

Mahood v. High Country Holdings Inc.

IN THE MATTER OF The Bankruptcy of High Country Holdings Inc.
AND IN THE MATTER OF The Bankruptcy of Makin Pulp & Paper Ltd.
AND IN THE MATTER OF The Bankruptcy of Britannia Beach Holdings
Ltd.

Between

Bertha Mahood, Michael Aird Mahood, Ernest Anthony Mahood and
Leslie Jan Mahood, petitioners, and
High Country Holdings Inc., Britannia Beach Holdings Ltd.,
Makin Pulp and Paper Ltd., 429553 B.C. Ltd., Ernest Alwyn
Mahood, Nova Corporation of Alberta, Fred Ratushny, Ashford
Engineering Ltd., Richard P. Begin, Personal Law Corporation
doing business as Begin and Company and The Attorney General
of Canada as representing the Interest of Her Majesty the
Queen in Right of Canada, respondents

[1996] B.C.J. No. 2408
43 C.B.R. (3d) 267
67 A.C.W.S. (3d) 224

British Columbia Supreme Court (In Bankruptcy)
Vancouver, British Columbia
Thackray J.

Heard: November 6 and 22, 1996.
Judgment: filed November 29, 1996.
(35 pp.)

*Bankruptcy — Voluntary assignments — Corporations — Authority to make assignment —
Setting aside.*

This was an application for directions in a bankruptcy proceeding. The respondent, Mahood, was the sole voting shareholder and director of five companies. The only asset owned by the companies was a large parcel of land. Mahood held a mortgage over the land. The applicants, his wife and sons, held non-voting shares and an interest in a family trust containing company shares. The Mahoods divorced. The wife sought maintenance and division of property. Several actions involving the property ensued. The wife and sons claimed that Mahood acted in an oppressive manner in regard to the trust and the companies. He had not made financial disclosure or proper accounting for the trust. He was restrained by the Court from encumbering or disposing of the property. A receiver-manager was appointed and ordered to dispose of the property. Mahood then assigned the companies into bankruptcy. The proposed trustee in

bankruptcy applied for directions. It contended that the bankruptcy assignment was valid and that it superceded the authority of the receiver. The wife and sons argued that the assignment was invalid. They noted that the assignment was made contrary to the terms of the Court orders restraining Mahood from disposing property.

HELD: The application was granted. The assignments of Mahood's companies into bankruptcy were annulled. Mahood violated the articles of a company by assigning it into bankruptcy. All the assignments violated the various Court orders restraining Mahood from transferring or disposing the property. Mahood was not entitled to appoint a trustee in bankruptcy of his own choice. Bankruptcy was used by Mahood for an illegitimate purpose. This constituted an abuse of process.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 34, 181(1).
Company Act, R.S.B.C. 1979, c. 59, s. 110.

Counsel:

David A. Hobbs, for the petitioners.
Dale B. Harder, for the respondents, 429553 B.C. Ltd. Ashford Engineering Ltd., Ernest Alwyn Mahood and Fred Ratushy.
David Lunny, for the respondents, High Country Holdings Inc., Britannia Beach Ltd. and Makin Pulp and Paper Ltd.
John F. Grieve, for the Receiver-Manager, Campbell, Saunders Ltd.
John I. McLean, for the Trustee in Bankruptcy, Coopers & Lybrand Limited.

¶ 1 **THACKRAY J.:**— Coopers & Lybrand Limited, in their apparent role as trustee in bankruptcy, has applied for directions pursuant to s. 34 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. I say "apparent" in that Campbell, Saunders Ltd., the receiver-manager, and the petitioners submit that the result should be that the assignments into bankruptcy are annulled.

¶ 2 There is also an application by the petitioners for a declaration that the affairs of High Country Holdings Inc., Britannia Beach Holdings Ltd. and Makin Pulp and Paper Ltd. ("the companies") and the powers of the directors have been conducted in a manner oppressive to the petitioners. Further, that resolutions have been passed which are unfairly prejudicial to the petitioners. The petitioners ask that the resolutions of the directors of September 9, 1996 making assignments into bankruptcy of the companies be annulled.

