4

Indexed as:

Magellan Aerospace Ltd. v. First Energy Capital Corp.

Between
Magellan Aerospace Limited, plaintiff, and
First Energy Capital Corp., Dundee Securities Corporation, Peters & Co. Limited, Nesbitt Burns Inc., Newcrest Capital Inc., RBC Securities Inc., and Bunting Warburg Dillon Read Inc., defendants, and
Merit Energy Ltd., Duncan A. Chisholm, Kent J. Edinga, John W. Ferguson, David D. Johnson, John P. Kaumeyer, Lawrence F. Walter, Richard A. Grafton and Barry Stobo, third parties
(Action No. 0001-02529)
And between
National Bank of Canada, Bank One, NA and Bank One Canada, plaintiffs, and
Merit Energy Ltd., defendant
(Action No. 0001-04994)
And between
Larry Delf, on behalf of himself, and all other members of a class having a claim against the defendants, Merit Energy Ltd., Duncan A. Chisholm, Kent J. Edinga, John W. Ferguson, David D. Johnson, John P. Kaumeyer, Lawrence F. Walter, First Energy Capital Corp., Dundee Securities Corporation, Peters & Co. Limited, Nesbitt Burns Inc., Newcrest Capital Inc., RBC Dominion Securities Inc., Bunting Warburg Dillon Read Inc. and PriceWaterhouseCoopers LLP, plaintiffs, and
Merit Energy Ltd., Duncan A. Chisholm, Kent J. Edinga, John W. Ferguson, David D. Johnson, John P. Kaumeyer, Lawrence F. Walter, First Energy Capital Corp., Dundee Securities Corporation, Peters & Co. Limited, Nesbitt Burns Inc., Newcrest Capital Inc., RBC Dominion Securities Inc., Bunting Warburg Dillon Read Inc. and PriceWaterhouseCoopers LLP, defendants, and
Merit Energy Ltd., Duncan A. Chisholm, Kent J. Edinga, John W. Ferguson, David D. Johnson, John P. Kaumeyer, Lawrence F. Walter, Richard A. Grafton and Barry Stobo, third parties

(Action No. 0001-01899)
And between
Law Investments Ltd., Debra Wollersheim, John Wollersheim, Urvashi Patel, Kent McDougall, Ron Sachkiw, Reginald Ball, Fred Claridge, Ben Dulley, Lawrence Fan, Glen Gibling, Ralph Gibson, Wayne Gillespie, T. Jack Hall, Jim Hinks, Alnoor Kassam, Gordon Kerr, Arif Kurji, Victor Luciak, Bill Mah, Wayne McNeill, Dennis Paddock, Dave Purcell, Roger Rodermond, Dalton Siebrasse, Shiraz Sumar, Salim Sumar, James Sachkiw, Michael Theilgaard, Astrid Theilgaard, Richard Walls, Alexandra Smith, Geoff Smith, and Ice Gate Holdings Inc., plaintiffs, and Merit Energy Ltd., Duncan Chisholm, Kent J. Edinga, John W. Ferguson, Richard A. Grafton, David D. Johnson, John P. Kaumeyer, PriceWaterhouseCoopers LLP, First Energy Capital Corp., Dundee Securities Corporation, Peters & Co. Ltd., Nesbitt Burns Inc., Newcrest Capital Inc., RBC Dominion Securities Inc., and Bunting Warburg Dillon Read Inc., defendants, and Merit Energy Ltd., Duncan A. Chisholm, Kent J. Edinga, John W. Ferguson, David D. Johnson, John P. Kaumeyer, Lawrence F. Walter, Richard A. Grafton and Barry Stobo, third parties
(Action No. 0001-13166)

[2000] A.J. No. 1176

274 A.R. 195

9 B.L.R. (3d) 173

1 P.P.S.A.C. (3d) 297

100 A.C.W.S. (3d) 576

Action Nos. 0001-02529, 0001-04994, 0001-01899 and

0001-13166

Alberta Court of Queen's Bench
Judicial District of Calgary

LoVecchio J.

Heard: August 31, 2000.
Judgment: filed September 26, 2000.

(45 paras.)

Counsel:

Howard A. Gorman, for the lenders.
Frank R. Dearlove, for Arthur Andersen.
David E. Tavender, Q.C., Brian D. Foster and Tom F. Mayson, for the syndicate members.
Jeff E. Sharpe, for certain directors and officers of Merit Energy Ltd.
Tristram J. Mallett, for First Energy Capital Corporation.
David A. Klein, for Larry Delf.
Douglas G. Stokes, for directors of Merit Energy.
G. Brian Davison and Richard C. Dixon, for certain lienholders and unsecured creditors of Merit Energy Ltd.
Susan Wortzman, for Canada Dominion.

REASONS FOR JUDGMENT

LoVECCHIO J.:--

INTRODUCTION

1 The general rules of law applicable in insolvency matters recognize that in certain situations priorities or special rights are to be recognized. As the cash available to satisfy unsecured creditors declines, the number seeking recognition as a priority creditor seem to rise. The Merit Energy Ltd. reorganization is no exception.

2 Several parties seek a declaration that would essentially give them a priority over the secured creditors in this matter, or they ask that monies be reserved from the proposed payout to the secured creditors until a priority determination is made. The declarations sought are in the nature of trusts and equitable liens.

BACKGROUND

3 Merit is currently subject to an order under the Companies Creditors Arrangement Act. Arthur Anderson Inc. is Merit's Receiver and Manager, and its secured creditors are National Bank of Canada, Bank One, NA and Bank One, Canada.

4 In addition, several proceedings have been instituted in various jurisdictions, including Alberta, by certain flow-through shareholders, claiming misrepresentation. These relate to the circumstances surrounding Merit's public offering of 2,222,222 flow-through common shares by a prospectus dated July 30, 1999.

5 The CCAA proceedings and the shareholder actions are being case managed by me. On August 9, 2000, the Receiver applied to this Court for the approval of a sale of Merit's assets for $92,200,000.00 and for the approval of a payout from the proceeds of up to $60 million.

6 The Court approved the sale and authorized a payout of only $45 million. Prior to authorizing a payout of an additional $15 million, the Court provided time for any party claiming an equitable lien, trust or other entitlement in priority to the Lenders to make an application seeking a determination of its priority claims. These applications emerged.

7 Only three groups requested a determination of priority. First, the purchasers of the flow-through shares under the Offering claimed a trust.

8 Second, the Underwriters of the Offering claimed an equitable lien, charge or constructive trust, in order to gain a priority over the Lenders' security. The Underwriters also supported the flow-through shareholders' trust claim. The Underwriters and the Directors clearly have an interest in the outcome of that claim, as any trust amounts awarded to the flow-through shareholders would reduce any damages that may ultimately be payable by the Underwriters and the Directors should the various claims by the flow-through shareholders be successful.

9 Third, former directors and officers of Merit (referred to for simplicity collectively as the "Directors"), who are also named as defendants by the flow-through shareholders, claimed an equitable lien securing Merit's indemnity obligations to them.

DISPOSITION

10 Immediately after the hearing, I indicated to Counsel for certain of the flow-through shareholders, who had sought a declaration that certain funds should be deemed to be held in trust for their benefit, that I was inclined to dismiss their application. It was also discussed that success in their application might be prejudicial to their clients' tax position. They were given an opportunity to withdraw their application. They informed me that they intended to do just that. As a result, no disposition was made of their application.

11 The applications by the Underwriters and the Directors were not withdrawn. While they did support the application of the flow-through shareholders for a declaration of trust, they did so for different reasons. Their applications were dismissed at the hearing with written reasons to follow. These are those reasons.

ISSUES

12

1. Is there a basis for an equitable lien or other priority claim by the Underwriters?
2. Is there a basis for an equitable lien or other priority claim by the Directors?

ANALYSIS

13

1. Underwriters' Equitable Lien or Other Priority Claim

a) Why are the Underwriters seeking an equitable lien or charge?

14 In the flow-through shareholders' actions against Merit, the Underwriters are also named defendants. While the Underwriters deny any liability to the flow-through shareholders, they also

acknowledge that position may not be ultimately sustained. In the event they were found liable, they seek to be indemnified by Merit under the terms of the Underwriting Agreement for the Offering dated July 15, 1999.

15 Due to Merit's financial difficulties, the economic value of this indemnity is minimal. Said another way, were the Underwriters to be found liable and were they to claim successfully on their indemnity from Merit, there will be very little in Merit, after the payments required to be made to the secured creditors, to satisfy that indemnity.

16 Accordingly, to fill this potential void, the Underwriters claim a lien not only generally over all of Merit's assets, but specifically against the $15 million in proceeds from the Offering. In order to be successful in this latter claim, there may be a need to trace the funds into specific Merit assets, as the proceeds of the Offering were co-mingled with Merit's own funds.

17 In light of the conclusion reached below, I need not address this tracing and co-mingling submission.

b) How does an equitable lien or charge arise?

18 The Underwriters outline the concept of an "equitable lien" from Halsbury's Laws of England, 4th ed. (London: Butterworths, 1990) at para. 754:

> ...an equitable right, conferred by law upon one person, to a charge upon the real or personal property of another, until certain specific claims have been satisfied....An equitable lien, like an equitable charge, confers on the holder a proprietary right so that he is a secured creditor in a bankruptcy or winding up.

19 Halsbury's also reviews some authorities for the proposition that "equitable liens are founded upon general considerations of justice" (para. 754, note 13). That is, an equitable lien is granted in circumstances where a party has some good reason for receiving a lien which would otherwise not be available to it, such as unfairness or unjust enrichment.

c) Specific circumstances allegedly giving rise to an equitable lien or charge

20 As a preliminary matter, I note that the Underwriters rely on a statutory reference and a documentary reference to bolster their claim for an equitable lien. First, the Underwriters claim that certain provisions of the Personal Property Security Act give a priority to equitable liens. Second, they point to the most recent commitment letter between Merit and the Lenders, dated November 24, 1999, as amended February 18, 2000. At para. 2 of the Representations and Warranties section, it states:

> The formal Offering Letter and the Security and related agreements will constitute, [sic] legal, valid, and binding obligations of the Borrower, enforceable in accordance with their terms, <u>subject to</u> applicable bankruptcy, insolvency, or similar laws affecting creditors' rights generally and to <u>the availability of equitable remedies</u>. [emphasis added]

21 The representation and warranty referred to is contained in an offering letter. Even if an equitable lien could be created by representation and warranty language, this document could not do

so as it is not the constating document for the loan or the security. It is merely the commitment of the lender to provide a credit facility on certain terms.

22 Leaving aside that the commitment letter is not the credit facility, the language in question does not create the right to a lien, it merely indicates that if one were to exist it would have a priority. Put another way, the language simply states the security of the Lenders is subject to any equitable remedies which may exist but does not itself create them. The same reasoning precludes a lien from being created by virtue of the provisions in the Personal Property Security Act.

23 Therefore, regardless of any priority recognized by legislation or documents, they do not create an equitable lien where none otherwise exists. Accordingly, the Underwriters must establish the existence of such a lien independently of such provisions.

24 The Underwriters argue that inducement and reliance are the principles of justice in the present case which make an equitable lien appropriate.

i) Inducement

25 On the inducement point, the Underwriters submit that they would not have participated in the Offering were it not for the indemnity and contribution rights. The Underwriters further argue that those rights are meaningless (by that they mean valueless in these circumstances) unless they give rise to an equitable lien: without an equitable lien, the Underwriters will not have priority; without priority, there will be little or nothing left from Merit's estate with which to indemnify the Underwriters (if an indemnity is called for).

26 That is an interesting argument for the creation of a security interest: when you strike a bargain, you do not provide for security to protect your claim - something you could do (as did the Lenders). Then things go bad so that you might not be paid, this gives you a right to claim a lien so you can get paid. In my view, that is not the law. If that were the law, every unsecured creditor in an insolvency would claim an equitable lien.

27 It is clear that the indemnity may have been a factor in the Underwriters entering into the Underwriting Agreement (I suspect the fee they were paid was also a factor). That alone does not mean that equity demands that indemnity be secured when the language the parties chose clearly sets out an unsecured obligation. There was no other evidence before me of an inducement by the company.

28 The Underwriters also claim that Merit violated the terms of the prospectus (in the prospectus the "Use Of Proceeds" section said the funds were to be used for Canadian Exploration Expenses) by paying all or most of the proceeds of the Offering into its current account with the National Bank of Canada (one of the Lenders) on the same day that Merit received the funds. That may be so, but that raises issues of breach of contract not equitable liens.

ii) Reliance

29 On the reliance point, the Underwriters claim that they were fully reliant on Merit regarding the representations, and alleged misrepresentations, in the prospectus. They submit that their due diligence obligations could only take them so far; beyond that, they had to rely on Merit. This is, of course, correct.

30 In any offering, the company and the underwriters both have obligations. One of the issues in the proceedings instituted by the flow-through shareholder actions will be whether one or both breached those obligations. In light of the Underwriters' due diligence obligations they were not, in my view, completely reliant upon Merit and the indemnity. Rather, they were in an ordinary business relationship with Merit as equals with distinct obligations and rewards.

31 Despite direct and repeated questions on this point, counsel was unable to provide one reason why the equities of the situation made it just to convert into a priority what was clearly in the documents an unsecured obligation. On fairness grounds, it is hard to conceive of the justification for granting a lien or other priority where the priority is being claimed in respect of an obligation that has two distinct contingencies at this point: first, no actions have yet succeeded against the Underwriters and, accordingly, the Underwriters at this point have no claim for indemnity. Second, the indemnity is not an absolute right. While it is clearly very broad in its terms, they still must be successful on their indemnity claim.

iii) Unjust Enrichment

32 The Underwriters also allege an unjust enrichment in favour of the Lenders at the expense of the flow-through shareholders and the Underwriters. Unjust enrichment requires: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of any juristic reason for the enrichment (see Sorochan v. Sorochan, [1986] 5 W.W.R. 289 (S.C.C.) at 294).

33 The Lenders cite, inter alia, County of St. Paul, No. 19 v. Genereux Workshop (Bonnyville) Ltd. (1984), 32 Alta. L.R. (2d) 395 (C.A.). There, the court refused to impose an equitable lien in favour of a builder's unpaid trade creditors. At 399, the court stated that an equitable lien arises "where property of one person may by a proceeding in equity be reached by another as a security for a claim on the ground that otherwise the former would be unjustly enriched" (citing Goff and Jones, The Law of Restitution, 2nd ed. (1978)).

34 I find no unjust enrichment in the circumstances of this application. This is a hearing not about the Lenders' assets, but about the proceeds from the sale of some of Merit's assets. Matters relating to liens against the Lenders' assets are properly between the Lenders and the Underwriters.

iv) Other Equitable Grounds

35 In addition to the basic framework for equitable liens already discussed, the Underwriters also made several related arguments. First, the Underwriters claimed to be beneficiaries of a trust or to have an equitable lien by subrogation, by adopting the flow-through shareholders' trust argument.

36 The direct and subrogated trust arguments attempt to give contractual rights and remedies the hallmarks and benefits of a trust. As mentioned earlier, the Underwriters had a self-serving motive for supporting this contention, in that any future damages attributed to them would be lower. In my view, the arguments must fail, as there is no underlying trust to support them.

37 Second, the Underwriters point to an August 5, 1999 letter from National Bank of Canada to Merit. It contains a statement that part of the proceeds of a new credit advance to Merit is being made by the Lenders "(S)ubject to the [Lenders'] right of demand, [for repayment of the advance] in full, by August 31, 1999 from proceeds of the $15,000,000 equity issue".

38 The Underwriters claim that this shows that the Lenders intended to "scoop" the proceeds of the Offering. As a result, the Underwriters should not now be entitled to a priority over the Lenders. The basis for this is really alleged improper conduct by the Lenders.

39 In my view, this letter may require some explanation from the Lenders, but that is a matter between the Underwriters and the Lenders. It is not relevant to a distribution of Merit's assets, unless this conduct could form the basis of a pre-judgement remedy such as the seizure of a property (cash which is the property of Merit) that was to flow to the Lenders (because they are a secured creditor) in the hands of a third party (Merit). The Underwriters have led no evidence that would support such a remedy.

40 Third, the Underwriters cite several instances where indemnity rights of trustees gave rise to equitable liens. As a starting point, they refer to W.E. Knepper and D.A. Bailey, Liability of Corporate Officers and Directors, 5th ed. (Charlottesville: Michie Company, 1993) at 281-82, where the authors refer to an indemnity as an inducement. However, the cases cited by the Underwriters are not analogous to the present situation. For example, in Ex Parte Chippendale, Re German Mining Co. (1853), 4 E.R. 19, 4 De G.M. & G. 19, directors received an equitable lien, but in circumstances where their subrogated interest made it just for them to have a priority.

41 As I said above, the bottom line of the Underwriters' submissions is to seek a pre-judgment remedy in the event that the Underwriters are found liable and activate the indemnity provision. Even if it were "beyond doubt" and "plain and obvious" that the Underwriters were going to be found liable to the flow-through shareholders, and that they would then be successful on their claim under the indemnity, why should their unsecured claim for indemnity be elevated to an equitable lien claim? In my view, the risk of non-payment of their indemnity is not a sufficient reason to ground the relief sought.

2. Directors' Equitable Lien or Other Priority Claim

42 The Directors (as stated earlier, I am using "Directors" to refer to both directors and officers of Merit) ask that $25 million be reserved pending a trial of an issue as to their equitable lien. As with the Underwriters, this application was also dismissed.

43 The Directors rely on the same passage in the November 24, 1999 commitment letter as do the Underwriters - i.e., that the security is subject to the availability of equitable remedies. As stated, this passage cannot be used to create an equitable remedy.

44 The Directors also claim an equitable lien arising out of an indemnity - both contractual and under relevant corporate legislation. As with the Underwriters, the Directors were unable to show any reason why it would be just to grant an equitable lien in these circumstances.

COSTS

45 If the parties are unable to reach an agreement respecting costs, they may speak to me on the matter within the next 30 days.

LoVECCHIO J.

cp/s/qljpn/qlcas/qlgxc

5

Indexed as:

Pettkus v. Becker

Lothar Pettkus (Defendant), Appellant; and Rosa Becker (Plaintiff), Respondent.

[1980] 2 S.C.R. 834

Supreme Court of Canada

1980: June 23 / 1980: December 18.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trusts and trustees -- Constructive trust or resulting trust -- Long standing common law relationship -- "Wife" first supported "husband" while he accumulated capital and later helped in construction of home and development of business -- Whether or not women entitled to portion of property an assets held exclusively in man's name -- Applicability of constructive and resulting trusts to common law relationship.

Appellant, through toil and thrift, developed over the years a successful beekeeping business. He owned two rural Ontario properties, where the business was conducted, and had the proceeds from the sale in 1974 of a third property located in Quebec. Respondent through her labour and earnings, too, contributed substantially to the good fortune of the common enterprise. Although unmarried, appellant and respondent lived as husband and wife from 1955 to 1974, save for a three-month separation in 1972. When the relationship terminated in late 1974, respondent commenced this action seeking a declaration of entitlement to one-half interest in the lands and a share in the beekeeping business.

The trial judge awarded respondent forty beehives without bees, together with $1,500 representing earnings from those hives for 1973 and 1974. The Ontario Court of Appeal varied the judgment at trial by awarding respondent one-half interest in the lands owned by appellant and in the beekeeping business.

Held: The appeal should be dismissed.

Per Laskin C.J. and Dickson, Estey, McIntyre, Chouinard and Lamer JJ.: In the absence of an express or implicit intention to create it, a resulting trust could not be found. Mr. Pettkus and Miss Becker had no express arrangement for sharing economic gain. An intention that a wife should have an interest cannot be implied if her conduct before or after the acquisition of the property is "wholly ambiguous", or its association with the agreement "altogether tenuous". Uncommitted to marriage or to a permanent relationship, it would be difficult to ascribe to Mr. Pettkus an intention, express or implied, to share his savings. While Miss Becker said they were to "save together", the truth was that Mr. Pettkus saved at her expense. In the face of the trial judge's explicit finding that common intention was not present and the appellate court's decision not to disturb that finding, this Court would not infer or presume otherwise.

