

CITATION: Grosvenor Park Media Fund L.P. v. Arc Productions Ltd. et al.
2020 ONSC 5651
COURT FILE NO.: 16-CV-11472-00CL
DATE: 20200925

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GROSVENOR PARK MEDIA FUND L.P.

Plaintiff

– and –

ARC PRODUCTIONS LTD., ARC
HOLDINGS INC., ARC INVESTMENTS
LTD., ARC/DARK CRYSTAL
PRODUCTIONS INC., KICK
PRODUCTIONS LTD., IN THE JUNGLE
PRODUCTIONS INC., TF I
PRODUCTIONS INC., BL II
PRODUCTIONS INC., ARCADIA
PRODUCTIONS LTD., EGGS LTD.,
PRINCESS PRODUCTIONS INC.,
UNDERZOO PRODUCTIONS INC.,
HOLE IN THE BELLY PRODUCTIONS
LTD., SIR SIMON PRODUCTION LTD.,
SAMURAI PRODUCTIONS LTD.,
THOMAS MURRAY, KALLAN KAGAN
and PETER KOZIK

Defendants

)
)
) *Joseph Latham, Jason Wadden, Jesse-Ross
Cohen* for Grosvenor Park Media Fund L.P.

)
) *Nathan Fan, Andrew R. O. Jones* for
BK2BRAC Holdings Inc.

)
) *S. Fay Sulley, Marco P. Falco* for Spin
Master Ltd. –

)
) *Daniel Goldenberg, Ben Cowley* for Blazing
Productions Ltd. –

)
) *Mario Forte*, for Deloitte Restructuring Inc.
in its capacity as the Court Appointed
Receiver of Arc Productions Ltd. et al.

)
)
) **HEARD:** July 23, 2020

KOEHNEN J.

Overview

- [1] This is a motion by the receiver of Arc Productions Ltd. for directions about how to distribute approximately \$1,150,000 that the receiver has collected on account of tax credits owing to Arc.
- [2] Arc was a film animation studio that created animated children's films for a variety of arm's-length film producers. The basic concept was that the producer paid Arc in advance for the work it was about to do. Arc, meanwhile, was entitled to receive tax credits from both the federal and provincial governments for the films it created.
- [3] Three contracts are at issue on this motion. All three provide that Arc would pay the tax credits it received on account of a particular film to the producer of that film upon receipt.
- [4] In addition, the three contracts contain language that either assigned the amount of the tax credits to the producer and/or provided that Arc would hold those funds in trust for the producer.
- [5] Grosvenor Park Media Fund L.P. provided Arc with approximately \$43,000,000 in financing of which over \$20,000,000 remains outstanding. It registered a general security agreement against all of Arc's assets under the *Personal Property Securities Act* R.S.O. 1990, c. P. 10.
- [6] Grosvenor claims priority over the tax credits in the receiver's hands by virtue of its registered security agreement.
- [7] The producers submit that the *PPSA* is irrelevant to the analysis because it applies only to property owned by Arc. The contract between Arc and the producers predates the Grosvenor security agreement and assigned the tax credits to the producers. As a result, the producers argue, by the time Grosvenor registered security, the tax credits were owned by the producers and not by Arc.
- [8] I am unable to agree with the producers. In my view, their interests in the tax credits fall within the definition of "security interest" under the *PPSA* and should have been registered in order to take priority over Grosvenor's interest. Moreover, the assignment language in the agreements between Arc and the producers does not assist because Section 2 of the *PPSA* provides that the statute applies to all transactions that in substance create a security interest regardless of their form. In my view, the contractual provisions relating to the producers' interests in the tax credits are, in substance, transactions that create security interests which should have been registered under the *PPSA* in order take priority over Grosvenor's interest.

