COURT FILE NUMBER	1603 13949
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFFS	ALBERTA LOCAL AUTHORITIES RECIPROCAL INSURANCE EXCHANGE
DEFENDANTS	ALBERTA BEACH, ALBERTA CAPITAL REGION WASTEWATER COMMISSION, ALBERTA MUNICIPAL HEALTH AND SAFETY ASSOCIATION, ALBERTA RECREATION & PARKS ASSOCIATION and others
DOCUMENT	**AUTHORITIES OF STRATHCONA COUNTY**

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
FEB 09 2017
Clerk of the Court

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Rackel Belzil LLP
Barristers & Solicitors
100 Westgrove Professional Building
10230 – 142 Street
Edmonton, AB T5N 3Y6
Lawyer: Louis M.H. Belzil, Q.C.
Tel: (780) 392-3321
Fax: (780) 451-8460
File No.: 65279-001

AUTHORITIES OF STRATHCONA COUNTY

Application before The Honourable J.D. Rooke, Associate Chief Justice
March 15, 2017

Counsel for Strathcona County:

Rackel Belzil LLP
Barristers & Solicitors
100, 10230 – 142 Street
Edmonton, AB T5N 3Y6
Lawyer: Louis M.H. Belzil, Q.C.
Tel: (780) 392-3321
Fax: (780) 451-8460
Email: lbelzil@rackelbelzil.ca
File: 65279-1 LMB

Counsel for Alberta Local Authorities Reciprocal Insurance Exchange:

Ogilvie LLP
Barristers & Solicitors
1400, 10303 Jasper Avenue
Edmonton, AB T5J 3N6
Lawyer: Grant S. Dunlop, Q.C.
Tel: (780) 429-6283
Fax: (780) 429-4453
Email: gdunlop@ogilvielaw.com
File: 62064.1.2 GD

Counsel for Battle River Regional Division No. 31 et al.:

Reynolds Mirth Richards & Farmer LLP
Barristers & Solicitors
3200, 10180 101 Street NW
Edmonton, AB T5J 3W8
Lawyer: Peter T. Buijs
Tel: (780) 497-3311
Fax: (780) 429-3044
Email: pbuijs@rmrf.com

TABLE OF AUTHORITIES

TAB 1

Superintendent the certificate of an actuary that satisfies him that the society's plan of insurance is sound, and that the reserve maintained or to be maintained, together with the payments to be received from the members, is or will be sufficient to provide for the payment at maturity of the contracts made or to be made by the society without deduction or abatement.

(5) Every licensed society shall file with its annual return under section 99 a valuation of its contracts in force at the last preceding December 31, and the valuation shall be made by an actuary, and shall be certified by him to be correct and shall have regard to the prospective liabilities of the society under its contracts and to the payments to be thereafter received under the contracts according to the scale in force at the date of the valuation.

RSA 1970 c187 s457

Licensing

484 No mutual benefit society shall be licensed, or have its licence renewed

(a) if it has on its books less than 75 members in good standing,

(b) if it insures or indemnifies against contingencies other than sickness, disability or funeral expenses,

(c) if it contracts for sick benefits for an amount in excess of $12 per week, or for a funeral benefit in excess of $400,

(d) if it undertakes insurance contracts with persons other than its own members,

(e) if it is in effect the property of its officers or collectors, or of any other person for his own benefit, or is conducted as a mercantile or business enterprise or for the purpose of mercantile profit, or if its funds are under the control of persons or officers appointed for life and not under that of the insured, or

(f) if it has charge of or manages or distributes charity or gratuities or donations only.

RSA 1970 c187 s458

Application of certain sections of Part 13

485 Sections 446 to 452 apply, with all necessary modifications, to societies licensed under this Part.

RSA 1970 c187 s459

PART 15

RECIPROCAL OR INTER-INSURANCE EXCHANGES

Definitions

486 In this Part,

(a) "attorney" means a person authorized to act for subscribers as provided in section 489;

(b) "subscribers" means persons exchanging with each other reciprocal contracts of indemnity or inter-insurance as provided in section 487.

RSA 1970 c187 s460

General Provisions

Reciprocal contracts

487 It is lawful, subject to this Part, for any person to exchange with other persons in Alberta and elsewhere reciprocal contracts of indemnity or inter-insurance for any class of insurance for which an insurance company may be licensed under this Act except life insurance, accident insurance, sickness insurance and guarantee insurance.

RSA 1970 c187 s461

Insurer

488 No person shall be deemed to be an insurer within the meaning of this Act by reason of exchanging with other persons reciprocal contracts of indemnity or inter-insurance under the provisions of this Act.

RSA 1970 c187 s462

Execution of contract

489 Reciprocal contracts of indemnity or inter-insurance may be executed on behalf of subscribers by any other person acting as attorney under a power of attorney, a copy of which has been filed as hereinafter provided.

RSA 1970 c187 s463

Court action

490 Notwithstanding any condition or stipulation of a power of attorney or of a contract of indemnity or inter-insurance, any action or proceeding in respect of any such contract may be maintained in any court of competent jurisdiction in Alberta.

RSA 1970 c187 s464

Declaration by members of exchanges

491 The persons constituting an exchange shall, through their attorney, file with the Superintendent a declaration verified by oath, setting out

(a) the name of the attorney and the name or designation under which the contracts are issued, which name or designation shall not be so similar to any other name or designation previously adopted by any exchange or by any licensed insurer as in the opinion of the Superintendent to be likely to result in confusion or deception;

(b) the classes of insurance to be effected or exchanged under the contracts;

(c) a copy of the form of the contract, agreement or policy under or by which the reciprocal contracts of indemnity or inter-insurance are to be effected or exchanged;

(d) a copy of the form of power of attorney under which the contracts are to be effected or exchanged;

(e) the location of the office from which the contracts are to be issued;

(f) a financial statement in the form prescribed by the Superintendent;

(g) evidence satisfactory to the Superintendent that it is the practice of the exchange to require its subscribers to maintain in the hands of the attorney, as a condition of membership in the exchange, a premium deposit reasonably sufficient for the risk assumed by the exchange;

(h) evidence satisfactory to the Superintendent that the management of the affairs of the exchange is subject to the supervision of an advisory board or committee of the subscribers in accordance with the terms of the power of attorney.

RSA 1970 c187 s465

Licence

492 On any exchange complying with this Part and paying the prescribed fee the Superintendent may issue a licence in the prescribed form.

RSA 1970 c187 s466

Security

493 Notwithstanding anything in this Act, the Superintendent may, with the approval of the Minister, require an exchange, as a condition of the issue or renewal of the licence of its subscribers, to deposit approved securities with the Minister in the amount and on the terms and conditions that the Superintendent considers proper.

RSA 1970 c187 s467

Issue of licence

494 A licence shall not be issued to the subscribers of an exchange to effect or exchange contracts of indemnity or inter-insurance

(a) against loss by fire, until evidence satisfactory to the Superintendent has been filed with him that applications have been made for indemnity on at least 75 separate risks in Alberta or elsewhere aggregating not less than $1 500 000 as represented by executed contracts or bona fide applications to become concurrently effective, or

(b) in respect of automobiles, until evidence satisfactory to the Superintendent has been filed with him that applications have been made for indemnity on at least 500 automobiles as represented by executed contracts or bona fide applications to become concurrently effective, and that arrangements satisfactory to the Superintendent are in effect for the reinsurance of all liabilities in excess of the limits the Superintendent may prescribe.

RSA 1970 c187 s468

Service of process

495 If the office from which the contracts are to be issued is not in Alberta, service on the Superintendent of notice or process in any action or proceeding in Alberta in respect of contracts of indemnity or inter-insurance effected by an exchange shall be deemed service on the subscribers who are members of the exchange at the time of service.

RSA 1970 c187 s469

Statement by attorney

496 There shall be filed with the Superintendent by the attorney, as often as the Superintendent requires, a statement of the attorney under oath showing, in the case of fire insurance, the maximum amount of indemnity on any single risk and a statement of the attorney verified by oath to the effect that he has examined the commercial rating, as shown by the reference book of a commercial agency, of the subscribers of an exchange having at least 500 subscribers and that from the examination or other information in his possession it appears that no subscriber has assumed on any single fire insurance risk an amount greater than 10% of the net worth of the subscriber.

RSA 1970 c187 s470

Statement of reserves

497 There shall at all times be maintained with the attorney, as a reserve fund, a sum in cash or approved securities equal to 50% of the annual deposits or advance premiums collected or credited to the accounts of subscribers on contracts in force having one year or less to run and pro rata on those for longer periods.

RSA 1970 c187 s471

Guarantee fund or surplus

498(1) Except as hereinafter provided, there shall also be maintained as a guarantee fund or surplus an additional sum, in excess of all liabilities, in cash or approved securities amounting to not less than $50 000.

(2) In the case of a fire insurance exchange whose principal office is in Alberta, the guarantee fund or surplus referred to in subsection (1) shall not be less than $25 000.

(3) In the case of an automobile insurance exchange whose principal office is in Alberta, the guarantee fund or surplus referred to in subsection (1) shall, during the first year of operation of the exchange, be maintained at an amount not less than $10 000, and thereafter at an amount not less than $25 000.

RSA 1970 c187 s472

Deficiency

499(1) If at any time the amounts on hand are less than required under sections 497 and 498, the subscribers or the attorney shall forthwith make up the deficiency.

(2) If funds other than those that accrued from premiums or deposits of subscribers are supplied to make up a deficiency, the funds shall, so long as a deficiency exists, be deposited and held for the benefit of subscribers under the terms and conditions the Superintendent may require, and may thereafter be returned to the depositor.

RSA 1970 c187 s473

Approved securities

500 In sections 497 and 498, "approved securities" means securities the investment in which is authorized by section 95.

RSA 1970 c187 s474

Investment of surplus insurance funds and reserve fund

501 If the principal office of the exchange is in Alberta, the surplus insurance funds and the reserve fund of the exchange shall be invested in the class of securities authorized by section 95.

RSA 1970 c187 s475

Evidence as to investments

502 If the principal office of the exchange is outside Alberta, it is a condition precedent to the issue of a licence under this Act that evidence satisfactory to the Superintendent shall be filed with him showing that the class of securities in which funds of the exchange are required by law to be invested and are in fact invested, is within the limits of investment prescribed for the investment of the reserve funds of an insurance corporation by the jurisdiction in which the office of the exchange is situated.

RSA 1970 c187 s476

Contracts

503 No exchange shall undertake any liability on a contract of indemnity, inter-insurance or insurance except on behalf of a subscriber.

RSA 1970 c187 s477

Reinsurance

504 No attorney or exchange shall effect reinsurance of any risks undertaken by the exchange in any other reciprocal or inter-insurance exchange.

RSA 1970 c187 s478

Attorney

505(1) No person shall

(a) act as attorney, or for or on behalf of any attorney, in the exchange of reciprocal contracts of indemnity or inter-insurance, or in acts or transactions in connection therewith, or

(b) exchange a reciprocal contract of indemnity or inter-insurance with any other person,

unless a licence has been issued and is in force.

(2) Any person who contravenes subsection (1) is guilty of an offence.

RSA 1970 c187 s479

Suspension or revocation of licence

506(1) If an exchange or attorney fails or refuses to comply with or contravenes any provision of this Act, the licence issued to the subscribers thereof may be suspended or revoked by the Minister on the report of the Superintendent after due notice and opportunity for a hearing before the Superintendent has been given to the exchange or its attorney.

(2) The suspension or revocation does not affect the validity of any reciprocal contracts of indemnity or inter-insurance effected prior thereto or the rights and obligations of subscribers under the contracts.

(3) Notice of the suspension or revocation shall be given by the Superintendent in at least 2 successive issues of The Alberta Gazette

as soon as reasonably possible after the suspension or revocation.

RSA 1970 c187 s480

Fire insurance

507(1) Notwithstanding anything in this Act, but subject to subsection (2), any person may, in any exchange not licensed under this Act, insure against fire any property situated in Alberta, and any property so insured or to be insured may be inspected and any loss incurred in respect thereof adjusted.

(2) Subsection (1) only applies when the insurance

(a) is effected outside Alberta and without any solicitation in Alberta directly or indirectly on the part of the insurer, and

(b) otherwise complies with sections 125 and 126.

RSA 1970 c187 s481

PART 16

AGENTS, BROKERS AND ADJUSTERS

Agents

Certificate of authority

508(1) No individual shall, either on his own account or as a member or representative of a partnership or corporation, act, or offer to undertake to act, as an insurance agent in Alberta without having first obtained a certificate of authority under this Act.

(2) Notwithstanding subsection (1), a member of a fraternal society licensed under this Act, other than a member who receives a salary or commission for the purpose, may without a licence solicit members of the society or corporation to insure with the society or corporation.

(3) A firm, partnership or corporation may apply for a certificate of authority in the name of the firm, partnership or corporation, and shall designate one individual who is to act as its or their representative and the certificate of authority, if granted, shall be issued in the name of the firm, partnership or corporation, and shall designate the name of the individual who is authorized to act as an insurance agent on its or their behalf.

(4) A salaried employee or an officer of a firm, partnership or corporation that holds a certificate of authority, who does not receive commission and who acts only in the name and on behalf of the firm, partnership or corporation, may, on application therefor and subject to the discretion of the Superintendent as provided in this Part, and on payment of the prescribed fee, receive a certificate of authority to act for the firm, partnership or corporation in the negotiation of any contracts of insurance or in the negotiation or the continuance or renewal of any contracts that the firm, partnership or corporation may lawfully undertake.

(5) In the case of a salaried employee mentioned in subsection (4),

TAB 2

alarie
THE ALTERNATIVE

ALBERTA LOCAL AUTHORITIES
RECIPROCAL INSURANCE EXCHANGE

STATEMENT OF PARTICIPATION

I Participation Number: [redacted]

II Subscriber: [redacted]

III Address of Subscriber: [redacted]

IV Category of Local Authority: School X Rural Urban

V Participation Period: From: September 1, 1992
To: September 1, 1993
12:01 a.m. Local Time at the above address

VI Annual Levy: $ 6,821.00

This document evidences that the Subscriber named above has in force a policy or policies of Liability Insurance on their own behalf, the details of which have been received and approved by the Alberta Local Authorities Reciprocal Insurance Exchange.
As a result of this approval, the Annual Levy noted above has been assessed and the Advisory Board has directed that this Levy be allocated on behalf of the Subscriber named on the following basis:

LAYER OF COVERAGE	ANNUAL LEVY $	ALARIE ANNUAL LEVY ALLOCATION PREMIUM EXPENDED TO BUY INSURANCE $	EQUITY RECLAIMED IN ALARIE $
A. $ 0 to $ 7,000,000 structured as follows:	4,643.00		
$ 0 to $ 10,000		315.75 }	
$ 10,000 to $ 2,000,000		947.25 }	1,015.00
$ 2,000,000 to $ 7,000,000		2,365.00 }	
B. $ 7,000,000 to $12,000,000	1,115.00	957.00	158.00
C. $12,000,000 to $17,000,000	650.00	552.00	98.00
D. $17,000,000 to $20,000,000	413.00	413.00	NIL
TOTAL OF ABOVE	6,821.00	5,550.00	1,271.00

Signed for and on behalf of the Attorney-in-Fact,
ALARIE Attorney in Fact Ltd.

Date :October 13, 1992 Per: [signature]

12310 - 105 AVENUE, EDMONTON, ALBERTA T5N 0Y4 TELEPHONE (403) 425-2743 FAX (403) 482-5659

alarie
THE ALTERNATIVE

ALBERTA LOCAL AUTHORITIES
RECIPROCAL INSURANCE EXCHANGE

INVOICE

ANNUAL LEVY - 1992/1993

TO : [redacted]	
[redacted] For the attention of : [redacted] PARTICIPATION NO : [redacted]	Please Pay This Amount ↓
The amount of your 1992/1993 Annual Levy is ----> $	**6,821.00**

The Annual Levy for ALARIE's 3rd year of operation is now due.

Because ALARIE has a commitment to remit Premium Portions form your Levy to other parties and the need to accumulate maximum Investment Earnings on your behalf, it is important that you submit your cheque in the above amount directly to the ALARIE office no later than ----------> September 1, 1992

Your Levy includes both your 1992/1993 Liability Insurance Premium and your ALARIE Equity. Your Levy should be the same as last year, unless you have added or deleted coverage in your policy in which case, your Levy has been adjusted slightly to reflect the change.

Your 1992/1993 ALARIE Statement of Participation is currently being prepared, and will be mailed to you under separate cover. This document will itemize the precise allocation of the Total Levy into the various layers of Premium and Equity in accordance with your required level of coverage.

If you have any questions concerning this Invoice or your ALARIE Statement of participation, please contact the representative at your Association's office:

Schools :	ASBA	- Lawrence Tymko	- 482-7311
Rural :	AAMDC	- Dean Marchon	- 436-9377
Urban :	AUMA	- Tony Wadsworth	- 433-4431

12310 - 105 AVENUE, EDMONTON, ALBERTA T5N 0Y4 TELEPHONE (403) 425-2743 FAX (403) 482-5659

TAB 3

SUMMARY OF DEPOSITS MADE AS AT DECEMBER 31, 1992

SUBSCRIBER	:	[redacted]	
CATEGORY	:	School	PARTICIPATION NO. : [redacted]

FOR INFORMATION PURPOSES ONLY

The Alberta Local Authorities' Reciprocal Insurance Exchange was established on October 1, 1990. As at December 31, 1992, ALARIE had just entered the 3rd year of operation, and was holding a surplus fund of $ 6,900,000.00 for its member Subscribers.

The following is a summary of the deposits which have been made on behalf of your jurisdiction during the past 12 month period, and which have been designated towards the level of funding desired to sustain future "self-insurance" operations as laid down in the ALARIE Business Plan:

Funds deposited on your behalf as at December 31, 1991	$	3,769.77
Deposit - 1992/1993 ALARIE Equity Levy	$	1,271.00
Deposit - Contribution from AAMD&C 1991/1992 Dividend	$	1,130.60
Deposit - Contribution from AAMD&C 1992/1993 Dividend	$	975.27
Total Deposits	$	7,146.64
Interest Earnings Allocated to your Jurisdiction during period January 1, 1992 to December 31, 1992	$	349.56
TOTAL FUNDS AND INTEREST DEPOSITED ON YOUR BEHALF as at December 31, 1992	$	7,496.20

NOTE : This notification is **for your information only.** The nature of these funds is such that you are **not** required to declare them as "assets" in your audited Annual Fiscal Return. The Government has requested that they be treated as an item of "Insurance Expense" in your Financial Statement. This is because their "asset-value" will not be realizable until some indeterminate time in the future.

TAB 4

POWER OF ATTORNEY

IN THE MATTER OF THE ALBERTA LOCAL AUTHORITIES RECIPROCAL INSURANCE EXCHANGE RECIPROCAL INSURANCE EXCHANGE AGREEMENT

WHEREAS the Subscribers have formed the ALBERTA LOCAL AUTHORITIES RECIPROCAL INSURANCE EXCHANGE (the "Exchange") whereby the Subscribers shall exchange with one another contracts of insurance or shall purchase insurance through and/or under the direction of the Exchange;

AND WHEREAS: ALARIE ATTORNEY IN FACT LTD. at 428-21-10405 Jasper Ave., Edmonton, Alberta T5J 3S2 is prepared to act as Attorney on behalf of the Subscribers pursuant to this Power of Attorney;

IT IS HEREBY AGREED that each Subscriber to the Exchange, shall appoint ALARIE Attorney In Fact Ltd. its true and lawful Attorney pursuant to the provisions of the Act.

1. The Attorney shall be empowered to act on behalf of the undersigned Subscriber in its place and stead and in regard to all matters involving the Exchange specifically, but without limiting the generality of the foregoing, to:

(a) Execute all documents on behalf of the Exchange;

(b) Represent each Subscriber with respect to the Reciprocal Insurance Agreement;

(c) Prepare and file all necessary documents as required by the laws of the Province of Alberta and as may be necessary to give full force and effect to the Exchange and this Agreement;

(d) Provide all ongoing administration including but not limited to the collection of Levy Deposits;

(e) Maintain the Reserve Fund and Guarantee Fund in accordance with the Act;

(f) Do all such things as are necessary to obtain a License for the Exchange and to maintain the License in good standing;

(g) Deal with and pay such Claims as may be made against the Subscribers to the Exchange to the limits established from time to time by the Advistory Committee;

(h) Appoint auditors who shall provide the Subscribers and Advisory Committee with an audit of the annual financial statements;

(i) Demand, collect and receive all monies which may become due by the Subscribers under this Agreement or under any policy of insurance;

(j) Give and to receive all notices necessary or proper under any policy of insurance, and to adjust, compromise and determine all Claims and losses thereunder;

(k) Open and operate a trust account in the name of the Exchange with any bank or Treassury Branches of Alberta in order to deposit and to distribute funds with respect to the operations of the Exchange;

(l) Invest funds not immediately required for the operation of the Exchange by direction of the Advisory Board;

(m) Pay all taxes, fees and other expenses relating to the orderly maintenance and management of the Exchange;

(n) Do and perform every other act and thing necessary or proper to be done in order to fully carry out and perform the terms hereof.

2. And for all and every of the purposes aforesaid the undersigned hereby grants and gives to the said Attorney full and absolute power and authority to do and execute all acts, deeds, matters and things necessary to be done aforesaid and also to commence, institute and prosecute all actions, suits and other proceedings which may be necessary or expedient aforesaid as fully and effectually to all intents and purposes as if personally present and acting therein.

3. This Power of Attorney shall be in effect from the date hereof.

4. The Attorney shall not be liable in any respect for any loss, damage or expense happening to the Exchange, or for the insufficiency or deficiency of any security in or upon which any of the monies of the Exchange shall be invested, or for any loss or damage arising from bankruptcy, insolvency or tortious acts of person with whom any monies, securities or effects of the Exchange be deposited, or for any loss occasioned by any error of judgment or oversight on its part, or for any other loss, damage or misfortune whatever which shall happen in the execution of the duties of its office or in relation thereto, unless the same are occasioned by its own willful neglect, willful default, fraud or dishonesty; provided that nothing herein shall relieve the Attorney from the duty to act in accordance with this Agreement or from liability for any breach thereof.

IN WITNESS WHEREOF we have set our hand and seal this _____ day of _____, 19____

SIGNED, SEALED AND DELIVERED in the presence of:

_____ WITNESS

_____ (SUBSCRIBER)

per _____ **(seal)**

(Title)

TAB 5

In the Court of Appeal of Alberta

Citation: Carevest Capital Inc. v Leduc (County), 2012 ABCA 161

Date: 20120525
Docket: 1103-0226-AC
Registry: Edmonton

Between:

Carevest Capital Inc.

Respondent

- and -

County of Leduc

Appellant

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice R. Paul Belzil

Reasons for Judgment Reserved of The Honourable Mr. Justice Slatter
Concurred in by The Honourable Mr. Justice Côté
Concurred in by The Honourable Mr. Justice Belzil

Appeal from the Order by
The Honourable Madam Justice M.G. Crighton
Dated the 26th day of July, 2011
Filed on the 12th day of August, 2011
(Docket: 1003-01050)

Reasons for Judgment Reserved
of The Honourable Mr. Justice Slatter

[1] The issue on this appeal is the entitlement to funds that were in a solicitor's trust account, but that were subsequently paid into court. The appellant County claims them in payment of development levies. The respondent lender, which originally advanced the funds, claims them under its security agreements or a trust.

Facts

[2] A property developer, 1262459 Alberta Ltd., had plans to develop some land it owned in the County of Leduc. It arranged financing with the respondent Carevest Capital Inc. As security for the loans, in April of 2007 it granted a mortgage to the respondent, and in October of 2007 it granted a general security agreement, and other security.

[3] On December 19, 2007 the developer entered into a development agreement with the County which required that it pay certain off-site levies. The applicable Off-Site Levy Bylaw had not yet been enacted, but the developer covenanted to pay the levies, once they had been set, prior to commencing certain construction.

[4] On April 15, 2008, Borden Ladner Gervais, solicitors for the respondent, direct deposited the sum of $801,350 into the trust account of Ranbir Thind & Associates, the solicitors for the developer. The funds were sent on the following condition:

> These funds are forwarded to you on the trust condition that you immediately pay the balance of the Leduc County Offsite Levy to the Leduc County in the amount of $801,350 and thereafter immediately provide our office with proof of payment that the entire Offsite Levy has been paid in full.

That same day Ranbir Thind drew two cheques on his trust account, payable to the County of Leduc: one for $801,350, and the other for $99,083.12. Both cheques had noted on them "Balance of Levy payment".

[5] Mr. Thind sent the cheques to the County, but because the exact amount of the levy had not yet been determined, the County did not deposit the cheques. Between April of 2008, and January 12, 2009, there were various discussions and negotiations about the exact amount of the off-site levy that was owed. As the calculated amount fluctuated during the negotiations, there were ongoing suggestions that fresh cheques should be sent in the revised amounts. The amount was finally settled on January 12, 2009.

