
CANADA / JUDGMENT

Bernard LLP (Re)

2015 BCSC 2382

COURT

Supreme Court of British Columbia

DECIDED

16 December 2015

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2015 BCSC 2382 Bernard LLP (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bernard LLP (Re),

2015 BCSC 2382

Date: 20151216

Docket: S148397

Registry: Vancouver

Between:

Bernard LLP

Petitioner/Respondent

Re: Interpleader of funds currently held in trust by Bernard LLP

Before: The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia,
dated December 16, 2014 (Bernard LLP (Re), 2014 BCSC 2503).

Reasons for Judgment

Counsel for the Petitioner/Respondent:

W. Gary Wharton

Counsel for the Appellant Harry Sargeant III:

Kieran E. Siddall

Place and Date of Hearing:

Vancouver, B.C.

June 18, 2015

Place and Date of Judgment:

Vancouver, B.C.

December 16, 2015

INTRODUCTION

- [1] On October 31, 2014, Master Baker granted a without notice interpleader application (the "Interpleader Order") brought by the petitioner, Bernard LLP ("Bernard"). Pursuant to that order, Bernard was permitted to interplead \$144,766.56, plus interest in the amount of \$19,314.90 (the "Funds") and hold the Funds in a trust account pending further order of the court. Harry Sargeant III ("Mr. Sargeant") applied to set aside that order. On December 16, 2014, Master Harper dismissed the application to set aside the Interpleader Order and ordered that the Funds be paid into court: Bernard LLP (Re), 2014 BCSC 2503 (the "Order"). Mr. Sargeant brings this appeal and asks that the Order be set aside and the Funds paid to him.
- [2] I have determined that the appeal should be dismissed. I have also concluded that the Order was deficient in failing to establish any process by which competing claims to the Funds could be resolved. That issue was not adequately addressed either before Master Harper or before me. Accordingly, I have directed that Bernard LLP give notice of this decision to all parties with a claim to the Funds. Any of those parties may apply for an order pursuant to sub-rule 10-3(9) to establish a procedure for determining rights to the Funds. If no such application is brought within 45 days, Mr. Sargeant may apply to have the Funds paid to him.

BACKGROUND

- [3] The factual and procedural background giving rise to the interpleader application is complex. The following is a brief summary of that background.
- [4] The Funds represent a small portion of the proceeds of sale from a luxury yacht (the "Vessel"). The Vessel was sold by order of the Federal Court and Bernard is holding the proceeds of the sale, some \$5 million, in trust, pending resolution of the various claims against the Vessel.
- [5] Mr. Sargeant contracted with Worldspan Marine Inc. ("Worldspan") for the construction of the Vessel. Worldspan is a creditor of Mr. Sargeant and the client of Bernard.

- [6] On July 28, 2010, the Vessel was arrested by Offshore Interiors Ltd. ("Offshore") which was a trade creditor of Worldspan. Offshore took default judgment against the Vessel. The Vessel was ultimately sold in a lengthy and complicated multi-party admiralty action in the Federal Court, Action No. T-1226-10 (the "Federal Court Action"). Mr. Sargeant and other parties made in rem claims against the Vessel. In the course of the Federal Court Action, the Court established a claims procedure to address the priorities between the parties to that proceeding.
- [7] Subsequent to the arrest of the Vessel, but before it was sold, Worldspan commenced a Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA") action in this Court and obtained a stay of proceedings so it could put forward a plan of arrangement. On July 22, 2011, in the course of the CCAA proceeding, this Court appointed Wolrige Mahon Limited as the Vessel Construction Officer ("VCO"). This order authorized the VCO to prepare an analysis of the cost to complete construction of the Vessel and to borrow up to \$200,000 to complete this task in addition to fees and disbursements. The order appointing the VCO was recognized in the Federal Court Action, and the VCO was granted a charge on the Vessel as security for any funds borrowed pursuant to this authority. It borrowed the principal amount of the Funds (\$144,766.56) from Mr. Sargeant. This charge was a first priority under the order made in the Federal Court proceeding (the "Borrowing Charge").
- [8] Mohammad Anwar Farid Al-Saleh ("Mr. Al-Saleh") holds a judgment in Florida against Mr. Sargeant for approximately \$37 million. Mr. Sargeant has exhausted the appeals process in Florida. Mr. Al-Saleh commenced proceedings in the British Columbia Supreme Court for registration and enforcement of the judgment. Mr. Al-Saleh also made an in rem claim against the Vessel in the Federal Court Action attempting to trace the sale proceeds of the Vessel, claiming it was purchased with fraudulently obtained funds.
- [9] Following the sale of the Vessel, Mr. Sargeant assigned his interest in the Borrowing Charge to his counsel, Bull Housser & Tupper ("BHT") (the "Assignment"). Mr. Sargeant then applied in Federal Court, to have the Funds paid out to the holders of the various priority charges including BHT. The other interested parties challenged the validity of the Assignment and objected to the application to have the Funds paid out. Mr. Al-Saleh took the position that the Assignment was a fraudulent preference designed to enable Mr. Sargeant to evade execution on the Florida judgment. Prothonotary Lafreniere heard the application and ordered Bernard to pay the funds in respect of the Borrowing Charge to Mr. Sargeant (the "Lafreniere Order"). Mr. Sargeant then brought an appeal of that decision on the grounds that the Lafreniere Order should have directed the funds to be paid to BHT.
- [10] No stay was issued pending the appeal; however, Bernard refused to pay the Funds to Mr. Sargeant and commenced these proceedings for the Interpleader Order.