The Arrangements at Issue

a. The Grosvenor Loan

- [9] In December 2015, after Arc had entered into the three contracts with the producers, Grosvenor entered into a credit agreement with Arc pursuant to which Grosvenor provided financing of U.S. \$46,326,500. Grosvenor secured the indebtedness of Arc through, among other things, a General Security Agreement, which it perfected and registered under the *PPSA*.

b. The Tax Credits

- [10] The tax credits at issue on this motion are designed to promote film production in Canada or Ontario by providing credits for certain types of payroll costs that are incurred in Canada (for federal tax credits) or in Ontario (for Ontario tax credits).
- [11] In effect they make it less expensive for Canadian film studios, like Arc, to provide services to film producers because the tax credit allows them to charge less than they would have to charge without the benefit of the tax credit.
- [12] As a business matter, film studios usually address the tax credits with their clients in one of three ways. Under the first model, the client pays the film studio in full upfront with the proviso that the studio will repay the client an amount equal to the tax credit once the credit is received. Under the second model, the client pays a lower price upfront and the studio retains the tax credit once it is received. Under the third model, the client can apply for the tax credit itself. This model requires a more nuanced navigation of tax regulations. By way of general summary, it requires the client to have a Canadian entity that has funded the costs that give rise to the tax credit.
- [13] The three clients at issue on this motion structured their affairs with Arc according to the first model.

c. The Spin Master Contract

- [14] Spin Master entered into its production services agreement with Arc in August 2014. The agreement provided that Spin Master “alone” would be entitled to the tax credits arising out of the production, that Arc would claim the tax credits “in trust” on behalf of Spin Master and that Arc would “remit 100% of all such tax credits to Spin Master within three business days of Arc’s receipt of same.”
- [15] Spin Master did not register any security against Arc under the *PPSA*.

d. The Disney Contract

[16] BK2BRAC Holdings Inc. (“Disney”) entered into its production services agreement with Arc in March 2013.

[17] Under Section 16(e) of the Disney Agreement, Arc assigned its interest in the tax credits to Disney pursuant to the following language:

Assignment of Canadian Credits. Arc hereby assigns and transfers absolutely to [Disney] all of its present and future rights, interests, and benefits in and to any and all Canadian Credits arising from the Picture and Ancillary Content and Producer hereby accepts such assignment...

[18] The Disney agreement further envisages that Arc would apply for the tax credits and remit the amount received to Disney. Section 16(e) of the Disney agreement provided that Disney appointed Arc as its attorney-in-fact to apply for the tax credits and pay all such tax credits to Disney upon receipt.

[19] Disney submits that the effect of its production services agreement is to make Disney the absolute owner of all rights, interests and benefits in the tax credits as of March 2013, two years before Grosvenor extended financing.

[20] Disney is somewhat unusual among the three clients because Section 18 of its production services agreement gave Disney a security interest in all of Arc’s assets to secure “all present and future obligations of Arc to [Disney] pursuant to the Agreement.” Disney registered its security under the *PPSA*.

[21] However, in December 2015 when Grosvenor entered into the Credit Agreement with Arc, Grosvenor also obtained a Subordination Agreement from Disney which subordinated Disney’s security and rights to Grosvenor’s security. At first blush, this would appear to give Grosvenor priority over any security interest that Disney had in the tax credits.

[22] Disney submits that this is not the case because the Subordination Agreement and Disney’s security could only apply to property that belonged to Arc. According to Disney, since its production services agreement assigned the tax credits to Disney, Arc no longer had any property interest in them, as a result of which they could not be subject to the Disney security agreement or the Subordination Agreement. Instead, Disney submits that the Subordination Agreement was intended to apply only to an amount of \$400,000 by which Disney had overpaid Arc. The Subordination Agreement is, however, drafted in more general terms and is not restricted to the overpayment.

e. The Blazing Contract

- [23] Blazing Productions Ltd. entered into its production services agreement with Arc in September 2015.
- [24] The Blazing production services agreement provided that only Blazing was entitled to receive tax credits, that Arc would repay to Blazing the amount of the tax credits upon receipt and that Arc would hold the tax credits in trust on behalf of Blazing.
- [25] Blazing did not register any interest it had to the tax credits under the *PPSA*.
- [26] In July 2016, when Arc needed additional funding, Grosvenor submits that it provided such funding only after receiving an assignment and direction signed by Arc and Blazing pursuant to which Arc would pay to Grosvenor an amount of \$1,050,000 that Arc owed Blazing. Grosvenor submits that this sum is comprised solely of the tax credits.
- [27] The record before me was unclear on this point. There was considerable ambiguity about the extent to which some of this has been paid, how much is outstanding and whether it does or does not relate to tax credits. As a result, the assignment and direction to pay does not figure in my reasoning on this motion.

