Court File No. CV-24-00715773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP. AND FINAL BELL CORP.

Applicants

BRIEF OF EXCERPTS FROM AUTHORITIES OF FINAL BELL HOLDINGS INTERNATIONAL LTD.

September 17, 2024

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TO: **THE SERVICE LIST**

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3 *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, at para 34

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TEXT OF STATUTES, REGULATIONS & BY - LAWS

14 Rule 59.06(2), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Bet-Mur Investments Limited v. Spring et al.

[Indexed as: Bet-Mur Investments Ltd. v. Spring]

41 O.R. (3d) 799
[1999] O.J. No. 342
Docket No. C19771

Ontario Court of Appeal
Weiler, Austin and Charron JJ.A.
February 12, 1999

1999 CanLII 2802 (ON CA)

Partnership -- Holding out -- Defendant holding himself out to plaintiff as partner of lawyer who defrauded plaintiff in fraudulent mortgage transaction -- Section 15(1) of Partnership Act (imposing liability on non-partners who hold themselves out to be partners) placing onus on plaintiff to prove that he relied on representation of partnership -- Plaintiff failing to meet that onus -- Action dismissed -- Partnerships Act, R.S.O. 1980, c. 370, s. 15(1).

NOTE: An appeal of the judgment of the Ontario Court (General Division) (Roberts J.), reported at 20 O.R. (3d) 417, to the Court of Appeal for Ontario was dismissed on February 12, 1999. The endorsement of the court was as follows:

BY THE COURT: -- The facts and decision of Roberts J. are reported at (1994), 20 O.R. (3d) 417. The sole ground advanced on appeal is that Roberts J. seriously misapprehended the evidence on the issue of whether the appellant is a person "who has on the faith of any such representation (that there is a partnership) given credit to the firm" within the meaning of s. 15(1) of the Partnerships Act, R.S.O 1980, c. 370.

Reliance is a question of fact. The appellant submits that

because of the payment of the moneys to be advanced for the mortgage was by way of a cheque payable to the firm and deposited in the trust account and that the cheque was written after there had been a holding out of Mr. Alexandor as a partner, Alexandor is liable. While these are important factors, they are not conclusive. The trial judge's finding that there was no reliance on the representation is supported by the evidence and, in our opinion, he did not misapprehend the evidence. The appeal is therefore dismissed. Costs of the appeal are to the respondent.

Jeffrey W. Kramer, for appellant.

T.P. Bates, for respondent.

1999 CanLII 2802 (ON CA)

Most Negative Treatment: Distinguished
Most Recent Distinguished: Citizens Bank of Rhode Island v. Paramount Holdings Canada Co. | 2008 CarswellOnt 1615, 165 A.C.W.S. (3d) 1035, [2008] O.J. No. 1114, 41 C.B.R. (5th) 131, [2008] W.D.F.L. 2607 | (Ont. S.C.J., Mar 26, 2008)

1996 CarswellOnt 619
Ontario Court of Justice (General Division, Commercial List)

Brown & Collett Ltd., Re

1996 CarswellOnt 619, [1996] O.J. No. 625, 11 E.T.R. (2d) 164, 61 A.C.W.S. (3d) 425

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Re BROWN & COLLETT, LIMITED

Winkler J.

Heard: January 29-31, February 1, 19-20, 1996
Judgment: February 26, 1996
Docket: Doc. B266/95

Counsel: *John T. Porter* and *Lynn O'Brien*, for applicant, Brown & Collett, Limited.
Raymond F. Leach and *B.F. Fischer*, for Hay Stationery Incorporated.

Subject: Estates and Trusts; Corporate and Commercial
Related Abridgment Classifications
Estates and trusts
III Trustees
III.1 Nature of trustee's office
III.1.h Miscellaneous
Headnote
Trusts and Trustees --- Nature of trustee's office
Constructive trust — Two companies supplying office supplies to customer pursuant to ongoing arrangement under which customer remitted payment to one company — Company receiving payment depositing money in general account and then sending other company its share of payment — Company receiving payment filing plan of compromise and arrangement under Companies' Creditors Arrangement Act — Moneys owing to other company being unpaid — No justification existing for proposition that doctrine of unjust enrichment should be applied sparingly in commercial context — Company receiving payment being enriched and other company suffering corresponding deprivation — No juristic reason for enrichment existing — Company receiving payment being agent of other company for purposes of collection and remittance of moneys owing by customer to that company — No express trust existing and parties being merely creditor and debtor — Debtor/creditor relationship and finding of unjust enrichment not being mutually exclusive — Company receiving payment being unjustly enriched — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
H Inc. and B & C Ltd. were stationary suppliers. One of their customers, FLtd., insisted on dealing with one stationary supplier only. Although H Inc. supplied two plants and B & C Ltd. supplied one plant, F Ltd. remitted its payments to B & C Ltd., who deposited them in its general account. Under B & C Ltd.'s arrangement with H Inc., the moneys owing to H Inc. were to be forwarded forthwith. Actually, B & CLtd. used the money owing to H Inc. as its own pending reconciliation of the cheques. A considerable time lapse developed between the receipt of the money by B & C Ltd. and the forwarding of the money to H Inc. While a considerable amount of money was still owing to H Inc., B & C Ltd. filed a plan of compromise and arrangement under the *Companies' Creditors Arrangement Act*. Pursuant to the plan, a claim in trust was one of the categories of claims against

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Accounts at the time. The supply of stationery products to these latter customers forms the basis of Hay's further unsecured claim against Brown & Collett (which claim is not part of this trial of an issue).

26 It was Mr. Clark's evidence that the Ford account was not a National Account. The main distinction between a National Account and the Ford account, he stated, was the fact that Hay did not invoice Brown & Collett at all with respect to the Ford account. Nor was the Ford account handled through Gold leaf. Ford, he said, was on the National Account list in error. All information required for the Ford account was processed and available through C-PARS. The GLOSS method of billing was not required. On cross-examination, he admitted that the understanding Hay had with Brown & Collett regarding the handling of Ford payments was the same as the understanding Hay had with Brown & Collett regarding the handling of National Account payments. In both cases, on receipt of payment, Brown & Collett was to remit any funds due to Hay immediately after Brown & Collett had reconciled the account. Hay's accounts receivable listing shows Ford as the account debtor. Brown & Collett does not appear as an account of Hay with respect to Ford. Similarly, in respect of National Accounts serviced through Brown & Collett, Hay shows the customer as being the account debtor on its account receivable listing, and not Brown & Collett.

27 There were distinct similarities between the Ford account and other National Accounts. However, I accept Mr. Clark's evidence, which was unrebutted as Brown & Collett called no witnesses, that the Ford account was not a National Account. As stated, it was not dealt with through Gold Leaf, there were no invoices as between Hay and Brown & Collett, and the area serviced did not go beyond provincial boundaries. It was a discrete and idiosyncratic transaction subject to the terms agreed upon between Ford and Brown & Collett and between Brown & Collett and Hay.

Value of Hay's Claim re: Ford

28 According to statements provided by Ford, which Brown & Collett concede they have no evidence to refute, Brown & Collett has been paid $1,926,881.70 for goods supplied by both Brown & Collett and Hay. Of this sum, Hay has received $628,313.68 from Brown & Collett directly. Hay remains unpaid for a substantial part of the goods supplied to Ford, notwithstanding that Brown & Collett now acknowledge they have received these funds from Ford.

29 Hay originally claimed the sum of $329,000.00 in its Statement of Claim, being the value of goods shipped by Hay to Ford as at June 20, 1995. The amount claimed was the value of all goods shipped as of that date. Hay now claims the amount of $343,519.74 which represents the value of stationery and supplies delivered by Hay to Ford, and for which Ford had made payment to Brown & Collett up to September 13, 1995. The original Proof of Claim delivered by Hay in relation to this matter was reduced to this figure once Hay had updated their reconciliation of the amounts Brown & Collett had received from Ford. This figure is not disputed by Brown & Collett in this proceeding.

