
CANADA / JUDGMENT

Inland Kenworth v. Laboucane

2004 BCSC 411

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Supreme Court of British Columbia

DECIDED

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2004 BCSC 411 Inland Kenworth v. Laboucane

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Inland Kenworth v. Laboucane,

2004 BCSC 411

Date: 20040331

Docket: 11239

Registry: Cranbrook

Between:

Inland Kenworth Ltd.

Plaintiff

And

Raymond Josue Laboucane and

Frederick Albert Joseph Laboucane

Defendant

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for plaintiff

W.G. Sheard

Appearing in person

F.A.J. Laboucane

Date and Place of Hearing:

March 8, 2004

Cranbrook, B.C.

- [1] This matter arises out of a sales agreement between Inland Kenworth Ltd. ("Inland") as vendor and Fred and Ray Laboucane (the "Laboucanes") as purchasers for a used Linkbelt excavator, model 2700CII and a used Pace Arrow motor home (collectively the "Equipment"). Inland claims that the Laboucanes defaulted on their agreement and asks for judgment in the amount of \$41,867, plus interest and costs. Fred Laboucane asks that the action against him be dismissed and for an award of special costs.

I. Background

- [2] The plaintiff is a company incorporated and registered in B.C. It does business under the names Parker Pacific Equipment Sales and Inland Kenworth Parker Pacific. Ray Laboucane is a businessman residing in Kimberley, and Fred Laboucane, his father, is a heavy equipment operator also residing in Kimberley. Ray Laboucane did not file a defence in this action.
- [3] The parties entered into a sales agreement on February 5, 1998 whereby the Laboucanes purchased the Equipment for \$100,295.03. This amount was net of a \$16,050 down payment and \$12,800 in previously made rental payments. The agreement includes a term that all purchasers are jointly and severally liable for the purchase price. It also states that the purchaser agrees to the terms and conditions on the reverse side of the agreement; neither party produced that reverse side. The vendor is listed as Parker Pacific Equipment Sales and the agreement is signed by Graham Eady, Inland's credit manager at the time. Both Laboucanes signed the sales agreement. At the time of purchase, the Laboucanes told Inland that they intended to use the Equipment for business purposes.
- [4] On March 23, 2000, Ray Laboucane entered into an agreement modifying the original sales agreement. At that time there was \$59,649.71 in principal owing on the Equipment. The modified agreement provided that the Laboucanes were to pay \$2,835.86 per month commencing on April 23, 2000 and ceasing on March 23, 2002. It also provides that upon default "the whole of the Unpaid Balance and interest thereon as aforesaid and all other money owing hereunder shall become due and payable forthwith without notice." The vendor is listed as Parker Pacific Equipment Sales and Graham Eady signed this agreement as well.
- [5] The Laboucanes defaulted on the contract in or around September 2000, which fact is not in dispute. Though the date is unclear, Inland repossessed the Equipment either in late 2000 or early 2001. It demanded payment of the balance owing by letter dated November 1, 2000; the Laboucanes have not paid this amount. Inland originally claimed \$64,778.27 plus interest

and costs; however, since the time it filed the statement of claim, Inland has sold the Equipment and has applied the sales proceeds to the amount owing. It has also excluded some previously claimed legal costs, which it was advised were not recoverable.

- [6] Before selling the Equipment, Inland had it appraised. A January 19, 2001 machine inspection report prepared by one of Inland's mechanics estimates the excavator's value as \$65,000 less \$28,000 in repair costs and \$10,000 in gross profit, or \$27,000 net. An undated used equipment appraisal lists the excavator's "net blue value" as \$35,000. A January 19, 2001 used vehicle appraisal lists the motor home's "net blue value" as \$8,000.

