

CANADA / JUDGMENT

Byer (Re)

2022 BCSC 2018

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2018 Byer (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Byer (Re),

2022 BCSC 2018

Date: 20221118

Docket: B190585

Registry: Vancouver

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

- and -

In the Matter of the Bankruptcy of Daniel Eric Byer

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for E. Sands & Associates Inc., the Trustee:

B. Lewis-Hand

Counsel for Roy M. Terry Jr., Receiver of International Fiduciary Corp, S.A.:

L. Li

Counsel for the British Columbia Securities Commission:

S. Andersen

Counsel for Amicus Curiae:

G. Dabbs

Place and Date of Hearing:

Vancouver, B.C.

October 25, 2021, February 18, May 17-18, June 3, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 18, 2022

I. INTRODUCTION

- [1] In September 2019, Daniel Byer made an assignment in bankruptcy in BC. E. Sands & Associates Inc. was appointed trustee of his estate (the "Trustee").
- [2] Many years, if not decades ago, Mr. Byer was a principal in International Fiduciary Corp. S.A. ("IFC"), an organization that operated a Ponzi scheme in Canada and the US.
- [3] In 2006, the US Securities and Exchange Commission (the "SEC") filed an action in the US against IFC, Mr. Byer and others. In 2007, the US court granted an order appointing Roy M. Terry, Jr., as receiver of IFC (the "Receiver"). The Receiver later took various steps to realize on IFC's assets for the benefit of claimants who were identified through a US court approved claims process (the "US Claims Process"). In addition, the BC Securities Commission (the "Commission") commenced proceedings in BC against IFC, Mr. Byer and others.
- [4] In spring 2019, the Receiver and the Commission acted to freeze monies held by Mr. Byer in a Hong Kong bank account. However, before the Receiver or the Commission possibly recovered any funds from Mr. Byer's bank account, the bankruptcy intervened. In September 2019, Mr. Byer's Hong Kong bank account held approximately HK\$2 million (US\$382,000) (the "Funds").
- [5] In early 2021, by agreement, the Funds were paid into a BC trust account in light of competing claims to the Funds, and pending the resolution of these applications.

II. OVERVIEW

- [6] The present issues arise mainly between the Trustee and the Receiver. The central disputes concern who is entitled to administer the Funds and whether the Funds should be administered in the bankruptcy proceedings or turned over to the Receiver for distribution to those IFC investors who have been recognized in the US Claims Process.

- [7] The Receiver and the Commission take the position that the Funds are not Mr. Byer's property; rather, the Funds are rightfully claimed by the IFC investors. The Receiver, supported by the Commission, seeks an order that the Funds be paid to the Receiver to be administered within the US Claims Process. The Commission also advances its own claim to the Funds.
- [8] The Trustee does not dispute that the IFC investors have a claim to the Funds; however, it disputes the Receiver's position that the only beneficiaries able to claim against the Funds are those investors who are part of the Receiver's US Claims Process.
- [9] Steps to resolve these competing positions began quite simply with the Trustee's application for directions pursuant to s. 34 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. This was a proper approach to the matter and one that was consonant with the Trustee's duties under the BIA and the relatively small amount at stake.
- [10] Unfortunately, the Receiver and the Commission saw fit to escalate the matter exponentially and, in my view, unreasonably. As a result, what was intended to be a one-day hearing in October 2021 to settle the course of the bankruptcy in relation to the Funds morphed into a protracted and extensive five-day hearing with numerous and substantial affidavits, countless binders, hundreds of pages of argument and a substantial amount of case authorities.
- [11] The Receiver and Commission's joint approach to the matter needlessly escalated this into a significant dispute that required the Trustee to seek outside input on the issues. Ultimately, this led to the appointment by the Court of an amicus curiae (the "Amicus") to assist in identifying potential IFC investors who may have claims to the Funds.
- [12] All of this has resulted in significant delay in addressing the issues and no doubt great expense for the parties.
- [13] Another aspect of these applications, as raised by the Trustee and the Amicus, relates to process and in particular, notice to all potential IFC investors and claimants who are not yet part of the bankruptcy proceedings or even perhaps the US Claims Process. The Receiver and the Commission wish to disregard these potential claimants; the Trustee and the Amicus quite properly raise these concerns for consideration by the Court.
- [14] Having considered the matter, I agree with the Trustee that the Funds should be administered in the bankruptcy proceedings. The potential claimants to the Funds are all of the IFC investors, wherever situated, and include, but not exclusively, those represented by the Receiver. They should all be given proper notice of the bankruptcy proceedings and an opportunity to participate in these proceedings, if they wish, through a claims process. I accept the Trustee's stated intention to administer a streamlined and efficient process, so as to minimize cost for the benefit of the stakeholders in relation to the Funds, hopefully with the assistance of the Receiver and the Commission.

- [15] I also agree with the Trustee that, in light of its duties to administer the Funds, it should be granted a corresponding charge for its fees and disbursements, subject to taxation, along with the Amicus.
- [16] The Receiver's and Commission's property claims to the Funds have no merit and are dismissed.
- [17] My reasons for the above conclusions follow.

III. THE FACTS

- [18] It is necessary to provide a brief summary of the background facts. I have sourced these facts from the parties' extensive Agreed Statement of Facts and the substantial evidentiary record before me, comprising hundreds of pages, which the parties agree includes all relevant documents.

A. International Fiduciary Corp. S.A. ("IFC")

- [19] IFC was operated by Mr. Byer and two other persons. Through IFC, they conducted a fraudulent or Ponzi scheme whereby millions of dollars of investors' money was misappropriated through the promotion and sale of IFC investments. The principals of IFC promoted the scheme to investors in BC, Alberta, Washington State, Florida and other locations.

B. The US Action

- [20] Around 2006, the IFC scheme became the subject of investigations in Canada and the US. The Canadian proceedings included investigations by the Commission and the Alberta Securities Commission. The US investigations relating to IFC's activities took place in Washington, D.C., Maryland and Washington State.
- [21] On December 4, 2006, the SEC filed a civil action against IFC, Mr. Byer and others in United States District Court, Eastern District of Virginia, Alexandria Division (the "US Court"), alleging contraventions of the Securities Act of 1933 and the Securities Exchange Act of 1934 (the "US Complaint").
- [22] The US Complaint alleged that, from at least July 2003, certain defendants, including Mr. Byer, raised at least \$40 million from investors by offering contracts to participate in returns from an investment program that did not exist; rather, as with all Ponzi schemes, the SEC alleged that returns to investors came largely from their own individual investments or other investors' monies.

