

CANADA / JUDGMENT

Jacobs v. Laumaillet

2010 BCSC 1229

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Supreme Court of British Columbia

DECIDED

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2010 BCSC 1229 Jacobs v. Laumaillet

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jacobs v. Laumaillet,

2010 BCSC 1229

Date: 20100714

Docket: S101841

Registry: Vancouver

Between:

Yvonne Jacobs

Petitioner

And

Albert Laumaillet, 400338 B.C. Ltd.

and Walter Stipic

Respondents

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

Philippa Estall

Counsel for the Respondent, 400338 B.C. Ltd.:

David Moonje

The Respondent, Walter Stipic:

Appearing In Person

Place and Date of Hearing:

Vancouver, B.C.

June 23, 2010

Place and Date of Judgment:

Vancouver, B.C.

July 14, 2010

- [1] THE COURT: This application concerns priorities between three creditors of the respondent Albert Laumaillet (the "Debtor"). The petition is brought by Yvonne Jacobs. On July 23, 2008, she loaned \$30,000 to the Debtor. He agreed to repay that amount plus 10% as a finder's fee by September 30, 2008. The loan agreement refers to the Debtor's motor vessel Virago and grants a security interest in the vessel to Ms. Jacobs. She registered her interest in the Personal Property Registry on August 18, 2008. There is no issue that her interest is perfected under the provisions of the Personal Property Security Act, R.S.B.C. 1996, c. 359 ["PPSA"].
- [2] The respondent, 400338 B.C. Ltd. (the "Numbered Company") also has a perfected security interest in the Virago. The Numbered Company loaned \$22,000 to the Debtor by way of a promissory note dated December 7, 2004. The Debtor granted a security interest in the Virago to the Numbered Company by way of a General Security Agreement (the "GSA") also dated December 7, 2004. The Numbered Company registered its security interest under the PPSA on the same date.
- [3] Walter Stipic claims a lien as a garage keeper for work he did on the Virago as set out in his invoice dated May 1, 2009. He supplied parts and labour for repairs to the engine and engine room of the vessel after it was damaged by fire. He filed the lien on June 10, 2009. The lien is claimed pursuant to s. 3 of the Repairers Lien Act, R.S.B.C. 1996, c. 404 ["RLA"].
- [4] The Debtor was served with notice of these proceedings. He did not appear at the hearing of this matter and filed no materials in response to the petition of Ms. Jacobs or the notice of motion of the Numbered Company.
- [5] As of July 2009, the Debtor was in default of the loan from Ms. Jacobs. She seeks repayment of the amount owing on the loan plus interest. In order to enforce her security interest and rights under the PPSA, Ms. Jacobs arranged for bailiffs to seize the Virago on July 14, 2009. Since that time, the Virago has remained in dry storage and Ms. Jacobs has paid the storage

fees. On May 30, 2010, the storage charges totalled \$8,290.33. In addition to those charges, Ms. Jacobs seeks expenses (bailiffs' fees, marine surveyors' fees and legal fees) incurred in the seizure of the vessel, totalling \$4,737.60.

- [6] As of July 2009, the Debtor had repaid \$15,000 of the principal of the loan from the Numbered Company. In other words, approximately 68% of the loan had been repaid. The loan went into default at about that time. The Numbered Company seeks repayment of the outstanding principal and interest in the total amount of \$7,911.80 to the end of May 2010. In addition, the Numbered Company seeks payment of legal fees incurred in these proceedings in the amount of \$5,556.17. The Numbered Company says that these fees were incurred in order to protect its interest in the security and accordingly, pursuant to the provisions of the GSA, it is entitled to recover that amount.
- [7] Following seizure of the Virago, Ms. Jacobs took steps to sell the vessel. She located a buyer who offered to purchase the boat at a price all parties agree is commercially reasonable. On June 23, at the hearing of this petition, I approved the proposed sale of the Virago for \$22,000. I reserved my decision on the priority issues raised by these facts until today.
- [8] The issues raised by these facts are as follows.
- 1) Is Mr. Stipic entitled to rely upon his garage keeper's lien?
 - 2) Is Ms. Jacobs entitled to recover the expenses she incurred to seize, store and sell the Virago in priority to the interest of the Numbered Company?
 - 3) Is the Numbered Company able to rely upon its security interest when the Debtor had repaid more than two-thirds of the total amount of the obligation secured when the Virago was seized in July 2009?
 - 4) Is the Numbered Company secured for its legal fees, as expenses incurred to establish or protect its security interest, in addition to the principal and interest owing to it?
- [9] I will deal with each issue separately.

