
CANADA / JUDGMENT

Silver Spoon Developments Ltd. v. Abakhan & Associates Inc.

2008 BCSC 1317

COURT

Supreme Court of British Columbia

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2008 BCSC 1317 Silver Spoon Developments Ltd. v. Abakhan & Associates Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Silver Spoon Developments Ltd. v. Abakhan & Associates Inc.,

2008 BCSC 1317

Date: 20081001

Docket: S081376

Registry: Vancouver

Between:

Silver Spoon Developments Ltd.

Petitioner

And

Abakhan & Associates Inc., the trustee of

the estate of Botham Holdings Ltd.

Respondent

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for the Petitioner:

J. L. Carpick

P. A. Brackstone

Counsel for the Respondent:

M. Peerson

Date and Place of Trial/Hearing:

July 4, 2008

Vancouver, B.C.

Introduction

- [1] This is a petition for a declaration that the petitioner Silver Spoon Developments Ltd. ("Silver Spoon"), has a valid security interest in and priority over all other creditors in respect of all of the assets of Botham Holdings Ltd. ("BHL"), other than assets in which CFI Leasing Limited in its capacity as administrative agent of CFI Trust ("CFI"), Shamrock Corporation in its capacity as the administrative agent of Shamrock Trust ("Shamrock") and Automotive Finance Corporation ("AFC") have security interests, as provided in the schedule to the petition.
- [2] In particular, the petitioner seeks a declaration that Silver Spoon has a valid security interest in and priority over any other creditor of BHL in respect of all monies payable to BHL in respect of BHL's 2007 income tax return. This refund consists of several cheques payable to BHL by various government agencies, as well as one specific payment of \$1,158,564.56, which has already been cashed and which is being held in trust by the solicitors for the petitioner, pending the determination of entitlement.
- [3] The petitioner also seeks an order that all of the tax refund cash be paid to it absolutely, and that it be authorized to negotiate the remaining cheques that are payable to BHL.
- [4] The respondent trustee, on the other hand, is seeking a declaration that Silver Spoon has no effective security interest in any of BHL's assets, and an order that the solicitors for the petitioner pay the tax refund cash to the trustee absolutely, and deliver to the trustee the uncashed cheques.

The Facts

- [5] BHL is a bankrupt company pursuant to a May 28, 2007 assignment in bankruptcy. The respondent, Abkhan and Associates Inc., is the trustee in that bankruptcy (the "Trustee"). It is also the trustee in the bankruptcy of BHL's partner, J. Welsh Investment's Inc. ("JWI"), as well as in the bankruptcy of the partnership (the "firm"), between BHL and JWI, the JW Auto Group both of which were also assigned into bankruptcy on May 28, 2007.

- [6] Sometime in BHL's taxation year ending October 31, 2004, it sold a substantial commercial property located in Vancouver at the corner of Burrard and Davie Street for which BHL had a significant taxable gain. As a result, BHL's taxable income for 2004 was approximately \$6,000,000, and BHL paid substantial taxes on it.
- [7] BHL and JWI entered into a partnership agreement in August of 2005. That agreement stated that BHL was entitled to 96.4% of any taxable profits and responsible for the same portion of losses of the firm. JWI was assigned 3.6% of any such profits and losses.
- [8] On or about August 31, 2005, the firm signed a loan agreement with Silver Spoon as lender. It identified the firm as the borrower, and the borrower's property was identified as "all present and after-acquired personal property, assets and undertakings" of the firm.
- [9] On or about the same date, the partnership acting through both of its partners executed a general security agreement ("GSA") in favour of Silver Spoon, which provided that the JW Auto Group partnership was the "debtor," and in which the partnership/debtor granted to Silver Spoon a security interest in the "debtor's" present and after-acquired personal property.
- [10] On September 2, 2005, Silver Spoon effected a registration with the Personal Property Registry (base registration 558530C) in which the firm was identified as the debtor, and the collateral charged was described as "all of the debtor's present and after-acquired personal property."
- [11] There is no dispute between the parties that the security was attached to and perfected against the collective property of the firm.
- [12] The GSA did not expressly state that either BHL or JWI were granting security to Silver Spoon in their individual capacities, and no registration with respect to BHL or JWI individually was made with the Personal Property Registry.
- [13] During the time between September 1, 2005 and May 31, 2006, BHL and JWI collectively as the firm incurred an operating loss of \$5,300,000, of which \$5,130,000 was assigned to BHL and \$190,000 was assigned to JWI, in accordance with the partnership agreement.
- [14] On May 28, 2007, BHL, JWI and the firm all filed their assignments in bankruptcy. Both parties agree that BHL has no separate creditors of its own, only creditors of the partnership.
- [15] On June 19, 2007, BHL filed an income tax return for its year ending October 31, 2006, which reflected the loss of \$5,130,000 and carried that loss back to its taxation years ending October 31, 2003 and 2004. As a result, BHL's taxable income for those years was substantially lower and it was issued several tax refund cheques totalling \$1,186,842.17 (the "tax refund").