Hay's Unsecured Claim

30 Brown & Collett owes Hay $9,274.63 in respect of several of the Gold Leaf National Accounts referred to above. Hay has acknowledged in its Proof of Claim that its claim in this regard is that of an unsecured creditor.

31 Brown & Collett's obligation to Hay regarding these Gold Leaf accounts was to reconcile the accounts upon receipt of funds, and to immediately remit the appropriate portion to Hay. Counsel for Brown & Collett assert that this obligation was identical to Brown & Collett's obligation in respect of payments received from Ford. There is no distinction it is said, between the nature of the funds received by Brown & Collet for these Gold Leaf accounts and the funds received by Brown & Collett for the Ford account. Brown & Collett submit that if the Gold Leaf accounts are simple unsecured debts, so then are the amounts owing to Hay in respect of the Ford account. In light of my finding that the Ford account if not a National Gold Leaf Account, it is unnecessary to address this point further.

Summary

32 The facts may be summarised as follows. Brown & Collett and Hay entered into an oral agreement to jointly supply Ford; Brown & Collett to supply the Oakville location and Hay to supply Windsor and Talbotville. Neither supplier would invoice for goods shipped. Each would service its designated locations and ship from its own inventory. They agreed between themselves

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on pricing. They stipulated to Ford that payment would be remitted for goods supplied by both companies to Brown & Collett in cheques payable to Brown & Collett. Brown & Collett undertook to reconcile the accounts as between the two suppliers and remit funds owing to Hay forthwith. Meanwhile the cheque from Ford was deposited in the Brown & Collett general account.

33 It seems to me that the raison d'etre for the agreement between Brown & Collett and Hay is apparent. Brown & Collett offered to include Hay in the Ford account because, without Hay's inclusion to service Windsor and Talbotville, the Ford account could not be obtained. Hay, on the other hand, was anxious to participate in a large account which it could not have obtained access to other than through Brown & Collett's involvement. There was an obvious mutuality of benefit to both companies. Given that Ford insisted on one supplier of record, and that Brown & Collett was the contact company of the two joint participants in the account, payment was directed to Brown & Collett and Brown & Collett acted as a "conduit" regarding funds attributable to Hay.

34 Brown & Collett's dilatoriness in transmitting Hay's funds was explained by Brown & Collett, in response to Hay's pressing for more prompt payment, as being due to the difficulty in reconciling the Brown & Collett and Hay portions of the Ford remitances. It was not until preparation for this litigation, when Hay received copies of the cheque stubs sent by Ford to Brown & Collett, that Hay learned Brown & Collett's explanation for the delay could not be accurate, in that Ford itself had reconciled the shipments of the companies, and had forwarded that information to Brown & Collett along with the payments.

35 Subsequently, Brown & Collett explained failure to pay Hay as being due to the fact that payment had not been received from Ford. It was not until delivery of the affidavit of Peter Perly, president of Canadian Treasury Management, in December, 1995, that Brown & Collett even conceded that it had received the monies now claimed. Accordingly, the evidence is clear that both of Brown & Collett's explanations for the delay in payments were untrue, and I so find.

36 Although the funds were deposited in the Brown & Collett account upon receipt, it was not a term of the agreement that Brown & Collett would be entitled to use the funds attributable to Hay for its own purposes, pending reconciliation. Brown & Collett had no right, title or interest in the monies.

37 In my opinion, for the purposes of collection, reconciliation and remission of funds between Brown & Collett and Hay, Brown & Collett acted as Hay's agent. The terms of the agreement were clear and not disputed. Brown & Collett was to reconcile and remit to Hay forthwith after receipt from Ford.

Issues

38 The parties to this proceeding are *ad item* that trust monies owed by Brown & Collett are Unaffected Obligations for the purposes of the Plan of Arrangement and are not, therefore, compromised by the Plan. Hence the issues in this proceeding are these:

1. Is there an implied trust with respect to the monies owed by Brown & Collett to Hay?

2. If not, has Hay made out a claim for unjust enrichment giving rise to the imposition of a constructive trust?

Law and Analysis

Implied Trust

39 Counsel for Hay asserts that the court ought to conclude that an implied trust exists with respect to the Ford monies owing to Hay. The elements of an implied trust are the same as those of an express trust.

40 According to D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 107, in order for an express trust to come into existence, it must have three essential characteristics: 1) the intention of the alleged settlor to create a trust must be certain; 2) the subject matter of the trust or trust property must be certain; and 3) the objets or beneficiaries of the trust must be certain. The principle of the "three certainties" is fundamental to the creation of a trust. Accordingly, Hay must demonstrate that there was a certain intention to create a trust in respect of the funds owing to Hay in the context of the agreement between Brown & Collett and Hay. Next, Hay must prove with certainty that it was the intended beneficiary of the trust.

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> reason" simply means some underlying justification, grounded in a legal or equitable base, for the circumstances that have arisen, notwithstanding that the benefit/detriment equilibrium has since become unbalanced.

54 In the present case, counsel for Brown & Collet assert that the more common application of the doctrine of unjust enrichment is in the family law context and that the doctrine should be applied sparingly in a commercial context, if at all. I do not accept this proposition. In my opinion, the principles of unjust enrichment are equally applicable to a commercial context, and should be applied in the same fashion as in any other context. I am comforted in this approach by the words of McLachlin J. in *Peter v. Beblow, supra*, at p. 649-650:

> I doubt the wisdom of dividing unjust enrichment cases into two categories commercial and family - for the purpose of determining whether a constructive trust lies. ... In short, the concern for clarity and doctrinal integrity with which this court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

55 Indeed, application of the principles of unjust enrichment in a commercial context have been recognised as promoting both commercial conscience and bargaining in good faith. In *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1989), 61 D.L.R. (4th) 14, the Supreme Court of Canada applied a remedial constructive trust in a commercial situation. In *LAC*, a company revealed confidential information about mineral deposits in a piece of property, during negotiations with a view to commencing a joint venture. The defendant then purchased the property independently, and developed a profitable mine on the site. The plaintiff was successful in an action for breach of confidence leading to a finding of unjust enrichment and the application of a constructive trust. In considering the applicability of an equitable remedy in a commercial context, Mr. Justice La Forest observed at p. 47:

> The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties.

56 Finally, in *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161, the British Columbia Court of Appeal, in concluding that the elements of the unjust enrichment test were equally applicable in a commercial context, held at p. 171:

> In the context of a domestic relationship those three circumstances are likely to be simpler to apply than in the context of a commercial relationship, where the essence of the relationship is the enrichment of the participants, perhaps at the expense of each other, all in the name of fair and honest business dealing. ... in a business relationship, honest dealing not equal dealing should set the standard of fairness. ... To my mind the key to the correct interpretation and application of the decision of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the "unjust" element of unjust enrichment.

And later at p. 172:

> In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in *Pettkus v. Becker* when they are applied to a commercial context.

57 I agree with the approach taken in the authorities above. Principles of unjust enrichment may properly be considered in a commercial context, with the aim of promoting sound commercial conscience and honest dealing between parties. In order to determine whether or not there exists a valid juristic reason, it is incumbent upon the court to ascertain whether there is any legal obligation, contractual or otherwise, which will justify an enrichment, keeping in mind at all times the legitimate expectations of the parties. In a commercial setting, the court must remain mindful of goal of the promoting honest dealing and sound commercial conscience.

58 In the present case, it is asserted on behalf of Brown & Collett that the relationship between the parties was a simple contractual debtor-creditor relationship. It is stated that the enrichment of Brown & Collett was incurred within the framework of that relationship, and as such, constitutes a juristic reason for the enrichment.

