2002 ABQB 993, 2002 CarswellAlta 1397, [2002] A.J. No. 1385, 118 A.C.W.S. (3d) 328

2002 ABQB 993
Alberta Court of Queen's Bench

Visionwall Technologies Inc., Re

2002 CarswellAlta 1397, 2002 ABQB 993, [2002] A.J. No. 1385, 118 A.C.W.S. (3d) 328

IN THE MATTER OF THE BANKRUPTCY OF VISIONWALL TECHNOLOGIES INC.

Agrios J.

Heard: October 17, 2002
Judgment: October 17, 2002
Written reasons: November 7, 2002
Oral reasons: October 17, 2002
Docket: Edmonton BK003 81675

Counsel: *Terrence Warner*, for Trustee
Leonard Hendrickson, for Applicant

Subject: Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.19 Miscellaneous
Headnote
Bankruptcy --- Property of bankrupt — Miscellaneous cases
Supplier supplied glass to bankrupt prior to bankrupt being placed in receivership — Four days after bankrupt was placed in receivership, supplier issued demand for repossession of goods under provisions of Bankruptcy and Insolvency Act — Supplier brought application to determine if goods constituted "30 day goods" under provisions of s. 81.1 of Act — Application granted — Supplier of goods entitled to repossess goods within 30 days where purchaser is bankrupt and when demand is made and goods have not been resold at arms length and are not subject to agreement for sale at arms length — No such arms length transaction or agreement existed in this case.
Table of Authorities
Cases considered by *Agrios J.*:
Barrington & Vokey Ltd., Re, 34 C.B.R. (3d) 187, 26 C.L.R. (2d) 28, 1995 CarswellNS 49 (N.S. S.C.) — considered
Gingras, Robitaille, Marcoux Ltée v. Beaudry, [1980] C.S. 468, (sub nom. *Tremblay, Re*) 36 C.B.R. (N.S.) 111, 1980 CarswellQue 59 (C.S. Que.) — considered
Royal Bank v. Stereo People of Canada Ltd. (Trustee of) (1996), 43 Alta. L.R. (3d) 389, [1997] 1 W.W.R. 204, 127 W.A.C. 311, 44 C.B.R. (3d) 213, (sub nom. *Stereo People of Canada Ltd. (Bankrupt), Re*) 187 A.R. 311, 1996 CarswellAlta 804 (Alta. C.A.) — followed
Skalbania (Trustee of) v. Wedgewood Village Estates Ltd., 37 B.C.L.R. (2d) 88, 74 C.B.R. (N.S.) 97, [1989] 5 W.W.R. 254, 60 D.L.R. (4th) 43, 44 C.R.R. 341, 1989 CarswellBC 344 (B.C. C.A.) — considered
Standard Trustco Ltd. (Trustee of) v. Standard Trust Co., 36 C.B.R. (3d) 1, 129 D.L.R. (4th) 18, 26 O.R. (3d) 1, (sub nom. *Standard Trustco Ltd. (Bankrupt) v. Standard Trust Co.*) 86 O.A.C. 1, 1995 CarswellOnt 932 (Ont. C.A.) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 3 — referred to

s. 3(1) — considered

s. 81.1 [en. 1992, c. 27, s. 38(1)] — referred to

s. 81.1(1) [en. 1992, c. 27, s. 38(1)] — referred to

APPLICATION by supplier of goods to bankrupt company to determine status of goods.

***Agrios J.*:**

1 This is an application by the supplier of goods, valued at some $145,OOO, to determine if the goods constitute "30 day goods" under the provisions of Section 81.1 of the *Bankruptcy and Insolvency Act*. This section was explained succinctly by our Court of Appeal in 1996 in the decision of*Royal Bank v. Stereo People of Canada Ltd. (Trustee of)* [1996 CarswellAlta 804 (Alta. C.A.)], upholding the decision of one of our bankruptcy judges, Justice Dea. At the end of the judgment, it reads:

