

Date: 1999 11 12
Docket: CV 08077

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ALBERTA EGGS LTD.

PLAINTIFF

-and-

PINEVIEW POULTRY PRODUCTS LTD.

DEFENDANT

MEMORANDUM OF JUDGMENT

- [1] As I have already set out much of the background of this matter in the Memorandum of Judgment filed July 13, 1999 on various interlocutory matters in this action, I will not review it again but will simply refer to the important points as they arise.
- [2] The cross-examinations and production of documents dealt with in the July 13, 1999 Memorandum of Judgment have been completed. The issue is now whether I should grant the Rice Order and deficiency judgment sought by Alberta Eggs and consented to by Pineview. For the reasons that follow, I have decided that Alberta Eggs' application should not be granted.
- [3] Whether a Rice Order is granted or not is a matter of discretion for the Judge hearing the application: *Canada Permanent Trust Company v. King Art Developments Ltd. et. al.*, [1984] 4 W.W.R. 587 (Alta. C.A.). In that case, the Court discussed the various factors that should be taken into account in deciding whether a Rice Order should issue or whether the property should be offered for sale by tender. Usually, the factors to be considered will relate to the value of the property or its marketability. In this case, the factors to be considered relate instead to whether the Rice Order procedure is being invoked for an improper purpose.

- [4] CEMA, the writholder, maintains its position that a Rice Order should not be granted. It says that there is evidence that if there was any default by Pineview under the Alberta Eggs mortgage, it was a contrived default and that the application for a Rice Order is simply another step in continuing efforts by Alberta Eggs and Pineview to keep Pineview's property out of CEMA's reach. It is essentially for these reasons that CEMA says the Court ought not to exercise its discretion to grant the Rice Order.
- [5] On behalf of Alberta Eggs and Pineview, it is argued that the concerns raised by CEMA are not supported by the evidence or that the evidence (by which I mean the numerous affidavits and exhibits and cross-examinations thereon) can be interpreted another way. They submit that the bottom line is that there is at least some money owing on the mortgage and therefore the Rice Order should be granted.
- [6] Alberta Eggs, as the party requesting the Rice Order, has the burden of satisfying the Court that this is a proper case for exercise of its discretion to grant the Order. Alberta Eggs does not have a right to a Rice Order. It seems to me that once concerns are raised, based on the evidence, about the propriety of granting such an order, Alberta Eggs must show that those concerns are unfounded. I have decided that the concerns raised by CEMA cannot be said to be unfounded. They arise from the evidence, as I will explain below.
- [7] As I have pointed out in the earlier Memorandum of Judgment, CEMA does not attack the validity of the mortgage itself. Alberta Treasury Branches loaned money to Alberta Eggs, which Alberta Eggs then loaned to Pineview. The intention was always that the money go to Pineview, but the loan could not be made direct from Alberta Treasury Branches because Pineview was an extra-provincial company. The mortgage was taken out in 1989; it appears that advances were made from time to time by Alberta Eggs to Pineview.
- [8] The players in Alberta Eggs and Pineview are set out in the cross-examinations of Randy and Gary Villetard. Randy Villetard is and was at the relevant times the sole shareholder, officer and director of Alberta Eggs.
- [9] Alberta Eggs owns 49 per cent of the shares of Pineview. The remaining 51 per cent are owned by Dene Gah Holdings Corporation, which has not taken any active part in this foreclosure proceeding and appears not to have taken any real part in the operations of Pineview except for its initial financial contribution. The original directors of Pineview were Gary Villetard and Pat Martel (the latter being connected with Dene Gah). Sometime prior to January of 1999, Larry Villetard replaced Pat Martel as a director. Larry Villetard has also been the on-site manager of Pineview's Hay River facility, which is the property being foreclosed on.