- [16] A cheque worth \$1,158,564.56 (the largest of the refund cheques) was cashed by agreement between the parties, and is currently held in trust, along with the other non-cashed cheques, by Owen Bird, solicitors for the petitioner.

Analysis

A. Did the security interest attach to and become perfected against the assets of the individual partners, including the tax refund?

Silver Spoon's Argument

- [17] In interpreting the GSA, Silver Spoon argues that its specific language states that the debtor (i.e. the partnership) grants a security interest in all of "its property." However, because the partnership technically is the partners, any unlimited grant by the partners of a security interest in their property necessarily must include all joint- and individually-owned assets of the partners.
- [18] In support of this proposition, Silver Spoon notes that ss. 7(2) and 8(1) of the Partnership Act, R.S.B.C. 1996, c. 348 state that an act of any partner, or any instrument relating to the business of a firm, is binding on the firm and all the partners. In other words, the GSA is binding on the firm and all its partners, whether or not the partners are specified.
- [19] Silver Spoon also cites Alison R. Manzer in a Practical Guide to Canadian Partnership Law (looseleaf (Aurora, Ont.: Canada Law Book, 1994)), where she states at para. 3.2025 that:

A key characteristic of partnership is the participation by each of the partners in the liabilities of the partnership, on a joint and several basis. Partners, both individually and to the extent of the partnership assets, are accountable to third parties:

In other words, all of the partners' assets - individual and partnership - are available to satisfy the debts of the partnership, and are available to be pledged as security to a creditor. This notion is captured in s. 142(2) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"), which states that once the individual assets of a partner have been applied to any individual debts of that partner, they are then applied to the collective debts of the partnership. It is also reflected in s. 11 of the Partnership Act, which states that:

A partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner but subject to the prior payment of his or her separate debts.

- [20] Thus, because an instrument which binds the firm binds the partners, and because a partner is individually liable for the debts of the partnership and may pledge their individual assets as security, Silver Spoon argues that the language in the GSA that charges the property of the partnership by necessary implication also charges the individual property of each partner. Even further, Silver Spoon states that express words of limitation are actually required in the GSA in order to exempt the partners' individual assets from being charged.

They cite no authority for this last proposition.

- [21] They do, however, rely on *Bank of Montreal v. Kiwi Polish Co. (Canada)*, [1971] S.C.R. 991, 19 D.L.R. (3d) 356 [Kiwi Polish], where the issue was somewhat the reverse of that here - that is, whether or not a security agreement signed individually by the partners could render the assets of the firm subject to the security interest. Judson J. stated at page 995 that, since the partners were the only partners of the partnership and they gave a joint and several covenant in the security argument, it was not necessary for them to expressly covenant as partners in order for the security interest to be enforceable against the assets of the firm.