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59 In support of the argument that the relationship between the parties is simply one of debtor-creditor, Brown & Collett relies on the decision of Morden J.A. in *Ontario Hydro-Electric Power Commission v. Brown*, [1960] O.R. 91 (C.A.). In that case, an agent appointed to collect accounts had placed the collected monies in a safe which was later burgled. The court held that the agent was not in a position of trustee of the actual money which comes into his hands, but is simply a debtor of his principal, and consequently liable to repay the money on that basis. Mr. Justice Morden stated at p. 94:

> An agent has been held to be a trustee of moneys he has received from or for his principal where he is specifically instructed to keep such moneys separate.... On the other hand and in contrast, where the sole duty of the agent with respect to the money is to pay it to his principal, the relationship between the parties is that of debtor and creditor.

60 In the case at bar, Brown & Collett was the agent of Hay for purposes of collection, reconciliation and remittance of monies owing by Ford to Hay. It was not required to maintain a separate account. I accept the contention that the parties are merely debtor and creditor, and not trustee and beneficiary in the sense of an express or implied trust. However, in my opinion, a debtor creditor relationship and a finding of unjust enrichment are not, of necessity, mutually exclusive.

61 Counsel for Brown & Collett submits that by reason of the debtor creditor relationship, this court should not make a finding of unjust enrichment. In support of this contention, I am directed to the reasons of Blair J. in *Confederation Life, supra*, at p. 771:

> The case-law indicates that a contractual debtor-creditor relationship will be sufficient to establish the existence of a juristic reason for an enrichment *that can be accounted for on the basis of that contractual relationship*. (emphasis added)

62 Here it cannot be said, however, that the enrichment of Brown & Collett can be accounted for on the basis of the contractual relationship. On the contrary, the enrichment is in clear breach of the agreement.

63 Similarly, in *Royal Bank v. Pioneer Trust Co. (Liquidator of), supra*, the bank provided cash in the amount of $30,000 to a trust company, in exchange for a cheque in the same amount. Winding up proceedings were subsequently commenced, and the bank brought an action claiming the liquidator held the monies in trust as constructive trustee. In holding that the existence of a debtor-creditor relationship was sufficient justification for the enrichment, Gerein J. held at p. 131:

> In short, a debtor and creditor relationship was created. As I see it, the transaction in its essence was like unto other commercial transactions. Like many of those, this transaction went bad; but that fact does not justify setting aside the transaction. To do so would have the result of seriously infringing upon the efficacy of contracts as a whole. The avoidance of this potential result is good juristic reason to permit the enrichment.

And later at p. 133:

> I hold the view that the plaintiff and defendant are parties to a creditor-debtor relationship. It is not unjust in law to hold the plaintiff to that status with the attendant consequences. To do otherwise would have no basis in law and would cause wrongful harm to other creditors.

64 In *Royal Bank* the court was asked to set aside the transaction. That is not so in the instant case.

65 In response to the submissions of Brown & Collett, Hay asserts that the mere existence of a contractual debtor-creditor relationship is not necessarily a bar to a finding of unjust enrichment, and points to several recent cases which have reached such a conclusion within the context of a debtor-creditor relationship. In *Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of)* (1991), 3 O.R. (3d) 129 (Gen. Div.), the claimants were real estate salespersons who worked as independent contractors for a bankrupt brokerage firm. The salespersons brought a claim for unjust enrichment in respect of commissions they had earned but not been paid. In allowing the claim, Killeen J. held that it was in fact the very contract with the brokerage firm which elevated the plaintiffs' status from that of a mere employee, relied on the terms of the contract to demonstrate the absence of juristic reason for the enrichment. He stated at p. 142:

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Butera et al. v. Chown, Cairns LLP et al.
[Indexed as: Butera v. Chown, Cairns LLP]

Ontario Reports

Court of Appeal for Ontario,

Juriansz, Pepall and B.W. Miller JJ.A.

October 13, 2017

137 O.R. (3d) 561 | 2017 ONCA 783

2017 ONCA 783 (CanLII)

Case Summary

Appeal — Grounds — Appellant franchisee suing franchisor for damages for misrepresentation — Motion judge A granting defendant's motion for summary judgment on basis that action was statute-barred and making obiter finding that there was no misrepresentation — Court of Appeal dismissing appellant's appeal on limitations ground and not addressing misrepresentation issue — Appellant suing his own lawyers for solicitors' negligence and lost opportunity damages — Motion judge B erring in granting partial summary judgment dismissing claim relating to misrepresentation on basis that appellant did not appeal motion judge A's misrepresentation finding and therefore there could be no missed opportunity — Appeal from motion judge A's judgment including appeal from misrepresentation finding.

Civil procedure — Summary judgment — Partial summary judgment — Motion for partial summary judgment appropriate only in rare cases where issue or issues may be readily bifurcated from those in main action and dealt with expeditiously and in cost-effective manner.

The appellant, a franchisee, sued the franchisor for damages for breach of contract, misrepresentation, negligence and breaches of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3. The franchisor moved for summary judgment on the basis that the two-year limitation period had expired. The appellant conceded that the applicable limitation period was two years. The motion judge ("motion judge A") granted the motion and dismissed the action as statute-barred. In *obiter*, he determined that there was no misrepresentation. The appellant appealed. Among other grounds of appeal, the appellant argued for the first time that the applicable limitation period was six years. The franchisor moved successfully to strike that ground of appeal on the basis that it had not been advanced before motion judge A. The Court of Appeal dismissed the appeal on the basis that the action was barred by the two-year limitation period. The court did not address the misrepresentation issue. The appellant then sued the respondents, his lawyers in the original action, for negligence, claiming that in the original action, the respondents had failed to take the position that a six-year limitation period applied, with the result that the appellant had lost the opportunity to argue the merits of his claims in negligence, misrepresentation, breach of contract and breaches of the Act. The respondents moved successfully for partial summary judgment dismissing that portion of the

will proceed to trial in any event. Such partial summary judgment runs the risk of duplicative proceedings or inconsistent facts. On the other hand, Karakatsanis J. noted [at para. 60] that the "resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach".

[26] The pre-*Hryniak* appellate jurisprudence on partial summary judgment limited its availability. At para. 3 of *Corchis v. KPMG Peat Marwick Thorne*, [2002] O.J. No. 1437, 2002 CanLII 41811 (C.A.), this court applied *Gold Chance International Ltd. v. Daigle & Hancock*, [2001] O.J. No. 1486, [2001] O.T.C. 266 (S.C.J.) to state that

> partial summary judgment ought only to be granted in the clearest of cases where the issue on which judgment is sought is clearly severable from the balance of the case. If this principle is not followed, there is a very real possibility of a trial result that is inconsistent with the result of the summary judgment motion on essentially the same claim.

[27] Since *Hryniak*, this court has considered partial summary judgment in *Baywood Homes Partnership v. Haditaghi* (2014), 120 O.R. (3d) 438, [2014] O.J. No. 2745, 2014 ONCA 450 and in *Canadian Imperial Bank of Commerce v. Deloitte & Touche* (2016), 133 O.R. (3d) 561, [2016] O.J. No. 6319, 2016 ONCA 922. *Baywood* was decided in the context of a motion for summary [page568] judgment on all claims, but where only partial summary judgment was granted. CIBC involved a motion for partial summary judgment.

[28] In both *Baywood* and *CIBC*, the court analyzed the issue from the perspective of whether (i) there was a risk of duplicative or inconsistent findings at trial; and (ii) whether granting partial summary judgment was advisable in the context of the litigation as a whole. In both cases, the court held that partial summary judgment was inadvisable in the circumstances.

[29] The caution expressed pre-*Hryniak* in *Corchis* is equally applicable in the post- *Hryniak* world. In addition to the danger of duplicative or inconsistent findings considered in *Baywood* and *CIBC*, partial summary judgment raises further problems that are anathema to the stated objectives underlying *Hryniak*.

[30] First, such motions cause the resolution of the main action to be delayed. Typically, an action does not progress in the face of a motion for partial summary judgment. A delay tactic, dressed as a request for partial summary judgment, may be used, albeit improperly, to cause an opposing party to expend time and legal fees on a motion that will not finally determine the action and, at best, will only resolve one element of the action. At worst, the result is only increased fees and delay. There is also always the possibility of an appeal.

