TAB 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Law Society of Upper Canada v. Mazzucco | 2009 CarswellOnt 200, 174 A.C.W.S. (3d) 1193, [2009] O.J. No. 193 | (Ont. S.C.J., Jan 19, 2009)

2005 CarswellOnt 7008
Ontario Court of Appeal

Graphicshoppe Ltd., Re

2005 CarswellOnt 7008, 2005 C.E.B. & P.G.R. 8178 (headnote only), [2005] O.J. No. 5184, 144 A.C.W.S. (3d) 355, 15 C.B.R. (5th) 207, 205 O.A.C. 113, 21 E.T.R. (3d) 1, 260 D.L.R. (4th) 713, 49 C.C.P.B. 63, 78 O.R. (3d) 401

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, as amended

AND IN THE MATTER OF THE BANKRUPTCY OF THE GRAPHICSHOPPE LIMITED, OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Moldaver, Armstrong, Juriansz JJ.A.

Heard: June 16, 17, 2005
Judgment: December 5, 2005*
Docket: CA C42864, M32603

Proceedings: reversing *Graphicshoppe Ltd., Re* (2004), 2004 CarswellOnt 5430, C.E.B. & P.G.R. 8132, 6 C.B.R. (5th) 176, 43 C.C.P.B. 243, 74 O.R. (3d) 121 (Ont. S.C.J.)

Counsel: Harvey Chaiton, George Benchetrit for Appellant
Andrew Hatnay, Clio Godkewitsch for Respondents

Subject: Corporate and Commercial; Estates and Trusts; Insolvency; Civil Practice and Procedure; Property

Related Abridgment Classifications

Estates and trusts
II Trusts
II.1 General principles
II.1.a Nature of trust

Pensions
I Private pension plans
I.1 Administration of pension plans
I.1.a General principles

Headnote

Pensions --- Administration of pension plans — General principles
Pension plan that G Ltd. provided for its employees was defined contribution plan administered by insurer L — Employees contributed four per cent of their wages and G Ltd. contributed amount equal to one per cent — G Ltd. deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to L within thirty days of month end — In months preceding bankruptcy, G Ltd. failed to remit $92,889.45 of moneys that it had

deducted from its 102 employees' pay — G Ltd. had one bank account that it used for all purposes — Employees' money deducted from their pay was commingled with G Ltd.'s own funds in that account — Employees filed proof of claim for $92,889.45 with trustee in bankruptcy, relying on s. 67(1)(a) of Bankruptcy and Insolvency Act ("BIA") — Trustee disallowed employees' claim on basis that employees must be able to trace their money into property in possession of bankrupt on date of bankruptcy — Because G Ltd. had converted trust moneys to other property or spent it on running its business, trust was destroyed and money in account on date of bankruptcy was not trust money — Employees successfully appealed to Registrar in Bankruptcy — Trustee's appeal of registrar's decision to Superior Court of Justice was dismissed — Trustee appealed to Court of Appeal — Appeal allowed — Trustee in bankruptcy correctly determined that employee contributions did not constitute trust funds under s. 67(1)(a) BIA — G Ltd. held its employee' pension contributions in trust when it deducted them from their pay — At that moment, trust property was identifiable and trust met requirements for trust under established principles of trust law — Shortly thereafter, however, trust property ceased to be identifiable — As of date of bankruptcy, none of employee contributions that had been deposited into G Ltd.'s bank account remained intact — Once trust funds have been converted into property that cannot be traced, claims under s. 67(1)(a) BIA are extinguished.