Analysis

a. The *PPSA*

- [28] The essence of the issue before me is to determine whether Grosvenor's registration of its *PPSA* security gives it priority over the tax credits even though the production services agreements of Spin Master, Disney and Blazing (the "Producers") refer to the tax credits as having been assigned to the Producers or as being held in trust for them.
- [29] Two sections of the *PPSA* are relevant: the definition of security interest and Section 2. Both provisions support the view that Grosvenor's security interest takes priority over the Producers' interest in the tax credits.

i. The Definition of Security Interest

- [30] Section 1(1) of the *PPSA* defines security interest as follows:

“security interest” means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation,

(a) the interest of a transferee of an account or chattel paper...

- [31] The definition contains two components. Both components support the proposition that the Producers' interests in the tax credits amount to security interests under the *PPSA*.
- [32] The first component involves the concept of an interest in personal property that "secures payment or performance of an obligation." The question then becomes whether the assignments of the tax credits to the Producers or the obligation of Arc to hold the tax credits in trust for the Producers secure payment or performance of an obligation.
- [33] There is no doubt in my mind that they do. No reason has been advanced for the assignment or trust arrangements other than to ensure that the Producers are paid the tax credits and that Arc performs on its obligation to remit the tax credits to the Producers within a few days of receipt.
- [34] As set out in greater detail below when discussing Section 2 of the *PPSA*, the transactions in respect of the tax credits are in essence loans from the Producers to Arc of an amount equal to the tax credits.
- [35] The second component of the definition of "security interest" is found in subparagraph (a) of the definition. That is to say, a security interest includes "the interest of a transferee of an account," "whether or not the interest secures payment or performance of an obligation." Thus, even if the assignment and trust arrangements do not secure performance of Arc's obligation to pay the tax credits to the Producers, the Producers' interests in the tax credits may still be security interests as defined in the *PPSA*.
- [36] Account is defined in Section 1(1) of the *PPSA* as:
- "account" means a monetary obligation not evidenced by chattel paper or an instrument, whether or not it has been earned by performance, but does not include investment property
- [37] The tax credit is a monetary obligation and the Producers are transferees of that obligation.
- [38] To my mind, the Producers' interests in the tax credits amount to security interests under both components of the definition of the term in the *PPSA*.
- [39] What then of the Producers' argument that the tax credits form no part of Arc's property because of the assignment and trust provisions of the production services agreements? That argument is answered by Section 2 of the *PPSA*.

ii. Section 2 of the *PPSA*

[40] In support of their argument that the tax credits do not form part of Arc's property, the Producers point to language in their respective agreements to the effect that the tax credits have been "assigned;" the tax credits are held in trust by Arc for the Producers; the Producers "alone shall be entitled to all tax credits;" that Arc "shall remit 100% of all such tax credits to" the Producers; that Arc "assigns and transfers absolutely to" the Producers all "present and future rights, interests and benefits in and to any and all" tax credits.

[41] That language must however be read in light of Section 2 of the *PPSA* which provides that the Act applies to all transactions that create a security interest without regard to the form or title of the transaction. More particularly, Section 2 provides:

Subject to subsection 4(1), this Act applies to,

- (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,
 - (i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and
 - (ii) an assignment, lease or consignment that secures payment or performance of an obligation;
- (b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation; and
- (c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation.