The constructive trust could be applied in this case. The requirements needed to establish unjust enrichment, the principle lying at the heart of the constructive trust, were: an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment. It was necessary not only to determine that one spouse had benefited at the expense of the other and order restitution but also to consider the retention of the benefit to be unjust in the circumstances of the case. The compelling inference from the facts was that Miss Becker believed she had some interest in the farm and that the expectation was reasonable in the circumstances. The first two requirements underlying unjust enrichment were satisfied: Mr. Pettkus had the benefit of 19 years, unpaid labour, while Miss Becker received little or nothing in return. As for the third requirement, where one person in a relationship tantamount to spousal, prejudiced herself in reasonable expectation of receiving an interest in property and the other in the relationship freely accepted benefits conferred by the first person in circumstances he knew or ought to have known of that expectation, it would be unjust to allow the recipient of the benefit to retain it.

The causal connection between the acquisition of the property and corresponding enrichment, necessary for the application of the principle of unjust enrichment, was met in this case. The question of causal connection was really one of fact: was her contribution sufficiently substantial and direct as to entitle her to a portion of the profits realized?

There was not basis for any distinction, in dividing property and assets, between marital relationships and those informal relationships which subsist for a lengthy period. The Court did not create a presumption of equal shares. There was a great difference between directing that there be equal shares for common law spouses, and awarding Miss Becker a share equivalent to the money or money's worth that she contributed over nineteen years. The fact that there was no statutory scheme directing equal division of assets acquired by common law spouses was no bar to the availability of an equitable remedy. The extent of interest was to be proportionate to the claimant's contribution, direct or indirect. Where the contributions were unequal, the shares would be unequal.

While the question of conflict of laws was not pleaded, addressed by the Court or counsel or alluded to in argument, it lurked in the background of the case. As the parties were domiciled in Quebec from 1955 until at least August 1971, it was arguable that the laws of Quebec, not Ontario, should govern the rights of the parties. While the Court takes judicial notice of the statutory or other laws prevailing in every province and territory in Canada, even in cases where such statutes or laws may not have been proved in evidence in courts below, the Court does not take judicial notice of the law of another province unless that law has been pleaded in the first instance.

Per Martland and Beetz JJ.: The case was not concerned with the rights of a wife and so was not concerned with matrimonial property. Any recognition by this Court of the right of a court to im-

pose on one party the obligations of a trustee in respect of his property for the benefit of another founded on unjust enrichment would have very wide implications and would involve judicial legislation that would extend substantially the existing law.

The scope of the doctrine of unjust enrichment in English law was somewhat nebulous. It was recognized in claims for the return of money -- usually in areas where a fiduciary relationship existed -- or in situations where a person, having knowledge of an existing trust acquired the legal title to the trust property.

The adoption of the concept of constructive trust involved an undesirable extension of the law, as so far determined in this Court, for it would clothe judges with a very wide power to apply "palm tree justice" without the benefit of any guidelines. The only test of what constituted unjust enrichment would be the judge's individual perception of what he considered to be unjust.

The determination of this appeal in respondent's favour could be made in accordance with existing authority and without recourse to the concepts of unjust enrichment and constructive trust.

Per Ritchie J.: The advances made by the plaintiff throughout the period of the relationship between the parties supported the existence of a resulting trust which was governed by the legal principles in Murdoch v. Murdoch and Rathwell v. Rathwell.

Contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household gave rise to a rebuttable presumption that, at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust in favour of the donor to be measured in terms of the value of the contributions so made. When there was a conjugal relationship between the parties the presumption of a resulting trust arose for the benefit of the donor whenever there was evidence of a contribution of money or money's worth having been made by one spouse towards the acquisition of property by the other, and this presumption persisted until the relationship was dissolved unless it was rebutted by "evidence showing some other intention".

The trial judge's opinion was that whatever respondent's motives may have been, her intention in making the contributions was to benefit the appellant and that those contributions were acquiesced in and freely accepted by him to be applied for and towards the maintenance and operation of a joint household. There was, accordingly, support for the existence of a common intention giving rise to a presumption of a resulting trust and certain pejorative remarks made by the trial judge could not be considered as evidence rebutting the presumption to which the contributions made by the respondent gave rise. Several facts recognized by the Court of Appeal -- that the parties had lived together as husband and wife, although unmarried, for twenty years, during which time the respondent made possible the appellant's acquisition of the first property by exclusively supporting the household and by working with the appellant to build up the beekeeping business -- constituted evidence that the properties and the beekeeping operation were subject to a resulting trust in favour of the respondent.

Cases Cited

Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Murdoch v. Murdoch, [1975] 1 S.C.R. 423; Pettitt v. Pettitt, [1970] A.C. 777; Gissing v. Gissing, [1971] A.C. 886; Fribance v. Fribance, [1957] 1 All E.R. 357; Moses v. Macferlan (1760), 2 Burr. 1005; The Ruabon Steamship Company, Limited v. The London Assurance, [1900] A.C. 6; Cooper v. Cooper (1888), 13 A.C. 88; Canadian National

Steamship Co. Ltd. v. Watson, [1939] S.C.R. 11; Reading v. Attorney-General, [1951] A.C. 507; Cooke v. Head, [1972] 2 All E.R. 38, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario [(1978), 87 D,L.R. (3d) 101, (1978), 20 O.R. (2d) 105.], varying a judgment of Chartrand J. Appeal dismissed.

Barry B. Swadron, Q.C., and Susan G. Himel, for the defendant, appellant.
Sidney N. Lederman and G.E. Langlois, for the plaintiff, respondent.

Solicitors for the defendant, appellant: Barry B. Swadron and Susan G. Himel, Toronto.

Solicitors for the plaintiff, respondent: Langlois and Wilkins, Hawkesbury.

The judgment of Laskin C.J. and Dickson, Estey, McIntyre, Chouinard and Lamer JJ. was delivered by

DICKSON J.:-- The appellant, Lothar Pettkus, through toil and thrift, developed over the years a successful beekeeping business. He now owns two rural Ontario properties, where the business is conducted, and he has the proceeds from the sale, in 1974, of a third property, located in the Province of Quebec. It is not to his efforts alone, however, that success can be attributed. The respondent, Rosa Becker, through her labour and earnings, contributed substantially to the good fortune of the common enterprise. She lived with Mr. Pettkus from 1955 to 1974, save for a separation in 1972. They were never married. When the relationship sundered in late 1974, Miss Becker commenced this action, in which she sought a declaration of entitlement to a one-half interest in the lands and a share in the beekeeping business.

I

The Facts

Mr. Pettkus and Miss Becker came to Canada from central Europe, separately, as immigrants, in 1954. He had $17 upon arrival. They met in Montreal in 1955. Shortly thereafter, Mr. Pettkus moved in with Miss Becker, on her invitation. She was thirty years old and he was twenty-five. He was earning $75 per week; she was earning $25 to $28 per week, later increased to $67 per week.

A short time after they began living together, Miss Becker expressed the desire that they be married. Mr. Pettkus replied that he might consider marriage after they knew each other better. Thereafter, the question of marriage was not raised, though within a few years Mr. Pettkus began to introduce Miss Becker as his wife and to claim her as such for income tax purposes.

From 1955 to 1960 both parties worked for others. Mr. Pettkus supplemented his income by repairing and restoring motor vehicles. Throughout the period Miss Becker paid the rent. She bought the food and clothing and looked after other living expenses. This enabled Mr. Pettkus to save his entire income, which he regularly deposited in a bank account in his name. There was no agreement at any time to share either monies or property placed in his name. The parties lived frugally. Due to their husbandry and parsimonious lifestyle, $12,000 had been saved by 1960 and deposited in Mr. Pettkus' bank account.

The two travelled to Western Canada in June 1960. Expenses were shared. One of the reasons for the trip was to locate a suitable farm at which to start a beekeeping business. They spent some time working at a beekeeper's farm.

They returned to Montreal, however, in the early autumn of 1960. Miss Becker continued to pay the apartment rent out of her income until October 1960. From then until May 1961, Mr. Pettkus paid rent and household expenses, Miss Becker being jobless. In April 1961, she fell sick and required hospitalization.

In April 1961, they decided to buy a farm at Franklin Centre, Quebec, for $5,000. The purchase money came out of the bank account of Mr. Pettkus. Title was taken in his name. The floor and roof of the farmhouse were in need of repair. Miss Becker used her money to purchase flooring materials and she assisted in laying the floor and installing a bathroom.

For about six months during 1961 Miss Becker received unemployment insurance cheques, the proceeds of which were used to defray household expenses. Through two successive winters she lived in Montreal and earned approximately $100 per month as a babysitter. These earnings also went toward household expenses.

After purchasing the farm at Franklin Centre the parties established a beekeeping business. Both worked in the business, making frames for the hives, moving the bees to the orchards of neighbouring farmers in the spring, checking the hives during the summer, bringing in the frames for honey extraction during July and August, and the bees for winter storage in autumn. Receipts from sales of honey were handled by Mr. Pettkus; payments for purchases of bee hives and equipment were made from his bank account.

The physical participation by Miss Becker in the bee operation continued over a period of about fourteen years. She ran the extracting process. She also, for a time, raised a few chickens, pheasants and geese. In 1968, and later, the parties hired others to assist in moving the bees and bringing in the honey. Most of the honey was sold to wholesalers, though Miss Becker sold some from door to door.

In August 1971, with a view to expanding the business a vacant property was purchased in East Hawkesbury, Ontario, at a price of $1,300. The purchase monies were derived from the Franklin Centre honey operation. Funds to complete the purchase were withdrawn from the bank account of Mr. Pettkus. Title to the newly acquired property was taken in his name.

In 1973 a further property was purchased, in West Hawkesbury, Ontario, in the name of Mr. Pettkus. The price was $5,500. The purchase monies came from the Franklin Centre operation, together with a $1,900 contribution made by Miss Becker, to which I will again later refer. Nineteen seventy-three was a prosperous year, yielding some 65,000 pounds of honey, producing net revenue in excess of $30,000.

In the early 1970's the relationship between the parties began to deteriorate. In 1972 Miss Becker left Mr. Pettkus, allegedly because of mistreatment. She was away for three months. At her departure, Mr. Pettkus threw $3,000 on the floor. He told her to take the money, a 1966 Volkswagen, forty beehives containing bees, and "get lost". The beehives represented less than ten percent of the total number of hives then in the business.

Soon thereafter, Mr. Pettkus asked Miss Becker to return. In January, 1973, she agreed, on condition he see a marriage counsellor, make a will in her favour and provide her with $500 per

year so long as she stayed with him. It was also agreed that Mr. Pettkus would establish a joint bank account for household expenses, in which receipts from retail sales of honey would be deposited. Miss Becker returned she brought back the car and $1,900 remaining out of the $3,000 she had earlier received. The $1,900 was deposited in Mr. Pettkus' account. She also brought the forty bee hives but the bees had died in the interim.

In February 1974 the parties moved into a house on the West Hawkesbury property, built in part by them and in part by contractors. The money needed for construction came from the honey business, with minimal purchases of materials by Miss Becker.

The relationship continued to deteriorate and on October 4, 1974 Miss Becker against left, this time permanently, after an incident in which she alleged that she had been beaten and otherwise abused. She took the car and approximately $2,600 in cash, from honey sales. Shortly thereafter the present action was launched.

At trial, Miss Becker was awarded forty beehives, without bees, together with $1,500, representing earnings from those hives for 1973 and 1974.

The Ontario Court of Appeal varied the judgment at trial by awarding Miss Becker a one-half interest in the lands owned by Mr. Pettkus and in the beekeeping business.

II

Resulting Trust

This appeal affords the Court an opportunity to clarify the equivocal state in which the law of matrimonial property was left, following Rathwell v. Rathwell [[1978] 2 S.C.R. 436.].

Broadly speaking, it may be said that the principles which have guided development of recent Canadian case law are to be found in two decisions of the House of Lords: Pettitt v. Pettitt [[1970] A.C. 777.] and Gissing v. Gissing [[1971] A.C. 886.]. In neither judgment does a majority opinion emerge. Though it is not necessary to embark upon a detailed analysis of the two cases, the legacy of Pettitt and Gissing should be noted. First, the decisions upheld the judicial quest for that fugitive common intention which must be proved in order to establish beneficial entitlement to matrimonial property. Second, the Law Lords did not feel free to ascribe or impute an intention to the parties, not supported by evidence, in order to achieve equity in the division of assets of partners to a marriage. Third, in Gissing four of the Law Lords spoke of "implied, constructive or resulting trust" without distinction.

A majority of the Court in Murdoch v. Murdoch [[1975] 1 S.C.R. 423.] adopted the "common intention" concept of Lord Diplock in Gissing:

> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other [p. 438]

In Murdock, it was held that there was no evidence of common intention. In Rathwell, supra common intention was held to exist. Although the notion of common intention was endorsed in Murdoch and in Rathwell, many difficulties, chronicled in the cases and in the legal literature on the subject, inhered in the application of the doctrine in matrimonial property disputes. The sought-for "common intention" is rarely, if ever, express; the courts must glean 'phantom intent' from the conduct of the parties. The most relevant conduct is that pertaining to the financial arrangements in the acquisition of property. Failing evidence of direct contribution by a spouse, there may be evidence of indirect benefits conferred: where, for example, one partner pays for the necessaries while the other retires the mortgage loan over a period of years, Fribance v. Fribance [[1957] 1 All E.R. 357.]

The artificiality of the common intention approach has been stressed. Professor Donovan Waters in a comment in (1975), 53 Can. Bar Rev. 366 stated:

> In other words, this "discovery" of an implied common intention prior to the acquisition is in many cases a mere vehicle or formula for giving the wife a just and equitable share in the disputed asset. It is in fact a constructive trust approach masquerading as a resulting trust approach. [at p. 368]

Professor Waters also observed, in a discussion of the resulting trust and constructive trust doctrines:

> After all, in few cases will the inferring of an agreement be impossible or unreasonable, and, where it is so, justice and equity may well come to the same conclusion as that produced by the law of resulting trusts. But too often the resulting trust theory produces a result at odds with what would seem the more desirable outcome, or there is a fight through the appeal courts, and then what may well be difference of judicial opinion on the factual merits becomes a difference on the subtleties of the law of trusts. [at p. 377]

In Murdoch v. Murdoch, Laskin J., as he was then, introduced in a matrimonial property dispute the concept of constructive trust to prevent unjust enrichment. It is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine beneficial entitlement. It was described this way in Rathwell, at p. 455:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason--such as a contract or disposition of law--for the enrichment.

Although the resulting trust approach will often afford a wife the relief she seeks, the resulting trust is not available, as Professor Waters points out, (at p. 374): "where the imputation of intention is impossible or unreasonable". One cannot imply an intention that the wife should have an in-

terest if her conduct before or after the acquisition of the property is "wholly ambiguous", or its association with the alleged agreement "altogether tenuous". Where evidence is inconsistent with resulting trust, the court has the choice of denying a remedy or accepting the constructive trust.

Turning then to the present case and common intention, the evidence is clear that Mr. Pettkus and Miss Becker had no express arrangement for sharing economic gain. She conceded there was no specific arrangement with respect to the use of her money. She said "No, we just saved together. It was meant to be together, it was ours". The arrangement "was without saying anything ... there was nothing talked over ...". She testified she was not interested in the amount Mr. Pettkus had in the bank. In response to the question "but he never told that what he was saving was yours?" she replied: "I never asked".

It is apparent Mr. Pettkus took a negative view of Miss Becker's entitlement. His testimony makes it clear that he never regarded her as his wife. The finances of each were completely separate, except for the joint account opened for the retail sales of honey. Mr. Pettkus was asked in cross-examination: "you both saved together?", and replied: "I saved, she didn't". Uncommitted to marriage or to a permanent relationship it would be difficult to ascribe to Mr. Pettkus an intention, express or implied, to share his savings. Miss Becker said they were to "save together" but the truth is that Mr. Pettkus saved at the expense of Miss Becker.

With respect to the period from 1955 until the spring of 1961, the trial judge found:

> Now the Plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the Plaintiff paying the living expenses and the Defendant doing the saving. I am sure that the Plaintiff wouldn't have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger Defendant into marriage.
>
> Moreover, the evidence does not clearly show that from 1955 to May, 1961, the Plaintiff contributed more than the Defendant to the overall expenses of the household, so that I find that the $12,000 accumulated by the Defendant was due to his superior salary, his frugal living and his off job gains from repairs. It is to be noted that the Plaintiff made also some savings. [Emphasis added.]

Whatever the passage may lack in point of gallantry, the words underlined represent findings of fact by the trial judge, negating common intention.

As to the contribution by Miss Becker to the beekeeping business, the trial judge found:

> As the honey business is a seasonal one, the Defendant continued his side line, repairs of German cars but both businesses were not enough sometimes to keep the household solvent so that the Plaintiff had to work outside a few times. I also find that during that period the Plaintiff helped the Defendant to a certain degree in the operation of The honey business, especially during the extracting period but such help was seasonal and marginal as the Defendant employed outside help in the peak periods.

The trial judge dealt with Miss Becker's claim to a part interest in the Ontario properties, for the 1971 to 1974 period, in the following manner:

> The Plaintiff alleges that those sums came from the Franklin Centre honey operation and claims a part interest in those Ontario properties on account of her active participation in the honey business. Once again, it would never have occurred to the Plaintiff to make such a claim explicitly at the time because such a trust wasn't in the contemplation of either party, even implicitly. [Emphasis added.]

Again there is a rejection of the notion of implied intention and resulting trust. At trial, Mr. Pettkus testified:

> Q. All right. Now did you ever have any discussions with her as to whether or not she had an interest in either your garage business or your bee business?
> A. It was all mine. She had no interest in the business, no.
> Q. Did she ever suggest that she did?
> A. No.

With regard to the arrangement under which Miss Becker was to receive $500 per year, Mr. Pettkus testified:

> A. Well, I knew the whole business is in my name and she has nothing so I figured it's only fair to give her a little bit of money and I figured the five hundred dollars, pay for all the expenses and she would have five hundred dollars every year as long as she stayed with me and if there's a good crop if there's no crop well of course I can't pay.

In the view of the Ontario Court of Appeal, speaking through Madam Justice Wilson, the trial judge vastly underrated the contribution made by Miss Becker over the years. She had made possible the acquisition of the Franklin Centre property and she had worked side by side with him for fourteen years building up the beekeeping operation.

The trial judge held there was no common intention, either express or implied. It is important to note that the Ontario Court of Appeal did not overrule that finding.

I am not prepared to infer, or presume, common intention when the trial judge has made an explicit finding to the contrary and the appellate court has not disturbed the finding. Accordingly, I am of the view that Miss Becker's claim grounded upon resulting trust must fail. If she is to succeed at all, constructive trust emerges as the sole juridical foundation for her claim.

III

Constructive Trust

The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of Moses v. Macferlan [(1760), 2 Burr. 1005.] put the matter in these words: "... the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. (See A.W. Scott, "Con-

structive Trusts", (1955), 71 L.Q.R. 39; Leonard Pollock, "Matrimonial Property and Trusts: The Situation from Murdoch to Rathwell", (1978), 16 Alberta Law Review 357). The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury. See Babrociak v. Babrociak [(1978), 1 R.F.L. (2d) 95 (Ont. C.A.).]; Re Spears and Levy et al. [(1975), 52 D.L.R. (3d) 146 (N.S.C.A.).]; Douglas v. Guaranty Trust Company of Canada [(1978), 8 R.F.L. (2d) 98 (Ont. H.C.).]; Armstrong v. Armstrong [(1978), 93 D.L.R. (3d) 128 (Ont. H.C.).].

