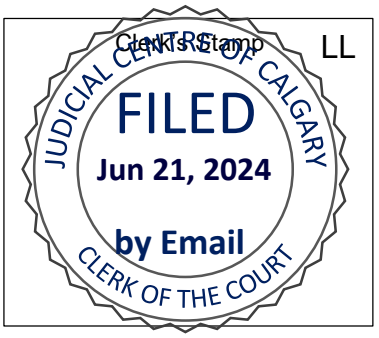
COURT FILE NUMBER	B201-996918 B201-997457 B201-997541
COURT	COURT OF KING'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY



IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

C61353
Jun 27, 2024
COM

AND IN THE MATTER OF THE BANKRUPTCY OF NOMODIC MODULAR STRUCTURES INC., AITHRA PROJECTS INC., AND NOMODIC MODULAR STRUCTURES (ONTARIO) LTD.

DOCUMENT

BOOK OF AUTHORITIES
FOR THE BENCH BRIEF OF ATB FINANCIAL
TO BE HEARD ON JUNE 27, 2024 AT 2:00 P.M.

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

McCarthy Tétrault LLP
4000, 421 – 7th Avenue SW
Calgary, AB T2P 4K9
Attention: Pantelis Kyriakakis / Nathan Stewart
Tel: 403-260-3536 / 3534
Fax: 403-260-3501
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COURT FILE NUMBER	B201-996918 B201-997457 B201-997541
COURT	COURT OF KING'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY

C61354
Jun 27, 2024
COM

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

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C61355
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LIST OF AUTHORITIES

STATUTES

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, at section 95(1);

2. *Personal Property Security Act*, R.S.A. 2000, c. P-7, at sections 1(1)(tt), 3(1), and 35(1)(b);

CASE LAW

3. *Agricultural Credit Corp of Saskatchewan v Pettyjohn* (1991), 1991 CanLII 7979 (SK CA), 90 Sask R 206;79 DLR (4th) 22 (CA);

4. *Barclays Bank Ltd. v Quistclose Investments Ltd.*, [1970] AC 567 (HL (Eng));

5. *Bassano Growers v Price Waterhouse*, 1998 ABCA 198;

6. *Brookfield Bridge Lending Fund Inc. v Karl Oil and Gas Ltd.*, 2009 ABCA 99;

7. *Bruderheim Community Church v Moravian Church in America (Canadian District)*, 2020 ABCA 393;

8. *Canada Trust Co. v Price Waterhouse Ltd.*, 2001 ABQB 555;

9. *Carevest Capital Inc v 1262459 Alberta Ltd*., 2011 ABQB 148;

10. *Carevest Capital Inc. v Leduc (County)*, 2012 ABCA 161;

11. *Carling Development Inc. v Aurora River Tower Inc.*, 2005 ABCA 267;

12. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60;

13. *Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805;

14. *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180;

15. *E Construction Ltd v Sprague-Rosser Contracting Co Ltd*, 2017 ABQB 657;

16. *Gainers Inc. v Pocklington Finance Corporation*, 2000 ABCA 151;

17. *Guaranty Properties Limited v Edmonton (City of)*, 2000 ABCA 215

18. *Giles v Westminster Savings Credit Union*, 2007 BCCA 411;

19. *Imor Capital Corp v Horizon Commercial Development Corp*, 2018 ABQB 39;

20. *Ja-Ker Financial Corporation v Norris*, 2015 ABQB 756;

21. *Kingsett Mortgage Corp et al. v Stateview Homes et al*., 2023 ONSC 2636;

22. *Ontario (Training, Colleges and Universities) v Two Feathers Forest Products LP*, 2013 ONCA 598;

23. *Rawluk v Rawluk*, [1990] 1 SC.R. 70;

24. Ronald C.C. Cumming, Catherine Walsh, Roderick Wood, *Personal Property Security Law*, 2nd ed. (Toronto: Irwin Law, 2012);

25. *Soulos v Korkontzilas*, [1997] 2 SCR 217;

26. *The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9; and,

27. *Westar Mining Ltd. (Re)*, 2003 BCCA 11.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to March 6, 2024

Last amended on April 27, 2023

À jour au 6 mars 2024

Dernière modification le 27 avril 2023

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to March 6, 2024. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of March 6, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 6 mars 2024. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 6 mars 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Statutory Crown securities

87 (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

Idem

(2) In relation to a bankruptcy or proposal, a security referred to in subsection (1) that is registered in accordance with that subsection

(a) is subordinate to securities in respect of which all steps necessary to make them effective against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

R.S., 1985, c. B-3, s. 87; 1992, c. 27, s. 39; 1997, c. 12, s. 74; 2004, c. 25, s. 53; 2005, c. 47, s. 70.

Priority of Financial Collateral

Priority

88 In relation to a bankruptcy or proposal, no order may be made under this Act if the order would have the effect of subordinating financial collateral.

R.S., 1985, c. B-3, s. 88; 1992, c. 27, s. 39; 1994, c. 26, s. 6; 2007, c. 29, s. 99, c. 36, s. 112; 2009, c. 31, s. 65.

89 and 90 [Repealed, 1992, c. 27, s. 39]

Preferences and Transfers at Undervalue

91 [Repealed, 2005, c. 47, s. 71]

92 and 93 [Repealed, 2000, c. 12, s. 12]

94 [Repealed, 2005, c. 47, s. 72]

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

Garanties créées par législation

87 (1) Les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but — ou principalement dans le but — de protéger des réclamations mentionnées au paragraphe 86(1) ne sont valides, dans le cadre d'une faillite ou d'une proposition, que si elles ont été enregistrées, conformément à un système d'enregistrement prescrit, avant l'ouverture de la faillite.

Rang

(2) Dans le cadre d'une faillite ou d'une proposition, les garanties visées au paragraphe (1) et enregistrées conformément à ce paragraphe :

a) prennent rang après toute autre garantie à l'égard de laquelle les mesures requises pour la rendre opposable aux autres créanciers ont toutes été prises avant l'enregistrement;

b) ne sont valides que pour les sommes dues à Sa Majesté ou à l'organisme mentionné au paragraphe 86(1) lors de l'enregistrement et les intérêts échus depuis sur celles-ci.

L.R. (1985), ch. B-3, art. 87; 1992, ch. 27, art. 39; 1997, ch. 12, art. 74; 2004, ch. 25, art. 53; 2005, ch. 47, art. 70.

Rang des garanties financières

Rang

88 Il ne peut être rendu au titre de la présente loi, dans le cadre de toute faillite ou proposition, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

L.R. (1985), ch. B-3, art. 88; 1992, ch. 27, art. 39; 1994, ch. 26, art. 6; 2007, ch. 29, art. 99, ch. 36, art. 112; 2009, ch. 31, art. 65.

89 et 90 [Abrogés, 1992, ch. 27, art. 39]

Traitements préférentiels et opérations sous-évaluées

91 [Abrogé, 2005, ch. 47, art. 71]

92 et 93 [Abrogés, 2000, ch. 12, art. 12]

94 [Abrogé, 2005, ch. 47, art. 72]

Traitements préférentiels

95 (1) Sont inopposables au syndic tout transfert de biens, toute affectation de ceux-ci à une charge et tout paiement faits par une personne insolvable de même que toute obligation contractée ou tout service rendu par une telle personne et toute instance judiciaire intentée par ou contre elle :

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

a) en faveur d'un créancier avec qui elle n'a aucun lien de dépendance ou en faveur d'une personne en fiducie pour ce créancier, en vue de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de trois mois la date de l'ouverture de la faillite et se terminant à la date de la faillite;

b) en faveur d'un créancier avec qui elle a un lien de dépendance ou d'une personne en fiducie pour ce créancier, et ayant eu pour effet de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de douze mois la date de l'ouverture de la faillite et se terminant à la date de la faillite.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Préférence — présomption

(2) Lorsque le transfert, l'affectation, le paiement, l'obligation ou l'instance judiciaire visé à l'alinéa (1)a) a pour effet de procurer une préférence, il est réputé, sauf preuve contraire, avoir été fait, contracté ou intenté, selon le cas, en vue d'en procurer une, et ce même s'il l'a été sous la contrainte, la preuve de celle-ci n'étant pas admissible en l'occurrence.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Exception

(2.1) Le paragraphe (2) ne s'applique pas aux opérations ci-après et les parties à celles-ci sont réputées n'avoir aucun lien de dépendance :

a) un dépôt de couverture effectué auprès d'une chambre de compensation par un membre d'une telle chambre;

b) un transfert, un paiement ou une charge qui se rapporte à une garantie financière et s'inscrit dans le cadre d'un contrat financier admissible.

Definitions

(3) In this section,

clearing house means a body that acts as an intermediary for its clearing members in effecting securities transactions; (*chambre de compensation*)

clearing member means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (*membre*)

Définitions

(3) Les définitions qui suivent s'appliquent au présent article.

chambre de compensation Organisme qui agit comme intermédiaire pour ses membres dans les opérations portant sur des titres. (*clearing house*)

TAB 2

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

Revised Statutes of Alberta 2000
Chapter P-7

Current as of June 1, 2024

Office Consolidation

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Personal Property Security Act* that are filed as Alberta Regulations under the Regulations Act

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

Interpretation

1(1) In this Act,

(a) "accessions" means goods that are installed in or affixed to other goods;

(b) "account" means a monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not it has been earned by performance, but does not include investment property;

(c) "advance" means the payment of money, the provision of credit or the giving of value and includes any liability of the debtor to pay interest, credit or other charges or costs, in connection with an advance or the enforcement of the security interest securing an advance;

(c.1) "broker" means a broker as defined in the *Securities Transfer Act*;

(d) "building" includes a structure, erection, mine or work built, erected, constructed or opened on or in land;

(e) "building materials" means materials that are incorporated into a building and includes goods attached to a building so that their removal

(i) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building, apart from the loss of value of the building resulting from the removal, or

(ii) would result in weakening the structure of the building or exposing the building to weather damage or deterioration,

but does not include heating, air conditioning or conveyancing devices or machinery installed in a building or on land for use in carrying on an activity inside the building or on the land;

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

(f) "chattel paper" means one or more records that evidence both a monetary obligation and a security interest in or lease of specific goods or specific goods and accessions, but does

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

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

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

(qq) "secured party" means

(i) a person who has a security interest,

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

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

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

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

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

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

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

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

(ii) a writing that evidences a security agreement;

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

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

(tt) "security interest" means

(i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an

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

(ii) the interest of

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

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

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

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

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

(uu.1) "standardized future" means an agreement traded on a futures exchange pursuant to standardized conditions contained in the bylaws, rules or regulations of the futures exchange, and cleared and settled by a clearing house, to do one or more of the following at a price established by or determinable by reference to the agreement and at or by a time established by or determinable by reference to the agreement:

(i) make or take delivery of the underlying interest of the agreement;

(ii) settle the obligation in cash instead of delivery of the underlying interest;

(uu.2) "tangible chattel paper" means chattel paper evidenced by a record consisting of information that is inscribed on a tangible medium;

(vv) "trust indenture" means any deed, indenture or document, however designated, including any supplement or amendment to it, by the terms of which a person issues or guarantees, or provides for the issue or guarantee of debt obligations secured by a security interest and in which a

(a) the purchase-money collateral also secures an obligation that is not a purchase-money obligation,

(b) collateral that is not subject to a purchase-money security interest also secures the purchase-money obligation, or

(c) the purchase-money obligation has been renewed, refinanced, consolidated or restructured.

RSA 2000 cP-7 s1;2006 cS-4.5 s108(2);AR 217/2022;2023 c5 s9(2)

Part 1
General

The Crown is bound

2 The Crown is bound by this Act.

1988 cP-4.05 s2

Application of Act

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

(a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and

(b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.

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

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

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

(c) a commercial consignment,

that does not secure payment or performance of an obligation.

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

Non-application of Act

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

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

the purchase-money security interest is effected disclosing the secured party named in the refinancing agreement as the secured party, or the security interest is otherwise perfected.

(12) A purchase-money security interest that is deemed to have been assigned under subsection (11) has the same priority it had immediately before the deemed assignment with respect to a competing security interest but, if subsection (11)(b)(ii) applies, it is subordinate to advances made or contracted for by the holder of a perfected competing security interest

(a) after expiry or discharge of the original registration relating to the purchase-money security interest, and

(b) before written notice of the deemed assignment is given to the holder.

RSA 2000 cP-7 s34;2023 c5 s9(18)

Residual priority rules

35(1) Where this Act provides no other method for determining priority between security interests,

(a) priority between conflicting perfected security interests in the same collateral is determined by the order of occurrence of the following:

(i) the registration of a financing statement without regard to the date of attachment of the security interest;

(ii) possession of the collateral under section 24 without regard to the date of attachment of the security interest;

(iii) control under section 1(1.2);

(iv) perfection under section 5, 7, 26, 29 or 77,

whichever is earliest,

(b) a perfected security interest has priority over an unperfected security interest, and

(c) priority between unperfected security interests is determined by the order of attachment of the security interests.

(2) For the purposes of subsection (1), a continuously perfected security interest shall be treated at all times as having been perfected by the method by which it was originally perfected.

TAB 3

Saskatchewan Court of Appeal

Citation: Agricultural Credit Corp. of Saskatchewan v. Pettyjohn
Date: 1991-03-28
Docket: No. 662

Between:
Agricultural Credit Corporation of Saskatchewan (appellant/applicant)
and
Terry Pettyjohn and Debra Pettyjohn (respondents/respondents)

Vancise, Wakeling and Sherstobitoff, JJ.A.

Counsel:
J. Lee, for the appellant
J. Peltier, for the respondents

[1] Sherstobitoff, J.A.: This appeal raises two issues. First, where a purchase takes place after a loan is approved, but before the loan monies are advanced, does the lender have the right to claim a purchase money security interest (PMSI) under the *Personal Property Security Act,* S.S. 1979-80, c. P-6.1 *(PPSA)?* Second, what are the appropriate principles of tracing to apply where a debtor wrongfully sells the secured items and uses the proceeds to pay off loans which had been used to purchase the same sort of items as had been originally secured?

Facts

[2] The respondents, Terry and Debra Pettyjohn, farm near Maple Creek. In 1981, before any involvement with the appellant, the Agricultural Credit Corporation of Saskatchewan (ACCS), or its predecessor, FarmStart, the Pettyjohns owned 100 head of cattle.

[3] On 3 March 1981, the Pettyjohns applied to FarmStart for a loan. The purpose of the loan was stated to be the purchase of a sprinkler system and about 80 head of cattle. Later the sprinkler system was deleted. On 9 March 1981, the Pettyjohns were advised by letter from FarmStart that they met the general eligibility requirements for a loan. The letter expressly stated that it was not a final loan approval, and that the cattle should not be bought on the strength of it.

[4] Upon receiving the letter, the Pettyjohns were asked to submit a "farm plan" which would indicate their precise needs. On 31 March 1981, the Pettyjohns submitted such a plan, indicating that they required a $50,000 loan to purchase 70 head of cattle.

[5] On 20 July 1981, FarmStart sent the Pettyjohns a letter indicating that their loan application had been approved in the amount of $50,300. Fifty thousand dollars was to be allocated to the purchase of 70 head of cattle, and $300 to legal fees.

1991 CanLII 7979 (SK CA)

may claim a PMSI in the present Watusi cattle as well.

[51] Section 28(1) of the *PPSA* provides that a security interest in the collateral extends to any proceeds of that collateral.

> "28(1) Subject to the other provisions of this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest therein:
>
> (a) continues as to the collateral unless the secured party expressly or impliedly authorizes such dealings; and
>
> (b) extends to the proceeds."

[52] The *PPSA* defines "proceeds" as identifiable or traceable personal property derived directly or Indirectly from any dealing with the collateral or proceeds therefrom.

> "2 In this Act:
>
> . . . . .
>
> (ee) 'proceeds' means identifiable or traceable personal property in any form or fixtures derived directly or indirectly from any dealing with the collateral or proceeds therefrom, and includes insurance payments or any other payments as indemnity or compensation for loss of or damage to the collateral or proceeds therefrom, or any right to such payment, and any payment made in total or partial discharge of an intangible, chattel paper, instrument or security; and money, cheques and deposit accounts in banks, credit unions, trust companies or similar institutions are cash proceeds and all other proceeds are noncash proceeds."

[53] The question is, therefore, whether one can trace from the 1981 and 1984 cattle to the present Watusi cattle owned by the Pettyjohns.

[54] The *PPSA* does not contain any definition of "tracing" or "traceable". Accordingly, in defining the notion of tracing under the *PPSA,* we. must have reference, to the notion of tracing in the common, law and equity. However, certain changes in the concept of tracing will be required in the context of the *PPSA.* Indeed, as Vancise, J.A., said in *Transamerica Commercial Finance Corporation, Canada v. The Royal Bank of Canada* (1984), 84 Sask. R. 81, at 86 (C.A.), it is the "appropriate features" of the law of tracing which must be incorporated into the *PPSA.*

[55] Tracing at common law and equity is a proprietary remedy. It involves following an item of property either as it is transformed into other forms of property, or as it passes into other hands, so that the rights of a person in the original property way extend to the hew property. In establishing that one piece of property may be traced

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into another, it is necessary to establish a close and substantial connection between the two pieces of property, so that it is appropriate to allow the rights in the original property to flow through to the new property. The question has most often arisen in the context of a trust, when the trustee has improperly disposed of the trust assets.

[56] Ignoring for the moment features of the law of tracing which protect innocent third parties, in establishing this close and substantial connection, the common law and equity have "focused upon the form of the various transactions taking place. Thus, if a person sells an item of property, and uses the money thereby gained in order to purchase a second item of property, the first may be traced into the second. Because of its focus on the form of transactions, the common law and equity have run into problems when the proceeds of a transaction are mixed with other proceeds. This occurs most frequently in the case of money and bank accounts. The common law and equity have established presumptions and rules which govern various kinds of cases.

[57] In the present case, the form of the transactions involving the 1981 and 1984 cattle, and the new Watusi cattle, is set out in the table annexed. Two things should be noted about this table. First, the defendant does not concede that all of the sale proceeds referred to were sales of the 1981 and 1984 cattle. As has been said, the Pettyjohns owned a large number of cattle, in only some of which ACCS had a PMSI. Second, the bank account was not the only source of funds for the purchase of the Watusi cattle, though it was the predominant source.

[58] If one attempts to apply the traditional tracing principles of equity to these transactions, the following result emerges. The sale proceeds were deposited into the account, but were then immediately used to pay down the overdraft. The overdraft had been incurred partially to purchase the new Watusi cattle, and partially for other purposes. Therefore, the first problem in tracing from the old cattle to the new cattle is that the proceeds from the 1981 and 1984. cattle were used to pay debts. It has been the traditional view of equity that where proceeds are used to pay debts, they have been dissipated and are gone, and can no longer be traced. Professor Waters puts it in this way in *Law of Trusts in Canada* (2nd Ed., 1984), at pages 1041 to 1042:

> "On the other hand when the funds are used to pay the debts of the original wrongdoer or any subsequent holder of the funds, the fund has gone. The creditor is a bona fide purchaser for value, so the fund cannot be traced into his hands, and, if the trust beneficiary were to be subrogated to the rights of the creditor against the debtor, this can only be because the debtor ought not to have employed the trust funds to which the beneficiary had a better title. It cannot be a tracing action, because the debtor no longer has the trust funds."

[59] However, the matter is not quite that simple, as Professor Waters goes on in a footnote to qualify this statement.

> "They [the funds] may still be traceable if the donee spent the loan on the

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TAB 4

A.C.

[HOUSE OF LORDS]

BARCLAYS BANK LTD. . . . . APPELLANTS

AND

QUISTCLOSE INVESTMENTS LTD. . . . RESPONDENTS

[ON APPEAL FROM QUISTCLOSE INVESTMENTS LTD. *v.* ROLLS RAZOR LTD.]

1968 July 23, 24, 25, 29; Oct. 31

Lord Reid, Lord Morris of Borth-y-Gest, Lord Guest, Lord Pearce and Lord Wilberforce

Company—Winding up—Voluntary liquidation—Loan to company for specific purpose of paying dividend—Money paid into separate account at bank—Company's liquidation before payment of dividend—Bank's claim to set off—Whether money held on trust for lender.

Banking—Multiple accounts—Company's share dividend account—Payment in of sum borrowed specifically to pay dividend—Bank's knowledge of condition—Company in liquidation before dividend paid—Whether sum held on trust for lender.

Trusts—Contract subject to—Bank—Loan for sole purpose of paying dividend—Non-payment of dividend—Trust attaching to loan—Lender's right to repayment—Co-existence of rights in contract and of cestui que trust in equity.

R. Ltd., who were in serious financial difficulties, having an overdraft with their bank, the appellants, of some £484,000 against a permitted limit of £250,000, commenced negotiations with X, a financier, with a view to obtaining a loan of £1,000,000, and it was suggested that such a loan might be made on condition that R. Ltd. found a sum of £209,719 8s. 6d. which was needed to meet an ordinary share dividend which R. Ltd. had declared on July 2, 1964. R. Ltd. succeeded in obtaining a loan of that sum from the respondents. The loan was made on the agreed condition that it would be used to pay the dividend. The respondents' cheque was paid into a separate account opened specially for the purpose with the appellants, who knew that the money was borrowed and who agreed with R. Ltd. that the account would only be used for the purpose of paying the dividend. Before the dividend had been paid, however, R. Ltd. went into voluntary liquidation. The respondents brought an action against R. Ltd. and the appellants claiming that the money had been held by R. Ltd. on trust to pay the dividend; that, that trust having failed, it was held on a resulting trust for the respondents, and that the appellants had had notice of the trusts and were, accordingly, constructive trustees of the money for the respondents.

Held, (1) that arrangements of this character for the payment of a person's creditors by a third person gave rise to a relationship of a fiduciary character or trust in favour, as a primary trust, of the creditors, and, secondly, if the primary trust failed, of the third person.

Toovey v. *Milne* (1819) 2 B. & A. 683 and *Edwards* v. *Glyn* (1859) 2 E. & E. 29 applied.

Moseley v. *Cressey's Co.* (1865) L.R. 1 Eq. 405; *Stewart v. Austin* (1866) L.R. 3 Eq. 299 and *In re Nanwa Gold Mines Ltd.* [1955] 1 W.L.R. 1080; [1955] 3 All E.R. 219 distinguished.

(2) That the fact that the transaction was one of loan giving rise to a legal action of debt did not exclude the implication of a trust enforceable in equity. That there was no difficulty in recognising the co-existence in one transaction of

legal and equitable rights and remedies; when the money was advanced, the lender acquired an equitable right to see that it was applied for the primary designated purpose. When the purpose had been carried out (that is, the debt paid) the lender had his remedy against the borrower in debt; if the primary purpose could not be carried out, the question arose if a secondary purpose (that is, repayment to the lender) had been agreed, expressly or by implication; if it had, the remedies of equity might be invoked to give effect to it, if it had not (and the money was intended to fall within the general fund of the debtor's assets) then there was the appropriate remedy of a loan. Here, there was a clear intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out.

In re Rogers, Ex parte Holland and Hannen (1891) 8 Morr. 243 applied.

(3) That the appellants had, on the facts, accepted the money with knowledge of the circumstances which made it, in law, trust money, and could not retain it against the respondents.

Per Lord Reid: I am by no means satisfied that this House would be precluded from holding, in such circumstances as exist in this case, that notice of the trust received by the bank after they had received the money could be effective (post, p. 578B).

Decision of the Court of Appeal [1968] Ch. 540; [1968] 2 W.L.R. 478; [1968] 1 All E.R. 613, C.A. affirmed.

The following cases are referred to in Lord Wilberforce's opinion:

Drucker (No. 1), In re [1902] 2 K.B. 55; [1902] 2 K.B. 237, C.A.
Edwards v. *Glyn* (1859) 2 E. & E. 29.
Hooley, In re, Ex parte Trustee [1915] H.B.R. 181.
Moseley v. *Cressey's Co.* (1865) L.R. 1 Eq. 405.
Nanwa Gold Mines Ltd., In re [1955] 1 W.L.R. 1080; [1955] 3 All E. R. 219.
Rogers, In re, Ex parte Holland and Hannen (1891) 8 Morr. 243, C.A.
Stewart v. *Austin* (1866) L.R. 3 Eq. 299.
Toovey v. *Milne* (1819) 2 B. & A. 683.

The following additional cases were cited in argument:

Clark v. *Ulster Bank Ltd.* [1950] N.I. 132.
Commissioner for Stamp Duties of New South Wales v. *Perpetual Trustee Co. Ltd.* [1943] A.C. 425; [1943] 1 All E.R. 525, P.C.
Foley v. *Hill* (1848) 2 H.L.Cas. 28, H.L.(E.)
Foxton v. *Manchester & Liverpool District Banking Co.* (1881) 44 L.T. 406.
Lister & Co. v. *Stubbs* (1890) 45 Ch.D. 1, C.A.
Moore v. *Barthrop* (1822) 1 B. & C. 5.
Rolls Razor Ltd. v. *Cox* [1967] 1 Q.B. 552; [1967] 2 W.L.R. 241; [1967] 1 All E.R. 397, C.A.
Union Bank of Australia Ltd. v. *Murray-Aynsley* [1898] A.C. 693, P.C.
Vautin, In re [1900] 2 Q.B. 325.
Watson, In re, Ex parte Schipper (1912) 107 L.T. 783, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the appellants, Barclays Bank Ltd., from the judgments and order of the Court of Appeal (Harman, Russell and Sachs

resolved that a loan of £209,719 8s. 6d. be made to Rolls Razor Ltd. "for the purpose of that company paying the final dividend due on July 24 next." On the same day, a cheque for that sum was drawn by the respondent company in favour of Rolls Razor Ltd. Rolls Razor Ltd. sent this cheque to the appellant bank's city branch office together with a covering letter on the notepaper of Rolls Razor Ltd., also dated July 15, 1964, signed by Mr. Goldbart and addressed to Mr. G. H. Parker, a joint manager of that branch, in the following terms:—

"Dear Mr. Parker,

"Confirming our telephone conversation of today's date, will you please open a no. 4 ordinary dividend share account.

"I enclose herewith a cheque valued at £209,719 8s. 6d. . . . being the total amount of dividend due on July 24, 1964. Will you please credit this to the above mentioned account.

"We would like to confirm the agreement reached with you this morning that this amount will only be used to meet the dividend due on July 24, 1964."

From an answer to an interrogatory administered to the bank in the course of the action, it appeared that, in the telephone conversation referred to in this letter, Mr. Goldbart had informed Mr. Parker that arrangements had been made with an unspecified person to lend or otherwise provide money for the purpose of paying the dividend due to be paid by Rolls Razor Ltd. on July 24, 1964.

The appellant bank had, on June 8, 1964, opened an ordinary dividend No. 4 account. The respondents' cheque for £209,719 8s. 6d. was specially cleared and credited to this account on July 17, 1964. Mr. Bloom was unable to raise further sufficient finance and on July 17, 1964, the directors of Rolls Razor Ltd., resolved to put the company into voluntary liquidation; the appellant bank was so informed. On or about July 20, it amalgamated all the accounts of the company except the ordinary dividend No. 4 account. On August 5, 1964, the respondents' solicitors demanded repayment from Rolls Razor Ltd. of the sum of £209,719 8s. 6d. but repayment was not made and no demand at this time was made upon the appellant bank. The effective resolution for the liquidation of Rolls Razor Ltd. was passed on August 27, 1964, and on the following day the appellant bank set off the credit balance on ordinary dividend No. 4 account against part of the debit balance on Rolls Razor Ltd.'s other accounts. There followed in due course demand by the respondents for repayment of this sum by the bank and the present proceedings.

Two questions arise, both of which must be answered favourably to the respondents if they are to recover the money from the bank. The first is whether as between the respondents and Rolls Razor Ltd. the terms upon which the loan was made were such as to impress upon the sum of £209,719 8s. 6d. a trust in their favour in the event of the dividend not being paid. The second is whether, in that event, the bank had such notice of the trust or of the circumstances giving rise to it as to make the trust binding upon them.

It is not difficult to establish precisely upon what terms the money was advanced by the respondents to Rolls Razor Ltd. There is no doubt that

TAB 5

Bassano Growers v. Price Waterhouse, 1998 ABCA 198

Date: 19980619
Docket: 97-17411

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE McCLUNG
THE HONOURABLE MR. JUSTICE O'LEARY
THE HONOURABLE MR. JUSTICE LoVECCHIO

BETWEEN:

BASSANO GROWERS LTD., CALVIN KANOMATA, LUKEY FARMS LTD., HUTTERIAN BRETHREN CHURCH OF FAIRVIEW (FAIRVIEW COLONY), M. TSUKISHIMA & SONS FARMS LTD., NAKAMURA FARMS LTD., SONNY NAKASHIMA FARMS LTD., OKUMA & TASHIRO FARMS LTD., S.L.M. SPUD FARMS LTD. S-SCAN FARMS LTD., TRI-T FARMS LTD., SETOGUCHI FARMS LTD., TORSIUS TATER FARMS LTD. and POTATO GROWERS OF ALBERTA

Appellants

- and -

PRICE WATERHOUSE LIMITED

Respondent

APPEAL FROM MEDHURST, J.

MEMORANDUM OF JUDGMENT

1998 ABCA 198 (CanLII)

COUNSEL:

L. V. Halyn
For the Appellants

F. R. Dearlove
For the Respondents

D. S. Nishimura
For the Intervenant, Alberta Treasury Branches

1998 ABCA 198 (CanLII)

MEMORANDUM OF JUDGMENT

THE COURT:

[1] This is an appeal from a ruling that the "deemed trust" created by s.31 of the ***Marketing of Agricultural Products Act***, ("MAPA") S.A. 1987, c. M-5.1 does not qualify as a trust contemplated by s.67(1)(a) of the ***Bankruptcy and Insolvency Act***, ("BIA") R.S.C. 1985, c. B-3. The latter provision exempts trust property from the property divisible and distributable among creditors on bankruptcy.

[2] The chambers judge also found that the evidence did not support the existence of a trust under the general law or a finding that the appellants are entitled to the benefit of a constructive trust.

[3] At the conclusion of the hearing we dismissed the appeal and promised these Reasons.

[4] The appellant Potato Growers of Alberta ("PGA") is a marketing board created under the MAPA to regulate the production and marketing of potatoes and other agricultural products in the province of Alberta. The other appellants are growers who sold produce to Diamond S. Produce Ltd., now bankrupt, pursuant to a marketing scheme operated under the auspices of the PGA. Diamond S. Produce Ltd. was petitioned into bankruptcy in March, 1997. It owed the appellant growers money for produce purchased from them and subsequently re-sold, and it was indebted to the PGA for fees payable

1998 ABCA 198 (CanLII)

under the marketing scheme. On the date of bankruptcy, the bankrupt had a sum of money on deposit in its general operating account at the Alberta Treasury Branch. The funds were insufficient to pay the claims of the appellants.

[5] The appellants filed proofs of claim asserting that the funds on deposit were held in trust for their benefit and should be excluded from the property of the bankrupt pursuant to s.67(1)(a) of the BIA. The respondent trustee in bankruptcy rejected the claims. The respondent Alberta Treasury Branches asserts a security interest in the funds on deposit.

[6] Under s.31 of the MAPA, if a person "has the possession or control over funds

> (a) owing to a producer for a regulated product sold to the person by the producer;
> (b) owing to a board or commission . . . . that person holds those funds in trust for the producer, board . . . as the case may be . . . .".
> Section 67(I)(a) of the BIA excludes from the property of a bankrupt divisible among creditors "property held by the bankrupt in trust for any other person."

[7] The funds subject to dispute include proceeds from the sale of regulated produce. However, these funds are commingled with other funds of the bankrupt. No portion of the funds is identifiable or can be attributed to the sale of any regulated products by any particular grower.

[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. The chambers judge also rejected the submission that the funds are subject to a constructive trust in favour of the appellants for the same reason, namely lack of certainty of subject-matter.

[9] The circumstances of this case fall squarely within the rationale of the majority judgment of the Supreme Court of Canada in ***British Columbia v. Henfrey Samson Belair Ltd.*** (1989), 75 C.B.R. (N.S.) 1, 59 D.L.R. (4th) 726. 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; ***Husky Oil Operations Ltd v. M.N.R.*** (1995), 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1 (S.C.C.); ***Robinson, Little & Co.***

TAB 6

In the Court of Appeal of Alberta

Citation: Brookfield Bridge Lending Fund Inc. v. Karl Oil and Gas Ltd., 2009 ABCA 99

Date: 20090514
Docket: 0801-0255-AC
Registry: Calgary

2009 ABCA 99 (CanLII)

Between:

Brookfield Bridge Lending Fund Inc.

Appellant
(Plaintiff)

- and -

Vanquish Oil & Gas Corporation and King Energy Inc.

Not Parties To the Appeal
(Defendants)

- and -

Second Wave Petroleum Ltd. and Brookfield Bridge Lending Fund Inc.

Appellants/Purchaser and Secured Creditor

- and -

Karl Oil and Gas Ltd. and Buffalo Resources Corp.

Respondents/Creditors

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment of
The Honourable Mr. Justice Slatter
Concurred in by The Honourable Madam Justice Rowbotham

Dissenting Memorandum of Judgment of
The Honourable Mr. Justice Berger

Appeal from the Order of
The Honourable Mr. Justice J.D.B. McDonald
Dated the 21st day of August, 2008
Filed on the 10th day of September, 2008
(2008 ABQB 444, Docket: 0701-03222)

2009 ABCA 99 (CanLII)

A276). It is argued that at the date of receivership Vanquish was in default of remitting as much as $320,539 to Karl or Choice.

[5] The receiver eventually sold all of the assets of Vanquish on behalf of the appellant secured creditor Brookfield Bridge Lending Fund Inc. The issue is whether the trust created by the Operating Procedure attached to the sale proceeds, effectively giving Karl or Choice a proprietary claim to those funds.

[6] The trial judge concluded that the issue was which of two innocent parties should bear the loss resulting from Vanquish's breach of trust: the non-operator working interest owner (i.e. Karl or Choice), or the appellant secured party? He concluded that the appellant secured party "was in a far better position to ensure that its customer conducted its affairs in a fashion so as to honour the obligations clearly imposed upon it": ***Brookfield Bridge Lending Fund Inc. v. Vanquish Oil & Gas Corp.***, 2008 ABQB 444, 96 Alta. L.R. (4th) 329 at para. 53. In this way the trial judge essentially imposed the burden of Vanquish's breach of trust on the appellant.

Standard of Review

[7] Whether a trust exists is a question of law, which will be reviewed for correctness. Whether a party is entitled in law to the imposition of a constructive trust is also a question of law, reviewable for correctness. To the extent that there is an element of discretion or fact-finding involved, some deference would be warranted, unless the imposition of a constructive trust was clearly unreasonable or based on an error of principle: ***Soulos v. Korkontzilas***, [1997] 2 S.C.R. 217 at paras. 54-5.

Trusts and Trustees

[8] Most trusts are consensual arrangements. They are created by the act of the settlor, who may also be the beneficiary. Sometimes the trustee is a party to the creation of the trust, but in any event the trustee must usually consent to act. The trust binds all those who are involved in its creation.

[9] A trust, however, creates proprietary interests that may affect the rights of third parties who deal with the trust property. In some cases those third parties may not even be aware of the existence of the trust, or that the property they are dealing with is trust property. Since it would be unfair to allow the consensual act of those who created the trust to prejudice the rights of third parties, the courts of equity always studiously protected the interests of the "*bona fide* purchaser for value without notice". Whatever proprietary rights might be created by the trust will be extinguished if the trust property comes into the hands of such a third party. The effect of the *bona fide* third-party rule is that much of the risk of a breach of trust by the trustee will fall on the beneficiaries.

2009 ABCA 99 (CanLII)

[10] The law also recognizes “constructive trusts” which are often actually a form of equitable remedy. The imposition of a constructive trust can also create proprietary rights, which can also affect the interests of third parties. For that reason the courts will decline to impose a constructive trust where that would prejudice the interests of a *bona fide* purchaser for value without notice. As the Court noted in ***Soulos v. Korkontzilas*** at para. 45, one of the preconditions for imposing a constructive trust is that “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.”

