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COURT FILE NUMBER	25 – 2172984
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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, C. B-3, AS AMENDED
	AND IN THE MATTER OF MICROPLANET TECHNOLOGY CORP.
DOCUMENT	**SUPPLEMENTAL BRIEF OF LAW AND ARGUMENT OF THE APPLICANT, MICROPLANET TECHNOLOGY CORP.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** 4500 Bankers Hall East 855 2nd Street SW Calgary, AB T2P 4K7 Attention: Alexis Teasdale / Michael W. Selnes Telephone No.: (403) 298-3067 / 3311 Fax No.: (403) 265-7219 Client File No.: 55088.16

Commercial List Chambers Application
Scheduled for the 11th day of January, ~~2016~~ 2017 at 2:30 p.m.
Before the Honourable Mr. Justice B. Nixon

TABLE OF CONTENTS

I. INTRODUCTION

1. This brief of argument supplements the brief of argument filed by MicroPlanet Technology Corp. ("**MTC**") on December 6, 2016. All capitalized terms not otherwise defined herein have the meanings given to them in the Struss Affidavit No. 1, the Struss Affidavit No. 2, and the Struss Affidavit No. 3, as defined below.

II. FACTS

A. Evidence Before This Court

2. The facts to support MTC's application for approval are set out in MTC's Brief of Argument, filed on December 6, 2016. Any additional facts relevant to the issues set out herein are found in several documents filed in these proceedings, including:

(a) Affidavit of Wolfgang Struss, sworn on December 5, 2016 (the "**Struss Affidavit No. 1**");

(b) Affidavit of Wolfgang Struss, sworn December 14, 2016 (the "**Struss Affidavit No. 2**");

(c) Proposal Trustee's Report pursuant to section 59(1) and paragraph 58(d) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "**BIA**") dated December 6, 2016 (the "**Trustee's Report to Court**");

(d) Supplemental Report to the Report of the Trustee on Proposal dated December 14, 2016 (the "**Trustee's Supplemental Report to Court**");

(e) Affidavit No. 3 of Wolfgang Struss, sworn December 21, 2016 (the "**Struss Affidavit No. 3**"); and

(f) any further Reports filed by the Proposal Trustee.

III. ISSUES

3. This supplemental brief addresses three discrete issues in a summary fashion:

(a) This Honourable Court's jurisdiction to further amend the Twice Amended Proposal to correct MTC's legal name and to clarify that it compromises claims against former and current directors.

(b) This Honourable Court's jurisdiction to request the aid of Courts in the United States in enforcing and giving effect to the Twice Amended Proposal.

(c) The legitimacy of Mr. Ironside's complaints respecting his unperfected security interest and EVI's security.

IV. LAW AND ARGUMENT

A. This Court has jurisdiction to amend the Twice Amended Proposal to correct the error in the name of the proposal debtor

4. The Twice Amended Proposal references MicroPlanet Technology Corporation; the proposal debtor's proper corporate name, as listed in the Alberta Corporate Registry is MicroPlanet Technology Corp. MTC requests that the Court amend the Twice Amended Proposal to reflect its proper corporate name.

- Struss Affidavit No. 1, Exhibit 3

5. This Court has jurisdiction under section 187(9) of the BIA to correct a formal defect or an irregularity in proceedings under the BIA. Rule 92 of the *BIA Rules* provides that when approving a proposal, the court may correct any clerical error or omission in the proposal, provided the correction does not constitute an alteration in substance. Changing the Twice Amended Proposal to reflect the proper corporate name of the proposal debtor is not an alteration in substance.

- *Bankruptcy and Insolvency Act,* RSC 1985 c B-3, s 187(9) [*BIA*] **[TAB 1]**
- *Bankruptcy and Insolvency General Rules*, CRC, c 368, rule 92 [*BIA Rules*] **[TAB 2]**
- *Vince v Cinezeta Internationale Filmproduktionsgesellschaft Mgb & Co. Kg*, 2013 SKQB 423 [*Vince*], at para 45 **[TAB 3]**

6. In *Vince v Cinezeta Internationale Filmproduktionsgesellschaft Mgb & Co. Kg*, the Saskatchewan Court of Queen's Bench made an order *nunc pro tunc* under section 187(9) of the BIA changing the corporate name of the creditor who had applied for and obtained the bankruptcy order and an order under section 38 of the BIA in the proceedings before the court, finding that:

> Parliament has specifically mandated that bankruptcy proceedings should not be derailed by technical defects or irregularities. Case law makes clear that matters under the BIA should be governed by substance rather than technicalities, with substantial injustice being the test.

- *Vince*, *supra*, at paras 46-51 **[TAB 3]**

7. No prejudice or substantial injustice will result by correcting the error in MTC's name in the Twice Amended Proposal, as none of MTC's creditors could have been misled by the error. All of the materials sent by the Proposal Trustee to MTC's creditors in October and subsequently all refer to MicroPlanet Technology Corp., not MicroPlanet Technology Corporation, as do the documents filed with this Honourable Court. From the institution of these proceedings to the present, the correct name of the proposal debtor was known to MTC's creditors. Further, and importantly, none of MTC's creditors, including those who oppose MTC's application for approval of the Twice Amended Proposal, have raised this issue.

- Trustee's Report to Court, at 1; Exhibits C and G
- Trustee's Supplemental Report to Court

B. This Court has jurisdiction to amend the Twice Amended Proposal to clarify that it applies to past and current directors

8. The second requested amendment to the Twice Amended Proposal is to add the words "former and current" before the word "directors" in the release in section 7.1 thereof, so the release is clear that all directors of MTC, whether past or present, will be released from all claims falling under section 50(13). Whether a defect under section 187(9) is a matter of form or of substance depends on the specific circumstances of each case. The requested amendment does not constitute a change in substance and causes no substantial injustice. This Court therefore has the jurisdiction to grant it.

- *BIA, supra*, s. 187(9) **[TAB 1]**
- *BIA General Rules*, rule 92 **[TAB 2]**
- *Cormie v Principal Group Ltd (Trustee of)*, [1989] AJ No 339, at para 63 **[TAB 4]**
- *Vince, supra*, at para 49 **[TAB 3]**

9. Including the words "former and current" is not a substantive amendment. It is simply a clarification of the Twice Amended Proposal, as follows.

10. The authority to include the release of a proposal debtor's directors is derived from section 50(13) of the BIA, which provides that

> [a] proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation **that arose before the**

> **commencement of proceedings under this Act** and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations. **[emphasis added]**

- BIA, s. 50(13) **[TAB 1]**

11. The language of section 50(13) is incorporated into the definition of "Director Claims" in the Twice Amended Proposal: "claims against directors of MTC that are based ... on facts, events or matters which existed or occurred on or before the date of this Proposal and that relate to the obligations of MTC for which the directors are by law liable...as directors". The Twice Amended Proposal also provides that distributing the Distribution Fund fully and finally satisfies all Claims and Director Claims. Neither section 50(13) of the BIA nor the Twice Amended Proposal limits the term "directors" to current directors. Therefore, the Twice Amended Proposal compromises certain types of claims against MTC's directors that arose before the date of the Twice Amended Proposal.

12. The only known obligation of MTC for which its directors are liable is Mr. Ironside's contingent claim for wages against individuals who were MTC's directors when the alleged wages accrued, between September 1, 2013 and December 16, 2013. MTC's directors at that time included Grahame Foulger, David Andrews and Alan Richardson, who are all named as defendants in the statement of claim filed on behalf of Mr. Ironside in Action No. 1501-14980 (the "**Ironside Employment Claim**"). MTC's current director, Mr. Struss, was not a director at that time, and there are no known claims against Mr. Struss that fall under section 50(13).

13. If the only claims compromised under the Twice Amended Proposal were claims against MTC's current director, against whom there are no known claims, it would not compromise claims arising before the commencement of MTC's proposal proceedings. Therefore, the requested amendments simply clarify the Twice Amended Proposal.

14. Although the requested amendments do not alter the substance of the Twice Amended Proposal, the fact that Mr. Ironside opposes the change suggests clarification is necessary. At paragraph 15(e) of his Affidavit sworn December 13, 2016 (the "**Ironside Affidavit**") Mr. Ironside complains he is "victimized" by the requested amendment. There is no basis for this complaint. First, as explained, the requested amendment does not substantively change the Twice Amended Proposal; if the amendment constitutes victimization of Mr. Ironside, so did the original Proposal and the Amended Proposal. Second, Mr. Ironside's claim for wages is contingent – MTC has

defended the Ironside Employment Claim, and it is not clear Mr. Ironside is entitled to the amounts claimed. Third, Mr. Ironside is the only creditor with a known claim against MTC's directors, and he voted against the Twice Amended Proposal – there is no evidence the requested amendment would have changed Mr. Ironside's vote or the votes of other creditors.

C. This Court is entitled to request aid and recognition of United States judicial and administrative bodies

15. Both the Approval and Vesting Order and the Approval Order include substantially the same provision requesting the aid and recognition of Canadian and United States administrative and judicial bodies:

> This Court requests the aid and recognition of any court or any judicial, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Trustee, as a officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Trustee and its agents in carrying out the terms of this Order.

16. This request for aid and recognition accords with the doctrine of comity, which dictates that courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not out of obligation, but out of mutual deference and respect. Canadian courts regularly request the aid of foreign jurisdictions in restructuring proceedings in accordance with the principles of comity and to ensure the efficacy of the Canadian proceedings, and United States Courts uniformly grant comity to Canadian proceedings..

- CED 4th (online), Bankruptcy and Insolvency, "Courts and Procedures: Courts Acting in Aid of Each Other" (XIII.4), at §1172 **[TAB 5]**
- *Re Walker* (1998), 5 CBR (4th) 123 (Ont Bktcy), at paras 18-20 **[TAB 6]**
- *Petition of Davis*, 191 BR 577 (Bankr SDNY 1996), at headnotes 21-27 (pp 11-12) **[TAB 7]**

17. The request for aid and recognition is also necessary to ensure that MTC and the Proposal Trustee can seek assistance of US judicial and administrative bodies to effect the terms of the orders granted by this Honorable Court.

D. Mr. Ironside's complaints respecting his unperfected security interest and EVI's security are unfounded

18. In the Ironside Affidavit, Mr. Ironside suggests that Bennett Jones LLP – MTC's counsel – was responsible for ensuring his security interest against MTC was perfected. Mr. Tetreault also complains MTC was responsible for registration of security.

- Ironside Affidavit, para 3
- Struss Affidavit No. 2, para 5, Exhibit "3"

19. However, the form of general security agreement granted to the 2009 Noteholders (the "**GSA**") and the Intercreditor Agreement among the 2009 Noteholders dated October 14, 2009 (the "**ICA**") indicate that a company managed by Mr. Ironside was responsible for the registration of the 2009 Noteholders' security. The GSA provides (in part) that MTC's obligation to execute and deliver financing statements as reasonably requested by the secured party to give effect to the GSA is subject to the terms and provisions of the ICA. The ICA provides that each 2009 Noteholder who was a party to the ICA agreed that Ryco Financial Management Corp. ("**Ryco**") would register their security. Mr. Ironside signed the ICA in his capacity as President of Ryco, as attorney for each 2009 Noteholder.

- Struss Affidavit No. 1, Exhibits "14", "16"

20. Where no contractual obligation exists, Alberta's legislative scheme governing personal property security contemplates that the secured party, not the debtor, bears the responsibility for preparing and registering financing statements. The British Columbia Court of Appeal has observed that courts are reluctant to circumvent or modify the explicit statutory provisions of personal property security legislation through extra-statutory principles of common law or equity.

- *Personal Property Security Regulation*, AR 231/2002, ex. ss 3(2), 34(2) **[TAB 8]**
- *KBA Canada Inc v 3S Printers Inc*, 2014 BCCA 117, paras 20-22 **[TAB 9]**

21. The fact remains that there is no security registration in favour of the 2009 Noteholders in any of the provinces in which MTC's securities traded, or in Washington State. If Mr. Ironside is alleging a breach of contract or duty by MTC or its counsel, that would give rise to a claim for damages by Mr. Ironside. It would not change his status as a creditor with an unperfected security interest in MTC's personal property.

- Struss Affidavit No. 1, para 35; Exhibits "15", "19"

22. Mr. Ironside also suggests the security granted to EVI does not represent a new liability of MI because it is a factoring agreement. This observation only applies to the August Security Agreement. The June Security Agreement secures all present and after-acquired personal property of MI. Moreover, Mr. Ironside's counsel has had copies of EVI's security agreements since November 4, 2016, and the list of advances since November 28, 2016, yet Mr. Ironside has not obtained a Washington security opinion contrary to that rendered to the Proposal Trustee.

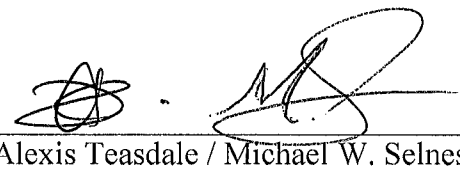
- Struss Affidavit No. 1, paras 54-57, 65(c), 65(f); Exhibits "24", "25", "30"
- Trustee's Report to Court, at Exhibit G – Trustee's Supplemental Report to Creditors dated November 21, 2016, para E

V. RELIEF SOUGHT

23. The Applicant seeks Orders approving the Twice Amended Proposal, approving the sale of the MTC Asset to EVI, and vesting title in the MTC Asset in EVI, substantially in the forms attached to the Applicant's Amended Application filed December 9, 2016.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BENNETT JONES LLP

Per: 

Alexis Teasdale / Michael W. Selnes
Counsel for the Applicant,
Microplanet Technology Corp.

VI. AUTHORITIES

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 November 21, 2016

Last amended on February 26, 2015

À jour au 21 novembre 2016

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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.

NOTE

This consolidation is current to November 21, 2016. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of November 21, 2016 are set out at the end of this document under the heading "Amendments Not in Force".

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.

NOTE

Cette codification est à jour au 21 novembre 2016. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 21 novembre 2016 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Report to creditors

(11) An interim receiver who has been directed under subsection 47.1(2) to carry out the duties set out in subsection (10) in substitution for the trustee shall deliver a report on the state of the insolvent person's business and financial affairs, containing any prescribed information, to the trustee at least fifteen days before the meeting of creditors referred to in subsection 51(1), and the trustee shall send the report to the creditors and the official receiver, in the prescribed manner, at least ten days before the meeting of creditors referred to in that subsection.

Court may declare proposal as deemed refused by creditors

(12) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that

(a) the debtor has not acted, or is not acting, in good faith and with due diligence;

(b) the proposal will not likely be accepted by the creditors; or

(c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.

Effect of declaration

(12.1) If the court declares that the proposal is deemed to have been refused by the creditors, paragraphs 57(a) to (c) apply.

Claims against directors — compromise

(13) A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(14) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or

Rapport à l'intention des créanciers

(11) Le séquestre intérimaire qui, aux termes du paragraphe 47.1(2), s'est vu confier l'exercice, en remplacement du syndic, des fonctions visées au paragraphe (10) est tenu de remettre à celui-ci, au moins quinze jours avant la tenue de l'assemblée des créanciers prévue au paragraphe 51(1), un rapport portant sur les affaires et les finances de la personne insolvable et contenant les renseignements prescrits; le syndic expédie, de la manière prescrite, ce rapport aux créanciers et au séquestre officiel au moins dix jours avant la tenue de l'assemblée des créanciers prévue à ce paragraphe.

Présomption de refus de la proposition

(12) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut, avant l'assemblée des créanciers, déclarer que la proposition est réputée refusée par les créanciers, s'il est convaincu que, selon le cas :

a) le débiteur n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) la proposition ne sera vraisemblablement pas acceptée par les créanciers;

c) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Effet de la déclaration

(12.1) Si le tribunal déclare que la proposition est réputée avoir été refusée par les créanciers, les alinéas 57a) à c) s'appliquent.

Transaction — réclamations contre les administrateurs

(13) La proposition visant une personne morale peut comporter, au profit de ses créanciers, des dispositions relatives à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(14) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou plusieurs créanciers à l'égard de contrats conclus avec un ou plusieurs administrateurs, ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Periodical sittings

(4) Periodical sittings for the transaction of the business of courts shall be held at such times and places and at such intervals as the court directs.

Court may review, etc.

(5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

Enforcement of orders

(6) Every order of a court may be enforced as if it were a judgment of the court.

Transfer of proceedings to another division

(7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

Trial of issue, etc.

(8) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of that judge or officer is subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall, subject to section 193, be to the Court of Appeal.

Formal defect not to invalidate proceedings

(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

Proceedings taken in wrong court

(10) Nothing in this section invalidates any proceedings by reason of their having been commenced, taken or carried on in the wrong court, but the court may at any time transfer the proceedings to the proper court.

Court may extend time

(11) Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

Sessions périodiques

(4) Des sessions périodiques pour l'expédition des affaires des tribunaux sont tenues aux dates, heures, lieux et intervalles que prescrit chacun de ces tribunaux.

Le tribunal peut réviser, etc.

(5) Tout tribunal peut réviser, rescinder ou modifier toute ordonnance qu'il a rendue en vertu de sa juridiction en matière de faillite.

Exécution d'ordonnances

(6) Toute ordonnance du tribunal peut être exécutée comme si elle était un jugement du tribunal.

Renvoi dans une autre division

(7) Sur preuve satisfaisante que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division de faillite, ou pour un autre motif suffisant, le tribunal peut, par ordonnance, renvoyer des procédures, que prévoit la présente loi et qui sont pendantes devant lui, à un autre district ou à une autre division de faillite.

Instruction des causes, etc.

(8) Le tribunal peut ordonner l'instruction de tout litige ou la tenue de toute enquête par un juge ou fonctionnaire d'un des tribunaux de la province, et la décision de ce juge ou de ce fonctionnaire est sujette à appel devant un juge en matière de faillite, à moins que le juge ne soit juge d'une cour supérieure, alors que l'appel doit, sous réserve de l'article 193, être interjeté devant la Cour d'appel.

Un vice de forme n'invalide pas les procédures

(9) Un vice de forme ou une irrégularité n'invalide pas des procédures en faillite, à moins que le tribunal devant lequel est présentée une opposition à la procédure ne soit d'avis qu'une injustice grave a été causée par ce vice ou cette irrégularité, et qu'une ordonnance de ce tribunal ne puisse remédier à cette injustice.

Procédures prises erronément devant un tribunal

(10) Le présent article n'a pas pour effet d'invalider des procédures pour le motif qu'elles ont été intentées, prises ou continuées devant un tribunal incompétent; mais le tribunal peut, à tout moment, renvoyer les procédures au tribunal compétent.

Le tribunal peut prolonger le délai

(11) Lorsque la présente loi restreint le délai fixé pour accomplir une action ou chose, le tribunal peut prolonger ce délai, avant ou après son expiration, aux termes, s'il en est, qu'il estime utile d'imposer.

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency General Rules

Règles générales sur la faillite et l'insolvabilité

C.R.C., c. 368

C.R.C., ch. 368

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...

Inconsistencies in regulations
(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to December 8, 2016. The last amendments came into force on March 25, 2011. Any amendments that were not in force as of December 8, 2016 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

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[...]

Incompatibilité — règlements
(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 8 décembre 2016. Les dernières modifications sont entrées en vigueur le 25 mars 2011. Toutes modifications qui n'étaient pas en vigueur au 8 décembre 2016 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

(h) the report containing the representations by the insolvent person required by paragraph 50.4(2)(c) of the Act;

(i) the material adverse change report required by subparagraph 50.4(7)(b)(i) of the Act; and

(j) the notice of the meeting of creditors required by paragraph 51(1)(a) of the Act.

(2) For the purposes of paragraphs 50(6)(c) and 50.4(2)(c) of the Act, the representations are as follows:

The hypothetical assumptions are reasonable and consistent with the purpose of the projection described in Note ....., and the probable assumptions are suitably supported and consistent with the plans of the insolvent person and provide a reasonable basis for the projection. All such assumptions are disclosed in Notes .....

Since the projection is based on assumptions regarding future events, actual results will vary from the information presented, and the variations may be material.

The projection has been prepared solely for the purpose described in Note ....., using a set of probable and hypothetical assumptions set out in Notes ..... Consequently, readers are cautioned that it may not be appropriate for other purposes.

SOR/98-240, s. 1.

91 For the purposes of section 53 of the Act, the manner in which a creditor who has proved a claim may indicate to the trustee assent to or dissent from the proposal is by personal delivery, by mail, by facsimile or by electronic transmission.

SOR/92-579, s. 23; SOR/98-240, s. 1.

92 When approving a proposal, the court may correct any clerical error or omission in it, if the correction does not constitute an alteration in substance.

SOR/98-240, s. 1.

93 For the purposes of section 62.1 of the Act,

(a) the time for an insolvent person to remedy a default in the performance of any provision in a proposal is 30 days after the day the default was made; and

(b) the time for a trustee to inform the creditors and the official receiver of the situation is 30 days after the expiration of the 30 day period described in paragraph (a).

SOR/98-240, s. 1.

h) le rapport contenant les observations de la personne insolvable, visé à l'alinéa 50.4(2)c) de la Loi;

i) le rapport sur le changement négatif important, visé au sous-alinéa 50.4(7)b)(i) de la Loi;

j) l'avis de convocation d'une assemblée des créanciers, visé à l'alinéa 51(1)a) de la Loi.