How then does one approach the question of unjust enrichment in matrimonial causes? In Rathwell I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. Lord Halsbury scotched this heresy in the case of The Ruabon Steamship Company, Limited v. London Assurance [[1900] A.C.] with these words: "... I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it." (p. 10) Lord Macnaghten, in the same case, put it this way: "there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it". (p.]5) It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must, in addition, be evident that the retention of the benefit would be unjust in the circumstances of the case.

Miss Becker supported Mr. Pettkus for 5 years. She then worked on the farm for about 14 years. The compelling inference from the facts is that she believed she had some interest in the farm and that that expectation was reasonable in the circumstances. Mr. Pettkus would seem to have recognized in Miss Becker some property interest, through the payment to her of compensation, however modest. There is no evidence to indicate that he ever informed her that all her work performed over the nineteen years was being performed on a gratuitous basis. He freely accepted the benefits conferred upon him through her financial support and her labour.

On these facts, the first two requirements laid down in Rathwell have clearly been satisfied: Mr. Pettkus has had the benefit of nineteen years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

I conclude, consonant with the judgment of the Court of Appeal, that this is a case for the application of constructive trust. As Madam Justice Wilson noted, "the parties lived together as husband and wife, although unmarried for almost twenty years during which period she not only made possible the acquisition of their first property in Franklin Centre during the lean years, but worked

side by side with him for fourteen years building up the beekeeping operation which was their main source of livelihood".

Madam Justice Wilson had no difficulty in finding that a constructive trust arose in favour of the respondent by virtue of "joint effort" and "teamwork", as a result of which Mr. Pettkus was able to acquire the Franklin Centre property, and subsequently the East Hawkesbury and West Hawkesbury properties. The Ontario Court of Appeal imposed the constructive trust in the interests of justice and, with respect, I would do the same.

IV

The "Common Law" Relationship

One question which must be addressed is whether a constructive trust can be established having regard to what is frequently, and euphemistically, referred to as a "common law" relationship. The purpose of constructive trust is to redress situations which would otherwise denote unjust enrichment. In principle, there is no reason not to apply the doctrine to common law relationships. It is worth noting that counsel for Mr. Pettkus, and I think correctly, did not, in this Court, raise the common law relationship in defence of the claim of Miss Becker, otherwise than by reference to The Family Law Reform Act, 1978, 1978 (Ont.) c. 2.

Courts in other jurisdictions have not regarded the absence of a marital bond as any problem. See Cooke v. Head [[1972] 2 All. E.R. 38.]; Eves v. Eves [[1975] 3 All E.R. 768.]; Spears v. Levy, supra; and in the United States, Marvin v. Marvin [(1976), 557 P.2d 106.] and a comment thereon (1977), 90 Harv. L.R. 1708. In Marvin the Supreme Court of California stated that constructive trust was available to give effect to the reasonable expectations of the parties, and to the notion that unmarried co-habitants intend to deal fairly with each other.

I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period. This was not an economic partnership nor a mere business relationship, nor a casual encounter. Mr. Pettkus and Miss Becker lived as man and wife for almost twenty years. Their lives and their economic well-being were fully integrated. The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs.

In recent years, there has been much statutory reform in the area of family law and matrimonial property. Counsel for Mr. Pettkus correctly points out that The Family Law Reform Act, 1978, of Ontario, enacted after the present litigation was initiated, does not extend the presumption of equal sharing, which now applies between married persons, to common law spouses. The argument is made that the courts should not develop equitable remedies that are 'contrary to current legislative intent'. The rejoinder is that legislation was unnecessary to cover these facts, for a remedy was always available in equity for property division between unmarried individuals contributing to the acquisition of assets. The effect of the legislation is to divide 'family assets' equally, regardless of contribution, as a matter of course. The Court is not here creating a presumption of equal shares. There is a great difference between directing that there be equal shares for common law spouses, and awarding Miss Becker a share equivalent to the money or money's worth she contributed over some nineteen years. The fact there is no statutory regime directing equal division of assets acquired by common law spouses is no bar to the availability of an equitable remedy in the present circumstances.

V

Settlement or Estoppel

Another question argued is whether acceptance by Miss Becker of $3,000, forty beehives and a car, upon temporary separation, and the imposition of terms on her return, estopped further claim. The trial judge answered this question in the affirmative. With respect, I think that he was wrong in so holding. A person is not estopped by accepting a sum of money, the amount of which is not negotiated, thrown at one's feet. There was no agreement by Miss Becker as to her interest in what I would regard as joint assets, nor can the conditions exacted by Miss Becker upon resumption of cohabitation be any bar to her claim. The filing by Mrs. Rathwell in Rathwell, supra, of a caveat claiming a one-tenth interest was held to be no basis for rejecting her claim to share equally in assets accumulated by her and her husband.

VI

Causal Connection

The matter of "causal connection" was also raised in defence of Miss Becker's claim, but does not present any great difficulty. There is a clear link between the contribution and the disputed assets. The contribution of Miss Becker was such as enabled, or assisted in enabling, Mr. Pettkus to acquire the assets in contention. For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute. Miss Becker indirectly contributed to the acquisition of the Franklin Centre farm by making possible an accelerated rate of saving by Mr. Pettkus. The question is really an issue of fact: was her contribution sufficiently substantial and direct as to entitle her to a portion of the profits realized upon sale of the Franklin Centre property and to an interest in the Hawkesbury properties, and the beekeeping business? The Ontario Court of Appeal answered this question in the affirmative, and I would agree.

VII

Respective Proportions

Although equity is said to favour equality, as stated in Rathwell it is not every contribution which will entitle a spouse to a one-half interest in the property. The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal.

It could be argued that Mr. Pettkus contributed somewhat more to the material fortunes of the joint enterprise than Miss Becker but it must be recognized that each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort. Physically, Miss Becker pulled her fair share of the load; weighing only 87 pounds, she assisted in moving hives weighing 80 pounds. Any difference in quality or quantum of contribution was small. The Ontario Court of Appeal in its discretion favoured an even division and I would not alter that disposition, other than to note that in any accounting regard should be had to the $2,600, and the car, which Miss Becker received on separation in 1974.

VIII

I would not wish to conclude without reference to the conflict of laws question lurking in the background in this case. The evidence discloses that the parties were domiciled in the Province of Quebec from 1955 until at least August 1971, when vacant property was purchased in East Hawkesbury, Ontario. It is arguable that the laws of the Province of Quebec, and not those of Ontario, should govern the rights of the parties. This point was not pleaded, nor was it addressed by court or counsel in any of the earlier proceedings. It was not alluded to during argument in this Court.

The position in law would seem to me to be as stated by Professor Jean Castel, in Droit international privé québécois (Butterworths, 1980, pp. 803-4). Although, before an inferior court, the law of another province in Canada has to be proven in the same manner as the law of a foreign country, that rule does not have application in an appeal to this Court. This Court follows the rule drawn by the House of Lords in the case of Cooper v. Cooper [(1888), 13 A.C. 88 (H.L.).] and takes judicial notice of the statutory or other laws prevailing in every province and territory in Canada even in cases where such statutes or laws may not have been proved in evidence in the courts below. This Court however, does not take judicial notice of the law of another province unless that law has been pleaded in the first instance. As Cannon J. held in Canadian National Steamship Co. Ltd. v. Watson [[1939] S.C.R. 11.] at p. 18 it would be unfair for this Court to take, suo motu, judicial notice of the statutory laws of another province, ignored in the pleadings.

I would dismiss the appeal with costs to the respondent.

The following are the reasons delivered by

MARTLAND J.:-- I am in agreement with the reasons of Mr. Justice Ritchie. I would like to outline my reasons for my concurrence with his opinion as to the application of the theory of a constructive trust in the circumstances of this case.

This is the third case to come before this Court in which a claim has been made for the recognition of an interest in what is claimed to be "family property". In the first two cases, the claim was made by a wife as against her husband. In the present case the claimant is not the wife of the defendant.

In Murdoch v. Murdoch [[1975] 1 S.C.R. 423.] the wife claimed a partnership interest in three quarters sections of land and in all the other assets of her husband. The trial judge held that the parties were not partners and also held that no relationship existed which would give the plaintiff the right to claim as a joint owner in equity any of the farm assets. Before this Court, the wife's claim was placed, not on the basis of partnership, but on the existence of a resulting trust. In rejecting the wife's claim, the majority of the Court referred to the two leading English authorities, Pettitt v. Pettitt [[1970] A.C. 777.] and Gissing v. Gissing [[1971] A.C. 886.], and also pointed out that in those cases the wife's claim related only to the matrimonial home. The following passages were cited with approval from the judgment of Lord Diplock in the latter case at pp. 905 and 909:

> A resulting implied or constructive trust--and it is unnecessary for present purposes to distinguish between these three classes of trust--is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui

> que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.
>
> ...
>
> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.

The conclusion reached was that in the light of the evidence in the case and the findings of the trial judge it could not be said that there was any intention that the beneficial interest in the property in issue did not belong solely to the husband.

The majority of the Court did not adopt the opinion expressed in the dissenting judgment that the court could find a constructive trust, not dependent upon evidence of intention.

In Rathwell v. Rathwell [[1978] 2 S.C.R. 436.], this Court was again concerned with a claim by a wife to a beneficial interest in land, the legal ownership of which was in the husband and such interest was found, on the evidence, to exist. Three members of the Court were of the view that the claim could be supported on the basis of either a resulting trust, founded upon common intention, or a constructive trust, founded upon unjust enrichment. Two members of the Court decided that a resulting trust had been established and that a decision as to the application of the principles of unjust enrichment and constructive trust was unnecessary. Four members of the Court rejected the application, in cases of this kind, of the doctrine of constructive trust as a means of preventing unjust enrichment. The reasons for so deciding are to be found at pages 471 to 474 of the report, and it is unnecessary to repeat them here.

As pointed out earlier, the present case is not concerned with the rights of a wife and so is not concerned with matrimonial property. Any recognition by this Court of the right of a court to impose on one party the obligations of a trustee in respect of his property for the benefit of another founded on unjust enrichment has very wide implications and involves judicial legislation in that it extends substantially the existing law.

The scope of the doctrine of unjust enrichment in English law is somewhat nebulous. The broad statement of Lord Mansfield in the case of Moses v. Macferlan [(1760), 2 Burr. 1005.] was made in relation to an action for money had and received to the plaintiffs use. It was in this context that he said: "The gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money".

Later decisions did not support the generality of this statement but held that the action for money had and received had to be placed on a contractual basis founded upon an implied promise to pay. Scrutton L.J. in Holt v. Markham [[1923] 1 K.B. 504.] at p. 513, referred to the "now discarded doctrine of Lord Mansfield". Lord Greene in Morgan v. Ashcroft [[1938] 1 K.B. 49.], at p. 62, said

that: "Lord Mansfield's view upon those matters, attractive though they be, cannot now be accepted as laying the true foundation of the claim".

Although Lord Wright in the case of Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ld. [[1943] A.C. 32.] at p. 62 expressed sympathy with Lord Mansfield's view, it may be noted that some years later in Reading v. Attorney-General [[1951] A.C. 507.] at pp. 513-14, Lord Porter said:

> It was suggested in argument that the learned judge founded his decision solely upon the doctrine of unjust enrichment and that that doctrine was not recognized by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated.

In the Pettitt (supra) case, at p. 795, Lord Reid dealt with the theory of unjust enrichment as follows:

> Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another. And in any case it would only result in a money claim whereas what a spouse who makes an improvement is seeking is generally a beneficial interest in the property which has been improved.

He did not suggest that in that case recognition of the beneficial interest could be effected by means of a constructive trust.

It would appear that in English law the existence of an unjust enrichment has been recognized in claims for the return of money, which was the case in Moses v. Macferlan (supra) in which Lord Mansfield's statement was made.

I turn now to the nature of a constructive trust as so far recognized. The areas in which a constructive trust has been found to exist have usually been in cases where a fiduciary relationship exists, e.g. a trustee or fiduciary taking advantage of his position to make a profit for himself. Such a trust has also been found to exist where a person having knowledge of an existing trust acquires the legal title to the trust property. In relation to the matter of unjust enrichment, the following passage appears in Snell's Principles of Equity, 27th ed., at p. 186:

> In some jurisdictions the constructive trust has come to be treated as a remedy for many cases of unjust enrichment; whenever the court considers that the property in question ought to be restored, it simply imposes a constructive trust on the recipient. In England, however, the constructive trust has in general remained essentially a substantive institution; ownership must not be confused with obligation, nor must the relationship of debtor and creditor be converted into one of trustee and cestui que trust. Yet the attitude of the courts may be chang-

> ing; and although the constructive trust is probably not confined to cases arising out of a fiduciary relationship, it is far from clear what other circumstances suffice to raise it or how far it can be employed as a species of equitable remedy to enforce legal rights.

The authority for the statement "the attitude of the courts may be changing" is given in the case of Hussey v. Palmer [[1972] 1 W.W.R. 1286.]. In that case, the plaintiff went to live with her daughter and son-in-law and paid the cost of adding an extra bedroom to their house. The arrangement did not work and the plaintiff left. She sued to recover the money she had expended. In the Court of Appeal, Lord Denning found there was a constructive trust. Phillimore L.J. regarded the matter as a resulting trust and Cairns L.J. dissented.

The validity of the judgment is questionable as indicated in the discussion of it in (1973), 89 L.Q.R. 2. Lord Denning, at p. 1290, referred to a constructive trust as a "trust imposed by law whenever justice and good conscience require it". Commenting on this generalization, the note in the Law Quarterly Review says, at p. 4:

> These large generalisations will be more familiar to American than English lawyers. This applies especially to the notion that resulting and constructive trusts run together and the amalgam is an equitable remedy: see e.g. A.W. Scott (1955) 71 L.Q.R. 39. Indeed, even those writers who have some sympathy with the notion do not suggest that it is already part of English law: see Hanbury's Modern Equity (9th ed. 1969) at pp. 222, 223; Goff and Jones, Restitution (1966) at p. 37.

In my opinion, the adoption of this concept involves an extension of the law as so far determined in this Court. Such an extension is, in my view, undesirable. It would clothe judges with a very wide power to apply what has been described as "palm tree justice" without the benefit of any guidelines. By what test is a judge to determine what constitutes unjust enrichment? The only test would be his individual perception of what he considered to be unjust.

As stated in the reasons of my brother Ritchie, the determination of this appeal in the respondent's favour can be made in accordance with existing authority and without recourse to the concepts of unjust enrichment and constructive trust.

The following are the reasons delivered by

RITCHIE J.:-- I have had the benefit of reading the reasons for judgment prepared for delivery by my brother Dickson which contain an accurate account of the facts giving rise to this appeal.

I agree with the conclusion reached by Mr. Justice Dickson, but as my reasons for doing so are substantially different from those adopted by him, I find it necessary to express myself separately.

The difference between us stems from the fact that I find that the advances made by the plaintiff throughout the period of the relationship between the parties to be such as to support the existence of a resulting trust which is governed by the legal principles adopted by the majority of this Court in Murdoch v. Murdoch [[1975] 1 S.C.R. 423.] and Rathwell v. Rathwell [[1978] 2 S.C.R. 436.], whereas Mr. Justice Dickson, in applying the reasoning contained in the dissenting opinions

in those cases to the evidence as he interpreted it, concluded that the circumstances disclosed the existence of a constructive trust arising out of and dependant upon the applicability of the doctrine of "unjust enrichment".

The leading cases of Pettitt v. Pettitt [[1970] A.C. 777.] and Gissing v. Gissing [[1971] A.C. 886.], afford a comprehensive though not entirely consistent review of the law respecting the disposition to be made of matrimonial property in the event of a marital break-up and it is made plain from the judgment of Lord Denning in Cooke v. Head [[1972] 2 All E.R. 38.] at p. 40 that the same considerations apply in the case of a man and his mistress who had been living in what is now frequently referred to as a "common law" relationship.

I should make it plain at the outset that in my opinion contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household give rise to a rebuttable presumption that, at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust in favour of the donor to be measured in terms of the value of the contributions so made. This opinion appears to me to be borne out in the following passage taken from the reasons for judgment of Lord Pearson in Cissing v. Gissing, supra, at p. 902 where he said:

> If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by her towards the purchase of the house there was and is a resulting trust in her favour. If she did make contributions of substantial amount towards the purchase of the house, there would prima facie be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption: it can be rebutted by evidence showing some other intention. The question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the judge acting as a jury.

The same proposition is elaborated in the reasons for judgment of Lord Reid, speaking for himself, in the case of Pettitt v. Pettitt, supra, where he said at p. 795:

> But it is, I think, proper to consider whether, without departing from the principles of the common law, we can give effect to the view that, even where there was in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other? I do not think that it is a very convincing argument to say that, if a stranger makes improvements on the property of another without any agreement or any request by that other that he should do so, he acquires no right. The improvement is made for the common enjoyment of both spouses during the marriage. It would no doubt be different if

> the one spouse makes the improvement while the other spouse who owns the property is absent and without his knowledge or consent. But if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position, I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.
>
> Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another.

It will be seen that in the case of Gissing v. Gissing, supra four of the law Lords spoke of "implied constructive or resulting trusts" without any apparent distinction and this is to be found in other English authorities, but it is nevertheless noteworthy that when there is a conjugal relationship between the parties the presumption of a resulting trust arises for the benefit of the donor wherever there is evidence of a contribution of money or money's worth having been made by one spouse towards the acquisition of property by the other, and this presumption persists until the relationship is dissolved unless it is rebutted by "evidence showing some other intention".

It is contended on behalf of the appellant that the five-year difference in age between the parties constituted evidence justifying the learned trial judge in making the following finding:

> Now, the Plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the Plaintiff paying the living expenses and the Defendant doing the saving. I am sure that the Plaintiff wouldn't have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger Defendant into marriage.

With the greatest respect for those who take a different view, I cannot but find that this gratuitously insulting conclusion is based upon the trial judge's opinion that, whatever her motives may have been, the respondent's intention in making the contributions was to benefit the appellant and it is clear that they were acquiesced in and indeed freely accepted by him to be applied for and towards the maintenance and operation of a joint household. Accordingly, the last quoted comments of the trial judge in my view support the existence of a common intention giving rise to a presumption of a resulting trust and nothing said by him in this paragraph can be considered as evidence rebutting the presumption to which the contributions made by the respondent give rise.

In the latter part of his reasons for judgment the learned trial judge made a further finding to the effect that a trust entitling the respondent to a part interest in the Ontario farm properties "was not in the contemplation of either party even implicitly".

My brother Dickson has made a finding that "The trial judge held there was no common intention, either expressed or implied. It is important to note that the Ontario Court of Appeal did not overrule that finding".

For my part, however, I would adopt the following paragraph from the judgment of Wilson J.A. in the Court of Appeal:

> With all due respect to the learned trial judge I think he vastly underrated the contribution the appellant made to the acquisition of the assets held in the respondent's name. The parties lived together as husband and wife, although unmarried, for almost twenty years during which period she not only made possible the acquisition of their first property in Franklin Centre by supporting them both exclusively from her income during 'the lean years', but worked side by side with him for fourteen years building up the bee-keeping operation which was their main source of livelihood. The respondent did not deny that she supported him for the first five or six years of their lives together while he put away all his earnings in the bank.

In my view these findings constitute evidence that the Hawkesbury properties and the beekeeping operation were subject to a resulting trust in favour of the respondent and I do not find it necessary to import the doctrine of "unjust enrichment" from the law of quasi contract in order to dispose of this appeal.

As to the share to which the respondent is entitled upon the dissolution of the relationship, I am, like my brother Dickson, in accord with the disposition made of the matter by the Court of Appeal.

