

# AT&T Capital Canada Inc. v. Tom Yee Co. Ltd.

Between  
AT&T Capital Canada Inc., plaintiff, and  
Tom Yee Co. Limited, defendant

[1996] B.C.J. No. 189  
60 A.C.W.S. (3d) 960  
Vancouver Registry No. C946378

**British Columbia Supreme Court  
Vancouver, British Columbia  
Cohen J.  
(In Chambers)**

Heard: January 10, 1996.  
Judgment: filed February 2, 1996.  
(75 pp.)

[Ed. note: A Corrigendum was released by the Court February 8, 1996; the correction has been made to the text and the Corrigendum is appended to this document.]

*Company law — Contracts by companies — Contracts by agents — Authority, what constitutes — When and how company bound — Whether contract made by company.*

This was an action by the plaintiff for judgment for \$395,000, on account of unpaid payments for eight equipment leases. The defendant claimed that the individual who signed some of the leases lacked the authority to do so. Two of the leases were signed by the defendant but the defendant claimed that it was induced by the individual who signed the other leases and who acted as the plaintiff's agent. The individual who signed the leases claimed that he was given the authority by the defendant to sign the leases.

**HELD:** Action allowed. The plaintiff was awarded judgment for \$395,000. The defendant was not credible and the testimony of the person who signed the leases was preferred. Therefore, this individual had the authority, on behalf of the defendant company, to sign the leases. The defendant permitted this person to negotiate leases on its behalf and did not communicate to the plaintiff any limitation on his authorization to engage in negotiations or execute documents. There was no evidence that the individual acted as the plaintiff's agent in these negotiations.

## **Statutes, Regulations and Rules Cited:**

Personal Property Security Act, ss. 59, 60.

## **Counsel:**

D.B. Hyndman, for the defendant.  
D.A. Hobbs, for the plaintiff.

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**COHEN J.:**—

I. The Application

¶ 1 The plaintiff, AT&T Capital Canada, Inc., applies for judgment against the defendant, Tom Yee Co. Limited, pursuant to Rule 18A in the amount of \$395,880.86, plus interest from September 1, 1995 to the date of judgment at 18% per annum compounded monthly, plus costs.

¶ 2 This application concerns eight equipment leases (the "leases") in which the plaintiff is the lessor and the defendant the lessee. The standard terms are the same in all eight leases. The leases span a time period between December 22, 1993 to March 29, 1994. Some of the leases involve new equipment and some involve a lease back of existing equipment.

II. The Leases

¶ 3 By way of brief background, the Tom Family owned and operated three companies engaged in the produce, processing, warehousing and distribution business known as: Sun Best Produce Co. Inc. ("Sun Best Co."); the defendant; and Tom Yee Trucking and Warehouse Co. Ltd. ("Trucking Co."). The defendant owned a wholly owned subsidiary, Tom Yee Produce Inc. ("Produce Inc."). The Tom Family companies' business activities in June 1994 were conducted out of three premises located on Vancouver's east side employing over 200 persons.

¶ 4 Mr. William Peek, a Certified General Accountant, signed five of the leases on behalf of the companies. In those leases, two of the Tom Family companies are co-lessees, being the defendant and Produce Inc. The other three leases were signed by Mr. Peter Tom and the co-lessees were the defendant, Produce Inc. and Sun Best Co. In all eight of the leases, the defendant is a co-lessee.

¶ 5 On the face page of the leases, above the lessees' full legal name, there appear the words, "the undersigned acknowledges to have read the entire lease and accepts the terms and conditions thereof." Underneath the lessees' full legal name there appear the words, "each one of the undersigned affirms that he is duly authorized to execute this lease."

¶ 6 Some of the relevant clauses of the lease are:

¶ 7 Clause 3 deals with rentals and provides as follows:

3. Rentals. Lessee shall pay to Lessor during the Term of this Lease the total number of rental payments set out in the Leasing Particulars. Such rental payments shall be payable to Lessor at 1600 - 777 Hornby Street, Vancouver, B.C. V6Z 2K3 or other address notified by Lessor to Lessee as follows: first rental payment upon Lessee's execution hereof and subsequent rental payments on the first day of each month, or other calendar period indicated in the Leasing Particulars, throughout the Term. Rentals, and any other amounts due, are payable without off-set compensation or abatement and in no event shall the first rental payment

be refunded to Lessee.

¶ 8 Clause 4 deals with interest on overdue payments and provides as follows:

4. Interest on Overdue Payments. Lessee shall without notice pay interest at the rate of eighteen percent (18%) per annum calculated and compounded monthly on any overdue rentals, costs of collection and enforcement by Lessor and other amounts due to Lessor hereunder not paid on their due dates and, upon written notice from Lessor, at the same rate on all other amounts required to be paid by Lessee hereunder which have been paid by Lessor. Such interest is to be calculated and compounded monthly not in advance and shall accrue from the date when such arrears were due and payable hereunder before and after maturity, default and judgement until such arrears are paid in full.

¶ 9 Clause 6 deals with installation, maintenance and repair and provides as follows:

6. Installation, Maintenance and Repair. Lessee shall, at its expense, be responsible for the delivery, installation, de-installation, re-delivery, maintenance and repair (including necessary replacements) of the Equipment by a party acceptable to Lessor. Lessee shall at its expense, keep the Equipment in good repair, condition and working order. Lessee shall not without the prior written consent of Lessor make any alterations to the Equipment. All such alterations, additions or improvements shall be at Lessee's expense and shall belong to, and become property of, Lessor immediately upon being made. On Lessor's request, Lessee shall enter into a maintenance agreement respecting the Equipment with the manufacturer thereof or other maintenance supplier acceptable to Lessor.

¶ 10 Clause 9 deals with loss and damage and provides as follows:

9. Loss and Damage. Lessee shall bear the risk of loss with respect to and damage to or, destruction, loss, theft, seizure or governmental taking of any item of the Equipment whether partial or complete and whether or not through any default or neglect of Lessee. No such event of damage, destruction, loss, theft, seizure or governmental taking, shall relieve Lessee of its obligation to pay rentals hereunder.

¶ 11 Clause 13 deals with taxes and provides:

13. Net Lease, Responsibility for Taxes and Tax Status of Lease. Lessee shall pay or reimburse Lessor for all expenses, fees, charges, claims and fines incurred or arising in connection with the registration, licensing, possession, use or operation of the Equipment and all Taxes. All other expenses and outgoings relating to the Equipment for any matter or thing shall be borne by Lessee. The rentals herein provided shall be absolutely net to Lessor, free of all set-offs, compensation, expenses or outgoings of any kind or nature. If Lessee fails to repair and restore, to procure and maintain insurance as herein provided or to pay any fees, expenses,

charges or claims on or in connection with the Equipment or otherwise perform as herein required Lessor may do so and shall be entitled to immediate reimbursement from Lessee without prejudice to any other of Lessor's rights or remedies hereunder and Lessee appoints Lessor its lawful attorney for such purposes. The word "Taxes" herein includes all taxes, imposts, levies, fees, duties and charges imposed by any federal, provincial, municipal or other taxing authority on Lessor, Lessee or Equipment, its purchase, sale, ownership, delivery, possession, use, operation or lease including, without limitation, sales, excise, use, property, business, transfer, goods and services and value added taxes, and including penalties or interest based on late payment of taxes, but excludes taxes and imposts on or measured by Lessor's overall net income. Lessee acknowledges and agrees that Lessor shall be entitled to claim any applicable capital cost allowance, investment tax credit or similar benefit under applicable tax legislation from time to time pertaining to the Equipment and/or the Lease and Lessee shall not make any such claim in respect thereof without consent in writing of Lessor.

¶ 12 Clause 18.1 provides as follows:

18. Default

18.1 Lessee acknowledges that Lessor has purchased the Equipment at the specific request of Lessee which has personally selected the Equipment for the purpose of this Lease and that rentals hereunder and loss to Lessor in the event of default are dependent in part upon the cost of the Equipment to Lessor, the Term and the minimum return expected by Lessor from the sale or re-leasing of the Equipment at the end of the Term. Each of the following is an Act of Default.

- (a) Lessee fails to make any rental payment or pay any other sum within 10 days after the same is due and payable; or
- (b) Lessee fails to perform, observe or comply with any other obligation, term or condition on its part to be performed, observed or complied with hereunder; or
- (c) any event of default occurs under any other lease or contact between Lessor and Lessee; or
- (d) any representation or warranty made by Lessee to Lessor in connection with obtaining this Lease is incorrect; or
- (e) any of the Equipment be subjected to any privilege, lien, charge, encumbrance, levy, security interest, seizure, attachment or judicial process or Lessee sells, mortgages, hypothecates or pledges, or attempts to

- sell, mortgage hypothecate or pledge any of the Equipment; or
- (f) Lessee makes any assignment for the benefit of its creditors, becomes insolvent, commits any act of bankruptcy, ceases or threatens to cease to do business as a going concern, or seeks any arrangement or composition with its creditors; or
  - (g) any proceeding in bankruptcy, receivership, liquidation, or insolvency be commenced by or against Lessee or its property; or
  - (h) if, in the reasonable opinion of Lessor, a material adverse change in risk under this Lease occurs at any time.

¶ 13 Clause 18.2 sets out the consequences upon the happening of any act of default, as follows:

18.2 Upon the happening of any Act of Default:

- (a) Lessee shall pay forthwith (without notice) to Lessor as liquidated damages the present value (calculated on the basis of an interest rate of six per cent (6%) per annum calculated and compounded monthly) of the aggregate of:
  - (i) unpaid rental payments to the date of the Act of Default; and
  - (ii) the remaining rental payments payable to the end of the Term; and
  - (iii) amounts otherwise payable to the end of the Term; and
  - (iv) the purchase price of the Equipment pursuant to any purchase option; and
  - (v) the amount of any residual interest which Lessor may have in Equipment;

Lessee agrees that all such amounts shall be paid as liquidated damages and not as a penalty.

- (b) upon Lessor's demand, Lessee at Lessee's expense shall forthwith deliver the Equipment to Lessor at the Place of Re-delivery, specified in the Leasing Particulars;
- (c) Lessor may without notice and without resort to legal process take immediate possession of the Equipment and for this purpose enter into and upon the premises wherein the Equipment is located without incurring any liability to Lessee; and

- (d) upon return of the Equipment to Lessor, the rights of Lessee hereunder to the Equipment shall cease and terminate absolutely.

¶ 14 Clauses 18.3 through 18.5 provide:

18.3 Lessor's cost of collection, legal proceedings to recover any monies due hereunder, taking possession of the Equipment, repairing and restoring the Equipment and enforcement of any of Lessor's rights, including without limitation, legal costs on a solicitor-client basis, shall be paid by Lessee to Lessor forthwith upon demand, with interest thereon as provided for in Section 4.

18.4 If Lessor repossess the Equipment or Lessee surrenders the Equipment pursuant to Section 18.2, Lessor may sell or re-lease the Equipment at public or private sale with or without notice to Lessee and upon such terms and in such manner as Lessor may determine. The amount of the actual net proceeds of any such sale or re-lease (after deducting all costs and expenses connected with repossession and sale or re-lease) shall be deducted from the amount to be paid to Lessor as liquidated damages under this Section 18. Lessee shall in all events be liable to Lessor to make up immediately the amount of any deficiency between the net proceeds to Lessor of sale, re-leasing or other disposition of the Equipment and the amount due to Lessor pursuant to Section 18.2 as liquidated damages.