BACKGROUND

¶ 3 Mr. Ernest Alwyn Mahood and Mrs. Bertha Priscilla Mahood were married on March 15, 1947. They had three sons who are petitioners in action A932672 along with Mr. Mahood. The marriage was described by Madam Justice Ryan in 1991 as a "traditional" marriage. Mrs. Mahood never worked outside of the home. Mr. Mahood has always been a businessman who for many years was in the logging industry. He had business misfortunes and turned to farming. In about 1979 he became interested in the pulp industry. He founded Makin Project Initiators which had an objective of building pulp and paper mills.

¶ 4 Five companies were incorporated. They were closely held with Mr. Mahood as chief executive officer and a director of them all. Family members held shares in High Country Holdings Inc. which in turn held all the voting shares in Makin Pulp and Paper Ltd., Britannia Beach Holdings Ltd. and Makin Air Limited. Makin Pulp and Paper Ltd. held all the voting shares in Makin Project Initiators.

¶ 5 Mr. Mahood held all of the voting shares in High Country Holdings Inc. The Class C equity shares of this company were held for the benefit of Mrs. Mahood and her three sons pursuant to the terms of a family trust. The family trust was established in 1985. Its first trustee was Mr. Bernard Buan. The second was Mr. J. Thiessen.

¶ 6 The only significant asset owned by the companies was a 486 acre property located near Britannia Beach.

¶ 7 An action was commenced in this Court on June 9, 1989, (Vancouver Registry No. A891536). The plaintiff is Mrs. Mahood. The defendants are Mr. Mahood as trustee of the family trust and the companies. Mrs. Mahood sought relief under the Family Relations Act, R.S.B.C. 1979, c. 121.

¶ 8 In that action Madam Justice Ryan said in 1991 as follows:

Mr. Mahood still clings to the notion that he will be able to develop a mill at Britannia Beach. The material reveals that between environmental controls and the lack of funding, this probably will not occur.

¶ 9 As will be seen as this history progresses, this vision of the future was alarmingly correct. Ryan J. noted that Mr. Mahood had spent "the last eleven years trying to get the pulp mill project off the ground." The Mahood family moved from Alberta to British Columbia in 1984 and immediately their "fortunes soared" when Mr. Mahood successfully obtained financing through a Scientific Research Tax Credit for some \$35 million.

¶ 10 Mrs. Mahood sought a divorce in an action (D071511) commenced on June 22, 1989. The divorce was granted by Mr. Justice Coultas on March 2, 1992.

¶ 11 Mr. Mahood applied to remove a *lis pendens* over the property on the basis that it severely hampered his ability to sell the property and to raise capital to finance a pulp mill. As well, Mrs. Mahood applied for the appointment of a receiver on the grounds that there was "gross mismanagement" of the companies.

¶ 12 Madam Justice Ryan dismissed the application to remove the *lis pendens*. She also refused the application to appoint a receiver but acknowledged that Mr. Mahood had not been co-operative in producing business records "even when ordered to produce them by the Alberta court."

¶ 13 On an application for maintenance Madam Justice Ryan said that she did not accept that Mr. Mahood was without funds to support his wife and that "he has not been entirely candid with the Court with respect to many things." She then went on to give examples.

¶ 14 Action No. A924009, commenced on October 15, 1992, concerns the family trust. Mrs. Mahood and her sons are petitioners and Messrs. Mahood, Thiessen and Buan are respondents. On November 3, 1992 Mr. Justice Macdonald ordered that High Country Holdings Inc. be restrained from altering its share capital, selling or encumbering its assets, or paying out dividends or income to shareholders.

¶ 15 On July 21, 1993 Bertha Mahood and her three sons issued a petition, action No. A932672. It asked the court to appoint a receiver-manager of the companies, to have the assets assessed and, if appropriate, sold and the proceeds distributed.

¶ 16 The petition has been twice amended. The first time by an order of Mr. Justice Holmes dated September 2, 1994. The second time was on March 29, 1996 pursuant to an order of Mr. Justice Brenner. The amendments expanded the number of respondents. The alleged oppression and suggested remedies were also defined. In his written submissions counsel for the petitioners refers to this action as the "oppression action".

¶ 17 On February 6, 1995 an affidavit of Mr. Mahood's was filed in that action. Mr. Mahood claimed to be entitled to a management fee and termination fee of \$1,931,900 and a mortgage in the amount of \$1,792,435. He further deposed that he assigned his mortgage to 429553 B.C. Ltd. with instructions to foreclose.

