately to be borne.”

However the application was unopposed, none of the investors being represented; and no distinction appears to have been made between the farms, which, subject to the consequences of the business being ultra vires, were the property of the company, and the pigs, some at least of which may have been held on a constructive trust for the investors, although it appears from the report that, despite the system of marking, it was not possible to identify them as belonging to any particular individual.

In In re Exchange Securities & Commodities Ltd. (No. 2) [1985] B.C.L.C. 392, the facts were nearer to those of the present case. Orders were made for the compulsory winding up of 12 associated companies, and the official receiver became the provisional liquidator of each company. Four of the companies invited deposits from the public for investment in commodities, commodity futures, unit trusts, insurance bonds and the like; and the investors claimed that moneys they had deposited were impressed with a trust. The official receiver issued applications under section 246(3) of the Companies Act 1948 to determine the issues raised by these claims, joining representative investors as respondents. In July 1984 Vinelott J. directed that the respondents be entitled until further order to be paid their costs out of the assets reputedly belonging to the companies. In March 1985 the matter came back before him on the official receiver's application that his proper fees and expenses should rank as a first charge on the assets reputedly belonging to the companies in priority to the trust claims. At that point of time the extent and validity of the trust claims had not been finally established.

Counsel for the official receiver submitted that the court had an inherent jurisdiction to direct the payment to the official receiver of a just allowance for his services, and in addition to direct the payment or reimbursement of all costs and expenses reasonably incurred by him in getting in and protecting and in taking steps necessary to ascertain the true ownership of the assets held by the companies. Counsel for the representative investors accepted, in Vinelott J.'s view rightly, that the court had jurisdiction to authorise the payment of a just allowance to the official receiver for his services and in reimbursement of costs and expenses reasonably so incurred. A number of authorities were referred to, but it appears that he limited his argument to a submission that, as the difficulties which had confronted the official receiver arose from the failure of each company to keep trust assets distinct from other assets, all costs and expenses in connection with the unravelling of the accounts (other than the costs of the section 246(3) applications) should be borne by the assets other than the trust assets so far as sufficient, save only that expenses directly

related to the realisation and preservation of the trust assets, such as insurance premiums, should fall exclusively on the trust assets: see p. 403A–B. Vinelott J. considered it premature to endeavour to formulate principles which would govern the incidence of costs and expenses incurred by or on behalf of the official receiver until after the questions relating to the trust claims and other questions had been determined. He accordingly made a declaration, inter alia, that the fees and proper expenses of the official receiver as provisional liquidator would rank as a charge on the assets held by or reputedly belonging to the companies in priority to any trust claims, but without prejudice to the ultimate incidence thereof as between trust and other assets.

In the present case Mr. de Lacy, counsel for the investors whose moneys have been applied in making mortgage advances, supported by Mr. Garnett, counsel for the investors whose moneys are still in the company's clients' accounts, challenges the right of the liquidator to be paid anything out of the trust assets in excess of the amounts which the company itself could have recovered under the terms on which deposits were invited from the public. Mr. de Lacy points out that the two cases to which I have referred were both cases of compulsory winding up, in which the official receiver, by virtue of his office, automatically becomes the liquidator until another liquidator is appointed: see section 136(2) of the Insolvency Act 1986 . In the present case the company is in voluntary liquidation, and Mr. Harris had an opportunity of considering the position before accepting office as liquidator. He submits that what the liquidator has done amounts to the officious conferment of a benefit and that, in the words of Bowen L.J. in Falcke v. Scottish Imperial Insurance Co. (1886) 34 Ch.D. 234, 248: “Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.”

A liquidator is not a trustee for anyone: he is a substitute for the board of directors. He is only the agent of the company, and is more akin to the board than is a trustee in bankruptcy; and even a trustee in bankruptcy acquires no title to trust assets vested in the bankrupt. Mr. de Lacy's submissions go to the root of what was accepted in In re Exchange Securities & Commodities Ltd. (No. 2) [1985] B.C.L.C. 392, and I have heard a full argument on the question whether the court has jurisdiction to make any such order as is sought by the liquidator.

In support of his submission that such a jurisdiction exists, Mr. Mann, counsel for the liquidator, referred me first to the cases which were referred to by Vinelott J. In a number of them the contest was between the liquidator and a secured creditor. In In re Marine Mansions Co. (1867)

L.R. 4 Eq. 601, a debenture holder had a specific charge on the leasehold land and buildings of the company. The liquidator sold two properties for a sum in excess of the amount owing on the debentures. Sir W. Page Wood V.-C. held that the debenture holder was entitled to be paid his principal, interest and costs out of the proceeds of sale, after deducting only the liquidator's costs of realising the property together with certain expenses incurred by the liquidator in rendering the property fit for sale and rent paid by him to the landlord, to which the debenture holder made no objection. The other costs incurred by the liquidator in the winding up and any remuneration payable to him were postponed to the rights of the debenture holder. A similar conclusion was reached by Wickens V.-C. in In re Oriental Hotels Co. (1871) L.R. 12 Eq. 126: the expenses of the realisation of the property by the liquidator took priority over any claim of the mortgagee, but the mortgagee's claim was paramount to the general costs of the winding up. I do not find these two cases of very much assistance. In both of them the mortgagee could have sold regardless of the winding up and the liquidator was in effect selling on his behalf. The expenses which he incurred for the purpose of selling to the best advantage were of a different character from the expenses incurred by the liquidator in the present case. Nevertheless they recognise that where a mortgagee permits a liquidator to sell the company's property which is subject to his mortgage, he cannot claim the entire proceeds of sale without allowing the liquidator the costs which he has properly incurred in connection with the sale.

In In re Regent's Canal Ironworks Co. (1875) 3 Ch.D. 411, liquidators appointed by the court in a voluntary winding up under the supervision of the court carried on the business of the company for nine years under a number of orders of the court which were expressed to be without prejudice to the claims of the debenture holders. Eventually, under a further order of the court, they realised the property which was subject to the debenture, which consisted of certain leaseholds, machinery and plant. The liquidators claimed to be allowed the costs of carrying on the business in priority to the debenture holders. The Court of Appeal held that the costs properly incurred in realising the properties comprised in the security were payable out of the proceeds of sale, and subject thereto the proceeds belonged to the debenture holders. James L.J. said, at p. 426:

“I am of opinion that the claim on behalf of the liquidators cannot be sustained. No doubt it is a very hard case for them that they have had to deal with an insolvent company, but they ought to have looked into that matter before they incurred expenses and made themselves liable. Those

who render services to an insolvent company, or an insolvent person, frequently find they have to go without payment, and the liquidators should not have incurred disbursements which they had no means of being reimbursed."

He would have allowed costs properly incurred in preserving the property, such as the cost of repairs, the payment of rates and taxes necessary to prevent a forfeiture or putting a person in to take care of the property (but not payments made as part of the current outgoings of the business); but the liquidators had not paid anything of that kind. Mr. de Lacy relied on this case as authority for the proposition that the inherent jurisdiction for which Mr. Mann contended does not exist. I do not think it provides any guidance either way. It was in essence quite a straightforward case in which the liquidator and the contributories thought it was for their own benefit that the business should be carried on, and the debenture holders were content to rely on their security: see *per* James L.J. at pp. 420–421. When the business failed and the security was realised, only the costs of realisation could properly be charged against the debenture holders. The position was no different in principle from that which existed in In re Marine Mansions Co., L.R. 4 Eq. 601 and In re Oriental Hotels Co., L.R. 12 Eq. 126 . In re Northern Milling Co. [1908] 1 I.R. 473 was a case in the High Court of Ireland to the same effect.

Similar reasoning was adopted by Kekewich J. in In re Staffordshire Gas and Coke Co. [1893] 3 Ch. 523, where the question was whether the costs of persons who successfully applied to be struck off the list of contributories were payable in priority to the costs of the liquidation. The liquidator was allowed the costs of realising the assets of the company, and would have been allowed "expenditure, if any there had been, in the preservation of the property coming under the head of 'salvage'": see p. 528. The costs of the applicants took priority over the liquidator's costs of resisting the application.

In In re Anglo-Austrian Printing and Publishing Union [1895] 2 Ch. 891, misfeasance proceedings were brought by the liquidator against certain officers of the company, under section 10 of the Companies (Winding-Up) Act 1890 , and a sum of £7,000 was recovered. The sum recovered was subject to a debenture. It was not disputed that the liquidator was entitled to deduct the costs incurred by him in the misfeasance proceedings; but the petitioning creditor claimed that his costs too should have priority as they were essential to the salvage of the fund,

because the particular proceedings under the Act of 1890 could not have been taken unless there had been a winding up order, and there could not have been a winding up order unless there had first been a petition. Vaughan Williams J. held that these costs could not be brought within the doctrine of salvage, and therefore, with some regret, that they could not be given priority. Mr. de Lacy says that if there had been any such inherent jurisdiction as is claimed by Mr. Mann the court could have allowed the petitioner his costs in priority to the debenture holders. There is some force in this, but the petitioning creditor stands on a rather different footing from the liquidator; and it does not appear that the wider question of inherent jurisdiction, of which salvage is only one aspect, was really argued.

In two further cases, In re Glasdir Copper Mines Ltd. [1906] 1 Ch. 365 and In re A. Boynton Ltd. [1910] 1 Ch. 519, the court had appointed a receiver in a debenture holder's action, in order to preserve and realise the company's property, and authorised him to borrow money for that purpose. In both cases it was held that the receiver's costs and remuneration took priority over the claims of the persons from whom he borrowed the money. In In re A. Boynton Ltd. Warrington J. pointed out that the receiver was an officer of the court, and summarised the position of the lenders, at p. 525:

“They come in and take a charge upon the assets of a business which is in the course of realization by the court, and in my opinion they can take in satisfaction of their charge no more than that which is actually realized. The plaintiff has incurred his costs of the action, and the receiver has given his services, in the endeavour to realize as large a fund as possible for the benefit of the several persons having charges on it, and I think they are both entitled to be indemnified before the fund is applied in payment of these charges.”

These cases are clearly distinguishable from the present case. Mr. Mann suggested that they illustrated a general principle that work carried on for the benefit of others should be paid for at the expense of those others, and that the position of the debenture holders was very similar to that of the investors in the present case, in that the assets subject to the debentures were no longer the assets of the company; but I do not think that there is a very close analogy between a

liquidator in a voluntary winding up who has incurred expense in dealing with assets which never belonged beneficially to the company, and a receiver acting on the directions of the court who has incurred expense in realising assets of the company which were subject to a debenture.

Having referred me to all the cases which were cited in In re Exchange Securities & Commodities Ltd. (No. 2) [1985] B.C.L.C. 392 Mr. Mann accepted that Vinelott J. did not have a line of cases before him which established the jurisdiction on which he relied; but nevertheless Vinelott J. was satisfied that there was jurisdiction, at all events where the official receiver was acting as liquidator. Mr. Mann submitted that the source of the jurisdiction was to be found first in the maxim that he who seeks equity must do equity, and secondly in the inherent jurisdiction to promote the proper administration of trusts, which includes the doctrine of salvage; and he submitted that these two sources are not distinct but overlap. In re Marine Mansions Co., L.R. 4 Eq. 601 and subsequent cases in which the liquidator had been allowed the costs incurred in preserving mortgaged property, might be seen as based on the maxim or on the jurisdiction to promote the proper administration of trusts; but reimbursement of expenses was not enough for his purposes: what he sought was an order authorising reasonable remuneration for the liquidator. He submitted that the court's jurisdiction to award compensation for services rendered was supported by two comparatively recent cases, Phipps v. Boardman [1964] 1 W.L.R. 993 and In re Duke of Norfolk's Settlement Trusts [1982] Ch. 61.

In Phipps v. Boardman [1964] 1 W.L.R. 993 trustees of a will held shares in a company. Mr. Boardman, who was the solicitor to the trustees, and Mr. Phipps, who was a beneficiary, obtained confidential information about the company by acting as self-appointed agents for the trustees. With the aid of that information they made a take-over bid on their own behalf for the outstanding shares in the company, so as to obtain control and, by a liquidation of assets, make a repayment of capital to the shareholders. The assets of the company proved to be worth far more than the amount paid for the shares. The trustees made a handsome profit on their shares, and Mr. Boardman and Mr. Phipps an even larger one on theirs. Wilberforce J. held that they must account to the beneficiaries for the profit they had made, less their expenditure incurred to enable it to be realised. He continued, at p. 1018:

Wilberforce J.'s decision was affirmed in the Court of Appeal [1965] Ch. 992, where Lord Denning M.R. equated the case to an action for restitution of the kind described in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1943] A.C. 32, 61, and said that the claim for restitution should not be allowed to extend further than the justice of the case demanded, and that generous remuneration should be allowed to the agents; and in the House of Lords [1967] 2 A.C. 46, where Lord Cohen and Lord Hodson, at pp. 104 and 112 respectively, agreed with Wilberforce J. that payment should be allowed on a liberal scale in respect of the work and skill employed in obtaining the shares and the profits therefrom.

In In re Duke of Norfolk's Settlement Trusts [1982] Ch. 61, a settlement authorised one of the plaintiffs, a trustee company, to charge remuneration in accordance with its usual scale of fees in force at the date of the settlement. The substantial redevelopment of the settled estates involved the trustees in work entirely outside anything which could reasonably have been foreseen when they accepted office. The plaintiffs sought an order under the inherent jurisdiction authorising increased remuneration for the plaintiff company. In the High Court Walton J. [1979] Ch. 37 held that he had jurisdiction to authorise additional remuneration in respect of past work, but that he had no inherent jurisdiction to authorise for the future any general increases in the remuneration provided for the trustee company under the settlement. The Court of Appeal [1982] Ch. 61 held that there was an inherent jurisdiction to increase the remuneration of a trustee, on the basis that in doing so the court was "exercising its ancient jurisdiction to secure the competent administration of trust property:" *per* Fox L.J., at p. 78E. Fox L.J. continued, at p. 79:

"I appreciate that the ambit of the court's inherent jurisdiction in any sphere may, for historical reasons, be irrational and that logical extensions are not necessarily permissible. But I think that it is the basis of the jurisdiction that one has to consider. The basis, in my view, in relation to a trustee's remuneration is the good administration of trusts. The fact that in earlier times, with more stable currencies and with a plenitude of persons with the leisure and resources to take on unremunerated trusteeships, the particular problem of increasing remuneration may not have arisen, does not, in my view, prevent us from concluding that a logical extension of admitted law

and which is wholly consistent with the apparent purpose of the jurisdiction is permissible. If the increase of remuneration be beneficial to the trust administration, I do not see any objection to that in principle."

Having established that the court has jurisdiction in certain cases to authorise remuneration to be paid out of trust funds to trustees or others acting in a fiduciary relationship to the trust, Mr. Mann referred me to a number of cases in which, he submitted, the court had applied the principle that he who seeks equity must do equity. In Scott v. Nesbitt

(1808) 14 Ves. Jun. 438, consignees (or managers) of a West Indian estate who had been appointed out of court claimed a lien on the estate for expenses incurred in managing it in priority to mortgagees of the estate. The master's report stated that he did not find that there was any law or usage in the West Indies under which the consignee was entitled to such a lien; but Lord Eldon upheld his claim on ordinary principles of equity as applied to estates in this country. He said, at p. 444:

"the concerns of the estate could not be carried on without consignees; and all moral justice requires, that for what in the fair discharge of their duty they become liable to in respect of the management of the estate they should be indemnified, with priority to the claim of those, who have interests in the estate, to be so managed, before any person can have any benefit from it. If any probable cause had been laid before the court, when the decree was made, in 1783, a receiver, or consignee and manager, would have been granted; whose fair expences would have been paid in the first instance, before this court would have permitted anything to be taken by the parties entitled; and it may be represented rather as the effect of accident, that this question arises now, than that a consignee might not have been appointed; who would have been immediately entitled to the benefit, which is now claimed."

A similar decision was given by Stuart V.-C. in Morrison v. Morrison (1854) 2 Sm. & G. 564, where consignees of an estate in Tobago were appointed by the court in proceedings to which a mortgagee was not party. Questions arose concerning priority of title to a fund in court, being the amount of the compensation money awarded to the owner of the estate in respect of slaves of the estate upon their emancipation. Stuart V.-C. said, at p. 576:

“To permit the mortgagee to take this compensation money, or any other part of the proceeds of this estate, or any fund in this cause belonging to the mortgagee or other owners of the estate, without reimbursing the consignee the debt found due to him for the management on behalf of all the owners, would be a violation of those principles of natural justice on which Lord Eldon said he proceeded in the case of Scott v. Nesbitt, 14 Ves. Jun. 438 .”

Mr. de Lacy submitted that these two cases could be distinguished because the outlay by the consignee was for the purpose of producing income, and the party who had not consented to the consignee's appointment could not make the consignee account for the income without reimbursing him his expenditure. In the present case, on the other hand, the liquidator's expenditure was incurred in the internal management of the company, and the investors are not seeking any form of relief against him. He sought to distinguish Phipps v. Boardman [1964] 1 W.L.R. 993 on similar grounds: the beneficiaries, he submitted, had an election either to affirm the transaction in which Mr. Boardman and Mr. Phipps assumed to act as agents for the trust, in which case they were obliged to pay their expenses and compensation for their skill and labour; or to refuse to treat them as agents, when they would not have been entitled to any payment (but could have kept the profits for themselves). In the present case the liquidator's work has not added to the assets of the investors, and the investors are not obliged to pay him anything.

In my judgment Mr. de Lacy's submissions are based on too narrow a view of the principles on which the court acts. It is true that the legal title to the mortgages and to the clients' accounts is not vested in the liquidator but remains in the company; but the investors still need the assistance of a court of equity to secure their rights. In this respect their position is different from that of the claimant in Falcke v. Scottish Imperial Insurance Co., 34 Ch. D. 234 , where Bowen L.J. said, at p. 251: “It is not even a case where the owner of the saved property requires the assistance of a court of equity ... to get the property back.” As a condition of giving effect to their equitable rights, the court has in my judgment a discretion to ensure that a proper allowance is made to the liquidator. His skill and labour may not have added directly to the value of the underlying assets in which the investors have equitable interests but he has added to the estate in the sense of carrying out work which was necessary before the estate could be realised for the benefit of the investors. As was the case in Scott v. Nesbitt, 14 Ves. Jun. 438 , if the liquidator had not done this work, it is inevitable that the work, or at all events a great deal of it, would have had

to be done by someone else, and on an application to the court a receiver would have been appointed whose expenses and fees would necessarily have had to be borne by the trust assets. On the evidence before me, the beneficial interests of the investors could not have been established without some such investigation as has been carried out by the liquidator.

The allowance of fair compensation to the liquidator is in my judgment a proper application of the rule that he who seeks equity must do equity.

"That ... is a rule of unquestionable justice, but which decides nothing in itself; for you must first inquire what are the equities which the defendant must do, and what the plaintiff ought to have:"

Neesom v. Clarkson (1845) 4 Hare 97, 101 *per* Wigram V.-C.

"The rule means that a man who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give; he must do justice as to the matters in respect of which the assistance of equity is asked:"

Halsbury's Laws of England, 4th ed., vol. 16 (1976), p. 874, para. 1303, which in my judgment correctly states the law.

The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in In re Marine Mansions Co., L.R. 4 Eq. 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in Scott v. Nesbitt, 14 Ves. Jun. 438); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in Phipps v. Boardman [1964] 1 W.L.R. 993). In my judgment this is a case in which the jurisdiction can properly be exercised.

It seems to me that this principle is entirely consistent with the basis upon which the Court of Appeal acted in In re Duke of Norfolk's Settlement Trusts [1982] Ch. 61. What the Court of Appeal held in that case was that, if the increase of the trustees' remuneration was beneficial to the trust administration, there was an inherent jurisdiction to require the beneficiaries to accept, as a condition of effect being given to their equitable interests, that such an increase in remuneration should be authorised. The court there was concerned with the good administration of a settlement of a conventional kind; but the jurisdiction which was held to be exercisable in that case is in my judgment equally exercisable in other cases in which a person seeks to enforce an interest in property to which he is entitled in equity. The principles on which a court of equity acts are not divided into watertight compartments but form a seamless whole, however necessary it may be for the purposes of exposition to attempt to set them out under distinct headings. I have already referred to the way in which Kekewich J. in In re Staffordshire Gas and Coke Co. [1893] 3 Ch. 523 treated expenditure on the preservation of trust property as coming under the head of "salvage," and the petitioning creditor in In re Anglo-Austrian Printing and Publishing Union [1895] 2 Ch. 891 sought to persuade Vaughan Williams J. to do the same. It is of interest that in In re Duke of Norfolk's Settlement Trusts [1979] Ch. 37, 59B–C, Walton J. regarded the cases in which the court authorises additional remuneration in order to secure the services of a particular trustee as also being "closely analogous to 'salvage'." I think this can fairly be regarded as confirmation of the underlying unity of the inherent jurisdiction which is exercised in such diverse circumstances as those which existed in In re Marine Mansions Co., L.R. 4 Eq. 601 ; Scott v. Nesbitt, 14 Ves. Jun. 438 ; Phipps v. Boardman [1964] 1 W.L.R. 993 and In re Duke of Norfolk's Settlement Trusts [1982] Ch. 61.

Another example of the exercise of the inherent jurisdiction which seems to me to fall within the same principle occurs when the court sets aside a settlement for undue influence or on the bankruptcy of the settlor. Although there is no longer any property subject to the settlement, the court has a discretion to allow the trustees to take their costs out of the fund before handing it over to the successful litigant: see Merry v. Pownall [1898] 1 Ch. 306, 310–311 and Bullock v. Lloyds Bank Ltd. [1955] Ch. 317, 327.

The particular aspect of the inherent jurisdiction which is sometimes referred to as "salvage" was said by Evershed M.R. and Romer L.J. in In re Downshire Settled Estates [1953] Ch. 218, 235, to be exercisable

"where a situation has arisen in regard to the [trust] property (particularly a situation not originally foreseen) creating what may be fairly called an 'emergency' — that is a state of affairs which has to be presently dealt with, by which we do not imply that immediate action then and there is necessarily required — and such that it is for the benefit of everyone interested under the trusts that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose."

