NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

BOOK OF AUTHORITIES OF THE PETITIONERS

(RE: WALTER CANADA GROUP'S SUMMARY HEARING WRITTEN SUBMISSIONS)

VOLUME 2 OF 2

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AUTHORITIES INDEX

CANADIAN AND UK CASE LAW

CANADIAN AND UK CASE LAW

SECONDARY SOURCES

TAB 11

4 of 5 DOCUMENTS

National Trust Company Limited v. Ebro Irrigation and Power Company Limited et al. National Trust Company Limited v. Catalonian Land Company Limited et al.

[1954] O.J. No. 545

[1954] O.R. 463

[1954] 3 D.L.R. 326

[1954] O.W.N. 516

1954 CarswellOnt 61

Supreme Court of Ontario

Schroeder J.

May 12, 1954

C.F.H. Carson, Q.C., J.L. Stewart, Q.C., J.G. Middleton, Q.C., and J.W. de C. O'Grady, for the plaintiff in each action.

A.S. Pattillo, Q.C., and B.R. McDade, for the Canadian defendant companies.

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1 **SCHROEDER J.**:-- The plaintiff in its capacity as trustee under the terms and provisions of certain trust deeds which are hereinafter mentioned, became the owner of shares of the capital stock and of bonds of the defendant companies Ebro Irrigation and Power Company Limited and Catalonian Land Company Limited (which will be hereinafter referred to as "Ebro" and "Catalonian Land" respectively), these bonds and shares having been the property of Barcelona Traction, Light and Power Company Limited, (which will be hereinafter referred to as "Barcelona"). On 12th February 1948 a judgment or order of a Spanish Court declared Barcelona (the holding company) to

be bankrupt and certain persons, purporting to act under the authority of that judgment or order, seized and brought under their control the physical assets of the defendants Ebro and Catalonian Land and, although neither of these companies had been adjudged bankrupt, they purported to issue new share capital and new bonds of both companies which they eventually sold to the defendant Fuerzas Electricas de Cataluna, S.A., which will be hereinafter referred to as "F.E.C.", a company which had obviously been organized for the purpose of acquiring such assets and operating the businesses formerly operated by Ebro and Catalonian Land. The procedure under which these functionaries, who were appointed in accordance with the terms of the bankruptcy judgment, undertook to sell to F.E.C. the alleged bonds and shares of Ebro and Catalonian Land, certificates of title to which were all situated in the Province of Ontario, was a process theretofore unknown to Spanish law. F.E.C. now claims to be the sole owner of such bonds and shares and of all the fixed assets of both Ebro and Catalonian Land, and purports to exercise all rights of ownership over the same, alleging that it has taken all proper and necessary steps to wind up and dissolve both of these corporations.

2 Following the bankruptcy judgment, in an endeavour to protect its rights and interests and the rights and interests of the bondholders, whom, as trustees, it represented, the plaintiff brought an enforcement action in this Court, in the course of which a receiver and manager was duly appointed by judgment of the Court dated 15th July 1948. While the validity of the Spanish bankruptcy decree was at once contested by Barcelona, the merits of its opposition have not been considered by the Spanish Courts because of the effect of proceedings described as "declinatario" taken by some of the Spanish creditors of Barcelona, which operated to suspend the proceedings instituted by Barcelona challenging the bankruptcy order made against it. Notwithstanding this, the bankruptcy proceedings have been permitted to be carried out to the point where all the fixed assets of Ebro and Catalonian Land in Spain are now in the actual control and possession of F.E.C. An action by the plaintiff National Trust Company in Spain was "not admitted", that is to say, it was declared that the action could not proceed and the merits of the claim were never considered or dealt with. Considering that it is under a duty to protect its portfolio in the interests of the bondholders and others who lent money to Barcelona on the security thereof, the plaintiff asks for a judgment of this Court declaring: (1) that both Ebro and Catalonian Land are Canadian companies, incorporated and still subsisting under the laws of Canada, having their head offices in the city of Toronto and having outstanding the shares and bonds which will be more particularly referred to; (2) that the properly authorized and constituted share- register and register of transfers of the defendants are those maintained in the city of Toronto and that the share- register and register of transfer of shares of the defendants purportedly authorized in Spain in or about the year 1949 were not properly authorized and that such authorization was invalid and that the outstanding shares and bonds of the defendants Ebro and Catalonian Land are validly represented by, and only by, certain certificates for shares and certain bonds of the said defendants which are held by the plaintiff in the city of Toronto or have been deposited by it with the accountant of the Supreme Court of Ontario.

3 It is contended by the plaintiff that its right to the relief it claims is governed by the law of Ontario, which is the domicile of both Ebro and Catalonian Land. It is therefore desirable to

consider the facts relating to the incorporation of these companies, their financial structure, their by-laws controlling all matters of internal management, and their bonded indebtedness. It is also necessary for a better appreciation of the problem involved in the case at bar to consider to some extent the various steps that were taken in Spain and culminated in the catastrophe that has engulfed both Ebro and Catalonian Land and has jeopardized the securities held by the plaintiff to such an extent that it feels constrained to take the proceedings now under consideration.

4 National Trust Company Limited (which will be hereinafter referred to as "National Trust") was incorporated under the laws of the Province of Ontario by letters patent dated the 12th August 1898. The defendant Ebro was incorporated under the laws of Canada by letters patent dated 12th September 1911, and it established and still maintains its head office in the city of Toronto, in the Province of Ontario. The defendant Catalonian Land was also incorporated under the laws of Canada by letter patent dated the 7th April 1912, and it established and still maintains its head office in the city of Toronto. The defendant F.E.C. is a company incorporated in Spain pursuant to Spanish law in or about the year 1951, with head office in the city of Barcelona. In the year of its incorporation Ebro, which acquired in Spain extensive hydro- electric undertakings, complied with the commercial laws of that country and was permitted to carry on its operations, which it continued until prevented from doing so by reason of what took place in 1948 and subsequent years. The assets of Catalonian Land consisted to a large extent of land and buildings in Spain, where in the year 1912 it qualified itself under the local law to carry on business which it continued to carry on until 1948 and for a short time subsequently, when its operations were interrupted as hereinafter stated.

5 The authorized and issued share-capital of Ebro was originally 25,000 shares of $100 each but by virtue of a by-law of the company passed on 28th October 1926 and confirmed by supplementary letters patent dated 11th November 1926, the company's capital stock was increased to 150,000 ordinary shares of the par value of $100 each and 150,000 deferred shares without nominal or par value. All of the aforesaid shares were duly issued and none of them has been retired and the directors of Ebro recognize the same as being outstanding, fully-paid, and non-assessable. Ebro also created and issued (STERLING)9,500,000 principal amount of 6 1/2% general mortgage bonds and (STERLING)1,500,000 principal amount of 6 1/ 2% cumulative income bonds, none of which has been retired and all of which are still outstanding.

6 All the ordinary and deferred shares and all the aforementioned bonds of the defendant Ebro were acquired by Barcelona, a company incorporated under the laws of Canada by letters patent dated 12th November 1911, and prior to the institution of the bankruptcy proceedings in Spain the same were mortgaged and charged by Barcelona to the plaintiff as trustee under a trust deed dated 10th July 1915, and indentures supplemental thereto under which consolidated 6 1/2% prior lien bonds of Barcelona were issued and are outstanding, and a trust deed dated 1st December 1911 and indentures supplemental thereto under which 5 1/2% mortgage bonds of Barcelona were issued and are outstanding, to secure the bonds issued under such trust deeds and the interest and premiums thereon and all other moneys expressed to be secured thereby. Pursuant to the provisions of the trust

deeds and supplemental indentures certificates representing all of the said ordinary shares and deferred shares and all of the said bonds of the defendant Ebro were deposited with the plaintiff. With the exception of 24,840 ordinary shares, which are registered in the name of the plaintiff, all of the shares of the defendant Ebro are registered either in the name of Barcelona or in the names of directors of the defendant Ebro or in the names of nominees, the certificates representing the shares registered in the names of Barcelona or of such directors or nominees being endorsed in blank for transfer or having attached stock-transfer powers executed in blank. All of the said bonds issued by the defendant Ebro are in bearer form. Some of the certificates for shares of the defendant Ebro held by the plaintiff were deposited by it in the year 1950 and all of the bonds of the defendant Ebro held by the plaintiff were deposited by it in the year 1951 with the Supreme Court of Ontario, pursuant to orders made in the receivership action.

7 The authorized and issued share-capital of the defendant Catalonian Land consists of 1,000 shares of $100 each and this compnay also has outstanding $100,000 principal amount of 6% gold bonds. 990 of the said shares are registered in the name of the plaintiff and all of the bonds are in bearer form.

8 The shares and bonds of Catalonian Land which are still recognized as being outstanding, fully-paid and non-assessable, and all the bonds, which are also recognized by Catalonian Land as outstanding, were acquired by Barcelona, which mortgaged and charged the same to the plaintiff as trustee under the trust deeds hereinbefore mentioned, under the terms of which certificates representing all of the said shares and bonds were deposited with the plaintiff. All such share-certificates and bonds are and have at all material times been held by the plaintiff in the city of Toronto, with the exception of 990 of the shares which stand in the name of the plaintiff and which were deposited by it in the year 1950 with the Supreme Court of Ontario pursuant to an order made in the receivership action. With the exception of 10 shares registered in the names of directors of the defendant Catalonian Land, all such shares are registered in the name of the plaintiff and the certificates representing the shares standing in the names of such directors are endorsed in blank for transfer.

9 By an order of a Spanish Court dated 12th February 1948 and made in bankruptcy proceedings instituted against Barcelona in Spain, Barcelona was declared to be bankrupt. In order to explain the various actions and proceedings which followed in the Courts of Spain, the plaintiff and the defendant Ebro called two outstanding members of the legal profession in Spain to testify as to the law of that country.

10 I have had the advantage of hearing the evidence of Senor Roberto Sanchez Jiminez, a highly qualified lawyer practising his profession in Spain, who represents large British, American and other foreign corporations and interests, as well as the evidence of Dr. Jos e Maria Giralt y Segura, also a very competent and highly qualified member of the legal profession in that country. Dr. Giralt was eminent in the academic field, and while he now actively engages in the practice of law in Barcelona, he is Professor Emeritus of Law at Barcelona University. Numerous documents

consisting of applications to the Spanish Courts, judgments or orders of the Courts, and recorded acts of the "judge comisario" and "depositario" and other persons engaged in carrying out the bankruptcy judgment, and extracts from documents registered in the mercantile registers in Barcelona, including minutes of alleged shareholders' and directors' meetings (the shareholders and directors being all Spanish nationals who assumed the right to act as shareholders and directors of Ebro and Catalonian Land), and other papers were filed in this case as exhibits, translations of which are set forth in exs. 32 and 68.

11 The actions taken in the Spanish Courts by Ebro, Catalonian Land, Barcelona and National Trust, as well as actions taken by certain Spanish nationals by way of intervention, will not be set out in any complete sense, and indeed it is not necessary for the purposes of this judgment that this should be done. It is sufficient to mention the more important proceedings so as to indicate broadly what efforts were made in Spain to attack the bankruptcy proceedings against Barcelona, which were extended to affect the assets of both Ebro and Catalonian Land, both of which were separate and distinct entities, and the result of such proceedings, or, to express it more accurately, the failure to secure any result and in many instances the failure to secure even an opportunity to present a case or a defence and answer on the merits.

12 In the course of their evidence Senor Sanchez and Dr. Giralt explained the functions of certain officials or persons who act in bankruptcy matters in their country and a brief reference to their evidence on that point will be conducive to a better understanding of what follows.

13 When the Court declares a person or corporation to be bankrupt, a "comisario" is appointed to exercise certain powers of a judicial or quasi-judicial nature. He must be a merchant who carries on business within the jurisdiction in which the bankruptcy decree is made. Senor Sanchez referred to him more than once as a "judge-comisario", but he is not required to be, and as a general rule is not, a lawyer or a person who has received legal training; he must be a merchant. The comisario exercises control over the actions of the depositario, an official appointed by the Court at the same time as the comisario is appointed. The depositario corresponds to some extent to a receiver and manager as known under our system. The comisario possesses power to affirm or disaffirm the actions of the depositario and his judgments or orders are effective as orders of the Court and remain in effect unless modified or reversed on appeal. "Sindicos" are officials who discharge functions not dissimilar to those carried out by the depositario, but they are clothed with somewhat broader powers over the administration of the assets of the bankrupt's estate and are appointed when the bankrupt estate has been brought to that stage of administration where it becomes necessary to dispose of the assets and make distribution of the proceeds of the disposition among the creditors.

14 In authorizing seizure of the bankrupt's assets, the order of the Court permitted the seizure of shares of Ebro and Catalonian Land held by Barcelona, declaring "it being understood that the occupation implies the 'mediata y civilisima' possession with regard to its shares which may be in the hands of Barcelona Traction, Light and Power Company Limited". One can only speculate as to the meaning of that phrase, since both Senor Sanchez and Dr. Giralt agree that it is a term which is

unknown in Spanish law, but apparently the words were intended to have the magical effect of enabling the officials to whom these extraordinary powers were committed to reach across the seas and reduce into their possession and bring under their control share-certificates and documents of title to bonds which were physically reposing in a vault somewhere in the city of Toronto. The inference is clear, however, that it is a new form of procedure which was without foundation under the laws of Spain as they existed at the time that this new theory was introduced for the first time in the Barcelona case.

15 The said order of 12th February 1948, which will be hereinafter referred to as "the bankruptcy decree", was made ex parte by the Court of Reus, a town in the Province of Tarragona, Spain, upon the application of three Spanish nationals who will be referred to as "the petitioners". These persons purported to be the holders of 5 1/2% first mortgage bonds of Barcelona. Two Spanish nationals were appointed as depositario and comisario respectively in the bankruptcy proceedings. Although the bankruptcy decree declared only Barcelona to be bankrupt, the judgment authorized the depositario and comisario to seize or cause to be seized and brought into their possession and control the assets of the defendant Ebro in Spain, upon the theory that the share-capital of Ebro was owned by Barcelona. Failing to recognize these two companies as separate and distinct legal entities, the order provided what was called ancillary relief so far as the defendant Ebro was concerned, and the comisario was authorized to dismiss the officers and servants of Ebro, to effect a seizure, in the bankruptcy of Barcelona, of all Ebro's property and under the theory of possession "mediata y civilisima" of the shares of the defendant Ebro. By a further order of the Reus Court made on the 27th March 1948 this possession was declared to extend also to all secured and unsecured bonds issued by Ebro, and to extend thereto notwithstanding that the documents of title were in the actual possession of the plaintiff. By the said supplementary decree of 27th March 1948 the same relief was granted so far as the physical assets of Catalonian Land and the shares and bonds, secured and unsecured, issued by it were concerned.

16 Although Barcelona entered an appearance in the bankruptcy proceedings and applied to have the bankruptcy decree set aside on the grounds, inter alia, that it was made without jurisdiction and was contrary to the law of Spain, the hearing of such application has been and still is delayed by procedural steps taken in the bankruptcy proceedings by other parties intervening and acting in concert with the petitioners, and the bankruptcy decree is still in force and effect in Spain notwithstanding the fact that it was made ex parte and that Barcelona has not yet had an opportunity of presenting its defence thereto on the merits. By order made in the bankruptcy proceedings by the comisario on the 20th February 1948 the comisario purported to dismiss all the members of the board of directors of Ebro and Catalonian Land who had been appointed in accordance with the provisions of The Companies Act of Canada, and this order was confirmed by orders of the Reus Court made between the 17th and the 27th March 1948. Later, on 16th March 1948, the depositario constituted himself a meeting of the shareholders of these companies in Spain and elected new directors. He claimed to exercise the powers of sole shareholder of the defendants Ebro and Catalonian Land by virtue of the doctrine of "mediata y civilisima possession" of the share-capital of both defendant companies which was declared to have been granted to him by the bankruptcy

decree, and exercising such powers he proceeded to appoint as directors of the defendant Ebro, as from the 20th February 1948, certain Spanish nationals who will be hereinafter referred to as "the Spanish board". He also conferred upon any two members of the Spanish board the right to execute documents on behalf of Ebro and to revoke the authority of the Spanish solicitors who had been duly authorized to act on behalf of the company in the Court of Reus and in the other Courts in Spain.

17 On the 9th April 1948 the depositario, claiming the right to exercise the powers of a general meeting of the defendant Catalonian Land by virtue of the said "possession mediata y civilisima" of its share-capital, alleged to have been granted to him by the bankruptcy decree and the ancillary relief awarded in the supplementary judgment, undertook (1) to dismiss all the members of the board of directors of Catalonian Land who had been appointed in accordance with the provisions of The Companies Act of Canada, and (2) to appoint certain Spanish nationals, who will be hereinafter referred to as "the Spanish board" of Catalonian Land. The aforesaid actions of the depositario with respect to both Ebro and Catalonian Land were approved by an order of the comisario and his order was confirmed by an order of the Court of Reus made between the 17th and the 27th March 1948.

18 Pursuant to an order of the Spanish Court made in the bankruptcy proceedings involving Barcelona, what purported to be a meeting of the creditors of Barcelona was held in Spain on the 19th September 1949, at which meeting three Spanish nationals were elected as sindicos, and they thereupon purported to assume control over the shares of the defendants Ebro and Catalonian Land which had been theretofore exercised by tje depositario and the comisario, the latter having been ordered by the Court of Reus, on or about the 20th September 1949, to hand over to the sindicos all the assets seized in the bankruptcy of Barcelona.

19 On or about 1st December 1949 the Spanish board, as it was then constituted, passed a resolution providing as follows:

> (1) that the register of shares of the defendants Ebro and Catalonian Land should be kept at the offices of the said defendants in the city of Barcelona;
>
> (2) that the persons registered in such registers as holders of shares should alone be recognized as shareholders and only persons whose names were entered in such registers as entitled to charges upon such shares should be recognized as entitled thereto;
>
> (3) that new ordinary and deferred shares should be issued representing the whole of the share-capital of the defendant Ebro and that new shares should be issued representing the whole of the share-capital of the defendant Catalonian Land;

(4) that the names of the persons to whom shares were so issued should be entered in such register and new share-certificates should be delivered in respect thereof.

20 On or about the 14th December 1949 the sindicos, claiming to exercise the powers of a general meeting of the defendants Ebro and Catalonian Land respectively, by virtue of the "possession mediata y civilisima" of the share-capital of these two defendants which was declared to be vested in them by the bankruptcy decree and the order of 20th September 1949, previously mentioned, purported to pass resolutions:

(1) ratifying all actions taken by the Spanish board since its appointment by the depositario on 16th March 1948;

(2) ratifying the resolutions of the Spanish board relating to the issue of new shares in the capital of the defendants Ebro and Catalonian Land referred to above;

(3) declaring that the defendants Ebro and Catalonian Land were incorporated under and governed under Spanish law;

(4) ratifying and declaring that the head office of both of these defendants was situate in the city of Barcelona;

(5) providing that all general meetings of the said defendants should be held at their head offices in the city of Barcelona and that the shareholders attending such meetings must deposit their shares in Spain and that the only persons entitled to exercise the rights of shareholders should be those whose names were entered in the register of shares hereinbefore mentioned;

(6) declaring that the pledgor or mortgagor of shares the subject of any pledge or mortgage should be entitled to exercise voting rights in respect of such shares to the exclusion of the pledgee or mortgagee;

(7) authorizing the Spanish board to issue the said shares, to enter in the register the names of persons to whom the said shares were issued and to issue share certificates in respect thereof; and

(8) declaring that the defendants Ebro and Catalonian Land were regulated by their statutes registered in the commercial register of the Province of Barcelona and that the above- mentioned resolutions should be registered in such commercial register as constituting part of the statutes of these two defendants.

21 The said resolutions were entered in the commercial register of the Province of Barcelona on or about the 22nd February 1950.

22 On or about 30th May 1950 a further entry was made in the commercial register of the Province of Barcelona whereby the Spanish board of Ebro purported to acknowledge on behalf of Ebro that the sindicos, by virtue of their office, were entitled to all property and rights in all the bonds issued by the said defendant.

23 In accordance with orders made by the Spanish Court in the bankruptcy proceedings, a sale by auction of the assets of Barcelona was purported to be held in Spain on the 4th January 1952, at which sale the said sindicos purported to sell to the defendant F.E.C., among other things, all the ordinary and deferred shares and all the bonds of the defendant Ebro as well as all the shares and bonds of the defendant Catalonian Land, such shares and bonds being supposedly represented by the new share-certificates and the new bonds issued in Spain. Following this sale the defendant F.E.C. purported to act as a shareholder of the defendants Ebro and Catalonian Land and to constitute its nominees directors of the said companies. On 21st August 1952 the defendant F.E.C. caused to be held in Spain what purported to be a meeting of the shareholders of the defendant Ebro at which the shareholders professed, among other things, to ratify the resolutions and actions hereinbefore mentioned, to adapt the by-laws of the defendant Ebro to accord with Spanish law as it existed on 17th July 1951, to convert the capital stock of Ebro into Spanish currency and to provide that 75 per cent. of its ordinary shares might not be transferred to persons who were not Spanish nationals, to amend the charter of the defendant Ebro by altering its name to Riegos y Fuerzas del Ebro, S.A., to move its head office to the city of Barcelona and to subject the defendant Ebro for all purposes to the Spanish law of 17th July 1951. On 13th October 1952 the defendant F.E.C. caused a similar meeting of the shareholders of the defendant Catalonian Land to be held, at which similar resolutions were passed as affecting that company and changing its name to Terrenos de Cataluna, S.A.

24 The defendant F.E.C. has taken de facto possession of the assets of Ebro and Catalonian Land in Spain and has also, through its nominees, taken steps in Spain for the winding-up or dissolution of the defendant Ebro and has taken further steps to amalgamate Catalonian Land with Immuebles y Terrenos de Cataluna, S.A., the latter corporation to absorb the former.

25 The defendants Ebro and Catalonian Land have at all times maintained their status as companies incorporated under the laws of Canada and have maintained their head offices in the city of Toronto. The plaintiff was appointed transfer-agent and registrar of the ordinary and deferred shares of the defendant Ebro and since that time has acted as such transfer-agent and registrar and

maintained in the city of Toronto a share- register and a register of transfers for ordinary and deferred shares. The defendant Catalonian Land has at all times kept a share-register and register of transfers for the shares of that company at its head office. Each company has at all relevant periods of time had in office a board of directors consisting of qualified shareholders who had been properly elected as directors at shareholders' meetings which were duly held in Canada.

26 No notice was given to the plaintiff of any meetings of the shareholders of the defendants Ebro and Catalonian Land professed to be held in Spain and it was not represented at any such meetings. Neither the depositario, the comisario nor the sindicos previously mentioned nor the defendant F.E.C. nor any of their respective nominees who assumed the right to act as shareholders or directors of the defendants Ebro and Catalonian Land in Spain was ever registered as a shareholder of the defendants Ebro or Catalonian Land on any register kept by or on behalf of these defendants pursuant to the provisions of The Companies Act of Canada.

27 After the seizure by the comisario and depositario of the property of the defendant Ebro the latter company, through its Spanish solicitors who were given instructions for that purpose, made applications to the Spanish Court in Reus to set aside the bankruptcy decree in so far as it professed to direct the seizure of that defendant's property. These applications, however, were dismissed by the Court on the following grounds:

> (1) that Ebro was not a party to the bankruptcy proceedings and therefore was not entitled to object to the same; (2) that since its shares were owned by Barcelona it had no legal personality distinct from Barcelona.

28 On the 16th March 1948 the depositario revoked the authority of the Spanish solicitors who had been instructed to act on behalf of this defendant not only in the Court of Reus but in other Courts in Spain and his action was approved by an order of the comisario on the same date and was later affirmed by an order of the Court of Reus between 17th and 27th March 1948. Between 17th and 20th March 1948 the Spanish board purported to ratify the said revocation of the authority of the Spanish solicitors hereinbefore referred to and to appoint other Spanish solicitors to act on behalf of and in the name of Ebro in the Court of Reus and other Courts in Spain. The Spanish solicitors who were thus substituted for the solicitors appointed by the lawful directors of the company then applied to the Court for the purpose of withdrawing the appeals made by Ebro's properly-instructed solicitors, as mentioned earlier. Such withdrawals and the authority of the substituted Spanish solicitors to act for the defendant Ebro, to the exclusion of the solicitors previously appointed, were accepted and upheld by the Courts before which these applications and appeals were pending.

29 Some time in the year 1952, and after the sale of the assets of Ebro and Catalonian Land was authorized, an action was taken in the Spanish Courts by the plaintiff in the present action for a declaration that the shares and bonds of both Ebro and Catalonian Land were situated in the city of Toronto. The Court of first instance rejected the action on the ground that there was no proof of the

fact that some of the purported assets of Ebro and Catalonian Land were in Canada, notwithstanding the fact that a certificate of the Supreme Court of Ontario to that effect had been filed with the pleadings, or, to express it in another way, the action was "not admitted". The result is that there has never been any hearing of this action. National Trust then appealed to the Court of Appeal in Barcelona, which confirmed the judgment of the judge of first instance. The matter is now before the Supreme Court of Spain and the decision of that Court has not yet been pronounced. In any event, the only issue before that Court is a procedural question as to whether or not the Court has jurisdiction to entertain an appeal on this point. It should also be mentioned that the Court was being asked in this latter action to declare the rights of the plaintiff under Spanish law.

30 The evidence of Professor Giralt makes it plain that what happened in the Courts of Spain was contrary to Spanish law, but this Court is not asked to say that the law of Spain was infringed, or to express any opinion upon the judgments or orders made in the Spanish Courts, nor is it necessary for the purposes of the present action that this should be done. We are concerned in this case with the status and the regulation of the affairs of two Canadian companies, and it is contended that the rights of National Trust in relation to the share- capital of both Ebro and Catalonian Land, and the bonds which have been pledged to it under the trust deeds in question herein, are to be governed by the law of the domicile of these two companies.

31 It is well established that the domicile of a corporation is in the country in which it was incorporated. In Cheshire on Private International Law, 4th ed. 1952, at pp. 193-4, it is stated that: "Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, i.e. by the law of the domicil. What this law is admits of no doubt if we reason upon the analogy of the individual. Every person, natural and artificial, acquires at birth a domicil or origin by operation of law. In the case of the natural person it is the domicil of his father, in the case of the juristic person it is the country in which it is born, i.e. in which it is incorporated." In support of this proposition the author cites Gasque v. Commissioners of Inland Revenue, [1940] 2 K.B. 80. The text proceeds: "If it is a corporation, it can be so only by virtue of the law by which it was incorporated. It is to this law alone that all questions concerning the creation and dissolution of the corporate status are referred. In the words of Lord Wright: 'English courts have long since recognized as juristic persons, corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. ... But if the creation depends on the act of the foreign State which involve the dissolution and non-existence of the corporation in the eye of English law. The will of the sovereign power which created it can also destroy it.' Lazard Bros. v. Midland Bank, Ltd., [1933] A.C. at p. 297."

32 In Gasque v. Commissioners of Inland Revenue, supra, Macnaghten J. quotes from a judgment of Holmes J. in Bergner & Engel Brewing Company v. Dreyfus (1898), 70 Am. St. Rep. 251, as follows: "A corporation has its domicil in the jurisdiction of the state which created it, and, as a consequence, has no domicil anywhere else."

33 In Baroness Wenlock v. River Dee Company (1887), 36 CL.D 674 at 685, Bowen L.J. stated: "What you have to do is find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature."

34 In Gasque v. Commissioners of Inland Revenue, supra, Macnaghten J. quoted with approval what was said by Sargant L.J. in Todd v. Egyptian Delta Land and Investment Company, Limited, [1928] 1 K.B. 152 at 173, reversed [1929] A.C. 1, where he expressed the following opinion: "In my judgment the provisions of the [Companies (Consolidation)] Act of 1908, not only enable a company to be born here, but necessarily keep the company domiciled here throughout its existence. And, though residence is less than domicil, and may often occur without domicil, yet I doubt whether an obligatory and continuous domicil in England such as seems to me to result from the provisions of the Act of 1908 in the case of such companies as this, does not necessarily involve residence at the place of domicil."

35 And as was stated by Macnaghten J. in the Gasque case at p. 84: "The domicil of origin, or the domicil of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence."

36 It follows that the instrument of incorporation and the law of a corporation's domicile govern not only its creation and continuing existence, but also all matters of internal management, the creation of share capital, and related matters, so that to determine questions affecting the status of a Canadian company and matters relating to its internal management reference must be had not only to the letters patent creating it and any supplementary letters patent and its by-laws but also to the powers and duties of the directors as set forth in s. 92 of The Companies Act, R.S.C. 1952, c. 53.

37 The principle enunciated above is very clearly stated in 20 Corpus Juris Secundum, 1940, s. 1802, pp. 21-3:

> "Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. Whatever disabilities are thereby placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere with knowledge of such limitations. Hence, a corporation can exercise no powers in a state other than that of its creation except such as are conferred upon it by its charter and the laws creating and governing it; and this principle applies even as to the mode in which, or the officers or agents by whom, a corporation is required by its charter provisions or by the law of its corporate domicile to contract or act. Furthermore, subject to certain well-established exceptions, considered infra ..., the rule is fairly general that a corporation is subject in other jurisdictions even to the general laws of the state of its creation, where such laws are intended as restrictions upon the powers of

the corporation.

> "In accordance with the foregoing rules, it is held that a corporation's charter and the laws of its domicile govern with respect to the fact and duration of the existence of the corporation, its internal affairs and management, its capacity to sue, the authority of its directors to represent it or to bring an action, its power to make particular contracts, the validity of conveyances of corporate property, the corporation's right to issue stock, its right to guarantee dividends upon stock, the validity of transfers of its stock, and the validity of bonus stock issued to directors. "Apart from burdens which may be imposed upon them by the laws of a state which a foreign corporation enters and in which it undertakes to do business, considered infra ..., the rights and liabilities of stockholders and directors are determined by the charter and governing laws of the state in which the corporation is created."

38 According to the evidence of both Senor Sanchez and Professor Giralt companies which are qualified to do business by registering their charters in the mercantile registers of Spain are subject to the laws of Spain so far as any business transacted by them in Spain is concerned, but all questions affecting the status of the company, its internal affairs and management, the authority of its directors and related questions, are determined according to the domestic law or the law of the corporation's domicile.

