

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Arthur Andersen Inc. v. Merit Energy Ltd.](#) | 2002 SKCA 105, 2002 CarswellSask 593, [2003] 2 W.W.R. 303, 220 D.L.R. (4th) 351, 117 A.C.W.S. (3d) 376, 227 Sask. R. 44, 287 W.A.C. 44, [2002] S.J. No. 535 | (Sask. C.A., Sep 18, 2002)

1989 CarswellSask 48
Saskatchewan Court of Appeal

Canadian Commercial Bank v. Simmons Drilling Ltd.

1989 CarswellSask 48, [1989] C.L.D. 1276, [1989] S.J. No. 481, 17 A.C.W.S.
(3d) 493, 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241, 78 Sask. R. 87

CANADIAN COMMERCIAL BANK v. SIMMONS DRILLING LTD.

Vancise and Sherstobitoff JJ.A. and Osborn J. (ad hoc)

Heard: June 5, 1989
Judgment: September 14, 1989
Docket: No. 115

Counsel: *L. Andrychuk*, for appellant.
J. Ehmman, for Deloitte, Haskins and Sells.
T. Stodalka, for Oil Patch.
M. Sawatsky, for Shell Products.

Subject: Corporate and Commercial; Insolvency; Contracts

Related Abridgment Classifications

Construction law

[IV Construction and builders' liens](#)

[IV.6 Holdback](#)

[IV.6.f When payable](#)

Construction law

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Construction law

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Headnote

Construction Law --- Construction and builders' liens — Holdback — When payable

Construction Law --- Construction and builders' liens — Holdback

Construction Law --- Construction and builders' liens — Trust fund — Distribution of fund

Secured creditors — Mechanics' liens — Receiver-manager appointed by court at instance of debenture holder — Receiver-manager having funds remaining after payment of subcontractors with registered liens out of receivables from contracts — Receiver-manager failing to discover unpaid subcontractors without registered liens until expiration of one-year limitation period for claims against lien trust fund — Receiver-manager actions constituting default of positive obligations under Business Corporations Act and Builders' Lien Act, and of responsibility to court — Receiver-manager and debenture holder not to benefit from default — Court directing payment of unpaid subcontractors out of funds received on account of contracts.

The plaintiff held a debenture secured by the assets of the defendant. In March 1987, at the instance of the plaintiff, the court appointed a receiver-manager of the defendant under the provisions of the Saskatchewan Business Corporations Act. The order permitted distribution of moneys held by the receiver only by direction of the court. By 31st March 1987 the defendant had completed various drilling contracts. The receiver-manager paid those subcontractors with registered builders' liens from the moneys received under the contracts and had funds remaining in hand. Upon completion of a review of the defendant's records in March 1988, the receiver-manager discovered that certain subcontractors who had not registered liens were unpaid. In June 1988 the receiver-manager applied for directions as to its obligation to pay these subcontractors in light of the expiration of the one-year limitation period for claims against the lien trust fund under s. 19 of the Builders' Lien Act. The judge declined to answer the question before him but found that the subcontractors had valid unregistered liens, enforceable against the funds received by the receiver-manager. The plaintiff appealed.

Held:

Appeal dismissed.

The trial judgment could not stand because under ss. 70 and 71 of the Act, the bank, holding security that arose prior to the lien, had priority in any event over the unregistered liens.

Pursuant to s. 7 of the Builders' Lien Act, when the receiver-manager was appointed, all of the receivables which eventually were converted into cash came into his possession and under his control impressed with the trust. As the defendant was prohibited from dealing with the receivables by s. 91 of the Business Corporations Act, the receiver-manager was de facto trustee of the trust fund. In addition, the receiver-manager was responsible to the court under s. 92 of the Business Corporation Act and the terms of the order appointing it for the receivables and moneys paid on that account. Section 89 of the Business Corporations Act, together with s. 7 of the Builders' Lien Act, imposed a positive obligation upon the receiver-manager to pay the subcontractors from the trust fund within a reasonable time. The receiver-manager's failure to act with sufficient promptness and diligence to discover and pay the claims against the trust before expiration of the limitation period was in default of those statutory obligations. The receiver-manager's actions were the actions of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default. The receiver-manager, and through it the plaintiff, must bear responsibility for the consequences of the unpaid subcontractors being deprived of the right to realize their claims from the trust fund. Accordingly, the receiver-manager should pay the claims of the subcontractors from the funds received on account of the appropriate contracts.

