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COURT OF APPEAL FOR ONTARIO

RE: **HIGHLAND NURSING HOME PENSION PLAN TRUST by its Trustee, Elizabeth Kaneb (Applicant/Appellant/Respondent by Cross-Appeal) – and – CONSTANCE HELEN ALDRIDGE (Respondent/Appellant by Cross-Appeal)**

BEFORE: **MOLDAVER, MACPHERSON and SIMMONS JJ.A.**

COUNSEL: **Diana M. Edmonds**
for Highland Nursing Home Pension Plan Trust

Irving Marks and Jeffrey A. Dicker
for Constance Helen Aldridge

HEARD: **February 5, 2004**

On appeal from the judgment of Justice Susan E. Greer of the Superior Court of Justice dated June14, 2002.

E N D O R S E M E N T

Released Orally: February 5, 2004

[1] Allan Huppe was a financial and investment advisor. He made an assignment in bankruptcy on May 7, 1997. He is serving a three-year sentence at a penitentiary in New York State for wire fraud and embezzlement.

[2] The appellant is an unsecured creditor in Huppe's bankruptcy claiming $1,321,415.61. The respondent (and/or her husband) gave Huppe at least $100,000 in 1995 and 1996 for investment purposes. In April 1998, eleven months after his bankruptcy, Huppe returned $100,000 US (approximately $150,000 CDN) to the respondent. The appellant obtained an order pursuant to s. 38 of the *Bankruptcy and Insolvency Act* ("the *BIA*") granting it the right to bring an action against the respondent to recover this money.

[3] In a judgment released on June 14, 2002, Greer J. held that the respondent was entitled to retain $100,674 of the funds received from Huppe. She also held that the respondent had to turn over the remaining $49,326 to the appellant. The appellant appeals the first component of the judgment; the respondent cross-appeals the second component.

[4] The application judge affirmed the respondent's entitlement to the $100,674 on two bases: (1) the existence of an implied trust in the arrangement between the respondent and Huppe; and (2) the respondent came within s. 99(1) of the *BIA* relating to after-acquired property.

[5] With respect, we think that the application judge erred in reaching these conclusions.

[6] We agree with the application judge that "none of the documentation shows that the money, which went over to Huppe, was fixed with an express trust". We also agree with her that a trust can be implied, provided there is compliance with the three certainties for the existence of any trust–intention, subject matter and objects.

[7] The application judge mentioned the three certainties, but she did not apply them. In our view, the same documentation that led her to conclude that there was no express trust also belies the existence of an implied trust, especially one in favour of the respondent. Huppe's own financial records refer to a management contract between his company and Dr. Douglas Aldridge, the respondent's husband. When Huppe, prior to bankruptcy, returned some money to the respondent, the stated purpose was "note repayment". Huppe transferred the money he received from the Aldridges to his corporate account and he did not keep it separate from his other funds. When he became bankrupt, Huppe did not declare a trust in favour of the respondent; indeed, he did not even acknowledge the California account from which the later payments to the respondent came. Moreover, the respondent was not the only person to receive money from the California account – his wife, another third party and Huppe himself also received payments. In our view, these factors, and many others, make it impossible for the respondent to establish that there was a valid trust, express or implied.

[8] As part of the cross-appeal, the respondent submitted that the appellant had failed to establish that the funds in the California bank account were Huppe's funds. We disagree. The application judge found that this account contained Huppe's money and the unanswered evidence (including Huppe's name on the account and the disbursements from it to Huppe and his wife) supports this conclusion.

[9] The application judge's reliance on s. 99(1) of the *BIA* is also, with respect, misplaced. It is inconsistent with her implied trust reasoning: the implied trust is

grounded in money given to Huppe *before* his bankruptcy; the after-acquired property analysis applies only to assets obtained by the bankrupt *after* bankruptcy. Moreover, there is nothing in the record to support the "good faith" and "value" components of the test for the application of s. 99(1).

[10] Finally, the respondent advanced an alternative argument, namely that the application judge did not have jurisdiction to determine the application because the respondent was a stranger to the bankruptcy proceedings and the matter did not fall within rule 14.05(3) of the *Rules of Civil Procedure*. We disagree. The claim advanced by the appellant related directly to Huppe's bankruptcy under the *BIA* and the appellant's status as a major creditor of the bankrupt. Indeed, a successful application had the potential to lead directly to the respondent becoming a creditor in the bankruptcy: see Houlden and Morawetz, *The 2000 Annotated Bankruptcy & Insolvency Act*, (Carswell, Toronto: 1999) p. 639. Moreover, no issue was raised before the application judge about the applicability of rule 14.05(3) in these proceedings. We cannot say, on the basis of the record, that the application is outside this rule.

[11] The appeal is allowed and it is ordered that the respondent pay the appellant the $100,000 US she received from Huppe in 1998 in accordance with s. 121 of the *Courts of Justice* Act. The cross-appeal is dismissed.

"M. J. Moldaver J.A."
"J. C. MacPherson J.A."
"Janet M. Simmons J.A."