39 The law of a company's domicile also governs as to the persons who are entitled to act as directors of that corporation and the manner of their selection. On this point reference may be made to Banco De Bilbao v. Sancha; Same v. Rey, [1938] 2 K.B. 176, [1938] 2 All E.R. 253, where it was stated by Clauson L.J. at pp. 194-5: "The question what body of directors have the legal right of representing the Banco de Bilbao, a commercial entity organized under the laws prevailing in Bilbao and having its corporate home in Bilbao, must depend in the first place on the articles under which it is constituted. The interpretation of those articles and the operation of them, having regard to the general law, must be governed by the lex loci contractus (see per Lord Wrenbury in Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse, [1925] A.C. 112, 149), i.e., by the law from time to time prevailing at the place where the corporate home (domicilio social) was set up. It seems clear that (for example) a law of the French legislature cannot have (at all events outside France) any operation in regard to the relations between an English company established in England under English law, and its shareholders on the one hand, and persons claiming as a board of directors to have control over the affairs of that company on the other. The question accordingly resolves itself into this: What is the Government whose laws govern in such a matter the Banco de Bilbao? The answer would seem necessarily to be: the laws of the government of the territory in which Bilbao is situate." It has been held that the property represented by shares of a Canadian company is subject to Canadian law, which can effectively prevent a transferee from acquiring legal or equitable title to such shares: Spitz v. The Secretary of State of Canada, [1939]

Ex. C.R. 162 at 172, [1939] 2 D.L.R. 546, or can effectively divest a registered shareholder of his title to the share: Lovibond v. Grand Trunk Railway Company of Canada et al., [1939] O.R. 305, [1939] 2 D.L.R. 562, 50 C.R.T.C. 124.

40 It has been established in the evidence that neither Ebro nor Catalonian Land established branch registers in accordance with s. 108 of The Companies Act, nor were the shares of these companies listed on any stock-exchange. The right to transfer shares in a Canadian company is not restricted except as provided by s. 38 of The Companies Act, so that it was not open to the Spanish board to restrict the ownership of shares to Spanish nationals to the extent of 75 per cent. as that board attempted to do. Section 36 of The Companies Act also makes invalid a transfer of shares without entry in the appropriate register and none of the shares which the Spanish board purported to create has been registered on the registers of these two companies kept in the city of Toronto.

41 Section 88 of The Companies Act also provides that the directors of a company are to be elected by shareholders in a general meeting of the company assembled at some place within Canada. Under s. 107 of the Act share-registers of a company must be kept in Canada and under s. 108 provision is made for the keeping of branch registers of transfers in other places either within or outside of Canada. It is to be noted, however, that the registers which were authorized by the Spanish board to be opened in Spain were, to all intents and purposes, to be regarded as the main registers.

42 It should also be observed that under s. 48 of The Companies Act share-capital can be altered only by a by-law which is confirmed by supplementary letters patent and by s. 26 the name of a company may be changed by by-law which is also subject to confirmation by supplementary letters patent. On the subject of the location of the head office, s. 21 of the Act provides that a company incorporated under the Act shall at all times have a head office in the place within Canada where the head office is to be situate in accordance with the letters patent or the provisions of Part I of the Act, "which head office shall be the domicile of the company in Canada". By the same section, the company is permitted to establish other offices and agencies elsewhere within or without Canada as it deems expedient.

43 While the head office must be kept in Canada, its place can be changed, but only if the change is sanctioned by at least two-thirds of the votes cast at a general meeting of the shareholders called for considering the by-law, followed by publication of a certified copy thereof in the Canada Gazette after the same has been filed with the Secretary of State.

44 In Re Canadian Cereal and Flour Mills Co. Limited (1921), 51 O.L.R. 316, 67 D.L.R. 234, 2 C.B.R. 158, Orde J. considered whether or not a judgment declaring a company bankrupt destroyed the company's corporate entity or interfered with its power to function as a corporation. This question is discussed at p. 318 as follows:

> "Apart from these grounds for believing that an assignment cannot affect the company's status or the powers of the directors and shareholders, there is the fact

> that under sec. 13 of the Act the insolvent, whether under an assignment or under a receiving order, may always submit to the creditors, through the trustee, a proposal for a composition, or for an extension, or for a scheme of arrangement. And this right is as clearly open to a corporation as to an individual. If so, how can the company authoritatively decide upon or present such a proposal unless its directors and shareholders can meet for the purpose of deliberation? Limited though the scope of the company's activity must necessarily be because of its inability to carry on its business, yet, within the circumscribed ambit of its curtailed powers, it has clearly, in my judgment, still power to continue its corporate existence, and this, not as in a merely dormant or moribund state, but so as to express its corporate decisions for all such purposes as may be expedient or necessary."

45 Dr. Giralt testified that the law of Spain was similar to the Canadian law in this respect, and stated that under Spanish law if a foreign company doing business in Spain has been declared to be bankrupt in Spain, such a decree does not preclude the directors of the company, who may be out of Spain, from continuing to have further directors' meetings or from carrying on the affairs of the company.

46 It would seem to follow that all the acts proved to have been done in Spain in relation to Ebro and Catalonian Land and the shares of their capital and the bonds issued by them have been done by persons who were not properly authorized, and those persons who purported to act as shareholders or directors were proved never to have been registered at any time as shareholders of either of these defendants on any register kept by them or on their behalf in accordance with the provisions of The Companies Act of Canada. Furthermore, the shareholders' meetings and directors' meetings of both Ebro and Catalonian Land which purported to have been held in Spain, and by the depositario and comisario and the sindicos or the defendant F.E.C. or their nominees as shareholders and directors of the defendants Ebro and Catalonian Land, were not properly constituted and were completely invalid and ineffective. No action which these persons claim to have taken on behalf of either of the defendants Ebro or Catalonian Land pursuant to resolutions passed at any such meeting has been properly authorized nor is the same binding on these defendants in any way.

47 The only question remaining to be considered is whether or not the Court ought to exercise its discretion in favour of the plaintiff by granting a declaratory judgment in accordance with its prayer in this action.

48 Section 15(b) of The Judicature Act, R.S.O. 1950, c. 190, reads: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether any consequential relief is or could be claimed or not."

49 In 19 Halsbury, 2nd ed. 1935, s. 511, at p. 212, it is stated: "Judgments and orders are usually

determinations of rights in the actual circumstances of which the Court has cognisance, and give some particular relief capable of being enforced. It is, however, sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any reference to their enforcement. Such merely declaratory judgments may now be given, and the Court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not."

50 The declaratory judgment for which the plaintiff asks under the provisions of s. 15(b) of The Judicature Act is, of course, a discretionary remedy and the manner in which the Court's discretion ought to be exercised must depend on the circumstances of each individual case. From all that has been stated, it is obvious that the plaintiff as well as Barcelona, Ebro and Catalonian Land, have made strenuous efforts to have their rights adjudicated upon in the Courts of Spain from the year 1948 down to the present time, but all their endeavours have been fruitless. The attempts made by Barcelona to protect its rights and interests have been frustrated by the taking of proceedings known under Spanish law as a "declinatario", which was defined earlier. It is rather astonishing that Barcelona, which has never sought the right to do business in Spain, has never carried on business there, and has no assets in that country, could be declared bankrupt in that jurisdiction, its domicile and all its assets being in Canada. Equally startling is the fact that the assets of Ebro and Catalonian Land were made subject to seizure in consequence of the decree of bankruptcy against Barcelona on the theory that Barcelona and these companies were not separate entities. The law of Spain, according to the evidence of Dr. Giralt, recognizes corporations as juristic persons to the same extent as does the law of this country, and a corporation is regarded as something different from the aggregate of its members or shareholders as determined in Salamon v. A. Salamon and Company, Limited, [1897] A.C. 22. It would appear that no decree of bankruptcy has been rendered involving either Ebro or Catalonian Land, nor is there evidence that any judgment has been rendered directly against these corporations or either of them. Notwithstanding all this, all their assets have come into the possession and under the control of the defendant F.E.C., which company, although duly served with the process of this Court in both actions, did not see fit to appear therein or to participate in the trial.

51 Another factor to be taken into consideration is that Dr. Giralt in his evidence states that the Spanish Commercial Code of 1929 provides that the Court decreeing bankruptcy shall provide for "the judicial occupation of all the properties of the bankrupt and the books and records and documents relating to its business and that 'judicial occupation' means physical apprehension and nothing less". He further pointed out that in Spanish law the assets of Barcelona could have been reached in Canada pursuant to art. 300 of the Law of Civil Procedure in Spain which provides that "where a summons or other judicial proceedings have to be carried out in a foreign country, letters rogatory will have to be sent through diplomatic channels or in the manner and form provided for in the treaties and failing such treaties in the manner and form determined by the general rules issued by the Government of Spain, and that in all cases the principle of reciprocity should be observed". He added that so far as Canada was concerned the treaty of 27th June 1929, to which Canada adhered in 1935, provided means by which action could have been taken to reach the assets of

Barcelona situated in Canada as this treaty contained reciprocal provisions relating to the carrying out of such judicial proceedings in both Spain and Canada. He further stated that under Spanish bankruptcy law "a pledgee of assets is not obliged to deliver up assets pledged as security for a debt without first receiving payment of the debt". Dr. Giralt also commented that when a "declinatario" is in existence it is absolute under Spanish law that a final decision be made in such proceedings before sindicos will be appointed in bankruptcy proceedings, and that the Barcelona case is unique in the history of Spanish law inasmuch as sindicos were appointed while the "declinatario" was still pending. This action, according to this witness, is prohibited by art. 114 of the Law of Civil Procedure because there was no urgency involved and there existed no danger of irreparable damage being done, as in any event all the assets were in the hands of the depositario who had seized them.

52 The plaintiff contends, with substantial justification, that it is unable at this time to obtain a legal determination of the matters in issue between it and the defendants Ebro and Catalonian Land unless it obtains a judgment of this Court granting the declaratory relief for which it asks. The defendants Ebro and Catalonian Land set up that F.E.C. claims to be entitled to the shares and bonds, ownership of which is claimed by the plaintiff in this action, and that in view of the conflicting claims of the plaintiff and the defendant F.E.C. they are entitled to the protection of a judgment of a Court of competent jurisdiction upon such claims, and they submit their rights to the Court in the circumstances.

53 What has occurred in Spain with respect to the properties of Ebro and Catalonian Land strikes at the fundamental rights of all companies in this country which have made heavy capital investments in foreign countries, and is a course of conduct which can have far-reaching and disastrous consequences to Canadian investors. The course of events outlined has had the result of vitiating these particular securities in the hands of the plaintiff and if it should be directed to realize upon the same in the enforcement action, conceivably the value of its portfolio will be found to have been greatly diminished. For this reason alone the plaintiff is entitled to have its rights declared and the situation clarified. Under all the circumstances disclosed in the evidence, I have reached the conclusion that this Court ought not to withhold from the plaintiff the declaratory relief which it seeks, notwithstanding the fact that no consequential relief is or could be claimed. There will, therefore, be judgment in the action in which Ebro is a defendant declaring:

> (1) that the defendant Ebro is a Canadian company duly incorporated and continuing and subsisting under the laws of Canada, that its head office is at the city of Toronto, and that it has outstanding the shares and bonds referred to in para. 5 of the statement of claim;
>
> (2) that the properly authorized and constituted share-register and register of transfers of shares of the defendant Ebro are those maintained in the city of Toronto by the plaintiff and that the share-register and register of transfers of

shares of the defendant Ebro purported to have been authorized in Spain in or about the year 1949 were not properly authorized;

(3) that the outstanding shares and the outstanding bonds of the defendant Ebro are validly represented by and only by certain certificates for shares and certain bonds of the defendant Ebro which are held by the plaintiff in the city of Toronto or have been deposited by the plaintiff with the Accountant of the Supreme Court of Ontario and are held by him or on his behalf in the said city of Toronto.

54 In the action in which Catalonian Land is a defendant there will be judgment declaring:

(1) that the defendant Catalonian Land is a Canadian company duly incorporated and continuing and subsisting under the laws of Canada, that its head office is at the city of Toronto and that it has outstanding the shares and bonds referred to in para. 5 of the statement of claim;

(2) that the properly authorized and constituted share-register and register of transfers of shares of the defendant Catalonian Land are those maintained at the head office of the defendant Catalonian Land in the city of Toronto; and that the share-register and register of transfer of shares of the defendant Catalonian Land purported to have been authorized in Spain in or about the year 1949 were not properly authorized;

(3) that the outstanding shares and the outstanding bonds of the defendant Catalonian Land are validly represented by and only by certain certificates for shares and certain bonds of the defendant Catalonian Land which are held by the plaintiff in the city of Toronto or have been deposited by the plaintiff with the Accountant of the Supreme Court of Ontario and are held by him or on his behalf in the said city of Toronto.

55 The plaintiff is also entitled to its costs of each action as against all the defendants, but it shall be restricted to one counsel fee.

56 Judgment for plaintiff.

57 Solicitors for the plaintiff in both actions: Tilley, Carson, Morlock & McCrimmon, Toronto, and Fraser, Beatty, Tucker, McIntosh & Stewart, Toronto.

Solicitors for the defendants Ebro and Catalonian Land: Blake, Anglin, Osler & Cassels, Toronto.

TAB 12

2011 BCCA 367
British Columbia Court of Appeal

Petrelli v. Lindell Beach Holiday Resort Ltd.

2011 CarswellBC 2331, 2011 BCCA 367, [2011] B.C.W.L.D. 7539, [2011] B.C.W.L.D. 7540, [2011] B.C.W.L.D. 7606, [2012] 1 W.W.R. 720, 206 A.C.W.S. (3d) 319, 24 B.C.L.R. (5th) 4, 310 B.C.A.C. 196, 340 D.L.R. (4th) 733, 526 W.A.C. 196

George Petrelli and Rita Petrelli (Respondents / Plaintiffs) And Lindell Beach Holiday Resort Ltd. (Appellant / Defendant)

Levine, Neilson, Groberman JJ.A.

Heard: June 24, 2011
Judgment: September 7, 2011
Docket: Vancouver CA038312

Proceedings: reversing *Petrelli v. Lindell Beach Holiday Resort Ltd.* (2010), 2010 CarswellBC 1796, 2010 BCSC 956 (B.C. S.C.)

Counsel: Ryan W. Parsons, Sarah F. Hudson for Appellant
J. Luke Zacharias for Respondent

Subject: Evidence; Civil Practice and Procedure; Contracts

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s. 26(2) — referred to

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s. 911 — referred to

s. 911(1) — considered

s. 911(2) — considered

Rules considered:

Court of Appeal Rules, B.C. Reg. 297/2001
R. 31 — considered

APPEAL by L Ltd. from judgment reported at *Petrelli v. Lindell Beach Holiday Resort Ltd.* (2010), 2010 CarswellBC 1796, 2010 BCSC 956 (B.C. S.C.), striking L Ltd.'s statement of defence and allowing plaintiffs' action.

Groberman J.A.:

1 The Petrellis purchased a "holiday home" in the defendant's trailer park in 2007. Their friends, the Bahrys, had purchased a similar unit earlier that year. In 2008, the Bahrys brought an action against the defendant, alleging that municipal bylaws prohibited the use of the park for holiday homes. They successfully sought rescission of the contract under which they purchased their unit.

2 After the Bahrys succeeded in their lawsuit, the Petrellis brought a similar action, seeking to rescind their contract, as well. The defendant filed a statement of defence, alleging that the Petrelli's unit could legally be situated in the park, as a legal non-conforming use. The Petrellis sought to strike the statement of defence as an abuse of process, arguing that, having lost the Bahry action, it was not open to the defendant to defend their similar claim. The chambers judge agreed. He struck the statement of defence and granted judgment to the Petrellis. The defendant appeals.

3 For reasons that follow, I am of the view that the chambers judge erred in finding that the defendant was abusing the process of the court by defending the action. The defendant was entitled to argue that the use of the Petrelli unit could be sited in the park as a legal non-conforming use of the land. It is necessary, in the circumstances, to remit the matter to the Supreme Court.

Background

4 The defendant operates the Lindell Beach Holiday Resort at Cultus Lake. The resort includes a trailer park, campground, and golf resort.

5 Many of the sites in the park are set up as "holiday homes". The homes are large trailers (known as "park model trailers") that have had their wheels and trailer hitches removed, and are mounted on cinder blocks. The units have certain other modifications, and resemble cottages. They are permanently sited on landscaped sites within the park, and available for seasonal occupation from March to October each year. The defendant sells the holiday homes. A purchaser takes title to the trailer unit and also takes a renewable 3 year lease on the site on which it is located.

6 In May 2007, Mr. and Ms. Bahry purchased a holiday home from the defendant. The Petrellis heard about the resort from the Bahrys, and they, as well, decided to purchase a unit. Their purchase was completed in July 2007 for a sale price of $88,250 plus taxes. The Petrellis occupied the unit until the park closed for the winter on October 31.

7 On about November 13, 2007, a windstorm damaged several of the units in the park. The Bahry and Petrelli units were blown off their mounts and sustained damage. Ms. Bahry contacted a building inspector with the Fraser Valley Regional District, who attended the site to view the damaged trailers, along with a bylaw technician. Ms. Bahry sought their advice as to how the unit could be more effectively secured to the ground. The bylaw technician expressed the view that the Bahry and Petrelli units were on the land illegally, as he believed that the defendant was only allowed to use the land as a "campground", while park model trailers could only be sited in a "holiday park".

8 In March 2008, the Bahrys commenced an action against the defendant. The Bahrys alleged, among other things, that the siting of their unit in the park was illegal, and that this constituted a fundamental breach of the agreement under which they purchased it.

9 The Bahry action came on for summary trial in January 2009, and judgment was given in their favour in May of that year (*Bahry v. Lindell Beach Holiday Resort Ltd.*, 2009 BCSC 632 (B.C. S.C.)). The summary trial judge found that the defendant was operating a "holiday park" without having obtained the necessary approvals from the Regional District in violation of Regional District Bylaws. He found this to constitute a fundamental breach of contract under which the unit was sold and ordered rescission of the contract and a return of the purchase price to the Bahrys. The defendant did not appeal the decision.

10 In June 2009, following the Bahrys' success in their lawsuit, the Petrellis commenced this similar action. The defendant filed a statement of defence, advancing a number of defences, including an assertion that the siting of the Petrellis' unit in the park was a legal non-conforming use of the land.

11 In January 2010, the plaintiffs filed an amended statement of claim asserting that it was an abuse of process for the defendant to defend the action because the same contract had been interpreted by the Supreme Court in *Bahry*, and the court had held that the siting of a park model trailer in the park was an illegal use of the land.

The Legal Non-Conforming Use Issue

12 The land on which the resort is located is zoned "Campground-Holiday Park (CHP)" under Regional District of Fraser-Cheam Bylaw No. 66, as amended (the Regional District of Fraser-Cheam was amalgamated into the Regional District of Fraser Valley in 1995. By virtue of s. 780(7) of the *Local Government Act*, R.S.B.C. 1996, c. 323, bylaws of the former Regional District continue to apply). The zoning allows use of the land for "campgrounds" and "holiday parks".

13 Under the bylaw, a park model trailer cannot be situated in a "campground", nor can any recreational vehicle be stored on a site in a campground for more than 90 days. A park model trailer can be located in a "holiday park", and there is no prohibition on permanent siting of recreational vehicles in such a park, as long as they are intended to be occupied for only part of the year.

14 The bylaw sets out different requirements for campgrounds and holiday parks in terms of site sizes, setbacks, and maximum density. The Regional District is of the view that the design of the defendant's park does not conform with the requirements of a "holiday park".

15 In addition to the zoning bylaw, campgrounds and holiday parks are subject to Regional District of Fraser-Cheam Campground and Holiday Park Bylaw No. 1190. That bylaw sets out different infrastructure requirements for campgrounds and holiday parks. It also requires a person who wishes to "locate, establish, construct, alter, expand or subdivide a ... campground or holiday park" to obtain final approval and a permit from the Regional District's building inspector.

16 It appears to be common ground on this appeal that at least parts of the defendant's resort (including the site on which the Petrelli unit is located) are being used as a "holiday park". It is also common ground that the defendant has never applied for or received a permit from the Regional District to operate either a campground or a holiday park on the land where the Petrelli unit is sited.

17 The Regional District appears to accept that the land in question has been used as a campground since before the advent of the current regulatory regime and that such a use may continue. Although it has not taken any action to enforce its view, it does not accept that use of the land as a "holiday park" is lawful.

18 The defendant, on the other hand, contends that at least part of the park (including the part on which the Petrelli unit is sited) has been continuously operated as a "holiday park" since before the bylaws prohibited such a use without a permit. They claim that, under the current bylaws, they are entitled to continue such operations without applying for a permit.

19 There have been several changes in the land use bylaws that apply to the resort. Until 1976, land use was not regulated. When Bylaw No. 66 was passed in 1976, the land comprising the resort was designated as "Rural - R", a zoning which allowed use as a "campground". At that time, the zoning bylaw did not define "holiday park" as a separate use. It is not clear, from the limited excerpts of the bylaw that are before the Court, whether the current use of the land would have been permissible under the 1976 zoning.

20 In 1980, the Regional District enacted Campground and Holiday Parks Bylaw 264, and also amended Bylaw 66 to create a new zone known as "Campground-Holiday Park - CHP". The resort was re-zoned to this new designation, which allowed the land to be used for campgrounds and for holiday parks. The 1980 bylaws do not appear to specifically exclude park model trailers from campgrounds, but they do limit the storage of recreational vehicles on a site in a campground to 90 days. It appears, therefore, that the current use of the Petrelli site would not have been permitted in a "campground" under Bylaw 264.

21 Bylaw 264 was repealed and replaced by the current Campground and Holiday Park Bylaw No. 1190 on December 5, 1995. At the same time, further amendments were made to Bylaw No. 66, to bring it into its current form.

22 The relevant bylaws all contain provisions exempting operations that existed at the time of their enactment from their provisions. In former Bylaw No. 264, the relevant section read as follows:

> 1.07(1) Subject to [sections which do not appear to have any bearing on this case], the provisions of this By-law do not apply to a campground or holiday park or any part of a campground or holiday park existing prior to the coming into force of this By-law [i.e. December 16, 1980]

23 A similar provision is contained in the current Bylaw No. 1190:

> 1.09 Subject to [sections which do not appear to have any bearing on this case], the provisions of this Bylaw do not apply to a ... campground, holiday park or any part of a ... campground, or holiday park legally existing prior to the coming into force of this Bylaw.

24 The zoning bylaw (Bylaw No. 66) also originally contained a similar provision, though it was probably superfluous in light of what is now s. 911 of the *Local Government Act*:

> 911 (1) If, at the time a bylaw under this Division is adopted,
>
> (a) land, or a building or other structure, is lawfully used, and
>
> (b) the use does not conform to the bylaw,
>
> the use may be continued as a non-conforming use, but if the non-conforming use is discontinued for a continuous period of 6 months, any subsequent use of the land, building or other structure becomes subject to the bylaw.

> (2) The use of land, a building or other structure, for seasonal uses or for agricultural purposes is not discontinued as a result of normal seasonal ... practices ....
>
> . . . . .
>
> (6) In relation to land, subsection (1) ... does not authorize the non-conforming use of land to be continued on a scale or to an extent or degree greater than that at the time of the adoption of the bylaw under this Division.
>
> (7) For the purposes of this section, a change of owners, tenants or occupants of any land, or of a building or other structure, does not, by reason only of the change, affect the use of the land or building or other structure.

25 The defendant alleges that the permanent siting of trailers on the land commenced before land use regulation commenced in 1976. It says that in 1973, there were 240 camping sites in the complex, of which half were "seasonal permanent sites". It further alleges that a new owner purchased the resort in 1978, and that from that time on, many of the resort's tenants agreed to sign leases of one to three years duration for their sites in the resort, and most of the sites were "permanent seasonal sites", on which trailers were fixed to the ground.

26 There is some evidence in this case suggesting that the Petrelli unit is located in a part of the resort that was occupied by permanently sited units before the 1980 Bylaw, though the evidence is disputed.

The Judgment Below

27 The defendant wished to defend this lawsuit primarily on the basis that the Petrelli unit is lawfully located in the resort because it constitutes a legal non-conforming use of the land under s. 911 of the *Local Goverment Act* and the specific provisions of the Regional District's bylaws. The chambers judge held that such a defence would amount to an abuse of the court's process:

> [52] I have concluded that it would be an abuse of process to permit the defendant to maintain its defence to the plaintiffs' claim that there was a fundamental breach of the contract in that the siting of the plaintiffs' Holiday Home in the Park is illegal because it is contrary to the applicable bylaws. The illegal nature of the siting was determined in *Bahry* and ought not to be relitigated in this action. Furthermore, the Bahrys' contract is identical in its material provisions to the Petrellis contract. It therefore follows from *Bahry* that there has been a fundamental breach of the contract in this case as well.

> [53] The amount in issue in this case is not significantly different from that in *Bahry*. The defendant was represented in *Bahry* and raised the same defences that it now seeks to raise on the issue of fundamental breach, including the issue of non-conforming use. While the discussion of that issue in *Bahry* at paragraph 12 of the decision is not lengthy, I am satisfied the issue was raised before the court, argued by the parties and considered and determined by the court. The defendant had every opportunity to present whatever facts were then available in support of that defence. I am not persuaded there are any new facts in relation to that issue that either were not presented or could not have been presented.
>
> [54] In my view, to put the plaintiffs to the burden of establishing that which has already been decided by this court in circumstances that are not distinguishable is unnecessary and unfair to the plaintiffs. More importantly, it is my view that relitigating this issue is contrary to the administration of justice. It not only involves an unnecessary use of judicial resources but creates the potential for conflicting decisions on legally indistinguishable facts. I see no unfairness to the defendant in refusing to permit it to relitigate the issue. It had every opportunity to fully deal with the issue in the other case and exercised its right to do so. It had the opportunity to challenge the decision on appeal but chose not to. Instead, the defendant now wants me, in effect, to sit on appeal from the decision of a brother judge.
>
> [55] There is, in my respectful view, an element of oppression in the defendant's position of seeking to raise, once again, the same issue on which it was unsuccessful in another action involving another party who entered into a contract for the purchase and sale of a Holiday Home for placement on its property.

28 The defendant argues that the chambers judge was wrong in holding that defending this action could amount to an abuse of process. It says that it was entitled to defend, and that nothing in its statement of defence was abusive of the process.

29 As well, it takes issue with the finding of fact made by the chambers judge in para. 53 to the effect that the issue of legal non-conforming use was "raised before the court, argued by the parties and considered and determined by the court" in *Bahry*. It says that the chambers judge had no basis for making such a finding. Further, it seeks to have the Court consider the pleadings in the Bahry action, which were not before the chambers judge, which show that the non-conforming use issue was not before the court in *Bahry*.

The Bahry Pleadings - Judicial Notice

30 While the defendant has applied to adduce the pleadings in the Bahry action as fresh evidence, it says, first, that such an application is unnecessary, because the Court is entitled to take judicial notice of the Bahry pleadings.

31 While I acknowledge that it is sometimes said that a court may by "judicial notice" rely on its own records, it seems to me that some care must be taken in applying that phrase to court records. Typically, judicial notice covers matters that are matters of general knowledge or are easily ascertainable by anyone through resort to widely available and unquestionably accurate resources. No one can be taken by surprise when judicial notice is taken of such facts, nor can such facts be challenged, practically speaking.

32 The contents of court records are not matters of general knowledge, nor can they be easily ascertained except by resort to court files. It is not surprising, then, that there are limits on courts taking "judicial notice" of their records.

33 The defendant relies on the following passage from Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed (Markham, Ontario: LexisNexis, 2009):

> §19.107 .... In order to determine the identity of the actions or issues, the court should consult pleadings, judgments, reasons for judgments and other formal documents relating to the previous proceeding. There documents are admissible without formal proof. [Citing *Barber v. McQuaig* (1900), 31 O.R. 593 at 596 (H.C.J.); *Kemptville Milling Co. v. Village of Kemptville* (1924), 26 O.W.N. 431 at 432; and *Wytinck v. DeGrouwe*, [1952] 4 D.L.R. 326]

34 The passage does not use the phrase "judicial notice" to describe the reception into evidence of pleadings. Rather it says that such documents are admissible without formal proof. It seems to me that that is an accurate summary of the law.

35 The *Evidence Act*, R.S.B.C. 1996, c. 124 provides for a method by which court documents may be entered into evidence:

> 26.(2) Evidence of a proceeding or record may be given in any action or proceeding in British Columbia by an exemplification or certified copy of it, purporting to be under the seal of the court or under the hand or seal of the justice or coroner, as the case may be, without any proof of the authenticity of the seal or of the signature of the justice or coroner or further proof.

36 It is well established, however, that proof in accordance with s. 26 is not needed in order for a court to make use of its own records. Courts have long accepted that they are entitled

to look at their own records even if those records have not been formally proven and entered in evidence: *R. v. Jones* (1839), 8 Dowl. P.C. 80 (Eng. Q.B.); *Craven v. Smith* (1869), L.R. 4 Ex. 146 (Eng. Exch.). In *R. v. Lewis*, [1941] 4 D.L.R. 640 (B.C. C.A.), this Court accepted that a judge of the County Court was entitled to rely on the notice of appeal in the court file to show that a notice had been filed on time. In *R. v. Hunt* (1986), 18 O.A.C. 78 (Ont. C.A.), at 79, the Ontario Court of Appeal stated the general proposition that "[t]he Court has at all times the power to look at its own records and take notice of their contents".

37 Such documents do not have to be attached to affidavits, or presented to the court in the same way that most documentary evidence is presented. In *R. v. Truong*, 2008 BCSC 1151 (B.C. S.C.) at para. 57, (2008), 235 C.C.C. (3d) 547 (B.C. S.C.), Smart J. described the situation as follows:

> [57] It has been said that documents do not walk into a courtroom unaccompanied. Usually, this is true. Documents are typically introduced into evidence through the evidence of a witness or by affidavit evidence pursuant to a statutory provision. See for example s. 29 and s. 30 of the *Canada Evidence Act*. However, documents in the court's own files are an exception to this usual rule.

38 I have no doubt that the parties could have asked the chambers judge to look at the pleadings in the *Bahry* action without attaching those pleadings to affidavits, and without proving them in accordance with s. 26 of the *Evidence Act*. Further, in keeping with cases such as *Lewis* and *Hunt*, it seems to me that the judge, with notice to the parties, was entitled to examine the pleadings in *Bahry* even without them having invited him to do so.

39 In short, I agree with the appellant that the pleadings in *Bahry*, being records of the court, did not have to be proven in order for the judge to consider them. The issue on this appeal, however, is not whether the pleadings had to be proven, but rather whether they can be relied on as evidence without them having been before the chambers judge. In my view, the case law does not support the idea that pleadings are subject to "judicial notice" in this broader sense.

