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Justice Eidsvik

COURT FILE NUMBER	2001 05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
APPLICANT	R BEE AGGREGATE CONSULTING LTD.
DOCUMENT	**REPLY BRIEF OF THE APPLICANT, R BEE AGGREGATE CONSULTING LTD., IN SUPPORT OF AN APPLICATION TO DECLARE A TRUST, NOVEMBER 27, 2020**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Bishop & McKenzie LLP 2300, 10180 – 101 Street Edmonton, AB, T5J 1V3 Telephone: 780-426-5550 Facsimile: 780-426-1305 Attention: Jerritt R. Pawlyk File No. 110151-003

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I. INTRODUCTION

1. This reply brief is submitted on behalf of the applicant, R Bee Aggregate Consulting Ltd. ("RBEE") in response to arguments raised in the responding briefs of JMB Crushing Systems Inc. ("JMB") and ATB Financial ("ATB"). Where possible, the defined terms in RBEE's brief filed November 13, 2020, as well as the defined terms in the JMB Brief and the ATB Brief, will be used herein.

II. LAW AND ARGUMENT

A. Certainty of Intention

2. In reply to paragraph 31 of JMB's brief, the first step in determining whether the Supply Contract creates a trust is to interpret the Supply Contract to determine the intention of the Municipality only. Express trusts "arise from the acts and intentions of the <u>settlor</u>" (emphasis added).[1] The intentions of the trustee are irrelevant.

3. In reply to paragraph 34 of JMB's brief, RBEE claims "compensation", which is an item that falls under the trust created by paragraph 26 of the Supply Contract and so the *ejusdem generis* rule does not apply to RBEE.

4. In further reply to paragraph 34, the *ejusdem generis* rule does not apply where the items in a list do not share a common characteristic.[2] There is no common characteristic between "wages, compensation, …" and "GST" in the terms of the trust other than that they are a cost of doing business paid to a third party.

5. In reply to paragraph 35 of JMB's brief, "one indicia" that a contract has not created a trust is that the parties to the contract can vary it without the beneficiaries' consent. This

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[1] *Century Services Inc v Canada (Attorney General),* 2010 SCC 60 at para 83. [TAB 3]

[2] John D McCamus, *Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 769-70. [TAB 7]

is, however, simply one indicium and "may weigh against an inference of the establishment of the certainty of intention" (emphasis added).[3]

6. In any event, the Municipality and JMB cannot vary the trust once the trust is constituted even if they vary the Supply Contract.

7. *Mohr* cites Waters' Law of Trusts, speaking about the difference between a trust and a mere contract : "Once the trust instrument or declaration of trust has taken effect, and the property is vested in the trustee, however, alienation on the terms of that trust has taken place. Therefore, no variation can be made by the settlor, or the settlor and the trustee, without the consent of the beneficiary, who now has the right of enjoyment in the trust property."[4]

8. The Municipality has transferred property to JMB or the Monitor. The trust is constituted and neither the Municipality nor JMB can vary the terms of the trust even if they vary the Supply Contract.

9. Further, the alleged trust in *Mohr* failed for an additional and important reason: the money was paid to a Fund to benefit the construction industry generally and not to provide an enforceable benefit to any specific individual party.[5]

10. In reply to paragraph 36 of JMB's brief, once the trust is constituted, the fact that there are no terms as to termination of trust is irrelevant. Contrary to JMB's assertion that "there is nothing preventing JMB from using the funds as it sees fit", as a trustee and thus fiduciary, JMB would be liable for breach of trust if JMB acted in any way other than the best interests of the beneficiaries, resulting in a constructive trust in favour of the beneficiaries.

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[3] *Dusanjh v Appleton*, 2017 BCSC 340, at para 67. [TAB 4]

[4] *Mohr v CJA,* 1989 CarswellBC 507 (SC), at para 85. [*Mohr*] [JMB's Brief, TAB 1].

[5] *Mohr*, at paras 94, 102, 108. [JMB's Brief, TAB 1].

11. In reply to paragraphs 37-39 of ATB's brief, the Court instituted a process to have the funds held in trust by the Monitor. So, the trust is modified by Court order, but the trust should not fail for that reason.

12. If there was an intention to create a trust on the part of the Municipality, as stated by ATB in their brief at paragraph 39, then it does not matter that the Holdback funds were paid directly to the Monitor and not JMB. As an interim step, because of the interjection of the CCAA action, the Monitor is to hold as trustee instead of JMB until the terms of the Bonnyville Order are complied with. Once the funds are paid to JMB, as they partially have been, JMB takes over as trustee.

13. In reply to paragraph 37 of JMB's brief, the use of the words "in trust" shows the Municipality's objective intention to create a trust. While the words "in trust" are not necessary, they suffice.[6]

14. When commercially sophisticated parties use the word "trust", it is assumed they understand the nature and effect of such language.[7]

15. Further, there is a canon of construction that effect should be given to all parts of an agreement if possible and not to interpret the contract in a way that makes clauses redundant.[8] Without the creation of a trust, paragraph 26 of the Supply Contract has no purpose and does nothing to protect the Municipality.

16. At paragraph 38 of JMB's brief, JMB lists the other paragraphs of the Supply Contract that provide protections to the Municipality, including paragraphs 37 (WCB premiums), 39 (indemnification for breach of contract or negligence) and 41 (indemnification of statutory obligations).

17. If paragraph 26 is not intended to create a trust and is simply a direction to JMB to pay WCB, etc., then the aforementioned paragraphs of the Supply Contract are redundant

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[6] *Carling Development Inc v Aurora River Tower Inc*, 2005 ABCA 267, at para 51. [RBEE Brief, TAB 6]

[7] *Luscar Ltd v Pemina Resources Ltd*, 1994 ABCA 356, at para 100. [TAB 5]

[8] *Steinberg Inc v Tilak Corp* (1991), 2 OR (3d) 165 (Sup Ct). [TAB 6]

provisions as paragraph 26 would have already protected the Municipality by requiring JMB to pay its creditors.

18. Paragraph 26 must have been included as a provision beyond a simple direction to pay. The words must be given effect: it is a trust.

19. Further, there is no distinction between a government entity and a subcontractor. All beneficiaries of the trust should be paid. The purpose of paragraph 26 of the Supply Contract is to protect the Municipality from having liability to <u>any</u> third party, including subcontractors.

20. In reply to paragraph 39 of JMB's brief, the trust is not a purpose trust and so it does not matter what the purpose in creating the trust was. The trust is a trust for persons – it only matters whom the legal beneficiaries are.[9]

21. The contract intended for JMB to hold in trust for the beneficiaries so that, incidentally, the Municipality could be protected from liability. However, that does not make the Municipality the legal beneficiary of the trust.

22. In reply to paragraph 42 of JMB's brief and paragraph 36 of ATB's brief, JMB subcontracted parts of the exact job contemplated in the Supply Contract between JMB and the Municipality. JMB cannot now argue that subcontractors are not covered because JMB did not, with its own forces, perform the work. The class of beneficiaries includes any source of "costs directly or indirectly related to the Products and Services".

B. Certainty of Subject Matter

23. JMB conflates "certainty of subject matter" with "certainty of objects". The test for certainty of subject matter applies at the time that the trust comes into existence.[10]

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[9] Albert H Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 9th ed (Toronto: Thomson Reuters, 2019) at 202-203. [Oosterhoff] [TAB 8]

[10] Oosterhoff at 187. [TAB 8]

24. The trust comes into existence when the trust is constituted. That is, the trust comes into existence when the Municipality transfers money to JMB or, in this case because of the Bonnyville Order, the Monitor.

25. The subject matter of the trust is all amounts paid to JMB by the Municipality under the Supply Contract "which are required or needed to pay… all costs directly or indirectly related to the Product and Services". Although the subject may be broad, it is not uncertain.

26. The test for certainty of objects also applies at the time the trust comes into existence, although identification of the beneficiaries is not required until distribution.[11]

27. Therefore, all parties that fit the parameters of the trust at the time of distribution would have a claim to the entire subject matter of the trust.

C. Certainty of Objects

28. The Supply Contract states that JMB holds all funds required to pay "<u>all costs</u> directly or <u>indirectly related</u> to the Product and Services" (emphasis added) on trust. Therefore, all subcontractors and vendors providing "indirect" services should be considered beneficiaries.

29. There is no uncertainty about "all costs".

30. Further, RBEE is a subcontractor that provided a "direct" service, because, without RBEE's work, JMB could not have fulfilled the Supply Contract.

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[11] Oosterhoff at 204. [TAB 8]

D. Security Trust

31. It is respectfully submitted that the trust created by the Prime Contract is not a Security Trust as argued by ATB in its brief.

32. Section 3(1)(b) of the Alberta *Personal Property Security Act* (the "PPSA") states:

> this Act applies to …(b) 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[12]
>
> (emphasis added).

33. Section 1(1)(tt)(i) of the PPSA defines "security interest" as:

> an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading where its equivalent to the order of the seller or to order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for investment property interest in the goods…[13]
>
> (emphasis added).

34. The PPSA has no application to this trust. It is submitted that the error in ATB's argument is that the subject trust funds were not placed in trust as a "security" for securing payment or performance of an obligation, but rather represent a payment itself for services already performed. The work had already occurred before the payment was made. The Municipality is not putting money into trust to secure the performance of an obligation by RBEE/JMB. The funds were provided by the Municipality to JMB after invoices for work performed were submitted.[14]

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[12] *Personal Property Security Act*, RSA 2000, c P-7, s. 3(1)(b). [PPSA] [TAB 2]

[13] PPSA, s. 1(1(tt)(i). [TAB 2]

[14] Affidavit of David Howells, sworn November 5, 2020, at paras 12 – 13, Exhibit "B" and "D".

35. The trust created in favour of RBEE does not satisfy the definition of "security interest" in the PPSA and the trust was never intended to give rise to a security interest transaction.

36. Furthermore, section 3 of the PPSA applies to a "trust indenture" where the interest is to secure payment or performance of an obligation. The PPSA also specifies that in the case of a trust indenture that secures payment or performance of an obligation, the secured party is the trustee, not the beneficiary:

> a "secured party" means…the trustee if a security agreement is embodied or evidenced by a trust indenture.[15]

37. RBEE respectfully submits that this undermines ATB's argument that the Claimants, as beneficiaries of the trust, are secured parties and, as such, have an obligation to perfect their alleged security interest in order to preserve priority over a secured party. If ATB were correct, and the trust gave rise to a security interest, the secured party, as defined in the PPSA, would be the trustee, not the beneficiaries.

38. A trust interest only becomes a security interest under the PPSA if the substantive purpose of creating the trust is to secure payment or performance of an obligation. One relevant factor in determining the substance of the transaction is whether the relationship between trustee and beneficiary, or settlor and beneficiary, is a debtor-creditor relationship, or some other relationship (e.g., agent-principal)[16]

39. The relationship between RBEE and JMB was not a debtor-creditor relationship. RBEE was a subcontractor who is owed compensation, not a lender. They only became creditors of JMB unintentionally as a result of the unforeseen CCAA. The transactions in substance were not transactions to secure payment or performance of an obligations and the assumed trust is not a security interest to which the PPSA applies.

