Date: 19990112
Docket: CV06292

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

FROBUILD CONSTRUCTION LTD.

Plaintiff

- and -

GROUP ONE (JM) HOLDINGS INC., operating as JM CONTRACTING

Defendant

Application by non-parties for stay of sale order pending appeal.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories on January 6, 1999

Reasons filed: January 12, 1999

Counsel for the Plaintiff: Charles Thompson

No one appearing for the Defendant

Counsel for the Applicants:
Shelda Morneau, Laura Morneau,
Samantha Morneau and Allison Morneau: Austin Marshall

Counsel for the Public Trustee and the
Estate of Robert Furnival: Larry Pontus

Counsel for the Government of the
Northwest Territories: Yvonne MacNeill

Counsel for the Workers'
Compensation Board: Michael Triggs

Counsel for Revenue Canada: Alan Regel

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REASONS FOR JUDGMENT

[1] The Plaintiff, Frobuild Construction Ltd., holds a writ of execution against the Defendant, Group One (JM) Holdings Inc., operating as JM Contracting. Pursuant to that writ of execution, on July 8, 1998, I ordered a tender sale of the Defendant's leasehold interest in land and a building (collectively the "property") in Iqaluit, Northwest Territories. The Defendant has filed an appeal of that order.

[2] The Applicants on this application are the wife and three children of Joseph Morneau, the sole shareholder of the Defendant. They claim that the building belongs to them and they seek a stay of the order for sale pending the appeal. The Plaintiff has already advertised the property for sale pursuant to the order granted by me and has applied to have its own tender accepted as the highest of six tenders received.

[3] To understand the issues on this application, it is necessary to review the background in some detail.

[4] When the Plaintiff first applied for an order that the property be offered for sale by tender, the Defendant responded with an affidavit of Joseph Morneau deposing that the property did not belong to the Defendant, but to Mr. Morneau's children. A corporate resolution, which I will refer to below, was offered as evidence of that fact.

[5] When the Plaintiff's application came before me on July 8, 1998, the following took place:

> COUNSEL FOR THE PLAINTIFF: ... I'll turn to the issue of ownership of the building. I don't believe that my friend is pursuing that issue today, although I could be mistaken on that.
>
> COUNSEL FOR THE DEFENDANT: That's correct, My Lady. My client will not propose that he has no ownership of that building. He would acknowledge that.
>
> THE COURT: He does acknowledge then that that building is owned by the defendant?
>
> COUNSEL FOR THE DEFENDANT: That's correct, My Lady.
>
> THE COURT: And that the leasehold interest --
>
> COUNSEL FOR THE DEFENDANT: That's correct, My Lady.

[6] With that concession, there was no argument as to ownership of the property but only as to whether a sale by tender should proceed.

[7] The order that the property be offered for sale by tender was granted. Counsel who appeared for the Defendant on the application filed an appeal from that order. The only ground of that appeal that has been referred to on the within application is that, "... the presiding Judge erred in ordering the sale of the property, given the transfer of the property from the Appellant to the Appellant's children thereby relinquishing any legal or beneficial interests in the property ...".

[8] There is no evidence before me on this application explaining how counsel came to make the admission that the Defendant owns the property or why the Defendant has now resiled from that admission. Counsel for the Applicants before me suggested that there may be an issue as to whether the Defendant's counsel had instructions to make the admission. Although an affidavit sworn by Mr. Morneau was filed in support of the Applicants' position, that affidavit does not refer to what took place on July 8.

[9] On the same date that the Notice of Appeal was filed, a Notice of Ceasing to Act was filed in this action by counsel for the Defendant. The material before me indicates

that the Defendant has not taken steps to perfect his appeal or schedule it for hearing. The Defendant did not appear on this application.

[10] In this application, the Applicants seek a stay of the order for sale by tender pending the appeal so that they may, either within the appeal proceedings or within this action, assert their claim to be the owners of the property.

[11] Counsel agree that the test for a stay pending appeal is as follows:

> (a) Is there a serious issue to be tried?
>
> (b) Will the applicant suffer irreparable harm if no stay is granted?
>
> (c) Does the balance of convenience between the parties favour the applicant?
>
> *Canadian Egg Marketing Agency v. Richardson*, [1995] N.W.T.J. No. 79 (N.W.T.C.A.)

[12] In *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.), Goodman J.A. also said that the bona fides of the appeal should be considered as well as whether it is in the interests of justice that the stay be granted. The burden of proof rests on the party seeking the stay.

[13] In this case, although those seeking the stay are not parties to the action, counsel did not dispute that the same principles should apply.