> The intention of Parliament in enacting this section is clear. Parliament intended to grant to suppliers who have recently delivered goods, limited relief from the inequities imposed upon them in earlier legislation. These inequities include the complete loss of all unpaid goods shipped by the supplier to the bankrupt, leaving the supplier subject to the risk that a debtor will order goods just prior to bankruptcy to improve his position at the bankruptcy, as pointed out by Justice Farley in *Re: Rizzo Shoes* with a citation. And they quote:
>
> > It appears that the repossession section was included in the 1992 amendments to the Bankruptcy and Inso1vency Act to protect recent unsecured creditors especially in those situations where the bankrupt had bulked up with inventory to liquidate so as to generate funds to pay third parties. The protection accorded to suppliers is strictly limited to goods recently supplied which have not been paid for, which have not been resold, and which are in the same state as they were on delivery. Parliament ensured that rights of innocent third parties who obtain an interest in goods subsequent to delivery would not be affected. We see no inequity to the secured creditor who was not given recourse against inventory, the cost of which has not been paid by the bankrupt.

This is as clear an explanation as anyone could ask for.

2 The important dates in this case are as follows. February the 24th, 2000, Visionwall Technologies Inc. placed in receivership, and I will refer in future to the bankrupt company either as the "bankrupt company" or "Inc.". On February the 28th, A.F.G. Industries Ltd. and I will refer to them in the future as either "A.F.G." or "the supplier", applied as a manufacturer of glass and glass related products and it issued a demand for repossession of the goods under the provisions of the *Bankruptcy and Insolvency Act.*

3 On March 3rd, 2000, "Inc." was deemed to have filed an assignment on bankruptcy. There are three separate and distinct situations and I shall deal with them in reverse order of size and importance. Firstly, one contract involved a Volkswagen dealership in California. The sum in this matter is somewhere in the order $2,000. The solicitors for the Trustee in bankruptcy, Pricwaterhousecooper, who I will refer to in the future as either the "Trustees" or "P.W.C." concede this in favour of the applicant, A.F.G., and agree that there should be a judgment for the agreed sum to A.F.G.. Counsel can work out the particulars of this judgment.

4 The second situation covers a window wall system in British Columbia. Was it Vancouver, did you say?

[5] MR. WARNER: I believe it was, sir.

[6] MR. HENDRICKSON: Yes, Sir.

7 THE COURT: Vancouver, Referred to in the material as the "Wall Centre Project". There was material supplied by A.F.G. apparently valued at some $36,460.40 on hand for this project. It is agreed that this product was not used. The owners of the building in mid-project changed the specifications to a lighter glass so that the glass applied by A.F.G. could no longer be used. The Receiver offered to return it to A.F.G. who refused to accept it.

8 I am told the material is worthless. So be it. It was not used. The Trustee can return it. There can be no claim for this sum. The matter of interest, as I indicted to both of you, is still unsettled in my mind and I would appreciate further argument on the point. The third and final situation is more complicated, and more interesting and covers glass product valued at some $107,000, which glass was in fact used to complete a contract in Omaha known as the Northwest Mortgage Project. It will be necessary to go into greater details on this claim.

9 The background is best set out in an affidavit of an adjuster from B.B.C.G. of Toronto, one Edmond Chase. Sometime in February of 2000, it became apparent that the bankrupt company, "Inc.", would not be able to finance the completion of the Northwest contract. There may have been other contracts but they do not concern me. A company called Frontier Insurance had supplied a bond to "Inc." for completion of the contract and in turn a federal government agency, the Export Development Corporation, hereinafter referred to as E.D.C., had guaranteed the bond. As Mr. Chase artistically pointed out, E.D.C. was facing a "potential hit" of $3,000,000.

10 When everyone realized the gravity of the situation there was a series of meetings involving many stakeholders including Pricewaterhousecooper, the Monitor of Inc. for the Toronto Dominion Bank (secured creditor). The best solution, as the Trustee put it, with the view to maximizing the value of accounts receivable and work in progress, was to complete the contract. This involved getting agreement from a great many stakeholders. A partial list would include the owner of the project under construction, the bonding company, E.D.C., the guarantor of the bond, the principals of "Inc.", Visionwall Technologies Corp., the suppliers of material, et cetera.

