
CANADA / JUDGMENT

Pythe Navis v. Abakhan & Assoc.

2013 BCSC 1660

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 1660 Pythe Navis v. Abakhan & Assoc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pythe Navis v. Abakhan & Assoc.,

2013 BCSC 1660

Date: 20130909

Docket: S68112

Registry: Nanaimo

Between:

Pythe Navis Adjusters Corporation

Plaintiff

And

Columbus Hotel Company (1991) Ltd., Lloyds Underwriters, Abakhan & Associates Inc., and City of Prince George

Defendants

Before: The Honourable Mr. Justice D.W. Thompson

Reasons for Judgment

Counsel for the Plaintiff:

D.R.S. Jonson

Counsel for the Defendant Abakhan & Associates Inc.:

J.M. Duncan

Place and Date of Chambers Hearing:

Nanaimo, B.C.

August 20, 2013

Place and Date of Judgment:

Nanaimo, B.C.

September 09, 2013

- [1] These reasons follow a summary trial of the plaintiff's claim of entitlement to a portion of a fund of money held in trust. The resolution of the issues requires the application of the law of assignments of choses in action in the context of a bankruptcy of the assignor. The matter is well-suited for disposition under the summary trial rule.

I

- [2] On 19 August 2008, there was a fire at a property in Prince George owned by the defendant Columbus Hotel Company (1991) Ltd. ("CHC"). A contract of insurance was in place between CHC and the defendant Lloyds Underwriters ("Lloyds").
- [3] On 22 August 2008, CHC retained the plaintiff Pythe Navis Adjusters Corporation ("Pythe Navis"), a firm of insurance adjusters. Pythe Navis agreed to measure and document the loss and present CHC's claim to Lloyds in exchange for six percent of all amounts recovered on the claim.
- [4] There is a contract in evidence. It is titled "Service Agreement" and dated 22 August 2008. It has been executed by CHC and Pythe Navis. The body of the document reads as follows:

To the LLOYD'S UNIVERSAL UNDERWRITING MANAGERS LTD, under your policy number UUM10219, be advised that the insured, namely, COLUMBUS HOTEL COMPANY (1991) LTD., retains PYTHE NAVIS ADJUSTERS CORPORATION to measure and document its loss and to present the Insured's claim to the Insurance Company for loss having occurred on or about the 19th day of AUGUST 2008 that was sustained by the Insured's property located at 1250 3rd AVENUE, PRINCE GEORGE, BC, V2L 3E7. The Insured agrees to pay and assigns, irrevocably, to PYTHE NAVIS ADJUSTERS CORPORATION for its services SIX per cent (6%) on all amounts adjusted or otherwise recovered from the Insurer(s), salvors or others. PYTHE NAVIS ADJUSTERS CORPORATION agrees to pay for a property appraisal and quantity survey for the Insured. Fees are to be paid to PYTHE NAVIS ADJUSTERS CORPORATION on a pro-rata basis as Insurance proceeds are received. The fee does not include legal or other professional advice.

- [5] On CHC's behalf, Pythe Navis conducted the negotiations on the fire insurance claim against Lloyds. Negotiations broke down. The parties to the insurance contract resorted to the appraisal process under the Insurance Act, R.S.B.C.1996, c. 226. The resulting award, issued on 13 Sept 2011, was \$671,160.00. Of this sum, \$556,319.44 was used to satisfy the loss payees

under the policy, secured creditors and Canada Revenue Agency, leaving \$114,840.56 payable by Lloyds in respect of the claim of CHC. This residual sum was deposited by Lloyds' solicitors into its trust account.

- [6] Six percent of the appraisal award is \$40,269.60. On 16 July 2012, Pythe Navis sent an account to CHC that included this sum.
- [7] On 5 October 2012, Pythe Navis sent notice of the assignment to the solicitor for Lloyds.
- [8] On 21 November 2012, a certificate of assignment of bankruptcy of CHC was issued.
- [9] On 3 December 2012, Pythe Navis sent an amended account to CHC deducting the \$40,269.60 from the amount owing.
- [10] On 5 December 2012, Pythe Navis filed a proof of claim in the bankruptcy. It was explicitly made as a contingent claim; Pythe Navis advised that if its claim that it has a proprietary interest in the funds succeeds (that is, the claim in this action) then its claim in the bankruptcy will not exist.