18.5 If at any time prior to Lessor repossessing the Equipment or Lessee surrendering the Equipment pursuant to Section 18.2 Lessee pays to Lessor the amounts to be paid as liquidated damages under this Section, title to the Equipment shall vest in Lessee on an "as is, where is" basis without any representation or warranty of Lessor whatsoever.

¶ 15 Clause 37 provides:

- 37. Joint and Several Liability. If more than one person executes this Lease, their obligations hereunder shall be joint and several, without benefit of division or discussion.

### III. Statement of Claim

¶ 16 Paragraph 11 of the amended statement of claim alleges as follows:

- 11. Pursuant to Lease No. 1, Lease No. 2, Lease No. 3, Lease No. 4, Lease No. 5, Lease No. 6, Lease No. 7 and Lease No. 8 (collectively, the "Leases"), it was also agreed by AT&T and Tom Yee that:
  - a. a failure to make any rental payment or pay any other sum within 10 days after the same is due and payable is an act of default;
  - b. an act of default under one Lease is an act of default under any other Lease between the same Lessor and the same Lessee;

- c. if, in the reasonable opinion of AT&T, a material adverse change in risk under a Lease occurs at any time, such material adverse change is an act of default;
- d. if Tom Yee, Produce and Sun Best default under the terms of the Leases, Tom Yee, Produce and Sun Best shall pay forthwith without notice to AT&t as liquidated damages the present value (calculated on the basis of an interest rate of 6% per annum calculated and compounded monthly) of the aggregate of:
  - i. unpaid rental payments to the date of default;
  - ii. the remaining rental payments payable to the end of the term;
  - iii. amounts otherwise payable to the end of the term;
  - iv. the purchase price of the equipment pursuant to any purchase option; and
  - v. the amount of any residual interest which AT&T may have in the equipment;
- e. if more than one person executed a lease as lessee, the obligations of the lessees are joint and several; and
- f. the Lessee would forthwith pay upon demand, with interest at the rate of 18% per annum calculated and compounded monthly, the Lessor's cost of collection, legal proceedings, to recover any monies under the Leases, taking possession of the Equipment and enforcement of any of the Lessor's rights, including without limitation, legal costs on a solicitor-client basis.

¶ 17 Paragraphs 13-28 of the amended statement of claim allege as follows:

Lease No. 1

- 13. Tom Yee and Produce have refused or neglected to make any monthly rental payments since June 15, 1994.
- 14. The Receiver-Manager has agreed to pay \$15,999.67 or a portion thereof to AT&T in partial satisfaction of the monthly rental payments.
- 15. By reason, inter alia, of Tom Yee and Produce's failure to make all monthly rental payments since June 1, 1994, and the material adverse change in risk under Lease No. 1, Tom Yee is in default under the terms of Lease No. 1 and there is now due and owing to AT&T the sum of \$58,449.71.

Lease No. 2

16. The Receiver-Manager paid or agreed to pay AT&T its monthly rental payments in the amount of \$9,057.95 in respect of Lease No. 2 up to and including November 29, 1994, but will not be making any further payments after that date.
17. There is a material adverse change in risk under Lease No. 2 and Tom Yee is as a result thereof, inter alia, in default under the terms of Lease No. 2 and there is now due and owing to AT&T the amount of \$36,656.44.

Lease No. 3

18. The Receiver-Manager paid or agreed to pay AT&T its monthly rental payments in the amount of \$14,446.25 in respect of Lease No. 3 up to and including November 29, 1994, but will not be making any further payments after that date.
19. There is a material adverse change in risk under Lease No. 3 and Tom Yee is as a result thereof, inter alia, in default under the terms of Lease No. 3 and there is now due and owing to AT&T the amount of \$58,330.56.

Lease No. 4

20. Tom Yee and Produce have refused or neglected to make any monthly rental payments since June 1, 1994, and accordingly, Tom Yee is in default under the terms of Lease No. 4 and there is now due and owing to AT&T the amount of \$16,791.05.

Lease No. 5

21. Tom Yee, Produce and Sun Best have refused or neglected to make any monthly rental payments since June 15, 1994, and accordingly, Tom Yee is in default under the terms of Lease No. 5 and there is now due and owing to AT&T the amount of \$92,821.70.

Lease No. 6

22. Tom Yee and Produce have refused or neglected to make any monthly

rental payments since June 1, 1994.

23. The Receiver-Manager has agreed to pay \$2,650.50 or a portion thereof to AT&T in partial satisfaction of the monthly rental payments.
24. By reason, inter alia, of Tom Yee and Produce's failure to make all monthly rental payments since June 1, 1994, and the material adverse change in risk under Lease No. 6, Tom Yee is in default under the terms of Lease No. 6 and there is now due and owing to AT&T the sum of \$10,946.73.

Lease No. 7

25. Tom Yee, Produce and Sun Best have refused or neglected to make any monthly rental payments since June 15, 1994, and accordingly, Tom Yee is in default under the terms of Lease No. 7 in the amount of \$31,361.40.
26. On November 2, 1994, AT&T sold Equipment No. 7 for \$21,828.00, and Tom Yee is indebted to AT&T in the amount of \$9,533.40 after deducting the sale proceeds.

Lease No. 8

27. Tom Yee and Sun Best have refused or neglected to make further monthly payments since June 1, 1994, and accordingly, Tom Yee is in default under the terms of Lease No. 8 in the amount of \$36,010.00.
28. On November 28, 1994, AT&T sold Equipment No. 8 for \$9,737.00, and Tom Yee is indebted to AT&T in the amount of \$23,670.69 after deducting the sale proceeds.

¶ 18 The prayer for relief claims as follows:

WHEREFORE THE PLAINTIFF CLAIMS:

- a. From Tom Yee the following amounts:
  - i. Lease No. 1 \$58,449.71
  - ii. Lease No. 2 36,656.44
  - iii. Lease No. 3 58,330.56
  - iv. Lease No. 4 16,791.05
  - v. Lease No. 5 92,821.70
  - vi. Lease No. 6 10,946.73
  - vii. Lease No. 7 9,533.40

viii. Lease No. 8            23,670.69

TOTAL:    \$307,200.28

- b. Costs;
- c. Court Order Interest thereon from the date of default(s) to the date of judgment;
- d. payment of all taxes, including, without limitation, sales taxes and goods and services taxes imposed on AT&T by statute or operation of law and payable pursuant to the terms of the Leases;

#### IV. Statement of Defence

¶ 19 The defendant's main defences are set out in paragraphs 19-31 of its amended statement of defence as follows:

- 19. In the alternative, the Defendant states, and the fact is, that if it signed all or any of the Leases, which is not admitted but specifically denied, then the Defendant signed those leases as an accommodation party or guarantor for the obligations of Produce under those leases which it did to the knowledge of and specifically at the request of the Plaintiff.
- 20. The Defendant states if it is a guarantor under the Leases, which is not admitted but specifically denied, then the following facts and circumstances void its obligation under the Leases and release and discharge the Defendant in respect of the claims of the Plaintiff:
  - (a) The Plaintiff has seized or purported to seize all or a portion of the goods covered by the Leases. Further, the goods which were the subject matter of leases number 7 and 8 have been disposed of by the Plaintiff. However, the Plaintiff did not, as required pursuant to the terms of the Personal Property Security Act of the Province of British Columbia, and specifically Section 60 thereof, give notice to the Defendant of its intention to dispose of all or any of those goods thereby depriving the Defendant of its rights under and pursuant to the Personal Property Security Act;
  - (b) In respect of those goods that were seized by the Plaintiff, the Plaintiff failed to properly advertise or expose those assets for sale;
  - (c) The assets that were sold by the Plaintiff were sold far below their cost and/or market value;
  - (d) Failure to take reasonable steps to secure and protect the assets which have been seized by the Plaintiff resulting in dissipation and deterioration of

those assets;

- (e) In respect of lease number 2, failure to register the lease in the appropriate Land Title Office resulting in the assets which are the subject matter of lease no. 2, and which were fixtures by their very nature, being sold by the Receiver of the Defendant and Produce as part of a sale of land free and clear of the interest of the Plaintiff in the assets which are the subject matter of lease number 2.
21. If the Defendant is a guarantor, which is not admitted but specifically denied, then there is no resolution of the Directors of the Defendant or any other evidence that the Defendant's guarantee of the Leases with Produce was in the best interests of the Defendant, which is in breach of the provisions of the Company Act with the result that the Leases are not binding on the Defendant.
22. The directors, officers and duly authorized signatories of the Defendant are, and at all relevant times hereto were, as follows:
- |             |           |
|-------------|-----------|
| Harry Tom - | President |
| Peter Tom - | Secretary |
| Fong Woo -  | Treasurer |
23. Lease numbers 1, 2, 3, 4 and 6 were purportedly executed on behalf of the Defendant by an individual by the name of Bill Peek ("Peek"), purportedly in his capacity as VP Finance for the Defendant.
24. At no time did the Defendant employ Peek as VP Finance or in any capacity whatsoever.
25. At no time did the Defendant authorize Peek, expressly, impliedly, ostensibly or otherwise, to hold himself out as being an officer, director, employee, agent or authorized signatory of the Defendant in respect of the Leases or otherwise.
26. Peek was not held out, expressly, impliedly ostensibly or otherwise, by the Defendant to anyone, and specifically the Plaintiff herein, as having authority to bind it legally under the leases or indeed to any contractual relationship to the Plaintiff or anyone whatsoever.
27. The fact that Peek had no authority to execute or deliver these leases on behalf of the Defendant was known, or ought to have been known, by the Plaintiff.
28. Therefore, lease numbers 1, 2, 3, 4 and 6 have not been duly authorized, executed or delivered by the Defendant to the Plaintiff and are not binding upon the Defendant.

29. Further, lease numbers 5, 7 and 8 were signed on behalf of the Defendant by Peter Tom at the request and direction of Peek who, in so acting, was the agent of the Plaintiff in obtaining execution of these leases.
30. Peek misrepresented the nature and effect of these leases informing Peter Tom that these were simply leases of equipment for Produce which Peter's brother, Harry had approved for Produce. Peter Tom was not advised that he was signing for the Defendant or, if he was so advised, that he was binding the Defendant to the Plaintiff in any way.
31. The Plaintiff, through its agent Peek, obtained the signature of Peter Tom on behalf of the Defendant through fraud and misrepresentation and the leases are therefore unenforceable by the Plaintiff as the Plaintiff cannot benefit from the fraud and misrepresentation of its agent, Peek.

¶ 20 There are no issues regarding defaults under the leases or about the lease or supply of any of the equipment dealt with under the leases.

#### V. The Evidence

¶ 21 Mr. Lui Spizzirri, the plaintiff's Manager of Operations, Western Region, supervised the plaintiff's transactions with the defendant. In his affidavit, sworn January 11, 1995, he deposed as follows:

7. Under the terms of the Leases the following events have occurred:
  - a) save and except some partial payments in November 1994 by the Receiver-Manager of Produce, nonpayment of monthly rental payments under Lease No. 4, Lease No. 6 and Lease No. 8 as of June 1, 1994, and since June 11, 1994 to date, nonpayment under all other Leases;
  - b) filing by Produce with the Official Receiver on July 5, 1994, a Notice of Intention to Make a Proposal pursuant to subsection 50.4(1) of the Bankruptcy and Insolvency Act. Now produced and shown to me and marked as Exhibit "C" to this my Affidavit is a true copy of the said Notice of Intention to Make a Proposal; and
  - c) in my opinion a material adverse change in risk under the Leases has occurred because of collection difficulties experienced, Produce's apparent insolvent circumstances and nonpayment of amounts due under the Leases.