The Trustee's Argument

- [22] The respondent Trustee, however, relies on the decision in *Wolf Estate v. Bank of Montreal*, 2004 ABQB 392, 4 C.B.R. (5th) 140 for the proposition that, although an individual partner (or their estate) may be liable for partnership obligations, it does not follow that a security granted in the partner's individual capacity is also a security for the liabilities of the partnership (or vice versa).
- [23] The Trustee therefore argues that simply because a creditor can execute against the individual property of any of the partners (due to the joint and several liability of partners in a partnership), this does not make their individual property "partnership property" and therefore subject to the security interest.
- [24] The trustee points point out that the decision in *Kiwi Polish* is distinguish-able. The security agreement in that case specifically stated that "all the joint and several properties of the Companies as partners and of each of the Companies individually" was charged (at 995). It was thus clear from that particular agreement that the partners intended to be bound as partners, and to charge both their separate and firm assets as security. It does not, argues the Trustee, mean that any reference in a GSA to partnership property automatically includes separate property, or vice versa.
- [25] The Trustee therefore argues that simply because an instrument which binds the partnership binds the partners (as partners), this does not mean the individual assets of the partners become charged collateral only because the partners have both signed the GSA.
- [26] In effect, the Trustee argues that *Silver Spoon* is attempting to take the principle that the partnership is the partners to establish a principle that, therefore, the property of the partners individually also is the "property of the partnership" as stated in the GSA, and is therefore subject to its security interest.

The Distinction between Partnership Property and the Separate Property of the Partners

- [27] The success of Silver Spoon's argument thus depends on whether it can be said that the separate property of an individual partner (which category both parties agree the tax refund falls into) is also "partnership property" as stated in the GSA, and therefore subject to Silver Spoon's security interest.
- [28] The parties are in agreement as to the legal definition of "partnership property." The Partnership Act s. 6 defines it as "property and rights and interests in property: originally brought into the partnership stock; acquired, whether by purchase or otherwise, on account of the firm; or acquired for the purposes and in the course of the partnership business."
- [29] More particularly, the common law definition of "partnership property," adopted at para. 10 in *Re Kingsberry Properties* (1997), 3 C.B.R. (4th) 124, 51 O.T.C. 252 (Ct. J. (Gen. Div.)) ["Kingsberry"], "does not mean that it is property owned by the partnership but rather property in which all the partners have an undivided interest." This is because a partnership is not "a legal entity or person having a separate existence recognized in law and accordingly being capable of holding title to property and creating security on such property." It is, rather, the collective of the individual partners.
- [30] The Trustee thus argues that simply because a partnership is the partners, this does not erase the distinction between partnership property and the separate property of the partners, which Lindley and Banks state "is still of such importance in the event of the insolvency of the firm or of any one or more of the partners": R.C. l'Anson Banks, ed., *Lindley & Banks on Partnership*, 18th ed. (London: Sweet & Maxwell, 2002). Their definition of "partnership property" also states that it includes "everything to which the firm, or in other words all the partners composing it, can be considered to be entitled as such." [Emphasis in original]
- [31] The question then becomes whether or not the tax refund fits within either the statutory or common law definitions. I find that it does not fit within the first two branches of the statutory definition, as it was neither brought into the original partnership stock, nor was it acquired on account of the firm. It is arguable that it fits within the third branch of that definition as being "acquired in the course of partnership business." This, however, depends on the refund being viewed as a proceed of the losses incurred by the partnership - an argument dealt with below.
- [32] Neither does the tax refund fit within the common law definition of "partnership property," as it is not something in which both BHL and JWI have an undivided interest, or to which they are both entitled.
- [33] Given this, Silver Spoon's argument that the individual assets of BHL, including the tax refund, were somehow implicitly included as collateral by the wording of the GSA, cannot succeed.

The Issue of Perfection

- [34] Put simply, the Trustee argues that because neither BHL nor its individual property was identified as a debtor or collateral respectively in the registration, any security interest in the tax refund which may have existed was never perfected by Silver Spoon.
- [35] Silver Spoon, however, argues that s. 8(1)(f) of the Personal Property Security Regulation, B.C. Reg. 227/2002 (the "PPSR"), only specifies that the name of the partnership is required to be entered in the registry when the debtor is a partnership, and that had the legislature intended that individual partners be named as well, it would have specified this requirement.
- [36] Silver Spoon also argues that any perfection against the firm is by necessity perfection against the individual partners who make up that firm, without the need to name them individually.
- [37] The Trustee makes several responses to this argument. First, they point out that the definition of a "debtor" in s. 1 of the Personal Property Security Act, R.S.B.C. 1996, c. 359 (the "PPSA") includes both a person who owes payment or performance and the owner of the collateral, and that these may be two different people: see (f). It then follows that, for BHL to be a "debtor" in the sense of who owns the collateral, it must be specifically named as a debtor in order to perfect a security interest in its separate property.
- [38] Second, the Trustee argues, relying on the decision in *Re Giffen*, [1998] 1 S.C.R. 91, 155 D.L.R. (4th) 332, that the purpose of the PPSA is to give third parties notice when assets of a debtor are subject to security interests. Permitting an unnamed individual partner's assets to be subject to a security interest would entirely defeat this purpose. It is not always possible to tell who the individual partners of any given partnership are, particularly if it is not a registered partnership. Moreover, even in the case of a registered partnership such as this one, determining who the individual partners are requires a physical search at the Registrar of Companies in Victoria on microfiche, defeating the purpose of an electronically searchable Personal Property Registry.
- [39] On these policy arguments alone, it seems that even if the court were to determine that the GSA granted a security interest in BHL's separate assets, it is unlikely that such interest was perfected by proper registration.