(2) Les observations prescrites pour l'application des alinéas 50(6)c) et 50.4(2)c) de la Loi sont les suivantes :

Les hypothèses conjecturales utilisées sont raisonnables et cadrent avec l'objet des projections mentionné dans la note ....., et les hypothèses probables sont convenablement étayées, cadrent avec les projets de la personne insolvable et constituent un fondement raisonnable pour les projections. Toutes ces hypothèses sont énoncées dans les notes .....

Puisque les projections sont fondées sur des hypothèses concernant des événements à venir, les résultats réels différeront des renseignements présentés, et les écarts peuvent être importants.

Les projections ont été établies exclusivement aux fins mentionnées dans la note ....., à partir d'un ensemble d'hypothèses probables et conjecturales énoncées dans les notes ..... En conséquence, il est à signaler que les projections peuvent ne pas convenir à d'autres fins.

DORS/98-240, art. 1.

91 Pour l'application de l'article 53 de la Loi, le créancier qui a prouvé une réclamation indique au syndic son approbation ou sa désapprobation de la proposition par un message en ce sens remis en mains propres ou envoyé par courrier, par télécopieur ou par transmission électronique.

DORS/92-579, art. 23; DORS/98-240, art. 1.

92 En cas d'approbation de la proposition, le tribunal peut y corriger les erreurs d'écriture ou les omissions, à condition que les corrections apportées ne modifient pas le fond.

DORS/98-240, art. 1.

93 Pour l'application de l'article 62.1 de la Loi, le délai dont dispose :

a) la personne insolvable pour remédier au défaut d'exécution d'une disposition de la proposition est la période de 30 jours suivant le premier jour de défaut;

b) le syndic pour informer de la situation les créanciers et le séquestre officiel est la période de 30 jours suivant celle visée à l'alinéa a).

DORS/98-240, art. 1.

TAB 3

2013 SKQB 423
Saskatchewan Court of Queen's Bench

Vince v. Cinezeta Internationale Filmproduktionsgesellschaft Mhb & Co. Kg

2013 CarswellSask 872, 2013 SKQB 423, [2014] 4 W.W.R. 92, 236 A.C.W.S. (3d) 294, 434 Sask. R. 151, 8 C.B.R. (6th) 33

In Bankruptcy

Marilynne Anne Vince, Applicant and Cinezeta Internationale Filmproduktionsgesellschaft MHB & Co. KG, Respondent

L.M. Schwann J.

Judgment: November 28, 2013
Docket: Bankruptcy 17477, Estate No. 22-031339

Counsel: Jeffrey M. Lee, Q.C. for Applicant
John Douglas Shields, Diana Lee for Respondent

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.3 Application to set aside

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Application to set aside

Pursuant to order made on June 3, 2010, J Inc. was adjudged bankrupt — Application underlying bankruptcy order was brought by C Co. as creditor of J Inc. — Subsequent order pursuant to s. 38 of Bankruptcy and Insolvency Act authorized C Co. to take proceedings in its own name and at its own expense in relation to transaction between J Inc. and I Inc. — Applicant, on behalf of J Inc., sought order pursuant to s. 187(5) of Act rescinding both initial bankruptcy order and subsequent s. 38 order — Applicant contended that statements made in Affidavit of Truth of Statements filed by C Co. in support of initial bankruptcy order, and upon which bankruptcy application was granted, were untrue — It was applicant's position C Co. was not registered, valid and subsisting legal entity at time either order was made, nor creditor of J Inc. — Application dismissed; order to issue nunc pro tunc correcting name of C Co. in proceedings — C Co. was misnamed in court orders — However, applicant failed to raise misnomer for over six years — There was no evidence of prejudice to applicant or anyone else resulting from issuance of either initial bankruptcy order or s. 38 order — Incorrect name used by C Co. was mere irregularity and not substantive in nature — Under s. 187(9) of Act, it did not invalidate bankruptcy proceedings.

Table of Authorities

Cases considered by *Schwann J.*:

Carlson, Re (2012), 2012 CarswellAlta 1032, 2012 ABCA 173, [2012] 9 W.W.R. 43, 62 Alta. L.R. (5th) 72, 90 C.B.R. (5th) 328, 533 A.R. 73, 557 W.A.C. 73 (Alta. C.A.) — referred to

Christiansen v. Paramount Developments Corp. (1998), 8 C.B.R. (4th) 220, 234 A.R. 149, 1998 ABQB 1005, 1998 CarswellAlta 1093 (Alta. Q.B.) — considered

DeGroote v. Canadian Imperial Bank of Commerce (1996), 1996 CarswellOnt 4712, (sub nom. *Montego Forest Products Ltd. (Bankrupt), Re*) 20 O.T.C. 179, 45 C.B.R. (3d) 132 (Ont. Bktcy.) — referred to

Elias v. Hutchison (1981), 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re*) 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 14 Alta. L.R. (2d) 268 (Alta. C.A.) — referred to

Garritty, Re (2006), 2006 ABQB 238, 2006 CarswellAlta 382, 62 Alta. L.R. (4th) 68, 21 C.B.R. (5th) 237, (sub nom. *Garritty (Bankrupt), Re*) 398 A.R. 100, (sub nom. *Garritty (Bankrupt), Re*) 398 A.R. 123 (Alta. Q.B.) — followed

HOJ National Leasing Corp., Re (2008), (sub nom. *Ontario (Motor Vehicle Dealers Act, Registrar) v. HOJ National Leasing Corp. (Trustee of)*) 293 D.L.R. (4th) 455, (sub nom. *HOJ National Leasing Corp. (Bankrupt), Re*) 245 O.A.C. 1, 68 C.C.P.B. 172, 2008 ONCA 390, 2008 CarswellOnt 2749, 42 C.B.R. (5th) 208 (Ont. C.A.) — referred to

Lechcier-Kimel, Re (2011), 2011 ONSC 4838 (Ont. S.C.J. [Commercial List]) — referred to

Longmire, Re (2001), 25 C.B.R. (4th) 280, 194 N.S.R. (2d) 218, 606 A.P.R. 218, 2001 CarswellNS 190 (N.S. S.C.) — followed

Northlands Cafe Inc., Re (1996), [1999] B.P.I.R. 747, 45 Alta. L.R. (3d) 301, 192 A.R. 211, [1997] 5 W.W.R. 362, 44 C.B.R. (3d) 170, 1996 CarswellAlta 957 (Alta. Q.B.) — referred to

Schreyer v. Schreyer (2011), 78 C.B.R. (5th) 1, [2011] 8 W.W.R. 413, 1 R.F.L. (7th) 1, 2011 CarswellMan 334, 2011 CarswellMan 335, 2011 SCC 35, 418 N.R. 61, 334 D.L.R. (4th) 1, 268 Man. R. (2d) 154, [2011] 2 S.C.R. 605 (S.C.C.) — considered

Strachan, Re (1980), 1980 CarswellOnt 153, 34 C.B.R. (N.S.) 136 (Ont. S.C.) — referred to

Taylor, Re (1998), 4 C.B.R. (4th) 139, 1998 CarswellBC 799, 55 B.C.L.R. (3d) 119 (B.C. S.C.) — considered

354828 Ontario Ltd., Re (1979), 30 C.B.R. (N.S.) 176, 1979 CarswellOnt 199 (Ont. S.C.) — referred to

1064521 Ontario Ltd., Re (1998), 1998 CarswellOnt 774, 38 O.R. (3d) 407, 1 C.B.R. (4th) 192, 18 R.P.R. (3d) 81, 13 P.P.S.A.C. (2d) 206 (Ont. Bktcy.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 38 — considered

s. 181 — considered

s. 181(1) — considered

s. 181(2) — considered

s. 187(5) — considered

s. 187(9) — considered

s. 192 — referred to

s. 193 — referred to

APPLICATION to rescind bankruptcy orders.

***Schwann J.*:**

1 Pursuant to an order made on June 3, 2010 by this Court in Bankruptcy and Insolvency, Just Friends Production Inc. ("Just Friends") was adjudged bankrupt (the "bankruptcy order"). The application underlying the bankruptcy order was brought by Cinezeta Internationale Filmproduktionsgesellschaft Mhb & Co. KG ("Cinezeta") as a creditor of Just Friends. A subsequent order pursuant to s. 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") was made by the Registrar in Bankruptcy on January 12, 2012. This order authorized Cinezeta to take proceedings in its own name and at its own expense in relation to a transaction between Just Friends and Infinity Features Entertainment Inc. (the "s.38 order").

2 Marilynne Anne Vince, on behalf of the bankrupt, Just Friends, applies for an order pursuant to s. 187(5) of the *BIA* rescinding both the initial bankruptcy order and the subsequent s. 38 order. Ms. Vince contends that statements made in the Affidavit of Truth of Statements filed by Cinezeta in support of the initial bankruptcy order, and upon which the bankruptcy application was granted, are untrue. It is her position Cinezeta was not a registered, valid and subsisting legal entity at the time either order was made, nor a creditor of Just Friends.

Background

3 William Vince was a movie producer and the driving force behind the production of a feature length motion picture entitled "Just Friends". Vince incorporated a company in Saskatchewan called Just Friends Productions Inc. for purposes of making and producing this movie.

4 Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. 1. Beteiligungs KG ("Beteiligungs") was involved with financing William Vince's film. Beteiligungs entered into a Production Services Agreement (the "production services agreement") with Just Friends (the corporate entity) on August 25, 2004. Pursuant to its terms, Just Friends agreed to produce the film on behalf of Beteiligungs. A company known as Mooseface Films Inc. ("Mooseface"), also a party to the production services agreement, contracted to provide post-production services in British Columbia. In exchange for services, Just Friends was to be paid $300,000.00. The parties agreed that Beteiligungs would own the copyright in the film, and all benefits, profits and revenue arising from it.

5 A provision of the production services agreement required Just Friends to apply for eligible Canadian film tax credits. Movie producers use tax credits to finance their films based on certain eligible expenses. According to Cinezeta, as part of the production services agreement, it was expected that Just Friends would apply for and obtain the available tax credit for the benefit of Cinezeta.

6 While Just Friends applied for the eligible tax credits as contemplated by the production services agreement, Cinezeta alleges Just Friends used the anticipated tax credits as security for a $3 million loan from CIBC. It is further alleged that the CIBC loan funds were transferred to Infinity Features Entertainment Inc., and other individuals and entities under the direction of Ms. Vince who had became involved at Mr. Vince's request.

7 William Vince passed away in June of 2008. Ms. Vince is the co-executor of his estate and is the chief financial officer of Just Friends.

8 The beneficial right to the tax credits came to a head in 2007 when Cinezeta commenced arbitral proceedings in the State of California against Just Friends and Mooseface. The parties settled their differences with the terms of resolution reflected in a Settlement Agreement of July 12, 2007. Effectively, Cinezeta gave up its claim to the tax credits and in return Just Friends agreed to pay the monetary equivalent of the tax credits to Cinezeta.

9 The final Settlement Agreement describes the claimant under the name and style: Cinezeta Internationale Filmproduktionsgesellschaft Mhb & Co. KG. In contrast, the Demand for Arbitration, which commenced proceedings and is attached as an appendix to the Settlement Agreement, describes the claimant as: Cinezeta Internationale Filmproduktionsgesellschaft Mbh & Co. *1. Beteiligungs* KG. (emphasis added) The nature of the dispute set out in this document describes it as a failure on the part of Just Friends "to pay the Tax Credits to Claimant in the sum of not less than $3.6 million".

10 While the terms of the Settlement Agreement called for Just Friends to complete the paperwork necessary to apply for the tax credits by September 15, 2007, it subsequently came to Cinezeta's attention that Just Friends had in fact applied for the tax credits a year earlier, had received the tax credits a week prior to the Settlement Agreement, and had already used the funds to repay the CIBC loan. It is Cinezeta's position the actions and misrepresentations of Just Friends make the Settlement Agreement a fraud.

11 Cinezeta ultimately brought bankruptcy proceedings in Saskatchewan in April 2010. The applicant in these proceedings is styled as: Cinezeta Internationale Filmproduktionsgesellschaft Mhb & Co. KG. The application alleged that Just Friends:

> 2. ...is justly and truly indebted to the Applicant in the sum of $3,124,939.00 being the principal sum of $3,124,939.00 as set out in the Settlement Agreement and Stipulated Judgment in the Superior Court of the State of California for the County of Los Angeles (West District) dated July 12, 2007. The Respondent has failed to pay as required under the Settlement Agreement/Stipulated Judgment and demand for payment of the full amount owing has been made.

12 An Affidavit of Truth of Statements deposed to by Florian Lechner on behalf of Cinezeta in support of its bankruptcy application contains the following statements:

> (a) Cinezeta is a limited partnership under German law, registered in the Commercial Register of the Local Court of Munich under HRA 80795, Bavariafilmplatz 7, 82031 Gruenwald;
>
> (c) Cinezeta entered into a Production Services Agreement with Just Friends and Mooseface, *a true copy of which was attached as exhibit "B" to his affidavit;*
>
> (d) As a result of a dispute between the parties, arbitration proceedings were begun in California which lead to a Settlement Agreement of July 12, 2007, secured by a Stipulated Judgment, requiring Just Friends to pay the monetary equivalent of the Saskatchewan tax credits which totaled $3,124,939.00.

13 In relation to Mr. Lechner's affidavit, it is of note that:

- The Production Services Agreement, attached as Exhibit "B", bears the name of the contracting party as: Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. *1. Beteiligungs* KG".

• Exhibit "F" attached the Settlement Agreement. Clause 1 of this agreement provides:

> 1. This Settlement Agreement and Mutual General Release (the "Agreement") is entered into by and between, Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. KG ("Cinezeta"), on the one hand, and Just Friends Productions, Inc. ("JFP") and Mooseface Films Inc. ("MF") and, on the other, with reference to the following facts:
>
> (a) Cinezeta filed a notice of arbitration, JAMS Arbitration No. 1220035951 (the "Arbitration") alleging that MF and JFP owed Cinezeta $3.6 million in Canadian tax credits (the "Tax Credits") pursuant to an Assignment of Tax Credits (the "Assignment") in connection with the movie "Just Friends" (the "Picture").
>
> (b) JFP and MF denied the allegations of Cinezeta's demand for arbitration and disputes Cinezeta's contention with respect to the Tax Credits and the Assignment.
>
> (c) In order to resolve their disputes and avoid the expense and uncertainty of further litigation, it is the intention of Cinezeta, on the one hand, and MF and JFP, on the other, by entering into this Agreement to fully and finally settle any and all claims and disputes which each may have against the other relating in any way in the Arbitration, the Tax Credits, the Assignment, the Picture or any other matter, except as set forth in this Agreement.

14 The initial bankruptcy order was followed by an order made pursuant to s. 38 of the BIA by the Registrar in Bankruptcy assigning to Cinezeta the Trustee's cause of action in relation to the purported improper transfer of monies from Just Friends to Infinity Features Entertainment Inc. The assigned action was commenced in the British Columbia Supreme Court (file no. VLC-S-S-120854) on February 3, 2012. Marilynne Vince is a named defendant both in her personal capacity and as co-executor of the estate of William Vince.

15 Ms. Vince filed a response to the British Columbia claim. Excerpts from her pleadings disclose:

• para. 12: "Just Friends entered into a service production agreement with the plaintiff dated August 25, 2004". (The plaintiff in the British Columbia style of cause is in the shortened version of Cinezeta.)

• paras. 26 and 27: a dispute arose between Cinezeta and Just Friends concerning tax credits in relation to the film which were resolved through arbitration proceedings in California.

• Paragraph 29:

> 29. On July 12, 2007, after negotiations between Just Friends and Cinezeta and their counsel, those parties entered into a settlement agreement to "fully and finally settle all claims and disputes which each may have against the other relating in any way to the Arbitration, the Tax Credits, the Assignment, the Picture or any matter, except as set forth in this Agreement". (the "Settlement Agreement").

16 The Demand for Arbitration, which initiated arbitral proceedings in California and to which the Settlement Agreement relates, is also attached as Exhibit "H" to the June 13, 2013 affidavit of Marilynne Vince filed in the British Columbia proceedings. It is beyond dispute that the Demand for Arbitration was brought by Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. *1. Beteiligungs* KG. Ms. Vince herself deposed:

> 25. Attached and marked exhibit 'H' is a copy of a Demand for Arbitration (the "Arbitration Demand") dated November 28, 2006. The Arbitration Demand describes the nature of the dispute as follows:
>
> Respondents have failed and refused to pay the Tax Credits to Claimant in the sum of not less than $3.6 million due and payable in connection with the film "Just Friends" pursuant to the Assignment of Tax Credits

(attached), provide notice to its bank to wire the funds to Claimant and provide all documentation and agreements concerning the Tax Credits.

26. Beteiligungs KG invoked the arbitration clause under the Production Agreement and claimed that it was entitled to tax credits in relation to the Film under an assignment dated October 24, 2004, purportedly executed by William Vince on behalf of Just Friends.

17 As to the referenced "Production Agreement", Ms. Vince said this:

9. Just Friends entered into a production services agreement with Cinezeta Inernationale Filmproduktionsgesellschaft mbH & Co. 1. Beteiligungs KG ("Beteiligungs KF") dated August 25, 2004 in relation to the making of the Film (the "Production Agreement"). Attached and marked exhibit 'A' is a copy of the Production Agreement.

Evidence from Germany

18 Both parties filed affidavits from German legal experts familiar with corporate registrations in that country. Ms. Vince filed the affidavit of Sylvia Jacob. Ms. Jacob conducted a search of the records of the Munich Commercial Register under the name and style of Cinezeta Internationale Filmproduktionsgesellschaft Mhb & Co. KG. Her search revealed:

- no limited partnership by that name has ever been entered into the Munich Commercial Register;
- there is no limited partnership under that name using the number HRA 80795;
- there is a limited partnership by the name and style: Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. 1. Beteiligungs KG;
- Beteiligungs changed its registered office to the Bavariafilmplatz 7, 82031 Gruenwald.

19 The affidavit of Frank M. Lehman, an attorney at law and member of the Munich Bar Association, was filed on behalf of Cinezeta. With regard to German corporate registrations and searches, he deposed that:

- Cinezeta Internationale Filmproduktionsgesellschaft Mhb & Co. KG is registered with the Commercial Register of the Munich Local Court under the reference No. HRA 80795 as Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. 1. Beteiligungs KG;
- according to the German Commercial Code, any commercial register of the *Local Courts* is linked to the portal of the justice authorities of the Federal and State governments and to the company register which is the official German central platform for storage of company data;
- conducting a search with the company register under the name of Cinezeta Internationale Filmproduktionsgesellschaft Mhb & Co. KG, or even Cinezeta, displays the name of Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. 1. Beteiligungs KG;
- from a German law perspective, any differences between the name/style an entity is registered under and its designation as a party to a lawsuit, i.e. erroneous misspelling of names and titles or the use of abbreviations, are not relevant as long as the party can be identified without any doubt;
- it is evident to any third party that the plaintiff in these proceedings is the company under the name and style of Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. 1. Beteiligungs KG, because:
    - the reference of the Commercial Register of the Munich Local Court - HRA 80795 - complies with it;
    - the registered business address referred to in the claim complies with it;

• there is no other company under name and style similar to Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. 1. Beteiligungs KG;

• business-wise, it is always referred to just as Cinezeta.

Position of the Parties

20 Ms. Vince alleges that, contrary to the affidavit sworn by Mr. Lechner, Cinezeta is not a party to the production services agreement. The production services agreement is, in fact, amongst Just Friends, Mooseface and the "Beteiligungs" corporate entity. As Cinezeta is not a party to this production services agreement, the purported obligations of Just Friends under the production services agreement are not owed to Cinezeta as otherwise claimed by Mr. Lechner, but to the "Beteiligungs" company.

21 The applicant further contends that Cinezeta is not a limited partnership registered in the Commercial Register of the Local Court of Munich and there is no limited partnership registered in that name, nor has there ever been.

22 Cinezeta says Ms. Vince's application amounts to much ado about nothing. The impugned court orders involving Cinezeta as creditor simply omits one word and one number in its formal name, *i.e.* 1. Beteiligungs. While Cinezeta's full and proper name was used from 2004 to 2007, and was clearly within the knowledge of Ms. Vince, it was inexplicably shortened in the Settlement Agreement. Cinezeta surmises the omission was nothing more than a papering or clerical error on the part of the California law firm which drew up the documents, and nothing more.

23 As to Ms. Vince's suggestion the improper corporate name issue only recently came to light through the vigilance of her new legal counsel, Cinezeta claims Ms. Vince was not deceived or prejudiced in any respect. She knew who she was dealing with when she signed the Settlement Agreement in 2007. She had notice of the bankruptcy application in 2010 but never once raised or opposed the application on this ground or others. She actively defended an application brought in British Columbia to examine her in the bankruptcy proceedings, and again never once raised this issue. And as recently as 2012, she actively defended the civil suit brought against her and in so doing agreed the root of the court action relates to the production services agreement with Cinezeta. In short, she has attorned to the status of Cinezeta in both provinces.

24 Cinezeta seeks an order dismissing Ms. Vince's application with costs as well as with an order *nunc pro tunc* amending the bankruptcy orders to reflect Cinezeta's full and proper corporate name.

Issues

1. Does s. 187(5) of the *BIA* empower this Court to rescind a bankruptcy order?

2. If this Court has jurisdiction to rescind such orders, should the court exercise its jurisdiction to rescind the bankruptcy order and/or the s. 38 order in these circumstances?