¶ 22 The calculation of the defendant's indebtedness to the plaintiff is set out in the following paragraphs of Mr. Spizzirri's affidavit:

8. Pursuant to the terms of the Leases it was also agreed that upon the happening of any act of default:
  - a) Tom Yee and Produce shall pay forthwith without notice to AT&T as

liquidated damages the present value (calculated on the basis of an interest rate of 6% per annum calculated and compounded monthly) of the aggregate of:

- (i) unpaid rental payments to the date of default;
  - (ii) the remaining rental payments payable to the end of the term;
  - (iii) amounts otherwise payable to the end of the term;
  - (iv) the purchase price of the equipment pursuant to any purchase option; and
  - (v) the amount of any residual interest which AT&T may have in the equipment; and
- b) Tom Yee and Produce shall pay to AT&T forthwith upon demand all AT&T's costs of collection, legal proceedings and legal costs incidental to any action brought to enforce the Leases.
9. Pursuant to the terms of the Leases it was also agreed that interest on overdue payments shall be paid by the Lessee at the rate of eighteen percent (18%) per annum calculated and compounded monthly on any overdue rentals.
10. Now produced and shown to me and collectively marked as Exhibit "D" to this my Affidavit are true copies of the calculation of Tom Yee's indebtedness as at November 28, 1994 under each of the Leases, exclusive of costs of collection, legal proceedings and legal costs, calculated pursuant to the terms of the Leases.
11. As at November 29, 1994, the indebtedness of Tom Yee to AT&T under all of the Leases was \$307,200.28 exclusive of costs of collection, legal proceedings and legal costs.
12. As at January 25, 1995 the indebtedness of Tom Yee to AT&T will be \$316,177.27 exclusive of costs of collection, legal proceedings and legal costs.

¶ 23 In Mr. Peek's affidavit, sworn September 20, 1995, he deposed that he was the Controller and ultimately the Vice-President of Finance for the Tom Family group of companies between February 1991 and March 1994. In paragraphs 2 through 22 he deposed as follows:

2. During the term of my employment, first as controller, and subsequently as Vice-President of Finance, I worked at an office located in premises at 830 Malkin Street, Vancouver, British Columbia, which real property I understood was owned by Sun Best Produce Co. Ltd. ("Sun Best"). As the operations of the produce business were carried on by one of the Tom

Family group of companies Tom Yee Produce Inc., the payroll for employees was run under that company's account.

3. I note in Exhibit "E" to the Affidavit of Jonathan Herbert the reference to the fact that no separate general ledger was maintained by the Defendant, Sun Best and Yee Co. or Tom Yee Trucking. All financial transactions during the year for the Tom Family Group of Companies were entered into the books of Produce. At year end, the books for the individual accounts of the Tom Family Group of Companies were adjusted by the auditors for the Tom Family Group of Companies. The Tom Family Group of Companies was treated as one business until each year end.
4. On or about February, 1992, I was promoted by Harry Tom to the position of Vice-President of Finance, given a 20% salary increase and business cards designating me as V.P. Finance. The promotion was given verbally.
5. At no time during my employment were performance bonuses or incentives provided to me. I have read the Affidavit of Harry Tom filed herein on February 7, 1995 and the allegations in paragraphs 16, 17, 19, 20 and 21 are false, and further nonsense. I was not a party to a bonus or incentive program.
6. As controller and subsequently as Vice-President of Finance, I took the majority of my instructions from Harry Tom. These instructions were mostly verbal instructions and related to the operations, management and financial affairs of the Defendant, Sun Best and Produce without exception.
7. I did not have a formal written job description during the term of my employment but was responsible for the day-to-day financial operations of Produce, the Defendant Tom Yee Co. Limited ("Tom Yee") and Sun Best (collectively the "Companies"), which included overseeing the management of the employees of Produce and Sun Best, corporate and financial dealings with the Companies' bank, inventory control, accounts payable, accounts receivable and negotiating and entering equipment leases.
8. During the term of my employment, I managed the financial affairs of the Companies with the approval and authorization of Harry Tom. At no time was I ever advised that my authority was limited in connection with the Defendant's affairs as compared to the other Companies.
9. On the basis of Harry Tom's instructions, I was authorized from time to time to execute bank documents on behalf of one or more of the Companies. In particular, I executed bank charge agreements, fund transfer documents and overdraft agreements, some of which were provided to me for execution by Mr. Ron McLaughlin, the then Bank Manager at the Canadian Imperial Bank of Commerce branch office where

the Companies banked. I often met with Mr. McLaughlin to address banking related matters as this effected all the Companies including the Defendant. Harry Tom was aware of this aspect of my activities and authorized me to do so.

10. Harry Tom verbally authorized me to negotiate and execute equipment leases for Produce and where necessary, cross obligate one or both of Tom Yee and Sun Best to secure the lease obligations of Produce as required by the Lessor. Basic credit searches disclosed Produce as an operating company with no real property assets, therefore, lenders and lessors would seek the covenants of the Defendant or Produce as they held the real property assets.
11. On the basis of Harry Tom's verbal instructions, I negotiated and executed a lease of tractor trailers and other equipment between Produce and Commcorp Financial Services Inc. (the "Commcorp Lease") in or about June, 1993. Now produced and shown to me and marked as Exhibit "A" to this my Affidavit is a copy of a Personal Property Registry search listing the Companies as debtors pursuant to the Commcorp Lease.
12. During the lease negotiations with Commcorp, I was asked to provide financial statements for the Companies. After Commcorp reviewed the financial statements for the Companies, I was advised that Commcorp would require Tom Yee and Sun Best to be added to the Commcorp Lease as co-obligant before it would supply the Commcorp Lease equipment to Produce. I subsequently executed the Commcorp Lease on behalf of each of the Companies in accordance with Harry Tom's instructions and my discussions with him.
13. During the month of September, 1993, I was approached by a representative of AT&T Capital Canada, Inc. ("AT&T") regarding equipment leasing, either by way of sale back of existing equipment, or purchase and lease of equipment to the Companies by AT&T.
14. I subsequently met with Harry Tom and Peter Tom to discuss the AT&T leasing proposal with them. We discussed the idea of selling and leasing back certain new and used equipment owned by Produce in order to create additional working capital for one or more of the Companies, or having AT&T purchase new equipment from a Vendor of Produce's choice, and then leasing that equipment from AT&T.
15. After discussing this matter with Harry and Peter Tom, and deciding what equipment was to be purchased by and leased from AT&T, or sold to and leased back from AT&T, I again met with a representative of AT&T to negotiate the specifics of the leasing proposal. When I produced a copy of the financial statements to January 31, 1993 for Tom Yee, and to December 31, 1992 for Sun Best, I was advised that AT&T would require one or both of Tom Yee and Sun Best to be co-lessees with Produce. I

discussed this co-lessee requirement with Harry and Peter Tom. I was instructed to proceed with the leasing arrangements on that basis. At no time did Harry or Peter Tom instruct me not to negotiate and conclude leasing arrangements with AT&T, nor did they advise me that I was not to execute any leases in the name of Tom Yee or Sun Best. In fact, Harry Tom stated that I did not need to keep coming to him to approve and execute any lease documentation because I had the authority to negotiate and execute leases with AT&T.

16. It was on the aforesaid basis that I represented to AT&T that I had authority as controller and Vice-President of Finance to negotiate and execute lease documentation on behalf of all of the Companies.
17. Between December 22, 1993 and March 29, 1994, a total of eight leases were entered into between AT&T and two or more of the Companies. In each instance, Produce was one of the lessees, while one or both of Tom Yee and Sun Best were co-lessees.
18. In accordance with the instructions and authority given to me by Harry Tom, I executed the leases numbered 1, 2, 3, 4 and 6 in the Amended Statement of Claim on behalf of Produce, Tom Yee and/or Sun Best. Leases numbered 5, 7 and 8 were executed by Peter Tom as I was not present or available to sign at the office at 830 Malkin Street when these three leases were delivered for execution.
19. In accordance with the instructions and authority given to me by Harry Tom, I also executed delivery and acceptance certificates and pre-authorized pre-payment forms with respect to the monthly lease payment obligations. Harry Tom was aware that funds were being received on the lease back on existing equipment leases.
20. Lease numbers 2 and 4 were sale/lease back agreements involving equipment already owned by Produce. In accordance with the instructions and authority given to me by Harry Tom, I negotiated the sale of the assets comprising lease number 2 for the sum of \$54,910.04, after which AT&T provided Produce with a cheque in that amount. I also negotiated the sale of the assets comprising lease number 4 for the sum of \$18,977.79, after which AT&T provided Produce with a cheque in that amount. In each of these instances, I was also authorized by Harry Tom to execute a Bill of Sale on behalf of Produce.
21. I resigned on or about March, 1994. Both Harry and Peter Tom were aware at this time that I had negotiated the terms of the eight leases with AT&T, and were aware that I had executed five of these leases in the name of Produce, as lessee, and one or both of Tom Yee and Sun Best, as co-lessee. No complaint or questioning as to my authority was discussed with or suggested to me at any time by anyone in connection with these lease arrangements.

22. At no time during the term of my employment did I intentionally or unintentionally inflate the inventory and accounts receivable or deflate accounts payable. I reported all financial affairs as accurately as I had no reason or incentive to do otherwise and would not do so in any event.

¶ 24 With respect to paragraph 11 of Mr. Peek's affidavit, plaintiff's counsel produced a photocopy of a signature page headed up "Commcorp Lease," showing that the lessee was Produce Inc. and the signatory on behalf of Produce Inc. was Mr. Peek, "V-P Finance."

¶ 25 With respect to the evidence of Mr. Peek in paragraph 15 of his affidavit, plaintiff's counsel produced a copy of the defendant's financial statements to the year ending January 31, 1993, the fiscal period ending before the leases were entered into. The balance sheet for the defendant shows, under the 1993 column, capital assets of \$2,665,740 and liabilities of \$2,406,405. Note 5 to the financial statements reads:

During the year, capital assets totalling \$2,406,405 were purchased from Tom Yee Produce Inc., its subsidiary. The purchase was transacted at the fair market value of the capital assets. The company issued a note in the amount of \$2,406,405 for the purchase of the capital assets. The note does not bear interest, and has no fixed terms of repayment. The note is payable upon demand by Tom Yee Produce Inc. and as such is classified as a current liability.

¶ 26 Produce Inc. went into receivership in May - June 1994, after the subject leases were entered into. Produce Inc. became a Bankrupt dated July 1994. The transaction referred to in note 5 was reversed and the assets ended up back in Produce Inc.

¶ 27 Plaintiff's counsel argued that it was obviously apparent to the plaintiff that one of the Tom Family companies sold a substantial portion of its assets to another, and therefore the plaintiff sought the covenant of the other company.