The situation which existed in the present case immediately before the commencement of the winding up could similarly fairly be called an emergency; and although the observations of Evershed M.R. and Romer L.J. were directed to the court's jurisdiction to confer administrative powers upon trustees, the cases to which I have referred show that the inherent jurisdiction is wider than this and extends to making an allowance for costs incurred and skill and labour expended by those who have acted without obtaining the prior authority of the court.

I should notice three particular objections which were made to the existence of the jurisdiction in the present case. First it was said that the liquidator was not in the position of a trustee, in that the legal interest in the trust assets remained throughout in the company and did not vest in him. In my judgment this does not preclude the court from making an allowance to him out of the trust assets in respect of his expenses and remuneration, although it is no doubt a factor to consider when determining to what extent compensation for his expenditure of money, skill and labour should be borne by the trust assets rather than the company's own assets. In several of the cases to which I have referred the person to whom the court made an allowance was not in the ordinary sense a trustee, although like the liquidator he was subject to fiduciary obligations; and the fact that he was not a trustee did not prevent the court from making a payment to him out of the trust assets. The salvage jurisdiction referred to in In re Downshire Settled Estates [1953] Ch. 218 was described in terms which were restricted to the conferment of powers on trustees; but Evershed M.R. and Romer L.J. recognised that salvage was only one aspect of the inherent jurisdiction, and the court's powers are clearly not exercisable only in favour of those who hold office as express trustees.

Thirdly, it was said that the business carried on by the company was contrary to section 1 of the Banking Act 1979 , and that this is a ground for declining to exercise the inherent jurisdiction. It is not necessary for me to express any view on the legality of the company's business, which appears to be a question of some difficulty. I am satisfied that even if it was illegal, this does not preclude the court from exercising the jurisdiction in favour of the liquidator, whose own conduct is blameless in this respect.

Accordingly I propose to declare that the liquidator is entitled to be paid his proper expenses and remuneration out of the trust assets if the assets of the company are insufficient. I am not deciding how such expenses and remuneration should be borne as between the company's assets and the trust assets, nor as between the different classes of trust assets, nor whether any part of them should be borne by the trust assets if the company's own assets should in the end prove sufficient to meet them. It is premature to determine questions of incidence when the full extent of the liquidator's claims to expenses and remuneration are not yet known and the assets of the company may yet be swelled as a result of the litigation in which it is engaged. But the liquidator is entitled to know at this stage that his proper expenses and remuneration will be paid if necessary out of the trust assets, and that he will not be left at the end of the winding up with the possibility of receiving no recompense for his work or of having to bear part of the expenses out of his own pocket.

Declaration accordingly.

Solicitors: Bond Pearce, Plymouth; Boyce Hatton, Torquay; Fynmores, Bexhill-on-Sea; Fairchild Greig & Wells.

[Reported by IAN SAXTON, ESQ., Barrister-at-Law]

TAB 10

Ontario Securities Commission v. Consortium Construction Inc., Consortium Property Management Inc., Consortium Properties Inc., Consortium Financial Inc., Consortium (2000) Securities Inc., Consortium Group International (Canada Inc.), 72714 Ontario Ltd., 780240 Ontario Ltd., 808925 Ontario Ltd., 808926 Ontario Ltd., 812353 Ontario Ltd., 812354 Ontario Ltd., 812355 Ontario Ltd., 812356 Ontario Ltd., 831415 Ontario Ltd. and Bahamas I "Investors"

[Indexed as: Ontario Securities Commission v. Consortium Construction Inc.]

9 O.R. (3d) 385
[1992] O.J. No. 1584
Action No. C9890

Court of Appeal for Ontario,
Lacourcire, Carthy and Galligan JJ.A.
July 28, 1992

Administrative law -- Boards and tribunals -- Ontario Securities Commission -- Appointment of receiver upon application of Ontario Securities Commission -- Court having jurisdiction to impose cost of receiver's fees and expenses upon assets held in trust -- Fees and expenses should not include fees and expenses incurred for investigative and prosecutorial activities of Commission -- Securities Act, R.S.O. 1980, c. 466, s. 17(2), (4).

Debtor and creditor -- Receivers -- Appointment upon application of Ontario Securities Commission -- Court having jurisdiction to impose cost of receiver's fees and expenses upon assets held in trust -- Discretion to be exercised sparingly -- Fees and expenses should not include fees and expenses incurred for investigative and prosecutorial

activities of Commission -- Securities Act, R.S.O. 1980, c. 466, s. 17(2), (4).

The respondent companies sold investment units in eleven Canadian real estate projects and four projects outside Canada. Concerned about the propriety of these sales under the Securities Act, the Ontario Securities Commission (OSC) commenced an investigation, and PMT was retained to prepare a report. The report revealed that over 1000 investors had invested in excess of $17 million in the projects but that the respondents' financial records were inadequate to particularize the investments by project. The report revealed that the projects would recover substantially less than the investments. On the grounds that it would be in the best interest of creditors, the public, and the investors, the OSC applied to the court for an order appointing PMT as receiver and manager of the respondent companies pursuant to s. 17(2) of the Securities Act. The application was made without notice to the investors and was granted. Then, certain of the investors in one of the projects, known as Bahamas I, moved to vary the order appointing the receiver; these investors argued that the order ought not to have allowed the receiver the right to look to certain assets that were allegedly held in trust. On the motion to vary, without determining whether or not the assets were held in trust, the court ordered a three-step process for the receiver's fees and disbursements. Under this scheme, it was likely that the receiver's expenses would be paid out of the assets that were allegedly held in trust for the Bahamas I investors. The investors appealed.

Held, except for a variation about the liability for costs of the OSC, the appeal should be dismissed.

Per Carthy J.A. (Lacourcire J.A. concurring): The court has a discretionary jurisdiction to make an order imposing upon trust assets in receiverships, although the discretion should be sparingly exercised. This jurisdiction was also supported in the immediate case by s. 17(2) and (4) of the Securities Act . The court having jurisdiction, the next question was whether the jurisdiction should have been exercised. Based upon a review of the facts and issues, it could not be said that the

discretion was wrongly exercised. Money from the various projects had been commingled, and there were tracing problems due to the inadequate financial records. The estate did not lend itself to separation into parcels of assets. The only alternative to the order was a series of receivers for individual projects, yet these receivers would have been met with the same problems that confronted the present receiver.

Although not an issue presented to the court, it was appropriate to comment about the possibility that the preparation of a report under the receivership order was prompted in part by the OSC's concern to investigate breaches of the Securities Act . In this regard, it would be improper for a receivership under s. 17 of the Act, or any significant part of it, to be conducted for the sole benefit of an investigation and eventual prosecution; investors and creditors should not be paying for these activities of the OSC. Accordingly, the order under appeal should be varied by inserting a paragraph making the order without prejudice to a motion relating to costs that should be payable by the OSC as a party to the proceeding.

Per Galligan J.A. (concurring): Because in the immediate case, the court's jurisdiction to impose a receiver's fees and expenses upon trust assets could be found in s. 17 of the Securities Act, it was unnecessary to decide this issue under general principles of insolvency law; the general issue should be left to be decided in a case where it is necessary to do so. The provisions of s. 17 determined that trust funds may be subject to the administration of the court. The statute makes the receiver and manager the receiver and manager of all or any part of property held in trust by the company that is the subject-matter of the receivership. The court has inherent power to allow a receiver and manager to recover its proper remuneration expenditures and disbursements out of any assets that are subject to the administration of the court. For the reasons expressed by Carthy J.A., the discretion to make an order imposing on trust assets was properly exercised.

Cases referred to

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.); Eastern Capital Futures Ltd. (Re), [1989] B.C.L.C. 371 (Ch.D.); Exchange Securities & Commodities Ltd. (Re) , [1985] B.C.L.C. 392 (Ch.D.); Fort Garry Trust Co. v. Alberta Securities Commission (1980), 27 A.R. 56, 35 C.B.R. (N.S.) 272, 113 D.L.R. (3d) 489, [1980] 6 W.W.R. 481 (C.A.); G.B. Nathan & Co. Pty. Ltd. (Re) (1991), 5 A.C.S.R. 673 (New South Wales S.C.); Harris v. Conway, [1989] 1 Ch. 32; Laudan v. ABC Travel Systems, Inc. , 165 A.2d 568 (N.J. Ch.D. 1960); Oberman v. Mannahugh Hotels Ltd. (1980), 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312, [1980] 5 W.W.R. 487 (Q.B.); Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (C.A.)

Statutes referred to

Securities Act, R.S.O. 1980, c. 466 (now R.S.O. 1990, c. S.5), s. 17, 17(2), (4)

APPEAL from an order of the General Division (1991), 9 C.B.R. (3d) 278, appointing a receiver under s. 17 of the Securities Act.

Robert J. Morris, for Bahamas I "investors", appellants.

Sheila R. Block and Michael B. Rotsztain, for Peat Marwick Thorne Inc., receiver and manager for the Consortium Group, respondent.

Thomas J. Lockwood, Q.C., and David E. Lang, for Ontario Securities Commission, respondent.

CARTHY J.A. (LACOURCIRE J.A. concurring):--This proceeding finds its origin in an application by the Ontario Securities Commission to appoint Peat Marwick Thorne Inc. as receiver and manager of the respondent companies pursuant to s. 17(2) of the Securities Act, R.S.O. 1980, c. 466 (now R.S.O. 1990, c. S.5).

The respondents, which I will call the Consortium Group, had been selling units in eleven Canadian based real estate projects and four projects outside of Canada. They attracted the attention of the Securities Commission by reason of their methods of sale and, after a series of investigatory and other steps had been taken, the receivership application was made without formal notice to the investors (the purchasers of units). Following the receivership order certain of the investors in one of the projects, known as Bahamas I, came forward to contest the right of the receiver to look to trust assets in the possession or control of the Consortium Group for its fees and expenses.

The position of the Bahamas I investors was that their money had been delivered to the Consortium Group on terms that it would be held in trust until a certain stage in the development of the project, which was never in fact reached. Thus, it was argued that these funds should be maintained separately from funds of the Consortium Group and should bear only limited responsibility for fees and expenses of the receivership. The motion for the variation to the original order, made by Ewaschuk J. on January 21, 1991, was heard by Rosenberg J. and it is his order of July 17, 1991 which is the subject of the present appeal. He ordered a three-step process of recovery of the receiver's remuneration, expenditures and disbursements. Under the order, the "trust claim assets", being funds that may eventually be found to be impressed with a trust, will bear the costs of realizing and distributing those assets. The balance of the expenses are to be paid out of the assets belonging to the Consortium Group. Finally, if there is still a deficiency, the expenses are to be paid out of the trust claim assets pro rata. As will appear when the facts are more fully developed, the last proviso is very likely to be implemented and the Bahamas I investors appeal to this court asking that this last proviso be struck out of the order of receivership.

Another panel of this court has determined that the order under appeal is final and we have therefore given no consideration to that issue. The reasons of Rosenberg J. are extensive and, since they are presently unreported [now reported (1991), 9 C.B.R. (3d) 278], I will borrow from them to

the extent that is necessary to understand the issues as they come before this court.

The appellants put two general arguments to this court. They question the jurisdiction of Rosenberg J. to make an order charging trust funds which do not belong to the Consortium Group and, in the event jurisdiction is found, they say that in the circumstances of this case such an order should not have been made. No further elaboration of the facts is necessary to consider the jurisdiction issue.

The general law as to the recovery of the costs of a receivership was canvassed in Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201 (C.A.). Houlden J.A., after reciting the principle that a receiver must look to the assets under its control for recovery of expenses, proceeds to discuss exceptions to the general rule. At pp. 89-90 O.R., pp. 207-08 C.B.R., he states:

> The second exception is this: if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact (as was attempted in the present case), that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors: Greenwood v. Algesiras (Gibraltar) Ry. Co. , [1984] 2 Ch. 205. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: Greenwood v. Algesiras (Gibraltar) Ry. Co., supra; and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order: Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. Thames Ironworks, Shipbuilding and Engineering Co. Ltd. , [1912] W.N. 66.

This excerpt deals with secured creditors and not those with money held in trust, but if the jurisdiction of the court is coincident and extends to trust funds, it must surely be subject to the limitations referred to by Houlden J.A. I will return to the excerpt from the Kowal case later when I deal with the merits of the present case.

Looking beyond Ontario, in Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.), the court permitted the receiver's costs to erode a mortgagee's claim on assets within the receivership. The court made the very broad statement at p. 308 C.B.R., p. 376 D.L.R.:

> All of the debtor's property under administration of the court, and not merely the equity of the debtor in that property, is available by order of the court to meet the fees and disbursements of a receiver.

These two cases deal with security instruments rather than trust claims, but they make it clear that in limited circumstances the court can attach more than the equity of the debtor to meet the expenses of the receivership. The following cases all deal specifically with trust assets.

In the case of Harris v. Conway, [1989] 1 Ch. 32, the High Court of England, in a case similar to the one before this court involving investors' money awaiting investment, it was stated at pp. 50-51:

> The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised ; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the

person entitled to the equitable interest (as in In re Marine Mansions Co., L.R. 4 Eq. 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in Scott v. Nesbitt, 14 Ves. Jun. 438); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in Phipps v. Boardman, [1964] 1 W.L.R. 993). In my judgment this is a case in which the jurisdiction can properly be exercised.

(Emphasis added)

Similar orders imposing a receivers' costs against trust funds are found in: Re Eastern Capital Futures Ltd. , [1989] B.C.L.C. 371 (Ch.D.); Re Exchange Securities & Commodities Ltd. , [1985] B.C.L.C. 392 (Ch.D.); Re G.B. Nathan & Co. Pty. Ltd. (1991), 5 A.C.S.R. 673 (S.C. of New South Wales); Laudan v. ABC Travel System, Inc., 165 A.2d 568 (N.J. Ch.D. 1960).

I am satisfied that these authorities amply ground an authority to make an order imposing upon trust assets in receiverships, although the discretion should be sparingly exercised. As to the present situation, where a receiver is appointed pursuant to the Securities Act, the authorizing sections lend further force to this conclusion.

Sections 17(2) and (4) read as follows:

> 17(2) Upon an application under subsection (1), the judge may, where he is satisfied that the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company , or, in a proper case, of the security holders of or subscribers to the person or company, appoint a receiver, receiver and manager, trustee or liquidator of the property of the person or company.
>
> . . . . .
>
> (4) A receiver, receiver and manager, trustee or liquidator

> of the property of any person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company , and the receiver, receiver and manager, trustee or liquidator shall have authority, if so directed by the judge, to wind up or manage the business and affairs of the person or company and all powers necessary or incidental thereto.

(Emphasis added)

The Bahamas I investors argue that the receiver is appointed under s. 17(2) and the appointment is restricted to the property of the companies. It is said that the extended wording in s. 17(4), which refers to trust property, only relates to the powers of the receiver to hold the property secure and does not make that trust property part of the receiver so as to subject it to a charge for fees. Whatever the reason may be for the differences in wording of the two subsections, I do not accept the appellants' interpretation and conclude, as stated above, that the reference to trust properties in the statute reinforces the receiver's right to ask the court to impose upon trust property for fees and expenses.

Turning to the question of whether the order charging the receiver's fees and expenses against the trust funds should have been granted, it is necessary to elaborate more fully on the factual background. First, it should be underlined that no funds have been established as trust funds. Rosenberg J. made the assumption that such a finding would be made as to some funds at a later stage in the proceeding and referred to them as trust claim assets.

On October 7, 1991, the Commission commenced an investigation into the possible unlawful distribution of securities by the Consortium Group. There was no prospectus, no registration under the Securities Act and the promotional material was offering real estate based investments with promise of tax relief and 100 per cent profit for the investors. The Commission formed the opinion that the Consortium companies

were committing breaches of the Securities Act. Freeze orders and cease trading orders followed and Peat Marwick Thorne Inc. was retained to prepare a draft report. The Consortium Group was to pay for the cost of the preparation of that draft report. That report became the basis of the receivership application and was issued on December 14, 1990.

The report revealed that there were over 1,000 investors who had invested in excess of 17 million dollars; the accounting system of the Consortium Group was not up to date and was inadequate for ready analysis; funds had been transferred from project to project and from account to account without records to enable the transactions to be retraced; general funds and project funds had been commingled; the potential recovery was uncertain but would be substantially less than the total of investments. Of the total, the Bahamas I project involved 238 investors and a total investment of approximately 3 million dollars. The monies advanced by the Bahamas I investors was to be deposited in a segregated trust account with a law firm in Nassau, to be returned to the investors if the project did not proceed. In the words of Rosenberg J. at pp. 13-14 of the transcript of his reasons [at pp. 288-89 C.B.R.]:

> Accordingly, the O.S.C. applied to the court for a receiving order. In support of its application, the O.S.C. filed the affidavit of Michael De Verteuil, which affidavit outlined the facts as I have referred to them herein and attested "I am of the view that further management of the project by the Consortium Group of Companies would result in increased losses to investors" (emphasis added). It went on to say, "Based on my review of the Peat Marwick Thorne Report, I am of the view that a Receiver and Manager of the Consortium Group of Companies is in the best interest of the creditors of the Consortium Group of Companies, the public, and the investors in the Canadian Co-ownership, the $ U.S. Projects and the Fund" (emphasis added).
>
> In using the term investors which I have emphasized, Mr. De Verteuil was undoubtedly including all investors notwithstanding that some of the investors might have a claim to have some of the funds held in the various bank accounts

deemed trust funds for their benefit. Even if such a claim could be established with regard to any specific funds, the persons investing these funds with the Consortium Group of Companies are undoubtedly included in the term investors as Mr. De Verteuil used that term. Accordingly, in the two hearings that followed with regard to the receiving order, the court had before it the uncontradicted affidavit evidence that the receiving order was in the best interest of the investors including those claiming the benefit of a trust relationship.

However, none of the investors were given notice of the hearing itself or the position of the Receiver that its fees and disbursements had priority over trust fund claims.

Before the return date of the application for the receiving order, Pia Williamson advised the Commission that, as the principal of the Consortium Group of Companies and as a gesture of good faith and integrity, she wished an opportunity to lend to the Consortium Group of Companies $2.5 million on certain terms and conditions to support the Consortium Group. As a result of the proposal, the O.S.C. did not oppose a request by the Consortium Group for an adjournment of the application for a receiving order.

On December 21, 1990, Steele J. granted an adjournment of the application to January 21, 1991 on terms that should Pia Williamson fail to come forward with the $2,500,000, a receiving order would be issued. The terms of that order were made a schedule to the adjournment order. Peat Marwick Thorne Inc. was not satisfied that the draft order clearly provided a charge for the receiver's expenses against potential trust assets and negotiated a change in wording with the Securities Commission. The investors were given a status report by letter with no attention drawn to the issue of charges against trust assets. Pia Williamson then failed to deposit the $2,500,000. The receiver and the Commission came before Ewaschuk J. on January 21, 1991 seeking an order in the form approved by Steele J., as amended respecting the receiver's fees and expenditures. It is unnecessary to examine the detail of those changes now because Rosenberg J. later found that they remained

ambiguous. If there is to be an entitlement, it must be under the later variations made by Rosenberg J.

In this earlier motion, there was no discussion before Ewaschuk J. as to the issue of the receiver having a charge against the trust claim assets and the order, as amended, was issued. In addition to the usual receivership terms, the order directed the receiver to prepare a report identifying the accounting of each of the projects, providing a statement of source and application of funds for each project, describing the status and prospects of each project, assessing the extent and priority of the various creditors of each project and setting forth recommendations. The order also authorized the receiver to draw up to $250,000 against its accounts.

Upon a motion on April 4, 1991, that amount was increased to $600,000. On that occasion a few unrepresented investors appeared. No one is presently able to say whether representations were made on that occasion as to the receivers' charge against the trust claim assets. Since Rosenberg J. treated the matter as of first instance in July, it is unlikely that the issue was raised in April.

On May 17, 1991, the receiver brought a motion to increase the draw against expenditures to $850,000. That motion was adjourned to be heard together with the motion which had then been launched on behalf of the Bahamas I investors to vary the provision as to the receiver's charge against trust claim assets.

On the motion before Rosenberg J. on May 24, 1991, a representative of the receiver filed an affidavit setting out the background of discussions and concerns relating to the knowledge that trust claim assets might be needed to meet the costs of the receivership. It stated in part:

> The Receiver consented to its appointment as receiver and manager with the knowledge that trust claims and other proprietary interests might be asserted and on the understanding, shared by the applicant OSC, that the definition of the Assets in the Receivership Order includes,

inter alia, property held by the Respondents which might be subject to trust claims and other proprietary interests and that the priority of the Receiver's charge for remuneration, expenditures and disbursements extends to such property which might be subject to trust claims and other proprietary interests. The Receiver has relied upon such understanding in acting as receiver and manager since January 21, 1991 and in incurring significant remuneration, expenditures and disbursements.

Rosenberg J. then observed at p. 32 of his reasons [p. 301 C.B.R.]:

> However, as stated previously, this "knowledge" and "understanding" was not disclosed to the court when the receiving order was made nor was this "knowledge" and "understanding" brought to the attention of the investors, in specific terms, so that they could, if they wished, either individually or collectively, oppose the receiving order or bring an appropriate motion for directions. In fact, it was a letter of March 22, 1991 from the receiver to the investors which first clearly stated that there would be a charge on the trust claim assets, and which presumably gave rise to the motion by the Bahamas I investors.

At pp. 26-27 of his reasons [pp. 297-98 C.B.R.], Rosenberg J. made the following comment at the time of the hearing of the motion, at which time, we were told, the receiver's actual expenditures totalled 1.4 million dollars:

> It will be some time before the validity of any trust or proprietary claims, including those which may be asserted by the Bahamas I investors, can be determined. However, in addition to the significant remuneration expenses and disbursements already incurred and made by the receiver, further remuneration, expenses and disbursements will continue to be incurred and made. If trust claims or other proprietary interests were successfully asserted and funds subject thereto were not available to the receiver for payment of its remuneration, expenses and disbursements, there would likely be insufficient proceeds available to pay

all the receiver's remuneration, expenses and disbursements.