As I reach the same conclusion as my brother Dickson, it may be thought that these reasons are somewhat superfluous but I find myself unable to subscribe to the application of the doctrine of constructive trusts under the circumstances here disclosed and I wish to disassociate myself with any suggestion in conformity with the trial judge's bitter criticism of the respondent.

In view of all the above, I would dismiss this appeal with costs to the respondent.

Appeal dismissed with costs.

6

Re
Merikallio

[1969] O.J. No. 1448

[1970] 1 O.R. 244

8 D.L.R. (3d) 142

Ontario
High Court of Justice

Ferguson, J.

July 4, 1969.

A.E. McKague, Q.C., trustee, in person.

Peter A. Vesa, for Gunilla Merikallio.

Michael D.R. O'Brien, for Eugene Merikallio.

---

1 **FERGUSON, J.**:-- This motion, which came before me in Weekly Court at Toronto on May 21st last and was adjourned pending the filing of a statement of law and fact pursuant to Rule 238 [am. O. Regs. 162/62, s. 6; 180/64, s. 7; 156/68, s. 8] concerns a marriage settlement made between the deceased Karl A. Merikallio and his wife who before marriage was Gunilla Domander.

2 Karl A. Merikallio died on April 18, 1966. On the eve of his marriage to his widow he agreed that he would "forthwith deposit $20,000.00" in bonds with Mr. A.E. McKague, barrister and solicitor "for the purpose of buying a house together with the Party of the second part [the intended bride] after the completion of the intended marriage". They did marry on July 9, 1960. It was a term of the agreement that the property to be purchased should be held by them as joint tenants and that "this type of ownership shall not in the future be changed or amended". They further agreed that

> ... the said sum of $20,000.00 in bonds or otherwise shall be forthwith delivered to A.E. McKague, 330 Bay Street, Toronto, who is the solicitor for the Party of the second part and he shall hold in trust the said bonds which will in all probability be registered in the name of the Party of the first part and the said bonds

> will be held until the purchasing of the said home together with other furniture or other requirements up to the amount of $20,000.00 or until both parties by written direction do instruct him otherwise or until any competent Court would adjudge the question of the said bonds.

3 The deceased agreed that in the event of his death his automobile should become the property of his widow and that the furniture and household effects "shall go to the wife upon his death".

4 According to Mr. McKague's affidavit the bonds were "placed in the care of A.E. McKague" which I expect means that they were deposited with him pursuant to the agreement and that he still holds the bonds pursuant to the terms of the agreement. Although that fact is not set out in clear language I take it to be so. Neither is it stated in clear words that no property was purchased with the $20,000 in bonds; but it is so stated by counsel and is in no way in issue.

5 The point for decision is whether the bonds form part of the deceased's estate or belong to the widow. I am of opinion that the bonds now belong to the widow. There can be no doubt that Mr. McKague became an express trustee and that the bonds were impressed with the trust.

6 The answer to the problem is found by me in the following passage which appears in Williams on Executors, 11th ed., p. 504:

> It is, however, an established doctrine in Courts of Equity, that things shall be considered as actually done, which ought to have been done: and it is with reference to this principle, that land is under some circumstances regarded as money, and money as land. It was laid down by Sir Thomas Sewell, M.R., in Fletcher v. Ashburner (1780), 1 Bro. C.C. 497, "that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this is in whatever manner the direction is given; whether by Will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land." See Weldale v. Partridge, (1796), 5 Ves. 396 ... It follows, therefore, that every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it; and its devolution and disposition will be governed by the rules applicable to that species of property. ... 2 Powell Dev. 61, Jarman's edition. See Sugden's Law of Property, 460.

Drew v. Martin (1864), 2 H. & M. 130 at p. 133, 71 E.R. 411, and Re Eykyn's Trusts (1877), L.R. 6 Ch. D. 115, may be also referred to.

7 There will be a declaration that the fund is now the property of the widow. Costs to the widow and the son of the deceased out of the estate of the deceased. No other costs without prejudice to the right of the trustee, if any, to his fee as trustee and the right of the estate of the deceased to the income if any on the fund.

Order accordingly.

7

Case Name:

Toronto Standard Condominium Corp. No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.

Between
Toronto Standard Condominium Corporation No. 1908 also known as Toronto Condominium Corporation No. 1908, Applicant, and Stefco Plumbing & Mechanical Contracting Inc., Respondent

[2013] O.J. No. 5760

2013 ONSC 7709

39 R.P.R. (5th) 320

2013 CarswellOnt 17594

236 A.C.W.S. (3d) 249

Court File No. CV-12-454835

Ontario Superior Court of Justice
Toronto, Ontario

W. Low J.

Heard: October 25, 2012; written submissions, November 25, 2013.
Judgment: December 13, 2013.

(56 paras.)

Real property law -- Condominiums -- Common elements -- Common expenses -- Unit holders -- Liability of -- For default on payment of common fees -- Application by the Condominium Corporation (CC) for a declaration that common expenses arrears were damages and an order requiring Stefco to pay its arrears allowed in part -- Stefco owned two units and its mortgage was in default -- The CC did not comply with the statute in asserting lien rights -- That non-compliance was prejudicial to the mortgagee -- It would not be fair and equitable to revive the CC's lien rights -- Failure to pay common expenses did not result in damages to the CC -- However, Stefco was ordered to pay the common expenses arrears with interest.

Statutes, Regulations and Rules Cited:

Condominium Act, 1998, S.O. 1998, c. 19, s. 84, s. 85, s. 86, s. 119, s. 134, s. 136

Counsel:

Yadvinder Singh Toor, for the Applicant.

Brandon Jaffe, for Stefco Plumbing & Mechanical Contracting Inc.

Doug Bourassa, for the Interested Party, Business Development Bank of Canada.

REASONS FOR JUDGMENT

1 **W. LOW J.**:-- The applicant seeks a declaration that the respondent (hereinafter "Stefco") has breached its obligation to pay common expenses, an order declaring that that the common expense arrears are damages, an order requiring Stefco to pay all its arrears together with interest and costs and an order that the damages as declared and costs as awarded are to be added as common expenses to Stefco's units.

2 Stefco does not challenge the fact of arrears.

3 The central issue to be decided, however, is a question of priority as between the applicant condominium corporation and the interested party, the Business Development Bank of Canada. The Business Development Bank has a mortgage against Stefco's two units in the condominium.

Background

4 The applicant Toronto Standard Condominium Corporation No. 1908 ("TSCC 1908"), is a non-profit corporation created under the *Condominium Act, 1998,* S.O. 1998, c. 19 ("the *Act*") by registration of a Declaration on January 21, 2008, at the Land Titles Division for the Land Registry Office for Toronto (No. 66).

5 TSCC 1908 comprises 33 units, two sign units and appurtenant common elements for the property at 127 Westmore Drive, Toronto, Ontario.

6 Stefco owned units 18 and 27, Level 1 in the condominium. The title search shows that the units were purchased by Stefco from the Declarant/Developer, 1288124 Ontario Inc. (the "Declarant") on January 7, 2009.

7 The *Act* requires the Declarant of a condominium to hold a turn over meeting transferring control of the Condominium Corporation to a new board, elected by the unit owners, within 21 days of transfer of a majority of the units. The *Act* also requires the Declarant to hand over a list of specified documents to the new board elected at the turn over meeting. In this case no turn over meeting was ever held. Nor were any documents or accounting details provided by the Declarant despite the title to the majority of the units having been transferred on January 7, 2009. The result was that none of the unit owners had any information about the affairs of the condominium corporation, its management or its working details.

8 The unit owners eventually decided to conduct a turn over meeting on their own initiative. They did so on September 7, 2011, electing a new board. The Declarant subsequently circulated a letter through its solicitors, declaring the new board elected to be invalid.

9 As a result, an application was commenced under Court File No. CV-11-436144.

10 On the hearing of the application on December 19, 2011 and January 5, 2012, the court validated the elected board and issued orders against the Declarant requiring it to comply with the *Act* by producing the required documents and information, [2012] O.J. No. 91. The court also required the Declarant to provide, no later than February 12, 2012, a full accounting of the money received to support and maintain the common elements of the condominium since January 21, 2008, the date on which the condominium corporation came into existence, up to and including December 19, 2011. The Declarant failed to comply with the orders of the court and withheld information and documents relating to the affairs of TSCC 1908.

11 Some information was obtained from the Toronto Dominion Bank, wherein TSCC 1908 maintains an account.

12 According to the condominium documents, the monthly common expenses attributable to each unit owned by Stefco was $388.41. Monthly common expenses attributable to Stefco's two units have been accruing in the amount of $388.41 per unit per month since January 21, 2008.

13 There is no record of Stefco ever having paid the common expenses allocated to its units since the inception of the condominium.

The Relevant Provisions of the *Condominium Act, 1998*, S.O. 1998, C. 19 (the *Act*)

14 Section 84 of the *Act* provides as follows:

> 84.(1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.

....

15 Section 85 of the *Act* provides as follows:

> 85.(1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.
>
> (2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister.
>
> (3) A certificate of lien when registered covers,

(a) the amount owing under all of the corporation's liens against the owner's unit that have not expired at the time of registration of the certificate;

(b) the amount by which the owner defaults in the obligation to contribute to the common expenses after the registration of the certificate; and

(c) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in clauses (a) and (b), including the costs of preparing and registering the certificate of lien and a discharge of it.

(4) At least 10 days before the day a certificate of lien is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien.

(5) The corporation shall give the notice by personal service or by sending it by prepaid mail addressed to the owner at the address for service that appears in the record of the corporation maintained under subsection 47(2).

(6) The lien may be enforced in the same manner as a mortgage.

(7) Upon payment of the amounts described in subsection (3), the corporation shall prepare and register a discharge of the certificate of lien in the form prescribed by the Minister and shall advise the owner in writing of the particulars of the registration.

16 Section 119 of the *Act* provides, in part, as follows:

119.(1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

17 Section 134 of the *Act* provides as follows:

134.(1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;
(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and
(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

...

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

18 Section 136 of the *Act* provides as follows:

136. Unless this Act specifically provides the contrary, nothing in this Act restricts the remedies otherwise available to a person for the failure of another to perform a duty imposed by this Act.

19 Section 85 creates an extraordinary mechanism by which a condominium corporation may enforce collection of common expenses which are in default. Section 136 of the *Act* creates jurisdiction for this court to make an order under s. 134 requiring Stefco pay to the condominium damages and costs incurred as a result of non-compliance of the respondent. The applicant submits that the damages suffered by TSCC 1908 for the purposes of s. 134(3)(b)(*i*) of the *Act* is the amount of common expenses that Stefco has failed to pay.

20 The condominium did not register any lien in respect of defaulted common expense payments owed by Stefco.

Relief Requested

21 The applicant requests the following relief:

(a) A declaration that Stefco is in breach of s. 84 of the *Act,* due to failure to pay the common expenses payable in respect of the units owned by it, since January 2009.

(b) An order under s. 134(1) of the *Act* requiring Stefco to comply with its duties and obligations under the *Act,* more particularly, an order requiring Stefco to comply with s. 84 of the *Act.*
(c) An order under s. 134(3)(b)(*i*) of the *Act* that Stefco pay to TSCC 1908 the full arrears of common expenses and interest thereon at the rate of 18% per annum, calculated and compounded monthly, not in advance, starting in January 2009.
(d) An order under s. 134(3)(b)(*ii*) of the *Act* that Stefco pay to TSCC 1908 its full and actual costs of these proceedings, and all actual costs associated with the collection and attempted collection of the sum claimed.
(e) An order under s. 134(5) of the *Act* that all damages ($24,895.42 for each unit) and costs awarded to TSCC 1908 shall be added to the common expenses payable in respect of the units and for such amount to be registered and enforceable as a lien in priority to registered mortgages.

Position of the Business Development Bank of Canada

22 I turn now to the position of the Business Development Bank of Canada ("BDC"). BDC holds a first mortgage against the two units owned by Stefco. Its interests are negatively impacted if the court should hold that unpaid arrears of common expenses constitute damages to the condominium corporation and that such damages shall be added to the common expenses payable in respect of the units.

23 Stefco's mortgage to BDC is in default. The units are subject to power of sale proceedings. The price obtainable for the 2 units will not be sufficient to pay Stefco's mortgage debt to the BDC and, a *fortiori*, will not be sufficient to pay both the mortgage and the amounts that it owes in common expense arrears.

24 The BDC's position is that notwithstanding that even if declaration is made that Stefco is found liable damages and costs to the applicant for failure to pay common expenses, such an order is not the basis upon which the applicant ought to be permitted to assert and register a lien on the respondent's units.

25 On page 2 of its factum, BDC sets out the basis of its submission that the *Act* does not permit the applicant to obtain the priority lien that it seeks:

(a) There is no case law addressing the question of priority of [the condominium corporation's lien] over a mortgagee. The only two cases purporting to address this strategy were unopposed and do not mention priority in respect to mortgagees;
(b) Section 134 of the *Act* is not intended to permit a condominium corporation to "revive" an otherwise expired lien. Granting the relief sought in this case would render the expiry of the lien in section 85(2) meaningless. Any lien could be "revived" simply by commencing an application under section 134;
(c) The relief sought upends the balance struck by the scheme of the *Act* which provides priority to a condominium corporation's lien, but only provided it gives notice to the mortgagee against which it claims priority. In this case,

BDC had no opportunity to protect itself the consequences of accumulating maintenance arrears;

(d) The condominium corporation in this case is not left without a remedy: its contract with the former property manager provides that "In the event the Manager fails to ensure the filing of a Notice of Lien ... the Manager shall be directly liable for such loss ... to the Corporation."

26 BDC also disputes that TSCC 1908 has proven the quantum of the lien it is seeking:

(a) The Applicant has little to no documents supporting its assertion that any arrears were unpaid. It relies on banking records which do not identify the source of any deposits. There are no cancelled cheques evidencing payment from other unit owners.

(b) The Applicant cannot prove the (i) monthly amount due for common expenses (it has offered at least four different figures); (ii) the proper rate of interest for arrears; (iii) the date at which the arrears ostensibly began to accumulate; and

(c) A significant portion of the arrears claimed are statute-barred as they allegedly arose in 2009 - this application was commenced in May 2012.

27 Facts relevant to the BDC's position are simple and largely uncontested.

28 BDC holds a first ranking mortgage registered against both of Stefco's units. Stefco defaulted, and BDC launched enforcement proceedings by issuing a statement of claim dated December 9, 2011. BDC obtained default judgment against Stefco for in excess of $1 million.

29 BDC also issued a notice of sale under charge/mortgage in respect of the units. The notice of sale was served on all parties who were (a) listed as subsequent encumbrancers on the parcel register for the units, (b) were execution creditors, or (c) were guarantors under the loan.

30 BDC has listed the units for sale jointly, with a total list price of $380,000 for both units. The BDC debt is in excess of $1 million. There will be a large deficiency on the sale of the units.

31 This application by TSCC 1908 was commenced on May 30, 2012. Stefco was the only named respondent in the application. TSCC 1908 seeks an order permitting it to add the sum of $24,895.42 to the common expenses of each unit, and for that amount to be enforceable by registration of a lien. The sum of $24,895.42 represents common expense arrears that TSCC 1908 alleges are due and owing from Stefco.

32 Notwithstanding Stefco's alleged failure to pay any common expenses since 2009, TSCC 1908 did not register liens in respect of those arrears as they went into default and the lien rights accordingly expired.

33 This application seeks to "revive" expired lien rights, and to claim priority over the BDC mortgage for the entire amount of unpaid common expenses dating back to 2009.

34 The initial return date for the application was Monday, August 27, 2012. Notwithstanding the fact that BDC is a party with a direct interest in the outcome of the application, the applicant did not notify BDC of the application until Wednesday, August 22, 2012.

35 On August 27, 2012, the applicant and BDC agreed to an adjournment of the application and a schedule for the delivery of materials and cross-examinations. In the result, BDC participated in the final hearing.

Analysis

36 Section 85 of the *Act* confers on condominium corporations an extraordinary and powerful tool, the statutory condominium lien.

37 The *Act* accords the lien priority over all registered encumbrances, regardless of when they were registered:

> 86.(1) Subject to subsection (2), a lien mentioned in subsection 85(1) has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose ....

38 The lien rights are, however, time-limited. Section 85(2) provides that the lien expires after 3 months, unless a certificate of lien is registered:

> (2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister.

39 It is not disputed that TSCC 1908 failed to register a lien for common expense arrears until September 2012. Accordingly therefore, any right to a lien for amounts accruing due prior to July 2012 has expired pursuant to s. 85(2) of the *Act*.

40 Having failed to preserve its lien rights under s. 85(2), TSCC 1908 seeks to employ s. 134 of the *Act* to "revive" the lien rights.

41 Section 134(1), by itself, does not afford TSCC 1908 the lien it seeks. TSCC 1908 relies on s. 134(5) for the additional relief:

> (5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

42 If TSCC 1908's position is accepted, a condominium corporation can "revive" an expired lien by characterizing it as damages for failure to pay common expenses, obtaining an award therefor, and adding those damages to the common expenses for the unit. In this case, when Stefco fails to pay this amount, TSCC 1908 will register a new lien, capturing all of the common expenses arrears dating back to 2009.

43 The "revival strategy" has been the subject of significant negative commentary in Marriott and Dunn: *Practice in Mortgage Remedies in Ontario*, 5th ed. (Carswell, Toronto, 1995) at 56-8.2:

> It is the authors' position that to allow condominium corporations to obtain compliance orders for arrears beyond the three month limitation provided for in s.

> 85(2) is a direct circumvention of the Act. To allow a condominium corporation to obtain a lien for these common expenses arrears would nullify s. 85(2) of the Act and make it meaningless. It would also allow condominium corporations to bypass the safeguards afforded to mortgagees in ss. 86(3) and (5). Condominium corporations could, in effect, allow common expenses arrears to accumulate indefinitely without providing any notice to a mortgagee which might allow it to exercise its rights under s. 88. Arguably, this was not the intention of the Legislature when passing the Act.

44 In contrast to the strong language in *Marriott and Dunn*, the case law in support of this proposition is negligible. There are two reported cases where this strategy of "reviving" expired arrears has been employed. Neither case involved any opposition and neither case considered the consequences of the relief on a prior ranking mortgagee.

45 In *York Condominium Corp. No. 298 v. Knight,* [2004] O.J. No. 6051, the respondent did not appear on the application and the mortgagee was not named as a party. The reported decision does not contain any reasons for decision, and merely recites the form of order that was granted, without explanation. This decision is, in my view, of no precedential value.

46 In *York Region Condominium Corp. No. 633 v. 1262018 Ontario Inc.*, 2008 CarswellOnt 7668 (S.C.), the respondent had not filed any material and sought an adjournment of the application. There was no mortgagee named as a party. The adjournment was refused, and the matter proceeded. The reported decision does not contain reasons considering the relief sought, and largely recites the form of order that was granted. This decision has not been cited in any subsequent decisions. This decision also cannot be relied upon for any precedential value.

47 In contrast to the two decisions cited above, my sister Greer J. commented on the topic of court enforcement of common expense arrears in *National Trust Co. v. Grey Condominium Corp. No. 36*, [1995] O.J. No. 2079, 1995 CarswellOnt 400 (Gen. Div.):

> I have made reference in these Reasons to the Special Assessment of approximately $150,000 passed by the Old Board. It wants an Order compelling National to pay its proportionate share. I have no power under the Act or at common law to make such an Order. The Old Board has its statutory remedies and its By-law remedies and these must be followed by it. It also has its statutory remedies with respect to the payment of the common elements fees.