RULING UNDER APPEAL

- [11] On the application before Master Harper, Mr. Sargeant argued that the Interpleader Order should be set aside because of judicial comity; this Court should respect and follow the Lafreniere Order. However, Master Harper noted that "comity cuts both ways". She found this to be relevant because the Federal Court adjourned Mr. Sargeant's appeal of the Assignment issue pending the ruling of the British Columbia court on the interpleader application. In these circumstances, Master Harper found that it was appropriate for this Court to consider the interpleader application.
- [12] Master Harper determined that Bernard received competing claims to the Funds and that it was not required to resolve those claims. She concluded that an interpleader order was the appropriate way to protect the interests of all of the claimants to the Funds. She concluded she did not have to decide if the interpleader proceeding was being used as a form of prejudgment garnishment and stated as follows at para. 18:

It is not necessary for me to decide this point as I have determined that interpleader the appropriate [sic] to protect the interests of all potential claimants. The application for interpleader relief in this case is not an application for a garnishing order in disguise. It is important to note once again that interpleader relief is interlocutory relief and does not make a final determination on entitlement to the property which is the subject of the interpleader order. All claimants will have their day in court eventually to prove the merits of their claims and will have the opportunity to prove their entitlement to the funds or a portion thereof.

STANDARD OF REVIEW

- [13] There is no dispute between the parties regarding the legal framework governing the standard of review for a master's decision:
- a) an appeal from a master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong; and
 - b) if the ruling concerns a question of law, raises "questions which are vital to the final issue in the case" or a final order, a rehearing is the appropriate form of appeal.

See: *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd.*, 2011 BCSC 999 at para. 7; *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.); and *Sidhu v. Hothi*, 2014 BCCA 510 at para. 9.

- [14] The parties do not agree as to the proper classification of the Order. Mr. Sargeant says the Order "engages questions of law including whether interpleader relief is available" and says that a rehearing on the merits is necessary. He further argues that the decision is not purely interlocutory because it served to finally "conclude Bernard LLP's obligations with respect to the Funds".