This sets the framework for an understanding of the dilemma facing Rosenberg J., and now this court. Even without knowing what valid trust claims will eventually be established, it seems likely that such will be eroded by the receiver's charge. It may be that the entire estate plus the valid trust claims will be eaten up by those charges. The receiver is not being indemnified by the Securities Commission and cannot be expected to perform services without an assurance that it will be able to recover its fees and expenses. Would the situation have been different had the issue been raised at the outset as indicated in the dictum of this court in Kowal referred to earlier?

On my best analysis of all of the facts and issues, and in recognition that Rosenberg J. was exercising a discretion, I cannot say that it was wrongly exercised. Had the issue been raised before Ewaschuk J. with all of the factual material and arguments presented later to Rosenberg J., I cannot see how Ewaschuk J. could have restricted the effectiveness of the receivership by limiting recovery of fees and expenditures from resources which were uncertain in amount. Money from the various projects had been commingled and there were tracing problems due to the inadequate financial records. The various assets and funds had to be identified and claims assessed by some one or more bodies. No one is presently saying that efforts were extended to pursuits that were of no interest to the investors and creditors generally.

The Bahamas I investors point to their promotional brochure which promised that the monies would be retained in a trust account of a law firm in Nassau, thus identifying it as discrete. We were told that upon investigation it turned out that there was no money in the account in Nassau, but that through the receiver's efforts a letter of credit was delivered anonymously for an equivalent amount. That is one indication that this estate does not lend itself to separation into parcels of assets. A question may also be raised as to whether the original trust, if such was established, could be traced through the substituted letter of credit. The only alternative to the order made, it seems, would have been to have a receiver

or a series of receivers pursue the assets of the individual projects. Yet, these receivers would have been met with the same problems and expenditures that are confronting the present receiver. The disentanglement of one project from another would have eventually brought all of the contestants into expensive confrontation. This leads me to conclude that the extent of commingling of the funds justified the order under appeal.

It is regrettable that this issue was not raised at the outset before the massive build-up of accounts. As Rosenberg J. has pointed out this might have led to a cost-benefit analysis and a more curtailed approach. He wrote at pp. 35-37 of his reasons [pp. 303-04 C.B.R.]:

> Before dealing with the various alternatives and the applicable law, I make some comments from the fact that I have had a number of motions before me with regard to this receivership. With the benefit of hindsight I have developed some views as to what might have been a more appropriate course for this receivership to have taken.
>
> In the first application and again in the receiving order, the O.S.C. asked for and received a provision in the order that a report be prepared as outlined in the order. This was a most expensive process and the evidence indicates that the initial estimate by the receiver was that some $500,000 in total costs, including the report, were to be incurred by the receiver. There was no evidence indicating how much of the total cost of $1.4 million was attributable to the report and how much could have been saved by not having the report prepared. There was also no evidence from the Commission as to why it felt it was necessary to include the request for a report in the receivership order. The affidavit in support of the application for the appointment of a receiver deals in some length with breaches of the Act. This may or may not have been a factor in deciding that a report was required. Since I was not asked to determine if the O.S.C. or anyone else should pay any portion of the receiver's costs, I did not hear evidence from the Commission as to its reasons for asking that a report be prepared. There may have been and probably were reasons that justify their position. That may

be for the court to determine on another day.

However, with the benefit of hindsight, it seems possible that a preferable course of action based on the preliminary report would have been to come to court with a scheme of distribution based on that preliminary report, with the submission to the court that further investigation would only dissipate the few funds available to pay investors and creditors. Such a scheme would have recommended some handling of the trust claims that may or may not have been accepted by the trust claimants, however, it would have consolidated all of the issues into one hearing and possibly could have saved a proportion of the expense of the receivership. Eventually the receiver did bring a motion asking for leave of the court to prepare such a scheme. Such a proposal may have been made earlier if not for the order directing that a report be prepared. Such speculation is not relevant to the issue that is before me but appears to me to be appropriate because it may be that no one else will have had such exposure to the overall history of these proceedings. As a result of a number of appearances before me and argument on a number of matters, I have had some insight into the history of this receivership that led me to make the comments that I have.

In the course of argument on the motion, I advised counsel for the O.S.C. that I was considering making comments of this nature and held a special hearing to allow counsel to make submissions as to the appropriateness of my doing so.

(Emphasis added)

These comments underline the difficulty that has been created by the failure to give notice alerting investors that an order would be sought which, under the case law, is given only "sparingly". They also raise a question, which is admittedly not raised on the factual material or in argument, whether one of the objectives of this receivership may have been to benefit an investigation by the Securities Commission, as opposed to the usual purpose of a receivership which is to protect the assets of the investors and the position of the creditors.

I appreciate that this was not the issue presented to the court. The appellants are arguing that the cost of administering the Consortium Group assets should not be visited upon trust assets, not that alternative approaches were available to deal with all the assets. In my view, however, some comment should be made on the subject raised by Rosenberg J., and emphasized in the quote, as to the possibility that the preparation of the report pursuant to the receivership order may have been prompted in part by the Commission's concern to investigate breaches of the Act.

The Commission pursues its investigations and the various preventative remedies that are assigned to it at general taxpayer expense. It has the power to come to the court under s. 17 and seek a receivership order and, as under any other receivership order, its costs become a burden upon those interested in the estate. In my opinion, however, it would be inappropriate and, indeed improper, for such a receivership, or any significant part of it, to be conducted for the sole benefit of an investigation and eventual prosecution. This would place an officer of the court, the receiver, in the anomalous position of pursuing evidence, under authorization of the court, that may eventually be presented to the court. Further, such an investigation would be conducted at the expense of individual investors rather than the taxpayers. The investors and creditors should not be paying for the "police" functions of the Commission. It is not clear, however, from Rosenberg J.'s reasons, and certainly not from his order under appeal, how this issue could be addressed on another day.

Without insinuating anything more about this case than was said by Rosenberg J., I would be more specific than he was in leaving it open to any party to bring a motion based upon supporting facts seeking to have the Commission, and thus the taxpayers, pay costs to the estate to indemnify against any expenses which have been incurred primarily for the benefit of investigation and ultimate prosecution under the Securities Act. Section 17(2) of the Act sets the standard that the receivership be in the best interest of those financially interested as creditors or investors. If it has been conducted for purposes beyond those limits then when the time comes for

allocating costs of the proceedings the Commission should bear the expenses of exceeding the limits. This issue is entirely separate from the claim of the receiver under the order of Rosenberg J. as it will stand.

I would therefore vary the order of Rosenberg J. by inserting a paragraph making it without prejudice to any subsequent motion relating to costs of the proceedings that should be payable by the Ontario Securities Commission as a party to the proceeding. In other respects the appeal should be dismissed. Rosenberg J. awarded all parties their costs before him on a solicitor-and-client basis. In the case of the Ontario Securities Commission and the Bahamas I investors, these were to be paid forthwith after assessment or approval by the receiver and were to be dealt with as disbursements of the receiver requiring no further order of the court.

If this was appropriate on the motion, it also seems appropriate on appeal and I would make the same order as to costs of the appeal, including the motion as to the finality of the order of Rosenberg J.

GALLIGAN J.A. (concurring):--There are two issues in this appeal. The first is whether Rosenberg J. had jurisdiction to make the order charging the trust funds, which were not the property of the Consortium Group, with the proper remuneration, expenditures and disbursements of the receiver. The second issue is whether, if he had jurisdiction to make the order, in the circumstances of this case Rosenberg J. correctly exercised his discretion when he made the order.

Carthy J.A. has decided the first issue on the ground that, in receiverships generally, there is authority in the court to impose a receiver's proper remuneration expenditures and disbursements upon trust assets which do not belong to the person against whom the receiving order is made. This, however, is not an ordinary receivership. This receiving order was made pursuant to s. 17 of the Securities Act , R.S.O. 1980, c. 466 (now R.S.O. 1990, c. S.5). Because, in my opinion, the issue can be decided upon a consideration of the provisions of s. 17, it is not necessary, in this case, to decide the issue of

whether under general principles of insolvency law a receiver and manager is entitled to be compensated for its general administration out of trust property that comes into its possession or control. I think that issue should be left to be decided in a case where it is necessary to do so.

It is, I think, well established that a court has the inherent power to allow a receiver and manager to recover its proper remuneration expenditures and disbursements out of any assets which are subject to the administration of the court. In Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373, Dickson J.A., speaking for the Manitoba Court of Appeal, said at p. 308 C.B.R., p. 376 D.L.R.:

> . . . the appointment is a court appointment; when made, the appointee becomes an officer of the court; his fees and disbursements, in the absence of an order to the contrary, become payable out of the assets subject to the administration of the court.

(Emphasis added)

See also Oberman v. Mannahugh Hotels Ltd. (1980), 34 C.B.R. (N.S.) 181, [1980] 5 W.W.R. 487 (Man. Q.B.), at p. 187 C.B.R., pp. 493-94 W.W.R.

If the trust funds form part of the assets which are subject to the administration of the court, it would seem to me to follow necessarily that the court has the power, in its discretion, to charge those assets with the receiver and manager's proper remuneration expenditures and disbursements. It was argued on behalf of the appellants that because the funds were held in trust for other persons, they did not constitute property of the Consortium Group which was subject to the administration of the court. The provisions of s. 17 are determinative of whether or not the trust funds are subject to the administration of the court. The relevant provisions of s. 17 are found in subss. (2) and (4).

Section 17(2) provides as follows:

> 17(2) Upon an application under subsection (1), the judge may, where he or she is satisfied that the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company, or, in a proper case, of the security holders of or subscribers to the person or company, appoint a receiver, receiver and manager, trustee or liquidator of the property of the person or company.

That provision authorized the appointment of a receiver and manager "of the property of" the Consortium Group. No challenge is made to the validity of the receiving order made against it.

Section 17(4) provides as follows:

> 17(4) A receiver, receiver and manager, trustee or liquidator of the property of any person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and the receiver, receiver and manager, trustee or liquidator shall have authority, if so directed by the judge, to wind up or manage the business and affairs of the person or company and all powers necessary or incidental thereto.

Extracting from that provision the words which apply to this case, and inserting "the Consortium Group" where appropriate, s. 17(4) says this:

> The receiver and manager of the property of the Consortium Group shall be the receiver and manager of all or any part of the property held by the Consortium Group in trust for any other person.

The provisions of s. 17(2) and (4) are clear and unambiguous.

In my opinion, therefore, the statute makes the receiver and manager of Consortium the receiver and manager of all or any part of property held by it in trust for others. Clearly, therefore, the trust funds are subject to the administration of the court.

The same view of a similar statute was expressed by McDermid J.A., speaking for the Alberta Court of Appeal in Fort Garry Trust Co. v. Alberta Securities Commission (1980), 35 C.B.R. (N.S.) 272, 113 D.L.R. (3d) 489, at p. 280 C.B.R., p. 497 D.L.R.:

> In my opinion a judge has jurisdiction under s. 27(1) to appoint a receiver-manager even where the property is held as a bare trustee or agent by the company being investigated. The reference to trust property in subs. (4) substantiates this view.

Because the trust funds were assets subject to the administration of the court, it follows that the power of the court to allow a receiver and manager to have its proper remuneration expenditures and disbursements out of the assets which are subject to its administration entitled Rosenberg J. to charge this receiver and manager's property remuneration expenses and disbursements against these trust funds.

I am in agreement with the reasons expressed by Carthy J.A. concluding that Rosenberg J. properly exercised his discretion to make the order which he did in this case.

I agree with and concur in the disposition of the appeal proposed by Carthy J.A.

Order accordingly.

ADMT SCLT COMT CIVT

TAB 11

Court of Queen's Bench of Alberta

Citation: Re Residential Warranty Company of Canada Inc. (Bankrupt), 2006 ABQB 236

Date: 20060327
Docket: 24 112232 and 24 112233
Registry: Edmonton

In the Matter of the Bankruptcy of Residential Warranty Company of Canada Inc.
Estate No. 24 112232

and
In the matter of the Bankruptcy of Residential Warranty Insurance Services Ltd.
Estate No. 24 112233

Corrected judgment: A corrigendum was issued on April 26, 2006; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski

I. Nature of the Application

[1] This Decision concerns retrospective and prospective funding of a trustee in bankruptcy from assets under administration when all of the assets are subject to a disputed trust claim that is far from being resolved.

[2] Residential Warranty Company of Canada Inc. (RWC) and Residential Warranty Insurance Services Ltd. (RWI) (collectively the Bankrupts) are Alberta companies that operated a home warranty business. They were in the process of winding up when, in late 2004, Deloitte & Touche LLP was appointed their interim receiver (IR) in the context of a minority shareholder's oppression action. On the companies' deemed bankruptcy in May 2005 (Bankruptcies), Deloitte & Touche LLP became their trustee in bankruptcy (Trustee).

[3] The Applicant, Kingsway General Insurance Company (Kingsway), was an insurance underwriter of home warranty policies brokered or administered by the Bankrupts in Alberta and British Columbia. Kingsway filed proofs of claim in the estates pursuant to s. 81 of the

Bankruptcy and Insolvency Act (*BIA*)[1] claiming approximately $11,200,000.00 pursuant to contractual, statutory and common law trusts. The Trustee gave notice under s. 81(2) that the trust claim was disputed. It maintains that all or substantially all of the insurance premiums collected by the Bankrupts for insurance policies on which Kingsway is liable have been paid to Kingsway and that the balance of the estate of the Bankrupts is income derived from the operation of their home warranty business. Kingsway has appealed the Trustee's decision (Appeal).

[4] Kingsway's trust claim arises from a series of transactions that are detailed in a broadly drafted Amended Statement of Claim (BC Action) which it filed in the British Columbia Supreme Court in June 2004, prior to the Bankruptcies. The Amended Statement of Claim is comprised of 125 paragraphs over 42 pages and contains allegations of breach of contract, fraud, conversion, breach of trust, breach of fiduciary duty. The Bankrupts, along with certain of their directors, officers, and employees, are named as defendants in the lawsuit.

[5] Kingsway now applies for an order:

1. declaring that the Trustee is not entitled to use the realizations of any assets and property of the Bankrupts for the purpose of paying its fees and expenses, both past and future, pending the hearing of the Appeal and the disposition of the BC Action;

2. directing that the Trustee return all fees paid after notice of its trust claim, subject to deduction for reasonable fees directly attributable to preservation of the alleged trust property;

3. appointing the Trustee as Interim Receiver of the Bankrupts' assets under s. 47.1 of the *BIA* (*BIA* IR) for preservation purposes pending determination of the Appeal and the BC Action; and

4. requiring the Trustee to post security for costs in respect of its defence of the Appeal and the BC Action;

[6] The Trustee's position is that resolution of the Appeal to finally determine the validity of Kingsway's claim is central to administration of the Bankruptcies. The Trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to the Appeal for lack of funding.

[7] In response to Kingsway's application, the Trustee asks for a retrospective and prospective charge on all of the estate assets under its administration in order to pay its fees and

[1] R.S.C. 1985, c. B-3, as amended and renamed by S.C. 1992, c. 27

disbursements, including legal fees and disbursements. The Canada Revenue Agency (CRA), an unsecured creditor, and a builder, Nucon Developments, support the Trustee's request.

[8] The parties on this application focussed squarely on the issue of Trustee funding. Kingsway did not pursue its request for security for costs and, while mention was made of its request for the appointment of the Trustee as a *BIA* IR in Kingsway's written submissions, no evidence or argument was offered to support the relief requested. In supplemental written submissions, Kingsway argued that 'super-priority' funding for a *BIA* IR under s. 47.2 of the *BIA* is not applicable in a "straight bankruptcy" like this. I took this submission to mean that it had abandoned this arm of its application.

[9] Kingsway has applied for an order transferring the Appeal to the British Columbia Supreme Court (In Bankruptcy) and for an order granting it leave to continue the BC Action "to be heard at the same time as the Appeal, subject to the direction of the Judge of the British Columbia Supreme Court hearing the BC Action". The applications and the Appeal were adjourned at the parties' suggestion. The applications are now set to be heard in mid May. Kingsway wants to await the outcome of its applications before scheduling the Appeal.

[10] As Kingsway's application to have the Court in British Columbia deal with the Appeal has not been decided, my Ruling on the present application presumes that the Appeal will proceed in the ordinary course of events in this Court.

II. Background

A. The Bankrupts, the Builders and Kingsway

[11] The Bankrupts brokered and administered residential warranty policies sold in Alberta and British Columbia to builders which were underwritten by Kingsway as the insurer of record. The builders paid for membership in the programs. Each of them also paid money by way of cash deposit or letters of credit as security for repairs covered by the warranty policies. The Bankrupts held the cash deposits in a segregated account. Provided a builder did not owe any money on expiry of the warranty period, the deposit would be repaid to the builder. Letters of credit were treated in a similar fashion.

[12] Relations between Kingsway and the Bankrupts soured to the point where Kingsway terminated its contracts with them in August 2003, alleging that the Bankrupts had sold unauthorized products and had failed to remit certain premiums. The Bankrupts denied the allegations and the fight was on.

[13] In the spring of 2004, Kingsway complained to the British Columbia Financial Institutions Commission (FICOM), British Columbia's insurance regulatory authority, about the Bankrupts' conduct. FICOM investigated the companies and RWI responded by surrendering its

broker's license for three weeks. The Insurance Council of British Columbia subsequently allowed reinstatement of its license on conditions, one of which was that RWI hold approximately $3,100,000.00 in trust with its lawyers for premiums allegedly owed to Kingsway.

[14] Kingsway commenced the BC Action in June 2004, claiming a minimum of $2,108,576.35 plus additional unascertained damages. It started a similar lawsuit in Alberta, but did not prosecute it. About three weeks after the BC Action was commenced, RWC paid $3,092,612.50 to Kingsway, unconditionally.

[15] By the date of the Bankruptcies in May 2005, the defendants to the BC Action had defended and counter-claimed (alleging outstanding commissions, expenses, third party costs, lost income, lost opportunity, and loss of reputation) and Kingsway had demanded document production. Kingsway's forensic accountant apparently calculated the amount that remained owing to Kingsway from the Bankrupts as at June 7, 2005 to be $3,786,606.00. In late June 2005, after receiving certain financial information from the Trustee, Kingsway's forensic accountant determined that $11,292,224.00 (over and above the monies already paid by RWC), plus additional amounts for unliquidated damages, was still owing from the Bankrupts.

[16] Kingsway filed proofs of claim in the Bankruptcies on September 2, 2005 and put the Trustee on notice of its claim and of the position that it was taking with respect to the Trustee's fees and expenses on October 4, 2005.

[17] In late 2005, the police charged the Bankrupts, one of their former directors, and a former employee with fraud, theft, uttering a forged document and drawing a document without authority. An Information was sworn and warrants were held until December 15, 2005. I was not provided with any additional information on this application as to the current status of the criminal proceedings.

B. The Interim Receiver, The Trustee and Stakeholders

[18] The order appointing the IR granted the IR a 'super-priority' charge over the companies' assets, giving it priority over all security, charges and encumbrances affecting the assets.

[19] The IR, which is also the Bankrupts' Trustee, complied with the Court's directions to investigate the Bankrupts' affairs, dispose of certain assets and report on numerous concerns, including the BC Action and the builders' deposits. It prepared three reports for the Court. Kingsway contends that the IR's mention of the BC Action in its first report, dated December 21, 2004, constitutes evidence of notice to Deloitte & Touche LLP of Kingsway's trust claim, and that funding for the Trustee from alleged trust assets, which comprise the entire estate of both Bankrupts, should not be allowed after that date. It asserts that funding should not extend beyond October 4, 2005 at the very latest, when its counsel particularized its trust claim and formally put the Trustee on notice of the position which it now advances.

[20] The assets under the Trustee's administration include bank accounts and claims against various parties, but the vagaries of the Bankrupts' business and their relationships with others have somewhat complicated the Trustee's work. Apart from the typical issues arising in any bankruptcy (financial analysis, securing assets, reviewing proofs of claim, reporting to and meeting with creditors and inspectors, and acting as the point person coordinating court matters), the Trustee has instructed litigation and dealt with winding up business operations. It has also addressed enquiries from policyholders and builder claimants about warranties and the refund of deposits relating to 550 properties.

[21] Kingsway has referred some policyholders to the Trustee on denying coverage under various policies and it has jointly instructed some litigation with the Trustee. The Trustee has provided it with financial analyses and other information, including information concerning the Trustee's findings on premium payments.

[22] The Trustee predicts that its future work will entail continued realization of assets through litigation efforts, including intended litigation against Kingsway to recover $1,500,000.00 in allegedly overdue profit sharing, and resolution of creditor and proprietary claims. In due course, it will wind up the estates, return property rightfully belonging to others, and distribute residual property to the creditors.

[23] There are 627 persons interested in the builders' deposit fund and letters of credit (Builder Claimants). The builders' deposit fund is worth approximately $1,000,000.00 while the letters of credit are valued at approximately $5,000,000.00. The Trustee concedes that some of the Builder Claimants have trust claims against the cash builders' deposits. The method by which builders' claims are to be proved in the bankruptcy and a claims bar date were set by Order in December 2005. Kingsway has agreed to that process.

[24] Kingsway has participated in case management meetings and applications relating to the claims of the Builder Claimants. It has requested that it be given notice of claims that the Trustee disallows. It also wants to participate in the Trustee's application for directions as to whether the letters of credit are impressed with a trust and appeals of the disallowance by the Trustee of some builders' claims. Kingsway maintains that it is entitled to all of the value of the letters of credit, although it has not indicated how these can be considered traceable trust assets. It also claims approximately $300,000.00 of the builders' cash deposit fund as a result of alleged setoffs owed to it by builders for the cost of repairs. Kingsway takes the position that once the claims of the Builder Claimants who are seeking access to the cash fund have been resolved in these bankruptcy proceedings, the Builder Claimants must "duke it out" with Kingsway in the ordinary courts to determine who is entitled to the funds.

III. Analysis

A. Fairness, Practicality and Neutrality

[25] A significant objective of the *BIA* is to ensure that all of the property owned by the bankrupt or in which the bankrupt has a beneficial interest at the date of bankruptcy will, with limited exceptions, vest in the trustee for realization and ratable distribution to creditors. To further this objective, the *BIA* provides for practical, efficient and relatively inexpensive mechanisms for asset recovery, determination of the validity of creditor claims, and distribution of the estate. A fundamental tenet of *BIA* proceedings is that fairness should govern.