Analysis

1. Does s. 187(5) of the BIA empower this Court to rescind a bankruptcy order?

25 Section 187(5) of the *BIA* provides:

187 (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

26 Relief under s. 187(5) is discretionary in nature. This Court's discretion must be exercised judicially with regard to recognized principles and applicable case authority. In general terms, courts have consistently recognized and adopted the following principles in relation to the exercise of s. 187(5) of the *BIA*:

• this jurisdiction should be sparingly exercised (*Carlson, Re*, 2012 ABCA 173, 90 C.B.R. (5th) 328 (Alta. C.A.); *Elias v. Hutchison* (1981), 121 D.L.R. (3d) 95, 37 C.B.R. (N.S.) 149 (Alta. C.A.));

• while no time limit is prescribed to bring a s. 187(5) application, it nonetheless must be brought promptly and could fail for laches if not done so (*354828 Ontario Ltd., Re* (1979), 30 C.B.R. (N.S.) 176, [1979] O.J. No. 3346 (Ont. S.C.); *1064521 Ontario Ltd., Re* (1998), 38 O.R. (3d) 407, [1998] O.J. No. 920 (Ont. Bktcy.));

• s. 187(5) should not be used as a substitute for an appeal, particularly after the appeal period has passed (*HOJ National Leasing Corp., Re*, 2008 ONCA 390, 42 C.B.R. (5th) 208 (Ont. C.A.));

• a change in circumstance must be established, i.e. the applicant must bring forward new evidence of a substantial nature that was otherwise not available at the time of the original hearing; (*Strachan, Re* (1980), 34 C.B.R. (N.S.) 136, [1980] O.J. No. 2963 (Ont. S.C.); *Northlands Cafe Inc., Re* (1996), 44 C.B.R. (3d) 170, 192 A.R. 211 (Alta. Q.B.));

• the onus is on the applicant to establish the new facts or evidence relied upon in support and to demonstrate that rescission is an appropriate remedy in the circumstances. (*Christiansen v. Paramount Developments Corp.*, 1998 ABQB 1005, 8 C.B.R. (4th) 220 (Alta. Q.B.)).

27 The Alberta Court of Queen's Bench in *Garritty, Re*, 2006 ABQB 238, 62 Alta. L.R. (4th) 68 (Alta. Q.B.) provides a useful summary and workable framework for judicial consideration of s. 187(5) applications:

> 46 The principles governing an application under s. 187(5) are that:
>
> (i) The issue on the application is whether the order should remain in force because of changed circumstances or fresh evidence and not, as on appeal, whether it ought to have been made.
>
> (ii) Fresh evidence in this context means that it is material, substantial in nature, and something that, with reasonable diligence, could not have been known at the time of the original application.
>
> (iii) The application must be made promptly, within a reasonable time of acquiring knowledge of the order.
>
> (iv) Review jurisdiction is exercised sparingly; it is a matter of indulgence that must be carefully guarded.
>
> (v) In exercising its discretion, the court must consider the rights not only of the debtor and of the creditors but also of the public.
>
> (vi) The court should resort to its s. 187(5) jurisdiction if it is just and expedient in the control of its own process.
>
> (vii) Trustee conduct is a factor where statutory non-compliance results in lack of notice, particularly if it negatively affects the integrity of the bankruptcy system.
>
> (viii) The applicant bears the onus of establishing that exercise of the review jurisdiction is warranted.
>
> 47 The definition of "rescission" is "to make void, annul, cancel, repeal or revoke".
>
> 48 The result of rescission of a bankruptcy order, assignment (into bankruptcy), or order discharging a person from bankruptcy are clear - the person is either in or out of bankruptcy. There is a return to the pre-order or pre-assignment *status quo*.....[footnotes omitted]

28 While nothing in s. 187(5) limits the types of bankruptcy orders to which it may apply, as LeBell J. observed in *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605 (S.C.C.) (*in obiter*), any expression or application of s. 187(5) relief must be consistent with the policies underlying the *BIA*. (para. 36) Policies and considerations which readily come to mind where a party seeks to set aside an initial bankruptcy order include the legislative re-structuring of arrangements

and priorities of the bankrupt's creditors, the effect of the stay on creditors actions, the importance of business efficacy attached to the operation of the *BIA*, certainty of result, and so forth.

29 Ms. Vince relies upon *Taylor, Re* (1998), 4 C.B.R. (4th) 139, [1998] B.C.J. No. 837 (B.C. S.C.) in support of her position. The court in *Taylor, Re* grappled with its authority to reverse itself in the face of a subsequent Supreme Court of Canada decision. This case seems to suggest s. 187(5) is available to reverse a previous order where a change in circumstance and unfairness can be shown. In my view, *Taylor* does not meaningfully assist Ms. Vince. The order under review in that circumstance was a disallowance of a creditor's claim, and unlike the present case, it did not concern the initiating bankruptcy order which placed the bankrupt's and creditor's rights under the *BIA* regime.

30 The root argument underpinning Ms. Vince's application lies in the suggestion the initial bankruptcy order ought not to have been made. This is akin to arguing the bankruptcy order, and by extension the s. 38 order, was a nullity and must be annulled and set aside. However, to be clear, Ms. Vince's application wasn't framed under s. 181 of the *BIA*, nor was it argued on that basis.

31 Section 181(1) of the *BIA* allows for annulment of the order where the bankruptcy order or assignment ought not to have been made in the first place:

> 181. (1) If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

32 The rescission remedy contemplated by s. 187(5) has been recognized as conceptually different from other remedies available under the *BIA*. Unlike an appeal (ss.192 and 193) which seek to reverse the decision-maker for reversible error, or an annulment (s. 181) to set aside a receiving order or bankruptcy assignment which ought not to have been made, s. 187(5) is designed to vary or rescind orders in circumstances where new evidence has come to light subsequent to the initial order. It permits courts to deal with an ongoing bankruptcy by adjusting to a changed circumstance. Bielby, J., in *Christiansen*, *supra*, describes these remedial distinctions:

> 24 The Court's task in assessing the availability of this remedy is the opposite of that under s. 181. There must be a fundamental change in circumstances between the original hearing and the time when a review is sought for the Court to exercise its discretion to rescind; see *Re MacCulloch Estate* (1992), 13 C.B.R. (3d) 201. The question is not, as on an appeal, whether the receiving order ought to have been granted but rather whether in the light of changed circumstances or fresh evidence it ought to remain in place. See *Re a Debtor* (No. 32-SD-1991), [1993] 1 W.L.R. 315 (Ch.D.).
>
> (See also: *HOJ National Leasing Corp*, *supra*, at para. 27)

33 The consequence of setting aside a bankruptcy order or assignment must also be considered. The most significant question (unaddressed by the applicant) is the legal consequence for Cinezeta, other creditors and the bankrupt. Moreover, had this application been formulated as an annulment under s.181(1), if granted, legislative validation of the trustee's actions was assured along with appropriate direction concerning the disposition of the bankrupt's property. Were I to make the order requested, none of the legal protections offered by s. 181(2) would ostensibly be available nor would there be appropriate direction on a go forward basis. These are significant issues. None were addressed by the applicant.

34 That said, based on applicable case law I find that I cannot unequivocally rule out the potential application of s. 187(5) to an initiating bankruptcy order or assignment, however the underlying policies and structure of the *BIA* suggest to me that a court should be very reluctant to invoke s. 187(5) in such circumstances.

2. If this Court has jurisdiction to rescind such orders, should the court exercise its jurisdiction to rescind the bankruptcy order andlor the s. 38 order in these circumstances?

35 Even if s. 187(5) is an available remedy for Ms. Vince, her application must be assessed with regard to the aforementioned legal principles governing s. 187(5).

36 The applicant contends there is no evidence Cinezeta has legal status in Germany, was not a party to the production services agreement and as a result, the Canadian bankruptcy system was utilized by a non-entity. She goes on to argue that had the court been aware of these facts, no such order would have issued in the first place. Ms. Vince contends the "new evidence", which has recently come to her attention, could not reasonably have been known by her but for the assistance of a German lawyer.

37 Ms. Vince further contends there has been non-disclosure of facts and/or mistakes of fact regarding the legal status of Cinezeta. She argues the parties and the courts have proceeded as if Cinezeta had the same legal rights and status as Beteiligungs.

38 Finally, Ms. Vince contends that allowing the initial bankruptcy and s. 38 orders to stand will result in an injustice and abuse of the court's process. Because bankruptcy proceedings are quasi-criminal in nature, they require strict adherence to process. It would therefore be unjust for a party with no legal standing and as a non-party to the production services agreement to have wrought such severe consequences upon Just Friends and, by extension, to Ms. Vince.

39 The first consideration is the timeliness of Ms. Vince's application. With the bankruptcy order having issued in April 2010, and matters not apparently dormant in British Columbia, Ms. Vince's application was not made expeditiously and hardly meets the criteria of promptness required by case law.

40 Ms. Vince says German legal counsel was required to extract the required corporate registry information. This argument has little merit. If she had concerns about the corporate status of Cinezeta in 2010, she could have sought assistance from German legal counsel at that time. Nothing stopped her. Furthermore, the information required is not hidden nor obscure; in fact it is found in a publically accessible electronic registry.

41 Second, and in any event, the moving party bears the onus of establishing "new evidence of a substantial nature that was not available at the original hearing". *(HOJ National Leasing*, *supra*, para. 28) There is no evidence of a fundamental change in circumstance between April 2010 and the present motion, nor, in my view, would the so-called evidence of an incorrectly named creditor have led to a different result in these circumstances had it been known in April 2010.

42 Third, as alluded to above, this remedy should not be used as a substitute for an appeal or an application to annul. The essence of Ms. Vince's application is to set aside the originating order because it ought not to have been made in the first place. Rather than formulating her application under either footing, she seeks to shoehorn her argument into s. 187(5). Neither the facts nor case authority support her in this regard.

43 Finally, there is no suggestion of prejudice to Ms. Vince. It is clear from the documents that Ms. Vince had at least implicit knowledge of the naming "misnomer" since the summer of 2007 when the California Settlement Agreement was executed. She was part of the arbitral proceedings and she signed the settlement agreement. She was served in these bankruptcy proceedings and in related proceedings in British Columbia. The documents have referred to Cinezeta in the shortened form and Ms. Vince has taken no objection or exception. Ms. Vince did not raise prejudice in her affidavits and in any event, no prejudice is apparent from the record or the facts.

44 The circumstances before me invite consideration of the possible application of s. 187(9) of the *BIA*. It provides:

> 187. (9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

45 By enacting this provision, Parliament has provided nominal indulgence for irregularities by declaring that no proceedings in bankruptcy shall be invalidated because of a formal defect or irregularity. Frank Bennett, *Bennett on Bankruptcy*, 14th ed, (Don Mills, ON: Canadian Limited, 2011) at p. 579 offers these observations about s. 187(a):

> ... Where the error can be described as "an irregularity" rather than an error of substance, the court has the jurisdiction to correct the error. Drawing the line between irregularity and substance can be a difficult task and varies with the circumstances of each case. Generally, the court will correct errors relating to form, but where the error relates to something mandatory under the Act or Rules, the court will not permit the correction.
>
> . . .

46 The decision of *Longmire, Re* (2001), 25 C.B.R. (4th) 280, 194 N.S.R. (2d) 218 (N.S. S.C.) is particularly instructive as it appears to be the only case where a name change was considered in the context of a remedial application under s. 187(9). In *Longmire*, the bankrupt's name had been cited incorrectly. The court stated at paras. 12-15:

> 12 Generally speaking, the history of the application of the *Bankruptcy and Insolvency Act* demonstrates that formal defects very rarely invalidate proceedings, and then only to the extent necessary to maintain the systems procedural integrity. Section 187(9) of the Act clearly recognizes this principal.
>
> 13 In *Re Paquett, Limited* (1921), 1 C.B.R. 445 (Que. S.C.) the Registrar allowed the amendment of an assignment to correct the name of the assigning corporation. So to in *Re Plante* (1992), 13 C.B.R. (3d) 40 (OCJ) the found that although the bankrupt had been petitioned into bankruptcy using an incorrect name, the use of other than the correct given name of the bankrupt was at most a formal defect or irregularity curable under section 187(9).
>
> 14 It was otherwise in the English case of *Re A Debtor* (No. 41 of 1951). Ex Parte *The Debtor v. Hunter et al*, [1952] 1 All E.R. 107 (Div. Ct.) where the bankruptcy notice was wrong in that it contained the name of the liquidator rather than that of the debtor. In that case, the court described the error as "dangerous and misleading" (p. 109). The court concluded that as the possibility of misleading the creditor existed the form was bad.
>
> 15 The difference in the outcome of these cases to my mind revolved upon the possibility of misleading the creditors and others as to the proper identity of the bankrupt. In my view, there must be a real possibility that the error will mislead, and not simply the potential to mislead. In the case at bar there was no real possibility that a creditor would be mislead as to the identity of the persons making the proposals.
>
> [Emphasis added]

47 I am satisfied from the preponderance of material filed that Ms. Vince was not misled. She makes no such claim in her affidavits, nor does she refer to any prejudice arising from the use of Cinezeta in its shortened form. Equally so, it is apparent from the material filed that all parties were well aware of which corporate entity they were dealing with. This is reflected in the production services agreement and the Demand for Arbitration attached as Exhibit "H" to Ms. Vince's affidavit. These documents were referred to and incorporated into the Affidavit of Truth and Statements filed in these proceedings. In short, viewed objectively, there was no mistaking which corporate entity was the creditor nor the nature of the debt which created Cinezeta's status as creditor vis- a-vis Just Friends.

48 Furthermore, there is nothing to suggest that Cinezeta's shortened name used in the Settlement Agreement was anything more than a clerical error. The terms of the production services agreement authorized the arbitral dispute resolution process which brought the parties to the table, and it was the interpretation of the agreement which lies at the root of the debt obligation and the bankruptcy of Just Friends. Again, to be clear, that agreement was drafted using Cinezeta's full and proper corporate name. There is no suggestion whatsoever that creditors, the Trustee or the bankrupt were misled in any sense. Moreover, paras. 26 and 29 of Ms. Vince's own affidavit satisfies me that she clearly understood who she was dealing with and the root nature of Cinezeta's claim.

49 Parliament has specifically mandated that bankruptcy proceedings should not be derailed by technical defects or irregularities. Case law makes clear that matters under the *BIA* should be governed by substance rather than technicalities, with substantial injustice being the test. (*Lechcier-Kimel, Re*, 2011 ONSC 4838, [2011] O.J. No. 3701 (Ont. S.C.J. [Commercial List]) and *DeGroote v. Canadian Imperial Bank of Commerce* (1996), 45 C.B.R. (3d) 132, [1996] O.J. No. 4332 (Ont. Bktcy.))

Conclusion and Relief

50 There is little question the equities in this case favour the creditor. Ms. Vince failed to raise the naming misnomer for over six years. There is no evidence of prejudice to her or anyone else resulting from issuance of either order. Having regard to the referenced factors, the facts before me and the cautionary approach attached to s. 187(5) relief, I have no hesitation concluding her application should be denied. Furthermore, I am quite satisfied the incorrect name used by the creditor was a mere irregularity and not substantive in nature, thus justifying reliance on s. 187(9) in these circumstances.

51 For the foregoing reasons, the application is dismissed. The proper corporate name of Cinezeta was an irregularity which may be cured by an order *nunc pro tunc*. Therefore, an order shall issue *nunc pro tunc* effective April 10, 2010 changing the corporate name of the creditor in these proceedings to Cinezeta Internationale Filmproduktionsgesellschaft mbH & Co. 1. Beteiligungs KG.

52 Cinezeta shall have its costs of this application fixed at $3,000.00.

Application dismissed.

TAB 4

1989 CarswellAlta 335
Alberta Court of Queen's Bench

Cormie v. Principal Group Ltd. (Trustee of)

1989 CarswellAlta 335, [1989] A.W.L.D. 570, [1989] C.L.D. 739, [1989] A.J. No. 339, 15 A.C.W.S. (3d) 162, 66 Alta. L.R. (2d) 340, 74 C.B.R. (N.S.) 124, 99 A.R. 1

CORMIE and PETRACCA v. COLLINS BARROW LIMITED

Berger J.

Judgment: April 26, 1989
Docket: Edmonton No. 25333

Counsel: *B.A.R. Smith, Q.C.* , and *D. Granger* , for trustee, Collins Barrow.
L.W. Scott, Q.C. , and *D.A. Thurmeir* , for inspectors and creditors.
W.J. Kenny and *J. Cross* , for applicant Cormie.
S.L. Harper , for applicant Petracca.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIV Administration of estate
XIV.2 Trustees
XIV.2.m Miscellaneous

Headnote
Bankruptcy --- Administration of estate — Trustees

Bankruptcy Act contemplating reports of preliminary nature.

Report not a nullity but capable of alteration by deletion of opinions.

Court prohibiting disclosure of full report.

The respondent trustee filed a preliminary full report with the superintendent pursuant to s. 171 of the Bankruptcy Act and prepared a second, partial report which stated that a "review" had been conducted of the bankrupt's affairs, and which made it clear that its conclusions were drawn from information gathered up to that date and that a supplementary report might be filed. The applicants contended the report did not comply with the requirements of s. 171 of the Act as to content and form because of its preliminary nature, that the trustee had not expressly stated his opinion as to the names of the persons who actively controlled the bankrupt company and under whose direction the greater proportion of the debtor's liabilities had been incurred, and that the report contained statements and opinions which were irrelevant and not required for the purposes of s. 171. They accordingly applied under s. 37 of the Act to have the report declared a nullity and to have the trustee directed to prepare another or, alternatively, to have the report altered pursuant to s. 171(4). The applicants further applied to dispense with the requirement in s.

171(3) that the trustee file the partial report with the official receiver and opposed the inspector's and the trustee's application to have the full report released to the inspectors and creditors of the bankrupt, or to have it filed with the official receiver.

Held:

Disclosure of full report not allowed; amended partial report to be filed with official receiver.

Although s. 171 provides for the filing of only one report, the Act contemplates reports that are of a preliminary nature. A primary purpose of the trustee's report is to alert the superintendent to possible offences under the Act or any other statute so that he can investigate. By providing for a two-month period in which the trustee is to file his report, Parliament has indicated an intention that such a report be made in the early stages of a bankruptcy, and therefore the report must be preliminary in nature. Filing the report as early as possible, rather than delaying it until the trustee is certain he has obtained all relevant information, also hastens the naming of individuals in day-to-day control of a bankrupt corporation and informing whether there is a sufficient account of any deficiency between assets and liabilities which allows potential lenders to determine whether to extend credit. As well, the Act contemplates reports in later stages of a bankruptcy that contain more definitive information.

A trustee is permitted to deviate from the prescribed form for the report without altering the substance, as s. 32 of the Interpretation Act allows deviations from standard forms that do not affect substance or mislead, and R. 3 and s. 209 of the Bankruptcy Act allows forms to the "like effect". This trustee had deviated from the prescribed form by adding expressions of opinion that did not relate to the discharge of his statutory responsibility, but this was merely a formal defect. As s. 171(4) of the Act grants jurisdiction to alter a trustee's report and s. 187(9) of the Act confers power on the court to relieve against formal errors and irregularities, the defect did not result in the report being a nullity but could be corrected by the deletion of the comments.

A duty to act fairly is owed when the report of an investigator is to be made public. As the trustee files the partial report with the official receiver, thus making it public, he owes a duty of fairness to those named in the report. The manner in which the duty of fairness is to be discharged depends on the circumstances of each case. This trustee did act fairly relative to the partial report. Those individuals mentioned in the partial report were immediately given copies and they were afforded the opportunity to object to any portion and to apply to have it altered before it was filed with the official receiver. However, the duty of fairness would be breached if the full report were released to the public. Those named in the report who would be adversely affected by it had not been afforded the opportunity to respond to the evidence in support of the allegations. Moreover, it would have been manifestly unfair to release to the public tentative opinions of wrongful conduct which might change over the course of the administration of the bankruptcy as a result of further investigations.

Table of Authorities

Cases considered:

Associated Investors of Can. Ltd., Re (1988), 63 Alta. L.R. (2d) 69, 71 C.B.R. (N.S.) 288, *(*sub nom. *Re First Investors Corp.)* 93 A.R. 344 (Q.B.) — *applied*

Houde v. Que. Catholic Sch. Comm., [1978] 1 S.C.R. 937, 80 D.L.R. (3d) 542, 17 N.R. 451 [Que.] — *applied*

Irvine v. Can. (Restrictive Trade Practices Comm.), [1987] 1 S.C.R. 181, *(*sub nom. *Re Irvine and Restrictive Trade Practices Comm.)* 41 D.L.R. (4th) 429, 74 N.R. 33 — *applied*

Objection 4	Parts of the report which may fall within this objection
Report comments on office configuration.	- (p. 6) "We also observed that the physical layout of the offices appeared to be such as to restrict communication between individuals in the various entities of the organization."

Adjudication In Respect Of Objection 4

59 This particular comment occurs immediately after the following words:

> None of the Officers or senior management personnel, aside from Donald M. Cormie, had a detailed knowledge of the entire operations of the Principal Group of Companies. Certain members of management indicated to the Trustee that information with respect to areas beyond their responsibility was kept from them.

In this context, the comment on office configuration is directly related to the question of control and forms part of the trustee's opinion as to who controlled the day-to-day operations of the company. In my view, the comment should not be removed.

Objection 5	Parts of the report which may fall within this objection
Report contains prejudicial, irrelevant and inconsistent statements in para. 5.	[Section omitted.]