- [15] Bernard disputes this, and says that the Order is "interlocutory in form and in function". It says that the appropriate question is, thus, whether the Order was 'clearly wrong'.
- [16] The parties did not provide authority addressing the question of interpleader orders being final or interlocutory in nature. Master Harper characterized interpleader relief as "interlocutory relief" on the basis that it does "not make a final determination on entitlement to the property which is the subject of the interpleader order" (at para. 18).
- [17] I have concluded that the Order is interlocutory. However, I have also concluded that the issues raised on this application concern a question of law. Accordingly, I will give only a brief summary of my reasons for concluding that the Order is interlocutory.
- [18] There is some inconsistency in the decisions which have considered this issue. Two older decisions concluded that interpleader applications are interlocutory in nature: *Frumento v. Shortt, Hill & Duncan, Ltd.* (1916), 22 B.C.R. 427 (C.A.); and *Fraser v. Neas*, [1925] 3 D.L.R. 547 (B.C.C.A.).
- [19] However, in *Royal Trust Company of Canada v. Brechert* (1993), 39 B.C.A.C. 73, Rowles J.A. found that the appellant did not require leave to appeal a decision on an interpleader application. She noted that Rule 48(9)(c) (now Rule 10-3) allows the court to determine a claimant's rights summarily, "on the request of the applicant or a claimant". She concluded that, in the circumstances of that case, the rights of the applicant were being determined summarily, at para. 18:
- 18 From the order of the Master dated September 28, 1993 and reasons given by the chambers judge, it appears to me that the applicant's claim of interest in regard to the motor vessel was being determined summarily, and that as to the interest he asserted, the judgment was final. On that basis, the order would be final, not interlocutory, and leave would not be required.
- [20] From my review of the authorities, I conclude that an interpleader order is generally considered to be interlocutory. However, in circumstances where the rights of a claimant or applicant are being determined summarily, the interpleader order is in the nature of a final order. This was the situation in *Brechert*.
- [21] Mr. Sargeant contends that the interpleader relief in this case finally concluded Bernard's obligations in respect of the Funds, such that it should be treated as a final order for the purposes of the standard of review. In other words, the Order summarily determined the obligations of Bernard. He says the Order is not "purely interlocutory" within the meaning contemplated by the authorities.
- [22] In my view, the Order does not conclude the rights of any of the parties claiming the Funds and is, thus, purely interlocutory. While Bernard is a necessary party to the interpleader application, it is not a party to the ongoing litigation regarding the various claims to the Funds or to the proceeds from the sale of the Vessel. The fact that its obligations are determined is incidental to any claim to the Funds. The Order does not determine the rights of any of the claimants to the Funds, including BHT's claim under the Assignment. In that

regard, the circumstances under which the Order was granted are very different from those in Brechert. As the Order does not determine any rights, it is an interlocutory order, both procedurally and in substance.

[23] Mr. Sargeant says the Order engages questions of law, including whether interpleader relief is available where:

- a) the property in the possession of the person seeking interpleader relief is subject to a court order in another Canadian court dealing with entitlement to property; and
- b) the claims received by the person seeking interpleader relief in respect of the property are not proprietary in nature.

[24] By posing both of these questions, Mr. Sargeant argues that this Court lacks jurisdiction to make the Order. In my view, these issues raise questions of law. Accordingly, I have approached this appeal as a rehearing. In doing so, I have allowed the parties to refer to steps taken and rulings made in the Federal Court proceeding subsequent to the Order.

ANALYSIS

[25] I will approach my consideration of the issues raised by examining three questions:

- 1) Does the Court have jurisdiction to make an interpleader order in view of the Lafreniere Order?
 - 2) Is interpleader relief available in these circumstances?
 - 3) What order should be made?
1. Does this Court have jurisdiction to make an interpleader order in view of the Lafreniere Order?

[26] The rules governing interpleader proceedings are set out at Rule 10-3 of the Supreme Court Civil Rules. The critical provision is sub-rule (1) which provides:

- (1) If
 - (a) a person (in this rule called the "applicant")
 - (i) 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
 - (ii) receives a claim in respect of
 - (A) the property, or
 - (B) the proceeds

by or from 2 or more persons (in this rule called the "property claimants") making adverse claims, and

(b) the applicant claims no beneficial interest in the property,
the applicant may apply to the court for interpleader relief.

- [27] An interpleader application must be made by petition if there is not an extant proceeding: sub-rule (6). The affidavit material must meet the conditions set out in sub-rule (7). Pursuant to sub-rule (9)(c), the court has the power to determine "the rights of the property claimants summarily". As I have explained, the Order does not purport to do that. Rule 10-3(9) gives the court powers to establish how an issue will be determined and sub-rule (9)(i) provides that the court can "make any other order the court considers will further the object of these Supreme Court Civil Rules."
- [28] There is no dispute as to the formal requirements of the application. Bernard's affidavits conformed to the Rules. The interpleader application was commenced by way of petition because there is no action in this province in which it could be brought.
- [29] Bernard has no interest in the Funds. However, it says it is aware of several competing claims to the Funds:
- a) Mr. Al-Saleh's claim against the Vessel, or the proceeds from its sale, arising from the Florida judgment. He says that the funds Mr. Sargeant obtained fraudulently were incorporated into the Vessel. Further, Bernard says Mr. Al-Saleh has a claim in the nature of a constructive trust claim against Mr. Sargeant's assets in British Columbia;
 - b) BHT as the assignee of Mr. Sargeant's Borrowing Charge;
 - c) Mr. Sargeant, as the holder of the Federal Court judgment; and
 - d) Worldspan, as a creditor of Mr. Sargeant. It claims for debt due under a Vessel Construction Agreement, for which garnishment of the Funds would be allowed under the Court Order Enforcement Act, R.S.B.C. 1996, c. 78.
- [30] Mr. Sargeant's central complaint is jurisdictional in nature; he says that this Court could not order interpleader relief where there is an order of the Federal Court which has "determined who is entitled to the Funds".

