Date of Release: August 19, 1992 No. C913340

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)	
)	
CANADIAN WESTERN BANK)	
)	
PLAINTIFF)	REASONS FOR JUDGMENT
)	
AND:)	OF THE HONOURABLE
)	
DANIEL J. McCRIMMON,)	MR. JUSTICE GOW
ED ROZING, ANGELO FACCONE,)	
BEN EUGENE FAST, HICHAM AL)	(IN CHAMBERS)
ACHKAR, MANFRED BOEHM and)	
SHIELDINGS INCORPORATED)	
)	
DEFENDANTS)	

Ms. Susan M. Eyre	Counsel for the Plaintiff
Mr. F.G. Potts and Mr. S. Mansfield	Counsel for the Defendants: McCrimmon, Rozing, Faccone, Fast, Achkar and Boehm
Mr. P. G. Guy	Counsel for the Defendant Shieldings Incorporated
Date and Place of Hearing	July 15, 1992 Vancouver, B.C.

The personal defendants apply for the following orders:

a) Pursuant to Rule 18A and 31(6) of the Rules of Court for judgment on the issue of whether the issuance of shares in Wagner Autohelm Corp. to the Plaintiff amounts, in law, to a mortgage or pledge granted by 368296 B.C. Ltd. to the Plaintiff and if so, whether sale of the said shares by the Plaintiff to Shieldings Incorporated extinguishes any debt of 368296 B.C. Ltd. to the Plaintiff or alternatively releases the guarantors of such debt, and for an

Order that the Plaintiff's claim herein by (sic) dismissed, or alternatively;

b) Pursuant to this Honourable Court's inherent jurisdiction that all proceedings in this consolidated action be wholly stayed pending the judicial resolution of the Plaintiff's claim in Supreme Court Action Number C911815 wherein the Plaintiff herein is Plaintiff and Shieldings Incorporated is Defendant, and;

c) Pursuant to Rule 19(24) of the Rules of Court on the ground that the pleadings and proceedings herein are an abuse of process in that they assert an inconsistent right from the right asserted by the Plaintiff in action number C911815 against the Defendant Shieldings Incorporated and as such these pleadings should be struck out;

d) Pursuant to Rule 18(A) for judgment on the issue of whether the pleadings herein assert an inconsistent right from those asserted by the Plaintiff in action number C911815;...

Wagner Engineering Ltd. for many years had been a successful British Columbia enterprise, particularly its Autopilot Division. By the summer of 1989 it had fallen on hard times and was doomed to go into receivership. The personal defendants had been skilled employees of Wagner in the Autopilot Division. They aspired to continue the business of the Autopilot Division. With the blessing of the Provincial Government, the following plan was put into effect. The Autopilot Division was sold to the newly incorporated Wagner Autohelm Corporation (Auto Helm). Autohelm had two owners, Shieldings Incorporated, an investment house, and 368296 B.C. Ltd. The former acquired a 60 per cent interest and the latter, a 40 per cent interest. 368296 B.C. Ltd. was incorporated in order to hold shares in Autohelm on behalf of the personal defendants. One thousand shares were issued, 600 to Shieldings and 400 to 368296. The Canadian Western Bank came into the picture as the lender of monies. Inter alia it lent $210,000 to 368296. To secure that loan the Bank obtained from each of the former employees, including the personal defendants, individual guarantees. It also obtained as security all the 400 shares "owned" by 368296. This was done on September 29, 1989 by allotment from Treasury to the Canadian Western Bank as the registered holder of 400 shares described as being shares of the company 357973 B.C. Ltd. (what the explanation of the discrepancy is I do not know). The share certificate was delivered to the Canadian Western Bank.

In addition, the Bank obtained from Shieldings the undertaking contained in the following letter dated September 29, 1989:

Re: 368396 B.C. Ltd.

Your Bank has agreed to provide loans to a maximum of $200,000 to the subject company, which is owned by former employees of Wagner Engineering. The purpose of the loan is to assist the employee group in acquiring a 40% interest in a new company, to be called Wagner Autohelm. The capitalization together with funds from our firm will be used to purchase assets from the Receiver of Wagner Engineering and provide an initial pool of working capital.

The Bank will obtain a pledge of the 40% shares being purchased by the employees.