[31] Second, a motion for partial summary judgment may by very expensive. The provision for a presumptive cost award for an unsuccessful summary judgment motion that existed under the former summary judgment rule has been repealed, thereby removing a disincentive for bringing partial summary judgment motions.

[32] Third, judges, who already face a significant responsibility addressing the increase in summary judgment motions that have flowed since *Hryniak*, are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action.

2017 ONCA 783 (CanLII)

[33] Fourth, the record available at the hearing of a partial summary judgment motion will likely not be as expansive as the record at trial, therefore increasing the danger of inconsistent findings.

[34] When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in [page569] a cost-effective manner. Such an approach is consistent with the objectives described by the Supreme Court in *Hryniak* and with the direction that the Rules be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[35] Lastly, I would observe the obvious, namely, that a motion for partial summary judgment differs from a motion for summary judgment. If the latter is granted, subject to appeals, it results in the disposal of the entire action. In addition, to the extent the motion judge considers it advisable, if the motion for summary judgment is not granted but is successful in part, partial summary judgment may be ordered in that context.

[36] Turning then to the substance of the second ground of appeal, the appellants submit that granting partial summary judgment on the misrepresentation issue provides minimal, if any, efficiency as the action is proceeding to trial on the negligence, breach of contract and *Arthur Wishart Act* claims. The misrepresentation claims are largely intertwined with these other claims and partial summary judgment risks inconsistent results.

[37] The respondents reject these submissions, arguing that rule 20.05(1) recognizes the utility of partial summary judgment. The motion judge's decision is entitled to deference and was appropriate for the litigation as a whole.

[38] As explained in *Hryniak*, the exercise of powers under the summary judgment rule generally attracts deference. Here the motion judge made an extricable error in principle in failing to consider whether partial summary judgment was appropriate in the context of the litigation as a whole. As the appellants point out, the action is proceeding to trial on the *Arthur Wishart Act* claims, which include allegations of a breach of the duty of fair dealing and deficient disclosure, the claims in negligence and for breach of contract. These claims are intertwined with the misrepresentation claims. An award of partial summary judgment in these circumstances may lead to inconsistent results to the extent the misrepresentation claims were not barred due to a limitation period. On the other hand, had the litigation as a whole been considered, partial summary judgment would not have been an appropriate award as it would not serve the objectives of proportionality, efficiency and cost effectiveness.

Disposition

[39] For these reasons, I would allow the appeal and set aside the award of partial summary judgment. I would order the respondents to pay $12,500 in costs of the appeal on a partial [page570] indemnity scale, inclusive of fees, disbursements and applicable tax. I would set aside the costs of $25,000 awarded by the motion judge to the respondents and, in the absence of agreement between the parties which is encouraged, remit the costs to him to reconsider in light of this decision.

2017 ONCA 783 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coast Capital Savings Credit Union v. The Symphony Development Corporation,* 2014 BCSC 400

Date: 20140312
Docket: H091522
Registry: Vancouver

Between:

Coast Capital Savings Credit Union

Petitioner

And

The Symphony Development Corporation, Gurmel Singh Kainth, Shminder Johal, 497308 B.C. Ltd., 0769932 B.C. Ltd., Emco Corporation, Pacific Utility Contracting Ltd., Unlimited Excavating & Landscaping Ltd., Jack Cewe Ltd., C & C Trucking (1988) Ltd., Ocean Construction Supplies Limited, Nora Rosalie Marvin, Bassi Brothers Framing Ltd., United Rentals of Canada Inc., McRae's Environmental Services Ltd., Graestone Ready Mix Inc., Valley Geotechnical Engineering Services Ltd., D.K. Bowins & Associates Inc., Vancouver City Savings Credit Union

Respondents

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Applicant, 497308 B.C. Ltd.:	G.R. Johnson
Counsel for the remaining Respondents:	R.A. Millar
Place and Dates of Hearing:	Vancouver, B.C. November 12, 2013 February 19, 2014 March 5, 2014
Place and Date of Judgment:	Vancouver, B.C. March 12, 2014

2014 BCSC 400 (CanLII)

[46] In *Melchior v. Pricewaterhouse Coopers*, 2007 BCSC 136 at paras. 84-85, Masuhara J. cited *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (at para. 34) and *Peter* (at 1023) for the proposition that while it may be inappropriate to impose a constructive trust where *bona fide* third party rights would be affected, a constructive trust may be imposed where there is no unfair or unjust effect on third parties.

[47] The judge hearing the claim *de novo* may conclude that prejudice to a third party secured creditor does not arise on the facts of this case because Bassi Brothers took its secured interest with full knowledge of the existence of the claim advanced by 497308, and in particular, its claim to a priority interest in the Property as a result of its CPL that had been filed against title per s. 31 of the *Land Title Act*. As a result, application of that section of the *Land Title Act* and the dicta of the Court of Appeal in *Ellingsen* (at para. 35) would mean that any failure by 497308 to obtain security for the performance of the obligation to pay for the water system in the Cost Sharing Agreement would not be a bar to recovery.

[48] Finally, it is open to the court to conclude that a damages award is not appropriate in this case, especially given the insolvency of Symphony: *Peter* at 999; *Tracy* at 23. The prospect of 497308 collecting on any judgment against RCB is not something that was identified on this application.

[49] In summary, resolution of the clear conflicts in the evidence in the manner characterized by 497308 could lead the judge hearing the case *de novo* to find that a constructive trust should be imposed, giving 497308 priority over Bassi Brothers. This case could be seen as one of those extraordinary cases, as was mentioned by the Ontario Court of Appeal in *Credifinance* (ONCA), requiring a constructive trust remedy to be imposed in an insolvency proceeding:

> 33 There is no question that the remedy of constructive trust is expressly recognized in bankruptcy proceedings. Both the case law and authors of texts make this clear, although the test for proving the existence of a constructive trust in a bankruptcy setting is high: L.W. Houlden & Geoffery Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: WL Can, 2011) at Fs. 5(1). The authors add this at Fs. 5(8): “A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent

2014 BCSC 400 (CanLII)

> him or her from being unjustly enriched by profiting from his or her wrongful conduct" (citations omitted).
>
> 34 *Ascent*, a case decided by an Ontario Registar in Bankruptcy, is a case that demonstrates the type of circumstances that can make a case extraordinary. I found this case to be very instructive.
>
> 35 The Registrar in *Ascent* held that in its role as the arbiter of commercial morality, the Bankruptcy Court can rely on equitable principles, "even at the expense of the formulaic aspects of the BIA scheme of distribution": para. 17.

[50] Accordingly, it is my opinion that the claim should be determined at a hearing *de novo*, where each party is able to call its own evidence and test the evidence of the other. I have determined that the most appropriate means to determine the claim is to have the issues heard at the same time as the trial of the Recovery Action, which is set to proceed in January 2015, subject to the directions of the trial judge. This will avoid the risk of inconsistent findings of fact and credibility and will promote judicial economy and economy for all of the parties. Many of the witnesses who have provided evidence on this application will be witnesses at that trial. There is commonality of many documents. Most importantly, many of the factual, legal, and credibility issues to be determined are the same. As a practical matter, the decision of the trial judge will determine the outcome of the funds held in trust by FMD. Accordingly, the stay against Symphony will be lifted in action number VA S086722. The funds held by FMD shall remain in trust pending the outcome of the Recovery Action or by further court order.

[51] One of the concerns expressed by Symphony during the hearing of this application is that Symphony may well be an empty chair defendant during the trial of the Recovery Action should the stay be lifted, to the prejudice of Bassi Brothers. There is no issue that the dispute in this insolvency is the priority between 497308 and Bassi Brothers; Symphony has no other assets or funds. For that reason, it is only appropriate to allow Bassi Brothers to defend the claim in the Recovery Action on behalf of Symphony if it chooses to do so.