Adjudication In Respect Of Objection 5

60 Section 171(1)(*b*) directs the trustee to state whether in his opinion the deficiency between the assets and the liabilities of the debtor has been satisfactorily accounted for. If his answer to this question is yes, the statute does not impose any further responsibilities on him under this subsection. It should be noted that s. 171(1)(*d*), which sets out some of the information required in the confidential part of the report that goes only to the superintendent, calls for a statement of the facts and information on which the trustee relied in arriving at the opinion which he expressed pursuant to s. 171(1)(*b*). The ejusdem generis rule of construction leads to the conclusion that such a statement of facts and information is not to be included in the partial report. In my view, these sentences should be excised.

Objection 6	Parts of the report which may fall within this objection
Report contains comments about Ms. Petracca which are superfluous and gratuitous to the report, and not within the mandate imposed upon the trustee under s. 171(1)(a).	- (p. 4) "The only significant influence Ms. Petracca appeared to exercise in the company was through Don Cormie." [Section omitted.]

Adjudication In Respect Of Objection 6

61 The first sentence can be seen as falling within the trustee's mandate to state his opinion as to the persons who controlled the day-to-day operations of the company. The trustee does not state that the influence which Ms. Petracca exercised through Donald Cormie was little or negligible. Therefore, I am of the view that this sentence should remain. As to the next sentence, it was my earlier conclusion that this sentence should be removed. With regard to the last sentence, it clearly modifies the middle sentence and should be removed.

62 The statutory jurisdiction to alter the trustee's report is set out in s. 171(4). In addition, s. 187(9) confers power on the court to relieve against formal errors and irregularities. Section 187(9) reads:

> (9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

63 However, it is clear that this jurisdiction can only be exercised with respect to formal defects. In *Re Roosenboom* (1973), 18 C.B.R. (N.S.) 180 at 181 (Ont. S.C.) , Mr. Justice Houlden stated:

> It is well-established that there is no power under s. 157(9) [now s. 187(9)] to grant relief if a matter of substance is involved. It is only formal defects or irregularities that the Court can excuse. As was pointed out in *Re Little*, 56 O.L.R. 196, 5 C.B.R. 244, [1925] 1 D.L.R. 395 , what is a matter of form, and what is a matter of substance, depends on the circumstances of each case.

64 The court has found that the report deviates from the prescribed form by the addition of expressions of opinion by the trustee that do not relate to the discharge of his statutory responsibilities. In my opinion, this is a merely formal defect which can be corrected by direction that the comments be deleted. I so order.

Should The Full Report Be Made Public?

65 The trustee and the inspectors of the estate have both applied for an order requiring disclosure of the full report. The provincial Ombudsman has indicated his desire that the report be made public. The Superintendent of Bankruptcy has also filed a submission with the court indicating that he does not object to the release of the entire report in these "extremely unusual, if not unique" circumstances.

66 The trustee has filed an affidavit indicating that it is his opinion that it would be to the benefit of the creditors to know the contents of the complete report.

67 He submits that a close examination of s. 171(1) can only lead to the conclusion that the information in the full report was intended also to be for the benefit of persons other than the Superintendent of Bankruptcy. He points out that the superintendent, in order to fulfil his statutory duties, only needs to know if there are grounds to suspect an offence. However, by s. 171(1)(*c*), the trustee is also required to express his opinion as to grounds which do not constitute an offence, such as misfortune, inexperience, incompetence, overexpansion, unwarranted speculation or gross negligence.

68 He further submits that nowhere in the Act is it stated that the full report is privileged from disclosure, or inadmissible in evidence in any proceeding. Additionally, he points out that by s. 171(6) the trustee is exonerated from liability with respect to the entire report, as long as his statements or opinions are made in good faith. He contends that it would not be necessary to grant the trustee an exoneration from liability with respect to the full report if it were only intended for the superintendent.

69 Donald Cormie opposes the applications, on the basis that it is the clear intention of Parliament as evidenced in s. 171 that the information contemplated by s. 171(1)(*c*) and (*d*) be included only in the report to the superintendent. He contends that there is no jurisdiction in s. 171 or elsewhere for the court to order that the full report be filed with the official receiver.

TAB 5

CED Bankruptcy and Insolvency XIII.4

Canadian Encyclopedic Digest
Bankruptcy and Insolvency
XIII — Courts and Procedures
4 — Courts Acting in Aid of Each Other

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

XIII.4

See Canadian Abridgment: BKY.I.2.h Bankruptcy and insolvency — Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Auxiliary bankruptcy jurisdiction

§1168 All courts and officers of the court are required to act severally in aid of and be auxiliary to each other in all matters of bankruptcy. [1] An order of one court seeking the assistance of another court is deemed to be sufficient to enable the latter court to exercise such jurisdiction as is necessary to discharge the order. As soon as a court of a province is seized of the administration of an insolvent estate, that court should not permit any court of another province to interfere with the administration of the insolvent's estate, except with the leave or concurrence of the initiating court. [2]

§1169 An order made by a court under the *BIA* is to be enforced by other bankruptcy courts in the same manner as if the order had been made by the court required to enforce it. [3] While a court sitting in bankruptcy may enforce the order of a court in some other province, it cannot vary the terms of such an order. [4] If it is a valid order, only the court of the province that made the order has jurisdiction to review, rescind or vary it. [5]

§1170 The *BIA* establishes a nationwide scheme for the adjudication of bankruptcy claims. The national implementation of bankruptcy decisions rendered by a court in a particular province is achieved through the cooperative network of superior courts of the provinces and territories. [6]

§1171 Any warrant issued by a Canadian court sitting in bankruptcy may be enforced in the same way as a warrant issued by a justice of the peace under the *Criminal Code* [7] against a person charged with an indictable offence. [8] This applies to a warrant issued under various sections of the *BIA* and Rules. [9]

§1172 A Canadian court may call in aid a court, tribunal or other authority in a foreign proceeding. [10] To assist a Canadian trustee in obtaining possession of foreign property of a bankrupt, the court can order that the trustee seek the aid of a foreign court in ordering persons in possession of the property to deliver it to the trustee. [11]

Footnotes

1 *Bankruptcy and Insolvency Act* [title re-en. 1992, c. 27, s. 2], R.S.C. 1985, c. B-3, s. 188(2); *Castor Holdings Ltd., Re* (1995), 36 C.B.R. (3d) 199 (Que. S.C.) (creditor having to apply to court having original jurisdiction, for order under s. 188(2) of *BIA*, to proceed against trustee in another province).

2 *Bryant Isard & Co., Re* (1923), 4 C.B.R. 317 (Ont. S.C.) (decided under *Bankruptcy Act*, S.C. 1919, c. 36).

3 *Bankruptcy and Insolvency Act* [title re-en. 1992, c. 27, s. 2], R.S.C. 1985, c. B-3, s. 188(1).

4 *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1995), 36 C.B.R. (3d) 36 (N.S. S.C. [In Chambers]); affirmed (1996), 39 C.B.R. (3d) 311 (N.S. C.A.).

5 *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1995), 36 C.B.R. (3d) 36 (N.S. S.C. [In Chambers]); affirmed (1996), 39 C.B.R. (3d) 311 (N.S. C.A.).

6 *Eagle River International Ltd., Re* (2001), 30 C.B.R. (4th) 105 (S.C.C.) (s. 188(1) ensures that orders made by court in one province are and will be enforced throughout Canada).

7 *Criminal Code*, R.S.C. 1985, c. C-46.

8 *Bankruptcy and Insolvency Act* [title re-en. 1992, c. 27, s. 2], R.S.C. 1985, c. B-3, s. 188(3) (various sections of the *BIA* and Rules provide for the issue of warrants, such as ss. 166, 168, 189 and RR. 15, 16, and if a warrant is issued under these sections, s. 188(3) will be applicable).

9 For example, *Bankruptcy and Insolvency Act* [title re-en. 1992, c. 27, s. 2], R.S.C. 1985, c. B-3, ss. 166 [rep. & sub. 2005, c. 47, s. 99] (penalty for failure to attend for examination), 168 [am. 2004, c. 25, s. 80] (arrest of bankrupts in certain circumstances), 189 [am. R.S.C. 1985, c. 31 (1st Supp.), s. 28] (search warrants); *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368, RR. 15 [rep. & sub. SOR/2007-61, s. 5], 16 [rep. & sub. SOR/98-240, s. 1; am. SOR/2007-61, s. 63(e)].

10 *Bankruptcy and Insolvency Act* [title re-en. 1992, c. 27, s. 2], R.S.C. 1985, c. B-3, s. 272 [rep. & sub. 2005, c. 47, s. 122]; *Clarkson Co. v. Shaheen* (1976), 23 C.B.R. (N.S.) 278 (U.S. 2nd Cir. Ct. App.).

11 *Walker, Re* (1998), 5 C.B.R. (4th) 123 (Ont. Bktcy.).

End of Document

TAB 6

1998 CarswellOnt 2770
Ontario Court of Justice, General Division (In Bankruptcy)

Walker, Re

1998 CarswellOnt 2770, 5 C.B.R. (4th) 123, 70 O.T.C. 386, 80 A.C.W.S. (3d) 1144

In The Matter of the Bankruptcy of Albert Walker, of the City of Woodstock, Province of Ontario

Browne J.

Heard: April 27, 1998
Judgment: May 11, 1998
Docket: 35-067940, 35-040761

Counsel: *F.A. Highley*, *G.D. Cudmore* and *A. D'Ascanio*, for the Trustee in Bankruptcy.

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

VII Consolidation orders and orderly payment of debts

Bankruptcy and insolvency

XIV Administration of estate
XIV.3 Trustee's possession of assets
XIV.3.a Jurisdiction of courts

Headnote

Bankruptcy --- Consolidation orders and orderly payment of debts

Trustee in bankruptcy for individual and corporate bankrupts applied for consolidation of bankrupt estates expediency and to eliminate any perceived conflict of interest by trustee administering both estates — Individual bankrupt incorporated corporate bankrupt, appropriated funds, fled Canada and was charged with numerous theft, fraud and money-laundering offences — Individual bankrupt arrested in England for murder and English police seized various assets — Funds that bankrupt used during stay in England had origin in funds misappropriated from Ontario — Creditors with claims against corporate bankrupt had claim against individual bankrupt also, as individual was corporation's principal and misappropriated funds from company — Consolidation would not preclude any creditors from asserting that money advanced could be traced into any assets recovered if tracing became viable issue — Consolidation of estates ordered for general administration purposes including consolidation of property of both estates for distribution amongst creditors of both estates.

Bankruptcy --- Administration of estate — Trustee's possession of assets — Jurisdiction of courts

Trustee in bankruptcy for individual and corporate bankrupts applied for consolidation of bankrupt estates and order declaring that certain property in Canada and abroad vested in trustee — Individual bankrupt incorporated corporate bankrupt, appropriated funds, fled Canada and was charged with numerous theft, fraud and money-laundering offences — Individual bankrupt arrested while in England for murder and English police seized various assets on arrest — Funds that bankrupt used during stay in England had origin in funds misappropriated from

Ontario — United Kingdom legislation and Canadian Bankruptcy and Insolvency Act both contain provisions promoting cooperation between international courts exercising bankruptcy jurisdiction to facilitate administration of bankrupt estates — Trustee obtained general order from bankruptcy court in England that English court would assist Ontario court in respect of individual's bankruptcy proceedings, which buttressed anticipation of cooperation — No known bankruptcy proceedings in any other jurisdiction and all property in issue was movable property — Where no competing proceedings in foreign jurisdiction, all property wherever situate vests in trustee — Court had international jurisdiction and declared that all assets wherever situate of consolidated estate vested with trustee — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Table of Authorities

Cases considered by *Browne J.*:

Hilton v. Guyot (1895), 159 U.S. 113 (U.S. Sup. Ct.) — referred to

Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077 (S.C.C.) — considered

Sefel Geophysical Ltd., Re (1988), 70 C.B.R. (N.S.) 97, 62 Alta. L.R. (2d) 193, 92 A.R. 51, [1989] 1 W.W.R. 251, 54 D.L.R. (4th) 117 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — pursuant to

Pt. XIII [en. 1997, c. 12, s. 118] — considered

s. 158 — considered

s. 271(1) [en. 1997, c. 12, s. 118] — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Insolvency Act, (U.K.), 1986, c. 45
Pt. XVII — considered

s. 426 — considered

s. 426(4) — considered

s. 426(5) — considered

MOTION by trustee in bankruptcy for consolidation of individual and corporate bankruptcy estates and for order vesting certain property in Canada and abroad in trustee.

***Browne J.*:**

1 The Trustee seeks an order under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) for recovery of property of the Bankrupt in Canada and elsewhere.

2 The Trustee had received an order relieving it from the obligation to serve the bankrupt Walker with notice of the relief sought before me. The Trustee in fact did not rely upon that order. Walker was served and in all 29 persons or corporations have been served. I am satisfied that adequate notice was given of the relief sought and that no other party has appeared or responded.

3 I draw upon the Trustee's factum for the following:

Albert Johnston Walker ("Walker") was born in Ontario and he is a Canadian citizen. In 1978 Walker and his wife incorporated in Ontario a small payroll and income tax services company called Walker's Financial Services Incorporated ("WFSI"). In 1980 it purchased another small bookkeeping business known as Oxford Bookkeeping Systems. WFSI began to grow and it diversified to provide financial services both in the nature of lending and investing. By the late 1980's WFSI had offices throughout southern Ontario in Woodstock, Paris, Guelph, Brantford, Hagersville, Cambridge, Stratford, London, and Kitchener.

Walker and his wife in 1982 also incorporated an off-shore investment holding company in Grand Cayman Island, British West Indies called United Canvest Corporation (Cayman) Ltd. ("UCC"). They marketed the purchase of preferred shares in UCC to Ontario residents as a safe investment with significant tax returns.

Walker fled Canada on December 5, 1990, with his then 15 year old daughter Sheena Walker. As a result of complaints received from, among others, investors in WFSI and UCC a joint forces investigation was established between the RCMP Commercial Crime Kitchener, Ontario Detachment, the OPP Anti-Racket's [sic] Branch, and the Woodstock City Police Criminal Investigation's [sic] Branch. This joint investigation resulted in numerous charges being laid against Walker for misappropriation of millions of dollars and he presently stands charged with numerous theft, fraud and money laundering offences under the *Criminal Code of Canada*.

Walker in the year leading up to his departure was engaged in an extensive and systematic campaign of misappropriating and diverting funds and investments belonging to WFSI and UCC for his own personal use and benefit outside of Canada. Basically, he opened a CIBC bank account and a Credit Suisse bank account in Toronto in 1990 and he then transferred money from the accounts of WFSI and UCC into these accounts and liquidated investment assets of UCC and transferred the proceeds into these accounts. From these commingled accounts he purchased gold bars and foreign currency and then transferred the balance of the funds electronically into a Credit Suisse account in Geneva, Switzerland.

A forensic audit of all relevant bank accounts has not been done. However, it is clear that at a minimum $1,066,940.00 was withdrawn or transferred by Walker from the CIBC and Credit Suisse bank accounts he opened in his name in Toronto in 1990. There appears to be about another $1,000,000.00 unaccounted for on the basis that the claims of UCC and the WFSI investors in the bankruptcy of WFSI are approximately 2.8 million dollars and the Trustee has recovered about $800,000.00 leaving approximately $1,000,000.00 unaccounted for.

After leaving Canada on December 5, 1990, Walker lived with his daughter incognito in England using assumed identities until he was arrested in October of 1996 and charged with murdering one of the persons whose identity he had assumed.

Upon arriving in England he began using the assumed identity of David Davis, a St. Thomas, Ontario resident who had been a customer of WFSI. Using the identity of David Davis, Walker made the acquaintance of Elaine Boyes and her boyfriend Ronald J. Platt. He persuaded these two people to incorporate a company in England for his sole benefit, operation and control called Cavendish Corporation Limited. Platt and Boyes were registered as the company's directors and officers, and Elaine Boyes as the sole shareholder of the company signed an agreement whereby she agreed to hold her shares as nominee for Walker.

After Cavendish Corporation Limited was incorporated Walker alone controlled it, and Elaine Boyes and Ronald J. Platt carried out tasks as instructed by Walker including, among other things, opening bank accounts in England in the company's name and operating them as instructed.

Elaine Boyes and Ronald J. Platt were also persuaded by Walker to open bank accounts in their personal names in England, Switzerland, France, and Italy and to do banking in respect of these accounts as instructed by Walker ostensibly as part of his carrying on the business of Cavendish Corporation Limited.

In 1992 Walker gave Elaine Boyes and Ronald J. Platt one way airline tickets to Calgary, Alberta departing in February of 1993. Prior to their departure Elaine Boyes and Ronald J. Platt provided Walker with some of their identification and rubber stamps made of their signatures. Further, Elaine Boyes executed a general power of attorney in favour of Walker.

After Elaine Boyes and Ronald J. Platt departed for Calgary, Alberta, Walker began using Ronald J. Platt's identity and utilizing the rubber signature stamps he continued to use the various bank accounts opened for him in the names of Cavendish Corporation Limited, Elaine Boyes and Ronald J. Platt.

There is no evidence that while Walker was a fugitive at large in England he had any income source other than from the monies he misappropriated and diverted from Ontario referred to above.

As part of the arrest of Walker for murder in England the English police authorities have seized from Walker and/or Sheena Walker and are in possession of the following chattel assets:

(a) One sail boat purchased for £4,500 by Walker for his own benefit using the name Ronald J. Platt;

(b) Two oil paintings purchased for £5,275 by Walker for his own benefit using the name David Davis;

(c) Three oil paintings purchased for £14,415 by Walker in the name of Cavendish Corporation Limited;

(d) Ten 500 gram gold bars purchased for £47,330 by Walker for his own benefit using the name Ronald J. Platt;

(e) Five 10 ounce gold bars purchased for $22,620 by Walker for his own benefit under his name in Toronto before fleeing Canada;

(f) Two 1 kilo gold bars purchased for £19,944 by Walker for his own benefit using the name Ronald J. Platt.

As part of the arrest of Walker the English police authorities also seized and are in possession of £25,600 and 8,170 Swiss francs. With the exception of £4,020 in the possession of Sheena Davis upon her arrest the balance of the funds were discovered in various premises rented by Walker. The funds Walker had access to and used during his stay in England to live on and to purchase all assets had their origin in funds misappropriated by him from Ontario. Further, his daughter Sheena Walker while she lived with him in England had no independent source of funds and was completely dependent on her father to provide for her and her two children which she gave birth to in England, and who lived with her and her father.

There are a few bank accounts which have been discovered in Walker's own name. The balance of the bank and credit card accounts with prepaid balances discovered are in the names of either Cavendish Corporation Limited, Elaine Boyes or Ronald J. Platt, but were used and controlled by Walker for his own benefit and purposes.

On July 19, 1991, UCC petitioned this Court to put WFSI into bankruptcy on account of WFSI's indebtedness to UCC for intra company advances. WFSI was put into bankruptcy and KPMG Inc. was appointed Trustee in bankruptcy.

> As a result of the numerous and significant unauthorized withdrawals from WFSI's operating account, WFSI's Trustee KPMG Inc. was a creditor of Walker. On May 6th, 1997, KPMG Inc. as Trustee of WFSI petitioned this Court to put Walker into bankruptcy. The Petition was personally served on Walker in prison in England and he failed to respond. As such, a Receiving Order was issued against Walker by this Court on June 4, 1997, adjudging him bankrupt and appointing KPMG Inc. as Trustee of his bankrupt estate.
>
> By Originating Application made without notice KPMG Inc. as Trustee of Walker requested, pursuant to section 426 of the United Kingdom's *Insolvency Act*, and obtained from the Exeter County Court In Bankruptcy in England on March 25, 1998, a general order ordering that the Exeter County Court In Bankruptcy assist the Ontario Court (General Division) in Bankruptcy in respect of the bankruptcy of Albert Walker, and that KPMG Inc. be given liberty to apply from time to time to Exeter County Court for all required assistance.

4 As a generalization, if this court were being asked to recognize and enforce an order of a foreign jurisdiction, this court would canvas the issue of international jurisdiction of the foreign court. It would also look at such issues as whether a fraud was committed on the foreign court, whether the judgment or order breached any natural justice rules and in given fact situations, a consideration as to Canadian public policy might be undertaken. In the original petition Walker was described as being of the City of Woodstock, Province of Ontario whereas all material led to the conclusion that he had been absent from Ontario for a period well in excess of six months. The original petition, supporting affidavit and receiving order did not identify or describe Walker as an absconding debtor. An amended petition is now before me for approval with a supporting affidavit setting out that at the material time Walker was an absconding debtor, formerly of the City of Woodstock, Province of Ontario, a fugitive incarcerated in prison, County of Devon, in the United Kingdom. Accordingly, an order is made *nunc pro tunc* amending the petition for receiving order and amending the receiving order issued June 4, 1997 *nunc pro tunc* changing the style of cause to describe Walker as Albert Johnson Walker, an absconding debtor, formerly of the City of Woodstock, Province of Ontario, a fugitive from the law of Canada currently incarcerated at Her Majesty's Prison, Exeter, County of Devon, in the United Kingdom. The body of the amended petition incorporating the concepts of an absconding debtor are approved and signed with the release of these reasons.

