Court File No.: CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FORME DEVELOPMENT GROUP INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Estate File No.: 31-2436568

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE PROPOSAL OF 58 OLD KENNEDY DEVELOPMENT INC., 76 OLD KENNEDY DEVELOPMENT INC. AND 82 OLD KENNEDY DEVELOPMENT INC., ALL CORPORATIONS INCORPORATED UNDER THE LAWS OF ONTARIO

COSTS SUBMISSIONS OF THE MONITOR

February 28, 2020

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COSTS SUBMISSIONS OF THE MONITOR

1. On February 20, 2020, this Honourable Court granted the motion of the Monitor (the "Motion") seeking an order annulling assignments into bankruptcy (the "Assignments") that had been made on January 28, 2020, under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"), and various other orders under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). In that Motion, the Monitor indicated it was seeking costs against Yuan Hua (Mike) Wang in his personal capacity. In his written endorsement of that same day (the "Endorsement"), Hainey J. stated "this is an appropriate case to make an order as to costs" and requested short written cost submissions. These costs submissions are submitted in support of a costs award against Mr. Wang.

2. The Monitor, who is acting in this case as a "super" Monitor with significantly expanded powers and responsibilities, is seeking partial indemnity costs in the total amount of $25,000 against Mr. Wang in his personal capacity.

Basis for Costs against Mr. Wang

3. Under both the CCAA and the BIA, the Court retains discretion in respect of ordering costs. While ordering costs against a non-party is an exceptional remedy, in light of the circumstances of this case, including the conduct of Mr. Wang who is the controlling mind of the corporations known in the CCAA proceedings as the Non-Applicants[1] that opposed the Motion and unsuccessfully sought other relief, including relief on behalf of Mr. Wang in his personal capacity, this is an appropriate case for the Court to exercise its discretion to order costs against Mr. Wang personally.

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[1] 4 Don Hillock Development Inc.; 7397 Islington Development Inc.; 101 Columbia Development Inc.; 4208 Kingston Development Inc.; 376 Derry Development Inc.; 390 Derry Development Inc.; 186 Old Kennedy Development Inc.; 31 Victory Development Inc.; 22 Old Kennedy Development Inc.; 35 Thelma Development Inc.; 19 Turff Development Inc.; 4550 Steeles Development Inc.; 9500 Dufferin Development Inc.; and 2495393 Ontario Inc.

4. Pursuant to subsection 197(1) of the BIA, costs are in the discretion of the Court:

> Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

5. Courts have stated that pursuant to subsection 197(1), "the court is given the widest discretion" with respect to costs.[2] Under the CCAA, while courts have recognized that costs are often not awarded, they have been awarded in a number of cases, and the Ontario Court of Appeal recently confirmed that a motion judge has discretion to award costs in the context of the CCAA.[3]

6. The Monitor submits that the circumstances before this Court are an exceptional case warranting the Court exercising its discretion to award costs against Mr. Wang, who is technically a non-party to the Motion, but is the sole shareholder and director of the Non-Applicants and for whom relief was sought by the Non-Applicants.

7. The standard for awarding costs against a non-party has been articulated as "fraud or abuse of the court's process or the bankruptcy process for a wrongful collateral purpose".[4] In those circumstances, the court can go behind the moving party's corporate veil to award costs against the person directing the litigation.[5] Therefore, where the party is really a nominee or surrogate for the "real party", costs against the non-party have been awarded.[6]

8. In this case, Mr. Wang has been found to be "the controlling mind of the Non-Applicants".[7] Therefore, while he was technically not a formal party to the Motion, he was clearly directing the party opposing the Motion. Of the nine stakeholders represented at the Motion, the Non-Applicants,

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[2] *2403177 Ontario Inc v Bending Lake Iron Group Ltd,* 2016 ONSC 5766 at para 30, citing *Re Dallas/North Group Inc,* [2001] OJ No. 2743 (CA) at para 11 [*Bending Lake*], Tab 2.

[3] *Urbancorp Toronto Management Inc,* 2019 ONCA 757 at para 82, Tab 3; see also *Return on Innovation Capital Ltd v Gandi Innovations Ltd,* 2011 ONSC 7465, Tab 4.

[4] *Bending Lake, supra* note 2 at para 37, Tab 2; *Re 1730960 Ontario Ltd,* 2009 ONCA 720 at para 8, Tab 5.

[5] *Ibid,* Tab 2 and Tab 5.

[6] *Re Party City Ltd,* 2002 CarswellOnt 1116 at para 37, Tab 6.

[7] *In the Matter of Forme Development Group Inc,* (February 20, 2020), Toronto, CV 18-608313-00CL (Endorsement) at para 3(vi)(b) [Endorsement], Tab 7.

at the direction of Mr. Wang, were the only party opposing the Motion. In addition, as noted in the Endorsement, prior to commencement of the hearing, the suggestion was made to counsel for the Non-Applicants that the order could be granted without prejudice to his client's position, however counsel "declined to proceed in this fashion and insisted that the motion proceed."[8]

9. The Non-Applicants also served motion materials and affidavit evidence in respect of the Motion on February 19, 2020, the day before the Motion, making it difficult for the Monitor, or any other interested party, to properly respond, including examining the affiant, Mr. Wang. Counsel to the Non-Applicants sent an email to the service list on February 18, 2020, advising that a motion would be filed later that day, but after counsel to the Monitor suggested that the affiant may need to be examined, the motion materials were not served until midday the following day (being the day before the Motion).

10. Importantly, in the notice of motion filed by the Non-Applicants, relief was expressly sought on behalf of Mr. Wang in his personal capacity, seeking "an interim order extending the deadline for Mike Wang to review claims", an "order permitting the withdrawal of the Undertaking...by Yuan Hua (Mike) Wang...", and an order in respect of "the costs of counsel to the [*sic*] Mike Wang". Mr. Wang was clearly no stranger to the Motion; he was the directing mind behind it and is actively involved in, and party to, every major activity in the CCAA proceedings.

11. The contested part of the Motion was only necessary due to the improper Assignments by the entities referred to in the Motion and herein as the "Bankrupt Non-Applicants" (being 19 Turff Development Inc., 22 Old Kennedy Development Inc., 35 Thelma Development Inc., and 4550 Steeles Development Inc.). The Assignments were clearly an abuse of the bankruptcy process and

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[8] *Ibid* at para 2, Tab 7.

for a wrongful collateral purpose. In granting the Order annulling the Assignments, this Court found the test in section 181 of the BIA for annulment to be satisfied, which includes a consideration of whether the bankruptcy process is being perverted to achieve an improper purpose other than that intended by the BIA.[9] The Endorsement further found that the Bankrupt Non-Applicants were not insolvent, an obvious prerequisite for an assignment in bankruptcy, and that the Assignments served "no valid purpose" and, if not annulled, would "stay the Court approved claims process at the expense of creditors and the Court and will not accomplish anything already achieved by these unique and heavily negotiated CCAA proceedings".[10]

12. There is therefore no doubt that the Assignments were an abuse of the bankruptcy process; as such, directing that the Non-Applicants oppose the Motion which sought to annul the improper Assignments must also be an abuse of the bankruptcy process, which warrants costs against Mr. Wang.

13. In directing the Non-Applicants to oppose the Motion, Mr. Wang further abused the court's process. As found in the Endorsement, Mr. Wang consented to the relevant orders under the CCAA proceedings and the Court-supervised claims process, including the appointment of the Monitor as "super" Monitor, the Undertaking and the Claims Procedure Order.[11] In spite of that, he directed the Non-Applicants to take steps to undermine those orders, effectively instituting a collateral attack on orders to which he consented.

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[9] *Wale, Re,* [1996] OJ No. 4489 at para 25, Tab 8; *Blaxland v Fuller*, [1990] BCJ No. 2555 at para 6, Tab 9. See also *Moss, Re,* [1999] MJ No. 261 at para 35 for its definition of an abuse of process in the context of subsection 181(1) of the BIA as "a term used to describe an improper use of the judicial proceedings and may arise if jurisdiction were exceeded. It arises when a legal process with some legitimacy is used for some ulterior motive, other than that for which it was intended. It is invoked to protect against harassment, or the perversion of the process to accomplish an improper result", Tab 10.

[10] Endorsement, *supra* note 7 at para 3(vi), Tab 7.

[11] *Ibid* at para 3(vi)(b), Tab 7.

14. The facts of this case are exceptional and warrant a costs award against Mr. Wang in his personal capacity.

Quantum of costs sought

15. After being advised of the Assignments, the Monitor moved quickly to determine the purpose of the Assignments. It never received a satisfactory response and was forced to take immediate steps to, among other things, file placeholder claims and attend the first meetings of creditors pending the hearing of the Motion. The Monitor prepared comprehensive materials for the Motion (materials that had to be expanded due to the Non-Applicants' last-minute opposition to standard relief sought, such as the stay extension), engaged in extensive discussions with stakeholders including those concerned over the Assignments, was forced to respond to late-filed materials by the Non-Applicants including an affidavit from Mr. Wang, and had to file a supplemental report in response to the Non-Applicants' motion materials filed on February 19, 2020.

16. In these circumstances, the partial indemnity costs of $25,000 are appropriate and reasonable.[12]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 28, 2020

BENNETT JONES LLP

BENNETT JONES LLP

[12] The Monitor's Costs Outline is included at Tab 1.

SCHEDULE A – APPLICANTS

3310 Kingston Development Inc.
1296 Kennedy Development Inc.
1326 Wilson Development Inc.
5507 River Development Inc.
4439 John Development Inc.
2358825 Ontario Ltd.
250 Danforth Development Inc.
159 Carrville Development Inc.
169 Carrville Development Inc.
189 Carrville Development Inc.
27 Anglin Development Inc.
29 Anglin Development Inc.

SCHEDULE B – STATUTORY PROVISIONS

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Section 197

Costs in Discretion of Court
(1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

How costs awarded
(2) The court in awarding costs may direct that the costs shall be taxed and paid as between party and party or as between solicitor and client, or the court may fix a sum to be paid in lieu of taxation or of taxed costs, but in the absence of any express direction costs shall follow the event and shall be taxed as between party and party.

Personal liability of trustee for costs
(3) Where an action or proceeding is brought by or against a trustee, or where a trustee is made a party to any action or proceeding on his application or on the application of any other party thereto, he is not personally liable for costs unless the court otherwise directs.

When costs payable
(4) No costs shall be paid out of the estate of the bankrupt, excepting the costs of persons whose services have been authorized by the trustee in writing and such costs as have been awarded against the trustee or the estate of the bankrupt by the court.

(5) [Repealed, 2005, c. 47, s. 110]

Priority of payment of legal costs
(6) Legal costs shall be payable according to the following priorities:

> **(a)** commissions on collections, which are a claim ranking above any other claim on any sums collected;
>
> **(b)** when duly authorized by the court or approved by the creditors or the inspectors, costs incurred by the trustee after the bankruptcy and prior to the first meeting of creditors;
>
> **(c)** the costs on an assignment or costs incurred by an applicant creditor up to the issue of a bankruptcy order;
>
> **(d)** costs awarded against the trustee or the estate of the bankrupt; and
>
> **(e)** costs for legal services otherwise rendered to the trustee or the estate of the bankrupt.

Costs of discharge opposed
(6.1) If a creditor opposes the discharge of a bankrupt, the court may, if it grants the discharge on the condition that the bankrupt pay an amount or consent to a judgment to pay an amount, award

costs, including legal costs, to the opposing creditor out of the estate in an amount that is not more than the amount realized by the estate under the conditional order, including any amount brought into the estate under the consent to the judgment.

Costs where opposition frivolous or vexatious

(7) If a creditor opposes the discharge of a bankrupt and the court finds the opposition to be frivolous or vexatious, the court may order the creditor to pay costs, including legal costs, to the estate.

SCHEDULE C – LIST OF AUTHORITIES

Cases Cited

1.	*Blaxland v Fuller*, [1990] BCJ No. 2555
2.	*In the Matter of Forme Development Group Inc,* (February 20, 2020), Toronto, CV 18-608313-00CL (Endorsement)
3.	*Moss, Re*, [1999] MJ No. 261
4.	*Re Party City Ltd*, 2002 CarswellOnt 1116
5.	*Return on Innovation Capital Ltd v Gandi Innovations Ltd*, 2011 ONSC 7465
6.	*Re 1730960 Ontario Ltd*, 2009 ONCA 720
7.	*Urbancorp Toronto Management Inc*, 2019 ONCA 757
8.	*Wale, Re*, [1996] OJ No. 4489
9.	*2403177 Ontario Inc v Bending Lake Iron Group Ltd*, 2016 ONSC 5766

TAB 1

Court File No: CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FORME DEVELOPMENT GROUP INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, C. c-36, AS AMENDED

Estate File No: 31-2436568

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE PROPOSAL OF
58 OLD KENNEDY DEVELOPMENT INC.,
76 OLD KENNEDY DEVELOPMENT INC. AND
82 OLD KENNEDY DEVELOPMENT INC.,
ALL CORPORATIONS INCORPORATED UNDER THE LAWS OF ONTARIO

COSTS OUTLINE OF THE MONITOR

The Monitor provides the following outline in support of the costs it is seeking:

Fees (as detailed below)	$	21,313.80
HST on Fees	$	2,770.79
Disbursements (as detailed in the attached appendix)	$	1,010.43
Total	**$**	**25,095.02**

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- the amount claimed and the amount recovered in the proceeding

Addressed in written costs submissions.

- the complexity of the proceeding

Addressed in written costs submissions.

- the importance of the issues

Addressed in written costs submissions.

- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

Addressed in written costs submissions.

- whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

Addressed in written costs submissions.

- a party's denial of or refusal to admit anything that should have been admitted

Addressed in written costs submissions.

- the experience of the party's lawyer:

Lawyer name: Sean Zweig	Call to the Bar - 2009
Lawyer name: Aiden Nelms	Call to the Bar - 2018
Lawyer name: Joshua Foster	Articling Student

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer:

FEE ITEM	PERSONS	HOURS	PARTIAL INDEMNITY RATE	ACTUAL RATE
To all telephone calls, emails, correspondence and meetings with internal counsel, external counsel, opposing counsel, the client and the Court; to preparing the notice of motion and motion record; to conducting all legal research relating to this motion; to serving and filing the motion material on all parties; to reviewing all responding motion materials; to drafting the factum	S. Zweig	18.3	$510.00	$850.00
	A. Nelms	23.2	$279.00	$465.00
	J. Foster	34.0	$162.00	$270.00

FEE ITEM	PERSONS	HOURS	PARTIAL INDEMNITY RATE	ACTUAL RATE
and considering all related law and finalizing same; to preparing the book of authorities; to amending the factum in light of application to challenge the stay extension; to reviewing opposing counsels factums; to preparing for and attending on the February 20, 2020 court appearance; to settling the order with counsel; and to all other matters related thereto.				

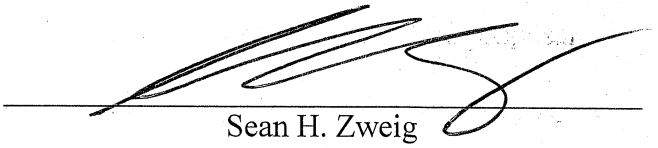
- any other matter relevant to the question of costs

Addressed in written costs submissions.

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: February 28, 2020



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Counsel to KSV Kofman Inc., solely in its capacity as Court-appointed monitor and proposal trustee and not in its personal capacity

TO: THE SERVICE LIST

APPENDIX - DISBURSEMENTS

DESCRIPTION	AMOUNT
Government filing*	$320.00
Photocopying and Printing	$611.00
Subtotal	$931.00
HST on applicable Disbursements (* is exempt)	$79.43
TOTAL	**$1,010.43**

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IN THE MATTER OF THE PROPOSAL OF 58 OLD KENNEDY DEVELOPMENT INC.
76 OLD KENNEDY DEVELOPMENT INC. AND 82 OLD KENNEDY DEVELOPMENT INC.,
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Court File No. CV-18-608313-00CL

Estate No. 31-2436538

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceedings commenced at
Toronto

COSTS OUTLINE OF THE MONITOR

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TAB 2

2016 ONSC 5766
Ontario Superior Court of Justice

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.

2016 CarswellOnt 14804, 2016 ONSC 5766, 271 A.C.W.S. (3d) 252, 40 C.B.R. (6th) 311

2403177 Ontario Inc. (Applicant) and Bending Lake Iron Group Limited (Respondent)

D.C. Shaw R.S.J.

Judgment: September 15, 2016
Docket: Thunder Bay CV-14-0274-00

Proceedings: additional reasons to *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* (2016), 34 C.B.R. (6th) 125, 2016 CarswellOnt 2673, 2016 ONSC 199, D.C. Shaw J. (Ont. S.C.J.); leave to appeal refused *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* (2016), 37 C.B.R. (6th) 173, 2016 CarswellOnt 9527, 2016 ONCA 485, E.A. Cronk J.A., K.M. Weiler J.A., M.L. Benotto J.A. (Ont. C.A.)

Counsel: Michael Strickland, for Applicant
Robert MacRae, for Respondent
Kenneth Kraft, for A. Farber & Partners Inc.
Paul Denton, for Receiver
Caitlin Fell, for Legacy Hill Resources Ltd.

Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.h Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous
Receiver brought motion for court approval of sale of debtor's assets to purchaser — Receiver's motion was granted — Debtor declined to approve draft orders or to identify any issues with them — Appointment was taken out by receiver to settle orders — Parties made submissions as to costs — Costs were payable to receiver on substantial indemnity basis, in sum of $33,468.66 — Allegations against receiver by debtor were unfounded attacks about receiver's integrity and reputation — Costs were awarded to secured creditor on partial indemnity basis in sum of $8,700 — Partial indemnity costs of purchaser were fairly set at $13,500 — Hours docketed by

solicitors for purchaser and hourly rates were reasonable — Proceeding was relatively complex and important to purchaser — Debtor's opposition to motion and its cross-motion unduly lengthened proceeding — Primary affiant of debtor was not personally liable for costs — There was no allegation that affiant was guilty of fraud in proceedings and his conduct did not constitute misuse of court and court process for improper collateral purpose — Although impugning of receiver's conduct warranted substantial indemnity costs order, it did not warrant exceptional order of non-party costs award.

Table of Authorities

Cases considered by *D.C. Shaw R.S.J.*:

Dallas/North Group Inc., Re (2001), 2001 CarswellOnt 2344, 27 C.B.R. (4th) 40, 148 O.A.C. 288 (Ont. C.A.) — followed

Party City Ltd., Re (2002), 2002 CarswellOnt 1116, 32 C.B.R. (4th) 286, 20 C.P.C. (5th) 156 (Ont. S.C.J. [Commercial List]) — considered

Television Real Estate Ltd. v. Rogers Cable T.V. Ltd. (1997), 99 O.A.C. 226, 1997 CarswellOnt 1580, 34 O.R. (3d) 291, 12 C.P.C. (4th) 381 (Ont. C.A.) — followed

1730960 Ontario Ltd., Re (2009), 2009 ONCA 720, 2009 CarswellOnt 6107, 57 C.B.R. (5th) 183 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 197(1) — considered

s. 243(1) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131(1) — considered

***D.C. Shaw R.S.J.* :**

1 On September 11, 2014, Bending Lake Iron Group ("*BLIG*") went into receivership on the application of its secured creditor, 2403177 Ontario Inc. (the "*Secured Creditor*"). A. Farber and Partners Inc. (the "*Receiver*") was appointed receiver over BLIG's property pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3. On November 27, 2014, the court approved, on consent of BLIG, a Sales and Investor Solicitation Process for BLIG's property (the "*SISP Order*").

2 In December 2015 the Receiver moved for court approval of an asset purchase agreement (the "*Sale Agreement*") with Legacy Hill Resources Ltd. ("*Legacy Hill*") for the purchase and sale of substantially all of BLIG's property consisting of an undeveloped iron ore site located northwest of Thunder Bay.

3 BLIG opposed the motion and brought its own cross-motion requesting, among other relief, postponement of the sale.

4 On January 8, 2016, I approved the Sale Agreement and ordered that the property of BLIG be vested in Legacy Hill upon the filing of a receiver's certificate (the "*Approval and Vesting Order*"). I dismissed BLIG's motion to postpone the sale and for other relief.

5 Following my decision, the Receiver prepared draft orders which were circulated to the parties. Despite several requests, counsel for BLIG declined to approve the draft orders or to identify any issues with them. An appointment was taken out by the Receiver to settle the orders. At the hearing to settle the orders, counsel for BLIG agreed to approve the draft orders as prepared by the Receiver. Costs of that hearing were reserved to be assessed together with the assessment of the costs relating to the motion to approve the Sale Agreement and the motions by BLIG to postpone the sale.

6 The Receiver, the Secured Creditor and Legacy Hill now seek their costs of the motions and the hearing to settle the orders. The costs of the motions are over and above the costs that would otherwise have been incurred in an uncontested Sale and Approval motion.

7 The Receiver and the Secured Party request their costs on a substantial indemnity basis. The Receiver seeks $33,468.66, all inclusive. The Secured Party seeks $13,499.00, all inclusive. In the alternative, the Receiver requests partial indemnity costs of $22,681.88, all inclusive, and the Secured Party requests partial indemnity costs of $8,700.00, all inclusive.

8 Legacy Hill does not seek substantial indemnity costs, but it requests partial indemnity costs of $25,771.59, all inclusive.

9 At the costs hearing, Mr. Robert MacRae, counsel for BLIG and Mr. Wetelainen, advised that he did not oppose the quantum of either the substantial indemnity or partial indemnity costs requested by the Receiver and by the Secured Creditor, but he opposed the principal of awarding costs on a substantial indemnity basis. He objected to the quantum of partial indemnity costs requested by Legacy Hill, on the basis that they were excessive, and submitted that they be awarded at a sum equal to the partial indemnity costs of the Secured Creditor.

10 Mr. MacRae requested time to file written material on behalf of Mr. Wetelainen, to oppose the request that Mr. Wetelainen pay the costs personally. Because Mr. Wetelainen may not have had effective notice of the claim made against him personally for costs, I gave Mr. MacRae time to file written material on that issue and gave the other parties time to respond to those materials if they wished. Written submissions were subsequently received on behalf of Mr. Wetalainen. The other parties elected to rely on the material that they had filed on the costs hearing and not to file further material responding to Mr. Wetelainen's submissions.

11 There are, therefore, two main issues:

(1) What scale of costs should be awarded?

(2) Should BLIG and Mr. Wetelainen be jointly and severally responsible for the costs?

12 A third issue is the amount of partial indemnity costs to which Legal Hill is entitled.

Submissions of the Parties Seeking Costs

1. Scale of Costs

13 First, the Receiver and the Secured Creditor submit that BLIG brought numerous motions in an attempt to delay, undermine and ultimately frustrate the Sale Agreement. They submit that those motions were unfounded and unnecessarily ran up the cost of litigation.

14 Second, it is submitted that the allegations in the motions brought by BLIG, in affidavits sworn by Mr. Wetelainen, impugned the conduct of the Receiver by claiming the Receiver had acted in an unfair, prejudicial manner, deceiving Mr. Wetelainen and acting solely as agent for Legacy Hill. These allegations were unfounded and rejected by the court.

15 BLIG responds that there was a genuine issue to be determined on its motions. Although the court found that BLIG's position was wrong, it is submitted there was no finding that BLIG was "on the side of wrong" or that its actions were abusive. BLIG submits that there was no finding that any of BLIG's principals acted to deprive BLIG of any assets. There was also no finding that BLIG's motions were vexatious or frivolous.

2. Liability of Mr. Wetelainen for costs

16 The Receiver, the Secured Party and Legacy Hill submit that Mr. Wetelainen, the primary affiant for BLIG, made various unproven, scandalous allegations impugning the Receiver's reputation and conduct in the sale process. It is submitted that Mr. Wetelainen caused BLIG to oppose the Sale Approval Motion primarily to allow himself and other BLIG shareholders the opportunity to refinance the property instead of allowing the sale to Legacy Hill to go through. In this regard, it is alleged that BLIG was merely acting as the "nominee and surrogate" for Mr. Wetelainen. It is noted that BLIG will be unable to pay a costs award and that if costs are not awarded against Mr. Wetelainen, the Secured Creditor will ultimately bear the costs of the Receiver's counsel and its own counsel.