¶ 28 In his affidavit sworn November 3, 1995, Mr. Harry Tom, a Director of the defendant, deposed as follows:

3. I have reviewed the Affidavit of William Peek sworn September 20, 1995 and filed herein on September 25, 1995 and have the following comments with respect to that Affidavit:

Paragraph 1: As stated in my Affidavit sworn in these proceedings February 2, 1995 (the "First Affidavit") Bill Peek was never VP Finance for the Defendant, Tom Yee Co. Limited ("Yee Co."). As stated in the First Affidavit, Mr. Peek was neither an officer nor a director of the Defendant, nor was he hired or otherwise engaged by the Defendant in any way whatsoever;

Paragraph 3: Yee Co. was not an operating entity and so never had any need to have a general ledger. Sun Best and Trucking had no general ledger either but this was a decision made by Mr. Peek. Mr. Peek reviewed the accounting procedures in respect of Produce, Sun Best and Trucking and told me that it was easier from an accounting perspective to have only one general ledger and then

separate entries out into the various entities individually at year-end. That was a decision that Mr. Peek made himself after reviewing the accounting systems;

Paragraph 4: I do not deny that I agreed with Mr. Peek that he could use the designation "Vice-President of Finance". However, as I indicated in the First Affidavit and as I have reiterated herein, Mr. Peek was never designated Vice-President of Finance or any other title in respect of the Defendant, Yee Co. With respect to the raise referred to in paragraph 4 of Mr. Peek's Affidavit, this raise was given to Mr. Peek by himself. Mr. Peek unilaterally advised the payroll department of Produce to increase his pay cheque by 20%. This did not become known to me until the latter part of 1992 but, on the advice of our audit accountant, Mr. Peek was not terminated as a result of this unilateral authorization of an increase in his salary because it was necessary to have Mr. Peek in an accounting function in order to allow continuity and integrity in Produce's accounting system. After discussions with the payroll clerk in charge who was told by Mr. Peek to increase his salary, it was determined that Mr. Peek went so far as to tell the payroll clerk not to tell me that she had been told by Mr. Peek to increase his salary.

Paragraph 5: Attached as Exhibit "A" to this my Affidavit is a true copy of a portion of a letter from the Province of British Columbia, Ministry of Skills, Training and Labour outlining the pension plan program for the employees of Tom Yee Produce. As can be seen from the outline at the bottom of page one of the excerpt, Mr. Peek added himself to the pension plan effective 1992. This is consistent with the comments that I made in respect of Mr. Peek and his performance and incentive program in paragraph 17 of the First Affidavit, being that part of his incentive and performance program would include being added to the pension plan. Mr. Peek obviously then took it upon himself to add himself to the Plan: again without my prior knowledge;

Paragraph 6: I reiterate that Mr. Peek was never given instructions relating to the operations (of which there were none) management or financial affairs of the Defendant Yee Co.;

Paragraph 7: Once again, Mr. Peek was never given any responsibility in respect of any matters relating to the Defendant Yee Co.;

Paragraph 8: Once again, Mr. Peek was never given any responsibility in respect of any matters relating to the Defendant Yee Co.;

Paragraph 9: Mr. Peek was never authorized to sign any banking or other- documentation on behalf of the Defendant Yee Co. I do not deny that Mr. Peek received authorization "from time to time" to execute documents on behalf of Produce, Sun Best and Trucking, but those instructions were specific and the authority was never general or continuing in nature;

Paragraph 10: I do not deny that Mr. Peek was authorized to negotiate some leases with AT&T. However, Mr. Peek was never authorized to negotiate any

leases on behalf of Yee Co. In addition, the authority to "negotiate" never extended to any authority of Mr. Peek to execute any leases on behalf of all or any of Produce, Yee Co., Trucking or Sun Best.

Paragraphs 11 & 12: I did not find out that Mr. Peek had executed the Commcorp Lease until after the fact. By then it was too late to do anything in respect of the execution of those documents other than to reprimand Mr. Peek for having apparently done so on behalf of Yee Co. This reprimand was given to Mr. Peek on several occasions;

Paragraph 15: Mr. Peek never discussed with me, as he describes it, a "co-lessee requirement" of AT&T. In addition, I categorically deny that Mr. Peek was instructed to proceed with the leasing arrangements with AT&T on "that" basis ("that" basis being that Yee Co, would be a signatory on those leases). Based on my reading of paragraph 15 of Mr. Peek's Affidavit, it is clear that Mr. Peek is very carefully expressing his instructions in the negative rather than in the positive. He has apparently drawn an unjustified inference from discussions that he says he had with myself and my brother Peter that he was authorized to execute leases on behalf of Yee Co. His language is that he was not not instructed to execute leases on behalf of Yee co. It seems to me that the issue is whether or not he was instructed to execute leases on behalf of Yee Co.; not whether he was instructed not to execute those leases;

Paragraph 16: I reiterate that Mr. Peck was never authorized to represent himself as acting in any representative capacity for the Defendant, Yee Co.;

Paragraph 18: I am informed by my brother Peter Tom, and do verily believe, that the leases were signed by Peter Tom not because Bill Peek was not available to sign these leases but rather because Bill Peek had personally presented the leases to Peter Tom to have them executed.

Paragraph 19: I was not aware at the time of any "sale/leaseback" arrangements with AT&T. I was not aware that monies were "being received": I only became aware after the fact that those monies "were received". In any event, those monies were received by Produce and not by Yee Co.;

Paragraph 20: Mr. Peek was never specifically authorized to sign any Bill of Sale on behalf of Produce;

Paragraph 21: This paragraph is completely incorrect. I questioned Mr. Peek on several occasions with respect to his actions. Mr. Peek in fact advised me at one point that the pressure of being questioned on these various problems caused his health to deteriorate to an extent that he felt that he had to resign as a result.

4. Attached as Exhibit "B" to this my Affidavit is a true copy of excerpts from a report provided to us by our accountants, Cinnamon Jang Willoughby & Company, advising us as to the problems which Mr. Peek denies he had anything to do with in paragraph 22. However, the

accountant responsible for all of the information provided to Cinnamon Jang Willoughby and Company and to the Bank in the financial reports being commented upon in Exhibit "B" were prepared by Mr. Peek.

¶ 29 In his affidavit sworn February 9, 1995, Mr. Peter Tom, a director of the defendant, deposed as follows:

12. I have read the Affidavit of my brother, Harry Tom sworn and filed herein in opposition to this application for judgment and I reiterate Harry's comments with respect to the difficulties that we had with Mr. Peek. All of the problems associated with Mr. Peek came to light sometime shortly after all of the leases which are the subject matter of these proceedings were signed.
13. My recollection of the events leading to my signing lease numbers 5, 7 and 8 is that they were all executed by me at a time when my brother Harry, who is the person who would normally either execute or approve the execution of leases such as these leases which are the subject matter of these proceedings, was on vacation.
14. I was approached by Mr. Peek who advised me that it was urgent that the lease numbers 5, 7 and 8 be executed but that, because Harry was on vacation, there was nobody who could sign those leases except myself.
15. I note from a review of all of the leases which are the subject matter of these proceedings that Mr. Peek himself has signed a number of the other leases. I, and to my knowledge, no other officer or director of Tom Yee Co. Limited, authorized Mr. Peek to sign on behalf of Tom Yee Co. Limited.
16. In view of the fact that other leases had been signed by Mr. Peek at or about the same time as the leases which I signed, I can only guess that the reason I was asked to sign lease numbers 5, 7 and 8 is because Sun Best Produce Co. Ltd. was also named as co-lessee. I am an officer and director of Sun Best Produce Co. Ltd. and would have been authorized to sign on its behalf.
17. It was my understanding that some of the items which were being leased pursuant to lease numbers 5, 7 and 8 were indeed required by both Produce and Sun Best.
18. When I executed these leases, 5, 7 and 8, I did so believing that I was only executing on behalf of Produce and Sun Best.
19. None of these items in lease 5, 7 and 8 (or indeed in respect of any of the other leases which are issues in these proceedings) were in respect of items which were needed or ever used by the Defendant.
20. As stated in Mr. Harry Tom's Affidavit, the business of the Defendant had

nothing to do with the use of any of the assets being leased pursuant to all or any of the leases which are the subject matter of these proceedings. The Defendant's only function was to own premises located at 645 Malkin Avenue and to lease those premises to a suitable tenant. Other than that, the Defendant carried on no business and had no use for any of the assets which are the subject matter of these proceedings.

21. In signing the leases numbered 5, 7 and 8, I relied entirely upon the advice of Mr. Peek who advised me that it was urgent that AT&T Capital Inc. receive signed copies of these leases right away and that they could not wait for the return of my brother, Harry.
22. As I indicated above, I am primarily responsible for ensuring that there is sufficient produce to meet all contracts and my focus with Produce was not on the administration side but rather on the purchasing, sales and distribution side.
23. I would not have executed lease numbers 5, 7 and 8 if I had not been told by Mr. Peek that:
  - (a) The leases were required urgently by the Plaintiff;
  - (b) My brother, Harry had approved the execution of these leases and the purchase of the equipment; and
  - (c) These items related to items which we had previously discussed which were being leased for Sun Best and Produce.
24. I never had any intention of binding the Defendant in any way to the Plaintiff and, if I had known that these leases were being signed by me on behalf of the Defendant I would not have executed them.

¶ 30 In his affidavit sworn January 4, 1996, Mr. Peek responded to the affidavit of Mr. Peter Tom, sworn February 9, 1995 as follows:

3. In response to paragraph 14 of the Peter Affidavit, I did not approach Peter Tom and advise him that it was urgent that lease numbers 5, 7 and 8 be executed. I did not advise Peter Tom that because his brother, Harry Tom, was on vacation that there was nobody who could sign the leases except for Peter Tom. I did not deliver lease numbers 5, 7 and 8 to Peter Tom and as I stated in paragraph 19 of my Affidavit sworn on September 20, 1995, I was not present or available at the office to sign lease numbers 5, 7 and 8.
4. In response to paragraph 21 of the Peter Affidavit, I gave no such advice to Peter Tom and further state that at no time did the Plaintiff indicate to me that there was any urgency in executing any of the leases entered into

by two or more of the Companies.

- 5. In response to paragraph 23 of the Peter Affidavit, I categorically deny making such statements to Peter Tom. If I had been present when lease numbers 5, 7 and 8 were presented for execution, there would have been no reason to make such statements to Peter Tom given the fact that I had authority on behalf of the Companies to execute the leases with AT&T.

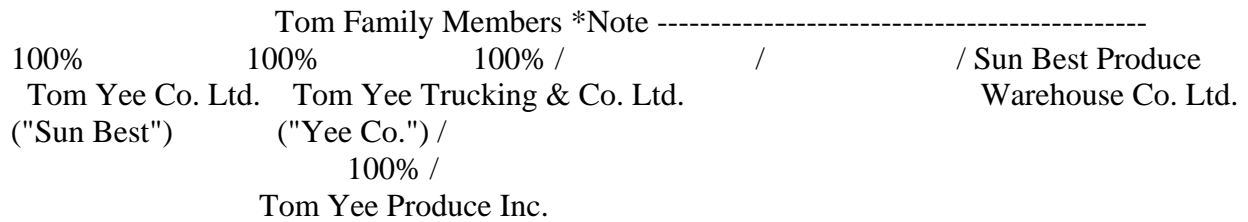
¶ 31 In support of its position regarding the relationship between, and the status of, the Tom Family companies, plaintiff's counsel referred to the Trustee's Report on its Preliminary Administration in the Bankruptcy of Produce Inc. Under the headings "Background" and "Company Records", the report sets out, in part,

- 1. Background

Tom Yee Produce Inc. (the Company) has been in the produce business for many years and expanded its operations in the late 1980s and early 1990s. The Company extended its activities into food processing, repacking, cruise ship supply, food service, third-party warehousing and distribution. By June of 1994, the Company and its affiliates' activities were conducted out of three separate leased facilities on the east side of Vancouver, B.C. employing over 200 personnel.

...

TOM YEE PRODUCE INC.  
GROUP STRUCTURE



\*NOTE:

The relative shareholdings of Tom Family Members in the three directly-owned companies is different in each case.

...

On December 9, 1994, the Company failed to either file a proposal or seek an extension of the filing date and, consequently, was deemed to have made an assignment in bankruptcy effective July 5, 1994.

As at the date of the Receiver's appointment, the Company owed the CIBC \$2.5 million and its affiliate, Sun Best, owed CIBC \$3.9 million. Yee Co. had guaranteed the debts of both companies to CIBC.