5 There are no known bankruptcy proceedings in any other jurisdiction.

6 All of the property in issue is movable property.

7 There is a receiving order dated February 27, 1992 judging WFSI bankrupt effective July 19, 1991, appointing as Trustee Peat Marwick Thorne Inc. KPMG Inc. was formerly Peat Marwick Thorne Inc. The proven unsecured claims in the bankruptcy estate of WFSI total $2,840,740.68 with there being 68 unsecured creditors. KPMG Inc. as Trustee in the bankruptcy of the estate of WFSI issued the petition for the receiving order against Walker which is subject to the amendments referred to above. On the return of the motion before me April 27, 1998 I raised the issue of apparent or real conflict of interest with KPMG being Trustee of both estates seeking assets for distribution to the creditors of two estates. In response to the issue addressed, the Trustee has made a supplementary motion to consolidate the bankruptcy estate of Walker and the bankruptcy estate of WFSI. The Trustee's affidavit in support of the supplementary motion to consolidate contains the following:

> 2. KPMG Inc., as Trustee in Bankruptcy of Albert Johnson Walker, brought a Motion returnable before this Honourable Court on April 27, 1988, for, among other things, an Order declaring certain property situated in Canada and abroad to be property of the bankrupt Albert Johnson Walker. I was present in Court on April 27, 1998 when that Motion was heard. I make this Affidavit in response to concerns raised by this Honourable Court about KPMG Inc.'s ability to fairly administer without conflict of interest both the bankrupt Estates of Albert Johnson Walker and Walker's Financial Services Incorporated, and the question raised by this Honourable Court as to the position being taken by the Cornwall and Devon Constabulary with respect to the assets in its possession.

3. I and KPMG Inc. are officers of this Honourable Court and all attempts would be made to administer both Estates fairly and justly. I therefore verily believe that any potential conflict of interest would be a perceived and not an actual conflict of interest.

4. The bankrupt Estate of Walker' s Financial Services Incorporated has four inspectors, and the bankrupt Estate of Albert Johnson Walker has five inspectors. All four inspectors of the bankrupt Estate of Walker's Financial Services Incorporated are inspectors in the bankrupt Estate of Albert Johnson Walker (ie. four of the five)

5. The issue of KPMG Inc.'s ability to fairly administer both the bankrupt Estates of Walker's Financial Services Incorporated and Albert Johnson Walker was canvassed and addressed with the four inspectors of the bankrupt Estate of Walker's Financial Services Incorporated as part of my seeking instructions to issue a Petition against Albert Johnson Walker with KPMG Inc. to be the named Trustee in Bankruptcy in the Petition. The four inspectors of the bankrupt Estate of Walker's Financial Services Incorporated unanimously agreed to KPMG Inc. acting both as Trustee in Bankruptcy in the Estate of Walker's Financial Services Incorporated and Albert Johnson Walker. As pointed out above, the four inspectors in the bankrupt Estate of Walker's Financial Services Incorporated became four of the five inspectors in the bankrupt Estate of Albert Johnson Walker. I have no reason to believe that any one of the four inspectors has changed their mind with respect to KPMG Inc. acting as Trustee in Bankruptcy in both Estates.

6. I verily believe that any perceived conflict of interest on KPMG Inc.'s part would be eliminated by a consolidation of these two bankrupt Estates whereby the assets of both Estates would be pooled as at and from the date the Albert Johnson Walker Estate arose with the claims against both Estates sharing equally in these assets from that date. I contacted the inspectors on April 28, 1998, in order to determine whether they would be agreeable to consolidating these two bankrupt Estates effective as at the date of the issuing of the Petition against Albert Johnson Walker, and wish to advise this Honourable Court that motions were made by the inspectors of each Estate in that regard, and were unanimously carried, that the Estates would be consolidated effective May 6, 1997.

7. I believe a consolidation of these Estates as set out above would be expedient and will make their administration easier and reduce duplication and costs. I also believe that a consolidation of these Estates would not materially prejudice any of the creditors for the following reasons:

(a) There are three groups of creditors involved: (a) those whose claims may be made against both Walker's Financial Services Incorporated and Albert Johnson Walker; (b) those with claims only against Walker's Financial Services Incorporated; and (c) those with claims only against Albert Johnson Walker. For practical purposes, all of the creditors of Walker's Financial Services Incorporated have a claim against Albert Johnson Walker as well in that the bankrupt company Walker's Financial Services Incorporated has a direct claim against its principal, the bankrupt Albert Johnson Walker, for all funds misappropriated from the company, and the dividend received from KPMG Inc. as Trustee of the company from the assets of Albert Johnson Walker on account of this claim would be distributed among the creditors of the company. Therefore, for practical purposes there are really only two groups of creditors with competing claims: (a) those with claims against both Walker's Financial Services Incorporated and Albert Johnson Walker; and (b) those with claims against Albert Johnson Walker;

(b) It would therefore not be unfair for the creditors of Walker's Financial Services Incorporated, who also have a claims against Albert Johnson Walker as explained above, to share in the assets of Albert Johnson Walker with creditors who only have claims against him; and

(c) It would be unfair for the creditors with claims only against Albert Johnson Walker to share in assets of Walker's Financial Services Incorporated *if there were assets of Walker's Financial Services Incorporated left to share in*. At the time Albert Johnson Walker's whereabouts became known in the fall of 1996, and that he had assets in his possession, power, or control, the administration of the Estate of Walker's Financial Services Incorporated had been essentially completed. I had prepared a draft final Statement of Receipts and Disbursements and was preparing to issue a final dividend and to proceed to discharge. Approximately $690,000.00 had been realized and there remained approximately $133,000.00 to be disbursed. The four inspectors of the Estate of Walker's Financial Services Incorporated resolved to have KPMG Inc. petition Albert Johnson Walker into bankruptcy and to take proceedings to recover the property in his possession, power, and control. To this end the inspectors agreed that the costs associated with the bankruptcy of Albert Johnson Walker and recovery of assets would be paid for from the approximate balance of $133,000.00 remaining in the Estate. I verily believe that there will not be a significant amount of money remaining after enforcement of the Order the Trustee seeks from this Court in foreign countries. Therefore, it is unlikely there will be any significant assets remaining in the Estate of Walker's Financial Services Incorporated for the creditors with claims only against Albert Johnson Walker to share in. Those creditors will have received an indirect benefit in the sense that money from the Estate of Walker's Financial Services Incorporated will have been used to recover assets of Albert Johnson Walker for their benefit as well. However, I believe that the benefits of consolidation would outweigh this indirect benefit to the creditors with claims only against Albert Johnson Walker.

(d) The consolidation of these Estates would not bar or preclude any of the creditors of either Estate from taking the position that the money they advanced can be "traced" into any of the assets recovered and that therefore they have an equitable charge or remedial trust over that asset or assets in priority to the Trustee's interest. To date no creditor has raised the prospect of attempting to "trace" their money into any asset of Albert Johnson Walker. Section 81 of the Bankruptcy and Insolvency Act provides a process for dealing with any such claims which may be advanced. Given the extent of commingling of funds and their conversion to various other assets any tracing exercise will be difficult and very expensive and at this point in time it would appear that the only fair way to deal with all classes of claimants is as one class entitled to share proportionately in the assets recovered. However, this is not an issue that needs to be decided on this motion.

8 On the uncontradicted evidence before me the property which has been in the possession, power or control of Walker was acquired by misappropriation from Ontario creditors. The property has been commingled. I accept the factual conclusion that there are now but two classes of creditors, being those having claims against both of the bankruptcy estates and those having claims against only against the Walker personal bankruptcy estate. There may be creditors of Walker which to date have not been identified as, for example, possible creditors in the United Kingdom. Again on the uncontradicted evidence before me, I conclude that at this point in time subject to further review if required, there are no assets of WFSI practically available to creditors. Therefore, creditors with claims only against Walker cannot unfairly benefit from the pooling of assets in the Walker estate for distribution to both sets of creditors on a pro rata basis. The affidavit in support points out remedies available should tracing become a viable issue. Accordingly, there will be an order consolidating the property of both estates as at May 6, 1997 or property acquired thereafter to be distributed on a pro rata basis to all creditors of both estates proving claims.

9 The United Kingdom bankruptcy legislation, now being the *Insolvency Act 1986*, was amended in 1985 to introduce what is now Part XVII, Section 426 with the heading *Co-Operation Between Courts Exercising Jurisdiction in Relation to Bankruptcy*.

10 Part XIII of *BIA* was added in 1997. The purpose of Part XIII being generally in keeping with s.426 of the *Insolvency Act*, intended to facilitate, approve or implement a foreign proceeding within this jurisdiction. Under *BIA* s.271(1) this court may seek aid and assistance of a foreign court. The Ontario Court under Part XIII may make orders on terms and

conditions that the court considers appropriate in the particular circumstances. An overview of Part XIII *BIA* and Part XVII of the *Insolvency Act* is that both intend to achieve effective administration of an international bankrupt estate or estates by the Trustee. Further to s.426(4) and (5) the United Kingdom court "shall assist the courts having corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory" and when the foreign court requests such assistance the request is "authority for the court to which the request is made to apply in relation to any matter specified in the request the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction". As I understand it, the United Kingdom court can apply the insolvency law of Canada or its own insolvency law.

11 All of the property in issue is movable property and there are no known bankruptcy proceedings in any other jurisdiction. The United Kingdom court, more specifically the Exeter County Court in Bankruptcy has made a preliminary order that "pursuant to s.426 of the *Insolvency Act 1986* this court do assist the Ontario Court (General Division) in Bankruptcy in respect of the bankruptcy of one Albert Walker". No specific particularized request was made at the time of the quoted order. The order was of a preliminary or general nature. The order further provides that the Trustee is at liberty to apply for specific relief. Specific relief is sought before me. It is anticipated that should the Trustee receive relief before me, which order for relief in turn will be part of the foundation for the request to the United Kingdom court for further particularized or specific assistance.

12 Further to *BIA*, with there being no competing proceedings in any foreign jurisdiction, there is a vesting of all property of the bankrupt in the Trustee. For greater certainty, all property includes property wherever situate, movable or immovable. That is a declaration which would clearly apply to property situate in Ontario. Prior to the enactment of Part XIII there was nothing in our own legislation to assist as to the international jurisdiction of the Ontario Court. The nature of international dealings is changing so rapidly that there is a need for a move in favour of recognition of foreign judgments.

13 The Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.) in a judgment relating to enforcement of judgments between provinces adopted the concepts of comity as found in the words of the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113 (U.S. Sup. Ct.1895):

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, or mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.

14 The concept of comity does not provide a blank cheque or foregone conclusion. For example, comity may result in a Canadian court recognizing foreign bankruptcy proceedings but accept only the Canadian law for distribution proceedings or determination of priorities. Reference is to *Sefel Geophysical Ltd., Re* (1988), 70 C.B.R. (N.S.) 97 (Alta. Q.B.) where a Canadian court went a long way to give effect to foreign priority law. This area of law is evolving, which evolution is greatly asserted by the 1997 enactment of Part XIII. The United Kingdom and Canadian legislation is of a practical reciprocal or corresponding nature. In my view in the facts of this case the Canadian court has international jurisdiction. That jurisdiction is not without limits which shall be discussed. In my further view, that jurisdiction results in this court declaring as I indicated above a vesting of all assets wherever situate of the consolidated estates in the Trustee in Bankruptcy.

15 The material before me includes an excerpt from a letter dated April 22, 1998 by the Devon and Cornwall Constabulary to the Trustee's solicitor in England, Mr. Stephen A. Lawson, which letter indicates that they would seek to retain for evidentiary reasons until the conclusion of the criminal case the sailboat which is one of the listed items of property and indicating further that there would be no resistance to an application for delivery up of the balance of property in their possession. The reference to application I take to be an application to the United Kingdom court for particular assistance. This material is of great assistance in supporting the conclusion that there is a high probability of success by the Trustee in the sense of being able to effectively administer the estate with the co-operation of the

Constabulary as referred to. Accordingly, there will be an order that the specific itemized property in the possession of the Chief Constable of Devon and Cornwall Constabulary is declared to be property of Walker vesting in the Trustee. There will be a further declaratory order vesting in the Trustee the balance of the specifically identified bank accounts and credit card credit balances. The Canadian financial institutions are hereby required to deliver up to the Trustee the contents of the itemized accounts. There will be an order that the Trustee further to the preliminary request seek the further aid of the United Kingdom courts for delivery up of the property in the possession of the said Chief Constable subject to such terms as are reasonable including when such property is no longer required as material evidence pertaining to the charges outstanding against Walker. The court further requests the aid and assistance of the applicable court or appropriate bodies in France, Italy, Switzerland and the Cayman Islands as well as the United Kingdom with power and authority over the balance of the bank accounts and/or credit balances as itemized.

16 Under *BIA* s.158 certain duties are imposed upon a bankrupt. Further to that section Walker is ordered to execute all deeds and other documents requested of him by the Trustee in order to effect transfer to the Trustee of all property wherever situate and this court, through further application to be made by the Trustee, requests the aid and assistance of such court or courts in the United Kingdom to enforce the carrying out of this term.

17 The Trustee by analogy to s.158 requests that this court seek the aid and assistance of the United Kingdom court over Elaine Boyes and the legal representative of the Platt estate to execute such documents required by the Trustee in order to effect the transfer to the Trustee of the accounts otherwise dealt with in this order and presently in the names of Cavendish Corporation Limited, Elaine Boyes or Ronald J. Platt.

18 On the material before me, it is not clear if there is in place a legal representative of the deceased Ronald J. Platt. I was advised, although I do not believe it is supported in an evidentiary way in the material before me, that Elaine Boyes would co-operate with the Trustee for the relief sought. If that co-operation is indeed forthcoming, it may not be necessary to apply to the United Kingdom court for aid and assistance in that particular regard. In any event, I express my view that this court would have little ability to require either Elaine Boyes or the representative of the Platt estate to execute documents. I expressed at the time of argument that the duty on a bankrupt to execute conveyances, deeds and instruments as may be required is in my view ancillary to vesting to assist in the production of documentary evidence of vesting in support of this court's declarations as to vesting as a matter of law. It may be that when seeking aid and assistance that the United Kingdom court may find that the appropriate assistance is to specify vesting or to render assistance available under its own legislation, if at all. I will order that the aid and assistance of the United Kingdom court be sought and suggest that their insolvency law be relied upon if it in fact provides for this specific relief.

19 It would be presumptive of this court to presume that any order made would necessarily bind or affect world wide assets. I do, however, repeat that this court does have international jurisdiction and in particular, international jurisdiction to make the declaration as to the vesting of world wide assets in the Trustee. Comity as found in the common law and now is assisted by legislation of a reciprocal or corresponding nature which goes a long way to assist a court in making an order for delivery up of world wide assets. In this case there is a preliminary indication of assistance from the Devon and Cornwall Constabulary. The United Kingdom legislation and the preliminary or general order of aid and assistance indicate in an anticipatory way the expectation that the relief sought before me will in fact be obtainable with the aid and assistance of foreign courts or tribunals. It would be presumptive to expect assets in other jurisdictions to be delivered up upon the basis of a Canadian court order without there being more. There is more. There is the anticipation of co-operation from parties in possession. The legislation of Canada and the United Kingdom recognizes the principles of comity. The material is silent upon legislation in other jurisdictions. The expectations I express assume without knowing that any other legislation will be of a corresponding nature. If I am wrong in that assumption, all provisions for delivery up of possession are conditional upon the foreign jurisdiction giving aid and assistance which may in turn be based upon Canadian or local insolvency law.

20 This court must not attempt to do that which cannot be practically accomplished or to do by order that which cannot aid a trustee in effective administration. This case cries out for a bankruptcy administered by one trustee, with one pool of assets available to the creditors of the consolidated estates. All of the assets ordered to be delivered up, except

those in Canada, are subject to the conditions of the aid and assistance of a foreign court or tribunal recognizing that such court or tribunal may apply the applicable insolvency law of Canada or its own insolvency law. The orders for delivery up are made against the backdrop of conditions made, the anticipation of co-operation from parties in possession and the reality that foreign law may be applied. I do not believe this court is too presumptive in making the orders herein for delivery up of possession to the Trustee of property outside of Canada.

21 The order attached gives specific application to the principles addressed in these reasons to the various items of property listed. This formal order attached and being part of these reasons will be signed as of the date of release of these reasons giving effect to the consolidation of the two estates and to the relief as touched upon in these reasons but specifically dealt with in the formal order including the issue of costs.

22 A formal order amending the style of cause and amending the petition and receiving order *non pro tunc* will be signed separately on the date of the release of these reasons.

Motion granted.

APPENDIX

Court File No. 35-067940

Court File No. 35-040761

Ontario Court (General Division) In Bankruptcy

THE HONOURABLE JUSTICE	)	MONDAY, THE 11TH DAY
	)	
E.R. BROWNE	)	OF MAY, 1998.

IN THE MATTER OF THE BANKRUPTCY OF ALBERT JOHNSON WALKER, an absconding debtor, formerly of the City of Woodstock, Province of Ontario, a fugitive from the law of Canada currently incarcerated at Her Majesty's Prison, Exeter, County of Devon, in the United Kingdom

and

IN THE MATTER OF THE BANKRUPTCY OF WALKER'S FINANCIAL SERVICES INCORPORATED of the Village of Ayr, in the Township of North Dumfries, in the Regional Municipality of Kitchener-Waterloo, and the Province of Ontario

ORDER

THIS MOTION made by KPMG Inc. as Trustee in Bankruptcy of Albert Johnson Walker, for, among other things, an Order declaring certain property situated in Canada and abroad to be property of the bankrupt Albert Johnson Walker vesting in KPMG Inc. his Trustee in Bankruptcy, and for the consolidation of the bankrupt estates of Albert Johnson Walker and Walker's Financial Services Incorporated with effect from May 6, 1997, was heard on Monday, April 27th, 1998, at the Court House, 80 Dundas Street, London, Ontario.

UPON READING the two volume Motion Record of KPMG Inc. originally returnable on April 27, 1998, containing in it, among other things, the joint Affidavit of Royal Canadian Mounted Police Corporals King and Kempf sworn March 24, 1998, and the Affidavit of Richard M. Jackson senior vice-president of KPMG Inc., sworn March 24, 1998, and the Exhibits attached thereto, the Supplementary Motion Record containing the Affidavit of Stephen Lawson and Richard M. Jackson sworn April 20, 1998, and exhibits attached thereto, the Supplementary Motion Record II of KPMG Inc. containing in it, among other things, the Supplementary Notice of Motion dated April 29, 1998, and the Affidavit of Richard M. Jackson sworn April 29, 1998, and upon hearing submissions of counsel for KPMG Inc., no one appearing

for the bankrupt Albert Johnson Walker and the parties set out in the Notice of Motion originally returnable April 27, 1998, although served as appears from the Affidavits of service filed,

1. THIS COURT ORDERS that the bankrupt estate of Albert Johnson Walker bearing Court File No. 35-067940 be and is hereby consolidated with the bankrupt estate of Walker's Financial Services Incorporated bearing Court File No. 35-040761, for general administration purposes including the consolidation of the property of both estates in existence as at May 6, 1997 or acquired thereafter which is to be distributed on a pro rate basis among all creditors of both estates with proven claims.

2. THIS COURT ORDERS AND DECLARES that the following property presently in the possession, power or control of The Chief Constable of Devon and Cornwall Constabulary, which was seized in relation to the arrest, charging, and criminal investigation of Albert Johnson Walker, is property of Albert Johnson Walker vesting in KPMG Inc. as his Trustee in Bankruptcy to be consolidated with the property of the bankrupt estate of Walker's Financial Services Incorporated as set out in paragraph 1 of this Order:

(a) Sail Boat

One 24 foot Trident Sail Boat named "Lady Jane", and formerly known as "Peach", together with all of its outfit, gear and equipment;

(b) Oil Paintings

Paintings entitled "Sunset Llanddwyn" by Kyffin Williams, "Everlastings" by Olwyn Bowey, "The Very Image" by Joseph Clark, "A Rest By the Gate" by William Bromley, and "Portrait of Nora Creina" by W. Powell Frith;

(c) Gold Bars

10 -500 gram gold bars, 5-10 ounce gold bars, and 2-1 kilo gold bars;

(d) Currency

All Pounds Sterling seized totaling approximately £25,600.00, and all Swiss Francs seized totaling approximately 8,170.00 Swiss Francs

3. THIS COURT ORDERS AND DECLARES that all of the contents of the following accounts are property of Albert Johnson Walker vesting in his Trustee in Bankruptcy KPMG Inc. to be consolidated with the property of the bankrupt estate of Walker's Financial Services Incorporated as set out in paragraph number 1 of this Order:

(a) Canada

(i) Toronto-Dominion Bank

(a) Account #93-0720 at 477 Dundas Street, Woodstock, Ontario, in the name of Walker's Financial Services Inc.;

(b) Account #212637 at 403 Fairview Drive, Brantford in the name of David Davis;

(c) Account #151632 and account #25-2307 at the Dundas and Riddell Branch, Woodstock, Ontario in the name of Albert Walker;

(ii) Canadian Imperial Bank of Commerce

(a) Account #9402616 at the Dundas and Graham Street branch, Woodstock, in the name of Walker Financial Services Inc.;

(b) Account #5364132 at the Commerce Court branch in Toronto, in the name of Albert Walker;

(c) Account #0726036 at Dundas and Graham Street Branch, Woodstock, Ontario, in the name of Albert Walker;

(iii) Credit Suisse

(a) Accounts numbered 10-01-0147555-700, 10-01-0099022-00 and 10-01-0099990-10 at 525 University Avenue, Toronto, Ontario, in the name of Albert Walker;

(iv) Bank of Montreal:

(a) Accounts numbered 302-8364 and 505-8882 at the Dundas and Wellington Street Branch, Woodstock, Ontario in the name of Albert Walker;

(b) England

(i) National Westminster Bank Harrogate Branch, 3 Cambridge Crescent, Harrogate, England account numbers 00366609, 00464260, 00325791, 00334413, 00321893, 06321974, 00467200, 00466913, and 0100321893;

(ii) Bank of Scotland, Fidelity Division, Fidelity Centre, St. Albans House, 59 Haymarket, S.W.1Y, London, England, account numbers 00367470 and 0016711;

(iii) Lloyds Bank, Hampstead Branch, 788-790 Finchley Road, London, England, account number 7 70733-5 9380;

(iv) Royal Bank of Scotland, 7 Cambridge Crescent, Harrogate, North Yorkshire, England, account number 1143308;

(v) NatWest Stockbrokers Ltd., 55 Mansell Street, London, England, account number 535021-321893;

(c) France

(i) Account number 285113T at the Credit Lyonnais S.A., 19 Boulevard Des Italiens, Paris, France, in the name of Elaine Boyes;

(d) Italy

(i) Account number 5009976312 at Credito Italiano 11 Via Vecchielti, Florence, Italy, in the name of Elaine Boyes;

(ii) Account number 216591612 at Credito Italiano S.A, Piazzo Cordusio 1, 1-20123, Milan, Italy, in the name of Elaine Boyes;

(e) Switzerland

(i) Account number 422.953.00 at Union Bank of Switzerland, 8 Rue de Rhone, 1211 Geneva 11, Switzerland, in the name of Elaine Boyes;

(ii) Accounts numbered 0751-674479-61 and 0751-674479-60 at Credit Suisse, Main Branch, Geneva, Switzerland, in the name of Albert J. Walker;

(iii) Account number R3205.57.94 at Banque Catonale de Geneve, at Quai de I'lle 17, Case Postal 2251, 1211 Geneve 2, Geneva Switzerland, in the name of Ronald Joseph Platt;

(iv) Account number 1351-783 at Banque CEG 4 Rue DeLa Corraterie, Case Postal 2251, 1211 Geneve 2, Geneva Switzerland, in the name of Elaine Boyes;

(v) Account number 00-09118-1045-050 at Credit Lyonnais (Suisse) S.A., at Place Bel-Air, Case Postage 442, Geneva, Switzerland, name unknown;

(vi) Any and all accounts opened at Banque Cantonale Vaudoise, at 14 Place St. Francois, Lausanne, Switzerland, in the name of Elaine Boyes;

(f) Cayman Island

(i) Account number 349432 at Barclay Bank, Grand Cayman Branch, P.O. Box 68, Grand Cayman, Cayman Islands, British West Indies.