[26] The *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers.[2] Accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. There are two preconditions to the Court exercising its inherent jurisdiction: (1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.[3]

[27] Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard.[4] What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis. As astutely noted by Mr. Justice Farley in ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.***[5]:

> While the *BIA* is generally a very fleshed-out piece of legislation when one compares it to the *CCAA*, it should be observed that s. 47(2)(c): "The court may direct an interim receiver ... to ... (c) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the court but in fact provided, with these general words, that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organised and operating

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[2] s. 183(1)

[3] ***Re Tlustie*** (1923), 3 C.B.R. 654, 23 O.W.N. 622 (S.C.); ***Re Cheerio Toys & Games Ltd***. [1971] 3 O.R. 721, 15 C.B.R. (N.S.) 77 (H.C.J.); varied [1972] 2 O.R. 845 (C.A.)

[4] ***A. Marquette & Fils Inc. v. Mercure*** , [1977] 1 S.C.R. 547 at 556 (S.C.C.)

[5] (1994), 114 D.L.R. (4th) 176 at 185, 27 C.B.R. (3d) 148 (Ont. Ct. (Gen. Div.))

> under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

[28] Neutrality is the necessary mantra of trustees in bankruptcy. They are neither an agent of the creditors nor of the debtor, but rather are administrative officials and officers of the court charged with the responsibility of looking after all parties' interests. Trustees are obliged to comply with the procedures and rules of conduct set out in the *BIA*, the code of ethics in the *BIA General Rules*[6] and with professional codes of conduct, and cannot enter the fray between competing stakeholders.[7] They must present the facts in a dispassionate, non-adversarial manner in matters before the court.[8] Their job is to act as an independent voice of reason and to provide discipline in the oft-chaotic circumstances created on bankruptcy.

B. Trust Property

[29] Unless otherwise provided by legislation, trustees in bankruptcy have no greater interest in the property they are responsible for administering than the bankrupt does.

[30] The property held by a bankrupt in trust for another is not divisible among the creditors of the bankrupt.[9] However, this does not mean that the res of the trust is not subject to administration by the trustee in bankruptcy. On the contrary, property held by the bankrupt in trust for a third party becomes part of the bankrupt's estate in the possession of the trustee in bankruptcy, who is obliged to administer the property and to deal with it in accordance with the law.[10]

[31] Section 81(2) of the *BIA* governs the actions of a trustee in bankruptcy when presented with a trust claim. Within 15 days of presentation, the trustee in bankruptcy is either to admit the claim or to give notice disputing it, together with the reasons for doing so. There is no intermediate position which may be taken.

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[6] Rules 34-53

[7] ***Re Rassell*** (1999), 177 D.L.R. (4th) 396, 237 A.R. 136, 12 C.B.R. (4th) 316 (C.A.); ***Re Nagy***, [1997] 10 W.W.R. 348, 199 A.R. 146, 45 C.B.R. (3d) 160 (Q.B.); reversed on other grounds [1999] 11 W.W.R. 48, 232 A.R. 399, 13 C.B.R. (4th) 1 (C.A); ***Engles v. Richard Killen & Associates Ltd.*** (2002), 60 O.R. (3rd) 572 at para. 150, 35 C.B.R. (4th) 77(Sup. Ct. Just.)

[8] ***Re Beetown Honey Products Inc.*** (2003), 67 O.R. (3d) 511, 46 C.B.R. (4th) 195 (Ont. Sup. Ct. Just.); affirmed (2004), 3 C.B.R. (5th) 204 (Ont. C.A.)

[9] s. 67(1)(a)

[10] ***Ramgotra (Trustee of) v. North American Life Assurance Co.***, [1996] 1 S.C.R. 325, 37 C.B.R. (3d) 141 at para. 61

[32] Section 81(2) reads:

> 81(2) The trustee with whom a proof of claim is filed under subsection (1) shall within fifteen days thereafter or within fifteen days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or give notice in writing to the claimant that the claim is disputed with his reasons therefor, and, unless the claimant appeals therefrom to the court within fifteen days after the mailing of the notice of dispute, he shall be deemed to have abandoned or relinquished all his right to or interest in the property to the trustee who thereupon may sell or dispose of the property free of any lien, right, title or interest of the claimant.

[33] The Trustee in the present case has performed a quasi-judicial function in assessing and disallowing Kingsway's claim. There is no suggestion that it acted unfairly in doing so or that it has somehow entered into the fray between competing stakeholders. The Trustee has simply done its job.

[34] The Trustee agrees that the Bankrupts had trust obligations to Kingsway for unremitted premiums, but disagrees with Kingsway's assessment that all of the money collected by the Bankrupts from their customers represented premiums. It also questions the merit of Kingsway's constructive trust claim arising from alleged "secret commissions" and breach of fiduciary duty. Tracing will be an issue concerning Kingsway's claim to entitlement to the letters of credit and possibly other aspects of its claim.

[35] The Act is silent about the trustee's responsibilities on an appeal from its rejection of a claim. However, s. 41(4) of the *BIA* provides that an estate is deemed to have been fully administered only when "a trustee's accounts have been approved by the inspectors and taxed by the court and all objections, applications, oppositions, motions and appeals have been settled or disposed of and all dividends have been paid".

[36] In my view, the Trustee is a necessary party to the Appeal, which it is to participate in as an officer of the court, presenting the relevant facts in a dispassionate, non-adversarial manner, leaving the court to decide the matter. The Trustee's responsibility is to ensure that only valid claims to the assets under administration are recognized.

[37] Kingsway has asserted a significant trust claim that might prevail at the end of the day, but at present that claim is merely an assertion - a fact that weighs heavily on this application.

[38] The onus of establishing a trust at the date of bankruptcy will rest with Kingsway and the ordinary law of trust applies in that regard.[11] Kingsway has not yet proved its claim of a valid trust. It has procured an accounting expert's opinion that it relies on, but that opinion is untested. The BC Action was in the early stages when stayed by the Bankruptcies. Other proceedings dealing with the same series of transactions are seemingly over or similarly not far advanced. FICOM's investigation resulted in a three-week licence suspension, but no further action was taken, and the criminal proceeding is in its early stages.

C. Trustee Funding

[39] In a typical bankruptcy, the trustee is paid from estate assets. Like all insolvency professionals, trustees in bankruptcy are or should be alive to securing payment of their fees, particularly for work in the initial stages of a bankruptcy until the asset base from which they can be paid is assessed. Trustees often look to the petitioning creditor for an indemnity for their fees. Here, the Bankruptcies occurred when proposal deadlines were not met and there is no petitioning creditor. However, other interested parties include the CRA, an unsecured creditor and the Builder Claimants.

[40] Section 39(1) of the *BIA* provides that: "The remuneration of the trustee shall be such as is voted to the trustee by ordinary resolution at any meeting of creditors." However, if remuneration has not been fixed under 39(1), the trustee is entitled under s. 39(2) to insert in his final statement and retain as remuneration, subject to increase or decrease on application to the court, a sum not exceeding seven and one-half per cent of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid or satisfied.

[41] Ordinarily, a trustee in bankruptcy will not be funded from trust assets unless it shows that its work was necessary to preserve or otherwise benefit the trust assets,[12] or the work was required for resolution of the trust claim or to sort out beneficiaries.

[42] The first exception developed as a result of the court's exercise of inherent jurisdiction in ordinary trust cases, a topic reviewed in some depth by Sigurdson J. in ***Re Gill*** and Tysoe J. in ***Re***

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[11] s. 81(3); ***Re Kenny*** (1997), 149 D.L.R. (4th) 508, 37 C.B.R. (4th) 291, 1997 CarswellOnt 6031, 34 O.T.C. 321 (Ont. Ct. (Gen. Div.))

[12] ***Re Gill***, (2002) 37 C.B.R. (4th) 257, 2002 BCSC 1401 at para. 23; ***Grant v. Ste. Marie Estate***, (2005) 39 Alta. L.R. (4th) 71, 8 C.B.R. (5th) 81 at paras. 30 and 31, 2005 ABQB 35; ***Re Westar Mining Ltd.*** (1999), 13 C.B.R. (4th) 289, 1999 CarswellBC 2149 (S.C.); ***Re Broome***, (1986) 61 C.B.R. (N.S.) 233 (Ont. S.C.); ***Re CJ Wilkinson Ford Mercury Sales Ltd.*** (1986), 60 C.B.R. (N.S.) 289 (Ont. H.C.J.); ***Re Shirt Man Inc***. (1987), 65 C.B.R. (N.S.) 309, 19 C.C.E.L. 148 (Ont. S.C.); ***Re Genometrics Corp.***, 2005 CarswellSask 790, 2005 SKQB 488; ***Re Frederick McLeod*** (1949), CarswellOnt 88, 29 C.B.R. 163 (S.C.(H.C.J.))

Eron Mortgage Corp.[13] The court's inherent jurisdiction in this regard has been exercised sparingly and generally in circumstances where the beneficiary would have had to hire someone else to do the work performed by the trustee.[14] The second exception flows from the trustee in bankruptcy's duty under the *BIA* to approve or disallow of claims.[15]

[43] There is also statutory authority in Alberta which allows for the funding of ordinary trustees. The *Trustee Act*[16] authorizes the court to order compensation for "the trustee's care, pains and trouble and the trustee's time expended in and about the trust estate". This compensation is available regardless of whether the trusteeship arises by construction, implication of law, or express trust.[17] Trustees in bankruptcy can avail themselves of this legislation to the extent that it is not in conflict with the *BIA*.[18]

[44] The Alberta Court of Appeal in ***Re Sproule Estate***[19] considered the intent and scope of s. 44 funding (then s. 39). Mr. Justice Haddad commented that:[20]

> My concept of the term care and management is consistent with the expressions to which I have referred. It connotes to me not only the responsibility of reasonable supervision and vigilance over the preservation or disposition of assets but also

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[13] (1998), 53 B.C.L.R. (3d) 24, 2 C.B.R. (4th) 184 (S.C.)

[14] ***Re Eron Mortgage Corp.***, footnote 14; ***Harris v. Conway***, [1989] 1 Ch. D. 32, [1989] B.C.L.C. 28, [1988] 3 All E.R. 71 (Eng. H.C.); ***Ontario (Securities Commission) v. Consortium Construction Inc.*** (1992), 9 O.R. (3d) 385, 14 C.B.R. (3d) 6 (C.A.); ***Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.*** (1993), 106 D.L.R. (4th) 132 (Ont. C.A.)

[15] ***Re Ridout Real Estate Ltd***. (1957), 36 C.B.R. 111 (Ont. H.C.J.); ***Re NRS Rosewood Real Estate Ltd.***, (1992) 9 C.B.R. (3rd) 163 (Ont. Ct. (Gen. Div.)); ***Re Nakashidze (No. 2)***, [1948] O.R. 254, 29 C.B.R. 35 (H.C.J.); ***Re Walter Davidson Ltd***. (1957), 10 D.L.R. (2d) 77, 36 C.B.R. 65 (Ont. H.C.J.)

[16] R.S.A. 2000, c. T-8, s. 44. The Act expressly permits charging of trust assets for the fees of judicial trustees, but otherwise is silent.

[17] *Trustee Act*, footnote 16, s. 1(b)

[18] *BIA*, footnote 1, s. 72(1); see also the discussion concerning operational conflict in ***Multiple Access Ltd. v. McCutcheon***, [1982] 2 S.C.R. 161 at 190: "[T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament." In my view, the overarching principle to be derived from ***Multiple Access Ltd.*** and later cases is that a provincial enactment must not frustrate the purpose of a federal enactment, whether by making it impossible to comply with the latter or by some other means. Impossibility of dual compliance is sufficient but not the only test for inconsistency.

[19] (1979) 95 D.L.R. (3d) 458, 13 A.R. 420 (C.A.)

[20] ***Re Sproule Estate***, footnote 20, para. 11

> the responsibility of judgment and decision making in the affairs of an estate to resolve problems from time to time arising over and above the usual and regular procedures attendant upon administration.

[45] The Trustee in the present case was obliged to gather in trust property, which vested in the Trustee, but it cannot distribute the res of the trust to creditors. The Trustee therefore has two capacities, one as trustee in bankruptcy and the other as an ordinary trustee arising by implication of law. If Kingsway prevails at the end of the day, the Trustee is entitled to seek compensation for its work "in and about the trust". In my view, the broad scope of compensable work discussed by Mr. Justice Haddad in ***Sproule*** includes identifying which assets, if any, are subject to a trust and, if doubt exists, placing the necessary information before the court for determination of that issue.

[46] There are several notable cases in which trustees in bankruptcy have been denied or given only limited funding from trust assets. ***Re Broome***, ***Re Shirt Man Inc.*** and ***Re Genometrics Corp.*** involved assets impressed with undisputed statutory trusts for employee withholdings. In ***Broome***, as here, the trust claims were to the entirety of the funds gathering in by the trustee.

[47] ***Broome*** concerned employee tax withholdings. Master Bowne described his ruling as:[21]

> …A signal to trustees that where there are trust claims, before undertaking work with a view to realization of assets to benefit trust fund recipients, the trustee would be advised to make arrangements that remunerations would be paid by the administrator of the trust or otherwise.

[48] Master Browne said in *obiter dicta* that even if the funds in the estate exceeded the amount of the trust claims, the expenses and fees which the trustee would be entitled to claim from the estate assets under s. 107 (now s. 136) of the *BIA* would not include indemnity for any work done which did not result in a benefit to the creditors. This aspect of the decision was qualified in ***Re Pugsley***,[22] an appeal of a registrar's taxing order which disallowed legal fees incurred by the trustee in obtaining an opinion on the validity of a trust claim asserted by Revenue Canada under s. 59 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3 (now s. 81 of the *BIA*). Mr. Justice O'Driscoll in that case held that the comment of Master Browne in ***Broome*** should not be extended or expanded to include the assessed costs of legal counsel retained by the trustee to provide such legal services. He did not consider it logical that a trustee would be entitled to pay counsel for the opinion if in the end the proof of claim was adjudged invalid, but not if the claim was upheld, even though technically there was no benefit to the creditors in obtaining the opinion.

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[21] ***Re Broome***, footnote 12, pp. 236 tp 237

[22] (1988), 63 O.R. (2d) 635, 67 C.B.R. (N.S.) 98 (S.C.)

[49] The debtor in ***Re CJ Wilkinson Ford Mercury Sales Ltd.***[23] sought a charge over statutory trust assets, again employee withholdings, to fund his legal counsel. The court denied the application, commenting that it would not allow money owned by one person to be paid over to another person so that he could pay it to yet another person.

[50] ***Grant v. Ste. Marie Estate***[24] involved a summary trial in the ordinary courts, a bankrupt rogue, a finding of a valid express trust and competing claimants. The plaintiff was granted leave to proceed with his lawsuit against the bankrupt. The issue was whether the plaintiff, a victim of the bankrupt defendant's fraud, could trace funds that he had paid to the bankrupt into the hands of the trustee in bankruptcy.

[51] Mr. Justice Slatter found that the bankrupt had used words of trust to reassure the plaintiff. He ruled that the trustee's investigative work was instrumental in precluding improper payouts to others and thereby benefited the plaintiff. Likening the trustee to a *bona fide* purchaser for value without notice, he allowed encroachment on the trust property to pay certain expenses to the extent they related to the trustee's dealings with the traced funds, but only to the date the trustee received notice of the trust claim.

[52] Slatter J. noted that the trustee's fees and expenses relating to general administration of the estate were a legitimate expense of the estate. Where trust funds are used to discharge a debt owed to the recipient of the funds, there is a giving of value and no tracing to the recipient is permitted.[25] Therefore, he reasoned that the trustee's payment of legal expenses and even its own fees prior to receiving notice of the trust precluded the trust claimant from tracing those funds and defeated the beneficiary's interest to that extent. He commented[26] that:

> ... the Trustee is an officer of the Court, and a necessary part of the bankruptcy regime, and the discharge of the estate's obligation to pay the Trustee should also be considered as the giving of value. Before receiving notice of the Plaintiff's claim the Trustee was a bona fide purchaser for value without notice, and the Plaintiff cannot recover the portion of funds used to discharge the legitimate expenses of the estate.

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[23] footnote 12

[24] footnote 12

[25] D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989), 68 Can. Bar Rev. 315 at 321

[26] footnote 12 at para. 31

[53] ***Re Westar Mining Ltd.***[27] addressed the issue from the opposite perspective. A group of trust claimants sought funding from estate assets to pay legal fees for their application to exclude certain assets from distribution to the creditors. The court held that the legal work did not benefit the bankrupt's estate nor was it necessary for the management and preservation of estate assets. The court was unmoved by the claimants' plea that it would be unfair to them to have to retain counsel when counsel for the trustee, who was paid for by the estate, represented the other creditors.

[54] The court in ***Re Ridout Real Estate Ltd.***[28] charged trust funds that ultimately were held to belong to realty vendors and purchasers, brokers and salespersons with payment of the fees of a trustee in bankruptcy. The only mention of the trustee's work in connection to the trust assets was that he received a deposit and brought an application for directions concerning distribution of the assets. Presumably, this was sufficient to warrant compensation. The case report refers only to trust funds in the trustee's hands. There is no mention made as to whether there were any residual assets in the bankrupt's estate.

[55] In ***Re NRS Rosewood Real Estate Ltd.***,[29]the court awarded the trustee in bankruptcy $25,000.00 in compensation from trust monies as it was satisfied that issues between the stakeholders had to be resolved by the court and it was the trustee's initiative which had caused that to happen. Apparently, there were some residual assets in that case.

[56] Mr. Justice Urquhart in ***Re Nakashidze (No. 2)***[30] allowed the trustee compensation from securities that were not property of the bankrupt, noting that the trustee had undertaken a vast amount of work in sorting out and assembling the securities and claims. However, he reached a contrary conclusion in ***Re Frederick McLeod***,[31] finding that the trustee in bankruptcy was not entitled to compensation from proprietary assets because the proprietary claimant rather than the trustee had "salvaged" the asset. Nevertheless, he did indicate that any work undertaken by the trustee could be taken into account when the estate was wound up in fixing his general compensation.

[57] ***Re Walter Davidson Ltd.***[32] involved a dispute between a secured creditor claiming under a general assignment of book debts, mechanics' lien claimants and unsecured creditors. The court ultimately ruled in favour of the statutory lien claimants, but held that it was the trustee in

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[27] footnote 12

[28] footnote 15

[29] footnote 15

[30] footnote 15

[31] footnote 12

[32] footnote 15

bankruptcy's efforts which had made the money available to the lien claimants and therefore charged the trust assets with payment of the trustee's fees.

[58] Like Kingsway, the miners' lien claimants in ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.***[33] protested funding of the insolvency professional. Funding in that case was pursuant to a 'super priority' charge granted under s. 47.2 of the *BIA*. In refusing the claimants' application, Mr. Justice Farley described the interim receiver's work as "providing discipline to the proceedings" and noted that the interim receiver had to be capable of exercising its own independent judgment. He commented as follows on the status of the applicants' claims in ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.***:[34]

> …Secondly, it would seem to me that one should not presume what one is hopeful of establishing (i.e. the MLA claimants have not yet proved the validity and priority of their liens). Thirdly, while it should be recognized that the IR may be funded, there is no assurance that it will "win"; it may "lose" in whole or in part. However, at least there will be the testing of the Royalty Claim for the benefit of all creditors who have a valid claim against ***Curragh***…
>
> ... Simply put, it comes down to a question of cutting through the Gordian Knot: one does not know at this stage whether these opposing MLA claimants have a valid and prior claim. It seems to me that the amount of funding is reasonable in the circumstances and would be modest investment in the process.

[59] The trustee is an integral part of the bankruptcy system. The claims review process is designed to ensure that only proper claimants are entitled to share in the bankrupt's property. The Trustee, at least in this case, is a necessary party to the Appeal. Kingsway should succeed only if it has a legitimate claim and not simply by default. To rule otherwise would be to open the door for possible abuse of the system by rogue claimants filing spurious proprietary claims.

[60] If a charge is granted, Kingsway ultimately may be prejudiced if it proves its claim to the extent asserted, but that prospect remains an "if". The sheer magnitude of its claim is no reason to hold the Trustee and the bankruptcy system at bay pending determination of its validity. Mr. Justice Farley's words in ***Curragh*** resonate … "one should not presume what one is hopeful of establishing".[35]

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[33] [1994] O.J. No. 1917 (Ont. Ct. (Gen. Div.)) (QL)

[34] 1994 CarswellOnt 3853 at paras. 8 and 9 (Ont. Ct. (Gen. Div.))

[35] footnote 34 at para. 8

D. Charge on the Assets

[61] Kingsway contends that an asserted trust claim valued at more than potential realizations, regardless of its facial merit, forces the trustee in bankruptcy to seek funding for an appeal of its disallowance of the claim from sources other than the assets under administration. It contends that responsibility to fund the Trustee falls on the shoulders of other creditors or claimants, whether by means of direct funding or an assignment under s. 38 of the *BIA*. Given the nature of the claims in these Bankruptcies, I disagree. The validity and priority of the trust claims must be determined. The Trustee is assisting the Court and all of the claimants in coordinating these matters and in providing the necessary information to resolve these issues.

[62] The Trustee is not asking for a retrospective charge over undisputed statutory employee withholdings, as were the (unsuccessful applicant) trustees in bankruptcy in ***Broome***, ***Shirt Man*** and ***Genometrics***. Nor is the Trustee seeking a prospective charge over undisputed statutory employee withholdings like the bankrupt in ***C.J. Wilkinson Ford Mercury Sales***.

[63] Mr. Justice Slatter held in ***Grant*** that the trustee in that case could not use the trust funds after receiving notice of the proprietary plaintiff's claim. It is unclear what position the trustee in that case took concerning the trust claim (offering financial and documentary information to the court does not equate to disputing the claim), what work, if any, it undertook after notice of the trust claim, and whether there were residual assets from which it could be funded. This is not surprising given that the case was not about trustee compensation or the charging of trust assets.

