COURT FILE NUMBER	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, as amended AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
APPLICANT	JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD
DOCUMENT	**BRIEF OF THE TRUST BENEFICIARY J. R. PAINE & ASSOCIATES LTD.**

Clerk's Stamp

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SUBMISSIONS OF J.R. PAINE & ASSOCIATES LTD.
APPLICATION ON NOVEMBER 27, 2020

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I. INTRODUCTION

1. This Brief is prepared in anticipation of the arguments of the Monitor and JMB in their briefs of law and argument and to supplement the previous communicated positions of the other interested parties.

2. J.R. Paine and Associates ("J.R. Paine") is a civil engineering company who was hired by JMB Crushing Systems Inc. ("JMB") to test aggregate to be supplied to the Municipal District of Bonnyville No. 87 (the "MD") for roadway construction pursuant to a contract entered into between the MD and JMB on or about November 1, 2013 ("the Contact").

3. J.R. Paine asserts that the Contract created an express trust and that J.R. Paine falls into a class of beneficiaries to be paid forthwith and without delay under said trust.

4. J.R. Paine further asserts that under this express trust monies paid by the MD to JMB under the Contract are not the property of JMB and therefore fall outside of these current CCAA proceedings.

II. CERTAINTIES OF TRUST

5. In order for a trust to exist, there are three certainties that must be satisfied:

   A. Certainty of intent;
   B. Certainty of subject matter; and
   C. Certainty of object.

6. Our Court of Appeal considered the requirements of certainty for the creation of a trust in *KPMG Inc. v. M.N.R.*, 1999 ABCA 95:

   But in our view, it is irrelevant whether any deemed statutory trust had collapsed since the April 6th letter constitutes an express trust, which satisfies requirements of certainty as to intent, subject matter, and object. As section 222(1.1) only applies to deemed statutory trusts, it does not operate to collapse the provisions of an earlier express trust. Moreover, once the principal portion of the fund was distributed, the trust condition was engaged which, in the absence of any countermand of that condition, mandated the law firm to submit the remaining portion of the fund to the Minister of National Revenue. It appears that no countermand of that condition was ever made by the landlords. And, once the receiver was appointed on June 8th, the insolvent landlords lost any capacity to issue such a countermand. (emphasis added)

   ***KPMG Inc. v. M.N.R.*, 1999 ABCA 95 [Tab 1]**

7. In light of the Court of Appeal's decision in *KPMG Inc.*, it is the respectful submission of J.R. Paine that an express trust was created which satisfies the three certainties.

A. CERTAINTY OF INTENTION

8. The November 1, 2013, contract between JMB Crushing Systems Inc. ("JMB") and the Municipal District of Bonnyville No. 87 (the "MD") expressly created a trust.

9. The Contract contained a provision at paragraph 26 which stated:

> *"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."*

November 1, 2013 Terms and Conditions Agreement
Page 5 [Tab 2]

10. J.R. Paine asserts that the wording of the Contract is clear and unambiguous, and demonstrates that the intention of the parties was to create a trust. In determining whether intention to create a trust exists, a Court should not be concerned with the technical wording for a trust, but should look to the intention of the parties. This is illustrated in *Water's Law of Trusts in Canada* where it is stated:

> *There is no need for any technical words or expressions for the creation of a trust. Equity is concerned with discovering the intention to create a trust; provided it can be established that the transferor had such an intention, a trust is set up.*

Donovan W. M. Waters, Mark R Gillon and Lionel D. Smith
***Water's Law of Trust in Canada*, Fourth Edition (Toronto: Thomson Reuters Canada Limited), 2012,**
Page 141 [Tab 3]

11. While specific or technical wording is not a requirement for a Court to find that a trust exists, or was created, in this case both the technical wording and the intent exist.

12. The evidence before the Court is that the MD wanted to ensure that the subtrades of JMB, including J.R. Paine, for the crushing and production of aggregate, were paid. The Contract contains both the technical wording, the use of the word 'trust', and the intention to create a trust.

13. When examining whether the intention to create a trust exists, the Court can infer intention by looking at the context and surrounding circumstances.

***Jin v. Ren*, 2015 Carswell Alta 251 (ABQB) paragraph 24. [Tab 4]**

14. The Contract before the Court demonstrates that there was an intention to create a trust.

B. CERTAINTY OF SUBJECT MATTER

15. J.R. Paine asserts that the subject trust funds are clearly identified in the May 21, 2020 Order of Justice Eidsvik; being the funds defined as "Funds" and Holdback Amount".

May 21, 2020 Order -Lien Claims – MD of Bonnyville [Tab 5]

16. Further, the Contract expressly set out which funds would be subject to the trust:

*"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." (emphasis added)*

November 1, 2013 Terms and Conditions Agreement
Page 5 [Tab 2]

17. We further note that there was enough certainty of subject matter for the Monitor to have earlier determined what payments from the MD related to the Contract, including the work done by J.R. Paine. This was addressed by the Monitor wanting to use the Contract funds as security for the MD of Bonnyville lien claims. As such, the subject trust funds are, and can be, clearly identified and ascertained.

18. The Courts have found that if the amount to be paid is ascertainable, then it doesn't matter if a precise amount is actually stipulated. The Court in *Alnav Platinum Group Inc. v. APM Delstar Inc.* confirmed this concept when it stated:

It is abundantly clear, in my view, that the Proceeds Agreement recognizes, prior to MacCosham's bankruptcy, that monies relating to any G.S.T. Claims are earmarked for distribution to Her Majesty. The degree of identification of those monies, as evidenced in the Proceeds Agreement, provides a sufficient degree of certainty of intent, subject matter, and object that I find an express trust on them pursuant to the principles of trust law in Equity. Those monies were impressed with a trust prior to MacCosham's bankruptcy, and prior to their having been moved, by Court Order, into a separate account pursuant to clause 3.2(b)(ii) of the Proceeds Agreement. Those trust monies now are identifiable in, and traceable to, the G.S.T. Fund as the G.S.T. Monies, as those two terms have been defined above. I have already noted that the exact sum of G.S.T. due Her Majesty may be varied based on an audit conducted by the C.C.R.A. This does not impair the certainty of subject matter in respect of those monies being impressed with an actual trust, as is trite law that if the correct amount can be easily identifiable out of funds earmarked that purpose, which is the case here, it does not matter that the precise amount was not actually identified. The

funds out of which easily calculated G.S.T. Claims would be determined were themselves clearly identified, and the G.S.T. Monies further identified out of them. (emphasis added)

***Alnav Platinum Group Inc. v. APM Delstar Inc.*, 2001 ABQB 930 paragraph 19 [Tab 6]**

19. Ultimately, the Court has the discretion to determine whether the amount to be paid to the beneficiaries are ascertainable. What the Court should be concerned about, we submit, is whether it can be shown that there is certainty of concept regarding the subject matter of the trust. This is illustrated by Waters Law of Trusts in Canada as follows:

"But, nevertheless to say that, though different Trustees might hold varying notions upon what is reasonable, the word "reasonable" is sufficiently objective that, on an application being made, the Court can determine what the income is to be. The Courts undoubtedly lean as far as possible in favour of upholding the Settlor's disposition ...

In determining certainty, what the Courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject matter." (emphasis added)

Donovan W. M. Waters, Mark R Gillon and Lionel D. Smith
***Water's Law of Trust in Canada*, Fourth Edition (Toronto: Thomson Reuters Canada Limited), 2012, Page 164 [Tab 7]**

20. The facts before the Court, clearly establish certainty of concept. That is, that the unpaid lienholder and subcontractors of JMB in relation to the Contract, were to be paid the amounts owing to them from the subject trust fund. The amounts owed to J.R. Pain, and other subcontractors, is an ascertainable amount.

21. Ultimately, the Court has discretion to give effect to a trust and to administer it where necessary. Water's Law of Trusts in Canada illustrates this concept as follows:

"However, a trust is an obligation, and, if the Trustees do not carry it out, the Courts have always taken the view that it is incumbent upon them to see its discharge. This is the root of the doctrine whereby the administration of a trust can be transferred to the Court. The Court both redresses a breach of trust by entertaining an action against the Trustee for breach, and it administers the trust if not other path is open for its administration by others."

Donovan W. M. Waters, Mark R Gillon and Lionel D. Smith
***Water's Law of Trust in Canada*, Fourth Edition (Toronto: Thomson Reuters Canada Limited), 2012, Page 168 [Tab 8]**

22. There is no evidence before the Court that the subject trust funds are not adequate enough to pay the unpaid subcontractors of JMB on the MD Contract. In addition, the

amounts owing to the subcontractors of JMB on the MD Contract are an ascertainable amount through the records of the parties or, alternatively, can be resolved by the Court. In any event, the amounts owed to J.R. Paine are clear, as set out in the Affidavits of J.R. Paine, and have not been challenged.

23. Even if the situation existed (which situation does not presently exist) where the trust funds were not enough to pay the beneficiaries the amounts owed to them (which is not the case presently), it is still possible to give effect to the trust. Canadian Courts have, in circumstances where there is a shortfall in trust funds, taken steps to order distribution of the trust funds on an equitable basis. So even if there is a shortfall in the subject trust funds, it is not fatal to giving effect to the trust. The Court can consider distribution on various terms, including on a pro rata basis.

***Easy Loan Corporation v. Base Mortgage and Investment Ltd.*,**
2016, ABQB 77 paragraphs 54 and 55 [Tab 9]

24. Certainty of subject matter is present on the facts of this matter when applying trust law.

C. CERTAINTY OF OBJECTS

25. J.R. Paine further asserts that there is certainty as to the objects, specifically the beneficiaries who are to be paid from the subject trust funds.

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." (emphasis added)

November 1, 2013 Terms and Conditions Agreement
Page 5 [Tab 2]

27. Included as beneficiaries of the trust are those individuals who were directly or indirectly related to the Product and Services.

28. The Contract defined Product and Services at paragraphs 1.e and 1.f:

> *"'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"*

"'Services' means the hauling and stockpiling of crushed aggregate of JMB as set out in this Agreement and anything else which is required to be done to give effect to this Agreement"

November 1, 2013 Terms and Conditions Agreement
Page 1 [Tab 10]

29. J.R. Paine was responsible for testing the aggregate to ensure that it met the required specifications of the Contract, a necessary and related service, which is defined by the Contract as a Product.

30. The Courts have routinely found that certainty of object can be found where the objects are ascertainable. The Court in Carling Development Inc. v. Aurora River Tower Inc. stated:

    The final part of the test is certain or ascertainable persons or objects who are to benefit.

Carling Development Inc. v. Aurora River Tower Inc., 2005 ABCA 267
Paragraph 51 [Tab 11]

31. Water's Law of Trusts in Canada gives further commentary as to what is meant by the term "ascertainable" as follows:

    Ascertainable is a somewhat ambiguous word, but in this context it means two things: first, that it is possible to determine, if the intended beneficiaries are not referred to by name but by a class description, whether any person is a member of that class, and, second that the totality of the membership of that class is known.

Donovan W. M. Waters, Mark R Gillon and Lionel D. Smith
***Water's Law of Trust in Canada*, Fourth Edition (Toronto: Thomson Reuters Canada Limited), 2012,**
Page 167 [Tab 12]

32. What is clear in the Contract is that the intention of the parties was to create a class of beneficiaries; those involved in the chain of production for both Products and Services. J.R. Paine is easily identifiable as falling within that class of beneficiary created under the Contract.

III. COURTS JURISDICTION TO ENFORCE THE TRUST

33. The Court has broad jurisdiction to give effect to the trust and to ensure compliance with the trust conditions and the intentions of the parties. The trust conditions in relation to the subject trust funds remain in effect, and cannot be revoked, such that the subject trust funds are held in trust to be paid to unpaid lienholders and subcontractors of JMB in relation to the MD Contract.

34. The Trust existed before the CCAA proceedings commended. Our Court of Appeal in *Iona Contractors Ltd. v Guarantee Company of North America*, 2015 ABCA 240 addressed the issue of the Court's ability to enforce a trust after bankruptcy proceedings had commended:

> *[44] The remaining issue is whether a trust must be in effect prior to the bankruptcy, in order to be effective after the bankruptcy. There is some passing suggestion in a few cases that a trust arising after bankruptcy is ineffective, but there is no binding authority to that effect. It is certainly true that no one can create a trust after bankruptcy in an attempt to withdraw assets from the estate and reorder priorities, but that does not mean that legitimate trusts that arise or are perfected after the bankruptcy are ineffective.*
>
> *[45] Section 67(1)(a) does not impose any temporal limit on when the trust arises, and only requires that the property be "held by the bankrupt in trust for any other person". Requiring that the trust exist prior to the bankruptcy might generate anomalous results. For example, had the Airport Authority written the cheque for the holdback, and mailed it to Iona, the date of receipt might be critical. If the trust must be perfected before bankruptcy, and had Iona received and deposited the cheque the day before the bankruptcy, the trust would be valid. However, if the same cheque arrived and Iona deposited it the day after the bankruptcy, the trust would not be valid. That does not appear to be a commercially sensible result. Another example would arise if the bankrupt became a testamentary trustee of an estate as a result of a death or other event that occurred after the bankruptcy. Yet another example would be of a bankrupt lawyer who came into possession of trust property after his or her bankruptcy. There is no reason in principle why such trust assets should accrue to the benefit of the unsecured creditors of the bankrupt, rather than the intended beneficiaries of the trust.*
>
> *[46] There is also uncertainty about the concept of the trust "existing" on the date of bankruptcy. It could mean simply that on the date of bankruptcy the trust instrument existed, or the class of beneficiaries existed, or that the trust property had come into existence and was identifiable, or some combination of those. In this case the "trust" clearly existed before Iona's bankruptcy, in the sense that the provisions of the Builders Lien Act were in place well before its bankruptcy. The disputed funds were "held back" in accordance with the legislation before Iona's bankruptcy. They were also "payable" before its bankruptcy. The only sense in which the trust did not "exist" on the date of bankruptcy is that the Airport Authority had not yet drawn the cheque to pay the holdback funds, nor had the deemed trustee received those funds. As noted, supra para. 22, the trust under the statute attaches to the holdback funds themselves when they are paid out.*

> *[47] It can be accepted that a trust cannot be created after bankruptcy if its intent or effect is to defeat the order of priorities under the Bankruptcy and Insolvency Act. The trusts under the Builders' Lien Act, however, have none of those attributes. The lien rights arise the minute the work is done, and the funds which are captured by the trust were quantified in the hands of the Airport Authority on the date of bankruptcy:* ***Andrea Schmidt Construction Ltd. v Glatt*** *(1979), 1980 CanLII 1711 (ON CA), 25 OR (2d) 567 at para. 12, 104 DLR (3d) 130 affm'd (1980), 1980 CanLII 2714 (ON CA), 28 OR (2d) 672, 112 DLR (3d) 371 (CA). Nothing in this case about the timing of the formation of the trust or the bankruptcy would render the statutory trust invalid or inoperative.*
>
> ***Iona Contractors Ltd. v Guarantee Company of North America*, 2015 ABCA 240**
> **[Tab 13]**

35. This Court has jurisdiction to enforce the trust as the trust pre-existed these CCAA proceedings.

36. The funds held in trust are <u>not</u> the property of JMB and are, in fact, held in trust for the beneficiaries of said trust including the Applicant J.R. Paine. In addition, the trust arose long before these CCAA proceedings.

IV. RELIEF SOUGHT

37. An Order declaring a trust was created by the November 1, 2013 contract.

38. An Order to pay all outstanding amounts owed to J.R. Paine including interest and costs, forthwith.

39. Costs of this Application payable forthwith, in any event of the cause, on a solicitor and own client basis or such other amounts as this Honourable Court deems appropriate and just.

40. Such other and further relief as may be required and as this Honourable Court deems appropriate and just

ALL OF WHICH IS RESPECTFULLY SUBMITTED by Smith Thompson Law LLP this 13th day of November, 2020.

SMITH THOMPSON LAW LLP

Per: Peter Alexander

Peter M. Alexander
Solicitors for J.R. Paine & Associates Ltd.

TAB 1

KPMG Inc. v. M.N.R., 1999 ABCA 95

Date: 19990317
Docket: 9703-0641AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE FOISY
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MR. JUSTICE BERGER

BETWEEN:

KPMG INC., in its capacity as Trustee in
Bankruptcy of the Estates of ARMCORP 4-18 LTD.,
STEWART GREEN PROPERTIES '88 LTD., STEWART GREEN
PARTNERSHIP, and STEWART GREEN PROPERTIES '89 LTD.

Appellant (Applicant)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of National Revenue

Respondent (Respondent)

- and -

THE ROYAL BANK OF CANADA

Intervenor

Appeal from the Order of the Honourable Mr. Justice W.E. Wilson
Dated the 4th day of April, 1997, and Entered on the 30th day of September, 1997

MEMORANDUM OF JUDGMENT

COUNSEL:

R.C. Rutman
for the Appellant

M.J. Lema
for the Respondent

J.D.B. McDonald, Q.C.
For the Intervenor

MEMORANDUM OF JUDGMENT

THE COURT:

[1] We dismissed this appeal from the Bench and promised these reasons.

[2] This appeal concerns a dispute between the Minister of National Revenue and a trustee in bankruptcy over the GST portion of two lease surrender payments. The appellant was appointed receiver manager of two of the registered owners ("89" and "Armcorp") of the leased premises on June 8, 1995, and was appointed trustee in bankruptcy of each effective July 6, 1995.

THE FIRST G.S.T. FUND

[3] On April 6, 1995, funds paid under the first lease surrender agreement were forwarded by the lawyer for one of the landlords, to the law firm representing the mortgagor. The funds were forwarded on the condition that "the funds less the G.S.T. are releasable to your client subject to the trust condition that you retain the G.S.T. exigible in the amount of $525,000 until such time as we confirm in what manner and (sic) whose behalf the G.S.T. should be remitted to Revenue Canada." The principal portion of the funds was later released to the mortgagor, but the G.S.T. portion remains invested with the law firm.

[4] The April 6th letter requested that the letter agreement be circulated to another landlord for signature, but there is no evidence that landlord ever signed the agreement. However, since there is also no evidence that it objected to the surrender or the transfer of the funds, we do not think anything turns on the lack of that signature, in this case.

[5] The chambers judge found it unnecessary to address the trust conditions in the April 6th letter. In his view, the monies were received subject to section 222(1) of the *Excise Tax Act* R.S.C. 1985, c. E-4, and never became the property of the insolvent companies. That section provides:

> Subject to subsection (1.1), where a person collects an amount as or on account of tax under Division II, the person shall, for all purposes, be deemed to hold the amount in trust for Her Majesty until it is remitted to the Receiver General or withdrawn under subsection (2).

[6] The appellant maintains that pursuant to subsection (1.1) any such deemed statutory trust collapsed on the bankruptcy of the supplier. That subsection provides:

> Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the Bankruptcy and

> Insolvency Act), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

[7] But in our view, it is irrelevant whether any deemed statutory trust had collapsed since the April 6th letter constitutes an express trust, which satisfies requirements of certainty as to intent, subject matter, and object. As section 222(1.1) only applies to deemed statutory trusts, it does not operate to collapse the provisions of an earlier express trust. Moreover, once the principal portion of the fund was distributed, the trust condition was engaged which, in the absence of any countermand of that condition, mandated the law firm to submit the remaining portion of the fund to the Minister of National Revenue. It appears that no countermand of that condition was ever made by the landlords. And, once the receiver was appointed on June 8th, the insolvent landlords lost any capacity to issue such a countermand. Because, according to section 71(2) of the Bankruptcy and Insolvency Act:

> On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property. . .

[8] Evidently the receiver demanded payment of the fund on June 16, 1995. But even assuming, without deciding, that it had the authority to countermand a trust condition which had already been triggered, the receiver did not purport to do so, since the demand was limited to a payment of the money, without reference to the trust condition.

[9] Accordingly, we would not interfere with the conclusion of the chambers judge that the funds cannot be said to have been the property of the bankrupt estates, but instead should be dealt with as if belonging to the respondent.

THE SECOND G.S.T. FUND

[10] The second lease surrender agreement was executed in February 1995, and was to be effective February 28, 1995. Funds payable pursuant to that agreement were sent by the tenant to its own lawyer at that time. On July 5th that lawyer then forwarded a trust cheque to the mortgagor's law firm, which included the principal amount and a specified amount for G.S.T. in trust, on condition that:

> . . . in the event the Order is not granted and/or entered and served prior to August 1, 1995, the Invested Funds are to be returned to us upon our request. . .

[11] It was understood that the funds were not paid to the receiver at that time because the lawyer for the tenant was seeking an opinion from the lawyers for one of the landlords that the

surrender of the lease would also be binding on that landlord. The settlement agreement was declared valid and binding on all parties by a Court Order issued on July 25, 1995. That Order also directed the mortgagor's law firm to distribute the fund to the receiver to be held until the expiry of the appeal period. On the expiry of that period, the principal amount was paid to the mortgagor, and it appears that the receiver has since retained the G.S.T. portion.

[12] There is no issue as to whether this second G.S.T. fund was the subject of an express trust, as there was no requirement that the money be held for the government. Rather, the appellant says that the issue is whether the surrender agreement was completed before or after the landlords became bankrupt.

[13] The appellant maintains that the GST liability arose in February 1995 pursuant to the written agreement, and since it arose prior to the bankruptcy, the payment must form part of the bankrupt estates. Reliance is placed on section 152 of the *Excise Tax Act*, which provides that "the consideration. . . for a taxable supply shall be deemed to become due on the earliest of . . . the day the recipient is required to pay that consideration or part to the supplier pursuant to an agreement in writing." As a result the appellant says, the taxable supply was deemed to become due on the day that the tenant was required to pay for the surrender of the lease, that is on February 28th. Further support is said to be found in section 133 of the *Excise Tax Act* in which a supply is deemed to have been made when an agreement is entered to provide the property or service. Reliance is also placed on the fact that interest was paid from February 28th, as well as on the fact that the respondent assessed the parties for that period.

[14] However, regardless of when the agreement was signed, or whether interest was paid for that period, the agreement did not come into force until it was validated by court order. The letter of July 5, 1995 imposed a trust condition on the use of the monies, which required the obtaining of a court order to validate the lease surrender agreement, and contemplated the return of that money in the event that order was not obtained. In our view, that condition conveys a clear intention that the surrender agreement was not complete until declared valid by court order. Hence, the taxable supply became due on the day it was payable on the expiry of the appeal period of the Order. Thus, the monies that had always been earmarked for the G.S.T. also became payable to the government at that time. It follows that we agree with the conclusion of the Bankruptcy judge that the GST portion of this fund should also be dealt with as if it belongs to the government.

[15] Accordingly, the appeal is dismissed. Having considered written submissions from the parties respecting costs, we order the appellant, in its capacity as trustee, to pay the respondent the costs of the appeal, exclusive of the costs of the intervention motion, and exclusive of costs in respect of the preparation of the respondent's factum due to its late filing. We order the intervenor to pay the respondent the costs of the intervention motion.
APPEAL HEARD on February 26, 1999

MEMORANDUM FILED at Edmonton, Alberta,
this 17th day of March, 1999

FOISY, J.A.

RUSSELL, J.A.

BERGER, J.A.

TAB 2

19. When crushing is being done in a Year, JMB shall invoice the MD on a bi-weekly basis for 50% (fifty percent) of the applicable price per tonne of the Product which has been crushed and which will subsequently be delivered to the MD in the same Year.

20. When the Product is delivered and stockpiled in a Year as per this Agreement, JMB shall invoice the MD bi-weekly, or other period agreed on in writing by the Parties, for the remaining 50% (fifty percent) of the applicable price per tonne for the Product which is scaled/weighed by JMB and delivered and stockpiled by JMB.

21. Within 30 days of receiving JMB invoices, the MD will pay undisputed amounts.

22. The MD may make adjustments for any overpayments to JMB at any time.

23. For each Year, all invoices for that Year are to be submitted by JMB to the MD by December 31 of that Year.

24. At all times, the MD reserves the right to verify the quantity and quality of Product which JMB invoices it. The MD is not required to pay for Product which does not meet the specifications and the permitted deviations from them in accordance with this Agreement.

25. JMB shall be responsible to remit all amounts required by provincial and federal laws to the appropriate governmental agency.

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.

27. The MD may set-off and deduct any monies payable to JMB against any financial obligation JMB owes the MD.

Other Fees

28. JMB reserves the right to negotiate with the MD for reasonable and necessary ancillary charges which are assessed by other municipalities or the provincial or federal governments. The MD must agree in writing to any such ancillary charges before they are paid by the MD.

TAB 3

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

Editor-in-Chief

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II. CERTAINTY OF INTENTION

There is no need for any technical words or expressions for the creation of a trust.[5] Equity is concerned with discovering the intention to create a trust; provided it can be established that the transferor had such an intention,[6] a trust is set up. There are indeed certain evidentiary requirements which the law regards as mandatory for the transfer of certain kinds of property. For example, the *Statute of Frauds* in 1677, reproduced in common law Canada, required all trusts of land to be evidenced in writing, and under the wills legislation of the common law provinces and the territories a person's last will and testament must be in writing, which means, of course, that a testamentary trust must be in writing, and form part of the will.[7] But these are requirements of the law of evidence, not of the law of trusts, though, as we shall see, the effect of these statutory evidentiary rules has created a variety of problems for trust lawyers.[8]

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[5] See, e.g., *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.) where it was noted that language need not be technical so long as the intention to create a trust can be inferred with certainty.

[6] For an unusual case, see *No. 382 v. Minister of National Revenue* (1957), 16 Tax A.B.C. 274, 57 D.T.C. 48 (Can. Tax App. Bd.) at 282-3 [Tax A.B.C.]. If tax avoidance is the object of a transaction, the courts are likely to be particularly concerned with whether there was indeed an intention to create a trust, or merely a desire to give that appearance. See *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, [1976] C.T.C. 506, 76 D.T.C. 6280 (Fed. C.A.). The fact that the alleged settlor of a number of trusts, purportedly created at the same time, did not know all the details of the scheme in which he was taking part, and that the amount of property initially assigned to the trustees for each trust was minimal, were found to be evidence of a desire only to create appearances. See further, *infra*, chapter 6, note 2.

The question of certainty of intention to create a trust can arise in a wide variety of contexts. One such context that has been considered on several occasions occurs where an employer seeks access to surplus pension funds. If the pension plan is construed such that the employer's contributions are to be held in trust *for the employees* then the employer will not be able to take back surplus contributions. Cases dealing with this issue include *Burke v. Hudson's Bay Co.*, 2010 CarswellOnt 7451, [2010] S.J. No. 34 (S.C.C.); *Mifsud v. Owens Corning Canada Inc.* (2004), 41 C.C.P.B. 81 (Ont. S.C.J.); *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 3 E.T.R. (2d) 1, 115 D.L.R. (4th) 631 (S.C.C.); *LuHave Equipment Ltd. v. Nova Scotia (Superintendent of Pensions)* (1994), 121 D.L.R. (4th) 67 (N.S. C.A.); *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.); *Howitt v. Howden Group Canada Ltd.* (1997), 152 D.L.R. (4th) 185 (Ont. Div. Ct.), leave to appeal allowed (1997), 1997 CarswellOnt 4662 (Ont. C.A.), affirmed (1999), 26 E.T.R. (2d) 1 (Ont. C.A.); *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5) (Administrator of)* (1997), (sub nom. *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5)*) 149 D.L.R. (4th) 200 (N.S. C.A.); *Crownx Inc. v. Edwards* (1994), 20 O.R. (3d) 710, 120 D.L.R. (4th) 270 (Ont. C.A.).

[7] On the requirement of writing, see chapter 7.

[8] But for the formal requirements in cases such as those involving wills or trusts of land, no formal document is required. A trust may arise simply from the words used (see, e.g., *Lev v. Lev* (1992), 40 R.F.L. (3d) 404 (Man. C.A.); and *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.)) or from conduct or circumstances (see note 9 below and the accompanying text). In

TAB 4

Court of Queen's Bench of Alberta

Citation: Jin v Ren, 2015 ABQB 115

Date: 20150213
Docket: 0703 07538
Registry: Edmonton

Between:

Shan Jin

Plaintiff

- and -

Zigang Ren and Hart Fibre Trade Company Ltd.

Defendant

Reasons for Judgment of the
Honourable Mr. Justice Peter B. Michalyshyn

Introduction

[1] The events giving rise to this trial began with a meeting of the parties in Shanghai on the eve of the Chinese New Year in late January, 2006. The parties were businessmen of some long acquaintance. The defendant, Zigang Ren, was promoting an Alberta investment opportunity. He enticed the plaintiff, Shan Jin, to agree to invest some $300,000 in the venture. By May, 2006 Jin delivered on his promised investment. A year later Ren had delivered nothing in return. Now after many more years of litigation Jin is entitled to judgment for the return of his funds, together with interest and costs.

Background

[2] At all material times the plaintiff Jin was a businessman in Shanghai. The defendant Ren was a former Shanghai businessman who emigrated to Canada in 2004. Early in 2006, Ren had returned to Shanghai seeking investors for an Alberta-based hemp growing/processing business operating through the corporate defendant Hart Fibre Trade Company Ltd. Jin agreed to invest some $300,000. As more fully described below, by May 1, 2006, Jin had delivered on his investment by transferring the equivalent of some $300,000 in Canadian currency to Ren. Jin believed, and it was conceded by Ren in his own evidence at trial, that the funds were an investment in Hart Fibre. Jin also believed, and I accept, that with his investment, he was

promised a controlling interest in Hart Fibre, including corresponding shareholdings in the company and a corresponding share of its major asset, land to be purchased by the company in Alberta for hemp growing and processing.

[3] At the Shanghai meeting in January, 2006, Ren described an investment worth a total of 3.7 million Renminbi (RMB). Ren offered Jin at least a two million RMB share of the investment, and thus a controlling interest in Hart Fibre (Hart Fibre had been incorporated in 2005 but by early 2006 had not commenced any 'operations' other than Ren's fund-raising. According to Ren, Hart Fibre did not have a bank account and as such Jin's funds were accepted by Ren personally, but, he maintained, *for* the company). For himself, Ren would keep as little as 3-5 per cent of the company representing his 'sweat equity' in it. The balance of needed investment capital would come from other investors. Ren also asked Jin to join him in Canada to help manage the business together. Once the investment was in place, Ren would send Jin an "invitation". Jin could then proceed with an immigration application.

[4] On the basis of Ren's promises, Jin agreed to invest two million RMB, or some $300,000 CDN. He agreed therefore to take a controlling interest in the 3.7 million RMB company. Jin and Ren agreed to talk again after the Chinese New Year, January 29, 2006, to work out details of the deal.

[5] Unexpectedly to Jin, the day after this initial meeting Ren called with news that he needed to leave for Canada immediately. He said he needed to close a deal on a two-acre parcel of land near Edmonton that Hart Fibre wished to buy as part of the hemp growing/processing investment. Ren said time was of the essence as he feared the price of the land would increase. Accordingly he told Jin that the promised further talks and details to cement Jin's investment would have to be deferred. Yet Ren insisted he needed Jin's two million RMB investment immediately, rather than after the Chinese New Year as the two had discussed just the day before.