II

- [11] On 18 December 2012, Pythe Navis commenced this action claiming \$40,269.60 of the fund held by the solicitors for Lloyds.
- [12] The plaintiff's claim is framed as an action in debt on an equitable assignment of a legal chose in action. Pythe Navis pleads that CHC assigned to Pythe Navis six per cent of all amounts recovered on the fire insurance claim. Pythe Navis also claims that it is entitled to receipt of this assigned property directly from Lloyds.
- [13] The plaintiff named Lloyds as a party defendant because Lloyds is the debtor. The plaintiff named CHC as a party defendant because the authorities mandate that this must be done in an action on an equitable assignment: *Re Steel Wing Co. (1921) 1 Ch. 349*, and *Generous Electric Ltd. v. 0726981 B.C. Ltd.*, 2012 BCSC 1048.
- [14] The plaintiff named Abakhan & Associates Inc. ("the Trustee") as a party defendant because the bankruptcy trustee's participation is required to thresh out the issue of whether the monies claimed by the plaintiff directly from Lloyds ought to instead form part of the estate of the bankrupt CHC.
- [15] The City of Prince George is a creditor of the bankrupt CHC. It was named as a party defendant because of some initial confusion arising out of a misnomer in the bankruptcy assignment certificate. For this application, nothing turns on the presence of the City of Prince George as a party defendant.
- [16] On 30 May 2013, the Trustee filed a notice of application to strike the claim. This application came on for hearing on the same day as the summary trial but it did not proceed as the issues on the application to strike were subsumed within the summary trial application.

[17] On 31 July 2013, the plaintiff Pythe Navis filed a notice of application for judgment on a summary trial. The Trustee opposes this application. The other defendants take no position and did not appear at the summary trial.

III

[18] At the summary trial, the Trustee advances two jurisdictional arguments.

[19] First, the Trustee submits that the fund held in the trust account of the solicitors for Lloyds was "property in the possession of the bankrupt" (CHC) at the time of the bankruptcy within the meaning of s. 81(5) of the Bankruptcy and Insolvency Act; R.S.C. 1985, c. B-3 ["BIA"]. If this is so, it would follow that Pythe Navis would be obliged to apply for a remedy under s. 81 of the BIA and within the rubric of the bankrupt proceedings.

[20] However, the Trustee concedes that if the \$40,269.60 claimed by Pythe Navis is the subject of an effective assignment by CHC to Pythe Navis then that portion of the fund is not caught by s. 81(5).

[21] There is a nice question of whether the fund in the trust account of Lloyds' solicitors can be said to have been in the possession of CHC at the date of the bankruptcy, but the Trustee acknowledges that this question only arises if there has not been an assignment. That is, if the \$40,269.60 was irrevocably assigned to Pythe Navis then CHC cannot be said to have a property interest in that part of the fund held in trust and, regardless of how expansive a definition of "possession" is applied, the definition could not reach so far as to encompass the \$40,269.60.

[22] Second, the Trustee submits that certain provisions of the BIA are obstacles to this court granting the judgment that is sought by Pythe Navis. In particular, the Trustee refers to s. 69.3(1) which provides that on the bankruptcy of a debtor, no creditor has any remedy against the debtor or the debtor's property, and s. 215 which prohibits proceeding against a trustee with respect to any action taken by a trustee pursuant to the BIA.

IV

[23] Because the s. 81(5) BIA issue arises only if there has not been an assignment of the \$40,269.60, it is convenient to begin the analysis with the assignment issue.

[24] Pythe Navis submits that the insurance claim of CHC was a legal chose in action, and the "Service Agreement" of 22 August 2008 assigned a defined part of that chose in action to Pythe Navis.

[25] Pythe Navis does not argue that the requirements of s. 36 of the Law and Equity Act, R.S.B.C. 1996, c. 253 have been met such as to give rise to a statutory assignment. It puts its case on the basis of an equitable assignment. *Gordon v. Gordon*, [1924] 1 W.W.R. 903 (Sask. C.A.) is cited for the proposition that fire insurance proceeds may be the subject of an equitable assignment.