The Federal Court Decisions

- [31] The Lafreniere Order provided that the Funds be paid to Mr. Sargeant directly. Mr. Sargeant attempted to have the Funds paid out to BHT on the basis of the Assignment. Worldspan and Mr. Al-Saleh opposed that application and argued that the Assignment constituted a fraudulent preference.
- [32] Prothonotary Lafreniere stated that he was "not satisfied that any claimant to the proceeds of sale of the Vessel would be prejudiced by payment of the priority charges". Although he ultimately concluded that payment should be made, he stated that he expressed "no view as to the merits" of the argument advanced regarding the fraudulent nature of the Assignment,

but concluded that it was not "appropriate, on the particular facts of this case, for the Court to grant a judicial imprimatur to an arrangement that could be perceived as favouring one of Mr. Sargeant's creditors over another".

- [33] Mr. Sargeant appealed the Lafreniere Order on the basis that the Funds should be paid to BHT in trust. On November 26, 2014, Mr. Justice Campbell of the Federal Court ordered an adjournment of the appeal. In so doing, he noted that the interpleader process before the British Columbia court "has the potential to engage issues that are pertinent" and elected to adjourn "out of respect for judicial economy and the concurrent jurisdiction of this Court and the Supreme Court of British Columbia over the subject matter under Appeal".
- [34] Mr. Sargeant also initiated a contempt application against Bernard for failure to pay the Funds in accordance with the Lafreniere Order. On December 23, 2014, Prothonotary Lafreniere dismissed the contempt application. In doing so, he noted that his order did not require payment to be made immediately. Second, he noted that Bernard had applied to interplead the Funds. Given the ongoing negotiations of counsel related to the appeal, Prothonotary Lafreniere was satisfied, "out of respect for the integrity of the appeal process that Mr. Sargeant himself instituted, and being faced with the competing claims to the monies ordered to be paid to Mr. Sargeant, Bernard quite properly held back payment of the Funds pending further order of the Court". Prothonotary Lafreniere concluded that no contempt was established.

Positions of the Parties

- [35] Mr. Sargeant says the Federal Court has determined entitlement to the Funds. He says that the Order prevents payment of the Funds to him and, thus, violates the principles of comity. Mr. Sargeant says that "full faith and credit" is owed by Canadian courts to one another, citing *Antwerp Bulkcarriers, N.V. (Re)*, 2001 SCC 91 at para. 51. The Supreme Court of Canada stated that courts "should give 'full faith and credit' to judgments given by a court in another province or territory, so long as that court has 'appropriately exercised' its jurisdiction." Mr. Sargeant says that there was no jurisdictional argument raised before the Federal Court and its order was not qualified in any way. Accordingly, he says there is no capacity for this Court to engage with these issues.
- [36] Bernard argues that the principles of comity are not offended in the circumstances. It points to the various statements of the Federal Court, which recognize the concurrent jurisdiction and the deference shown by that court to the process unfolding in British Columbia. While both courts have concurrent jurisdictions in admiralty, the Federal Court has no jurisdiction over debts and obligations in this province.
- [37] Bernard says that, as a result of the limited jurisdiction of the Federal Court, it could not address the Assignment and did not have jurisdiction to determine the issue of fraudulent preference. Prothonotary Lafreniere recognized that he could not comment on the merits of the Assignment. Bernard says that decision left all other issues open because the Federal

Court does not have the ability to determine the respective rights of other creditors to the Funds. Bernard says the Lafreniere Order cannot be determinative of claims to the Funds based on issues which that court has no jurisdiction to address.

