Court File No. CV 12-9896-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BONNIE CUMMINGS IN HER CAPACITY AS ESTATE EXECUTRIX OF THE ESTATE OF THE LATE JOHN CUMMINGS

Applicant

- and –

PEOPLEDGE HR SERVICES INC., WINSTON PARK FINANCIAL SERVICES LTD., CMC FRASER LTD., 1624452 ONTARIO LIMITED

Respondents

BOOK OF AUTHORITIES OF THE RECEIVER (MOTION RETURNABLE JANUARY 14, 2015)

January 5, 2015

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TAB 1

Citation: Campbell, Saunders v. Samtack
2000 BCSC 1316

Date: 20000901
Docket: S001120
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CAMPBELL, SAUNDERS LTD., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF STARTEK COMPUTER INC.

PLAINTIFF

AND:

SAMTACK COMPUTER INC.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HARVEY

(IN CHAMBERS)

Counsel for the Plaintiff:	C.L. Shaley
Counsel for Defendant:	C. Tong
Date and Place of Hearing:	August 30, 2000 Vancouver, B.C.

[1] The plaintiff applies for judgment pursuant to Rule 18A against the defendant Samtack Computer Inc. ("Samtack") in the amount of $20,098.88 plus interest and costs.

[2] Startek Computer Inc. ("Startek") paid the defendant for certain goods, computer equipment, sold by it to Startek with a cheque. That cheque was returned to the defendant for non-sufficient funds.

[3] Startek provided the defendant with a replacement cheque for the goods. The defendant negotiated the replacement cheque.

[4] On June 17 two events occurred. Startek filed a Notice of Intention to Make a Proposal pursuant to the ***Bankruptcy and Insolvency Act,*** R.S.C. 1985, c. B-3 and pursuant to s. 69(2) of the said statute a stay of proceedings was in effect as of June 17, 1999.

[5] On or about June 21, 1999 without the knowledge or consent of Startek or the trustee, the defendant renegotiated the original cheque which was cleared by Startek's bank.

[6] The matter has a history.

[7] On July 6, 2000 the matter came on for hearing before Pitfield J. At that time Samtack claimed that the first

cheque and the replacement cheque were not issued to pay for the same three invoices. Samtack claimed it had evidence that supported its position but that evidence was not before the court. As a result, Pitfield J. ordered Samtack to produce this evidence and the application was adjourned accordingly.

[8] In due course Samtack forwarded copies of the invoices it claims were paid by the first cheque and the replacement cheque.

[9] The issue is framed in counsel for the plaintiff's outline of argument as follows:

> Is Samtack liable to the trustee in the amount of $20,098.88 for cashing both the first cheque and the replacement cheque on the basis that renegotiating the first cheque was a remedy prohibited as a result of the stay of proceedings imposed by section 69(1) of the BIA.

[10] The answer to this question is yes.

[11] The short answer to this application is that Samtack by renegotiating what has been referred to as the First Cheque on or about June 21, 1999, without the knowledge or consent of Startek or the trustee, exercised a remedy and violated the existing stay of proceedings. Further, upon a comparison of the invoices and particularly the further material ordered to be produced by Pitfield J. it is apparent the cheques were

issued to pay for the same three invoices and not as alleged by Samtack invoices in relation to additional goods sold to Startek. In this perspective Samtack was paid twice for the same goods and the same invoices.

[12] I do not accept Samtack's assertion that it has some form of defence based upon the fact it was not aware of the filing and the stay of proceedings referred to *supra*. In this regard in *Gene Moses Construction Ltd.* (1999), B.C.J. No. 141 the Court of Appeal confirms that knowledge of the filing of the Notice of Intention to make a proposal is not necessary for the stay to be effective. It follows that in this case pursuant to the relevant provision of the BIA a stay of proceedings was in effect as of June 17, 1999 and no creditor, including Samtack, had any remedy against it for a claim provable in bankruptcy.

[13] I grant the application for summary judgment in the amount as claimed together with interest and costs on Scale 3.

"R.B. Harvey, J."
The Honourable Mr. Justice R.B. Harvey

TAB 2

CITATION: Jema International v. Scholle Canada, 2013 ONSC 2270
COURT FILE NO.: 02-CV-298897PD3
DATE: 20130417

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Jema International Food Products Inc.	)	*Nawaz Tahir and Brent Hodge,* for the **Plaintiff/Defendant by Counterclaim**
Plaintiff/Defendant by Counterclaim	)	
	)	
– and –	)	
	)	
Scholle Canada Limited	)	***Kelly Smith and Thomas Whillier,* for the Defendant/Plaintiff by Counterclaim**
Defendant/Plaintiff by Counterclaim	)	
	)	
	)	
	)	
	)	**HEARD: March 6-8 and 11, 2013**

MORGAN J.

I. The Question

[1] This three day trial explored the sticky question of how over 1,200 50-gallon containers of tomato sauce spilled in storage. The containers were made of corrugated boxes lined with aseptic bags, comprising a storage system known as the bag-in-box.

[2] In a warm July of 2000, something in the Plaintiff's warehouse went terribly wrong. Was it the bags or was it the boxes?

II. The Parties

[3] The Plaintiff is the owner and operator of a tomato processing plant and storage facility in Leamington, Ontario. According to Michael Mazzaferro, the president of the Plaintiff, Leamington is site of the largest tomato harvesting and processing operations in Canada. It is known as the tomato capital of the country.

[4] The annual tomato harvest and processing season is relatively short. It lasts from the beginning of August to the beginning of October. The Plaintiff processes the newly harvested tomatoes in its Leamington plant, packaging and wholesaling products such as pizza sauce, tomato paste, and crushed tomatoes. The entire manufacturing process has to be done in the short

period from August to October, after which the processed tomato products are stored in the warehouse for sale throughout the coming year.

[5] The Defendant is a pioneer of the bag-in-box storage system. It manufactures aseptic bags that line the inside of the boxes. The bags are not designed to be used alone, but rather are part of the two-part system when used together with corrugated boxes. The Defendant does not make the boxes that go with the aseptic bags, but recommends box manufacturers whom it knows to have products that are compatible with its liner bags.

[6] The Defendant supplied the bags in issue to the Plaintiff. It did not supply the boxes. Further, although a representative of the Defendant has seen and visited the Plaintiff's plant, the Defendant was not involved in any aspect of the Plaintiff's tomato processing, sales, or storage operations.

III. The Spill

[7] In late June and early July 2000, the Plaintiff had several thousand containers of concentrated tomato sauce stored in its warehouse. Mr. Mazzaferro testified that the Plaintiff had produced between 7,000 and 8,000 50 gallon boxes of tomato produce in the 1999-2000 year. The Defendant's invoice shows that the Plaintiff ordered 12,000 liner bags that year. Whatever the precise figure, the Plaintiff clearly had a large number of anticipated orders that year, and the stock of bags and boxes was well above the previous year's order of 5000 container units.

[8] Mr. Mazzaferro was not yet the corporate president of the Plaintiff in 2000, but he was working in the business. He testified that in early July what started as a small problem with leaking boxes of tomato sauce escalated quickly into a major disaster. He described what he called a "domino effect" in which sauce leaked out of the corrugated containers, causing the boxes to explode and the pallets on which they rested in the warehouse to collapse. Contemporaneous photographs in the record show pallets stacked with large corrugated boxes saturated with a dark, thick liquid leaking through the cardboard.

[9] The Plaintiff's plant manager at the time, Jim DiMenna, estimated at his examination for discovery that somewhere around 1,200 boxes of sauce were damaged. The staff tried to re-package the damaged containers in other types of receptacles (tins, jars, etc.), and were able to salvage 500 containers of sauce in that way. The accounting records show that 1,404 boxes were ultimately destroyed.

[10] Plaintiff's management saw red. Mr. Mazzaferro described not only a major financial loss but a serious mess. The cleanup lasted many days, as there were gallons of pizza sauce on the floor and all over the warehouse. Specialized cleaning and moving equipment had to be rented to facilitate restoring the premises to a point where product could be stored there again.

[11] In the heat of the summer, the situation was a rather unhygienic one for a food processing plant. It was imperative that the cleanup be as thorough and as expeditious as possible. There were, in Mr. Mazzaferro's words, "fruit flies everywhere".

IV. The Bags

[12] The Plaintiff had a consulting engineer, Neil Stone, examine the some of the leaking bags that the Plaintiff had purchased from the Defendant. Mr. Stone was produced by the Plaintiff as an expert witness at trial. He was qualified to testify as an expert process engineer. The majority of his professional experience, however, is as a chemical engineer for the food industry, with a focus on pickling systems. He has limited experience with packaging and materials engineering.

[13] Nevertheless, Mr. Stone did perform a first-hand examination of the damaged linings in 2000, and was able to describe in detail the state of these bags just after the spill.

[14] In testing the failed bags, he found that there were weak zones in the side seams of the bags where the seams could be pulled apart by hand. In the strong parts, he could not pull the bag apart. This led him to the conclusion that the seams had intermittent bonding problems resulting in some sections of the seam being weak while most of the seam was quite strong.

[15] In his testimony, Mr. Stone also pointed out that the failures in the bags all appeared to be on the side seams, not the bottom of the bags. He also tested some of the undamaged bags by filling them with water under pressure, and found that none of them ruptured upon filling. This conformed with the Plaintiff's own experience, as none of the sauce-filled bags had burst when being filled; rather, all of the leaking and tearing of bags had occurred while stored in the corrugated boxes in the warehouse.

[16] In Mr. Stone's testimony and his report, which was admitted into evidence, he did not address any issues about the way in which the boxes were stored in the Plaintiff's premises. He did observe that the boxes were somewhat larger than the bags that lined their interior, and that the sides of the bags therefore were not well supported within the boxes. He stated that it would have been better if the top of the boxes had been filled to the top with packing filler to prevent the sauce in the bags from "sloshing about".

[17] To be clear, Mr. Stone never spoke with the box suppliers and never got any of the box specifications. He did not know the material strength of the corrugated material, and had no particular insight into how, or whether, they should be stacked when stored.

[18] Mr. Stone did observe that the boxes "bowed" outward in the middle when full. He opined that the boxes would have provided better support for the sauce-filled bags if they had stiff corner posts for side support, but he did not go so far as to say that the design of the boxes caused the bags to burst at the seams. Rather, to the extent that he had studied the matter, he indicated that he would put the fault squarely on the bags themselves.