B. Is the tax refund an after-acquired property and therefore subject to the security interest?

Silver Spoon's Argument

- [40] According to Silver Spoon's reasoning, even if the court were to find that the GSA did not create a security interest in the tax refund as a separate asset of BHL, once the refund becomes the property of the firm, it is an "after-acquired" property and therefore subject to the security interest, whether or not the firm possessed it at the time the interest attached and was perfected.
- [41] In this case, Silver Spoon says the refund will become the property of the firm by virtue of BHL's obligations as a partner for the firm's debts. In other words, once the refund was applied to BHL's individual debts (of which both parties acknowledge there are none) under s. 142(1) of the BIA, they will then flow to the partnership to satisfy the partnership's obligations, including that to Silver Spoon. This occurs under s. 142(2) of the BIA, which states that the individual assets must then be dealt with "as a part of the joint property." When this happens, the trustee will receive the funds in trust for the partnership, and once the partnership is the beneficiary of those funds, they become the property of the partnership, and subject to the security interest.
- [42] To rule otherwise, they say, would be to give the unsecured partnership creditors in this case the right to gain priority over secured creditors of the partnership by recovering nominally from an individual partner directly rather than through the firm.
- [43] In support of this argument, Silver Spoon relies on *Agricultural Credit Corp. of Saskatchewan v. Featherstone (Estate of)*, [1996] 8 W.W.R. 281, 45 C.B.R. (3d) 113 (Sask. Q.B.) [Featherstone]. In that decision, the bankrupt individual's estate received cash from shares owed to the individual by the Saskatchewan Wheat Pool following his assignment into bankruptcy. His secured creditor argued that the cash was subject to its security interest as after-acquired property, and the court agreed, holding at para. 31 that "[m]onies owing to a bankrupt, when collected by the trustee continue to be the property of the bankrupt and continue to be subject to existing security interests."
- [44] The petitioner also relies on *Re Ronald Estate*, 2007 MBQB 102, 32 C.B.R. (5th) 169 for the same proposition. There, the court held that the bankrupt had a future contingent interest in funds applied for and received by the trustee on behalf of the bankrupt, and that therefore they were subject to the security interests in that case.
- [45] Silver Spoon argues that the "monies owing to a bankrupt" in this case are the tax funds owed by BHL to the partnership by virtue of the partner's obligations for the firm's debts, and that although the partnership did not possess them at the time the GSA was entered into, the partnership had a future, contingent interest in all of the assets of its partners in the case of the bankruptcy of the firm, thus making the assets subject to the security interest.

The Trustee's Argument

- [46] The Trustee argues that the fact of a bankruptcy cannot create a security interest in an individual partner's assets that did not exist in the first place. The Trustee it points out that the partnership can't acquire anything after the bankruptcy because it was dissolved upon the bankruptcy of the partners: Partnership Act, s. 36. The partnership agreement at para. 11.5 specifically states that, after dissolution of the partnership, the net assets of the firm are to be distributed to the partners. There is no comparable provision that requires the partners to contribute anything to the partnership.
- [47] Even if BHL were somehow liable to contribute its assets to the firm, the Trustee argues that such contribution would at best be an unsecured claim by the firm against BHL and as such, would not create an effective security interest for Silver Spoon vis-à-vis the BHL trusteeship. However, until discharge, there will always remain three separate bankruptcy estates, and any creditor of the firm is also a creditor of each of BHL and JWI and their respective, separate estates. The refund will go from the bankrupt estates to the creditors in those bankruptcies, and there is no basis in law for Silver Spoon's assertion that the funds will ever go to the partnership, thereby becoming its property.
- [48] At most, says the Trustee, BHL might be required to indemnify JWI for BHL's share of any claims made against the partnership and paid by JWI, but it will never be required to indemnify the partnership for the partnership's obligations, since BHL is a partner in the partnership, and cannot indemnify itself.