II. Parties' Positions

- [7] Inland seeks judgment for the deficiency between the balance owing on the sales agreement and the sales proceeds. Part of the deficiency includes a sales commission on the Equipment of approximately \$3,500. Because default is not in issue, if Fred Laboucane fails to raise an effective defence to all or part of the claim, Inland is entitled to judgment in its favour.
- [8] Fred Laboucane asserts the following main defences in arguing the amount owing should be reduced:
- (a) There was never a contract with the plaintiff because the vendor is listed as Parker Pacific Equipment Sales and Inland is the plaintiff listed in this action.
 - (b) Because the modification agreement does not bear Fred Laboucane's signature, the original contract is nullified.
 - (c) Inland did not act in a commercially reasonable manner during the seizure and sale of the Equipment. Because the Equipment was sold in a "fire sale", Inland should not be compensated for sales commissions nor should it be able to charge back repair costs.
 - (d) Inland is in breach of s. 59 of the Personal Property Security Act, R.S.B.C. 1996, c. 359 (the "PPSA").
 - (e) By returning the collateral to its inventory, Inland is deemed to have elected to keep the collateral in full satisfaction of its debt.
 - (f) Inland acted with bad faith.
- [9] I will go through each of those defence arguments in turn.

III. Discussion

(a) Vendor's Name

- [10] The sales agreement clearly lists Parker Pacific Equipment Sales as the vendor and the entity suing for default is clearly Inland. The question becomes whether the fact that the names are different has an effect on that agreement. Fred Laboucane's argument, essentially, attempts to invoke the doctrine of mistake as to the identity of a party to the contract.

- [11] For there to be a valid contract the parties to that contract must come to an agreement about its terms. If the parties do not come to an agreement on certain important matters, the existence of the contract can be called into question. One reason parties may not come to a true agreement over terms is because one or both parties has made a mistake about those terms.
- [12] Fred Laboucane in his April 12, 2002 affidavit claims he never knew he was contracting with the plaintiff. This could qualify as a mistake as to the identity of a party. However, such a mistake must be material in order for it to have an effect on the contract. In *Industrial and Educational Publishing Co. v. Gold Medal People Ltd.* (1927), 32 O.W.N. 228 (Ont. C.A.), the Ontario Court of Appeal held as follows at p. 228:

Where a person enters into a contract with another, and is induced by that other to make the contract by misrepresentation or deceit, whereby he is misled as to the identity of the person with whom he is contracting, the contract will be non-enforceable, and may be repudiated at any time on the facts being learned. Where, however (except in cases where the identity of the person contracted with is an essential element in the contract), there is no misleading by the other party, the contract will be binding on both parties, notwithstanding the impression on the part of one of the parties as to the identity of the other contracting party.

- [13] The situation in this case falls squarely into the second category. While Fred Laboucane may have been confused as to the vendor's name, there is no evidence that Inland induced this confusion in any way.
- [14] In any event, there is no evidence that the identity of the vendor was material to the contract, making any such confusion irrelevant. The fact that the certificate creating Parker-Pacific Equipment Sales Limited Partnership states that the partnership's business was to terminate October 1, 1992 is also irrelevant. Inland is the proprietor of and uses the trade name "Parker Pacific Equipment Sales", which has no relation in this case to the existence or non-existence of a partnership bearing a similar name.
- [15] I find that the doctrine of mistake provides Fred Laboucane with no relief in these circumstances.

(b) The Modification Agreement

- [16] There is no evidence about why the parties entered into a modification agreement in March 2000. Fred Laboucane complains that the agreement was modified without his knowledge or consent, which nullified the original contract. Only Ray Laboucane's signature appears on the modification agreement, though it purports to affect the rights of Fred Laboucane as well, since he is listed as a purchaser.
- [17] Fred Laboucane's argument on this point can be divided into two streams: novation and alteration.

i. Novation

[18] Where a novation argument succeeds, the modified agreement replaces the existing one and any rights and liabilities under the existing agreement are extinguished (see *Commercial Bank of Tasmania v. Jones*, [1893] A.C. 313 (P.C.)).

[19] The B.C. Supreme Court set out the test for novation as follows in *Polson v. Wulffsohn* (1890), 2 B.C.R. 39 (S.C.) at p. 43:

[F]irst, the new debtor must assume the complete liability; second, the creditor must accept the new debtor as a principal debtor, and not merely as an agent or guarantor; third, the creditor must accept the new contract in full satisfaction and substitution for the old contract[.]

