Most Negative Treatment: Distinguished
Most Recent Distinguished: Ellis-Don Construction Ltd. v. Ritchot (Rural Municipality) | 2001 MBQB 319, 2001 CarswellMan 608, 25 M.P.L.R. (3d) 20, 159 Man. R. (2d) 276, 31 C.B.R. (4th) 4, [2002] 4 W.W.R. 541, 110 A.C.W.S. (3d) 755 | (Man. Q.B., Dec 4, 2001)

1994 CarswellMan 15
Manitoba Court of Appeal

Merchants Consolidated Ltd. (Receiver of) v. Canstar Sports Group Inc.

1994 CarswellMan 15, [1994] 5 W.W.R. 210, 113 D.L.R. (4th) 505, 25 C.B.R. (3d) 203, 61 W.A.C. 253, 92 Man. R. (2d) 253

PEAT MARWICK LIMITED (receiver and manager of MERCHANTS CONSOLIDATED LIMITED) and ROYAL BANK OF CANADA v. INCE HOLDINGS LTD. (c.o.b. BOYD DISTRIBUTORS)

Twaddle, Lyon and Helper JJ.A.

Oral reasons: March 24, 1994
Written reasons: March 31, 1994
Docket: Doc. AI 93-30-01250

Counsel: *R.J. Handlon* and *J.A. Baigrie*, for Ince Holdings Ltd.
D.A. Bedford, for Peat Marwick Limited.
D.W. Leslie, for Royal Bank.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure; Torts; Contracts

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

Headnote

Judges and Courts --- Contempt of court — Forms of contempt

Receivers --- Possession of receiver — Particular property — General

Torts --- Interference with contractual relations — Elements of tort

Receivers — Possession of debtor's assets — Supplier of wholesale distributor asserting claim to ownership of goods supplied by it to distributor's dealers — Supplier attempting to stop payments from dealers from going to distributor's receiver — Contract existing between distributor and supplier — Receivables belonging to distributor — Finding upheld on appeal.

Receiving **orders** — **Contempt** — Supplier of company in **receivership** attempting to keep payments from going to receiver — Trial judge finding no **contempt** where interference based on honestly held but mistaken belief as to ownership of goods — Finding overturned on appeal — Person with valid claim to property in hands of receiver not being entitled to interfere with receiver's possession of it.

Torts — Interference with contractual relations — Trial judge finding supplier's attempt to direct money owing from retailers to it instead of receiver to be interference giving rise to damages — Finding overturned on appeal — No damages owing where interference did not cause breach of any retailer's contract with distributor.

A wholesaler distributor ("MC Ltd.") purchased goods from suppliers and retailers. Some of the goods were stored in its warehouse and sold from the warehouse to member dealers. Other goods were delivered directly from the suppliers to the member dealers under direct shipment programs.

MC Ltd. had an arrangement with one of its suppliers under which it negotiated a discount price for certain goods which would be supplied directly to MC Ltd.'s dealers. The supplier would bill MC Ltd. for those goods directly delivered to the dealers, and MC Ltd. would bill the dealers.

When a receiver was appointed over the assets of MC Ltd., approximately $500,000 was owed to it in book debts by individual member dealers; a similar amount was owed by MC Ltd. to the supplier. As the supplier had no security interest in the money owed by MC Ltd., it sent letters to the member dealers, claiming that the debts due from them were due to it, and not to MC Ltd. or its receiver. MC Ltd. and its bank brought an action claiming ownership of the receivables. The trial judge found that the receiver, and not the supplier, was entitled to collect the receivables. She also found that the supplier was not guilty of contempt for interfering with the receiver in the collection of the receivables, but that the supplier was liable to the receiver in damages for wrongfully interfering with the contractual relationship between MC Ltd. and its dealers.

The supplier appealed from the findings that it was not entitled to the receivables and that it was liable to the receiver in damages. The receiver cross-appealed from the finding that the supplier was not guilty of contempt.

Held:

The appeal was allowed only with respect to the order requiring the supplier to pay damages to the receiver; the cross-appeal was allowed.

The trial judge did not err in finding that the money owing by the dealers was properly payable to the receiver.