Comity

[38] Master Harper considered the principle of comity. She concluded as follows:

[16] Comity is the notion that a court of one jurisdiction will give effect to a judicial decision of another jurisdiction, not out of obligation, but out of deference and respect. Counsel for Sargeant argues that this court should defer to the federal court judgment which required Bernard LLP to pay the funds to Sargeant. Of note, however, is that the Federal Court has deferred to this court in adjourning the hearing of the appeal of the assignment issue pending the outcome of the interpleader issue. Comity therefore cuts both ways. It is appropriate for this court to consider the application for interpleader relief notwithstanding the federal court order directing Bernard LLP to pay the funds to Sargeant because of the potential for claims to the funds by other claimants.

[39] The decision of Master Harper, regarding the question of comity, must be correct. The Federal Court clearly acknowledged this Court's ability to hear and consider the interpleader application knowing that Bernard was seeking to have the Funds interpleaded. In doing so, it recognized the jurisdictional limitations of the Federal Court. It could not consider Mr. Al-Saleh's constructive trust claim, nor could it consider the fraudulent preference claim made in relation to the Assignment. As the Order does not finally determine entitlement to the Funds, and allows all claimants to pursue final relief, including relief based on the orders made in the Federal Court, the Order appealed from did not offend the principle of comity.

2. Is interpleader relief available in these circumstances?

[40] The determination of this issue depends on whether there are competing proprietary claims to the Funds. As I am conducting this appeal as a rehearing, I have taken into account the decisions from the Federal Court issued subsequent to Master Harper's ruling. I have concluded that there are competing claims to the Funds in accordance with Rule 10-3. I will set out the positions of the parties and outline the reasons for my decision.

Position of Mr. Sargeant

[41] Mr. Sargeant argues that the only claims Bernard purports to have received, which are adverse to his claim are those of Mr. Al-Saleh and Worldspan. He says neither of these claims is proprietary in nature and so cannot be subject to an interpleader order.

[42] With regard to Mr. Al-Saleh's claim, he argues that it is not specific to the Funds or the Borrowing Charge because it arises out of a Florida judgment against Mr. Sargeant. While Mr. Al-Saleh did advance an in rem claim against the proceeds of the sale of the Vessel and the Funds, that claim was dismissed by the Federal Court of Appeal. Further, Mr. Al-Saleh's allegation that he can trace the funds used by Mr. Sargeant for the construction of the

Vessel, because they were obtained by fraud, cannot apply to the Funds which were advanced long after construction on the Vessel had ceased. He says, in these circumstances, Mr. Al-Saleh does not have a constructive trust claim against the Funds.

- [43] With regard to Worldspan, Mr. Sargeant says it only has a claim against Mr. Sargeant arising out of alleged failures to make payments pursuant to a ship construction contract. It is, thus, a claim for damages which pre-dates the Borrowing Charge and is, thus, not a proprietary claim against the Funds.
- [44] Mr. Sargeant says there are only two potential proprietary claims to the Funds: his claim, pursuant to the Lafreniere Order, and BHT's claim pursuant to the Assignment. Mr. Sargeant says these claims are not adverse in interest and, indeed, BHT is acting for Mr. Sargeant in these proceedings. Accordingly, there are no competing claims to the Funds.
- [45] Finally, Mr. Sargeant says that Worldspan and Mr. Al-Saleh could not garnish the Funds in court, and could not have done so when Bernard held them, because it was doing so pursuant to a court order. Mr. Sargeant argues that interpleader proceedings are not available for pre-judgment execution, and this is precisely what Worldspan and Mr. Al-Saleh are trying to use it for.

Position of Bernard

- [46] Bernard says there are competing claimants to the Funds and that the claims are proprietary.
- [47] First, Bernard says that Mr. Sargeant should not be in a position to advance a proprietary claim to the Funds having made the Assignment to BHT. However, by advancing his claim to the Funds, he is making a claim adverse to that of BHT, as the assignee. The fact that BHT is not purporting to rely on the Assignment at the hearing of the interpleader application is irrelevant to the court's consideration as to whether the claims are adverse. At the time the interpleader application was brought, Bernard did not know what position BHT would take. Further, the existence of these two claims, which are directly adverse, is sufficient to support the interpleader, especially when any order allowing the Funds to be paid to Mr. Sargeant could result in the Funds being paid to BHT. This would allow Mr. Sargeant to do, indirectly, that which he could not do directly: grant a fraudulent preference.
- [48] With regard to the claim of Mr. Al-Saleh, Bernard notes that his \$37 million Florida judgment against Mr. Sargeant is in fraud. Mr. Al-Saleh says he is, thus, entitled to advance a constructive trust claim against the assets of Mr. Sargeant. This allows him to trace the funds used to construct the Vessel. He says the claim against the Funds is the same; it is based on the same allegations of, and judgment for fraud, which allow him to make a constructive trust claim against the Funds. There can be no suggestion that the money used by Mr. Sargeant to provide the Funds for the Borrowing Charge is untainted by his fraud. In addition, the Florida court ordered Mr. Sargeant to assign any interest he may be found to have in the Vessel, or any sale proceeds, to Mr. Al-Saleh. Accordingly, Mr. Al-Saleh's claim is