[6] In the meantime, on October 15, 2008 the two solicitor's trust cheques became "stale dated". In accordance with the *Rules* of the Canadian Payments Association, and the practices of the Canadian banking system, once they were six months old they could not be cleared in the ordinary course.

[7] Between November of 2008 and March 6, 2009 Mr. Thind sent various communications to the County, reminding it that the cheques were stale dated, and suggesting that it request replacement cheques. On May 13, 2009, on instructions from the developer, Mr. Thind countermanded payment of the stale dated cheques. It was not until October 9, 2009 that the County actually requested replacement cheques (EKE A69).

[8] On October 13, 2009, Mr. Thind replied that his instructions were "not to discuss anything further with you about this matter and to inform you to contact the Developer directly about this matter." By this point in time the respondent had commenced enforcing its security, and it made a demand on Mr. Thind for a return of the funds that were in his trust account. Faced with competing claims to the money, on November 26, 2009 Mr. Thind advised Borden Ladner Gervais that he intended to issue replacement cheques to the County, inviting that firm to take whatever legal steps it felt necessary. The disputed funds were ultimately paid into court by a consent order dated January 13, 2010, which provided that the payment was without prejudice to the "priority, right and entitlement to the Monies of any person".

[9] The parties eventually appeared before a Master in chambers to argue their respective entitlement to the funds. The respondent claimed that the funds were payable to it, as they were caught by the general security agreement. The County claimed that the funds had been impressed with a trust, and that since they were no longer the property of the insolvent developer, it was the proper claimant. The Master concluded that an effective trust had been created, but that the respondent lender was the beneficiary, and directed that the funds be paid out to the respondent: ***Carevest Capital Inc. v 1262459 Alberta Ltd.***, 2011 ABQB 148, 45 Alta LR (5th) 79. On appeal, a Queen's Bench judge affirmed the conclusion of the Master in unreported reasons.

Standard of Review

[10] The standard of review for questions of law is correctness. The findings of fact of the trial judge will only be reversed on appeal if they disclose palpable and overriding error: ***Housen v Nikolaisen***, 2002 SCC 33 at paras. 8, 10, 25, [2002] 2 SCR 235. In this appeal the facts are not in dispute. The rights of the parties depend on the answers to various questions of law arising from those facts, and the standard of review is correctness.

Existence of a Trust

[11] The County argues that the funds are impressed with a trust under the principle set out in ***Barclays Bank Ltd. v Quistclose Investments Ltd.***, [1970] AC 567 (HL (Eng)). In that case the creditor Quistclose had advanced funds to the borrower Rolls Razor Limited for a specific purpose, namely paying a declared dividend. The borrower deposited the funds in its account at Barclays Bank, but entered liquidation before the dividend could be paid. Barclays Bank applied the funds to its outstanding loans, and Quistclose sued for a return of the funds on the basis that they were impressed with a trust to pay the dividend. Lord Wilberforce stated the principle relied on at p. 579:

> Two questions arise, both of which must be answered favourably to the respondents if they are to recover the money from the bank. The first is whether as between the respondents and Rolls Razor Limited, the terms upon which the loan was made were such as to impress upon the sum of GBP 209,719 8s. 6d. a trust in their favour in the event of the dividend not being paid. The second is whether, in that event, the bank had such notice of the trust or of the circumstances giving rise to it as to make the trust binding upon them.

This type of trust, commonly called a Quistclose trust, arises when funds are advanced for a specific purpose, but cannot be or are not used for that purpose. Quistclose trusts have been recognized in subsequent cases.

[12] The County argues that the funds in question were advanced for a specific purpose, namely the payment of the off-site levies, and that accordingly they should be subject to a Quistclose trust. The Master agreed that a trust existed, but concluded that the beneficiary of a Quistclose trust is the lender.

[13] In ***Quistclose*** a type of constructive trust was imposed in order to create a proprietary remedy. In this appeal it is not necessary to decide whether a Quistclose trust should be imposed, because the correspondence between Borden Ladner Gervais and Ranbir Thind & Associates created an express trust: ***Carling Development Inc. v Aurora River Tower Inc.***, 2005 ABCA 267 at para. 47, 46 Alta LR (4th) 40, 371 AR 152. There clearly was a trust on the funds when they were sent from the respondent's solicitors to the developer's solicitors. The terms of the trust were also clear - they were to pay the off-site levies. Mr. Thind had only two choices: he could use the funds to pay the off-site levies, or he could return them to Borden Ladner Gervais: ***Carling Development*** at para. 56.

[14] Mr. Thind attempted to discharge the trust by sending the funds to the County. Those funds were sent to discharge a contractual obligation, not to create, nor in furtherance of any trust between the developer and the County. The County was obliged to use the funds in the manner intended, that is to pay the off-site levies. For example, the County could not have used the funds to pay outstanding taxes. But that obligation arises from the law of debtor and creditor, not because of any

trust: ***Cory Bros. & Co. v "The Mecca"***, [1897] AC 286 at p. 293 (HL (Eng)); ***Waisman v Crown Trust Co.***, [1970] SCR 553 at p. 560.

[15] There is no room for a Quistclose trust in the transaction between the County and Ranbir Thind & Associates. If the respondent had sent the funds directly to the developer, with the common expectation that they would be used to pay the off-site levies, but without any express trust, nor any stipulation that they could not used in any other manner, there might be room for a Quistclose trust. But any such expectations must yield to the specific terms of the express trust that was created between the solicitors.

[16] The County argued that once Mr. Thind drew the trust cheques, the trust was "crystallized", and the funds could not thereafter be diverted. That analysis overlooks the critical fact that the cheques were never negotiated, meaning that the funds ended up in limbo. They were never finally applied to the levies, nor were they held unused. It also assumes that the County was the beneficiary of any trust. However, the expectation of a law firm sending a client's funds in trust is that the firm is protecting its client, not any third party. In the absence of an express stipulation, the assumption should be that the beneficiaries of the trusts are the various clients, and not any third parties, even if the trust conditions contemplate the money being used for a specific purpose. For example, sending money in trust to pay prior encumbrances does not create a trust in favour of the holders of those encumbrances. The identification of a purpose in a solicitor's trust letter does not usually create an obligation enforceable by a third party to have the funds used for that purpose.

[17] Ultimately, Ranbir Thind & Associates held money in trust. It attempted to send the money to the County, which it was perfectly entitled to do because that was one of the options available under the trust. The recipient of the funds, being the County, held the cheques rather than negotiating them. Eventually Ranbir Thind & Associates ended up in the situation where it had outstanding trust cheques in the hands of the County, and a sum of money sufficient to cover those cheques in its trust account. The issue on this appeal comes down to the rights of the various parties in those circumstances.

The Claim of Carevest

[18] The respondent initially advanced its claim under the general security agreement. If the funds in the trust account of Ranbir Thind & Associates were owned by the developer, then they would be caught under the security.

[19] Alternatively, if there was a Quistclose trust, the respondent argued that it was the beneficiary of that trust. That was the effect of the original ***Quistclose*** decision, where the funds were found to be held in trust for the lender who advanced the money, not the shareholders who anticipated receiving the dividend. The respondent argued that the funds had been sent by it, through

its solicitors, to Ranbir Thind & Associates for a specific purpose: the payment of the off-site levies. When that purpose failed, it claimed the right to a return of the funds.

[20] As previously noted, introducing the concept of a Quistclose trust is not necessary, because there was clearly an express trust. The respondent sent its funds in trust for a specific purpose: payment of the off-site levies. It thereby authorized Mr. Thind to do exactly what he did, namely tender the funds on the County. If the County had negotiated the cheques, the respondent could have had no complaint against Ranbir Thind & Associates or anyone else.

[21] The respondent would potentially have a claim to the funds under its general security agreement. As mentioned, that claim depends on the funds belonging to the borrower (the developer), which would make them part of the "present or after-acquired personal property" captured by the security document. If the funds had been paid to the County in discharge of the developer's contractual obligation to pay the off-site levies, the funds would no longer belong to the developer, and the respondent would have no claim. If the funds simply remained in the trust account of Ranbir Thind & Associates they could potentially be seen as belonging to the developer, in which case they would be caught by the general security agreement. Alternatively, they would still be subject to the trust imposed by Borden Ladner Gervais, in which case they might potentially be subject to recall before they were dispersed. Either way, the respondent would be entitled to the funds.

[22] But in the end the funds were not clearly in the hands of the County, nor were they clearly still in the trust account of Ranbir Thind & Associates in an unencumbered form. As noted, Ranbir Thind & Associates ended up in the situation where it had outstanding trust cheques in the hands of the County, and a sum of money sufficient to cover those cheques in its trust account. It had been expressly authorized under the trust imposed to send the cheques to the County, and the respondent cannot undermine the position of Ranbir Thind & Associates once it sent the funds in compliance with the trust conditions.

The Obligations of Ranbir Thind & Associates

[23] The respondent put the funds in the hands of Ranbir Thind & Associates, and authorized that firm to deal with the funds in a certain way. As it was perfectly entitled to do, that firm tendered the funds on the County. As noted, the respondent can have no complaint about that.

[24] For the same reason, Ranbir Thind & Associates should not be placed at any risk by what it did, as it acted strictly within its authorization. What are the obligations of Ranbir Thind & Associates, given that the County now holds stale dated and countermanded cheques drawn on its trust account?

[25] The respondent argued that once the cheques became stale dated, they were worthless. As such, Ranbir Thind & Associates had no obligation or right to replace them. The respondent argued that in any event the countermanding of the cheques rendered them unenforceable.

[26] The stale dating of a cheque does not render it invalid or unenforceable. Stale dated items merely may not be cleared through the normal Canadian clearing system unless and until they are certified: *CPA Rules Manual*, Rule A4, Returned and Redirected Items, s. 22 (made under authority granted by the *Canadian Payments Act*, RSC 1985, c. C-21, s. 18(1)(e)). Those *Rules* would entitle whatever bank the County uses, and TD Canada Trust (where Ranbir Thind & Associates kept its trust account), to decline to clear the cheques in the ordinary course until they were certified. But those internal rules only bind the banks that belong to the Canadian Payments Association, and do not affect the rights to the parties to the cheques: ***B.M.P. Global Distribution Inc. v Bank of Nova Scotia***, 2009 SCC 15 at paras. 55-7, [2009] 1 SCR 504. As s. 3 of the *Rules* confirms: "Nothing in the Rules shall affect or be interpreted to affect the rights or liabilities of any party to any Payment Item, except as expressly provided in the Rules." As observed by B. Crawford, Payment, Clearing and Settlement in Canada, Vol. 1 (Aurora, Ontario: Canada Law Book, 2002) §7:05.2 at p. 169:

> Obviously, that rule [on non-clearance of stale dated items] does not affect the right of the holder, if he wishes, to demand payment by physical presentment directly to the drawee, and to take appropriate action outside the clearing system if payment is refused.

The stale dating of the cheques therefore does not affect the underlying rights of the various parties to this litigation.

[27] The limitation period for suing on a stale dated cheque under the *Limitations Act*, RSA 2000, c. L-12, ss. 3(1)(a) and 3(3)(c) is still presumptively two years from the date of discovery of the cause of action. Even though the cheques are six months old, the County could still sue the drawer, Ranbir Thind & Associates: *Bills of Exchange Act*, RSC 1985, c. B-4, s. 129:

> 129. The drawer of a bill by drawing it
>
> (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken; and
>
> (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

These proceedings to determine entitlement to the funds were commenced by operation of the consent order within two years of the date of the two disputed cheques.

[28] In this case the cheques were not only stale dated, they were countermanded. If the cheques had been certified before they were countermanded, they could still have been negotiated even if they were over six months old. It is safe to assume that there would always be sufficient funds in a solicitor's trust account to cover any outstanding cheques, no matter how old they were: *The Rules of the Law Society of Alberta*, R. 119.24(1). Even if the drawee bank consulted with its customer (in this case Ranbir Thind & Associates) before clearing a cheque that was six months old, the solicitor would generally be duty bound to authorize the clearance of the trust cheque, rather than face it being dishonoured.

[29] The countermanding prevented the County from presenting the cheques for payment to Ranbir Thind & Associates' bank, but countermanding payment on the cheques does not relieve the drawer Ranbir Thind & Associates of liability. It merely discharges the drawee bank of any obligation to honour the cheque. This is clear from s. 167 of the *Bills of Exchange Act*:

> 167. The duty and authority of a bank to pay a cheque drawn on it by its customer are determined by
>
> (a) countermand of payment . . .

But the customer cannot relieve itself of its underlying obligation simply by calling its bank and telling it to "stop payment" on a cheque drawn to discharge a valid obligation. The underlying obligation to pay remains intact, unless there is some valid reason for non-payment, such as fraud, complete failure of consideration, or some other reason acceptable in law: J. Reynolds, *Countermand of Cheques* (1981), 15 UBC Law Rev 341 at pp. 365-8.

[30] ***Elliott v Crutchley***, [1904] 1 KB 565 (CA), affm'd [1906] AC 7 (HL (Eng)) was an action on a stopped cheque. The cheque was given as a deposit for catering to be provided at a naval review to be held in honour of the coronation of the King. When the event was cancelled due to the illness of the King, payment of the cheque was countermanded. The caterer brought an action on the cheque, and Collins, M.R. stated at p. 568:

> . . . In my judgment the stopping of the cheque makes no difference to the rights of the parties, and they would have stood in exactly the same position if the cheque had been paid.

Mathew L.J. agreed, and Romer L.J. did not mention the point. The Court held that on a proper interpretation of the contract the drawer of the cheque had the right to cancel the reception and only pay the actual expenses incurred by the caterer. There was thus a substantive defence to the action

on the stopped cheque, but the stopping of the cheque itself had no effect on the outcome. The same result was reached in ***Gaynor v McDyer***, [1968] IR 295 at p. 304 (SC); ***Curley v Briggs***, [1920] 2 WWR 1025 at p. 1026, 13 Sask LR 346 (CA); ***Pollway Ltd. v Abdullah***, [1974] 1 WLR 493 at pp. 496-7 (CA); and ***Barclays Bank Ltd. v W. J. Simms Son & Cooke (Southern) Ltd.***, [1980] 1 QB 677 at p. 703 (QBD).

[31] An analogous situation arose in ***Galco Enterprises Ltd. v Hatty*** (1979), 27 NBR (2d) 608. Mr. Mills, a solicitor, sent funds in trust to Mr. Hatty, another solicitor. Mr. Hatty, as authorized by the trust conditions, issued a trust cheque to partly pay out a prior encumbrance. When another creditor took objection to the transaction, Mr. Mills stopped payment on his trust cheque, which caused Mr. Hatty to stop payment on his trust cheque. However, by that time Mr. Hatty's cheque had been negotiated by the payee to a related third party, who claimed to be a holder in due course. The holder sued Mr. Hatty. The Court confirmed at paras. 22, 24 that the liability of Mr. Mills and Mr. Hatty on their cheques was not affected by their countermand of payment. The holder was entitled to recover against Mr. Hatty, who in turn was entitled to recover against Mr. Mills.

[32] The respondent argued that Ranbir Thind & Associates could not have provided replacement cheques when it intended, because by doing so it would be in breach of the trust conditions. The respondent argues that the trust conditions were that the development levy had to be paid "immediately", which precluded tendering replacement cheques some 18 months later. The record discloses that Mr. Thind sent the trust funds to the County the same day he received them, which would fall within any definition of "immediately". Since the sending of the two trust cheques created a binding obligation of Ranbir Thind & Associates to honour those cheques as of that day (which obligation it was entitled to satisfy from its trust account), the trust obligation was effectively complied with the same day the trust cheques were drawn. Providing replacement cheques would not involve any breach of trust. In any event, Ranbir Thind & Associates was liable on the original cheques, and no replacements were necessary to found the County's claim.

[33] Here the cheques were tendered to the County in payment of off-site levies that were due and owing by the developer under the development contract. Those funds were tendered by the developer's agent, Ranbir Thind & Associates, which was fully authorized by the trust conditions, and its principal/client, to do so. There is no basis upon which Ranbir Thind & Associates could validly refuse to honour the two cheques, or defend an action brought against it by the County on the cheques.

Conclusion

[34] In this case Ranbir Thind & Associates drew two cheques in favour of the County to discharge valid obligations of its developer client, in full compliance with the trust conditions over the funds. The immediate tendering of the cheques was not only in compliance with the trust conditions, it created a legal obligation in Ranbir Thind & Associates to honour those cheques.

While the County did not negotiate the cheques, it continues to have a right to enforce payment against Ranbir Thind & Associates. The stale dating and countermanding of the cheques does not affect that right. Ranbir Thind & Associates was entitled to discharge its obligation to the County on the cheques by issuing replacement cheques, as it threatened to do on November 26, 2009. The disputed funds paid into court are available to discharge that obligation.

[35] The appeal should accordingly be allowed, and a declaration issued that the appellant is entitled to the disputed funds. The parties may approach the Court of Queen's Bench to deal with any collateral issues that arise. As the critical point in this litigation was not identified by the parties, each party should bear its own costs.

Appeal heard on May 2, 2012

Reasons filed at Edmonton, Alberta
this 25th day of May, 2012

Slatter J.A.

I concur: Côté J.A.

I concur: Belzil J.

Appearances:

D.T. Madsen
for the Respondent

D.R. Peskett and M.T. Coombs
for the Appellant

TAB 6

2001 BCSC 618
British Columbia Supreme Court

Westar Mining Ltd., Re

2001 CarswellBC 1330, 2001 BCSC 618, [2001] B.C.W.L.D. 906,
[2001] B.C.T.C. 618, 104 A.C.W.S. (3d) 1001, 26 C.B.R. (4th) 109

In the Matter of the Bankruptcy Act Westar Mining Ltd

Davies J.

Heard: February 28, 2001 - March 2, 2001
Judgment: May 11, 2001 *
Docket: Vancouver 143440 92

Counsel: *Laura Donaldson*, for Trustee in Bankruptcy of Westar Mining Ltd.
Clive S. Bird, Catherine L. Shaley, for Greenhills Mine Suppliers
Mark L. Skwarok, Keith L. Johnston, for Director of Employment Standards
Douglas I. Knowles, Benjamin J. Ingram, for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VIII Property of bankrupt
VIII.5 Trust property
VIII.5.a General principles

Headnote

Bankruptcy --- Property of bankrupt — Trust property — General

Prior to bankruptcy bankrupt operated mine as joint venture with partner — Following bankruptcy trustee brought action against joint venture partner claiming payment of certain amounts under joint venture agreement — Action was settled and settlement amount was paid to trustee — Trustee brought application for directions concerning distribution of portion of settlement amount — Trustee directed to pay $523,710.59 to mine employees and $1,106,540.33 to mine suppliers — Employees and suppliers were beneficiaries of purpose trust and amounts held in trust for them did not form part of property of bankrupt divisible among creditors — Bankrupt and partner mutually intended that monies advanced by partner to bankrupt under joint venture agreement would not become property of bankrupt — Bank, which was bankrupt's largest secured creditor, was aware of and accepted fact that operational funds paid to bankrupt by partner did not become property of bankrupt — Funds paid by partner to bankrupt were sufficiently segregated to establish mutual intention that they were delivered for benefit of employees and suppliers — Failure to segregate amounts held in trust for employees and suppliers from balance of settlement amount did not preclude enforcement of purpose trust by employees and suppliers — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67.

Table of Authorities

Cases considered by *Davies J.*:

Australian Elizabethan Theatre Trust, Re (1991), 102 A.L.R. 681 (Australia Fed. Ct.) — considered

Bank of Montreal v. British Columbia (Milk Marketing Board) (1994), 94 B.C.L.R. (2d) 281 (B.C. S.C.) — considered

Barclays Bank Ltd. v. Quistclose Investments Ltd. (1968), [1970] A.C. 567, [1968] 3 All E.R. 651, [1968] 3 W.L.R. 1097 (U.K. H.L.) — considered

Carreras Rothmans Ltd. v. Freeman Matthews Treasure Ltd. (1984), [1985] 1 All E.R. 155, [1985] Ch. 207 (Eng. Ch. Div.) — considered

General Communications Ltd. v. Development Finance Corp. of New Zealand, [1990] 3 N.Z.L.R. 406 — considered

Harrington Motor Co., Re (1927), [1928] 1 Ch. D. 105 (Eng. Ch. Div.) — distinguished

Ling v. Chinavision Canada Corp. (1992), 10 O.R. (3d) 79 (Ont. Gen. Div.) — considered

Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd. (1986), 11 B.C.L.R. (2d) 308 (B.C. S.C.) — considered

Peter Cox Investments Pty Ltd. (In Liquidation) v. International Air Transport Assn., 161 A.L.R. 105, [1999] AUS FCA 27 (Australia Fed. Ct.) — considered

Twinsectra Ltd. v. Yardley (Eng. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 67 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Insurance Act, R.S.B.C. 1996, c. 226
s. 159 — referred to

APPLICATION by trustee in bankruptcy for directions concerning distribution of funds received following settlement of litigation.

Davies J.:

Introduction

1 The Trustee in Bankruptcy (the Trustee) of Westar Mining Ltd. (Westar) has applied for directions concerning the distribution of funds recovered by it through its settlement of litigation with Pohang Steel Canada Ltd. (Poscan).

2 This application concerns $1,630,250.92 of those settlement funds (the Disputed Funds) which are the subject of trust claims by Westar's former employees and trade creditors at its Greenhills Mine. Of the Disputed Funds the Greenhills Employees claim $523,710.59 and the Greenhills Suppliers claim $1,106,540.33.

3 The Bank of Montreal (the Bank), Westar's largest secured creditor, says the Disputed Funds are the property of Westar unencumbered by any trust.

Issue

4 The sole issue to be determined is whether the Disputed Funds are subject to a trust in favour of the Greenhills Employees and Greenhills Suppliers which precludes distribution to the Bank in the usual course of Westar's bankruptcy.

Background

5 Prior to its bankruptcy, Westar operated the Greenhills and Balmer coal mines in the east Kootenay area of British Columbia.

6 The Greenhills Mine was operated as a joint venture. Westar owned an undivided 80% interest and Poscan owned a 20% interest pursuant to a Joint Venture Agreement (the JVA) dated September 13, 1982 as amended December 20, 1991 (the JVA Amendment).

7 Westar was adjudged bankrupt on August 31, 1992 following a three and one-half month period during which Westar had continued operations under the protection of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c.C-36 (the *CCAA*). That protection included a court-ordered stay of claims by Westar's creditors.

8 During the *CCAA* stay period, only the Greenhills Mine operated. Trade suppliers to the Greenhills Mine were assured payment for goods and services provided during the stay period to ensure continued operations at Greenhills during Westar's efforts at restructuring or refinancing its affairs. Payment to these suppliers was secured by a court-ordered charge against Westar's interest in the Greenhills Mine.

9 As of the date of its bankruptcy, Westar was indebted to its secured lenders (the Secured Lenders), including the Bank, for an aggregate amount in excess of $330 million. It was also indebted to the Province of British Columbia (the Province) as a preferred creditor for outstanding taxes of approximately $25 million.

10 In addition, Westar owed money to a large number of trade suppliers for goods and services delivered to both the Greenhills and Balmer Mines prior to the *CCAA* stay order. These trade suppliers creditors filed proofs of claim in the Westar bankruptcy as unsecured creditors for amounts owing to them relating to the pre-*CCAA* period in an aggregate amount of approximately $22.3 million. Of that amount approximately $6.7 million was for goods and services supplied to the Greenhills Mine.

11 For all practical purposes, the Balmer Mine was completely encumbered by security held by Westar's Secured Lenders and all proceeds of the sale of the Balmer Mine after Westar's bankruptcy went to the Secured Lenders.

12 Westar's 80% ownership interest in the Greenhills Mine was eventually sold by the Trustee for $33 million of which the first $18 million was applied to satisfy amounts owing to those parties who had supplied goods and services to the Greenhills Mine during the *CCAA* stay and to pay the fees of the monitor of that stay.

13 The balance of the sale proceeds, together with the proceeds of other Greenhills assets (i.e. receivables) realized by the Trustee were applied to: pay property taxes owing by Westar; cover the costs of the Trustee; pay a dividend to Westar's former employees in satisfaction of their preferred claims; and, pay an interim dividend to the Province as a preferred creditor.

14 The administration of Westar's estate is now nearing completion. The Trustee has reached a settlement with both the Province and the Secured Lenders regarding their respective entitlement to funds realized from Westar's assets and has also retained $375,000 for distribution to Westar's unsecured creditors. Pursuant to the order of Master Bolton pronounced October 23, 2000, the Trustee has also set aside $1,999,601.05 which includes the Disputed Funds.

15 By reason of the settlement among the Trustee, the Province and the Secured Lenders, the Trustee now has no financial interest in the outcome of this application.

The Greenhills Mine Joint Venture

16 The trust claims which are the subject of this application arise from the nature and terms of the joint venture between Westar and Poscan.

17 Under the JVA, Poscan was responsible for funding 20% of all expenses incurred by Westar in relation to the Greenhills Mine and in return, received 20% of the coal produced by that mine.