[6] Jin initially hesitated, but when pressed by Ren, he eventually agreed to go forward with the investment with a 500,000 RMB advance. He did so, he testified and I accept, because of the strength of his history with Ren going back to the early 1990s, Ren appeared sincere, the details of the project appeared to be factual, and he was told that in due course he would obtain shares in the company equal to his investment.

[7] While initially nothing was reduced to writing between the parties, Ren did provide Jin with a hand-written record, dated January 25, 2006, acknowledging receipt of 500,000 RMB "as the first instalment of the investment into Hart Fibre Company Ltd. in Canada..."

[8] In fact the two-acre parcel near Edmonton was never purchased. Ren explained that the price had already gone up. Instead, and in due course, Ren identified an alternate property for the company, this one 80 acres, which included a house, garage and stable for horses. No records were in evidence at trial with regard to the acquisition of this property, or the proposed acquisition of the earlier two-acre parcel for that matter.

[9] In spite of the initial uncertainty around the property acquisition, Jin testified that he remained enthused about his investment in the company and the nascent hemp enterprise. He and Ren were in touch in early 2006 almost daily. Jin accordingly followed through with the balance of his investment. In April, 2006, he transferred CDN $27,000 to Ren via a Bank of Montreal transfer. On April 21, 2006 he provided Red with another CDN $30,000 in cash. And finally on

May 1, 2006 he personally provided Ren with CDN $70,000 in cash and US $70,000, also in cash.

[10] Altogether, by May 1, 2006, Jin had provided some CDN $300,000 to Ren representing Jin's investment in Hart Fibre.

[11] However, also by May 1, 2006, Jin was pressing Ren for the confirming details of Jin's investment that he had been denied when Ren left Shanghai for Canada in January, 2006. Jin testified, and I accept, that Ren was unwilling to write down anything, yet he eventually agreed to type up record styled an "agreement" dated May 2, 2006 record, reducing certain things to writing. The May 2, 2006 record refers to a "budget" of 10,000,000 RMB "more or less"; it refers to "terms of invest" that Jin "will be a shareholder" and that he invests capital stock of 2,000,000 RMB in exchange for a "ratio of the share hold about 20 percent *for the time being* and *we will confirm the share ratios of every shareholder after the whole capital stock had been inputted into the company*" (emphasis added). The agreement's final paragraph states that "whole terms of the Agreement will be arranged by every shareholder after the whole capital stocks of whole shareholders have been inputted".

[12] As will be seen in what follows, clearly the May 2, 2006 was a record without legal effect. Even Ren's evidence supported this conclusion: he testified that the May 2, 2006 record was prepared just to placate Jin's wife, who had been skeptical of the whole venture.

[13] What's more, the May 2, 2006, record was different from what Jin was promised in late January 2006. In particular Ren was now saying the hemp project needed a capital investment of 10 million RMB, not 3.7 RMB. Ren told Jin that the other 8 million RMB – that is, the additional capital over and above the two million RMB Jin had agreed to invest for a controlling interest – would be made up by Ren himself and/or through other investors. Ren told him "not to worry, he'll get the money". Lost also would be Jin's controlling interest in the company.

[14] Jin signed the May 2, 2006 "agreement". He said, and I accept, that he did so because he believed there was little else he could do to protect his investment. He had already invested heavily with the defendants, with no result or security.

[15] As events unfolded, Ren never did identify any other investors. No additional eight million RMB, or any other amount, materialized. Jin's shareholdings in Hart Fibre were never confirmed.

[16] Despite a great deal of evidence at trial of the parties' dealings in the year that followed the May, 2006 "agreement", the legal landscape remained unchanged. Jin persistently asked for proof of his interest in the company, or the return of his investment. With equal persistence, Ren failed to comply.

[17] A couple of dates are worth noting between May, 2006 and June, 2007. First, Ren acknowledged in his evidence at trial that in June, 2006, he agreed to return Jin's investment but needed three months to do so. Nothing was agreed to coming out of discussions around that period of time. Second, and again by Ren's own evidence (in the form of an email to Jin of March 28, 2007) referred to at trial, by Spring 2007 Ren was proposing that he would return Jin's investment but only on terms that Jin would guarantee that neither Jin, nor his wife or son, would be involved in any hemp-related business in Canada or in China. Jin refused these terms. In June, 2007 the within action was commenced.

Credibility

[18] This was a two-witness trial, supplemented by a variety of exhibits. Credibility was an issue. Both parties gave evidence through an interpreter. Ren was self-represented at trial. For his part, Ren accused Jin of outright lying on numerous matters. Ren's own evidence, and his cross-examination of Jin, was ineffective however in proving the point. What's more, much of Ren's attack on Jin was irrelevant to the matters in issue in this action. The attack was irrelevant because it was based on allegations made in a proposed counterclaim against Jin that was not before the court. Well before the trial, Ren's application to amend his pleadings to raise a counter-claim against Jin was denied: ***Jin v. Ren*** 2014 ABQB 250.

[19] On the whole where the parties differed on material points, I have accepted Jin's evidence. Jin's evidence, in manner and substance, was straightforward and plausible. As noted, he was not impeached on cross examination. Ren's evidence was often confusing and irrelevant. He was evasive at times during cross examination. He was particularly so when attempting to excuse his failure to confirm Jin's interest in Hart Fibre – either because he said he was waiting for Jin to invest another 50,800 RMB, and/or that Jin's interest in the company needed to be calculated by a "Canadian certified accountant". Yet Ren did not or could not deny the essence of the plaintiff's case: that Jin's investment funds were received by him and/or the company – although he was again most evasive with regard to how the funds were specifically used; that shares, or any kind of legal recognition of the investment, was never forthcoming; and that Jin's demands for a return of his investment funds were ignored, or deflected by unkept promises the funds would returned 'in due course', or only on conditions imposed by Ren that, for purposes of this trial, were irrelevant and without foundation.

Issues

[20] The issues to be decided in this case are as follows:

1. Did the arrangement between the parties create an express trust?
2. Did Ren owe Jin a fiduciary duty, and if so, was it breached?
3. Was there an unjust enrichment?
    i. Were the defendants enriched by Jin?
    ii. Did Jin suffer a corresponding deprivation?
    iii. Was there an absence of a juristic reason?
    iv. Can Ren be held personally liable?
4. What is the appropriate remedy?
    i. Should a constructive trust be imposed?
    ii. Is Jin entitled to compound interest?
    iii. What is the appropriate currency?

Analysis:

1. Did the agreement between the parties create an express trust?

[21] Jin's counsel submits that in making the arrangement with Ren to invest in Hart Fibre and by Jin forwarding his funds in exchange for shares and an interest in land, there was an intention that Ren hold those funds on trust until consideration was exchanged; the result being that Jin can recover his investment monies in full.

[22] In order for an express trust to come into existence, there must be three certainties: 1) the intention to create the trust; 2) the *subject-matter* or *trust property*; and, 3) the *object(s)*, or beneficiaries, of the trust: ***Luscar Ltd v Pembina Resources Limited***, 1994 ABCA 356 at para 96, 162 AR 35, citing ***Knight v Knight***, (1840) 3 Beav 148, 49 ER 58.

[23] This means that the alleged settlor of the trust must use language clearly showing his intention that the recipient hold the property on trust. It must also be shown that the settlor has clearly described the trust property such that it can be definitely ascertained. Third, there must be no uncertainty as to whether a person is actually a beneficiary. If any of these three certainties does not exist, the trust fails to come into existence or, in other words, is void: DWM Waters, *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Carswell, 2005) at 132.

[24] The intention to create a trust can be inferred with certainty from context and surrounding circumstances: see ***Royal Bank v Eastern Trust Co***, 32 CBR 111, [1951] 3 DLR 828 (PEI TD) at para 13. The words which nearly always reveal intention are "in trust," or "as trustee for," but these words are not necessary: Waters at 135, citing ***Canada Trust Co v Price Waterhouse Ltd*** 2001 ABQB 555 at para 26, 288 AR 387.

[25] In this case there are no express words or phrases in any record establishing that the funds advanced were intended to be held by Ren or Hart Fibre in trust for Jin. Even when looking at the conduct and nature of the actual exchange and advancement of funds, nothing in the parties' arrangement constitutes an express trust based on several passages from ***Luscar*** at paras 100-102 and 105, where the Court determined whether a written agreement created an express or implied trust:

> …the parties were informed and capable of fully setting out their intended rights and duties in an agreement. The AMI Clause contained none of the usual indicia of trust. While the words "in trust' or "on trust' are not an iron-clad requirement to finding the existence of a trust, one would have expected them here, and their absence is telling…There are many authorities which refer to the onerous duties that trustees bear, and a party should not be saddled with trust obligations where that intention is not clearly expressed. As sophisticated parties, they would have been aware of a trustee's onerous duties, and if they intended to impose those obligations, they would have so stated.
>
> ...
>
> The statutory regime, as well as the common law, creates duties and concerns for trustees to the extent that no sophisticated party would blindly accept them. Before willingly entering into an agreement that created a trust arrangement, any

> potential trustee, with the legal resources of the appellant, would therefore be expected to seek to include terms limiting the trustee's liability...
>
> ...
>
> On the whole of the evidence, it is apparent these parties intended merely to enter into a contract. The commercial context and jurisprudence make it doubtful the parties to such an agreement would even think about an AMI Clause carrying fiduciary duties. I stress the importance of not straining equity beyond its due and proper limits...

[26] Applying these principles here, neither Jin nor Ren are as sophisticated as the corporate parties in ***Luscar***. However, they were both still businessmen. Had a trust been the expectation of both parties, one would reasonably expect a written agreement to be drafted in some way confirming Ren's obligation to hold the investment monies to the benefit of or on trust for Jin.

[27] It appears the arrangement here was simply intended to be a commercial, contractual exchange: Jin gave Ren *money*, or more precisely, *investment capital*; he did so in *exchange for shares* in the corporation. This is to some extent evidenced by the May 2, 2006 record referred to as an "agreement", and by the nature of the actual exchange. While one may transfer property on trust in exchange for consideration, there appears to have been no contemplation here of creating a trust in those monies until consideration was exchanged. Based on the arrangement and surrounding circumstances, it does not appear that Jin intended the monies to be held by Ren in trust until all the investors and share ratios were confirmed. Rather the evidence shows that Jin expected the investment monies to be used immediately towards Hart Fibre's expenses and start-up costs, with the expectation that Jin would receive a share interest in Hart Fibre in exchange.

[28] Furthermore, Jin demanded the return of his funds in August 2006 after Ren failed to confirm Jin's share interest in Hart Fibre by way of shares or by way of an interest in the land purchased by Hart Fibre. This request is further evidence that the parties' arrangement was intended to be purely contractual. Once an express trust is settled –that is, once the property is in the trustee's hands – it cannot generally be revoked or varied unless the terms of the trust or agreement expressly provide for it: *Trustee Act*, RSA 2000, c T-8, s 42(2).

[29] Jin's counsel relies on ***Air Canada v M & L Travel Ltd***, [1993] 3 SCR 787, [1993] SCJ No 118, a case in which the court found "a stranger" to the trust relationship to be a constructive trustee, so as to be in breach of the express trust agreement. ***Air Canada*** is of little relevance to the case before me. First, Ren cannot be characterized as a stranger to the trust arrangement, even if there was one. If there were a trust relationship, he would be the express trustee. Second, there was an express trust clearly set out in the ***Air Canada*** agreement. The agreement expressly authorized a travel agency to receive blank airline ticket stock from Air Canada and to issue tickets directly to the public; funds collected from the sale of Air Canada tickets were to be held *in trust* by the travel agency and paid twice a month to Air Canada. The agreement contained the following clause, cited at 803-804:

> All monies, less applicable commissions to which the Agent is entitled hereunder, collected by the Agent for air passenger transportation (and for which the Agent has issued tickets or exchange orders) shall be the property of the

> Airline, and *shall be held in trust* by the Agent until satisfactorily accounted for to the airline. All such monies, less applicable commissions to which the Agent is entitled hereunder, shall be remitted to the Airline by the Agent in accordance with the Airline's accounting procedures.
> (Emphasis added).

[30] There is nothing in any agreement or arrangement in the case before me that contains similar wording so as to constitute an express trust.

[31] The only words or actions supporting Jin's proposition that he intended to create a trust was his testimony that he advanced the monies because he "trusted" Ren. However, similar to what was expressed in ***Udovitch Estate v Helm Estate***, 2002 ABQB 94 at para 24, 111 ACWS (3d) 444, albeit in reference to a loan, it would pervert the meaning of the word "trust" in trusts law to say that the exchange here created a trust relationship simply because an investor trusted a corporation's director.

[32] I conclude therefore that the parties' intentions were purely contractual. (I pause to emphasize their *intentions* as I have not found a valid contract ever existed between the parties.) Jin intended to invest $300,000 for an interest in Hart Fibre in the form of shares and land purchased by Hart Fibre. There was no evidence supporting an intention, express or implied, that Ren was to hold Jin' monies in trust until consideration was exchanged.

2. Did Ren owe Jin a fiduciary duty, and if so, was it breached?

[33] Jin's counsel argues that Ren acted in a fiduciary capacity in the business relationship, in that he was expected to surrender his self-interest in the investment funds, specifically to not misappropriate them or to not use them for any reason other than their designated purpose. Counsel submits the fiduciary duty was breached when the shares in Hart Fibre were never rendered.

[34] While I agree that Jin reasonably expected Ren to not misappropriate his investment funds, this was not an expectation giving rise to a fiduciary relationship, for reasons which follow.

[35] The relationship between Jin and Ren does not fall within one of the traditional categories in which fiduciary obligations generally arise. Granted, these categories are not closed and a fiduciary relationship can be established by using the three-part principled test in ***Frame v Smith***, [1987] 2 SCR 99, [1987] SCJ No 49, wherein Wilson J. at 136 articulated that relationships in which fiduciary obligations are imposed possess three 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; and,
3. the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[36] As outlined by McLachlin C.J.C. in ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 244 at para 36, [2011] 2 SCR 261, a fiduciary duty can also be found on an *ad hoc* basis,

outside the traditional categories of fiduciary relationships, if the following requirements are met:

> for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[37] The Alberta Court of Appeal added that the undertaking of loyalty is now "definitely a requirement of an ad hoc fiduciary relationship": ***Indutech Canada Limited v Gibbs Pipe Distributors Ltd,*** 2013 ABCA 111 at para 39, 544 AR 205, citing ***PIPSC v Canada (Attorney General)***, 2012 SCC 71 at para 124, [2012] 3 SCR 660. The Court also noted that the ***Frame*** and ***Elder*** tests "may just be different ways of stating the same thing": ***Indutech*** at para 16.

[38] Courts should hesitate to find a fiduciary relationship when business entities (or businessmen) motivated by profit enter into an arm's length transaction: ***Financial Management Inc v Planidin***, 2006 ABCA 44 at para 17, 384 AR 70; ***155569 Canada Limited v 248524 Alberta Ltd***, 2000 ABCA 41 at paras 89-97, 255 AR 1; ***Cadbury Schweppes Inc v FBI Foods Ltd***, [1999] 1 SCR 142 at para 30, [1999] SCJ No 6; ***Hodgkinson*** at para 415.

[39] Vulnerability is often seen to be lacking in commercial settings, such that the courts apply the fiduciary concept sparingly, opting instead to "uphold the inviolability of business enterprise": ***155569 Canada Limited*** at para 91, citing ***Ironside v Smith***, 1998 ABCA 366, 223 AR 379. Indeed, only in exceptional cases will courts impose fiduciary obligations where the parties did not make them a term of their agreement: ***155569 Canada Ltd*** at para 92, citing ***Litwin Construction (1973) Ltd v Pan*** (1989), 29 BCLR (2d) 88, 52 DLR (4th) 459 (BCCA) at 472-473.

[40] In ***JA Huber Holdings Ltd v Davidge*** (1993), 128 AR 268 (QB), McFadyen J., as she then was, found that an accounting firm, which was also the sole owner of the general partner, did not owe a fiduciary duty to the individual limited partner plaintiff. She concluded at 274-275:

> I find that the plaintiff has not established that the defendant breached any duty to the plaintiff in connection with the original investment of the funds. There is no ground for any complaint of any undue influence, or of any failure to disclose the terms of the proposal or the involvement of Johnson and the other partners of Davidge and Company in this project. The proposal and the partnership agreement set out their involvement as developers, as investors, and as shareholders in the general partner, 266548 Alberta Limited. Johnson testified that limited partners were advised that Davidge and Company would be paid a fee for putting together the project and for their services as accountants.
>
> ...
>
> Further, the plaintiff has not established that the plaintiff was *vulnerable* to *or at the mercy* of Davidge and Company. The *plaintiff acted in the purchase of the*

> *units as a prudent businessman*, inspecting the property, studying agreements and consulting his own solicitor. *Huber had prior experience in speculative land investments.* In light of these facts, it is difficult to allege and establish any peculiar vulnerability.
>
> (Underline in original, italics added).

[41] McFadyen J. assessed the relationship in terms of the commercial reality of the circumstances, consistent with the principles set out in ***Lac Minerals***. The fact that the terms of the agreements were clearly laid out, together with the lack of vulnerability, militated against finding a fiduciary duty.

[42] Subsequent to ***Huber***, the majority of the Supreme Court of Canada in ***Hodgkinson*** opted for a broader approach in applying fiduciary concepts in a commercial setting, stating that the existence of a contract in itself does not preclude the existence of fiduciary obligations. La Forest J. suggested that the court, in assessing the existence of fiduciary obligations, take a contextual approach and inquire 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": ***Hodgkinson*** at 409.

[43] However, at 414, La Forest J. raised a warning about applying fiduciary obligations in commercial contexts too readily:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self- interest...
>
> (Citations omitted).

[44] The Supreme Court in ***Cadbury***, a case involving unauthorized use and disclosure of confidential information, confirmed this approach at para 30. Finding that a fiduciary duty did not exist on the facts case, the Court noted that "while the existence of a fiduciary duty will not be denied simply because of the commercial context where the ingredients giving rise to that duty are otherwise present, the overriding deterrence objective applicable to situations of particular vulnerability to the exercise of a discretionary power" did not operate on the facts of that case: ***Cadbury*** at para 30.

[45] In ***Financial Management Inc,*** the corporate plaintiff sued the defendant for breach of contract and breach of fiduciary duty for failing to pay certain commissions. In finding that the defendant did not owe a duty, the Alberta Court of Appeal noted there was no evidence to show that the plaintiff's principal was an unsophisticated businessman nor that there was any peculiar vulnerability on the part of corporation, nor exceptional circumstances so as to warrant the imposition of a fiduciary duty, stating that "a fiduciary relationship does not arise simply because one of the parties to a commercial transaction has wrongly assessed the trustworthiness of the other and reposed confidence in that other party": ***Financial Management Inc*** at para 18.

[46] Assessing fiduciary duties as they apply to business entities in arm's length transactions came to a head in ***Indutech***. In this case, the defendants marketed the plaintiff's products under

two agreements which appointed the defendants and their companies as the plaintiff's exclusive sales force. For several years, the defendants operated a competing manufacturing business without the plaintiff's knowledge.

[47] The plaintiff eventually learned about the competing business and sued for breach of contract and breach of fiduciary duty. The trial judge found in favour of the plaintiff, holding that the defendants were fiduciaries to the plaintiff. The trial judge's conclusions were upheld on appeal.

[48] In noting the courts' reluctance to find fiduciary relationships in arms-length business transaction contexts, the Court of Appeal distinguished those cases from the facts of ***Indutech***, stating that the general disposition of precluding the finding a duty is limited to those situations in which a business entity fails to take available steps to protect its interests, then turns around and complains that it was taken advantage of. In ***Indutech***, the Court found that the plaintiff built protections into the terms of the agreements, and the defendants gained advantage through a series of calculated breaches of those contractual protections. In finding a fiduciary duty was owed by the defendants, the Court noted specifically at paras 30 and 35 that:

> In comparison, Indutech's losses did not arise through its failure to insert protective provisions in the Agency agreements; it did not end up vulnerable to the appellants' actions through careless drafting or gormless bargaining. It was not an oversight or failure to take advantage of available means of protecting itself that led Indutech from a position of equal bargaining power into a position of practical helplessness. Rather, its losses arose through the appellants' calculated breach of the very provisions Indutech did insert into the Agency agreements for its own protection.
>
> ...
>
> ...Indutech took steps to protect itself, by requiring that loyalty and non-competition obligations be expressly imposed upon the appellants in both Agency agreements. It could have done little more to protect its interests. A smoothly operating, effective market demands that manufacturers be entitled to rely on their marketing representatives to protect their confidential information, including trade secrets. That interest would not be protected through, in effect, the licensing of marketing representatives to earn significant sums by taking full personal advantage of confidential information provided by manufacturers.

[49] The case before me cannot similarly be distinguished. Jin had every opportunity to protect his vulnerabilities in advancing the investment monies. He could have required more onerous terms in a written agreement or otherwise to secure his expectations as to the funds, the duties of loyalty expected, and what would occur if the agreement were breached. There is no evidence to suggest that he was an unknowledgeable or unsophisticated businessman, no evidence to support any particular vulnerabilities or exceptional circumstances giving rise to a fiduciary duty.

[50] While I agree with Jin's submission that Ren was not expected to misappropriate the investment funds, this was merely a contractual expectation and did not give rise to a fiduciary relationship.

3. Was there an unjust enrichment?

[51] Jin's counsel alternatively submits that the defendants converted the investment monies for their own purposes, and therefore have been unjustly enriched by the use and enjoyment of Jin's funds.

[52] Unjust enrichment is a cause of action distinct from contract and tort: ***Scott & Associates Engineering Ltd v Finavera Renewables*** Inc, 2013 ABQB 273 at para 156, 79 Alta LR (5th) 172, citing ***Pettkus v Becker***, [1980] 2 SCR 834, 117 DLR (3d) 257 and ***Soulos v Korkontzilas***, [1997] 2 SCR 217 at paras 16-25, 146 DLR (4th) 214.

[53] As set out by ***Pettkus*** at 848 and ***Garland v Consumers' Gas Co***, 2004 SCC 25 at para 30, [2004] 1 SCR 629, an unjust enrichment claim will be successful when three elements are proved:

1. There has been an enrichment in favour of the defendant;
2. There has been a corresponding deprivation on the part of the plaintiff; and,
3. There is an absence of juristic reason for the transfer.

[54] A determination on each of these elements is necessary, and is discussed below.

i. Were the defendants enriched by Jin?

[55] I am satisfied that Hart Fibre received the $300,000 from Jin, and therefore obtained an *enrichment*. As to Ren, I conclude that he received the monies from Jin in his capacity as Director of Hart Fibre. Later in these reasons I will deal with whether an unjust enrichment is permitted against Ren personally, by way of a piercing of the corporate veil, thus giving rise to joint and several liability between the defendants for Jin's judgment.

ii. Did Jin suffer a corresponding deprivation?

[56] It is clear that Jin suffered a *corresponding deprivation* in the principal amount of $300,000.

iii. Was there an absence of a juristic reason for the transfer?

[57] If there is a "juristic reason" for the transfer, recovery must be denied.

[58] The Court in ***Garland*** at paras 44-46 explained the two-step analysis to determine the absence of juristic reason: the plaintiff must first show that no juristic reason from an established category exists to deny recovery, with established categories including a contract, a disposition of law, a donative intent, or other valid common law, equitable or statutory obligations. Second, in the absence of the established categories, the Court may consider the reasonable expectation of the parties and public policy considerations to assess whether recovery should be denied. The latter do not appear to be in play here, and I am satisfied that donative intention, disposition of

law or other valid common law, equitable or statutory obligations, are not made out on the facts. Therefore, in making out a claim of unjust enrichment here, there must have been no contract in place.

[59] Agreement is at the basis of any legally enforceable contract. There must be a *consensus ad idem* on essential terms. Without a meeting of the minds of the parties, there can be no contract and it is considered void *ab initio*: GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto, Ontario: Thomson Reuters Canada Limited, 2011) at 15.

[60] As Fraser C.J.A. stated in ***Ron Ghitter Property Consultants Ltd v Beaver Lumber Company Limited,*** 2003 ABCA 221 at para 9, 330 AR 353:

> the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty

[61] The test is whether the term(s) in question relate to *essential* aspects of the alleged contract: ***Ron Ghitter*** at para 8. Beyond the written agreement, an oral agreement or the conduct of the parties can also be looked at to determine whether there was consensus on all essential terms: ***Milroy v Klapstein***, 2003 ABQB 871 at paras 16-19, 342 AR 352.

[62] Further, a valid contract will not be found where the parties have only agreed to agree. This will be the case where they have left important aspects of the intended contract to be determined at a later date; thus, it is impossible to conclude they arrived at a final definite contractual relationship: Fridman at 23.

[63] On the facts at bar, I conclude that any "agreement" as between Jin and Hart Fibre is invalid and unenforceable because the essential terms of the contract between the parties cannot be determined with a reasonable degree of certainty.

[64] The May 2, 2006 "agreement", if it was anything, was no more than an agreement to agree. It was unclear on an essential term, in that the interest that Jin was to receive is unascertainable. The agreement merely says that in exchange for his investment, Jin was to receive in exchange a "ratio of the share hold *about* 20 percent *for the time being* and *we will confirm the share ratios of every shareholder after the whole capital stock had been inputted into the company*". There appears to be nothing else within the four corners of the contract to give any further certainty, nor was there anything said or done as between the parties before or after the contract was entered into that would give sufficient certainty to those terms. It would be impossible for the reasonable observer to be able to conclude what was agreed to regarding Jin's shareholder interest, which was the consideration he was to receive in exchange for the investment monies.

[65] I find as well the absence of a *consensus ad idem* on this essential term of the contract. Like the purchase price in sale agreement, or the date of commencement and term of a lease, the interest that Jin was to receive in Hart Fibre in exchange for his shares went to the very root of the contract; it was a term that could reasonably be considered to be of essential importance to a bargaining party.

[66] The May 2, 2006 "agreement" was no more than an agreement to agree, in that:

a. the share ratios were to be confirmed at some time in the indefinite future;

b. the Agreement's final paragraph stated "whole terms of the Agreement will be arranged by every shareholder after the whole capital stocks of whole shareholders have been inputted"; and,

c. Jin's many demands of Ren for certainty around his interest in the company and its land holdings were unmet, leading to Jin's equally un-met demands for the return of his monies.

[67] On the basis of these findings, and as was found in ***Milroy*** at para 31, I conclude that neither party thought the document of May 2, 2006 was a binding agreement. It was merely intended as a show of good faith and at best, a "preliminary understanding". It did not constitute a binding agreement. Nor was there any *other* agreement, in written or oral form, before or after the May 2, 2006 record.

[68] In summary, no juristic reason exists in this case so as to deny recovery. Any contract that is alleged to have been made between the parties is invalid and unenforceable. An unjust enrichment is made out as there was an enrichment to the defendants, a deprivation to Jin, and a lack of any juristic reason for the transfer.

iv. Can Ren be held personally liable?

[69] As stated earlier, I am satisfied that Hart Fibre received and was enriched by Jin's investment monies, as Ren received the monies in his capacity as Director of Hart Fibre.

[70] I am also satisfied on the evidence that an unjust enrichment claim is not precluded against Ren, as Director of Hart Fibre, as in the circumstances of this case it is appropriate to lift the corporate veil between him and the company.

[71] A corporation is a legal entity distinct from its shareholders: ***Salomon v Salomon & Co Ltd.***, [1897] AC 22. ***Salomon*** stands for the proposition that one cannot go behind a legitimately incorporated company or "lift the corporate veil" to reach the incorporators. This principle applies even in the case of a one-man company: ***Halpern Investments Ltd v Sovereign General Insurance Co***, 2004 ABQB 865 at para 10, 375 AR 394.

[72] There remains however a narrow range of circumstances in which lifting the corporate veil is appropriate. Specifically the veil may be lifted where *improper conduct* has been committed by a corporation's shareholders or its controlling minds: ***Halpern*** at para 16.

[73] By way of background, in ***Kosmopoulos v Constitution Insurance Co of Canada***, [1987] 1 SCR 2, 34 DLR (4th) 208, Wilson J. for the majority observed that the law on piercing the corporate veil followed no consistent principle. She noted however that the veil would be pierced where leaving it intact would yield a result "too flagrantly opposed to justice": ***Kosmopoulos*** at 10.

[74] In ***Transamerica Life Insurance Company of Canada v Canada Life Assurance Company et al*** (1996), 28 OR (3d) 423 (Gen Div), 2 OTC 146, aff'd in [1997] OJ No 3754 (CA), Sharpe J. canvassed the developments in the case law throughout Canada and England since ***Kosmopoulos***. He concluded that the test for lifting the corporate veil is much more stringent than the "just and equitable standard" mentioned in ***Kosmopoulos***, and that the courts

will only intervene where (1) the court is construing a statute, contract, or other document, (2) the court is satisfied that a company is a "mere facade" concealing the true facts, or (3) it can be established that the company is an authorized agent of its controllers or its members, corporate or human. At 433, he stated:

> [T]he courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct.

[75] A similar rationale for lifting the veil was found in ***Shillingford v Dalbridge Group Inc*** (1996), 197 AR 56 (QB), 47 Alta LR (3d) 154. In that case the plaintiff entered a contract with a corporate defendant for a custom-built house. The house was never built, and the plaintiff lost her deposit and down payment. The issue at trial was whether the two brothers, who were the sole shareholder and manager of the corporation, were personally liable for the plaintiff's damages. Perras J. held that the corporation was created in order to allow the individual defendants to improperly divert funds: ***Shillingford*** at para 27. Accordingly, the two brothers were personally liable and were ordered to pay damages.

[76] While it is tempting to do so, the evidence in this case falls short of persuading me that Hart Fibre was set up as a mere shield or façade in order to improperly attract Jin's investment. On the other hand I do not hesitate to conclude that Ren enticed Jin's investment for an improper purpose.

[77] In ***642947 Ontario Limited v Fleischer*** (1997), 9 RPR (3d) 261 (Ont CJ), 29 OTC 161, aff'd in (2001), 56 OR (3d) 417 (CA), the joint owners of a corporation were held liable where the corporation gave an undertaking it had no ability to fulfill. The trial judge concluded that the corporation was merely the alter ego for the two individual defendants.

[78] In upholding the decision on appeal, Laskin J. for the majority stated at para 68:

> Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. *But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done*": Clarkson Co. v. Zhelka, [1967] 2 O.R. 565. (Emphasis added).

[79] This approach was recently affirmed in ***Shoppers Drug Mart Inc v 6470360 Canada Inc***, 2014 ONCA 85 at para 38, 372 DLR (4th) 90, where the Court found the sole director, officer and shareholder of a corporation personally liable for an unjust enrichment claim. Peppall J, for the Court, determined that the defendant was the directing mind of the company and that he expressly directed and caused the wrongful act of misappropriating the plaintiff company's money: ***Shoppers*** at para 45. In finding this, the Court commented that the defendant had sole signing authority over the corporation's accounts and authorized the transfer of significant amounts of the plaintiff's monies for improper purposes, when the monies were supposed to be dedicated to another purpose: ***Shoppers*** at para 45.