proprietary.

- [49] With regard to Worldspan, Bernard says that it has a proprietary claim because it could have issued a garnishing order to Bernard when the Funds were in the firm's trust account.

Analysis

- [50] Rule 10-3(1) permits interpleader relief when a person "(i) is sued or expects to be sued in respect of property in the person's possession or in respect of the proceeds from a disposition of the property, or (ii) receives a claim in respect of (A) the property by or from 2 or more persons making adverse claims". There can be no question that the claims of Mr. Sargeant and BHT are claims in respect of the property or, in other words, the Funds. The existence of these two claims to the Funds would be sufficient for Bernard to obtain an order to interplead the Funds if they are "adverse claims". Clearly, the claims are, in fact, adverse. However, in this Court, and in the application before Master Harper, BHT took the position that the Funds should be paid to Mr. Sargeant in accordance with the Lafreniere Order. BHT did not assert its claim to the Funds based on the Assignment.
- [51] BHT is not relying on the Assignment and has advised the Court that it will make no claim to the Funds. Given the decision I have arrived at regarding Mr. Al-Saleh's claim, I need not consider Bernard's argument that Mr. Sargeant has no claim to the Funds because of the Assignment. In other words, I have assumed that BHT does not have a claim adverse to that of Mr. Sargeant. However, I have concluded that Mr. Al-Saleh does have an adverse claim, which provides a basis for the Order such that this appeal must be dismissed.

Mr. Al-Saleh's Claim

- [52] The decision in *360networks inc. v. Impsat Comunicacoes Ltda.*, 2001 BCCA 656, is the leading case on interpleader applications in this province. Mr. Sargeant says the circumstances of the present application are very similar to those in *360networks*, where the Court found that there was no triable issue regarding the entitlement of *360networks inc.* ("the Company") to the funds in question. On close examination, the circumstances of this case are distinguishable from those before the Court in *360networks*; there is a triable issue as to Mr. Sargeant's entitlement to the Funds.
- [53] In *360networks*, one of the Company's subsidiaries ("360Brazil") transferred approximately \$20 million to CIBC, payable to the Company, by way of a forward exchange contract. The funds were urgently required by the Company as it had filed for relief under Chapter 11 in the United States and pursuant to the CCAA. Prior to the interpleader application, Impsat commenced proceedings in Brazil against 360Brazil, and obtained an order from the court in Brazil preventing 360Brazil from transferring funds out of Brazil. Unfortunately for Impsat, the funds were transferred to CIBC in breach of that order. 360Brazil requested the transferring bank to ask CIBC to return the funds to Brazil. The Company demanded that CIBC place the funds in its account. Faced with these competing demands, CIBC brought the

interpleader application. Justice Tysoe, who heard the initial without notice application, ordered the funds paid into court and required notice to be given to interested parties which included Impsat and 360Brazil. Impsat filed material advancing its claim, but 360Brazil did not advance any claim to the funds.

- [54] On appeal, the issue before the court was described at para. 12, as "whether Impsat can make a claim in interpleader proceedings not being pursued by 360Brazil." Madam Justice Huddart explained the difficulty faced by Impsat at paras. 9 and 10:
- [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.
- [55] The difficulty with Impsat's claim was that it had an unproved claim against 360Brazil which it was advancing in Brazil. This did not give it any interest in or claim to the funds which CIBC interpleaded. The application was heard pursuant to Rule 48(1) of the former Rules which is substantially the same as the current rule. Impsat took the position that the validity of the transfer from 360Brazil to the Company was the proper subject of an interpleader proceeding. It relied on the broad language in the Rule which applies where a person receives a claim "in respect of" property.
- [56] At para. 29, Huddart J.A. accepted "that 'in respect of' is 'probably the widest of any expression intended to convey some connection between two related subject matters' ". However, she concluded that the rule did not apply in the circumstances of Impsat's claim:
- 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.
- [57] Mr. Al-Saleh's claim against the Funds is much more direct than Impsat's claim against the funds held by CIBC in 360networks. Impsat had no claim against the Company, just a pre-trial security order against 360Brazil who was advancing no claim to the funds. In contrast, Mr. Al-Saleh holds a \$37 million judgment in fraud against Mr. Sargeant from Florida. Mr. Al-