[20] Some authorities add a fourth factor - that the new contract must be made with consent of the old debtor - but Mr. Justice Esson remarks in *Re Prospect Mortgage Investment Corp. and Van-5 Developments Ltd.* (1985), 23 D.L.R. (4th) 349 (C.A.) at p. 364 that:

I have found no case in which novation has been denied because of the absence of consent of the old debtor. Some of the authorities which have considered the question have expressed the view that the requirement is not one for express consent.

[21] The Supreme Court of Canada referred to the Polson test with approval in *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410. However, Madam Justice Wilson for the majority mentioned this caution at p. 427:

Because assent is the crux of novation it is obvious that novation may not be forced upon an unwilling creditor and, in the absence of express agreement, the court should be loath to find novation unless the circumstances are really compelling. Thus, while the court may look at the surrounding circumstances, including the conduct of the parties, in order to determine whether a novation has occurred, the burden of establishing novation is not easily met.

[22] There is no evidence about the conduct of the parties relative to this modified agreement; therefore, I must confine my analysis to what that modified agreement states. There is nothing in that agreement that makes it possible for me to find that the Polson test is satisfied and I raise two problems as examples.

[23] First, the agreement clearly lists the purchasers as Ray and Fred Laboucane. This belies an intention on the part of Ray Laboucane to assume the entire debt.

[24] Second, the modified agreement states that "[e]xcept for modifications above stated, all other terms of the said Conditional Sales Contract shall remain in full force and effect unchanged and are hereby confirmed." In *Canada Permanent Trust Co. v. Carlyle* (1983), 49 B.C.L.R. 342 (S.C.), Mr. Justice MacDonald dealt with a fact pattern very similar to the one at bar. In that case, two brothers assumed a mortgage. After the brothers had entered into one renewal agreement together, one brother accepted second and third renewal offers on the part of the bank without the knowledge or consent of the other brother. These renewals extended the length of the mortgage and increased the interest rate payable. The second and third renewals both included a term to the effect that all terms of the original mortgage not

inconsistent with the terms in the renewal agreement in question were to remain in force.

[25] Mr. Justice MacDonald said the following at pp. 346-47:

I would hold that it was the intention of Canada Permanent that the original mortgage was to remain in force; it was not their intention this renewal agreement be substituted for the mortgage. I would hold that the third requirement for novation has not taken place for the reasons stated. I would hold that the renewal agreements do not constitute a new contract - that no novation has taken place.

[26] Mr. Justice Esson accepted Mr. Justice MacDonald's reasoning on this point in Prospect Mortgage Investment, resolving some of the conflict in the law prior to that decision.

[27] The facts here lead to a similar result on this point as that in Carlyle. There is no indication on the part of Inland to accept the modified agreement as a new contract, which precludes reliance on novation.

ii. Alteration

[28] The general principle, as described by G.H.L. Fridman in *The Law of Contract*, 2d ed. (Toronto: Carswell, 1986) at p. 447 is that "a material alteration by one party, not assented to by the other and evidenced appropriately, will nullify the original contract." As noted, the alteration must be material, which was defined in this context in *Roberto v. Bumb*, [1943] 2 D.L.R. 613 (Ont. C.A.) at 618:

A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed or may otherwise prejudice the party bound by the deed as originally executed.

[29] In *Carlyle*, Mr. Justice MacDonald, after having dismissed the novation argument, found that the bank could not claim against William Carlyle because the agreements to renew the mortgage and change the interest rate constituted material changes to the original mortgage. Because the bank did not obtain William Carlyle's consent for those changes the original agreement was nullified.

[30] However, Mr. Justice Esson in *Prospect Mortgage Investment* questioned this part of the reasoning in *Carlyle*. He noted that Mr. Justice MacDonald relied on *Holland-Canada Mortgage Company v. Hutchings*, [1936] S.C.R. 165, in coming to his conclusion. However, *Holland-Canada* dealt with the position of sureties on a mortgage and not the mortgagors or "primary obligators" themselves. Mr. Justice Esson expressed the view at p. 360 that "[t]he rule applied in *Holland-Canada v. Hutchings* has no application to mortgagors or covenantors."