Estates and trusts --- Trusts — General principles — Nature of trust
Pension plan that G Ltd. provided for its employees was defined contribution plan administered by insurer L — Employees contributed four per cent of their wages and G Ltd. contributed amount equal to one per cent — G Ltd. deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to L within thirty days of month end — In months preceding bankruptcy, G Ltd. failed to remit $92,889.45 of moneys that it had deducted from its 102 employees' pay — G Ltd. had one bank account that it used for all purposes — Employees' money deducted from their pay was commingled with G Ltd.'s own funds in that account — Employees filed proof of claim for $92,889.45 with trustee in bankruptcy, relying on s. 67(1)(a) of Bankruptcy and Insolvency Act ("BIA") — Trustee disallowed employees' claim on basis that employees must be able to trace their money into property in possession of bankrupt on date of bankruptcy — Because G Ltd. had converted trust moneys to other property or spent it on running its business, trust was destroyed and money in account on date of bankruptcy was not trust money — Employees successfully appealed to Registrar in Bankruptcy — Trustee's appeal of registrar's decision to Superior Court of Justice was dismissed — Trustee appealed to Court of Appeal — Appeal allowed — Trustee in bankruptcy correctly determined that employee contributions did not constitute trust funds under s. 67(1)(a) BIA — G Ltd. held its employees' pension contributions in trust when it deducted them from their pay — At that moment, trust property was identifiable and trust met requirements for trust under established principles of trust law — Shortly thereafter, however, trust property ceased to be identifiable — As of date of bankruptcy, none of employee contributions that had been deposited into G Ltd.'s bank account remained intact — Once trust funds have been converted into property that cannot be traced, claims under s. 67(1)(a) BIA are extinguished.

The pension plan that G Ltd. provided for its employees was a defined contribution plan administered by insurer L. The employees contributed four per cent of their wages and G Ltd. contributed an amount equal to one per cent. G Ltd. deducted the employees' contributions from their pay and was supposed to remit those contributions, together with its own, to the plan administrator within thirty days of the month end. In the months preceding bankruptcy, G Ltd. failed to do so: between February 2003 and the date of bankruptcy, November 20, 2003, G Ltd. failed to remit $92,889.45 of the moneys that it had deducted from its 102 employees' pay. G Ltd. had one bank account that it used for all purposes. The employees' money deducted from their pay was commingled with G Ltd.'s own funds in that account. As G Ltd. continued to carry on business, the bank account balance fluctuated and, at one point, became negative. On the date of bankruptcy, however, there was $145,667.51 in the account. The closing balance resulted from transfers from T Ltd., which was factoring G Ltd.'s receivables. The employees filed a proof of claim for $92,889.45 with the trustee in bankruptcy. They relied on s. 67(1)(a) of the Bankruptcy and Insolvency Act ("BIA"), which provides that the property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person. The trustee disallowed the employees' claim on the basis that the employees must be able to trace their money into property in the possession of the bankrupt on the date of bankruptcy. Because G Ltd. had converted the trust moneys to other property or spent it on running its business, the trust was destroyed and the money in the account on the date of bankruptcy was not trust money. The employees successfully appealed to Registrar in Bankruptcy. The trustee's appeal of the registrar's decision to the Superior Court of Justice was dismissed. The trustee appealed to the Court of Appeal.

Held: The appeal was allowed.

Per Moldaver J.A. (Armstrong J.A. concurring): The trustee in bankruptcy correctly determined that the employee contributions did not constitute trust funds under s. 67(1)(a) BIA. G Ltd. held its employees' pension contributions in trust

when it deducted them from their pay. At that moment, the trust property was identifiable and the trust met the requirements for a trust under established principles of trust law. Shortly thereafter, however, the trust property ceased to be identifiable. The employee contributions were commingled with G Ltd.'s funds and, prior to the date of bankruptcy, they were converted into other property and were no longer traceable. As of the date of bankruptcy, none of the employee contributions that had been deposited into G Ltd.'s bank account remained intact. Once trust funds have been converted into property that cannot be traced, claims under s. 67(1)(a) BIA are extinguished.

Per Juriansz J.A. (dissenting): Under traditional principles of trust law, commingling the trust property with other assets does not destroy the trust. It simply affects whether proprietary as opposed to personal relief is available. In this case, there was no doubt that the pension contributions were the employees' money, and it was conceded that G Ltd. held that money in trust upon deducting it from the employees' pay. The commingling of the employees' money with its own in one bank account did not destroy the trust. It was open for the Superior Court of Justice to not apply the lowest intermediate balance rule and to find that the employees were entitled to reclaim their contributions in the amount of $92,899.45.

