ENTERED

1103910

JUDICIAL CENTRE OF CALGARY
FILED
Clerk's Stamp
Nov 23, 2020
by Email
CLERK OF THE COURT

JS
Nov. 27 2020
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*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.

DOCUMENT **BRIEF OF LAW OF JMB CRUSHING SYSTEMS INC. IN RESPONSE TO TRUST CLAIM APPLICATIONS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

GOWLING WLG (CANADA) LLP
1600, 421 – 7th Avenue SW
Calgary, AB T2P 4K9

Attn: **Tom Cumming/Caireen E. Hanert/Stephen Kroeger**
Phone: 403.298.1938/403.298.1992/403.298.1018
Fax: 403.263.9193

File No.: A163514

I. INTRODUCTION

1. This Bench Brief is submitted by JMB Crushing Systems Inc. ("**JMB**") in opposition to the applications of a number of parties seeking a declaration of trust in their favour pursuant to a contract dated November 1, 2013 for the supply of aggregate between the MD of Bonnyville No. 87 (the "**MD**") and JMB (the "**Supply Contract**"). They also ask seek payment of the amounts subject to the alleged trust (the "**Trust Claim**").

2. In addition, Jerry Shankowski and his company, 945441 Alberta Ltd. (collectively, "**Shankowski**"), seek the following relief:

   (a) Setting aside the Orders granted by Justice K.M Eidsvik on October 16, 2020, namely the Amended and Restated Mantle Sale Approval and Vesting Order and the Reverse Vesting Order (collectively the "**October 16 Order**s**"**), as well as the Amended Royalty Aggregates Agreement entered into on October 15, 2020;

   (b) Requiring JMB to deposit additional funds with the Clerk of the Court or the Monitor, so the claims of all unpaid suppliers of materials, labour or other services under the Supply Contract are covered; and

   (c) Directing notice be provided to all actual or potential beneficiaries of the trust created by the terms of the Supply Contract and of their right to claim to be a beneficiary of the trust and for payment of their claims (collectively, the "**Additional Shankowski Relief**").

3. With respect to the Trust Claim, JMB states the Supply Contract does not create a trust in favour of the Applicants. Rather, to the extent any trust can be found to have been created, it is created solely for the benefit of the MD. Consequently, no monies are payable to the Applicants pursuant to the Supply Contract.

4. With respect to the Additional Shankowski Relief, JMB states that relief should be denied. First, Shankowski's counsel was in possession of the Supply Contract prior to the October 16 Orders and did not review it. Even if he had, the result would have been the same; the

October 16 Orders would have been granted, as the terms of the Supply Contract do not impact the substance of the October 16 Orders.

5. Further, and importantly, there is no "new evidence" that requires this Court to review the October 16 Orders. The materials filed in support of the October 16 Orders, including a copy of the Supply Contract, was served to all parties on the Service List in advance of the applications. The fact that Shankowski's counsel did not review these materials in sufficient detail prior to the applications resulting in the October 16 Orders cannot justify setting aside orders or agreements that JMB and other stakeholders are relying upon in ensuring this matter is successfully resolved. The failure of Shankowski's counsel to review materials properly served upon him also cannot be laid at the feet of the Proposed Respondents.

6. Shankowski also seeks to add a number of Respondents to his Application, including JMB, JMB's counsel, the Monitor and the Monitor's counsel (the "**Proposed Respondents**"). Shankowski, on his behalf and on behalf of other "beneficiaries of the trust", seeks indemnity from the Proposed Respondents to the extent of any unrecoverable amounts from funds currently being held in accordance with the Order of Justice K.M. Eidsvik dated May 20, 2020, as well as costs payable forthwith by the Proposed Respondents on a full indemnity basis.

7. The parties to this portion of the relief sought have jointly agreed that the hearing of this particular issue will be adjourned to a date to be determined. In any event, JMB's counsel believes that this particular issue is frivolous, vexatious and without merit. Further submissions will likely be made on this issue in writing or orally, or both, in the event that Shankowski does not abandon or otherwise withdraw this aspect of his Application.

8. Based on the foregoing, JMB asserts the Trust Claim and the Additional Shankowski Relief should be denied.

II. FACTS

9. On or about November 1, 2013, JMB entered into the Supply Contract with the MD. The Supply Contract contains the following key provisions:

1.e. "Product" means the production by JMB of the aggregate described in this Agreement which includes the crushing and cleaning of rock/gravel, and all related services whereby rock/gravel is made into usable crushed aggregate for the MD in accordance with the required specifications set out in this Agreement;

1.f. “Services" means the hauling and stockpiling of crushed aggregate by JMB as set out in this Agreement and anything else which is required to be done to give effect to this Agreement;

…

26. From the amounts paid to JMB by the MD, JMB is deemed to hold that part of them in trust which are required or needed to pay for any salaries, wages, compensation, overtime pay, statutory holiday pay, vacation pay, entitlements, employee and employer Canada Pension Plan contributions, employee and employer Employment Insurance contributions, Workers' Compensation premiums and assessments, income taxes, withholdings, GST and all costs directly or indirectly related to the Product and Services. JMB shall pay the foregoing from such trust funds.

…

37. At all times, JMB shall maintain Workers' Compensation insurance and shall pay its assessments and premiums as required by applicable Workers' Compensation legislation. JMB shall provide the MD with proof of Workers' Compensation coverage as required by the MD.

39. JMB shall indemnify and hold harmless the MD, its directors, trustees, officers, councillors, agents and employees, against and from any actions, claims, demands, proceedings, loss, liability, damages on account of injury to or death of persons, damage to or destruction of property belonging to the MD or others, which are directly or indirectly caused by JMB's acts, breach of contract or negligence related to the Product and Services.

…

41. JMB indemnifies the MD for all amounts related to the Product and Services, or related to its personnel, including interest and penalties, which it is required to pay or remit to any governmental agency as required by law, including the Workers' Compensation Board.

…

45. By notifying JMB in writing, the MD may terminate this Agreement forthwith for a material breach of the terms of this Agreement and without further obligation on the MD beyond the date of such termination.

46. By notifying the MD in writing, JMB may terminate this Agreement forthwith for a material breach of the terms of this Agreement and without further obligation on JMB beyond the date of such termination.

Affidavit of Jason Panter sworn October 9, 2020 ("**Panter Affidavit**"), Exhibit "C"
05.14-738

10. The Supply Contract provides that JMB will produce, haul and stockpile crushed aggregate materials for use by the MD. In order to complete the 2020 supply for the Supply Contract, JMB:

    (a) Extracted aggregate from lands owned by Shankowski (the "**Shankowski Land**");

    (b) Entered into a Subcontractor Services Agreement with RBee Aggregate Consulting Ltd. ("**RBee**"), on or around February 25, 2020, pursuant to which RBee was to crush the aggregate to specification in satisfaction of the Supply Contract;

    (c) Engaged J.R. Paine and Associates Ltd. on or about April 1, 2020 to undertake testing of the crushed aggregate to ensure it met the MD's specifications under the Supply Contract; and

    (d) Stockpiled the aggregate on the Shankowski Land until transported to the MD' yard, where it was stored until needed.

Panter Affidavit, para 12

11. Due to the financial issues facing JMB in late 2019 and early 2020, JMB was unable to make payments to a number of its suppliers and subcontractors, including the Applicants.

Affidavit of Jeff Buck sworn April 16, 2020 ("**Buck Affidavit**")
05-44

12. On April 14, 2020, RBee advised the MD it would be registering a lien to secure payment of amounts owed to RBee by JMB for crushing services. At that time, RBee knew the aggregate it was crushing was being hauled to the MD's yard. The MD sent JMB the correspondence from RBee, and advised that Matt Silver Trucking Ltd. ("**MS Trucking**") had also complained of non-payment.

Affidavit of Blake Elyea sworn November 20, 2020 ("**November Elyea Affidavit**"), para 6, Exhibit "A"
05.16-2610

13. On April 27, 2020, the MD advised JMB that it would require written confirmation from RBee that its issues had been resolved before the MD would pay the outstanding invoices.

November Elyea Affidavit, para 7
05.16-2323

14. On April 29, 2020, Shamrock Valley Enterprises Ltd. advised the MD that it had not been paid for trucking services. The MD again forwarded the correspondence to JMB and advised that the JMB invoices would not be processed until the issues raised by subcontractors had been resolved.

November Elyea Affidavit, para 8, Exhibit "B"
05.16-2612

15. On May 1, 2020, JMB and its wholly owned subsidiary, 2161889 Alberta Ltd., were granted an initial order pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985 c C-36, as amended.

16. The Buck Affidavit was filed in support of the application for the initial order and set out the factual background for the application, including a list of key contracts that included the Supply Contract. It specifically noted that the Supply Contract was for the "production, hauling and stockpiling of crushed aggregate materials for use in road construction."

Buck Affidavit, para 33(a)
05-52

17. It quickly became apparent that without payment of the invoices issued to the MD by JMB, JMB would not be able to continue with the within proceedings to restructure for the benefit of its stakeholders. Accordingly, JMB worked with the MD and the Monitor to create a process by which any additional lien claims would be stayed, the MD would pay the monies to the Monitor, the MD would no longer have any liability in relation to those monies, the Monitor would hold sufficient funds to cover any lien claims related to the Supply Contract in trust, and the Monitor would pay the excess funds to JMB to permit it to continue its operations and support the within proceedings.

November Elyea Affidavit, para 9
05.16-2323

18. This Honourable Court approved the process by way of the Lien Claims Process Order granted May 20, 2020. The process provided an opportunity for subcontractors seeking to

be paid from the monies paid to JMB by the MD to make a claim pursuant to the Lien Claims Process Order.

19. With respect to the Lien Claim Process Order:

(a) On May 21, 2020, a letter was sent to Richard Hajduk ("**Hajduk**"), counsel for Shankowski, advising him of the Lien Claim Process Order;

(b) Other potentially interested parties not on the service list were also advised of the Lien Claim Process Order;

(c) The Claims Bar Date under the Lien Claim Process Order was June 1, 2020;

(d) On May 29, 2020, Hajduk served a Lien Notice and Affidavit pursuant to the Lien Claims Process Order;

(e) No inquiries were made of counsel for JMB by any of the potentially interested parties requesting additional information or copies of any documents, including the Supply Contract before the Claims Bar Date. JMB also did not receive any requests for additional information or copies of any documents, including the Supply Contract, at any time;

(f) On June 26, 2020, Hajduk served an unfiled Application and Affidavit (the "**Shankowski Lien Removal Application**") seeking the removal of two liens that had been registered against title to lands owned by Shankowski (the "**Shankowski Lands Liens**"). JMB has a royalty agreement with Shankowski with respect to the extraction of aggregate from the subject lands (the "**Shankowski Royalty Agreement**"). The Shankowski Land Liens had been filed by the RBee and J.R. Paine for amounts owed for work done by them for JMB relating to the Supply Contract;

(g) On July 6, 2020, Jerritt Pawlyk ("**Pawlyk**"), counsel for RBee, set out RBee's position with respect to the Shankowski Lien Removal Application;

(h) Sometime at the end of July 2020, Pawlyk requested and was provided with a copy of the Supply Contract;

(i) On or about July 27, 2020, the Monitor issued Determination Notices to all Lien Claimants pursuant to the Lien Claims Process Order;

(j) On August 11, 2020, Hajduk served Shankowski's Application and Affidavit to appeal the Determination Notice issued by the Monitor to Shankowski;

(k) As part of the potential sale of JMB assets to Mantle Materials Group, Ltd. ("**Mantle**"), counsel for Mantle approached Hajduk to discuss obtaining Shankowski's support for the potential sale and to ensure that the Shankowski Royalty Agreement would be included in the potential sale; and

(l) During the course of the discussions between Mantle and Shankowski, it was clear that Shankowski would require Mantle or JMB to ensure that the Shankowski Lands Liens were removed from title.

November Elyea Affidavit, para 11
05.16-2323

20. On October 9, 2020, counsel for JMB served an Application seeking the discharge of the Shankowski Lands Liens (the "**Lien Removal Application**"), along with the Affidavit of Jason Panter sworn October 9, 2020 in support (the "**Panter Affidavit**"). The Panter Affidavit appended the Supply Contract as an exhibit. The Lien Removal Application was scheduled to be heard on October 16, 2020 at the same time as had been scheduled for the following Applications, all in relation to the sale of JMB assets to Mantle: (a) Application for Amended and Restated Approval and Vesting Order; (b) Application for a Reverse Vesting Order; (c) Application for an Assignment Order; (d) Application for a Plan Sanction Order; and (e) Application for a Stay Extension Order (collectively, the "**October 16th Applications**"). All application materials for the October 16th Applications were served on the service list by October 1, 2020.

November Elyea Affidavit, para 12
05.16-2325

21. During this time, Mantle and Shankowski continued to negotiate the terms of an agreement, pursuant to which Shankowski would consent to the vesting of the Shankowski Royalty Agreement pursuant to the Amended and Restated Vesting Order and Mantle or JMB would ensure that the Shankowski Lands Liens were discharged from title, among other things. The parties reached agreement on October 15, 2020.

Elyea Affidavit at para. 14
05.16-2325

22. The Lien Removal Application was heard and granted on October 16, 2020, and accordingly, the remaining Shankowski Lands Lien was discharged by Court order. Hajduk was present at the Shankowski Lien Removal Application on October 16, 2020, having brought an Application seeking similar relief on behalf of Shankowski on that same date, and made submissions to the Court in respect of same.

November Elyea Affidavit, para. 15
05.16-2326

23. With respect to the Determination Notices:

(a) The Applications appealing the Determination Notices were scheduled to be heard on October 22, 2020;

(b) On October 17, 2020, Hajduk advised that he wished to cross-examine on the Panter Affidavit, which examination was scheduled for October 20, 2020;

(c) On the morning of October 20, 2020, a few hours before the cross-examination was scheduled to start, Hajduk advised that he would be seeking an adjournment of his client's Application, as he wished to amend it to seek additional relief, including a declaration that the Holdback Amount constitutes trust funds and an order to have those trust funds further supplemented and contributed to as necessary to fully constitute a trust he alleged is contemplated by the Supply Contract in favour of Shankowski and other subcontractors; and

(d) On October 23, 2020, counsel for JMB sent a letter to Hadjuk responding to his email of October 20, 2020.

November Elyea Affidavit, para. 16
05.16-2326

24. With respect to how costs are allocated to various projects, it is JMB's accounting practice to attribute identifiable costs, including indirect costs, to various projects, like the Supply Contract. For the 2020 contract year, those indirect costs include costs for equipment repairs, fuel, and accommodation. For prior years, costs for items like portable toilets and waste receptacles have been allocated. Any indirect costs as they have been allocated to the Supply Contract that were not paid as of April 30, 2020 have not been included in the above table.

November Elyea Affidavit, para 19
05.16-2326

25. No premium for the March and April 2020 supply is payable pursuant the Shankowski Royalty Agreement. The aggregate excavated from the Shankowski Lands met the Alberta Transportation specifications ("**AT Specifications**") for Des 2 Class 16 product, which is not classified as an asphalt product by Alberta Transportation. The product supplied to the MD does not meet the Des 1 Class 12.5 specifications as set out in the AT Specifications, and is in fact a "modified base course material" and not an asphalt product.

November Elyea Affidavit, para 20

26. Moreover, the justification for a premium is not borne out. The product supplied to the MD in March and April 2020 and described as "Des 1 Class 12.5" on the statements of account sent to Shankowski in fact generated less waste than the Des 2 Class 16 product previously provided. There was an approximate 50% waste rate for the Des 2 Class 16 product, as compared to an approximate 40% waste rate for the modified Des 1 Class 12.5 product, which is attributable to the smaller size of the modified Des 1 Class 12.5 product.

November Elyea Affidavit, para 20
05.16-2327

III. ISSUES

27. There is really only one issue to be determined: whether the Supply Contract creates a trust, and if so, were the Applicants the intended beneficiaries of that trust. JMB states that the Supply Contract does not create a trust, and even if it did, it is the MD, not the Applicants, that are beneficiaries of any trust.

28. It is arguable that the Additional Shankowski Relief need be considered only if this Honourable Court finds the Supply Contract creates a trust. However, if this Court considers the Additional Shankowski Relief, JMB asserts that the October 16 Orders and the Amended Aggregates Agreement should not be set aside. The Applicants, including Shankowski, had a copy of the Supply Contract prior to October 16, 2020 and had ample opportunity to raise the Trust Claim before, or on, October 16, 2020. There is nothing before this Court in these Applications that was not before the Court on October 16, 2020 that would require the October 16 Orders to be revisited, let alone set aside. The same applies to the Amended Aggregates Agreement.

29. In addition, given that Shankowski had the Supply Contract before the October 16 Orders were granted, and could have obtained a copy of the Supply Contract earlier upon request, any attempt to seek indemnity from the Proposed Respondents must fail. There is no evidence the Proposed Respondents, or any of them, acted in bad faith or had any legal obligation to Shankowski to bring specific sections of the Supply Contract to his attention.