17 The parties requesting costs against Mr. Wetelainen refer to s. 131(1) of the *Courts of Justice Act* and submit that it gives the court jurisdiction to hold a non-party liable for costs where it is found to be the "real litigant" behind the action:

> 131(1) Subject to the provisions of an Act or rules of the court, the costs of and incidental to a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

18 The parties seeking costs submit that a court should generally apply a three-fold test, citing *Television Real Estate Ltd. v. Rogers Cable T.V. Ltd.* (1997), 34 O.R. (3d) 291 (Ont. C.A.), at para. 16:

> (a) the non-party must have status to bring the action;
>
> (b) the plaintiff must not have been the true plaintiff; and
>
> (c) the plaintiff must have been "a man of straw" put forward to protect the true plaintiff from liability for costs.

19 The parties seeking costs also refer to the wider discretion that the court has to award costs under s. 197(1) of the *Bankruptcy and Insolvency Act*:

> 197(1) Subject to the Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

20 As such, it is submitted that it is not strictly necessary for the court to apply the three part test set out in *Television Real Estate* to exercise its discretion to award costs against a non-party, although such awards should still be reserved for "exceptional cases". It is submitted that this is an "exceptional case" because Mr. Wetelainen acted in contravention of the SSIP Order by trying to run a parallel sales process unbeknownst to the Receiver and because he made unfounded allegations impugning the Receiver's conduct.

21 Mr. Wetelainen submits that there is no evidence that BLIG was not the true respondent in the action. Mr. Wetelainen submits that at all times BLIG's management acted on behalf of all shareholders, stakeholders, creditors and affected aboriginal communities. Mr. Wetelainen accepts that he would have benefitted personally from a successful restructuring of BLIG. However, he points out that there were approximately another 185 shareholders of the company. Mr. Wetelainen submits that his actions as a member of BLIG's management were not those of a nominee or surrogate for any party expect BLIG proper.

Discussion

22 I have determined that costs should be payable to the Receiver on a substantial indemnity basis.

23 I agree with the submission that the allegations against the Receiver by BLIG essentially amounted to a claim that the Receiver acted partially towards Legacy Hill. The Receiver is an officer of the court. The allegations were unfounded attacks about the Receiver's integrity and reputation.

24 With respect to the Secured Creditor, costs will be awarded on a partial indemnity scale. The Secured Creditor was not subject to an attack on its integrity and reputation by BLIG.

25 Costs are therefore assessed against BLIG in favour of the Receiver in the sum of $33,468.66, on a substantial indemnity basis. Costs are assessed against BLIG in favour of the Secured Party in the sum of $8,700.00 on a partial indemnity basis.

26 As noted above, although BLIG does not contest the quantum of substantial indemnity costs claimed by the Receiver and the quantum of partial indemnity costs claimed by the Secured Creditor, it does contest the quantum of partial indemnity costs claimed by Legacy Hill, namely, $25,771.52 and submits that Legacy Hill should receive no more than the partial indemnity costs sought by the Secured Creditor.

27 Legacy Hill submits a Bill of Costs. The hours docketed by the solicitors for Legacy Hill and the partial indemnity hourly rates are, generally, reasonable.

28 The proceeding was relatively complex. The proceeding was important to Legacy Hill, both to secure the purchase and to protect its reputation which BLIG attacked. BLIG's opposition to the motion and its cross-motion unduly lengthened the proceeding. BLIG should have reasonably expected that in the event it was unsuccessful, there would be a significant cost award in favour of Legacy Hill. In my view, the sum of $8,700 which the Secured Creditor has accepted for partial indemnity costs would not be an appropriate yardstick for determination of Legacy Hill's partial indemnity costs. I find the sum of $8,700 to be modest in the circumstances of this case. However, I also have the partial indemnity costs of the Receiver, namely $22,681.88, as a comparative amount. Counsel for the Receiver carried the bulk of the argument for the parties opposed to BLIG. Having regard to the relative roles played by the Receiver and Legacy Hill on the motions, the partial indemnity costs of Legacy Hill, in my view, are fairly set at $13,500.00, all inclusive, which is approximately 60% of the Receiver's partial indemnity costs.

29 The issue remains as to whether Mr. Wetelainen should be jointly and severally liable for the costs awards.

30 In my view, the governing legislation for costs is s. 197(1) of the *Bankruptcy and Insolvency Act*. As noted by the Court of Appeal in *Dallas/North Group Inc., Re*, [2001] O.J. No. 2743 (Ont. C.A.), at para. 11, because there are no limiting words, the court is given the widest discretion.

Because it is a federal statue, a court must interpret it within its own parameters and avoid using provincial rules of practice.

31 In *1730960 Ontario Ltd., Re*, 2009 ONCA 720 (Ont. C.A.), Juriansz J.A. held that the standard for awarding costs against a non-party in proceedings under the *Bankruptcy and Insolvency Act* is set out in *Dallas/North Group Inc., Re.*

32 In *Dallas/North Group Inc., Re*, the key to awarding costs against the non-party was the finding that the bankruptcy proceeding had been brought for a wrongful collateral purpose and was an abuse of the bankruptcy process. The true purpose of the proceeding was not to obtain the distribution of assets but to remove an officer and director of a third-party company and reduce shareholdings.

33 In *1730960 Ontario Ltd., Re*, Juriansz J.A. found that the case before him was quite different. He described the circumstances surrounding the non-party's involvement in the case before him. In many respects those circumstances are similar to the circumstances surrounding Mr. Wetelainen's involvement in the case before me. It was alleged that the non-party, Rompson Investment Corporation, was at all times the real moving party, that Rompson's principal, who was the affiant for all the affidavits of the moving party, 2205305 Ontario Inc., referred to Rompson and 220 interchangeably in the affidavits, that Rompson and not 2205305 had the largest economic stake in the outcome and that any cost order made against 2205305 on the motion would be an "empty order" because 220 had no assets.

34 At para. 8, Juriansz J.A. referred to the abuse of the bankruptcy process in *Dallas/North Group Inc., Re*, and stated:

> [8] The case before me is quite different. Accepting that 220 was incorporated for the specific purpose of purchasing the property of the bankrupt, its bringing of the motion is consistent with attempting to achieve its corporate purpose. The contention that 220 was acting as a nominee or surrogate of the sole shareholder, Romspen, is simply an attempt to lift the corporate veil. Cost awards against non-parties always involve the exceptional exercise of judicial discretion. Absent fraud, abuse of the court's process in general and the bankruptcy process in particular to serve a collateral purpose or similar wrongdoing, there is no basis for looking behind a moving party's corporate legal personality to award costs against its parent.

35 Apply the criteria set out by Juriansz J.A., I have concluded that I am unable to find Mr. Wetelainen personally liable for costs. I am well aware that the costs award against BLIG will not be effectively enforceable.

36 There is no allegation that Mr. Wetelainen was guilty of fraud in these proceedings. Further, although I have previously found that Mr. Wetelainen was in breach of the Sales and Investor Solicitation Process order, by personally engaging in negotiations with Legacy Hill without the

consent or knowledge of the Receiver, I do not find that this breach, and the subsequent opposition by BLIG to the Receiver's motion for approval of the Sale Agreement and BLIG's motion to postpone the sale, constituted a misuse of the court and the court process for an improper collateral purpose.

37 On the authority of *1730960 Ontario Ltd., Re*, without proof of fraud or abuse of the court's process or the bankruptcy process for a wrongful collateral purpose, the court should not go behind the moving party's corporate veil to award costs against its principal shareholder who is directing the litigation and who stands to personally benefit from its outcome.

38 I have considered the decision of Cumming J. in *Party City Ltd., Re* (2002), 32 C.B.R. (4th) 286 (Ont. S.C.J. [Commercial List]). As discussed by Juriansz J.A. in *1730960 Ontario Ltd., Re*, the decision of Cumming J. to award costs against a non-party was based on a finding that the non-party had made a meritless allegation of actual fraud on the part of the receiver. Although Mr. Wetelainen alleged that the Receiver had shown a lack of impartiality in its conduct with Legacy Hill, that allegation did not, in my view, rise to the level of an allegation of actual fraud. Although the impugning of the Receiver's conduct warranted a substantial indemnity costs order, it does not warrant the exceptional order of a non-party costs award.

Conclusion

39 For the reasons given, BLIG is ordered to pay the following costs, all inclusive:

(a) To the Receiver, on a substantial indemnity basis - $33,468.66;

(b) To the Secured Creditor, on a partial indemnity basis - $8,800.00; and

(c) To Legacy Hill, on a partial indemnity basis - $13,500.00.

Order accordingly.

TAB 3

2019 ONCA 757
Ontario Court of Appeal

Urbancorp Toronto Management Inc. (Re)

2019 CarswellOnt 15220, 2019 ONCA 757, 313 A.C.W.S. (3d) 240, 74 C.B.R. (6th) 23

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a plan of compromise or arrangement of Urbancorp Toronto Management Inc., Urbancorp (St. Clair Village) Inc., Urbancorp (Patricia) Inc., Urbancorp (Mallow) Inc., Urbancorp (Lawrence) Inc., Urbancorp Downsview Park Development Inc., Urbancorp (952 Queen West) Inc., King Residential Inc., Urbancorp 60 St. Clair Inc., High Res. Inc., Bridge on King Inc. (Collectively the "Applicants") and the affiliated entities listed in Schedule "A" hereto

K. van Rensburg, C.W. Hourigan, Grant Huscroft JJ.A.

Heard: March 28, 2019
Judgment: September 27, 2019
Docket: CA C65891

Proceedings: affirming *Urbancorp Toronto Management Inc. (Re)* (2018), 60 C.B.R. (6th) 241, 2018 CarswellOnt 7672, 2018 ONSC 2965, F.L. Myers J. (Ont. S.C.J. [Commercial List])

Counsel: Matthew Milne-Smith, Chantelle Cseh, for Appellant, KSV Kofman Inc., in its capacity as Monitor
Kevin D. Sherkin, Jeremy Sacks, for Respondent, Speedy Electrical Contractors Ltd.
Neil Rabinovitch, for Israeli court-appointed Functionary and Foreign Representative of Urbancorp Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.7 Fraudulent and illegal transactions
XI.7.a Reviewable transactions under Act
Headnote
Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent and illegal transactions — Reviewable transactions under Act
Debtor was nominee holding title to condominium corporation being developed by group of corporations owned by S — Creditor made loan to S personally and registered lien for

monies owing by another corporation in group — S wanted to clean up title and re-finance, so debtor provided guarantee and granted mortgages in favour of creditor — Companies' Creditors Arrangement Act proceedings were now underway — Monitor was not successful in bringing motion to disallow creditor's claim for $2,323,638.54 against debtor pursuant to guarantee on basis it was transaction under value and fraudulent conveyance, or oppressive — Monitor appealed — Appeal dismissed — Motion judge considered Monitor's request that court should award no costs — He noted that, while in some ways facts of case resembled those in caselaw, there were important differences that he had already noted in reasons — Motion judge rejected Monitor's argument that there should be no costs unless it was found to have been unreasonable, and he applied normative approach that costs follow event.

Table of Authorities

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Perry, Farley & Onyschuk v. Outerbridge Management Ltd. (2001), 2001 CarswellOnt 1564, 199 D.L.R. (4th) 279, 146 O.A.C. 144, 54 O.R. (3d) 131, 26 C.B.R. (4th) 64, 7 C.P.C. (5th) 300, 2 P.P.S.A.C. (3d) 242 (Ont. C.A.) — referred to

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Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. (2011), 2011 ONSC 7465, 2011 CarswellOnt 14401, 88 C.B.R. (5th) 320 (Ont. S.C.J. [Commercial List]) — considered

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XDG Ltd. v. 1099606 Ontario Ltd. (2002), 2002 CarswellOnt 4535, 23 C.L.R. (3d) 67, 41 C.B.R. (4th) 294 (Ont. S.C.J.) — considered

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "transfer at undervalue" — referred to

s. 4(2) "related persons" — referred to

s. 4(4) — referred to

s. 4(5) — referred to

s. 95 — considered

s. 96 — considered

s. 96(1)(a) — considered

s. 96(1)(b) — considered

s. 96(1)(b)(i) — considered

s. 96(1)(b)(ii) — referred to

s. 96(1)-96(3) — referred to

s. 96(3) "person who is privy" — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36.1 [en. 2007, c. 36, s. 78] — considered
Construction Act, R.S.O. 1990, c. C.30
s. 31(3) — considered
Fraudulent Conveyances Act, R.S.O. 1990, c. F.29
Generally — referred to

s. 2 — considered

ss. 2-4 — referred to

***K. van Rensburg J.A.*:**

OVERVIEW

1 King Residential Inc. ("KRI") is part of the Urbancorp group of companies, which are presently involved in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). Speedy Electrical Contractors Ltd. ("Speedy") filed a claim against KRI pursuant to a secured guarantee given by KRI to Speedy for debts owed by Edge on Triangle Park Inc. ("Edge") and Alan Saskin. KRI's monitor, KSV Kofman Inc. (the "Monitor") argued that Speedy's claim (which was in the amount of $2,323,638.54) should be disallowed, among other things, because the secured guarantee was a transfer at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and a fraudulent conveyance under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "FCA"). The motion judge disagreed and dismissed the Monitor's motion for an order disallowing Speedy's claim. The Monitor appeals, with leave.

2 The Monitor challenges the motion judge's finding, in relation to s. 96(1)(b) of the BIA, that the secured guarantee was between arm's length parties. The Monitor says that the motion judge erred in law in focussing on the relationship between KRI and Speedy, rather than the relationships among KRI, Edge and Mr. Saskin. The Monitor also contends that there was reversible error in the motion judge's conclusion that the fraudulent intent necessary under s. 96(1)(a) of the BIA and s. 2 of the FCA was not proved.

3 For the following reasons I would dismiss the appeal.

4 Briefly, as I will explain, the motion judge properly considered the relationship between KRI and Speedy, rather than the relationship between KRI, Edge and Mr. Saskin, in determining whether the impugned transfer was to a non-arm's length party. Although Edge and Mr. Saskin were parties to, and beneficiaries of, the *transaction* that provided for the secured guarantee, the *transfer* sought to be impugned by the Monitor was KRI's secured guarantee in favour of Speedy.

The issue, under a proper construction of s. 96(1)(b) of the BIA, is whether the transferee, Speedy, was dealing at arm's length with KRI, the transferor, in relation to the impugned transfer, which is the secured guarantee.

5 The other main arguments on appeal challenge the motion judge's finding that the transfer was for the purpose of facilitating a financing for the Urbancorp group and not with the intention to defraud, defeat or delay KRI's creditors. This is a finding of fact, supported by the evidence, that is entitled to deference and reveals no reversible error. This finding is determinative of the appellant's claim for relief, whether under s. 96 of the BIA or s. 2 of the FCA.

6 Finally, the motion judge's costs award against the Monitor, on behalf of the debtor, and not in its personal capacity, was a proper exercise of his discretion, and reveals no reversible error.

FACTS

7 The Urbancorp group consists of a number of corporations and business entities all ultimately owned by Alan Saskin, and principally involved in the development of residential real estate projects in the Greater Toronto Area.

8 Speedy operates an electrical contracting business and performed electrical services for members of the Urbancorp group.

9 In September 2014, Speedy made a personal loan to Mr. Saskin for $1 million, with interest at the rate of 12.5%, evidenced by a promissory note due in one year dated September 23, 2014 (the "Promissory Note"). In addition, Speedy completed electrical work for Edge (an Urbancorp entity) on Lisgar Street in Toronto, ultimately registering a construction lien against the project for $1,038,911.44 on September 30, 2015.

10 On November 14, 2015, KRI, Speedy, Mr. Saskin and Edge executed a debt extension agreement (the "DEA") under which:

- Speedy agreed to extend the due date of the Promissory Note to January 30, 2016;
- Edge confirmed its debt to Speedy and Speedy agreed to discharge its lien against the Edge project;
- In consideration of the extension of the Promissory Note, the discharge of the lien, and payment by Speedy to KRI of $2.00, KRI agreed to guarantee the two outstanding debts, secured by a collateral mortgage in Speedy's favour over 13 KRI condominium units and 13 parking spaces; and
- KRI agreed to provide evidence showing that there were no common element arrears of the subject condominium units or to pay such arrears on closing, confirmed the taxes on the units

were up to date, and agreed that it would obtain a discharge or postponement of a Travelers Guarantee Company of Canada mortgage registered on the subject units.

11 Pursuant to the DEA, on November 16, 2015, Speedy discharged its lien against the Edge property, and the collateral mortgage in favour of Speedy was registered on title to the KRI properties.

12 At the time of the DEA, the beneficial owners of the Urbancorp group's various development projects were three limited partnerships: TCC/Urbancorp (Bay) LP ("Bay LP"), Urbancorp (Bay/Stadium) LP ("Bay/Stadium LP"), and Urbancorp (Stadium Road) LP ("Stadium Road"). Typically, the Urbancorp group set up various single-purpose, project-specific corporations that acted as bare trustees or nominees for their beneficial owners. KRI was a wholly-owned subsidiary and nominee of Bay LP, while Edge was a wholly-owned subsidiary and nominee of Bay/Stadium LP. The Monitor emphasizes that each limited partnership had distinct ownership and different creditor groups.

13 Part of the impetus behind the DEA was to facilitate a financing of the Urbancorp group through a public bond issuance in Israel. In order to support the underwriting and to complete the financing, Mr. Saskin wanted to offer the unencumbered value of the Edge project property. And Speedy had threatened to bring legal proceedings against Mr. Saskin and was pressing forward with its lien.

14 The parties entered into the DEA shortly before the Urbancorp group initiated a corporate reorganization, which was completed on or around December 15, 2015. The reorganization was also required to facilitate the bond issuance.

15 According to the Monitor, as part of the reorganization, Urbancorp Inc. ("UCI") was incorporated in June 2015 and several wholly-owned subsidiaries were formed. KRI, previously owned by Bay LP, became part of a wholly-owned subsidiary called Urbancorp Cumberland 1 LP. Edge, previously owned by Bay/Stadium LP, became part of a wholly-owned subsidiary called Urbancorp Cumberland 2 LP.

16 In December 2015, the Israeli bond issuance closed. UCI raised approximately $65 million, most of which it used to repay certain secured debt owed by various Urbancorp group members and for general working capital purposes. Speedy was not repaid.

17 Approximately five months after the Israeli bond funding, the Urbancorp empire collapsed and substantially all the Urbancorp group entities commenced insolvency proceedings. On May 18, 2016, KRI and the other Urbancorp entities involved in these proceedings were granted protection under the CCAA. There are other insolvency proceedings involving other Urbancorp entities, including Edge.

18 On September 15, 2016, Newbould J. made an order establishing a procedure to identify and quantify claims against the CCAA-protected entities and their current and former directors and officers. Speedy filed a proof of claim, dated October 19, 2016, against KRI in the amount of $2,323,638.54 pursuant to its secured guarantee. On November 11, 2016, the Monitor disallowed the claim on the basis that the granting of the guarantee could be voidable as a transfer at undervalue or as a fraudulent conveyance or preference. On November 25, 2016, Speedy filed a notice disputing the disallowance.

19 After some delay, the Monitor brought a motion on March 7, 2018, for an order declaring that Speedy's claim be disallowed in full. Guy Gissin, in his capacity as the court-appointed functionary of UCI in proceedings in Israel (the "Israeli Functionary") participated in the court below, and was represented in court in this appeal. [1] The Israeli Functionary was appointed in 2016 pursuant to an application under Israel's insolvency regime. The Israeli Functionary supported the Monitor on its motions to disallow Speedy's claim. The Israeli Functionary also sued Mr. Saskin and others in Israel, alleging, among other things, fraud and securities law violations in connection with the bond underwriting.

20 On May 11, 2018, the motion judge dismissed the Monitor's motion for an order disallowing Speedy's claim.

21 By the time of the hearing of the appeal, there was evidence that, shortly after executing the DEA, Speedy had waived KRI's mortgage in relation to Mr. Saskin's personal debt, a fact that was not brought to the attention of anyone when the motion was heard, including the Monitor and the motion judge. After this information came to light, the motion judge varied his original order to exclude the loan from Speedy's claim. At issue, therefore, is only the claim against KRI under the secured guarantee of Edge's debt to Speedy. This does not affect the arguments made on appeal, except, according to the Monitor, in respect of the quantum of costs awarded by the motion judge.

RELEVANT STATUTORY PROVISIONS

22 Of relevance to this appeal, the Monitor challenged the secured guarantee under s. 96 of the BIA, and alternatively under s. 2 of the FCA.

23 Section 96 of the BIA provides for the challenge of pre-bankruptcy transfers at undervalue made by a debtor. Section 96 is applicable in CCAA proceedings pursuant to s. 36.1 of the CCAA. Subsections 96(1) to (3) of the BIA provide as follows:

> (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons,

pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

(3) In this section, a *person who is privy* means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

24 A "transfer at undervalue" is defined as a "disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor": BIA, s. 2. "Related persons" is defined, and includes entities that are controlled by the same person: BIA, s. 4(2). It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length: BIA, s. 4(4). Persons who are related to each other

are deemed, in the absence of evidence to the contrary, not to deal with each other at arm's length: BIA, s. 4(5).

25 The FCA is provincial legislation that is also available in insolvency proceedings for the declaration of fraudulent transfers as void. Sections 2 to 4 provide as follows:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.
>
> 3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.
>
> 4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.

DECISION OF THE MOTION JUDGE

26 The motion judge considered the Monitor's motion for an order disallowing Speedy's claim as filed against KRI on three bases: as a transfer at undervalue under s. 96 of the BIA, as a fraudulent conveyance contrary to s. 2 of the FCA, and as oppression under the *Business Corporations Act*, R.S.O. 1990, c. B.16. Only the first two grounds are relevant to this appeal.

27 The motion judge noted that the motion resolved to two findings. The first was that Speedy and KRI were operating at arm's length when KRI gave its guarantee. As such, it would be necessary under s. 96 of the BIA for the Monitor to prove, among other things, that the guarantee was given by KRI to Speedy with the intent to defraud, defeat or delay a creditor.

28 On the arm's length question, the motion judge rejected the Monitor's argument that Speedy had leverage to subvert normal economic incentives because of Speedy's long-term relationship with Mr. Saskin and the personal loan it made to him. The motion judge explained that there was no evidence that Speedy and KRI were acting in concert, and that contemporaneous written communications indicated they were adverse in interest. He rejected the Monitor's argument that Mr. Saskin had acted in bad faith by offering the guarantee to remove what the Monitor argued was an untimely and therefore invalid lien. Speedy's witness had testified the lien was timely and, contrary to the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.), he was not confronted with

the document said to suggest the lien was registered late. As a result of all of these circumstances, the motion judge found that Speedy and KRI were operating at arm's length.

29 The second finding of the motion judge was that the Monitor had failed to prove that the guarantee was given by KRI with the intent to defraud, defeat or delay its creditors. He recognized that such intent could be inferred from "badges of fraud", including where "the consideration is grossly inadequate". Here he noted that the adequacy of consideration was disputed. He then stated that the only apparent badge of fraud was that the transaction "was made in [the] face of threatened legal proceedings". The fact that Speedy registered its mortgage on title — as one would expect any *bona fide* commercial creditor to do — further undermined the suggestion of fraudulent intent. The motion judge concluded at para. 24: "[t]here is nothing about the facts of this transaction that leads me to infer that it was made with a fraudulent intent rather than to obtain Speedy's cooperation to allow Urbancorp to refinance as intended at the time."

30 The motion judge contrasted the case of *XDG Ltd. v. 1099606 Ontario Ltd.* (2002), 41 C.B.R. (4th) 294 (Ont. S.C.J.), aff'd (2004), 1 C.B.R. (5th) 159 (Ont. Div. Ct.), which similarly involved a challenge to a guarantee by an insolvent affiliate for debts that did not relate to the specific business of the guarantor. In that case, the parties entered into the impugned transaction in great haste and the lender knew or ought to have known that the debtor was insolvent. The motion judge noted that here, by contrast, the solvency of the debtor depended on whether one looked at the debtor on its own or as part of the broader business of Bay LP, and that in any event, the Monitor accepted that the business was solvent on a balance sheet basis at the relevant time. He noted that he was "simply pointing out that the situation in *XDG* was quite different from this case in which the debtor was undertaking obligations to support the refinancing of the overall business within a few weeks' time and the refinancing occurred": at para. 25.

