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Blaneys on Business

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This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Corporate/Commercial group, Steve Popoff at 416.593.3972 or spopoff@blaney.com.

FINANCING THE PURCHASE OF VEHICLES? BEWARE SOME VERY FINE POINTS

Diane P.L. Brooks

If you lend money to someone to buy a truck or other motor vehicle, make sure not only that the vehicle is insured, but that the insurer is obliged to pay *you* the proceeds of any claim. If you don't, you may never see your money if the vehicle is totalled or stolen.

That is the lesson of a decision earlier this year in an Ontario Superior Court of Justice case in which a lender, *GE Canada Equipment Finance G.P.* was neither listed as the "loss payee" in policies covering two highway tractors it had financed nor the holder of an "assignment of insurance" recorded with the insurer, *ING Insurance Company of Canada.*

Here is the background. GE financed two highway tractors for Brampton Leasing and Rental Inc. by conditional sales contract, properly registering its interest in the tractors under Ontario's Personal Property Security Act (PPSA) and reserving title to them until they were fully paid for.

Brampton leased the vehicles to a third party, or sublessee. The sublease presumably was issued with the consent of GE but the court decision is silent on this point. In any event, the sublessee obtained insurance from ING, naming itself as lessee and Brampton as lessor. The decision states "the evidence demonstrates that ING did not know of GE's interest in the vehicles."

The vehicles were stolen. A claim was made to ING and ING made payment to cover the total loss. Then the vehicles were recovered and ING took possession of them. One was sold and the other remained in the possession of ING.

GE claimed that its security agreement with Brampton as registered with the province under the PPSA entitled it to the vehicles or to the proceeds of their sale. (While not explicitly stated in the case, it is implied that Brampton did not remit the proceeds to GE and subsequently became a bankrupt.)

ING argued that GE's claim was nullified by Ontario's Insurance Act. The regulations under that Act require every motor vehicle insurance policy to incorporate Statutory Condition 6(7), which stipulates that if the insurer "replace(s) the automobile or pays the actual cash value of the automobile, the salvage, if any" becomes the property of the insurer.

In arriving at its decision, the court examined two sections of the PPSA – section 4(1)(c), which provides that the Act does *not* apply to a transfer of an interest in an insurance policy, and section 9, which states that a security agreement is effective against third parties "except as otherwise provided by this *or any other Act*."

"...the Insurance Act prevents anyone, regardless of their interest, who is not a named insured or loss payee, from claiming entitlement to the insurance proceeds."

Diane P.L. Brooks is a member of Blaney McMurtry's Corporate/Commercial Group. Her practice centers on commercial law with an emphasis on lending from the perspectives of both lenders and borrowers and on equipment leasing. She has also developed expertise in transportation financing, energy management and retrofit financing. With more than11 years of industry experience as corporate counsel to a number of financial institutions, Diane brings a unique business perspective to her practice.

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The court also considered an earlier Ontario Supreme Court case, *Chrysler Credit Canada v Fehr*, which examined the entitlement of a financier to insurance proceeds and found that subsection 258(3) of the Insurance Act prevents anyone, regardless of their interest, who is not a named insured or loss payee, from claiming entitlement to the insurance proceeds.

Lessons Learned

Often, finance companies will allow a borrower or lessee to lease or sublease leased or financed equipment. The results above indicate that the insurer is not obliged to conduct a PPSA search prior to paying out a claim, and further, if the finance company is not named as loss payee, it has no entitlement to claim the insurance proceeds from the insurer.

While finance companies will want to see evidence that the financed equipment is insured, not all will take steps to ensure that they are listed on the insurance policy or that an assignment of insurance is recorded with the insurer.

However, the listing of two loss payees on an automobile policy is not permissible under Ontario law, so the only way to protect the lead financier is for there to be a direct covenant between a sublessee and the finance company and for the finance company to be the only loss payee under the policy. ■

JOINT ACCOUNTS - NOT ALWAYS WHAT THEY SEEM TO BE

Margaret E. Rintoul

There has been much interest recently in employing joint bank accounts, joint investment accounts and jointly held real estate to simplify the processing of the estate when one of the owners of a jointly-held asset dies and also to reduce related professional and government costs.

The most commonly stated estate planning reason for joint holdings is to avoid Estate Administration Tax, which is 1.5 per cent of the value of the estate when an application for a Certificate of Appointment of Estate Trustee is made.

Relying on family harmony, the deceased owner, usually a parent, may also assume that the surviving account holder, usually one child, will "do the right thing" and share with his or her siblings.

It does not always turn out that way, however, and bruising and costly litigation may well ensue at a cost far greater than the initial taxes that may have been saved.

Two Supreme Court of Canada decisions confirm that it is very important to exercise considerable care when these joint holdings are created to explicitly set out what is to happen to one owner's share when he or she dies.

It has long been known that jointly held assets pass to the surviving owner with nothing more than proof that the deceased owner has, in fact, died. Most married couples will arrange their affairs through joint holdings, for example, unless there are successive marriages, disabled spouses or other non-routine situations that require other planning techniques.