- [23] On January 19, 2007, the US Court entered an order appointing Roy M. Terry, Jr. as the Receiver over all property and assets of IFC, wherever situated. The order also states that the US Court takes exclusive jurisdiction over IFC assets or that "are attributable to funds provided by an investor in an investment contract offered by any of the defendants" (the "Appointment Order"). The Appointment Order specifically authorized the Receiver:
- (i) to institute such actions or proceedings to impose a constructive trust, obtain possession and/or recover judgment with respect to persons or entities who received assets or funds traceable to investor monies, with all such actions filed in this Court;
- [24] On June 8, 2007, the SEC filed summary judgment materials in the US Complaint. On June 17, 2007, IFC consented to a judgment exceeding US\$25 million.
- [25] On November 13, 2007, the Appointment Order was amended to allow the Receiver to file legal actions (including in a foreign court) in discharging his duties as Receiver or "on behalf of investors whose interests he is protecting". The Amendment also granted the Receiver the ability to seek recognition of his appointment as Receiver in another court and confirming his powers in that jurisdiction (the "Amended Appointment Order").
- [26] On June 18, 2008, the US Court approved the Receiver's claims administration process and plan of distribution (the "Plan of Distribution"). The Plan of Distribution provided that the Receiver was to advertise its appointment in certain publications, including in BC. The US Court also approved a claims bar date (September 15, 2008) for the filing of claims by IFC investors (the "Claims Bar Date").
- [27] On March 3, 2008, Justice Meiklem, of this Court, granted an order in Action No. S081549 (Vancouver Registry), recognizing the Receiver's appointment under the Amended Appointment Order, and stating that the Receiver's powers and duties were to be enforced as an order of this Court (the "BC Recognition Order").
- [28] In June 2008, pursuant to the US Court's order, the Receiver caused notice of the Plan of Distribution to be published once in seven publications (one in Vancouver; five in community publications in the Lower Mainland; two in northern Washington State, one in Seattle and one in Florida).
- [29] Since the Receiver's appointment, he has taken actions to investigate and trace monies and collect and distribute IFC monies pursuant to the Plan of Distribution.
- [30] The Receiver commenced actions and/or participated in various actions in BC and Alberta to recover monies. The Receiver also entered into monetary settlements with various parties.
- [31] To date, those IFC investors who filed proofs of claims with the Receiver, and whose claims have been approved by the US Court, have received a recovery of approximately 41% of their net shortfall (investments less returns).

C. The Commission's Proceedings

- [32] On February 20, 2008, the Commission issued its decision regarding the activities of IFC, Mr. Byer and others: International Fiduciary Corp SA (Re), 2008 BCSECCOM 107 (the "Decision").
- [33] In the Decision, the Commission found that all of IFC's statements were false and that the IFC investment scheme was a Ponzi scheme whereby IFC used the funds of later investors to make the promised payments to earlier investors. In addition, the Commission found that Mr. Byer and others had misappropriated millions of dollars of investors' money through the promotion and sale of the sham investment scheme operated by IFC.
- [34] According to the Decision, at least 143 investors are known to have invested in the scheme: 89 are BC residents; 54 are non-BC residents. The BC investors collectively invested over \$23.3 million in the scheme and received payments totalling just under \$10.3 million.
- [35] On March 3, 2008, the Commission filed its Decision in the BC Supreme Court, making it enforceable as an order of this Court: see *Poonian v. British Columbia (Securities Commission)*, 2022 BCCA 274 at para. 48; Securities Act, R.S.B.C. 1996, c. 418, s. 163.

D. Proceedings Against Mr. Byer / the Funds

- [36] On August 28, 2007, the SEC obtained final default judgment against Mr. Byer in the US Court in the amount of US\$3,327,150.36 (the "US Byer Judgment").
- [37] In February 2008, in the Decision, the Commission (para. 209, item 23) ordered that Mr. Byer pay to the Commission any amount obtained as a result of his illegal activities, which was found to be not less than \$2,439,585.95. In addition, the Commission imposed an administrative penalty on Mr. Byer of \$1.5 million (para. 209, item 24).
- [38] In June 2008, the Receiver commenced an action in BC Supreme Court Action No. S084366 (Vancouver Registry), seeking judgment against Mr. Byer based on the US Byer Judgment. On March 1, 2010, the Receiver obtained judgment in this Court against Mr. Byer in the amount of CDN\$3,725,566.96 (the "CDN Byer Judgment").
- [39] Mr. Byer did not appeal the CDN Byer Judgment nor did he pay any monies towards the CDN Byer Judgment. On February 26, 2020, the CDN Byer Judgment was "renewed" after ten years (after this Court lifted the BIA stay of proceeding).
- [40] At some point, the Commission and the Receiver became aware of Mr. Byer's Hong Kong bank account.
- [41] On May 21, 2019, the Commission obtained a court order in their BC Supreme Court enforcement proceeding to compel Mr. Byer to collapse his Hong Kong account and pay the Funds to the Commission.
- [42] On April 25, 2019, the Receiver commenced an action against Mr. Byer in Hong Kong on the CDN Byer Judgment.

E. Mr. Byer's Bankruptcy

- [43] On September 12, 2019, Mr. Byer made a voluntary assignment into bankruptcy and the Trustee was appointed. At that time, the Funds represented the balance in Mr. Byer's Hong Kong bank account.
- [44] The bankruptcy resulted in an immediate stay of the actions commenced by the Commission and the Receiver against Mr. Byer to secure the Funds, pursuant to s. 69.3 of the BIA.
- [45] The Trustee advises that it provided notice of the bankruptcy to all known creditors of Mr. Byer pursuant to s. 102 of the BIA. The BIA does not provide for notice of a bankruptcy to be given to investors. Accordingly, the investors of IFC have not received notice of Mr. Byer's bankruptcy.
- [46] The aggregate amount owing to proven creditors in Mr. Byer's bankruptcy is \$10,756,513. The three largest proven unsecured claims who have filed proofs of claim are:
- a) Canada Revenue Agency: \$1,644,823.31 with respect to unpaid income tax for 2006, and 2008-2011 (including penalties and interest);
 - b) The Commission: \$5,361,148.48 with respect to the Decision; and
 - c) The Receiver: \$3,725,566.96 with respect to the CDN Byer Judgment.
- [47] On September 19, 2019, the Trustee wrote to Receiver's counsel advising of the bankruptcy and noting the stay of proceedings that arose. The Trustee requested that the Receiver release its hold on the Funds, then in Hong Kong.
- [48] On September 20, 2019, the Trustee wrote to the bank in Hong Kong advising of the bankruptcy, advising that the Funds were property within the meaning of the BIA and that the Funds vested in the Trustee pursuant to s. 71 of the BIA.
- [49] On September 26, 2019, the Receiver's counsel advised the Trustee that the Receiver would be making a claim that the Funds were not Mr. Byer's property and are not therefore part of his estate in bankruptcy.
- [50] On September 29, 2020, this Court granted a Consent Order in the Commission's enforcement action against Mr. Byer in relation to the Decision. The Consent Order provided that Mr. Byer sign the necessary forms to close the Hong Kong bank account and remit the funds to the Receiver's counsel. The Consent Order also provided that the Funds cannot be disbursed without the consent of the Trustee, the Commission, and the Receiver, or court order in the bankruptcy proceedings or the Commission's enforcement proceedings.

- [51] On March 15, 2021, the Funds were transferred to the Receiver's counsel's trust account pending further court order or consent of the parties. These represent the only assets of the Byer estate (the "Estate"), save for a minor amount of surplus income paid by Mr. Byer.

F. The Funds

- [52] The parties agree that the Funds were transferred from IFC's pooled account to Mr. Byer and represent funds obtained by IFC from investors. Mr. Byer asserted to the Trustee that the Funds belonged to him and were commissions owing to him by IFC, however that position has not been advanced at this hearing.
- [53] The Trustee's position is that the Funds can be traced to IFC but cannot be traced to any particular IFC investor or group of investors.