[14] In considering whether there is a serious issue to be tried or whether the appeal may have merit, I have to consider what evidence there is that the Applicants have an interest in the property. The evidence in that regard may be summarized from the affidavits as follows.

[15] In the spring of 1994, the Defendant purchased the building for $2350.00 at a government asset sale, taking possession of the building and moving it from government lands in July of that year. A corporate resolution of the Defendant dated and notarized July 30, 1994 provides that ownership of the building be transferred jointly and equally to the three minor children of Mr. Morneau and that as they are minors, the building will be managed and developed for them in trust by the Defendant until they reach the age

of majority. There is also a provision that no more than 25% equity in the building may be transferred to relatives as collateral for purposes of financing to upgrade the building.

[16] A letter dated July 30, 1994 from Mr. Morneau to his wife, Shelda, indicates that he accepts the children's offer of $1.00 each as payment in full for the building and that Mr. Morneau will move the building to his company's lot.

[17] In September of 1994, the building was moved to lands then owned by the federal government. The government and the Defendant entered into a lease dated September 1, 1994. The lease grants a leasehold interest in the land and building to the Defendant and provides that at the end of the term, the building will be surrendered to the government. The lands have subsequently been transferred to the territorial government which is now the lessor.

[18] At some point prior to the lease date but after the resolution, the Defendant entered into discussions with a Mr. Furnival, now deceased, for the purchase by Mr. Furnival of a half interest in the building. A payment was made by Mr. Furnival or his company to the Defendant. This would have been contrary to the terms of the resolution, which provided that no more than a 25% interest in the building could be transferred and then only to relatives of the children. In March of 1995, Mr. Morneau wrote a letter to the office of the Public Trustee, saying that he had agreed to sell Mr. Furnival a half interest in "the company's building". A claim arising from the agreement between the Defendant and Mr. Furnival resulted in a writ of execution in favour of the Furnival estate against the Defendant.

[19] In the spring of 1995, Shelda Morneau made a loan of $20,000.00 to the Defendant. A corporate resolution of the Defendant states that it will enter into an agreement with her to grant her 10% equity in the building. That loan was subsequently repaid in full.

[20] At some point after this, the Plaintiff supplied building materials to the Defendant, giving rise to the Plaintiff's claim and the writ of execution under which it now seeks a sale.

[21] The position of the Applicants is that by virtue of the documentation referred to above, Shelda Morneau is the owner as to 10% of the building and the remainder is held in trust by the Defendant for the benefit of the three children. Counsel for the Applicants submitted that the trust is now such that the beneficial interest in the property, consisting of income and profit from the operation of the building, belongs to the children until such

time as the building is surrendered to the territorial government pursuant to the terms of the lease.

[22] Although the three certainties required for a trust - certainty of intention, certainty of subject matter and certainty of objects [Waters, Law of Trusts in Canada (Toronto: Carswell, 1974)] - appear on the face of the corporate resolution of July 30, 1994, the Defendant's dealings with the building seem to contradict the existence of a trust or the terms of the trust. There is, for example, the arrangement to sell a half interest to Mr. Furnival. Mr. Morneau's explanation for this is that he and Mr. Furnival were to get legal advice on how a sale could be effected from the children to Mr. Furnival. Thus, very soon after stating by resolution its intention to hold the building in trust for the children, the Defendant apparently changed its corporate mind by entering into the arrangement with Mr. Furnival.

[23] The absolute transfer of a 10% interest to Mrs. Morneau would also appear to contradict the terms of the trust, which were that up to 25% of the equity could be transferred as collateral for purposes of financing. The usual meaning of collateral is that it is property pledged to secure the performance of an obligation and upon performance it is surrendered or discharged. The Applicants claim, however, a transfer to Mrs. Morneau and an interest still held by her despite the fact that the monies she lent the Defendant have been repaid. Interestingly, Mr. Morneau made no reference to the interest purportedly held by Mrs. Morneau in his affidavit sworn for the application in July of 1998.

[24] In an affidavit sworn July 2, 1998, Mr. Morneau says that the Defendant company ceased operations in December of 1996 and that since then, the building has been managed by himself and his wife through a company called Group One (JM) Holdings (PEI) Inc. Mrs. Morneau, on the other hand, makes no reference to this latter company in her affidavit and states that Mr. Morneau rarely spoke to her about the business affairs of "his" company. There is no evidence that the PEI company has taken on the role of trustee.

[25] There is no evidence of the actual operation of a trust or that a bank account is maintained for the trust or any accounting made to the trust. In my view the evidence suggests that even if there was an intention to create a trust, that intention was not carried out subsequent to the corporate resolution of July 30, 1994.