[80] Applying these cases to the facts here, I am satisfied that Ren was the controlling mind of Hart Fibre, as he was its sole director. Additionally, while not as clear cut as in some of the authorities canvassed above, the evidence supports the conclusion that Ren retained Jin's investment funds for an improper purpose as he stubbornly refused to account to Jin for his

investment both before and after the action was commenced, and even at trial. By retaining Jin's monies in his capacity as Director of Hart Fibre, which did not belong to him, he "expressly directed a wrongful thing to be done."

[81] Therefore, an unjust enrichment claim is not precluded against Ren personally.

4. What is the appropriate remedy?

[82] Jin seeks disgorgement of profits earned by Hart Fibre with his investment monies, shares in Hart Fibre proportionate to the Plaintiff's investment and a proportionate share of the Lands, or, in the alternative, return of his investment monies. At trial, the Plaintiff argued in the alternative for an equitable remedy in the form of a constructive trust in the investment monies and profits, if any, accruing from those monies.

[83] Once unjust enrichment has been established, the invariable and appropriate remedy to grant is restitution, whether it be monetary restitution consisting of the monetary value of the enrichment or deprivation; or, proprietary restitution consisting of, for example, the imposition of a trust.

[84] Here the appropriate remedy is a monetary one designed to compensate Jin for the enrichment conferred to the Defendants.

[85] Canadian courts have generally held that for restitution in unjust enrichment claims, the measure of relief is capped by the highest amount common to the parties' respective enrichment and deprivation – or in other words, the lesser of the enrichment of the defendant and that of the plaintiff's deprivation. The defendant cannot give up more than was gained, and the plaintiff cannot get back more than was lost: Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ontario: LexisNexis Canada, April 2014) at 5, citing ***Quebec (Attorney General) v A***, 2013 SCC 5, 354 DLR (4th) 191 at 252 and ***Air Canada v British Columbia***, [1989] SCJ No 44, 59 DLR (4th) 161 at 193-194.

[86] A remedy of disgorgement of profits, whereby the wrongdoer must give up *all* of the benefits that were acquired by virtue of the wrong, is only appropriate where there is a successful claim of civil wrongdoing, like a breach of fiduciary duty or a breach of contract, as opposed to the "autonomous unjust enrichment" three-part cause of action: McInnes at 6-9. Because a breach of fiduciary duty or other civil wrongdoing has not been made out on these facts, I cannot award disgorgement or accounting of profits.

i. Should a constructive trust be imposed?

[87] I am not convinced in the circumstances that I should exercise my discretion to impose a constructive trust in either the investment monies or the interest in the land owned by Hart Fibre.

[88] A constructive trust is a remedy awarded in exceptional circumstances and comes into existence, regardless of any party's intent, when the law imposes an obligation upon a party to hold specific property for another: Waters at 454.

[89] A constructive trust *may* be available in cases of wrongful conduct on the part of a fiduciary or in unjust enrichment cases. It remedies an unjust enrichment by "creating a property interest where none previously existed": McInnes at 1149.

[90] In ***Peter v Beblow***, [1993] 1 SCR 980, [1993] SCJ No 36 at 988, followed more recently in ***Man-Shield (Alta) Construction Inc v 1117398 Alberta Ltd***, 2007 ABQB 603 at para 10, 436 AR 353, the court noted that a constructive trust should be granted only where a monetary award is insufficient.

[91] Furthermore, the majority in ***International Corona Resources Ltd v Lac Minerals Ltd***, [1989] 2 SCR 574 at 678, 61 DLR (4^{th}) 14 (SCC) said that a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. The court noted that among the most important of these rights is priority for the plaintiff in the defendant's bankruptcy.

[92] The plaintiff who establishes a constructive trust moves from being an unsecured creditor to being one who can simply demand the transfer of the asset from the trustee in bankruptcy. This has substantial effects on third parties and can interfere with the intention of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 67(1)(a): Waters at 478-480.

[93] There appears to be no evidence here that either Hart Fibre or Ren are insolvent. Further, Jin has expressly pleaded for a monetary award, in the event that a proprietary one is not available. Therefore, it is not necessary to go any further in assessing whether or not a constructive trust should be awarded on these facts.

ii. Is Jin entitled to compound interest?

[94] As Professor McInnes notes at 102 of *The Canadian Law of Unjust Enrichment and Restitution*:

> The receipt of money is considered doubly enriching...[in that it] can be used to generate more wealth. The recipient...enjoys both the principal sum and its *time value*...[aka] compound interest. Money loaned or borrowed in the market carries not only *simple* interest on the principal, but also interest upon the interest.
>
> (Emphasis in original, citations removed).

[95] While courts historically refused to recognize the time value of money, some Canadian courts have begun to follow the English line of authority in recognizing arguments in favour of awarding compound interest. In ***Bank of America Canada v Mutual Trust Co***, 2002 SCC 43, [2002] 2 SCR 601, the court held that "restitutionary damages" may include a component of compound interest. Major J. explained that while compound interest was traditionally awarded as a form of equitable punishment, "modern theory" is based on the desire to "compensate rather than punish": ***Bank of America Canada*** at 306. Since both parties in that case operated in the financial industry, compound interest was awarded to reflect the fact that the defendant seized the plaintiff's right to "commercially exploit the principal fund": McInnes at 103.

[96] In his Statement of Claim, Jin claimed judgment interest pursuant to the *Judgment Interest Act*, RSA 2000, c. J-1. No claim was made for compound interest in the prayer for relief. While Jin's counsel asserted at trial that Jin should receive the use value of the money since 2006, no facts were alleged which could be used to substantiate a claim for compound interest and amendments were never made to the original Statement of Claim.

[97] The Alberta Court of Appeal in ***Creditel of Canada Ltd v Terrace Corp (Construction) Ltd*** (1983), 50 AR 311, 23 ACWS (2d) 442 (Alta CA), recently followed in ***321665 Alberta Ltd v ExxonMobil Canada Ltd***, 2012 ABQB 76, 529 AR 276, held that the jurisdiction of a trial judge is restricted to the relief claimed in the pleadings.

[98] In ***Costello v Calgary (City)***, 1997 ABCA 281, 209 AR 1, the Court of Appeal stated at para 114:

> Civil litigation almost invariably involves something that was not done that ought to have been done (e.g. the exercise of reasonable care, the fulfilment of a contractual obligation, the restoration of a mistaken payment). And while it is conceivable that (compound) interest could accompany all manner of claims, it is too late in the game for a court to effect such a development. That is particularly true now that the legislature has devised a scheme of pre-judgment interest in the *Judgment Interest Act*.

[99] Moreover, ***Bank of America*** at para 55 appeared to limit the circumstances as to when compound interest may be awarded:

> An award of compound pre- and post-judgment interest will generally be limited to breach of contract cases where there is evidence that the parties agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest as damages. It may be awarded as consequential damages in other cases but there would be the usual requirement of proving that damage component.

[100] I heard no evidence at trial to satisfy the ***Bank of America*** test.

[101] While there is some support for awarding compound interest on the basis of economic realities, these cases have often dealt with successful claims of fraud and the tort of deceit: see, for example, ***Village on the Park (Re)***, 2009 ABQB 497, 472 AR 230.

[102] There is also quite limited jurisdiction to award compound interest in equity. As noted in ***Alberta (Minister of Public Works, Supply & Services) v Nilsson***, 2002 ABCA 283, 320 AR 88 at para 197:

> A right to compound interest remains in equity for cases falling outside of statutory schemes. A plaintiff must prove, first, entitlement to interest either in equity before the statutory scheme came into play or by some express contract; and, second, either that the defendant traded, speculated, or earned compound interest with the money improperly withheld the profits of which should be justly disgorged, or that the plaintiff would have earned compound interest had the debt been properly paid...

[103] There is no evidence in this case to satisfy either of these components.

[104] I accept that the Court has power to award interest at a rate which would compensate Jin for the loss of the use of his money. However, for similar reasons as expressed by Belzil J. in ***ExxonMobil Canada***, I am not satisfied that this case warrants anything over and above that provided by the *Judgment Interest Act*. Compound interest was not plead in the Statement of

Claim, nor was the ***Bank of America*** or ***Nilsson*** test met. In the result, Jin is entitled to recover only simple interest.

[105] Therefore, I find Ren and Hart Fibre are jointly and severally liable to Jin for the principal investment amount of $300,000, together with interest pursuant to the *Judgment Interest Act*.

iii. What is the appropriate currency?

[106] The collective enrichment to the Defendants and the corresponding deprivation to Jin was expressed at trial variously in terms of Chinese, U.S., and Canadian currencies.

[107] For purposes of this judgment the award will be expressed in Canadian currency: *Currency Act*, RSC 1985, c C-52, s 12; ***Litecubes, LLC v Northern Light Products Inc***, 2009 BCSC 427, 94 BCLR (4th) 158 at para 8.

[108] There is discretion to select either the date of breach/tortious conduct or date of judgment as the conversion date: ***Houweling Nurseries Oxnard, Inc v Saskatoon Boiler Mfg Co Ltd***, 2011 SKQB 112, 370 SaskR 1 at para 220, citing ***Stevenson Estate v Siewert***, 2001 ABCA 180, [2001] 10 WWR 401, ***Kellogg Brown & Root Inc v Aerotech Herman Nelson Inc***, 2004 MBCA 63, 238 DLR (4th) 594. Here the conversion date of RMB and US dollar amounts will be the date of these reasons.

[109] I award judgment to Jin in the amount of $300,000 CND, more or less once conversion has taken place, plus simple interest pursuant to the *Judgment Interest Act*.

Heard the 9-19 days of June, 2014; further written submissions received August 15, 2014.
Dated at the City of Edmonton, Alberta this 13th day of February, 2015.

Peter B. Michalyshyn
J.C.Q.B.A.

Appearances:

Genevieve Chan
Barrister & Solicitor
for the Plaintiff

Zigang Ren, self-represented
for himself, and for
the Defendant Hart Fibre
Trade Company Ltd.

TAB 5

I hereby certify this to be a true copy of
the original Order
Dated this 21 day of May 2020
for Clerk of the Court

Order
Rule 9.5

JUDICIAL CENTRE OF CALGARY
FILED
May 21, 2020
LD
by Email
CLERK OF THE COURT

COURT FILE NO.:	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

INV #501099

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

APPLICANT	JMB CRUSHING SYSTEMS INC.
DOCUMENT	**ORDER – LIEN CLAIMS – MD of BONNYVILLE**
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/Alex Matthews** Phone: 403.298.1938/403.298.1992/403.298.1018 Fax: 403.263.9193 File No.: A163514

DATE ON WHICH ORDER WAS PRONOUNCED: May 20, 2020

LOCATION AT WHICH ORDER WAS MADE: Calgary Court House

NAME OF JUSTICE WHO MADE THIS ORDER: Madam Justice K.M. Eidsvik

UPON THE APPLICATION of JMB Crushing Systems Inc. (**"JMB"**); **AND UPON HEARING** counsel for JMB; **AND UPON** reviewing the Affidavit of Jeff Buck sworn May 8, 2020 and the Affidavit of Jeff Buck sworn May 20, 2020; **AND UPON** hearing counsel for the Applicant and those parties present; **IT IS HEREBY ORDERED THAT:**

1. The time for service of notice of application for this Order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

2. The Consent Order granted May 11, 2020 by the Honourable K.M. Eidsvik is hereby set aside and the process contemplated therein is replaced by the process set out herein.

Definitions

3. For the purpose of the within Order, the following terms shall have the following meanings:

   (a) "**BLA**" means the *Builders' Lien Act*, RSA 2000, c B-7;

   (b) "**Claims Bar Date**" means 5:00p.m. (Calgary time) on June 1, 2020, or such other date as may be ordered by the Court;

   (c) "**Contract**" means the agreement between MD of Bonnyville and JMB dated November 1, 2013, as amended, pursuant to which JMB provided Product to MD of Bonnyville and hauled the Product for stockpiling at the Lands;

   (d) "**CRA Amount**" means $236,000.00 to be paid to the CRA from the Funds less the Holdback Amount in accordance with this Order;

   (e) "**Determination Notice**" means written notice of a Lien Determination;

   (f) "**Disputed Amount**" means the amount disputed as owing by MD of Bonnyville to JMB, which is $131,237.60;

   (g) "**Funds**" means those amounts invoiced by JMB to MD of Bonnyville but not yet paid by MD of Bonnyville for the period up to and including April 30, 2020 in relation to the Contract, less the Disputed Amount, which is $3,563,768.40;

   (h) "**Holdback Amount**" means the amount to be held by the Monitor from the Funds, which is $1,850,000.00;

   (i) "**Interested Party**" means any party who gives notice in writing to the Monitor of its interest in a Lien Determination;

   (j) "**JMB**" is JMB Crushing Systems Inc.;

   (k) "**Lands**" means those lands legally described as:

LEGAL DESCRIPTION
MERIDIAN 4 RANGE 5 TOWNSHIP 61
SECTION 19
QUARTER NORTH EAST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS

EXCEPTING THEREOUT:		HECTARES	(ACRES) MORE OR LESS
A) PLAN 8622670	ROAD	0.416	1.03
B) PLAN 0023231	DESCRIPTIVE	2.02	4.99
C) PLAN 0928625	SUBDIVISION	20.22	49.96

EXCEPTING THEREOUT ALL MINES AND MINERALS

(l) "**Lien**" means a lien registered under the BLA against the Lands in respect of the Work or the Contract;

(m) "**Lien Claim**" means a claim of any Lien Claimant to the extent of such Lien Claimant's entitlement to receive payment from the major lien fund, as defined in the BLA, as it relates to the Work performed by the Lien Claimant or a subrogated claim for such Work;

(n) "**Lien Claimant**" means a claimant who: (i) has registered a Lien for its Work against the Lands; or (ii) has a Lien Claim and has provided a Lien Notice to the Monitor as described herein;

(o) "**Lien Determination**" means a determination of the validity of a Lien, a Lien Claim and the quantum thereof, whether by the Monitor or this Court;

(p) "**Lien Notice**" means the form attached as Schedule "A" hereto;

(q) "**MD of Bonnyville**" is the Municipal District of Bonnyville No. 87;

(r) "**Monitor**" means FTI Consulting Canada Inc., in its capacity as the Court-appointed monitor of JMB, and not in its personal capacity or corporate capacity;

(s) "**Product**" means the aggregate produced by JMB pursuant to the Contract; and

(t) "**Work**" means work done or materials furnished with respect to the Contract or the Lands.

Stay of Lien Claims

4. No person shall be permitted to commence or serve any Lien Claims, or to preserve or perfect any Lien Claim under the BLA, for Work done in respect of the Contract or the Lands for the period up to and including April 30, 2020. Any such Lien or Lien Claim is hereby stayed, and any person seeking to serve or enforce any Lien or Lien Claim shall be required to seek the rights and remedies set out in this Order.

Claims Process

5. Within one (1) Business Day of the within Order being granted by this Court, MD of Bonnyville shall remit to the Monitor the Funds, and shall thereafter be deemed to have been in the same position as if (a) no written notices of Lien had been received; (b) no Lien Claims had been made, asserted, delivered, preserved or perfected; and (c) no Lien Notice had been received, and MD of Bonnyville shall have no further liability for such Funds.

6. The Monitor shall hold the Holdback Amount in trust in an interest bearing account in accordance with the terms of this Order, which Holdback Amount shall be deemed to be the amount MD of Bonnyville was required to hold back pursuant to section 18 of the BLA from payments it made or makes to JMB for those amounts invoiced up to and including April 30, 2020.

7. Any person who wishes to assert a Lien Claim against the Lands and who has not yet registered a Lien against the Lands shall deliver a Lien Notice by email to the Monitor's attention within the time frame prescribed by the BLA in order to preserve and perfect their Lien Claim.

8. Pursuant to section 48(2) of the BLA, the Holdback Amount shall stand as security in place of the Lands to the extent of any security granted under the BLA for all Lien Claims registered by Lien or provided to the Monitor by Lien Notice prior to the expiry of the time frame prescribed by the BLA.

9. Lien Claimants who have registered a Lien against the Lands or provided a Lien Notice to the Monitor as set out in paragraph 7 hereof shall only be required to take the steps set out

in this Order to prove their Lien, and shall not be required to take any steps set out in the BLA, including, but not limited to, filing a statement of claim or a certificate of lis pendens.

10. Upon the Monitor providing a certificate to the Registrar of Land Titles confirming receipt of the Funds by the Monitor and that the Funds are sufficient to pay the Liens, the Registrar is hereby authorized and directed under section 191(3)(a) of the *Land Titles Act*, RSA 2000, c L-4 to discharge the registration of the Liens registered on or before the date of this Order against title to the Lands, whereupon the Lien Claimants shall have no further claim against MD of Bonnyville in accordance with paragraph 5 hereof.

11. The Lien Claimant, JMB, any Interested Party and MD of Bonnyville, at the request in writing of the Monitor, shall provide to the Monitor information reasonably necessary for the Monitor to make a Lien Determination.

12. Upon receipt of the information relating to a Lien and Lien Claim contemplated by paragraph 12 hereof, the Monitor shall make its Lien Determination in respect thereof and provide a Determination Notice to the Lien Claimant, JMB and any other Interested Party.

13. If a Lien Claimant, JMB or any Interested Party does not accept a Lien Determination, each of the Lien Claimant, JMB and Interested Party is hereby granted leave to file and serve an application with this Court within 15 days of being served with the Determination Notice by the Monitor at the email address of the Lien Claimant as shown on the Lien or Lien Notice, and on JMB and any Interested Party in the records of the Monitor.

14. Once the 15-day period provided for in paragraph 13 hereof has expired without an application being served and filed with this Court, the Lien Determination of the Monitor shall be final and the Lien Claimant, JMB, and any Interested Parties shall not have any recourse to remedies set out in the BLA with respect to such Liens or Lien Claims, or as and against any of the Funds or the Holdback Amount.

15. The Monitor shall make the following payments from the Funds pursuant to this Order:

    (a) Once the certificate has been provided to the Registrar by the Monitor pursuant to paragraph 10 herein, the Monitor shall pay: (i) to JMB, the total amount of the

Funds less the Holdback Amount and the CRA Amount; and (ii) to CRA, the CRA Amount;

(b) Following each Lien Determination becoming final, the Monitor shall pay to each Lien Claimant the amount of its Lien Claim as set out in the Lien Determination from the Holdback Amount; and

(c) The Monitor, provided that it reserves a sufficient amount of the Holdback Amount to pay the Lien Claims, may pay the amount in excess thereof, if any, to JMB after the Claims Bar Date has passed, and upon the Lien Determinations becoming final in respect of all of the Liens, the Monitor shall pay the remaining Holdback Amount to JMB.

Disputed Amount

16. The Disputed Amount is not subject to the terms of this Order and shall be dealt with by way of separate application to this Court if required.

17. Each party shall be responsible for their own costs regarding the within matter.

J.C.C.Q.B.A.

Schedule "A"
Lien Notice

Claimant: _____

Address for Notices: _____

Telephone: _____

Fax: _____

Email: _____

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

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

do hereby certify that:

1. ☐ I am the Claimant

OR ☐ I am the _____ of the Claimant
(title/position)

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

3. The Claimant has a valid

   (a) **Builders' Lien Claim** in the amount of $_____ arising pursuant to work done or materials furnished on behalf of JMB Crushing Systems Inc.

   (b) **Subrogated Claim** in the amount of $_____ arising pursuant to work done or materials furnished on behalf of JMB Crushing Systems Inc.

4. Attached hereto as Schedule "A" is an affidavit setting out the full particulars of the Claimant's builders' lien claim or subrogated claim, including all applicable contracts,

sub-contracts, the nature of the work completed or materials furnished, the last day on which any work was completed or materials were furnished, any payments received by the Claimant, all invoices issued by the Claimant, and all written notices of a lien served by the Claimant.

DATED at _____, this _____ day of May, 2020.
(location)

_____ _____

Witness

Name: Name:

Must be signed and witnessed

TAB 6

Alnav Platinum Group Inc. v. APM Delstar Inc., 2001 ABQB 930

Date: 20011213
Action No. 85583, 85584, 85585, 85586, 85587

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF IN THE MATTER OF an Application Pursuant to Section 47 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, Ch. B3, as amended

BETWEEN:

ALNAV PLATINUM GROUP INC.

Applicant

- and -

APM DELSTAR INC., MACCOSHAM VAN LINES (CANADA) CO. LTD., WALLACE WAREHOUSE & CARTAGE LTD., DIXON VAN LINES LTD., AND WESTERN MOVING & STORAGE LTD.

Respondent

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE J. A. AGRIOS

APPEARANCES:

D. N. Tkachuk
for the Applicant

Margaret A. Irving
for Her Majesty the Queen in Right of Canada
as represented by the Minister of National Revenue

[1] This is a dispute, between the Minister of National Revenue and a secured creditor of a company now in bankruptcy, over the sum of $386,217.00 which the Minister states are properly G.S.T. monies which should be paid to the Crown. The Applicant, Alnav Platinum Group Inc. ("Alnav"), argues that this is a priority claim between two competing interests, namely that of Alnav and the Canada Customs and Revenue Agency ("C.C.R.A."). The Minister uses a totally different approach and argues that the monies have at all times been the property of the Crown or C.C.R.A. and are therefore beyond the reach of, and not subject to, any priority contest.

[2] The facts are not in dispute and are correctly set out in the memoranda of argument submitted by the parties. Briefly stated, they are as follows: upon the application of Alnav, Pricewaterhouse Cooper ("PwC")was appointed receiver of the Respondents which includes a group of companies called the A.P.M. Delstar Group which in turn which includes MacCosham Van Lines (Canada) Co. Ltd. MacCosham collected the G.S.T. monies in dispute. The documentation quoted in these reasons makes reference to the Delstar Group, but for convenience I shall refer to the Group as "MacCosham." unless otherwise required.

[3] The Receiver was appointed on September 15, 2000 (the order being amended and restated on September 20, 2000). On December 15, 2000 MacCosham was adjudged bankrupt and PwC was appointed trustee of the Respondents' estate. To the date of this application Alnav has advanced to the receiver over $7,700,000.00 to permit the receiver to carry out its powers and has been reimbursed for approximately $1,100,000.00.

[4] The Minister, through the C.C.R.A., states that MacCosham's current Goods and Services Tax ("G.S.T.") indebtedness to the C.C.R.A., including interest and penalties, to the date of bankruptcy is $617,150.52.

[5] Shortly prior to PwC's appointment, another secured creditor of the MacCosham group had appointed another firm of accountants to collect accounts receivables. The particulars of this and various agreements between PwC and the other creditor are somewhat germane to this dispute, in particular a Procceeds Agreement outlined below, and the fact that between September 15, 2000 and November 13, 2000, that other secured creditor collected $4,829,000 of which $315,915.89 would represent G.S.T. monies for taxable supplies made prior to September 15, 2000. During the period between November 24, 2000 and December 15, 2000, PwC collected a further $688,395.93, of which $45,035.25 would represent G.S.T. monies for taxable supplies made prior to September 15, 2000. These G.S.T. amounts are calculated as 7/107 of the respective amounts collected; they were not sums specifically set aside, at this point, as G.S.T. monies.

[6] The other secured creditor was paid in full in respect of MacCosham's indebtedness, leaving a surplus amount of $1,413,370.40 (the "Surplus Amount"), which included the G.S.T. monies collected by that other creditor. By an agreement dated November 17, 2000 between PwC and the other creditor (the "Proceeds Agreement") PwC and the other creditor agreed that the Surplus Amount, less a holdback of $200,000, would be paid to PwC and that PwC would

hold that amount, and any further amounts collected (including PwC's G.S.T. monies), subject to the terms of the Proceeds Agreement. That Agreement clearly contemplates what it refers to as "Pre-Receivership G.S.T. and Other Trust Claims", and on March 23, 2001 I ordered PwC to pay into a separate account (the "G.S.T. Fund") the sum of $617,150.52 relating to the G.S.T. Claims as contemplated by that Agreement. It is now agreed that the correct sum that may be properly referred to as monies related to these G.S.T. Claims is $386,217.00 (the "G.S.T. Monies") and that the G.S.T. Fund has a surplus. The terms of the Proceeds Agreement relevant to whether a trust is impressed on the G.S.T. Fund or Monies are outlined in detail below. The final relevant fact is that the Delstar Group, including MacCosham, were adjudged bankrupt on December 15, 2000, with a Receiving Order being made against each of them, and with PwC being appointed Trustee of their Estates.

[7] Alnav now brings an application for a declaration that the C.C.R.A. has no claim to the G.S.T. Fund or Monies and that Alnav is entitled to a declaration that the costs of the interim receivership paid by Alnav have priority against the C.C.R.A.

[8] The Crown argued that this application is premature since an audit is currently in progress to determine the appropriate sum of G.S.T. owing by MacCosham, as this may be adjusted, as a result of that audit, from an October 24, 2000 C.C.R.A. assessment. In view of the decision I render, which comprehends the possibility of any adjustment entailed by this audit, I believe this argument is made moot, but if an issue arises on this point, a further application may be made.

[9] The Minister characterizes the issues as follows: Does a secured creditor have any claim to G.S.T. monies; and is the G.S.T. Fund part of MacCosham's estate. The Applicant, Alnav, characterizes the issues somewhat differently, asking whether the C.C.R.A. can claim priority on the basis of either a deemed trust or an actual trust and further, does provision of the Receiving Order or intervening bankruptcy alter any priority position, and finally, assuming C.C.R.A. has priority, what is the amount of the priority.

[10] I need not answer the issues raised by Alnav's counsel as to whether a deemed trust arises in favour of the C.C.R.A., as the Minister makes no claim under this head. I think the Minister is wise to have declined this argument, as any deemed trust on G.S.T. monies created by the relevant section of the ***Excise Tax Act*** R.S.C. 1985, c. E-15 (as amended) is, pursuant to that same Act, undone by MacCosham's assignment into bankruptcy. Nor do I find, on the facts of this case, the existence of any deemed trust prior to bankruptcy to be helpful in determining if an actual trust exists on the G.S.T. Fund or Monies, as it is clear from the reasons of McLachlin J (as she then was) in ***B.C. v. Henfrey Sampson Belair Ltd.*** [1989] 5 W.W.W. 577 (S.C.C.) that deemed statutory trusts do not constitute valid trusts in accordance with ordinary general principles of law, rather they are a priority scheme set up to give the Crown priority over secured and other creditors. That deemed trust is not applicable post-bankruptcy, and as it is not a true trust *per se* I regard it, if it existed, as irrelevant to determining any of the issues on this application.

[11] Having considered the able arguments by counsel, I have decided that the G.S.T. Monies in the G.S.T. Fund are in fact the "Government's money". Ms. Irving, counsel for the Minister, argued pointedly that "this is our money". It is her position that suppliers (like MacCosham) have no property or interest in the G.S.T. portion of their receivables and accordingly it is not possible for assignees, simply by virtue of their assignment, to attach the G.S.T.

[12] I agree. Suppliers of G.S.T. taxable goods and services act as agent collecting G.S.T. on behalf of Her Majesty by virtue of a combination of various sections of the ***Excise Tax Act***, see ***Minister of National Revenue v. Williston Wildcatters Oil Corp.*** [1997] 5 W.W.R. 55 (Sask. C.A.). In that case the Saskatchewan Court of Appeal held, as do I, that the G.S.T. monies were never the property of the bankrupt and that the supplier collected the monies as agent for the Minister. On this point, the Court of Appeal quoted and affirmed the Chambers judge's reasons, and I too find them worth quoting at length (at 66):

> [para34] We now turn to the respondent's motion to vary which challenges the Minister's second claim. On this branch of the case the learned Chambers judge held at p. 215, paras. 18-20 [(1996)145 Sask. R. 209]:
>
> > [18] The second point in issue in the present case is the claim by the MNR to $22,186.79 now in the hands of the trustee paid by Koch as GST. In the notice of motion the only ground cited by the MNR in support of the claim to the money is ETA s. 165(1). It reads:
> >
> > 165(1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada a tax in respect of the supply equal to 7% of the value of the consideration for the supply.
> >
> > This section could well be sufficient without reference to more in the ETA to sustain the claim of the MNR. The section requires that the purchaser of a taxable something, in the present case oil, pay the tax to Her Majesty in Right of Canada. If it is paid to a person required to collect the tax, that person must be collecting it solely for Her Majesty in Right of Canada. But that the collector of the tax does so as agent of Her Majesty is made specifically so by ETA s. 221(1).
> >
> > [19] In the circumstances, the bankrupt could not claim any property right in the GST collected and I do not see any way in which the trustee could have any claim on this money. It never was the property of Williston.Williston billed for and would be entitled to collect the GST only as agent for the MNR. ETA s. 265 deems a trustee in bankruptcy to become the agent of the bankrupt in relation to GST.

> [20] I cannot, with respect, see any basis for the trustee maintaining that GST paid as such and clearly identifiable and traceable as such in the hands of the trustee can be considered as part of the bankrupt estate divisible among creditors. On this point I find for the MNR. Property in the amount of $22,186.79 is the property of the MNR.

[para35] We agree with these reasons and conclusion. It is unnecessary for us to say more.

[13] I do not regard ***Williston Wildcatters*** to be standing for the proposition that mere agency alone would be sufficient to find that G.S.T. monies collected by a person under a duty to collect them is sufficient to keep those monies out of a bankrupt's estate – for G.S.T. monies are probably invariably collected by persons who could be seen to be acting as agent for Her Majesty. Once, however, those monies are collected as agent *and* are clearly identifiable or traceable in the hands of the trustee they, in my view, bypass the bankrupt's estate. Those monies, may also, if they meet the three certainties required to find a trust, bypass the bankrupt's estate on that basis, regardless of any agency relationship between the collector of the monies and Her Majesty.

[14] Mr. Tkachuk for the Applicant argues that the ***Williston Wildcatters*** decision was rendered just prior to the decision of the Supreme Court of Canada in ***Royal Bank of Canada v. Sparrow Electric Corp.*** [1997] 2 W.W.R. 457 and, accordingly, the rationale set forth in ***Williston Wildcatters*** has been overturned. There is no disagreement that as a result of ***Sparrow Electric***, where the Supreme Court of Canada held in favour of the secured creditor on the priority issue with C.C.R.A., s. 227 of the ***Income Tax Act*** R.S.C. 1985, c. 1 (5th Supp.) is amended to its current wording. However, it is agreed that s. 222(1) of the ***Excise Tax Act*** was not amended until October 20, 2000, to parallel with current wording of the ***Income Tax Act***, so, the pre-October 20, 2000 wording in s. 221(1) of the ***Excise Tax Act*** is applicable to this application.

