

1984 CarswellBC 561
British Columbia Supreme Court

Canadian Imperial Bank of Commerce v. Trapper John's Restaurant Ltd.

1984 CarswellBC 561, [1984] B.C.W.L.D. 2001, 27 A.C.W.S. (2d) 21, 52 C.B.R. (N.S.) 28

**CANADIAN IMPERIAL BANK OF COMMERCE
v. TRAPPER JOHN'S RESTAURANT LTD. et al.**

Proudfoot J. [in Chambers]

Judgment: May 14, 1984
Docket: Vancouver No. C804570

Counsel: *R.G. Morgan*, for applicants.

H.G. Holloway, for Elias Winters and I.R.C. Food Equipment Ltd.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

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

Headnote

Receivers --- Possession of receiver --- General

Receivers — Court-appointed receivers — **Order** appointing receiver — **Contempt of order** — Unpaid vendor removing equipment from premises of purchaser in **receivership** — Receiver obtaining injunction for return of equipment — Equipment not returned — Vendor in **contempt of receivership order** and injunction.

An application was made to find two of the defendants in **contempt of a receivership order** and an injunction. W., one of the defendants, through his company, another defendant, sold restaurant equipment to the company in receivership. No security agreement was registered to secure the balance of the moneys owing, although W. knew that such a document had to be registered. After W. became aware of the appointment of the receiver, he arranged for the restaurant equipment to be removed from the restaurant premises by misrepresentation and intimidation. Ultimately the equipment disappeared. The receiver obtained an injunction order requiring the defendants to return the equipment to the receiver. No equipment was returned.

Held:

Application granted.

When a 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. Any party thinking he has a right paramount to that of the receiver or of the person who obtained the appointment of the receiver must apply to the court for leave to assert his right against the receiver before he can presume to take any steps of his own motion. Such a rule is absolutely necessary to enable the court to administer justice between parties. It is not competent for any person to take the law into his own hands and frustrate the proceedings of an established court.

Table of Authorities

Cases considered:

Hawkins v. Gathercole (1852), 1 Drew. 12, 61 E.R. 355 (V.C.) — *followed*

Mead, Re; Ex parte Cochrane (1875), L.R. 20 Eq. 282 (Eq.) — *applied*

Rules considered:

British Columbia Supreme Court Rules, R. 56.

Authorities considered:

Miller, C.J., Contempt of Court, pp. 218-20.

Application to find two defendants in contempt of receivership order and injunction.

Proudfoot J. (orally):

- 1 This matter came before me by way of a notice of motion, an application to find Elias Winters and I.R.C. Food Equipment Ltd. in **contempt** of a **receivership order** made 11th December 1980 by interference with the receiver's possession of certain equipment, and in **contempt** of an injunction **order** made by myself 22nd December 1982.
- 2 The matter has covered a number of days of hearing evidence, and unfortunately the case could not be concluded at the time. In this regard let me thank counsel for their review and summation of the evidence and their very thorough presentation of the law.
- 3 While I will go into some of the evidence, I do not propose to cover all the detail.
- 4 The application before me is made pursuant to [British Columbia Supreme Court] R. 56, and that rule is headed "Contempt of Court". Section 56(7) [of the Rules] re service of this motion has been complied with.
- 5 Winters is or was president, director and a shareholder of I.R.C. Food Equipment Ltd. He through the company sold some restaurant equipment to Trapper John's Restaurant at Salmo, B.C. I.R.C.-Winters did not register any document, i.e., conditional sales agreement or chattel mortgage, to secure the balance of the moneys due. Neither s. 15(1) of the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, nor s. 25, Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373, was complied with, notwithstanding that Winters knew he had to comply to secure his position.
- 6 Donald Henfrey was appointed a receiver of Trapper John's on 13th November 1980. This was an appointment by way of a debenture. On 11th December 1980 on application to Judge van der Hoop, Henfrey was appointed receiver-manager by court order.
- 7 A copy of that order was forwarded to the solicitor of I.R.C. Foods on 19th January 1981. Winters I am satisfied would probably have been informed some time later. However, be that as it may, there is no doubt that he spoke to Bigham about this matter in October 1982. He knew at that time. Finally he conceded on cross-examination that he was well aware prior to 7th November 1982 that Trapper John's was in a court-appointed receivership. Further confirmation came from Topley's evidence — he told him on 7th November 1982 when he spoke to Winters from the restaurant- motel in Salmo; Winters at that point still had the opportunity to withdraw from this escapade.