11 On February the 24th, there was at least agreement in principal, and a Mr. Chase swore, the various pieces had fallen into place. Inc. would be placed into receivership. E.D.C. would finance the completion of the contract. The work would be completed by a separate but associated company, Visionwall Technologies Corp., which I have for convenience referred to hereafter as "Corp". They would complete the manufacturing process using the equipment and the employees of the earlier company, Inc.

12 There is no question that this was a valid business decision. A great deal of effort went into reaching the agreement with all the interested parties. I take it that the job on Northwest Project was completed and far more value received for the creditors than to have stopped the job in midstream. Alas, only the secured creditors benefitted and there was nothing left for the unsecured creditors.

13 This leaves in question the position of the supplier of the glass A.G.F. and the 30 day goods. Much of the argument of counsel this morning was directed to whether or not there was an agreement for sale on February the 24th, 2000. Mr. Warner argued most persuasively for the Receiver that there was such an agreement, and Mr. Hendrickson argued there was not. Mr. Chase swears there was an agreement on February the 25th with E.D.C. agreeing to purchase the material in possession of the Receiver. It is agreed there was no written contract.

14 Mr. Hendrickson points out that the bill of sale is dated May 17th, 2000 and he refers to a letter from Messrs. Field Atkinson who were acting for the Frontier and E.D.C.

15 The letter is dated March 10th, and it sets out in writing what the agreement will be. I think one of the principals, a Mr. Clarahan set it out rather well and Mr. Hendrickson did well to bring this to my attention. I quote from page 19 of his examination on September the 10th, 2001. He reads, to a question:

> Was all of this worked out before 24th -- et cetera, et cetera. And he answered:

> It was not all worked out before February 24th but the way -- I'm trying to think of. Discussions occurred prior to February 24th whereby the -- I think it's fair to say there was agreement in principle with E.D.C. per discussions that we had with B.B.C.G. that this would go forward on that basis. The actual formal contract, the written form of contract was a tough and complicated negotiation that worked in all kinds of safeguards and procedures. It was -- it then involved lots of lawyers.
>
> And it didn't actually get settled until sometime in March. I believe I remember right it was March 10th when we -- no, pardon me, the first payment that we received from E.D.C. was February 28th, and there was another major payment that we got from then on March 10th that I think if I went back to actually checking I think it might be as late as March 20th, 24th before the deal was actually signed.

16 So there was an evolution of how this whole thing was to occur. It was likely, in my view, an agreement in principle, and under the circumstances, the parties formalized the details about March 10th. I would be surprised if any of the parties had walked away from the agreement in principle, that they could have been sued.

17 But I need not answer the vexing question of when the discussions became an agreement. On a peripheral point, there is no doubt in my mind that on February 28th, the product in question was in the possession of the Receiver, and the cross-examination of the Receiver and his answers assist me in this determination.

18 Now, to the important question. In my view, it really is settled by a fair interpretation of the term, "arm's length". Under the *Bankruptcy and Insolvency Act*, a supplier of goods is entitled to repossess within 30 days where a purchaser is bankrupt and when a demand is made and the goods have not been resold at arm's length and are not subject to an agreement for sale at arm's length.

19 Mr. Warner has come up with an intriguing suggestion and he puts forth a definition of arm's length transaction in Black's dictionary which he feels should be determinate of this question. I respectfully disagree. E.D.C. and all the players in the reconstruction scheme were not at arm's length. They were a vital cog in this transaction. E.D.C. stood to lose $3,000,000 if the contract was not completed. To suggest that such a party is at arm's length simply defies any commercial understanding or reasonable interpretation of arm's length in the real world.

> The Act goes further, and at subsection 6, it says: Notwithstanding any other federal or provincial act or law, a supplier's right to repossess goods pursuant to this section ranks above every other claim or right against the purchaser in respect of those goods other than the right of a bona fide subsequent purchaser of the goods for value without notice that the supplier has demanded repossession of the goods.