On August 26, 1994, Tom Yee Co. Inc., took an assignment of the CIBC's security position by paying it \$1.2 million. These proceeds were generated from the sale of its property at 645 Malkin Street.

As at the date of this report all of the CIBC's debts have been paid in full. This includes approximately \$1.7 million from the sale of the Company's assets, \$4 million from the sale of Sun Best's assets and a further \$1.2 million from Tom Yee Co. Inc.

We understand Yee Co. has since received approximately \$800,000 from the sale of group assets in partial repayment of its debt.

## 2. Company Records

No General Ledger exists for Sun Best, Yee Co., or Tom Yee Trucking and transactions were effected through the inter-company accounts.

No capital assets ledger or comprehensive listing of assets was available prior to July 6, 1994. Apparently one of the reasons that the Company's auditors, Messrs. Cinnamon, Yang and Willoughby, were unable to express an opinion on the financial statements of Tom Yee Produce Inc. as at January 31, 1994, was their inability to determine ownership of various assets. This was caused by the purported transfer of all capital assets of the Company (except leasehold improvements), to Yee Co., in the year ended January 31, 1993. At that time certain assets under a capital lease with the Hongkong Bank of Canada were also purportedly transferred from the Company to Sun Best.

¶ 32 Mr. Harry Tom admitted, at questions 7 and 8 of his discovery, that the above report is accurate as to its content. Plaintiff's counsel argued that this report establishes that the companies constitute a family group of companies, that no general ledger exists for the companies, that transactions were effected through inter-company accounts and that no capital assets ledger or comprehensive listing of assets was available prior to July 6, 1994.

¶ 33 The plaintiff introduced the affidavit of Jonathan Herbert, sworn September 25, 1995, the plaintiff's Account Administrator, Western Region, who administered the leasing files with the defendant, to establish that the directors of the Tom Family companies knew what was transpiring regarding the subject leases:

4. I am aware from reviewing the eight lease files, my subsequent involvement and discussion with the credit granting personnel of AT&T in particular Mr. Spizzirri, that in approximately December, 1993 Mr. Bill Peek, representing himself as the controller, authorized signatory and V.P. Finance of the Defendant Tom Yee Co. Limited negotiated the terms of a lease with AT&T. The written contract was dated by the lessor as accepted on December 22, 1993 and executed by Mr. Peek as authorized signatory, Controller and V.P. Finance of the co-lessees on their

behalf. This contract is part of Exhibit "B" to the Affidavit of Lui Spizzirri filed herein on January 11, 1995 (hereinafter called "Lease #1").

5. In the Credit Approval Notification form it was noted that having the parent company Tom Yee Co. Limited sign Lease #1 as co-lessee was sought by AT&T for credit purposes and this in fact occurred.

...

7. The invoicing, credit information, lease, correspondence with prior registered security holders, delivery and acceptance certificate are all contained in our file 9312 90189037 which is now produced and shown to me and marked collectively as Exhibit "A" to this my Affidavit and which exceeds five pages in length.

...

15. By letter dated July 25, 1994 to Arthur Andersen Inc. the receiver was asked whether lease payments would continue to be made to AT&T. Now produced and shown to me and marked as Exhibit "F" to this my Affidavit is a true copy of the said letter.
16. AT&T prepared an analysis of leased assets and by its legal counsel forwarded same to the receiver on August 18, 1994. Now produced and shown to me and marked as Exhibit "G" to this my Affidavit is a true copy of the said analysis and letter raising the subject of paying the lease obligations.
17. By letter dated August 19, 1994 the receiver advised that it did not intend to make lease payments. Now produced and shown to me and marked as Exhibit "H" to this my Affidavit is a true copy of the said letter.
18. In October, 1994 certain arrangements were made with the receiver to repossess certain leased equipment and to make lease payments for certain equipment, which occurred with the personal authorization of Mr. Harry Tom according to the receiver's counsel's letter. Now produced and shown to me and marked as Exhibit "I" to this my Affidavit is a true copy of a letter from the receiver dated October 13, 1994. AT&T received \$22,468.16 by cheque with Exhibit "I".
19. I was involved in repossessing and selling the Urschel cutter. The "french fry line" and "centrifuge" were left in the receiver's care as we had no buyer for those assets at that time.
20. By letter dated November 23, 1994, from AT&T's legal counsel to the

Beedie Group efforts were pursued to locate some of the leased equipment, in particular the racking. The racking was picked up and sold.

21. As a result of the ongoing non-payment of lease payments AT&T commenced these proceedings to recover the liquidated sums owing.
22. Efforts were successfully made by AT&T to attach by garnishment process sums payable from the receiver to Tom Yee Co. Ltd. which funds were leftover from the sale of assets sold to satisfy the group of companies' obligations to CIBC as discussed in Exhibit "E" herein.
23. I was involved in attempting to locate and identify the leased equipment on more than one occasion. Difficulty was experienced as the leased assets were being moved around and serial numbers were missing. Other members of the Tom Family had restarted the produce business as a new company in the same premises as the defunct company had carried on business. Further, the leased dock levellers were attached to the loading dock and the new company took the position that these leased assets were fixtures and sold to the new company with the land.
24. By letters dated December 20, 1994 and January 6, 1995, AT&T's legal counsel made attempts to locate unaccounted for leased assets. Now produced and shown to me and marked collectively as Exhibit "J" to this my Affidavit is a true copy of the said letters.
25. The details of the accounting and sum due are set forth in paragraphs 10 and 11 of Mr. Spizzirri's Affidavit filed herein on January 11, 1995. The amount, exclusive of legal costs as at January 25, 1995 was \$316,177.27. With interest at eighteen percent per annum compounded monthly (18%) as per the term of the Leases the amount outstanding is \$351,616.04 as at August 31, 1995 and the per diem during September \$173.40 per day.

...

32. AT&T amended its Statement of Claim on May 16, 1995, to include claims for all applicable taxes and interest. The taxes that are payable by AT&T are calculated on the basis of 14% of the principal amount outstanding and total the sum of \$44,264.82 bringing the total claim to \$359,880.86 as at August 31, 1995.

¶ 34 Exhibit I, referred to in paragraph 18 above, is a letter dated October 13, 1994 to the solicitors for the plaintiff from Arthur Andersen Inc., the Receiver-Manager of Produce Inc., which states, in part, as follows:

We are writing to you with respect to various leases between Tom Yee Produce Inc. (the "Company") and AT&T Capital Canada Inc. ("AT&T"). We wish to

advise you that the equipment leased under the following leases may be repossessed by AT&T at its earliest convenience.

1. Lease number 01-90207276 with respect to various racking located at the warehouse formerly leased by the Company at 1040 Parker Street.
2. Lease number 01-90239063 with respect to one Urschel model GA strip cutter.
3. Lease number 01-90223017 with respect to the "french fry line".
4. Lease number 01-90212156 with respect to one FP90 centrifuge.

With the exception of the racking located at 1040 Parker Street, the equipment listed above is located at 830 Malkin Avenue. We would appreciate it if AT&T contacted us in order to arrange for removal of this equipment.

Certain equipment which has been leased from AT&T is currently being used by us in our capacity as Receiver-Manager of Tom Yee Produce Inc. We have received authorization from Mr. Harry Tom to make payment with respect to this equipment for our use. As a result we are enclosing a cheque totalling \$22,468.16 which represents the lease payments for the months of July, August, September, and October 1994 under the following leases:

¶ 35 Plaintiff's counsel underscored that, according to the letter, the Receiver received authorization from Mr. Harry Tom who did not take issue with the leases. Plaintiff's counsel also contended that the letter establishes that Mr. Harry Tom was well aware of the discussions that had transpired between the plaintiff and the Receiver.

¶ 36 Plaintiff's counsel read-in the following questions and answers from the examination for discovery of Mr. Harry Tom, conducted on May 16, 1995 and January 3, 1996:

4 Q Sir, there's a document produced to us from the trustee of Tom Yee Produce Incorporated which is called the Trustee's Report on its Preliminary Administration regarding the state of that company; you have to answer yes, no, I don't know, whatever.

A Yes.

5 Q Have you seen this document?

A No, I haven't.

6 Q All right. What I wanted to ask you was whether or not the contents of it were accurate and in particular I was most interested in the fact

that the trustee had described the relationship of various companies owned by the Tom family and share holdings and so on and I just wanted to --

A I've seen some of the portions of this I guess now. Can I take a look?

7 Q My question to you is this, are the contents of this accurate?

A M'mm-hmm, yeah, I'd like to take a look.

8 Q All right.

A I have seen this.

...

15 Q Now, page three of the trustee's report, under the heading, Company's Records, says there's no general ledger in existence for Sun Best, Yee Co. which I believe is Tom Yee Co. Limited and Tom Yee Trucking which would be Tom Yee Trucking and Warehouse Company Ltd.; is that correct?

A Yes.

...

20 Q The first question was just is that statement in the report correct, that there's no general ledger in existence for those three companies; that's correct, as I understand your evidence;

A I don't think there is. There may be. You have to appreciate we have had four sets of accountants.

...

23 Q All right. Now, you hired -- when I say you, I'm using the royal you there -- Bill Peek was hired in February of 1991?

A Yes.

24 Q Who hired him?

A Dyke and Howard the accounting company did all the interviews and they recommended that the company hire him.

25 Q Did you then meet or interview Bill Peek?

A Yes, we did.

26 Q And you and who else?

A It was myself and Peter Tom and the final interviews were done between myself and Garson Lee.

...

54 Q Would you agree that the main business record keeping and daily accounting was performed at the accounting offices at 830 Malkin?

A Yes.

...

88 Q I've seen correspondence and other material from the CIBC. What relationship, if any, did the group of companies have to the CIBC?

A Before -- at what period of time?

89 Q Well, when Mr. Peek was working at the company?

A Well, he -- we wanted to stay at Hong Kong Bank and then he initiated the change. He came to me and said he wanted to change to another bank because the Hong Kong Bank was applying too much pressure on him. We were expanding.

90 Q So the switch was made from the Honk Kong Bank to the CIBC?

A Yes.

91 Q When did that happen?

A I guess it's been a few years.

92 Q Some time after Mr. Peek was hired?

A Yes.

93 Q He was hired in February of '91, so a year or two --

A About a year after.

94 Q All right. And Mr. Ron McLaughlin was the fellow at the bank that was most familiar with your companys' accounts there?

A That's correct.

95 Q Were you aware that Mr. Peek had dealings with Mr. McLaughlin on the companys' behalf at the bank?

A Yeah, he came to me. I didn't know until he had talked to him for -- I guess he talked to him for a period of time because when he came to me it surprised me that he wanted to make the change and that he had gone that far ahead.

...

107 Q Sir, getting to the leasing aspect involving AT&T, I understand these companies or some of them decided that they wanted to take equipment that was either owned or owned in the sense that it was partially paid for, sell it to AT&T and then lease the equipment back so it was a purchase with a lease-back type arrangement; is that a fair summary of what the business objective was?

A Yes.

108 Q All right. And one of the purposes of that business objective was to create capital by having the leasing company purchase the equipment which would result in the payment from the leasing company back to your companies?

A Right.

...

112 Q Your counsel is trying to create this argument and now you're picking up on it. I can see all this, sir. I don't consider it to be proper. That's fine. We will go on here.

Mr. Peek - getting back to him. It's true, sir, that before Tom Yee Co. Limited or Tom Yee Produce Incorporated had any dealings with AT&T, that Mr. Peek had been out dealing with other leasing companies prior to the dealings with AT&T?

A Yes.

113 Q Commcorp would be one company he had dealings with?

A Yes.