IV. LAW AND ARGUMENT

A. The Supply Contract does not create a trust

30. JMB asserts the Supply Contract does not create a trust in favour of the Applicants. Rather, it is evident, based on the plain language of the Supply Contract, that no trust is created.

31. The first step is to interpret the Supply Contract to determine the intention of JMB and the MD at the time the contract was entered into. If there is no demonstrated intention to create a trust in favour of the Applicants, their Applications must fail.

Mohr v CJA, 1989 CarswellBC 507 (SC) at para 62, affirmed 1991 CarswellBC 639 (CA)
05.16-2279 **[Tab 1]**

Tobin Tractor (1957) Ltd v Western Surety Co., 1963 CarswellSask 42 at paras 29-31 **[Tab 2]**
05.16-2286

32. The Alberta Court of Appeal set out the principles governing contractual interpretation in *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*. Those principles include the following:

(a) The Court is to determine the objective intent of the parties at the time the contract was made, which is "what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix";

(b) Where there are disputed contractual terms, they must be interpreted in light of the contract as a whole;

(c) While the factual matrix of an agreement is used as an objective interpretive aid to determine the meaning of the words used by the parties, it cannot be used to craft a new agreement, or to do anything more than ensure that the written words of the contract are not "divorced from the background context against which the words were chosen;"

(d) The surrounding circumstances are a question of fact arising from "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting;"

(e) "Mere difficulty in interpreting a contract is not the same as ambiguity;" and

(f) "[C]ommercial contracts should be interpreted in accordance with sound commercial principles and good business sense."

IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing, 2017 ABCA 157 at paras 79-88 **[Tab 3]**

05.16-2290

33. The Court of Appeal summarized the goal of contractual interpretation as follows:

> [C]ontractual interpretation is not an exercise in second guessing what could have been included in a contract while discounting or dismissing relevant terms of a contract and uncontradicted contextual information. It is instead an exercise in determining what the parties objectively intended having

> regard to the entire written text, relevant contextual background and commercial context. [emphasis added]

IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing, *supra* at para 89 **[Tab 3]**

05.16-2290

34. In addition to these general principles of contractual interpretation, there are maxims of interpretation that have been developed by courts and applied to determine how the language chosen by the parties should be interpreted. The relevant maxim for this case is the *ejusdem generis* rule, which has been defined as follows:

> A canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. For example, in the phrase, horses, cattle, sheep, pigs, goats or any other barnyard animal, the general language or any other barnyard animal—despite its seeming breadths—would probably be held to include only four-legged, hoofed mammals (and thus would exclude chickens).

Itak International Corp v CPI Plastics Group Ltd.Eyeglasses, 2006 CarswellOnt 3986 (SCJ) at para 29, citing *Black's Law Dictionary*, 7th Edition, West Group, St. Paul Minnesota, 1999 at page 535 **[Tab 4]**

05.16-2297

35. To establish the existence of a trust, the Applicants must prove that the MD and JMB intended to create a trust for the benefit of the Applicants. One indicia that leads to the conclusion that a contract has not created a trust is the fact that parties to a contract can vary it without the consent of a third party. If no consent is required, then there is no intention to create a trust. Further, the fact that the Supply Contract can be terminated, amended or assigned runs contrary to the intention to create a trust as argued by the Applicants.

Mohr v CJA, *supra* at paras 85, 97-98, 100 **[Tab 1]**

05.16-2279

36. It is significant that the Supply Agreement, and in particular paragraph 26, can be altered at any time by the parties to the agreement, the MD and JMB, alone. Further, there is no provision in the Supply Contract that preserves the alleged trust funds upon termination of the agreement, or directs what is to happen to the trust funds should the agreement be

terminated. In this case, there is nothing preventing JMB from using the funds as it sees fit, as there is no term in the Supply Contract that establishes the survival of the obligation of JMB pursuant to paragraph 26 upon termination.

37. In this case, as in all contractual interpretation cases, the language chosen by the parties is a critical piece of the interpretative exercise. Although the Applicants argue that the use of the word "trust" in paragraph 26 of the Supply Contract is determinative, the interpretative exercise cannot end there, particularly in light of case law holding that the use of the words "trust" or "in trust" are not determinative in creating a trust. Rather, the intention of the contracting parties is to be determined by the entire agreement and not simply by reference to one provision of the contract.

Mohr v CJA, *supra* at para 103 **[Tab 1]**

05.16-2279

38. When paragraph 26 is read in conjunction with other terms of the Supply Contract, the intention of the parties becomes clear. The parties did not intend to create a trust in favour of third party beneficiaries, but rather, to protect the MD from any liability once it had paid JMB for the Product and Services. The Supply Contract provides the following protections in favour of the MD:

(a) Paragraph 37 requires JMB to maintain Workers' Compensation insurance and to pay the applicable premiums;

(b) Paragraph 39 requires JMB to indemnify and hold harmless the MD from any breaches of contract or negligence related to the Product or Services; and

(c) Paragraph 41 requires JB to indemnify the MD "for all amounts related to the Product and Services, or related to its personnel, including interest and penalties, which it is required to pay or remit to any government agency as required by law, including the Workers' Compensation Board.

39. The interpretation urged on this Honourable Court by the Applicants wholly ignores these other provisions, which are important in determining the intention of the parties. Based on these contractual terms, it becomes clear that the intention of JMB and the MD was for the

MD to be shielded from any liability arising out of JMB's fulfillment of its obligation to supply aggregate.

40. The Applicants have focused on paragraph 26 of the Supply Contract, and specifically the phrase "and all costs directly or indirectly related to the Product and Services" and assert that this must mean that this provision applies to the amounts owed to them. However, the Applicants' interpretation ignores the wording in the balance of paragraph 26.

41. Paragraph 26 provides a long list of obligations to be satisfied from the funds paid to JMB by the MD. All items on the list relate to obligations that would be incurred by JMB as an employer or obligations owed to governmental agencies, like the Canada Revenue Agency and the Workers' Compensation Board. There are no items specified on the list that suggest an intention to include obligations to third parties.

42. This interpretation is supported by the definition of "Product", which is defined as "the production by JMB of the aggregate described in this Agreement, […]". "Services", similarly, is defined in reference to "hauling and stockpiling…by JMB as set out in this Agreement […]". [emphasis added] Thus, it is JMB's operations, obligations and work that are contemplated by the parties, not the work of third parties.

43. Moreover, the three certainties are not met in this case.

> For a court to hold that a true or express trust exists, the party asserting the existence of such a trust must establish what are commonly referred to as "the three certainties". They are:
>
> (i) certainty of intention on the part of the settlor to create a trust;
>
> (ii) certainty of the subject matter of the trust, i.e., the property to be settled upon the trustee in favour of the beneficiaries of the trust; and,
>
> (iii) certainty of the object or persons intended to be the beneficiaries of the trust.
>
> …
>
> While, in determining whether or not there was an intention to create a trust, the use of the words "in trust", or "as trustee", or words to that effect is not essential, the evidence must be clear that the settlor did, indeed, intend to

> create a trust; a general intention to benefit someone will not suffice to create a trust…
>
> The principles applicable to this mode of making a gift are perfectly clear. The owner of the legal or equitable interest in the property in question must make it evident that he intends to constitute himself a trustee, he must leave no doubt as to what property interest of his is to be the subject of the trust, and he must similarly leave no doubt as to who is to be the trust beneficiary. In other words, the three certainties must be established as in the case of the creation of all trusts. … it is not necessary that the donor use the words, "I declare myself a trustee": words of any kind, and even conduct, are sufficient, provided it is satisfactorily shown that the donor did in fact intend to constitute himself a trustee. . . .
>
> The burden of proof that the donor intended to make himself a trustee is on those who allege such a trust, however, and many factors may reveal the true intent. [emphasis added]

Canada (Attorney General) v Confederation Life Insurance Co, 1995 CanLII 7097 (ONSC)
[Tab 5]

05.16-2301

44. As set out above, there is no certainty of intention. The Applicants simply rely on the language in paragraph 26 of the Supply Contract without regard to the balance of the provisions. It is respectfully submitted that when the entire agreement is taken into account, there is no evidence that the parties intended to create a trust as alleged by the Applicants, or that JMB intended to become a trustee. The burden of proof is on the Applicants, and that onus has not been met.

45. With respect to the second certainty, certainty of subject matter, this too is not certain from the language argued to create the trust. The Supply Contract is clear that it is an annual contract; that is, the monies paid to JMB by the MD pursuant to the Supply Contract are based on the aggregate delivered during each contract year. However, paragraph 26 of the Supply Contract states “from the amounts paid to JMB by the MD”. For example, there is no certainty as to whether a subcontractor would have a claim to monies paid in a prior contract year in which it did not do any work for JMB in relation to the Supply Contract. If these types of questions cannot be answered by reference to the language creating the alleged trust, there can be no certainty of subject matter.

46. The third certainty is object. In this case, the Applicants argue that they are all intended to be beneficiaries of the alleged trust. However, they have not provided this Honourable

Court with any guidance as to where the line may be drawn. The language itself is ambiguous in referring to "all costs directly or indirectly related to the Product and Services." It is not clear what would fall into that category. Put another way, it is not certain which subcontractors/vendors providing "indirect" services should be considered beneficiaries of the alleged trust.

47. Shankowski has also argued that if there is not an express trust, there is a constructive trust by virtue of the language in the Supply Contract. With respect, a constructive trust is a remedy applied for wrongdoing by a fiduciary. Accordingly, to impose a constructive trust, this Honourable Court must find that JMB is a fiduciary of the Applicants, which would be a most unusual finding as it relates to a debtor-creditor relationship and nothing more. Accepting Shankowski's argument on this point requires this Honourable Court to elevate the debtor-creditor relationship inherent in the supply of goods or services as between businesses to a fiduciary relationship. It is respectfully submitted that the Applicants cannot meet the test.

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Canada (Attorney General) v Confederation Life Insurance Co, 1995 CanLII 7097 (ONSC)
05.16-2301 **[Tab 5]**

48. Here, there is no scope for the exercise of discretion or power that is unusual in any way when compared to a debtor-creditor relationship. Being none, there is no way for JMB to exercise that power or discretion to affect the Applicants' legal or practical interests. Finally, there is no peculiar vulnerability of the Applicants that puts them at the mercy of JMB. They are merely unsecured creditors in the same position as any unsecured creditor.

49. It should also be noted that all of these arguments turn on the interpretation of the language in the Supply Contract. If paragraph 26 is found by this Honourable Court not to create a trust, all of the Applicants' arguments as to the type of trust or the remedy to be applied must fail.

50. Therefore, based on the foregoing, the Trust Claim must fail.

B. The Amended and Restated Mantle Sale Approval and Vesting Order and the Reverse Vesting Order should not be set aside

51. It is not disputed that Shankowski was served with a copy of the Supply Contract on October 9, 2020, a full week prior to the applications that led to the October 16 Orders. Accordingly, Shankowski had ample time to review the Supply Contract and raise any trust argument at the hearing on October 16, 2020. The fact he failed to do cannot justify opening up the October 16 Orders.

52. Shankowski advances the argument that the October 16 Orders were granted on an *ex parte* basis in order to impose an obligation on JMB and its counsel to meet a standard of utmost good faith in supporting the applications for the Vesting Orders. However, this completely ignores the fact that the application materials for the Vesting Orders were served on all interested parties, including Shankowski, on or before October 1st. The Panter Affidavit, which provided a copy of the Supply Contract, was served on October 9th in conjunction with an application to discharge the Shankowski Lands Liens, which application was made on the request of Shankowski. In fact, Shankowski had a companion application to discharge the same liens scheduled for the same date. Given Shankowski's demonstrated interest in having the Shankowski Lands Liens removed from his title, it is wholly reasonable to expect that Shankowski would have reviewed the Panter Affidavit in detail. If he had done so, Shankowski would have been aware of the terms of the Supply Contract shortly after October 9th and in advance of the applications on October 16 for the Vesting Orders. His failure to do so cannot reasonably be the basis for vacating the October 16 Orders.

53. Further, at the hearing of this matter, this Court permitted all parties in attendance, including Shankowski's counsel, to raise any issues of concern with respect to the applications before the October 16 Orders were granted.

54. Moreover, the idea that the Supply Contract is "new evidence" is simply incorrect. The Supply Contract was always available for any of the interested parties to obtain upon a request. The existence of the Supply Contract was disclosed in these proceedings in the Buck Affidavit, the first affidavit sworn in these proceedings, and copy of the Supply Contract was provided on October 9th to Shankowski. New evidence is only permitted as part of a review or appeal process when the material sought to be introduced was not available at the time of the original hearing or could not have been available by reasonable diligence. If this test is not satisfied, new evidence is not permitted by the Court.

Buck Affidavit, para 33(a)
05-52
CED Judgments and Orders XVII.2.(b)
05.16-2307 (Western) **[Tab 6]**

Alberta (Public Trustee) v Koblanski, 1961 CarswellAlta 7, paras 33, 35 **[Tab 7]**
05.16-2310

55. Additionally, the onus is on Shankowski to establish that his counsel's late review of the Supply Contract would have altered the decision of this Court, such that the October 16 Orders would not have been granted in their current form or at all. Shankowski has not met this onus.

Hill v Hill, 2016 ABCA 49, paras 30, 31, 33
05.16-2313 **[Tab 8]**

C. The Amended Aggregates Agreement should not be set aside

56. Contracts can only be set aside in cases of duress, fraud, or common mistake.

> More frequently the jurisdiction of the court to rescind a contract on equitable grounds is invoked in three main instances. The first is where the contract resulted from some fraud, which induced a mistake on the part of the defrauded party. The second is where the mistake in question was the result of an innocent, non-fraudulent misrepresentation. The third, which comprehends a somewhat mixed variety of instances, though sharing a general underlying character, is where the contract was procured, without

> fraud in the common law sense, but as a consequence of what in equity is regarded as fraud, *i.e.*, by the use of undue influence, or where there has been some unconscionable conduct which renders the bargain questionable on equitable grounds, even though it may be perfectly valid at common law. [emphasis added]

Carlson v Big Bud Tractor of Canada Ltd., 1981 CarswellSask 111 (CA) at para 74, citing Fridman, *The Law of Contract* (1976), p 624

05.16-2317 **[Tab 9]**

57. This issue is not addressed by Shankowski in his written submissions. In the event this issue is addressed by Shankowski during oral argument, JMB reserves its right to respond.

V. CONCLUSION

58. Accordingly, JMB submits the Applications should be dismissed, with costs payable to JMB.

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

GOWLING WLG (CANADA) LLP

Tom Cumming/Caireen E. Hanert/Stephen Kroeger
Counsel for JMB Crushing Systems Inc.

VI. TABLE OF AUTHORITIES

1. *Mohr v CJA*, 1989 CarswellBC 507 (SC)
2. *Tobin Tractor (1957) Ltd v Western Surety Co.*, 1963 CarswellSask 42
3. *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157
4. *Itak International Corp v CPI Plastics Group Ltd.Eyeglasses*, 2006 CarswellOnt 3986 (SCJ)
5. *Canada (Attorney General) v Confederation Life Insurance Co*, 1995 CanLII 7097 (ONSC)
6. CED Judgments and Orders XVII.2.(b) (Western)
7. *Alberta (Public Trustee) v Koblanski*, 1961 CarswellAlta 7
8. *Hill v Hill*, 2016 ABCA 49
9. *Carlson v Big Bud Tractor of Canada Ltd.*, 1981 CarswellSask 111 (CA)

TAB 1

1989 CarswellBC 507, [1989] B.C.W.L.D. 2765, [1989] B.C.J. No. 2083, 36 E.T.R. 246

Most Negative Treatment: Distinguished
Most Recent Distinguished: Chemainus Team Development Training Trust (Trustee of), Re | 2004 BCSC 1605, 2004 CarswellBC 2853, 135 A.C.W.S. (3d) 1188, 43 C.C.P.B. 197, 13 E.T.R. (3d) 203, [2004] B.C.J. No. 2519, [2005] B.C.W.L.D. 554, [2005] B.C.W.L.D. 555 | (B.C. S.C., Dec 3, 2004)

1989 CarswellBC 507
British Columbia Supreme Court

Mohr v. C.J.A.

1989 CarswellBC 507, [1989] B.C.W.L.D. 2765, [1989] B.C.J. No. 2083, 36 E.T.R. 246

MOHR (ON BEHALF OF MOHR ON BEHALF OF LOCAL 2213 (MISSION)) et al. v. THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA IN BRITISH COLUMBIA et al.

Coultas J.

Heard: April 27 and 28, 1989
Judgment: November 16, 1989
Docket: Doc. No. Vancouver C862660

Counsel: *Scott Stewart* and *Michael Hoogbruin*, for plaintiffs.
Bruce Laughton and *Joan Gordon*, for defendants Colin Snell, Malcolm Brixham and the British Columbia Provincial Council of Carpenters.
Susan Paish, for defendants Kent Nielsen and John Kettlewell on behalf of the Carpentry Apprenticeship Joint Board and the British Columbia Construction Association.

