

**IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY**
Citation: Robie Financial Inc. v. Pye, 2009 NSSC 397

Date: December 22, 2009
Docket: B 33527
Registry: Halifax

District of Nova Scotia
Division No. 01-Halifax
Court No. 33527
Estate No. 51-1198349

Between:

Robie Financial Incorporated

Applicant

- and -

**PricewaterhouseCoopers Inc., Trustee in Bankruptcy of
Barry Kevin Pye**

Respondent

DECISION

Registrar: Richard W. Cregan, Q.C.

Heard: October 2, 2009

Counsel: Robie Financial Incorporated represented by
Joseph McNally

PricewaterhouseCoopers Inc. represented by
Joshua Santimaw

Background

- [1] This is an appeal by Robie Financial Incorporated (Applicant) of the disallowance of a claim as a secured creditor by PricewaterhouseCoopers Inc., the Trustee of the estate in bankruptcy of Barry Kevin Pye.

- [2] On May 15, 2008 Sunset Auto Sales Ltd. (Sunset) leased an all terrain vehicle (Vehicle) to Mr. Pye. On March 19, 2009 Sunset assigned the lease to the Applicant which proceeded to register a financing statement pursuant to the *Personal Property Security Act*, S.N.S. 1995-96, c.13 (PPSA) under the name “Pye, Barry” and the Vehicle’s serial number “4XALH46A18A268016”.

- [3] A search of the PPSA registry under the name “Pye, Barry” identifies the financing statement registered by the Applicant under Reg. No. 15065261. A search using the serial number identifies the same financing statement.

- [4] A search made on October 1, 2009 using the search criteria “Pye, Barry Kevin” gives no results.

- [5] S. 44(1) of the PPSA directs that a financing statement may be registered in accordance with the Regulations under this *Act*.

Regulation 19(1) provides:

Where the debtor is an individual, the registrant shall enter, under the heading “Debtor (Enterprise)”, the name, in the manner provided under Section 20, and address of the debtor.

- [6] Regulation 20(1) provides:

Where the debtor is an individual, the registrant shall enter the last name followed by the first name followed by the middle name, if any, of the debtor.

- [7] As in some other provinces, the registration system in Nova Scotia is programmed to automatically disclose both exact and near matches of names and serial numbers on a search result.

Issues

- [8] The first issue is whether the failure to register the bankrupt’s full name “Pye, Barry Kevin”, as required by Regulation 20 (1), is fatal to the security provided by the PPSA; that is, whether the security is unperfected and thus not effective against the Trustee, by operation of Section 21(2)(a) of the PPSA.

[9] The second issue is whether, if the security is unperfected, the trustee, following the principle of promising estoppel, is estopped from denying the Applicant's security because of a representation alleged to have been made by an employee of the Trustee to the Controller of the Applicant that a release would be provided by the Trustee to enable the Applicant to dispose of the Vehicle. The Applicant did in fact dispose of the vehicle for \$5,500.

First Issue

[10] The determination of the first issue requires a careful analysis of the following portions of Section 44 of the PPSA:

44(7) The validity of the registration of a financing statement is not affected by any defect, irregularity, omission or error in the financing statement unless the defect, irregularity, omission or error is seriously misleading.

(8) Subject to subsection (10), a registration is invalid if there is a seriously misleading defect, irregularity, omission or error in

(a) the name of any of the debtors required to be included in the financing statement other than a debtor who does not own or have rights in the collateral; or

(b) the serial number of the collateral if the collateral is consumer goods of a kind that are prescribed as serial numbered goods.

(8A) For greater certainty, if there is a seriously misleading defect, irregularity, omission or error in the name of any of the debtors required to be included in the financing statement other than a debtor who does not own or have rights in the collateral, the registration is invalid even if there is no seriously misleading

defect, irregularity, omission or error in a serial number.

(8B) For greater certainty, if there is a seriously misleading defect, irregularity, omission or error in the serial number that is included in the financing statement for collateral that is consumer goods of a kind that are prescribed as serial numbered goods, the registration is invalid even if there is no seriously misleading defect, irregularity, omission or error in the name of any of the debtors required to be included in the financing statement.

(9) In order to establish that a defect, irregularity, omission or error is seriously misleading, it is not necessary to prove that anyone was actually misled by it.

Subsections (8A) and (8B) were added to the PPSA by Chapter 13 of the Acts of 2003, which was assented to on May 22, 2003.

