

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the Seizures
Ordinance R.O.N.W.T. Ch. S-7,
as amended;

AND IN THE MATTER OF that certain
seizure made the 1st day of March,
A.D. 1975

BETWEEN:

RUSSELL FOOD EQUIPMENT (EDMONTON) LTD.,

Applicant

- and -

MONIQUE'S DRIVE-INN LTD.,

Respondent

Application heard at Yellowknife, N.W.T. July 11, 1977 for
an Order granting the Applicant leave to remove and sell
certain goods presently under seizure by private sale.

Order granted.

Judgment of the Court filed September 8th, 1977

Reasons for Judgment by:

The Honourable Mr. Justice C. F. Tallis

Counsel on the Hearing:

W. Stefura, for the Applicant

No one appearing for the Respondent

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Respondent

Counsel: W. Stefura, for the Applicant

No one appearing for the Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE C. F. TALLIS

This is an application under Section 11(1) of the Seizures Ordinance R.O.N.W.T. 1974 Ch. S-7 for an Order granting the Applicant leave to remove certain goods presently under seizure and allowing the Applicant to sell the same by private sale.

This Application came on for hearing before me on July 11, 1977. At that time I reserved judgment with leave to the Applicant to make further submissions in writing. Written submissions have been filed.

The Applicant claims to have effected service of the Notice of Motion and supporting material on the Respondent by registered mail. The Affidavit of Service filed with respect to Monique's Drive-Inn Ltd. is as follows:

" I, LOREEN LAMBERT, of the City of Yellowknife in the Northwest Territories, Secretary, MAKE OATH AND SAY:

1. That I did on the 28th day of June, A.D. 1977, serve Monique's Drive-Inn Ltd. with a true copy of the Notice of Motion and Affidavit of Edward Redford, the originals of which are hereunto annexed and marked Exhibits "A" and "B" respectively, to this my Affidavit, by inserting such copies in an envelope addressed to Monique's Drive-Inn Ltd., Box 310, Hay River, N.W.T. and by posting the same by single registered mail in the Post Office at Yellowknife in the Northwest Territories. Hereunto annexed and marked as Exhibit "C" to this my Affidavit is the receipt of the Postmaster at Yellowknife, Northwest Territories, for such letter.

SWORN BEFORE ME at the City)
of Yellowknife in the North-)
west Territories this 11 of) "Loreen Lambert"
July, A.D. 1977.)

"Sue P. Heron"
A Commissioner for Oaths in and
for the Northwest Territories.
My Commission expires: 1 Oct. 78

A similar affidavit has been filed with respect to service on Monique Scott. The Applicant relies primarily upon Section 33 of the Seizures Ordinance which provides as follows:

"33. (1) Except as otherwise provided in this Ordinance a notice required to be served upon a person pursuant to this Ordinance may be served by sending the notice by registered mail to such person at his latest known address.

(2) A notice referred to in subsection (1) shall be deemed to have been duly served upon proof being made by affidavit stating

- (a) that the notice was sent by registered mail to the person to be served at his latest known post office address;
- (b) the date and place of mailing of the registered letter; and
- (c) the date at which the registered letter would, in the ordinary course of mail, reach its destination.

(3) The date on which a registered letter would, in the ordinary course of mail, reach its destination is deemed to be the date of service of the notice referred to in subsection (1)."

An examination of the Affidavit of Service in the light of the above statutory provisions clearly indicates that the Affidavit of Service does not comply with the requirements of Section 33(2). The Affidavit of Service must establish, inter alia, that the Notice was sent by registered mail to the latest known address of the person to be served and also indicate the date at which the registered letter would, in the ordinary course of mail reach its destination.

I am satisfied that this omission does not constitute a fatal defect and accordingly pursuant to Rule 558 I grant the Applicant leave to file proper affidavits of service.

In this particular case I have received the assurance of Counsel that the registered letters to the Respondent Monique's Drive-Inn Ltd. and Monique Scott have not been returned. Where service by registered mail is relied upon, Counsel have a duty to inform the Court whether or not the registered letter has in fact been returned.

In dealing with this aspect of the Application I have considered the Judgment of Cullen, D.C.J. in *deJong v. Sime and Prime Fasteners Limited* 59 W.W.R. 441 where it was held that Rule 31 must be complied with notwithstanding the provisions of Section 270 of *The Companies Act R.S.A. 1955 Ch. 53* which provides as follows:

"... a document may be served on a company by leaving it at or sending it by registered post to the registered office of the company or by serving any director, manager or other officer of the company."

In this jurisdiction Section 189 of the *Companies Ordinance* provides as follows:

"189. A document may be served on a company by leaving it at or sending it by registered post to the registered office of the company, or by serving any director, manager or other officer of the company."

This Section or its equivalent has been judicially interpreted in the following cases: *Berg v. Kingsley Builders Ltd.* (1967) 60 W.W.R. (N.S.) 59; *A/S Cathrineholm v. Norequipment Trading Ltd.* (1972) 2 All E.R. 538; *Saga of Bond Street v. Avalon Promotions* (1972) 2 All E.R. 545. With respect I would follow the approach of these authorities rather than the approach of Cullen, D.C.J. in *deJong v. Sime and Prime Fasteners Limited* (supra) and hold that the sender of a registered letter who relies on Section 189 or its equivalent is not required to prove actual receipt by the company. However, for the guidance of the Bar, I would point out that in my opinion the Affidavit of Service by registered mail on a company should contain, inter alia, a statement showing the date at which a registered letter would, in the ordinary course of mail reach its destination.

