

**Date: 2001101**  
**Docket: S. H. 165537**

**IN THE SUPREME COURT OF NOVA SCOTIA**  
[Cite as: *Aliant Telecom Inc. v. 3007620 Nova Scotia Ltd.*, 2001 NSSC152]

**BETWEEN:**

**ALIAN T TELECOM INC.**

**PLAINTIFF**

**- and -**

**3007620 NOVA SCOTIA LIMITED, carrying  
on business as “Tallships Internet”**

**DEFENDANT**

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**D E C I S I O N**

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**HEARD BEFORE:**      **The Honourable Justice Walter R. E. Goodfellow in the  
Supreme Court of Nova Scotia on October 29<sup>th</sup> and 30<sup>th</sup>,  
2001**

**DECISION:**            **October 31<sup>st</sup>, 2001 (Orally)**

**WRITTEN RELEASE  
OF ORAL:**            **November 1<sup>st</sup>, 2001**

**COUNSEL:**            **D. Blair Pritchett, Solicitor for the Plaintiff  
Derrick Zinck, Personally for the Defendant**

**GOODFELLOW, J.: (Orally)****BACKGROUND**

[1] Aliant Telecom Inc. is the successor via amalgamation of Maritime Tel & Tel Ltd.. Donald Eisner who passed away December 30<sup>th</sup>, 1998 was married to Joan C. Eisner in December, 1985. At the time of their marriage, he owned and operated Lunenburg Print which existed until 1998. Mr. Eisner was in a number of partnership and business arrangements and in 1995 became the ISIS of Halifax, internet provider of service for South Shore. Effectively, his business was ISIS South Shore. It provided internet connection through the telephone that did not require long distance. Some time in 1996, ISIS was bought out by Hookup Ontario which discontinued ISIS South Shore. Donald Eisner needed another backbone or pipeline and went with ISTAR. Mrs. Eisner indicates this was in the fall of 1996 and Donald Eisner changed the name to Tallships with the web site [www.tallships.istar.ca](http://www.tallships.istar.ca) and this affiliation lasted until the fall of 1998 when ISTAR was bought out by PSI Net, an American net company which did not wish to involve itself with any affiliates and at this time Donald Eisner went on his own. The main concerns were the technical support for internet service and it required the change of a new backbone or pipeline and Donald Eisner switched the backbone or connecting service through Maritime Tel & Tel. In the Spring of 1997, 3007620 Nova Scotia Limited was incorporated and 1998 "Tallships Internet" was registered October the 17<sup>th</sup>, 1997 as an internet service provider owned by the Company. On Donald Eisner's death, Joan C. Eisner obtained all of the shares which had previously been exclusively in Donald Eisner's name and she became effectively the owner, president and a recognized agent of 3007620 N. S. Ltd. In June of 2000, Joan C. Eisner sold all her interest in 3007620 Nova Scotia Ltd. to Derrick Zinck of Kentville, Nova Scotia and on transfer of ownership, Mr. Zinck became the sole shareholder, director, officer and recognized agent of the Company and "Tallships Internet".

**PLAINTIFF'S CLAIM**

1.	Account No. 22198113	\$6,197.37
2.	Account No. 24769648	5,733.48
3.	Account No. 25377169	38,178.94
4.	Account No. 30604284	23.58
5.	Account No. 300-9566	<u>50,204.61</u>

TOTAL \$100,337.98

- [2] The evidence at trial established:
1. Account No. 22198113. This account included regular business telephone numbers, as well as telecommunications support required to allow Tallships Internet customers not located in Bridgewater to have a local number from which “dial-up” internet access could be obtained.
  2. Account No. 24769648. This account provided the network access and telecommunications support necessary to allow Tallships Internet, based in Bridgewater, Nova Scotia, to provide internet access to Soldiers Memorial Hospital, a client located in Middleton, Nova Scotia.
  3. Account No. 25377169. This account provided Tallships Internet with access to the world internet, which could then be resold to its customers.
  4. Account No. 30604284. This account was for one local data channel, which allowed a Bridgewater based customer of Tallships Internet to have a direct link from their offices to the Tallships Internet router in Bridgewater, Nova Scotia.
  5. Account No. 300-9566. This account provided Tallships Internet with access to the world internet which could then be resold to its customers. It served essentially the same functions as Account No. 15377169. Account 300-9566 became active in late 1998.