[15] I do not agree in any event with the Applicant's submission that ***Sparrow Electric*** overturns ***Williston Wildcatters***. In ***Sparrow Electric*** the bankrupt had made income tax payroll deductions but failed to remit them to the Minister of National Revenue. The Chambers judge held that the Crown had priority over the proceeds from the inventory by reason of a deemed statutory trust in favour of the Minister. This secured creditor appealed and the appeal was allowed on the basis that the ***Bank Act*** S.C. 1991, c. 46. transferred title from the borrower to the Bank. The Minister's deemed trust arose, if at all, too late. The Supreme Court of Canada upheld the decision and added that the deemed trust provisions in favour of the Crown found in the ***Income Tax Act*** are not a mechanism for undoing an existing security interest. The deemed trust cannot be effective, that is, unless it is first determined there is some unencumbered asset out of which the trust may be deemed. The Bank's general security agreement gave it a fixed and specific charge against the borrower's inventory and the licence of the bankrupt to sell and to incur debts in the ordinary course of business did not derogate from that security interest. In ***Sparrow Electric*** the monies had been deducted but not paid to

Her Majesty. In the current case, neither MacCosham nor the secured creditor has any property or interest in these monies. There is in fact, as the Minister argues, the formation of an express trust with the three certainties, those of intention, subject matter, and object being met. The G.S.T. Fund is identifiable and traceable and is an actual trust as contemplated by the Supreme Court of Canada in ***B.C. v. Henfrey Sampson Belair Ltd.*** (*supra*).

[16] The three certainties required for an express trust in Equity are made evident in the Proceeds Agreement noted above, which agreement was created before MacCosham's bankruptcy. That Agreement was approved by myself in a Court Order of November 21, 2000 where PwC was authorized and directed to carry out the terms and obligations as set out in the Agreement. The Agreement clearly contemplates the existence of the G.S.T. Claims and the holding of monies relating to those claims for the purpose of payment to Her Majesty. First, one of the recitals of the Agreement states: "The Bank holds a first charge on the Accounts, subject only to such statutory priorities and trust claims which may rank ahead of the Bank Security." Article 3.2 of the Agreement states:

> 3.2 Upon
>
> (a) the granting of receiving orders under the BIA against each member of the APM Delstar Group; and
>
> (b) either
>
> i) the granting of a final order declaring that amounts claimed by CCRA under the Excise Tax Act (Canada) for goods and services tax ... do not have priority over the Bank Security as a result of such receiving orders; or
>
> ii) an agreement being reached between the Interim Receiver, CCRA, the applicable provincial authorities and the Bank, approved by the court, as to the quantum and payment of Pre-Receivership GST and Other Trust Claims,
>
> the balance of the Proceeds Account shall be released to the Interim Receiver.

[17] Although a Receiving Order has been granted, I regard the following provision as further evidence that the Proceeds Agreement contemplates that the Interim Receiver holds G.S.T. monies in the Proceeds Account for payment to Her Majesty in discharge of any G.S.T. Claims:

> 3.3 In the event that a receiving order is not granted for any member of the APM Delstar Group within a reasonable time from the issue of petitions and filing of notices of dispute, the Interim Receiver shall either

a) reach an agreement with CCRA, the Bank and the applicable provincial authorities, approved by the court; or

b) apply to the Court on notice to the CCRA, the Bank, the applicable provincial authorities and such other interested parties for an order

determining the full amount outstanding for Pre-Receivership GST and Other Trust Claims.

[18] The Agreement further recognizes the G.S.T. monies as earmarked for payment to Her Majesty in the following provision:

> 3.5 Upon a final order being granted or an agreement being reached determining the amount owing for Pre-Receivership GST and Other Trust Claims by any member of the APM Delstar Group for which a receiving order has not been granted, as required by paragraph 3.3 above, the Interim Receiver shall disburse from the Surplus Account GST Portion and, if insufficient, from the Proceeds Account, such amount to discharge the Pre-Receivership GST and Other Trust Claims in full.

[19] It is abundantly clear, in my view, that the Proceeds Agreement recognizes, prior to MacCosham's bankruptcy, that monies relating to any G.S.T. Claims are earmarked for distribution to Her Majesty. The degree of identification of those monies, as evidenced in the Proceeds Agreement, provides a sufficient degree of certainty of intent, subject matter, and object that I find an express trust on them pursuant to the principles of trust law in Equity. Those monies were impressed with a trust prior to MacCosham's bankruptcy, and prior to their having been moved, by Court Order, into a separate account pursuant to clause 3.2(b)(ii) of the Proceeds Agreement. Those trust monies now are identifiable in, and traceable to, the G.S.T. Fund as the G.S.T. Monies, as those two terms have been defined above. I have already noted that the exact sum of G.S.T. due Her Majesty may be varied based on an audit conducted by the C.C.R.A. This does not impair the certainty of subject matter in respect of those monies being impressed with an actual trust, as is trite law that if the correct amount *can* be easily identifiable out of funds earmarked that purpose, which is the case here, it does not matter that the precise amount was not *actually* identified. The funds out of which easily calculated G.S.T. Claims would be determined were themselves clearly identified, and the G.S.T. Monies further identified out of them.

[20] A similar decision, in respect of a court finding an actual trust, was reached by my Court of Appeal in ***Re Armcorp 4-18 Ltd.***, (1999) 10 C.B.R. 4th 65. This case clearly post-dates ***Sparrow Electric*** (*supra*) and once again held that there was an express trust on monies which were sufficiently identifiable and traceable. As in this case, it is irrelevant whether any deemed trust was created. I read ***Re Armcorp 4-18 Ltd.*** to say that the monies had always been earmarked for G.S.T. and the G.S.T. portion of the Fund belonged, in this case, to Her Majesty from the outset for all of the reasons stated above.

[21] In the result, I find that the G.S.T. Monies, as defined above, and as varied by the audit referred to above, do not fall into the bankrupt's estate, and those monies, up to a maximum of the sums of the receivables actually collected, namely $360,951.14, are payable as G.S.T. monies due to Her Majesty the Queen through her agency the C.C.R.A.

[22] Counsel may speak to costs at their convenience.

HEARD on the 22nd day of October, 2001.
DATED at Edmonton, Alberta this 13th day of December, 2001.

J.C.Q.B.A.

TAB 7

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

Editor-in-Chief

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nevertheless to say that, though different trustees might hold varying notions upon what is reasonable, the word "reasonable" is sufficiently objective that, on an application being made, the court can determine what the income is to be. The courts undoubtedly lean as far as possible in favour of upholding the settlor's disposition, but it is at least arguable whether this case does not lean too far. What are the criteria for determining what is reasonable income? It does not necessarily infer need; the wealthy beneficiary is not excluded.[108] And may the trustees consider the other calls that are to be made upon the trust capital, for example, the maintenance of infants who have capital interests?

In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.[109] "Reasonable income" seemed to the learned judge in *Re Golay* to satisfy that test.

Of course, certainty of the property that is to be subject to an express trust can always be obtained by the settlor or testator transferring nominal property to the trustees; for instance, he settles $100 "plus such other property as shall later be added."[110] The settlor, the personal representatives, or third parties may then add this further property. However, though this familiar device secures certainty, it is of no assistance if the creator of the trust has described what shall constitute that further property, and the description lacks definition or ascertainability. No one can determine what is meant by a trust of $100 plus "the bulk of my estate", for instance; the trust will remain a trust of $100. It will indeed be sufficient, on the other hand, if the creator of the trust employs a formula; for example, he gives his executors and trustees the power to transfer to the trust of $100 such other assets from his residuary estate as they shall choose.

D. Certainty of Beneficial Shares

Even if the trust property is clearly defined or ascertainable, the trust will still be void and the trust property revert to the settlor if the beneficial shares in that property are not clearly defined. The classic example of such failure is *Boyce v.*

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uncertainty. It may appoint new trustees, or require the professional preparation of a proposal for the allocation of assets to the "spouse trust".

The importance of the difference between these arguments is that s. 70(6)(b) of the *Income Tax Act*, *supra*, as amended, requires the spouse trust to be "created by the taxpayer's will". The problem can be avoided, however, if the testator in his will deputes one asset, however nominal, as spouse trust property, and then confers the above trustee discretion.

See further on the subject of discretionary powers and the doctrine of uncertainty, F.D. Baker, "Are Wills Draftsmen Misusing Discretionary Powers?" (1973-4) 1 E & T.Q. 172.

[108] See R.E. Megarry (1965), 81 L.Q.R. 481.

[109] *Re Gape*, [1952] Ch. 418, affirmed [1952] Ch. 743 (Eng. C.A.) (Roxburgh J.). The issue here was the certainty of a condition subsequent: "take up permanent residence in England".

[110] The same thing can be done with a declaration of trust, when the settlor declares himself from henceforth to be a trustee of his assets for others.

TAB 8

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

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certainty, and it is certainty on both of those matters that must be established if the trustees have no discretion as to distribution among the class members, but hold the property for beneficiaries who have interests whose amount or quantum is set out in the instrument creating the trust.[121]

1. Reason for Certainty of Objects

Before pursuing these two elements of certainty further, however, something must be said of why certainty of objects is required. If a testator leaves property on trust for equal distribution "among my friends", it is self evident that before the trustees can discharge their task they must be able to say what the testator meant by a "friend" and be able to discover the full number of those friends. It is equally clear that, even if the trustees could be said to have an objective and workable test by which they can determine whether any person is a member of the intended class of trust objects, they can never be sure that they have a complete list of these persons. If such a trust were valid, each friend being entitled to an equal share, the result would be a stalemate. The trustees do not know that they have all the friends, and until they have a definitive list they cannot divide the property. However, a trust is an obligation, and, if the trustees do not carry it out, the courts have always taken the view that it is incumbent upon them to see to its discharge. This is the root of the doctrine whereby the administration of a trust can be transferred to the court. The court both redresses breach of trust by entertaining an action against the trustees for breach, and it administers a trust if no other path is open for its administration by others. But, said Sir William Grant and Lord Eldon in *Morice v. Bishop of Durham*,[122] how can the court control and administer the trust if the trust objects are uncertain? The court is in no better position than the trustees. The inevitability of this position is that the trust for uncertain objects must fail initially, and the property, if that is certain, revert to the settlor or to the testator's estate.

---

property, assuming that the settlor died on a given date twenty years after the taking effect of the settlement instrument. For an unusual case – an hotelier's catering staff during the time that he had been imposing a service charge upon customers – see *Shabinsky v. Horwitz* (1971), [1973] 1 O.R. 745, 32 D.L.R. (3d) 318 (Ont. H.C.).

[121] In *Ernst & Young Inc. v. Central Guaranty Trust Co.*, *supra*, note 95, the court noted that the trustees had no discretion as to who constituted the beneficiaries. At the outset there would have been no warranty-holder beneficiaries. The beneficiaries entitled to make claims under the trust would only be determined over time as the warranty holders made accepted warranty claims. The court felt that the test of certainty of beneficiaries, requiring both certainty of whether any person is a member of the class and certainty of the totality of the membership of the class, was thus not established. Is this perhaps too narrow an approach constraining the adaptation of the trust to a commercial context in which the trust might have served a useful function in protecting the value of the warranties to warranty holders against the risk of insolvency of the warranty provider?

[122] (1804), 9 Ves. Jun. 399 (Eng. Ch. Div.), affirmed (1805), 10 Ves. Jun. 522, 32 E.R. 947 (Eng. Ch. Div.).

TAB 9

Court of Queen's Bench of Alberta

Citation: Easy Loan Corporation v Base Mortgage & Investments Ltd, 2016 ABQB 77

Date: 20160208
Docket: 1501 11817
Registry: Calgary

Between:

Easy Loan Corporation and Mike Terrigno

Plaintiffs

- and -

Base Mortgage & Investments Ltd., Base Finance Ltd., Arnold Breitkreutz, Susan Breitkreutz, Susan Way and GP Energy Inc.

Defendants

Reasons for Judgment of the Honourable Mr. Justice K.D. Yamauchi

---

I. Introduction

[1] These are a number of applications being brought by persons (collectively, the "Applicants") who provided funds to the Defendant Base Finance Ltd. ("Base Finance"). They seek to recover funds they provided to Base Finance, arguing that Base Finance holds those funds in trust for them.

[2] The Receiver BDO Canada Limited (the "Receiver") opposes the Applicants' applications and seeks to have this Court remit those funds to it to allow those funds to be used by the Receiver to cover the costs of Base Finance's receivership, including the Receiver's fees and those of its solicitors.

II. Procedural Background

[3] Base Finance maintained a bank account at the Royal Bank of Canada, Britannia Branch, transit number 1004050, account number 2649003 (the "Bank Account"). As a result of certain activities allegedly undertaken by the Defendants on September 29, 2015, the Executive Director of the Alberta Securities Commission ("ASC") issued an order pursuant to section 47 of the *Securities Act*, RSA 2000, c S-4, freezing the Bank Account.

[4] On October 15, 2015, this Court granted an order (the "Receivership Order") appointing the Receiver as the receiver of all the current and future assets, undertakings and properties of every nature and kind of Base Finance and Base Mortgage & Finance Ltd. The Receivership Order was subject to 2 amendments. The second amendment is of importance to the within applications. Para 5 of the Receivership Order, as amended, reads in part, as follows:

> The funds of Base Finance Ltd. on deposit in account #2649003 at the Royal Bank of Canada – Britannia Branch, 1004050 (Bank) are subject to a freeze order issued by the Executive Director of the Alberta Securities Commission (Executive Director) dated September 29, 2015. These funds shall remain on deposit with the Bank until further order or the Executive Director or this Honourable Court. No order shall be made, or application commenced, which affects the frozen funds unless five clear days' notice of same is provided to each of the Receiver and the Executive Director.

[5] On November 6, 2015, the Receiver brought an application (the "November 6th Application") for an order, among other things, directing that the funds in the Bank Account be remitted to the Receiver to fund ongoing receivership fees and expenses. Certain of Base Finance's investors attended at the November 6th Application objecting to the release of funds from the Bank Account, without first being able to assert a possible trust claim to certain of the funds in the Bank Account. On November 6, 2015, this Court directed that the funds in the Bank Account remain frozen and that a court hearing should be scheduled before a presiding Commercial List Justice to hear applications concerning entitlement to funds in the Bank Account.

[6] Ultimately, a full-day hearing before this Court was scheduled for this purpose. On December 11, 2015, Rooke ACJ granted an Order that scheduled the hearing and provided deadlines to the parties concerning filing of documents to support or contest the matters that would be addressed at that hearing. Part of Rooke ACJ's Order reads as follows:

> All parties with notice of the within Order who wish to assert a trust entitlement to any specific funds in the Frozen Account as described in the First Report of the Receiver, being at the Royal Bank of Canada - Britannia Branch 1004050 - (Transit Number), account 2649003 must bring an Application to be returned on January 21, 2016 at 10:00 am before the Honourable Justice K. Yamauchi. Any person with notice of this order who does not bring such application shall be deemed to have abandoned their rights to assert a trust claim to any sums held in the Frozen Account, and forever barred from asserting a trust claim to funds in the Frozen Account.

III. Factual Background

[7] There are certain common facts, which this Court will articulate. It will then deal with the facts specific to each of the Applicants.

[8] Over a lengthy period, the Applicants at one time or another were introduced to the Defendant Arnold Breitkreutz. Mr. Breitkreutz was the sole shareholder and director of Base Finance. Mr. Brietkruetz would inform each of the Applicants that Base Finance was in the mortgage broker business. Base Finance would obtain investments from investors that it would pool and loan to borrowers. The borrowers would provide Base Finance with mortgages on real

estate as security for the loans. The investors would be the beneficial holders of those mortgages, although Base Finance would be the nominal mortgagee.

[9] In most cases, Base Finance would provide the investors with a document entitled "Irrevocable Assignment of Mortgage Interest," that would name the investor, show the amount the investor provided to Base Finance, and the terms of the mortgage into which the borrower was entering. Interestingly, this document does not name either the mortgagor or the lands on which the mortgage would be placed. There is no wording that says that the investor's funds will be held by Base Finance "in trust" for the investor. None of the Applicants has ever seen the mortgages that apparently supported their investments.

[10] All of the Applicants' claims, save one, involve monies they provided to Base Finance during September of 2015. As part of their investigation and proceeding, ASC obtained a copy of the transaction history involving the Bank Account for the period from September 1, 2015, through September 24, 2015 (the "September RBC Statement"). This Court was shown copies of all the cheques that the Applicants provided to Base Finance in support of their investments.

[11] In all cases, Base Finance represented to the investors that the loans were not being made by the investors directly to Base Finance. Rather, Base Finance was acting as an intermediary in the transactions involving the investors and the borrowers.

[12] None of the Applicants has received any monies from Base Finance or any other person for their September 2015 "investments."

[13] In the Receiver's first report that was filed on November 5, 2015 ("First Report"), the Receiver states that, "the Receiver has not discovered any underlying Alberta based mortgages that the Debtors have invested in for the benefit of their investors": First Report, para 22. The Receiver goes on to say that "Mr. Breitkreutz continued to solicit investments from his Base Finance investor group in order to maintain the interest payment and principal redemption requirements of his investor group": First Report, para 28. Some of the Applicants have referred to the scheme that Base Finance was undertaking as a "Ponzi scheme."

[14] This Court will review the facts involving the Applicants. All the Applicants argue that the funds they invested, were deposited into the Bank Account. They concede that their invested funds were commingled with funds that other investors invested. There might be others who have claims against the Bank Account, which this Court will address later in these reasons. In the past, all of the Applicants had invested substantial funds with Base Finance. Most had received payments of "interest" or return of part of their principal amounts for those past investments.

[15] The cheques for the investments that the Applicants allegedly made are, and their corresponding credits to the Bank Account, were provided as exhibits to the Affidavit of Vi Pickering, a Securities Investigator with the ASC, Enforcement Division.

[16] The facts involving the various Applicants are as follows:

A. Thomas Wiseman

[17] In approximately 1995, Mr. Wiseman was introduced to Mr. Breitkreutz and his company, Base Finance. Between 1995, and September 2015, Mr. Wiseman made approximately 50 to 60 different investments with Base Finance, either personally or through corporations in which Mr. Wiseman held an interest.

[18] On September 23, 2015, Mr. Wiseman invested $500,000 (the "Wiseman Investment") with Base Finance which Mr. Breitkreutz represented was to be used for a mortgage to be placed on a property located in the Windsor Park area in Calgary, Alberta. Mr. Breitkreutz further advised Mr. Wiseman that the mortgage was to be for a 6-month term at an interest rate of 14% per annum.

[19] Mr. Wiseman delivered the Wiseman Investment to Base Financial in the form of a cheque (the "$500k Cheque") on September 23, 2015. The $500k Cheque was deposited into the Bank Account on September 24, 2015, and shows at line 68 of the September RBC Statement.

[20] Following the deposit of the $500k Cheque, four withdrawals were made from the Bank Account on September 24, 2015, in the form of 4 cheques totaling $39,581. These transactions are all contained in the September RBC Statement.

B. Sandra Unger and Ken Unger

[21] Mr. and Ms. Unger began investing with Base Finance in 2002. On or about September 11, 2015, Ms. Unger received a telephone call from Mr. Breitkreutz, who encouraged Mr. and Ms. Unger to make an investment with Base Finance. As a result of that telephone conversation, on or about September 17, 2015 they sent a cheque to Base Finance in the sum of $100,000.

[22] They did not receive any documentation from Base Finance at the time of this investment, but expected to receive the standard Irrevocable Assignment of Mortgage Interest.

[23] Line item 61 of the September RBC Statement shows a deposit into the Bank Account on September 22, 2015 in the sum of $300,000. The copy of the cheque that was provided to this Court is the cheque that Ms. Unger issued to Base Finance in the amount of $100,000 (the "$100k Cheque") and it appears that the $100k Cheque was deposited in the Bank Account on September 22, 2015. It further appears that a cheque from another investor, Larry Revitt, in the amount of $200,000 (the "$200k Cheque") was also deposited into the Bank Account on September 22, 2015. Therefore, it appears that the $300,000 deposit listed at line item 61 of the September RBC Statement is the aggregate deposit amount of the $100k Cheque and the $200k Cheque and that those amounts remain in the Bank Account.

C. Larry Revitt and Shirley Revitt

[24] On or about September 17, 2015, Larry and Shirley Revitt delivered a cheque for $200,000 to Mr. Breitkreutz. The Revitts gave the $200k Cheque to Mr. Breitkreutz as partial funding of a represented $3,000,000 mortgage.

[25] On September 22, 2015, the $200k Cheque was deposited to the Bank Account, together with the $100k Cheque. These cheques were then simultaneously commingled with $391,295.03 already on deposit in the Bank Account. Following the deposit of these cheques, $67,110 was withdrawn from the Bank Account on September 22, 2015, and September 23, 2015.

D. Raymond Sampert and Margaret Sampert

[26] Mr. and Ms. Sampert have being making investments through Base Finance since 2002. On or about September 13, 2015, Mr. Breitkreutz contacted Mr. Sampert by telephone and asked him to make another investment in Base Finance. Mr. Breitkreutz informed Mr. Sampert that there were 5 properties that required financing and that it was Mr. Breitkreutz's intention to encumber them with a single mortgage.

[27] Based on this information, Mr. Sampert wrote a cheque to Base Finance on September 15, 2015, from a joint account shared with his wife Ms. Sampert for the amount of $100,000 (the $100,000 Cheque) and mailed the $100,000 Cheque to Base Finance. Base Finance did not provide the Samperts with an Irrevocable Assignment of Mortgage Interest, which was the usual document they would receive.

[28] On September 25, 2015, Mr. Sampert tried to deposit a cheque for $10,000 from Base Finance for "interest" owing from another purported Irrevocable Assignment of Mortgage Interest. That cheque was returned to him by ATB Financial which noted that the account for Base Finance had been frozen by the ASC.

[29] The September RBC Statement shows a deposit of $100,000 on September 21, 2015, at line 57.

E. Calgary Aggregate Recycling Ltd.

[30] Calgary Aggregate Recycling Ltd. ("Calgary Aggregate") had invested about $1.3 million with Base Finance over several years. On September 3, 2015, it drew a cheque in favour of Base Finance in the amount of $200,000 (the "$200,000 Cheque") for a proposed mortgage investment. Base Finance deposited the $200,000 Cheque into the Bank Account on or about September 4, 2015.

[31] Base Finance never provided Calgary Aggregate with any mortgage security for this investment.

F. John Davies

[32] John Davies, personally or through his corporation, has invested about $940,000 through Base Finance over the years. On September 2, 2015, he withdrew $100,000 from his account with the Bank of Montreal - South Trail Crossing branch through a bank draft (the "$100k Bank Draft"). The $100k Bank Draft was made payable to Base Finance in respect of a proposed $100,000 mortgage investment. Base Finance deposited the $100k Bank Draft in the Bank Account, on or about September 4, 2015.

[33] Base Finance has never provided Mr. Davies with any mortgage security for this investment.

G. Fred Dowe and Carol Dowe

[34] Between August 2011, and October 2014, the Dowes have invested $230,000 with Base Finance. They have received "interest" throughout the years, and were expecting, but never received, payments on their principal and interest during 2015. They made no payments that appear in the September RBC Statement.

H. Resch Construction Ltd.

[35] When Mr. Resch first met with Mr. Breitkreutz in December of 2011, Mr. Breitkreutz advised Mr. Resch that the funds he was investing would be "pooled" into funds used to grant mortgages. In other words, they would be commingled, although Mr. Breitkreutz did not use this wording.

[36] On August 31, 2015, Darren Resch, on behalf of Resch Construction Ltd. delivered a cheque to Mr. Breitkreutz, payable to Base Finance in the amount of $100,000, which was deposited into the Bank Account on September 1, 2015.

IV. Discussion

[37] The Applicants ask this Court to find that all or part of the monies they paid to Base Finance are trust monies and either to distribute those invested monies in their entirety to them, or determine a methodology for calculating the amounts to which they are entitled.

[38] Easy Loan Corporation and Mike Terrigno, the original applicants who sought and obtained the appointment of the Receiver (collectively, Easy Loan"), and the Receiver, ask that this Court direct RBC to provide the funds to the Receiver to continue preserving and investigating the affairs of Base Finance and its various related parties with a view to maximizing recoveries for "all known investors in a fair and equitable manner."

[39] The Receiver has been candid with this Court in advising it that the Receiver currently has no funds that will permit it to continue performing its duties. It requires the funds in the Bank Account to do this. As well, it is clear to this Court that Easy Loan seeks the same result, as it undoubtedly provided the Receiver with an indemnity for any costs the Receiver incurs.

[40] In the Second Receiver's Report that was filed with this Court on January 19, 2016, the Receiver says the following:

> ... From the work already performed by the Receiver, a number of strong leads have been identified that could result in further assets being realized by the Receiver. It would follow that all creditors will benefit by the Receiver's actions and investigations and, at some point in the future, a claims process to determine the priorities of each creditor will be established by the Receiver and any funds will be systematically distributed in accordance with the same.

[41] The difficulty with this position is that all these steps cost money. No doubt the Receiver has already expended time investigating these matters, and "all creditors" include the Applicants. If the Applicants are entitled to receive all or some of the monies currently in the Bank Account, and this Court permits the Receiver to use those monies to continue its investigations, the Receiver is doing so on the backs of the Applicants. Said differently, "other creditors" would benefit from the use of the funds to which the Applicants are otherwise entitled. While this Court has some sympathy for the positions articulated by the Receiver and Easy Loan, it must examine this issue on a principled basis.

A. Are the Monies in the Bank Account Impressed with a Trust?

[42] The first question that this Court must address is whether the monies in the Bank Account are trust monies. The Receiver and Easy Loan argue that they are not, as the so-called 3 certainties, *viz*, certainty of intention, certainty of subject-matter and certainty of objects, do not exist. It is important to differentiate between what the Applicants are claiming and what the Receiver and Easy Loan are challenging.

[43] The Applicants ask this Court to find a constructive trust. It appears that the Receiver and Easy Loan are asking this Court to find that there is no express or implied trust. What makes an express or implied trust and a constructive trust different? In the case of an express or implied trust, the existence of the 3 certainties is critical. The leading Canadian text on the law of trusts says, "If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void": Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds, *Waters' Law of Trusts in Canada* (Toronto: Thomson , 2005 [*Waters*] at 132. Why are the 3 certainties important in the case of an express or implied trust? In those types of trust, we are

trying to determine the settlor's intention. What was its intention? What is the subject-matter of the trust? Who is to benefit from the trust?

[44] In the case of a constructive trust, intention is not of much importance. *Waters* says the following:

> The trust is "constructive" because, regardless of anyone's intent, the law constructs a trust in order to enforce the obligation. In Canada that obligation is now recognized as arising out of unjust enrichment and "good conscience."
>
> *Waters* at 22.

[45] *Waters* cites the leading Canadian cases of ***Becker v Pettkus*** (1980), 117 DLR (3d) 257 (SCC) and ***Soulos v Korkontzilas***, [1997] 2 SCR 217, 146 DLR (4th) 214 [***Soulos***, cited to DLR], for this proposition.

[46] What is the meaning of "good conscience"? In ***Hussey v Palmer***, [1972] 1 WLR 1286 at 1289-90, [1972] All ER 744 (Eng CA), Lord Denning MR said the following:

> By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it ... It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

[47] How might a court determine whether "good conscience" will permit it to impose a trust? If there is no agreement that creates or implies a trust, courts may draw an inference from words and conduct, or conduct alone, that property should be held beneficially otherwise than according to the legal title. Moreover, where it is impossible to determine what was the parties' actual intention, "each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": *Waters* at 462.

[48] Typically we see constructive trusts argued in the context of an unjust enrichment. In ***Soulos***, however, the Supreme Court of Canada has emphatically broadened the scope within which courts might impose a trust. It said the following:

> I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.
>
> ***Soulos*** at 229-30 (emphasis added).

[49] In ***International Corona Resources Ltd v Lac Minerals Ltd***, [1989] 2 SCR 574, 61 DLR (4th) 14 [***Lac***, cited to SCR], LaForest J said that there is no requirement of any pre-existing

proprietary right and that "a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property": ***Lac*** at 678.

[50] For a court to impose a constructive trust to take away a wrongful gain (as opposed to unjust enrichment), the Supreme Court of Canada has established the following 4 conditions that must be generally satisfied:

> 1. The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> 2. The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> 3. The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> 4. There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.
>
> ***Soulos*** at 230.

[51] The Applicants argue that they meet all 4 conditions in the following way:

(a) They provided their investments to Base Finance based on representations that Base Finance made through Mr. Breitkreutz, that their investments would be used to fund mortgages and that their investments would be protected through security in the form of first mortgages on the properties that their investments were funding. Base Finance was not only under a legal obligation, but it was under an equitable obligation, to use (and secure) those funds in that manner. This meets condition 1 of the ***Soulos*** test.

(b) The Applicants provided their investments to Base Finance on the understanding that Base Finance was the conduit through which the investments would flow through to the mortgagors. Professor Fridman describes agency as follows:

> Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property: GHL Fridman, *The Law of Agency*, 7th ed (London: Butterworths, 1996) at 11.

The Receiver argues that nowhere in the Irrevocable Assignment of Mortgage Interest document is the word "agent" or "agency" used. That is not the test. The Court can look at the surrounding circumstances to determine whether such a "relationship" exists between the parties in the manner that Professor Fridman describes. This Court finds that Base Finance held itself out as the investors' agent in using their invested funds for loans that were to be secured by a mortgage for their benefit. In this way, Base was representing them in such a way as to be able to affect their legal position in respect of the various mortgagors. This meets condition 2 of the ***Soulos*** test.

(c) Base Finance did not obtain any mortgages using the investors' money. The investors' monies as they relate to the September RBC Statement, can be easily and clearly traced to the Bank Account. Base Finance's banking records of the Bank Account, including the cancelled cheques, point to the individual investment amounts, and the timing of the deposits. As well, the parties and Ms. Pickering have produced the cancelled cheques for those deposits that show the date of the deposit into the Bank Account. Accordingly, this Court finds that the Applicants have a legitimate reason for seeking a proprietary remedy. The Receiver does not challenge this. This meets condition 3 of the ***Soulos*** test.

(d) The Receiver argues that the imposition of a constructive trust, as it relates to the September 2015 advances that the Applicants made would be unjust inasmuch as this elevates their claims over those of previous investors. This is a timing issue, which this Court will discuss later in these reasons. If this Court were to accede to the Receiver's argument, the funds in the Bank Account could be used by the Receiver for purposes other than the payment to the investors. This would be unjust. This Court finds that there are no factors that would render the imposition of a constructive trust of the Applicants' investments unjust, as the whereabouts of those investments are contained in the Bank Account, and their respective deposits can be readily identified. This meets condition 4 of the ***Soulos*** test.

[52] Thus, this Court imposes a trust over funds in the Bank Account for the benefit of the Applicants, and other investors who were defrauded by Base Finance, through Mr. Breitkreutz's various fraudulent misrepresentations.

[53] The Receiver argued that ***Re Titan Investments Limited Partnership***, 2005 ABQB 637, somehow has some bearing on the issues before this Court. It does not. Hawco J, in that case, was dealing with an allegation that certain amounts that certain investors in a Ponzi scheme received were fraudulent preferences. That is not the issue before this Court. Hawco J did not have to deal with characterization and entitlement to a finite fund, which is the issue before this Court.

B. How does this Court Distribute the Trust Monies?

[54] Even with respect to the monies that the Applicants provided to Base Finance in September of 2015, and the amount that remained in the Bank Account when the ASC froze the Bank Account, there is a shortfall. In other words, what this Court is undertaking essentially amounts to a loss allocation among the various investors.