31 Having found that the necessary intention was not proved, the motion judge held that the remedies under s. 96 of the BIA and s. 2 of the FCA could not apply.

32 As for the oppression claim, the motion judge concluded that, assuming that such a claim could be raised in response to a debt in a CCAA claim process without an oppression claim being separately heard and an appropriate remedy granted, there was no basis on the evidence for an oppression remedy to lie.

33 Finally, the motion judge noted that he had decided the motion based solely on the arm's length relationship and lack of fraudulent intent, and that it was not necessary to deal with a number of other issues raised by the parties orally and in their factums: at para. 30.

34 In dismissing the motion, the motion judge ordered costs of $25,000 to be paid to Speedy by the Monitor on behalf of the debtor, and not in its personal capacity.

ISSUES

35 I would frame the issues on appeal as follows:

1. Did the motion judge err in focussing on the relationship between Speedy and KRI rather than between Edge and Mr. Saskin (as beneficiaries of the secured guarantee) and KRI?

2. Did the motion judge err by failing to consider the record as a whole, including all of the potential badges of fraud, when he refused to find fraudulent intent?

3. Did the motion judge err in misapplying the rule in *Browne v. Dunn*?

4. Did the motion judge err in his award of costs of the motion against the Monitor?

ANALYSIS

(1) Did the motion judge err in focussing on the relationship between Speedy and KRI rather than between Edge and Mr. Saskin (as beneficiaries of the guarantee) and KRI?

36 As noted, the motion judge concluded that KRI and Speedy were acting at arm's length when the secured guarantee was given. As such, s. 96(1)(b) did not apply and the secured guarantee, provided that it was made within one year of the CCAA proceedings, could only be impugned as a transfer at undervalue under s. 96(1)(a) if: (i) KRI was insolvent at the time of the transfer or was rendered insolvent by it, and (ii) KRI intended to defraud, defeat or delay a creditor.

37 The motion judge's conclusion that Speedy and KRI were acting at arm's length in respect of the transaction is a finding of fact under s. 4(4) of the BIA, which is subject to a palpable and overriding error standard of review: *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, 58 B.L.R. (5th) 243 (Ont. C.A.), at para. 66, leave to appeal refused, [2016] S.C.C.A. No. 361 (S.C.C.); *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 86 Alta. L.R. (5th) 203 (Alta. C.A.), at para. 17. The Monitor does not challenge this finding. Rather, its main argument on appeal is that, in determining whether the parties were acting at arm's length, the motion judge considered only the relationship between Speedy and KRI, instead of the relationship between KRI and the other parties to the DEA, namely Edge and Mr. Saskin. The Monitor says that, because KRI, Edge and Mr. Saskin were related parties, and clearly non-arm's length, the entire DEA was void as against the Monitor, including the secured guarantee that was provided to Speedy as a term of the DEA. According to the Monitor, the motion judge failed to make any finding on this central issue. It is unclear whether any such argument was advanced before the motion judge.

38 The Monitor submits that, in contrast with s. 95 of the BIA, which deals with fraudulent preferences and requires a "transfer" from an insolvent debtor to a "creditor", s. 96 does not explicitly use the word "creditor" and is therefore intended to encompass a broader set of relationships and harm. Edge and Mr. Saskin, in addition to Speedy, benefited from the DEA, and since Edge and KRI are both controlled by Mr. Saskin, these parties are related and presumed not

to be operating at arm's length pursuant to the BIA. As such, the "transfer" was between non-arm's length parties, and can be voided without any determination of the debtor's fraudulent intent or insolvency under s. 96(1)(b)(i) since it occurred less than one year before the date of the initial bankruptcy event. The Monitor argues that this interpretation is consistent with the objective of s. 96 which is to provide a remedy for asset-stripping by insolvent debtors.

39 Speedy asserts that the plain wording of s. 96(1)(b) does not support the Monitor's interpretation. For the purpose of this section, in determining whether a non-arm's length relationship existed, such that it is unnecessary to establish fraudulent intent for a transfer within one year of the initial bankruptcy event,[2] the court must consider the parties to the transfer, and not whether other parties to the overall transaction may have benefited.

40 I agree with Speedy. While s. 96 no doubt is a tool to address "asset stripping" by a debtor, as the Monitor contends, a bankruptcy trustee or CCAA monitor that seeks to impugn a transfer under that provision must nevertheless meet the requirements of the section to establish that the transfer in question is void. The point of departure is to consider the specific words used in this section of the BIA.

41 Section 96 provides for a court order to declare void as against the trustee (in this case the Monitor) a "transfer at undervalue" or to require the "party to the transfer" or "any other person who is privy to the transfer" to pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor.

42 "Transfer at undervalue" is defined in s. 2 of the BIA to mean:

> A disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor. [Emphasis added.]

43 A "transfer" is defined in Black's Law Dictionary, 11th ed. (Saint Paul: Thomson Reuters, 2019) as "any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance". A "transaction", by contrast, is defined as "something performed or carried out, a business agreement or exchange". While the DEA was a *transaction* between KRI, Speedy, Edge and Mr. Saskin, the transaction contemplated a *transfer*, which was the secured guarantee given by KRI to Speedy. The only parties to the transfer, as opposed to the transaction, were KRI and Speedy.

44 The DEA is not the "transfer" — the transfer sought to be impugned by the Monitor is the secured guarantee provided to Speedy. The overall agreement pursuant to which the guarantee and security were provided to Speedy does not make the entirety of the DEA the "transfer" for the purpose of s. 96.

45 I also disagree with the Monitor's argument that, because s. 96 uses the term "party" rather than "creditor", the court is not limited to considering the relationship between KRI and Speedy, but should also consider the relationship between KRI and other "parties" to the DEA (Edge and Mr. Saskin). The reason that s. 96 uses the term "party" rather than "creditor" is that it applies to a broader range of dealings than s. 95, including gratuitous transfers to persons who are not creditors of the debtor.

46 The distinction between a person who is a "party to the transfer" and a "person who is privy to the transfer" underscores that the focus in determining whether the dealing was non-arm's length is on the relationship between the parties to the particular transfer. If the transfer is between non-arm's length parties, then a person who is privy to the transfer (defined under s. 96(3) as "a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person") may be ordered, together with the transferee, to pay the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor. In this case, if the secured guarantee were impeachable (whether because KRI and Speedy as the parties to it were non-arm's length, or because fraudulent intent and insolvency were established), then Edge, as KRI's privy, and beneficiary of the transfer, could be subject to an order for a remedy in favour of KRI. Edge is a privy to KRI, but not a party to the transfer.

47 In argument, the Monitor asserted that the "transfer" here is in fact the transfer by Edge to KRI of Edge's indebtedness to Speedy. If this is the transfer sought to be impugned, then the remedy is properly sought against Edge itself. The non-arm's length relationship between Edge and KRI, as entities under common control, would be relevant if the relief sought by the Monitor were against Edge. To the extent that Edge received value from KRI for no consideration, Edge, as a non-arm's length party, would be liable to account for such value to KRI. The problem, of course, is that Edge is insolvent and also under CCAA protection. However, it would be an unwarranted interpretation of s. 96(1)(b) to void the guarantee KRI provided to Speedy on the basis that KRI and Edge (the beneficiary of the transaction) are related. Indeed, the Monitor has cited no case or commentary to support this interpretation of s. 96(1)(b), which ignores its plain meaning.

48 In conclusion, s. 96 is a remedy to reverse an improvident transfer that strips value from the debtor's estate, where its conditions are met. The interpretation of the section must be considered in relation to the remedy that is sought. The remedy in this case is to prevent Speedy from enforcing its secured guarantee against KRI. While the reason KRI provided the guarantee was to accommodate its related party Edge, this does not transform the transfer sought to be impugned — the secured guarantee — into a transfer between non-arm's length parties. The focus of the motion judge was properly on the relationship between KRI and Speedy, not between KRI and the beneficiary of the transaction, its related party Edge. As such, I would dismiss this ground of appeal.

(2) Did the motion judge err by failing to consider the record as a whole, including all of the potential badges of fraud, when he refused to find fraudulent intent?

49 The motion judge concluded that the Monitor had failed to prove that KRI held a fraudulent intention when it granted the secured guarantee. He began his analysis by stating that it was the intent of the transferor (i.e., KRI), and not that of the transferee (i.e., Speedy) that was relevant. Noting the difficulty for an applicant to prove a debtor's subjective intention to defeat creditors, the motion judge referred to "badges of fraud" from which the court can infer the existence of the necessary intention. Relying on *Indcondo Building Corp. v. Sloan*, 2014 ONSC 4018, 121 O.R. (3d) 160 (Ont. S.C.J.), aff'd 2015 ONCA 752, 31 C.B.R. (6th) 110 (Ont. C.A.), he explained that, "[i]f the court draws the inference of fraudulent intent due to the existence of badges of fraud, then an evidentiary burden will fall to the respondent to explain its conduct to try to rebut the inference of fraudulent intent. The ultimate persuasive burden remains on the applicant throughout": at para. 22.

50 The Monitor does not take issue with the motion judge's statement of the law; rather it argues that the motion judge erred by failing to consider the record as a whole, including all of the potential badges of fraud, when he concluded that there was no fraudulent intent.

51 I would not give effect to this ground of appeal.

52 "Badges of fraud" can provide an evidentiary shortcut that may help to establish the subjective intention of a transferor both under s. 96 of the BIA and s. 2 of the FCA: see e.g., *Goldfinger*, at para. 72*; Purcaru v. Seliverstova*, 2016 ONCA 610, 39 C.B.R. (6th) 15 (Ont. C.A.), at para. 5. In *Fancy, Re* (1984), 46 O.R. (2d) 153 (Ont. Bktcy.), Anderson J. explained the role of "badges of fraud" in the determination of fraudulent intent under s. 2 of the FCA. He stated at p. 159:

> Whether the [fraudulent] intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.

53 The burden of proving fraudulent intent is on the party seeking to avoid the transfer. While badges of fraud are indicia of fraudulent intent, their presence does not mandate an inference of fraud to be drawn. The alleged badges of fraud must be considered in the context of the

entire record. "Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance": *Goldfinger*, at para. 72.

54 In *Goldfinger*, as in this case, the appellant argued that the trial judge had "failed to identify and to consider the badges of fraud that were present": at para. 50. The court found that the trial judge had assessed the evidence and made findings of fact that supported his reasons for finding an absence of intent. The findings were available on the record: at para. 75.

55 Badges of fraud are non-exhaustive and may or may not be applicable to a given fact situation: see e.g., *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 ONCA 425, 85 O.R. (3d) 561 (Ont. C.A.), at para. 39; *Indcondo*, at paras. 52-53. Since badges of fraud are an evidentiary shortcut, and the analysis requires taking into account "all of the circumstances as they existed at the time of the conveyance" (*Fancy*, at p. 159), it follows that the failure to identify any particular badge of fraud and to undergo a mechanical analysis does not justify appellate intervention.

56 The Monitor accepts that the failure to consider a particular badge of fraud is not, in itself, a legal error justifying review on a correctness standard. The real issue here is whether the trial judge failed to take into account the entirety of the fact situation, and made conclusions of fact, or mixed fact and law, that were not supported by the record. In other words, was the motion judge's refusal to find that the transfer from KRI to Speedy was made with fraudulent intent adequately supported by the entirety of the record?

57 The motion judge set out a non-exhaustive list of badges of fraud referred to in the case law, including in *Indcondo*, at para. 52. He stated that "the adequacy of consideration is disputed" and that "[t]he only apparent badge of fraud is that the transaction was made in face of threatened legal proceedings". He noted that that particular "badge of fraud" was barely impactful as it was consistent with a *bona fide* transaction in circumstances such as those before the court. He went on to state:

> Of greater impact, in my view, is the fact that Speedy registered its mortgages on title. It gave notice to the world as one would expect any *bona fide* commercial creditor to do. There is nothing about the facts of this transaction that leads me to infer that it was made with a fraudulent intent rather than to obtain Speedy's cooperation to allow Urbancorp to refinance as intended at the time. [Emphasis added.]

58 The Monitor submits that the motion judge erred by failing to recognize various badges of fraud that were present in this case. It emphasizes that the consideration for the guarantee was nominal, so that the adequacy of the consideration was not in fact "disputed". It also submits that the motion judge ought to have accepted the uncontroverted evidence that KRI was insolvent on a cash flow basis, rather than refusing to make any determination of the issue of KRI's insolvency. Moreover, it argues that, when the motion judge concluded that the lien was registered and

therefore not concealed, he overlooked the fact that the secured guarantee was not disclosed in the prospectus for the Israeli bondholders. According to the Monitor, all of these factors were important "badges of fraud" that were ignored by the motion judge.

59 I disagree. First, as already explained, the relevant intent is that of KRI in relation to the transfer with Speedy. While there is no question that the $2 Speedy paid to KRI is a nominal sum, Speedy also gave up its construction lien claim against Edge. Whether this abandonment of the construction lien constituted consideration of value to KRI is disputed. This is what prompted the motion judge's observation that the adequacy of consideration was disputed.

60 Second, with respect to the question of insolvency, the Monitor misinterprets para. 25 of the motion judge's reasons. At para. 25, the motion judge noted that "the solvency of the debtor depends upon whether one looks at the debtor on its own behalf (as Speedy submits) or considers the position of the beneficial owner [Bay LP] as a whole (as the Monitor submits)". He did not resolve that question. Rather, he stated that "even if one looks at the financial position of the broader business of [Bay LP], with all of its various nominees and buildings, the Monitor accepts that the business was solvent on a balance sheet basis at the relevant time". This was not a finding that KRI was, in fact, solvent, but was a factor that distinguished this case from the *XDG* case relied on by the Monitor, where the insolvency of the transferor was readily apparent to the lender. The motion judge stated, "I am simply pointing out that the situation in *XDG* was quite different from this case in which the debtor was undertaking obligations to support the refinancing of the overall business within a few weeks' time and the refinancing occurred": at para. 25.

61 The fact that the motion judge did not determine whether or not KRI was insolvent is confirmed by his later observation, at para. 30 of the reasons, that he decided the motion based solely on the arm's length relationship and lack of fraudulent intent, and that he did not have to deal with the other arguments raised. Since s. 96(1)(a) of the BIA requires both fraudulent intent and insolvency, it was open to the motion judge to decline to make a determination as to whether KRI was insolvent given that he was not satisfied that KRI provided the secured guarantee with the intent to defraud, defeat or delay its creditors.

62 While the Monitor concedes that the motion judge was not required to determine whether KRI was insolvent for the purpose of s. 96 of the BIA, it nonetheless argues that he erred in law in failing to make that determination for the purpose of s. 2 of the FCA. The Monitor submits that there was uncontradicted evidence that KRI was insolvent on a cash-flow basis at the time of the transfer. It relies on *Sun Life Assurance Co. of Canada v. Elliott* (1900), 31 S.C.R. 91 (S.C.C.), to argue that KRI's insolvency is a persuasive if not determinative consideration under the FCA.

63 In *Sunlife Assurance Co.*, a debtor made a gratuitous settlement of all of his property on his family before his death, thus rendering his estate insolvent. The Supreme Court set aside the settlement under the Statute of Elizabeth, 13 Eliz. I, c. 5, legislation to which the FCA traces its

roots: see *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.* (2001), 54 O.R. (3d) 131 (Ont. C.A.), at para. 29. In setting aside the settlement, the Supreme Court stated the principle that "where at any time a person is solvent and then makes a voluntary settlement the effect of which is to make him insolvent, the settlement is void, and that too no matter what the intent of the settlor was": at pp. 94-95.

64 Despite this one broad statement, however, there is no special rule that makes evidence of a debtor's insolvency determinative as opposed to one factor that may be considered. The common issue under s. 2 of the FCA and s. 96 of the BIA is whether the debtor made the conveyance or transfer with the intent to defraud, delay or defeat creditors. A number of the authorities referred to earlier in these reasons relating to the role in the analysis of badges of fraud, including the debtor's insolvency, were in the context of the provincial legislation. Insolvency can be a factor, but is not sufficient or decisive. Instead, the crucial question remains whether the applicant has proved the fraudulent intent of the debtor.

65 Finally, the motion judge was well aware of the Monitor's argument that the secured guarantee was not disclosed to the Israeli bondholders. I agree that concealment of a transfer may be consistent with fraudulent intent. An alleged badge of fraud, however, must be considered in context, and in relation to how it relates to the question of the intention of the debtor at the time of the transfer. Here the motion judge noted that the discharge of the lien and the registration of the mortgages were public. The fact that the secured guarantee, while a matter of public record, was not disclosed in the prospectus in relation to the Israeli funding, may well have been a wrong against the Israeli investors. Indeed, the motion judge explained that the Israeli bondholders (who, with Speedy are the only creditors of KRI in the CCAA proceedings) have their own remedies, which they are pursuing.

66 Ultimately, the issue was whether the Monitor had established that, in giving the secured guarantee, KRI (or arguably Bay LP) intended to defraud, defeat or delay its creditors. The overall context was the impending Israeli bond financing. There was uncontroverted evidence that Speedy's lien had to be discharged in order to facilitate the financing, and that the lawyers for Speedy and the Urbancorp group were seeking alternative security for Speedy's debt. This was accommodated by the secured guarantee and mortgages on KRI's completed units and parking spaces. The bond funding was expected to be available to discharge debts of the Urbancorp group. Instead, the funding was used for other purposes, and ultimately the Urbancorp group defaulted on its obligations to the Israeli bondholders and others. In my view, the motion judge's finding that the Monitor had not established the debtor's fraudulent intent, or that it was anything other than "to obtain Speedy's cooperation to allow Urbancorp to refinance" and "to support the refinancing of the overall business", were available on the record and did not ignore any relevant evidence.

(3) Did the motion judge err in misapplying the rule in* Browne v. Dunn*?

67 This issue will be addressed only briefly, as in my view its determination has no effect on the outcome of the appeal.

68 At the hearing of the motion, the Monitor argued that the construction lien that Speedy agreed to discharge under the DEA was invalid because it was registered out of time. The Monitor relied on a copy of the statutory declaration filed by Speedy which indicated October 22, 2014 as the date of last supply of goods or services. Contrary to s. 31(3) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as it provided at the relevant time, the lien was registered on September 30, 2015, more than 45 days after the last supply. The lien itself stated that the contract price was $6,159,625, and that services and materials were supplied between August 1, 2012 and August 31, 2015.

69 The statutory declaration was contained in a report of the Israeli Functionary dated February 27, 2018. In its own reports, which were filed with the court as evidence, the Monitor had not questioned the validity of the lien. The Monitor also did not put the statutory declaration to Speedy's witness, Albert Passero, when it cross-examined him on his affidavits, which, among other things, attested to "ongoing work up to the end of August".

70 The motion judge noted that Speedy's witness had testified that the lien was timely, and that he was not confronted with the document on cross-examination to enable him to explain any apparent inconsistency. Absent compliance with the rule in *Browne v. Dunn*, the motion judge was not prepared to make a credibility finding against Speedy.

71 The Monitor says that the motion judge's reliance on *Browne v. Dunn* was in error, that the statutory declaration was conclusive, and that it was beyond question that the lien was out of time.

72 The problem with the Monitor's argument that the motion judge misapplied the rule in *Browne v. Dunn* is its apparent lack of relevance to any issue that continues to be in dispute in this appeal.

73 Before the motion judge, the Monitor argued that the invalidity of the lien called into question Mr. Saskin's *bona fides* which was relevant to whether Speedy and Mr. Saskin were acting at arm's length when the secured guarantee was given. The motion judge's finding that Speedy on the one hand and Mr. Saskin and Edge on the other were at arm's length is not in dispute in this appeal.

74 On appeal, the Monitor makes a different argument. At para. 70 of its factum, the Monitor states:

> But for his error in applying the rule in *Browne v. Dunn*, the Motion Judge should properly have concluded that the Lien was not registered on a timely basis and was accordingly invalid. If the Lien was invalid, then the Secured Guarantee did not provide any value to Edge (because there was no Lien that needed to be discharged and the underlying unsecured debt was not released). The Monitor's principal position, as argued above, is that it does not matter whether

Edge received any consideration. KRI was the entity that granted the Secured Guarantee, it was not at arm's length with Mr. Saskin, and it did not receive consideration. However, even if one focusses, as the Motion Judge did on the relationship between Speedy and Edge, the Lien was invalid and therefore there was no consideration to Edge for the Secured Guarantee. This further supports the Monitor's submission, above, that there was no consideration for the Secured Guarantee and it is void as a transfer at undervalue.

75 According to the Monitor, the relevance of the lien being out of time is simply that it would support the Monitor's submission that there was no consideration for the secured guarantee and it is void as a transfer at undervalue. Whether the secured guarantee was or was not a "transfer at undervalue" as defined in s. 2 of the BIA was not the question on which the motion judge's disposition of the motion turned. At para. 30 of his reasons he noted that he decided the motion based solely on the arm's length relationship and lack of fraudulent intent and that it was not necessary to deal with a number of other issues raised by the parties orally and in their factums.

76 I have determined that the motion judge made no error in his factual conclusions that the transfer in question — the secured guarantee — was between arm's length parties, and was for the purpose of obtaining Speedy's cooperation to allow the Urbancorp group to refinance, and not with a fraudulent intent. Whether or not the secured guarantee was a transfer at undervalue is not a question that was definitively answered by the motion judge; nor does it fall to be determined in this appeal.

(4) Did the motion judge err in awarding costs of the motion against the Monitor?

77 The motion judge awarded Speedy $25,000 in costs payable by the Monitor on behalf of KRI, and not in its personal capacity.

78 An award of costs, as an exercise in discretion, is entitled to deference. This court will interfere where the costs award reveals an error in principle or where it is plainly wrong: see *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27. The Monitor says there were two such errors here.

79 First, the Monitor says that it had no alternative but to make an application to the court after Speedy objected to the disallowance of its claim. The Monitor asserts that the motion judge erred in awarding costs in circumstances where he had concluded that it was "reasonable and appropriate" for the matter to be brought to the court. The Monitor asserts that policy considerations should have militated against an award of costs in this case.

80 The motion judge considered the Monitor's request that, as in *XDG*, the court should award no costs. He noted that, while in some ways the facts of the case resembled those in *XDG*, there were important differences that he had already noted in his reasons. The motion judge rejected the

Monitor's argument that there should be no costs unless it was found to have been unreasonable, and he applied the "normative approach that costs follow the event": at para. 33.

81 The Monitor argues that there was an error in principle in this case because the motion judge departed from the general rule that costs should not be awarded against unsuccessful parties in the context of motions in CCAA proceedings. The Monitor relies on the observation of this court in *Indalex Ltd., Re*, 2011 ONCA 578, 81 C.B.R. (5th) 165 (Ont. C.A.), at para. 4, rev'd on other grounds 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), that the "conventional approach" or "usual practice" in CCAA proceedings is to "rarely make costs orders", with the result that "each party bears its own costs". The Monitor also asserts that, given the policy considerations animating CCAA proceedings, it would be unjust to award costs against the Monitor, which is obliged to bring a motion to court when a creditor disputes its disallowance of a claim.

82 We see no reversible error here. We agree with the observation of Newbould J. in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 7465, 88 C.B.R. (5th) 320 (Ont. S.C.J. [Commercial List]), at para. 5, that this court's decision in *Indalex* should not be read as laying down a "general principle that costs should rarely be awarded in CCAA proceedings". There is nothing in *Indalex* that would remove the motion judge's discretion to award costs in this case, and there is nothing unreasonable in his decision that costs of the Monitor's unsuccessful attempt to disallow Speedy's claim (which, if successful, would have benefited KRI's creditors) should follow the event and be borne by the debtor's estate.