- [10] Notwithstanding the above, all three Villettard brothers appear to have been involved in making decisions for both companies. Both Gary and Larry Villettard wrote cheques on the Alberta Eggs account to Pineview over 1988 to 1993, despite the fact that neither was an officer, director or shareholder of the company. In his cross-examination, Randy Villettard said that the three brothers made the decisions on the advances made by Alberta Eggs to Pineview. At the same time, virtually all of Pineview's eggs, the sole means of income for the company, were sold to Alberta Eggs, which in turn sold them to another partnership or company owned by the Villettards. In 1997, Alberta Eggs stepped in to take over the Pineview operation and, according to Randy Villettard, a combination of the three brothers made the decisions about Pineview's operations. Since Dene Gah appears from the evidence not to have taken any real role in the operation of Pineview, this essentially leaves the three Villettard brothers managing both the creditor and debtor sides of the mortgage. Clearly the two companies were not operating at arm's length.
- [11] This then leads me to the issue of default under the mortgage. It is not disputed that money was advanced to Pineview by Alberta Eggs, although exactly how much was advanced under the mortgage is not clear because some of the cheques written were in payment for eggs. Similarly, it is not completely clear what payments were made under the mortgage. Counsel for Alberta Eggs said in his submissions that there were only two payments - in 1992 and 1996. Pineview has not submitted any evidence on this issue.
- [12] Pineview stopped production in approximately 1992. Alberta Eggs blames the shutdown on CEMA, while CEMA says that it was the result of licensing problems arising from the illegality of Pineview's egg marketing activities. From the information before me about various proceedings in the Federal Court, it is clear that there were licensing problems and that certain actions taken by CEMA were upheld by the Court. I do not, therefore, accept Alberta Eggs' argument that CEMA caused Pineview to default on the mortgage.
- [13] Pineview started up again in 1996 and its financial statements indicate that it earned over \$1.6 million that year. Then, in 1997, its revenue decreased to \$108,000.00 and, in 1998, to zero. At the same time, according to Alberta Eggs' financial statements, the revenue of Alberta Eggs went from zero in 1996 to \$1.175 million in 1997 and \$2.19 million in 1998. CEMA submits that these monies should have been applied to the mortgage debt.
- [14] The explanation offered by Alberta Eggs is that by 1997, Pineview was unable to obtain financing, so Alberta Eggs stepped in with a cash infusion. In return for that, and in order to protect its investment, Alberta Eggs also stepped in to run the facility. It is submitted that since Alberta Eggs was running the facility, it was

- entitled to keep the profits, or alternatively, even if Pineview should be credited with some or all of the profits, that would still not reduce the balance owing on the mortgage to less than the appraised value of the property.
- [15] The problem with this explanation is that it is very difficult, if not impossible, to draw a clear line between these companies for the reasons I have referred to earlier. The same people were in a position to control both the creditor and debtor side of the mortgage. It also raises the question why Alberta Eggs, a holding company, would step in to run the business in 1997 when, according to Randy Villetard's evidence, the mortgage was in default by 1992 and foreclosure proceedings could have been taken as early as then.
- [16] This becomes more significant when viewed against the background of certain other transactions which took place.
- [17] The first is what I will refer to as the "1992 agreement". In 1992, shortly after CEMA commenced its action against Pineview arising out of its extra-provincial egg marketing, Pineview entered into an agreement with Pat Martel and Gary Villetard (then the sole directors of Pineview) for sale to them of almost all the operating assets of Pineview's egg producing business. This included assets which were subject to the Alberta Eggs mortgage, which was to remain as a permitted encumbrance.
- [18] The evidence of Randy Villetard is that the 1992 agreement was entered into with the consent of Alberta Eggs and that its purpose was to save taxes.
- [19] One of the conditions precedent of the sale was approval of the transaction by the Hay River Dene Band. That condition was never fulfilled and the land which is the subject of the agreement was never transferred. Despite that, when, in 1997, CEMA attempted to seize chickens and eggs from the egg producing facility in satisfaction of its judgment against Pineview, the bailiff was advised by letter from Mr. McLennan on behalf of his then client Dene Eggs, a partnership between Gary Villetard and Pat Martel, that the assets were owned by Dene Eggs. A copy of the 1992 agreement was provided to the bailiff as evidence of ownership.
- [20] I should say here that I accept that Mr. McLennan had no knowledge that the sale had never been completed because the condition precedent was never fulfilled. When I refer to what he said in the letter, I accept that he did so acting on the instructions of his client. Whether Pineview itself or the Villetards knew the true situation is not clear. There are contradictions in the evidence, to which I will refer further on. I am asked to accept that they did not know - the only evidence on that point from Pineview is a reference in its 1998 financial statements that it received legal advice that year that the 1992 agreement had never been completed.

