Case Name:

Strathcona County v. PriceWaterhouseCoopers Inc.

Between
Strathcona County, applicant,a nd
PriceWaterhouseCoopers Inc., Trustee of the Estates of Fantasy Construction Ltd., Madison Development Corporation 1984 Ltd., John Van Leenen, and Irene Jean Van Leenen, Bankrupts, respondents

[2005] A.J. No. 915

2005 ABQB 559

256 D.L.R. (4th) 536

[2006] 3 W.W.R. 195

47 Alta. L.R. (4th) 138

386 A.R. 338

13 C.B.R. (5th) 145

12 M.P.L.R. (4th) 167

141 A.C.W.S. (3d) 524

2005 CarswellAlta 1018

Dockets: BK03 109703, BK03 109704,

BK03 109685, BK03 109686

Alberta Court of Queen's Bench
Judicial District of Edmonton

Burrows J.

Heard: June 10, 2005.

Judgment: July 21, 2005.

(61 paras.)

Insolvency law -- Property of bankrupt -- Real property -- Claims -- Priorities -- Claims by municipalities -- Municipal law -- Planning -- Building or development permits.

Application by Strathcona County for a declaration that PriceWaterhouseCoopers, as trustee in bankruptcy of the bankrupts, was bound by development permits issued by the County regarding a condominium project. The purpose of the declaration was to require Price to use the bankrupts' assets to pay for the cost of drainage work required by the permits. The County issued three development permits to Fantasy Construction in 1999 and 2000. In February 2004 title to the condominium units was in the name of Madison Development Corporation and the individual bankrupts. The bankrupt Van Leenen was the sole shareholder and director of Fantasy and Madison. Fantasy, Madison and Van Leenen assigned themselves into bankruptcy in September 2004 after the County commenced an action to require them to properly complete the drainage work.

HELD: Application allowed in part. The relief was granted regarding Fantasy. The obligation imposed on Fantasy by the permits was pursuant to statutory authority. It was an obligation owed to the public in general. It related to public safety or environmental standards. It did not cease when Fantasy assigned itself into bankruptcy. The trustee was therefore obligated to use Fantasy's assets to cover the cost of the drainage work. This obligation applied even though it would affect the claims of the secured creditors. It was not affected by amendments to the Bankruptcy and Insolvency Act that dealt with trustee's personal liability and its standard of care regarding environmental issues. The declaration only applied to Fantasy's estate because the permits and the court orders in the litigation were issued to it.

Statutes, Regulations and Rules Cited:

Bankruptcy Act,

Bankruptcy and Insolvency Act, s. 14.06(2), s. 14.06(4), s. 14.06(8), s. 30(1)(g), s. 121(1)

Municipal Government Act, R.S.A. 2000, c. M-26, s. 554, s. 624(1), s. 639, s. 640(2)(c)(iv)

Strathcona County Land Use Bylaw, Bylaw 8-2001, s. 6.13

Counsel:

Jeneane S. Grundberg and Daniel R. Peskett, Brownlee, for the Applicant

Michael J. McCabe, Q.C. and Rebecca Ratti, Reynolds, Mirth, Richards & Farmer, for the Respondent

Jeremy H. Hockin, Parlee McLaws, for Sunrise Park Condominium Corporation

REASONS FOR JUDGMENT

1 **BURROWS J.**:-- Strathcona County seeks a declaration that PriceWaterhouseCoopers, as Trustee in Bankruptcy of the bankrupts, is bound by the terms of Development Permits issued by the County in respect of a condominium project in the County. In particular the County seeks declarations which would have the effect of requiring the Trustee to use the assets of the bankrupt estates to pay the cost of drainage work the Development Permits required be done, but which was not done. The Trustee takes the position that it cannot be required to use estate assets to do the work and that, at best, the Trustee may have a provable claim as a creditor in the bankruptcy.