- [42] The language is clear: The Act applies to every transaction that in substance creates a security interest (i.e. that secures payment or performance of an obligation) regardless of the technicalities of title, assignments or trusts.
- [43] While the Producers do not admit it expressly, they implicitly admit that the assignment and trust provisions in the production services agreements are designed to secure payment or performance of an obligation.
- [44] The Producers describe the transaction surrounding the tax credits as one that is designed to lower Arc's borrowing costs. If the Producers did not pay Arc the full cost of the services upfront, then Arc would have to borrow money to fund the entirety of its payroll costs. Arc would of course have to repay the party from whom it borrowed money to fund payroll costs. The transactions at issue are simply ones in which the Producer is giving money to Arc in advance to fund payroll costs, which money Arc will repay to the Producers at a future date. That is, in essence, a lending transaction. There is no doubt that security for the payment of a garden-variety loan would be subject to the PPSA. The fact that this is not a garden-variety loan but one that has some nuances attached to it by virtue of the assignment or trust provisions in the production services agreements does not change the substance of the transaction.
- [45] In argument, the Producers said that Arc would have to obtain financing to cover payroll costs in the absence of the contractual arrangements they had entered into. According to the Producers, when Arc needs money from a nonclient to fund payroll, it is a financing transaction. Yet when Arc gets that money from a client, the Producers no longer describe that transaction as a financing transaction but as a "prepayment" of the tax credits or as "funding the tax credits."
- [46] The Producers provided no compelling reason for which an advance of funds from them to cover payroll costs amounts to a "prepayment" of the tax credit while an advance of funds from anyone else to cover payroll would amount to financing. In this context, the difference between financing and prepayment is simply wordsmithing that does not affect the substance of the transaction.
- [47] The Blazing agreement is fairly open in this regard and provides as follows in Section 17(a):
- The parties hereto agree that [Arc] shall **repay** to Producer by cheque or wire transfer (and for certainty, not by way of set-off), that portion of the Production Financing equal to the OCASE Tax Credit within ten (10) days of the receipt by [Arc] of the OCASE Tax Credit. (emphasis added)
- [48] The Producers also point to language in their agreements that places a duty on Arc to deliver various documents to them including tax documents, status reports, cost statements and the identity of accountants that Arc was using. Those obligations do not override the substance of the transaction. Indeed, they are merely additional obligations to ensure that

Arc performs its obligation to repay to the Producer the amount that the Producer has advanced on account of the expected tax credits. Far from taking the transaction outside of the scope of the *PPSA*, these obligations serve only to further “secure payment or performance” of Arc’s obligations.

- [49] To my mind, the substance of these transactions is that the Producers have lent money to Arc instead of having Arc borrow money from an arm’s length party. Arc has agreed to repay those funds by remitting the tax credits to the Producers. The assignment and trust provisions are simply designed to secure payment of the tax credits and secure Arc’s performance of its obligation to remit the tax credits to the Producers. As a result, the portions of the arrangements between Arc and the Producers that relate to the tax credits amount to security interests to which the Act applies.
- [50] The Act sets up a scheme of priority based on timing of registration. Grosvenor registered its security interest before Spin Master and Blazing did. Although Disney registered its security interest before Grosvenor did, Disney subsequently subordinated its interest to that of Grosvenor. As a result, Grosvenor’s claim to the funds generated by the tax credits has priority over the claims of the Producers.
- [51] I am strengthened in this view by the legislative history of the *PPSA*. As the Supreme Court of Canada noted in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at para. 21:

These statutory regimes have been implemented to increase certainty and predictability in secured transactions through the creation of a coherent system of priorities: Ronald C. C. Cuming & Roderick J. Wood, *British Columbia Personal Property Security Act Handbook* (2nd ed. 1993), at pp. 4-5; *G. M. Homes Inc.*, supra, at p. 252. The benefits of such certainty in commercial transactions, on basic economic principles, are intended to accrue to the health of the economy in general.