Table of Authorities

Cases considered:

Cornish, Re; Ex parte Bd. of Trade, [1896] 1 Q.B. 99 (C.A.) — distinguished

Gen. Rolling Stock Co., Re (1872), 7 Ch. 646 — distinguished

Harrison v. Duignan (1842), 2 Dr. & War. 295 — distinguished

Parsons v. Sovereign Bank of Can., [1913] A.C. 160 (P.C.) — considered

Plisson v. Duncan (1905), 36 S.C.R. 647 [N.W.T.] — referred to

Wrixon v. Vize (1842), 3 Dr. & War. 104 — distinguished

Statutes considered:

Builders' Lien Act, S.S. 1984-85-86, c. B-7.1

s. 7

s. 15

s. 16

s. 19

s. 27

s. 33

s. 34

s. 40 [am. 1986, c. 8, s. 3]

s. 49(5)

s. 70

s. 71

Business Corporations Act, R.S.S. 1978, c. B-10

s. 89

s. 91

s. 92

s. 95(d)

Authorities considered:

Bennett on Receiverships (1985), pp. 15-16.

39 Hals. (4th), para. 877.

Kerr on Receivers, 15th ed. (1978), pp. 130, 142, 159.

Appeal from order of Geatros J., 73 C.B.R. (N.S.) 73, 33 C.L.R. 238, 73 Sask. R. 140, enforcing payment of unregistered liens from funds held by receiver-manager.

The judgment of the court was delivered by *Sherstobitoff J.A.*:

1 The determinative issue in this appeal [from 73 C.B.R. (N.S.) 73, 33 C.L.R. 238, 73 Sask. R. 140] is whether a court-appointed receiver-manager, and the secured creditor at whose instance the receiver-manager was appointed, are entitled to rely upon the time limitation in s. 19(1) of the Builders' Lien Act, S.S. 1984-85-86, c. B-7.1, to obtain priority for the secured creditor over a debt to a stranger to the action, secured by a statutory trust fund, when the time limitation did not elapse until after the appointment of the receiver-manager.

2 These are the relevant provisions of the Builders' Lien Act:

7(1) All amounts:

(a) owing to a contractor, whether or not due or payable; or

(b) received by a contractor;

on account of the contract price of an improvement constitute a trust fund for the benefit of:

(c) subcontractors who have subcontracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and

(d) labourers who have been employed by the contractor for the purpose of performing the contract.

(2) The contractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until all persons for whose benefit the trust is constituted are paid all amounts related to the improvement owed to them by the contractor ...

15 In addition to any other priority which a beneficiary of a trust constituted by this Part may have at law, a beneficiary has priority over all general or special assignments, security interests, judgments, attachments, garnishments and receiving orders, whenever received, granted, issued or made, of or in respect of the contract or subcontract price or any portion of the contract or subcontract price ...

19(1) On the expiry of one year after the contract is completed or abandoned:

(a) a person who is a trustee under this Part is discharged from his obligations as trustee; and

(b) no action to enforce the trust may be commenced.

(2) Subsection (1) does not affect the ability to commence and maintain a prosecution.

3 In 1980 the appellant Canadian Commercial Bank obtained a debenture, including a fixed and floating charge, over the present and future assets of Simmons Drilling Limited. Validity of the debenture and default thereunder were not disputed.

4 Deloitte, Haskins & Sells Ltd. was appointed receiver-manager of the business and property of Simmons at the instance of the bank by the Court of Queen's Bench of Alberta on 20th February 1987 and by the Court of Queen's Bench of Saskatchewan on 3rd March 1987. The orders contain no unusual provisions. They prohibit any action against Simmons or the receiver without the leave of the court. They also permit distribution of any moneys in the hands of the receiver, after payment of expenses, only by the direction of the court.