83 Second, the Monitor asserts that the quantum of costs awarded by the motion judge, although agreed at the time of the motion, is clearly unreasonable. At the time of the motion, everyone, including the motion judge, believed that the amount in dispute exceeded $2 million. In fact, because Speedy had waived its rights under the secured guarantee in respect of Mr. Saskin's personal debt, the amount in dispute was substantially less. The Monitor submits that this reduction should be reflected in the amount of costs.

84 I disagree. The amount in dispute is only one of a variety of factors that are relevant to the determination of costs. In the circumstances of this case, the quantum of costs reflected the legal work required, which was the same, irrespective of the amount in dispute. There is nothing to suggest that the agreed quantum of $25,000 was other than proportional to the work and reasonable in all the circumstances.

CONCLUSION AND DISPOSITION

85 For these reasons, I would dismiss the appeal. I would award costs of the appeal to Speedy, including the motion for leave to appeal, fixed at the inclusive amount of $15,000, to be paid by the Monitor on behalf of the debtor and not in its personal capacity. No costs are awarded in favour of or against the Israeli Functionary.

***C.W. Hourigan J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

SCHEDULE A — LIST OF NON APPLICANT AFFILIATES

Urbancorp Power Holdings Inc.

Vestaco Homes Inc.

Vestaco Investments Inc.

228 Queen's Quay West Limited

Urbancorp Cumberland 1 LP

Urbancorp Cumberland 1 GP Inc.

Urbancorp Partner (King South) Inc.

Urbancorp (North Side) Inc.

Urbancorp Residential Inc.

Urbancorp Realtyco Inc.

Appeal dismissed.

Footnotes

1 The Israeli Functionary did not file a factum in this court, although counsel was present for the argument of the appeal.

2 If the transfer occurred within one year before the date of the initial bankruptcy event, fraudulent intent is not required: BIA, s. 96(1)(b)(i). If the transfer occurred more than one year but less than five years before the date of the initial bankruptcy event, fraudulent intent or insolvency is required: BIA, s. 96(1)(b)(ii).

TAB 4

Most Negative Treatment: Check subsequent history and related treatments.

2011 ONSC 7465
Ontario Superior Court of Justice [Commercial List]

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.

2011 CarswellOnt 14401, 2011 ONSC 7465, 88 C.B.R. (5th) 320

Return on Innovation Capital Ltd. as agent for Roi Fund Inc, Roi Sceptre Canadian Retirement Fund, Roi Global Retirement Fund and Roi High Yield Private Placement Fund and Any Other Fund Managed by Roi from time to time (Applicants) and Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co and Gandi Special Holdings LLC. (Respondents)

Newbould J.

Judgment: December 16, 2011
Docket: 09-CL-8172

Proceedings: additional reasons to *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List])

Counsel: Harvey Chaiton, Maya Poliak for Monitor, BDO Canada Limited
Mathew Halpin, Evan Cobb for TA Associates Inc.
Christopher J. Cosgriffe for Harry Gandy, James Gandy, Trent Garmoe

Related Abridgment Classifications
Bankruptcy and insolvency
XX Miscellaneous
Headnote
Bankruptcy and insolvency --- Miscellaneous
Costs — GG was group of companies under protection pursuant to Companies' Creditors Arrangement Act (CCAA) — GH LLC was parent of other companies in GG — Creditors were officers and board members of GH LLC — T Inc. invested in GG by way of debt and equity — T Inc. brought arbitration proceedings against creditors for recovery of its investment in GG — Creditors filed proof of claim against GG based on indemnity provisions — Creditors claimed they were entitled to indemnification by GG in respect of any damages award made against them in arbitration — Creditors disputed monitor's disallowance of indemnity claims — Monitor brought motion for advice and directions relating to creditors' indemnity claims — Motion

was granted — Parties made submissions regarding costs — Certain creditor awarded $30,000, monitor awarded $50,000 for counsel fees and disbursements, and $12,000 for its own fees and disbursements — Making costs orders in proceedings under CCAA was not rare occurence — Monitor was successful and was entitled to costs — Monitor in proceedings had unusual functions such as filing plan — Claimants were sophisticated creditors whose claim of indemnification was intended to dilute unsecured creditors' claim — Monitor acted properly — Taking position contrary to claimants did not disentitle monitor from costs — Participation of certain creditor was not redundant and creditor was entitled to costs — Claimants' assertion that indemnities were under control of monitor added time to proceedings — Rates and time spent by counsel were not excessive.

Table of Authorities

Cases considered by *Newbould J.*:

Calpine Canada Energy Ltd., Re (2008), 2008 CarswellAlta 1163, 2008 ABQB 537, 46 C.B.R. (5th) 243 (Alta. Q.B.) — followed

Canadian Asbestos Services Ltd. v. Bank of Montreal (1993), 21 C.B.R. (3d) 120, [1995] G.S.T.C. 36, 1993 CarswellOnt 226 (Ont. Gen. Div.) — considered

Frazer v. Haukioja (2010), 261 O.A.C. 138, 101 O.R. (3d) 528, 73 C.C.L.T. (3d) 167, 317 D.L.R. (4th) 688, 2010 ONCA 249, 2010 CarswellOnt 1996 (Ont. C.A.) — considered

Grant Forest Products Inc., Re (2009), 58 C.B.R. (5th) 127, 2009 CarswellOnt 6099 (Ont. S.C.J. [Commercial List]) — considered

Grant Forest Products Inc., Re (2010), 276 O.A.C. 43, 101 O.R. (3d) 383, 67 C.B.R. (5th) 23, 2010 CarswellOnt 3001, 2010 ONCA 355, 318 D.L.R. (4th) 598 (Ont. C.A.) — considered

Indalex Ltd., Re (2011), 2011 CarswellOnt 9077, 2011 ONCA 578, 92 C.C.P.B. 277, 81 C.B.R. (5th) 165 (Ont. C.A.) — followed

Risorto v. State Farm Mutual Automobile Insurance Co. (2003), 32 C.P.C. (5th) 304, 2003 CarswellOnt 934, 64 O.R. (3d) 135 (Ont. S.C.J.) — considered

Thomas Cook Canada Inc. v. Skyservice Airlines Inc. (2011), 2011 CarswellOnt 10334, 2011 ONSC 5756 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 57.01 — referred to

***Newbould J.*:**

1 On August 25, 2011 I released my endorsement on a motion brought by BDO Canada Limited in its capacity as a court-appointed Monitor of Gandi Innovations Limited, Gandi Innovations

Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co, and Gandi Special Holdings LLC (the "Gandi Group") for advice and directions, and particularly to determine preliminary issues in connection with the indemnity claims made by Hary Gandy, James Gandy and Trent Garmoe (the "Claimants") against all of the Gandi Group.

2 The Monitor was successful and seeks costs of the motion on a partial indemnity basis. The position of the Monitor was supported by TA Associates, Inc. ("TA Associates ") which also seeks costs on a partial indemnity basis. The cost orders are opposed by the Claimants.

3 The usual rule is that absent some special circumstance, costs follow the event. In this case, the Claimants assert that costs are rarely made in a CCAA proceeding and should not be made in this case. Reliance is placed on the following statement of the Ontario Court of Appeal in *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165 (Ont. C.A.):

> 4. We make no order as to costs of the underlying motions. We understand that the conventional approach in CCAA proceedings is to rarely make costs orders, with the result that each party bears its own costs. There are sound policy reasons that underlie this approach, which include the reality that as a result of the situation of the insolvent company, the amount of funds available for distribution is limited and parties ought not to expect to recover their litigation costs: see *Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487, at para. 31 (Gen. Div.) and *Re Calpine Canada Energy Limited*, [2008] A.J. No. 965, at para. 1. We see no reason to depart from the usual practice.

4 The statement of the Court of Appeal that cost orders are rarely made in CCAA proceedings is somewhat surprising. Recently, for example, in *Grant Forest Products Inc., Re* (2009), 58 C.B.R. (5th) 127 (Ont. S.C.J. [Commercial List]) in a motion in a CCAA proceeding between the former chairman and the secured lenders, I ordered costs to be paid to the former chairman. That decision was affirmed by the Court of Appeal (2010), 101 O.R. (3d) 383 (Ont. C.A.) in which costs were also awarded for the appeal. See also my comments in *Thomas Cook Canada Inc. v. Skyservice Airlines Inc.*, [2011] O.J. No. 4378 (Ont. S.C.J. [Commercial List]) in a case dealing with costs in a receivership matter.

5 I do not read the decision of the Court of Appeal as laying down a principle that costs should rarely be ordered in CCAA proceedings. The statement is "We understand that..." and indicates that the court was essentially passing on what it was told, which I think was an overstatement. The cases cited do not stand for any general principle that costs are rarely ordered. In *Canadian Asbestos Services Ltd. v. Bank of Montreal* [1993 CarswellOnt 226 (Ont. Gen. Div.)], Chadwick J. in declining costs in a CCAA proceeding stated:

> I appreciate SGB 2000 Inc. has incurred a large number of legal costs in disputing these various applications. However, it was apparent very early in these proceedings that there was

> going to be limited funds available for distribution. As such counsel should have considered the cost to the client, and the likelihood they would not recover costs.

6 In *Calpine Canada Energy Ltd., Re* [2008 CarswellAlta 1163 (Alta. Q.B.)] Romaine J. ordered costs to be paid in a CCAA proceeding. Regarding the issue of whether costs are ordered in CCAA proceedings, she did not state that costs are rarely made, but rather that it was often that cost orders were not made. She stated:

> Often in proceedings under the Companies' Creditors Arrangement Act, costs are not awarded against unsuccessful parties.

7 I agree with Romaine J. that cost orders are often not made in CCAA proceedings. I do not agree that they are rarely made and, as I said, I do not read the decision in *Re Calpine* as dictating otherwise.

8 The Claimants contend that in CCAA proceedings, Monitors are officers of the court with an obligation to act independently and to consider the interests of the debtor and creditors, with a duty to remain neutral as between the various stakeholders in the CCAA proceedings. Thus it is claimed that the Monitor should not be entitled to costs for taking a position that was contrary to the interests of the Claimants.

9 While Monitors are officers of the court and intended normally to provide neutral services and neutral advice, BDO in this case had obligations beyond that of a typical Monitor. By order of Cameron J. dated March 9, 2010, BDO as Monitor was empowered and authorized to do a number of things on behalf of the Gandi companies, including being authorized to file a plan of compromise or arrangement. This order was necessitated because under the CCAA process, all of the business and assets of the Gandi companies had been sold and all of the directors and officers had resigned and there was no functioning board of directors. Proceeds from the sale were sufficient to pay off secured creditors and on the same day, BDO was authorized by Cameron J. to establish a claims procedure to distribute the available cash from the sale of assets among the unsecured creditors.

10 The claims process was substantially completed by November 2010 and the Monitor prepared a consolidated plan of compromise and arrangement and scheduled a motion for approval to file the plan. On December 20, 2010 the Claimants filed proofs of claim in excess of $76 million. The basis for their claim is set out in my endorsement of August 25, 2011. On February 18, 2011 the Claimants brought a motion for leave to file their claims. At that time the Monitor raised concerns regarding the evidence supporting the claims and the fact that a portion of them appeared to constitute equity claims. Morawetz J. granted the Claimants leave to file their claims late and noted that the Monitor could apply to the court regarding preliminary issues that had been identified.

11 The Claimants alleged that they were *de jure* directors and officers of the corporate entities in the Gandi Group. TA Associates had advanced $75 million to the Gandi Group by way of

$25 million of debt and $50 million of equity. In January 2009, TA Associates commenced an arbitration proceeding against the Claimants. In the arbitration TA Associates claimed damages against the Claimants in an amount of US $75 million with interest, being the total amount of TA Associates' investment in the Gandi Group. The arbitration has not yet been heard on its merits.

12 The Claimants asserted an entitlement to indemnification by the Gandi Group in respect of any award of damages which may be made against them in the arbitration together with all legal fees incurred by the Claimants in defending the arbitration. Their right to be indemnified was hotly contested as was the question of whether their claim was an equity claim has to $50 million. The Claimants were thus not normal creditors in a CCAA proceeding, but rather sophisticated individuals seeking to put themselves in a position to substantially dilute the unsecured creditors on an indemnity that had to be determined, one way or the other. The indemnity claims of the Claimants, if permitted, would have delayed distributions to all creditors for a considerable period of time.

13 On March 11, 2011 the Monitor disallowed the indemnity claims of the Claimants and advised them that based on the evidence filed in support of the indemnity claims, any indemnity claim would be solely against Gandi Holdings. The Claimants then served a notice of dispute, which led to the motion before me.

14 In the circumstances of this case, I find no fault with the actions of the Monitor in bringing the matter before the Court and taking the position that it did. It really had no other choice. It was the Monitor who was charged with the responsibility of filing a plan of compromise and arrangement, and the form in which the plan would finally be settled depended on the outcome of the motion.

15 In the circumstances, I am of the view that Monitor is entitled to its costs on a partial indemnity basis as it was successful.

16 The claim for costs by TA Associates is opposed by the Claimants. TA Associates is a substantial creditor and would be severely affected if the indemnity claims of the Claimants were accepted by the Monitor. It participated in the motion. It filed an affidavit of Mr. Johnson who was cross-examined by counsel for the Claimants. TA Associates' counsel examined one of the Claimants on his affidavit and participated fully in the motion. The Claimants oppose any order for costs in favour of TA Associates whose participation they contend was redundant. I do not agree. Whether the indemnities are proper claims in the CCAA proceedings is of importance to TA Associates because the indemnities are said to protect the Claimants in the event that an award is made against them in the arbitration commenced by TA Associates in the U.S. The Claimants had to know that if they succeeded in their position, that would give them some leverage in the arbitration proceedings as TA Associates would be making a claim in the arbitration that if successful would partially end up coming out of its own pocket. The Claimants could not have

expected TA Associates to sit back, particularly as it was the Monitor who brought the motion for directions and it was not clear at the outset exactly what the Monitor would do in the motion.

17 In my view TA Associates is entitled to its costs, although some recognition is to be given to the fact of duplication of efforts in considering what a fair and reasonable cost order is to be made against the Claimants.

18 The monitor seeks costs of $45,431.09, inclusive of HST, for fees and disbursements of $10,804.91, inclusive of HST. It also seeks fees and disbursements from BDO of $12,178.99, inclusive of HST. Apart from the usual work done on a motion such as this, because the Claimants alleged they were officers and directors of all members of the Gandi Group, it was necessary to consult U.S. Counsel regarding some of the Gandi companies that were incorporated in Delaware and Texas. In the face of a lack of written indemnities, the Claimants took the position that the indemnities were in the possession, power or control of the Monitor. Because of that position taken by the Claimants, counsel for the Monitor had to attend at the offices of the former solicitors of the Gandi Group to review the corporate governance documents. BDO and its counsel had to review 11 boxes of books and records of the Gandi Group in storage and 29 additional boxes at the Claimants' request. The Monitor was also required to review the books and records of the Gandi Group to disprove the allegations made by the Claimants that the Monitor authorized payment of certain legal fees of the Claimants in the arbitration.

19 The Claimants contend that the work done by counsel for BDO was excessive. While it is not required that the Claimants produce information as to the amount of time spent by its counsel, its failure to do so is something to be taken into account. In *Risorto v. State Farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), Wrinkler J. (as he then was) stated:

> The attack on the quantum of costs, insofar as the allegations of excess are concerned, in the present circumstances is no more than an attack in the air. I note that State Farm has not put the dockets of its counsel before the court in support of its submission. Although such information is not required under Rule 57 in its present form, and the rule enumerates certain factors which would have to be considered in exercising the discretion with respect to the fixing of costs in any event, it might still provide some useful context for the process if the court had before it the bills of all counsel when allegations of excess and "unwarranted over-lawyering" are made. In that regard, the court is also entitled to consider "any other matter relevant to the question of costs". (See rule 57.01(1)(i).) In my view, the relative expenditures, at least in terms of time, by adversaries on opposite sides of a motion, while not conclusive as to the appropriate award of costs, is still, nonetheless, a relevant consideration where there is an allegation of excess in respect of a particular matter.

20 In *Frazer v. Haukioja*, 2010 ONCA 249 (Ont. C.A.), it was contended that the trial judge erred in awarding costs against the defendant. LaForme, J.A. for the court stated:

Dr. Haukioja argued before the trial judge that Grant Frazer's counsel docketed almost twice as much time as his own. This, he says is relevant to Dr. Haukioja's reasonable expectations and establishes that he could not reasonably have expected Mr. Frazer's counsel to have invested so much more time than his own.

The answer to this argument is found in the submissions of Grant Frazer that were made to this court.

In making his finding with respect to the application of that part of rule 57.07(1)(0.b) "the amount of costs that an unsuccessful party could reasonably expect to pay..." the trial judge noted Mr. Haukioja's failure to provide adequate information as to his own legal costs incurred. He also agreed with the observations of Nordheimer J. in *Hague v. Liberty Mutual Insurance Co.*, [2005] O.J. No. 1660at para.16 that, "the failure to volunteer that information may undermine the strength of the unsuccessfully part's criticisms of the successful party's requested costs." In that regard, his decision is entirely consistent with the authorities, and in particular the dicta of the Divisional Court in Andersen, "the inference must be that the [unsuccessful] Defendants devoted as much or more time and money" as did the successful Plaintiffs: *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508 (Ont. S.C.J.) at paras. 24 to 27.

21 In reviewing the cost outline filed on behalf of the Monitor, nothing on the face of it would indicate that excessive time was spent. This was not a straightforward matter by any means and involved some novel issues. Nor do I think that the hourly rates used were excessive, being $350 per hour for Mr. Chaiton who was called in 1982 and $170 for Ms. Poliak who was called in 2007.

22 The Claimants contend that work done by BDO should not be permitted. The work done by BDO was entirely in connection with the motion and was necessitated by the need to review books and records and to supervise the Claimants' review of the record boxes. These costs would not have been incurred but for the position taken by the Claimants. In my view the cost of the work done by BDO was for and incidental to the motion and permissible in accordance with section 131 of the *Courts of Justice Act*.

23 TA Associates claims fees of $37,055 and disbursements of $4,522.11. In reviewing the cost outline filed on behalf of TA Associates, nothing on the face of it would indicate that excessive time was spent. As well, the hourly rates appear reasonable, being $350 per hour for Mr. Halpin who was called in 1986 and $165 per hour for Mr. Cobb who was called in 2008.

24 Taking into account the factors enumerated in rule 57.01, including the time spent, the results achieved, the complexity of the matter, the issue of possible duplication by counsel for the Monitor and for TA Associates, and also considering the amount of costs that an unsuccessful party such

as TA Associates in the circumstances of this motion could reasonably expect to pay, I order that costs be paid by the Claimants within 30 days as follows:

1. To the Monitor for its counsel's fees and disbursements, $50,000 inclusive of HST.

2. To the Monitor for its fees and disbursements, $12,000 inclusive of HST.

3. To TA Associates for its counsel's fees and disbursements, $30,000 inclusive of HST.

Order accordingly.

TAB 5

2009 ONCA 720
Ontario Court of Appeal

1730960 Ontario Ltd., Re

2009 CarswellOnt 6107, 2009 ONCA 720, 181 A.C.W.S. (3d) 433, 57 C.B.R. (5th) 183

In the Matter of the Notice of Intention to Make A Proposal of 1730960 Ontario Ltd.

R.G. Juriansz J.A.

Heard: July 31, 2009
Judgment: October 14, 2009
Docket: CA M37857, C50800

Counsel: Brett D. Moldaver for 2205305 Ont. Inc.
Howard F. Manis for Ira Smith Trustee & Receiver Inc.
Doug Bourassa for Portuguese Canadian Credit Union
David Jackson for Pocrnic Realty Advisors Inc. in Trust
C. Peddle for Gary Neumann
Ahmed Shafey for some secured creditors

Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.f Non-party
Headnote
Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Non-party
Receiver sold certain properties of debtor — Corporation formed numbered company for purposes of bidding on property — Numbered company's short notice motion to stay proceedings was dismissed — Respondents claimed that numbered company was shell designed for specific purpose related to acquiring property — Hearing held regarding corporation's liability for costs — Corporation not liable for costs — Corporation and numbered company were separate entities despite fact that corporation owned all shares of numbered company — Contention that numbered company was acting for corporation as nominee or surrogate was merely attempt to lift corporate veil — No fraud or abuse of process in motion.
Table of Authorities
Cases considered by *R.G. Juriansz J.A.*:

Dallas/North Group Inc., Re (2001), 148 O.A.C. 288, 27 C.B.R. (4th) 40, 2001 CarswellOnt 2344 (Ont. C.A.) — followed

Party City Ltd., Re (2002), 32 C.B.R. (4th) 286, 20 C.P.C. (5th) 156, 2002 CarswellOnt 1116 (Ont. S.C.J. [Commercial List]) — considered

1730960 Ontario Ltd., Re (2009), 2009 CarswellOnt 4235, 55 C.B.R. (5th) 265 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

***R.G. Juriansz J.A.*:**

1 2205305 Ontario Inc. ("220") was unsuccessful on its urgent motion brought on short notice to stay the order of Cumming J. dated July 10, 2009 [2009 CarswellOnt 4235 (Ont. S.C.J. [Commercial List])] approving the sale of certain properties to Pocrnic Realty Advisors Inc. in Trust by a receiver appointed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The respondents are entitled to their costs of the motion.

2 The respondents seek an order that Romspen Investment Corporation ("Romspen") be made liable for the costs fixed against 220. They submit that Romspen was "at all times the real moving party". They allege that Romspen incorporated 220 for the single purpose of attempting to purchase the property from the receiver. Romspen had been a participant throughout the process and was to provide 75% of the purchase monies in the transaction. The respondents point out that Romspen's Managing General Partner, the affiant for all of 220's affidavits, referred to Romspen and 220 interchangeably. They submit that it was Romspen and not 220, that had the largest economic stake in the outcome. They submit that costs assessed against 220 would be an "empty order" as 220 has no assets. The receiver advised Romspen, prior to the motion being brought, that he would seek costs against both 220 and Romspen.

3 Counsel for 220 concedes that Romspen owns 100% of the shares of 220 but argues that there is no basis for making a costs order against Romspen.

4 The respondents rely on the decision of Cumming J. in *Party City Ltd., Re* (2002), 32 C.B.R. (4th) 286 (Ont. S.C.J. [Commercial List]), in which he awarded costs against a non-party. In *Party City*, a creditor brought a motion to set aside an order of the court approving the receiver's sale of the property of the bankrupt. The respondents rely on Cumming J.'s comment that the creditor brought the motion "as a nominee and surrogate" for an unsuccessful bidder who was "the real moving party to the motion at hand", and that the moving party may have been "simply a shell corporation and not financially able to pay an adverse costs award".

5 It seems to me the respondents read Cumming J.'s decision in *Party City* too broadly. The moving party in that case, a creditor, had attacked the personal integrity of the receiver as well as

the integrity of the bidding process. The moving party had acted as the "nominee" and "surrogate" of the "real moving party", an unsuccessful purchaser, in putting forward what Cumming J. found was in substance a meritless allegation of actual fraud on the part of the receiver. Cumming J.'s passing remark that the moving party may have been "simply a shell corporation and not financially able to pay an adverse costs award" was not part of the basis for his decision.

6 The standard for awarding costs against a non-party is set out in *Dallas/North Group Inc., Re*, [2001] O.J. No. 2743 (Ont. C.A.), which Cumming J. relied upon in *Party City*. In *Dallas* this court upheld the order of the bankruptcy judge awarding costs against non-parties. The bankruptcy judge had concluded that the bankruptcy proceeding had been brought for an improper collateral purpose. The true purpose of the proceeding was not to attain the distribution of assets but to remove an officer and director of a third-party company and reduces shareholdings. Labrosse J. A. noted at para. 6:

> The trial judge further concluded that it was apparent that there had been a concentrated effort orchestrated by [the non-parties] of bullying, harassment and intimidation against [one of the litigation parties] and that it was difficult to think of a clearer example of petitions in bankruptcy having been brought for an improper collateral purpose. The barrage of proceedings brought against [one of the litigation parties] and [Dallas/North Group Inc.] constituted an abuse of process and was orchestrated by [the non-parties]. The trial judge found it most disturbing that the misconduct of [the non-parties] was carried out using the court system as a vehicle and that a lawyer participated in the scheme.