[19] Mr. Stone did not know a great deal about the Defendant's manufacturing process for the bags. Indeed, although he surmised that the problem was with the joint seals, he did not know whether the joints are made with adhesive or with a heat seal. But he reasoned that there must have been some sporadically faulty seaming when the failed bags were made.

[20] In Mr. Stone's view, the possible causes of seam failure were: a) contamination of the seam area when the bag was being made; or b) an intermittent problem with the seaming

equipment (whether it be heat sealed with intermittent failure of heat, or intermittent pressure issues with the sealing equipment, or intermittent contamination of the seal causing a faulty adhesive seal). He conceded that this was conjecture on his part – although in his view a logical conjecture – as he had never inspected or even seen a picture of the Defendant's manufacturing equipment and assembly line.

V. The Boxes

[21] In response to the expert evidence of Neil Stone, who addressed what he saw as problems with the bags, the Defendant produced Ralph Young, a packaging expert who addressed what he saw as problems with the boxes. Mr. Young is not a professional engineer, but he has substantial industry experience in product development with respect to corrugated containers. He was qualified to testify as an expert packaging consultant.

[22] Mr. Young was not retained at the time of the spill in 2000, but rather was brought in years later by the Defendant in the run-up to trial. Accordingly, he did not have the opportunity to study first-hand any of the boxes used by the Plaintiff. In addition, the Defendant could not provide him with any samples of the boxes in issue, as they were manufactured by another company and were ordered directly from that company by the Plaintiff.

[23] What Mr. Young did have was a series of photographs taken by the Plaintiff in July 2000. These photos showed the leaking boxes as stored in the Plaintiff's warehouse. On the witness stand he used the photos as a visual aid, and pointed out that in these photos there is ample evidence of bulging boxes. Mr. Young explained that this is a sign that they were not compatible with their contents or with the way they were being stored, as packaging should be designed for bulge resistance and top-to-bottom compression. This is especially true for a product like tomato sauce, which is heavy and stresses the bottom part of the boxes.

[24] He also indicated that a few of the boxes have visible corner posts, but that these appear to have been placed in the containers as an afterthought. The Plaintiff conceded that after the spill, it had ordered corner posts from the box manufacturer in an effort to salvage the containers that were left undamaged. Mr. Young stated that with vertical compression – especially with stacked boxes – the corners or columns of the box support about 2/3 of its strength. He opined that the internal corner posts should always have been there, and must go from the bottom vertical edge to the top vertical edge in order to become rigid and integral to the box.

[25] The photos also depict the boxes stored on wooden pallets in the Plaintiff's warehouse. These pallets often supported two and sometimes with three tiers of boxes stacked on top of each other. Mr. Young pointed out that with this vertical compression comes the most severe bulging of the boxes.

[26] Mr. Young also noted numerous instances in the photos where the boxes were not sitting flush on the pallets. When the box hangs over the edge of the pallet, Mr. Young explained, it stresses the corrugated walls of the box; and when another box is then loaded vertically on top of the first one, container failure is likely to occur.

[27] Finally, Mr. Young noted that time is not friendly to corrugated containers. The Fibre Box Association, an industry group of which Mr. Young is a member, states that a box under load will lose 40% of its initial compression strength in the first 30 days after being packed.

[28] Moreover, there is a tendency for corrugated boxes to break down with the change from winter to summer (i.e. from the dry air of a heated warehouse to the humid air of July). In Mr. Young's view, it is not surprising that the spill occurred at the beginning of July, the most humid month in southern Ontario, and after the boxes had sat in the warehouse some 8 to 9 months.

[29] It was put to Mr. Young on the stand that the numbers of boxes in storage had increased over the two previous years in which the bag-in-box system was used by the Plaintiff, and that while there was single tier storage in previous years there was double and triple tier stacking in 1999-2000. Mr. Young responded to this information rather forcefully and without hesitation: "You can't do that."

[30] The multiple stacking was, in Mr. Young's view, the major cause of the rupture in the bags. He opined that the increase in vertical compression, in combination with the humidity, length of storage time, and bulging of the boxes due to their oversized construction and lack of corner support, combined to cause the failure of the bag-in-box units.

VI. The Contest

[31] In the contest between bags and boxes, there is no 100% winner.

[32] In terms of aseptic bag production, the most knowledgeable witness was Steven Falk, the Defendant's in-house technical support specialist during in the late 1990's and 2000. Mr. Falk was quite familiar with the Defendant's manufacturing process, and had spent much time looking after problems with bags in the field. He explained that problems generally occurred because of incompatibility with a customer's equipment or storage vessels that were not manufactured by the Defendant.

[33] Mr. Falk recalled visiting the Plaintiff's warehouse on July 18, 2000. In his testimony he described it as being "a mess". He inspected a number of leaking containers as well as non-leaking containers, and discussed the leakage problem with Jim DiMenna, who at the time was the Plaintiff's manager.

[34] Mr. DiMenna said that he had initially moved from metal drums to the bag-in-box system as a more up to date means of storage. On inspection, it was Mr. Falk's view that the problem was the compatibility of the bag with the size of the box. He recalled explaining this to Mr. DiMenna, and that it was Mr. DiMenna himself who had proposed using cardboard corner posts as a possible solution.

[35] Mr. Falk testified that there were large gaps in the corners of the boxes when the bags were full, evidencing the incompatibility of the boxes with the bags. He took some measurements of the full boxes, and advised Mr. DiMenna that the boxes might need even bigger corner posts than he was suggesting.

[36] In cross-examination, Mr. Falk conceded that the material that the aseptic bags are made from often doesn't seal well on its own. For that reason, the Defendant encapsulates each bag with polyethylene on the sides, which reinforces the sealing at the seams. An extra layer of plastic is then added to tie the two layers together, and through this co-excrusion process the seams of the bags come together into a single material.

[37] After Mr. Falk's visit to the Plaintiff's premises in July 2000, he sent a Quality Variance Report to the Defendant's office in Chicago, along with a sample bag from the Plaintiff's batch. The quality experts in Chicago checked the sample, and found no issue with the seals.

[38] The Defendant's manager for Canada, Michael Doucas, also testified at trial. He briefly described the process by which the Defendant manufactures the bags in their plant in California. He indicated, among other things, that the horizontal seals along the top and bottom of the bags are identical to the vertical seals along the sides. This is significant since the damaged bags, as described by Neil Stone, were all torn along the side seams. If there were problems in the Defendant's sealing process, one would surmise that all the seams would potentially be damaged, not just the side seams.

[39] Most importantly, Mr. Doucas testified that the bags are made on continuous runs, such that one purchaser's bags are produced at the same time as those of other purchasers. There are no custom orders, and there is not a separate run of the machinery in the Defendant's plant for each customer who buys the aseptic bags.

[40] For this reason, Mr. Doucas explained, it does not make sense that there was a defect in the bags purchased by the Plaintiff but no defect in the bags purchased by any other customer. The Defendant's plant in California produces 700,000 bags annually; in 1999, 12,000 of these bags were sold to the Plaintiff. No other customer complained about spillage or leaks in 1999-2000.

[41] Like Mr. Falk, Mr. Doucas had also visited the Plaintiff's warehouse during the July 2000 cleanup. He also recalled that the full boxes bulged in the centre.

[42] The one witness who may have been able to shed more light on the problem would have been the Plaintiff's plant manager, Mr. DiMenna. However, he has ceased working for the Plaintiff and was not produced as a witness.

[43] Counsel for the Defendant has asked me to draw an adverse inference from Mr. DiMenna's absence, but I find there is no need to do so. Mr. DiMenna was examined for discovery on behalf of the Plaintiff, and Defendant's counsel read portions of his transcript into evidence. That transcript provides more than sufficient insight into Mr. DiMenna's view of the bag vs. box controversy.

[44] Mr. DiMenna confirmed in discovery that he was the one in charge of selecting the boxes for the Plaintiff. The Defendant had recommended one manufacturer of corrugated containers – a company called Wilomet Industries Inc. that produced a box called the Wil Pac. Mr. DiMenna had briefly considered ordering the Wil Pac boxes, but opted against it when he discovered that

another manufacturer, Noram Pak, produced much cheaper boxes. Noram Pak is located in the southern United States and ultimately was selected by the Plaintiff to supply the boxes in issue.

[45] At his examination for discovery Mr. DiMenna also conceded that he had initially considered smaller boxes that would have been sturdier and more compatible with the Defendant's bags. He changed his mind and ultimately chose the larger Noram Pak boxes, however, because they displayed better for customers when stacked on pallets.

[46] One series of answers given by Mr. DiMenna on discovery is particularly revealing:

> Q. ...You said you did testing on that and I'm just wondering what testing. I mean, you could see the bag was unsupported couldn't you?
>
> A. Yes.
>
> Q. And wouldn't it have been apparent that you could have used a smaller box?
>
> A. It fit the pallet perfectly, provided very good stacking in the warehouse. If you look at the photos of the stretch-wrapped finished product on the pallet, it's beautiful. It's very attractive. So it made the stacking very simple for the warehouse, for the forklift driver.
>
> Q. Well, there's some competition between the prettiness of the pallet stack and the ethicacy *[sic]* of the packaging, and the cost of the packaging was, obviously, you've said it a few times, important. Less cardboard, cheaper box. You turned down the Wil Pac because it was too expensive.
>
> A. Yes. Because it was six to seven times more expensive.

[47] In other words, the Plaintiff was focused on the price and presentation of the boxes more than it was on the efficacy and physical integrity of the bag-in-box system. The Wil Pac boxes recommended by the Defendant were rejected, and the further testing of the storage system recommended by the Defendant was curtailed, all due to the Plaintiff's non-structural considerations.

VII. The Onus

[48] I cannot rule out that the bags may have suffered intermittent seam failure due to a faulty sealing process in the Defendant's plant. Mr. Stone's testing of the bags suggests that possibility. At the same time, I cannot rule out that the boxes may have been the wrong size and stored or stacked in a way that made them structurally unsound. Mr. Young's analysis of the 2000 photos suggests that possibility.

[49] The expert witnesses – Mr. Stone for the Plaintiff and Mr. Young for the Defendant – each expressed compelling opinions pointing in opposite directions. Looking at the experts alone, the contest comes out more or less even.