40 In *R. v. Wheeler* (1944), [1945] 1 D.L.R. 745, 83 C.C.C. 105 (B.C. C.A.), a magistrate was asked to make an order declaring the defendant to be the father of a child. The governing statute provided that no such order could be made unless the mother of the child had sworn a complaint alleging paternity within one year of the child's birth. No complaint was in evidence, and the defendant argued that the magistrate lacked jurisdiction to make the order. Unbeknownst to the defendant or his counsel, the magistrate had taken a complaint from the mother. The magistrate, without notice to the defendant, took judicial notice of that complaint and made the order. His order was reversed on appeal to the County court, and a further appeal was taken to this Court.

41 Three separate judgments were given in *Wheeler*. Sloan J.A., dissenting, was of the view that judicial notice could be taken of the complaint, based on *R. v. Lewis*. O'Halloran J.A. was of the view that compliance with the statutory precondition to the making of the order had to be strictly proven, and could not be a matter of judicial notice. Robertson J.A., concurring in the result, held that the magistrate could not take judicial notice of the complaint without letting the parties know that he was doing so (at D.L.R. 752):

> The Magistrate should have told counsel when the objection was taken that there was a complaint and that he proposed to use it in evidence, in which case counsel might have asked leave to recall the complainant to cross-examine her upon it. If counsel had been told of the complaint and of the Magistrate's intention to use it in evidence at the hearing and did nothing, the complaint might have been admissible as a record of the Court (although I do not so decide) ... *R. v. Lewis*.

42 I agree with the position taken by Robertson J.A. A judge may be entitled to consult court records that are not directly before him or her and may be entitled to use them as evidence to decide a case. He or she should not normally do so, however, without advising the parties of his or her intentions and without giving them an opportunity to address the issue. In this way, the documents, even without formal proof, can properly be said to have become part of the evidence in the case.

43 I agree, as well, with the observations of Wong Co. Ct. J. (as he then was) in *R. v. Sawchuk*, [1984] B.C.J. No. 394 (B.C. Co. Ct.) at para. 9 to the effect that it is a good practice, where a court document is being relied on as evidence in a case, for a copy of the documents to be made and marked as an exhibit so that they will be readily available to this Court if an appeal is taken.

44 In the case before us, neither party drew the judge's attention to the statement of defence in the Bahry action, nor did the judge indicate an intention to examine it. In the circumstances, I am of the view that it did not become evidence in this case. I do not agree with the defendant's assertion that this Court may take "judicial notice" of the pleadings in the Bahry action without some step (however informal) having been taken to make them part of the evidence in the court below.

45 In saying this, I acknowledge that the defendant has referred to *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431, 22 B.C.L.R. (2d) 89 (B.C. S.C.), in which McEachern C.J.B.C. indicates, at 433, that he has examined a Court of Appeal file and proceeds to make certain findings of fact based on the contents of the file. The defendant suggests that the Chief Justice in that case acted without notice to the parties, on the basis that judicial notice could be taken of court documents. I do not read the judgment as suggesting that the Chief Justice was engaged in a covert operation, and I

would not treat the judgment as authority for the idea that court documents (apart from the pleadings in the case that is before the court) may form part of the evidence in a case without notice to the parties.

Should the Pleadings be Before the Court as Fresh Evidence?

46 It follows that if the statement of defence in *Bahry* is to be considered, it must be by way of the defendant's application to adduce fresh evidence in this Court.

47 Under Rule 31 of the *Court of Appeal Rules*, the Court may grant a party leave to adduce evidence that was not before the court appealed from. In applying this rule, the court has adopted the tests set out in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212 (S.C.C.). Normally, the court will not allow a party to adduce fresh evidence if, by due diligence, the evidence could have been adduced at trial. Further, the evidence that is proposed to be adduced must bear upon a potentially decisive issue in the case, and be credible. Finally, the fresh evidence, when considered along with the evidence that was adduced in the court below, must be of such significance that it could reasonably be expected to have affected the result if it had been adduced.

48 The evidence sought to be adduced in this case was clearly available to the defendant at the time of the summary trial, and could easily have been brought to the attention of the chambers judge. No satisfactory explanation has been tendered for the defendant's failure to do so.

49 The tests for the reception of fresh evidence in this Court are stringent, and as a result, it is rare for this Court to grant an application to adduce such evidence. In particular, this Court generally takes a hard line with respect to the due diligence aspect of the test, especially in civil cases. In *Morris v. Fletcher* (1993), 76 B.C.L.R. (2d) 283 (B.C. C.A.), at 286, Southin J.A. for the Court, said:

> There may be rare and unusual circumstances where lack of diligence or lack of all reasonable diligence may be forgiven upon an application such as this but I see no reason at all why utter and complete lack of diligence should ever be indulged by this Court. On that footing, I would dismiss the application to adduce further evidence ....

50 Nonetheless, the Court does retain a discretion to allow fresh evidence to be adduced even when the due diligence aspect of the *Palmer* test is not met. In unusual cases, where the interests of justice demand it, the Court may allow fresh evidence to be adduced even if it ought to have been adduced in the court below: *Golder Associates Ltd./Golder Associes Ltee v. North Coast Wind Energy Corp.*, 2010 BCCA 263 (B.C. C.A.), 88 C.P.C. (6th) 12.

51 The case before us presents some special challenges. The chambers judge found the defendant to be abusing the process of the court on the basis that it was re-litigating the very issues that had been determined against it in *Bahry*. It is difficult to see, however, how the chambers judge could have reached that conclusion on the basis of the evidence before him.

52 The chambers judge did not have the pleadings or evidence in *Bahry* in front of him, nor did any of the affidavits he examined refer to the question of whether the legal non-conforming use issue was raised in *Bahry*. The judge's stated basis for his finding that the legal non-conforming use issue was raised in *Bahry* was para. 12 of the *Bahry* decision, which is as follows:

> [12] The parties have produced a series of correspondence between the defendant and the Regional District. It seems clear from this that the facility the defendant operates does not conform with the Holiday Park designation under the Bylaws. At best, the defendant seems entitled to consideration as a non-conforming use under the Campground Designation. However, the defendant has not provided evidence of use of the land prior to the Bylaws in the manner indicated by the Holiday Park designation, either in these proceedings or to the satisfaction of the Regional District.

53 The reference to "non-conforming use" in this paragraph is to the Regional District's concession, in correspondence in 2003, that the land could be used as a campground notwithstanding the absence of a permit for such use. It does not suggest that the defendant took the position, in *Bahry*, that use as a holiday park was also a legal non-conforming use. Indeed, the paragraph suggests that it did not, noting that the defendant did not tender any evidence to suggest historic use as a holiday park.

54 The above-quoted paragraph in the *Bahry* judgment does not show that the non-conforming use issue was "raised before the court, argued by the parties and considered and determined by the court". Rather, the comment about non-conforming use appears to be simply an aside, describing the uncontroversial background to a case in which the defendant did not contend that use of the land as a holiday park was a legal non-conforming use.

55 Given the absence of evidence to support the chambers judge's finding, it would be open to this Court to simply overturn his decision and remit the matter to the trial court for determination. If that were done, the parties would, having expended considerable time and effort on this application and appeal, be no further ahead than when they started. It is quite possible that the plaintiff would simply bring a new application before the trial court to dismiss the action as an abuse of process.

56 The fresh evidence sought to be adduced in this case is uncontroversial. There is no doubt that the pleadings that are tendered are copies of the court records in *Bahry*. When they are examined in conjunction with the reasons for judgment in *Bahry* and the other evidence tendered in this case, they provide a clear picture of the issues that were before the court that heard *Bahry*. In particular, the pleadings in *Bahry* show, unequivocally, that the defendant in that case did not contend that land in the resort could be used as a holiday park. Instead, it defended on the assumption that the only permitted use of the land was as a campground.

57 In my view, the fresh evidence ought to be admitted notwithstanding the fact that it ought, with due diligence, to have been adduced in the court below. In coming to this conclusion, I rely on two factors that distinguish this case from most cases in which a party seeks to adduce fresh evidence on appeal.

58 First, the evidence that is sought to be adduced in this case was essential, in the court below, not only to the defendant's case, but also to that of the plaintiffs. Where a party alleges that the other party to a lawsuit is abusing the process of the court by re-litigation, it is crucial that the court hearing the allegation know precisely what issues were before the court in the previous litigation. At least in the case before us, the court below could not reasonably have made any findings of fact on that issue without looking at the statement of defence in *Bahry*.

59 While I am mindful of Southin J.A.'s statement in *Morris v. Fletcher*, it seems to me that admitting the *Bahry* pleadings as evidence in this case is not indulging "utter and complete lack of diligence" by one party to the litigation at the expense of the other. The fresh evidence must be considered if the Court is to come to any conclusion with respect to the merits of the abuse of process argument.

60 I am also influenced by recent case law that suggests a somewhat more relaxed test to the reception of fresh evidence where the purpose of that evidence is to clarify and amplify the procedural history of the matter under appeal. That seems to have been the purpose of the evidence that was tendered in *Golder Associates Ltd./Golder Associes Ltee v. North Coast Wind Energy Corp.* I note, as well, that in *Khadr v. Canada (Minister of Justice)*, 2008 SCC 28, [2008] 2 S.C.R. 125 (S.C.C.), the Supreme Court accepted fresh evidence to clarify the record where the substance of the evidence was not contested and was not prejudicial to the party who opposed admission of the evidence.

61 In the circumstances, I would allow the application to adduce the pleadings in the *Bahry* matter as fresh evidence on appeal.

Abuse of Process by Relitigating a Fact Previously Determined by the Court

62 The plaintiffs' primary argument on this appeal is that the statement of defence filed by the defendant is an abuse of the process of the court because it attempts to relitigate an issue that was finally determined in *Bahry* .

63 In order to analyze the argument, it is helpful to begin with the doctrine of issue estoppel, which holds that where a court has finally determined an issue between two parties, the determination cannot be questioned in subsequent proceedings. The requirements for issue estoppel were conveniently listed in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.) at para. 25, [2001] 2 S.C.R. 460 (S.C.C.):

> [25] The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle* [*Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248] at 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceddings in which the estoppel is raised or their privies.

64 The plaintiffs acknowledge that the doctrine of issue estoppel is inapplicable in this case, because the parties to this action are not the same as those to the *Bahry* action. The third of the preconditions for the operation of issue estoppel (often called the requirement of "mutuality") is not present.

65 The plaintiffs argue, however, that a court has discretion to prevent a party from relitigating an issue even where the condition of mutuality is not present. They say that this discretion arises out of the flexible doctrine of abuse of process discussed in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) .

66 *Toronto (City) v. C.U.P.E., Local 79* dealt with the right of an employee of the City who had been convicted of sexual assault in criminal proceedings to contend, in a subsequent labour arbitration, that the assault did not occur.

67 The Court first considered the question of whether the doctrine of issue estoppel should be modified by removing the mutuality requirement. While noting that the mutuality requirement has come under criticism, the Court also recognized that simply abolishing the requirement would lead to unfairness in a number of cases. At para. 32, the majority found "no need to reverse or relax the long-standing application of the mutuality requirement".

68 The Court did, however, find that the inherent discretion of courts to prevent an abuse of their processes could be used to preclude relitigation of an issue. At para. 37, Arbour J. for the majority said:

> [37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.
> >
> > [Emphasis added by Arbour J.]
>
> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. ...

69 At para. 38, the Court cited, with approval, a passage from pp. 347-48 of Donald J. Lange, *The Doctine of Res Judicata in Canada* (Markham, Ontario: Butterworths, 2000):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

70 In accepting that the doctrine of abuse of process can be used to prevent a party from relitigating an issue, even when the mutuality requirement of issue estoppel is not present, the Court stated that the focus of the doctrine of abuse of process is on the integrity of the adjudicative functions of courts. It summarized the position at para. 51:

> [51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

71 Allowing a party to relitigate an issue that has been finally determined in previous proceedings, then, challenges the integrity of the adjudicative function of the courts in two respects. First, the duplication of efforts results in inefficient use of judicial resources. This inefficiency directly impacts the ability of the courts to function. It also tends to diminish public respect for the judicial process. Second, in opening up the possibility of inconsistent findings of fact, relitigation of an issue diminishes the credibility authority of judgments.

72 These challenges to the integrity of the adjudicative functions of the court occur when a court is asked, in litigation, to come to a different finding of fact on an issue than was reached in previous litigation. There are situations in which overriding concerns of fairness to the parties require such challenges to be tolerated. The Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79* recognized, however, that a robust doctrine of abuse of process by relitigation means that such challenges may be avoided where there are no such fairness concerns.

73 If the issue of legal non-conforming use had been before the court in *Bahry*, it is arguable that relitigating it in the current case would amount to an abuse of the court's processes. Before accepting that argument, however, a court would have to reach the conclusion, based on evidence, that the legal status of the Petrelli unit is the same as that of the Bahry unit. Reaching that conclusion might not be as straightforward as it might appear at first glance. Because the legality of a non-conforming use may depend on its precise location and extent, a minor difference in the siting of the two units could conceivably allow one to constitute a legal non-conforming use of land even though the other was not.

74 Given that it is clear that the issue of legal non-conforming use was not before the court in *Bahry*, it is unnecessary to examine this question further. The doctrine of abuse of process by relitigation, to the extent that it is analogous to issue estoppel, simply does not arise in this case.

Cause of Action Estoppel and Abuse of Process

75 The plaintiffs say that even if the issue of non-conforming use was not before the court in *Bahry*, the defendants' reliance on it in this case may still amount to an abuse of process. They contend that the applicable principle is that enunciated in *Henderson v. Henderson* (1843), 3 Hare 100 (Eng. V.-C.) at 115:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

76 While the plaintiffs acknowledge that they cannot rely on the doctrine of *res judicata* directly (because the mutuality requirement is not satisfied), they say that the expanded doctrine of abuse of process by relitigation discussed in *Toronto (City) v. C.U.P.E., Local 79* encompasses the sort of claims discussed in *Henderson*.

77 In my view, *Toronto (City) v. C.U.P.E., Local 79* does not extend as far as the plaintiffs suggest. In that case, the Supreme Court of Canada was considering whether the doctrine of abuse of process was available to prevent a party from litigating a matter that, but for the requirement of mutuality, would have fallen within the branch of *res judicata* known as issue estoppel. The Court recognized, at para. 23, there is a separate branch of *res judicata* known as "cause of action estoppel".

78 The distinction between the two branches of *res judicata* was briefly noted by Dickson J. in *Angle v. Minister of National Revenue* [1974 CarswellNat 375 (S.C.C.)], at 254:

> [*Res judicata*] has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been

> determined in earlier proceedings by a court of competent jurisdiction ... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537, at p. 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

79 In *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (N.S. C.A.), at 330, Cromwell J.A. (as he then was) said this about the two branches of *res judicata*:

> [21] *Res judicata is* mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed." : see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "...prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

80 The two branches of *res judicata* have much in common. As Lord Keith of Kinkel said in *Arnold v. National Westminster Bank plc*, [1991] 2 A.C. 93 (U.K. H.L.), at 110, "[e]stoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process".

81 That said, there is a subtle difference in focus between the two branches of *res judicata*. Cause of action estoppel is focussed primarily on fairness to litigants. The idea behind it is that a party should not be "twice vexed" with litigation, and should be entitled to deal with the entirety of the opposite party's case within a single piece of litigation. Issue estoppel, on the other hand, as discussed in *Toronto (City) v. C.U.P.E., Local 79*, is primarily concerned with the integrity of the judicial system - the efficiency of the trial process and the authority and credibility of judicial findings.

82 In identifying the primary focus of each branch of *res judicata*, I do not suggest that there is no overlap between them. Some cases involving issue estoppel will raise concerns about fairness to litigants, and some cases of cause of action estoppel will raise concerns about the

integrity of the judicial system. My point is merely that, because the primary focus of each branch of *res judicata* is different, it is not appropriate to assume that what is said about one branch applies equally to the other.

83 The rule in *Henderson v. Henderson* is connected to cause of action estoppel rather than issue estoppel. Its primary focus is on the unfairness that a litigant faces in having to litigate matters twice. Litigants who were not involved in the previous proceedings cannot claim to have been "twice vexed", nor can they complain that the entirety of the opposite party's case against them has not been presented in a single piece of litigation. Mutuality will typically be a key component in the unfairness that founds cause of action estoppel.

84 The specific concerns addressed in *Toronto (City) v. C.U.P.E., Local 79* are not necessarily engaged by the rule in *Henderson v. Henderson*. The efficiency of the court system is not always challenged, because the court may not be asked to re-decide an issue that has been fully canvassed before it on a previous occasion. Nor is the authority or credibility of a previous finding of fact placed in doubt, because no attempt is being made to have the court reach a contrary factual conclusion on an issue that it has already decided.

85 For these reasons, where the rule in *Henderson v. Henderson* forms the basis for an argument of abuse of process, a court must look beyond *Toronto (City) v. C.U.P.E., Local 79* to determine whether there is any basis on which to conclude that the process of the court is being abused.

86 In the case before us, the trial court was not being asked to re-consider an issue that had previously been litigated, nor was it being asked to make primary findings of fact that were incompatible with previous findings. Further, the plaintiffs can point to no aspect of the proposed defence that could be said to be abusive of the process. The defendant has not, for instance, reaped an advantage in the earlier litigation by refraining from raising the non-conforming use issue. It has not committed a fraud on the court. It did not keep the Petrellis from joining in the Bahry action by suggesting that *Bahry* was a test case.

87 I do not suggest that these various examples of conduct that might amount to an abuse of process are exhaustive. In a case such as the present, however, where the principles set out in *Toronto (City) v. C.U.P.E., Local 79* are not directly applicable, the court must examine the situation carefully to determine whether there is anything about it that constitutes an abuse. I am unable to find anything of that sort in this case.

88 In my view, the chambers judge erred in finding that the defendant's attempt to raise the defence of legal non-conforming use was an abuse of the court's process. I would allow the appeal and set aside the order of the chambers judge. The matter should be remitted to the Supreme Court for a new trial.

Levine J.A.:

I agree.

Neilson J.A.:

I agree.

Appeal allowed.

End of Document

TAB 13

2005 BCSC 1355
British Columbia Supreme Court

Radke v. S. (M.) (Litigation Guardian of)

2005 CarswellBC 2264, 2005 BCSC 1355, [2005] B.C.J. No. 2077, 142 A.C.W.S. (3d) 535, 48 B.C.L.R. (4th) 178

Christopher Radke (Plaintiff) And M.S., an infant by his litigation guardian J.S., Malik Rama, Insurance Corporation of British Columbia, Robert Kurtz, Her Majesty the Queen in Right of the Province of British Columbia, Attorney General of British Columbia and Attorney General of Canada (Defendants) And Her Majesty the Queen in Right of the Province of British Columbia, Attorney General of British Columbia and Attorney General of Canada and Constables Jane and Jack Doe (Third Parties)

Bennett J.

Heard: February 28, 2005; March 1-4, 2005
Judgment: September 27, 2005
Docket: Vancouver M032854

Counsel: Christopher R. Bacon for Plaintiff
Peter K. Hamilton for Defendants M.S., an infant by his Litigation guardian J.S., Malik Rama, Insurance Corporation of British Columbia
Helen J. Roberts, Bobby Bharaj for Defendants, Third Parties Kurtz, Attorney General of British Columbia, Attorney General of Canada

Subject: Public; Torts; Evidence

Table of Authorities

Cases considered by *Bennett J.*:

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Generally — referred to

s. 122 — considered

s. 177 — considered

Police Act, R.S.B.C. 1996, c. 367
Generally — referred to

s. 11 — referred to

s. 11(1) — considered

s. 14 — considered

s. 21 — considered

s. 21(1) "police officer" — considered

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s. 18 — considered

s. 18(a) — considered

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Motor Vehicle Act, R.S.B.C. 1996, c. 318
Emergency Vehicle Driving Regulation, B.C. Reg. 133/98

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s. 3 — considered

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TRIAL on issue of liability in action for damages in motor vehicle accident; RULING on admissibility of evidence.

***Bennett J.*:**

Introduction

1 On Sunday, February 16, 2003, M.S., a young offender, was driving a stolen car. Constable Kurtz, a member of the Royal Canadian Mounted Police commenced a chase of the stolen vehicle. The vehicle ran a stop sign at the intersection of Willingdon Avenue and Union Street in Burnaby, B.C. and struck the vehicle driven by Christopher Radke. Mr. Radke was seriously injured. The issues in this case are the liability of the RCMP officer, the Government of Canada and the Government of British Columbia.

2 It is conceded that primary liability falls to M.S., the driver of the stolen vehicle.

Facts Relating to the Accident

3 Constable Kurtz has been with the RCMP since July 2001, and has been assigned to Burnaby since that time. On the morning of February 16, 2003, Constable Kurtz was assigned to a call regarding a breaking and entering on Dundas Street near Gamma Avenue. The breaking and entering was not "in progress" meaning there was no suspect in the immediate vicinity, nor was there any emergency at this location. En route, at around 10:30 a.m., he drove past a Honda Civic which was parked facing south on the west side of Gamma.

4 Constable Kurtz suspected the car was stolen and asked the dispatcher to check the licence plate number. The dispatcher reported back right away that, indeed, the car had been reported stolen in North Vancouver. Upon learning this, Constable Kurtz called for an unmarked cover vehicle to watch him as he disabled the vehicle, a process that would take 15 to 20 seconds and would involve removing the car's distributor cap. Constable Kurtz did not consider it safe to disable the vehicle alone.

5 Constable Chow, who has been an RCMP officer since 2001, was assigned to assist Constable Kurtz. He was driving an unmarked panel van. He was told to meet Constable Kurtz at the gravel parking lot on the east side of Confederation Park.

6 Constable Pride, who has been with the RCMP since 2002, had only been working in Burnaby for two weeks. He arrived at the scene around 10:30 in a marked car. Constable Kurtz told Constable Pride to get his car off Gamma in case the suspects returned and noticed the police presence. Constable Kurtz then went to the breaking and entering call, where he attended for 15 to 20 minutes.

7 Constable Uzelac, who has been with the RCMP since 2001, was assigned to assist in setting up a perimeter around the stolen car. He arrived at 10: 45 a.m. in a marked police

unit and parked on North Beta Avenue and Penzance Drive, north of where the stolen car was parked. Constable Uzelac had grown up in the area and is very familiar with Burnaby.

8 Constable Chow arrived at the gravel parking lot at approximately 10:51 a.m. He understood that someone else was coming to help disable the car.

9 At this juncture, no one was positioned south of the stolen vehicle. Dispatch radioed Constable Kurtz to assign someone to a position south of the vehicle, but he did not respond to the call and instead engaged in a conversation with Constable Chow. He then drove to the parking lot where Constable Chow was parked.

10 Constable Kurtz was coordinating the other officers. He could not say why he did not disable the vehicle at 10:30, when Constable Pride was able to cover him. He said it did not occur to him to disable the vehicle at the first opportunity because he intended on finishing the breaking and entering call first.

11 Constable Kurtz does not recall a plan to set up a perimeter and said that was not what he was doing. Once the vehicle was disabled, he was going to surround it to see if someone came back for it.

12 Before he could disable the vehicle, however, someone did come back for it; shortly after 10:51, three males, described by the officers as "kids", were seen walking north on Gamma towards the car. The officers then saw the car move southbound on Gamma. Constable Chow began to follow the car down Gamma, while Constable Kurtz went down a side street in an effort to cut off the suspects.

13 The car passed Constable Kurtz at the corner of Albert Street and, instead of having Constable Chow follow them in the unmarked vehicle, he pulled out and began following the stolen vehicle himself. Constable Kurtz was unable to say why he did certain things. He only recalled wanting to box in the car and that he hoped other cars were in position do so, even though no police cars were stationed to the south.

14 The stolen vehicle slowed, but went through a stop sign at Albert Street (which is the first intersection). It went through a green light on Hastings Street, crossed Pender Street, slowed to 20 km/h at the stop sign at Frances Street, but did not make a full stop. At this point, Constable Kurtz activated his lights and siren. The vehicle had been travelling 30-40 km/h to this point, except when it slowed for stop signs. Once the chase commenced, the speed of the stolen vehicle increased to 60 km/h and then reached a maximum of 70 km/h, in Constable Kurtz's estimation. The stolen vehicle turned right (westbound) on to Union Street and almost hit the south side curb of Union Street. The rear and front passenger doors opened at this point and Constable Kurtz thought the passengers might jump out.

15 Constable Kurtz testified that the vehicle slowed to 20 km/h at the next intersection. His report to dispatch at the time says that the vehicle went through the intersection at 40 km/h. Constable Kurtz testified that the car slowed to 20 km/h and then sped up to 40 km/h. However he acknowledged that travelling through a stop sign at either 20 or 40 km/h was hazardous.

16 The vehicle continued towards Willingdon Avenue and slowed, according to Constable Kurtz, as if to turn north, but instead went through the intersection where it collided with the vehicle Mr. Radke was driving, knocking it on to the lawn of a house on Union Street.

17 The area was residential, with a school and soccer field nearby. The roads were wet. There was a woman walking her dog at Frances and Pender Streets. There were no other cars or pedestrians in the area.

18 Earlier that day, M.S., who was 15 years old at the time, went to Michael Sing's house with Mike Parker. M.S. was driving a white Honda Civic that had been stolen. After picking up Mr. Sing, they drove to the McDonald's at Gamma and Hastings, parking the car on Gamma. As they walked back to the car from the restaurant, Mr. Sing saw a police car drive into the park. They got into the car and as they approached the Albert Street intersection, the saw the police car again. This was Constable Kurtz.

19 Mr. Sing said they were not speeding and were hoping the police would not follow them. They went through the Hastings intersection at about 40-50 km/h on the green light. He said as soon as the police lights went on, M.S. hit the gas and continued to accelerate until he went around the corner at Union. Mr. Sing said that as the car turned the corner, he was going to "bail", meaning jump out of the car. Mr. Sing said M.S. continued accelerating down Union and was going 80-90 km/h when it crossed the intersection at Willingdon. Mr. Sing said he and Mike Parker were yelling at M.S. to stop but he did not respond. Mr. Sing thought the car they hit was travelling at the speed limit. Mr. Sing hit his head on the windshield and then tried to walk away from the scene.

20 Mr. Sing has convictions for possession of stolen property, possession of a weapon and assault. He was aware the car was stolen when he rode in it, and he was going to look at buying some stolen property from M.S. and Mike Parker. These are matters which are relevant to Mr. Sing's credibility.

21 The only real divergence between the evidence of Mr. Sing and the evidence of Constable Kurtz relates to their estimates of the speed of the vehicle driven by M.S. This is the main factual issue I must resolve.

22 The other relevant evidence related to this issue is the recording of radio communication made by RCMP dispatch (the "Dispatch Recording"). This recording was transcribed and marked as an exhibit. In the transcript reproduced below, B represents the transmission of Constable Kurtz, except for the second last B, which is the transmission of Constable Uzelac, while C represents the transmissions of the dispatcher. The words in italics are those words originally marked as "inaudible" on the transcript as they were heard in court:

> B: (inaudible) I got them Burnaby, I have (inaudible) 3 males. Whiskey, Juliet Echo 842 and we're gonna be straight through southbound on Gamma I'm not in pursuit. I am following, not in pursuit.
>
> C: Southbound Gamma, no pursuit, following only at this time.
>
> B: Clearing.
>
> B: Burnaby, everybody keep the air clean, I'm gonna be in pursuit now, he just blew the stop sign. We're gonna be westbound on Union. Westbound on Union.
>
> C: Westbound Union, go with your locations.
>
> B: West, they're getting' ready to bail, get, everybody get in the area they're gonna bail.
>
> Through the stop sign at Beta, speed is forty.
>
> C: Speed is 40 k, through the stop sign at Beta, still westbound.
>
> B: Okay we're through Alpha, still westbound, speed is 60.
>
> C: Through *Alpha*, westbound, speed 60.
>
> B: Burnaby Bravo 8, second car in pursuit, I'll take *chase from* there.
>
> C: Copy that, Bravo 19 pursuing, Bravo 8 calling.
>
> B: MVA, MVA, MVA at (inaudible).

23 While I do not think Mr. Sing was intentionally lying about the speeds that the vehicle was travelling, there was no evidence of his experience in judging the speed of motor vehicles. His estimates of speed were based on seeing houses pass by. He was trying to jump out of the car and trying to get M.S. to stop. Given his excited state, I do not think his estimates of speed are reliable.

24 Constable Kurtz was broadcasting the speed as he was driving. It was clear on the evidence of both Mr. Sing and Constable Kurtz that once the pursuit started, the stolen vehicle accelerated.

25 There is also a dispute regarding the speed of the vehicle when it struck Mr. Radke. In his evidence, Constable Kurtz stated that the top speed the vehicle was travelling was 60-70 km/h. It was clear that the vehicle was accelerating. Constable Kurtz testified that the vehicle slowed at Willingdon and he thought it was turning right. He testified that the vehicle was travelling at 40-50 km/h through the intersection. At discovery, on the other hand, he said it was travelling at 30-40 km/h. There is no mention of the speed of the vehicle as it approached Willingdon in the Dispatch Recording.

26 Mr. Sing said the vehicle did not slow down at Willingdon. His description of M.S. was that of someone transfixed. This is consistent with the accelerating speed of the vehicle, which is not disputed.

27 The traffic report prepared by Constable Fookes states that "the witness" estimated the speed of the vehicle as 70 km/h when it struck Mr. Radke's vehicle. According to her report, the civilian witnesses who were interviewed did not see the Honda Civic. The witness who estimated the speed of the stolen vehicle at 70 km/h is unknown; however it is reasonable to infer that it was Constable Kurtz as no one else, other than the occupants, saw the stolen vehicle. In any event, by agreement (see Exhibit 7) the report of Constable Fookes was admitted as *prima facie* proof of the truth of its contents and proof that the statements therein were made. I am alive to the hearsay issue, and use this note only to corroborate the evidence of Mr. Sing.

28 Based on the evidence, I conclude that the speeds were those reported by Constable Kurtz to the dispatcher and recorded in the Dispatch Recording, which is the most reliable evidence at it was contemporaneous with the event. I do not accept Constable Kurtz's evidence that the vehicle slowed at Willingdon as if to turn north. Mr. Sing's evidence on this point regarding his description of M.S. and the speed was compelling and consistent with the reports of Constable Fookes, referred to above.

29 Thus, I make the following findings of fact relating to the pursuit: the stolen vehicle was travelling under the speed limit initially. The speed limit was 50 km/h. It slowed, but did not stop, at the stop sign at Albert Street. It slowed to 20 kms km/h, but did not stop, at the stop sign at Frances Street, at which point the pursuit commenced. Constable Kurtz turned on both lights and siren. The vehicle picked up speed. The vehicle sped around the corner at Union Street and almost hit the south-side curb, causing M.S. to lose some control of the vehicle. The vehicle accelerated, driving through the stop sign at Beta Avenue at 40 km/h. It continued to accelerate and drove through the stop sign at Alpha Avenue at 60 km/h. Finally,

it drove through the stop sign at Willingdon Avenue and struck Mr. Radke's vehicle when travelling at approximately 70 km/h. The entire pursuit lasted 46 seconds.