IV. HISTORY OF PROCEEDINGS

- [54] On June 4, 2021, the Trustee filed this application for directions ("Application for Directions") regarding:
- Whether the Funds are the subject of a constructive trust in favour of IFC investors;
 - Whether the Funds are to be administered by the Trustee or the Receiver; and
 - If the Funds are to be administered by the Trustee, whether a charge should be granted in favor of the Trustee with respect to its fees and disbursements, subject to taxation.
- [55] In response to the Application for Directions, the Receiver claimed that the Funds are trust property or alternatively, that a constructive trust ought to be imposed on the Funds in favour of the Receiver. The Commission also responded by saying that the Funds should be released to the Receiver, or alternatively, to the Commission, so that the Funds can be "returned" to "defrauded investors".
- [56] Both the Receiver and Commission oppose the appointment of the Trustee to administer a BC claims process for IFC investors regarding the Funds or the imposition of a charge in favour of the Trustee to administer the Funds.
- [57] In late June 2021, despite the extant Application for Directions, the Receiver and the Commission delivered Reclamation of Property claims with the Trustee (collectively, the "Property Claims"), seeking release of the Funds to the Receiver so that he could administer them for the benefit only of those IFC investors confirmed through the US Claims Process.
- [58] On July 8, 2021, the Trustee delivered its Dispute Notices, by which it disputed the Property Claims.
- [59] On July 21 and September 3, 2021, respectively, the Commission and the Receiver filed appeals from the Trustee's Dispute Notices (collectively, the "Appeals"). On October 15, 2021, the Trustee filed its responses to the Appeals.

[60] The parties agreed the Application for Directions and the Appeals would be heard together.

V. POTENTIAL CLAIMANTS/THE AMICUS

[61] There was considerable discussion on this application about the number and identity of potential IFC investors who may have a claim to the Funds.

[62] The Receiver indicated that he had compiled a list of 250 people who were connected to IFC and who may or may not be investors. There were 199 Canadian persons on that list. The Receiver sent all of these persons a notice of the US Action and proofs of claim. Of those, 183 persons filed proofs of claim with the Receiver by the Claims Bar Date; 147 persons were Canadian and 83 were BC residents.

[63] As noted above, in the Decision, the Commission referred to at least 143 investors as having invested in the scheme: 89 being BC residents and 54 being non-BC residents (from Alberta, Saskatchewan, Arizona, Florida, Washington State and other locales).

[64] The Trustee's Application for Directions is principally directed to the question of the 33 potential IFC investors (who are part of the 89 BC residents identified by the Commission) who do not appear to have participated in the US Action and who did not file a claim or receive any dividend in the US Action. The evidence also now suggests that this cohort of IFC investors may be upwards of 60-plus persons.

[65] On October 1, 2021, the Trustee applied for and was granted an order in this proceeding to appoint Geoffrey Dabbs of Gehlen Dabbs as Amicus in relation to the Application for Directions and the Appeals. The Amicus' accounts are to be paid by the Trustee from the Estate assets, or as may be ordered by the Court. The order provides that the Amicus' role is to:

seek and provide facts and make submissions to the court regarding the interests of investors in IFC who did not file a claim in the US Action by the claims bar date of September 15, 2008;

[66] The Amicus' efforts, along with those of the Trustee, have made a significant contribution towards a full understanding of who the IFC investors are and what potential claims they may have against the Funds. As noted above, this effort follows from the Commission and Receiver's efforts as identified in the Decision and as reported by the Receiver arising from the US Claims Process.

[67] The Amicus made efforts to obtain further clarity concerning IFC investors who did not participate in the US Action.

- [68] In October 2021, the Amicus selected a sampling of ten investors from the list of 33 people and contacted them by mail or email. He eventually contacted five of them by phone. All five persons indicated that they were interested in advancing a claim in the bankruptcy against the Funds. None of those five persons were specifically addressed by the Receiver. All five persons indicated to the Amicus that they wished to advance a claim in this proceeding. Their total claims appear to be in the range of about \$1.7 million.
- [69] The Receiver investigated 23 of the 33 persons in terms of their previous participation and advises:
- a) Six persons had their claims allowed by the US Court;
 - b) Three persons were sued by the Receiver and they either settled or had judgments granted against them;
 - c) Two persons received a full refund from IFC;
 - d) One person passed away;
 - e) Three persons had their claims disallowed by the US Court; and
 - f) Eight persons opted into a class action settlement against two lawyers involved with IFC.
- [70] By February 2022, the Amicus had been contacted by two other potential claimants. One person had invested approximately \$348,000 and received only \$310,000, leaving approximately \$38,000 owing, and may wish to submit a proof of claim. Another person indicated that it was owed \$900,000 and that it was interested in submitting a proof of claim in the bankruptcy.
- [71] Needless to say, the Amicus does not make any submissions as to whether any of the 33-60-plus IFC investors referred to above have a valid claim for recovery against the Funds, suggesting that, if ordered by the Court, that process would be undertaken by the Trustee.

VI. DISCUSSION

[72] I will address the following issues:

- a) What is the role of the Trustee in the bankruptcy proceeding?
- b) What is the nature of the claim of the IFC investors against the Funds?
- c) Do the Receiver and/or the Commission have property interests in the Funds?
- d) What is the path forward - who should administer the Funds? and
- e) The Trustee's requested charge.

[73] The above issues are not watertight compartments that might be separately and distinctly considered, in that there is some overlap, as I will discuss below.

A. What is the role of the Trustee in the bankruptcy proceeding?

[74] The BIA provides for the vesting of property in the trustee upon a bankruptcy:

71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

[75] In addition, s. 67(1)(a) of the BIA provides that property divisible among creditors does not include property held by the bankrupt in trust for any other person.

[76] This distinction--between administration of property of the estate versus what property the creditors are entitled to share--was discussed in *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 [Ramgotra], where the Court adopted a two-stage process in relation to this issue:

[48] Unlike provisions of the Act such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property. Thus, property which is divisible among creditors is defined very broadly in s. 67(1)

However, the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.

[49] Thus, it can be seen that ss. 91 and 67 relate to two different stages of bankruptcy. Section 91 dictates that certain settled property will fall back into the estate of the bankrupt in the possession of the trustee, while s. 67 is directed at the exercise of administrative powers over the estate by the trustee. This two-stage analysis is similar to the one adopted by Henry J. of the Ontario Supreme Court in *Re Pearson* (1977), 23 C.B.R. (N.S.) 44. ... In my opinion, so far as the creditors of the bankrupt are concerned, that situation crystallized at the time the bankruptcy occurred, and that property by virtue of s. 47(b) [now s. 67(1)(b)] of the Bankruptcy Act was impressed with its character of not being divisible among the creditors, for all the purposes of the bankruptcy.

I adopt this as a correct statement of the law.

[Emphasis added.]

[77] The principle from *Ramgotra* has been applied in various Canadian decisions, including *Douglas v. Stan Fergusson Fuels Ltd.*, 2018 ONCA 192 at paras. 76-77.

- [78] In *Kingsway General Insurance Company v. Residential Warranty Company of Canada Inc.* (Trustee of), 2006 ABCA 293 [Residential Warranty ABCA], a person was contesting the ability of the court to impose a charge in favour of a trustee against property that was subject to undetermined trust claims. The court stated:
- [23] Kingsway relies on s. 67 to assert that property held by a bankrupt in trust for others does not form part of the estate and therefore use of inherent jurisdiction to grant a charge on that property would be contrary to the Act. Section 67 does not mean, however, that trust property does not fall within a trustee's administration. It only addresses the division of the bankrupt's property among the creditors; it does not address what property forms the estate that must be administered by the trustee.
- [79] Accordingly, I accept that the Funds are part of the Estate that are now properly in the possession of the Trustee and to be administered in accordance with the BIA. However, those Funds are potentially available for valid trust claimants as may be determined by the Court.