8 It might be useful to backtrack at this point. I.R.C. had obtained a consent judgment against Trapper John's on 8th September 1980. A garnishee proceeding was instituted by I.R.C. on 3rd September 1980. However, the latter procedure proved unsuccessful. Sometime prior to 7th November 1982 I am satisfied that Winters contacted one Bigham and asked Bigham to assist him "picking up some stuff from a restaurant that owed him some money", or words to that effect. Bigham agreed, and four other persons in addition to Bigham and Winters journeyed to Salmo. The party consisted of one Brian Brown, the Gruza brothers, Steve Carrier, Ken Bigham, and of course Winters. Winters was in charge was the evidence [sic], and that was conceded. Curiously this same group, with Winters in charge along with a number of others, had journeyed to Clinton in a similar escapade, but that mission proved unsuccessful, title to the goods apparently having been transferred — the goods in a truck had to be unloaded.

9 I accept Bigham's evidence when he stated that Winters said, "We might get some papers through on this job", etc. The inference is irresistible that Winters was going to make sure that the Salmo job would not fail. I suggest that is why this question of a "bailiff" arises and a "Writ of Seizure and Sale". Bigham's evidence was that the Gruzas and Carrier were "bikers", and he described their size and appearance, including their dress. There was some suggestion that these persons in a group could create an atmosphere of intimidation, which I suggest has some relevance in this scenario as was unfolded here.

10 On 7th November 1982, a Sunday, at approximately 1:00 p.m., Winters and his crew arrived at the restaurant, Trapper John's, in Salmo. This restaurant was part of a motel complex. Mrs. Lafreniere had been placed in charge by the receiver-manager as the "resident manager".

11 The evidence from Mrs. Lafreniere was that Winters introduced himself as a "bailiff" and showed her what he said was a court order to seize the equipment. I accept this evidence of Mrs. Lafreniere. This evidence concerning a bailiff and a seizure and sale order is confirmed by Constable Muckalt in his evidence, as well as by way of his notes, Ex. 1, and his occurrence report, Ex. 4. It is interesting in Ex. 4 the words "Seizure and Sale" are printed as are the words "Bailiff", "I.R.C. Foods" and the name of the lawyer "Gunnlaugson". There is absolutely no doubt in my mind that Winters represented himself to be a bailiff acting for I.R.C. Foods. There is further confirmation by Topley's evidence. There is no mistake here by all these parties; Mr. Winters simply is not telling the truth. Winters having had the problem previously was going to make sure that this time he would be successful. As a bailiff with a document, a writ of seizure and sale, he could be confident he could not be stopped. The call to the police was only for the purpose to make this whole transaction appear more credible.

12 The only other evidence of some significance is Winters testifying he felt he had permission from the R.C.M.P., and of course he felt he owned the goods.

13 Brown I believe in his evidence stated he saw no writ of seizure and sale. However, in Ex. 9 there are a number of references to "Seizure Papers". He also states in that statement that Winters presented himself to Mrs. Lafreniere "as acting on behalf of someone else and never told him he was actually involved with I.R.C.".

14 First, there is no evidence to suggest his misapprehension that the R.C.M.P. gave him permission; secondly, he well knew he had no legal right to those goods. However, I am giving him the benefit of the doubt as far as the latter point: his legal right to the goods. Topley gave him the opportunity to wait till Monday to resolve this question, but he was not prepared to wait. He knew what he was doing was illegal and wrong. Mrs. Lafreniere allowed them entrance because there was nothing else to be done. There was no point in having the door broke down, which I suggest this group was quite capable of doing.

15 These people came a long way and wanted to be paid. Some members of the party had money owing for previous work done. Winters himself was broke, as he put it. The decision had been made before 7th November 1982 "to get this stuff", and make some division of either the proceeds or the goods. Winters was not to be frustrated.

16 There is much evidence about the documents Winters had: the garnishee order, the judgment, the list of equipment. I suggest there was one more document which we have never had the opportunity to see. Muckalt did not refer in his notes to a "Garnishee Order", but clearly the court order, writ of seizure and sale. In Ex. 4, the reference was "Supreme Court Order for Seizure and Sale" — "the Order appeared valid" is in his report.