The Development Permits and Stop Orders

2 In 1999 and 2000 the County issued three Development Permits to Fantasy Construction Ltd., all relating to a proposed multi-family residential development in the County known as Sunrise Park. The first permit, dated May 31, 1999, was for Phase I of the project which covered 12 dwelling units. The second, dated October 4, 1999, was for Phase II covering 14 units. The third was issued on August 30, 2000 for Phases III and IV and covered 25 units.

3 Each of the permits was issued subject to express conditions requiring the installation of appropriate stormwater management. The permits required Fantasy to submit grading plans to County officials for review and approval and then to do site grading in accordance with those plans.

4 At least as of February 2004 titles to various units of the condominium project were in the names of Madison Development Corporation 1984 Ltd. and the individual bankrupts. The bankrupt John Van Leenen is the sole shareholder and director of both corporate bankrupts.

5 On November 13, 2003 the County issued Stop Orders to Fantasy in respect of all three Development Permits. Grading on the project lands did not comply with the design grades that had been submitted. There had been unauthorized alterations to a berm structure on the property. The Stop Orders required Fantasy to submit a new surface drainage plan for approval by November 30, 2003 and to complete the drainage work by May 31, 2004. Fantasy submitted a new drainage plan in response to the Stop Orders but there were a number of deficiencies and it was not approved.

The Drainage Action

6 On February 6, 2004 the County commenced an action by Originating Notice against Fantasy, Madison and the Van Leenens (the "developers") seeking declarations that they were in breach of the Municipal Government Act, the Strathcona County Land Use Bylaw, the Development Permits, and the Stop Orders. The County also sought a mandatory injunction pursuant to the Municipal Government Act, s. 554 requiring the developers to complete the necessary grading and drainage work to the satisfaction of the County. This proceeding is referred to as "the drainage action".

7 The developers did not contest the drainage action. They acknowledged that the County was entitled to the relief claimed. However, they asked for more time to comply with the Stop Orders.

8 On February 18, 2004 Sanderman J. issued an Order, founded on the developers' concessions, declaring the developers in breach of the Act, Bylaw, Development Permits, and Stop Orders, and granting the mandatory injunction which the County had sought. The developers were required to submit drainage plans prepared by an engineer to the satisfaction of the County by March 31, 2004.

9 The plans were not submitted as required by the injunction. The developers sought and were granted time extensions. They submitted plans to the County but they were unacceptable.

10 On June 15, 2004 County personnel inspected the construction site and discovered a contractor doing drainage work though no plan had been approved. When informed that there was no approved plan, the contractor stopped work.

July 22, 2004 Order

11 On July 22, 2004 the County applied before Sanderman J. for further relief in the drainage action. Efforts to get Fantasy to provide an acceptable drainage plan had been in vain. Unapproved drainage work had been done. Counsel who had appeared for Mr. Van Leenen in February had ceased to act. Mr. Van Leenen had fired the successor counsel just before the July 22 application. Purchasers of condominium units had advised the County that they had lost all confidence in Fantasy and would not allow Fantasy on their property to do drainage work. The transcript of the proceedings on July 22 demonstrates that Sanderman J. concluded that Mr. Van Leenen was solely at fault for the drainage issue not having been resolved by that date.

12 The main thrust of the July 22 application was to put in place a procedure by which the drainage work would get done without further involvement of the developers, but at their expense.

13 The County had sought a temporary injunction preventing the developers from engaging in unapproved drainage work. However, it was plain that approved work would not get done if any reliance was placed on the developers. So Sanderman J. issued a permanent injunction requiring them "to cease drainage related work including trenching, excavation and pouring of concrete". The Order also declared that the County would be at liberty to engage an engineer to complete a satisfactory drainage plan and to complete the required work at the expense of the developers. The Order further required:

- Fantasy and Madison to pay $240,000 into Court by July 30, 2004 as security for the completion of the work,
- Fantasy, Madison and the Van Leenens not to sell any of the lands, and
- any funds received on existing sales to be paid into Court pending further directions.