[11] The law imposes strict duties on trustees. It is certainly a prudent practice for a trustee to keep trust funds separate from its own funds, but in some situations (such as the present) the trustee may be expressly or impliedly authorized to commingle trust funds with other funds. The express or implied right to commingle does not however give the trustee the right to breach the trust. The Operating Procedure provided that the funds could be applied “only to their intended use”. This was not the type of trust where the trustee is effectively allowed to borrow the commingled trust funds and use them for its own private purposes. Whether commingled or not, the trustee may only expend trust funds on purposes authorized by the trust. In this case it is clear that Vanquish was in breach of trust, because it spent trust funds on unauthorized things.

[12] So long as there is a positive balance in the account the analysis is easy. The trust attaches to the trust account and protects the net balance from the claims of any secured creditors: ***Bank of Nova Scotia v. Société Générale (Canada***), [1988] 4 W.W.R. 232, 58 Alta. L.R. (2d) 193 (C.A.).

[13] But once the trust funds are disbursed to *bona fide* third parties for value without notice, the funds are released from the trust. The beneficiaries can no longer follow the funds. The result is the same whether the funds are kept in a segregated trust account, or whether they are commingled. The only difference is that if the trust funds are commingled with non-trust funds, the trustee is generally presumed to have honest intentions, and to have spent the non-trust funds first: ***Re Hallett’s Estate*** (1879), 13 Ch.D. 696. Thus any remaining balance will be presumed to be trust funds. The claim of the beneficiaries is *prima facie* limited to the lowest intermediate balance in the account: ***Re Greymac Securities Commission and Greymac Credit Corp.*** (1986), 55 O.R. (2d) 673 at p. 677 (C.A.), affirmed ***Greymac Trust Co. v. Ontario (Securities Commission)***, [1988] 2 S.C.R. 172; ***Société Générale***; ***In re Goldcorp Exchange Ltd.***, [1995] 1 A.C. 74 at p. 108 (P.C.). It follows that in this case the remaining balance in the general account at its lowest point ($40,218) was still covered by the trust. The additional trust monies that were deposited and never expended in breach of trust ($40,599) were also covered by the trust: ***Neste Oy v. Lloyds Bank PLC***, [1983] 2 Lloyd’s Rep. 658 at p. 667 (Q.B. Div.). Karl or Choice are entitled to their proportionate share of those subsequently deposited funds.

[14] After March 14th and up to the date of the receivership on March 28th, Vanquish deposited further non-trust funds into the account. Are those funds caught by the trust? On the one hand the law could assume that the trustee Vanquish merely “borrowed” the trust funds in breach of trust, and is deemed to have repaid the misappropriated trust funds by the next deposit.

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On the other hand the law could take the view that once the trust funds are expended, the loss falls on the beneficiary, and it is not entitled to any proprietary claim to subsequent replenishment of the fund.

[15] The law is summarized in Goff & Jones, *The Law of Restitution*, 7th ed. (London: Sweet & Maxwell, 2007) at para. 2-038 with this example:

> A trustee mixes his own money with trust money; he withdraws money from the mixed fund, dissipates some of it and then deposits more money into the mixed fund. Subsequent deposits of the fiduciary into the mixed fund are not presumed to be impressed with the trusts in favour of the beneficiary. [Citing *Roscoe v. Winder*, [1915] 1 Ch. 62, 69, *per* Sargant J.; *Bishopsgate Investment Management Ltd. v. Homan*, [1995] 1 All E.R. 347, 354, *per* Dillon L.J.] Consequently if the trustee is insolvent, that part of the mixed fund, equal to the amount paid in, will normally pass to the trustee's general creditors. The beneficiary will be entitled to additions to the mixed fund only if he can prove that thereby the trustee intended to make restitution to the trust. It follows that the trust is entitled only to the lowest intermediate balance of the mixed fund. So, if the fund is wholly dissipated before any additions are made to it, the interest of the trust in the mixed fund is extinguished. Professor Scott has justified this result on the ground that "the real reason for allowing the claimant to reach the balance [of the mixed fund] is that he has an equitable interest in the mingled fund which the wrongdoer cannot destroy as long as any part of the fund remains; but there is no reason for subjecting other property of the wrongdoer to the claimant's claim any more than to the claims of other creditors merely because the money happens to be put in the same place where the claimant's money formerly was, unless the wrongdoer actually intended to make restitution to the claimant." [*Scott on Trusts* § 518.1]

Thus the further deposits to the account are not presumed to have the effect of replenishing the trust fund: ***Ontario (Real Estate and Business Brokers Act, Director) v. NRS Mississauga Inc.*** (2003), 64 O.R. (3d) 97, 226 D.L.R. (4th) 361 at para. 49 (C.A.); ***Re 1653 Investments Ltd.*** (1981), 129 D.L.R. (3d) 582 at pp. 597-9, 32 B.C.L.R. 71.

[16] If the trust funds were segregated, the outcome would be clearer. If the trustee misappropriated segregated funds, and then deposited non-trust funds into the segregated account, the intent must have been to replenish the trust account. But where the trust funds are commingled with other funds, the intent is not so clear. Since the trustee by definition is using the account for trust and non-trust purposes, the deposits might simply be made to enable further non-trust expenditures. Where the beneficiary has created the risk of this type of expenditure by allowing commingling, it should not be allowed to easily divert funds from the other creditors of the trustee. Absent a clear intention by the trustee to replenish the trust, which is not found on this record, further deposits are not attached by the express trust.

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During cross-examination the receiver was asked about purchases of assets. He noted a deposit of $7.45 million in April 2006, which was an advance from the appellant Brookfield and clearly not the proceeds of production from this oil well. He then noted a series of large cheques shortly after this deposit which he said "I would be speculating, those are paying for capital expenditures . . . it's my belief that capital items also went through this account " (EKE A295-6). The receiver did not know how the funds had actually been spent, and merely expressed the bare opinion that the amounts were large enough to be consistent with capital expenditures. He could not depose to any specific assets that were purchased with trust funds, or any specific assets that still remained in Vanquish's hands that had been purchased with trust funds, as opposed to Vanquish's own funds. There is no evidence that the account balance was reduced by these expenditures below the amount of funds needed for Vanquish to satisfy its fiduciary obligations, and it was not a breach of trust for Vanquish to spend the loan advance from Brookfield. These transactions took place about one year before the receivership. To the extent that the trial reasons involve a finding of fact respecting the tracing of the funds, they reflect palpable and overriding error.

[20] It therefore cannot be shown that the trust proceeds were expended on any of Vanquish's assets that formed a part of the eventual realization by the receiver, so as to satisfy the second precondition. Since Vanquish's wrongdoing cannot be traced into any asset, that precludes the imposition of a constructive trust: ***Bassano Growers Ltd. v. Diamond S. Produce Ltd. (Trustee of)***, 1998 ABCA 198, 66 Alta. L.R. (3d) 296 at para. 13. The trust funds were apparently used for Vanquish's general ongoing operations. As said in ***NRS Mississauga Inc***. at para. 37, it is insufficient "that some unspecified amount of trust funds were used at some unspecified time in some unspecified way to assist to some unspecified degree in maintaining the operation of the business."

[21] The fourth precondition in ***Soulos v. Korkontzilas*** is also missing. The appellant had a perfected prior secured interest. The decision under appeal essentially assumes that a secured creditor has a positive duty to monitor the fiduciary activities of its borrowers. On the assumption that the secured creditor has a "better opportunity" to prevent breaches of trust, it essentially becomes a guarantor for any such breaches of trust. This analysis discounts the fact that the underlying risk of misappropriation was created by the respondents allowing the commingling of the trust funds, and transfers the duty of monitoring that risk to the appellant. This is contrary to the principle stated in ***Soulos v. Korkontzilas*** that "the interests of intervening creditors must be protected": ***Barnabe v. Touhey*** (1995), 26 O.R. (3d) 477 (C.A.).

[22] The contention that the appellant had a better opportunity to prevent breaches of trust is, in any event, unconvincing. The respondent had agreed that its trustee could mingle the trust funds with its own funds. There was accordingly no realistic way that the appellant could challenge any expenditure from the mixed account; the fact that funds were being spent from the mixed account on non-trust purposes was not objectionable. In order to monitor the trust, the appellant would have had to keep precise records of the amount of trust money coming into the account at TD Canada Trust, and then monitor each and every expenditure from the account to determine that the balance of the account was never reduced below the net trust balance. This

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would require the appellant to monitor the trustee's business on a daily basis. It is unreasonable to allow the respondent to foist that duty on the appellant by operation of law.

[23] The analysis in the reasons under appeal also overlooks the fact that the imposition of the constructive trust gave the respondents a priority over not only the appellant secured creditor, but also potentially the unsecured creditors of Vanquish. Even if the appellant had a "better opportunity" to prevent the breach of trust, the unsecured creditors had no such opportunity. While the unsecured creditors in particular cases may not receive anything anyway, it would be anomalous if the entitlement to a constructive trust against the secured creditor depended on whether and to what extent the unsecured creditors were affected.

[24] The respondents argue that it should be assumed the appellant knew Vanquish dealt with trust funds, and so the appellant is not a party "without notice" and would not be protected in equity. This argument also overlooks the effect of the imposition of a constructive trust on the unsecured creditors. But in any event, the mere knowledge that Vanquish dealt with trust funds from time to time is not sufficient. Without knowledge that the funds it received were being paid in breach of trust or were trust assets, the appellant would not lose its protection under the rule in ***Soulos v. Korkontzilas***. This is just another way of saying that the appellant had a duty to police Vanquish's management of the trust funds.

[25] This appeal demonstrates the shortcomings of a practice, which is apparently an industry-wide practice, of letting oil well operators commingle trust funds with non-trust funds, while purporting to limit the ability of the operator to use those funds only for operation of the specific well. It must be remembered that it is the respondents who created the risk of these circumstances arising by agreeing that trust and non-trust money could be commingled. Where the conduct of one party creates the problem, that is a relevant consideration in deciding whether a constructive trust should be imposed: D.M. Paciocco, *The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors* (1989), 68 Can. Bar Rev. 315 at pp. 348-9. It was a reviewable error to impose a constructive trust in this situation.

Conclusion

[26] In conclusion, it was an error of principle to impose a constructive trust in the circumstances of this case. The express trust agreed to by the parties only attached to the lowest balance of the account on March 14th, 2007, plus the respondents' proportion of the additional trust funds deposited on March 16th, 2007. The appeal is allowed.

Appeal heard on March 11, 2009

Memorandum filed at Calgary, Alberta
this 14th day of May, 2009

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TAB 7

In the Court of Appeal of Alberta

Citation: Bruderheim Community Church v Moravian Church In America (Canadian District), 2020 ABCA 393

Date: 20201106
Docket: 1803-0041-AC
Registry: Edmonton

2020 ABCA 393 (CanLII)

Between:

Bruderheim Community Church and Bruderheim Moravian Church

Appellants

- and -

Board of Elders of the Canadian District of the Moravian Church In America

Respondent

The Court:

The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Michelle Crighton
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Decision by
The Honourable Mr. Justice J.T. Henderson
Dated the 9th day of February, 2018
Filed on the 9th day of February, 2018

(2018 ABQB 90, Docket: 1703 10116)

2020 ABCA 393 (CanLII)

[12] The Board of Elders concluded, therefore, that the Bruderheim congregation "had no intention of remaining within the ... [Moravian Church-Northern Province] or associating with the denomination in any capacity." The Board of Elders recommended to the Provincial Conference that it dissolve the Bruderheim Moravian Church which it did effective March 16, 2017. On March 22, 2017, the Northern Province advised representatives of the Bruderheim Moravian Church that all real and personal property associated with the Bruderheim church reverted to the Northern Province. The Provincial Conference also demanded that the church property be vacated by May 31, 2017.

[13] The appellants obtained an interim injunction enjoining the respondent from interfering with their use and enjoyment of the church lands and subsequently sought a permanent injunction to the same effect.

[14] In dismissing the appellants' application for a permanent injunction, the chambers judge found, after careful analysis of the materials before him, that the Board of Elders held title to the church lands and buildings as successors to the original trustees from 1897. He found that since 1912 the Board of Elders were trustees on behalf of beneficiaries that were adherents to the worldwide Moravian Church organization with a congregation in Bruderheim and not simply to the Bruderheim Moravian Church. Thus, to be beneficiaries of the trust, he concluded that the local Bruderheim congregation must also be members of the Moravian Church.

[15] The chambers judge concluded that having dissociated themselves from the Northern Province, the Bruderheim Moravian Church congregation ceased to be beneficiaries of the trust. As a result, he concluded that the people on whose behalf the Bruderheim Moravian Church and the Bruderheim Community Church sought the injunction had lost any right to use the church building and property as beneficiaries of that trust. Not having established a right to the church lands, the chambers judge refused the appellants' application for a permanent injunction.

[16] The appellants challenge the chambers judge's interpretation of the objects of the 1897 trust. Creation of an express trust requires the presence of three certainties, namely intention, subject matter, and object: ***Century Services Inc v Canada (Attorney General***), 2010 SCC 60 at para 83, [2010] 3 SCR 379. Certainty of objects requires that the persons or the class of persons who are the intended beneficiaries must be sufficiently certain so that the trust can be performed.

[17] The appellants' primary argument on appeal is the chambers judge misconstrued the objects of the trust by concluding that only adherents to the worldwide Moravian Church with a congregation in Bruderheim are beneficiaries under the trust and not the local congregation of the Bruderheim Moravian Church. The appellants also argue procedural unfairness in the chambers

TAB 8

Canada Trust Company v. Price Waterhouse Limited, 2001 ABQB 555

Date: 20010629
Action No. 9801-06640

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

2001 ABQB 555 (CanLII)

BETWEEN:

THE CANADA TRUST COMPANY

Interpleader
(Applicant)

- and -

PRICE WATERHOUSE LIMITED, THE TORONTO-DOMINION BANK, PALLISER GRAIN CO. LTD., THOMPSON COUNTRY TERMINAL LIMITED, KATHRYN GRAIN CO. LTD., CANADIAN GRAIN COMMISSION, AGRICULTURAL FINANCIAL SERVICES CORP. (ALBERTA) RICHARD KIRKWOOD, DON CARLSON, RON-MAR FARMS LTD., CIRCLE 6 FARMS INC., B'n'E FURNITURE & CABINET BUILDERS LTD., HOWARD HAGG, GERLYN ACRES LTD., and JOHN DOERKSEN

Claimants
(Respondents)

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE G.R. FORSYTH

APPEARANCES:

S.E.D. Fairhurst
for the Claimant (Respondent)Price Waterhouse Coopers in its capacity as Receiver and Manager of Palliser Grain Co. Ltd.

J.D. Blair
for the Claimants (Respondents) Richard Kirkwood, Don Carlson, Ron-Mar Farms Ltd., Circle 6 Farms Inc., B'n'E Furniture & Cabinet Builders Ltd., Howard Hagg, Gerlyn Acres Ltd. and John Doerksen

BACKGROUND

Second Edition (Toronto: The Carswell Company Limited, 1984) addresses the three characteristics as follows at 107:

> [T]he alleged settlor ... must employ language which clearly shows his intention that the recipient should hold on trust ... If such imperative language exists, it must, secondly, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitely ascertained. Third, the objects of the trust must be equally clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

[22] Price Waterhouse has argued that the Fund does not constitute a trust. Price Waterhouse has focussed on both an alleged absence of certainty of intention and an alleged absence of certainty of object as the basis for arguing that no trust exists or that any alleged trust should fail. I will address the matters of certainty of intention and certainty of object separately below.

Certainty of Intention:

[23] In order for a trust to be valid, it must be established that the settlor intended to create a trust. Price Waterhouse has relied on the fact that there was no obligation on Palliser to forward monies to Canada Trust. Price Waterhouse contends that this "freedom" to forward monies "on an ad hoc basis" is not demonstrative of intention.

[24] I agree that the discretionary component of transferring monies to Canada Trust clouds the determination as to whether there was certainty of intention. What is determinative of intention is the language used by the parties and the actions of both Palliser and Canada Trust during the times when in fact monies were transferred between Palliser and Canada Trust.

[25] Reference must be had to the language chosen by Palliser and Canada Trust in both the Escrow Agreement and the Amending Agreement. The Agreements make specific use of the words "Trust" and "Trustee" in the context of monies being held in a trust account. The Amending Agreement expressly notes that monies are held in trust for the benefit of producers.

[26] Price Waterhouse referred to **Waters**, *supra*, wherein, at 109,the author notes that the use of the words "trust" and "in trust" is not determinative of the existence of a trust. However, immediately preceding this cautionary remark, the preceding text contains commentary noting that "the words which **nearly always** reveal the intention [to create a trust] are 'in trust', or 'as trustee'..." [my emphasis added].

[27] I am satisfied that the use of the words connoting a trust scenario, as used by Palliser and Canada Trust in the Escrow Agreement and the Amending Agreement, and the subsequent conduct of parties, collectively operate to meet the test for certainty of intention. Palliser and Canada Trust entered into an Escrow Agreement, the terms of which

2001 ABQB 555 (CanLII)

TAB 9

Court of Queen's Bench of Alberta

Citation: Carevest Capital Inc. v. 1262459 Alberta Ltd., 2011 ABQB 148

Date: 20110307
Docket: 1003 01050
Registry: Edmonton

2011 ABQB 148 (CanLII)

Between:

Carevest Captial Inc.

Plaintiff

- and -

1262459 Alberta Ltd., 1281388 Alberta Ltd., 1256462 Alberta Ltd., Jagjit Dhami, Baljinder Dhot, Aqbal Gill and Ravinder Khandal

Defendants

Reasons for Decision
of
L. A. Smart, Master in Chambers

Background

[1] 126245 Alberta Ltd. ("126") is a property development company that was carrying on business in the County of Leduc ("the County"). On April 17, 2007, the County issued conditional subdivision approval to 126 for development of lands within the County. 126 obtained a mortgage loan from CareVest Capital Inc. ("CareVest"), secured in part by land mortgages, and a General Security Agreement over all present and after acquired personal property ("the GSA"). On December 19, 2007, the County and 126 entered into a development agreement ("the Development Agreement"). Schedule "E" of the Development Agreement set out 126's responsibilities regarding the levies payable to the County, which were subject to future adjustments based on the anticipated passage of a new proposed off-site levy bylaw (the

"Off-site Levy Bylaw"). On April 15, 2008, Mr. Thind, counsel for 126, received an advance of $801,350.00 (the "First Advance") from CareVest, with the following condition:

> These funds are forwarded to you on the trust condition that you immediately pay the balance of the Leduc County Offsite Levy to the Leduc County in the amount of $801,350.00 and thereafter provide our office with proof of payment that the entire Offsite Levy has been paid in full.

[2] Two other advances were also made, on June 27, 2008 and August 19, 2008, which brought the total sum of the advances to $3,341,902.40. Both of these advances were made with the following condition:

> These funds are forwarded to you on the trust condition that you immediately provide our office with confirmation that the Leduc Country [sic] Offsite Levy has been paid in full.

[3] On April 15, 2008, the same date as the First Advance, Mr. Thind sent two cheques to the County for an amount totaling $900,433.12 (one cheque was for $801,350.00, and the other for $99,083.12). Before the cheques were cashed, 126 applied for a reduced levy rate under the Off-site Levy Bylaw. As a result, the County did not immediately deposit those cheques. The County eventually rejected 126's reduced rate request, and proceeded to review the calculation of the levies. At some point in this process, the cheques became stale-dated.

[4] On December 31, 2008, the County advised 126 that the amount owing for the levies was $1,089,932.80 rather than $900,433.12. Shortly thereafter, 126 wrote back to the County and identified an error in the County's calculations. The County reviewed the calculations, and replied on January 12, 2009 that the correct amount was $900,309.26.

[5] Mr. Thind e-mailed the County several times between November 13, 2008 and March 6, 2009 reminding the County that the cheques were stale-dated and uncashed, and that the County could request replacement cheques. Mr. Thind did not receive a response until October 9, 2009, at which point the County requested new cheques. 126 instructed Mr. Thind to refrain from sending new cheques. The funds remained in Mr. Thind's trust account, until they were deposited into Court pursuant to a consent order granted by Master Laycock on January 13, 2010. Entitlement to the approximately $900,000 deposit (the "Subject Funds") is the issue in the current dispute. The County claims that it has entitlement to the Subject Funds by virtue of a *Quistclose* trust. CareVest claims entitlement on the basis of a security interest in the assets of 126 under its GSA, or alternatively, if a *Quistclose* trust exists, it is the rightful "beneficiary".

Positions of the Parties

The County

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[6] The County takes the position that the Subject Funds were impressed with a *Quistclose* trust. CareVest advanced the funds specifically for the purpose of paying the off-site levies. That purpose still remains capable of being carried out, as the levies remain unpaid and outstanding. Additionally, the formal requirements of a trust were met, as there was certainty of intention, subject-matter and object. Since the County is the beneficial owner of the Subject Funds, the *Personal Property Security Act* ("*PPSA*") does not apply and the funds should be awarded to the County.

CareVest

[7] CareVest takes the position that a *Quistclose* trust was not created, or alternatively, that as the lender, CareVest is the beneficial owner of the Subject Funds. In support of its first argument, CareVest submits that the trust conditions do not expressly or impliedly state that the monies were to be used exclusively to pay the off-site levies. The total amount of all three advances was $3,341,902.40, a substantially larger amount than the off-site levies. Therefore, clearly not all of these funds were intended to be paid to the County. Additionally, there is no evidence showing a distinction between the funds held by Mr. Thind for the payment of the off-site levies, and the funds held by Mr. Thind for the benefit of 126. CareVest also argues that the requirement for the certainty of subject-matter is absent in this instance, as the final amount of the off-site levies was not determined until January 12, 2009. Since the requirements of a trust relationship are not present, the relationship is actually one of debtor-creditor, to which the *PPSA* applies.

[8] In the alternative, CareVest submits that if a *Quistclose* trust has been created, then it should nonetheless receive the Subject Funds. The primary purpose of the trust, which was to pay the off-site levies immediately, failed when the County did not cash the original trust cheques. The original mandate of the trust, which was to help 126 complete the development, would have been frustrated when 126 defaulted under the loan. If a *Quistclose* trust existed, CareVest would be entitled to a return of the Subject Funds as the beneficial owner of those funds.

Law

[9] In ***Barclays Bank Ltd. v. Quistclose Investments Ltd.***, [1970] A.C. 567; [1968] 3 All E.R. 651; [1958] 3 W.L.R. 1097 (H.L.) Rolls Razor Ltd. borrowed money from Quistclose Investments for the specific purpose of paying a declared dividend. However, before the dividend was paid, Rolls Razor entered voluntary liquidation. Barclay's Bank applied the money earmarked for the dividend account against Rolls Razor's outstanding loan. Quistclose sued for a return of its funds on the basis that they had been impressed with a trust.

[10] The Lord Wilberforce stated, at page 579:

> Two questions arise, both of which must be answered favourably to the respondents if they are to recover the money from the bank. The first is whether

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> as between the respondents and Rolls Razor Limited, the terms upon which the loan was made were such as to impress upon the sum of £209,719 8s. 6d. a trust in their favour in the event of the dividend not being paid. The second is whether, in that event, the bank had such notice of the trust or of the circumstances giving rise to it as to make the trust binding upon them.

[11] The House of Lords found that both of these conditions had been met. The "mutual intention" of the parties was that the money should be used exclusively for the payment of the dividend. Barclay's Bank also had sufficient notice, by way of a letter from Rolls Razor to the bank. Therefore, the arrangement gave rise to a "primary trust", the terms of which required the money to be paid out as a dividend. Where the primary trust failed, as in this instance, the "secondary purpose" of the trust operated to return the dividend monies to the lender, Quistclose. If the dividend monies had been distributed, thereby fulfilling the primary purpose of the trust, then Quistclose would only have had a remedy against Rolls Razor through a debt action. This case is the origin of the term *Quistclose* trust, although the principles underlying the trust can be traced back to much older cases: ***Tooley v. Milne*** (1819) 2 B. & A. 683, ***Edwards v. Glynn*** (1859) 2 E. & E. 29.

[12] In ***Ling v. Chinavision Canada Corp.*** (1992), 10 O.R. (3d) 79 (Ont. Gen. Div.) the plaintiff ("Ling") advanced $500,000.00 loan to the defendant corporation ("Chinavision"). The loan agreement contained a term that, in the event of a default, Ling could convert his debt to shares of Chinavision. The loan was guaranteed by Mr. Francis Cheung ("Cheung"), who was also a co-defendant in this matter. Both Cheung and Chinavision became insolvent, and Chinavision defaulted on the loan. Ling attempted to convert his debt into shares of Chinavision.

[13] A third party, North America Television Production Corporation ("North America T.V."), advanced funds to Chinavision and Cheung for the purpose of paying off the loan. Ling refused to accept the loan repayment because he was concerned that the funds would be "attacked by creditors of Mr. Cheung." Chinavision then applied for summary judgment, seeking a declaration that Ling was obliged to accept the repayment. The Court found that the "principle contained in the *Quistclose* trust case has been recognized consistently in this jurisdiction." He concluded that the funds tendered by North America T.V. were "for the sole purpose of paying the indebtedness of [Cheung]" and therefore did not become part of the estate of either of the defendants. Ling must accept the repayment.

[14] In ***Del Grande v. McCleery*** (1998), 40 B.L.R. (2d) 202; 24 E.T.R. (2d) 30 (Ont. Ct. J. (Gen. Div.)), aff'd (2000) 127 O.A.C. 394 (C.A.) after reviewing ***Barclays Bank Ltd. v. Quistclose Investments Ltd.***, the Court restated the criteria for finding a *Quistclose* trust at p. 206:

1. Whether the terms of the loan were such as to impress upon the loan sum a trust in favour of the lender if the specific purpose of the loan was not achieved or fulfilled;

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2. Whether the party receiving the loan proceeds had notice of the trust or of the circumstances giving rise to the trust so as to bind such a party.

[15] In ***Twinsectra Ltd. v. Yardley***, [2002] UKHL 12; [2002] 2 A.C. 164; [2002] 2 W.L.R. 802 a purchaser ("Yardley") sought financing to purchase property. He obtained financing from Twinsectra Ltd. ("Twinsectra"), on the condition that the loan money will be "utilized solely for the acquisition of property". The money was released to the client account of Yardley's solicitor ("Sims"). Yardley assured Sims that the money would be used to fund the acquisition of property, and was therefore disbursed to another of Yardley's solicitors ("Leach"). Leach was unaware of the previous undertaking, and the money was subsequently used for purposes other than the acquisition of property. Yardley went bankrupt, and Twinsectra commenced proceedings against all parties involved in the transaction.

[16] The House of Lords found that the parties had created a *Quistclose* trust. Lord Millet discussed the nature of the *Quistclose* trust. He considered where the beneficial interest of the trust was located and rejected Lord Wilberforce's characterization of there being two trusts, a primary trust and a secondary trust. Instead, Lord Millet determined that there are four theoretical possibilities for the location of the beneficial interest in a *Quistclose* trust: (i) the lender, (ii) the borrower, (iii) the contemplated beneficiary, (iv) in suspense. After examining all the possibilities, Lord Millet concluded that the beneficial interest remains with the lender. When a *Quistclose* trust is established, the lender "does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset."

[17] ***Re Cliffs Over Maple Bay Investments Ltd.***, 2010 BCSC 389, a real estate company, The Cliffs Over Maple Bay Investments Ltd. (The "Cliffs"), commenced proceedings under the *Companies' Creditors Arrangement Act* in May, 2008. Pursuant to those proceedings, the Court issued a debtor in possession order (the "DIP Order"), which authorized The Cliffs to borrow funds from Century Services Inc. The DIP Order provided that the terms and conditions of the loan were to be subject to a commitment letter dated June 13, 2008. The DIP Order also imposed certain conditions on the use of the DIP funds. The Cliffs borrowed $500,000.00 from Century, which was deposited into the trust account of The Cliff's solicitors, Lawson Lundell LLP. The Cliffs made expenditures pursuant to the terms of the DIP Order. However, pursuant to an appeal to the British Columbia Court of Appeal, the DIP Order was set aside on August 15, 2008 (***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.***, 2008 BCCA 327). At that point, $162,276.33 of the loan ("the Funds") remained in the trust account. The setting aside of the DIP Order left no way for expenditures to be made from the Funds.

[18] This case concerned entitlement to the Funds. Three parties claimed exclusive entitlement: Century argued that it retained both legal and equitable ownership of the Funds pursuant to a *Quistclose* trust; Fisgard Capital Corp. and Liberty Excell Holdings Ltd. ("Fisgard"), the secured creditors to The Cliffs, claimed that they had priority and ownership of the Funds; and Lawson Lundell claimed that it had a solictor's lien over the Funds. The Court ultimately concluded that Century was entitled to the Funds, as they had been impressed with a *Quistclose* trust.

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[19] At para. 78, the Court stated that:

> Where funds have been released by a lender to a borrower's solicitor with trust conditions governing their use, they do not become the property of the borrower until the trust conditions are satisfied. If the trust conditions are not satisfied, unspent funds must be returned to the lender.

[20] Since the trust condition "has not and now never will be satisfied", the Court concluded at para. 89 that The Cliffs never had possession or control over the Funds. This finding defeated both the claims of Fisgard and Lawson Lundell.

Analysis

A.) Were the terms of the loan capable of impressing the funds with a *Quistclose* trust?

[21] The first issue before the Court is whether a valid *Quistclose* trust was created. The terms of the loan must have been capable of impressing the funds with a trust in favour of the lender. The three certainties of a trust must still be present to create a *Quistclose* trust and ascertainable on an objective basis. The party who seeks to apply the trust bears the onus of proving its existence on a balance of probabilities.

i.) Certainty of Intention

[22] The County submits that, in this case, the terms of the advance were sufficiently clear to impress the Subject Funds with a *Quistclose* trust. The fax accompanying the First Advance by CareVest was on the trust condition that 126 "immediately pay the balance of the Leduc County Offiste Levy to the Leduc County in the amount of $801,350.00." This first condition was clear the trust property was to be used for no other purpose than for payment of the offsite levy. Subsequent advances were made on the trust condition that required 126 to provide proof that the levies had been paid in full. If a *Quistclose* trust was created, there must have been the mutual intention to create a trust where the beneficial interest remained with the lender, CareVest. Here, there is insufficient evidence to establish a mutual intention that the subsequent advances were to be restricted solely for the purpose of paying the Offsite Levies. The mutual intention to create a *Quistclose* trust was not present for the subsequent advances so the claim that the funds were impressed with a *Quistclose* trust must fail for those advances. Arguably the *Quistclose* trust could exist for the First Advance although the subsequent co-mingling of funds arguably puts that in question.

ii.) Certainty of Subject Matter

[23] CareVest argues that the certainty of subject-matter is not present in the circumstances of the case because the exact amount of the off-site levies had not been finally determined until well after the advance was made. However, whether the First Advance represented all or a

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portion of the off-site levies is irrelevant to whether they are considered to be held in trust. To establish the certainty of subject-matter, the trust property has to be clearly identifiable.

[24] The County has not argued that the second and third advances were impressed with a *Quistclose* trust. Therefore, if a *Quistclose* trust is to be found, the subject-matter of the trust is limited to the First Advance, and $801,350.00 of the Subject Funds is all that could be considered trust property. The remainder of the funds advanced would be the property of 126, and are subject to the claim of CareVest under its GSA.

*iii.) Certainty of Object*s

[25] The object of the trust is easily ascertainable in this case. Assuming that a trust had been created, the funds were to be forwarded to the County for payment of the off-site levies. In its reply brief, CareVest did not dispute the certainty of objects.

B.) Notice requirement

[26] It is the intended recipient of the funds, the County, rather than the lender, CareVest, who is seeking to apply a *Quistclose* trust. The policy rationale behind the notification requirement is to provide certainty to the party receiving the funds. In other words, the notice requirement exists for the protection of the recipients of the trust funds, who are entitled to know if funds must be returned to the lender when they are not applied towards a specific purpose. The notice requirement has no application to these circumstances.

C.) If a trust has attached to the First Advance, then which party is the rightful beneficiary of the trust?

[27] Prior to 2002, there had been some debate regarding the location of the beneficial interest in a *Quistclose* trust. In ***Twinsectra v. Yardley,*** Lord Millet directly answered this debate. He rejected the notion that there was a primary trust and a secondary trust, and concluded that the beneficial interest of a *Quistclose* trust remains with the lender until the primary purpose of the trust is achieved.

> The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset. Contrary to the opinion of the Court of Appeal, it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money.

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> Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case.

[28] As noted above the Ontario Court of Justice (affirmed by the Court of Appeal) restated the criteria for finding a Quistclose trust in part as follows:

> "Whether the terms of the loan were such as to impress upon the loan sum a trust in favor of the lender **if the specific purpose of the loan was not achieved or fulfilled**;" (emphasis added).

[29] The County argues that the cheques forwarded to them support the intention of Carevest and 126 to use the funds for payment to the County for off-site levies. Although the cheques were allowed to staledate the purpose of the trust is still capable of being carried out, that is, it is not impossible to carry out.

[30] I agree with the County, the funds when advanced did not become the property of the Developer (126) but equally they did not become the property of the County. 126 is not proceeding to complete the development and will not instruct Mr. Thind to send new cheques to the County for the levies. In my view the purpose of the loan was not achieved or fulfilled and in these circumstances can be said to be impossible to carry out.

Conclusion

[31] In a *Quistclose trust* the beneficial interest remains with the lender until the purpose of the trust is carried out. Therefore in the circumstances, Carevest is entitled to the Subject Funds. Failing the existence of the *Quistclose trust* it is not disputed that Carevest would have priority to the Subject Fund pursuant to its security, particularly the GSA. In either case Mr. Thind and 126 must return the funds to Carevest. Accordingly, the Clerk shall release the funds held pursuant to the Order of Master Laycock including any interest accrued thereon to Carevest. Carevest shall have their costs.

Heard on the 29th day of June, 2010.

Dated at Edmonton, Alberta this 7th day of March, 2011.

2011 ABQB 148 (CanLII)

L. A. Smart
M.C.C.Q.B.A.

Appearances:

David Madsen
Borden Ladner Gervais LLP
for the Plaintiff

Emmanuel Alade
City Law Office - Fort Saskatchewan
for the Defendant

Daniel Peskett
Brownlee LLP
for theCounty of Leduc

2011 ABQB 148 (CanLII)

TAB 10

In the Court of Appeal of Alberta

Citation: Carevest Capital Inc. v Leduc (County), 2012 ABCA 161

Date: 20120525
Docket: 1103-0226-AC
Registry: Edmonton

2012 ABCA 161 (CanLII)

Between:

Carevest Capital Inc.

Respondent

- and -

County of Leduc

Appellant

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice R. Paul Belzil

Reasons for Judgment Reserved of The Honourable Mr. Justice Slatter
Concurred in by The Honourable Mr. Justice Côté
Concurred in by The Honourable Mr. Justice Belzil

Appeal from the Order by
The Honourable Madam Justice M.G. Crighton
Dated the 26th day of July, 2011
Filed on the 12th day of August, 2011
(Docket: 1003-01050)

Reasons for Judgment Reserved
of The Honourable Mr. Justice Slatter

[1] The issue on this appeal is the entitlement to funds that were in a solicitor's trust account, but that were subsequently paid into court. The appellant County claims them in payment of development levies. The respondent lender, which originally advanced the funds, claims them under its security agreements or a trust.

Facts

[2] A property developer, 1262459 Alberta Ltd., had plans to develop some land it owned in the County of Leduc. It arranged financing with the respondent Carevest Capital Inc. As security for the loans, in April of 2007 it granted a mortgage to the respondent, and in October of 2007 it granted a general security agreement, and other security.

[3] On December 19, 2007 the developer entered into a development agreement with the County which required that it pay certain off-site levies. The applicable Off-Site Levy Bylaw had not yet been enacted, but the developer covenanted to pay the levies, once they had been set, prior to commencing certain construction.

[4] On April 15, 2008, Borden Ladner Gervais, solicitors for the respondent, direct deposited the sum of $801,350 into the trust account of Ranbir Thind & Associates, the solicitors for the developer. The funds were sent on the following condition:

> These funds are forwarded to you on the trust condition that you immediately pay the balance of the Leduc County Offsite Levy to the Leduc County in the amount of $801,350 and thereafter immediately provide our office with proof of payment that the entire Offsite Levy has been paid in full.

That same day Ranbir Thind drew two cheques on his trust account, payable to the County of Leduc: one for $801,350, and the other for $99,083.12. Both cheques had noted on them "Balance of Levy payment".

[5] Mr. Thind sent the cheques to the County, but because the exact amount of the levy had not yet been determined, the County did not deposit the cheques. Between April of 2008, and January 12, 2009, there were various discussions and negotiations about the exact amount of the off-site levy that was owed. As the calculated amount fluctuated during the negotiations, there were ongoing suggestions that fresh cheques should be sent in the revised amounts. The amount was finally settled on January 12, 2009.