5 Simmons had drilling contracts with several oil and gas operators in Saskatchewan and had completed various wells between 5th December 1986 and 31st March 1987. The receiver, between 15th May 1987 and 5th February 1988, received moneys due under the contracts and paid therefrom those subcontractors who had registered builders' liens. There remained, in the receiver's hands, about \$141,000. During a review of Simmons' records by the receiver conducted between December 1987 and March 1988, it was discovered that there were some subcontractors, including the respondents Oil Patch Group Ltd., J-& L Supply Co. Ltd. and Shell Canada Products Limited, who had supplied services and materials in connection with the drilling of the wells, who were unpaid, and had not registered liens. The receiver applied, on 30th June 1988, to the Queen's Bench for the following relief:

... advice and directions as to its obligation, if any, with respect to the possible claims of certain subcontractors of SDL in relation to the proceeds of certain drilling contracts received by the receiver, in light of the provisions of s. 19 of *The Builders' Lien Act*, S.S. 1984-85, c. B-7.1, which proceeds are claimed by the plaintiff Canadian Commercial Bank ("CCB") pursuant to its security interests.

6 Geatros J. declined to answer the question put to him, but found, by application of ss. 27, 33, 34, 40 and 49(5) of the Act, that the respondents had valid unregistered liens, enforceable against the funds received by the receiver under the contracts which constituted holdbacks required by the Act. His judgment cannot stand because, even if the liens were valid (and we pass no judgment on that issue), he misconstrued ss. 70 and 71 of the Act, which gave priority to a secured creditor over a lienholder where the security was given before the lien arose. Thus, the bank had priority in any event over the unregistered liens. We are therefore left to determine the original question which was unanswered below.

7 The issue to be decided is the effect of s. 19 of the Act on priority between the bank as secured creditor and the respondents as beneficiaries of the trust created by s. 7 and given priority by s. 15. That raises the following questions. At what date are priorities determined: the date of appointment of the receiver, the date of receipt of the moneys, the date of application to the court, or the date of distribution? Is a court-appointed receiver entitled to affect priorities between competing creditors by permitting limitation periods to expire even if done inadvertently? Even assuming that s. 19 does not apply to prevent any claim against the trust fund, what moneys are affected: all moneys received on account of the contracts, or only moneys actually received within a year of completion of the contracts?

8 As to the last question, s. 7 makes all amounts owing to a contractor under a contract, whether due and payable or not, a part of the trust fund. Thus, when the receiver was appointed, all of the receivables which eventually were converted into cash came into his possession and under his control impressed with the trust. The date of actual receipt of moneys is therefore irrelevant since the payment simply converted the assets in the trust from receivables to cash to the extent of the payments. There were, at all relevant times, assets in some form in the trust fund sufficient to meet the claims of the respondents.

9 The first two questions must be answered together.

10 The respondents argued that time did not run against them under s. 19 from the date of appointment of the receiver. They relied principally on two cases. *Re Cornish; Ex parte Bd. of Trade*, [1896] 1 Q.B. 99 (C.A.), was a case concerning the application of s. 8 of the Trustee Act, 1888, to a trustee in bankruptcy.

11 The court said at p. 104:

The other point taken was that s. 8 of the Trustee Act, 1888, applies to the case. In my opinion s. 8, which limits the time for making claims upon trustees, has nothing to do with an officer of the Court who is required by the Court to account. If it had, it would equally apply to a receiver and to other officers of the Court who have been put by the Court in possession of property, and are required to account to the Court. I have never yet heard it suggested that s. 8 of the Trustee Act applied to such cases as that. Moreover, if it did apply, it would not apply to the present case, because if upon taking the account it should appear that the trustee has money in his hands which he has not properly applied, he would come within the exception in s. 8 of the Act, and the limitation of the liability of a trustee would not apply to him at all.

12 In *Re Gen. Rolling Stock Co. (1872)*, 7 Ch. 646, the court said this concerning a compulsory winding-up order [pp. 649-50]:

That being so, I think we must consider that the Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors, or under a decree of the Court of Chancery, in an administration suit. In these cases the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the *Statute of Limitations* does not run against this claim, but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend.

13 These cases do not apply. They dealt with fact situations and with statutes unrelated to those before us. While *Cornish* mentioned receivers, the reference was obiter dictum. *Rolling Stock*, and the cases upon which it relied, as well as those which followed it, did not deal with receivers.

14 The appellant relied on the common law with respect to receivers and reasoned as follows. A receiver appointed by the court becomes a principal and is answerable to the court which appointed him. As a principal, he is not the agent of the security holder, the debtor or of any particular creditor. He has a duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary man would give to his own and if he fails to provide this standard of care he may be liable for his negligence: *Bennett on Receiverships* (1985), pp. 15-16; *Plisson v. Duncan* (1905), 36 S.C.R. 647 [N.W.T.]. The powers and duties of a court-appointed receiver are summarized in *Parsons v. Sovereign Bank of Can.*, [1913] A.C. 160 at 167 (P.C.), by Viscount Haldane:

A receiver and manager appointed ... is the agent neither of the debenture-holders whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs ...

