

CANADA / JUDGMENT

360networks Inc. v. Impsat Comunicacoes Ltda.

2001 BCCA 656

COURT

British Columbia Court of Appeal

DECIDED

7 November 2001

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Citation:

360networks inc. v. Impsat

Date: 20011107

2001 BCCA 656

Docket:

CA029056

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

360networks inc.

PETITIONER

(Respondent)

AND:

IMPSAT COMUNICACOES LTDA.,

IMPSAT FIBER NETWORKS, INC., AND IMPSAT S.A.

APPLICANTS

(Appellants)

AND:

CHASE MANHATTAN BANK,
as Administrative Agent and Collateral Agent
and
PRICEWATERHOUSECOOPERS INC.,
Court Appointed Monitor of 360networks inc. et al.
RESPONDENT
(Respondents)

Before:

The Honourable Mr. Justice Lambert
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Mackenzie

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Place and Date of Hearing:

Vancouver, British Columbia

1 November 2001

Place and Date of Judgment:

Vancouver, British Columbia

7 November 2001

Written Reasons by:

The Honourable Madam Justice Huddart

Concurred in by:

The Honourable Mr. Justice Lambert

The Honourable Mr. Justice Mackenzie Reasons for Judgment of the Honourable Madam Justice Huddart

- [1] This appeal from an order made in an interpleader application brought in a proceeding under the Companies' Creditors Arrangement Act raises interesting and difficult issues that counsel, the chambers judge, and this Court have been required to consider on a most urgent basis. Regretfully, these reasons may not be as complete as the issues and the submissions we heard with regard to them deserve.
- [2] The urgency arises from a condition imposed on 360networks inc. as the price of obtaining their agreement to an order permitting continuing operations during the restructuring period permitted under the CCAA. 360networks inc. and affiliated companies filing for relief in United States chapter 11 proceedings were required to maintain cash deposits during that period of at least \$100 million US. In accepting that condition in the days immediately prior to the approval of the Confirmation Order in the CCAA proceedings, 360networks inc. relied on the anticipated receipt, not later than 31 August 2001, of about \$19.7 million US from its Brazilian (indirect) subsidiary, 360networks do Brasil Ltda. (360Brazil). When the Confirmation Order was made on 21 July 2001, 360networks inc. knew 360Brazil had purchased a forward exchange contract from BankBoston, N.A., payable to 360networks inc. on 17 August 2001 for US\$19,754,990.51. It also knew the Central Bank of Brazil had refused to permit the early remittance of those funds. Presumably, it also knew 360Brazil could cancel the derivative exchange contract if it indemnified the seller for any loss the seller incurred as a result of the cancellation.
- [3] On 15 August 2001 the appellants (Impsat) obtained an order from a Brazilian court preventing 360Brazil from "remitting or transferring funds to destinations outside Brazil for any reason, until further notice from this Court." The same order asked the Central Bank of Brazil, inter alia, "not to make or permit the making by respondent or on behalf of respondent any remittance of cash to foreign destinations for any reason:" and directed that Impsat "shall arrange for the sending of the official communication." Impsat notified the Central Bank of the court order that day.
- [4] Failing to recognize any urgency in the matter, the Central Bank did not post the required notice of the order to Brazilian banks until 17 August at 4:22 p.m., by which time BankBoston Brazil had transferred the funds via Fleet National Bank Boston to CIBC in Toronto for deposit to 360networks' account. Less than 20 minutes after that transmission

was begun, a court officer served the court order on the legal representative of 360Brazil, Vitoriano Locateli. Mr. Locateli advised the court officer that funds "would be sent abroad ... in light of the transaction already executed 15 days ago."

- [5] The court officer had first made an abortive attempt to deliver the notice to Ulrich Kuhn, having been directed to his office at a different location by the receptionist at the office of Mr. Locateli. Because Mr. Kuhn had resigned on August 15 as legal representative of 360Brazil, the court officer was redirected to Mr. Locateli's office.
- [6] After receiving legal advice, 360Brazil that same day requested BankBoston's Sao Paulo exchange department to "reverse the settlement" and repay the monies to itself. Four days later, on 21 August, BankBoston Brazil asked CIBC by telex to "cancel the payment immediately" and return the funds to Fleet National Bank "based in a local judicial order received by our bank in Brazil." That same day counsel for 360networks demanded the funds be deposited in its account, writing that "we have not countermanded our instructions to the transferring bank." CIBC neither returned the funds to BankBoston nor deposited them to the account of 360networks. Instead it applied within the CCAA proceedings to interplead the funds under Rule 48(1) of the Supreme Court Rules.
- [7] By court order CIBC deposited the funds in the Supreme Court on 12 September. By that same order, Justice Tysoe directed copies of the order and the materials filed in support of it be served on interested parties that included 360Brazil and Impsat. That notice required any person making a claim to the funds to file materials supporting their claim by 27 September 2001.
- [8] Impsat's interest in the interpleader proceedings derives from claims for debt and damages for breach of contracts they made with 360Brazil in February this year. They have good reason to fear 360Brazil will have no funds to pay any judgment or arbitration decision they might obtain in their favour. When subsequently directed to deposit security for the liquidated portion of the claim Impsat made in the Brazilian action, 360Brazil borrowed 1.7 million reais from 360networks for its payment into court. For this reason, it is important to note that interpleader proceedings are not available for pre-judgment execution or to obtain more security for a contract than was negotiated at its making.
- [9] Although other issues were raised, in my view, the fundamental question on this appeal is whether Impsat has established that the validity of the transfer by 360Brazil to 360networks is the proper subject of an interpleader. In other words, is Impsat entitled to require the court to state an issue and direct its trial and meanwhile to order the funds be held in court. The issue on interpleader has traditionally been thought to be who among the claimants is entitled to the property, not absolutely, but as against the other claimants.

