

 COURT FILE NO.: 31-OR-207257-T  
DATE: 20071017

ONTARIO  
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE BANKRUPTCY ) *James H. Grout, Larry C. Ellis, for KPMG*  
OF PORTUS ALTERNATIVE ASSET ) Inc., in its capacity as Trustee of the  
MANAGEMENT INC., AND PORTUS ) Consolidated Estate of Portus Alternative  
ASSET MANAGEMENT INC., both ) Asset Management Inc. and Portus Asset  
corporations incorporated pursuant to the ) Management Inc., bankrupts  
*Business Corporations Act* (Ontario) with ) *Jeffrey Leon, for Manulife*  
their principal place of business in the City of ) *R. Shayne Kukulowicz, representative*  
Toronto, in the Province of Ontario, bankrupts ) counsel  
) *C. Smith for Berkshire Hathaway*  
)  
) HEARD: July 27, 2007

C. CAMPBELL J.

REASONS FOR DECISION

[1] The Trustee in the above-noted Estate of Portus Alternative Asset Management Inc. ("PAAM") sought an Order that would assist in the administration and distribution of funds to Investors.

[2] Approximately twenty six thousand (26,000) parties (the "Investors") retained PAAM as a portfolio manager by entering into an investment management agreement with PAAM (the "Management Agreement.") Pursuant to the Management Agreement, the Investor granted PAAM complete discretion to invest all of the assets that the Investor contributed to its account with PAAM (the "Account") from time to time subject to representations that were made by PAAM regarding the way in which it proposed to exercise the investment discretion granted to it by the Investor.

[3] PAAM represented to the Investors that it would utilize all of the funds received by it from the Investors to purchase Canadian securities listed on the Toronto Stock Exchange (the "Canadian Securities.") Pursuant to a complicated series of forward contracts with offshore counterparties involving the Canadian Securities, the Investors were to receive the indirect economic benefit of principal protected notes issued by a bank to a series of trusts (the "Managed Account Structure.")

[4] PAAM received approximately \$792 million from the Investors. It did not purchase any Canadian Securities. The Managed Account Structure as it was described to the Investors and the failure of PAAM to implement the Managed Account Structure is fully described in the Consolidated Bankruptcy Report dated May 4, 2007 (the "Consolidated Bankruptcy Report") of KPMG Inc. (the "Receiver") in its capacity as the Receiver of the property, assets

and undertaking of PAAM, PAM, BancNote Corp. and certain other related entities and assets (collectively, the "Portus Group.")

[5] The Receiver ascertained that all funds contributed by the Investors to their Accounts for investment by PAAM were transferred by PAAM through numerous commingled offshore and domestic bank accounts controlled by PAAM before being used for one of two purposes.

[6] First, approximately \$110 million of the amount that PAAM received from the Investors was misappropriated by PAAM and used by PAAM to, among other things, fund its operations, repay investors who requested a return of some or all of their investments, fund the redemption of units of a related fund – the Market Neutral Preservation Fund (the "MNPF") and pay referral fees to the financial advisors that had referred the Investors to PAAM.

[7] Second, approximately \$529 million of the amount that PAAM received from the Investors was used to acquire fifteen (15) principal protected notes (the "Notes") from Société Générale (Canada.) The Notes were held in a custodial account that was maintained by RBC Dominion Securities Inc. in the name of the MNPF (the "MNPF Account.")

[8] On the date the Receiver was appointed, there were numerous bank accounts in the names of various members of the Portus Group containing commingled funds and assets. For example, the Notes, cash received from the Investors and cash subsequently claimed by investors in the MNPF were contained and commingled in the MNPF Account.

[9] As a result of the above-described misappropriations and the extensive commingling of the funds received by PAAM from the Investors, the Receiver was of the view that:

- (a) none of the Investors could assert a proprietary claim to the assets in the hands of the Receiver;
- (b) the Receiver should seek an Order declaring that all of the cash, the Notes and any other property of the Portus Group (collectively the "Property") was the property of PAAM; and
- (c) the assets in the hands of the Receiver ought to be realized upon and distributed to the Investors by way of a bankruptcy of PAAM administered under Part XII of the *Bankruptcy and Insolvency Act* (the "BIA").