[11] The purpose of the PPSA is to provide a registration system to cover security interests in personal property. If a secured creditor wishes to have priority against other creditors, secured or otherwise and a trustee in bankruptcy, it must register a financing statement in the form appropriate to the collateral involved by making the required inputs into the registration system. The doctrines of notice and constructive notice which were the basis of the former personal property security law no longer have application. Under the PPSA, if the secured creditor does not register its financing statement properly, its security is not effective whether other claimants have notice or

not.

- [12] This puts the burden on the secured creditor to effect registration properly; otherwise its security is subordinate to that of a subsequent secured creditor who has done it properly and is not effective against a trustee in bankruptcy.
- [13] The collateral in this case is consumer goods with a serial number. Regulations 23(1)(a) and 25 direct that the financing statement for such collateral is to be registered not only under the debtor's name but also under the serial number. The name is deficient as the middle name was not used. The serial number registered is correct.
- [14] There are two lines of authority as to whether the security in this situation fails. They differ as to whether there is a dual search requirement when dealing with serial numbered goods which are consumer goods, as the vehicle in question here.
- [15] The dual search rule is simply that with serial numbered goods which must be registered by serial number, one must search both the name registry and

the serial number registry. That way the reasonable searcher will find the financing statement in any event, notwithstanding either the name registration or the serial number is defective. The defect should not be seriously misleading because one is going to find it in one registry or the other.

- [16] The question has been very thoroughly reviewed in *GMAC Leasco Ltd. v. Moncton Motor Home & Sales Inc. (Trustee of)* (2003), 42 C.B.R. (4th) 43, a decision of Robertson J.A. of the New Brunswick Court of Appeal. In this case the registration of “Motorhome” as the debtor

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[17] The differing positions arise from the wording of the respective statutes.

The Ontario statute says that the validity is not impaired unless “a

reasonable person is likely to be misled materially by the error”. The New Brunswick and Nova Scotia statutes provides that an error does not affect the validity of the registration unless it “is seriously misleading”.

- [18] There is further distinction in the NB and NS statutes with the direction given in Subsection 44(7),(8) of the NS statutes (Subsections 43 (7),(8) of the NB statute), something not given in the Ontario statute.
- [19] These subsections declare that, if there is a seriously misleading defect, irregularity, omission or error in either a required name or in a required serial number, the registration is invalid.
- [20] In the present case, the evidence is that when a search was made giving the name, correct for registration purposes, of the debtor, it shows no matches, correct or near.
- [21] The scope of defects, etc. being seriously misleading is very wide and one best not try to define it inclusively; however, it seems self evident to me that, if one searches the correct name for registration purposes in the registry and

it produces neither an exact nor a near match, the defect is seriously misleading.

[22] In the midst of the conflicting jurisprudence over the dual search rule, Subsections 44(8A) and (8B) were added. I do not think they add anything to the provisions of Subsections (8) (a) and (b). Rather they simply declare their consequences in the given situations, and make it clear that the jurisprudence in Ontario regarding the dual search rules does not apply in Nova Scotia.

[23] More specifically the words “For greater certainty” should not be taken to change any law, rather they intend to confirm the specific interpretation of Subsections(8) (a) and (b) in the situations described.

[24] The foregoing is essentially the argument put to me by counsel for the Trustee. Counsel for the Applicant however, sees the matter differently.

[25] He provided the court with an extensive analysis of Subsections 44 (7), (8), (8A), and (8B) and (9). I do not think that his analysis in any material way

differs from the analysis given by Counsel for the Trustee, except he takes quite a different position regarding defects, irregularity, omission or errors being seriously misleading.

[26] He follows the Ontario case: *Lambert, Re* (1994), 28 C.B.R. (3d) 1 (C.A.).

This case concerned a motor vehicle the financing statement for which required registration under both the debtor's name and serial number. The serial number was correctly imputed, but the debtor's name was not. The debtor's birth certificate name was "Joseph Phillippe Gilles Lambert". The financing statement showed the name "Gilles J. Lambert". The Ontario PPSA requires the name of the debtor who is a natural person to be set out on the financing statement to show first given name, followed by the initial of second given name, if any, followed by surname. The correct entry would then have been "Joseph P. Lambert".

[27] In this case the name search did not reveal the financing statement in question since it referred to the debtor as Gilles J. Lambert. The serial number search would have revealed the financing statement in question, however, the trustee did not do this search. I quote from paragraph 6:

GMAC (the creditor) maintained that the errors were cured by S.46(4) of the P.P.S.A. since the trustee should have performed a V.I.N. search and had he done so, he would not have been misled by the error in the debtor's name.