Annotation

In a result which even the majority conceded to be "harsh", the Ontario Court of Appeal has overturned the decision below which had applied the "deemed trust" rules in the Ontario *Pension Benefits Act* to extricate unremitted employee pension plan contributions from the bankrupt employer's estate. Many commercial insolvency lawyers had considered the earlier decision to be simply wrong in law, and indeed the majority's reasons for judgment at the Court of Appeal are much more consistent with well-established precedents like the Supreme Court of Canada's *Henfrey Samson* decision. That being said, the fact that this case involved EMPLOYEE contributions as opposed to EMPLOYER contributions makes this result all but impossible to justify to the man on the street. Recent amendments to the *Bankruptcy and Insolvency Act*, which will give special priority to employee pension plan contributions, will likely go a long way to limiting the effect of this decision on future insolvencies.

Gary Nachshen

Table of Authorities

Cases considered by *Juriansz J.A.*:

Anderson & Co., Re (1923), 4 C.B.R. 288, 25 O.W.N. 257, 1923 CarswellOnt 74 (Ont. S.C.) — referred to

Becker v. Pettkus (1980), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 1980 CarswellOnt 299, 1980 CarswellOnt 644 (S.C.C.) — referred to

Bethlehem Steel Corp. v. Tidwell (1986), 66 B.R. 932 (U.S. Dist. Ct.) — referred to

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — considered

Bryant Isard & Co., Re (1923), 4 C.B.R. 41, 24 O.W.N. 597, 1923 CarswellOnt 35 (Ont. S.C.) — considered

Bryant Isard & Co., Re (1925), 5 C.B.R. 393, [1925] 1 D.L.R. 847, 1925 CarswellOnt 3 (Ont. S.C.) — considered

Capra v. Grobstein (1929), 49 B.R. 495, 11 C.B.R. 250, 1929 CarswellQue 19 (C.A. Que.) — referred to

Clayton's Case, Re (1816), 35 E.R. 781, 1 Mer. 572, [1814-23] All E.R. Rep. 1 (Eng. Ch. Div.) — considered

Conrad, Re (1963), 6 C.B.R. (N.S.) 275, 1963 CarswellQue 58 (C.S. Que.) — referred to

Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustee of) v. Caisse populaire de Black-Lake (1986), 64 C.B.R. (N.S.) 156, 1986 CarswellQue 37 (C.S. Que.) — referred to

Cynar Dry Co., Re (2005), 2005 CarswellOnt 63, 8 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — considered

Diplock v. Wintle (1948), (sub nom. *Diplock, Re)* [1948] 2 All E.R. 318, [1948] 1 Ch. 465 (Eng. C.A.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), 74 O.R. (3d) 382, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, (sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360 (Ont. C.A.) — considered

H. O. Kirkham & Co., Re (1938), 20 C.B.R. 223, [1939] 1 W.W.R. 425, 53 B.C.R. 278, 1938 CarswellBC 3 (B.C. S.C.) — referred to

Hallett's Estate, Re (1880), 13 Ch. D. 696, [1874-1880] All E.R. Rep. 793 (Eng. C.A.) — considered

Law Society of Upper Canada v. Toronto Dominion Bank (1998), 1998 CarswellOnt 4757, 169 D.L.R. (4th) 353, 116 O.A.C. 24, 42 O.R. (3d) 257, 44 B.L.R. (2d) 72 (Ont. C.A.) — considered

Lupton v. White (1808), 33 E.R. 817, 15 Ves. Jun. 432 — considered

Murdoch v. Murdoch (1973), [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367, [1975] 1 S.C.R. 423, 1973 CarswellAlta 156, 1973 CarswellAlta 119 (S.C.C.) — referred to

Nierenberg, Re (1979), 30 C.B.R. (N.S.) 267, 1979 CarswellOnt 211 (Ont. Bktcy.) — considered

Ontario (Securities Commission) v. Greymac Credit Corp. (1986), 55 O.R. (2d) 673, 17 O.A.C. 88, 23 E.T.R. 81, 30 D.L.R. (4th) 1, 34 B.L.R. 29, 1986 CarswellOnt 158 (Ont. C.A.) — considered

Ontario (Securities Commission) v. Greymac Credit Corp. (1988), 31 E.T.R. 1, (sub nom. *Greymac Trust Co. v. Ontario (Securities Comm.))* [1988] 2 S.C.R. 172, 52 D.L.R. (4th) 767, 29 O.A.C. 217, 87 N.R. 341, 65 O.R. (2d) 479, 1988 CarswellOnt 597, 1988 CarswellOnt 964 (S.C.C.) — referred to