7 Labrosse J. A. made clear that the abuse of the bankruptcy process was key to the decision:

> There are special policy considerations to take into account when dealing with abuse of process in bankruptcy court because bankruptcy proceedings are quasi-criminal in nature and a petition in bankruptcy can destroy a person's financial standing and reputation. A harsher consequence in costs against a person who misuses the bankruptcy court for an improper collateral purpose is therefore justified.

8 The case before me is quite different. Accepting that 220 was incorporated for the specific purpose of purchasing the property of the bankrupt, its bringing of the motion is consistent with attempting to achieve its corporate purpose. The contention that 220 was acting as a nominee or surrogate of sole shareholder, Romspen, is simply an attempt to lift the corporate veil. Cost awards against non-parties always involve the exceptional exercise of judicial discretion. Absent fraud, abuse of the court's process in general and the bankruptcy process in particular to serve a collateral purpose or similar wrongdoing, there is no basis for looking behind a moving party's corporate legal personality to award costs against its parent.

Conclusion

9 The circumstances of this case do not fall into that exceptional class of cases where a costs order may be made against a non-party. In this case the moving party, a corporation, brought a motion that it should have recognized was doomed to fail. If the respondents believed it would be unable to pay the cost awards that were inevitable, they could have sought security costs before the motion proceeded.

10 Costs are fixed on a partial indemnity scale as follows:

$2500.00 in favour of the Receiver

$1500.00 in favour of Portuguese Canadian Credit Union

$1500.00 in favour of Pocrnic Realty Advisors Inc. in Trust

$1000 in favour of the other responding parties who attended on the motion.

11 All amounts include disbursements and G.S.T.

Order accordingly.

TAB 6

2002 CarswellOnt 1116
Ontario Superior Court of Justice [Commercial List]

Party City Ltd., Re

2002 CarswellOnt 1116, 114 A.C.W.S. (3d) 378, 20 C.P.C. (5th) 156, 32 C.B.R. (4th) 286

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, As Amended

In the Matter of the Courts of Justice Act, R.S.O. 1990, c. C.43, As Amended

In the Matter of a Plan of Compromise or Arrangement of Party City Ltd. and the other Companies as Listed in Schedule "A" the Application Herein

Cumming J.

Heard: April 4, 2002
Judgment: April 12, 2002
Docket: 02-CL-4382

Counsel: *M.H. Hilbing*, for Receiver
Tamara Vanmeggelen, for Eques Capital Corporation
B. McPhadden, for Party on Eh!
Justin R. Fogarty, for Trustee, KPMG
Fred Myers, for Party City Corp., Franchisor

Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.h Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.f Non-party
Headnote
Bankruptcy --- Practice and procedure in courts — Costs — Miscellaneous issues

Receiver was appointed in respect of debtor company — Receiver brought motion for order approving sale of debtor company — Creditor opposed sale on basis that another unsuccessful bidder had been treated unfairly in bid process and had made offer that was substantially higher than successful one — Receiver's motion was granted — Court found sale was made pursuant to fair and proper bidding process — Creditor brought motion to set aside or vary order approving sale of assets and subsequent order expanding authority of receiver to facilitate dealings with leased premises in context of pending sale — Motion dismissed — Creditor and unsuccessful bidder held jointly and severally responsible for solicitor and client costs of receiver and trustee, successful bidder and American franchisor — Case was appropriate one for exercise of discretion to hold person who was not formally party accountable for costs — Creditor brought motion as nominee and surrogate for unsuccessful bidder and unsuccessful bidder was real moving party to motion — All allegations raised related to alleged unfairness in respect of unsuccessful bidder's offer to purchase assets of debtor company — Allegations made were tantamount to allegations of fraud and were entirely without merit — Concerns could have been addressed by contacting counsel for trustee in bankruptcy.

Practice --- Costs — Persons entitled to or liable for costs — Non-party

Receiver was appointed in respect of debtor company — Receiver brought motion for order approving sale of debtor company — Creditor opposed sale on basis that another unsuccessful bidder had been treated unfairly in bid process and had made offer that was substantially higher than successful one — Receiver's motion was granted — Court found sale was made pursuant to fair and proper bidding process — Creditor brought motion to set aside or vary order approving sale of assets and subsequent order expanding authority of receiver to facilitate dealings with leased premises in context of pending sale — Motion dismissed — Creditor and unsuccessful bidder held jointly and severally responsible for solicitor and client costs of receiver and trustee, successful bidder and American franchisor — Case was appropriate one for exercise of discretion to hold person who was not formally party accountable for costs — Creditor brought motion as nominee and surrogate for unsuccessful bidder and unsuccessful bidder was real moving party to motion — All allegations raised related to alleged unfairness in respect of unsuccessful bidder's offer to purchase assets of debtor company — Allegations made were tantamount to allegations of fraud and were entirely without merit — Concerns could have been addressed by contacting counsel for trustee in bankruptcy.

Table of Authorities

Cases considered by *Cumming J.*:

Dallas/North Group Inc., Re, 2001 CarswellOnt 2344, 27 C.B.R. (4th) 40, 148 O.A.C. 288 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 47 — referred to

s. 197(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to
Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131(1) — referred to
Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 37.07(1) — referred to

R. 59.06(2) — pursuant to

Endorsement. *Cumming J.*:

The Motion

1 Party on Eh!, a creditor of the Party City Ltd. group of companies ("Party City") brings a motion on an urgent basis that this Court's orders of March 5 and 15, 2002 be amended, varied or set aside, or in the alternative be suspended, or in the further alternative, be stayed pending appeal.

2 The motion at hand is brought under Rule 59.06(2) which provides that a party may seek to set aside or vary an order on the ground of fraud or because of facts arising or discovered after the order was made.

Background

3 KPMG was appointed as Receiver in respect of the assets of Party City February 4, 2002. Mr. Blair Davidson of the Toronto office of KPMG is the principal person acting on behalf of KPMG in its role as Receiver. Prior to being named Receiver, KPMG through Mr. Davidson had acted as a consultant to Congress Financial, the banker to Party City, and its main secured creditor.

4 The Receiver moved March 5, 2002, *inter alia*, for an order approving the sale of Party City's assets to Eques Capital Corporation ("Eques"), resulting in the approval order dated March 5, 2002. The basis for this order is set forth in my Endorsement dated March 6, 2002.

5 Party on Eh! opposed the sale to Eques on the basis that Party Mania, an unsuccessful bidder, had been treated unfairly because of the bid process followed by the Receiver and because the Party Mania offer was substantially higher than the successful Eques offer.

6 This Court held the sale to have been made pursuant to a fair and proper bidding process. The allegations and claims of Party on Eh! and Party Mania were held to have no merit.

7 A further Endorsement dated March 15, 2002 deals with subsequent, follow-on matters. The authority of KPMG as Receiver was expanded pursuant to the provisions of s. 47 of the *Bankruptcy and Insolvency Act*. KPMG was authorized as Trustee in Bankruptcy to enter into an "Occupancy Agreement" to facilitate dealing with leased premises of Party City in the context of

the pending sale to Eques. The Trustee's proposal in this regard had been objected to by four of the five Inspectors, one of the objectors being the nominee of Party on Eh!.

8 Another opposing Inspector, Ronald Sluyters, put forward an affidavit opposing the Trustee's motion heard March 15. The thrust of Mr. Sluyters' opposition was that Party Mania continued to be prepared to offer a higher purchase price than seen in the successful Eques offer.

9 Again, this Court found that the opposition to the successful Eques offer was without merit. It was reiterated that the bidding process conducted by the Receiver was fair. As well, it was again also found that in all events the Party Mania bid was inferior to the successful Eques offer.

10 The sale to Eques was completed and a vesting order issued. This brings us to the motion at hand.

The allegations of Party on Eh!

11 Mr. Andre Turk, a consultant to Party Mania and a co-investor with respect to Party Mania's proposed purchase of the assets of Party City, provides three affidavits in support of the motion to undo the orders of March 5 and 15, 2002.

12 Mr. Turk raises again the two issues dealt with in the prior orders. First, Party on Eh! says that the process adopted by KPMG for the sale of Party City's assets was unfair. Second, it submits that the Party Mania offer was a "substantially higher offer" than the successful Eques offer.

The allegation that the sale process was unfair

13 Party on Eh! disputes the fairness of the sale procedures adopted by KPMG on the basis that Party Mania did not have the same opportunity to obtain and review information as was provided to Eques.

14 This Court found, as set forth in the March 6, 2002 Endorsement, that

> [t]he Receiver has considered *objectively* the best interests of all the parties, including landlords, creditors, and *prospective bidders or purchasers*. The process by which the offers have been obtained is demonstrably objective and fair. (emphasis in original)

15 At the March 15, 2002 hearing, concerns had been raised by Mr. Sluyters as to a possible conflict of interest on the part of KPMG. It was stated that Michael Pesner, a senior partner of KPMG in Montreal, was on the board of directors of Eques.

16 Counsel for the Receiver/Trustee, KPMG, responded to these concerns on March 15, 2002 by stating that Mr. Pesner was never a director of Eques and had resigned from an advisory board

to Eques in January, 2002 upon learning that KPMG in Toronto was involved in respect of Party City's assets and that Eques might be seeking to purchase the assets of Party City.

17 Counsel for the Receiver further advised that there had been disclosure of Mr. Pesner's terminated advisory relationship to Eques and that a "Chinese wall" had been constituted within KPMG so as to avoid any appearance of impropriety. The Court found in the March 15, 2002 Endorsement that the "concerns [of Mr. Sluyters] were satisfactorily answered...."

18 Mr. Turk states in one affidavit sworn April 3, 2002 that information now available to him establishes that Mr. Pesner in fact remains on the advisory board of Eques, as indicated by the Eques website.

19 More significantly, in a second affidavit dated April 3, 2002 Mr. Turk states that he retained the services of a private detective who obtained the cell phone records of Ken Kadonoff, the principal of Eques, for the periods ending February 20, 2002 and March 20, 2002.

20 I leave aside without comment the ethical and legal issues relating to obtaining surreptitiously a person's private cell phone records.

21 The cell phone records establish that Mr. Kadonoff, who resides in Toronto, did make telephone calls to Mr. Pesner's telephone in Montreal January 21, 23 and 26, February 2, 3, 4 and 16, March 2, 15 (three calls) and 19, 2002. Most calls were for only a couple of minutes and probably some were not answered as the record indicates a minimum time charged of one minute. The cell phone records indicate that Mr. Kadonoff uses his cell phone extensively on a daily basis as a means of communication.

22 Mr. Kadonoff called Mr. Pesner January 23, 2002. Mr. Michael Shneer, President of Party City, states in his affidavit that Eques made an offer January 23, 2002 directly to Party City for its assets. This offer was for $3,900,000 for the purchase of 80% of the shares of Party City. Mr. Shneer states that Eques withdrew that offer the next day, January 24, 2002, during the Court hearing under the *Companies' Creditors Arrangements Act*.

23 Mr. Pesner is named in the website of Eques as one of its seven person advisory group. Mr. Pesner serves in an unpaid personal capacity but he is, of course, named in the context of his position with KPMG. Mr. Kadonoff states in his affidavit of April 4, 2002 that he spoke with Mr. Pesner in connection with his resignation from the board of advisors and that Mr. Pesner resigned January 21, 2002 when he was told by Mr. Kadonoff of the interest of Eques in Party City's assets and that KPMG was involved in the matter. Mr. Kadonoff stated that the website has not been brought up to date to reflect the resignation.

24 Mr. Kadonoff, now 53, states that Mr. Pesner became his step-brother by the marriage of his father to Mr. Pesner's mother in the early 1980's. He states that they "speak often regarding family matters and other matters completely unrelated" to the proceeding at hand.

25 Mr. Kadonoff in his oral testimony denied that Mr. Pesner gave him any information or assistance in respect of the Eques purchase of Party City's assets. Mr. Pesner in an April 4, 2002 communication faxed to the Receiver states that upon learning that KPMG had become a consultant to Congress Financial, the banker of Party City, he told Mr. Kadonoff that he could no longer give advice to Eques. He states further that "at no time did I have any discussions, meetings or telephone conversations with Mr. Blair Davidson or other members of KPMG in regard to Eques' proposed acquisition of Party City." He says that after resigning his advisory role to Eques that his further telephone conversations with Mr. Kadonoff did not relate "to giving advice or consultations in regard to the proposed acquisition of Party City." This evidence is not before the court in affidavit form. The Trustee had difficulty reaching Mr. Pesner given the short notice of the motion. The letter from Mr. Pesner indicates it was faxed some 12 minutes before the commencement of the hearing.

26 Mr. Pesner's resignation from his advisory role January 21, 2002 was prior to KPMG being appointed Receiver February 4, 2002. Whether or not Mr. Pesner may have given any advice on any business matter unrelated to the Eques purchase of the Party City assets after that point in time, I accept Mr. Kadonoff's sworn testimony that there were not any communications at all after January 21 that related to the Eques purchase of the assets of Party City.

27 The tender process for Party City's assets closed February 18, 2002. Mr. Blair Davidson testified that he has had no contact with Mr. Pesner with respect to any matter pertaining to the proceedings at hand, or with respect to any matter at all over the relevant time period (other than just saying hello to him at a conference in Toronto in February, 2002) until April 4, 2002, when it was necessary to get information to enable KPMG to respond to the allegations of Party on Eh! raised by the motion at hand.

28 I accept the testimony of Mr. Kadonoff and Mr. Davidson. I reiterate my findings of fairness and objectivity on the part of the Receiver in respect of the bidding process and sale to Eques as set forth in my previous Endorsements of March 6 and 15, 2002. There is no merit to the allegations made in the motion at hand as to unfairness and impropriety.

The allegation by Party on Eh! that the offer of Party Mania is superior to the accepted offer of Eques.

29 Party on Eh! again repeats the allegation that was previously made and rejected in my Endorsements of March 6 and 15, 2002. The allegation now made is that the Court was misled by the counsel for the Receiver and by the Receiver with respect to an asset valued at $703,945.

relating to credit card receipts prior to March 1, 2002. Accordingly, Party on Eh! asserts that based upon "a misapprehension of the facts, the Court made the erroneous finding of fact" that Party Mania's purported offer of $4 million was less than the Eques offer.

30 The explanation in respect of this alleged issue was definitively dealt with in the March 6 and March 15 Endorsements. Mr. Davidson reiterated the explanation again in his testimony relating to the present motion. The simple fact, as seen from the Trustee's reports, is that the $703,945. remains an asset of the Receiver and was not included in the assets purchased by Eques for some $3.5 million, whereas this asset has been included in the assets intended to be purchased by Party Mania in its purported offer of $4 million. I say "purported offer" because there was *not* any offer of $4 million made *prior* to the closing of bidding and it remains questionable whether any later, out-of-time offer was in reality made as a firm offer by Party Mania.

31 Party on Eh! requested an order during the course of the hearing on the motion at hand to compel Eques to release further telephone records and for KPMG to release its phone records. This request was refused. In my view there was no proper foundation made for this evidence being required. The request amounted to no more than the proverbial fishing expedition and would mean further delay and unnecessary expense and uncertainty for the affected parties.

Disposition

32 For the reasons given, the motion is dismissed. The parties were advised at the conclusion of the hearing April 4 as to this disposition of the motion. I advised that an endorsement would follow. Oral submissions as to costs were made at the time and the opportunity was given for written submissions which have been received.

33 Costs normally follow the event. In my view, the allegations made by Party on Eh! are allegations tantamount to allegations of fraud. The allegations attack the integrity of the tendering process followed by the Receiver. The allegations attack the integrity of KPMG and Mr. Davidson. In essence, the allegation is that the Receiver acted fraudulently in representing that the sale process was to be conducted fairly and impartially. In essence, the allegation is that Mr. Davidson acted unlawfully in breach of the Receiver/Trustee's fiduciary duties so as to give an unfair advantage by providing information to Mr. Pesner who in turn communicated such information so as to assist Mr. Kadonoff in making the Equus bid. These allegations have no merit. In my view, any suspicions inferred because of the cell phone records could and would have been answered quickly by counsel for Party on Eh! contacting counsel for the Trustee. If doubts persisted, a statutory declaration(s) from Messrs. Davidson and/or Pesner could have been requested. The continuing concern in respect of the $703,905. would also have been easily explained, once again, by a simple telephone call to counsel for the Trustee.

34 In my view, and I so find, costs are to be awarded on a solicitor and client or substantial indemnity basis. I have been asked to fix costs,

35 Several interested parties, beyond the Trustee and Receiver, were potentially significantly affected by the motion at hand, necessitating appearances to make submissions, as was foreseen by Party on Eh!. All these parties were served late April 3 or on April 4 with the moving parties' motion record pursuant to Rule 37.07(1) as persons who would be affected by the order sought. The interested parties who appeared and made submissions have rights and obligations that would be adversely affected by the relief being sought by the moving party. The hearing commenced at 1:00 p.m. and concluded at 6:00 p.m.

36 I fix the costs payable to the Trustee at $7000. plus G.S.T. and applicable disbursements. I fix the costs payable to KPMG as Receiver at $1200. plus G.S.T. I fix the costs payable to Eques at $3000. plus G.S.T. I fix the costs payable to Party City Corp. (the U.S. franchisor) at $3000. plus G.S.T.

37 It is apparent that in reality Party on Eh! brings this motion as a nominee and surrogate for Party Mania. This is seen from the history of these proceedings as set forth in my previous Endorsements of March 6 and 15, 2002. The main affiant for Party on Eh!, Mr. Turk, refers to himself in his affidavits in the motions at hand as "a consultant to Party Mania ... and a co-investor with respect to the proposed purchase of some or all of the assets of Party City...." All of the allegations raised and repeated pertain to the alleged unfairness in respect of Party Mania's purported offer to purchase the assets of Party City. I conclude from the record that Party Mania is the real moving party to the motion at hand. It may also be that Party on Eh! is simply a shell corporation and not financially able to pay an adverse costs award, although there is no evidence to suggest this.

38 In my view, this is one of those exceptional cases where the court should exercise its discretion to hold a person who is not formally a party accountable for the costs. See *Dallas/North Group Inc., Re*, [2001] O.J. No. 2743 (Ont. C.A.) Accordingly, I exercise my discretion under s. 197(1) of the *Bankruptcy and Insolvency Act* and s. 131(1) of the *Courts of Justice Act* to make Party on Eh! and Party Mania jointly and severally responsible for all of the above costs awards, said costs to be paid within 30 days. Party Mania has the right to obtain indemnity from Party on Eh! for any costs paid by Party Mania pursuant to this order.

Motion dismissed.

TAB 7

Court File No.: CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FORME DEVELOPMENT GROUP INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Sean Zweig / Aiden Nelms for Moving Party (KSV as Monitor)
D.J. Miller / Alex Soutter for Moving Party (Ferina)
Adam Slavens for Tarion Warranty Corporation
Dom Michaud for –various mortgagees in claims process
Chris Besant for Non-Applicant companies
Bobby Sachdeva / Stephanie DiCarie for Grant Thornton, Trustee in Bankruptcy
Jeffrey Larry for First Source Mortgage
George Benchetrit for Home Trust Company
John N. Birch for Cassels Brock
Mario Forte for CCAA entities

ENDORSEMENT OF MR. JUSTICE HAINEY
DATED FEBRUARY 20, 2020

1. The Monitor brings a motion for relief to be reviewed below. The motion is supported by all stakeholders represented by counsel recorded on the Counsel Slip except the Non Applicant companies represented by Mr. Besant who opposes the motion.

2. At the outset of the motion the Monitor's counsel, at my direction, suggested to Mr. Besant that the order could be granted without prejudice to his client's position. Mr. Besant declined to proceed in this fashion and insisted that the motion proceed.

3. Despite Mr. Besant's submissions, I granted the order for the following reasons:

   (i) The Kennedy approval and vesting order and the distribution order were not opposed and I am satisfied the sale and proposed distribution are in the best interest of the stakeholders;

(ii) The ancillary order is appropriate and the time for service of the motion record is abridged. No one is prejudiced by this order as the motion record was served 8 days before the motion was heard.

(iii) I am satisfied that the stay period should be extended to May 31, 2020. The *Applicants have acted in good faith and circumstances exist that make the order appropriate because it will permit the Monitor to maximize stakeholder recovery for the reasons set out at paragraph 53 of the Monitor's Factum.

(iv) The confidential appendices of the Monitor's Twelfth Report contain sensitive commercial information that should be sealed in accordance with the test in *Sierra Club*. That aspect of the Order is not opposed.

(v) The undertaking dated March 11, 2019 should be amended by order of the Court to substitute Bennett Jones LLP, the Monitor's legal counsel, to hold the surplus funds currently held in Cassels Brock & Blackwell LLP's ("**CBB**") trust account and any further realizations from the Non-Applicants unsold real property. CBB is therefore ordered to transfer these funds to Bennett Jones LLP forthwith on the terms set out in the order.

(vi) I am satisfied that I should make an order pursuant to section 181(1) of the BIA annulling the assignments into bankruptcy made on January 28, 2020 by the Non-Applicant companies without any notice to the Monitor for the following two reasons;

(a) the Non-Applicant companies were not demonstrably insolvent persons. Each company has sold its real property generating sufficient proceeds to repay its mortgage debt in full and to fund the surplus funds currently held in CBB's trust account in the amount of approximately $11 million. The only evidence before the Court is that the value of the Non-Applicant's assets exceeds their liabilities. This is not a "clear cut situation" of insolvency that is "clearly established by sound and convincing evidence"; and

(b) in my view the assignments into bankruptcy are all entirely duplicative and serve no valid purpose. The Non-Applicant's creditor relationships are already being managed in these CCAA proceedings and the Court supervised claims process, all of which was consented to by Mr. Wang, the controlling mind of the Non-Applicants. If these assignments are not annulled, they will stay the Court approved claims process at the expense of creditors and the Court and will not accomplish anything already achieved by these unique and heavily negotiated CCAA proceedings. The claims process is one of several integral "building blocks" in the CCAA proceedings and, in my view, must be respected. The assignments must not be permitted to undermine this important building block [see Chief Justice Morawetz's Reasons at paragraph 81 in *Target Canada Co.*, 2015 ONSC 303].

(vii) I am satisfied that this CCAA claims process should continue and that proven Wang claims will be admitted as proven claims in the proceedings related to the Wang NOI.

(viii) Finally, without further order of the Court the surplus funds to be transferred from CBB to the Monitor's counsel shall not be used to pay any parties' legal fees.

(ix) In my view, this is an appropriate case to make an order as to costs. I have requested counsel provide me with short written cost submissions.

(x) I thank all counsel for their helpful submissions.

- References to "Applicants" acting in good faith in this context refers to the Monitor, as it is a super-Monitor in these CCAA proceedings.

Hainey, J.
February 20, 2020

COUNSEL SLIP

COURT FILE NO.: CV-18-00608313-00CL

DATE: February 20, 2020

NO. ON LIST 9

TITLE OF PROCEEDING: FORME DEVELOPMENT GROUP INC et al v. WINDSOR FAMILY CREDIT UNION et al

COUNSEL FOR:
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- [ ] APPLICANT(S)
- [ ] PETITIONER(S)

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COUNSEL FOR:
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Court File Number: CV-18-608313-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

IN THE MATTER OF A PLAN OF
Plaintiff(s)

AND

COMPROMISE OF FORME Development Group INC.
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

1) The Monitor brings a Motion for relief to be reviewed below. The Motion is supported by all Stakeholders represented by counsel

_____ Date

_____ Judge's Signature

☐ Additional Pages_____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

recorded on the counsel slip except the Non-Applicant companies represented by the Respondent who opposes the Motion.

(2) At the outset of the Motion the Monitor's counsel, at my direction, suggested to the Respondent

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

that the order could be granted without prejudice to his clients' positions. Mr Berard declined to proceed on this fashion and invited that the Motion proceed.

(3) Despite Mr Berard's reluctance, I granted the order for the

Page 3 of _____ Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

following reasons:

1) The Remedy approval and vesting order and the distribution order will not offend and I am satisfied the sale and proposed distributions are in the best interests of the stakeholders.

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

(2) The amendment ordered is appropriate and the time for service of the Motion Record is abridged. No one is prejudiced by this order as the Motion Record was served eight days before the Motion was heard.