40. The trust established in this matter was not to secure payment or performance of an obligation. The trust beneficiaries are not lenders and there was no security agreement

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[15] PPSA, s. 1(qq)(iii). [TAB 2]

[16] *E Construction Ltd. v Sprague-Rosser Contracting Co Ltd.*, 2017 ABCA 657, at para 38. [RBEE Brief, TAB 7]

between the beneficiaries and JMB or between the beneficiaries and anyone else. Therefore, the trust is not a Security Trust as alleged by ATB.

E. Non-Security Trust

41. As the trust is not a Security Trust under the PPSA, RBEE agrees that the principles of common law and equity apply to the issue of priority to the trust.

42. RBEE submits that it is essential that ATB establish that it is a *bona fide* purchaser for value without notice in order to defeat the Claimants' claim to the trust property:

> Equity is willing to extend personal trust obligations to third parties who obtain legal title to the property, but will not do so if the person acquired the interest for value and without notice of the trust obligation. <u>A secured party therefore cannot escape the imposition of equitable obligations in respect of trust property unless the secured party can bring itself within the *bona fide* purchaser principle</u>
>
> (emphasis added).[17]

43. ATB asserts at paragraph 22 of its brief that they are a *bona fide* party who acquired an interest in the trust without knowledge of the alleged equitable interest held by the Claimants. However, there is absolutely no evidence of the assertion before this Court that ATB did not have notice of the trust.

44. The first affidavit of Jeff Buck, sworn April 16, 2020, swears at paragraph 39 that ATB first advanced funds to JMB in 2017.[18]

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[17] Ronald C.C. Cuming, Catherine Walsh, and Roderick J. Wood, *Personal Property Security Law* (Toronto: Irwin Law Inc., 2005) at p 422. [ATB Brief, TAB 4]

[18] Affidavit of Jeff Buck, sworn April 16, 2020, at para 39.

45. The Prime Contract between JMB and the Municipality was entered into on November 1, 2013.[19]

46. ATB has not submitted an affidavit in these proceedings. There is no evidence before this Court that ATB has acted in good faith, has clean hands, or did not have notice of the trust.

47. ATB says at paragraph 22 of its brief that it advanced funds based on the strength of the Municipality receivable as reported to ATB by JMB. However, there is no evidence before this Court as to the due diligence steps ATB took prior to advancing funds to JMB. It is expected that a lender as sophisticated as ATB would have at least reviewed the Prime Contract and therefore, would have notice of the trust provision in the Prime Contract. In any event, there is no evidence either way.

48. In *i Trade Finance Inc. v. Bank of Montreal*, an authority relied upon by ATB, the *bona fide* purchaser (BMO) established that it did not have notice because it was a victim of fraud, which is not the circumstance of this case.[20] ATB was not the victim of fraud by JMB and did have the means to receive notice of the trust.

49. ATB also relies on the authority of *Horizon Earthworks*[21] as being factually similar to this case. However *Horizon* can be distinguished from this case at almost every turn:

    a. In *Horizon,* the *Bankruptcy and Insolvency Act, R.S.C.,* 1985, c. B-3 (the "BIA") applied, which is an entirely different legislative scheme. The funds in question were received by the municipality *after* the date of bankruptcy as a result of a bond and a new contractor completing the work. [22] In our case, the funds were payable before the CCAA.

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[19] Affidavit of David Howells, sworn November 5, 2020, at para 2.

[20] *i Trade Finance Inc. v. Bank of Montreal*, 2011 SCC 26, at paras 2-5 and 66. [ATB's Brief, TAB 5]

[21] *Horizon Earthworks*, 2013 ABCA 302. [*Horizon*] [ATB's Brief, TAB 6]

[22] *Horizon*, at paras 1 – 2. [ATB's Brief, TAB 6]

b. The municipality's contract with the bankrupt alone was not sufficient to establish a trust in benefit for subcontractors without also looking at other documents; a bond that it was not a party to and an indemnity and security agreement that it was not a party to.[23] In our case, section 26 of the Prime Contract establishes the trust.

c. The issue in *Horizon* was whether contractual language requiring the municipality to pay subcontractors could override the priority scheme of the BIA. The Court determined that the contractual language, as it was, could not override the priority structure of the BIA and the money payable from the Municipality to the bankrupt became the property of the Trustee to distribute in accordance with the BIA.[24] In our case, there is no legislative scheme but instead the principles of equity to determine who has priority to the trust property.

50. RBEE submits that the *Horizon* case is not instructive in these proceedings as there are significant distinguishable facts as well as a different legislative scheme in place.

51. RBEE submits that ATB has not provided any evidence that it is a *bona fide* purchaser without notice and therefore, it does not defeat RBEE's claim to the trust property as a result of its after-acquired security interest.

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[23] *Horizon*, at paras 26, 42-43. [ATB's Brief, TAB 6]

[24] *Horizon*, at paras 3 and 44. [ATB's Brief, TAB 6]

F. Tracing

52. "Funds" were defined in the Order as "those amounts invoiced by JMB to MD of Bonnyville but not yet paid by MD of Bonnyville for the period up to and including April 30, 2020 in relation to the Contract, less the Disputed Amount, which is $3,563,768.40".[25]

53. It is RBEEs position that the trust property at issue in these applications is the entire $3.5 million paid to the Monitor as Funds pursuant to the Order (the "Trust Property"). The Funds were distributed as follows:

    a. $1.85 million of the Funds remains in the Monitor's account;

    b. approximately $1.5 million was disbursed to JMB and $236,000 was remitted to the Canada Revenue Agency with respect to unremitted payroll source deductions, in accordance with paragraph 15(a) of the Order.[26]

54. As of November 13, 2020, JMB is holding a cash balance of approximately $1.7 million.[27]

55. Co-mingling of trust funds is not fatal to a tracing claim. It is only once the funds have been converted into property that cannot be traced that the tracing claim will be extinguished.[28]

56. Co-mingling of the Trust Property with other funds of JMB does not prevent the Claimants from tracing the Trust Property. The funds released by the Monitor to JMB have been held in JMB's bank account and all disbursements have been overseen by the Monitor. The Claimants have more information than most beneficiaries as to the status of the Trust Property.

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[25] Order, s. 3(g). [RBEE Brief, TAB 1]

[26] Tenth Report of the Monitor, dated November 20, 2020, at paras 18-19. [Monitor's Report] [TAB 1]

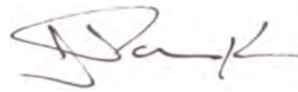
[27] Monitor's Report, at para 26. [TAB 1]

[28] *Graphicshoppe Ltd., Re*, 2005 CarswellOnt 7008 (CA), at para 123. [ATB Brief, TAB 7]

57. Should this Honourable Court find that the Trust Property is traceable by the Claimants, and should RBEE be required to trace the Trust Property in order to satisfy its claim, then RBEE reserves its right to make further submissions on the tracing principles to be applied to any required tracing.

ALL OF WHICH IS RESPECTIFULLY SUBMITTED THIS 26th day of November, 2020.

BISHOP & McKENZIE LLP



Per: ______________________________
Jerritt R. Pawlyk
Solicitors for the Applicant
R BEE Aggregate Consulting Ltd.

III. INDEX OF AUTHORITIES

A. Evidence

TAB 1. Tenth Report of the Monitor, dated November 20, 2020.

B. Legislation

TAB 2. *Personal Property Security Act*, RSA 2000, c P-7, ss. 1(1)(qq)(iii) and 1(1)(tt)(i).

C. Jurisprudence

TAB 3. *Century Services Inc v Canada (Attorney General),* 2010 SCC 60.

TAB 4. *Dusanjh v Appleton*, 2017 BCSC 340.

TAB 5. *Luscar Ltd v Pemina Resources Ltd*, 1994 ABCA 356.

TAB 6. *Steinberg Inc v Tilak Corp* (1991), 2 OR (3d) 165 (Sup Ct).

D. Secondary Sources

TAB 7. John D McCamus, *Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 769-70.

TAB 8. Albert H Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 9th ed (Toronto: Thomson Reuters, 2019) at 202-203.

TAB 1

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DOCUMENT	TENTH REPORT OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS MONITOR OF JMB CRUSHING SYSTEMS INC. AND 2161889 ALBERTA LTD. **November 20, 2020**
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TENTH REPORT OF THE MONITOR

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Appendix A – Interim Statemement of Cash Receipts and Disbursements by Week

INTRODUCTION

1. On May 1, 2020 (the "**Filing Date**"), JMB Crushing Systems Inc. ("**JMB**") and 2161889 Alberta Ltd. ("**216**" and together with JMB, the "**Applicants**") commenced proceedings (the "**CCAA Proceedings**") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to an order granted by this Honourable Court which was subsequently amended and restated on May 11, 2020 (the "**ARIO**").

2. The ARIO appointed FTI Consulting Canada Inc. as Monitor in the CCAA Proceedings (the "**Monitor**") and established a stay of proceedings (the "**Stay of Proceedings**") in favour of the Applicants until July 31, 2020. On November 12, 2020, this Honourable Court granted an order extending the Stay of Proceedings to December 11, 2020.

3. On May 20, 2020, this Honourable Court granted an order (the "**MD Lien Order**") which set aside the Consent Order, granted on May 11, 2020 and replaced the process set out therein to address the validity of any builders' lien claims associated with any work done or materials furnished (the "**Builders' Lien Protocol**") with respect to the agreement between the Municipal District of Bonnyville No. 87 (the "**MD**") and JMB, dated November 1, 2013, as subsequently amended (the "**MD Contract**").

4. On May 29, 2020, following the Builders' Lien Protocol established in the MD Lien Order, this Honourable Court granted an order (the "**ED Lien Order**" and together with the MD Lien Order, the "**Lien Orders**") which set out a similar Builders' Lien Protocol but with respect to a project involving 1598313 Alberta Ltd. and Kuwait Petrochemical Limited Partnership as owners and EllisDon Industrial Inc. ("**ED**") as contractor.

5. Details concerning the MD Lien Order and the corresponding Builders' Lien Protocol are set out in the Monitor's Eight Report, dated October 16, 2020.

6. Following the issuance of the Monitor's Eight Report, dated October 16, 2020, the determination of RBEE Aggregate Consulting Ltd.'s ("**RBEE**") and Jerry Shankowski's

and 945441 Alberta Ltd.'s (collectively, "**Shankowski**") contested builder's lien claims was adjourned, to November 27, 2020, to allow RBEE and Shankowski additional time to advance any trust claims such parties may have against the approximately $1.85MM held back by the Monitor pursuant to the MD Lien Order (the "**MD Holdback Amount**").

7. Between November 5 and 18,, 2020, six parties filed applications to be heard on November 27, 2020, claiming, among other relief, a trust over the MD Holdback Funds under and pursuant to paragraph 26 of the MD Contract (the "**Trust Claimants**") with such trust claims ("**Trust Claims**") totalling approximately $2.0 to $2.1 million in respect of their Trust Claims plus interest and costs are funds held by JMB in trust for the claimants and awarding costs in favour of the claimants.