Owen, Re (1985), (sub nom. *Burlingham v. First City Trust Co.)* 38 Sask. R. 104, 55 C.B.R. (N.S.) 161, 1985 CarswellSask 54 (Sask. Q.B.) — referred to

Plourde, Re (1979), 31 C.B.R. (N.S.) 308, 1979 CarswellQue 73 (C.A. Que.) — referred to

Pratchler Agro Services Inc. (Trustee of) v. Cargill Ltd. (1999), 1999 CarswellSask 435, 11 C.B.R. (4th) 107, (sub nom. *Pratchler Agro Services Inc. (Bankrupt) v. Cargill Ltd.)* 183 Sask. R. 157 (Sask. Q.B.) — referred to

Rathwell v. Rathwell (1978), [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 1978 CarswellSask 36, 1978 CarswellSask 129 (S.C.C.) — referred to

Reed v. Franco (1980), [1980] C.S. 391, 35 C.B.R. (N.S.) 149, 1980 CarswellQue 54 (C.S. Que.) — referred to

Reed v. Franco (1983), 49 C.B.R. (N.S.) 21, 1983 CarswellQue 41 (C.A. Que.) — referred to

Soucier, Re (1939), 20 C.B.R. 298, 1939 CarswellNB 1 (N.B. S.C.) — referred to

Tlustie, Re (1923), 3 C.B.R. 654, 23 O.W.N. 622, 1923 CarswellOnt 12 (Ont. S.C.) — considered

Ward-Price v. Mariners Haven Inc. (2001), 2001 CarswellOnt 1514, 199 D.L.R. (4th) 68, 42 R.P.R. (3d) 39, 57 O.R. (3d) 410, 159 O.A.C. 117 (Ont. C.A.) — considered

Cases considered by *Moldaver J.A.*:

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — followed

Law Society of Upper Canada v. Toronto Dominion Bank (1998), 1998 CarswellOnt 4757, 169 D.L.R. (4th) 353, 116 O.A.C. 24, 42 O.R. (3d) 257, 44 B.L.R. (2d) 72 (Ont. C.A.) — distinguished

Ontario (Securities Commission) v. Greymac Credit Corp. (1986), 55 O.R. (2d) 673, 17 O.A.C. 88, 23 E.T.R. 81, 30 D.L.R. (4th) 1, 34 B.L.R. 29, 1986 CarswellOnt 158 (Ont. C.A.) — distinguished

Ontario (Securities Commission) v. Greymac Credit Corp. (1988), 31 E.T.R. 1, (sub nom. *Greymac Trust Co. v. Ontario (Securities Comm.))* [1988] 2 S.C.R. 172, 52 D.L.R. (4th) 767, 29 O.A.C. 217, 87 N.R. 341, 65 O.R. (2d) 479, 1988 CarswellOnt 597, 1988 CarswellOnt 964 (S.C.C.) — referred to

Statutes considered by *Juriansz J.A.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 30 — referred to

s. 30(1)(d) — referred to

s. 67 — referred to

s. 67(1)(a) — considered

s. 136 — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

Social Service Tax Act, R.S.B.C. 1979, c. 388
s. 18(1) — referred to

s. 18(2) — referred to

Statutes considered by *Moldaver J.A.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 67(1)(a) — considered

APPEAL by trustee in bankruptcy from judgment reported at *Graphicshoppe Ltd., Re* (2004), 2004 CarswellOnt 5430, C.E.B. & P.G.R. 8132, 6 C.B.R. (5th) 176, 43 C.C.P.B. 243, 74 O.R. (3d) 121 (Ont. S.C.J.) with respect to application of s. 67(1)(a) of *Bankruptcy and Insolvency Act*.

***Juriansz J.A.* (dissenting):**

[deleted]

***Moldaver J.A.*:**

118 I have read the reasons of my colleague Juriansz J.A. With respect, I am unable to agree with his analysis or conclusion, except as it relates to the right of the trustee in bankruptcy to pursue this appeal. In my view, the trustee in bankruptcy correctly determined that the employee contributions did not constitute trust funds under s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

119 The salient facts are not in dispute. It is accepted that Graphicshoppe held its employees pension contributions in trust when it deducted them from their pay. At that moment, the trust property was identifiable and the trust met the requirements for a trust under established principles of trust law.