48 The *Act* provides the court with broad discretion in response to a compliance order under section 134. Section 134(3) provides:

(3) On an application, the court may, subject to subsection (4),'

(a) grant the order applied for;
(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and
(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

49 The Court of Appeal in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2005] O.J. No. 1604, 2005 CarswellOnt 1576 (C.A.) at para. 40 described the purpose behind the s. 134 regime as shifting compliance costs to the unit owners who caused the problem. It is not directed at otherwise innocent mortgagees, such as BDC in this case, who will bear the entire burden of the arrears if the arrears are permitted to form the basis for a new lien:

> My review of the terms of s. 134(5) leads me to agree ... that the section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to the unit owners whose conduct necessitated the obtaining of the order.

50 It is submitted by BDC that it would not be "fair and equitable" in the circumstances to grant the relief sought in this application for the following reasons:

(a) BDC was never provided with any notice of the accumulating arrears. Therefore, it was never in a position to protect itself from the substantial priority claim now being advanced by the condominium corporation;
(b) The condominium corporation has an alternative remedy available to it: pursuit of the property manager that failed to register liens as and when the arrears first arose; and
(c) Section 134 compliance orders are aimed at "people, pets and parking"[2], and are not intended to serve as a parallel regime for common expense collection.

51 The lien registration scheme in s. 86 balances the rights of condominium corporations to collect common expenses with the rights of mortgagees to limit their exposure to priority claims. Section 86 of the *Act* sets out the scheme underlying the priority regime. A central feature of the priority regime is that the lien loses priority if notice is not given:

> **Notice of lien**
>
> (3) The corporation shall, on or before the day a certificate of lien is registered, give written notice of the lien to every encumbrancer whose encumbrance is registered against the title of the unit affected by the lien.
>
> **Service of notice**
>
> (4) The corporation shall give the notice by personal service or by sending it by registered prepaid mail addressed to the encumbrancer at the encumbrancer's last known address.
>
> **Effect of no notice**

(5) Subject to subsection (6), the lien loses its priority over an encumbrance unless the corporation gives the required notice to the encumbrancer.

Priority if notice late

(6) If a corporation gives notice of a lien to an encumbrancer after the day the certificate of lien is registered, the lien shall have priority over the encumbrance to the extent of,

(a) the arrears of common expenses that accrued during the three months before the day notice is given and that continue to accrue subsequent to that day; and
(b) all interest owing on the arrears and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the arrears.

52 The function of the notice requirement is to permit encumbrancers to take such steps as are necessary, available and advisable to protect their respective interests in the property. Where no notice is given, and, *a fortiori*, where no lien is registered at all, an encumbrancer is lulled into the belief that nothing is amiss. The opportunity to protect its interests is denied to the encumbrancer.

53 While the condominium corporation may have a grievance against the Declarant for failure to comply with the its obligations to give full disclosure of the affairs of the condominium upon turnover, as between TSCC 1908 and the mortgagee BDC, the equities lie with the mortgagee in this case. TSCC 1908 did not comply with the statute in asserting any lien rights it would have. That non-compliance was prejudicial to the rights of the encumbrancers, of which BDC was one.

54 I do not consider that the failure to pay common expenses by the Stefco results in damages to the condominium corporation. The condominium corporation is a statutory conduit. Damages, if any, accrue to the unit owners who have borne the consequences of under-contribution to common expenses. In my view, it would not be fair and equitable to declare the product of this litigation a basis for a new lien right and thus in effect revive lien rights that the applicant has long ago allowed to expire. Accordingly, I do not make a declaration that the common expense arrears constitute damages to the condominium corporation.

<u>Disposition</u>

55 I am satisfied, on a balance of probabilities, that Stefco has failed to pay the common expenses attributable to its two units. The following relief is granted:

An order that Stefco pay common expenses arrears commencing January 1, 2009 with interest accruing from the date upon which each such payment came due.

Given that Stefco did not oppose the application, costs on an uncontested basis. A costs outline is to be forwarded to me within 14 days.

56 As between TSCC 1908 and BDC, if the parties are not in agreement that there should be no costs, then submissions may be made in writing of no more than 3 pages in length: by BDC within 2 weeks from the date of these reasons and by TSCC 1908 within 1 week thereafter. The submissions

should be sent to my attention and delivered to The Court House, 361 University Avenue, Judges' Administration, Room 170, Toronto, ON M5G 1T3.

W. LOW J.

1 Subsection (4) deals with leasehold interests and tenants' rights. It has no application in this case.

2 *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2004] O.J. No. 3360, 2004 CarswellOnt 3330 (SCJ) rev'd on other grounds at 2005 CarswellOnt 1576 (CA).

8

151

Case Name:

Toronto Standard Condominium Corp. No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.

Between
Toronto Standard Condominium Corporation No. 1908 also known as Toronto Condominium Corporation No. 1908, Applicant (Appellant), and Stefco Plumbing & Mechanical Contracting Inc., Respondent (Respondent)

[2014] O.J. No. 4806

2014 ONCA 696

246 A.C.W.S. (3d) 207

47 R.P.R. (5th) 15

325 O.A.C. 231

377 D.L.R. (4th) 369

2014 CarswellOnt 14131

Docket: C58192

Ontario Court of Appeal

R.A. Blair, S.E. Pepall and C.W. Hourigan JJ.A.

Heard: August 22, 2014.
Judgment: October 10, 2014.

(53 paras.)

Real property law -- Condominiums -- Unit holders -- Duties of -- Payment of share of common expenses -- Liability of -- For default on payment of common fees -- Lien rights of condominium corporation -- Appeal by Condominium Corporation from refusal of its application for a declaration

that respondent's failure to pay outstanding arrears of its condominium common expenses constituted damages to appellant dismissed -- Appellant had failed to register lien on time to cover all arrears -- Application judge characterized application as attempt to revive lien rights previously lost and found damages resulted to unit owners, not appellant -- Proposed revival strategy ignored fair balance the legislature had struck between the rights of mortgagees and condominium corporations -- Appellant's position was also inconsistent with the scheme of the Act.

Appeal by the Condominium Corporation from a refusal of its application for a declaration that the respondent's failure to pay outstanding arrears of its condominium common expenses constituted damages to the appellant. As a result of this finding, the claim by mortgagee of the respondent's condominium units stood in priority to the appellant's claim. The mortgagee had sold the units but suffered a deficit on the sale. The appellant had not registered a lien with respect to the arrears owing in time to cover all arrears. The appellant then applied under s. 134 of the Condominium Act for a declaration that the arrears owing constituted damages. The appellant thereby attempted to utilize the procedure in s.á134 of the Act to claim the arrears in common expenses as damages and have the damages added to the common expenses payable by the respondent. If successful, the appellant could then register a lien for the full amount of the arrears, plus interest and collection costs. The application judge characterized the application as an attempt to revive lien rights previously lost. She concluded that the equities favoured the mortgagee, as the failure of the appellant to comply with the Act was prejudicial to the rights of the encumbrancers, including the mortgagee. The application judge determined that the revival strategy was not fair and equitable in the circumstances of the case and that damages, if any, accrued to the other unit owners, but not to the appellant, a statutory conduit.

HELD: Appeal dismissed. The application judge made a legal error in her implicit finding that unpaid common expenses could constitute damages under s. 134 of the Act. This legal error adversely impacted on the application judge's exercise of discretion and consequently, appellate interference was warranted. The section of the Act dealing with the collection of common expenses was designed to safeguard the financial viability of a condominium corporation in a manner that fairly balanced the rights of the various stakeholders. The proposed revival strategy ignored the fair balance the legislature had struck between the rights of mortgagees and condominium corporations by granting an unfettered right to a priority to condominium corporations, to the detriment of mortgagees. The appellant's position was also inconsistent with the scheme of the Act. There was nothing in the language of s. 134 that evidenced any intention on the part of the legislature to permit common expenses to be classified as damages so that they could then be reclassified back to being common expenses.

Statutes, Regulations and Rules Cited:

Condominium Act, 1988 S.O. 1998, c. 19, s. 84, s. 85, s. 86, s. 88(1), s. 134(1), s. 134(3), s. 134(3)(b)(ii), s. 134(5)

Appeal From:

On appeal from the order of Justice Wailan Low of the Superior Court of Justice, dated December 13, 2013, with reasons reported at 2013 ONSC 7709.

Counsel:

Jonathan H. Fine and Yadvinder S. Toor, for the appellant.

No one appearing for the respondent, Stefco Plumbing & Mechanical Contracting Inc.

Doug A. Bourassa, for the intervening party, Business Development Bank of Canada.

The judgment of the Court was delivered by

1 **C.W. HOURIGAN J.A.**:-- The appellant, Toronto Standard Condominium Corporation No. 1908 ("Toronto Standard"), commenced an application, wherein it sought, *inter alia*, an order that the respondent, Stefco Plumbing and Mechanical Contracting Inc. ("Stefco"), the owner of two condominium units, pay the full arrears of its outstanding condominium common expenses, plus interest and collection costs.

2 Stefco did not dispute that its common expenses were in arrears and did not participate in the application below or on this appeal. The central issue, both on the application and on this appeal, is the question of the priority between the claim of the Business Development Bank of Canada ("BDC") as mortgagee of Stefco's condominium units and the claim of Toronto Standard for common expenses.

3 The application judge granted an order that Stefco pay common expense arrears plus interest, but declared that Stefco's failure to pay such expenses did not constitute damages to Toronto Standard. The effect of that finding is that the claim of BDC, as mortgagee, stands in priority to the claim of Toronto Standard.

4 Toronto Standard appeals the decision, arguing that the application judge failed to properly interpret and apply the provisions of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act"), and that its claim has priority, pursuant to ss. 86(1) and 134(3).

5 For the reasons that follow, I would dismiss the appeal.

FACTS

6 Toronto Standard is a non-profit corporation created under the Act by registration of a declaration on January 21, 2008 by 1288124 Ontario Inc. (the "Declarant").

7 On January 7, 2009, the Declarant transferred units 18 and 27, Level 1 to Stefco. On August 10, 2010, BDC registered first mortgages against the Stefco units.

8 Under the Act, the Declarant was obliged to hold a turn-over meeting transferring control of Toronto Standard to a new board of directors elected by the unit owners within 21 days of the transfer of a majority of units. It was also obliged to provide financial information and documentation to the new board. As of January 7, 2009, title to the majority of the units had been transferred from the Declarant to unit purchasers, but the turn-over meeting did not occur within the prescribed time limits and the Declarant did not produce any financial documents or accounting details.

9 On September 7, 2011, the unit owners took the initiative of holding their own turn-over meeting, at which they elected a new board. The Declarant did not recognize the new board as val-

id. Consequently, an application was commenced in the Superior Court by various unit owners regarding the validity of both the turn-over meeting and the new board.

10 As a result of Stefco's default under its mortgages, BDC commenced enforcement proceedings on December 9, 2011. Stefco was subsequently noted in default and BDC obtained default judgment for in excess of $1 million.

11 Judgment was delivered in the application bought by the unit owners on January 5, 2012. The court validated the elected board and ordered production of, *inter alia*, an accounting of all payments received to date by Toronto Standard on account of common expenses. The Declarant failed to comply with that order.

12 The new board of Toronto Standard eventually determined, through an examination of bank records, that there was no record of Stefco having paid any common expenses since the inception of the condominium. It is not disputed that Stefco owed common expense arrears totaling $49,790.84 as of June 30, 2012.

13 Pursuant to s. 84 of the Act, unit owners are obliged to contribute to the common expenses in the proportions specified in the declaration. The legislation also provides, in s. 85, that if an owner defaults in its obligation to contribute to common expenses, a lien arises in favour of the condominium corporation against the owner's unit for such expenses, plus interest, and reasonable legal and other costs incurred in the collection or attempted collection of the unpaid amount.

14 The lien expires three months after the default that gave rise to the lien occurred, unless the condominium corporation registers a certificate of lien. The condominium corporation is required, on or before the day that the certificate of lien is registered, to give written notice of its lien to every encumbrancer whose encumbrance is registered against title to the unit. Pursuant to s. 86 of the Act, the amounts subject to the lien have priority over all registered encumbrances, regardless of when they were registered.

15 It is not disputed that Toronto Standard did not register a certificate of lien with respect to Stefco's units until September 20, 2012. This lien only covers arrears from July, 2012 onward because the lien for the earlier common expenses had expired.

16 BDC proceeded by power of sale proceedings. The units were sold and BDC suffered a deficit of several hundred thousand dollars on the sale. This deficit gives rise to the priority dispute between BDC and Toronto Standard.

THE APPLICATION

17 In May, 2012, Toronto Standard commenced an application seeking:

(i) A declaration that Stefco was in breach of its s. 84 obligation to pay common expenses since January, 2009;

(ii) An order pursuant to s. 134(1) of the Act, requiring Stefco to comply with its obligations under the Act, more particularly, an order requiring Stefco to comply with s. 84 of the Act;

(iii) An order pursuant to s. 134(3)(b)(i) of the Act that Stefco pay Toronto Standard the full amount of common expense arrears plus interest at a rate of 18%;

(iv) An order pursuant to s. 134(3)(b)(ii) of the Act that Stefco pay Toronto Standard its full costs of the application, and all costs associated with the collection and attempted collection of the sum claimed; and

(v) An order pursuant to s. 134(3)(b)(ii) of the Act that all damages and costs awarded be added to the common expenses payable in respect of Stefco's units.

18 Under s. 134(1) of the Act, an interested party (e.g. a condominium corporation, a unit owner, or a mortgagee of a unit) may make an application to the Superior Court of Justice for an order enforcing compliance with, *inter alia*, the Act, a declaration or by-laws. The court has the power to grant such relief as is fair and equitable in the circumstances, including an award of damages and costs. Pursuant to s. 134(5), if a condominium corporation obtains an award of damages or costs against an owner or occupier of a unit, the damages or costs, together with any additional actual costs of enforcement, shall be added to the common expenses for the unit.

19 In its application, Toronto Standard attempted to utilize the procedure in s. 134 of the Act to claim the arrears in common expenses as damages and have the damages added to the common expenses payable by Stefco. If successful, Toronto Standard could then register a lien for the full amount of the arrears, plus interest and collection costs. Pursuant to s. 86 of the Act, the lien would stand in priority to all other encumbrances, including the mortgage held by BDC, notwithstanding the fact that Toronto Standard had failed to register a certificate of lien within the time limits in s. 85.

20 The application judge characterized Toronto Standard's application as an attempt to "revive" lien rights previously lost. She observed that this revival strategy had been the subject of negative commentary in G. William Dunn & Wayne S. Gray, *Marriott and Dunn: Practice in Mortgage Remedies in Ontario*, 5th ed. (Scarborough: Carswell, 1995) at 56-8.2. The application judge also noted that the case law cited by Toronto Standard in which the revival strategy had been successfully employed, involved situations where no mortgagee was named as a party. Moreover, these cases did not provide any reasons for the decision to permit the revival of lien rights.

21 The application judge recognized that s. 134 grants the court a broad discretion to fashion an appropriate remedy, having regard to the equities of the case. She also found that "a central feature to the priority regime [in the Act] is that the lien loses priority if notice is not given" (at para. 51). She concluded that the equities favoured the mortgagee, as the failure of Toronto Standard to comply with the Act was prejudicial to the rights of the encumbrancers, including BDC.

22 The application judge declined to make a declaration that the common expense arrears constituted damages to Toronto Standard, stating at para. 54:

> I do not consider that the failure to pay common expenses by Stefco results in damages to the condominium corporation. The condominium corporation is a statutory conduit. Damages, if any, accrue to the unit owners who have borne the consequences of under-contribution to common expenses. In my view, it would not be fair and equitable to declare the product of this litigation a basis for a new lien right and thus in effect revive lien rights that the applicant has long ago allowed to expire. Accordingly, I do not make a declaration that the common expense arrears constitute damages to the condominium corporation.

23 The application was granted only to the extent that an order was made that Stefco pay common expenses arrears commencing January 1, 2009, with interest accruing from the date upon which each such payment came due. The application was otherwise dismissed. The effect of this order is that Toronto Standard's claim to common expense arrears arising before July 2012 is subject to the priority of BDC's mortgage.

POSITIONS OF THE PARTIES

24 Toronto Standard submits the application judge made a "critical error" in finding that damages awarded under s. 134 for unpaid common expenses were not damages suffered by the condominium corporation, but by the individual unit owners.

25 In coming to this erroneous conclusion, the application judge is said to have failed to appreciate the inherent risk that a mortgagee of a condominium unit takes as a result of the provisions of the Act that permit a condominium corporation to add certain amounts to the common expenses of a unit. The application judge is also alleged to have erred in failing to recognize that the Act provides various methods for a condominium corporation to collect common expenses, not just the lien procedure in ss. 85 and 86.

26 In addition, Toronto Standard submits that the application judge failed to appreciate that the Act is consumer protection legislation, which favours the rights of unit owners over mortgagees and, thus, the application judge's conclusion that the equities favoured the mortgagee was in error.

27 BDC submits that the decision of the application judge under s. 134 of the Act was discretionary in nature and therefore, is entitled to a high degree of deference on appeal. Its position is that the application judge properly exercised her discretion by granting an order for the payment of arrears by Stefco and by refusing to allow the arrears to be collected by use of a priority lien.

28 BDC argues that the application judge did not err in concluding that damages in the nature of unpaid common expenses were not damages suffered by Toronto Standard. Rather, the application judge correctly recognized that the actual economic loss will be borne by the unit holders, as they will be obliged to contribute more money to cover the costs of the unpaid common expenses.

ISSUES

29 The appeal raises the following issues:

(i) What is the standard of review of the application judge's decision?

(ii) Can a condominium corporation's claim for common expenses constitute a claim for damages under s. 134 of the Act?

ANALYSIS

(i) Relevant Sections of the Act

30 In order to consider these issues, it is necessary to have regard to the following sections of the Act:

> 84. (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.

...

85. (1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister.

...

86. (1) Subject to subsection (2), a lien mentioned in subsection 85 (1) has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose ...

...

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this *Act*, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

...

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

...

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the com-

mon expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

(ii) Standard of Review

31 The granting of a remedy under s. 134(3) of the Act is within the discretion of the application judge, who is obliged to consider what is fair and equitable in the circumstances of the case: *Metro Toronto Condominium Corp. No. 545 v. Stein*, (2006) 212 O.A.C. 100 (Ont. C.A.), at para. 37; *Gordon v. York Region Condominium Corp. No. 818*, 2014 ONCA 549, at para. 8.

32 The jurisdiction of an appellate court to review the exercise of a judicial discretion is very limited. An appellate court generally will not interfere unless it is clearly demonstrated that the judge applied the wrong legal standard or based his or her conclusions on irrelevant factors, or on factors to which he or she attached inappropriate weight: *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] 2 C.N.L.R. 355 (Ont. C.A.) at para. 82; *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566 (Ont. C.A.) at para. 43.

33 BDC submits that the application judge based her decision on a consideration of the fairness and equity of the situation. Therefore, the decision should attract considerable deference, and should not be subject to reversal on the facts of the case.

34 Toronto Standard accepts the limited jurisdiction of this court to interfere with the exercise of the discretion by the application judge, but submits that the application judge erred in law in finding that damages suffered as a consequence of unpaid common expenses are not damages suffered by the condominium corporation, but by the individual unit owners. Given this legal error, it submits that this court has jurisdiction to reverse the finding of the application judge and award it damages under s. 134.

35 In my view, the application judge made a legal error in her implicit finding that unpaid common expenses can constitute damages under s. 134 of the Act. The application judge approached the issue by reviewing the scheme of the Act and then determined that the revival strategy was not fair and equitable in the circumstances of the case. The correct approach was to first determine whether a claim for common expenses as damages could be made under s. 134. If the answer to that question is no, there is no necessity to consider whether it is fair and equitable for Toronto Standard to be permitted to revive its expired lien.

36 This legal error adversely impacted on the application judge's exercise of discretion and consequently, appellate interference is warranted. It falls to this court to undertake the analysis on the critical issue of whether common expenses can constitute damages under s. 134 of the Act.