- [10] The evidence is persuasive that there are only two persons with claims to the funds CIBC paid into the Supreme Court, 360Brazil and 360networks. There may be issues between them as to whether the derivative forward exchange contract was cancelled before its completion and whether the transfer of funds it effected wrongfully preferred 360networks over its Brazilian creditors. The difficulty for those in Brazil who have claims against 360Brazil, including Impsat, is that 360Brazil has not made a claim for the funds in court.
- [11] It is not for want of opportunity. Neither the notice delivered to 360Brazil under Justice Tysoe's order nor the subsequent order of the Brazilian trial court persuaded that company to put forward a claim based on its August 17 cancellation order to BankBoston. On October 17, the Brazilian trial court ordered "the urgent issuance of a notification order to [360Brazil] requiring it to make arrangements within 72 hours for the repatriation of the funds" It was not until October 19 that Justice Tysoe, after hearing further submissions from Impsat and 360networks, confirmed his order of October 16.
- [12] Thus, the question becomes whether Impsat can make a claim in interpleader proceedings not being pursued by 360Brazil. Justice Tysoe's reasons given orally on October 16 and October 19 (In the Matter of the Companies' Creditors Arrangement Act and 360networks inc. 2001 BCSC 1439 and 2001 BCSC 1512) describe Impsat's claims against 360Brazil and the proceedings with regard to them in Brazil and elsewhere. I need not repeat them.
- [13] Impsat considers itself a claimant within the meaning of that term in Rule 48. Claimant is given meaning by Rule 48(1), which provides in its relevant parts:
- (1) Where a person (in this rule called "the applicant") is sued or expects to be sued in respect of property in the person's possession or under the person's control or in respect of the proceeds from a disposition of the property, or receives a claim in respect of the property or proceeds by or from 2 or more persons (in this rule called the "claimants") making adverse claims and the applicant claims no beneficial interest in the property, the applicant may apply to the court for relief by way of interpleader. [14] Obviously CIBC was entitled to interplead the funds. It had received two claims, one from counsel for 360networks and the other from BankBoston as agent for 360Brazil. Each was asserting the right to payment of the funds as against CIBC and the other.
- [15] Impsat considers its claim that the funds be returned to 360Brazil is adverse to that of networks inc. and "in respect of the" funds and that "claim" in Rule 48(1) is not restricted to a claim to a "proprietary interest."
- [16] In support of their proposition, they cite *Peake v. Carter*, [1916] 1 K.B. 651 (Eng. C.A.) where Swinfen Eady L.J., at 656, commented that "it has not been the practice of the Court to treat the exact form of the issue as material, as 'the issue is only a proceeding directed for the purpose of informing the conscience of the Court:' per Parke B., *Carne v. Brice* [(1840) 7 M. & W. 183, 187]." The point being made was that interpleader proceedings decide entitlement only as between claimants, and thus a claimant need only show such a title or interest in goods that the sheriff ought not to have seized them. While it follows that Impsat might

bring a claim within the interpleader proceeding if it had the right to maintain an action for the funds against CIBC, I cannot find in Lord Justice Swinfen Eady's opinion support for Impsat's proposition that a trial must be directed whenever the court's conscience is tweaked by being made aware of a challenge to a claimant's title.