The supplier was guilty of contumacious conduct; it should have applied to the court for an order declaring it to be entitled to the receivables instead of taking the matter into its own hands. The trial judge's finding that the supplier's honest belief in its entitlement to collect the receivables was a complete defence. Even a person with a valid claim to property in the hands of a receiver is not entitled to interfere with the receiver's possession of it.

In order for the tort of interference with contractual relations to be made out, the interference must result in a breach. The supplier's action did not result in a breach of any retailer's contract with MC Ltd. Therefore, that part of the trial judge's order was set aside.

Table of Authorities

Cases considered:

Ames v. Birkenhead Docks Trustees (1855), 20 Beav. 332, 52 E.R. 630 — *referred to*

Bottoms v. Pacific Northwest Lumber Co., [1929] 4 D.L.R. 415 (B.C. S.C.) — *referred to*

Canadian Imperial Bank of Commerce v. Trapper John's Restaurant Ltd. (1984), 52 C.B.R. (N.S.) 28 (B.C. S.C.) — *referred to*

Dixon v. Dixon (1903), [1904] 1 Ch. 161, 73 L.J. Ch. 103 — *referred to*

Hawkins v. Gathercole (1852), 1 Drew. 12, 61 E.R. 355 [subsequent proceedings (1855), De G.M. & G. 1 (L.JJ.)] — *referred to*

Torquay Hotel Co. v. Cousins, [1969] 2 Ch. 106 at 123, [1969] 1 All E.R. 522 (C.A.) — *referred to*

Appeal and CROSS-APPEAL from judgment reported at (1992), 17 C.B.R. (3d) 282, 84 Man. R. (2d) 100 (Q.B.), additional reasons at (1993), 19 C.B.R. (3d) 89, 87 Man. R. (2d) 26 (Q.B.).

The judgment of the court was delivered by *Twaddle J.A.*:

1 This matter comes to us by way of appeal and cross-appeal from a judgment of Krindle J. [(1992), 17 C.B.R. (3d) 282 (Man. Q.B.), additional reasons at (1993) 19 C.B.R. (3d) 89 (Man. Q.B.)] by which she determined:

(i) that the receiver, rather than Boyd Distributors, is entitled to collect the disputed accounts receivable of Merchants Consolidated;

(ii) that Boyd Distributors was not guilty of contempt for interfering with the receiver in the collection of the accounts receivable; and

(iii) that Boyd Distributors was liable to the receiver in damages for wrongfully interfering with the contractual relationship between Merchants and each of several retailers.

2 The appeal is by Boyd Distributors and is from the first and third determinations whilst the cross-appeal is by the receiver from the second determination.

3 Key to an understanding of the case is the role of Merchants. Essentially it was a long-established wholesaler which bought goods from suppliers and resold them to retailers. In the early years, the goods it dealt in were mainly groceries. These were shipped from the supplier to Merchant's warehouse in bulk and from there smaller quantities were shipped to a retailer against an order. Merchant paid the supplier for what it received and, in due course, billed the several retailers to whom the goods had been resold.

4 As Merchants' business grew, so also did the categories of merchandise it handled. The purchase and resale of lumber and other building supplies became part of its business. This kind of merchandise was found unsuitable for warehousing, because of both the space which would have been required and the cost of shipping first to the warehouse and then to the retailer. Merchants therefore arranged with suppliers for the direct shipment of such merchandise to the individual retailers.

5 One supplier of lumber and other building supplies was Boyd Distributors. Merchants negotiated from time to time with Boyd for a discount from the list price of goods. It also arranged that Boyd would accept orders from Merchants' retailers which would be confirmed by the remittance of a Merchants' purchase order. The arrangement also was that Boyd would then bill Merchants for the goods delivered direct to the retailers, it being understood that Merchants would in turn bill the retailers for them at the same price plus a service surcharge.

6 And so Merchants and Boyd continued to do business for quite some time. Then a receiver was appointed by the court over the assets and undertaking of Merchants. When this occurred Merchants owed something close to half a million dollars to Boyd and in turn was owed a slightly greater sum by its retailers.

7 Boyd had no security for the moneys owed it by Merchants. It would therefore rank after the secured creditors in its entitlement to a share of what was realized in the receivership.