30 Frances, Union, Alpha and Beta are residential side streets. Willingdon, at that point, is a six-lane major thoroughfare in Burnaby.

Evidence of Mr. Radke

31 Mr. Radke was en route to his workplace at Regency Toyota, which is located at Lougheed Highway just west of Willingdon. He is employed there as a painter and was meeting a friend to help him with a car.

32 He was travelling south on Willingdon at the speed limit, which was 50 km/h. There was another car two to three car lengths ahead of him. About five seconds before he crossed the intersection with Union, he heard a faint siren and began checking to see where it was coming from. He looked in front, in the rear view mirror and as he was looking around he was struck by a white car. He first saw the car as it reached him.

33 Mr. Radke did not pull over immediately upon hearing the siren because he wanted to look for the siren before he stopped. He took his foot off the accelerator, but did not stop. He knows he has to pull over when a siren approaches, but he did not see anyone coming from behind him. He acknowledged that if he had stopped immediately, he would not have been hit by the car, but said it happened quickly.

34 His car landed in the front yard of a house on Union Street. He suffered serious injuries.

Facts Relating to Police Policy in Pursuits

35 All the police testified to their understanding of police pursuit procedure, including their understanding that the primary objective of that procedure is the safety of the public. It is worth noting that all of the police officers involved had less than two years experience.

36 Constable Kurtz was aware that the public safety came first when considering a police pursuit and that all steps must be taken to avoid a pursuit, including disabling a vehicle. Despite this knowledge, however, he did not disable the vehicle as soon as was reasonable — that is when other uniformed constables were on the scene. He says he wanted to wait for the unmarked vehicle. This makes no sense. He was in uniform and he intended to disable the vehicle. Thus, regardless of whether he was being covered by an officer in a police car or by one an unmarked car, if suspects returned to the vehicle while he was disabling it, they would be put on notice rather quickly that the police had found the vehicle. There was no reason to wait to disable the vehicle.

37 Constable Kurtz agreed that it would have been preferable for Constable Chow to have followed the stolen vehicle in the unmarked van, since this would not have alerted the suspects that they had been discovered and would give other officers time to get into position.

38 Constable Kurtz was aware that being in a residential area is a factor to take into account, along with the use and nature of the road, in assessing the risk to public safety when considering a pursuit. He also was aware that public safety was paramount. He had to take into account all of the circumstances on the road.

39 Constable Kurtz was aware that the seriousness of the offence was also a factor. In this case he saw people he referred to as "kids" driving a stolen Honda Civic. He thought this theft was a dual or hybrid offence. There was no evidence as to the value of the Honda Civic, but it was a 1994 model, according to the traffic report. I could not assume that it was worth more than $5,000, which would have made the offence strictly indictable. On the other hand, it would be unreasonable to expect Constable Kurtz to know the year of the stolen vehicle. As indicated, he thought the offence was hybrid. A dual or hybrid offence is indictable unless the Crown elects to proceed summarily. Constable Kurtz acknowledged that a property crime is less serious than a crime such as kidnapping.

40 Constable Kurtz felt it was a low risk situation because there was no vehicular or pedestrian traffic. He stated that a high risk situation for a pursuit would have been one undertaken on a Monday at 3:00 p.m.

41 Constable Kurtz was aware of the Headquarters Operational Manual and the provisions of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 and Regulations.

42 Gamma Avenue has two lanes with parking on the shoulders. Union Street has two-way traffic, but if cars are parked on both sides of the street, there is only room for one car to drive down the street. It is a residential neighbourhood with a high school and fields. February 16 was a Sunday. School was obviously not in session. The pedestrian and vehicular traffic was light.

Admission of Documents

43 The plaintiff seeks to tender three documents which are objected to by the defendant. These are 1) a report prepared by the RCMP Public Complaints Commission on "Police Pursuits and Public Safety", 2) an interim and 3) a final report by the Commission for Public Complaints Against the RCMP prepared as a result of complaints launched in this case.

44 The plaintiff submits that the documents are admissible as they fall within the public documents exception to the hearsay rule. The plaintiff specifically states that he is not tendering the Commissioner's reports as expert evidence.

45 The defendant argued the issue primarily on the footing that the documents are in fact expert opinion and not admissible as such.

46 I will deal first with the 1999 report relating to Police Pursuits and Public Safety. This report reviews the RCMP policy regarding pursuits and the pursuits that took place in the five years prior to the report. It is highly critical of the police pursuits policy. The policy in place at the time of the accident and admitted as evidence was prepared several years after this report was published. The plaintiff has not pleaded that there is anything wrong with the current policy. Thus, this document is simply not relevant to the case before me. If evidence is not relevant, it is not admissible.

47 The interim and final reports prepared by Ms. Shirley Heafey, the Chair of the Commission for Public Complaints Against the RCMP, are tendered in evidence by the plaintiff under the "public document" exception to the hearsay rule.

48 This exception, which admits documents as *prima facie* truth of the contents, is founded in the following principle stated in *R. v. Aickles* (1785), 1 Leach 390 (Eng. Crown Ct.), at 392 and approved by the Supreme Court of Canada in *R. v. Finestone*, [1953] 2 S.C.R. 107 (S.C.C.):

> The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require.

49 Thus, the circumstantial guarantee of trustworthiness justifying the admission of hearsay for the truth is found in the assumption that those assigned an official duty to record will see it as important and perform the duty honestly and accurately.

50 Further, the exception exists because it is inconvenient to require public officials to attend court to prove the contents of the document. See *R. v. P. (A.)* (1996), 109 C.C.C. (3d) 385, 92 O.A.C. 376 (Ont. C.A.).

51 In J. Sopinka et al., *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 247 the authors state:

> Founded on the belief that public officers will perform their tasks properly, carefully, and honestly, an exception to the hearsay rule was created for written statements prepared by public officials in the exercise of their duty. When it is part of the function of a public officer to make a statement as to a fact coming within his [or her] knowledge, it is assumed that, in all likelihood, he [or she] will do his [or her] duty and make a correct statement. The circumstances of publicity also adds another element of trustworthiness. Where an official record is necessarily subject to public inspection, the facility and certainty with which errors would be exposed and corrected provides an additional guarantee of accuracy. Before this exception to the hearsay rule comes into play, the following preconditions, cumulatively providing a measure of dependability, must be established:
>
> (1) The subject matter of the statement must be of a public nature;
>
> (2) The statement must have been prepared with a view to being retained and kept as a public record;
>
> (3) It must have been made for a public purpose and available to the public for inspection at all times;
>
> (4) It must have been prepared by a public officer in pursuance of his duty.

52 However, the application here relates not to records but to the information reviewed and summarized in an inquiry and the recommendations flowing from the inquiry.

53 In the context of an inquiry, the following sets out the test for a public document; as noted by Macdonald J. in *Robb Estate v. St. Joseph's Health Care Centre* (1998), 87 O.T.C. 241, 31 C.P.C. (4th) 99 (Ont. Gen. Div.), at para. 12:

> I have considered the authorities which have reviewed what constitutes a public document. In ***R. v. Kaipiainen*** (1953), 107 C.C.C. 377, the Court of Appeal of Ontario cited with approval Lord Tucker's public documents test, outlined in ***Thrasyvoulos Ioannou v. Papa Christoforos Demetriou***, [1952] A.C. 84. In order for a document to be considered public, it must be shown, either intrinsically from the contents of the document itself or from other evidence, that: (a) a judicial or semi-judicial inquiry was held; (b) the inquiry was held with the purpose that the report would be made public; (c) the report was at all times open to public inspection; and (d) the statements in a document tendered in evidence should be statements with regard to matters which it was the duty of the public officer who held the inquiry to inquire into and report on (***Kaipiainen***, supra, at p. 377).

54 In *Robb Estate*, *supra* the plaintiffs sought to tender the Royal Commission of Inquiry into the Blood Systems (the Krever Inquiry) and the Report of the Information Commissioner (the Grace Report). In that case, Macdonald J. said the following regarding the admissibility of these reports as public documents, at paras. 19-24:

> The Krever Report contains the opinion of Commissioner Krever based on a record that is not before this court. The report contains Commissioner Krever's conclusions and opinions based upon what he observed as having occurred, upon what he found to have been done correctly and incorrectly, and upon what he found should have been done but was not done. Commissioner Krever did not apply the standards of proof of evidence which are applicable to the conduct of a civil trial. I accept the submission of Mr. Morrison that Commissioner Krever's conclusions and opinions are based on evidence and opinions given at the hearings, much of which would not be admissible in a civil or criminal trial. This was recognized by Commissioner Krever himself. He made the following observations at the outset of the Inquiry on November 22, 1993:
>
> > It [the Inquiry] is not and will not be a witch hunt. It is not concerned with criminal or civil liability. I shall make findings of fact. It will be for others, not for the commission, to decide what actions if any are warranted by those findings.
> >
> > I shall not make recommendations about prosecution or civil liability. I shall not permit the hearings to be used for ulterior purposes, such as a preliminary inquiry, or Examination for Discovery, or in aid of existing or future criminal or civil liability ...
>
> See ***Canada v. Canada*** (F.C.A.) at 261.
>
> And on November 24, 1995 the Commissioner said:
>
> > I want to repeat what I have said before on more than one occasion that this is not a trial. No one, no person, or organization is on trial. This is not an adversary proceeding in which a party makes allegations against another party. It is an inquiry, inquisitional in nature.
> >
> > ***Canada v. Canada*** (F.C.A.) at 261.
>
> Accordingly, the Krever Inquiry was described by Commissioner Krever himself as " . . . an inquiry into facts that will form the foundation of important policy recommendations" (***Canada v. Canada***, [1996] F.C.J. No. 864, (Trial Div.), quoted at para. 89).

To my mind, these comments illustrate that Commissioner Krever proceeded on the basis that he did not intend for his findings to be used in subsequent civil proceedings. But this alone is not sufficient to decide the issue. The public documents exception to the hearsay rule was never intended to be applied to admit into evidence at a trial documents such as the Krever Report.

The hallmark of a judicial or quasi-judicial decision is that it determines a *lis inter partes*. At the Krever Inquiry, there was no *lis inter partes*. The authorities which consider the nature of judicial inquiries make this point very clearly. For example, in ***Re Copeland and McDonald*** (1978), 88 D.L.R. (3d) 724 (F.C.T.D.), Cattanach J. found that a commission of inquiry appointed to investigate certain activities of the R.C.M.P., and which was directed to report to the Governor in Council, was a fact-finding body and did not determine any lis inter partes. Accordingly, it was not judicial or even quasi-judicial. In ***Bird v. Keep***, [1918] 2 K.B. 692 (C.A.), Swinfen Eady M.R. found that the trial judge properly excluded the findings of a coroner's "inquisition." One reason for this was his finding at p. 698 that "[t]he coroner's inquisition is not like a judgment in rem. Nothing is done which is conclusive upon any person affected by it. . . . An inquiry before a coroner is merely in the nature of a preliminary investigation. It is not of any binding force."

It is no answer to say, as has occurred in this case, that the plaintiffs are unable to bring forward the evidence that would prove their claims in these three actions. The statement of their counsel cannot constitute evidence and, in any event, there is nothing at law to prevent the plaintiffs from bringing forward such evidence and proving it on the balance of probabilities. The plaintiffs cannot be said to be prejudiced by the onus, fundamental to the conduct of a civil trial, to bring forward evidence which supports the case alleged by the plaintiffs.

To the extent that Commissioner Krever relied on evidence which may be inadmissible in a civil trial to come to his conclusions, the defendants would be prejudiced by the introduction of such evidence. If the report were admitted, the defendants would be unable to have the opportunity to test the evidentiary findings which are contained in the report. They could not cross examine the report. They cannot know the evidence upon which the particular findings contained in the report are based. This was never a purpose for which the Krever Commission was intended.

There are also public policy considerations which prevent the Krever Report from being admitted into evidence. To admit the Krever Report as evidence in this trial would have the effect of converting a commission of inquiry into something that it was never intended to be. A commission of inquiry is a means by which the executive branch of the government can be informed on a particular issue. A commission of inquiry cannot

have the collateral purpose of providing evidence in civil proceedings. If I were to so find, parties in future civil proceedings could attempt to make use of the findings of a commission of inquiry for that purpose.

55 This reasoning was adopted in this Court by Humphries J. in *Rumley v. British Columbia* (2003), 12 B.C.L.R. (4th) 121, 2003 BCSC 234 (B.C. S.C.) at paras. 49-50.

56 This reasoning also applies in this application. There was no "*lis*" that the Commission was dealing with between the parties. The facts found are based on reports, notes, and interviews conducted by staff members and not subjected to cross-examination. The standard of proof for the consideration of evidence by the Commission is clearly not the same as a court of law. The Commission's mandate is to make recommendations which may or may not be accepted.

57 The reports by the Commission do not possess the circumstantial guarantee of trustworthiness required to come within the public document exception to the hearsay rule.

58 I agree with Justice Macdonald that this exception was never intended to apply to the reports of Commissions of Inquiry such as those put forward here.

59 Therefore the interim and final reports of Chair Heafey are not admitted into evidence.

Liability

60 It is agreed that the action against Malik Rama, the owner of the stolen vehicle, be dismissed. The claim against Constables Jane and John Doe is likewise dismissed. The third party claim against British Columbia was discontinued. The remaining issues are as follows:

1) Was Constable Kurtz negligent?

2) If so, what is the liability of the Province of British Columbia?

3) Was Constable Kurtz grossly negligent?

4) If so, what is the liability of Constable Kurtz and the provincial and federal governments?

5) Does the Insurance Corporation of British Columbia bear any liability as an independent defendant?

6) Is Christopher Radke contributorily negligent towards his injuries?

1) Was Constable Kurtz Negligent?

61 In *Blaz v. Dickinson* (1996), 9 O.T.C. 301, 2 P.L.R. 135 (Ont. Gen. Div.), Cumming J. set out the basis for a finding of negligence as follows, at para. 32:

> To establish liability for negligence, a plaintiff must demonstrate:
>
> • s/he was owed a duty of care by the defendant;
>
> • the defendant should have observed a particular standard of care in order to fulfil that duty;
>
> • the defendant was in breach of the duty of care by failing to fulfil the relevant standard of care;
>
> • the breach of the duty caused the damage or loss to the plaintiff; and
>
> • such damage or loss was not too remote a consequence of the breach so as to render the defendant not liable for its occurrence.
>
> See G.H.L. Fridman, The Law of Torts in Canada, vol. 1 (Toronto: Carswell, 1989) at 223; A. Linden, Canadian Tort Law, 5th ed. (Toronto: Butterworths, 1993) at 93.

Duty of Care

62 It is not disputed that Constable Kurtz owed Christopher Radke a duty of care.

Standard of Care

63 The issue of the appropriate standard of care was considered by Kirkpatrick J. (as she then was), in *Doern v. Phillips Estate* (1994), 2 B.C.L.R. (3d) 349, [1995] 4 W.W.R. 1 (B.C. S.C.), and she held at para. 69:

> . . . [T]here is little doubt that the standard of care to which a police officer will be held is that of a reasonable police officer, acting reasonably and within the statutory powers imposed on him or her, according to the circumstances of the case.

Did Constable Kurtz Breach the Standard of Care

64 It is necessary to set out the statutory authority under which informs the conduct of a police officer.

65 The relevant duties of a police officer are set out in s. 18(a) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 as follows:

18. It is the duty of members who are peace officers, subject to the orders of the Commissioner,

> (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
>
> (b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
>
> (c) to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and
>
> (d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

66 Section 122 of the *Motor Vehicle Act* permits exceptions for police pursuits. It reads as follows:

> 122 (1) Despite anything in this Part, but subject to subsections (2) and (4), a driver of an emergency vehicle may do the following:
>
> (a) exceed the speed limit;
>
> (b) proceed past a red traffic control signal or stop sign without stopping;
>
> (c) disregard rules and traffic control devices governing direction of movement or turning in specified directions;
>
> (d) stop or stand.
>
> (2) The driver of an emergency vehicle must not exercise the privileges granted by subsection (1) except in accordance with the regulations.
>
> (3) REPEALED: S.B.C. 1997-30-2 effective April 21, 1998 (B.C. Reg. 133/98).

(4) The driver of an emergency vehicle exercising a privilege granted by subsection (1) must drive with due regard for safety, having regard to all the circumstances of the case, including the following:

(a) the nature, condition and use of the highway;

(b) the amount of traffic that is on, or might reasonably be expected to be on, the highway;

(c) the nature of the use being made of the emergency vehicle at the time.

67 The *Emergency Vehicle Driving Regulations*, B.C. Reg. 133/98, also apply. The relevant sections are:

3 (1) To engage in or continue a pursuit, a peace officer must

(a) have emergency equipment activated, and

(b) have reasonable grounds to believe that

(i) the driver or a passenger in the vehicle being or to be pursued has committed, is committing or is about to commit an offence, and

(ii) the seriousness of the offence and the need for immediate apprehension outweigh the risk to the safety of members of the public that may be created by the pursuit.

(2) In considering whether there are reasonable grounds under subsection (1) (b), the driver of the emergency vehicle must consider any pertinent factors, including the following, if relevant:

(a) the nature and circumstances of the suspected offence or incident;

(b) the risk of harm posed by the manner in which the emergency vehicle is being or is likely to be operated;

(c) the risk of harm posed by the distance, speed or length of time required or likely to be required to exercise the privileges;

(d) the nature, condition and use of the highway;

(e) the volume and nature of pedestrian or vehicular traffic that is, or might reasonably be expected to be, in the area.

(3) For the purposes of subsection (1) (b),

(a) the need for immediate apprehension will be low if

(i) the driver or a passenger in the vehicle pursued has not committed an indictable offence, or

(ii) identification or apprehension of the suspected offender may be achieved by other means at that or a later time,

(b) the greater the distance, speed or length of time required or likely to be required for the pursuit, the greater the risk to the safety of members of the public, and

(c) an attempt to evade apprehension is not a factor to be considered in determining the seriousness of the offence or the need for immediate apprehension.

4 (1) A peace officer operating an emergency vehicle for purposes other than pursuit may exercise the privileges granted by section 122 (1) of the Motor Vehicle Act if

(a) the peace officer has reasonable grounds to believe that the risk of harm to members of the public from the exercise of those privileges is less than the risk of harm to members of the public should those privileges not be exercised, and

(b) the peace officer operates emergency equipment.

68 The following policy and procedures were admitted into evidence by consent: RCMP Headquarters Operational Manual IV.II.H and I (dated June 12, 2002) and RCMP "E" Division Operations Manual II.6.E.1 (dated February 13, 2003).

69 The following are the relevant excerpts from these policy manuals. First, from the Headquarters Manual:

H. EMERGENCY VEHICLE OPERATIONS

H.

1.a. Emergency vehicle operations include pursuits, closing the distance and emergency vehicle response.

H.

1.b. The Incident Management Intervention Model (IMIM) must guide any decision to initiate, continue or terminate an emergency vehicle operation. The following principles apply:

1. The primary objective of any intervention is public safety.

2. Police officer safety is an essential element of public safety.

3. The IMIM must always be applied in the context of a careful risk assessment.

4. Risk assessment must take into account the likelihood and extent of fatalities, injury and damage to property.

5. Risk assessment is a continuous process and risk management must evolve as situations change.

6. The best strategy is to use the least intervention to manage the risk.

7. Prudent intervention causes the least amount of harm or damage.

H. 2.a. Initiating a Pursuit

1. A pursuit may occur when a suspect driver refused to stop for a peace officer and attempts to evade apprehension.

2. A pursuit may only be initiated and continued when other alternatives are not available and the seriousness of the situation and the necessity of immediate apprehension is judged to outweigh the level of danger created by the pursuit.

. . . . .

H. 2.b. Termination of a Pursuit

1. A pursuit must be terminated when the risk to life becomes too great, the pursuit become futile or other means of apprehension are possible.

70 Next are the relevant excerpts from the "E" Division Operations Manual:

E. INVESTIGATIVE TECHNIQUES

E. 1. PursuitslEmergency Vehicle Operation

E. 1.a. General

E. 1.a. 1.

Pursuant to the *Emergency Vehicle Driving Regulations (EVDR)* by Order of Lieutenant Governor in Council No. 0522, signed 1998-04-21, the Police Services Division Guidelines were endorsed by the Attorney General.

E. 1.a. 2.

"Attempting to close the distance" means the act of "catching-up" to an offender, but does not include a pursuit.

E. 1.a. 3.

"Pursuant", means the driving of an emergency vehicle by a peace officer while exercising the privileges granted by Section 122(1) MVA for the purpose of apprehending another person who:

E. 1.a. 3.

1. refuses to stop as directed by a peace officer; and

E. 1.a. 3.

2. attempts to evade apprehension.

E. 1.a. 4.

For the purposes of this directive, the terms "pursuit" as referred to in HQ Ops. Man. II.6.E.5 (Hazardous Pursuits) and "pursuit" are synonymous.

. . . . .

E. 1.c. Risk Assessment —

E. 1.-c. 1.

Public safety is the paramount consideration when a member is operating a police vehicle while exercising the exemptions granted under Sec. 122 of the Motor Vehicle Act.

E. 1. c. 2.

Threats to public safety can change rapidly, and continual assessment is required throughout the pursuit or while a member is attempting to close the distance.

E. 1. c. 3.

Assessment is based on whether there are reasonable grounds to engage in or continue a pursuit, or an attempt to close the distance, balance against the risk of harm to the public.

. . . . .

E. 1.d. Factors to Consider

E. 1. d. 1.

When making an assessment as to the reasonable grounds to engage in or continue a pursuit, a member must consider the following factors:

E. 1. d. 1.

1. nature and circumstances of the suspected offence or incident;

E. 1. d. 1.

2. the risk of harm posed by the manner in which the police vehicle is being operated;

E. 1. d. 1.

3. the risk of harm posed by the distance, speed or length of time required or likely to be required to exercise the privileges under Sec. 122 MVA;

E. 1. d. 1.

4. the nature, condition and use of the highway; E. 1. d. 1. 5. the volume and nature of pedestrian and/or vehicle traffic that is or might reasonably be expected to be in the area;

E. 1. d. 2.

The need for immediate apprehension will be low if:

E. 1. d. 2.

> 1. the driver or passenger in the vehicle has not committed an indictable offence; or

E. 1. d. 2.

> 2. identification or apprehension of the suspect offender may be done by other means at that or a later time

E. 1. d. 3.

> The greater the distance, speed or time required to apprehend an offender, the greater the risk to public safety.

E. 1. d. 4.

> A suspect's attempt to evade apprehension is not a factor in determining the seriousness of the offence, or the need for immediate apprehension.

71 The statutes and policy provisions provide the context within which to assess whether there was negligence on the part of Constable Kurtz.

72 I add that no expert evidence was provided on the issue of how a reasonable police officer would conduct himself or herself. However, while not saying expert evidence would be inadmissible, in this case, given the facts, the statutes, the policy and case law, I do not need expert evidence to assess whether negligence existed.

73 In assessing the conduct of Constable Kurtz it is necessary to determine whether he complied with the policy.

74 In *Noel (Committee of) v. Royal Canadian Mounted Police* (1995), 9 B.C.L.R. (3d) 21, [1995] 7 W.W.R. 479 (B.C. S.C.), Clancy J. summed up the approach in this way, at para. 65:

> In summary, the question to be asked in assessing the conduct of police officers during pursuit is whether they, viewed objectively from the viewpoint of a reasonable police officer, acted reasonably and within the statutory powers conferred upon them. In considering that question, the Court must take into account that officers will be expected to perform the duties imposed on them by statute and to comply with policies adopted by the force to which they belong. A failure to comply with policy will not necessarily constitute negligence, nor will an error in judgment. Officers are exempted from compliance with certain traffic rules, provided they meet they meet the requirements of s.118 of the Motor Vehicle Act. There must be a recognition that officers are required

to exercise judgment in balancing the competing interests of arresting wrongdoers and protecting citizens.

75 Therefore, Constable Kurtz's compliance or non-compliance with the pursuit policy is a factor, albeit an important factor, in determining whether he was negligent. See also *Doern*, *supra*, at para. 69; *Doern v. Phillips Estate* (1997), 43 B.C.L.R. (3d) 53, 2 D.L.R. 108 (B.C. C.A.), at para. 15-16.

76 When assessing negligence in the context of a police pursuit a balancing of interests must occur. Society accepts that in exercising lawful duties, police may at times interfere with innocent bystanders: See *Blaz*, *supra*, at 50. It is important not to lose sight of the fact that police officers are exercising judgement often quickly and in highly stressful circumstances. One must not to analyze the circumstances, from the relative calm of a courtroom, without keeping this in mind.

77 At the risk of over-simplification, the following principle factors may be derived from the relevant statutes and policy relating to police pursuit:

1) The primary and overriding principle is public safety.

2) A pursuit may only be initiated when other alternatives are not available.

3) There must be a risk assessment in terms of the public safety before a pursuit is initiated.

4) The risk assessment is ongoing throughout the pursuit.

5) The factors to consider in the risk assessment include:

i) the seriousness of the offence;

ii) driving conditions;

iii) volume and nature of pedestrian and vehicular traffic that is or might be reasonably expected;

iv) whether the suspect can be identified by other means;

v) the likelihood of fatalities, injury and;

vi) damage to property.

78 Constable Kurtz could have and should have disabled the stolen vehicle as soon as Constable Pride was present. He did not.

79 He did not direct any of the officers who attended to take a position south of the vehicle nor did he provide dispatch with the necessary information so dispatch could direct where the officers should park. It is obvious that in order to cover off the travel of the vehicle (or the suspects on foot), someone should have been in a south position.

80 Next, Constable Kurtz followed the vehicle and knew that there were three "kids" (to use his description) in the car. While the car did not stop at two stop signs, it slowed significantly and indeed was driving under the speed limit.

81 Constable Kurtz commenced the pursuit, knowing no officer was in position ahead of him. As soon as the pursuit commenced, the stolen vehicle immediately accelerated. It turned westbound at Union, clearly not under control of the driver. The passenger doors opened, causing risk to the passengers. The vehicle continued to accelerate and within three blocks crossed a major intersection.

82 Constable Kurtz testified that he continuously assessed the risk factors.

83 His assessment before he started the pursuit did not give due consideration to the factors in the police pursuit policy. The stolen vehicle was not being driven in a manner that threatened public safety. The offence being committed, which he thought was a dual or hybrid offence (and he was probably right), was not a serious offence. There was no one in position to assist him, which raised the risk to the public significantly.

84 Once he put on his lights to pull the vehicle over and saw that the driver's response was to accelerate in a residential area and drive through stop signs while heading towards one of, if not the busiest street in Burnaby, a proper risk assessment would have informed him of the significant danger to the public posed by continuing the pursuit. Constable Kurtz clearly did not follow police policy when initiating the pursuit or by continuing it once the vehicle began accelerating and driving dangerously.

85 Taking into account his failure to conduct proper risk assessments at two critical times, I find Constable Kurtz did not act within the standard of the reasonable police officer, acting reasonably and within the statutory powers imposed upon him in the context of all of the circumstances of this case. I find Constable Kurtz breached his duty of care.

86 The negligence was clearly a contributing cause to the injuries suffered by Mr. Radke. While I acknowledge M.S was not obeying traffic signs, it was not until the pursuit commenced that he began driving dangerously. His dangerous driving and the accident was a consequence of the police pursuit.

2) Liability of the Province of British Columbia

87 Section 11 of the *Police Act*, R.S.B.C. 1996, c. 367, is as follows:

> 11 (1) The minister, on behalf of the government, is jointly and severally liable for torts committed by
>
> > (a) provincial constables, auxiliary constables, special provincial constables and enforcement officers appointed on behalf of a ministry, if the tort is committed in the performance of their duties, and
> >
> > (b) municipal constables and special municipal constables in the performance of their duties when acting in other than the municipality where they normally perform their duties.

88 It is not disputed that this *Act* is applicable to this case. Section 14 of the *Act* allows governments to contract with the Royal Canadian Mounted Police and, when such agreements are entered into, deems the RCMP to be a provincial police force. The section is set out below: :

> 14 (1) Subject to the approval of the Lieutenant Governor in Council, the minister, on behalf of the government, may enter into, execute and carry out agreements with Canada, or with a department, agency or person on its behalf, authorizing the Royal Canadian Mounted Police to carry out powers and duties of the provincial police force specified in the agreement.
>
> (2) If an agreement is entered into under subsection (1),
>
> > (a) the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial police force,
> >
> > (b) every member of the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial constable,
> >
> > (c) the provisions of this Act respecting the powers and duties of the provincial police force and provincial constables apply, subject to the agreement, and with the necessary changes and insofar as applicable, to the Royal Canadian Mounted Police and its members, and
> >
> > (d) the officer commanding the division of the Royal Canadian Mounted Police referred to in the agreement and the second in command of the division are deemed to be the commissioner and deputy commissioner, respectively, appointed under this Act.

89 There is no dispute that if Constable Kurtz is found negligent, the Province is jointly and severally liable.

3) Was Constable Kurtz Grossly Negligent?

90 Section 21 of the *Police Act* limits the personal liability of Constable Kurtz. It is set out below:

> 21(1) In this section, "police officer" means a person holding an appointment as a constable under this Act.
>
> (2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.
>
> (3) Subsection (2) does not provide a defence if
>
> > (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
> >
> > (b) the cause of action is libel or slander.
>
> (4) Subsection (2) does not absolve any of the following, if they would have been liable had this section not been in force, from vicarious liability arising out of a tort committed by the police officer or other person referred to in that subsection:
>
> > (a) a municipality, in the case of a tort committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or an employee of its municipal police board, if any;
> >
> > (b) a regional district, government corporation or prescribed entity, in the case of a tort committed by any of its designated constables or enforcement officers;
> >
> > (c) the minister, in a case to which section 11 applies.

91 Therefore, in order for Constable Kurtz to be personally liable, he must be found to be grossly negligent. Counsel for Constable Kurtz submits that the plaintiff did not plead gross

negligence and therefore the claim should be defeated on that basis. In fact, the plaintiff did plead that Constable Kurtz was grossly negligent (see para. 7A of the pleadings).

92 Gross negligence is not defined in the statute. The difference between negligence, gross negligence and criminal negligence is difficult to discern. Gross negligence has been called "a very great negligence" (see *Cowper v. Studer*, [1951] S.C.R. 450 (S.C.C.)). It is more than ordinary negligence, but less than criminal negligence. See *R. v. Tutton*, [1989] 1 S.C.R. 1392 (S.C.C.).