4. THIS COURT ORDERS AND DECLARES that the credit balances, if any, in respect of the following credit cards are property of Albert Johnson Walker vesting in his Trustee in Bankruptcy KPMG Inc. to be consolidated with the property of the bankrupt estate of Walker's Financial Services Incorporated as set out in paragraph number 1 of this Order, and KPMG Inc. shall be authorized and empowered to take any and all steps and measures available to convert the credit balances into cash or to otherwise utilize them:

(a) Barclay Bank Mastercard Account Number 5301250111466450 issued to R.J. Platt and E. Boyes;

(b) Barclay Bank Visa Account Number 4929532119167 issued to R.J. Platt and E. Boyes;

(c) Royal Bank of Scotland Visa Account Number 4543051102231718;

(d) Royal Bank of Scotland Visa Account Number 4543058492892694 in the name of Elaine Boyes;

(e) Royal Bank of Scotland Visa Account Number 4543058325382811 in the name of Elaine Boyes;

(f) Royal Bank of Scotland Mastercard Account Number 5224008632721454 in the name of Elaine Boyes;

(g) Barclay Bank Mastercard Account Number 5301250111143430 in the name of R.J. Platt;

(h) Barclay Bank Visa Account Number 4929531676381 in the name of Ronald Platt;

(i) NatWest Visa Account Number 5434680024924494 in the name of Ronald Platt;

(j) NatWest Mastercard Account Number 5224006770902563 in the name of Ronald Platt.

5. THIS COURT ORDERS that the financial institutions described in paragraph 3 (a) of this Order be and are hereby required to deliver up to KPMG Inc. the contents of the accounts at each financial institution referred to therein.

6. THIS COURT RESPECTFULLY REQUESTS the aid and assistance of all foreign Courts, tribunals, administrative bodies, or other authority in the enforcement and carrying out of this Order, and in particular:

(a) This Court requests the aid and assistance of the Court or Courts in the United Kingdom with power and authority over the property described in paragraph 2 of this Order and/or The Chief Constable of Devon and Cornwall Constabulary in ordering that The Chief Constable of Devon and Cornwall Constabulary deliver up possession of the property described in paragraph 2 of this Order to KPMG Inc. when that property is no longer required as material evidence in the prosecution of pending charges against Albert Johnson Walker;

(b) This Court respectfully requests the aid and assistance of the applicable Court, tribunal, administrative body, or authority in France, Italy, Switzerland, the United Kingdom, and/or the Cayman Islands with power and authority over the accounts and institutions described and set out in paragraphs 3(b), (c), (d), (e), and (f) and 4 of this Order in ordering that the contents and/or credit balances contained therein be delivered up to KPMG Inc. forthwith.

7. THIS COURT ORDERS that Albert Johnson Walker hereby execute any and all deeds, transfers, conveyances, instruments, powers of attorney, and other documents requested of him by KPMG Inc. in order to effect the transfer to KPMG Inc. of all of his property wherever situated, and this Court respectfully requests the aid and assistance of the Court or Courts in the United Kingdom with jurisdiction over Albert Johnson Walker to enforce and carry out this term of this Order.

8. THIS COURT RESPECTFULLY REQUESTS the aid and assistance of the Court or Courts in the United Kingdom with jurisdiction over Elaine Boyes and the executor, administrator, or legal representative of the deceased Ronald J. Platt in ordering Elaine Boyes and/or the executor, administrator, or legal representative of the deceased Ronald J. Platt to execute such deeds, transfers, conveyances, instruments, powers of attorney or other documents reasonably required by KPMG Inc. in order to effect the transfer to KPMG Inc. of any of the accounts, or contents therein, set out in paragraphs 3 and 4 of this Order, in the names of Cavendish Corporation Limited, Elaine Boyes, or Ronald J. Platt, to KPMG Inc.

9. THIS COURT ORDERS that KPMG Inc. shall have its costs of this Motion payable on a solicitor and client basis out of the consolidated bankruptcy estates after assessment.

_____

JUSTICE

ONTARIO COURT (GENERAL DIVISION)

End of Document

TAB 7

191 B.R. 577
United States Bankruptcy Court,
S.D. New York.

In re Petition of Herbert H. DAVIS, Trustee
for Polinex Plastic Products Canada,
Ltd., Debtor in a foreign proceeding.
In re Petition of Herbert H. DAVIS,
Trustee for Packman Packaging Supplies,
Inc., Debtor in a foreign proceeding.

Bankruptcy Nos. 95–B–42923, 95–B–42924.
|
Feb. 1, 1996.
|
As Corrected Feb. 20, 1996.

Court appointed trustee of affiliated Canadian corporations, which were subject of separate bankruptcy cases pending in Canada, filed petition to commence cases ancillary to foreign proceedings, seeking to permanently enjoin creditor from commencing or continuing any action, litigation, or proceeding against trustee or corporations anywhere in United States. Trustee filed motion for summary judgment. Creditor requested dismissal of petitions. The Bankruptcy Court, James L. Garrity, Jr., J., held that: (1) creditor's dismissal of United States action against trustee and corporations did not moot relief sought in ancillary petition; (2) petitions presented justiciable issues; and (3) trustee was entitled to permanent injunction prohibiting creditor from commencing or continuing any action, litigation or proceeding, including discovery, against corporations and trustee, either in his official or individual capacity, anywhere in United States.

Trustee's motion granted.

West Headnotes (27)

[1] Federal Civil Procedure
Presumptions

Federal Civil Procedure
Ascertaining existence of fact issue

In considering summary judgment motion, court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against moving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[2] Federal Civil Procedure
Burden of proof

Summary judgment movant bears burden of establishing absence of genuine issue as to any material fact. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[3] Bankruptcy
Cases Ancillary to Foreign Proceedings

Case under Bankruptcy Code section governing cases ancillary to foreign proceedings is not full scale bankruptcy case; rather, it is limited one, designed to function in aid of proceeding pending in foreign court. Bankr.Code, 11 U.S.C.A. § 304.

1 Cases that cite this headnote

[4] Bankruptcy
Cases Ancillary to Foreign Proceedings

Pending Canadian bankruptcy cases constituted "foreign proceedings," and court-appointed trustee in those cases constituted "foreign representative," and, therefore, trustee was eligible to seek injunctive relief in United States bankruptcy court. Bankr.Code, 11 U.S.C.A. §§ 101(23, 24), 304(a).

Cases that cite this headnote

[5] Federal Courts
Rights and interests at stake;adverseness

Federal Courts
Governments and political subdivisions

"Case or controversy" limitation in Article III is intended to limit business of federal courts to questions presented in adversary context

and in form historically viewed as capable of resolution through judicial process, and it defines role assigned to judiciary in tripartite allocation of power to assure that federal courts will not intrude into areas committed to other branches of Government. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[6] Federal Courts
Justiciability in general

"Justiciability" is term employed to give expression to dual limitation placed upon federal courts by case-and-controversy doctrine.

Cases that cite this headnote

[7] Federal Courts
Justiciability in general

Federal Courts
Mootness

Federal Courts
Ripeness;Prematurity

Among other things, "justiciability" embodies doctrines of standing, ripeness and mootness.

2 Cases that cite this headnote

[8] Bankruptcy
Cases Ancillary to Foreign Proceedings

Principal goal of case ancillary to foreign proceeding is to permit foreign debtors to prevent piecemeal distribution of assets in United States by means of legal proceedings initiated in domestic courts by local creditors. Bankr.Code, 11 U.S.C.A. § 304.

1 Cases that cite this headnote

[9] Bankruptcy
Cases Ancillary to Foreign Proceedings

Pursuant to Bankruptcy Code section governing cases ancillary to foreign proceedings, bankruptcy court is empowered, among other things, to enjoin commencement or continuation of litigation against foreign debtor, provided that petitioner establishes that factors contained in that provision militate in favor of granting ancillary petition to best assure economical and expeditious administration of foreign estate. Bankr.Code, 11 U.S.C.A. § 304(b)(1)(A), (c).

Cases that cite this headnote

[10] Bankruptcy
Cases Ancillary to Foreign Proceedings

Motion for permanent injunction filed by court appointed trustee of affiliated Canadian corporations, which were subject of separate bankruptcy cases pending in Canada, did not have to be denied, and petitions filed by trustee to commence case ancillary to foreign proceeding did not have to be dismissed, even though creditor had discontinued action in United States against trustee and corporations. Bankr.Code, 11 U.S.C.A. § 304.

Cases that cite this headnote

[11] Federal Courts
Rights and interests at stake

Federal Courts
Inception and duration of dispute; recurrence;"capable of repetition yet evading review"

Case is moot when issues presented are no longer "live" or parties lack legally cognizable interest in outcome.

Cases that cite this headnote

[12] Bankruptcy
Cases Ancillary to Foreign Proceedings

Creditor's dismissal of action brought in United States against Canadian corporations, which were subject of bankruptcy cases pending in Canada, and against corporations' court-appointed trustee did not moot injunctive relief sought in trustee's petitions for commencement of cases ancillary to foreign proceedings with regard to creditor's commencement or continuation of any action,

litigation or proceeding against trustee or corporations anywhere in United States, where dismissal of United States action was without prejudice and creditor conceded that it intended to litigate against trustee in United States on matters raised in its amended complaint, albeit purportedly against trustee in his unofficial capacity; trustee did not have to await commencement of further litigation to seek injunction. Bankr.Code, 11 U.S.C.A. § 304(b).

Cases that cite this headnote

[13] Federal Courts
Nature of dispute;concreteness

Case that presents real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract, is ripe for adjudication.

1 Cases that cite this headnote

[14] Bankruptcy
Bankruptcy Jurisdiction

Federal Courts
Bankruptcy

In determining whether matter is ripe for adjudication, bankruptcy court must consider hardship to parties of withholding judicial decision.

Cases that cite this headnote

[15] Federal Courts
Fitness and hardship

Question of ripeness turns on fitness of issues for judicial decision and hardship to parties of withholding court consideration.

Cases that cite this headnote

[16] Bankruptcy
Cases Ancillary to Foreign Proceedings

Petitions for commencement of cases ancillary to foreign proceedings that were filed by court-appointed trustee of affiliated Canadian corporations, which were subject of bankruptcy cases pending in Canada, seeking to permanently enjoin creditor from commencing or continuing any action, litigation or proceeding against trustee or corporations anywhere in United States, presented justiciable issues, even though creditor had dismissed United States action against trustee and corporations, where pendency of action had prevented trustee from making distributions to creditors and had increased administrative expenses in Canadian bankruptcy cases, and delay in adjudicating merits of petitions would compound that harm because trustee could not make distributions in Canadian cases until creditor's claims against him and corporations were resolved. Bankr.Code, 11 U.S.C.A. § 304.

Cases that cite this headnote

[17] Bankruptcy
Cases Ancillary to Foreign Proceedings

Court appointed trustee of affiliated Canadian corporations, which were subject of bankruptcy cases pending in Canada, was entitled to permanent injunction prohibiting creditor from commencing or continuing any action, litigation or proceeding, including discovery, against corporations and trustee, either in his official or individual capacity, anywhere in United States, where denial of injunction could result in creditor obtaining preferential position vis-a-vis other creditors, it was appropriate for any litigation against trustee to go forward in Canada given one corporation's contingent liability for any judgment taken by creditor against trustee, protection afforded trustee under Canadian Bankruptcy and Insolvency Act (BIA) was likely to be issue in any litigation brought by creditor against trustee, and lack of injunction would frustrate purpose of granting comity to Canadian bankruptcy cases. Bankr.Code, 11 U.S.C.A. § 304(c)(1–5).

1 Cases that cite this headnote

[18] Bankruptcy
Cases Ancillary to Foreign Proceedings

Merely because creditor would have to litigate its claims against debtors in Canada was not sufficient prejudice in and of itself to deny permanent injunction prohibiting creditor from commencing or continuing any action, litigation or proceeding, including discovery, against Canadian debtors and court-appointed trustee in debtors' Canadian bankruptcy proceeding, either in his official or individual capacity, anywhere in United States. Bankr.Code, 11 U.S.C.A. § 304(c).

Cases that cite this headnote

[19] Bankruptcy
Injunction or stay of other proceedings

Litigation against non-debtors not otherwise protected by automatic stay will be stayed when failure to do so will work irreparable harm on debtor's estate and creditors. Bankr.Code, 11 U.S.C.A. §§ 105, 362.

Cases that cite this headnote

[20] Bankruptcy
Injunction or stay of other proceedings

One factor to be considered in deciding whether to stay litigation against non-debtors who are not otherwise protected by automatic stay is whether estate will bear cost of any judgment taken against non-debtor. Bankr.Code, 11 U.S.C.A. §§ 105, 362.

Cases that cite this headnote

[21] International Law
Public policy and comity in general

"Comity" is recognition which one nation allows within its territory to legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to rights of its own citizens or of other persons who are under protection of its laws.

Cases that cite this headnote

[22] Bankruptcy
Cases Ancillary to Foreign Proceedings
Courts
Comity between courts of different countries

Purpose of according comity to foreign insolvency proceeding is to enable assets of debtor to be disbursed in equitable, orderly, and systematic manner, rather than in haphazard, erratic or piecemeal fashion.

2 Cases that cite this headnote

[23] Courts
Comity between courts of different countries

Comity is discretionary principle of courtesy and expedience.

Cases that cite this headnote

[24] Bankruptcy
Cases Ancillary to Foreign Proceedings

Under general principles of comity as well as specific provisions of Bankruptcy Code section governing cases ancillary to foreign proceedings, federal courts will recognize foreign bankruptcy proceedings provided that foreign laws comport with due process and fairly treat claims of local creditors. Bankr.Code, 11 U.S.C.A. § 304.

1 Cases that cite this headnote

[25] Bankruptcy
Cases Ancillary to Foreign Proceedings
Courts
Comity between courts of different countries

In determining whether to accord comity to foreign bankruptcy case, bankruptcy court need not find foreign law is identical to

American law; it is enough that foreign law is not repugnant to American laws and policies. Bankr.Code, 11 U.S.C.A. § 304.

6 Cases that cite this headnote

[26] Bankruptcy
Cases Ancillary to Foreign Proceedings

Principles of comity dictated deference to Canadian bankruptcy cases in determining whether court-appointed receiver in Canadian bankruptcy cases was entitled to permanent injunction prohibiting creditor from commencing or continuing any action, litigation or proceeding, including discovery, against Canadian debtors and trustee, either in his official or individual capacity, anywhere in United States; Canadian Bankruptcy and Insolvency Act (BIA) contains comprehensive procedure for orderly marshalling and equitable distribution of Canadian debtor's assets which closely resembles that available under Bankruptcy Code. Bankr.Code, 11 U.S.C.A. § 304(c).

5 Cases that cite this headnote

[27] Courts
Comity between courts of different countries

Courts in United States uniformly grant comity to Canadian proceedings.

1 Cases that cite this headnote

Attorneys and Law Firms

***579** Hebb & Gitlin, A Professional Corporation, Hartford, CT, for Herbert H. Davis, Trustee for Polinex Plastic Products Canada, Ltd., and Packman Packaging Supplies, Inc.

***580** Rosner, Bresler, Goodman & Bucholz, New York City, for World Hangers, Inc., and Nicholas Glorioso.

MEMORANDUM DECISION ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT

JAMES L. GARRITY, Jr., Bankruptcy Judge.

Polinex Plastic Products Canada, Ltd. ("Polinex") and Packman Packaging Supplies, Inc. ("Packman") are affiliated Canadian corporations which are the subject of separate bankruptcy cases pending in Canada under the Canadian Bankruptcy and Insolvency Act. Herbert H. Davis ("Davis" or "Petitioner") is the court appointed trustee in each case. In 1995, World Hangers, Inc. and Nicholas Glorioso (collectively "Glorioso") sued Petitioner, Packman and others in the United States District Court for the Southern District of New York (the "Action"). Among other things, the underlying complaint ("Amended Complaint") seeks damages from Petitioner and Packman on account of their alleged involvement in a scheme to defraud Glorioso. Although not a party to the litigation, Polinex is alleged to have been involved in that scheme. On or about July 3, 1995, Davis filed petitions (the "Petition(s)") under § 304 of the Bankruptcy Code ("Code") on behalf of Packman and Polinex, respectively, seeking judgment (i) pursuant to § 304(a) of the Code on the commencement of these cases, and (ii) granting him relief pursuant to §§ 304(b)(1) and 105 of the Code permanently enjoining Glorioso from commencing or continuing any action, litigation or proceeding, including discovery, against himself, Packman or Polinex anywhere in the United States. After the commencement of the ancillary cases, and in response to the motion filed by Petitioner on behalf of himself and Packman in the district court to dismiss the Action, Glorioso voluntarily discontinued that litigation, without prejudice, pursuant to Fed.R.Civ.P. 41(a). In doing so, Glorioso informally acknowledged that under Canadian law it is stayed from commencing or continuing litigation against Polinex or Packman and cannot sue Petitioner on account of actions taken by him subsequent to his appointment as trustee in the bankruptcy cases by the Canadian court without first obtaining leave from that court. However, Glorioso made it clear that it intends to bring suit against Petitioner in the United States on account of certain wrongs alleged against Petitioner in the Amended Complaint, to the extent that they purportedly relate to actions taken by him prior to his appointment by the Canadian court.

Petitioner seeks summary judgment on the Petitions. Glorioso objects to the motion and contends that the Petitions must be dismissed because that there is no justiciable case or controversy upon which we can act due to the voluntary discontinuance of the Action. For the reasons stated herein, Glorioso's objection is overruled and its request to dismiss the Petitions is denied. Petitioner's motion for summary judgment is granted.

Facts

Polinex and Packman are the subject of separate proceedings pending under the Canadian Bankruptcy and Insolvency Act ("BIA") in the Quebec Superior Court, District of Montreal, Canada. Hong Kong Bank of Canada (the "Bank") is a secured creditor of Polinex and Packman. On January 4, 1995, the Bank retained Petitioner as a consultant to evaluate the corporations, their indebtedness to the Bank, and the Bank's collateral, and to report to the Bank on those items. On January 18, 1995, Polinex filed a "Notice of Intention To Make a Proposal" ("Notice of Intention") pursuant to BIA § 50.4 with the Office of the Superintendent of Bankruptcy (the "Superintendent"). On February 10, 1995, Packman did the same. Both notices identify Petitioner as "Trustee Under the Proposal". By Certificates of Assignment of the Superintendent dated April 7, 1995, and pursuant to BIA §§ 49 and 50.4(8), Polinex and Packman were deemed bankrupt retroactive to January 18, and February 10, 1995, respectively. After creditor meetings held in each case, on April 28, 1995, Petitioner was approved by the Canadian court as trustee for each debtor. On April 12, 1995, Petitioner gave notice to Glorioso and other creditors of the Polinex bankruptcy case.