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2012 ABCA 161 (CanLII)

[11] The County argues that the funds are impressed with a trust under the principle set out in ***Barclays Bank Ltd. v Quistclose Investments Ltd.***, [1970] AC 567 (HL (Eng)). In that case the creditor Quistclose had advanced funds to the borrower Rolls Razor Limited for a specific purpose, namely paying a declared dividend. The borrower deposited the funds in its account at Barclays Bank, but entered liquidation before the dividend could be paid. Barclays Bank applied the funds to its outstanding loans, and Quistclose sued for a return of the funds on the basis that they were impressed with a trust to pay the dividend. Lord Wilberforce stated the principle relied on at p. 579:

> Two questions arise, both of which must be answered favourably to the respondents if they are to recover the money from the bank. The first is whether as between the respondents and Rolls Razor Limited, the terms upon which the loan was made were such as to impress upon the sum of GBP 209,719 8s. 6d. a trust in their favour in the event of the dividend not being paid. The second is whether, in that event, the bank had such notice of the trust or of the circumstances giving rise to it as to make the trust binding upon them.

This type of trust, commonly called a Quistclose trust, arises when funds are advanced for a specific purpose, but cannot be or are not used for that purpose. Quistclose trusts have been recognized in subsequent cases.

[12] The County argues that the funds in question were advanced for a specific purpose, namely the payment of the off-site levies, and that accordingly they should be subject to a Quistclose trust. The Master agreed that a trust existed, but concluded that the beneficiary of a Quistclose trust is the lender.

[13] In ***Quistclose*** a type of constructive trust was imposed in order to create a proprietary remedy. In this appeal it is not necessary to decide whether a Quistclose trust should be imposed, because the correspondence between Borden Ladner Gervais and Ranbir Thind & Associates created an express trust: ***Carling Development Inc. v Aurora River Tower Inc.***, 2005 ABCA 267 at para. 47, 46 Alta LR (4th) 40, 371 AR 152. There clearly was a trust on the funds when they were sent from the respondent's solicitors to the developer's solicitors. The terms of the trust were also clear - they were to pay the off-site levies. Mr. Thind had only two choices: he could use the funds to pay the off-site levies, or he could return them to Borden Ladner Gervais: ***Carling Development*** at para. 56.

[14] Mr. Thind attempted to discharge the trust by sending the funds to the County. Those funds were sent to discharge a contractual obligation, not to create, nor in furtherance of any trust between the developer and the County. The County was obliged to use the funds in the manner intended, that is to pay the off-site levies. For example, the County could not have used the funds to pay outstanding taxes. But that obligation arises from the law of debtor and creditor, not because of any

trust: ***Cory Bros. & Co. v "The Mecca"***, [1897] AC 286 at p. 293 (HL (Eng)); ***Waisman v Crown Trust Co.***, [1970] SCR 553 at p. 560.

[15] There is no room for a Quistclose trust in the transaction between the County and Ranbir Thind & Associates. If the respondent had sent the funds directly to the developer, with the common expectation that they would be used to pay the off-site levies, but without any express trust, nor any stipulation that they could not used in any other manner, there might be room for a Quistclose trust. But any such expectations must yield to the specific terms of the express trust that was created between the solicitors.

[16] The County argued that once Mr. Thind drew the trust cheques, the trust was "crystallized", and the funds could not thereafter be diverted. That analysis overlooks the critical fact that the cheques were never negotiated, meaning that the funds ended up in limbo. They were never finally applied to the levies, nor were they held unused. It also assumes that the County was the beneficiary of any trust. However, the expectation of a law firm sending a client's funds in trust is that the firm is protecting its client, not any third party. In the absence of an express stipulation, the assumption should be that the beneficiaries of the trusts are the various clients, and not any third parties, even if the trust conditions contemplate the money being used for a specific purpose. For example, sending money in trust to pay prior encumbrances does not create a trust in favour of the holders of those encumbrances. The identification of a purpose in a solicitor's trust letter does not usually create an obligation enforceable by a third party to have the funds used for that purpose.

[17] Ultimately, Ranbir Thind & Associates held money in trust. It attempted to send the money to the County, which it was perfectly entitled to do because that was one of the options available under the trust. The recipient of the funds, being the County, held the cheques rather than negotiating them. Eventually Ranbir Thind & Associates ended up in the situation where it had outstanding trust cheques in the hands of the County, and a sum of money sufficient to cover those cheques in its trust account. The issue on this appeal comes down to the rights of the various parties in those circumstances.

The Claim of Carevest

[18] The respondent initially advanced its claim under the general security agreement. If the funds in the trust account of Ranbir Thind & Associates were owned by the developer, then they would be caught under the security.

[19] Alternatively, if there was a Quistclose trust, the respondent argued that it was the beneficiary of that trust. That was the effect of the original ***Quistclose*** decision, where the funds were found to be held in trust for the lender who advanced the money, not the shareholders who anticipated receiving the dividend. The respondent argued that the funds had been sent by it, through

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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

2005 ABCA 267 (CanLII)

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)

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

2005 ABCA 267 (CanLII)

TAB 12

Century Services Inc. *Appellant*

v.

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

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Century Services Inc. *Appelante*

c.

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

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

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

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

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

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

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The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

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Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

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recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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

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

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

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

3.4 *Express Trust*

3.4 *Fiducie expresse*

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

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

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

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

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

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

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TAB 13

Citadel General Assurance Co. *v.* Lloyds Bank Canada, [1997] 3 S.C.R. 805

The Citadel General Assurance Company and the Citadel Life Assurance Company *Appellants*

v.

Lloyds Bank Canada and Hongkong Bank of Canada *Respondents*

1997 CanLII 334 (SCC)

Indexed as: Citadel General Assurance Co. *v.* Lloyds Bank Canada

File No.: 25189.

1997: May 20; 1997: October 30.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for alberta

Trusts and trustees -- Breach of trust -- Liability of strangers to trust -- Knowing assistance -- Knowing receipt -- Insurance agent depositing premiums collected on insurer's behalf into bank account -- Bank transferring funds to account of insurance agent's parent company to reduce overdraft -- Whether bank liable for breach of trust on basis of knowing assistance or knowing receipt.

D sold insurance to auto dealers. After collecting the premiums, D paid commissions and settled any current claims under the policies. The balance of the premiums was remitted on a monthly basis to the appellant insurance companies, the

underwriters of the policies. In December 1986, D and its parent company started banking with the respondents (the "bank"). D used one bank account for all its transactions. Through its senior officers, the bank was aware that insurance premiums were being deposited into that account. In May 1987, a "trip report" by one of the appellants' employees indicated that D was reluctant to establish a trust account for the premiums but would do so if necessary. From June 1, D no longer settled claims under the insurance policies, with the result that the monthly premiums payable to the appellants increased significantly. In June the bank received instructions from the parent company's signing officers, who were identical to D's signing officers, to transfer all funds in D's account to the parent company's account at the end of each business day. In July and August, the transfer of funds between the accounts resulted in an overall reduction in the parent company's overdraft. In late August D advised the appellants that the July and August premiums could not be remitted. It agreed to pay these outstanding receipts by way of promissory note. After D and its parent company ceased carrying on business, the appellants brought an action against the bank for the outstanding insurance premiums. They were successful at trial and judgment was entered against the bank. The Court of Appeal allowed the bank's appeal and dismissed the appellants' claim.

Held: The appeal should be allowed.

Per La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The relationship between the appellant insurers and D was clearly one of trust. Under s. 124(1) of the Alberta *Insurance Act*, an agent who receives any money as a premium for an insurance contract from the insured is deemed to hold the premium in trust for the insurer. The promissory note was merely confirmation of the amount owed by D to the appellants and did not amount to a revocation of the trust. As well, the arrangement

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between them meets the three characteristics of a trust, namely certainty of intent, certainty of subject-matter, and certainty of object. The fact that the trust funds in D's account were commingled with other funds does not undermine the relationship of trust between the parties. Also, D's actions in failing to remit to the appellants the insurance premiums collected on their behalf in July and August 1987 were clearly in breach of trust. Moreover, the appellants did not acquiesce in the breach of trust by asking for and receiving the promissory note from D.

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There are three ways in which a stranger to a trust can be held liable as a constructive trustee for breach of trust: as a trustee *de son tort*; for "knowing assistance"; and for "knowing receipt". The first type of liability is inapplicable to the present case since the bank never assumed the office or function of trustee. A stranger to a trust can be liable for breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of the trustees. Assuming the present case falls under this "knowing assistance" category, it is clear that only actual knowledge, recklessness, or wilful blindness will render the bank liable for participating in the breach of trust. Since the bank had only constructive knowledge, it cannot be liable under the "knowing assistance" category of constructive trusteeship.

Liability on the basis of "knowing receipt" requires that strangers to the trust receive or apply trust property for their own use and benefit. By applying the deposit of insurance premiums as a set-off against the parent company's overdraft, the bank received a benefit and thus received the trust funds for its own use and benefit. The bank cannot avoid the "property" issue by characterizing the deposit of trust monies in D's account as a debt obligation. A debt obligation is a chose in action and, therefore, property over which one can impose a trust. The receipt requirement in "knowing receipt" cases is best characterized in restitutionary terms. In this case the bank has been

enriched at the appellants' expense and thus, in restitutionary terms, there can be no doubt that the bank received trust property for its own use and benefit.

The second requirement for establishing liability on the basis of "knowing receipt" relates to the degree of knowledge required of the bank in relation to the breach of trust. While constructive knowledge is excluded as the basis for liability in "knowing assistance" cases, in "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. This lower threshold of knowledge is sufficient to establish the "unjust" or "unjustified" nature of the recipient's enrichment, thereby entitling the plaintiff to a restitutionary remedy. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property.

On the issue of knowledge, it is clear from the trial judge's findings that the bank was aware of the nature of the funds being deposited into, and transferred out of, D's account. The bank knew that D's sole source of revenue was the sale of insurance policies and that premiums collected by D were payable to the appellants. In light of the bank's knowledge of the nature of the funds, the daily emptying of D's account was in the trial judge's view "very suspicious". In these circumstances, a reasonable person would have been put on inquiry as to the possible misapplication of the trust funds. The bank should have inquired whether the use of the premiums to reduce the account

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overdrafts constituted a breach of trust. By failing to make the appropriate inquiries, the bank had constructive knowledge of D's breach of trust. The bank's enrichment was thus clearly unjust, rendering it liable to the appellants as a constructive trustee.

Per Sopinka J.: Subject to what was said in *Gold*, issued concurrently, La Forest J.'s reasons were agreed with.

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Cases Cited

By La Forest J.

Referred to: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787; *Gold v. Rosenberg*, [1997] 3 S.C.R. 767; *Canadian Pacific Air Lines, Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233; *R. v. Lowden* (1981), 27 A.R. 91; *Bank of N.S. v. Soc. Gen. (Can.)*, [1988] 4 W.W.R. 232; *Fletcher v. Collis*, [1905] 2 Ch. 24; *Selangor United Rubber Estates, Ltd. v. Cradock (No. 3)*, [1968] 2 All E.R. 1073; *Agip (Africa) Ltd. v. Jackson*, [1990] 1 Ch. 265, aff'd [1992] 4 All E.R. 451; *Foley v. Hill* (1848), [1843-60] All E.R. Rep. 16; *Fonthill Lumber Ltd. v. Bank of Montreal* (1959), 19 D.L.R. (2d) 618; *Lipkin Gorman v. Karpnale Ltd.*, [1991] 3 W.L.R. 10; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *In re Montagu's Settlement Trusts*, [1987] 1 Ch. 264; *Polly Peck International plc v. Nadir (No. 2)*, [1992] 4 All E.R. 769; *C.I.B.C. v. Valley Credit Union Ltd.*, [1990] 1 W.W.R. 736; *Bullock v. Key Property Management Inc.* (1997), 33 O.R. (3d) 1; *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia* (1975), 64 D.L.R. (3d) 78; *Carl B. Potter Ltd. v. Mercantile Bank of Canada*, [1980] 2 S.C.R. 343; *Arthur Andersen Inc. v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363, leave to appeal refused, [1994] 3 S.C.R. v; *Glenko Enterprises Ltd. v. Ernie Keller*

the parties considered this possibility confirms that the relationship was viewed by Citadel and Drive On as one of trust.

B. *The Liability of the Bank as a Stranger to the Trust*

1. General Principles

18 Having found that the relationship between Citadel and Drive On was one of trust, it is clear that Drive On's actions were in breach of trust. Quite simply, Drive On failed to remit to Citadel the insurance premiums collected on Citadel's behalf in July and August 1987. Moreover, I agree with the trial judge that Citadel did not acquiesce in the breach of trust by asking for and receiving the promissory note from Drive On. By accepting the note, Citadel did not represent that it was acquiescing in the use of the funds by the Bank. Consequently, Citadel is not barred from bringing an action against the bank for breach of trust; see *Fletcher v. Collis*, [1905] 2 Ch. 24 (C.A.); P. H. Pettit, *Equity and the Law of Trusts* (7th ed. 1993), at p. 491. The question remains whether the Bank, as a stranger to the trust between Citadel and Drive On, can be liable as a constructive trustee.

19 There are three ways in which a stranger to a trust can be held liable as a constructive trustee for breach of trust. First, a stranger to the trust can be liable as a trustee *de son tort*. Secondly, a stranger to the trust can be liable for breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of the trustees ("knowing assistance"). Thirdly, liability may be imposed on a stranger to the trust who is in receipt and chargeable with trust property ("knowing receipt"; see *Air Canada v. M & L Travel Ltd.*, *supra*, at pp. 809-11).

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> but most modern opinion takes it to be a restitutionary liability, based on the fact that the defendant has acquired the plaintiff's property.

The same view was expressed by the Privy Council in *Royal Brunei Airlines Sdn. Bhd. v. Tan*, [1995] 3 W.L.R. 64, at p. 70: "Different considerations apply to the two heads of liability. Recipient liability is restitution-based; accessory liability is not." These comments are also cited with approval by Iacobucci J. in *Gold, supra*, at para. 41.

48 Given the fundamental distinction between the nature of liability in assistance and receipt cases, it makes sense to require a different threshold of knowledge for each category of liability. In "knowing assistance" cases, which are concerned with the furtherance of fraud, there is a higher threshold of knowledge required of the stranger to the trust. Constructive knowledge is excluded as the basis for liability in "knowing assistance" cases; see *Air Canada v. M & L Travel Ltd.*, *supra*, at pp. 811-13. However, in "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. Iacobucci J. reaches the same conclusion in *Gold*, *supra*, where he finds, at para. 46, that a stranger in receipt of trust property "need not have actual knowledge of the equity [in favour of the plaintiff]; notice will suffice".

49 This lower threshold of knowledge is sufficient to establish the "unjust" or "unjustified" nature of the recipient's enrichment, thereby entitling the plaintiff to a restitutionary remedy. As I wrote in *Lac Minerals*, *supra*, at p. 670, "[t]he determination

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that the enrichment is 'unjust' does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief". In "knowing receipt" cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

50 Some commentators go further and argue that a recipient may be unjustly enriched regardless of either a duty of inquiry or constructive knowledge of a breach of trust. According to Professor Birks, a recipient of misdirected funds should be liable on a strict, restitutionary basis. In his article "Misdirected Funds: Restitution from the Recipient", [1989] *L.M.C.L.Q.* 296, he argues that a recipient's enrichment is unjust because the plaintiff did not consent to it, not because the defendant knew that the funds were being misdirected. In particular, he writes, at p. 341, that "[t]he 'unjust' factor can be named 'ignorance', signifying that the plaintiff, at the time of the enrichment, was absolutely unaware of the transfer from himself to the defendant". Birks, however, lessens the strictness of his approach by allowing a defendant to take advantage of special defences, including a defence arising out of a *bona fide* purchase for value. (See also P. Birks, "Overview: Tracing, Claiming and Defences", in P. Birks, ed., *Laundering and Tracing* (1995), 289, at pp. 322 *et seq.*)

51 In my view, the test formulated by Professor Birks, while not entirely incompatible with my own, may establish an unjust deprivation, but not an unjust enrichment. It is recalled that a plaintiff is entitled to a restitutionary remedy not because he or she has been unjustly deprived but, rather, because the defendant has been unjustly

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enriched, at the plaintiff's expense. To show that the defendant's enrichment is unjustified, one must necessarily focus on the defendant's state of mind not the plaintiff's knowledge, or lack thereof. Indeed, without constructive or actual knowledge of the breach of trust, the recipient may very well have a lawful claim to the trust property. It would be unfair to require a recipient to disgorge a benefit that has been lawfully received. In those circumstances, the recipient will not be unjustly enriched and the plaintiff will not be entitled to a restitutionary remedy.

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52 In the banking context of the present case, it is true that s. 206(1) of the *Bank Act*, R.S.C., 1985, c. B-1, negates any duty on the part of a bank to see to the execution of any trust, whether express, implied or constructive, to which a deposit is subject. In accordance with this provision, a bank is not under a duty to regularly monitor the activities of its clients simply because the funds deposited by those clients are impressed with a statutory trust. Nonetheless, this provision does not render a bank immune from liability as a constructive trustee or prevent the recognition of a duty of inquiry on the part of a bank. Indeed, in certain circumstances, a bank's knowledge of its customer's affairs will require the bank to make inquiries as to possible misapplication of trust funds. As discussed earlier, the degree of knowledge required is constructive knowledge of a possible breach of trust. It follows that a bank which is enriched by the receipt of trust property and has knowledge of facts that would put a reasonable person on inquiry is under a duty to make inquiries of its customer regarding a possible breach of trust. If the bank fails to make the appropriate inquiries, it will have constructive knowledge of the breach of trust. In these circumstances, the bank will be unjustly enriched and, therefore, required to disgorge the benefit it received at the plaintiff's expense.

53 The respondents argued that imposing liability on a banker who merely has constructive notice of a breach of trust will place too great a burden on banks, thereby

TAB 14

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cliffs Over Maple Bay (Re),*
2011 BCCA 180

Date: 20110414
Docket: CA038042

2011 BCCA 180 (CanLII)

In the Matter of the
***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36**

And

In the Matter of the
***Business Corporations Act*, R.S.B.C. 2002, c. 57**

And

In the Matter of The Cliffs Over Maple Bay Investments Ltd.

Between:

Fisgard Capital Corporation and Liberty Holdings Excell Corp.

Appellants
(Respondents on Cross-Appeal)

And

Century Services Inc., Lawson Lundell LLP

Respondents
(Appellants on Cross-Appeal)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson

On Appeal from the Supreme Court of British Columbia, March 25, 2010
(*Cliffs Over Maple Bay (Re)*, 2010 BCSC 389,
Vancouver Registry, Docket No. S083716)

Counsel for the Appellant:	G.J. Tucker Z.J. Ansley
Counsel for the Respondent Century Services Inc.:	M.I.A. Buttery L. Williams
Counsel for the Respondent Lawson Lundell LLP:	P. Roberts
Place and Dates of Hearing:	Vancouver, British Columbia January 14, 2011
Place and Date of Judgment:	Vancouver, British Columbia April 14, 2011

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Prowse
The Honourable Mr. Justice Chiasson

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Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal involves a three-way dispute among creditors of The Cliffs Over Maple Bay Investments Ltd. ("Cliffs" or the "Company"), which was the developer of an ill-fated real estate project near Maple Bay on Vancouver Island. Unfortunately, the Company was unable to secure a reliable water supply for its proposed golf course and residential units, and the project failed. The ensuing proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") were, as it turns out, similarly misconceived: this court ultimately ruled that a Supreme Court order made under the *CCAA* staying creditors' proceedings against the Company and authorizing debtor-in-possession ("DIP") financing, should not have been granted, no arrangement or compromise with creditors having been intended.

[2] In this last phase of the litigation, the court below had to determine the parties' respective entitlements to what remains of one *tranche* of DIP financing that the DIP lender, "Century", purported to advance in violation of a term in its letter of commitment. The letter had been incorporated by reference in the court order. The chambers judge who was seized of this matter below decided the priority issue as between Century and the existing first-ranking creditor, "Fisgard Liberty", with respect to the funds so advanced. He found that "Century's priority for advances made pursuant to the order is lost because ... those advances were not in compliance with the terms of the order." He granted a declaration that Fisgard Liberty was "entitled to priority" in respect of the funds, subject to the claim of a third creditor, "Lawson", to a solicitor's lien over all or part of the funds – a matter to be decided at a separate hearing following the issuance of his reasons. No appeal was taken from the order.

[3] However, Century then brought another motion before the chambers judge, questioning whether the funds had in law and in fact been advanced. On this occasion, the judge stated that his previous order had not determined "entitlement" to the funds. He declined to apply *res judicata*. He found that the advance had never taken place, that the funds remaining in Lawson's trust account had been

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subject to a *Quistclose* trust in Century's favour, and that Cliffs had never obtained an interest in the funds to which Fisgard Liberty's security interest could attach. Lawson was ordered to [re]pay what remained in its trust account to Century, and its motion for a declaration of solicitor's lien over the funds was dismissed.

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[4] In this court, Fisgard Liberty (with Lawson joining in) argues among other things that the question of priority was *res judicata* and that issue estoppel or cause of action estoppel should have barred the chambers judge from making the second order. These creditors also assert that the "new" issues concerning advance, trust and attachment raised in the second hearing below were wrongly decided. Fisgard Liberty seeks a declaration that its security interest attached to the funds upon their release to Lawson as Cliffs' agent.

[5] Following the issuance of these reasons, this court will consider Lawson's claim both to part of the "Administrative Charge" contemplated by the original DIP order and to a solicitor's lien over all the funds it holds in trust. Until that matter has also been disposed of by this court, Lawson holds the funds in trust.

Chronology

[6] The following chronology will, I hope, be sufficient to provide an overview of the facts of this case. I will provide additional facts as necessary when analyzing the issues on appeal.

- April 18, 2006 – Cliffs granted to the appellants Fisgard Capital Corp. and Liberty Holdings Excell Corp. (collectively, "Fisgard Liberty") a mortgage of its real property and a General Security Agreement ("GSA"), registered pursuant to the *Personal Property Security Act* ("*PPSA*"), charging all the Company's present and after-acquired property. (The Fisgard Liberty mortgage was a third mortgage, but it appears that the first and second mortgages, which secured fairly small amounts, were assigned at some point to Fisgard Liberty.)

- January 9, 2007 – The Company granted a fourth mortgage to Liberty Holdings Excell Corp. and Canada Trust Company in the amount of $7,650,000.

- June 15, 2008 – By this time, the Company found itself unable to move forward with the project or to draw down funds required for that purpose because of the water supply problem. Approximately $21,160,000 was outstanding under the third mortgage and $8,800,000 under the fourth, and the sum of approximately $7,340,000 was owed to various trade creditors, lessors and others.

- April-May, 2008 – Fisgard Liberty served the Company with notices of intention to enforce its security and on May 23 appointed a receiver.

- May 26, 2008 – Cliffs proceeded *ex parte* to obtain a stay of proceedings under the *CCAA* and the Court appointed The Bowra Group Inc. as Monitor. The order provided detailed terms for an "Administrative Charge", not to exceed $200,000, in favour of the Monitor and Cliffs' counsel, Lawson Lundell LLP ("Lawson") as security for the payment of their respective fees and disbursements. The Charge was to rank in priority over all other interests and charges.

- June 27, 2008 – The stay was extended in a 'comeback order' under which the Court authorized DIP financing not to exceed $2,350,000 and to be advanced in *tranches* not to exceed $500,000 each. The DIP lender was Century Services Inc. ("Century"), one of the respondents herein. The order, referred to by counsel as the "DIP Order", stated:

> THIS COURT ORDERS that, advances under the DIP Facility shall be made only at the request of the Monitor to the DIP Lender, such advances to be paid to Lawson Lundell LLP "in trust" and to be paid out only on the written request of the Monitor in consultation with the Petitioner, subject to further Order of the Court. [Emphasis added.]

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The DIP financing itself was to be on the terms in Century's commitment letter dated June 13, which contained an "appeal provision" as follows:

> The liability and obligation herein and any future obligations of any nature and kind of the Borrower shall be evidenced, governed and secured, as the case may be, by the following documents (collectively, the "Security") completed in a form and manner satisfactory to Century's counsel:
>
> a. Loan Agreement;
>
> b. Promissory note;
>
> c. A court[-]approved first and unencumbered charge on the real and personal property of the Borrower and no appeal therefrom being taken within 21 days after the pronouncement of that Order ... [Emphasis added.]

- July 7, 2008 – Cliffs and the Monitor signed an "Order to Pay" authorizing Century to advance the first *tranche* of DIP financing to Lawson as solicitors for the Company.
- July 18, 2008 – Fisgard Liberty obtained leave to appeal the June 27 order under the *CCAA*. (This occurred within the specified 21-day appeal period.)
- Early August 2008 – The following events took place as described by the chambers judge:

> [16] In early August, prior to the hearing of the appeal, Century purported to waive the appeal provision, and provided the $500,000 in DIP financing authorized by the order to pay to Lawson Lundell. Century sought, and was provided, further security from the Cliffs' principals for this payment. When commitment fees, interest charges, and other chargebacks were taken into account, Lawson Lundell held the net amount of $350,500 in trust on account of this payment.
>
> [17] Lawson Lundell was placed on an undertaking not to release any portion of this $350,500 until Century's solicitors provided them with written authority to do so. A further condition imposed was the payment of a $25,000 due diligence fee to Century.
>
> [18] On August 8, 2008, this undertaking and condition were satisfied.
>
> [19] In accordance with paragraph 8 of the DIP Order, the Cliffs and the Monitor requested and proceeded to use some

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> of the DIP funds held in trust by Lawson Lundell. On July 15, 2008, a real estate appraisal was prepared by the Altus Group in respect of the Cliffs' property located at North Cowichan on Vancouver Island at the direction of the Monitor (the "Altus Report"). The parties agree that approximately $98,000 of the DIP monies were used to pay for the Altus Report. Additionally, the parties agree that the amount of $12,958.52 was directed to be paid by the Monitor out of the DIP facility to consultants who provided advice on golf course specific issues. Payments were also made to the principals of the Cliffs on account of wages.
>
> [20] None of the parties dispute the propriety of these expenses, and none advance a claim of entitlement for these amounts. After these expenditures are taken into account, the $162,276.33 which constitutes the subject of this dispute remains in Lawson Lundell's trust account. [Emphasis added.]

- August 15, 2008 – This court allowed Fisgard Liberty's appeal and set aside the June 27 order for reasons indexed as 2008 BCCA 327. Tysoe J.A. for the Court stated at para. 41:

> I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

As mentioned earlier, the resulting order had not been settled or entered at the time of the initial hearing of the present appeal, but has now been entered. It states in material part:

> THIS COURT ORDERS that the appeal is allowed, and the order dated June 27, 2008 is set aside;
>
> AND THIS COURT FURTHER DECLARES that the powers and duties of the Monitor contained in the May 26, 2008 and June 27, 2008 orders herein continued until today's date and that the Administration Charge created by the May 26, 2008 order shall continue in effect so as to ensure payment of all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel;

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> AND THIS COURT FURTHER ORDERS that any issues relating to DIP financing are remitted to the Supreme Court;

- September 24, 2008 – Rice J. confirmed the appointment of a receiver of the Company's assets pursuant to Fisgard Liberty's GSA and granted Century a charge on the Company's property in the amount of $98,000, ranking in priority to all other security interests, to secure the cost of the "Altus report".
- February 17, 2009 – The chambers judge below approved fees and disbursements of the Monitor and counsel. The order did not state the amount so approved, but referred to invoices attached to the Monitor's report. We are told these amounted to $118,577.28.
- March 31, 2009 – Pitfield J. approved the sale of the Company's real property holdings to another company, subject to the prior changes in favour of Fisgard Liberty, various encumbrances in favour of the District of North Cowichan, and the security interest created by the Administrative Charge "as it may have been affected" by the order of June 27, 2008.
- May 4, 2009 – Century filed a motion in Supreme Court seeking *inter alia*:

  > 1. A declaration that the monies advanced by Century to The Cliffs Over Maple Bay Investments Ltd. ("Cliffs") on August 7, 2008 was made pursuant to and in accordance with the terms of a valid and enforceable court order dated June 17 [*sic*], 2009 (the "DIP Order");
  > 2. A declaration that an appeal setting aside the DIP Order does not affect the priority of the security held by Century for funds advanced prior to the appeal under the terms of the DIP Order. [Emphasis added.]

- May 5, 2009 – Fisgard Liberty filed a motion seeking an order that its mortgage and GSA charged the Company's property in priority to any claims or interests of Century or Lawson, an inquiry as to the amount Century had advanced to Cliffs, and an order for the delivery up to Fisgard Liberty of all amounts of such advance in the possession of Century or Lawson.

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- June 30, 2009 – After hearing both motions on May 12, the chambers judge issued reasons, indexed as 2009 BCSC 869, in which he formulated the issues before him as follows:

> 1. Was Century's advance of funds to Cliffs made in accordance with the terms of the DIP Order?
> 2. Does the successful appeal of the DIP Order deprive Century of priority for advances already made pursuant to the order? [Emphasis added.]

He concluded that the "appeal term" in Century's commitment letter had been intended to be a condition of the financing, that Century had not been entitled to waive it unilaterally or indeed without further order, and that:

> ... the August 7, 2008 advance of $500,000 was not authorized under the terms of the DIP order. Thus Century is not entitled to priority on the funds claimed. As Fisgard/Liberty are the first and second mortgagees of Cliffs, they are entitled to priority of the funds in question, with the exception of the amount of $98,000 spent on the Altus appraisal report, which is not in dispute by agreement between the parties. [At para. 51; emphasis added.]

Having answered the first issue in the affirmative, the judge found it unnecessary to go on to consider the second question. In his words, "Century's priority for advances made pursuant to the order is lost because I have concluded that those advances are not in compliance with the terms of the order." [Emphasis mine.] The judge's order of June 30, 2009 stated in material part:

> THIS COURT ORDERS that
>
> 1. The advance of $500,000 by Century, on or about August 7, 2008, to Cliffs Over Maple Bay Investments Ltd. ("Cliffs") (the "Funds"), was not authorized under the terms of the Order of this Court dated June 27, 2008.
> 2. Century is not entitled to priority over the Funds except with respect to the amount of $98,000 incurred in connection with the Altus appraisal report.
> 3. Fisgard and Liberty are entitled to priority over the Funds, except with respect to the amount of $98,000 incurred in connection with the Altus appraisal report.

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> 4. Nothing in this Order affects the entitlement, if any, of Lawson Lundell LLP, to a solicitor's lien over all or part of the Funds in its trust account, which shall be determined on a separate motion.
>
> 5. Fisgard/Liberty are entitled to their costs of this application. [Emphasis added.]

- In November 2009, Lawson and Fisgard Liberty filed motions which the chambers judge heard on November 24 and 26. Lawson sought a declaration that it was entitled to "payment of its outstanding accounts from the funds secured by the Administrative Charge granted herein by order of the Court on May 26, 2008", and to a solicitor's lien "over funds held in its trust account to the credit of the Petitioner [Cliffs] in an amount to be determined", and costs. For its part, Fisgard Liberty sought an order that:

  1. Century Services Inc. ("Century") pay to Fisgard and Liberty the sum of $239,860.31, together with interest on that sum from the date of making of the Advance by Century to The Cliffs Over Maple Bay Investments Ltd. ("COMB") in or about August 2008.
  2. Alternatively, an accounting to determine that portion of the $500,000 Advance which was actually paid into the hands of COMB in or about August 2008, and an order that Century pay to Fisgard and Liberty an amount calculated by deducting from the $500,000 Advance;
     a) the sum of $162,139.69 held in trust by [Lawson];
     b) the sum of $98,000 incurred in connection with the Altus appraisal report; and
     c) that amount determined on an accounting to have been actually paid into the hands of COMB from the Advance.
  3. Lawson pay to Fisgard and Liberty the sum of $162,139.69, together with interest on that sum from the date of payment of those funds into Lawson's trust account in or about August 2008.
  4. An accounting as to funds received into and/or paid out of Lawson's trust account in connection with the Advance and the *CCAA* proceeding.
  5. An order that Lawson pay to Fisgard and Liberty any sum held by Lawson for the benefit of or in connection with COMB other than the sum referred to in paragraph 3. ...

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The Chambers Judge's Reasons

[7] The chambers judge issued reasons dated March 25, 2010 that are indexed as 2010 BCSC 389. After describing the events I have summarized, he reviewed the amounts relevant to Lawson's claim:

> In addition to its claim of solicitor's lien, Lawson Lundell seeks a declaration that it is entitled to payment of its outstanding accounts from the administrative charge created in the Initial Order.
>
> To date, Lawson Lundell has been paid $15,700.70 by the Cliffs for legal fees and disbursements incurred in this matter. On June 26, 2008, Lawson Lundell rendered a bill in the amount of $7,291.34 for which it was paid in full. On August 18, 2008, Lawsons rendered a bill in the amount of $144,822.94 to the Cliffs for legal services and disbursements incurred up to that date in this matter, of which $8,409.36 has been paid. Thus, Lawson Lundell is owed $136,413.58 on account of that bill. Interest continues to accrue on this sum at 12% per annum.
>
> Since August 18, 2008, Lawsons has continued to perform work for the Cliffs, and as of January 5, 2009, had recorded unbilled work in progress in the amount of $50,516.29 inclusive of disbursements, but not any applicable taxes. [At paras. 30-2.]

[8] He described the issues before him as follows:

> 1. Does *res judicata* bar Century from claiming entitlement to the Funds?
> 2. Were the Funds "advanced" by Century to the Cliffs? Did the Cliffs ever own or possess the Funds?
> 3. Alternatively, are the Funds impressed in equity with a trust in Century's favour? If the Funds are subject to a trust, does this defeat Fisgard's claim?
> 4. Is Lawson Lundell entitled to a solicitor's lien over the Funds?
> 5. Is Lawson Lundell entitled to access the residue of the administrative charge on account of its fees and disbursements? [At para. 33.]

Items 4 and 5 will be the subject of our second hearing in this proceeding.

Res Judicata

[9] The chambers judge's analysis of *res judicata* began at para. 34 of his reasons. Fisgard Liberty contended that any claim by Century to the funds in trust was barred by both issue estoppel and cause of action estoppel in light of the chambers judge's earlier finding that Century's "advance of funds to Cliffs" on

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August 7, 2008, had violated the DIP Order. That the advance had indeed occurred was also reflected on the face of the order, which stated that "The advance of $500,000 by Century ... to [Cliffs] was not authorized" under the June 30 (DIP) Order, and that "Fisgard and Liberty are entitled to priority over the Funds." No appeal had been taken from that order. As a result, the lenders submitted, it was not open to Century to assert arguments that could and should have been raised at the hearing on May 12, 2009, nor to attack collaterally what was said to be a final order, i.e., the order of June 30, 2009 declaring Fisgard Liberty's priority over the funds.

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[10] The chambers judge reviewed the law relating to issue estoppel, which he noted (citing *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44, [2001] 2 S.C.R. 460) applies only where the question said to be previously decided was "distinctly put in issue and directly determined by the court" at the previous hearing. (See also *R. v. Van Rassel* [1990] 1 S.C.R. 225 at 238.) After reviewing the motion material filed prior to the hearing on May 12, 2009, his earlier reasons for judgment and the resulting order of June 30, 2009, the judge concluded that what he had considered and decided on the previous occasion was limited to the "construction of a clause in the commitment letter, whether the loan was made in compliance with the required terms and conditions, and the relative priorities Century and Fisgard held in relation to those funds as a result of the advance having been made in a manner contrary to these terms and conditions." He continued:

> It is clear that issue estoppel does not bar what Fisgard itself characterized as Century's "new arguments", based on unjust enrichment and the law of trusts. The beneficial ownership of the funds was not a question decided at the May 12, 2009 hearing, nor was it raised in the parties' arguments or the reasons of this Court. Thus, it cannot be said that this question was "distinctly put in issue and directly determined" at that time. Neither party raised, nor did the Court address, any party's equitable interest in or entitlement to the funds at the previous hearing.
>
> Further, I find that Century is not barred by issue estoppel from arguing that the Funds were never advanced to the Cliffs. The previous hearing only addressed priorities within the context of the DIP charge, not at large.
>
> Finding that Fisgard was entitled to "priority" over the Funds insofar as the terms of the DIP Order were concerned was not a finding on the issue of ownership. A "priority" is distinct from an *in rem* interest in property: *Dinning v. Workmen's Compensation Board*, [1932] 1 D.L.R. 373 at 378 (B.C.C.A.).