[55] Canadian courts have determined that there are the 3 ways in which this Court could order the distribution of the monies in the Bank Account among the Applicants and other investors, which are as follows:

(1) "First in, first out": this is derived from the ***Dvaynes v Noble: Clayton's Case*** (1816), 1 Mer 572 [***Clayton's Case***], where the court held that the first money deposited into the account is presumed to be the first money withdrawn;

(2) *Pro rata* or *pro rata ex post facto* sharing based on the original contribution that the various claimants made, regardless of the time they made their contributions. If there is a shortfall, between the amount the claimant's claim and the amount remaining in the account, the claimants share proportionately, based on the amount of their original contribution;

(3) *Pro rata* sharing based on tracing or the lowest intermediate balance rule ("LIBR") which says that a claimant cannot claim an amount in excess of the lowest balance in a fund subsequent to their investment but before the next claimant makes its investment.

[56] Although the rule in ***Clayton's Case*** has been used by Canadian courts, practically it has fallen is disuse because it is "arbitrary and unfair": ***Ontario (Securities Commission) v Greymac Credit Corp*** (1986), 55 OR (2d) 673, 20 DLR (4th) 1 (CA) [***Greymac***, cited to DLR], aff'd [1988] 2 SCR 172.

[57] In ***Greymac***, the Ontario Court of Appeal provided the following quotation from ***Re Walter J Schmidt & Co***, 298 F. 314 at 316 (Dist Ct, 1923) in support of its holding:

> The rule in Clayton's Case is to allocate the payments upon an account. Some rule had to be adopted, and though any presumption of intent was a fiction, priority in time was the most natural basis of allocation. It has no relevancy whatever to a case like this. Here two people are jointly interested in a fund held for them by a common trustee. There is no reason in law or justice why his depredations upon the fund should not be borne equally between them. To throw all the loss upon one, through the mere chance of his being earlier in time, is irrational and arbitrary, and is equally a fiction as the rule in Clayton's Case, *supra*. When the law adopts a fiction, it is, or at least it should be, for some purpose of justice.
>
> ***Greymac*** at 15.

[58] Of course, the reason why the rule in ***Clayton's Case*** is considered arbitrary and unfair is because it is prejudicial to those who contributed earliest to the fund. The reason it is a fiction is that no one knows with any certainty that the withdrawals from the fund were taken from the money first deposited. There is no allocation of loss. It places the loss squarely at the feet of those who deposited their funds earliest.

[59] None of the parties in the case at bar has asked this Court to apply the rule in ***Clayton's Case*** to the loss allocation it is considering. This Court agrees and will not discuss that case any further.

[60] The LIBR approach assumes that the investor can identify the monies it has deposited into the fund. The sum of the amount existing in the fund at the time of the investor's deposit and the investor's deposit make up the total of the fund at that time. A simple calculation will determine the percentage of each to the total amount that makes up the fund. Sulatycky ACJ in ***Elliott (Re)***, 2002 ABQB 1122, 11 Alta LR (4^{th}) 358, 333 AR 39 [***Elliott***] then outlines the way in which LIBR will work as follows:

> ... [W]here the funds in an account are depleted below the trust money balance, further deposits by the trustee cannot be accessed by the beneficiaries. They are, instead, limited to the lowest intermediate balance of the account. This is rational, because the entire line of cases being discussed is based on equitable rules of tracing. It is impossible to affix money subsequently deposited with the imprint of tracing. Only the money still remaining can be traced.

[61] In ***Boughner v Greyhawk Equity Partners Limited Partnership (Millenium)***, 2012 ONSC 3185, 111 OR (3d) 700, 95 CBR (5th) 239, aff'd 2013 ONCA 26, 5 CBR (6^{th}) 113 [***Boughner***, cited to ONSC], Morawetz J provides the following example of how LIBR works:

> ... A invests $100 in a fund. The value of the fund then declines to $50. B invests $100, bringing the balance in the fund to $150. The value of the fund then declines to $120.
>
> In this fact pattern, if LIBR were applied, A could not claim more than $50, because that is the lowest balance in the fund prior to B's investment. In other words, the initial decline in the value of the fund from $100 to $50 is borne entirely by A. When B contributes $100, her investment constitutes 2/3 of the $150 in the fund. As a result, when the fund declines to $120, 2/3 of the decline is borne by B, while 1/3 is borne by A. Therefore, of the $120 remaining in the fund, A can claim $40 while B can claim $80.
>
> ***Boughner*** at paras 4-5.

[62] In the end, the LIBR approach does not permit an investor to receive more than what can be traced from their contribution. Timing is important.

[63] Timing is not so important in the *pro rata ex post facto* approach, which Sulatycky ACJ described in ***Elliott*** as follows:

> In the *pari passu ex post facto* approach applied in *Law Society of Upper Canada v. Toronto Dominion Bank*, the total quantum of available assets is determined — i.e., the amount remaining in the trust accounts. The funds are then shared proportionally among the contributors to the fund (except for any money contributed by the trustee, as that is considered applied to the shortfall). The date of deposits is ignored.

[64] Thus, in the example that Morawetz J provides in ***Boughner***, A and B would receive $60, as each invested an equal amount of $100.

[65] Thus, there are 2 approaches that this Court can consider when determining how best to distribute the monies in the Bank Account. Both have their advantages and disadvantages, which this Court will discuss in a moment. The overarching aspect, however, is that this Court must apply an approach that is logical, just, equitable and convenient: ***Greymac*** at 7; ***Law Society of Upper Canada v Toronto Dominion Bank*** (1998), 169 DLR (4th) 353, 42 OR (3d) 257, 44 BLR (2d) 72 [***TD Bank***, cited to DLR] at para 31.

[66] The LIBR approach has been criticized as being the reverse of the rule in ***Clayton's Case*** in the sense that it is a "last in, first out" approach: ***TD Bank*** at para 9. As well, the LIBR approach is more difficult and more complicated than the *pari passu ex post facto* approach and, accordingly, the court should try to find a solution that is workable: ***TD Bank*** at paras 33-34; ***Greymac*** at 17. Furthermore, the LIBR approach is difficult to apply "where there are numerous deposits and withdrawals, as the LIBR has to be determined at multiple points throughout the account's history: ***Elliott*** at para 37.

[67] The *pari passu ex post facto* approach, on the other hand, "seems unfair to late investors": ***Boughner*** at para 42, quoting ***Barlow Clowes International Ltd v Vaughan***, [1992] 4 All ER 22 (CA). As stated in *Waters* at 1283, "Although there is a certain fairness in proportionate sharing, this approach shifts earlier losses onto later contributions, whose money could not possibly have been implicated in those losses." Furthermore, in the case at bar, certain of the Applicants have acknowledged that they received payments of some form or another from Base Finance. As Morawetz J said in ***Boughner***, "Just as earlier investors would not have

expected to share their gains with later investors, they should not be allowed to so share their losses": ***Boughner*** at para 56.

[68] The *pari passu ex post facto* is more simple to apply. One simply takes the total amount remaining in the Bank Account and divides it proportionately among the investors in accordance with the deposits they made into the Bank Account. There is a certain complexity, however, in this approach. The Bank Account had an opening balance. How does one distribute the opening balance among the investors? Did those earlier investors, or some of them, invest in a legitimate scheme, or were they similarly "duped" by Mr. Breitkreuz? Which ones were duped? Must the amounts that Applicants and others received from the Bank Account be accounted for in calculating their losses?

[69] In the case at bar, the parties have advised this Court that they have access to the complete records of the Bank Account from the date that Base Finance opened the account sometime in May of 2014, which shows not only the debits and credits, but also the balances in the account for all those transactions. As well, this Court assumes that RBC can provide the parties with the cancelled cheques that show the deposits. This differs from ***Elliott***, where the parties provided Sulatycky ACJ merely with "evidence as to final balances and the dates and amounts of the claimants' deposits": ***Elliott*** at para 31. How could Sulatycky ACJ possibly come to a rational conclusion that LIBR could be applied, given the paucity of the information the parties provided to him? His only choice was to apply the *pari passu ex post facto* approach.

[70] This Court recognizes that the Ontario Court of Appeal (as affirmed by the Supreme Court of Canada) applied the *pari passu ex post facto* approach in ***Greymac***. That application, however, does not derogate from Morden JA's comment that although the *pari passu ex post facto* approach might be appropriate in some circumstances, he did not feel it would be appropriate "where the contributions to the mixed fund can be simply traced": ***Greymac*** at 16. Morden JA went on to say the following:

> I am not persuaded that considerations of possible inconvenience or unworkability should stand in the way of the acceptance, as a general rule, of [LIBR]. That it is sufficiently workable to be the general rule is indicated by the fact that it appears to be the majority rule in the United States.
>
> ***Greymac*** at 17.

See also ***TD Bank*** at para 32.

[71] This Court recognizes that calculating entitlement to the Bank Account might be considered by some to be inconvenient and moderately complex. It is not, however, impossible to do the calculations. Inconvenience should not stand in the way of fairness.

V. Conclusion

[72] The real key is whether LIBR is workable or "practically impossible" to use. In this case, the calculations are not so complex. This Court holds that the parties will use the LIBR approach when distributing the Bank Account. The methodology will be for the parties to work backwards from the last deposit. This will allow the Bank Account to be distributed to those who most recently made their deposits. Why? Those amounts can be specifically traced. To start at some earlier time would be arbitrary, and this Court suspects, without knowing, that starting at some earlier time will deplete the funds available to those who deposited later. If there is an amount

remaining in the Bank Account after the LIBR calculations are completed, those funds will be given to the Receiver to be dealt with as part of Base Finance's property.

[73] How far must the parties go back? The parties will go back to the date of the opening of the Bank Account. Rooke ACJ was not provided with all the information that could be factored into a consideration of how best to distribute the funds in the Bank Account. The LIBR approach does not require the necessity of a claims bar order, as each investor's deposit can be easily traced, whether or not they participated in this hearing. Furthermore, from a practical perspective, serving notice on all potential claimants through electronic posting is manifestly unfair to many of the investors, as they are seniors who do not even have access to computers or other electronic media. Accordingly, this Court does not view Rooke ACJ's order as a claims bar order. The relative simplicity of the method of calculation obviates the necessity of a claims bar order. All those who contributed to the Bank Account must be able to receive their fair share of the funds that remain, whether or not they took place in the application that occurred before this Court.

[74] Should those who received funds be required to account for the funds they received? This Court considers such an approach adds a level of complexity and unfairness to the LIBR approach. Beside, how does one determine the source of the funds that resulted in payment to the investor? Was it their latest deposit into the Bank Account, or an earlier deposit? Most of the investors, at some time or another, received some payment from Base Finance. There is no principled or rational reason requiring them to account for those receipts by set-off or otherwise.

[75] Obviously, the result of this decision will require someone to do the calculations. The Receiver is not getting paid, so why should the Receiver do these calculations? If the Receiver chooses to undertake these calculations, the parties may agree to pay the Receiver on a *pro rata* sharing of the Receiver's costs for this task, or on some other basis. If they choose to retain someone other than the Receiver, they will likewise have to agree on the method for remunerating that person. If they are unable to agree on how the costs should be allocated, this Court grants them leave to apply for direction.

Heard in Calgary, Alberta on the 21st day of January 2016.

Dated at the City of Calgary, Alberta this 8th day of February, 2016.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Richard N. Billington
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Christopher Souster
Riverside Law Office
for the Plaintiffs Easy Loan Corporation and Mike Terrigno

Dean A. Hutchison and Megan Kheong
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for the Applicant Thomas Wiseman

Arif Chowdhury and Claire Himsl
Fasken Martineau
for the Applicants Raymond Sampert and Margaret Sampert

Patrick F. Mahoney
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Paul A. Kazakoff
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Ken J. Rogers
Inglewood Law Office
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Predrag Anic
Miles Davison LLP
for Norm and Barb Denoon

Jeffery Woodruff
Low, Glen & Card
for Fred and Carol Dowe

TAB 10

TERMS AND CONDITIONS AGREEMENT

This Agreement is made effective the 1st day of November, 2013.

Between:

Municipal District of Bonnyville No. 87
(" hereinafter the "MD")

- and -

JMB Crushing Systems ULC
(hereinafter "JMB")

Definitions

1. In this Agreement, capitalized words will have the following meanings:

    a. "Agreement" means this Terms and Conditions Agreement;

    b. "MD" means the Municipal District of Bonnyville No. 87, a municipality under the provisions of the *Municipal Government Act*, R.S.A. 2000, c. M-26, as amended, with offices at or near the town of Bonnyville, Alberta;

    c. "JMB" means JMB Crushing Systems ULC, a corporation under the laws of Alberta with offices in the town of Bonnyville, Alberta;

    d. "Parties" means the Municipal District of Bonnyville No. 87 and JMB Crushing Systems ULC;

    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;

    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;

3

TAB 11

In the Court of Appeal of Alberta

Citation: Carling Development Inc. v. Aurora River Tower Inc., 2005 ABCA 267

Date: 20050816
Docket: 0401-0386-AC
Registry: Calgary

Between:

Carling Development Inc. and Carling Financial Corporation

Appellants
(Plaintiffs/Applicants)

- and -

Aurora River Tower Inc. and Carling Spring Village Inc.

Respondents
(Defendants/Respondents)

Corrected judgment: A corrigendum was issued on November 16, 2005; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Clifton O'Brien

Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurred in by The Honourable Madam Justice Picard

Reasons for Judgment Reserved of The Honourable Mr. Justice O'Brien
Concurring in the Result

Appeal from the Judgment by
The Honourable Mr. Justice S. LoVecchio
Dated the 3rd day of December, 2004
Filed the 15th day of April, 2005
(2004 ABQB 897, Docket: 0301-19649)

Reasons for Judgment of
The Honourable Mr. Justice Côté

A. Issues

[1] This appeal involves solicitors' trust conditions, how to rescind them, remedies for their breach, and trial of preliminary issues. The Reasons for Judgment after trial are 2004 ABQB 897.

B. Facts

[2] Here is a brief chronological summary of the facts.

2000 ff.:

1. Investments by many individual investors in three land developments, via a parent company of the respondents, which company was the fundraiser. The appellants were the developers. Their principals were Cheng and Wong, who had given some personal guarantees.

2003:

2. Complaints of non-payment, apparently raised by individual investors. Allegations by the fundraiser that the appellants had misappropriated the funds invested, which the appellants denied.

3. November 1: Regular project meeting. Only available minutes say that it resulted in agreement in principle on conveyance by the appellants to the respondents with indemnity of principals of appellants by respondents. Respondents' parent company was to assume all of the appellants' obligations to the investors and take over the land (via new companies to be incorporated) and to run the developments.

4. November: Mackin held self out to Anderson as an Alberta solicitor (though he knew he could no longer practise under the British Columbia reciprocal arrangement, and was not called to the Alberta bar until December 16). Mackin was the new lawyer for the respondents. Anderson was then the lawyer for the appellant developers.

5. November 6: Meeting between the opposing lawyers: Anderson for the appellants, and Mackin for the respondent fundraising company. Again a request for an indemnity.

6. November 7: Mackin letter to investors saying that the fundraising company was "currently negotiating the exit of" the appellants from the three projects but "the transfer is very complex".

7. November 13: Mackin letter to principals of appellants asking for a serious proposal from them.

8. November 13 afternoon: Phone call between the two lawyers (Anderson and Mackin). Their trial evidence conflicts sharply on whether or not there was an agreement that Mackin would draft a contract including a clause indemnifying the principals from claim from investors.

9. November 13 suppertime: Anderson wrote a letter to Mackin enclosing transfers of two Alberta land parcels and minute book and seal of company. The covering letter contained trust conditions:

> "The same are sent to you on the express trust condition that concurrent to your registering the Transfers and effecting a change in the shareholders in Carling Development (B.C.) Inc., your office and ours will prepare the agreement for the transfer of the administration of the projects. This will include a clause to indemnify and save harmless Mr. Cheng and Ms. Wong from any civil claims by any investor, a clause which you have agreed to strongly recommend to your clients."

10. November 13 suppertime: The letter and documents were delivered to Mr. Mackin when he was having supper in a pub; a brief meeting ensued.

11. Not clear when the transfers had been registered by Mr. Mackin; presumably a few days before December 10.

12. December 10 and 11: Registrar cancelled the old titles to the parcels of land and issued new titles. Not clear when the transfers had been registered by Mr. Mackin; presumably a few days before.

13. December 11: ***Ex parte*** order by Master permitting transferors to file immediately vendor's lien caveats against the new titles. Caveats were filed the same day?

14. December 11: Faxed "without prejudice" letter (p. E164) by Mackin to a different lawyer in a different firm newly acting for the appellants (not to Anderson, and no copy to him). Letter alleges that the trust conditions had

been waived a month before, and that Mackin had rebuffed every suggestion of an indemnity at the time.

15. December 16 and December 22: Letters by the new lawyer for the appellants and their principals to Mackin, demanding that the trust conditions be performed.

16. December 16: Mackin is called to the Bar of Alberta.

17. (a) December 17: Letter to appellants' new lawyer similar to later January 4 letter.

2004:

17. (b) January 4: Letter to Anderson by Mackin alleging that the trust conditions were waived at the time of delivery about 7 weeks before. Letter says that it is the writing required by the Law Society Rules.

18. January 22: Anderson replied and said no waiver was discussed.

19. January 24: Mackin sends to one of the principals of the appellants demand letters on behalf of a number of the investors.

20. March: Trust conditions were still not met: nothing was done about them.

21. Court proceedings

    (a) April 23: Notices of motion about cancelling the caveats

    (b) May 21 and June 21: Contest over motions for a receiver. One motion also sought a retransfer of the lands.

22. July 15: With the parties' concurrence, on the return of the last motion, the judge ordered trial of an issue of whether the transfers had been used in breach of trust conditions.

23. Positions of opposing parties: The appellants said that the trust conditions stood and were breached. The respondents said that the trust conditions had been merely proposed, but orally waived at once.

24. December 3:

    (a) What the trial judge (the same judge) ordered

– really nothing (other than fact findings and permission to sue afresh)

(b) What the trial judge found

– trust conditions were intended and were clear enough (though this is disputed on appeal)

– lands were conveyed in breach of trust conditions

(c) What the trial judge did not find

– whether waiver occurred

(d) What the trial judge did not do

– give any relief

25. December 22: Appeal by clients of trustor. They seek reconveyance and redelivery of the land and company.

C. Alleged Errors in the Reasons for Judgment

[3] I will vary the order which the appellants use to list their grounds of appeal.

1. No Decision about Waiver

[4] The appellants complain that the Reasons for Judgment did not rule upon the only factual defence raised by the parties receiving the transfers of land. The recipients contend that the trust conditions were waived on the spot, shortly after the transfers were tendered. So they say that when their solicitor Mr. Mackin carried off the transfers, he not only did not accept the trust conditions, but the conditions had ceased to exist.

[5] The lawyer who imposed the trust conditions, Mr. Anderson, testified also. He totally denied that any such waiver or discussion occurred.

[6] The Reasons for Judgment noted the total irreconcilability of the two lawyers' evidence, and the fact that at least one was not truthful. The Reasons declined to make any findings on the point, fearing harm to the reputation of whichever lawyer the court might disbelieve.

[7] That refusal to decide is puzzling, as it dodges the substantial defence of the respondents. Given the findings in the Reasons for Judgment that these were true trust conditions and certain enough to obey or enforce, that is doubly puzzling.

[8] If the question of waiver were totally academic or moot, one might understand the refusal. But the question was not. The Reasons for Judgment declined to order reconveyance of the property entrusted or to give any relief in this proceeding. But the Reasons for Judgment said that some sort of relief such as damages might lie, and that it was open to the appellants to bring other proceedings for that relief, and there to relitigate the waiver question (para. 79). Nor did the Reasons for Judgment ever find that in law or equity these trust conditions were void, or were subordinate to the pre-existing rights (or lack of rights) between the clients. The Reasons for Judgment gave some suggestions in that direction. But in my respectful view, that is not true in a court of equity, for reasons given in Parts D and E below.

[9] Even in a case where the appropriate remedy might be comparatively modest, or comparatively uneconomical to litigate, that is a decision for the plaintiff to make, not the court. If a party suffers a wrong and is entitled to any remedy in law or equity (beyond the entirely trivial), he is entitled to sue and get his remedy. Sometimes nominal damages or a declaration of breach are appropriate. It would be a rare case where a complete breach of trust conditions would be trivial, whether or not loss resulted. (I am not speaking of performance of most of the conditions or almost complete performance of one condition.)

[10] Therefore, in my view it was wrong to refuse to decide the crucial issue, which was an issue coming before most other issues, and raised by the respondents themselves. For that reason alone, there must be a new trial; there is no other alternative.

2. Deferring Remedy

[11] Another error alleged was sending the appellants to start a second lawsuit to get a remedy. Once again, we see the extreme risks involved in trying narrow preliminary questions of fact. Courts of appeal, including our Court, keep warning trial courts about this. The authorities and heartfelt warnings of this and other courts are collected in 2 Stevenson & Côté, ***Civil Procedure Encyclopedia***, Chap. 25 (2003), especially part C.9 on pp. 25-40. See particularly ***Esso Res. Can. v. Stearns Catalytic*** (1991) 114 A.R. 27, 29-30 (C.A.) (paras. 9-10).

[12] It is true that the parties seemed to concur in risky extremely informal procedure to that point. But a trial court need not acquiesce in ill-founded trials. It has ample powers to insist upon proper pleadings, or to decline to split a suit or hear a preliminary issue.

[13] If one steps back and looks at the whole proceedings to that point, one finds that nothing effective has been done about the trust conditions. The court should have stopped the parties and at some stage should have had them broaden the proceedings underway. The net result of the course taken was to expend a good deal of time and money hearing evidence, then to do nothing effective with that evidence. At any given moment, everything was handled in a tidy manner, but at the end of the day, many key issues have not been dealt with at all, and are not going to be, save maybe by suing afresh and starting all over.

[14] I can see but one effective resolution to this state of affairs. It is to have the parties exchange proper pleadings and have a new trial. I am not sure whether any examination for discovery is needed. But discovery of records would probably be beneficial.

3. Subordinating Trust Conditions

[15] Another error alleged is letting the trust conditions between the lawyers, or their enforcement, be trumped by the alleged pre-existing rights of the two sets of clients. This topic is more easily discussed along with the general nature of trust conditions. See Part D below.

4. Misstating Some Evidence

[16] Another error alleged is the statement in the Reasons that there was no direct evidence that the parties had previously agreed that there would be an indemnity (Reasons, para. 65). The Reasons deem that topic important because of their suggestion that solicitors' trust conditions should not go any further than the parties themselves had already gone (Reasons, paras. 53, 64, 66, 69, 76 and 77).

[17] In my respectful view, that statement that there was no such evidence is incorrect, whether taken narrowly or broadly.

[18] Though Mr. Anderson had not been at the November 1 meeting and so had no first-hand knowledge of it, Mr. Kadylo did. He testified that he attended that meeting and that he and Mr. Mackin took notes. Mr. Mackin was to draw up minutes, but did not (and has never produced his notes). So Mr. Kadylo wrote minutes based upon his notes and memory. He sent them to all concerned, with a request for corrections if any errors or omissions were noted. No one offered any corrections. Mr. Kadylo identified these minutes at trial, and they were put into evidence as an exhibit, found on pp. E119-20 of the appeal book. Page E120 shows that the parties agreed in principle that Integra would give Cheng and Wong an indemnity against claims by investors. That is what the trust conditions required: that the lawyers draft such an indemnity.

[19] The Reasons for Judgment said that the minutes were as close as one comes, but that it was not direct evidence. I cannot understand that. Mr. Kadylo's evidence seems direct to me, and in any event well worth weighing. Again the Reasons for Judgment seem not to have accepted it or rejected it.

[20] Furthermore, Mr. Kadylo was not connected with the appellants. He represented the building contractor on one of the developments.

[21] That omission is doubly unfortunate, because there was also indirect evidence. Mr. Anderson and Mr. Mackin were in contact with their respective clients and had some discussions between the November 1 meeting and the November 13 trust condition letter. Mr. Anderson testified that the November 13 trust conditions mirrored closely what the two lawyers had agreed upon, and that Mr. Mackin said so on November 13. If believed, that is powerful evidence. But once again, the Reasons for Judgment did not decide whether to believe or disbelieve that evidence.

[22] There may well have been conflicting evidence, but it was wrong to suggest that there was no evidence of substance supporting the appellants' position.

[23] That still leaves conflicts of evidence unresolved. Maybe the topic of previous discussions or agreements among the parties is of little legal importance, given my conclusions in Part D below about the nature of trust conditions. However, this suit has suffered already from premature decision of issues and failure to decide factual disputes. And the question of what the parties and their solicitors had discussed before the trust conditions were sent, may be very relevant to whether the trust conditions were accepted (as Mr. Anderson testified) or waived (as Mr. Mackin testified). Therefore, once again the only solution is a new trial.

5. No Adverse Inference

[24] Another ground of appeal is that the Reasons for Judgment did not draw an adverse inference from Mr. Mackin's failure to put the alleged waiver into writing, and Mr. Mackin's failure to produce his notes of the November 1 meeting. I prefer to leave those factual questions to the new trial judge, and to express no opinion on them.

6. Conclusion

[25] Therefore, the Reasons for Judgment decided one or two factual questions, some of no direct relevance, but did not decide one vital issue. Both errors may have flowed from a misunderstanding of the legal authorities on point. Therefore, it is necessary to discuss the law respecting solicitors' trust conditions.

[26] When an appeal court orders a new trial, sometimes it is wise to say little more, especially about factual matters, lest the new trial be prejudiced. However, if some dispute or uncertainty as to the governing law is likely at the new trial, then clarifying the applicable law may prevent error then and obviate a further appeal. Clarifying the law may help the parties research and prepare for the new trial and maybe negotiate a settlement. Some of the discussion of the law in the Reasons at trial suggests some legal errors, and that discussion seems to have influenced the actual judgment now under appeal.

[27] Furthermore, on appeal counsel argued remedies and whether the existing contract can nullify trust conditions. They likely will argue those questions at the new trial. Counsel thought it logically necessary to look at the basic nature of trust conditions to answer those questions. I agree that it is necessary.

D. General Nature of Trust Conditions

1. Introduction

[28] There is a lamentable dearth of authority on the nature of solicitors' trust conditions. Many legal textbooks are for classroom use by undergraduates, and omit important topics of everyday occurrence in law offices. And some authorities from elsewhere suggest legal propositions about

trust conditions which seem to me unsound in principle and unworkable, and contrary to Alberta authority.

[29] What is the nature of solicitors' trust conditions? What are the basic principles governing them? We must begin with the local environment.

2. Need for a Closing Mechanism

[30] If a contract for sale of land says nothing to the contrary, the obligations of vendor and purchaser are presumed to be simultaneous. Neither can demand that the other perform first: diCastri, ***Law of Vendor and Purchaser*** § 589 (3d ed. looseleaf rev. 2005); ***Centurian Ridge Farms v. Boyle, McCallum*** (1978) 14 A.R. 391, 401-3, 7 Alta. L.R. (2d) 340. To complete a sale under those conditions would involve a formal closing. The two sides would attend at the same time and place, where each would tender all the documents or money which the contract calls upon it to provide. The documents must literally be exchanged at the same moment, which becomes very awkward if each side is to provide more than one thing, or further documents must be signed. In practice such a formal closing would be modified a little: everything is tendered and put into the middle of the table in escrow, and then when everything is present, the escrow is lifted and each side takes the documents or money coming to it. See ***Field & Field v. Parlee McLaws*** (1990) 105 A.R. 131, 133 (C.A.).

[31] But in a Torrens jurisdiction, conveyance or mortgage is by transfer or other registrable document, and not by deed, and priority of registration is vital. So simultaneous delivery of funds and clear title is virtually impossible, even if the closing is done at the Land Titles Office. For one thing, the Land Titles Office usually takes some days to check the record and register and issue a new certificate. Various kinds of insurance might solve the problem, but they are far from universal. See Sterk's ***Alberta Conveyancing Law and Practice*** 80, 82 (2d ed. 1987); 2004-05 "CPLED" (Canadian Centre for Professional Legal Education) Program, ***Alberta Resource Materials***, Tab 2 "Real Estate", Chap. 3, pp. 3-3 and 3-5; Legal Education Society of Alberta, ***Alberta Residential Conveyancing Guide*** s. 4.3.1 (looseleaf, rev. 2002).

[32] Alberta law poses another complication. The ***Law of Property Act***, R.S.A. 2000, c. L-7, s. 40 forbids a suit on the covenant on an agreement for the sale of land (or a mortgage), in many circumstances. Often a purchaser has no personal liability. In those cases, the unpaid vendor's only recourse would be a lengthy so-called "foreclosure" action, culminating in a judicial sale or order of cancellation, but no deficiency judgment. I do not believe that it has ever been decided by the Alberta courts whether the usual real estate "interim agreement" is such an agreement for the sale of land. If it were, then s. 40 might apply to most sales of land in Alberta. I have no opinion on whether it would apply. But careful solicitors wish to avoid all complexities and risks.

[33] Letting an unpaid purchaser into possession also involves some practical dangers: ***Alberta Residential Conveyancing Guide, supra***, s. 4.3.3. So the vendor's only practical remedy may be to withhold possession and conveyance until the moment of payment. Without the participation of

someone known and reliable, such as the purchaser's solicitor, closing such a sale safely is almost impossible.

[34] Furthermore, to have a formal closing is very time-consuming and expensive, especially when one solicitor handles a number of transactions closing the same day. Today much Land Titles Office work is done electronically, not by personal attendance at the Land Titles Office. And commonly transactions for sale of land are really three-cornered, and not truly cash transactions. Very often the purchaser borrows part of the purchase price, and wishes to secure it by a new mortgage on what is being bought. Conversely, the vendor often lacks funds to clear off encumbrances, and wishes to use the sale proceeds to do so. Then again, sometimes mortgagees will not advance funds under a new mortgage until the new mortgage is properly registered.

[35] So one solution has long been used in Alberta: solicitors' trust conditions. Most Alberta land transactions close that way: ***Alberta Residential Conveyancing Guide***, ***supra***, s. 4.3.1. For example, the solicitor for the vendor will send to the solicitor for the purchaser a calculation of exactly how much money is owing after all adjustments. He will also enclose a signed fully-registrable ***Land Titles Act*** transfer of land from the vendor to the purchaser. The covering letter by the vendor's solicitor will state that the transfer is sent on the express "trust condition" that if it is used or passed on, the balance owing will (by a certain date) be unconditionally paid by the purchaser's solicitor to the vendor's solicitor. The letter may state that if the addressee cannot accept or perform those conditions, he is to return the transfer unused.

[36] The trust conditions can be much more complicated than that, especially if a new mortgage is being put on and old encumbrances removed.

3. What Legal Relation is Created?

[37] There is authority inside and outside Alberta saying that such "trust conditions" create an express or deemed solicitor's undertaking by the recipient solicitor to perform the conditions. See ***Witten Vogel v. Leung*** (1983) 46 A.R. 53, 148 D.L.R. (3d) 418; ***Kutilin v. Auerbach*** (1988) 54 D.L.R. (4th) 552, 558 (B.C. C.A.), leave den. (1989) 101 N.R. 231 (S.C.C.). I do not question the accuracy of that legal proposition.

[38] However, are "trust conditions" something else as well? In particular, do they create a trust? Does the ordinary law of trusts apply? The answer to that will help decide many questions, such as remedies available, and who is bound.