We undertake, that in the event of default by 368296 B.C. Ltd. (the Borrower), Shieldings will purchase the shares from the Bank for the amount of the loan then outstanding, up to $200,000.

To what extent, if any, the existence of this letter and its contents were ever communicated to the personal defendants remains unclear but in his examination for discovery held on January 30, 1992 McCrimmon said:

It was my understanding that the Canadian Western Bank had a deal with

Shieldings where they would buy those shares, or the Canadian Western Bank could sell those shares, if we defaulted, for the total sum of $200,000 to anybody who they so pleased.

Unfortunately the Autohelm venture failed and the Bank sought to recover the monies lent to 368296. On January 2, 1991 its solicitors, Russell & DuMoulin, wrote Shieldings with a copy of the letter of September 29, 1989 and said:

Pursuant to the terms of the enclosed letter of undertaking, we hereby request on behalf of our client that you honour your commitment by purchasing from our client the shares which our client holds by way of security in Wagner Autohelm Corp. for the aggregate purchase price of $200,000.

No reply was received and on January 10, 1991 Russell & DuMoulin again wrote Shieldings demanding payment of the $200,000. Shieldings did not and has not complied and on January 29, 1991 the Bank commenced action No. C910815, Vancouver Registry. It filed its statement of claim on February 8, 1991 by which it claims the following relief:

(a) An order that the defendant purchase the Wagner Shares as aforesaid for the sum of $200,000 plus interest such amount from January 9, 1991;

(b) In the alternative, judgment against the defendant in the amount of $200,000 plus interest on such amount from January 9, 1991.

On May 7, 1991 the Bank commenced actions against the personal defendants upon their respective guarantees of the debt of 368296.

The action against McCrimmon is No. C913340 and on November 25, 1991 an order was made that the actions against the other personal defendants be consolidated with the McCrimmon action. On March 4, 1992 an order was made that Shieldings had status to be heard in the McCrimmon action and was added as a party defendant. It is in this McCrimmon consolidated action that Mr. Potts, on behalf of the personal defendants, has brought this application.

The application is based upon the allegation, found in paragraph 6 of Part I of the "Defendant's Written Argument and Supplemental Argument", that "C.W.B. has sold the security pledged by the Borrower to Shieldings, and that the debt owed by the Borrower is thereby extinguished."

Mr. Potts' argument was that the Bank, by commencing action for specific performance against Shieldings, necessarily held itself out, and continues to hold itself out, as the owner of the shares and as such owner ready, willing and able at all times to transfer the shares to Shieldings; that it could only have become such owner by "foreclosing", that is, taking the shares in satisfaction of the debt owed by 368296; that the Bank foreclosed when it commenced action against Shieldings; that the foreclosure extinguished the debt of 368296 and with that extinguishment the liability, if any, of the guarantors ceased.

At the outset of his skilfully presented argument, Mr. Potts stated that his core postulate was:

Where a lender takes shares from a debtor as security for a loan, in the absence of a contractual power of sale or a Court ordered sale, the lender's remedy in the event of default is to either retain the shares or sue for the debt but not both.

He conceded that if his postulate were not sound in law, the application must fail.

In the course of the arguments, the question was raised whether the shares had been mortgaged or pledged to the Bank. In the realm of personal property, there is a distinction between mortgage and pledge. That distinction is well described in Halsbury, 4th ed., Vol. 32, para. 412. For the purposes of the disposition of this application, perhaps the distinction is of no moment, nevertheless, upon the facts before me I find that there was by 368296 an equitable mortgage of the 400 shares, Treiber v. Lougheed (1968), 69 D.L.R. (2d) 676 at p. 680.

Mr. Potts' core postulate is indistinguishable from the principle described by Lawrence J. in Ellis v. Dixon-Johnson (1924), 1 Ch. 342 at p. 351:

The principle that a mortgagee will not be permitted to sue his mortgagor for the mortgage debt, if he has parted with the mortgaged property otherwise than in exercise of a power of sale or with the direct concurrence of the mortgagor, is far too well established to be questioned in this court. This principle is founded on the right which every mortgagor has to have a reconveyance of the mortgaged property, upon payment of the money due on the mortgage, and upon the duty with which every mortgagee is charged of making such reconveyance upon such payment being made... If a mortgagee, although unable to perform this duty, insisted on suing his mortgagor at law on the covenant, the courts of equity interfered in the mortgagor's favour;... The principle extends to the case where a mortgagee, having sold the estate after foreclosure, sues only for the difference between the debt and the price of the estate sold, because this would be obtaining the full amount of the debt taking the value of the estate as part, thus altering the nature of the contract between the parties.