114 Q You were aware he was doing that?

A Yes.

...

121 Q Were you aware sir, that Tom Yee Co. Limited had been involved in the lease negotiations that Mr. Peek had been engaged in prior to the dealings with AT&T?

A No.

122 Q Sir, this is a document that's produced by searching registrations of Personal Property Security Act Registered Security. It shows in June of 1993 there was a lease entered into and the secured party was Commcorp Financial Services Incorporated; do you see that?

A Yes.

123 Q Are you aware Mr. Peek went out and negotiated those lease arrangements with Commcorp?

A Yes.

124 Q And you'll see that one of the debtors besides Sun Best and Tom Yee Produce was also Tom Yee Co. Limited?

A I see that.

...

129 Q Sir, did you ever participate in any negotiations with perspective leasing companies?

A No.

130 Q Other than Mr. Peek, to the best of your knowledge, did anyone else on behalf of the companies in the group of companies participate in leasing negotiations?

A No.

...

148 Q Did you participate in any discussions with Mr. Peek generally about the subject of leasing equipment or --

A Yes, I did.

149 Q All right. When did you first have discussions with Mr. Peek about the notion of selling and leasing back equipment?

A Mid '94.

150 Q Mid '94?

A Yes

151 Q And before or after he had resigned?

A Before -- oh, I am sorry, just let me get the dates right. Mid '93, I'm sorry.

- 152 Q Mid '93, all right. And what did you discuss with him at that time?
- A The possibility of leasing instead of purchasing, finding out what the write-offs were, tax benefits, cash flow.
- 153 Q Sir, there's -- I'm going to show you some documents. In these documents there's documentation sent to you, signed by you and so on, regarding sale and lease back of equipment dating back to 1992, I believe; is that possible, sir?
- A Yes.
- 154 Q All right. I'm advised, sir, that Mr. Peek came to you prior to say January, February, March of 1992, so prior to the early part of 1992, and you and he discussed the notion of selling and leasing back equipment to create capital for the companies involved?
- A Yeah, that's possible?
- 155 Q That's possible?
- A Yes.
- 156 Q All right. Is it probable?
- A Not to create capital at that time, earlier time because we didn't think we had a cash problem.
- 157 Q Well, is it probable that you had discussions to that effect?
- A To lease?
- 158 Q To sell and lease back equipment.
- A Not sell. We were -- I just don't recall that.
- 159 Q Well, let me come at it again, sir. I'm advised that Mr. Peek had discussions with you about the subject of selling equipment and then leasing it back before -- on or before the early part of 1992, January, February, March of 1992; is that true?

A That's -- like I said, I don't recall.

160 Q And just trying to refresh your memory here, those discussions would have been about, I'm advised, need for money in the companies and using this selling and lease-back device to create capital in the company; does that help you at all?

A At that time we were talking about -- instead of -- instead of borrowing more money, just go out and leasing it. Leasing the -- not to create -- we never thought of it as creating capital.

161 Q I'm using the words, creating capital but it's a way of getting cash into the company from the leasing company is to sell them their assets and they give you some cash and now you make the lease payments, that type of business idea; did you discuss that with Mr. Peek?

A It wasn't discussed in that way. It was discussed we need equipment. We don't have the cash to buy it so go out and lease and the business will cover the leases.

162 Q Well, the equipment that's the subject of the AT&T leases, is it all new purchased equipment or is any of it equipment that was either owned or had been partially paid for before the leases were entered into with AT&T?

A It was mostly -- there was some old equipment in there.

163 Q So that old equipment -- selling it to AT&T and then leasing it back created the benefit of getting cash from the lease company over to your company, correct?

A Yeah.

...

182 Q Sir, were you aware that cheques were coming from AT&T at the time or soon after the leases were entered into with AT&T?

A Yes.

183 Q All right. What did you think those cheques were for?

A Paid for the potato line, the chipping line we get from Vanmark.

184 Q And did you go to Mr. Peek and query him as to why you were receiving these cheques?

A Yes, I did.

185 Q And what did you say to him?

A I said why are we getting the cheques?

186 Q What did he say?

A To pay for the equipment.

187 Q What did you say?

A Fine.

...

197 Q While Mr. Peek was discussing the leasing arrangements with AT&T, the subject of these proceedings, were you aware that he was engaging in that process?

A Of negotiating leasing? Is that what you're saying?

198 Q Yes, negotiating or discussing lease arrangements with AT&T?

A Yes.

199 Q Sorry?

A Yes, I knew he was doing it.

...

216 Q Now, I'm advised, sir, that Mr. Peek had authority to sign bank documentation such as authority to transfer funds from one account to another account; did he have such authority?

A Yes, he did.

...

232 Q So you or Peter Tom were aware of and agreed that this equipment needed to be leases for whatever business purpose it was required for?

A Yes.

...

236 Q All right. And Mr. Peter Tom, was he an officer or director of Tom Yee Co. Limited at the time those leases were signed, leases five, seven and eight?

A Yes.

237 Q Was he an officer of the companies as well?

A Officer, can you explain that to me?

238 Q President, secretary, vice-president?

A Yes, he was.

239 Q What was his office in connection with Tom Yee Co. Limited?

A I don't understand that?

240 Q Was he the president of Tom Yee Co. Limited, the vice president, the secretary?

A No, he was director.

...

245 Q All right. Now, there's some mention, sir, in affidavit material filed in these proceedings that there was some bonus or incentive system that applied to Mr. Peek. Was there a term of his employment contract that was in the nature of a bonus or incentive?

A No.

246 Q What were the terms of his employment contact? By that I mean just straight salary or what?

A Straight salary.

...

255 Q Is it true sir, that with respect to any borrowing from the CIBC lines of credit or borrowing, that that bank required the covenants of all three companies and, by that, I mean Sun Best, Tom Yee Co. Limited and Produce?

A Yes.

...

299 Q And you were aware that Mr. Peek from time to time would have come to payroll clerk and obtain the stamp and affix it to cheques to be issued?

A Yes.

300 Q Okay. There happens to be a corporate search of Tom Yee Produce Incorporated on this file. It shows the directors of Tom Yee Produce Incorporated are you, Peter Tom and Fong Woo. Is that correct to the best of your knowledge?

A Yes.

301 Q And to the best of your knowledge that would have been the state of the directorship and the offices held in January and February and March of '92 when the AT&T leases were being executed; is that correct?

A Was it '92, the AT&T lease?

302 Q The first lease is -- I'm sorry, beg your pardon, December of '93.

A '93.

303 Q And January, February and March of '94?

A Yes.

304 Q To the best of your knowledge that would have been the state of the directorship and the offices held in December of '93 and the early part of '94?

A That's correct.

...

307 Q There's another company search, sir, for Tom Yee Co. Limited and it shows the directors of that company being you, Peter Tom and Fong Woo and the same persons being representatively president, secretary and treasurer of Tom Yee Co. Limited. Was that the state of the directorships and offices held in late '93 and early '94 of that company?

A I thought they were different. I thought the two companies were different.

MR. HOBBS: You can check on that and advise me if they are different.

...

345 Q Now, there's a telefax in this file, sir, to you from CGS?

A Yes.

346 Q It's from a Mr. Harold Wakahara, W-A-K-A-H-A-R-A and you received this telefax from Mr. Wakahara around December the 14th, 1993?

A Right.

347 Q And it's information about computer hardware and software and other cost related items?

A Yes.

348 Q And you were looking at such information because you were considering updating the computer system in the office at 830 Malkin?

A I think this was requested -- this was requested for me to have a copy because Bill had taken a copy and never gave me a copy and we were about to go ahead and talk about updating the equipment and I asked him what the price would be. He gave me a price and I couldn't understand how it could be that cheap.

349 Q Well, I just want to be clear on your evidence. You received a copy of this document from Mr. Wakahara?

A Right.

350 Q And when you received it, did you notice that it was being copied to Mr. Peek, vice president of finance?

A Yes.

351 Q And, as I understand or I surmise, you were looking at updating the computer system that was located in the office at 830 Malkin; is that correct?

A Yes.

352 Q And you discussed that with Mr. Peek?

A Yes.

353 Q And you were also discussing the prospect of leasing it back as opposed to just outright purchasing it?

A Correct.

354 Q Sir, this, I believe is the third lease. It's dated January 28th, 1994, appears to be signed by Mr. Peek, V.P. Finance; is that correct?

A Yes.

355 Q And Exhibit 14, that lease, sir, it's the computer equipment that we were looking at that Mr. Wakahara was providing information on, correct?

A Yes.

356 Q And you knew, sir, that Mr. Peek was going to go out and negotiate with AT&T and enter lease arrangements with AT&T regarding that computer equipment.

A Yes.

...

396 Q I understood you to say earlier, sir, you correct me if I'm wrong, that you were aware Mr. Peek was over at AT&T negotiating leases?

A Correct. I thought you were talking about the potato machine.

397 Q And just to come full circle, you were aware that was going on because of some financial difficulties the company was experiencing at that time and it was a way of creating cash?

A He didn't state it as a financial difficulty. He always said it was a cash flow crunch because we were expanding.

...

400 Q In Exhibit 19, there's a lease dated February 22nd, 1994 and I believe this is the fifth lease. It appears to be signed by your brother Peter Tom?

A Yes.

401 Q Am I correct?

A Yes.

...

403 Q Now, Dyke and Howard were the accountants for those three companies?

A Yes, correct.

404 Q Were you aware that these Dyke and Howard financial statements had been delivered to AT&T?

A No.

405 Q All right. Were you aware that AT&T had requested financial statements for these companies in connection with the leasing arrangements?

A No.

406 Q Do you know how these financial statements came into AT&T's possession?

A No.

407 Q All right. Sir, these are the financial statements that record significant capital assets in Tom Yee Co. Limited. I'm just looking at the financial statements for Tom Yee Co. Limited. It shows an increase from '92 to '93 of some \$644,000 to 2.6 million dollars as to the capital assets now; do you see that?

A Yes.

408 Q And the notes to the financial statement indicate that in the year the company Tom Yee Co. Limited acquired 2.4 million worth of capital assets from Tom Yee Produce Incorporated?

A Right.

409 Q Now, as I understand your evidence, you say that never happened?

A No, it never happened.

410 Q Were these financial statements ever published sir? They appear to be signed and approved by the directors of the company, Peter Tom and Fun Woo; do you notice that?

A Yes.

411 Q So they were prepared by the accountants?

A Yes.

412 Q Signed by the directors?

A Yes.

413 Q Approved by the Board of Directors?

A Correct.

414 Q How did you deal with changing what would otherwise appear to be the content of these financial statements?

A As far as correcting these?

415 Q Well, I don't -- that's what the Board of Directors approved?

A Right.

416 Q Correct?

A Correct.

417 Q All right. And what happened afterwards?

A We discovered it wasn't done properly so we didn't discover that until John Henderson.

418 Q Were new financial statements prepared?

A For 1994.

419 Q Were 1993's redone?

A No.

420 Q Did Tom Yee Co. Limited claim the depreciation on the capital assets transferred pursuant to these financial statements?

A I don't know. I have to think about it.

...

423 Q There's a letter dated February 22nd, 1994 to Mr. Peek on behalf of Tom Yee Produce Incorporated, Tom Yee Co. Limited and Sun Best Produce Co. Limited from AT&T. Were you aware that Mr. Peek had received this letter?

A No.

424 Q All right. You'll notice on the second page of the letter there's a signature agreeing to the terms of what's been proposed in the letter; do you see that?

A Yes.

425 Q Is that Peter Tom's signature?

A Yes.