- [26] Pythe Navis points to the opening words of the agreement: "To the Lloyd's Universal Underwriting Managers Ltd. ". It submits that these words are fully consistent with an assignment as they are intended to give notice to Lloyds of Pythe Navis' retainer and that six percent of all amounts recovered has been assigned. Pythe Navis also relies upon these words: "The Insured agrees to pay and assigns, irrevocably, to Pythe Navis for its services ".
- [27] The Trustee submits that the agreement, construed as a whole, is not an unconditional assignment but is a form of collateral security in support of an agreement by CHC to pay Pythe Navis a contingency fee. In the alternative, the Trustee submits that the agreement is ambiguous and that the extrinsic evidence favours the conclusion that the agreement is a security interest.
- [28] The Trustee acknowledges that the language of irrevocable assignment was used in the agreement, but refers to this sentence: "Fees are to be paid to Pythe Navis Adjusters Corporation on a pro-rata basis as Insurance proceeds are received." It says that this clearly contemplates that CHC would receive the insurance proceeds and then pay to Pythe Navis its portion, and that this payment process is not consistent with the mechanics of an assignment.
- [29] Some of the principles of contract interpretation are summarized in *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459. The following extracts from the reasons of Lowry J.A. are of particular assistance in the case at bar:
- [23] Recourse to extrinsic evidence to aid in the interpretation of an agreement is the court's last resort. It is only when the intentions of the parties cannot be objectively determined from the works they have chosen to employ, such that there is ambiguity, that the law permits consideration to be given to evidence of their conduct in making their agreement and in fulfilling their obligations. If it were otherwise, the certainty that is essential to documenting commercial transactions would be seriously undermined .
- [24] Thus, the court looks first to the words of the agreement, read as a whole, aided, if necessary, by evidence of the circumstances or what is referred to as the factual matrix existing when the agreement was made .
- [25] If, after undertaking the first step of the analysis, the text is ambiguous, extrinsic evidence becomes admissible for the purpose of resolving the ambiguity and determining what was actually agreed. But there must be a true ambiguity before recourse can be had to evidence of the way in which the parties conducted themselves. It is well recognized that a court is not to search for ambiguity .
- [26] An ambiguity can be said to exist only where, on a fair reading of the agreement as a whole, two reasonable interpretations emerge such that it cannot be objectively said what agreement the parties made: *Gilchrist v. Western Star Trucks Inc.* and *Re Canadian National Railways and Canadian Pacific Ltd.* [citations omitted] .

- [27] Where an ambiguity exists, a court in this province (unlike an English court) may consider not only evidence of the parties' conduct in making an agreement, such as the course of their negotiations, but also the conduct of the parties in performing their agreement. It is, however, clear that evidence of that kind much be approached with caution.
- [30] Lowry J.A. also referenced *Re Canadian National Railways and Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242 (B.C.C.A.), *aff'd* [1979] 2 S.C.R. 668 for the proposition that extrinsic evidence of subsequent conduct is not necessarily entitled to weight because it is admissible, particularly given the dangers that it may be misleading. Furthermore, in *Re Canadian National Railways*, the Court of Appeal made the point that if "the parties to the agreement are corporations and the acts are the acts of employees of the corporations, then evidence of subsequent conduct is much less likely to carry weight."

V

- [31] Reading the agreement as a whole, I conclude that the parties' intentions at the time the contract was made was to effect an irrevocable assignment to Pythe Navis of six percent of the amounts recovered on the fire insurance claim. The opening language of the agreement addresses Lloyds and includes clear language of irrevocable assignment. This language, together with the absence of any language pointing to an equity of redemption, persuades me to this conclusion.
- [32] In my opinion, the sentence dealing with pro-rata distribution does not derogate in any way from the clear language of assignment, or give rise to an ambiguity as to whether there has been an irrevocable assignment. The Trustee invites me to add by implication the words "by the Insured" or "by Columbus Hotel Company (1991) Ltd." to the sentence. I do not accept this invitation. This sentence is intended to deal with advance payments. By the agreement, the insured is given notice that Pythe Navis is retained to present the insured's claim. The sentence is drafted broadly enough so that regardless of whether the insurance proceeds were sent to the insured or to Pythe Navis, the fees earned by Pythe Navis were to be paid on a pro-rata basis.
- [33] If a firm of solicitors had presented the claim on behalf of the insured, it would not be surprising for the insurance company to send the insurance proceeds to the firm. When a firm of adjusters presents a claim on behalf of an insured, it may be that the insurance proceeds are, at least on occasion, sent to the firm of adjusters. There is no evidence in the application record one way or the other of the practice of the industry in this respect and I am not prepared to conclude, as impliedly urged by the Trustee, that insurance proceeds would invariably have been received by the insured and not by the firm of adjusters.
- [34] When deciding the question of the parties' intentions, other cases are of limited assistance. This is so because the court must focus on the words used in the particular contract that requires construction, and the surrounding context in which those words were chosen by the parties to the contract.