- [52] Recognizing Grosvenor’s priority furthers certainty and predictability and maintains the coherence of the first-in-time principle enshrined in the *PPSA*.
- [53] The *PPSA* was introduced to replace a wide variety of security interests that were cumbersome for commercial actors to detect. It was thought to be far more preferable to create a single, broad security interest that was easy to register and easy to detect: McLaren's *Secured Transactions in Personal Property in Canada* 3d ed. (Toronto: Thomson Reuters Canada, 2013, loose-leaf) ch 3 at 3.01 and Ch. 7 at 7.01.
- [54] This system provides fundamental economic efficiency. It allows lenders to determine quickly and inexpensively who might rank ahead of them if they decide to lend to a debtor. It also allows lenders to approach prior ranking creditors to obtain subordination agreements which have the effect of allowing subsequent lenders to obtain priority over those who have perfected earlier.

[55] The *PPSA* provides a fundamental cornerstone for financing of any form in Ontario. To circumvent this scheme by requiring lenders to make inquiries into the extent to which a debtor has assigned receivables or subjected receivables to trust arrangements so as to remove them from the purview of the *PPSA* would make lending significantly more cumbersome, more expensive and less certain. That would undercut a fundamental purpose of the *PPSA*.

[56] In reply, Spin Master's counsel pointed me to Section 4(1)(h) of the *PPSA* which provides that the statute does not apply:

to an assignment of accounts made solely to facilitate the collection of accounts for the assignor.

[57] Spin Master submits that, since what the Producers received was an assignment of an account, the *PPSA* does not apply to it.

[58] Spin Master's submission ignores the closing words of Section 4(1)(h) which requires that, for the assignment of an account to fall outside of the *PPSA*, it must be made for the purpose of facilitating the collection of accounts "for the assignor." In other words, the assignment of the tax credits must have been engaged in order to enable the Producers to collect the tax credits for the benefit of Arc. That is directly contrary to what the Producers say the purpose of the arrangement is. The purpose of the arrangement is not to enable the Producers to collect the tax credits for Arc but to help ensure that Arc delivers the tax credits to the Producers upon receipt.

[59] I am strengthened in this view by commentary about Section 4(1)(h) in McLaren's *Secured Transactions in Personal Property in Canada* Ch. 3 at 3.02 to the effect that:

The exclusion of this type of assignment of accounts relates only to collection agencies, since these types of assignments are not commercial financing arrangements, and therefore cannot prejudice or affect the interest of any third party. The exclusion created by s. 4(h) does not exclude an arrangement under which a factor obtains a transfer of specific accounts because the factor is essentially purchasing the accounts, and not merely acting as a collection agent.

b. Borrowing Base Certificates

[60] Spin Master submits that the borrowing base certificates that Grosvenor used when financing Arc show that Grosvenor did not anticipate any right to the tax credits arising from the productions at issue on this motion.

- [61] Spin Master argues that at least a portion of the Grosvenor financing was based on a percentage of receivables associated with productions that were specifically listed in borrowing base certificates issued by Arc throughout the relationship. Those receivables included tax credits. The productions of the three Producers on this motion are not listed in those borrowing base certificates. According to Spin Master, this demonstrates that Grosvenor had no entitlement to the tax credits associated with the three Producers on this motion because, if Grosvenor had any such entitlement, the three productions at issue here should have been included in the borrowing base certificates.
- [62] I am not persuaded by this argument.
- [63] Generally speaking, a borrowing base is the body of the debtor's assets against which a lender is prepared to lend. This, however, is different from what is covered by a general security agreement. Like most general security agreements, the one that Arc signed in favour of Grosvenor covered all of its assets. The general security agreement was not limited to those assets listed in Arc's borrowing base certificates. It is not uncommon for the borrowing base to be defined more narrowly than the borrower's asset base. Lenders also frequently exclude certain receivables or other assets from a borrowing base to ensure that they are lending only against those assets that the lender believes to be of higher quality or to ensure a greater margin of protection for the lender. Thus, the fact that some receivables may be excluded from a borrowing base certificate is not surprising. That does not, however, mean that assets excluded from the borrowing base are excluded from the general security agreement. What is captured by a general security agreement is determined by the language of that document, not by the terms of the borrowing base.
- [64] Moreover, here Grosvenor advanced funds under four credit facilities. Two of those facilities were grounded on the concept of a borrowing base; two were not. Thus, even if I were to conclude that the exclusion of the three productions at issue from the borrowing base certificates was of significance (which I am not prepared to conclude) the receivables from the productions at issue would still stand as security for the credit facilities that were not associated with a borrowing base.