14 On August 12, 2004 the developers, having retained new counsel, applied to Sanderman J. for a variation of the July 22 Order on the ground that they had not had notice of the application and because the obligations imposed by the Order were "unnecessarily onerous and difficult to comply with". In an affidavit filed in support of this application Mr. Van Leenen swore that Fantasy, Madison and he, himself, did not have the funds required to be paid into Court and attempts to borrow them had been unsuccessful.

15 On that application Sanderman J. suspended the requirement that Fantasy and Madison pay $240,000 into Court as security until August 26, 2004.

Safety Code Proceedings

16 At the same time as the drainage action was proceeding, the County was also taking steps against Fantasy and Madison in relation to violations of the Safety Code. Those proceedings were also under Sanderman J.'s case management. Mr. Van Leenen's actions in that context were similarly uncooperative and frustrating to the County, purchasers of condominium units and the Court.

August 26, 2004 Order

17 On August 26, 2004 Mr. Van Leenen, who had again changed counsel, submitted, based on his construction experience, that the required drainage work would not cost more than $45,000 so that security of $240,000 was excessive. He made various proposals for dealing with the safety code and drainage concerns and other issues. Both the County and the Court found the proposals unacceptable. Sanderman J. ordered Fantasy and Madison to pay $625,000 and the Van Leenens to pay $125,000 into Court by October 1, 2004 as security in respect of the safety code deficiencies, and ordered that all assets owned by the developers be frozen. The obligation created by the July 22 Order to pay $240,000 into Court as security in respect of the drainage work continued to be outstanding.

The Bankruptcies

18 The developers assigned themselves into bankruptcy on September 9 and 10, 2004. PriceWaterhouseCoopers Inc. was appointed Trustee of all four bankrupt estates.

Drainage Work Not Done

19 Though, at the time of the July 22 Order, the intention clearly was that the County would do the drainage work that the developers had not done, that did not occur by the time of the bankruptcies. The intention had been that the County would do the work at the expense of the developers who would pay $240,000 into Court to secure payment. The funds were not paid into Court. The County did not therefore do the work.

20 After the assignments into bankruptcy, the County took the position that the Trustee was obliged to carry out the drainage work. In October 2004 the Trustee attempted to find a practical solution and applied for an order appointing the Trustee as a receiver and authorizing it to charge the bankrupt estate in priority to other secured creditors in order to obtain funds to do the required work. Creditors who would have realized no benefit from the proposed work and who feared deterioration of their security position opposed that application. I declined to grant the receivership order because, in my view, the question of whether the proposed course of action was in the interests of the bankrupt estates, and should therefore be undertaken, was for the Inspectors and Trustee, not the Court, to determine. (BIA s. 30(1)(g))

21 It was essential that some of the required work not be further delayed. It was done. At least some of it was done pursuant to an order preserving the County's right to claim that the Trustee ought to have done it and without prejudice to the County's claim to have the cost paid out of the bankrupt estates. (Order of November 25, 2004)

22 In January 2005 the Sunrise Park Condominium Corporation, supported by the County, applied in early 2005 to have the bankruptcies of Fantasy and Madison annulled. I dismissed the application. ((2005) 8 C.B.R. (5th) 216)

County's Position

23 The County, supported by the Sunrise Park Condominium Corporation, now takes the position that the obligation to do drainage work according to a County approved plan, survived the bankruptcy and is now an obligation of the Trustee. They seek a declaration to that effect and an order requiring that the drainage work, for which an engineering firm retained by the County has prepared a plan, be completed at the expense of the bankrupt estates.

Panamericana Case

24 The County cites Panamericana De Bienes Y Servicio (Receiver of) v. Northern Badger Oil & Gas Ltd. (1991) 81 D.L.R. (4th) 280 (Alta. C.A.) (leave to appeal to the Supreme Court of Canada refused, 86 D.L.R. (4th) viii) in support of its application. Northern Badger was the operator of several oil wells. The Energy Resources Conservation Board regulated oil well operations. The Board had ordered Northern Badger to properly abandon several non-producing wells to make them environmentally safe. The process was expected to cost in excess of $200,000. Northern Badger defaulted on security held by Panamericana and a Court- appointed receiver was put in place. Shortly thereafter a bankruptcy receiving order was issued. Northern Badger's assets were insufficient to cover both Panamericana's secured claim and the abandonment costs. The Alberta Court of Appeal held that the receiver was obliged to use the bankrupt's funds to pay for the well abandonment - to comply with the ERCB's order - even though doing so would prejudice the secured creditor, Panamericana.