18 Westar wore two hats in relation to the Greenhills Mine and the JVA; it was an 80% Owner (as defined in the JVA) and was the mine Manager (also as defined in the JVA). As Manager it was responsible for all aspects of the operations of the Greenhills Mine. Pursuant to the JVA, and in practice, Westar handled all of the day-to-day operation of the Greenhills Mine.

19 Westar employed the Greenhills Employees and also in its own name entered into all contracts with third parties relating to the Greenhills Mine. Invoices were paid by cheques written by Westar and drawn on an operations account. Poscan's name did not appear on any documents used in day-to-day operations. Westar incurred 100% liability to all employees and suppliers and Poscan was to be shielded from any financial exposure or liability.

Greenhills Banking Arrangements

20 In the ordinary course of the operation of the Greenhills Mine, Poscan advanced monies to fund its 20% share of operating and capital costs. The JVA contemplated that Westar as Manager would make a monthly "cash call" upon both Owners at the beginning of each month based upon the anticipated cash requirements for that month. During the latter years of the joint venture, the practice changed from monthly to weekly cash calls.

21 These cash calls were paid by Poscan by way of direct deposit into a joint venture account maintained by Westar at the Bank. Westar also deposited its 80% share of expenses into that joint venture account. Westar then transferred funds into an operating account as required to pay expenses. Any surpluses in the joint venture account were invested with interest accruing to the benefit of the Owners in accordance with their proportionate interest in the joint venture.

22 If Poscan failed to pay its share of joint venture expenses (i.e. if it failed to meet a cash call), Article 19 of the JVA gave Westar as Manager a number of remedies. Westar could sell Poscan's share of the coal production until the deficiency was satisfied, Westar acquired an option to acquire Poscan's interest in the Greenhills Mine and Westar could pursue any other remedies available to it at common law.

23 Westar's banking arrangements were the subject of detailed agreements and security instruments. These included a Montreal Investment Loan Agreement (the Investment Loan Agreement) dated for reference June 15, 1990 which detailed the purpose and manner of operation of various Westar bank accounts with the Bank. Funds in Westar's Greenhills operating account were expressly excluded from a monthly cash sweep performed by the Bank on the basis that at any given time that account contained funds in which Poscan had an interest.

24 Pursuant to Article 21.3 of the JVA, neither Poscan nor Westar was entitled to encumber its ownership interest in the Greenhills Mine without the other's consent. That provision also stipulated that in the event of a breach of that

provision the holder of the security interest would become bound by all of the obligations of the encumbering Owner under the JVA. Westar's Secured Lenders including the Bank were aware of this prohibition.

25 The purpose of the JVA Amendment in 1991 was to evidence Poscan's agreement that Westar could grant a security interest in favour of its Secured Lenders in respect of its processed coal inventory without contravening Article 21.3 of the JVA.

The Trustee's Litigation against Poscan

26 As of the date of Westar's bankruptcy on August 31, 1992, Poscan had received its full 20% share of the coal produced by the Greenhills Mine to that date. It had, however, not yet contributed its 20% share of operating expenses. Poscan also owed Westar certain royalty amounts pursuant to the JVA and a separate Property Rights Grant.

27 The Trustee sued Poscan to collect the aggregate amount of $7,460,929.79 plus interest and costs.

28 The Trustee's action against Poscan was a debt claim based on Poscan's contractual obligation under the JVA to bear 20% of the operating expenses of the Greenhills Mine. It was comprised of claims for:

a) Poscan's 20% share of debts incurred by Westar to trade suppliers ($2,327,528.63), which included Poscan's 20% share of debts owing to the Greenhills Suppliers for the pre-*CCAA* period in the amount of $1,106,540.33;

b) Poscan's 20% share of various taxes associated with the ownership and operation of the Mine ($1,288.962.83);

c) Poscan's 20% share of wages and vacation pay owing by Westar to the Greenhills Employees ($870,002.93), of which $523,710.59 remained owing;

d) Freight charges incurred by Westar on Poscan's behalf in connection with the transportation of Poscan's share of coal from the Greenhills Mine to the port ($2,651,138.08);

g) Port charges, port escalation charges and miscellaneous port expenses ($135,914.24); and

h) Royalties of $187,282.08.

29 Poscan raised a number of defences to the Trustee's action including that:

a) it had no obligation to pay Westar unless Westar had paid the liability (i.e. unless Westar had paid its 80% share); and

b) it was entitled to set-off against the amount claimed by the Trustee the damages, costs and expenses it claimed to have suffered by reason of Westar's alleged breach of its duties as Manager and Westar's insolvency which had resulted in the Greenhills Mine being temporarily shut down.

30 The amount which Poscan sought to set-off against the Trustee's claim was quantified during the course of the litigation to be $3,378,796.00, based on an expert report tendered on Poscan's behalf. Poscan alleged that it suffered several categories of damages, including lost coal production, loss of the benefit of a volume rebate from CP Rail, additional professional fees, inventory adjustment amounts and demurrage charges.

31 The Trustee denied that Poscan had suffered any of the alleged losses and also asserted that set-off was not available to Poscan in any event.

32 The Trustee's litigation with Poscan was settled during a mediation session. Pursuant to the settlement, Poscan agreed to pay the all-inclusive amount of $7,460,929.79 comprised of $5,222.698.00 in cash and $2,238,231.79 by way of the Trustee keeping funds in that amount, which it owed Poscan. The aggregate settlement figure was precisely the

same figure as the aggregate principal amount (that is, with no recovery of interest or costs) of the individual categories of claims under the JVA which the Trustee had sought to recover in the litigation.

33 The settlement agreement between the Trustee and Poscan did not specifically allocate the settlement funds to the individual claims notwithstanding that the total settlement amount was identical to the principal amount of the specific claims advanced by the Trustee under the JVA.

34 Poscan paid the entirety of the settlement funds, including the Disputed Funds, to the Trustee in Bankruptcy on an unconditional basis and the parties exchanged Mutual Releases as part of the settlement.

35 In its Release of the Trustee, Poscan reserved the right to pursue any claim it might have against the Trustee arising from any failure on the part of the Trustee to distribute the settlement funds in accordance with its duties and responsibilities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 [as amended S.C. 1992, c.1 and S.C. 1992, c.27].

Analysis and Discussion

36 The Greenhills Employees and Greenhills Suppliers argue that the Disputed Funds are impressed with "purpose" trusts created by the provisions of the JVA and the JVA Amendment and recognized by the Bank in its banking arrangements with Westar. They argue that because of these "purpose" trusts the Disputed Funds could never have become the sole property of the Trustee (or the Bank) because Westar never had any beneficial interest in them.

37 The position of the Bank is that:

(a) the debt claim advanced by the Trustee against Poscan in its litigation with Poscan was advanced by the Trustee on the basis that the amount claimed was an ordinary asset of Westar's estate indistinguishable from any other asset of Westar;

(b) the Trustee's claim against Poscan was, therefore, an ordinary asset of Westar's estate;

(c) the Trustee received the settlement funds for settling the litigation and payment was made by Poscan and received by the Trustee finally, absolutely and unconditionally in settlement of the litigation;

(d) there never was any agreement or intention on the part of Poscan and the Trustee that any part of the settlement funds would or should be treated other than as an ordinary asset of the Westar's estate; and,

(e) the Trustee, therefore, holds all of the settlement funds including the Disputed Funds as an ordinary asset of Westar's estate so that all of settlement funds including the Disputed Funds should be distributed among Westar's creditors according to the usual bankruptcy rules.

The "Purpose Trust"

38 The origin of the concept of the "purpose trust" upon which the Greenhills Suppliers and the Greenhills Employees rely is *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1968] 3 All E.R. 651 (U.K. H.L.).

39 In *Quistclose*, Quistclose Investments Ltd. (Quistclose) had advanced monies to Rolls Razor Ltd. (Rolls Razor) for the specific purpose of paying a dividend owed by Rolls Razor to its shareholders. Rolls Razor then went into voluntary liquidation. The House of Lords held that Rolls Razor was a trustee in respect of the sum advanced to it by Quistclose so that it was therefore not available for distribution to Rolls Razor's other creditors.

40 Although Quistclose and Rolls Razor Ltd. did not expressly set out their intention to create a trust, the House of Lords held (at page 654) that the sum advanced to Rolls Razor was held in trust because the "mutual intention" and the

"essence of the bargain" of and between Quistclose and Rolls Razor was that the sum advanced to Rolls Razor should not become part of its assets. It could only be used by Rolls Razor exclusively for payment to its shareholders.

41 The House of Lords held that because Rolls Razor never acquired beneficial ownership of the sum advanced to it by Quistclose, the funds would have to be returned to Quistclose if Rolls Razor was unable to pay its shareholders. It was determined that the arrangement created a "primary purpose trust" to pay Rolls Razor's shareholders and that if that primary trust failed a secondary or resulting trust in favour of Quistclose would be enforceable.

42 *Quistclose* has been criticised by some authors and commentators as not adhering to traditional trust principles. See: D.M. Watters, *Law of Trusts in Canada*, 2d. ed. (Toronto: Carswell, 1984) and P.J. Millett, "*The Quistclose Trust: Who Can Enforce It?*" (1985), 101 L.Q.R. 269. Notwithstanding that criticism, however, "purpose trusts" of the type identified by *Quistclose* have been recognized in The United Kingdom, New Zealand, Australia and Canada.

43 *Quistclose* was applied in the United Kingdom in *Carreras Rothmans Ltd. v. Freeman Matthews Treasure Ltd.* (1984), [1985] 1 All E.R. 155 (Eng. Ch. Div.). In *Carreras Rothmans*, Carreras Rothmans Ltd. (Rothmans) had engaged Freeman Matthews Treasure Ltd. (Freeman Matthews) to manage the advertising that Rothmans needed. Their agreement required that Freeman Matthews buy advertising space in the media and that it contract with production agencies. Rothmans agreed to pay a monthly sum to Freeman Matthews for the purpose of allowing it to pay the amounts it owed to the media and to the production agencies. Freeman Matthews went into voluntary liquidation prior to payment by Freeman Matthews of the sums paid to it by Rothmans and Rothmans paid the amounts owing to the production agencies from its own resources. It then took an assignment of the production agencies' interests in the funds held by Freeman Matthews. Accordingly, Rothmans now stood in the place of the production agencies as the alleged beneficiaries of the primary trust, and applied for an order that the sums delivered to Freeman Matthews ought to be returned to it.

44 The court held (at pp. 164-165) that moneys paid by Rothmans to Freeman Matthews were impressed with a purpose trust. As in *Quistclose*, it was held to be apparent from the nature of the arrangement between Rothmans and Freeman Matthews that each intended that the money payable by Rothmans to Freeman Matthews was not to become Freeman Matthews property. Accordingly, Freeman Matthews was not free to deal with those funds as it pleased and the third party creditors had the right to enforce the trust. In support of the proposition that persons who are intended to benefit from the primary purpose trust do have enforceable rights, the court cited the unreported 1978 decision of the Chancery Division in *Re Northern Developments (Holdings) Ltd.*

45 The English Court of Appeal has recently analyzed the "purpose trust" remedy in *Twinsectra Ltd. v. Yardley*, [1999] E.W.J. No. 2789. The court determined moneys will be impressed with a *Quistclose* "purpose trust" if they are transferred with a mutual intention that the moneys should not fall within the general fund of the [recipient's] assets but should be applied for a specific designated purpose. The court said (at paragraphs 87-89):

> In that connection it seems clear that the mere declaration of a specified purpose will not itself be enough to create a purpose trust. There must be some additional indication that the borrower is not to have the full beneficial interest in the fund. In Quistclose-type cases this conclusion has usually been drawn from the requirement that the borrower keeps the loan monies separate from his other assets. Such segregation, coupled with the expressed purpose has been regarded as indicating an intention to create/retain a proprietary right or interest in the loan monies to support a right to repayment on failure of the purpose.
>
> The cases proceed on the assumption that the primary purpose trust comes to an end either when the expressed purpose is performed, in which event no question of a secondary trust arises (save in respect of any balance remaining in the hands of the borrower), or, when the purpose becomes impossible to perform (at which point the secondary trust comes into effect). Thus, in the sense, and to the extent, that the lender has an equitable right to prevent the money being applied for any but its designated purpose, so long as the primary purpose trust continues, the beneficial interest in the monies lent is "in suspense" until applied for that purpose (c.p. per Peter Gibson J in the

> ***Carreras*** case at p. 223). On the other hand, if such a conception is a "faulty analysis" in the orthodox language of trust law (see P.J. Millett QC 101 LQR 1985 at p 269 et seq), it seems to me that the matter is better put in general terms on the basis of the broad jurisdiction of equity. In the ordinary way, a borrower has the full benefit of money lent to him at common law and there is no reason or basis for equity to interfere. However, when a loan is made for a special purpose, equity will interfere in appropriate cases to prevent the borrower from using that money for any other purpose. The purpose imposed at the time of the advance creates an enforceable restriction on the borrower's use of the money. Although the lender's right to enforce the restriction is treated as arising on the basis of a "trust", the use of that word does not enlarge the lender's interest in the fund. The borrower is entitled to the beneficial use of the money, subject to the lender's right to prevent its misuse; the lender's limited interest in the fund is sufficient to prevent its use for other than the special purpose for which it was advanced.

[emphasis added]

46 In New Zealand in *General Communications Ltd. v. Development Finance Corp. of New Zealand*, [1990] 3 N.Z.L.R. 406 (N.Z. C.A.), the dispute was between a supplier, General Communications Ltd. and the respondent, Development Finance Corporation of New Zealand which had delivered funds to a video company specifically for the purchase of new equipment from suppliers. General Communications Ltd. had some general but not specific knowledge of the terms of the advance and was held to be entitled to enforce the trust arrangement against the Development Finance Corporation of New Zealand after the video company went into receivership. The New Zealand Court of Appeal held that the Development Corporation had, by informing General Communications Ltd. that the funds were being delivered to its solicitors, assured suppliers that funds were in hand. It was thereafter beyond the power of the Development Finance Corporation to recall the funds because it had conferred a beneficial interest on each supplier as each supply contract was fulfilled.

47 In Australia, *Quistclose* was analysed by the Federal Court of Australia in *Re Australian Elizabethan Theatre Trust* (1991), 102 A.L.R. 681 (Australia Fed. Ct.). At paragraph 28, after considering criticism of the *Quistclose* decision by Professor Millett and others, the court concluded that:

> But the essential reason why the insolvency law did not strike at the transaction in question in Quistclose was that the moneys represented by the cheque drawn by Quistclose in favour of Rolls Razor and banked in the special account of Rolls Razor never at any stage became the beneficial property of Rolls Razor. It acquired no more than what Dixon J. called a dry legal interest (see ***Commissioner for Stamp Duties of New South Wales v Perpetual Trustee Company, Limited***, supra at 510). On its part, Quistclose had both contractual right to repayment out of the general assets of Rolls Razor, as a general creditor, and the beneficial interest in a fund, whether by way of resulting trust or as the second limb of an express trust.

[emphasis added]

48 *Re Australian Elizabethan Theatre Trust* was recently followed in *Peter Cox Investments Pty Ltd. (In Liquidation) v. International Air Transport Association*, [1999] F.C.J. No. 27, in which O'Loughlin J. summarized the *ratio decidende* of *Quistclose* (at para. 39) as follows:

> I favour the view that ***Quistclose*** merely stands as authority for the proposition that an apparent debtor-creditor relationship can incorporate a trust relationship when such a trust relationship accords with the mutual intentions of the parties. This, I think, is a reflection of the views of Gummow J. in ***Re Australian Elizabethan Theatre Trust***.

[emphasis added]

49 In Ontario, the *Quistclose* decision was applied in *Ling v. Chinavision Canada Corp.* (1992), 10 O.R. (3d) 79 (Ont. Gen. Div.), at 82-85.

50 In British Columbia, *Quistclose* has been considered by this court on at least two occasions. In *Bank of Montreal v. British Columbia (Milk Marketing Board)* (1994), 94 B.C.L.R. (2d) 281 (B.C. S.C.), Newbury J. (as she then was) considered the *Quistclose* decision and the earlier decision of this court of Southin J. (as she then was) in *Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd.* (1986), 11 B.C.L.R. (2d) 308 (B.C. S.C.). In *Bank of Montreal v. British Columbia (Milk Marketing Board)*, at p. 288 Newbury J. said:

> Mr. Stark on behalf of the Board cited the decision of the House of Lords in ***Barclays Bank Ltd. v. Quistclose Investments Ltd.***, [1970] A.C. 567, and the judgment of Southin J. (as she then was) in ***Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd.*** (1986), 11 B.C.L.R. (2d) 308 (S.C.). These stand for the proposition that where A gives money to B for the specific purpose of paying C, that money is impressed with a trust and may not be appropriated by him. I certainly do not doubt this principle, which in the words of Lord Wilberforce is supported by "longevity, authority, consistency and...good sense". In both ***Barclays Bank*** and ***Lowndes***, however, it would appear that the recipient of the funds was required, either by express terms or the past course of dealings between the parties, to keep the money separate from its own funds. Certainly in ***Barclays Bank***, the funds had been advanced by a lender into a separate account opened specially to enable the borrower to pay a dividend to its shareholders. The Court in ***Lowndes*** did not refer specifically to the question of segregation of funds in its description of the facts, but the correspondence quoted at p. 310 of the judgment refers to "trust accounts designated by the Superintendent of Insurance." Both cases, moreover, were concerned with funds paid on *express* conditions of trust which the payees thereof later tried to repudiate. The case at bar is concerned with whether a trust may be implied from the course of dealings imposed by G.O. 131 and the language thereof.

[emphasis added]

51 I have also considered the analysis of the *Quistclose* type of "purpose trust" advanced by Professor C.E.F. Ricketts in "*Different Views on the Scope of the Quistclose Analysis: English and Antipodean Insights*" (1991), 107 L.Q.R. 608. At pages 617-619, the learned author said:

> It is suggested that a series of propositions can now be put as representing the content in England of the *Quistclose* analysis. These propositions indicate that "the pure trusts law philosophy" is dominant, although there may well be scope, particularly in relation to propositions (6) and (7) (iii) below, to introduce a remedial element.
>
> (1) The essential feature of the *Quistclose* analysis is the existence of a primary purpose trust, together with a secondary "persons" trust.
>
> (2) The primary purpose trust must be clearly intended and expressed. It appears that a common intention is required on the part of both the transferor and the transferee (i.e. the settlor and the trustee). This factor may appear to be at odds with orthodox trusts theory, where the intended trustee on a transfer to him of property cannot have any standing to establish the trust. There is no requirement that the indirect "beneficiaries" of the purpose trust share this common intention, nor, it is suggested, that they have any knowledge of the existence of the trust, before the trust becomes effective to bind the trustee.
>
> (3) The secondary trust is an automatic resulting trust. In that limited sense only can it also be characterised as a constructive trust. It does not depend for its existence on any expression of intention to establish it.
>
> (4) The primary purpose trust comes to an end once the expressed purpose is performed. The secondary trust will end at this point also, although if a surplus of property remains in the hands of the trustee that secondary trust will continue to bite on that surplus.
>
> (5) The primary purpose trust also comes to an end if the expressed purpose is impossible to perform. At this point the secondary trust comes into effect.

(6) The analysis can be applied to any case where the money or other property is transferred for a specific purpose only, and not as an accumulation to the property of the transferee. The specific purpose will often be the payment of a debt owed to a third party (the third party becoming the indirect "beneficiary" of a purpose trust), but this is apparently not necessary.

(7) A variety of equitable rights and obligations arise in respect of the primary purpose trust:

(i) the transferor can enforce the trust, and it is suggested, restrain any breach of the trust on the part of the transferee;

(ii) the "direct" or "factual" beneficiaries can also enforce the trust, so as to acquire by the transfer of the money or property to them an absolute title, and, it is suggested, can also restrain any breach of the trust.

(iii) certain other "interested parties" might be treated as having standing also to enforce or restrain breaches, e.g. subsidiary companies where the transferee is the parent company and the transfer was made in the context of a corporate salvage plan.

(8) While the primary purpose trust endures, the beneficial interest in the property remains in suspense.

[emphasis added]

52 I agree with Professor Rickett's analysis and I would add (because of the decisions of this court in *Bank of Montreal v. British Columbia (Milk Marketing Board)*, (*supra*), and the English Court of Appeal in the *Twinsectra Ltd.* (*supra*) case) that the issue of the segregation of funds is an important factor in determining whether a trust for the benefit of third parties is to be implied from the course of dealings between the contracting parties.

53 I turn next to the question of whether a purpose trust for the benefit of the Greenhills Employees and Greenhills Suppliers has been established in this case.

Have the Greenhills Employees and the Greenhills Suppliers established the existence of an enforceable "Purpose Trust" between Westar and Poscan for their benefit?

54 I am satisfied that Westar and Poscan mutually intended that monies advanced by Poscan to Westar as Manager for Poscan's 20 percent of operating expenses (including funds to pay its portion of the joint venture's obligations to the Greenhills Employees and the Greenhills Suppliers) would not become the property of Westar and that Westar was not entitled to use those funds for its own purposes. I find that until Westar paid the amounts owing by the joint venture for its operations Poscan's funds were held on the condition that they were to be used only for that purpose. I also find that the Bank was aware of and accepted the fact that operational funds delivered by Poscan pursuant to the JVA did not become the property of Westar unless received by Westar in repayment for Westar having paid those operational expenses to which Poscan was required to contribute.

55 I reach those conclusions because of the following provisions of the JVA, the Joint Venture Amendment and the Investment Loan Agreement:

(a) Section 1.1 (t) of the JVA which provides that:

"Ownership Interest" means the respective undivided interests from time to time of each Owner in the Project, being initially, for BC Coal, 80% and for Poscan, 20%;

(b) Section 1.1 (m) and s. 3.3 of the JVA which appoint Westar as the Manager of the joint venture;

(c) Section 3.2 of the JVA which provides that:

Capital Expenditures and Operating Costs made or incurred by Manager for the account or on behalf of the Owners shall be borne by the Owners in accordance with their Ownership Interests;

(d) Section 4.1 of the JVA which provides that:

The Manager shall perform its duties under this Agreement for the account of, at the expense of and on behalf of the Owners, according to their respective Ownership Interests, but subject to the overall control and direction of the Owners acting through the Owners' Committee;

(e) Section 4.2 (d) of the JVA which specifically obligates Westar to:

pay or cause to be paid, as and when they become due and payable all claims for wages or salaries for services rendered or performed and for materials supplied on, to or in respect of the Project;

(f) Sections 11.1 to 11.5 of the JVA which provide that:

Section 11.1 Cash Contributions

The manager shall notify the Owners not later than 45 days prior to the first day of each month and the Owners shall contribute, in order that Manager shall receive not later than the first day of such month, such amounts as Manager shall require to cover Capital Expenditures and Operating Costs (including cash for working capital) for that month.

Section 11.2 Subsequent Adjustments

In the event of the incorrect calculation of a cash contribution any Owner shall be entitled to claim a subsequent adjustment from the Manager or the Manager shall be entitled to claim a subsequent adjustment from an Owner. Any claim for an adjustment will be settled within the month following the claim.

Section 11.3 Cash Management

Manager shall invest temporary surplus cash on hand in a prudent manner. All income earned from the investment of such funds shall be pro-rated to the credit of each Owner on the basis of its Ownership Interest.

Section 11.4 Interest on Arrears

Contributions for Capital Expenditures and Operating Costs not made on the due date shall be subject to interest at the rate of two percent (2%) above the Prime Rate compounded and payable quarterly on the outstanding balance until the arrears have been made up by the defaulting Owner or the Ownership Interest of the defaulting Owner has been acquired pursuant to Article 19. Such interest shall be prorated to the credit of the non-defaulting Owners in the ratio of the Ownership Interest of each Owner to the aggregate of all non-defaulting Owners until such time as the Owner obliged to do so pursuant to Section 19.1 makes payment on behalf of the defaulting Owner. Thereafter such interest shall be exclusively to the credit of the Owner making payment on behalf of the defaulting Owner.

Section 11.5 Payments to Manager

Manager shall be entitled to reimburse itself on a monthly basis from funds on hand for its fee payable pursuant to Article 13 hereto and any other moneys disbursed by Manager on behalf of the Owners pursuant to this Agreement;

(g) Section 21.3 of the JVA which provides that:

No owner shall grant any mortgage or charge, whether by way of assignment or otherwise (herein called a "Security Interest") on the whole or any part of its Ownership Interest or its interest in the Project Limits or the Project Reserves unless the Security Interest contains provisions in form reasonably satisfactory to the other Owners; to the effect that the grantee or holder of the Security Interest, or his agent or any receiver or receiver-manager appointed by him or by the Court at his request, in the exercise of any right, power or remedy in respect of any property or assets used for purposes of the Project, will be subject to all the terms and conditions by which the encumbering Owner is bound pursuant to the provisions of this Agreement and the Property Rights Grant;

(h) Recitals B and D of the JVA Amendment which provide that:

B. Mining has obtained from Bank of Montreal, Royal Bank of Canada and MC Resources Ltd. (collectively the "Restructuring Plan Lenders") credit facilities comprised of a $25,000,000 operating loan, $169,062,000, $30,938,000 and $20,000,000 investment loans and $85,424,365, $14,110,470 and $10,000,000 reducing term loans (collectively the "Restructuring Plan Facilities"), all as evidenced by an operating loan agreement, three investment loan agreements and three reducing term loan agreements, each made between Mining and one of the Restructuring Plan Lenders, dated for reference 15 June 1990 and has secured its indebtedness and liabilities with respect to the Restructuring Plan Facilities by, inter alia, the security described in paragraph 6(a) and (b) hereof;

D. Mining has requested that Poscan and Posco execute this Amendment to amend the Joint Venture Agreement so as to facilitate determination of the interest held by each of Mining and Poscan from time to time in the Greenhills Mine Coal inventory and to permit the security described in paragraph 6 hereof to extend to and charge the interest of Mining in such inventory from time to time;

(i) Section 1 of the JVA Amendment which defines a Joint Venture Asset to mean property which is the subject of an Ownership Interest as defined in the JVA.