- [17] I have no difficulty with the proposition that Impsat had the right to bring the Brazilian proceedings and orders to the attention of Justice Tysoe in the interpleader proceeding. Moreover, I consider Justice Tysoe was right to accede to Impsat's request to reconsider his order when Brazilian courts made further orders. The more difficult question is whether Impsat is entitled to any of the relief they sought in the interpleader proceeding.
- [18] Impsat sees the injunction they obtained in Brazil as akin to a Mareva injunction or pre-trial garnishing order and themselves as having attached the property of 360Brazil for the benefit of Brazilian creditors who will suffer if 360networks is allowed to strip 360Brazil of its working capital to benefit North American creditors. Those orders gave them security for any judgment for damages they may obtain in a Brazilian court or by way of an arbitral order. They appear to consider that the effect of Justice Tysoe's order was to determine the entitlement issue in 360networks' favour and thus to permit absolutely that stripping. I disagree. In my view, the practical effect of the order was to deprive them of the security the injunction sought to give them and to make the enforcement of any judgment more difficult, if not impossible, but it does not preclude anyone who might obtain control of 360Brazil from directing it to pursue a claim against 360networks or Impsat and other creditors from challenging the transfer of funds under Brazilian law in a Brazilian court.
- [19] Justice Tysoe noted his order was a determination only that 360networks inc. had established a property interest in the funds and that there was no triable issue as to whether Impsat did. He said nothing about any potential interest of 360Brazil or about what might be the outcome of an application in Brazil or British Columbia to set aside the transfer, under the law of either jurisdiction. He held only that Impsat was not entitled to have the question of 360Brazil's entitlement to the funds tried in the interpleader proceeding.
- [20] Justice Tysoe ordered the funds be paid to 360networks because it was the only claimant who had established a property interest in them. Then he continued, at para. 27:
- ...Subject to any other valid interest in the funds or an outstanding court order, CIBC was required to pay the monies to 360networks inc., and 360networks inc. was entitled to receive them. The Brazilian Court is no longer requiring that the funds be returned to Brazil by CIBC.
- [21] When he turned to the question whether Impsat had raised a triable issue as to whether it had a property interest in the funds, he concluded it had not. That conclusion is not challenged.

- [22] Finally, he considered whether he should exercise any discretion he might have to keep the funds in court while Impsat pursued its remedies against 360Brazil and its claim to have the transfer from 360Brazil to 360networks set aside. He concluded such an order would amount to pre-judgment execution by way of garnishing order, a remedy not available in British Columbia to Impsat against 360networks.
- [23] In his reconsideration reasons, Justice Tysoe considered the effect of the restoration of the repatriation order of September 25 by the Brazilian Civil Appellate Court. He concluded that change did not affect his ruling that the Supreme Court had and should retain jurisdiction over the interpleader proceeding. He refused to "go behind the facts that 360 networks inc. was the payee under the derivative contract and that the funds were transferred to CIBC for the credit of 360networks inc.," in the absence of an application in either Brazil or British Columbia to set aside the transfer.
- [24] Impsat considers that was one of the applications they were making in the interpleader proceedings. Justice Tysoe dealt with that possibility when he concluded that the issue in any such proceeding would be whether the transfer should be set aside as a fraudulent conveyance or preference or as an impermissible return of capital, not whether the transfer occurred or whether the property in the funds passed.
- [25] When Justice Tysoe suggested to counsel that the funds be paid out of court to 360Brazil so it could have the ability to decide whether it would return them to Brazil, Impsat preferred that the Court cause the funds to be returned to Brazil given the existence of the Brazilian court orders and the submissions made concerning the untrustworthy and fraudulent conduct exhibited by 360networks and 360Brazil in the transactions thus far. In this Court, they resile from that position, considering that at the very least such should be the disposition of the funds.
- [26] What Impsat did not seek to do directly in the Supreme Court, they seek to do in this Court. Impsat's claim that comity requires deference to the proceedings in Brazil comes to a request that this Court enforce the Brazilian court's injunction. Its fifth ground of appeal challenges Justice Tysoe's refusal to require the return of funds to 360Brazil's account with BankBoston Brazil. That order is its preferred outcome of this appeal.
- [27] That submission was not made to Justice Tysoe. At para. 8 of his reconsideration reasons, Justice Tysoe noted that "counsel did not argue that comity required this court to respect these Orders by having the funds sent back to Brazil. Indeed, counsel stated that Impsat was not seeking to have this court enforce the foreign injunction." Justice Tysoe thought counsel had taken the right approach because the Brazilian orders operated only in personam against 360Brazil, and the Brazilian court had not requested the assistance of the Supreme Court to have the funds returned to Brazil. I agree with Justice Tysoe that comity does not require the enforcement of the Brazilian injunction in this interpleader proceeding.