> A priority is not a property right; rather, it is a relative or comparative term, a concept which is legally distinct from that of ownership or title: *Attorney General of Newfoundland v. Churchill Falls (Labrador) Corporation Ltd.* (1983), 49 Nfld. & P.E.I.R. 181 at 226, ***aff'd***. on other grounds (1985), 56 Nfld. & P.E.I.R. 91 (Nfld. C.A.), ***aff'd***. [1988] 1 S.C.R. 1085. [At paras. 45-7; emphasis added.]

[11] The chambers judge also rejected Fisgard Liberty's submission that his order of June 30 had conclusively established that Century had not retained "title" to the funds. In his analysis, issues of "ownership" and the "impact of legal and equitable principles beyond the narrow scope of the priority granted in the DIP order itself" had not been argued and were simply "not in the contemplation of the Court" at the time of the previous hearing.

[12] Alternatively, if he was wrong and issue estoppel was applicable in the circumstances, the chambers judge said he would exercise his discretion to refuse to apply the doctrine where it would work an injustice. Again in his words:

> These proceedings are not the "one shot" trial of an action, and of necessity have required multiple hearings. Great care must be taken in applying *res judicata* to proceedings in the same action, as distinct from separate actions between the same parties: *Talbot v. Pan Ocean Oil Corp*. (1977), 3 Alta. L.R. (2d) 354 at 360 (C.A.).
>
> Further, the key finality rationale which was held in *Danyluk* to underpin *res judicata* is of limited weight in the present circumstances, given that Fisgard knew that issues surrounding Lawson Lundell's entitlement to a solicitor's lien would require a subsequent application relating to the Funds, and that no conclusive finding as to their ultimate disposition had been made in my June 30 reasons.
>
> I do not accept that Century is precluded from advancing its claim. The public interest in ensuring that justice is done on the facts of this case requires entertaining the parties' submissions on the merits. [At paras. 52-4; emphasis added.]

[13] The chambers judge then turned to cause of action estoppel. Unlike issue estoppel, he noted, this principle does not require that the issue have been directly raised and decided by the court previously. The classic statement to this effect is found in *Henderson v. Henderson* (1843) 3 Hare 100, [1843-60] All E.R. 378, where Wigram, V.C. stated:

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> In trying this question, I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time. [At 381-82; emphasis added.]

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[14] The chambers judge noted that "some flexibility" had been introduced to cause of action estoppel recently in *Hoque v. Montreal Trust Co. of Canada* (1997) 162 N.S.R. (2d) 321 (C.A.), where it was suggested that the language in *Henderson* was "somewhat too wide" and that the better principle was that "those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred." (At para. 37.) He also referred to *Buschau et al. v. Rogers Communications Inc.* 2003 BCSC 1718 (*rev'd on other grounds*, 2004 BCCA 142), where the Court observed that the rule in *Henderson* is of limited application to interlocutory applications and that judicial efficiency will often "be well served by allowing interlocutory applications to deal with only small parts of a larger picture." (Para. 36.)

[15] The chambers judge was not satisfied that cause of action estoppel had any application in the circumstances before him. This was not an instance, he said, in which Century was seeking any relief against Fisgard Liberty – indeed there was "no cause of action or claim asserted by Century against Fisgard". Instead, the dispute involved three competing creditors in a dispute over a pool of money. Further, the question litigated at the prior hearing had not decided the ultimate disposition of the funds. (Para. 65.) In the circumstances, the chambers judge found that cause of action estoppel had not been established and that in any event, he would again have exercised his residual discretion to refuse to apply the doctrine:

> I reiterate my earlier conclusion that it would be against the interests of justice if Century were precluded from arguing its legal and equitable entitlement to the funds, given that the issue was not considered, and that the fundamental "finality" consideration which underpins *res judicata* is of limited force in the circumstances. [At para. 68.]

Were the Funds Advanced to Cliffs?

[16] Being satisfied that neither issue estoppel nor cause of action estoppel applied to bar Century's motion, the chambers judge turned next to consider whether Century had in fact "advanced" the $500,000 *tranche* of DIP financing to the Company or its agents, thus (in Fisgard Liberty's submission) losing any rights to those funds. Even though Century had purported to advance the funds in breach of the appeal provision in the commitment letter, the chambers judge found that they had remained subject to the conditions specified in the DIP Order – that the Monitor authorize or request the release of funds and that the Monitor in consultation with the Company request Lawson to pay the funds out. The chambers judge said there was "no evidence" the Monitor had authorized or requested the funds and that accordingly, they had remained subject to a trust condition that would now never be satisfied. In his analysis:

> Where funds have been released by a lender to a borrower's solicitor with trust conditions governing their use, they do not become the property of the borrower until the trust conditions are satisfied. If the trust conditions are not satisfied, unspent funds must be returned to the lender. [At para. 78.]

This conclusion, the Court said, defeated the claims of both Fisgard Liberty and of Lawson. (Para. 89.)

Alternative Conclusions: Trust and Attachment

[17] Century argued in the alternative that Fisgard Liberty and Lawson would be unjustly enriched if they obtained the funds, but the chambers judge found a "clear juristic reason" – the existence of the financing agreement between Cliffs and Century, the foreclosure proceedings taken against Cliffs, and Lawson's "purported statutory entitlement" to a solicitor's lien pursuant to the *Legal Profession Act* – for

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any deprivation Century might have suffered if the funds had been advanced and Fisgard Liberty or Lawson were to receive them. (Para. 93.)

[18] In the further alternative, Century submitted that regardless of whether the funds had been advanced to Cliffs, they had been subject to a *Quistclose* trust in Century's favour: see *Barclay's Bank Ltd. v. Quistclose Investments Ltd.* [1970] A.C. 567 (H.L.). It was clear that such trusts are subject to the requirement of the three certainties (see *Twinsectra Ltd. v. Yardley* [2002] 2 A.C. 164, [2002] 2 All E.R. 377 (H.L.) at paras. 70-1, 101; *Re Westar Mining Ltd.* 2003 BCCA 11 at para. 12; *Giles v. Westminster Savings Credit Union* 2007 BCCA 411 at para. 31.) With respect to certainty of intention, the Court reviewed Century's commitment letter, which stated that the purpose of the DIP loan was to further the "construction of a golf course and development of the home lots and source an irrigation source for the golf course." This purpose had the effect of restricting the Company's freedom to use the funds. (Para. 105.) The surrounding circumstances and the terms of the DIP order shed additional light on the parties' intention that the funds were not to be used to extinguish the Company's general liabilities or wind up the project. The chambers judge found as a fact that the terms of the commitment letter disclosed a mutual intention on the part of Century and Cliffs to create a *Quistclose* trust. (Para. 110.)

[19] Being satisfied that the second certainty – certainty of subject matter – was shown, the chambers judge found that the commitment letter provided adequate clarity for the Court to determine that if the funds had been provided either to Fisgard Liberty or Lawson following the demise of Cliffs' development project, the funds would have been misapplied, i.e., the trust would have been breached. Thus, he said, certainty of objects was also made out.

[20] The next question was whether, again assuming the funds had been advanced to Cliffs, a *Quistclose* trust alone could defeat Fisgard Liberty's registered security interest. The chambers judge accepted that a *Quistclose* trust is a form of resulting trust, which comes into existence when money is advanced rather than at the time the trust is judicially declared to exist: see *Twinsectra*, *supra*, at paras. 100-

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102. Existing case law suggested that a constructive trust is not defeated by a prior security interest registered under the *PPSA* (see *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.* 2000 BCCA 458 and *Kimwood Enterprises Ltd. v. Roynat Inc.* (1985) 15 D.L.R. (4th) 751 (Man. C.A.)), but it was unclear whether the same was true of resulting trusts.

[21] The chambers judge found it unnecessary to decide this point, since in his analysis, the *PPSA* security interest of Fisgard Liberty had never "attached" to the funds and could therefore not defeat or rank ahead of Century's "equitable ownership". (Para. 121.) He cited various authorities for the proposition that before an interest may attach, the debtor must have something more than mere possession of the collateral or an interest that is "trifling" or "completely contingent" in nature. (See paras. 122-29.) Since the advances to be made under the DIP loan facility had been conditional upon the Monitor's making a written request, he concluded that the Company had not had sufficient rights in the collateral for Fisgard Liberty's security interest to have attached, regardless of whether the funds had been "advanced" or not. In his analysis:

> ... The will of a third party (the Monitor) is an external condition upon which the Cliffs' entitlement to the money is entirely dependent, and is therefore a barrier to the Cliffs obtaining "rights in the collateral" beyond a mere expectation or contingent right to future enjoyment.
>
> The Cliffs certainly had a right to receive the collateral; but this right was contingent upon the Monitor making a request in writing which has not and never will be made. Century held the entirety of the beneficial interest in the Funds through the *Quistclose* trust; the Cliffs never had actual possession of the Funds, had no control over their disposition, and could not compel Lawson Lundell to disburse them. The agency of the Monitor was required. In these circumstances, I find that the Cliffs did not have sufficient "rights in the collateral" for Fisgard's security interest to attach. [At paras. 131-32; emphasis added.]

[22] In the result, the chambers judge's order, dated March 25, 2010, stated in material part:

> 1. The Fisgard and Liberty Motion is dismissed;
> 2. Lawson pay the sum of $162,276.33 held in Lawson's trust account to the credit of The Cliffs Over Maple Bay Investments Ltd. (the "Funds") to Century;

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3. Lawson is entitled to payment of $81,422.72 on account of its fees and disbursements from the funds secured by the Administrative Charge granted herein by Order of the Court on May 26, 2008, unless an application for further relief in this regard is brought within 30 days of March 25, 2010;

4. Lawson's application for a declaration that it is entitled to a solicitor's lien over the Funds is dismissed; and

5. the parties each bear their own costs of the Lawson Motion and the Fisgard and Liberty Motion.

On Appeal

[23] Fisgard Liberty advanced the following grounds of appeal in its factum:

1. The learned Chambers Judge erred in law in determining *res judicata* did not bar Century from claiming entitlement to the Advance at the November 2009 hearing.

2. The learned Chambers Judge committed an error of law in determining the Fisgard/Liberty's security interest did not attach to funds in Lawson's trust account and with Century.

3. The learned Chambers Judge erred in law in holding that the funds in Lawson's trust account were subject to a *Quistclose* trust.

4. The learned Chambers Judge erred in law in finding that the funds in Lawson's trust account were not advanced to Cliffs.

5. The learned Chambers Judge erred in law in determining Lawson was entitled to the administration charge and that the charge had not been used up.

I propose to deal with item 1, and then with items 2, 3 and 4 together. Item 5, together with Lawson's grounds of appeal, will be addressed following the later hearing.

Res Judicata

[24] The appellant Fisgard Liberty acknowledged that whether *res judicata* should have applied to bar Century's motion is a question of law, reviewable on a standard of correctness. The only exception relates to the chambers judge's exercise of discretion not to apply the principle even if the circumstances of this case fell within its ambit. The appellant notes the well-known formulation of the circumstances in which an appellate court may interfere with such a decision – i.e., if the court below

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proceeded on a wrong principle or failed to give weight, or sufficient weight, to relevant considerations: see *Friends of the Old Man River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3 at 76-7; *Stone v. Ellerman* 2009 BCCA 294, (2009) 92 B.C.L.R. (4th) 203 at para. 94. We were also referred to a more recent formulation, which mandates intervention if the court below has misdirected itself as to the applicable law or made a palpable error in its assessment of the facts: see *British Columbia (Ministry of Forests) v. Okanagan Indian Band* [2003] 3 S.C.R. 371 at para. 43.

[25] The policy objectives underlying *res judicata* generally are well-known and have been discussed at length in the jurisprudence and in the academic context: see for example, Donald J. Lange, *Res Judicata in Canada* (3rd ed., 2010), chapter 1; *Henderson v. Henderson*, *supra*; *Hoystead v. Taxation Commissioner* [1926] A.C. 155 (J.C.P.C.); *Angle v. Minister of National Revenue* [1975] 2 S.C.R. 248; and *Danyluk v. Ainsworth Technologies Ltd.* 2001 SCC 44, [2001] 2 S.C.R. 460. The authors of Spencer Bower and Turner, *The Doctrine of Res Judicata* (4th ed., 2009), state:

> Two policies support the doctrine of *res judicata* estoppel: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. Maugham L.C. said:
>
> > The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

[26] Appellate courts in Canada have emphasized that the importance of finality and the principle that a party should not be ‘twice vexed’ (*bis vixari*) for the same cause, must be balanced against the other “fundamental principle” (see *Hoque* at para. 21) that courts are reluctant to deprive litigants of the right to have their cases decided on the merits: see *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 55; *Revane v. Homersham* 2006 BCCA 8, 53 B.C.L.R. (4th) 76 (C.A.) at paras. 16-7; Lange at 7-8.

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[27] *Res judicata* takes two forms in modern practice, cause of action estoppel (still sometimes called *res judicata*) and issue estoppel. Lange summarizes them as follows:

> In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding. [At 1.]

The distinction was described in more elaborate terms by Lord Denning, M.R. in *Fidelitas Shipping Co., Ltd., v. V/O Exportchleb* [1965] 2 All E.R. 4 (C.A.):

> The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in *rem judicatam* ... But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ... And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. ... But this again is not an inflexible rule. It can be departed from in special circumstances. ... [At 8-9; quoted with apparent approval in *Grandview v. Doering*, *infra*.]

[28] Although grounded in the same basic considerations, each form involves, or has traditionally involved, criteria that have been expressed in slightly different terms. The traditional criteria for cause of action estoppel, confirmed in Canada in *Angle, supra*, were summarized by Chief Justice Hewak in *Bjarnarson v. Manitoba* (1987) 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, ***aff'd.*** (1987) 45 D.L.R. (4th) 766 (Man. C.A.), as taken from *Grandview v. Doering* [1976] 2 S.C.R. 621:

> 1. There must be a <u>final decision</u> of a court of competent jurisdiction in the prior action [the requirement of "finality"];

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> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
> 3. The cause of action and the prior action must not be separate and distinct; and
> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. [At para. 6; emphasis added.]

It is perhaps unnecessary to state that the doctrine contemplates two "causes" – the first having ended in a final judgment that bars a "second claim for the same cause": see *Mohl v. University of British Columbia*, 2006 BCCA 70 at paras. 23-4. In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy: see also Lange at 147; *Comeau v*. *Breau* (1994) 145 N.B.R. (2d) 329 (C.A.) at para. 18; and *Letang v. Cooper* [1965] 1 Q.B. 222 (C.A.) at 242-43.

[29] Presumably, it is the breadth of the fourth requirement listed above ("could have been argued") that leads Fisgard Liberty to argue that cause of action estoppel can have application in the case at bar. The appellant cites four cases for the proposition that "both issue and cause of action estoppel apply to subsequent motions in the same proceeding on the same questions finally decided in an earlier motion". Three of these authorities – *Air Canada v. British Columbia* (1985) 21 D.L.R. (4th) 685 (B.C.C.A.), *Heather's House of Fashion Inc. (No. 2) (Re)* (1977) 24 C.P.R. (N.S.) 193 (Ont. S.C.J.), and *Las Vegas Strip Ltd. v. Toronto (City)* (1996) 30 O.R. (3d) 286 (Gen. Div.) – do not in my view support this proposition. *Air Canada* was decided on the basis of issue estoppel (see 697), and *Heather's* and *Las Vegas* involved proceedings that resembled separate causes of action (in the substantive, rather than the formal, sense), as opposed to steps taken in the same proceeding. The fourth case, *Re Agil Holdings Ltd.;* (also indexed as *Scherer v. Price Waterhouse* (1985) 32 A.C.W.S. (2d) 259 (Ont. H.C.J.), does take a broader view than the prevailing one, and illustrates the difficulty in some cases of distinguishing between cause of action and issue estoppel.

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[30] While it is arguable that the other conditions associated with cause of action estoppel exist in this case, I am not persuaded the chambers judge erred in concluding that because of the procedural context of the two orders – in particular, the fact this is a "dispute over a pool of money between three competing creditors" in one proceeding – the doctrine does not apply. At the very least, one would have to bend it considerably out of shape to fit the facts with which we are concerned. Given my view that issue estoppel applies, it is not necessary to go to these lengths.

[31] Turning then to issue estoppel, I note the three traditional "tests" adopted by the Supreme Court of Canada in *Angle*, namely:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. ... [At 254; emphasis added.]

There is also the well-known formulation of issue estoppel given by Middleton J.A. in *McIntosh v. Parent* [1924] 4 D.L.R. 420 (Ont. C.A.):

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [At 422; emphasis added.]

[32] The narrow wording ("directly determined") adopted in these and other authorities, however, has not been construed as strictly as one might expect. In *Danyluk,* Binnie J. for the Court stated at para. 54 that issue estoppel applies "to the issues of fact, law, and mixed fact and law that are necessarily bound up [my emphasis] with the determination of that 'issue' in the prior proceeding". This would seem to echo the formulation provided by Lord Shaw in *Hoystead*:

> … Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result

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> either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.
>
> Thirdly, the same principle – namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs. [At 165-66; emphasis added.]

The wording used in *Hoystead* (where it was held that issue estoppel applied not only to the admission of a fact fundamental to the first decision, but also to "an erroneous assumption as to the legal quality of that fact") which I have underlined above was approved in *Angle, supra*, at 255, and by this court in *Morgan Power Apparatus v. Flanders Installations Ltd*. (1972) 27 D.L.R. (3d) 249, at 252. (See also *Hill v. Hill* (1966) 57 D.L.R. (2d) 760 (B.C.C.A.) at 764; *Insurance Co. of the State of Pennsylvania v. Global Aerospace Inc*. 2010 SKCA 96 at para. 78; *Foster v. Reaume* [1927] 1 D.L.R. 1024 (Ont. S.C., App. Div.) at 1033; *Prince v. T. Eaton Co*.(1992) 91 D.L.R. (4th) 509 (B.C.C.A.) at 522.)

[33] Lange (see 58-65 and the cases cited therein) suggests that an "extended form" of issue estoppel has been adopted in some provinces such that any question that could have been decided or could have been raised at the first proceeding, will be barred in the second. However, this approach has not received appellate approval in this province, and when it has been used, seems not to have led to a different result than the traditional approach. (See the discussion in *Re Agil Holdings, supra*, and in Lange at 62-3.) Neither party relied on the extended form of issue estoppel in the case at bar.

[34] Century submits that both the requirement of finality and that of the "same question" are not met in the case at bar. Regarding finality, it contends at para. 59 of its factum:

> ... to the extent [the chambers judge's] Order addressed entitlement to the Trust Funds, Century submits that it was not final. Cause of action (and issue estoppel) only apply when the court has no further jurisdiction to hear the issues or to vary or rescind its decision. In this case [the chambers judge]

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> retained jurisdiction to consider entitlement to the Trust Funds. To the extent [his] later decision contradicted his earlier one, the later decision is to be taken as the final one on the basis that it is the most informed expression of the Court's opinion. [Emphasis added.]

With respect, if by this Century is suggesting that having made a final order, a court may subsequently adopt a "more informed opinion" of the matter and proceed to contradict its earlier order, I must disagree. Obviously, this proposition flies in the face of the principle of finality which is the essence of *res judicata.* Nor did the court below "retain jurisdiction" to vary or rescind its decision: only Lawson's claim, which had the potential of trumping that of Fisgard Liberty, was left for another day. The issue of priority as between Century and Fisgard Liberty was finally determined and the Court did not have jurisdiction to rehear it or to vary or rescind its order.

[35] In connection with the "same question" criterion, Century naturally relies on the chambers judge's observation that the issue of the "ultimate disposition of the funds" was not decided in the first proceeding. It says that since "issues of ownership" were not in the Court's contemplation, Century's position in the second hearing did not amount to a collateral attack on the first order; that the two applications concerned "different facts altogether"; that evidence advanced at the second hearing was not known to Century (although Mr. Roberts on behalf of Lawson suggested it was available) until Lawson's affidavit evidence was filed; and that:

> The two hearings related to separate and distinct causes of action, as the First Hearing sought a declaration in respect of the parties' priorities in respect of Cliffs' estate generally, whereas the Second Hearing concerned the parties' potential entitlement to the Trust Funds in particular.

[36] It is certainly true that the two hearings dealt with different issues. The question is whether the issues of advance, attachment and trust were "necessarily bound up" with or "fundamental to" the determination of priority as between Fisgard Liberty and Century. In my opinion, it is clear that to the extent the earlier order addressed priority, it assumed "entitlement". As a matter of logic, the question of whether the advance had been validly made to Cliffs (through its agent Lawson) should have been raised and determined before or as part of the determination of

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priority over the advance as between Century and Fisgard Liberty. A finding that Fisgard Liberty was entitled to priority in respect of the funds would seem to be "bound up with" or indeed to rest on the 'foundation' that the funds had indeed been advanced to Cliffs. (Indeed, it was precisely because Century had made an advance in violation of the 21-day period that it had lost its priority in the first hearing.) In the wording used by Lange, entitlement or ownership was part of the "latent structure supporting the express question [of priority] by virtue of an … assumed recognition of that structure." (*Supra*, at 47.) If the funds had not been advanced, the question of priority would have been moot. Priority was not a "threshold issue", as counsel for Century suggests; it was the ultimate issue.

[37] In this respect, the case at bar resembles *Zimbel Estate v. Pascoe* (1992) 80 Man. R. (2d) 142 (Q.B.), where a party who had participated in a proceeding to interpret a will was barred from challenging the validity of the same will in a subsequent proceeding. The Court noted that "there is an underlying assumption that parties participating in an action for interpretation of the will have inferentially conceded its validity. Courts do not construct invalid wills. If there is some issue as to validity, that issue must first be determined." The Court also quoted the following passage from the 1969 edition of Spencer Bower and Turner, *Res Judicata*:

> Whenever it is shown that the party against whom a judicial decision is ultimately pronounced omitted to raise by pleading, argument, evidence, or otherwise some question, or issue, or point which he could have raised in his favour by way of defence or support to his case without detriment to his position or interests in the pending, or in future, proceedings, and which, therefore, it was his duty (in a sense) to have then raised, the adverse general decision, though it contains no express declaration to that effect, is deemed to carry with it a particular adverse decision on the question, issue, or point so omitted to be raised, just [as] much as if it had been expressly raised by the party, and expressly determined against him. And this is so whether the question or issue is simply passed over through inadvertence, or is made the subject of express or implied assumption or admission. [At 160.]

[38] Similarly, in *Ernst & Young Inc. v. Central Guaranty Trust Co.* 2006 ABCA 337, the Alberta Court of Appeal held that the defendant's apparent acceptance of the validity of certain trusts in a receivership proceeding barred it from challenging the validity of the trusts in a subsequent action. (See also *Hill v. Hill* (1966), 57

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D.L.R. (2d) 760 (C.A.) at 769; *R. v. Duhamel* (1982) 33 A.R. 271 (C.A.) at 277-8 (***aff'd.*** [1984] 2 S.C.R. 555.); Spencer Bower and Turner (2009), *supra*, at § 8.09, 8.10 and 8.12, and cases cited therein.)

[39] Ms. Buttery contends on behalf of Century that at the time of the first hearing in May 2009, her client was not aware of the amount of funds Lawson was holding in trust – a fact she says was important because Century needed to know whether the question of "entitlement" was "worth fighting about". Since it was clear, and the first order contemplated, that Lawson would be asserting entitlement to a solicitor's lien at a later date, she says it would be "incongruous" if other parties (i.e., Century) would not have been able to assert claims at a later date as well. In her submission, there was nothing in the record to suggest that the "super-priority" question (i.e., priority as between Fisgard Liberty and Century as the DIP lender) decided at the first proceeding was intended to be the only issue, or that its determination was to bar any of the parties from raising questions as to whether an advance had taken place and whether Cliffs' interest had attached. Although the parties' notices of motion and the first order itself had all referred to "advances" as though they were an accepted fact, Ms. Buttery emphasized that counsel were dealing with an unusual situation (i.e., the reversal of a stay granted under the *CCAA* and the finding that the Supreme Court's authorization of DIP financing was invalid). This situation gave rise to many uncertainties in the course of the 'unwinding' of the restructuring, and counsel found themselves having to adapt to facts as they unfolded. Thus, it is implied, the requirements of due diligence should not be applied too stringently in this instance.

[40] These arguments may bear on the issue of the chambers judge's discretion, but I do not find them persuasive on the prior question of whether issue estoppel is technically applicable to this case. If counsel at the first hearing intended the Court to deal with only one of many issues, they should have made that clear to the other parties and to the Court, which may have had an opinion on the subject. They should have begun with what logically was the first issue – were the funds advanced? – and left the ultimate issue – which creditor has priority? – for later if

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that course was acceptable to the Court, and if it became necessary. They should have reserved not only the question of Lawson's entitlement in the order but Century's – a course that would have placed the problem of "conflict" front and centre. They should have been much more restrictive in the wording of the first order, ensuring that the Court would not be embarrassed by what appears to be a contradiction of its first order by the second order. If nothing else, this case is a cautionary tale for practitioners in the insolvency area about the importance of clearly informing the Court as to the issues being raised, and properly stating in the Court's order exactly what was determined and what was not.

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[41] In my respectful view, the question of Cliffs' "entitlement" to the funds advanced by Century was, to paraphrase the reasoning in *Hoystead*, a "point fundamental to the [first] decision ... assumed by [Fisgard Liberty] and traversable by [Century] which was not traversed." I conclude that the chambers judge erred in permitting Century to re-open the question, and in ruling that its arguments were not barred by issue estoppel.

[42] This brings us to the exercise of the chambers judge's discretion not to apply issue estoppel, a question that is also dependant on case law that is not completely consistent and in which subtleties abound. In *Danyluk*, the Court ruled that it was an error of principle not to address the factors for and against the exercise of the discretion not to apply issue estoppel and that "The list of factors is open ... The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." (Para. 67.) The most important of these, the Court said, was the potential for injustice since, as noted by Jackson J.A. in dissent in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* [1993] 6 W.W.R. 1 (Sask. C.A.):

> The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard. [At 21.]

[43] Binnie J. was referring, however, to the tribunal-to-court context rather than the court-to-court context. He noted the Court's earlier decision in *G.M. (Canada)*

v. Naken [1983] 1 S.C.R. 72, where it was said that the discretion not to apply issue estoppel is "very limited in its application'". A broader discretion, Binnie J. stated, was warranted in relation to the decisions of administrative tribunals. This distinction was made in *Furlong v. Avalon Bookkeeping Services Ltd*., 2004 NLCA 46, where the Court emphasized that *Danyluk* had not modified *Naken, supra,* and that potential injustice becomes relevant only where, having exercised due diligence, a party has not received a "full and fair hearing". (At paras. 41-2; my emphasis.)

[44] In *Proctor & Gamble Pharmaceuticals Canada, Inc. v. Canada (Minister of Health)* [2004] 2 F.C.R. 85, Rothstein J., then of the Federal Court of Appeal, suggested for the majority that the discretion is limited to "special circumstances" (citing *Henderson v. Henderson, supra*, at 115), which would include fraud, misconduct or the discovery of decisive fresh evidence that could not have been adduced at the earlier proceeding by the exercise of reasonable diligence, although "fairness considerations could cancel the exercise of discretion." (Para. 29.) In *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd*. (1988) 47 D.L.R. (4th) 431 (B.C.S.C.), Chief Justice McEachern described the exception as requiring "some overriding question of fairness" necessitating a rehearing. (At 438.)

[45] Fisgard Liberty contends that Century made no argument and led no evidence at the second hearing as to any "special circumstances" that would justify the chambers judge's decision declining to apply *res judicata* in this case. Whilst acknowledging that considerations of fairness are relevant, the appellant emphasizes that the first hearing occupied an entire day, that the parties filed extensive written submissions, and that both are "sophisticated commercial entities". Not surprisingly, Century responds that if the chambers judge "did not decide the ultimate disposition of the funds" and if the issues raised in the second hearing were "simply not in the contemplation of the court" in the first hearing (as the chambers judge himself suggested), it would be unfair if Century were held to be bound by the earlier order.

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[46] It will be recalled that the chambers judge enunciated two reasons for finding that it would be contrary to justice to apply issue estoppel in this case. The first was that these proceedings are not the "one-shot" trial of an action and that "great care" should be taken in applying *res judicata* to proceedings in the same action. On this point, he cited *Talbot v. Pan Ocean Corp*. (1977) 3 Alta.L.R. (2d) 354 (C.A.) at 360, where the Court was discussing the fact that in many interlocutory applications – e.g., an application for an interim injunction – the court proceeds on assumed or incomplete facts. Obviously, such applications do not give rise to final decisions, and *res judicata* has no place. (For this reason, it seems to me that the comment quoted by the chambers judge from *Buschau v. Rogers* (see para. 14 above) cannot be correct.) The Court in *Talbot* did not suggest that estoppel is to be applied with "great care" in subsequent motions once a final determination has been made on an issue; nor did it make any mention of the residual discretion not to apply issue estoppel.

[47] The second reason given by the chambers judge was that the principle of "finality" underlying *res judicata* was of "limited weight" in this instance, given that Fisgard Liberty knew a subsequent application would be necessary to decide Lawson's claim to the funds, and that no "conclusive finding as to their ultimate disposition" had been made in the order of June 30, 2009. As has been seen, however, Fisgard Liberty's status was squarely raised at the first hearing and Fisgard Liberty had no reason to think that the Court's declaration of priority over Century was anything less than a "conclusive finding" on that question.

[48] We are of course not exercising our discretion as a matter of first instance. The question for us is whether the chambers judge proceeded on a wrong principle or failed to give weight or sufficient weight to valid considerations in exercising his discretion as he did. In my view, he did err in failing to recognize the finality of his earlier order as between Century and Fisgard Liberty and in failing to give consideration to the narrowness of the circumstances in which his discretion could properly be exercised. It cannot be said "special circumstances" existed here: this was a monetary dispute between sophisticated lenders that had been decided in

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favour of one of them, and it was not open to the Court to change its mind in favour of a party that had thought of additional arguments that it could and should have mounted at the previous hearing. No overriding question of fairness was engaged. Indeed, in my view, it would be unfair to permit Century's arguments to prevail. I would allow the appeal on this ground.

"Advance" and "Attachment" Issues

[49] In the event I am wrong on the applicability of issue estoppel to this case, however, I turn to the alternative grounds of appeal advanced by Fisgard Liberty, namely that the chambers judge erred in determining that the funds in Lawson's trust account had not been advanced to Cliffs and in finding that the appellant's security interest did not attach to the funds. In my view, these two issues are essentially the same: if the funds were indeed "advanced" to the Company (through its agent Lawson), then, subject to the remaining issue concerning the existence of a *Quistclose* trust, Cliffs would have been entitled to the funds and thus would have had a sufficient interest to which Fisgard Liberty's security could attach.

[50] It will be recalled that the chambers judge's order of June 27, 2008 authorized the Company to borrow an amount not exceeding $2,350,000 from Century, "provided that such advances under the DIP Facility will be made in *tranches* not to exceed $500,000, unless permitted by further Order of this Court". The conditions under which such advances would be made were specified:

> ... advances under the DIP Facility shall be made only at the request of the Monitor to the DIP Lender, such advances to be paid to Lawson Lundell LLP "in trust" and to be paid out only on the written request of the Monitor in consultation with the Petitioner [the Company], subject to further Order of the Court.

[51] The order also stated that the "DIP Facility" would be on the terms and conditions in the commitment letter, which in turn said the purpose of the loan was to "facilitate further construction of the golf course and development of the home lots and source an irrigation solution for the golf course." A commitment fee of 3% was

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to be deducted from each advance, "representing the Commitment Fee for the entire Facility and six months' interest for each draw."

[52] On or before July 17, 2008, Cliffs and the Monitor signed an "Order to Pay" addressed to Century and its solicitors, Boughton Law Corporation ("Boughton"). The material part of this document stated:

> Please accept this as your irrevocable authority and direction to payout [*sic*] of the first advance under the above referenced mortgage loan all taxes, assessments and utilities charged against the Property given as security; property valuation fee, solicitor's charges, accrued interest to interest adjustment date, and other expenses payable, and to pay all prior encumbrances on the Property as follows:
>
> | | |
> |---|---|
> | Mortgage Advance Amount | $500,000 |
> | Less: | |
> | The Lender's Commitment Fee | 70,500 |
> | The Lender's Six Month Interest Reserve | 54,000 |
> | Boughton Law Corporation | |
> | Holdback for estimated legal fees, disbursements and taxes to complete the transaction** | 25,000 |
> | Net mortgage proceeds under the 1st advance payable to Lawson Lundell LLP "In Trust" | $350,500 |
>
> Dated this 17th day of July, 2008. [Emphasis added.]

[53] On August 7, Boughton remitted its trust cheque to Lawson. Referring to Cliffs as "Borrower" and Century as "Lender", Boughton advised:

> Further to your recent correspondence with ... our office, we enclose our trust cheque payable to Lawson Lundell LLP In Trust in the sum of $350,000.00 representing the advance under the above loan, in accordance with the approved Order to Pay.
>
> The enclosed funds are sent to you on your undertaking not to release any portion of the funds to your client until we have provided you with our written authority that it is in order for you to do so.

The written authority referred to in the second paragraph was given later the same day by an email from Boughton to Lawson, confirming that:

> It is now appropriate pursuant to my instructions to release the monies you have in trust to your client. The only undertaking I impose upon your firm is

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> to pay the due diligence fee of $25000 to Century Services Inc., care of Boughton Law Corporation.
>
> I also confirm that my client has waived the condition requiring no appeals to be filed. [Emphasis added.]

[54] The following day, Lawson forwarded its trust cheque in the amount of $25,000 payable to Century. According to the affidavit of Ms. Ferris of Lawson, her firm also disbursed $100,000 to the Monitor, $4,400 to 648962 B.C. Ltd., and $36,000 to Mr. and Ms. Paulin, the principals of Cliffs. (The $100,000 payable to The Bowra Group Inc. represented the costs of preparing the Altus Report, which had been the subject of a specific priority order mentioned earlier.) On August 15, further funds were disbursed by Lawson, leaving the sum of $162,276.33 in its trust account as at November 1, 2009.

[55] The chambers judge stated at para. 21 of his reasons that there was "no evidence that the Monitor requested the release of the Funds, as required by the DIP Order and they were never used by the Monitor or the Cliffs." With respect, the Company and the Monitor did sign the Order to Pay and surely an "order" goes even farther than a "request". In my view, it simply cannot be said that the conditions for the advance set forth in the order of June 27, 2008 were not met. I conclude, with respect, that the chambers judge fell into clear error at para. 89 of his reasons in finding that the funds remained held by Lawson on a trust condition "that has not and now never will be satisfied" and that therefore Century was entitled to their return.

Quistclose Trust

[56] This leads us to the final alternative argument, acceded to by the chambers judge, that the funds were impressed with a *Quistclose* trust in Century's favour, based on the terms of the commitment letter which were incorporated by reference into the DIP Order of June 27, 2008. The letter described the purpose of the DIP Facility thus:

> 3. PURPOSE: To facilitate further construction of the golf course and development of the home lots and source an irrigation solution for the golf course.

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> 8. CONDITIONS: The obligation of Century to make the facility available is subject to and conditional upon each of the following:
>
> a. Court [-] authorized DIP borrowing, with the funds to be used for development purposes as disclosed by the borrower. [Emphasis added.]

[57] A *Quistclose* trust is a purpose trust of a very special kind. Waters, Gillen and Smith in *Waters' Law of Trusts in Canada* (3rd ed., 2005) write that such trusts arise "when moneys are loaned by a lending institution expressly for the purpose for which the borrower intends to use the loan." (At 565.) The authors continue:

> These trusts occur when moneys are loaned by a lending institution expressly for the purpose for which the borrower intends to use the loan. The lender advances the moneys on the condition that they are to be held "on trust" by the borrower until the time for expenditure upon the purpose takes place. At that point in time, having the authority of the loan agreement, the borrower applies the moneys to the purpose and becomes a debtor *vis-à-vis* the lender. If the contemplated expenditure upon the purpose does not occur, the moneys are held in trust by the borrower for the lender – that is, ahead of all the unsecured creditors of the borrower. [At 565.]