[50] The testimony supplied by Mr. Falk and Mr. Ducous must also be factored into this equation. Both of those witnesses cast doubt on the Plaintiff's theory about the failed sealant on the seams of the bags. It is difficult to understand how the same manufacturing process that produced an annual run of 700,000 bags could have failed in sealing 1,200 to 1,400 of them, all belonging to the Plaintiff.

[51] In addition, I must take into account the evidence given by Mr. DiMenna at discoveries. It is clear that he was aware that a smaller size box, or a box with sturdier corner support, would be more suitable to the bags supplied by the Defendant.

[52] It is also clear that Mr. DiMenna rejected the box company recommended by the Defendant for reasons of price and aesthetics. In choosing the Noram Pak boxes, the Plaintiff opted for corrugated containers containing less cardboard (making them cheaper) and that fit squarely onto its pallets (making them neatly stackable in tiers). Both of these considerations point to problems with the boxes and storage identified by Mr. Young, and point away from problems with the bags and seams identified by Mr. Stone.

[53] On the evidence before me I cannot conclude definitively that the Plaintiff's choice of boxes and its method of stacking them was the sole cause of the spill in July 2000. What I can certainly conclude, however, is that the Plaintiff has not proved on the balance of probabilities that the bags were defective and that they caused the spill.

[54] There are two possible explanations in evidence; but once all of the evidence is reviewed, the more likely explanation is that it was the ill-fitting boxes stacked on top of each other that caused the spill. That does not fully explain Mr. Stone's findings that some of the bags had intermittent weak spots, but it does explain why of all the Defendant's customers for aseptic bag liners in 1999-2000, only the Plaintiff suffered torn bags and leakage.

[55] Needless to say, the onus of proof is on the Plaintiff. The Defendant does not have to prove that its theory about the boxes is correct. It is sufficient to dismiss the claim that the Plaintiff has not proved on a balance of probabilities that its own theory about the bags is correct.

VIII. The Warning

[56] The Plaintiff further argues that the Defendant failed to warn the Plaintiff of the danger of storing the boxes in a way which might burst the bags. Counsel for the Plaintiff points to *Lambert v Lastoplex Chemicals Co.*, [1972] SCR 569 for the proposition that a manufacturer must warn of the dangers that arise due to the fault of the purchaser itself if that fault is reasonably foreseeable.

[57] I agree that manufacturers have a duty to warn their customers of the inherent risks of a given product. Generally, only if the consumer voluntarily assumed the risks of the injury caused by the product is the manufacturer absolved of the duty to warn of all dangers in the product that it puts into the stream of commerce. *Siemens v Pfizer C & G Inc.*, [1988] 3 WWR 577 (Man CA).

[58] Under the circumstances, however, I cannot see how the Defendant failed in any legal duty to warn the Plaintiff. In the Plaintiff's view, the Defendant would have had to warn it of the danger of ordering ill-fitting boxes, or the risk it was taking in stacking 50 gallon boxes two and three tiers high. That view of the duty to warn seems to stretch the legal duty to the breaking point.

[59] The important point here is that the Plaintiff specifically rejected the Defendant's recommendation in selecting its boxes. Without consulting with the Defendant, it purchased a box that was inferior in quality to the one that the Defendant recommended and that did not suit the bags. The Plaintiff was free to make this choice, but in doing so it assumed the risk that the choice would cause it harm.

[60] Furthermore, the evidence of Mr. DiMenna was that the Plaintiff disregarded all of the Defendant's advice regarding the boxes specifically because it wanted to stack the boxes on pallets as a visually pleasing form of display. The Defendant had nothing to do with the stacking of the boxes in the Plaintiff's warehouse. The Plaintiff cannot complain that the Defendant failed to advise it on its storage method when the Plaintiff failed to consult the Defendant on that very storage method.

[61] It is one thing for a manufacturer to be under an obligation to warn of dangers inherent in its own product; however, the law does not impose a duty on a manufacturer to warn of dangers inherent in another manufacturer's product that it did not recommend, or to warn of the self-evident risk of storing very heavy cardboard containers on top of each other.

[62] The Plaintiff cannot shift the cost of its own cavalier attitude to box selection and storage by arguing that the Defendant should somehow have warned it. In fact, one might say that in recommending a sturdier, more expensive box, the Defendant had in effect warned the Plaintiff of the risks of its choice. The loss must lie where it spilled.

IX. The Counterclaim

[63] Despite the Plaintiff's complaint that the Defendant's bags caused the spill, the Plaintiff re-ordered bags from the Defendant for the 2000-2001 year. In his testimony, Mr. Ducous identified the invoice issued by the Defendant to the Plaintiff in the amount of $81,932.04 dated May 9, 2000. This invoice was for 10,800 bags, which Mr. Ducous testified were delivered to the Plaintiff for the upcoming season.

[64] The Defendant's bill was never paid and is the subject of the counterclaim. On the merits, the Plaintiff has no real defense to this counterclaim. The bags were ordered and delivered, but not paid for.

[65] However, at the opening of trial I was advised by Plaintiff's counsel that the Plaintiff has filed a Notice of Intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"). Section 69(1)(a) of the *BIA* imposes a stay on any claim by a creditor claiming against the Plaintiff. Across the country courts have consistently held that, "[t]he stay of proceedings imposed by the *BIA* does not affect proceedings brought by

[the debtor] but does stay the proceedings against [the debtor]." *Re Navionics Inc.*, 251 Nfld & PEI R 216 (Nfld SC). That would include the counterclaim in these proceedings.

[66] The Defendant also raises a defence of set off, proposing to deduct the 2000 invoice from any amount found owing to the Plaintiff. However, set off only arises where the claims to be set off against each other exist in the same right.

[67] The Plaintiff produced as a damages witness James Hoare, who was hired by Canadian General Insurance to calculate the losses suffered by the Plaintiff as a result of the spill, and who made it clear that the Plaintiff's claim is a subrogated insurance claim. The Court of Appeal has specifically held that, "as a result of subrogation the claims sought to be set off do not exist in the same right" as the main claim. *Colonial Furniture Co. v Saul Tanner Realty Limited*, 52 OR (3d) 539, at para 22. Therefore, as a matter of law no defence of set off can apply here.

[68] In any case, I have found that the Defendant is not liable for the Plaintiff's losses. Accordingly, no question of set off arises.

[69] Finally, Defendant's counsel submits that the court has discretion to permit its counterclaim to proceed. Section 69.4 of the ***BIA*** provides that the court has discretion to lift a stay if a creditor can show that it is especially prejudiced or if there are other equitable grounds to do so. In particular, counsel complains that the Defendant was not given timely notice of the Plaintiff's Notice of Intention to make a proposal. Apparently, the Plaintiff's Notice was issued on October 10, 2012, but the Defendant was not served with it until after the pre-trial of this matter on January 22, 2013.

[70] Frustrating at a stay of proceedings under section 69(1)(a) might be for a creditor of an insolvent party, the Defendant has not presented adequate grounds for lifting the stay. Lifting a stay impacts on the position of other creditors, and so is not something that the court can do without "sound reasons, consistent with the *Bankruptcy and Insolvency Act*." *Re Ma*, [2001] OJ No 1189, at para 3 (Ont CA).

[71] The British Columbia Supreme Court has confirmed that, "knowledge of the filing of the Notice of Intention to make a proposal is not necessary for the stay to be effective." *Sartek Computer Inc. v Samtack Computer Inc.*, 20 CBR (4th) 166, at para 12. The fact that the Defendant was only notified late in the day of the Plaintiff's proposal to its creditors is disconcerting to the Defendant, but it does not affect the within counterclaim or remove it from the ambit of the stay of proceedings.

[72] Moreover, the counterclaim is a claim provable in the bankruptcy. The court hearing the Plaintiff's bankruptcy proceeding, which according to the Notice of Intention is the Quebec Superior Court, is the appropriate forum for that claim. The discretion found in section 69.4 of the *BIA* is to exercised, if at all, by the bankruptcy court. It is only that court that can consider the claimant's request in the context of the overall position of the debtor and all of its creditors.

X. The Disposition

[73] The Plaintiff's claim is dismissed. The Defendant's counterclaim is stayed.

[74] The parties may make written submissions on costs. I would ask that they be sent directly to my attention within two weeks of the release of these reasons for judgment.

Morgan J.

Released: April 17, 2013

CITATION: Jema International v. Scholle Canada, 2013 ONSC 2270
COURT FILE NO.: 02-CV-298897PD3
DATE: 20130417

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Jema International Food Products Inc.

Plaintiff/Defendant by Counterclaim

– and –

Scholle Canada Limted

Defendant/Plaintiff by Counterclaim

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: April 17, 2013

TAB 3

1985 CarswellNat 12
Supreme Court of Canada

Vachon v. Canada (Employment & Immigration Commission)

1985 CarswellNat 12, 1985 CarswellNat 668, [1985] 2 S.C.R. 417, [1985] S.C.J. No. 68, 23 D.L.R. (4th) 641, 34 A.C.W.S. (2d) 379, 57 C.B.R. (N.S.) 113, 63 N.R. 81, J.E. 85-1089

VACHON v. CANADA EMPLOYMENT AND IMMIGRATION COMMISSION AND ATTORNEY GENERAL OF CANADA

Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

Heard: December 14, 1984
Judgment: November 21, 1985
Docket: No. 17252

Counsel: *G. Morrin, A.-G. Brodeur* and *M. Plante*, for appellant.
G. Côté, Q.C., and *G. Leblanc*, for respondent.

Subject: Income Tax (Federal); Insolvency; Corporate and Commercial

Related Abridgment Classifications

Headnote

Bankruptcy --- Priorities of claims — Claims of Crown — Dominion — Income tax, unemployment insurance, and Canada Pension Plan — General

Stay of proceedings — Bankrupt receiving overpayment of unemployment insurance benefits prior to bankruptcy — Unemployment Insurance Commission withholding amount of overpayment from benefits payable to bankrupt — Withholding of payments constituting "remedies" or "proceedings" for purposes of s. 49(1) of Bankruptcy Act — Commission having acted unlawfully in failing to obtain prior leave of court — Appeal by bankrupt allowed.

Property of bankrupt — Property exempt from execution — Unemployment insurance benefits — Bankrupt receiving overpayment of unemployment insurance benefits prior to bankruptcy — Unemployment Insurance Commission withholding amount of overpayment from benefits payable to bankrupt — Withholding of payments constituting "remedies" or "proceedings" for purposes of s. 49(1) of Bankruptcy Act — Section 49 applying to all property of bankrupt and not only property divisible among creditors — Commission having acted unlawfully in failing to obtain prior leave of court — Appeal by bankrupt allowed.