8 It was in these circumstances that Boyd advanced a claim to collect direct from the retailers the monies owed by them for the merchandise which had been supplied by Boyd. In particular, it sent to each of the retailers a letter in the following terms:

> We are recently advised that a Receiver has been appointed by the Court over the assets of Merchants Consolidated Limited.
>
> We understand that the Receiver has written to each customer and member of Merchants requesting that payment be made to Merchants for all direct shipments received by the customer *prior to* the appointment of the Receiver at 3:00 p.m. on August 9, 1988.
>
> We believe that we are entitled to the receivables generated through the Building Materials Division of Merchants for the goods shipped by us prior to the August 9, 1988 date. As you are aware, we call on you, receive orders from you, ship to you, but invoice Merchants. However, the ownership of the receivables may have to be settled through the Courts.
>
> Our records indicate that certain materials were shipped by us to you for which payment has not been received. Our records indicate that the amount owing is (*here was inserted the amount owing by the particular retailer to whom the letter was sent*) as per listing attached.
>
> In light of the receivership of Merchants, we hereby request that you remit payment of the said amount directly to us. If payment has already been sent to Merchants, kindly instruct the Receiver, Peat Marwick Limited, to forward those funds directly to us.
>
> In the event we are unsuccessful in defending our position in court, we will ensure that no further monies will be required to be paid by you against any invoice which you have paid directly to us.
>
> Obviously, we wish to continue our excellent relationship. We would very much appreciate your prompt attention to this matter.

9 Having considered all of the material evidence, Krindle J. concluded that Boyd had sold its merchandise to Merchants; that Merchants had resold it to its retailers; and that in consequence the monies owing by the retailers were properly payable to the receiver. There was evidence to support those findings, and we are not persuaded that there is any ground for interfering with that part of the judgment.

10 The much more difficult issue is whether Boyd was in contempt of court. The contempt alleged consisted of the letter sent to the retailers in which Boyd asked that the monies which the receiver had asked be paid to it be paid instead to Boyd.

11 The receiver acknowledges the trial judge to have been right in holding that contempt must be proved beyond reasonable doubt. It says, however, that the essential ingredients of the charge were so proved and that the learned trial judge erred in that she misunderstood the nature of the contempt and what were the essential ingredients of it.

12 The learned trial judge treated the alleged contempt as being of the order appointing the receiver. In fact, as counsel for the receiver correctly pointed out, the alleged contempt consisted of interference with the court-appointed receiver's administration of the property it had been appointed to protect.

13 It is well established that deliberate interference with a court-appointed receiver amounts to contempt of court: see, e.g.:

> (i) *Dixon v. Dixon* (1903), 73 L.J. Ch. 103 (K.B.), wherein Swinfen Eady J. said at pp. 103-104:
>
> ... any act that is calculated to destroy property under the management of the Court by means of a manager and receiver, and that is done deliberately, is an interference with the receiver, even although it may not involve the breaking, or attempted

breaking, of any contract. The object of the Court is to prevent any undue interference with the administration of property under the protection of the Court.

(ii) *Bottoms v. Pacific Northwest Lumber Co.*, [1929] 4 D.L.R. 415 (B.C. S.C.), wherein Murphy J. said (at p. 416):

But the possession of the receiver being the possession of the Court cannot be interfered with or disturbed without the leave of the Court. When the Court has appointed a receiver it will not allow the possession of the receiver to be disturbed by anybody however good his right may be but the party thinking he has a right paramount to that of the receiver ... must, before he can presume to take any steps of his own motion, apply to assert his right against the receiver — *Hawkins v. Gathercole* (1852), 1 Drew. 12, 61 E.R. 355.

(iii) *Canadian Imperial Bank of Commerce v. Trapper John's Restaurant Ltd.* (1984), 52 C.B.R. (N.S.) 28 (B.C. S.C.), wherein Proudfoot J. (as she then was) also quoting from *Hawkins v. Gathercole*, supra, held to the same effect.