The following is the text of this subsection:

(4) A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.
(underlining added)

This provides an objective test as to what errors or omissions are materially misleading and thus invalidate a financing statement. Who then is the reasonable person and what would he or she do? Let me quote paragraphs 45, 46 and 47:

45 In summary, the reasonable person in s. 46(4) has the following attributes:

He or she is a reasonable prudent prospective purchaser or lender who looks to the registration system of the P.P.S.A. to provide notice of any prior registered claims against the property he or she is proposing to buy or take as collateral for a loan.

He or she is conversant with the search facilities provided by the registration system and is a reasonably competent user of those facilities.

Where the property to be bought or

taken as collateral is a motor vehicle, the reasonable person will obtain the name and birth date of the seller/borrower as well as the V.I.N. of the motor vehicle.

Where the property is a motor vehicle, the reasonable person will conduct both a specific debtor name search and a V.I.N. search.

- 46 Bearing this reasonable person in mind I move to the final question. Is this reasonable person “likely to be misled materially” by a financing statement which contained an error in the debtor’s name, but accurately set out the V.I.N.? The purpose for which the reasonable person uses the search function of the registration system provides the key to determining when it can be said that the reasonable person would be materially misled by an error in a financing statement. The reasonable person uses the system to find prior registered secured interests in the property in question. If the error in the financing statement results in the reasonable person not retrieving that financing statement from the system, then the reasonable person will probably be misled materially. If despite the error, the reasonable person as defined above will still retrieve the flawed financing statement from the system, then the error in the financing statement is not likely to mislead materially.
- 47 A reasonable person would not likely be misled materially by an error in a financing statement relating to the debtor’s name if that same financing statement accurately set out the V.I.N. That financing statement would come to the attention of the reasonable person through a V.I.N. search despite the error in the name. The reasonable person would, therefore, be put on notice of the security interest referred to in the financing statement and could proceed accordingly. This conclusion accords with that reached in *Ford Credit Canada Ltd. v. Percival Mercury Sales Ltd.*, [1986] 6 W.W.R. 569 (Sask. C.A.).

- [28] Counsel for the Applicant adopts this analysis and submits that a reasonable searcher in Nova Scotia would check both the name register and the serial number register and thus find the financing statement in the latter registry. The reasonable person will not be misled by this omission. In effect he is asserting that the dual search rule applies in Nova Scotia.
- [29] The Nova Scotia PPSA takes a different approach in Section 44. One must start with Subsections (7) and (9).
- [30] Just as in Ontario, the test is objective, but the emphasis is not on what the reasonable searcher would or would not do, rather it is on the defect itself.
- [31] One must focus on the question what is a seriously misleading defect, irregularity, omission or error in the context of what the PPSA registry is designed to accomplish.
- [32] The primary purpose of registration is to confirm the status of financing arrangements which involve security in personal property. If one wants to have a security interest in personal property effective against third parties

one normally must perfect it by registering a financing statement which complies with the PPSA and its regulations.

[33] Section 44 specifically deals with the act of registration. Subsection 44(7) provides that a defect, irregularity, omission or error does not affect the validity of the registration of a financing statement, etc., unless it is “seriously misleading”. Subsection 44(8) proceeds to then specifically and positively state that, if there is a seriously misleading defect, etc. in a required name, the registration is invalid. Subsection 44(8A) drives the point home further by saying that the registration of a correct serial number does not save the registration when the name has a seriously misleading defect, etc.

[34] The proper name for registration under the Regulation of the P.P.S.A. is “Pye, Barry Kevin”. The evidence is that a search under this name does not produce any financing statements regarding the vehicle, nor were any near matches given.

[35] As there were no near matches, I do not have to consider what a searcher is

expected to do with near matches. The point is that a search of the proper name does not find any registrations.

[36] However, Counsel for the Applicant says that to determine whether the defect, etc. is seriously misleading one does not simply look at the defect by itself and make a determination, but one adopts the test in the *Lambert* case and asks what the reasonable searcher would do. I see no basis in the Nova Scotia PPSA for this. Its application in Ontario is provided in Subsection 46(4) of the Ontario PPSA quoted above in [27]. There is no such provision in the Nova Scotia PPSA. There is thus no basis for applying the overall thrust of the *Lambert* case to this matter.

[37] In paragraph 98 of *GMAC Leasco Ltd.*, Robertson J.A. concludes:

An error in a financing statement, tied to either the debtor's name or serial number of collateral, is "seriously misleading" if a search using the correct information fails to reveal any exact or close match.

[38] I agree with this conclusion and find that the registration is invalid, notwithstanding the registration of the correct serial number.

[39] The background of this matter is well summarized in *Personal Property Security Law* by Ronald C. C. Cuming, Catherine Walsh and Roderick J.