Subject: Estates and Trusts
Related Abridgment Classifications
Estates and trusts
II Trusts
II.1 General principles
II.1.b Trust distinguished from other relationships
II.1.b.iii Contract
Headnote
Trusts and Trustees --- Trust distinguished from other relationships — Contract
Trusts and trustees — Nature of trust — Trust distinguished from other relationships — Contract — Agreement between employers' association and union creating fund for training in industry — Agreement not creating a trust.
Practice — Summary judgment — Availability of summary judgment — Application of principles — British Columbia Rules of Court, r. 18A.
The plaintiffs were, respectively, a journeyman carpenter and an apprentice carpenter and they claimed to sue as representatives of journeymen and apprentice carpenters in the defendant union. Their claims related to the fund established by a levy payable by employers for the training of apprenticeship and journeyman carpenters (the Apprenticeship Plan). The disbursement of money from the fund was determined by the Board established by the agreement between an employer's association and the council — the governing body of the union.
The plaintiffs claimed that the money had been disbursed from the fund for purposes not provided in the agreement and in an inequitable manner. They sought damages for breach of trust, breach of constructive trust and for inducing breach of trust, an

accounting, and an injunction restraining the defendants from using the funds for any purpose other than that provided for in the agreement. The defendants sought an order, pursuant to r. 18A of the Rules of Court, that the plaintiffs' claim be dismissed. There were 3 issues: (1) whether it was a proper case for determination under r. 18A; (2) whether the Apprenticeship Plan and the agreement enshrining it were created by collective agreement and, if so, whether any issue concerning rights emanating from the agreement should be governed solely by industrial relations, the Court declining to take jurisdiction; and (3) whether the fund was a trust fund and whether rights and duties associated with the fund arose from contract or trust.

Held:

The plaintiffs' action was dismissed.

(1) The matter raised in the application was suitable for determination under r. 18A.

(2) The Apprenticeship Plan was created by collective bargaining.

(3) The agreement did not, for the reasons that follow, create a trust. Rather, the agreement constituted a contract between the employers and the council of the union to benefit the construction industry generally, not to confer an enforceable benefit on any individual employee or employer.

(i) Although the agreement referred throughout to "trustees" and used the terminology of trust, that was not determinative.

(ii) Representatives of both the union and the employers confirmed that the Plan was not designed or administered to confer an enforceable benefit on any individual worker or employee.

(iii) The agreement gave the right to either party to it to alter its terms or to cancel the Plan without any reference to "beneficiaries" of it.

(iv) There was no provision in the agreement preserving the assets of the fund on termination of the agreement; there was nothing to prevent them from being returned to the employers.

(v) Unlike a pension fund in which an employee can point to a sum of money contributed by him or contributed on his behalf as a condition of employment, there were no specific beneficiaries in this fund. It was, rather, established for an industry-wide program.

(4) The issues raised in the action were governed by the law of industrial actions and the Court declined to take jurisdiction.

Table of Authorities

Cases considered:

Bethel, Re, [1971] 2 O.R. 316, 17 D.L.R. (3d) 652 (C.A.) — *considered*

Boe v. Alexander (1987), 28 E.T.R. 228, 15 B.C.L.R. (2d) 106, 41 D.L.R. (4th) 520 (C.A.) — *distinguished*

C.A.W., Local 458 v. White Farm Manufacturing Can. Ltd. (1988), 66 O.R. (2d) 535, 30 E.T.R. 202, 24 C.C.E.L. 188, C.E.B. & P.G.R. 8069 (H.C.), additional reasons at (1989), 66 O.R. (2d) 535 at 542, 31 E.T.R. 252 (H.C.) — *referred to*

Greenwood Shopping Plaza Ltd. v. Beattie, [1980] 2 S.C.R. 228, 39 N.S.R. (2d) 119, 71 A.P.R. 119, 10 B.L.R. 234, 111 D.L.R. (3d) 257, [1980] I.L.R. 1-1243, 32 N.R. 163 — *followed*

Hotra v. Hotel, Restaurant Union, Local 40 (16 October 1987), Doc. No. Vancouver C852645 (B.C. S.C.) — *referred to*

Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 C.P.C. (2d) 199, 36 B.C.L.R. (2d) 202 (C.A.) — *followed*

Johnson v. Carpentry Workers' Welfare Plan (Trustees of) (21 January 1988), Doc. No. New Westminster F851900 (B.C. Co. Ct.) — *referred to*

MacDonald v. Thompson (1988), 26 C.C.E.L. 269 (B.C. S.C.) — *referred to*

Marshall v. Health Labour Relations Assn. of B.C. (1988), 31 B.C.L.R. (2d) 359 (C.A.) — *referred to*

Massaro v. Labourers' Pension Plan of B.C. (Trustees of) (15 February 1988), Doc. No. Vancouver A873063 (B.C. S.C.) — *referred to*

Placer Development Ltd. v. Skyline Explorations Ltd. (1985), 67 B.C.L.R. 366 (C.A.) — *referred to*

Schebsman, Re; Ex parte Official Receiver, Trustee v. Cargo Superintendants (London) Ltd. & Schebsman, [1944] Ch. 83, [1943] 2 All E.R. 768 (C.A.) — *referred to*

Sorochan v. Sorochan, [1986] 5 W.W.R. 289, 2 R.F.L. (2d) 225, 46 Alta. L.R. (2d) 97 (S.C.C.) — *referred to*

St. Anne Nackawic Pulp & Paper Co. v. C.P.U., Loc. 219, [1986] 1 S.C.R. 704, 86 C.L.L.C. 14,037, 28 D.L.R. (4th) 1, 73 N.B.R. (2d) 236, 184 A.P.R. 236, 68 N.R. 112 — *followed*

Syndicat Catholique des Employés de Magasins v. Paquet Ltée, [1959] S.C.R. 206, 18 D.L.R. (2d) 346 — *followed*

Tobin Tractor (1957) Ltd. v. Western Surety Co. (1963), 42 W.W.R. 532, 40 D.L.R. (2d) 231 (Sask. Q.B.) — *applied*

61 The plaintiffs point to these factors, inter alia, which they say must lead me to conclude that the Agreement is a trust document creating an enforceable trust:

62 (1) The Agreement clearly evinces an intention to create a trust property, clearly describes the trust property, and clearly delineates the objects of the trust. (See D.M.W. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 107.)

63 (2) The words "in trust", or "as trustee for", or expressions close to them are found in the Agreement, and they reveal an intention to set up a trust. (See Waters, p. 109.)

64 (3) While this trust is revocable without the consent of the beneficiaries, courts have held this power is not fatal to the concept of trust.

65 The case relied upon is *Wilson v. Darling Island Stevedoring & Lighterage Co.*, [1956] 1 Lloyd's Rep. 346, 95 C.L.R., High Court of Australia. In his reasons, Mr. Justice Fullagar said, at p. 67 [C.L.R.]:

> That the common law rule was a rule which could operate unjustly in some circumstances may be conceded, but equity could and did intervene in many cases by treating the promisee as a trustee of a promise made for the benefit of a third party, and allowing the third party to enforce the promise, making the promisee-trustee, if necessary, a defendant in an action against the promisors. A well known example is *Lloyds v. Harper*. It is difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases. ...
>
> I cannot see why it should be necessary that such a trust should be irrevocable: a revocable trust is always enforceable in equity while it subsists.
>
> The defendant company in the present case does not rely upon any trust. It says that there is a rule of the common law which entitles it to rely on the exceptions from liability contained in the bill of lading.

66 That statement of law concerning a revocable trust being enforceable is obiter.

67 (4) It is not necessary that beneficiaries be "identified" at any particular time. It is sufficient to show that one is an object of the trust (*Re Bethel*, [1971] 2 O.R. 316, 17 D.L.R. (3d) 652 (C.A.)).

68 In *Bethel*, a testator left a sum of money to the executive of ficers of the T. Eaton Company to be used as a trust fund for "any needy or deserving" Toronto members of the Eaton Quarter Century Club. This club had no separate identity. Employees became members after 25 years of service with the company, and employees who were members had been transferred throughout Canada by the company. The trial Judge found the trust void for uncertainty. On appeal, the majority of the Court found a clear charitable intention. The Court prevented a gift failing for uncertainty by application of cy-pres.

69 (5) At any given time, individual apprentices and journeymen can be identified and each have an entitlement to training and upgrading programs pursuant to the Agreement, and therefore it creates a trust for their benefit.

70 (6) There are numerous examples of trust created in the business world. Examples are:

71 (a) Pension plans

72 At p. 439 of his *Law in Trusts in Canada*, 2d ed., Professor Waters writes of pension plans:

> A major concern to nearly all persons, whether employed by another or self-employed, is adequate provision for the period of retirement. Pension plans set up by employers, usually on the basis of a contribution both by the employer and the employee, have for many years been conducted through insurance companies. This still continues, whether the plan takes the form of individual employee annuity contracts, group annuity contracts, or deposit administration, but another and increasingly favoured pension arrangement is the trusteed pension plan.

To establish the existence of a trust in this case the plaintiff must prove affirmatively that the contractor and the municipality intended to create a trust for the benefit of persons, such as the plaintiff, who would come within the ambit of said par. 14. See *Vandepitte* case, *supra*, at p. 579.

Again, could the said contract be altered or terminated without the plaintiff's consent? *Cheshire & Fifoot's Law of Contract*, 5th ed., at p. 375, deals with 'the fundamental inconsistency between the concept of Trust and the concept of Contract' as follows:

> A trust, once it is constituted is irrevocable without the beneficiary's consent; a contract may be altered or discharged by the agreement of the contracting parties irrespective of the wishes of the beneficiary.

83 Judge Disbery concluded, at p. 543:

I can find nothing to indicate that either the contractor or municipality ever intended to create a trust for the use of the plaintiff or anybody else. The power given in the contract to the municipality to unilaterally cancel the contract, whether the contractor was in default or not, is completely repugnant to the concept of trust.

84 In his *Law of Trusts* to which I have referred, Professor Waters comments upon this statement of Judge Disbery [W.W.R., at 540]:

The interpretation of either facts or documents must not be warped, distorted or given undue emphasis in order to find the existence of a constructive trust,

and says of it [p. 51, n. 93]:

By this term (Judge Disbery) means a trust arising out of the construction of the language of the instrument.

85 Professor Waters [pp. 52-53] wrote of the "dividing line" referred to by Lord Green in *Re Schebsman; Ex parte Official Receiver, Trustee v. Cargo Superintendents (London) Ltd. & Schebsman*, [1944] Ch. 83, [1943] 2 All E.R. 768 (C.A.):

Here is the heart of the matter; a 'dividing line' is drawn between trust and such a contract. Unhappily, however, enquiry by the courts into the location of this line has proceeded along the lines that it lies between contract and trusts of express or construed intent only. That is to say, the courts are concerned to discover whether the parties to the contract intended, as revealed by the language of the contract, that the promisee became a trustee of the benefit for the contract for the third party.

If this is the extent of the inquiry, the line is not hard to find, at least in law if not on the facts of a particular case. The point has been made that, if A and B can vary their contract without the consent of C, then there is clearly no intention to create a trust. And this was echoed by Disbery J. in the *Tobin Tractor* decision, when he quoted Cheshire and *Fifoot's Law of Contract*:

> A trust, once it is constituted, is irrevocable without the beneficiary's consent; a contract may be altered or discharged by the agreement of the contracting parties irrespective of the wishes of the beneficiary.

This is a distinction of crucial significance and it arises from the fact that contract is obligation, while trust is transfer. The terms of a contract are binding on the parties to it, and cannot be unilaterally varied, but the parties may agree at any time to vary those terms, even after the contract has taken effect. He who is not a party to that contract, even if he is to be the beneficiary of the promisee's performance, cannot object. 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. If the contract also creates a trust of the benefit of that contract, the terms will show that no subsequent variation may be made without the beneficiary's consent. Few contracts demonstrate such

> an intention, and therefore it is only the occasional contract which through the medium of trust affords the third party a right of action against the promisee.
>
> Disbery J. makes the point in his citation of Cheshire and Fifoot that there is a difference between trust and contract because trusts are irrevocable. However, it has been said that [in Wilson v. Darling Island Stevedoring & Lighterage Co., supra] as the revocable trust is enforceable by the beneficiary if there has been no exercise of a power of revocation reserved by the settlor, in effect the beneficiary has a right of action despite the fact that the settlor can cancel the transfer at any time and at will. This is correct, but such a power must appear in the trust instrument or the evidence of declaration of trust. If it does not, the settlor cannot later revoke or amend the trust terms in any way, either unilaterally or by some purported agreement with, or consent of, the trustee. Though the revocable trust is even closer in result to that of the contract than is the irrevocable trust, it does not meet the point that without reservation in the trust instrument or declaration there can later be no variation of a trust.

86 (iii) There is no provision in the Agreement preserving the Fund on termination of the Agreement. The Agreement speaks of the Fund being disbursed through a liquidation trust proviso in keeping with the "current *Trust Act*" of British Columbia. No proviso has been produced and there is no evidence that one was ever prepared, agreed to or entered into. The *Trustee Act* of British Columbia [R.S.B.C. 1979, c. 414] does not assist, for it does not provide for disbursement of funds held in trust upon liquidation of that trust.

87 In the circumstances of this case, there is nothing in the Agreement to prevent the balance of monies in the Fund being returned to the contributing employers, and this is inconsistent with the concept of trust.

88 (iv) The Fund is not akin to a pension fund to which a specific beneficiary can point to his contribution or a right to an individual benefit. The Fund was established to benefit the construction industry generally by developing a well trained workforce, not to confer an enforceable benefit on any individual worker or employer.

89 (See Nielsen affidavit sworn February 3, 1989, para. 21 and Snell affidavit sworn February 3, 1989, para. 5).

90 (v) The Union is not a trust or analogous to a trust. If it were, trust law would govern every aspect of its business, including the administration of a collective agreement. To the extent that the Union is a fiduciary to its members, it is governed not by the law of trusts, but by the rules of the labour statute, and its own constitution and bylaws. (See *Hotra v. Hotel, Restaurant Union, Local 40* (16 October 1987), Doc. No. Vancouver C852645 (B.C. S.C.), a decision of Mr. Justice Gibbs; see also *Industrial Relations Act*, R.S.B.C. 1979, c. 212, s. 7.)

91 (vi) This is not a proper case to find a constructive trust. It is not alleged in the pleadings nor is there any suggestion in the pleadings that any defendant has been unjustly enriched. Unjust enrichment lies at the heart of constructive trust. (See *Sorochan v. Sorochan*, [1986] 5 W.W.R. 289, 2 R.F.L. (2d) 225, 46 Alta. L.R. (2d) 97 (S.C.C.).)

92 (vii) A terminology of "trust" in the Agreement does not make it a trust. (See *Hotra*, at p. 2; see also Waters' *Law of Trusts in Canada*, at p. 109.)

93 At p. 109, Professor Waters writes:

> The words employed to set up a trust, therefore, must show that the transferee is to take the property not beneficially, but for objects which the transferor describes. The words which nearly always reveal the intention are 'in trust', or 'as trustee for', but it is well established in common law courts, including those of Canada, that these words are neither conclusive nor indispensable.

94 I find that the Agreement does not create a trust — it is not a trust document. It is a contract entered into between employers and the Council to benefit the construction industry generally, not to confer an enforceable benefit on any individual employee or employer.

95 I so find for these reasons:

96 (1) The representatives of both the Union and employers, Snell and Nielsen, for many years associated with the Apprenticeship Plan and both members of the committee that negotiated the 1979 Agreement, both confirm that the Plan was not designed or administered to confer an enforceable benefit on any individual worker or employee.

97 (2) The parties to the Agreement could alter its terms without reference to the "cestui que trusts". The Court in *Greenwood* spoke of the power to so alter terms as a determinating factor in an inquiry to find whether a trust has or has not been created.

98 (3) The Agreement gives the right to either contracting party to cancel the Plan, without any reference to the beneficiaries.

99 It is true that in *Tobin*, supra, and *Greenwood*, the Court was considering a constructive, not an express trust. Counsel for the plaintiffs submits that these cases have no application, for we are dealing with an express trust. I cannot agree. The issue that I must resolve is — did the Agreement create a trust? The onus of proving it rests on the plaintiffs. The factors that the Courts in *Tobin* and *Greenwood* considered to determine if a trust did or did not exist are relevant to this inquiry.

100 (4) There is no provision in the Agreement preserving the monies in the Fund on termination of the Agreement — nothing to prevent them from being returned to the employers. In his affidavit sworn February 20, 1989, the plaintiff Steven Mohr deposes that the Fund received monies from the federal government for the purposes of training apprentices and upgrading journeymen. There is nothing in evidence to suggest that those monies so advanced could not be repaid to the government.

101 Mr. Mohr further deposes (in para. 32) that the Apprenticeship Trust Agreement and the Apprenticeship Joint Board have been terminated. He speaks of a Carpenters Joint Advisory Committee having been established in its place, but with terms of reference "yet to be determined".

102 (5) Unlike a pension fund to which an employee can point to a sum of money contributed by him or contributed on his behalf as a condition of employment, there are no specific beneficiaries to this Fund. It was established for an industry-wide program.