¶ 18 Mr. Trower, then counsel for 429553 B.C. Ltd., filed an affidavit in support of "foreclosing creditors" deposing that Mr. Mahood, Ashford Engineering Ltd., Fred Ratushny and Trinkhaus and Burkhardt had all assigned their mortgages to 429553 B.C. Ltd.

¶ 19 Counsel for the petitioners say that the Ashford mortgage was "allegedly made on August 19, 1993 and further that there was an assignment of mortgage by Makin Pulp to Mr. Mahood on that same date. This was one day before a restraining order was obtained from Mr. Justice Preston." Further, that "allegedly" High Country assigned its mortgage to Mr. Mahood on November 21, 1989 and Mr. Mahood then assigned it to Trinkhaus and Burkhardt.

¶ 20 The petitioners say that while Trinkhaus and Burkhardt is an entity often mentioned by Mr. Mahood, its obscure identity and role is not consistent with the usual habits of an arm's length, unpaid creditor. They say that there is no objective evidence of a demand for repayment made independently by Trinkhaus and Burkhardt. Nor has there been any production of loan documentation between the alleged lender and the companies. The petitioners' submissions are made notwithstanding the presence of a charge registered against the properties since Sept 16, 1989 and "allegedly held" by Trinkhaus and Burkhardt.

¶ 21 In an affidavit filed February 9, 1995 the receiver-manager expressed its concerns about Mr. Mahood, the alleged security and indebtedness and Mr. Mahood's conflict of interest.

¶ 22 Mr. Justice Preston's order of August 20, 1993 restrained Makin Pulp and Paper Ltd. and Britannia Beach Holdings Ltd. from altering their share structure, selling or otherwise encumbering any portion of their property and from paying out any income. On October 15, Mr. Justice Macdonald ordered an extension of the restraining order pending the application to appoint a receiver-manager. He also adjourned an application to appoint a replacement trustee for the family trust.

¶ 23 On December 3, 1993 Mr. Justice Holmes continued the restraining order until he rendered a decision on the application to appoint a receiver-manager. On that same day he delivered reasons on the respondents' application to have the petition struck. One of the grounds of the respondents' application was that the submission that the petition was frivolous or vexatious. Holmes J. dismissed the application.

¶ 24 An important point was reached in this litigation with the reasons of Mr. Justice Holmes on September 2, 1994. He said that the "current plan" for the Britannia property was to obtain sub-division approval, provide servicing and then market the land. The reasons also update the history as contained in Madam Justice Ryan's reasons of February 5, 1991. In considering motivation and purpose Mr. Justice Holmes said:

It is clear the corporate organization of the respondent companies coupled with the Mahood Family Trust was to ultimately transfer the value of the companies to the petitioners while retaining to Mr. Mahood the operational control of the companies and a discretion as to distribution of the value those companies produced through the Mahood Family Trust. I assume in 1985 the petitioners and Mr. Mahood were all members of a happy family with all co-operating to increase the family fortune.

¶ 25 Holmes J. recited the "many allegations" in support of the contention that the companies were being operated in an oppressive and unfairly prejudicial manner. These included lack of financial disclosure, lack of proper accounting, failure to supply information to the petitioners and the failure to appoint a proper trustee for the trust. Mr. Justice Holmes said:

... I am satisfied that there is substantial merit to this form of complaint.

¶ 26 He further noted that a loan made to Mr. Buan while he was trustee of the family trust supports the "general complaints made by the petitioners as to the improper and secretive business practices of Mr. Mahood ...". . Holmes J. said that as long as Mr. Mahood had operational control of the companies the allegations could not be analyzed because Mr. Mahood would not give access to the accounting records.

¶ 27 In conclusion Holmes J. said:

The allegations made by the petitioners when categorized encompass the classic reasons for intervention by a court to place assets or business under receivership pending resolution of matters in litigation. The categories include waste, improper disposition of property, improper management, lack of proper accounting, bias in management, and improperly profiting personally.

¶ 28 Mr. Justice Holmes appointed Campbell Saunders Ltd. as receiver-manager. The order that was drawn was, for the most part, in standard form. It provided that the receiver-manager was empowered to:

manage the businesses, business works and undertaking of the Companies and with power to act at once until further Order of this Court with full authority to the Receiver-Manager to enter into possession of all the property, assets and undertaking of the Companies and to carry on or concur in carrying on the

business of the Companies.

¶ 29 In his reasons Holmes J. specifically deleted words from the suggested order empowering the receiver to sell or concur in selling any of the properties in question.