93 In assessing whether Constable Kurtz's degree of negligence amounted to gross negligence, the standard of "a very marked departure" from the standard of care of the reasonable police officer may be applied (see *McCulloch v. Murray*, [1942] S.C.R. 141 (S.C.C.)). All of the circumstances must be considered. Here, of importance in particular, was the short duration of the pursuit. Once Constable Kurtz commenced the pursuit (a decision which was not grossly negligent), he had 46 seconds to assess whether to continue the pursuit. Further, while the statutory and policy guidelines were not followed in the context of a proper risk assessment, they were not totally abandoned either. Constable Kurtz had his lights and siren operating, he was broadcasting the pursuit and he was driving in a manner that did not put the public at risk.

94 I therefore conclude that Constable Kurtz was not grossly negligent and therefore not personally liable.

4) Liability of Canada

95 The parties agree that if Constable Kurtz is not found personally liable then the Government of Canada is not liable.

5) Liability of the Insurance Corporation of British Columbia (ICBC)

96 ICBC was sued as an independent defendant. Counsel for Constable Kurtz submits that ICBC remains liable. Counsel for Mr. Radke does not consent to the dismissal against ICBC because of a potential costs issue. However, he does not maintain the action either.

97 There was no argument directed at the uninsured motorist provisions. ICBC was initially sued because the driver of the stolen vehicle had not been identified. It is now agreed that M.S. was the driver and his liability was never contested.

98 I do not see how ICBC can be independently liable for damages in these circumstances. Therefore the action against ICBC is dismissed.

6) Was Christopher Radke Contributorily Negligent?

99 Mr. Radke heard the faint sound of a siren five seconds before he was struck. He slowed down but did not pull over. He looked around for the origin of the siren.

100 Mr. Phillips, who was approximately three car lengths ahead of Mr. Radke, heard the sirens for anywhere between 10-20 seconds. He looked around, but did not pull over.

101 Section 177 of the *Motor Vehicle Act* reads as follows:

> On the immediate approach of an emergency vehicle giving an audible signal by a bell, siren or exhaust whistle, and showing a visible flashing red light, except when otherwise directed by a peace officer, a driver must yield the right of way, and immediately drive to a position parallel to and as close as possible to the nearest edge or curb of the roadway, clear of an intersection, and stop and remain in that position until the emergency vehicle has passed.

102 It was argued that by not pulling over immediately, Mr. Radke contributed to his injuries. Authorities were cited where, for example, there was blatant disregard of a police officer's emergency equipment by motorists.

103 In this case, Mr. Radke acted reasonably. He heard the siren for only seconds, he could not see an emergency vehicle, he slowed down and indeed he took more precautions than the other driver on the road. Counsel submitted that had he stopped he would have avoided the accident. But it is equally true that had he not slowed as a precaution he also would likely have avoided the accident. He was not entering a marked intersection. I find that Christopher Radke was not negligent.

104 The final question is apportionment of liability, which is relevant as between tortfeasors (see *McVea (Guardian ad litem of) v. B. (T.) (Guardian ad litem of)* (2005), 209 B.C.A.C. 144, 2005 BCCA 104 (B.C. C.A.)).

105 In *Doern*, *supra* Kirkpatrick J. found the police 25 percent liable. The facts of that case were more egregious than this one. Weighing the circumstances of this case, the liability of British Columbia is 15 percent and the liability of M.S. is 85 percent.

106 Counsel advised they wished to make submissions on costs.

Order accordingly.

End of Document

TAB 14

2010 BCSC 1562
British Columbia Supreme Court

Rogers v. Tourism British Columbia

2010 CarswellBC 2961, 2010 BCSC 1562, [2011] B.C.W.L.D. 301, [2011] B.C.W.L.D. 302, [2011] B.C.W.L.D. 303, [2011] B.C.W.L.D. 306, [2011] B.C.W.L.D. 58, 194 A.C.W.S. (3d) 491, 85 C.C.E.L. (3d) 298

Monika Rogers (Plaintiff) and Tourism British Columbia (Defendant)

M.J. Allan J.

Heard: September 16, 2010
Judgment: November 4, 2010
Docket: Vancouver S099257

Counsel: Plaintiff, Monika Rogers for herself
Karen Horsman for Defendant

Subject: Employment; Public; Civil Practice and Procedure

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

Civil practice and procedure

XX Trials
XX.8 Summary trial
XX.8.e Miscellaneous

Labour and employment law

II Employment law
II.1 Nature of employment relationship
II.1.d Miscellaneous

Labour and employment law

II Employment law
II.3 Interpretation of employment contract
II.3.k Miscellaneous

Labour and employment law

II Employment law
II.6 Termination and dismissal
II.6.b Notice
II.6.b.iii Effect of contractual terms regarding notice

Labour and employment law

II Employment law
II.6 Termination and dismissal
II.6.c Remedies
II.6.c.i Damages

II.6.c.i.O Aggravated, punitive or exemplary damages

Headnote

Labour and employment law --- Employment law — Interpretation of employment contract — Miscellaneous

Whether contracts enforceable — Plaintiff was employed as accommodations advisor for defendant — Plaintiff was initially hired on one-year contract, and then parties signed three-year contract for period from April 1, 2005 to March 31, 2008 — On December 7, 2007 defendant gave plaintiff notice that it was terminating second contract effective December 31, 2007 — Plaintiff brought action alleging wrongful dismissal — Defendant brought application for order dismissing action pursuant to R. 9-7 of Supreme Court Civil Rules — Application granted — With respect to first contract, it was clear that defendant's payment for plaintiff's services was adequate consideration — In any event, first contract came to its natural end at date of expiry — There was no evidence that defendant made any oral material misrepresentations that induced plaintiff to enter into contracts — Even if oral misrepresentations were made, parties signed written contracts that explicitly provided that they constituted entire agreement between parties — Law was clear that oral representations had no contractual force when whole contract was understood by both parties to be in writing — Plaintiff alleged that defendant made unilateral changes to second contract that required her to do additional work — Regardless of whether plaintiff was compensated for time extra activities took, issue in this case was whether plaintiff was entitled to damages for wrongful dismissal, not whether there was fundamental breach of contracts — Although some of plaintiff's written material suggested that she was not paid for some of work that she performed, her statement of claim did not contain any claim for unpaid work.

Labour and employment law --- Employment law — Termination and dismissal — Notice — Effect of contractual terms regarding notice

Plaintiff was employed as accommodations advisor for defendant — Plaintiff was initially hired on one-year contract, and then parties signed three-year contract for April 1, 2005 to March 31, 2008 — Contracts provided that they could be terminated by defendant for reasons other than cause by providing 21 days written notice — Plaintiff's regular practice was to work at about same time each year, usually between March and September — On December 7, 2007 defendant gave plaintiff notice that it was terminating second contract effective December 31, 2007 — Plaintiff brought action alleging wrongful dismissal — Defendant brought application for order dismissing action — Application granted — Contractual terms that unambiguously specify notice period are enforceable unless they contravene minimum notice requirements in Employment Standards Act — Section 65(1) of Act exempts employers from having to give notice set out in s. 63 of Act where employment is temporary or for definite term — In this case, neither s. 65(1)(a) nor (b) of Act precluded application of notice provisions in s. 63 — Contract provided for 21 days of notice, which was consistent with Act — As to fact that plaintiff was holidaying when notice was provided, s. 67 of Act, which prohibits employers from delivering notice while employee is, among other things, on "annual vacation" or "temporary layoff", did not apply — Finally, while defendant gave slightly over three weeks' notice, plaintiff effectively benefited from much longer notice period — Notice provision was enforceable and defendant properly complied with it when terminating second contract.

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Aggravated, punitive or exemplary damages

Plaintiff was employed as accommodations advisor for defendant — Plaintiff was initially hired on one-year contract, and then parties signed three-year contract for period from April 1, 2005 to March 31, 2008 — On December 7, 2007 defendant gave plaintiff notice that it was terminating second contract effective December 31, 2007 — Plaintiff brought action alleging that she was wrongfully dismissed — Defendant brought application for order dismissing action pursuant to R. 9-7 of Supreme Court Civil Rules — Application granted — Contractual notice provision was enforceable and defendant properly complied with it when terminating second contract, so plaintiff was not entitled to compensation — Aggravated damages would be available if employer engaged in conduct during course of dismissal that was unfair or was in bad faith by being, for example, untruthful, misleading

or unduly insensitive — Normal distress and hurt feelings resulting from dismissal were not compensable — Punitive damages were restricted to advertent wrongful acts that were so malicious and outrageous that they were deserving of punishment on their own — To merit award of punitive damages, conduct of employer had to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature and such that by any reasonable standard it was deserving of full condemnation and punishment — There was no evidence of any egregious conduct on part of defendant in manner of dismissal that would warrant award of either aggravated or punitive damages.

Civil practice and procedure --- Trials — Summary trial — Miscellaneous

Plaintiff was employed as accommodations advisor for defendant — Plaintiff was initially hired on one-year contract, and then parties signed three-year contract for period from April 1, 2005 to March 31, 2008 — On December 7, 2007 defendant gave plaintiff notice that it was terminating second contract effective December 31, 2007 — Plaintiff brought action alleging that she was wrongfully dismissed — Defendant brought application for order dismissing action pursuant to R. 9-7 of Supreme Court Civil Rules — Application granted — Summary trial was appropriate method of resolving all issues in this case — Although plaintiff filed extensive materials on this application, it was settled law that court would grant judgment on summary trial if necessary facts were adduced and it was not unjust to do so — No weight was placed on possibility that plaintiff might be able to call witnesses at trial to bolster her case for damages — Plaintiff could not resist summary judgment in present case on basis that full trial could conceivably turn something up or produce different result.

Labour and employment law --- Employment law — Nature of employment relationship — Miscellaneous

Table of Authorities

Cases considered by *M.J. Allan J.*:

Bank of Montreal v. Hawrish (1967), 61 W.W.R. 16, 1967 CarswellSask 55, 63 D.L.R. (2d) 369 (Sask. C.A.) — referred to

Bodor v. British Columbia Lottery Corp. (1988), 1988 CarswellBC 732, 24 C.C.E.L. 172 (B.C. Co. Ct.) — referred to

Harrison v. British Columbia (2010), 319 D.L.R. (4th) 251, 2010 BCCA 220, 2010 CarswellBC 1095, 86 C.P.C. (6th) 231, 4 B.C.L.R. (5th) 317, 484 W.A.C. 240, 286 B.C.A.C. 240 (B.C. C.A.) — referred to

Hawrish v. Bank of Montreal (1969), [1969] S.C.R. 515, 2 D.L.R. (3d) 600, 66 W.W.R. 673, 1969 CarswellSask 9 (S.C.C.) — referred to

Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199, 1989 CarswellBC 69 (B.C. C.A.) — referred to

Keays v. Honda Canada Inc. (2008), 2008 SCC 39, (sub nom. *Honda Canada Inc. v. Keays*) 2008 C.L.L.C. 230-025, 376 N.R. 196, 294 D.L.R. (4th) 577, (sub nom. *Honda Canada Inc. v. Keays*) [2008] 2 S.C.R. 362, 92 O.R. (3d) 479 (note), (sub nom. *Honda Canada Inc. v. Keays*) 63 C.H.R.R. D/247, 66 C.C.E.L. (3d) 159, 2008 CarswellOnt 3743, 2008 CarswellOnt 3744, 239 O.A.C. 299 (S.C.C.) — considered

Machtinger v. HOJ Industries Ltd. (1992), 40 C.C.E.L. 1, (sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.*) 53 O.A.C. 200, 91 D.L.R. (4th) 491, 7 O.R. (3d) 480n, (sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.*) 136 N.R. 40, 92 C.L.L.C. 14,022, [1992] 1 S.C.R. 986, 1992 CarswellOnt 892, 1992 CarswellOnt 989 (S.C.C.) — referred to

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Starcevich v. Woodward's Ltd. (1991), 1991 CarswellBC 190, 37 C.C.E.L. 46, 58 B.C.L.R. (2d) 254 (B.C. S.C.) — referred to

Strench v. Canem Systems Ltd. (2005), 2005 BCSC 1736, 2005 CarswellBC 2981 (B.C. S.C.) — referred to

Sullivan v. Graydon (2000), 2000 BCSC 999, 2000 CarswellBC 1331 (B.C. S.C.) — considered

Toronto Dominion Bank v. Griffiths (1987), 18 B.C.L.R. (2d) 117, 1987 CarswellBC 289, [1988] 1 W.W.R. 735 (B.C. C.A.) — referred to

Weaver v. Strata Plan No. K-353 (December 9, 1997), Doc. Kamloops 28276 (B.C. Prov. Ct.) — considered

Statutes considered:

Employment Standards Act, R.S.B.C. 1996, c. 113
Generally — referred to

s. 1(1) "temporary layoff" — considered

s. 1(1) "temporary layoff" (a) — considered

s. 1(1) "temporary layoff" (b) — considered

s. 4 — considered

s. 57 — considered

s. 58 — considered

s. 63 — considered

s. 63(1) — considered

s. 63(2) — considered

s. 63(2)(b) — considered

s. 65(1)(a) — considered

s. 65(1)(b) — considered

s. 67 — considered

s. 67(1)(a) — considered

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

App. B, s. 2(2)(b) — referred to

Supreme Court Civil Rules, B.C. Reg. 168/2009
R. 9-7 — referred to

APPLICATION by defendant for order dismissing plaintiff's wrongful dismissal action pursuant to R. 9-7 of *Supreme Court Civil Rules.*

***M.J. Allan J.*:**

1 In this action, the plaintiff, Ms. Rogers, alleges that she was wrongfully dismissed from her employment as an Accommodations Advisor ("Advisor") with the defendant Tourism BC. She seeks damages in lieu of notice and both aggravated and punitive damages. The action is scheduled to be heard at a five-day trial in May 2011. On this application, Tourism BC seeks an order dismissing the action pursuant to Rule 9-7 of the *Supreme Court Civil Rules.*

Background

2 Ms. Rogers was employed as an Advisor for Tourism BC from 2004 through 2007. Her duties consisted of on-site inspections of facilities enrolled in Tourism BC's Approved Accommodations Program to ensure that the facilities met the minimum standards for cleanliness and state of repair.

3 Ms. Rogers was initially hired on a one-year contract for the period from February 15, 2004 to March 31, 2005 (the "2004 Contract"). In April 2005, the parties signed a three-year contract for the period from April 1, 2005 to March 31, 2008 (the "2005 Contract"). Both the 2004 Contract and the 2005 Contract (collectively "the Contracts") were amended from time to time to increase Ms. Rogers' daily rate and her expenses, but all amounts payable were limited to a specified maximum. The maximum amount payable for the 2005 Contract was $37,500, plus an equal amount for expenses.

4 The Contracts provided that they would terminate automatically on the expiration of their terms. Additionally, the Contracts could be terminated by BC Tourism for reasons other than cause by providing Ms. Rogers with 21 days written notice and paying her an amount equal to the fees that she would have earned during that notice period:

> 10. Termination - This Contract will terminate automatically on the expiration of the Term. Additionally, this Contract may be terminated:
>
> a) For Reasons other than Cause
>
> . . . . .
>
> (ii) by us, for reasons other than cause, by giving 21 days written notice to you or upon any other period of written notice as may be agreed between the parties. At our sole discretion, we may terminate this Contract effective immediately upon payment of an amount equal to the amount of Fees described in Schedule "B" that would have been earned during this notice period.

5 The Contracts further provided that they constituted the entire agreement between the parties.

6 Ms. Rogers was interviewed in the fall of 2003 and accepted BC Tourism's offer of employment on December 19, 2003. Her employment commenced when she attended a training session in March 2004, and she began conducting her inspections on March 8, 2004. She was not given the 2004 Contract to sign until March 31, 2004.

7 Ms. Rogers says that she started work in 2005 on March 31. In 2006, she performed some administrative work in January and completed her first inspection on February 6. She was able to start earlier that year because Tourism BC had money left over from the previous year's budget. Her last inspection in 2006 was on October 5. In 2007, the

date of her first inspection was March 19 and the date of her last inspection was August 30 because she had made travel plans for September.

8 In 2006, Pierre Drouin was hired as the Manager of Quality Assurance with Tourism BC. He implemented a process of seeking feedback from six Advisors, of which Ms. Rogers was one. Feedback was sought at the end of each inspection season to identify problems and introduce changes. Mr. Drouin debriefed the Advisors at the end of the 2006 and 2007 seasons. In 2007, he sent each Advisor a lengthy debriefing questionnaire. Ms. Rogers and a friend, Jim Harris, were on holiday in Palm Springs from November 1 to December 31, 2007. Mr. Drouin telephoned Ms. Rogers on November 14, 2007 to discuss her feedback. He did not keep notes of that conversation, but Ms. Rogers made lengthy typed notes the following day which were produced during this litigation. Mr. Drouin concedes that the factual matters Ms. Rogers noted are accurate, but he does not agree with her subjective views as to his state of mind and motivations. He agreed that he had expressed disappointment that Ms. Rogers had shared her debriefing comments with the other Advisors and that she had asked them to send her their comments before sending them to Mr. Drouin. In his affidavit, he deposed that the debriefing process was intended to be confidential in order to encourage a frank discussion with each Advisor and he was concerned that Ms. Rogers' actions had undermined that process. Ms. Rogers' notes indicate that she sensed that Mr. Drouin was very angry with her for three reasons: she had shared her comments with the other Advisors; her comments in the debriefing were "too strong"; and she had acted as the spokeswoman for the Advisors with respect to asking for higher wages from management. Mr. Drouin told her that if the changes she wanted were not introduced in the next contract, she would have to decide if she wanted to continue working with Tourism BC. When Ms. Rogers asked him if he was considering not renewing her contract, he did not respond. She said that she had a strong sense that her contract might not be renewed.

9 On December 7, 2007, Mr. Drouin gave Ms. Rogers notice that Tourism BC was terminating the 2005 Contract effective on December 31, 2007. In late December, Ms. Rogers requested a meeting to discuss that decision. In January 2008, Ms. Rogers sent an email to Mr. Drouin that stated she was totally devastated that he had not renewed her contract and asked him to reconsider his decision. In a subsequent telephone conversation, Mr. Drouin told Ms. Rogers that the decision was final. At her request, he provided her with a favourable letter of reference.

10 After her employment was terminated, Ms. Rogers filed a complaint with Canada Revenue Agency (CRA) alleging she was an employee of Tourism BC rather than an independent contractor. On August 8, 2008, CRA ruled that she was an employee under a contract of service during 2007. An appeal by BC Tourism was dismissed on March 18, 2009.

11 On May 8, 2008, Ms. Rogers filed a complaint with the Director of Employment Standards. Tourism BC and Ms. Rogers reached a settlement agreement whereby Tourism BC paid her $5,296.52. As a term of the settlement, the parties agreed that the sum of $2,392.38 would be allocated to compensation for her length of service and that the sum would be applied to any award made by a court in a civil action for damages for wrongful dismissal.

Ms. Rogers' statement of claim

12 I will summarize the more serious allegations that Ms. Rogers makes in her lengthy statement of claim. Ms. Rogers submits that BC Tourism misrepresented the nature of the job and the terms of employment during her interview. She understood that the job would continue for as long as she wanted to work as long as she wished provided that her job performance was satisfactory. Ms. Rogers claims BC Tourism made a number of negligent oral representations. In addition, she says that BC Tourism "imposed a 'fixed term' one year contract", required her to work beyond the seven month season, and made her perform work outside the "job description" in the 2005 Contract. With respect to the 2004 Contract, Ms. Rogers points out that she began working before it was signed.

13 Ms. Rogers is adamant that she lost benefits as a result of being categorized as an "employee" during the time that she worked for BC Tourism. She claims that she lost the ability to receive employee benefits under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (*"ESA"*) including medical benefits, dental benefits, vacation pay, statutory holiday pay, overtime income, and other benefits. She also claims that she lost the ability to collect employee benefits from the BC

Government Employees' Union, including bonuses and pay increases, and that she lost Employment Insurance Benefits. She says she has suffered a loss as a result of a reassessment of her 2007 tax return and that she may owe taxes to CRA although no particulars of such a loss are given.

14 Ms. Rogers also alleges that "the dismissal of the plaintiff by the defendant as alleged herein was without cause and proper working notice, and constitutes an arbitrary and wilful breach of the plaintiff's contract of employment with the defendant and a wrongful dismissal of the plaintiff".

15 Ms. Rogers claims aggravated and punitive damages for "the manner of dismissal and the conduct of the defendant leading up to and in the course of dismissal and the necessary aftermath thereto". She says that BC Tourism conducted her dismissal in bad faith by being untruthful, misleading and unduly insensitive. She provides the following particulars of bad faith:

- Mr. Drouin unnerved her by his unpredictable behaviour;
- Mr. Drouin sent her a "thank you" note for a job well done on August 17, 2007;
- Mr. Drouin required her to fill out a debriefing document;
- on September 9, 2007, Ms. Rogers responded in "good faith" openly and honestly with thoughts for improving the organization"; and
- on November 14, 2007, during the conference call to discuss the debriefing, Mr. Drouin "acted in Bad Faith by upbraiding the Plaintiff for using 'very strong words' and 'for sharing the Plaintiff's Debriefing comments with the other Inspectors'" and "for acting as spokesperson regarding the wage issue which the Defendant said put me in an untenable position."

16 Ms. Rogers claims that those incidents "intimidated" her and caused her to suffer humiliation and mental anguish. She also says that they caused damage to her reputation, self esteem, and confidence, and impaired her ability to locate and secure similar employment.

Issues

Are the Contracts enforceable?

17 Ms. Rogers signed the 2004 Contract on March 31, 2004. Although she says that there was no consideration for that agreement, it is clear that Tourism BC's payment for her services was adequate consideration. In any event, the 2004 Contract came to its natural end at the date of expiry.

18 There is no evidence that BC Tourism made any oral material misrepresentations that induced Ms. Rogers to enter into the Contracts. Even if oral material misrepresentations were made, the parties signed written contracts that explicitly provided that they constituted the entire agreement between the parties. The law is clear that oral representations have no contractual force when the whole contract is understood by both parties to be in writing: *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 (S.C.C.), (1967), 63 D.L.R. (2d) 369 (Sask. C.A.); *Toronto Dominion Bank v. Griffiths* (1987), [1988] 1 W.W.R. 735, 18 B.C.L.R. (2d) 117 (B.C. C.A.).

19 Ms. Rogers says that BC Tourism made unilateral changes to her 2005 Contract in 2007. She says that those changes required her to do additional work such as completing monthly statistics, handing out "sales kits" at the time of her inspections, attending conference calls, and filling out a debriefing questionnaire. Regardless of whether Ms. Rogers was compensated for the time that those activities took, the issue in this case is whether Ms. Rogers is entitled to damages for wrongful dismissal, not whether there was a fundamental breach of the Contracts. Although some of Ms. Rogers' written material suggests that she was not paid for some of the work that she performed, her statement of claim does not contain any claim for unpaid work.

Is Ms. Rogers entitled to damages arising from the termination of the 2005 Contract?

20 Tourism BC does not allege cause for the termination of the 2005 Contract. It was a fixed-term contract due to expire on March 31, 2008, but it also contained a notice provision that purported to allow Tourism BC to terminate it without cause before its expiry date on three weeks' notice.

21 BC Tourism submits that no damages are owed to Ms. Rogers because the notice provision is enforceable and BC Tourism complied with it when providing her with notice of termination.

22 The first issue is whether the notice provision is enforceable. Contractual terms that unambiguously specify a period of notice are enforceable unless they contravene the minimum notice requirements in the *ESA*: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at 998; *Strench v. Canem Systems Ltd.*, 2005 BCSC 1736 (B.C. S.C.) at para. 33. In the absence of such a contravention, the contractual term replaces the presumption of reasonable notice inferred by the common law. In the event of a conflict, the contractual provision will be rendered null and void for all purposes, as provided by s. 4 of the *ESA*:

> The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2) or (4), has no effect.

23 If the contractual term is void, the employee will be entitled to damages measured by the wages that the employee would have received during the unexpired term of the contract, subject to their duty to mitigate: *Park v. Parsons Brown & Co.* (1989), 62 D.L.R. (4th) 108 (B.C. C.A.), at 115 -116.

24 Section 63 of the *ESA* sets out the employer's liability for compensating employees according to their length of service:

> (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

25 Ms. Horsman submits that there can be no conflict between the notice provision and s. 63 of the *ESA* because Ms. Rogers was a seasonal employee and, as such, was not entitled to notice under the *ESA*. Section 65(1) of the *ESA* exempts employers from having to give the notice set out in s. 63 of the *ESA* where the employment is temporary or for a definite term:

> (1) Sections 63 and 64 do not apply to an employee
>
> (a) employed under an arrangement by which
>
> (i) the employer may request the employee to come to work at any time for a temporary period, and
>
> (ii) the employee has the option of accepting or rejecting one or more of the temporary periods,
>
> (b) employed for a definite term.

26 In this case, neither s. 65(1)(a) or (b) of the *ESA* preclude the application of the notice provisions in s. 63 of the *ESA*.

27 With respect to s. 65(1)(a) of the *ESA*, the jurisprudence emphasises that the "intermittent aspect ... is at the heart of the provision" and that it must necessarily involve "periods of time when either at the employee's option, or at the employer's request, the employment is temporarily suspended": *Bodor v. British Columbia Lottery Corp.* (1988), 24 C.C.E.L. 172 (B.C. Co. Ct.), at 174 ; *Starcevich v. Woodward's Ltd.* (1991), 58 B.C.L.R. (2d) 254 (B.C. S.C.); *Weaver v. Strata Plan No. K-353*, [1997] B.C.J. No. 3064 (B.C. Prov. Ct.).

28 In *Weaver*, the plaintiff was routinely laid off in mid-November of each year and re-hired months later due to work fluctuations. The employee had been employed for 10 years. Judge Gordon concluded at paras. 8-9 that the provision equivalent to s. 65(1)(a) of the *ESA* did not apply to preclude the application of the notice provisions in the *ESA*:

> While I agree Mrs. Weaver was laid off and rehired, this was a regular annual practise which occurred during the same times of each year. Her situation was not akin to those of substitute teachers or sales clerks whose names are within a pool of part-time workers the employer can call upon in times of need. Those people accept or refuse an offer to take any individual work opportunity that is offered without prejudice to their position in the pool. Mrs. Weaver's position was entirely different. If she had refused to return to work when called in the spring, that, no doubt, would have been the end of her employment with the Strata Corporation.
>
> [Emphasis added.]

29 Those comments are apposite to the case at bar. Ms. Rogers' regular practice was to work at approximately the same time each year, usually between March and September. Unlike part-time workers who can accept or refuse an offer of employment without jeopardizing their future employment prospects, Ms. Rogers clearly could not. She acknowledged that during at least one period in her employment, she felt "compelled to continue to work for Tourism BC in order to have her contract renewed." Moreover, there is no reference in the 2005 Contract to "seasons", and only limited reference to the "March - September season" in the 2007 debriefing questionnaire. In all of these circumstances, s. 65(1)(a) of the *ESA* does not apply.

30 Section 65(1)(b) of the *ESA* is also inapplicable to preclude the application of the notice provision in s. 63 of the *ESA*. Ms. Rogers was not employed for a "definite term" within the meaning of s. 65(1)(b) because of the inclusion of a termination clause in the 2005 Contract. In *Sullivan v. Graydon*, 2000 BCSC 999 (B.C. S.C.), Neilson J. concluded at paras. 43-44 that an employee was not employed for a "definite term" within the meaning of s. 65(1)(b) of the *ESA* because his three-year contract provided for the possibility of dismissal during that period:

> Section 65(1)(b) is clearly intended to benefit the employer, as it effectively removes the employee's statutory entitlement to compensation for length of service at the end of a definite term of employment. This is because employment for a definite term encompasses the concept of notice in the employment contract itself. An employee who is hired for a definite term is aware from the commencement of the employment that his position is of limited duration: *Re Wiebe* (6 October 1997), No. D451/97 (B.C.E.S.T.), [1997] B.C.E.S.T.D. No. 457, at para. 9. Section 65(1)(b) does not preclude the parties from negotiating provisions with respect to dismissal in an employment contract which is otherwise stated to be for a specific term, see I. Christie et al., *Employment Law in Canada*, 3rd ed., vol. 2 (Vancouver: Butterworths, 1998), at para. 12.12.
>
> In my view, this is what the parties intended here. The Employment Agreement provides Mr. Sullivan with the potential of employment for three years. However, that is clearly qualified by the specific provisions in Articles 2.02, 2.03, and 6.01 that relate to the possibility of dismissal during that three year period. I accordingly reject Mr. Sullivan's argument that this is a definite term contract ...
>
> [Emphasis added.]

31 The 2005 Contract provided for 21 days of notice, which is completely consistent with the *ESA*. Even if Ms. Rogers were entitled to notice for the entire period of her employment under the Contracts, commencing with the 2004 Contract

in February 2004 and ending with the termination of the2005 Contract in December 2008, that period of employment, which totals three years and nine months, would entitle her to three weeks of notice under s. 63(2)(b) of the *ESA*:

> (2) The employer's liability for compensation for length of service increases as follows:
>
> . . . . .
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

32 I conclude that the notice provision does not conflict with the *ESA* and is enforceable.

33 The next issue is whether BC Tourism complied with the notice provision when terminating the 2005 Contract. Tourism BC notified Ms. Rogers on December 7, 2007 that the 2005 Contract would be terminated without cause effective December 31, 2007. That provided her with slightly more than three weeks' notice. At the time, Ms. Rogers was holidaying in Palm Springs. Her vacation commenced on November 1, 2007 and ended on December 31, 2007.

34 Section 67 of the *ESA* prohibits employers from delivering a notice of termination while an employee is, among other things, on "annual vacation" or "temporary layoff":

> 67 (1) A notice given to an employee under this Part has no effect if
>
> (a) the notice period coincides with a period during which the employee is on annual vacation, leave, temporary layoff, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, ...

35 Ms. Rogers argues that the notice period should not have begun to run until she would realistically have returned to her inspections. She asserts that this would have been sometime between January 2008 and March 2008.

36 I find that s. 67 of the *ESA* does not apply. There is a clear distinction between an "annual vacation" and a gap in employment arising from the part-time nature of an employee's work. The term "annual vacation" is used in ss. 57 and 58 of the *ESA* to refer to the paid period away from work that employers are statutorily obligated to give employees after at least one year of employment. In this case, Ms. Rogers completed her inspections on September 10, 2007. Her holiday commenced on November 1, 2007 and ended on December 31, 2007. In my view, it cannot be said that the plaintiff was on "annual vacation" during this period. She was merely taking the opportunity to enjoy a holiday during a gap in her employment, which was consistent with the part-time nature of her work.