B. What is the nature of the claim of the IFC investors against the Funds?

- [80] Fortunately, on a broad perspective, the Trustee, the Receiver and the Commission all agree that the IFC investors have a constructive trust claim against the Funds that can be recognized in this proceeding: *Creditfinance Securities Ltd. (Re)*, 2011 ONCA 160 [Creditfinance] at para. 31-33, applying *Ascent Ltd. (Re)*, [2006] O.J. No. 89 [Ascent]; and *Wilson Estate (Re)*, 2019 ONSC 1278 at paras. 38-49 [Jeffrey Wilson].
- [81] However, the Receiver takes the position that any declaration should be in his favour, as IFC's Receiver. Perplexingly, the Commission does not consent to the Trustee even seeking directions concerning whether the Funds are subject to a constructive trust; rather, the Commission seeks a direction that the Funds be paid to the Receiver or, alternatively, to the Commission, to be paid to "defrauded investors".
- [82] The concept of a constructive trust was discussed in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, where the Court stated:
- [43] I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, supra. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

[Emphasis added.]

- [83] In addition, I have been referred to many authorities where courts have imposed constructive trusts involving fraud or Ponzi schemes, including *British Columbia (Securities Commission) v. Bossteam E-Commerce Inc.*, 2017 BCSC 787 [Bossteam] and *Easy Loan Corp. v. Base Mortgage & Investments Ltd.*, 2016 ABQB 77 at paras. 13 and 52, *aff'd* 2017 ABCA 58 [Easy Loan].
- [84] The Trustee also refers to *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607 at paras. 479-490, where Justice Sewell imposed a constructive trust to remedy the wrongful conduct of the insolvent person. Finally, all of the parties have made substantial submissions on the issue of whether a substantive constructive trust or a remedial constructive trust arises and if so, when that trust arose, citing many authorities, including *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 at paras. 52-60, 76 and 83.
- [85] The Receiver has also advanced substantial other legal arguments to support his argument that the Funds belong to the IFC investors: money had and received, unjust enrichment, knowing assistance and knowing receipt on the part of Mr. Byer, and the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 [FCA].
- [86] I agree with the parties that whether the Funds are subject to a constructive trust, and whether the trust is a substantive or remedial one, or whether any other legal basis affords recovery to the Funds for the IFC investors is within the purview of this Court and in this proceeding.
- [87] In *Caterpillar Financial Services Ltd. v. 360networks corp.*, 2007 BCCA 14, the court confirmed that the imposition of a constructive trust is a discretionary remedy. At para. 66, the court adopted the trial judge's quote from Justice Lambert in *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.*, 2000 BCCA 458 at para. 71:

A remedial constructive trust will be imposed only if it is required in order to do justice between the parties in circumstances where good commercial conscience determines that the enrichment has been unjust. But a remedial constructive trust is a discretionary remedy. It will not be imposed where an alternative, simpler remedy is available and effective. And it will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. In this case that would include other creditors of the bankrupt, (both secured creditors and general creditors, since the trust may defeat both), and any relevant third parties.

[Emphasis added.]

- [88] As I have alluded to before at para. 14, if any of these legal bases are available to the IFC investors, represented by the Receiver, to allow recovery of the Funds, they are equally available to all of the IFC investors, whether they participated in the US Claims Process or not. With respect to the Funds, now in BC and vested in the Trustee, I see no basis to grant that remedy so as to benefit only those who are "represented by the Receiver" to the detriment of other IFC investors. To the contrary, I consider such a result to be unfair and unjust.

- [89] I agree with the Trustee that the Funds are not traceable to any particular IFC investor and, therefore, must be seen as potentially recoverable by all IFC investors. Accordingly, I see no basis at this point to distinguish between any of the IFC investors with respect to potential claims against the Funds. As noted by the Trustee, constructive trusts imposed in Bossteam and Easy Loan were in favour of all the defrauded investors, and not just those who were the applicants for that remedy.
- [90] I would again emphasize that there are substantial process and notice issues in that many potential IFC investors are potential stakeholders and are not yet involved in the proceeding. They have no notice of this potential for a declaration of constructive trust (or any other legal argument advanced).
- [91] The Receiver submits that, as authorized by the US Court, he provided notice under the Plan of Distribution, where he published notice of the claims process in various publications, including those in BC and created a website to also publish relevant documents. However, I am not convinced that this notice is sufficient for the purpose of these proceedings, particularly when some efforts may have been undertaken by the Receiver to sent notice directly to persons who were identified by the Receiver as IFC investors.
- [92] On a preliminary basis, I agree that there is merit in the IFC investors advancing constructive trust claims against the Funds, particularly in light of the fact that the Funds cannot be traced to any particular IFC investor.
- [93] Therefore, in my view, it is not necessary to undertake a full legal analysis of the various legal issues that arise in light of the common ground here that the IFC investors are entitled to a return of the Funds. As the Court did in Bossteam at paras. 29-32, I do not find it necessary to determine whether a substantive or remedial constructive trust should be declared in favour of the IFC investors, as the result would be the same.
- [94] However, I consider the granting of any such declaration to be premature and more appropriately dealt with at a later time once proper notice to the remaining IFC investors is given as will be done by the Trustee.

C. Do the Receiver and/or the Commission have property interests in the Funds?

- [95] Property proof of claims can be filed with the Trustee under s. 81(1) of the BIA:

Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

[Emphasis added.]

- [96] Section 81(3) provides that the onus of establishing a property claim is on the claimant.

- [97] Any property claim must be a proprietary interest or title and not a security interest: *Festival Singers of Canada (Re)*, [1980] O.J. No. 2980 at para. 10; *Stephenson (Re)*, [1983] B.C.J. No. 160 at paras. 4-5.
- [98] Any appeal from a Trustee's disallowance of a property claim is to be heard as a "true appeal" and not a hearing de novo: *Galaxy Sports Inc. (Re)*, 2004 BCCA 284 at para. 40; 8640025 *Canada Inc. (Re)*, 2018 BCCA 93 [Telephone Data] at para. 58. This approach has been applied to appeals from disallowances of s. 81 property claims: *White (Re)*, 2021 BCSC 2031 at paras. 25-33.
- [99] In *Telephone Data* at para. 64, the court stated that the standard of review is as follows: factual determinations and those of mixed fact and law are subject to the standard of palpable and overriding error; and, questions of law or extricable questions of law are subject to the standard of correctness: see *Blanchette (Re)*, 2020 BCSC 158 at para. 29.