Issue 1. Is Mr. Stipic entitled to rely upon his garage keeper's lien?

[10] Section 3(1) of the RLA provides as follows:

- (1) If a garage keeper, before surrendering possession of a ... boat ... obtains from the person at whose request the garage keeper has bestowed money, skill or materials on it, an acknowledgment of debt by requiring that person to sign an invoice or other statement of account, the garage keeper does not, by surrendering possession of the ... boat ... lose any lien on it.
- [11] At the hearing, I indicated to Mr. Stipic that I would permit him to file affidavit evidence to prove he is a garage keeper. He did not do so, but given the decision I have reached, his failure to do so is not important. I infer that he is a "person who keeps a place of business for the ... storage or repair of ... boats or outboard motors" and thus meets the definition of a

garage keeper. I also find that he obtained an appropriate acknowledgement of debt from the Debtor. At the hearing before me, Mr. Stipic presented a letter from the Debtor stating that until the latter was in a position to pay back the money owing, Mr. Stipic could retain possession of the Virago. I assume that when the Virago was seized at the direction of Ms. Jacobs, it was taken from Mr. Stipic.

- [12] The RLA provides for two types of liens: possessory liens under s. 2 and non-possessory liens under s. 3. Pursuant to s. 32 of the PPSA, both types of liens take priority over perfected security interests.
- [13] A possessory lien ceases to exist 21 days after possession is surrendered unless, in the meantime, the garage keeper registers a financing statement respecting the lien on the boat: RLA, s. 3(2).
- [14] As noted above, Mr. Stipic filed a financing statement on June 10, 2009.
- [15] Section 4(1) of the RLA provides that:
 - (1) On the registration of a financing statement, the lien continues for a period of 180 days after the date of registration and, subject to subsections (2) and (3), after that period
 - (a) the lien ceases to exist, and
 - (b) the registration of the financing statement is no longer effective.
- [16] Sections 11 and 12 of the RLA provide for the seizure and sale of a boat that is the subject of a garage keeper's lien. Section 4(2) provides that if the boat has been seized pursuant to s. 11, the lien continues so long as the vessel remains in the possession of the sheriff or the garage keeper. Section 4(3) provides that if a seizure cannot be effected by the garage keeper within 180 days, this court may order "on application made without notice to any person but within the 180 days, that the time during which the seizure may be made be extended for a further period not exceeding 180 days".
- [17] Under the provisions of the RLA, the rights of a garage keeper are clearly specified. Where a lien is properly registered, the garage keeper has 180 days to seize the collateral or apply to court to extend the time to do so. Here, Mr. Stipic did neither. While he did have possession for a period of time, he lost that possession and was not in a position to, and did not effect, a seizure of the vessel under s. 11 and sell it under s. 12. Accordingly, pursuant to the provisions of the RLA, his lien "ceased to exist" and the registration of the financing statement was no longer effective as of December 7, 2009.
- [18] It seems somewhat unfair that the other secured parties receive the benefit of the work done by Mr. Stipic when there is insufficient value in the boat to pay him after payment of their interests. However, he did not take the steps that he could have to protect his interest in the Virago. He could have applied to extend the lien, but that application had to be made prior to the expiry of the lien.

- [19] I have no power at this time to extend the time period. As a general rule, the court has no inherent jurisdiction to extend the period of time established by legislation for doing something. Inherent jurisdiction cannot be exercised so as to conflict with a statute: *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.*, [1971] 4 W.W.R. 542 (Man. C.A.).
- [20] In summary, I conclude that Mr. Stipic is not entitled to rely on his garage keeper's lien. As a result, his claim does not have priority over the interests of the Numbered Company and Ms. Jacobs.