c. Unjust Enrichment

- [65] The Producers submit that giving Grosvenor priority over the tax credits would unjustly enrich Grosvenor and that I should impose a constructive trust to prevent that outcome. I will address the unjust enrichment and constructive trust arguments separately.
- [66] The test for unjust enrichment requires a benefit in the hands of the defendant, a corresponding deprivation suffered by the plaintiff and the absence of a juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, 1 S.C.R. 629 at para. 30 per Iacobucci J.

- [67] The critical element here is the absence of a juristic reason for the enrichment. Courts have recognized that payment of a debt is a juridical reason for an enrichment: *Royal Bank v. Harowitz*, [1997] O.J. No. 2599 (Ont. C.A.) at paras. 1-2, affirming [1994] O.J. No. 619 (Ont. Gen. Div.).
- [68] There is no deprivation to the Producers that creates a stronger equitable claim to the tax credits than Grosvenor has. Grosvenor and each of the Producers is owed money by Arc. Even after being paid the tax credits, Grosvenor will still be out of pocket approximately \$19,000,000.

d. Constructive Trust

- [69] In addition to the express trust argument that the Producers raise in connection with at least some of the production services agreements, all three Producers submit that the tax credits should be subject to a constructive trust.
- [70] They submit that the applicable test for finding a constructive trust is set out in *Re Redstone Investment Corp.*, 2015 ONSC 533 at para. 68 per Morawetz R.S.J. as follows:
- (a) Arc must have been under an equitable obligation;
 - (b) The assets in Arc's hands must have resulted from deemed or actual agency activities of the defendant in breach of its equitable obligation to the Producers;
 - (c) The Producers must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like Arc remain faithful to their duties; and
 - (d) There must be no factors that would render imposition of a constructive trust unjust in all the circumstances of the case.

- [71] These factors do not give rise to a constructive trust in the circumstances of this case.
- [72] Arc's equitable obligations do not come into play. For the sake of argument, I am prepared to accept that Arc was under an equitable obligation to apply for the tax credits. It did so.
- [73] The real issue is whether Arc was under any equitable obligation to remit the tax credits to the Producers in the context of a priority dispute that arose after Arc's receivership and

bankruptcy. In my view, Arc is under no such equitable obligation. This case has nothing to do with ensuring that others in Arc's position remain faithful to their duties. Arc did what it was supposed to do. It applied for the tax credits. The issue does not arise out of any misconduct by Arc but out of a priority dispute between Grosvenor and the Producers.

- [74] There is no need for the Producers to resort to the proprietary remedy of constructive trust because they were in complete control of the situation. They could have obtained security agreements over Arc that gave them priority over the tax credits. For whatever reason, they chose not to. The imposition of a constructive trust in the circumstances of this case would be unjust to the interests of Grosvenor as an intervening creditor. The *PPSA* makes clear that the rights of parties like Grosvenor must be protected. To refuse to protect perfected security interests like those of Grosvenor would fundamentally undermine the simple, cost-effective structure for the protection of security interests that the legislature has seen fit to establish.
- [75] If the regime that the legislature has established causes a loss to the Producers, there is no injustice in that. It is a loss that the Producers could have prevented through the simple registration of a security agreement. There would be a far greater injustice done to commercial lenders generally if courts began imposing solutions that deprive lenders of the certainty and efficiency of the *PPSA*.
- [76] The Producers submit that there are good policy reasons for imposing a constructive trust because the purpose of the tax credit scheme is to promote employment in Ontario film production. According to the Producers, that goal is undermined if the tax credits can be used as collateral for loans of secured creditors. I disagree.
- [77] As noted above, the easy remedy is for the Producers to have registered security under the *PPSA*. I was given no reason for which that was not possible.
- [78] The Producers rely heavily on the decision of the British Columbia Court of Appeal in *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.*, 2000 BCCA 458, 142 BCAC 26. In that case, a car dealership had given a truck to a customer pursuant to an agreement of purchase and sale that was conditional on the customer receiving financing for the truck. The dealer was responsible for obtaining financing. The customer made an assignment in bankruptcy before the dealer obtained financing. The car dealership claimed possession of the truck. The trustee in bankruptcy claimed that the dealership's interest in the truck amounted to a security interest under the *PPSA* which should have been registered and, since no security was registered, the truck should form part of the overall assets of the estate and should not be returned to the dealership.
- [79] The Court of Appeal imposed a constructive trust and ordered that the truck be returned to the dealership.
- [80] *Ellingsen* is, however, distinguishable. The Court of Appeal noted at paragraph 26 that the trustee's argument was premised on a concluded contract. The court found, however, that no contract had ever been concluded because the contract was subject to a condition precedent of financing which was never satisfied.