[52] In the event 497308, Symphony, or Coast Capital require directions or assistance in arranging to have the issue tried before the trial judge hearing the

2014 BCSC 400 (CanLII)

CITATION: Credifinance Securities Limited v. DSLC Capital Corp., 2011 ONCA 160
DATE: 20110302
DOCKET: C51766

COURT OF APPEAL FOR ONTARIO

Goudge, Sharpe and LaForme JJ.A.

In the Matter of the Bankruptcy of Credifinance Securities Limited, of the City of Toronto, in the Province of Ontario

BETWEEN

Deloitte & Touche Inc.,
in its Capacity as Trustee in Bankruptcy of
Credifinance Securities Limited

Appellant

and

DSLC Capital Corp.

Respondent

Catherine Francis, for the appellant

Gregory Sidlofsky, for the respondent

Heard: January 7, 2011

On appeal from the order of Justice F. N. Marrocco of the Superior Court of Justice, dated February 16, 2010, with reasons reported at 63 C.B.R. (5th) 250.

2011 ONCA 160 (CanLII)

DSLC to bypass the BIA. Her view was – as it continues to be – that in bankruptcy proceedings, there is no special status accorded to a victim of a fraud.

2011 ONCA 160 (CanLII)

[32] Second, she fairly conceded – again as she does here – that constructive trust principles can be applied in bankruptcy proceedings, however, those principles are applied only in the most extraordinary cases. She relies on *Ascent Ltd. (Re)* (2006)*,* 18 C.B.R. (5th) 269 (Ont. S.C.) as illustrating such a case. Indeed, in her oral submissions, counsel conceded that a trustee could, albeit in extraordinary circumstances, find a *de facto* constructive trust by allowing the property claim, or otherwise refer the issue for a hearing before a Bankruptcy Registrar or judge of the Superior Court.

[33] There is no question that the remedy of constructive trust is expressly recognized in bankruptcy proceedings. Both the case law and authors of texts make this clear, although the test for proving the existence of a constructive trust in a bankruptcy setting is high: L.W. Houlden & Geoffrey Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: WL Can, 2011) at F§5(1). The authors add this at F§5(8): "A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct" (citations omitted).

[34] *Ascent,* a case decided by an Ontario Registrar in Bankruptcy, is a case that demonstrates the type of circumstances that can make a case extraordinary. I found this case to be very instructive.

2011 ONCA 160 (CanLII)

[35] The Registrar in *Ascent* held that in its role as the arbiter of commercial morality, the Bankruptcy Court can rely on equitable principles, "even at the expense of the formulaic aspects of the BIA scheme of distribution": para. 17.

[36] An example of commercial immorality is described in *Ascent* as being where a bankrupt and its creditors benefit from misconduct by the bankrupt which was the basis upon which the property was obtained. The Registrar held that to permit an estate to retain the property in such circumstances amounts to an unjust enrichment, and the court can impose a constructive trust on an estate's assets to remedy the injustice. Furthermore, "it matters not which assets are consumed to remedy this": para. 18.

[37] Thus, a constructive trust in bankruptcy proceedings can be ordered to remedy an injustice; for example, where permitting the creditors access to the bankrupt's property would result in them being unjustly enriched. The prerequisite is that the bankrupt obtained the property through misconduct. The added necessary feature is that it would be unjust to permit the bankrupt and creditors to benefit from the misconduct.

[38] A Trustee in bankruptcy is an officer of the court and must act in an equitable manner. Enriching creditors with a windfall and depriving another of its interest in property, has been held to be an offence to natural justice. As Karakatsanis J. (as she then was) held at para. 14 in *Elez (Re)* (2010), 54 E.T.R. (3d) 31 (Ont. S.C.), "The court will not allow the trustee, as an officer of the court, to stand on his legal rights if to do so would offend natural justice" (citations omitted).

Gold *v*. Rosenberg, [1997] 3 S.C.R. 767

Jeffrey Lorne Gold *Appellant*

v.

Primary Developments Limited and
The Toronto-Dominion Bank *Respondents*

Indexed as: Gold *v*. Rosenberg

File No.: 25064.

1997: May 21; 1997: October 30.

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

on appeal from the court of appeal for ontario

Trusts and trustees -- Breach of trust -- Liability of strangers to trust -- Knowing assistance -- Knowing receipt -- Customer giving bank loan guarantee supported by collateral mortgage on trust property -- Whether bank knowingly assisted in breach of trust -- Whether bank liable for knowing receipt of trust property -- Whether bank received trust property for its own use and benefit -- Whether bank in breach of its duty to inquire.

A testator died in 1985 and named his son, R, and his grandson, the appellant G, as executors and equal beneficiaries of the residue of his estate. The assets of the

1997 CanLII 333 (SCC)

52 Harpum discusses the policy considerations which support the application of a stricter standard on strangers in receipt of trust property than that applied to strangers who assist in a breach of trust (at pp. 126-27):

> In such a case [of knowing receipt], the conflict between the beneficiary and the stranger is at its most acute, because the court has in effect to determine which of them has the better title to the trust property. The winner takes all and the loser is left with a claim against the trustee that is likely to be worthless. Because the beneficiary stands to lose outright his beneficial interest, equity is at her most demanding, and insists upon compliance with her most exacting standard.
>
> In all other cases, a stranger should be liable only if he had actual knowledge of, or wilfully closed his eyes to, the terms of the trust, or as the case may be, to the dishonest and fraudulent design on the part of the trustee. No question as to the title of the trust property is in issue. . . . In cases of knowing inducement and assistance, the stranger may never have received any part of the trust property. . . . In cases of knowing assistance, the emphasis on participation by the stranger in the fraud of the trustee necessarily implies that the stranger will be liable only is he acts in bad faith. [Emphasis added.]

53 Therefore, to conclude my discussion of the applicable legal principles, in order to recover the disputed property, the plaintiff must prove the following:

(1) That the property was subject to a trust in favour of the plaintiff;

(2) That the property, which the defendant received, was taken from the plaintiff in breach of trust; and

(3) That the defendant did not take the property as a *bona fide* purchaser for value without notice. The defendant will be taken to have notice if the circumstances were such as to put a reasonable person on inquiry, and

1997 CanLII 333 (SCC)

> the defendant made none, or if the defendant was put off by an answer which would not have satisfied a reasonable person.

1997 CanLII 333 (SCC)

54 Before turning to consider whether the guarantee in question was subject to a trust in favour of the plaintiff, I must first address the respondent's argument that the principles of knowing receipt are inapplicable to the present case, because the Bank never received any trust assets. Specifically, the Bank contended that the guarantee itself is not property and that, accordingly, in receiving the guarantee, the Bank did not acquire any property which could be the subject of a knowing receipt claim. I do not agree with this argument. There is some commentary which suggests that a guarantee does not constitute security of a proprietary nature since it is contract security and unlike a mortgage or pledge (K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996), at p. 5). However, on the facts of this case, when the Bank obtained the guarantee from Primary, it also acquired, as found by Haley J., a $1.2 million collateral mortgage on real estate belonging to Primary in support of the guarantee. As such, the Bank received both a contractual undertaking to assume the obligations of Trojan in the event of its default, and security of a proprietary nature in support of that undertaking. The mortgage, as security for the guarantee, conferred on the Bank a proprietary interest in the trust property. The guarantee provided by Primary, supported by a collateral mortgage over property owned by Primary, in my view, constitutes property which can be made the subject of a knowing receipt claim. Even if one takes the position that the guarantee does not constitute trust property, the giving of the guarantee confers a valuable benefit on the Bank and correspondingly encumbers the estate and detracts from its value. The benefit conferred on the Bank and the resulting loss in value suffered by the estate are sufficient, in my view, to bring the guarantee within the knowing receipt category of liability.