25 Laycraft J.A., writing for the Court, articulated the issue as follows: (page 289)

> Thus the direct issue in this litigation, in my opinion, is whether the Bankruptcy Act requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public.

26 The main argument in support of the secured creditor's position was that the obligation to the Board was a "provable claim" under the Bankruptcy Act. It was therefore subject to the scheme of distribution under that Act which gave priority to secured creditors. The Trustee would therefore not be able to obey the Board's abandonment order. The requirements of provincial legislation could not subvert the scheme of distribution specified by the Bankruptcy Act.

27 Laycraft J.A. observed that a "provable claim" in bankruptcy has two features. First the bankrupt must have been subject to a liability. This feature was present. From the day the wells were drilled, Northern Badger was liable for their ultimate abandonment.

28 The second feature was that the liability must be owed to the party said to have the provable claim, the creditor. Laycraft J.A. held that this feature was not present. Northern Badger's abandonment obligation was not owed to the ERCB. It was owed to the public at large. Laycraft J.A. said: (page 290)

> With respect, I do not agree, however, that the public officer or public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it.
>
> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

29 Laycraft J.A. held that the Board was not a creditor even though the statute which empowered it gave it the authority to do the required abandonment work itself and to create a statutory debt in its own favour. He observed that though such powers existed, the Board had not chosen to use them. It had not taken the steps which the statute permitted it to take to make itself a creditor. It was seeking to enforce the bankrupt's obligation by steps which did not involve making itself a creditor.

30 Having concluded that the Board was not a creditor, Laycraft J.A. went on to consider whether a receiver appointed under a security instrument had a duty to comply with the provincial law which the Board was charged to enforce. After considering several points relevant to that issue, including the constitutionally validity of provincial legislation which has an incidental effect on a subject within federal jurisdiction, Laycraft J.A. concluded that the Receiver was bound to obey the Board's order and to use estate assets to pay for the abandonment despite the resulting prejudice to the secured creditor.

31 Strathcona County submits that the situation in this case is governed by Panamericana. The obligation imposed on Fantasy in the Development Permits relating to drainage grading was an obligation owed to the public in general - not to the County. The County's position is analagous to that of the ERCB in Panamericana. It is the public agency charged by the Legislature to ensure that standards required for the safety of citizens and their property are imposed on those who undertake land development. On the day it began to develop the Sunrise Park Condominium project pursuant to the first Development Permit, Fantasy acquired an obligation to ensure that the required drainage work was done. That obligation did not cease to exist when Fantasy assigned itself into bankruptcy and the Trustee became responsible for the administration of its assets. Just as the receiver in Panamericana was obliged to use the assets of Northern Badger to cover the cost of abandonment of the oil wells even though the secured creditor would not, as a result, realize as much of its secured debt, so here, the Trustee is obliged to use the bankrupts' assets to cover the cost of the drainage work, even though secured creditors may not, as a result, recover as much on their claims.

BIA Amendments

32 The Trustee submits that amendments to the BIA made after Panamericana and in response to that case have "overruled the state of the common law created by Panamericana".

33 It appears accurate that implications of the decision in Panamericana and other similar decisions that preceded it (Canada Trust Co. v. Bulora Corp. (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.) and Quanta Resources Corp. v. New York (City) (1986) 474 U.S. 494 (U.S.S.C.)) resulted in both judicial and legislative response. Developments are traced by Dr. Dianne Saxe in her article Trustee's and Receivers' Environmental Liability Update (1997) 49 C.B.R. (3d) 138.