¶ 30 On November 4, 1994 the Court joined Mr. Mahood and others as respondents in the action. Further, it restrained the respondents from transferring, disposing of or encumbering any real property in which they had an interest. The receiver- manager was also empowered to obtain an appraisal on the property, to seek an opinion with respect to the validity of the lis pendens and to consult with a named expert "with respect to the proposed development by the companies of a paper mill to obtain his assistance in determining if the project is viable."

¶ 31 In order to bring to light the financial picture of the companies the Court empowered the receiver-manager to take such steps as necessary to ensure that the financial statements accurately reflected the companies' financial circumstances. A review of financial records was also directed to determine the validity of certain declared debt obligations.

¶ 32 This recurring matter of what were "true" liabilities arose again before Mr. Justice Macdonald on January 26, 1995 when the receiver-manager applied for certain directions. In giving reasons Macdonald J. said:

... There are allegations of conduct contrary to court orders in this and other actions. It is clear that the secured mortgagees are not arm's length parties in the normal sense, but to some extent or other have been involved with Mr. Mahood, Sr. in his efforts to develop the property in question.

¶ 33 On February 9 the parties were again before Mr. Justice Macdonald for directions. In the course of his reasons he stated as follows:

... it is not my intention at the present time that any such application have the effect of replacing Campbell Saunders entirely in the matter since I consider, at least at this stage, that Campbell Saunders has an important function to perform in connection with the vetting and investigation of the validity and accounting details relating to the mortgages allegedly held by the secured creditors.

¶ 34 There was a further application by the secured creditors of the Britannia Beach property for leave to file a petition of foreclosure. Mr. Justice Macdonald reflected as follows:

... the documents produced in support of the application for leave to commence the foreclosure proceeding should have been in the hands of the receiver manager many months ago and indeed should perhaps have been disclosed in other proceedings years ago.

¶ 35 The next set of important and illuminating reasons are those of Mr. Justice Macdonald delivered on February 24, 1995. These arose out of an application by the respondents to discharge Campbell Saunders as receiver-manager. The application was based upon the narrow ground that the receiver-manager had divulged a letter from Swinton & Company addressed to counsel for Britannia Beach Holdings Ltd. and Makin Pulp and Paper Ltd. Macdonald J. found no substance in the application and it was dismissed.

¶ 36 On that same date the lis pendens was discharged from the properties.

¶ 37 On February 21, 1995 in action A932672 the petitioners filed a motion asking for an order that the receiver-manager be entitled to list for sale the Britannia lands. Mr. Justice Macdonald adjourned the application but in doing so stated:

... there is much force to the contention of the receiver that a sale somewhere down the road is inevitable.

...

I am coming to the view that a sale of these assets to someone interested in proceeding with this project, or to someone with an entirely different plan for the use of these lands, may be the only way to bring to a head the issues between the protagonists.

...

The fact of the matter is of course that there has been some water under the bridge since those reasons for judgment. Gradually, the situation is changing to the point where realization of whatever equity may exist in this property, or indeed its loss to the secured creditors through foreclosure, may be the appropriate solution. These disputes have been in and out of this court for five years. The time is approaching when the court will have to decide what is in the best interests of all the parties.

¶ 38 On March 17, 1995, 429553 B.C. Ltd. brought an application to have a second receiver appointed to carry forward on "the development and re-zoning of the ... properties." Madam Justice Sinclair Prowse, in giving reasons as to why a second receiver was not approved, said as follows with regard to the possibility of the pulp mill project going forward:

As far as references to the Japanese; to the U.S. public company; or to the tradeable debt instruments on the Luxembourg exchange are concerned, the evidence did not disclose that there was a firm financial commitment from any of these sources or even that there was a realistic possibility of such a commitment in the future.

¶ 39 On March 20, 1995, Chief Justice Esson asked me to be the case management judge in Action A932672. On two occasions before me counsel for Mr. Mahood alleged that the financing for a pulp mill was all but in place. Once, according to my memory, the financing was arranged through a European connection and another time it was Asian. I recall that once a "contract" of financing was waved in front of me. However, it was never tendered for inspection.

¶ 40 It was not until December 21, 1995, that the application for an order granting the receiver-manager the power to sell the properties was heard. The hearing continued on December 28, 1995 and on March 22, 1996. On that date, after many adjournments for

negotiations between the parties, it was indicated that a settlement could be reached. However, the parties wanted some "judicial involvement."