COURT OF APPEAL FOR ONTARIO

CITATION: Hitti v. Maranello Sports Inc. (Ferrari of Ontario),
2023 ONCA 633
DATE: 20230925
DOCKET: M54360 & M54435 (COA-23-CV-0295)

2023 ONCA 633 (CanLII)

Gillese, Trotter and Coroza JJ.A.

BETWEEN

Ronald Hitti and 285 Spadina SPV Inc.

Applicants (Appellants/Responding Parties)

and

Maranello Sports Inc. o/a Ferrari of Ontario

Respondent (Respondent/Moving Party)

Ronald Hitti, acting in person

David A. Brooker, for the moving party

Heard: September 18, 2023

REASONS FOR DECISION

Overview

[1] Maranello Sports Inc. o/a Ferrari of Ontario (the "Respondent") brings two motions to this court.

2023 ONCA 633 (CanLII)

The First Motion is Granted

[14] For various reasons, it appears that Mr. Hitti never was an officer or director of 285. In any event, the February 2023 Order stripped him of any authority to act on behalf of 285. Accordingly, he had no authority to commence or continue the appeal on its behalf.

[15] The current management of 285 does not wish to continue with the appeal. Even if the appeal were successful, the management of 285 has indicated that 285 will not pay for the Vehicle nor take possession of it. The Agreement was for 285 to take title to the Vehicle. Accordingly, the appeal is moot, clearly without merit, and must be dismissed.

[16] The Consent Order is set aside pursuant to r. 59.06(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, because of fraud or facts the Respondent discovered after it was made. Mr. Hitti knew of the February 2023 Order when the Consent Order was being negotiated. He hid its existence from the Respondent and his own lawyer. Had the Respondent been aware of the February 2023 Order, it would not have entered into the Consent Order. Clearly, the Consent Order must be set aside.

Disposition

[17] For these reasons, both the First Motion and the Second Motion are granted. An order shall go striking the notice of appeal in this matter, dismissing the within

COURT OF APPEAL FOR ONTARIO

CITATION: Mason v. Perras Mongenais, 2018 ONCA 978
DATE: 20181205
DOCKET: C65236

2018 ONCA 978 (CanLII)

Watt, Miller and Nordheimer JJ.A.

BETWEEN

Michael Mason

Plaintiff (Appellant)

and

Perras Mongenais, Blumberg Segal LLP and Scott D. Chambers

Defendants (Respondent)

Jeffrey Radnoff and Charles Haworth, for the appellant

Michael R. Kestenberg and Aaron Hershtal, for the respondent Perras Mongenais

Susan Sack and Jenny Bogod, for Blumberg Segal LLP and Scott D. Chambers[1]

Heard: November 15, 2018

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice, dated March 6, 2018, with reasons reported at 2018 ONSC 1477.

Nordheimer J.A.:

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[1] While counsel for Blumberg Segal LLP and Scott D. Chambers appeared on the appeal, they did not file any material nor did they participate in the hearing.

2018 ONCA 978 (CanLII)

[23] The potential liability of the respondent to the appellant is not an issue that can be readily bifurcated from the rest of the appellant's claim. The nature of the appellant's claim is such that it is inextricably linked to the claim against the other defendants, especially Chambers. Indeed the motion judge appears, at one point, to recognize this problem when he says, at para. 99:

> I recognize that nothing is certain and there are risks of both duplication and that a judge could look at the same undisputed facts that I have reviewed and possibly see them differently.

[24] There are serious issues raised in this case about the duties of a lawyer in advising his/her client. Principal among those is whether a lawyer can rely on another lawyer as a conduit for providing advice to a client. One crucial fact in this case is that the respondent's client was the appellant. It was not Chambers.

[25] Perras' professional obligations had two aspects. One was to ensure that his advice was correct. There does not appear to be any dispute that Perras' advice about the tax implications for the appellant personally buying his ex-spouse's shares was correct. The other was to ensure that the advice was communicated to, and properly understood by, his client. At least on the appellant's view of the matter, that did not occur.

[26] There is some authority for this second aspect of a lawyer's professional obligations in a case referred to by the motion judge, namely, *Turi v. Swanick* (2002), 61 O.R. (3d) 368 (S.C.). In that case, Spiegel J. said, at p. 390:

Michelle Constance Moore *Appellant*

v.

Risa Lorraine Sweet *Respondent*

INDEXED AS: MOORE *v.* SWEET

2018 SCC 52

File No.: 37546.

2018: February 8; 2018: November 23.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Equity — Restitution — Unjust enrichment — Remedy — Constructive trust — Husband and wife separating and entering into contractual agreement pursuant to which wife will pay husband's life insurance policy premiums in order to remain named sole beneficiary of policy — Husband subsequently naming new common law spouse as beneficiary without wife's knowledge — Insurance proceeds payable to common law spouse on husband's death despite wife having continued to pay premiums — Whether common law spouse unjustly enriched at wife's expense — If so, whether constructive trust is appropriate remedy.

Insurance — Life insurance — Beneficiary designation — Wife designated as revocable beneficiary of husband's life insurance policy — After separation, wife agreeing to continue to pay policy premiums to maintain beneficiary designation — Husband subsequently designating new common law spouse as irrevocable beneficiary without wife's knowledge — Insurance proceeds payable to common law spouse on husband's death — Whether designation of common law spouse as irrevocable beneficiary in accordance with statute precludes recovery for wife with prior claim to benefit of policy — Insurance Act, R.S.O. 1990, c. I.8, ss. 190, 191.

During L and M's marriage, L purchased a term life insurance policy and designated M as revocable beneficiary. They later separated, and entered into an oral agreement whereby M would pay all of the policy premiums and, in

Michelle Constance Moore *Appelante*

c.

Risa Lorraine Sweet *Intimée*

RÉPERTORIÉ : MOORE *c.* SWEET

2018 CSC 52

N° du greffe : 37546.

2018 : 8 février; 2018 : 23 novembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

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

Equity — Restitution — Enrichissement sans cause — Réparation — Fiducie par interprétation — Conclusion par un époux et une épouse d'une entente contractuelle à la suite de leur séparation aux termes de laquelle l'épouse paiera les primes de la police d'assurance-vie de l'époux afin de demeurer la seule bénéficiaire de la police — Désignation subséquente par l'époux de sa nouvelle conjointe de fait comme bénéficiaire à l'insu de l'épouse — Produit de l'assurance payable à la conjointe de fait au décès de l'époux même si l'épouse a continué de payer les primes — La conjointe de fait s'est-elle enrichie sans cause au détriment de l'épouse? — Dans l'affirmative, une fiducie par interprétation est-elle une réparation convenable?

Assurances — Assurance-vie — Désignation à titre de bénéficiaire — Épouse désignée à titre de bénéficiaire révocable de la police d'assurance-vie de son époux — Épouse consentant, après la séparation, à continuer de payer les primes de la police afin de maintenir son statut de bénéficiaire — Désignation subséquente par l'époux de sa nouvelle conjointe de fait comme bénéficiaire irrévocable à l'insu de l'épouse — Produit de l'assurance payable à la conjointe de fait au décès de l'époux — La désignation de la conjointe de fait comme bénéficiaire irrévocable en conformité avec la loi fait-elle obstacle au recouvrement en faveur de l'épouse ayant un droit antérieur au bénéfice de la police? — Loi sur les assurances, L.R.O. 1990, c. I.8, art. 190, 191.

Durant le mariage de L et de M, L a souscrit une police d'assurance-vie temporaire et désigné M comme bénéficiaire révocable. Ils se sont séparés par la suite, et ont conclu une entente verbale aux termes de laquelle M

2018 SCC 52 (CanLII)

remedy which, according to Dickson J. (as he then was),

> is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine beneficial entitlement.