Issue 2. Is Ms. Jacobs entitled to recover the expenses she incurred to seize, store and sell the Virago in priority to the interest of the Numbered Company?

- [21] Ms. Jacobs argues that the provisions of s. 59 of the PPSA apply to the present situation and require that the expenses incurred by Ms. Jacobs to seize, store and sell the boat are a first charge against the sale proceeds. Section 59(2) provides as follows:
- (2) After seizing or repossessing the collateral, a secured party may dispose of it in its existing condition or after repairing it and the proceeds of the disposition must be applied in the following order to
- (a) the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses of enforcing the security agreement incurred by the secured party, and
- (b) the satisfaction of the obligations secured by the security interest of the party making the disposition,

and any surplus must be dealt with in accordance with section 60.

- [22] Section 60(2) provides that once a security holder has dealt with the collateral in accordance with s. 59, any surplus must be paid in the following order to:

- (a) a person who has a subordinate security interest in the collateral

...

- (b) any other person with an interest in the collateral if that person has given a notice of his or her interest to the secured party before the distribution, and
- (c) the debtor or any other person who is known by the secured party to be an owner of the collateral,

- [23] Ms. Jacobs argues that the expense of seizing and selling the collateral must be paid in priority to any other security interest, including holders of prior security interests. The rationale for this is that the seizure and sale benefits all of those parties who hold a security interest.

[24] The Numbered Company argues that s. 59(2) cannot be read in isolation. It must be read along with s. 35(1) of the PPSA, which sets out the residual priority rules as follows:

- (1) If this Act does not provide another method for determining priority between security interests,
 - (a) priority between perfected security interests in the same collateral is determined by the order of the occurrence of the following:
 - (i) the registration of a financing statement without regard to the date of attachment of the security interest;

[25] The registration of the financing statement in relation to the Numbered Company's security interest occurred almost four years before the interest of Ms. Jacobs was registered. Accordingly, it argues that its security interest has priority over that of Ms. Jacobs, and the provisions of s. 59(2) do not provide "another method for determining priority between security interests".

[26] I agree with the submissions of the Numbered Company.

[27] The purpose of the PPSA registration regime is to impart order and certainty to commerce. In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at para. 21, Gonthier J. noted this legislative intent in his dissenting reasons:

More recently, provincial legislatures have moved to protect secured creditors generally through the enactment of personal property security legislation: e.g. Personal Property Security Act, R.S.O. 1990, c. P.10; Personal Property Security Act, S.B.C. 1989, c. 36; and the PPSA. These statutory regimes have been implemented to increase certainty and predictability in secured transactions through the creation of a coherent system of priorities ... The benefits of such certainty in commercial transactions, on basic economic principles, are intended to accrue to the health of the economy in general.

[28] Section 35 lies at the heart of this "coherent system of priorities". Where no other rule for determining priorities under the PPSA applies, the residual priority rule governs. This is described in Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2005) at 308:

It is conventional to divide the priority rules of the PPSA that govern competitions between or among competing secured parties into two categories: (1) the special priority rules; and (2) the residual or general priority rule. The special priority rules provide for particular types of situations, most notably competitions involving purchase money security interests. The residual rule applies where the Act provides no other method for determining priorities among security interests.