20 The Trustee received notice on February 28th. The notice was properly given. If he chose to deal with those products, he did so at his peril and the peril of the others who were parties to the reconstruction scheme. I do not imply any impropriety or wrongdoing except for the ignoring of the 30 day goods notice. The rest of this was commercially valuable in what was done. In hindsight, the restructuring group should have bought the 30 day goods from A.F.G. they might even have been able to make a more advantageous deal for cash but that is so easy for me to say in hindsight. Accordingly, the applicant is entitled for judgment for the value of the 30 day goods in this, the Norwest contract.

(ORAL JUDGMENT CONTINUES AT PARAGRAPH 23)

21 At the time of rendering this oral judgment I took the position that any party that was involved in the reconstruction scheme was not dealing at arm's length. In my mind, anyone who was involved had a financial interest, or could somehow benefit from the reconstruction, could not in normal commercial parlance be considered at arm's length.

22 Since then, as I have been asked to review the transcript. As a matter of interest I have carried out a search of Canadian authorities and I have been surprised at how little there is in the way of reported cases defining the term arm's length as it relates to bankruptcy. Our legal counsel have located four cases, none of which give me cause for concern and

some of which provide comfort in what has been held. The most helpful, clear explanation, in my view, is to be found in the dissenting judgment of Doherty, J.A., Ontario Court of Appeal in *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 36 C.B.R. (3d) 1 (Ont. C.A.) . Although this is a dissenting judgment the majority do not disagree with this aspect of Justice Doherty's decision. The case revolves around the term "reviewable transaction" as referred to in s. 3 of the *Bankruptcy and Insolvency Act* Section 3.(1) reads:

> For the purposes of this Act, a person who has entered into a transaction with another person otherwise than at arm's length shall be deemed to have entered into a reviewable transaction.

He states:

> In making this argument, Mr. Thompson was careful to avoid reliance on any coercive role played by the regulators and CDIC as somehow placing the transaction beyond the reach of s. 3 of the *Act.* He stressed that on the approach he urges, the regulators and CDIC received and gave consideration and were in every real sense parties to the overall transaction. He submits that their central participation in the overall transaction rendered it an arm's length transaction and took it outside of s. 3 of the *Act*.
>
> . . .
>
> The fact that third parties were instrumental in bringing about the transfer of assets, took or didn't take certain steps as a result of that transfer, and stood to profit or suffer as a result of that transfer in no way alters the essential nature of what happened between Trustco and STC. The appellant's argument comes down to the assertion that a non-arm's length transaction becomes an arm's length transaction when it is driven by non-related third party forces who have a financial or other interest in the transaction between the related parties. I see nothing in s. 3 or s. 4 of the Act which would permit the court to place this gloss on the language of the statute. This was a reviewable transaction . . .

23 I take a similar view that when non related third parties have a financial or other interest in a transaction between related parties they cease to be at arm's length. The remaining three authorities are not as decisive but are quoted for completeness. In *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* [1989 CarswellBC 344 (B.C. C.A.)] Esson J.A. noted the term "arm's length" may be one in general use only in North America - at least I found no reference to it in English dictionaries. The Canadian Law Dictionary 1983) . . . has a definition . . . as does Black's Law Dictionary (the latter definition is the one that was quoted by Mr. Warner, namely:

> Arm's length transaction. Said of a transaction negotiated by unrelated parties, each acting in his or her own self interest; the basis for a fair market value determination. Commonly applied in areas of taxation when thee are dealings between related corporations, e.g. parent and subsidiary. The standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction.

The Encyclopedia of Words and Phrases, 4th ed. (1986) has this:

> Arm's Length. (Can.) The expression "dealing at arm's length" is one which is usually employed in cases in which transactions between trustees or cestuis que trust, guardians and wards, principals and agents or solicitors and clients are called into question. Per Locke, J.
>
> *M.N.R. v. Sheldons Engineering Ltd.*, [1955] S.C.R. 637

The last quotation is a fair summary of the language of Locke J. speaking for the court in *M.N.R. v. Sheldon's Engineering Ltd.*, [1955] 3 D.L.R. 801 . . . which remains the most authoritative judicial exposition of the term.