- [21] In his letter to the bailiff (dated September 10, 1997), Mr. McLennan stated that since purchasing the business in 1992, Dene Eggs had also purchased all of the laying chickens and other non-physical plant materials to operate the egg production facilities. He also referred to an invoice said to clearly evidence that the business was owned by and being conducted by Dene Eggs.
- [22] This, of course, contradicts the assertion of Alberta Eggs that it was operating the business in 1997 and was entitled to the profits. It gives rise to the question who was actually operating the business in 1997 - was it Alberta Eggs, Dene Eggs, Gary Villetard (with or without Pat Martel and under the mistaken impression that the 1992 agreement was valid) or was it indeed Pineview? The evidence is contradictory.
- [23] In my view, the 1992 agreement, because of its timing in relation to CEMA's lawsuit and the use that was made of it in 1997, does lend support to the assertion that Pineview was attempting to keep its assets from CEMA. It also, as I have pointed out above, puts in question the assertion by Alberta Eggs that it was operating the facility in 1997 (and 1998) and whether any real distinction can be drawn between the Villetards and the two companies.
- [24] The matter is further complicated by another agreement, which I will call the "1993 agreement". In cross-examination, Randy Villetard undertook to advise whether there was an agreement between Alberta Eggs and Pineview for use of the latter's facilities. In response to that undertaking, he produced what was said to be a 1993 agreement between the two companies, although he clarified in further cross-examination that the document produced was actually drawn up in 1999, after he had been asked about the existence of any agreement during his earlier cross-examination. As I understand his evidence from the transcripts, the document drawn up in 1999 is actually a list of terms agreed to in 1993. It is not signed by anyone and it does not appear that there actually was a written agreement in 1993.
- [25] The document refers to "details of an agreement effective March 15, 1993". It makes no reference to the sale to Pat Martel and Gary Villetard, despite the fact that the 1992 agreement had been signed by then and the parties involved are said to have been under the mistaken impression that it was effective. Indeed, the 1993 agreement states that "Pineview's only source of income is from the sale of the eggs its operation produces". The agreement provides that Alberta Eggs will fund Pineview's litigation with CEMA and provide funds as necessary for other expenses. It also provides that Pineview is entitled to the income from the egg laying operation in Hay River until December 31, 1996 and that if Pineview has not paid out Alberta Eggs in full before the beginning of the fifth year of the agreement, Alberta Eggs or its nominee will be entitled to the rent free use of the

- Hay River facilities from then on until paid out in full. And it provides that Alberta Eggs agrees not to foreclose on the Pineview debt before December 31, 1998.
- [26] As counsel for CEMA pointed out, although I think he used stronger words, it is interesting how, in 1993, Alberta Eggs and Pineview were able to predict almost exactly what would happen by 1999. The document purports to explain rather conveniently why Alberta Eggs took over operation of the egg producing facility in 1997, why it had the rent free use of the facility and why Alberta Eggs did not foreclose on Pineview until 1999, despite only two mortgage payments allegedly having been made. It is Alberta Eggs' position that it brought these foreclosure proceedings when it did because Alberta Treasury Branches made demand on its loan. In my view, a serious question of credibility arises from the circumstances in which this document was produced and the fact that it coincidentally provides that Alberta Eggs will not foreclose until 1999, which is exactly when Alberta Treasury Branches as it turns out decided to make demand on the loan.
- [27] The 1993 agreement (assuming for the moment that there was such an agreement in 1993) also contradicts the assertion that Alberta Eggs and Pineview believed at that time that the business had been sold to Gary Villetard and Pat Martel, because the agreement clearly contemplates that Pineview will continue to operate the business, at least until 1996, and that Alberta Eggs will then step in if the debt is not paid, all without any reference to the positions or rights of Villetard and Martel.
- [28] There is also the 1997 sale of a flock of hens. It appears that in January of 1997, Alberta Eggs purchased a flock of laying hens from Pineview for \$108,000.00, which was credited to Pineview as a payment on the mortgage. CEMA takes the position that this, along with Alberta Eggs' take-over of the operation of the business, effectively stripped Pineview of its only way of earning money, causing Pineview to be unable to make payments on the mortgage. Alberta Eggs says that it makes sense that when Pineview had no further financial resources, Alberta Eggs would step in to run the business to protect its investment and the purchase of the flock was made in that context. However, considering that Alberta Eggs is a holding company and that it had security for its investment in the form of the debenture, it is curious that it would spend more money (money it did not have; the evidence is that it borrowed the \$108,000.00 from another Villetard company, Villetard's Eggs Ltd.) to operate the business.
- [29] Again, it seems to me contradictory for Alberta Eggs and Pineview to say that they were under the impression that the business had been sold to Gary Villetard and Pat Martel, yet say also that Alberta Eggs purchased the flock from Pineview so that Alberta Eggs could keep the business running.