(*Pettkus*, at pp. 843-44)

[91] While the constructive trust is a powerful remedial tool, it is not available in *all* circumstances where a plaintiff establishes his or her claim in unjust enrichment. Rather, courts will impress the disputed property with a constructive trust only if the plaintiff can establish two things: first, that a personal remedy would be inadequate; and second, that the plaintiff's contribution that founds the action is linked or causally connected to the property over which a constructive trust is claimed (*PIPSC*, at para. 149; *Kerr*, at paras. 50-51; *Peter*, at p. 988). And even where the court finds that a constructive trust would be an appropriate remedy, it will be imposed only to the extent of the plaintiff's proportionate contribution (direct or indirect) to the acquisition, preservation, maintenance or improvement of the property (*Kerr*, at para. 51; *Peter*, at pp. 997-98).

[92] The application judge concluded that Michelle had established an entitlement to the entirety of the proceeds of the life insurance policy on the basis of unjust enrichment, and he accordingly ordered that Risa held those proceeds on constructive trust for Michelle (para. 52). He specifically found that Michelle had demonstrated a "clear 'link or causal connection' between her contributions and the proceeds of the Policy that continued for the entire duration of the Policy" (para. 50).

[93] While my analysis of Michelle's right to recover for unjust enrichment differs from that of

répandue et la plus importante pour remédier à l'enrichissement sans cause est la fiducie par interprétation — une réparation qui, selon le juge Dickson (plus tard juge en chef),

> est imposé[e] indépendamment de l'intention de créer une fiducie, et son but est de remédier à un résultat autrement injuste. C'est un outil général, souple et juste qui permet aux tribunaux d'apprécier toutes les circonstances de l'espèce, y compris les contributions respectives des parties, et de déterminer le droit de propriété véritable.

(*Pettkus*, p. 843-844)

[91] Bien que la fiducie par interprétation soit un puissant outil de réparation, on ne peut l'accorder dans *toutes* les circonstances où le demandeur établit le bien-fondé de son allégation d'enrichissement sans cause. En fait, les tribunaux n'assujettiront le bien contesté à une fiducie par interprétation que si le demandeur peut établir deux choses : premièrement, qu'une réparation personnelle serait insuffisante; et deuxièmement, que la contribution du demandeur à la base de l'action a un lien ou un rapport de causalité avec le bien qui serait grevé d'une fiducie par interprétation (*IPFPC*, par. 149; *Kerr*, par. 50-51; *Peter*, p. 988). Et même lorsque le tribunal estime qu'une fiducie par interprétation serait une réparation convenable, elle ne sera imposée que dans la mesure de la contribution proportionnelle du demandeur (directe ou indirecte) à l'acquisition, la conservation, l'entretien ou l'amélioration du bien (*Kerr*, par. 51; *Peter*, p. 997-998).

[92] Le juge de première instance a conclu que Michelle avait établi avoir droit à l'intégralité du produit de la police d'assurance-vie sur le fondement de l'enrichissement sans cause, et, par conséquent, il a ordonné à Risa de détenir ce produit en fiducie par interprétation pour le compte de Michelle (par. 52). Il a précisément conclu que Michelle avait démontré [TRADUCTION] « un "lien ou un rapport de causalité" clair entre ses contributions, qui ont continué pendant toute la durée de la police, et le produit de la police » (par. 50).

[93] Même si mon analyse du droit de Michelle au recouvrement pour remédier à l'enrichissement sans

2018 SCC 52 (CanLII)

CITATION: 1705371 Ontario Ltd. v. Leeds Contracting Restoration Inc., 2018 ONSC 7423
COURT FILE NO.: CV-17-583838
DATE: 20181211

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1705371 ONTARIO LTD. carrying on business as B & A MASONRY, Plaintiff

AND:

LEEDS CONTRACTING RESTORATION INC. and PETER DURIC
Defendants

BEFORE: Cavanagh J.

COUNSEL: *William Ribeiro*, for the Plaintiff

Sakina Babwani, for the Defendants

HEARD: November 23, 2018

2018 ONSC 7423 (CanLII)

ENDORSEMENT

Introduction

[1] The plaintiff noted the defendants in default on November 28, 2017 and obtained default judgment from the registrar against the defendant Leeds Contracting Restoration Inc. ("Leeds"). The plaintiff then moved for default judgment against the defendant Peter Duric. The defendants were served with the motion materials at the direction of McArthur J.

[2] Following receipt of the motion materials, the defendants brought a cross-motion to set aside the default judgment against Leeds and the noting in default against both defendants.

[3] The plaintiff's motion for default judgment against Mr. Duric was also before me.

[4] For the following reasons, the defendants' motions to set aside the default judgment against Leeds and the noting in default against both defendants is dismissed. The plaintiff's motion for default judgment against Mr. Duric is granted.

Procedural Background

[5] The plaintiff commenced this action by statement of claim issued on October 3, 2017. The plaintiff claims payment of the sum of $64,497.03 from the defendants representing the balance owing on an invoice that was sent under a verbal agreement whereby the plaintiff agreed to supply labour for installation of brick masonry to Leeds for construction of new subdivision homes on three lots in Kitchener, Ontario. The plaintiff also claims a declaration that all amounts paid to Leeds and all amounts owing to or received by Leeds on account of these contracts

The relevance of the questions that were taken under advisement was explained on the record. If the true state of affairs was that Mr. Duric does not stay with friends several nights a week, the credibility of his evidence that he did not receive the statement of claim until May 26, 2018 would be significantly undermined. The questions that were refused were clearly proper, and the decision to maintain the refusals, even after taking them "under advisement", was unjustified.

[27] Rule 34.15(1) of the *Rules of Civil Procedure* provides that where a person refuses to answer any proper question on a cross-examination, the court may (a) require the person to re-attend and answer the question, (b) where the person is a party, dismiss the party's proceeding or strike out the party's defence, (c) strike out all or part of the person's evidence, including any affidavit made by the person, and (d) make such other order as is just.

[28] The plaintiff submits that I should draw an adverse inference from the refusal by Mr. Duric to answer this question.

[29] The defendants submit that no adverse inference should be drawn. The defendants rely upon the fact that the plaintiff requested an adjournment of these motions in order to bring a motion to compel answers to refusals on the cross-examination of Mr. Duric, and that the plaintiff's counsel advised on September 10, 2018 that the plaintiff would not go forward with a motion to compel answers to undertakings and refusals. Counsel for the defendants submitted that, having decided not to proceed with a motion to compel answers to refusals, the plaintiff is precluded from asking the court to draw an adverse inference from the refusals to answer proper questions.

[30] I disagree with the defendants' submissions. The questions that were asked and taken under advisement were clearly proper and directed to a relevant matter, that Mr. Duric had put into issue in his affidavit. The plaintiff had no obligation to move to compel answers to proper questions that were refused. In this regard, see *Snelgrove v. Steinberg Inc.*, 1995 CarswellOnt 1222 (C.A.) at para. 53. By choosing not to so move, the plaintiff did not acknowledge that the refusals were justified.

[31] In *236523 Ontario Inc. v. Nowack*, (2013), 235 Brown J. (as he then was) held at para. 28 that a court, on motion, may draw adverse inferences against a party who fails to comply with production and discovery obligations. The same reasoning applies where a proper question asked during cross-examination on an affidavit is refused. I am entitled to draw an adverse inference from Mr. Duric's refusal to answer proper questions on his cross-examination.

[32] In the circumstances of this case, I draw an adverse inference against Mr. Duric because of his refusal to answer proper questions when he was cross-examined and when he refused to answer the questions that were taken under advisement. The evidence to which the questions were directed was given to support Mr. Duric's evidence that he did not receive the statement of claim on or about October 16, 2017. This evidence was necessary to explain Mr. Duric's conduct in support of the defendants' motion to set aside the consequences of their default. I infer that the answers would have exposed facts that are unfavourable to the merits of the defendants' motion.

2018 ONSC 7423 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pemberton Music Festival Limited Partnership (Re),* 2017 BCSC 2398

Date: 20171229
Docket: B170370
Registry: Vancouver

2017 BCSC 2398 (CanLII)

In the Bankruptcy and Insolvency

In the Matter of the Consolidated Bankruptcy of Pemberton Music Festival Limited Partnership and 1115666 B.C. Ltd.5666 B.C. Ltd.