8. The purpose of this report is to provide this Honourable Court and the Applicants' stakeholders with information with respect to:

    a. the funds received and disbursed by the Monitor pursuant to the Lien Orders;

    b. a summary of the Applicants' interim statement of cash receipts and disbursements (the "**R&D**") for the period of May 1, 2020 to November 13, 2020; and,

    c. details concerning a contingent claim by the Canada Revenue Agency (the "**CRA**") in respect of certain withholdings associated with a voluntary disclosure made by JMB's predecessor, JMB Crushing Systems ULC ("**JMB ULC**")

TERMS OF REFERENCE

9. In preparing this report, the Monitor has relied upon certain information (the "**Information**") including information provided by JMB concerning the various assets subject to the various transactions and JMB's unaudited financial information, books and records and discussions with senior management and the Chief Restructuring Advisor (collectively, "**Management**").

10. Except as described in this report, the Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Chartered Professional Accountants of Canada Handbook.

11. The Monitor has not examined or reviewed financial forecasts and projections referred to in this report in a manner that would comply with the procedures described in the Chartered Professional Accountants of Canada Handbook.

12. Future oriented financial information reported to be relied on in preparing this report is based on Management's assumptions regarding future events. Actual results may vary from forecast and such variations may be material.

13. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian dollars.

MONITOR'S TRUST ACCOUNT

14. As discussed in the first report of the Monitor, JMB engaged subcontractors (the "**Subcontractors**") to perform certain services in respect of projects owned or managed by the MD and ED (the "**Projects**"). JMB was unable to make payments in full to certain of these Subcontractors for the services they performed. As a result of this non-payment, a number of the Subcontractors filed builders' liens against the Projects.

15. Both MD and ED had advised JMB that they would not pay any amounts owing to JMB until the builders' liens registered against their respective Projects had been discharged.

16. The Lien Orders established the Builders' Lien Protocol to provide for the orderly payment of amounts owing to Subcontractors who had registered valid builders' liens against the Projects and to facilitate the timely collection of the Project accounts receivable in order to provide liquidity to the Applicants.

17. The general terms of the Builders' Lien Protocol are as follows:

a. MD and ED remitted to the Monitor the full amount owing to JMB in respect of work performed on the Projects;

b. the Monitor, in consultation with its legal counsel, confirmed the validity and quantum of each lien or lien notice claimed by each claimant; and

c. where appropriate and in accordance with the terms of the Lien Orders, the Monitor paid to each lien claimant the amount validated by the Monitor in respect of the lien registered by the lien claimant and remit the remainder to the Applicants.

18. Pursuant to the Lien Orders, the Monitor opened a trust account to facilitate payments under the Builders' Lien Protocol. A summary of the transactions in the Monitor's trust account is provided below:

Monitor's Trust Account History by Project
For the period of May 1, 2020 to November 13, 2020
$000's

Description	Date	MD	ED	Balance
Collection of pre-filing accounts receivable from MD	21-May-20	$ 3,564	$ -	$ 3,564
Disbursement to JMB of amounts in excess of MD Holdback	25-May-20	(1,478)	-	2,086
Collection of pre-filing accounts receivable from ED	3-Jun-20	-	1,434	3,521
Disbursement to JMB of amounts in excess of ED Holdback	9-Jun-20	-	(1,020)	2,501
Disbursement to CRA for outstanding source deductions	9-Jun-20	(236)	-	2,265
Collection of pre-filing accounts receivable from ED	24-Jun-20	-	1,012	3,276
Disbursement to JMB of amounts in excess of ED Holdback	8-Jul-20	-	(512)	2,765
Disbursement to JMB of amounts in excess of ED Holdback	20-Aug-20	-	(500)	2,265
Disbursement to valid Lien Claimants	11-Sep-20	-	(208)	2,057
Total		**$ 1,850**	**$ 207**	**$ 2,057**

19. Following the granting of the MD Lien Order, the Monitor collected approximately $3.6 million (the "**MD Lien Funds**") in pre-filing accounts receivable from the MD. Pursuant

to the MD Lien Order, the MD Lien Funds were allocated as follows: (i) approximately $1.5 million was disbursed to JMB and $236,000 was remitted to the Canada Revenue Agency with respect to unremmitted payroll source deductions, in accordance with paragraph 15(a) of the MD Lien Order; and (ii) approximately $1.85 million, as the MD Holdback Amount, was held back in trust as security for any lien claims, in accordance with paragraph 6 of the MD Lien Order.

20. The Monitor collected approximately $2.4 million in pre-filing accounts receivable from ED. Pursuant to the ED Lien Order, approximately $2.0 million was disbursed to JMB, $208,000 was paid to the corresponding lien claimants in respect of valid and enforceable builders' liens and $207,000 remains in trust with the Monitor, pending distribution to JMB.

21. On October 20, 2020, the application scheduled for October 21, 2020 to determine the validity of RBEE's and Shankowski's builder's lien claims was adjourned to November 27, 2020 to allow the Trust Claimants with additional time to prepare their applications to have the holdback amounts under the Builders' Lien Protocol declared trust funds.

INTERIM STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

22. The Applicants' R&D by week for the period of May 1, 2020 to November 13, 2020 is attached as Appendix "**A**".

23. A summary of the R&D is set out below:

R&D **For the period of May 1, 2020 to November 13, 2020** ***$000's***	
Operating Receipts	
Collection of Pre-Filing AR - Ellis Don	$ 2,032
Collection of Pre-Filing AR - MD of Bonnyville	1,478
Collection of Post Filing AR - MD of Bonnyville	1,566
Post-filing Gravel Sales	49
SISP Proceeds	577
Other Receipts	840
Total Operating Receipts	**6,541**
Operating Disbursements	
Payroll And Source Deductions	(1,416)
Royalties	(408)
Fuel	(207)
Repair & Maintenance	(52)
Office Administration	(40)
Insurance & Benefits	(207)
Jobsite Lodging	(21)
Equipment Loan & Lease Payments	(137)
Occupancy	(236)
Other	(55)
Total Operating Disbursements	**(2,779)**
Non-Operating Receipts & Disbursements	
Interim Financing (Repayment)	(211)
Professional Fees	(1,886)
Total Disbursements	**(4,876)**
Net Cash Flow	1,665
Opening Cash Balance	-
Ending Cash	**$ 1,665**

24. JMB has collected a total of approximately $5.1 million in project accounts receivable, of which approximately $3.5 million was collected pursuant to the Builders' Lien Protocol.

25. During the CCAA Proceedings, the Applicants have used only one bank account and do not maintain a segregated account relating to the MD project accounts receivable. For clarity, the holdback amounts have been retained, separately, by the Monitor in accordance with the Builders' Lien Protocol.

26. As at November 13, 2020, the Applicants' are holding an ending cash balance of approximately $1.7 million.

CRA VOLUNTARY DISCLOSURE AND CONTIGENT CLAIM

27. Pursuant to the Share Purchase Agreement, dated November 21, 2018 (the "**SPA**"), between JMB, as purchaser, Resource Land Fund V, LP ("**RLF**"), as guarantor, JMB ULC, and the Shareholders of JMB ULC (the "**Sellers**") as vendors, JMB purchased certain shares of JMB ULC.

28. During RLF's due diligence leading to the acquisition of the shares of JMB ULC, RLF discovered certain potential tax reporting deficiencies and unresolved potential tax liabilities (the "**Unresolved Tax Liabilities**"). As a result, the purchase price to be paid under the SPA was subject to certain adjustments on account of such Unresolved Tax Liabilities.

29. Pursuant to the SPA and in order to address these Unresolved Tax Liabilities, counsel to the Sellers initiated a voluntary disclosure to the CRA, on or around July 9, 2019 (the "**Voluntary Disclosure**").

30. On November 17, 2020, Counsel to the Sellers first informed the Monitor of: (i) the outstanding adjustment issues under the SPA; and, (ii) the Voluntary Disclosure and corresponding potential CRA claims associated with the Unresolved Tax Liabilities.

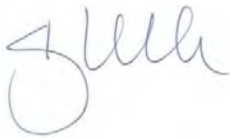
31. Following the Monitor becoming aware of the Unresolved Tax Liabilities and the pending Voluntary Disclosure on November 17, 2020, and its subsequent correspondence with counsel to the CRA, the Monitor currently understands that: (i) the CRA has not yet completed its review or analysis associated the Voluntary Disclosure; (ii) the CRA may seek to assert a contingent priority claim in connection with any or all of the Unresolved Tax Liabilities; and, (iii) in the event the CRA has a valid deemed trust claim, in priority to the Applicants' secured creditors, depending on the outcome of the Trust Claims and

the corresponding priority to the MD Holdback Amount there may not be sufficient funds to satisfy the CRA’s claim.

*****

All of which is respectfully submitted this 20th day of November, 2020.

FTI Consulting Canada Inc.
in its capacity as Monitor of the Applicants



Deryck Helkaa
Senior Managing Director

Tom Powell
Senior Managing Director

TAB 2

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of June 13, 2016

Office Consolidation

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51 Transfer of debtors' interests in collateral or change of debtors' names
52 Recovery of loss caused by error in Registry
53 Recovery of loss where trust deeds involved
54 Payment of claim for loss

**Part 5
Rights and Remedies on Default**

55 Application of Part
56 Rights and remedies
57 Collection rights of secured party
58 Right of secured party to enforce, etc., on default
59 Seizure of mobile homes
60 Disposal of collateral on default
61 Surplus or deficiency
62 Retention of collateral
63 Redemption of collateral
64 Application to Court
65 Receiver

**Part 6
Miscellaneous**

66 Proper exercise of rights, duties and obligations
67 Deemed damages
68 Unauthorized discharge or amendment
69 Order of the Court
70 Application to Court
71 Extension of time
72 Service of notices and demands
73 Regulations
74 Conflict with other legislation
75 References
76 Transitional application of Act
77 Security interest prior to commencement of Act
78 Transitional provisions

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Interpretation

1(1) In this Act,

(i) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its purchase price,

(ii) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights,

(iii) the interest of a lessor of goods under a lease for a term of more than one year, or

(iv) the interest of a person who delivers goods to another person under a commercial consignment,

but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, "purchase price" and "value" include credit charges or interest payable in respect of the purchase or loan;

(mm) "purchaser" means a person who takes by purchase;

(nn) "receiver" includes a receiver-manager;

(oo) "Registrar" means the Registrar of Personal Property designated under section 42;

(pp) "Registry" means the Personal Property Registry continued under Part 4;

(qq) "secured party" means

(i) a person who has a security interest,

(ii) a person who holds a security interest for the benefit of another person, and

(iii) the trustee, if a security agreement is embodied or evidenced by a trust indenture,

and, for the purposes of sections 17, 36, 38, 55, 56, 57, 58(1), 60(1), (3), (12) and (14), 61, 63(1)(a), 64 and 67, includes a receiver;

(qq.1) "securities account" means a securities account as defined in the *Securities Transfer Act*;

(qq.2) "securities intermediary" means a securities intermediary as defined in the *Securities Transfer Act*;

(rr) "security" means a security as defined in the *Securities Transfer Act*;

(ss) "security agreement" means an agreement that creates or provides for a security interest, and, if the context permits, includes

(i) an agreement that creates or provides for a prior security interest, and

(ii) a writing that evidences a security agreement;

(ss.1) "security certificate" means a security certificate as defined in the *Securities Transfer Act*;

(ss.2) "security entitlement" means a security entitlement as defined in the *Securities Transfer Act*;

(tt) "security interest" means

(i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for investment property interest in the goods, and

(ii) the interest of

(A) a transferee arising from the transfer of an account or a transfer of chattel paper,

(B) a person who delivers goods to another person under a commercial consignment, and

(C) a lessor under a lease for a term of more than one year,

whether or not the interest secures payment or performance of the obligation;

(uu) "specific goods" means goods identified and agreed on at the time a security agreement in respect of those goods is made;

(uu.1) "standardized future" means an agreement traded on a futures exchange pursuant to standardized conditions

information relates under circumstances in which a reasonable person would take cognizance of it.