34 Dr. Saxe observes that these cases created uncertainty which produced a reluctance on the part of Trustees and receivers to accept assignments in cases involving environmental issues. Some of this reluctance was overcome judicially. In Re Lamford Forest Products Ltd. (1991), 10 C.B.R. (3d) 137 (B.C.S.C.) Harvey J. held that though the cost of compliance with an environmental protection order would have priority to the claim of a secured creditor, it would not have priority to the fees of the Trustee. He also held that the Trustee would not be personally liable for the compliance cost.

35 In November 1992, the BIA was amended to confirm the protection of Trustees from personal liability. A Trustee could not be personally liable for any environmental damage that occurred before the Trustee's appointment. If there was environmental damage after the Trustee's appointment, the Trustee could only be liable if the damage resulted from the Trustee's negligence. (S.C. 1992, c. 27, s. 9(1) enacting BIA s. 14.06(2))

36 In April 1997 the BIA was further amended to extend to receivers the protection from personal liability that had been granted to Trustees in 1992. The standard of care required of Trustees and receivers in respect of after appointment environmental damage was reduced from negligence to "gross negligence or willful misconduct". In limited circumstances, a Trustee could avoid personal liability for failure to comply with an order requiring the Trustee to remedy an environmental condition by abandoning any interest in the property affected by the condition. The Crown was given a charge, prior to any other claim, against real property on which an environmental cleanup was required for the cost of the cleanup. Though normally a liability must exist at the time of the bankruptcy in order to be a provable claim, claims against a bankrupt estate for environmental cleanup costs would be provable claims regardless of when the claim arose.

37 The principle established in Panamericana is that an obligation of a bankrupt to comply with public safety or environmental standards, imposed pursuant to statutory authority, must be honoured by the Trustee using estate assets notwithstanding resulting prejudice to creditors of the bankrupt. The BIA amendments deal with Trustee's personal liability, Trustee's standard of care in relation to environmental issues, Trustee's abandonment of property to avoid liability for environmental conditions, crown priority, and timing of provable claims. It may be that Panamericana inspired the concerns that lead to the amendments. Parliament responded to those concerns as it considered necessary. But in doing so it did not overrule Panamericana. In my view the principle articulated and applied in Panamericana is still part of the law.

38 The Trustee referred to an extensive collection of materials generated by the parliamentary committee which reviewed both BIA amendments. Those materials do not support the conclusion that Parliament's intention in enacting the amendments was to overrule Panamericana.

39 I note that the vitality of the Panamericana principle was not doubted by either Slatter J. in Re Big Sky Living Inc. (2002) 318 A.R. 165 (para. 46) or Master Wacowich in KPMG v. Kovacs (2003) 2 C.B.R. (5th) 320.

BIA s. 14.06(8)

40 I wish to comment more specifically on BIA s. 14.06(8) because it could appear to be directed to the reasoning in Panamericana. The subsection reads:

> (8) Notwithstanding subjection 121(l), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

41 In Panamericana Laycraft J.A. held that the obligation to pay the abandonment costs was not a provable claim. It was a liability of the bankrupt. But it was a liability owed to the public at large which the ERCB was charged to enforce. So it was not a liability owed to a creditor. It therefore lacked the features of a provable claim. It might be argued that s. 14.06(8) provides, despite that reasoning, that an environmental costs claim is a provable claim.

42 That, in my view, would be a misinterpretation of s. 14.06(8). I interpret the section as intending only to overcome what would otherwise be the effect of s. 121(1). That section provides that liabilities to which the bankrupt is subject on the day on which he becomes bankrupt, or to which he may become subject before discharge by reason of an obligation existing at the time of bankruptcy, are provable claims. If that section applied, an environmental claim arising after the date of bankruptcy but before discharge might not be a provable claim. Section 14.06(8) deals only with that timing issue. It does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it.

Application of Panamericana

43 The Panamericana principle continues to be part of the law. I am obliged to apply it where a bankrupt has an obligation of the type contemplated by the principle at the time of bankruptcy. In my view that is the situation in the case before me.