1. The Receiver

- [100] At the outset, I note that the Trustee has objected to the introduction of the Receiver's Affidavit #3, sworn October 11, 2021, as part of the evidentiary record before the Court on the Appeal from the disallowance of the Receiver's Property Claim. I have reviewed this Affidavit and do not see that it materially adds to the basis upon which the Receiver advances his Property Claim against the Funds. As such, I have considered this Affidavit as simply supplementing the Receiver's Property Claim and not doing violence to the hearing de novo approach set out in *Galaxy Sports*.
- [101] Curiously, the Receiver does not frame his Property Claim by asserting the basis upon which he has a proprietary interest in the Funds. Rather, he asserts that the Funds are not Mr. Byer's property under s. 71 of the BIA and that the Funds should be paid to him as the representative of the defrauded IFC investors under their trust and other claims. Therefore, the Receiver "demands" that the Funds be paid to him as the Receiver of IFC--despite his clear acknowledgement and argument that the Funds are claimable by someone else (i.e. the IFC investors).
- [102] The Trustee's Notice of Dispute with respect to the Receiver's Property Claim is very straightforward--that no proprietary interest in the Funds is held by the Receiver. Alternatively, the Trustee further states, consistent with its submissions on the Application for Directions, that if the Funds are subject to a constructive trust, the beneficiaries are all IFC investors, and not just those represented by the Receiver.
- [103] Here, the standard of review that applies is correctness, as the question of whether the Receiver has a proprietary claim is a question of law. I find that the Trustee correctly disallowed the Receiver's Property Claim under s. 81, as the Receiver has no proprietary claim to the Funds.

- [104] I accept that the Receiver is the receiver of IFC. Under Canadian law, such an appointment does not vest title of the assets under administration in the name of the receiver: Frank Bennett, *Bennett on Receiverships* (3rd ed) (Carswell, 2011) at 46; Sandra Frisby & Malcolm Davis-White, *Kerr and Hunter on Receiverships and Administrators* (19th ed) (Thomson Reuters, 2010), at 152-157. I have not been referred to any US law that would suggest a different legal result in that jurisdiction.
- [105] Understandably, the Receiver does not advance any proprietary claim pursuant to the Amended Appointment Order, the BC Recognition Order or the US/CDN Byer Judgments. Section 71 of the BIA provides that bankruptcy takes precedence of any of those Judgments.
- [106] The Receiver's status here is fundamentally different than that in *Boale, Wood & Company Ltd. v. Whitmore*, 2017 BCSC 1917 [Boale], where a trustee in bankruptcy was pursuing restitutionary claims as it was entitled to do under its BIA mandate for the benefit of creditors/investors who suffered losses (paras. 89-96). The same can be said for *Blanchette* where the property claim was brought by the claimant against the fraudster.
- [107] The Trustee points in particular to the Receiver's affidavit, sworn October 21, 2011, filed in another action in the BC Supreme Court, Action No. S073021 (Vancouver Registry), which involved a class action (the "McCandless Class Action"). The Receiver stated:
5. As IFC Receiver, I serve as a fiduciary with respect to IFC, and seek to maximize the recovery of IFC assets for the benefit of "investors", who are actually creditors of the corporation. I do not act for the benefit of the investors themselves, and may not bring or enforce actions or claims in their names.
- [108] It is evident enough that the Trustee's Notice of Dispute correctly identified the flaw in the Receiver's asserted Property Claim, after considering the entire factual and legal basis for that Claim. I see no error in the Trustee's analysis and conclusions. I do not accept the Receiver's argument that, since his mandate is to "protect" the investors' interests (per the Amended Appointment Order), he acquired title to the Funds on their behalf.
- [109] The Receiver has no propriety claim to the Funds as the Receiver of IFC in the sense that he is seeking the return of IFC's assets. The Receiver's clear position is that the Funds belong to the defrauded IFC investors and that Mr. Byer was simply holding the Funds on a constructive trust for those investors. That trust relationship has now been altered in that the Trustee now holds the Funds pursuant to the BIA and specifically, s. 71.
- [110] Alternatively, even if the Receiver is considered a representative of the IFC investors who can advance propriety claims against the Funds, those investors are not the only potential claimants.

- [111] To a large extent, the Receiver's Property Claim simply repeats his opposition to the Trustee's Application for Directions and adds nothing further in terms of the main issues, being who is entitled to the Funds, on what legal basis and the question as to who should administer the Funds.
- [112] As I will discuss below, I conclude that the unfounded Receiver's Property Claim was brought unnecessarily in the face of the Application for Directions. The Receiver's aggressive and full-scale counter attack on the Trustee's reasonable approach to seek directions from this Court in the circumstances has created a litigation scenario that was meritless. As the court stated in *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABQB 236 [Residential Warranty ABQB] at para. 31, the Trustee had no choice but to contest the Property Claims pursuant to s. 81(1) of the BIA.
- [113] The Receiver's meritless Property Claim and the ensuing Notice of Dispute and Appeal were neither necessary, proportionate or appropriate in that the Claim was advanced when the Receiver well knew that the Trustee was attempting to address a relatively small amount (the Funds) and where the Estate's resources were minimal. The Receiver's conduct is deserving of this Court's rebuke.

2. The Commission

- [114] The approach of the Commission to its Property Claim is equally, if not more, suspect in that it amounts to no more than a supporting role for the meritless position of the Receiver.
- [115] As with the Receiver, the Commission asserts that the Funds are its property. However, the Commission then asserts that the Funds are not Mr. Byer's property; rather, they are the property of the "defrauded investors" and held in trust for them. The Commission states that it advances its Property Claim to "facilitate" the release of the Funds to the Receiver, such that, after release of the Funds to it, the Commission will simply provide the Funds to the Receiver for distribution in the US Claims Process.
- [116] The Commission did not obtain possession of the Funds prior to the bankruptcy.
- [117] The Commission asserts that its Property Claim is brought pursuant to "its statutory and regulatory authority to recover and return that property to those investors, as contemplated by the Securities Act".
- [118] The Decision requires that Mr. Byer make certain payments to the Commission pursuant to ss. 161(1)(g) and 162 of the Securities Act. I see nothing in the Decision or its registration in this Court under the Securities Act that would elevate the legal claim of the Commission to a proprietary claim against the Funds, particularly, in the face of ss. 70-71 of the BIA. It is quite unclear what the Commission refers to when it states that it could have run a statutory claims process for the investors under s. 15.1 of the Securities Act since that would only potentially arise if the Commission was entitled to the Funds as opposed to the Trustee, which it is not.

- [119] The remainder of the Commission's Property Claim is, like the Receiver's, a recitation of its arguments in opposition to the Trustee's Application for Directions. The Commission's stated objective is to "facilitate the return of the investors' money in the most cost-effective manner so that each investor receives as much of those funds as possible". That objective is one shared by all concerned here, including the Trustee and the Court. I do not consider that either or both of the Property Claims were necessary to achieve that objective; to the contrary, if nothing else, the Property Claims have resulted in significant delay and cost, all to the detriment of the IFC investors.
- [120] The Commission's rationale for filing its Property Claim was that it arose from the Trustee's initial delay in acknowledging the fraud and that the Commission was a "more expedient" route to establish a constructive trust. This argument is hardly persuasive, particularly when it would have been very clear to the Commission that it had no propriety claim to the Funds and that its arguments could have been easily advanced in relation to the Application for Directions. Expediency does not equate to having a property claim as is required by the BIA.
- [121] At bottom, the Commission's Property Claim fails even more abjectly than that of the Receiver. For the same reasons cited above in relation to the Receiver, the Commission's tactic of advancing its entirely meritless "Property Claim" is also deserving of rebuke, if not more so than in relation to the Receiver, given that it was only to "support" the Receiver's Property Claim.