103 (6) While the Agreement throughout refers to "trustees" and uses the terminology "trust", that is not determinative.

104 (7) In the *Greenwood* and *Tobin* cases, the issue of trust was before the Court; in *Wilson v. Darling Island Stevedoring*, supra, it was not, and the remarks of Fullagar J., to which I have referred, were pure obiter.

105 (8) In *Boe v. Alexander*, supra, it was not disputed that a trust had been created. This is not surprising when one considers the Agreement under consideration in that case. In its preamble, it read:

> And whereas to affect the aforesaid purpose, the parties desire to create a trust and establish a fund to be used in the manner hereinafter set forth.

106 In the case at Bar, the parties wished to administer a fund.

107 The jurisdictional issue was not raised in the *Boe* case, nor in other cases referred to by the plaintiffs, nor was existence of a trust, an issue in them. (See: *Massaro v. Labourers' Pension Plan of B.C. (Trustees of)* (15 February 1988), Doc. No. Vancouver A873063, per Macdonald J. (B.C. S.C.); *MacDonald v. Thompson* (1988), 26 C.C.E.L. 269 (B.C. S.C.); *Johnson v. Carpentry Workers' Welfare Plan (Trustees of)* (21 January 1988), Doc. No. New Westminster F851900, per Hogarth Co. Ct. J.) (B.C. Co. Ct.).

108 In C.A.W., Local 458 v. White Farm Manufacturing Can. Ltd. (1988), 66 O.R. (2d) 535, 30 E.T.R. 202, 24 C.C.E.L. 188, C.E.B. & P.G.R. 8069 (H.C.), additional reasons at (1989), 66 O.R. (2d) 535 at 542, 31 E.T.R. 252 (H.C.), no jurisdictional issue was raised, although existence of a trust was disputed by the parties and found to exist by the Court.

The Results That Flow from My Finding on the Second Issue

TAB 2

1963 CarswellSask 42
Saskatchewan Court of Queen's Bench

Tobin Tractor (1957) Ltd. v. Western Surety Co.

1963 CarswellSask 42, 40 D.L.R. (2d) 231, 42 W.W.R. 532

Tobin Tractor (1957) Ltd. v. Western Surety Company

Disbery, J.

Judgment: May 9, 1963

Counsel: *W. M. Elliott*, for plaintiff.
E. R. Gritzfeld, for defendant.

Subject: Contracts

Headnote

Guarantee and Suretyship — Contractor's Performance Bond — No Right in Materialman to Sue Surety on Bond — Lack of Privity.

Where a contractor is obliged by an owner to enter into a performance bond, a materialman cannot sue the surety for non-performance; he is not a party to the contract and is without remedy at common law. In equity he is also without remedy unless the contract creates a constructive trust in his favour, which was not the case under the contract in question herein. Authorities extensively reviewed.

It is, however, regrettable that a surety, in consideration for a cash premium, may issue its performance bond conditioned to answer for debts to be incurred by a contractor in carrying out his work, and then, when debts have been so incurred and left unpaid, may advise creditors that it cannot be compelled to honour its undertaking because there is no privity between the surety and the creditors. No doubt materials and labour are often supplied in erroneous reliance upon such a performance bond.

***Disbery, J.*:**

1 This is a special case stated under O. XXIV of the Rules of Court to obtain the opinion of the court on certain questions of law which arise out of the facts as agreed to by counsel and the documents which form part of the case.

2 The rural municipality of Rosemount No. 378, hereafter referred to as "the municipality," desired to construct approximately five miles of municipal grid road and called for tenders for such work. One, Lloyd W. Bennell, hereafter referred to as "the contractor," submitted the successful tender and, accordingly, on May 16, 1959, a contract to construct said strip of roadway was entered into between the municipality and the contractor. This contract contained, *inter alia*, the following covenants, the relevant portions of which are as follows:

> (14) Payment by contractor for labour, etc.
>
> The Contractor shall promptly pay for all labour expended, services given and materials and supplies used in, upon, in respect of, or about the construction of the work, or any portion thereof, including any sum due for the labour or services of any sub-contractor, foreman, workman, labourer or other person ... the payments in respect of such labour, services, materials and supplies to include without prejudice to the foregoing generality all sums for:
>
> (b) The use, rent of [obviously misprint for 'or'] hire of:
>
> (1) Wagons or other plant or machinery;
>
> (2) Motor power equipment of any kind;

trust for the use and benefit of the plaintiff as a person coming within the provisions of sec. 14 of the contract; and, of course, being based thereon, the benefit of the collateral surety bond entered into by the defendant. Thus the plaintiff contends that it is a *cestui que trust* of such benefits and the municipality the trustee thereof. Learned counsel cited and I have read and considered the following authorities in support of this contention, namely: *Dutton v. Poole* (1678) 3 Keb 786, 2 Lev 210, 83 ER 523; *Tomlinson v. Gill* (1756) Amb 330, 27 ER 221; *Gregory and Parker v. Williams* (1817) 3 Mer 582, 36 ER 224; *Lamb v. Vice* (1840) 6 M & W 467, 9 LJ Ex 177, 151 ER 495; *Robertson v. Wait* (1853) 8 Exch 299, 22 LJ Ex 209, 155 ER 1360; *Fletcher v. Fletcher* (1844) 4 Hare 67, 14 LJ Ch 66, 67 ER 564; *Lloyd's v. Harper* (1880) 16 Ch D 290, 50 LJ Ch 140; *Les Affréteurs Réunis Société Anonyme v. Walford (London) Ltd.*, [1919] A.C. 801, 88 L.J.K.B. 861 (commonly known as *"Walford's case"*); *Smith v. River Douglas Catchment Board, supra; Drive Yourself Hire Co. (London) Ltd. v. Strutt, supra; Faulkner v. Faulkner, supra; McCannell v. Mabee McLaren Motors Ltd.*, [1926] 1 W.W.R. 353, 36 B.C.R. 369; *Metropolitan Loan Co. v. Canada Security Assur. Co., supra.* In the *McCannell* case, *supra*, Macdonald, C.J.A. said, at p. 357:

> ... this is not a case of a third party suing on a contract made by others for his benefit ....

25 The case is therefore not an authority with respect to constructive trusts. In passing, it is interesting to note that the learned authors *Cheshire and Fifoot* in their *Law of Contracts*, 5th ed., at p. 375, state with reference to the English cases that: "Any attempt to reconcile these decisions seems doomed to failure." Be this as it may, prior to the decision of *Tweddle v. Atkinson, supra*, instances can be found in the common-law courts where third-party beneficiaries enforced contracts to which they were strangers, while in the court of equity, chancery, the device of constructive trust was resorted to where the evidence permitted it; and in that way the blockade imposed by the doctrine of privity was overcome. Thus we find Lord Wright in the *Vandepitte* case, *supra*, saying, at p. 579:

> ... a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party.

26 14 *Halsbury*, 3rd ed., pp. 556-7, states:

> The doctrine of trusts applies also to contracts and where equity can spell out of a contract made between A and B for the benefit of C the construction that B intended to contract as trustee for C, even though nothing was said about any trust in the contract, C. is a *cestui que trust* under the contract and is allowed in equity to enforce it.

27 The defendant, on the other hand, maintains that the said contract is nothing more than a simple contract between the contractor and the municipality which, *inter alia*, contains a benefit for the plaintiff among its provisions; and such being the case, the doctrine of privity bars the plaintiff from enforcing it. The decision of this case therefore hangs upon the question of whether or not a constructive trust was created or whether the said contract is no more than a simple contract which contains a benefit for the plaintiff.

28 Romer, L.J. in *Green v. Russell; Re McCarthy, supra*, said at p. 531:

> An intention to provide benefits for someone else and to pay for them does not in itself give rise to a trusteeship.

29 Were it otherwise, then every time a contract contained a third-party benefit the third party would, in the words of Street, J., "seek refuge under the shelter of an alleged trust in his favour," and the efficacy of the doctrine of privity would thus be for all practical purposes at an end.

30 The interpretation of either facts or documents must not be warped, distorted or given undue emphasis in order to find the existence of a constructive trust, where a reasonable and impartial interpretation would reveal that such a trust was neither intended nor created; and this must prevail no matter how much one might sympathize with the third-party beneficiary and wish to help him in the light of the circumstances. When all is said and done, when a third-party beneficiary claims to be a *cestui que trust* it lies upon him to prove the existence of the trust. Lord Greene, M.R. put the matter aptly in *In re Schebsman; Official Receiver v. Cargo Superintendents Ltd.*, [1944] 1 Ch. 83, 113 LJ Ch 33, where at p. 89 he is reported as follows:

> It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third. That dividing line exists although it may not always be easy to determine where it is to be drawn.

31 This statement received the approval of Romer, L.J. in *Green v. Russell; Re McCarthy, supra*, at pp. 531-2; and *Chitty on Contracts*, 22nd ed., sec. 906, states:

> Equity leans against implying a trust for the benefit of a person not a party to the contract unless there is a clear intention to create one.

32 The courts refused to find a constructive trust in the following cases:

33 *Tweddle v. Atkinson, supra*: A covenant by Guy with John Tweddle to pay the plaintiff, William Tweddle, the sum of £2OO even although the agreement specifically provided that the plaintiff be given full power to sue Guy for said sum should he default in payment, which he did.

34 *Faulkner v. Faulkner, supra*: A covenant by a mortgagor with the mortgagee to educate a third person.

35 *Vandepitte v. Preferred Accident Insur. Co. of N.Y., supra*, at p. 581: An automobile accident insurance policy in which the insurer covenanted that the indemnity was also available to third persons driving the automobile with the consent of the insured.

36 *Crown Bakery Ltd. v. Preferred Accident Insur. Co. of N.Y., supra*: So also our court of appeal in like circumstances.

37 *Metropolitan Loan Co. v. Canada Security Assur. Co., supra*: An indemnity bond entered into by two applicants for bailiffs' licences and by the defendant as their surety to indemnify the city of Winnipeg, "and every other person or corporation" against defaults by the bailiffs. The bailiffs failed to pay to the plaintiff who was "another corporation" moneys collected for the plaintiff by them.

38 *Green v. Russell; Re McCarthy, supra*: A group accident insurance policy entered into between Russell, as insured, and Yorkshire Insurance Co. Ltd. as insurer, in which Green was named as an employee beneficiary in the schedule thereto for a benefit of £1,000.

39 Having considered examples of cases where no constructive trust was found to have been created, it now becomes necessary to consider briefly the nature of a trust in order to then examine the contract now before me to ascertain if the contractor and the municipality have created a constructive trust in favour of the plaintiff as a *cestui que trust* thereof. A definition of a trust which has received the approval of Cohen, J. in *In re Marshall's Will Trusts*, [1945] Ch. 217, 114 LJ Ch 118, and of Romer, L.J. in *Green v. Russell; Re McCarthy, supra*, at p. 531, is to be found in *Underhill's Law of Trusts and Trustees*, 11th ed., p. 3, and is as follows:

> A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestuis que trust*) of whom he may himself be one, and any one of whom may enforce the obligation.

40 To establish the existence of a trust in this case the plaintiff must prove affirmatively that the contractor and the municipality intended to create a trust for the benefit of persons, such as the plaintiff, who would come within the ambit of said par. 14. See *Vandepitte* case, *supra*, at p. 579.

41 Again, could the said contract be altered or terminated without the plaintiff's consent? *Cheshire & Fifoot's Law of Contract*, 5th ed., at p. 375, deals with "the fundamental inconsistency between the concept of Trust and the concept of Contract" as follows:

TAB 3

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: EnCana Midstream and Marketing v. IFP Technologies (Canada) Inc. | 2017 CarswellAlta 1669, [2017] S.C.C.A. No. 303 | (S.C.C., Aug 25, 2017)

2017 ABCA 157
Alberta Court of Appeal

IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing

2017 CarswellAlta 1133, 2017 ABCA 157, [2017] 12 W.W.R. 261, [2017] A.W.L.D. 3423, [2017] A.W.L.D. 3424, [2017] A.W.L.D. 3448, [2017] A.W.L.D. 3756, [2017] A.W.L.D. 3757, [2017] A.J. No. 666, 280 A.C.W.S. (3d) 752, 53 Alta. L.R. (6th) 96, 70 B.L.R. (5th) 173

IFP Technologies (Canada) Inc. (Appellant) and EnCana Midstream and Marketing, PanCanadian Resources, EnCana Corporation, EnCana Oil & Gas Developments Ltd., Canadian Forest Oil Ltd. and The Wiser Oil Company (Respondents)

Catherine Fraser C.J.A., Jack Watson, Patricia Rowbotham JJ.A.

Heard: October 16, 2015; November 10, 2015
Judgment: May 26, 2017
Docket: Calgary Appeal 1401-0235-AC

Proceedings: reversing *IFP Technologies (Canada) Inc. v. Encana Midstream and Marketing* (2014), 2014 CarswellAlta 1423, 591 A.R. 202, 2014 ABQB 470, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

Counsel: P. Edwards, R. de Waal, for Appellant
G.N. Stapon, Q.C., L.M. Gill, for Respondents

Subject: Contracts; Evidence; Natural Resources
Related Abridgment Classifications
Contracts
VII Construction and interpretation
VII.4 Resolving ambiguities
VII.4.e Miscellaneous
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.h Damages for breach
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.k Miscellaneous
Headnote
Contracts --- Construction and interpretation — Resolving ambiguities — Miscellaneous
Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically pro[illegible]

05.16-2249

to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trial judge held that joint operating agreement did not supersede asset exchange agreement — Trial judge ruled that working interest was not defined in asset exchange agreement — Trail judge found that provision in JOA, stating that working interest was limited to thermal and other enhanced recovery, was not conflict but rather provided definition — Trial judge held that under agreements, I Inc.'s working interest was always limited to thermal and other enhanced recovery methods — I Inc. appealed — Appeal allowed — Trial judge erred in law in failing to recognize that "working interest" was legal term of art with specific meaning in oil and gas industry — Trial judge disregarded in their entirety clear, compelling substantive provisions in AEA relating to 20 per cent of PCR's working interest that PCR conveyed to I Inc. — Trial judge wrongly relied on preamble provision in AEA to trump its substantive textual provisions — This led the trial judge into further errors and, in end, it led him to interpretation of the contract that would have given I Inc. not only interest incompatible with parties' objective intentions but one incompatible with law on working interests in oil and gas industry — Trial judge erred in finding that I Inc. acted unreasonably in withholding its consent to farmout to W Co. I Inc.'s withholding of consent was reasonable in circumstances of this case — Accordingly, PCR breached contract by proceeding as it did.

Natural resources --- Oil and gas — Exploration and operating agreements — Miscellaneous

Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trial judge held that agreements did not prohibit and actually contemplated primary production, and did not require PCR to undertake enhanced recovery operations — Trial judge found that I Inc. was unreasonable in withholding its consent to agreement between defendants — Trial judge ruled that I Inc. retained its 20 per cent working interest in thermal and other enhanced recovery at property and did not establish that its working interest was destroyed by primary operations — I Inc. appealed — Appeal allowed — Law is clear that "working interest" in relation to mineral substances in situ is particular kind of property right or interest in land — When owner of minerals in situ leases right to extract these minerals, right to extract is known as "working interest" — "Working interest" constitutes percentage of ownership that owner has to explore, drill and produce minerals from lands in question — Trial judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production, including through new wells, was permitted without limitation — I Inc.'s working interest remained undivided interest tenant in common equal to 20 per cent of PCR's working interest in site's petroleum and natural gas rights and in PCR miscellaneous interests in site, as both terms were defined in AEA — I Inc.'s withholding of consent was reasonable in circumstances of this case — Accordingly, PCR breached contract by proceeding as it did.

Natural resources --- Oil and gas — Exploration and operating agreements — Damages for breach

Plaintiff I Inc., research and development company, entered into deal with defendant PCR, Canadian oil and gas over plans to jointly work on enhanced recovery technology at site — I Inc. was granted 20 per cent working interest in asset exchange agreement ("AEA") — Joint operating agreement ("JOA"), attached as schedule, specified that working interest was limited to enhanced recovery — Economics of gas development changed, and PCR had to establish economically producing wells on site to prevent expiry of leases — PCR entered into agreement with defendant W Co., for it to act as operator on site, dealing with existing wells and taking over working interest — I Inc. waived its right of first refusal but refused to consent to transaction — I Inc. brought action against defendants for breach of agreement — Action dismissed — Trail judge held that I Inc. was unreasonable in withholding its consent to agreement between defendants — Trial judge ruled that I Inc. retained its 20 per cent working interest in thermal and other enhanced recovery at property and did not establish that its working interest was destroyed by primary operations — Trial judge held that accumulation of errors by I Inc.'s experts was such that valuation based on their evidence could not accepted and that any figure selected for damages would be guess unsupported by method, principle or evidence — Trial judge held that I Inc. was never in position to realize upon its working interest, and there was no chance of thermal development at site within reasonable time of alleged breach of contract — I Inc. appealed — Appeal allowed

on other grounds — Despite breach of contract when PCR transferred its interest to W Co., I Inc. merely lost opportunity to convince PCR that thermal project should be "go" — Realistically, having regard to all relevant considerations and factors, trial judge's conclusion that there was no chance thermal project would be implemented was correct — Therefore, trial judge made no reviewable error in concluding that any award of damages should be discounted by 100 per cent to reflect chance of non-occurrence of thermal project.