(j) Section 6 of the JVA Amendment which provides that:

Poscan and Posco hereby waive, with respect to the Security, any provisions of Section 21.3 of the Joint Venture Agreement which would require the holders of the Security, their agents or any receiver or receiver-manager appointed thereunder or by the court at their request to be subject to the terms and conditions of the Joint Venture Agreement binding upon Mining. "Security" means the following security:

(a) the floating charge contained in the Deed of Trust and Mortgage dated for reference the 15th day of June, 1990 made between Mining and Montreal Trust Company of Canada;

(b) security under Section 177 and Section 178 of the ***Bank Act*** (Canada) issued or to be issued by Mining to the Lender providing the Operating Loan under the Restructuring Plan Facilities;

(c) the floating charge contained in the Debenture in the principal amount of $25,000,000 issued by Mining in favour of Canadian Pacific dated for reference the 14th day of June, 1991;

(d) any renewals of, supplements to or replacements of any of the aforesaid security, whether pursuant to further assurances, clauses contained in such security or otherwise, including without limitation any security under the ***Personal Property Security Act*** (British Columbia), provided the form of same is acceptable to Poscan's solicitors, acting reasonably; provided that:

(e) such security shall not charge any Joint Venture Assets; and

(f) such security shall be held by or on behalf of:

(i) the Restructuring Plan Lenders, their successors and assigns, for the Restructuring Plan Facilities; or

(ii) Canadian Pacific pursuant to the terms of the Instrument of Delivery dated for reference the 14th day of June, 1991;

[emphasis added]

(k) Recitals A and B of the Investment Loan Agreement which provide that:

A. Pursuant to a Restatement Agreement (as herein defined) the Borrower has confirmed and acknowledged that it is indebted to Montreal for $169,062,000, to The Royal Bank of Canada for $30,938,000 and the MC Resources Ltd. for $20,000,000 in respect of the B Debt (as herein defined);

B. It was one of the conditions of Montreal entering into the Restatement Agreement that the Borrower enter into this Agreement;

(l) Section 1.1 of the Investment Loan Agreement which includes the following definitions:

"Greenhills Joint Accounts"

means all such Bank Accounts as the Borrower or the Borrower and Poscan maintain with the Designated Bank if the Borrower shall have notified the Designated Bank thereof and which Bank Accounts are used only for the deposit and disposition of funds in which Poscan has an interest in accordance with Article 3 of this Agreement.

[emphasis added]

"Greenhills Joint Venture"

means the joint venture of the Borrower and Poscan concerning the Greenhills Mine constituted pursuant to the Greenhills Joint Venture Agreement; and

(m) Section 3.6(b) of the Investment Loan Agreement which provides that:

Until payment in full of the Indebtedness the Borrower shall:

(b) deposit in a Greenhills Operating Account all amounts received from Poscan as reimbursement for amounts paid by the Borrower in anticipation of reimbursement by Poscan pursuant to the Greenhills Joint Venture Agreement and deposit in a Greenhills Joint Account all amounts received from Poscan for disbursement to third parties pursuant to the Greenhills Joint Venture Agreement;

[emphasis added]

56 I also reach those conclusions because the actions of the parties prior to Westar's bankruptcy were entirely consistent with all of those agreements. Poscan's 20% of operating costs were actually deposited into the joint venture operating account, Westar only used funds in that account to pay operating expenses including those owed to the Greenhills Suppliers and Greenhills Employees and, by exempting the operating account from its monthly sweeps, the Bank recognized that it had no claim to the funds.

57 The authorities which I have accepted as being applicable to the determination of the issues in this case establish that the Greenhills Employees and Greenhills Suppliers as beneficiaries of a "purpose trust" may enforce the provisions

of that trust to their benefit. I also find that there was sufficient segregation of funds delivered by Poscan to Westar to establish a mutual intention that funds delivered by Poscan for its 20% shares of operational expenses did not become the property of Westar and were delivered for the benefit of third parties including Greenhills Employees and Greenhills Suppliers.

58 The Greenhills Suppliers and the Greenhills Employees have accordingly established both the existence of a pre-bankruptcy purpose trust for their benefit as well as the right to apply to enforce the provisions of that trust by transfer of the legal title to the Disputed Funds to them.

59 I turn next to the questions of whether Westar's bankruptcy, the litigation between the Trustee and Poscan or, its settlement now preclude the enforcement of that trust.

Did the Bankruptcy of Westar or the Trustee's Litigation and Settlement with Poscan Alter or Discharge Westar's Purpose Trust bligations?

60 Although the Bank argued that a purpose trust was not established by the joint venture arrangements between Poscan and Westar, it did not argue that, if established, a purpose trust could not survive a bankruptcy. That proposition would fly in the face of the *Quistclose* rationale and those cases that have followed and applied it in insolvency situations. Further, s.67 of the *Bankruptcy and Insolvency Act* provides that the property of a bankrupt that is divisible amongst its creditors does not include property held in trust by the bankrupt for any other person.

61 As I understand them, the remaining arguments of the Bank are that:

(a) because Poscan had not paid the funds to Westar prior to the bankruptcy but had already received its coal entitlement the purpose trust was not perfected by delivery of funds to Westar so that the action by the Trustee to enforce Poscan's obligations under the JVA was merely a debt action; and

(b) because the settlement payment was a compromise payment made to settle contested litigation and was not allocated to specific claims or otherwise segregated, the Disputed Funds fall into Westar's estate together with the balance of the settlement funds.

62 I do not accept the Bank's submissions.

63 The Trustee could not convert an action to recover what would be monies impressed with a trust into an action to recover a debt free of trust obligations. A determination to the contrary would in my view contravene s. 67 of the *Bankruptcy and Insolvency Act*.

64 Under the JVA, Westar was required to deposit Poscan's 20% of operating expenses into the segregated operations account for the purposes set forth in the JVA. The Trustee was not entitled to avoid its obligation to Poscan and the purpose trust beneficiaries by not segregating the funds. That finding is supported by the provisions of the release between Poscan and Westar which allowed Poscan to pursue the Trustee for any failure on the part of the Trustee to distribute the settlement funds in accordance with its duties and responsibilities under *Bankruptcy and Insolvency Act*.

65 The circumstances of this case are different than those considered by the English Court of Appeal in *Re Harrington Motor Co.* (1927), [1928] 1 Ch. D. 105 (Eng. Ch. Div.) upon which the Bank relies. Although the *Harrington* case did involve monies recovered by a trustee in bankruptcy it did not involve recovery of funds impressed with a trust but rather concerned monies owing under a policy of insurance which was triggered by the claimant's loss. In addition, *Harrington* has been legislatively overturned in relation to motor vehicle liability insurance policies in British Columbia (see: *Insurance Act*, R.S.B.C. 1996, c.226, s.159) and elsewhere. Finally, *Harrington* predates *Quistclose* and to the extent that it may be inconsistent with the principles expressed in *Quistclose*, I would decline to follow *Harrington*.

66 I am also satisfied that the receipt of the coal by Poscan prior to Westar's bankruptcy did not alter Poscan's obligation to deliver funds to Westar under the JVA as a payment for the benefit of the Greenhills Employees and Greenhills Suppliers.

67 The Trustee did not sue Poscan for the value of the coal Poscan had received without payment but rather sued to enforce Poscan's obligations to Westar under the JVA. The Greenhills Employees and Greenhills Suppliers had, prior to Westar's bankruptcy, delivered their labour and material to Westar. That labour and those materials had been used by Westar to produce the coal obtained by Poscan and for which Poscan owed its 20% of operations costs. The Trustee sued Poscan for precisely the same amount as that owing to Westar on account of the Greenhills Suppliers ($1,106,540.33) and the Greenhills Employees ($523,710.59) under the JVA. The Trustee received payment from Poscan in exactly those amounts albeit without costs and interest.

68 When the monies due under the JVA were paid to the Trustee by way of settlement of the action the Trustee was obliged to keep that portion of the settlement funds impressed with the JVA purpose trust segregated for payment to the Greenhills Suppliers and Employees. In other words, the legal title in the settlement funds passed to the Trustee subject to the claims of the purpose trust beneficiaries.

69 For those reasons, I am satisfied that neither the failure to segregate the Disputed Funds from the balance of the settlement funds, nor the lack of evidence concerning the extent to which the global settlement reached between Poscan and the Trustee may have compromised the claims of either should in the peculiar circumstances of this case preclude the enforcement of the purpose trust by the beneficiaries of that trust.

70 I also reach that conclusion because:

a) the compromise of the litigation was made without reference to the interests of either the Greenhills Employees or the Greenhills Suppliers and their beneficial interests should not be compromised or defeated by circumstances over which they had no control;

b) the fact that the settlement amount coincided precisely with the principal amounts claimed by the Trustee under the JVA gives rise to the logical inference that the Trustee abandoned its interest and cost claims in return for compromise and the further logical inference that if Poscan's disputed set off claims were given any consideration they were also compromised in relation to the Trustee's substantial interest and cost claims which exceeded $3 million;

(c) there is no evidence that the settlement amount arose as a consequence of the abandonment or compromise of the Trustee's claims under the JVA related to either Poscan's or Westar's obligations to the Greenhills Employees or Greenhills Suppliers; and,

(d) although neither the Greenhills Employees nor the Greenhills Suppliers were aware of their trust claims until after the settlement and thus will receive an unexpected payment for their services, the Bank was at all times prior to Westar's bankruptcy aware that it held no security over those funds which Poscan was obligated to pay Westar for unpaid operational costs.

Conclusion

71 I find that the Trustee holds the Disputed Funds in trust for the benefit of the Greenhills Employees and the Greenhills Suppliers and I direct payment of $523,701.59 to the Greenhills Employees and $1,106,540.33 to the Greenhills Suppliers from the funds now held in court pursuant to the Order of Master Bolton.

72 The parties shall have leave to address the issue of costs or any other issues which may now require determination as a consequence of these directions.

rder accordingly.

Footnotes

* A corrigendum issued by the court has been incorporated herein.

TAB 7

2003 BCCA 11
British Columbia Court of Appeal

Westar Mining Ltd., Re

2003 CarswellBC 271, 2003 BCCA 11, [2003] 3 W.W.R. 244, [2003] B.C.W.L.D. 146, [2003] B.C.J. No. 25, 119 A.C.W.S. (3d) 10, 182 B.C.A.C. 161, 300 W.A.C. 161, 39 C.B.R. (4th) 313, 9 B.C.L.R. (4th) 61

In the Matter of the Bankruptcy of Westar Mines Ltd□

Rowles, Newbury, Mackenzie JJ.A.

Heard: December 3, 2002
Judgment: January 10, 2003
Docket: Vancou□r CA028532

Proceedings: affirming 2001 BCSC 618 (B.C. S.C.)

Counsel: *C.W. Caverly, T.D. Braithwaite*, for Appellant, Bank of Montreal
P.G. Foy, Q.C., C.S. Bird, C.L. Shaley, for Respondent, Greenhills Mine Suppliers
M.L. Skwarok, K. Johnston, for Respondent, Director of Employment Standards

Subject: Insolvency; Estates and Trusts; Property; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VIII Property of bankrupt
VIII.5 Trust property
VIII.5.a General principles

Headnote

Bankruptcy --- Property of bankrupt — Trust property — General

Prior to bankruptcy, bankrupt operated mine as joint venture with partner — Following bankruptcy, trustee brought action against joint venture partner claiming payment of certain amounts under joint venture agreement — Action was settled and settlement amount was paid to trustee — Trustee was directed to pay $523,710.59 to mine employees and $1,106,540.33 to mine suppliers — Bank appealed — Appeal dismissed — Joint venture arrangements clearly distinguished bankrupt's position as owner of portion of joint venture from its position as mine manager — Bankrupt received payments from partner for operating expense in its capacity as mine manager — Bank exempted joint venture account from monthly sweeps of bankrupt's account, confirming that money in that account was separate from other accounts subject to bank's security — Payments by partner under joint venture were separated from bankrupt's other assets — Under s. 67 of Bankruptcy and Insolvency Act, purpose trust can survive bankruptcy — Trustee could not avoid trust implications of joint venture agreement by framing claim in debt — Joint venture agreement was sole basis for claim against partner which was brought by trustee in bankrupt's position as mine manager — Joint venture agreement provided certainty and exclusivity required for purpose trust of funds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67.

Table of Authorities

Cases considered by *Mackenzie J.A.*:

Australian Elizabethan Theatre Trust, Re (1991), 102 A.L.R. 681 (Australia Fed. Ct.) — distinguished

Bank of Montreal v. British Columbia (Milk Marketing Board), 94 B.C.L.R. (2d) 281, 1994 CarswellBC 334 (B.C. S.C.) — distinguished

Barclays Bank Ltd. v. Quistclose Investments Ltd. (1968), [1970] A.C. 567, [1968] 3 All E.R. 651, [1968] 3 W.L.R. 1097 (U.K. H.L.) — followed

Carreras Rothmans Ltd. v. Freeman Matthews Treasure Ltd. (1984), [1985] 1 All E.R. 155, [1985] Ch. 207 (Eng. Ch. Div.) — distinguished

Harrington Motor Co., Re (1927), [1928] 1 Ch. D. 105 (Eng. Ch. Div.) — distinguished

Liverpool Mortgage Insurance Co. s Case, Re [1914] 2 Ch. 617 (Eng. Ch. Div.) — distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 67 — considered

APPEAL by bank from judgment reported at 2001 BCSC 618, 2001 CarswellBC 1330, 26 C.B.R. (4th) 109 (B.C. S.C.), directing trustee to pay amounts to bankrupt's employees and suppliers.

***Mackenzie J.A.*:**

1 This is an appeal from an order of Mr. Justice Davies that the trustee in bankruptcy (the "Trustee") of Westar Mining Ltd. ("Westar") holds the sum of $1,630,250.92 (the "Disputed Funds") in trust for the benefit of the respondent employees and suppliers of the Greenhills coal mine ("Greenhills"). The appellant Bank of Montreal (the "Bank") contests the trust and contends that the Disputed Funds are an asset of Westar available to satisfy the general claims of Westar's creditors in the bankruptcy. The Trustee took no position on this appeal.

Background

2 Greenhills is located in the East Kootenay region of British Columbia and was a joint venture between Westar and Pohang Steel Canada Ltd. ("Poscan"). The joint venture was owned 80 percent by Westar and 20 percent by Poscan and was operated by Westar pursuant to an agreement between the two parties (the "Joint Venture Agreement").

3 Westar was the mine manager. It was responsible for the operation of the mine, including contracts with employees and third parties. Poscan was shielded from all financial liability, except its liability to Westar pursuant to the Joint Venture Agreement. Poscan received 20 percent of the coal produced by Greenhills.

4 Westar, as manager, made "cash calls" upon itself and Poscan based on the anticipated cash requirements for the coming month or week. Westar maintained a separate bank account for Greenhills by arrangement with the Bank

under a loan agreement (the "Loan Agreement"). Poscan paid its 20 percent share of operating and capital costs into this separate joint venture account.

5 Westar was adjudged bankrupt on 31 August 1992. The assets were insufficient to satisfy the claims of secured lenders, including the Bank. At the time of the bankruptcy, Poscan had received its full share of the coal produced by Greenhills but it had not contributed its share of operating expenses.

6 The Trustee sued Poscan for its unpaid share of operating expenses including $1,106,540.33 for its share of amounts owing to Greenhills, suppliers and $523,701.59 for its share of wages and vacation pay owing to the employees. Poscan defended the claim on a number of grounds. The litigation was eventually settled for the exact amount of the claims without interest or costs.

7 Poscan and the Trustee exchanged mutual releases as part of the settlement. The settlement agreement did not specifically allocate the Disputed Funds to the particular claims. Poscan reserved the right to pursue any claim it might have against the Trustee for failing to distribute the Disputed Funds in accordance with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

The Reasons of the Chambers Judge

8 Davies J. concluded that Poscan and Westar had intended that Poscan's payments for operating expenses would not become the property of Westar, based on their mutual intent derived from the Joint Venture Agreement and the banking arrangements under the Loan Agreement. Until Westar paid the amounts owing for the expenses of Greenhills' operations, Poscan's payments were held on the condition that they could be used only for that purpose. The Bank knew and accepted that operational expense payments by Poscan did not become the property of Westar. Davies J. therefore found that the disputed amounts were impressed with a purpose trust and that Greenhills' employees and suppliers could enforce that trust for their benefit.

The Issues on Appeal

9 The Bank advanced three grounds of appeal in its factum, as follows:

> 1. The chambers judge erred in not applying the terms of the settlement of the litigation between Poscan and the Trustee to determine the nature of the Disputed Funds rather than the Joint Venture Agreement and the banking arrangements.
>
> 2. The chambers judge erred in his conclusion that monies paid by Poscan to Westar in the ordinary course of business under the Joint Venture Agreement prior to the bankruptcy were the subject of a purpose trust in favour of the employees and the suppliers.
>
> 3. The chambers judge erred in concluding that the entitlement to the disputed funds was by reference to a purpose trust analysis rather than by reference to an analysis applicable to contracts of indemnity.

Analysis

10 Mr. Caverly confined his oral submission on behalf of the Bank to the first issue. That issue is linked to the second issue to the extent that the purpose trust found by the chambers judge depends on the pre-bankruptcy arrangements between Westar and Poscan. I therefore propose to consider the second issue first.

i) Do the pre-bankruptcy arrangements support a purpose trust?

11 A purpose trust is often referred to as a Quistclose trust in recognition of the influential judgment in *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1968] 3 All E.R. 651 (U.K. H.L.). *Quistclose* also involved a special banking arrangement. The respondent Quistclose had advanced funds to Rolls Razor Ltd. to allow it to pay a declared dividend.

Quistclose accompanied its cheque to Rolls Razor with a letter to the appellant bank confirming that the cheque would be deposited to a separate account and that the funds "will only be used to meet the dividend due...." Rolls Razor went into voluntary liquidation before the dividend was paid and the bank claimed the monies on behalf of Rolls Razor's creditors. The House of Lords, in a unanimous judgment delivered by Lord Wilberforce, held that the monies had to be returned to Quistclose because they were advanced exclusively for the payment of a dividend which could not be paid after the voluntary liquidation. Lord Wilberforce concluded that the advance of the funds for a specific purpose created an equitable right in Quistclose to see that the fund be applied for that purpose, and created a secondary trust in favour of Quistclose when that specific purpose could not be carried out.

12 *Quistclose* does not modify the certainty of intention, subject matter, and object required of trusts generally. The Bank submits that the arrangement here did not have the certainty of intention required to create a trust relationship or a segregation of Poscan's payments required for certainty of subject matter. It contends that *Quistclose* is therefore distinguishable on its facts.

13 Davies J. set out extensive portions of the Joint Venture Agreement and the Loan Agreement in his reasons for decision and I need not repeat them here. He concluded:

> I am satisfied that Westar and Poscan mutually intended that monies advanced by Poscan to Westar as Manager for Poscan's 20 percent of operating expenses (including funds to pay its portion of the joint venture's obligations to the Greenhills Employees and the Greenhills Suppliers) would not become the property of Westar and that Westar was not entitled to use those funds for its own purposes. I find that until Westar paid the amounts owing by the joint venture for its operations Poscan's funds were held on the condition that they were to be used only for that purpose. I also find that the Bank was aware of and accepted the fact that operational funds delivered by Poscan pursuant to the [Joint Venture Agreement] did not become the property of Westar unless received by Westar in repayment for Westar having paid those operational expenses to which Poscan was required to contribute.

He also found that:

> [57] There was sufficient segregation of funds delivered by Poscan to Westar to establish a mutual intention that funds delivered by Poscan for its 20% share of operational expenses did not become the property of Westar and were delivered for the benefit of third parties including Greenhills Employees and Greenhills Suppliers.

14 In my view, the record before Davies J. supported those conclusions. The joint venture arrangements clearly distinguished Westar's position as owner of 80 percent of the joint venture from its position as mine manager, and Westar received payments from Poscan for operating expenses in the latter capacity. The Bank exempted the joint venture account from its monthly sweeps of Westar's accounts, confirming that monies in that account were separate from other Westar accounts subject to the Bank's security.

15 On this aspect of the case the Bank relies on *Bank of Montreal v. British Columbia (Milk Marketing Board)*, [1994] B.C.J. No. 1606 (B.C. S.C.), and *Australian Elizabethan Theatre Trust, Re* (1991), 102 A.L.R. 681 (Australia Fed. Ct.). The *B.C. Milk Marketing Board* case involved funds payable by the Board to a bankrupt vendor for milk shipped by milk producers to the vendor as required by their Board licences. Newbury J., as she then was, held that the funds were not subject to a purpose trust for the producers because the vendor was not required under the terms of its dealings with the Board to separate funds received from the Board for producer payments from the other property of the vendor, or to use the funds received exclusively to pay producers. Therefore, the essential elements of mutual intention to create a trust and certainty of subject matter were not satisfied.

16 Conversely, in the present case, the payments by Poscan were required to be paid into a separate joint venture account to be used exclusively to pay the operating expenses of Greenhills. The Bank recognized the separate status of the account. The payments by Poscan under the Joint Venture Agreement were separated from Westar's other assets,

in contrast to the payments to the vendor by the Milk Marketing Board that, with the agreement of the Board, were mingled with the vendor's other property.

17 The *Elizabethan Theatre Trust* case also turned on the intention attached to donations to the Theatre Trust. The trust claim by the Australian Opera failed because the donations were found to have been made to the bankrupt Theatre Trust unconditionally. The donors had expressed a preference that the donations be given by the Theatre Trust to the Australian Opera but that expressed preference did not fetter the unconditional nature of the gift to the Theatre Trust. The tax deductible status of the donations required that they be given to the Theatre Trust unconditionally, and this was inconsistent with any enforceable preference in favour of the Opera. The Theatre Trust's banking arrangements did not separate the donations from its other monies. The trust claim therefore failed because there was no mutual intention to create a trust and because the donations were not separated from the Theatre Trust's other assets.

18 In my view, the *Milk Marketing Board* and *Elizabethan Theatre Trust* cases are distinguishable on their facts and Davies J. was correct in his conclusion that the pre-bankruptcy joint venture arrangements satisfied the requirements for a purpose trust.

ii) Do the post-bankruptcy events defeat a purpose trust?

19 I now turn back to the first issue. The Bank submits that the pre-bankruptcy relationship between Poscan and Westar under the Joint Venture Agreement and Loan Agreement is irrelevant, and that the status of the Disputed Funds depends on the intention of Poscan and the Trustee at the time of the settlement. Even if the pre-bankruptcy arrangements could support a purpose trust, the Bank contends that the intervention of the bankruptcy and the Trustee's litigation severed any link that would have otherwise have created a trust.

20 The Bank does not challenge the general proposition that a purpose trust can survive a bankruptcy. Section 67 of the *Bankruptcy and Insolvency Act* confirms that position. Instead, the Bank makes the narrow argument that the Trustee's action was limited to a claim in debt and the Disputed Funds were paid unconditionally by Poscan and received by the Trustee in settlement of that debt claim. The result, it says, is that the funds lacked all three elements of a valid trust. Poscan and the Trustee did not have the mutual intent to create a trust and there was no certainty that the employees and the suppliers were the exclusive beneficiaries. The Disputed Funds were not deposited in the separate Greenhills account. The Bank contends that the Trustee only had limited authority to recover debts owed to Westar for the benefit of Westar's creditors generally, and that the Trustee had no authority to pursue a trust claim for the exclusive benefit of the respondents.