- [35] In support of its position that the agreement in the case at bar is a form of collateral security rather than an assignment, the Trustee cites *Pro-Mor Mortgage Services Ltd. v. Smith*, 2010 BCSC 782.
- [36] The issue in *Pro-Mor Mortgage* was whether a company retained a right to share in the profits of a real estate development. Two agreements required interpretation in order to resolve the issue, one in 2005 and another in 2007. The 2005 agreement provided that the company agreed to "transfer and assign" all of its right, title and interest to the profits in the development; the assignee specifically agreed to hold the rights as "collateral security" for a debt owed to it -- if the debt was not repaid by a particular date, it was agreed that the assignee would be entitled to retain the chose in action.
- [37] Following *Alberta (Treasury Branches) v. Canada (Minister of National Revenue)*, [1996] 1 S.C.R. 963, Fisher J. held that the 2005 agreement could not be both an unconditional assignment and a security interest. Because the company retained the right to redeem the interest assigned, the 2005 agreement was held to be a security interest. On the other hand, the 2007 agreement, which contained the language of "irrevocable assignment" and did not contain a right of redemption, was held to be an effective assignment rather than a security interest.
- [38] In my opinion, *Pro-Mor Mortgage* does not advance the Trustee's position. The contract in the case at bar is more akin to the 2007 agreement than the 2005 agreement in *Pro-Mor Mortgage*. There was no underlying debt at the time that Pythe Navis and CHC made their contract, and there is no language in the contract providing for a right of redemption.
- [39] The Trustee also relies upon *Farm Credit Canada v. Naramata Vines Inc.*, 2010 BCSC 1317. In that case, the contract language was held to be ambiguous. On the one hand, it purported to absolutely and irrevocably assign the property in question. On the other hand, it was said to be "null, void and of no effect" if the assignor repaid the debt due to the assignee. Barrow J. found, after looking to extrinsic evidence, that the parties intended the assignment to be conditional.
- [40] The facts in *Naramata Vines* make that case distinguishable. In particular, it is not surprising given the language in the contract in that case that the court made the finding that the parties intended to provide an equity of redemption.
- [41] The Trustee submits that the language of irrevocable assignment in a contract does not necessarily lead to a finding of a true assignment. This argument is sound, and I accept it. The cases referred to by counsel contain examples where the language of irrevocable assignment is used by the parties but the court has held the document to be a security interest, and vice-versa. But the whole of the language in the contract between Pythe Navis and CHC and the context in which it was entered into lead me to the conclusion that this contract is not a security interest but an unconditional assignment.

- [42] The Trustee made an alternative argument that the agreement between CHC and Pythe Navis was a fee agreement and not an assignment. The Alberta (Treasury Branch) case makes it clear that whether an agreement is a form of security or whether it is an unconditional assignment is an "either/or" proposition. However, whether an agreement is an unconditional assignment or an agreement to pay a contingency fee is not an "either/or" proposition. The agreement between CHC and Pythe Navis, in my opinion, is both. In fact, a review of the authorities submitted by counsel makes it apparent that the combination of an assignment term with other terms of an agreement is a commonplace.
- [43] I do not find ambiguity in the language of the contract read as a whole. In my view this document effects an irrevocable assignment and is not a security instrument.

VI

- [44] Had I found the agreement ambiguous, I should add that I would have reached no different conclusion as to the intention of the parties. In my view, the acts of performance relied on by the trustee cannot be said to be unequivocal. Moreover, the acts were those of employees of corporations rather than individuals -- as the Court of Appeal made clear in *Re Canadian National Railways*, the evidence of subsequent conduct by employees of corporations is much less likely to carry weight.
- [45] The Trustee submits that the act by an employee of Pythe Navis of issuing a statement of account to CHC was inconsistent with the alleged assignment. I do not think this is so. The agreement has terms providing for a fee agreement and terms effecting an assignment. It would be expected that Pythe Navis would account to CHC.
- [46] It is true that this statement of account, dated 16 July 2012, is addressed to CHC and shows the six percent balance owing. But it is equally true that an amended statement dated 3 December 2012 shows a balance owing net of the six percent fee. This amended statement of account is clearly consistent with the alleged assignment.
- [47] The Trustee points to the delayed delivery of the agreement to Lloyds, but I do not attach much significance to the timing of the delivery of the document. The fact that it was delivered to Lloyds is consistent with assignment.
- [48] The Trustee submits that the fact that Pythe Navis filed a proof of claim in the bankruptcy is inconsistent with the assertion of a claim against Lloyds on an assignment, but acknowledges that there is not much strength in this submission given that the proof of claim was filed contingently.
- [49] There is nothing in any of these acts of employees of the corporate parties to this agreement, in furtherance of performing the agreement, that I would attach weight to in grappling with the question of the intention of the parties. The acts are not unequivocal and cannot in my opinion to be said to be consistent only with one of the alternative interpretations.