(3) A lease referred to in subsection (1)(z)(ii) does not become a lease for a term of more than one year until the lessee's possession extends for more than one year.

(4) If the debtor and the owner of the collateral are not the same person, "debtor" means

(a) in a provision of this Act dealing with the collateral, an owner of, or a person with an interest in, the collateral, or

(b) in a provision of this Act dealing with the obligation, an obligor,

or both where the context permits.

(5) Unless otherwise provided in this Act, goods are "consumer goods", "inventory" or "equipment" if at the time the security interest in the goods attaches they are "consumer goods", "inventory" or "equipment".

(6) Proceeds are traceable whether or not there exists a fiduciary relationship between the person who has a security interest in the proceeds as provided in section 28 and the person who has rights in or has dealt with the proceeds.

RSA 2000 cP-7 s1;2006 cS-4.5 s108(2)

Part 1
General

The Crown is bound

2 The Crown is bound by this Act.

1988 cP-4.05 s2

Application of Act

3(1) Subject to section 4, this Act applies to

(a) 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

(b) 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.

(2) Subject to sections 4 and 55, this Act applies to

(a) a transfer of an account or chattel paper,

(b) a lease of goods for a term of more than one year, and

(c) a commercial consignment,

that does not secure payment or performance of an obligation.

1988 cP-4.05 s3;1991 c21 s29(3)

Non-application of Act

4 Except as otherwise provided under this Act, this Act does not apply to the following:

(a) a lien, charge or other interest given by an Act or rule of law in force in Alberta;

(b) a security agreement governed by an Act of the Parliament of Canada that deals with rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, and any agreement governed by sections 425 to 436 of the *Bank Act* (Canada);

(c) the creation or transfer of an interest or claim in or under any policy of insurance, except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral;

(c.1) a transfer of an interest in or claim in or under a contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account;

(d) the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services;

(e) the transfer of an interest in an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract;

(f) the creation or transfer of an interest in land, including a lease;

(g) the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land, but not including a right to payment evidenced by investment property or an instrument;

TAB 3

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

2010 SCC 60 (CanLII)

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

3.4 *Fiducie expresse*

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

2010 SCC 60 (CanLII)

TAB 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dusanjh v. Appleton,*
2017 BCSC 340

Date: 20170302
Docket: S1510728
Registry: Vancouver

2017 BCSC 340 (CanLII)

Between:

Robin Lynne Dusanjh and Ronald David Wright

Petitioners

And

Mark Appleton, Sharon Halkett and Tracy Maureen Wright as executors of the will of Robert Harold Chadwick Wright, deceased, Mark Appleton, in his personal capacity, Sharon Halkett in her personal capacity, Oak Bay Marina Ltd., Yun Wright aka Yun Kloihofer, and Randall Robert Wright

Respondents

\- and -

Docket: S160282
Registry: Vancouver

Between:

Randy Robert Wright

Petitioner

And

Mark Appleton, Sharon Halkett and Tracy Maureen Wright as executors of the will of Robert Harold Chadwick Wright, deceased, Mark Appleton, in his personal capacity, Sharon Halkett in her personal capacity, Oak Bay Marina Ltd., Yun Wright aka Yun Kloihofer, Robin Lynne Dusanjh aka Robin Lynne Wright and Ronald David Wright

Respondents

Before: The Honourable Madam Justice Loo

Reasons for Judgment

language used by the settlor is critical and must show a clear intention that the recipient of the trust property holds that property on trust": *Mordo* at para. 293.

[64] While it may be useful for the settlor to use such words as "trust" or "trustee", no such wording is *required* to create a trust: Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 204; *Re Kayford*, [1975] 1 All E.R. 604 at 607. Even conduct may suffice. The question is one of fact: *McInerney v. Laass*, 2015 BCSC 1708 at para. 40:

> … In the absence of formal documentation creating a trust, the court may infer an intention to create a trust from the surrounding circumstances. Evidence of what the parties intended, what they actually agreed upon and how they conducted themselves will be considered (*Elliott* at paras. 26 and 28).

[65] The petitioners rely on a series of cases, primarily involving laypeople and more informal circumstances, whereby the courts held trusts to exist without formal documentation or wording: *Union Bank of Chicago v. Wormser*, 256 Ill. App. 291; *Re Kayford, supra*. In *Paul v. Constance*, [1977] 1 All E.R. 195 (Eng. C.A.), the alleged settlor was described as a man of unsophisticated character and the trust was created by him telling his girlfriend that the money in a particular account was as much his as it was hers.

[66] The executors do not disagree that courts are capable of inferring a trust in a document without express language. However, they contend that a court should be less willing to do so when documents prepared by a lawyer do not contain specific and clear declarations of trust: *Daley, Kero, Morgan and Wong v. OHR Whistler Management Ltd.*, 2007 BCSC 383 at para. 14:

> [14] I find no trust is created by the terms of the Hotel Management and Rental Pool Agreement. This is a sophisticated legal document prepared by lawyers to create a very specific and defined bundle of legal rights. If it was intended that a trust be created, I would expect a trust would have been expressly stipulated. …

[67] Further, the following principles may weigh against an inference of the establishment of the certainty of intention:

2017 BCSC 340 (CanLII)

- the parties to the agreement may alter the terms of the agreement without reference to the alleged beneficiaries: *Mohr v. C.J.A.*, [1989] B.C.J. No. 2083 (S.C.), aff'd [1991] B.C.J. No. 209 (C.A.);

- the parties to the agreement may cancel the agreement without reference to the alleged beneficiaries: *Mohr*;

- the agreement is not in the form of a declaration of trust; there is no settlor, no disposition of trust property from a settlor to a trustee and no express declaration of trust by a trustee: *Khavari v. Mizrahi*, 2016 ONSC 101 at para. 48;

- the parties to an agreement do not treat the agreement as a trust in their dealings with third parties: *Khavari, supra* at para. 55; and

- it is possible for certainty of intention to be found even where the settlor retains legal title to the item, provided the beneficial ownership is transferred: *Elliott (Litigation Guardian of) v. Elliott Estate*, 2008 CarswellOnt 7448 (S.C.J.) at para. 37.

2017 BCSC 340 (CanLII)

[68] I do not find that the Articles established a trust in favour of the petitioners. While a court may infer a trust in a document that does not contain express language to that effect, I am not satisfied that it is appropriate to do so here. I base this conclusion on the following:

- Mr. Wright was familiar with the legal requirements of a trust and had previously set up the Alter Ego Trust and was in the process of setting up the Joint Partner Trust;

- the fact that Mr. Wright chose to create the trusts through formal trust documents prepared by his lawyer suggests that, if he wished to set up a trust for the petitioners, he would have done

TAB 5

In the Court of Appeal of Alberta

Citation: Luscar Ltd. v. Pembina Resources Limited, 1994 ABCA 356

Date: 19941110
Docket: 13293
Registry: Calgary

1994 ABCA 356 (CanLII)

Between:

Luscar Ltd. and Norcen Energy Resources Limited

Plaintiffs
(Respondents)

- and -

Pembina Resources Limited

Defendant
(Appellant)

The Court:

The Honourable Madam Justice Hetherington
The Honourable Madam Justice Conrad
The Honourable Mr. Justice Côté

Reasons for Judgment of The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice Côté
Reasons for Judgment of The Honourable Madam Justice Hetherington
Concurring in the Result

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE W.G.N. EGBERT DATED THE 31ST DAY OF MARCH, A.D. 1992 FILED 1ST DAY OF APRIL, A.D. 1992

COUNSEL:

L.M. Sali, Q.C., A.G. MacWilliam, L.R. Duncan, Q.C. and L.O'donoghue, for the appellant Pembina Resources Ltd.

E.L. Bunnell, Q.C. and A.P. Argento, for the respondent Luscar Ltd.

J.J. Marshall, Q.C. and T.E. Valentine, for the respondent Norcen Energy Resources Limited

> specified area) and certainty of the persons, in this case companies, who are intended to benefit from the trust, or such certainties can be implied.
>
> That being the case, it follows that, upon acquisitions, division of interests in the Crown lands, the Cabot Lands, and the pooled lands, Pembina held and still holds in trust for each of Norcen and Luscar a one-third interest therein.
>
> (A.B. Vol. IV 1221)

1994 ABCA 356 (CanLII)

[96] The relevant language of Clause 18 provides that upon receipt of the notice the party has a period of thirty days to elect to participate in the lands by paying a proportion of the consideration paid and "thereupon shall be entitled to receive…good and sufficient conveyance…vesting in it the interest to which it is entitled by virtue of this provision". The clause also provides that if the party fails to elect to acquire its share, "…such share shall be owned by the parties which acquired the same and the party not so electing shall have no further right to participate in such interest". It is submitted by the respondents that this language constitutes an express or, at a minimum, an implied trust.

[97] Various arguments were raised in opposition to the imposition of a trust. The appellant argued that Clause 18 provided for a contingent interest, that there was not certainty as to the date of creation of the trust, and that being contingent, it invited perpetuity problems. I find it unnecessary to deal with that issue as, in my view, there is no certainty of intention.

[98] It has long been settled that the three certainties required for a valid trust are certainty of words, certainty of subject, and certainty of object: *Knight v. Knight,* (1840) 3 Beav. 148, 49 E.R. 58. In *Guerin v. R.* (1984), 13 D.L.R. (4th) 321 (S.C.C.), Dickson J. summed up the requirements as follows:

> …An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation.

[99] D.W.M. Waters, *Law of Trusts in Canada,* 2d ed. (Toronto: Carswell, 1984) at p. 107 indicated that the language must be imperative:

> For a trust to come into existence, it must have three essential characteristics. …first, the language of the alleged settlor must be imperative; …This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust.