14 The rule against deliberate interference with a receiver's possession equally applies where the receiver is appointed to receive sums of money and attempts are made to intercept them. Thus in *Ames v. Birkenhead Docks* (1855), 20 Beav. 332, 52 E.R. 630, the Master of the Rolls, Sir John Romilly, said (at E.R. p. 638):

There is no question but that this Court will not permit a receiver, appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive, by anyone, although the order appointing him may be perfectly erroneous; this Court requires and insists that application should be made to the Court, for permission to take possession of any property of which the receiver either has taken or is directed to take possession, and it is an idle distinction (which could not be maintained if it were attempted, which it is not by counsel at the Bar although suggested by the affidavits), that this rule only applies to property actually in the hands of the receiver. If a receiver be appointed to receive debts, rents, or tolls, the rule applies equally to all these cases, and no person will be permitted, without the sanction or authority of the Court, to intercept or prevent payment to the receiver of the debts, rents, or the tolls, which he has not actually received but which he has been appointed to receive.

15 The learned trial judge held that Boyd's honest belief in its own entitlement to collect the accounts receivable from the retailers was a complete defence. With respect, in so holding, she erred in law. Even if Boyd had eventually been found to have such entitlement, Boyd would not have had any defence. As the authorities to which I have referred make clear, even a person with a valid claim to property in the hands of the receiver is not entitled to interfere with the receiver's possession of it. The claim must be advanced through the court.

16 As is abundantly clear from the letter which it wrote to the retailers, Boyd well knew that the receiver had been appointed by the court; that it was authorized to take possession of Merchants' assets; and that it had asserted its claim to the accounts receivable in question. By suggesting to the retailers that they should ignore the receiver's request for payment and instead honour Boyd's, Boyd was guilty of contumacious conduct. Boyd's proper course of action was to apply to the court for an order declaring it to be entitled to the proceeds of the accounts receivable.

17 The third issue is the most difficult of all. Boyd's counsel submits, with some authority, that an interference with contractual relations can only be found where a breach of contract results. The receiver's counsel, on the other hand, submits that we should follow the dicta of Lord Denning M.R. in *Torquay Hotel Co. v. Cousins*, [1969] 2 Ch. 106 at 123, where he said (at p. 138):

The time has come when the principle should be further extended to cover "deliberate and direct interference with the execution of a contract without that causing any breach."

18 The trial judge did not attempt to resolve these conflicting submissions (assuming they were also made to her). Nor shall I. Counsel for the receiver concedes that the costs to which his client is entitled as a result of the finding of contempt cover the same loss as that for which damages would be payable for interference with contractual relations. It is therefore unnecessary for us to grapple with a complex issue, particularly when the facts of this case may not be the most suitable for its resolution.

19 We think the proper course — one to which the receiver's counsel raised no objection — is to follow the traditional rule that for the tort of interference with contractual relations to be made out there must be a resulting breach. The question of whether Lord Denning's extension of the rule should be applied here in Manitoba can then be left for determination to another day.

20 Save for one possible instance, which caused no loss, there was no breach of any retailer's contract with Merchants. For this reason, the judgment on this aspect of the case cannot stand.

21 There was one further point raised in the appellant's factum, but not pressed at the hearing. It was said that the learned trial judge erred in ordering Boyd to account to the receiver for moneys or goods received by it from retailers after August 9, 1988 (in respect of goods shipped directly to such retailers and received by them prior to the date and time of the appointment of the receiver) in circumstances where Boyd did not send an invoice to Merchants. We agree with the trial judge's disposition of this aspect of the case.

22 In the result, the appeal is dismissed save to the extent that Boyd was ordered to pay the receiver damages for its costs arising from the letter of August 23, 1988, addressed to the retailers. The appeal with respect to that part of the order is allowed and that part of the order set aside.

23 Additionally, the cross-appeal is allowed. There shall be an order declaring Boyd's letter of August 23, 1988, to be contumacious interference with the receiver. The order will also provide for the receiver to recover from Boyd its costs consequential upon the need for the receiver to reassert its lawful claim to the receivables. In view of an earlier order of severance, no evidence as to these costs was led at trial. An assessment must therefore be made by the Court of Queen's Bench if the parties cannot agree as to the amount.

24 Each of the receiver and the Royal Bank is entitled to be paid one set of costs in this Court by Boyd.

Appeal allowed in part; cross-appeal allowed.

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