37 Moreover, it cannot be said that Ms. Rogers was on a "temporary layoff". That term is restrictively defined in s. 1 of the *ESA*:

> "temporary layoff" means
>
> (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
>
> (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

38 Ms. Rogers cannot fall within part (a) of the definition because she is not an employee who has a right of recall, which is defined in s. 1 of the *ESA* as "the right of an employee under a collective agreement to be recalled to employment." Further, Ms. Rogers cannot fall within part (b) of the definition because her absence from work far exceeded 13 weeks in any period of 20 consecutive weeks between her last inspection in September 2007 and the expected date of commencement of employment in 2008.

39 Finally, it must be noted that although BC Tourism gave Ms. Rogers slightly more than three weeks' notice, she has effectively benefited from a much longer period of notice. Although Ms. Rogers received notice of termination in December, her usual practice was to recommence employment in March. During her examination for discovery, she acknowledged that her first inspection the previous year was on March 19. Assuming that Ms. Rogers would have recommenced work in mid-March 2008, her effective notice period would have been more than three months. This period of notice would have been more than adequate in all of the circumstances, especially in light of her status as a part-time employee and the length and nature of her employment.

40 I conclude that the notice provision is enforceable and that BC Tourism properly complied with it when terminating the 2005 Contract. Accordingly, Ms. Rogers is not entitled to compensation.

41 Even if the notice provision were unenforceable, and therefore void, Ms. Rogers would not be entitled to additional compensation because the measure of her damages would be the employment income that she could be expected to receive during the unexpired term, subject to her duty to mitigate. Due to the seasonal nature of Ms. Rogers' employment, that income (which would have been earned between the time she commenced her inspections in 2008 and March 31, 2008) would be minimal. Significantly, it would be less than the $2,392.38 that she received as a result of the settlement of her claim under the *ESA*. The parties agreed that this amount would be deducted from any court award.

42 There is insufficient evidence to support Ms. Rogers' assertion that she intended to start work in January 2008. In 2004, 2005, and 2007, she commenced her seasonal employment in approximately mid-March. The only exception was 2006, when she started in February. I consider it significant that Ms. Rogers deposed that she changed her I.C.B.C. insurance from personal to business use for the March to September season each year.

43 I find that Ms. Rogers would have commenced her seasonal employment in mid-March 2008, in accordance with past practice. Accordingly, she would not have received any wages for the period between December 31, 2007 and mid-March 2008. Starting in mid-March, she would have received wages until the 2005 Contract expired approximately two weeks later, on March 31, 2008.

Did Ms. Rogers suffer a loss because BC Tourism classified her as an independent contractor rather than an employee?

44 Tourism BC has always taken the position that Advisors are independent contractors and not employees. Although Tourism BC concedes for the purpose of this action that Ms. Rogers was an employee, she is adamant that the Court should consider and determine the issue of her employment status. She believes that this is an important issue for the Advisors who are still employed by Tourism BC. She has saved hundreds of e-mails between 2004 and 2007 "to show the true nature of the working relationship". She says that those e-mails show that Tourism BC exercised control over her job and the inspection process.

45 The basis for Ms. Rogers' argument that she was an employee is that she sought and obtained such a ruling from CRA with respect to the 2007 tax year after her termination. Ms. Horsman submits that this finding is not conclusive because Ms. Rogers may still be an independent contractor under other legislation.

46 Tourism BC says that it paid Ms. Rogers the following amounts for professional fees:

- 2004 - $14,862.78
- 2005 - $12,679.98
- 2006 - $18,782.60
- 2007 - $15,499.34

47 On the other hand, Ms. Rogers income tax returns show that she reported the following amounts as net income from Tourism BC:

- 2004 - $16.635.22
- 2005 - $947.32
- 2006 - $5,203.43
- 2007 - $7,422.52

48 The simple answer to Ms. Rogers' claim for having allegedly lost certain benefits is that she also obtained certain benefits by filing her income tax returns as an independent contractor for each year that she worked for Tourism BC. For example, she was able to deduct her business expenses. That deduction presumably explains the large divergence between the amounts that she was paid and the amount that she declared as net income each year. Further, she only applied for a declaration that she had been an employee for the 2007 tax year. There is no evidence as to whether she would receive any net benefits if she were to refile her income tax returns for 2004-2007 as an employee.

49 I am prepared to assume for the purposes of this lawsuit that Ms. Rogers is an "employee", but I am not prepared to make a judicial determination of her employment status that would affect third parties to the action.

Is Ms. Rogers entitled to aggravated or punitive damages because she was terminated in bad faith?

50 Ms. Rogers believes that she was terminated because she was considered a troublemaker. She discussed the debriefings with the other Accommodations Advisors and acted as their spokesperson. She says that Tourism BC encouraged her to be frank in her debriefing but then punished her for making strong comments.

51 At her examination for discovery, Ms. Rogers conceded that she relies on the single telephone call from Mr. Drouin on November 14, 2007 as the basis for her claim for punitive and aggravated damages. At that time, she indicated that she intended to subpoena witnesses at trial to prove those damages.

52 Mr. Harris, who was in Palm Springs with Ms. Rogers at the time that Mr. Drouin telephoned her, has deposed that, after the telephone call, Ms. Rogers was teary eyed, lost her good spirits, and was sullen and sad for the rest of their holiday. He said that both the phone call and the termination letter ruined their Christmas.

53 In a case of dismissal without alleging cause, the employer is required to compensate the employee with damages for the proper notice period, determined either at common law or by the contract. The employee is not entitled to damages for the actual loss of the job, or for the pain and distress that may have been suffered as a result of termination: *Keays v. Honda Canada Inc.*, 2008 SCC 39 (S.C.C.) at para. 50. Aggravated damages will be available if the employer engages in conduct during the course of the dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive": *Honda* at para. 57. Normal distress and hurt feeling resulting from dismissal are not compensable.

54 Examples of behaviour justifying aggravated damages include "attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the dismissal, or dismissal meant to deprive the employee of a pension benefit or other right": *Honda* at para. 59.

55 Ms. Rogers asserts that after the examinations for discovery in the summer of 2010, she learned for the first time that there had been a complaint about her conduct at one of the accommodations in 2007. She had not been told about that complaint, and she now questions whether it was the cause of her termination. Learning of the complaint years after her termination cannot justify an award of aggravated or punitive damages for the manner of the dismissal.

56 Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. To merit an award of punitive damages, the conduct of an employer must be "harsh, vindictive, reprehensible and malicious" as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment": *Honda*, at paras. 62 and 68.

57 Ms. Rogers relies on Mr. Drouin's statements in his telephone call of November 14, 2007 as the basis for the employer's bad faith, and her claims for aggravated and punitive damages. Mr. Drouin did not talk to her again prior to her receipt of the termination letter. Ms. Rogers stated at her examination for discovery that she intended to call witnesses to make her case for aggravated damages at trial.

58 In my view, there is no evidence of any egregious conduct by Tourism BC in the manner of dismissal that would warrant an award of either aggravated or punitive damages.

Is a summary trial appropriate?

59 I find that a summary trial is the appropriate method of resolving all issues in this case. Although Ms. Rogers has filed extensive materials on this application, it is settled law that the court will grant judgment on a summary trial if the necessary facts are adduced and it is not unjust to do so. I place no weight on the possibility that Ms. Rogers may be able to call witnesses at a trial to bolster her case for damages. She cannot resist summary judgment in the present case on the basis that "a full trial could conceivably 'turn something up' or produced a different result": *Harrison v. British Columbia*, 2010 BCCA 220 (B.C. C.A.) at para. 40; *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C. C.A.).

60 In conclusion, Ms. Rogers' action is dismissed. BC Tourism is entitled to its costs at scale "B".

Application granted.

End of Document

TAB 15

2 of 2 DOCUMENTS: ICLR: Appeal Cases/1897/ARON SALOMON (PAUPER) APPELLANT; AND A. SALOMON AND COMPANY, LIMITED RESPONDENTS. BY ORIGINAL APPEAL. AND A. SALOMON AND COMPANY, LIMITED APPELLANTS; AND ARON SALOMON RESPONDENT. BY CROSS APPEAL. - [1897] A.C. 22

[HOUSE OF LORDS.]

ARON SALOMON (PAUPER) APPELLANT; AND A. SALOMON AND COMPANY, LIMITED RESPONDENTS. BY ORIGINAL APPEAL. AND A. SALOMON AND COMPANY, LIMITED APPELLANTS; AND ARON SALOMON RESPONDENT. BY CROSS APPEAL.

1896 Nov. 16.

LORD HALSBURY L.C., LORD WATSON., LORD HERSCHELL., LORD MACNAGHTEN., LORD MORRIS., LORD DAVEY.

Company - Private Company - One Man Company - Limited Liability - Winding-up - Fraud upon Creditors - Liability to indemnify Company in respect of Debts - Rescission - Companies Act 1862 (25 & 26 Vict. c. 89) ss. 6, 8, 30, 43.

It is not contrary to the true intent and meaning of the Companies Act 1862 for a trader, in order to limit his liability and obtain the preference of a debenture-holder over other creditors, to sell his business to a limited company consisting only of himself and six members of his own family, the business being then solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the Act being complied with.

A trader sold a solvent business to a limited company with a nomina capital of 40,000 shares of 1*l.* each, the company consisting only of the vendor, his wife, a daughter and four sons, who subscribed for one share each, all the terms of sale being known to and approved by the shareholders.

In part payment of the purchase-money debentures forming a floating security were issued to the vendor. Twenty thousand shares were also issued to him and were paid for out of the purchase-money. These shares gave the vendor the power of outvoting the six other shareholders.

No shares other than these 20,007 were ever issued. All the requirements of the Companies Act 1862 were complied with. The vendor was appointed managing director, bad times came, the company was wound up, and after satisfying the debentures there was not enough to pay the ordinary creditors: -

Held, that the proceedings were not contrary to the true intent and meaning of the Companies Act 1862; that the company was duly formed and registered and was not the mere "alias" or agent of or trustee for the vendor; that he was not liable to indemnify the company against the creditors' claims; that there was no fraud upon creditors or shareholders; and that the company (or the liquidator suing in the name of the company) was not entitled to rescission of the contract for purchase.

The decisions of Vaughan Williams J. and the Court of Appeal ([1895] 2 Ch. 323) reversed.

THE following statement of the facts material to this report is taken from the judgment of Lord Watson: -

The appellant, Aron Salomon, for many years carried on business, on his own account, as a leather merchant and wholesale boot manufacturer. With the design of transferring his business to a joint stock company, which was to consist exclusively of himself and members of his own family, he, on July 20, 1892, entered into a preliminary agreement with one Adolph Anholt, as trustee for the future company, settling the terms upon which the transfer was to be made by him, one of its conditions being that part payment might be made to him in debentures of the company. A memorandum of association was then executed by the appellant, his wife, a daughter, and four sons, each of them subscribing for one share, in which the leading object for which the company was formed was stated to be the adoption and carrying into effect, with such modifications (if any) as might be agreed on, of the provisional agreement of July 20. The memorandum was registered on July 28, 1892; and the effect of registration, if otherwise valid, was to incorporate the company, under the name of "Aron Salomon and Company, Limited," with liability limited by shares, and having a nominal capital of 40,000*l.*, divided into 40,000 shares of 1*l.* each. The company adopted

the agreement of July 20, subject to certain modifications which are not material; and an agreement to that effect was executed between them and the appellant on August 2, 1892. Within a month or two after that date the whole stipulations of the agreement were fulfilled by both parties. In terms thereof, 100 debentures, for 100*l.* each, were issued to the appellant, who, upon the security of these documents, obtained an advance of 5000*l.* from Edmund Broderip. In February 1893 the original debentures were returned to the company

and cancelled; and in lieu thereof, with the consent of the appellant as beneficial owner, fresh debentures to the same amount were issued to Mr. Broderip, in order to secure the repayment of his loan, with interest at 8 per cent.

In September 1892 the appellant applied for and obtained an allotment of 20,000 shares; and from that date until an order was made for its compulsory liquidation, the share register of the company remained unaltered, 20,001 shares being held by the appellant, and six shares by his wife and family. It was all along the intention of these persons to retain the business in their own hands, and not to permit any outsider to acquire an interest in it.

Default having been made in the payment of interest upon his debentures, Mr. Broderip, in September 1893, instituted an action in order to enforce his security against the assets of the company. Thereafter a liquidation order was made, and a liquidator appointed, at the instance of unsecured creditors of the company. It has now been ascertained that, if the amount realised from the assets of the company were, in the first place, applied in extinction of Mr. Broderip's debt and interest, there would remain a balance of about 1055*l.*, which is claimed by the appellant as beneficial owner of the debentures. In the event of his claim being sustained there will be no funds left for payment of the unsecured creditors, whose debts amount to 7733*l.* 8*s.* 3*d.*

The liquidator lodged a defence, in name of the company, to the debenture suit, in which he counter-claimed against the appellant (who was made a party to the counter-claim), (1.) to have the agreements of July 20 and August 2, 1892 rescinded,

(2.) to have the debentures already mentioned delivered up and cancelled, (3.) judgment against the appellant for all sums paid by the company to the appellant under these agreements, and (4.) a lien for these sums upon the business and assets. The averments made in support of these claims were to the effect that the price paid by the company exceeded the real value of the business and assets by upwards of 8200*l.*; that the arrangements made by the appellant for the formation of the company were a fraud upon the creditors of the company; that no board of directors of the company was ever appointed, and that in any case such board consisted entirely of the appellant, and there never was an independent board. The action came on for trial on the counter-claim before Vaughan Williams J., when the liquidator was examined as a witness on behalf of the company, whilst evidence was given for the appellant by himself, and by his son, Emanuel Salomon, one of the members of the company, who had been employed in the business for nearly twenty years.

The evidence shews that, before its transfer to the new company, the business had been prosperous, and had yielded to the appellant annual profits sufficient to maintain himself and his family, and to add to his capital. It also shews that at the date of transfer the business was perfectly solvent. The liquidator, whose testimony was chiefly directed toward proving that the price paid by the company was excessive, admitted on cross-examination that the business, when transferred to the company, was in a sound condition, and that there was a substantial surplus. No evidence was led tending to support the allegation that no board of directors was ever appointed, or that the board consisted entirely of the appellant. The non-success and ultimate insolvency of the business, after it came into the hands of the company, was attributed by the witness Emanuel Salomon to a succession of strikes in the boot trade, and there is not a tittle of evidence tending to modify or contradict his statement. It also appears from the evidence that all the members of the company were fully cognisant of the terms of the agreements of July 20 and August 2, 1892, and that they were willing to accept and did accept these terms.

[1897] A.C. 22 Page 26

At the close of the argument Vaughan Williams J. announced that he was not prepared to grant the relief craved by the company. He at the same time suggested that a different remedy might be open to the company; and, on the motion of their counsel, he allowed the counter-claim to be amended. In conformity with the suggestion thus made by the Bench, a new and alternative claim was added for a declaration that the company or the liquidator was entitled (1.) to be indemnified by the appellant against the whole of the company's unsecured debts, namely, 7733*l.* 8*s.* 3*d.*; (2.) to judgment against the appellant for that sum; and (3.) to a lien for that amount upon all sums which might be payable to the appellant by the company in respect of his debentures or otherwise until the judgment was satisfied. There were also added averments to the effect that the company was formed by the appellant, and that the debentures for 10,000*l.* were issued in order that he might carry on the business, and take all the profits without risk to himself; and also that the company was the "mere nominee and agent" of the appellant.

Vaughan Williams J. made an order for a declaration in the terms of the new and alternative counter-claim above stated, without making any order on the original counter-claim.

Both parties having appealed, the Court of Appeal (Lindley, Lopes and Kay L.JJ.) being of opinion that the formation of the company, the agreement of August 1892, and the issue of debentures to the appellant pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of

the company by means of such debentures, dismissed the appeal with costs, and declined to make any order on the original counter-claim.(1)

Against this order the appellant appealed, and the company brought a cross-appeal against so much of it as declined to make any order upon the original counter-claim. Broderip having been paid off was no party to this appeal or cross-appeal.

(1) Reported as *Broderip v. Salomon*, [1895] 2 Ch. 323.

June 15, 22, 29. ***Cohen Q.C.*** and ***Buckley Q.C.*** (***McCall Q.C.*** and ***Muri Mackenzie*** with them), for the appellant in the original appeal. The view of Vaughan Williams J. that the company was the mere alias or agent of the appellant so as to make him liable to indemnify the company against creditors, was not adopted by the Court of Appeal, who seem to have considered the company as the appellant's trustee. There is no evidence in favour of either view. The sale of the business was bonâ fide: the business was genuine and solvent, with a substantial surplus. All the circumstances were known to and approved by the shareholders. All the requirements of the Companies Act, 1862, were strictly complied with: the purpose was lawful, the proceedings were regular. How could the registrar refuse to register such a company? What objection is it that the vendor desires to convert his unlimited into a limited liability? That is the prime object of turning a private business into a limited company, practised every day by banks and other great firms. And what difference to creditors could it make whether the debentures were held by the vendor or by strangers? Whoever held them had the preference over creditors - that is the future creditors - all the old creditors having been paid off by the vendor. There was no misrepresentation of fact, and no one was misled: where is "the fraud upon creditors" spoken of in the Court of Appeal? The creditors were under no obligation to trust the company; they might, if they had desired, have found out who held the shares, and in what proportion, and who held the debentures. There is not a word in ss. 6, 8, 30, 43, or any other section of the Companies Act, 1862, forbidding or even pointing against such a company so formed and for such objects. Then, if the company was a real company, fulfilling all the requirements of the Legislature, it must be treated as a company, as an entity, consisting indeed of certain corporators, but a distinct and independent corporation. The Court of Appeal seem to treat the company sometimes as substantial and sometimes as shadowy and unreal: it must be one or the other, it cannot be both. A Court cannot impose conditions not imposed by the Legislature, and say that the shareholders must not be related

to each other, or that they must hold more than one share each. There is nothing to prevent one shareholder or all the shareholders holding the shares in trust for some one person. What is prohibited is the entry of a trust on the register: s. 30. If all the shares were held in trust that would not make the company a trustee. The authorities relied upon below (which all turn upon some one being deceived or defrauded) do not touch the present case and do not support the judgment below.

[They referred to *Reg. v. Arnaud* (1); *In re Ambrose Lake Tin and Copper Mining Co.* (2); *In re British Seamless Paper Box Co.* (3); *Farrar v. Farrars, Limited* (4); *North-West Transportation Co. v. Beatty* (5); *In re National Debenture and Assets Corporation* (6); *In re George Newman & Co.* (7)]

As to the cross-appeal, there being no fraud, misrepresentation or deceit, not even any failure of consideration, there is no ground for rescission. Moreover, the company's assets having been sold the company is not in a position to ask for it.

Farwell Q.C. and ***H. S. Theobald***, for the respondents. The question is one of fact rather than law, and the true inferences from the facts are these: The appellant incorporated the company to carry on his business without risk to himself and at his creditors' expense. The business was decaying when the company was formed, and though carried on as before, nay with more (borrowed) money, it failed very soon after the sale. To get an advantage over creditors the vendor took debentures and concealed the fact from them. The purchase-money was exorbitant, the price dictated solely by the vendor, and there was no independent person acting for the company. Though incorporated under the Acts the company never had an independent existence: it was in fact the appellant under another name; he was the managing director, the other directors being his sons and under his control. The shareholders other than himself were his own family, and his vast preponderance of shares made him absolute master.

(1) (1846) 9 Q. B. 806.

(2) (1880) 14 Ch. D. 390, 394, 398.

(3) (1881) 17 Ch. D. 467, 476, 479.

(4) (1888) 40 Ch. D. 395.

(5) (1887) 12 App. Cas. 589.

(6) [1891] 2 Ch. 505.

(7) [1895] 1 Ch. 674, 685.

He could pass any resolution, and he would receive all the profits - if any. Whether therefore the company is considered as his agent, or his nominee or his trustee, matters little. The business was solely his, conducted solely for him and by him, and the company was a mere sham and fraud, in effect entirely contrary to the intent and meaning of the Companies Act. The liquidator is therefore entitled to counter-claim against him for an indemnity. As to the cross-appeal and the claim for rescission the decision in *Erlanger v. New Sombrero Phosphate Co.* (1) and the observations of Lord Cairns are precisely applicable and conclusive in favour of rescission. See also *Adam v. Newbigging.* (2)

[LORD WATSON referred to *Western Bank of Scotland v. Addie* (3), following *Clarke v. Dickson.* (4)]

[They also referred to *Ex parte Cowen* (5); *In re Smith.* (6)]

The House took time for consideration.

Nov. 16. LORD HALSBURY L.C. My Lords, the important question in this case, I am not certain it is not the only question, is whether the respondent company was a company at all - whether in truth

that artificial creation of the Legislature had been validly constituted in this instance; and in order to determine that question it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.

Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not

(1) (1878) 3 App. Cas. 1218, 1236, 1238.

(2) (1888) 13 App. Cas. 308.

(3) (1867) L. R. 1 H. L., Sc. 145.

(4) (1858) E. B. & E. 148.

(5) (1867) L. R. 2 Ch. 563.

(6) (1890) 25 Q. B. D. 536, 541.

be competent to any one - and certainly not to these persons themselves - to deny that they were shareholders.

I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the share-holders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of inquiry which the statute itself recognises as legitimate. If they are shareholders, they are shareholders for all purposes; and even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the cestuis que trust of the seventh, whatever might be their rights inter se, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities, and, dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body.

I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence - quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of scire facias you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

I will for the sake of argument assume the proposition that

[1897] A.C. 22 Page 31

the Court of Appeal lays down - that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

I observe that the learned judge (Vaughan Williams J.) held that the business was Mr. Salomon's business, and no one else's, and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent (the company). I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there

was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

Lindley L.J., on the other hand, affirms that there were seven members of the company; but he says it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the Legislature intended not to be done.

It is obvious to inquire where is that intention of the Legislature manifested in the statute. Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the Legislature is, or was. In this particular case it is the members of one family that represent all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven shareholders must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as

[1897] A.C. 22 Page 32

to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the Legislature - a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the Legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute.

As one mode of testing the proposition, it would be pertinent to ask whether two or three, or indeed all seven, may constitute the whole of the shareholders? Whether they must be all independent of each other in the sense of each having an independent beneficial interest? And this is a question that cannot be answered by the reply that it is a matter of degree. If the Legislature intended to prohibit something, you ought to know what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. Where am I to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person?

My Lords, I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted - that the business was the business of Aron Salomon, and that the company is variously described as a myth and a fiction. Lopes L.J. says: "The Act contemplated the incorporation of seven independent bonâ fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader." The words "seven independent bonâ fide members with a mind and will of their own, and not the

puppets of an individual," are by construction to be read into the Act. Lopes L.J. also said that the company was a mere nominis umbra. Kay L.J. says: "The statutes were intended to allow seven or more persons, bonâ fide associated for the purpose of trade, to limit their liability under certain conditions and to become a corporation. But they were not intended to legalise a pretended association for the purpose of

enabling an individual to carry on his own business with limited liability in the name of a joint stock company."

My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.

Vaughan Williams J. appears to me to have disposed of the argument that the company (which for this purpose he assumed to be a legal entity) was defrauded into the purchase of Aron Salomon's business because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognisant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded.

The proposition laid down in *Erlanger v. New Sombrero Phosphate Co.* (1), (I quote the head-note), is that "Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it." But if every member of the company - every shareholder - knows exactly what is the true state of the facts (which for this purpose must be assumed to be the case here), Vaughan Williams J.'s conclusion seems to me to be inevitable that no case of fraud upon the company could here be established. If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.

My Lords, the truth is that the learned judges have never allowed in their own minds the proposition that the company

(1) 3 App. Cas. 1218.

[1897] A.C. 22 Page 34

has a real existence. Then have been struck by what they have considered the inexpediency of permitting one man to be in influence and authority the whole company; and, assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law; and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned judges below; but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which are implied in some of the observations made by more than one of the learned judges. The appellant, in my opinion, is not shewn to have done or to have intended to do anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own.

The result is that I move your Lordships that the judgment appealed from be reversed, but as this is a pauper case, I regret to say it can only be with such costs in this House as are appropriate to that condition of things, and that the cross-appeal be dismissed with costs to the same extent.

LORD WATSON. My Lords, this appeal raises some questions of practical importance, depending upon the construction of the Companies Acts, which do not appear to have been settled by previous decisions. As I am not prepared to accept without reservation all the conclusions of fact which found favour with the Courts below, I shall, before adverting to the law, state what I conceive to be the material facts established by the evidence before us. [His Lordship stated the facts above set out.]

The allegations of the company, in so far as they have any relation to the amended claim, their pith consisting in the averments

[1897] A.C. 22 Page 35

made on amendment, were meant to convey a charge of fraud; and it is unfortunate that they are framed in such loose and general terms. A relevant charge of fraud ought to disclose facts necessitating the inference that a fraud was perpetrated upon some person specified. Whether it was

a fraud upon the company and its members, or upon persons who had dealings with the company, is not indicated, although there may be very different considerations applicable to those two cases. The res gestæ which might imply that it was the appellant, and not the company, who actually carried on its business, are not set forth. Any person who holds a preponderating share in the stock of a limited company has necessarily the intention of taking the lion's share of its profits without any risk beyond loss of the money which he has paid for, or is liable to pay upon his shares; and the fact of his acquiring and holding debentures secured upon the assets of the company does not diminish the risk of that loss. What is meant by the assertion that the company "was the mere nominee or agent" of the appellant I cannot gather from the record; and I am not sure that I understand precisely in what sense it was interpreted by the learned judges whose decisions we have to consider.

No additional proof was led after the amendment of the counter-claim. The oral testimony has very little, if any, bearing upon the second claim; and any material facts relating to the fraudulent objects which the appellant is said to have had in view, and the alleged position of the company as his nominee or agent, must be mere matter of inference derived from the agreements of July 20 and August 2, 1892, the memorandum and articles of association, and the minute-book of the company.

On rehearing the case Vaughan Williams J., without disposing of the original claim, gave the company decree of indemnity in terms of their amended claim. I do not profess my ability to follow accurately the whole chain of reasoning by which the learned judge arrived at that conclusion; but he appears to have proceeded mainly upon the ground that the appellant was in truth the company, the other members being either his trustees or mere "dummies," and consequently that

the appellant carried on what was truly his own business under cover of the name of the company, which was nothing more than an alias for Aron Salomon. On appeal from his decision, the Court of Appeal, consisting of Lindley, Lopes, and Kay L.JJ., made an order finding it unnecessary to deal with the original claim, and dismissing the appeal in so far as it related to the amended claim. The ratio upon which that affirmance proceeded, as embodied in the order, was: "This Court being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures." The opinions delivered by the Lords Justices are strictly in keeping with the reasons assigned in their order. Lindley L.J., observing "that the incorporation of the company cannot be disputed," refers to the scheme for the formation of the company, and says(1): "the object of the whole arrangement is to do the very thing which the Legislature intended not to be done"; and he adds that "Mr. Salomon's scheme is a device to defraud creditors."

Assuming that the company was well incorporated in terms of the Act of 1862, an assumption upon which the decisions appealed from appear to me to throw considerable doubt, I think it expedient, before considering the amended claim, to deal with the original claim for rescission, which was strongly pressed upon us by counsel for the company, under their cross-appeal. Upon that branch of the case there does not appear to me to be much room for doubt. With this exception, that the word "exorbitant" appears to me to be too strong an epithet, I entirely agree with Vaughan Williams J. when he says: "I do not think that where you have a private company, and all the shareholders in the company are perfectly cognisant of the conditions under which the company is formed, and the conditions

(1) [1895] 2 Ch. 337, 339.

of purchase by the company, you can possibly say that purchasing at an exorbitant price (and I have no doubt whatever that the purchase here was at an exorbitant price) is a fraud upon those shareholders or upon the company." The learned judge goes on to say that the circumstances might have amounted to fraud if there had been an intention on the part of the original shareholders "to allot further shares at a later period to future allottees." Upon that point I do not find it necessary to express any opinion, because it is not raised by the facts of the case, and, in any view, these considerations are of no relevancy in a question as to rescission between the company and the appellant.

Mr. Farwell argued that the agreement of August 2 ought to be set aside upon the principle followed by this House in *Erlanger v. New Sombrero Phosphate Co.* (1) In that case the vendor, who got up the company, with the view of selling his adventure to it, attracted shareholders by a prospectus which was essentially false. The directors, who were virtually his nominees, purchased from him without being aware of the real facts; and on their assurance that, in so far as they knew, all was right, the shareholders sanctioned the transaction. The fraud by which the company and its shareholders had been misled was directly traceable to the vendor; and it was set aside at the instance of the liquidator, the Lord Chancellor (Earl Cairns) expressing a doubt whether, even in those circumstances, the remedy was not too late after a liquidation order. But in this case the agreement of July 20 was, in the full knowledge of the facts, approved and adopted by the company

itself, if there was a company, and by all the shareholders who ever were, or were likely to be, members of the company. In my opinion, therefore, *Erlanger v. New Sombrero Phosphate Co.* (1) has no application, and the original claim of the liquidator is not maintainable.

The Lords Justices of Appeal, in disposing of the amended claim, have expressly found that the formation of the company, with limited liability, and the issue of 10,000*l.* worth of its debentures to the appellant, were "contrary to the true intent

(1) 3 App. Cas. 1218.

and meaning of the Companies Act, 1862." I have had great difficulty in endeavouring to interpret that finding. I am unable to comprehend how a company, which has been formed contrary to the true intent and meaning of a statute, and (in the language of Lindley L.J.) does the very thing which the Legislature intended not to be done, can yet be held to have been legally incorporated in terms of the statute. "Intention of the Legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. Accordingly, if the words "intent and meaning," as they occur in the finding of the Appeal Court, are used in their proper legal sense, it follows, in my opinion, that the company has not been well incorporated; that, there being no legal corporation, there can be no liquidation under the Companies Acts, and that the counter-claim preferred by its liquidator must fail. In that case its creditors would not be left without a remedy, because its members, as joint traders without limitation of their liability, would be jointly and severally responsible for the debts incurred by them in the name of the company.