44 The obligation to provide an approved drainage system for the land on which the condominium development was built was imposed pursuant to statutory authority. The Municipal Government Act, RSA 2000, c. M-26, requires the County to enact a land use bylaw (s. 639), and to have a designated development authority to exercise development powers on its behalf (s. 624(1)). The Act requires that the land use bylaw prescribe the conditions that are to be attached to a Development Permit (s. 640(2)(c)(iv)). The County's land use bylaw requires applicants for Development Permits to address site drainage issues. It requires the development authority to ensure that site drainage issues are properly addressed in a development plan: Strathcona County Land Use Bylaw, Bylaw 8-2001, s. 6.13. As previously noted, the Development Permits issued in this case required drainage grading plans to be approved and followed in construction.

45 In Panamericana Laycraft J.A. held that the obligation to abandon the oil wells was an obligation owed by Northern Badger to the citizens of Alberta. He said that the obligation was:

> . . . part of the general law of Alberta, binding every citizen of the province. All who became licensees or oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing or ice and snow, or the demolition of unsafe structures are examples which come to mind."

46 Is the Panamericana principle limited to a certain subclass of statutory obligations? Is the obligation to provide appropriate stormwater drainage grading in a land development in that class? In my view whether the type of statutory obligation to which Panamericana applies is limited to obligations imposed to protect the safety of citizens or their property or is as broad as any obligation imposed pursuant to the general law of Alberta, the obligation here in question is included. The obligation imposed on the land developer in this case was for the benefit of citizens who would eventually buy units in the project. It was also for the benefit of the taxpayers of the County upon whom fall some part of the expense of responding to floods which damage property with inadequate drainage. It is an obligation to which the Panamericana principle applies.

Effect of July 22, 2004 Order

47 Was the obligation affected by the July 22, 2004 Order of Sanderman J.? As previously noted, that Order provided, in part, as follows:

> 1. A permanent injunction is hereby granted requiring the Respondents to cease drainage related work, including trenching, excavation and pouring of concrete.
> 2. It is hereby declared that the County is at liberty to engage the services of an engineer or engineering firm of the County's choice to

have a Drainage Plan completed to the County's satisfaction at the expense of the Respondents.

3. It is hereby declared that the County, its designated officers or employees, agents or contractors, without further notice or further leave of this Court, are at liberty to enter the Lands and proceed with completion of the work contemplated under an approved Drainage Plan, at the Respondents' expense.
4. The Respondents Fantasy and Madison are hereby ordered to pay $240,000 into Court by July 30, 2004 as security for completion of the aforementioned orders.

. . .

48 This Order was in force at the time of the bankruptcy. The Trustee observes that paragraph 1 of the Order enjoined the developers from doing any further drainage work. How then can it be that the Trustee acquired an obligation to do drainage work?

49 As noted above, at the time of this Order the County had been attempting for many months to secure the developer's compliance with the drainage obligations of the Development Permits. The developers had never disputed their obligation. They had repeatedly acknowledged it and sought time extensions to permit them to comply with it. In the weeks immediately preceding the July 22 Order it had become plain that efforts to secure compliance were unlikely to succeed. In that context, it appeared that the only way the work would get done was if the County stepped in to do it. Given that the County had recently discovered the developer doing drainage grading without an approved plan, it was necessary to have that activity stopped. The July 22 Order stopped it and contemplated the County doing the required work at the developer's expense.

50 The injunction therefore was part of a plan to secure compliance with the developers' obligation. Its purpose was similar to the purpose of the Stop Orders which had, it appeared, been ignored. The other parts of the plan were that the County would retain an engineer to do the drainage design, would get the work done, and that the developers would pay funds sufficient to pay for drainage work into Court. The plan failed because the developer did not pay the funds into Court. Without that security, the County did not do the work.