***581** On April 21, 1995, Glorioso filed an Amended Complaint in the Action. Petitioner and Packman are among the defendants therein. Although Polinex is not named as a defendant, Glorioso alleges, among other things, that Petitioner, Packman and Polinex participated in an intricate, continuing scheme to defraud Glorioso giving rise to causes of action in tort for fraud and pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*

On or about July 3, 1995, Petitioner commenced separate ancillary proceedings herein under § 304 of the Code on behalf of the corporations. By court order, those cases have been consolidated for administrative purposes only.

On or about July 24, 1995, Petitioner and Packman moved the United States District Court to dismiss the Action. Thereupon, Glorioso voluntarily dismissed it without prejudice pursuant to a Notice of Dismissal filed under Fed.R.Civ.P. 41(a). By letter dated on August 3, 1995, Glorioso's counsel advised that notwithstanding the voluntary dismissal of the Action, Glorioso would pursue, in the United States, the claims purportedly alleged in the Amended Complaint against Petitioner in his individual capacity. On or about August 9, 1995, Glorioso answered each Petition. As and for its first defense to the Petitions, Glorioso contends that because it filed the Notice of Dismissal, no case or controversy exists upon which this Court can act.

Discussion

[1] **[2]** Fed.R.Civ.P. 56(c) states that summary judgment " 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.' " *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In considering a summary judgment motion, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Insurance Co.,* 804 F.2d 9, 11 (2d Cir.1986), *cert. denied,* 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987). Movant bears the burden of establishing the absence of a genuine issue as to any material fact. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). In support of this motion, Davis has submitted a memorandum of law, an affidavit ("Davis Affidavit") and a Statement of Material Facts Pursuant to Local Rule of Bankruptcy Procedure 13(h). He is also relying on the Petitions and the identical affidavit of Mark Schrager, Esq., ("Schrager Affidavit"), his Canadian counsel, submitted with each Petition. Because Glorioso failed to challenge any portion of Petitioner's 13(h) statement, the facts therein are

the statutory scheme of chapter 11 or diminish Manville's ability to formulate a plan of reorganization"). Courts have also extended the automatic stay to non-debtors where failure to extend the stay would jeopardize the success of the bankruptcy process. *E.g., A.H. Robins v. Piccinin,* 788 F.2d at 1008 (if lawsuits were allowed to proceed, efforts to comply with discovery requests would sidetrack management from the reorganization process); *In re Ionosphere Clubs, Inc.,* 124 B.R. 635, 642 (S.D.N.Y.1991) (stay may properly be extended to parties in interest to the reorganization where failure to do so would frustrate reorganization attempts); *In re Lomas Financial Corp.,* 117 B.R. 64, 67 (S.D.N.Y.1990) (stay of litigation proper where reorganization efforts would be stymied by distraction of key personnel who were targets of litigation); *In re Johns–Manville Corp.,* 26 B.R. at 426 (stay extended where targets of litigation were key operating personnel responsible for formulating plan of reorganization). Thus, Glorioso is not prejudiced by being required to seek relief against Petitioner in the Canadian court, and § 304(c)(2) is satisfied.

Sections 304(c)(3) and (4) likewise are satisfied because the powers of the trustee to avoid preferences and fraudulent transfers under BIA §§ 95 and 96 are similar to those contained in §§ 547 and 548 of the Code, and the priority and distribution scheme under the BIA is akin to that contained in the Code. *Compare* BIA §§ 136, 148, *with* 11 U.S.C. §§ 507, 726.

[21] **[22]** **[23]** **[24]** Finally, the principles of comity dictate that we defer to the Canadian cases and grant Petitioner judgment in these ancillary cases. *See* 11 U.S.C. § 304(c)(5). Comity is the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 163, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895). The purpose of according comity to a foreign insolvency proceeding is to enable "the assets of a debtor to be disbursed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." *Cunard S.S. Co., Ltd. v. Salen Reefer Servs. A.B.,* 773 F.2d at 457–58. Comity is a discretionary principle of courtesy and expedience. *See Laker Airways, Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909, 937 (2d Cir.1984). "[U]nder general principles of comity as well as the specific provisions of section 304, federal courts will recognize foreign bankruptcy proceedings provided the foreign laws comport with due process and fairly treat the claims of local creditors." *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709, 714 (2d Cir.1987). *See also The Clarkson Co., Ltd. v. Shaheen,* 544 F.2d 624, 629 (2d Cir.1976) (New York State courts will recognize the statutory title of an alien trustee in bankruptcy so long as the foreign court has jurisdiction over the bankrupt and the foreign proceeding has not caused injustice to New York citizens or prejudiced their statutory remedies, or violates laws or public policy); ***587** *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.,* 453 F.2d 435, 440 (3d Cir.1971) (comity should be withheld only "when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect"), *cert. denied,* 405 U.S. 1017, 92 S.Ct. 1294, 31 L.Ed.2d 479 (1972).

[25] **[26]** In determining whether to accord comity to a foreign bankruptcy case, we need not find that the foreign law is identical to our own. It is enough that it is not repugnant to American laws and policies. *In re Brierley,* 145 B.R. at 166; *In re Gee,* 53 B.R. at 904. The BIA contains a comprehensive procedure for the orderly marshalling and equitable distribution of a Canadian debtor's assets which closely resembles that available under the Code. For example, the principal duties of a trustee under the BIA mirror those imposed upon a chapter 7 or 11 trustee under the Code. *See* 11 U.S.C. §§ 704, 1106. Likewise, the automatic stay under the BIA § 69 is similar to that imposed by § 362 of the Code. Like the Code, the BIA recognizes the rights of secured creditors to realize on their collateral, protects that collateral from the claims of unsecured creditors and preserves the right of an undersecured creditor to assert a deficiency claim. It makes provision for the avoidance of fraudulent transfers or preferential payments, *see* BIA §§ 95, 96, and contains a comprehensive distribution scheme similar to that under the Code. *Compare* BIA § 69.3(2) (determination of secured status), § 127 (recognizing right to assert deficiency claim) and §§ 136–147 (priority of claims and scheme of distribution), *with* 11 U.S.C. § 506 (determination of secured status), § 507 (priorities) and § 726 (distribution).

[27] Courts in the United States uniformly grant comity to Canadian proceedings. *See, e.g., Canada Southern R. Co. v. Gebhard,* 109 U.S. 527, 539–40, 3 S.Ct. 363, 371, 27 L.Ed. 1020 (1883); *Cornfeld v.*

Investors Overseas Servs., Ltd., 471 F.Supp. 1255, 1260–62 (S.D.N.Y.), *aff'd,* 614 F.2d 1286 (2d Cir.1979); *Caddel v. Clairton Corp.,* 105 B.R. 366 (N.D.Tex.1989). This is consistent with the treatment accorded by federal courts to foreign proceedings in "sister common law jurisdictions". *See, e.g., In re Brierley,* 145 B.R. 151 (British proceeding); *In re Gercke,* 122 B.R. 621 (same); *Matter of Axona Int'l Credit & Commerce, Ltd.,* 88 B.R. 597, 609 (Bankr.S.D.N.Y.1988), *aff'd,* 115 B.R. 442 (S.D.N.Y.1990), *appeal dismissed,* 924 F.2d 31 (2d Cir.1991) (Hong–Kong proceeding); *In re Gee,* 53 B.R. 891 (Cayman Islands proceeding); *In re Culmer,* 25 B.R. 621 (Bahamian proceeding).

Section 304 does not specify irreparable injury as a predicate to the issuance of an injunction. "Arguably, comity—including consideration of upholding of international duty and convenience—may permit injunctive relief without the showing of irreparable injury to the debtor." *In re Rubin,* 160 B.R. at 283 (citing *In re Gercke,* 122 B.R. at 628). As noted, the prosecution of the Action already has prevented Petitioner from effectively administering these estates by, among other things, delaying distributions to creditors. Estate assets will be wasted if litigation proceeds against the debtors or Petitioner outside of Canada. Thus, Petitioner has demonstrated that the estates of Packman and Polinex will be irreparably harmed if injunctions are not issued. *See Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709 (2d Cir.1987) (harm to the estate exists in the form of disruption of orderly determination of claims and the fair distribution of assets in a single case).

Conclusion

Based on the foregoing, Petitioner is granted judgment on both Petitions. Glorioso is permanently enjoined from commencing or continuing any action, litigation or proceeding, including discovery, against Packman, Polinex and Petitioner, either in his official or individual capacity, anywhere in the United States.

SETTLE ORDER ON NOTICE.

All Citations

191 B.R. 577, 35 Collier Bankr.Cas.2d 307, Bankr. L. Rep. P 76,929

TAB 8

Province of Alberta

PERSONAL PROPERTY SECURITY ACT

PERSONAL PROPERTY SECURITY REGULATION

Alberta Regulation 95/2001

With amendments up to and including Alberta Regulation 158/2015

Office Consolidation

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

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.

(c) a general property order;

(d) a statutory charge.

Forms

3(1) The Minister may prescribe any form to be used for the purposes of the Act and this Regulation.

(2) A secured party is responsible for ensuring that all information on a prescribed form submitted for registration in the Registry is fully and accurately completed and is in accordance with the Act and this Regulation.

(3) Where any enactment authorizes a financing statement or financing change statement to be registered in the Registry, the form to be used is the prescribed form that is provided by the Registrar or a person designated by the Registrar.

4 Repealed AR 229/2007 s2.

Length of registration (PPSA, Sale of Goods Act, Factors Act)

5(1) A registration of a financing statement or financing change statement in relation to a security interest or an interest under the *Sale of Goods Act* or the *Factors Act* is effective for the period of time selected by the secured party.

(2) For the purposes of subsection (1), a secured party may select "infinity" or a number of whole years from 1 to 25, inclusive.

Length and scope of registration (writs of enforcement)

6 A registration relating to a writ of enforcement may be renewed for one or more further periods of 2 years each from the date of the registration of the renewal.

Length of registration (other interests)

7 The registration of a financing statement does not expire if the registration is in respect of

(a) an order under section 23 or 26 of the *Matrimonial Property Act*,

(b) repealed AR 237/2004 s3,

(c) an interest under section 129 of the *Workers' Compensation Act*,

Stays, statutory liens and receiver's reports

33 Where a financing statement is submitted for registration in respect of a stay or receiver's report, the secured party is not required to provide a description of collateral.

Collateral description

34(1) Where a financing statement is submitted for registration in respect of a security interest in collateral that is serial number goods,

(a) if the goods are consumer goods, the secured party must provide a description of the goods by serial number in accordance with section 35, and

(b) if the goods are equipment or inventory, the secured party may provide a description of the goods in accordance with section 36 or by serial number in accordance with section 35.

(2) Where a financing statement is submitted for registration of a security interest in collateral that is other than serial number goods, the secured party must provide a description of the collateral in accordance with section 36.

Contents of serial number description

35(1) Where collateral is required to be described under this section, the description must be set out in the space provided for serial number description, and must include

(a) the last 25 characters of the serial number for the collateral or all the characters if the serial number contains less than 25 characters,

(b) the 4 digits for the model year of the collateral,

(c) the make and model of the collateral, and

(d) the appropriate category of collateral as set out in Schedule 3.

(2) For the purposes of subsection (1)(a), the serial number for

(a) a trailer, mobile home, designated manufactured home or motor vehicle, other than an automobile or truck, is the serial number located on the chassis,

(b) an automobile or truck is the vehicle identification number located on the body frame,

TAB 9

2014 BCCA 117
British Columbia Court of Appeal

KBA Canada Inc. v. 3S Printers Inc.

2014 CarswellBC 832, 2014 BCCA 117, [2014] 6 W.W.R. 695, [2014] B.C.W.L.D. 2689, [2014] B.C.W.L.D. 2731, [2014] B.C.W.L.D. 2758, [2014] B.C.W.L.D. 2760, [2014] B.C.J. No. 544, 10 C.B.R. (6th) 286, 239 A.C.W.S. (3d) 775, 2 P.P.S.A.C. (4th) 145, 353 B.C.A.C. 167, 372 D.L.R. (4th) 303, 59 B.C.L.R. (5th) 273, 603 W.A.C. 167

KBA Canada, Inc., Respondent (Plaintiff) and Supreme Graphics Ltd., Appellant (Defendant) and 3S Printers Inc., CIT Financial Ltd. and The Attorney General on behalf of Minister of National Revenue, Respondents (Defendants)

Low, Neilson, Groberman JJ.A.

Heard: October 1, 2013
Judgment: March 31, 2014
Docket: Vancouver CA040176

Proceedings: reversing *KBA Canada Inc. v. 3S Printers Inc.* (2012), 93 C.B.R. (5th) 263, 20 P.P.S.A.C. (3d) 142, 2012 CarswellBC 2563, 2012 BCSC 1078, Kelleher J. (B.C. S.C.)

Counsel: R.D.W. Dalziel, A. Amos-Stewart, for Appellant
B.G.N. McLean, R.V. Aldridge, for Respondent, KBA Canada Inc.
G.G. Plottel, for Respondent, CIT Financial Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Public; Restitution

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Equity

I Equitable jurisdiction
I.1 General principles

Personal property security

III Perfection of security interest
III.1 Registration
III.1.f Discharge of registration

Personal property security

IV Priority of security interest
IV.1 Competing perfected interests
IV.1.b Miscellaneous

Personal property security

IV Priority of security interest
IV.7 Miscellaneous

Restitution and unjust enrichment

I General principles

I.2 Requirements for unjust enrichment
I.2.c No juristic reason for enrichment

Statutes

II Interpretation
II.1 Role of court
II.1.a General principles

Headnote

Personal property security --- Priority of security interest — Competing perfected interests — Miscellaneous

Plaintiff had registered security interest in offset printing press that was in possession of defendant 3S — Third party discharged registration without authorization — Plaintiff became aware of discharge and re-registered interest but it had lost priority under express scheme of Personal Property Security Act (B.C.) (PPSA) — 3S became insolvent — Plaintiff brought action seeking equitable relief to restore priority of charge — Chambers determined that secured creditor would be unjustly enriched if its general security agreement was given priority over plaintiff's security interest and that ss. 68 and 70 of PPSA allowed court to remedy unjust enrichment within statutory scheme — Secured creditor appealed — Appeal allowed — Section 68 of PPSA only allowed principles of common law or equity to be applied to fill gaps in PPSA or to cover areas that were beyond scope of PPSA but it did not allow court to apply such principles instead of clear statutory principles — Section 70 of PPSA was purely procedural in nature and did not give court substantive powers to vary statutory priorities provisions — Chambers judge erred in finding that ss. 68 and 70 of PPSA gave him jurisdiction to override statutory priority rules on basis that rules resulted in unfairness — Nothing in sections justified application of equitable principles in preference to residual priorities rule set out in s. 35 of PPSA — PPSA did not allow court to exercise equitable jurisdiction to override balance of statutory priorities scheme — Inadvertent cancellation of plaintiff's financing statement, through no fault of its own, resulted in it losing priority of security and in secured creditor gaining priority — However, priorities provisions in PPSA provided clear juristic reason for enrichment — Chambers judge erred in finding that doctrine of unjust enrichment could be used to get around clear statutory provisions — Personal Property Security Act, R.S.B.C. 1996, c. 359.

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — No juristic reason for enrichment

Plaintiff had registered security interest in offset printing press that was in possession of defendant 3S — Third party discharged registration without authorization — Plaintiff became aware of discharge and re-registered interest but it had lost priority under express scheme of Personal Property Security Act (B.C.) (PPSA) — 3S became insolvent — Plaintiff brought action seeking equitable relief to restore priority of charge — Chambers determined that secured creditor would be unjustly enriched if its general security agreement was given priority over plaintiff's security interest and that ss. 68 and 70 of PPSA allowed court to remedy unjust enrichment within statutory scheme — Secured creditor appealed — Appeal allowed — Section 68 of PPSA only allowed principles of common law or equity to be applied to fill gaps in PPSA or to cover areas that were beyond scope of PPSA but it did not allow court to apply such principles instead of clear statutory principles — Section 70 of PPSA was purely procedural in nature and did not give court substantive powers to vary statutory priorities provisions — Chambers judge erred in finding that ss. 68 and 70 of PPSA gave him jurisdiction to override statutory priority rules on basis that rules resulted in unfairness — Nothing in sections justified application of equitable principles in preference to residual priorities rule set out in s. 35 of PPSA — PPSA did not allow court to exercise equitable jurisdiction to override balance of statutory priorities scheme — Inadvertent cancellation of plaintiff's financing statement, through no fault of its own, resulted in it losing priority of security and in secured creditor gaining priority — However, priorities provisions in PPSA provided clear juristic reason for enrichment — Chambers judge erred in finding that doctrine of unjust enrichment could be used to get around clear statutory provisions — Personal Property Security Act, R.S.B.C. 1996, c. 359.

Equity --- Equitable jurisdiction — General principles

Plaintiff had registered security interest in offset printing press that was in possession of defendant 3S — Third party discharged registration without authorization — Plaintiff became aware of discharge and re-registered interest but it had lost priority under express scheme of Personal Property Security Act (B.C.) (PPSA) — 3S became insolvent — Plaintiff brought action seeking equitable relief to restore priority of charge — Chambers determined that secured creditor would be unjustly enriched if its general security agreement was given priority over plaintiff's security interest and that ss. 68 and 70 of PPSA allowed court to remedy unjust enrichment within statutory scheme — Secured creditor appealed — Appeal allowed — Section 68 of PPSA only allowed principles of common law or equity to be applied to fill gaps in PPSA or to cover areas that were beyond scope of PPSA but it did not allow court to apply such principles instead of clear statutory principles — Section 70 of PPSA was purely procedural in nature and did not give court substantive powers to vary statutory priorities provisions — Chambers judge erred in finding that ss. 68 and 70 of PPSA gave him jurisdiction to override statutory priority rules on basis that rules resulted in unfairness — Nothing in sections justified application of equitable principles in preference to residual priorities rule set out in s. 35 of PPSA — PPSA did not allow court to exercise equitable jurisdiction to override balance of statutory priorities scheme — Inadvertent cancellation of plaintiff's financing statement, through no fault of its own, resulted in it losing priority of security and in secured creditor gaining priority — However, priorities provisions in PPSA provided clear juristic reason for enrichment — Chambers judge erred in finding that doctrine of unjust enrichment could be used to get around clear statutory provisions — Personal Property Security Act, R.S.B.C. 1996, c. 359.

Statutes --- Interpretation — Role of court — General principles

Personal Property Security Act, R.S.B.C. 1996, c. 359, ss. 68 and 70 — Sections 68 and 70 of Personal Property Security Act (B.C.) (PPSA) do not give court jurisdiction to override statutory priority rules set out in PPSA on basis that rules result in unfairness — PPSA does not allow court to exercise equitable jurisdiction to override statutory priorities scheme.

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Bond Development Corp. v. Esquimalt (Township) (2006), 20 M.P.L.R. (4th) 12, 268 D.L.R. (4th) 69, 18 B.L.R. (4th) 169, 52 B.C.L.R. (4th) 243, 51 C.L.R. (3d) 45, [2006] 6 W.W.R. 473, 226 B.C.A.C. 227, 373 W.A.C. 227, 2006 BCCA 248, 2006 CarswellBC 1187 (B.C. C.A.) — referred to

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Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of) (1993), 23 C.B.R. (3d) 161, 1 E.T.R. (2d) 1, 6 P.P.S.A.C. (2d) 5, 1993 CarswellOnt 251 (Ont. Bktcy.) — referred to

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — considered

Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp. (1994), 43 R.P.R. (2d) 137, 77 O.A.C. 253, 121 D.L.R. (4th) 53, 24 O.R. (3d) 506, 1994 CarswellOnt 760 (Ont. C.A.) — considered

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Peel (Regional Municipality) v. Canada (1992), (sub nom. *Peel (Regional Municipality) v. Ontario*) 144 N.R. 1, 1992 CarswellNat 15, 55 F.T.R. 277 (note), 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762, 59 O.A.C. 81, 1992 CarswellNat 659 (S.C.C.) — referred to

Rapid Transit Mix Ltd. v. Commcorp Financial Services Inc. (1998), 212 A.R. 199, 168 W.A.C. 199, 1998 ABCA 63, 1998 CarswellAlta 116, 59 Alta. L.R. (3d) 92, 156 D.L.R. (4th) 366, 13 P.P.S.A.C. (2d) 164 (Alta. C.A.) — considered

674921 B.C. Ltd. v. Advanced Wing Technologies Corp. (2006), 9 P.P.S.A.C. (3d) 43, 263 D.L.R. (4th) 290, 18 C.B.R. (5th) 1, 2006 BCCA 49, 2006 CarswellBC 222, 50 B.C.L.R. (4th) 201, 222 B.C.A.C. 104, 368 W.A.C. 104 (B.C. C.A.) — considered

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Generally — referred to

Fisheries Act, R.S.C. 1985, c. F-14
Generally — referred to

Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

s. 1(1) "purchase money security interest" — considered

s. 12 — referred to

s. 34 — considered

s. 34(1) — considered

s. 34(1)(a) — considered

s. 35 — considered

s. 35(1) — considered

s. 35(1)(a)(i) — considered

s. 35(7) — considered

s. 46(2)(b) — considered

s. 49(2) — considered

s. 68 — considered

s. 68(1) — considered

s. 70 — considered

Uniform Commercial Code
Generally — referred to

Regulations considered:

Personal Property Security Act, R.S.B.C. 1996, c. 359
Personal Property Security Regulation, B.C. Reg. 227/2002

s. 2 — considered

APPEAL by creditor from judgment in favour of plaintiff reported at, *KBA Canada Inc. v. 3S Printers Inc.* (2012), 2012 BCSC 1078, 2012 CarswellBC 2563, [2012] B.C.W.L.D. 8742, [2012] B.C.W.L.D. 8743, [2012] B.C.W.L.D. 8756, [2012] B.C.W.L.D. 8758, 221 A.C.W.S. (3d) 225, 93 C.B.R. (5th) 263, 20 P.P.S.A.C. (3d) 142 (B.C. S.C.), finding unjust enrichment.

