

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

APPLICANT,

- and -

J. J. DUMAIS, operating as NORTHERN WELDING, GREAT AMERICAN INSURANCE COMPANIES, THE MINISTER OF NATIONAL REVENUE on behalf of HER MAJESTY THE QUEEN IN RIGHT OF CANADA, MODERN TOOL LTD., LINCOLN ELECTRIC CO. OF CANADA LTD., EUTECTIC CANADA LTD., and GREAT WEST ELECTRIC LTD.,

RESPONDENTS.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE W. G. MORROW

By previous order in this Court the sum of \$18,108.96 had been paid in pursuant to Section 37 of the Insurance Ordinance, c.51, R.O.N.W.T. 1956. This sum represents the amount set forth in Proof of Loss dated January 20th, 1969, declared by J.J. Dumais, and with reference to a fire which took place at Yellowknife in the Northwest Territories on October 15th, 1968. The loss was covered by a policy of insurance with General Insurance Company at Edmonton, Alberta, and placed through Yellowknife Company agent Lanky Agencies Ltd.

The present hearing was brought on for the purpose of establishing priorities as between the various parties to this action. At the hearing agreement was reached with respect to the facts, leaving only the legal effect and conclusions to



settled by me. These agreed facts, which are also for the part set forth in several affidavits filed in the proceedings, emerge as I proceed to discuss the adverse claims and arguments set forth in respect to each.

The Canadian Imperial Bank of Commerce (hereinafter referred to as "the bank") is admitted to have a claim for money loaned together with interest in the sum of \$10,157.96 as of May 26th, 1969. On October 17th, 1968, J.J. Dumais (hereinafter referred to as "Dumais") signed a short printed form which carries an endorsement at the bottom in the words, "This mortgage clause must be signed in ink by the Insurer." The form contains the phrase: "At the request of the Insured loss - - under the policy is hereby made payable - - to Canadian Imperial Bank of Commerce first mortgagee." Except for whatever effect this document may have the bank holds no mortgage on any property of Dumais. The bank through its counsel argues that the above document is an assignment of funds under the insurance policy or in any event a mortgage on any proceeds from same.

On October 18th, 1968 Modern Tool Ltd. (hereinafter referred to as "Modern") took a formal assignment from Dumais. This document after reciting the insurance policy, the monies to be paid under it, and that Dumais is indebted to them in the sum of \$8,655.36 for goods sold and delivered, goes on to provide that the assignor, Dumais "in consideration of the sum of One Dollar (\$1.00) - - does hereby assign and transfer unto the assignee ( Modern) the policy of insurance and all sums of money assured by and to become payable under or by virtue of the policy,"



This document also contained an assurance that the policy was unencumbered. Notice of assignment bearing the same date was also prepared.

On October 19th, 1968 copies of the bank's document, above, were delivered to the office of Lanky Agencies Ltd. at Yellowknife, at 10:15 a.m. and a copy of the Modern assignment and notice was similarly served at 5:15 p.m.

Lanky Agencies forwarded a memo dated October 19th, 1968 to Syd Rambaut, of Great American Ins. Co., Edmonton. This memo recites the fact of delivery of the two documents referred to above as well as the times of delivery on Lanky. This memo refers to the documents being enclosed and concludes: "I guess we need some mortgage endorsement."

An endorsement to the insurance policy dated October 21st, 1968, was released over the signature of Lanky Agencies Ltd. It states:

"Effective date of Endorsement  
October 18, 1968

Notice is Received and Accepted that loss, if any, under the within policy, shall be payable firstly to the Canadian Imperial Bank of Commerce, subject to special mortgage clause attached and secondly to Modern Tool Ltd., Calgary, Alberta, subject to standard mortgage clause attached to policy and thirdly to the Insured."

By letter dated October 22nd, 1968, S.A. Rambaut, to whom Lanky addressed the memo of October 19th, 1968, replied enclosing endorsement in the exact wording as the endorsement above but over the signature of Great American Insurance Company, New York. Lanky Agencies Ltd. It appears from the



material filed that this Company simultaneously prepared a mortgage clause in favour of Modern Tool Ltd. and one in favour of the bank, dating them October 18th, 1968, and signing each one in the same manner as the endorsement.

The Department of National Revenue by an assessment dated December 16th, 1968, under Section 123(1) of the Income Tax Act, put forward a claim for \$6,822.66. This was for income tax and Canada pension plan payroll deductions and was charged against Dumais Welding Ltd. The Department further holds an undated assignment from Dumais Welding Ltd. in its favour. This assignment is undated but it is admitted that the assignment was sent in after January 27th, 1969. The Yellowknife manager of the bank executed an authority which purports to be an undertaking to pay the Government its claim of \$6,822.66 from out of the \$18,108.96. At the hearing before me argument was put forth by counsel for the Department of National Revenue to the effect that the bank was estopped from claiming priority over the Department because of this authority. It is not open for me on this application to settle such an issue which is irrelevant to the general question relating to priorities among the creditors.

A second claim was put forward by counsel for the Department claiming priority as the Crown. Since the Department appears to have a claim against the limited Company and not against J.J. Dumais in his personal capacity and since the policy with which I am concerned and the remaining claims all appear to be against J.J. Dumais personally I can see no alternative but to

held that the Department of National Revenue has no status in these proceedings whatsoever.

At the hearing before me the Agency Agreement between Great American Insurance Company, New York, and Lanky Agencies Limited was filed. Paragraph 1 of this agreement provided among other things that "The Agency shall have power to - - countersign and issue policies of insurance, - - and consent to transfers thereof, make endorsements thereon - -." Accordingly I am satisfied that the agent at Yellowknife had the authority to accept and act upon any assignment presented to it. In this respect therefore it seems to me that the subsequent endorsements added at Edmonton, while possibly perfecting the documentation, can have no effect on priorities as such. Accordingly I find that, subject to what I say later in respect to the nature of the Bank's document, the Bank presented its purported assignment first and Modern second and the Yellowknife agent accepted them in the same order.

The document which the Bank had Dumais sign does not purport to be an assignment as such and no doubt is the form used in the normal course to effect an hypothecation of the assured's interest in the policy where there has as yet been no loss suffered. The critical words are "loss (if any) under the Policy is hereby made payable (solely if required) to the - - bank - - first mortgagee." Except as this document may make the bank a mortgagee the bank is not otherwise holding any security.



Although it gives me difficulty I do accept the bank's document as a transfer by Dumais of his rights under the policy to the bank as security for the payment of its claim and to this extent find it had the same effect as an assignment.

In the result there will be judgment as follows:

- (1) \$10,157.96 together with costs in Column 5 to the Canadian Imperial Bank of Commerce in priority to any other creditor.
- (2) The balance remaining from the monies paid in to Modern Tool Ltd. in priority to any other creditor.

This money not to be paid out until the time for appeal has run out.



W. G. Morrow,  
J. T. C.

Yellowknife, N.W.T.  
June 4, 1969.

Counsel: W. Wiese for Modern Tool  
D. Searle for Canadian Imperial Bank of Commerce  
Miss A. Ostrowercha for remaining creditors  
J.J. Dumais in person.