120 Shortly thereafter however, the trust property ceased to be identifiable. The employee contributions were co-mingled with Graphicshoppe's funds and prior to the date of bankruptcy, they were converted into other property and were no longer traceable. On this point, it is clear from the record that as of the date of bankruptcy, none of the employee contributions that had been deposited into Graphicshoppe's bank account remained intact. We know that with certainty because prior to the date of bankruptcy, the account went into a negative balance. We likewise know that the funds in the account on the date of bankruptcy came from Textron, the company that was factoring Graphicshoppe's receivables. Replenishment is a non-issue on the facts before us.

121 Against that backdrop, the central issue on appeal is whether the trustee in bankruptcy was correct in concluding that the employee contributions did not constitute trust funds at the date of bankruptcy within the meaning of s. 67(1)(a) of the *BIA*. With respect, I believe that he was.

122 On the facts of this case, I am of the view that McLachlin J.'s majority decision in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.) ("*Henfrey Samson*"), vindicates the position taken by the trustee in bankruptcy. My colleague has reviewed the salient facts of that case and they need not be repeated. The passages that I consider to be apposite are found at pp. 741 and 742. They are reproduced below:

> I turn next to s. 18 of the *Social Service Tax Act* and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. *At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced.* At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(*b*) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. *But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust.* Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.
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> . . . . .
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> Nor does the argument that the tax money remains the property of the Crown throughout withstand scrutiny. If that were the case, there would be no need for the lien and charge in the Crown's favour created by s. 18(2) of the *Social Service Tax Act. The province has a trust interest and hence property in the tax funds so long as they can be identified or traced. But once they lose that character, any common law or equitable property interest disappears*. The province is left with a statutory deemed trust which does not give it the same property interest a common law trust would, supplemented by a lien and charge over all the bankrupt's property under s. 18(2) [emphasis added].

123 For present purposes, I am prepared to accept that *Henfrey Samson* falls short of holding that co-mingling of trust and other funds is, by itself, fatal to the application of s. 67(1)(a) of the *BIA*. Once however, the trust funds have been converted into property that cannot be traced, that is fatal. And that is what occurred here.

124 It should be noted here that the facts of this case are very different from the facts in the two cases upon which my colleague so heavily relies, namely, *Ontario (Securities Commission) v. Greymac Credit Corp.* (1986), 55 O.R. (2d) 673 (Ont. C.A.), aff'd [1988] 2 S.C.R. 172 (S.C.C.) ("*Greymac*"), and *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 42 O.R. (3d) 257 (Ont. C.A.) ("*LSUC*").

125 In *LSUC*, all of the funds in issue were trust funds. Even though the defalcating lawyer had made an assignment into bankruptcy, there was no issue about whether the funds in question formed part of the estate divisible among his creditors; they did not. Rather, in *LSUC*, the court was solely concerned with how best to allocate the funds remaining in the mixed trust account between competing beneficiaries.

126 In the case at bar, we are only at the first stage of this analysis. That is, we are still trying to determine if any or all of the funds in the bankrupt's bank account at the date of bankruptcy were trust funds and therefore not part of the bankrupt's

estate pursuant to s. 67(1)(a) of the *BIA*. At this preliminary stage, we are not concerned about calculating the amount each beneficiary may claim from the trust funds, if it turns out that some such funds do in fact exist. Instead, we are simply trying to determine what, if any, of the money in the Graphicshoppe's bank account at the date of bankruptcy was trust money and therefore did not belong to it. The reasoning in *LSUC* as it relates to the issue of how best to allocate the funds remaining in a mixed trust account between competing beneficiaries simply has no application to this preliminary question. The same thing can be said about the reasoning in *Greymac*, which, like the reasoning in *LSUC*, focused on the resolution of beneficiaries' competing proprietary claims to remaining trust funds.

127 I would also add that throughout his reasons for judgment in *LSUC*, Blair J. (*ad hoc* at that time) clearly acknowledged that the issue before the court was confined to determining the best approach for resolving the claims of competing beneficiaries to funds remaining in a mixed trust account. Blair J. considered the *pari passu ex post facto* approach to be the best approach for that task because of the inconvenience that is often associated with having to apply the lowest intermediate balance rule in cases involving any significant number of beneficiaries and transactions, and because of the nature and purpose of a mixed trust fund. In Blair J.'s view, such a fund is in many ways a mechanism of convenience, in that it avoids the necessity, cost and cumbersome administrative aspects of having to set up individual trust accounts for each beneficiary. Blair J. reasoned that "a mixed fund of this nature should be considered a whole fund, at any given point in time, and that the particular moment when a particular beneficiary's contribution was made and the particular moment when the defalcation occurred, should make no difference" (p. 272).