[10] On November 9, 2005, upon the application of the Receiver, this Court made an Order declaring that the Property was the property of PAAM and all claims of the other members of the Portus Group, their creditors and any claimants against them in respect of the Property were vested out (the "Title Declaration Order.")

[11] The Title Declaration Order also granted relief in respect of the subsequent bankruptcy of PAAM to be administered under Part XII of the BIA. The Title Declaration Order declared that;

- (a) PAAM is a "securities firm" within the meaning of Part XII of the BIA;
- (b) the Property constituted "cash" and "securities" within the meaning of Part XII of the BIA and were held by or for the account of PAAM as a securities firm, for securities accounts of customers of PAAM or for PAAM's own account as a securities firm all within the meaning of Part XII of the BIA; and
- (c) each Investor is a "customer" of PAAM within the meaning of Part XII of the BIA.

[12] On March 24, 2006, upon the application of the Receiver, PAAM was adjudged a bankrupt and KPMG Inc. was appointed as Trustee of the Estate (the "PAAM Estate") pursuant to an Order of this Honourable Court (the "PAAM Bankruptcy Order.")

[13] On May 18, 2007, upon the application of the Receiver, PAM was adjudged a bankrupt, KPMG Inc. was named as Trustee of the Estate and the Estate was consolidated with the PAAM Estate on a substantive and procedural basis (the "Consolidated Estate") pursuant to an Order of this Honourable Court (the "Consolidated Bankruptcy Order.")

[14] Counsel for the Trustee submitted that the Order sought could be made, given that this Court has the inherent jurisdiction to "fill" a "functional" gap in a statute and/or to give effect to the provisions of the statute itself where the provisions of the statute itself are insufficient to fulfill the purpose of the statute.

[15] The Order sought was granted on July 25, 2007 at which time counsel were advised that reasons for the Order may well be given to amplify the basis for the Order.

[16] The question of the inherent jurisdiction of the Court has received considerable attention recently, particularly in the context of insolvency and commercial law. When a Court is asked to extend the terms of legislation or to deal with circumstances not provided for, the question arises: on what basis may the Court do so? The basis on which a Court may provide relief in circumstances not specifically covered in legislation requires an analysis of

[17] That analysis has now been done in a forthcoming article co-authored by a noted jurist and a noted academic. Justice Georgina R. Jackson of the Saskatchewan Court of Appeal and Dr. Janis P. Sarra of the British Columbia Faculty of Law explore this area in a paper to be published in the forthcoming (2007) Annual Review of Insolvency Law – Thomson – Carswell.<sup>1</sup>

[18] What the learned authors explore in their paper is an articulation of the basis for exercising the Court's authority to provide appropriate remedies within the context of insolvency statutes.

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<sup>1</sup>"Selecting the Judicial Tool to Get The Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters."

[19] There is wide recognition that a statute such as the *Companies Creditors Arrangements Act*<sup>2</sup> ("CCAA") requires the Court to provide practical, effective and often very speedy resolution in what has often been referred to as "real time" litigation. Indeed, it has been said that to achieve the objectives of the legislation, the Court requires a broad, flexible and often urgent exercise of jurisdiction.<sup>3</sup>

[20] The *Bankruptcy & Insolvency Act*<sup>4</sup> ("BIA"), while often dealing with less urgent issues of priority, does so in a more prescribed context but does allow for the development of the common law and the exercise of some equitable principles.

[21] I accept the hierarchical analysis proposed by Justice Jackson and Dr. Sarra. The first step in that process is to have regard to the scheme of the Statute under consideration, its purpose as determined from the Act, its context and the expression intention of Parliament.