**INVOICE INTEREST**

- [3] Aliant claims interest on its invoices at the rate of 1.5 percent per month, an effective rate probably in excess of 18 percent per annum.
- [4] There is no evidence before me that the invoice interest was a term of the contract between the parties nor has there been any evidence to show unequivocally that such was a trade practice known and accepted by the defendant. In *Robb (K.W.) & Associates Ltd. v. Wilson* (1998), 169 N.S.R. (2d) 201 (C.A.) Hallett, J.A. stated at p. 217:

I agree with Justice Goodfellow's remarks in *Tannous v. Halifax (City)* (1995), 145 N.S.R. (2d) 13; 86 A.P.R. 13 (T.D.), at p. 32:

“...however, modern practice is for almost all commercial accounts to have some reference to interest on overdue balances stated on invoices. The mere statement of an interest term on an invoice by itself raises no legal obligation for payment of such interest, and the Taxing Master was correct in declining any award of invoice interest.

In short, the mere presence of a statement on an invoice that interest is claimed at a particular rate, standing alone, is an insufficient basis to warrant a finding that the debtor is obliged to pay interest; there must be something more in the course of dealings between the parties. If a debtor, for instance, has paid interest on prior accounts this could indicate an agreement to the payment of interest on overdue accounts. As a general rule, a court should be slow to imply a term in a contract and this is recognized by the general principle of law that I have set out.

See also *Charles Hardy Appraisals Limited and Ancaster Holdings Limited*, 1993-94, unreported, April 29, 1994.

**REDUCTION IN ACCOUNT FOR INVOICE INTEREST POSTED**

1.	Account No. 22198113	\$ 6,197.37	
		- 56.92	
		- <u>56.36</u>	
			\$ 6,084.09
2.	Account No. 24769648	\$ 5,733.48	
		- 56.77	
		- <u>56.21</u>	
			\$ 5,620.50
3.	Account No. 25377169	\$ 38,178.94	
	(adjusted by Aliant to .....)	\$ 37,893.00	
		- 378.01	
		- <u>374.27</u>	
			\$37,140.72
4.	Account No. 30604284		23.58
5.	Account No. 300-9566		\$50,204.61
		<b>TOTAL</b>	<b><u>\$99,073.50</u></b>

[5] I find as a fact that on two of these accounts payments were made after the agreement and transfer of 337620 Nova Scotia Limited, carrying on business as "Tallships Internet" to Mr. Zinck and have been credited. These accounts are Tallships 300-9566 and Tallships 22198113. It looks also as if a payment was made on Tallships 30604284 post the agreement and transfer and credited. Given the fact that Mrs. Eisner was out of her league

attempting to run the company, was anxious to dispose of it and sever all relationship with the business, I can only infer that Mr. Zinck made payments after his acquisition of the business as a going concern.

- [6] I am completely satisfied that whatever payments were made post the 22<sup>nd</sup> of June, 2000 Agreement, they have been credited and are reflected in the amounts claimed.

### **ADDITIONAL FINDINGS OF FACT**

- [7] Prior to the acquisition of 3007620 Nova Scotia Ltd., carrying on business as “Tallships Internet”, Mrs. Eisner, then president and sole owner and recognized agent, totally and completely complied with the requirements of the agreement of the 26<sup>th</sup> of June, 2000 with Derrick Zinck and in particular,

### **Article 3 - Conditions Precedent to Closing**

**3.01** The obligations of Zinck to complete the purchase of the Shares shall be subject to fulfilment at the time of Closing of each of the following conditions, which are included for the exclusive benefit of Zinck and may be waived in whole or in part by Zinck at any time:

- (f) on the Closing Date, Eisner shall provide to Zinck the following documentation for his review:

- (i) copies of all accounts receivable and payable;
  - (ii) all employee files including present rates of pay and current resumes for all current employees;
  - (iii) all client files and lists;
  - (iv) all tax returns;
  - (v) all contracts or leases between Tallships and any other individual, corporation or organization;
  - (vi) Tallships' company minute book, corporate seal and corporate files;
  - (vii) all information and documentation with respect to the dispute between Tallships and MTT;
  - (viii) all keys, computer access codes, server administrative passwords and login information; and
  - (ix) a backup disk of all electronic information.
- (g) prior to closing, Zinck shall have an opportunity to investigate the records, property and assets of Tallships;
  - (h) Eisner shall obtain any necessary consents required to transfer any lease or contracts of Tallships to Zinck; and
  - (i) Eisner shall insure that reasonable insurance is kept in place until the Closing.

[8] I accept Mrs. Eisner's evidence of total compliance and that Mr. Zinck attended on a number of occasions at the Company's offices prior to closing to satisfy himself with respect to these matters and was given full, complete

and total access to all relative material and most particularly, copies of accounts receivable and payable outstanding.

- [9] I accept the evidence of Mrs. Eisner that during the period of negotiation leading up to the 22<sup>nd</sup> of June, 2000 Agreement with Derrick Zinck, that Mr. Zinck was fully made aware of the indebtedness to Aliant and he advised Mrs. Eisner that he really felt he could work out some payment schedule with Aliant for the indebtedness.
- [10] Mrs. Eisner, in addition to providing all available documentation, specifically advised Derrick Zinck of the indebtedness to Aliant, she believed in the approximate amount of \$85,000.00. She indicated a level of frustration because she did not understand the accounts. In addition, she had remembered a statement by her deceased husband that when he was switching to Aliant for a portion of the business requirements, that it was going to result in a reduction from \$1,700.00 per month of approximately \$100.00 to \$150.00. I am further satisfied and find as a fact the evidence of Gary White establishes clearly that what was being referenced here is the reduction from \$1,700.00 per month to \$1,595.00 per month for that portion of the services as:



1. BUS INTERNET @ \$1,595.00

[11] Aliant has established above the threshold of the balance of probabilities that the accounts existed at the time of the transfer to Mr. Zinck and that all outstanding credits due have been made. In particular, I accept Mr. White's evidence that although Mrs. Eisner did not have any written record, nor was Aliant able to find any written record warranting an adjustment, nevertheless for good customer relations and competitive reasons, Aliant accepted representations from her resulting in the credit to account #25377169 on March the 22<sup>nd</sup>, 2000 of \$16,151.94, plus tax of \$2,422.79 for a total credit of \$18,574.73, which is set out on Ms. Craig's spreadsheet under date the 31<sup>st</sup> of March, 2000.

[12] All the accounts were business accounts of the Defendant Company and that whenever an account was addressed to either Ms. Eisner or Ms. Eisner, c/o of "Tallships", this was only sent to her as the contact person. The account was clearly that of the business and known to be such by Mrs. Eisner and Mr. Zinck. These accounts all came about by verbal agreement, followed by a history of payment over a period of time for services ordered by the Defendant Company and received by them.

[13] The contracts were verbal, however, in order to secure a discount for the Defendant Company, Aliant required a written contract as relates to the HyperStream contract. Mr. White sent out such a contract by letter May the 22<sup>nd</sup>, 1998 to the late Mr. Eisner and again June the 30<sup>th</sup>, 1998 and I find that neither were actually executed by “Tallships”. Nevertheless, contrary to Aliant policy, presumably on the belief that such would be executed, the appropriate discount was provided to the Defendant Company. It actually received a benefit that it ought not to have received without having executed the specific contract.

[14] Derrick Zinck entered into the Agreement of the 26<sup>th</sup> of June, 2000 to purchase 3007620 Nova Scotia Ltd., carrying on business as “Tallships Internet” as a going concern and acquired all of its assets and liabilities and had full knowledge of such at or prior to entering this Agreement.