- [29] The PPSA does recognize certain exceptions to this default rule for reasons of commercial practice or convenience. However, these exceptions are expressed in clear and unambiguous language and none of them apply to the circumstances here.
- [30] The residual priority rules and other priority rules are found in Part 3 of the PPSA, which is entitled "Perfection and Priorities". Sections 59 and 60 are found in Part 5 of the PPSA, entitled "Rights and Remedies on Default" which, as its title would suggest, is concerned with how and when a secured party may enforce the security agreement and deal with the collateral.
- [31] Section 11 of the Interpretation Act, R.S.B.C. 1996, c. 238, provides that a heading to a provision is not part of an enactment and must be considered to have been added editorially or for convenience of reference only. Notwithstanding this provision, courts have favoured the view that for the purposes of statutory interpretation, headings should be read and relied on like any other contextual feature. Headings are a valid indicator of legislative intent and may be taken into account on interpretation: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 392-397; *Arts Umbrella v. British Columbia (Assessor Of Area 9 - Vancouver)*, 2007 BCCA 45 at para. 3.
- [32] When provisions are grouped together under headings, it is presumed that they are related to one another in some particular way; there is a shared subject or a common feature to the provisions. Conversely, the placement of provisions elsewhere under a different heading suggests the absence of such a relationship.
- [33] In my view, the existence of a right to seize and accompanying obligations which arise upon exercising that remedy cannot undermine the clear priority rules found elsewhere in the PPSA. Section 59(2) cannot be read as setting out a scheme that establishes priority between security interests. The subsection only provides that reasonable expenses must be paid following disposition in priority to the obligation secured by the security interest of the party making the disposition. Section 60 sets out the scheme for dealing with the surplus but it only refers to subordinate security interests.
- [34] As Cowan J. noted in *CIBC v. Wildflower Productions Inc.*, 2000 BCSC 193 at para. 16, rev'd on other grounds 2001 BCCA 159, s. 59(2)(a) is intended to embody the common law rule applicable to receiver's fees and expenses: the receiver is paid before distributing the estate. Mr. Justice Cowan did not suggest, and no other authorities have found, that s. 59(2) is intended to negate the priority rules between competing secured creditors found elsewhere in the PPSA.
- [35] If I were to accept Ms. Jacobs' arguments, then the effect of ss. 59 and 60 is that a person with a prior security interest could, in some circumstances, receive nothing from the seizure and sale of the collateral, notwithstanding their prior interest. That would make little sense. Such a conclusion would undermine the objectives of certainty and predictability which underlie the PPSA and could encourage a race to seize assets.

[36] I conclude that s. 35(1) applies to the two security interests in question. In other words, the PPSA, and more specifically, ss. 59 and 60 do "not provide another method for determining priority" between those interests. Accordingly, the interest of the Numbered Company has priority over the interest of Ms. Jacobs and the provisions of s. 59(2) do nothing to change that priority.

[37] The conclusion that a junior secured party's seizure and sale of collateral is made subject to security interests with priority is also implicit in s. 59(6) of the PPSA, which provides:

(6) Not less than 20 days before the disposition of the collateral the secured party must give notice of disposition to

1 ...

(b) any creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party

[38] Notice of disposition does not have to be given to secured creditors with priority. This is because the priority status of the secured party cannot be prejudiced by the junior secured party's act of seizure and sale. For that proposition, I refer to Richard H. McLaren's notes in *The 2010 Annotated British Columbia Personal Property Security Act* (Toronto: Carswell, 2010) at 410:

Section 59 and, in particular, subsection 59(6) is drafted on the presumption that the Secured Party with the highest priority under the Act is the realizing secured Creditor. Thus, the secured Creditor with the highest priority is not required to have the 20 days notice before disposition of the Collateral as set out in clause (b) of s. 59(6). Thus, a realizing Secured Party who does not have the highest priority in the Collateral to be disposed of will not be required to give notice of disposition to the more senior Secured Parties. When a subordinate Secured Party exercises its rights of repossession and disposition, the purchaser will take the property subject to the interests of any Secured Parties with a priority right which is higher than that of the disposing Secured Party.

[39] In summary, Ms. Jacobs is not entitled to recover the expenses she incurred to seize, store and sell the Virago in priority to the interests of the Numbered Company.

Issue 3. Is the Numbered Company able to rely upon its security interest when the Debtor had repaid more than two-thirds of the total amount of the obligation secured when the Virago was seized in July 2009?

[40] Ms. Jacobs argues that the Virago falls within the definition of consumer goods in the PPSA. It was acquired for use primarily for personal, family or household purposes. The Numbered Company does not take issue with this. Ms. Jacobs says that the effect of ss. 58(3) and 67 of the PPSA is that the Numbered Company cannot seize the consumer goods and cannot obtain the relief it seeks in its notice of motion. In essence, she says that by attempting to rely upon its security interest by claiming priority over the interests of Ms.