The provisions of the Act of 1862 which seem to me to have any bearing upon this point lie within a very narrow compass. Sect. 6 provides that any seven or more persons, associated for a lawful purpose, such as the manufacture and sale of boots, may, by subscribing their names to a memorandum of association and otherwise complying with the provisions of the Act in respect of

registration, form a company with or without limited liability; and s. 8, which prescribes the essentials of the memorandum in the case of a company limited by shares, inter alia, enacts that "no subscriber shall take less than one share." The first of these enactments does not require that the persons subscribing shall not be related to each other; and the second

[1897] A.C. 22 Page 39

plainly imports that the holding of a single share affords a sufficient qualification for membership; and I can find no other rule laid down or even suggested in the Act. Nor does the statute, either expressly or by implication, impose any limit upon the number of shares which a single member may subscribe for or take by allotment. At the date of registration all the requirements of the Act had been complied with; and, as matters then stood, there does not appear to have been any room for the pleas now advanced by the liquidator. The company was still free to modify or reject the agreement of July 20; and the fraud of which the appellant has been held guilty by the Court of Appeal, though it may have existed in animo, had not been carried into execution by the acceptance of the agreement, the issue of debentures to the appellant in terms of it, and by his receiving an allotment of shares which increased his interest in the company to 20001/20007 of its actual capital. I have already intimated my opinion that the acceptance of the agreement is binding on the company; and neither that acceptance, nor the preponderating share of the appellant, nor his payment in debentures, being forbidden by the Act, I do not think that any one of these things could subsequently render the registration of the company invalid. But I am willing to assume that proceedings which are permitted by the Act may be so used by the members of a limited company as to constitute a fraud upon others, to whom they in consequence incur personal liability. In this case the fraud is found to have been committed by the appellant against the creditors of the company; but it is clear that if so, though he may have been its originator and the only person who took benefit from it, he could not have done any one of those things, which taken together are said to constitute his fraud, without the consent and privity of the other shareholders. It seems doubtful whether a liquidator as representing and in the name of the company can sue its members for redress against a fraud which was committed by the company itself and by all its shareholders. However, I do not think it necessary to dwell upon that point, because I am not satisfied that the charge of fraud against creditors has any foundation in fact.

[1897] A.C. 22 Page 40

The memorandum of association gave notice that the main object for which the company was formed was to adopt and carry into effect, with or without modifications, the agreement of July, 1892, in terms of which the debentures for 10,000*l.* were subsequently given to the appellant in part payment of the price. By the articles of association (art. 62 (e)) the directors were empowered to issue mortgage or other debentures or bonds for any debts due, or to become due, from the company; and it is not alleged or proved that there way any failure to comply with s. 43 or the other clauses (Part III. of the Act) which relate to the protection of creditors. The unpaid creditors of the company, whose unfortunate position has been attributed to the fraud of the appellant, if they had thought fit to avail themselves of the means of protecting their interests which the Act provides, could have informed themselves of the terms of purchase by the company, of the issue of

debentures to the appellant, and of the amount of shares held by each member. In my opinion, the statute casts upon them the duty of making inquiry in regard to these matters. Whatever may be the moral duty of a limited company and its share-holders, when the trade of the company is not thriving, the law does not lay any obligation upon them to warn those members of the public who deal with them on credit that they run the risk of not being paid. One of the learned judges asserts, and I see no reason to question the accuracy of his statement, that creditors never think of examining the register of debentures. But the apathy of a creditor cannot justify an imputation of fraud against a limited company or its members, who have provided all the means of information which the Act of 1862 requires; and, in my opinion, a creditor who will not take the trouble to use the means which the statute provides for enabling him to protect himself must bear the consequences of his own negligence.

For these reasons I have come to the conclusion that the orders appealed from ought to be reversed, with costs to the appellant here and in both Courts below. His costs in this House must, of course, be taxed in accordance with the rule applicable to pauper litigants.

[1897] A.C. 22 Page 41

LORD HERSCHELL. My Lords, by an order of the High Court, which was affirmed by the Court of Appeal, it was declared that the respondent company, or the liquidator of that company was entitled to be indemnified by the appellant against the sum of 7733*l.* 8*s.* 3*d.*, and it was ordered that the respondent company should recover that sum against the appellant.

On July 28, 1892, the respondent company was incorporated with a capital of 40,000*l.* divided into 40,000 shares of 1*l.* each. One of the objects for which the company was incorporated was to carry out an agreement, with such modifications therein as might be agreed to, of July 20, 1892, which had been entered into between the appellant and a trustee for a company intended to be formed, for the acquisition by the company of the business then carried on by the appellant. The company was, in fact, formed for the purpose of taking over the appellant's business of leather merchant and boot manufacturer, which he had carried on for many years. The business had been a prosperous one, and, as the learned judge who tried the action found, was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant, his wife and daughter, and his four sons, each subscribing for one share. The appellant afterwards had 20,000 shares allotted to him. For these he paid 1*l.* per share out of the purchase-money which by agreement he was to receive for the transfer of his business to the company. The company afterwards became insolvent and went into liquidation.

In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counter-claim that the company was formed by Aron Salomon, and the debentures were issued in order that he might carry on the

said business, and take all the profits without risk to himself; that the company was the mere nominee and agent of Aron Salomon; and that the company or the liquidator thereof was entitled to be indemnified by Aron Salomon against all the debts owing by the company to creditors other than Aron Salomon. This counter-claim was not in the pleading as

[1897] A.C. 22 Page 42

originally delivered; it was inserted by way of amendment at the suggestion of Vaughan Williams J., before whom the action came on for trial. The learned judge thought the liquidator entitled to the relief asked for, and made the order complained of. He was of opinion that the company was only an "alias" for Salomon; that, the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him, and, having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them. On appeal the judgment of Vaughan Williams J. was affirmed by the Court of Appeal, that Court "being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement were a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures."

The learned judges in the Court of Appeal dissented from the view taken by Vaughan Williams J., that the company was to be regarded as the agent of the appellant. They considered the relation between them to be that of trustee and cestui que trust; but this difference of view, of course, did not affect the conclusion that the right to the indemnity claimed had been established.

It is to be observed that both Courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances, I am at a loss to understand what is meant by saying that A. Salomon & Co., Limited, is but an "alias" for A. Salomon. It is not another name for the same person; the company is ex hypothesi a distinct legal persona. As little am I able to adopt the view

[1897] A.C. 22 Page 43

that the company was the agent of Salomon to carry on his business for him. In a popular sense, a company may in every case be said to carry on business for and on behalf of its share-holders; but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled, substantially, to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual

members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess.

The Court of Appeal based their judgment on the proposition that the formation of the company and all that followed on it were a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862. The conclusion which they drew from this premiss was, that the company was a trustee and Salomon their cestui que trust. I cannot think that the conclusion follows even if the premiss be sound. It seems to me that the logical result would be that the company had not been validly constituted, and therefore had no legal existence. But, apart from this, it is necessary to examine the proposition on which the Court have rested their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years, been, to use a common expression, converted into joint stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in

[1897] A.C. 22 Page 44

the judgment of the Court of Appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company and the transfer to it of the business is, that whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other respect is it intended that there shall be any difference: the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the Court of Appeal be pushed to its logical conclusion, all these companies must, I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable without limit to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think the learned judges in the Court below have contemplated the application of their judgment to such cases as I have been considering; but I can see no solid distinction between those cases and the present one.

It is said that the respondent company is a "one man" company, and that in this respect it differs from such companies as those to which I have alluded. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the

other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided, in each case, the requirements of the statute have been complied with and the company has been validly constituted. How does it concern the creditor

[1897] A.C. 22 Page 45

whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person, who practically takes the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. The creditors in the present case gave credit to and contracted with a limited company; the effect of the decision is to give them the benefit, as regards one of the shareholders, of unlimited liability. I have said that the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with; and this leads naturally to the inquiry, What are those requirements?

The Court of Appeal has declared that the formation of the respondent company and the agreement to take over the business of the appellant were a scheme "contrary to the true intent and meaning of the Companies Act." I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares may, however, be of as small a nominal value as those who form the company please: the statute prescribes no minimum; and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The Legislature, therefore, clearly sanctions a scheme by which all the shares except six are owned by a single individual, and these six are of a value little more than nominal.

It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion, it makes no difference. The statute forbids the entry in the register of any trust; and it certainly

[1897] A.C. 22 Page 46

contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum, or who have agreed to become members of the company and whose names are on the register, are alone regarded as, and in fact are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do: it concerns only them and their

cestuis que trust if they have any. If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act?

It may be that a company constituted like that under consideration was not in the contemplation of the Legislature at the time when the Act authorizing limited liability was passed; that if what is possible under the enactments as they stand had been foreseen a minimum sum would have been fixed as the least denomination of share permissible; and that it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company and how it is held.

I have hitherto made no reference to the debentures which the appellant received in part-payment of the purchase-money of the business which he transferred to the company. These are referred to in the judgment as part of the scheme which is pronounced contrary to the true intent and meaning of the Companies Act. But if apart from this the conclusion that the appellant is bound to indemnify the company against its debts cannot be sustained, I do not see how the circumstance

[1897] A.C. 22 Page 47

that he received these debentures can avail the respondent company. The issue of debentures to the vendor of a business as part of the price is certainly open to great abuse, and has often worked grave mischief. It may well be that some check should be placed upon the practice, and that, at all events, ample notice to all who may have dealings with the company should be secured. But as the law at present stands, there is certainly nothing unlawful in the creation of such debentures. For these reasons I have come to the conclusion that the appeal should be allowed.

It was contended on behalf of the company that the agreement between them and the appellant ought, at all events, to be set aside on the ground of fraud. In my opinion, no such case has been made out, and I do not think the respondent company are entitled to any such relief.

LORD MACNAGHTEN. My Lords, I cannot help thinking that the appellant, Aron Salomon, has been dealt with somewhat hardly in this case.

Mr. Salomon, who is now suing as a pauper, was a wealthy man in July, 1892. He was a boot and shoe manufacturer trading on his own sole account under the firm of "A. Salomon & Co.," in High Street, Whitechapel, where he had extensive warehouses and a large establishment. He had been in the trade over thirty years. He had lived in the same neighbourhood all along, and for many years

past he had occupied the same premises. So far things had gone very well with him. Beginning with little or no capital, he had gradually built up a thriving business, and he was undoubtedly in good credit and repute.

It is impossible to say exactly what the value of the business was. But there was a substantial surplus of assets over liabilities. And it seems to me to be pretty clear that if Mr. Salomon had been minded to dispose of his business in the market as a going concern he might fairly have counted upon retiring with at least 10,000*l.* in his pocket.

Mr. Salomon, however, did not want to part with the business. He had a wife and a family consisting of five sons and a

daughter. Four of the sons were working with their father. The eldest, who was about thirty years of age, was practically the manager. But the sons were not partners: they were only servants. Not unnaturally, perhaps, they were dissatisfied with their position. They kept pressing their father to give them a share in the concern. "They troubled me," says Mr. Salomon, "all the while." So at length Mr. Salomon did what hundreds of others have done under similar circumstances. He turned his business into a limited company. He wanted, he says, to extend the business and make provision for his family. In those words, I think, he fairly describes the principal motives which influenced his action.

All the usual formalities were gone through; all the requirements of the Companies Act, 1862, were duly observed. There was a contract with a trustee in the usual form for the sale of the business to a company about to be formed. There was a memorandum of association duly signed and registered, stating that the company was formed to carry that contract into effect, and fixing the capital at 40,000*l.* in 40,000 shares of 1*l.* each. There were articles of association providing the usual machinery for conducting the business. The first directors were to be nominated by the majority of the subscribers to the memorandum of association. The directors, when appointed, were authorized to exercise all such powers of the company as were not by statute or by the articles required to be exercised in general meeting; and there was express power to borrow on debentures, with the limitation that the borrowing was not to exceed 10,000*l.* without the sanction of a general meeting.

The company was intended from the first to be a private company; it remained a private company to the end. No prospectus was issued; no invitation to take shares was ever addressed to the public.

The subscribers to the memorandum were Mr. Salomon, his wife, and five of his children who were grown up. The subscribers met and appointed Mr. Salomon and his two elder sons directors. The directors then proceeded to carry out the proposed transfer. By an agreement dated August 2, 1892,

the company adopted the preliminary contract, and in accordance

[1897] A.C. 22 Page 49

with it the business was taken over by the company as from June 1, 1892. The price fixed by the contract was duly paid. The price on paper was extravagant. It amounted to over 39,000*l.* - a sum which represented the sanguine expectations of a fond owner rather than anything that can be called a businesslike or reasonable estimate of value. That, no doubt, is a circumstance which at first sight calls for observation; but when the facts of the case and the position of the parties are considered, it is difficult to see what bearing it has on the question before your Lordships. The purchase-money was paid in this way: as money came in, sums amounting in all to 30,000*l.* were paid to Mr. Salomon, and then immediately returned to the company in exchange for fully-paid shares. The sum of 10,000*l.* was paid in debentures for the like amount. The balance, with the exception of about 1000*l.* which Mr. Salomon seems to have received and retained, went in discharge of the debts and liabilities of the business at the time of the transfer, which were thus entirely wiped off. In the result, therefore, Mr. Salomon received for his business about 1000*l.* in cash, 10,000*l.* in debentures, and half the nominal capital of the company in fully paid shares for what they were worth. No other shares were issued except the seven shares taken by the subscribers to the memorandum, who, of course, knew all the circumstances, and had therefore no ground for complaint on the score of overvaluation.

The company had a brief career: it fell upon evil days. Shortly after it was started there seems to have come a period of great depression in the boot and shoe trade. There were strikes of workmen too; and in view of that danger contracts with public bodies, which were the principal source of Mr. Salomon's profit, were split up and divided between different firms. The attempts made to push the business on behalf of the new company crammed its warehouses with unsaleable stock. Mr. Salomon seems to have done what he could: both he and his wife lent the company money; and then he got his debentures cancelled and reissued to a Mr. Broderip, who advanced him 5000*l.*, which he immediately handed over to the company on loan. The temporary relief only hastened

[1897] A.C. 22 Page 50

ruin. Mr. Broderip's interest was not paid when it became due. He took proceedings at once and got a receiver appointed. Then, of course, came liquidation and a forced sale of the company's assets. They realized enough to pay Mr. Broderip, but not enough to pay the debentures in full; and the unsecured creditors were consequently left out in the cold.

In this state of things the liquidator met Mr. Broderip's claim by a counter-claim, to which he made Mr. Salomon a defendant. He disputed the validity of the debentures on the ground of fraud. On the same ground he claimed rescission of the agreement for the transfer of the business, cancellation of the debentures, and repayment by Mr. Salomon of the balance of the purchase-money. In the alternative, he claimed payment of 20,000*l.* on Mr. Salomon's shares, alleging that nothing had been paid on them.

When the trial came on before Vaughan Williams J., the validity of Mr. Broderip's claim was admitted, and it was not disputed that the 20,000 shares were fully paid up. The case presented by the liquidator broke down completely; but the learned judge suggested that the company had a right of indemnity against Mr. Salomon. The signatories of the memorandum of association were, he said, mere nominees of Mr. Salomon - mere dummies. The company was Mr. Salomon in another form. He used the name of the company as an alias. He employed the company as his agent; so the company, he thought, was entitled to indemnity against its principal. The counter-claim was accordingly amended to raise this point; and on the amendment being made the learned judge pronounced an order in accordance with the view he had expressed.

The order of the learned judge appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the Act requires that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or

[1897] A.C. 22 Page 51

that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned Lords Justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.

When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the words of the enactment, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority - no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability.

Mr. Salomon appealed; but his appeal was dismissed with costs, though the Appellate Court did not entirely accept the view of the Court below. The decision of the Court of Appeal proceeds on a declaration of opinion embodied in the order which has been already read.

I must say that I, too, have great difficulty in understanding this declaration. If it only means that Mr. Salomon availed

himself to the full of the advantages offered by the Act of 1862, what is there wrong in that? Leave out the words "contrary to the true intent and meaning of the Companies Act, 1862," and bear in mind that "the creditors of the company" are not the creditors of Mr. Salomon, and the declaration is perfectly innocent: it has no sting in it.

In an early case, which in some of its aspects is not unlike the present, the owners of a colliery (to quote the language of Giffard L.J. in the Court of Appeal) "went on working the colliery not very successfully, and then determined to form a limited company in order to avoid incurring further personal liability." "It was," adds the Lord Justice, "the policy of the Companies Act to enable this to be done." And so he reversed the decision of Malins V.-C., who had expressed an opinion that if the laws of the country sanctioned such a proceeding they were "in a most lamentable state," and had fixed the former owners with liability for the amount of the shares they took in exchange for their property: *In re Baglan Hall Colliery Co.* (1)

Among the principal reasons which induce persons to form private companies, as is stated very clearly by Mr. Palmer in his treatise on the subject, are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company, as Mr. Palmer observes, a trade can be carried on with limited liability, and without exposing the persons interested in it in the event ot failure to the harsh provisions of the bankruptcy law. A company, too, can raise money on debentures, which an ordinary trader cannot do. Any member of a company, acting in good faith, is as much entitled to take and hold the company's debentures as any outside creditor. Every creditor is entitled to get and to hold the best security the law allows him to take.

If, however, the declaration of the Court of Appeal means that Mr. Salomon acted fraudulently or dishonestly, I must say I can find nothing in the evidence to support such an imputation. The purpose for which Mr. Salomon and the other

(1) L. R. 5 Ch. 346.

[1897] A.C. 22 Page 53

subscribers to the memorandum were associated was "lawful." The fact that Mr. Salomon raised 5000*l.* for the company on debentures that belonged to him seems to me strong evidence of his good faith and of his confidence in the company. The unsecured creditors of A. Salomon and Company, Limited, may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company, I suppose, because they had long dealt with Mr. Salomon, and he had always paid his way; but they had full notice that they were no longer dealing with an individual, and they must be taken to have been cognisant of the memorandum and of the articles of association. For such a catastrophe as has occurred in this case some would blame the law that allows the creation of a floating charge. But a floating charge is too convenient a form of security to be lightly abolished. I have long thought, and I believe some of your Lordships also think, that the ordinary trade creditors of a trading company ought to have a preferential claim on the assets in liquidation in respect of debts incurred within a certain limited time before the winding-up. But that is not the law at present. Everybody knows that when there is a winding-up debenture-holders generally step in and sweep off everything; and a great scandal it is.

It has become the fashion to call companies of this class "one man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid, it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.

[1897] A.C. 22 Page 54

One argument was addressed to your Lordships which ought perhaps to be noticed, although it was not the ground of decision in either of the Courts below. It was argued that the agreement for the transfer of the business to the company ought to be set aside, because there was no independent board of directors, and the property was transferred at an overvalue. There are, it seems to me, two answers to that argument. In the first place, the directors did just what they were authorized to do by the memorandum of association. There was no fraud or misrepresentation, and there was nobody deceived. In the second place, the company have put it out of their power to restore the property

which was transferred to them. It was said that the assets were sold by an order made in the presence of Mr. Salomon, though not with his consent, which declared that the sale was to be without prejudice to the rights claimed by the company by their counter-claim. I cannot see what difference that makes. The reservation in the order seems to me to be simply nugatory.

I am of opinion that the appeal ought to be allowed, and the counter-claim of the company dismissed with costs, both here and below,

LORD MORRIS. My Lords, I quite concur in the judgment which has been announced, and in the reasons which have been so fully given for it.

LORD DAVEY. My Lords, it is possible, and (I think) probable, that the conclusion to which I feel constrained to come in this case may not have been contemplated by the Legislature, and may be due to some defect in the machinery of the Act. But, after all, the intention of the Legislature must be collected from the language of its enactments; and I do not see my way to holding that if there are seven registered members the association is not a company formed in compliance with the provisions of the Act and capable of carrying on business with limited liability, either because the bulk of the shares are held by some only, or even one of the members, and the others are what is called "dummies," holding, it may be, only one share

[1897] A.C. 22 Page 55

of 1*l.* each, or because there are less than seven persons who are beneficially entitled to the shares.

I think that this result follows from the absence of any provision fixing a minimum nominal amount of a share - the provision in s. 8 that no subscriber shall take less than one share, and the provision in s. 30 that no notice of any trust shall be entered on the register. With regard to the latter provision, it would, in my opinion, be impossible to work the machinery of the Act on any other principle, and to attempt to do so would lead only to confusion and uncertainty. The learned counsel for the respondents (wisely, as I think) did not lay any stress on the members, other than the appellant, being trustees for him of their shares. Their argument was that they were "dummies," and did not hold a substantial interest in the company, i.e., what a jury would say is a substantial interest. In the language of some of the judges in the Court below, any jury, if asked the question, would say the business was Aron Salomon's and no one else's.

It was not argued in this case that there was no association of seven persons to be registered, and the registration therefore operated nothing, or that the so-called company was a sham and might be disregarded; and, indeed, it would have been difficult for the learned counsel for the respondents, appearing, as they did, at your Lordships' Bar for the company, who had been permitted to litigate in the Courts below as actors (on their counter-claim), to contend that their clients were nonexistent.

I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that s. 18, making the certificate of the registrar conclusive evidence that all the requisitions of the Act in respect of registration had been complied with, would be an answer to it.

We start, then, with the assumption that the respondents have a corporate existence with power to sue and be sued, to incur debts and be wound up, and to act as agents or as trustees, and I suppose, therefore, to hold property. Both the Courts below have, however, held that the appellant is liable to indemnify the company against all its debts and liabilities.

[1897] A.C. 22 Page 56

Vaughan Williams J. held that the company was an "alias" for the appellant, who carried on his business through the company as his agent, and that he was bound to indemnify his own agent; and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to cestui que trust.

The ground on which the learned judges seem to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the Act and unlawful. I observe, in passing, that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say, one share. I am at a loss to see how in either view taken in the Courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant; and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking the learned counsel what the equity was, but got no answer. By an "alias" is usually understood a second name for one individual; but here, as one of your Lordships has already observed, we have, ex hypothesi, a duly formed legal persona, with corporate attributes and capable of incurring legal liabilities. Nor do I think it legitimate to inquire whether the interest of any member is substantial when the Act has declared that no member need hold more than one share, and has not prescribed any minimum amount of a share. If, as was said in the Court of Appeal, the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a

[1897] A.C. 22 Page 57

nullity, or, if the appellant has committed a fraud or misdemeanour (which I do not think he has), he may be proceeded against civilly or criminally; but how either of those states of circumstances creates the relation of cestui que trust and trustee, or principal and agent, between the appellant and

respondents, is not apparent to my understanding.

I am, therefore, of opinion that the order appealed from cannot be supported on the grounds stated by the learned judges.

But Mr. Farwell also relied on the alternative relief claimed by his pleadings, which was quite open to him here, namely, that the contract for purchase of the appellant's business ought to be set aside for fraud. The fraud seems to consist in the alleged exorbitance of the price and the fact that there was no independent board of directors with whom the appellant could contract. I am of opinion that the fraud was not made out. I do not think the price of the appellant's business (which seems to have been a genuine one, and for some time a prosperous business) was so excessive as to afford grounds for rescission; and as regards the cash portion of the price, it must be observed that, as the appellant held the bulk of the shares, or (the respondents say) was the only shareholder, the money required for the payment of it came from himself in the form either of calls on his shares or profits which would otherwise be divisible. Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members. In fact, it is impossible to say who was defrauded.

Mr. Farwell relied on some dicta in *Erlanger v. New Sombrero Phosphate Co.* (1), a case which is often quoted and not infrequently misunderstood. Of course, Lord Cairns' observations were directed only to a case such as he had before him, where it was attempted to bind a large body of shareholders by a contract which purported to have been made between the vendor and

(1) 3 App. Cas. 1218, 1236.

directors before the shares were offered for subscription; whereas it appeared that the directors were only the nominees of the vendor, who had accepted his bidding and exercised no judgment of their own. It has nothing to do with the present case. That a company may contract with the holder of the bulk of its shares, and such contract will be binding though carried by the votes of that shareholder,

was decided in *North-West Transportation Co. v. Beatty*. (1)

For these reasons, I am of opinion that the appellant's appeal should be allowed and the cross-appeal should be dismissed. I agree to the proposed order as to costs.

Order of the Court of Appeal reversed and cross-appeal dismissed with costs here and below; the costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis; cause remitted to the Chancery Division.

Lords' Journals, November 16, 1896.

Solicitors for appellant: *Ralph Raphael & Co.*

Solicitors for respondents: *S. M. & J. B. Benson.*

(1) 12 App. Cas. 589.

TAB 16

3 of 5 DOCUMENTS

Indexed as:

Singer Sewing Machine Co. of Canada Ltd. (Re)

IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended
AND IN THE MATTER OF Evan D. Flaschen foreign representative for Singer Sewing Machine Company of Canada Limited

[2000] A.J. No. 212

2000 ABQB 116

[2000] 5 W.W.R. 598

79 Alta. L.R. (3d) 95

259 A.R. 364

18 C.B.R. (4th) 127

94 A.C.W.S. (3d) 1055

Action No. Bk03 80954U

Alberta Court of Queen's Bench
Judicial District of Edmonton

Registrar Funduk

Heard: February 18, 2000.
Judgment: filed February 24, 2000.

(28 paras.)

Counsel:

M. Penny, for the applicant.
G. McKenzie, for the Murrays.

REASONS FOR DECISION

1 REGISTRAR FUNDUK:-- The issue is whether I should recognize and enforce an American chapter 11 bankruptcy court order which includes in its scope a Canadian company carrying on business only in Canada and whose assets are all in Canada.

2 The answer is no.

3 The facts are not in dispute.

4 The Singer Company, N.V. ("Singer") is incorporated under the laws of the Netherland Antilles. Its principal executive office is in New York. Singer is the "parent company" of numerous foreign companies, including Singer Sewing Machine Company of Canada Limited ("Singer Canada").

5 Singer is the direct or indirect beneficial owner of all the shares in Singer Canada.

6 Singer got a chapter 11 order from the American bankruptcy court for itself. It also managed to convince the American bankruptcy court to include all the foreign companies under the protective umbrellas of the order, including Singer Canada. The fact that Singer Canada is a Canadian company carrying on business solely in Canada and whose assets are solely in Canada does not appear to have been cause for pause by the American bankruptcy court.

7 The American bankruptcy court's attitude is this:

> B. The Debtors are part of a global group of companies (the "Singer Group") engaged in business under the trademarks of "Singer" and "Pfaff". Certain of the Debtors are incorporated, domiciled or have a principal place of business outside the United States.
>
> C. Given the international identities and operations of the Debtors and the other members of the Singer Group, maximizing the value of the Debtors' businesses and assets for the benefit of all stakeholders wherever located in the world will be facilitated by coordinating the Singer Group's activities on a global basis such that (1) the core businesses within the Singer Group can be reorganized on a consistent global basis, and (2) the non-continuing businesses within the Singer Group can be liquidated on an organized basis, rather than piecemeal.
>
> D. In situations where the Debtors and other members of the Singer Group are subject to insolvency proceedings outside the United States ("Relevant Foreign Proceedings"), such value maximization will be best achieved through

cooperation and coordination with the within chapter 11 proceedings with the Relevant Foreign Proceedings.

. . . . .

G. Pursuant to United States law and jurisprudence, prepetition management of a debtor remains in place as postpetition management of the debtor in possession, except under rare circumstances not present here. Consistent with the foregoing, it is this Court's preference and desire that foreign courts and office holders accord recognition to debtors in possession in United States chapter 11 proceedings as the duly-authorized representatives of the debtors' estates.

H. Notwithstanding the foregoing, it is the collective experience and leaning of this Court and the other bankruptcy judges in the District and elsewhere that some foreign jurisdictions and foreign courts are not necessarily accustomed to the concept of prepetition management remaining in place as management of the postpetition debtor in possession. As a result, some foreign jurisdictions and courts, and some foreign office holders, by law or by custom, may be reluctant to recognize a debtor in possession as the representative of a US debtor's estate.

I. In light of the foregoing, and without derogating the importance of the debtor in possession concept in the United States or the role of Skadden, Arps, Slate, Meagher & Flom LLP and law practice affiliates as the Debtors' Lead counsel, both domestically and internationally, this Court is appointing the Foreign Representatives with the desire that, in foreign situations where there may be some reluctance to recognize a debtor in possession, the Foreign Representatives be recognized as the official representatives of the Debtors' estates.

8 That appears to be a "we can do it best" attitude untrammelled by the fact that Canadian private international law does not recognize an American bankruptcy court's jurisdiction over a Canadian not resident in the United States, not carrying on business in the United States, and not having any assets in the United States.

9 The American bankruptcy court goes on to order:

1. All persons (including individuals, partnerships and corporations, and all those acting for or on their behalf), and all foreign or domestic governmental units (and all those acting for or on their behalf) are hereby stayed, restrained and enjoined from:

(a) Commencing or continuing any judicial, administrative or other proceeding against the Debtors, including the issuance or employment of

process, that was or could have been commenced before any of the Debtors' chapter 11 cases were commenced, or recovering a claim against any of the Debtors that arose before the commencement of any of their chapter 11 cases;

(b) Enforcing a judgment obtained before the commencement of any of the Debtors' chapter 11 cases against any of the Debtors or against property of any of the Debtors;

(c) Taking any action to obtain possession of property of any of the Debtors or of property from any of the Debtors;

(d) Taking any action to create, perfect or enforce any lien against property of any of the Debtors, to the extent that such lien secures a claim that arose before the commencement of any of the Debtors' chapter 11 cases;

(e) Taking any action to collect, assess or recover a claim against any of the Debtors that arose before the commencement of any of their chapter 11 cases;

(f) Offsetting any debt owing to any of the Debtors that arose before the commencement of any of the Debtors' chapter 11 cases against any claim against any of the Debtors; and

(g) Commencing or continuing any proceeding before the United States Tax Court concerning any of the Debtors.

2. All persons and all foreign and domestic governmental units, and all those acting on their behalf, including sheriffs, marshals, constables, and other or similar law enforcement officers and officials are stayed, restrained and enjoined from, in any way, seizing, attaching, foreclosing upon, levying against or in any other way interfering with any and all of the property of any of the Debtors, wherever located.

3. This Order shall not affect the exceptions to the automatic stay contained in section 362(b) of the Bankruptcy Code or the right of any party in interest to seek relief from the automatic stay in accordance with section 362(d) of the Bankruptcy Code.

4. Pursuant to section 525 of the Bankruptcy Code, all governmental units are prohibited and enjoined from denying, revoking, suspending, or refusing to renew any license, permit, charter, franchise, or other similar grant to, condition such a grant to, or discriminate with respect to such a grant against, any of the Debtors solely because one or all of the Debtors: (a) are debtors under the Bankruptcy Code; (b) may have been insolvent before the commencement of the Debtors' chapter 11 cases; or (c) may be insolvent during the pendency of the Debtors' chapter 11 cases.

5. In connection with the Initial Case Conference (as defined in the Motion), the Court shall establish a mediation process or appoint a facilitator to be the official

clearinghouse for disputes relating to the Other Singer Companies (as defined in the Motion).

10 The Murrays got a substantial money judgment against Singer Canada. The Murrays are Canadians, domiciled and resident in Alberta. They would now have to prove their claim in the United States bankruptcy proceeding and be subject to United States law.

11 Canadian law says that a corporation is a person in law. Canadian law says that a corporation has an existence separate from its shareholders. Canadian law says that a shareholder is not liable for the corporation's debts. Canadian law says that a shareholder does not own the corporation's assets. Canadian law says that a corporation's business activities are not the shareholder's business activities..