¶ 41 It was arranged that Mr. Justice Brenner would become involved in the settlement process. Shortly thereafter I was informed that a settlement had been concluded. The petitioner's brief states as follows: "A settlement agreement was entered into on March 29, 1996,"

¶ 42 In early June I was informed that the settlement had "fallen through" and that a ruling was required on the application to sell the properties. On June 7, in "reasons" that showed my frustration, I authorized the sale. I am informed by the companies' brief that a notice of appeal was filed by the companies on July 9, 1996.

¶ 43 Pursuant to the June 7 order and to the order of Mr. Justice Henderson of September 12, 1996 that authorized the receiver to enter a listing agreement, the receiver listed the properties with Colliers Macaulay Nicolls on September 12. On that same date each of the three companies filed an assignment in bankruptcy whereby Coopers & Lybrand was named as the trustee.

¶ 44 The assignments were filed pursuant to motions passed at directors' meetings of each of the three companies. The meetings were all held at 11 a.m. at 1111 West Hastings Street in Vancouver and in all cases the only person in attendance was Mr. Ernest A. Mahood. All of the motions read as follows:

ON MOTION DULY MADE, SECONDED AND CARRIED, ERNEST MAHOOD acted as CHAIRMAN at the meeting. A quorum of Directors being present in person the Chairman declared the meeting to be regularly constituted. The Chairman reported that the company was in financial difficulties and was no longer able to meet its obligations generally as they became due. It was therefore RESOLVED that the company make an assignment pursuant to the Bankruptcy and Insolvency Act and that for that purpose ERNEST A. MAHOOD be authorized to execute such documents in connection therewith as may be required.

¶ 45 Counsel for the receiver submitted that since June 7, 1996 the receiver has spent a considerable amount of time and money in preparing the plans for marketing and in marketing the properties. I accept that to be the case and it is supported by a glossy, colour advertising brochure, which I will annex to these reasons. Counsel further submitted that it has been distributed to "some 2,200" potential purchasers and that there has been "significant interest" shown.

THE RECEIVER'S REPORTS

¶ 46 The receiver's reports are lengthy and detailed. I will therefore only touch upon them and note some of the comments that are relied upon by the petitioners. In its report of May 10, 1995 the receiver said that at the instance of Mr. Mahood share transactions had taken place diluting High Country's interest in Makin Pulp and Paper and in that these took place after the court imposed injunctions the transaction might be invalid.

¶ 47 The receiver said that it could not produce final form financial statements due to the lack of accounting records. It suggested lack of co-operation by the companies in producing the required documentation. Consequently, the financial reports available represented the "rationale of Mr. Mahood" about which the receiver had reservations. The report suggested that the validity of some of the alleged securities might only be determined through a trial.

¶ 48 The report noted that Mr. Mahood was acting as sole director and sole voting shareholder and that this might not be in keeping with the requirements of the articles of the companies or with the Company Act, R.S.B.C. 1979, c. 59. The receiver set out specific actions of Mr. Mahood that had questionable validity. Other transactions of Mr. Mahood were labelled by the receiver as invalid.

¶ 49 The conclusions to the receiver's supplemental report of December 14, 1995 reads as follows:

Except for the fact that the opportunity for "grandfathering" the commercial zoning may still exist, nothing has come to our attention since the date of our first Report to the Court on May 10, 1995 which would alter the Recommendations and Conclusions outlined in that report.

ISSUES

¶ 50 There is agreement as to the issues. The wording of the various parties diverges somewhat but the issues come out as follows:

1. Are the assignments in bankruptcy contrary to the articles of the companies, the Company Act, the Bankruptcy and Insolvency Act or the orders of this Court?
2. If so, are the assignments "unlawful" and either void or voidable, or should they simply be stayed?
3. Should the assignments be annulled or stayed as being oppressive or unfairly oppressive to the petitioners?
4. Does the trustee supplant the powers of the receiver?
5. If the assignments are not contrary to court orders, articles or legislation, if they are not oppressive or unfairly prejudicial to the petitioners and if the trustee does not supplant the receiver, how should the duties and responsibilities of the trustee and the receiver be reconciled?

¶ 51 The petitioners and the receiver submit that the assignments in bankruptcy "should be annulled or at the very least stayed pending further order of this Honourable Court."