Prior to making an assignment in bankruptcy, the appellant had received an overpayment of unemployment insurance benefits. During the bankruptcy the appellant became entitled to further unemployment insurance benefits. Rather than paying the appellant all benefits owing to him, the respondent commission withheld the amount of the overpayment. After his discharge, the appellant sought a declaration that the commission had acted unlawfully in retaining some of the benefits owing to him, in that it had not sought leave of the court pursuant to s. 49(1) of the Bankruptcy Act to exercise this remedy. His action was dismissed, and the judgment affirmed on appeal to the Federal Court. The appellant brought a further appeal.

Held:

Appeal allowed.

The respondent acted unlawfully by withholding, without authorization under s. 49(1) of the Bankruptcy Act, unemployment insurance benefits to which the appellant was entitled during his bankruptcy. The stay of proceedings prescribed by s. 49(1) is sufficiently broad to include recovery by retention from subsequent benefits, such as the recovery at issue here. Moveover, since the subsection uses only the word "property", of which s. 2 of the Act gives a broad definition, it is not open to the interpretation that the section does not apply to property which is not divisible among creditors by virtue of s. 47. There is an analogy between the wages of a bankrupt and unemployment insurance benefits, and the partial or complete elimination of the latter may deprive the bankrupt of his means of subsistence, contrary to the objective of the Bankruptcy Act. If retentions from unemployment insurance benefits cannot be made without the court's authority, as specified in s. 49(1), this will allow the court to ensure that the objectives are not lost sight of. The grammatical or literal interpretation of s. 49(1) of the Bankruptcy Act, which makes retention of unemployment insurance benefits subject to authorization by the court, is not an obstacle to pursuing any of the objectives of the Bankruptcy Act. On the contrary, it makes possible the coherent pursuit of those various objectives under the supervision of the court. The respondent should have applied pursuant to s. 49(1) for authority to recover the overpayment by retention of subsequent benefits. The court may grant such authorization, refuse it or grant it only in part or on certain conditions, taking all the circumstances into account.

The rehabilitation of a bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with

measures designed to give him the minimum needed for subsistence. These measures are stated in s. 47 of the Bankruptcy Act concerning, inter alia, the exemption from execution of certain property, and in s. 48, regarding the wages of the bankrupt, which applies notwithstanding s. 47 and which empowers the court to make an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine having regard to the family responsibilities and personal situation of the bankrupt.

Table of Authorities

Cases considered:

Hudson v. Brisebois Const. Ltd.; Hudson v. Marcel's Ditching & Consulting Ltd., 42 C.B.R. (N.S.) 97, [1982] 4 W.W.R. 84, 19 Alta. L.R. (2d) 276, 135 D.L.R. (3d) 166, 37 A.R. 48 (C.A.) — *considered*

Indust. Accept. Corp. v. Lalonde, [1952] 2 S.C.R. 109, 32 C.B.R. 191, [1952] 3 D.L.R. 348 [Que.] — *considered*

Plastiques Valsen Inc.; Gaz Metro. Inc. v. St-Georges (1981), 41 C.B.R. (N.S.) 7 (Que. S.C.) — *considered*

Standard Pharmacy Ltd., Re; Re Alta.'s Claim, 7 C.B.R. 424, [1926] 1 W.W.R. 773, [1926] 2 D.L.R. 300 (Alta. S.C.) — *considered*

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 2, 47, 48, 49(1), 107(1)(*h*), 187.

Canada Pension Plan Act, R.S.C. 1970, c. C-5, s. 65 [am. 1974-75-76, c. 4, s. 33].

Code of Civil Procedure, L.R.Q. 1977, c. C-25, art. 553(12).

Gas, Water and Electricity Companies Act, L.R.Q. 1977, c. C-44, s. 73.

Old Age Security Act, R.S.C. 1970, c. 0-6, s. 22 [re-en. R.S.C. 1970, c. 21 (2nd Supp.), s. 10; am. 1974-75-76, c. 58, s. 8].

Pension Act, R.S.C. 1970, c. P-7, s. 23(8) [re-en. 1976-77, c. 28, s. 34(3)].

Quebec Pension Plan Act, L.R.Q. 1977, c. R-9, s. 148.

Social Assistance Act, L.R.Q. 1977, c. A-16, s. 25.

Unemployment Insurance Act, 1970-71-72 (Can.), c. 48, ss. 48, 49.

Regulations considered:

Unemployment Insurance Act, 1970-71-72. (Can.), c. 48 —

Unemployment Insurance Regulations, SOR/71-324, s. 175.

Authorities considered:

Black's Law Dictionary, 5th ed. (1979), "remedy".

Côté, Interpretation of Legislation in Canada (1984), p. 209.

Driedger, Construction of Statutes, 2nd ed. (1983), p. 87.

Houlden and Morawetz, Bankruptcy Law of Canada (1984), vol. 1, p. F-70.

Jowitt's Dictionary of English Law, 2nd ed. (1977), "remedy".

Words and phrases considered:

property

Appeal from judgment of Federal Court of Appeal, No. A-436-80, 28th January 1982 (unreported), affirming dismissal of appellant by Federal Court, Trial Division, No. T-3791-79, 5th June 1980 (unreported); action for declaration that Unemployment Insurance Commission acted unlawfully in withholding benefits payable to appellant while a bankrupt.

The judgment of the court was delivered by *Beetz J.*:

I Facts and Proceedings

1 The parties were agreed on the facts summarized by the unanimous judgment of the Federal Court of Appeal [No. A-436-80, 28th January 1982, (unreported)]:

> (1) Appellant owed respondent commission the sum of $922 when he made an assignment of his property under the Bankruptcy Act;
>
> (2) This sum of $922 was owed by appellant under ss. 47 and 49 of the Unemployment Insurance Act, 1971; however, the debt had been incurred without fraud on the part of appellant, with the result that it was a debt from which he should normally be released by the order of discharge (see s. 148 of the Bankruptcy Act);
>
> (3) The claim of the commission was a claim provable in bankruptcy and the commission filed its proof of claim with the trustee;
>
> (4) During the bankruptcy, when the commission had not yet received anything from the trustee and appellant had not yet been discharged, unemployment insurance benefits became payable to appellant;
>
> (5) Rather than paying appellant all the benefits owing to him, the commission withheld the sum of $922 owed to it by appellant from these benefits.

2 On 3rd July 1979 an order of discharge was made concerning appellant, and on 27th July 1979 he brought against respondent a declaratory action in which he asked the Federal Court to:

> [TRANSLATION] DECLARE that defendant acted unlawfully in retaining unemployment insurance benefits amounting to $951, benefits which plaintiff was entitled to during his bankruptcy.

(Counsel for the appellant admitted at the hearing that the amount at issue is in fact $922, as stated by the Federal Court of Appeal, and not $951.)

3 The Federal Court dismissed the action [No. T-3791-79, 5th June 1980 (unreported)] and the Federal Court of Appeal, which considered the action as one for recovery of the money retained, affirmed the trial judgment: hence the appeal.

4 In addition to the facts, the two parties admitted that:

5 (a) the Crown and respondent are bound by the Bankruptcy Act, R.S.C. 1970, c. B-3, in view of s. 187 of that Act;

6 (b) respondent's claim was a preferred debt under s. 107(1)(*h*) of the Bankruptcy Act, a debt which, if it had not been for the retention of benefits, would have been paid before the claims of ordinary creditors, had there been a distribution;

7 (c) unemployment insurance benefits which had become payable to appellant could not be assigned, charged, attached, anticipated or given as security, as a consequence of s. 48 of the Unemployment Insurance Act, 1970-71-72 (Can.), c. 48, s. 47 of the Bankruptcy Act and art. 553(12) of the Code of Civil Procedure.

II Legislation and Point at Issue

8 Section 49 of the Unemployment Insurance Act, 1971 is what imposes on a claimant a duty to repay any overpayment and which provides the procedure for recovery, including in subs. (3) retention from subsequent payments, which respondent applied in the case at bar:

> 49.(1) Where a person has received benefit under this Act or the former Act for a period in respect of which he is disqualified or any benefit to which he is not entitled, he is liable to repay an amount equal to the amount paid by the Commission in respect thereof.
>
> (2) All amounts payable under this section or section 47, 51 or 52 are debts due to Her Majesty and are recoverable as such in the Federal Court of Canada or any other court of competent jurisdiction or in any other manner provided by this Act.
>
> (3) Where a benefit becomes payable to any claimant, the amount of any indebtedness described in subsection (1) or (2) may, in the manner prescribed, be deducted and retained out of the benefit payable to him.

9 This method of recovering an overpayment, by retention from subsequent benefits, is a technique which is found in many statutes having a social purpose, federal as well as provincial: see, for example, Canada Pension Plan Act, R.S.C. 1970, c. C-5, s. 65; Old Age Security Act, R.S.C. 1970, c. 0-6, s. 22; Pension Act, R.S.C. 1970, c. P-7, s. 23(8); Social Assistance Act, L.R.Q. 1977, c. A-16, s. 25; Quebec Pension Plan Act, L.R.Q. 1977, c. R-9, s. 148.

10 The provision on which respondent's principal argument is based is s. 47 of the Bankruptcy Act:

47. The property of a bankrupt divisible among his creditors shall not comprise...

(*b*) any property that as against the bankrupt is exempted from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides.

11 Finally, the provision which is at the heart of the dispute is s. 49(1) of the Bankruptcy Act, which must be cited in both versions:

49.(1) Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.	49.(1) Lors de la deposition d'une proposition faite par une personne insolvable ou lors de la faillite de tout debiteur, aucun creancier ayant une reclamation prouvable en matiere de faillite n'a de recours contre le debiteur ou contre ses biens, ni ne doit in tenter ou continuer une action, execution ou autres procedures pour le recouvrement d'une reclamation prouvable en matiere de faillite, tant que le syndic n'a pas ete libere ou que la proposition n'a pas ete refusee, sauf avec l'autorisation du tribunal et aux conditions que ce dernier peut imposer.

This provision is preceded by the subheading "Suspension des procedures"/"Stay of Proceedings".