D. What is the path forward - who should administer the Funds?

- [122] At the end of the day, the substantial issue that arose was who should administer the Funds and for who?
- [123] As before, the Receiver wants to receive the Funds to administer them in the US Claims Process. He argues that he has been pursuing the collection of funds for the IFC investors since 2007. He confirms that he has IFC's records and substantial background knowledge. He objects to the cost that it would take the Trustee to "come up to speed". He places great emphasis on the fact that, if he receives the Funds, none of his expenses will be paid from the Funds and that all of the Funds will go to the IFC investors in the US Claims Process.
- [124] The Commission seeks a direction that the Funds be paid to the Receiver or, alternatively, to the Commission to be paid to "defrauded investors".
- [125] The Receiver argues that fairness and equity require that the Funds only go to those who filed claims in the US Claims Process. The Commission joins with the Receiver in arguing that this Court should not allow further IFC investors "another opportunity" to participate after the Claims Bar Date, so as to prejudice the IFC investors who did file claims in the US Claims Process so as to "dilute" their rate of return.

- [126] I agree with the Trustee that all IFC investors have potential claims against the Funds that go beyond those IFC investors who participated in the US Claims Process.
- [127] I accept that some IFC investors--including BC investors--may not have filed claims with the Receiver; however, there may be valid reasons why those claims were not filed with the Receiver. For example, it is my understanding that US law allows for recovery of monies from investors even if they are "net losers" versus in Canada where recovery can be pursued only from "net winners". I also understand that US law allows for a reverse onus on the investor, which is not the case in Canada: see *LLS America LLC (Trustee of) v. Dill*, 2017 BCSC 469 at para. 151; rev'd 2018 BCCA 86 on a different point [Dill BCCA]. As such, many Canadian investors may have purposefully declined to attorn to the jurisdiction in the US for that reason or some other reason of which I am unaware.
- [128] Many Canadian cases involve actions against investors to collect funds for the benefit of all investors, and in doing so, apply Canadian law.
- [129] In *Titan Investments Ltd. Partnership (Re)*, 2005 ABQB 637 [Titan Investments] at para. 16, the court accepted that Ponzi schemes are insolvent from the time when the first investment is made, adopting the US approach. The court in *Titan Investments* granted recovery to the receiver under Alberta fraudulent preference legislation. The applicants included not only the receiver of the company that operated the fraud but also individual investors (para. 1). See also *Den Haag Capital, LLC v. Correia*, 2010 ONSC 5339 at para. 64.
- [130] In *Boale*, the Court awarded the trustee of a bankrupt a judgment against a "net winner" under a fraudulent scheme (at para. 31), finding that the recovery of the net win was supported by the FCA, the claim of "money had and received", and unjust enrichment.
- [131] Accordingly, there may be any number of reasons for an investor not to file in the US, including that the investor did not even receive notice of the US Claims Process before the Claims Bar Date.
- [132] Both the Receiver and Commission advance substantial arguments that this Court should order the release of the Funds to the Receiver on the basis of comity, particularly given the granting of the BC Recognition Order. They say that allowing the Trustee to run a further claims process would be a "collateral attack" on the US order that approved the US Claims Process. The Commission's counsel suggests that a Canadian claims process would "nullify" the US Claims Process.
- [133] I see no merit in these submissions.
- [134] I accept, without hesitation, that comity has long been recognized and applied by both Canada and the US in respect of our respective legal proceedings, including insolvency proceedings. Comity is recognized in Part XIII of the BIA.

- [135] The Receiver and Commission's submissions disregard the context in which I am being asked to consider the matter. In *Canadian Imperial Bank of Commerce v. ECE Group Ltd.*, [2001] O.J. No. 535 (S.C.J.), Justice Farley noted that comity has its limits:
- [10] The Courts of Canada have traditionally been strong supporters of recognition, on a comity basis, of foreign orders. See for example *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (Alta. Q.B.) (Forsyth J., Q.B.) and *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) (Farley J., S.C.).
- [11] However, the existence of comity has its limits. See *Hunt v. T & N plc* (1992), [1993] 1 W.W.R. 354 (B.C. S.C.) at p. 358 adopting what Robins J. stated in *Westinghouse Electric Corp. v. Duquesne Light Co.* (1977), 16 O.R. (2d) 273 (Ont. H.C.) at p. 291:

It is also fundamental that comity will not be exercised in violation of the public policy of the state to which the appeal [for assistance re comity] is made or at the expense of injustice to its citizens; and comity leaves to the court whose power is invoked the determination of the legality, propriety or rightfulness of its exercise: see generally 15A Corp. Jur. Sec., pp 391-7; Szaszy, *International Civil Procedure* (1967), pp 652-3.

[Emphasis in original.]

- [136] I do not see that my order allowing the Trustee to undertake a further claims process with respect to the Funds, now located in Canada and subject to the BIA, does violence to the concept of comity. Nor does it amount to, as argued, this Court rejecting the status of the Receiver or his previous collection efforts (including in this Court) as being against Canadian public policy. I fail to see that public policy arguments in the context of comity are engaged at all. It would hardly "shock the conscience of most Canadians" to allow Canadian/BC investors, including those who may not have been given proper notice, to share in the Funds located in Canada and subject to Canadian legislation: see Dill BCCA para. 75.
- [137] The BC Recognition Order provided that this Court would recognize and enforce the Amended Appointment Order. The BC Recognition Order did not mandate that this Court grant the Receiver exclusive jurisdiction with respect to all funds arising from IFC's operations that may be situate in BC or that are otherwise under the jurisdiction of this Court in the context of the BIA. The BC Recognition Order only states that the courts are "respectfully requested" to provide assistance to the Receiver. The BC Recognition Order also did not allow the Receiver exclusive jurisdiction to run the claims process with respect to any such funds received (or claimed as in this case).
- [138] An example of parallel proceedings and a non-US Claims Process is found in the McCandless Class Action, which the Receiver participated in, although not as a party. The settlement arose from a claim against lawyers who received IFC funds. Ultimately, the settlement amount was distributed to IFC investors from BC pursuant to a BC-run claims process, which the Receiver supported. Indeed, in his Affidavit dated October 21, 2011

(McCandless Class Action), the Receiver indicated that he was going to account for these distributions in terms of his distributions to all IFC investors who filed claims in the US Claims Process.

- [139] At no time did the Receiver "demand" that the McCandless Class Action settlement funds be paid to him for distribution pursuant to the US Claims Process.
- [140] If the Receiver had obtained possession of the Funds prior to September 2019, I have no doubt that this Court would have granted such assistance to him as was appropriate. However, what has intervened is Mr. Byer's bankruptcy, which now engages the BIA provisions discussed above and the Trustee's corresponding statutory and professional obligations under the BIA: *Juce (Re)*, 2004 MBQB 18 at paras. 33 and 36-37. The "property" that is now vested in the Trustee includes property whether situated in Canada or elsewhere (BIA, s. 2 definition of "property"); therefore, since the Funds were not paid to the Receiver prior to the bankruptcy, they now vest in the Trustee: BIA, s. 70(1). They are now subject to administration within that context and in accordance with Canadian law.
- [141] I do not consider that the BC Recognition Order or comity requires that this Court ignore the clear statutory provisions that are now in play and the interests that arise in that respect.
- [142] The Receiver argues that, a constructive trust may be imposed to remove the funds in question from the Estate and turn them over to the trust beneficiary, citing *Ascent* and *Jeffrey James*, as referred to above. In the discussion above, I have already accepted, on a preliminary basis, that a constructive trust is an appropriate remedy with respect to the IFC investors. However, these authorities do not address the more complicated issue that arises here in relation to the mechanics of who is entitled to assert the trust claim and how should that process be administered.
- [143] Indeed, I propose by the order that I am granting that the Receiver's status under the Amended Appointment Order and his prior efforts with respect to identifying claimants will be respected and recognized in this proceeding.
- [144] This does not amount to this Court ignoring the status of the Receiver in BC pursuant to the BC Recognition Order; nor do I see the Trustee's position as seeking to look behind the US judgment against Mr. Byer, as discussed in *Jones (Re)*, 2012 BCSC 1146 at paras. 83-86, citing *Canada Asian Centre Developments Inc. (Re)*, 2003 BCSC 41 at paras. 33-34.
- [145] As in *Residential Warranty ABCA* at paras. 30-31, I find no cause for complaint that the Trustee is attempting to "re-create the wheel" or cause unnecessary costs in addressing the bankruptcy and trust claims. In *Residential Warranty ABCA*, the court addressed the purpose of the BIA:
- [39] One of the fundamental purposes of the BIA is to ensure equitable distribution of a bankrupt debtor's assets among the estate's creditors: *Ramgotra* at para. 15, citing *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Determination of the