¶ 52 Mr. Mahood, the trustee and the companies contend that there should be an order declaring the assignments in bankruptcy lawful and valid. Further, they contend that there should be an order declaring that the trustee's power to take possession and control of the lands and related assets supersedes the rights and powers of the receiver.

DISCUSSION AND RULINGS

¶ 52a Were the assignments in bankruptcy made either contrary to the articles, the Company Act, or the orders of this Court? [The Court did not number this paragraph. QL has assigned the number 52a.]

The Articles

¶ 53 Article 4.01 of the articles of Makin Pulp and Paper Limited ("Makin") provides that the Board of Directors shall consist of a minimum of three persons and that a quorum for the transaction of business "shall consist of a majority of the minimum number of directors ...".

¶ 54 I cannot locate any similar article for the other companies. Part 7 of the articles of Britannia Beach Holdings Ltd. ("Britannia") provides that the number of directors shall be such number as is from time to time determined by ordinary resolution. Certain articles speak of "a person who is both the sole director and sole member." What constitutes a "quorum" may be fixed by the Board of Directors.

¶ 55 With respect to High Country Holdings Inc. ("High Country"), the number of directors may be determined by the subscribers to the Memorandum and the number may be changed by an ordinary resolution. A quorum of directors may be fixed by the directors and may be only one. If not so fixed, the number of directors shall be two.

¶ 56 The submissions of those parties who support the bankruptcy do not address the issue of the articles of Makin. The submission of counsel for the companies touches upon this subject only as follows:

23. In the case at bar, Mr. Mahood, as the sole director and president of each of the companies, in accordance with the companies' articles of incorporation passed resolutions that the companies were in financial difficulties and were no longer able to meet their obligations generally as they became due."

¶ 57 Counsel for the trustee, under the heading "AUTHORITY OF THE DIRECTOR", states that:

33. The Trustee is not in a position to know the internal working of the companies. The public records of the companies show Mr. Mahood as the sole director of all of the companies.

¶ 58 The references by counsel to the authority of directors are either incorrect or irrelevant.

¶ 59 In the case of Makin, Mr. Mahood was not, as submitted by counsel, acting "in accordance with the compan[y] articles."

¶ 60 With respect to the trustee's submission, it was directed at defending itself in accepting the trusteeship. This is a subject that might well have to be dealt with but is not to be entangled with the question of the authority of Mr. Mahood, acting as a sole director, to put Makin into bankruptcy.

¶ 61 In the case of Makin, Mr. Mahood, in acting as a Board of one, was acting contrary to the company articles in transacting directors' business.

Court Orders

¶ 62 The order of Mr. Justice Holmes on September 2, 1994 appointed Campbell Saunders Ltd. receiver-manager "of all the property, assets and undertaking of the Respondents ... with power to manage the businesses, business works and undertaking of the Companies ...".

¶ 63 On November 4, 1994 I ordered as follows:

... the respondents ... (the Companies) and any one or more of them be and are hereby restrained and enjoined from transferring, disposing of or encumbering any real property in which they have an interest ...

¶ 64 Counsel for the trustee and the respondents rely upon *Re Fuller; Blaxland et al. v. Fuller* (1990), 2 C.B.R. (3d) 125 (B.C.S.C.) wherein Donald J. was dealing with a contempt motion with respect to an order preventing the husband from disposing, encumbering or dealing with matrimonial property. The husband had made an assignment in bankruptcy.

¶ 65 Mr. Justice Donald found that "those having a claim against the interest are no worse off inside the bankruptcy." Consequently, there was no alienation of interest in that claims, as against the same property, were simply passed over to the trustee. However, Donald J. specifically noted that if the conduct was tainted with bad motives the court remains able to annul a bankruptcy. He held that "improper motive does not arise in this application."

¶ 66 That is far different than the case at bar wherein improper motive is alleged and, as stated by counsel for the receiver-manager, "The primary purpose of the appointment of the Receiver-Manager was to wrest management control of the Companies out of the hands of Mr. Mahood and place them in the hands of the Court through its officer, the Receiver."

¶ 67 Fuller was heard and decided in the context of a contempt motion. The court order allegedly breached was directed only at the husband's interest in the matrimonial home. Furthermore, the property was not affected, simply moved under the control of a different form of receiver trustee.