12 The question that must be decided is the following: does the recovery of an overpayment by retention from subsequent benefits, applied by respondent, constitute within the meaning of s. 49(1) of the Bankruptcy Act a remedy against the debtor or his property, an action, execution or other proceeding which had been stayed except, as provided by this section, with leave of the court or on such terms as the court might impose?

III Trial Judgment and Judgment A Quo

13 The trial judgment simply cited and approved the submissions made by counsel for the defendant commission. Among the arguments so approved by the trial judge, the following are the two principal ones:

[TRANSLATION] (1) the setoff allowed by ... the Unemployment Insurance Act, is neither a remedy nor a proceeding within the meaning of s. 49 of the Bankruptcy Act. It is in fact an administrative act of recovery which is allowed by a specific statute and which, in my opinion, is not in the nature of a proceeding.

(2) ... by thus reimbursing itself by recovery, the Unemployment Insurance Commission is not making payments to itself which are preferential over all other creditors, for its benefits cannot be attached and are not part of the fund available for creditors.

14 It would appear that the Federal Court of Appeal only adopted the first argument approved by the trial judge. Its entire reasoning is contained, be it said with respect, in one sibylline sentence:

In my view the right granted to the commission under s. 49(3) of the Unemployment Insurance Act, 1971 is not a remedy, action, execution or proceeding. Section 49(1) of the Bankruptcy Act does not therefore prevent it from being

exercised.

15 The Federal Court of Appeal did not say why the right granted to the commission by s. 49(3) of the Unemployment Insurance Act, 1971 is not a remedy or a proceeding. It may be that this is because the right is not a remedy or proceeding of a judicial nature. It is also possible that this is for other reasons which the Federal Court of Appeal did not disclose.

16 In this court, counsel for the appellant sought to show, first, that the remedies and proceedings covered by s. 49(1) of the Bankruptcy Act are not confined to remedies and proceedings of a judicial nature and may include recovery by retention from subsequent benefits, such as that applied by respondent. Counsel for the appellant also sought, on the other hand, to answer the second argument approved by the trial judge, and adopted by counsel for the respondent, with further clarification, in support of the findings of the Federal Court of Appeal.

17 These two points must now be discussed.

IV General Nature of Stay of Proceedings Imposed by s. 49(1) of the Bankruptcy Act

18 Appellant in my view properly relied upon the English version of s. 49(1) of the Bankruptcy Act, where the word "recours" is rendered by the word "remedy", giving to it and the words "autres procédures" ("other proceedings") a very broad meaning which covers any kind of attempt at recovery, judicial or extra-judicial. Black's Law Dictionary, 5th ed. (1979), defines "remedy": "The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated", and below: "Remedy means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal."

19 Jowitt's Dictionary of English Law, 2nd ed., (1977), gives an almost identical definition:

> the means by which the violation of a right is prevented, redressed, or compensated. Remedies are of four kinds: (1) by act of the party injured ... (2) by operation of law ... (3) by agreement between the parties ... (4) by judicial remedy, *e.g.*, action or suit. The last are called judicial remedies, as opposed to the first three classes, which are extrajudicial.

20 The courts have also interpreted the stay of proceedings imposed by s. 49(1) of the Bankruptcy Act very broadly.

21 Thus, in *Re Standard Pharmacy Ltd.; Re Alta.'s Claim*, 7 C.B.R. 424, [1926] 1 W.W.R. 773, [1926] 2 D.L.R. 300 (Alta. S.C.), the city of Edmonton wished to use a proceeding mentioned in its charter to collect unpaid taxes, consisting alternatively of a distress of personal property or a simple notice to the trustee that there were taxes which had not been paid by the bankrupt. Tweedie J. of the Supreme Court of Alberta, sitting in bankruptcy, cited s. 8(*b*) of the Bankruptcy Act — now s. 49(1) — and wrote, at pp. 430-31:

> This section applies to both judicial and extra-judicial proceedings; and distress being a remedy within the meaning of that section the section is, in my opinion, an absolute bar to any proceedings judicial or otherwise to enforce payment of taxes without the leave of the Court, which was not granted to, nor applied for on behalf of, the city...

> In regard to the notice to be given by "the collector or other person authorized to collect the taxes" to the trustee in bankruptcy as provided in sec. 376*a* of the Charter it is evident from the reading of that section that the notice is a substitute for the distress, and that it was intended that such simple method, instead of the actual physical seizure of the property, should be the remedy to be pursued. Notice is a remedy or proceeding within the meaning of sec. 8B of *The Bankruptcy Act* and what has been said in regard to distress applies with equal force in regard to the notice and the city is deprived of its right to enforce payment in priority by the provisions of sec. 8B of *The Bankruptcy Act*.

22 At p. 430, he gave the reason underlying this decision:

> The city by reason of the authorized assignment was deprived of any opportunity of gaining priority in the distribution of the assets which it might have acquired in the enforcement of its remedies.

23 In *Hudson v. Brisebois Bros. Const. Ltd.; Hudson v. Marcel's Ditching & Consulting Ltd.*, 42 C.B.R. (N.S.) 97, [1982] 4 W.W.R. 84, 19 Alta. L.R. (2d) 276, 135 D.L.R. (3d) 166, 37 A.R. 48, the Alberta Court of Appeal ordered that the trustee be repaid money distributed by the sheriff to certain creditors, in ignorance that the debtor was bankrupt at the time of the distribution. At p. 103, Lieberman J. A. wrote in the unanimous reasons of the court:

> Section 49(1) has the effect of staying the proceedings taken by the appellant prior to the payment out by the sheriff. Thus the payment out by the sheriff, although completely innocent, contravenes s. 49(1) and is without authority.

24 In Quebec, public utilities have used s. 73 of the Gas, Water and Electricity Companies Act, L.R.Q. 1977, c. C-44, as authority for interrupting the service of a bankrupt subscriber. In a judgment, *Re Plastiques Valsen Inc.; Gaz Metro. Inc. v. St-Georges* (1981), 41 C.B.R. (N.S.) 7 (Que. S.C.), Jacques Dugas J. reviewed the decided cases, which as he recognized are far from being unanimous; but he nevertheless dismissed an application by Gaz Metropolitan Inc. for an order directing the trustee to give him access to the bankrupt's premises in order to cut off the natural gas service. He wrote (at pp. 10-11):

> [TRANSLATION] Applicant enjoys no guarantee under the Bankruptcy Act. The rule for distributing property of a bankrupt is that the ordinary creditors receive equal shares of the common fund, once the trustee's expenses and secured debts have been paid. It would be contrary to the scheme of the Bankruptcy Act if it could by threatening to interrupt the service obtain more than the other ordinary creditors would get.
>
> In *Colonial Indust. Equipment Ltd.; Mercure v. Compagnie Bell Telephone du Can.*, [1971] C.A. 564, the Court of Appeal vacated the payment which the telephone company had succeeded in prising from its debtor, six days before its bankruptcy, by threatening to interrupt service: this was a cancellable preferential payment. It would be unusual, to say the least, if the applicant could obtain from the trustee preference which the debtor could not give it: surely this is what the applicant is seeking here by making its threat of interrupting service...
>
> The court considers that the threat to interrupt service made by applicant is designed to obtain from the trustee preferential treatment for its debt, and this is contrary to the Bankruptcy Act. The court has a duty to protect creditors against abusive use of s. 73 of the Gas and Electricity Companies Act so as to obtain advantageous treatment at variance with the scheme of the Bankruptcy Act.

25 This court of course does not have to decide whether the conclusions of these judgments are correct, but in my opinion the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the Bankruptcy Act. This broad meaning is confirmed by the fact that the legislator took the trouble to exclude actions against either the creditor or his property.

26 As Houlden and Morawetz wrote in Bankruptcy Law of Canada (1984), vol. I, p. F-70, under s. 49 of the Bankruptcy Act:

> An ordinary unsecured creditor with a claim provable in bankruptcy can only obtain payment of that claim subject to and in accordance with the terms of the Bankruptcy Act. The procedure laid down by that Act completely excludes any other remedy or procedure.

27 The Bankruptcy Act governs bankruptcy in all its aspects. It is therefore understandable that the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the Act could be attained.

28 Accordingly, I consider that s. 49(1) of the Bankruptcy Act is sufficiently broad to include recovery by retention from subsequent benefits, such as the recovery at issue here.

V Section 49(1) of the Bankruptcy Act and the Immunity from Seizure of Unemployment Insurance Benefits

29 Respondent replied, however, through its counsel, that even if s. 49(1) of the Bankruptcy Act is so broadly worded as to include an extra-judicial remedy or proceeding, such a remedy or proceeding is not a remedy or proceeding within the meaning of s. 49(1) when its purpose is to recover property of the bankrupt which, in view of its immunity from seizure, does not fall within the fund available for his creditors, as provided by s. 47 of the Bankruptcy Act.

30 Respondent submitted that s. 49(1) of the Bankruptcy Act must be interpreted in accordance with the principles underlying the Act, and what is in its submission the purpose or reason for the stay of proceedings imposed by s. 49(1).

31 In the factum submitted by its counsel, respondent explained the purpose of s. 49(1) of the Bankruptcy Act as follows:

> [TRANSLATION] The true meaning of this section is determined by certain general principles underlying the Bankruptcy Act, both as regards the bankrupt's property and with respect to unsecured creditors.
>
> So far as property owned by the bankrupt is concerned, it is worth recalling the rule in s. 50(5) of the *Bankruptcy Act*, that on a receiving order being made or an assignment being filed with an official receiver, "a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and subject to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment..."
>
> As we know, bankruptcy does not have the effect of depriving a bankrupt of all his assets, without exception. The property which passes to the trustee is limited to that which, under s. 47 of the *Bankruptcy Act*, constitutes what the Act calls the property of the bankrupt "divisible among his creditors", that is, property that proceeds from which are to be distributed *pari passu* among the unsecured creditors.
>
> The property in question includes anything belonging to the bankrupt on the date of the bankruptcy or which may devolve upon him before his discharge. On the other hand, it does not include property which, as against the bankrupt, is immune from seizure. It accordingly follows that in a bankruptcy proceeding the property of a bankrupt actually falls

into two categories: what falls within the assets of his bankruptcy and what remains external to it.

If the situation is considered from the standpoint of unsecured creditors, the fundamental principle of the Act is that the latter are to be regarded as on an equal footing in relation to each other: their rights are limited to being collocated *pari passu* in the proceeds of sale of property held by the bankruptcy, in accordance with the order of priority specified in s. 107 of the *Bankruptcy Act*.