24 The head note in Quebec Superior Court (In Bankruptcy) *Gingras, Robitaille, Marcoux Ltée v. Beaudry* [1980 CarswellQue 59 (C.S. Que.)] by Justice Moisan reads as follows:

> The notion of reviewable transactions was introduced to capture transactions, disadvantageous to the bankrupt and therefore to his creditors, where the bankrupt was either related, within the definitions contained in the Act, to his co-contracting party, or was not dealing at arm's length with him. The meaning of "otherwise than at arm's length" is, however, elusive. The concept has its source in the Income Tax Act, but the jurisprudence, as it relates to bankruptcy, is practically non-existent. The doctrine provides that the court has wide discretion to say whether or not persons who are not related were dealing at arm's length when a particular transaction took place. In the absence of a better definition, a transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contacting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reason of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction in question is not at arm's length.

25 Finally, Registrar Smith of the Nova Scotia Supreme Court in *Barrington & Vokey Ltd., Re* (1995), 34 C.B.R. (3d) 187 (N.S. S.C.) was called on to determine whether goods that were subject to an agreement of sale are arm's length had been resold at arm's length. He held that, Emco, a supplier, had delivered certain supplies to the bankrupt firm. Solicitors for Emco had presented the trustee with a demand for repossession of the goods and materials pursuant to s. 81.1(1) of the *Bankruptcy and Insolvency Act*. Counsel for the trustee declined to release the goods and materials on the ground that these goods and materials were subject to an agreement for sale at arm's length. The Registrar noted as follows:

> Section 81.1 of the Act is a relatively new section which became effective on November 30, 1992. Therefore there is very little case authority interpreting this section.

26 Registrar Smith held that Emco's claim was valid and subsisting under s. 81.1 and that Emco was entitled to be paid the total value thereof. He determined that the trustee had failed to establish that the goods had been resold at arm's length and noted that in his opinion the alleged contract represented by a particular purchase order was vague and uncertain and fell far short of the legal requirements for a contract quite apart from the fact there was no evidence to show there was any election made to accept it as a contract.

27 To repeat, nothing in these authorities causes me to resile from my original decision.

(ORAL JUDGMENT CONTINUES)

28 So Gentlemen, I will need your assistance on the mater of whether interest on the Vancouver contract is appropriate and also the matter of costs. Any suggestions?

29 MR. WARNER: My Lord, I would suggest that it's not appropriate for two reasons. One, even though we offered to return the glass, I would still submit that, at the critical date of February 28th, that glass was still subject to a valid and subsisting contract between Wall Centre Inc. and Visionwall Technologies. Now, clearly, in the coming days after the appointment of the Receiver, effectively approximately a week or ten days after the appointment of the Receiver, the Receiver gave notice to Wall Centre that they weren't in a position to complete that contact but they were making arrangements with Visionwall B

> [30] THE COURT: Other parties to complete it.

31 MR. WARNER: Other parties to complete it, yes. But that doesn't take away from the fact that at the critical juncture, which is the date that the demand for repossession of goods was served, there was still a valid and subsisting contract in place. Nothing had happened to it at that point other than the Receiver had made a determination in his own mind that there was too much risk involved in the Receiver operating the company in receivership. So on the basis

that there was still a valid and subsisting agreement in place, I don't believe that A.F.G. has brought itself within 81.1 in relation to that glass.

32 My second point on that, Sir, is the -- we didn't learn -- the Receiver didn't learn that the glass hadn't been used until Mr. Clarahan was examined by Mr. Hendrickson and --

[33] THE COURT: And that was September the following year?

[34] MR. WARNER: Yes.

35 MR. WARNER: It was really my reading, because I didn't attend the examination, but it was my reading of the transcript that twigged us to the fact that the glass had not been used. I informed the receiver of that, whereupon I got instructions to offer that glass back to A.F.G., which we did within a short period of time thereafter. so -- and it was refused, as you pointed out. So I don't believe that interest is appropriate in the circumstances based on those two points, Sir.

[36] THE COURT: Mr. Hendrickson?