- [81] The facts of *Ellingsen* are also somewhat unusual. In that case, the customer had earlier purchased a used truck from the dealership based on the representation that it had never been involved in an accident. When the customer discovered that the representation was incorrect, he returned the truck. The dealership offered to sell him another truck subject to the condition precedent of financing. The customer, however, needed the truck quickly. It appears that, as a goodwill gesture to make up for the earlier misrepresentation, the dealership let the customer take the second truck before financing was arranged. Financing fell through and the customer made an assignment in bankruptcy.
- [82] Given that the condition precedent of financing had not been satisfied, the situation was more akin to one in which the dealership simply allowed the customer to use the dealership's truck. While the customer was doing that, he made an assignment in bankruptcy. Under that characterization, the truck never belonged to the customer but had simply been lent to the customer by the dealership, hence the court's characterization of the issue as restitutionary in nature.
- [83] In the case before me, the contracts between both Arc and the Producers and between Arc and Grosvenor were completed. Moreover, as I found above, the provisions in the contract between the Producers and Arc relating to tax credits in substance amounted to a security interest that was subject to the *PPSA*.
- [84] *Graff v. Bitz Estate (Trustee of)* (1991), 10 C.B.R. (3d) 126 (Sask. Q.B.), on which the Producers also rely, is to similar effect. In that case, a customer of an automobile dealership had wanted to buy a particular 1985 Porsche 944 that was being offered at auction. The customer paid the dealership in exchange for which the dealership obtained the car. The dealership made an assignment in bankruptcy before ownership was registered in the name of the customer. The court found a constructive trust in favour of the customer and rejected the characterization of the transaction as one in which the customer had simply made a loan at large to the dealership. The court found that the money had not been advanced for the general purposes of the dealership but to buy a specifically identified car. That arrangement constituted a true trust relationship and was not subject to Saskatchewan's *PPSA*.
- [85] The equities in this case are significantly different from those in *Ellingsen* and *Graff*. Both of those cases involved ownership to a specific piece of tangible property. *Graff* dealt with a common consumer transaction: the purchase of the car. It would be inequitable to require consumers to take out the *PPSA* registrations to cover the time between which they pay the dealer and receive the car. That is a situation to which the concept of a constructive trust corresponds ideally.
- [86] In the case before me, the Producers are sophisticated entities who receive legal advice and regularly carry out transactions of this sort. There is no equitable reason to relieve them from an obligation to register security under the *PPSA*. The priority scheme contained in the *PPSA* was instituted only after long, careful study and consideration. Courts should be cautious before granting constructive trusts that would upset those legislative priorities without good reason. *Ellingsen* and *Graff* are examples of cases where courts had good reason to impose a constructive trust. I see no reason to do so here.