So as to give full effect to the fundamental principles discussed above, it was necessary for the legislator to put property that would be part of the bankruptcy fund beyond the reach of individual actions that might be brought by any of the bankrupt's creditors, seeking payment of their own debts from the property in question and so obtaining an advantage over other creditors. The solution decided on by the legislator was to provide that, from the date of the bankruptcy, no creditor with a claim provable in bankruptcy shall have any remedy, including an execution proceeding, against the debtor or his property, unless with leave of the Court and on such terms as the Court may impose. As can be seen from the wording of s. 49(1), such a prohibition applies to any type of remedy the aim of which is to recover a claim provable in bankruptcy, regardless of whether it is a remedy that can be exercised by an action, or is a remedy in the nature of an execution proceeding.

32 Respondent concluded with this argument, which constitutes the crux of its second submission:

[TRANSLATION] It follows, therefore, that the only remedies to which s. 49(1) applies are those the effect of which is to take out of the property included in the bankruptcy anything which under the Act devolves on the trustee for the common benefit of creditors of the bankrupt. This section thus clearly cannot be interpreted, in our opinion, as prohibiting the exercise of a right which has no adverse effect on the common fund available to creditors of the bankruptcy.

33 Respondent submitted that, as unemployment insurance benefits are property which is immune from seizure, they are not part of the common fund available to creditors, and the retentions made by respondent did not have the effect of depriving the ordinary creditors of anything which belonged to the bankruptcy creditors' common fund. Such retentions cannot then be regarded as contravening s. 49(1) of the Bankruptcy Act.

34 To this apparently plausible argument, the gist of which is contained in respondent's factum, counsel for the latter added another in their oral pleading, which also at first sight seems to carry considerable weight. It is the following: in reimbursing itself by retentions from subsequent benefits due to appellant, respondent did something which conferred a benefit on the mass of ordinary creditors — not only did it pay itself from property to which they had no right, but, at the same time, it released those ordinary creditors from the lien which it is given by s. 107(1)(*h*) of the Bankruptcy Act and in accordance with which it would have been paid before them in the event of a distribution.

35 However, the interpretation suggested by respondent comes up against a major obstacle: without adequate justification, it rejects the method of grammatical or literal interpretation of a very clear provision. This interpretation suggests that words be added to s. 49(1) of the Bankruptcy Act, by interpreting the word "property" as referring to "property divisible among his creditors". These words, which are contained in s. 47, are not found in s. 49(1) of the Act. That subsection uses only the word "property", of which s. 2 of the Act gives a broad definition not including the limitation in s. 47.

36 In The Interpretation of Legislation in Canada (1984), Professor Pierre-André Côté wrote at p. 209:

> Assuming a statute to be well drafted, an interpretation which adds to the terms of its provisions or deprives them of meaning is suspect.
>
> Since the judge's task is to interpret the statute, not to create it, as a general rule he should reject an interpretation which adds to the terms of the law. Legislation is deemed to be well drafted and to express completely what the legislation wanted to say:
>
> > It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.
>
> — Lord Mersey in *Thomson v. Goold and Co.*, [1910] A.C. 409, at 420.

37 Respondent is thus asking the court to make a distinction where the legislator makes none, and this prima facie is an error of interpretation.

38 Respondent sought to justify this distinction in reliance on a fundamental objective of the Bankruptcy Act, namely, an equitable distribution of property to the creditors.

39 First, it should be said that this is not the sole objective of the Bankruptcy Act. As Estey J. wrote, in giving the unanimous judgment of this court in *Indust. Accept. Corp. v. Lalonde*, [1952] 2 S.C.R. 109 at 120, 32 C.B.R. 191, [1952] 3 D.L.R. 348 (Que.), "The purpose and object of the *Bankruptcy Act* is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts."

40 The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence. These measures are contained in s. 47 of the Bankruptcy Act concerning, inter alia, the exemption from execution of certain property, and in s. 48, regarding the wages of the bankrupt, which applies notwithstanding s. 47 and which empowers the court to make:

> 48(1) ... an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine having regard to the family responsibilities and personal situation of the bankrupt.

41 The part of the wages paid to creditors does not necessarily correspond to the part which may be attached. It may be more or less "having regard to the family responsibilities and personal situation of the bankrupt". Houlden and Morawetz, vol. 1, write at pp. F-66 and F-67:

> Since the enactment of s. 48, wages have been removed from the operation of s. 47 so that no part thereof vests in the trustee to be divided among creditors unless he makes an application under s. 48 and then only to the extent allowed by the court: *Re Giroux* (1983), 45 C.B.R. (N.S.) 245, 41 O.R. (2d) 351, 146 D.L.R. (3d) 103 (S.C.)...
>
> Applications under s. 48 of the Bankruptcy Act come down not to a question of law, but of fact; that is, whether the bankrupt after being given credit for his reasonable living expenses has excess funds which might be used to pay creditors. The Senate Committee poverty lines, while not binding on the court, are persuasive evidence: *Re Michael; Re Superior Films Shops* (1980), 34 C.B.R. (N.S.) 1 (Ont. S.C.).

42 In my view, appellant was right to see an analogy between the wages of a bankrupt and unemployment insurance benefits, and to argue that the partial or complete elimination of the latter may deprive the bankrupt of his means of subsistence, contrary to an other objective of the Bankruptcy Act. If retentions from unemployment insurance benefits cannot be made without the court's authority, as specified in s. 49(1), the court will ensure that this other objective is not lost sight of.

43 Moveover, the sole objective of the Bankruptcy Act mentioned by respondent, namely an equitable distribution of the bankrupt's property to his creditors, and the interests of the latter, will also be taken into account by the court, to which the respondent will apply pursuant to s. 49(1) for authority to recover the overpayment by retention from subsequent benefits. The court may grant such authorization, refuse it or grant it only in part or on certain conditions, taking all the circumstances into account.

44 In other words, the grammatical or literal interpretation of s. 49(1) of the Bankruptcy Act, which makes retentions from unemployment insurance benefits subject to authorization by the court, is not an obstacle to pursuing any of the objectives of the Bankruptcy Act. On the contrary, it makes possible the coherent pursuit of those various objectives, under the supervision of the court. It may be added that it will also have the effect of facilitating the administration of the bankruptcy by the trustee, who will thus automatically be informed of retentions made by creditors who have also filed claims in the bankruptcy.

45 I accordingly consider that not only has respondent not shown any justification for an interpretation of s. 49(1) of the Bankruptcy Act other than the grammatical or literal one, but the latter is the only possible one in view of the general scheme of the Act. As Elmer A. Driedger writes, in an oft-cited passage from his text Construction of Statutes, 2nd ed. (1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

46 Before concluding, it may be worth mentioning that the Unemployment Insurance Regulations, SOR/71-324 also take into account the fundamental needs of a claimant, and even his bankruptcy. Section 175 of the regulations in effect in 1977, when the bankruptcy in the case at bar occurred, provides:

> Write-off of benefit wrongly paid
>
> 175. (1) Amounts owing under sections 47, 49, 51 and 52 of the Act may be declared by the Commission to be no longer due and owing, where
>
> (*a*) the sums in the aggregate do not exceed five dollars, and a benefit period is not current;
>
> (*b*) the claimant is deceased;
>
> (*c*) the claimant is a discharged bankrupt;
>
> (*d*) the claimant is an undischarged bankrupt, the final dividend has been received and the trustee has been discharged; and

(*e*) the Commission considers that, having regard to all the circumstances,

(i) the sums are uncollectable, or

(ii) the repayment of the sums would result in undue hardship to the claimant.

(2) Where the Commission, pursuant to subsection (1), declares that an amount is no longer due and owing, that amount shall be written off.

47 Neither of the two parties relied on this provision, which was not discussed. Counsel for the respondent simply referred to it in his oral argument, saying that he had not reproduced it in his factum, as he did not see how it was relevant.

48 It is probably unnecessary to say any more on the point. However, it may be observed that the additional benefit given to the bankrupt by this provision depends on the discretion of an administrative commission. It exists in addition to the rule stated in s. 49(1) of the Bankruptcy Act, but it in no way detracts from it.

VI Conclusions

49 I am of the view that we should allow the appeal, set aside the judgments of the Federal Court of Appeal and the trial court, allow appellant's action and declare that respondent acted unlawfully by withholding, without the authorization of the bankruptcy court, unemployment insurance benefits totalling $922, to which appellant was entitled during his bankruptcy. The whole with costs on all courts.

Appeal allowed.

TAB 4

1999 CarswellBC 149
British Columbia Master

Gene Moses Construction Ltd., Re

1999 CarswellBC 149, [1999] B.C.J. No. 141, 4 B.C.T.C. 76, 85 A.C.W.S. (3d) 747, 9 C.B.R. (4th) 275

In the Matter of the Notice of Intention to File a Proposal of Gene Moses Construction Ltd.

Master Powers

Heard: January 11, 1999
Judgment: January 13, 1999
Docket: Vernon 22283, Bankruptcy 188154

Counsel: *F.J. Quinn*, for Gene Moses Construction Ltd.
R.C. Hunter, Q.C., for GE Capital Corporation.

Subject: Insolvency; Property

Related Abridgment Classifications

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

Headnote

Bankruptcy — **Proposal — Effect of proposal — Effect on other legal processes**

Company made lease payments by pre-authorized debits to bank account — Company executed notice of intention to file proposal — Creditor presented debit memos to company's bank to collect arrears of lease payments — Bank honoured memos and paid funds — Company brought motion for order that funds be returned to bank — Motion granted — Bankruptcy and Insolvency Act provides that creditor has no remedy against insolvent person's property once notice filed — "Remedy" not restricted to proceedings of judicial nature — Presenting debit memos was exercise of remedy — Creditor's knowledge of filing notice not necessary to make stay effective — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69(1)(a).