[100] In this case the parties were informed and capable of fully setting out their intended rights and duties in an agreement. The AMI Clause contained none of the usual indicia of

trust. While the words "in trust' or "on trust' are not an iron-clad requirement to finding the existence of a trust, one would have expected them here, and their absence is telling. Their use in Clause 24(g) indicates that the parties understood the use of the trust relationship and employed trust wording when desired. There, it is stated that on the assignment of an interest, it "shall be held in trust' until the obtaining of necessary consents where required. It is anomalous that the parties did not use similar language in regard to Clause 18, if a trust was intended. There are many authorities which refer to the onerous duties that trustees bear, and a party should not be saddled with trust obligations where that intention is not clearly expressed. As sophisticated parties, they would have been aware of a trustee's onerous duties, and if they intended to impose those obligations, they would have so stated.

1994 ABCA 356 (CanLII)

[101] D.W.M. Waters, *supra,* explained the essential nature of trust duties at p. 690, as follows:

> The obligation which lies at the base of trusteeship has resulted in there being three fundamental duties applicable to all trustees. First, no trustee may delegate his office to others; secondly, no trustee may profit personally from his dealings with the trust property, with the beneficiaries, or as a trustee; thirdly, a trustee must act honestly and with that level of skill and prudence which would be expected of the reasonable man of business administering his own affairs. These might be called "substratum duties", to which the duties associated with the particular trust are added.

[102] The statutory regime, as well as the common law, creates duties and concerns for trustees to the extent that no sophisticated party would blindly accept them. Before willingly entering into an agreement that created a trust arrangement, any potential trustee, with the legal resources of the appellant, would therefore be expected to seek to include terms limiting the trustee's liability. For instance, one would expect that the parties would have clauses expressly declaring or agreeing that they would only be accountable for such moneys as might actually come into their hands; or that they would not be answerable for involuntary losses incurred through any agent; or agreeing that in the absence of fraud, they would not be responsible for any loss, costs or damages that might result from the exercise or non-exercise of trust duties. No such limitations appear.

[103] In particular, and of major concern in this action, are the provisions of sections 40 and 41 of the *Limitations Act,* which remove time limits against a trustee in certain situations. Thus, it is critically important whether the parties expressly, or by implication, agreed to create a trust. The applicable limitation period is an important consideration for any party entering into an agreement. It is a natural inference that parties to a contract intend that the applicable

TAB 6

Steinberg Inc. v. Tilak Corp.
(Gen. Div.)

2 O.R. (3d) 165
[1991] O.J. No. 97
Action No. RE 2281/90Q

ONTARIO
Ontario Court (General Division)
Potts J.
January 25, 1991

Landlord and tenant -- Assignment and subletting -- Consent -- Supermarket tenant desiring to assign store lease as part of transaction involving 70 other stores -- Transaction including sale of fixtures and inventory -- Landlord refusing to consent to assignment and taking position that proposed assignment was bulk sale giving right of termination -- Landlord's interpretation would make assignment provision redundant -- Bulk sales provision not applying -- Consent unreasonably withheld -- Bulk Sales Act, R.S.O. 1980, c. 52, s. 1(g) -- Landlord and Tenant Act, R.S.O. 1980, c. 232, s. 23.

Contracts -- Interpretation -- Supermarket tenant desiring to assign store lease as part of transaction involving 70 other stores -- Transaction including sale of fixtures and inventory -- Landlord refusing to consent to assignment and taking position that proposed assignment was bulk sale giving right of termination -- Landlord's interpretation would make assignment provision redundant -- Contract should be interpreted in manner that gives purpose to all terms -- Bulk sales provision not applying -- Bulk Sales Act, R.S.O. 1980, c. 52, s. 1(g).

S Inc. was a supermarket chain with 71 stores in Ontario. One of its stores was in leased premises in a shopping mall. T Corp. was the landlord. The lease was for an initial term of 25

1991 CanLII 7135 (ON SC)

years expiring on May 31, 1991. There were five successive five-year renewal terms that did not provide for any rent increase. The rents were substantially below market rates. The lease provided that the premises could only be used for a supermarket and that S Inc. would not assign or sublet without leave, such leave not to be unreasonably withheld. The lease further provided that if S Inc. should make an assignment for the benefit of creditors or any bulk sale or become bankrupt or insolvent, then the landlord had a right to terminate the lease. S Inc. entered into an agreement to sell all its Ontario stores to A&P, including the store in this shopping mall. The agreement provided for an assignment of the lease along with the fixtures and inventory in the store. T Inc. refused to consent to the assignment of the lease and took the position that the transaction was a bulk sale and that accordingly, it had the right to terminate the lease. There was uncontradicted evidence that T Inc. was withholding its consent in order to induce re-negotiation of the rent. S Inc. applied for an order that T Inc. had unreasonably withheld its consent and for an order permitting it to assign the lease without T Inc.'s consent.

Held, the application should be granted.

The proposed assignee was a solid and satisfactory replacement tenant. T Inc.'s refusal to consent was unreasonable, unless the bulk sale provisions of the lease were applicable. In this regard, the transaction appeared to be one that fell under the definition of "sale of bulk" found in the Bulk Sales Act, being a "sale of stock in bulk out of the usual course of business or trade of the seller". However, when supermarket stores are sold, the sale usually includes their inventories and fixtures. Given that under the lease only a supermarket could be operated, to interpret the bulk sales provision in a strict manner would preclude any viable meaning to the assignment provision. To apply T Inc.'s interpretation of the bulk sales provision was to totally disregard the realities of the situation and to render meaningless the assignment provision. A contract should be interpreted in a manner that gives a purpose to its clauses and does not make the clauses redundant in any way. The bulk sales provision was

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there to protect the landlord's flow of rent and his or her position in case the tenant was insolvent; it did not apply to the situation in this case.

Cases referred to

Campbell-Bennet Ltd. v. George L. McNichol Co., [1952] 3 D.L.R. 247 (B.C. S.C.); Durnford Elk Shoes Ltd. (Re) (1916), 11 O.W.N. 59, 27 O.W.R. 152 (H.C.J.) [leave to appeal refused (1916), 11 O.W.N. 105, 27 O.W.R. 502]; Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd., [1986] 1 S.C.R. 57, 25 D.L.R. (4th) 649, 65 N.R. 23, 71 N.S.R. (2d) 353, 171 A.P.R. 353; Industrial Propane Inc. and Cooper (Re) (1984), 48 O.R. (2d) 321 (H.C.J.)

Statutes referred to

Bulk Sales Act, R.S.O. 1980, c. 52, s. 1(g)
Landlord and Tenant Act, R.S.O. 1980, c. 232, s. 23

APPLICATION for an order that the refusal of consent to assign a lease is unreasonable under s. 23 of the Landlord and Tenant Act and for an order permitting the assignment without the landlord's consent.

Robert J. Arcand, for applicant.

David J. Moll, for respondent.

POTTS J.:-- This is an application under s. 23 of the Landlord and Tenant Act, R.S.O. 1980, c. 232, as amended. My decision on the matter was rendered orally in court on November 14, 1990. While I offered very brief reasons at the time, I indicated that written reasons would be forthcoming. These are those reasons.

The applicant, Steinberg Inc. (Steinberg) is a major tenant of the respondent corporation, Tilak Corp. (Tilak) at the respondent's property in Etobicoke, Ontario, commonly known as

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Eringate Mall (the Mall). Their relationship is governed by a lease which was executed on July 11, 1966, between Canadian Interurban Properties Limited as landlord and Steinberg's Limited as tenant (the lease). The lease concerns a supermarket at the Mall. The lease, which began on June 1, 1966, and which expires on May 31, 1991, has an initial term of 25 years. However, the lease allows for five successive renewal terms of five years each. The renewal clauses in the lease do not call for any sort of rent increase. I would add that the rent payable is substantially below market rates. Steinberg presently desires to assign the lease. It requires Tilak's consent to do so. Tilak refuses to consent to the assignment.

Steinberg requests an order that determines that Tilak has unreasonably withheld its consent to the assignment of the lease by Steinberg to New Miracle Food Mart Inc. (New Miracle), a company owned and operated by the Great Atlantic & Pacific Company of Canada Limited (A & P Canada). A & P Canada is, in turn, a subsidiary of A & P Inc. of Montvale, New Jersey. In addition, Steinberg seeks an order permitting it to assign the lease without Tilak's consent.

Steinberg has agreed to sell to A & P Canada all of its Ontario Division stores. The transaction involves 71 stores and is worth in the area of $235,500,000. The store in question, and its inventory, are worth approximately $900,000. A provision of the sale is that Steinberg must assign all of its leases that it holds. As stated, Tilak has refused to consent to the assignment of the lease. It claims that what has taken place here is a bulk sale as, along with the lease, the fixtures and the inventory in the store were sold to A & P Canada. Consequently, under the bulk sales provision in the lease, Tilak maintains that it has the right to demand the current month's rent and the next three months' rent and, as well, it claims it can terminate the operation of the lease.

The asset purchase transaction closed on October 22, 1990. Leases to 69 out of the 71 stores transacted for have been assigned. The Mall store is one of the two stores of Steinberg's that have not been assigned.

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Correspondence was exchanged in August of 1990 concerning Tilak's consent to the assignment of the lease. Arising out of that correspondence is an allegation that Tilak is withholding its consent in order to induce re-negotiation of the lease's rental provisions so that they reflect current market value. The affidavits filed by Steinberg and their corresponding exhibits appear to support this allegation. Tilak chose not to cross-examine the deponents of the affidavits. Tilak has not countered the above allegation either in the correspondence or before me. Rather, it has chosen to rely on a strict reading of the bulk sales provision of the lease.

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The following are the provisions of the lease that are relevant to the determination of this dispute.

6. THE TENANT COVENANTS WITH THE LANDLORD:

. . . . .

(j) That it will not assign or sublet without leave, such leave not to be unreasonably withheld ...

9. IT IS UNDERSTOOD AND AGREED BETWEEN THE LANDLORD AND THE TENANT THAT:

(h) In case, without the written consent of the Landlord ... the Tenant shall make an assignment for the benefit of creditors or any bulk sale or become bankrupt or insolvent ... then in every such case the then current month's rent and the next ensuing three month's rent shall immediately become due and payable, and at the option of the Landlord, this lease shall cease and determine and the said term shall immediately become forfeited and void ...

. . . . .

(k) This Lease shall enure to the benefit and be binding upon the successors and assigns of the parties hereto.

The dispute before me reduces to a simple matter of which provision of the lease is to govern the Steinberg/A & P Canada

transaction. If the transaction is indeed primarily a bulk sale, then I must find in favour of Tilak. However, if the transaction is just a matter of assigning the lease to a suitable replacement tenant, then I must find in favour of Steinberg.

Evidence was presented before me, evidence which was not challenged, that New Miracle and A & P Canada are both solid corporations that are worthy of Tilak's consent to the assignment. New Miracle is fully prepared to assume the obligations of Steinberg under the lease and A & P Canada is fully prepared to guarantee the obligations of New Miracle. I find as a matter of fact that New Miracle is a satisfactory replacement tenant for the premises in question. I have no doubt that New Miracle can fulfil the tenant's obligations under the lease. Therefore, if the bulk sales provision is not to govern the facts, then Tilak, on the material filed before me, has withheld its consent unreasonably.