[31] Mr. Justice Esson also referred to *Canadian Imperial Bank of Commerce v. Skender*, [1986] 1 W.W.R. 284 (B.C.C.A.). In that case, the defendant guarantor signed a standard form guarantee document, which contained some spaces left blank. Subsequent to his having

signed, a bank employee filled in the blanks without the defendant's express or implied authority to do so. Mr. Justice Lambert first found that the guarantee was not unenforceable because the blanks were not filled in, then turned his mind to the effect of the alteration. He held as follows at p. 288:

In my opinion, the application of the rule [relieving parties from liability on the grounds of alteration] must be guided by its underlying rationale. If there is fraud, then the perpetrator should not only be prevented from benefiting from his fraud, but, additionally, he should be penalized by preventing him from enforcing even the original unmodified obligation.

The materiality of the alteration should also be viewed from the perspective of the rationale for the rule. If the alteration makes a significant difference, in favour of the promisee, in the fundamental character of the obligations under the agreement, then, absent an explanation, it is reasonable to assume a fraudulent or mischievous purpose. The penalty is then appropriate.

But, if it is apparent from all the evidence that the purpose was innocent and well-intentioned, then it seems too simple, in today's welter of documents, to release the promisor from an obligation for which he is likely to have received a commensurate benefit, just because a clerk in the employment of the promisee fills in a blank in a way that causes some alteration in the legal effect of some clause in the document. I think that, in addition to considering whether there was any alteration in the legal effect of the document, there should be some additional balancing of the interests of justice; some flexibility in the concept of materiality of the alteration; and some recognition of the principles of unjust enrichment.

[32] Though I have briefly set out the law, there is a critical problem with this argument. Though it seems trite to say so, for a material alteration argument to succeed there must be an alteration. In this case, although there is clearly a modification agreement, there is no indication what the modification may be. In this regard, I lament the fact that neither party included a copy of the terms and conditions of the original contract. Without it, and without any other evidence as to which terms changed, I cannot continue the material alteration analysis. Mr. Justice Lambert clearly indicates that such an analysis is circumstance-specific and I am unaware of the circumstances here. The onus is on Fred Laboucane to persuade me of the applicability of this doctrine since he is the one who raised it and he has not done so.

[33] Fred Laboucane's arguments related to the modification agreement fail. That agreement has no effect on his legal liability under the sales contract.

(c) Commercially reasonable actions/"fire sale" argument

[34] The essence of this argument is that Inland did not act in a commercially reasonable manner in selling the Equipment, as required by s. 68(2) of the PPSA.

[35] Whether or not a sale is commercially reasonable is a question of fact in each case (see *National Bank of Canada v. Marguis Furs Ltd.*, [1987] O.J. No. 1228 (H.C.J.) (Q.L.)). In *National Bank*, Mr. Justice Steele came to the following conclusion about the applicable test for determining whether a secured party has effected a "commercially reasonable" transaction:

Generally there are two tests that may be applied to the conduct of a sale as referred to by the Court of Appeal in *Wood v. Bank of Nova Scotia et al*, 14 R.P.R. 1. One is the less stringent test which is that the creditor who sells must act in good faith. The plaintiff has clearly complied with that test. The other test is the more stringent one, that the creditor must take reasonable care that the proper value is obtained. While it is not a trustee for the debtor it cannot act negligently in the sale. I adopt the principle as stated in *Debor Contracting Ltd. v. Core Rentals Ltd and Parks*, 44 C.B.R.9 (a Mechanics' Lien action) that the creditor must "act a role somewhat akin to that of an agent or fiduciary for the purpose of a sale". This is a higher standard than that referred to in *Kimco Steel Sales Ltd. v. Latina Ornamental Iron Works Ltd*, 1984 3 P.P.S.A.C, 237, at page 241 where the test was that the sale be in good faith and not be in a recklessly improvident manner calculated to result in a sacrifice of the equipment.

In my opinion the proper test under the P.P.S.A. is the more stringent one that I have enunciated.

