

NOVA SCOTIA COURT OF APPEAL

Citation: *ITI Education Corporation (Re)*, 2002 NSCA 152

Date: 20021129

Docket: CA 179966

Registry: Halifax

In the Matter of: ITI Education Corporation

- and -

In the Matter of: The Application of TORSTAR CORPORATION to appoint Ernst & Young Inc. as Receiver and Manager pursuant to Civil Procedure Rule 46

- and further -

In the Matter of: The Application of Roswell Computer Books Halifax, Ltd. for an Order granting leave to Roswell Computer Books, Halifax, Ltd. to commence proceedings against Ernst & Young Inc., for an Order requiring Ernst & Young Inc. to comply with provisions of Section 81.1 of the *Bankruptcy and Insolvency Act* (1985), R.S.C., c. B-3; (1992) c. 27

Judges: Roscoe, Cromwell and Oland, JJ.A.

Appeal Heard: November 29, 2002, in Halifax, Nova Scotia

Written Judgment: December 3, 2002

Held: **Appeal allowed per oral reasons for judgment of Cromwell, J.A.; Roscoe and Oland, JJ.A.**

Counsel: Charles J. Ford, for the appellant
Alexander S. Beveridge, Q.C., for the respondent

Reasons for judgment:

[1] This is an appeal by a supplier from the refusal by MacDougall, J. of an order requiring the receiver to release goods to the supplier pursuant to s. 81.1 of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3, as amended.

[2] The single issue is whether the judge erred in finding that the goods were “subject to [an] agreement for sale at arms’ length” at the time the supplier presented a written demand for repossession.

[3] The goods in issue were books supplied to ITI as course materials. ITI was obliged by its contract with its students “... to provide, at its discretion, textbooks and courseware needed for the program...” and the students acknowledged that “... it is necessary for ITI to change ... materials ... from time to time” and that such changes “... may be made during the course of the student’s program.” ITI intended to use the books which had been supplied for a module starting at the end of August, but they had not been distributed to the students and remained on the shelves at ITI as of the date of the receivership and the supplier’s written demand in mid-August.

[4] The judge held that once ITI had decided what course materials it would use, there was a binding contract to supply those very materials to the students. He found that ITI had selected the books in issue here and that, therefore, the books delivered to ITI were subject to an agreement for sale to the students.

[5] In our view, the judge erred in law in so holding. ITI retained a discretion under its contract with its students as to what course materials it would supply. The fact that it intended to supply certain materials did not give rise to a contractual obligation to provide those particular materials. It follows that, as of the date of the supplier’s demand, these books were not “subject to any agreement for sale” within the meaning of s. 81.1(1)(c)(v) and that the judge erred in finding otherwise.

[6] Leave to appeal is granted, the appeal is allowed and an order will issue directing return of the goods or payment of their value. Counsel for the appellant will prepare the order for review by counsel for the respondent and submission to the Court. The respondent shall pay to the appellant costs fixed at \$1500 inclusive of disbursements.

Cromwell, J.A.

Concurred in:
Roscoe, J.A.
Oland, J.A.