[58] A somewhat narrower description was given in a Canadian case, *Niedner Ltd. v. Lloyds Bank of Canada* (1990) 72 D.L.R. (4th) 147 (Ont. H.C.J.):

> A Quistclose trust is created when A lends money to B for the specific purpose of enabling B to pay its creditors or a specific class of them ["C"]. The money is then impressed with a trust and may not be reached by third parties other than the beneficiaries of the trust. Assuming the purpose of the trust should fail, the money reverts back to the settlor of the trust. ... [At 151; emphasis added.]

[59] In fact, *Quistclose* trusts have had a broader application, at least in the U.K. In *The Quistclose Trust in a World of Secured Transactions* (1992) 12 Oxf. U. Leg. Stud. 333, Professor M. Bridge observes that they have arisen in three main situations**:**

> These cases are, for the most part, centred on three fact patterns, though the authorities relied upon in the *Quistclose* decision itself are confined to the first of these categories. First, A puts in funds B, a debtor, for the purpose of paying C, one of B's creditors. The practical issue here is whether the funds may be retained or recovered by B's trustee-in-bankruptcy. Secondly, A consigns goods to C in response to an order placed by B and A draws on B for payment of the price. The question here is whether the cargo has been appropriated to secure the due payment of the bill of exchange. This

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> transaction can also occur in a two-party form, where A consigns goods to B and then, after so advising B, discounts a bill drawn upon B. Thirdly, A transfers to B, a bank, bills of exchange payable to A in payment for other bills drawn earlier by A upon B. B becomes insolvent before paying the bills drawn upon it. Is B merely indebted to A in respect of the bills transferred to it? Another bank insolvency problem occasionally presents itself where one bank is put in funds to be remitted to another bank and becomes insolvent before the remittance is made. [At 347.]

The author also notes certain characteristics common to the decided cases:

> A characteristic of these cases is the immediacy of the debtor's need for outside sources of funding. The debtor may already be faced with a bankruptcy petition by one of his creditors, who may be a judgment creditor, or he may be poised to abscond to evade his creditors, or already by lying in a debtors' prison. In one case, the money is paid over to the debtor to obtain the release of the payer's property from a sheriff executing on behalf of a judgment creditor of the debtor. It does no harm to the payer's case if the money advanced is still capable of being returned *in specie*. This was so in one case where it was a surety who was seeking the return of the money to the payer, who unlike the surety was unaware that the money was being advanced conditionally to save a bank from bankruptcy. In all of these cases, the party paying the money does so on an emergency, rescue basis and the debtor is merely a conduit through whom money is channelled to the outside creditor. In the circumstances, the debtor's possession of the money is far removed from misleading anyone entering into further dealings with him and any benefit accruing to the unsecured general creditors would be of a windfall nature. Nor is the payer, it seems, receiving anything in the nature of a premium or reward for the very high degree of risk attendant upon the transaction being a mere loan. It is therefore difficult to see that the payer receives an unfair advantage over the payee's other creditors, in the period leading up to the bankruptcy, making it unfair to allow him to retain or recover the money as the case may be. [At 348.]

[60] Such trusts are the subject of much controversy and academic comment in the United Kingdom, and it appears that they are used mainly there to overcome the vagaries of what Bridge describes as its "antiquated" property security laws (see 345.) Many questions about them remain unanswered, despite the important role played by Lord Millett in explaining them in the academic and judicial contexts: see *The Quistclose Trust: Who can Enforce it?* (1985) 101 LQR 269; *The Quistclose Trust – a Reply* (2011) 17:1 Trusts & Trustees 7. (See also Dennis R. Klinck, *Re-Characterizing the Quistclose Trust: Lord Millett's Obiter Dicta in Twinsectra* (2005) 42 Can. Bus. L.J. 427 at 428-31, and Michael Smolyansky, *Reining In the Quistclose Trust: A Response to Twinsectra v. Yardley* (2010) 16 Trusts & Trustees 558.)

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[61] The first situation described by Professor Bridge existed in the *Quistclose* case itself, *Barclays Bank Ltd. v. Quistclose Investments Ltd., supra.* It involved a company, Rolls Razor Ltd., that had declared a dividend but was unable to pay it. The company negotiated a loan from Quistclose Investments Ltd. for the purpose of paying it, and the lender paid the money into a specific account at Barclay's Bank for this purpose. Before the dividend could be paid, however, Rolls Razor went into bankruptcy and the bank purported to apply the funds against the bankrupt's outstanding indebtedness to the bank. The House of Lords held that a (resulting) trust had been created for the purpose of paying the dividend, which trust had "failed", entitling the original settler, the lender, to the return of the funds, and ensuring the bank did not enjoy what would have been a windfall.

[62] The chambers judge in the instant case began his discussion by noting the most recent leading case in this context, the decision of the House of Lords in *Twinsectra, supra.* Its facts were somewhat closer to those in the case at bar: a lender agreed to advance funds to "Y" for the specific purpose of enabling him to purchase certain property. The lender forwarded the loan proceeds in trust to a firm of solicitors on their undertaking to hold the funds until they were applied to the acquisition of the property by Y. The firm instead paid the funds to another solicitor, who simply paid them out on Y's instructions, utilizing some £358,000 for purposes unrelated to the acquisition. The second solicitor then went bankrupt, and the loan was not repaid.

[63] The House of Lords applied *Quistclose*, ruling that the money had been subject to a trust in the firm's hands, that the trust met the three certainties, that the firm was liable for breach of the trust, and that the second solicitor held the remaining funds in trust for the lender, subject to a power to apply it by way of loan to Y in accordance with the undertaking.

[64] The chambers judge quoted by way of overview a passage from the reasons of Lord Millett in *Twinsectra*, part of which I will also reproduce:

> Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the

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> extent to which he may have taken security for repayment the lender takes the risk of the borrower's insolvency. But it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases. [At para. 68.]

At the same time, his Lordship observed:

> A *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower. Similarly payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cashflow. Commercial life would be impossible if this were not the case.
>
> The question in every case is whether the parties intended the money to be at the free disposal of the recipient: *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 100 *per* Lord Mustill. ... [Paras. 73-4.]

[65] As we have seen, in considering whether the three certainties were met in the case at bar, the chambers judge noted the statement of purposes for which the loan was to be used, finding that these were "intended to, and had the effect of, restricting the Cliffs' freedom to utilize the funds for purposes other than those set out in the commitment letter." (Para. 105.) Further, since the commitment letter had been executed after the Company had sought *CCAA* protection, Century was obviously aware that Cliffs' continued existence was "in doubt". He continued:

> ... In light of the danger that Century's funds would simply be used to satisfy other creditors and wind up the project instead of constructing and completing the development, it makes sense that Century set out the permitted purposes for which the Funds could be used in clauses 3 and 8(a) of the commitment letter. The purpose of Century's credit facility was not to pay secured creditors and wind up the project; rather, it was to provide funds which were required for the project's continued existence and completion. [At para. 107.]

[66] It will be recalled that the Order to Pay which was signed by Cliffs and the Monitor and then forwarded to Century and its solicitors, was somewhat more specific than the commitment letter about the purposes for which the first advance

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was to be used. (See above at para. 52.) It referred to the payment of prior encumbrances, taxes, assessments, utility charges, a property valuation fee, and solicitor's charges. The chambers judge seemed to assume that this "direction" from the Monitor to Century was in conflict with the commitment letter: he said it could not "negate or vary the terms of the purpose trust in the commitment letter." Having said this, he concluded without more that the language of the commitment letter disclosed a mutual intention between Century and the Company to create a *Quistclose* trust.

[67] With respect, I find myself in disagreement with much of the chambers judge's analysis. First, I doubt that a *Quistclose* trust was created. This is not a case in which A put B in funds in order to pay C, a creditor of B. (See *Niedner, supra*.) Rather, A (Century) put B (Lawson, not a debtor) in funds to disburse to B's client, C (Cliffs), on B's undertaking to hold the money until it received A's written authority to release to C. The undertaking was a type of trust, certainly, but did not, as in *Twinsectra,* impose a duty on B to supervise how its client C used the money. The trust was almost completely executed – Lawson disbursed most of the advance, including the $25,000 paid to A – and did not "fail" in the *Quistclose* sense.

[68] Nor is this a case like *Twinsectra*, in which the bankruptcy or insolvency of C made the purposes of the loan impossible, such that a resulting trust was necessary to ensure the monies reverted to A and did not fall into the hands of C's creditors. Indeed, A was fully aware of C's financial condition and believed at the time of the advance that it was entitled to the super-priority given by the DIP Order. Once it had obtained additional covenants from the borrower's principals, Century directed that the funds be disbursed. Upon all the conditions being met, the funds were *ipso facto* "advanced" to C. The Company would have been bound by contract to use the funds for the general purposes it had agreed on in the letter, but the monies were then its own, and but for this litigation, would presumably have been paid into its general bank account. As Lord Wilberforce observed in *Quistclose*, "in the absence of some special arrangement creating a trust ..., payments of this kind are made upon the basis that they are to be included in a company's assets." There was no

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obligation on Cliffs to hold what it received from the loan proceeds in any separate account; rather, as stated by Lord Millett in *Twinsectra*, "the money [was] intended to be at the free disposal of the [borrower]" and could be used as part of its cash flow.

[69] In short, although it is obvious that Cliffs agreed as a matter of contract that the funds would be used for the general purpose stated, I disagree that this restriction gives rise to any inference of an intention on the part of both parties (Century and Cliffs) to create the specialized vehicle that is a *Quistclose* trust. The only trust in existence here was the usual type created by the undertaking given to the lender by Lawson as Cliffs' solicitors. The terms of that trust were met, as were the terms of the DIP Order.

[70] Nor do I agree that the terms of the Order to Pay, under which the Monitor directed Century to pay the first *tranche* into Lawson's trust account and gave its "irrevocable authority" to pay out taxes, assessments, utilities, solicitor's charges and prior encumbrances, would have constituted a breach or "negation" of any trust or of the June 27 order incorporating the commitment letter. Century chose to make the advance it did in July 2008, fully aware of the circumstances that had led to the receivership and to the *CCAA* order, pronounced on May 26, 2008. We may assume Century had fully discussed the risk of lending to Cliffs and had decided that advancing funds for the specified purposes in the conditions prevailing in August was necessary or conducive to the Company's efforts to revive the project (which efforts were referred to by Tysoe J.A. in his reasons, *supra*, at paras. 14-5). And, by signing the Order to Pay, the Monitor must be taken to have indicated its satisfaction that the expenditures were appropriate. Both decisions were judgements that in my opinion were not unreasonable, and ones that a court should not second-guess.

[71] In summary, I conclude that:

- the chambers judge did not err in finding that cause of action estoppel did not apply;

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- the chambers judge did err in finding that the criteria for issue estoppel were not met. Although different questions were addressed and different evidence was adduced in the two hearings, the issues addressed in the second proceeding were a foundational element of the first order;

- the chambers judge erred in the exercise of his discretion not to apply issue estoppel in that he failed to recognize the finality of his first order, and the requirement for "special circumstances" such as fraud or the discovery of fresh evidence that due diligence could not have brought forward. No such circumstances were present in this case;

- the chambers judge erred in finding that the conditions in the DIP Order for the advances by Century were not met;

- contrary to the finding below, the *tranche* which Century purported to advance on August 7, 2008 was advanced in fact and in law, and Fisgard Liberty's interest thereupon attached to the funds and remains attached to the residue still held by Lawson, subject to the outstanding issue of Lawson's claim;

- the chambers judge erred in finding that a *Quistclose* trust was intended or created; and

- the chambers judge erred in ruling that the use by Cliffs of the funds for the purposes stated in the Order to Pay would have been a violation of the commitment letter or the order that incorporated it.

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[72] I would therefore allow Fisgard Liberty's appeal and declare that as between it and Century, its interest in the funds ranks in priority to any interest of Century, but that pending this court's determination of Lawson's claim to the funds (or settlement of that issue by the relevant parties) the funds shall continue to be held by Lawson in trust.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Madam Justice Prowse"

I Agree:

"The Honourable Mr. Justice Chiasson"

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TAB 15

Court of Queen's Bench of Alberta

Citation: E Construction Ltd v Sprague-Rosser Contracting Co Ltd, 2017 ABQB 657

Date: 20171031
Docket: 1403 13215
Registry: Edmonton

2017 ABQB 657 (CanLII)

Between:

E Construction Ltd.

Applicant

- and -

Sprague-Rosser Contracting Co. Ltd. and Regional Municipality of Wood Buffalo

Respondents

Memorandum of Decision on Trust Claim
of the
Honourable Madam Justice J.M. Ross

Introduction

[1] This application was initially made by E Construction Ltd [ECL], a subcontractor and creditor of Sprague-Rosser Contracting Co Ltd [SR], seeking a declaration that funds held by the solicitors for Alvarez & Marsal Canada Inc, the Receiver of SR [Funds], are subject to a trust, and a declaration that ECL has a beneficial right and interest in the Funds.

[2] The Funds were transferred by the legal counsel of the Regional Municipality of Wood Buffalo [RMWB] to Burstal Winger Zammit LLP [BWZ], legal counsel of SR, in trust, regarding RMWB Projects. This occurred prior to the Court appointment of the Receiver and Trustee in Bankruptcy under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] on July 31, 2014.

event, is subordinate to the perfected security interests of RBC and BDC Capital Corporation [BDC], pursuant to the *PPSA*, s 35.

[36] Pioneer submits that the *PPSA* has no application, because the Funds were not provided to secure payment or performance of an obligation. The RMWB, as the settlor, did not intend to or put the money in trust to secure payment or performance, but simply to allow the flow of monies owing on the construction project.

[37] The *PPSA*, s 3, provides:

> 3(1) Subject to section 4, this Act applies to:
>
> (a) Every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) Without limiting the generality of clause (a) a chattel mortgage, conditional sale, a floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.

[38] A trust interest only becomes a security interest under the *PPSA* if the *substantive* purpose of creating the trust is to secure payment or performance of an obligation: ***Skybridge Holidays Inc, Re*** (1998), 11 CBR (4th) 126, 1998 CarswellBC 1214 at paras 8-10 (BC SC), aff'd 1999 BCCA 185, 11 CBR (4th) 130. One relevant factor in determining the substance of the transaction is whether the relationship between trustee and beneficiary, or settlor and beneficiary, is a debtor-creditor relationship, or some other relationship (e.g., agent-principal): Ronald C Cuming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law*, 2nd ed (Irwin Law Inc, 2012) at 139 [*PPSL*].

[39] The authors of *PPSL* observe that, where a trustee and beneficiary, or a settlor and beneficiary, are in a debtor-creditor relationship, "the issue to be determined is whether the trust is being used as a vehicle to secure the obligation that is the basis of this relationship or is merely the source of the obligation": at p 140.

[40] SR was debtor of Pioneer and other subcontractors. But SR was neither trustee nor settlor, and had either no interest in the Funds (the July 25, 2104 letter stipulated that *all funds* were to be disbursed to SR's subcontractors), or at most a contingent interest to any potential surplus. Neither RMWB, as settlor, nor BWZ, as trustee, were debtors of Pioneer or other unpaid subcontractors. BWZ's only obligation was to comply with the trust conditions, or return funds to RMWB.

[41] Pioneer's beneficial interest is not related to an obligation of RMWB, nor an obligation of BWZ other than the obligation to fulfill the terms of the trust. I agree that the *PPSA* does not apply.

C. The Bankruptcy and Insolvency Act's Distribution Scheme

[42] The Receiver contends that it is contrary to the bankruptcy distribution scheme under the *BIA* to permit a contractual arrangement between the parties that circumvents a secured creditor's interest and priority. In ***Greenview (Municipal District No 16) v Bank of Nova Scotia***, 2013 ABCA 302 at para 41, 556 AR 34 (***Horizon Earthworks***), the Court of Appeal held:

2017 ABQB 657 (CanLII)

TAB 16

Gainers Inc. v. Pocklington Financial Corporation, 2000 ABCA 151

Date: 20000523
Docket: 9603-0216-AC

2000 ABCA 151 (CanLII)

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MADAM JUSTICE FRUMAN
THE HONOURABLE MR. JUSTICE ROOKE

BETWEEN:

GAINERS INC.

Plaintiff/Defendant by Counterclaim
(Appellant)

- and -

POCKLINGTON FINANCIAL CORPORATION,
POCKLINGTON HOLDINGS INC. and
POCKLINGTON FOODS INC.

Defendants/Plaintiffs by Counterclaim
(Respondents)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE CLARKE
DATED THE 7TH DAY OF DECEMBER, 1995 AND
9TH DAY OF FEBRUARY, 1996
FILED THE 9TH DAY OF APRIL, 1996

MEMORANDUM OF JUDGMENT

COUNSEL:

N. J. Pollock, Q.C.
D. J. Wilson
For the Appellant/Plaintiff

No representation
For the Defendants/Respondents

2000 ABCA 151 (CanLII)

about written contracts to weeks of historical investigation. And oral evidence admitted for a very limited purpose sometimes ends by supplanting the words of the contract.

[11] In this case the Management Services Agreements were very important, governing many of the matters which the trial judge ruled upon. Both of them contained the following clauses:

> "6.01 This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof and supercedes [sic] all prior negotiations, proposals and agreements, whether oral or written, with respect to the subject matter hereof.
>
> 6.06 No term or provision hereof may be amended except by an instrument in writing signed by the Parties to this Agreement."

[12] The contract expressly says that the management fees were as agreed by the parties, subject to a minimum payment. For at least two relevant fiscal years, only the minimum was paid, with no evidence of any other agreement. After the foreclosure and after the government became the sole shareholder of Gainers, Mr. Pocklington unilaterally pronounced a retroactive increase in fees, which was never agreed to by the government. The retroactive adjustment was accepted by the trial judge, resulting in a substantial reduction in the amount awarded to Gainers at trial.

[13] Though this supposed power of Mr. Pocklington to make debts shrink and swell retroactively was allegedly based upon past practice, close examination of the evidence shows that past practice had not been frequent or recent, it was always done for tax reasons, and it was never done after final financial statements were signed. The adjustments here were large, unprecedented, long after the relevant final financial statements, and without any tax benefit. Clearly they cannot stand.

[14] It seems to us that much of what the trial judge did was to amend the Management Services Agreements by implication, conduct, oral discussions, or oral agreements. The quoted clauses alone would suffice to prevent that.

[15] When the deal is complete in the written contracts, and not subject to an escrow, other evidence (parol evidence) is inadmissible to vary or contradict a clear written contract: ***Chant v. Infinitum Growth Fund*** (1986) 15 O.A.C. 393, 55 O.R. (2d) 366, 369-70 (C.A.); ***Case Threshing Machine Co. v. Mitten*** (1919) 59 S.C.R. 118, 49 D.L.R. 30. More classic cases are cited in 1 ***Chitty on Contracts*** para. 12–094 (28th ed. 1999).

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[16] Even earlier promises or representations, otherwise having legal effects, may be wiped out by suitable contractual clauses: ***Case v. Mitten, supra***. There is such a "whole contract" clause here. Such a clause may also bar side oral contracts: ***Steeplejack Services (Can.) v. Access Scaffold etc.*** (1989) 98 A.R. 310, 318 (M.). See further Chitty, ***op. cit. supra***, at para. 12-102.

[17] Similarly, the parties may validly contract, as they did here, that oral modifications of the contract will be ineffective, and that amendments must be written: ***Soc. Gén. (Can.) v. Gulf Can. Res. (#1)*** [1995] 9 W.W.R. 453, 456, 169 A.R. 317 (C.A.).

[18] The power to imply terms is to be used cautiously, and no implied term can be inconsistent with or contrary to the express terms of the contract: ***Sullivan v. Newsome*** (1987) 78 A.R. 297, 303-04 (C.A.); ***Catre Ind. Alta. v. R.*** (1989) 99 A.R. 321, 63 D.L.R. (4th) 74, 85 (C.A.).

[19] Nor can the court find a collateral parol contract inconsistent with the express written contract: ***Catre Ind. v. R., supra; Hawrish v. Bank of Mtl.*** [1969] S.C.R. 15, 66 W.W.R. 673. Collateral contracts are viewed suspiciously and must be proved strictly, along with clear intent to contract: ***Hawrish*** case, ***supra***, at 678 (W.W.R.).

[20] The intent of the parties is to be determined from the words which they put in their written contract; their subjective intent is irrelevant: ***Eli Lily & Co. v. Novopharm*** [1998] 2 S.C.R. 129, 166, 161 D.L.R. (4th) 1, 27. Subjective intent cannot even be used to interpret the written words, if they are clear: ***id.*** at pp. 27-29 (D.L.R.).

[21] The trial judge thought (para. 68, p. 118 A.R.) that he could bypass all those rules by using the so-called "armchair rule". That rule lets the court see what the authors of the contract knew when they wrote it, in order indirectly to assist in resolving any difficulties in what certain words of the contract refer to. For example, a contract may contain unclear references to other people, or to things. The background knowledge may help to decide who or what was referred to. The expression quoted comes from the law of wills, and suggests that often one cannot construe a contract without knowing the facts which the parties knew when they contracted (not later). The rule under discussion is rarely called "the armchair rule" in contracts law, but that expression explains more than such vague or misleading labels as "the factual matrix". See ***Boyes v. Cook*** (1880) 14 Ch.D. 53, 56 (C.A.).

[22] For example, the parties may contract about a piece of land, or an earlier contract, or an existing paper, in vague terms. One then needs to know what they knew, in order to identify the vague reference. See, for example, ***Bank of N.Z. v. Simpson*** [1900] A.C. 182, 187-88 (P.C.(N.S.W.)); ***Charrington & Co. v. Wooder*** [1914] A.C. 71, 82 (H.L.(E.)); ***Indian Molybdenum v. R.*** [1951] 3 D.L.R. 497, 502-03 (S.C.C.). A good explanation of this doctrine is found in ***Reardon Smith Line v. Hansen-Tangen*** [1976] 1 W.L.R. 989, 995 - 97, [1976] 3 All

TAB 17

Guaranty Properties Limited v. Edmonton (City of), 2000 ABCA 215

Date: 20000726
Docket: 9803-0242-AC

2000 ABCA 215 (CanLII)

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE MCFADYEN
THE HONOURABLE MR. JUSTICE O'LEARY
THE HONOURABLE MADAM JUSTICE RUSSELL

BETWEEN:

GUARANTY PROPERTIES LIMITED and CLAREVIEW ESTATES INC.

Appellants
(Applicants)

- and -

THE CITY OF EDMONTON

Respondent
(Respondent)

Appeal from the Whole of the Order of
THE HONOURABLE MR. JUSTICE M.B. O'BYRNE
Dated the 13th day of February, A.D. 1998
Filed the 4th day of May, A.D. 1998

MEMORANDUM OF JUDGMENT

COUNSEL:

W.W. SHORES
For the Appellants

R.S. HOFER
For the Respondent

conclusion however, it is necessary to determine whether the potential evidence might be admissible at trial.

The Parol Evidence Rule

[20] The parol evidence rule generally bars extrinsic evidence that alters, adds to, subtracts from, or varies the meaning of the written document. The parties intentions are to be found in the document itself: ***Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.*** (1998), 223 A.R. 180, 183 W.A.C. 180 at para. 27 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 600, online: QL (S.C.C.). Therefore, unless the evidence falls within an exception to the parol evidence rule, it would be inadmissible at trial.

[21] The appellants contend that the rule restricts the admission of evidence as to the parties' intent to cases of ambiguity, and that the definition of "assessable area" is unambiguous. As the agreements were drafted by the City, which omitted to expressly remove the exchange lands from the definition of "assessable area", they must be interpreted against the City. Further, the appellants say that the entire agreement clause precludes any reference to the Twin Ice Agreement, as the interpretation of these agreements cannot be subject to the application of collateral agreements: ***Dynatec Mining Ltd. v. PCL Civil Constructors (Canada) Inc.*** (1996), 25 C.L.R. (2d) 259 at 262 (Ont. Gen. Div.); ***Société Generale (Canada) v. Gulf Canada Resources Ltd.*** (1995), 31 Alta. L.R. (3d) 137 at 140 (C.A.), additional reasons (1996), 38 Alta. L.R. (3d) 305 (C.A.).

[22] The City disputes such a narrow application of the parol evidence rule. It relies on ***Re Ulster Petroleums Ltd. and Pan-Alberta Gas Ltd.*** (1975), 53 D.L.R. (3d) 459 (Alta. C.A.) in which this court overturned an interpretation of a contract under Rule 410(e) on the basis that the language in the agreement should not have been construed in isolation from disputed material facts.

[23] But even assuming a narrow application of the rule, exceptions to the rule would permit the admission of parol evidence, including evidence to dispel ambiguities, or to demonstrate the factual matrix of the agreement; or to establish a condition precedent, or a collateral agreement, or that the documents were not intended to constitute the whole agreement; or in support of a claim for rectification: ***Gallen v. Allstate Grain Co.*** (1984), 9 D.L.R. (4th) 496 at 506, leave to appeal to S.C.C. refused (1984), 56 N.R. 233 (S.C.C.)(B.C.C.A.).

[24] In ***Eli Lilly & Co. v. Novopharm Ltd.***, [1998] 2 S.C.R. 129, the Supreme Court of Canada restated the three salient features of the parol evidence rule. First, where the written language of an instrument is clear and unambiguous on its face, it is unnecessary to consider extrinsic evidence. Second, where the words are ambiguous, evidence of surrounding circumstances may be admitted to enable the court to properly construe the language. Third, such

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evidence must shed light on the surrounding circumstances, not merely on the subjective intention of the parties.

(a) Is there any ambiguity on the face of the agreement?

[25] External evidence will be allowed to resolve ambiguity, but the ambiguity must arise from the language itself and not from external circumstances: Fridman, ***The Law of Contract***, 3rd ed. (Toronto: Carswell, 1994) at 458. Schedule "D" to the two servicing agreements requires the City to calculate PACs using a formula which is based on the "assessable area". That schedule contains the following definition:

> Assessable Area or AA - the area of the Developer's subdivision less the municipal, school and environmental reserves, the area of public utility lots, the area of pipeline rights of way and the area of freeways and arterial roads.

It is evident that the language of the definition is clear and unambiguous. What concerns the City is the absence of any reference to the exchange lands, which it says was the result of oversight. However, an omission is not equivalent to an ambiguity in this context. So the first exception to the parol evidence rule does not assist the City.

(b) Does the servicing agreement form the entire agreement?

[26] The City claims that the servicing agreements were not intended to constitute the entire agreement, and therefore parol evidence should be allowed to show the entire scope of the agreement as reflected in the Twin Ice Agreement. However, the servicing agreements contain

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an express “entire agreement” clause which states:

> It is agreed that this written instrument embodies the entire agreement of the parties hereto with regard to the matters dealt with herein, and that no other understandings or agreements, verbal or otherwise, exist between the parties.

The effect of an “entire agreement” clause was discussed by this court in ***Paddon-Hughes Development Co., supra***, in which O’Leary J.A. referred to the affinity between the parol evidence rule and entire agreement clauses. The wording of the clause in that case did not prevent this court from using extrinsic evidence to interpret a term in the agreement. But there the court was not asked to rely on extrinsic evidence to establish a collateral agreement.

[27] Here, the court would be asked to admit the Twin Ice Agreement. One purpose in doing so would be to establish that it forms part of the servicing agreement, which might violate the express exclusion in the entire agreement clause. Another purpose would be to explain why the exemption was not included in the servicing agreement, and to demonstrate that the entire agreement clause, and the servicing agreement itself, was not intended to govern other contractual relations between the parties: See ***Turner v. Visscher Holdings Inc.*** (1996), 23 B.C.L.R. (3d) 303 at 308 (C.A.). But the existence of other contractual relationships between the parties without more might be irrelevant to the interpretation of the servicing agreements. Moreover, the trial court might be called upon to interpret the Twin Ice Agreement, which might offend the arbitration clause in that agreement.

[28] Thus it is doubtful that the extrinsic evidence would be admissible to show that the servicing agreements are not the entire agreement. However, one other reason to admit the Twin Ice Agreement would be to establish the context in which the servicing agreements were made, to determine whether they mistakenly omitted reference to the exchange lands and should be rectified.

(c) Is the evidence admissible to rectify the contract?

[29] The City notes that, as a result of the ***Gallen*** decision and given the factual background set out in the Affidavit of Larry Benowski, exceptions to the parol evidence rule may apply, specifically that there is evidence which may support a claim for rectification. A claim for rectification is typically granted only in the case of common mistake where it can be established that both parties had continually agreed on the term, but that term was erroneously and/or inaccurately expressed in the written document: ***Oriole Oil & Gas Ltd. v. American Eagle Petroleums Ltd.*** (1980), 27 A.R. 415 (Q.B.), aff’d (1981), 24 Alta. L.R. (2d) 121 (C.A.), leave to appeal to S.C.C. refused (1981), 27 A.R. 180 (S.C.C.). In the case of a unilateral mistake, rectification will only be granted where it would be tantamount to fraud to allow the other party to rely on the contract as written: Fridman, ***supra***, at 827.

2000 ABCA 215 (CanLII)

TAB 18

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Giles v. Westminster Savings Credit Union,*** 2007 BCCA 411

Date: 20070810
Docket: CA33783

Between:

Laurie Giles and others

Appellants
(Plaintiffs)

And

Westminster Savings Credit Union, Gary J. Thomas, Taylor Ventures Ltd., Ralph Dennis Taylor, Joanne Taylor, Floyd Taylor, Vince Taylor, Michael G. Oliver, Raymond E. Drabik, Ewen C. Carruthers and William R. Chalcraft, carrying on business under the firm name and style of Oliver, Drabik, Carruthers & Chalcraft, a Partnership, Kenneth Rogers Appraisals Ltd. and Kenneth N. Rogers

Respondents
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Donald
The Honourable Madam Justice Levine

J.N. Laxton, Q.C. and C.M. Weiler	Counsel for the Appellants
E.J. Milton, D.A. Goult and R.D.W. Dalziel	Counsel for the Respondent, Westminster Savings Credit Union
D.R. McGowan	Counsel for the Respondent, Gary J. Thomas
J.M. Webster, Q.C.	Counsel for the Respondents, Michael G. Oliver and Raymond E. Drabik
Place and Date of Hearing:	Vancouver, British Columbia May 7-10, 2007

2007 BCCA 411 (CanLII)

Place and Date of Judgment: Vancouver, British Columbia
August 10, 2007

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice Levine

2007 BCCA 411 (CanLII)

knowing assistance in a breach of trust, or for knowing receipt of trust property. In my respectful view, the trial judge's findings on these issues are unassailable.

[28] As the reasons of the judge amply demonstrate (paras. 250-255) there was no certainty as to the subject matter of the alleged trust for two reasons. First, the arrangement between the parties left it unclear as to what interest TVL held in any of the subject properties. Second, it was uncertain as to what percentage each of the plaintiffs owned in any of the subject properties, or whether any such interest could be diluted by the sale of further shares in that property.

[29] When the parties made their agreements, no one could say what property was held in trust for any plaintiff. The plaintiffs allege each party's interest was determinable as an exercise of TVL's discretion. The discretion on which this argument is based demonstrates the impossibility of there being any certainty of subject matter. On the plaintiffs' submission, TVL could decide what part of the "trust property" to keep for itself, and what part to divide among others who had "invested" in that property. The plaintiffs do not suggest a standard to govern the exercise of TVL's discretion, nor did the trial judge find any such standard.

[30] Uncertainty of subject matter is fatal to the plaintiffs' allegation of a conventional trust.

[31] I also respectfully agree with the trial judge's conclusion that the evidence failed to establish a ***Quistclose***, or purpose trust. Such a trust requires that the person receiving the money is not free to apply the money for any purpose other than the specific purpose agreed to. Here, the trial judge found that the evidence did

2007 BCCA 411 (CanLII)

not establish a mutual intention that the monies could not be used for other purposes of TVL (para. 269). He rightly rejected the plaintiffs' subjective intentions as a foundation for finding such a purpose. And he pointed to the debtor/creditor relationship between the parties, and the absence of any obligation on TVL's part to keep the plaintiffs' funds separate.

[32] It is evident that in the absence of any trust relationship, the claims against the defendants Credit Union and Thomas for knowing assistance in breach of trust, or for knowing receipt of trust funds, cannot be supported.

[33] I would not give effect to any of the grounds of appeal directed at the trial judge's conclusions on these issues.

b. The Allegation of Fiduciary Duty

[34] The trial judge held that although TVL owed, and was in breach of, the duties of a fiduciary, the defendants Credit Union and Thomas were not liable as accessories because neither had actual or constructive knowledge of TVL's breach of duty, and there was no reason for either to be put on their inquiry. He also held that even if they had inquired, the most likely inquiries would not have disclosed a breach of fiduciary duty (para. 542).

[35] I respectfully disagree with the trial judge's conclusion that TVL owed the plaintiffs the duties of a fiduciary.

[36] The trial judge's conclusions on fiduciary duty are based essentially on the broad discretion he found TVL held in managing the funds placed with it by the

2007 BCCA 411 (CanLII)

TAB 19

Court of Queen's Bench of Alberta

Citation: Imor Capital Corp v Horizon Commercial Development Corp, 2018 ABQB 39

Date: 20180116
Docket: 1603 12068
Registry: Edmonton

2018 ABQB 39 (CanLII)

Between:

Imor Capital Corp.

Plaintiff

- and -

**Horizon Commercial Development Corp,
Prism Capital Corp, Granite Man Ltd,
Prism Real Estate Investment Corporation,
Ali Ghani, Abdul Ghani, and Kamal Elkadri**

Defendants

**Reasons for Judgment
of the
Honourable Madam Justice Dawn Pentelechuk**

Introduction

[1] The Plaintiff Imor Capital Corp [Imor] is a secured creditor of the Defendant Horizon Commercial Development Corp [Horizon], a company now in receivership.

[2] The assets of Horizon have been sold and distributed except for the sum of $134,200.52, which is the subject of this application.

into a separate trust account. TCT did not do so, depositing the funds into its operating account. The motion judge found TCT's computer accounting program identified the funds collected on behalf of the carriers and held the trust funds were sufficiently identified.

[49] The Court of Appeal allowed the appeal, concluding that once purported trust funds were co-mingled with other funds, they lost their character as trust funds. The Court stated at para 20:

> In my view, the facts in this case regarding how the funds were held and accounted for are not distinguishable from the ***Henfrey Samson Belair*** case, and consequently, the legal result must also be the same. The funds relating to the carriers' fees collected by TCT prior to January 24, 2002 lost their character as trust funds **when they were not segregated and were co-mingled with other TCT funds** [emphasis added].

[50] A literal interpretation of this passage suggests that once trust funds are co-mingled, the trust ceases to exist and it is unnecessary to examine whether the funds are otherwise traceable or identifiable. In my view, this interpretation is neither correct in law nor consistent with subsequent jurisprudence.

[51] First, the Court in ***GMAC*** concluded that the facts in that case were not distinguishable from the facts in ***Henfrey Samson*** and the same legal result must follow. But key factual differences did exist. The legislation in ***Henfrey Samsen*** deemed the taxes collected to be held in trust and deemed the funds collected to be held separate and apart from the assets of the collector. The legislation went further to provide that the unpaid tax formed a lien and charge on all assets of the collector, in the nature of a secured debt.

[52] In ***GMAC***, as in the case before me, the legislation did not deem the funds to be held in trust, but rather, mandated that the funds be placed in a separate trust account. The intention of the legislation was to avoid any issue of co-mingling. Further, the regulation in ***GMAC*** did not attempt to expand the reach of the trust beyond those amounts collected on behalf of the carriers. These are key factual differences that, in my respectful view, may properly lead to a different result.

[53] Second, despite the fact TCT's computer accounting program identified the funds collected on behalf of the carriers, the Court, relying on ***Henfrey Samson***, declined to find a trust for their benefit, concluding the co-mingling of funds served to destroy the fund's character as trust funds.

[54] But ***Henfrey Samson*** is not authority for the proposition that co-mingling destroys a trust. The trust in ***Henfrey Samson*** did not fail because the funds were co-mingled but because, on the facts before the Court, tracing or identification of the trust funds was not possible. As McLachlin J stated at p 35:

> 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 s. 47(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.47(a) [emphasis added].

[55] On the heels of ***GMAC***, the Ontario Court of Appeal decided ***Graphicshoppe Ltd, Re*** (2005), 78 OR (3d) 401, 260 DLR (4th) 713 (CA). Although the Court was split on whether a trust existed, the Court unanimously agreed that co-mingling, by itself, is not fatal to the

2018 ABQB 39 (CanLII)

application of s 67(1)(a) of the *BIA* (at para 65 per Juriansz JA in dissent; at para 123 per Moldaver JA for the majority).