Table of Authorities

Cases considered by *Master Powers*:

National Bank of Canada v. Dutch Industries Ltd. (1996), 149 Sask. R. 317, 45 C.B.R. (3d) 103 (Sask. Q.B.) — considered

Vachon v. Canada (Employment & Immigration Commission), [1985] 2 S.C.R. 417, (sub nom. *Vachon v. Canada Employment)* 63 N.R. 81, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641 (S.C.C.) — applied

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3
Generally — considered

s. 49(1) — considered

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

Pt. III, Div. I — referred to

s. 69 [rep. & sub. 1992, c. 27, s. 36(1)] — considered

s. 69(1) [rep. & sub. 1992, c. 27, s. 36(1)] — considered

s. 69(1)(a) [rep. & sub. 1992, c. 27, s. 36(1)] — considered

Words and phrases considered

remedy

. . . [In] *Vachon v. Canada Employment and Immigration Commission* (1985), 56 C.B.R. 113 (S.C.C.) . . . [t]he court decided that . . . [r]emedies were not restricted to proceedings of a judicial nature.

. . .

I conclude that "remedy" in section 69 [of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] must be given a broad meaning. I also conclude that in presenting the debit memos for payment of the arrears of lease payments [the creditor] was exercising a remedy to try and collect its debt. The exercise of this remedy is stayed pursuant to section 69(1) of the *Bankruptcy and Insolvency Act* and therefore [the creditor] was not entitled to the use of those debits memos.

MOTION by company making proposal in bankruptcy for order that funds released by bank to creditor be returned.

***Master Powers*:**

The Application

1 Gene Moses Construction Ltd. (the company) seeks the declaration that GE Capital Leasing Services Inc. (GE Capital) unlawfully removed $29, 149.13 from the bank account of the company and for an order that those funds be returned to the company account.

Background

2 The company leased a piece of logging equipment with the assistance of GE Capital Leasing Services Inc. The cost of this equipment called a forwarder was $454,351. The monthly lease payments were $12,198.06 payable on the 1st day of each and every month excluding April and May. The payments were made by way of pre-authorization to debit an account. The lease was originally entered into on July 30, 1997. Problems arose in March of 1998 when payments were not made. GE Capital agreed to restructure the lease to allow for some skipped payments for 1998 and the payments were to be $12, 342.54 per month commencing July 1, 1998.

3 The company says that the method of payment was changed after the lease was restructured and this has not been denied by GE Capital. The company says that payments were not always processed on the 1st of the month but only after specific authorization by Mr. and Ms. Moses. GE Capital says that their position was that they had worked with the company but they advised the company it was imperative that the payments be made. $10,000 was paid towards the October payment on November 3, 1998 but no payments were made on the November or December accounts up to December 17, 1998.

4 The company executed a Notice of Intention to File a Proposal under the *Bankruptcy and Insolvency Act*. The notice was filed with the official receiver on December 17, 1998. Ms. Louise Moses states that she spoke to Mr. Sutherland, a representative of GE Capital, some time after December 17, 1998 and before December 22, 1998 and advised him that the notice had been filed. Mr. Sutherland does acknowledge speaking with Ms. Moses on December 15, 1998 and December 17, 1998, but says he did not have any knowledge of the proposal until he was advised by telephone by the trustee on December 23, 1998.

5 On December 22, 1998 GE Capital presented three debit memos to the company's bank in the amount of $4,464.05, $12,342.54 and $12,342.54, for a total of $29,149.13. The bank honoured those debit memos and paid $29,149.13 to GE Capital.

6 The company says that the withdrawal of this money prevents the company from meeting its payroll and its payments to the Bank of Montreal. They also say the insurance on the forwarder has been cancelled for non payment of premiums. They also say that it may be detrimental to their efforts at reorganizing their affairs pursuant to the *Bankruptcy Act*.

7 GE Capital takes the position that they were unaware of the proposal and after attempting to deal with the company, simply processed the debit memos as they were entitled to do in order to collect the arrears of lease payments.

Bankruptcy and Insolvency Act

8 The company relies on Part III, Division I of the *Bankruptcy and Insolvency Act* and Section 69 which they say operates as a stay of proceedings upon the filing of the proposal or a notice of intention to file a proposal whether or not a creditor has knowledge of the notice or the proposal. The section relied on is as follows:

> 69 (1) Subject to subsections (2) and (3) and section 69.4 and 69.5 on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> > (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

9 The issue is whether the presentation of the debit memos to collect the arrears of lease payments was the exercise of a "remedy" and prohibited pursuant to section 69(1) of the Act.

10 The company refers to a number of decisions in support of its position including:

> *Vachon v. Canada (Employment & Immigration Commission)* (1985), 57 C.B.R. (N.S.) 113 (S.C.C.). This deal with a stay under s. 49(1) of the *Bankruptcy Act* at the time. Revenue Canada had made an overpayment to an individual who subsequently became bankrupt. The individual subsequently became entitled to Unemployment Insurance benefits but Revenue Canada exercised its statutory authority to set off the overpayment against the new benefits. Subsequent to a discharge from bankruptcy the bankrupt applied to the court for a declaration that such set off was contrary to section 49(1) of the *Bankruptcy Act*. Section 49(1) of the *Bankruptcy Act* provided:
>
> > Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceeding for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until a proposal has been refused, unless with the leave of the court and on such

terms as the court may impose.

11 The court decided that the *Bankruptcy Act* should be broadly interpreted and that the remedy included the statutory retention of subsequent benefits. The court said at page 121:

> This broad meaning is confirmed by the fact that the legislature took the trouble to exclude actions against either the creditor or his property.

12 This broad meaning was consistent with the general scheme of the *Bankruptcy and Insolvency Act* (page 125). Remedies were not restricted to proceedings of a judicial nature.

13 It was also referred to *National Bank of Canada v. Dutch Industries Ltd.* (1996), 45 C.B.R. (3d) 103 (Sask. Q.B.). In this case the court dealt with a bank's right to impose margining requirements which allowed the bank to take the debtor's cash deposits made to its account. The bank applied to lift the stay but the court found if the stay were lifted it would prevent the debtor from making a viable proposal. The stay was not lifted but terms were imposed on the monies deposited into the accounts. The court treated the contractual margining rights as a remedy covered by section 69(1) of the Act.

14 I conclude that "remedy" in section 69 must be given a broad meaning. I also conclude that in presenting the debit memos for payment of the arrears of lease payments GE Capital was exercising a remedy to try and collect its debt. The exercise of this remedy is stayed pursuant to section 69(1) of the *Bankruptcy and Insolvency Act* and therefore GE Capital was not entitled to the use of those debits memos.

15 It is not necessary for me to decide whether Ms. Moses actually told Mr. Sutherland about the notice of intention to file a proposal because knowledge of the filing of the notice is not necessary for the stay to be effective.

16 I grant the declaration that the sum of $29,149.13 was removed from the account of the company at the Bank of Montreal contrary to the provisions of section 69(1) of the *Bankruptcy and Insolvency Act* and direct that those funds be repaid to the company's account at the Bank of Montreal.

17 The fact that the insurance on the forwarder has been cancelled does raise a concern. GE Capital is at liberty to apply to lift the stay under section 69 of the *Bankruptcy and Insolvency Act* and may wish to do so if satisfactory arrangements cannot be made for the placement of insurance on the forwarder. Neither party had an opportunity to address that issue at the hearing before me.

18 The point argued by the parties was a novel one with limited case authority to support either position and I find it is appropriate that each party bear their own costs.

Motion granted.

TAB 5

1988 CarswellOnt 165
Ontario Supreme Court, In Bankruptcy

Ontario (Securities Commission) v. Gaudet

1988 CarswellOnt 165, [1988] C.L.D. 1970, [1988] O.J. No. 1349,
11 A.C.W.S. (3d) 210, 65 O.R. (2d) 424, 70 C.B.R. (N.S.) 181

ONTARIO SECURITIES COMMISSION v. GAUDET, GAUDET, GAUDET FAMILY TRUST (Trustee of) and 711817 ONTARIO LIMITED

Reid J.

Judgment: August 2, 1988
Docket: No. RE326/88

Counsel: *T.J. Lockwood, Q.C.*, and *J. McDougall*, for Commission.
W.N. Ortved and *S.R. Orzy*, for Clarksons.
J. Morin, Q.C., and *M.D. Duder*, for Noreen Gaudet and Gaudet Family Trust.
J.E. Sexton, Q.C., G. Marantz, Q.C., and *D.S. Morritt*, for Venard J. Gaudet and 711817 Ontario Limited.
P.D. Jackson and *M.B. Rotstain*, for Lloyds Bank Canada.
F.L. Maefs, for Toronto Stock Exchange.
H. Fogul, for Mercedes-Benz Canada Inc.
D.B. MacDougall, for Globe and Mail, intervenor.

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

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

Headnote

Bankruptcy — Practice and procedure in Courts — Practice in miscellaneous proceedings

Stay of proceedings · · Effect of stay — Court staying all proceedings against debtor and receiver in absence of leave — Bank issuing bankruptcy petition without leave in belief order made under provincial statute not effective to bar proceedings under federal statute — Bank held in contempt · Order made pursuant to court's inherent jurisdiction and effective until properly challenged — Solicitor-client costs ordered against bank.

An application was made for an order holding a bank and certain of its officers in contempt of court for launching a petition in bankruptcy against the applicants. The bank had instituted the petition, without seeking or obtaining leave, when its officers were aware that the Supreme Court of Ontario had prohibited all proceedings against the applicants without leave. The court had previously provided that "no action at law or other proceedings or remedies shall be asserted, taken or continued against the [applicants] or the receiver without leave of this honourable court first being obtained". There was no question that the bank had a real interest in the financial affairs of the applicants and there was no question that the bank's conduct in proceeding without leave was deliberate. However, the bank had proceeded in the belief that the prohibition, being based on s. 17 of the Ontario Securities Act, a provincial statute, could not affect rights given to creditors under the Bankruptcy Act, a federal statute, because of the latter's constitutional supremacy.

Held:

Application granted with costs on solicitor-client scale.

A party cannot ignore an order of the Supreme Court of Ontario simply because it holds the opinion that the order is ineffective on constitutional or any other grounds. The order stands and must be obeyed until it is reversed on appeal or an equally effective order is secured to the effect that it need not be obeyed. The proper way to establish or seek to establish that a prohibition of the court is not effective is an application to the court for leave. The authority to impose a condition for leave to be obtained before proceedings are commenced is not rooted in the Securities Act, but in the inherent jurisdiction of the court to control its own processes and protect and supervise its own officers. A receiver is an officer of the court, and the leave requirement is usual in an order appointing a receiver. For the proper and orderly conduct of a receivership, it has traditionally been regarded as essential that the receiver be party to all proceedings against the assets under its care, and that the estate be protected against groundless or unjustified proceedings. For these and other reasons, the condition that leave be obtained is commonly included; indeed, it is essential. As these circumstances did not involve disrespectful, offensive or blatantly contumelious behaviour, which would require a fine, it would be sufficient if those who were put to unjust expense and trouble by the petition were compensated by an award of costs on a solicitor-client scale.