Jacobs, it is attempting to obtain the benefit of a seizure of the collateral at a time when it is not permitted to do so by s. 58(3), which provides:

- (3) Subject to subsection (4), if a debtor, who is in default under a security agreement that provides for a security interest in consumer goods, has paid at least 2/3 of the total amount of the obligation secured, the secured party must not seize the consumer goods.
- [41] Subsections 67(1) and (2) of the PPSA set out the steps that a secured party may take if a debtor defaults under a security agreement that provides for an interest in consumer goods. Section 67(1) is known as the "seize or sue" provision. In brief, a secured party may take possession of the goods (subject, of course, to s. 58(3)), proceed with a "voluntary foreclosure", accept surrender of the goods, or bring action to recover judgment subject to the terms of the agreement. If it does anything other than bring action, then the unperformed obligations under the security agreement are extinguished.
- [42] Here, I agree that the Numbered Company's interest in the Virago is an interest in consumer goods. I also find that when the Debtor defaulted, he had paid more than two-thirds of the total amount of the obligation secured.
- [43] I do not accept the argument of the Numbered Company that the obligation secured must include the additional legal costs incurred by the Numbered Company since the vessel was seized by Ms. Jacobs. A priority dispute between two secured parties should be resolved as of the time when their respective security interests came into conflict: *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (C.A.). In accordance with this rule, in *Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée* (2004), 7 P.P.S.A.C. (3d) 194 at para. 76 (Ont. S.C.J.), Smith J. held that the date on which the parties' respective security interests came into conflict was also the date on which the security interests should be valued.
- [44] In this case, the conflict between the Numbered Company and Ms. Jacobs' security interests arose on the date of the seizure. Accordingly, the legal costs subsequently incurred by the Numbered Company do not form part of the obligation secured for the purposes of this analysis. The default occurred in July of 2009 at which time \$15,000 had been paid by the Debtor. This was more than two-thirds of the obligation secured.
- [45] Additionally, s. 62(1)(b) of the PPSA provides that where the collateral is consumer goods, a debtor may reinstate the security agreement:

... by paying the sums actually in arrears exclusive of the operation of an acceleration clause in the security agreement and by curing any other default because of which the secured party intends to dispose of the collateral,

together with a sum equal to the reasonable expenses incurred by the secured party or receiver in seizing, repossessing, holding, repairing, processing or otherwise preparing the collateral for disposition.

- [46] The Numbered Company's costs were not incurred in the course of "seizing, repossessing, holding, repairing, processing or otherwise preparing the collateral for disposition". Accordingly, I have not included those expenses for the purposes of calculating the quantum of the "obligation secured" referred to in s. 58(3).
- [47] However, I do not accept Ms. Jacobs' argument that the Numbered Company is prevented from relying on its priority position merely because Ms. Jacobs, the holder of a subsequent security interest, seized the collateral. I cannot read s. 58(3) of the PPSA as having that effect. The Numbered Company did not seize the collateral, and it did not take any steps with regard to the collateral other than steps to receive payment for the balance owing to it. I also note that the Numbered Company did not take any of the steps listed in subsections 67(1)(a) to (c), and so subsection (2) is not engaged.
- [48] The seizure and sale by a junior secured creditor does not have the effect of extinguishing the senior secured party's security interest in the collateral: Personal Property Security Law at 572. To hold otherwise would allow a junior secured creditor to unilaterally impair the rights and status enjoyed by a secured creditor who is otherwise entitled to priority.
- [49] Accordingly, I find the Numbered Company's security interest in the Virago is valid and subsisting, notwithstanding the seizure and disposition of the collateral.

Issue 4. Is the Numbered Company secured for its legal fees, as expenses incurred to establish or protect its security interest, in addition to the principal and interest owing to it?