[22] One aspect of judicial power has been referred to as "gap filling." As the learned authors note, this power has sometimes been referred to as permitting a judge to make explicit what is already implicit in the words of a statute.<sup>5</sup> Alternatively, the authors note "gap filling" may be regarded as a judicial tool when the nature of the legislative scheme requires the Court to "make it work."<sup>6</sup>

[23] I accept the advice of the authors that the first task of the Court is to "interpret the statute before it and exercise authority pursuant to the statute, before reaching for other tools in the judicial toolbox."<sup>7</sup> The exercise of statutory interpretation that allows for what is referred to as "gap filling" will frame and in circumstances may limit what has been referred to as "judicial discretion."

[24] If the above referred to method of statutory interpretation is accepted, resolution of many issues before the Court may be made before resort to what has increasingly been referred to as the "inherent jurisdiction" of the Court.

[25] In this methodology referred to by Justice Jackson and Dr. Sarra<sup>8</sup>, inherent jurisdiction of the Court may be defined as "being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observation of the due process of law, to prevent improper vexation or oppression..."

<sup>2</sup> R.S.C. 1985, c. C-36, as amended.

<sup>3</sup> See *United Used Auto & Truck Parts Ltd. Re* (1999), 12 C.B.R. (4<sup>th</sup>) 144 (B.C.S.C.) (Chambers), affirmed [2000] B.C.J. No. 409, 16 C.B.R. (4<sup>th</sup>) 141 (B.C.C.A.)

<sup>4</sup> R.S.C. 1985 c. B-3, as amended.

<sup>5</sup> See references at pp 5-7 to the work of Pierre-André Coté, "The Interpretation of Legislation in Canada" 3<sup>rd</sup> ed., (Toronto: Carswell 2000)

<sup>6</sup> See reference to Professor Sullivan on page 7 of the Article and her work "Sullivan and Dridger on the Construction of Statutes," 4<sup>th</sup> ed., (Markham: Butterworths, 2002)

<sup>7</sup> See section C, pp. 10-11.

<sup>8</sup> See page 27 referring to I.H. Jacob, "The Inherent Jurisdictions of the Court" (1970), 23 *Current Legal Problems* 23. Also see *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725 at paragraph 29 – adopting.

[26] I considered at the time of granting the Order in July that a simple justification for relief that was not opposed and also made practical sense was available invoking the inherent jurisdiction of the Court. Further reflection and the availability of the paper by Justice Jackson and Dr. Sarra have led me to reconsider the basis for my Order.

[27] Part XII of the BIA was added in 1997 to facilitate customer compensation upon the bankruptcy of a securities firm, particularly where there are customer name securities and to expedite claims where those other claims of customers are involved.<sup>9</sup> This matter does fall within Part XII of the BIA.

[28] A customer of a bankrupt securities firm under Part XII of the BIA has a claim against the bankrupt securities firm for the amount of his or her "net equity". "Net equity" is defined in Section 253 of the BIA as:

net equity" means, with respect to the securities account or accounts of a customer, maintained in one capacity, the net dollar value of the account or accounts, equal to the amount that would be owed by a securities firm to the customer as a result of the liquidation by sale or purchase at the close of business of the securities firm on the date of bankruptcy of the securities firm, of all security positions of the customer in each securities account, other than customer name securities reclaimed by the customer, including any amount in respect of a securities transaction not settled on the date of bankruptcy but settled thereafter, less any indebtedness of the customer to the securities firm on the date of bankruptcy including any amount owing in respect of a securities transaction not settled on the date of bankruptcy but settled thereafter, plus any payment of indebtedness made with the consent of the trustee after the date of bankruptcy;

[29] Part XII of the BIA presumes that the bankrupt securities firm purchased securities with funds received by it from its customers. The intention of the definition of "net equity" is for the quantum of the claim of each customer to be the market value of the securities purchased and held for him or her by the securities firm as at the date of bankruptcy less any amounts owing by the customer to the securities firm.