e. Quistclose Trust

- [87] The Producers submit that the tax credits are subject to a Quistclose trust.
- [88] A Quistclose trust arises when funds are advanced for a specific purpose, but cannot be or are not used for that purpose: *Carevest Capital Inc. v. Leduc (County)*, 2012 ABCA 161, A.W.L.D. 2592 at para. 11; *Redstone Investment Corporation (Re)*, 2015 ONSC 533, 26 C.B.R. (6th) 272 at para. 83. In *Redstone*, Morawetz R.S.J. (as he then was) held at paragraph 84 that a Quistclose trust will be imposed where:
- (a) Funds were advanced for a specific purpose;
 - (b) The funds are paid to the party under court supervised creditors' protection; and
 - (c) There is no effect on the other creditors of the party under receivership because the funds were never the property of the party under receivership and its creditors have no entitlement to the funds in question.
- [89] In my view the Quistclose trust argument is a bit of a red herring. The nub of the issue in this case goes back to whether the *PPSA* applies to the Producers' interest in the tax credits. I have already found that it does.
- [90] Moreover, the specific requirements for a Quistclose trust do not apply here. The funds that the Producers advanced were used for their intended purpose, namely, the production of films.

f. The Disney Subordination Agreement

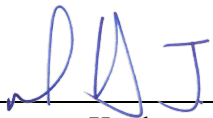
- [91] As noted earlier, Disney submits that the subordination agreement did not apply to the tax credits but was designed to apply solely to the \$400,000 by which Disney had overpaid Arc. Disney submits that the subordination agreement can only apply to property owned by Arc and, since Arc had assigned the tax credits to Disney, the tax credits no longer constitute property of Arc.
- [92] For the reasons set out earlier, the provisions of the production services agreements relating to the tax credits were subject to the *PPSA*. As a result, the subordination agreement gives Grosvenor priority over Disney's claim to the tax credits unless the subordination agreement had somehow carved them out. It did not.

g. Agency Argument

- [93] Spin Master submits that it constituted Arc as its agent for purposes of obtaining the tax credits. This however seems to contradict Section 14 of its production services agreement which provides that Spin Master and Arc are independent contractors with respect to each other and that nothing contained in the production services agreement shall create any “partnership, joint venture, agency or employment relationship” between the parties.
- [94] In addition, Section 16(d) of Disney’s production services agreement provided that Disney could apply directly for the tax credit. Although Disney may have had the power to do so, it did not. Instead, the receiver applied for the tax credits on Arc’s behalf. Disney was aware of this and raised no objection.

Disposition

- [95] For the reasons set out above, I direct the receiver to pay to Grosvenor all amounts it receives on account of federal and provincial film production tax credits up to a maximum of the amount outstanding pursuant to Grosvenor’s credit agreements with Arc.
- [96] Any party seeking costs as a result of these reasons may provide written submissions within 14 days of receipt of the reasons. Responding submissions are to be delivered seven days later with any reply being delivered five days after that.



Koehnen J.

Released: September 25, 2020

Grosvenor Park Media Fund L.P. v. Arc Productions Ltd. et al.
2020 ONSC 5651
COURT FILE NO.: 16-CV-11472-00CL
DATE: 20200925

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

BETWEEN:

GROSVENOR PARK MEDIA FUND L.P.

Plaintiff

– and –

ARC PRODUCTIONS LTD., ARC HOLDINGS INC.,
ARC INVESTMENTS LTD., ARC/DARK CRYSTAL
PRODUCTIONS INC., KICK PRODUCTIONS LTD.,
IN THE JUNGLE PRODUCTIONS INC., TF I
PRODUCTIONS INC., BL II PRODUCTIONS INC.,
ARCADIA PRODUCTIONS LTD., EGGS LTD.,
PRINCESS PRODUCTIONS INC., UNDERZOO
PRODUCTIONS INC., HOLE IN THE BELLY
PRODUCTIONS LTD., SIR SIMON PRODUCTION
LTD., SAMURAI PRODUCTIONS LTD., THOMAS
MURRAY, KALLAN KAGAN and PETER KOZIK

Defendants

REASONS FOR JUDGMENT

Koehnen J.

Released: September 25, 2020