12 As Mr. McKenzie, for the Murrays, rightly points out, the American bankruptcy Court even gives injunctive relief against the Canadian government, provincial and territorial governments and Canadian municipal governments.

13 There is understandably no case law on s. 271.

14 Counsel refer to Re Graham, [1929] 3 D.L.R. 353 (Sask. K.B.); Re IIT, 58 D.L.R. (3d) 55 (Ont. H.C.); Microbiz Corp. v. Classic Software Systems Inc., [1996] O.J. No. 5094 (Ont. C.J.); Re Cumberland Trading Inc., [1994] O.J. No. 132 (Ont. C.J.; Pitts v. Hill & Hill Truck Line Inc., 53 Alta. L.R. (2d) 219 (M) and Best Electric & Heating v. MacKillop, [1993] B.C.J. No. 1156 (B.S.S.C.).

15 The headnote in Re Graham says all that is necessary. It says:

> Property, situated in a Province, of a person domiciled in England at the time when he was adjudicated a bankrupt under the English Bankruptcy Act will be vested in his English trustee by order of a provincial Court having bankruptcy jurisdiction whose aid is requested under s. 122 of that Act.

That is not helpful to Singer Canada's representative. He does not seek assistance in Alberta in realizing on assets in Alberta owned by Singer i.e., the shares. That is not what this application is about.

16 Re IIT is also not helpful. That is also a case of a foreign "bankrupt" with assets in Canada. The bankruptcy judge said, p. 58:

> On the material before me I have no hesitation in finding that the Luxembourg Court had the authority to make the order appointing the liquidators. Indeed, I do not think that any other jurisdiction would have had authority to appoint liquidators for IIT: National Trust Co. Ltd. v. Ebro Irrigation

> & Power Co. Ltd. et al; National Trust Co. Ltd. v. Catalonian Land Co. Ltd. et al., [1954] O.R. 463 at p. 477, [1954] 3 D. L.R. 326 at p. 340. The liquidators were given status by the law of Luxembourg and in my opinion that status should be recognized by the Courts of this Province.
>
> The question then arises - what form of recognition should be given by this Court? Since the assets have been vested in the liquidators by the Luxembourg Court, I believe the proper form of recognition in these circumstances is an order vesting the Ontario assets in the liquidators. The alternative would be to appoint a receiver to administer the Ontario assets, but in my opinion, in view of the substantial amount of assets involved and the ramifications of administering those assets this would not be a convenient procedure to adopt.

17 That has no application to the case before me.

18 Microbiz Corp. is also not helpful to the representative of Singer Canada. There the bankrupt was a United States corporation which had no assets in Ontario and carried on business in Ontario only through a distributor. The bankruptcy judge says:

> ... There is no doubt that under the principles laid down in the Morguard Investments case, that judgment of the U.S. Court should be recognized in Canada as there is a real and substantial connection between the U.S. Court's judgment and the subject matter of the proceeding. More importantly, both Classic Software and Haggerty have recognized the judgment and in fact have filed Proofs of Claim in the U.S. proceeding to take advantage of the mechanism provided therein for adjudication of their claims and recovery to the extent of 17.5% of their proven claims. To participate in the U.S. proceedings is beneficial in that it allows Classic and Haggerty to prove their claims and obtain collection in one proceeding rather than obtain judgment on their claims in Ontario and in a separate proceeding in New Jersey seek to effect recovery against the estate of MicroBiz. By filing their Proofs of Claim, Classic and Haggerty have thereby attorned to the jurisdiction of the U.S. Court in New Jersey.

19 What is the "real and substantial connection" between the American bankruptcy court's order and Singer Canada?

20 The Murray's have not attorned to the jurisdiction of the American bankruptcy court.

21 The relevance of Re Cumberland Trading Inc. entirely escapes me.

22 Pitts is also a case of an American bankrupt with assets in Alberta, an American judgment in favour of a creditor and the creditor then attorning to the American bankruptcy court's jurisdiction.

It also does not help the representative of Singer Canada.

23 Best Electric & Heating Ltd. helps the Murrays. It points out the drastic difference between a chapter 11 bankruptcy and a Canadian bankruptcy. The order sought to be recognized in Alberta lets Singer Canada keep possession of its assets and stay in business without paying its current creditors.

24 The Murrays are creditors only of Singer Canada. They are not creditors of Singer or of any of the foreign companies. If they are to be prohibited from pursuing their claim against Singer Canada it must be by Canadian law, not American Law.

25 Best Electric & Heating Ltd. puts the issue in proper perspective with the following quote from Westinghous Electric Corp. v. Duqueshe Light Co., 78 D.L.R. (3d) 3 (Ont. S.C.), pp. 20-21:

> The enforcement of letters rogatory is always a matter within the discretionary power of the Court. Their enforcement is based upon international comity or courtesy proceeding from the law of nations. Inherent in the idea of international comity is a mutuality of purpose and of power. As a matter of principle Courts of justice of different countries are in aid of justice under a mutual obligation consistent with their own jurisdiction to assist each other in obtaining testimony upon which the rights of a cause may depend; so generally are individuals under a duty to give their testimony to Courts of justice in all inquiries where it may be material. Courts in Canada recognize, and have often said, that, in the interest of comity, judicial assistance should whenever possible be given at the request of Courts of other countries: see, for example, National Telefilm Associates Inc. v. United Artists' Corp. et al (1958), 14 D.L.R. (2d) 343, generally, Castel, Canadian Conflict of Laws (1975), p. 691 et seq. <u>It is also fundamental that comity will not be exercised in violation of the public policy of the state to which the appeal is made or at the expense of injustice to its citizens; and comity leaves to the Court which power is invoked the determination of the legality, propriety of rightfulness of its exercise:</u> see generally 15A Corp. Jur. Sec., pp. 391-7; Szaszy, International Civil Procedure (1967), pp. 652-3.

(emphasis mine)

26 Comity does not require me to recognize a chapter 11 order over a Canadian company carrying on business only in Canada and whose assets are all in Canada. Who the shareholders are is irrelevant and who the creditors are is irrelevant. Under Alberta law neither gives an American bankruptcy court jurisdiction over Singer Canada.

27 As Mr. McKenzie rightly points out, if Singer Canada is insolvent it can resort to Canadian

legislation.

28 The application is dismissed with costs of $750 to the Murrays against Singer Canada.

REGISTRAR FUNDUK

cp/i/qljpn/qlgxc

TAB 17

2014 BCCA 149
British Columbia Court of Appeal

Tassone v. Cardinal

2014 CarswellBC 995, 2014 BCCA 149, [2014] B.C.W.L.D. 3026, [2014] B.C.W.L.D. 3029, [2014] B.C.W.L.D. 3049, [2014] B.C.J. No. 666, 240 A.C.W.S. (3d) 234, 354 B.C.A.C. 111, 605 W.A.C. 111

Angelo Tassone, Respondent (Plaintiff) and Carole Cardinal, Appellant (Defendant)

Frankel J.A., Neilson J.A., Stromberg-Stein J.A.

Heard: March 28, 2014
Judgment: April 16, 2014
Docket: Vancouver CA041401

Counsel: J. Shewfelt, for Appellant
M. Siren, for Respondent

Subject: Civil Practice and Procedure; Contracts; Estates and Trusts; Property

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

Civil practice and procedure

XX Trials
XX.8 Summary trial
XX.8.a Availability
XX.8.a.i General principles

Contracts

III Formation of contract
III.7 Undue influence
III.7.c Miscellaneous

Estates and trusts

I Estates
I.7 Will challenges
I.7.b Undue influence
I.7.b.v Practice and procedure
I.7.b.v.D Miscellaneous

Headnote

Estates and trusts --- Estates — Will challenges — Undue influence — Practice and procedure — Miscellaneous

In 2002, AT purchased AR's house for $10,000, assumed $120,000 reverse mortgage, and registered transfer stating value of $221,000 — AR was 80, ill, and AT's friend of 20 years — In 2003 CC met AR and in 2004 apparently became his common law spouse — In 2004, AR commenced action to set aside AT agreement for undue influence, and executed new will appointing CC executrix and leaving her all his property — AR lived in house until he died May 29, 2007, but CC remained — On August 15, 2007, AR's action was dismissed for want of prosecution — On

October 16, 2007, AT commenced action and on May 28, 2008 applied for summary trial for possession of $521,000 house — On May 29, 2008, CC commenced action as personal representative, which was stayed until she proved will in solemn form, but probate action was not advanced — On April 11, 2013, CC's action was dismissed for want of prosecution — On April 16, 2013, AT filed notice of intention to proceed with 2007 action and applied for summary trial — On September 11, 2013, CC demanded from AT delivery of overdue documents, dates for examination and case planning conference, and trial date — On October 7, 2013 AT provided list of documents which CC now disputed legal adequacy of, but she did nothing to compel production — On October 22, 2013, AT produced copies of documents, but there was no response to CC's request for dates for AT's examination — CC alleged that AT was in continuing breach of his duty to respond to her requests for discovery, which resulted in incomplete factual record and prejudiced her ability to defend herself at summary trial — Summary trial judge granted AT vacant possession under R. 9-7 of Supreme Court Civil Rules — CC appealed — Appeal dismissed — AT fulfilled his disclosure obligations — Any gaps in evidentiary record were result of CC's failure to take proper procedural steps to obtain disclosure — Trial judge committed no error by determining it was not unjust to proceed by way of summary trial — CC had ample time to marshal her evidence in pursuit of her claim.

Civil practice and procedure --- Trials — Summary trial — Availability — General principles

In 2002, AT purchased AR's house for $10,000, assumed $120,000 reverse mortgage, and registered transfer stating value of $221,000 — AR was 80, ill, and AT's friend of 20 years — In 2003 CC met AR and in 2004 apparently became his common law spouse — In 2004, AR commenced action to set aside AT agreement for undue influence, and executed new will appointing CC executrix and leaving her all his property — AR lived in house until he died May 29, 2007, but CC remained — On August 15, 2007, AR's action was dismissed for want of prosecution — On October 16, 2007, AT commenced action and on May 28, 2008 applied for summary trial for possession of $521,000 house — On May 29, 2008, CC commenced action as personal representative, which was stayed until she proved will in solemn form, but probate action was not advanced — On April 11, 2013, CC's action was dismissed for want of prosecution — On April 16, 2013, AT filed notice of intention to proceed with 2007 action and applied for summary trial — On September 11, 2013, CC demanded from AT delivery of overdue documents, dates for examination and case planning conference, and trial date — On October 7, 2013 AT provided list of documents which CC now disputed legal adequacy of, but she did nothing to compel production — On October 22, 2013, AT produced copies of documents, but there was no response to CC's request for dates for AT's examination — CC alleged that AT was in continuing breach of his duty to respond to her requests for discovery, which resulted in incomplete factual record and prejudiced her ability to defend herself at summary trial — Summary trial judge granted AT vacant possession under R. 9-7 of Supreme Court Civil Rules — CC appealed — Appeal dismissed — AT fulfilled his disclosure obligations — Any gaps in evidentiary record were result of CC's failure to take proper procedural steps to obtain disclosure — Trial judge committed no error by determining it was not unjust to proceed by way of summary trial — CC had ample time to marshal her evidence in pursuit of her claim.

Contracts --- Formation of contract — Undue influence — Miscellaneous

In 2002, AT purchased AR's house for $10,000, assumed $120,000 reverse mortgage, and registered transfer stating value of $221,000 — AR was 80, ill, and AT's friend of 20 years — In 2003 CC met AR and in 2004 apparently became his common law spouse — In 2004, AR commenced action to set aside AT agreement for undue influence, and executed new will appointing CC executrix and leaving her all his property — AR lived in house until he died May 29, 2007, but CC remained — On August 15, 2007, AR's action was dismissed for want of prosecution — On October 16, 2007, AT commenced action and on May 28, 2008 applied for summary trial for possession of $521,000 house — On May 29, 2008, CC commenced action as personal representative, which was stayed until she proved will in solemn form, but probate action was not advanced — On April 11, 2013, CC's action was dismissed for want of prosecution — On April 16, 2013, AT filed notice of intention to proceed with 2007 action and applied for summary trial — On September 11, 2013, CC demanded from AT delivery of overdue documents, dates for examination and case planning conference, and trial date — On October 7, 2013 AT provided list of documents which CC now disputed legal adequacy of, but she did nothing to compel production — On October 22, 2013,

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Table of Authorities

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D. Fogell Associates Ltd. v. Esprit de Corp. (1980) Ltd./Esprit de Corp. (1980) Ltée (1996), 1996 CarswellBC 1747 (B.C. S.C. [In Chambers]) — considered

Everest Canadian Properties Ltd. v. Mallmann (2008), 47 B.L.R. (4th) 161, 434 W.A.C. 23, 258 B.C.A.C. 23, 2008 BCCA 275, 2008 CarswellBC 1372, [2008] 10 W.W.R. 31, 82 B.C.L.R. (4th) 201, 42 E.T.R. (3d) 161 (B.C. C.A.) — considered

Hamilton v. Sutherland (1992), 68 B.C.L.R. (2d) 115, 14 B.C.A.C. 51, 26 W.A.C. 51, 45 E.T.R. 229, [1992] 5 W.W.R. 151, 1992 CarswellBC 159 (B.C. C.A.) — considered

Hunt v. Atlas Turner Inc. (1990), 1990 CarswellBC 1332 (B.C. C.A.) — followed

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Romans Estate v. Tassone (2013), 2013 CarswellBC 921, 87 E.T.R. (3d) 73, [2013] 9 W.W.R. 581, 2013 BCSC 609, 46 B.C.L.R. (5th) 371 (B.C. S.C.) — referred to

Salem v. Priority Building Services Ltd. (2005), 2005 BCCA 617, 2005 CarswellBC 3002, 220 B.C.A.C. 139, 362 W.A.C. 139 (B.C. C.A.) — followed

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App. A, Form 23 — referred to

APPEAL by defendant from summary trial judgment granting judgment to plaintiff.

***Stromberg-Stein J.A.*:**

Overview

1 This appeal concerns whether the summary trial judge erred by granting judgment to the respondent/plaintiff, Angelo Tassone, under Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. The relevant section of the rule reads:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application...

2 The appellant/defendant, Carole Cardinal, alleges Mr. Tassone was in continuing breach of his legal duty to respond to her requests for discovery. She submits this breach resulted in an incomplete factual record and prejudiced her ability to defend herself at the summary trial. She asks this Court to remit the matter to the Supreme Court. Mr. Tassone denies any breach and asserts the judge made no error in law or in principle.

3 At the outset it is worth noting that the appropriate test for appellate review of a decision to resolve a matter by way of summary trial is one of deference. As stated by this Court in *Salem v. Priority Building Services Ltd.*, 2005 BCCA 617 (B.C. C.A.):

> [19] The appellant opposed the summary trial application on the ground that the necessary facts could not be found in the face of conflicting affidavits. However, the summary trial judge concluded that he could find the necessary facts to grant judgment and that it would not be unjust to do so. The decision to proceed summarily was within his discretion. This Court will not interfere unless satisfied that the discretion was not exercised judicially or was exercised on a wrong principle...
>
> [Emphasis added.]

4 For the reasons that follow, I am satisfied the summary trial judge committed no error by determining it was not unjust to proceed by way of summary trial. I would dismiss this appeal.

Facts

5 As the trial judge noted, the backdrop to this appeal involves "a complex web of proceedings". The following is a chronology of the key events.

6 On December 6, 2002, Andries Romans agreed to convey his house to Angelo Tassone, a friend he had known for approximately 20 years. At this time, Mr. Romans was 80 years old and in ill health, having just had surgery for facial cancer. Before entering into the agreement, Mr. Romans received legal advice from William Murray. Mr. Tassone purchased the property for $10,000 and assumed a "reverse mortgage" in the amount of $120,000. The agreement allowed Mr. Romans to live in the house rent-free for ten years or until his death, whichever came first. Mr. Tassone was responsible for all the costs associated with the house, including taxes and insurance. The title was transferred on January 23, 2003, and the registered transfer in the Land Title Office indicated the value of the property was $221,000. A 2008 property assessment indicated the value was $521,000. There is no other evidence of the value of the property.

7 Sometime in 2003, Mr. Romans met the appellant, Ms. Cardinal. She moved in with him in 2004 and apparently became his common law wife. There is some evidence to suggest she may have been his caregiver at some point.

8 On September 22, 2004, Mr. Romans commenced an action to set aside the agreement he made with Mr. Tassone on the basis of undue influence. He alleged that Mr. Tassone had taken advantage of his trust and ill health.

9 On November 5, 2004, Mr. Romans executed a new will, appointing "his friend" Ms. Cardinal as his executrix and leaving all of his property to her.

10 Mr. Romans lived in the house until his death on May 29, 2007. Mr. Romans' action was dismissed for want of prosecution on August 15, 2007, shortly after his death.

11 When Mr. Tassone attempted to take possession of the house, Ms. Cardinal refused to vacate it. On October 16, 2007, Mr. Tassone commenced an action to recover possession. It is this action that is the subject of this appeal.

12 On May 28, 2008, Mr. Tassone filed an application for a summary trial, seeking possession of the property. On May 29, 2008, the application was initially adjourned until June 5, 2008, but was later adjourned generally.

13 On the same day, May 29, 2008, Ms. Cardinal commenced an action, purportedly as the personal representative of the estate, seeking the same relief Mr. Romans sought in 2004. In her action, Ms. Cardinal also named William Murray, Mr. Romans' former lawyer, as a defendant, alleging he had been negligent when he acted for Mr. Romans with respect to the property transaction.

14 On February 18, 2009, Mr. Murray was granted a stay of Ms. Cardinal's action on the grounds that she had not obtained letters probate. He had alleged that Mr. Romans' will was invalid as he did not have the necessary capacity or was under the undue influence of Ms. Cardinal at the time it was executed. Mr. Justice Savage stayed the action, given evidence of "suspicious circumstances", until Ms. Cardinal proved the will in solemn form. He gave her six months from the date of his order to bring the probate action. The stay was affirmed on appeal (2009 BCCA 421 (B.C. C.A.)).

15 Ms. Cardinal commenced a probate action on August 17, 2009, however she did nothing to advance it and no statement of claim was ever served.

16 On December 4, 2009, Ms. Cardinal delivered a demand for discovery of documents to Mr. Tassone regarding his action for possession of the property.

17 On August 3, 2012, Ms. Cardinal applied *ex parte* for a grant of letters of administration *ad colligenda bona* without bond over Mr. Romans' estate. Mr. Justice Savage directed she give notice to Mr. Tassone and Mr. Murray, the defendants in her action.

18 Mr. Justice Savage heard Ms. Cardinal's application for administration *ad colligenda bona* in the probate action at the same time he heard Mr. Tassone's application for dismissal for want of prosecution of Ms. Cardinal's action. Mr. Justice Savage dismissed Ms. Cardinal's action for want of prosecution on April 11, 2013 (2013 BCSC 609 (B.C. S.C.)).

19 The dismissal of Ms. Cardinal's action precipitated Mr. Tassone's decision to advance his action. On April 16, 2013, Mr. Tassone filed a notice of intention to proceed with his action commenced October 16, 2007, to recover possession of the property. On August 20, 2013, Mr. Tassone filed an application for summary trial.

20 By letter dated September 11, 2013, Ms. Cardinal demanded from Mr. Tassone: (a) delivery of his overdue list of documents forthwith; (b) dates for his examination for discovery; (c) dates for a case planning conference; and (d) that a trial date be scheduled.

21 Ms. Cardinal provided her list of documents to Mr. Tassone on September 23, 2013. After being served with a motion to compel delivery, Mr. Tassone provided his list of documents on October 7, 2013. Ms. Cardinal now disputes the legal adequacy of the list of documents but did nothing further to compel production. On October 15, 2013, Ms. Cardinal requested production of Mr. Tassone's documents. On October 22, 2013, Mr. Tassone produced copies of his documents. There was no response to Ms. Cardinal's request for dates for Mr. Tassone's examination for discovery.

Summary Trial Judgment

22 On November 12, 2013, Mr. Justice Sewell heard Mr. Tassone's summary trial application. Mr. Tassone sought an order declaring his entitlement to possession of the house and requiring Ms. Cardinal to give him vacant possession of the house. Alternatively, Mr. Tassone sought a mandatory injunction granting him possession pending a trial of the action.

23 Ms. Cardinal objected to the matter being decided under R. 9-7 on the basis that there had not been examinations for discovery or proper documentary discovery. She argued it would be unfair to grant judgment because the facts were insufficient to allow the judge to consider the merits of her defence. Mr. Justice Sewell set out her position as follows:

> [19] The defendant's position is that it is inappropriate to grant judgment on this application because she has a *bona fide* defence and that no examinations for discovery have taken place and documentary discovery was only made very recently. The defendant says that the plaintiff has unreasonably delayed in applying for the interlocutory injunction which is the alternate ground on which the plaintiff seeks possession of the Burnaby property.

24 The judge referenced the oft-quoted *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199 (B.C. C.A.) where Chief Justice McEachern said:

> [53] The test for Rule 18A [*the predecessor to Rule 9-7*] in my view, is the same as on a trial. Upon the facts being found the chamber judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to law unless he has the opinion that it will be unjust to give such judgment.
>
> [54] In deciding whether the case is an appropriate one for judgment under Rule 18A the chambers judge will always give full consideration to all of the evidence which counsel place before him but he will also consider whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player in the piece, unless its absence is adequately explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do, so. But even then, as the process is adversarial, the judge may be able fairly and justly to find the facts necessary to decide the issue.

25 The judge decided there was sufficient evidence to grant judgment and that Ms. Cardinal had failed to establish it would be unjust to do so:

> [30] The claim that the defendant asserts has been outstanding in one form or another since 2004. The defendant has had ample opportunity to move her case forward either by proving Mr. Romans' will in solemn form and proceeding with the 2008 action, or by setting this case down for trial and proceeding to have it determined in a trial in the ordinary way.

26 The judge held that Ms. Cardinal had an obligation to move her claim expeditiously in light of the serious allegations she made. Additionally, her defence concerned whether Mr. Romans was competent to enter into the agreement and whether Mr. Tassone acted unconscionably. These events took place in 2002. Given the length of the delay, witnesses' recollections would be impaired and medical evidence would be difficult to obtain. Her delay was found to be unexplained and inexcusable.

27 Mr. Justice Sewell found that Mr. Tassone was entitled to judgment on his claim. The factual record established that he was the registered owner and there was nothing (other than Ms. Cardinal's unsubstantiated allegations) to indicate he had acquired title by means of undue influence or a void or voidable agreement. The judge noted that Ms. Cardinal advanced the same allegations that had been made in the two previous claims that had been dismissed for want of prosecution. Ms. Cardinal bore the onus of establishing her defence and she had failed to do so.

28 In the event he was wrong in his ability to grant judgement under R. 9-7, Justice Sewell held that the injunction should be granted because Mr. Tassone has a strong *prima facie* case; he is suffering irreparable harm by being prevented from the use and enjoyment of the property; it would be difficult to recover damages if he were to be successful in another action; and the balance of convenience favoured Mr. Tassone.

29 Mr. Justice Sewell made an order granting Mr. Tassone possession of the property on or before January 4, 2014. The order was entered on February 18, 2014, and has been stayed pending the outcome of this appeal. Ms. Cardinal remains in the house living rent-free, as she has for the past six years, and Mr. Tassone continues to pay all the expenses related to the property.

Discussion

Did the judge err by granting judgment under Rule 9-7?

30 Ms. Cardinal argues judgment should not have been granted under R. 9-7 because Mr. Tassone was in breach of the *Rules* regarding discovery and this prejudiced her ability to prove her defence.

31 Ms. Cardinal claims Mr. Tassone was served with a demand for discovery of documents on December 4, 2009, but he ignored that demand. In his reasons, Mr. Justice Sewell referred to document discovery having been made "very recently" but Ms. Cardinal disputes the accuracy of this statement. In her written submissions she argues that Mr. Tassone had not complied with his disclosure obligations and that "the delivery of a list of documents on the eve of a summary trial does not remedy the injustice at issue in this appeal". Ms. Cardinal claims that the actual documents were delivered three weeks before the November 12, 2013, hearing. She disputes the legal adequacy of the list of documents provided and further alleges that Mr. Tassone obstructed the examination for discovery process by ignoring her request for preferred dates made in the letter of September 11, 2013.

32 Mr. Tassone submits that he provided Ms. Cardinal with a list of documents on October 7, 2013, two weeks after Ms. Cardinal produced her list of documents and more than five weeks before the summary trial. Ms. Cardinal never issued an appointment in Form 23 for an examination for discovery so he was never legally obligated to attend an examination. Further, she did not seek to cross-examine him on his affidavit or to adjourn the summary trial so that she could complete her pre-trial discovery.

33 However, despite not requesting an adjournment of the summary trial, I note she did maintain it would be unjust to proceed with the summary trial.

34 I agree with Mr. Tassone that he complied with the *Rules* with respect to document discovery and document production. When he did not respond to Ms. Cardinal's counsel's request for dates for examination for discovery she could have taken out an appointment for examination for discovery. She was prepared to bring an application for production of a list of documents and to unilaterally set down a case management conference shortly before the date for

the summary trial. It is puzzling why this issue was not addressed in a forceful way, or at least at the case management conference.

35 The second aspect to Ms. Cardinal's appeal is that the judge erred in finding there would be no prejudice in granting judgment based on the factual record as it stood at the time of the summary trial. Since Mr. Romans is deceased, Ms. Cardinal maintains that her ability to prove her defence rests entirely on documents and oral discovery from Mr. Tassone. In her affidavit before the chambers judge, she made the following allegations in support of her claim that the matter should have gone to trial following proper discovery:

- Shortly after the transaction, Mr. Romans did not know Mr. Tassone's name;
- At the time of the transaction, Mr. Romans was gravely ill and lonely;
- By the end of 2003, Mr. Romans was in very poor physical condition. Ms. Cardinal took him to the hospital where he remained for approximately two weeks;
- Mr. Romans' doctor expressed the opinion that Mr. Romans was recovering from major facial cancer surgery during the time of the transaction and "thus his mental abilities would have been compromised";
- Mr. Romans was practically illiterate in relation to written English;
- There was no obligation upon Mr. Romans to make payments toward the principal or interest on the "reverse mortgage" for as long as he lived on the property;
- The reverse mortgage was taken out to pay Mr. Tassone for renovation work that Ms. Cardinal claims was unnecessary, unfairly valued, and done without the fully informed consent of Mr. Romans;
- The property was undervalued for the purpose of the transaction.

36 She argues it was therefore an error in principle for the judge to have granted judgment under R. 9-7 because Mr. Tassone's breach of his obligations prejudiced her ability to respond. In response, Mr. Tassone disputes the accuracy and/or relevance of Ms. Cardinal's allegations and claims there is no admissible evidence to support them.

37 Ms. Cardinal cites several cases in which appeals from summary trial judgments were allowed because discovery had not taken place: *Hunt v. Atlas Turner Inc.*, [1990] B.C.J. No. 2563 (B.C. C.A.); *Phillips v. Fedoration*, [1987] B.C.J. No. 2429 (B.C. C.A.); and *Mayer v. Osborne Contracting Ltd.*, 2012 BCCA 77 (B.C. C.A.). I agree with Ms. Cardinal that these cases offer general support for the proposition that it would be an error to proceed by way of summary trial if the evidentiary record is insufficient to allow a judge to resolve conflicting evidence or find the necessary facts.

38 However, these cases can be distinguished on their facts from the case at hand. There is no rule that discovery must always take place before a matter can be dealt with by way of summary trial. Indeed, in *Hamilton v. Sutherland* (1992), 14 B.C.A.C. 51, 68 B.C.L.R. (2d) 115 (B.C. C.A.), this Court held that arguing "with the aid of the discovery processes something might turn up" is insufficient to defeat a summary trial application. Similarly, in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 (B.C. C.A.), this Court made the following remarks:

> [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378 at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7 ...

39 What matters is whether a judge can find the facts necessary to decide the issues of fact or law, and whether it would be unjust to do so in the circumstances: *Inspiration Management* at para. 47. Even if there is "a conflict of evidence which cannot easily be resolved on affidavits", that does not entitle the parties to a full trial: *Inspiration Management* at para. 56.

40 As noted above, Mr. Tassone was not in breach of his obligations as Ms. Cardinal claims. Any gaps in the record are the result of her failure to take the proper procedural steps to obtain discovery. The respondent refers to the following passage from *D. Fogell Associates Ltd. v. Esprit de Corp. (1980) Ltd./Esprit de Corp. (1980) Ltée*, [1996] B.C.J. No. 1715 (B.C. S.C. [In Chambers]), which is apposite:

> [55] It must be remembered that a summary trial is a trial. A party who deliberately chooses not to present evidence cannot then assert that as a result there are not enough facts before the court to decide the issues contested, or that it would be unjust to decide the issues because evidence, which is available, has not been put before the court. To permit a party to conduct itself in such a way would defeat the purpose of the summary trial procedure.
>
> [56] A party cannot unreasonably delay investigation into the factual basis of defences it has raised and then argue that it would be unjust to decide the issues in the absence of that investigation.

41 Given the history of this case, the trial judge's decision was not unjust. Ms. Cardinal had years to obtain evidence to support her defence, yet she did not provide the court with any admissible evidence to establish Mr. Romans lacked capacity at the time he entered into the agreement with Mr. Tassone. Her allegations have been raised in two previous actions, both of which were dismissed for want of prosecution.

42 Lastly, the arguments Ms. Cardinal raises on appeal were raised before the trial judge. He held that the matter was fit for summary trial. Such decisions are entitled to deference. Ms. Cardinal has failed to demonstrate there is any basis on which this Court could interfere with how that discretion was exercised. I see no basis on which to grant this appeal.

Standing

43 Mr. Tassone also argued that Ms. Cardinal does not have standing to defend the action: only Mr. Romans' estate has standing and Ms. Cardinal never proved the will. In light of my disposition of the appeal, I do not have to consider the issue of standing.

Conclusion

44 The learned judge made no error in law or principal. It was not unjust to proceed by summary trial having regard to the evidence available and the drawn out convoluted nature and cost of the dispute. Ms. Cardinal had ample time to marshal her evidence in pursuit of her claim to the house. This matter has been ongoing for years and Ms. Cardinal has delayed the final resolution of the matter as evidenced by the history of proceedings. Mr. Tassone's name is on title to the house. He has suffered prejudice as he has paid all the expenses while Ms. Cardinal has lived rent-free in a house that is in need of repair. I would dismiss Ms. Cardinal's appeal.

45 Mr. Tassone is entitled to possession of the house within 30 days from the date this judgment is released.

Frankel J.A.:

I Agree:

Neilson J.A.:

I Agree:

Appeal dismissed.

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