- [50] As I find there to have been an irrevocable assignment by CHC to Pythe Navis of six percent of the proceeds of the insurance claim against Lloyds, it is not necessary to address the question of whether the funds were in the possession of the bankrupt at the date of the bankruptcy.

VII

- [51] The Trustee submits that the stay of proceedings provisions of the BIA apply so as to bar Pythe Navis from obtaining its remedy. Section 69.3(1) provides that:

69.3(1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceeding, for the recovery of a claim provable in bankruptcy.

- [52] I agree with the submission of Pythe Navis that this action does not seek any remedy against the bankrupt or the bankrupt's property; rather, the claim is founded on the assertion that the \$40,269.60 is not the bankrupt's property. The requirement that an assignor be named as a party if an equitable assignment is asserted accounts for the presence of CHC as a party defendant. The fact that the bankrupt is a defendant in these circumstances does not mean that Pythe Navis is seeking a remedy against it or its property. And this action is not one for the recovery of a claim provable in bankruptcy: it is, rather, a claim against Lloyd's that patently is not a claim provable in the bankruptcy of CHC.

- [53] The Trustee cites *Bowles v. Barber* (1985), 60 C.B.R. (N.S.) 311 (Man. C.A.). In that case, Huband J.A., in the course of introducing a similar predecessor provision to s. 69.3(1), said: "What the applicant cannot do, without leave of the court, is to commence and prosecute a civil action against the bankrupt while the bankruptcy subsists."

- [54] I read this dicta in *Bowles* as a general summary of the predecessor section to s. 69.3(1) and not as a pronouncement intended in any way to extend the reach of the section beyond its plain meaning.

- [55] The Trustee also cites s. 215 of the BIA which provides that except with leave of the bankruptcy court, no action lies against a trustee with respect to any action taken by the trustee pursuant to the BIA.

- [56] I agree with the submission of Pythe Navis that this is not an action against the Trustee within the meaning of s. 215. It is not an action "against a trustee." Pythe Navis is in no way aggrieved by any step the Trustee has taken under the BIA. The Trustee is a party because in this action against Lloyds on the alleged assignment the plaintiff succeeds only if it can establish that CHC has no property interest in the \$40,269.60, and the Trustee is interested in and entitled to be heard on this issue. Indeed, there is authority that the proper venue for determining whether the bankrupt has a property interest is the ordinary courts of the province and not the bankruptcy court: *Re Custom Cresting Ltd.* (1975), 19 C.B.R. (N.S.) 282

(Ont. S.C.).

[57] I find that the provisions of the BIA do not bar Pythe Navis' application for judgment against Lloyds.

VIII

[58] The agreement of 22 August 2008 between CHC and Pythe Navis was an irrevocable assignment of six percent of the proceeds of CHC's insurance claim against Lloyds. The bankrupt CHC has no property interest in this sum of \$40,269.60, and s. 81(5) of the BIA has no application.

[59] Neither s. 69.3(1) nor s. 215 of the BIA bars the granting of judgment in this sum against Lloyds in favour of Pythe Navis.

[60] In the result, Pythe Navis is entitled to judgment for \$40,269.60 against the defendant Lloyds.

[61] As to costs, Pythe Navis is not seeking an order for costs against any party other than the Trustee. I understood the Trustee to agree that if Pythe Navis obtained judgment then an order that the Trustee pay costs of the action is appropriate: *Sigurdson v. Fidelity Insurance Co of Canada* (1980), 35 C.B.R. (N.S.) 75 (B.C.C.A.)

[62] Order accordingly.

"Mr. Justice D.W. Thompson"

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