51 It is clear that the Order, read as a whole, did not intend to relieve the developers of their obligation. Quite the contrary. The intention clearly was to ensure the obligation was met at the expense of the developers. In my view, the Order had no effect on the obligation the County now seeks to enforce against the Trustee. That obligation was extant at the time of the bankruptcy. The Panamericana principle applies in this case.

Are all bankrupt estates liable?

52 The County seeks a declaration that all four of the bankrupt estates, those of Fantasy, Madison and both Mr. and Mrs. Van Leenen, are subject to the obligation to complete the drainage work. However, the Development Permits were issued only to Fantasy. Likewise, the Stop Orders were issued only to Fantasy, albeit to the attention of Mr. Van Leenen.

53 The Originating Notice of Motion by which the drainage action was commenced on February 9, 2004 named Madison and the Van Leenens as Respondents in addition to Fantasy and sought declarations that all four respondents were in breach of the Municipal Government Act, the Development Permits and the Stop Orders. The pleading alleged that Fantasy was the developer of the land, that Madison was the owner of 16 units and that the Van Leenens were the owners of two units.

54 The Affidavit filed in support of the application contained evidence supporting those allegations and also indicating that Mr. Van Leenen was the sole director and shareholder of both Fantasy and Madison. It also recited that the Stop Orders were provided to the registered owners of the lands including Madison and the Van Leenens.

55 The Order granted on February 18, 2004 in the drainage action granted the declarations the County sought. It was declared that all four Respondents were in breach of the Municipal Government Act, the Development Permits and the Stop Orders. As previously noted this Order was founded on concessions by the Respondents which are recited in the Order as follows:

> . . . AND UPON hearing that the Respondents do not contest the validity of the Stop Orders, nor do they intend to cross examine Mr. Lanuk on his evidence, nor do they intend to submit evidence, but they do wish additional time to comply with the requirements of the Stop Orders . . .

56 I have reviewed an excerpt from the transcript of the proceedings before Sanderman J. on February 18, 2004 and there appears to have been no discussion of the basis for concluding that Madison and the Van Leenens owed, and should be declared to be in breach of, the obligations imposed by the Development Permits. It does not appear that that specific point was either raised or conceded in the hearing. It is not specifically mentioned in the recital quoted above. A concession that the Stop Orders were valid does not equate to an admission that parties not named in them have an obligation under them.

57 The materials before me do not address the basis upon which Madison and the Van Leenens were held in breach. The point was not addressed on this application. I am not certain as to the effect of the February 18, 2004 Order. Is it now, by reason of the Order, beyond dispute that Madison and the Van Leenens are in breach of the drainage work obligation imposed by the Development Permits? In considering whether to make the declaration sought in this application am I obliged to accept the conclusion recorded in the February 18, 2004 Order?

58 It may be that these questions do not have practical significance. It may be that the assets of Fantasy are sufficient to cover the cost of the required work. Or it may be that creditors with claims only against Fantasy would wish to submit that the cost of the drainage work must be shared by all four bankrupt estates.

59 Since this aspect of the matter was not addressed in the application I will at this point only grant the declaration sought by the County in respect of Fantasy. If counsel wish to address the issue of whether the same declaration should also be made in respect of Madison and the Van Leenens, they may arrange to make submissions in that regard.

60 I therefore grant the declarations sought in paragraphs 1 and 2 of the Notice of Motion in respect only of the estate of Fantasy Construction Ltd. It may be that the formal order will require other provisions to give practical effect to these declarations. If counsel are unable to agree in that regard they may make arrangements for an application to address the matter.

61 Finally, I wish to observe that during the hearing of this application there was some discussion of BIA s. 14.06(4) which gives the Trustee the right in certain circumstances to avoid personal liability for failure to comply with an order requiring a Trustee to remedy an environmental condition by abandoning the property. It appears from their submissions that counsel differ on the applicability of this section to this case. If it becomes necessary to determine whether the section could be invoked in this situation, counsel may wish to make application in that regard. Though there was argument addressed to the point, I do not consider it necessary to make any ruling on it now.

BURROWS J.

cp/e/qw/qlmmm