[39] An escrow or undertaking is not sufficient to solve the problems outlined above.

[40] The term or procedure of escrow strictly applies to deeds, and negatives their delivery, because a deed is effective only on delivery, not on signing or on its date. Escrow would be of use when sending a sealed Agreement for Sale or Bill of Sale, but possibly not when sending a registrable transfer. A ***Land Titles Act*** transfer is not a deed, and becomes effective by filing, not by delivery. When "escrow" is used in a wider sense, it is ambiguous. Cf. ***Tooton v. Atkinson (#1)*** (1983) 52 N. & P.E.I.R. 167 (Nfld. D.C.) (paras. 29-30).

[41] A proposed undertaking is of very little use. An undertaking must be actually given to be of much use to anyone. Even then, it presumably does not cover the period before it was given. And an undertaking has diminished worth in conveyancing in any situation where it is not easy to prove that it was given, so that litigation is needed to test that. One of the major aims of trust conditions is to bypass the need for litigation, and to produce certainty. Trust conditions aim to link obligation directly to use of documents, rather than to words or assent.

[42] An undertaking sometimes may not bind the recipient solicitor's client. If the solicitor is seen as a mere agent, lack of consideration may be a problem there, as non-lawyers may only be bound by contracts, not by promises. Whether he gave the undertaking as an agent, and what that means, could be open to debate. Cf. ***Hoffman & Dorchik v. Agnew, Nykyforuk*** [1985] 1 W.W.R. 656, 36 Sask. R. 257; ***Domfab v. Ross*** (1976) 22 N.S.R. (2d) 185.

[43] Another important aim of trust conditions is to allow simple enforcement between known persons of honor (solicitors) without need to sue their clients, who may be insolvent, unreasonable, litigious, or entrenched behind arguable counterclaims or set-offs. Without trust conditions, the two solicitors may be merely agents of their respective clients. So the clients might have to be sued.

[44] Therefore, sometimes mere undertakings (or escrows) will not provide perfect remedies.

[45] But a trust often will. If the trust condition creates a real trust, then the recipient of the document or money is a mere trustee for the sender. The trustee is the recipient solicitor, not his client. The documents or money sent under trust conditions are not held by the recipient solicitor (or his client) beneficially. If something goes wrong, proprietary remedies are available, not merely an unsecured claim for money compensation. If the recipient's client or some non-lawyer gets possession of the documents or money entrusted, he and they are just as bound.

[46] There is a bigger advantage. On occasion, solicitors send documents on trust to non-lawyers, such as trust companies, share registries, or trustees in bankruptcy. See the Law Society of Alberta's ***Code of Professional Conduct***, Chap.4, Commentary C.11.1 (para. 2) (version VS 2004). If trust conditions did not create trusts or equitable interests, and were nothing but solicitors' undertakings, they would be of little use if the recipient turned out not to have been a solicitor at the relevant time, or if he was struck off the rolls before he obeyed the trust conditions, or even struck off before the Law Society or court could enforce his undertaking.

[47] All that reinforces the conclusion that trust conditions between solicitors are intended to create, and do create, a traditional trust. See ***Hardtman & Strack v. Farr*** (1974) 5 O.R. (2d) 45, which seems to reach the same conclusion.

[48] I believe that most Alberta solicitors who give or receive trust conditions mean and understand what they say: trust conditions really create a trust. For evidence of their understanding and intent, we may look at the only generally-published pieces of evidence. The first is a textbook: Sterk, ***op. cit. supra***, at p. 80. One should note the terminology in the textbook's item (e), and its

quotation from the Law Society of Alberta's former ***Professional Conduct Handbook***, Ruling 19.1(iv) (looseleaf 1977, rev. 1988). The second is also a textbook: ***Alberta Residential Conveyancing Guide***, ***supra***, s. 4.3.1 (p. 4-9). Note the phrase "breach of trust". The third piece of evidence is the Law Society's current ***Code of Professional Conduct***, Chap. 4, R. 11(a), and commentary C.11.2 to R. 11(i), and commentary C.11.3 (revision V2 2004). One should note its terminology: "entrustor", "in trust", and "the trust". Finally, there are the 2004/05 CPLED materials, ***supra***, at p. 3-4. This publication is used to train articling students in Alberta. On that page, it refers to "the trust relationship created through the use of trust conditions", and says that undertakings are not the same as trust conditions, the latter being imposed on the solicitor, not given by him or her.

[49] I do not suggest that the Law Society's Rules on trust conditions bind the courts. They do not, and indeed in one or two respects they seem to make suggestions contrary to established Alberta case law. The Law Society Rules govern the professional discipline of lawyers, and cannot govern property disputes over entrusted documents. Only the courts, legislation on property, and case law, can govern that. In particular, the Law Society can make it a professional offence to impose a certain type of trust condition. But it cannot invalidate such a trust condition, nor can it let the recipient of such a trust condition take and enjoy the property entrusted free of that trust condition. The respondents concede this point, at least in part (factum para. 45).

[50] However, when solicitors have a choice as to what kind of legal relationship to create, pre-existing textbooks and Law Society Rules are an important backdrop against which to interpret the words which the solicitors choose.

[51] In courts of equity, there is an accepted three-part test for creation of an express trust. It is normally satisfied when one solicitor imposes trust conditions upon another. The first part of the test is words which show that the recipient must take the property for described persons or objects, not beneficially. The words "in trust" suffice, but are not necessary. Between two solicitors, handing over money or property to create a mere moral obligation is highly unlikely. The second part of the test for a new trust is clear identification of the property which is the subject matter. Ordinarily that property is the documents or money enclosed in the letter containing the trust conditions, and said to be subject to the conditions. Occasionally the conditions refer to documents sent previously in a named letter. Usually that part of the test is clearly satisfied. The final part of the test is certain or ascertainable persons or objects who are to benefit. That is even more easily satisfied, as usually the required performance is to be given to the solicitor sending the documents and letter. Occasionally, performance is to be to someone else, such as a mortgagee, but that person is usually clearly identified. These tests are described in Waters, ***Law of Trusts in Canada***, Chap. 5 (3d ed. 2005); Underhill and Hayton, ***Law Relating to Trusts and Trustees***, Chap. 2 (15th ed. 1995).

[52] Therefore, solicitors' trust conditions do create a trust.

4. Terms and Effect of the Trust

[53] What are the terms of the trust? That depends largely upon the wording of the trust conditions, but a few typical examples may suffice. The simplest arises when a vendor's solicitor

sends documents to a purchaser's solicitor before all the contract or conveyancing details are worked out, e.g. when the purchaser does not know what his new mortgagee will accept or require. Then the trust conditions will just say that the documents are sent on trust, to be held at the disposal of the sending solicitor, and to be sent back on demand. That creates a simple bare trust in favor of the sending solicitor. The receiving solicitor and his client acquire no beneficial interest whatever. This is not performance of the sale contract, nor a tender of such performance. It is a temporary storage measure.

[54] The next simplest example comes when the vendor's solicitor sends the purchaser's solicitor a registrable transfer on trust for payment of the precise sum needed to close the sale. In my view, without payment of that sum the receiving solicitor and his client again acquire no beneficial interest in the transfer. However, the trust is alternative or defeasible. It may be performed either by returning the transfer unused, or by paying the specified sum. Once the sum is paid, the obligation to return the transfer ceases. However, until the sum is actually paid (without strings attached), the trust over the transfer remains.

[55] This sort of alternative or defeasible trust may sound a little unusual, but it is not. A formal ***inter vivos*** trust, or one contained in a will, often has such features. An executrix may be constituted trustee and told to hold certain property of the deceased on trust, to pay taxes debts and expenses, to pay certain bequests or equalizing payments, and then to transfer part or all of the remainder of the property to herself beneficially. She cannot take the property beneficially without making the various payments, but once she has made them, she is the sole remaining beneficial owner.

[56] One rule about solicitors' trust conditions is very clear in Alberta and British Columbia. They bind the recipient solicitor fully, and are in no way qualified by whatever rights, powers or immunities his client has or claims to have. In particular, it is no defence to a claim under the trust conditions that those conditions go beyond, or contradict, the sale contract. Such a defence might be valid in Manitoba: ***Milburn v. Dueck*** [1992] 6 W.W.R. 497, 81 Man. R. (2d) 266 (C.A.). But it is not a defence in Alberta, where the trust condition must be unconditionally obeyed if the documents are not returned: ***Witten, Vogel v. Leung, supra***, at pp. 54-5 (A.R.); ***Minsos, McLeod v. Wedekind*** [1988] A.U.D. 772, [1988] A.J. # 447, Edm. 8703-0801 (C.A.); ***Field & Field v. Parlee McLaws, supra,*** at 132-33 (A.R.); ***McCarthy Tetrault v. Lawson, Lundell*** (1991) 58 B.C.L.R. (2d) 310; cf. Law Society of Alberta ***Code of Professional Conduct, supra***, R. 11(e).

[57] The respondents admit that

> "the court has an inherent jurisdiction to compel compliance with trust conditions. . . In the appropriate circumstances enforcement of such conditions can occur regardless of the contract between the parties whom the solicitors are representing; enforcement occurs against the solicitor, not the party he represents."
>
> (factum, para. 21(a))

[58] Still less is it a defence to a suit for breach of such a trust condition, that imposing that trust condition, or its terms, was unreasonable or otherwise violated Law Society Rules. The argument that the entrustor might be disciplined by the Law Society because the trust conditions went beyond the contract of sale, in substance is another attempt to make the sale contract an excuse for breach of the trust conditions. As noted, that is fundamentally mistaken.

[59] That rule barring set-offs and arguments about the contract of sale between the clients is founded on more than precedent. It is a corollary of the fact that trust conditions between solicitors are really a trust, and that the recipient solicitor holds the document entrusted as a trustee for the entrusting solicitor, not as the agent or trustee of the recipient's client. Without such rules, trust conditions would be largely useless. If they merely gave a right to sue on the sale contract, or were overridden by the sale contract, then they would add nothing to the sale contract, and would be a mere trap for those sending documents or money on trust.

[60] Needless to say, a client's instructions not to obey trust conditions are no excuse for breach of trust conditions: ***Witten, Vogel v. Leung***, ***supra***, at 54 (para. 6).

[61] The practical corollary of all this is that the recipient of trust conditions should carefully consider whether or not to accept them. Is it safe and proper to do so? Has he or she personal power to ensure their performance? If not, he or she should at once return the documents or money unused. See the Canadian Bar Association's ***Code of Professional Conduct***, Chap. 16, Commentary 7 end (1987).

[62] As in the trial Reasons here, it is easy to mix together two topics which should be kept distinct. One topic is when it is proper to impose a certain trust condition. The other topic is the effect of using documents after such a condition is imposed (properly or improperly).

[63] If a party has his solicitor impose a trust condition which is inconsistent with the existing sale contract, that may be a breach of the sale contract. And if a solicitor imposes a trust condition inconsistent with an existing binding sale contract, that may also be professional misconduct. But the recipient has a cheap easy solution. He or she should at once refuse in writing to accept the trust condition. At the same time, he or she should either get an acceptable written variation of the trust condition, or return the entrusted documents unused.

[64] Alberta solicitors have built a handsome high bridge quickly crossed every day by thousands of clients with valuable transactions. To remove any struts from the structure now would wreck the bridge, flinging down into the deep valley all the clients now crossing. It would also condemn all future clients to a long descent down one side of the valley and a labourious climb up the other.

5. No Sale Contract Here

[65] In any event, it is difficult to see how the topic of trust conditions which go beyond the sale contract even arises in the present case.

[66] The suggestion in the trial Reasons was that trust conditions should not be used to get an advantage by stipulating for more than the underlying sale contract already gives (paras. 66, 77). Presumably the suggestion is that a sale contract gives each side rights, and each side should be entitled to performance of those rights with no strings attached.

[67] But that reasoning could even be relevant only when the parties are closing a contract which is legally valid and enforceable. It has no possible relevance when there is no contract yet, and the parties are still negotiating. If there were a rule of the sort suggested, it would prevent use of any trust conditions where there is no valid contract. There is no policy reason for such a rule. When parties negotiate where there is no existing contract, commonly they tender documents or money to each other on trust conditions.

[68] And in the present case, no one suggests that there was a legally-binding contract to sell, even to settle claims. There was an agreement in principle, and some of its terms are now disputed.

[69] To use documents sent on trust conditions, is to accept the trust conditions. To do so and not perform them is a clear breach of trust. Almost invariably, the person so entrusted is the solicitor (not his client). Then the solicitor is personally liable for the breach of trust. In some circumstances, his client may be liable for the breach of trust also. The solicitor is never a party to any pre-existing sale contract, and so he or she presumably does not have any set-off rights under it.

[70] Therefore, the trial Reasons in the present case erred when they said "this case is first and foremost about the [lawyers'] clients and the equities between them" and not "about [the lawyers] and their conduct" (para. 69). Similarly, they erred in saying that trust conditions cannot be used if they would lever or improve the client's position (paras. 66, 77). Those errors are additional reasons to order a new trial, especially to decide if the trust conditions were waived.

E. Remedies

[71] This topic creates difficulties on the facts apparently present here. Further sifting of this topic will be needed at the new trial. More evidence will probably be useful, even necessary. I will offer only a few preliminary observations.

[72] The conclusion that trust conditions create more than a solicitor's undertaking, and are a real trust, helps one discover remedies for enforcement. Many remedies might be possible (apart from the court's summary powers over solicitors): disgorgement of profits, or possibly damages in lieu of specific performance or in lieu of injunction or in lieu of other equitable remedy (under (Imp.) 21 & 22 Vict. c. 27). Where someone pays or delivers performance of a proposed contract not yet made or effective, if the contract never becomes legally binding, then the performance is recoverable by the person making it. See Maddaugh and Camus, ***Law of Restitution***, ss. 21:200 to 21:200.40.20 (looseleaf ed., rev. 2004); Goff and Jones, ***Law of Restitution***, Chap. 26 (6th ed. 2002 and 1st supp. 2004). That rule could apply to many breaches of trust conditions. Whether it would apply to the facts here is much less clear.

[73] But the usual forms of remedy for breach of trust are open if the trust conditions are not observed. Those remedies fall broadly into two classes. The first class is various types of money compensation to the ***cestui que trust***. The second class is property remedies, including tracing. The respondents admit that "the remedy of damages for breach of trust conditions is available, and is the most appropriate remedy in light of the unusual circumstances." (factum para. 20). (That is obviously subject to their defence of waiver.)

[74] Some defences which might apply to a mere contractual suit, such as lack of privity, or restrictions on ability to claim for loss suffered by another, probably would not apply, because trusts and their remedies are proprietary. Nor could such remedies be limited to enforcement against solicitors. If the recipient entrusted never was a solicitor, or had ceased to be one, that would be no obstacle to enforcement of the trust.

[75] To give more detail about remedies or possible defences would be premature here, especially as appellate argument on this topic was not very full. The Reasons for Judgment mistakenly suggest that the trust conditions could not be valid if they gave more protection than the existing contract (if any), or if they gave the appellants a negotiating lever. Those were the reasons for rejecting a re-transfer of the land and the company (paras. 74-76). That is so flawed (for the reasons given in Part D) as to require a new trial.

[76] I express no opinion about whether any kind of retransfer of the land or the company would be an appropriate remedy now.

F. Rescinding Trust Conditions

[77] The respondents allege an oral waiver of the undoubted trust conditions. What if that allegation is true? Can an effective waiver of trust conditions be purely oral? Do the appellants also allege an oral amendment of the written trust conditions, to clarify who would prepare the first draft of the contract?

[78] In the first place, the Law Society of Alberta's ***Code of Professional Conduct*** requires that any oral amendment or rescission of trust conditions be confirmed in writing: Chap. 4, R. 11(f), (g), (h). (British Columbia's and the Canadian Bar Association's Codes have similar requirements.) As discussed in Part D.3 above, such Rules do not bind the courts. But to leave such vital agreements purely oral would be sloppy and dangerous. Where the issue is whether an important variation or waiver of trust conditions occurred, it could be suggestive that neither solicitor reduced it to writing. The first claim of waiver was in a without-prejudice letter to someone else almost a month later, after the change of title. The first such suggestion to the entrusting lawyer, Mr. Anderson, and the first purported record in writing, was much later.

[79] Another piece of legislation not argued before us is s. 9 of the Statute of Frauds. It requires writing to assign an equitable interest. See Waters, ***Law of Trusts in Canada***, 246-54 (3d ed. 2005). More research on that section and how the courts have interpreted it might be useful.

[80] Oral waiver will be an important issue for the new trial, but no conclusion at this stage is possible or desirable.

G. Conclusion

[81] I would allow the appeal and set aside the judgment under appeal. It is desirable that the parties exchange pleadings, raising all the issues which they wish respecting the transfers sent under trust conditions, the resulting change of title, the question of indemnities, and the question of trust conditions or their nonperformance. Usually that may be done in the existing suit, without paying a further fee for commencement of proceedings. But here no originating document was ever filed in the Court of Queen's Bench. So I can see no alternative but to suggest that the appellants issue and pay for a statement of claim. The appellants will want to consider whether to add any other persons as plaintiffs or as defendants in that new suit. But I would order that no limitation period expiring after the order to try issues will be open to the present respondents provided that the new suit is issued within 45 days after the date of these Reasons.

[82] There will be examination for discovery if any party requests it, and after close of pleadings either party may have discovery of records on demand. There will be no automatic discovery of records. I would order that one month after the close of pleadings, the matter may be set down for trial on all issues in the pleadings, in the usual way, including certificate of readiness (dropping any need for discovery which neither party has requested).

[83] The appellants had to appeal, and had considerable success on appeal. I would give them one set of costs on appeal, payable as soon as taxed.

[84] I am powerfully tempted to reduce those costs because some of the authorities cited and reproduced lacked page numbers, or paragraph numbers, and any citation of any law report. That leads to uncertainty, and shifts counsel's traditional work onto the court. In one puzzling instance, counsel cited a case without any reported citation, and research showed that the court issued two full decisions during the year in question with the same name. It took further checking to find out which was the correct one. This Court has complained often of such breaches of its Consolidated Practice Directions. It is about time to replace exhortations with sanctions, as threatened a number of times before. Such a penalty should be no surprise in the next appeal thus blighted.

[85] Costs of the new trial are often ordered to await the end of the new trial, and often may be disposed of by the new trial judge. Though the parties here appear to have agreed on the unfortunate procedure followed here, I would leave the costs to date in the Court of Queen's Bench to be awarded in the discretion of the judge hearing the new trial.

Appeal heard on June 16 and 17, 2005

Reasons filed at Calgary, Alberta
this 16th day of August, 2005

Côté J.A.

I concur:

Authorized to sign for: Picard J.A.

Reasons for Judgment of
The Honourable Mr. Justice O'Brien
Concurring in the Result

[86] The trial judgment cannot stand. The trial judge found that express trust conditions had been breached but provided no remedy to the appellants and left them to re-litigate the issues if they wish to pursue a claim for damages or other relief. In reaching his conclusion that trust conditions had been breached, the trial judge did not rule on the main defence that the trust conditions had been waived. While his reluctance to make a ruling, including making of a determination of which of the solicitors was untruthful, may be understandable in the circumstances of the case, it left a crucial issue, perhaps the crucial issue, undecided. I therefore agree with my colleagues that the appeal must be allowed.

[87] I am in further agreement that it is not appropriate that the issues directed by the trial judge simply be re-tried. In my view, matters must start afresh. While I am not prepared to dictate the procedures to be followed, I am in agreement with my colleagues that pleadings and other normal litigation procedures are desirable. It would be appropriate for counsel to apply for case management at an early date.

[88] I do not think it necessary for the disposition of this appeal to make the analysis of the true nature of trust conditions or otherwise to deal with the issues as set out in the judgment of my brother Côté, J.A. I am particularly reluctant to do so in the absence of argument by counsel with respect to some of the specific points developed in his judgment.

Appeal heard on June 16 and 17, 2005

Reasons filed at Calgary, Alberta
this 16th day of August, 2005

O'Brien J.A.

Appearances:

V.P. Lalonde
A. Goddard
for the Appellants (Plaintiffs/Applicants)

F.H. Monaghan
for the Respondents (Defendants/Respondents)

Corrigendum of the Reasons for Judgment of
The Honourable Mr. Justice Côté

In para. [34], fourth sentence, "Very often the vendor borrows" has been corrected to read "Very often the purchaser borrows".

TAB 12

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

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A. Persons

We saw earlier[118] that the courts in England have distinguished between a mere or non-discretionary trust, a power in the nature of a trust which includes the discretionary trust, and a mere power. Persons, human or incorporated, are the familiar objects of trusts, and the problem of certainty which they present is whether it is possible to say that the persons intended as objects are ascertainable.[119] Ascertainable is a somewhat ambiguous word, but in this context it means two things: first, that it is possible to determine, if the intended beneficiaries are not referred to by name but by a class description, whether any person is a member of that class, and, second, that the totality of the membership of that class is known.[120] Ascertainment means

---

[118] *Supra*, chapter 3, Part VII C.

[119] Reference should be made to chapter 3, Part VII, *supra*, where distinction is drawn between the certainty required for a mere power, a power in the nature of a trust which includes a discretionary trust, and a mere or non-discretionary trust.

[120] Both these elements are required for certainty of beneficiaries of a non-discretionary trust. For example, in *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)*, *supra*, note 111, Brooker J. concluded that winners of a casino jackpot were a sufficiently certain class since it was "possible to determine if an individual is a member of the class by seeing if their poker hand meets the necessary criteria of being a flush or higher in order to win. It is also possible to determine the extent of the class since the class consists only of those people who meet the requirements at the time of winning the jackpot." One difficulty with the analysis in this case was that the funds in question were amounts left after payment of all winners to the point that the casino discontinued its operations. Thus, amounts remaining would have been for future jackpot winners had the casino continued to operate. Could the totality of this class have been known? In *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2001), *supra*, note 95, Wilson J. made the following comment on the *Arkay Casino* case, "It seems to me to say, without a declaration to that effect in any trust instrument, that all the world is a member of the beneficiary class, as anyone could walk in to play the game. There being no description of the class, it cannot be said whether or not it is certain, and a class that includes everyone in the world surely is not certain." Also in *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.), funds had been deposited with Canada Trust Co, pursuant to an agreement in which Canada Trust was referred to as "trustee". The funds were to provide security for the payment of the farmers who had sold grain to the purchaser on a deferred payment basis. Price Waterhouse had been appointed as a receiver of the purchaser and argued that there was no trust on the basis, among other reasons, that the class of beneficiaries was uncertain. Forsyth J. noted that it was possible to determine whether any given person was a member of the class of farmers who had sold grain to the purchaser on a deferred payment basis and that, indeed, a complete list of the class could be determined since Price Waterhouse itself had created a complete list.

Two things should be noted: (1) the difficulty of finding the members of the class is irrelevant, if the description is such that it is possible to say who is or is not in the class, and to list the persons who make up the class. "The whereabouts or continued existence of some of its members at the relevant time matters not": *per* Lord Upjohn in *Re Gulbenkian's Settlement* (1968), [1970] A.C. 508, [1968] 3 All E.R. 785 (U.K. H.L.) at 524 [A.C.]; (2) "The question of certainty must be determined as of the date of the document declaring the donor's intention": *ibid.*, i.e., the date of the deed, writing, or verbal declaration which is to take effect *inter vivos*, or the date of the testator's death when his will is the instrument of creation. However, it should be observed that certainty exists as at the moment of the instrument taking effect even though the instrument creates a successive interest in a class of persons, the actual membership of which can only be known when that interest vests in possession. E.g., *Kinsela v. Caldwell* (1975), 132 C.L.R. 458 (Australia H.C.): to the next-of-kin of the settlor, and in the shares the intestacy laws of New South Wales would then distribute the settled

TAB 13

In the Court of Appeal of Alberta

Citation: Iona Contractors Ltd. v Guarantee Company of North America, 2015 ABCA 240

Date: 20150716
Docket: 1401-0159-AC
Registry: Calgary

Between:

Ernst & Young Inc. in its capacities as Receiver and Manager and Trustee in the Bankruptcy of Iona Contractors Ltd.

Respondent
(Applicant)

- and -

The Guarantee Company of North America

Appellant
(Respondent)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Keith Yamauchi

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Mr. Justice Yamauchi

Dissenting Reasons for Judgment Reserved of the Honourable Madam Justice Paperny

Appeal from the Order by
The Honourable Madam Justice K.M. Eidsvik
Dated the 10th day of June, 2014
Filed on the 3rd day of July, 2014

(2014 ABQB 347, Docket: 25-1475756)

Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter

[1] This appeal relates to the entitlement to holdback funds that remain unpaid under a construction contract. The main players are:

- Iona Contractors, a now bankrupt contractor (represented by its bankruptcy trustee) that agreed to improve the north airfield for the Calgary Airport Authority;
- The Calgary Airport Authority which retained Iona, and owed the disputed sum of $997,716 remaining payable under the contract. Those funds are held in trust by the appellant's solicitors pending the resolution of this dispute;
- The appellant Guarantee Company of North America which issued a Labour and Material Payment Bond to the Airport Authority to ensure payment of Iona's obligations under the contract;
- A group of unpaid subcontractors, who Iona retained to perform work on the airfield, and who were subsequently paid out by Guarantee Company of North America under the Labour and Material Payment Bond;
- The Alberta Treasury Branches, Iona's secured creditor, which has a prior registered security interest against all of Iona's assets.

The chambers judge concluded that the Trustee in Bankruptcy of Iona Contractors was entitled to receive the unpaid funds from the Airport Authority, and to pay them to Alberta Treasury Branches: ***Iona Contractors Ltd. v Guarantee Co. of North America***, 2014 ABQB 347. The surety Guarantee Company of North America appeals.

Facts

[2] In 2009 Iona and the Airport Authority entered into a contract for the construction of improvements on the airport's north airfield. Under the contract, the Airport Authority required Iona to deliver a Performance Bond, and a Labour and Material Payment Bond to guarantee that suppliers of materials and labour to the project would be paid. The appellant Guarantee Company of North America is the surety under both bonds.

[3] By October 2010, work under the contract was substantially complete, but some of Iona's subcontractors remained unpaid. The Airport Authority withheld further payment. It used $182,869 ($105,000 + $77,869) of the remaining outstanding funds to complete deficiencies in the contract work, leaving $997,715.83 still in the Airport Authority's hands. Guarantee Company paid out $1.48 million under the Payment Bond to settle the outstanding accounts of Iona's

subcontractors. It now claims the $997,715.83 that remains unpaid under the contract to recoup these payments.

[4] In December 2010, Iona applied for protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36. Iona was assigned into bankruptcy on March 18, 2011.

[5] Guarantee Company argues that it is entitled to the remaining funds as the subrogee of the subcontractors because:

(a) There is no money owed to Iona under the contract, because:

(i) Iona is in breach, and

(ii) the contract gives the Airport Authority the right to cure Iona's breaches by paying the unpaid subcontractors,

and alternatively,

(b) The remaining funds are impressed by a trust under the *Builders' Lien Act*, RSA 2000, c. B-7, s. 22.

Therefore, Guarantee Company argues, Iona's Trustee has no claim to the leftover funds.

[6] The Trustee argues that:

(a) The contract work was substantially completed, and Iona is entitled to payment of the remaining funds held back under the contract. It argues that the wording of the contract permitting the Airport Authority to cure Iona's breaches of the contract does not extend as far as paying unpaid subcontractors. In the alternative, any such payments would defeat the priority regime in the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 and are therefore impermissible, and

(b) The trust provisions of the *Builders' Lien Act*, if they apply, would also offend the priority regime in the *Bankruptcy and Insolvency Act*, and they cannot assist the surety Guarantee Company in the circumstances.

The Airport Authority takes no position, and has paid the money into trust.

[7] The chambers judge rejected both of Guarantee Company's arguments. On the contractual argument, she held at paras. 15-6, 26 that Iona was the only party with a contractual relationship with the subcontractors, and with a duty to pay the subcontractors. The Airport Authority had no "duty" to pay subcontractors. She held further at paras. 24-5 that the ability of the Airport Authority to hold back funds "required to have the Work completed", was not wide enough to cover the payment of unpaid subcontractors.

[8] With respect to the second argument, the chambers judge held at paras. 33-4 that the statutory trust created by s. 22 of the *Builders' Lien Act* conflicted with the priority regime in the *Bankruptcy and Insolvency Act*, and so was inoperative in these circumstances. She directed that the remaining holdback funds be paid to the Trustee, generating this appeal by Guarantee Company.

Issues and Standard of Review

[9] The appellant Guarantee Company raises the same issues on appeal. The first issue is whether there are any funds owed to Iona under the contract, which depends on whether the Airport Authority had the ability to pay the unpaid subcontractors. The second issue is whether the trust provisions of the *Builders' Lien Act* conflict with the priority regime of the *Bankruptcy and Insolvency Act.*

[10] The standard of review of the interpretation of contracts depends on the issue raised and the legal and factual context: ***Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.***, 2015 ABCA 121 at paras. 12-9. No parole evidence was introduced to suggest that the parties turned their mind to how these contractual provisions would operate in the circumstances that have arisen in this appeal. The main dispute over the meaning of the contract is now between non-parties to the contract. The proper interpretation of the contract turns largely on its wording. Whether the bare wording of the contract is, in any event, rendered inoperative because of conflict with the *Bankruptcy and Insolvency Act* is a question of law. Whether the trust provisions of the *Builders' Lien Act* are operative in these circumstances is also a question of law. The appropriate standard of review in this appeal is correctness.

The Contractual Argument

[11] Guarantee Company argues that, under the terms of the contract, there is no money owing to Iona. It argues that the contract allows the Airport Authority to remedy breaches of the contract by Iona, which includes paying subcontractors that Iona did not pay.

[12] This argument is premised on the definition of "Work" in the contract:

> 1.1.54 "Work" means the total construction and related services required by the Contract to be performed and Products to be supplied under the Contract, and includes everything that is necessary to be done, furnished or delivered by the Contractor to perform the Contract.

Clause 13.1.1 places an obligation on Iona to pay its subcontractors, and so Guarantee Company argues that this is "something that is necessary to be done" under the contract. If Iona is in breach of that part of the "Work", then the Airport Authority is entitled to cure the default under clause 6.3.3(d):

6.3.3 If any part of the Work is taken out of the Contractor's hands:

. . .

(d) the Contractor's right to any further payment that is due or accruing due (including any holdback or progress claim) for the Work taken out of the Contractor's hands is extinguished, save and except that portion (if any) which is not required by the Airport Authority to have the Work completed or to compensate it for any consequential damages or losses arising out of the taking of the Work or any part of it out of the Contractor's hands.

On this argument, if a subcontractor is not paid then the "Work" is not complete, and the Airport Authority is entitled to take paying the subcontractors "out of the Contractor's hands". If the Airport Authority pays the subcontractors directly, it can deduct the funds so used from what is otherwise owing to Iona.