[15] In *Whiteway v. Courtland Prop. Inc.* (1997), 162 N.S.R. (2d) 161 (N.S.S.C.) at para 15:

The Nova Scotia Supreme Court, Appeal Division, in *Avco Financial Services Ltd. v. West and Steele* (1979), 32 N.S.R. (2d) 192; 54 A.P.R. 192 (C.A.), addressed the burden of proof on the plaintiff. Cooper, J.A., at page 196, paragraph 6 stated:

I address myself first to the burden of proof which rested upon Avco as the plaintiff in the action. I respectfully adopt what was said by Chief Justice Cowan of the Trial Division of this Court in *Royal Bank of Canada v. Kirk Patrick et al* (1977), 20 N.S.R. (2d) 458; 27 A.P.R. 458, at p. 468:

With regard to the burden of proof that the transfer of the property in question was made with intent to defeat, hinder, delay or prejudice the plaintiff creditor, it is clear that, if the effect of the transfer might be expected to be, and has, in fact, been to defeat, hinder, delay, or prejudice the creditor, the court will attribute the fraudulent intention to the settlor ...

...The burden of proof is on the Ms. Whiteway to prove on a balance of probabilities that the conveyance was made with the intent to defeat, hinder, delay or prejudice a creditor.

[16] The evidence of Derrick Zinck given on Discovery and read into the record as part of the Aliant's direct case clearly establishes well beyond a balance of probabilities the conveyance/transfer of the client list to a new Company controlled by Mr. Zinck was deliberate with the clear intent to defeat, void and prejudice Aliant as a creditor. The scheme entered into by Mr. Zinck had only one purpose, namely, an attempt to avoid payment to creditors so as to permit Mr. Zinck, through his purchase of the Company and "Tallships Internet" as a going concern, to retain the major asset, the client list, some equipment and some accounts receivable, leaving the creditors, including Aliant, out in the cold. The evidence clearly establishes that Mr. Zinck in

acquisition of the Company and “Tallships Internet” initially hired no new employees, then incorporated 2163818 Nova Scotia Limited and began the operation of “Tallships On-Line” using the client base secured through his Agreement. The transfer to 2163818 N. S. Ltd. was made without any Purchase or Sale Agreement, clientele have all been transferred to “Tallships On-Line”, some of the employees were rehired, clients on the “Tallships Internet” list were not given any notice of change but simply had their bills changed to “Tallships On-Line, no consideration passed between the Defendant and the new Company, carrying on business of “Tallships On-Line” for the transfer of the client base.

- [17] I find that all of the requirements of the *Assignment and Preferences Act* have been met and in addition, the Plaintiff has met the prerequisites of the *Statute of Elizabeth*. With respect to the application of the *Statute of Elizabeth*, Aliant has established:
- (1) the conveyance/transfer was without valuable consideration.
  - (2) the Defendant had the clear intention to delay or defeat Aliant.
  - (3) that the conveyance or transfer of the client list clearly had the effect of delaying or defeating Aliant.
- [18] In the past it has been held that a Plaintiff must first obtain a Judgment against a debtor prior to commencement of proceedings to set aside a

transfer of conveyance under the *Statute of Elizabeth*. In *Shah v. Jesudason* (1999), 177 N.S.R. (2d) 162 (N.S.C.A.) after re-stating Justice Hallett's three part test, Pugsley, J.A. wrote at para 34:

Counsel for the appellant pointed out that there is a substantial amount of authority from academia, as well as courts in other provinces, stipulating that a person attempting to set aside an allegedly fraudulent conveyance pursuant to the *Statute of Elizabeth* need not have a judgment in hand, at the time of the impugned conveyance, nor even at the time the action is commenced, in order to be successful. Dunlop, *Creditor-Debtor Law in Canada*, (2d), Carswell (1995) 619; *Hopkinson v. Westerman* (1919), 45 O.L.R. 208 at p. 210 (Ont. C.A.); *McGillan v. McGillan* [1947] 4 D.L.R. 456 at 458 (N.B.C.A.)

In my opinion, it is not necessary to decide this issue for the purposes of this appeal.