As mentioned above, the transaction in question calls for the sale of Steinberg's inventory and fixtures at the premises in question to A & P Canada. The transaction appears to be one that falls under the definition of "sale in bulk" found in the Bulk Sales Act, R.S.O. 1980, c. 52, s. 1(g) (the Act). The Act refers to a "sale in bulk" as a "sale of stock in bulk out of the usual course of business or trade of the seller".

Counsel for Steinberg argued that when supermarket stores are sold, the sale usually includes their inventories and fixtures, as is the case here. Counsel further argued that since this is the normal course that is followed in the industry, then logic would dictate that the signatories to the lease must have meant to exclude a transaction such as this from the operation of the bulk sales provision in the lease. To counsel, if the proposition above is not so, then the assignment provision in the lease is of no purpose given that the lease has in it a provision that allows for only a supermarket to operate in the space in question. Put differently, if the bulk sales provision will not allow the normal course of events to take place, it renders the assignment provision of the lease redundant. I find that the restriction of what type of business can occupy the

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store in question qualifies both the assignment provision and the bulk sales provision of the lease. Therefore, the interpretation of the lease is to occur in a light such that no provision is to be regarded as superfluous.

The Supreme Court of Canada in Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd., [1986] 1 S.C.R. 57, 25 D.L.R. (4th) 649, 65 N.R. 23, 71 N.S.R. (2d) 353, 171 A.P.R. 353, held, at p. 66 S.C.R., that contract provisions or clauses are to be read in light of the entire agreement and are not to be read in an isolated fashion. The decision of Le Dain J. goes on to support the principle that words in a contract are there for a purpose. The contract is to be interpreted in a manner that gives a purpose to its clauses and does not make the clauses redundant in any way. The lease is to be interpreted upon the findings of the Supreme Court in Hillis.

Counsel for Tilak argued that the lease should be interpreted upon its face and that Steinberg, in any event, has the onus of proving that in situations such as the one before me there is a certain custom or special meaning attached to the bulk sales provision in the lease: Re Durnford Elk Shoes Ltd. (1916), 11 O.W.N. 59, 27 O.W.R. 152 (H.C.J.) [leave to appeal refused (1916), 11 O.W.N. 105, 27 O.W.R. 502]; Campbell-Bennet Ltd. v. George L. McNichol Co., [1952] 3 D.L.R. 247 (B.C. S.C.). The lease on its face, according to counsel for Tilak, is straightforward and to him the transaction falls squarely in the domain of the bulk sales provision of the lease. I cannot agree.

To interpret the bulk sales provision in a strict manner would preclude any viable meaning to the assignment provision. If the lease is to be assigned, then it is to be assigned to another supermarket operator. If another supermarket operator is to take over the premises, then it is logical that it would want to step in, in most situations, and carry on essentially the same operations as the previous operator. The products that are available for a supermarket to sell are truly limited. There are only so many brands of detergent, so many brands of cereal, coffee, breads, etc., that are available on the market for sale. Consequently, on the facts before me, the sale of the

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store's fixtures and inventory along with the lease only makes sense. To apply the interpretation of the bulk sales provision that Tilak was pressing for is to totally disregard the realities of the situation and to render utterly meaningless the assignment provision of the lease.

Counsel for Steinberg argued, based upon case authority, that a bulk sales provision in a lease such as the one found before me is there to protect the landlord's flow of rent and his or her position in case the tenant finds him or herself in an insolvency position: Re Industrial Propane Inc. and Cooper (1984), 48 O.R. (2d) 321 (H.C.J.), at p. 322. I agree. The bulk sales provision in the lease is cloaked in insolvency terms. The provision is not in the lease to deter assignments but, rather, it is there only to protect the landlord in case the tenant is in dire straits financially.

To reiterate, to allow the bulk sales provision to circumvent the assignment clause would in effect be to interpret the provision of the lease in a vacuum -- a vacuum separating the bulk sales provision from (a) the assignment provision; (b) the realities of the situation; and (c) its naturally intended purpose. Both the Hillis decision and common sense dictate that I cannot interpret the lease in such a fashion.

For all the foregoing reasons, an order will go as asked for in paragraphs 1(1) and 1(2) of the application. Costs are to the applicant, Steinberg, payable forthwith after assessment.

Order accordingly.

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TAB 7

Other books in the *Essentials of Canadian Law* Series

Immigration Law
International Trade Law
Family Law
Copyright Law
The Law of Equitable Remedies
The Law of Sentencing
Administrative Law
Ethics and Canadian Criminal Law
Securities Law
Computer Law 2/e
Maritime Law
Insurance Law
International Human Rights Law
The Law of Trusts 2/e
Franchise Law
Pension Law
Constitutional Law 3/e
Legal Ethics and Professional Responsibility 2/e
Refugee Law
Bank and Customer Law in Canada
Statutory Interpretation 2/e
National Security Law: Canadian Practice in International Perspective
Remedies: The Law of Damages 2/e
Public International Law 2/e
Individual Employment Law 2/e
Environmental Law 3/e
Bankruptcy and Insolvency Law
The Law of Partnerships and Corporations 3/e
The Charter of Rights and Freedoms 4/e
Youth Criminal Justice Law 2/e
Civil Litigation
International and Transnational Criminal Law
Conflict of Laws
Detention and Arrest
Canadian Telecommunications Law
The Law of Torts 4/e
Intellectual Property Law 2/e
The Law of Evidence 6/e
Animals and the Law
Income Tax Law 2/e
Fundamental Justice
Mergers, Acquisitions, and Other Changes of Corporate Control 2/e
Criminal Procedure 2/e
Criminal Law 5/e
Personal Property Security Law 2/e

ESSENTIALS OF CANADIAN LAW

THE LAW OF CONTRACTS

SECOND EDITION

JOHN D. McCAMUS
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ity for negligence and, if the provision can reasonably be interpreted as excluding some other type of liability, the clause will be interpreted as not protecting the author against liability for negligence.[116] The application of the *contra proferentum* to exculpatory clauses thus appears to be particularly vigorous. In a case involving a bill of lading entered into by sophisticated commercial parties, however, the Supreme Court of Canada has emphasized that the rule is not an absolute one and that, especially in the context of an agreement in which commercial parties are essentially determining which of the parties is to bear the cost of insurance at various stages of the agreement, the provision should be construed in the context of the whole agreement. In such circumstances, it may be appropriate to treat the provision as excluding liability for negligence even though an express reference to negligence has not been made.[117] Further, the House of Lords has drawn a distinction between exculpatory clauses excluding liability as opposed to those merely limiting liability and has suggested that clauses of the latter type, though subject to *contra proferentum*, would not be subject to the "specially exacting standards, applicable to such clauses."[118] It is difficult, however, to justify the drawing of a stark distinction between clauses that limit, as opposed to those that exclude, liability. A more defensible distinction might be drawn between commercial and consumer transactions, with the particularly exacting standards being reserved for the latter context. The problem of interpreting limitation and liability clauses has also inspired the development of the doctrine of so-called fundamental breach. The history and current status of this doctrine will be reviewed in a later chapter.[119]

116 *Canada Steamship Lines Ltd. v. The King*, [1952] 2 D.L.R. 786 (P.C.); *Salmon River Logging Co. Ltd. v. Burt*, [1953] 2 S.C.R. 117; *Canadian Pacific Forest Products Ltd. v. Belships (Far East) Shipping (Pte.) Ltd.* (1999), 175 D.L.R. (4th) 449 (Fed. C.A.). Conversely, a reference in the clause to a limitation of liability "whether or not from negligence or gross negligence" has been held inapplicable to losses resulting from deliberate misconduct. See *Meditek Laboratory Services Ltd. v. Purolator Courier Ltd.* (1995), 125 D.L.R. (4th) 738 (Man. C.A.).

117 *I.T.O. — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 799, McIntyre J.

118 *Ailsa Craig Fishing Co. Ltd. v. Malvern Co. Ltd.*, [1983] 1 W.L.R. 964 at 970 (H.L.), Lord Fraser of Tullybelton.

119 See Chapter 20.

6) List of Particulars Followed by General Language: *Ejusdem Generis*

Where a provision lists a series of particular items that share a common characteristic of some kind, and the list is then completed by a more general phrase, the *ejusdem generis* principle holds that the scope of the general phrase is limited by the common characteristics or the class or genus of the particularized items. Thus, a well-known illustration of the point concerned a lease that provided for an abatement of rent if occupancy was interrupted by "fire, flood, storm, tempest or other inevitable accidents." It was held that the phrase "inevitable accident" does not refer to accidents caused by either of the contracting parties. The particularized items indicate that the phrase refers to accidents resulting from circumstances beyond their control.[120] The principle was applied to a *force majeure* clause in *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.*[121] The clause was contained in a requirements contract that excused the purchaser from a minimum-purchase requirement in various circumstances beyond the control of the parties including acts of God, war, labour unrest, the destruction of production facilities, "or the non-availability of markets for pulp or corrugating medium." The purchaser had suffered a decline in the market for his own product and sought to excuse its obligations under the requirements contract on the basis of the latter phrase. The Supreme Court held, however, that the *ejusdem generis* principle applied and, accordingly, the "non-availability of markets" also must result from circumstances beyond the control of the parties. On the particular facts, the Court was of the view that the purchaser's lack of satisfactory markets resulted in the main from its own poor planning, inadequate marketing efforts, and soaring production costs. Accordingly, the *force majeure* clause did not excuse the purchaser from meeting its minimum commitment.

Like other canons of construction, *ejusdem generis* is a guide to interpretation rather than a rule. Its application is dependent on a careful assessment of the context of the particular clause. Indeed, the common sense underlying the canon is that the particular items in a list are suggestive of the object of the provision and it is generally appropriate, of course, to interpret a clause in the light of its object.[122] It has been said that the doctrine "is a very valuable servant, but it would be a most dangerous master."[123] The principle will not be of assistance in a case

120 *Saner v. Bilton* (1878), 7 Ch. D. 815.

121 [1976] 1 S.C.R. 580.