Wood, Irwin Law Inc. 2005, at page 273, which I take the liberty of quoting:

5) Error in Debtor Name Where Serial Number Correct

The omission of a serial number, or a seriously misleading error in the entry of a serial number, is treated as substantially misleading even if the debtor name is entered correctly.¹⁶⁴ The Ontario Court of Appeal has rejected the converse proposition, holding that a correctly registered serial number cures an error in entering the name of the debtor.¹⁶⁵ Although adopted by the British Columbia Court of Appeal,¹⁶⁶ the Ontario position has been rejected by the Saskatchewan, Alberta, and New Brunswick Courts of Appeal,¹⁶⁷ and this position has since been confirmed by legislative amendments in the Maritime provinces,¹⁶⁸ In the view of the authors and of commentators,¹⁶⁹ this represents the correct approach. Serial number searching was intended to be a supplementary mode of searching, not an alternative to debtor-name searching. The ability of a third party to place full confidence in either a debtor name or a serial number search is essential to the integrity of the registry system. Not all searchers will necessarily have ready access to the serial number of particular vehicles of the debtor. Even if access is available, not all searchers are sophisticated enough to appreciate the necessity to search by serial number. Finally, there are situations where the imposition of serial number searching imposes excessive transaction costs on searchers, for example, where the debtor in question holds many pieces of equipment that qualify as serial numbered goods.

Second Issue

[40] Having ruled that the registration is invalid, I must consider the Applicant's alternative claim.

[41] First I must determine whether the Trustee's employee, Ms. Sibbins had authority, actual or ostensible, to make the alleged representations about a

release being provided so as to be binding on the Trustee. The evidence regarding the alleged representation is found in paragraph 12 in the affidavit of Penny Ordinelli, the Applicant Controller which I quote:

On or about May 13, 2009 I was informed by the office of the Trustee that a release was to be faxed to the Applicant with respect to the Vehicle and that if an offer came in for the purchase of the Vehicle the Trustee would provide the release on an expedited basis, and a true copy of my hand written notes regarding the May 13, 2009 conversation with the office of the Trustee are attached as Exhibit "F" to this Affidavit.

The following are the notes on this exhibit:

May 13/09

Kim Sibbons said release will be faxed to us.

If an offer comes in, we can call her and she will rush release.

The evidence in reply is in the affidavit of Kimberly Sibbins which I quote in full:

1. I am Kimberly Sibbins, an Estate Administrator with PricewaterhouseCoopers, Inc., ("PwC") who is the Respondent in this matter.
2. I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information and belief.
3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
4. I have been employed with PwC for approximately twenty-one (21) years and have worked with Stan Hopkins, who is a Senior Vice President employed by PwC, for five (5) years, as an Estate Administrator.

5. I have been informed by Mr. Hopkins, which I verily believe to be true, that he is the signing authority for PwC.
6. As an Estate Administrator I answer approximately fifty (50) telephone calls per week from various secured creditor's regarding their respective Proof of Claims and draft various documents for PwC's review.
7. The telephone calls are routine in that the secured creditor is calling to ascertain if PwC has received the Proof of Claim and when it might receive a Release.
8. I do not review a particular file during a telephone call.
9. I never inform the secured creditor that I have authority to bind PwC because I do not have that authority.
10. I only offer a prediction, regarding the expected time PwC would review a claim and respond to the secured creditor's request for a release.
11. PwC is responsible to review the file and either grant a Release or issue a Notice of Disallowance.
12. Mr. Hopkins on behalf of PwC informs me, which I verily believe to be true, that he has not informed any secured creditor that I have authority to bind PwC.

Neither of them was cross examined on her affidavit.

[42] Ms. Ordinelli is very brief as to the alleged telephone conversation with Ms. Sibbins. She says she was informed that a release would be forthcoming. She made a note at the time. Ms. Sibbins says nothing of the conversation. Rather she outlines the chain of authority at the Trustee's office, her place in it and her practice in answering telephone inquiries.

- [43] I take it from her silence regarding the conversation that she does not have a recollection of it. However, I accept Ms. Ordinelli's deposition that there was a conversation regarding this matter. However, I am left with the question of what she is reasonably entitled to draw from the conversation.
- [44] Ms. Ordinelli is the Applicant's controller. It is reasonable for one in her position to make inquiry of a trustee about its position respecting security on estate assets. Ms. Sibbins' affidavit though makes it clear that she had no actual authority to bind the Trustee regarding whether or not the Trustee would provide a release.
- [45] The question then reduces itself to whether she had ostensible authority to bind the Trustee. If she does not have such authority, that is the end of the matter and I do not have to consider the question of estoppel.
- [46] There is a paucity of evidence before me on the question. The burden is on the Applicant to prove Ms. Sibbins' ostensible authority. All I have is Ms. Ordinelli's bare assertion of what Ms. Sibbins said. Against this, Ms. Sibbins fails to say anything about the conversation. As well she asserts

that she has no authority to make such statements and that she does not make such statements.