[36] Therefore, whether or not Inland has acted in a commercially reasonable manner depends on whether or not it took reasonable care to obtain the proper value for the Equipment.

[37] The bottom line is whether or not the sale yielded an appropriate amount. The only evidence before me about the value of the Equipment comes from Inland. It assessed the excavator as worth between \$27,000 and \$35,000 and the motor home as worth \$8,000; it sold the excavator for \$30,000 and the motor home for \$4,386.

[38] In the circumstances, I find that this was a commercially reasonable sale. Inland got an amount between the two assessed amounts for the excavator and, though it did not fare so well with the motor home, the difference only amounts to about \$3,500 on a recovery figure of almost \$40,000.

[39] As well, there is nothing else in the evidence to suggest that Inland was negligent in the way in which it conducted the sale. It was entitled to sell privately under s. 59(3) of the PPSA, which it chose to do, and it also conducted some minor repairs. Further, taking October 6, 2000 as the date on which the Equipment was seized, Inland did not sell the excavator until June 6, 2001 and the motor home until July 23, 2001, which can hardly justify characterizing the sales as fire sales.

[40] Notwithstanding my characterization of the transactions as commercially reasonable, I must still assess the propriety of Inland claiming a commission amount on these sales. Section 59(2)(a) of the PPSA allows a secured party to recover, among other costs, the reasonable expenses of disposing of the collateral. Counsel for Inland did not point me to any authority where a secured party was able to recover from the debtor commission paid to its own sales people. However, I find that this amount is reasonable in this case. In choosing

to sell the Equipment on its own, Inland knew that its salespeople would be entitled to a commission payable by Inland. But had it chosen to sell the Equipment through an agent there would likely be commission either payable by Inland or subtracted from the sales proceeds by the agent before submitting them to Inland; this would result in a lower amount realized on sale and, consequently, a higher deficiency owing by the Laboucane. Inland should not be penalized for having chosen to deal with the sale on its own. The commission amount is properly claimed.

[41] Inland properly charged repair costs pursuant to s. 59(2)(a) of the PPSA.

(d) Breach of s. 59 of the PPSA

[42] Fred Laboucane does not claim that he never received a notice of intended sale, as required by s. 59 of the PPSA. In fact he has attached the notice as exhibit C to his April 12, 2002 affidavit. What he does argue is that the notice is invalid for two reasons: first, because the notice does not include the date, time and place of sale, and second, because the secured party is listed on the notice as Parker Pacific Equipment Sales.

[43] I do not accept either of these arguments. First, s. 59 of the PPSA requires a secured party to send a notice of disposition to certain entities and prescribes what information needs to be in the notice in subsection (7). Nothing in that subsection requires a party to include the date, time and place of private sale. What it does say, in subparagraph (7)(h), is that the notice must include the date "after which any private disposition of the collateral is to be made" (emphasis mine). The other date, place and time requirements relate to public sales. The notice fulfills the appropriate requirement by indicating in paragraph (f) that "Unless the Collateral is redeemed not later than 20 days after you receive this Notice, the Collateral will be disposed of by private sale, public sale, lease, auction or other disposition".

[44] Second, nothing in subsection 59(7) requires the secured party to identify itself to the persons receiving the notice. It is absurd to think that a secured party would not identify itself in such a notice. However, I do not agree that where the secured party uses a different name this affects the validity of the notice. The purpose of the notice is to inform the debtor and others entitled to receive notice that the secured party intends to dispose of the collateral; it is not to notify the debtor of the secured party's identity. The notice clearly fulfills its primary purpose here.

[45] I also refer back to part of my analysis discussing the fact that Inland is the plaintiff here but Parker Pacific Equipment Sales is listed as the vendor in the sales agreement. I found that the difference in name was not material and did not affect the validity of the contract. The same applies here. Fred Laboucane does not allege that the different name caused him confusion as to what collateral or what secured transaction the notice referred to and, consequently, the listing of Parker Pacific Sales Equipment on the notice does not invalidate the notice in this case.