[19] In my view, it is no longer necessary or appropriate to require a Judgment in hand to impugn a transfer or conveyance. Such a requirement has an impact of adding unnecessarily to the litigation process requiring in effect two lawsuits. This provides a fraudulent debtor with a continuing opportunity to hinder the creditor's ultimate recovery. What is necessary, in my view, is the Court to be satisfied that a valid debt exists before proceeding with the issue of setting aside a fraudulent conveyance. In other words, within the same action the Court must first address the entitlement to Judgment before addressing the setting aside of a conveyance or transfer and I have done so in this case.

[20] I accept Mrs. Eisner's evidence that over the years her husband had built up a client base from approximately 150 to close to 600 clients at the time of the sale of the business a going concern to Derrick Zinck. Subsequent to the entry into the Agreement, Derrick Zinck deliberately, willfully and with an intent to avoid payment to Aliant, incorporated a new Company and purported to transfer the major, if not sole asset of 3007620 N. S. Ltd. "Tallships Internet" customer base or list to his new Company and carried on business utilizing this asset under a new registration of "Tallships On-Line". If it were necessary to conclude Aliant was required to establish beyond a reasonable doubt fraudulent conduct to defraud by avoidance, then I would have had no difficulty making such a finding of fact.

### **PRE-JUDGMENT INTEREST**

[21] Pre-judgment interest is mandated by the *Judicature Act* and simple interest is allowed at the rate of five per cent per annum. The starting date for each of the accounts is as follows:

1. "Tallships" 22198113 - September 12<sup>th</sup>, 2000
2. "Tallships" 24769648 - June 30<sup>th</sup>, 2000

3. “Tallships” 25377169 - June 31<sup>st</sup>, 2000
4. “Tallships” 30604284 - September 15<sup>th</sup>, 2000
5. “Tallships” 300-9566 - September 30<sup>th</sup>, 2000

## **COSTS**

[22] I have now heard the parties with respect to costs and disbursements. The “amount involved” is in this case the amount recovered. It does not, however, include prejudgment interest which is mandated by the *Judicature Act*. The fact that Mr. Zinck represented himself does not in itself raise any issue as to costs and as I am satisfied that from the point when he took over the conduct of the file from his previous solicitor he has not conducted himself, including during the trial, in any manner that was unreasonable or in any way gives rise to consideration of additional costs. *Gilfoy et al. v. Kelloway et al.* (2000), 184 N.S.R. (2d) at 226.

[23] I am now advised that the Plaintiff made a CPR 41(A) Offer to Settle of \$55,000.00 October the 4<sup>th</sup>, 2001 which invokes CPR 41(A).09(1). The amount involved, \$99, 073.50, in accordance with Scale 3, Tariff A, is \$7,325.00. I accept counsel’s estimate that two-thirds of the work required

pre-dated the Offer to Settle. Prior to settlement, the parties had extensive work, including two full days of Discoveries. Applying the failure to accept adds \$2,441.00 for total costs, tax allowed, in the amount of \$9,766.00. I have been provided with an Affidavit showing the total disbursements incurred of \$2,334.32. This includes disbursements for administrative charges, substantial xeroxing costs, postage, faxes, etcetera, and a number of these items would be outside the realm of party and party disbursements and the amounts would be subject to reduction. Erring on the side of the Defendant, I reduce the disbursement claim and tax and allow it at \$1,334.32. See *Wyatt v. Franklin* (1993), 123 N.S.R. (2d) 347.

## **RELIEF**

[24] Aliant is entitled to its Judgment for \$99,073.50 pre-judgment interest, costs and disbursements as taxed. It is also entitled to a Declaration that the transfer of the client list from 3007620 Nova Scotia Ltd., carrying on business as “Tallships Internet” to 2163818 Nova Scotia Ltd., carrying on business as “Tallships On-Line” is void as against Aliant Telecom Inc. The Defendant is required to secure the return of the client list and a full accounting for its use from the date of the fraudulent transfer and in



addition, a full a complete accounting of any funds paid on accounts receivable of “Tallships Internet” to 2163818 Nova Scotia Ltd.

[25] Mr. Zinck, the only advice the Court can give you is that you should obtain counsel to review this matter and possibly avoid further unnecessary costs.

J.