[47] The telephone conversation was for the purpose of obtaining a release of the Trustee's claim to the property in the Vehicle by virtue of the defective security agreement. This is a serious matter. I think there is considerable strength in the submission of the Trustee that more than the assertion of a clerk is needed for the Trustee to give up its interest in an asset like the Vehicle.

[48] I find helpful the following quote from *Kwok v. Griffiths*, [1996] B.C.J. No. 84 (B.C.S.C.) where Henderson J. speaking of whether a legal assistant had authority to bind a client said:

When Ms. Chambers first placed her call to Karen, the latter agreed immediately to the one-day extension. It must have been obvious to Ms. Chambers and to her principal, Mr. Griffiths, that Karen had not consulted the vendors before agreeing. Karen said only that the transaction "could complete the following day". The defendants carry the burden of establishing that Karen's assurance amounted to an agreement to extend the completion date as opposed to a mere prediction that the vendors, when consulted, would agree to that. Given that she had not had time to consult the vendors about an extension, I view her remark as no more than a prediction as to what the position of the vendors would be. The defendants have failed to prove an agreement to extend the completion date to March 19. (underlining added)

[49] Ms. Ordinelli may well be subject to the same criticism as the Ms. Chambers.

[50] There is nothing to indicate that Ms. Sibbins consulted the Trustee about the alleged statement. Certainly Ms. Sibbins' affidavit indicates that she would not make any such statements without the Trustee's authorization.

[51] I accept that a statement was made by Ms. Sibbins to Ms. Ordinelli, but I am not satisfied that the Applicant has proved that Ms. Ordinelli is reasonably entitled to rely on it as she did; that is, neither actual nor ostensible authority on Ms. Sibbins part has been proved.

[52] I need not go further, but should I be wrong, there remains the question of whether the elements of promissory estoppel are proved.

[53] I quote paragraph 13 from the judgment of Sopinka J. of the Supreme Court of Canada in *Maracle v. Travellers Indemnity Co. of Canada* , [1991] 2 S.C.R. 50:

13 The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltds. V. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, 68 D.L.R. (2d) 354, Ritchie J. stated [at p. 615, S.C.R.]:

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. V. Mason*, [1983] 1 S.C.R. 641, 51 B.C.L.R. 273, 49 C.B.R. (N.S.) 257, 47 N.R. 379, 146 D.L.R. (3d) 577, at p. 647 [S.C.R.]. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

[54] Also the following quote from *Williams v. Saanich School District No 63*, [1986] B.C.J. No. 2303 (B.C.S.C.), at paragraph [31] Bouk J., is helpful:

Reliance is also a key ingredient in the legal equation. A plaintiff must prove by a balance of probabilities that he relied upon the negligent misstatement of the defendant to his detriment. But it also seems to me that the plaintiff must prove it was reasonable for him to place such reliance upon the defendant's misstatement. Not every wrong statement by a defendant should automatically attract liability. Some may be so extravagant or suspicious as to make them incapable of belief by any ordinary reasonable person. A plaintiff must be able to prove that it was reasonable for him to accept the statement of the plaintiff at face value and as something

that any other reasonable person would rely upon in the
circumstances. (underlining added)

[55] I am not convinced that whatever Ms. Sibbins said to Ms. Ordinelli necessarily met the tests established in these two cases. I have to consider what Ms. Sibbins said in her affidavit. She has been in the Trustee's employ for many years. She regularly deals with creditors' inquiries. She is cognizant of the limits of her authority. These points suggest that she would be careful in what she would say in a telephone inquiry. It is obvious that Ms. Ordinelli relied on what was said thinking that she was clearly promised the release. But it may well be that she put more meaning to it than was warranted. What was said may as in the *Kwok* case be a remark which was no more than a prediction as to what the position of the Trustee would be. I am not satisfied that the requirements of promissory estoppel are met.

Conclusion

[56] The entitlement of the Trustee to the vehicle as against the Applicant is affirmed. The vehicle was sold to a third party. Strictly speaking, it still belongs to the Trustee, the Applicant having had no right to sell it. It remains that the vehicle must be restored to the Trustee or compensation

given.

[57] The Trustee shall be entitled to costs.

R.

Halifax, Nova Scotia
December 22, 2009