- [50] The Numbered Company has conceded it is not entitled to charge NSF and late fees and is not entitled to \$250 on account of a PPSA discharge fee. The remaining dispute between the parties over the quantum of the Numbered Company's claim concerns its entitlement to cover legal fees out of the proceeds from the sale of the Virago.
- [51] Ms. Jacobs submits that even if the Numbered Company's security is valid and subsisting, its charge on the collateral should be limited to the amount of the principal and interest as provided for in the promissory note. She argues that the provisions of the GSA, which entitle the Numbered Company to add legal fees to the debt provided for in the promissory note, do not apply here. The Numbered Company should not be able to rely on the provisions of the GSA, which was drafted to apply to goods other than consumer goods. Ms. Jacobs says that any such expenses can only be claimed if they were incurred for the purpose of seizing or realizing on the collateral. Here, the Numbered Company has not incurred legal fees in seizing the collateral. Ms. Jacobs took that step. Rather, the Numbered Company has incurred legal fees by challenging Ms. Jacobs' right to sell the collateral and opposing Ms. Jacobs' claims for priority. Additionally, Ms. Jacobs argues that the legal fees are excessive and should be disallowed.
- [52] The Numbered Company submits that the legal fees were incurred in order to protect its interest in the security and accordingly, pursuant to the provisions of the GSA and the PPSA, it is entitled to recover that amount in addition to the principal and interest.

[53] I accept the Numbered Company's submissions.

[54] Section 56(2) of the PPSA sets out the rights and obligations of the Numbered Company arising upon default of the Debtor:

- (2) If the debtor is in default under a security agreement,
 - (a) except as provided in subsection (3), the secured party has against the debtor only
 - (i) the rights and remedies provided in the security agreement,
 - (ii) the rights, remedies and obligations provided in this Part and in sections 36 to 38, and
 - (iii) when the secured party is in possession or control of the collateral, the rights, remedies and obligations provided in section 17 or 17.1,

[55] Section 56(2) demonstrates that the PPSA is not an exhaustive framework for the resolution of secured transaction disputes. Subsection 2(a)(i) permits a secured party to rely upon the rights set out in the contractual agreement between the parties in addition to the rights in the PPSA.

[56] The GSA entered into between the Numbered Company and the Debtor provides, in part, the following:

5.01 The Debtor hereby undertakes to:

...

- (k) pay, on demand of the Secured Party, all reasonable expenses, including solicitor's fees and disbursements and all the remuneration of any Receiver appointed hereunder, incurred by the Secured Party in the preparation, perfection and enforcement of this Agreement.

...

6.01 The Debtor shall pay all expenses and, upon request, take any action reasonably deemed advisable by the Secured Party to preserve the Collateral or to establish, determine priority of, perfect, continue perfected, terminate and/or enforce the Secured Party's interest in it or rights under this Agreement. If the Debtor fails to act as required by this Agreement, the Secured Party is authorized, in the Debtor's name, to take any such action, including without limitation, signing the Debtor's name or paying any amounts so required, and the cost thereof shall be one of the debts and liabilities secured hereunder.

...

8.01 (a) Upon default the security interests granted hereby shall become enforceable and the Secured Party shall have all the rights and remedies available to it under the Personal Property Security Act of British Columbia as amended from time to time as well as any other applicable laws and, but so as not to restrict the generality of the foregoing, the following rights and remedies:

...

- (v) the Secured Party may charge the Debtor for any expense incurred by the Secured Party (including taxes, insurance, legal, accounting and Receiver fees) in protecting, seizing, collecting, realizing, borrowing on the security of, selling or obtaining payment of the Collateral or any part thereof and may add the amount of such sums to the indebtedness of the Debtor.

[57] In *Anderson v. Lucas*, 2005 BCSC 846, Shaw J. held that the legal fees incurred by a secured party to preserve collateral could properly be charged to the loan based on the terms of the security agreement entered into between the parties. In that case, the general security agreement contained a provision that obliged the debtor to pay all costs "taken in connection with ... the enforcement of this Security Agreement."

[58] In *United Used Auto & Truck Parts Ltd. (Re)*, 2003 BCSC 1008 at paras. 13-14, aff'd 2005 BCCA 55, Tysoe J. (as he then was) reached a similar decision. He held that the following language entitled the security holder to require the debtor to pay the legal costs incurred in respect of acts done or taken to protect its security for the loan:

The Company shall pay all legal, fees and disbursements in respect of any and all acts, actions, or proceedings including, without limiting the generality of the foregoing, any legal proceedings of any kind or nature, done, taken or instituted by the Lender for the exercise, enforcement or preservation of any of the rights, remedies or recourses hereunder, or in respect of the Loan, shall be paid by the Company.