122 See *Sun Fire Office v. Hart* (1889), 14 App. Cas. 98 at 104, Lord Watson.

123 *Anderson v. Anderson*, [1895] 1 Q.B. 749 at 755, Lopes L.J.

where the itemized particulars do not share a common characteristic.[124] Obviously, parties minded to avoid application of the maxim may draft provisions that signal a contrary intention by including phrases such as "from any cause whatsoever" or "whether or not similar to the foregoing."[125]

7) The Restrictive Effect of Explicit References: *Expressio Unius*

An express reference to a particular person, thing, condition, or exception may, when considered in context, amount to an exclusion of unmentioned alternatives. The principle that explicit reference to the one may constitute an exclusion of the alternatives is often expressed in the Latin maxim *expressio unius est exclusio alterius*. In an often referred to illustration of the point, a deed transferring a group of properties specifically mentioned that the fixtures in some of the properties were included in the conveyance. The court concluded that the explicit reference to fixtures in some cases was to be interpreted as excluding a transfer of fixtures with respect to the other properties.[126] If the parties had made no mention of fixtures at all, the fixtures would normally pass as part of the realty. The common sense underlying the analysis is that since the parties obviously knew how to express themselves when they wished to include fixtures, the absence of a reference to fixtures with respect to some properties is of significance.[127] The maxim is to be applied cautiously, however, as it is well understood that the missing reference may be an accidental omission rather than an intended exclusion.[128]

124 *S.S. Magnhild v. McIntyre Bros. & Co.*, [1920] 3 K.B. 321 at 329–31, McCardie J.

125 *Chandris v. Isbrandtsen-Moller Co. Inc.*, [1951] 1 K.B. 240 at 245, Devlin J.

126 *Hare v. Horton* (1833), 5 B. & Ad. 715, 110 E.R. 954. See also *Blackburn v. Flavelle* (1881), 6 App. Cas. 628 (P.C.); *Pearson v. Adams* (1912), 27 O.L.R. 87 (Div. Ct.), rev'd (1913), 28 O.L.R. 154 (C.A.), rev'd (1914), 50 S.C.R. 204 [*Pearson*]; *Miller v. Emcer Products Ltd.*, [1956] Ch. 304.

127 Often the point is expressed in more or less these terms. See, for example, *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445, in which La Forest J., in dissent, would have interpreted a fire insurance policy as providing coverage to a homeowner under a fire insurance policy excluding liability for injuries caused by an "insured." The fire in question was caused by the son of the plaintiffs who, as a member of the household, was an included "insured." In the provision of the policy excluding liability for vandalism, however, the term explicitly included loss caused by members of the household. For La Forest J., that explicit reference signalled that losses caused by members of the household were not excluded from the more general provision concerning losses caused by fire. In the majority view, however, the policy plainly excluded all losses caused by an "insured," including all members of the household. See also *Torchia v. Royal Insurance Co. of Canada* (2003), 64 O.R. (3d) 775 (S.C.J.).

8) The Preference Accorded Amendments to Printed Terms

Parties dealing with each other on the basis of standard printed terms may make handwritten or typed amendments to the form that may conflict with the printed terms and conditions. If that conflict cannot be resolved by the usual techniques of construction,[129] it is well established that handwritten or typed terms take priority to the inconsistent terms in the printed standard form.[130] The evident rationale for the rule is that preference should be given to terms that the parties have clearly chosen for themselves and therefore constitute the best evidence of their intentions.

9) The Preference Accorded the Earlier of Two Inconsistent Terms

As we have seen earlier in this chapter,[131] courts attempt to give a harmonious reading to two apparently inconsistent terms. Where such a reading cannot be found, however, the terms are said to be repugnant and preference is given to the provision that first appears in the agreement.[132] As we have seen earlier,[133] in *J. Evans & Son (Portsmouth)*

128 *Colquhoun v. Brooks* (1887), 19 Q.B.D. 400, aff'd (1889), 14 App. Cas. 493. See also *Pearson*, above note 126. And see *473807 Ontario Ltd. v. The TDL Group Ltd.* (2006), 271 D.L.R. (4th) 636 (Ont. C.A.).

129 See, for example, *Bayoil S.A. v. Seawind Tankers Corp.*, [2001] 1 Lloyd's Rep. 533.

130 *Robertson*, above note 67; *Glynn*, above note 94; *Mann v. St. Croix Paper Co.* (1912), 5 D.L.R. 596 (N.B.C.A.); *Baldwin v. Canada Foundry* (1914), 6 O.W.N. 152, aff'd 6 O.W.N. 364 (S.C.A.D.); *British Whig Publishing Co. v. E.B. Eddy Co.* (1921), 62 S.C.R. 576; *Knight Sugar*, above note 75; *Templin v. Alles*, [1944] O.W.N. 96; *Blanco v. Nugent*, [1949] 3 D.L.R. 19 (Man. K.B.); *The Athinoula*, [1980] 2 Lloyd's Rep. 481; *Homburg Houtimport B.V. v. Agrosin Private Ltd.*, [2003] 2 W.L.R. 711 (H.L.).

131 See Section B(3), above in this chapter.

132 *Forbes v. Git*, [1922] 1 A.C. 256 at 259 (P.C.), Lord Wrenbury; *Cotter v. General Petroleums Ltd.*, [1951] S.C.R. 154 at 158, Kerwin J. and 170–71, Cartwright J. [*Cotter*]; *Hassard v. Peace River Co-operative Seed Growers Association*, [1954] 2 D.L.R. 50 at 54 (S.C.C.), Kellock J.; *Independent Lumber Co. v. David* (1911), 1 W.W.R. 134 at 140 (Sask. C.A.), Lamont J.; *Continental Insurance Co. v. Law Society of Alberta* (1984), 14 D.L.R. (4th) 256 at 262 (Alta. C.A.), Lieberman J.A. A different rule applies to the construction of wills, where the later provision will prevail. See, for example, *Re Hammond*, [1938] 3 All E.R. 308.

133 See Chapter 6, Section D(5).

TAB 8

CARSWELL

OOSTERHOFF ON TRUSTS

NINTH EDITION

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(a) Uncertainty in Identification

The first issue is perhaps the simplest to conceptualize, even though its application often is complex. A trust cannot exist unless the affected property can be *identified*.[55] It must be possible to point (notionally in the case of intangible property) to some particular thing. Consequently, a trust will not arise if a purported settlor said that a person was entitled to call for the payment of $110,000 out of a larger fund;[56] nor if a settlor, possessed of four bank accounts at the same branch, ambiguously refers to her "checking/savings account located at the [bank]";[57]nor if a man, subject to a divorce order that required him to maintain life insurance for his children, died after obtaining several policies without designating one for the trust.[58]

(i) Types of Property

Any type of property is capable of being the subject matter of a trust. That property may be legal or equitable, personal or real, tangible[59] or intangible.[60]That first pair of possibilities warrants an explanation. A trust usually arises because the trustee holds legal title, while the beneficiary enjoys equitable title. It is possible, however, for the trustee to begin with an equitable interest and for the beneficiary to enjoy another equitable interest. For that reason, it sometimes is helpful to refer to the beneficiary's interest as "beneficial" rather than "equitable."

The definition of property is broad, but it does not encompass "future property." Future property refers to things that the settlor does not yet own, either because they do not yet exist or because they are owned by someone else. Examples include an anticipated inheritance, future royalties, and property that may be acquired through the exercise of a power. Significantly, however, there is a difference between future property and an enforceable right to receive property in the future. Since the latter is a form of property in itself (*e.g.* a contractual right to demand the transfer of an asset or the payment of a debt), it may provide the subject matter of a trust. Consequently, while one cannot today create a trust over potential lottery winnings in the future, an enforceable right to participate in the proceeds of future lotteries can be the subject matter of a trust.[61] (The issue of future property is considered in more detail below, in connection with the issue of constitution.)

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[55] A distinction (not assiduously followed in this book) sometimes is drawn between the *subject matter* of a trust and *trust property*. The former refers to the property from which the *res* of the trust is drawn; the latter refers to the property beneficially owned by the beneficiary. The two concepts may overlap entirely, as when Blackacre, as a whole, is held on trust for one person. The distinction becomes meaningful, however, if only part of a larger asset is beneficially owned. That is true, for example, if a life estate is held on trust. Blackacre is the subject matter of the trust and the life estate is the trust property. See A. Scott & W. Fratcher, *Scott on Trusts* 4th ed. (Boston: Little Brown & Co., 1987) at § 3.1.

[56] *Hemmens v. Wilson Browne (a firm)*, [1995] Ch. 223.

[57] *Wilkerson v. McClary*, 647 S.W.2d 79 (Tex. C.A., 1983). *Cf. Pan v. Pan Estate*, 2011 BCSC 856 (subject matter merely described as "my savings in Canada," but since testatrix held only one Canadian account, there was sufficient identification).

[58] *Manufacturers Life Insurance Co. v. Senesouma*, 2016 ABQB 495.

[59] Such as cars, cows, and cottages.

[60] Such as trademarks and contractual rights.

[61] *Abrahams v. Trustee in Bankruptcy of Abrahams*, [1999] B.P.I.R. 637 (Ch.) (subject matter of resulting trust).

Because the issue often is confused, it also is worth observing that property is not "future property" simply because the settlor does not yet enjoy possession. The holder of a vested remainder interest, for example, will not enjoy possession until the prior life estate expires. That remainder interest nevertheless already is a recognized form of property that may be held in trust.[62]

(ii) Ascertained or Ascertainable

Whatever type of property is involved, it must be *ascertained* or *ascertainable*. The subject-matter is ascertained when it is a fixed amount or specified piece of property; it is ascertainable if there is some method or formula by which the subject matter may be ascertained. *Id certum est quod potest redid certum.*[63]

In some respects, the identification requirement is relatively relaxed. To begin, the goal is not absolute certainty, but rather sufficient certainty. The courts generally are inclined to save trusts where possible, and they sometimes exercise considerable ingenuity. Second, the mere fact that a particular asset cannot be located will not prevent a trust from arising.[64] As long as the property is sufficiently identified, it can be held on trust and distributed to the beneficiary if and when it is found. Third, external evidence may be used to identify property. Accordingly, if a testatrix referred to "my savings in Canada," and if she had only one such account, the property is sufficiently ascertained.[65] Fourth, once trust property has been sufficiently ascertained and a valid trust has been created, there is nothing to prevent the settlor from later contributing new property to the trust. So too, once a valid trust has been created, the beneficiary is entitled to trace the original property into any substitute and to thereby assert an equitable interest in the new asset.[66]

(iii) Timing Issues

The test for certainty of subject matter generally applies at the moment that the trust (purportedly) comes into existence. In the case of a testamentary trust, that means that the subject matter must be ascertainable when the testator dies and not when the will is drafted. It therefore is possible to impose a testamentary trust upon the "residue" of an estate. Though that concept would be hopelessly uncertain if assessed at the time of drafting, it becomes certain upon death. The residue is defined as an estate's assets minus its debts and legacies. The fact that time inevitably will pass between the testator's death and the calculation of the state's assets and liabilities is not fatal.

With respect to *inter vivos* trusts, it appears that the test once again applies at the moment of (purported) creation, even if the trust property is not to be distributed until later. *Re Beardmore Trusts*[67] involved an attempt to create an *inter vivos* trust that consisted of 60% of the settlor's estate at the time of his

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[62] *Re Ralli's Will Trusts: Calvocoressi v. Rodocancachi*, [1964] 1 Ch. 288, [1963] 3 All E.R. 940, [1964] 2 W.L.R. 1144, discussed below.

[63] "That is certain which can readily be made certain."

[64] *Brown v. Gould* (1971), [1972] Ch. 53, [1971] 2 All E.R. 1505.