- [30] All of this simply confirms in my view that there was no distinction drawn as between Alberta Eggs, Pineview and the individual Villettards, as to who owned the business and its assets, who operated the business, who was entitled to the profits, who paid the expenses and who decided when and how the mortgage monies would be advanced and paid down. While Alberta Eggs and Pineview were set up as separate companies and had separate financial statements, the evidence indicates that they did not operate separately.
- [31] In these circumstances, I am not satisfied that the default under the mortgage, if there was one, was not contributed to or acquiesced in or even contrived by Alberta Eggs, because the same people were lending the money as were responsible for paying it off. The contradictions that arise from the circumstances surrounding the 1992 and 1993 agreements suggest that the purpose of seeking a Rice Order may well be to preserve the property within the Villettard family and render it unavailable to CEMA, with whom Pineview has an ongoing legal dispute. A Rice Order would mean that Alberta Eggs would take title and could continue to operate the business as it has for the last few years. There is no suggestion that Alberta Eggs plans to do anything but that.
- [32] In saying this, I do not ignore Alberta Eggs' submission that if the Rice Order is not granted, Alberta Treasury Branches will simply take action on its own security. I do not think that the serious questions about the actions and intent of Alberta Eggs and Pineview can be answered by submitting that even if they do not get what they want, CEMA will still lose out because another encumbrance holder will take action.
- [33] I had also considered whether a Rice Order should be granted with a condition that CEMA be paid out or that its writ remain against the property. However, in light of the concerns I have referred to, and the fact that CEMA's writ is not the only debt owing to it by Pineview, I do not think it would be appropriate to grant a Rice Order at all. To do so would be to place the Court's stamp of approval on what has happened or at least to say that there are no significant concerns. That cannot be said in this case.
- [34] The Court does have a duty to prevent misuse of its process and procedures: *ATL Industries Ltd. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div.). In this case, the mortgagee and mortgagor have not operated at arm's length and the mortgagee ought not to be permitted to take advantage of the Court's discretion to grant a Rice Order when its bona fides in doing so has not been established.
- [35] I need not go so far as to find that there has been fraudulent conduct on the part of Alberta Eggs or Pineview, although the circumstances, especially those surrounding the 1992 and 1993 agreements, raise that suspicion. Neither counsel

- sought a trial of the issues raised. There are credibility issues arising from the contradictory evidence which I cannot resolve or reconcile. This also persuades me that a Rice Order should not be granted.
- [36] As I have noted above, the evidence given by Randy Villetard himself in his cross-examinations indicates a blurring of the lines between Alberta Eggs and Pineview. Therefore, I need not deal with CEMA's submission that I should pierce the corporate veil to find out whether that is the case.
- [37] The only other submission I will comment on is CEMA's argument that Alberta Eggs does not have standing to bring this foreclosure action. There was an assignment agreement between Alberta Eggs, Pineview and Alberta Treasury Branches by which Alberta Eggs assigned to Alberta Treasury Branches its rights under the mortgage from Pineview. The assignment agreement provides that it is governed by the laws of Alberta. CEMA relies on s. 21(1) of the *Alberta Judicature Act*, 1980, R.S.A. c. J-1, arguing that the right to bring the action has been transferred to Alberta Treasury Branches by the assignment.
- [38] However, the evidence or information that was placed before me on an earlier application was, as noted in my Memorandum of Judgment of July 13, 1999, that Alberta Treasury Branches had entered into an agreement with Alberta Eggs that the foreclosure action was without prejudice to the assignment. This information was set out in a letter written by counsel for Alberta Treasury Branches and appended to an affidavit filed by CEMA. It may be that by this agreement Alberta Treasury Branches has reassigned to Alberta Eggs the right to bring the action or that Alberta Eggs is acting as agent for Alberta Treasury Branches to the extent of any monies owing to the latter; see *Singh v. Industrial Mortgage and Finance Corporation Ltd. et. al.* (1967), 61 W.W.R. 338 (B.C. Co. Ct.) and the cases referred to therein.
- [39] The argument that Alberta Eggs does not have the right to bring the action was raised for the first time in CEMA's written brief on this application. What CEMA is asking is that the Court rule on the validity of the agreement or the arrangements made between Alberta Eggs and Alberta Treasury Branches. In order to do that, CEMA should give notice to Alberta Treasury Branches, which it has not done. It may be in any event that if Alberta Treasury Branches should be the only or a co-plaintiff, it can simply be added as a party to the action. In the circumstances, I would not give effect to CEMA's submission that Alberta Eggs has no right to bring this action.
- [40] The application for a Rice Order is dismissed. If counsel wish to speak to costs, they may do so by filing written submissions within 30 days of the date this Memorandum is filed or they may, within that time, contact the Clerk of Court to arrange a date when the matter can be heard in Chambers.

V.A. Schuler

J.S.C.

Dated at Yellowknife, NT
this 12th day of November, 1999.

Counsel for the Plaintiff: Graham McLennan

Counsel for the Defendant: Ed Gullberg

Counsel for the Canadian Egg
Marketing Agency: David
Wilson