[30] As a result of:

- (a) the failure of PAAM to purchase Canadian Securities with the funds received by it from the Investors;
- (b) the misappropriation of the funds received by PAAM from the Investors; and
- (c) the extensive co-mingling of the funds received by PAAM from the Investors and the Notes purchased with a portion of those funds on behalf of non-existent trusts;

the Customers have no assets in their Accounts and the Customers are unable to trace their funds to either of the Notes, the cash or the other property in the hands of the Receiver.

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<sup>9</sup> See Houlden & Magrawetz, "Bankruptcy & Insolvency Law of Canada," 3<sup>rd</sup> ed. (looseleaf), Thomson:Carswell, Vol. 3, p. 7-180.

[31] As a result, according to the definition of "net equity" in Section 253 of the BIA, each Investor's "net equity" would be zero. This result would neither be just nor equitable.

[32] Part XII of the BIA contemplates the establishment of securities accounts for the customers of a securities firm and presumes that the securities firm will utilize all funds received from its customers to purchase securities. Part XII of the BIA does not contemplate a misappropriation of funds received by a securities firm from its customers. This is a "functional gap" in the BIA.

[33] The rationale of Part XII of the BIA is to provide for recovery by customers of amounts owing to them when their priority is determined. Section 253 of the BIA provides the mechanism for determining the amount of the customer priority.

[34] In my view, the statutory purpose of Part XII would be defeated if a fraud by or on behalf of the securities firm operated to defeat an otherwise legitimate entitlement to recovery by a customer.

[35] I accept the submission of the Trustee that making the Order being sought in respect of the quantum of the claims of the Investors against PAAM will not conflict with the provisions of Part XII of the BIA – in particular the definition of "net equity" contained in Section 253. Section 253 of the BIA is inapplicable to the facts before this Honourable Court because PAAM failed to purchase any securities whatsoever with the funds it received from the Investors.

[36] The "gap" created arises because Part XII does not specifically contemplate a fraud by a securities firm on its own customer prior to the firm's bankruptcy.

[37] In such circumstances it is not only just and equitable but within the purpose of Part XII to declare that the net equity of each customer of the Consolidated Estate is in an amount equal to the amount invested by each customer by or through PAAM less any amounts received by each such customer from PAAM prior to March 4, 2005 together with the ancillary relief contained in the draft Order filed.

[38] It is to be noted that no other party involved in the PAAM bankruptcy objected or contested the relief sought since it is accepted that making the Order being sought is essential to the administration of the Consolidated Estate because it will ensure that the Investors have the claims against the Estate to which they are entitled.

[39] If it were necessary to do so, I would not hesitate to employ the tools of judicial discretion or indeed inherent discretion to provide recovery for Investors. For the reasons set out above, I am satisfied that the Order sought is more than justified on the basis of statutory interpretation and have so ordered.

[40] The above approach is in my view consistent with a growing judicial preference for a hierarchy of judicial tools, a discussion that will be accelerated and amplified by the work of Justice Jackson and Dr. Sarra.<sup>10</sup>

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C. CAMPBELL J.

Released: Oct. 17, 2007

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<sup>10</sup> See *Clear Creek Contracting Ltd. v. Sheena Cellulose*, [2003] B.C.J. No. 1335, 43 C.B.R. (4<sup>th</sup>) 187 (C.A.) and the conclusion of the authors at pp. 41-42 of their paper.

**COURT FILE NO.:** 31-OR-207257-T  
**DATE:** 20071017

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF THE  
BANKRUPTCY OF PORTUS  
ALTERNATIVE ASSET MANAGEMENT  
INC., AND PORTUS ASSET  
MANAGEMENT INC., both corporations  
incorporated pursuant to the *Business  
Corporations Act* (Ontario) with their  
principal place of business in the City of  
Toronto, in the Province of Ontario,  
bankrupts

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REASONS FOR DECISION

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**C. CAMPBELL J.**

**RELEASED:** October 17, 2007

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