15 Unlike a trustee in bankruptcy, a receiver does not become vested with title to the debtor's property. He only has possession and custody of them. As stated in *Kerr on Receivers*, 15th ed. (1978), at p. 130:

The appointment of a receiver does not in any way affect the right to the property over which he is appointed. The court takes possession by its receiver, and his possession is that of all parties to the action according to their titles ... [*Re Butler* (1863) 13 L.R. Ir. 456; *Bertrand v. Davies* (1862) 31 Beav. 436.]

The appellant argued that the key portion of this passage was the statement that the possession of the court was the possession only of the parties to the action, and not the possession of all persons who might be interested in the property of the debtor. He cited two cases in support of that proposition: *Harrison v. Duignan* (1842), 2 Dr. & War. 295, and *Wrixon v. Vize* (1842), 3 Dr. & War. 104. Both cases dealt with receivers appointed by the court to protect the interest of minors in land. The first case held that the appointment of a receiver did not affect the operation of a Statute of Limitations against a stranger to the action. The second case held that the appointment of a receiver did prevent a Statute of Limitations from operating in favour of a stranger to the action. The appellant concluded, relying as well on the

interpretation of the same cases in Kerr at pp. 142 and 159, and 39 Halsbury's Laws of England, 4th ed., para. 877, that the application of limitation periods to the recovery of property or the enforcement of encumbrances against an estate in receivership depended entirely upon who was a party to the action. If the person claiming a paramount right was a party to the action, the possession of the receiver was his possession and therefore the appointment of the receiver would prevent the running of the limitation period. If he was a stranger to the action and was out of possession, time would continue to run against him as the possession of the receiver was not his possession. Thus the appellant said, in this case, the respondents being strangers to the action, time ran against them under s. 19, the trust terminated, and the bank had priority.

16 While the foregoing is, in our opinion, an accurate statement of the common law as it existed at the dates of the cases decided, we do not agree that the venerable cases cited by the appellant apply to this case. They were concerned with use of receiverships to protect the property of minors, a procedure long since fallen into desuetude, and were concerned with adverse possessory claims to land where actual possession was always a crucial factor in determining whether and when limitation periods ran. Furthermore, we are dealing in this case with receivables and cash where actual possession has no bearing on right to claims of entitlement to it. Most importantly, Saskatchewan legislation now governs the appointment and delineates some of the duties of the receiver, and in this case, the receiver has additional obligations superimposed by the Builders' Lien Act.

17 The receiver was appointed under the provisions of the Business Corporations Act, R.S.S. 1978, c. B-10. The relevant provisions of the Act are as follows:

89. A receiver of any property of a corporation may, subject to the rights of secured creditors, receive the income from the property and pay the liabilities connected with the property and realize the security interest of those on behalf of whom he is appointed, but, except to the extent permitted by a court, he may not carry on the business of the corporation.

91. If a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

92. A receiver or receiver-manager appointed by a court shall act in accordance with the directions of the court.

95. Upon an application by a receiver or receiver-manager, whether appointed by a court or under an instrument, or upon an application by any interested person, a court may make any order it thinks fit including, without limiting the generality of the foregoing:

(d) an order requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation, or to relieve any such person from any default on such terms as the court thinks fit, and to confirm any act of the receiver or receiver-manager.

18 Thus the receiver held the receivables and moneys paid on account thereof in two representative capacities — as receiver-manager responsible to the court (s. 92 of the Business Corporations Act, and the terms of the order appointing the receiver) and as trustee under s. 7 of the Builders' Lien Act. We reject the argument of the bank that the latter statute made Simmons only the trustee, and that the appointment of the receiver, which gave only the right to possession and not ownership of the receivables, could not substitute the receiver as trustee in the place of Simmons. The receiver received the receivables impressed with the trust. Section 16 of the Builders' Lien Act made anyone who had effective control of a corporation or its relevant activities liable for any breach of trust by the corporation, if assented to or acquiesced in. Simmons was prohibited from dealing with the receivables by s. 91 of the Business Corporations Act. Thus, the receiver became the de facto trustee.