21 The Bank submits that *Carreras Rothmans Ltd. v. Freeman Matthews Treasure Ltd.* (1984), [1985] 1 All E.R. 155 (Eng. Ch. Div.) supports its position. The facts of *Carreras* are complicated. Carreras, a tobacco company, employed Freeman Mathews ("FMT") as its advertising agency to buy advertising space in the media and to deal with production agencies. The media and agencies charged FMT who then invoiced Carreras for those amounts plus an amount for FMT's services. FMT dealt with the third party agencies as principal and not as agent. Invoices from third party agencies received by FMT in one month were passed on to Carreras who then paid FMT in time for FMT to pay the third parties the following month. In 1983 FMT was in financial difficulties and Carreras became concerned that its business would be damaged if FMT defaulted on payment to third parties for Carreras' advertising. On 20 July 1983 Carreras and FMT agreed that FMT would set up a special bank account, that payments by Carreras for third party invoices would be deposited by FMT to that account, and that the funds in the account would be used exclusively to pay the third parties. FMT's bank set up the account and acknowledged its purpose. On 26 July 1983 Carreras paid an amount into the special account to cover the June third party invoices. On 29 July, 1983 FMT went into voluntary liquidation before the funds in the special account were dispersed.

22 The liquidator refused to pay the funds in the accounts to the third parties. Under business pressure from the third parties, Carreras paid them directly and sued the liquidator for repayment of the funds in the special account on the ground of a failed purpose trust. The liquidator counterclaimed for £780,000, £20,000 representing FMT's fee for July

services and the balance for the third party accounts invoiced to FMT in July. Gibson J. concluded that this agreement established a purpose trust for the third parties and the funds in the special account should be repaid to Carreras on the ground of a failed purpose trust. However, the liquidator succeeded in the counterclaim for £780,000 on the ground that it represented a book debt due by Carreras to FMT and could be recovered for the benefit of FMT's general creditors.

23 The Bank relies on this decision to support its submission that the Trustee's claim against Poscan is also a claim in debt and the payment of the Disputed Funds in settlement should be equally available to Westar's creditors. In my view, this submission misses a critical difference between the two cases. In *Carreras*, the purpose trust agreement was made *after* the July invoices from the third parties were received by FMT. Before that agreement, FMT had a claim in debt against Carreras for the invoiced amounts. As the purpose trust agreement was made later, it could not convert the existing debt to a trust obligation retroactively. Here, however, the Joint Venture Agreement was in force at all material times and Westar's only claim to payment was pursuant to its terms. Unlike FMT, Westar never had a separate claim in debt before the bankruptcy that it would have been entitled to record on its books as an unconditional account receivable.

24 I do not think that the Trustee could avoid the trust implications of the Joint Venture Agreement by simply framing the claim in debt. The Joint Venture Agreement is the sole basis for the claim and it is brought by the Trustee in Westar's position as mine manager, not mine owner. Section 67 of the *Bankruptcy and Insolvency Act* excludes trust property from a bankrupt's estate that is available to general creditors. The mutual releases between the Trustee and Poscan do not relieve the Trustee of Westar's obligations under the Joint Venture Agreement. The claim in debt cannot be severed from the equities attached to it by the terms of the Joint Venture Agreement that is the basis for its recovery. Poscan settled the Trustee's action for the precise amount of the principal of the outstanding claims of the employees and suppliers. I think that the equities attaching to those claims arising from the terms of the Joint Venture Agreement must follow Poscan's settlement. I do not think that the Trustee can avoid those equities unilaterally by pleading the claim in debt. In my view, Davies J. was correct in his conclusion that the Trustee was bound by the purpose trust implications of the Joint Venture Agreement.

iii) The contract of indemnity issue

25 Finally, the Bank submitted that Davies J. erred in not applying a contract of indemnity analysis developed in several English cases rather than a trust analysis. In rejecting that submission, Davies J. concluded:

> [65] The circumstances of this case are different than those considered by the English Court of Appeal in *Harrington Motor Company Limited*, [1928] 1 Ch.D. 105 (C.A.) upon which the Bank relies. Although the *Harrington* case did involve monies recovered by a trustee in bankruptcy it did not involve recovery of funds impressed with a trust but rather concerned monies owing under a policy of insurance which was triggered by the claimant's loss. In addition, *Harrington* has been legislatively overturned in relation to motor vehicle liability insurance policies in British Columbia (see: *Insurance Act*, R.S.B.C. 1996, c.226, s.159) and elsewhere. Finally, *Harrington* predates *Quistclose* and to the extent that it may be inconsistent with the principles expressed in *Quistclose*, I would decline to follow *Harrington*.

In my respectful view, this conclusion is correct. A mutual intention to create a trust is essential to the existence of a purpose trust. The payment by the insurer in *Harrington* [*Harrington Motor Co., Re* (1927), [1928] 1 Ch. D. 105 (Eng. Ch. Div.)] was a payment to discharge the insurer's contractual obligation under the insurance policy. There was no intent on the part of either the insurer or Harrington that the payment would be separated from Harrington's other funds or otherwise dedicated to the payment of the judgment that the accident victim, Chaplin, had obtained against Harrington. The essential element of mutual intent to create a trust was missing. Similarly, in *Liverpool Mortgage Insurance Co. s Case, Re*, [1914] 2 Ch. 617 (Eng. Ch. Div.), the payment was made pursuant to a contract of insurance or indemnity without any mutual intent that the payment would be held exclusively for a particular purpose.

26 Unlike those contracts of indemnity, the Joint Venture Agreement here did provide the certainty and exclusivity required for a purpose trust of the Disputed Funds.

27 In the result, I think that the judgment appealed from was correct and I would dismiss the appeal.

Rowles J.A.:

I agree.

ewbury J.A.:

I agree.

Appeal dismissed.

TAB 8

Province of Alberta

PERPETUITIES ACT

Revised Statutes of Alberta 2000
Chapter P-5

Current as of December 11, 2015

Office Consolidation

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

PERPETUITIES ACT

Chapter P-5

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "court" means the Court of Queen's Bench;

(b) "disposition" includes the conferring of a power of appointment and any provision whereby an interest in property or a right, power or authority over property is disposed of, created or conferred and also includes a possibility of reverter or resulting trust, and a right of re-entry on breach of a condition subsequent;

(c) "in being" means living or conceived but unborn;

(d) "perpetuity period" means the period within which at common law as modified by this Act an interest must vest;

(e) "power of appointment" includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration.

RSA 1980 cP-4 s1

Rule against perpetuities

2 Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect.

RSA 1980 cP-4 s2

Possibility of vesting beyond period

3 No disposition creating a contingent interest in real or personal property shall be treated as or declared to be void as violating the rule against perpetuities by reason only of the fact that there is a possibility of the interest vesting beyond the perpetuity period.

RSA 1980 cP-4 s3

Presumption of validity - "Wait and See"

4(1) Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish

(a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 6, 7 or 8, shall be treated as void or declared to be void, or

(b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

(2) A disposition conferring a general power of appointment, which but for this section would have been void on the ground that

it might become exercisable beyond the perpetuity period, is presumptively valid until the time, if any, it becomes established by actual events that the power cannot be exercised within the perpetuity period.

(3) A disposition conferring a power other than a general power of appointment, which but for this section would have been void on the ground that it might be exercised beyond the perpetuity period, is presumptively valid and shall be declared or treated as void for remoteness only if, and so far as, the power is not fully exercised within the perpetuity period.

RSA 1980 cP-4 s4

Determination of perpetuity period

5(1) When section 4 applies to a disposition, the perpetuity period shall be determined as follows:

(a) if any persons falling within subsection (2) of this section are persons in being and ascertainable at the beginning of the perpetuity period, the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within subsection (2)(b) or (c) shall be disregarded if the number of persons of that description is such as to render it impractical to ascertain the date of death of the survivor;

(b) if there are no lives under clause (a), the perpetuity period is 21 years.

(2) The persons referred to in subsection (1) are as follows:

(a) the person by whom the disposition is made;

(b) a person to whom or in whose favour the disposition was made, that is to say,

(i) in the case of a disposition to a class of persons, any member or potential member of the class;

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;

(iv) if, in the case of a special power of appointment exercisable in favour of one person only, the object of

the power is not ascertained at the beginning of the perpetuity period, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(v) in the case of a power of appointment, the person on whom the power is conferred;

(c) a person having a child or grandchild within clause (b)(i) to (iv), or such a person any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent, fall within those subclauses;

(d) any person who takes any prior interest in the property disposed of and any person on whose death a gift over takes effect;

(e) when a disposition is made in favour of a spouse or adult interdependent partner of a person who is in being and ascertainable at the commencement of the perpetuity period, or when an interest is created by reference to the death of the spouse or adult interdependent partner of such a person, or by reference to the death of the survivor, the same spouse or adult interdependent partner whether or not he or she was in being or ascertainable at the beginning of the period.

RSA 2000 cP-5 s5;2002 cA-4.5 s62

Reduction of age

6(1) When a disposition creates an interest in real or personal property by reference to the attainment by any person or persons of a specified age exceeding 21 years and actual events existing at the time the interest was created or at any subsequent time establish

(a) that the interest, but for this section, would be void as incapable of vesting within the perpetuity period, but

(b) that it would not be void if the specified age had been 21 years,

the disposition shall be read as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would, if specified instead, have prevented the interest from being so void.

(2) One age reduction to embrace all potential beneficiaries shall be made pursuant to subsection (1).

(3) When in the case of any disposition different ages exceeding 21 years are specified in relation to different persons

(a) the reference in subsection (1)(b) to the specified age shall be construed as a reference to all the specified ages, and

(b) that subsection operates to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

RSA 1980 cP-4 s6

Exclusion of class members to avoid remoteness

7(1) If the inclusion of any persons, being potential members of a class or unborn persons who at birth would become potential members of the class, prevents section 6 from operating to save a disposition from being void for remoteness, those persons shall be excluded from the class for the purposes of the disposition and that section has effect accordingly.

(2) If, in the case of a disposition to which subsection (1) does not apply, it is apparent at the time the disposition is made, or becomes apparent at a subsequent time that, but for this subsection, the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, those persons shall for all the purposes of the disposition be excluded from the class.

RSA 1980 cP-4 s7

General cy-pres provision

8(1) When

(a) it has become apparent that, apart from this section, a disposition would be void solely on the ground that it infringes the rule against perpetuities, and

(b) the general intention originally governing the disposition can be ascertained in accordance with the normal principles of interpretation of instruments and the rules of evidence,

the disposition shall, if possible and as far as possible, be reformed so as to give effect to the general intention within the limits of the rule against perpetuities.

(2) Subsection (1) does not apply if the disposition of the property has been settled by a valid compromise.

RSA 1980 cP-4 s8

Presumptions and evidence as to future parenthood

9(1) When, in proceedings respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then

(a) it shall be presumed

(i) that a male is able to have a child at the age of 14 years or over, but not under that age, and

(ii) that a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years,

but

(b) in the case of a living person, evidence may be given to show that the person will or will not be able to have a child at the time in question.

(2) Subject to subsection (3), when a question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then that person shall be so treated for the purpose of any question that may arise concerning the rule against perpetuities in relation to the same disposition, notwithstanding that the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.

(3) When a question is decided by treating a person as unable to have a child at a particular time and that person subsequently has a child or children at that time, the court may make any order it sees fit to protect the right that the child or children would have had in the property concerned as if that question had not been decided and as if the child or children would, apart from that decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

(4) The possibility that a person may at any time have a child by adoption shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by adoption, then subsection (3) applies to the child or children.

RSA 2000 cP-5 s9;2010 c16 s1(47)

Application to court to determine validity

10(1) An executor or a trustee of any property or a person interested under, or in the validity or invalidity of, an interest in that property may at any time apply to the Court of Queen's Bench in accordance with the *Surrogate Rules* for the opinion, advice or direction of the court as to the validity or invalidity with respect to the rule against perpetuities of an interest in that property and with respect to the application of any provision of this Act.

(2) An executor or trustee acting on the opinion, advice or direction of the court given under this section is deemed, so far as regards the executor's or trustee's own responsibility, to have discharged any duty as executor or trustee in respect of the subject-matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify an executor or trustee in respect of any act done in accordance with the opinion, advice or direction of the court given under this section if the executor or trustee has been guilty of fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

RSA 2000 cP-5 s10;RSA 2000 c16(Supp) s60; 2009 c53 s127

Application of remedial provisions

11 The remedial provisions of this Act shall be applied in the following order:

(a) section 9;

(b) section 4;

(c) section 6;

(d) section 7;

(e) section 8.

RSA 1980 cP-4 s11

Interim income

12 Pending the treatment or declaration of a presumptively valid interest within the meaning of section 4 as valid or invalid, the income arising from that interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest, and any uncertainty whether the disposition will ultimately prove to be void for remoteness shall be disregarded.

RSA 1980 cP-4 s12

Saving provision and acceleration of expectant interests

13(1) A disposition that, if it stood alone, would be valid under the rule against perpetuities is not invalidated by reason only that it is preceded by one or more dispositions that are invalid under the rule against perpetuities, whether or not the disposition expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent on, the invalid disposition.

(2) When a prior interest is invalid under the rule against perpetuities, any subsequent interest that, if it stood alone, would be valid shall not be prevented from being accelerated by reason only of the invalidity of the prior interest.

RSA 1980 cP-4 s13

Powers of appointment

14(1) For the purpose of the rule against perpetuities, a power of appointment shall be treated as a special power unless

(a) in the instrument creating the power it is expressed to be exercisable by one person only, and

(b) it could, at all times during its currency when that person is of full age and capacity, be exercised by that person so as immediately to transfer to that person the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

(2) A power that satisfies the conditions of subsection (1)(a) and (b) shall, for the purpose of the rule against perpetuities, be treated as a general power.

(3) For the purpose of determining whether an appointment made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a general power when it would have been so treated if exercisable by deed.

RSA 1980 cP-4 s14

Administrative powers of trustees

15(1) The rule against perpetuities does not invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property, or to do any other act in the administration, as opposed to the distribution, of any property including, when authorized, payment to trustees or other persons of reasonable remuneration for their services.

(2) Subsection (1) applies for the purpose of enabling a power to be exercised at any time on or after July 1, 1973, notwithstanding that the power is conferred by an instrument that took effect before that date.

RSA 1980 cP-4 s15

Avoidance of contractual rights in cases of remoteness

16 When a disposition inter vivos would be treated as void for remoteness if the rights and duties under it were capable of transmission to persons other than the original parties and had been

so transmitted, it shall be treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of that person, and no remedy lies in contract or otherwise for giving effect to it or making restitution for its lack of effect.

RSA 1980 cP-4 s16

Options to acquire reversionary interest

17(1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease or renewal of a lease, whether the lease or renewal is of real or personal property,

(a) if the option is exercisable only by the lessee or the lessee's successors in title, and

(b) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease or renewal.

(2) Subsection (1) applies to an agreement for a lease as it applies to a lease, and "lessee" shall be construed accordingly.

(3) Subsection (1) applies to a right of first refusal or pre-emption as it applies to an option.

(4) The rule against perpetuities does not apply to options to renew a lease of real or personal property.

RSA 1980 cP-4 s17

Commercial transactions

18(1) In the case of a contract whereby for valuable consideration an interest in real or personal property may be acquired at a future time, the perpetuity period is 80 years from the date of the contract, and if the contract provides for the acquisition of such an interest at a time greater than 80 years, then the interest may be acquired up to 80 years and not afterwards.

(2) In particular and not so as to restrict the generality of subsection (1), that subsection applies to all contracts relating to a future sale or lease, to options in gross, rights of pre-emption or first refusal and to future profits a prendre, easements and restrictive covenants.

(3) This section does not apply to any provision in a will or inter vivos trust.

RSA 1980 cP-4 s18

Possibilities of reverter and conditions subsequent

19(0.1) In this section,

(a) "minerals" means all naturally occurring minerals and, without restricting the generality of the foregoing, includes gold, silver, uranium, platinum, pitchblende, radium, precious stones, copper, iron, tin, zinc, asbestos, salts, sulphur, petroleum, oil, asphalt, bituminous sands, oil sands, natural gas, coal, anhydrite, barite, bauxite, bentonite, diatomite, dolomite, epsomite, granite, gypsum, limestone, marble, mica, mirabilite, potash, quartz rock, rock phosphate, sandstone, serpentine, shale, slate, talc, thenardite, trona, volcanic ash, sand, gravel, clay and marl;

(b) "mineral lease" means a lease of minerals in the nature of a profit a prendre for a term of uncertain duration.

(1) In the case of

(a) a possibility of reverter on the determination of a determinable fee simple, or

(b) a possibility of a resulting trust on the determination of a determinable interest in real or personal property,

the rule against perpetuities as modified by this Act applies in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise on its breach to a right of re-entry or an equivalent right in the case of personal property, and, if the event that determines the determinable interest does not occur within the perpetuity period, the provision shall be treated as void for remoteness and the determinable interest becomes an absolute interest.

(2) The perpetuity period for the purpose of a possibility of reverter or a possibility of a resulting trust or of a right of re-entry on breach of a condition subsequent or equivalent right in personal property is 40 years.

(3) Subsection (1) does not apply when the event that determines the prior interest or on which the prior interest could be determined, is the cessation of a charitable purpose but in that case if the cessation of the charitable purpose takes place after the expiration of the perpetuity period, the property shall be treated as if it were the subject of a charitable trust to which the cy-pres doctrine applies.

(4) This section does not apply, nor does the rule against perpetuities apply, to a gift over from one charity to another.

(5) For greater certainty, subsection (1) does not apply to a mineral lease, whether the lease was entered into before or after the coming into force of this subsection.

RSA 2000 cP-5 s19;2013 c10 s3

Specific non-charitable trusts

20(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person

(a) shall be construed as a power to appoint the income or the capital, as the case may be, and

(b) is, unless the trust is created for an illegal purpose or a purpose contrary to public policy, valid so long as and to the extent that it is exercised either by the original trustee or the trustee's successor within a period of 21 years, notwithstanding that the disposition creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period,

but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended

(a) within a period of 21 years, or

(b) within any annual or other recurring period within which the disposition creating the trust provided for the expenditure of all or a specified portion of the income or the capital,

each person or that person's successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to the unexpended income or capital.

RSA 1980 cP-4 s20

Rule in Whitby vs. Mitchell abolished

21 The rule of law prohibiting the disposition, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without affecting any other rule relating to perpetuities.

RSA 1980 cP-4 s21

Rules not applicable to employee benefit trusts

22 The rules of law and statutory enactments relating to perpetuities and to accumulations do not apply and are deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities or sickness, death or other benefits to employees or persons not being employees engaged in any lawful calling or to their widows, widowers, dependants or other beneficiaries.

RSA 1980 cP-4 s22

Rule against perpetuities not applicable to qualifying environmental trusts

22.1(1) In this section, "qualifying environmental trust" means a qualifying environmental trust as defined in section 1(1)(p.2) of the *Alberta Personal Income Tax Act.*

(2) The rule against perpetuities does not apply to a qualifying environmental trust created after December 31, 2013.

2014 c13 s9;2015 c21 Sched. 2 s4

Application to Crown

23 This Act and the rule against perpetuities bind the Crown except in respect of dispositions of property made by the Crown.

RSA 1980 cP-4 s23

Accumulations of income

24(1) The *Accumulations Act, 1800*, 39 & 40 Geo. III c98 (U.K.), does not apply in Alberta.

(2) When property is settled or disposed of in such manner that the income of the property may or must be accumulated wholly or in part, the power or direction to accumulate that income is valid if the disposition of the accumulated income is or may be valid but not otherwise.

(3) Nothing in this section affects the rights of any person to terminate an accumulation that is for the person's benefit or any jurisdiction or power of the court to direct payments from accumulations pursuant to any statute.

(4) This section applies to instruments taking effect before or after July 1, 1973 except when the period of accumulation permitted by the *Accumulations Act, 1800* has expired before July 1, 1973 and as a result a beneficiary has acquired a vested right to receive income from property.

RSA 1980 cP-4 s24

Application of Act

25 Except as provided in sections 15(2), 22 and 24(4), this Act applies only to instruments taking effect after July 1, 1973, including an instrument made in the exercise of a general or special power of appointment after July 1, 1973 even though the instrument creating the power took effect before July 1, 1973.

RSA 1980 cP-4 s25

Printed on Recycled Paper

TAB 9

R. v. Royal Bank of Canada, [1913] J.C.J. No. 4

Privy Council Judgments

Judicial Committee of the Privy Council
Viscount Haldane (Lord Chancellor), Lord MacNaghten, Lord Atkinson and Lord Moulton
January 31, 1913.
82 LJPC 33

[1913] J.C.J. No. 4 9 D.L.R. 337

3 W.W.R. 994 23 WLR 315 [1913] AC 283 1913 CLB 1285

Between The King, and Royal Bank of Canada

(24 paras.)

Counsel

Sir R. Finlay, K.C., and William Finlay, for all the appellants, and J.H. Moss, K.C. (of the Canadian Bar), for the appellants the Alberta and Great Waterways Railway Company and the Canada West Construction Company, Limited.

S.O. Buckmaster, K.C., C. A. Masten, K.C. (of the Canadian Bar), and Geoffrey Lawrence, for the respondents.

The judgment of the Court was delivered by

THE LORD CHANCELLOR

1 This is an appeal from a judgment of the Supreme Court of Alberta. It raises questions of much importance, which their Lordships have taken time to consider. The main controversy is as to the validity of a statute of the legislature of Alberta, passed in 1910, and dealing with the proceeds of sale of certain bonds. These proceeds had been deposited with certain banks, one of them being the appellant bank. The judgment under appeal was given in an action brought by the Government of Alberta against the Royal Bank of Canada, the Alberta and Great Waterways Railway Co. and the Canada West Construction Co., to recover $6,042,083.26, with interest, being the amount of the deposit held by the appellant bank. The Court of first instance and the Court of Appeal for the province have given judgment for the Government. (2 D.L.R. 762.)

2 It is contended by the appellants that the statute in question was not validly enacted. It is said to have been *ultra vires* of the legislature of the province, as attempting to interfere with property and civil rights outside the province, and also as trenching on the field of legislation as to banking, which, by section 91 of the British North America Act, is reserved to the Parliament of Canada. It is further said that, inasmuch as the statute purported to make the deposits part of the general revenue fund of the province, it was

inoperative, as being an attempt to raise revenue for provincial purposes in a manner not authorized by section 92 of that Act.

3 In order to determine the points thus raised, it is necessary to examine the transactions to which the legislative action of the Alberta Government was directed. The appellant railway company was incorporated by an Act of the legislature of the province, being chapter 46 of 1909, for the purpose of constructing and operating a railway, to extend from Edmonton in a north-easterly direction, and to be wholly within the province. The capital was to be $7,000,000, and the company was empowered to issue bonds. By another Act of the same session, being chapter 16, which received the Royal assent on the same day, the 25th February, the Government of Alberta was authorized to guarantee the principal and interest of the bonds to be issued by the railway company to the extent of $20,000 a mile up to 350 miles, with a further amount in respect of the cost of terminals. The bonds were to be repayable in fifty years, and were to bear interest at the rate of five per cent. By section 2 it was provided that the bonds so guaranteed were to be secured by a mortgage to be made to trustees, which was to cover the railway, its rolling stock and equipment, and its revenues, rights and powers. By section 3, the form and terms of the bonds, mortgage, and guarantees were to be approved by the Lieutenant-Governor-in-council. By section 4, when the guarantees were signed on behalf of the Government, the province was to be liable for payment of principal and interest, and no person entitled to the bonds was to be under the necessity of inquiry in respect of compliance with the terms of the Act. By section 5, all moneys realized by sale, pledge, or otherwise of the bonds, were to be paid by the purchaser, subscriber, pledgee, or lender, into a bank or banks approved by the Lieutenant-Governor-in-council, to the credit of a special account in the name of the treasurer of the province, or such other credit as the Lieutenant-Governor-in-council should direct. The balance at the credit of the special account or accounts was to be credited with interest at such times and at such rate as might be agreed on between the company and the bank holding the same, and such balance was from time to time to be paid out to the company or its nominee, in monthly payments so far as practicable, as the construction of the lines of railway and the terminals was proceeded with to the satisfaction of the Lieutenant-Governor-in-council, according to specifications to be fixed by contract between the Government and the company, and in such sums as an engineer appointed by the Lieutenant-Governor-in-council should certify as justified; provided that, at the option of the company, the moneys so paid into the bank should, instead of being so paid out, be paid to the company on the completion, as certified by the engineer, to the satisfaction of the Lieutenant-Governor-in-council, of sections and terminals specified. The balance of the proceeds of the bonds which might remain after completion of the railway was to be paid over to the company or its nominees. Section 5 concluded with a provision, which appears to have been inaccurately printed, but which their Lordships interpret as bearing the meaning put on it in an order-in-council subsequently made by the Lieutenant-Governor, on the 7th October, 1909, that the balance at the credit of the special account remaining until paid out, as above arranged for, was to be deemed part of the mortgaged premises under the mortgage, and not public moneys received by the province.

4 On the 7th October, two orders-in-council were made by the Lieutenant-Governor. The first of these, after reciting the incorporating Act and the Guarantee Act, above referred to, approved forms of mortgage and a guarantee, authorized the proper officials to execute them, and designated the Standard Trusts Co. as the trustee under the mortgage-deed. This order, also, pending the preparation of engraved bonds, authorized the guarantee of a single printed bond without coupons for the entire sum to be covered by the bonds, $7,400,000, to be exchanged for the engraved bonds in due course. By the second of these orders, after reciting that the company had elected to receive the money on completion of sections and of terminals on a progress basis, certain banks, including the appellant bank, were designated as the banks into which the proceeds of the bonds were to be paid in accordance with the Guarantee Act.