[56] The conflict involved the pension contributions deducted from the paycheques of Graphicshoppe employees. It did not involve legislation creating a deemed trust. Graphicshoppe created a defined pension plan with London Life and was supposed to remit the employee contributions to the plan administrator, but in the months preceding bankruptcy, did not.

[57] The majority decision held the employees' claims under s 67(1)(a) must fail. In so concluding, they were not concerned with the co-mingling of funds, but rather, that the trust funds could not be traced. Notably, it was clear on the evidence that the employees' pension contributions were totally dissipated before the bankruptcy, and therefore, tracing was not possible (at para 132).

[58] Accordingly, Horizon's co-mingling of trust funds with its own is not fatal to the trust. It must be determined whether, despite the co-mingling, the trust funds can be identified or traced.

Can the Funds be Traced?

The Post-Receivership Tenants

[59] Tracing is a proprietary remedy at common law. The Saskatchewan Court of Appeal in ***Agricultural Credit Corp of Saskatchewan v Pettyjohn*** (1991), 90 Sask R 206;79 DLR (4th) 22 (CA) defined tracing in the following terms, at para 55:

> Tracing at common law and equity is a proprietary remedy. It involves following an item of property either as it is transformed into other forms of property or, as it passes into other hands, so that the rights of a person in the original property may extend the new property. In establishing that one piece of property may be traced into another, it is necessary to establish a close and substantial connection between the two pieces of property, so that it is appropriate to allow the rights in the original property to flow through to the new property. The question has most often arisen in the context of a trust, when the trustee has improperly disposed of the trust assets.

[60] It is unknown what Horizon did with the security deposits of these tenants, where they were deposited, and what use was made of the money. The trust funds cannot be either identified or traced.

[61] There may be compelling policy reasons why a distinction should be made between statutory trusts where the legislation permits co-mingling of funds, and statutory trusts where the legislation mandates that the trust funds be placed in a separate trust account. After all, had Imor done what it should have done, no issue would arise. No one suggests that the *RTA*, if complied with, would not create a legitimate trust, both statutorily and under general law. This is evidenced by the Receiver acknowledging and honoring those deposits received in the interim period before its own accounts were established.

[62] This fact did not sway the Court in ***GMAC***, which declined to find a trust, even though the regulation in question compelled the bankrupt to place the carriers' fees in a separate trust account. I am unaware of any authority that exempts such trusts from the requirement that they constitute a trust under general law, and satisfy the three certainties. The Post-Receivership Tenants cannot establish certainty of subject matter and accordingly, the security deposits of

2018 ABQB 39 (CanLII)

TAB 20

Court of Queen's Bench of Alberta

Citation: Ja-Ker Financial Corporation v Norris, 2015 ABQB 756

2015 ABQB 756 (CanLII)

Date: 20151127
Docket: 1403 05348
Registry: Edmonton

Between:

Ja-Ker Financial Corporation

Plaintiff

- and -

Mark Norris and Veronica Norris and Total Modular Structures Ltd.

Defendants

Reasons for Judgment
of
R. P. Wacowich, Master in Chambers

Introduction:

[1] This matter involves two applications. The defendants apply for summary dismissal of this action based on a limitations defence. The plaintiff seeks summary judgment submitting that there is no merit to the defence.

[2] The statement of claim was issued on April 9, 2014 against defendants Mark Norris (Mark) and Veronica Norris (Veronica). It indicates the plaintiff entered into a Factoring Agreement with Total Modular Solutions Ltd. (Solutions) whereby the plaintiff provided short term financing to Solutions purchasing certain accounts receivable of Solutions. On August 8, 2011 the plaintiff advanced $202,899.00 to Solutions to acquire the rights to amounts owing to

contracts so the parol evidence does not apply. They are clearly enforceable agreements entered into by the plaintiff and Solutions. They are contracts.

[32] Our Court of Appeal, like the Supreme Court in ***Lac Minerals***, cautions against the use of parol evidence to vary the terms of a written contract or to attempt to establish a collateral parol contract inconsistent with the expressed terms of a written contract:

> Nor can the court find a collateral parol contract inconsistent with the express written contract: **Catre Ind. Alta v. R**. (1989) 99 A.R. 321; **Hawrish v. Bank of Montreal** [1969] S.C.R. 15. Collateral contracts are viewed suspiciously and must be proved strictly, along with clear intent to contract: ***Hawrish***.
>
> ***Gainers Inc. v. Pocklington Financial Corporation***, 2000 ABCA 151 at para 19, ("Gainers"),

[33] The "judicial reluctance" to recognize an undocumented trust relationship between arms-length commercial parties is particularly warranted in this case where the alleged existence of such relationship is based entirely upon parol evidence.

[34] The rule against the admission of parol evidence has been formulated as follows:

> If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract.
>
> > ... parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.
> >
> > **Chitty on Contracts** (Thomson Reuters (Legal) Limited, Thirteenth Edition, 2008) - pages 864 to 865,

[35] Here, the Plaintiff seeks to introduce evidence that is completely contrary to the written terms of the two Promissory Notes. Specifically, the Plaintiff seeks to introduce parol evidence of a completely different transaction, namely its purported "purchase" of two receivables, combined with an alleged appointment of Solutions as the Plaintiffs agent to collect the receivables and remit them to the Plaintiff.

[36] The Plaintiff goes further and attempts to impose a trust obligation upon the individual Defendant Mark Norris to account for the proceeds of the two receivables allegedly collected by Solutions and to be liable for the alleged failure of Solutions to have remitted those proceeds to the Plaintiff.

[37] A written contract cannot be modified or changed by parol evidence in the absence of a mistake or fraud in the preparation of the written agreement. In this case the Plaintiff, an experienced businessman in the loans business, prepared the promissory notes. There was no fraud or mistake in preparation of the documents.

[38] It is too easy for a party to a written contract to attempt to change its terms through self-serving evidence; hence the parol evidence rule.

2015 ABQB 756 (CanLII)

TAB 21

CITATION: Kingsett Mortgage Corp et al v. Stateview Homes et al., 2023 ONSC 2636
COURT FILE NO.: CV-23-00698395-00CL
CV-23-00698632-00CL
CV-23-00698637-00CL
CV-23-00698576-00CL
CV-23-00699067-00CL
DATE: 2023-12-20

2023 ONSC 2636 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO [COMMERCIAL LIST]

RE: KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL CORPORATION, Applicant

AND:

STATEVIEW HOMES (MINU TOWNS) INC., STATEVIEW HOMES (NAO TOWNS) INC., STATEVIEW HOMES (ON THE MARK) INC., AND STATEVIEW HOMES (HIGH CROWN ESTATES) INC. et al, Respondents

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DORR CAPITAL CORPORATION Applicant

AND:

HIGHVIEW BUILDING CORP INC. Respondent

DORR CAPITAL CORPORATION Applicant

AND:

STATEVIEW HOMES (BEA TOWNS) INC. Respondent

ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR CAPITAL CORPORATION Applicant

AND:

STATEVIEW HOMES (NAO TOWNS II) INC., DINO TAURASI, AND CARLO TAURASI Respondents

---

MERIDIAN CREDIT UNION Applicant

AND:

STATEVIEW HOMES (ELM&CO) INC. Respondent

BEFORE: J. STEELE J.

COUNSEL: *Adam Slavens, David Outerbridge, Mike Noel, Jonathan Silver* for the Moving Party, Tarion Warranty Corporation

Alan Merskey, Kiyan Jamal for the Receiver, KSV Restructuring Inc. (NAO Phase 1, Minu, On the Mark, High Crown and Taurasi Holdings Recieverships)

Jeffrey Larry, Daniel Rosenbluth for the Receiver, KSV Restructuring Inc. (NAO Phase 2, BEA, Highview and Elm Receiverships)

Sean Zweig, Joseph Blinick for Kingsett Mortgage Corporation

Eric Golden for Dorr Capital Corporation

George Benchetrit for Atrium Mortgage Corporation

Vern W. DaRe for Meridian Credit Union Limited

Geoff R. Hall for Toronto-Dominion Bank

Kelly Smith Wayland for Canada Revenue Agency

Stewart Thom for Reliance Comfort Limited Partnership d/b/a Reliance Home Comfort

HEARD: November 2, 2023

2023 ONSC 2636 (CanLII)

ENDORSEMENT

OVERVIEW

[1] This motion arises following the declaration of bankruptcy of the Stateview entities. The Stateview entities were residential real estate developers. When the Receiver was appointed over the assets of the Stateview entities, the home construction in respect of the residential projects, other than High Crown and On the Mark, had not started. Many purchasers, however, had made deposits to one of the Stateview entities in respect of a new home purchase (the "Purchasers"). The deposits made by the Purchasers have been spent by the Stateview entities. Tarion Warranty Corporation ("Tarion") seeks declaratory relief on behalf of these Purchasers. Tarion asks the court to declare that the deposits were subject to either an express trust or a constructive trust arising because of unjust enrichment, the beneficiaries of which express trust or constructive trust are the Purchasers. Because the deposits were not held by the Stateview entities in separate trust accounts, Tarion also seeks a remedial constructive trust and a charge elevating the Purchasers' ranking in priority.

[2] Under the *Ontario New Homes Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "Warranties Act"), new home purchasers, who would otherwise lose their deposits if the vendor went bankrupt, are entitled to receive payment out of the guarantee fund administered by Tarion for the amount of the deposit (up to $100,000). Tarion has a statutory right of subrogation, which is why Tarion seeks declaratory relief on these issues.

[3] The Receiver made submissions opposing the relief sought by Tarion. KingSett Mortgage Corporation ("KingSett"), a secured creditor of the Stateview entities, filed materials and made submissions in support of the Receiver's position. Several other secured creditors made brief oral submissions in support of the Receiver's position. The Canada Revenue Agency also supports the Receiver's position.

[4] For the reasons set out below, Tarion's motion is dismissed.

[5] Below I provide the detailed analysis on the issues. However, at a high level, the motion fails for a few reasons. First, the Purchasers all entered into agreements with the Stateview entities under which they agreed that the lenders that provided a secured mortgage or construction financing would have priority. To the extent that any priority argument could be raised, the Purchasers contracted that these lenders would have a priority over the Purchasers' interest. Second, Parliament sets out a statutory scheme of priorities in bankruptcy. That priority scheme recognizes super priorities for certain statutory deemed trusts. There is no statutory deemed trust in respect of the deposit funds. Further, unlike the applicable statute for condominiums (see s. 81 of the *Condominium Act, 1998*, S.O. 1998, c. 19), the applicable legislation for new homes does not require the recipient of the deposit funds to hold them in trust. There were also no express trusts created, other than in respect of limited agreements where there was an early termination provision. In these cases, however, the monies were not set aside and held in trust by the Stateview entities. Finally, the court is generally reluctant to grant an equitable remedy such as a constructive trust where doing so would upset the priority scheme set out in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). In a bankruptcy, there can be many parties that are negatively impacted, and Parliament has established a priority scheme to deal with what money is available in the bankrupt's estate.

[6] As submitted by Meridian, the first mortgagee on Stateview's Elm project, it is important that the law is interpreted in a way that supports certainty, predictability, and uniformity. The subordination clause in the pre-purchase agreements provides certainty to the lenders regarding their priority status. In terms of predictability, the lenders have lent millions of dollars based on the statutory regime, which does not provide for a statutory deemed trust for Purchaser deposit monies. Finally, the Purchasers are unsecured creditors, and under the BIA priority scheme secured creditors rank ahead.

Background

[7] The moving party, Tarion, is a consumer protection agency that the Ontario government designated to administer the Warranties Act and the regulations thereunder (the "Warranties Regulations").

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[66] Tarion submits that the proper remedy for the Stateview entities' breach of an express trust in respect of certain Purchasers is to impress the proceeds from the sale of the real property with a constructive trust for the Purchasers' benefit.

[67] A constructive trust is an equitable remedy that the court has jurisdiction to impose. The constructive trust is a proprietary remedy. It is granted over specified property. Where a constructive trust is granted, the property is removed from the bankrupt's estate, which effectively reorganizes the BIA priorities: *306440 Ontario Ltd. v. 782127 Ontario Ltd. (Alrange Container Services)*, 2014 ONCA 548, 324 O.A.C. 21 ("*Alrange Container Services*"), at para. 24.

[68] Here, Tarion asks the court to declare that the Purchasers are entitled to a constructive trust in the proceeds of sale from the real property as a remedy for breach of trust. The imposition of a constructive trust would effectively remove the property subject to the trust from the estate of the Stateview entity.

[69] A constructive trust is available as a remedy where a party has been unjustly enriched to the prejudice of another party, or a party has obtained property by committing a wrongful act, such as a breach of a fiduciary obligation: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 ("*Soulos*"), at para. 36.

[70] A constructive trust arising from a wrongful act may be imposed by the court. As set out in *Soulos*, at para. 45, there are certain conditions that generally should be met before a constructive trust is ordered:

a. The defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in the defendant's hands;

b. The assets in the defendant's hands must have resulted from agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;

c. The plaintiff must show a legitimate reason for seeking a proprietary remedy; and

d. There must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case.

[71] In considering the above in the context of an insolvency proceeding, courts in Canada have given significant weight to the fourth factor, specifically the impact on other creditors: *Caterpillar Financial Services v. 360networks corporation*, 2007 BCCA 14, 61 B.C.L.R. (4th) 334, at para. 66, *KPMG (Trustee in Bankruptcy of Ellingsen) v. Hallmark Ford Sales Ltd.*, 2000 BCCA 458, 190 D.L.R. (4th) 47, at para. 71, and *Creditfinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, 277 O.A.C. 377 ("*Creditfinance*"), at para. 44. If a constructive trust is ordered in respect of a bankrupt, there is an obvious impact on the other creditors of the bankrupt's estate. Accordingly, the use of a constructive trust as a remedy in insolvency proceedings is used "only in the most extraordinary cases" and the test to show that there is a "constructive trust in a bankruptcy setting is high:" *Creditfinance*, at paras. 32 and 33.

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[72] In the instant case, there will likely not be enough funds for the secured creditors. Accordingly, any remedial constructive trust awarded by this court would upset the priority scheme under the BIA and effectively take funds from the secured creditors to pay certain unsecured creditors.

[73] In *Ascent Ltd. (Re)*, [2006] 18 C.B.R. (5th) 269 (ON SC) ("*Ascent*"), this court imposed a constructive trust in an insolvency proceeding. However, in that case the court had made an order that Ascent set aside $24,374 and hold it in trust for a certain creditor pending certain events. Ascent did not set aside and hold the funds in trust as had been ordered. Accordingly, when Ascent was assigned into bankruptcy, the affected creditor argued that the proper remedy was a declaration of constructive trust over Ascent's assets sufficient to provide the creditor with the $24,374 that had been ordered by the court to be held in trust. The court found that there was unjust enrichment. In the court's analysis of whether there was juristic reason, the court emphasized that there was an intervening Court Order requiring the funds to be set aside and held in trust. The court stated, at para. 15, that the failure to comply with the Court Order was the source of the unjust enrichment. In determining that a constructive trust was an appropriate remedy, the court also referred to the failure to comply with the Court Order, and stated, at para. 17:

> It is also important to consider that imposition of a remedial constructive trust will take out of the hands of the Estate and the creditors the sum in dispute, and turn it over, in its entirety, to Cafo. This will clearly be a disruption of the scheme laid out in the BIA. This was the position of the Trustee at the hearing. I have considered this, but I have also considered *Brown* and the cases cited therein. I am satisfied that it is, in certain cases, appropriate to do injustice to the BIA in order to do justice to commercial morality. After all, the cases are too numerous to cite wherein commercial morality is considered in insolvency settings. It is the clear role of the Bankruptcy Court to act as the arbiter of commercial morality, and I find no offence in equity intervening, even at the expense of the formulaic aspects of the BIA scheme of distribution. <u>It is simply not right for Ascent and its creditors to benefit from Ascent's failure to obey the Hoy Order, and then come to this Court to seek to retain such an unjust enrichment</u>. [Emphasis added.]

[74] Unlike *Ascent* there was no court order in the instant case requiring the Stateview entities to hold the deposit funds in trust. There was an express trust, and the Stateview entities, in their capacity as trustee, failed to adhere to the terms of the trust.

[75] Further, a constructive trust, which is not otherwise available, cannot be imposed by the court for the purpose of altering the priority scheme under the BIA: *Barnabe v. Touhey*, [1995] 26 O.R. (3d) 477 (C.A.).

[76] For a court to order a constructive trust remedy in a bankruptcy case, there must be a close and causal connection between the property over which the party seeks the constructive trust and the misappropriated trust property. The Court of Appeal in *Alrange Container Services*, stated at paras. 26 and 27:

> The very nature of the constructive trust remedy demands a close link between the property over which the constructive trust is sought and the improper benefit

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> bestowed on the defendant or the corresponding detriment suffered by the plaintiff. Absent that close and direct connection, I see no basis, regardless of the nature of the restitutionary claim, for granting a remedy that gives the plaintiff important property-related rights over specific property. A constructive trust remedy only makes sense where the property that becomes the subject of the trust is closely connected to the loss suffered by the plaintiff and/or the benefit gained by the defendant. [...]
>
> Professor Paciocco goes on to argue that the requirement of a close connection between the property over which the trust is sought and the product of the unjust enrichment is particularly strong in the commercial context. He observes, at p. 333:
>
> > In the commercial contest where there should be a hesitance to award proprietary relief, a purer tracing process is justifiable. This approach accurately describes the prevailing trend in Canadian case law.

[77] Tarion acknowledges that a close causal connection to the property is required. Tarion cited *British Columbia Securities Commission v. Bossteam E-Commerce Inc.*, 2017 BCSC 787 ("*Bossteam*") as support for their position that establishing a close causal connection does not necessarily require forensic tracing. *Bossteam* involved an award of a constructive trust for fraud, and this award meant that defrauded investors benefitting from the trust were given priority over other creditors. This award was granted notwithstanding the fact that there was no tracing because the court found evidence of a close causal connection between the property in the bank account and the investor's money: *Bossteam*, at para. 36.

[78] Tarion submits that there is a close causal connection between the deposit monies and the proceeds of sale from the real property. Tarion points to Mr. Pollack's affidavit where he stated that certain monies funded from KingSett, the High Crown Real Property first mortgagee, and Purchaser deposits were for the purpose of paying development charges and cash in lieu of parkland dedication in connection with the High Crown Real Property. However, Mr. Pollack further stated that approximately half of those funds were inappropriately diverted for other purposes. The Receiver submits that Tarion has not provided any material evidence as to how the Purchaser deposits were used to improve or acquire the real property. The Receiver further notes that Tarion's assertion is contradicted by Tarion's other allegation that the deposits were misused in ways that were unconnected to the real property projects.

[79] I am not satisfied that Tarion has established a close causal connection between the deposits and the proceeds from the sale of the real property such that a proprietary remedy is appropriate in the circumstances.

[80] In addition, I am not satisfied that "extraordinary circumstances" exist in this case such that a constructive trust ought to be ordered. As noted, a remedial constructive trust would upset the BIA priority scheme. Here we have a situation where, on the one hand, if the Stateview entities had not breached the trusts, the creditors would not have had access to the deposits. However, on the other hand, had the Stateview entities not breached the trusts, the Stateview entities may have

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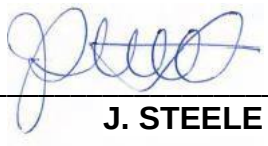
appeared less financially secure, and the creditors may not have extended credit or additional credit to the Stateview entities.

[81] In my view the fact that the Purchasers agreed to the Subordination Clause in the Pre-Sale Purchase Agreements is also a factor weighing against the ordering of this remedy.

[82] As noted above, the express trusts are individual trusts that arose between each individual Purchaser and the respective Stateview entity. There was not evidence before the court on each trust relationship. Accordingly, I am not foreclosing the possibility of the court in an individual case determining that a constructive trust remedy could be appropriate in the specific circumstances.

Disposition

[83] Tarion's motion is dismissed.



J. STEELE J.

Date of Release: December 20, 2023

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TAB 22

Her Majesty the Queen in Right of Ontario as Represented by the Minister of Training, Colleges and Universities v.Two Feathers Forest Products LP et al.

[Indexed as: Ontario (Minister of Training, Colleges and Universities) v. Two Feathers Forest Products LP]

Ontario Reports

Court of Appeal for Ontario,

Feldman, Lauwers and Strathy JJ.A.

October 2, 2013

117 O.R. (3d) 227 | 2013 ONCA 598

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Case Summary

Trusts and trustees — Trusts — Quistclose trust — Ministry advancing grant moneys to limited partnership to provide skills training in two proposed plants — Grant moneys which were not spent before appointment of interim receiver not subject to Quistclose trust for benefit of ministry — Parties not intending that partnership would hold funds in trust for ministry — Funding agreement specifically providing that any unused funds would constitute debt owing to ministry — Agreement giving partnership considerable freedom to use majority of funds.

The ministry granted funds to a First Nations limited partnership to provide skills training in two proposed plants. Ultimately, two of the limited partners applied to dissolve the partnership and an interim receiver and manager was appointed. On an application by the receiver, the application judge found that grants which were not spent before the receiver was appointed were subject to a *Quistclose* trust for the ministry's benefit and ordered the receiver to pay those moneys to the ministry. The receiver appealed.

Held, the appeal should be allowed.

The requirements for a *Quistclose* trust were not met. On the issue of the intention to create a trust, it is not the subjective intention of the lender or grantor that governs but the intention of the two parties, discerned from the terms of the loan or grant. In this case, an examination of the terms of the funding agreement showed that the parties did not intend that the partnership would hold the funds in trust for the ministry. The funding agreement specifically provided that any unused funds constituted a debt owing to the ministry. Moreover, under the funding agreement, while specific funds were designated for the actual costs of training, the partnership had significant freedom to use the majority of the funds. Finally, the circumstances of the grant transaction in this case did not have many of the characteristics that caused a trust to be found in either of the two seminal cases on *Quistclose* trusts. It was not a situation where the limited partnership needed immediate funding to stave off bankruptcy; the funds were not needed to make a specific payment to a group of creditors or to make a specific purchase but were

obtained as a basic source of business funding for a [page228] long-term project; and the funds were not advanced on a short or quickly drawn contractual agreement.

Barclays Bank Ltd. v. Quistclose Investments Ltd., [1970] A.C. 567, [1968] 3 All E.R. 651, [1968] 3 W.L.R. 1097 (H.L.); *Cliffs Over Maple Bay Investments Ltd. (Re)*, [2011] B.C.J. No. 677, 2011 BCCA 180, 304 B.C.A.C. 116, 17 B.C.L.R. (5th) 60, 18 P.P.S.A.C. (3d) 11, 67 E.T.R. (3d) 1, [2011] 8 W.W.R. 266, 77 C.B.R. (5th) 1; *Twinsectra Ltd. v. Yardley*, [2002] 2 A.C. 164, [2002] UKHL 12 (H.L.), **consd**

Other cases referred to

Abulyha v. Montemurro, [1984] O.J. No. 962 (H.C.J.); *Continental Bank of Canada v. Boekamp Manufacturing Inc*., [1990] O.J. No. 1043 (H.C.J.); *Cummings Estate v. Peopledge HR Services Inc*., [2013] O.J. No. 2296, 2013 ONSC 2781, 2 C.B.R. (6th) 45, 228 A.C.W.S. (3d) 1195 (S.C.J.); *Del Grande v. McLeery*, [2000] O.J. No. 61, 127 O.A.C. 394, 31 E.T.R. (2d) 50, 94 A.C.W.S. (3d) 132 (C.A.), affg [1998] O.J. No. 2896, 70 O.T.C. 127, 40 B.L.R. (2d) 202, 5 C.B.R. (4th) 36, 24 E.T.R. (2d) 30, 80 A.C.W.S. (3d) 1276 (Gen. Div.); *Edwards v. Glyn* (1859), 2 E. and E. 29; *Ernst & Young Inc. v. Central Guaranty Trust Co*., [2006] A.J. No. 1413, 2006 ABCA 337, [2007] 2 W.W.R. 474, 66 Alta. L.R. (4th) 231, 397 A.R. 225, 24 B.L.R. (4th) 218, 28 E.T.R. (3d) 174, 153 A.C.W.S. (3d) 971, revg [2004] A.J. No. 600, 2004 ABQB 389, [2005] 3 W.W.R. 97, 29 Alta. L.R. (4th) 269, 365 A.R. 302, 8 E.T.R. (3d) 169, 131 A.C.W.S. (3d) 1186 [Leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 9]; *Gignac, Sutts v. National Bank of Canada*, [1987] O.J. No. 298, 5 C.B.R. (4th) 44, 4 A.C.W.S. (3d) 172 (H.C.J.); *In re Drucker (No. 1)*, [1902] 2 K.B. 237 (C.A.); *In re Hooley, Ex parte Trustee*, [1915] H.B.R. 181; *In re Rogers, Ex parte Holland and Hannen* (1891), 8 Morr. B.C. 243; *Ling v. Chinavision Canada Corp*. (1992), 10 O.R. (3d) 79, [1992] O.J. No. 1438, 34 A.C.W.S. (3d) 664 (Gen. Div.); *Niedner Ltd. v. Lloyds Bank of Canada* (1990), 74 O.R. (2d) 574, [1990] O.J. No. 1346, 72 D.L.R. (4th) 147, 38 E.T.R. 306, 22 A.C.W.S. (3d) 271 (H.C.J.); *Ontario (Securities Commission) v. Consortium Construction Inc.*, [1993] O.J. No. 1408, 1 C.C.L.S. 117, 41 A.C.W.S. (3d) 18 (Gen. Div.); *Smith v. Gold Key Construction Ltd*., [1993] O.J. No. 157 (Gen. Div.); *Teperman v. Teperman*, [2000] O.J. No. 4133 (S.C.J.); *Toovey v. Milne* (1819), 2 B. & Ald. 683, 106 E.R. 514; *Triax Resource Ltd. Partnership v. Research Capital Corp*., [1999] O.J. No. 1920, 96 O.T.C. 290, 88 A.C.W.S. (3d) 767 (S.C.J.); *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083, 2007 ONCA 205, 222 O.A.C. 102, 29 B.L.R. (4th) 312, 56 R.P.R. (4th) 163, 156 A.C.W.S. (3d) 95; *Venture Capital USA Inc. v. Yorkton Securities Inc*. (2005), 75 O.R. (3d) 325, [2005] O.J. No. 1885, 197 O.A.C. 264, 4 B.L.R. (4th) 324, 139 A.C.W.S. (3d) 4 (C.A.) [Leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 334]

Statutes referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.]

Personal Property Security Act, R.S.O. 1990, c. P.10 [as am.]

Authorities referred to

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A. *History of the Quistclose trust*

[9] The genesis of the concept of the "*Quistclose* trust" was the House of Lords' decision in *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, *supra*. In that case, the trust arose in the following way: Rolls Razor was a client of Barclays Bank that was in financial difficulties and had exceeded its allowed overdraft at the bank by a significant margin. In order to try to recover financially, Rolls Razor found a lender who agreed to lend it ú1 million but on the condition that Rolls Razor obtain funds from another source to pay its shareholders the dividend of ú209,719 8s. 6d, which it had already declared and which was to be paid within a short time. Quistclose became that source, agreeing to lend Rolls Razor the sum necessary to pay the dividend, on the condition that the funds would be used only for that purpose and that they would be held in a special account, newly opened for that purpose, until the dividend was paid.

[10] One of the directors of Rolls Razor then made an oral agreement with its bank manager at Barclays, confirmed by the letter that Rolls Razor later sent to the bank with Quistclose's cheque. They agreed that the cheque was to be deposited into a special account and was to be used only to pay the declared dividend. Unfortunately, the company was unable to raise the further funds it needed to remain in business, and decided to voluntarily liquidate. Contrary to the agreement that the Quistclose loan would only be used to pay the shareholders' dividend, the bank then set off the balance in the special account against part of the debit balance owed to it. [page233]

[11] Quistclose sued the bank for return of the funds. Lord Wilberforce explained that in order for Quistclose to be able to claim the funds from the bank, it had to meet two requirements. First, it had to establish that the funds were impressed with a trust in its favour if the funds were not used to pay the dividend, and second, that "[the bank] had such notice of the trust or of the circumstances giving rise to it as to make the trust binding upon them" (at p. 579 A.C.).

[12] Lord Wilberforce had no trouble finding that the mutual intention of Rolls Razor, the borrower, and Quistclose, the lender, was that the funds were to be used only to pay the declared dividend and were not to form part of the assets of Rolls Razor. He concluded that a necessary consequence of their mutual intention was that if the dividend could not be paid, then the funds were to be returned to Quistclose. He stated that it had long been recognized that this type of arrangement created a fiduciary obligation to hold the funds in trust [at p. 580 A.C.]:

> That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years.

[13] He referred to five historical cases, at pp. 580-81 A.C., all of which involved moneys loaned for the purpose of paying a specific group of the borrower's creditors in order to stave off bankruptcy: *Toovey v. Milne* (1819), 2 B. & Ald. 683, 106 E.R. 514; *Edwards v. Glyn* (1859), 2 E. and E. 29; *In re Rogers, Ex parte Holland and Hannen* (1891), 8 Morr. B.C. 243; *In re Drucker (No.1)*, [1902] 2 K.B. 237 (C.A.); [and] *In re Hooley, Ex parte Trustee*, [1915] H.B.R. 181.

> Whether a trust was created and what were its terms must depend upon the construction of the undertaking.

[20] Lord Millett's main focus was to properly characterize the operation of the *Quistclose* trust under trust principles by conducting an analysis of the locus of the legal and beneficial interest in the trust property.[4] He concluded that the moneys are always held on a resulting trust for the lender who never parts with the entire beneficial interest in them and that it is the lender who is the person who can enforce the trust. He rejected the theory that anyone but the lender can enforce the trust, including the persons who are the primary objects of the trust, such as a subgroup of the borrower's creditors. In the context of that analysis, he addressed the question whether a *Quistclose* trust's primary purpose must be to benefit a subset of identified creditors as in the *Barclays Bank* case itself. He rejected that premise, referring to cases where his characterization of the purpose of the loan was not to benefit a group of people but to purchase equipment or to enable a bank to meet a run and where only the lender could oversee its enforcement. He concluded that, as in the *Twinsectra* circumstances, a *Quistclose* trust "must be able to accommodate gifts and loans for an abstract purpose" (at para. 89).

[21] Lord Millett also reviewed the three certainties required for a trust: certainty of intention, of subject-matter and of objects, at paras. 71, 101. On the issue of the significance of certainty of the objects of the trust, Lord Millett agreed with Lord Hoffmann, pointing out as well that if the objects were not sufficiently certain, the result in law is that the moneys revert back to the lender under a resulting trust -- the same result as when the purpose cannot be carried out (para. 101).

[22] One could conclude that after *Twinsectra*, any time moneys are advanced on an undertaking to use the moneys only [page236] for a stated purpose, which can be an abstract purpose, then regardless of the subjective intention of the person providing the funds and of the nature of the purpose, there is a resulting trust for the lender. This represents a significant expansion of the *Quistclose* trust, which had been narrowly described in the *Barclays Bank* case.

[23] As I have concluded that the requirements for a *Quistclose* trust have not been met in this case, I do not need to decide to what extent that expansion should be adopted in Ontario. However, when that decision does have to be made, the court will have to consider a number of commercial consequences, one of the most significant of which is the potential effect on the creditors of the borrower (or grantee) of the subject funds. For example, as in this case, where funds are advanced to a business with no registration under the *Personal Property Security Act*, R.S.O. 1990, c. P.10, creditors will have no notice, and in many cases no knowledge, that they are dealing with a debtor whose money is subject to a trust and not available to general creditors.[5]

B. *Was there a Quistclose trust in this case?*

[24] The House of Lords authorities are clear that on the issue of the intention to create a trust, it is not the subjective intention of the lender (here the granter) but the intention of the two parties, discerned from the terms of the loan (here the grant). As Lord Millett put it [*Twinsectra*, at para. 71]:

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specific purchase; instead, they were obtained as a basic source of business funding for a long-term project.

[37] Nor were the funds advanced based on a short or quickly drawn contractual arrangement; instead, they were the subject of a detailed government-approved funding agreement, fully executed by both parties that prescribed all aspects of the funding relationship between them. It is difficult to see the basis for implying a trust where a sophisticated party, such as a provincial ministry, provides funding by means of a commercial agreement in which its contractual rights and remedies are carefully and extensively defined.

[38] This court has not yet applied the *Quistclose* trust concept.[6] However, the British Columbia Court of Appeal in [page240] *Cliffs Over Maple Bay Investments Ltd. (Re)*, [2011] B.C.J. No. 677, 2011 BCCA 180, 17 B.C.L.R. (5th) 60 recently reversed a decision of a motion judge that had implied a *Quistclose* trust in circumstances where funds were loaned to be used for a general, long-term purpose, as in this case. There, funds were advanced by a debtor-in-possession lender in the context of a *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 order "[t]o facilitate further construction of [a] golf course and development of [a series of] home lots and source an irrigation solution for the golf course": at para. 56. In rejecting the implication of a *Quistclose* trust for a number of reasons, the British Columbia Court of Appeal stated [at para. 69]:

> In short, although it is obvious that Cliffs agreed as a matter of contract that the funds would be used for the general purpose stated, I disagree that this restriction gives rise to any inference of an intention on the part of both parties . . . to create the specialized vehicle that is a *Quistclose* trust[.]

[39] To summarize my analysis, the ministry entered into a detailed funding agreement with Two Feathers setting out the terms under which the ministry granted funding for Two Feathers to provide on-the-job skills training to residents of Northern Ontario. Although the funds provided were intended to be used only for the purpose described in the funding agreement, there is no basis to infer a mutual intention that the funds were to be held on trust for the ministry. To the contrary, under the budget attached to the funding agreement, the recipient, Two Feathers, had significant discretion to spend the majority of the funds as long as it was for the general purpose stated, as in the *Cliffs Over Maple Bay* case. And, most importantly, art. 17 of the funding agreement defines the relationship between the parties with respect to any funds that have to be returned to the ministry under the agreement as a debt, not a trust.

Conclusion

[40] In my view, the application judge erred in law in concluding that in these circumstances, the court could imply a *Quistclose* trust. I would therefore allow the appeal, set aside the order of the application judge and dismiss the application with costs, fixed at $15,000, inclusive of disbursements and HST.

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TAB 23

Harry Phillip Rawluk *Appellant*

v.

Jacqueline Dorothy Rawluk *Respondent*

INDEXED AS: RAWLUK *v.* RAWLUK

File No.: 20736.

1989: October 6; 1990: January 25.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Family law — Property — Constructive trust — Wife contributing to accumulation of assets held in husband's name — Act providing for equal division of value of family assets as determined on valuation day — Assets appreciating significantly after valuation day — Whether or not the constructive trust applicable where the Family Law Act, 1986 provides a remedy for unjust enrichment — Family Law Act, 1986, S.O. 1986, c. 4, ss. 4(1), 5(6), 10(1), 14, 64(1), (2), (3).

Trusts and trustees — Constructive trust — Family assets — Act providing for equal division of value of family assets as determined on valuation day — Assets appreciating significantly after valuation day — Whether or not the constructive trust applicable where the Family Law Act, 1986 provides a remedy for unjust enrichment.

The Rawluks were married in 1955 and lived and worked together for twenty-nine years. They had a farm and a farm equipment sales and service business. In the early years of their marriage, the wife cared for their children and looked after farm chores. By the early 1960s, she was also assisting with customers in the shop of the farm implement business. In 1969, the wife assumed a major role in its operation and maintained her involvement in all aspects of the farming operation. She contributed to the assets the parties acquired during the marriage. At the time of separation in 1984, the Rawluks held a number of properties, all but one of which were registered in the name of the husband. The *Family Law Act, 1986* provided that family assets be valued and divided equally. The valuation date here was the date of separation. In the years between separation and the trial of the action, the value of these properties increased dramatically. The trial judge and the Court of Appeal held that the property in question was impressed

Harry Phillip Rawluk *Appelant*

c.

Jacqueline Dorothy Rawluk *Intimée*

RÉPERTORIÉ: RAWLUK *c.* RAWLUK

N° du greffe: 20736.

1989: 6 octobre; 1990: 25 janvier.