[46] In any event, as Inland argues and according to the very section Fred Laboucane referred me to, failure to comply with s. 59 creates a cause of action as per s. 69(2); it does not act as a defence to a deficiency claim (see *AT&T Capital Canada Inc. v. Tom Yee Co. Ltd.*, [1996] B.C.J. No. 189 at ¶ 51 (S.C.) (QL)).

(e) Returning collateral to inventory

[47] Fred Laboucane asserts that the fact that Inland returned the Equipment to its inventory means that it elected to keep the collateral in full satisfaction of its debt. This argument stems from an interpretation of the voluntary foreclosure procedure in s. 61 of the PPSA. That section provides that, upon default, a secured party may propose to keep the collateral in full satisfaction of the debt and it must send notice of such a proposal to the parties listed in s. 61. If voluntary foreclosure is successful, the secured party loses any right to sue for the deficiency between the value of the collateral and the amount owing.

[48] In *Angelkovski v. Trans-Canada Foods Ltd.*, [1986] 3 W.W.R. 723 (Man. Q.B.), Angelkovski bought a restaurant and the balance owing was partially secured by a security agreement over the restaurant chattels. Angelkovski defaulted and the defendant seized the restaurant by padlocking the door. A bailiff tried to sell the restaurant but this sale proved abortive; therefore, a few months later, the defendant opened the restaurant for business. A few months after that, the restaurant burned down. The plaintiffs claimed that the defendant had elected to keep the restaurant in full satisfaction of the amount owing under the s. 61 of the Manitoba Personal Property Security Act in force at the time (the equivalent to our s. 61).

[49] Mr. Justice Wright determined that until the appropriate notices are sent, there can be no voluntary foreclosure. He made the following comments at p. 729:

The effect of these statutory provisions then is to preclude any actual or deemed appropriation of the collateral according to the general law principles I earlier identified. The intention and objective of the secured party is no longer of importance. That does not mean to say a secured party does not have to account for the chattels and may be subject to a claim by the debtor for damages in that regard (cf. 62(2)), but - be that as it may - unless there has been compliance with the [notice] procedure under 60(2) and (3) the secured party is free to pursue any perceived deficiency.

[50] The Saskatchewan Court of Queen's Bench came to a different conclusion in *Yuan v. Mah Investments Ltd.* (2001), 205 Sask. R. 22 (Q.B.). In that case, the Yuans also purchased a restaurant. The Yuans ceased making payments on their lease, which was registered under the Saskatchewan personal property security scheme, and the defendant seized the collateral. Mr. Justice Foley determined that the defendant had voluntarily foreclosed on the collateral even though the defendant had not sent the appropriate notices. This precluded it from suing the Yuans for deficiency. He discussed the Angelkovski case at ¶ 66:

In *Angelkovski et al. v. Trans-Canada Foods Ltd.*, [1986] 3 W.W.R. 723 (Man. Q.B.), Wright J., considered the effect of the secured party failing to give notice of intention to retain the collateral under the equivalent Manitoba statute. He concluded at p. 729 that "until there has been compliance with the [notice] provisions . . . the debtor retains the right to redeem." This may well be correct but the trial judge then went on to state as a corollary to his first proposition that the debtors "are not entitled therefore to a general declaration that they have no further obligation to the [secured creditor]." If by this is meant that, although the creditor has in fact retained the collateral, it can, by the simple device of defaulting in the giving of the statutory notice to the debtor, keep the possibility of a deficiency action alive, then this is a strange and unacceptable result. It is a result which I am not prepared to adopt as the law of Saskatchewan. Professors Cuming and Wood in *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Toronto: Carswell, 1994) at p. 445 stated that the conclusion in *Angelkovski* to the effect that the deficiency is not extinguished where the secured party used the collateral for its own purposes "is open to question". I agree and conclude that [Mah Investments Ltd.], having retained the collateral, cannot now assert a claim for deficiency despite not having complied with the notice provision of the Act.