validity of Kingsway's trust claims is central to these bankruptcies. This trustee's participation in that process furthers appropriate distribution of the assets, whether that be to unsecured creditors in the event all or part of Kingsway's trust claim is rejected by the Court of Queen's Bench, or whether the estate stays out of reach of other creditors as trust property.

- [40] The ultimate purpose of the administrative powers granted a trustee under the BIA is to manage the estate in order to provide equitable satisfaction of the creditors' claims: Ramgotra at para. 45. The trustee will be assisting the court and all of the claimants in the bankruptcies in coordinating Kingsway's claims, as well as dealing with the validity and priority of the other trust claims and in providing the necessary information to the Court of Queen's Bench to resolve these issues. For these reasons, it is also just and practical that inherent jurisdiction be used to grant the charge for the trustee's fees.
- [146] I am satisfied that the Trustee has acted and continues to act in an impartial manner for the benefit of the Estate, including addressing potential trust claimants with respect to the Funds: 0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd., 2021 BCSC 1925 at paras. 188-193; Creditfinance at para. 38. That includes the bringing of this Application for Directions, which was an appropriate means to bring the matter forward for consideration by the Court: Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, The 2020-2021 Annotated Bankruptcy and Insolvency Act (Thomson Reuters, 2020) [H&M] at F\$9, at 379.
- [147] As the court noted in Residential Warranty ABQB at para. 33, the Trustee should not be criticized for "simply do[ing] its job".
- [148] I do not accept the position of the Receiver that the Trustee has acted in an inappropriate or inequitable manner. To the contrary, the Trustee has acted in a thoughtful and measured fashion in these proceedings, with a view to the interests of all stakeholders, including all of the IFC investors. The fact that the Trustee did not immediately succumb to the onslaught of the Receiver's efforts to wrest away the Funds into the US Claims Process does not mean that the Trustee has "overstep[ped] its role" or acted in a manner that deserves criticism.
- [149] I would adopt the court's description of the Trustee's motives and objectives in Residential Warranty ABCA as equally applicable here:
- [30] Kingsway objects to the trustee being paid to "defeat" its claim out of what it alleges to be its property. Kingsway's opinion on the merits of its trust claim differs from the trustee's. However, Kingsway does not suggest that the trustee has acted improperly or unfairly in its disallowance of its claim.
- [31] I do not characterize the actions of the trustee as an attempt to "defeat" Kingsway's claims. Upon receiving a proof of claim claiming property in possession of the bankrupt, the trustee must respond in one of two ways according to s. 81(2) of the BIA. The trustee can either admit the claim and deliver possession of the property to the claimant, or give notice in

writing to the claimant that the claim is disputed, indicating the reasons for the dispute. The section provides for an appeal to the Court of Queen's Bench if the trustee disputes the claim. The trustee is not to function as an adversary. Rather, it functions to advise the court of the relevant facts as its officer in a dispassionate manner, in furtherance of its role to administer the estates to completion, leaving the court to decide the matter: see *Re Beetown Honey Products Inc.* (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.), *aff'd* (2004), 3 C.B.R. (5th) 204 (Ont. C.A.) and BIA, s. 41(4). The trustee's conduct to date has been in accordance with requirements of the Act and its participation in the appeal is necessary in this case. Kingsway's claims purport to cover the entire estates of both bankrupts, against which there are competing property claims and unsecured claims.

- [150] The Receiver and the Commission raise cost issues, which I agree is a relevant consideration. The Commission says that it would be inefficient and cost prohibitive for the Trustee to administer the Funds. The Receiver argues that the US Claims Process is already well-developed under the Plan of Distribution and that the Funds can be distributed to the accepted claimants without any deduction of any fees or expenses.
- [151] Towards the conclusion of this hearing, the Commission proposed a form of order that the Receiver supported. I do not propose to recite these provisions in detail. Essentially, they propose that: 1) this Court would extend the Claims Bar Date; 2) the Receiver will apply to the US Court to approve another claims process in the US; 3) that further claims process would allow for all IFC investors to advance further claims; and, 4) any concerns by a claimant about the US claw-back or reverse onus provisions would not apply, thus adopting the Canadian approach to Ponzi schemes.
- [152] In my view, this draft order is completely unrealistic and not feasible in the circumstances.
- [153] The first point to be made is that this Court has no jurisdiction to make any order so as to extend the Claims Bar Date, as set by the US Court. Further, it is entirely uncertain as to what relief might be granted by the US Court. Finally, the draft order proposes that I adjourn all of the applications before me while the parties file applications in the US Court and await the result. However, the delay inherent in this proposal is entirely unwarranted and has the potential to increase the already significant costs incurred in bringing these applications, particularly on the part of the Trustee.
- [154] As a backstop measure, the Receiver also proposes that he run a BC claims process and administer the Funds in BC pursuant to s. 15.1 of the Securities Act at his cost.
- [155] I appreciate that all of the stakeholders must recognize and give effect to concerns about the costs of any claims process and the need to run that process in an efficient and cost-effective manner, so as avoid any unnecessary depletion of the Funds. I also accept that I have the jurisdiction under the BIA to provide for another type of claims process that would achieved the objectives here, including a claims process run by either the Receiver or the Commission.

- [156] After much consideration of these costs concerns, I do not see the Trustee's proposal as contrary to those objectives. I also conclude that empowering either the Receiver or the Commission to run a claims process within the context of the bankruptcy proceeding would not be appropriate. It is the Trustee who has statutory obligations under the BIA and the Trustee is very familiar with running claims processes in Canada under our usual procedures. Neither the Receiver or the Commission are officers of this Court. I also consider such a proposal to be either unworkable or undesirable, particularly given the litigation mentality that has been directed to the Trustee by both the Receiver and Commission.
- [157] I have no doubt that the Trustee can run a streamlined and efficient process going forward. For example, it is plain enough that the Trustee would welcome assistance from the Receiver and the Commission and those parties appear to be inclined to provide assistance to the Trustee to lessen the costs. Further, the Trustee has proposed that the Receiver be empowered to file a proof of claim on behalf of the claimants in the US Claims Process, which seems a sensible way to proceed. As far as I can tell, this omnibus claim for the IFC investors whose claims were determined in the US Claims Process would likely result in a very efficient way to record that claims in the BIA proceeding.