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

(3) I am satisfied that the stay period should be extended to May 31, 2020. The applicants have acted in good faith and circumstances exist that make the order appropriate because it will permit the Monitor to maximize Stakeholder

Page 6 of _____

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

recovery for the reasons
set out at para 53 of
the Monitor's factum.
④ The confidential appendices
of the Monitor's Twelfth
Report contain sensitive
commercial information
that should be sealed
in accordance with the
test in Sierra Club. They

Page 7 of _____ Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

aspect of the order is not
opposed.

(5) The Undertaking
dated March 11, 2019
should be amended by
Order of the Court to
substitute Bennett Jones
LLP, the Monitor's legal
counsel, to hold the
surplus funds currently

Page 8 of _____ Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

held in Cassels Brock & Blackwell LLP's ("CBB") trust account and any further realizations from the Non-Applicants' secured real property. CBB is therefore ordered to transfer these funds to Bennett Jones LLP forthwith on the terms set

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

out in the order.

6) I am satisfied that I should make an order pursuant to s. 181(1) of the BIA annulling the assignments into bankruptcy made on January 28, 2020 by the Non-Applicants companies and that any

Page 10 of _____ Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

motion & the Monitor for the following two reasons:

(a) The Non-Applicant companies will not demonstrably unaffect persons. Each company has sold its real property generating settlement proceeds to

Page 11 of _____ Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

repay its mortgage debt
in full and to fund
the surplus funds
currently held in
CBC's trust account in
the amount of approximately
$11 Million. The only
evidence before the
Court is that the value
of the Non-Applicants' units

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

exceeds their liabilities.
This is not a "clear
cut situation" of
insolvency that is
"clearly established by
sound and convincing
evidence."; and
(b) In my view
the assignment into
bankruptcy and an

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

abuse of process because
there is an ongoing
claims process, approved
by Mr. D. addressing
any remaining claims
against the Non-applicants,
and distributions will
not require a
bankruptcy. The
arrangements are

Page 14 of _____ Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

entirely duplicative and serve no valid purpose. The non applicants' creditor relationships are already being managed in these CCAA proceedings and the Court-supervised claims process, all of which was commenced

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Ld by Mr Wang, The controlling mind of the Non-applicants. If these arrangements are not annulled, they will stay the court-approved claims process at the expense of creditors and the court and will not

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

accomplish anything already achieved by these unique and hardly negotiated CCAA proceedings. The claims process is one of several "building blocks" in the CCAA proceedings and, in my view, must be respected.

Page 17 of _____

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

The assignment must not be permitted & undermine this important building block. [See Chief Justice Moravetz's reasons at para 81 in Target Canada Co, 2015 ONSC 303]

7) I am satisfied that the CCAA claims

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

~~Claims~~ process should continue and that proven Wang claims would be admitted as proven claims in the proceedings related to the Wang NOI.

(8) Finally, without further order of the court the surplus funds

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

to be transferred from
CBB to the Monitor's
counsel shall not
be used to pay any
parties' legal fees.
(9) In my view, this
is an appropriate
case to make an order
as to costs. I have
requested counsel

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

provide me with
short written cost
submissions.

(10) I thank all counsel
for their helpful
submissions.

J. Davies J.

February 20, 2020

Page 21 of _____ Judges Initials _____

TAB 8

Most Negative Treatment: Distinguished
Most Recent Distinguished: Oliver, Re | 2005 MBQB 204, 2005 CarswellMan 330, 15 C.B.R. (5th) 249, 197 Man. R. (2d) 33, [2005] M.J. No. 331, 142 A.C.W.S. (3d) 729 | (Man. Q.B., Sep 20, 2005)

1996 CarswellOnt 4873
Ontario Court of Justice (General Division) [In Bankruptcy]

Wale, Re

1996 CarswellOnt 4873, [1996] O.J. No. 4489, 18 O.T.C. 290, 45 C.B.R. (3d) 15, 67 A.C.W.S. (3d) 1064

In the matter of the bankruptcy of Henry John Wale

O'Connor J.

Judgment: November 29, 1996
Docket: Owen Sound 35-063684

Counsel: *Mona Anis*, for Applicant.
Ross Thompson, for Bankrupt.
Harold Poultney, Q.C., for Trustee.

Related Abridgment Classifications
Bankruptcy and insolvency
II Assignments in bankruptcy
II.3 Annulment of assignment
II.3.a By creditor

Headnote
Bankruptcy --- Assignments in bankruptcy — Annulment of assignment — By creditor
Bankruptcy — Assignments in bankruptcy — Annulment of assignment — By creditor — Assignment in bankruptcy being granted on morning of commencement of family law trial — Motion to annul bankruptcy granted — Bankrupt making assignment with intention of removing assets from reach of court and former wife so as to frustrate claim for unequal division of property — Bankruptcy being abuse of process of court and fraud on creditor.
The parties were married for 18 years, and developed a successful business building and installing kitchens. Family law proceedings were commenced in August 1994, and the parties were divorced in October 1995. The bankrupt's assignment in bankruptcy was date-stamped by the Official Receiver on October 16, 1996, an hour and a half before the commencement of his family law trial. Despite a December 1995 court order against dissipating assets, the bankrupt sold assets, and

withheld the proceeds. The bankrupt also removed the contents of the matrimonial home, and hid them. His former wife brought a motion to annul the bankruptcy, and to vest his property in her pending outcome of the family trial.

Held:

The bankruptcy was annulled, and title to the home was vested in the former wife pending its sale. The bankrupt's motives and conduct compelled the court to exercise its discretion to annul the assignment. The bankrupt barely met the definition of an insolvent person. With some effort on his part, he could have worked his way through his financial problems. The timing of the assignment was not coincidental. His conduct, including selling assets and withholding the proceeds and removing the contents of the matrimonial home, demonstrated male fides by the bankrupt. The bankrupt made his assignment with the intention of removing assets from the reach of the court and his former wife so as to frustrate her claim for unequal division. The bankruptcy was an abuse of the process of the court, and a fraud on at least one of his creditors, his former wife.

Table of Authorities

Cases considered:

Blaxland v. Fuller (1990), 2 C.B.R. (3d) 125 (B.C. S.C.) — *considered*

Dunn, Re, [1949] Ch. 640, [1949] 2 All E.R. 388 (C.A.) — *referred to*

Good, Re (1991), 4 C.B.R. (3d) 12 (Ont. Bktcy.) — *considered*

Irving Oil Co. v. Murphy (1962), 5 C.B.R. (N.S.) 203, 38 D.L.R. (2d) 207 (P.E.I. S.C.) — *referred to*

Kalau v. Dahl (1985), 39 Alta. L.R. (2d) 156, *(*sub nom. *Dahl, Re)* 57 C.B.R. (N.S.) 296, 59 A.R. 224 (Q.B.) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

generally*referred to*

s. 2*considered*

s. 2(a)*considered*

s. 2(b)*considered*

s. 2(c)*considered*

s. 69.3*considered*

s. 181*considered*

***O'Connor J.*:**

1 Henry John Wale's assignment in bankruptcy was date-stamped by the Official Receiver an hour and a half before the commencement of his family law trial. His former wife brings this motion, under s. 181 of the *Bankruptcy and Insolvency Act*, to annul the bankruptcy and to vest his property in her pending the outcome of the family law trial, or to exempt her claims from the usual stay of creditor proceedings under s. 69.3, and other relief. She argues his filing was motivated solely by his desire to defeat her family law claims and was an abuse of the process of the court. He says he had no such intention, he is an "insolvent person", as defined by the act and is entitled to its' protection.

History of the proceedings

2 Ms. Wale commenced family law proceedings by application on August 11, 1994. The parties were divorced in October 1995 and he has remarried. On December 15, 1995 McKay J., made an interim order, inter alia, restraining Mr. Wale from dissipating assets except in the ordinary course of business. At the outset of the trial on October 16, 1996, Ms. Wale sought an order declaring Mr. Wale in contempt for breach of the interim order, alleging he had sold his inventory and tools, removed all the furnishings from the matrimonial home and attempted to place other assets out of her reach. The court was also advised Mr. Wale had attended on a trustee in bankruptcy the previous week and filed an assignment late Friday afternoon, October 13, 1996. It was received and date-stamped by the Official Receiver at 8:30 am, October 16, 1996, the first day of trial. After one day's evidence and argument the matter was adjourned to October 28, 1996 to permit Ms. Wale to bring this motion to annul the bankruptcy assignment. Pending return of the matter, I ordered Mr. Wale's interest in the matrimonial home and all his assets be held in trust, the contents of the home be returned to it, that he make the mortgage and other payments, that Ms. Wale may occupy the home and the parties cooperate in selling it.

3 The annulment motion was served on the parties, the trustee and all the creditors. Upon return of the motion the parties and the trustee were represented by counsel. None of the creditors attended or was represented. Pending this ruling I ordered several measures intended to preserve the *status quo*, including postponing the creditors meeting and requiring Mr. Wale deliver to the trustee $4500 (part of what he received on the sale of his inventory), out of which the trustee is required to pay the mortgage and other household expenses.

Evidence Summary

4 The Wales lived together and were married for a total of eighteen years. He is a skilled cabinet-maker, specializing in custom-built kitchens. They developed a successful business, first designing and constructing pine furniture and then building and installing kitchens. They built a workshop and showroom behind their home in Chatsworth. She did the books and some of the sales and customer relations work and he built and installed the kitchens. During the several years before their separation in May, 1994 the business prospered and the Wales lived comfortably. At

separation she moved out and he stayed in the matrimonial home and continued to run the business. She has one daughter living with her and he has a son and daughter living with him. In October 1995 they were divorced and he has remarried. Ms. Wale's claims in the matrimonial action include child and spousal support and an unequal division of the matrimonial property.

5 Although it is difficult to determine exact figures for the business because some of it was done for cash, its' reported net incomes for the several years before separation were:

Year ended	Net income
February 1990	$73,072
February 1991	$44,182
February 1992	$ 8,540
February 1993	$27,682
February 1994	$30,575

6 He says that his business declined severely during 1995 and 1996. He was forced to declare bankruptcy, the close timing to the family law trial being merely coincidental. His reported net incomes for the years after separation were:

Year ended	Net Income
February 1995	$22,908
December 1995	$(15,334)

7 However during a part of the year prior to his declaration Mr. Wale continued paying in excess of $1,500 per month against the mortgage, an accelerated rate of about three times that required by the bank. About a week prior to the commencement of the family law trial Mr. Wale met with Richard Burnside, a trustee in bankruptcy. Mr. Burnside advised him an assignment would stay all creditors claims, including those of Ms. Wale, except for support. In the week prior to his declaration Mr. Wale removed all his tools and equipment from his workshop. They were appraised at $18,915 and are security for a line of credit with Scotiabank of about the same amount. He sold his inventory for $8,500 and used this money to pay some creditors and his trustees' fee, $750 to board his dog and cat and he kept $4,500 for "Room and board for 3 children @ $1500 each". He took from the home all the furnishings and contents, appraised at $8896, and stored them at an unknown location. He left a mobile 4' × 6' sign at the bottom of the driveway, on Hwy. 10, which read, "Joyce Wale Your Kids Lost Their Home God Bless You. Closed Sorry".

8 Although he says he lost money over 1996 and is unable to obtain credit to carry on his business, it appears he has been doing a considerable cash business. His trade creditors are owed less than $5700. When confronted with business records Ms. Wale found in the garbage after he moved out, he admitted receiving $17,885.27 in September and October of 1996. When he filed his assignment he had orders for at least five kitchen projects and had received deposits from four of these customers, totalling $3800. Ms. Wale says his usual practice was to take deposits of about 20% of the value of a project before starting it. Projecting the 20% figure, the deposits are evidence of orders for work worth about $19,000. His 1956 MGA sportscar was appraised at $9000 and a lawn tractor at $1200. He claims both are held by a repairman who is owed much of their values.

9 In his Statement of Affairs, Mr. Wale declares assets of $157,000 and debts of $105,800. However, the values he placed on some of the assets are less than the appraised values mentioned above. Using the appraised values and including the cash he received for the inventory, his assets would total about $19,000 more than declared. Mr. Wale argues this figure may be decreased by an overstatement of the value of some assets, e.g. the home by $7000 and his tools by $1000.

10 He declared income for himself and new wife of $1593 per month and expenses of $4428.82. However, the declared income does not take into account the $17,855.27 received in September and October, and the expenses appear to be inflated in that they include house taxes, mortgage and other expenses which he has not paid and has no intention of paying, as he had abandoned the house before the assignment.

11 In summary, Mr. Wale moved out of the house, stored his furniture and tools, discontinued producing kitchens despite a backlog of orders which had been partly paid for, sold his inventory to obtain cash and stopped paying the mortgage and other expenses, apparently prepared to let the house be sold under a power of sale.

12 Particularly telling of Mr. Wale's scheming are his plans to accelerate his loan payments to the Scotiabank once he finalized the divorce proceedings, as confirmed in the bank's letter to him, and a handwritten note on a bill to him from a real estate appraiser, "Okay to pay after court case".

The Parties' Positions

13 Ms. Wale argues the purpose of the bankruptcy filing was obvious. Mr. Wale intended to stop the family law trial from proceeding in any meaningful way by removing the couples' assets from the reach of the court and Ms. Wale's claim for an unequal division of them. She points out that even he now admits his assumption he could no longer carry on the business may have been incorrect. He was determined to move anything movable out of her reach and devalue or destroy anything immovable, i.e. the house and shop, by allowing it to be sold under power of sale.

14 Mr. Wale and his trustee argue there was nothing improper in his assignment immediately before the trial. He met the definition of an insolvent person. He had debts over $1000, he was "... unable to meet his obligations as they generally become due..." and he had "... ceased paying his current obligations in the ordinary course of business ...". He had a right to avail himself of the act's protection against all his creditors, including Ms. Wale, who has no special status as his former wife. To grant the annulment would give Ms. Wale a preference over other creditors, which the Court ought not do. The filing in advance of the trial would actually assist the court by apprising it of his true financial circumstances. Annulment is a rarely granted remedy reserved only for cases of clear fraud or abuse of the process of the court. These circumstances do not exist here, he and his trustee argue.

Analysis

15 S. 181 of the *Bankruptcy and Insolvency Act* reads:

> (1) 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.
>
> (2) Where an order is made under subsection (1), all sales, dispositions of property, payments duly made and acts done theretofore by the trustee or other person acting under his authority, or by the court, are valid, but the property of the bankrupt shall vest in such person as the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate or interest of the trustee therein on such terms and subject to such conditions, if any, as the court may order.

16 The jurisdiction of this court, sitting as a bankruptcy court, is limited by the special rules and procedures set out in the Act. The court has no authority, either on an interim or permanent basis to stay an assignment. However, the Act does give the court authority to annul a bankruptcy. *Kalau v. Dahl* (1985), 57 C.B.R. (N.S.) 296 (Alta. Q.B.).

17 An annulment will be granted only where it is shown either the debtor was not an insolvent person when he made the assignment or where it is shown that the debtor abused the process of the court or committed a fraud on his creditors.

Was Mr. Wale an insolvent person when he made the assignment?

18 An insolvent person is defined in s. 2:

> "insolvent person" means a person who is not bankrupt and who resides or carries on business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

19 Here, Mr. Wale's liabilities exceeded $1000 when he made the assignment. They totalled at least $105,000, and more, if the repair accounts for the sportscar and the lawn tractor are valid. He satisfies the preamble requirement.

20 Subsections (a), (b) and (c) of the definition are disjunctive. If he has debts exceeding $1000 a person claiming insolvency must show either (a) he is unable to meet his obligations as they generally become due *or* (b) he has ceased paying his current obligations in the ordinary course of business *or* (c) establish his assets, if sold, would not yield sufficient money to pay his debts. Mr. Wale does not rely on ss.(c), as his assets, even allowing for devaluation caused by a quick or forced sale of them, would appear to exceed his liabilities.

21 He argues he complies with both ss.(a) and (b). However, in considering ss.(a) it appears he had sufficient cash flow in the September and October of this year to meet his obligations as they became due. He received over $17,800, part of which arose from the sale of his inventory, a finished kitchen and part from the receipt of deposits from new orders. His trade debts were about $5700. He had orders for four or five kitchens or smaller jobs which would have produced further income. He declared personal living expenses of $4427 per month, and his loan payment to the Scotiabank was $500 per month. He clearly had an ability to meet his obligations as they generally became due. He simply chose not to do so. He does not meet the criteria under ss.(a).

22 Mr. Wale had ceased paying his current obligations in the ordinary course of business as they generally became due. The cheques he wrote in payment of some of his trade creditors were returned NSF and he has not replaced them. Perhaps better organization of his affairs or the use of money he held as cash and put to personal use would have permitted payment of some or all of the trade creditors. However, unlike ss.(a) which requires the debtor to show an inability to meet obligations, ss.(b) requires only that the debtor "has ceased paying his current obligations in the ordinary course of business ...". Unlike ss.(a) there is no requirement in ss.(b) for the debtor to show and thus no need to investigate his inability to make payments. If he has ceased paying current obligations, which he had, he meets the criteria of this sub-section. I must assume the reference by parliament to a debtor's "inability" in ss.(a) and not in ss.(b) is intentional and the easier test in the business oriented subsection, i.e.ss.(b), was imposed for a specific reason.

23 Mr. Wale qualifies as an insolvent person, if only marginally so, and was therefore entitled to make an assignment in bankruptcy, unless in doing so he abused the process of the court or committed a fraud on his creditors.

Was there an abuse of the court's process?

24 Numerous cases conclude that the debtor's motive in making an assignment is not generally relevant. There is nothing unlawful in declaring bankruptcy for the sole purpose of defeating the claims of one's creditors. *Irving Oil Co. v. Murphy* (1962), 5 C.B.R. (N.S.) 203 (P.E.I. S.C.). One of the objectives of bankruptcy legislation is to permit the debtor, in the words of Evershed M.R. "to protect himself from the evils which he might otherwise suffer". *Re Dunn*, [1949] 2 All E.R. 388 (C.A.). However, this general principle must always be tempered by the caveat that fraud or abuse of the process will permit a court to annul the assignment. In *Bankruptcy and Insolvency Law of Canada*, by Holden and Morawetz, Third Edition, Vol 2, at page 6-107, the learned authors say:

> The court must consider the rights not only of the debtor and of the creditors but also the rights of the public. A bankrupt should not be permitted to benefit from his own turpitude.

25 In *Blaxland v. Fuller* (1990), 2 C.B.R. (3d) 125 (B.C. S.C.), Donald J. of the B.C. S.C. [In Bankruptcy], said at page 127: "If, however, the conduct is tainted by bad motives, then the Court remains able to annul a bankruptcy under s. 181 of the *Bankruptcy Act*".

26 Under s. 181 the Court has a wide discretion when considering an annulment application. An exhaustive review of the circumstances surrounding the assignment should be made by the Court. There is no single test or principle to be applied. The test is flexible and fact specific. The debtor's motve is the primary consideration is determining abuse of process or fraud. After considering whether the debtor is an insolvent person some of the questions the court might pose to ascertain the debtor's motive are:

> (1) Is the debtor's financial situation genuinely overwhelming or could it have been managed?
>
> (2) Was the timing of the assignment related to another agenda or was bankruptcy inevitable in the near or relatively near furture?
>
> (3) Was the debtor forthcoming in revealing his situation to his creditors or did he hide assets or prefer some creditors over others?
>
> (4) Did the debtor convert money or assets to himself which would otherwise have been assets in the bankruptcy?
>
> (5) What had been the debtor's relationship with his creditors, particularly his major ones? Was it such that they might have assisted him, if he had approached them, by granting time or terms of repayment or had any goodwill been destroyed by past unfulfilled promises?

(6) Are there other relationships — business partnerships, shareholder arrangements, spousal, competitors for an asset, or simply personal associations which could cast light on a possible bad faith motive for making an assignment?

27 In *Re Good* (1991), 4 C.B.R. (3d) 12 (Ont. Bktcy.), Rosenberg J. of the Ontario Court (General Division) annulled a bankruptcy where he found the husband in a bitter family law dispute filed an assignment because he was "... determined to destroy himself and all of his assets rather than allow his wife the benefit of any of those assets... In my view, a clear case of abuse of process has been established."

Conclusion

28 Here, Mr. Wale's motives and conduct compel the Court to exercise its discretion under s. 181 to annul the assignment. He barely meets the definition of an insolvent person. With a modicum of effort and good intentions on his part he could easily have worked his way through his less than formidable financial problems. He was on good terms with Scotiabank, a major creditor which had agreed to reduced payments on its fully secured loan until after his matrimonial difficulties were settled. His mortgage to National Trust, upon which he had been paying three times the required amount within the year prior to the assignment, was current. His trade debts were only $5700 among five creditors with whom he had worked for years. He made no approaches to his mortgagee or his trade creditors to reduce or postpone parts or all of their accounts. The timing of the assignment, the day of his family law trial, is not coincidental, nor motivated by a desire to assist the Court. The visceral antipathy toward his former wife, as evidenced by the mobile sign he left at the property, the holy war that has raged between them since separation, his egregious conduct in selling assets and pocketing the cash shortly prior to the assignment, contrary to an order of the Court, and his removing and hiding the contents of the matrimonial home all overwhelmingly demonstrate *male fides* by him. I have little difficulty concluding he made his assignment with the intention of removing assets from the reach of the Court and his former wife so as to frustrate her claim for an unequal division of them. The assignment was an abuse of the process of the bankruptcy court and a fraud on at least one of his creditors, his former wife.

Order

29 Accordingly an order will go:

(1) Annulling the bankruptcy of Henry John Wale.

(2) Vesting title to the Wale matrimonial home in Joyce Wale pending its sale and distribution of the net proceeds therefrom as ordered in my judgment in the family law matter, delivered coincidentally with these reasons.

(3) Requiring Richard Burnside, the trustee, to account for all assets in his possession and to deliver same, except the matrimonial home and contents, to Henry John Wale.

(4) Requiring the trustee to serve a copy of these reasons on all the creditors.

(5) Requiring Henry John Wale to pay forthwith the costs of Joyce Wale for this motion, fixed at $3500.

(6) There will be no order as to the payment of the trustee's costs.

Order accordingly.

TAB 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: Mahood v. High Country Holdings Inc. | 1996 CarswellBC 2583, [1997] B.C.W.L.D. 002, 67 A.C.W.S. (3d) 224, [1996] B.C.J. No. 2408, 43 C.B.R. (3d) 267 | (B.C. S.C. [in Chambers], Nov 29, 1996)

1990 CarswellBC 377
British Columbia Supreme Court, In Bankruptcy

Blaxland v. Fuller

1990 CarswellBC 377, [1990] B.C.J. No. 2555, 24 A.C.W.S. (3d) 33, 2 C.B.R. (3d) 125

RE FULLER; BLAXLAND et al. v. FULLER

Donald J. [in Chambers]

Heard: October 9, 1990
Judgment: November 29, 1990 *
Docket: Docs. Vancouver 1542/90 and C890985

Counsel: *Daniel S. Gleadle*, for plaintiff.
Kimberly S. Campbell, for trustee in bankruptcy.
Timothy Mark Fuller, bankrupt in action No. Vancouver 1542/90 and defendant in action No. Vancouver C890985 appearing personally.

Related Abridgment Classifications
Bankruptcy and insolvency
II Assignments in bankruptcy
II.3 Annulment of assignment
II.3.a By creditor
Headnote
Bankruptcy --- Assignments in bankruptcy — Annulment of assignment — By creditor
Assignments — Annulment — Assignment in bankruptcy not breaching court order that bankrupt not dispose of or encumber his interest in his residence pending outcome of civil action — No ulterior purpose for assignment — Application by plaintiffs in civil action to annul assignment in bankruptcy dismissed.
The applicants, who were suing the bankrupt in a civil action, applied to cite the bankrupt for contempt, alleging that he made an assignment in bankruptcy in the face of an order which forbade his disposing of, encumbering, or otherwise dealing with his interest in his residence pending the outcome of the civil action. They also sought to annul the assignment in bankruptcy. In a second application, they sought to amend the statement of claim in the civil action to include a claim

entitling them to trace funds they claimed to have advanced to the bankrupt to his interest in the residence.