19 The intent of the Builders Lien Act was that the trust fund be used to pay unpaid subcontractors. That did not happen because the directors of Simmons could not do so by reason of s. 91 of the Business Corporations Act and the receiver, for unexplained reasons, did not discover the existence of the unpaid subcontractors until after the time limitation in s. 19 had expired.

20 The material before us discloses that nine or ten months elapsed between the date of appointment of the receiver and the commencement of the review of accounts that disclosed the trust claims of the subcontractors. Another two or three months elapsed before the review was completed, and another three months elapsed before the receiver applied to the court for directions with respect to the claims. No explanation was given for the delays, nor was there any suggestion or evidence of any improper motive on the part of the receiver, and in particular, no suggestion that the receiver deliberately sought to affect priorities between the subcontractors and the bank. Nevertheless, the failure to discover the claims and to apply to the court for directions until about 16 months after the date of the appointment must be considered a breach of the receiver's obligation to the court to act with diligence and within a reasonable time. The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.

21 What is clear is that, when the receiver was appointed, the subcontractors were entitled to payment from the trust fund. The failure to make payment to the subcontractors within a reasonable time thereafter, an obligation imposed by s. 89 of the Business Corporations Act and s. 7 of the Builders' Lien Act taken together, was in default of those statutory obligations. If the receiver had applied to the court for directions for payment out of the moneys on that date or within a reasonable time thereafter, the money would have been ordered paid to the subcontractors. The result is that the default of the receiver in failing to act with sufficient promptness and diligence to discover and pay the claims against the trust before expiration of the limitation period has deprived the subcontractors of the right to realize their claims from the trust fund.

22 The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, for he is an officer of the court. The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default.

23 The receiver and the bank argued that the onus was on the subcontractors to assert their claims, rather than on the receiver to discover and pay them. That might be so in other claims against a receiver or the person at whose instance he was appointed. However, in this case, as noted above, we view s. 89 of the Business Corporations Act and s. 7 of the Builders' Lien Act, taken together, as imposing a positive obligation on the receiver to pay the subcontractors from the trust fund within a reasonable time.

24 The court has the power to direct payment to the subcontractors by virtue of s. 92 of the Business Corporations Act and by virtue of the terms of the order appointing the receiver, both of which make distribution by the receiver subject to the direction of the court. The bank, at whose instance the order was obtained, is bound by those provisions.

25 If there is any doubt about the right of the court to act under s. 92 or the order, we would invoke the provisions of s. 95(d) of the Business Corporations Act, which permits the court to require the receiver and the bank to make good any default in respect of the receivership. The failure of the receiver to discover and pay the claims of the subcontractors within a reasonable time is such a default and is deserving of remedy by requiring payment by the receiver to the subcontractors from the moneys which would have constituted the trust fund created by the Builders' Lien Act.

26 The court did not consider whether the receiver was in a fiduciary relationship to all interested persons, whether parties to the action or not, either at common law, or by reason of the relevant provisions of the Business Corporations

Act, or the Builders' Lien Act, and if so, the effect of that relationship. That question is left open. However, reference must be made to the position of the receiver on an application such as this. The receiver, in its factum, strongly supported the position of the bank. At the opening of the hearing of the appeal, counsel for the receiver was asked why, since the receiver was not the agent of the bank, but an officer of the court, it was taking a position favouring one party against the other. Counsel indicated that he would take no position in argument. Nevertheless, he spoke, when the time came, in favour of the position of the bank. The court took exception to this for two reasons. First, it gave the appearance that the receiver felt itself to be agent of the bank and acted accordingly, which would not be a proper position for an officer of the court. Secondly, since the receiver's failure to act promptly gave rise to the bank's claim to priority, the position taken again gave the appearance of favouring its own interest and that of the bank against another party. We do not suggest any improper motives or lack of good faith on the part of either the receiver or counsel, but take the opportunity to re-emphasize that a court-appointed receiver is not an agent of the secured creditor or anyone else, but is an officer of the court. He must act accordingly.

27 The appeal must therefore fail. The order below is now inappropriate. The application was for advice and directions. It is declared that the receiver shall pay the claims of the respondent subcontractors from the funds received on account of the appropriate contract or contracts. The respondents will have their costs under double col. V.

Appeal dismissed.