In support of its application for an order for private sale of the goods under seizure the Applicant filed the affidavit of Edward Redford which sets forth the following facts:

"1. That I am the Manager of the Applicant herein and as such have personal knowledge of the matters hereinafter deposed to save where stated to be based on information and belief.

2. That on or about the 16th day of August, A.D. 1972, the Respondent, MONIQUE'S DRIVE-INN LTD. entered into a Conditional Sale Contract, a copy of which contract is attached hereto and marked as Exhibit "A" to this my Affidavit, for the purchase of those goods listed in Schedule "A" which is attached to and forms part of the Conditional Sale Contract marked as Exhibit "A".

"3. That it was a term of the said Conditional Sale Contract that should the purchaser fail to make payments when due, the entire balance of the purchase price was to become due and payable forthwith at the option of the Applicant.

4. That the Respondent has defaulted in making payments on the said Contract as shown by an up-to-date Statement of Account marked as Exhibit "B" to this my Affidavit with the balance shown to June 9, 1975. That attached hereto and marked Exhibit "C" to this my Affidavit is a further up-to-date Statement.

5. That the total amount owing as at January 26, 1977 is \$4,882.59.

6. That pursuant to a Warrant delivered to the Sheriff of the Northwest Territories the said goods as described in the said Conditional Sale Contract were seized by the Sheriff in the Town of Hay River, Northwest Territories, on March 1, 1975 and is now on Bailee's Undertaking with Monique Scott, Manager of the Respondent, so I have been informed by the Sheriff of the Northwest Territories and do verily believe.

7. That I have further been advised by the Sheriff of the Northwest Territories and do verily believe that a Notice of Objection to Removal of Goods signed by Monique Scott giving the address of Box 525, Pine Point, Northwest Territories was received by the Sheriff on the 26th day of March, A.D. 1975."

Paragraph 8 of the said Affidavit reads as follows:

" That I make this Affidavit in support of an application for an Order permitting the removal of the mobile home in question and its subsequent sale in accordance with the provisions of the Seizures Ordinance."

I am advised that this is an error because this application is not concerned with a mobile home.

A Notice of Objection was filed by the Respondent and Monique Scott. The material portions of this objection are as follows:

" The objection to seizure is as follows

1. The amount owing according to the February Statement is \$5,282.
2. Russell equipment is well aware that business in the fast food industry is extremely poor during the winter months and we fully intend to remit large payments during the spring and summer when business resumes.
3. Bad luck caused us two serious setbacks this winter when our business froze up putting us out of business for eight days."

In the light of the evidence before me I am satisfied that the seizure is valid. I accordingly turn to a consideration of the Application for an Order for private sale.

Section 11(1) of the *Seizures Ordinance* R.O.N.W.T. 1974 provides as follows:

"11. (1) Personal property taken in execution under a writ of execution or by virtue of a power of distress and not specifically mentioned in this Ordinance shall, unless a judge otherwise orders, be offered for sale by public auction or by tender."

Section 25 subsections 1 to 3 provides as follows:

"25. (1) Where the Sheriff receives a notice of objection pursuant to section 23, he shall immediately notify the creditor and thereupon the creditor may apply to a judge for an order for the removal and sale or for the removal or the sale of the property

"seized or any part thereof.

(2) Where a creditor applies pursuant to subsection (1), the application shall, as far as is reasonably possible, specify and describe the particular property in respect of which the order is sought.

(3) Seven days' notice of an application referred to in subsection (1), or such other notice as the judge may direct, shall be given to the debtor."

Section 25(6) provides as follows:

"25. (6) Where the judge orders a sale, he may give directions as to the manner, time and place of the sale and such other directions as to him seem proper and convenient, and may give leave to any party to bid or submit a tender at the sale."

After considering this matter I am satisfied that this Court has the authority to allow the Applicant to remove the goods presently under seizure and direct that the same be sold by private auction. I am not prepared to follow the judgment of *Sissons, C.J.D.C. In re General Motors Acceptance Corporation and Ramias* 12 W.W.R. (N.S.) 585 insofar as it holds that when a debtor files a Notice of Objection with the Sheriff he is entitled as of right to have the sale conducted by the Sheriff. To do so would completely negate the discretion vested in the Court by Section 11(1) of the *Seizures Ordinance*. In making an order for private sale the Court should be cautious and in an appropriate case should direct that the sale be by public auction conducted by the Sheriff.

After carefully considering this matter I find that this is an appropriate case for an Order giving the Applicant leave


to remove the following goods which are presently under seizure and direct that the Applicant may sell the same by private sale:

- 1 Ice Cream Machine Model 731 Taylor
(used)
- 1 Milkshake Machine, Model 431 Taylor
(used)
- 1 Bun Warmer Model HF071 (2 drawer)
- 2 Fryers, Model CF 15/40
- 1 Grill Model QCG40
- 2 Coffee Percolators, 55 cup
- 1 Hot Dog Machine, Model 56
- 1 Pizza Oven, Model GP0141A
- 1 8' x 3' Overhead Canopy, complete with
duct take off, galvanized
- 1 Fan, Model Delhi #415, 2 speed, complete
with galvanized housing
- 1 Microwave Oven, Model 70/40, Litton

I accordingly grant such an Order with the same to issue upon the Applicant filing amended affidavits of service to comply with the terms of this judgment.

In making this Order, I would point out that the Applicant creditor is not relieved of its responsibility to obtain the highest possible price when effecting a private sale.

Dated at the City of Yellowknife in the Northwest Territories this 5th day of September, A.D. 1977.


C. F. Tallis, J.S.C.

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