The plaintiff I Inc., a research and development company, entered into a deal with the defendant PCR, a Canadian oil and gas partnership, over plans to jointly work on enhanced recovery technology at a property in Alberta ("site"). The deal made between PCR and I Inc. involved a number of agreements. There was a Memorandum of Understanding ("MOU") and a formal Asset Exchange Agreement ("AEA)". Attached to the AEA as schedules were a number of agreements, including a Joint Operating Agreement ("JOA").

I Inc. was granted a 20 per cent working interest in the AEA.The JOA specified that a working interest was limited to enhanced recovery. PCR had to establish economically producing wells on site to prevent the expiry of leases. PCR entered into an agreement with the defendant W Co. for it to act as operator on site, dealing with existing wells and taking over the working interest. I Inc. waived its right of first refusal but refused to consent to the transaction. I Inc. brought an action against the defendants for breach of agreement. The action was dismissed.

The trial judge ruled that "working interest" was not defined in the AEA and that the provision in the JOA stating that working interest was limited to thermal and other enhanced recovery, was not in conflict but rather provided the definition. The trial judge held that under the agreements, I Inc.'s working interest was always limited to thermal and other enhanced recovery methods. I Inc. appealed.

Held: The appeal was allowed.

Per Fraser C.J.A. (Rowbotham J.A. concurring) The term "working interest" has an accepted meaning and usage in the oil and gas industry sector Its interpretation has precedential value, therefore it must be interpreted consistently. While a legal term of art may be modified by the parties to an agreement, that does not permit a trial judge to ignore the meaning attributable to it in the absence of such modification. To do so is tantamount to failing to take into account a key term of a contract or relevant factor or ignoring applicable principles and governing authorities. That is a question of law reviewable for correctness.

In a recent contractual interpretation case, the Supreme Court of Canada clarified that courts ought to "have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract." While the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. An antecedent agreement like the MOU, which was agreed to in writing by both PCR and I Inc., fell within the category of objective evidence of background facts. Netiations preceding the conclusion of the MOU were also relevant to the extent that they shed light on the factual matrix.

The AEA referred to PCR's conveying to I Inc. 20 per cent of PCR's "working interest" in the site. "Working interest", as that term was used in the AEA, had a specific legal meaning. Unfortunately, the trial judge failed to recognize this, then compounded this error by wrongly using the fact that the parties had not expressly defined the meaning of "working interest" in the AEA to disregard, in their entirety, the textually explicit conveyance articles in the AEA.

The fact that the AEA did not expressly define the term "working interest" was irrelevant, since it is a legal term of art. The law is clear that a "working interest" in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* leases the right to extract these minerals, the right to extract is known as a "working interest." Simply stated, "working interest" constitutes the percentage of ownership that an owner has to explore, drill and produce minerals from the lands in question.

The trial judge found that the JOA was determinative of the nature and extent of I Inc.'s working interest in the site. In so finding, however, the trial judge failed to consider surrounding circumstances on the basis the contract was not ambiguous. This interpretive approach constituted a reviewable error of law. Had the surrounding circumstances been taken into account, it would have been apparent that the JOA was not intended to, and did not, limit I Inc.'s working interest in the site.

The incontrovertible facts, as revealed in the supporting documentary evidence, confirmed that PCR and I Inc. agreed, following negotiations between the parties, that I Inc. would receive 20 per cent of PCR's working interest in all development in the site. That agreement, documented in the MOU, did not limit I Inc.'s interest in the site to thermal or enhanced production only. In ignoring this factual matrix, the trial judge also relied on Article 7.3 of the AEA, which provided that the AEA "supercedes

all other agreements, documents, writings, and verbal understandings among the Parties relating to the subject matter hereof and expresses the entire understanding of the Parties with respect to the subject matter hereof." On this basis, the trial judge effectively dismissed the MOU and other surrounding circumstances as irrelevant to the interpretive exercise. In so doing, he erred.

The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear when it is not.

The trial judge failed to recognize that the AEA and the JOA served fundamentally different objectives. The AEA dealt with ownership of the assets. The JOA outlined the terms under which the parties would operate to exploit those assets.

The record was replete with evidence that both PCR and I Inc. considered primary production to be finished at the site. The JOA did not address the terms and conditions under which primary production could be restarted or initiated without I Inc.'s agreement. Consequently, the trial judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production, including through new wells, was permitted without limitation and in further concluding that W Co. did no more than PCR was entitled to do when it reactivated primary production at the site.

I Inc.'s working interest remained an undivided interest as a tenant in common equal to 20 per cent of PCR's working interest in the site's petroleum and natural gas rights and in the PCR miscellaneous interests in the site, as both terms were defined in the AEA.

The trial judge erred in finding that I Inc. acted unreasonably in withholding its consent to the farmout to W Co. I Inc.'s withholding of consent was reasonable in the circumstances of this case. Accordingly, PCR breached the contract by proceeding as it did.

The JOA did not obligate PCR to implement a thermal project. Corporate priorities, financial circumstances and the economy can all change, but that does not end the analysis. The trial judge failed to consider whether there was nevertheless, at a minimum, a reasonable expectation that PCR would not engage in primary production in a manner that substantially nullified the contractual objectives or caused significant harm. Having regard to the entirety of the contract and the factual matrix, such an expectation was a reasonable one.

Despite the breach of contract when PCR transferred its interest to W Co., I Inc. merely lost an opportunity to convince PCR that a thermal project should be a "go" and an opportunity to agree with PCR on other methods to exploit the minerals at the site. Realistically, having regard to all relevant considerations and factors, the trial judge's conclusion that there was no chance a thermal project would be implemented was correct. Therefore, the trial judge made no reviewable error in concluding that any award of damages should be discounted by 100 per cent to reflect the chance of non-occurrence of a thermal project.

Per Watson J.A. (dissenting): The trial judge's reasons properly accepted that the onus was on PCR to prove consent was unreasonably withheld. It was not a palpable error to find that I Inc.'s rationale for refusing consent was unreasonable because it had the effect of overriding legitimate rights of another party to the same deal. There was no reasonable refusal under the terms of the deal. As a matter of law, I Inc. was in no worse position after the farm-out to W Co. than it was before. PCR was under no obligation to develop the thermal and enhanced recovery potential of the site. I Inc. did not contract for that obligation.

If a reasonable reading of the deal did not support the sort of veto that I Inc. asserted could be based on its reasonable expectations, a veto could not be grounded in reasonable expectations in law. Reasonable expectations of persons involved in a specific industry (industry expectations) may also have a role in assessing whether an ambiguous clause or term of a contract should be given a specific meaning. Such expectations are not subjective. In a sense, reasonable expectations grounded in the practice of the relevant industry may be circumstantial evidence of what would be the likely objective meaning of the clause or term and therefore its case-specific meaning.

The trial judge's finding of that there was no breach of the deal was reasonable.

The appeal should be dismissed.

Table of Authorities

Cases considered by *Catherine Fraser C.J.A.*:

A. Goal of Contractual Interpretation

79 I now turn to a brief overview of the applicable principles of contractual interpretation. The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation: *Sattva*, *supra* at para 49. To this end, "the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix": Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) at 33 [Hall]. Accordingly, disputed contractual terms must be interpreted, not in isolation, but in light of the contract as a whole: *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4 (S.C.C.) at para 64, [2010] 1 S.C.R. 69 (S.C.C.).

1. Requirement to Consider Factual Matrix

80 One aspect of the current law on contractual interpretation engaged by this appeal relates to the relevance of the factual matrix. In *Sattva*, the Supreme Court finally clarified that courts ought to "have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract" (para 46). Why? As the Supreme Court noted, "ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning" (para 47).

81 Considering the surrounding circumstances of a contract does not offend the parol evidence rule. That rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract. However, evidence of surrounding circumstances is not used for this purpose but rather as an *objective* interpretive aid to determine the meaning of the words the parties used: *Sattva*, *supra* at paras 59-61. Therefore, while the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. The goal is to deepen the trial judge's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. This approach is in keeping with Lord Steyn's famous admonition in *R. (on the application of Daly) v. Secretary of State for the Home Department*, [2001] UKHL 26 (Eng. H.L.) at para 28 that "[i]n law context is everything".

82 Thus, in interpreting a contract, a trial judge must consider the relevant surrounding circumstances even in the absence of ambiguity: Hall, *supra* at 24-25; John D. McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 751 [McCamus]; *Bighorn*, *supra* at para 10; *Seven Oaks Inn Partnership v. Directcash Management Inc.*, 2014 SKCA 106 (Sask. C.A.) at para 13, (2014), 446 Sask. R. 89 (Sask. C.A.); *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2013 ABCA 40 (Alta. C.A.) at para 31, (2013), 542 A.R. 212 (Alta. C.A.) [*Nexxtep*], citing *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59 (Ont. C.A.) at para 54, (2007), 85 O.R. (3d) 616 (Ont. C.A.); *Hi-Tech Group Inc. v. Sears Canada Inc.*, 2001 CanLII 24049 at para 23, (2001), 52 O.R. (3d) 97 (Ont. C.A.) [*Hi-Tech*]; *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21 (Nfld. C.A.) at para 10, (2000), 5 C.L.R. (3d) 55 (Nfld. C.A.).

83 Determining what constitute properly surrounding circumstances is a question of fact. As to what is meant by surrounding circumstances, this consists of "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": *Sattva*, *supra* at para 58. Examples of relevant background facts include: (1) the genesis, aim or purpose of the contract; (2) the nature of the relationship created by the contract; and (3) the nature or custom of the market or industry in which the contract was executed: *Sattva*, *supra* at paras 47-48; *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71 (Man. C.A.) at para 15, (2003), 173 Man. R. (2d) 300 (Man. C.A.); *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 (Man. C.A.) at para 72, (2011), 270 Man. R. (2d) 63 (Man. C.A.); *Ledcor*, *supra* at paras 30, 106. Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": *Sattva*, *supra* at para 58, citing Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at 913.

84 All this being so, it will be obvious why the factual matrix, that is surrounding circumstances, of a contract can be critical to understanding the objective intentions of the parties. That is certainly so in interpreting the Contract between PCR and IFP. Of particular relevance on this appeal are the genesis and purpose of the Contract and the relevant background, including the MOU. An antecedent agreement like the MOU, which has been agreed to in writing by both PCR and IFP, falls within the category of objective evidence of background facts.

85 Negotiations preceding the conclusion of the MOU are also relevant to the extent that they shed light on the factual matrix. It is true that evidence of negotiations is not itself admissible as part of the factual matrix: Hall, *supra* at 29; *Keephills Aggregate Co. v. Riverview Properties Inc.*, 2011 ABCA 101 (Alta. C.A.) at para 13, (2011), 44 Alta. L.R. (5th) 264 (Alta. C.A.) [*Keephills*]. Nor generally are prior drafts of an agreement: *Wesbell Networks Inc. (Receiver of) v. Bell Canada*, 2015 ONCA 33 (Ont. C.A.) at para 13, (2015), 248 A.C.W.S. (3d) 820 (Ont. C.A.). However, evidence of negotiations is relevant insofar as that evidence *shows* the factual matrix, for example by helping to explain the genesis and aim of the contract: Hall, *supra* at 30, 80; *Nexxtep*, *supra* at para 32. Moreover, written evidence of those negotiations is far more objective evidence of the parties' intentions than after-the-fact evidence from opposing parties about oral statements made during negotiations.

2. Admissibility of Parol Evidence to Resolve Ambiguity

86 Further, where a contract itself is ambiguous, extrinsic evidence, that is parol evidence, may be admitted to resolve the ambiguity: Hall, *supra* at 59; McCamus, *supra* at 205; *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*, 1998 ABCA 333 (Alta. C.A.) at para 28, (1998), 223 A.R. 180 (Alta. C.A.) [*Paddon Hughes*]; *Guaranty Properties Ltd. v. Edmonton (City)*, 2000 ABCA 215 (Alta. C.A.) at para 23, 261 AR 376; *Nexxtep*, *supra* at para 20. In the face of ambiguity, the interpretation promoting business efficacy is to be preferred so long as it is supported by the text: *Keephills*, *supra* at para 12; Hall, *supra* at 38-47.

87 Mere difficulty in interpreting a contract is not the same as ambiguity: *Paddon Hughes*, *supra* at para 29. A contract is ambiguous when the words are "reasonably susceptible of more than one meaning": *Hi-Tech*, *supra* at para 18. An ambiguity in the contract also allows courts to consider evidence of the parties' subsequent conduct post-contract: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 (Ont. C.A.) at paras 46, 56, (2016), 404 D.L.R. (4th) 512 (Ont. C.A.); Hall, *supra* at 83-85. But it must be understood that even under this ambiguity exception to the parol evidence rule, there are limitations as to what parol evidence is admissible. In this regard, evidence as to the parties' subjective intentions is generally inadmissible.

3. Interpreting Commercial Contracts

88 Also of particular importance on this appeal, commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: McCamus, *supra* at 763-766. In the absence of evidence of a bad bargain, courts should not interpret a contract in a way that yields an unrealistic or absurd result.

B. Conclusion

89 In the end, contractual interpretation is not an exercise in second guessing what could have been included in a contract while discounting or dismissing relevant terms of a contract and uncontradicted contextual information. It is instead an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context.

VI. Analysis

A. Overview of IFP's Interest in Eyehill Creek

90 Following a careful and comprehensive review of the QB Reasons and all relevant documentation, I have concluded that the Trial Judge erred in concluding that the Contract gave IFP a 20% interest in thermal and enhanced recovery methods only at Eyehill Creek. In my view, the Contract reveals that PCR agreed to transfer, and did transfer, to IFP 20% of PCR's working interest in all the assets held by PCR in Eyehill Creek, including both Crown oil and gas leases and leases that PCR

05.16-2254

TAB 4

2006 CarswellOnt 3986
Ontario Superior Court of Justice

Itak International Corp. v. CPI Plastics Group Ltd.

2006 CarswellOnt 3986, [2006] O.J. No. 2637, 149 A.C.W.S. (3d) 595, 20 B.L.R. (4th) 67

Itak International Corp. (Applicant) and CPI Plastics Group Limited and Peter F. Clark (Respondents)

C. Campbell J.

Heard: May 19, 2006
Judgment: June 21, 2006
Docket: 05-CL-6182

Counsel: Matthew J. Latella for Applicant
W. Paul Huston for Respondents, CPI Plastics Group Limited and Peter F. Clark

Subject: Corporate and Commercial
Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
III.2 Shares
III.2.a Share capital
III.2.a.iv Repurchase or redemption (decrease)
III.2.a.iv.C Miscellaneous
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.D Orders for relief
III.3.e.ii.D.2 Order for purchase of shares

Headnote

Business associations --- Specific corporate organization matters — Shares — Share capital — Repurchase or redemption (decrease) — General principles

Holding company had owned approximately 20 percent of predecessor to plastics company — Upon reverse takeover of plastics company, agreement was reached that portion of holding company's common shares would be converted into retractable preference shares, which could be retracted by holding company on demand — Rights and conditions attached to preference shares included that if plastics company could not, by insolvency provisions "or otherwise" redeem all shares, plastics company was only required to redeem maximum number of shares determined permissible by directors of plastics company — Holding company gave written notice of redemption to plastics company — Plastics company relied on "or otherwise" statement in contract and legal opinion to refuse retraction of shares, based on opinion that retraction would affect banking arrangements, and that plastics company was experiencing financial pressures due to seasonal nature of business, rising cost of resin, and falling US dollar — Holding company brought application for order that plastics company purchase all preference shares held by holding company in accordance with contract between companies — Application granted — Lawyer's opinion letter could not be regarded as careful, comprehensive, considered legal opinion as it contained limitations — Plastics company was required by contract to retract holding company's preference shares, and such contractual right was not subject to bank financing — Common sense dictated that financial risk to plastics company in complying with redemption was required to be risk of severe

financial distress approaching insolvency — No evidence existed that risk to plastics company was severe — Business judgment of directors of plastics company lacked touchstone of informed reasoned judgment as there was no dialogue with holding company, and no offer to make partial payment or time-frame as to when retraction right could be honoured.