Held:

The first application was allowed; the second application was dismissed.

When the bankrupt made his assignment into bankruptcy, he was clearly insolvent; there was no improper or ulterior purpose in making the assignment. The applicants were not prejudiced as a result of the bankruptcy.

An assignment in bankruptcy affects the transfer of the debtor's interest only, not title to the property. Those having a claim against that interest are no worse off inside the bankruptcy. There is no alienation of the interest. Therefore, the bankrupt did not breach the court order.

Table of Authorities

Cases considered:

Develox Industries Ltd., Re, [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579 (S.C.) — *referred to*

Gasthof Schnitzel House Ltd. and Sanderson, Re, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C. S.C.) — *referred to*

Henfrey Samson Belair Ltd. v. Manolescu (1985), 58 C.B.R. (N.S.) 181, 69 B.C.L.R. 216 (C.A.) — *distinguished*

Louis & Peter Co., Re (1988), 67 C.B.R. (N.S.) 176 (Ont. S.C.) — *referred to*

Neustaedter v. Armitage (1986), 56 O.R. (2d) 769, 60 C.B.R. (N.S.) 173, 32 D.L.R. (4th) 627 (S.C.) — *applied*

Public's Own Market (Prince George) Ltd., Re (1984), 54 C.B.R. (N.S.) 222 (B.C. S.C.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 69

s. 81

s. 181

***DONALD J.* [In Chambers]:**

1 There are two applications brought by the plaintiffs in action No. C890985 (the "civil action"). The first is to cite Timothy Mark Fuller, a defendant in the civil action and the bankrupt in action No. 1542/90, for contempt. The applicants allege that Mr. Fuller made an assignment in bankruptcy in the face of an order of Mr. Justice Fraser which forbade his disposing of, encumbering, or otherwise dealing with, his interest in his residence pending the outcome of the civil action. In addition, the applicants seek an order to annul Mr. Fuller's assignment in bankruptcy on two grounds. First, they allege that the assignment was made for an improper purpose and that this

was contrary to the terms of Fraser J.'s order. Second, they claim the making of the assignment was an abuse of the Court's process.

2 The second application is one to amend the statement of claim in the civil action to include a claim entitling the applicants to trace funds they say they advanced to Mr. Fuller to his interest in the residence. Ancillary to that is a claim that Mr. Fuller's trustee in bankruptcy holds Mr. Fuller's interest in the residence in trust for the applicants.

3 I shall deal with the contempt application first.

4 I am satisfied that at the time he made his assignment into bankruptcy, Mr. Fuller was insolvent and that he remains so. His debts greatly exceed his assets. His affidavit evidence is that he had no ulterior purpose in making his assignment. The applicants have not sought to cross-examine Mr. Fuller on his affidavit, nor have they challenged the contention he makes in that regard. It is true that it appears suspicious since the assignment was made so close to the trial date in the civil action. However, the timing of the assignment can be explained by his recent loss of counsel, his feeling overwhelmed by debt, and the pressure of an imminent trial date.

5 I am unable to find that there is any prejudice to the applicants as a consequence of the bankruptcy apart from the delay of the civil action. The applicants have not shown themselves to be any worse off with the bankruptcy remaining. Mr. Gleadle contends that there are assets remaining to be found which will allow a better realization for the applicants in the ordinary civil process than they would obtain through the bankruptcy procedure. I find that contention to be mere speculation, unsupported by any material. As for the question of delay, that matter has already been addressed. The applicants have obtained leave under s. 69 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 to continue their claim against Mr. Fuller despite the bankruptcy. An early trial date has also been ordered. In addition, the applicants are entitled to seek an order in respect of costs to further compensate them for the delay if the trial Judge sees fit.

6 Mr. Campbell cited authority to me for the proposition that the debtor's motive in making an assignment in bankruptcy is not necessarily relevant unless there is a clear abuse (see *Re Develox Industries Ltd.*, [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132 (S.C.), *Re Gasthof Schnitzel House Ltd. and Sanderson*, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C. S.C.), *Re Public's Own Market (Prince George) Ltd.* (1984), 54 C.B.R. (N.S.) 222 (B.C. S.C.), and *Re Louis & Peter Co.* (1988), 67 C.B.R. (N.S.) 176 (Ont. S.C.)). That may generally be true. If, however, the conduct is tainted by bad motives, then the Court remains able to annul a bankruptcy under s. 181 of the *Bankruptcy Act*.

7 The question of improper motive does not arise in this application. In my view, Mr. Fuller did not abuse his right to make an assignment, nor did he abuse the Court's process.

8 The applicants contend that Mr. Fuller breached Fraser J.'s order by making the assignment because the trustee now has Mr. Fuller's interest in the residence. Mr. Campbell relied on

Neustaeder v. Armitage (1986), 56 O.R. (2d) 769, 60 C.B.R. (N.S.) 173, 32 D.L.R. (4th) 627 (S.C.) for the proposition that the assignment in bankruptcy effects the transfer of the debtor's interest only, not title to the property. Those having a claim against that interest are no worse off inside the bankruptcy. There is no alienation of the interest. It merely passes to the trustee against whom claims in respect of the interest can still be made. I agree with Mr. Campbell's submission that this analysis applies in these circumstances to defeat the argument that the simple fact of an assignment alone constitutes a breach of Fraser J.'s order.

9 The applicants also complain that Mr. Fuller has been tardy in obtaining certain life insurance coverage which Fraser J. directed he obtain for their benefit and that he is still $50,000 short of the amount ordered. I accept as genuine Mr. Fuller's explanation of this matter, namely, that there was a misunderstanding between himself and his insurance agent over the manner in which coverage should be placed and that he is anxious to comply with the order. Hopefully, the trustee will co-operate with Mr. Fuller in his efforts to correct this matter once and for all.

10 As for the question of annulment of the bankruptcy, Mr. Gleadle relies the decision of the British Columbia Court of Appeal in *Henfrey Samson Belair Ltd. v. Manolescu* (1985), 58 C.B.R. (N.S.) 181, 69 B.C.L.R. 216, in support of his submission that Mr. Fuller's assignment violates Fraser J.'s order. In *Manolescu*, 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 an 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.

11 Here, there is no question that Mr. Fuller was insolvent at the time he made his assignment. There are no facts showing an intention to frustrate or disobey the order. Accordingly, there is nothing at Bar analogous to the circumstances in *Manolescu*.

12 I find, therefore, that there has been no contempt committed by Mr. Fuller and that there is no basis for annulling the bankruptcy.

13 As for the amendment application, I have considered Mr. Campbell's analysis of s. 81 of the *Bankruptcy Act* in respect of his contention that the applicants' tracing claim must be made through the estate, considered by the trustee, and dealt with according to the summary provisions in the Act. I would generally agree with those submissions. However, I cannot ignore the history between the parties. In my view, the applicants' tracing claim is not a fresh matter. It is merely an additional remedy they may claim rather than a new cause of action.

14 Arkell J. has already given the applicants leave to continue the civil action despite the bankruptcy. It seems to me almost inevitable that the trustee will be unable to resolve the tracing

claim to the ap plicants' satisfaction. This will result in the matter coming back to the Court with the likely outcome that a direction will be made that the issue be tried in conjunction with the civil action. This will generate considerable needless expense for all concerned. I shall therefore exercise the jurisdiction I have under s. 69 of the *Bankruptcy Act* to grant further leave for that additional aspect of the applicants' claim and I allow the amendments sought. That avoids a set of further proceedings in the bankruptcy which, given the nature of this litigation, will be contested and should be resolved by a trial.

15 Since the success of the parties was divided, costs will be in the cause.

First application dismissed; second application allowed.

Footnotes

* Oral reasons were pronounced October 9, 1990, but not recorded. Counsel requested weitten reasons. At the Court's direction, counsel prepared ajoint memorandum taken from their notes of the oral judgment. These reasons are an edited form of that memorandum.

TAB 10

1999 CarswellMan 277
Manitoba Court of Queen's Bench

Moss, Re

1999 CarswellMan 277, [1999] M.J. No. 261, 12 C.B.R. (4th) 62, 137 Man. R. (2d) 199

In the Matter of: The bankruptcy of Rachel Leah Moss of the City of Winnipeg, in the Province of Manitoba

Steel J.

Judgment: June 2, 1999
Docket: Winnipeg Centre BK 98-01-54168

Counsel: *David Jacyk*, for Minister of National Revenue.
Brian Bowman, for Bankrupt.

Related Abridgment Classifications
Bankruptcy and insolvency
II Assignments in bankruptcy
II.3 Annulment of assignment
II.3.a By creditor

Headnote
Bankruptcy --- Assignments in bankruptcy — Annulment of assignment — By creditor
Revenue Canada claimed $301,956.21 in unpaid taxes from husband and issued notice of assessment to wife for same amount — Wife purchased four annuity policies from insurance companies — Revenue Canada made claims against insurance companies under Income Tax Act "requirement to pay" — Companies refused to pay but would not release funds to wife — Revenue Canada offered to lift orders if wife paid liabilities — Wife rejected offer and made assignment in bankruptcy — Revenue Canada brought motion to annul assignment — Motion granted — Wife was "insolvent person" within meaning of Bankruptcy Act, as she was unable to meet her financial obligations because of lack of funds — Wife's refusal to accept Revenue Canada's offer did not mean she was merely unwilling to pay — Analysis of conduct of wife and husband showed bad

faith motive — Annuities not purchased as legitimate device for retirement savings but to shield assets — Annuities not locked in and used by wife for living expenses — Assignment annulled as abuse of process — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2(1)(a).

Table of Authorities

Cases considered by *Steel J.*:

Blaxland v. Fuller (1990), 2 C.B.R. (3d) 125 (B.C. S.C.) — considered

Good, Re (1991), 4 C.B.R. (3d) 12 (Ont. Bktcy.) — considered

Henfrey Samson Belair Ltd. v. Manolescu (1985), 58 C.B.R. (N.S.) 181, 69 B.C.L.R. 216 (B.C. C.A.) — considered

Minister of National Revenue v. Anthony (1995), 32 C.B.R. (3d) 109, 129 Nfld. & P.E.I.R. 91, 402 A.P.R. 91, 124 D.L.R. (4th) 575, 8 C.C.P.B. 249 (Nfld. C.A.) — referred to

Moody v. Ashton (1997), 47 C.B.R. (3d) 91, 158 Sask. R. 78, 153 W.A.C. 78 (Sask. C.A.) — referred to

Redbrooke Estates Ltd, Re (1967), *(*sub nom. *Meco Electric (1960) Inc., Re)* [1968] Que. S.C. 692, 13 C.B.R. (N.S.) 117 (C.S. Que.) — considered

Regional Steel Works (Ottawa - 1987) Inc., Re (1994), 25 C.B.R. (3d) 135 (Ont. Bktcy.) — referred to

Shaw v. Trudel, *(*sub nom. *Shaw v. Trudel Prov. J.)* [1988] 3 W.W.R. 732, 44 C.C.L.T. 194, 53 Man. R. (2d) 10 (Man. Q.B.) — considered

Swain, Re (1997), 47 C.B.R. (3d) 100, 119 Man. R. (2d) 137, [1998] 2 W.W.R. 456 (Man. Q.B.) — distinguished

Sykes, Re, 156 D.L.R. (4th) 105, *(*sub nom. *Sykes (Bankrupt), Re)* 103 B.C.A.C. 81, *(*sub nom. *Sykes (Bankrupt), Re)* 169 W.A.C. 81, 2 C.B.R. (4th) 79, 1 C.C.L.I. (3d) 1, 48 B.C.L.R. (3d) 169, [1998] 8 W.W.R. 120, 17 C.C.P.B. 219, [1999] I.L.R. I-3630 (B.C. C.A.) — referred to

Thorne Riddell v. Fleishman (1983), *(*sub nom. *Re Toyerama Ltd.)* 47 C.B.R. (N.S.) 233 (Ont. S.C.) — referred to

Wale, Re (1996), 45 C.B.R. (3d) 15, *(*sub nom. *Wale (Bankrupt), Re)* 18 O.T.C. 290 (Ont. Bktcy.) — applied

609940 Ontario Inc. (Five Star Auto), Re (1985), *(*sub nom. *Cicco v. 609940 Ontario Inc. (Trustee of))* 57 C.B.R. (N.S.) 137 (Ont. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 2(1) "insolvent person" [renumbered 1997, c. 12, s. 1(1); am. 1997, c. 12, s. 1(3)] — considered

s. 2(1) "insolvent person" (a) [renumbered 1997, c. 12, s. 1(1)] — considered

s. 2(1) "insolvent person" (b) [renumbered 1997, c. 12, s. 1(1)] — considered

s. 2(1) "insolvent person" (c) [renumbered 1997, c. 12, s. 1(1)] — considered

s. 49(1) — referred to

s. 181(1) — pursuant to
Excise Tax Act, R.S.C. 1985, c. E-15
s. 325 [en. 1990, c. 45, s. 12(1)] — referred to
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 160(1) — referred to
Insurance Act, R.S.M. 1987, c. I40
s. 168 — considered

***Steel J.*:**

1.0 Introduction

1 This is a motion for an order annulling the assignment in bankruptcy of Rachel Moss ("Rochelle") pursuant to s. 181(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("the *Act*").

2 The major creditor of the bankrupt, Revenue Canada, submits that Rachel Moss does not meet the definition of an insolvent person in that she is not a person who is unable to meet her obligations as they become due. Therefore, she is not entitled to make an assignment under s. 49(1) of the *Act*.

3 Alternatively, Revenue Canada submits that the assignment in bankruptcy should be annulled because it constitutes an abuse of process.

2.0 The Facts

4 This motion is but one piece of the puzzle. There are several pieces of litigation outstanding with respect to Mrs. Moss and her husband, Danny Moss. In order to understand this motion, it is necessary to understand the context in which the assignment in bankruptcy took place.

5 Rochelle Moss has been employed full time as a clerk with the Royal Canadian Mounted Police in Winnipeg for at least the last 10 years. Her salary in that position is approximately $30,000.00 per year. Her reported annual net income between 1987 and 1994 averaged less than $30,000.00.

6 This trail of litigation began with Revenue Canada claiming against Danny Moss for income tax arrears and assessments totalling $301,956.21. The taxation years involved in that assessment are 1991, 1992 and 1994 and also involve tax debt from 1987, 1990, 1993 and 1995.

7 Between 1992 and 1996, cheques totalling in excess of $550,000.00 were received by the plaintiff in her account. These cheques were payable to either Danny Moss, the plaintiff herself

or Danro Construction. Danny Moss was in the business of home construction between the years 1984 and 1995. He is also a self-employed insurance broker.

8 In her cross-examination on her affidavit, Mrs. Moss indicated that the monies were put into her account to shield them from her husband's creditors. Mr. Moss also indicated to representatives of Revenue Canada that he used his wife's name and bank accounts because he could not get credit or transact business under his own name.

9 By virtue of s. 160(1) of *The Income Tax Act*, R.S.M. 1988, c. 110, a notice of assessment was issued to the plaintiff claiming the same $301,956.21 - the amount assessed against her husband. This particular section of *The Income Tax Act* commonly referred to as one of the "attribution rules" is applicable when property or monies are transferred not at arm's length.

10 Mrs. Moss has also been the subject of two assessments under *The Income Tax Act* for G.S.T. in the amount of $31,361.25 and she was further assessed under s. 325 of the *Excise Tax Act*, R.S.C. 1985, E-15, for unpaid G.S.T. originally assessed against her husband in the amount of $55,890.30.

11 The plaintiff appealed the assessments to the Revenue Canada Appeals Division. The appeal was denied and a further appeal is now pending before the Tax Court of Canada.

12 Between July 1995 and August 1996, the plaintiff purchased four annuity policies with NN Life Insurance Company of Canada ("NN Life"), The Equitable Life Insurance Company of Canada ("Equitable Life") and Manulife Financial ("Manulife") totalling approximately $678,000.00. The policies are plans held with the three insurance companies which are invested in mutual funds. According to Revenue Canada, and not contested by Mrs. Moss, the funds deposited in these plans came from the sale and re-mortgaging of real property. Mortgage sale proceedings were initiated on all real property still owned by Mrs. Moss.

13 In January 1997, pursuant to *The Income Tax Act*, Revenue Canada made claim against the three insurance companies under a "requirement to pay". The specifics of this requirement to pay are that the insurance companies must collapse the annuity contracts and pay the proceeds to Revenue Canada.

14 On February 5, 1997, Revenue Canada obtained a "jeopardy order" allowing it to take collection proceedings pending any appeals from assessments. That order was reviewed on motion of the plaintiff and the matter was heard by Mr. Justice Muldoon of the Federal Court of Canada. On November 19, 1997, he handed down reasons dismissing the plaintiff's appeal and confirming the jeopardy orders.

15 Although first resisted by NN Life, ultimately that company paid the sum of $270,645.47 to Revenue Canada on December 4, 1997 pursuant to the requirement to pay. [1]

16 The other two insurance companies take the position that the plans are exempt from seizure. However, the insurance companies have been unwilling to release any funds to Mrs. Moss for fear they will be the subject of an assessment by Revenue Canada for failure to comply with a requirement to pay. Thus, effective January 20, 1997, the dates of service of the requirements to pay, Mrs. Moss has had no access to these assets.

17 Revenue Canada offered an arrangement to Mrs. Moss whereby the government would lift the receiving orders to the extent that Moss would be allowed access to the balance of the funds remaining after the payment of her tax debt.

18 Moss refused to agree to any such arrangement and made an assignment in bankruptcy a few weeks later on January 5, 1998. She submits that the trustee in bankruptcy has no interest in the annuity contracts, that they are exempt and would not form part of the bankrupt's estate. There is approximately $400,000.00 in the remaining two policies.

19 The total collectable debt assessed against Mrs. Moss under *The Income Tax Act* and the *Excise Tax Act* as of December 19, 1997 was $458,791.09. After accounting for the payment by NN Life, the outstanding balance is $188,145.62 plus accrued interest.

3.0 The Law

3.1 Definition of an "Insolvent Person"

20 Section 181(1) of the *Bankruptcy and Insolvency Act* provides for the annulment of an assignment in bankruptcy:

> 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.

21 There is no simple or universal principle prescribed to decide when an assignment ought not to have been made. It is a wide-ranging and flexible test which necessitates an examination of the facts on a case-by-case basis. However, the power to annual a bankruptcy should only be exercised under very special circumstances and should take into account the conduct of the debtor.

22 The case law confirms that the court has a broad discretion as to when it may annul an assignment in bankruptcy. (*Re Regional Steel Works (Ottawa - 1987) Inc.* (1994), 25 C.B.R. (3d) 135 (Ont. Bktcy.).)

23 For example, if a person cannot bring herself within the definition of an insolvent person, she cannot make an assignment in bankruptcy. Section 49(1) of the *Act* specifies that it must be an "insolvent person" who may make the assignment of all his property for the general benefit of his creditors.

24 Section 2(1) of the *Act* defines an insolvent person:

> ...means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

25 It is clear that the bankrupt cannot bring herself within s. 2(1)(c) since her statement of affairs indicates that the aggregate of her reported assets are valued at more than her debts. Her summary administration form lists her assets as $1,176,000.00 and her debts as $1,043,413.43.

26 Section 2(1)(b) of the definition deals with a person who has "ceased paying his current obligations in the ordinary course of business as they generally become due". This refers to an individual who is unable to pay their current obligations as they become due, not simply an individual who is unwilling to do so.

27 In the case of *Re Redbrooke Estates Ltd.* (1967), 13 C.B.R. (N.S.) 117 (C.S. Que.), the court dealt with the allegation that the debtor had ceased to meet his liabilities as they became due, within the context of a petition for a receiving order. The court considered the specific wording of a saving provision which allowed the bankrupt to avoid such a petition where he could satisfy the court that he was "able to pay his debts". The court stated as follows at p. 119:

> ...If the legislature had considered it advisable that a receiving order should be made against a wealthy but unwilling debtor, it would have so provided in the statute by adding after the word "able" the suggested words "and willing" .... If a debtor is able to pay immediately all his creditors, theoretically each of these creditors is fully protected and there is no need for bankruptcy proceedings.... (***Re Redbrooke*** was followed in *Moody v. Ashton* (1997), 47 C.B.R. (3d) 91 (Sask. C.A.).)

28 In effect, the court held that bankruptcy proceedings were not the place for a debtor who was able to pay his debts but was unwilling to do so or was slow in doing so.

> ...If a debtor, although having quite sufficient liquid funds to do so, is not willing to pay his creditors but has not committed any act of bankruptcy, he can be sued in the civil courts by

> every one of his creditors and thus each claim can be paid in full out of the debtor's property which is their common pledge.... (***Re Redbrooke**, supra*, p. 119)

29 A similar conclusion is reached when analyzing s. 2(1)(a) of the *Act*. If a person has ample funds to meet obligations and chooses not to do so, he is not insolvent by reason of s. 2(1)(a) of the *Act*. See *Thorne Riddell v. Fleishman* (1983), 47 C.B.R. (N.S.) 233 (Ont. S.C.).

30 Moreover, a reading of the *Act* as a whole confirms this interpretation. The *Act* must be given a contextual and purposive interpretation. The interpretation should be consistent with the underlying principles of the *Act*.

31 The principles underlying the *Act* include: to assist honest but unfortunate debtors and to allow realization and equitable distribution of the assets of the bankrupt for the benefit of the creditors. (See Houlden and Morawetz, *The 1999 Annotated Bankruptcy and Insolvency Act*, Carswell, pp. 2, 3.)

32 It would be an inconsistent result if the *Act* was interpreted in a manner whereby a person could simply decide not to pay his debts and still declare bankruptcy, despite having the ability to do so. This would not be in furtherance of any of the principles or purposes of the *Act*.

3.2 Abuse of Process

33 Alternatively, Revenue Canada argues that the assignment in bankruptcy should be annulled because it is an abuse of process.

34 There are a number of grounds upon which courts have annulled an assignment including mistake, fraud, a clear sufficiency of assets to pay all creditors' claims *and* abuse of process. (See *609940 Ontario Inc. (Five Star Auto), Re* (1985), 57 C.B.R. (N.S.) 137 (Ont. S.C.).) If an abuse of process exists, the court may exercise its discretion to annul even where the bankrupt meets the criteria of an insolvent person.

35 The term "abuse of process" is not easily susceptible to precise definition. In *Shaw v. Trudel* (1988), 53 Man. R. (2d) 10 (Man. Q.B.), Kennedy J. defines it in the following terms:

> ...a term used to describe an improper use of the judicial proceedings and may arise if jurisdiction were exceeded. It arises when a legal process with some legitimacy is used for some ulterior motive, other than that for which it was intended. It is invoked to protect against harassment, or the perversion of the process to accomplish an improper result. (p. 12)

36 The conduct of the bankrupt must be tainted by bad motives in order to justify a finding of abuse of process. (See *Blaxland v. Fuller* (1990), 2 C.B.R. (3d) 125 (B.C. S.C.) at p. 127.)

37 For example, in the case of *Henfrey Samson Belair Ltd. v. Manolescu* (1985), 58 C.B.R. (N.S.) 181 (B.C. C.A.), the abuse of process consisted of the bankrupt making an assignment in bankruptcy in contravention of a court order that one of the creditors be given seven days notice before any of the debtor's assets were dealt with in any way. On the facts, the court felt that bad motive could clearly be inferred. In *Re Good* (1991), 4 C.B.R. (3d) 12 (Ont. Bktcy.), the assignment in bankruptcy was annulled in a situation where a husband, after 33 years of marriage, was:

> ...determined to destroy himself and all of his assets rather than allow his wife the benefit of any of those assets.... (p. 14)

38 In *Re Wale* (1996), 45 C.B.R. (3d) 15 (Ont. Bktcy.), the husband's assignment in bankruptcy was date-stamped by the official receiver an hour and a half before the commencement of his family law trial.

39 On the other hand, in *Re Swain* (1997), 47 C.B.R. (3d) 100 (Man. Q.B.), the bankrupt was indebted to Revenue Canada for unpaid taxes in the approximate amount of $120,000.00. The conduct which was alleged to prove bad motive consisted of the bankrupt's failure to file returns or pay taxes for a five year period culminating in the assignment. The Registrar in Bankruptcy refused to annul the assignment holding that there was a dearth of evidence respecting the circumstances of the assignment and that Revenue Canada's allegations as to the motive for the assignment could not be supported by the evidence.