17 Winters was warned by Topley not to go in or take any goods. However, he finally stated Winters could take an inventory. This, however, was not good enough. The goods were loaded and brought back to Kelowna.

18 Bigham's brother had a warehouse and the goods were taken there. Not too surprisingly, the goods disappeared. Within a few days, according to Brown, Bigham was aware of this as well.

19 Winters, I am satisfied, was equally aware as a matter of fact. I am satisfied he authorized at least Brown, Bigham and Linmayr to take some of the goods. This was agreed, and everyone was, as prearranged, helping themselves.

20 Had this been a theft, Winters would have reported it as such, but indeed it was not. I suggest a further reason why the missing goods were not reported as stolen was because Winters well knew the illegality of this whole exercise.

21 Winters testified he wanted to hold the goods to negotiate with the bank — that is sheer nonsense. Winters never went near the bank at any time after, nor of course did he contact the receiver. No effort of any kind was made to sort out this mess. The goods all disappeared.

22 In summary on the receivership matter some time prior to 7th November 1982 Mr. Winters formulated a plan and organized the help of Bigham and a group of people to carry through this plan, to go to Salmo to pick up the equipment at Trapper John's. In order to succeed I find as a fact Winters held himself out as being a bailiff (which he was not) acting on behalf of I.R.C. Foods, and he had with him some documents allegedly empowering him to seize and sell the goods seized.

23 The goods were picked up, brought back to Kelowna; a substantial portion, if not all, were taken by the participants and sold.

24 The plaintiff has proved beyond any doubt the interference with the receivership order as made 11th December 1980. That interference is a clear contempt of that court order.

25 I refer here to the case of *Hawkins v. Gathercole* (1852), 1 Drew. 12, 61 E.R. 355 (V.C.), at pp. 357-58:

Now the question is, whether the act done by Mr. Carrack in procuring that sequestration amounts to a disturbance of, or interference with, the possession of the receiver. Now Mr. Carrack has done nothing more than in the ordinary course of legal process he was entitled to do, by virtue of a judgment which he had recovered against Mr. Gathercole; but it is quite clear that when this Court has appointed a receiver, it will not allow the possession of that 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, or rather to that of the person who has got the appointment of the receiver, must, before he can presume to take any steps of his own motion, apply to this Court for leave to assert his right against the receiver. That is a plain rule, and a very necessary rule; it is not a rule of arbitrary authority, but it is absolutely necessary, because if it were otherwise it would be impossible for this Court to administer justice between parties; and all inconvenience is entirely prevented from the circumstance that, upon application made to this Court, this Court will always take care to have justice done, and to give any party who has a right paramount to that of the receiver, or the party obtaining the receiver, the means of obtaining justice, and will even assist him in asserting that right, and of having the benefit of it. The question, therefore, that I have to consider is not whether Mr. Carrack in the abstract, as a matter of right and justice, had a right to issue the sequestration; unquestionably he had; but whether he has done anything without the leave of this Court, which has interfered with, or disturbed, or tends to disturb, the possession of the receiver.

Also there are two lines I want to read from *Re Mead; Ex parte Cochrane* (1875), L.R. 20 Eq. 282 at 286 (Eq.):

If that is the law, if a man (I will assume with a good title) were at liberty to turn the receiver out of possession, in my opinion the appointment of a receiver would, in a great many cases, be utterly fruitless.

There is one further passage:

If it is competent for any man in this country, where the law is administered I hope justly, so to take the law into his own hands, and frustrate the proceedings of an established Court, I think it would be a matter greatly to be regretted.

I find those passages most relevant, and I adopt them.

26 There is authority for the proposition that interference with the receivership, such as took place in the case at bar, is in actuality a criminal contempt. Certainly it is a premeditated plan, holding oneself out as an official, i.e., bailiff with a lot of power, and to take a court order, a writ of seizure and sale, is totally reckless, absolutely no intention of taking heed to anyone's advice, that what was taking place was not in order, a threat to break a door down and not even prepared to wait until Monday when titles could be examined — to me no set of circumstances could display a more reckless attitude or approach. From the outset Winters intended to succeed in this mission — nothing was going to stop him.