5 By an order made on the 9th November, the lists of banks was varied, but the appellant bank remained

included, and the deposit out of the proceeds of the bonds of $6,000,000, being the principal included in the amount sued for, was assigned to it. This order recited that it was the understanding of the Government that, on the proper interpretation of the last-mentioned Act, the moneys in question, when paid into the banks, not being public moneys received by the province, could only be withdrawn on the terms stated in the Act.

6 The second order of the 7th October had approved the terms of the preliminary bond, in a form which made the principal and interest payable in London at the counting-house of Messrs. Morgan, Grenfell & Co. The terms of the bond provided that it should be secured by a mortgage from the railway company to the Standard Trusts Co. and for the guarantee of principal and interest by the province. The bond was to be registered in the books of the company in London, and transfers were to be made in these books. Shortly after the making of the two orders-in-council of the 7th October, arrangements were made in London with Messrs. Morgan, Grenfell & Co., for the raising of the money authorized to be borrowed.

7 To enable the transaction to be carried out, the railway company, on the 28th October, entered into a formal contract with the provincial Government for the construction of at least 350 miles of the line. The contract recited the right of the company to issue bonds in proportion to mileage and terminals and the authority of the Government to guarantee principal and interest to the extent of $20,000 a mile and further sums in respect of terminals, and provided, in accordance with the Guarantee Act, that the proceeds arising from the bonds so issued should be paid into the banks approved by the Lieutenant-Governor-in-council, to the credit of the treasurer of the province in a special account, and that such proceeds should from time to time be paid out to the railway company on engineers' certificates. The balance of the proceeds, after completion of the railway and terminals, was to be paid over to the railway company. By a deed of the same date made between the railway company, the provincial Government, and the Standard Trusts Co., a company incorporated under the law of Manitoba, and having its head office outside the province, the railway company mortgaged its property to the trusts company to secure the bonds for the sum of $7,400,000 and interest at 5 per cent., repayable on the 1st January, 1959; and the Government guaranteed payment of principal and interest. The security expressly included, not only the railway and its rolling stock and equipment, but all real and personal property then or thereafter held or acquired for the purposes of the railway. Later on, on the 22nd November, the railway company entered into a contract with the appellant construction company, which had been incorporated under Dominion statutes, and had its head office outside the province, for the construction of the railway, and the railway company agreed to pay to the construction company the net proceeds of the bond issue, an agreement which was afterwards supplemented by a formal assignment of the 8th March, 1910.

8 Under the arrangements with Messrs. Morgan, Grenfell & Co., the preliminary bond for $7,400,000, already referred to, was taken up by them. A letter of the 11th October, 1909, from the deputy provincial treasurer of the province to Messrs. J. P. Morgan & Co., of New York, shews the method adopted by the Government in carrying out the transaction. The preliminary bond was to be handed to Messrs. J. P. Morgan & Co. as agents for the Government. That firm was to transfer to or hold this bond for Messrs. Morgan, Grenfell & Co., the immediate takers-up of the bond issue in London. The purchase-money was to be deposited to the credit of the provincial treasurer in the Edmonton branches of the designated banks. These arrangements were carried out in this fashion. As the proceeds of the bond issue in London came over to New York, the money which was to be applied and secured in accordance with the statutes, orders-in-council, and contracts, already referred to, was paid in instalments in New York, the part with which the appellant bank is concerned being received by its house in New York, and credited to the provincial treasurer in the railway special account. The bank had its head-offices in Montreal, and was incorporated under Dominion law. The account at Edmonton, in Alberta, was opened there in accordance with the arrangements already referred to.

9 No money in specie was sent to the branch office which the bank possessed there, but the general manager in Montreal arranged for the proper credit of the special account. It is plain that all these transactions were carried out for the purposes and on the faith of the statutes, orders-in-council, contracts, and mortgage-deed referred to, and were effected for the purpose of providing for the construction of the railway with the security and guarantees which had been given. It is not in dispute that the Government at this period meant the appellants to understand that it would adhere strictly to the terms of its guarantee.

10 The construction company commenced the works preliminary to the construction of the line. No part of the sum at the credit of the special account was paid out for this purpose, but the bank made advances, and the construction company assigned to the bank as security its interest in the proceeds of the bond issue.

11 The second chapter of the history of the events which resulted in the appeal before their Lordships opened in March, 1910. There appears to have been public uneasiness about the action of the Government in entering into the arrangements above described; and, in the event, a Royal Commission of inquiry was appointed. While it was sitting, there was a change of Government.

12 The new administration introduced and passed two statutes, and on the validity of the first of these the question to be decided in the appeal turns. This statute, which became law on the 16th December, 1910, after setting out in its preamble that the railway company had made default in payment of interest on the bonds and in the construction of the line, and then ratifying and confirming the guarantee by the province of the bonds, enacted that the whole of the proceeds of sale of the bonds, and all interest thereon, including such part of the proceeds of sale as was then standing in the banks in the name of the treasurer of the province or otherwise, and comprising, *inter alia*, the $6,000,000 and accrued interest in the appellant bank, should form part of the general revenue fund of the province, free from all claim of the railway company or their assigns, and should be paid over to the treasurer without deduction. It was also provided that, notwithstanding the form of the bonds and guarantee, the province should, as between itself and the railway company, be primarily liable on the bonds, and should indemnify the company against claims under them.

13 By another statute passed at the same time, any person or corporation claiming to have suffered loss or damage in consequence of the passing of the Act just referred to, might submit a claim to the Government, to be reported on to the legislature.

14 On the day of the passing of these Acts, a notice was served on behalf of the treasurer of the province on the appellant bank, claiming payment of $6,042,083.26 and interest, and a cheque was presented to and refused by the bank. A claim against the bank as from this date for interest at the rate of 5 per cent. was then made. The action out of which the appeal arises was immediately launched, claiming, on behalf of the Crown and the provincial treasurer, the sum above mentioned from the appellant bank, and the railway company and the construction company were subsequently joined as defendants. The main defence pleaded was the invalidity of the first of the two statutes of 1910, and the bank also claimed a lien for advances to the construction company.

15 The case was tried before Stuart, J., who held that the proceeds of the bonds were within the province, and that the matter was one of a local nature in the province. He, therefore, decided that it fell within class 16 of section 92 of the British North America Act, and not within section 91; and that, accordingly, the statute having been validly passed, there should be judgment for the plaintiffs.

16 The appellants appealed to the Court of Appeal, which unanimously dismissed the appeal. The Chief

Justice held that the statute was probably authorized by classes 10 and 16 of section 92, and certainly by class 13, relating to property and civil rights. He also decided against the appellants on the further points they made, that the Act trenched on the subject of banking legislation in section 91, and that it was invalid as being confiscatory, and not an authorized way of raising a provincial revenue. Beck, J., Scott, J., and Simmons, J., decided against the appeal on substantially the same grounds, though the two latter learned Judges differed from the rest of the Court on a minor question as to interest.

17 Their Lordships are not concerned with the merits of the political controversy which gave rise to the statute the validity of which is impeached. What they have to decide is the question whether it was within the power of the legislature of the province to pass the Act of 1910. They agree with the contention of the respondents that, in a case such as this, it was in the power of that legislature subsequently to repeal any Act which it had passed. If this were the only question which arose, the appeal could be disposed of without difficulty. But the Act under consideration does more than modify existing legislation. It purports to appropriate to the province the balance standing at the special accounts in the banks, and so to change its position under the scheme to carry out which the bondholders had subscribed their money. Elaborately as the case was argued in the judgments of the learned Judges in the Courts below. their Lordships are not satisfied that what appears to them to be the fundamental question at issue has been adequately considered.

18 It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover, as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed. It applies, as was pointed out by Brett, L.J., in *Wilson v. Church*, 13 Ch. D. 1, at 49, when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers, as being held to his use. *Wilson v. Church*, which was affirmed in the House of Lords, under the name of *National Bolivian Navigation Co. v. Wilson*, 5 App. Cas. 176, is an excellent illustration of the principle. A loan had been raised to make a foreign railway, on a prospectus which set out a concession by the foreign Government in virtue of which the bondholders were to have the benefit of certain custom duties. The foreign Government, finding that the railway had not been made, revoked the concessions. The trustees, to whom the money had been paid to be expended on the gradual construction of the railway, contended that it was not apparent that they could not, with certain variations, substantially carry out the scheme. It was held that, while the Government had a right to revoke the concession which could not be questioned, the effect of its so doing was to materially vary the prospects and terms of security of the bondholders, and that the question whether the scheme had became so abortive that the consideration for the advances had failed, must be determined, not merely by a survey of physical or financial considerations, but by reference to the conditions originally stipulated for. The bondholders were declared to be entitled to recover their money.

19 The present case appears to their Lordships to fall within the broad principle on which the judgments in that case proceeded. The lenders in London remitted their money to New York to be applied in carrying out the particular scheme which was established by the statutes of 1909 and the orders-in-council, and by the contracts and mortgage of that year. The money claimed in the action was paid to the appellant bank as one of those designated to act in carrying out the scheme. The bank received the money at its branch in New York, and its general manager then gave instructions from the head office in Montreal to the manager of one of its local branches, that at Edmonton, in the Province of Alberta, for the opening of the credit for the special account. The local manager was told that he was to act on instructions from the head office, which retained control.

20 It appears to their Lordships that the special account was opened solely for the purposes of the scheme, and that, when the action of the Government in 1910 altered its conditions, the lenders in London were entitled to claim from the bank, at its head office in Montreal, the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province; and the legislature of the province could not legislate validly in derogation of that right. These circumstances distinguish the case from that of *The King v. Lovitt*, [1912] A.C. 212, where the point decided was in reality quite a different one.

21 In the opinion of their Lordships, the effect of the statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen and remained enforceable outside the province.

22 The statute was, on this ground, beyond the powers of the legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.

23 Other questions have, as already stated, been raised in this appeal as to whether the statute of 1910 infringed the provisions of section 91 of the British North America Act, by attempting to deal with a question relating to banking, and by trenching on the field already occupied by the Dominion Bank Act. It was also contended that the appropriation of the deposits to the general revenue fund of the province was outside the powers assigned to the provincial legislature for raising a revenue for provincial purposes. The conclusion already arrived at makes it unnecessary for their Lordships to enter on the consideration of these questions and of other points which were made during the arguments of counsel.

24 Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the action dismissed. The respondents must pay the costs here and in the Courts below.

TAB 10

that in order to make a good tenant to the præcipe, there should be a legal estate for life, with a legal re-**[812]**-mainder in tail, or an equitable estate for life with an equitable remainder in tail. This is broadly laid down in *Shapland* v. *Smith*. But it has been contended, that although this recovery be void, the plaintiff has sustained no injury, because the estate tail upon which Malin's contingent remainder depended was destroyed, and therefore that the remainder was destroyed. The answer to that is, that the conveyance by the daughter to the tenant to the præcipe, could convey no more than she had; and, therefore, that it did not displace the remainder. Then it was said that the conveyance by Caldecott to her destroyed the contingent remainder. But the recovery could have no previous operation, therefore Caldecott's conveyance to her might make her tenant in tail in possession, but could not have the effect of destroying the remainder. *Doe* v. *Jones* (1 B. & C. 238), is an authority to shew that no act by a remainder man in tail can destroy the estate tail, it can only be done by tenant in tail in possession. The plaintiff, therefore, having sustained damage by reason of this defect of title, the remaining question is, whether the defendant was guilty of negligence? The Court is not bound in this case to say whether there was negligence, but only whether there was evidence to justify the jury in finding that the defendant was guilty of negligence; and we are of opinion that there was. In stating the case laid before Mr. Preston, the defendant assumed that Malin was tenant in fee, instead of setting out the deeds, which would have shewn that Caldecott had an estate for life. Now, although it may not be part of the duty of an attorney to know the legal operation of conveyances, yet it is his duty to take care not to draw wrong conclusions from the deeds laid be-**[813]**-fore him, but to state the deeds to the counsel whom he consults, or he must draw conclusions at his peril. It therefore appears to us, that, in omitting those deeds, and erroneously describing Malin as tenant in fee, there was negligence in the defendant. There is another circumstance from which negligence may be inferred. The defendant received the abstract in February 1818, and that contained no notice of the deeds whereby Caldecott conveyed to Mrs. Wagstaff; but they were supplied to him before any conveyance was made, and he never enquired of Mr. Preston whether those deeds made any difference in his opinion; and they undoubtedly would; for if Malin was seised in fee, how could Caldecott have any thing to convey? For these reasons we are of opinion, first, that the title is defective; and, secondly, that there was evidence before the jury sufficient to justify them in coming to the conclusion that the defendant was guilty of a species of negligence sufficient to make him liable in this action. The judgment of the Court must, therefore, be for the plaintiff.

Judgment for the plaintiff.

[814] NOCKELS *against* CROSBY, MITCHELL, AND ANOTHER. 1825. Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and after some subscriptions had been paid to the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project: Held, that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part towards the payment of the expences incurred. By the scheme it appeared, that the money subscribed was to be laid out at interest, and to enure to the benefit of the survivors; the subscribers were to be governed by regulations made by the directors, and at the end of a year, shares were to be issued and to be transferrable: Held, that this was not an undertaking within the operation of the Bubble Act.

[S. C. 5 D. & R. 751. Followed, *Walstab* v. *Spottiswood*, 1846, 15 Mee. & W. 515.]

Assumpsit for money had and received. Defendant pleaded the general issue, and paid 252l. 11s. into Court. At the trial before Abbott C.J. at the London sittings after Hilary term 1824, a verdict was found for the plaintiff for 47l. 15s., subject to the opinion of the Court upon the following case: The defendants were the directors of a scheme called the "British Metropolitan Tontine." A printed paper was circulated with their authority, stating (amongst other things) that to effect the objects of the scheme it was proposed to receive subscriptions of ten shillings a week from each

member for the period of one year, viz. from the 1st of January 1821, to the 1st of January 1822, and that the total amount of such year's subscription should be deemed a share, and all such shares form one capital or joint stock of the company, with benefit of survivorship; that the amount of the subscriptions would be vested in the names of the trustees, and from time to time laid out in Government or other securities, the net proceeds and interest of which would be equally divided among all surviving shareholders twice in every year; that members were to subscribe their names to the company's rules and regulations at the time of opening their subscriptions, or at any subsequent convenient **[815]** time, and to abide thereby; that the management of the company was vested in eight directors; and that at the expiration of the year every subscriber would receive a shareholder's ticket, which would be saleable or transferrable. The above was the paper referred to in the following agreement, which was signed by the plaintiff and several other persons: "We whose names are hereunder subscribed do hereby consent and agree to, and with the present and any future directors of the British Metropolitan Tontine as follows: First, we do each of us agree to become subscribers thereto, and to take such numbers of shares upon such life or lives as is or are set forth against our respective names; secondly, we do acknowledge the plan or prospectus hereto annexed to contain the nature and intent of the said Tontine, so far as the same is therein expressed, and do ratify the same in every respect, and agree to abide thereby; thirdly, we do agree to ratify and confirm all rules, laws, and regulations passed, or which shall at any time hereafter pass, for the further promotion, direction, management, and carrying into effect the said Tontine, and to sign any deed or deeds to that effect; fourthly, we do agree to pay our subscriptions for one year." An account was opened with Glyn and Co., bankers in London, entitled "British Metropolitan Tontine." The plaintiff paid two sums of money, amounting together, to 308l. 6s., to the aforesaid account at Messrs. Glyn and Co.'s. Various other subscribers to the Tontine paid sums of money to the said account, amounting in the whole, with the plaintiff's payments, to 737l. 10s. 6d. In the books of the Metropolitan Tontine the following resolutions are entered:

[816] "General resolutions of the 19th January 1821.

"First, that the books of the Tontine be opened to receive subscriptions, and that no less than 2l. per share shall be received in the first instance, being for the first monthly subscription.

"Secondly, that the affairs and entire management of the concerns of the Tontine be vested in eight directors, any three of whom to be a sufficient quorum for the purpose of transacting business.

"Thirdly, that James Pope be appointed secretary and solicitor to the directors of the Tontine, and that for such secretaryship he be paid such yearly salary as the present or any future directors may think fit.

"Fourthly, that all monies to be received under or in virtue of the Tontine be paid into the hands of the treasurer or treasurers thereof, and that no monies be drawn for or paid by the treasurer or treasurers unless by draft, to be signed by not less than three of the directors.

"Fifthly, that the directors do, as often as occasion may require, place out at interest, in the names of the trustees, in Government or other securities all sums of money remaining in the hands of the treasurer."

"30th August 1822.

"Resolved by a quorum of the directors present that, there not being a sufficient sum subscribed to warrant the further prosecution of the scheme, the subscribers have returned to them the amount of the subscriptions less the expences attending the same, and that such expences be ascertained at another meeting of the directors to be held at the secretary's house the 6th of September next."

[817] "Old Bethlem, 6th September 1822.

"Resolved by a quorum of the directors present that the expences attending the prosecuting the scheme of the Tontine do amount to the sum of 3l. 19s. 7d. per share, and that each subscriber do have the amount of his subscription returned, less the said 3l. 19s. 7d. per share."

On the 27th of May 1822, the plaintiff wrote to the directors, requesting to have

his money returned immediately, and said, he understood it was to be returned subject to some small charge, and he did not then make any objection to the charge.

On the 25th of July 1822, he again wrote and complained of the delay in returning his money; and that he had "been put off from time to time in consequence of charges attending the concern."

In September 1822 several checques signed by the defendants were drawn on Glyn and Co. for different sums, amounting in the whole to the said sum of 737l. 10s. 6d., which checques were paid by them from the money paid into the aforesaid account. One of such checques for 252l. 11s. was made payable to the plaintiff or bearer, and placed by the defendants in the hands of Mr. Pope, the secretary, with instructions to deliver it to the plaintiff; but the plaintiff refused to accept the same in satisfaction of his claim, and the said Mr. Pope, without the knowledge or authority of the said defendants, paid the said checque into his own private account at the Bank of England, through which the same was presented to and paid by Glyn and Co. Previous to the commencement of the present action the plaintiff had sued G. C. Glyn, one of the partners in the banking-house of Glyn and Co., for the money sought to be recovered in this action, **[818]** but had afterwards discontinued that suit. On the trial, Mr. Pope, the secretary of the Metropolitan Tontine, being called as a witness for the defendants, stated, that the expences of the institution amounted to 3l. 19s. 7d. a share making 47l. 15s. on the plaintiff's twelve shares; that the expences consisted in stationery, printing, advertisements, postages, and 75l. paid to the witness for his trouble; that he explained this to the plaintiff, and offered him the balance, 252l. 11s., which he refused; that none of the money was appropriated to their own use by any of the defendants. He further stated, that the money paid by the subscribers was not laid out at interest, but remained in the hands of the bankers with whom the account was opened, and that the defendant, George Mitchell, and the witness alone caused the prospectus to be put forth, and prosecuted the scheme themselves. That the defendant, Crosby, was not a subscriber, and that he attended one meeting only when the checques were signed.

Campbell, for the plaintiff. The plaintiff is entitled to recover back the whole sum advanced. The consideration upon which it was paid failed; the money was, therefore, in the hands of the defendants money had and received to the plaintiff's use. It will, perhaps, be urged as a defence, that the scheme was within the Bubble Act, 6 G. 1, c. 18: but first it was not so; and even if the Court should think it was, still the scheme was abandoned, and never carried in any degree into effect. The illegality of it, therefore, cannot alter the present plaintiff's rights. This was not within the Bubble Act, it was not to carry on any wild trading speculation, which manifestly tended to the prejudice of the **[819]** subscribers, but was a mere association to contribute money with a benefit of survivorship. But even if this were otherwise, the plaintiff would be entitled to recover. When a person sues to recover back money paid on a consideration that has failed, then it is money had and received to his use, and the nature of the consideration is out of the question: *Farmer* v. *Russell* (1 B. & P. 296). If money paid to a stakeholder on an illegal wager is paid over, it cannot be recovered back; but the rule is otherwise if the money has not been paid over, *Cotton* v. *Thurland* (5 T. R. 405), *Smith* v. *Bickmore* (4 Taunt. 474). Here, the defendants took no steps towards the performance of the contract upon which the money was paid in. It remained wholly unproductive from January 1821 till August 1822, when the scheme was abandoned; the plaintiff is therefore entitled to recover back the whole sum advanced. [Holroyd J. Suppose five persons enter into partnership, and contribute 1000l. each, they afterwards find the concern a losing one, and put an end to it, can any one maintain an action against the others for his share?] Perhaps not; but this is a different case; at most it was only a proposed partnership, and nothing was done towards carrying it into effect; and it is most fit that those persons who proposed the scheme should bear the expences. Besides, the directors had no power to make a resolution to deduct the expences out of the monies contributed; they had power to make resolutions for carrying on the concern, but not for the abandonment of it; the plaintiff, therefore, was not bound by the resolution in question.

[820] E. Lawes contrà. The defendants are clearly entitled to deduct the money in dispute from the amount paid in by the plaintiff. They did not warrant that the concern would answer, but only proposed that it should be tried, and the abandonment

of the scheme was with the plaintiff's assent. That appears from his letters, which were written before the resolution to put an end to the concern was made. They also shew that he agreed to pay his proportion of the expences, for he alludes to the proposed deduction of part of his money to pay those expences, and does not object to it. But it does not appear that the defendants ever received any of the plaintiff's money; they only gave an order to Pope, and he received, and now has the money. If that were not so, still this action could not be maintained. All the shareholders were jointly interested in the funds of the concern, and the defendants have never stated any account, or bound themselves to pay over any sum to the plaintiff. [Bayley J. Crosby was not interested in the money.] Then the action was improperly commenced against him. In the next place, this scheme falls within the 6 G. 1, c. 18, s. 18. That Act is not confined to trading speculations; and here books were opened for public subscriptions; small sums were collected, amounting in the whole to a large sum, the shareholders acted as a corporation, having agreed to be bound by the resolutions and bye-laws of the directors, and the shares were to be transferrable. It is therefore precisely similar to that which was determined to be illegal in *Josephs* v. *Pebrer* (ante, 639). [Bayley J. It might be intended to make the shares transferrable, **[821]** but in fact no shares were ever issued.] The intent to make them so was, together with the other circumstances, in itself illegal, and the whole transaction being illegal, no right of action can arise out of it. [Littledale J. It seems to be nothing more than an agreement by the subscribers to be joint tenants of the money subscribed.]

Bayley J. I am of opinion that the plaintiff is entitled to recover the whole sum which he advanced. There is no difficulty in some of the points urged, viz. that the money was not received by the defendants, or that it was drawn out and applied with the concurrence of the plaintiff. The money was originally paid by the plaintiff into the hands of certain persons, who, for the purposes of this concern, were the bankers of the defendants, and it was paid upon a prospect that it should be in the bankers' hands in furtherance of a continuing scheme. It was afterwards drawn out by the defendants, and it was their duty to see to the proper application of it. If they had paid the whole to the plaintiff, or according to his directions, of course he could not complain; but if they applied a part of it without his assent, and in a mode which the law did not warrant, the plaintiff clearly has a right to recover, unless it can be shewn that he was party to a scheme within the 6 G. 1, c. 18. The scheme was not within that statute, unless it was formed for the purpose of carrying on some mischievous project or undertaking, and unless we can predicate of it that it was likely to tend to the common grievance, prejudice, and inconvenience of His Majesty's subjects, or great numbers of them in their trade, commerce, or other lawful affairs. The cases of *Rex* v. **[822]** *Webb* (14 East, 406), and *Pratt* v. *Hutchinson* (15 East, 511), were decided on that principle. I think that we cannot assume, as a matter of law, that this scheme was within the description before given. It is true that a large sum, made up of many small payments, was to be collected; but that was not to be invested in any general speculation, but merely to enure to the benefit of the survivors. Primâ facie the principal effect of the scheme would be to encourage the saving of money. But this action might be maintained even if the scheme were within the Act, for it proved abortive, and no transferrable shares were ever created, and the period had not arrived at which it would have been within the operation of the statute. The defendants then having possession of the plaintiff's money, applied it without his express assent. Do they shew any matter of law sufficient to justify that application of it? The scheme was set on foot by Pope and the defendants, and the prospectus was circulated with their assent. On all projects some expence must be incurred before many members join the concern. Upon whom should that fall? Undoubtedly if the scheme proves abortive, it should fall upon the original projectors, and not upon those who advance their money on the faith of its going on. The plaintiff did nothing to render himself liable to the expences, and it was the duty of the defendants within a reasonable time to lay out in securities the money received. They never did so, but kept it for eighteen months in their bankers' hands, and appear to have acted throughout as if they thought the undertaking must fail. For these reasons, I think that the plaintiff is entitled to the whole of the money **[823]** which he advanced; and it is also observable that, by the third resolution of the directors, Pope was to have such annual salary as the defendants should fix; they never fixed any; it is

therefore questionable whether that would not of itself be sufficient to prevent them from deducting that part of the money sought to be retained which was paid to Mr. Pope.