¶ 68 In Fuller, Mr. Justice Donald distinguished *Hemfrey Samson Belair Ltd. v. Manolescu* (1985), 58 C.B.R. (N.S.) 181 (B.C.C.A.) wherein there was an injunction prohibiting the transfer, disposition or encumbering of assets without notice. The trial judge held that an assignment into bankruptcy without notice was in contravention of the injunction and, as such, was an abuse of the process of the court. The judge thereby annulled the assignment. The Court of Appeal upheld the ruling as a proper exercise of judicial discretion.

¶ 69 In distinguishing *Manolescu*, Mr. Justice Donald said as follows:

... there was a matrimonial dispute in which the husband went about a course of dealings which was clearly contrary to an order of the Court. He declared himself to be insolvent when the merit of that contention was very much open to question. In those circumstances the Court found there had been an abuse of

process. It did not hold that the making of the assignment, per se, constitutes a violation of an order restraining the disposition of property. An examination of the full background of the facts surrounding the assignment must be made in order to properly determine whether an annulment should be granted.

¶ 70 I think it fair to say that I have done "an examination of the full background of the facts." I am of the opinion that they establish that, in the case at bar, "the making of the assignment, per se, constitutes a violation of an order restraining the disposition of property." Consequently, Monalescu is, to my way of thinking, a compelling precedent. Re Fuller is not.

¶ 71 Counsel for the trustee suggested that on the basis of Everex Systems Inc. v. Pride Computer Distribution Ltd. (1988), 68 C.B.R. (N.S.) 24 (S.C.B.C.) the directors retain the authority to assign the companies into bankruptcy notwithstanding the existence of a court appointed receiver-manager.

¶ 72 I do not agree that Everex is authority for such a broad proposition. Mr. Justice Meredith said that a receiver-manager is appointed by the court and, as such, cannot instruct the company as an officer thereof. He then went on to say as follows:

In any event, the directors of the corporation retain their powers except with respect to that part of the undertaking for which the receiver-manager is appointed (Company Act, s.110). Thus the directors retain the authority to cause the company to execute an assignment in bankruptcy. The receiver-mar does not. [my underlining]

¶ 73 In the case at bar the court appointed receiver was given broad powers to act as the court's agent. I adopt the following submissions of counsel for the receiver:

There is no remaining management authority vested in Mr. Mahood. ... it would be completely ironic and unjust if Mr. Mahood could thwart the Court's intention by replacing the Receiver-Manager with a trustee in bankruptcy of his own choice. ... To sanction a bankruptcy in these circumstances would be to foster that conduct which the Court sought to enjoin both directly and indirectly in the orders appointing the receiver and setting out the receiver's duties.

¶ 74 Regardless of the facts, I would be hard pressed to follow Everex.

¶ 75 In Manolescu, Nemetz C.J.B.C. said as follows:

Mr. Manolescu was aware of that order of Locke J. [enjoining him from transferring, etc. any assets without notice] and understood its meaning. Nevertheless, he dealt with the assets without giving notice to Mrs. Manolescu. He was, in my view, in contempt and in ordinary circumstances would be brought before the court to show cause why sanctions should not be employed against him.

¶ 76 Those words have application to the case at bar. Mr. Mahood, and "his companies" are in breach of the court orders. They have abused the process of the court. On this basis the assignments in bankruptcy are annulled.

The Company Act

¶ 77 Section 110 of the Company Act provides:

Where a receiver manager is appointed, the powers of directors and officers cease with respect to that part of the undertaking for which he is appointed until he is discharged.

¶ 78 Section 181.(1) of the Bankruptcy and Insolvency Act reads:

Where, in the opinion of the court, a receiving order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

¶ 79 The threshold inquiry must be as to what legitimate purpose or motivation exists for the assignments into bankruptcy. It is clear that Mr. Mahood is determined to wrest control of the companies away from the receiver. The question is, why? None of the proponents of the assignments have supplied evidence from which I can discern any motivation or purpose that could be said to be necessary. The best evidence before the Court establishes that there is, even accepting the disputed charges, sufficiency of assets to pay all the creditors out of the potential proceeds from the sale of the properties.

¶ 80 With the dearth of evidence establishing a legitimate reason for the assignments, it becomes necessary to examine whether or not the assignments can be said, to use the words of Donald J. in *Manolescu*, to be motivated by "a purpose not legitimate to the use of the process." Simply put, was there an abuse of process?