426 Q You'll notice that it's asterisked that he signed this letter on behalf of all three companies?

A Yes.

427 Q Did you have any discussion with Peter Tom about the execution of this letter we have marked as Exhibit 22?

A No.

428 Q There's a direction, sir, to AT&T Capital, dated February 22nd,

1994, signed by Peter Tom on behalf of all three companies; do you agree with that?

A Yes.

...

442 Q This lease looks like it concerns some more computer equipment; are you aware of that?

A Yes.

443 Q Did you have discussions with Mr. Peek about a need for more computer equipment before the lease was entered?

A It was the same as the other.

444 Q I see. It was part of the overall package?

A Part of the overall package.

445 Q This is a lease dated March 18th, 1994, signed by Peter Tom?

A

Yes.

446 Q You'll note on exhibit 28, Mr. Tom has signed this document three times.

A

Yes.

447 Q You see above his signature is the words co-lessees with respect to the three different companies; do you see that?

A

Yes.

...

463 Q There's a direction to pay dated March 17th, 1994, signed by Peter Tom in three places?

A Yes.

MR. HOBBS: Let's mark that as the next exhibit please. (EXHIBIT NO. 30 FOR IDENTIFICATION: DIRECTION TO PAY DATED MARCH 17, 1994)

MR. HOBBS:

464 Q There's a delivery and acceptance certificate dated March 18th, 1994 and that's Peter Tom's signature?

A Correct.

465 Q And now, did you receive a letter dated March 9th, 1994 from a Mr. Sigler at Urschel Laboratories?

A Can I see it? Yes.

466 Q So you were involved in discussions with Urschel about the equipment that you were thinking of acquiring and leasing?

A That's correct.

MR. HOBBS: Could we mark as the next exhibit file 90207276. (EXHIBIT NO. 31 FOR IDENTIFICATION: FILE 90207276)

MR. HOBBS:

467 Q The lease on this file is dated March 29th, 1993 and it has Peter Tom's signature in three places on it?

A Yes.

...

479 Q All right. And you were aware that Tom Yee Co. Limited had provided its covenant in connection with borrowings of other companies in the group on previous occasions such as the

Commcorp lease?

A Yes.

480 Q And such as the borrowing from the CIBC?

A Yes.

...

482 Q Actually, let me deal with paragraph 30 and then 31. There's an allegation that Mr. Peek misrepresented the nature and effect of these leases in the sense that they were simply leases for Produce. Now, I just want to be clear, is that the nature of the misrepresentation alleged that Mr. Peek either did or said something to lead Peter Tom to believe that what he was signing only concerned the company, Tom Yee Produce, as opposed to some other company? Is that the nature of the misrepresentation that you're alleging?

A He got Peter to sign the documents saying that I approved it which I didn't.

483 Q Oh, I see, the nature of the misrepresentation is telling Peter Tom that you had approved that Peter Tom sign these documents?

A Correct.

484 Q All right. Now, it goes on to allege in paragraph 30 that Peter Tom was not advised that he was signing for the defendant?

A That's correct.

484 Q Have you discussed with Peter Tom what he thought he was doing or what he understood when he signed these documents more than once?

A Yes.

485 Q What was his response?

A I just -- Bill put this stuff in front of him and told him just to sign it in three spots for signing and Harry said it was okay.

487 Q How old is Peter Tom?

A 40

488 Q And how long has he been involved in the business of this family group of companies?

A 30 years.

489 Q And paragraph 31 says that, "the plaintiff through it's agent, Mr. Peek, obtained the signature of Peter Tom." What facts do you rely on, you, the defendant company, in support of a theory that Mr. Peek was the agent of AT&T?

A Well, they took all the documents to Bill -- to Bill Peek and said, Bill take these to the owners and get it signed.

490 Q You believe that they told Mr. Peek to take the documents and go get someone else to sign them or what are you alleging?

A Well, either he signed them or somebody signed them on behalf of the company but they never brought them to us.

491 Q Are you alleging that someone at AT&T told Mr. Peek to do something other than just obtain signature of the documentation, like, for example, to go to a specific person and have them sign the documentation?

A No, I'm not saying that. I'm just saying, you know, they never came directly to us to sign these. I didn't even know the leases were happening or what the date for completion were and, you know, Bill was -- Bill was the negotiator. He was --

492 Q Well, you tell me. I don't know. What is the misrepresentation you're alleging in paragraph 31?

A That --

493 Q What's the fraud or misrepresentation?

A Again, he told Peter that I said everything was okay.

494 Q Okay. So the fraud and/or misrepresentation in paragraph 30 and 31 is Mr. Peek telling Peter Tom that you had approved of what he was about to sign?

A Yeah.

495 Q And nothing more than that?

A No.

496 Q Why did Peter Tom need your approval to sign documents when he was an officer and director of that company --

A Well --

497 Q -- or all of those companies?

A Well, you know, the position of director and officer, I guess, in our family, the way it started off in the family business, that we had to get something on the books to hand the papers in to Victoria and most of the negotiation and everything on that part -- Peter was, you know, was mainly in purchasing of produce. He wasn't really doing this type of work. He just -- he didn't read, you know, he just didn't read the stuff.

...

499 Q All right. There's some evidence in some of the affidavit material filed that Mr. Peek was inflating numbers or not reporting numbers correctly and it was further deposed he was doing that to try to get bonuses or to earn incentives but I understood your earlier evidence to be that he was not under a bonus or incentive plan.

A Not in the contract. You asked me if it was under a contract and I said no but we had discussions that he wanted, if he did well, and if the company showed a profits, he wanted to get a raise and be put on

the pension plan.

500 Q But there had been no agreement reached on those matters?

A No.

January 3, 1996

EXHIBIT 33 FOR IDENTIFICATION: Lease between Commcorp. and Tom Yee Produce Incorporated dated July 23, 1993.

MR. HOBBS:

513 Q Now, the personal property search information concerning the defendant Tom Yee Co. Limited indicates that it is also a debtor in connection with the lease that we have marked as Exhibit 33, and that would imply to me that it's a guarantor or a co-lessee. Do you recall that to be the case?

A No -- say that again.

514 Q I'm showing you the personal property registry search information concerning the lease that we've marked as Exhibit 33, and it shows that Sun Best Produce and Tom Yee, the defendant in these proceedings, are debtors in connection with the lease that we've marked as Exhibit 33. I'm just asking you to confirm that that's the case.

A I see that, yeah.

515 Q And you agree with that?

A I see that.

516 Q And you --

A Yes.

517 Q Do you know where the pages of Exhibit 33 are that would show the execution on behalf of Tom Yee Co. Limited?

A No, I don't.

518 Q Have you made an effort to locate those pages of Exhibit 33?

A Yes, I have.

519 Q And you have not been able to locate them?

A No, I haven't.

520 Q All right. Would you agree that those pages would show Bill Peek executing the Commcorp. lease on behalf of Tom Yee Co. Limited?

A Yes.

...

EXHIBIT 35 FOR IDENTIFICATION: Report from Cinnamon Jang Willoughby & Company dated April 21, 1994

MR. HOBBS:

529 Q So you would agree that you had seen and reviewed the contents of Exhibit 35 before you had sworn any affidavits in these proceedings?

A Yes.

530 Q All right. And you were aware, from the content of Exhibit 35, that it in no way was intended to reflect on the integrity or the competence of the personnel of the company?

A Yes.

531 Q And you would agree that the content of Exhibit 35 is accurate?

A Yes.

¶ 37 The letter dated February 22, 1994 referred to in question 423 is a letter to Produce Inc., the defendant and Sun Best Co., to the attention of Mr. Peek. The letter commences with the words "this letter is to state our agreement as to the manner in which you have asked us to proceed with the Lease, a copy of which is attached hereto." The second page contains the words "Agreed this 22nd day of February 1994 and shows the signature of Mr. Peter Tom on behalf of Produce Inc., the defendant and Sun Best Co. As well, there is a document headed "Direction" which states as follows:

DIRECTION

TO:  
AT&T CAPITAL CANADA, INC. ("AT&T")

RE: Lease No. 01-90223017 (the "Lease") between AT&T and TOM YEE PRODUCE INC./TOM YEE CO. LIMITED/SUN BEST PRODUCE CO. LTD. of equipment supplied by VANMARK CORPORATION (THE "Vendor") and described in the Lease (the "Equipment")

1. The Equipment described in the schedule attached hereto, forming part of the Equipment and having an aggregate purchase price, including all taxes, of (A) \$38,232.61; (B) \$54,618.01; (C) \$16,385.40 (the "Purchase Price") has been received by us (the "Delivered Equipment").
2. The delivered Equipment has been accepted by us and is installed, tested and is operating satisfactorily.
3. We authorize and request AT&T (or its assignee) to pay the Vendor an amount not in excess of the Purchase Price as payment for the Delivered Equipment, as the Vendor may require by invoice.
4. We acknowledge that the Lease commenced on February 22, 1994 notwithstanding that the Delivered Equipment may not have been delivered by such date and that our obligation under the Lease to pay for the Delivered Equipment existed in accordance with the terms of the Lease and prior to the date hereof.

AGREED this 22nd day of February, 1994.

TOM YEE PRODUCE INC.  
TOM YEE CO. LIMITED

Per: \_\_\_\_\_

Per: \_\_\_\_\_

(authorized signatory)  
(authorized signatory)

SUN BEST PRODUCE CO. LTD.

Per:

\_\_\_\_\_  
(authorized signatory)

¶ 38 The Direction to Pay referred to in question 463 provides as follows:

DIRECTION

TO: AT&T CAPITAL CANADA, INC. ("AT&T")

RE: Lease No. 01-90239063 (the "Lease") between AT&T and TOM YEE PRODUCE INC./TOM YEE CO. LIMITED/SUN BEST PRODUCE CO. LTD. of equipment supplied by URSHEL LABORATORIES INC. (the "Vendor") and described in the Lease (the "Equipment").

- 
1. The equipment described in the schedule attached hereto, forming part of the Equipment and having an aggregate purchase price, including all taxes of 1) \$14,456; 2) \$14,456 & 3) \$5,092, (the "Purchase Price") has been received by us (the "Delivered Equipment").
  2. The Delivered Equipment has been accepted by us and is installed, tested and is operating satisfactorily.
  3. We authorize and request AT&T (or its assignee) to pay the Vendor an amount not in excess of the Purchase Price for the Delivered Equipment, as the Vendor may require by invoice.
  4. We acknowledge that the Lease commenced on March 18, 1994 notwithstanding that the Delivered Equipment may not have been delivered by such date and that our obligation under the Lease to pay for the Delivered Equipment existed in accordance with the terms of the Lease and prior to the date hereof.

AGREED this 17th day of March, 1994.

- 1) TOM YEE PRODUCE INC.
- 2) TOM YEE CO. LIMITED
- 3) SUN BEST PRODUCE CO. LTD.

#### VI. The Defence Position

¶ 39 Defence counsel's position is that the plaintiff's application should be dismissed so that the trial judge will have an opportunity to hear and see the witnesses on the main defence regarding the authority of Mr. Peek to enter into the leases. Counsel argued that this court was not in the position to make a determination on this application. He contended that Mr. Peek was never clothed with authority to enter into leases on behalf of the defendant and all that can be concluded from Mr. Peek's evidence is that he was never told not to negotiate on behalf of the defendant. Defence counsel argued that Mr. Peek was only Vice-President Finance for Produce Inc. and not for the defendant. He insisted that Mr. Peek was never authorized by Messrs. Harry or Peter Tom to negotiate or enter into leases on behalf of the defendant and therefore it would

not have entered their minds to have communicated with the plaintiff about Mr. Peek's limited authority.