37 MR. HENDRICKSON: Sir, I agree with my -- the way my friend has structured his response. The first question is if Your Lordship says that there was a subsisting contract, then there's no right to the return of the goods B

[38] THE COURT: Yes, and there was B

39 MR. HENDRICKSON: -- or anything.

[40] THE COURT: -- at that moment.

41 MR. HENDRICKSON: If that's your decision, Sir, that would be pp

42 THE COURT: No, no, but I -- as far as I understand, thee was at that time a contract with the Vancouver people, was there not?

43 MR. HENDRICKSON: There -- well, it depends. On our view, the Receiver had made a decision on the date of the receivership to repudiate that contract.

[44] THE COURT: My recollection is they didn't do that until four days later?

45 MR. HENDRICKSON: No, he made the deci --he made the decision. He communicated B

[46] THE COURT: Oh, I see what you mean.

[47] MR. HENDRICKSON: -- the decision B

[48] THE COURT: He -- four days later, he communicates it.

[49] MR. HENDRICKSON: That's right, Sir.

[50] THE COURT: Okay.

[51] MR. HENDRICKSON: So probably that's the nub of the question of whether the repudiation is effective of the date. When he enters into an arrangement that's incompatible with the Wall Centre, with Vision Corp., he entered into an arrangement whereby Vison Corp. would manufacture. And so I don't want to belabour that point. If your decision is that that -- that there is a contract, then that's the end of the interest issue because we'd have to show that there was a valid 30 day goods claim before there could be any consideration of interest.

[52] Secondly, regarding interest, I don't want to be too gracious, but interest normally follows principal and if there is no principal being returned, I mean, we're just getting some worthless glass and I don't think there can be interest. I guess I'm -- I'm having a hard time understanding where the interest could come in because it --interest would just be B

[53] THE COURT: Okay. it -- I -- it was really the letter that you forwarded, I think, quite fairly, Mr. Warner. You sort of implied if we use your product, we will put money in trust, and at the end of the day, if you win on 8.1, we will pay you. Okay. There was almost an implication there - I -- and I think the letter was fairly stated. There is no complaint here. But is there not an almost impression given that this glass is going to be used and, if you win, we will give you your money? Is that not correct?

[54] MR. WARNER: That was certainly the thinking at the time, Sir.

[55] THE COURT: Yes.

[56] MR. WARNER: I mean, we did not believe -- or we did not know B

[57] THE COURT: You did not know B

[58] MR. WARNER: -- that the glass wouldn't be used.

[59] THE COURT: -- they were -- somebody else was going to change specs.

[60] MR. WARNER: So it was certainly our expectation at the time the letter was written that the glass would be used and B

[61] THE COURT: Okay. I do not think we are talking a lot of money. We are talking interest on some $36,000 for a period of what, two years in all fairness, do you think that there should be payment of that interest?

[62] MR. WARNER: No, I don't believe so, sir.

[63] THE COURT: You do not, no. Okay. I do not agree. I have no hesitation. Incidentally, I reserve the right if counsel wish to take this case any further to make additions to this oral judgment. I am with Mr. Hendrickson in this case that I think at the time on the 24th when the receivership took place, from what I gather, there was an intention to repudiate all contracts including the one in Vancouver and have them turned over to a new company that subsequently became Corp., okay. so to that extent, I think, in all fairness, and with the understandings here, although I have said that they can have their glass back because you did not use it and they are not entitled judgment for that sum, I think they are entitled to interest on that sum because of a general feeling that this was the understanding. Okay: Now, I do not say this with any great strength but that is my feeling of fairness. Let us get to the matter of costs.

[64] MR. HENDRICKSON: Costs should follow the event, Sir.

[65] THE COURT: I should think so. Mr. Warner? they have won most of it, not all of it.

[66] MR. WARNER: I think it's a missed deal. I mean, we offered the Wall Centre glass back to them quite some time ago and -- which was refused. Really the only issue then really was the Norwest Mortgage.

[67] THE COURT: Okay, Can I say costs on $107,000? Does that make any difference? I do not know.