E. The Trustee's Charge

- [158] The Trustee seeks an order that, if the Funds are to be administered by it in the Estate, a charge be granted with respect to its fees and disbursements, subject to taxation.
- [159] Both the Receiver and the Commission oppose the imposition of a charge.
- [160] There is no dispute that this Court has jurisdiction to exercise its discretion to grant such a charge in appropriate circumstances: Residential Warranty ABCA at paras. 29-33. At para. 32, Residential Warranty ABCA outlined many case authorities supporting this conclusion. This jurisdiction has been recognized in BC: Gill (Re), 2002 BCSC 1401 at paras. 11-32 and Michie (Re), 2020 BCSC 1611 at para. 41.
- [161] I accept that imposing such a charge is an unusual measure. Given the balancing of interests that are required, such an award should be granted "sparingly": Residential Warranty ABCA at para. 33; Gill at para. 14.
- [162] Various non-exhaustive factors to be considered were set out in Residential Warranty ABCA:
- [37] Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse. The following non-exhaustive factors should be considered before invoking inherent jurisdiction here:
1. The strength of the trust claim being asserted. The mere assertion of a trust claim is not determinative of the validity of the trust and cannot preclude the trustee from investigating concerns. In some cases, the trust claim may be obvious, as was the case in C.J. Wilkinson,

where the claim was based on statutory trusts in favour of employees or tax authorities and the interim receiver conceded their validity. In other circumstances, a trustee will have no choice but to have the issue of the trust determined in order to further the administration of the bankruptcy. In that event, the ultimate beneficiary of the trust may have to shoulder the costs of the determination;

2. The stage of the proceedings and the effect of such an order on them. For example, the ability of the trustee to make distributions and their amount may depend on the determination of the issue;
3. The need to maintain the integrity of the bankruptcy process. The equitable distribution of the bankrupt estate must remain at the forefront. The court should recognize the expertise of the trustee in this regard and in effective management of bankruptcy: see GMAC at para. 50. Also, the court should assess the extent to which the determination is necessary to administer the bankruptcy and discourage academic or potentially unrewarding litigation;
4. The realistic alternatives in the circumstances. This could include a s. 38 order, deferring a decision or empowering a court to review the decision in the future, for example, after final determination of the claims and the extent of the property available for distribution. The court should consider whether there is an existing guarantee of the trustee's fees, whether the party ultimately determined to be the beneficiary might bear some responsibility for the costs, and whether counsel might be hired on contingency;
5. The impact on the trust claimants and on the trust property as well as on other creditors. The court should examine the breadth of the trust claims, the existence of competing proprietary claims, and whether the trust claims leave any assets in the estate for unsecured creditors in assessing which stakeholder is going to suffer most from the trustee's disputing of the trust claim. In that exercise, the court should assess what part of the estate would ideally bear the burden of costs. It is important to consider whether the determination would proceed by default if the trustee were not fully funded;
6. The anticipated time and costs involved. The court should contemplate whether the proposed determination represents an efficient and effective means of resolving the issue to the benefit of all stakeholders. Consideration should be given to expediting the process;
7. The limits that can be placed on the fees or charge; and
8. The role that the trustee will take in the determination process.

[Emphasis added.]

[163] In addition, I have considered similar factors which may support the imposition of such a charge, as identified by Justice Gomery in *Michie* at para. 41(d):

- i. Whether the trustee was required to address the ownership of the assets in the course of the administration of the estate;

- ii. Whether the trustee took the initiative or otherwise positively contributed to the resolution of an uncertain situation;
- iii. The work done by the trustee and the public interest in the orderly administration of bankrupt estates;
- iv. The interests of the persons entitled to the assets in question and their actions; and
- v. the interests of justice.

[164] Applying the above factors, and considering the background as noted above, I would emphasize the following. The Trustee has acted expeditiously to address the matter and in an appropriate manner, entirely consistent with its statutory and professional obligations and with a view to maintaining the integrity of the BIA process. The criticisms that the Trustee did "nothing" to preserve the funds are without merit as the Trustee only became able to seek possession of the Funds after its appointment, by which time the Funds had been frozen in Hong Kong. The Trustee has accepted that a trust claim can be advanced, however, its efforts were to protect the Funds for all investors, not just those represented by the Receiver. In that respect, the Trustee properly acted to bring this issue before the Court for consideration, rather than just handing over the Funds to the Receiver, as he demanded.

[165] It remains to be seen what will come from the further claims process. The Receiver and the Commission advance speculative arguments that none of these persons have a valid claim or could be excused for not filing a claim in the US Claims Process. I agree that whether these further IFC investors have a valid claim for recovery, and if so, in what amount, is somewhat speculative but that largely arises from the lack of notice and subsequent engagement with those investors within these BIA proceedings. If nothing else, this unknown militates in favour of a process that will fully flush out any other valid claims against the Funds.

[166] I exercise my discretion to award the Trustee a charge with respect to its fees and disbursements. However, that charge will only relate to the efforts of the Trustee in relation to the Application for Directions, the Property Claims and the Appeals and any future efforts with respect to the Funds, including the claims process to determine any further claimants to the Funds.

[167] I also consider it appropriate to set some limits on the costs that may be claimed by the Trustee against the Funds under this charge to \$80,000, subject to further court order. This amount will be in addition to any amounts payable to the Amicus.

[168] As stated above, if the Receiver and the Commission wish to assist in minimizing the costs of this further claims process, I have no doubt that the Trustee would welcome that.

VII. CONCLUSION

[169] I grant the orders requested by the Trustee as follows:

- a) I declare that the Funds vested in the Trustee on Mr. Byer's assignment into bankruptcy on September 12, 2019;
- b) Counsel for the Receiver shall forthwith pay the Funds to the Trustee, together with any accrued interest; and
- c) I adjourn generally the Trustee's application to declare that the Funds are subject to a constructive trust for the benefit of the IFC investors;

[170] I also grant the following orders:

- a) The Funds shall be paid to the Trustee potentially for the benefit of the IFC investors;
- b) The Funds are to be administered by the Trustee pursuant to a claims process for the IFC investors;
- c) The procedure for investors to file a claim with respect to the Funds shall be determined by subsequent court order in this proceeding;
- d) The Receiver is authorized to file a claim with the Trustee on behalf of IFC investors who filed a claim with the Receiver on or before the Claims Bar Date and whose claims were allowed by the Receiver and the US Court;
- e) The reasonable fees and disbursements of the Trustee and its legal counsel, with respect to these applications and with respect to the administration of a claims process for the IFC investors, are to be secured by a first charge on the Funds, to a maximum amount of \$80,000, plus any publication costs of the claims process, subject to taxation as required by the BIA;
- f) The reasonable fees and disbursements of the Amicus are to be secured by a first charge on the Funds, subject to taxation as required by the BIA; and
- g) The Trustee, Amicus, and any other interested party have leave to apply to this Court for directions and for such further order(s) as are considered necessary with respect to the claims process and the distribution of the Funds to the IFC investors.

[171] Finally, pursuant to my jurisdiction under s. 197 of the BIA, I award the Trustee its special costs, to be taxed, to be paid jointly and severally by the Receiver and the Commission. This costs award will be one half of the Trustee's costs of these applications, which I consider a reasonable attribution for the unnecessary costs incurred by the Trustee in relation to the Property Claims and Appeals.

"Fitzpatrick J."

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