Holroyd J. At the commencement of the argument I entertained great doubts upon this question, but am now satisfied that the plaintiff is entitled to recover. There is not sufficient in the case to warrant the payment of any part of the money detained to Pope; for even supposing the concern to have gone so far as to authorise the appointment of a salary to him, still in point of fact none was appointed. It appeared to me at first that this was very like the case of a partnership, which I put during the argument, but here the concern was never really set agoing; and I think that the expences incurred in setting a scheme on foot are not to be paid out of the concern unless they are adopted when it is actually in operation. In the present case a very small sum was collected, and that was not invested in Government or other securities, which, by the prospectus, were to be the only source of profit. No tontine could exist until the money was laid out. All the steps taken were therefore only preparatory to carrying the project into effect, and as it never was carried into effect, I think that the plaintiff is entitled to have back the whole of the money that he advanced.

Littledale J. I also am of opinion that the plaintiff is entitled to recover upon this general principle, that **[824]** if persons set a scheme afoot, and assume to be the directors or managers, all the expences incurred before the scheme is in actual operation must, in the first instance, be borne by them. When it is in operation, the expences and charge of management should be borne by the concern, and then it may be fair that the preliminary expences should be paid in the same way; for then the subscribers have the benefit of them. The prospectus put forth by these defendants stated that the money subscribed was to be placed out at interest. The plaintiff's sole object in paying the money must have been to have it so placed out, but during eighteen months it remained idle at the bankers. Suppose there had been no subscribers, then the projectors must have paid all the expences. If, then, one person only subscribes, are all those expences to be cast upon him? The hardship and injustice would be monstrous; yet that would be the consequence in such a case were we now to hold that the plaintiff was liable to a proportion of the expences incurred by these defendants. With respect to the supposed partnership, it is plain that there could be none until the money was laid out in execution of the proposed scheme. I am therefore clearly of opinion that the plaintiff was entitled to recover.

Postea to the plaintiff.

[825] THOMAS *against* THOMAS AND OTHERS. 1825. A., by will, charged all his real and personal estate with the payment of his debts, and then, after giving an annuity for life to his brother, payable out of his lands, devised to his wife all his real and personal estate for the term of her life, or as long as she should remain his widow, and immediately after her decease, or in case of her marriage, which ever should first happen, then he directed all his real and personal estate to be divided according to the Statute of Distributions in that case made and provided: Held, that by this will there was not any devise to any person of the real estates of the testator after the death or second marriage of the widow.

The following case was sent by the Vice Chancellor, for the opinion of this Court:

John Thomas made his will, duly executed and attested to pass freehold estates by devise, in the words following: "I, John Thomas, do make and declare this my will and testament in manner and form following. First, I charge all and singular my real and personal estate, with the payment of all my debts; then I give, devise, and bequeath unto my brother Richard Thomas, for and during the term of his natural life, an annuity or clear yearly rent or sum of 25l., free of all taxes and other deductions, Parliamentary or otherwise, to be issuing and payable out of certain lands therein mentioned and described, to be paid and payable by equal half-yearly payments, at the days therein mentioned. Also, I give, devise, and bequeath unto my beloved wife, Maria Letitia Thomas, all my real estates, (and which he enumerated by name,) for and during the term of her natural life, or as long as she shall remain my widow. Also, I give, devise, and bequeath unto my wife the use and benefit of all

TAB 11

might plead in abatement the pendency of the other action, and that would be a good plea as well for Ede as for the defendant. The two actions, therefore, cannot go on together, if the parties follow the [500] proper rules of defence. The same man need not be twice vexed for the same cause. For these reasons, I am of opinion that the plea is bad, and the plaintiff is entitled to judgment of respondeat ouster.

ROLFE, B. I am of the same opinion. The case must be considered independently of the stat. 3 & 4 Will. 4, c. 42. If two or more parties had made a joint contract, and one only was sued upon it, his course was to plead in abatement the non-joinder of the others, and the plaintiff was then bound to bring his action against those parties. The statute, however, seems to assume that that course was in many respects inconvenient, as the plaintiff, in many cases, could not in fact go on with his action against all the parties. It therefore required the defendant to shew where the other co-contractors were. The case of *King* v. *Hoare* has no bearing upon the question. The decision there was, that a judgment recovered against one of two joint debtors is a bar to an action against the other; and it proceeded on the ground, that the plaintiff was going on to judgment, in a matter that had passed in rem judicatam. It is altogether inapplicable to this case.

PLATT, B. The rule of law is clearly laid down in *The Earl of Bedford* v. *The Bishop of Exeter*, and in the case of *Rawlinson* v. *Oriel*, that a man is not to be twice vexed for the same cause. If a party has a legal right he may enforce it, but he ought not to institute two actions instead of one. But the defendant's objection in this case is, that another action is pending against another party, who is alleged to be a joint contractor. But the defendant is not liable to the judgment in that other action; whereas, in the cases I have referred to, the defendant was liable, and therefore the judgment and execution would touch the same person. But here the defendant is not twice vexed; he is in the same [501] situation as if all had been joined in the action, in which case execution might have been levied upon any of them. The plea is therefore bad, and the plaintiff is entitled to judgment.

Judgment of respondeat ouster.

WALSTAB *v.* SPOTTISWOODE. June 12, 1846.—A railway company was provisionally registered, and a prospectus was issued, which stated the proposed capital to be £2,000,000, in 80,000 shares of £25 each. The plaintiff applied to the provisional committee for seventy shares, in a letter whereby she undertook to accept the same or any less number that they might allot to her, to pay the deposit of 2l. 12s. 6d. per share thereupon, and to sign the parliamentary contract and subscribers' agreement when required. To this letter she received an answer, signed by the secretary, stating that the committee of management had allotted to her thirty shares, and requesting her to pay the deposit of 2l. 12s. 6d. per share, amounting to 78l. 15s., into one of certain banks on or before a day mentioned. The plaintiff accordingly paid into one of those banks, in due time, the deposit of 78l. 15s., and received the banker's receipt for the same. She afterwards presented the receipt to the company, and made several fruitless applications to the committee for scrip, and at length was informed that the directors had come to the resolution not to issue any scrip, and that the greater part of the deposits had been expended, and the balance would be rateably divided. It appeared that the directors, finding it impossible to go to Parliament in the ensuing session, had determined not to issue any scrip; and that, of the entire number of 80,000 shares, 70,000 were allotted, but deposits were paid on 4000 only, producing altogether the sum of £10,500.—In an action by the plaintiff to recover back, from a member of the managing committee, the sum of 78l. 15s. so paid by her as deposits on the shares allotted to her:—Held, first, that there was sufficient evidence of the final abandonment of the project.—Secondly, that, on its abandonment, under the circumstances above stated, the plaintiff was entitled to recover back, as money had and received to her use, the whole sum so paid by her.—An association of this nature does not amount to a partnership.

[S. C. 10 Jur. 460, 498. Approved, *Hutton* v. *Thompson*, 1851, 3 H. L. Cas. 191. Commented on, *Baird* v. *Ross*, 1856, 2 Macq. H. L. 68.]

Assumpsit. The declaration stated, that heretofore, to wit, on &c., the defendant and certain other persons, whose names are to the plaintiffs unknown, agreed together

to form a certain joint-stock company, called "The Direct Birmingham, Oxford, Reading, and Brighton Railway Company," for the purpose of making a certain railway, under the powers of an act of Parliament to be applied for in that behalf; the capital of which company was to consist of £2,000,000, in 80,000 shares, at £25 each, to be allotted by the committee of management of the said company to such persons as should apply to them, and as they should select for that purpose; and the plaintiff then, to wit, on &c., at the request of the defendant, applied to the committee of [502] management for, and there were then allotted to her by the said committee, by a certain letter of allotment, to her directed and delivered, divers, to wit, thirty of the said shares; and thereupon then, in consideration of the premises, and that the plaintiff, at the instance and request of the defendant, would, on or before the 24th day of October, A.D., 1845, pay to one of certain banking companies in the said letter of allotment named, whereof one was a certain banking company, called "The London Joint-stock Bank," to the account of the said joint-stock railway company, a deposit of 2l. 12s. 6d. upon each of the said thirty shares, making in the whole the sum of 78l. 15s., and would present the said letter of allotment with a receipt of one of the said banks for the said deposit appended thereto, to the defendant or his agents in that behalf, at the office of the said company, and execute a certain contract relating to the formation of the said company, called "the Parliamentary contract," and a certain agreement also relating to the formation of the said company, called "the subscribers' agreement," within a certain reasonable time appointed on that behalf, to wit, on the 27th day of October, A.D. 1845, or within a reasonable time then next following, the said contract and agreement to be prepared by the defendant, and ready for execution at such time as aforesaid, the defendant then promised the plaintiff to give her, in exchange for the said letter of allotment and banker's receipt, scrip certificates for the said thirty shares, (that is to say), certain certificates in writing, purporting that the holder or holders thereof were entitled to thirty shares in the capital of the said Joint-stock Railway Company, and to be shareholders thereof in respect of such shares; and the plaintiff avers, that she, confiding in the said promise of the defendant, afterwards, and within the time limited in that behalf, namely, on the said 24th day of October, 1845, paid to the said London Joint-stock Bank, on account of the said railway company, the said deposit on each of the said shares, amounting in the whole to the said [503] sum of 78l. 15s., and then received from the said bank a receipt for the same appended to the said letter of allotment; and afterwards, and within the time appointed in that behalf as aforesaid, and at a proper and reasonable time in that behalf, to wit, on &c., the plaintiff presented the said letter of allotment, with the banker's receipt appended thereto, at the office of the said railway company, to wit, at Moorgate-street, in the City of London, to the defendant, and then was, and always since has been, ready and willing, and then offered to the defendant, to deliver to him the said letter of allotment and banker's receipt appended thereto, and to execute the said Parliamentary contract and subscribers' agreement, and to receive such scrip certificates as aforesaid in exchange for the said letter of allotment and the banker's receipt, and then requested to exchange the said letter of allotment, with the said banker's receipt appended thereto as aforesaid, for such scrip certificates as aforesaid, and a reasonable time for the defendant so to do had elapsed long before this suit commenced: yet the defendant, not regarding his said promise, did not nor would, at the time when he was so requested by the plaintiff so to do, or at any time before or since, exchange the said letter of allotment, with the said banker's receipt appended thereto, for such scrip certificates as aforesaid, or deliver such scrip certificates as aforesaid to the plaintiff, but then wholly neglected and refused, and still neglects and refuses so to do, and then wholly discharged the plaintiff from executing the said contract or agreement. Breach, &c. There were also counts for money had and received, money paid, money lent, and on an account stated.

The defendant pleaded non assumpsit, and also several special pleas, which it is not necessary to notice.

At the trial before Pollock, C. B., at the London sittings after last Hilary Term, the following facts appeared in evidence:—The defendant was a member of the provisional and managing committee of the "Direct Birmingham, Ox-[504]-ford, Reading, and Brighton Railway Company," which was provisionally registered in August 1845. The capital was announced in the published prospectus to be

£2,000,000, in 80,000 shares of £25 each. On the 7th of October, 1845, the plaintiff, Mrs. Walstab, made the following application for an allotment of shares in the undertaking addressed to the provisional committee:—

"I request that you will allot me seventy shares of £25 each in the Direct Birmingham, Oxford, Reading, and Brighton Railway; and I do hereby undertake to accept the same, or any less number that you may allot to me, and to pay the deposit of 2l. 12s. 6d. per share thereupon, and sign the Parliamentary contract and subscribers' agreement, when required."

(Signed) "ELIZABETH WALSTAB."

To this letter the following answer was returned on the 18th of October:—

"W. 283.

"Letter of allotment—(not transferable).

"Direct Birmingham, Oxford, Reading, and Brighton Railway.

"Capital, £2,000,000, in 80,000 shares of £25 each.

"Deposit, 2l. 12s. 6d. "No. of Letter, 123.
"No. of Shares, 30.

"46 Moorgate-street, London, October 18, 1845.

"The committee of management have allotted to you thirty shares in this undertaking; and I am directed to request you will pay the deposit of 2l. 12s. 6d. per share, amounting to 78l. 15s., into one of the under-mentioned banks, on or before Friday, the 24th day of October, 1845, or this allotment will be null and void.

"This letter, with the banker's receipt appended thereto, will be exchanged for scrip upon your presenting it at the [505] offices of the company, and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 24th of October, and due notice will be given when the deeds will be sent into the country.—I am, your obedient servant,

"J. B. RAYNER, Secretary.

"To Mrs. Elizabeth Walstab."

The letter then contained a list of the bankers to whom the deposits were made payable. On the 24th of October, the plaintiff paid to the company of 78l. 15s. as a deposit on thirty shares, and received the banker's receipt for the same. The plaintiff's son presented the banker's receipt to the company, and made several fruitless applications to the committee for scrip; and was finally informed, in the month of November, that the directors had come to the resolution not to issue any scrip. He was also informed, that the greater part of the deposits had been expended, and that the balance would be rateably divided. It appeared that the directors, finding it impossible to go to Parliament during the ensuing session, had determined, on the 27th of November, not to issue any scrip. Of the entire number of 80,000 shares, 70,000 were allotted, but deposits were paid upon 4000 only, producing altogether the sum of £10,500.

At the trial, the following objections were taken on the part of the defendant. First, that the letters of the 7th and 18th of October did not prove any contract; or if they did, it was not the contract alleged in the first count, inasmuch as they did not shew an agreement to give scrip certificates for shares, but only to allot shares. Secondly, that the contract, if any, being signed, not by the defendant, but by the secretary of the company, was not personally binding on the defendant. Thirdly, that a contract to give scrip was illegal under the stat. 7 & 8 Vict. c. 110. Fourthly, that the count for money had and received could not be sustained; that there was no failure of consideration on the [506] ground of the abandonment of the undertaking: for, first, there was no sufficient evidence that it had in fact been abandoned; and secondly, the provisional committee had no power to abandon it.

For the plaintiff it was contended, on the authority of the case of *Nockells* v. *Crosby* (3 B. & C. 814; 5 D. & R. 751), that the provisional committee were bound, on the failure of the undertaking, to return the plaintiff's deposit; for that the expenses of an abortive scheme must be borne by the projectors of it; and the plaintiff was there-

fore entitled to recover, either on the special count, or, at all events, on the count for money had and received.

The Lord Chief Baron overruled the objections, and under his direction a verdict was found for the plaintiff, damages 78l. 15s., leave being reserved to the defendant to move to enter a nonsuit.

In Easter Term, Martin obtained a rule nisi accordingly; against which

Jervis and Willes shewed cause in this term (May 29). First, the plaintiff is entitled to recover on the special contract alleged in the first count. The company were bound, on the allotment of shares being made, and on payment of the deposits thereon, to exchange the letter of allotment for scrip. It will be said on the other side, that the letters of the 7th and 18th of October, taken together, shew no contract, but the latter amounted merely to an intimation of an intention, on the part of the directors, thereafter to give scrip in exchange for it. But this argument cannot be supported: nor does it make any difference that the plaintiff's application was for a greater number of shares than was afterwards allotted to her. Suppose a man offered to another to give £50 for a mare, and ten days afterwards the latter wrote him a letter saying, that if he paid the sum of £50 **[507]** into a certain bank, he should have the mare and her foal; would that be called a mere intimation? would it not be a contract to deliver the mare and her foal on payment of the £50? This is merely the case of one party contracting to do one thing, if the other party will perform two. There is first a proposal on the part of the plaintiff, which is modified by the qualified acceptance of the company, and the bargain is completed by the final acceptance of the plaintiff.

Secondly, it is said that the defendant cannot be bound, because this was a company only provisionally registered, which therefore had no authority to issue scrip: but it is clear from the several provisions of the 7 & 8 Vict. c. 110, that this is otherwise. The 24th section, in particular, which imposes a penalty upon the issuing of scrip before provisional registration, seems to imply that scrip may be issued after such registration. [They referred also, on this point, to the 23rd, 25th, 51st, and 52nd sections of the statute.]

The principal question in this case, however, arises upon the second count, for money had and received. Now the principle established by the case of *Nockells* v. *Crosby* is, that the promoters of an abortive company are bound to return to the subscribers the earnest received from them, and themselves to bear the expenses of the undertaking. That was a case in which a scheme for a tontine was put forth, stating that the money subscribed was to be laid out at interest; and after some subscriptions had been paid to the directors, but before the money was so laid out, the directors determined to abandon the project. The Court held that each of the subscribers was entitled, in an action for money had and received, to recover the whole of the money advanced by him, without deduction of any part towards the payment of the expenses already incurred. Bayley, J., there says, "On all projects some expense must be incurred before many members join the concern. Upon whom shall that fall? Undoubtedly, if the scheme prove abortive, it should fall upon the original projectors, and not upon **[508]** those who advanced their money upon the faith of its going on." Holroyd, J., says, "It appeared to me, at first, that this was very like the case of a partnership, which I put during the argument; but here the concern was never really set going; and I think that the expenses incurred in setting a scheme on foot, are not to be paid out of the concern, unless they are adopted when it is actually in operation." And Littledale, J., says, "The plaintiff is entitled to recover, upon this general principle, that if persons set a scheme afoot, and assume to be the directors or managers, all the expenses incurred before the scheme is in actual operation must, in the first instance, be borne by them." And he puts the case of there being one subscriber only, in which case, he says, the hardship and injustice would be monstrous that all these expenses should be cast upon him. [Alderson, B. In *Pitchford* v. *Davis* (5 M. & W. 2), a company was projected, and a prospectus issued, stating the proposed capital to consist of 10,000 shares of £25 each. The directors entered into contracts at a time when a small portion only of that capital had been raised; and it was held that a subscriber, who had made deposits, was not liable upon such contracts, without proof that he knew of and assented to their proceeding on the smaller capital, or expressly authorised the making of the contracts. Does not the principle of that case apply to the present?] Unquestionably it does. If the promoters of a scheme of

this nature think fit to proceed before the whole of the capital is subscribed for, they do so at their own risk. The party subscribes on the faith that his subscription is to form an integral part of a fund amounting to 80,000 times 2½ guineas; and until that fund is raised, the directors cannot pledge his credit. Until the whole is subscribed, the deposit of each subscriber is a mere earnest: then it becomes a part of the agreed capital. And the stat. 7 & 8 Vict. c. 110, does not alter the effect [509] of the contract between the promoters and the subscribers. The former are merely put in the same position, after the concern is provisionally registered, as they were at common law without any provisional registration.

But further, this deposit of 2l. 12s. 6d. is composed of two sums, of 2l. 10s., which is the 10 per cent. on each share, required by the Standing Orders of Parliament to be deposited with the Accountant-General, and 2s. 6d., which may be considered as paid to be applied to the preliminary expenses. The former sum is appropriated to the express purpose for which it is received, and not having been so applied, the plaintiff is clearly entitled to recover it back. And with respect to the 2s. 6d., that cannot be retained for the preliminary expenses until the whole amount of deposits has been paid up. [They cited *Fox* v. *Clifton* (6 Bing. 776; 4 M. & P. 676), *Bourne* v. *Freeth* (9 B. & C. 632; 4 M. & R. 512), and *Lake* v. *Duke of Argyll* (6 Q. B. 477).]

Lastly, it is said that the secretary had no power to bind the defendant by making this contract. But by the prospectus, applications are to be made to the officer of the company, and the plaintiff's letter is answered by him as the agent of the provisional committee, to whom her application for shares was addressed.

Martin, F. V. Lee, and Peacock, contrà. (May 29 and 30.) First, the special contract alleged in the first count was not proved. The documents which were read in evidence must be taken together, in order to see what the contract was. It consists in the letter of the 7th of October, and the first paragraph of the letter of the 18th. The plaintiff's contract attached on her thirty shares being allotted; there was then a complete obligation upon her to sign the parliamentary deed, and pay the deposit. She did nothing, and was not called upon to do anything, except what she did and was bound to do upon the allotment being [510] made to her. There was no consideration for any promise to exchange the letter of allotment for scrip or shares: the allotment was all the plaintiff asked for, and she had all for which she bargained.

Secondly, the count for money had and received was not established. In the first place, the prospectus contains no engagement on the part of the provisional committee to go to Parliament at all in the then ensuing session, and there is really no evidence to shew that the scheme has been finally abandoned. For aught that appears, it is an open contract to the present hour. But even if this be otherwise, there is no failure of consideration sufficient to sustain the action. Nor can any distinction be drawn between the 2l. 10s. and the 2s. 6d., nor was any such attempted at the trial: the case was rested altogether on the ground of a general failure of consideration, and not on that of a specific appropriation of any part of the deposit. Now it is obvious, that, in such an undertaking, expenses must necessarily be incurred ab initio —as for rent of offices, stationery, advertising, &c. &c.: and the subscribers, as well as the promoters, know this to be the case. Why should not such expenses be borne by all the parties, unless there be fraud? There is no difference in their situation, except that one is the first suggester of the scheme to the others. In truth, a party subscribing to such an undertaking becames a quasi partner, and cannot receive back the whole of the money which he deposits for the necessary expenses, in case of the scheme being unsuccessful. If twelve individuals set on foot a project, and, without fraud, ask fifty others to join them in taking shares, and they agree to do so, why should the expenses fall exclusively on the twelve original projectors, instead of being borne equally by all the parties? *Nockells* v. *Crosby* is quite distinguishable; that was the case of a tontine, where all the money subscribed was to be invested at interest; and there, also, the scheme had absolutely and finally failed. But a subscriber to a railway company perfectly well knows that [511] his money is to be applied to a common purpose, and that the promoters must use it in taking the necessary steps for the formation of the Company; and surely, under such circumstances, he authorizes them to expend it in payment of the necessary preliminary expenses. An ordinary joint stock company, no doubt, cannot go on with their manufacture or their trade until all the capital has been subscribed for; but there the contract is made for the carrying on of the trade or manufacture itself, not for preliminary matter until the company is

formed. It may be that the plaintiff would not, under these circumstances, be liable to a creditor of the concern; but that is not the question. Each subscriber brings his money into hotchpot, for carrying on the scheme for the joint benefit of all. It is paid as a contribution to a joint fund for a quasi partnership. It is true that, in *Kempson* v. *Saunders* (4 Bing. 5; 12 Moore, 44), money which had been paid for shares in an abandoned undertaking was allowed to be recovered back. But the authority of that case is very questionable: and *Holmes* v. *Higgins* (1 B. & Cr. 74), confirmed by *Lucas* v. *Beach* (1 Man. & G. 417; 1 Scott, N. R. 350), went upon the principle, that persons associating together and subscribing money for the purpose of making a railway, are partners in the undertaking. The plaintiff has her remedy in equity; and though the sum in dispute in this case is so small, it is better to lay down the general principle, that a party, who thinks fit to run the risk of gaining or losing by embarking in a concern of this kind, shall be without remedy at law.

Lastly, there was no sufficient evidence of the dissolution of the Company. The provisional committee still retain their powers under the 7 & 8 Vict. c. 110, s. 23. They were not bound to go to Parliament in the next session; and although they had failed to do so, they might afterwards be compelled by the subscribers to proceed. [Alder-**[512]**-son, B. Is there any authority that the promoters of a scheme of this kind may not abandon it?] Yes; *The Kidwelly Canal Company* v. *Raby* (2 Price, 93). [Alderson, B. That was the case of a company actually formed and incorporated: this is a mere project.] Nevertheless, they could not dissolve it without the consent of all, or at least of the majority of the subscribers, and the declarations of any other member of the committee that it was abandoned were not at all binding on the defendant.

But further, the secretary had no power to issue scrip at all. The statute does not give any authority to do so. The 24th section subjects the parties to a penalty if it be issued before provisional registration, but it is not therefore lawful after. If not absolutely illegal, it is against the policy of the statute. There is, at all events, a clear distinction between scrip and shares. [On this part of the case they cited *Jackson* v. *Cocker* (4 Beav. 59), *Leeman* v. *Lloyd* (14 Law J., N. S., Q. B., 165), and *Mitchell* v. *Newhall* (ante, 308).]

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. This was an action of assumpsit. The declaration contained a special count, founded on an alleged contract to deliver scrip; there was also a count for money had and received. At the trial before me, on the 27th of February, it appeared that the defendant was a member of the provisional committee of the Direct Birmingham, Oxford, and Brighton Railway Company, registered provisionally under the 7 & 8 Vict. c. 110. The prospectus announced the capital to be £2,000,000, in 80,000 shares, of £25 each share. The deposit required was stated to be 2l. 12s. 6d. per share. On the 7th of October, 1845, the **[513]** plaintiff applied to the provisional committee for shares, according to the form directed by the committee, (which form it is not necessary now to state). On the 18th of October, the plaintiff received a letter of allotment in the following form. [His Lordship read it, as ante, p. 504.]