(iii) Common Expenses as s. 134 Damages

37 Whether unpaid common expenses can constitute damages under s. 134 is a matter of statutory interpretation. As LaForme J.A. recently stated in *Tyendinaga Mohawk Council v. Brant*, 2014 ONCA 565, at para. 51, statutory interpretation cannot be founded on the wording of the legislation alone; strict construction of statutes has given way to purposive and contextual interpretation. The Supreme Court of Canada has described the court's role in the modern approach to statutory interpretation as engaging in a consideration of the words of a statute "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": *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 9-12, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

38 For the reasons that follow, I find that the interpretation of s. 134 urged by Toronto Standard is contrary to the legislative purpose of the Act, the scheme of the Act, and is not consistent with the wording of s.134.

39 The first part of the analysis involves a consideration of the legislative purpose behind the enactment of the sections of the Act dealing with the collection of common expenses. Toronto Standard describes the Act as being consumer protection legislation, which demonstrates a clear preference for the rights of a condominium corporation to collect common expenses over the rights of a mortgagee to enforce payment obligations under a mortgage.

40 That statement is accurate only to a point. In recognition of the special significance of common expenses in the on-going operation of a condominium building, s. 86 grants the condominium corporation a powerful tool by creating a priority for the collection of common expenses. However, the use of that tool is conditional on the condominium corporation fulfilling its obligation to register its lien and provide notice to encumbrancers.

41 In my view, this part of the Act is designed to safeguard the financial viability of a condominium corporation in a manner that fairly balances the rights of the various stakeholders. Lane J. was correct in *York Condominium Corp. No. 482 v. Christiansen*, (2003), 64 O.R. (3d) 65 (Ont. S.C.J.) when he observed, at para 5: "[A] principal object of the Act is to achieve fairness among the parties -- owners, their tenants, their mortgagees, the corporation itself -- in raising the money to keep the common enterprise solvent."

42 In restricting the availability of the priority for common expenses to circumstances where the condominium corporation has registered its lien and provided notice to encumbrancers, the legislature has balanced the right and obligation of a condominium corporation to collect common expenses against the right of a mortgagee to have notice of a default in the payment of common expenses. This right of notice is of significant benefit to a mortgagee. It allows a mortgagee to determine if it should take steps to protect its interests under s. 88, by paying the common expenses, treating the failure to pay as a default under the mortgage, and commencing enforcement proceedings. The proposed revival strategy ignores the fair balance the legislature has struck between the rights of mortgagees and condominium corporations.

43 With respect to the purpose of s. 134 (5) of the Act, we have the guidance of this Court in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties*, 2005 CarswellOnt 1576 (C.A.), at para. 40:

> [T]he section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to the unit owners whose conduct necessitated the obtaining of the order. Furthermore, the section was enacted to provide a means whereby the condominium corporation could, if necessary, recover those costs from the unit owner through the sale of the unit.

44 In the *Skyline* case, the issue was not whether common expenses could be classified as damages under s. 134. However, the court's interpretation of the purpose of the subsection is instructive. The court considered it to be a tool available to the condominium corporation to ensure that the costs of obtaining compliance orders were not borne by all of the unit owners. Such an ad-

ditional tool is not necessary for the collection of common expenses because ss. 85 and 86 provide the condominium corporation with the process to collect such costs.

45 In summary, I am of the view that the revival scheme proposed by Toronto Standard is inconsistent with the purpose of the Act and the intention of the legislature. This interpretation of the Act upsets the balancing of the rights of stakeholders, by granting an unfettered right to a priority to condominium corporations, to the detriment of mortgagees.

46 Toronto Standard's position is also inconsistent with the scheme of the Act. If its interpretation were accepted, and a priority could be revived utilizing the s. 134 procedure for an expired lien right, s. 85(2) would be rendered meaningless. A condominium corporation could ignore its obligation to register a lien under that sub-section, safe in the knowledge that it could always assert its lien rights later and still claim priority. Thus, Toronto Standard's interpretation would result in a statute that is internally inconsistent.

47 Toronto Standard submits that the Act permits a condominium corporation to add to the common expenses on an unlimited basis in circumstances where the condominium corporation has carried out repair or restorative work, or constructed an addition to the building (e.g. ss. 92(4), 98(4), 105(2), 162(6) and 163(4)). It argues that mortgage lenders willingly accept the risk that the value of their security can be diminished or eliminated, if such costs are added to a unit owner's common expenses account. Therefore, it submits, that adding common expenses as damages under s. 134 is entirely consistent with the scheme of the Act.

48 The difficulty with this argument is threefold. First, the examples cited involve situations where the costs incurred are added to common expenses. However, in the present case, we are being invited to add common expenses to common expenses, through the artifice of briefly labelling them as damages. Second, although the sections cited permit a condominium corporation to increase a unit owner's common expenses, contrary to the submission of Toronto Standard, they do not provide a new mechanism for the enforcement of existing common expense claims. Third, while a mortgagee must recognize that it runs the risk of having its security imperiled by an increase in common expenses, it does so based on the understanding that such a priority is limited to expenses incurred in the three months prior to the registration of a lien.

49 In my view, therefore, Toronto Standard's proposed interpretation of s. 134 is inconsistent with the scheme of the Act.

50 Finally, the lien revival scheme is also inconsistent with the language of *s. 134.* Subsection 134(5) states that "damages or costs" awarded to a condominium corporation are to be "added to the common expenses". Clearly, on the plain language of the subsection, a distinction is drawn between damages and common expenses.

51 There is nothing in the language of s.134 that evidences any intention on the part of the legislature to permit common expenses to be classified as damages so that they can then be reclassified back to being common expenses. This circular statutory interpretation argument is simply not borne out by the wording of the section.

DISPOSITION

52 I would dismiss the appeal.

53 As agreed between the parties, BDC, as the successful party, is entitled to its costs payable by Toronto Standard, fixed in the amount of $5,000, all inclusive.

C.W. HOURIGAN J.A.
R.A. BLAIR J.A.:-- I agree.
S.E. PEPALL J.A.:-- I agree.

9

Case Name:

Transwest Helicopters Ltd. v. International Aviation Services

Action in rem against the aircraft Bell Helicopter 412 S/N 33045 and the aircraft Bell Helicopter 412 S/N 33050 and in personam
Between
Transwest Helicopters Ltd., plaintiff, and
International Aviation Services, defendant, and
The owners and all others interested in the aircraft Bell 412 S/N 33045, defendants, and
The owners and all others interested in the aircraft Bell 412 S/N 33050, defendants

[2002] B.C.J. No. 1933

2002 BCSC 1244

115 A.C.W.S. (3d) 1061

Vancouver Registry No. S020211

British Columbia Supreme Court
Vancouver, British Columbia

Gill J.

Heard: June 11, 2002.
Judgment: August 23, 2002.

(19 paras.)

Liens -- Particular or possessory lien -- Creation at common law -- When available -- Creation by statute -- When lien arises -- Equitable liens -- When available.

Application by the defendant Helicopteros Del Sureste S.A. for the dismissal of the claims against it by the plaintiff Transwest Helicopters Ltd. and for the delivery of a helicopter, serial number 33050. Transwest was asked by the defendant International Aviation Services to overhaul and repair two helicopters having serial numbers 33050 and 33045. Transwest shipped 33045 to HSE in Spain at

the request of IAS. An unpaid account remained regarding 33045. Transwest believed that it would not be paid regarding 33050 and did not ship the helicopter as requested to HSE. Transwest claimed damages for breach of contract against IAS and made a claim in rem against 33050 seeking a statutory, common law and equitable lien. In addition, Transwest claimed an equitable lien in respect of 33045. HSE submitted that Transwest's claims disclosed no reasonable cause of action and should be dismissed.

HELD: Applications dismissed. While an equitable lien did not normally arise in respect of the repair of a chattel, the state of the law dealing with equitable liens was sparse in terms of guiding principles. As the application was brought pursuant to Rule 19(24)(a), it was not plain and obvious that a claim for an equitable lien could not succeed. With respect to Transwest's claims for a statutory and common law lien, the evidence indicated that all information dealing with the full amount claimed for repair were presented to IAS and HSE. The amounts for insurance, storage and carrying charges were itemized on the invoice. In addition, the lien could be claimed because the evidence supported Transwest's assertion that IAS instructed Transwest to repair the helicopter and was either the owner or acted as an agent for the owner. A claim for a common law possessory lien would not necessarily fail. Transwest's claim in rem against 33050 under section 22(2)(n) of the Federal Court Act would not succeed. The section referred only to ships and not aircraft.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rules 18, 18(6), 19(24), 19(24)(a), 55.

Federal Court Act, R.S.C. 1985, C. F-7, s. 22, 22(2)(j), 22(2)(k), 22(2)(l), 22(2)(n).

Repairers Lien Act, R.S.B.C. 1996, c. 404.

Counsel:

D.W. Roberts, Q.C., for the plaintiff, Transwest Helicopters Ltd.
R. Davies, Q.C., and D. Duncan, for the defendant, Helicopteros Del Sureste, S.A.
R. Dhami, for the defendant, International Aviation Services.

---

1 **GILL J.**:-- Helicopteros Del Sureste S.A. ("HSE") seeks a dismissal of the plaintiff's claims against it and the delivery of a Bell 412 Helicopter, serial number 33050. HSE relies upon Rule 19(24)(a) and in respect of one issue where evidence was adduced, Rule 18(6).

2 The plaintiff, Transwest Helicopters Ltd. ("Transwest") is in the business of operating, repairing and overhauling Bell Helicopters. Transwest was asked by International Aviation Services ("IAS") to overhaul and repair two helicopters having serial numbers 33050 and 33045. The helicopters will be referred to by their serial numbers. Transwest says that the repairs were to be charged on a cost-plus basis. No written agreement exists.

3 The repair and refurbishment of 33045 was completed approximately one year ago. At the request of IAS, it was shipped by Transwest to HSE in Spain. Eight hundred thousand dollars (US) was paid to Transwest, but it is alleged that there is an unpaid account of $223,043 (US) and $405,972 (Cdn). The repairs to 33050 were completed in September, 2001, but as it believed it

would not be paid, Transwest did not ship 33050 to HSE as requested. Instead, it claimed entitlement to a lien. The amount owing in respect of 33050 is alleged to be $1,303,961 (US) and $456,155 (Cdn).

4 There were negotiations between the parties in respect of these outstanding accounts. What is described by Transwest as a compromise account was delivered to IAS in October, 2001. That account was not paid. The covering letter includes the following:

> Per the attached invoice the total amount due is 1,522,932.64 USD and 239,320.91 CDN. Transwest is willing to accept a minimum amount of 983,710.07 USD and 239,320.91 CDN. Payment in full of this amount will allow shipment of the aircraft to Spain with all logbooks and its Data Plate.

Transwest then prepared a second invoice seeking payment of the full amount for the repair and overall of both helicopters. That invoice is dated September 28, 2001, and includes carrying charges, charges for insurance and storage and an amount for work unrelated to either of the helicopters.

5 Both 33045 and 33050 are registered with Transport Canada in the name of IAS. The evidence of Mr. Wallace, quality manager at Transwest, is that in order to obtain a Transport Canada Export Certificate of Airworthiness for an aircraft, it must be registered in Canada and Transport Canada will only register aircraft owned by Canadians. Mr. Moore, the owner of IAS, has deposed that HSE is the owner of 33050. A notarized Bill of Sale from the government of Guatemala to HSE is appended to his affidavit.

6 Turning to the statement of claim, the plaintiff makes a claim in rem against 33050. Transwest also seeks declarations of a statutory lien under the Repairers Lien Act, R.S.B.C. 1996, c. 404, a common law lien and an equitable lien. In respect of 33045, Transwest claims an equitable lien only. Damages for breach of contract are sought from IAS.

7 The arguments of HSE and the authorities on which it relies are as follows:

1. The plaintiff cannot invoke the provisions of Rule 55, which deals with this court's admiralty jurisdiction, as a claim for payment for repairs to an aircraft is not a claim recognized by maritime law. Unless the claim falls within s. 22 of the Federal Court Act, R.S.C. 1985, C. F-7, the Federal Court has no jurisdiction and therefore, this court does not have jurisdiction under Rule 55: Middleton v. Ocean Tribune (The), [2000] B.C.J. No. 2271, 2000 BCSC 1621.
2. As a repairer, the plaintiff has no claim to an equitable lien: Snell's Equity (30th ed., 2000) at pp. 521-534.
3. The Repairers Lien Act does not create a statutory lien: Evans v. Martins, [1950] 1 W.W.R. 1 (B.C.C.A.), Paccar Financial Services Ltd. v. Waterfield (1993), 84 B.C.L.R. (2d) 162 (S.C.)
4. While a repairer has a common law possessory lien so long as the chattel remains in its possession, the lien applies only to the sum due for materials and labour expended in connection with the repair. It does not include storage charges or interest and may be lost even while the chattel remains in its possession. Reliance was placed upon a number of authorities including General Securities Ltd. v. Brett's (Lillooet) Ltd. (1956), 5 D.L.R.

(2d) 46 (B.C.S.C.), Inland Kenworth Sales (Kamloops) Ltd. v. Mikela Holdings Ltd. (1978), 6 B.C.L.R. 342 (Co.Ct.) and Albemarle Supply Company, Limited v. Hind and Company, [1928] K.B. 307 (C.A.).

8 Before turning to these issues, I would note that there is no disagreement as to the principles applicable to applications pursuant to Rule 19(24)(a) and Rule 18(6). On an application to strike a claim under Rule 19(24), the question to be decided is whether it is plain and obvious that the plaintiff's statement of claim as it stands or as it might be amended discloses no reasonable cause of action: Kripps v. Touche Ross & Co. (1992), 69 B.C.L.R. (2d) 62 (B.C.C.A.). The test under Rule 18(6) is whether there is a bona fide triable issue or whether the claim is bound to fail: Serup v. School District No. 57 (1989), 54 B.C.L.R. (2d) 258 (B.C.C.A.).

THE CLAIM IN REM

9 Mr. Roberts on behalf of Transwest described the plaintiff's claim against 33050 as novel. He stated that he could find no cases in which a claim was brought in rem for a declaration of lien against an aircraft for repairs performed to that aircraft. It is nevertheless argued that the policy reasons articulated in Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of) (2001), 207 D.L.R. (4th) 577 (S.C.C.) at 590-91 should and would apply to a claim in rem against an aircraft. It was argued that s. 22(2)(n) of the Federal Court Act, which states that there is jurisdiction with respect to "any claim arising out of a contract relating to the construction, repair or equipping of a ship" includes an aircraft. Thus, as the Federal Court has jurisdiction, an action may be brought in rem against a helicopter in this court pursuant to Rule 55.

10 Mr. Davies on behalf of HSE describes the plaintiff's assertion as untenable. I agree. Section 22(2)(j)(k) and (l) of the Federal Court Act are as follows:

> Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any one or more of the following:
>
> ...
>
> (j) any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if the aircraft were a ship;
>
> (k) any claim for towage in respect of a ship or of an aircraft while the aircraft is water-borne;
>
> (l) any claim for pilotage in respect of a ship or of an aircraft while the aircraft is water-borne;

In each of the subsections quoted above, Parliament has made reference to an aircraft and to a ship. Section 22(2)(n) refers only to a ship. I do not accept that an argument that it includes an aircraft has any prospect of success.

EQUITABLE LIEN

11 HSE argues that as a repairer, Transwest has no claim to an equitable lien. In Snell's Equity,29th ed., (1990) the authors discuss liens for sums spent on the property of another at 467:

> "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will". Thus, where a man pays premiums on a policy of insurance belonging to another person to save that policy from lapsing, he will normally be unable to claim a lien on the policy moneys.

HSE says that it is therefore clear that an equitable lien cannot arise. However, the authorities dealing with equitable liens are sparse in terms of guiding principles. In Halsbury's Laws of England, 4th ed., reissue (1998), Vol. 28, para 754, the meaning of "equitable lien" is discussed and it is stated:

> Although lien is a word which is sometimes used in practice to describe a right which arises by agreement of parties, the word is more commonly, and correctly, used to refer to a right arising by operation of law. It is not possible to state a general principle which will account for the diversity of situations in which an equitable lien arises and there is lack of agreement as to the theoretical basis of the most common equitable liens, those of the vendor and purchaser under a contract of sale, let alone equitable liens generally.
>
> An equitable lien differs from a common law lien in that a common law lien is founded on possession and, except as modified by statute, merely confers a right to detain the property until payment, whereas an equitable lien, which exists quite irrespective of possession, confers on the holder the right to a judicial sale.

12 The difficulty in stating general principles is echoed by others: See, for example, Phillips "Equitable Liens - A Search for a Unifying Principle", in Palmer and McKendrick, eds. Interests in Goods, 2d ed., (1998) 975. Mr. Phillips states, at 977:

> It has been correctly said that the list of equitable liens is "something of a themeless rag bag" and within this "rag bag" it is not easy to discern any coherent statements of principle.

13 Thus, while I agree with the general proposition that an equitable lien will not normally arise in respect of the repair of a chattel, given the state of the law and the fact that this is an application brought pursuant to Rule 19(24)(a), I am not able to conclude that it is plain and obvious that the claim cannot succeed.

STATUTORY AND COMMON LAW LIEN

14 It is argued by HSE that Transwest has forfeited any common law lien that it may have to 33050 and it seeks a dismissal of that claim pursuant to Rule 18(6). In summary, it was said that the plaintiff has claimed different amounts on two occasions, and that neither is correct. Nor do the invoices permit calculation of the correct amount. Further, the lien extends only to sums due for materials and labour and Transwest has included other charges. It is agreed that evidence is admissible under Rule 18, although it is not appropriate to weigh conflicting evidence.

15 Counsel for Transwest did not disagree that as stated in Albemarle Supply Company Limited v. Hind and Company, [1928] K.B. 307 (C.A.) at 318, a person claiming a lien must either claim it for a definite amount or give particulars which allow the owner to calculate the amount due. It was argued, however, that the first account was a compromise and when IAS declined to pay, Transwest sought full payment. Mr. Ramsay, Transwest's director of maintenance, has deposed that at a meeting held on December 31, 2001, all information and documentation dealing with the full amount claimed for repair were presented to IAS and HSE. In my view, there is therefore evidence that particulars have been given.

16 As to the inclusion of insurance, storage and carrying charges, the amounts in question are itemized on the invoice. Counsel for HSE referred to authorities in which claims of lien for storage charges and interest were refused, but I do not read those authorities as supporting an assertion that the lien is lost, as HSE now argues.

17 Transwest accepts that a lien cannot be claimed unless the work was expressly or impliedly consented to by the chattel owner. It asserts that IAS, who instructed the plaintiff to repair, is either the owner or was acting as agent for the owner. The evidence supports that assertion.

18 I therefore cannot conclude that the claim for a common law possessory lien is bound to fail. Given that conclusion, I do not intend to deal with issues raised regarding the Repairers Lien Act.

19 The applications of HSE are therefore dismissed.

GILL J.

cp/i/qldrk/qlsng

10

Case Name:
XDG Ltd. v. 1099606 Ontario Ltd.

Between
XDG Limited, plaintiffs, and
1099606 Ontario Limited and General Electric Caoutak Canada Inc., defendants

[2002] O.J. No. 5307

[2002] O.T.C. 1062

41 C.B.R. (4th) 294

23 C.L.R. (3d) 67

121 A.C.W.S. (3d) 18

2002 CarswellOnt 4535

Court File No. 1424/99

Ontario Superior Court of Justice

Gordon J.

Heard: July 9-12, 2002.
Judgment: December 23, 2002.

(104 paras.)

Liens -- Priorities -- Particular liens --Mortgages -- Priorities -- Statutory liens versus mortgagee.