***Groberman J.A.*:**

1 The issue on this appeal is whether the Supreme Court may exercise equitable jurisdiction to adjust the priority regime set out in s. 35(1) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the "*PPSA*") where it considers the results of that regime to be unfair.

2 The plaintiff, KBA Canada, Inc. ("KBA") had a registered security interest in an offset printing press in the possession of 3S Printers Inc. ("3S"). A third party discharged the registration without authorization, apparently through inadvertence. By the time KBA became aware of the discharge and re-registered its interest, it had lost its priority under the express scheme set out in the *PPSA*.

3 After 3S became insolvent, KBA commenced proceedings seeking equitable relief to restore the priority of its charge. The claim was opposed by two other secured creditors, Supreme Graphics Ltd. ("Supreme Graphics") and CIT Financial Ltd. ("CIT"). All parties agreed that the matter should be dealt with by way of a summary trial. KBA was successful in the summary trial, and Supreme Graphics appeals with the support of CIT.

Factual Background

4 In November 2004, 3S entered into a general security agreement ("GSA") with Supreme Graphics. The GSA covered all existing and after-acquired property of 3S. Supreme Graphics registered a financing statement in respect of its interest in the personal property registry.

5 A year later, 3S entered into an arrangement to obtain an offset press from KBA's parent company. The financing arrangement was somewhat complicated. KBA's parent company sold the press to Wells Fargo Equipment Financial Corporation ("Wells Fargo"), which leased the equipment to 3S for a term of 96 months. Under the arrangement, 3S had the option of obtaining title to the press at the end of the lease period upon payment of the sum of $1. If 3S defaulted on the lease, Wells Fargo was entitled to have KBA's parent company (or a related company nominated by it) repurchase the press and take an assignment of Wells Fargo's rights as against 3S.

6 Wells Fargo's interest in the offset press was a "purchase money security interest" ("PMSI") as that term is defined in s. 1(1) of the *PPSA*. Wells Fargo registered a financing statement in respect of its PMSI in the personal property registry in November 2005.

7 In September 2006, 3S entered into a second GSA, this time giving CIT security over its existing and after-acquired property. A financing statement with respect to the second GSA was promptly registered in the personal property registry.

8 In early 2010, 3S defaulted on its lease payments in respect of the offset press. On March 15, 2010, Wells Fargo exercised its right to have the press repurchased from it; KBA's parent company complied with its obligations by having KBA purchase the press. In April 2010, a financing change statement was filed to register the transfer of Wells Fargo's security interest in the press to KBA.

9 In May 2010, Wells Fargo mistakenly filed a financing change statement discharging KBA's security interest. It is not clear, on the evidence, how this error occurred. Surprisingly, the *PPSA* appears to allow anyone to file a financing change statement discharging a security interest. [1] The registrar's practice is to send verification statements to persons whose security interests have been discharged (a practice authorized by s. 49(2) of the *PPSA*). The verification statements are sent by ordinary mail. The evidence in this case is that neither KBA nor its agent had any record of having received a verification of the discharge.

10 KBA first learned of the discharge on July 15, 2010. By that time, it was too late to take advantage of the limited curative provision contained in s. 35(7) of the *PPSA*:

> 35(7) If... a registration has been discharged without authorization or in error, and the secured party re-registers the security interest not later than 30 days after the... discharge, the... discharge does not affect the priority status of the security interest in relation to a competing perfected security interest that immediately before the... discharge had a subordinate priority position, except to the extent that the competing security interest secures advances made or contracted for after the... discharge and before the re-registration.

11 Wells Fargo re-registered a financing statement in respect of the PMSI on July 16, 2010, and subsequently registered a transfer of the interest to KBA. Wells Fargo then attempted to obtain agreements from other secured creditors to waive their priority over the KBA charge. While it did obtain such agreements from at least two creditors, it was not able to convince Supreme Graphics and CIT to waive their priority.

12 KBA ultimately seized the offset press and sold it for 800,000. The net proceeds are being held in trust pending final determination of priorities among the secured creditors.

Statutory Provisions Governing Priority

13 Section 35 of the *PPSA* sets out the general (or "residual") priority rule for security interests:

> 35 (1) If this Act does not provide another method for determining priority between security interests,
>
> (a) priority between perfected security interests in the same collateral is determined by the order of the occurrence of the following:
>
> (i) the registration of a financing statement without regard to the date of attachment of the security interest....

14 Section 34 provides an exception to this rule, giving a PMSI what is often described as a "super-priority":

> 34(1) Subject to section 28, a purchase money security interest in
>
> (a) collateral... that is perfected not later than 15 days after the day the debtor... obtains possession of the collateral....
>
> . . .
>
> has priority over any other security interest in the same collateral given by the same debtor.

15 Subject to a rather esoteric argument put forward by Supreme Graphics which I will mention later in these reasons, this section would have given KBA's interest in the offset press priority over the interest of Supreme Graphics up until the time KBA's financing statement in respect of the PMSI was discharged by Wells Fargo. CIT's interest would have ranked subsequent in priority to both KBA's interest and that of Supreme Graphics.

16 Upon the discharge of the financing statement in respect of the PMSI, KBA's security interest ceased to be a perfected one. It became a perfected interest again only when it was re-registered in July 2010. It no longer qualified for super-priority under s. 34 (since more than 15 days had elapsed since S3 took possession of the offset press). By virtue of the priority scheme established by s. 35(1), KBA's security interest ranked subsequent to both the interests of Supreme Graphics and CIT.

The Judgment Below

17 KBA applied to the Supreme Court for equitable relief to restore the priority of its charge. In doing so, it relied on s. 68 of the *PPSA*, which recognizes the continued operation of principles of equity where they are consistent with the provisions of the statute, and on s. 70, which gives the court jurisdiction to deal with priority disputes by way of summary applications.

18 KBA also relied on the doctrine of unjust enrichment, which it contended could be applied to override the statutory priority regime. The chambers judge accepted both of KBA's arguments and restored KBA's priority. It is not clear that the judge considered the statutory arguments as independent from the unjust enrichment argument. Rather, it appears that he determined that Supreme Graphics would be unjustly enriched if its GSA were given priority over KBA's security interest, and found that ss. 68 and 70 of the statute allowed the court to remedy the unjust enrichment within the statutory scheme.

Analysis

19 In my view, KBA's arguments should be separately analyzed. The first question is whether the *PPSA* itself allows a court to exercise equitable jurisdiction to override the balance of the statutory priorities scheme. If the statute does not allow that to occur, then the next question is whether the doctrine of unjust enrichment can nonetheless be applied to give KBA the relief that it seeks.

1. The Statutory Provisions

20 It is well-established that the overriding goal of the *PPSA* is to provide commercial certainty and predictability to personal property financing. The statute includes clear rules for registration of financing statements in respect of security interests and for priorities among secured creditors. Courts have been very reluctant to circumvent or modify the explicit statutory provisions through the use of extra-statutory principles of common law or equity. The general approach to the statute is well-described in the first chapter of Ronald C.C. Cuming, Catherine Walsh & Roderick Wood, *Personal Property Security Law*, 2d ed. (Toronto: Irwin Law, 2012) at 51:

> The PPSA is founded on certain legislative policies that generally inform its interpretation. The most prominent of these is the advancement of commercial certainty and predictability. This is a primary value in commercial law generally. Its principal application in the PPSA context takes the form of an appropriate reluctance to countenance judicial glosses on the statutory rules, especially those dealing with priority.

21 This approach is in keeping with the purpose and language of the statute. As Newbury J.A. commented in *674921 B.C. Ltd. v. Advanced Wing Technologies Corp.*, 2006 BCCA 49 (B.C. C.A.), the statute was designed to replace convoluted common law, equitable and statutory rules that beset personal property security law with complexity and uncertainty:

> [1]... [P]riority dispute[s] between... secured creditors over the proceeds of chattel security... have become rare since the adoption, by most Canadian provinces, of Personal Property Security Acts.... In British Columbia, as in most other Canadian provinces, the *Personal Property Security Act*... swept away various statutory, common law and equitable rules dealing with secured transactions involving personal property.... This patchwork of rules relating to constructive and actual knowledge, title, registration, crystallization, realization and priorities had developed over many years in response to changing exigencies and without any overall rationale. The new unified statutory scheme ("PPSA") applies to all interests that "in substance" create security interests on personal property.

22 The statute includes several provisions dealing with priorities, and provides, in s. 35, a residual rule that applies where the "Act does not provide another method for determining priority between security interests." The section does not, on its face, leave room for priorities to be determined on the basis of common law or equitable principles, except to the extent that those principles are expressly incorporated into the statutory scheme.

23 The chambers judge considered that such an incorporation is present in s. 68 of the statute:

> 68(1) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.

24 In my view, s. 68 cannot be given the expansive role attributed to it by the chambers judge. If s. 68 were interpreted as "providing another method for determining priority between security interests" it would mean that equitable and common law principles would dominate the determination of priorities. The statutory purpose of replacing those complex and convoluted principles with simple rules that provide certainty and predictability would be undermined.

25 Academic commentators have specifically referred to the limited role of equitable principles within the statutory regime:

> Equity continues to apply as well as the common law, but care has to be taken in the use of equitable principles. The PPSA deliberately sets up a rather rigid system of property entitlement and priority that is not based first and foremost on actual notice and fairness, but on parties' following certain procedural steps and the application of predictable rules. The interjection of too many equitable ideas would destroy this system and undermine its predictability and efficiency.

> Bruce MacDougall, *Personal Property Security Law in British Columbia* (Markham, Ontario: LexisNexis Canada, 2009) p. 11.

26 As I read s. 68, it allows principles of common law, equity, and the law merchant to be applied only to fill interstices in the statute, or to cover areas that are beyond the scope of the legislation. It does not allow the court to apply such principles instead of the clear statutory precepts.

27 It is difficult to conceive of a situation in which principles of common law, equity, or the law merchant will be applicable to a priorities dispute, because the *PPSA* deals with priorities comprehensively. In discussing similar Saskatchewan legislation in *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47 (S.C.C.), the Supreme Court of Canada said this of the priorities scheme:

> [22] The *PPSA* provides a detailed set of rules for resolving priority disputes between competing security interests; perfection and various temporal priority rules generally serve as the default priority rules where there is no more specific rule that governs in a particular circumstance: s. 35(1). While having a security interest gives the secured creditor an interest which is enforceable both as against the debtor and against third parties, the *PPSA* recognizes other stakeholders' interests in collateral by subordinating secured creditors' interests to third parties' interests in various circumstances. For example, unperfected secured interests are subordinated to the interests of a trustee in bankruptcy and in certain circumstances to transferees for value without notice: ss. 20(2) and (3) [ss. 20(b) and (c) of the B.C. Act]. Thus, within the domain of application of the Act, the *PPSA* provides a complete set of priority rules for ranking the interests of both creditors and third parties in particular property.

28 As the chambers judge acknowledged, courts have not generally interpreted s. 68 of the *PPSA* (or the equivalent sections in other provinces' statutes) as affording them jurisdiction to depart from the strictures of the statute in the interests of abstract notions of fairness. Applications by parties seeking to be relieved of the effects of faulty registrations or mistaken discharges have not met with success: the judge noted, for example, *Estevan Credit Union Ltd. v. Transamerica Commercial Finance Corp.* (1989), 78 Sask. R. 285 (Sask. Q.B.); *Canadian Auto Lease Corp., Re*, 2006 BCSC 849 (B.C. S.C.) and *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)* (1993), 23 C.B.R. (3d) 161 (Ont. Bktcy.).

29 While the chambers judge appears to have accepted that s. 68 does not give a court general discretion to apply equitable principles in order to avoid the strictures of the statute, he considered that s. 70 gave the court greater discretion to apply equitable principles in respect of priorities disputes than in respect of other issues addressed in the statute. Section 70 provides as follows:

> 70. On application of an interested person, a court may
>
> (a) make an order determining questions of priority or entitlement to collateral, or
>
> (b) direct an action to be brought or an issue to be tried.

30 The judge seems to have been of the view that *obiter dicta* at para. 38 of *Rapid Transit Mix Ltd. v. Commcorp Financial Services Inc.*, 1998 ABCA 63 (Alta. C.A.), supports the idea that s. 70 of the *PPSA* can be used to mitigate any unfairness that results from the strict provisions of the statute, as long as no party will be unfairly prejudiced by such use. As the appellants point out, the section of the statute under consideration in that case was not the Alberta counterpart of s. 70, and the judgment of the Alberta Court of Appeal does not provide the support suggested by the chambers judge.

31 Section 70 is purely procedural in nature. It establishes that the Supreme Court has jurisdiction to determine priorities questions summarily (*i.e.*, on "application") and gives the court discretion to require complex issues of priority or entitlement to be brought by action. Nothing in s. 70 gives the court substantive powers to vary the statutory priorities provisions.

32 I am of the view that the chambers judge erred in finding that the provisions of the *PPSA*, and in particular, ss. 68 and 70, gave him jurisdiction to override the statutory priority rules on the basis that those rules resulted in unfairness. The overriding statutory goals of certainty and predictability in personal property financing would be undermined by giving those sections the broad interpretation applied to them by the chambers judge. In my view, nothing in those sections justifies the application of equitable principles in preference to the residual priorities rule set out in s. 35.

2. Unjust enrichment

33 I turn, then, to the question of whether the doctrine of unjust enrichment can assist KBA.

34 There are three elements that must be satisfied in order for a claim in unjust enrichment to succeed: there must be an enrichment of the defendant, a corresponding deprivation of the plaintiff, and an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.) at para. 30, citing *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), at 848 and *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at 784.

35 In the case before us, it is apparent that the inadvertent cancellation of KBA's financing statement, through no fault of its own, resulted in it losing the priority of its security, and in Supreme Graphics and CIT gaining corresponding priority for theirs. I accept, therefore, that the first two elements of the test for unjust enrichment are satisfied. The question is whether the statutory priorities scheme represents a "juristic reason for the enrichment".

36 The judge placed considerable reliance on *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506 (Ont. C.A.) in holding that the statutory priorities scheme did not preclude resort to the doctrine of unjust enrichment. That case involved real property. The plaintiff trust company was the holder of a first mortgage which it discharged by mistake. The defendant mortgage company held what was originally a second mortgage. It did not realize that the first mortgage had been discharged, and continued to make payments to the trust company. It was when it sold the property under a power of sale that the mortgage company determined that the first mortgage had been discharged. It refused to pay out the trust company, and the trust company brought an action against it, arguing unjust enrichment. The trust company succeeded at trial, and the result was upheld on appeal. The Ontario Court of Appeal discussed the principle involved at pp. 516-517:

> At the level of principle the issue is whether recognizing Central Guaranty's claim undermines the purpose of the statutory provisions in question. These provisions... are intended to protect persons who, in their dealings with land, rely on the abstract. In this case, however, Dixdale did not rely on the abstract either when it decided to exercise power of sale proceedings, or when it accepted an offer to purchase the property in February 1992. Dixdale bargained with the owner for a second mortgage; it was a second mortgagee when it commenced power of sale proceedings; it did not rely on its priority of registration in entering into an agreement to sell the property; and it disposed of the property at or slightly above its appraised value. In principle, I do not think that the provisions of the Act should preclude Central Guaranty from restitutionary recovery. On the facts of this case allowing Central Guaranty to recover on the basis of unjust enrichment would not undermine the purpose of the legislation.

37 Supreme Graphics notes that *Central Guaranty Trust* was decided twenty years ago, and says that it has been overtaken by developments in the law of restitution. In particular, it says that the Supreme Court of Canada's analysis of "juristic reason" in *Garland* must be considered. In *Garland*, Iacobucci J., for the Court, said this about "juristic reason":

> [44]... [In] the proper approach to the juristic reason analysis..., the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection [L. Smith, "The Mystery of 'Juristic Reason'", (2000), 12 S.C.L.R. (2d) 211] to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter* [*Peter v. Beblow*, [1993] 1 S.C.R. 980], *supra*), and other valid common law,

equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

38 Justice Iacobucci elaborated on "disposition of law" as a juristic reason for an enrichment:

> [49] Disposition of law is well established as a category of juristic reason. In *Rathwell* [*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436], *supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter*, *supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust enrichment. In the leading Canadian text, *The Law of Restitution* [Peter D. Maddaugh and John D. McCamus, *The Law of Restitution* (Aurora, Ontario: Canada Law Book, 1990)], *supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell*, *supra*, stating, at p. 46:
>
> > ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.
>
> It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

39 *Garland* did not, itself, concern a statutory provision. In *Gladstone v. Canada (Attorney General)*, 2005 SCC 21 (S.C.C.), however, the Supreme Court dealt with the question of whether an allegedly unjust enrichment was justified by a statutory disposition. In that case, the Crown had seized herring spawn on kelp allegedly harvested in violation of the *Fisheries Act*, R.S.C. 1985, c. F-14. When charges were eventually stayed, it paid the proceeds of sale of the herring spawn to the respondents. The respondents claimed entitlement to interest, as well, and relied on the doctrine of unjust enrichment. The Supreme Court denied recovery, on the basis that the matter was governed by statute:

> [19] In the case at bar, the seizure, sale, and return of the proceeds were all done pursuant to the *Fisheries Act*. The statute provides for the return of any fish, thing, or proceeds realized from its disposition. This is what happened. Any residual gain or loss is ancillary. Relying upon such a statutory basis fall within the "disposition of law" category of juristic reason....

40 Where a statute addresses issues of enrichment only obliquely, there may be room for interpretation as to whether it constitutes a "juristic reason" for that enrichment: see, for example, *Bond Development Corp. v. Esquimalt (Township)*, 2006 BCCA 248 (B.C. C.A.). Such is not the case, however, with the *PPSA*, which is directly and centrally concerned with priorities among security interests.

41 Indeed, in *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14 (B.C. C.A.), this Court accepted that it would be improper to impose a constructive trust to improve the creditor's security position in a manner that was contrary to the *PPSA* (and, in that case, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36).

42 In my view, the *PPSA*'s priorities provisions constitute clear juristic reasons for the enrichment in this case. The *PPSA* comprehensively governs priority among creditors, and the judge erred in finding that the doctrine of unjust enrichment could be used to navigate around the clear statutory provisions.

43 I note, before leaving this area, that KBA has placed some reliance on the judgment of this Court in *Furmanek v. Community Futures Development Corp. of Howe Sound* (1998), 162 D.L.R. (4th) 501 (B.C. C.A.), a case in which this Court accepted that an estoppel could preclude a creditor from relying on the priority of its security interest over that of another creditor. In my view, the case does not assist KBA. There is no suggestion that anything that Supreme Graphics or CIT have done is untoward, nor that they should be prevented, as a result of their conduct, from relying on particular facts or statutory advantages. This is, quite simply, not a case of estoppel.

3. The Alternative Argument

44 It is unnecessary, given my analysis of the other issues, to deal in any detail with Supreme Graphics' alternative argument, to the effect that Wells Fargo's original 2005 financing statement was not entitled to "super-priority" under s. 34 of the *PPSA*. Supreme Graphics says that 3S took possession of the offset press long before acquiring rights in it. It therefore contends that the PMSI was not "perfected" (because it had not "attached" under s. 12 of the *PPSA*) within 15 days of the debtor taking possession of the collateral, as required by s. 34(1).

45 KBA says that this alternative argument is not properly before the Court, as it was not argued before the Supreme Court.

46 I will say only that the arguments on both sides are problematic. The evidence before the court below on the issue of delivery of the press and on the acquisition of property rights by 3S was far from conclusive. In my view, it would be unfair for this Court to make the factual findings contended for by Supreme Graphics on the limited record presented. On the other hand, KBA's contention that the issue was conceded in the court below relies, to a very great extent, on equivocal statements made by counsel in the course of oral argument.

47 In short, while I am not convinced that Supreme Graphics is precluded, by its conduct below, from advancing the alternative argument, I am also of the view that the record is wholly inadequate to allow this Court to make essential findings of fact. Were it necessary to resolve the issue, I would remit the matter to the court below for determination of the factual questions.

Conclusion

48 In my view, the clear priority scheme set out in the *PPSA* applies in this case, and there was no room for the court below to override that scheme in the interests of "fairness". I would allow the appeal.

***Low J.A.*:**

I Agree:

***Neilson J.A.*:**

I Agree:

Appeal allowed.

Footnotes

1 Section 46(2) allows for the filing of discharges, but does not set out who may file them:
46(2) Information in a registration may be removed from the records of the registry
. . .

(b) on receipt of a financing change statement discharging... the registration.
The *Personal Property Security Regulation*, B.C. Reg. 227/2002 requires financing change statements to be filed electronically (s. 2) and provides that a statement discharging a registration must show the registration number of the charge to be discharged, the name of the debtor, and the name or registration party code of the person seeking the discharge (s. 35). There is no requirement that the person seeking the discharge be the holder of the charge, or, indeed, that that person have any connection to the charge. Further, s. 48 of the Regulation states that "A registration may be effected in the registry without proof that... the registering party has authority to submit the registration."

It is notable that the *Uniform Commercial Code*, on which is the *PPSA* is loosely modelled, does specify, in §9-509(d), that a termination statement can only be filed by the secured party of record, or, in very limited circumstances, the debtor.

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