[13] The Trustee does not accept this line of argument, primarily because it notes that there is no contractual relationship between the Airport Authority and the subcontractors, and therefore no "obligation" on the Airport Authority to pay subcontractors. That is true, but not directly relevant at this stage of the analysis. The Airport Authority has no "obligation" to do any of the "Work"; it was Iona that was obliged to improve the airfield and perform all of the covenants in the contract, including paying the subcontractors. The issue at this stage is not whether the Airport Authority has an "obligation" to pay the subcontractors (or otherwise complete the Work), but whether it has the "right" to do so under clause 6.3.3(d).

[14] As the chambers judge noted at para. 21, this argument is "compelling", but it is not necessary to resolve whether, on the wording of the contract, paying the subcontractors is "something that is necessary to be done under the Contract", and therefore part of the "Work". Even if the paying of the subcontractors was authorized under clause 6.3.3(d) prior to any bankruptcy, the provisions of that clause become inoperative after bankruptcy.

[15] There is nothing objectionable about a provision in a contract allowing the owner to complete work that was not performed by a bankrupt contractor, and to deduct the amount from what was otherwise owing to the contractor. Section 97(3) of the *Bankruptcy and Insolvency Act* allows such set-offs. After a bankruptcy, however, no such clause is effective to the extent that it gives a discretion to the owner to pay creditors of the bankrupt contractor otherwise than as authorized in the *Bankruptcy and Insolvency Act*: ***A.N. Bail Co. v Gingras***, [1982] 2 SCR 475 at pp. 485-7. It is at this stage of the analysis that it is relevant that the owner has no "obligation" to pay the subcontractors, but only the "right" or "discretion" under clause 6.3.3(d). After bankruptcy, that discretion cannot be exercised in such a way that it disturbs the priorities in the *Bankruptcy and Insolvency Act*.

[16] This point was confirmed in ***Greenview (Municipal District No. 16) v Bank of Nova Scotia***, 2013 ABCA 302, 87 Alta LR (5th) 335, 556 AR 344 where the contract gave the owner municipality an explicit right to pay unpaid subcontractors:

> 1.2.35 The Contractor shall promptly pay . . . any subcontractor . . . . In the event of failure by the Contractor at any time to do so . . . the Department may retain out of any money due on any account to the Contractor from the Department such amount as the Department may deem sufficient to satisfy the same . . . . The Department may pay directly to any claimant such amount as the Department determines is owing, rendering to the Contractor the balance due after deducting the payments so made.

The Court noted at para. 41 that this clause gave the owner a wide discretion to pay any unpaid subcontractors. However, once a bankruptcy intervened, this discretion could no longer be exercised:

> . . . once bankruptcy occurs any monies owing become the property of the Trustee, and the terms of the contract do not replace the terms of the *BIA* to prefer some of Horizon's creditors over others. Once Horizon was placed in bankruptcy, all creditors stand on an equal footing vis-à-vis Horizon, and claims must be submitted in accordance with the provisions of the *BIA* section 69.3. Further, clause 1.2.35 embodies a discretion, not a commitment, on the part of Greenview, the exercise of which would reduce what Greenview might owe to Horizon either for work already billed or work to be billed.

As this passage notes, if the owner had an obligation to pay the subcontractors, and not just a discretion, the result would be different.

[17] The appellant argues that even if the Airport Authority merely had a discretion (and not an "obligation") to pay subcontractors under the contract, it does have such an obligation under the Labour and Material Payment Bond. The appellant argues that when the construction contract and the bond are read together, they disclose an obligation on the part of the Airport Authority to "mitigate" the exposure of the surety, which includes using the holdback funds to pay the subcontractors. Even if the agreements, when read together, disclose some intention to minimize the exposure of the surety, the private arrangements between the owner, the contractor, and the bonding company cannot affect the rights of third parties like the Trustee in bankruptcy and the secured creditor. Whatever rights the appellant may have were not registered at the Personal Property Registry, and cannot displace the rights of the secured party. Further, in ***Greenview*** the Court confirmed that the existence of a surety and a bonding arrangement did not change the outcome.

[18] It follows that the appellant is unable to succeed based on its argument that no money was due to Iona under the contract.

The Trust Argument

[19] In the alternative, Guarantee Company argues that it is entitled to the disputed funds by virtue of the trust created by s. 22 of the *Builders' Lien Act*. It argues that the unpaid subcontractors are the beneficiaries of that trust, and that it is subrogated to their position. The Trustee replies that the trust created is inconsistent with the priorities set by the *Bankruptcy and Insolvency Act*, and so cannot assist Guarantee Company.

The Builders' Lien Act

[20] The general provisions of the *Builders' Lien Act* are well known. At common law, subcontractors have no claim against the owner of property that they improve, because there is no privity of contract between them. The *Builders' Lien Act* provides a partial remedy to that problem. It allows an unpaid subcontractor to file a lien against the owner's property, and potentially to sell the owner's property to satisfy its claim. The owner can post security in substitution for the lien, in which case the subcontractor's rights are transferred to the security. The owner can also limit its exposure by keeping statutorily mandated "holdbacks", which it can decline to pay to the contractor until it is satisfied that there are no liens. If necessary, the owner can pay the holdback into court, and allow the contractor and the subcontractors to litigate entitlement.

[21] The *Builders' Lien Act* therefore creates a comprehensive, integrated system that provides some assurance to subcontractors that they will get paid for improving land. A portion of that overall regime is a statutory trust found in s. 22:

> 22(1) Where
>
> (a) a certificate of substantial performance is issued, and
>
> (b) a payment is made by the owner after a certificate of substantial performance is issued
>
> the person who receives the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate was issued, holds that money in trust for the benefit of those persons.
>
> (2) When a person other than a person who received the payment referred to in subsection (1)
>
> (a) is entitled to the money held in trust under this section, and
>
> (b) receives payment pursuant to that trust,
>
> the person, to the extent that the person owes money to other persons who provided work or furnished materials for the work or materials in respect of which the

payment referred to in clause (b) was made, holds that money in trust for the benefit of those other persons.

(3) A person who is subject to the obligations of a trust established under this section is released from any obligations of the trust when that person pays the money to

(a) the person for whom that person holds the money in trust, or

(b) another person for the purposes of having it paid to the person for whom the money is held in trust.

Neither the trust provisions, nor any other portion of the *Builders' Lien* statutory regime should be read in isolation. They are all a part of one comprehensive package relating to property and civil rights in the province.

[22] These trust provisions are narrow in their operation. They only apply when "a certificate of substantial performance is issued", as occurred here. That certificate is a precondition to the release of the holdback funds under s. 21, which to that point have been held by the owner to ensure that the subcontractors will be paid, and to satisfy the owner's obligation should a lien be filed. Section 22 ensures that when the remaining funds are paid out, they will end up in the hands of any unpaid subcontractors. Section 22 effectively uses the mechanism of a trust to avoid the diversion of the holdback funds, after the issue of the certificate of substantial completion, but before the funds actually reach the unpaid subcontractors. If, in this situation, the $997,716 had been paid by the Airport Authority to Iona or the Trustee, under the statute the recipient would have held the funds in trust for the subcontractors.

[23] It is obvious that the *Builders' Lien Act* could have an effect on the entitlement to payments on bankruptcy. A subcontractor which has a valid lien, or another valid claim under the *Builders' Lien Act,* might become entitled to a payment to which it would not be entitled as a mere unsecured creditor. No one has suggested that these provisions, relating as they do to property and civil rights in the province, necessarily offend the bankruptcy distribution regime.

[24] An added complication in this appeal is that airport lands fall under federal jurisdiction, and so cannot be liened. This is primarily because it would be incompatible with the regulation of airports to permit any portion of the airport lands to be sold to satisfy the liens. In this case, the parties agree that the trust provisions in s. 22 can nevertheless apply, and the appeal was argued on that basis: see ***Minneapolis-Honeywell Regulator Co. v Empire Brass Manufacturing Co.***, [1955] SCR 694; ***Canadian Bank of Commerce v T. McAvity & Sons Ltd.***, [1959] SCR 478; ***Kerr Interior Systems Ltd. v Kenroc Building Materials Co. Ltd.***, 2009 ABCA 240 at paras. 14, 17, 6 Alta LR (5th) 279, 457 AR 274. The trust provisions should not, however, be interpreted as if they were a "stand alone" trust; they are still a part of the overall scheme in the *Builders' Lien Act.*

The Bankruptcy and Insolvency Act

[25] The *Bankruptcy and Insolvency Act* is federal legislation, the general provisions of which are also well known. It governs the orderly distribution of the estates of bankrupt persons, and in particular specifies the priority in which competing claims will be paid. Provisions like s. 72 confirm that the *Bankruptcy and Insolvency Act* operates against the background of property and civil rights created by provincial law. In the event of an operational conflict, the federal provisions prevail.

[26] The *Bankruptcy and Insolvency Act* incorporates numerous provisions that determine the priority of payments to claimants in a bankruptcy. In the most general terms, the scheme is:

> (a) Under s. 67(1), only "property of the bankrupt" is available for distribution to any class of claimants. Under s. 67(1)(a) property "held by the bankrupt in trust for any other person" is not considered to be property of the bankrupt, and so is not available to the creditors of the bankrupt.
>
> (b) Under s. 136(1), the scheme of distribution is made "subject to the rights of secured parties". Secured parties are thus entitled to enforce their security in accordance with provincial law, without regard to the scheme in the *Bankruptcy and Insolvency Act*.
>
> (c) Section 136 next lists, in order of priority between themselves, a dozen categories of claims that have priority over general unsecured claims. Priority is given to things like funeral expenses, costs of administration, some wage claims, etc.
>
> (d) Finally, s. 141 provides that all other claims will be payable rateably, subject to a few specific statutory exceptions.

The categorization of a claim for the purposes of relative priority is a matter of federal law. Thus, the provinces cannot define what is a "trust" or a "secured party" for the purposes of bankruptcy law; which claims are included in those various categories is a matter of federal law. This ensures the uniformity of bankruptcy law across Canada. But while uniformity of bankruptcy law is an important value, that does not mean that results will not vary from province to province. Since "property and civil rights" can vary depending on provincial law, a type of creditor in one province may be in a different position after bankruptcy than the same type of creditor in another province.

Interaction of the Federal and Provincial Law

[27] Because federal bankruptcy legislation is enacted against the background of provincial laws respecting property and civil rights, there will be occasions when a different outcome will result depending on which law is applied. As mentioned, in case of operational conflict federal law prevails. Obviously a deliberate attempt by a province to change the order of priority in bankruptcy will be ineffective, but an operational conflict can arise short of that.

[28] There have been a number of cases in which operational conflicts have arisen:

(a) In ***Quebec (Deputy Minister of Revenue) v Bourgault (Trustee of)***, [1980] 1 SCR 35 the provincial statute purported to create a priority for unpaid sales tax debts owed to the province, by deeming them to be a privileged debt. The relative priority for such claims was specifically dealt with in what is now s. 136(1)(j), which applied "notwithstanding any statutory preference to the contrary". This provincial attempt to create a new category of "privileged creditor" created an operational conflict with federal legislation, and was ineffective.

(b) In ***Deloitte Haskins and Sells Ltd. v Alberta (Workers' Compensation Board)***, [1985] 1 SCR 785 the provincial statute purported to create a charge on all of the property of the employer, thereby making the Board a secured creditor. The priority for Workers' Compensation Board claims was specifically dealt with in what is now s. 136(1)(h), and this attempt to create a secured claim was also ineffective.

(c) ***Federal Business Development Bank v Québec (Commission de la santé et de la sécurité du travail du Québec)***, [1988] 1 SCR 1061 was another attempt to turn a workers' compensation claim into a secured claim. This provision was also held to be ineffective, even if the enforcement of the secured claim took place outside the bankruptcy regime.

(d) The provincial statute in ***British Columbia v Henfrey Samson Belair Ltd.***, [1989] 2 SCR 24 attempted to create a priority for unpaid sales taxes. Rather than deeming the Crown's claim to be "secured", this legislation deemed a "trust" in support of the unpaid claim, in an attempt to withdraw the assets from the bankruptcy regime under s. 67(1)(a). This "trust" was held not to be a true trust for bankruptcy purposes, and the priority of the claim was governed by what is now s. 136(1)(j). While the provinces could define "trust" for purposes of provincial legislation, only the common law definition of a "trust" met the requirements for a trust under federal bankruptcy law.

(e) In ***Husky Oil Operations Ltd. v Canada (Minister of National Revenue)***, [1995] 3 SCR 453 the provincial statute did not purport to create either a secured claim or a trust. Rather it deemed the debtor of the bankrupt to be the surety or guarantor of the bankrupt's obligations to the Worker's Compensation Board. If the bankrupt did not pay the Board, the debtor had to pay, but it could then set off what it had paid against its debt owing to the bankrupt. The effect of the regime was to divert funds from the bankrupt's estate to pay the Board. This statutory technique was also held to create an operational conflict.

Some of these challenged provisions affected the payment priorities set out in the *Bankruptcy and Insolvency Act* more directly than the ones involved in this appeal. A feature of most of them was that they purported to create interests with priority that attached to all the assets of the bankrupt, not just to any discrete asset: see ***Henfrey Samson Belair*** at pp. 33-4.

[29] In ***Husky Oil*** the Court set out certain principles for evaluating the effectiveness of provincial legislation after bankruptcy. It rejected two possible rules:

> (a) First, it rejected (at para. 31) the "broader 'bottom line' approach", which postulated that any provincial law that affects the final result in bankruptcy would create an operational conflict. Such a broad rule was inconsistent with the accepted premise that property and civil rights were defined, in many fundamental ways, by provincial legislation.
>
> (b) The Court also rejected (at para. 32) the "narrower 'jump the queue' approach", by which an operational conflict would only arise if there were a manifest intention to change priorities in bankruptcy. The scope of operational conflict was wider than this approach.

In the result, the Court endorsed a position between these extremes.

[30] ***Husky Oil*** sets out (at paras. 33, 40) six propositions underlying the proper approach:

> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the *Bankruptcy Act*;
>
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;
>
> (3) if the provinces could create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;
>
> (4) the definition of terms such as "secured creditor", if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the *Bankruptcy Act*.
>
> (5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
>
> (6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

These propositions, unfortunately, do not establish where the line is between effective and inoperative provincial legislation. Many of them merely confirm that the terms and concepts used in the *Bankruptcy and Insolvency Act* must be determined by federal law, which prevails over provincial law. The first proposition, in particular, cannot be read as endorsing the explicitly rejected "broader 'bottom line' approach". Whether any provincial scheme is in operational conflict with the bankruptcy regime must be determined by examining the purposes and effect of the provincial legislation within its statutory context.

[31] Because ***Husky Oil*** rejected the "broader 'bottom line' approach", it is not sufficient to note that the impugned provincial legislation has some effect on priorities. It is only where provincial law interacts with federal bankruptcy law (i.e., somebody is insolvent) that the issue even arises. Obviously, if everyone is solvent, nobody cares about trusts, secured interests or priorities. If everyone is solvent, nobody cares about builders' liens either. Whether anybody has a secured or prior claim depends on provincial law over property and civil rights, so in one sense all priorities are set by provincial law. Merely noting that a provincial law has some effect on priorities is not determinative.

The Operational Validity of the Builders' Lien Act

[32] On what side of the line do the trust provisions in s. 22 of the *Builders' Lien Act* stand?

[33] An important consideration is that these trust provisions do not directly, intentionally, or primarily affect the order of payment in bankruptcy. They are part of a larger statutory scheme designed to create new civil rights for unpaid subcontractors. The holdback provisions and the trust provisions play a supportive role in the overall regime, and are primarily in place to prevent the unjustified erosion of the lien rights created by the statute. There is no attempt to use "form to override substance"; the trust is a legitimate part of the overall scheme. However, ***Husky Oil*** confirms that an intention to reorder priorities is not necessary to create an operational conflict.

[34] ***Henfrey Samson Belair*** at pp. 34-5 confirms that the definition of "trust" encompasses, at least, all common law trusts. The common law test for a trust requires three certainties: certainty of intention, certainty of objects and certainty of subject matter. In most common law trusts, the "intention" arises because (a) the settlor forms and declares an intention to hold property in trust, or (b) property is transferred to somebody with the intention that the recipient hold the property in trust. A statutory trust is imposed by law, so it is not "intentional" in that sense; for a statutory trust to meet the common law test for a trust, the general law must be applied by analogy.

[35] ***Henfrey Samson Belair*** at p. 34 concluded:

> In summary, I am of the view that s. 47(a) should be confined to trusts arising under general principles of law, while s. 107(1)(j) should be confined to claims such as tax claims not established by general law but secured "by her Majesty's personal preference" through legislation. (emphasis added)

Bassano Growers Ltd. v Diamond S. Produce Ltd. (Trustee of), 1998 ABCA 198 at para. 12, 66 Alta LR (3d) 296, 216 AR 328 interpreted ***Henfrey Samson Belair*** as accepting that some statutory trusts could qualify under the "general principles of law":

> This is not to say that a trust that meets the requirements of the general law, and therefore qualifies as a trust under s. 67(1)(a) of the BIA, may not have its genesis in a deemed or statutory trust. It must, however, satisfy the essential requirements of a valid trust under the general law in order to do so. Here, the purported trust fails to meet the necessity for certainty of subject-matter. (emphasis added)

The alternative interpretation of ***Henfrey Samson Belair*** would be that no statutory trust could ever qualify as a trust "arising under general principles of law", if only because statutory trusts are in one sense "involuntary". That alternative interpretation is, however, inconsistent with the specific findings in ***Henfrey Samson Belair*** at p. 34 about the statutory trust that was the subject of that decision:

> . . . At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. . . . There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt. (emphasis added)

The problem with the trust in ***Henfrey Samson Belair*** was that there was no certainty of subject matter, not that a statutory trust could never qualify as a "trust arising under general principles of law".

[36] In most statutory trust situations, only the third certainty will be in play. Certainty of intention and certainty of objects will usually be satisfied by the terms of the statute. If the statute uses the word "trust", the intention is clear: ***Re: 0409725 B.C. Ltd.***, 2015 BCSC 561 at para. 22. Usually the intended beneficiary of the trust will also be obvious. The only potential for uncertainty is over the assets that are covered by the trust.

[37] The trusts created by s. 22 meet the requirements of the general principles of trust law:

(a) There is certainty of intention. The "intention" of s. 22 is clearly to create a trust;

(b) There is certainty of object. The beneficiaries of the trust are clearly the unpaid subcontractors;

(c) There is certainty of subject matter. Section 22 provides that once a certificate of substantial completion is issued, any "payment by the owner" is subject to the trust. At this stage the owner's primarily obligation will be to pay out the holdback, and its obligation to do so represents a discrete chose in action. That chose in action is the subject matter of the trust. If, as the Trustee postulates, the Airport Authority had written a cheque for $997,716 to Iona, that bill of exchange and those funds would have been trust assets in Iona's hands.

It follows that the provisions of s. 22 meet the requirements of a common law trust. There is no deliberate attempt to reorder priorities in bankruptcy, and the province is not attempting to achieve indirectly what it cannot do directly. These considerations, coupled with the fact that the trust provisions of s. 22 are merely a collateral part of a complex regime designed to create security for unpaid subcontractors, leads to the conclusion that there is no operational conflict.

[38] One of the objections to the statutory scheme in ***Henfrey Samson Belair*** was that the trust in question did not attach to any specific funds. It purported to attach to all the assets of the bankrupt tax collector as if it were a secured claim, like a type of general floating charge. The trust in s. 22 does not suffer from this deficiency, because it only attaches to the discrete sum of money paid by the owner after the certificate of substantial completion has been issued. The other assets of the owner (the Airport Authority) and the contractor (Iona) are unaffected. There is no attempt to throw a general trust over all the assets of the bankrupt.

[39] A number of decisions touch on this issue. In ***John M.M. Troup Ltd. v Ontario (Attorney General)***, [1962] SCR 487 the Court considered the provisions of Ontario's *Mechanics' Lien Act*. That statute purported to create a trust over "all funds received by a contractor on account of the contract price", and therefore had a wider reach than the Alberta statute involved here. The contractor had one account at the Royal Bank, into which it deposited funds it received from many projects all over the province. The Bank was sued for allegedly appropriating trust funds, but on the particular facts the Court held that the Bank could not reasonably have suspected that the funds were deposited in breach of any trust, or that there were any unpaid lien claimants. In response to an alternative argument about the validity of the trust, the Court held at p. 494: "It is suggested that the legislation is in conflict with federal legislation on banking and bankruptcy but in my opinion the conflict does not exist in either field." ***Troup*** supports the appellant's proposition that the trust provisions under the *Builders Lien Act* are effective even after bankruptcy. The decision is, however, inconclusive because the statement relied on is *obiter*, and must be read in the light of the subsequent decisions, discussed *supra*, paras. 28-30.

[40] In ***Duraco Window Industries (Sask.) Ltd. v Factory Window & Door Ltd.*** (1995), 135 Sask R 235, 34 CBR (3d) 196 the bankrupt deposited all of its receipts from several projects into a single bank account. On bankruptcy, there was a balance remaining in that bank account. Since the statute in question created a trust over "all amounts owing" to a contractor or subcontractor, an unpaid supplier argued that all of these funds were impressed with a trust. The court held that there was no certainty of intention, because there was no instrument that showed an intention by the

supplier and the bankrupt to create a trust. If ***Duraco Window*** is correct, then no statutory trust will ever meet the common law test. If the wording of the statute creating a trust is not sufficient to demonstrate an intention to create a trust, no statutory trust will ever be effective, because the trustee and beneficiary are never involved at that stage. This is inconsistent with the decision in ***Henfrey Samson Belair*** which implies that some statutory trusts can be effective. The real problem with the trust created in ***Duraco Window*** is that it lacked certainty of subject matter, because it purported to throw a general trust over all of the assets of the bankrupt. It was impossible for any third party to tell which assets of the contractor were trust assets, and which were not.

[41] ***Roscoe Enterprises Ltd. v Wasscon Construction Inc.*** (1998), 169 Sask R 240, 161 DLR (4th) 725 was another decision arising out of a statutory trust over "all amounts owing" to a contractor or subcontractor. The balance of the funds owing to the bankrupt contractor had been paid into court, and the dispute was between the Trustee and the unpaid subcontractors. This decision also interpreted ***Henfrey Samson Belair*** as invalidating all statutory trusts, and followed ***Duraco Window***.

[42] In ***D&K Horizontal Drilling (1998) Ltd. (Trustee of) v Alliance Pipeline Ltd.***, 2002 SKQB 86, 216 Sask R 199, 33 CBR (4th) 217 the bankrupt contractor had substantially completed its contract at the date of its bankruptcy, leaving unpaid subcontractors. The owner paid the outstanding funds into court to vacate liens on the land. The court held at para. 23 that the liens were valid interests that could be enforced after bankruptcy, and that the funds in court were merely a substitute for that security. Accordingly, the subcontractors were entitled to the funds. It was not necessary to rely on the trust provisions in the statute, but in the alternative the court at para. 37 distinguished ***Duraco Window*** and ***Roscoe Enterprises*** on the basis that the funds in question in ***D&K*** were paid into court to discharge the liens.

[43] In ***Royal Bank of Canada v Atlas Block Co.***, 2014 ONSC 3062 at para. 36, 15 CBR (6th) 272, 37 CLR (4th) 286 it was held that "there is no apparent reason why a deemed trust under the [*Construction Lien Act*] should be treated differently than any other provincial statutory deemed trust for the purposes of para. 67(1)(a) of the *BIA*." ***Atlas Block***, like ***Duraco Window*** and ***Roscoe Enterprises***, reads the prior Supreme Court of Canada authorities as essentially holding that no statutory trust will be effective after bankruptcy. This approach, however, appears to be inconsistent with the decision in ***Husky Oil*** which specifically rejected the "broader 'bottom line' approach". If the Supreme Court believed that no statutory trust was ever effective, or that all provincial statutory trusts were indistinguishable for the purposes of bankruptcy law, it would have just said so in ***Henfrey Samson Belair***. In effect, the "broader 'bottom line' approach" would be the prevailing principle. On the contrary, the Court held at p. 34 that the statutory trust there did meet the first two requirements of a common law trust. By recognizing that there was room between the "broader 'bottom line' approach" and the "narrower 'jump the queue' approach", the Court essentially recognized that some provincial statutory trusts could be effective: ***Re: 0409725 B.C. Ltd.*** at para. 20. It is simply not enough to say that "all statutory trusts are the same".

[44] The remaining issue is whether a trust must be in effect prior to the bankruptcy, in order to be effective after the bankruptcy. There is some passing suggestion in a few cases that a trust arising after bankruptcy is ineffective, but there is no binding authority to that effect. It is certainly true that no one can create a trust after bankruptcy in an attempt to withdraw assets from the estate and reorder priorities, but that does not mean that legitimate trusts that arise or are perfected after the bankruptcy are ineffective.

[45] Section 67(1)(a) does not impose any temporal limit on when the trust arises, and only requires that the property be "held by the bankrupt in trust for any other person". Requiring that the trust exist prior to the bankruptcy might generate anomalous results. For example, had the Airport Authority written the cheque for the holdback, and mailed it to Iona, the date of receipt might be critical. If the trust must be perfected before bankruptcy, and had Iona received and deposited the cheque the day before the bankruptcy, the trust would be valid. However, if the same cheque arrived and Iona deposited it the day after the bankruptcy, the trust would not be valid. That does not appear to be a commercially sensible result. Another example would arise if the bankrupt became a testamentary trustee of an estate as a result of a death or other event that occurred after the bankruptcy. Yet another example would be of a bankrupt lawyer who came into possession of trust property after his or her bankruptcy. There is no reason in principle why such trust assets should accrue to the benefit of the unsecured creditors of the bankrupt, rather than the intended beneficiaries of the trust.

[46] There is also uncertainty about the concept of the trust "existing" on the date of bankruptcy. It could mean simply that on the date of bankruptcy the trust instrument existed, or the class of beneficiaries existed, or that the trust property had come into existence and was identifiable, or some combination of those. In this case the "trust" clearly existed before Iona's bankruptcy, in the sense that the provisions of the *Builders Lien Act* were in place well before its bankruptcy. The disputed funds were "held back" in accordance with the legislation before Iona's bankruptcy. They were also "payable" before its bankruptcy. The only sense in which the trust did not "exist" on the date of bankruptcy is that the Airport Authority had not yet drawn the cheque to pay the holdback funds, nor had the deemed trustee received those funds. As noted, *supra* para. 22, the trust under the statute attaches to the holdback funds themselves when they are paid out.

[47] It can be accepted that a trust cannot be created after bankruptcy if its intent or effect is to defeat the order of priorities under the *Bankruptcy and Insolvency Act*. The trusts under the *Builders' Lien Act*, however, have none of those attributes. The lien rights arise the minute the work is done, and the funds which are captured by the trust were quantified in the hands of the Airport Authority on the date of bankruptcy: ***Andrea Schmidt Construction Ltd. v Glatt*** (1979), 25 OR (2d) 567 at para. 12, 104 DLR (3d) 130 affm'd (1980), 28 OR (2d) 672, 112 DLR (3d) 371 (CA). Nothing in this case about the timing of the formation of the trust or the bankruptcy would render the statutory trust invalid or inoperative.

Involvement of the Surety

[48] In this case the subcontractors were not paid directly by Iona or the Airport. They were in fact paid by Guaranty Company under the Payment Bond. The intervention of the surety does not change the analysis, since the surety is subrogated to the rights of the unpaid subcontractors: ***E C & M Electric Ltd. v Medicine Hat General & Auxiliary Hospital & Nursing Home District No. 69*** (1987), 76 AR 281, 50 Alta LR (2d) 48. Once the appellant surety paid the subcontractors, it became entitled to enforce all of their rights under the *Builders' Lien Act*. The funds in question which were held by the Airport Authority are still intact, and available to discharge the trust. Those funds should now be paid to Guarantee Company.

Conclusion

[49] In conclusion, the disputed holdback funds are impressed by a trust under the *Builders Lien Act*, and are therefore not property of the bankrupt. The appeal is allowed, and the disputed funds should be paid to the appellant.

Appeal heard on April 8, 2015

Reasons filed at Calgary, Alberta
this 16th day of July, 2015

Slatter J.A.

I concur: Authorized to sign for: Yamauchi J.

Dissenting Reasons for Judgment Reserved of the Honourable Madam Justice Paperny

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Introduction

[50] I would dismiss the appeal. For the reasons that follow, I agree with the disposition of my colleagues on the first issue. However, I respectfully disagree with their conclusion on the standard of review, and with their analysis and conclusion regarding the existence of a common law trust in these circumstances.

Background

[51] The Calgary Airport Authority (Airport) and Iona Contractors Ltd. (Iona) entered into a contract in 2009 for the construction of improvements on the Airport's north airfield (the Contract). By October 2010, work under the Contract was substantially complete and Iona applied to receive payment. The Airport, however, had received notice that some of Iona's subcontractors remained unpaid, and withheld further payment.

[52] In December 2010, Iona applied in Ontario for protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. Iona was assigned into bankruptcy on March 18, 2011, and Ernst & Young Inc. was appointed Trustee.

[53] As a pre-condition to the Contract, the Airport required Iona to deliver a Performance Bond to guarantee the completion of the project, and a Labour and Material Payment Bond (Payment Bond) to guarantee that suppliers of materials and labour to the project would be paid. The appellant Guarantee Company of North America (GCNA) is surety with respect to both bonds.

[54] The Airport called on GCNA, as surety under the Payment Bond, to pay the outstanding accounts of Iona's subcontractors. GCNA paid out $1.48 million to subcontractors.

[55] The Airport had retained just over $1.1 million in holdback funds from Iona at the time of substantial completion. It used $105,000 to complete deficiencies remaining in the contract work, leaving $997,715.83 still in the Airport's hands (the Funds).

[56] The Trustee takes the position that the Funds are owed to Iona under the Contract and therefore should be paid to it as Trustee of Iona. The Trustee proposes to forward the Funds to Alberta Treasury Branches, Iona's secured lender.

[57] GCNA argues that it is entitled to the Funds as subrogee to the Airport. Its argument is twofold. First, GCNA argues that, because Iona breached the terms of the Contract, the Airport is

entitled to withhold payment of the Funds. Accordingly, the Funds are not a debt payable to Iona and do not form part of Iona's estate on the bankruptcy. Instead, the Funds should be paid to GCNA, as subrogee to the Airport.

[58] Alternatively, if the Funds are due to Iona, they are impressed with a trust pursuant to the trust provisions of s 22 of the Alberta *Builders' Lien Act*, RSA 2000, c B-7 (*BLA*), and therefore do not form part of the bankrupt's estate by virtue of s 67 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 *(Bankruptcy Act)*.

[59] The chambers judge considered and dismissed both of these arguments. GCNA appeals.

Issues on Appeal

[60] GCNA argues the same two issues on the appeal:

1. Are the Funds a debt payable to Iona?

2. If the Funds are payable to Iona, are they impressed with a trust such that they are exempted from the bankrupt's property pursuant to s 67 of the *Bankruptcy Act*?

Standard of Review

[61] The Supreme Court has recently clarified that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": ***Creston Moly Corp. v Sattva Capital Corp.***, 2014 SCC 53 at para 50. Accordingly, the chambers judge's interpretation of the contractual documents at issue here is entitled to deference. I agree with my colleagues, however, that the impact of the *Bankruptcy Act* on the effect of the contract is a question of law to which the correctness standard applies.