[64] The role of the Trustee here is more akin to that of the trustees described in ***Ridout Real Estate***, ***NRS Rosewood***, ***Nakashidze (No.2)***, ***Walter Davidson Ltd.***, and ***Frederick McLeod***, each of whom was successful in obtaining a retroactive charge over established trust assets for their work in gathering and preserving trust assets or in sorting out the trust claims.

[65] In ***Pugsley***, Mr. Justice O'Driscoll commented that a trustee should be able to pay counsel for their opinion and services in regard to a proof of claim whether the claim eventually is adjudged invalid or not. He reasoned that if the trustee cannot hire and remunerate counsel to process the claims, counsel to a trustee might refuse to do so because of the potential for non-remuneration. In his view, that would put the trustee in a "no win" situation with regard to legal advice and legal services regarding proofs of claim.

[66] ***Sproule*** is also responsive to the "no win" situation identified by Mr. Justice O'Driscoll in ***Pugsley***.

[67] Common sense dictates that trustees in bankruptcy should receive reasonable compensation when they are called on to exercise their judgment and to be real problem solvers in a situation such as the present one. If it were otherwise, trustees would be inclined to shy away from problems and the list of persons willing to take on the role of trustee would dwindle, particularly in situations where there was no personal connection between the potential trustee and the beneficiary or the assets under administration.

1. Retrospective Charge

[68] Kingsway's application is denied. The Trustee is entitled to a charge on the assets under administration for its fees and expenses in undertaking work on the estate to date. Presuming success for Kingsway in the end, a significant part of the Trustee's work will have benefited Kingsway, given that its claim is to all of the assets under administration. Furthermore, the Trustee is entitled to compensation for all of its work to date in sorting out Kingsway's claim. The Trustee has offered its assistance to Kingsway in related proceedings concerning proposals made by various directors and officers of the Bankrupts, it has formulated a plan that Kingsway has joined in for resolving claims by Builder Claimants, it has coordinated and attended case management meetings, and it has argued a preliminary arm of Kingsway's jurisdictional application.

[69] I have taken Kingsway's choices regarding process into consideration in determining whether it is appropriate to grant the Trustee a retrospective charge on the contested assets for its fees and disbursements. Kingsway has chosen to make a preliminary application to move the Appeal to British Columbia. It wants to continue the BC Action. While it is entitled to bring these applications, it cannot ignore the logical consequences of doing so. These applications, and others which it has brought in parallel proceedings relating to the proposals made by various officers and directors of the Bankrupts, have and will continue to delay the ultimate decision about the validity of Kingsway's trust claim. Kingsway wants to take advantage of the bankruptcy proceedings to have this Court determine the validity of the claims of the Builder Claimants and whether the letters of credit are impressed by a trust, but to force builders with trust claims against which it alleges a right of setoff to "duke it out" in the ordinary courts. Finally, I observe that Kingsway did not seek an expedited hearing for this or its other applications.

[70] Kingsway's application to stop the Trustee from using assets under its administration to pay its fees and expenses is denied and the Trustee is granted a retrospective charge over the assets under its administration for all of its reasonable fees and disbursements, including legal expenses, concerning the gathering in and preserving of assets in the estate and the general administration of the Bankruptcies, such as investigating Kingsway's trust claim. The charge is granted no matter what the outcome is of the Appeal.

[71] If an appeal court decides that the retrospective charge should be restricted to fees and expenses relating to work undertaken before the Trustee had notice of Kingsway's claim, as in ***Grant***, I offer my finding that reasonable notice did not occur until November 25, 2005. The reasons for my finding in this regard are:

1. The Trustee's work in its capacity as IR was at the Court's behest. Like the insolvency professional in ***Ontario (Registrar of Mortgage Brokers) v.***

Matrix Financial Corp.,[36] it is entitled to payment from trust assets for all work done prior to the Bankruptcies.

2. The Trustee, as IR, indicated in its reports to the Court between December 2004 and May 2005 that:

   (i) the BC Action existed;

   (ii) it had a concern about Kingsway's calculation of premiums owing;

   (iii) it was premature to opine on the merits of the BC Action, but once that could be done, a decision would be taken to settle, vigorously defend or purse damages by counter-claim.

3. The allegation of breach of trust in the BC Action is just one of many claims in a broadly cast pleading. The filing of pleadings in a civil action does not mean that the plaintiff will pursue its claim in a bankruptcy.

4. It was not until October 4, 2005 that Kingsway's counsel particularized its trust claim and formally put the Trustee on notice of the position which it now asserts.

5. Kingsway's Notice of Motion was filed November 25, 2005. That is the date on which the clock should run.

2. Prospective Charge

[72] ***Gill*** is the only reported bankruptcy case that specifically addresses prospective charges over trust assets. As might be expected, the decision there turned on the unique facts of the case. There were allegations that the bankrupt had been involved in a scheme to hide his interest in certain properties by having them registered in the names of others. The trustee filed 350 caveats to preserve the interests of creditors and potential proprietary claimants. Information about the extent of the trust property and the claimants was uncertain at the date of the application. The trustee sought a retrospective and prospective charge over the yet unascertained trust assets.

[73] Mr. Justice Sigurdson found that the application for a prospective charge was premature, but granted leave to the trustee to reapply on evidence of creditor prejudice. He noted that the trustee's request would ripen when valid trust claims were established and sale proceeds were ready for distribution. He was concerned that affected parties should have notice of the

[36] footnote 14

application, an impossibility at the time of the application given that the trustee did not know who they were.

[74] The facts in ***Gill*** are distinguishable from those in the present case. Unlike the situation in ***Gill***, the Trustee's application here is not wholly premature. It is clear that Kingsway and the Builder Claimants advance trust claims. The value of Kingsway's claim is established. Values of the assets under administration are known, subject to some further collection efforts and potential litigation recoveries from actions against Kingsway. The trust claims have not been substantiated at present. That alone is not sufficient reason to defer the Trustee's application.

[75] ***Eron Mortgage*** was followed in ***Gill*** and therefore merits brief discussion, although the facts in that case also are distinguishable. ***Eron Mortgage*** involved the judicial trusteeship of an insolvent company. A court sanctioned lenders' committee sought a charge over (what appear to be undisputed) trust assets to secure past and future payment of expenses and remuneration. Mr. Justice Tysoe concluded that he could exercise inherent jurisdiction to order the charge, but declined to do so, although he gave leave to the committee to reapply. His rationale for declining the charge was that the evidence was unclear about certain committee functions. He considered that it was premature to say what future efforts, if any, would benefit the trust assets.

[76] In my view, it is clear in the present case that resolution of Kingsway's claim will benefit the trust claimant if it succeeds. Similarly, the creditors are entitled to have Kingsway's claim tested, presuming the Inspectors agree to the Trustee's involvement in the Appeal.

[77] The Trustee's request, however, is not just for a charge over potential trust assets in relation to the Appeal, but for a charge in relation to furthering the general administration of the Bankruptcies, including the Appeal. I understand that the Trustee intends to seek a charge over the assets at issue in the Builder Claimants' matter. However, even excluding that work, the proposed charge encompasses more than the case law presently authorizes for sorting out claims and preserving trust assets. It is a request for a general "super priority" funding order like that available to *BIA* interim receivers under s. 47.2, to judicial receivers, and to debtors in *Companies' Creditors Arrangement Act*[37] proceedings for financing a restructuring (DIP or priming liens).

[78] Except in the context of commercial restructuring cases under the *BIA*,[38] caution must be exercised when considering developments concerning inherent jurisdiction emanating from the *CCAA*. The *BIA* and *CCAA* are very different in degree of specificity and the policy considerations involved. For example, courts in *CCAA* proceedings routinely rationalize financing for commercial restructuring that compromises creditors' traditional interests in the

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[37] R.S.C. 1985, c. C-36

[38] ***Fiber Connections Inc. v. SVCM Capital Ltd.*** (2005), 10 C.B.R. (5th) 192, 5 B.L.R. (4th) 271, 2005 CarswellOnt 1963 (Sup. Ct. Just.), leave to appeal to Ont. C.A. granted (2005) 10 C.B.R. (5th) 201.

name of the greater good. There is an overarching policy concern favouring the possibility of a going concern solution and the potential of a long-term upside value for a broad constituency of stakeholders.[39] Arguably, in some cases, super-priority financing and priming charges must be available if restructuring is to be a possibility.

[79] Here, the policy consideration is not to facilitate a potential business survival, but rather to maintain the integrity of the bankruptcy system and to be fair, while recognizing established trusts law.

[80] According to the court in ***Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd***,[40] "super priority" funding for judicial receivers ordinarily is limited to circumstances where either:

1. The receiver's appointment is at the request of or with the consent or approval of the holders of security.

2. The receiver's appointment is to preserve and realize assets for the benefit of all interested parties, including secured creditors.

3. The receiver has expended money for the necessary preservation or improvement of the property.

[81] In my view, a prospective charge can be fashioned which will respect these limitations. Since the assets under administration are bank accounts and chose in action, the Trustee's work for general estate administration can be restricted to matters of some urgency. If the Appeal is dealt with in a timely fashion, significant hardship to the creditors can be avoided and Kingsway can be offered some assurance deductions from the assets over which it is claiming a trust will be minimized. I appreciate, however, that some litigation may be time sensitive. Therefore, the Trustee is granted leave to revisit this restriction on evidence of prejudice to the creditors by delaying litigation.

[82] A prospective charge will be granted on the Trustee filing a report with the Court confirming that the Inspectors in these Bankruptcies have approved the actions which the Trustee proposes to take, including its involvement in the Appeal and all of the preliminary applications filed by Kingsway that may be heard prior to the Appeal. On the filing of that report, the prospective charge will cover the preliminary applications, the Appeal *per se*, and all steps to readying the Appeal for hearing, whether it is a "paper Appeal" or a directed trial of an issue.

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[39] ***Re Royal Oak Mines Inc.*** (1999), 6 C.B.R. (4th) 314 (Ont. Ct. (Gen. Div.)); David B. Light, "Involuntary Subordination of Security Interests to Charges for DIP Financing under the *Companies' Creditors Arrangement Act*," (2005) 30 C.B.R. (4th) 245.

[40] (1975), 21 C.B.R. (N.S.) 201 at 205-206 (Ont. C.A.)

Conservative measures for asset maintenance and preservation also are covered by this prospective charge. However, the Trustee may not pursue new asset realization without leave of the Court or Kingsway's consent.

[83] The Appeal will proceed on an expedited basis after the hearing of Kingsway's preliminary jurisdictional applications. Any application to have the Appeal dealt with by way of a trial of an issue is to be filed within 14 days of these Reasons and made returnable on May 12, 2006. If there is no such application, a case management meeting will be held May 12, 2006 for the purpose of setting deadlines for the exchange of affidavits, cross-examinations on affidavit and the filing of written submissions.

[84] If, as a result of the Appeal, Kingsway establishes a recoverable trust of the magnitude claimed, it will have suffered a loss by virtue of the charge. Nevertheless, that loss will have been incurred, broadly speaking, to benefit the trust in realizing assets and to determine entitlements. If it is held that all of the assets under administration are not impressed with the trust claimed by Kingsway, a hearing is to be held in order to determine out of which funds (i.e. any trust monies owing to Kingsway, any trust monies owing to the Builder Claimants or other parties with a proven trust claim, and the monies to be distributed to creditors), and in what proportion the Trustees' fees and expenses (once approved) are to be taken.

3. Builder Claimants

[85] The retrospective and prospective charges which I have granted have the potential to affect the Builder Claimants if they are successful at the end of the day in establishing entitlement to some of the assets under administration. There is no evidence that the Builder Claimants have been given notice of this application. Accordingly, I direct that the Trustee serve the Builder Claimants with notice of my decision. The charges which I am granting will not take effect on any monies claimed by the Builder Claimants until 14 days after the Trustee has filed proof with the Court of service of these Reasons on all of the Builder Claimants. Prior to that time, the Builder Claimants may challenge the charges which I am granting the Trustee over that portion of the assets to which they claim an interest.

4. Costs

[86] Costs of this application will be determined following the Appeal. If the Appeal does not proceed for some reason, the parties may return on notice to settle the issue of costs.

Dated at the City of Edmonton, Alberta this 24th day of March, 2006.

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

Appearances:

Brian Rhodes
Dolden Wallace Folick

John I. McLean
Davis and Company
for Kingsway General Insurance Company

Kent Rowan
Ogilvie LLP
for Deloitte & Touche Inc.

Corrigendum of the Memorandum of Decision
of
The Honourable Madam Justice J.E. Topolniski

The third sentence in paragraph 23 was changed from: “Both Kingsway and the Trustee concede that many of the Builder Claimants have trust claims against the cash builders’ deposits.” to read: “The trustee concedes that some of the Builder Claimants have trust claims against the cash builders’ deposits.”

The date May 12, 2005 in lines 3 and 4 in paragraph 83 have been changed to May 12, 2006.

TAB 12

In the Court of Appeal of Alberta

Citation: Kingsway General Insurance Company v. Residential Warranty Company of Canada Inc. (Trustee of), 2006 ABCA 293

Date: 20061010
Docket: 0603-0093-AC
Registry: Edmonton

Between:

Kingsway General Insurance Company

Appellant
(Applicant)

- and -

Deloitte & Touche Inc., Trustee In Bankruptcy of Residential Warranty Company of Canada Inc. and Residential Warranty Insurance Services Ltd.

Respondent

Corrected judgment: A corrigendum was issued on October 18, 2006; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Doreen Sulyma

Reasons for Judgment Reserved of The Honourable Madam Justice Paperny
Concurred in by The Honourable Mr. Justice Côté
Concurred in by The Honourable Madam Justice Sulyma

Appeal from the Decision of
The Honourable Madam Justice J. E. Topolniski
Dated the 24th day of March, 2006
(24 112232; 24 112233)

Reasons for Judgment of
The Honourable Madam Justice Paperny

Introduction

[1] This is an appeal from a case management judge, sitting in bankruptcy, granting a charge for trustee's fees against property subject to conflicting, undetermined trust claims.

Background

[2] The bankruptcy judge reviewed the facts in her reasons: (2006), 21 C.B.R. (5th) 57, 2006 ABQB 236. The following is a summary.

[3] Residential Warranty Company of Canada ("RWC") and Residential Warranty Insurance Services ("RWI") operated a home warranty business in Alberta and British Columbia. The appellant Kingsway General Insurance ("Kingsway") underwrote warranty policies sold by RWI and RWC.

[4] RWI collected insurance premiums on behalf of Kingsway pursuant to a broker agreement. RWC and RWI also received funds from home builders by way of fees for membership in the warranty programs and by way of cash deposits or letters of credit as security for repairs covered by the warranty policies.

[5] RWC and RWI became bankrupt on May 31, 2005. The respondent, Deloitte & Touche, is the trustee in bankruptcy of their estates.

[6] Kingsway filed proofs of claim pursuant to s. 81 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") asserting that all property in the bankrupt estates is subject to a trust in Kingsway's favour. Unsecured creditors, Canada Revenue Agency and other competing trust claimants (home builders) also claim interests in the property.

[7] Kingsway claims that the entirety of the bankrupts' estates is comprised of premiums which the bankrupts collected on its behalf and therefore is impressed with a trust under the *Insurance Act*, R.S.A. 2000, c. I-3 and corresponding legislation in British Columbia. Section 504 (formerly 124) of the Alberta statute provides that an insurance agent who acts for an insurer in negotiating, renewing or continuing a contract of insurance and who receives insurance premiums from an insured, is deemed to hold the premiums in trust for the insurer. Kingsway submits that these premiums cannot be subject to the charge granted because as trust funds they do not form part of the bankrupts' estates. Kingsway also asserts an express trust by virtue of the broker agreement and a constructive or resulting trust. The broker agreement between Kingsway and RWI provides that "[a]ll money received by the Broker [RWI] on behalf of the Company [Kingsway] less the Broker commission shall be the property of the Company and shall be held...as Trust Funds...".

[8] The trustee disallowed Kingsway's trust claim and notified Kingsway pursuant to s. 81(2) of the *BIA*. The trustee's review of the records indicated to it that all premiums owing had been paid

to Kingsway and that the funds in the estate represent other income from the operation of the business.

[9] Kingsway appealed the trustee's decision to the Court of Queen's Bench, a summary proceeding under s. 81(2) of the *BIA*. That appeal is pending.

[10] Kingsway applied to the bankruptcy judge seeking that Deloitte & Touche be prohibited from accessing any property in the estates for any purpose, including paying its past and future fees and expenses for appearing on the appeal and otherwise, pending the determination of Kingsway's trust claim.

[11] The trustee opposed Kingsway's application and sought a retrospective and prospective charge against all assets under its administration.

[12] The trustee has been administering the estates of RWC and RWI in accordance with the *BIA*, including: conducting financial analysis; securing and retaining possession of property of RWC and RWI; communicating with Kingsway and builders who are also advancing trust claims; establishing and executing a process to deal with builder claims to cash security deposits held by RWC and RWI; communicating with home owners claiming insurance coverage pursuant to policies issued by Kingsway; and administering insurance claims on a limited basis.

[13] The trustee anticipates future costs arising from dealing with the validity and priority of the trust claims of Kingsway and various builders.

[14] The trustee asserts that because Kingsway's trust claims encompass the entirety of the property under the trustee's administration, the ultimate determination of Kingsway's claim is critical to the administration of these bankruptcies. The trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to Kingsway's appeal of the disallowance due to lack of funding.

Decision Below

[15] The case management judge denied Kingsway's application and granted the trustee's application for a retrospective charge. She also granted the trustee's application for a prospective charge, subject to the trustee filing an interim report with the court confirming the inspectors approved the actions proposed by the trustee, including its involvement in the proceedings to determine Kingsway's trust claim. She stipulated that both the retrospective and prospective charges were subject to challenge by builders with trust claims who had not been given notice of the applications before her. She further ordered the trustee to minimize general estate administration, not to pursue further asset realization without Kingsway's consent or the court's approval, and that Kingsway's appeal from the trustee's disallowance proceed on an expedited basis.

Issues on Appeal

[16] This appeal raises the following issues:

1. Does a bankruptcy judge have jurisdiction to order that a trustee's fees be paid from property that is subject to undetermined trust

> claims?
>
> 2. If so, does that jurisdiction include the trustee's fees associated with determination of a trust claim?
>
> 3. If jurisdiction exists, what factors should a court consider in exercising its discretion to make such orders?
>
> 4. If jurisdiction exists, did the case management judge properly exercise the discretion?

Standard of Review

[17] The first three issues raise a question of law, subject to the standard of correctness: ***Murphy Oil Co. v. Predator Corp.*** (2005), 384 A.R. 251, 2006 ABCA 69. The fourth issue involves the exercise of discretion of a case management justice and cannot be interfered with in the absence of a palpable or overriding error: ***Northstone Power Corp. v. R.J.K. Power Systems Ltd.*** (2002), 36 C.B.R. (4th) 272, 2002 ABCA 201.

Discussion

1. Jurisdiction to order trustee's fees be paid from property subject to undetermined trust claims

[18] The *BIA* does not address the ability of a trustee to obtain a charge for its fees on property that is subject to undetermined trust claims. The trustee submits that the jurisdiction to do so is found in the inherent jurisdiction of the bankruptcy court.

[19] Section 183(1) of the *BIA* preserves the inherent jurisdiction of the Court of Queen's Bench of Alberta sitting in bankruptcy, stating in part:

> 183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancilliary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
> ...
>
> (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;...

[20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: ***Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.***, [1976] 2 S.C.R. 475 at 480; ***Wasserman Arsenault Ltd. v. Sone*** (2002), 33 C.B.R. (4th)145 (Ont. C.A.). In ***Wasserman***, the trustee applied for an increase in fees in a summary administration bankruptcy. Rule 128 of the *BIA* Rules caps the trustee's fees in summary administration bankruptcies with no permissive or discretionary language. The Ontario

Court of Appeal concluded that inherent jurisdiction could not be used to conflict with that legislative expression.

[21] Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA*: ***Re Tlustie*** (1923), 3 C.B.R. 654; ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*** (1994), 27 C.B.R. (3d) 148 (Ont. S.C.). It has also been used where there is no other alternative available: ***Re Olympia & York Developments Ltd.*** (1997), 18 C.B.R. (4th) 243 (Ont. Gen.Div.); ***Re City Construction Company Ltd.*** (1961), 2 C.B.R. (N.S.) 245 (B.C.C.A.) and to accomplish what justice and practicality require: ***Canada v. Curragh***.

[22] Kingsway asserts that s. 67(1) of the *BIA* prohibits such a charge. That section states:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
> (a) property held by the bankrupt in trust for any other person...

[23] Kingsway relies on s. 67 to assert that property held by a bankrupt in trust for others does not form part of the estate and therefore use of inherent jurisdiction to grant a charge on that property would be contrary to the Act. Section 67 does not mean, however, that trust property does not fall within a trustee's administration. It only addresses the division of the bankrupt's property among the creditors; it does not address what property forms the estate that must be administered by the trustee.

[24] The Supreme Court of Canada addressed this issue in ***Ramgotra (Trustee of) v. North American Life Assurance Co.***, [1996] 1 S.C.R. 325 at para. 61:

> Unlike provisions of the [BIA] such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property...the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). *While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.*
> (Emphasis added)

[25] In any event, Kingsway's argument in regard to s. 67 rests on the premise that the property is in fact trust property, a proposition that remains undetermined.

[26] Kingsway also asserts that there is no jurisdiction to order that a trustee's fees be paid from property subject to a statutory trust, citing ***P.A.T. Local 1590 v. Broome*** (1986), 61 C.B.R. (N.S.) 233 (Ont. Master) and ***Re C.J. Wilkinson Ford Mercury Sales Ltd.*** (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.).

[27] In both of those cases, however, the validity of the trusts in question was clear and accepted by the trustee. Further, the question of fees for sorting out their validity was not squarely in issue in either decision. Here, a statutory trust as well as several other trust claims have been asserted but not accepted by the trustee and all remain to be determined by the Court of Queen's Bench.