Présents: Le juge en chef Dickson et les juges Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit de la famille — Biens — Fiducie par interprétation — Contribution de l'épouse à l'acquisition de biens détenus au nom de l'époux — Loi prévoyant le partage égal de la valeur des biens familiaux à la date d'évaluation — Augmentation importante de la valeur des biens après la date d'évaluation — Peut-il y avoir fiducie par interprétation quand la Loi de 1986 sur le droit de la famille prévoit un recours pour l'enrichissement sans cause? — Loi de 1986 sur le droit de la famille, L.O. 1986, ch. 4, art. 4(1), 5(6), 10(1), 14, 64(1), (2), (3).

Fiducies et fiduciaires — Fiducie par interprétation — Biens familiaux — Loi prévoyant le partage égal de la valeur des biens familiaux à la date d'évaluation — Augmentation importante de la valeur des biens après la date d'évaluation — Peut-il y avoir fiducie par interprétation quand la Loi de 1986 sur le droit de la famille prévoit un recours pour l'enrichissement sans cause?

Les Rawluk se sont mariés en 1955 et ils ont vécu et travaillé ensemble pendant vingt-neuf ans. Ils possédaient une exploitation agricole et une entreprise de service de vente et d'après-vente de matériel agricole. Au cours des premières années du mariage, l'épouse a pris soin des enfants et s'est occupée de travaux de ferme. Au début des années 60, elle s'occupait également des clients de l'entreprise de matériel agricole. En 1969, l'épouse a joué un rôle dominant dans l'exploitation de l'entreprise et continué de participer à tous les aspects de l'exploitation agricole. Elle a contribué à l'acquisition des biens des parties au cours du mariage. Au moment de la séparation en 1984, les Rawluk possédaient un certain nombre de biens, qui étaient tous au nom de l'époux à l'exception d'un seul. La *Loi de 1986 sur le droit de la famille* prévoit que les biens familiaux doivent être évalués et partagés également. En l'espèce, la date d'évaluation était la date de la séparation. Au cours des années écoulées entre la séparation et l'audi-

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with a constructive trust which gave the wife a beneficial half interest in the property at the time of separation and therefore entitled her to participate as owner in the value of the property after separation. At issue here is whether or not the constructive trust finds application where the *Family Law Act, 1986* already provides a remedy for the unjust enrichment complained of.

tion de l'action en première instance, la valeur de ces biens a augmenté considérablement. Le juge de première instance et la Cour d'appel ont conclu que les biens en question faisaient l'objet d'une fiducie par interprétation qui conférait à l'épouse un intérêt bénéficiaire de moitié dans les biens à l'époque de la séparation lui permettant donc, comme propriétaire, d'avoir une part dans la valeur des biens après la séparation. La question en l'espèce est de savoir si la fiducie par interprétation s'applique quand la *Loi de 1986 sur le droit de la famille* prévoit déjà un recours pour l'enrichissement sans cause reproché.

Held (La Forest, Sopinka and McLachlin JJ. dissenting): The appeal should be dismissed.

Arrêt (les juges La Forest, Sopinka et McLachlin sont dissidents): Le pourvoi est rejeté.

Per Dickson C.J. and Wilson, L'Heureux-Dubé and Cory JJ.: Far from abolishing the constructive trust doctrine, the *Family Law Act, 1986* incorporates the constructive trust remedy as an integral part of the process of ownership determination and equalization established by that Act. As a general rule a legislature is presumed not to depart from prevailing law without expressing its intentions to do so with irresistible clearness. But even aside from this presumption, the *Family Law Act, 1986* intended to both recognize and accommodate the remedial constructive trust.

Le juge en chef Dickson et les juges Wilson, L'Heureux-Dubé et Cory: Loin d'abroger la théorie de la fiducie par interprétation, la *Loi de 1986 sur le droit de la famille* fait du recours à la fiducie par interprétation une partie intégrante du processus de détermination du droit de propriété et d'égalisation établi par cette loi. En règle générale, le législateur est présumé ne pas s'écarter du droit existant sans exprimer de façon incontestablement claire son intention de le faire. Même sans cette présomption, la *Loi de 1986 sur le droit de la famille* visait à reconnaître et à rendre applicable le recours à la fiducie par interprétation.

Before property can be equalized under s. 5 of the *Family Law Act, 1986*, a court is required by s. 4 to determine the "net family property" of each spouse on the valuation date. "Property" is defined as "any interest, present or future, vested or contingent, in real or personal property" and accordingly includes not only legal but beneficial ownership. The remedial constructive trust therefore should be included in the list of equitable principles or remedies that may be used to calculate the beneficial ownership of net family property. It can be recognized as having come into existence from the time when the unjust enrichment first arose, even though it is judicially declared at a later date.

Avant de pouvoir égaliser les biens en vertu de l'art. 5 de la *Loi de 1986 sur le droit de la famille*, un tribunal doit, en vertu de l'art. 4, déterminer les «biens familiaux nets» de chaque conjoint à la date d'évaluation. «Bien» est défini comme un «droit actuel ou futur, acquis ou éventuel, sur un bien meuble ou immeuble» et comprend donc non seulement la propriété en common law mais aussi la propriété bénéficiaire. Le recours à la fiducie par interprétation devrait donc être inclus dans la liste des principes ou réparations en *equity* qui peuvent être utilisés pour établir la propriété bénéficiaire des biens familiaux nets. On peut reconnaître qu'elle prend naissance dès le moment où survient l'enrichissement sans cause même si la déclaration judiciaire de la fiducie intervient plus tard.

The distinction between ownership and a share on equalization is more than an exercise in judicial formalism. It involves conceptual and practical differences for ownership which encompass far more than a mere share in the value of property.

La distinction entre une part dans la propriété et une part de l'égalisation est plus qu'un exercice de formalisme judiciaire. Elle comporte des différences conceptuelles et pratiques parce que le droit de propriété comprend beaucoup plus qu'une simple part dans la valeur du bien.

Where the property at issue is one to which only one spouse has contributed, it is appropriate that the other spouse receive only an equalizing transfer of money. But where both spouses have contributed to the acquisition

Lorsque le bien en cause est un bien auquel un seul conjoint a contribué, il est juste que l'autre conjoint reçoive uniquement la somme provenant de l'égalisation. Mais lorsque les deux conjoints ont contribué à l'acquisi-

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or maintenance of the property, the spouse who does not hold legal title should be able to claim an interest in that property by way of a constructive trust and realize the benefits that ownership may provide. The imposition of a constructive trust recognizes that the titled spouse is holding property that has been acquired, at least in part, through the money or effort of another.

Under the Act a court is, as a first step, required to determine the ownership interests of the spouses. It is at that stage that the court must deal with and determine the constructive trust claims. The second step requires that the equalization be calculated. The third step requires that the court assess whether equalization is unconscionable, pursuant to s. 5(6). This step in the process must be kept distinct from the preliminary determinations of ownership.

Section 10 of the *Family Law Act, 1986* reinforces the Act's emphasis on the importance of individual ownership, even within a regime of deferred sharing. A spouse can apply to a court to determine a question of ownership or possession prior to equalization, and thus to assert some degree of control over matrimonial property during cohabitation. It would be inconsistent to deny a spouse the same remedy when it is sought after a separation.

Section 14 specifically refers to the doctrine of resulting trust. It is not intended to specifically preserve that trust, and by implication abolish all other non-express trusts, but rather is intended to modify the resulting trust doctrine as it applies in the context of the *Family Law Act, 1986*. The combination of these modifying provisions and the legislature's silence on the subject of remedial constructive trust indicate that the constructive trust is maintained in an unmodified form.

The constructive trust remedy can be utilized by unmarried cohabitants. It would not only be inequitable but would also contravene the provisions of s. 64(2) if married persons were precluded by the *Family Law Act, 1986* from utilizing the doctrine of remedial constructive trust which is available to unmarried persons.

Per La Forest, Sopinka and McLachlin JJ. (dissenting): The doctrine of constructive trust is not a property right but a proprietary remedy for unjust enrichment. The availability of other remedies for the unjust enrich-

tion ou à l'entretien du bien, le conjoint qui ne détient pas le titre de propriété devrait pouvoir revendiquer un droit sur le bien au moyen de la fiducie par interprétation et profiter des avantages que le droit de propriété peut apporter. L'imposition d'une fiducie par interprétation reconnaît que l'époux titulaire détient le bien dont l'acquisition s'est faite, au moins en partie, au moyen de sommes d'argent ou d'efforts fournis par une autre personne.

En vertu de la Loi, le tribunal doit d'abord déterminer les droits de propriété des conjoints. C'est à cette étape qu'il doit examiner et trancher les demandes relatives aux fiducies par interprétation. La deuxième étape consiste à faire les calculs d'égalisation. La troisième étape exige que le tribunal détermine si l'égalisation est inadmissible, en vertu du par. 5(6). Cette étape du processus doit être distincte des questions préliminaires concernant la propriété.

L'article 10 de la *Loi de 1986 sur le droit de la famille* renforce l'accent qui est mis dans la Loi sur l'importance du droit de propriété individuel, même à l'intérieur d'un régime de partage différé. Un conjoint peut demander au tribunal de régler une question relative à la propriété ou au droit à la possession avant l'égalisation, et donc faire valoir un certain degré de contrôle sur les biens familiaux pendant la cohabitation. Il serait illogique de priver un conjoint du même recours lorsque la demande en est faite après une séparation.

L'article 14 mentionne expressément la théorie de la fiducie par déduction. L'article 14 n'a pas pour but de préserver spécifiquement cette fiducie, et donc d'abroger implicitement toutes les autres fiducies non expresses; il vise plutôt à modifier la théorie de la fiducie par déduction telle qu'elle s'applique dans le contexte de la *Loi de 1986 sur le droit de la famille*. L'effet combiné de ces dispositions modificatives et du silence du législateur sur le recours à la fiducie par interprétation indique que la fiducie par interprétation est maintenue sans modification.

Le recours à la fiducie par interprétation peut être utilisé par des personnes qui cohabitent sans être mariées. Il serait non seulement inéquitable mais également contraire aux dispositions du par. 64(2) de priver les personnes mariées, en vertu de la *Loi de 1986 sur le droit de la famille*, du recours à la théorie de la fiducie par interprétation qui est offert aux personnes non mariées.

Les juges La Forest, Sopinka et McLachlin (dissidents): La théorie de la fiducie par interprétation ne confère pas un droit de propriété mais constitue un recours sur la propriété contre l'enrichissement sans

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ment must accordingly be considered before declaring a constructive trust. The doctrine of constructive trust should not be applied in this case because the *Family Law Act, 1986* provides a remedy for the unjust enrichment of the husband to the detriment of the wife.

The fundamentals of the Canadian approach to constructive trust in relation to unjust enrichment are: (1) its purpose is to remedy an unjust enrichment; (2) it is remedial rather than substantive; and (3) it is but one of many remedies that may be available to correct unjust enrichment. A plaintiff should exhaust his personal remedies before the remedy of constructive trust is imposed.

In Canada the constructive trust, at least in the context of unjust enrichment, is a remedy and not a doctrine of substantive property law. It does not arise automatically when the three conditions set out in *Pettkus v. Becker* are established. Rather, the court must go on to consider what other remedies are available to remedy the unjust enrichment in question and whether the proprietary remedy of constructive trust is appropriate. The doctrine of constructive trust does not permit the court to confer retrospectively a property interest solely on the basis of contribution of one spouse and enrichment of the other. A further inquiry must be made to determine if the remedy of constructive trust is necessary or appropriate given the presence of another remedy.

Given an unjust enrichment arose from the fact that the property to which the wife contributed was in the husband's name, the *Family Law Act, 1986* provides a remedy which makes it unnecessary to resort to the doctrine of constructive trust. Both the statutory remedy and the remedy of constructive trust are directed to the same end. The Act provides for the equalization to be accomplished by a payment of money based on the value of the property at the time of separation (a remedy *in personam*) while the doctrine of constructive trust would give a beneficial interest in the land which persists to the date of trial (a proprietary remedy).

The *Family Law Act, 1986* provides complete compensation for the wife's contribution to the date of separation. Any disproportionate enrichment must occur because of the increase in value due to changing market conditions after that date. But that does not constitute

cause. Il faut donc déterminer s'il existe d'autres recours contre l'enrichissement sans cause avant de déclarer l'existence d'une fiducie par interprétation. La théorie de la fiducie par interprétation ne devrait pas être appliquée en l'espèce parce que la *Loi de 1986 sur le droit de la famille* prévoit un recours dans le cas de l'enrichissement sans cause du mari au détriment de l'épouse.

Les fondements de l'application de la fiducie par interprétation au Canada, en matière d'enrichissement sans cause, sont les suivants: (1) elle a pour objet de remédier à l'enrichissement sans cause; (2) elle est un recours plutôt qu'une règle de fond; (3) elle n'est qu'un parmi d'autres recours possibles pour corriger l'enrichissement sans cause. Le demandeur devrait donc épuiser les recours dont il dispose avant que la fiducie par interprétation soit imposée.

Au Canada, la fiducie par interprétation, du moins dans le contexte de l'enrichissement sans cause, est un recours et non une règle de fond en droit des biens. Elle n'existe pas automatiquement lorsque les trois conditions requises dans l'arrêt *Pettkus c. Becker* sont établies. Le tribunal doit plutôt se demander quels autres recours existent pour remédier à l'enrichissement sans cause et si la fiducie par interprétation comme recours sur la propriété est appropriée. La théorie de la fiducie par interprétation ne permet pas au tribunal de conférer rétroactivement un droit de propriété en se fondant uniquement sur la contribution d'un conjoint et l'enrichissement de l'autre. Il faut se demander en outre si, compte tenu de l'existence d'un autre recours, le recours à la fiducie par interprétation est nécessaire ou approprié.

Puisque l'enrichissement sans cause provient du fait que les biens auxquels l'épouse a contribué étaient au nom de l'époux, la *Loi de 1986 sur le droit de la famille* prévoit un redressement qui rend inutile l'utilisation de la théorie de la fiducie par interprétation. Le recours prévu par la Loi et celui qu'offre la fiducie par interprétation visent le même but. La Loi prévoit que l'égalisation s'effectue par le paiement d'une somme calculée selon la valeur des biens au moment de la séparation (un recours *in personam*) alors que la théorie de la fiducie par interprétation conférerait un intérêt bénéficiaire dans le bien-fonds qui subsiste jusqu'à la date de l'audience (un recours sur la propriété).

La *Loi de 1986 sur le droit de la famille* prévoit une compensation complète de la contribution de l'épouse jusqu'à la date de la séparation. Après cela, tout enrichissement disproportionné résulte de l'augmentation de valeur due aux conditions changeantes du marché. Mais

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an unjust enrichment under the principles set forth in *Pettkus v. Becker*, given that the wife made no contribution after that date. As a matter of legal principle, given the fact that the Legislature provided a remedy for the unjust enrichment which would otherwise have occurred, it is not for this Court to impose an additional equitable remedy aimed at correcting the same wrong. To graft the remedy of constructive trust to the statutory scheme would pose practical problems, add uncertainty and promote litigation, and perhaps adversely affect the rights of third parties.

The suggestion that the wife should not be in a worse position than had the parties not been married is met by the fact that the Legislature, acting within the proper scope of its authority, chose to confine the Act to married persons.

The fact that a married person might be able to obtain a declaration of constructive trust before but not after separation is not anomalous. The equalization provisions of the Act provide an alternative remedy to which the spouse becomes entitled upon separation. The fact that that remedy may not be as advantageous in some cases as the remedy of constructive trust does not justify the court in altering the doctrine of constructive trust.

Very different provisions govern the division of marital property in the various provinces. There can be no simple or universally applicable answer to the question of whether the doctrine of constructive trust will apply in a statutory context: in each case, the circumstances of the case and the efficacy of alternative remedies conferred by the applicable legislation must be examined to ascertain whether, in that situation, a declaration of constructive trust should be declared.

Cases Cited

By Cory J.

Considered: *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; **referred to**: *Thompson v. Thompson*, [1961] S.C.R. 3; *Trueman v. Trueman* (1971), 18 D.L.R. (3d) 109; *Pettitt v. Pettitt*, [1969] 2 All E.R. 385; *Gissing v. Gissing*, [1970] 2 All E.R. 780; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Nuti v. Nuti* (1980), 28 O.R. (2d) 102; *Vedovato v. Vedovato* (1984), 39 R.F.L. (2d) 18; *Thoreson v. Thoreson* (1982), 137 D.L.R. (3d) 535; *Leatherdale v. Leatherdale*, [1982] 2 S.C.R. 743; *Seed v. Seed* (1986),

ce n'est pas un enrichissement sans cause selon les principes établis dans l'arrêt *Pettkus c. Becker* puisque l'épouse n'a fait aucune contribution après cette date. Selon les principes juridiques, lorsque le législateur a prévu un moyen de remédier à l'enrichissement sans cause qui se serait produit en l'espèce, il n'appartient pas à cette Cour d'imposer une réparation additionnelle en *equity* pour corriger le même tort. Greffer le mécanisme de la fiducie par interprétation à ce régime législatif entraînerait des problèmes pratiques, ajouterait à l'incertitude, susciterait des litiges et pourrait même porter atteinte aux droits de tiers.

À l'argument que la situation de l'épouse ne devrait pas être pire que celle dans laquelle elle se trouverait si les parties n'avaient pas été mariées, la réponse est que le législateur, agissant dans le cadre de ses pouvoirs, a décidé que la Loi ne s'appliquerait qu'aux personnes mariées.

Le fait qu'une personne mariée puisse obtenir une déclaration de fiducie par interprétation avant mais pas après la séparation n'est pas anormal. Les dispositions de la Loi sur l'égalisation offrent au conjoint un autre recours au moment de la séparation. Le fait que ce recours puisse ne pas être aussi avantageux dans certains cas que la fiducie par interprétation ne justifie pas le tribunal de modifier la théorie de la fiducie par interprétation.

Des dispositions très différentes régissent le partage des biens familiaux dans les provinces autres que l'Ontario. Il n'existe aucune réponse facile ou universelle à la question de savoir si la théorie de la fiducie par interprétation doit s'appliquer en contexte législatif: dans chaque cas, les circonstances de l'espèce et l'efficacité d'autres recours prévus par les lois applicables doivent être examinées pour évaluer si, dans un cas donné, il y a lieu d'imposer une fiducie par interprétation.

Jurisprudence

Citée par le juge Cory

Arrêts examinés: *Murdoch c. Murdoch*, [1975] 1 R.C.S. 423; *Sorochan c. Sorochan*, [1986] 2 R.C.S. 38; *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436; *Pettkus c. Becker*, [1980] 2 R.C.S. 834; **arrêts mentionnés**: *Thompson v. Thompson*, [1961] R.C.S. 3; *Trueman v. Trueman* (1971), 18 D.L.R. (3d) 109; *Pettitt v. Pettitt*, [1969] 2 All E.R. 385; *Gissing v. Gissing*, [1970] 2 All E.R. 780; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286; *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426; *Nuti v. Nuti* (1980), 28 O.R. (2d) 102; *Vedovato v. Vedovato* (1984), 39 R.F.L. (2d) 18; *Thoreson v. Thoreson* (1982), 137 D.L.R. (3d) 535; *Leatherdale c. Leatherdale*, [1982] 2 R.C.S. 743; *Seed*

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In *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, Mrs. Rathwell had made a direct financial contribution to the acquisition of the disputed farmland and the majority were content to use a resulting trust analysis to award a one-half interest to the wife. Dickson J. (as he then was) enlarged upon the concept of constructive trust. Writing for Laskin C.J. and Spence J., he held that Mrs. Rathwell could succeed on the basis of either a resulting trust or a constructive trust. At page 455, Dickson J. reiterated the equitable foundations of this doctrine and defined the requisite elements for a finding of constructive trust:

> The constructive trust . . . comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment.

The validity of the doctrine of constructive trust was accepted by a majority of this Court in *Pettkus v. Becker*, [1980] 2 S.C.R. 834. In this decision Dickson J. extended the constructive trust principle to a common law relationship, awarding Mrs. Becker a one-half interest in the farmlands and a bee-keeping business developed by herself and Mr. Pettkus. Although the minority found a contribution of both money and labour sufficient to support a resulting trust, Dickson J., for the majority, emphasized that the trial judge had found no common intention and that the Ontario Court of Appeal had not overruled that finding. Dickson J. commented upon the artificiality and inadequacy of the resulting trust, quoting at p. 843, with approval, Professor Donovan Water's comment that the "discovery" of an implied common intention is a "mere vehicle or formula" for achieving equity, "a constructive trust approach masquerading as a resulting trust approach" (Waters (1975), 53 *Can. Bar Rev.* 366, at p. 368). His reasons clearly demonstrate the

Dans l'affaire *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, M^me^ Rathwell avait fait une contribution financière directe à l'acquisition de la ferme en cause et les juges, à la majorité, se sont contentés d'utiliser une analyse fondée sur la fiducie par interprétation pour lui accorder le droit à la moitié des biens. Le juge Dickson (maintenant Juge en chef) a étendu la notion de fiducie par interprétation. S'exprimant au nom du juge en chef Laskin et du juge Spence, il a conclu que M^me^ Rathwell pouvait avoir gain de cause en invoquant soit la fiducie par déduction soit la fiducie par interprétation. À la page 455, le juge Dickson a rappelé les fondements en *equity* de cette théorie et défini les éléments requis pour conclure à l'existence d'une fiducie par interprétation:

> La fiducie par interprétation [. . .] comporte l'imposition par le tribunal du mécanisme fiduciaire pour atteindre un résultat conforme à ce que dicte la conscience. En principe, le tribunal ne permettra pas à quelqu'un de s'approprier injustement des biens acquis par le travail d'un autre. Le lien du mariage entre les parties ne met pas en échec ce principe; mais pour qu'il l'emporte, les faits doivent démontrer un enrichissement, un appauvrissement correspondant et l'absence de tout motif juridique — tel un contrat ou une disposition légale — à l'enrichissement.

Dans l'arrêt *Pettkus c. Becker*, [1980] 2 R.C.S. 834, notre Cour, à la majorité, a accepté la validité de la théorie de la fiducie par interprétation. Dans cet arrêt, le juge Dickson a étendu le principe de la fiducie par interprétation à une relation de fait, accordant à M^me^ Becker le droit à la moitié des terres agricoles et de l'exploitation apicole mise sur pied par elle-même et M. Pettkus. Bien que la minorité ait conclu à l'existence d'une contribution en argent et en travail suffisante pour justifier une fiducie par déduction, le juge Dickson, au nom de la majorité, a souligné que le juge de première instance avait conclu à l'absence d'intention commune et que la Cour d'appel de l'Ontario n'avait pas infirmé cette conclusion. Le juge Dickson a souligné le caractère artificiel et inadéquat de la fiducie par déduction, citant et approuvant, à la p. 843, le commentaire du professeur Donovan Waters que la «découverte» d'une intention commune implicite est un «simple moyen ou formule» pour rendre une décision équitable ou «une fiducie par interprétation qui se déguise en une fiducie par

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broad and equitable nature of the remedial constructive trust and its applicability to any property dispute.

The importance of *Pettkus v. Becker* was emphasized in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. At page 471 Dickson C.J. stated:

> The constructive trust has existed for over two hundred years as an equitable remedy for certain forms of unjust enrichment .... Until the decision of this Court in *Pettkus v. Becker*, the constructive trust was viewed largely in terms of the law of trusts, hence the need for the existence of a fiduciary relationship. In *Pettkus v. Becker*, the Court moved to an approach more in line with restitutionary principles by explicitly recognizing constructive trust as one of the remedies for unjust enrichment.

Subsequently, this Court has made it clear that the constructive trust remedy will also apply to circumstances where a spouse has contributed not to the acquisition of property but to its preservation, maintenance or improvement. In *Sorochan v. Sorochan*, *supra*, a woman was awarded an interest in a farm owned by her common law spouse of 42 years on the basis of the labour she had contributed over the years to preserving and maintaining the farm, performing domestic labour and raising the parties' six children. Dickson C.J., writing for a unanimous Court, reiterated the three-part test requiring an enrichment, a corresponding deprivation and the absence of any juristic reason therefor. In light of the particular facts of the case, he concentrated on defining the requirement for a causal connection between the deprivation and the property involved. He wrote at p. 50:

> These cases reveal the need to retain flexibility in applying the constructive trust. In my view, the constructive trust remedy should not be confined to cases involving property acquisition. While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of prop-

déduction» (Waters (1975), 53 *R. du B. can.* 366, à la p. 368). Ses motifs indiquent clairement le caractère étendu et équitable du recours à la fiducie par interprétation et son applicabilité à tous les litiges portant sur les biens.

L'importance de l'arrêt *Pettkus c. Becker* a été soulignée dans l'arrêt *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426. À la page 471, le juge en chef Dickson a affirmé:

> La fiducie par interprétation existe depuis plus de deux cents ans à titre de redressement en *equity* contre certaines formes d'enrichissement sans cause [. . .] Jusqu'à l'arrêt de cette Cour *Pettkus c. Becker*, la fiducie par interprétation était perçue surtout sous l'angle du droit des fiducies, d'où la nécessité d'une relation fiduciaire. Dans l'arrêt *Pettkus c. Becker*, cette Cour a choisi d'adopter un point de vue plus conforme aux principes de restitution en reconnaissant explicitement que la fiducie par interprétation constitue l'un des redressements contre l'enrichissement sans cause.

Ultérieurement, notre Cour a clairement indiqué que la fiducie par interprétation comme recours s'appliquera également dans des circonstances où un conjoint a contribué non pas à l'acquisition du bien mais à sa conservation, à son entretien ou à son amélioration. Dans l'arrêt *Sorochan c. Sorochan*, précité, elle a accordé à une femme un droit dans la ferme appartenant à son conjoint de fait, avec lequel elle avait vécu 42 ans, en raison du travail qu'elle avait fourni au cours des ans pour conserver et entretenir la ferme, en exécutant des travaux domestiques et en élevant les six enfants des parties. Le juge en chef Dickson, au nom de la Cour unanime, a rappelé les trois volets du critère qui exigent un enrichissement, un appauvrissement correspondant et l'absence de tout motif juridique. Compte tenu des faits particuliers de l'affaire, il a porté son attention sur la définition de l'exigence d'un lien causal entre l'appauvrissement et le bien en cause. Il a écrit, à la p. 50:

> Cette jurisprudence révèle la nécessité de souplesse dans l'application du principe de la fiducie par interprétation. Selon moi, le redressement qu'est la fiducie par interprétation ne doit pas être accordé uniquement dans les affaires où il y a eu acquisition de biens. Certes, il importe d'exiger un certain lien entre l'appauvrissement du requérant et les biens en cause, mais il n'est pas nécessaire que ce lien revête toujours la forme d'une contribution à l'acquisition comme telle des biens. Une

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TAB 24

CHAPTER 2

THE CONCEPT OF SECURITY INTEREST AND SCOPE OF THE *PERSONAL PROPERTY SECURITY ACT*

A. THE DEFINITION AND CENTRAL CONCEPT OF SECURITY INTEREST

1) A Unitary Concept

The concept of security interest is at the core of the PPSA.[1] The Act applies only to transactions that create or provide for security interests or that are deemed to create security interests.[2] In the context of the PPSA itself, there is no need to determine the nature of a security interest other than to recognize that it is an interest that gives to the secured party the rights against specified kinds of competing claim-

1 Issues relating to the creation of a security interest, including questions of rights in the collateral and attachment, are dealt with in Chapter 4.

2 It is clear that a security agreement is a necessary but not sufficient condition for the creation of a security interest. All of the statutory prerequisites for its creation must be met: an agreement through which it is recognized that the secured party has or is to have a "security interest"; the giving of value by the secured party; and the holding or acquisition of (or power to transfer) rights in the collateral by the debtor. A security interest is created by a security agreement only in the sense that a security agreement is a *sine qua non* of the existence of a security interest. The making of a security agreement by the parties provides the legally relevant evidence of their intentions that one party is to have a security interest in property of the other. Once the existence of this evidence coincides with the existence of the other prerequisites, the security interest attaches.

of those proceeds.[92] However, since "trust proceeds" clauses are a common feature of security agreements under which inventory is collateral, such a clause by itself has neutral significance. It will have significance as a characterization factor only when found along with other indicia of a consignment.

There are several factors that, by themselves, are outside a pure principal-agent relationship but which do not necessarily preclude the finding of a consignment arrangement if they are accompanied by other factors that indicate a consignment. For example, a consignment may provide that the consignee is free to set the sale price of the goods at any level above that set by the consignor and is entitled to retain as remuneration the difference between the sale price and the set price.[93] A true consignment may provide that the consignee is obligated to bear the risk of loss of or damage to the consigned goods,[94] or has the right to elect to buy the consigned goods and then sell them on his own account.[95]

4) Security Trusts

a) A Trust That Secures Payment or Performance of an Obligation

The PPSA includes in the illustrative list of security agreements a "trust . . . that secures payment or performance of an obligation."[96] This is in addition to the traditional types of financing transactions mentioned in the list, such as trust indentures,[97] that contain trust elements. While under pre-PPSA law trusts were not considered to be security devices unless they were part of a trust indenture, courts were quite prepared

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92 See *Bank of Montreal v Colossal Carpets Ltd*, above note 76; *In re Richardson*, above note 85.

93 See *Re Stephanian's Persian Carpets Ltd*, above note 82; *Langley v Kahnert*, above note 82; *Re Alcock, Ingram & Co*, [1924] 1 DLR 388 (Ont SCAD).

94 *Re Stephanian's Persian Carpets Ltd, ibid*.

95 *Ibid*; *Langley v Kahnert*, above note 82.

96 PPSA (A, M, NB, PEI, S) s 3(1); (BC, NWT, Nu) s 2(1); (NL, NS) s 4(1); O s 2(a); Y s 2. OPPSA s 2(a) does not include a trust in the list of transactions deemed to create a security interest. However, it refers to an equipment trust, a trust indenture, and a trust receipt. Since the list of included transactions does not exhaust the types of transactions to which the Act applies, this difference between the OPPSA and the PPSA is not significant. The analysis in this part of the book applies equally to all Acts.

97 See Donovan WM Waters, Mark Gillen, & Lionel Smith, *Water's Law of Trusts in Canada*, 3d ed (Toronto: Thomson Carswell, 2005) at 12.III.C.3 [Waters].

to recognize that they could have this effect.[98] Consequently, even without an express mention of trust in the PPSA, the general substance test of the section would bring within the scope of the Act a trust that secures payment or performance of an obligation.

When determining in a particular situation whether or not a trust falls within the scope of the PPSA, it is necessary to distinguish three different patterns: (1) where the transaction is a trust but not a security agreement; (2) where the arrangement is both a trust and a security agreement; and (3) where a trust and a security agreement are used separately as part of the same transaction.

b) Trust or Security Agreement

Even though a trust gives rise to an obligation on the part of the trustee to pay money or other value to a beneficiary, it is not necessarily a trust within the scope of the PPSA (that is, a security trust). For a trust to be a security trust, its function must be to secure an obligation, not just embody the obligation as an inherent aspect of the trust relationship.

One test that has been applied by the courts to determine whether a transaction is a trust or security agreement is whether the relationship between the parties is that of creditor and debtor, on the one hand, or trustee and beneficiary, on the other. Only when a creditor-debtor relationship exists can a security agreement be involved.[99] If, for example, the relationship is one of principal and agent,[100] the obligation owing by the agent-trustee to honour the express or implied terms to hold the principal's property in trust is endemic to the relationship[101] and not one created by agreement between the parties.[102] Of course, an agency relationship does not preclude the creation of a security agreement be-

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98 See *Flintoft v Royal Bank of Canada,* [1964] SCR 631; *Ford Tractor Equipment Sales Co of Canada Ltd v Otto Grundman Implements Ltd (Trustee of)* (1969), 72 WWR 1 (Man CA). See Donovan WM Waters, "Trusts in the Settling of Business, Commerce, and Bankruptcy" (1983) 21 Alta L Rev 395 at 418–20.

99 See, for example, *Re Skybridge Holidays Inc* (1998), 13 PPSAC (2d) 387 (BCSC), aff'd1999 BCCA 185; *Gervais (Guardian ad litem of) v Yewdale* (1993), 6 PPSAC (2d) 62 (BCSC).

100 *Graff v Bitz (Trustee of)* (1991), 2 PPSAC (2d) 262 (Sask QB).

101 See, for example, *Canadian Pacific Airlines Ltd v Canadian Imperial Bank of Commerce* (1987), 42 DLR (4th) 375 (Ont HCJ); *Air Canada v M & L Travel Ltd* (1993), 108 DLR (4th) 592 (SCC).

102 Where the relationship between the principal and agent arises out of a commercial consignment, the beneficial interest of the consignor-principal is a security interest under the PPSA since a commercial consignment is deemed to be a security interest under all Acts other than the OPPSA. See PPSA (A, M, NB, PEI, S) s 3(2); (NL, NS) s 4(2); (NWT, Nu) s 2(2); BC s 3; Y s 2(b).

tween the parties where an interest is taken in property of the agent to secure a separate obligation owing by the agent to the principal.[103]

While this test can be helpful in some situations, its usefulness is limited. Unless the contract between the parties falls within a recognized category, such as agency, that does not involve a creditor and debtor relationship, this approach may not lead to a relevant conclusion; it may just beg the question. The existence of an equitable debt owing by a trustee to a beneficiary does not lead to the conclusion that a security agreement is involved.

c) Trust and Security Agreement

It is clear from the wording of the PPSA[104] that the drafter contemplated situations in which a trust arrangement created by contract is also a security agreement. The result is that two legal regimes apply to a trust that secures payment or performance of an obligation: equity and the PPSA. Since a trustee and a beneficiary or a settlor and beneficiary can be in a debtor-creditor relationship, the issue to be determined in this context is whether the trust is being used as the vehicle to secure the obligation that is the basis of this relationship or is merely the source of the obligation. Under a security trust either the secured party or the debtor can be the trustee or the beneficiary.

A trust and a security agreement co-exist in the following situations:

> Pursuant to an agreement with B, A transfers property to C to be held on the trust condition that, in the event of non-performance of an obligation owing by A to B, the property will be transferred to B or disposed of and the proceeds applied to discharge the obligation owing by A to B. The beneficial interest of B under the trust is a security interest.
>
> Pursuant to an agreement with B, A transfers property to B to be held on the trust condition that, in the event of non-performance of an obligation owing by A to B, B will be entitled to retain the property or may sell it and apply the proceeds to the obligation owing by A to B. B's title as trustee and B's potential beneficial interest in the property that is the object of the trust constitute a security interest.
>
> Pursuant to an agreement with B, A settles property on himself on the trust condition that it will be transferred to B or be sold and the proceeds applied to an obligation owing by A to B if A fails to dis-

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103 *Re Sims Battle Brewster & Associates Inc,* 1999 ABQB 830.

104 PPSA (A, M, NB, PEI, S) s 3(1); (BC, NWT, Nu) s 2(1); (NL, NS) s 4(1); Y s 2.

TAB 25

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Fotios Korkontzilas, Panagiota Korkontzilas and Olympia Town Real Estate Limited *Appellants*

v.

Nick Soulos *Respondent*

INDEXED AS: SOULOS *v.* KORKONTZILAS

File No.: 24949.

1997: February 18; 1997: May 22.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trusts and trustees — Constructive trust — Agency — Fiduciary duties — Real estate agent making offer to purchase property on behalf of client — Vendor rejecting offer but advising agent of amount it would accept — Agent buying property for himself instead of conveying information to client — Market value of property decreasing from time of agent's purchase — Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

Real property — Remedies — Constructive trust — Agency — Real estate agent making offer to purchase property on behalf of client — Vendor rejecting offer but advising agent of amount it would accept — Agent buying property for himself instead of conveying information to client — Market value of property decreasing from time of agent's purchase — Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

K, a real estate broker, entered into negotiations to purchase a commercial building on behalf of S, his client. The vendor rejected the offer made and tendered a counteroffer. K rejected the counteroffer but "signed it back". The vendor advised K of the amount it would accept, but instead of conveying this information to S, K arranged for his wife to purchase to property, which was then transferred to K and his wife as joint tenants.

Fotios Korkontzilas, Panagiota Korkontzilas et Olympia Town Real Estate Limited *Appelants*

c.

Nick Soulos *Intimé*

RÉPERTORIÉ: SOULOS *c.* KORKONTZILAS

N° du greffe: 24949.

1997: 18 février; 1997: 22 mai.