The exception "otherwise than in exercise of a power of sale" is not, however, confined to a power by words expressly conferred by the mortgagor upon the mortgagee. The flaw in the position taken by Mr. Potts is not that his postulate is unsound but in his insistence that it is restricted to a power of sale by words expressly conferred by the mortgagor. Hence, his emphasis that "no hypothecation agreement or other documentation with respect to this portion of the transaction was entered into and no request for a power to sell the shares was made by C.W.B." (defendant's written argument, part 1, para. 3).

For long enough the law has been that:

The mortgagee of a personal chattel (when possession has been delivered to him), of stocks and shares, of a policy of insurance or other thing in action, has an implied power of sale as a legal incident of his security.

Fisher and Lightwood, Mortgages, 9th ed. (1977), at p. 359. See also the 1910 Canadian edition, 927 and 928.

In Deverges v. Sandeman, Clark (1901), 1 Ch. 70, Farwell J. held that where shares were mortgaged, the mortgagee had an implied power of sale. He pointed out at p. 73 that because of this implied power, express powers had not been necessary. His comments upon the history of express powers are to be found in Stevens v. Theaters Ltd. (1903) 1 Ch. 857 at p. 860. On appeal his decision in Deverges was affirmed, (1902) 1 Ch. 579, where at p. 588, Vaughan Williams, L.J., said:

In the present case there is no express power of sale, and we have, therefore, to ascertain whether or not there is, in the circumstances of this case, an implied power of sale.

That decision was discussed and applied by Sheppard, J.A., in Alce v. Higgins (1963), 41 W.W.R. 321.

In Ellis v. Dixon-Johnson supra the plaintiffs were stock brokers with whom the defendant had had for many years a speculative account. As security

for any debit balance which might from time to time be owing by him, the defendant had deposited with the plaintiffs the indicia of title to a number of investments, consisting of debentures, bonds and shares. The bargain between the defendant and the stock brokers was that they should each month render an account to him, that the balance shown by each account should be carried forward to the next account, but on payment of the balance he was entitled to have the shares restored to him. The stock brokers, without the consent of the defendant, sold the shares. They went into bankruptcy and the trustee in bankruptcy sued the defendant for the deficiency upon a final account. The point, then considered novel, was whether the principle, applicable to real property, that a mortgagee is not entitled to sue for the mortgage debt if he is unable to return the mortgage security, applied to investments as well. The defendant took the position that the special contract between him and the stock brokers excluded an implied power of sale and that their refusal, without any valid excuse, to return the shares, upon a proper tender of the amount due was a good defence to the action (at p. 346). Lawrence J. held that the principle that a mortgagee is not entitled to sue for the mortgage debt if he is unable to return the mortgage security (in the absence of a power to sell) applied but only in a modified form, namely, that as the value of the shares which had been sold was comparatively small in proportion to the total value of the investments pledged and the shares were easily purchasable, the defendant was not entitled to have the claim dismissed but in calculating what was owing by him, he was entitled to set-off the value of the shares as on the day when the shares ought to have been returned, namely, on the day when the balance was ascertained and became payable (at p. 356). The case went to the House of Lords (1925), A.C. 489 where it was held that the stock brokers could not have maintained an action for the debt if they were not in a position to hand over the shares against payment, and the trustee in bankruptcy had no higher right but that, in the special circumstances of the case, the order of Lawrence J. was correct.

Shieldings, which is vigorously contesting the action brought upon its undertaking, takes the position that there has been no sale to it and, in any event, under s. 182 of the Bank Act the Bank has a power of sale. That section reads:

182. Securities acquired and held by a bank as security may, in case of default in the payment of the loan, advance or debt or in the discharge of the liability for the securing of which they were so acquired and held, be dealt with, sold and conveyed, in like manner as and subject to the restrictions under which a private individual might in like circumstance deal with, sell and convey the same, and the right to deal with and dispose of securities as provided in this section may be waived or varied by any agreement between the bank and the person by whom the security was given. 1980-81-82-83, c. 40, s. 2 "182".