¶ 81 In his brief, counsel for Mr. Mahood submitted under the heading "Abuse of Process" as follows:

The courts have the power to annul an assignment pursuant to section 181(1) of the Bankruptcy and Insolvency Act. However, in order to set aside or annul the assignments in bankruptcy, the courts appear to require the presence of an improper motive for the filing of an assignment as discussed in the *Manolescu*, *Fuller* and *Neustaeder* cases.

¶ 82 Counsel for Mr. Mahood and counsel for the trustee cited *Bodrogi v. Vulcan Industries Ltd.*, [1975] 3 W.W.R. 764 (B.C.S.C.) for the proposition that an abuse of process requires both an improper motive and an improper collateral purpose. Although the requirements stated in *Bodrogi* have been applied in subsequent cases, superior courts have not restricted their inherent jurisdiction to prevent an abuse of process to situations which satisfy the "collateral purpose" test: see *Federal Business Development Bank v. Holm*, [1995] B.C.J. No. 2416 (14 November 1995) Kamloops 29826 (B.C.S.C.); *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (3 September 1993) Vancouver C931968 (B.C.S.C.); *Henfrey Samson Belair v. Manolescu* (1985), 58 C.B.R. (N.S.) 181 (B.C.C.A.). As an example, in *Manolescu I* I cannot find that requirement. Chief Justice Nemetz noted that the trial judge had found that the assignment "was in clear contravention of the injunction" of the court. "This, in my view, was an abuse of the process of the court." He further said as follows:

Mr. Smith was frank to concede that where there is an abuse of process, there is a discretion which may be exercised by the judge as to whether the court will annul the assignment.

¶ 83 In *Re Good* (1991), 4 C.B.R. (3d) 12 (Ont. C. J., G.D.) Mr. Justice Rosenberg, in detailing the background of the dispute, said:

The history of Mr. and Mrs. Good and the various proceedings demonstrated that the husband, after 33 years of marriage, is determined to destroy himself and all of his assets rather than allow his wife the benefit of any of those assets. ... It is clear from the record before me that if the counsel for the wife had not been prepared to see this through to the end and to be as tenacious as they have been, that Mr. Good would have succeeded in preventing his wife from receiving any of the benefit of assets accumulated over those 33 years.

In my view, a clear case of abuse of process has been established.

¶ 84 The assignment in bankruptcy was annulled, and there was no suggestion that more than a finding of abuse of process, simpliciter, was required. I find the actions of the husband in that case analogous to the actions of Mr. Mahood.

¶ 85 The situation in the case at bar is analogous to that in *Re Louise & Peter Co. Ltd.* (1988), 67 C.B.R. (N.S.) 176 (Ont. S.C.) The court found the assignment to be an abuse of process in a situation where distress proceedings were already underway and the assignment would do no more than add additional expense. The assignment was annulled.

¶ 86 If the test in *Bodrogi* must be met, and I do not think that it does, I am of the opinion that the assignments are improperly motivated and constitute an abuse of process. Further, that the actions of Mr. Mahood have an improper collateral purpose. The history in the case at bar illustrates that Mr. Mahood will take whatever steps are necessary to disrupt the judicial process, frustrate the sale of the properties and avoid the finalization of the various claims. Mr. Justice Macdonald held, on January 26, 1995, that "the secured mortgagees are not arm's length parties", but rather persons involved with Mr. Mahood in his dream of developing the properties as a pulp mill.

¶ 87 Whether the motivation of Mr. Mahood is to establish unfounded claims against property, gain control over the trustee that he cannot over the receiver, halt the proposed sale of the property, or simply delay the proceedings and frustrate the other parties, I am of the opinion that any one of these would be an improper collateral purpose.

¶ 88 The assignments are annulled pursuant to s. 181.(1) of the Bankruptcy and Insolvency Act as being in contravention of the Company Act.

Oppression and Unfairly Prejudicial

¶ 89 I am not going to come to any decision on this issue. It was agreed between counsel that this would be severed from the applications and would be heard separately.

¶ 90 I would also bring to counsel's attention the reasons of Holmes J. on September 2, 1994. At page 13 he said:

Whether in fact the petitioners can prove the "oppression" or "unfairly prejudicial" conduct they allege can only be determined on a trial of those issues. They cannot be determined on the basis of conflicting affidavits.

¶ 91 While I do not necessarily agree, there must nevertheless be a determination of the form of hearing.

[Appendices non-displayable. See paper copy.]

THACKRARY J.

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