Analysis

- [49] Although it seems quite clear from the authorities relied on by Silver Spoon that the estate of a bankrupt (in this case the estate of the firm) can come into possession of property following the assignment into bankruptcy this does not necessarily mean that the individual partners must therefore indemnify the firm itself for the firm's liabilities. In each of the cases cited, the bankrupt was an individual, not a partnership, and so the issue of the indemnification of the firm by the partners never arose.
- [50] The best resolution of this argument is to first determine what is meant in s. 142(2) of the BIA that all the individual assets of a partner are to be "dealt with as part of the joint property" in the case of a bankruptcy.
- [51] Silver Spoon argues that the phrase must mean that the property in question becomes the joint property of both partners, and therefore is the property of the firm in the very real sense of passing from the estate of BHL into the firm's estate, whereupon the security interest attaches to it.

[52] The Trustee argues that s. 142(2), when read in conjunction with s. 11 of the Partnership Act, merely means that the individual property of each partner must be used to pay the debts of the partnership as if that property were the property of the partnership, but that it does not actually become partnership property.

[53] This argument holds some appeal, particularly if the whole of s. 11 is considered:

Liability of partners for firm debts

11 A partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner, and after his or her death his or her estate is also severally liable in a due course of administration for those debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his or her separate debts. [Emphasis added]

[54] Although the italicized portion above refers to the estate of a deceased person and not a bankrupt per se, it is logical that the estate of each ought to be dealt with in a similar way in order for the provisions of the BIA and the Partnership Act regarding the liability of partnerships to be read in harmony. If that is the case, then the individual partner's estate is liable to the partnership's creditors directly and not to the partnership intermediately.

[55] There is little relevant judicial interpretation of s. 142 that specifically addresses this issue. In both *GMAC Commercial Credit Corp. Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 and *D.I.M.S. Construction Inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, the Supreme Court of Canada held that s. 142 (both on its own and in the context of the surrounding provisions) was merely a scheme for the priority of payment by bankrupt partners to the various estates of the partners and the partnership. There is no mention in either decision that the property of the individual partner's estate becomes the property of the partnership estate once the individual's debts are satisfied.

[56] Similarly, in *Kingsberry*, the court held that the surplus from the partner's individual estate was merely "made available" by the Trustee to the claimants against the partnership trust.

[57] Finally, *Featherstone* itself states at para. 31 that the monies owing to a bankrupt continue to be the property of the bankrupt. In this case, the monies owing are owed by the governments of Alberta and Canada to BHL individually, and therefore the tax refund is an after-acquired asset, but only of BHL and not of the partnership.

[58] Thus, the case law that interprets s. 142 and the manner in which a partnership's liabilities are satisfied does suggest that the contribution of an individual partner's assets towards the debts of the partnership is made directly to the creditors of the partnership and not to the trustee of the partnership first. If this is the case, then it cannot be said that the tax refund has become or will become partnership property to which Silver Spoon's security interest is attached.