Business associations --- Specific corporate organization matters — Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief — Order for purchase of shares

Holding company had owned approximately 20 percent of predecessor to plastics company — Upon reverse takeover of plastics company, agreement was reached that portion of holding company's common shares would be converted into retractable preference shares, which could be retracted by holding company on demand — Rights and conditions attached to preference shares included that if plastics company could not, by insolvency provisions "or otherwise" redeem all shares, plastics company was only required to redeem maximum number of shares determined permissible by directors of plastics company — Holding company gave written notice of redemption to plastics company — Plastics company relied on "or otherwise" statement in contract and legal opinion to refuse retraction of shares, based on opinion that retraction would affect banking arrangements, and that plastics company was experiencing financial pressures due to seasonal nature of business, rising cost of resin, and falling US dollar — Holding company brought application for order that plastics company purchase all preference shares held by holding company in accordance with contract between companies — Application granted — Agreement between parties constituted best evidence of parties' reasonable expectations — Parties' rights were defined in documentation which created security interest upon which claim was based — Effect of refusal to honour retraction rights of holding company was to give preferential treatment to one class of shareholder over another.

Table of Authorities

Cases considered by *C. Campbell J.*:

Catalyst Fund General Partner I Inc. v. Hollinger Inc. (2006), 2006 CarswellOnt 1416, 15 B.L.R. (4th) 171, 208 O.A.C. 55, 79 O.R. (3d) 288, 266 D.L.R. (4th) 228 (Ont. C.A.)

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 40 B.C.R. 28, 60 Alta. L.R. (2d) 122, 40 B.L.R. 28, 1988 CarswellAlta 103 (Alta. Q.B.) — considered

Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board) (2006), 2006 CarswellOnt 13, 12 B.L.R. (4th) 189, 206 O.A.C. 61, 263 D.L.R. (4th) 450, 79 O.R. (3d) 81 (Ont. C.A.) — considered

Kerr v. Danier Leather Inc. (2005), 2005 CarswellOnt 7296, 11 B.L.R. (4th) 1, 77 O.R. (3d) 321, 205 O.A.C. 313, 261 D.L.R. (4th) 400 (Ont. C.A.) — referred to

Linamar Corp. v. Wescast Industries Inc. (2004), 1 B.L.R. (4th) 253, 2004 CarswellOnt 2329 (Ont. S.C.J.) — considered

Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 85 O.A.C. 29, 23 B.L.R. (2d) 286, 1995 CarswellOnt 1207 (Ont. C.A.) — followed

Pente Investment Management Ltd. v. Schneider Corp. (1998), 1998 CarswellOnt 4035, 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (Ont. C.A.) — considered

People's Department Stores Ltd. (1992) Inc., Re (2004), (sub nom. *Peoples Department Stores Inc. (Trustee of) v. Wise*) 244 D.L.R. (4th) 564, (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Eng.), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, 2004 SCC 68, 2004 CarswellQue 2862, 2004 CarswellQue 2863 (S.C.C.) — referred to

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2002), 2002 CarswellOnt 2096, 214 D.L.R. (4th) 496, 32 C.C.P.B. 120, 27 B.L.R. (3d) 53, 19 C.C.E.L. (3d) 203 (Ont. S.C.J. [Commercial List]) — followed

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2004), 250 D.L.R. (4th) 526, 42 B.L.R. (3d) 34, 32 C.C.E.L. (3d) 68, 40 C.C.P.B. 114, 2004 CarswellOnt 691, (sub nom. *UPM-Kymmene Corp. v. Repap Enterprises Inc.*) 183 O.A.C. 310 (Ont. C.A.) — referred to

Waxman v. Waxman (2002), 2002 CarswellOnt 2308, 25 B.L.R. (3d) 1 (Ont. S.C.J.) — referred to

Waxman v. Waxman (2004), 186 O.A.C. 201, 44 B.L.R. (3d) 165, 2004 CarswellOnt 1715 (Ont. C.A.) — referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

s. 248 — considered

s. 248(1) — pursuant to

With the above limitation, the lawyer's letter cannot be regarded as a careful, comprehensive, considered legal opinion.

19 The board of directors apparently considered two matters when it reached a conclusion that the "or otherwise" language supported a decision not to accept retraction within the time set out in the agreements.

20 The first consideration was that the language "or otherwise" would permit CPI to enter into banking arrangements, including negative covenants containing "debt to working capital ratios" without consideration of the retraction rights.

21 The second consideration is as set out in paragraph 18 of the CPI factum:

> At the time CPI received the redemption notice, the Company was experiencing financial pressures which included, the seasonal nature of the business, the rising cost of resin and the falling American dollar relative to the Canadian Dollar. It was felt that it was financially prudent to decline to redeem Itak's shares in these challenging financial circumstances. CPI's 2005 Q3 2005 year end results reflect these challenges.

22 The Applicant challenges that statement and its bona fides, particularly in the circumstances of its timing and of the opinion sought and obtained from outside counsel.

23 In the view I take of this Application, it is not necessary to decide all the issues of bona fides or the lack thereof. There does not appear to be any issue that CPI is contractually required to retract the First Preference Shares of the Applicant.

24 The question more appropriately put, is the following: Is the failure of CPI to retract the Applicant's shares based on the judgment of its Board of Directors that it would not be prudent to do so exercising their business judgment in the context of negative banking covenants and adverse market conditions oppressive conduct within the meaning of the provisions of the *OBCA* for which a remedy is appropriate?

25 A subsidiary question arises, namely, assuming CPI was entitled to exercise business judgment in respect of its obligation, was it exercised reasonably?

26 It is most often difficult to reach findings of fact based on affidavits and transcripts without the benefit of seeing the witnesses and hearing their evidence. In the view I take of the matter, it is not necessary to make specific findings of credibility or intent. There is sufficient objective evidence on which to reach a conclusion regarding the exercise of business judgment.

27 On the material before me, there is nothing to support the suggestion that the contractual right to retraction was specifically subject to any bank financing. The banking covenants that appear to have arisen after the rights arose do not specifically refer to such rights. The Applicant was neither consulted nor asked for consent regarding the banking arrangements after the notice of retraction was sent.

28 I agree with the submission of the Applicant that what has come to be known as the *ejusdem generis* rule would appear to apply to the "or otherwise" term as it appears in the contractual provision at issue. This legal concept was not considered by counsel retained to give the legal opinion relied on.

29 The *ejusdem generis* rule is defined in *Black's Law Dictionary*, 7th Edition, West Group, St. Paul Minnesota, 1999 at page 535, as:

> A canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. For example, in the phrase, horses, cattle, sheep, pigs, goats or any other barnyard animal, the general language or any other barnyard animal — despite its seeming breadths — would probably be held to include only four-legged, hoofed mammals (and thus would exclude chickens.)

There are a myriad of legal decisions that have adopted that description of the canon with similar illustrations.

TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bennett v. British Columbia | 2009 BCSC 1358, 2009 CarswellBC 2635, [2009] B.C.J. No. 1955, 77 C.C.P.B. 56, 181 A.C.W.S. (3d) 596, [2009] B.C.W.L.D. 7782, [2009] B.C.W.L.D. 7783, 2009 C.E.B. & P.G.R. 8363 (headnote only) | (B.C. S.C., Oct 1, 2009)

1995 CarswellOnt 318
Ontario Court of Justice (General Division)

Canada (Attorney General) v. Confederation Life Insurance Co.

1995 CarswellOnt 318, 1995 C.E.B. & P.G.R. 8227 (headnote only), [1995] O.J. No. 1959, 24 O.R. (3d) 717, 31 C.C.L.I. (2d) 77, 33 C.B.R. (3d) 161, 56 A.C.W.S. (3d) 509, 8 C.C.P.B. 1, 8 E.T.R. (2d) 72

Re CONFEDERATION LIFE INSURANCE COMPANY; AND Re Insurance Companies Act, S.C. 1991, as amended; AND Re Winding-up Act, R.S.C. 1985, c. W-11, as amended

ATTORNEY GENERAL OF CANADA v. CONFEDERATION LIFE INSURANCE COMPANY

R.A. Blair J.

Heard: March 3, 7, 8, 20, 21, 27, 28 and 31 and April 5, 6 and 13, 1995
Judgment: July 4, 1995
Docket: Doc. RE 4315/94

Counsel: *Benjamin Zarnett, Andrea W. Rowe* and *Michele Altaras*, for Peat Marwick Thorne Inc., agent of Superintendent of Financial Institutions, provisional liquidator of Confederation Life Insurance Company.
Mark Zigler, Susan Rowland and *Cynthia Weekes*, appointed as representative counsel to represent interests of retirees of Confederation Life Insurance Company.
Donald C. Matheson, Q.C., Martha Milczynski and *Clifton Prophet*, appointed as representative counsel to represent interests of Supplementary Pensioners "In Pay"; and appointed as representative counsel to represent interests of Messrs. Rhind and Burns in respect of their claims for payment from Confederation Life Insurance Companies Deferred Compensation Plan.
Ronald Robertson, Q.C., Michael MacNaughton and *Edmond Lamek*, appointed as representative counsel to represent interests of Supplementary Pensioners "Not In Pay".
J.H. Grout and *Aida Van Wees*, appointed as representative counsel to represent interests of all policyholders and claimants of Confederation Life Insurance Company other than those persons described above.
Charles Scott and *David Roney*, for Canadian Life and Health Insurance Compensation Corporation.
Shaun Devlin and *Peggy McCallum*, for Superintendent of Pensions.
John Varley and *M. Jasmine Sweatman*, for Deloitte & Touche which was appointed administrator of Confederation Life Insurance Company Pension Plan for Canadian Salaried Employees by Superintendent of Pensions.
Hart Schwartz, for intervenor, Attorney General of Ontario.
R. Stephen Paddon, Q.C. and *Russell Laishley*, for Prost Investments Limited, Grant Forest Industries Corporation, Domco Food Services Ltd., Sullivan Entertainment, The Miller McAsphalt Corp. and CCL Industries Inc., policyholders.
Robb Heintzman, for Price Waterhouse Limited, liquidator for Confederation Trust Company.
Lawrence Ritchie, for Avenor Inc., Coopérative fédérée du Québec, Avenor Maritimes Inc., Bombardier Inc., ITT Industries of Canada Limited and AlliedSignal Canada Inc., policyholders.
Jeff Carhart, for Association of Confederation Life Contractholders, Inc.
Dana Fuller and *Derrick Tay*, for Fidelity Management Trust Company, policyholder.
Ian Morris, for Daniel Wiseblott, former employee of Confederation Life Insurance Company.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Insurance

Related Abridgment Classifications

Business associations

VI Changes to corporate status

VI.4 Winding-up

VI.4.b Under Dominion Act

VI.4.b.vii Claims of creditors

VI.4.b.vii.F Miscellaneous

Pensions

I Private pension plans

I.2 Payment of pension

I.2.l Bankruptcy or insolvency of employer

I.2.l.iii Supplementary plans

Headnote

Corporations --- Winding-up — Under Dominion Act — Claims of creditors

Corporations — Winding-up — Priorities — Employees of life insurance company ranking behind policyholders as ordinary unsecured creditors — Employees not qualifying as "policyholders" under s. 161(1)(c) of Winding-up Act and failing to establish facts that would support claim of trust — Winding-up Act, R.S.C. 1985, c. W-11, s. 161(1)(c).

A life insurance company was ordered to be wound up. The company had a contractual arrangement with its employees as part of their remuneration package. Under the arrangement, they would be entitled to long-term medical, dental and life insurance coverage after their retirement. The company had also set up a supplementary retirement income arrangement with its senior officers, the purpose of which was to "top up" the benefits provided under the company's registered pension plan for officers and employees.

One of the issues in the winding up process was the priority to the company's remaining assets between the employees and insurance policyholders. Since only "policyholders" are entitled to priority under the distribution provisions of the *Winding-up Act*, the employee claimants could only receive effective protection in the winding-up proceedings if they could show that their claims were in the nature of trust claims or if they could show themselves to be in the category of policyholders who had priority.

Held:

The policyholders had priority.

Under s. 161(1)(*c*) of the *Winding-up Act*, the claims of "policyholders" of the company rank in priority after the costs of the liquidation and preferred claim given to employees for three months' wages, but ahead of the priority provided in s. 161(2) for ordinary or general creditors. The only reason the claimants could argue that they were "policyholders" under the Act was because the liquidation of the company was a liquidation of an insurance company. Parliament could not have intended to treat employees differently with respect to priority on liquidation simply because of the nature of their employer's business. Therefore, the claimants were not "policyholders" as that term is used in s. 161(1)(*c*).

None of the claimants was successful in showing the existence of an express trust with respect to their benefits. The trust claims failed because certainty of intention to create a trust and certainty of subject-matter were not shown. No funds or assets were set aside or designated to fund any of the claimants retirement benefits arrangements.

Insufficient evidence was adduced to support the claimants' suggestion that constructive trusts should be declared. There was no indication that there was fiduciary relationship between the company and the claimants with respect to the retirement benefits arrangements. The evidence did not show a mutual understanding that the benefits would be pre-funded or secured, and there was nothing upon which to base a finding that the claimants had any reasonable expectation that the company had undertaken to subordinate its own interests, and those of its policyholders, to those of the claimants with respect to the benefits. Therefore, since there was no fiduciary relationship in this regard, no constructive trust could be imposed as a remedy for breach of the obligations arising out of such a relationship.

No constructive trust could be imposed on the basis of a finding of unjust enrichment. While the company benefitted from the services of its former employees, and they were going to suffer from the collapse of the company, the deprivation of the claimants was not related to the company's enrichment. The deprivation of the claimants related to the company's collapse.

> Insolvency and the winding-up of an insurance company are two events which threaten the protection and the financial security sought by the people who execute annuity contracts with an insurer, if they cannot benefit from the privileged status provided by the legislature in the Winding-Up Act.

122 The purpose of the regulatory scheme governing the insurance industry, and of the priority scheme enacted through s.161(1) of the *Winding-up Act*, supra, in my view, is to protect policyholders who invest funds with an insurance company. In such circumstances the regulatory scheme established under the *Insurance Companies Act*, supra, requires that an adequate reserve be established to cover the actuarial liability associated with the investment. What the "policyholder" priority of para.161(1)(*c*) does is to preserve access to that reserve by arm's-length purchasers of financial services products from life insurance companies, when such companies become insolvent.

123 It is not the senior officers of the Company — many of whom, including the Chairman and President, would have been at the helm in the period leading up to the collapse — whom the priority scheme is designed to protect. Vaulting the claims of such senior officers — and even the retired employees as well — into the same position as policyholders of the Company's products would mean ignoring the carefully constructed regulatory scheme which Parliament and the Legislatures have erected.

124 The only reason the Claimants are able to argue that their claims are claims of "policyholders" under the *Winding-up Act*, supra, is because the liquidation of their employer, Confederation Life, is the liquidation of an insurance company. Parliament, in my opinion, could not have intended to treat employees differently, in terms of priority on the liquidation of their employer, simply because of the nature of their employer's business. That, however, would be the result if the Claimants' position on the "policyholder" argument were to prevail. In my view, it cannot prevail.

125 I therefore hold that neither the Retirees nor the Supplementary Pensioners nor the Deferred Compensation Claimants are "policyholders" of Confederation Life, as that term is contemplated in para.161(1)(*c*) of the *Winding-up Act*, supra.

126 Finally, even if it could be said that the Claimants are "policyholders", as contemplated by s.161 of the *Winding-up Act*, supra, they would only rank, in the circumstances of this case, with "other creditors and *policyholders*" under subs.161(2), in my opinion. Ensuring the integrity of the legislative scheme of priority, intended as it is to protect arm's-length purchasers of insurance policies and annuities from insurers, commands nothing less.

127 I turn now to the issues of whether Confederation Life is bound by trust or fiduciary obligations in relation to its arrangements with the three groups of Claimants.

II. True or Express Trusts

128 All categories of Claimants are asserting the existence of an express trust in relation to their benefits.

129 For a Court to hold that a true or express trust exists, the party asserting the existence of such a trust must establish what are commonly referred to as "the three certainties". They are:

> (i) certainty of intention on the part of the settlor to create a trust;
>
> (ii) certainty of the subject matter of the trust i.e. the property to be settled upon the trustee in favour of the beneficiaries of the trust; and,
>
> (iii) certainty of the object or persons intended to be the beneficiaries of the trust.

130 See: *Knight v. Boughton* (1840), *(*sub nom. *Knight v. Knight)* 49 E.R. 58 (Ch.) at p.68; D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at p.105.

131 In terms of pensions, it has been held that whether the pension arrangement is governed by contract or by trust principles depends upon the terms of the plan itself: see *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, at p.639 S.C.R., particularly per Cory J.

132 While, in determining whether or not there was an intention to create a trust, the use of the words "in trust", or "as trustee", or words to that effect is not essential, the evidence must be clear that the settlor did, indeed intend to create a trust; a general intention to benefit someone will not suffice to create a trust: *Re Allan Realty of Guelph Ltd.* (1979), 29 C.B.R. (N.S.) 229 (Ont. S.C.) at pp.241-242; *Jones v. Lock* (1865), 1 Ch. App.25 at pp.28-29; J.E. Martin, *Hanbury & Maudsely: Modern Equity*, 13th ed. (London: Stevens & Sons, 1989) at p.80. A Court will give weight to the absence of any reference to a trust in a pension plan, in determining whether there was an intention to create a trust: *Crownx Inc. v. Edwards* (1994), 20 O.R. (3d) 710 (C.A.), affirming (1991), 7 O.R. (3d) 27 (Gen. Div.).