[51] This question remains open in B.C., as well. Professors Cuming and Wood in *British Columbia Personal Property Security Handbook*, 4th ed. (Scarborough, Ont.: Carswell, 1998) have this to say at p. 407:

The consequences of a failure to give the notice under s. 61(1) to a person entitled to receive it are not fully addressed by the Act. In *Tureck v. Hanston Investments Ltd.* [(1986), 30 D.L.R. (4th) 690 (Ont. H.C.)], it was held that, until the notice is given, a person entitled to the notice may force the secured party to dispose of the collateral through sale. In *Angelkovski v. Trans-Canada Foods Ltd.* the court went further and held that the secured party's right to a deficiency is not extinguished until the notice requirements are satisfied even though the secured party seized and used the collateral for its own purposes. This conclusion is open to question. A case may arise where the secured party has notified the debtor of its intention to retain the collateral in satisfaction of the obligation, but has failed to give a notice to a subordinate secured party who registered its security interest. The secured party who has failed to comply with s. 61 should not be permitted to assert a deficiency claim against the debtor under these circumstances. In order to prevent injustice the court may apply an estoppel principle or hold that the delay and use of the collateral rendered the accurate determination of a deficiency impracticable.

[52] In this case, the issue is resolved by analyzing Inland's seizure of the collateral. When it took possession of the Equipment, it initiated some repairs then placed both pieces in its inventory. This is not a proposal by Inland showing an intention to keep the collateral and this is not a situation such as that Professors Cuming and Wood describe where Inland should be estopped from claiming for the deficiency. Although *Angelkovski* has been questioned on some grounds, the following examples stated at pp. 726-27 remain helpful:

If the facts show the defendant intended to reopen the restaurant to sell the chattels as part of an ongoing business in order to improve their sale value, with the primary purpose of recovering the balance of the debt owing, then I do not think an appropriation of the chattels can be found. On the other hand if it can be concluded the defendant reopened the restaurant with the essential purpose of operating it himself, or of reselling it, so as to make more money than the amount owing on the debt, with no intention of accounting to the plaintiff and his partner for any surplus, then the court could reasonably conclude the chattels were appropriated in full satisfaction of the debt.

[53] Mr. Justice Wright in *Angelkovski* found the latter, which invoked the s. 61 discussion. I find the former; therefore, s. 61 does not apply. Inland showed a clear intent to sell the chattels as part of its ongoing business by placing them in its inventory, which renders the lack of notice question moot. Consequently, Inland did not accept the Equipment as voluntary foreclosure under s. 61 of the PPSA and it is not precluded from suing the Laboucane for deficiency.

(f) Bad faith

[54] Fred Laboucane has not introduced any evidence that supports an allegation of bad faith. Therefore, I dismiss that part of the claim.

IV. Conclusion

[55] Although Inland claimed \$44,337.76 due and owing on September 26, 2001, its counsel conceded that certain legal and repair costs should not have been included in that sum. Deducting \$1,883.50 in legal costs and \$587.26 in repair costs leaves a claim of \$41,867. Inland indicates that figure includes interest calculated up to September 26, 2001; however, I have no way of determining from the evidence whether the interest charged was pursuant to the original agreement or the modification agreement. The interest rate payable on the original contract is not available. The modification agreement provides for interest at 6% per annum above the "prime rate", defined as the variable rate of interest designated from time to time by the Canadian Imperial Bank of Commerce as its prime rate. But there was no evidence about that bank's prime rate at any time. Therefore, I cannot determine the interest rate applicable to the modification agreement.

[56] In the circumstances, I will not award judgment for the component of the claim seeking interest pursuant to either agreement. I calculate the balance owing as follows:

\$64,778.27

claimed in the statement of claim

-30,000.00

proceeds realized from the sale of the excavator

- 4,386.00

proceeds realized from the sale of the mobile home

+ 9,218.25

repossession and repair costs

- 1,883.50

improperly claimed legal fees

- 587.26

improperly claimed repair costs

= \$37,140

TOTAL (rounded)

[57] Inland is entitled to default judgment against Ray Laboucane and to judgment against Fred Laboucane for \$37,140. In the circumstances I award court ordered interest at registrar's rates against both defendants from January 25, 2001, the date Inland filed the statement of claim, to date of judgment. Inland is also entitled to its costs, on Scale 2.

"T.J. Melnick, J."

The Honourable Mr. Justice T.J. Melnick

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