C. Is the tax refund a 'proceed' of the loss incurred by the partners, to which the security interest attaches?

Silver Spoon's Argument

- [59] Silver Spoon argues that the tax refund monies are "proceeds" of an asset of the firm, and therefore remain assets of the firm, subject to Silver Spoon's security interest.
- [60] The authority alleged for this can be found in s. 28(1) of the Personal Property Security Act, R.S.B.C. 1996, c. 359 (the "PPSA"), which states that if collateral is dealt with or otherwise gives rise to proceeds, the security interest continues in the collateral and extends to the proceeds. The definition of "proceeds" in s. 1 of the PPSA includes property that is "derived directly or indirectly from any dealing with collateral" and "in which the debtor requires an interest."
- [61] In this case, argues Silver Spoon, the tax refund was obtained from dealing with the operating losses incurred by the firm in its tax year ending in October 31, 2006, and the firm will gain an interest in the tax refund because its trustee will be able to use it to pay its debts. The tax refund therefore meets the definition of a proceed.
- [62] The losses are an "asset" of the firm from which the "proceeds" (the tax refund) arise, according to Silver Spoon, because they are a chose in action - the right of the firm to use its operating loss as a deduction against tax otherwise payable. Thus even though the firm itself does not pay taxes and cannot apply the operating losses to reduce those taxes, the losses represent a right to claim a tax deduction that the firm can use in many different ways, including:
- assigning that right wholly to one partner;
 - admitting a new partner, thereby increasing the partnership's capital so that the new partner can obtain an assignment of the right; and
 - selling or transferring the right to a third party.
- [63] Silver Spoon relies particularly on the decision in *Orr & Co. v. Saskatchewan Economic Development Corp.* (1994), 24 C.B.R. (3d) 196, 119 Sask. R. 121 [Orr], where the Saskatchewan Court of Queen's Bench held that a secured creditor's security interest in the tax refund of a corporate debtor attached when the debtor had rights in the collateral, which in the case of a tax refund, was when the debtor qualified for the tax credit. Thus, says Silver Spoon, the partners qualified for the tax refund - and the partnership had rights in the collateral - when the partnership incurred the losses.
- [64] Silver Spoon also seeks to rely on the Supreme Court of Canada decision in *Spire Freezers Ltd. v. Canada*, 2001 SCC 11, [2001] 1 S.C.R. 391 [Spire Freezers] for the proposition that operating losses incurred by a partnership are an asset of the partnership which can be legitimately bought and sold.

The Trustee's Argument

- [65] The Trustee argues that the operating losses are not property which can give rise to proceeds in the manner suggested by Silver Spoon. They give several reasons for this.
- [66] First, they say, a partnership is not a taxpayer. It has no income, it is not required to pay any taxes on such income, and therefore it does not incur and cannot use losses in order to recover taxes paid. While s. 96(1)(a) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) does state that the income and losses of a partnership are to be calculated as if the partnership was a separate person resident in Canada, it is clear that a partnership is not a taxpayer and therefore cannot actually have income or losses. If this is the case, then it also cannot have proceeds from any losses, as argued by Silver Spoon.
- [67] This is supported by s. 96(1)(g) of the Income Tax Act, which states that losses of the partnership are, in fact, the losses of each individual partner/taxpayer, to the extent of their share in the partnership. Thus, says the Trustee, 'partnership' losses are merely a fiction for calculation purposes, but are actually incurred by the individual partners.
- [68] This is also supported by the decision of the Federal Court of Appeal in *Madsen v. Canada* (2000), 196 D.L.R. (4th) 332, 10 B.L.R. (3d) 1 [Madsen]. There, Linden J. for the court held at paras. 16-17 that:

A partnership's lack of a separate legal personality is what distinguishes it from an individual or corporation. The [Income Tax Act] maintains this lack of legal personality, and does not generally treat partnerships as taxpayers. Instead, it is the individual partners who pay tax on the basis of their particular share of the income or losses of the partnership. In my view, the foregoing "regime" [in s. 96 of the Act] implies nothing more than a notional construct for calculating a taxpayer's tax liability. It is a purely administrative convenience necessary to sustain the Act's view of the partnership as a conduit or vehicle for taxpayers.

In this way, the fiction of a partnership as an entity separate from the partners is temporary and does not extend to colour the true legal nature of transactions at the time they are entered into by a partnership.

- [69] The trustee argues that these principles are illustrated in this case by the fact that the tax refund monies are actually monies which were paid by BHL as an individual corporate taxpayer to the government well before the partnership was ever formed. In this way, the tax refunds are the proceeds solely of BHL's previous tax payment, and not of any losses of the partnership.