27 C.J. Miller in his text Contempt of Court, in c. 13 at pp. 218, 219 and 220 quite clearly states that interference with the possession of receivers, liquidators, etc., will constitute criminal contempt. The main requirement, that of knowledge of appointment, was clearly proved in the case at bar. Surely a criminal contempt occurred in the case at bar. I agree with Mr. Morgan that it probably does not make that much difference if civil or criminal in that the ultimate punishment should be the same and reflect the seriousness of the contempt. However, I repeat it would be difficult to find a set of circumstances more serious than those present in the case at bar, to arrive at any other conclusion than that a criminal contempt occurred.

28 Dealing now with the non-compliance with the injunction made 22nd December 1982, which ordered all the goods removed to be returned, all parties (that is, I.R.C. Foods and the six participants) were named in that order. A schedule was attached, but that list was not all-inclusive. The evidence is that Ray Gruza was served on 13th January 1983 with that order; Herbie Gruza on 26th February 1983; Ken Bigham 23rd February 1982; and Brian Brown 8th March 1983. Steve Carrier was not served.

29 There is much evidence relating to the difficulty of serving Winters. I.R.C. Foods was served on 17th January 1983 at 665 Lawrence, Kelowna, B.C., by leaving it with the receptionist at the registered office. Once again Winters probably had notice of that. However, Bigham testified that after he was served he spoke to Winters the first chance he got, about four or five days after. I accept that evidence. To me it would be a natural reaction on the part of Bigham to talk to Winters. He stated he told Winters the nature of the order and that all the parties, Elmer, Ray, Steve, Brian and himself were all on it. I agree with Bigham's conclusion, that obviously if he was talking to him, to Winters, he would know his name was on it, or words to that effect — "It was his deal that we were over there on", he said. Where Bigham's evidence is contradicted or varies with that of Winters, I prefer Bigham's. Mr. Winters's evidence was so totally unreliable, unbelievable, and so totally fabricated as to be totally unbelievable and unacceptable.

30 I have no difficulty in concluding that some time after Bigham was served, Winters had knowledge as to what was transpiring. If I am wrong in that conclusion I accept Spriller and Schulthers' evidence explaining that Winters was served finally on 6th May 1983, and how he was served, and there was no sealed brown envelope.

31 As for he not having any notice of this order prior to 11th October 1983, again that is simply not true.

32 Winters of course did not comply with the order. He argues he could not, that all the goods had disappeared. That again is totally misleading. He authorized at least Brown, Bigham and Linmayr to take goods for payment of moneys owing. He stated he removed some of the goods himself and placed them in a house he was building and says they were stolen. No theft was reported to the police from either the warehouse or the house he was constructing. No report was made because firstly he knew he had no authority in the first place to take those goods, and secondly, people were taking goods and he well knew it because they were owed money. It is of no assistance for Winters to plead to this court that everything was gone. There was nothing to deliver up. That was his own fault. Once he embarked on this whole illegal transaction the very least he might have done was to place the goods in a secure place until title could be resolved. He had no intention of doing that; he cannot then expect that plea to be successful before the court.

33 There was much more than carelessness on the part of Winters. He firstly authorized the persons to take goods, and second, he placed the goods in an insecure warehouse. He knew that more than the Bigham brothers and Brown had access. He contacted no one after he had the goods in an effort to straighten out this matter, and again no report was made to the police department.

34 In summary I find as a fact that Winters had knowledge of the presence of the court order approximately by the end of February 1983, and certainly was personally served on 6th May 1983; that he authorized persons to take goods and took some himself; that the goods were never stored in a secure place and, needless to say disappeared. Winters did nothing to prevent this because he was not concerned. The goods were obviously going to persons to which he had no objection, to people that he owed money. His inability to comply with the order was his own fault. He indeed was in contempt of the injunction order made 22nd December 1982.

35 There is one further aspect that requires comment. The defence argues that there has been much delay, and on that basis the plaintiff should not succeed. My answer to that is quite simple: The difficulty in getting Winters served caused the delay. Once served with the order, then an application must be commenced if there is non-compliance; that again has to be served. Rule 56(7) must be complied with. Thereafter a question of a hearing date is necessary. Four days were set aside in December 1983, but the matter was not completed at that time and had to be resumed Wednesday, 9th May 1984. That argument of delay is totally without merit.

36 I am satisfied beyond any doubt that Elias Winters and I.R.C. Foods Equipment Ltd. are in **contempt of the receivership order** made on 11th December 1980, and similarly that Elias Winters and I.R.C. Foods Ltd. are in **contempt of the injunction order** made 22nd December 1982.

Application granted.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.