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for Bankrupt and the Applicant:	Mary Buttery H. Lance Williams
Counsel for Trustee:	Kibben M. Jackson Danielle Toigo
Place and Date of Hearing:	Vancouver, B.C. December 1, 2017
Place and Date of Judgment:	Vancouver, B.C. December 29, 2017

> who would give priority to remedial constructive trust beneficiaries. (Footnotes Omitted)

[95] A constructive trust may be imposed, with the consequent disruption of the scheme of distribution under the *BIA*, where it is necessary to remedy debtor misconduct and thereby avoid commercial immorality. In *Ascent Ltd. (Re)*, [2006] O.J. No. 89 (Ont. S.C. In Bankruptcy), the debtor had engaged in misconduct by disobeying a court order to set aside money and to hold that money in trust for the appellant. The Court held Ascent had been unjustly enriched by its misconduct. The Court considered the effect of the imposition of a remedial constructive trust on the general creditors of the estate, but concluded that it was "appropriate to do injustice to the *BIA* in order to do justice to commercial immorality" and to prevent an unjust enrichment (at para. 17).

[96] Here, the applicants must establish misconduct on the part of the debtors in obtaining the ticket sale proceeds that would warrant the imposition of a constructive trust as a matter of good conscience in order to avoid commercial immorality.

[97] The debtors have not engaged in fraud nor have they failed or refused to obey a court order.

[98] The applicants contend the debtors engaged in misconduct by authorizing the sale of tickets to gauge interest in the 2017 Festival when they must have known there was substantial uncertainty about whether the Festival would proceed.

[99] From January through April 2017, the Canadian Investors sought to remove Huka as the Festival producer and to acquire control of the general partner. Huka was unwilling to relinquish its role as the producer of the Festival. By April 20, 2017, following the mediation, 111 B.C. Ltd. replaced Twisted Tree as the new general partner of PMFLP.

[100] Despite the ongoing dispute concerning management and control of the Festival, the Canadian Investors made *bona fide* efforts to proceed with the 2017 Festival. As the Trustee has reported, between April 19 and April 28, 2017, Ticketfly

2017 BCSC 2398 (CanLII)

COURT OF APPEAL FOR ONTARIO

CITATION: Sirius Concrete Inc. (Re), 2022 ONCA 524
DATE: 20220713
DOCKET: C70020

2022 ONCA 524 (CanLII)

Benotto, Zarnett and Sossin JJ.A.

In the Matter of the Bankruptcy of Sirius Concrete Inc. of the City of Waterloo, in the Province of Ontario

Scott Turton, for the appellant Ayerswood Development Corporation

Melinda Vine and Jason DiFruscia, for the respondent BDO Canada Limited, as Trustee for the Estate of Sirius Concrete Inc.

Heard: June 14, 2022

On appeal from the order of Justice Jonathon C. George of the Superior Court of Justice, dated December 14, 2020, with reasons at 2020 ONSC 7733.

REASONS FOR DECISION

Introduction

[1] The appellant, Ayerswood Development Corporation ("Ayerswood"), appeals the order of the bankruptcy judge, made on a motion for directions brought by the respondent, BDO Canada Limited, as trustee in bankruptcy of Sirius Concrete Inc. ("Sirius"). In particular, Ayerswood appeals from those parts of the order by which the bankruptcy judge directed that the amount of $381,578.40 (the "funds") that Ayerswood paid to Sirius on March 1, 2019, one business day before Sirius made an assignment into bankruptcy on March 4, 2019, forms part of the bankrupt estate of Sirius and is to be distributed to its creditors.

Ayerswood's evidence as true, as a matter of law no trust claim could possibly succeed.

[12] A motion for directions with a summary procedure would be appropriate to resolve the issue of entitlement to the funds as between the bankrupt estate and Ayerswood if it could have been determined, as a matter of law, that taking Ayerswood's allegations as true, Ayerswood could not possibly establish a proprietary entitlement to the funds.

[13] As to the correctness of the disposition, however, the bankruptcy judge did not cite any authority for his conclusion that Ayerswood's evidence, taken as true, could not possibly establish a trust, and in our respectful view it was incorrect.

[14] Property of the bankrupt divisible among creditors does not include property that the bankrupt holds in trust for any other person: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), s. 67(1)(a). It is well established that unjust enrichment, arising from certain types of debtor misconduct prior to bankruptcy, may impress funds with a constructive trust in favour of a third party and that the successful assertion of a constructive trust means that the property subject to it does not form part of the property of the bankrupt that vests in the trustee under s. 71 of the *BIA*: *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, 277 O.A.C. 377, at paras. 33-37.

2022 ONCA 524 (CanLII)

COURT OF APPEAL FOR ONTARIO

CITATION: Wescom Solutions Inc. v. Minetto, 2019 ONCA 251
DATE: 20190401
DOCKET: C64415

van Rensburg, Hourigan and Huscroft JJ.A.

BETWEEN

Wescom Solutions Inc.

Plaintiff
(Respondent)

and

Nadia Minetto aka Nadia Arsenault,
Eric Yip aka Sam Yip aka Samuel Yip aka Samson Man Chun Yip,
GF International, Gabriel Kit Chun Fung,
Plus One Solutions, John Doe #1 and John Doe #2

Defendants
(Appellants)

John Russo and Dina Milivojevic, for the appellants

Jeffrey Brown and Melissa Wright, for the respondent

Heard: March 25, 2019

On appeal from the judgment of Justice Michael G. Emery of the Superior Court of Justice, dated September 14, 2017.

REASONS FOR DECISION

[1] This appeal seeks to overturn the judgment of the trial judge, holding that the appellant, Gabriel Kit Chun Fung, knew or was wilfully blind to the fraudulent means by which Nadia Minetto obtained iPhones and iPads (the "Apple Products") that he purchased from her between early 2012 and July 2014.

2019 ONCA 251 (CanLII)

2019 ONCA 251 (CanLII)

[9] The respondent submits that the objective analysis was appropriate because this was a knowing receipt case. It is true that knowing receipt can be proven not only by establishing actual knowledge or wilful blindness, but also by establishing "constructive knowledge" using objective criteria. Specifically, knowing receipt can be proven by showing that the defendant: (i) had knowledge of circumstances that would indicate the facts to an honest and reasonable person; or (ii) had knowledge of circumstances that would put an honest and reasonable person on inquiry: *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458, 131 O.R. (3d) 273, at para. 62; see also *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, at paras. 53, 74. However, in this case the agreed issues for the trial judge were whether Mr. Fung had actual knowledge or was willfully blind to the fact that he was purchasing stolen goods or goods fraudulently obtained by Ms. Minetto. The trial judge was not asked to consider whether Mr. Fung as a reasonable person would have been alerted to a potential breach of trust.

[10] The trial judge erred in law in his articulation of the concept of wilful blindness. As stated by this court in *R. v. Malfara* (2006), 211 O.A.C. 200 (C.A.), at para. 2, "Where wilful blindness is in issue, the question is not whether the accused should have been suspicious, but whether the accused was in fact suspicious." In short, a finding of wilful blindness, which is the same standard in criminal and civil proceedings, involves a subjective focus on the workings of a defendant's mind.

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Rules of Civil Procedure, RRO 1990, Reg 194

Amending, Setting Aside or Varying Order
Amending

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding. R.R.O. 1990, Reg. 194, r. 59.06 (1).

Setting Aside or Varying

(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed. R.R.O. 1990, Reg. 194, r. 59.06 (2).

BZAM LTD. et al.
Applicants

-and-

CORTLAND CREDIT LENDING CORPORATION et al.
Respondents

Court File No. CV-24-00715773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

BRIEF OF EXCERPTS FROM AUTHORITIES OF FINAL BELL HOLDINGS INTERNATIONAL LTD.

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