Action by the plaintiff lien claimants to determine priority between the lien claimants and the defendant General Electric Caoutak Canada, the mortgagee of the defendant 1099606 Ontario Ltd.'s property. The lien claimants provided services and material to the property in the demolition and renovation of a building. They left the job site when they were not paid and registered liens against the title to the property. 1099606 provided a guarantee and mortgage to General Electric to secure the indebtedness of its related lessee. At the time it had no income and had existing liabilities for income tax and other debts. 1099606 and the lessee eventually declared bankruptcy and the property

was sold. There were insufficient funds to pay the lien claimants and General Electric. In the financing documents 1099606 made many misrepresentations, including that no material or services had been provided to the property. General Electric did not complete a due diligence investigation, which would have uncovered the misrepresentations. The lien claimants had commenced work before General Electric's mortgage was registered.

HELD: Action allowed. The lien claimants had priority over General Electric. The mortgage was void as against the lien claimants as 1099606 failed both the solvency and balance sheet tests under section 20 of the Business Corporations Act at the time of the financing. Reliance on the representations of 1099606 and failing to conduct a due diligence investigation was wilful blindness by General Electric. There were strong badges of fraud. There was a prima facie presumption of an intention to defeat current and future creditors that General Electric was unable to rebut as it failed to conduct a due diligence investigation. There was one improvement. The first lien arose before the mortgage was registered, so the mortgage was a subsequent mortgage.

Statutes, Regulations and Rules Cited:

Assignments and Preferences Act, ss. 4, 4(1), 5(5)(d). Bankruptcy and Insolvency Act, s. 2(1). Construction Lien Act, ss. 15, 78, 78(1), 78(5), 78(6). Fraudulent Conveyances Act, ss. 2, 3, 7. Ontario Business Corporations Act, s. 20, 20(1), 20(1)(c), 20(1)(d), 20(3).

Counsel:

I. Duncan and M. Van Bodegom, for the plaintiff XDG Limited.
A. Speciale, for the plaintiff William Green Roofing Ltd.
L. Ricchetti, for the defendant General Electric Capital Canada Inc.
No one appearing for 1099606 Ontario Limited.

---

1 **GORDON J.**:-- A trial of this consolidated contraction lien action was directed to determine the priority as between the lien claimants and the mortgagee with respect to certain lands in the City of Kitchener described as the "Dielcraft property".

BACKGROUND

2 109606 Ontario Limited ("109") was incorporated on 30 November 1994. In December 1994 it purchased the Dielcraft property for $1,515,000. The property was leased to Euro United Corporation ("Euro United"), commencing 1 April 1995 for the purposes of storing raw material and finished product.

3 Mr. Sam Rehani was the sole director, officer and shareholder of 109. He was also the controlling shareholder and president of Euro United.

4 In 1998 and 1999 the lien claimants provided services and material to the Dielcraft property. Various contractors were involved, commencing with certain demolition work to the ultimate renovation, being the raising of the building roof. In the fall of 1999 the contractors left the job site as they were not being paid by 109. Claims for lien were registered on title commencing in October 1999.

5 Euro United, and related companies operating under a similar name in different jurisdictions, was financed by General Electric Capital Canada Inc. ("GECC") pursuant to a credit agreement dated 13 November 1998. By the end of March 1999 GECC determined Euro United was in a default position regarding certain covenants in the credit agreement. In April 1999 an amendment to this agreement resulted in 109 providing a guarantee and mortgage on the Dielcraft property in favour of GECC regarding the indebtedness of Euro United.

6 Euro United temporarily corrected its default position, but by August 1999 GECC determined there were significant problems. On 24 November 1999 GECC demanded payment from Euro United and 109. In December 1999 KPMC Inc. was appointed interim receiver of Euro United and 109. In June 2000, both companies were declared bankrupt and KMPG Inc. was appointed trustee of their estates. Sale of the property by the trustees was authorized in January 2002.

7 The sale proceeds are held by KPMG Inc. pending the outcome of this litigation. There are insufficient funds to pay the lien claimants and the mortgage holder.

ISSUES

8 Pursuant to the order of Sills J., granted 17 December 2001, the statement of issues identified the following:

1. Section 20 of the Ontario Corporations Act. Is the mortgage invalid or void as against the plaintiffs as a result of contravening section 20 of the Ontario Business Corporations Act?
2. Section 4 of the Assignments and Preferences Act and section 2 of the Fraudulent Conveyances Act.

Is the mortgage invalid or void as against the plaintiffs as an unlawful assignment or preference or as a fraudulent conveyance?

3. Section 78 of the Construction Lien Act.

   (a) Was the mortgage registered prior to the time when the first lien arose in respect of the subject improvement, and, if so, to what extent does the mortgage have priority under section 78 of the Construction Lien Act?
   (b) Was the mortgage registered as a subsequent mortgage, and, if so, to what extent does the mortgage have priority under section 78 of the Construction Lien Act?

ANALYSIS

(i) Section 20, Business Corporations Act

(a) 109 and GECC

9 Euro United was involved in the manufacture and sale of plastic injection mould products, such as patio furniture. Some of their product was supplied to large retail stores in Canada and the United States. According to Mr. Paul Feehan, Senior Vice President of GE Capital Commercial Finance, Inc., a related company to GECC, Euro United was growing rapidly. Mr. Feehan, who was

involved in the underwriting of Euro United's financing by GECC, reported the growth in sales went from $10,000,000 in 1996 to $102,000,000 in 1998.

10 The Canadian Imperial Bank of Commerce was the lending institution providing financing to Euro United. GECC, acting as agent for a syndicate of lenders, including itself, provided new replacement financing in November 1998 consisting of a revolving line of credit in the notional amount of $127,000,000 and a term loan of $50,000,000. The line of credit authorized from time to time was based on a formula pertaining to receivables and inventory.

11 Mr. Feehan, and others at GECC, conducted a due diligence investigation of Euro United from July to November 1998. The new financing terms were set out in the credit agreement dated 13 November 1998. GECC acquired security on the assets of Euro United.

12 GECC was aware of Euro United leased the Dielcraft property from the outset. A Landlord's Waiver and Consent, signed by Mr. Rehani on behalf of 109 and Euro United, dated 16 November 1998, was one of the documents in the security package. A copy of the lease was attached to this document indicating an annual rent to be paid by Euro United in the sum of $700,000 on a net net basis commencing 1 April 1996 and ending 31 March 2002. GECC was also aware Mr. Rehani controlled both companies.

13 By the end of March 1999, less than five months after the advance on the credit agreement, GECC became aware Euro United was in a default position. Amongst other items, Euro United had overstated its receivables, resulting in an overadvance on the line of credit of $15,300,000. In addition, Euro United had paid Mr. Rehani $525,000, apparently with respect to his shareholder loan, and purchased and mortgaged their head office property in Oakville, both items lacking the required consent of GECC. At this point in time, GECC's exposure was $89,900,000 on the line of credit and $50,000,000 on the term loan.

14 Mr. Feehan, and others involved in the financing, met with Mr. Rehani on 5 April 1999. Mr. Rehani offered to add his real estate, the Dielcraft property, as collateral and indicated its value to be $7,000,000 to $8,000,000. There was an indication equity investors might become involved in Euro United. Mr. Feehan said GECC wanted to resolve the existing financing problems and move forward in their relationship with Euro United. He also acknowledged GECC wanted to buttress its existing security to cover Euro United's indebtedness.

15 On 6 April 1999 Mr. Feehan reported to his superior, setting out the issues and possible solutions. In addition to taking security on the Dielcraft property, he recommended a two percent bonus on the indebtedness and a $200,000 fee to charged to Euro United as well as acquiring an option to purchase equity on favourable terms. Mr. Feehan testified GECC had not yet concluded to retract its financing, that Euro United was thriving and although it had significant management and administrative problems, he felt GECC should "take the risk" and provide bridge financing.

16 Nevertheless, in his written report dated 5 April 1999, he told his superior:

> "Therefore we recommend that GECC choose the least disruptive solution because it allows Advent to work towards our quickest and easiest exit (i.e. Lehman). In addition, GECC is receiving additional boot collateral and is getting paid for its risk with an equity opportunity in the future."

17 Upon receipt of approval from his superior, Mr. Feehan submitted a written proposal to Mr. Rehani on 9 April 1999. It was accepted the same date.

18 The security documentation was prepared and signed by 14 April 1999, within five days of the accepted proposal. The mortgage was registered on 15 April 1999. The documentation appears to have been prepared by the solicitors for GECC, McMillan, Binch, although it is noted Euro United and 109 were represented by Bennett Jones. Mr. Rehani signed all documentation for 109, including the guarantee for $11,5000,000 and the mortgage for $300,000,000. Numerous declarations and other documents were also executed by Mr. Rehani, including an insolvency certificate.

19 Mr. Feehan stated the amounts described in the guarantee and mortgage were determined by GECC's solicitors. The $11,500,000 stated in the guarantee resulted from Mr. Rehani's representation the value of 109's assets was $12,000,000 with only $100,000 in liabilities. The $300,000,000 referred to in the mortgage was to cover loans of the syndicated loan agreement although Mr. Feehan was not clear on this explanation.

20 The GECC proposal dated 9 April 1999 permitted it to conduct a due diligence investigation. For some unexplained reason, GECC chose not to make any inquiry with respect to 109. According to Mr. Feehan, GECC relied exclusively on the representations of Mr. Rehani.

21 In due course, GECC receive the executed security documents from its solicitors. There was no reporting letter regarding certification of title with respect to the Dielcraft property. Mr. Feehan indicated a certification was required and mistakenly assumed it was provided by the solicitors for 109.

22 GECC did not request financial statements from 109, nor did they conduct a credit check. They were unaware 109 had never filed income tax returns. GECC did not inspect the Dielcraft property nor did they obtain an appraisal.

23 The proposal contained a provision whereby GECC would release its mortgage if 109 obtained another mortgage, so long as the proceeds therefrom of at least $4,000,000 were contributed to Euro United as equity and applied to reduce the line of credit with GECC. This item was not included in the amending agreement.

24 Mr. Feehan said his only concern was the Dielcraft property be worth at least $4,000,000. He was not concerned with Mr. Rehani's representations as to the property value, nevertheless, no inquiry was made to appraise the property.

25 City Management & Appraisals Ltd. provided an appraisal report dated 3 April 2000 to KPMG Inc., in which they estimated the market value, as of 1 June 1999, at $3,190,000. This valuation appears to be accepted by the parties as the market value on 15 April 1999. The stated value, however, may be high as the appraiser also estimated market value as of 1 April 2000 to be $5,000,000, yet the property only sold for $2,896,000 in January 2002. There may have been intervening market conditions affecting the sale price although no evidence was presented.

26 Mr. Feehan also said GECC had no reason to question the representations made by Mr. Rehani although he offered to explanation. Without due diligence, it is equally reasonable to say GECC had no reason to believe those representations.

27 The declarations and certificates signed by Mr. Rehani, on or before 14 April 1999, as part of the security documents required by GECC contained numerous errors or, perhaps, deliberate false statements, examples of which are as follows:

(a) there was no change in the financial condition 109 which would have a material adverse effect on its ability to pay GECC and all rental payments where current when, in fact, Euro United had not paid its rent for at least four months and, therefore, 109 had no income;
(b) no material or services had been provided to the property, nor contracts signed, nor estimates given or, alternatively, all amounts have been paid in full and no liens have arisen within the meaning of the Construction Lien Act when, in fact, 109 had entered into substantial contracts in excess of $3,000,000 to renovate the building, work had started in August or September 1998, there were monies owing to one contractor, and, accordingly, liens had arisen;
(c) there were no encumbrances against the assets of 109 when, in fact, Engel Canada had an outstanding debenture or general security agreement;
(d) the value of assets was inflated and liabilities were not disclosed;
(e) 109 was up-to-date in filing income tax returns when, in fact, 109 had never filed a return since incorporation in 1994 and, further, there was significant, income tax owing.

28 All of these errors or misrepresentations would have been discovered on a due diligence investigation. GECC and its related companies are well known in the commercial finance business. They specialize in large commercial loans starting at $5,000,000. They are a sophisticated lending institution. Failure to perform a due diligence investigation of 109 is inconsistent with GECC's normal practice.

29 On 27 April 1999 Mr. Feehan was informed 109 and Euro United had increased the rental payment required from $700,000 to $1,400,000 per annum. No explanation was requested. Mr. Feehan was still unaware rent was not being paid.

30 Equity investors contributed $70,000,000 to Euro United over the two months following 15 April 1999 and the overadvance was paid off by 25 May 1999. GECC, however, did not release its mortgage on the Dielcraft property.

31 In August 1999 Euro United requested an overadvance of $300,000. GECC refused. Mr. Feehan said Euro United was growing rapidly without the proper financing to support the growth. In fact, this was similar to the comment he made in April 1999.

32 Mr. Feehan stated GECC discovered the construction project on the Dielcraft property in November 1994 when Mr. Rehani made mention of it, he says, for the first time.

33 On 24 November 1999 GECC demanded payment from Euro United and 109. The end result was the bankruptcy of these companies and the ultimate sale of assets by the trustee.

(b) Subsection 20(1), Business Corporations Act

34 Subsection 20(1) of the Ontario Business Corporations Act, as at the relevant time of the events, said:

"20(1) Financial assistance by corporation - Except as permitted under subsection (2), a corporation with which it is affiliated, shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise,

(a) to any shareholder, director, officer or employee of the corporation or affiliated corporation or to an associate of any such person for any purpose; or,

(b) to any person for the purpose of or in connection with a purchase of a share, or a security convertible into or exchangeable for a share, issued or to be issued by the corporation or affiliated corporations,

where there are reasonable grounds for believing that,

(c) the corporation is or, after giving the financial assistance, would be unable to pay its liabilities as they become due; or

(d) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan and in the form of any secured guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes."

35 The parties acknowledge 109 and Euro United were affiliated corporations and the guarantee and mortgage provided by 109 constituted financial assistance within the meaning of subsection 20(1).

36 The purpose of subsection 20(1), in part, is to prevent the dissipation of corporate assets that might otherwise prejudice the financial position of creditors and shareholders: see: Wayne D. Gray, Corporate Guarantees, 1999, Law Society of Upper Canada, Continuing Legal Education Lectures.

37 The initial determination is the amount of the financial assistance. The guarantee says $11,500,000, the mortgage says $300,000,000. There is some merit in relying on the amount stated in the mortgage, insofar as the mortgage is central to the issue in this litigation; however, I am of the view such is misleading. The explanation provided for this sum bears little, if any, relationship to the actual credit agreement amendment. Further, 109's liability is from the guarantee, the mortgage only providing collateral security.

38 GECC suggests the financial assistance is limited to $4,000,000, relying on its 9 April 1999 proposal which allowed for such payment, but on strict conditions. This provision was not inserted in the amendment to the credit agreement, the guarantee or any of the security documents delivered on 14 April 1999. Further, GECC has always claimed entitlement to the full amount of the guarantee, namely $11,500,000, as confirmed by its demand letter on 24 November 1999 and, as well, Mr. Feehan's testimony at trial.

39 Accordingly, I find the amount of financial assistance was $11,500,000.

40 The test in subsection 20(1)(c) and (d) is an objective one, that is, were there reasonable grounds on 15 April 1999.

41 The practical difficulty regarding a review of the financial problems of Euro United and 109 is that much of the evidence relates to subsequent events. Their ultimate bankruptcy, however, can-

not be relied upon as the basis for finding a breach of this statutory provision. There are, however, a number of matters that existed on 15 April 1999 and are relevant to this issue. The evidence established the following facts:

(i) 109 had no income as Euro United had not paid its rent for at least four months;
(ii) the only prior source of income for 109 had been rental payments from Euro United which it relied on to meet its obligations;
(iii) 109 had an outstanding debt to Engel Canada, subsequently calculated by KPMG to be $279,913, as at 30 June 1999;
(iv) 109 had never filed income tax returns and there was income tax owing, subsequently calculated by KPMG to be $1,441, 200 as at 30 June 1999;
(iv) similarly, there was goods and services tax owing by 109, subsequently calculated by KPMG to be $26,618 as at 30 June 1999;
(vi) it is reasonable to assume 109 had other ongoing expense in the normal course of business, particularly if Euro United was also not paying the property related expense;
(vii) 109 had $102,275 on deposit in its bank account;
(viii) the property was valued at $3,190,000;
(ix) other assets of 109 were described as rent owing from Euro United and monies owing from its shareholder, Mr. Rehani, but there was no evidence these were tangible assets;
(x) 109 had entered into construction contracts in excess of $3,000,000, much of it for future work, and, although contractors had been substantially paid to date, there were holdback monies owing to one contractor;
(xi) the GECC mortgage prevented the property being used by 109 as security to fund the construction project.

42 On 15 April 1999, 109 was not paying, nor was able to pay, its outstanding liabilities. It had no income and significant debt had accumulated. Even if Euro United had been paying rent, there would be insufficient income to pay liabilities. The construction project, commenced some months prior, would require substantial funding which could not come from income. The guarantee and mortgage to GECC compounded the situation by preventing use of the property as security for funding to pay liabilities.

43 In addition, the value of 109's assets on 15 April 1999, excluding the amount of the financial assistance, was less than its outstanding liabilities. The construction expense alone was equal to or exceeded the property value. The outstanding income tax liability suggests it was only a matter of time before failure would occur.

44 In my review of the evidence, it appears 109 failed the solvency and the balance sheet tests without having to take into account the financial assistance provided in the guarantee and mortgage, although it is possible 109 might have been able to meet most of its liabilities if Euro United was paying its rent and it could mortgage the property to fund the construction. Neither event occurred, nor was there evidence to suggest it would occur.

45 Nevertheless, consideration must given to whether there were reasonable prospects of GECC calling on the guarantee as of 15 April 1999. In this regard, the comments by Farley J. in Clarke v. Technical Marketing Associates Ltd. Estate (1992), 8 O.R. (3d) 734 (Gen. Div.) at p. 750:

> "It does not seem to me that the words after giving the financial assistance' under either s. 44(1)(c) or (d) mean that the tests have to be applied on the assumption that the corporation giving the guarantee has had to make payment. The guarantee has been given as financial assistance when it was entered into and not when it might actually be called upon (or as if it had been called upon). Thus a guarantee would no appear to impinge upon the cash flow' requirement contemplated by s. 44(1)(c) if given on a naked basis.
>
> However, one has to go back to the lead-in words where there are reasonable grounds for believing that'. This implies that one must form a reasonable opinion based on the facts of each case to see what the likelihood would be of the guarantee being called upon in the future so as to constitute it a liability' which must be paid as part of the liabilities as they become due' (s. 44(1)(c))."

46 The guarantee had only just been signed and, therefore, it might be said 109, Euro United and GECC were optimistic the financial problems at Euro United had been resolved, however, a more detailed analysis is required. GECC was buttressing its security, as acknowledged by Mr. Feehan. Within two months, equity investors inject $70,000,000 into Euro United and the overadvance is paid in full. The basis for the extra security appears resolved yet GECC does not release 109.

47 Despite Mr. Feehan's expressed optimism on 15 April 1999, it is clear GECC wanted more security as they were contemplating further default by Euro United. This is the only conclusion that can be drawn from Mr. Feehan's report on 5 April 1999 "our quickest and easiest exit". There was no acceptable evidence to the contrary and, therefore, I conclude the guarantee must be considered a liability in the solvency test under subsection 20(1)(c). It is also included on the basis it prevented 109 mortgaging the Dielcraft property to fund the construction project.

(c) Subsection 20(3), Business Corporations Act

48 Subsection 20(3) of the Ontario Business Corporations Act, as at the relevant time of the events, said:

> "(3) Validity of Contract - A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention."

49 GECC seeks to rely on this safe harbour provision.

50 It is apparent, on the evidence, GECC did not have actual "notice of contravention." The question is whether it can rely on the representations of Mr. Rehani and its failure to perform a due diligence investigation or, as stated in the subsection, was GECC "a lender for value in good faith."