¶ 40 Further, defence counsel submitted that all of the lease transactions relate to equipment used and paid for by Produce Inc., that the defendant had no need or use for the equipment and never paid for it. He urged the court to accept the proposition that it would never have occurred to Messrs. Harry and Peter Tom that Mr. Peek was negotiating on behalf of companies that had no use for the equipment. They accept that Mr. Peek was authorized to engage in negotiations for Produce Inc., but do not accept his authority to represent the interests of the defendant, or Sun Best Co. Defence counsel submitted that the introduction of the Commcorp Lease does not assist the plaintiff, but rather assists the defence because it shows that Mr. Peek executed that lease for Produce Inc., and there is no evidence that, although the PPSA security search showed the defendant and Sun Best Co. as business debtors relating to this lease, that Mr. Peek executed any documentation on behalf of the latter two companies.

#### Decision

¶ 41 On the matter of the conflict in the affidavit evidence between the positions of Mr. Peek and that of Messrs. Harry and Peter Tom, it is well established that this court, on a Rule 18A application, may find facts on conflicting evidence. See *Inspiration Management Ltd. et al. v. McDermid St. Lawrence Limited and Wheeler* (1989), 36 B.C.L.R. (2d) 202 (C.A.) and *Coast Wholesale Appliances Ltd. v. Armitstead* (1993), 77 B.C.L.R. (2d) 267 (C.A.). In *Coast* at p. 271, the Court held that where there is conflicting affidavit evidence the question then is - is there other evidence which makes it possible to find the facts necessary for judgment to be given in the face of the contradictory affidavit evidence?

¶ 42 On the issue of the Toms' credibility, plaintiff's counsel pointed out some of the discrepancies in Mr. Harry Tom's testimony. For example, in his affidavit sworn February 2, 1995, Mr. Tom deposed as follows:

16. Part of the terms of Mr. Peek's employment with Produce was that he was given various performance incentives with a view to rewarding him for improved performance of Produce.
17. For example, if certain profit targets were met by Produce under the financial guidance of Mr. Peek, he would be promoted to Vice-President, Finance which would result in his receiving a raise. Ultimately, promotions would lead to Mr. Peek becoming vested with the Produce pension plan and so on.
18. In early 1994, I became concerned that the monthly performance numbers for Produce were much better than I felt they should be in the circumstances. I was so concerned that I retained a firm of chartered accounts, Cinnamon Jang & Willoughby to conduct an audit and review of the financial information of Produce.
19. It was determined by this independent accounting firm that Mr. Peek, either intentionally or unintentionally, was inflating inventory and accounts receivable and deflating accounts payable. The obvious effect of

this was that it gave the appearance that the performance of Produce was much better than it really was which in turn resulted in Mr. Peek receiving the performance bonuses and incentives that were provided in his employment package.

20. When I received the management report from Cinnamon Jang & Willoughby informing us that these discrepancies were appearing in our reports and financial information, I confronted Mr. Peek who in March of 1994, resigned and left Produce.

¶ 43 With respect to paragraph 16, Mr. Harry Tom admitted at question 245 of his discovery that Mr. Peek did not have a bonus or incentive program.

¶ 44 As to paragraph 19, while the Cinnamon Jang and Willoughby audit reports on that firm's review of the accounting systems of the Tom Family companies, the report states clearly that "these recommendations are not intended to reflect on the integrity or confidence of your personnel". In fact, the only mention of Mr. Peek is on page seven of the report which states, as follows:

#### Monthly Financial Statements and Year-end Financial Statements

Prior to our arrival, Bill Peek sent us a copy of the January 1994 monthly financial statements which also contained the year-to-date figures. Mr. Peek had indicated to Mr. Henderson that there was a pre-tax profit of approximately \$280,000. During our review of the accounting records and his year-end working papers, we came to the conclusion these financial statements seriously misstated the financial position of the company from its true position. We are of the opinion that this misstatement is so serious that in fact, the statements are false and misleading. This does not just apply to the January 31, 1994 statement, we feel the same about all of the monthly financial statements issued throughout the year. As we are still awaiting a reply to certain questions raised about the previous audited financial statements, we are not able to comment on these figures. We also note that the company's bankers have been receiving these internal monthly statements. The following is a summary along with the approximate amounts misstated in some of the areas in the year-end financial statements:

¶ 45 In paragraphs 25 and 26 of Mr. Harry Tom's February 2nd affidavit, he deposed as follows:

25. I was not aware that Mr. Peek had executed any leases in favour of the Plaintiff on behalf of the Defendant or that he had required my brother Peter to execute any leases on behalf of the Defendant until after Produce had filed a Notice of Intention to file a proposal pursuant to the provisions of the Bankruptcy and Insolvency Act and, indeed, after the Canadian Imperial Bank of Commerce had appointed a receiver-manager of the Defendant, Sun Best and Produce.
26. If I had found out earlier that leases had been purportedly executed on

behalf of the Defendant, I would have taken immediate steps with the Plaintiff to advise them that such execution was unauthorized and without authority and would have dealt with the matter at that time.

In fact, Mr. Harry Tom admitted on his discovery, at question 413, that the directors had approved the defendant's January 31, 1993 financial statements, which make reference to the defendant's lease obligations.

¶ 46 As to Mr. Peek's credibility, plaintiff's counsel pointed out, and stressed, that, in November 1995, the defendant applied for and received an order to cross-examine Mr. Peek. However, Mr. Peek was not cross-examined. I agree with plaintiff's counsel that an inference can be drawn that the defendant did not consider that exercising its right to cross-examine Mr. Peek would assist the defendant on this application.

¶ 47 I am aware of the authorities dealing with Rule 18A which hold that where there is a conflict in the evidence going directly to the foundation of a plaintiff's action that the case may be unsuited for summary trial. See *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (C.A.); *Jutt v. Doehring* (1993) 82 B.C.L.R. (2d) 223 (C.A.). However, in the instant case, I am satisfied, on the whole of the evidence, that Mr. Peek was the Controller and Vice-President of Finance of the Tom Family companies' business generally and had the authority to enter into and sign the leases on behalf of the defendant.

¶ 48 Even if I were not able to make this finding, because of the conflict in the evidence between the Toms and Mr. Peek, plaintiff's counsel argued, and I accept, that this application can still be determined without the court having to decide whose evidence to accept. Plaintiff's counsel relied upon the decision of the Supreme Court of Canada in *Rockland Industries Inc. v. Amerada Minerals Corporation of Canada Ltd.* (1980), 11 B.L.R. 29 where at pp. 40-42 Martland J. said as follows:

I will deal first with the issue of liability. On this issue, the finding of the trial Judge, supported by Prowse and Morrow J.J.A., that Kurtz had actual authority to negotiate a sale up to September 3, 1974, is of prime importance.

I am not prepared to disturb this finding. Moir J.A. did not expressly disagree with it, though giving reasons why it was difficult to maintain. Those reasons are not, in my opinion, sufficient to warrant a reversal of that finding.

The appellant was dealing with Amerada, a very large corporation. In seeking to effect a purchase of sulphur, the appellant had been put into contact with the manager Petrochemicals/Speciality Products, responsible, inter alia, for sales of sulphur. Kurtz conducted the negotiations for Amerada, including the terms of sale and on September 5, after Leaderman had agreed to certain matters suggested by Kurtz, Kurtz said "We have a deal".

In that situation I do not agree that an onus rested on the appellant to inquire as to the extent of Kurtz's actual authority on September 5 to conclude the deal. Rather, in view of the fact that Kurtz had been clothed with actual authority up to September 3, it is my opinion that the respondent should have notified the

appellant of the limitation on the authority of Kurtz before the deal was made.

The view which I hold is stated in Bowstead on Agency, (14th ed.), p. 434. In art. 139, on that page, under the heading "Apparent Authority Where Actual Authority Revoked", the author writes:

"Where a principal, by words or conduct, represents or permits it to be represented that an agent is authorized to act on his behalf, he is bound by the acts of the agent, notwithstanding the determination of authority otherwise than by the death or bankruptcy of the principal, to the same extent as he would have been if the authority had not been determined, with respect to any third person dealing with the agent on the faith of any such representation, without notice of the determination of this authority."

The reasons for judgment in the Court below indicate the view that, having disposed of the matter of actual authority by the finding at trial that it did not exist on September 5, the only issue is as to the existence of apparent authority on that date. The evidence is then examined to ascertain if it satisfies the requirements defined by Diplock L.J. in the Freeman & Lockyer case, previously quoted. The Court appears to be of the view that the existence of actual authority up to September 3 has little, if any, relevance to this issue.

I do not share this view. In his judgment in the Freeman & Lockyer case, Diplock L.J. said at pp. 503-04:

"The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into."

Surely there can be no stronger instance of representing an agent as having permission to act in the conduct of the principal's business with other persons than by permitting an agent to negotiate who is clothed with actual authority to do so. Kurtz, who had actual authority to negotiate for the sale of sulphur and to effect its sale, was permitted by the respondent to negotiate with the appellant for that purpose. This is not a case of an agent, without authority, representing that he had an authority to deal which, in fact, he lacked. His lack of authority on September 5 was the result of a curtailment of his real authority effected without the knowledge of the appellant. In my opinion, there was here a representation of authority by the respondent on which the appellant relied.

On this issue, with great respect, I agree with the views of the trial Judge rather than those of the Appellate Division.

¶ 49 In the instant case, the defendant permitted Mr. Peek to negotiate leases on behalf of the Tom Family companies and did not communicate to the plaintiff any limitation on Mr. Peek's authorization to engage in negotiations or execute documents. On the basis of the principle established in Rockland, if the defendant had wished to limit Mr. Peek's authority, the onus was on the defendant to notify the plaintiff of any limitations on his authority. Further, while Mr. Peter Tom made much of the fact of alleged representations by Mr. Peek persuading him to sign the leases, I agree with plaintiff's counsel that even if Mr. Peek persuaded Mr. Peter Tom to sign, Mr. Peek would have to be the plaintiff's agent to make the plaintiff liable for the wrongful acts of Mr. Peek and, in my view, there is no evidence establishing that Mr. Peek was the plaintiff's agent in these transactions.

¶ 50 With respect to the guarantor defence, I agree with plaintiff's counsel that there is no evidence to support the defence proposition that the defendant was a guarantor, and not a co-lessee. Even if the defence had established, which I do not think it has, that the equipment was only used by Produce Inc., no authority was cited for the proposition that such a circumstance would support a conclusion that a co-lessee is to be treated as a guarantor.

¶ 51 Finally, dealing with the defendant's position that the plaintiff was in breach of s. 59 or 60 of the Personal Property Security Act, I agree with plaintiff's counsel that to the extent that there is a lack of notice, it creates a cause of action in the defendant for damages, rather than operating as a defence to the plaintiff's claim.

¶ 52 Accordingly, I find that the leases were duly executed and entered into by the defendant with the plaintiff, that the subject equipment was leased, or leased back, and that default occurred under the terms of the leases, thereby, triggering the plaintiff's rights as lessor under the default provisions of the leases. I find further that the plaintiff is entitled to a judgment in the amount of \$395,880.86, plus interest from September 1, 1995 to the date of judgment at 18% per annum, compounded monthly. The plaintiff will have its costs of this application on Scale 3.

COHEN J.

\* \* \* \* \*

CORRIGENDUM  
Released February 8, 1996

COHEN J.:-- My Reasons for Judgment dated February 2, 1996 are hereby amended as follows:

"To show D.A. Hobbs as counsel for the Plaintiff and D.B. Hyndman as counsel for the Defendant."

COHEN J.