Beyond that, many people have established joint ownership of assets with people other than their spouses. Widowed parents holding assets jointly with adult children or grandchildren are quite common.

"...just because an asset is held jointly, it cannot be assumed automatically that the deceased owner intended to gift the jointly held property to the surviving account holder alone."

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Ms. Rintoul has chaired the Executive Committee of the Wills, Trusts and Estates Sections of the National Section of the Canadian Bar Association and of the Ontario Bar Association. She publishes extensively in the area of estate planning and administration. Margaret also writes or contributes to four current Butterworths titles and she contributes to one Thomson/Carswell title.

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When the joint asset in question is a chequing account that essentially exists to make bill-paying more efficient and has only enough money in it to cover regular expenses, there is generally little problem regardless of who the surviving holder is.

Where the jointly held property is a substantial proportion of the overall net worth of an individual, however, and where leaving the jointly held property to the surviving owner results in others, who are beneficiaries under a will, getting little or nothing as a result, problems, and litigation, arise.

The decisions in May, 2007 of the Supreme Court of Canada in two cases where the real impact of jointly held assets were being appealed should cause planners to rethink the way in which they approach joint ownership.

Each case arrived at a different conclusion based on its own facts, but the overall result was a Supreme Court position that, just because an asset is held jointly, it cannot be assumed automatically that the deceased owner intended to gift the jointly held property to the surviving account holder alone.

Both cases involved fathers who put joint accounts into their own names and those of their daughters. In one case, both the daughter and her (by then) ex-husband were beneficiaries of the father's estate under his will. The ex-husband went to court to try and get a ruling that the jointly held assets were part of the estate and therefore partly his. Letters were found that were written by the father when the joint accounts were set up saying that he was doing this for estate planning purposes. This was held to be evidence that he wanted his daughter to have the funds when he died and that they were not to be handled under the terms of his will.

The second case involved one daughter who was the surviving joint account holder and her siblings who were the beneficiaries of their father's estate under his will. There was no evidence that confirmed that the father wanted only the one daughter to have the assets, and she was the executor of his estate. The daughter was ordered to include the jointly held assets as part of the estate to be divided according to the terms of the will.

In both cases, there was total rejection of the presumption of advancement (or gift) in favour of an adult, financially independent child. That means, in the absence of evidence to prove the intention to make a gift, there is a presumption that jointly held assets are held by a surviving child account holder in trust for the estate as a whole.

Recent experience indicates that banks have taken these Supreme Court decisions to heart and are becoming more cautious in transferring large joint accounts to surviving owners, particularly if there is any indication of family strife.

Anyone looking at an estate plan must examine the way that assets are owned and it is even more important now to review the transfers to joint ownership that may have occurred since the last time a will was updated. A clause in a will stating that any jointly held property is intended to go to the surviving owner, and is not intended to form part of the deceased owner's estate, should be sufficient to ensure that accounts in existence at the time a will is being prepared will be handled properly. This covers the situation where the intention is clear that the surviving holder should receive the assets outright.

However there are times when assets have been placed into joint ownership with the underlying

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intention that the surviving owner will, in fact, deal with them for the benefit of other beneficiaries. This intention is sometimes documented by way of a declaration of trust or a letter of direction setting out what is to be done with the assets when the original owner dies.

Extreme care must be taken in this form of approach. If the intention is that the joint owner of the property will become a form of trustee of the fund for the benefit of others, then a proper trust agreement, usually an Alter Ego or Joint Spousal Trust if the original owner is over 65, should be prepared and the assets put into accounts that reflect the trust.

The existence of only a joint account and an informal trust declaration or a letter of intention that is known to the financial advisors may prompt financial institutions to insist that the assets are still part of the estate and that a certificate of appointment is needed. There is a further possibility that the joint assets will wind up back into the calculation of the estate value and therefore be subject to Estate Administration Tax. When the surviving joint holder is also the executor named in a will and/or held a power of attorney before the original owner died, problems are even more likely.

A person trying to organize his or her estate by way of jointly held assets intended for a variety of ultimate beneficiaries may need to include all of the intended beneficiaries as joint owners, or may need to divide the joint ownership so that some assets are held jointly with each of several intended recipients.

Whatever method of estate planning is adopted, it is important that the documents be properly drafted, and that legal ownership reflects what was really intended, even if some Estate Administration Tax winds up being paid as a consequence. It is usually cheaper than the time dealing with banks and financial institutions to try and get things done after a death, or the litigation that can ensue when the surviving joint account holder isn't seen by others as "doing the right thing". ■

Blaney McMurtry LLP is pleased to announce

Sundeep Sandhu has joined our Corporate/Commercial Group. Sundeep's practice includes general corporate matters, mergers and acquisitions, secured lending and commercial leasing. She was called to the Bar of Ontario in 2007 and is a member of the Canadian Bar Association, the South Asian Bar Association and the Indo-Canadian Chamber of Commerce.

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Blaneys on Business is a publication of the Business Law Department of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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