> ...There is nothing in the evidence to suggest an element of deliberate planning in the bankrupt's conduct, the applicant's contention can only be deemed mere speculation and conjecture.... (p. 104)

40 *In obiter*, the Registrar goes on to say:

> Even if the evidence had disclosed deliberate planning or dishonesty on the part of the bankrupt, it is doubtful, on the basis of existing case law, that an annulment could be sustained. The applicant was unable to provide one decision where a "tax driven" assignment has been annulled.
>
> The effect of an annulment would be to place the bankrupt in the same position as he was immediately prior; that is, owing the *full* amount to Revenue Canada. In reviewing those authorities cited by the applicant as evidencing "poor motives" on the part of the bankrupt in the face of an outstanding debt to Revenue Canada, there is not one case in which the court required the bankrupt to pay the debt *in full*.... (pp. 104, 105)

41 The Registrar was not referred to the cases of *Re Wale* and *Re Good*. In those cases, deliberate planning and dishonesty were instrumental in convincing the court to annul the bankruptcy. With respect to the nature of the debt (i.e. a debt owed to Revenue Canada as opposed to a spouse), given

the appropriate circumstances, I do not believe the nature of the creditor should be the determining factor in a finding of abuse of process.

42 In exercising my discretion, I adopt the analysis followed in the case of *Re Wale*. In that case, the court indicated that the debtor's motive is the primary consideration in determining whether an abuse of process or fraud exists. Some of the questions the court might pose to ascertain the debtor's motive are:

> 1. Is the debtor's financial situation genuinely overwhelming or could it have been managed?
>
> 2. Was the timing of the assignment related to another agenda or was bankruptcy inevitable in the near or relatively near future?
>
> 3. Was the debtor forthcoming in revealing his situation to his creditors or did he hide assets or prefer some creditors over others?
>
> 4. Did the debtor convert money or assets to himself which would otherwise have been assets in the bankruptcy?
>
> 5. What had been the debtor's relationship with his creditors, particularly his major ones? Was it such that they might have assisted him if he had approached them by granting time or terms of repayment or had any goodwill been destroyed by past unfulfilled promises?
>
> 6. Are there other relationships - business partnerships, shareholder arrangements, spousal, competitors for an asset or simply personal associations which could cast light on a possible bad faith motive for making an assignment?

43 In short, an examination of the full background surrounding the assignment must be made in order to properly determine whether an annulment should be granted (*Blaxland v. Fuller*, supra, at p. 128).

4.0 Decision

4.1 Was the Bankrupt an Insolvent Person when the Assignment in Bankruptcy was made?

44 Since the "requirements to pay" issued by Revenue Canada to each of the three insurance companies holding the policies of the bankrupt, the insurance companies have refused to distribute any funds to Mrs. Moss. NN Life has in fact paid over the funds from its policy to Revenue Canada. The other funds are effectively frozen.

45 Revenue Canada maintains that it made a reasonable proposal to Mrs. Moss. Even pending appeal, the tax assessed is considered a current liability and payable forthwith. Revenue Canada proposed that she pay her current tax liabilities, which would be returned to her with interest if

her appeal was successful. They would, in turn, lift the jeopardy orders. This would leave her with approximately $200,000.00 in excess funds for living expenses and payment of other creditors.

46 This offer was rejected by Mrs. Moss immediately prior to her assignment in bankruptcy. Revenue Canada argues that the refusal to accept their offer indicates that Mrs. Moss was unwilling to pay her obligations, not genuinely unable.

47 While the reasonableness of offers and proposals made to alleviate the individual's financial situation may be a factor to be taken into account when considering an abuse of process, it is not a factor when determining whether or not the bankrupt was an insolvent person. Section 2(1) of the *Bankruptcy and Insolvency Act* indicates that the individual will be considered insolvent if they are unable to meet their obligations *for any reason*.

48 It is indisputable that there is an actual inability to meet her financial obligations as a result of a lack of access to the funds in the remaining two insurance policies. As a result of the freezing orders, the only liquid funds available to her arose out of her salary. Her monthly wages were subject to garnishment pursuant to a judgment by the Bank of Montreal at the rate of 30%. As such, she was unable to make even the mortgage payment on her home at 133 Park Boulevard West in the sum of $1,589.35 per month.

49 Further, the debtor submits that the funds from the policies fall within s. 168 of *The Insurance Act*, R.S.M. 1987, c. l40, and therefore do not form part of her estate in bankruptcy and cannot be accessed by the trustee in bankruptcy. If this argument is correct (a point I shall deal with later in this judgment), by making the offer it did, Revenue Canada was attempting to access the assets of the bankrupt that could not be attached at law. There was no obligation on the bankrupt to acquiesce to this arrangement so long as she fell within the legal requirements of the *Bankruptcy and Insolvency Act*.

50 Moreover, if these insurance policies constitute legitimate savings plans, there are strong policy reasons why the Legislature has indicated that they are exempt from execution or seizure under the law.

51 The fostering and nurturing of pension plans, and the encouragement of persons to make provisions for their retirement during their productive working years can be regarded as a desirable objective in today's society. The insurance annuity is one of the vehicles for individuals to make such provision for themselves, and their families on retirement. To encourage the accumulation of savings for pension-type provision on retirement and for the protection of the security of people in their advancing years, the laws have seen fit to place these funds beyond the reach of creditors. (See *Minister of National Revenue v. Anthony* (1995), 32 C.B.R. (3d) 109 (Nfld. C.A.), pp. 27, 28 and *Re Sykes*, [1998] 8 W.W.R. 120 (B.C. C.A.).)

52 Given the foregoing policy objectives, it can reasonably be taken that the law intended that a bankrupt emerge from bankruptcy with insurance plans which the law secures normally from execution or seizure, intact. If the insurance policies in question fall within these definitions, not only would the funds in the insurance policies have been beyond the reach of Mrs. Moss as a result of the jeopardy orders, but it would also have been reasonable for her to have refused the proposal made to her by Revenue Canada.

53 Therefore, I find that Mrs. Moss was an insolvent person according to the definition of the *Act* at the time the assignment was made.

54 *In obiter*, I should respond to one further argument made by counsel for the bankrupt. It was argued that Mrs. Moss should not have been required to accept the arrangement of Revenue Canada because to have collapsed the plans would have required her to incur substantial penalties. As well, she would not have had the use of the funds pending the decision of the Appeal Court.

55 First, the language of the plans themselves indicate that the penalties would not have been substantial. In the Equitable Life policy the penalty was 5% and in the Manulife policy the penalty would have been 3.5% until August 1997 and 3.0% thereafter. Second, if these sums were in other vehicles, it would have been inappropriate for the bankrupt to make an assignment in bankruptcy simply because her financial affairs were so arranged that she needed to access her funds earlier than otherwise contemplated or that she would have lost the use of the funds pending appeal or that she can make a profit by keeping the money in the mutual funds. None of these reasons would have been sufficient to render her unable to meet her obligations. Instead, it would simply have been a situation where she was capable of paying her debts but was unwilling because it was financially unattractive.

4.2 Abuse of Process

56 Revenue Canada also argues that the assignment in bankruptcy by the debtor Rochelle Moss constitutes an abuse of process. It is submitted that the bankrupt is not an honest and unfortunate debtor but rather that her conduct evidences a clear pattern of deceptiveness in a number of ways. Revenue Canada refers to the factors considered in *Re Wale* and submits that an analysis of the debtor's motives over a period of time run contrary to the stated philosophy and objectives of the *Bankruptcy and Insolvency Act* and therefore constitute an abuse of process.

57 An appropriate analysis of her conduct would be incomplete if done in isolation. This debtor's conduct and financial affairs are inextricably linked to that of her husband. While normally an analysis of her financial matters would stand alone, the court in *Re Wale* did indicate that one of the considerations in an abuse of process analysis was whether there were other relationships, whether spousal or business partnerships, which would cast light on a possible bad faith motive for making the assignment in bankruptcy.

58 It is clear that Mrs. Moss deferred most financial decisions to her husband. Her answers on the cross-examination of her affidavit indicate that she has very little financial information on her own and defers many questions to her husband. As she indicated, "My husband handles that stuff." Her husband was also her insurance agent for the policies in question. In dealings with Revenue Canada, meetings and telephone discussions were held with Mr. Moss as her "representative". In correspondence with Manulife, she indicates that her husband is her agent and has the authority to request cheques on her behalf and move money between funds. Therefore, when considering the conduct and motive of Mrs. Moss, her husband's actions as her agent and representative should be considered.

59 Second, the conduct of both Mr. and Mrs. Moss indicates a history of lack of voluntary payment of tax. In dismissing the appeal by Mrs. Moss against his order allowing the jeopardy orders, Justice Muldoon made the following findings of fact:

> The evidence is clear that the respondent's spouse, the transferor, has made no voluntary payment of tax due since around 1990. The respondent herself has to be threatened with or subjected to litigation, garnishment or other attachment procedures before back tax can be realized by the department. The respondent and her husband evince a willingness to shelter or hide their assets from legitimate creditors. While Canada's income tax system is based on self-reporting - the honour system - the respondent always has to be threatened, garnished, proceeded against. Of course she, in common with all others, is entitled to engage in lawful avoidance of taxation although there is very little lawful scope to the avoidance of lawful collection of taxes. In any event, it is a factor, this proclivity demonstrated by conduct to avoid collection of taxes, ... (para. 24)

60 Another consideration mentioned by the court in *Re Wale* was the debtor's relationship with his creditors, particularly his major ones.

> ...Was it such that they might have assisted him, if he had approached them, by granting time or terms of repayment or had any goodwill been destroyed by past unfulfilled promises? (para. 26)

As has already been discussed, Revenue Canada was willing to make an arrangement which would have paid the current tax liability while allowing approximately $200,000.00 to the debtor to have met her ongoing liabilities. While she may not have been technically obligated to accept such an arrangement, the fact that it was available to her and she refused it is a consideration that I am entitled to take into account when determining overall conduct.

61 Next, s. 168 of *The Insurance Act* indicates that the insurance funds will not form part of the debtor's estate only if the beneficiary has been designated as irrevocable. The evidence indicates that Danny Moss was *not* designated as an irrevocable beneficiary in the Equitable Life policy.

62 In an affidavit filed by Cathy Kocher, the customer service representative employed by Equitable Life, she indicates that a policy title change form respecting the life insurance policy of Rochelle Moss was filed at their head office on February 6, 1997. (It is interesting to note that the requirements to pay had been served January 20, 1997.) The purpose of the form is to allow a policy owner to change or add beneficiaries and contingent beneficiaries. Previous to this form, Danny Moss had already been named as a beneficiary under the policy, but only a revocable beneficiary. In this form, under beneficiary change, Danny Moss is listed and then his signature is present as a signature of an irrevocable beneficiary, dated February 4, 1997. The signature of Rochelle Moss, the policy owner, is not present. Instead, under the section headed "Contingent Beneficiary Change", her son and daughter are listed as contingent beneficiaries and that portion is indeed signed by Rochelle Moss.

63 Given this discrepancy, Ms Kocher indicated in her affidavit that:

> I put a line through the section of the form relating to Beneficiary Change as Danny Moss was already named as a beneficiary under the policy. As Rochelle L. Moss did not sign as policyowner (sic) within the Beneficiary Change section, I did not appreciate that any change in Danny Moss's position as beneficiary was intended, notwithstanding that Danny Moss did sign as irrevocably (sic) beneficiary in the Beneficiary Change section.

64 Given this, there is no evidence that the policy owner signed a form requesting the change of the designated beneficiary's status to that of an irrevocable beneficiary. Certainly, it is questionable whether Equitable Life accepted that a change had occurred.

65 With respect to the policy with Manulife, Danny Moss is stated to be the irrevocable beneficiary of the death benefit which is included in that policy as of August 27, 1996 and a representative of Manulife accepts that the declaration is an appropriate declaration of that intention.

66 More importantly, regardless of whether the technical requirements of s. 168 of *The Insurance Act* have been met, the actions of the bankrupt and her husband certainly leave open to question whether these funds were used as a legitimate device for retirement saving or contingency planning in the event of Mrs. Moss's death. The bankrupt argues that these funds were purchased for a legitimate purpose, i.e. for retirement purposes.

67 Instead, an analysis of the conduct of Mr. and Mrs. Moss would seem to indicate that the plans were used as a device to convert assets which would otherwise have been assets in the bankruptcy into funds that could be shielded from their creditors while at the same time providing them with liquid funds for their living expenses.

68 On February 28, 1996, Richard Denomme, Manager of Annuity and Pension Services, replies to Mrs. Moss's inquiry regarding "creditor proof protection for deposits with an insurance company" as follows:

Mrs. Rochelle Moss

133 Park Place West

Winnipeg, Manitoba

R3P 2J2

Dear Mrs. Moss:

Re: Policy Number 586200

Re: Creditor Proof Protection for Deposits with an Insurance Company

Further to your recent inquiry, I enclose a copy of a February 23, 1996 article from the Financial Post.

It appears from the Article that the Supreme Court of Canada has recently held that registered retirement savings plans and registered retirement income funds that are deposited with insurance companies are protected from the claims of creditors.

You have raised the issue as to whether or not non registered deposits with insurance companies would also receive the same creditor protection.

We cannot determine from the Financial Post article if non registered deposits are likewise protected. Accordingly, we are awaiting receipt of the Supreme Court of Canada decision in order that we may review same and provide you with information on this issue.

We shall immediately advise you once we have received and reviewed the Court decision.

Should you have any questions or concerns please do not hesitate to contact me.

Yours truly,

The Equitable Life Insurance Company of Canada

Per: Richard Denomme

Manager, Annuity and Pension Services

69 All of the assets which have been the subject of Revenue Canada collection activity and which have been claimed as exempt from execution, were the products of a conversion from equity in real property, after Mrs. Moss was on notice of the audit referred to previously.

70 Danny Moss, in Federal Court proceedings relating to the review of the jeopardy order, alleged that the source of the proceeds used to purchase the insurance policies was the sale or re-financing of real properties registered in the name of Rochelle Moss. He has given affidavit evidence that the NN Life policy was purchased in June or July of 1995 from the sale of real property at 51 Dumbarton. Revenue Canada initiated contact with Rochelle Moss concerning the audit a few months before that date.

71 Danny Moss also deposed that the plan with Equitable Life was purchased on March 8, 1996 from the re-mortgaging of real property at 2165 West Taylor and 52 Dumbarton and a line of credit on 133 Park Place. This second plan was purchased around the same time of the completion of the audit which resulted in proposed assessments against both Danny and Rochelle Moss. (Letter from Revenue Canada to Mrs. Moss was dated February 20, 1996 and indicates the audit is complete and proposes adjustments.)

72 The evidence also indicates that by means of a cheque dated August 23, 1996, Mrs. Moss transferred $100,000.00 to Manulife Insurance Company. This purchase was made the day before she deposited into her account $94,942.52 from the proceeds of a mortgage on 133 Park Place, 2165 West Taylor and 52 Dumbarton. The mortgage was entered into with the Laurentian Bank. In fact, a copy of the bankrupt's account transactions show that the initial withdrawal left the account in a deficit position of $90,806.28 until the proceeds from the mortgage were deposited into the account the following day. Thus, in the case of the Manulife asset, the conversion from equity in real property to assets claimed as exempt from execution was after the issuance of re-assessments against the couple and shortly before Danny Moss's assignment in bankruptcy on September 6, 1996.

73 Payments on the mortgage were made for two months, after which no further payments were made.

74 It is also significant to consider the manner in which the mortgage was obtained from the Laurentian Bank.

75 Tom Standing, the individual who arranged the mortgage for the Laurentian Bank with Rochelle Moss as mortgagor and Danny Moss as guarantor, filed an affidavit in these proceedings. He met with Mr. Moss in June or July of 1996. He testified that Danny Moss told him the purpose for the mortgage loan was to facilitate payment of certain liabilities of Danro Construction, a business which he understood to be a home construction business of Mr. Moss and for confidential business investments in the United States.

76 Mr. Standing made it clear that had he known the money was going to be invested in an insurance policy that was creditor-proof, he would not have approved the loan.

> 39 Q But wouldn't you have thought that an investment in an insurance policy was also reasonably safe, or at least that there would be income generated thereby?
>
> A There are certain credit guidelines that people look for when you are coming to borrow money from me, and if somebody is looking to borrow money to put it into a creditor proof insurance fund and they disclose that up front, the answer to that would have been no....

77 In her affidavit, Mrs. Moss denies that she ever made any representation to Mr. Standing or any representative of Laurentian Bank that the funds were to be used for a confidential business investment in the United States.

78 Mr. Standing confirmed that he never spoke to Mrs. Moss prior to approving the loan. It is true that all dealings with the Laurentian Bank were by Danny Moss and not by Rochelle Moss. It is also true that Rochelle Moss made no representations by herself that the monies were to go to a business investment in the United States, that those representations were made by her husband. What is significant is that it is her husband who has conducted the business affairs of this couple throughout. It is he who acted as her agent and representative. No affidavit was ever filed on behalf of Danny Moss in response to the allegations of Mr. Standing or Revenue Canada.

79 Moreover, the way that the bankrupt used the funds in the insurance policies indicate again that her intent was not to preserve the savings in the plans for her retirement or for her family in the event of her death. Irrespective of whether the investment plans fall within a provincial exemption from execution, it is clear that the plans are not locked in and can be liquidated by way of withdrawals or, subject to some penalty, surrenders. The monies in the plans were in fact used for her every day living expenses. This use was acquiesced in and expressly consented to by the alleged irrevocable beneficiary, her husband.

80 For example, Justice Muldoon, in his judgment at para. 26, makes the following findings of fact:

> So, it appears that the insurance investments with NN Life, Manulife and Equitable Life evidence one characteristic of a bank chequing account: funds can be withdrawn from time for family living expenses or anything else....

81 Again in the decision of Justice Nurgitz, in an action between the bankrupt and NN Life (May 14, 1998), Justice Nurgitz makes certain findings of fact at para. 14:

> The annuity contract with the defendant allows the plaintiff to withdraw funds at will. The contract has been used in a fashion that could be characterized as a chequing account while at the same time providing a form of protection from auditors.

82 The bankrupt argues that this statement is not correct since the funds can be withdrawn only with a penalty and with the consent of the irrevocable beneficiary her husband. Nonetheless, it is indisputable that funds were withdrawn with the consent of her husband prior to January 20, 1997 and that since they were withdrawn, presumably Rochelle Moss had no problems with any penalty that was attached.

83 Moreover, in the opinion of the bankrupt herself, the reason that she became unable to meet her obligations as they became due had nothing to do with her husband or his lack of consent to the withdrawal of funds as irrevocable beneficiary:

> 6 Q Okay. Now I have read your affidavit and I want you to correct me if I'm wrong, but it is my understanding that the main cause of bankruptcy is your inability, is what you say to be your inability to meet obligations as they become due, is that fair?
>
> A Yes.
>
> 7 Q And is it fair to say that you primarily are pointing at the actions of Revenue Canada in freezing those policies as a reason why you cannot meet obligations as they become due?
>
> A Yes.

84 She repeats this assertion several times throughout the cross-examination on her affidavit, that the reason for her bankruptcy is Revenue Canada's actions in freezing her accounts. In effect, she was using the monies in the accounts to meet her monthly expenses.

> 233 Q Can you just explain why that is?
>
> A Well, with everything frozen, I was not able to access anything and I was just relying on my income from my job.
>
> 234 Q And are you suggesting that -- you are not suggesting you have had any difficulty paying living expenses, are you?
>
> A Of course I am.
>
> 235 Q What kind of living expenses?
>
> A Well, it's been very tough paying the mortgage, buying food, medication, clothing and anything else in terms of living expenses.

85 She was using the funds as part of her income even though her husband was designated as a beneficiary several years prior to the bankruptcy. There were a number of written withdrawals filed as part of Mrs. Moss's cross-examination that showed withdrawals from the policies (NN Life insurance policy, withdrawals dated August 16, 1996, October 17, 1996 - $7,500.00, January 14, 1997 - the withdrawal in January was for 10% of the value of the entire plan). With respect to the Equitable Life plan, there was approximately $40,000.00 withdrawn between February 1996 and February 1997. The requests for withdrawals are all signed only by Mrs. Moss, although she indicates that her husband provided his consent by way of telephone. The withdrawals were in the amounts of $10,000.00 (April 11, 1996), $5,500.00 (December 9, 1996, $3,500.00 (October 17, 1996), $19,936.09 (January 14, 1997).

86 With respect to the Manulife policy, the withdrawals were in the amount of $5,056.00 (November 4, 1996), $7,960.00 (December 12, 1996) and $13,514.04 representing 15% of the monies in the fund (January 12, 1997).

87 The intent of the bankrupt in relation to these plans is an important one. Even though these are not R.R.S.P. plans, if the bankrupt had shown an intent over a period of time to use these plans as a savings vehicle for herself and her family, that would be a factor to take into account when attempting to determine whether an abuse of process had occurred. As discussed earlier, there are strong social policy objectives in favour of encouraging savings for contingencies. As well, such long-term conduct would obviously negate the allegations of improper motive.

88 However, in this case the funds in the insurance policy were not placed there with the continuing intent to preserve savings for her retirement or contingency in the event of death. Rather, they represent assets-converted from equity and real property in order to hide those assets from the creditors. In the case of the mortgage from the Laurentian Bank, her agent and representative misrepresented the purpose of the loan. Those funds were deposited into the Manulife policy. Moreover, the funds were used for living expenses clearly without the written consent of the husband prior to the assignment in bankruptcy. It is only recently that the issue of consent arises.

89 Mr. Moss was cross-examined during his discharge hearing in November and December of 1997. During that questioning, Mr. Moss never mentioned his position as irrevocable beneficiary or that he would not give his consent to the use of his funds. His position throughout the cross-examination was that the funds were unavailable to his wife because Revenue Canada had frozen them or, later on in the cross-examination, funds which she would not withdraw because of a penalty for early withdrawal.

> Q Okay. Therefore, it's not touchable because you say it's not touchable. Is that, is that why it's not touchable?
>
> A Because she says it's not touchable, yes.

90 To allow Rochelle Moss an assignment in bankruptcy while maintaining monies in the amount of $400,000.00 by believing in the fiction that the irrevocable beneficiary, her husband, refuses to release any funds is a fiction this court should not accept.

91 Therefore, taking all of these factors into consideration, I find the debtor's assignment in bankruptcy was an abuse of process.

5.0 Conclusion

92 The debtor's situation is clearly not overwhelming in light of the availability and liquidity of her assets and the options available to her. The evidence reveals that the debtor is making an assignment as part of a concerted effort with her husband to fulfill their agenda of defeating creditors.

93 A factor that the court should consider in deciding whether to annul an assignment in bankruptcy based on an abuse of process is the integrity of the bankruptcy process itself. One of the prime purposes of the *Bankruptcy and Insolvency Act* is to assist an honest but unfortunate debtor. I do not believe Rochelle Moss falls into that category. I believe that her husband, in her name and with her permission, so ordered their affairs as to shelter large sums of money from their creditors. You should not be able to use the *Bankruptcy and Insolvency Act* as a tool to manipulate the system.

94 An order is granted annulling the assignment in bankruptcy.

95 If counsel cannot agree as to costs, they may arrange for time to make their submissions on this point.

Motion granted.

Footnotes

1 The bankrupt did bring action against that insurance company for making that payment to Revenue Canada. That action has been stayed pending decision on this motion to annul and pending the result of the appeal in the Tax Court of Canada.

Court File No.: CV-18-608313-00CL

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FORME DEVELOPMENT GROUP INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Applicants")

Estate No. 31-2436538

IN THE MATTER OF THE PROPOSAL OF 58 OLD KENNEDY DEVELOPMENT INC.,
76 OLD KENNEDY DEVELOPMENT INC. AND
82 OLD KENNEDY DEVELOPMENT INC.,
ALL CORPORATIONS INCORPORATED UNDER THE LAWS OF ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

COSTS SUBMISSIONS OF THE MONITOR

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