[59] In *Vancouver City Savings v. Staschuk*, 2004 BCSC 19, Bernard J. addressed an application by two mortgage holders for an order that the mortgagor was obliged to pay their legal fees and disbursements incurred in relation to the determination of a priority issue which arose after foreclosure proceedings were commenced. The language of one of the mortgages held by Trans Canada Credit Corporation ("TCC"), provided the following:

The borrower promises to pay on demand all of the lender's costs, including lawyers fees and disbursements (on a solicitor and own client basis) incurred in connection with or arising out of the enforcement of the terms of this mortgage including efforts to compel the borrower to perform the borrower's promises and agreements. These costs include ... costs and expenses incurred by the lender to protect the lender's interest under this mortgage.

[60] Mr. Justice Bernard at para. 15 held that even though the priority dispute was not caused by TCC, pursuant to this clause, the costs incurred in the litigation of priorities between the mortgagees properly formed part of the balance due under the mortgage:

In the light of the foregoing, I am unable to find support for the Staschuks' position, or to grant any relief to them, in relation to TCC's claim. I conclude that the Staschuks are contractually obliged to pay the costs incurred by TCC to protect its interest under the mortgage. Its interest was in jeopardy when VanCity claimed that the balance owing under its line of credit had priority over the second mortgage of TCC. The costs claimed were incurred by TCC as legal expenses and

disbursements to litigate the priority issue. Notwithstanding that the Staschuks did nothing to create this issue, it arose because they failed to meet their loan payments. TCC was entitled to protect its security in the circumstances, and the Staschuks had agreed to indemnify TCC for their costs in so doing.

[61] In the present case, the language used in the GSA is similar to the language in the agreements in those cases. Here, the Debtor agreed to "pay all expenses ... to preserve the Collateral or to establish, determine the priority of, perfect, continue perfected, terminate and/or enforce the Secured Party's interest in [the Collateral] or rights under this Agreement." The legal fees incurred by the Numbered Company resulted from the seizure of the collateral by Ms. Jacobs and the arguments she advanced in this petition impugning the priority and validity of the Numbered Company's security. In other words, they were expenses incurred to preserve the collateral or to determine the priority of its interest in the collateral.

[62] Accordingly, I conclude that the legal fees are expenses incurred to establish and determine the priority of the Numbered Company's interest in the collateral and to enforce the Numbered Company's interest and rights under the GSA within the meaning of clause 6.01.

[63] The alternative argument advanced by Ms. Jacobs is that the fees charged are excessive. I have not been provided with a great deal of information about the fees. They do, however, seem to me to be somewhat high, especially in relationship to the amount spent by Ms. Jacobs to seize and take steps to attempt to sell the vessel. In these circumstances, I would normally refer the question of the assessment of the fees to the Registrar. However, given the amount involved and my assumption that the parties would not wish this matter to be further prolonged, I propose to make an order fixing the amount of the fees following submissions from counsel.

[64] Now, that concludes my reasons. I also order that the Numbered Company is entitled to its costs against the Debtor. I will hear submissions on the appropriate order to be made on what fees can be added and how we can deal with that summarily rather than send you to the Registrar.

[SUBMISSIONS RE COSTS & AMOUNT OF LEGAL FEES]

[65] THE COURT: The petitioner was successful in obtaining an order for sale, and the petitioner is entitled to costs of the petition from Mr. Laumaillet.

[66] THE COURT: The Numbered Company is entitled to recover from the Debtor 75% of its legal fees plus the full amount of its disbursements, and those amounts may be added to the indebtedness and recovered from the sale proceeds.

[67] MR. MOONJE: I think in light of the fact that this is a decision on a novel point and the reasons will be written, I think it should go that that term was by consent.

[68] THE COURT: I think that is probably a wise way to deal with it.

[69] MR. MOONJE: All right.

[70] THE COURT: Ms. Estall, that is correct?

[71] MS. ESTALL: Yes.

[72] THE COURT: Thank you.

"Butler J."

The Honourable Mr. Justice Butler

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