[28] Kingsway also relies on ***Re Gill*** (2002), 37 C.B.R. (4th) 257, 2002 BCSC 1401 at paras. 29-32 in support of its statutory trust argument. In that case, however, Sigurdson J. recognized the jurisdiction to grant a charge for trustee fees over assets subject to trust claims. He determined on the distinct facts before him not to grant the charge requested.

[29] I therefore accept that inherent jurisdiction exists to grant a charge on property subject to undetermined trust claims.

2. Permitting trustee costs involved in determining the validity of the trust to be paid out of trust property

[30] Kingsway objects to the trustee being paid to "defeat" its claim out of what it alleges to be its property. Kingsway's opinion on the merits of its trust claim differs from the trustee's. However, Kingsway does not suggest that the trustee has acted improperly or unfairly in its disallowance of its claim.

[31] I do not characterize the actions of the trustee as an attempt to "defeat" Kingsway's claims. Upon receiving a proof of claim claiming property in possession of the bankrupt, the trustee must respond in one of two ways according to s. 81(2) of the *BIA*. The trustee can either admit the claim and deliver possession of the property to the claimant, or give notice in writing to the claimant that the claim is disputed, indicating the reasons for the dispute. The section provides for an appeal to the Court of Queen's Bench if the trustee disputes the claim. The trustee is not to function as an adversary. Rather, it functions to advise the court of the relevant facts as its officer in a dispassionate manner, in furtherance of its role to administer the estates to completion, leaving the court to decide the matter: see ***Re Beetown Honey Products Inc.*** (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.), aff'd (2004), 3 C.B.R. (5th) 204 (Ont. C.A.) and *BIA*, s. 41(4). The trustee's conduct to date has been in accordance with requirements of the Act and its participation in the appeal is necessary in this case. Kingsway's claims purport to cover the entire estates of both bankrupts, against which there are competing property claims and unsecured claims.

[32] There is precedent for allowing a trustee to be remunerated from trust property for efforts in sorting out trust claims and distributing the trust *res* to beneficiaries: see for example, ***Re***

Nakashidze (1948), 29 C.B.R. 35 (Ont. S.C.); ***Re Rideout Real Estate Ltd.*** (1957), 36 C.B.R. 111 (Ont. S.C.); ***Re Kern Agencies, Ltd.*** (No. 3) (1932), 13 C.B.R. 333 (Sask. K.B.); ***Re NRS Rosewood Real Estate Ltd.*** (1992), 9 C.B.R. (3d) 163 (Ont. S.C.). In ***NRS Rosewood***, for example, Austin J.

faced the same argument made by Kingsway in this case that the trustee had no entitlement to share in assets which were not the property of the bankrupt. Austin J. concluded that "[a]s the question had to be settled one way or another, and as the Trustee took the initiative, it is only reasonable that some part of the Trustee's fees be paid out of the property in issue".

[33] I do not suggest that a trustee will in every case be entitled to be paid from trust property. On the contrary, such an order, based on inherent jurisdiction, must be granted sparingly. The situation before us is unique in many respects:

1. Kingsway asserts a trust on various grounds, none of which are obvious. Kingsway has delayed determination of its claim, resulting in additional work by the trustee;

2. Kingsway's claim encompasses the entirety of the estate;

3. There are other trust claimants making claims to the same funds;

4. There are significant sums in dispute;

5. This bankruptcy occurred as a result of a failed proposal. Deloitte & Touche went from interim receiver to trustee and the typical guarantee of the trustee's fees is not in place;

6. There is no other reasonable and more expeditious alternative but to have the trustee participate in the appeal process as part of its administration of these bankruptcies. Most of the other creditors are owed small amounts, aside from a government claim;

7. There is no suggestion that the trustee is acting improperly in disputing the claims; and

8. Kingsway seeks to link the appeal from the trustee's disallowance with the trial of other unrelated issues.

These circumstances and the centrality of the trust claims to the bankruptcies underscore the necessity of the trustee's involvement and the payment of its fees from the property subject to the disputed trusts.

[34] Even if Kingsway is ultimately successful in its appeal of the trustee's disallowance, the trustee has been administering the property and a significant part of its work will likely have benefited Kingsway. The trustee has expended and will continue to expend considerable effort in

sorting out other claims on the property, including the formulation of a plan that Kingsway has joined in for resolving builder claims. It has offered assistance to Kingsway in related proceedings

concerning proposals made by directors and officers of the bankrupts. It has also formulated, coordinated and attended case management meetings throughout the course of its administration.

[35] Kingsway suggests its claim will not go unchallenged if the trustee is not funded to defend the litigation on behalf of the estates; it asserts that one or more of the creditors can pursue the litigation at their own cost pursuant to s. 38 of the *BIA*. However, the litigation is central to these bankruptcies and not merely an action that interests select creditors. The validity and priority of Kingsway's trust claims must be determined and follows from the claims review process mandated by the *BIA*. That process is designed to ensure that only proper claimants share in the bankrupt's property and in these circumstances, the trustee plays an integral part.

[36] Kingsway also submits that the appeal to the Queen's Bench from the trustee's disallowance will be complex, as it intends to bring other solvent parties into the action. Accordingly, Kingsway argues, the *res* of the estates could be frittered away with fees. However, the appeal to the Queen's Bench is intended to be a summary and efficient process to determine the issue relevant to the bankruptcy. To the extent that Kingsway chooses to increase the scope and complexity of the appeal, it must similarly accept the increased costs of the trustee in dealing with that action.

3. Factors in exercise of discretion

[37] Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse. The following non-exhaustive factors should be considered before invoking inherent jurisdiction here:

> 1. The strength of the trust claim being asserted. The mere assertion of a trust claim is not determinative of the validity of the trust and cannot preclude the trustee from investigating concerns. In some cases, the trust claim may be obvious, as was the case in ***C.J. Wilkinson***, where the claim was based on statutory trusts in favour of employees or tax authorities and the interim receiver conceded their validity. In other circumstances, a trustee will have no choice but to have the issue of the trust determined in order to further the administration of the bankruptcy. In that event, the ultimate beneficiary of the trust may have to shoulder the costs of the determination;
>
> 2. The stage of the proceedings and the effect of such an order on them. For example, the ability of the trustee to make distributions and their amount may depend on the determination of the issue;
>
> 3. The need to maintain the integrity of the bankruptcy process. The equitable distribution of the bankrupt estate must remain at the forefront. The court should recognize the expertise of the trustee in this regard and in effective management of bankruptcy: see ***GMAC*** at para. 50. Also, the court should assess the extent to which the determination is necessary to administer the bankruptcy and discourage academic

or potentially unrewarding litigation;

4. The realistic alternatives in the circumstances. This could include a s. 38 order, deferring a decision or empowering a court to review the decision in the future, for example, after final determination of the claims and the extent of the property available for distribution. The court should consider whether there is an existing guarantee of the trustee's fees, whether the party ultimately determined to be the beneficiary might bear some responsibility for the costs, and whether counsel might be hired on contingency;

5. The impact on the trust claimants and on the trust property as well as on other creditors. The court should examine the breadth of the trust claims, the existence of competing proprietary claims, and whether the trust claims leave any assets in the estate for unsecured creditors in assessing which stakeholder is going to suffer most from the trustee's disputing of the trust claim. In that exercise, the court should assess what part of the estate would ideally bear the burden of costs. It is important to consider whether the determination would proceed by default if the trustee were not fully funded;

6. The anticipated time and costs involved. The court should contemplate whether the proposed determination represents an efficient and effective means of resolving the issue to the benefit of all stakeholders. Consideration should be given to expediting the process;

7. The limits that can be placed on the fees or charge; and

8. The role that the trustee will take in the determination process.

4. Exercise of discretion by the case management judge

[38] The case management judge considered the relevant factors and the applicable law. She carefully constructed a limited charge that she viewed as suitable in the circumstances. The order for a prospective charge is subject to the trustee filing a report confirming the bankruptcy inspectors had approved the steps the trustee proposed to take. She delayed the operation of her order to give builder claimants an opportunity to challenge it. She held that if all the property was not ultimately found to be impressed with a trust in Kingsway's favour, that a further hearing be held in order to prorate the trustee's fees between estate and trust assets. Further, she directed that the trustee only address urgent matters of general administration, and that Kingsway's claim be addressed as quickly and efficiently as possible. I see no basis to disturb her exercise of discretion.

[39] One of the fundamental purposes of the *BIA* is to ensure equitable distribution of a bankrupt debtor's assets among the estate's creditors: ***Ramgotra*** at para. 15, citing ***Husky Oil Operations Ltd. v. Minister of National Revenue***, [1995] 3 S.C.R. 453. Determination of the validity of Kingsway's trust claims is central to these bankruptcies. This trustee's participation in that process furthers

appropriate distribution of the assets, whether that be to unsecured creditors in the event all or part of Kingsway's trust claim is rejected by the Court of Queen's Bench, or whether the estate stays out of reach of other creditors as trust property.

[40] The ultimate purpose of the administrative powers granted a trustee under the *BIA* is to manage the estate in order to provide equitable satisfaction of the creditors' claims: ***Ramgotra*** at para. 45. The trustee will be assisting the court and all of the claimants in the bankruptcies in coordinating Kingsway's claims, as well as dealing with the validity and priority of the other trust claims and in providing the necessary information to the Court of Queen's Bench to resolve these issues. For these reasons, it is also just and practical that inherent jurisdiction be used to grant the charge for the trustee's fees.

Conclusion

[41] There is inherent jurisdiction to permit trustee's fees to be paid from property that is subject to undetermined trust claims in appropriate circumstances. The case management judge recognized the power must be used sparingly and did not err in exercising jurisdiction in this case. The appeal is therefore dismissed.

Application heard on September 05, 2006

Reasons filed at Edmonton, Alberta
this 10th day of October, 2006

"Paperny J.A."

Paperny J.A.

I concur: "Côté J.A."

Côté J.A.

I concur: "Paperny J.A."

Authorized to sign for: Sulyma J.

Appearances:

E.A. Dolden
B.D. Rhodes
for the Appellant

K.A. Rowan
for the Respondent

Corrigendum of the Reasons for Judgment of
The Honourable Madam Justice Marina Paperny

On page 6, [33] & [34] have been joined and now read:”....contrary, such an order, ...”

TAB 13

Court of Queen's Bench of Alberta

Citation: Stone Sapphire Ltd. v. Transglobal Communications Group Inc., 2008 ABQB 575

Date: 20080919
Docket: 0503 00170; BE03 071018
Registry: Edmonton

Between:

Stone Sapphire Ltd.

Applicant
Defendant by Counterclaim

- and -

Transglobal Communications Group Inc. and Steven Prescott

Respondents
Plaintiffs by Counterclaim

And Between:

Transglobal Communications Group Inc.

Plaintiff by Counterclaim

- and -

**Stone Sapphire Ltd., Stone Sapphire Limited,
Gary Rana, Vick Rana and Alex Chan**

Defendants by Counterclaim

And:

Docket: BE03 071018

**In the Matter of the Bankruptcy and Insolvency Act
Proposal of Transglobal Communications Group Inc.**

Corrected judgment: A corrigendum was issued on October 6, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

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

I. Introduction

[1] After losing an application for partial summary judgment and receiving an award against it (award), applying to adduce new evidence to support a motion to vary or rescind the award, and receiving a demand for payment of all obligations due to its banker, Transglobal Communications Ltd. filed a notice of intention to make a proposal (NOI) pursuant to s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

[2] Transglobal's ability to make a viable *BIA* proposal (due to be filed October 14, 2008) apparently rests heavily on the outcome of this dispute between its banker and a judgment creditor concerning entitlement to USD $1,533,352.62 paid into Court by Transglobal (payment in) as a condition of obtaining a stay of enforcement of the award.

[3] This priority determination concerns the effect of certain Court orders relating to the award and the payment in and whether the payment in was made in the ordinary course of Transglobal's business or otherwise is not subject to the security involved as a result of the *Personal Property Security Act*, R.S.A. c. P-7 (*PPSA*), the common law, and the banker's security.

II. The Actors and Their Positions

[4] Transglobal sells imported goods to stores across North America. Typically, it takes orders from customers, procures the necessary inventory to fill the orders from offshore suppliers and sells them it to its customers.

[5] Stone Sapphire Ltd. is an overseas company that procured goods for Transglobal. A dispute concerning unpaid invoices of USD $2,280,828.57 prompted litigation that Transglobal defended. In turn, it counterclaimed for an amount exceeding Stone Sapphire's claim. Stone Sapphire was granted the award on April 12, 2007, but has not been entitled to enforce on it as a result of the stay of enforcement.

[6] Stone Sapphire asserts that the payment in was sufficiently 'earmarked' for it and trumps the banker's security. It argues, in any event, that the payment in was made in the ordinary course of Transglobal's business. It contends that if Transglobal had simply paid all of the invoices that led to the award when they became due, the banker could not have claimed a security interest, and submits that there should be no difference between a voluntary and involuntary payment of

the amount due. Stated otherwise, the payment in should be considered equivalent to payment on the account owing.

[7] HSBC Bank Canada (HSBC) is Transglobal's banker. It holds a perfected security interest over all of Transglobal's present and after-acquired personal property under the terms of a general security agreement (GSA) and s. 427 *Bank Act* security (BAS) (collectively, the security). It characterizes Stone Sapphire as, at best, a judgment creditor stayed from executing on the award and, at worst, a litigant required to re-apply for judgment because of the stay on entry of the order granting the award.

[8] HSBC takes the position that the payment in cannot properly be classified as one fitting within the "ordinary course of business" exception. It contends that the common law "licence theory" has been subsumed by the *PPSA,* and that for policy reasons simple judgment debts should not be given elevated status, thereby reversing priorities.

III. Facts

[9] The facts pertinent to the orders concerning the award can be briefly stated as follows:

(a) The award and conditional stay on enforcement were granted on April 12, 2007 by Mr. Justice Lee, who was case managing the litigation (***Stone Sapphire Ltd. v. Transglobal Communications Group Inc.***, 2007 ABQB 236, 416 A.R. 289). The order reads in part:

> 3. The Defendant Transglobal is granted a stay of execution of the within judgment conditional upon Transglobal or anyone on its behalf paying the Judgment Amount into the Court of Queen's Bench of Alberta not later than June 11, 2007.
>
> 4. Once paid into Court, the Judgment Amount shall be invested in an interest bearing account and shall not be released to the Plaintiff without further Order of the Court.

(b) On June 5, 2007, Lee J. extended the deadline for the payment in. He also addressed Transglobal's desire to bring applications to adduce new evidence (new evidence application) and to have the award varied or set aside (re-hearing application). His order of that date reads in part:

> 1. This Order sets deadlines and conditions for a hearing of an application ("Application") to adduce new evidence with respect to the Plaintiff's motion for summary judgment and for the variation, reconsideration, discharge or setting aside of the Reasons for Judgment of Mr. Justice Lee dated April 12, 2007.

2. The Order arising from the Reasons for Judgment of April 12, 2007 is stayed (the "Stay") pending the hearing of the Application.

. . .

11. If Transglobal fails to make any payment in accordance with the payment schedule set forth in paragraph 3 herein, Transglobal's Application shall be struck, the Stay lifted and the Plaintiff may immediately appear before Justice Lee to seek entry of the Order of April 12, 2007 in the form attached as Schedule "A", or as modified by Justice Lee at such appearance, at which time the Plaintiff is at liberty to take enforcement steps to execute upon the April 12, 2007 Order and shall be entitled to its costs of enforcement of that Order.

(c) By September 12, 2007, Transglobal had paid $1,000,000 into Court, but was having difficulty meeting the September 15th deadline for completion of the payment in. Lee J. extended the deadline for the payment in until December 15, 2007 (2007 ABQB 563).

(d) On December 12, 2007, Transglobal sought and obtained another extension of the deadline for completing the payment in to mid-January 2008 (2007 ABQB 763).

(e) The new evidence application was heard on April 2, 2008. Mr. Justice Lee reserved his decision.

(f) The NOI was filed on May 20, 2008.

(g) Lee J. issued written Reasons refusing the new evidence application on June 27, 2008 (2008 ABQB 397), stating at para.51:

> I do however reconfirm that no stay of proceedings arising from
>
> the Notice of Intention will affect the entry of the Order arising from Stone Sapphire's Summary Judgment already issued by the Court on April 12, 2007. My Summary Judgment decision takes effect from the date of its pronouncement on April 12, 2007 pursuant to Rule 322(2).

(h) The April 12, 2007 order was filed on July 7, 2008.

(i) Transglobal met the January 2008 deadline for the payment in. A letter from Transglobal's then counsel indicated: "I am writing to confirm that

Transglobal has paid the sum of $1,533,352.60 into court…". Various Certificates of Payment into Court state: "The Defendant Transglobal Communications Group Inc. hereby tenders …"

(j) The security contains typical covenants, including these provisions found in the GSA:

> 4.1 The Debtor covenants and agrees that at all times while this General Security Agreement remains in effect the Debtor will:
>
> 4.1.2 not, without prior written consent of the bank:
>
> ….
>
> (b) grant, sell, exchange, transfer, assign, lease or otherwise dispose of the Collateral;
>
> provided always that, until default, the Debtor may, in the ordinary course of the Debtor's business sell or lease inventory, and, subject to clause 5.2 hereof, use monies available to the Debtor…
>
> …
>
> 5.2 The Debtor acknowledges that any payments on or other proceeds of the Collateral received by the Debtor from Account Debtors… shall be received and held by the Debtor in trust for the Bank and shall be turned over to the Bank forthwith upon request.

(k) Clause 5 of the BAS provides in part:

> 5. The Customer shall at all times duly and seasonably pay and discharge all claims whatsoever in any way secured by or constituting a charge upon the Property or any part thereof...

IV. The Issues

[10] The issues can be briefly stated as follows:

A. What was the effect of the April 12 and June 5, 2007 orders?

B. Did HSBC's security interest apply to the monies paid in?

C. Was the payment in made in the ordinary course of business, or otherwise free of HSBC's security interest under the *PPSA*, the common law licence theory, or the security itself?

V. Analysis

A. What was the Effect of the April 12 and June 5, 2007 orders?

[11] There are a number of authorities concerning priority disputes over monies paid into court that, although not directly on point, nevertheless are instructive. The following principles can be distilled from these cases:

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] S.C.R. 311, 38 C.B.R. 1; ***Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.*** (1993), 33 C.B.R. (3d) 244 (Ont. Ct. Gen. Div.), aff'd (1997), 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), 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), 64 Man. R. 289 (Q.B.), aff'd without reasons (1957), 64 Man. R. 365n (C.A.)).

[12] In ***T.L. Cleary Drilling Co.***, Locke J. (who wrote separate concurring Reasons) rejected the proposition that service of a garnishee order created an equitable charge on a judgment debt, observing (at para. 14) that a contrary result 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", something directly contrary to the intent and purpose of the *Bankruptcy Act*. Accordingly, Locke J. said that an assignment in bankruptcy takes precedence over a garnishment unless it has been completely executed by payment to the creditor or his agent.

[13] Speaking for the other members of the unanimous court, Judson J. expressed the view (at para. 18) that:

> 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? [Emphasis added.]

[14] Judson J. explained this in the context of s. 41(1) of the then *Bankruptcy Act*, R.S.C. 1952, c. 14. Its successor, s. 70 (1) of the *BIA*, provides:

> 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.

[15] In this vein, Mr. Justice Judson noted (at para. 20) that until the concluding phrase of the section "…and except also the rights of a secured creditor," the words of the section could not be plainer and 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.

[16] Judson J. referred to ***McCurdy Supply Company Limited***, a priority dispute between a garnisheeing creditor, an assignee of a mortgage for full value prior to bankruptcy, and the trustee. The effect of s. 41(1) of the *Bankruptcy Act* was not raised. He noted (at para. 25) that whatever the position of the garnisheeing creditor may have been, whether secured creditor or not, there was "a much more serious obstacle in the way of the trustee in bankruptcy" as there was no property to pass to him because the bankrupt had made a complete assignment of the mortgage prior to bankruptcy.

[17] In an annotation to the decision ((1959), 38 C.B.R. 1), Carl H. Morowetz suggests that it accorded with jurisprudence in Ontario, and particularly ***Re Christian*** (1957), 36 C.B.R. 131 (Ont. H.C.J.), in which Smiley J. ruled that the opposite view would defeat the principle of the *Bankruptcy Act* concerning distribution of the property of the debtor amongst all creditors.

[18] ***Tradmor Investments Ltd.*** involved a priority dispute between a plaintiff creditor and a trustee to monies paid into court prior to the defendant's bankruptcy as a condition of setting aside a default judgment. Carruthers J. ruled that the money was the property of the defendant/bankrupt, commenting that any other result would create the anomaly of putting the plaintiff in a superior position than it would have been in as an unsecured creditor after judgment was upheld on appeal. The Ontario Court of Appeal expressly rejected the notion that the payment into court elevated the litigant's position to that of a secured creditor.

[19] The priority dispute in ***Tercon Contractors Ltd. v. Cassiar Mining Corp.*** (1994), 24 C.B.R. (3d) 206 (B.C.C.A.) was over a pre-bankruptcy settlement offer paid into court by the defendant under Rule 37 of the *British Columbia Supreme Court Rules*, which provided that:

> 37(3) Money paid into court shall remain in court subject to further order unless the plaintiff elects to accept it under this rule.
>
> . . .
>
> (8) Subject to subrules (9) and (10), where money is paid into court under this rule, except under subrule (6), a party, at any time before the commencement of the trial, may accept and take out of court the whole sum or any one or more of the specified sums paid in, in satisfaction of that party's claim or claims, by filing and delivering to each party of record a notice in Form 29.

[20] In the end, the plaintiff, who had not accepted the offer at the date of the bankruptcy, lost out to the trustee. The Court of Appeal observed (at para. 9) that the money paid into court was the bankrupt's until the plaintiff either accepted the offer or succeeded in the action.

[21] ***Laker*** is a Quebec decision. The English version headnote summarizes the case as one involving a judgment debtor posting money into court as a condition of appeal, losing his appeal and then making an assignment into bankruptcy before the monies were paid out to the judgment creditor. The court ruled in favour of the trustee, rejecting the notion that the creditor could bootstrap his position by relying on the payment into court. In the absence of a completed execution procedure, the money remained the property of the bankrupt.