- [70] The Trustee also points to the fact that here, the losses cannot be "partnership property" because they were never something in which the partners had an undivided interest. Specifically, the partnership agreement allocated the partnership losses between BHL and JWI, assigning to the former 96.4% of all income and losses of the partnership (which represents its proportionate share of the losses under s. 96(1)(g)). The losses were thus never something in which all the partners had an undivided interest.
- [71] Moreover, says the Trustee, the partnership never could have owned property called "losses." Silver Spoon's argument confuses the allocation of a profit or a loss (as occurred through the partnership agreement) with the distribution of the property of the firm to the individual partners.
- [72] As they point out, profits and losses do not change the amount of property owned by the partnership. Where there are profits which have been allocated but not yet distributed, this does not affect the property of the firm, which includes cash, receivables, inventory, etc. In the case of a loss, they say, the loss will merely impact how much of the property the firm has. A creditor cannot have a charge on income (which is only the difference between profit and loss) or on loss (which merely reduces the actual assets of the firm). In other words, "losses" cannot be partnership property.
- [73] Finally, the Trustee argues that the definition of "proceeds" in s. 1 of the PPSA requires that the debtor (in this case the firm) have some interest in the proceeds (in this case the tax refund) in order for them to qualify as "proceeds." They state that here, the refund is the property of a third party - specifically BHL - and that, at most, the only interest the firm has in the refund is in the form of an unsecured "claim" against BHL for the firm's debts (which I held in the previous section cannot exist), and which itself does not translate into a secured claim by Silver Spoon against BHL's tax refund.

Analysis

- [74] Given that I have concluded that BHL is not liable to the partnership for the partnership's debts (as discussed in the previous section), then the Trustee is correct that the argument regarding proceeds must also fail. This is because, in order to meet the definition of "proceeds" as set out in the PPSA, it must be shown that the debtor (in this case the partnership) acquired an interest in the proceeds (the tax refund).
- [75] Thus, because BHL does not owe the tax refunds to the partnership and they were not paid from the BHL trust into the firm trust, then the partnership will never acquire an interest in them, and it cannot be said that they are then proceeds of a partnership asset to which the security interest attaches.
- [76] On this basis, I find that the tax refund was not a "proceed" of the operating losses nominally incurred by the firm in 2004.

D. Is the Trustee estopped from asserting entitlement to the tax refund on the basis of a legal opinion that the security interest is valid and enforceable against it by Silver Spoon?

Silver Spoon's Argument

[77] Silver Spoon does not detail precisely how the Trustee is estopped from claiming that the security interest vis-à-vis the firm was valid and enforceable. It merely states that the Trustee made a representation to all the creditors of the firm that this was the case.

The Trustee's Argument

[78] The Trustee asserts that Silver Spoon is basing its estoppel argument on the fact that the Trustee's report to the creditors of the firm (including Silver Spoon) states that the Trustee has sought and received a legal opinion on the Silver Spoon security interest vis-à-vis the firm, and that that opinion confirmed that the interest was valid and enforceable.

[79] In response to this argument, the Trustee first points out that the legal opinion referred to in its report clearly only dealt with a security interest in the property of the partnership, and not of the individual partners. Therefore, even if the doctrine of estoppel did apply, it would have no bearing on whether or not Silver Spoon had a valid and enforceable security interest in any property of the individual partners, such as the tax refund.

[80] Second, the Trustee argues that there is no estoppel in this case because:

- there is no evidence that there was any misrepresentation by the Trustee regarding the validity of the security agreement vis-à-vis the partnership;
- there is no evidence that Silver Spoon relied on any such misrepresentation; and
- there is no evidence that any such reliance was to Silver Spoon's detriment, such that Silver Spoon could have done something which it did not do.

Analysis

[81] I agree that there is insufficient evidence to establish an estoppel. Accordingly, the Trustee is not estopped from asserting a right to the tax refund.

Decision

[82] Does Silver Spoon have a valid security interest in and priority over any other creditor in respect of all of the assets of BHL, such that the court should issue an order that BHL's funds, including the uncashed cheques and the funds held in trust by Silver Spoon's solicitors, be paid to Silver Spoon absolutely? The answer is no. The tax refund is the property of BHL individually, and not the partnership. Therefore, the security interest did not attach to and was not perfected against BHL's individual assets, including its tax refund. The tax refund is not the after-acquired property of the partnership, nor is it a proceed from partnership property. Further, there is no basis on which the trustee may be estopped from

claiming the tax refund for BHL's beneficial interest.

[83] The petition of Silver Spoon is dismissed. The respondent's motion of May 27, 2008 is granted.

"The Honourable Mr. Justice Rice"

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