- [28] I can find no error in Justice Tysoe's conclusion that the Supreme Court had jurisdiction simpliciter over the interpleader proceedings and that he should not decline that jurisdiction for reasons of comity. The difficult question is whether he erred in failing to find a triable issue regarding the entitlement of 360networks to the funds.
- [29] I accept that "in respect of" is "probably the widest of any expression intended to convey some connection between two related subject matters," as the Supreme Court of Canada held in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39. Impsat maintains they are sufficiently broad to include them, in their capacity as an "attaching creditor" under Brazilian court orders. I am not persuaded, however, that Impsat is an "attaching creditor" by reason of those orders such as to entitle them to have the validity of the transfer determined in the interpleader proceeding. In my view, Impsat is seeking to extend interpleader proceedings to include claims by those who have obtained orders for pre-trial security.
- [30] The two orders in place on the date of Justice Tysoe's order together resemble most closely a Mareva injunction. The Brazilian order of October 19 requires 360Brazil to "take appropriate action" with CIBC within 72 hours so that US\$19,754,990.52 is repatriated to Brazil and deposited with BankBoston Brazil "where it will remain blocked until further decision by this Court."
- [31] Included in the September 25 order were these provisions:
- [1] ...[360Brazil] need only take the appropriate steps with the Canadian Imperial Bank of Commerce to have the sum of US\$19,754,990.52 sent back to Brazil and deposited (after conversion to Brazilian currency) at BankBoston, where it will remain blocked until further decision by this court. This step is to be implemented by respondent within 72 hours, ...
3. Official communications are to be sent to BankBoston N.A. and to the Canadian Imperial Bank of Commerce, along with a copy of this decision, so that they may be informed of it. Inasmuch as process was served on [Impsat] inviting it to respond to the court proceedings brought by the Canadian Imperial Bank of Commerce at the Supreme Court of British Columbia, it is [Impsat's] responsibility to inform that Court of the decision now rendered, in the defense of its interests.
- [32] Impsat relies on eleven authorities for its proposition that the issue of the validity of the transfer is a proper issue to be the subject of an order for trial in the interpleader proceeding. All but three concerned applicants with proprietary claims. Two of those three involved attaching or execution creditors.
- [33] In *Leech v. Williamson* (1884), 10 Ont.P.R. 226, the interpleader proceeding was held to extend to a claim by an attaching creditor that a prior execution creditor's judgment and execution were void against the attaching and other creditors of the judgment debtor whose goods had been taken in execution by the sheriff. In *Standard Ins.Co. v. Hughes* (1885), 11 Ont. P.R. 220, the judge was considering a sheriff's application to a master under the Ontario

Interpleader Act for a summary resolution of disputes about priority among judgment creditors, attaching creditors under the Absconding Debtors' Act, and creditors certificated under the Creditors' Relief Act.

- [34] It is a long stretch from resolving a dispute among such creditors of an absconding debtor about priority to property seized by a sheriff to the case at bar. The chambers judge did not err when he did not make that leap. I think it fair to say the court's reasoning in each case depended on the funds being in the hands of the sheriff, and on the provisions of the Interpleader Act relating specifically to such circumstances.
- [35] Three decisions in *Van's Nurseries Inc. v. Leung*, [1992] BCJ No. 310, [1992] BCJ No. 1431 (Donald J.), and [1992] 17 B.C.A.C.161, BCJ No. 3005 (Southin J.A.) were the last of the authorities cited to us on this point. The facts bear some resemblance to the situation that faced Justice Tysoe. Two groups were disputing who had the benefit of an agreement under which Van's Nurseries was to pay for services rendered in the arrangement of a sale of a business. The unfortunate misadventure, as Madam Justice Southin called the interpleader proceeding at para. 25 of her reasons, is of no precedential value. It does, however, demonstrate the need to identify the claimants to the fund in issue, to delineate the issues between them that are to be tried, and to set down the procedural foundation for the order being given.
- [36] In Madam Justice Southin's reasons can be found two other helpful comments with relevance on this issue. At para. 29, she commented: "Whether the liability to whomever it was which arose under the handwritten note, if there was a liability, falls within rule 48(1) is a nice question." In *Van's Nurseries*, all parties assumed it did. At para. 34, she noted that she found it difficult to know what order can properly be made in an interpleader proceeding other than a finding that one of the claimants is entitled to the fund in court.
- [37] I would not extend the scope of interpleader beyond a consideration of who is entitled as between the claimants to possession of the funds or goods that are the subject of the interpleader.
- [38] In any event, as Justice Tysoe found, Impsat would not be entitled to an order under the Court Order Enforcement Act in British Columbia and would not qualify as an attaching creditor. Its claim against 360Brazil on one contract is before the Brazilian court where the liquidated damages portion is fully secured by the deposit of 1.7 million reais 360Brazil borrowed from 360networks. Its claim on the other contract is being resolved by arbitration proceedings in accordance with its terms.
- [39] It follows I would dismiss the appeal. As discussed with counsel at the conclusion of the hearing, I would extend the stay of proceeding granted by Justice Tysoe for seven days following the giving of judgment on this appeal.

"The Honourable Madam Justice Huddart"

I AGREE:

"The Honourable Mr. Justice Lambert"

I AGREE:

"The Honourable Mr. Justice Mackenzie"

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