[22] In ***Careen Estate***, a pre-judgment attachment order prompted Careen Estate to pay money into court pending disposition of the trial. 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 monies 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.

[23] Distinguishing the circumstances from those in ***T.L. Cleary Drilling Co.***, Russell J. found (at paras. 18 and 31) that the funds became the plaintiff's property 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.

[24] Russell J. in ***Careen Estate at para. 35*** referred to Registrar Quinn decision in ***Harmon Valley Co-op Feeders Association v. Collins Barrow Ltd.*** (1998), 1 C.B.R. (4th) 220 (Alta. Q.B.). The plaintiff in that case had obtained an order requiring the defendant to pay monies into court and obtained judgment before the defendant gave notice of its intention to make a proposal under the *BIA*. The proposal ultimately failed. Rejecting the proposition that the funds in court were "earmarked" for the creditor, Registrar Quinn stated (para. 26):

> ... In the present case it cannot be said the funds in court were "earmarked" for Harmon Valley. The funds were not paid into court to provide the bankrupts an opportunity to obtain a trial of an action or to allow Harmon Valley to prove a builders lien or some other security.

[25] Although he used the term "earmarked" as it was used in the 1913 decision of ***Doctor v. People's Trust Co.*** (1913), 14 D.L.R. 451 (B.C.S.C.), Registrar Quinn chose not to follow that case, saying it was not authority for the proposition that the funds ceased to be the property of the defendant on being paid into court since it was only if the plaintiff won the case at the second trial that it could claim the money.

[26] ***Doctor*** concerned a pre-bankruptcy payment into court to secure a new trial. A plaintiff obtained judgment for $3,650 and a costs award. The defendant got an order permitting a re-trial on condition that it pay $4,000 into court to answer any judgment the plaintiff might obtain. It paid the money into court, had the re-trial, lost the re-trial, and then made an assignment into bankruptcy. The court gave the plaintiff priority to the $4,000, expressing the view (at paras. 5-6) that the money had been paid in as against the happening of the contingency that judgment would be secured in favour of the plaintiff, which contingency had occurred before the assignment. The court indicated that the money paid in was appropriated or earmarked and when the second judgment was given, it became the plaintiff's. The short delay in applying for payment out did not change the character of the situation.

[27] With this backdrop, I first consider the plain language of the subject orders.

[28] The April 12, 2007 order unambiguously describes its purpose - to stay immediate enforcement on the award by Stone Sapphire if certain conditions are met. It gave Transglobal a choice; either make the payment in and enjoy a stay of enforcement, or do not and face enforcement proceedings. If Transglobal chose the former, Stone Sapphire had the ability to attach the payment, if two things happened:

1. Transglobal failed to make the payment in by the deadline (or presumably if it removed all or part of it); and

2. A further order was granted allowing Stone Sapphire to access the payment in.

[29] Neither of those things happened.

[30] Consistent with this is the plain language of paragraph 11 of the June 5, 2007 order. It describes the consequences if Transglobal failed to meet the then extended deadline for the payment in. In that eventuality, the new evidence application would be struck, the stay of enforcement would be lifted, and Stone Sapphire could seek entry of the order of April 12, 2007 and could then take enforcement steps to execute on that order.

[31] None of those things happened.

[32] In short, this is what the orders granted by Lee J. concerning the payment in did:

1. They gave Transglobal a chance to have its counterclaim tried without the interference of enforcement proceedings.

2. They gave some modicum of protection to Stone Sapphire. I say a modicum of protection because:

   (a) The protection is dependant on Stone Sapphire obtaining a further order releasing the payment in after adjudication of Transglobal's counterclaim.

   (b) Obtaining such an order cannot be presumed to be a sure thing since, when the time is ripe, Stone Sapphire must satisfy the Court that the order is appropriate after considering such matters as procedural setoffs (if any) and competing claims of other judgment and secured creditors.

[33] This is what the orders granted by Lee J. concerning the payment in did not do:

1. They did not elevate Stone Sapphire's status to that of a secured creditor.

2. They did not otherwise give Stone Sapphire a property interest in the payment in.

3. They did not interfere with HSBC's secured creditor status and claim to the payment in.

[34] The authorities cited are distinguishable on their unique facts, but the distinctions do not detract from the underlying principle applied in each case that regardless of the scenario giving rise to a payment into court, a judgment creditor is simply an unsecured creditor until it has

completed execution proceedings. Unless the fruits of the proceedings are in the hands of the judgment creditor, it has no property interest in the asset.

[35] Stone Sapphire is a judgment creditor whose enforcement proceedings are far from complete. It stands on the same footing in this fundamental respect as the creditors in ***T.L. Cleary Drilling Co.***, ***Laker***, ***Tercon***, and ***Tradmor***.

[36] The proposition in ***Doctor*** that, without evidence of a completed execution process, funds paid into court nevertheless may be sufficiently "earmarked" for an unsecured creditor to defeat the interests of a trustee in bankruptcy (and similarly a secured creditor), offends the underlying premise of the *BIA* concerning distribution of a bankrupt's property among all creditors, and the specific language of s. 70 of the *BIA*. These concerns were not addressed by the court in ***Doctor***. Further, the court's conclusion was based on the presumption that had the trial judge given his judgment in open court, an immediate application for payment out would have been made, which would have been successful. Presumption can be a dangerous thing and should be avoided, particularly where it can lead to the reversal of priorities or preferences. In any event, I am not satisfied that ***Doctor*** remains good law in light of the Supreme Court of Canada's subsequent decision in ***T.L. Cleary Drilling Co.***

[37] Irrespective of the notion of "earmarking," Stone Sapphire is not in the same category as the creditor in ***Careen Estate***, which obtained an order for payment out of the monies in court and did all that it could to make that happen before the assignment in bankruptcy occurred, only to be frustrated by bureaucratic requirements.

[38] Given these conclusions, I need not address HSBC's contention that the June 5, 2007 order stayed the April 12, 2007 order in its entirety and, accordingly, Stone Sapphire would have had to obtain a fresh order for summary judgment.

B. Did HSBC's Security Interest Apply to the Payment In?

[39] It is evident from the discussion above that Stone Sapphire had no property interest in the payment in. Stone Sapphire argues that HSBC failed to prove that the monies used to fund the payment in would have been caught by its security. I reject that argument. The uncontroverted evidence is that the monies to fund the payment in were paid by Transglobal. There is no evidence to suggest that those monies were anything but present or after-acquired personal property such that they would have been caught by HSBC's security. In the circumstances, I conclude that HSBC's security interest applies to the payment in.

C. Was the Payment in Made in the Ordinary Course of Business, or Otherwise Free of HSBC's Security Interest under the *PPSA*, the Common Law Licence Theory, or the Security Itself?

1. ***PPSA***

[40] The BSA is excluded from application of the *PPSA* by s. 4 of that Act.

[41] The GSA, however, is subject to its operation by virtue of s. 3, which provides as follows:

> 3(1) Subject to section 4, this Act applies to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation."

[42] The GSA grants HSBC a security interest in all present and after-acquired property, an interest addressed by s. 28(1) of the *PPSA*, which states:

> 28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and extends to the proceeds, ...

[43] Under s. 28(1), HSBC's security interest continues in the collateral unless the payment in was a "dealing" with the collateral and one that was authorized by HSBC. It was neither.

[44] Also of concern is s. 31 of the *PPSA*, which applies where a creditor is paid in currency or by instrument. Section 31 reads:

> 31(1) A holder of money has priority over any security interest perfected under section 25 or temporarily perfected under section 28(3) if the holder acquired the money without knowledge that it was subject to a security interest, or is a holder for value, whether or not the holder acquired the money without knowledge that it was subject to a security interest.
>
> (2) A creditor who receives an instrument drawn or made by a debtor and delivered in payment of a debt owing to the creditor by that debtor has priority over a security interest in the instrument whether or not the creditor has knowledge of the security interest at the time of delivery."

[45] This protection does not help Stone Sapphire since the payment was not:

(a) a payment made to it in the form of currency;

(b) a payment made to it in the form of an instrument;

(c) a payment made to it at all.

[46] It was simply a payment into court to satisfy a condition which would allow Transglobal to take advantage of a stay of enforcement of the award.

[47] Section 30(2) of the *PPSA* is another relevant provision protective of third parties. It reads:

> 30(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

[48] In ***Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.***, 2002 ABCA 79 at para. 14, 299 A.R. 250, the Alberta Court of Appeal explained the purpose of s. 30(2) as follows:

> Under s. 30(2), a buyer of goods sold in the ordinary course of the seller's business takes the goods free from any perfected or unperfected security interest given by the seller. Its purpose "is to avoid disruption to commerce and injustice to unsuspecting ordinary course buyers which would otherwise result if such buyers were required in every case to conduct a search of the Personal Property Registry before buying goods": *Cuming and Wood*, supra, at 213. The focus is on commercial practicality: ***Fairline Boats Ltd. v. Leger*** (1980), 1 P.P.S.A.C. 218 at 220-21 (Ont. H.C.J.). The ordinary course exception applies whether or not the buyer knew of the security interest, and even though the security agreement limited the seller's rights to dispose of the goods. The exception does not apply if the buyer was aware that the transaction was in breach of the security agreement.

[49] In ***Fairline Boats Ltd. v. Lager*** (1980), 1 P.P.S.A.C. 218 at 222 (Ont. H.C.J.), Linden J. offered the following advice for determining whether a transaction is one that is in the ordinary course of business:

> ... the courts must consider all of the circumstances of the sale. Whether it was a sale in the ordinary course of business is a question of fact. (See the Ziegel article, *supra*, at p. 86.) The usual, or regular type of transaction that people in the seller's business engage in must be evaluated. If the transaction is one that is not normally entered into by people in the seller's business, then it is not in the ordinary course of business. If those in the sellers business ordinarily do enter into such agreements, then, even though it may not be the most common type of contract, it may still be one in the ordinary course of business.

[50] Applying ***Fairline Boats Ltd.***, the Court of Appeal in ***369413 Alberta Ltd. v. Pocklington***, 2000 ABCA 307 at para. 21, 271 A.R. 280 [***Gainers***] instructed that courts should undertake a "broad and case-specific analysis of the ordinary course of the company's business" by objectively examining the usual type of activity in which the business is engaged, followed by a comparison of that general activity to the specific activity in question. Citing ***Aubrett Holdings Ltd. v. Canada***, [1998] G.S.T.C. 17 (T.C.C.), the court said that the transaction "must fall into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation."

[51] ***Gainers*** concerned an asset sale, but the following factors considered by the Court of Appeal (at para. 22) are instructive nonetheless:

> (I) The nature and significance of the transaction: it ought to be one that a manager might reasonably be expected to carry out on the manager's own initiative without making prior reference back or subsequent report to superior authorities, such as the board of directors or the shareholders…
>
> . . .
>
> (iv) The reason for the transaction: it ought not to have occurred as a response to financial difficulties or in suspicious circumstances…
>
> (v) The intent of the transaction: neither its intent nor its effect should have been to undermine bank security…
>
> (vi) The frequency of the type of transaction: an unusual or isolated transaction might be viewed differently from a routine one.

[52] In ***Northwest Equipment Inc.***, quoting R.C.C. Cuming and R.J. Wood, *British Columbia Personal Property Security Act Handbook*, 4th ed. (Scarborough: Carswell, 1998) at 215, the Alberta Court of Appeal said (at para. 15) that "[s]ales in the ordinary course of business are usually 'carried out under normal terms and consistent with general commercial practices.'"

[53] Application of these considerations in the present case leads to the conclusion that the payment in was not an ordinary course transaction because:

> (a) It is in excess of $1,500,000. While there was no evidence adduced to suggest that it was one a manager could make without reference to superior authorities, it is substantial given the business' operation and cash flows as detailed in various reports to the Court by the Proposal Trustee.
>
> (b) It arose out of a special or peculiar situation; to obtain a stay of enforcement proceedings on the award which, in turn, arose in a dispute about contractual obligations and setoffs.

(c) Its purpose was to stave off enforcement proceedings until Transglobal's counterclaim could be adjudicated.

(d) While a secondary consequence was to undermine bank security, there is no evidence to indicate that such was the intent.

(e) There is no evidence to show that its occurrence was anything but an isolated event.

(f) There is no evidence to show that the payment in falls "into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation" or was "carried out under normal terms and consistent with general commercial practices."

[54] If a dispute about the parties' respective obligations and alleged breaches of same had not arisen, and Transglobal had paid the invoices as they became due, such transactions doubtless would fit within the ordinary course exception. However, that is not what happened.

[55] HSBC's priority position is not disturbed by the ordinary course of business exception in the *PPSA*.

2. The Common Law Licence

[56] The Supreme Court of Canada in ***Royal Bank of Canada v. Sparrow Electric Corp.***, [1997] 1 S.C.R. 411 at para. 91 offered the following description of licence theory:

> [L]icence theory holds that a bank's security interest in a debtor's inventory, though it be fixed and specific, is subject nevertheless to a licence in the debtor to deal with that inventory in the ordinary course of business. Consequently, says the theory, the bank's claim to the inventory must give way to any debts incurred in the ordinary course of business.

[57] The court in ***Sparrow Electric Corp.*** at para. 94 indicated that a security agreement with a licence to sell creates "…a defeasible interest; but the event of defeasance is the actual sale of the inventory and the actual application of the proceeds against an obligation to a third party."

[58] According to the court in ***Sparrow Electric Corp.***, all of the following factors must be established in order for the common law licence theory to apply:

1. The source of the payment must be proceeds from a sale of inventory (para. 96).

2. The recipient of the payment must be a third party (para. 94).

3. The object of the payment must be in "satisfaction of obligations that are immediately incidental to an actual sale of the inventory" (para. 89).

[59] The evidence tendered on this application does not support the payment in fitting the definition and parameters of the licence theory because:

(a) There is no evidence of the source of the funds used to make the payment in. There are any number of possible sources of the funding, just one of which is proceeds of the sale of inventory.

(b) The payment in was not made to a third party, and in particular, Stone Sapphire. It was simply a payment into court for the sole purpose of securing a stay of enforcement.

[60] HSBC submitted that this analysis was unnecessary since the common law licence theory has been subsumed by the *PPSA*. In ***Sparrow Electric Corp.***, the Supreme Court of Canada spoke to the effect of s. 28 of the *PPSA*. It did not say that it had subsumed the common law licence.

[61] In Ronald C.C. Cuming, Catherine Walsh and Roderick J. Wood's text, *Personal Property Security Law* (Toronto: Irwin Law Inc., 2005) at 176, the authors say this about the licence theory in the era of the *PPSA*:

> The *PPSA* expressly states that a transferee of collateral takes free of a security interest where the dealing was expressly or impliedly authorized by the secured party. Even where authority has not been given, the *PPSA* replaces the priority ground previously occupied by the implied licence jurisprudence with explicit priority rules that protect the title acquired by a buyer or lessee of goods in the ordinary course of business and by a holder of money and a purchaser of negotiable and quasi-negotiable collateral.

[62] The authors hypothesize that the paucity of discussion about the common law licence theory after ***Sparrow Electric Corp.*** may be because the "codified provisions of the *PPSA*, and in particular the *PPSA*s of the western provinces, sufficiently deal with debtors' ability to transfer property free and clear in the ordinary course of business."

[63] I need not decide whether the *PPSA* has occupied the field of the common law licence theory to resolve this priority dispute. Even presuming that it has not, the test for establishing a common law licence to deal is not been met.

3. HSBC's Security

[64] Clause 5 of the BAS requires that Transglobal: "... at all times duly and seasonably pay and discharge all claims whatsoever in any way secured by or constituting a charge upon the Property or any part thereof."

[65] Stone Sapphire contends that the effect of this provision is to estop HSBC from laying claim to the payment in since it was a payment on a judgment and one which HSBC required that Transglobal make. However, the payment in was not made on account of or to discharge a claim. Moreover, this provision simply governs the relationship between the parties. It does not expand the scope of the any common law licence that Transglobal might have had. (***Sparrow Electric Corp.*** at para. 101).

[66] Like s. 30(2) of the *PPSA*, the GSA authorizes the use of monies available to Transglobal in the ordinary course of business (clause 4.1.2). The distinction is that, under the GSA, the proceeds of sale are held in trust for HSBC (clause 5.2).

VI. Conclusion

[67] The orders of April 12 and June 5, 2007 gave Transglobal a chance to have its counterclaim tried without the interference of enforcement proceedings. They gave some modicum of protection to Stone Sapphire, but neither elevated its status to that of a secured creditor nor otherwise gave it a property interest in the payment in. The orders did not affect HSBC's secured creditor status and priority to the payment in.

[68] HSBC had a security interest in the monies used by Transglobal to fund the payment in. Under a *PPSA* analysis, the payment in was neither one made to a creditor by cash or instrument nor one made in the ordinary course of business. Accordingly, HSBC's security interest continues and it has priority to the payment in.

[69] Even if the common law licence theory is in effect in Alberta, the test set out by the Supreme Court of Canada in ***Sparrow Electric Corp.*** is not satisfied. HSBC's priority position is unaffected by the common law licence theory.

[70] Finally, the obligation described in clause 5 of the BSA does not impact on HSBC's priority position.

[71] The parties may speak to costs within 30 days of the date of this decision.

Heard on the 5th day of September , 2008.

Dated at the City of Edmonton, Alberta this 19th day of September, 2008.

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

Appearances:

Kentigern A. Rowan and
H. Lance Williams
Ogilvie LLP
for the Applicant (Defendant by Counterclaim)

Charles P. Russell, Q.C. and
Kenneth W. Fitz
McLennan Ross LLP
for the Respondents (Plaintiffs by Counterclaim)

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

The second docket number listed should be BE03 071018.

In paragraph 9, subparagraph (i) please note quotations should be at the end of the paragraph.

In paragraph 39, sentence five should read “after-acquired personal property”.

TAB 14

In the Court of Appeal of Alberta

Citation: Stone Sapphire Ltd. v. Transglobal Communications Group Inc., 2009 ABCA 125

Date: 20090401
Docket: 0803-0242-AC
Registry: Edmonton

Between:

Docket: 0803-0242-AC

Stone Sapphire Ltd.

Appellant (Applicant)
(Defendant by Counterclaim)

- and -

Transglobal Communications Group Inc. and Steven Prescott

Respondents (Respondents)
(Plaintiffs by Counterclaim)

And Between:

Transglobal Communications Group Inc.

Respondent
(Plaintiff by Counterclaim)

- and -

Stone Sapphire Ltd.

Appellant
(Defendant by Counterclaim)

- and -

Stone Sapphire Limited, Gary Rana, Vick Rana and Alex Chan

Not Parties to the Appeal
(Defendants by Counterclaim)

And:

Docket: BE03 1071018

In the Matter of the Bankruptcy and Insolvency Act
Proposal of Transglobal Communications Group Inc.

Corrected judgment: A corrigendum was issued on April 28, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Jack Watson

Memorandum of Judgment
Delivered from the Bench

Appeal from the Decision by
The Honourable Madam Justice J.E. Topolniski
Dated the 19th day of September, 2008
(Docket 0503 00170; BE03 1071018)

Memorandum of Judgment
Delivered from the Bench

Ritter J.A. (For the Court):

[1] In her careful, complete analysis, the bankruptcy judge determined that the payment into court, subject to conditions resulting in the potential return of the money paid to the respondent bankrupt, did not constitute transfer of the funds to the appellant.

[2] We conclude that the bankruptcy judge did not err in that determination.

[3] For substantially the same reasons of the chambers judge, we dismiss the appeal.

[4] Each side shall bear their own costs of this appeal.

Appeal heard on March 5, 2009

Memorandum filed at Edmonton, Alberta
this 1st day of April, 2009

Ritter J.A.

Appearances:

K.W. Fitz
for the Appellant

M.J. McCabe, Q.C.
for the Respondent Transglobal Communications Group Inc. and Steven Prescott
Not participating in the appeal

K.A. Rowan
for the Respondent HSBC Bank of Canada

Corrigendum of the Memorandum of Judgment
Delivered from the Bench

On page 2 under “Appearances” counsel has been confirmed or amended as follows:

K.W. Fitz
for the Appellant

M.J. McCabe, Q.C.
for the Respondent Transglobal Communications Group Inc. and Steven Prescott
Not participating in the appeal

K.A. Rowan
for the Respondent HSBC Bank of Canada

TAB 15

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

TAB 16

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Mikan Inc. v. Hillier*, 2015 NLTD(G) 92
Date: June 29, 2015
Docket: 201301G2508

BETWEEN:

MIKAN INC.

PLAINTIFF

AND:

SHARON HILLIER

FIRST DEFENDANT

AND:

ROBERT WAYNE HILLIER

SECOND DEFENDANT/PLAINTIFF BY COUNTERCLAIM AND PLAINTIFF BY THIRD PARTY

AND:

CIBC MORTGAGES INC.

THIRD DEFENDANT/DEFENDANT BY COUNTERCLAIM

AND:

PRESIDENT'S CHOICE BANK

THIRD PARTY

AND:

JANES & NOSEWORTHY LIMITED, IN ITS CAPACITY AS TRUSTEE OF THE ESTATE OF SHARON HODDER (FKA SHARON HILLIER), A BANKRUPT

INTERVENOR

- AND -

Docket: 201301G4465

BETWEEN:

CIBC MORTGAGES INC.

APPLICANT

AND:

SHARON HILLIER

FIRST RESPONDENT

AND:

ROBERT WAYNE HILLIER

SECOND RESPONDENT

AND:

JANES & NOSEWORTHY, IN ITS CAPACITY AS TRUSTEE OF THE ESTATE OF SHARON HODDER (FKA SHARON HILLIER), A BANKRUPT

INTERVENOR

Before: Justice William H. Goodridge

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: June 23, 2015

Summary:

A bank (with first mortgage) and a judgment creditor (with judgment filed in the Judgment Enforcement Registry) agreed to allow a debtor and her husband to sell their matrimonial home and pay the proceeds into court. Subsequent to the payment into court, the debtor made an assignment in bankruptcy. The Trustee in bankruptcy applied to have 50 percent of the money in court paid out to it, after allowing for the amount owing the bank as first mortgage. The application was granted.