128 These reasons in support of the *pari passu ex post facto* approach have no application in a case where the concern is not how to allocate the shortfall of funds remaining in a mixed trust account between competing beneficiaries but is rather how to determine if funds in the hands of a bankrupt at the date of bankruptcy are actually, in whole or in part, trust funds for purposes of s. 67(1)(a) of the *BIA*.

129 Finally, even if we were to ignore the fact that much of Blair J.'s justification for the *pari passu ex post facto* approach was tied to the special nature and purpose of a mixed *trust* fund and accept that this approach ought to apply to any kind of mixed fund, it nonetheless ought not to apply here, because I cannot accept that at the date of bankruptcy, the bankrupt's bank account in this case was, in fact, a "mixed" fund. Since it is clear on the evidence that the employees' pension contributions were totally dissipated *before* the monies from Textron were deposited into the bankrupt's bank account, as a matter of fact there is no mixture here: see, on this point, Lionel Smith, "Tracing in Bank Accounts: The Lowest Intermediate Balance Rule on Trial" (2000) 33 Can. Bus. L.J. 75 at 90. I recognize that my colleague Juriansz J.A. says that this argument is simply an attempt to apply the logic of the lowest intermediate balance rule. With respect, assuming that characterization is correct, I do not see how applying this logic can be erroneous, when in this case it is solidly supported by fact.

130 In the case at bar, the employees had a trust interest and hence a right to seek a proprietary remedy with respect to the pension contributions so long as they could be identified or traced. However, as McLachlin J. noted at p. 742 of *Henfrey Samson*, once the contributions lost that character, any common law or equitable property interest disappeared. While this may seem harsh, it must be remembered that in the commercial context and particularly in the realm of bankruptcy, innocent beneficiaries may well be competing with innocent unsecured creditors for the same dollars. This raises policy considerations which the courts in *Greymac* and *LSUC* did not have to face.

131 My colleague purports to distinguish *Henfrey Samson* on the basis that in this case there is a connection between the employees' pension contributions and Graphicshoppe's bank account, whereas in *Henfrey Samson*, the Province did not establish a connection with any particular account or asset, advancing a claim against the entire estate of the bankrupt instead. My colleague states that in this case the pension contributions can be traced to Graphicshoppe's bank account, and that pursuant to the reasoning in *LSUC*, this bank account should be considered an indivisible asset in the hands of Graphicshoppe, over which the employees may assert a proprietary interest.

132 With respect, I have already explained in these reasons why the reasoning in *LSUC* ought not to apply to the facts of this case, and I do not think it is necessary to elaborate on this issue any further. I would only point out that regardless of the particular facts in *Henfrey Samson*, it must be remembered that in that case a majority of the Supreme Court of Canada held that once monies held on trust can no longer be traced, that is fatal to the application of s. 67(1)(a) of the *BIA*. In the case at bar, it is clear on the evidence that the pension contributions cannot be traced. Accordingly, the employees' claim under s.

67(1)(a) of the *BIA* must fail.

133 For these reasons, I am satisfied that the trustee in bankruptcy was correct in holding that the pension plan contributions made by the employees did not constitute trust funds within the meaning of s. 67(1)(a) of the *BIA*. Accordingly, I would allow the appeal, set aside the order of Lax J. and in its place, substitute an order upholding the trustee's disallowance of the employees' proof of claim.

134 With respect to costs both here and below, if the parties cannot agree, the appellant may file submissions with the court within fifteen days of the release of these reasons. The respondents shall reply within ten days thereafter. The submissions shall not exceed five pages double-spaced. If so advised, counsel for the appellant may file a reply within five days of the receipt of the respondents' submission, limited to three pages double-spaced.

***Armstrong J.A.*:**
I agree.

Appeal allowed.

Footnotes

* Additional reasons at *Graphicshoppe Ltd., Re* (2006), 2006 CarswellOnt 652 (Ont. C.A.).