Saleh attempted to pursue an in rem claim against the Vessel in the Federal Court Action, and was not able to do so only because his claim was outside of the court's jurisdiction. This was expressed clearly by the Federal Court of Appeal in *Sargeant v. Al-Saleh*, 2014 FCA 302 at para. 31:

the relief sought and granted in the Florida Judgment was not one which fell under the Federal Court's jurisdiction pertaining to Canadian maritime law. Hence, the Florida Judgment could not be recognized and enforced by the Federal Court.

[58] Mr. Al-Saleh is now seeking to enforce the Florida judgment in British Columbia. Unlike Impsat's claim, Mr. Al-Saleh's claim is "in respect of" property. He alleges that his judgment in fraud allows him to advance a form of constructive trust claim against the property of Mr. Sargeant, and can trace his claim to any assets in British Columbia. Contrary to the position of Mr. Sargeant, the fact that he advanced the principal amount of the Funds after construction of the Vessel is irrelevant to the substance of the constructive trust and tracing claims advanced by Mr. Al-Saleh. Further, the Florida judgment purports to assign any interest Mr. Sargeant has in the Vessel or sale proceeds to Mr. Al-Saleh.

[59] In summary, Mr. Al-Saleh has a claim to the Funds which is proprietary and adverse to Mr. Sargeant's claim. This is sufficient for the Order to have been made and so Mr. Sargeant's appeal must fail. Having arrived at this conclusion, I need not consider whether Worldspan's claim is also proprietary.

3. What order should be made?

[60] While there was a proper basis for ordering interpleader of the Funds, the failure of the Order to provide for any process by which the competing claims could be resolved, has complicated and delayed these proceedings. The lack of any term in the Order which would move resolution forward likely contributed to the substantial delay between the granting of the Order and the pursuit of this appeal. When the Order was made, the Court undoubtedly assumed that steps would be taken by a claimant other than Mr. Sargeant, to pursue a claim to the Funds. However, that has not happened, likely because of the complex nature of the proceedings.

[61] The fact that Mr. Al-Saleh did not appear on the appeal certainly impeded the Court's ability to understand and assess the nature of his claims. While it may be that he could have taken a position on the appeal, there was little reason for him to do so. Mr. Al-Saleh did not take any position before Master Harper, and the Order preserved his rights to advance a claim against the Funds.

[62] The powers of the court on an interpleader application are set out in Rule 10-3(9) and include the following:

(9) On the hearing of an application for interpleader relief, the court may

- (a) order a property claimant to be made a party to a proceeding that has already been started in substitution for or in addition to the applicant,
 - (b) order an issue between the property claimants to be stated and tried in an action and direct which property claimant is to be the plaintiff in the action and which property claimant is to be the defendant,
 - (c) on the request of the applicant or a property claimant, determine the rights of the property claimants summarily,
- [63] If the Order had contained a term based on one of these sub-rules, a process could have been put in place to resolve the adverse claims. It may be that the claims can be resolved in Mr. Al-Saleh's action to enforce his Florida judgment. It could also be done in a separate proceeding. I have given some consideration as to the proper procedure by which the adverse claims should be resolved. However, I cannot determine that on the material that was before the Court on the appeal.
- [64] In these circumstances, the order I make is that Bernard provide notice of the appeal ruling to potential applicants, including Worldspan and Mr. Al-Saleh, within seven days of this ruling. Any party with a claim to the Funds may apply for an order pursuant to sub-rule 10-3(9) to establish a procedure for determining rights to the Funds. If no party has applied within 45 days of this order, Mr. Sargeant may apply for payment out of court of the Funds pursuant to the terms of the Lafreniere Order.
- [65] Bernard LLP is entitled to costs of this application at Scale B.

"Butler J."

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