Présents: Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Fiducies et fiduciaires — Fiducie par interprétation — Mandat — Obligations fiduciaires — Un agent immobilier a présenté une offre d'achat concernant un immeuble au nom de son client — Le vendeur a rejeté l'offre, mais il a informé l'agent du montant qu'il accepterait — L'agent a acheté l'immeuble pour lui-même au lieu de transmettre l'information à son client — La valeur marchande de l'immeuble a diminué depuis que l'agent l'a acheté — Est-il possible d'imposer une fiducie par interprétation à l'égard de l'immeuble et d'ordonner à l'agent de le transférer à son client, même si ce dernier ne peut établir qu'il a subi une perte?

Immeuble — Réparation — Fiducie par interprétation — Mandat — Un agent immobilier a présenté une offre d'achat concernant un immeuble au nom de son client — Le vendeur a rejeté l'offre, mais il a informé l'agent du montant qu'il accepterait — L'agent a acheté l'immeuble pour lui-même au lieu de transmettre l'information à son client — La valeur marchande de l'immeuble a diminué depuis que l'agent l'a acheté — Est-il possible d'imposer une fiducie par interprétation à l'égard de l'immeuble et d'ordonner à l'agent de le transférer à son client, même si ce dernier ne peut établir qu'il a subi une perte?

K, un courtier en immeubles, a entamé des négociations au nom de S, son client, en vue d'acheter un immeuble commercial. Le vendeur a rejeté l'offre et présenté une contre-offre. K a rejeté la contre-offre, mais il est revenu à la charge. Le vendeur a informé K du montant qu'il accepterait, mais au lieu de transmettre cette information à S, K a pris des dispositions pour que son épouse achète l'immeuble. L'immeuble a ensuite été

S brought an action against K to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in his community. He abandoned his claim for damages because the market value of the property had decreased from the time of the purchase by K. The trial judge found that K had breached a duty of loyalty to S, but held that a constructive trust was not an appropriate remedy because K had not been "enriched". The Court of Appeal, in a majority decision, reversed the judgment and ordered that the property be conveyed to S subject to appropriate adjustments.

transféré à K et à son épouse, à titre de copropriétaires. Alléguant un manquement à une obligation fiduciaire donnant lieu à une fiducie par interprétation, S a intenté une action contre K afin d'obtenir que l'immeuble lui soit transféré. Il a soutenu que l'immeuble avait une valeur particulière pour lui parce que son banquier en était le locataire et que le fait d'être le bailleur de son propre banquier était une source de prestige dans sa communauté. Il a renoncé à revendiquer des dommages-intérêts parce que la valeur marchande de l'immeuble avait diminué depuis que K l'avait acheté. Le juge du procès a conclu que K avait manqué à un devoir de loyauté envers S, mais il a statué que la fiducie par interprétation n'était pas la réparation appropriée parce que K ne s'était pas «enrichi». Dans une décision rendue à la majorité, la Cour d'appel a infirmé cette décision et ordonné le transfert de l'immeuble à S sous réserve des ajustements nécessaires.

Held (Sopinka and Iacobucci JJ. dissenting): The appeal should be dismissed.

Arrêt (les juges Sopinka et Iacobucci sont dissidents): Le pourvoi est rejeté.

Per La Forest, Gonthier, Cory, McLachlin and Major JJ.: The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and 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.

Les juges La Forest, Gonthier, Cory, McLachlin et Major: La fiducie par interprétation est une institution ancienne et éclectique imposée par le droit non pas seulement pour remédier à l'enrichissement sans cause, mais aussi pour obliger des personnes se trouvant dans diverses situations à se conformer à des normes élevées en matière de confiance et de probité et les empêcher de conserver des biens qu'en toute «conscience» elles ne devraient pas être autorisées à garder. Bien qu'au cours des dernières décennies les tribunaux canadiens aient utilisé la fiducie par interprétation pour remédier à l'enrichissement sans cause, cet emploi ne devrait pas être interprété comme ayant fait disparaître du droit canadien la fiducie par interprétation dans les autres cas où l'on reconnaît depuis longtemps la possibilité d'y avoir recours. Au nom de la conscience, l'application de la fiducie par interprétation est reconnue tant pour sanctionner des conduites fautives tels la fraude et le manquement à un devoir de loyauté que pour remédier à l'enrichissement sans cause et à un appauvrissement correspondant. Bien qu'elle soit souvent imposée parce qu'il y a à la fois conduite fautive et enrichissement sans cause, la fiducie par interprétation peut aussi être accordée pour l'un ou l'autre motif.

The following conditions should generally be satisfied before a constructive trust based on wrongful conduct will be imposed: (1) the defendant must have been under an equitable obligation 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

Les conditions suivantes doivent généralement être réunies avant qu'une fiducie par interprétation fondée sur un comportement fautif puisse être imposée: 1) le défendeur doit avoir été assujetti à une obligation en *equity* relativement aux actes qui ont conduit à la possession des biens; 2) il faut démontrer que la possession des biens par le défendeur résulte des actes qu'il a ou est

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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.

Here K's breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust. First, K was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted a breach of his equitable duty of loyalty. Second, the assets in K's hands resulted from his agency activities in breach of his equitable obligation to S. Third, a constructive trust is required to remedy the deprivation S suffered because of his continuing desire to own the particular property in question. A constructive trust is also required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty. Finally, there are no factors which would make imposition of a constructive trust unjust in this case.

Per Sopinka and Iacobucci JJ. (dissenting): The ordering of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. The trial judge's decision not to order such a remedy should be overturned on appeal only if the discretion has been exercised on the basis of an erroneous principle. The trial judge committed no such error here. He considered the moral quality of K's actions and there is thus no room for appellate intervention on this ground. He was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which is a correct statement of the law. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In this case, S withdrew his claim for damages. While compensatory damages were unavailable since no pecuniary

réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'*equity* lui imposait à l'égard du demandeur; 3) le demandeur doit établir qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel, soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations; et 4) il ne doit pas exister de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire.

En l'espèce, le manquement par K à son devoir de loyauté a suffi pour engager la conscience du tribunal et lui permettre de conclure à l'existence d'une fiducie par interprétation. Premièrement, K était assujetti à une obligation en *equity* relativement à l'immeuble en cause. Son omission de faire part à son client de l'information qu'il avait obtenue au nom de ce dernier quant au prix que le vendeur accepterait pour l'immeuble et l'utilisation de cette information pour acheter lui-même l'immeuble constituaient un manquement au devoir de loyauté imposé par l'*equity*. Deuxièmement, K a obtenu la possession de cet immeuble par suite des actes accomplis à titre de mandataire et du manquement à l'obligation que lui imposait l'*equity* envers S. Troisièmement, une fiducie par interprétation est nécessaire pour remédier à l'appauvrissement que S a subi en raison de son désir persistant de devenir propriétaire de l'immeuble en question. Une fiducie par interprétation est également requise dans des cas comme celui-ci pour assurer le respect du devoir de loyauté auquel sont tenus les mandataires et autres personnes occupant des postes de confiance. Enfin, il n'y a pas en l'espèce de facteurs qui rendraient inéquitable l'imposition d'une fiducie par interprétation.

Les juges Sopinka et Iacobucci (dissidents): La décision d'imposer une fiducie par interprétation est discrétionnaire, et à ce titre, elle doit être abordée avec retenue par les tribunaux d'appel. La décision du juge de première instance de ne pas imposer une telle réparation ne peut être annulée en appel que si l'exercice du pouvoir discrétionnaire a été fondé sur un principe erroné. Il n'a pas commis une telle erreur dans la présente cause. Le juge du procès a tenu compte de la valeur morale du comportement de K et, par conséquent, un tribunal d'appel ne peut intervenir en se fondant sur ce motif. Il était d'avis que lorsque rien ne justifie que le tribunal accorde une fiducie par interprétation ou une autre réparation, la seule valeur morale de l'acte ne suffira pas à fonder une telle décision; cet énoncé du droit est juste. Le juge du procès a le pouvoir discrétionnaire d'imposer ou non la fiducie par interprétation et l'exercice de ce pouvoir ne devrait pas dépendre du nombre des répara-

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loss was suffered, S could have sought exemplary damages. His decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust. The trial judge also considered deterrence, but held that it alone could not justify a remedy in this case.

Even if appellate review were appropriate, the remedy of a constructive trust was not available on the facts of this case. Recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment, and there was no enrichment, and therefore no unjust enrichment, here. The unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role and supported by specific consideration of the principles set out in *Lac Minerals*. Deterrence does not suggest that a constructive trust should be available even where there is no unjust enrichment. Despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not held it to be necessary where a tort duty or a contractual duty has been breached to order remedies even where no loss resulted. There is nothing which would justify treating breaches of fiduciary duties any differently in this regard. In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not have any significant effect on deterrence. Exemplary damages are available if deterrence is deemed to be particularly important, and an unscrupulous fiduciary has to reckon with the possibility that if there were gains in value to the property, he or she would be compelled to pay damages or possibly give up the property.

Cases Cited

By McLachlin J.

Referred to: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *White v. Central Trust Co.* (1984), 17 E.T.R. 78; *Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276; *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (1919); *Neale v. Willis* (1968), 19 P. & C.R. 836; *Binions v. Evans*, [1972] Ch. 359; *Hussey v.*

tions possibles. En l'espèce, S a renoncé à réclamer des dommages-intérêts. Même s'il ne pouvait réclamer de dommages-intérêts compensatoires puisqu'il n'a subi aucune perte pécuniaire, S aurait pu réclamer des dommages-intérêts punitifs. Sa décision de ne pas le faire ne devrait pas jouer sur l'exercice du pouvoir discrétionnaire du juge du procès relativement à la fiducie par interprétation. Le juge du procès a également tenu compte de l'élément de dissuasion, mais il a conclu que celui-ci ne pouvait en soi justifier l'octroi d'une réparation en l'espèce.

Même si l'examen en appel était justifié, la fiducie par interprétation ne s'offrait pas aux parties, vu les faits de l'espèce. Il ressort très clairement de la jurisprudence récente de la Cour qu'une fiducie par interprétation ne peut être imposée que lorsqu'il y a enrichissement sans cause. En l'espèce, il n'y a eu aucun enrichissement et, par conséquent, aucun enrichissement sans cause. L'impossibilité d'imposer une fiducie par interprétation en l'absence d'un enrichissement sans cause est compatible avec le rôle réparateur de cette fiducie, et l'analyse des principes exposés dans l'arrêt *Lac Minerals* appuie également cette règle. La dissuasion n'exige pas que l'on puisse recourir à la fiducie par interprétation même en l'absence d'un enrichissement sans cause. Malgré des considérations de dissuasion, il est vrai que le droit privé ne prévoit habituellement pas de recours en cas d'absence de perte. Les tribunaux n'ont pas jugé qu'il était nécessaire d'accorder, même en l'absence de perte, une réparation à la suite d'un manquement à une obligation en matière délictuelle ou contractuelle. Rien ne justifie que les manquements aux obligations fiduciaires reçoivent un traitement particulier à cet égard. De toute façon, l'impossibilité d'invoquer la fiducie par interprétation en l'absence d'un enrichissement sans cause n'a aucune incidence importante quant à l'élément de dissuasion. Des dommages-intérêts punitifs pourraient être imposés si l'élément de dissuasion était jugé particulièrement important, et un fiduciaire sans scrupules devra avoir à l'esprit la possibilité que, si le bien prenait de la valeur, il devrait alors payer des dommages-intérêts ou peut-être même céder le bien.

Jurisprudence

Citée par le juge McLachlin

Arrêts mentionnés: *Pettkus c. Becker*, [1980] 2 R.C.S. 834; *White c. Central Trust Co.* (1984), 17 E.T.R. 78; *Carl Zeiss Stiftung c. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276; *Beatty c. Guggenheim Exploration Co.*, 122 N.E. 378 (1919); *Neale c. Willis* (1968), 19 P. & C.R. 836; *Binions c. Evans*, [1972] Ch. 359;

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The Court of Appeal did not take issue with these conclusions. The majority did, however, differ from the trial judge on what consequences flowed from Mr. Korkontzilas' breach of the duty of loyalty.

IV

This brings us to the main issue on this appeal: what remedy, if any, does the law afford Mr. Soulos for Mr. Korkontzilas' breach of the duty of loyalty in acquiring the property in question for himself rather than passing the vendor's statement of the price it would accept on to his principal, Mr. Soulos?

At trial Mr. Soulos' only claim was that the property be transferred to him for the price paid by Mr. Korkontzilas, subject to adjustments for changes in value and losses incurred on the property since purchase. He abandoned his claim for damages at an early stage of the proceedings. This is not surprising, since Mr. Korkontzilas had paid market value for the property and had, in fact, lost money on it during the period he had held it. Still, Mr. Soulos maintained his desire to own the property.

Mr. Soulos argued that the property should be returned to him under the equitable doctrine of constructive trust. The trial judge rejected this claim, on the ground that constructive trust arises only where the defendant has been unjustly enriched by his wrongful act. The fact that damages offered Mr. Soulos no compensation was of no moment: "It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none" (p. 69). Furthermore, "it seems simply disproportionate and inappropriate to utilize the drastic remedy of a constructive trust where the plaintiff has suffered no damage" (p. 69). The trial judge added that nominal damages were inappropriate, damages having been waived, and that

La Cour d'appel n'a pas remis en question ces conclusions. Les juges majoritaires n'étaient toutefois pas du même avis que le juge du procès quant aux conséquences du manquement par M. Korkontzilas à son devoir de loyauté. 8

IV

Cela nous amène à la principale question en litige dans le présent pourvoi: quelle réparation, s'il en est, le droit offre-t-il à M. Soulos par suite du manquement au devoir de loyauté commis par M. Korkontzilas lorsqu'il a acquis l'immeuble en question au lieu de faire part à son mandant, M. Soulos, du prix que le vendeur accepterait? 9

Au procès, M. Soulos a seulement demandé le transfert de l'immeuble sur paiement de la somme versée par M. Korkontzilas, sous réserve des ajustements nécessaires par suite des changements de valeur intervenus et des pertes subies depuis l'achat de l'immeuble. Il s'est désisté de sa demande de dommages-intérêts au début de la poursuite, ce qui n'est pas étonnant vu que M. Korkontzilas avait acquis l'immeuble pour sa valeur marchande et qu'il avait en fait perdu de l'argent au cours de la période pendant laquelle il en avait été propriétaire. Quoiqu'il en soit, M. Soulos voulait toujours devenir propriétaire de l'immeuble. 10

Monsieur Soulos a soutenu que l'immeuble devait lui être remis en vertu de la doctrine de la fiducie par interprétation reconnue en *equity*. Le juge du procès a rejeté cette prétention pour le motif qu'il ne pouvait y avoir fiducie par interprétation que si le défendeur s'était enrichi sans cause par suite de sa conduite fautive. L'impossibilité d'indemniser M. Soulos au moyen de dommages-intérêts n'avait aucune importance: [TRADUCTION] «Il serait anormal de reconnaître l'existence d'une fiducie par interprétation parce que le recours aux dommages-intérêts n'est pas satisfaisant, le demandeur n'ayant subi aucun préjudice» (à la p. 69). De plus, [TRADUCTION] «il semble tout simplement exagéré et inapproprié d'accorder la réparation draconienne que constitue la fiducie par interprétation lorsque le demandeur n'a subi aucun préjudice» (à la p. 69). Le juge du procès a ajouté qu'il 11

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Mr. Soulos had mitigated his loss by buying other properties.

n'y avait pas lieu d'accorder des dommages-intérêts symboliques étant donné qu'il y avait eu renonciation aux dommages-intérêts et que M. Soulos avait atténué sa perte en achetant d'autres immeubles.

12 The majority of the Court of Appeal took a different view. Carthy J.A. held that the award of an equitable remedy is discretionary and dependent on all the facts before the court. In his view, however, the trial judge had exercised his discretion on a wrong principle. Carthy J.A. asserted that the moral quality of the defendant's act may dictate the court's intervention. Most real estate transactions involve one person acting gratuitously for the purchaser, while seeking commission from the vendor. The fiduciary duties of the agent would be meaningless if the agent could simply acquire the property at market value, and then deny that he or she is a constructive trustee because no damages are suffered. In such circumstances, equity will "intervene with a proprietary remedy to sustain the integrity of the laws which it supervises" (p. 261). Carthy J.A. conceded that Mr. Soulos' reason for desiring the property may seem "whimsical". But viewed against the broad context of real estate transactions, he found that the remedy of constructive trust in these circumstances serves a "salutary purpose". It enables the court to ensure that immoral conduct is not repeated, undermining the bond of trust that enables the industry to function. The majority accordingly ordered conveyance of the property subject to appropriate adjustments.

Les juges majoritaires de la Cour d'appel étaient d'un avis différent. Le juge Carthy a statué que la décision d'accorder une réparation en *equity* était discrétionnaire et dépendait de l'ensemble des faits invoqués devant le tribunal. Selon lui, le juge du procès avait toutefois exercé son pouvoir discrétionnaire en se fondant sur un principe erroné. Le juge Carthy a affirmé que la valeur morale de la conduite du défendeur pouvait dicter l'intervention du tribunal. Dans la plupart des opérations immobilières, une personne agit gracieusement pour l'acheteur tout en demandant une commission au vendeur. Les obligations fiduciaires de l'agent seraient dénuées de sens si celui-ci pouvait tout simplement acquérir l'immeuble à sa valeur marchande et nier ensuite qu'il est fiduciaire par interprétation parce qu'aucun préjudice n'a été subi. Dans de telles circonstances, les tribunaux d'*equity* [TRADUCTION] «accordent une réparation fondée sur la propriété pour préserver l'intégrité des règles de droit dont ils surveillent l'application» (à la p. 261). Le juge Carthy a admis que le motif pour lequel M. Soulos désirait l'immeuble pouvait sembler [TRADUCTION] «fantaisiste». Il a toutefois conclu que, si on l'examine dans le contexte général des opérations immobilières, le recours à la fiducie par interprétation dans ces circonstances vise un [TRADUCTION] «objectif salutaire». Elle permet au tribunal de veiller à ce que ne se reproduise pas un comportement immoral qui risque d'ébranler la relation de confiance sur laquelle repose la profession. Les juges majoritaires ont donc ordonné le transfert de la propriété de l'immeuble sous réserve des ajustements nécessaires.

13 The difference between the trial judge and the majority in the Court of Appeal may be summarized as follows. The trial judge took the view that in the absence of established loss, Mr. Soulos had no action. To grant the remedy of constructive trust in the absence of loss would be "simply disproportionate and inappropriate", in his view. The major-

La divergence entre le juge du procès et les juges majoritaires de la Cour d'appel peut se résumer de la manière suivante. Le juge du procès était d'avis qu'en l'absence d'une perte établie, M. Soulos n'avait aucun droit d'action. Selon lui, il serait «tout simplement exagéré et inapproprié» d'accorder, en l'absence d'une perte, la fiducie par

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useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The

société considère comme utile, tout en écartant la nécessité d'une réglementation officielle qui risquerait d'en réduire l'utilité sociale.

La fiducie par interprétation imposée pour manquement à une obligation fiduciaire permet non seulement de rendre justice aux parties comme l'exige la conscience, mais aussi d'obliger les fiduciaires et autres personnes occupant des postes de confiance à se conformer aux normes élevées en matière de confiance et de probité nécessaires pour assurer l'efficacité des institutions commerciales et autres institutions sociales.

Il ressort qu'une fiducie par interprétation peut être imposée lorsque la conscience l'exige. L'examen portant sur les exigences de la conscience doit tenir compte des situations où des fiducies par interprétation ont été reconnues dans le passé. Il est guidé aussi par les deux raisons pour lesquelles les fiducies par interprétation ont été traditionnellement imposées: rendre justice aux parties et préserver l'intégrité d'institutions fondées sur des rapports assimilables à ceux qui existent dans le cadre des fiducies. Enfin, l'examen se fait en fonction de l'absence d'indication qu'une fiducie par interprétation aurait un effet inéquitable ou injuste sur le défendeur ou sur des tiers, ce dont l'*equity* a toujours tenu compte. Les réparations reconnues en *equity* sont souples; elles sont accordées en fonction de ce qui est juste compte tenu de toutes les circonstances de l'espèce.

La conscience comme élément unificateur dans les différents cas où il est possible de conclure à une fiducie par interprétation a l'inconvénient d'être très générale. Mais tout concept capable d'englober les diverses circonstances dans lesquelles une fiducie par interprétation peut être imposée doit obligatoirement l'être. Ce sont les circonstances particulières des cas où les juges ont conclu dans le passé à l'existence d'une fiducie par interprétation qui viennent préciser le concept général. Le juge à qui l'on demande d'imposer une fiducie par interprétation tiendra compte non seulement de ce qui pourrait sembler «équitable» dans un sens général, mais aussi des autres cas où les tribunaux ont conclu à l'existence d'une fiducie par interprétation. L'objectif consiste simplement à

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TAB 26

The Guarantee Company of North America et al. v. Royal Bank of Canada et al.

[Indexed as: Guarantee Company of North America v. Royal Bank of Canada]

Ontario Reports

Court of Appeal for Ontario

Hoy A.C.J.O., Doherty, Sharpe, L.B. Roberts and Fairburn JJ.A.

January 14, 2019

144 O.R. (3d) 225 | 2019 ONCA 9

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Case Summary

Bankruptcy and insolvency — Property of bankrupt — Trusts — Provincially created statutory trusts preserving bankrupt's assets from distribution to ordinary creditors under s. 67(1)(a) of Bankruptcy and Insolvency Act so long as statutory trust satisfies general principles of trust law — Statutory trust created by s. 8(1) of Construction Lien Act ("CLA") satisfying requirement for certainty of intention — Debts for construction project choses in action that supply requisite certainty of subject matter — Commingling of CLA funds from various projects not negating certainty of subject matter where funds were identifiable and traceable — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1) (a) — Construction Lien Act, R.S.O. 1990, c. C.30, s. 8(1).

Constitutional law — Distribution of legislative authority — Paramountcy — No operational conflict existing between s. 8(1) of Construction Lien Act and s. 67(1)(a) of Bankruptcy and Insolvency Act — Doctrine of paramountcy not applying — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Construction Lien Act, R.S.O. 1990, c. C.30, s. 8(1).

Construction law — Trust fund — Trust funds under s. 8(1) of Construction Lien Act excluded from distribution to bankrupt contractor's creditors pursuant to s. 67(1)(a) of Bankruptcy and Insolvency Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Construction Lien Act, R.S.O. 1990, c. C.30, s. 8(1).

A priority dispute arose between Royal, a secured creditor of a bankrupt construction contractor, GCNA, a bond company and secured creditor of the bankrupt, and certain employees of the bankrupt, represented by the unions. RBC took the position that funds paid to the receiver by owners that were "trust funds" within the meaning of s. 8 of the *Construction Lien Act* formed part of the bankrupt's estate available to creditors. GCNA and the unions took the position that the funds were trust funds that had to be excluded from the bankrupt's property pursuant to s. 67(1)(*a*) of the *Bankruptcy and Insolvency Act* ("*BIA*"). The receiver brought a motion for advice

and directions to resolve the dispute. The motion judge found that the funds were not excluded under s. 67(1)(*a*) and were available for distribution to creditors. GCNA appealed.

Held, the appeal should be allowed.

The decision of the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd.* contemplates provincially created statutory trusts preserving assets from distribution to ordinary creditors under s. 67(1)(*a*) of the *BIA*, provided the statutory trust satisfies the general principles of trust law. A statutory provision that deems a trust into existence can give rise to the certainty of intention required to create a trust. The statutory trust created by s. 8(1) of the *CLA* satisfies the requirement for certainty of intention. There is no operational conflict [page226] between s. 8(1) of the *CLA* and s. 67(1) (*b*) of the *BIA*. Section 8(1) is not in pith and substance legislation in relation to bankruptcy and insolvency. Rather, it is an integral part of the scheme of holdbacks, liens and trusts, designed to protect the rights and interests of those engaged in the construction industry and to avoid the unjust enrichment of those higher up the construction pyramid. That purpose exists outside the bankruptcy context. In the absence of an operational conflict, the doctrine of paramountcy did not apply. Debts for a project subject to the *CLA* are choses in action that supply the required certainty of subject matter. The commingling of *CLA* funds from various projects in this case did not mean that the required certainty of subject matter was not present because the funds remained identifiable and traceable. The funds were not property of the bankrupt available for distribution to the bankrupt's creditors.

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, 59 D.L.R. (4th) 726, 97 N.R. 61, [1989] 5 W.W.R. 577, J.E. 89-1098, 38 B.C.L.R. (2d) 145, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1, 2 T.C.T. 4263; *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785, [1985] S.C.J. No. 35, 19 D.L.R. (4th) 577, 60 N.R. 81, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 31 A.C.W.S. (2d) 297; *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)*, [1995] S.J. No. 452, [1995] 9 W.W.R. 498, 135 Sask. R. 235, 34 C.B.R. (3d) 196, 23 C.L.R. (2d) 239, 57 A.C.W.S. (3d) 541 (Q.B.); *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, [1988] S.C.J. No. 44, 50 D.L.R. (4th) 577, 84 N.R. 308, J.E. 88-745, 14 Q.A.C. 140, 68 C.B.R. (N.S.) 209, EYB 1988-67858, 9 A.C.W.S. (3d) 397; *GMAC Commercial Credit Corp. -- Canada v. TCT Logistics Inc*. (2005), 74 O.R. (3d) 382, [2005] O.J. No. 589, 194 O.A.C. 360, 7 C.B.R. (5th) 202, 137 A.C.W.S. (3d) 247 (C.A.); *Husky Oil Operations Ltd. v. M.N.R*., [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77, 128 D.L.R. (4th) 1, 188 N.R. 1, [1995] 10 W.W.R. 161, J.E. 95-1945, 137 Sask. R. 81, 35 C.B.R. (3d) 1, 24 C.L.R. (2d) 131, EYB 1995-67967, 58 A.C.W.S. (3d) 182; *Iona Contractors Ltd. v. Guarantee Co. of North America*, [2015] A.J. No. 787, 2015 ABCA 240, 19 Alta. L.R. (6th) 87, 26 C.B.R. (6th) 173, 44 C.L.R. (4th) 165, [2015] 9 W.W.R. 469, 387 D.L.R. (4th) 67, 602 A.R. 295, 255 A.C.W.S. (3d) 30 [Leave to appeal to S.C.C. refused [2015] S.C.C.A. No. 404]; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 151 A.C.W.S. (3d) 1004 (C.A.) [Leave to appeal to S.C.C. granted [2006] S.C.C.A. No. 490, appeal discontinued on October 31, 2007]; *Quebec (Deputy Minister of Revenue) v. Rainville*, [1980] 1 S.C.R. 35, [1979] S.C.J. No. 93, 105 D.L.R. (3d) 270, 30 N.R. 24, 33 C.B.R. (N.S.) 301, [1979] 3 A.C.W.S. 707; *Roscoe Enterprises Ltd. v. Wasscon*

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the receiver's appointment. The receiver had deposited payments received into a separate account pursuant to court orders: *GMAC*, para. 33. The court found that the receiver was required to comply with s. 15 of the regulation and hold the funds on trust: *GMAC*, para. 36. Accordingly, the court found that the payments the receiver collected were held on trust because the receiver was required to comply with the regulation and did in fact comply with it by holding the funds in a separate account: *GMAC*, para. 38. The receiver's action of complying with the statutory trust obligation by depositing the funds into a separate account thus brought the trust into existence.

[96] In contrast, s. 8(1) of the *CLA* operates quite differently than s. 15 of the *Load Brokers* regulation. It does impose a deemed statutory trust rather than merely create a statutory trust obligation on the contractor to hold money on trust in a separate account. Section 8(1) declares that the amounts owing to the contractor "constitute a trust fund" independently of the contractor's subjective intention or actions. The s. 8(1) trust is imposed from the time the moneys are owed to the contractor, not just after they are received. Accordingly, the fact that s. 8(1) and (2) did not require the segregation of amounts received is not determinative because the statute itself, not the act of complying with a statutory obligation to segregate funds, created the trust.

[97] Second, the statement that once the purported trust funds are commingled with other funds, they cease to be trust funds must be read in the light of the fact that when making it, the court was explicitly following *Henfrey.* In *Henfrey*, as I have explained, McLachlin J. made it clear that it was only when commingling is accompanied by conversion and tracing becomes impossible that the required element of certainty of subject matter is lost.

[98] In my view, *GMAC* should not be read as standing for the proposition that all deemed statutory trusts cease to exist if there is any commingling of the trust funds.

[99] I am fortified in that conclusion by a considerable body of authority in addition to *Henfrey* that stands for the proposition that commingling alone will not destroy the element of certainty of subject matter under the general principles of trust law. I have already mentioned *Graphicshoppe,* where this court clearly rejected that proposition. A.H. Oosterhoff, Robert Chambers and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014), at pp. 207-208, [page253] states that when trust property is deposited into a mixed account, "the trust is not necessarily defeated. The rules of tracing allow the beneficiary to assert a proprietary interest in the account." In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, [2009] 1 S.C.R. 504, [2009] S.C.J. No. 15, 2009 SCC 15, the Supreme Court held that mixing of the funds does not necessarily bar recovery and that it is possible to trace money into bank accounts as long as it is possible to identify the funds: at para. 85. The funds are identifiable if it can be established that the money deposited in the account was the product of, or substitute for, the original thing: at para. 86. As the Alberta Court of Queen's Bench recently held, in *Imor Capital Corp. v. Horizon Commercial Development Corp.*, [2018] A.J. No. 43, 2018 ABQB 39, 56 C.B.R. (6th) 323, at para. 58:

> . . . [the bankrupt's] co-mingling of trust funds with its own is not fatal to the trust. It must be determined whether, despite the co-mingling, the trust funds can be identified or traced.

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The following cases are to the same effect: *Hallett's Estate (Re)* (1880), 13 Ch. D. 696 (C.A.); *Kayford Ltd. (Re)*, [1975] 1 W.L.R. 279, [1975] 1 All E.R. 604 (Ch.); *Kel-Greg Homes Inc. (Re)*, [2015] N.S.J. No. 417, 2015 NSSC 274, 365 N.S.R. (2d) 274, at paras. 51-59; *0409725 B.C. Ltd.*, at paras. 24-34; *Kerr Interior Systems Ltd. v. Kenroc Building Materials Co.*, [2009] A.J. No. 675, 2009 ABCA 240, 54 C.B.R. (5th) 173, at para. 18.

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(4) *Does RBC's security interest have priority even if the trust created by s. 8(1) of the CLA survives in bankruptcy?*

[100] On appeal, RBC submits that its security interest takes priority over the deemed statutory trust in s. 8(1) of the *CLA* even if this court finds that the *CLA* trust is valid under s. 67(1)(*a*) of the *BIA*. RBC relies on the Supreme Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, [1997] S.C.J. No. 25 in support of this argument. In that case, the majority found that a bank's security interest under the *Bank Act*, S.C. 1991, c. 46 and the *Personal Property Security Act*, S.A. 1988, c. P-4.05 took priority over a deemed statutory trust in favour of the federal Crown established by s. 227(4) and (5) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[101] RBC did not advance this argument before the motion judge. Nor did RBC introduce its general security agreement with A-1 into the record.

[102] Accordingly, I would decline to consider this argument. A respondent on appeal cannot seek to sustain an order on a basis [page254] that is both an entirely new argument and in relation to which it might have been necessary to adduce evidence before the lower court: see *R. v. Perka*, [1984] 2 S.C.R. 232, [1984] S.C.J. No. 40, at p. 240 S.C.R.; *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.* (2016), 129 O.R. (3d) 391, [2016] O.J. No. 779, 2016 ONCA 131 (in Chambers), at para. 9. RBC's proposed argument is both new and requires evidence that RBC has not adduced. In both *Sparrow Electric* and *GMAC*, the court considered the specific provisions of the security agreement in determining whether the security attached to the trust funds: see *Sparrow Electric*, at paras. 71-72, 90; *GMAC*, at para. 26. This court is unable to consider the specific provisions of RBC's security agreement with A-1 because it is not part of the record.

Disposition

[103] For these reasons, I would allow the appeal, set aside the order below and make an order

(1) that by operation of s. 67(1)(*a*) of the *BIA*, the funds satisfy the requirements for a trust at law and so are not property of A-1 available for distribution to A-1's creditors; and

(2) that the balance of the motion concerning GCNA's priority dispute with the unions be remitted to the Superior Court for disposition.

[104] GCNA is entitled to costs awarded against RBC fixed at $30,000 for the motion and at $45,000 for this appeal, both amounts inclusive of disbursements and taxes.

TAB 27

Citation: ***Westar Mining Ltd. (Re)*** Date: 20030110
2003 BCCA 11 Docket: CA028532
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

2003 BCCA 11 (CanLII)

BETWEEN:

**IN THE MATTER OF THE BANKRUPTCY OF
WESTAR MINES LTD.**

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Mackenzie

C.W. Caverly and T.D. Braithwaite	Counsel for the Appellant Bank of Montreal
P.G. Foy, Q.C., C.S. Bird, and C.L. Shaley	Counsel for the Respondent The Greenhills Mine Suppliers
M.L. Skwarok and K. Johnston	Counsel for the Respondent Director of Employment Standards
Place and Date of Hearing:	Vancouver, British Columbia December 3, 2002
Place and Date of Judgment:	Vancouver, British Columbia January 10, 2003

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Madam Justice Newbury

3. The chambers judge erred in concluding that the entitlement to the disputed funds was by reference to a purpose trust analysis rather than by reference to an analysis applicable to contracts of indemnity.

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Analysis

[10] Mr. Caverly confined his oral submission on behalf of the Bank to the first issue. That issue is linked to the second issue to the extent that the purpose trust found by the chambers judge depends on the pre-bankruptcy arrangements between Westar and Poscan. I therefore propose to consider the second issue first.

i) Do the pre-bankruptcy arrangements support a purpose trust?

[11] A purpose trust is often referred to as a Quistclose trust in recognition of the influential judgment in ***Barclay's Bank, Ltd. v. Quistclose Investments Ltd.***, [1968] 3 All E.R. 651 (H.L.). ***Quistclose*** also involved a special banking arrangement. The respondent Quistclose had advanced funds to Rolls Razor Ltd. to allow it to pay a declared dividend. Quistclose accompanied its cheque to Rolls Razor with a letter to the appellant bank confirming that the cheque would be deposited to a separate account and that the funds "will only be used to meet the dividend due...." Rolls Razor went into voluntary liquidation before the dividend was paid and the bank claimed the monies on behalf of Rolls Razor's creditors. The House of Lords, in a unanimous judgment delivered by Lord Wilberforce, held that the monies had to be returned to Quistclose because they were advanced exclusively for the payment of a dividend which could not be paid after the voluntary liquidation. Lord Wilberforce concluded that the advance of the funds for a specific purpose created an equitable right in Quistclose to see that the fund be applied for that purpose, and created a secondary trust in favour of Quistclose when that specific purpose could not be carried out.

[12] ***Quistclose*** does not modify the certainty of intention, subject matter, and object required of trusts generally. The Bank submits that the arrangement here did not have the certainty of intention required to create a trust relationship or a segregation of Poscan's payments required for certainty

of subject matter. It contends that ***Quistclose*** is therefore distinguishable on its facts.

[13] Davies J. set out extensive portions of the Joint Venture Agreement and the Loan Agreement in his reasons for decision and I need not repeat them here. He concluded:

> I am satisfied that Westar and Poscan mutually intended that monies advanced by Poscan to Westar as Manager for Poscan's 20 percent of operating expenses (including funds to pay its portion of the joint venture's obligations to the Greenhills Employees and the Greenhills Suppliers) would not become the property of Westar and that Westar was not entitled to use those funds for its own purposes. I find that until Westar paid the amounts owing by the joint venture for its operations Poscan's funds were held on the condition that they were to be used only for that purpose. I also find that the Bank was aware of and accepted the fact that operational funds delivered by Poscan pursuant to the [Joint Venture Agreement] did not become the property of Westar unless received by Westar in repayment for Westar having paid those operational expenses to which Poscan was required to contribute.

He also found that:

> [57] There was sufficient segregation of funds delivered by Poscan to Westar to establish a mutual intention that funds delivered by Poscan for its 20% share of operational expenses did not become the property of Westar and were delivered for the benefit of third parties including Greenhills Employees and Greenhills Suppliers.

[14] In my view, the record before Davies J. supported those conclusions. The joint venture arrangements clearly distinguished Westar's position as owner of 80 percent of the joint venture from its position as mine manager, and Westar received payments from Poscan for operating expenses in the latter capacity. The Bank exempted the joint venture account from its monthly sweeps of Westar's accounts, confirming that monies in that account were separate from other Westar accounts subject to the Bank's security.

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