133 In cases such as the present one, where what is argued is that the alleged settlor (Confederation Life) and the proposed trustee (the Confederation Life Trustees, or the Human Resources Committee acting under the direction of the Board of Directors) are in effect one and the same, particular difficulties arise. Waters, supra, at pp.150-151 deals with such difficulties in the following passage [emphasis added; footnotes omitted]:

> The principles applicable to this mode of making a gift are perfectly clear. The owner of the legal or equitable interest in the property in question must make it evident that he intends to constitute himself a trustee, *he must leave no doubt* as to what property interest of his is to be the subject of the trust, and he must similarly leave no doubt as to who is to be the trust beneficiary. In other words, the three certainties must be established as in the case of the creation of all trusts. As Jessel M.R. pointed out in *Richards v. Delbridge* [(1874), L.R. Eq. 11], however, an authority quoted in many Canadian judgments, it is not necessary that the donor use the words, "I declare myself a trustee": *words of any kind, and even conduct, are sufficient, provided it is satisfactorily shown that the donor did in fact intend to constitute himself a trustee. ...*
>
> The burden of proof that the donor intended to make himself a trustee is on those who allege such a trust, however, and many factors may reveal the true intent. ...

134 See also on this point *Re Garden Estate*, [1931] 4 D.L.R. 791 (Alta. C.A.).

135 On behalf of the Supplementary Pensioners in Pay and the Deferred Compensation Claimants, Mr. Matheson submits that the Supreme Court of Canada has recognized the special nature of promises made with respect to retirement benefits and that such promises should be viewed as trust promises, in recognition of the special vested rights acquired by retirees in connection with their benefits. Mr. Zigler and Mr. Robertson make a similar submission on behalf of the Retirees and Supplementary Pensioners Not in Pay, respectively. In support of this proposition they all rely upon the decision in *Dayco (Canada) Ltd. v. C.A.W.* (1993), 102 D.L.R. (4th) 609 (S.C.C.).

136 In *Dayco*, supra, the Supreme Court of Canada held that retirement benefits, depending upon the wording of the promise, could survive the expiration of a collective agreement. This is so because when a worker withdraws from the employer-employee relationship upon retirement, his or her accrued employment benefits crystallize into some form of "vested" retirement right and cannot subsequently be terminated or "divested": see *Dayco*, supra, at pp. 619, 637, 654 and 659, per La Forest J.

137 The key to the *Dayco* decision for the purposes of this case, however, is to be found in the statement of La Forest J. at p.637, that [emphasis added]:

> the old collective agreement is not rendered a nullity. *Rights that have accrued* under that agreement *remain enforceable*.

138 In short, the rights that have accrued to the retired employees cannot be terminated and may continue to be enforced. This is the essence of the "vesting" concept in this context. The right remains *enforceable*. Being *enforceable* is not necessarily the equivalent to being *secured* in the sense of pre-funded or the equivalent of being subject to a trust. There is nothing in

166 In recent years the Supreme Court of Canada has had occasion to deal with the concept of fiduciaries on a number of occasions, and the following statement by Wilson J. (then in dissent) in *Frame v. Smith*, [1987] 2 S.C.R. 99 at p.135-136, is frequently cited — to use her words — as "a rough and ready guide" in determining whether a fiduciary relationship exists. She began the Supreme Court's search for "an underlying fiduciary principle" in this fashion:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses ... [references omitted] ... Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

167 This conceptual approach was followed in *Guerin v. R.*, [1984] 2 S.C.R. 335 and in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574. In *Hodgkinson v. Simms*, supra, it has been developed further. There, La Forest J., speaking for the majority (in the result), said at pp. 409-410 (S.C.R.) [underlining added]:

> In *Lac Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith*. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in *Lac Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relation ships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see at p.648. *In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.* Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

168 At p.412 (S.C.R.) La Forest J. continued [emphasis added]:

> As is evident from the different approaches taken in [*Norberg v. Wynrib*, [1992] 2 S.C.R. 226], the law's response to the plight of vulnerable people in power-dependency relationships gives rise to a variety of often overlapping duties. Concepts such as the fiduciary duty, undue influence, unconscionability, unjust enrichment, and even the duty of care are all responsive to abuses of vulnerable people in transactions with others. *The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.*

TAB 6

CED Judgments and Orders XVII.2.(b) (Western)

Canadian Encyclopedic Digest

Judgments and Orders (Western)
XVII — Setting Aside Judgments and Orders
2 — Grounds
(b) — Evidence Subsequently Discovered

For print citation information and the currency of the title, please click here.

XVII.2.(b)

See Canadian Abridgment: CIV.XXII.17.b.iv Civil practice and procedure — Judgments and orders — Setting aside — Grounds for setting aside — New evidence

§520 Whether it is sought to set aside a judgment on the ground of fraud or the discovery of new evidence, the judge must be satisfied that there is a reasonable probability that the plaintiff will succeed in a new action. When an action is brought to set aside a judgment on the ground of the discovery of new evidence and an application is brought to dismiss the action on the ground that it is frivolous and vexatious, it is the duty of the judge to inquire whether the plaintiff has, since the impugned judgment was obtained, discovered evidence, other than that given at the former trial, which was not known to the plaintiff at the time of that trial and which could not with reasonable diligence have been discovered before it, and, if there is such newly discovered evidence, to inquire whether if it had been given before, it would have led the court to a different result.[1]

§521 The failure of the party seeking a new trial on the basis of fresh evidence to prove that the material sought to be introduced was not available at the time of trial nor could have been made available by reasonable diligence is fatal to the application.[2]

§522 The burden is on the applicant to show reasonable diligence, materiality and conclusiveness.[3]

§523 In Manitoba, a party seeking to have an order set aside or varied on the ground of facts arising or discovered after it was made may make a motion in the proceeding for the relief claimed.[4]

§524 The Federal Courts Rules expressly empower the court, on motion, to set aside or vary an order by reason of a matter that arose or was discovered subsequent to the making of the order.[5] The rules are not, however, a vehicle for an appeal or an opportunity to repair a deficient submission.[6]

Footnotes

1 *Kaliel v. Aherne* (1946), [1946] 1 W.W.R. 461 (Alta. C.A.); *Alberta (Public Trustee) v. Koblanski* (1961), 34 W.W.R. 24 (Alta. T.D.); *Kornberg v. Kornberg* (1990), 43 C.P.C. (2d) 10 (Man. Q.B.); reversed in part (1990), 1990 CarswellMan 241 (Man. C.A.); leave to appeal refused (1991), 1991 CarswellMan 61 (S.C.C.) (court refusing reconsideration where new evidence merely confirming earlier decision); *Fouracres v. Taylor* (1996), 49 C.P.C. (3d) 313 (B.C. S.C. [In Chambers]) (court's inherent jurisdiction to reopen case in light of new evidence to be used sparingly, particularly where matter tried by judge and jury; defendants failing to show probable miscarriage of justice without re-hearing or that evidence would probably have changed trial outcome; evidence available before trial had defendants exercised ordinary diligence); *Apotex Fermentation Inc. v. Novopharm Ltd.* (1995), [1996] 2 W.W.R. 346 (Man. Q.B.).

2 *Alberta (Public Trustee) v. Koblanski* (1961), 34 W.W.R. 24 (Alta. T.D.) (plaintiff failing to show evidence of conclusive nature and not discoverable by due diligence); *Barker v. Nofield* (1957), 24 W.W.R. 157 (B.C. Co. Ct.) (application dismissed where no material filed to explain why evidence not available at trial); *National Arts Services Corp. v. Bank of British Columbia* (1981), 16 Alta. L.R. (2d) 111 (Alta. Q.B.) (failure to discover evidence due more to inattention than inability; evidence not incontrovertible); *Bains v. Bhandar* (2000), 80 B.C.L.R. (3d) 1 (B.C. C.A.); leave to appeal refused (2001), 269 N.R. 206 (note) (S.C.C.) (plaintiff, defendant and third party involved in joint venture which failed; during course of number of lawsuits between parties and others, settlement agreement entered into between defendant and accountant who worked for joint venture providing accountant not to actively assist plaintiff in defendant's action against plaintiff for fraudulent misrepresentation; defendant successful in action; plaintiff bringing action to set aside judgment on grounds defendant concealing evidence and misleading court after plaintiff discovering terms of agreement; plaintiff failing to establish deliberate concealment of material evidence; question not what

plaintiff knew, but what plaintiff ought to have known; plaintiff aware agreement existed and had concern about potential impact on accountant as witness, but not actively taking steps to pursue disclosure; plaintiff failing to meet onus of showing due diligence in pursuing and ascertaining terms of agreement in timely manner).

3 *de Lamprecht v. de Lamprecht* (1935), 54 B.C.R. 332 (B.C. S.C.) (plaintiff's action dismissed at trial for failure to prove consideration for alleged contract; application to adduce fresh evidence after judgment delivered but before judgment entered dismissed where due diligence not shown); *Luscar Ltd. v. Pembina Resources Ltd.* (1992), 2 Alta. L.R. (3d) 157 (Alta. Q.B.); *D.K. Investments Ltd. v. S.W.S. Investments Ltd.* (1990), 44 B.C.L.R. (2d) 1 (B.C. C.A.) (factors to be considered on issue of due diligence); *Hill v. Hill* (2016), 2016 ABCA 49 (Alta. C.A.); leave to appeal refused (2016), 2016 CarswellAlta 1752 (S.C.C.) (very high threshold for materiality to set judgment aside on basis of new evidence alone; new evidence must be incontrovertible, and must, on its face, give rise to conclusion that result would have been different had it been adduced at trial); **see also** *Loughlin v. Hargrove* (1983), 53 B.C.L.R. 342 (B.C. C.A.) (order to proceed as though no defence filed; defendant applying to set aside order when documents difficult to obtain becoming available; order set aside).

4 *Manitoba Court of Queen's Bench Rules*, Man. Reg. 553/88, R. 59.06(2); *Wong v. Grant Mitchell Law Corp.* (2016), 2016 MBCA 65 (Man. C.A.); leave to appeal refused (2017), 2017 CarswellMan 53 (S.C.C.) (rule not intended as back door appeal of merits of unfavourable decision).

5 Federal Courts Rules [title re-en. SOR/2004-283, s. 1], SOR/98-106, R. 399(2); *Peerless Lake Indian Band v. Canada (Minister of Indian Affairs & Northern Development)* (2002), 2002 FCT 642 (Fed. T.D.); *Metro-Can Construction Ltd. v. R.* (2001), 203 D.L.R. (4th) 741 (Fed. C.A.) (subsequent decisions of higher court in separate cases not constituting "new matter"); *Del Zotto v. Minister of National Revenue* (2000), 181 F.T.R. 168 (Fed. T.D.) (inappropriate for proceedings for review of decision based on new facts to go forward at same time as hearing of appeal; appellate court quite capable of admitting newly discovered facts into evidence).

6 *Phillip v. Canada (Minister of Citizenship & Immigration)* (2008), 2008 CarswellNat 296 (F.C.).

End of Document

TAB 7

1961 CarswellAlta 7
Alberta Supreme Court

Alberta (Public Trustee) v. Koblanski

1961 CarswellAlta 7, 34 W.W.R. 24

Public Trustee of Alberta v. Koblanski (No. 2) *

Riley, J.

Judgment: January 27, 1961

Counsel: *G. A. C. Steer* and *P. C. Power*, for plaintiff.
J. L. Bassie, for defendant.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.c Grounds
XVI.3.c.iii Action frivolous, vexatious or abuse of process
XVI.3.c.iii.B Miscellaneous
Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.b Grounds for setting aside
XXII.17.b.ii Fraud, perjury or collusion

Headnote

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Action frivolous, vexatious or abuse of process
Practice --- Judgments and orders — Setting aside — Grounds for setting aside — Fraud, perjury or collusion
Judgments and Orders — Attacking Judgment in Second Action on Ground of Fraud or Fresh Evidence — Principles Applicable.
A plaintiff who wishes, in a second action, to attach a judgment in a first action on the ground that he has obtained fresh evidence, should reveal in his statement of claim what such evidence is. He must also show that it is of a conclusive nature and that it was not discoverable by diligence before the first trial.
Authorities on attacking a judgment on the ground that it was obtained by fraud, extensively considered.

***Riley, J.*:**

1 This is an application to have the present plaintiff's action dismissed on the ground that it is vexatious, frivolous, and an abuse of the due process of law. In support the defendant submits that the real matters in question have been tried by the Supreme Court of Alberta on May 15, 1957, and that the said action was appealed to the appellate division of this honourable court and the judgment of the learned trial judge was affirmed, (1958-59) 27 W.W.R. 268. The defendant says that all permissible facts that may now come out were already before the court in the prior action, have been decided on in the former action and therefore should not be tried again. In the former action the trial judge made it quite plain that he did not believe the present plaintiff's witnesses.

In my opinion this ought not to be permitted without an allegation that something entirely new in the way of evidence has been discovered and there is no such allegation.

To this it may be answered that the plaintiff is not bound to disclose his evidence. But why not? In my opinion this usual rule ought not to be applied in an action of this kind for several reasons. In the first place in most actions the matter is between the parties who have not come into Court before. One party is attacking merely the other. But here a solemn judgment of the Court itself is what it attacked. Should not the reasons for that attack be set forth in the record so that the Court will see what the reasons alleged are for which it is asked to expunge its own record? I think they should be so shown. Moreover, the rule that a party must not be obliged to disclose his evidence is not applied in the case of a motion to the Court of Appeal for a new trial (i.e., to set aside the judgment below), upon the ground of discovery of fresh evidence. Certainly there the appellant is bound, at least, to say that he has some fresh evidence. And here he does not even say that. And still more on such a motion he is forced to disclose the nature of the evidence which he has discovered, so that it may be seen whether it is likely to change the result. *Riverside Lbr. Co. v. Calgary Water Power Co.* (1916) 9 W.W.R. 471, 10 W.W.R. 980, 32 W.L.R. 858, 34 W.L.R. 859, 10 Alta. L.R. 128. And he must do this even where there is no suggestion of fraud or perjury on the part of his opponent.

If that is so then, surely, *a fortiori* where the defeated party instead of merely appealing and asking for a new trial actually brings an action to set aside the record, he ought to allege such facts as will show on their face that if they are true he has a right to bring his action, that is, that he has a good cause of action. There would be no need perhaps of disclosing the names of the witnesses but certainly the nature of any fresh evidence ought to be disclosed. In such a proposed action as this the discovery of new evidence assuming that to be sufficient ought to be treated as the very gist of the action. I think there is no right to bring it otherwise unless the fraud alleged is extraneous to the Court proceedings, which was undoubtedly the case in *Cole v. Langford*. In all the modern contested cases (in none of which, by the way did the plaintiff succeed, except *Cole v. Langford*) it will be observed that the Court had before it a statement of what new evidence the plaintiff proposed to adduce, although, of course, he was perhaps forced to divulge it by motions to dismiss before trial.

33 See also *Glatt v. Glatt*, [1937] S.C.R. 347, where at 350, Duff, C.J. held:

... a judgment cannot be set aside on such a ground [of facts established by newly discovered evidence] unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. The importance of this rule is obvious and it is equally obvious that the finality of judgments generally would be gravely imperilled unless the rule was applied with the utmost strictness.

34 See also *Friesen v. Braun*, [1926] 2 W.W.R. 257, at p. 267, 20 Sask. L.R. 512:

A new trial may sometimes be ordered on the ground of the discovery of fresh evidence after the hearing; but as it is in the public interest that litigation should end, the right to a new trial on this ground is subject to restriction. The party applying must satisfy the court that the new evidence could not have been obtained before the hearing by the exercise of reasonable diligence, and that it is of such a character that, if admitted, it would be practically conclusive the other way.

35 I think, too, that in a second action such as this the plaintiff should reveal his evidence to the court; that has not been done. A mere allegation in the statement of claim that he has now evidence fresh discovered is not sufficient. He must show not only what type of evidence it is but he must show that it is of a conclusive nature, and he must also show that it is evidence he could not by the use of diligence have discovered at the previous trial.

36 In the result the plaintiff's action is dismissed on the ground that it is vexatious, frivolous and an abuse of the due process of law. There will be costs to the defendant to be taxed on col. 5. There will be a special fee to the defendant for the argument submitted in the sum of $100.

Footnotes

TAB 8

2016 ABCA 49
Alberta Court of Appeal

Hill v. Hill

2016 CarswellAlta 229, 2016 ABCA 49, [2016] 5 W.W.R. 61, [2016] A.W.L.D. 866, [2016] A.W.L.D. 867, [2016] A.W.L.D. 868, [2016] A.J. No. 180, 262 A.C.W.S. (3d) 1040, 34 Alta. L.R. (6th) 234, 395 D.L.R. (4th) 1, 612 A.R. 213, 662 W.A.C. 213, 82 C.P.C. (7th) 49

Daniel Walter Hill, Respondent (Plaintiff) and Paul James Hill, Richard P. Rendek and Rand Flynn, Appellants (Defendants)

Daniel Walter Hill, Respondent (Plaintiff) and Famhill Investments Limited and Harvard Developments Inc., Appellants (Defendants)

Marina Paperny, Brian O'Ferrall, Barbara Lea Veldhuis JJ.A.