The Bank takes the position that the application, even if it had some merit (which is not conceded), is premature and will remain so until the issue of the Shieldings undertaking, with its many ramifications, has been decided; furthermore, that there has been no sale. The Bank also submits that by the very express terms of his guarantee, each personal defendant is barred from objecting to any sale of the shares by the Bank to Shieldings.

The guarantees contains a provision that the guarantor agrees with the Bank that it may:

...otherwise deal with, the customer and others and with all securities as the bank may see fit.... The whole without in any way limiting or lessening the liability of the undersigned under this guarantee and no loss of or in respect of any securities received by the bank from the customer or others, whether occasioned by the fault of the bank or otherwise, shall in any way limit or lessen the liability of the undersigned under this guarantee.

It seems to me that s. 182 of the Bank Act simply bestows upon a bank the

power to sell which it might have if it were a private individual. In any event, upon the evidence, I find that the Bank as mortgagee of the 400 shares of 368296 acquired an implied power of sale as a legal incident of the mortgage and entitled, upon the default of 368296, to sell the shares. I find, therefore, that the Bank has not "foreclosed".

But the implied right of a mortgagee to sell the security is not without conditions. "This right is exercisable on non-payment on the day fixed for payment, or, where no day has been fixed, after a proper demand and notice and the lapse of a reasonable time." Fisher and Lightwood op. cit. at p. 359. A sale may, therefore, be wrongful if the right to sell has been improperly exercised. In the context of this application, two issues, therefore, arise. Has the Bank sold the shares to Shieldings? - if yea, was its right to sell improperly exercised?

To a sale of a chose in action of the species shares in a company, rules applicable to a sale of goods do not necessarily apply. The common law concept of a "bargain and sale" by which the right of property in goods is transferred although the goods are not delivered (s. 23(2) Sale of Goods Act) seems to be confined to possessory personal chattels. I refer to the erudite historical excursus by Fry, L.J. in Cochrane v. Moore (1890), 25 Q.B.D. 57. The common law in the matter of shares seems to be otherwise. "As from the time of contract of sale the equitable or beneficial interest in the shares passes to the purchaser, and the vendor holds the legal title as quasi-trustee for the purchaser. The purchaser does not obtain the legal or complete title until his name is entered on the register of members." Charlesworth and Morse on Company Law (14th ed. 1991) at p. 289.

The evidence before me is that the share certificate is still in the possession of the Bank. There is no evidence of the execution of any transfer or what the articles of 368296 have to say about the transfer of its shares (s. 58 Company Act).

Also to be determined is the issue whether the Shieldings undertaking of September 29, 1989 created a contract for the sale of the shares by the Bank to Shieldings. As the issues of the construction of and the effect, if any, to be given to the Shieldings undertaking will be before the trial judge, it would be impious of me to trespass upon his territory. Nor do I tarry to consider whether any of the provisions of the Personal Property Security Act are applicable.

On the whole of the evidence before me, I am, within the meaning of Rule 18A(5), unable to find the facts necessary to decide the issues whether there was a sale of the shares by the Bank to Shieldings or, if yea, whether the Bank wrongfully exercised its implied right to sell. Accordingly, the application is refused and I order that all issues, to the extent not disposed of by me, be determined at trial. Costs are in the cause.

It was suggested that if the application failed that I should direct a stay of the trial of action No. C913340 until the trial of action No. C910815 (the Shieldings action). The order of Master Patterson made November 25, 1991 provides:

THIS COURT FURTHER ORDERS THAT THE consolidated action (C913340) be tried at the same time as Supreme Court Action Numbers C910815 and C910342, in which latter actions the Canadian Western Bank is the Plaintiff and Shieldings Incorporated is the Defendant and which latter actions are presently set for trial commencing October 26, 1992.

THIS COURT FURTHER ORDERS that the trial of the said matters be subject to the sole direction of the trial judge and recommends to such trial judge that Action Number C910815 and C910342 be tried prior to the hearing of

consolidated Action Number C913340.

I need say no more.

"J.J. Gow, J."

July 31, 1992

Victoria, British Columbia