[62] Likewise, the interaction of the *Bankruptcy Act* and the *BLA* raises questions of law. The chambers judge's characterization of whether the circumstances here give rise to a "trust" for purposes of s 67 of the *Bankruptcy Act* is a matter of mixed fact and law, and also entitled to deference absent palpable and overriding error or an extricable error of law.

Analysis

1. Are the Funds a debt payable to Iona under the Contract?

[63] GCNA argues that the Funds are not a debt payable to Iona and therefore do not form part of Iona's estate. The chambers judge disagreed, finding that the balance of the Funds (after deducting that portion paid by the Airport and GCNA to complete the project) is payable to Iona under the Contract. She ordered that net amount, $919,846.83, be paid to the Trustee.

[64] GCNA makes several arguments based on the language of the Contract and the Payment Bond and on the general law of surety. They all lead to this: that the Airport is required to mitigate the surety's loss in making payments of some $1.48 million to subcontractors under the Payment Bond. Iona is not entitled to payment under the Contract to the extent that it has failed to meet its obligation to pay its subcontractors and suppliers. Accordingly, the remaining funds should be paid to GCNA, not to the Trustee.

[65] There are several relevant provisions in the Contract between Iona and the Airport, all of which were reviewed by the chambers judge.

[66] Under the Contract, the Airport has no duty to pay Iona's subcontractors and no contractual relationship with them: GC 1.4.1. Iona, as contractor, is required to enter into agreement with subcontractors and suppliers, and is further obliged to pay its subcontractors at least as often as the Airport is obliged to pay Iona: GC 3.12.1 and 13.1.1. Iona is also required to provide statutory declarations to the Airport regarding the status of any obligations or claims by subcontractors or otherwise arising under the Contract: GC 13.1.2.

[67] The Contract also deals with the situation where Iona becomes insolvent or commits an act of bankruptcy. In such circumstances, the Airport may take any part of the Work[1] out of the Contractor's hands (GC 6.3.1), and may then "employ such means as it sees fit to have the Work completed at the Contractor's cost and expense" (GC 6.3.2). The obligation of the Airport to make further payments to the Contractor in this situation is set out in GC 6.3.3(d):

> 6.3.3(d) the Contractor's right to any further payment that is due or accruing due (including any holdback or progress claim) for the Work taken out of the Contractor's hands is extinguished, *save and except that portion (if any) which is not required by the Airport Authority to have the Work completed or to compensate it for any consequential damages or losses arising out of the taking of the Work or any part of it out of the Contractor's hands.*
>
> [emphasis added]

[68] GC 13.7.1 gives the Airport the right to set-off costs incurred to complete the Work against any amount payable to Iona:

> 13.7.1 In addition to any right of set-off or deduction given or implied by law or the Contract, the Airport Authority may at any time set-off against any amount payable to the Contractor any amount payable by the Contractor to the Airport Authority either under the Contract or any other contract between the Contractor and the

[1] "Work" is defined as "the total construction and related services required by the Contract to be performed and Products to be supplied under the Contract, and includes everything that is necessary to be done, furnished or delivered by the Contractor to perform the Contract."

> Airport Authority under which the Contractor has an undischarged obligation to perform or supply work, labor or material or under which the Airport Authority has exercised its rights to take work out of the Contractor's hands.

[69] The Contract contemplates that the Airport was entitled to complete the Work at Iona's expense. It did so, in the amount of $105,000. The chambers judge also permitted the set-off of an additional $77,869, paid by GCNA on behalf of the Airport, for work necessary to complete the project. The Airport is expressly entitled to retain those amounts from any payments due to Iona under the Contract. What the Contract does not say is that the Airport is obliged to pay Iona's subcontractors (to the contrary, the Contract expressly places that obligation solely on Iona). Nor does it say that the Airport is entitled to pay the subcontractors and retain that amount from contractual payments otherwise due to Iona. As the chambers judge pointed out, the Contract could have provided for that course of action, but it does not.

[70] GCNA argues that Iona's breach of contract entitled the Airport to withhold all further payment. It says that Iona failed to satisfy its obligations under the Contract by failing to, *inter alia*, pay its subcontractors pursuant to GC 3.12.1 and provide the statutory declaration required pursuant to GC 13.1.2. It argues that payment of those subcontractors was part of Iona's responsibilities under GC 13.1.1, and so falls under the definition of "Work" in GC 1.1.54 because it was "necessary to be done ... by the Contractor to perform the Contract". When Iona did not pay, the Airport had the right (although not the obligation) to take that Work "out of the Contractor's hands" under GC 6.3.3(d) and pay the subcontractors. The funds so used were necessary to "have the Work completed", and so are not due to Iona.

[71] The chambers judge considered and rejected that argument, stating [at para 21]:

> Although GCNA's argument is compelling that Iona should not be allowed payment for its subcontractors when the Airport knows that Iona will not be able to fulfill its obligations to pay the subcontractors with these funds, the Contract does not support that this breach on the part of Iona would allow the Airport to withhold all payment as suggested by GCNA.

[72] The chambers judge concluded that GC 6.3.3(d) deals with the remedy for this breach. That provision does not say that all right to payment is extinguished. Rather, "that portion" of the payment that is not required by the Airport to finish the Work remains payable to Iona. She further noted that the Contract expressly allows the Airport to completely suspend payments for failure to pay certain other obligations, such as WCB and insurance: GC 9.22 and GC 10.1.7.

[73] GCNA argues further that the chambers judge's interpretation of the Contract is incomplete because she failed to read the Payment Bond and the Contract together. The Payment Bond provides that the Airport is a trustee for every Claimant under the Payment Bond (the subcontractors) and states, in part:

> The Principal [Iona] and the Surety [GCNA], hereby jointly and severally agree with the Obligee [Airport], as Trustee, that every Claimant who has not been provided for under the terms of its contract with the Principal, before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work or labour was done or performed of materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant under the terms of its contract with the Principal and have execution thereon ...

[74] The purpose of the trust language in the Payment Bond is to give the Claimants, though they are not party to the Payment Bond, the right to sue the surety under the Bond directly for payment of monies owing to them by the principal (Iona, in this case): see ***Citadel General Assurance Co. v Johns-Manville Canada Inc.***, [1983] 1 SCR 513; Donovan W M Waters, ed, *Waters' Law of Trusts in Canada*, 4th ed, at 3.IV(e).

[75] The right of subrogation vis-à-vis the Claimants gives the surety the right to sue Iona on the contracts between Iona and the subcontractors. GCNA argues that the relationship among the parties under the Payment Bond also obliges the Airport, as a beneficiary under the Bond, to mitigate the surety's loss when it is required to make good the obligations of Iona under the subcontracts. The Airport, according to this theory, is required to exercise its rights and remedies against Iona under the Contract to mitigate any claims under the Bonds. In other words, the Airport must exercise its set-off rights against Iona to recover the funds paid out by GCNA.

[76] The difficulty with this argument is that nothing in the Contract or Payment Bond imposes an obligation on the Airport to pay the subcontractors directly. In the absence of a positive contractual obligation to pay subcontractors, Canadian authority makes clear that an owner cannot make such payments in the face of a contractor's bankruptcy, even if the contract gives it the option to do so: ***A.N. Bail Co. v Gingras***, [1982] 2 SCR 475.

[77] In ***A.N. Bail***, a construction contract granted the following rights to the owner, the Crown:

> 21 (1) Her Majesty may, in order to discharge lawful obligations of and satisfy lawful claims against the Contractor or subcontractor arising out of the execution of the work, pay any amount which is due and payable to the Contractor ... directly to the obligees of and the claimants against the Contractor or the subcontractor.
>
> (2) A payment made pursuant to subsection (1) is to the extent of the payment a discharge of Her Majesty's liability under the contract to the Contractor.

[78] The appellant contractor entered into a subcontract for masonry work with a company that subsequently became bankrupt. The subcontract incorporated the terms of Clause 21, set out

above. At the insistence of the Crown department, the contractor paid a supplier of the bankrupt directly, rather than paying the amount owing to the bankrupt's trustee.

[79] The question, as characterized by Chouinard J writing for the court, was "whether the contractual clause relied on can be applicable after the bankruptcy of the sub-contractor". In other words, could the owner (or the contractor), notwithstanding the intervening bankruptcy, rely on Clause 21 to make payment directly to a subcontractor or a supplier of materials, or must payment be made to the trustee of the bankrupt. The court noted that Clause 21 contains "only an option which the owner reserved in the principal contract, and appellant in its sub-contract: no obligation has been created": para 30.

[80] After considering several authorities, the Supreme Court concluded that, given the intervening bankruptcy, it was not open to the owner to pay the supplier directly and in preference to the trustee. Chouinard J said, at paras 40-42:

> [40] From the date of the bankruptcy also, the debt of [the subcontractor] against appellant passed into the hands of the trustee as part of the property of the bankrupt company, and only the trustee can obtain payment of it. ...
>
> [41] **It would be to disregard the *Bankruptcy Act* and deprive it of all meaning if the debtor of a bankrupt, instead of paying the trustee, were authorized, by contract or some other means, to pay one or other of the creditors of the bankrupt as he saw fit.**
>
> [42] I adopt the conclusion of Montgomery JA, speaking for the Court of Appeal:
>
> > The above clause of the general conditions may be perfectly valid and effective where there is no question of bankruptcy. I cannot, however, agree with Appellant that it can supplant the provisions of the *Bankruptcy Act* and entitle one unsecured creditor to be paid by preference, which would almost necessarily operated to the detriment of the other unsecured creditors. I regard this as contrary to the policy of the *Bankruptcy Act*.
>
> [emphasis added]

[81] The chambers judge here properly followed and applied the decision of the Supreme Court in ***A.N. Bail***, as well as the recent decision of this Court in ***Greenview (Municipal District No. 16) v Bank of Nova Scotia (Horizon Earthworks)***, 2013 ABCA 302. The facts in ***Horizon Earthworks*** are similar to those before us. ***Horizon Earthworks*** involved a priority dispute among a municipality (owner of the road construction project), a surety and a bank over funds being held back by the municipality from an insolvent contractor. Like this case, the contractual documents in ***Horizon Earthworks*** included a Performance Bond and a Payment Bond. At the time of the contractor's default, some $774,000.00 of the contract price remained unpaid and in the hands of

the municipality. The municipality made a claim under the Performance Bond and paid $383,000.00 to complete the project. The surety paid some of the sub-contractors and suppliers under the Payment Bond, but other subcontractors remained unpaid. It was common ground that the outstanding claims vastly exceeded the disputed amount.

[82] The municipality sought a direction as to whether it could pay the subcontractors directly out of the remaining funds. It argued that the bonds created a relationship between the municipality and the subcontractors to provide for payment, and also argued that the contract, bonds and an Indemnity and Security Agreement between Horizon and the surety together created a trust relationship whereby the funds are trust funds for the benefit of the subcontractors.

[83] The surety generally supported the municipality's position, but further argued that it was entitled to funds owing to subcontractors who may claim under the bond, by way of set-off and subrogation.

[84] This Court disagreed, concluding that the contracts did not impose a legal obligation on the municipality to pay the subcontractors directly. Accordingly, if the municipality owed money to the contractor at the time of bankruptcy, that account receivable became the property of the Trustee. In this respect, the Court relied on the reasoning of the Supreme Court in ***A.N. Bail***.

[85] As noted above, the contractual relationships in ***Horizon Earthworks*** included a Payment Bond, not present in ***A.N. Bail***. This Court rejected the argument that the existence of the Bond should lead to a different result, saying at para 43:

> In our view, the contractual arrangements here do not establish a relationship sufficient to distinguish *Bail*. Although there is language in the contracts between Horizon and Western Surety relating to unpaid funds being earmarked with a trust, Greenview [the municipality] is not a party to the Bonds or the ISA, and has no legal obligations under any of those agreements to pay unpaid creditors. While the Labour and Material Payment Bond says that Greenview, as Obligee under the Bonds, can bring claims on behalf of unpaid creditors, it does not require Greenview to do so. Nothing in any document places an obligation on Greenview to pay the unpaid creditors. Thus if Greenview owes money to Horizon at bankruptcy pursuant to the Harper Creek Contract, that account receivable becomes the property of the Trustee.

[86] The reasoning in ***Horizon Earthworks*** applies here. The Funds held by the Airport are payable to Iona, and therefore to the Trustee, and not to the subcontractors. The Airport has no obligation to pay the subcontractors and no legal relationship with them.

[87] GCNA relies on American jurisprudence which, it says, stands for the proposition that a surety is subrogated to and acquires the rights of the contractor whose obligation it discharged, the subcontractors whose claims it paid, and the owner who holds the balances and retention. The

surety, GCNA argues, has a right to payment due the contractor when the surety completes the defaulted contractor's obligations. In particular, GCNA relies upon the following description of the right of subrogation in ***Pearlman v Reliance Insurance Company***, 371 US 132, pp 7-8: "... that the Government has a right to use the retained fund to pay the laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid the laborers and materialmen, would have become entitled to the fund; and the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it".

[88] Those authorities are not persuasive given that existing Canadian authority deals with the issue. The equitable doctrine of subrogation described by the British Columbia Court of Appeal in ***Canadian Indemnity Company v British Columbia Hydro and Power Authority***, 1976 CarswellBC 1227 at para 15; [1976] BCJ No 815 (QL) (CA) (also relied upon by GCNA) is said to entitle a surety, who carries out its obligations to pay or perform what a contractor has failed to pay or perform, to the rights of the person to whom the surety was obligated. In this case, those rights would include the right to use retained funds to complete the project, as was done. The chambers judge relied on the reasoning in ***Canadian Indemnity*** to include in that amount the cost of paying an electrical subcontractor to return to finish its work, and I would not interfere with that conclusion. It is clear from this Court's decision in ***Horizon Earthworks***, however, that the surety's subrogated rights would not include repayment for fulfilling the contractor's obligation to pay the subcontractors. The Airport has no corresponding obligation to make those payments under the Contract and importantly, under the law as set out in ***Horizon Earthworks*** and ***A.N. Bail***, the Airport had no ability to use the Funds to make voluntary payments to subcontractors in priority to other creditors, in the face of Iona's bankruptcy. I also note the decision of ***St. Paul v Genereux Workshop (Bonnyville) Ltd.*** (1984), 12 DLR (4^{th}) 238 (ABCA), where this Court declined to follow the American authorities relied upon by GCNA.

[89] The remaining Funds are a debt owing to Iona under the Contract as found by the chambers judge and are, therefore, payable to the Trustee. This ground of appeal must fail.

2. Are the Funds impressed with a trust and therefore exempt from the bankrupt's estate under the *Bankruptcy Act*?

[90] As an alternative argument, GCNA submits that, if the Funds are payable to Iona under the Contract, they are impressed with a trust by virtue of s 22 of the *BLA* such that they are excluded from the property of Iona pursuant to s 67(1)(a) of the *Bankruptcy Act*.

[91] Section 67 of the *Bankruptcy Act* exempts certain property held by a bankrupt from being divided among the bankrupt's creditors. One such exemption applies to "property held by the bankrupt in trust for any other person": s 67(1)(a). The Supreme Court of Canada described the intention behind this provision [then s 47(a)] in ***British Columbia v Henfrey Samson Belair Ltd.***, [1989] 2 SCR 24 at para 38:

> Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the *Bankruptcy Act* because, in equity, it belongs to another person. The intention of Parliament in enacting s 47(a), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*.

[92] Like other Canadian lien legislation, the *BLA* includes provisions that require contractors who receive monies in payment for a project subject to the *BLA* to hold those monies in trust for their subcontractors or suppliers. Section 22 of the *BLA* provides:

> 22(1) Where
>
> (a) a certificate of substantial performance is issued, and
>
> (b) a payment is made by the owner after a certificate of substantial performance is issued
>
> the person who receives the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate issued, holds that money in trust for the benefit of those persons.

[93] GCNA argues that, by operation of this provision, monies paid to Iona are impressed with a trust within the meaning of s 67(1)(a) of the *Bankruptcy Act*, such that they are exempt from distribution in the bankruptcy proceedings.

[94] Given that the project in this case is an airport, a federal undertaking, a preliminary issue arises with respect to the applicability of the provincial *BLA*. The airport property cannot be subject to a builders' lien: *Construction Builders' and Mechanics' Liens in Canada*, Bristow et al, 7th ed (Toronto: Carswell, 2010) at 2.12.1-2; ***Greater Toronto Airports Authority v Mississauga (City)***, (2000), 50 OR (3d) 641 (CA); ***Vancouver International Airport v Lafarge Canada Inc.*** (2009), 82 CLR (3d) 285 (BCSC). However, the parties here agree that the trust provisions in s 22 can apply to a project even where the lien provisions of the *BLA* do not apply, citing ***Canadian Bank of Commerce v T. McAvity & Sons Ltd.***, [1959] SCR 478, 17 DLR (2d) 529. For purposes of this appeal, I am prepared to assume that s 22 of the *BLA* applies to payments made to Iona with respect to construction of the project, and to Iona's relationship with its subcontractors. I will therefore proceed to consider whether s 22 creates a trust within the meaning of the *Bankruptcy Act*.

[95] Statutory trusts are, as the name implies, creatures of statute enacted with a view to protecting the interests of the Crown or private interests that otherwise would have little

protection. The Supreme Court of Canada has had occasion to consider whether deemed statutory trusts constitute valid trusts for the purpose of the *Bankruptcy Act*. In ***Henfrey Samson Belair***, a majority of the Supreme Court held that a "deemed trust" created by provincial legislation is not, without more, a trust within the meaning of s 67 of the *Bankruptcy Act*, nor is it entitled to priority under that *Act*. The provisions of s 67 are confined to trusts arising under general principles of law. McLachlin J, writing for the majority, interpreted the relevant provision of the *Bankruptcy Act* as follows (at para 42):

> To interpret s 47(a) [now s 67(a)] as applying not only to trusts as defined by the general law, but to statutory trusts created by provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

[96] McLachlin J went on to state that, depending on the facts of the case, monies collected under a statutory trust might meet the requirements for a trust under the general principles of trust law [at para 46]:

> If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of [the current s 67(a)]. If, on the other hand, the money has been converted to other property and cannot be traced, there is no 'property held ... in trust' under [s 67(a)].

[97] In ***Husky Oil Operations Ltd. v Minister of National Revenue***, [1995] 3 SCR 453, 128 DLR (4th) 1, the Supreme Court undertook a broad review of the effect of provincial legislation that may intrude into the federal sphere of bankruptcy. The majority set out a number of propositions that emerge from the court's quartet of decisions in this area, including ***Henfrey Samson Belair*** [at paras 33 and 40]:

> 1. Provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s 136(1) of the *Bankruptcy Act;*
>
> 2. While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;
>
> 3. If the provinces could create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;
>
> 4. The definition of terms such as "secured creditor", if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by the

federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the *Bankruptcy Act*;

5. In determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;

6. There need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the *effect* of the provincial legislation is to do so.

[98] The goal, wrote Gonthier J, is to maintain a "nationally homogeneous system of bankruptcy priorities". Provincial laws can use the concept of "trust" for their own purposes, but they cannot affect bankruptcy priorities when doing so. ***Henfrey Samson Belair*** and ***Husky Oil*** provided that provincially created statutory trusts can only affect bankruptcy priorities when they also have all the attributes of trusts under the general principles of trust law, thus bringing them within the ambit of s 67(a) of the *Bankruptcy Act*. To conclude otherwise would be to permit provinces to create their own bankruptcy priorities outside the scheme, and to risk a situation of differing priorities in different jurisdictions.

[99] GCNA says that the governing authority with respect to trusts created under provincial builders' or mechanics' lien legislation is an earlier decision of the Supreme Court, ***John M.M. Troup Ltd., et al. v Royal Bank of Canada***, [1962] SCR 487, 34 DLR (2d) 556. In particular, GCNA relies on the following statement by the majority in *Troup* at para 11:

> As to bankruptcy, the creation of the trust by s. 3(1) [of the Ontario *Mechanics' Lien Act*] does affect the amount of property divisible among the creditors but so does any other trust validly created.

[100] There is a line of authority that has cited ***Troup*** for the proposition that lien legislation and the *Bankruptcy Act* are not operationally in conflict and therefore a lien act's trust provisions create a trust that falls within the exemption in s. 67(1)(a). These cases take the view that ***Troup*** and ***Henfrey Samson Belair*** are not in conflict: see, for example, ***D&K Horizontal Drilling (1998) Ltd. (Trustee of) v Alliance Pipeline Ltd.***, 2002 SKQB 86, [2002] 6 WWR 497; ***Re 0409725 BC Ltd.***, 2015 BCSC 561.

[101] In my view, the statement from ***Troup*** set out above cannot sit comfortably with the later reasoning of McLachlin J in ***Henfrey Samson Belair***. The dissent in ***Henfrey Samson Belair*** relied on ***Troup***, but the majority did not. Although ***Troup*** was not expressly overruled by the majority, McLachlin J clearly rejected the proposition that deemed statutory trusts could be valid trusts under bankruptcy legislation if they did not otherwise meet the requirements of general trust

law. To the extent that ***Troup*** says that trusts created by lien legislation, without more, are valid trusts under the *Bankruptcy Act*, it has been overruled by ***Henfrey Samson Belair***.

[102] Even if this aspect of ***Troup*** has not been overruled, the brief statement in that case regarding trusts created by lien legislation is at best *obiter*. It is important to consider what was actually at issue in ***Troup***. A contractor had received monies for work done on a county project and deposited the cheque into its current account. The contractor had previously given its bank a general assignment of book debts. The bank used the deposited funds to pay down some of the contractor's indebtedness. It was alleged that the monies which were taken by the bank under the assignment were trust monies under the *Mechanics' Lien Act*, and accordingly the bank must account to the appellant lien holders who had claims under that *Act*. A majority of the Supreme Court held that the payment received by the bank was in the ordinary course of business and a bank that received monies, not through the assignment but through the ordinary course of business, can retain such funds unless it has notice not only that they are trust monies but also that the payment to the bank constitutes a breach of trust.

[103] One argument advanced by the bank was that the *Mechanics' Lien Act* was unconstitutional as being in conflict with federal legislation on banking and bankruptcy. The majority rejected this argument, stating that there was no conflict in either field. Importantly, there was no intervening bankruptcy on the part of the contractor, so the issue of whether there was an operational conflict between the lien legislation and the *Bankruptcy Act* was not directly before the court. The statement relied on by GCNA was made in that context and was, in my view, *obiter*.

[104] The correct approach to the question of whether a builders' lien trust is valid under the *Bankruptcy Act* is to assess the putative trust through the lens of general principles of trust law and, in particular, consider whether the three certainties (of intention, object, and subject matter) have been established. This approach is in keeping with the Supreme Court's direction in ***Henfrey Samson Belair*** and ***Husky Oil***. The issue is whether there exists a trust that survives the bankruptcy of the statutorily mandated trustee, pursuant to s 67(1)(a) of the *Bankruptcy Act*. There is no such valid trust unless it possesses all the elements of a trust under general law.

[105] This was the approach taken by this Court in ***Bassano Growers Ltd. v Diamond S. Produce Ltd. (Trustee of)***, 1998 ABCA 198. In that case, a chambers judge concluded that a deemed statutory trust in favour of potato growers who sold produce to a now bankrupt purchaser, without more, was not a "trust" within the meaning of s 67(1)(a). On the evidence, the chambers judge concluded that the existence of a trust under the general law could not be found for a lack of certainty of subject matter. In upholding that decision, this Court set out the relevant principles as follows at paras 8 – 10:

> [8] The chambers judge held that the trusts contemplated by s 67(1)(a) are only those that qualify as trusts under the general law, that is, only those that meet the conditions necessary for the creation of a valid trust under the general law. Because the funds in question were commingled and cannot be identified there is no

> certainty of subject matter, one of the essential requirements for a common law trust. ...
>
> [9] The circumstances of this case fall squarely within the rationale of the majority judgment of the Supreme Court of Canada in ... *Henfrey Samson* .... The *ratio* of *Henfrey Samson* has been applied in a number of subsequent judgments involving statutory trusts of various kinds created pursuant to provincial legislation [citations omitted].
>
> [10] The underlying principle of *Henfrey Samson* was concisely stated by the British Columbia Court of Appeal in *British Columbia v National Bank of Canada* ... at 232:
>
> > That principle being that the province cannot legislate to, in effect, create its own priorities contrary to those in the *Bankruptcy Act*. If the province cannot deem a trust in order to accomplish this I cannot see how it can by legislation create facts through that legislation to accomplish that same end.

[106] Having concluded that a valid trust had not been created in the circumstances before it, the Court went on to note that a trust that has its genesis in a deemed or statutory trust may qualify under s 67(1)(a) in the right circumstances. However, to so qualify it must "satisfy the essential requirements of a valid trust under the general law". I agree.

[107] Neither ***Henfrey Samson Belair*** nor ***Bassano*** dealt with statutory trusts created under lien legislation. The deemed statutory trust in ***Henfrey Samson Belair*** was created under the *Social Service Tax Act*, RSBC C-431, and was intended to benefit the Crown. Later decisions have concluded that the principles set out in ***Henfrey Samson Belair*** apply to other statutory trusts, regardless of the nature of the deemed beneficiary: see ***Edmonton Pipe Industry Pensions Plan Trust Fund (Trustees of) v 350914 Alberta Ltd.***, 2000 ABCA 146, 187 DLR (4^{th}) 23 at para 41; ***Bassano***; ***British Columbia v National Bank of Canada*** (1994), 30 CBR (3d) 215 at 232 (BCCA); ***Re Points of Call Holidays Ltd.*** (1991), 54 BCLR (2d) 384 (BCSC) at 389.

[108] I see no principled reason why the approach should be different with respect to lien legislation from that taken with respect to other deemed statutory trusts, particularly those intended to benefit private parties such as was the case in this Court's decisions in ***Bassano*** and ***Edmonton Pipe***. Moreover, courts in several jurisdictions have used this same approach in assessing whether trusts created under lien legislation are valid for purposes of the *Bankruptcy Act*: see ***0409725 BC Ltd***, 2015 BCSC 561; ***Royal Bank of Canada v Atlas Block Co.***, 2014 ONSC 3062, 15 CBR (6^{th}) 272; ***Roscoe Enterprises Ltd. v Wasscon Construction Inc.*** (1998), 161 DLR (4^{th}) 725, 169 Sask R 240 (SKQB); ***Re Factory Window and Door Ltd. (Duraco Window)***, [1995] 9 WWR 498, 135 Sask R 235 (SKQB). In all those cases, courts have examined the facts to assess whether the three certainties required to establish a valid trust under the general law are present.

[109] Most courts dealing with deemed statutory trusts seem to assume that certainty of intention has been established, perhaps implied by virtue of the statutory language that creates the trust[2]. That appears to have been the case in ***Henfrey Samson Belair***, where McLachlin J does not discuss the intention to create the trust. An exception is ***Duraco Window***, where Geatros J of the Saskatchewan Court of Queen's Bench expressed doubt that the parties intended to create a trust relationship with respect to the funds in the bankrupt contractor's bank account. Although the issue seems not to be entirely settled, for purposes of this appeal I have accepted that the creation of the statutory trust in s 22 of the *BLA* is sufficient to establish certainty of intention.

[110] The establishment of certainty of object is also generally straightforward; in trusts created under lien legislation, the object is the subcontractors sought to be protected by the legislation.

[111] Establishing sufficient certainty of subject matter has consistently been the main stumbling block to establishing a builders' lien trust as a valid trust under the *Bankruptcy Act*. That was the problem identified by the courts in, for example, ***Henfrey Samson Belair***, ***Bassano***, and in this case in the court below. In ***0409725 BC Ltd.***, a recent case from the British Columbia Supreme Court, Grauer J noted that the issue of certainty of subject matter is an evidentiary one. That is the case; in ***Henfrey Samson Belair***, McLachlin J stated that whether there exists a "trust" under the *Bankruptcy Act* "depends on the facts of the particular case": para 46. Whether certainty of subject matter exists is dependent on the facts and is, to some extent, a function of the statutory language and a question of timing.

[112] A review of cases where certainty of subject matter has been found shows that the court was able to point to a specific, identifiable *res* that formed the subject matter of the trust, thereby satisfying the requirements of ***Henfrey Samson Belair***. For example, in ***D&K***, a registered lien had been vacated and replaced by a payment into court prior to the bankruptcy.

[113] Similarly, in ***Kerr Interior Systems Ltd. v Kenroc Building Materials Co. Ltd.***, 2009 ABCA 240, [2009] 8 WWR 1, an owner paid money into court in order to vacate builders' liens filed by two subcontractors of the bankrupt. The Saskatchewan *Builders' Lien Act* was at issue in that case, which was decided by this Court. The majority found that, on the facts, both claimants were able to establish claims to amounts that were "readily ascertainable and identifiable" as at the relevant date. The dissenting judge held that in order to constitute a "trust" for purposes of the CCAA, the claim had to be sufficiently specific as at the relevant date in order to reach the position of a trust at law. One of the claimants had filed a lien under the Saskatchewan *BLA*, thereby making its claim sufficiently ascertainable. The other had not, and that trust claim was not sufficiently specific as of the relevant date.

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[2] For a discussion of certainty of intention in this context, see Aline Grenon, "Common law and statutory trusts: In search of missing links" (1995) 15:2 Est & Tr J.

[114] It is also worth noting that the Saskatchewan *Builders' Lien Act* is structured differently from the Alberta *BLA*. The owner, as well as the contractor, is made a trustee over all amounts in the owner's hands that are payable to the contractor. Under s 22 of the Alberta *BLA*, no trust comes into existence until payment is made to the contractor, who is the sole trustee. In this case, the funds were in the hands of the Airport at the time of the bankruptcy (and are still), so no *BLA* trust had come into existence.

[115] In cases where the requisite certainty of subject matter has been absent, it is often because funds from all sources flow into the putative trustee's account, resulting in commingling and an inability to trace the funds that are subject to the trust. In ***Atlas Block***, Penny J noted that the bankrupt contractor was under no obligation under the provisions of the relevant lien legislation to keep the putative trust funds separate and apart from other funds received. Because the funds were commingled with funds from other sources, there could be no certainty of subject matter as described in ***Henfrey Samson Belair***: paras 43 – 45. Similar reasoning was applied by the courts in ***0409725 BC Ltd***, ***Roscoe Enterprises***, and ***Duraco Window***.

[116] This is one of the latter cases. The chambers judge reviewed the evidence and submissions of counsel and concluded that, once the funds in the hands of the Airport were paid to Iona they would be immediately commingled with funds from other sources and any certainty of subject matter lost. That conclusion is supported by the language of s 22 of the *BLA*, which does not obligate a contractor who receives payment to segregate the funds. The same type of commingling was found to be fatal to the existence of a valid trust in ***Bassano*** and in ***Henfrey Samson Belair***, both cases that were binding on the chambers judge. There is no basis to interfere with her conclusion on the point.

[117] For these reasons, I would dismiss the second ground of appeal.

Conclusion

[118] For all the foregoing reasons, I would dismiss the appeal.

Appeal heard on April 8, 2015

Reasons filed at Calgary, Alberta
this 16th day of July, 2015

Paperny J.A.

Appearances:

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