51 109 received no benefit from the guarantee and mortgage. The sole purpose of these documents, as said by Mr. Feehan, was so secure past indebtedness of Euro United. Monies may have

been advanced by GECC to Euro United after 15 April 1999 but such was merely a continuation under the revolving letter of credit. Given the subsequent injection of funds by equity investors and the payment of the overadvance, GECC's failure to release 109 clearly demonstrates the purpose of this additional security to cover past indebtedness of Euro United. Therefore, in my view, GECC was not "a lender for value" within the meaning of subsection 20(3) as it relates to the financial assistance.

52 Further, failure to conduct a due diligence investigation cannot be used to establish "good faith" in the circumstances of this case. GECC made no attempt to investigate 109 which was inconsistent with their corporate practice as demonstrated in their inquiry in 1998 with respect to the Euro United application for financing. Here, a property inspection would, in a matter of minutes, reveal the construction project on the Dielcraft property and caused further inquiry. The normal request for financial statements would have led to finding the income tax liability. GECC also knew Mr. Rehani was responsible for several covenant breaches which ought to have raised concerns about his honesty.

53 In this regard, I adopt the comment by Huband J.A. in Petro-Canada v. Jojef Ltd., [1992] M.J. No. 575 (Man. C.A.) where, at p. 2, he said:

> "There is merit in the argument that Petro-Canada cannot turn a blind eye toward the obvious. Moreover, Petro-Canada must be judged, not on the basis of an unsophisticated lender, but as one whose business it is to extend credit on the basis of guarantees. Petro-Canada is aware of the hazards of relying on a guarantee which proves unenforceable by virtue of sec. 42(1). It cannot claim the benefit of sec. 42(3) by ignoring the obvious and neglecting to ask questions."

54 Upper Mapleview v. Stolpe Homes (Veterans Drive Inc.) (1979), 36 B.L.R. (2d) 31 (Gen. Div.), is comparable in many respects to the case at bar. In discussing this issue, Swinton J. also indicated the defendant "should not be held to the same standard of sophistication as Petro-Canada".

55 GECC is a sophisticated financial institution that well knows the necessity of a due diligence investigation. As such, it cannot rely on the suggestion a solvency certificate satisfies the test. GECC knew enough about the relationship between 109, Euro United and Mr. Rehani that necessitated further inquiry. The evidence clearly indicated GECC made no inquiry, not even a property inspection or search of title, and, further, there was an urgency in completing the transaction.

56 In this regard, the statement by Carthy J.A. in Assad v. Economical Mutual Insurance Group, [2002] O.J. No. 2356 (O.C.A.), at p. 4, is appropriate:

> "Suspicions combined with blindness adds up to an absence of good faith."

57 Mr. Wayne Gray, in his paper Corporate Guarantees, supra, offered this conclusion, at p. 3-39:

> "Thus a prudent lender should not expect to rely on the safe harbour provision. Instead, it will take all steps available to it to ensure that it not only has on notice of the contravention but that it can also, if necessary, produce compelling evidence to a court that the lender addressed its mind to the statutory requirements and reasonably satisfied itself that the corporation providing the financial assis-

tance was not contravening the provisions of its incorporation statute. Unless the lender takes appropriate steps so that it can adduce such evidence should the issue arise in litigation, it will risk encountering significant enforcement difficulties if its primary security from the borrower should become insufficient to meet the borrower's obligations."

58 GECC took no steps and, therefore, has no evidence to demonstrate its good faith. Reliance on Mr. Rehani's representations and failure to conduct a due diligence investigation was, in my view, willful blindness by GECC.

(d) Summary

59 In summary, I find 109 failed both the solvency and balance sheet test under subsections 20(1)(c) and (d) and, further, GECC cannot rely on the sale harbour provision of subsection 20(3). Accordingly, I find the mortgage from 109 to GECC is void as against the plaintiffs, as a result of contravention of section 20, Business Corporations Act.

(ii) Section 2, Fraudulent Conveyances Act Section 4, Assignment and Preferences Act

60 Although Mr. Rehani did not testify, it is likely he was optimistic, on 15 April 1999, Euro United and 109 would be successful business ventures. Optimism, however, is not evidence of good intentions. The mortgage to GECC, if it stands up, has the actual effect of defeating creditors. An objective analysis of the circumstances is necessary to determine if either, or both, of these statutory provisions apply.

(a) Section 2 Fraudulent Conveyances Act

61 Section 2 of the Fraudulent Conveyances Act says:

> "Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns."

62 The financial circumstances of 109 were identified previously. In April 1999 Mr. Rehani, sole director, officer and shareholder of 109, knowing the financial situation, caused 109 to guarantee the indebtedness of Euro United, a company of which he was the president and controlling shareholder, and to provide collateral mortgage security on its only real asset. Mr. Rehani's actions were facilitated by the willful blindness of GECC. Mr. Rehani was not truthful. He deliberately misrepresented the situation to GECC. GECC failed to make any inquiry.

63 At issue, therefore, is whether there was an intent to defeat or delay creditors, such as the lien claimants, some of whom had already commenced work on the Dielcraft property by 15 April 1999. There was no direct evidence of intent, however, as West J. said in Home Savings & Loan Corp. v. Matthews (1995), 49 R.P.R. (2d) 79 (Gen. Div.), at p. 87, "Intent can be inferred from the surrounding circumstances."

64 Over the years, the case law has referred to suspicious circumstances demonstrating "badges of fraud": see, for example Solomon v. Solomon (1997), 16 O.R. (2d) 769 (H.C.J.) and Prodigy Graphics Group Inc. v. Fitz-Andrews, [2000] O.J. No. 1203 (S.C.J.).

65 The evidence established the following, which may be appropriately considered in this analysis:

(i) the conveyance by 109 was in support of a related party, Euro United;
(ii) Mr. Rehani controlled both corporations;
(iii) 109 received no consideration;
(iv) the property conveyed was all of 109's real assets;
(v) 109 had existing and substantial debt such as for income tax, for creditors and was incurring future and substantial liability for creditors regarding the construction project;
(vi) the conveyance was completed with considerable haste, within five days;
(vii) disclosure to GECC was incomplete and in error which could have been discovered upon investigation;
(viii) Mr. Rehani had already committed acts of dishonesty regarding payment on his shareholders loan and acquisition and mortgaging of other property without the consent of GECC;
(ix) The conveyances exceeded the property value;
(x) Euro United was in financial difficulties, having defaulted on the credit agreement within five months of the advance; and,
(xi) There was good reason for GECC and Mr. Rehani to consider Euro United and 109 were insolvent, or about to be.

66 As Cameron J. said in Prodigy Graphics, supra, at p. 22:

> "The badges of fraud are of evidentiary value in determining the issue of intent but are not conclusive evidence of fraud. Fraudulent intent is a matter of fact to be determined in the circumstances of each case or the basis of the evidence as a whole: Meeker v. Cedar Products v. Edge (1968), 12 C.B.R. (N.S.) 49 (B.C.C.A.).
>
> Once the suspicious circumstances raise a prima facie presumption of intent to hinder, defeat or defraud a creditor, the court may find the intent unless the presumption is displaced by corroborative evidence of the bona fides of the debtor in the suspect transaction: Kingsbridge Grand Ltd. v. Vacca, [1999] O.J. No. 4914 citing Koop v. Smith (1915), 51 S.C.R. 554; Applecrest Investments Ltd. v. Toronto Masonry (1986) Ltd., [1997] O.J. No. 436; Rinaldo v. Rosenfeld, [1999] O.J. No. 4665."

67 In Petrone v. Jones (1995), 33 C.B.R. (3d) 17 (Gen. Div.), Wright J. at p. 20 provided this comment:

> "In the absence of any direct proof of intention, if a person owing a debt makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid then,

since it is the necessary consequence of the settlement that some creditors must remain unpaid, it is the duty of the judge to direct a jury that they must infer the intent of the settler to have been to defect or delay his creditors. (Sun Life Assurance Co. v. Elliott (1900), 31 S.C.R. 91). ... Further: even if the plaintiff did not intent to defeat, hinder or delay their creditor but effected the transfer with a view to defeating, hindering or delaying potential future creditors his defence would still fail."

68 There are strong suspicious circumstances, or badges of fraud, as noted previously. Mr. Rehani knew of the construction project and the cost of same. He knew Euro United was not paying rent to 109. He knew 109 required the property to be mortgaged for the construction project expense as rent, if paid, was insufficient. He knew 109 already had significant liabilities, particularly for unpaid income tax. In spite of this knowledge, he caused 109 to pledge its only asset to GECC to secure Euro United's existing indebtedness. The only logical inference is that Mr. Rehani used 109 to support the financial difficulties of Euro United and, in so doing, used the property from which the contractors would look for payment.

69 Therefore, there is, in my view, a prima facie presumption of intent to defeat current and future creditors. GECC is unable to rebut this presumption as they failed to conduct a due diligence investigation and, therefore, had no knowledge, but should have, of the true circumstances on 15 April 1999.

70 Section 7 of the Act says:

> "3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge the intent set forth in that section."

71 109 received no consideration for the conveyance. In Courtesy Chevrolet Oldsmobile Ltd. v. Dhaliwal (1987), 67 C.B.R.(NS) 72 (O.S.C.), Austin J. at p. 79 indicated:

> "The jurisprudence makes it clear that where there is no good consideration', then the intent of the transferor alone is relevant."

72 Further, GECC cannot rely on section 3 for the same reasons as with respect to subsection 20(3) of the Business Corporations Act. Willful blindness is not good faith.

73 The plaintiffs argue a conveyance from 109 to Euro United for no consideration would be void under section 2 and, as the conveyance from 109 to GECC has the same effect, it should also be void. I agree. Substance, not form, is the determining factor.

(e) Section 4, Assignments and Preferences Act

74 Subsection 4(1) of the Assignments and Preferences Act says:

> "4(1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when

insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced."

75 Subsection 4(1) includes a solvency test. As previously noted, under section 20, Business Corporations Act, 109 was, in my view, insolvent on 15 April 1999. 109 was also insolvent as defined in subsection 2(1) of the Bankruptcy and Insolvency Act: see also Robinson v. Countrywide Factors Ltd. (1977), 23 C.B.R. (NS) 97, at p. 136 (S.C.C.).

76 On 15 April 1999, 109 had no income and had existing liability for income tax and other debts. Construction work had commenced and there was an outstanding debt to one contractor. 109's liabilities exceeded its assets. The conveyance to GECC compounded 109's insolvency.

77 The evidence supports a prima facie case for insolvency of 109 and there is, therefore, a presumption of intent to defeat creditors, as noted in the analysis under the Fraudulent Conveyances Act. No evidence was presented to rebut the presumption.

78 Subsection 5(5)(d) of the Act says:

"Nothing in this Act,

...

(d) invalidates a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance of money is made to the debtor by the creditor in the belief that the advance will enable the debtor to continue the debtor's trade or business and to pay the debts in full."

79 No advance was made to 109. The pre-existing debt was Euro United's. There was no evidence to suggest any advance to Euro United would enable 109 to continue its business and pay its debts in full. Indeed, the evidence showed otherwise as confirmed by subsequent events. GECC, therefore, cannot rely on subsection 5(5)(d).

(f) Summary

80 In summary, I find the mortgage from 109 to GECC is void as against the plaintiffs, as a result of contravention of section 2 of the Fraudulent Conveyances Act and section 4 of the Assignments and Preferences Act.

(iii) Section 78, Construction Lien Act

81 Subsection 78(1) of the Construction Lien Act says:

"(1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the matters."

Other subsections provide exceptions to this general priority in favour of construction liens. It is, therefore, necessary to determine if the mortgage to GECC is prior or subsequent to the construction liens.

82 In Boehmers v. 794561 Ontario Inc. (1993), 14 O.R. (3d) 781 (Gen. Div.), affirmed (1995), 21 O.R. (3d) 771 (O.C.A.), Killeen J. said:

> "Section 78(1) is the overarching principle of the regime of the Act for the determination of priorities. It is, if you will, the central interpretative principle for the adjudication of conflicts of this type before the court in this case. Surely, it necessarily implies that, in cases of conflicts, as here, the burden must be on the mortgagee to persuade the court that it somehow falls clearly within a specified exception to the generalized priority of the liens."

83 The comment by Rosenberg J. in 697470 Ontario Ltd. v. Presidential Developments Ltd. (1989), 69 O.R. (2d) 334 (Div. Ct.) is also of assistance where, at p. 337, he said:

> "Accordingly, while the Act may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies it must be given a strict interpretation in determining whether it does in fact apply: Clarkson Co. Ltd. v. Ace Lumber Ltd. (1963), 36 D.L.R. (2d) 554 (S.C.C.)"

84 Before proceeding to consider whether the mortgage was prior or subsequent, a preliminary finding is necessary as to whether there was one improvement or several improvements. "Improvement" is defined in the Act as:

> "(a) any alteration, addition or repair to, or
> (e) any construction, erection or installation on any land and includes the demolition or removal of any building, structure or works or part thereof, and improved' has a corresponding meaning."

85 Various contractors provided services and materials for 109 at the Dielcraft property at different times. 109 entered into specific contracts with Jannick Electric Limited ("Jannick"), Aim Waste Management Limited ("Aim") and XDG Limited ("XDG"). Numerous subcontractors were also involved.

86 In the summer of 1998 Mr. Raymond El Jamal, vice-president of Euro United and general manager of 109, began inquiring of contractors and consulting engineers as to renovations of the building located on the Dielcraft property. Several contractors expressed an interest and provided quotations for various components of the intended project. Contracts were then negotiated with the successful firms.

87 Jannick was on site in early September or perhaps August 1998 to disconnect electrical services. Aim commenced demolition work on 15 September 1998. Negotiations with XDG continued to January 1999 at which point Mr. El Jamal presented XDG with a draft contract. Giffel's Associates Limited ("Giffels"), 109's consulting engineers, prepared the contract in final form based on the terms as already negotiated. Although the written contract is dated 15 April 1999, it is on the same terms as negotiated and agreed to and, therefore, I find the contract between 109 and XDG was orally entered into in early January 1999.

88 XDG employees and others were on site on 7 June 1999, however, actual work was commenced on 3 March 1999 when Mr. Wayne Nosal of Design Plus started to prepare the architectural

drawings. XDG employees also commenced work on its metal fabrication drawings on the same day.

89 The ultimate goal of the project was to raise the roof on the building, a large undertaking. XDG was to perform that actual work, however, demolition and electrical disconnection was required before they could commence work on site. In my view, therefore, this appears to be one project, or improvement, not several, as suggested by GECC.

90 Additional evidence confirms this observation. Aim was initially approached by another contractor in July 1998 to provide a quote for part of the project. 109 eventually contracted directly with Aim on 10 September 1998. Jannick's proposal to 109, dated 28 August 1998, stated it was "... to assist you in raising of your roof ...". Also, the minutes of meeting on 19 November 1998, prepared by Giffels, refers to one project with numerous components.

91 Accordingly, I find there was one improvement. A comparison can be found in the situation in Moffatt & Powell Ltd. v. 682901 Ontario Ltd., [1992] O.J. No. 199, (1992), Kirsch's C.L.C.F., 61.3 (Gen. Div.) where Misener J. said:

> "The construction' (and therefore the improvement') that Kuco undertook on the lands in question here was the erection of a three-storey residence for the elderly that contained 66 separate suites. All 16 lien claimants contracted with Kuco to perform work or services or to supply materials of that construction' (and therefore for that improvement'). Therefore, all performed work or services in respect of the same construction' - and therefore the same improvement'."

Section 15 of the Act says:

> "15. A persons' lien arises and takes effect when the person first supplies services or materials to the improvement."

92 Jannick was on site to disconnect electrical services, likely in August 1998, however, the evidence was not clear. Aim was on site to commence demolition on 15 September 1999. Therefore, the first lien arose at least by 15 September 1998 and, accordingly, the mortgage from 109 to GECC was a subsequent mortgage, and I so find.

93 Subsections 78(5) and (6) of that Act say:

> "78(5) Special priority against subsequent mortgages - Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the lien arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.
>
> (6) General priority against subsequent mortgages - Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect of the improvement, has priority over the liens arising from the improvement to the extent of any advances made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien."

94 As previously stated, the mortgage was provided as collateral security with respect to the prior indebtedness of Euro United. No advance was made to 109 nor did 109 benefit in any manner whatsoever. The statutory provisions refer to amounts advanced, not amounts secured: See 561861 Ontario Ltd. v. 1085043 Ontario Inc., [1998] O.J. No. 2925, (1998), Kirsh's C.L.C.F. 78.50 (Gen. Div.)

95 In Marsil Mechanical v. A Reissing-Reissing Enterprise Ltd., [1996] O.J. No. 279, (1996), Kirsh's C.L.C.F. 78.40 (Gen. Div.), Klowak J. said:

> "In considering the definition of advance' it seems to me that, for purposes of the Construction Lien Act ... it must mean when the owner, or the owner's delegate, acquires actual control of the money."

96 Accordingly, I find there was no advance under the mortgage from 109 to GECC and, therefore, the lien claimants have priority pursuant to section 78 of the Construction Lien Act.

CONCLUSION

97 KPMG Inc., trustee in bankruptcy of 109, filed a statement of defence in this action but did not participate in the trial for obvious reasons. Representatives of 109 and Euro United were not called as witnesses by the participating parties. The issues dealt with the relationship between those corporations and GECC and, as well, the lien claimants. The plaintiffs were able to establish their case based upon the documents and oral testimony.

98 In many respects, GECC required testimony of representatives of 109 and Euro United. Although there was sufficient evidence for the findings made, there is a strong argument to also rely on findings of adverse inference as against GECC for failure to call these witnesses.

99 One theme was central to all issues in this litigation; that is, GECC's failure to perform its usual and customary due diligence investigation with respect to 109. There was no satisfactory answer for this neglect. GECC is a sophisticated lending institution. It normally performs due diligence. Was its failure to do so an oversight or was GECC scrambling to gain additional security for a customer they knew was on the edge of failure?

100 It would be unconscionable and inequitable to allow a mortgagee to obtain priority based upon its willful blindness or negligence. Even the simplest of investigations would have revealed the construction project and led GECC to make further inquiry. They would easily have determined Mr. Rehani was not being truthful.

101 A due diligence investigation would, in my view, have led GECC to decide against mortgage security on the Dielcraft property.

102 A trial of issues was directed to determine the priority as between the lien claimants and the mortgagee. There were secondary issues that arose during the trial pertaining to the validity and quantum of some liens. Those issues were beyond the scope of the trial.

103 In result, the plaintiffs are entitled to a declaration the lien claimants have priority over the mortgage from 109 to GECC, subject to proof as to validity and quantum of the liens for which a further trial, if necessary, is directed.

104 If the parties cannot agree on the issue of costs, written submissions are required. The party seeking costs shall serve such submissions within 28 days of the release of this decision. The responding party shall have 14 days to serve submissions and a further 7 days is allowed for reply. All written submissions are to be filed by the last day for reply.

GORDON J.

cp/e/nc/qw/qlrme/qlhcs

TREZ CAPITAL LIMITED PARTNERSHIP and COMPUTERSHARE TRUST COMPANY OF CANADA
Applicants

\- and -

WYNFORD PROFESSIONAL CENTRE LTD. and GLOBAL MILLS INC.
Respondents

Court File No. CV-14-10493-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings Commenced at Toronto

BOOK OF AUTHORITIES

MACDONALD SAGER MANIS LLP
Lawyers and Trade-mark Agents
150 York Street, Suite 800
Toronto, ON M5H 3S5

Tel: (416) 364-1553
Fax: (416) 364-1453

Shawn Pulver (LSUC#51129L)
Email: spulver@msmlaw.ca

Debora Miller-Lichtenstein (LSUC#66397T)
Email: dmiller-lichtenstein@msmlaw.ca

Lawyers for Metro Toronto
Condominium Corporation No. 1037