[68] MR. WARNER: Probably not. I think that Mr. Hendrickson was arguing for B

[69] THE COURT: a Hundred B

[70] MR. WARNER: -- 36,000 in cash for the Wall Centre.

[71] THE COURT: Yes, and he did not get it..

[72] MR. WARNER: Which he didn't get, so I think it's a mixed result, Sir. and we conceded some stuff.

[73] THE COURT: And so how should I best handle that?

[74] MR. WARNER: I would say split the costs. Basically no costs to either party.

[75] THE COURT: Oh, I do not think I can go that far, Mr. Warner. I might ameliorate the situation a trifle if you can show me a basis on which I can do that. There has been partial success, $107,000 instead of $145,000.

[76] MR. WARNER: Well, My Lord, what we could do is we could workout the numbers and just take a percentage of the total.

[77] THE COURT: Mr. Hendrickson?

[78] MR. HENDRICKSON: Well, Sir, costs are normally awarded to the successful party on the amount recovered so the -- that's ..

[79] THE COURT: Yes, I think that.

[80] MR. HENDRICKSON: B the concern is dealt with.

[81] THE COURT: I think Mr. Hendrickson is entitled to costs on $107,000. Okay?

[82] MR. HENDRICKSON: Thank you, Sir. And interest B

[83] THE COURT: Anyway B

[84] MR. HENDRICKSON: B Sir, on the 107? We've claimed that.

[85] THE COURT: Forgive me?

[86] MR. HENDRICKSON: Interest on the 107.

[87] THE COURT: I think you are entitled to it. I -- no disagreement there, Mr. Warner?

[88] MR. WARNER: Well, I guess, My Lord, my only concern about that is the length of time that it took to bring this application forward.

[89] THE COURT: Was there a delay on anybody's part that can be attributed, for instance, to the applicant?

[90] MR. WARNER: Part of the delay, I think, involved getting to Mr. Clarahan because I believe that Mr. Hendrickson wanted to examine Mr. Clarahan but that didn't take place until 18 months after the event. and then part of the additional delay related to Mr. Clarahan providing his responses B

[91] THE COURT: Are we talking --

[92] MR. WARNER: -- to undertakings.

[93] THE COURT: -- about a lot of money, Mr. Warner?

[94] MR. HENDRICKSON: It's judgment interests rates are quite low, sir.

[95] THE COURT: Yes, I did not B

[96] MR. HENDRICKSON; Sorry, Judgment interest.

[97] THE COURT: I should B

[98] MR. WARNER: It's just that, to my way of thinking, this application probably should have been brought within a relatively short time frame of the events in question and here we're B

[99] THE COURT: But if it hadn't been for that cross-examination you would not have realized. You would still have the $36,000 of glass.

[100] MR. WARNER: That is true.

[101] THE COURT: I think we are talking about fairly small sums, Mr. Warner. I have not calculated them but if the Bank of Canada is -- what is their -- 3 percent? What is the judgment interest?

[102] MR. HENDRICKSON: I honestly don't know, Sir, but I think it is in the neighbourhood of 4 percent.

[103] THE COURT: Yes, it is B

[104] MR. WARNER: I think it's 5 and a half percent. The only think is, My Lord, that all these little small amounts added up together are big amounts and the -- the other creditors have already taken a big hit on this and it's just ...

[105] THE COURT: Yes, you -- your client chose to ignore the 30 day notice so I think he -- going to give interest on it, Mr. Warner. I think that is -- that would be the fair thing to do.

[106] So you are entitled to interest on the $107,000, Mr. Hendrickson.

[107] MR. HENDRICKSON: At judgment interest rate. Yes, thank you Sir.

[108] THE COURT: Yes, at judgment interest rate.

[109] MR. HENDRICKSON: Thank you, sir.

[110] THE COURT: Is there anything else?

[111] MR. HENDRICKSON: No, sir.

[112] THE COURT: Well, I thank you both for your arguments. You have made for a very entertaining and interesting day and I thank you for that.

[113] MR. HENDRICKSON: Thank you, Sir.

[114] MR. WARNER: Thank you, Sir.

[115] THE COURT: Good day.

Application granted.

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