Application for contempt order.

***Reid J.*:**

1 There is before me a motion on behalf of Noreen Gaudet for an order holding Lloyds Bank Canada and certain of its officers in contempt of court for launching a petition in bankruptcy against her without leave. The petition, together with one against Venard, came on with this motion on behalf of the Ontario Securities Commission: the "main motion". The petitions proceeded contemporaneously with the main motion, and the numerous others associated with it, up to the point where the order of hearing was settled. Lloyds Bank had also moved to be added with intervenor or party status on the main motion, and for other relief including a stay of the Gaudet receivership. The result was that much of what was said on the bankruptcy matters applied to Lloyds' motion to be added.

2 I dismissed both the bankruptcy petitions and the motion to be added. It is only the petitions that form the basis for the contempt motion.

3 The contempt order is sought on the ground that Lloyds initiated the petitions without obtaining leave, or, for that matter, without even seeking it, when its officers were aware that this court had prohibited all proceedings against the Gaudets without leave. In the orders of Smith J. of 27th January and Sutherland J. of 5th February, it was provided that "no action at law or other proceedings or remedies shall be asserted, taken or continued against the respondents or the receiver without leave of this honourable court first being obtained".

4 There is no question that Lloyds' officers were aware of that prohibition. There is equally no question that they had a real interest in the Gaudets' financial affairs, claiming against Venard some $2.9 million for repayment on a loan, of which some $830,000 was claimed against Noreen on a guarantee.

5 Similarly, there is no question that Lloyds' conduct in proceeding without leave was not inadvertent but deliberate. It rested on the view that the prohibition of proceedings without leave, being based on s. 17 of the Securities Act, a provincial statute, could not affect rights given to creditors under the Bankruptcy Act, a federal statute, because of the latter's constitutional supremacy.

6 I disagreed. In my view, which I stated at the time, one could not ignore an order of this court simply because one held the opinion that it was ineffective on constitutional grounds, or on any other grounds. The order stood, and must be obeyed, until it was reversed on appeal, or an equally effective order was secured to the effect that it need not be obeyed. If that were not so, any order of the court which on its face was plainly directed to everyone could be disobeyed by those who held the opinion that they were not subject to it. Thus, the mere opinion, which may be wrong, elevates he who holds it to the level of the court,

and wipes the order off the record. In my opinion, it is not only novel, it is fallacious. The proper way to establish, or seek to establish, that the prohibition was not effective was on an application to this court for leave.

7 I also stated my view that the authority to impose a condition for leave to be obtained before proceedings were commenced was not rooted in the Securities Act but in the inherent jurisdiction of the court to control its own processes and protect and supervise its own officers. A receiver is an officer of the court. The leave requirement is usual in an order appointing a receiver. For the proper and orderly conduct of a receivership it has traditionally been regarded as essential that the receiver be party to all proceedings against the assets under its care, and that the estate be protected against groundless or unjustified proceedings. For these and other reasons the condition that leave be obtained is commonly included; indeed, I am not aware of any receivership order lacking one. In my view, it is essential.

8 I was therefore dubious of the legal proposition on which Lloyds' rests. There was no need, however, to decide it, for there was no motion for leave before me where it could properly be considered. I did observe that my dismissal of the petitions was without prejudice to Lloyds moving for leave.

9 Wilfully ignoring an order of the court is contempt plain and clear. The only open question is the appropriate penalty. I am satisfied that Lloyds' conduct was based simply on a view of the law which I thought wrong. It was not intended to flout the law or demean the court. Lloyds has apologized through counsel, and offered to do so in court through one of its senior officers. There is lacking the disrespectful, offensive or blatantly contumelious quality that would require a fine, certainly one on the scale Mr. Morin demands. The dismissal of the petitions carries with it liability for costs payable to the respondent to those proceedings. Launching the petitions without leave amounts to contempt and demands a penalty. I think it is sufficient if those who were put to unjustified expense and trouble by the petitions are compensated by an award of costs on a solicitor-and-client scale. I so direct.

10 The contempt motion having been successful, it is granted with costs on a solicitor-and-client scale.

11 Lloyds' attempt to be added in the main motion had its roots in the abortive bankruptcy proceedings. Lloyds sought, among other things, a stay of the existing receivership. There is no doubt that the attempt had a disrupting and delaying effect. In dismissing the motion I reserved the question of costs until I had the opportunity to consider the contempt issue. In light of its outcome, the dismissal shall be with costs on a solicitor-and-client scale.

12 That motion was dealt with contemporaneously with other matters. There may be some difficulty in sorting out to whom costs should be payable, and to what extent, given that many issues were being dealt with at the same time. Only those who opposed Lloyds' motion to be added shall be entitled to costs. That did not include the receiver. It did include the respondent Gaudets. If others than the latter consider that they are entitled to costs, or if further directions are required on the subject, I may be spoken to.

Application granted.

TAB 6

1996 CarswellSask 631
Saskatchewan Court of Queen's Bench

National Bank of Canada v. Dutch Industries Ltd.

1996 CarswellSask 631, 149 Sask. R. 317, 45 C.B.R. (3d) 103, 66 A.C.W.S. (3d) 1023

In the Matter of Dutch Industries Ltd. and Dutch Blacksmith Shop Ltd.; National Bank of Canada (Applicant) and Dutch Industries Ltd. and Dutch Blacksmith Shop Ltd. (Respondents)

Kyle J.

Judgment: October 25, 1996
Docket: Bankruptcy 2604

Counsel: *Conrad D. Hadubiak*, for applicant.
Rick M. Van Beselaere, for respondents.

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Headnote

Bankruptcy — Practice and procedure in courts — Stay of proceedings

Bankruptcy — Practice and procedure in courts — Stay of proceedings — Debtors filing intentions to make proposals — Creditor bank applying for order lifting resultant stay of proceedings — Court finding that bank not prejudiced by stay — Court dismissing application — Court considering that margin requirements allowing bank to seize debtors' receipts rendering stay ineffective — Court ordering monitoring of receipts to be deposited in different financial institution — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 69(1)(b), 69(4).

Two debtor corporations defaulted under security agreements which gave the bank a first charge on their assets. The agreements provided margining requirements under which the debtors would deposit receipts of accounts receivable into their account with the bank. The bank intended to shut down the company, after which it would still incur a loss. The debtors filed intentions to make proposals. The creditor applied for an order lifting the 30-day stay of proceedings flowing from the debtors' filing.

Held:

The application dismissed.

Section 50.4(11) of the *Bankruptcy and Insolvency Act* allows a court to lift the stay if the respondent has not acted in good faith, if the respondent will be unable to make a viable proposal by the stay's end, or if the creditors will be materially prejudiced by the stay. Cases decided under the Act indicate a reluctance to lift the stay. There was no doubt in the debtors' good faith, but there were grave doubts that they could make a viable proposal. However, there was nothing about the circumstances that would prejudice the bank should its application be dismissed. Accordingly, the bank did not establish grounds to lift the stay. However, the margining requirements meant that the bank would have the right to seize the debtors' daily deposits. That would effectively nullify the stay. In order to address that possibility, and protect the bank's security, an order should issue under s. 69(4) of the Act. The order would provide that deposits would be made to a different institution, but the debtors would have to account for the receipts to the bank.

Table of Authorities

Cases considered:

Doaktown Lumber Ltd., Re (1996), 39 C.B.R. (3d) 41, (sub nom. *Doaktown Lumber Ltd. v. BNY Financial Corp. Canada)* 174 N.B.R. (2d) 297, 444 A.P.R. 297 (C.A.) — *considered*

Magasin Coop Dégelis, Re (1993), 24 C.B.R. (3d) 49 (C.S. Qué.) — *considered*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 50.4 [en. S.C. 1992, c. 27, s. 19]

s. 50.4(11) [en. S.C. 1992, c. 27, s. 19]*considered*

s. 69(1)(b)*considered*

s. 69(4)*considered*

s. 244*referred to*

APPLICATION by creditor for order lifting stay of proceedings under *Bankruptcy and Insolvency Act*.

Kyle J.:

1 The respondents, Dutch Industries Ltd. and Dutch Blacksmith Shop Ltd., are collectively indebted to the applicant, National Bank of Canada (the "Bank"), in the approximate amount of $4.8 million dollars. This indebtedness is secured by various guarantees, security agreements and mortgages granted by the respondents creating effectively a first charge in favour of the Bank in all of the respondents' real and personal property. The security agreements include a first charge over all of the accounts receivable and inventory of Dutch Industries Ltd. Dutch Industries Ltd. is the principal operating company and it has defaulted in its obligations to the Bank with the result that the Bank demanded payment of all of the said obligations on October 2, 1996. The respondents were both served with notices pursuant to s. 244 of *The Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as am. S.C. 1992, c. 27 (the "*Act*"), that the Bank intended to enforce its securities over the assets of the respondents. Dutch Industries Ltd. filed a notice of intention to make a proposal pursuant to s. 50.4 of the *Act* on October 9, 1996. Subsequently Dutch Blacksmith Shop Ltd. applied for leave to file a similar motion and it was permitted to do so by the Court upon condition that the thirty day period contemplated by the *Act* would begin and end contemporaneously with that of Dutch Industries Ltd.

2 Dutch Industries Ltd. has sustained operating losses for several years and has failed to achieve most of the financial objectives which were reflected in financial projections provided to the Bank. The Bank has applied for an order lifting the stay of proceedings imposed by the *Act*, and it is understood as a result of the aforementioned order respecting Dutch Blacksmith Shop Ltd., that this application and the result thereof will bear equally upon the stay of proceedings arising under the *Act* in respect of both Dutch Industries Ltd. and Dutch Blacksmith Shop Ltd.

Issues

3 Section 50.4(11) of the *Act* empowers this Court to terminate the thirty day stay or any extension thereof if the Court is satisfied that the respondents have not acted in good faith and with due diligence, or that they will be unable to make a viable proposal before the expiration of the period in question, or that they will not likely be able to make a proposal before the expiry of the period in question that will be accepted by the creditors, or that the creditors, as a whole, would be materially prejudiced were the application for the lifting of the stay rejected.