Appearances[1]:

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[1] Sharon and Robert Hillier did not participate in this application.

Kevin Stamp, Q.C.	Appearing on behalf of the Mikan Inc.
Geoffrey L. Spencer and R. Trent Skanes	Appearing on behalf of CIBC Mortgages Inc. and President's Choice Bank
Mark A. Russell	Appearing on behalf of Janes & Noseworthy, as Trustee

Authorities Cited:

CASES CONSIDERED: Acepharm Inc., Re (1999), 122 O.A.C. 63, 89 A.C.W.S. (3d) 213; **Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.** (1995), 33 C.B.R. (3d) 244, 56 A.C.W.S. (3d) 12 (Ont. Ct. J. (Gen. Div.)), aff'd (1997), 43 C.B.R. (3d) 135, 68 A.C.W.S. (3d) 19 (Ont. C.A.); **Lamperstorfer v. McDermott (Trustee of)**, [1984] O.J. No. 1472, 54 C.B.R. (N.S.) 37 (Sup. Ct.); **Charisma Fashions Ltd., Re** (1971), 15 C.B.R. (N.S.) 207, 1971 CarswellOnt 64 (Sup. Ct.); **T.L. Cleary Drilling Co. (Trustee of) v. Beaver Trucking Ltd.**, [1959] S.C.R. 311; **Ontario Development Corp. v. Trustee of the Estate of I.C. Suatac Construction Ltd.** (1976), 12 O.R. (2d) 465, 69 D.L.R. (3d) 353 40 (C.A.); **Westcoast Savings Credit Union v. McElroy** (1981), 39 C.B.R. (N.S.) 52, 7 A.C.W.S. (2d) 376 (B.C.S.C.); **Austin Powder Ltd. v. Blastech Consulting Ltd.** (1998), 83 A.C.W.S. (3d) 338, 169 Nfld. & P.E.I.R. 178 (Nfld. S.C.T.D.); **Stone Sapphire Ltd. v. Transglobal Communications Group Inc.**, 2008 ABQB 575, aff'd 2009 ABCA 125; **Toronto-Dominion Bank v. Phillips**, 2014 ONCA 613

STATUTES CONSIDERED: *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

GOODRIDGE, J.:

INTRODUCTION

[1] This application is one part of interwoven disputes regarding entitlement to money paid into court. Those potentially entitled to the money include: Janes & Noseworthy as Trustee in bankruptcy for the estate of Sharon Hillier, Robert Hillier, CIBC Mortgages Inc., and Mikan Inc. There are other applications pending, but this decision relates only to the Trustee's application dated May 4, 2015. In that application, the Trustee sought the following relief:

> (a) An order directing that 50 percent of the funds paid into court by Sharon Hillier and Robert Wayne Hillier pursuant to a consent order of this Court dated 14 January 2014 be paid to the Trustee, after allowing for the amount of CIBC Mortgages Inc.'s claim against the entirety of the funds; or
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> (b) In the alternative, if the Court determines that Mikan Inc. has established priority over the claims of CIBC Mortgages Inc. and that priority survives or is otherwise effective after the commencement of Sharon Hillier's bankruptcy proceedings, an order directing that 50 percent of the funds paid into Court by Sharon Hillier and Robert Wayne Hillier pursuant to a consent order of this Court dated 14 January 2014 to be paid to the Trustee; and
>
> (c) Such further and other order as this Court deems just.

[2] The reason that the Trustee seeks an order for only 50 percent of the funds (after payout of the mortgage) is because the funds trace to a matrimonial home for which the bankrupt, Sharon Hillier, held only a 50 percent interest. The remaining 50 percent interest in that home (undivided 50 percent interest as joint tenant) was held by Robert Hillier. The Trustee concedes that it has no claim against Mr. Hillier's 50 percent interest in the funds.

BACKGROUND

[3] The background to this dispute begins with a misappropriation of funds. Ms. Hillier was an employee of Mikan and during the course of her employment she misappropriated $807,338.28 from Mikan. It appears that she squandered the money through gambling pursuits. Mikan obtained a judgment against Ms. Hillier for the misappropriated amount on November 21, 2012 and had that judgment registered under the *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1.

[4] The matrimonial home of Mr. and Ms. Hillier was sold with the consent of CIBC (first mortgagee) and Mikan (judgment creditor). The consent was provided only after all parties agreed that the proceeds, net of the real estate commission and legal fee, would be paid into court. A court order was prepared (by consent) to effect the payment in court of these net proceeds in amount $355,143.61. Paragraph 2 of that January 14, 2014 Court Order provided:

> The net proceeds of sale of 13 Teakwood Drive, St. John's, Newfoundland and Labrador in the amount of $355,143.61 after the payment of real estate commissions and closing costs shall be paid into this Honourable Court as security in lieu of 13 Teakwood Drive, St. John's, Newfoundland and Labrador with respect to the respective interests of CIBC Mortgages Inc. and Mikan Inc., pending further Order hereof.

[5] The parties have different views about the effect of this Court Order on priorities.

[6] The net proceeds were paid into court without payout of the first mortgagee because Mikan was challenging the amount of CIBC's entitlement. In Supreme Court action 201301G2508[2] Mikan was claiming that the CIBC mortgage only encumbered Mr. Hillier's 50 percent interest in the matrimonial home. In its pleading Mikan sought, *inter alia*, a declaration that Ms. Hillier's "one-half share of the proceeds … be free and clear of the CIBC Mortgage." Before that action was decided Ms. Hillier made an assignment in bankruptcy. On July 21, 2014, Janes & Noseworthy was named as Trustee in bankruptcy for the estate of Ms. Hillier.

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[2] Action 201301G2508 is one of the three actions identified in this style of cause being tried at the same time.

POSITION OF THE PARTIES

[7] The Trustee's position is that: 50 percent of the money paid into court qualifies as property of the bankrupt; CIBC is a secured creditor and its full mortgage balance has first priority; and Mikan is an unsecured creditor.

[8] CIBC's position is the same as the Trustee's.

[9] Mikan's position (capsulated by the issues identified at paragraph 22 of its memorandum) is that: none of the money paid into court qualifies as property of the bankrupt; CIBC is not a secured creditor; and section 70(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") does not apply.

BANKRUPTCY AND INSOLVENCY ACT

[10] Section 70(1) of the *BIA* provides:

> 70.(1) Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor.

ISSUES

[11] I accept the issues as identified in paragraph 22 of Mikan's response memorandum:

1. Does any of the money paid into court qualify as property of the bankrupt?
2. Does section 70(1) of the *BIA* apply to this situation for determination of priorities?
3. Is CIBC a secured creditor?

ANALYSIS

Does any of the money paid into court qualify as property of the bankrupt?

[12] Mikan submits that none of the money paid into court qualifies as property of the bankrupt and therefore the money is not available to the Trustee. Mikan's argument is that money paid into court constitutes a trust fund with only three potential beneficiaries: Mr. Hillier, Mikan and CIBC. It says that the bankrupt Ms. Hillier either abandoned her interest in the money or established a trust. Under section 67(1)(a) of the *BIA*, "[t]he property of a bankrupt divisible among his creditors shall not comprise (a) property held by the bankrupt in trust for any other person ... ."

[13] I reject Mikan's arguments on this point and find that 50 percent of the money paid into court qualifies as property of the bankrupt divisible among the creditors.

[14] The Court Order of January 14, 2014 did not affect the relative priorities. Ms. Hillier's 50 percent interest in the house and land at 13 Teakwood Drive was property of the bankrupt, 50 percent of the money from the sale of the house and land remained property of the bankrupt, and 50 percent of the money paid into court as "security in lieu of 13 Teakwood Drive" remained property of the bankrupt. The court was a neutral repository. The Court Order did not elevate or diminish the relative position of either Mikan or CIBC. The parties' contingent interests in the money paid into court were unaffected. Mikan was an unsecured judgment creditor before the money was paid into court and the Court Order did

not change that status. Unfortunately for Mikan, the bankruptcy intervened. The result was that, through operation of section 71 of the *BIA*, the bankrupt's interest in the money vested in the Trustee subject only to the rights of secured creditors.

[15] Mikan relied in part on the Ontario Court of Appeal decision of **Acepharm Inc., Re** (1999), 122 O.A.C. 63, 89 A.C.W.S. (3d) 213. In that case, the court accepted that money paid into a trust fund at a law firm prior to bankruptcy would not be property of the bankrupt. However, that same decision distinguished situations, such as the present, where money is paid into court pursuant to rules of court and court orders. In situations where the court is used simply as a repository for money pending the outcome of litigation, a trust as contemplated by section 67(1)(a) of the *BIA*, is not established. The money remains property of the bankrupt. At paragraph 9 of **Acepharm**, Carthy, J.A. stated:

> 9 It could not be argued, (and was not argued), in *Tradmor* that the Accountant of the (now) Superior Court of Justice was a trustee. That office is simply a repository which responds not to terms of a trust but to the rules of court and court orders.

[16] In **Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.** (1995), 33 C.B.R. (3d) 244, 56 A.C.W.S. (3d) 12 (Ont. Ct. J. (Gen. Div.)), aff'd (1997), 43 C.B.R. (3d) 135, 68 A.C.W.S. (3d) 19 (Ont. C.A.), 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: the payment did not bring the plaintiff within the definition of a secured creditor; the money paid into court retained its status as property of the bankrupt; and the property of the bankrupt vested in the trustee upon the assignment in bankruptcy. At paragraph 19, the Ontario Court of Justice specifically noted:

> 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. …

[17] In **Lamperstorfer v. McDermott (Trustee of)**, [1984] O.J. No. 1472, 54 C.B.R. (N.S.) 37 (Sup. Ct.), Catzman, J. (as he then was) rejected trust notions,

and ruled that money paid into court remained property of the bankrupt and that even after the money was paid into court the trustee in bankruptcy had a statutory preference over any judgment creditor.

[18] My conclusion that 50 percent of the money paid into court in this case qualifies as property of the bankrupt is limited to the facts of this case.

Does section 70(1) of the BIA apply to this situation for determination of priorities?

[19] Having found that the money paid into court qualifies as property of the bankrupt, I also find that section 70(1) of the *BIA* must apply.

[20] Mikan presented authorities to argue that section 70(1) of the *BIA* does not apply to money paid into court. The argument is capsulated in paragraph 4 of **Charisma Fashions Ltd., Re** (1971), 15 C.B.R. (N.S.) 207, 1971 CarswellOnt 64 (Sup. Ct.) where the Ontario Registrar in bankruptcy (Poultney) stated:

> 4 … [Section 70 of the *BIA*] only extends to give a receiving order or an assignment in bankruptcy precedence over the processes of execution and attachment and does not interfere with the rights of persons to money paid into court under other due process of law. …

[21] This comment from **Charisma Fashions** is based on the unique facts and procedural rules at play in that case. There is a compelling line of authority which takes a different view and recognizes that section 70 of the *BIA* does apply to money that had been paid into court pending the outcome of a priority dispute. The assignment in bankruptcy takes precedence over the money, excepting judgments completely executed by payment and excepting secured creditors. The mere convenience of a payment into court, often nothing more than a parking place for money while a dispute continues, does not displace the priority of the

assignment in bankruptcy. Examples of authorities which have recognized the applicability of section 70(1) of the *BIA* to monies paid into court include: **T.L. Cleary Drilling Co. (Trustee of) v. Beaver Trucking Ltd.**, [1959] S.C.R. 311; **Ontario Development Corp. v. Trustee of the Estate of I.C. Suatac Construction Ltd.** (1976), 12 O.R. (2d) 465, 69 D.L.R. (3d) 353 at para. 40 (C.A.); **Westcoast Savings Credit Union v. McElroy** (1981), 39 C.B.R. (N.S.) 52, 7 A.C.W.S. (2d) 376 at para. 10 (B.C.S.C.); **Austin Powder Ltd. v. Blastech Consulting Ltd.** (1998), 83 A.C.W.S. (3d) 338, 169 Nfld. & P.E.I.R. 178 at paras. 4-7 (Nfld. S.C.T.D.); **Stone Sapphire Ltd. v. Transglobal Communications Group Inc.**, 2008 ABQB 575 at para. 34, aff'd 2009 ABCA 125; and **Toronto-Dominion Bank v. Phillips**, 2014 ONCA 613 at para. 27.

[22] Mikan is a judgment creditor and section 70 of the *BIA* applies to this situation. Pursuant to section 70(1) of the *BIA* the assignment in bankruptcy:

> 70(1) … takes precedence over … judgment creditors … except those that have been completely executed by payment to the creditor … and except the rights of a secured creditor.

Is CIBC a secured creditor?

[23] The money was paid into court as "security in lieu of 13 Teakwood Drive" and the secured position of CIBC was not affected by the payment or the subsequent assignment in bankruptcy. The secured position of CIBC did not change.

[24] There remains an issue of whether CIBC is a secured creditor *vis-à-vis* the interest of Ms. Hillier. That issue is the subject matter of a separate application filed by CIBC on May 8, 2015. That is an issue because Ms. Hillier did not sign the mortgage document. Mr. Hillier did sign the mortgage and no one disputes that CIBC is a secured creditor *vis-à-vis* his interest in the matrimonial home. In the May 8, 2015 application CIBC requests payment out of court of its full mortgage balance outstanding of $207,402.80 plus interest. This request by CIBC presumes that it has a valid mortgage based on legal and equitable principles and that the

absence of Ms. Hillier's signature does not adversely impact its secured position. This will be an issue between the Trustee and CIBC. The interests of unsecured creditors (including Mikan's interests) will be addressed by the Trustee.

CONCLUSION

[25] Fifty percent of the money paid into court pursuant to the January 14, 2014 Court Order is property of the bankrupt. Pursuant to section 71 of the *BIA*, that property vests in the Trustee, subject to the rights of secured creditors. Distribution of that property shall be in accordance with the *BIA*. Pursuant to section 70(1) of the *BIA*, the assignment in bankruptcy takes precedence excepting judgments completely executed by payment and excepting secured creditors. Mikan's judgment was not completely executed by payment and it falls to the ranks of unsecured creditors. CIBC is a secured creditor.

[26] I order that 50 percent of the funds paid into court by Sharon Hillier and Robert Wayne Hillier pursuant to a January 14, 2014 Court Order, after allowing for CIBC's claim against the entirety of the funds, shall be paid out to the Trustee. If the parties are unable to agree on the exact quantum of this payout, then further submissions may be made.

COSTS

[27] Pursuant to Rule 55.05(1) of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, the costs of this interlocutory application shall be costs in the cause.

WILLIAM H. GOODRIDGE
Justice

TAB 17

Ontario Supreme Court
Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.
Date: 1995-06-29

Tradmor Investments Limited

and

Valdi Foods (1987) Inc.

Ontario Court of Justice (General Division) Carruthers J.

Heard – May 23, 1995.

Judgment – June 29, 1995.

Robert J. Arcand, for applicant.

John Honsberger, for respondent.

(Doc. 93-CQ-39905)

[1] June 29, 1995. CARRUTHERS J.: – This is yet another in a long line of cases in which a trustee in bankruptcy is involved in a contest over the ownership of funds standing in court to the credit of an action.

[2] Here the plaintiff commenced an action claiming some $90,000 as arrears of rent due under an offer to lease. On the 11th January 1994 it moved before Matlow J. for summary judgment under R. 20. On 13th May, 1994 [unreported] Matlow J. dismissed the motion ordering “that the action proceed to trial on condition that the defendant pay into court on or before 31 May 1994 the sum of $70,719.63 as security for the Plaintiff’s claim”.

[3] That sum was paid into court by the defendant within the required time and, two weeks later, on the 13th April 1994, the defendant was declared bankrupt and Richter & Associés Inc. was named as its trustee in bankruptcy. The trustee now moves for an order paying out to it all the money now in court.

[4] Although the plaintiff has yet to move for leave to continue its action against the defendant, it resists the trustee’s motion principally on the ground that it is a secured creditor and intends to take the necessary steps to proceed with this action.

[5] The plaintiff relies upon the decision of *Re Ford, Ex parte Trustee,* [1900] 2 Q.B. 211 as support for its position that it is a secured creditor. In that case, as here, the plaintiff moved for judgment and leave was granted to the defendant to defend. The operative part of the order in that case reads as follows [at p. 211]:

> "It is ordered that the plaintiffs be at liberty to sign final judgment for the claim indorsed [sic] on the writ and costs to be taxed unless the sum of 1000£ be paid into court within three days."

[6] The money was paid into court and the defendant delivered a defence on 10th January, 1900. On January 29th, 1900 the defendant filed his own petition in bankruptcy and a receiving order was made. The trustee in bankruptcy applied for an order that the money in court be declared a "part of the bankrupt's estate and should be paid out to him". The application was dismissed.

[7] Wright J. at p. 213 states as follows:

> It seems plain in principle and on the authorities that Messrs. Jay are for the present entitled to the benefit of the security which they obtained by the order of September 21, 1899, and the payment into court in compliance with that order. The order must be treated as an order that the right to the money when paid into court shall abide the event: see *Bird v. Bastow* (1), where the order appears to have been in the same form as in this case; and it is settled that where money is ordered to be paid into court to abide the event it must be treated as a security that the plaintiff shall not lose the benefit of the decision of the court in his favour: *Ex parte Banner* (2); *Ex parte Bouchard* (3); *Ex parte Navalchand* (4); *Tomlinson v. Hampson* (5). The very object of such an order is that the plaintiff shall be in as good a position, so far as the money paid in extends, against contingencies such as bankruptcy as if he had got an immediate judgment; and the cases cited shew that, where the plaintiff has without default on his part failed to get judgment before the bankruptcy, "the event" is the decision of his right in the bankruptcy. The money must remain in court until "the event" is decided by the trial of the action, if that is to be tried, or by adjudication upon a proof by the plaintiffs in the bankruptcy.

[8] I was told by counsel for the plaintiff that the *Bankruptcy Act* in vogue at the time of *Ford* was similar in its provisions to the present Act and, specifically, s. 70(1) thereof.

[9] It appears to me that Wright J. had only in mind the provisions of the rule under which the money was paid into court in that case. The wording of that rule is of some significance given the language of the order of Matlow J. here. The rule referred to in *Ford* includes the words "subject to such terms as to giving security". The order, however, as can be seen above, does not in fact refer to the word "security".

[10] Of some interest for my present purposes is the fact that while of the five cases referred to by Wright J. in *Ford,* four involve bankruptcy proceeding, only one contains any reference to the provisions of what then represented the present s. 70(1) or "secured creditor".

[11] In *Re Keyworth, Ex parte Banner* (1874), 9 Ch. App. 379, counsel for the trustee in bankruptcy urged the court to conclude that the plaintiff in that action, who was claiming the money which had been paid into court, was not a "secured creditor under the terms of the 16th section of the *Bankruptcy Act, 1869."* The court in that case, in concluding that the plaintiff was entitled to the money standing in court, made no reference to whether it was a secured creditor under the *Bankruptcy Act.* Rather, the court concluded that [at p. 383] "[t]he sum in question was paid into Court to abide the event of the action… [i]t belongs to the party who was found eventually to be entitled to the sum in dispute."

[12] To my mind the essential issue in the present case, and, I would have thought as well in those earlier cases, including *Ford,* is whether the party opposed to the claim of the trustee in bankruptcy is, for the purposes of determining ownership of the funds in court, a secured creditor within the meaning of that term as it is used in the *Bankruptcy Act* [*Bankruptcy and Insolvency Act*]. If the plaintiff here is not such a secured creditor, then, it has no claim to the money in court in priority to that of the trustee in bankruptcy.

[13] Counsel for the trustee spent some time in argument dealing with the provisions of s. 70(1) of the *Bankruptcy Act.* It is his position that the words "other processes" as found there include an order for payment into court such as that which was made by Matlow J. I am not prepared to agree with that contention. In my opinion those words, "other processes", must be interpreted ejusdem generis. In this respect I agree with the decision of Master Funduk in *V.I. International Holdings Ltd. v. Henbar Investments Ltd.* (1982), 41 C.B.R. (N.S.) 304 (Alta. Master), at p. 307.

[14] To the extent that s. 70(1) specifically exempts "the rights of a secured creditor," provisions of that section are relevant; otherwise, in my opinion its provisions are not determinative of the issue here.

[15] The *Bankruptcy Act* defines "secured creditor" as follows:

> "secured creditor" means 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 on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable;

[16] Matlow J. ordered the money to be paid into court pursuant to the provisions of r. 20.05(3)(*a*) which reads as follows:

> (3) Where an action is ordered to proceed to trial, in whole or in part, the court may give such directions or impose such terms as are just, including an order
>
> (*a*) for paying into court of all or part of the claim;…

[17] In my opinion, an order made pursuant to the provisions of that rule does not make the person putting forward the claim in respect of which the money is paid into court a secured creditor within the meaning of the *Bankruptcy Act.* In this respect I agree with the decision of Barr J. in *Bank of Montreal v. Faclaris* (1984), 48 O.R. (2d) 348 (H.C.).

[18] To my mind, the fact that Matlow J. added the words “as security for the plaintiff’s claim” to those of the rule, does not alter my conclusion. I hold the same view about the “security” to which Wright J. refers in *Ford.*

[19] There is a suggestion in some of the cases that when the judgment is ultimately obtained the money in court then belongs to the plaintiff exclusively. I cannot agree with that position because, if the plaintiff is not a secured creditor then s. 70(1) must apply at the time of judgment. In that event the money in court is available to be distributed along with the rest of the bankrupt’s property in accordance with the terms of the Act. 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. To my mind that appears to be the result attained in *Ford* and the cases referred to therein. For this reason I cannot follow them.

[20] In my opinion when paid into court pursuant to Matlow J.’s order, the money was the property of the bankrupt and has remained to be such. At the time of the claim of the trustee in bankruptcy to that money, it cannot be said that the plaintiff was a secured creditor within the meaning of the *Bankruptcy Act.*

[21] Accordingly the trustee is entitled to the relief which it seeks. If cots are not to follow the event counsel may make written submissions to me, with those on behalf of the trustee to be made first to be followed by those on behalf of the plaintiff within ten days and with a right of response to the trustee within three days.

Motion granted.