[26] Assuming that a trust was in fact intended and established by the corporate resolution of July 30, does the Plaintiff's writ against the Defendant bind only the

Defendant's interest as trustee and not the beneficial interest of the children? Counsel for the Plaintiff submitted that any interest that the children may have in the building is void as against the Plaintiff by reason of failure to comply with the *Bills of Sale Act*, R.S.N.W.T. 1988, c. B-1, s. 2 of which provides as follows:

> 2 (1) A sale or mortgage that is not accompanied by an immediate delivery and an actual and continued change of possession of the chattels sold or mortgaged is void as against creditors and as against subsequent purchasers or mortgagees claiming from or under the grantor in good faith, for valuable consideration and without notice, whose conveyances or mortgages have been duly registered or are valid without registration, unless the sale or mortgage is evidenced by a bill of sale duly registered.
>
> (2) The sale or mortgage, and the bill of sale, if any, evidencing the sale or mortgage referred to in subsection (1), takes effect as against creditors and subsequent purchasers or mortgagees referred to in subsection (1) only from the time of the registration of the bill of sale.

The terms "sale" and "mortgage" each include by definition a declaration of trust without transfer: s. 1 of the *Act*.

[27] No bill of sale or declaration of trust was registered. Nor was there any change of possession. Counsel for the Applicants argued that the *Bills of Sale Act* does not apply because the building is no longer a chattel, having become part of the leasehold interest in the land by virtue of the government lease. He relied on the following definition of "chattel" found in s. 1:

> "chattels" means goods and chattels capable of complete transfer by delivery and includes, when separately assigned or charged, fixtures and growing crops but does not include
>
> (a) chattel interests in real property or fixtures when assigned together with a freehold or leasehold interest in land or a building to which they are affixed ...

[28] In my view, however, the focus must be on the transaction that the creditor claims is void and not what may have been done subsequently with the property. In this case, the declaration of trust (assuming that it was a valid declaration) was made at a time prior to the building becoming subject to the government lease. The building was a chattel at that time and did not come within the exclusion in the definition in the *Bills of Sale Act*. Section 2(1) therefore renders void that declaration of trust as against the Plaintiff as a creditor.

[29] As to the interest of Shelda Morneau, transfer of an interest to her could be valid only to the extent, under the terms of the trust, that it was pledged as collateral for her loan to the company. That loan having been repaid, she can have no further interest in the building. Additionally, once the government lease was in effect in September of 1994, the building became part of the leasehold interest and although the Defendant may have intended to assign a part of that interest to Shelda Morneau, no such assignment took place within the terms of the lease.

[30] For the foregoing reasons, I am not convinced of the merits of the Defendant's appeal. I am further troubled by the Defendant's failure to explain why it was admitted on July 8, 1998 that the Defendant is the owner of the building and to provide any information as to what is happening with the appeal. Nor am I convinced of the merits of the claim made by Shelda Morneau and the children, again for the reasons set out above.

[31] I therefore conclude that the first branch of the test is not met. Any claim that the Applicants may have to the building is not, in my view, sustainable against the Plaintiff as a creditor.

[32] As to the issue of irreparable harm, this is not a case where the beneficiaries of a trust have expended money or acted to their detriment in reliance on the trust. The total consideration passing from the three children was $3.00 and Shelda Morneau was repaid the loan she made to the Defendant. If the building is sold, then the beneficiaries may have a claim as against the Defendant to the sale proceeds or what remains of them after creditors have been paid.

[33] As to the balance of convenience, there are several writs outstanding against the Defendant. Counsel advised that there may also be rent owing to the government and that municipal taxes are in arrears. There is a concern that action may be taken by the government to cancel the lease or by the municipality to sell the leasehold interest for arrears of taxes. The balance of convenience in this situation favours the Plaintiff.

[34] Having considered all of the above, I dismiss the application for a stay. Costs usually follow the event but counsel may arrange to address that issue before me in Chambers within 30 days of the date this judgment is filed if they are unable to agree.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 12th day of January, 1999

Counsel for the Plaintiff:	Charles Thompson
No one appearing for the Defendant	
Counsel for the Applicants: Shelda Morneau, Laura Morneau, Samantha Morneau and Allison Morneau:	Austin Marshall
Counsel for the Public Trustee and the Estate of Robert Furnival:	Larry Pontus
Counsel for the Government of the Northwest Territories:	Yvonne MacNeill
Counsel for the Workers' Compensation Board:	Michael Triggs
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CV 06962

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