Heard: January 12, 2016
Judgment: February 25, 2016
Docket: Calgary Appeal 1501-0174-AC, 1501-0175-AC

Proceedings: reversing *Hill v. Hill* (2015), [2015] A.J. No. 760, 2015 ABQB 436, 2015 CarswellAlta 1245, R.J. Hall J. (Alta. Q.B.)

Counsel: C.J. Popowich, R. Jadusingh, for Respondent
M.O. Laprairie, Q.C., J.R. Wildeman, for Appellants, Paul James Hill, Richard P. Rendek and Rand Flynn
F.R. Foran, Q.C., J.G. Hopkins, for Appellants, Famhill Investments Limited and Harvard Developments Inc.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.b Grounds for setting aside
XXII.17.b.ii Fraud, perjury or collusion
Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.b Grounds for setting aside
XXII.17.b.iv New evidence
Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.a Res judicata
XXII.23.a.viii Raising defence of res judicata
XXII.23.a.viii.C Miscellaneous

Headnote
Civil practice and procedure --- Judgments and orders — Setting aside — Grounds for setting aside — New evidence
Plaintiff brought action claiming 25 per cent of shares held by family trust — Action was dismissed, as was appeal — Plaintiff applied to set aside judgment on basis new evidence discovered after conclusion of the first action — Defendants applied to

strike statement of claim as frivolous and vexatious, an abuse of process and res judicata — Application was dismissed and defendants appealed — Appeal allowed and plaintiff's action dismissed — Evidence failed to meet materiality requirement of new evidence exception to res judicata — New evidence only to be admitted after judgment where evidence "practically conclusive" — New evidence must conclusively establish plaintiff's case — New evidence here not practically conclusive, did not conclusively impeach result of first trial, and could not be said to change aspect of case — New evidence contained document stating that four siblings were shareholders, but it did not incontrovertibly establish that they were shareholders in fact and in law — Evidence would not have affected key findings of trial judge regarding intentions of trustees which findings formed basis of decision.

Civil practice and procedure --- Judgments and orders — Setting aside — Grounds for setting aside — Fraud, perjury or collusion

Plaintiff brought action claiming 25 per cent of shares held by family trust — Action was dismissed, as was appeal — Plaintiff applied to set aside judgment on basis new evidence discovered after conclusion of the first action — Defendants applied to strike statement of claim as frivolous and vexatious, an abuse of process and res judicata — Application was dismissed and defendants appealed — Appeal allowed and plaintiff's action dismissed — Chambers judge found that plaintiff had not established fraud with respect to defendant PH's testimony and would not have admitted fresh evidence on ground of fraud — Nothing raised on appeal to indicate fraudulent behaviour, aside from some potentially inconsistent or incorrect testimony.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Raising defence of res judicata — Miscellaneous

Plaintiff brought action claiming 25 per cent of shares held by family trust — Action was dismissed, as was appeal — Plaintiff applied to set aside judgment on basis new evidence discovered after conclusion of the first action — Defendants applied to strike statement of claim as frivolous and vexatious, an abuse of process and res judicata — Application was dismissed and defendants appealed — Appeal allowed and plaintiff's action dismissed — Evidence failed to meet materiality requirement of new evidence exception to res judicata — New evidence only to be admitted after judgment where evidence "practically conclusive" — New evidence must conclusively establish plaintiff's case — New evidence here not practically conclusive, did not conclusively impeach result of first trial, and could not be said to change aspect of case — New evidence contained document stating that four siblings were shareholders, but it did not incontrovertibly establish that they were shareholders in fact and in law — Evidence would not have affected key findings of trial judge regarding intentions of trustees which findings formed basis of decision — Res judicata applied.

Table of Authorities

Cases considered by *Marina Paperny J.A.*:

Ambrozic v. Burcevski (2008), 2008 ABCA 194, 2008 CarswellAlta 652, 90 Alta. L.R. (4th) 247, 41 E.T.R. (3d) 1, 53 R.F.L. (6th) 242, 433 A.R. 25, 429 W.A.C. 25 (Alta. C.A.) — referred to

Arnold v. National Westminster Bank plc (1991), [1991] 3 All E.R. 41, [1991] 2 A.C. 93, 142 N.R. 31 (U.K. H.L.) — considered

Burcevski v. Ambrozic (2010), 2010 ABQB 570, 2010 CarswellAlta 1781, 34 Alta. L.R. (5th) 273, [2011] 3 W.W.R. 370, 491 A.R. 245 (Alta. Q.B.) — considered

Burcevski v. Ambrozic (2011), 2011 ABCA 178, 2011 CarswellAlta 973, [2011] 9 W.W.R. 120, 46 Alta. L.R. (5th) 145, (sub nom. *Ambrozic v. Burcevski)* 505 A.R. 359, (sub nom. *Ambrozic v. Burcevski)* 522 W.A.C. 359 (Alta. C.A.) — referred to

D.K. Investments Ltd. v. S.W.S. Investments Ltd. (1990), 44 B.C.L.R. (2d) 1, 1990 CarswellBC 45 (B.C. C.A.) — referred to

Doering v. Grandview (Town) (1975), [1976] 2 S.C.R. 621, (sub nom. *Grandview (Town) v. Doering)* [1976] 1 W.W.R. 388, (sub nom. *Grandview (Town) v. Doering)* 61 D.L.R. (3d) 455, 7 N.R. 299, 1975 CarswellMan 64, 1975 CarswellMan 87 (S.C.C.) — considered

Glatt v. Glatt (1935), [1935] O.R. 410, [1935] 4 D.L.R. 99, 17 C.B.R. 1, 1935 CarswellOnt 94 (Ont. H.C.) — referred to

Glatt v. Glatt (1935), [1936] O.R. 75, 17 C.B.R. 219, [1936] 1 D.L.R. 387, 1935 CarswellOnt 106 (Ont. C.A.) — referred to

Henderson v. Henderson (1843), 67 E.R. 313, 3 Hare 100, [1843-60] All E.R. Rep. 378 (Eng. V.-C.) — followed

Hill v. Hill (2012), 2012 ABQB 256, 2012 CarswellAlta 873, (sub nom. *Hill v. Hill Family Trust)* 540 A.R. 158 (Alta. Q.B.) — referred to

Hill v. Hill (2013), 2013 ABCA 137, 2013 CarswellAlta 436, (sub nom. *Hill v. Hill Family Trust)* 553 A.R. 16, (sub nom. *Hill v. Hill Family Trust)* 583 W.A.C. 16 (Alta. C.A.) — considered

with very high degrees of proof required to ensure that relitigation will be permitted only in rare circumstances. As noted by LeBel J, relitigation is available only where necessary to enhance the credibility, effectiveness and integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (S.C.C.) at para 52, [2003] 3 S.C.R. 77 (S.C.C.) [*CUPE*].

30 This appeal deals primarily with the "new evidence" exception to *res judicata*. That exception has been expressed in a number of ways in the case law, but a test has emerged which can be generalized as follows: First, the new evidence must not have been discoverable with reasonable diligence prior to trial; and second, the new evidence must be so material that it would have changed the result had it been adduced at trial.

31 The first part of the test, the requirement for reasonable diligence, is not the main issue on this appeal. It is the articulation and interpretation of the second branch of the test, the materiality requirement, that requires further discussion.

Materiality of the new evidence

32 The case law in this area reveals that the new evidence exception to *res judicata* demands a high threshold in terms of relevance and materiality. The test has been formulated variously in the Canadian jurisprudence, but the challenge in establishing the requisite level of materiality is apparent throughout.

33 The Supreme Court of Canada set out the general test for relitigation on the basis of new evidence in *Varette v. Sainsbury* (1927), [1928] S.C.R. 72 (S.C.C.) at paras 23-25, (1927), [1928] 1 D.L.R. 273 (S.C.C.). That case involved an appeal from a trial decision seeking to set a judgment aside or order a new trial on the basis of new evidence discovered after trial. The court stated the test as follows:

> On an application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that, if adduced, it would be practically conclusive: para 23.

The court noted that the new evidence in that case was not practically conclusive, as it would not "conclusively establish the plaintiffs' case" and could not affect the judgment (paras 25-26).

34 The Supreme Court of Canada returned to the new evidence exception in *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.) at para 11, (1975), 61 D.L.R. (3d) 455 (S.C.C.) [*Doering*], where an action was struck on the basis of *res judicata*. There, the court adopted Lord Cairns' formulation of the new evidence exception from *Phosphate Sewage Co. v. Molleson* (1879), (1878-79) L.R. 4 App. Cas. 801 (Scotland H.L.) at pp 814-5:

> My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before. Now I do not stop to consider whether the fact here ... would have been been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to
>
> [emphasis added].

35 In *CUPE*, the Supreme Court of Canada restated, in general terms, the test for relitigation on the basis of new evidence. The court held that relitigation will enhance the integrity of the judicial system when, among other circumstances, "fresh, new evidence, previously unavailable, *conclusively impeaches the original results*" (*CUPE* at para 52) [emphasis added].

36 This Court delineated the test to be met for a judgment to be set aside on the basis of new evidence in *Kaliel v. Aherne*, [1946] 1 W.W.R. 461, [1946] 2 D.L.R. 388 (Alta. C.A.) [*Kaliel*]. As in the within appeal, that case dealt with an application to strike a setting aside action on the basis of *res judicata*. Although the result ultimately turned on the fraud exception, Ford JA for the majority set out the test for the new evidence exception to *res judicata* at 469:

TAB 9

1981 CarswellSask 111
Saskatchewan Court of Appeal

Carlson v. Big Bud Tractor of Canada Ltd.

1981 CarswellSask 111, [1981] 3 W.W.R. 237, 7 Sask. R. 337

CARLSON et al. v. BIG BUD TRACTOR OF CANADA LTD.

Brownridge, Hall and Bayda JJ.A.

Judgment: January 30, 1981
Docket: Saskatoon

Counsel: *R.D. Laing* and *B.W. Wirth* , for appellant.
D.A. Shapiro and *G.W. Sandstrom* , for respondents.

Subject: Contracts
Related Abridgment Classifications
Contracts
VIII Rectification or reformation
VIII.7 Bars to rectification
Headnote
Contracts --- Rectification or reformation — Bars to rectification
No mistake in recording parties' intentions.
Heavy onus not met.
Rectification not permitted where third parties affected.
Not entitled to avoidance or rescission.
The plaintiffs H. and C. together owned a majority of shares in two companies. The defendant company was granted an option to purchase the plaintiffs' shares on the condition that within 60 days it would arrange to have H. released from two guarantees he had given on behalf of the companies. This condition was not made a term of the agreement, but a representative of the defendant company assured H. that it was "understood".
The defendant company was unsuccessful in having the guarantees lifted. When the option was about to expire, H. agreed to transfer his shares to the defendant company to assist it in obtaining the necessary financing. C. also transferred his shares, and the defendant company assumed control of the two companies. The terms of the agreement were carried out except for the lifting of the guarantees.
Some time later, the defendant company entered bankruptcy and the plaintiffs commenced an action to recover their shares. At trial, it was held that lifting the guarantees was a condition precedent to exercising the option and that the acts of H. merely extended the time for performance of the condition precedent. Since the condition precedent was not performed, the agreement was found to be null and void and the shares were ordered to be restored to the plaintiffs. The defendant company appealed.
Held:
Appeal allowed.
Per Bayda J.A. (Hall J.A. concurring):
Rectification was inappropriate. As H. was aware of the omission, there was no mistake in recording the parties' intentions. It was not certain that the parties had a concluded common intention that the shares could be acquired only if the guarantees were

first lifted, and there was no strong, clear, convincing evidence to support rectification. Further, an equitable remedy could not be allowed where it would affect third parties, in this case the defendant company's creditors.

Even if the trial judge was right to permit rectification, the plaintiffs were not entitled to recover the shares. When H. transferred the shares and carried out the other terms of the agreement without requiring that the guarantees be lifted, that requirement ceased to be a condition precedent to the formation of a contract under the original unilateral agreement and instead became an internal condition of a new bilateral or synallagmatic contract. Thus H. could claim damages for breach of contract, but he was not entitled to have the agreement rescinded or declared void.

Per Brownridge J.A.:

As the defendant company deliberately omitted the condition to its own advantage, it was not entitled to resist rectification on the ground that the mistake was unilateral. The evidence supported the trial judge's finding that the transfer of the shares and the performance of the agreement did not constitute a waiver of the condition precedent but merely extended the time for its performance.

Table of Authorities

Cases considered:

Statutes considered:

Companies Act, R.S.S. 1978, c. C-23, s. 79.

Authorities considered:

Chitty on Contracts, General Principles, 24th ed. (1977), paras. 691, 693.

Fridman, The Law of Contract (1976), p. 624.

Snell's Principles of Equity, 25th ed. (1960), p. 569.

Appeal from order for rectification of written agreement.

Considered by majority:

Dom. Bank v. Marshall, 63 S.C.R. 352, (sub nom. *Marshall v. Can. Pac. Lbr. Co.)* [1922] 2 W.W.R. 266, 65 D.L.R. 461 — *referred to*

Trans Trust S.P.R.L. v. Danubian Trading Co., [1952] 2 Q.B. 297, [1952] 1 All E.R. 970 (C.A.) — *applied*

Turney v. Zhilka, [1959] S.C.R. 578, 18 D.L.R. (2d) 477 — *considered*

United Doms. Trust (Commercial) Ltd. v. Eagle Aircraft Services, [1968] 1 W.L.R. 74, [1968] 1 All E.R. 104 (C.A.) — *applied*

Considered in dissent:

Bercovici v. Palmer (1966), 58 W.W.R. 111, 59 D.L.R. (2d) 513 (Sask. C.A.) — *applied*

Saint John Tug Boat Co. v. Irving Refinery Ltd., [1964] S.C.R. 614, 49 M.P.R. 284, 46 D.L.R. (2d) 1 — *referred to*

Smith v. Hughes (1871), L.R. 6 Q.B. 597 (D.C.) — *applied*

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

1 This is an appeal from the judgment of MacPherson J. in which he ordered rectification of a written agreement dated 25th April 1978 between Big Bud Tractor of Canada Ltd., Richard Hettrick, Bernard Carlson, Wesley Carlson, Ronald Thorstad, Eston Dodge-Chrysler Ltd. and Prairie Palace Motel Ltd.

2 As of the date of this agreement, Hettrick owned 51 per cent of the issued shares of Eston Dodge-Chrysler Ltd. and 26 per cent of the shares of Prairie Palace Motel Ltd., both located in Eston, Saskatchewan.

73 It is noted the respondents, in para. (a) of their prayer for relief, claim a declaration that the 25th April agreement was null and void. The learned trial judge made such a declaration. In my respectful view such a remedy was not available to the respondents in any event. For, even if the agreement contained a condition precedent respecting the lifting of guarantees, the failure to perform that condition precedent would not render the agreement containing it null and void but simply would preclude the ipso facto formulation of a new synallagmatic contract obliging Mr. Hettrick and Mr. Bernard Carlson to transfer their shares. But, as noted, that result became irrelevant once the parties voluntarily chose to enter into a new synallagmatic contract.

74 The relief claimed in para. (b) is a rescission of the 25th April agreement on the ground of "non-performance". Fridman, at p. 608, after briefly dealing with rescission as a common law remedy and with certain exceptional cases where the court's equitable jurisdiction may be invoked to rescind a contract, correctly states the law as follows:

> More frequently the jurisdiction of the court to rescind a contract on equitable grounds is invoked in three main instances. The first is where the contract resulted from some fraud, which induced a mistake on the part of the defrauded party. The second is where the mistake in question was the result of an innocent, non-fraudulent misrepresentation. The third, which comprehends a somewhat mixed variety of instances, though sharing a general underlying character, is where the contract was procured, without fraud in the common law sense, but as a consequence of what in equity is regarded as fraud, *i.e.* , by the use of undue influence, or where there has been some unconscionable conduct which renders the bargain questionable on equitable grounds, even though it may be perfectly valid at common law.

In the present case fraud was not alleged or proved. "Non-performance" is not one of the grounds entitling the respondents to equitable rescission. It follows the respondents are not entitled to rescission.

75 The relief claimed in paras. (c) and (d) is totally dependent upon the relief being granted under either paras. (a) or (b). Since no relief can be granted under these latter paragraphs, no relief can be granted under the former.

76 The respondents are left only with the right to claim damages. This claim was not pursued at trial nor did counsel at the hearing of this appeal assert any rights in this respect. Accordingly, subject to the suspension hereinafter directed, the appeal is allowed with costs. The judgment at trial is set aside and the appellant will have its costs of the trial. The judgment of this court will be suspended for 30 days, and if the respondents decide to pursue their claim for damages, they will have leave, during that period, to advise the court of their decision, whereupon the court will fix a time for counsel to address the court on the question of whether or not the respondents should be allowed to pursue their claim for damages at this time and, if so, on what terms and conditions.

Appeal allowed.