[65] *Pan v. Pan Estate*, 2011 BCSC 856.

[66] The beneficiary's proprietary rights may be defeated, however, by a *bona fide* purchaser for value. That possibility is discussed elsewhere in this book, especially in Chapter 19.

[67] *Re Beardmore Trusts* (1951), [1952] 1 D.L.R. 41, [1951] O.W.N. 728 (H.C.).

to take the remaining three. Maria dies without having made her choice. What property, if any, does Charlotte enjoy under the trust?[135] Is there an effective mechanism for determining the beneficiaries' interests?

A testator, who had three sons, owned several properties at the time of death. His will aimed to give one property to the first son, another property to the second son, and the remaining properties to the third son. The testator did not, however, specify the property to which each son is entitled, nor did he expressly provide the first or second son with a power of selection. Are any of the sons entitled to any of the properties?[136]

9. Does constitution invariably cure uncertainty of subject-matter? If so, how? Refer back to this question after completing the heading on constitution, below.

4.3.3 Certainty of Objects

(a) Introduction

In addition to certainty of intention and certainty of subject matter, an express trust also requires certainty of objects. The phrase "certainty of objects" sometimes is used to indicate that an express trust must benefit persons, rather than non-charitable purposes. Purpose trusts are discussed in Chapters 7 and 8. In the present context, the need for certainty of objects refers instead to the fact that the beneficiaries must be sufficiently described so as to facilitate performance of the trust.

Certainty of objects is important from various perspectives. The settlor wants to be sure that the trust property is distributed to the intended beneficiaries. Those beneficiaries similarly want to ensure that their property is not given to someone else. Because an improper distribution results in liability, the trustee must be able to determine, with sufficient certainty, who falls within the class of beneficiaries. And finally, because a trust cannot fail for want of a trustee, and because a judge may be required to direct the disposition of trust property if a trustee does not do so, it is crucial, from the courts' perspective, that trust objects be certain. Judges are not willing to speculate as to whom property ought to be given.

Certainty of objects also is important for the purposes of the rule in *Saunders v. Vautier*.[137] That rule exists in Canada's common law jurisdictions, other than Alberta and Manitoba. As explained in more detail in the next chapter, *Saunders v. Vautier* states that, as long as they are *sui juris* and unanimous in the desire, the beneficiaries of a trust may demand an immediate distribution of the trust property, even if the settlor intended for the trust to be executed at some future date. The application of that rule obviously requires ascertainment of the beneficiaries.

(b) Persons and Purposes

As previously noted, it is necessary to distinguish between trusts for persons and trusts for purposes. The former category includes both natural and legal persons — *i.e.* human beings and corporations. The rules regarding

[135] See *Boyce v. Boyce* (1849), 16 Sim. 476, 60 E.R. 959 (V.-C.).
[136] *Guild v. Mallory* (1983), 13 E.T.R. 218, 144 D.L.R. (3d) 603 (Ont. H.C.). See also *Re Sapusak* (1984), 16 E.T.R. 197, 8 D.L.R. (4th) 158 (Ont. C.A.).
[137] (1841), 4 Beav. 115, 49 E.R. 282 (Rolls Ct.), affirmed (1841), 1 Cr. & Ph. 240, 41 E.R. 482 (Ch. Div.).

certainty of objects are the same in either event. The rules governing purpose trusts are examined in Chapters 7 and 8. One comment nevertheless is warranted at this point. A personal trust sometimes looks like a purpose trust if the quantum of the beneficiary's interest is defined by some purpose. A trust involving the disposition of "such amounts as my trustee determines is appropriate for the purpose of educating my daughter" is not, despite use of the word "purpose," a purpose trust. The settlor's aim is not to advance education generally, but rather to benefit his daughter personally. The reference to "purpose" merely provides a means of ascertaining the amount to which the daughter is entitled.

(c) Tests of Certainty of Objects

The precise requirements for certainty of objects depend upon the nature of the trust. A personal express trust may be either *fixed* or *discretionary*. A fixed trust is one in which the beneficiaries and their shares are fully determined by the settlor. A discretionary trust is one in which the settlor directs the trustee to exercise a choice as to the beneficiaries or their shares or both. Because the trustee *must* exercise that choice, the disposition is a trust, rather than a power. The trust is discretionary, rather than fixed, however, because the trustee is required, for example, to distribute $5000 "to either A or B," or to distribute to A "such amount as is thought appropriate."

Re Gulbenkian's Settlement,[138] which appeared in the preceding chapter, contains *dicta* to the effect that the objects of both fixed trusts and discretionary trusts require "class ascertainability." In fact, as the extracts in this section explain, that test properly applies to fixed trusts only. Discretionary trusts, like powers, are governed instead by the test of "individual ascertainability."

(d) Evidentiary and Conceptual Certainty

Whichever test applies, it generally is said that equity requires *conceptual*, rather than *evidentiary*, certainty of objects. The criteria for admission into the class of beneficiaries must be clear, even if the actual identification of those beneficiaries requires considerable effort. Evidentiary difficulties can be worked out, by a judge if necessary, as they arise.[139] Indeed, as Wynn-Parry J. said in *Re Eden*,[140] "it may well be that a large part, even the whole of the funds available, would be consumed in the inquiry. To say the least of it, that would be very unfortunate, but it cannot of itself constitute any reason why such an inquiry, whether by the trustees or by the court, should not be undertaken."

(e) Saving Potentially Uncertain Objects

As previously explained, the courts often exercise considerable flexibility in overcoming potential problems regarding certainty of subject matter.

[138] (1968), [1970] A.C. 508 (H.L.).
[139] *Re Baden's Deed Trusts (No. 2)* (1972), [1973] Ch. 9 (C.A.) at 19 ("the court is never defeated by evidential uncertainty").
[140] [1957] 2 All E.R. 430 (Ch. Div.) at 435.

Though perhaps less pronounced, the same sometimes is true with respect to certainty of objects. Once again, for example, the "armchair rule" allows the settlor's words to be interpreted in context. A trust for one's "good friends" *prima facie* is invalid for uncertainty of objects. The category of "good friends" is hopelessly open-ended. The disposition nevertheless may be saved by evidence proving that the settlor invariably used the operative phrase in reference to certain individuals.

Seemingly uncertain objects also may be saved if the settlor entrusted some person (usually the trustee) to resolve such difficulties. There is some debate, however, as to the scope of that proposition. It occasionally is said that while a third party may be allowed to determine *factual* issues, *conceptual* uncertainties are not amenable to the same approach.[141] In a case of factual difficulty, the settlor provides a conceptually clear test and the third party merely bears responsibility for determining whether the criteria are met. In a case of conceptual difficulty, in contrast, the settlor has not established a clear standard. And since the trust derives from the settlor's intention, it is not appropriate to allow a third party to supply the criteria for membership in the class of beneficiaries. *Re Tuck's Settlement Trusts*[142] provides an illustration. A trust purportedly was created for benefit of a man as long as he was "of the Jewish faith" and married to an "approved wife." The settlor further directed that, in the event of factual dispute or doubt, "the decision of the Chief Rabbi in London . . . shall be conclusive."[143] Although the operative terms were held to be sufficiently certain by themselves, the Court of Appeal favourably entertained the possibility that the Chief Rabbi, acting "in the business in which he is expert," otherwise could have been of assistance.

(f) Timing Issues

It generally is said that the test for certainty of objects must be satisfied at the time that the trust is created. The test therefore applies immediately in the context of an *inter vivos* trust and at the moment of death in the context of a testamentary trust. Significantly, however, the test does not necessarily require the actual identification of the beneficiaries at the outset. In some situations, it is enough that the beneficiaries and shares will be identifiable at the moment of distribution. Without that flexibility, the courts would be required to strike down a large number of trusts that commonly are used in practice. It is possible, for example, to create a trust that consists of a life interest for A, followed by a remainder interest for A's heir at the time of A's death. Although the trust arises immediately, A's heir will not be known for some time. Similarly, it is possible to create a trust subject to a condition precedent, so that the identity of the beneficiaries (if any arise) will be known only if and when the condition is met.

[141] G. Thomas & A. Hudson, *The Law of Trusts* (Oxford, Oxford University Press, 2004) at 120-123.
[142] [1978] Ch. 49 (C.A.).
[143] *Ibid.*, at 49-50.

(g) Consequences of Uncertainty

If the objects are not sufficiently certainty, the attempted trust will fail. Following the general rule, any property that has been given to the "trustee" presumptively will return to the settlor by way of resulting trust.

Further Reading

J.W. Harris, "Trust, Power and Duty" (1971), 87 L.Q.R. 31.
J. Hopkins, "Certain Uncertainties of Trusts and Powers," [1971] C.L.J. 68.
Y.F.R. Grbich, "Certainty of Objects: The Rule That Never Was" (1973), 5 N.Z.U.L. Rev. 348.
G.E. Palmer, "Private Trusts for Indefinite Beneficiaries" (1972), 71 Mich L. Rev. 359.
L. McKay, "Re Baden and the Criterion of Validity" (1974), 7 V.U.W.L. Rev. 258.
M.C. Cullity, "Fiduciary Powers" (1976), 54 Can. Bar Rev. 229.
R. Burgess, "The Certainty Problem" (1979), 30 N.I.L.Q. 24.
C.T. Emery, "The Most Hallowed Principle — Certainty of Beneficiaries of Trusts and Powers of Appointment" (1982) 98 L.Q.R. 551.

(h) Test for Certainty of Objects of a Fixed Trust: Class Ascertainability

A fixed trust triggers the *class ascertainability* test. It must be possible to draw a complete list of the beneficiaries.

Class ascertainability is required by the very nature of a fixed trust. The trustee has no discretion as to recipients or shares; the property must be distributed as directed by the settlor. Consequently, for example, a fixed trust that calls for $100,000 to be distributed "to the members of my family in equal shares" requires a precise determination as to the number of recipients. Since the test is conceptual, rather than evidentiary, the trustee need not necessarily locate each member of the family. At a minimum, however, the trustee must know the number of beneficiaries in order to determine the size of each share. (If some family members are known to be alive, but cannot be located, the relevant share can be held in trust pending their appearance.)

Given the nature of the test, it is impossible, in normal circumstances, to have a fixed trust "for equal distribution among my friends." The problem is not merely that the concept of "friends" is vague, so as to make it difficult, at least at the margins, to know whether the test is satisfied. The more fundamental problem is that, because the concept of "friends" is vague, the trustees would never know if they had compiled a complete list. And without a complete list, it is impossible to know the proper size of a single share, even for a person who undoubtedly does fall within the class.

Notes and Questions

1. Explain why the following disposition is a fixed trust: "$10,000 to be held in trust for the members of my family in equal shares". Does it pass the certainty of objects test for a fixed trust? Why or why not?

2. Is the class ascertainability test concerned with conceptual or evidential uncertainty?

3. A testatrix left $10,000 in trust in equal shares for her "aged housekeepers". She had four housekeepers whose ages, at the time of her death, were 21, 45, 87 and 89.