

IN THE MATTER OF
THE SECURITIES ACT, 1988, S.S. 1988, c. S-42.2

AND

IN THE MATTER OF
RAYMOND BRILTZ
AND
RUDY FLAMAN, FLAMAN SALES LTD.

DECISION

Hearing Held January 14, 1997

Before: Marcel de la Gorgendiere, Q.C., Chairman
Art Wakabayashi, Commission Member

Appearances: Patti Pacholek, representing Commission staff

Applicant: Rudy Flaman, on his own behalf.
Raymond Briltz, on his own behalf.

Decision dated February 18, 1997.

DECISION

This matter is an application of Rudy Flaman, Flaman Sales Ltd. ("Flaman") for a return of funds that were frozen by an Order to Freeze Property by the Saskatchewan Securities Commission (the "Commission") dated September 15, 1995. The frozen account is in the name of Raymond P. Briltz ("Briltz").

Briltz is a Regina resident who has been ceased traded by the Commission pursuant to an order dated March 15, 1994 and extended March 30, 1994, which stated that all trading in securities by Briltz cease. In the Agreed Statement of Facts on file before us it is stated that in August, 1995 Briltz made representations to Flaman in respect to a used clothing venture and that on August 10, 1995 Flaman gave Briltz a cheque in the amount of \$30,000. to invest in the used clothing venture. The investment was evidenced by a promissory note. The \$30,000. was deposited in the personal account of Briltz in a bank in Regina, except for \$300. in cash paid to Briltz. Subsequent to that date Briltz deposited \$1,378.09 in his own funds. Between August 10, 1995 and September 15, 1995 Briltz withdrew approximately \$20,549.15 from the account using it on operating and personal expenses. None of Flaman's money was used in the used clothing venture.

The facts, as agreed to, and bank records filed make it clear that there is no argument whether or not the money in the account was Flaman's. While Briltz did deposit funds to the account, as more than Briltz' deposits were withdrawn, he must have been withdrawing Flaman's funds. It is further agreed that there was no other money commingled in the account. Deposits show that they were either Briltz' funds or Flaman's. There were no other funds from other individuals. Considering that the money can be traced to Flaman, pursuant to a trust as mentioned below, it would be impossible for bona fide creditors of Briltz, secured or otherwise, to establish a prior claim to the funds. The funds were obtained by Briltz by virtue of an illegal distribution and they are not clean. Briltz does not have any interest in the funds. Considering these facts, it is therefore submitted that the Commission need not object to the release of the funds in the frozen account to Flaman, as he is able to trace the funds. In accordance with subsection 4 of section 17 of *The Securities Amendment Act, 1995*, S.S. 1995, c.32 (the "Pre-amended Act"), the Commission can consent to the release of the funds.

In considering whether it is in the public interest for the Commission not to object to the release of the funds frozen in the account to Flaman, pursuant to his application, one must consider the statutory provisions governing the freeze order and the legality of the entitlement to the funds. The order was made pursuant to *The Securities Act, 1988*, S. S.

1988, c.S-42.2 prior to the proclamation of the Pre-amended Act on May 15, 1996. Section 17(1) of the Pre-amended Act provided that where the Commission was conducting an investigation in respect to a person or company, the Commission may in writing direct:

"any person or company having on deposit or under control or for safe keeping any funds, securities, commodity futures contracts or other property of the person or company" "to hold those funds, securities, commodity futures contracts or other property" "until the Commission in writing revokes the direction or consents to release any particular funds, securities, commodity futures contracts or other property from the direction".

Subsection 4 of section 17 of the Pre-amended Act provided:

"on the application of a person or company directly affected by a direction issued pursuant to subsection (1), the Commission may make an order on any terms or conditions that it may impose:

- (a) revoking that direction; or
- (b) consenting to the release of any fund, security, commodity futures contract or other property with respect to which the direction was issued pursuant to subsection (1)".

It is clear then that the statute in effect at the time of the freeze order provides for the Commission entertaining such an application as has been made to it.

The question then rises as to Flaman's entitlement to the funds in Briltz' account. In *Re Hallett's Estate (1880)*, 13 Ch.D. 696 (H. L) is authority that if money held by a person of a fiduciary character, though not a formal trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands. The case is also authority that any money drawn by the account holder in such a situation must be taken to have been taken from his own money in preference to the trust money deposited. The question then is whether Briltz was holding these funds in a fiduciary capacity. The Supreme Court of Canada in *Carter v Long & Bisby (1896)*, 26 S.C.R, 430 S.C.C. provided at page 432:

"A great number of cases decided in courts of equity ranging over more than a century have established that trust monies may always be traced into property of any species into which it may have been converted, in such a way that the court will give the cestui que trust as nearly as possible the same interest in the property as that which he had in the money of which it is the produce.

That money placed in the hands of an agent or other person standing in a fiduciary relationship in order that he may invest it for the benefit of his principal will be considered trust funds within this principle is also commonplace doctrine not calling for any authority".

"The case however of *Harris v. Truman* if there was any ground for raising a reasonable doubt as to the law, would be conclusive against the appellant". That appellant was the assignee of an insolvent wool buyer who had received funds from the defendant, plaintiff, to purchase wool. "That case in all features which are material exactly resembles the case before us. It proceeded entirely upon the equitable doctrine alluded to. Lord Coleridge at page 268 says:

"The judgment of the court below is founded mainly on two grounds. The first ground is of this nature: When large amounts of money are entrusted to a man to buy goods and carry on a business he becomes a trustee for the person to whom the money belongs and the proceeds of the money are affected with a trust. This is an old and well established doctrine in equity; it applies where the relation of principal and agent in the ordinary sense of the word does not exist. According to this doctrine where a confidence is created between two persons and where the one receives the money on the faith that he will do a certain thing and leads the other who has given the money to understand that the thing has been done, as between these two persons it is considered in equity to have been done. Therefore the person receiving the money is bound to hold what he gets for the person giving the money. I think that this ground is quite right".

The Chief Justice goes on to deny the proposition that the courts of equity only apply the doctrine in case of fraud.

It is clear that in the fact situation in front of us, whether fraudulent or not, that a fiduciary relationship has arisen as a result of the trust and confidence placed by Flaman in Briltz. Case law clearly states the fiduciary relationship which exists in a fact situation as we have, leads to a right to tracing by the beneficiary of the trust. In this case the funds can be clearly traced in the account to being the funds of Flaman and not those of Briltz as his own funds would be presumed to have been withdrawn by Briltz.

The Commission feels it is clear then that it has the power to make the order and that the funds being the funds of Flaman it would be in the public interest to issue an order amending the Freeze Order of September 15, 1995:

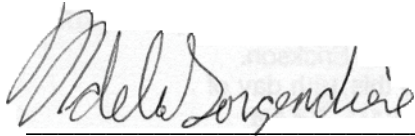
1. Revoking the direction to the bank to hold any funds, securities, commodity

futures contracts or other property of Raymond Briltz, which they have on deposit under control, or in their safekeeping on behalf of or for the account of Briltz for the purpose of the release of the funds to Flaman; and

2. Consenting to Briltz withdrawing the funds to enable him to release the funds to Flaman.

That amended order was issued on the date of the hearing of the application, namely, January 14, 1997.

DATED at the City of Regina, in the Province of Saskatchewan, this 18th day of February, 1997.

A handwritten signature in cursive script, reading "Marcel de la Gorgendiere". The signature is written in dark ink and is positioned above a horizontal line.

Marcel de la Gorgendiere, Q. C.
Chairman