This letter was signed by the secretary, and set out the names of the several bankers; and the plaintiff, in due time, paid the deposit on the thirty shares into the London Joint-stock Bank, the bankers of the Company, and on the 27th of October applied for scrip. The time for delivering the scrip was extended by the provisional committee to the 6th of November. On the 12th of November the plaintiff applied again; and, after several other fruitless applications at the office of the Company, the plaintiff was told by the secretary, that the directors did not mean to issue scrip; and upon the plaintiff requiring her money to be repaid, the final answer given at the office by one of the provisional committee, not the defendant, was that a statement would be made of the concerns of the Company, and the surplus would be divided. It was admitted, at the trial, that 40,000 shares had been applied for; 7000 shares had been allotted; but, about the 25th of October, 1845, public confidence in railway schemes having been much shaken, the deposit was paid on 4000 shares only, a number much too small to justify proceeding with the scheme. The plaintiff, failing to get scrip or her money again, brought the present action. At the trial, it was contended by the defendant's counsel that the defendant was not liable under either count of the declaration; that the special count could not be supported; and that

the defendant was not liable on the count for money had and received. A verdict was found for the plaintiff under my direction, with liberty for the defendant to move to enter a nonsuit, if there was not evidence to support the verdict: all the points raised by the defendant's counsel being reserved. Accordingly, Mr. Martin, in Easter Term, obtained a rule, which was argued on the 29th and **[514]** 30th of May last, before me and my Brothers Alderson, Rolfe, and Platt.

For the defendant it was contended, that the contract, as laid in the special count, was not proved, and the defendant was under no contract to deliver scrip. But the argument chiefly turned on the count for money had and received; and it was alleged that the subscribers became a quasi partnership, and that their subscriptions went into a common fund, to be applied for the general benefit, and in consequence that the plaintiff could not sue the defendant at law. A further point made was, that the application being made for an allotment of shares, which in fact had been allotted, the plaintiff had really obtained all she asked for, and had no grounds of complaint; and lastly, it was said that there was no evidence of the concern being at an end, as the defendant was not bound by what another member of the committee stated, and unless the concern was abandoned, money had and received would not lie.

For the plaintiff it was argued, that the special count was proved, and that there was evidence that the concern was at an end, and the case of *Nockells* v. *Crosby* was cited as an authority. We do not think it necessary to give any opinion on the special count, as to which some doubt may well be entertained, because we are all of opinion that the plaintiff is entitled to recover on the count for money had and received; and as the plaintiff cannot be entitled, in a case like the present, to damages on the first count, for not delivering scrip, as upon a contract broken, and also to have her money returned as on a contract rescinded, we are of opinion that the verdict for the plaintiff on the count for money had and received ought to stand, but that the verdict for the plaintiff on the first count should be set aside, and a verdict entered for the defendant.

With respect to the first point made by the defendant, that the subscribers became quasi partners, and that the subscriptions became a common fund, to be applied for the **[515]** general benefit, so that no one could claim back his subscription, we are of opinion that such is not the true result of the publication of the prospectus (by the provisional committee, of which the defendant was one), of the application for shares, and the allotment and the payment of the deposit. We think, in this case, no partnership ever actually commenced. In the case of *Pitchford* v. *Davis*, it was decided, that where a prospectus was issued for a speculation to be carried on by means of a certain capital, a subscriber did not become a partner unless the terms of the prospectus were in that respect fulfilled: and that decision has been since frequently acted on in this and other courts. In the case of *Nockells* v. *Crosby*, cited by the plaintiff's counsel, a similar doctrine was held. It appears to us that the application for shares, and payment of the deposit, amounts to nothing, if the shares subscribed for are so few that the concern cannot proceed, and the scheme must necessarily be abortive.

With respect to the point that the plaintiff applied for shares, and that shares were actually allotted, and therefore no action can be sustained; it is a sufficient answer to say, that the allotment of shares in an abortive scheme, which does not correspond with what the prospectus held out, is really not a compliance with the application. If the scheme has wholly failed, and has ceased even as a speculation, nothing whatever has been allotted to the subscriber. But it was urged that there was no evidence of the concern being at an end. We think that the answer given at the office by one of the provisional committee, that a statement would be made, and the surplus would be divided, was evidence to go to the jury that the concern was abandoned; and unopposed as this was by any evidence on the part of the defendant, we think that the jury were well warranted in finding that the scheme was at an end. If so, we think, on the authority of *Nockells* v. *Crosby*, that the plaintiff is **[516]** entitled, under the count for money had and received, to recover back her deposit.

A question was raised, though not much argued, whether there was any difference between one portion of the deposit and another. It being, as we think, manifest that the deposit of 2l. 12s. 6d. consisted of 2s. 6d., being 10s. per cent. on the £25, in pursuance of the 23rd clause of the act referred to, and the residue being £10 per cent.

required to be deposited by the Standing Orders of Parliament, we think it is clear beyond all doubt, that the amount paid in order to be deposited in pursuance of any Standing Orders, must be returned to the plaintiff. There is no foundation whatever for a claim to retain that, which was paid for a specific purpose, and the concern abandoned before the money could be applied for that specific purpose. But we think that the remainder of the money may be also claimed back, and that the language of Littledale, J., and Holroyd, J., in *Nockells* v. *Crosby*, applies to this part of the case. To use the language of Holroyd, J., in that case, "the concern was never really set agoing; and the expenses incurred in setting a scheme on foot are not to be paid out of the concern, unless they are adopted when it is in actual operation. All the steps taken were only preparatory to carrying the project into effect; and, as it never was carried into effect, the plaintiff was entitled to have back the whole of the money she advanced."

On these grounds, we think that the verdict ought to be entered for the defendant on the first count, but that the verdict for the plaintiff on the count for money had and received ought to stand.

Our judgment therefore must be for the plaintiff.

Rule discharged.

[517] [The three following cases are inserted here, though decided at later periods, as also relating to the subject of railway liabilities.]

REYNELL *v.* LEWIS. WYLD *v.* HOPKINS.(*a*) Nov. 25, 1846.—The mere fact of a person agreeing to become a member of the provisional committee of an intended railway company, amounts to no more than a promise that he will act with other persons, appointed or to be appointed, for the purpose of carrying the scheme into effect. Therefore, in an action against a provisional committee-man for goods supplied on the order of the solicitor of the company, it was held that the law would not imply, from the mere fact of his agreeing to be a member of such committee, an authority from him to the other members of it to make contracts by himself or by the solicitor, nor an authority to the solicitor to make them on behalf of the committee.—If the party not only consents to be a provisional committee-man, but authorises his name to be inserted and published in a prospectus, which merely states the names of the members of the provisional committee, and nothing more, that fact does not alter the liability. If it state the names of an acting or managing committee also, it is a question for the jury to say, whether it means that the latter are to take upon themselves the whole management of the concern, or that the former have constituted the latter their agents to manage it on their behalf, in which case the former would be liable for the contracts of the latter. Or, if the solicitor's name were mentioned in it, the question for the jury would be, whether it meant that he was to be employed by those of the committee who acted, or that he was already appointed by all whose names were mentioned, as their solicitor, to do all solicitor's work on their behalf; and further, what was the business then usually transacted by solicitors, in such undertakings, on behalf of the company. And the same as to the secretary.—Where there is also evidence that the defendant has acted with relation to the proposed scheme, it is a question for the jury, whether, by his consent and acts, he has authorised the solicitor, or secretary, or any member of the committee, to pledge his credit for the necessary and ordinary expenses to be incurred in forming such a company; and if so, whether the work was done, and the credit given, on the faith of his being liable.—Such an intended association does not constitute a partnership, inasmuch as it constitutes no agreement to share in profit or loss.

[S. C. 3 Railw. Cas. 351; 16 L. J. Ex. 25; 10 Jur. 1097.]

The case of *Reynell* v. *Lewis* was an action of debt for £1000, due to the plaintiff from the defendant, for and in respect of the plaintiff having, and who had, for the

(*a*) These two cases are reported together, as they were argued and decided in that form.

TAB 12

[681] IN THE EXCHEQUER CHAMBER

(In Error from the Court of Exchequer)

MOORE *v* GARWOOD Dec 1, 1849 —In an action for money had and received, by an allottee of railway scrip, for the recovery of his deposit on the abandonment of the scheme, the letter of allotment was offered in evidence by the plaintiff, who called upon the defendant to produce the letter of application, which he refused to do —Held, in error on a bill of exceptions, that, under such circumstances, the letter of allotment was receivable in evidence without a stamp, as there was no presumption that the two letters were ad idem, and that the contract depended upon them alone —The deposit was paid into one of the Banks mentioned in the prospectus of the Company, on account of the Company and to their credit, the defendant being a member of the managing and also of the provisional committee, and upon application by the plaintiff for a return of his deposit, he received from the attorney of the Company an answer, to the effect that arrangements for that purpose were being made —Held, that there was evidence that the money was had and received by the defendant Held also, that, as the evidence in the case did not depend altogether upon written instruments, but upon other matters of fact, it was a question for the jury, and not for the judge, what was the contract between the parties

[S C 19 L J Ex 15 Applied, *Hudspeth* v *Yarnold*, 1850, 9 C B 621, *Ward* v *Lord Londesborough*, 1852, 12 C B 252]

Error on a bill of exceptions This was an action of assumpsit brought by the plaintiff below (the defendant in error) for money had and received, and on an account stated to which the defendant below (the plaintiff in error) pleaded non assumpsit, and upon that plea issue was joined At the trial of the cause, before Pollock, C B, at the Middlesex Sittings after Trinity Term, 1846, it appeared that the action was brought by the plaintiff (*a*) to recover back the amount of a deposit, that the defendant was a member both of the provisional and of the managing committees, and had taken an active part in the transactions, of a certain projected Railway Company, and that the committee of that Company had, in the month of September, 1845, published a prospectus, headed "The Great Manchester, Rugby, and Southampton Railway Company, with a direct Line from Derby to Rugby Provisionally registered pursuant to 7 & 8 Vict c 110 Capital 3,000,000l, in 150,000 Shares of 20l each Deposit 2l 2s. per Share" This prospectus, after setting forth the names **[682]** of the provisional and managing committee, in both of which that of the defendant appeared, and after enlarging upon the advantages of the line, contained the following clause "The subscribers will only be liable to the extent of their deposits, and power will be taken to allow the shareholders 4l per cent on the deposits and calls on the opening of the line" The plaintiff had applied by letter to the committee of management for a certain number of shares in the scheme, but the defendant, when called upon by the plaintiff's counsel to produce this letter, refused to do so, though due notice to produce had been given The plaintiff's counsel thereupon tendered in evidence the following unstamped letter of allotment, which had been sent to the plaintiff by the secretary, and which was signed by and issued under the authority of that committee —

"The Great Manchester, Rugby, and Southampton Railway Company, with a Direct Line from Derby to Rugby Registered provisionally Capital, 3,000,000, in 150,000 Shares of 20l each No of Letter, 53 No of Shares, 50 Deposit, 105l Offices of the Company, 1 Royal Exchange Buildings

"Nov 1, 1845

"Sir,—I am directed to inform you that the committee of management have, in compliance with your application, allotted to you 50 Shares in this Company, and that you are required to pay the deposit of 2l 2s per Share, amounting to 105l, on or

(*a*) The defendant in error will be called the plaintiff throughout this report, and the plaintiff in error the defendant

before Friday, the 7th instant, to one of the undermentioned bankers [Here followed a list of the bankers] The deposit must be paid within the time specified in the Parliamentary contract and subscribers' agreement, signed before the 7th of December This letter, with the banker's receipt, must be produced when you attend to execute the deed, which will lie for signature at this office on and after Friday, the 7th instant Arrangements will be made for sending the deed [683] to places in the country, for the accommodation of subscribers, who will be duly advised by circular through the post-office —I am, Sir, &c, "G. J FARRANCE"

This document was objected to on the part of the defendant, on the ground that it was inadmissible in evidence without a proper stamp, but the Lord Chief Baron overruled the objection, and admitted it

On the 5th of November, 1845, the plaintiff paid into one of the banks mentioned in the prospectus, and which was one of the banks of the Company, the sum of 105l, on account of the Company, and an entry of the receipt of that sum to the credit of the Company was made by the banker's clerk in the banking account of the Company A vast number of shares had been allotted by the 8th of December, 1845, and the allotment of shares was in full operation up to within a day or two of the issuing of the letters of allotment. The number of applications for shares was four times greater than the number that could have been issued The letters of allotment were issued on the 1st of November, and the payments of the deposits were to be made on the 7th of that month, but the time for such payment was afterwards extended It became impossible for the Company to apply to Parliament for an Act during the then ensuing session, as the plans and surveys were not deposited by the 30th of November, in pursuance of the Standing Orders of the Houses of Parliament On the 10th of December the committee published an advertisement, stating that they had not been able to proceed to Parliament by reason of the unexpected delay of the engineers in completing the survey, and in the unexpected failure of the allottees to pay up their deposits, and that, in order to liquidate the claims on the Company, and to do justice to those who had paid their deposits, by returning a portion of them, they had decided on calling [684] on the allottees who had not paid to pay up 2s per share, and that the project was only postponed, but not abandoned A general meeting of the shareholders took place on the 19th of December, at which the defendant, in an address to the meeting, stated that the deposits of 2l 2s were below 10,000l that the total amount of deposits was below 11,000l, that the object in applying for the 2s per share was to lighten the liabilities of the Company, which then amounted to 17,000l, and that, if that sum were paid, the letters of application would be delivered up A resolution was thereupon come to, that a circular should be issued, calling on the allottees who had not paid to pay up 2s per share, with a promise that, on the payment thereof, the allottee should be released from all further responsibility, and should receive back his letter of application On the 22nd of December a circular to the effect of the preceding resolution was issued, a circular of a similar nature having previously issued by the orders of the committee of management. The plaintiff having applied by letter to the Company to have the amount of his deposit returned to him, received by way of answer, on the 7th of March, 1846, a letter from the attorney of the Company, in which he stated that he was instructed by the managing committee to say, that arrangements were being made for paying the creditors, and that, when they were paid, it would become a question whether a rateable proportion of the deposits should be returned, or whether the Company should proceed to Parliament next session

Upon this state of facts it was contended by the defendant, that there was no evidence that the money had been had and received by him The Lord Chief Baron, however, over-ruled this objection, and in summing up the case directed the jury in effect as follows —"That the nature of the contract into which the parties had entered was rather a question of fact than of law, because it did not consist of one distinct contract between the parties, but of a series [685] of acts and things done, from which the jury were to determine what was the real intention and meaning of the parties when they entered into the mutual relation in which they stood, that is to say, the provisional committee as the founders and managers of the scheme, and the plaintiff as a person who had applied for shares, and that the jury were to collect what was the nature of the contract from the documents, and from what was done by the

respective parties, and also, that it was for the jury to consider whether the Company was ever actually established and completely formed, and whether a sufficient number of shares had been taken for that purpose, or whether it had not absolutely failed, and whether that was not the view that the parties themselves took, that there ought to have been a reasonable prospect of the concern going on, and that they were to consider whether there was any such prospect during any part of the transaction. That, if there was not, the plaintiff was entitled to recover his money back, unless he had entered into some arrangement to become a partner, or to contribute to the preliminary expenses. That the two points for their consideration were, first, looking at the prospectus, and the letter of allotment, and the receipt of the money, and any other matters that were in evidence, did the plaintiff become a partner, or did he engage to pay any part of the preliminary expenses, without reference to whether the concern began or not? That, if they should think that the plaintiff entered into no engagement to pay any part of the preliminary expenses, but that he engaged to become a partner in the large scheme which was announced by the prospectus, then the second point for their consideration was, whether the concern was ever formed, whether they thought that an application for four times the number of shares, followed up by this, that when people were called on to pay their deposits, instead of 300,000 guineas, less than 10,000*l* was forthcoming, the scheme was ever on [686] foot, or that it ever would be, and had not rather practically failed. That, if they should think that the plaintiff paid his money to have shares in a scheme commensurate with the prospectus, and not something so infinitely short of it as to be quite illusory, and did not enter into a contract either to become a partner, or to pay for the expenses, or to do anything other than to deposit his money on the faith that the scheme in extenso, or within reasonable limits, should be carried into effect, and that it had altogether failed, the plaintiff would be entitled to a verdict for the amount of his deposit, and that it was not necessary for him to wait until the affairs of the Company were wound up." The defendant tendered a bill of exceptions to this summing up, and also to the ruling of the Lord Chief Baron upon the admission of the letter of allotment, and also on the ground that the jury ought to have been directed that there was not sufficient evidence to entitle the plaintiff to a verdict. The plaintiff had a verdict for the full amount.

A writ of error having been brought, the case was now argued by (*a*)

Peacock, for the plaintiff in error. The first question is, whether the letter of allotment was receivable in evidence without an agreement stamp. It is submitted that it was not, as the letter of allotment and letter of application together constituted the agreement between the parties. In *Vollans* v *Fletcher* (1 Exch. 20), it was held that the letter of allotment did not require the stamp, but the Court there proceeded upon the ground that the letters of allotment and of application were not *idem*, as the latter introduced a new term. [Patteson, J. I see that the decision of the Court of Exchequer was to the same effect in *Willey* v *Parratt* (3 Exch. 212). Maule, J. And the same rule was followed in [687] *Chaplin* v *Clarke* (ante, p. 403), in the Exchequer Chamber.] Those cases are distinguishable from the present, for, as no evidence was given of the letter of application, it is to be presumed that the two letters did not differ. [Patteson, J. Here the letter of application was not produced, although the defendant below was requested to produce it. How can we, then, presume that the letter of allotment contains the same terms as the letter of application?] It would be a question for the jury in the first instance. [Erle, J. It is the province of the Judge to decide upon the admissibility of a written instrument, when the result depends upon a disputed fact. *Bartlett* v *Smith* (11 M. & W. 486). Maule, J. In the present case the presumption is against you, for how can it be assumed that the applicant knew to what bankers, or within what time, the money was to be paid?] Without reference to the question of stamp, the Lord Chief Baron ought to have asked the jury whether they believed the terms of the two documents corresponded, and to have told them what the effect of the contract was, if they thought they were the same. [Patteson, J. I do not see by the bill of exceptions that the learned Judge was ever asked to put it to the jury, that the letters contained the same terms. On the contrary, both parties appear to have taken the contrary for granted. Maule, J. I think that if the jury had found that the letter of application did

(*a*) Before Patteson, J., Maule, J., Erle, J., Williams, J., and Talfourd, J.

contain the same terms as the letter of allotment, it would have been a verdict against evidence Had an issue been joined upon that question, the learned Judge ought to have told the jury that there was no evidence for them] In the second place, it appears by the prospectus, that the subscribers are to be liable only to the extent of their deposits, which provision renders the depositors liable to pay the expenses incurred to the extent of their deposits No fraud is imputed to the conductors of the undertaking The Lord Chief Baron ought there-[688]-fore to have directed the jury that the plaintiff had agreed, by the terms of the prospectus and of the letter of application, that the conductors of the undertaking had the power of expending the deposits in the preliminary expenses It seems that directors of a projected Company have such a power, from the 7 & 8 Vict c 110, s 21, that section shews that expenses incurred in obtaining an Act of Parliament are legal [Maule, J All that is meant by the prospectus is, that the subscribers shall not be liable beyond the amount of their deposits Patteson, J The Act to which we are referred does not authorise the directors to expend the deposits whether the allottees agree to it or not The real question is, what was the contract between the parties; that is a proper matter for the consideration of the jury, and that question was properly left to them Erle, J It has been held, that if the directors, without the shareholder's consent, proceed with less than the proposed capital, they cannot make him liable]

In the last place, there was no evidence that the defendant ever received the money deposited In *Burnside* v *Dayrell* (3 Exch 226), where the facts were similar to the present, the defendant was held not to be liable There was no evidence that the defendant drew the money out of the Bank, or that he had the power to do so, and the action for money had and received would not lie, until it had been drawn out It is paid into the Bank to the credit of the Company, and not of the directors *Watson* v *The Earl of Charlemont* (12 Q B 856) [Maule, J The money was paid to the account of the defendant and others, and therefore the proper mode of taking the objection would be by plea in abatement of the nonjoinder of the other parties as co defendants If all had been sued, there would not have been any room for the objection]

Taprell, contrà, was not called on

[689] PATTESON, J We are all of opinion that the direction of the Lord Chief Baron was perfectly right The question, whether the letter of allotment required a stamp, has been already disposed of in the course of the argument In this case, the letter of allotment was put in by the plaintiff below, but the letter of application was not produced by the defendant, although a regular notice to that effect had been properly given. That circumstance was sufficient ground for the Judge or the jury to found the presumption that the terms contained in the letter of allotment were not the same as those in the letter of application That being so, these letters did not per se make the contract, and consequently the letter of allotment did not require a stamp

Then comes the second question, whether the money paid by the plaintiffs to the bankers of the Company can be said to be money had and received to the use of the defendant Now the present case differs considerably from that of *Watson* v *The Earl of Charlemont*, which was cited for the plaintiff in error In that case, the money was paid into the Bank to the credit of one of the defendants and of five other persons, by name, as trustees of the Railway Company, and two of the defendants were not among that number Here the letter of allotment, which it is admitted that the defendant issued, shews that the money was paid into the hands of the banker of the Railway Company, to the credit of the Company

Those two matters being disposed of, we then come to the main point in the case,—whether it was a question of law for the Judge,—whether he ought to have taken upon himself to say what the contract was, or, on the other hand, whether that was a question for the jury Now there was a good deal of evidence, independent of these letters and of other documents There was the conduct of the parties, which was relied upon, and which appeared from the statements of the witnesses in the pro-[690]-gress of the trial We therefore think that, looking to all the circumstances of the case, the Lord Chief Baron could hardly have put the case in better terms to the jury The substance of his direction was, whether or not the plaintiff had engaged to pay any part of the preliminary expenses, without reference to whether the concern had begun or not. It was contended, that if the preliminary expenses were incurred

bonâ fide, the plaintiff, under any circumstances, could not recover back his deposit If the plaintiff agreed to such an arrangement, no doubt that would be so, but the question here is, whether the learned Judge rightly directed the jury, and we are of opinion that he did If the jury came to a wrong conclusion, and their decision was against the evidence, that would have been ground for an application for a new trial But the substance of the learned counsel's argument here has been, that the learned Judge ought to have taken upon himself to say what the contract between these parties was If the contract had depended solely upon the written documents, the argument might have prevailed, but as it does not, we think the question was properly submitted to the jury The judgment of the Court below must therefore be affirmed

Judgment affirmed

[691] SIR JOHN RENNIE AND GEORGE REMINGTON *v* SIR WILLIAM WYNN Dec 1, 1849 —In an action by A and B for work done for a Railway Company, as engineers, against C, it appeared that C was a member of the provisional committee, and took part at a meeting on the 9th of September, 1845, at which the plaintiff A and one D were appointed joint engineers, and S was appointed secretary to the Company D never acted as such engineer, but there was no proof that his appointment had ever been revoked All the work had been done by the plaintiffs At a meeting of the board (the date of which did not appear) the defendant C proposed that the engineers should be paid through the solicitors out of the money which was to come from the shareholders, but the names of the engineers were not then mentioned On a subsequent occasion, one of the plaintiffs, A, was paid a sum of money by one of the solicitors of the Company In order to prove that the plaintiff A had been appointed one of the joint engineers to the Company, a letter from the secretary, signed by him and headed "Minute of the Board, Sept 13, 1845," which letter stated that it was "resolved that B be requested to accept the office of joint engineer to the line," was offered in evidence, and also an entry in the minute book, also written by the secretary (its being his business to enter in the book all minutes of the proceedings of the board) This entry was "Minute of the Board, Sept 13th, 1845 Resolved, that B be requested to accept the office of joint engineer to this line" This entry did not contain the names of any persons present at the meeting, nor had it the signature of any person as chairman, although that word stood at the bottom of the entry, preceded by a blank for the name, and there was no independent evidence to shew that any meeting of the board was held on the 13th of September, or that the secretary had any authority to write the letter in question —Held, in error, on a bill of exceptions, that these documents were not admissible in evidence, and that, independently of them, there was no evidence to go to the jury of the defendant's liability

[S C 19 L J Ex 2]

Error on a bill of exceptions This was an action of assumpsit for work and labour done by the plaintiffs as engineers, in making surveys, &c for a railway, and on an account stated The defendant pleaded non assumpsit and payment and upon the first plea issue was joined, and the payment was traversed, and issue was joined thereon The plaintiffs sought to recover in the action the sum of 2615*l*, being the balance of their account as joint engineers of the Direct East and West Junction Railway Company, from the defendant, who was sued as a member of the managing committee and deputy-chairman of the Company

At the trial of the cause, before Pollock, C B, at the London Sittings after Hilary Term last, the following facts appeared —It was stated by a Mr M'Gregor, who was the promoter of the scheme, that, in the autumn of the year 1845, he had applied to the defendant to become a member of the provisional committee, and that he had afterwards caused a prospectus to be printed and published, in which the defendant's name was inserted as a provisional committee man This prospectus was registered on the 26th of August, 1845, on the 9th of the following month **[692]** of September, a meeting of the promoters of the railway was held in Moorgate street, in the city of London At that meeting the defendant was present and officiated as